“Self-Generated Controversies in Private Law: The Role of Estoppel”

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INTRODUCTION

This is a paper about estoppel, a private law idea according to which “one is concluded and forbidden in laws to speak against his own act or deed, yea though it be to say the truth.”\(^1\) It is also a paper about the idea of private ordering because, as I will show, estoppel makes a certain conception of private ordering possible.

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I begin with the basic intuition that there is something real about how we stand in relation to others as of right. More than a prediction about how judges might resolve disputes, our private law relations reflect some fact of the matter about how things stand between us. It is only if in fact a certain bicycle belongs to A that another’s dealing with that bicycle without A’s permission is the tort of conversion. It is only if in fact B has made an undertaking to another in her own name that B herself is bound by that undertaking. It is only if in fact C owns Blackacre that C can convey legal title to someone else. There is some fact of the matter about property and identity that is the foundation for all that comes after: obligation in contract law, liability in tort law, authority in property law.

We might think, then, that courts ought to insist at every opportunity on the truth about who owns what or who’s who. This view that courts ought to get to the truth of the matter about our private rights reflects in part our sense that these legal facts are morally significant. Legal facts about property and identity form the foundation of our shared private order, something in which we all have a stake. Others have an interest in knowing “who it is with whom they deal”\(^2\) when they accept another’s promise as the basis of contractual obligation. Similarly, what in fact belongs to a person matters to others because what it is for one person to own something is that others do not, and so owe her deference. Set against this sense that legal

\(^2\) JEREMY BENTHAM, PRINCIPLES OF PENAL LAW (1843) reprinted in THE WORKS OF JEREMY BENTHAM 557 (John Bowring ed., 1962). For Bentham, this shared interest in who’s who meant that identity should be a matter of public law.
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facts matter, we might find it puzzling—even odious— that estoppel produces private law decisions that reflect a *false* statements about rights contained in a deed, a pleading, a court record or a prior public statement by the right-holder herself. In estoppel cases, a person’s declaration about her own private rights operates very much like a binding admission in court pleadings: The right-holder is barred from contradicting her earlier false narrative in order to vindicate her rights in a later action (*allegans contraria non audiendus est*).5

What accounts for the place of estoppel in private law decisions? I will argue in this paper that a principle of estoppel reflects the normative idea that certain controversies are of the plaintiff’s own making and as such are not genuine legal disagreements for courts to resolve. My aim here is to show how this principle of estoppel relates to an ideal of private ordering that takes private rights seriously.

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4 Bowman v. Taylor, 2 Ad. & E. 278, 112 (“we suppose to be true what the party has already recited under his hand and seal.”)

5 Translated as “he who alleges contrary things shall not be heard.” See Cave v. Mills (1862) 158 Eng. Rep. 740, 747; 7 H. & N. 913: “A man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those he has deluded to their disadvantage and *founding that claim on the very matter of the delusion.*” See also Wolford v Tankersley 695 P.2d 1201, 1222 (Idaho 1984) (cannot change horses midstream). Pickard v Sears (1837) 112 Eng. Rep. 179; Gregg v Wells, (1839) 10 A & E 90.
The core insight of the paper is that the idea of private ordering relies on an authoritative foundation of fact rather than a truthful one, and that a principle of estoppel is in service of this authoritative foundation. On this account, legal facts are indeed the objects of our claims about our private right: we are making statements about legal facts when we say things like “that is mine, not yours” or “I am J.S.” But it is authoritative statements about legal facts, not true statements of fact, that give us private ordering. A right-holder, in making public declarations about what in fact is hers or who in fact she is, offers just such an authoritative foundation for private law relations in the absence of contestation by others. If a right-holder were to contest her own prior view of the matter, which another has taken up and acted on, she would be in a self-generated controversy, which it is not the business of courts to resolve.

Estoppel then does not alter existing substantive private law relations between the parties, as when I abandon my property right or I waive my rights by consenting to your kiss. In these cases, courts simply have new legal facts to account for: the fact that I am no longer the owner of

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6 See e.g. sources in 27 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 70:132 (4th ed. 1993) (e.g., “... it is difficulty if not impossible to form a distinct notion of a private legal right interest or liability separated from the facts in which it is involved and upon which it depends. Mistakes therefore of a person with respect to his own private legal rights and liabilities may be properly regarded...as mistakes of fact.”)

7 The following analogy might help: X might have a right to rule but only where X has asserted herself as ruler does her right to rule have an effect in the world, the de facto legal order. Authoritative statements—and our own will do, provisionally—are required!
that thing or that you are at liberty now to kiss me. Estoppel by contrast leaves those substantive private rights as they were: you remain the owner of that thing even as you are estopped from asserting the fact of ownership; you remain L.K. even as you are estopped from denying that you are J.S.

Although estoppel does not alter the fact of the matter about who we are or what we own, it is nonetheless a relational concept. Estoppel reflects a sense in which two parties are now joined in a common view of how things stand between them. An authoritative declaration about rights, completed by another’s uptake of that viewpoint, forges this connection. Estoppel precludes a severance of that connection by its author in order to generate a controversy about rights.

In Anglo-American law, the most lucid instance of a pure estoppel is called “estoppel by deed”: where a person in a deed or under seal makes a declaration, she is estopped from later contradicting herself. And yet pure estoppel is not limited to cases of this kind; modern extensions of this principle proliferate. A classic example is US v Westinghouse, in which the Supreme Court held that an assignor of a patent was estopped from denying the validity of the patent as against its assignee even though as a matter of fact the patent lacked novelty. The assignment of the patent stood as a declaration that the assignor itself had a good patent to assign. The assignor

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8 Bowman v. Taylor, 2 Ad. & E. 278, 112 (“we suppose to be true what the party has already recited under his hand and seal.”)
could not then turn around and assert the invalidity of that patent in
defending itself against the assignee’s claim of unjustified infringement of
that very patent.9

This principle of pure estoppel also explains many of the cases legal
theorists have awkwardly tried to account for in terms of detrimental
reliance. I say awkwardly because in many such cases there is no empirical
detriment or harm suffered and yet an estoppel results. We see decisions of
this sort in cases like Horn v Cole.10 In that case, a heavily indebted man
had taken his goods to the railway station to ship them west, out of reach of
his creditors. At the railway station, the debtor noticed two men down the
platform and leapt to the conclusion that they were his creditors. The debtor
then falsely declared to the stationmaster that the goods were not his but

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9 US v Westinghouse, 266 U.S. 342 (1924) (extending a principle of estoppel
by deed applied by to assignments of patents.). As to the effect of the estoppel, the
USSC wrote: “As to the rest of the world, the patent may have no efficacy and
cerate no right of monopoly but the assignor cannot be heard to question the rights
of his assignee to exclude him from its use.”

10 See Horn v. Cole et al., 51 N.H. 287 (1808). Pure estoppel cases in Anglo-
American law concern what is often called “legal estoppel” although equity has
developed its own version of the principle, estoppel by representation. SNELL’S
EQUITY (John McGee, ed., 32nd ed. 2010). Estoppel by deed is one of the oldest
instances of legal estoppel. See Co. Litt. 265 a (on feudal warranty); see also The
Doctrine of Estoppel by Deed, 22 HARV. L. R. 136 (1908) (on the evolution of estoppel
by deed from the effect of feudal warranties, barring entry to heirs.) See also
Chambers v Crichley, (1864) 55 Eng. Rep. 412 (assignment of patent, assignor later
estopped from denying the existence of the patent right in derogation of his own
grant); Westinghouse Elec. v. Formica Ins. Co. 266 U.S. 342 (1924). The “pure”
estoppel cases that I have in mind do not include equitable principles like
promissory estoppel, which Rob Stevens suggests might be treated as an equitable
extension of the doctrine of waiver, or much of proprietary estoppel, better seen as
a subset of promissory estoppel or an instance of the remedial constructive trust.
See e.g. R Stevens, Not Waiving, but Drowning (permission to cite?) [source does not
appear to be publicly available] See also BEN MCFARLANE, THE LAW OF
PROPRIETARY ESTOPPEL (2014) [hereinafter PROPRIETARY ESTOPPEL](doctrinal
support for thinking of estoppel as fundamentally a procedural mechanism).
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rather belonged to his brother out west.\textsuperscript{11} The debtor made this false statement very loudly so that his putative creditors would overhear and so, he hoped, leave the goods alone. As it turned out, these two men represented his brother’s creditors, and they acted on the debtor’s false statement by seizing the goods in satisfaction of his brother’s debts. The true owner was subsequently estopped from raising the truth, the fact of his ownership of the goods, as the basis for an action in tort against his brother’s creditors.\textsuperscript{12} This was so notwithstanding that his brother’s creditors suffered no detriment other than in a purely juridical sense of having tortiously interfered with the plaintiff in reliance on the statement. Thus, the creditors’ debt action against the brother was unimpaired. If they had simply returned the plaintiff’s things or their proceeds, they would not have suffered any real harm in the world. Later in the paper, I will explain

\textsuperscript{11} It will also become clear how and why the structure of estoppel is independent of assumption of responsibility for statements/reliance leading to economic loss. See e.g. Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 (HL) (appeal taken from Eng.).

