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The Pluralities of Property[†]

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Abstract—In *Property Rights: A Re-Examination*, James Penner returns to and develops a project that he has been engaged in for nearly three decades: to replace the influential 'bundle of rights' picture of property, which he regards as irredeemably flawed, with an alternative account—one that regards property as a unified entitlement. In this review article, I expound and analyse the central features of Penner's theory. I defend the view that, in its original iteration, Penner's account was trebly monistic: it regarded property as a single entitlement justified by a single human interest and protected by a single duty of non-interference. I go on to critically examine one of Penner's central ideas—that to understand property it is necessary to understand its justification. Along the way, I trace how Penner's account has evolved and explain how certain alterations have put some problems to bed while generating others.

Keywords: property, property rights, rights, legal philosophy, jurisprudence

1. Introduction

'It is more plausible', James Penner claims in a celebrated essay published in 1996,[1] 'not to regard property [as a bundle of rights], but rather as a single right protecting a single, identifiable interest.' There is, as this quotation suggests, and as Penner has observed,[2] a critical and a constructive dimension to his work on property: he has sought to dislodge the enduringly influential 'bundle of rights' picture of property, which he regards as irredeemably flawed, and to expound and defend an alternative account—one that regards property as a 'single right': 'the right of exclusive use'.

The primary aim of the 1996 essay was to advance the 'negative' project by examining, and explaining why we should discard, the 'bundle of rights' picture. This project has more than one target. Indeed, it is partly thanks to Penner's work[3] that, among property theorists, it is now widely recognised that the beginning of

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[†] A review of JE Penner, *Property Rights: A Re-Examination* (OUP 2020) (hereinafter *PRR*).

[1] JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L Rev 711, 739.

[2] JE Penner, *The Idea of Property in Law* (OUP 1997) 2.

[3] See Penner, 'Bundle' (n 1) esp 714–15, 722–3, 733–9.

wisdom when it comes to understanding the 'bundle of rights' picture is that several distinct theses have paraded under this banner; that it is possible to consistently endorse one or some of these while rejecting others; and that each thesis ought to be clearly identified and examined.

One thesis associated with the 'bundle of rights' picture of property is that property 'is a structural composite, ie that its nature is that of an aggregate of fundamentally distinct norms'.[4] This proposition, as Penner has explained,[5] has been connected with, and sometimes regarded as based upon, Wesley Newcomb Hohfeld's account of jural relations.[6] A significant feature of Hohfeld's account is the bilaterality thesis, that is, the thesis that every jural relation is a relation between two, and only two, persons.[7] A right–duty relation, for instance, is, according to Hohfeld, a relation that obtains between two persons wherein one of them (the duty bearer) owes the other (the right holder) a duty to do or not do something.[8] The bilaterality thesis, when combined with certain other propositions that Hohfeld appears to have endorsed,[9] entails that 'a right against the world at large', such as a right to exclude all others from certain land, is not actually a single right[10] but a set of distinct rights, and thus distinct right–duty relations, each of which holds between just two persons. Hohfeld seemingly embraced this conclusion: 'instead of there being a single right with a single correlative duty resting on all the persons against whom the right avails', he wrote, 'there are many separate and distinct rights'.[11] Therefore:

> If A owns and occupies Whiteacre, not only B but also a great many other persons … are under a duty, eg not to enter on A's land. A's right against B is … simply one of A's class of *similar*, though separate, rights, actual and potential, against *very many* persons.[12]

On this view, then, A does not have a single right to exclude; he has a 'large and indefinite' set of distinct rights to exclude.[13]

[4] ibid 741.

[5] ibid 712–14, 724–31. See also Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111 Yale LJ 357, 365.

[6] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913–14) 23 Yale LJ 16 (hereinafter SFLC); Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916–17) 26 Yale LJ 710 (hereinafter FLC).

[7] FLC (n 6) 718–20, 742–5. See John Finnis, *Natural Law and Natural Rights* (OUP 1980) 199–200; Matthew H Kramer, 'Rights Without Trimmings' in Matthew H Kramer, NE Simmonds, and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (Clarendon Press 1998) 9–10 (including fn 2); David Frydrych, 'Rights Correlativity' in Shyamkrishna Balganesh, Ted M Sichelman and Henry E Smith (eds), *Wesley Hohfeld a Century Later: Edited Work, Select Personal Papers, and Original Commentaries* (CUP 2022) 124–5.

[8] SFLC (n 6) 30–2.

[9] For discussion, see Frydrych (n 7) 122–8.

[10] Some theorists have sought to hold on to a Hohfeldian account of legal relations, including the bilaterality thesis, while making space for the idea that, in the example discussed in the main text, there is a single entitlement—see eg Pavlos Eleftheriadis, *Legal Rights* (OUP 2008) ch 7, distinguishing 'rights as reasons' from 'legal relations'; Charlie Webb, 'Three Concepts of Rights, Two of Property' (2018) 38 OJLS 246, distinguishing 'rights as reasons' from 'rights as conclusions'; Andrew Haplin, 'Hohfeld and Rules' in Balganesh, Sichelman and Smith (n 7), distinguishing a 'legal relations level analysis' from an 'aggregate level analysis'.

[11] FLC (n 6) 742.

[12] ibid 719 (emphasis in original). At 745–7, Hohfeld develops the example by considering the legal privileges, legal powers and legal immunities that coexist with A's rights.

[13] FLC (n 6) 718.

Penner's latest monograph, *Property Rights: A Re-Examination*,[14] seeks to develop the critical and the constructive dimensions of his thought. Part 2 of the book 'undertakes a fairly minute analysis of what the Hohfeldian perspective on property offers the student of the subject', and concludes that 'no version of "Hohfeldian analysis" illuminates our understanding of property rights'.[15] A major part of this critique of Hohfeld involves analysing and appraising the implications of the bilaterality thesis in respect of, for instance, legal powers,[16] transfers of property[17] and 'rights *in rem*'.[18] This thesis and its ramifications for property have been much discussed.[19] But Penner's critique in *PRR* is not a re-statement of old objections; he develops existing lines of argument and advances novel ones. This work is timely, for there has been renewed interest in Hohfeld's work among private law scholars in recent years,[20] including in relation to property.[21]

I will say very little in this review article about Penner's discussion of the bilaterality thesis or other aspects of his critique of Hohfeldian analysis. This is not because this work is unimportant. It is due to what I regard as the degree of its success. While I think that aspects of Hohfeld's work are of major significance, I am inclined to agree that the bilaterality thesis, at least as understood by Hohfeld, is flawed and that Hohfeld's account of rights that bind people generally must be rejected; and I accept many of the reasons Penner has articulated for thinking so. I will focus, instead, on Penner's account of how 'property' should be understood. Penner first set out his preferred view in his 1996 essay, and more fully expounded and defended it in *The Idea of Property in Law*,[22] published in 1997. In *PRR*, Penner revisits, restates and, in some respects, revises his account. I will provide an overview of the central features of Penner's view in section 2. I will then critically examine one of Penner's pivotal ideas—that to understand the nature of a 'property right' it is necessary to understand its 'justification', for this 'explains and dictates the contours of the right'.[23] Along the way, I will trace how Penner's theory has evolved and endeavour to show how certain modifications have put some problems to bed while giving rise to others.

