

Comment

'Economic property rights' as 'nonsense upon stilts': a comment on Hodgson

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Abstract. Hodgson's (2015) critique of extra-legal 'property rights' – in this case, so-called 'economic property rights' – is right on target. This Comment contributes two further points to his critique. First, the notion of 'economic property rights' is based on what Gilbert Ryle (1949) referred to as a 'category mistake', conflating physical possession, which is a brute fact about the world, with the right or entitlement to possession, which is a social or institutional fact that cannot exist in the absence of some social contract, convention, covenant, or agreement. The very notion of a non-institutional 'right' is oxymoronic. Second, the fact that property is an institutional fact does not mean it must exist with the structure of a 'state' (as Bentham suggested). Rather, institutions like 'property rights' only require some community, however large or small, operating with what Searle (1995; 2005) calls collective intentionality and collective acceptance, according to shared 'rules of recognition' (Hart, 1997).

In 2002, the economist Peter Grossman and I published an article criticizing *some* property-rights economists for adopting definitions of 'property rights' that deviated substantially from conventional legal definitions (Cole and Grossman, 2002). Our primary concern in that article was that such disparate definitions sew confusion and impede the progress of the joint scholarly enterprise known as Law & Economics. That article has been cited more than 130 times (according to Google Scholar) but has had scant effect on property rights economists, who continue to employ ill-conceived expressions, such as 'economic property rights' (see, e.g., Allen, 2014; Barzel, 1997).¹ Perhaps they will pay more attention to Hodgson's new article, which mounts a broader epistemological and theoretical assault on the notion of 'economic property rights', as a category distinct from

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1 The phrase '*de facto*' property rights is similar, but used in different ways by various scholars. For example, Ostrom and Schlager (1992: 254) used that phrase to denote property systems that emerge among resource users without state sanction. Significantly, among the users themselves, the property systems are treated as *de jure*. I have more to say about informal property systems in the penultimate section of this Comment.

legally recognized and protected property rights (Hodgson, 2015). Hodgson's article hits all its targets, and hits them hard.

Instead of rehearsing, reinforcing, or simply applauding Hodgson's arguments, in this brief Comment I seek to make two additional, marginal contributions. First, I explore what I take to be the root problem of 'economic property rights' talk, which is the conflation of actual possession with the 'right' to possess. My second goal is to soften an apparent (if unintended) implication from several of Hodgson's (2015) arguments, that a legal system requires a state.² As Hodgson undoubtedly appreciates, one need not share Bentham's belief, articulated in *Principles of the Civil Code* [1843], that the law and the state are born and die together (see Bentham 1962, Vol. 1: 309) in order to conclude that the notion of 'economic property rights' is, as Bentham derisively wrote of 'natural and imprescriptible rights' in France's 1789 Declaration of the Rights of Man, 'nonsense upon stilts' (see Bentham 1962, Vol 2: 501).³

1. The brute fact of physical possession ≠ the institutional fact of a right of possession

As Hodgson (2015) observes, some economists treat actual, physical possession as equivalent to a 'right' of possession. It is not. The conflation of possession with the right of possession reflects a simple Rylean 'category mistake' (Ryle, 1949), combining objects from separate logical or ontological magisteria. In this case, the separate magisteria are what Searle has labeled 'brute facts' and 'social facts' (Searle, 1995). For Searle, a brute fact is a fact about the world that exists independently of what people think about it. You might not believe in the existence of walls, for example, but as you start moving around the brute fact of a wall will make itself known to you. In contrast to walls and other physical objects in the world, there is no such *thing* as property (although we sometimes casually, but mistakenly, refer to land as property, e.g., 'That property over there is mine').

'Property' is not a brute fact about the world but an 'institutional fact', which Searle (1995) defines as a subset of 'social facts'. Social facts do not exist in nature regardless of human attitudes towards them but are the consequences of a 'collective intentionality' by groups of agents attempting to order social interactions. More recently (Searle, 2005: 9–10), has observed that 'institutional

2 Consider the following quotations from Hodgson's article: 'there are good reasons to confine the definition of law to circumstances where there is a state with an institutionalized judiciary and legislature'; '[b]oth the state and custom are necessary for law to function'; 'property in its truest sense has another prerequisite – the political authority of the state'; 'establishment of legal rights, through perceptions of moral legitimacy and the use of state power, can affect intentions or behavior'.

