

## Property and Disagreement

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From James Penner and Henry E. Smith, eds., *Philosophical Foundations of Property Law* (Oxford University Press, 2013), 289-319.

*Abstract:* Legal philosophers and property scholars sometimes disagree over one or more of the following: the meaning of the word 'property,' the concept of property, and the nature of property. For much of the twentieth century, the work of W. N. Hohfeld and Tony Honoré represented a consensus around property. The consensus often went under the heading of property as bundle of rights, or more accurately as a set of normative relations between persons with respect to things. But by the mid-1990s, the consensus was under attack. Key figures in the attack were James Penner, a legal philosopher, and Thomas W. Merrill and Henry E. Smith, two highly regarded professors of property law. This article aims to repel the attack and argues for property as a set of normative relations between persons with respect to things. The positive case for this view of property pays special attention to the philosophy of language and the analysis of concepts. The positive case also maintains that the right to use and the power to transfer are as central to property as the right to exclude. It is possible that the virtues of Smith's modular theory of property differ from the virtues of a well-crafted bundle theory. Indeed, it may be the case that these two theories throw light on different features of property law and are not, save at the margin, competitors with each other. The label 'new essentialism' sometimes applied to the work of Penner, Merrill, and Smith seems inapt if property does not have an essence. Of course, they might refuse the label.

*Key words:* substantive and verbal disagreements; the metaphysics of property; concepts and their individuation; incomplete understandings of property; Wittgenstein and family resemblance; Lofti Zadeh and fuzzy sets; metaphysical extensional indeterminacy (MEI) versus the metaphysical intensional indeterminacy (MII) of the concept of property.

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For most of the 20th century, the idea that property is a bundle of sticks—more precisely, a set of normative relations between persons with respect to things—dominated the legal and philosophical landscape. Recently, some legal philosophers and property scholars have challenged this idea. I argue that these challenges, which typically see the right to exclude as the essence of property, are unsuccessful.

The challenges of interest potentially involve disagreements of three different sorts: disagreements over the definition or meaning of the word ‘property’, disagreements over the concept of property, and disagreements over the nature of property. A major figure behind these challenges is James Penner. His two landmark works are couched in terms of the definition of property, which suggests that he is concerned with the meaning of ‘property’, and in terms of the concept of property.<sup>1</sup> Penner has since published other books and articles on property, and he has advised me that he no longer holds all of the views advanced earlier in his career. But because his first two works have achieved iconic status, I cannot do justice to his writings without examining the central claims of his initial publications, which have greatly influenced the views of Thomas W. Merrill and Henry E. Smith in the United States.

In this chapter I first address the disagreements over the last quarter-century by looking at the phenomenon of disagreement and making use of recent philosophical literature on verbal disagreement and on concepts. I look at some actual disagreements in property theory to explore possible ways to clarify, dissolve, or resolve them. Clarification is laying bare the nature of the disagreement. Dissolution is showing that upon examination all or almost all of the disagreement turns out to be largely or totally insignificant. Resolution is showing that one side is right and the other wrong or, in some cases, that neither side is right or that both sides are

\* For help with this project I thank David J. Chalmers, Paul Daniell, Simon Douglas, David Frydrych, Joshua Getzler, Mark Greenberg, Carrie Holmes, Rob Hughes, Robert Lawner, Harvey Lederman, Ben McFarlane, Arthur Ripstein, Luke Rostill, Brian Sawers, Henry Smith, Alexander Stremitzer, and Douglas Wolfe. I am indebted to Peter Hacker for a long conversation on Wittgenstein and the nature of concepts and to Sheldon Smith for access to some of his unpublished work. Special thanks go to James Penner. His constructive comments on two drafts of this chapter constitute the highest form of scholarly engagement, and I am deeply grateful to him.

<sup>1</sup> Penner 1996a; Penner 1997.

right in different respects. I next consider the possibility that, despite Penner's language to the contrary, the disagreement between us ultimately concerns the nature of property. Here I show that almost all of my arguments relating to substantive disagreements that seem either partly verbal or partly conceptual can be transposed into the key of disagreements over the nature of property.<sup>2</sup>

Rather different theoretical views fall under the heading of 'a theory of property'. For present purposes, the two most important views are these. View 1, to which I subscribe, presupposes that one is talking about existing institutions of property law and suggests a particular way of analysing property in institutional, especially legal, contexts. Those who harness Hohfeld's vocabulary to Honoré's account of ownership represent various ways of performing this task.<sup>3</sup> For them, property is a set of legal relations between persons with respect to things. The relations are right (claim-right)—duty, liberty-right (privilege)—no-right, power—liability (susceptibility to change of legal position), and immunity—disability (no-power) *plus* a thing that is the subject of these relations. The terminal ends of each of these relations are *normative modalities*. View 2 attempts to construct an institution of property law on the basis of building blocks that illuminate key doctrines of existing property institutions, such as *nemo dat quod non habet* and the *ad coelum* rule. Henry Smith pursues this modular enterprise. In certain respect he adapts Penner's work for his own purposes.<sup>4</sup>