2. The Right of Property

In seeking to explain the nature of property rights, jurists and philosophers have tended to focus on one or more of the following four candidate features.[24]

[14] *PRR*.
[15] ibid x.
[16] ibid ch 4.
[17] ibid ch 6.
[18] ibid ch 5.
[19] eg AM Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1959–60) 34 Tul L Rev 453; Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 179–81; Eleftheriadis (n 10) 134–8.
[20] eg Balganesh, Sichelman and Smith (n 7).
[21] eg Simon Douglas and Ben McFarlane, 'Defining Property Rights' in JE Penner and Henry E Smith, *Philosophical Foundations of Property Law* (OUP 2013); Webb (n 10).
[22] JE Penner, *The Idea of Property in Law* (OUP 1997) (hereinafter *IPL*).
[23] Penner, 'Bundle' (n 1) 754.
[24] It is an important question whether the writers referred to in this paragraph are all really concerned with the same thing. A difference in subject matter is sometimes obscured by the fact that the term 'property right' is used in different ways: see JW Harris, *Property and Justice* (OUP 1996) 11–13, 59–60, 169.

First, the *content* of the right and/or the duty or duties owed to the right holder.[25] Robert Nozick, for instance, claimed that 'The central core of the notion of a property right in X … is the right to determine what shall be done with X'.[26] And many legal scholars have thought that one has a property right only if another, or others, owe one a duty not to interfere with a thing.[27] Secondly, the *scope*—or, as lawyers sometimes put it, the 'exigibility'—of the right. A common view is that a right is a property right only if it binds people generally.[28] Thirdly, the *alienability* of the right.[29] Some have maintained, for instance, that a right is a property right only if it encompasses or is conjoined with a power of alienation such that the right holder has the ability to alienate the right.[30] Fourthly, the *ground*—the justificatory basis—of the right. David Owens, for example, has argued that property rights 'serve the right holder's interest in having authority over things'—their interest, that is, in having control over the rights and obligations that they and others have in respect of the things around them.[31]

It is a striking fact about Penner's view of the nature of 'property rights' that, in all its iterations, it brings together in a distinctive way certain claims about all four of these candidate features. Before explaining how it does so, I should mention that it is necessary to consider what, exactly, Penner means by 'property right' and, relatedly, what the subject matter of his account is. I discuss this below. For now, I will use another of Penner's labels—'right of property'—to refer to the subject matter of the enquiry.

According to the account first set out in 1996 and more fully developed in *IPL*, a right of property is a right that is grounded by a particular human interest, namely, the interest in exclusively determining the use of things,[32] and which, in virtue of serving this interest, is alienable and has a certain scope and content.[33] More precisely, a right of property is an entitlement to a thing that has three core features. First, it comprises a right to exclude others from the thing the right relates to (which Penner also describes as a right to immediate, exclusive possession).[34] This right 'correlates to the duty *in rem* that all others have to exclude themselves from the property of others',[35] and protects a liberty to deal with the

[25] Note that, on some accounts of the nature of rights, the content of the right simply is the content of the duty or duties that correspond to the right. For discussion and criticism, see Frydrych (n 7) 114–18.

[26] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 171. Compare Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1988) 39.

[27] eg Douglas and McFarlane (n 21); Merrill and Smith (n 5).

[28] See eg John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (5th edn, John Murray 1885) vol I, 369–72; *Tyler v Judges of the Court of Registration* (1900) 175 Mass 71, 76 (Holmes CJ); Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Russell & Russell 1961) 85–6. Compare Kenneth Campbell, 'On the General Nature of Property Rights' (1992) 3 KCLJ 79.

[29] On some views, this may be regarded as an aspect of the *content* of the right rather than a distinct feature.

[30] eg *OBG Ltd v Allan* [2008] 1 AC 1 (HL) [309] (Baroness Hale); Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 American Economic Review 347, 349. Compare Campbell (n 28) 84 (focusing on what he regards as the broader idea of a power to alter the exclusivity of the right).

[31] David Owens, 'Property and Authority' (2019) 27 Journal of Political Philosophy 271, 284.

[32] Penner, 'Bundle' (n 1) 743; *IPL* 4–5, 49–51, 68, 70–5, 139, 181, 204.

[33] Penner, 'Bundle' (n 1) 742–67; *IPL* chs 4–6.

[34] Penner, 'Bundle' (n 1) 742–43; *IPL* 68–74, 128–34. In *PRR*, the term 'right to exclude' is replaced with 'right to immediate exclusive possession' because Penner thinks the former can be misleading: *PRR* 140, citing James Y Stern, 'What Is the Right to Exclude and Why Does It Matter?' in JE Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (CUP 2018).

[35] *IPL* 71 (emphasis removed).

thing as one wishes.[36] Penner reaffirms his commitment to this core feature in *PRR*, though he revises his description of the duty: it is, he claims, a duty not to interfere with the thing, where 'interfering' encompasses using the thing, damaging it or 'ousting' the right holder.[37] When Penner says this is a 'duty *in rem*', he means it is not 'in any way specific to particular individuals in terms of its content';[38] it is, rather, a duty, imposed on everyone, not to interfere with others' things.[39] On this view, we do not owe a separate duty of non-interference to each proprietor. Rather, we are all subject to the duty not to interfere with others' things.

The second feature of the right of property is a power to confer licences, ie to permit what would otherwise be a wrongful interference with the thing.[40] The third is a power of gratuitous *inter vivos* disposition.[41] The holder of the right has, for instance, the legal ability to make, during his lifetime, an outright gift of the right and to thereby transfer it to another. The right of property thus has what in *PRR* Penner calls a 'tripartite structure'.[42]

If, as Penner maintains, a right of property comprises a right to exclude and certain powers, is it not a 'bundle', 'an aggregate of fundamentally distinct' normative elements?[43] Penner's answer—sketched in 1996, defended at length in *IPL* and partly reaffirmed in *PRR*—is 'no', because the normative elements of a right of property are unified by the interest that grounds them. How so? When answering this question, it is important to distinguish two propositions that are easily elided. The first is that the right to exclude and the two powers are grounded by *the very same interest* ('the Single Interest Thesis'). The second is that the right to exclude and the two powers are grounded *jointly, not severally* ('the Jointly Grounded Thesis').

If the Single Interest Thesis is true, the right to exclude, the power to license and the power to give are grounded by the very same interest. So far as this thesis is concerned, the interest may or may not ground each of the three incidents independently of the others. So it would be compatible with the thesis for the interest to ground the right to exclude in a way that does not depend upon the right holder's also having a power to license or a power to give, such that the interest could continue to ground the right to exclude even if it were to cease—in consequence, say, of a significant change of circumstances—to ground the powers. This, however, would *not* be compatible with the Jointly Grounded

[36] Penner, 'Bundle' (n 1) 756–7; *IPL* 73.
[37] *PRR* 12–18, ch 7.
[38] *IPL* 29.
[39] For discussion of this, see *IPL* 25–31, 75–6, 82–4; *PRR* 16, 86–116 (in the latter, Penner defends the notion of a 'duty *in rem*' from some of its critics).
[40] Penner, 'Bundle' (n 1) 744–6; *IPL* 74–8.
[41] Penner, 'Bundle' (n 1) 746–54; *IPL* 80–90. Penner adds that the right 'entails' a power to abandon the 'property': *IPL* 79–80, 86, 103.
[42] *PRR* 14.
[43] Munzer has suggested that this question should be given an affirmative answer: see Stephen Munzer, 'Property and Disagreement' in Penner and Smith (n 21) 299–301. Note, though, that Munzer does not engage with Penner's interest-based justificatory argument.

