

COMMENT

On the primacy of economic property rights¹

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Abstract

Bart Wilson suggests that economists interested in property rights have it all backwards when they define ownership as a bundle of rights. Rather he argues that ownership comes first in the form of an abstract concept. I claim there is a small element of truth to this, but the bulk of what he argues is already understood through the concept of economic property rights. Wilson's consternation is mostly the result of a failure to appreciate this latter concept.

Key words: Economic property rights; ownership

1. Introduction

Wilson (2022) objects to the idea that property (ownership) is too often defined as a 'collection of rights,' because this implies that rights 'come before property,' and therefore rights improperly 'explain property.' Rather, he sees 'property' as a primal abstract custom which ultimately leads to or 'effects' property rights; that is, property 'comes before' rights.

The 'custom of property,' according to Wilson, has four explanations. As I understand him, Wilson claims that humans have subjective perceptions of the world that connect and classify concrete things as 'mine' (the material explanation). Humans are naturally inclined to object to infringements, and defend what is theirs (the efficient explanation). Wilson claims this naturally gives rise to inter-generational mentoring over the concept of ownership (the formal explanation), and ultimately the abstract custom survives because it brings peace to greedy humans within the context of general scarcity.

On the one hand, there is a novel contribution in Wilson's paper: any higher ordered notion of property rights must be founded on a conception of ownership. But this post-modern point is obvious. Of course the collective of individual conceptions of ownership and rights depends on the subjective perceptions of particular people in certain times and places. As he notes, Hayek (1978) pointed out that the abstract is primal, and Wilson now applies this to property. I doubt any scholar of property rights would object to this.

On the other hand, I think the bulk of what Wilson argues is already contained within the property rights literature, but he has expressed it in an odd and muddled way.² Part of the problem is Wilson grounds his argument on only two papers by Alchian and ignores sixty years of subsequent work. Most notably, he obfuscates critical distinctions in the term 'property rights.'

I want to clarify the different types of property rights and their relations. Then I want to argue that Wilson's notion that 'property is a custom,' is really just a reference to 'economic property rights.' This

¹Thanks to Geoffrey Hodgson for requesting this comment.

²For example, his 'final explanation' is approximately the Coase Theorem. When there are no transaction costs, there are perfect property rights and peace.

allows for a more mainstream and clearer understanding of what he is claiming; points out that customs of property effect ‘property rights,’ but ‘property rights’ also effect the custom of property; and shows that the real primal idea is economic property rights.

2. Property right definitions³

Terms like ‘transaction costs,’ ‘institutions,’ and ‘property rights,’ illuminate nothing when they float undefined on a page. Given the inter-disciplinary nature of the study of law, organization, and institutions, the same words often have vastly different meanings across disciplines. This is particularly true with the term ‘property.’

In this context, it is unfortunate that Wilson’s complicated, highly abstract, and counter-intuitive paper does not provide a strong definitional framework. Without it any contribution his paper might have will likely go unnoticed because what he writes can mean almost anything.

Alchian’s work is used to characterize the ‘standard approach in the analysis of property,’ but Wilson ignores Alchian’s critical idea that the fundamental concept in explaining organization is ‘economic property rights’ (EPRs), which are distinct from legal or moral rights. Following Barzel and Allen (forthcoming) these are defined as:

Economic Property Rights: *the individual’s ability (in expected terms) to exercise a choice with respect to a thing*

The ‘thing’ can be anything of relevance to the individual: from apples and ideas to people and animals. Likewise, the ‘choice’ can include any relevant and feasible options to the individual, and each of these choice types can be considered a specific *type* of economic property right. Critically, economic property rights include an expectation, and this probability expresses the strength of the right.⁴ The concept EPRs is critical because behavior and organization depend on them; that is, behavior and organization depend on the choices people can actually make. As I note below, EPRs are what are primal.

There are, of course, other notions of property rights. Most notably, governments assign, regulate, and adjudicate legal rights to individuals. Legal property rights can be defined as: *the individual’s authority under state law to exercise a choice with respect to some thing*. Likewise, it is common to speak of ‘natural,’ ‘human,’ or ‘moral’ property rights. These, can be defined as *the individual’s authority under God or Nature or Society to exercise a choice with respect to some thing*. Legal and moral rights *constrain* the EPRs of individuals.

There are, of course, many things that constrain EPRs, including ‘social norms,’ ‘customs,’ and ‘private orderings.’ These things restrict the choices individuals are able to make, and therefore restrict economic property rights. In other words, there is a functional relationship between EPRs and the collection of legal rights, moral rights, social norms, customs, etc. These latter things, in part, influence our conceptions of ‘ownership.’⁵

³For a detailed discussion of property rights, transaction costs, and institutions from the perspective I am using, see Barzel and Allen (forthcoming). This journal has entertained discussions of these issues in the past. See Hodgson (2015), Allen (2015), Barzel (2015) and Cole (2015) who debate the value of distinguishing legal versus economic rights. See also Holcombe (2014) or Allen (2017) for similar elaborations.

