Journal of Institutional Economics (2023), **19**, 276–279
doi:10.1017/S174413742200039X

CAMBRIDGE UNIVERSITY PRESS

COMMENT

Ownership or possession? On Bart Wilson's concept of ownership

Frank Decker

The University of Sydney Law School, Sydney, Australia
Corresponding author. Email: frank.decker@sydney.edu.au and fdecker@uni-bremen.de

(Received 20 September 2022; accepted 26 September 2022; first published online 21 October 2022)

Abstract
In a recent article Wilson explores the origins and explanation of ownership (property) as a custom, and argues that the custom of ownership is the primary concept and that property rights are subordinated to ownership. I argue that Wilson's subordination argument is unpersuasive; the linguistic evidence used by Wilson fits better with the concept of possession; and ownership is not a human universal.

Key words: Collateral; GDR land reform; ownership; possession; residue of rights; security

1. Introduction

In his recent article in this journal, Wilson (2022) explores the origins and explanation of ownership[1] as a custom and the relationship between ownership and property rights. Research on the origins and meaning of ownership is an important undertaking but notoriously difficult. This is particularly evident in the legal field, with the legal meaning of the terms property and ownership contested. Ownership has indeed been described as 'one of the most elusive concepts of English law' (Goode, 2004: 31). On the other hand, economists, including leading proponents of new institutional economics, have placed an undue focus on use rights (possession), and neglected ownership and security interests (Heinsohn and Steiger, 1996, 2013; Hodgson, 2015). In what follows, I will comment on three areas. I first review Wilson's subordination argument and find it unpersuasive and at odds with the actual legal structure. I then review the distinction between ownership and possession and argue that the linguistic evidence used by Wilson fits better with the concept of possession. In the last section, I take issue with Wilson's claim that ownership is a human universal.

2. The subordination of property rights

Wilson criticises what he refers to as the 'standard approach' in the analysis of ownership. In his interpretation of that standard approach, a property right is defined as a 'subset' of the 'set of incidents for full ownership' drawn from Honoré's (1961) incidents of ownership (Wilson, 2022: 13). On this basis, Wilson concludes that 'property rights compose ownership' in this approach (Wilson, 2022: 13), and that, as a corollary, property rights explain ownership and what he calls the 'custom of property [ownership]' (Wilson, 2022: 13).[2] Wilson argues that the standard view puts things the wrong way around. In his view, the custom of ownership must explain property rights and the latter are subordinated to ownership – hence the title of his paper. Ownership as a custom is defined by Wilson as a set of rules

[1]Wilson (2022) uses the terms 'property' and 'ownership' interchangeably. I prefer the term 'ownership' in line with Honoré (1961) and legal usage.

[2]In the following referred to as 'custom of ownership'.

that are socially taught about what things under what circumstances can be claimed as 'MINE' and 'NOT MINE' (Wilson, 2022: 2, 5). In turn, he argues that the concepts of 'MINE' and 'NOT MINE' are products of the human mind, as humans have a propensity to conceptualise things as abstract objects that can be claimed as 'MINE'. Ownership is the primary concept because it is 'rooted in the abstract concept MINE' (Wilson, 2020: 183).

I must admit that I have some difficulties following this argument. Honoré positioned his 11 incidents as 'ingredients in the notion of ownership' or available criteria for 'the identification of the interest called "ownership"' (Honoré's 1961: 112). Arguably, Honoré's incidents represent features of ownership and not, as Wilson assumes, 'the most complete and comprehensive set of rights' or a collection of 'pieces that are property rights' that 'compose' ownership (Wilson, 2022: 13, 1). Ownership is itself a property right. These conceptual difficulties perhaps illustrate why it is also important from an economic point of view to look closely at the underlying legal structure to gain a complete picture. If we take the example of personal property, which includes items like tools that Wilson (2020) appears to be most interested in, standard textbooks on commercial law (e.g. Goode, 2004) tell us that there are three main forms of property rights in English common law: ownership, possession and the equitable charge (hypothecation). All three are separate rights. The equitable charge is an encumbrance not based on ownership and possession. A closer inspection of the legal concept of possession reveals that it is not carved out of ownership either but created as an original interest when an asset is delivered to another party, for instance a bailee (Goode, 2004: 33). Hence, Wilson's argument that all property rights are subordinated to ownership is difficult to reconcile with the actual legal structure.

A further concern relates to Wilson's use of the term 'custom'. His custom of ownership appears to be an incredibly flexible concept that even encompasses the latest case law decisions (Wilson, 2022: 14–15). In my view, Wilson stretches the term too far and the concept loses explanatory power. How the abstract concept of 'This thing is mine', claimed by Wilson to be common to 'all communities, past and present' (Wilson, 2022: 2–3), has asserted its primacy and influenced the development of property law as well as specific problems in English and American case law is left unexplained.