Allow me to elaborate on these respective views. My version of the bundle theory of property exemplifies View 1. It is an arrangement of points made by other scholars. My version starts with existing legal systems and their associated laws of property. The chief objective of the theory is analytical clarity. To attain this objective it does the following: marks out a set of relations between persons with respect to things; shows how to use these relations in analysing cases and legislation; exposes confused thinking, such as the failure to discriminate between a claim-right and a liberty-right, between a claim-right and a correlative duty, between a claim-right and a power, between a power and a correlative liability, between a claim-right and an immunity, and so on; uncovers ambiguity, such as the multiple uses of the word 'right'; clarifies the policy issues that judges and legislatures face, e.g. whether a court should recognize a duty of non-interference with the land of another or only a penumbra of protection that falls short of a duty not to interfere; maps out different incidents of property such as possession, use, management, transferability, excludability, and others; identifies the relative functional importance of these different incidents in particular legal systems; isolates different property holders

<sup>2</sup> Penner's views have changed somewhat over the years, and his most recent essay on this topic—not addressed here—is Penner 2011.

<sup>3</sup> E.g. Becker 1977, ch. 2, and Munzer 1990, ch. 2, both invoke Hohfeld 1919 and Honoré 1961. The American Law Institute 1944 relied heavily on Hohfeld's analysis. Penner 1996a and Penner 1997 offer a different way of making use of, but also partly rejecting, some views of Hohfeld and Honoré, and in that respect are partly competitors with bundle theories of property. These two works by Penner differ, I think, from the modular enterprise conducted in terms of information costs that is characteristic of Smith's recent work.

<sup>4</sup> Smith 2012a; Smith 2012b; Smith this volume.

such as natural persons, married couples, cotenants, corporations, limited partnerships, cities, counties, and the state; and applies these tools to a wide range of different systems of property, from early, relatively undeveloped arrangements to complicated contemporary institutions of property law in industrialized nations. Worthy of note are specific illustrations of the usefulness of the bundle approach: its employment to good effect by the US Supreme Court,<sup>5</sup> a stimulating account of the importance of a privilege (liberty-right) in American legal history,<sup>6</sup> and an explanation of property transfers in terms of a network of claim-rights, powers, duties, and liberty-rights.<sup>7</sup> This list is sizeable but incomplete.

Smith's recent work exemplifies View 2. Its object is to conduct a modular enterprise that, with low information costs, can build up from scratch a legal institution of property and that explains salient rules and doctrines of property law. Smith's central insight is that it can be efficient to construct a set of property rules and institutions by using basic building blocks ('modules') and stacking them together in various ways. Mind you, Smith is very good at parsing and criticizing existing rules of property law. That is evident from his many articles, most written from the perspective of law and economics, which illuminate the advantages and disadvantages of various property rules. His background in linguistics aids him in expertly remapping property law. It is, then, his most recent work that goes in a new direction.

Near the end of this chapter I argue that my version of the bundle theory and Smith's recent modular work are rather different enterprises with rather different objectives. There is a slight area of competition between these two views, chiefly because Smith may have different positions on concepts and 'things' from mine and he values Albert Kocourek's analysis of rights *in rem* more highly than I.<sup>8</sup> To the extent that there seems to be a greater area of competition, it exists partly because Smith claims that the allegedly high information costs of a bundle theory make it unattractive. Still, bundle theorists can use context and heuristics to hold down information costs. Applying a bundle theory need not be computationally intensive.

Otherwise, my principal conclusions are these. Verbal disagreements differ from verbal misunderstandings and from substantive disagreements. There are many kinds of verbal disagreements, and I do not try to classify them. Instead, I concentrate on what David J. Chalmers calls disagreements that are both partly verbal and partly substantive.<sup>9</sup> An illustration is the disagreement between Penner

<sup>5</sup> E.g. *United States v Craft* 2002; *Hodel v Irving* 1987. These cases remind us that some disagreements over property involve practical legal problems.

<sup>6</sup> Horwitz 1992, 155–6, 164. However, I disagree with much of what Horwitz says about 'the de-physicalization of property' because he does not distinguish clearly and consistently between 'a bundle of legal relations' and 'a bundle of legal relations between persons with respect to things'. Horwitz 1992, 156, 162 and *passim*.

<sup>7</sup> Munzer 2011, 267–8.

<sup>8</sup> E.g. Smith 2012b, 1696; Kocourek 1920. Insofar as Smith would reiterate the centrality of the right to exclude based on James Penner's work, the discussion of Penner below would also cover Smith.