\textsuperscript{12} Rastell 1721, 330 [Is Rastell’s law dictionary called Exposiciones Terminorum Anglorum? Citation should include title and reference to modern published source, with date of publishing]: “Estoppel in a strict sense concerns representations of fact, not Law.” See Robertson v. Minister of Pensions 1949 1 KB 227 (Eng.). See Yeoman’s Row Mgmt v. Cobbe [2008] UKHL 55, [2008] 1 WLR 1752 (Lord Scott of Foscote) (appeal taken from Eng.) (UK). Compare with Sidney Bolsom Inv. Tr. Ltd. v. E. Karmios & Co. [1956] 1 QB 529 (Eng.) . There a landlord gave an opinion about invalidity of his tenant’s initial renewal request, and the tenant acted on that basis by not taking the next steps in the renewal process. According to Lord Denning, the landlord’s opinion concerned what the courts would make of the renewal request (a point of law) rather than a claim of fact or right, and so the landlord could contradict his earlier view about the invalidity of his tenant’s request later on, when it suited him to do so.
that reliance has a role to play in pure estoppel cases but not the normative
significance it is often thought to have: in the absence of formality, reliance
or a change of position with or without harm evinces the social uptake that
completes an authoritative declaration about private rights.

Finally, a principle of estoppel operates on a very different basis
from the many other occasions on which courts simply deem or presume
some fact of the matter because the truth is unavailable,¹³ inconvenient¹⁴ or
the means of proving it destroyed.¹⁵ In estoppel cases, the courts fix upon a
view of how things stand between the parties that is contrary to the truth of
the matter even when the truth is readily available.¹⁶

¹³ See Arthur Ripstein, Private Order and Public Justice: Kant and Rawls
And Freedom: Kant’s Legal and Political Philosophy 51, 210, 291 (2009). See
(Mary Gregor ed. and trans., Cambridge University Press 1996) (1797) on
presumptions of facts: “What courts do in passing a verdict as public judges
sometimes require them to hold a right, in itself one thing, to be something quite
different.” Why does the court make presumptions of fact, according to Ripstein?
Because otherwise its verdicts on rights would be made infinitely more difficult or
even impossible. Supra at 6:298. See also John Langbein, Introduction to Sir
William Blackstone, Commentaries on the Laws of England John Langbein,
Introduction to Book III of Blackstone’s Commentaries (discussing the role of legal
fictions).

¹⁴ See Paradine v. Jane (1647) 82 Eng. Rep. 897; Aleyn 26 (those ousted
during civil war were treated as “enemies of the Kings” in order to preserve the
idea that the Crown is the source of authority).

Armorie]; Lupton v. White (1808) 33 Eng. Rep. 817; 15 Ves 432 (where the
defendant destroyed the evidence a party needs to vindicate her rights).

¹⁶ Estoppel is not a mechanism for abandoning or waiving rights. See R
Stevens, Not Waiving but Drowning (work in progress) (distinguishing waiver
from certain forms of procedural estoppel). The right remains with the right-
holder; the defendant’s act is a wrong and she has no privilege that would make it
otherwise. Nor as we will see is estoppel a defense for the wrongdoer (in contrast to
cases of self-authored misfortune, where the plaintiff’s own conduct might
generate such a defence.
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The gap that estoppel opens between legal facts and private law decisions has never sat well with courts precisely because it seems to generate results that fail to make sense of the “true rights of the parties.”\(^{17}\) This discomfort has led many to characterize legal estoppel as merely a rule of procedure, a hold-over from a much older procedure.\(^{18}\) What I will show is that we have a normative basis for accepting that gap between legal facts and judicial decisions. A principle of estoppel has normative foundations then in the very idea of private ordering. On my account, private rights-holders—alongside of judges and other public officials—participate in forming and stabilizing the private order. A right-holder, I will argue, has a legally constructed, albeit qualified, authority to determine her own private rights. It is not for third-parties to determine where I stand in the legal order: my neighbor’s statements about what is or is not mine, or who I am, are not authoritative pronouncements about how I stand in relation to others. It might be unfortunate if another believes my neighbor’s false statement but it does not preclude my later asserting a different view about

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\(^{17}\) Huddersfield Banking Company v Henry Lister & Son [1895] 2 Ch 273 at [Pinpoint if available] (Eng.) [hereinafter Huddersfield]. There are many judicial descriptions of legal estoppel as “odious”.

\(^{18}\) Generally my claim is that estoppel is not just a feature of law at a certain time and place. There is an interesting discussion of the ubiquity and indeed the unavoidability of estoppel across legal systems in H. Lauterpacht, Private Law Sources and Analogies in International Law 204 (1927). On estoppel as a rule of evidence, see Shepard v Beck, 2007 WY 53, 154 P.2d 982 (Wyo. 2007); Herbert Broom, A Selection of Legal Maxims Classified and Illustrated 272 (1874). See also Proprietary Estoppel, supra note 2) (offering doctrinal reasons for treating estoppel at its core as a procedural mechanism).
these legal facts. Nor is it consistent with the idea of private ordering for the
state to fix how I stand in relation to others.\(^{19}\) It is up to each of us to declare
who we are and what is ours and to insist that others respect it (or to show
up in court if they contest.)\(^{20}\)

This view of estoppel suggests a more limited role for judges in the
context of private law disputes.\(^{21}\) A principle of estoppel, I will argue, sets
out when it is appropriate for courts to treat basic legal facts as settled in
light of our own authoritative pronouncements about the matter. In a society
of equals, there is a role for judicial authority— not in order for rights ever to

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\(^{19}\) For an interesting historical illustration of this resistance to state
authority over our private relations, see Stead v. Carey (1845) 135 Eng. Rep. 634; 1
where an act of parliament recited that A. was attainted of treason, and confirmed
the attainder, and in fact A. was not attainted, it was held that the act was no
estoppel to him, but that he might deny the attainder.” A in other words was not
bound in his private dealings to take the viewpoint even of parliament about how
he stood in relation to others (at a time when treason had implications for one’s
property claims vis a vis others).

\(^{20}\) What can we make then of identity cards, land title systems, etc, through which
the state fixes who we are and what is ours? This makes naming and claiming a matter
of public, not private, authority. Jeremy Bentham described an “invisible chain,” both
freedom-enhancing and diminishing, that results where the state fixes our identity.
Bentham, Book I, 5571 (843.) This is on my account defective as a kind of private
ordering, which is just to say that it is a way of ordering that must be justified, if at all, on
other terms.

\(^{21}\) In doing so, does estoppel undermine the rule of law by leaving it to private convention
to establish the contours of the lis inter partes, the basis of a legal disagreement for courts?
I don’t think so: the point of courts is not to see that the truth of the matter about how
things stand between parties is brought to light. So it would be a misuse of judicial power
to have judges on beat, standing on every corner making ex tempore declarations of private
right. We can trace this intuition to the basic idea that private rights, who I am and what I
own, are matters of fact. Private actors assert themselves in the legal order and turn to
courts if there are genuine disagreements about whether those assertions track the truth of
the matter. But nothing I have said suggests it should also be up to private actors to
determine another aspect of private law relations: the content of those private rights and the
appropriate response to their violations. Seana Shiffrin, for instance, has argued against
penalty clauses on the grounds that these clauses displace the public’s role (through courts)
to determine the content of the law as it concerns appropriate response to a rights’
be determinate but for rights to be determinate in the face of competing views about those rights. But a court’s role in a genuine controversy should not obscure the antecedent role that rights-bearers have to slot themselves in to the legal order by asserting for themselves how things stand between them and another. Courts refuse to hear the truth in cases of self-generated controversy not in the service of judicial authority at the expense of private ordering, but in service of the idea of private ordering itself. A principle of estoppel, in ruling self-generated controversies out of court, both preserves and limits (or, better put, in limiting, preserves) our basic authority to assert ourselves in the legal order.