3. The distinction between ownership and possession

Pollock and Maitland noted in their landmark history of English law that 'it is hardly correct to say that Anglo-Saxon customs or any Germanic customs, deal with ownership at all'. They concluded that '[w]hat modern lawyers call ownership or property, the *dominium* of the Roman system, is not recognised in early Germanic ideas' and that the leading concept was possession. It was possession that was defended and recovered, and 'to possess without dispute' was 'the only sure foundation of title' (Pollock and Maitland, 1898: 34; emphasis in original). It was a time when the law focussed on the restoration of chattels (cattle) and the punishment of thieves. Pollock summarised this view some years later, in 1926, in a letter to Holmes by stating that 'our ancestors simply couldn't understand owning anything one does not actually possess' (Pollock, 1942: 186).

By contrast, ownership is the leading concept in developed civil and common law systems. An owner does not have to be the possessor to have the best title to an absolute interest in an asset. This becomes evident when ownership is defined based on its residuary character, a concept used to articulate the essence of ownership. For instance, Goode defines ownership in personal property 'as the residue of legal rights in an asset remaining in a person […] after more specific rights [e. g. possession as part of a bailment] over the asset have been granted to others'.[3] The conceptual distinction between ownership as a residue of rights and possession as a special right is significant as it underpins the core transactions in modern economies. Here, a vast number of transactions are based on credit and lease arrangements with asset ownership and possession vested in different persons. Take the case where A has taken out a mortgage under general common law rules and obtained a

[3]Goode (2004: 31).

https://doi.org/10.1017/S174413742200039X Published online by Cambridge University Press

money loan from B. With the agreement of B, A remains in possession and can continue with the economic use of the asset, while ownership is transferred to B as security for the loan. What makes property rights significant is the protection they provide to creditors in the case of a debtor's insolvency. Should A become insolvent, B can realise the security, rather than have to make a claim in competition with other unsecured creditors. Goode has repeatedly reminded us that '[i]f it were not for the possibility of the insolvency of A or B, the distinction between a real [property] right *in* goods and a personal right *to* goods would be largely academic' (Goode, 1989: 2, emphasis in original; reemphasised in Goode, 2004: 25).

The legal analysis of ownership and possession within their economic context thus reveals (i) a concept of ownership as a residue of rights that enables the structuring of secured transactions and bailments, and protects creditor interests in debt enforcement actions; and (ii) a concept of possession that facilitates the economic use of an asset free from interference and is closely aligned with the ancient ideas of 'mine' and 'thine'. This allows me to assess Wilson's claim that terms such as 'Mine!', 'not yours' and 'thou shalt not steal' could ground ownership as a custom (Wilson, 2022: 2). Based on the foregoing discussion, I argue that these terms are more closely aligned with possession. Wilson's term custom of ownership would perhaps be more accurately described as the 'custom of possession', with the associated remedies against theft and interference.

I believe that the explanation of ownership as a residue of rights that is distinct from possession requires more sophisticated concepts than 'MINE' and 'NOT MINE'. The commercial context in which ownership in this form becomes essential suggests that it may be grounded in the idea of collateral security or the idea of the lease. Such an explanation was indeed suggested by Heinsohn and Steiger more than 25 years ago. They argued that ownership, conceptualised as an abstract ownership title distinct from possession, was invented by the revolutionary founders of the first ancient city states, when they began to encumber their land allotments as collateral security for money loans, while continuing with their land use and possession.[4]

4. Is ownership a human universal?

Wilson (2022: 2) claims that '[p]roperty [ownership] is one of numerous customs that humans universally practice'. Based on the discussion above, I argue that this statement may hold for possession but not for ownership, unless the term ownership is stripped of its essential legal meaning. Pollock and Maitland argued that both Anglo-Saxon and German customs knew possession but not ownership. A similar argument has been made for communities of hunters and gatherers, feudal societies and the former systems of state socialism.[5] While some form of possession is encountered throughout human history, societies with ownership only account for a relatively short period of this history. Ownership is not a universal characteristic of human organisation.

The former socialist German Democratic Republic (GDR) provides a particularly instructive example in this regard.[6] In 1945, the German Communist party in conjunction with the Soviet Military Administration designed a wide-ranging land reform to expropriate the land of national socialists, war criminals and landowners with holdings above 100 hectares ('Junkers') without compensation. The expropriated land was transferred into a land fund, with a size equivalent to about 30% of the total land area of the former GDR. The land was redistributed in much smaller parcels as 'land reform property' to peasants and farm workers. By January 1949, 13,699 properties with a combined land area of 3,225,364 hectares had been expropriated, with 209,000 new peasant farms created and 120,000 grants provided to existing farms (Sandford, 1983: 113–114). The legal status of the new holdings was described by the leading GDR official as 'private ownership in land' and the new

[4]Heinsohn and Steiger (1996: 113–116, 247; 2013: 57–59); refer to Decker and McCracken (2016) for a detailed discussion and supporting evidence from contemporary legislative developments.