Thesis. For if the Jointly Grounded Thesis is true, each of the three incidents is not grounded individually; rather, the incidents are grounded *as a package*.

It should be noted that the Jointly Grounded Thesis does not presuppose the Single Interest Thesis. It would be compatible with the Jointly Grounded Thesis for the right to exclude, the power to licence and the power to give to be grounded by several distinct interests of the right holder—or by various considerations of which only some, or none, concern the right holder's interests—provided that these interests and/or other considerations ground the three incidents, not one by one, but as a composite.

When thinking about the idea that the right and powers are grounded by the interest jointly, not individually, it is helpful to consider the fruitful analogy which Penner,[44] building on the work of Seana Shiffrin,[45] has drawn with the right to bodily integrity. There is no moral right to exclude others from one's body that does not come with a power to modify or cancel the duty by, for instance, permitting another to touch it. The reason there is no such right is that the interest that the right to bodily integrity serves does not ground an unmodifiable duty of non-interference; such a duty, as Shiffrin explains, would 'render (morally) impossible real forms of meaningful human relationships'.[46] And in those legal systems that appropriately recognise the moral position, this explains the legal position too.

Similarly, for Penner, the right of property comprises a right to exclude, a power to license and a power to give because the interest(s) served by the right of property justify this combination and nothing less. In other words, Penner is committed to the Jointly Grounded Thesis. In his early work, Penner appears to have also endorsed the Single Interest Thesis.[47] The right to exclude others and the licensing and dispositive powers are, he maintained, grounded by a 'single interest', the interest in exclusively determining the use of things, and this interest grounds them as a set. I will analyse the argument for this in section 3. For now, it is enough to note that, in its original form, it includes the claim that 'individuals *qua* owners [do not] live in a social vacuum' and 'their interest in using property is [not] confined to using it alone'.[48] On the contrary, our interest in exclusively determining the use of things encompasses our interest in using things with others and allowing others to use them without us. The right to exclude that the interest grounds is 'like a gate, not a wall',[49] in the same way that the right that others do not interfere with our bodies is. The right to exclude also comes with a power to give, 'for only by having the power to give may I have the power to serve my interests in a thing where my interest lies in someone else's flourishing'.[50] However, the right of property does not, according to Penner, comprise an entitlement to

[44] JE Penner, 'On the Very Idea of Transmissible Rights' in Penner and Smith (n 21) 264–8; *PRR* 26–31.
[45] Seana Valentine Shiffrin, 'Promising, Intimate Relationships, and Conventionalism' (2008) 117 Philosophical Review 481, 500–2.
[46] ibid 502.
[47] Penner, 'Bundle' (n 1) 739, 742–3, 754; *IPL* 49–51, 70–5, 139.
[48] *IPL* 75.
[49] ibid 74.
[50] Penner, 'Transmissible Rights' (n 44) 268. See also *IPL* 87–90; text to n 119 below.

bargain about making a transfer or conferring a licence, for the interest in exclusively determining the use of things does not justify such an entitlement.[51] The general power to make contracts, he argues, serves a distinct interest, viz 'the interest in forming co-operative relationships by making bargain agreements, that is, agreements in which each party provides a quid pro quo'.[52] Consequently, the right of property, contrary to what many believe, 'comprises a right to give, but not a right to sell'.[53] In these and other ways, the right of property is 'shaped by the interest in exclusively determining the disposition of things'.[54]

If, as Penner claims, a right of property is a right in respect of a thing, the question arises as to what a thing, in this context, is. Penner's view is encapsulated in what he calls the 'separability thesis': the only '"things" in the world' that may be objects of property are those that are 'contingently associated with any particular owner' such that 'nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another'.[55] On this view, a thing is not necessarily part of the physical world. Certain intangibles—including choses in action, such as debts—can be objects of property. Importantly, however, Penner's explanation of what it means to have a right of property in respect of an intangible thing has changed over time.

In *IPL*, Penner claimed that the duty of non-interference that corresponds to rights of property in respect of tangible things, such as land and goods, also protects intangible things. This gave rise to a problem. One can take another's car without their permission, damage it or destroy it altogether. But how can one interfere with an intangible thing, such as a debt? What, exactly, is the content of a duty to 'exclude oneself from', to 'not to interfere with', a debt?[56] In *IPL*, Penner thought that 'Figuring out how a sensible duty of non-interference does protect choses in action is the key to understanding how they are property',[57] and he devoted several pages to the challenge. His answer, in summary, was that 'the general duty of non-interference' *indirectly* protects the holders of choses in action, by protecting 'the "wherewithal" of the entity or person against which the chose is held … which provide the assets from which the chose may be satisfied'.[58] This, though, gives rise to many difficulties, and in *PRR* Penner deserts it. Instead, he maintains that in

> [t]he case of intangible property, such as choses in action … all we have is an underlying right … which is *inherently 'exclusive'* in the sense that nothing any third party does can extinguish this right in normal circumstances, and a power to deal with it, by assignment, etc.[59]

[51] *IPL* 5, 87, 90–7, 103, 153. See also Penner, 'Bundle' (n 1) 746, 752–4.
[52] *IPL* 51.
[53] *IPL* 87. Compare Hanoch Dagan, *A Liberal Theory of Property* (CUP 2021) 183–5.
[54] *IPL* 139. Note that Penner uses the terms 'disposition' and 'use' interchangeably: see n 85 below and text thereto.
[55] *IPL* 111.
[56] For a detailed discussion of this and related issues, see Ben McFarlane and Simon Douglas, 'Property, Analogy and Variety' (2022) 42 OJLS 161.
[57] *IPL* 129.
[58] ibid 129.
[59] *PRR* 14 (emphasis in original). Compare Campbell (n 28) 81–4.

So, a 'right of property' in respect of a chose in action does not comprise a right to exclude. It comprises, rather, certain dispositive powers, such as the power to assign the chose. There is thus a significant contrast between the 'tripartite structure' of ownership of land and goods and the 'simpler' structure of 'intangible property'.[60] What is common to both, on Penner's view, are certain dispositive powers in relation to a thing, which the proprietor is broadly free to exercise as and when, and in the manner, she chooses.[61]

In *IPL*, Penner uses the terms 'right of property', 'right to property' and 'property right' interchangeably. This raises an exegetical difficulty,[62] exacerbated by the fact that 'property right' is used in different ways in legal and theoretical discourse. When Penner says that he is offering an analysis of a 'property right', or 'right of property', what do these terms mean? What is the analysis an analysis *of*? I think Penner's discussion of 'intangible things' tells us something about what, in *IPL*, the term 'right of property' means. It means ownership. This is suggested by the fact that easements, profits and security interests—which, in one sense of the term, are *types* of 'property right'—are discussed in a section entitled 'objects of property', along with land, chattels, choses in action and the interests of beneficiaries of trusts.[63] These various things, some tangible, some intangible, can, on Penner's account, all be 'objects of property', the *subject matter* of 'property rights'. On this approach, it is appropriate to say, for instance, that where A holds an easement (say, a right of way) over Blackacre outright, the easement is the object of a 'property right' held by A. This means, it seems, that the easement belongs to A; he owns it. This usage of 'property right' should be distinguished from another, common among property lawyers, according to which an easement is a *type* of property right, the subject matter of which is *the land* to which the right pertains.[64]

The thought that to have what Penner calls the 'right of property' is to have ownership explains something else which otherwise appears puzzling, namely the claim that the right to exclude protects a liberty, 'the liberty to dispose of the things one owns as one wishes within a general sphere of protection'.[65] Now, as Penner recognises, in English law one might hold, say, a fee simple absolute in possession in respect of certain land and yet *not* be at liberty to use or otherwise deal with the land as one wishes—because, say, one holds the fee simple as a trustee, an executor of a deceased's estate or an insolvency administrator. And so, while most property lawyers would say that a fee simple is a type of 'property right', it would be a mistake to say that one who has a fee simple in Blackacre

[60] *PRR* 14.