3 At the same time, Hodgson (2015) rightly observes that large and complex market-based economies do seem to require state-like governance authorities to function – at least, no one has ever witnessed a large, functional market-economy without a state.

facts only exist in virtue of collective *acceptance* of something having a certain status, where that status carries functions that cannot be performed without the collective *acceptance* of the status'.⁴ So, the existence of an institutional fact depends on human intentionality and acceptance. Searle (1995) even uses property as an example: 'there is nothing in the physical relations between me and a piece of land that makes it my property'. What makes it 'property' is some kind of 'collective intentionality' – a social agreement, covenant, convention, or constitution among a group of agents however large or small – which is accepted by enough individuals within that community. This is consistent with H.L.A. Hart's (1994: 94) requirement that a legal system must satisfy 'rules of recognition' within a relevant community, to make it stick as a legal system.

Searle's distinction between brute and social/institutional facts underlies confusions about meanings of word 'possession'. In the vernacular, 'possession' can, and often does, refer to a brute fact about the world, which obtains regardless of anyone's attitude toward it. But in its conventional legal use, 'possession' is an institutional fact that depends on collective intention and acceptance. In many cases, these diverse meanings of 'possession' are unproblematic. We often possess physically what we have a right to possess. I physically possess two arms and two legs, and I have the right to possess them; in fact, it is extremely unlikely that someone else might claim superior title to them. But in some cases – the cases that are most interesting from a combined legal and economic perspective – the brute fact of physical possession may be separated from the institutional fact of legal (or quasi-legal) rights of possession. These are the cases in which property-rights economists contend the notion of 'economic property rights' becomes important. The person who physically possesses the good, they claim, has economic, but not legal, property rights.

This claim is inconsistent with Searle's brute fact/institutional fact distinction, and it is the conflation of physical possession and presumed property rights that constitutes the category mistake. What is the source of the alleged 'right' – is there collective intentionality and acceptance? And what makes that right 'property' – with various attributes of rights and duties attending ownership of title to land or chattels (see Hodgson 2015, citing Honoré 1961)? Does anyone (or everyone) have a duty not to interfere with the 'economic property right' holder's possession and use? If not, then the holder's possession does not count as a 'right' under prevailing definitions (Hohfeld, 1913). It is telling that economists who assert 'economic property rights' elide these questions. In fact, one does not need to posit the brute fact of physical possession as *any* kind of institutionalized 'property right' in order to make the simple economic point that physical possession alone has economic value.

Following Searle, the words 'property' and 'rights' encompass *inherently institutional concepts*, referring not to physical things in the world but relations

4 Emphasis added.

between people within some social order. Therefore, ‘economic property rights’ as a supposedly non-institutionalized form of property – a purported relation between a person and a thing, irrespective of the social order – is a contradiction in terms (accord Hodgson, 2015). As Justice Jackson noted in *U.S. v. Willow River Power Co.*, 324 US 499, 503 (1945), ‘economic uses are rights only when they are legally protected interests’.

But what amounts to a ‘legally protected interest’? The answer to this question is actually a good deal more complicated than most scholars (including many legal scholars) suppose. Suffice it, for present purposes, to observe that the law (at least in some jurisdictions) protects even thieves in their possession, if only against subsequent thieves (see, e.g., *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1982)). A mere bailee – someone who borrows your lawnmower, for instance – has a *legal* property interest in that lawnmower. Specifically, he has a better claim to that lawnmower than anyone else in the world except for you, the nominal owner (*Armory v. Delamirie*, King’s Bench 1722, 1 Strange 505). He also has an affirmative property *duty* to return the lawnmower to you upon your demand. The possessory *rights* of both bailees and thieves receive protection under the legal dictum ‘relativity of title’, which courts designed to resolve disputes over possession where neither party in the case was the nominal owner (see Dukeminier *et al.*, 2014). Perhaps property-rights economists can take solace in the knowledge that, even if their idea of thieves having ‘economic property rights’ is nonsense, thieves can possess a modicum of *legal* property (although, as Helmholtz, 1986 observes, property contests between two thieves seldom arise).