This account of a principle of estoppel and its place in private ordering explains a long-standing normative puzzle about relations between the idea of private ordering and the idea of judicial authority. There are those (e.g. classical liberals in the tradition of Hayek, Locke) who think we can analyze private law relations as prior to and independent of public institutions.\textsuperscript{22} From this viewpoint, if our public institutions, especially courts, fail to track our “true” private rights, so much the worse for our public institutions.\textsuperscript{23} We would be better off in that case resorting to other

\textsuperscript{22} See e.g. Ernie Weinrib, The Idea of Private Law (1996) (arguing for a corrective justice account of tort law that courts are meant to track).

\textsuperscript{23} Civil recourse theory works out the move from moral to legal rights differently: tort law is meant to be a substitute for our moral right of self-help in a state of nature. Because courts are meant to give effect to this alternative right of redress through tort law, civil recourse theorists do not expect tort law to track the
enforcement mechanisms, like self-help. For others (e.g., legal realists and their successors in law and economics and critical legal studies), private rights are outputs, the product of public institutions. Seen from this viewpoint, judicially determined answers are useful at least insofar as there is no requirement that these answers track any idea of proper private ordering. Of course, most who take this view also think that courts ought to aim at what is good and right, all things considered. It is just that there is no prior truth of the matter about private law relationships that constrains courts. H.F Jolowicz, a 20th century English jurisprud, wrote that judges are to “settle disputes and thus prevent their being settled in a disorderly manner. The state will see that its force is used to uphold the settlement but such settlement might be found by tossing a coin and it is in fact not found according to law in the large field which law leaves to the judges’

moral content of our private rights (e.g. corrective justice.). For an overview and answer to critics, see John Goldberg & Ben Zipursky, Civil Recourse Defended, 88 Indiana Law. J. 569 (2013).

24 There is consensus that courts at least serve a basic institutional role of providing closure in a specific disputes between person A and B, [regardless of] whether there is a further role for courts in private law disputes to advance public policy goals. See Jeremy Waldron, Do Judges Reason Morally? in EXPONDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY (Grant Huscroft ed., 2008) (pointing out the priority of basic institutional role of courts).

25 There are different views about what ought to count as a “good” outcome in private law decisions, but what these views have in common is that judges ought to resolve private disputes with an eye to advancing these larger social values, whatever they might be. One step before that, John Gardner has suggested that even in the formulation of private law causes of actions, we ought to attend to the allocation of scarce judicial resources. See John Gardner, What is Tort Law for Part 2? The Place of Distributive Justice, in THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW (John Oberdike ed., 2014)
From this viewpoint, there is nothing particularly odious about a principle of estoppel because there is no truth of the matter about our private rights from which courts diverge in applying it.

The puzzle about estoppel comes into view only if we take private ordering seriously and yet allow that judges act within their mandate when they make private law decisions that fail to reflect the truth of the matter. We can both confront and resolve this puzzle by revising our understanding of the role of private actors and courts in relation to private rights. On my account, judicial authority does something for the possibility of private ordering that truth alone cannot supply: judicial authority provides closure by authoritatively determining our rights in the face of genuine controversy. But this is not to say that private ordering is just the making of public officials or authoritative judicial decisions. For on my account, in a system where private ordering is possible, some of that authority rests with the right-bearer herself, subject to contestation by others.

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The following is my plan for this paper. I will begin in part II by setting out my account of self-generated controversies and distinguishing these from the genuine controversy that engages judicial authority. In part III, I will explain why we have a principle against self-generated

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26 See HERBERT FELIX JOLOWICZ, LECTURES ON JURISPRUDENCE 132 [hereinafter LECTURES ON JURISPRUDENCE].
controversies in a society of equals and how it works. Central to this account is the idea of an authoritative declaration about private rights, which I also call legal facts, and its uptake by others. In this part, I will show how estoppel is a feature of private ordering which also explains why estoppel does not constrain private actors who wish to assert rights in relation to public officials. In part IV, I will show how a principle of estoppel is consistent with and yet different from the many other occasions on which courts decide disputes other than on the basis of the truth of the matter. Here I will distinguish a principle of estoppel in relation to self-generated controversies and other principles that bear a resemblance to it: the idea of self-authored misfortunes, which grounds a defense to wrongs; the idea of judicial integrity, in which the only justice that could be done between the parties is to decide the matter on the basis of some legal fiction or presumption of fact; and finally cases of entrapment, in which a defect in the exercise of public authority prevents the state from holding an accused to account.

II. DISTINGUISHING SELF-GENERATED AND GENUINE CONTROVERSIES

Much of what follows turns on a distinction I draw between a genuine controversy and a self-generated one. Here is what a genuine controversy looks like: Say I ride off with your bicycle on the grounds that I have better title to it. I am not impeaching your position on moral grounds,
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e.g., you have more bicycles than you need. Rather, I am asserting a competing view about the legal fact of ownership of that bicycle. I genuinely contest your claim to your bicycle when I make a hostile claim about what in fact our entitlements are in our shared legal order.27 A legal disagreement does not turn on what I honestly take the fact of the matter to be. Perhaps I think that you abandoned it when you left it unlocked overnight in front of my building such that, in taking possession of it I now have the better right to possess. Or perhaps I do not honestly believe that I have a better right to it but challenge your version of the legal facts anyway. What matters is that I am raising a genuine legal disagreement by asserting and acting on a different view of the matter than that which you take to govern how things stand between us. A legal disagreement in this way forms the basis of a genuine controversy in law. There is a genuine controversy when I present a version of the matter that is actually inconsistent with your own view, and which, if left uncorrected, is hostile to your right. For you (or anyone in your position) to maintain private rights at all, we cannot remain in a state of disagreement. We need a procedure by which our dispute is resolved (or we come to blows) and so require a judicial authority.28 A genuine controversy thus grounds the *lis inter partes*,

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27 Cooper v. Phibbs (1867) 2 LR 149 2(HL) (appeal taken from Eng.) [hereinafter Cooper]

28 See *LEGAL FICTIONS*, supra note 14 at 89 “And perhaps it may be said that procedure has been dominated by one ‘general’ fiction; the notion— inherited from
which Bentham called the distinguishing feature of judicial authority.\textsuperscript{29} A judge, confronted with a genuine controversy of this sort, appears to do something very simple: he or she “give(s) effect to what are the true rights of the parties.”\textsuperscript{30}

Now imagine that prior to my riding off with the bicycle, you had declared that you were not the owner of that bicycle, without at the same time intending to or taking steps to abandon your claim to the bicycle. The right remains with you in that case. I act on your statement of fact when I take the bicycle to be unowned and ride off with it.\textsuperscript{31} Now, in order to state a legal disagreement, you would have to contradict your own earlier claim in order to establish the facts that would support a tort action (in conversion) against me: you would have to show that you did own the bicycle and did not authorize my taking it. The very basis of such a complaint is the contradiction of what you had earlier alleged.

The point of estoppel is to insist that there is no genuine controversy where I have taken up your earlier false account about how things stand between us. You cannot generate a legal disagreement for the courts to

\textsuperscript{29} LECTURES ON JURISPRUDENCE, supra note 18 at 339-41. (lis inter partes is the distinguishing feature of judicial power.)

\textsuperscript{30} Huddersfield, supra note 14

\textsuperscript{31} See infra ___ (on social acts)
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resolve simply by contradicting your earlier false statement.\(^{32}\) This is so whether or not I have incurred any loss in relying on your representation: detrimental reliance is not necessarily a factor in a pure estoppel case. Indeed, in the example of the stolen bicycle from above, I am not left empty-handed at all: I may have possession of your bicycle still or I may have gotten away with a clear invasion of your rights (for which I would be strictly liable in the normal course of things).\(^{33}\) The loss may lie with *you* but still you are estopped from proving the facts you need to vindicate your rights. A controversy is self-generated where the very basis of the controversy you now raise is the conflict between your view now and your own earlier allegation: the controversy emerges through self-contradiction.