[61] On this view, therefore, the hallmarks of 'ownership' are 'alienable exclusivity' and 'separability': JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27 CJLJ 473, 488–9.

[62] See eg Munzer (n 43) 294.

[63] *IPL* 105–11. Compare the distinction Penner draws between 'ownership rights' and 'proprietary rights' in JE Penner, 'Ownership, Co-ownership, and the Justification of Property Rights' in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006).

[64] See eg Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 341–5.

[65] *IPL* 73. Note, further, that throughout chs 4–6 of *IPL* Penner refers to those who have a right to exclusive use as 'owners'. See also Penner, 'Bundle' (n 1) 754; JE Penner, 'Hohfeldian Use-Rights in Property' in JW Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer Law International, 1997) 167–8; *PRR* 26–7.

necessarily has a right of property in respect of Blackacre. Such a person has, in one sense of the term, a property right in the land, but she does not necessarily *own* the land.

In *PRR*, Penner explicitly states that his analysis of the tripartite structure is part of an account of the nature of ownership of land and goods. 'Ownership', he writes, 'comprises an underlying right, the right to immediate, exclusive possession, plus powers to deal with that right',[66] and the underlying right 'entails … the liberty to use the property as one wishes'.[67] The powers are twofold: the power to confer licences and the power to make a disposition, either by granting a lesser interest or by outright transfer. A person who owns land or goods is, therefore, to be distinguished from a 'trustee', who 'has the right of immediate exclusive possession' but 'no liberty to use the property for his own benefit'.[68] The structure and content of ownership of intangibles is discussed only very briefly in *PRR*, but presumably Penner would say that a person who holds such a 'thing' owns it only if she is broadly free to determine whether and how to alienate or otherwise dispose of it.[69]

If the foregoing is right, Penner has given us an account of the nature of ownership (the right of property) according to which it is an entitlement that has a particular justification—a justification which unifies and explains the entitlement's incidents. The account, as originally presented, may be characterised as trebly monistic.[70] It sees ownership as a *single* (because unified) entitlement that is grounded by a *single* interest and which, at least where it pertains to goods or land, comprises a right to exclude which correlates with a *single* duty, the duty everyone has not to interfere with others' things. The first of these—that ownership is a single entitlement—is predicated on the second, which itself reflects a commitment to the Single Interest Thesis. In *PRR*, however, Penner affirms the first while denying the second and thereby leaves the theory in a probelamatic position—this, at any rate, is what I will argue.

3. *Grounding the Right of Property*

I will begin by examining in greater detail Penner's account of the justificatory basis of the right of property. To simplify the discussion, I will focus on ownership of goods and land, which, on Penner's account, has the tripartite structure discussed in section 2. Penner insists in *PRR* that this 'is no concession to [the Bundle of Rights picture] *unless* no story can be told about how the three parts "naturally" go together'.[71] As we have seen, Penner thinks that such a story can be told, and, in its original incarnation at least, the story is committed to the Single

[66] *PRR* 14.
[67] ibid 26.
[68] ibid 27. See also JE Penner, 'Equitable Proprietary Interest' (n 61) esp 486–91.
[69] See Penner, 'Equitable Proprietary Interest' (n 61) 487–9.
[70] Hanoch Dagan, while defending his view of the 'structural' and 'normative' pluralism of 'property', has explored and criticised various forms of 'property monism': see eg Hanoch Dagan, *Property: Values and Institutions* (OUP 2011) ch 3; Dagan, *A Liberal Theory of Property* (n 53) 19–25, ch 4.
[71] *PRR* 15 (emphasis in original).

Interest Thesis and the Jointly Grounded Thesis. To properly defend the Single Interest Thesis, it is necessary to show that the three incidents are grounded by the same interest. And at the heart of *IPL*, we do indeed find a lengthy explanation of how the right to exclude and the licensing and dispositive powers serve the interest in exclusively determining the use of things—an explanation which I will seek to expound and analyse.

I will first consider Penner's understanding of interests and the relationship between them and rights and powers. In *IPL*, Penner explains that interests are connected to values.[72] The thought, it seems, is that something is in a person's (P's) interest if and only if it positively contributes to P's well-being (ie makes P's life a better life for P), and something positively contributes to P's well-being only if it is valuable, that is, 'truly of worth'.[73] An interest may ground a legal or moral right or power.[74] Indeed, there is, for Penner, a conceptual connection between rights and interests. He is committed to a version of the 'interest theory' of the nature of rights,[75] based on the work of Joseph Raz,[76] according to which a person has a right if and only if his interests are, or are part of,[77] the justifying reason for another, or others, being subject to a duty or duties. A person has a *legal* right, on this view, where the law regards his interests as the justification, or as part of the justification, of the imposition of a duty or duties on another or others. Penner points out that whether an interest justifies a right is 'dependent [not only] on a person's having an interest of sufficient importance', but also 'on there being another person (or institution, or group) upon whom it is appropriate to impose the correlative duty or duties'.[78]

Why, according to Penner, should we think that the interest in exclusively determining the use of things justifies the right to exclude as well as the licensing and dispositive powers, and that it justifies them jointly? There is an ambiguity here that must be exposed before the question can be properly addressed. Is Penner's view of the justificatory basis of rights of property about what *the law regards as* the justification of the rights of property that it confers or recognises? Or is it about what *actually* provides a valid justification of such rights, never mind whether the law has endorsed or adopted this justification? It is, in fact, both. In *IPL*, Penner advances the following claims:

(P1) Exclusively determining the use of things is a genuine aspect of our well-being.[79]

(P2) The interest in exclusively determining the use of things actually justifies legal rights of property, ie the rights of property conferred by law.[80]

[72] *IPL* 10.

[73] ibid. Penner is thus committed to what Tim Scanlon has called a 'substantive good' theory of well-being: TM Scanlon, *What We Owe to Each Other* (Harvard UP 1998) 113–26.

[74] *IPL* 13–20.

[75] JE Penner, 'The Analysis of Rights' (1997) 10 Ratio Juris 300; *IPL* 13–16.

[76] J Raz, 'On the Nature of Rights' (1984) 93 Mind 194; J Raz, 'Legal Rights' (1984) 4 OJLS 1.

[77] Penner, 'The Analysis of Rights' (n 75) 313, seemingly endorsing the main argument in J Raz, 'Rights and Individual Well-Being' (1992) 5 Ratio Juris 127. See also *PRR* 104.

[78] *IPL* 14.