2. Property rights without the state?

Searle’s (1995; 2005) definition of institutions and his distinction between brute facts and social facts not only exposes the inherent contradiction in assertions of non-institutionalized ‘economic property rights’. It also provides a useful compromise position for Hayekians and other libertarians (but probably not strict natural law theorists) who deplore Bentham’s identification of property with the ‘state’.⁵

Return to Searle’s (1995; 2005: 9–10) conditions for the ontological existence of ‘institutional facts’, as a subset of ‘social facts’: there must be ‘collective intentionality’ behind the creation and application of rules, norms, and other institutions, plus ‘collective acceptance’ of the status conferred by them. But what does ‘collective’ mean? Does it require a ‘state’, however defined? I suspect

⁵ However, strict Hayekians who believe that institutions spontaneously emerge as consequences of human actions ‘but not of human design’ (Hayek, 1967) inevitably must be disappointed to find that many existing non-state-established property systems, of the kind Ostrom (1990) describes, have in fact been carefully designed.

Searle used the broader term purposefully so as to encompass social groupings of any size capable of collective intention and acceptance of institutions.

For example, the ‘common-property regimes’ about which Ostrom (1990) wrote in *Governing the Commons* were not creations of states or state-agencies but of local resource-users themselves, who had the collective intention of sustainably managing common-pool resources by imposing institutional constraints on access and use of those resources. The more successful of such efforts benefitted from widespread collective acceptance plus relatively low-cost monitoring and enforcement. Ostrom acknowledged that common-property regimes were more likely to be successful if governmental authorities minimally recognized the authority of local resource users to make their own rules – common-property regimes for managing common-pool resources tend to be more successful when they are ‘nested’ within a polycentric system of governance (Ostrom, 1990: 90, Table 3.1). However, *Governing the Commons* contains several examples of the institutionalization, by collective intention and acceptance, of successful common-property regimes where the state was completely absent. It would seem odd to conclude that because the state was not involved, these systems are not ‘legal’ or, at least, legalistic, especially given that, in many cases, dispute resolution mechanisms were created, some of which operated akin to courts of law or justice.

Hodgson (2015) recognizes several other instances in which legal or legalistic systems appear to exist without a formal state system, referencing Benson (1990), Ellickson (1991), and Grief (1993), among others. He does not dispute them, but he observes correctly that non-state-based social-ordering systems become more difficult to manage as size and heterogeneity increases. Even so, this hardly entails the conclusion that non-state-based property systems cannot exist. We know for a fact that they do exist. So, Libecap (1989: 1) is not inaccurate in stating that ‘[p]roperty rights institutions range from formal arrangements, including constitutional provisions, statutes and judicial rulings, to informal conventions and customs regarding the allocations and use of property’. For Libecap, systems of property remain social ‘institutions’, implicitly repudiating assertions of non-institutionalized ‘economic property rights’ based on mere physical possession.

3. Conclusion

As I argued more than a decade ago (Cole and Grossman, 2002), the notion of extra-legal, non-institutionalized ‘economic property rights’ creates unnecessary confusion that obstructs efforts by legal scholars and economists to advance our understanding of how institutions structure exchange. Indeed, the very notion of non-institutionalized rights is both a contradiction in terms – rights are institutions – and involves a logical or ontological category mistake by conflating physical possession, a brute fact, with a property right to possess, which is an institutional or social fact. In order to posit a ‘property right’, collective

intention and acceptance (e.g., under a ‘rule of recognition’) is required. Such collective intention and acceptance can occur below (or above) the level of the ‘state’ (however defined), but it requires a community, however large or small, establishing and enforcing legal or legalistic rules for itself.

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