But what is it about claims about private rights or identity that precludes later contradiction? After all, there clearly are contexts in which I might retract statements of fact I have made before or even during a judicial process. For instance, I might have mentioned sotto voce to my spouse over

\(^{32}\) This principle has ancient origins in relation to assertions about your name, or who speaks in your name, or what authority you have as owner. Two very early cases illustrate how courts attend to authoritative, as opposed to merely truthful, statements of fact in fixing the nature of the controversy between the parties. (1603) Yelverton 33 80 Eng. Rep. 25 (on the record as a knight then claimed he was not a knight); Cross v Tyrer (date required) 78 Eng. Rep. 904 (defendant appeared “per J. S. attornatum suum , and there is not any such J. S. in rerum natura . The defendant pleaded in nullo est erratum , and so confesses it.—The Court held it to be no error, for it is against the record; for the Court hath it upon record, that he appeared by such an attorney.”)

\(^{33}\) This does not rule out equitable reasons for limiting the effects of this rule of evidence (by barring those who did not detrimentally rely from taking advantage of the estoppel.). Nat’l Westminster, supra note 14. See discussion of detrimental reliance as the grounds of equitable forms of estoppel.
dinner that I do not own certain stock when in fact I do, and yet maintain my ownership as grounds to complain in law about exclusion from a shareholders’ meeting. Or I might contradict my own earlier statements of fact, where these are not material to the controversy over how things stand between us. If I said it was sunny and later that it was cloudy on the day that I say you stole my bicycle, the contradiction is not at the same time the basis of the controversy between us, which concerns whether the bicycle was mine and you took it without permission, whatever the weather. In what follows, I will consider what makes a pronouncement by a private actor authoritative and how authoritative statements figure in our relations to others as a matter of private ordering.

III. PRIVATE AND PUBLIC AUTHORITY AND LEGAL FACTS

In seeing estoppel as a principle against self-generated controversy, we gain important insights into how rights are made determinate in a legal order. Private ordering, I will say, entails a procedure by which rights are made determinate in relation to others. This is a procedure that on my account precedes any invocation of courts and courts’ authority and rests in part on private authoritative declarations. Absent contestation, a person’s declaration about her private rights, even if false, pre-empts any further determination of the matter by a court— in much the same way that a valid
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judicial decision makes a matter res judicata even if we reasonably think that the decision got that private law relationship wrong, on the merits.\(^{34}\)

Anyone can be right or wrong about who’s who or who owns what. But the claim I will develop here is that only the right-holder and a court can make *authoritative*, as opposed to simply true or false statements, about the legal facts of the matter about her own identity or property.\(^{35}\) Any quarrel that a person later has with someone who had accepted her earlier view of the matter is thus properly treated as a self-generated controversy: she brought about the very controversy about which she now wishes to complain. By contrast, I cannot determine someone else’s property rights in this way. The public position B takes about A’s rights has no normative significance in a contest between A and C even if C believed and acted on every false word B said.\(^{36}\)

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\(^{34}\) Thus Grotius cites Aristotle for the idea that “It is right that each one should have his own. But what the judge decides sincerely, even if wrong, is law. And thus the same thing would be right and not right.” Bk III Ch IV 11 p 354. A person who pays a debt and then wants the money back when a court rules the debt is not owing but gets it wrong. The money paid does not unjustly enrich the creditor, notwithstanding that the debt is not legally enforceable. See Moses v MacFerlan.


\(^{36}\) Huddersfield, *supra* note 14 (third party (bankrupt owner of a mill) induced the defendant liquidator and the plaintiff mortgagee to make a mistake about the status of certain looms on mortgaged premises. Court found that court retained the power to give effect to the true rights of the parties (but suggested it did not matter whether or not the mistake was the result of the third party’s fraud or arose otherwise.) But clear at least that the mistake did not issue from any authoritative declaration or conduct of the plaintiff.
The idea of private ordering thus entails a private authority to fix how one stands in relation to others that does indeed change the normative landscape for others and for courts: its exercise (1) transforms the nature of any subsequent private opposition to the declared viewpoint about rights, marking such opposition as a genuine and public controversy with respect to which courts have a role to play, and, (2) constrains any contrary declaration, by the right-bearer or by courts, about how things stand (through an estoppel mechanism). 37

In what follows I will treat two questions that emerge from this account of private ordering: why ought we to treat a private actor’s declarations as authoritative, and as against whom, and what counts as an exercise of that kind of authority?

(i) The Authoritative Nature of Private Actors’ Declarations About Rights

To hold a person to a prior version of what in fact is hers or who in fact she is is I think to say something quite important about the normative idea of private ordering and the importance for that idea of a procedure by

37 This claim at least is consistent with civil recourse theory of John Goldberg and Ben Zipursky in the following way. Estoppel simply establishes the lack of authority on the part of a right-holder to make out the basis of a claim. My colleague Bruce Chapman has put it this way: “If she has the authority to make the claim, she exercises the claim (or not) as a matter of right.” Professor Chapman was concerned the evidentiary basis for asserting a claim: the idea that one can only justifiably claim something on the basis of direct (rather than say statistical) evidence of its truth. See Bruce Chapman, Defeasible Rules and Interpersonal Accountability, in The Logic of Legal Requirements: Essays on Defeasibility (2012). Estoppel gives another basis on which to find a lack of authority: where one has already authoritative declared one’s position in relation to another, one has used up any authority to assert a position to the contrary. So a condition of having a right of redress, the authority to claim, is simply lacking in estoppel cases.
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which private rights are made determinate. In a legal order constituted in large part by private rights, we must work out who in fact has rights as against other private actors. The very idea of private rights as matters of fact suggests there is something determinate about them and yet no claim of private right is beyond genuine dispute. Imagine that I am presently eating with a fork that I have crafted out of wood from a tree in my backyard. It might seem at first instance that there can be no doubt that I own that fork. If you dispossess me of it, should it not be perfectly clear that I have a right to retake it immediately? In what meaningful sense could you or I have different views about the fact of ownership in that case? But we can see even here how two people might form genuinely different views about the fact of ownership even within a legal system that has clear rules for allocating rights and for resolving conflicting claims. We may have arrived at a genuine difference in views about the fact of ownership given our perspectives on how things stand between us (you may think it is yours because you have one just like it or you may think I gave it to you the other day or you may think you have a better claim to it because I stole the wood from your tree).

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38 This is only one aspect of the problem of indeterminacy to overcome in civil society. We also have to figure out how private rights are consistent with the private rights of others and also how private rights are consistent with the very possibility of civil society in the first place, i.e. what public accommodations are required to alleviate extreme inequality, poverty, etc that no one could coherently accept for himself and which pose an existential threat to the state.
Where we wish to maintain the possibility of private rights, we need then some way to make our rights determinate in specific cases so that there is an answer that binds at least those of us raising the question of who owns that thing.\(^{39}\) To be clear: there is no dearth of answers to that question. You and I may have come up with two perfectly plausible ones. What is lacking is an authoritative answer.

One response to the problem of indeterminacy of rights is of course to look to public institutions to clearly define rights and then to resolve any disputes about rights that arise.\(^{40}\) Public institutions may exercise a legally constructed authority to determine rightful relations between private actors. The judiciary is the public agency primarily charged with resolving the kind of indeterminacy that concerns me here, i.e., indeterminacy as to the fact of ownership rather than as to the content of that right. But the judiciary is not the only public agency that might be called on to do so. We might rely on executive or legislative action to determine the fact of ownership, e.g., an act declaring “Mr X, esq., hereby owns the fisheries in River Y” where no right to the fisheries existed prior to the legislative act and so no question of

\(^{39}\) Not to establish the content of those rights or to render them consistent with rights of others—a job for judges and/or the legislature—but the simpler question of who in fact owns that thing, assuming that we know what ownership of that thing entails.