[5]See the discussion and quoted references in Heinsohn and Steiger (2013: 1–15).

[6]See also the discussion in Heinsohn and Steiger (2013: 8–9).

https://doi.org/10.1017/S174413742200039X Published online by Cambridge University Press

East German farmers as 'masters of their soil' (Hoernle, 1946: 4, 12–14). The land could be inherited and the new farmers obtained land title certificates and could register their holdings with the land registry. Old land registers were burned. The authorities made a deliberate effort to give the new land titles the appearance of proprietary rights in order to discourage any future challenge to the reforms (Sandford, 1983: 100). The new land titles would have passed Wilson's ownership test (Wilson, 2022: 6) with flying colours: the new farmers could say about their land reform property: 'This is mine' and other people could know that this was true.

Despite the appearance of full private ownership, land reform property was subject to a number of material restrictions. Land reform property could not be subdivided, transferred, leased out or hypothecated and there was a duty to utilise the land. While the new farmers could certainly make the statement 'this land is mine', Wilson's custom or rules of ownership applied to the former GDR would have to reflect their inability to sell, lease out or mortgage their land. If abandoned, the individual land holding reverted back to the land fund. As a result, the land titles had come to signify a mere use right[7] and had lost their nexus to collateral security, leasing and sales. Would a court of the Federal Republic of Germany recognise an interest in land reform property before German reunification as ownership? Or to use Wilson's terminology, how would the court interpret the socialist custom of ownership related to 30% of land in the former GDR? The German Federal Court decided that the land title did not amount to ownership. Due to the imposed restrictions, the Court held that 'ownership in land reform property was stripped of its essential meaning as ownership under the German Civil Code'.[8] Possession, not ownership, was the leading concept in the former GDR.

References

Decker, F and S. McCracken (2016), 'Security as a Driver in Shaping the Legal Concept of Property: From the Roma Quadrata to Personal Property Securities Legislation', in J. Beaufort and F. Decker (eds.), '*Eigentum, Zins und Geld' nach 20 Jahren*, Marburg: Metropolis, pp. 21–48.

Goode, R. M. (1989), *Proprietary Rights and Insolvency in Sales Transactions*, London: Sweet & Maxwell.

Goode, R. M. (2004), *Commercial Law*, London: Penguin Books.

Heinsohn, G. and O. Steiger (1996), *Eigentum, Zins und Geld: Ungelöste Rätsel der Wirtschaftswissenschaft*, Reinbek bei Hamburg: Rowohlt Verlag.

Heinsohn, G. and O. Steiger (2013), *Ownership Economics: On the Foundations of Interest, Money, Markets, Business Cycles and Economic Development*, translated and edited with comments and additions by Frank Decker, London: Routledge, 2013.

Hodgson, G. M. (2015), 'Much of the "Economics of Property Rights" Devalues Property and Legal Rights', *Journal of Institutional Economics*, **11**(4): 683–709.

Hoernle, E. (1946), *Die Bodenreform*, Berlin: Deutscher Bauernverlag.

Honoré, A. M. (1961), 'Ownership', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence*, New York, NY: Oxford University Press, pp. 107–147.

Pollock, F. (1942), 'Letter to Holmes', in O. W. Holmes, F. Pollock and M. Howe (eds), *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874–1932*, Cambridge, Mass.: Harvard University Press, pp. 185–186.

Pollock, F. and F. M. Maitland (1898), *The History of English Law before the Time of Edward I, Volume I*, Cambridge: Cambridge University Press.

Sandford, G. W. (1983), *From Hitler to Ulbricht: The Communist Reconstruction of East Germany*, Princeton, NJ: Princeton University Press.

Wilson, B. J. (2020), *The Property Species: Mine, Yours, and the Human Mind*, New York, NY: Oxford University Press.

Wilson, B. J. (2022), 'The Primacy of Property; or, the Subordination of Property Rights', *Journal of Institutional Economics*, published online. doi: 10.1017/S1744137422000212

[7]Sandford (1983: 115) referred to the new farmers as 'mere usufructaries'.

[8]Bundesgerichtshof Urteil V ZR 200/97, Section 1 c), 17 December 1997.

Cite this article: Decker F (2023). Ownership or possession? On Bart Wilson's concept of ownership. *Journal of Institutional Economics* **19**, 276–279. https://doi.org/10.1017/S174413742200039X