⁴Thus, EPRs are not monolithic, but have three dimensions: they can be i) divided across people over attributes, ii) incomplete for a person in terms of the set of rights, and iii) imperfect in that the expectation is less than one.

⁵It is beyond this note to elaborate, but certain sets of legal and moral rights, along with norms and customs are ‘institutions.’ See Barzel and Allen (forthcoming), Chapter 8. This journal has also devoted special issues to the topic. See JOIE issues 18(1); 16(2); or 14(6).

3. Understanding Wilson

Wilson is emphatic that property (ownership) is a custom, which is made up of primitive concepts and which exists prior to ‘property rights.’ But what property rights? In the opening paragraph he tersely states ‘By rights, I mean moral (as opposed to legal) rights grounded in moral reason.’ It is not clear why legal rights are excluded, and most of his examples seem to pertain to legal rights, but let’s take his assertion as given.⁶

On three occasions Wilson refers to the custom of property as ‘rules’ which are taught by community mentors, conditional on local circumstances, contain elements of social duty, and are the result of a ‘community equilibrium.’ In such a world people actually make choices, and there is some expectation that they will be carried out. In other words, economic property rights exist, and the primal sense of ownership is just a given distribution of individual economic property rights. As Barzel and Allen state:

‘Had there been a time of no economic property rights, then there would have been no life to examine a pre-economic property rights state of affairs has no meaning. Economic property rights (though very weak) have always existed, and one cannot discover evidence of a pre-economic property rights state of the world. In order to gain a toehold on the evolution of property rights, one must start with the simultaneous emergence of life and economic property rights, where some rights are already in place.’ [forthcoming, Chapter 10]

Indeed, more ‘primitive’ (or better, ‘weaker’) EPRs are prior to ‘property as custom.’ A lone human who pops into existence on a desert island will mentally perceive and connect the things around him and consider the fruit he eats as ‘mine.’ He will consider the animals as threats to his food sources, and defend his stocks. He will exercise choices and have an expectation that they will be carried out to some extent, even though there is no community around him to teach him ‘customs of property.’⁷ Thus, (economic) property rights precede ‘property’ as custom.

Wilson goes on to note that ‘property’ is successfully transmitted across generations, and he notes that it ‘effects’ property rights, which are ultimately refinements on the custom of property. But this is really a re-articulation of the basic theory of economic property rights. Alone, economic property rights are weak, and weak property rights lead to low levels of wealth. Individual wealth maximizers find it in their interest to create customs, laws, and norms to enhance economic property rights – even when these enhancements might restrict the freedoms of particular individuals.

But it is a two way street. It is true, as Wilson notes, ‘property as custom’ effects ‘rights.’ They effect all sorts of rights: economic rights certainly, but also legal and natural rights. However, those institutional effects in turn feedback and effect the individual’s economic property rights – the ability of the individual to exercise some choice. In other words, the causality is two way, not one directional as Wilson maintains.

Hence, when Wilson refers to *Haslem v. Lockwood* and claims that Haslem could claim ownership of the manure through effort, others knew it was true, others said it was his, and even Lockwood could not claim it was his, he misses a critical point. Haslem took Lockwood *to court* for taking the manure! If all was so clear, that would not have happened. True enough, there was a common culture of property that Haslem relied on, but it was not so common that Lockwood could foresee a costly loss at trial.

⁶Much hinges on the phrase ‘grounded in moral reason.’ Those of Abrahamic faith would certainly claim that the moral law preceded human existence, and hence came first. Likewise, the Natural Law purist would claim Nature also exists objectively and independently of human existence. If moral rights require moral reasoning, then it seems redundant to say that it follows the existence of the abstract concept of ownership. How could there be moral rights over something of which the conception does not exist yet?

⁷The closest thing I can think of in recorded history is the landing of the Bounty mutineers and their slaves on Pitcairn Island in 1789. They had no access to legal property rights, and no common set of moral rights to draw on to develop a custom of property. Economic rights existed, but they were weak, and violence over the scarce women and their allocation led to only one male adult survivor of the original mutineers.

Rather, the legal institution made a decision that ‘effected’ the ‘custom of property’ or economic property rights of Haslem. We already have all the tools we need for articulating what is going on with Haslem, Lockwood, or the other cases referred to. Wilson’s paper adds little.

Conclusion

As a pragmatic, dirt level, instrumentalist property rights researcher, I’m not prone to find value in high fallutin papers that add almost nothing to our understanding of real things. Many have successfully built on and exploited Alchian’s concept of economic property rights; and the claim that organizations and institutions can best be explained by the hypothesis that they maximize wealth net of the costs of strengthening those economic rights (transaction costs) is also well empirically supported. All Wilson’s paper adds to this is that humans must have some abstract conception of ownership for it all to work.

Okay, fine. However, I think if Wilson had been more careful, or more aware, of the critical importance of economic property rights, he would have recognized that his notion of ‘property’ was such a thing, in which case his paper might have better been called ‘The primacy of economic property rights.’ But then, we knew that already.

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