\(^{40}\) We can imagine a variety of institutional arrangements that might achieve legal ordering. For instance, juries used to be sworn to tell the truth and so unless a judge nonsuited the party, or charged the jury to decide on a point of law [], (i.e., if the parties turned the whole matter over to a jury), then whatever the party had said, estoppel could not be raised to alter the factual basis on which juries decided. Goddards case (1650) Owen 10; 74 ER 862; Vooght v. Winch (1819) 106 Eng. Rep. 507; 2 B & A 662; W Gordon Stoner, Pleading Estoppel, 9 Mich. L. Rev. 484 (1911).
Katz on *Estoppel*

ownership of those fisheries could have been raised (or answered) prior to the legislation in question. 41 Many legal systems have indeed made it a matter of executive discretion to determine the fact of ownership of some thing (e.g., Land Titles Act, Patents Act) ex ante. 42

The choice of state agency (courts or legislatures) engages all kinds of concerns about institutional competence and constitutional ordering that I will not take up here. That is because I wish to draw another contrast, between the authority of public institutions like courts, and what I will argue is the qualified authority of private actors to make their own rights determinate. I aim to show, in what follows, that the process by which private rights are rendered determinate not only admits of the participation of private actors but in fact crucially depends on it, too. This account of private authority and responsibility for the determinacy of rights makes sense within a certain understanding of the role of judges. Judges are there to offer a neutral third view of the matter where there is a genuine controversy between A and B that presents an obstacle to the vindication of

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41 Executive action also includes royal charters and land grants in letters patent. Acts of Parliament which directly determined ownership were relatively common in England in the 19th Century. See e.g. Cooper, *supra* note 23.

42 We might even look to the legislature to resolve other kinds of private law controversies, for instance, how the law applies to a specific person or the liability of a particular person for certain conduct, e.g. Bills of Attainder, law of exactions. However, significant rule of law concerns attach to such legislation. It is not my concern here, though, to compare different public agencies relative to each other in respect of private ordering.
their rights. Courts have a role to play – not in order for rights ever to be determinate but for rights to be determinate in the face of competing views about those rights.

A person’s authoritative declaration about her rights are authoritative vis a vis courts, such that a court has nothing further to add about how things stand between the parties. If I declare in a covenant or pleading or in a public forum that this bicycle is not mine, and you accept that viewpoint, the court has no proper basis—there is no proper lis inter partes—on which to ground its own authority to declare how things stand between us. Estoppel works to treat you as having already exercised some authority to determine your rights such that there is nothing more for you or the courts to say about the matter.

A right-holder’s declaration, however, does not command deference from other private actors in the same way. Say you are my creditor and it matters to the vindication of your rights whether or not that bicycle belongs to me. You are equally authorized to come up with your own viewpoint about how things stand between us with respect to that bicycle (e.g., to take the view that the bicycle is mine and as such, is subject to your lien) and to submit the matter to a court if we cannot agree. Thus, a person’s authority to take a position about her own rights does not displace the liberty of

43 This is Martin Shapiro’s triad. See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (University of Chicago Press, 1981).
44 This is analogous to the lis contestatio that the magistrate determined in Roman law, which in turn gave rise to the “formula” (cause of action), making way for the judex.
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others to contest that position, in coming up with their own view of that private law relationship.

Authority of this kind might strike us at first as empty: what does it mean to say that I have authority to determine my own rights only insofar as no one subsequently contests my claims? Is this not like the parent who claims authority over her children but only insofar as they never test the limits of that authority? Is not authority realized just by its effects in the face of opposition? It is a mistake however to think of a person’s authority to declare how things stand between her and another as grounding any obligation of deference on the part of others or limiting in any way their liberty to contest; rather, authoritative declarations are authoritative vis a vis courts. Contestation by others does of course trigger a court’s authority to have a second kick at the can—to revisit and to decide the question of how things really stand between the parties, which a court otherwise lacks. But this is just to say that it is *courts* whose jurisdiction is constrained by a person’s authoritative declaration about her own private rights: there is nothing for a court to say about that matter unless another contests that viewpoint, giving rise to a genuine legal disagreement.

What does this view imply about the idea of private ordering? It suggests, first of all, that private ordering is possible only where we have a

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45 *Scott Shapiro, Legality* (Harvard University Press 2013).
procedure in place to resolve the problem of indeterminacy (contra those who think private rights are fully determinate in a state of nature). Private ordering thus does not on my account reflect fully determinate legal facts in the world. There is no seamless world of private rights in which, barring information costs or other epistemic barriers, everyone’s moves may be synchronized without public institutions because all the facts are just out there to be discovered. To allow for the indeterminacy of private rights, as I do, is not at the same time to say that private ordering is wholly dependent on authoritative intervention by public institutions—i.e., dependent on courts, a fully public matter. Yes, the idea of private ordering depends on a procedure that solves the problem of indeterminacy but that procedure itself precedes public institutions: it begins with authoritative declarations by private actors and, where there is genuine legal disagreement, terminates in judicial decisions.

Private ordering is on my account a cooperative enterprise in which we participate as equals. When I say, “that’s my call,” or “I am not L.K.,” I do not force you to accept the truth of that statement: that would be unilaterally to establish the private order. But it is up to you to decide whether to accept or to contest my view. This goes to the basis on which any one of us can be drawn into controversy with another. It is only if we have not (already) formed a shared viewpoint of how things stand between us that there is a genuine controversy for a judge to resolve. What is more,
as I will go on to show below, this is a feature of private ordering, not of constitutional ordering more generally: public officials have their own work to do in coming up with a justified exercise of public authority at first instance. For this reason, public officials cannot plead estoppel when a private actor has falsely stated her position of right even if the public official acts on that very basis: it is for the official to come up with the right answer in the first place.46

My account also suggests that we see legal disagreement differently, not in terms of epistemic deficits in relation to legal facts but as the expression of morally autonomous opinions about one’s position in a legal order where respect for others’ viewpoints about their normative position is also required. We could solve the problem of indeterminacy with tops-down official pronouncements about each individual’s rights and positions. But we would do that at the expense of truly private ordering where our declarations about our rights count even if only provisionally as authoritative statements about the facts of the matter about our rights. To do away with this aspect of private ordering would be, perhaps counterintuitively, to relegate private actors to a much more trivially private sphere, one in which they are taken to concern themselves just with their own ends-setting, free to act strategically at every turn, to “blow hot and cold” as their

46 See infra note __ and accompanying text.
private interests dictate. Private actors would lack any authority as well as any responsibility for the formation of a truly shared private order—an authority and responsibility that would then rest entirely with our public institutions.

Bentham would have been horrified by the suggestion that private actors participate in forming and stabilizing the legal order: staking out your own position in the legal order would have been as troubling to him as staking out your own identity, which he thought ought to be settled tops-down, as it is in civilian systems. But as many old cases show, the name of your house, your own identity, your own position in fact in a system of right is something which is yours to determine, subject to further refinement when it conflicts with someone else’s considered view of the matter.47

The point of estoppel then is not to treat false statements about our identity or our property as “unconscionable” in some way, as moral wrongs generating rights in others but rather to set out when courts treat a dispute as a legal disagreement rather than a self-generated controversy for reasons related to the very idea of private ordering.48

47 See e.g. Day v. Brownrigg (1878), 10 Ch. Div. 294 (CA) 296 wherein the defendant claims: “A man is at perfect liberty to change the name of his house or his own name and to adopt the name of his neighbour’s house or to take his neighbour’s name. It is not a cause of action and the utmost that can be said is that some inconvenience may possibly be caused to the Plaintiff’s by the defendant’s conduct” (position upheld on appeal).

48 See Yeoman’s Row Management Limited and Another v. Cobbe, [2008] UKHL 55 at para 46. “Equitable estoppel is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side.” At para 48, “My Lords, unconscionability of conduct
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(iii) Social Uptake: When is a Declaration Authoritative?

What counts as an authoritative declaration of private right? We might put this question in terms of the distinction between public statements and mere “table-talk”, things we might say privately that lack the status of shared or public communications. To count as an effective exercise of authority, our statements about our rights must stand as shared communications, what we might describe as social acts involving uptake by others.49 Something changes when another takes up our view by acting on it and that change in the world completes the social act of asserting who we are and what is ours in the legal order. This entails a shared communication with someone in particular or everyone in general, and the principle of estoppel that marks the change in the world that results when others take up

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our viewpoints may be either *in personam* (good against a specific other) or
in rem, good against the world at large.\(^{50}\)

As *authoritative* social acts, our pronouncements about our rights,
formal or merely public, must also be intentional and discretionary: you as a
true owner denying the fact of ownership must have intended to assert *that*
(false) position having sufficient grasp of the truth to have formed a
different (true) view of the matter.\(^{51}\) Your ignorance of the falsity of your
view does not make your declaration defective as an authoritative
declaration where you were at the same time not convinced of its truth,
either.\(^{52}\) But you cannot be taken to have exercised your authority to fix on
a false view of the facts when you were not at the same time aware that it is
a departure from the truth.