[79] ibid 49–51, 181, 204.

[80] ibid 49–51, ch 4, 181, 204, 206–7. See also Penner, 'Bundle' (n 1) 743, 754, 801.

(P3) The law recognises (P1) and (P2), that is, legal rights of property are, according to law, grounded by the interest in exclusively determining the use of things.[81]

While Penner claims that (P3) is true, he does not seek to demonstrate this. Indeed, he observes that *IPL* does *not* provide a 'vindication' of his theory 'through the examination of the rules and doctrines of the property law in different jurisdictions, cultures, and historical periods'.[82] Such an examination 'must await another day'. He does maintain, though, that (P3) is *likely* to be true if, as he believes, (P1) and (P2) are true. This is based on the thought that a well-functioning legal system must recognise and protect 'basic interests', such as our interest in exclusively determining the use of things.[83] I do not have the space to examine this argument here, though I note there are reasons to believe that (P3) is false, at least insofar as the law of England and Wales is concerned.

Returning to (P1) and (P2), to properly assess these, we need to know more about how Penner conceives of the interest in exclusively determining the use of things. There are two points about his account of it that should be emphasised. The first concerns the notion of use. Penner says the right of property 'is grounded by the interest we have in using things in the broader sense'.[84] While 'use', in the narrow sense of the term, involves 'active engagement of some kind'—eg sitting on a chair, ploughing a field—use in the broader sense 'refers to a disposition one can make of something that is purposeful and can be interfered with by others', such as 'hoarding gold to drive up the price'.[85] Secondly, when Penner says that we have an interest in exclusively *determining* the use of things, he does not mean an interest in deciding 'upon any use one fancies, and insist[ing] that that use be made of the property'.[86] Perhaps it would be in my interest to force Elton John to play my piano, but this is not an example of what Penner is concerned with. He has in mind one's interest in being free 'from the interference of others' in one's purposeful dealings with things.[87]

Why is it in our interest to exclusively determine the use of things? Why, in other words, is this an aspect of our well-being? Penner does not provide anything close to a full answer in *IPL*.[88] This is unfortunate, for the reasons why it is good for us to exclusively determine the use of things affect the strength of the interest and the manner in which it can be effectively served. Consequently, one cannot adequately assess the justificatory force of the interest—and thus whether it truly justifies rights of property—if one does not know why it is an aspect of our well-being. Penner does, however, briefly identify three ways in which exclusively determining the use of things is good for us. First, 'occupying some patch of the earth and drawing on its resources for food, shelter, and so on, [is] necessary for

[81] *IPL* 4–5, 37–8, 49–56, 58, 60, 68, 72, 103.
[82] ibid 220.
[83] ibid ch 3, especially 52–3, 58–9.
[84] ibid 70.
[85] ibid 70.
[86] ibid 50. See also *PRR* 164, 173.
[87] *IPL* 50.
[88] Possibly, he thought he did not need to: see ibid 52–3.

life itself'.[89] Secondly, 'much of what humans do culturally depends upon forming our physical environment in ways that appeal to us'.[90] And thirdly, it 'is an interest of ours because of the freedom it provides to shape our lives'.[91] Penner sees the last of these as particularly important. Exclusively determining the use of things is an aspect of our well-being, he thinks, because of the contribution it makes to living in accordance with the value of personal autonomy; the value, that is, of freely shaping, to some degree, one's own life.[92]

Let us assume that we have an interest in exclusively determining the use of things, for the reasons Penner articulates. This leaves us with (P2). How, according to Penner, does the interest ground the right and powers that make up the 'tripartite structure' of rights of property in land and goods? I will approach this by first considering the right to exclude and the power to license and then the power to transfer, though it must be remembered that, for Penner, the three elements are justified jointly.

A. Grounding the Right to Exclude and the Power to License

In *IPL*, Penner explains how the right to exclude serves the right holder's interest in exclusively determining the use of things. The law, through recognising the right, confers on the right holder 'a protected sphere of indefinite and undefined activity' with respect to the thing.[93] The right holder can use the thing as they wish 'within [this] general sphere of protection'.[94] This sphere of protection is, however, 'like a gate, not a wall', because our interest in exclusively determining the use of things includes our interest in allowing others to use the thing, with or without us.[95] Thus, the interest is served by a right to exclude that comes with a power to permit others to use the thing. This combination serves the right holder's interest in exclusively determining the use of things 'in the social context. Exclusion can be directed or relaxed to protect or facilitate any particular use, by any particular persons, for any particular length of time.'[96] The right and power thus come as a package, as the Jointly Grounded Thesis maintains.

It is important to keep in mind, at this point, that an explanation of how a right or power serves an interest is not necessarily an explanation of how the right or power is grounded by the interest. As we have seen,[97] it is, for Penner, a constitutive element of having a right that another or others owe the right holder a duty or duties. Here, the pertinent duty is the duty of non-interference. What needs to be shown, then, is how the interest provides (or is part of) a justification for the legal recognition or imposition of the *duty* not to interfere. This is not achieved

[89] ibid 49.
[90] ibid 49.
[91] ibid 49; see also 181, 204.
[92] Penner refers to and draws upon the account of this value provided by Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986).
[93] *IPL* 72.
[94] ibid 73.
[95] ibid 75, 139. See also text to nn 48 and 49 above.
[96] *IPL* 78.
[97] See text to n 75.

merely by showing that it would promote the right holder's well-being for others to be under such a duty. After all, it would be good for me—would serve my interests—if Elon Musk were to give me £1m, but while this perhaps gives Elon Musk a reason to give me £1m, it does not mean or entail that he is under a duty to do so. Penner is aware of the general point;[98] yet what seems to be missing from *IPL* is an explanation of how the interest in exclusively determining the use of things is of a kind sufficient to justify the legal duty of non-interference. This is connected to the point, discussed above, that Penner says very little in *IPL* about *why* it is good for us to exclusively determine the use of things. He also says very little about the effects, for duty bearers or society in general, of imposing the duty of non-interference.[99]

In an essay published in 2013,[100] Penner advances an argument that might be thought to plug the gap. He asks one to imagine coming out of the woods and finding a basket of apples, which have been gathered by another. To take the apples 'would be to interfere with some other human agent's purposive activity', and 'understanding the interest people have in the success of their purposive activity' and 'the apples' contribution to that in this case', you understand that you have 'a reason not to interfere which would prevail over your current, personal goals, such that it would be both rational and reasonable to regard yourself to be under a duty not to interfere'.[101] This duty correlates with a right held by the gatherer. Penner maintains that not every engagement with a thing gives rise to the right—there must be an 'appropriation' of a thing in the sense of having rendered it integral to the success of the agent's purposive activity.[102]

What are we to make of this? One may wonder whether our interest in the success of our purposive activities, even when limited to those activities that involve engaging with things, is, or is understood by Penner to be, the same as our interest in exclusively determining the use of things. This is an important issue, but I wish to put it to one side for now.[103] The first thing I wish to consider here is whether the mere fact that some act of mine would interfere with another's purposive activity is, or provides, a reason for me not to perform the act—*irrespective of* the value or disvalue of the activity. Suppose, for instance, that the apples have been collected, poisoned and left by someone who intends to kill, and that the person who finds the apples knows or suspects this. Does the finder really have a reason not to interfere with the would-be poisoner's purposive activity, his attempt to kill? Penner does say that the duty not to interfere with the apples is not 'absolute' and 'Not all appropriations ought to be respected',[104] but it is not entirely clear what this means. Possibly, he means that the duty may be overridden in certain circumstances such that it would be justified to interfere. It is not

[98] See n 78 above; *PRR* 189.
[99] Compare Jeremy Waldron, 'Property, Justification and Need' (1993) 6 CJLJ 185.
[100] Penner, 'Transmissible Rights' (n 44).
[101] ibid 265.
[102] ibid 265–6.
[103] The individuation of human interests is discussed further in s 3C below.
[104] Penner, 'Transmissible Rights' (n 44) 266.

obviously wrong to think, though, that the person who finds the poisoned apples has *no* reason not to interfere, rather than a reason that has been overridden by other considerations.