This is not to say a person is estopped only if she adopts a false view
of the facts with the intention to deceive another. We can well imagine a

\(^{50}\) Trevivan v. Lawrence [1790] 92 ER 188, 1 Salk 276 ("estoppel binds not
only parties, but all who claim under them, and that they run with the land.")

\(^{51}\) A person cannot release rights or take a position at all about rights you
do not know of: Ramsden v Hylton (1751), 2 Vens Sen 304, 28 E.R. 196 (release did
not include daughters’ rights under the settlement, if which they were entirely
ignorant.)

\(^{52}\) Rawlins v. Wickham (1858), 3 De. G. & J. 316; Preston v. Mann (1890) 25 Conn.
118 ("represent that he has the very knowledge he now claims not to have” in
holding man estopped from denying what he had already acknowledge, that a
signature on a check was his); Carr v. London & North Western Railway Co.
(1875), L.R. 10 C.P. 307 (balance sheet showing a bank to be solvent but turns out
to be false. One party knew this. The other did not know whether it was true or
false but represented it as true. “Representation was made by Wickham of a fact of
the truth or falsehood of which he knew nothing.” Case construed on other
grounds later in Jolliffe v. Baker (1884), 11 Q.B.D. 255 (partner liable for fraud in a
transaction he authorized his partner to carry out.) Seana Shiffrin in Speech
Matters (on what counts as a lie.)
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person asserting some position as her own even if she knows it is false and further knows very well that no one else will believe her. ⁵³ She may have her own reasons for insisting on that viewpoint, whether or not she expects others to take her up on it. We can also well imagine another taking her up on her claim whether or not they *were* deceived (although equity may wish to limit the availability of this procedure for resisting disagreement where no one actually relied to their detriment). The procedure of which estoppel is a part is a procedure that allows for contestation whether or not the declarant’s view reflects her honest view or the audience’s uptake reflects good faith reliance. The point of estoppel is to determine what counts as genuine controversy—we can join issue, and so forge a legal disagreement for courts to resolve, by denying a viewpoint about private rights that we know we have reason to accept, and we can fail to join issue by accepting a viewpoint about private rights that the right-holder false and that we do not honestly believe to be true.

What counts as uptake sufficient to mark a right-holder’ declaration as shared or public? A principle of pure estoppel emerged initially in the context of formal declarations about private rights, e.g., “acts of notoriety

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⁵³ There are other defects in authority to make a claim that grounds a controversy for courts to resolve. For instance we might lack the direct evidence that justifies that claim in court (even if we have reason to think it is true.) See Bruce Chapman, infra note __ at 406. Abuse of process, if the suit is frivolous or malicious, might also constitute a defect in authority. A right to exercise a claim is always a right to exercise a claim one is authorized to make.
no less formal and solemn than execution of a deed such as livery entry
acceptance of an estate and the like."54 There is an important difference
between a public representation, at auction or on a train platform and a
declaration about private rights in a deed or other formal mechanism. The
significance of formality in estoppel cases is this. Formality operates as a
mode of social uptake. Mechanisms for formalizing rights are at the same
time mechanisms for publishing our claims of right without particularized
uptake by others. The formality of certain communications about rights, in a
law, a record or an oath, marks these as shared communications, or social
acts complete in themselves, i.e., without particularized uptake by any
other. Formality marks a communication as public and shared: a formal
apology is a public apology in which all share, not just the person to whom
it is addressed.

The formality of a statement may refer quite literally to its form, as
in an oath or a will that involve the utterances of certain words or the
presence of certain elements like signatures, witnesses, etc. It refers also and
more basically to the manner of its publication, through public institutions.
Laws promulgated through the proper institutional channels (law on the
books) are formal in this latter sense as are records concerning title to land
that are deposited (and so published) in the registry office. Through our
very membership in a political community, we are primed to hear and

54 Freeman v. Cooke (1848), 154 ER 652; (1577) 2 Leonard 1174 E.R. 316 (on
formality of deeds and estoppel).
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accept certain communications. In the same way, we are all taken to have notice of what is on the record relating to title. These records do not assume their formality in virtue of the form of the communication itself—anything from handwritten notes to deeds conforming to legal conventions could become a part of the formal record in a recording system.\footnote{There is no registry for apologies but apologies can be made formal by the manner and place of their expression.} It is rather that the manner of publication, through public institutions, that marks these records as formal such that world at large is taken to have notice of everything found therein. The formal nature of law, the idea that legal enactments are social acts,\footnote{Kevin Mulligan, *Promising and Other Social Acts: Their Constituents and Structure*, in *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology*, 29-90 (Dordrecht: Nijhoff, 1987) (discussing Adolf Reinach’s treatment of legal enactments as social acts).} accounts for why we take everyone to know the law and so to disallow ignorance of the law as an excuse.\footnote{Aristotle said, “*nemo censetur ignorare legem.*” Everyone is taken to know the law such that ignorance of the law is no excuse.}

Formality, however is not a requirement for estoppel: it is rather a mode of social action that completes itself. It may be enough for a person to have made a statement openly in a public place, such as on a railway platform or in a place of work or at a public auction or marketplace. One who accepts and acts on that communication completes it as a social act. That is enough to preclude the right-holder’s later contradiction of that position in order to generate a controversy fit for the courts.
Oral declarations of right, like oral laws, run into problems relating to social uptake. One explanation for why we favour written laws passed through formal channels is that it is difficult to distinguish oral laws from table-talk, neither shared with nor taken up by others. And yet there is nothing in the concept of law that precludes oral delivery as long as there is sufficient promulgation or social communication of those laws. Similarly, oral declarations about private rights may stand as authoritative declarations only where the communication is truly a shared one. These oral declarations, like “these are not my goods” said on a railway platform require uptake by others in fact—evidenced by a change of position.

In the context of oral statements about rights, social uptake is manifest in another’s acting on the very basis that the right-holder asserts. It is not that reliance is a normative requirement for estoppel but rather changing one’s position in the world to align with the declarant’s view is just how one could possibly take up another’s view about their rights.

Detrimental reliance, in the rich normative sense sometimes offered as the rationale for estoppel, is not a required factor in pure estoppel cases because a person may take up the right-holder’s position about her rights without suffering any loss at all.58

58 Detrimental reliance in a rich sense may well be all that justifies promissory estoppel, in which one promises to bring about a state of affairs rather than declaring what in fact is the truth of the matter about how one relates to another already. Estoppel in the pure sense always concerns facts, and facts about private rights at that. Promissory estoppel concerns promises that bind without consideration for reasons of detrimental reliance. The point is that estoppel in the
Katz on *Estoppel*

A well-known English case, Knights v Wiffen, illustrates the role of reliance without empirical detriment in estoppel cases. In that case, the defendant with a warehouse full of barley entered into a contract to sell some of it to a middle-man, Maris. Maris, without having paid the defendant for the barley, turned around and sold it the plaintiff. The plaintiff promptly and foolishly paid Maris what was owing under contract and subsequently contacted the defendant to arrange delivery of the barley. The defendant had not separated the barley for Maris from the bulk in the warehouse, a necessary condition for title to the barley to pass from the defendant to Maris and on to the Plaintiff. And yet, when the plaintiff inquired about delivery, the defendant said words to the effect that he held the barley not on his own behalf as owner but on behalf of the plaintiff, as bailee and so stood ready to do as the plaintiff instructed. Maris was then found to be insolvent and failed to pay the defendant what he owed under the first contract for sale. At that, the defendant refused to send the barley on to the plaintiff. The plaintiff sued the defendant for conversion, a hopeless cause of action if the defendant could show superior title to the barley. And that’s where the principle of estoppel came in: although the harm to the plaintiff (the payment of the purchase price to Maris) occurred purely sense is massively important in private law and under-theorized notwithstanding its significance because of assumptions that substantive private law relations not private law procedure is all that is morally salient.
before the defendant said anything at all about the plaintiff’s right to possess, the court found that the defendant could not contradict his earlier statement. The plaintiff had taken up the defendant’s view about how things stood between them with respect to the barley. Evidence of that was the plaintiff’s failure to ask for his money back from Maris. But because of the timing of the plaintiff’s payment to Maris, the estoppel could not be explained normatively in terms of detrimental reliance. There is thus a distinction between a change of position, which reliance without harm might evidence, and a change of position causing harm.