A further point is that a reason not to Φ does not necessarily amount to a *duty* not to Φ, and it is difficult to believe that the fact that some act of mine would interfere with another's purposive activity gives rise, without more, to a duty, binding on me, not to perform the act. Imagine you decide to spend a sunny afternoon revising for an exam in a public park. You find a bench, sit down and begin to read. A little while later, three other people arrive and start to play football. The game makes it impossible for you to concentrate on your revision materials and you cease to study. The footballers have interfered with your 'purposive activity'. Possibly, they had a reason not to. But it is doubtful they had a moral duty not to play football in the park. If they lacked such a duty but it nevertheless would be wrong to take the apples in Penner's example, this must be based on something other than, or more than, interfering with the gatherer's purposive activity—perhaps the effort involved in gathering the apples, the contribution they would make to satisfying the gatherer's need for sustenance or some material difference in the surrounding circumstances.

Thirdly, even if the argument in Penner's 2013 essay provides a valid justification of the duty not to interfere with others' purposive activities with respect to things, this is not the same as a duty not to interfere with others' things; and it is the latter that Penner needs to justify. Penner recognises this very clearly in *PRR*,[105] where he once again deploys the notion of human agency to justify the acquisition of rights to things, but this time in the service of a different argument. There are, he maintains, 'natural' or 'pre-legal' rights to the *use* of things, which he calls 'usufructory rights'.[106] One acquires such a right by appropriating a thing without wronging another or others. Usufructory rights, according to Penner, protect human agency with respect to things through securing, or helping to secure, the independence of the right holder's choices regarding the use of the thing from the interference of others.[107] Such independence is a necessary condition of living an autonomous life.[108] Importantly, usufructory rights do not correlate with the duty not to interfere with others' things but, rather, the duty not to interfere with others' *use* of them.[109] One who is bound by the duty may use the thing provided he does not interfere with the right holder's use. Usufructory rights are not, therefore, 'fully exclusionary in the way that a property right is'.[110]

The position defended in *PRR* is that usufructory rights are 'the only rights to things we are generally morally entitled to' in the absence of law.[111] But there are

[105] *PRR* 9–10, 14, 141, 197–9.
[106] ibid xi, 138, 197–8.
[107] ibid 177–80, 197–9.
[108] ibid 28, 197–9. See also JE Penner, 'Taking Raz Seriously: On the Value of Autonomy and Its Relation to Private Law' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory*, vol II (OUP 2023). Compare Dagan, *A Liberal Theory of Property* (n 53) 41–50.
[109] *PRR* 198.
[110] ibid 198; see also 177–9.
[111] ibid 180 (emphasis removed).

'numerous instrumentalist considerations that weigh in favour of the law's introducing exclusive property rights',[112] and 'It is only with the addition of [these] other considerations' that the 'natural right serves as part of the justification of the formally exclusionary property rights that we generally have under the law'.[113] These other considerations include the fact that rights to exclude (i) offer 'blanket protection' which enables 'us to know where we stand vis-à-vis each other much more easily'[114] and (ii) provide, with respect to land and some other things, a means for organising 'our relations of intimacy and our general gregariousness'.[115] Residential property, for instance, provides a 'space for privacy and intimacy'.[116]

The significance of this deserves to be emphasised. The position defended in *PRR*, which Penner describes as 'Kantian instrumentalism',[117] is that, while legal rights to exclude protect human agency with respect to things by protecting the independence of our choices regarding the use of them, this, by itself, does not justify them. Other considerations form part of the justification, including our interest in privacy and our interest in having legal norms that can be easily understood and applied. I doubt that this new account of the justificatory basis of rights to exclude fully plugs the justificatory gap discussed above, but it does go some way towards addressing the problem. Where, though, does it leave the Single Interest Thesis and the aspects of Penner's theory that are based on it? I will return to this question in section 3C.

B. Grounding the Power to Give

I turn now to the third element of the tripartite structure, the power to make a (lifetime) gift. It might be thought that by transferring the right of property to another one relinquishes one's ability to exclusively determine the use of the thing and that, therefore, a power to transfer by way of gift does *not* serve one's interest in having or exercising this ability. In *IPL*, however, Penner denies this. The denial rests on the thought that the donee's use is, in a sense, the donor's use too.[118] How so? Penner's explanation begins with the claim that one person's interests can be served through another person's interest being served.[119] As he put it in a 2006 essay that builds upon the account in *IPL*, 'A's interests may be served when B's interests are served, because A's interests encompass, or include, or turn on B's interests'.[120] Consequently, where A makes an outright gift to B,

[112] ibid 198.
[113] ibid xi.
[114] ibid 199. Compare Henry E Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31 JLS S453, S455: 'exclusion rights are used when the audience (of duty holders) is large, and their simplicity reduces the processing costs that would be high for such a large and anonymous audience'.
[115] *PRR* 199.
[116] ibid 199.
[117] Penner remains committed to the view that property rights are grounded by human interests. This, as Penner recognises, was not Kant's view: see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard UP 2009) 34.
[118] *IPL* 88–90. See also Penner, 'Bundle' (n 1) 750–4.
[119] *IPL* 88.
[120] Penner, 'Co-ownership' (n 63) 182.

A's interests may be served as a result of B's well-being being enhanced through B's use of the thing. Consider, for instance, a father who gives a cello to his daughter when it appears that she will learn to play and appreciate the value of playing music.[121] Since—let us assume—the father's well-being is bound up in various ways with his daughter's, the daughter's realisation of (part of) the value of the cello (eg through playing it) serves the father's interests as well as her own. The father thereby 'adopts' the daughter's use as his own:[122] her use, Penner explains, is not the father's in the sense that he directly engages with it or decides precisely how it is to be used, but 'in the equally robust sense' that he provided it 'for use in a way which directly implicates [his] interests'.[123]

This analysis, in Penner's view, does not extend to contractual transfers. He maintains that where a right of property is transferred 'by contract'—say, a contract of sale—the transferee's 'use does not implicate any of [the transferor's] interests'.[124] The transferor does not 'adopt' the transferee's use as his own in the sense described above and, therefore, the seller, by selling, relinquishes his interest in exclusively determining the use of the thing.[125] Penner writes, 'the property in question is, following the exchange, no longer in any position to serve [the seller's] interests'.[126] Of course, the seller's interests may be served through realising the value of what is received in exchange, but it is the buyer 'who now realises the value of the property'. This is the basis of Penner's controversial claim that the power to transfer by way of (lifetime)[127] gift is a constituent of ownership but the power to transfer by way of sale or other contractual exchange is not.

Two questions raised by Penner's argument are: what, exactly, is meant by 'gift' and how do 'gifts' differ from 'contractual exchanges'?[128] I wish, however, to put these to one side, and to focus instead on three objections to Penner's account of how the interest in exclusively determining the use of things grounds the power to give. The first objection begins with the observation that it is important not to conflate the claim that B, by using the thing, serves A's interest with the narrower claim that B, by using the thing, serves A's particular interest *in exclusively determining the use of things*. Suppose it is the case that, once the father has given the cello to his daughter, the daughter's use of the cello serves not only her own interests, but her father's too. It is a further question whether the interests that are thereby served include the father's particular interest in exclusively determining the use of the thing. For the argument to succeed, it must be shown that this specific interest is included. To merely say that the daughter's use of the cello is

[121] ibid.
[122] *IPL* 88–90.
[123] Penner, 'Co-ownership' (n 63) 183, re-stating *IPL* 90.
[124] *IPL* 90.
[125] ibid 91.
[126] Penner, 'Co-ownership' (n 63) 183.
[127] In *IPL*—and, I think, in *PRR*— Penner leaves open whether ownership also comprises a power to make *testamentary* dispositions: *IPL* 98–100; *PRR* 28.
[128] It is clear that a 'gift' is not simply a non-contractual transfer, for Penner recognises a third category, which he calls 'command transfers': *IPL* 92–3.

the father's in the sense that the father has provided it for her to use in a way that implicates his interests is inadequate.

Secondly, in many cases involving a gift, the donor's interests are not served by the donee's use of the thing.[129] Consider a person who makes a donation to a large charity that she otherwise has no relationship with, or one who gives a £10 note to a complete stranger on the street. Possibly, such gifts promote the donors' well-being by, for instance, appeasing their conscience or contributing to their moral flourishing. But, in each case, is it really true that the donee's *use*, or *exclusive determination of the use*, of what has been given serves the donor's interests? The answer may well be 'no'. Suppose the benefactor never again encounters or hears about the stranger. It would seem to make no difference to the benefactor's well-being if the stranger were to, say, keep the cash in her pocket for a week before using it to buy her lunch.

The case of the benefactor and the stranger also highlights a third problem. There are instances of gift in which the donor's well-being is not related to the donee's in the relevant way—where the donor's interests do not encompass, include or turn on the donee's. Penner is aware of this. His response is to say he is concerned with the 'standard, uncomplicated case'.[130] But why should we think that the kind of cases he focuses on are standard and uncomplicated? Certainly, these supposedly 'non-standard' cases are not unusual. And anyway, if Penner's explanation of how the power serves the donor's interest is correct, why is the scope of the power so broad? Why does it encompass the ability to make a lifetime gift to a donee in circumstances where serving the donee's interests will *not* serve the donor's?

It is notable that in Penner's more recent work, including *PRR*, the claim that the donee's use serves the donor's interest in exclusively determining the use of the thing is not repeated. Instead, Penner advances the more general and more plausible—though arguably still too narrow—claim that the power to give serves the donor's 'interests in a thing where [his] interest lies in someone else's flourishing'.[131] By making this move, Penner has neutered the first two objections canvassed above, but at the price of abandoning his explanation of how the power to give is grounded by a particular human interest, the interest in exclusively determining the use of things. Once again, it seems the thesis that the various incidents of ownership are grounded by 'single interest' has been replaced with a more pluralistic, multifaceted, justificatory argument. I wish to consider the ramifications of this move. It will be fruitful, though, to first outline two further problems generated by the Single Interest Thesis.

C. Identifying and Individuating the Underlying Interest(s)

The Single Interest Thesis gives rise to two challenging questions: what counts as, and how do we identify, a single interest? And does the thesis entail that interests

[129] Conversely, there are examples of 'contractual exchanges' in which the transferee's use or determination of the use serves the transferor's interests, but there is not space here to consider these.

[130] *IPL* 88.

[131] Penner, 'Transmissible Rights' (n 44) 268. See also *PRR* 193–5.

other than the interest in exclusively determining the use of things are not part of the justification of ownership and, if it does, why should we accept this?

An answer to the first question cannot be found in the 1996 essay or in *IPL*. And it is not obvious that the interest in exclusively determining the use of things is a single interest, as opposed to a collection of distinct interests. Penner's explanation of the interest and how it grounds the right of property suggests that it encompasses both our interest in *using* things, alone or with others, and our interest in *freely determining* the use of things.[132] Now, while these are connected in various ways, they are not the same. Suppose I own a house. I have an interest in occupying it during a storm. The house has instrumental value for me: a consequence of occupying it is that it keeps me dry and warm, which contributes to my comfort and protects my health. But I also have a distinct interest in being free to choose whether to occupy the house. That these are distinct is shown by the fact that one can be served without the other. If I have been placed under house arrest by the state, I have not freely chosen to occupy the house, yet it is still a refuge; I remain warm and dry. Similarly, a parent who, on a cold day, forces her child to wear a coat that the child does not wish to wear serves the child's interest in making use of the coat, even though the child was not free to choose whether to wear it. Given that our interest in using and our interest in being free to determine the use of things are distinct, why should we accept that the right to property—which, on Penner's own account, seems to serve both interests—is grounded by *one* interest? Perhaps the thought is that they are two constituent elements of a single interest. But how is this to be explained? What is it that unifies them? To answer these questions—and to provide an adequate defence of the Single Interest Thesis—what we need, but appear to lack, is a (sound) theory of the individuation of interests.

As for the second question, it is hard to identify any reason for thinking that no interest except the interest in exclusively determining the use of things forms part of the justification of rights of property. I noted earlier that, in *PRR*, Penner explicitly accepts that legal rights to exclusive possession in respect of land protect the right holders' interest in privacy.[133] Like Lord Leggatt,[134] I think this claim, which in some quarters is controversial, is true. Part of the value of my right to exclusive possession in respect of my home resides in the fact that it serves my interest in privacy. In certain ways, my home shelters me, not just from the elements, but from prying eyes. It offers respite from the gaze of the multitude. My right protects and facilitates this by entitling me to keep out others—by, in other words, imposing on people generally a duty not to interfere with (eg enter upon) the land.[135] The fact that the right serves, in this way, the right holder's interest in privacy is a reason for the law to recognise the right, and contributes to the

[132] See *IPL* 49–50, 70–1.
[133] See text to n 116.
[134] *Fearn v Tate Gallery* [2023] UKSC 4, [2024] AC 1 [112] (Lord Leggatt). See also Hannah Arendt, *The Human Condition* (University of Chicago Press 1958); Waldron (n 26) 295–6.
[135] This, it should be emphasised, is not the same as a duty not to look.

justifiableness of the legal recognition of the right (if, indeed, this is justifiable). Is this consistent with the Single Interest Thesis? Certainly, the claim that multiple interests of the right holder, and even considerations other than the right holder's interests, may be part of the justification of the right and corresponding duty or duties is compatible with Penner's interest theory of rights in general.[136] But the Single Interest Thesis is, of course, about rights of property specifically. It might be thought that all the thesis requires is that the interest in exclusively determining the use of things is *a non-redundant part* of the justification of the three incidents of the right to property, and that, consequently, the thesis is perfectly compatible with the claim that the interest in privacy, or some other interest, is also part of the justification. This interpretation, however, seems to conflict with other aspects of Penner's account. Recall that Penner argues in *IPL* that the right of property does not comprise or entail a power to sell. This is because this power, unlike the powers that are part of the right, is a 'hybrid power', which is grounded by both our interest in exclusively determining the use of things and our interest 'in forming co-operative relationships by making bargain agreements'.[137] This suggests that the right to exclude, power to license and power to give are not even partly justified by interests other than the interest in exclusively determining the use of things.