The court in Knight v Wiffen clearly indicates that detrimental reliance is not a required feature of estoppel except insofar as it is evidence of uptake, something I will discuss below when I explain how declarations about private rights become shared or public declarations.

(iv) Public Officials and Estoppel

Estoppel does not undermine the idea of private ordering but completes it. Estoppel does not have the same role with respect to public officials.

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59 This loss of the opportunity to demand money back from Maris stands as evidence of uptake but not of harm: the court noted that nothing would have come of such a request and indeed bankruptcy law would probably treat such a return of money as a preferential transfer.

60 Knights v Wiffen, supra at 665-66 (“If once the fact is established that the plaintiff’s position is altered by relying the statement and taking no steps further, the case becomes identical with Woodley v Coventry.”)

61 Ibid. Thus, the court said that even in Woodley v Coventry, a case where the defendant’s declaration about the existence of a right to possess certain goods did prompt the plaintiff to pay his vendor, the ground for estoppel was not the actual loss suffered but the declaration itself (“It will be noticed [in Woodley v Coventry] that although the fact did exist of payment of price, Martin B seems to found his decision on the assenting to hold and the fact that when the assent was communicated to the plaintiffs they altered their position.”
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ordering, in relation to the exercise of police powers, the exercise of statutory powers, etc.\(^{62}\) To be perfectly clear, the question here is not whether estoppel applies to public officials in the sense that a private actor could raise estoppel against the state where its officials have made an authoritative statement about how particular state-citizen relations. Everything I have said so far about a principle of estoppel in relation to private rights applies, mutatis mutandi in relation to false statements of public right. A public official who makes a statement that falsely understates the state’s power/right cannot then contradict that position in order to generate a controversy between state and citizen. As long as the state’s declaration of public right does not entail a claim jurisdiction in excess of what it has, these declarations are also, authoritative vis a vis courts too, absent contestation by others.\(^{63}\) The question I have treated here concerns now whether a principle of estoppel applies to declarations of public right but whether the state can raise an estoppel against a private actor, when the public official acts on the basis of that private actor’s earlier false statement and, in doing so, does wrong.

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\(^{63}\) See 13 HALSBURY’S LAWS OF ENGLAND, 474 (2d ed., 1934), “A party cannot by representation any more than by any other means raise against himself an estoppel so as to create a state of affairs which he is under a legal disability of creating.” See also Woon v. MNR (1950), 50 D.T.C. 871 “Estoppels of all kinds however are subject to one general rule they cannot override the law of the land.”
A private actor’s assertions about her relations to the state – for instance, her right to state forbearance or state largess under statutory, regulatory or common law-- are not authoritative vis a vis the state in the same way as her declarations of private right. We can reproach the state even when public officials acts on our own private views of the matter, because what we reproach the state for is not the interference with our private rights but the misuse of its discretion in relation to us. We cannot legitimately be governed by brute force, and the state acts legitimately only when at the same time it has satisfied the public justification requirements for coercive action. A private actor has no special standing to determine how the levers of public authority are exercised with respect to her. It follows then, that a public official ought not to be able to raise estoppel to shield herself from liability for failing properly to exercise her public authority vis a vis a private actor.64

We can illustrate this point about the place of estoppel with respect to private and public right by contrasting the following cases: the first, is *Horn v Cole*, the case about the brother who falsely asserted that goods of his belonged to his brother, to put off men he thought were his own creditors’ agents. These men turned out to be agents of his brother’s creditors, and then acted on the basis that the goods belonged to his brother, the true owner was later estopped from asserting his own property rights in

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64 Robertson v. Min. of Pensions, [1949] 1 KB 227 (CA).
the goods in an action for conversion against his brother’s creditors. The second case is *Freeman v. Coke*. In that case, plaintiff who had moved all his things to his brother’s house gave a false account of who owned certain goods in that house to the sheriff. The man, thinking the sheriff was there on behalf of *his* creditors, first claimed, falsely that the goods were not his but rather belonged to the brother Benjamin who owned the house. Then, when he realized that the sheriff was there on behalf of Benjamin’s creditors, contradicted his assertion twice: claiming next that the goods belonged to a third brother and then finally insisting that he was the owner. The sheriff carted the things off and sold them on the basis that they were Benjamin’s goods. The plaintiff later sued in conversion, asserting that things belonged to him as in fact they did. The defendant’s attempt to raise estoppel was denied, and the court said: “The sheriff is bound at his peril to seize the goods of the proper party. Suppose he had arrested the wrong person, he could not have been justified had the person arrested said he was the person against who the writ issued.”65

Estoppel was also denied a public official on similar grounds in *Weaver v Price*, a case of an owner who failed to correct the mistake of a magistrate, who thought that the owner was liable to his power to distrain

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65 Freeman v. Cooke (1848), 154 ER 652 at 653 (citing Coote v. Lightsworth).
for non-payment of rent. The owner did not assert his immunity from this
to object that he had no readable property in Overton; and how are the
justices to know that he had none?… It would be hard upon
magistrates if they were bound to ascertain at their own peril
whether a party who appears on the face to be duly rated really has a
property for which he is needed or not.

The court found that because the owner was not in fact an occupier
of land, the defendants had no authority to distrain his goods and were
liable for trespass. 66

Estoppel is irrelevant in a suit against a public official because to
raise estoppel is to say that the burden of proof is on someone else when the
obligation to speak is clearly on the state (to show whose goods these are).
Although the brother’s declaration in Freeman v Cooke might have been
grounds for estoppel had it been made in relation to another private actor, it
does not help in the state official. It is up to the state (through its officials)
to show that it got it right; and it is not reasonable for a state official to rely
on what someone else says when it is his burden to establish sufficient
grounds for exercising public authority in the first place. What this suggests
is that burdens of proof, and more generally, justification requirements, are
relevant at an earlier stage in the transaction and in an important sense
account for when estoppel can be at work. 67

66 Weaver v Price (1832), 3 B. & Ad. 409 at 41.
67 We can put this in terms of the fact/law distinction: private rights are
matters of fact; but it is always a question of law whether a public official has
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We can explain this quite simply on my account on the grounds that while we may have authority to determine how we stand in relation to others, this is an idea of *private ordering*. There is something altogether different going on in state-owner relations: public officials have public justification requirements to meet in acting as they do. That may or may not require them to get the facts right themselves but it does mean that the private owner’s statement of where she stands in the legal order does not displace whatever obligations they have to insert themselves only where justified.

III. The Domain of Estoppel: Other Principles Distinguished

A pure estoppel case concerns a self-generated controversy about private rights that does not amount to a legal disagreement. And what marks a controversy as self-generated is that the defendant has merely taken up the plaintiff’s own view of the matter, authoritatively declared. A principle of estoppel is not applicable to all cases in which courts do not seem to track legal facts in their decisions. In what follows, I show how each of these other principles involve factors not at work in pure estoppel cases.

(i) Legal Fictions: The Only Justice that Could be Done

_exercised her authority properly. Questioning the private/public distinction, see Antonin Scalia, The Rule of Law as a Law of Rules 56 University of Chicago Law Review 4, 1175, 1181 (Autumn, 1989). “Why should the question whether a person exercised reasonable care be a question of fact, but the question whether a search or seizure was reasonable be a question of law?”_
We can distinguish self-generated controversies, to which a principle of estoppel relates, from another kind of self-authored risks to rights: that which arises where a right-holder has impeded a court’s ability to do ordinary corrective justice, by for instance destroying evidence.

Consider the problem that arises where someone through his own actions has destroyed evidence relating to the pro rata contributions of the parties to an intermixture. Thus, where one person mixes his property with another’s and in doing so deprives the other of her ability to prove her pro rata contribution, the court makes every presumption against the wrongdoer (so that the innocent party gets the fullest satisfaction possible in the circumstances.)\(^6\) If the mixture was unauthorized or it was authorized only in conjunction with a strict duty to account to a beneficiary, then the court holds any uncertainty as to pro rata shares against the mixer: it. Where an executor messes up the accounts for a mixed fund to which he has also contributed, the only justice that can be done is to disallow any claim that the executor might in fact have had against that fund: in failing to keep

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\(^6\) There is an analogue in the law of trusts, where a person fails to *unmix* when they ought to have. In Hunter v. Moss, [1994] 1 WLR 452, an owner of shares declared a trust of 50 shares out of 950 that he owned but then failed to remove the 50 from bulk. He later tried to raise a problem with the certainty of subject-matter: which 50 were subject to the trust? Although the court did not put this in terms of estoppel we can see how it might have: it does not lie in the trustee/settlor’s mouth to complain about uncertainty when it was entirely his own doing that there was uncertainty about which shares he owned subject to the trust and which he took free and clear of it. In the end the court seems to have treated all 950 as on trust, creating on equitable tenancy in common: 900/950 for the settlor/trustee and 50/900 for the original beneficiary.
proper accounts the executor has made it impossible for the beneficiaries to prove their entitlement.\(^6^9\)

The truth, in these cases, is not ascertainable because of what the defendant has done: the defendant has made it impossible for the plaintiff to discharge the burden of proving her right and so the only justice that can be done is to shift the burden to the defendant: if the plaintiff is entitled to something less than the whole fund (or mixture, or the most expensive jewel that could fit in a certain-sized socket), let the defendant prove that on the balance of probabilities.

The kinds of presumptions that courts rely on in these cases are presumptions about the nature of the right the plaintiff might have had but for the interference of the defendant, whose own right then must bear all the risks associated with the loss of evidence. This kind of presumption, like other presumptions of fact and legal fictions generally (e.g., The Winkfield), arise because of the impossibility otherwise of doing justice at all in the case before a court. These presumptions are in the service of judicial authority. By contrast, in the cases of self-generated controversy, the truth is readily ascertainable. When I falsely state that I have no property in certain goods, and future dealings with this property reflects this viewpoint, the problem is not that the court lacks access to the truth but that

\(^{69}\) White v. Lady Lincoln (1803), 8 Ves. Jun. 363. For the principle in a different context, see Armorie, *supra* note 12; Indian Oil;
my narrative once accepted is authoritative: it is possible in these cases for courts to inquire into the true state of affairs relating to my rights; but they do not, on principle, because there is no genuine controversy that had gotten in the way of my vindicating my rights.

(i) Author of Her Own Misfortune

How is the principle of estoppel I set out here different what is at work in cases of self-authored misfortunes generally? Everyday morality suggests that we should not complain about a misfortune that we have brought upon ourselves.\(^7^0\) We might reasonably reproach ourselves for failing to guard against certain harms, for instance for failing to hold the bannister as we run down the stairs. What is the proper response when the misfortune against which we failed to guard is an injury to our rights—someone else’s wrong? Here too we can imagine cases where the reasons we have to reproach ourselves are also reasons courts have to excuse the wrongdoer from liability.\(^7^1\) It stands to reason, Grotius tells us, that a tenant’s failure to deliver an agreed-upon share of crops does not give the landlord reason to complain, when the landlord himself trampled the plants. The agreement may have been violated in that case, but the landlord’s conduct, in bringing about the very risk to her rights that materialized,

\(^{70}\) I note that this intuition has been much abused in the history of law, used as a cover for “blame the victim” tactics.

\(^{71}\) See R. Stevens, *Contributory Fault—Analogue or Digital? in *DEFENCES IN TORT* (Andrew Dyson, et. al., Hard Publishing Ltd., 2015). (Accounting for contributory fault as a defence against liability not obligation.)
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excuses the defendant from liability for breach.\(^72\) The distinction between self-authored misfortune and estoppel is easy to make out in such cases: the victim made the wrong all but unavoidable, thereby affording the defendant a defense against liability. In estoppel cases, the defendant does not acknowledge a wrong and defend against it but rather insists that she and the plaintiff have no disagreement for the court to resolve, having taken up the plaintiff’s own earlier view according to which there is no conflict between them.

Cases of self-authored misfortune may also (less defensibly) include cases where the victim has engineered the vulnerability of the right—the risk of its violation. The wrongdoing by another that follows is just a materialization of the very risk she created: the wrongful conduct is merely the trigger that sets off the risk you have already created. The creation of the risk to the right is distinct from its materialization (in the form of the defendant’s wrongful conduct). But a person can hardly be surprised when the very thing she invites actually happens. In Germany, for instance, it is against the law to leave your car doors unlocked. The owner of goods stolen from the car remains of course the owner of those goods vis a vis the thief,

\(^72\) Grotius, who took himself to be distilling the common sense of the ages, quotes Seneca for something like this proposition: “The landowner does not have the right of binding the farmer to him, even if the agreement beuncancelled, if he trample down his corn, if he cut down the plants; not because he has received what he agreed for but because he himself has been the means of his not receiving it.” Bk III Ch XIX Sec XVII
but she bears liability for the loss herself: her insurance company is not
liable to make good that loss. It is not that the court fails to take you as a
holder of a right in these situations but that the court holds you partly
responsible for bringing about the very circumstances that undermine your
rights. The victim’s conduct serves to allow the wrongdoer or anyone else
ordinarily liable for that wrong a partial defense against liability.73 Someone
who authors her own misfortune does not absolve the wrongdoer of the
wrong itself but may create a partial or total defense to liability for that
wrong—on the part of the wrongdoer or even a third-party.

What the corn-trampling landlord and the German car-owner have in
common is that to a lesser or greater degree they are the authors of their
own misfortune.74 This does not mean that there is no wrong or legal
disagreement for a court to sort out; rather, the plaintiff’s role is a factor for
courts to consider in figuring out the extent of the defendant’s liability for
the harm that resulted from the wrong. She has created the risk of its
violation either by delivering the means of violating the right into the hands

73 See e.g., Bishopsgate Motor Finance Corp. Ltd v. Transport Brakes Ltd.,
[1949] 1 K.B. 322. The owner who leaves the logbook in the hands of the bailee for
sale creates the very vulnerability to her right—the loss of possession to a BFPV—
against which she later seeks protection in court (through the recognition of the
priority of her earlier right).

74 “Look to Swan v. North British Australians Co., (1862), 7 Hurl. & N. 603,
158 ER 611 and Hern v Nichols (1795), 1 Salk. 289, 91 ER 256 (in which it was said
that the “author of the misfortune should not himself escape the consequences and
cast the burden upon another.” See also MELVILLE BIGELLOW, A TREATISE ON THE
LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE, (5th ed, 1890) at 504.
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of the wrongdoer or by diminishing the wrongdoer’s capacity to avoid the violation.

We may have reason not to treat the former as cases of self-authored misfortune: we may question whether your lack of care with respect to your rights at the same time excuses my lack of care with respect to those rights. As Rob Stevens has pointed out, it makes very little sense to insist that “if the claimant can require the defendant to take care with respect to him, then the defendant can insist that the claimant also care for herself.” But however we come down on that question—to include cases where a person creates a risk of violation rather than bringing about the violation itself—, we can see that these cases do not fit as estoppel, either: my creating the circumstances that make my rights more vulnerable to violation is not tantamount to staking out a (false) position about what in fact my rights are.

(iv) Entrapment

Entrapment occurs when “(a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and, (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.” Estoppel shares this

75 R. Stevens, supra note 65.
with entrapment: it reflects a sense in which a controversy is no longer justiciable. In pure estoppel cases, the central factor is the absence of legal disagreement because of an authoritative prior declaration about rights taken up by another: there is a bilateral relation between declarant and listener that removes the possibility of controversy between them about that state of affairs.

In entrapment cases, the wrong is not justiciable but not because the accused and the state have a shared view of the matter that deprives courts of jurisdiction. It is rather that the wrong is not justiciable because the state has done something that results in a defect in the state’s authority to proceed against that accused. In certain jurisdictions, the logic of entrapment is clearly set out in terms not of a defence or an entitlement on the part of the accused but in terms of a defect in the state’s own authority to prosecute.76 The courts, in refusing to allow the state to proceed in entrapment case, is not simply having regard to its own place in a larger procedure, as it does in estoppel cases; rather, its role in entrapment cases is to police the state’s own authority to hold someone to account in a criminal trial.

CONCLUSION

Estoppel is, I have argued, a fundamental principle in private law relations. A principle of estoppel preserves an idea of private ordering that

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puts private actors in positions of authority to assert themselves in the legal order (or not). It is not the truth that never runs out that courts respond to in making private law decisions. It is rather the need for authoritative resolution of genuine controversies. In pure estoppel cases, we have ourselves authoritatively declared how things stand between us and another, leaving nothing for a court to decide absent contestation by others.

Estoppel then is a rule of procedure that suggests a different way of thinking about procedure-- not just in terms of what happens in court or even on the way to court, but as an aspect of private ordering in a society of equals.