Can the theory be interpreted in such a way as to avoid this unappealing conclusion? One might say that the interest in exclusively determining the use of things provides a *sufficient*—which is not to say the *only*—reason for the legal recognition of the tripartite structure of ownership, but does not provide a sufficient reason for the legal recognition of the power to sell. But I have already identified, in sections 3A and 3B above, several considerations that suggest that the interest does *not* provide a sufficient reason, or, at least, that Penner has not provided a convincing defence of the claim that it does.

Importantly, in *PRR*, Penner accepts that more than one interest forms part of the justificatory basis of ownership. The discussion in sections 3A and 3B above bears this out. As we have seen, Penner now thinks that legal rights to exclude protect the independence of individuals' choices with respect to things and that this forms part of their justification. He tells us that 'the two powers that go with title need to be regarded as related, but distinct, aspects of title, with related, but distinct, justifications'.[138] Penner has, then, jettisoned the Single Interest Thesis, which was such a prominent feature of the account he offered of the right of property in the 1990s, and put in its place a pluralistic account of the justificatory basis of the right of property. Given the discussion above, this may be regarded as a wise move, but its implications are far-reaching. What reason does Penner now have for insisting, as he seemingly still wishes to,[139] that ownership comprises

[136] See n 75 above.
[137] *IPL* 51; see also 5, 87–96, 153–64.
[138] *PRR* 28.
[139] The precise scope of the power of disposition which forms part of ownership, as understood in *PRR*, is somewhat unclear. But the account of the justificatory basis of ownership (*PRR* 27–8, 193–6, 199) and the citation of Penner's earlier work (eg *PRR* 199, fn 80) suggest that the power does not encompass the power to make 'contractual transfers'.

a power to give but not a power to sell? It can no longer be that the former, but not the latter, is grounded by the 'single interest' that underpins ownership, the interest in exclusively determining the use of things. If the right to exclude, the power to license and the power to give have 'related but distinct justifications', is it not the case that the power to sell also has a 'related but distinct justification'? Penner's answer appears to be 'no', but his explanation is brief:

> In my view, using the powers of title to share and give respond[s] to certain relationships in which individuals share interests, whereas contractual licences and transfers do not, and so need a second, independent, element of justification, the justification of contract itself.[140]

There is a real risk of mischaracterising Penner's position here, as there is not much to go on. Possibly, Penner is claiming that, whereas the powers that go with title have 'related but distinct justifications', the justification of the powers to license and transfer by contract involve an 'independent' (element of) justification. But what, then, is it that distinguishes 'distinct but related' justificatory factors from those that are truly 'independent'? And even if the justification of the power to sell is (wholly or partly) 'independent', how does this provide any support for the proposition that ownership does not comprise such a power?

One may also wonder where the abandonment of the Single Interest Thesis leaves Penner's view that the 'tripartite structure' of ownership is 'unified' by its justificatory basis. The explanation of this unification no longer includes the claim that the right and two powers are grounded by a single interest. The new explanation appears to have two main strands. First, that the right and the two powers have 'distinct but related justifications'—justifications which have to do with the exercise of human agency with respect to things. But to make sense of this, and properly assess it, we need a much richer and more developed account of these justifications and how they are related. As things stand, it remains to be seen whether Penner can reconcile this aspect of his explanation of the unification of the tripartite structure with his claim, discussed above, that numerous 'instrumentalist considerations' also form part of the justification of the right to exclude.

The second strand concerns the Jointly Grounded Thesis, which Penner remains committed to, at least in respect of the right to exclude and the power to license. The right to exclude comes with a power to license because the considerations that justify the right do not justify a right without a 'gate'—a right that would force one to live like a hermit.[141] I am not sure whether the same point can be made with respect to the power of disposition. Clearly, Penner thinks the power is justified, and that the justification is related to, but distinct from, the justification of the other two incidents. It is, however, a separate question whether it is justifiable for a legal system to recognise a right to exclude with a 'gate' but

[140] *PRR* 199.
[141] ibid 26–31, 35.

without a power of disposition. Penner does maintain that it would be problematic for one person to have a right to exclude in respect of a thing and another to have the power to dispose of it,[142] but this is not the same as saying that it would not be justified for one person to have a right to exclude and a licensing power and for *no one* to have a power of disposition in respect of the right. It seems to me, therefore, that both strands of Penner's explanation of the 'unification' of the tripartite structure are in need of further development.

4. Conclusion

If my interpretation is correct, Penner has in *PRR* abandoned one of his most distinctive ideas—that the 'right of property', ownership, is grounded by a 'single interest'; an interest that provides 'a justification which explains and dictates the contours of the right which protects it'.[143] It has been replaced by a more pluralistic account of ownership's justificatory basis. This is all to the good, but it has left the claim that ownership has a unified tripartite structure in a precarious position and destroyed the foundations of the claim that the power to sell, unlike the power to give, is not an incident of ownership. Penner is certainly still committed to the first of these claims, and seemingly to the second. Yet they remain in want of a new defence.

The provision of such a defence will leave a larger question, which I am unable to fully explore here—namely, whether we should endorse Penner's general approach to accounting for the nature of ownership. On one reading,[144] it is an approach that connects ownership's nature to its justification in two ways: (i) ownership, by its very nature, has a particular justification (in *IPL*, this is the interest in exclusively determining the use of things); and (ii) the structure and content of ownership is determined, or partly determined, by this justification. These are contentious claims. In connection with (ii), consider those who think that a power of sale is a conceptually necessary feature of ownership. If these theorists are told that the power of sale is not a feature of ownership because it is not justified by the interest that grounds ownership, their rejoinder may well be: 'yes, the power is justified by something else, but the lesson one should draw from this is that ownership is not grounded by a single interest, or even by a cluster of "related" justificatory factors'. As for (i), it is important to recognise how it constrains what can count as a justification of ownership. If ownership, by its nature, has a particular justification, then justificatory arguments that are incompatible with this justification cannot really be justifications *of ownership*. They are not even candidate justifications; they are conceptually ruled out. As with so much of Penner's writing on property, this idea is set out and explored in engaging and highly original terms, but one is left wondering whether it may well

[142] ibid 26.
[143] Penner, 'Bundle' (n 1) 754.
[144] I have greater confidence that this interpretation is correct in relation to *IPL* than *PRR*, but it is certainly a plausible interpretation of the approach adopted in *PRR*.

be a condition of the success of an account of ownership's nature that it does not so tightly connect what ownership is with a particular view of its justification.[145]

Penner 'hope[s] never to have to write about' the 'bundle of rights' picture of property again.[146] I hope he does return, though, to his account of the nature of ownership—its structure, its justification and the relationship between these—and augments his 'Kantian instrumentalism'. Property theory has much to gain.

[145] Compare Owens (n 31) 275–8.
[146] *PRR* ix.