<sup>9</sup> Chalmers 2011 actually speaks of 'verbal disputes'. My use of 'disagreements' tallies with his use of 'disputes'. For brevity, I elide his distinction between 'broadly' and 'narrowly' verbal disagreements, as my concern is with the former.

and me on whether property is the right to exclude (his view), or whether property is better understood as a set of relations between persons with respect to things (my view). Our partly substantive, partly verbal disagreement has analytical and metaphysical dimensions. I clarify the nature of this disagreement and resolve at least part of it.

Some disagreements about property turn on the nature of concepts, their individuation, or the possibility of using concepts without fully understanding them. I suggest that some academic lawyers might either have different concepts of property or, if they use the same concept of property, have incomplete understandings of that concept. I examine two illustrations of this possibility. One is a disagreement between Jim Harris and Tony Honoré on the one side and me on the other regarding the relations involved in property. I suggest that once the logic of relations is correctly understood, the disagreement between us is of minor significance. This disagreement is clarified in one respect and dissolved in another. Of considerably greater philosophical interest is the disagreement between Penner and me, partly because it shows that some disagreements can have both verbal and conceptual aspects, and partly because the Wittgensteinian theory of family-resemblance concepts he uses is incompatible with Penner's effort to mark out the essence of property, and in fact supports a bundle approach to property. I clarify our disagreement in some respects and resolve it in others.

The final section of this chapter entertains the possibility that, despite appearances, all substantive disagreements discussed here concern, deep down, the nature of property. I suggest that most of the substantive arguments presented earlier in the chapter can be redeployed to clarify the nature of property.

### 1. Disagreements Substantive and Verbal

Verbal disagreement is not the same as verbal misunderstanding. In the many times I have taught the basic course in contract law, I have often asked students to discuss the example of Samuel Williston's tramp. In the example a benevolent man tells a tramp, 'If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit.' The tramp then walks to the store and the legal question is whether, in so doing, the tramp has offered consideration.<sup>10</sup> One time, a student argued earnestly that the tramp could well have given consideration, and that her sexual behaviour and reputation were irrelevant to the issue of consideration. I replied, as gently as possible, that he and Williston were using the word 'tramp' in different senses. The student was not verbally disagreeing with Williston. He misunderstood what Williston meant by 'tramp'.

<sup>10</sup> Williston 2008, 412–15.

### 1.1 Verbal disagreements

Perhaps the best-known illustration of verbal disagreement comes from William James's case in which a man and a squirrel move rapidly around a tree, always with the tree being between them and with both facing the tree, and a dispute erupts over whether the man 'goes round' the squirrel.

'Which party is right', I said, 'depends on what you *practically mean* by "going round" the squirrel. If you mean passing from the north of him to the east, then to the south, then to the west, and then to the north of him again, obviously the man does go round him, for he occupies these successive positions. But if on the contrary you mean being first in front of him, then on the right of him, then behind him, then on his left, and finally in front again, it is quite obvious that the man fails to go round him . . . . Make the distinction, and there is no occasion for any farther dispute.'<sup>11</sup>

Chalmers offers a taxonomy of verbal disagreements. The kind of disagreement that is most important for my purposes is both broad and partial. As to breadth, his characterization is:

A dispute over [a sentence] *S* is (broadly) verbal when, for some expression *T* in *S*, the parties disagree about the meaning of *T*, and the dispute over *S* arises wholly in virtue of this disagreement regarding *T*.<sup>12</sup>

He then relaxes the foregoing characterization by replacing 'wholly' with 'partly'. Relaxing it makes the disagreement partly verbal and partly substantive. More precisely, it gives us 'an apparent first-order dispute [that] arises partly in virtue of a metalinguistic disagreement and partly in virtue of a substantive nonmetalinguistic disagreement'.<sup>13</sup>

Here is a non-property example of this kind of disagreement for the term 'chef' in the following sentence *S*: 'Lazarus is a chef'. Mary believes that the word 'chef' applies to a person who consistently cooks meals that are pleasing to the palate. Martha believes that the word 'chef' applies to a person who has gone through professional training at a culinary institute. If both Mary and Martha believe that *S* is true, their agreement would be only apparent if Lazarus both consistently cooks meals that are pleasing to the palate and has been professionally trained at a culinary institute. If only Mary or only Martha believes *S* is true, the *verbal* aspect of their disagreement stems from the fact that they mean different things by the word 'chef'. Yet Mary and Martha also have a *substantive* non-metalinguistic disagreement over what has to go on in the world in order for Lazarus to qualify as a chef.<sup>14</sup> By comparison, James's example of the squirrel and 'going round' might be dismissed as trivial or as a 'merely' verbal disagreement. That is not true of the partly verbal and partly substantive disagreement between Mary and Martha, for

<sup>11</sup> James 1907, 44 (italics in original). James's dissolution does not consider whether the dispute involves different linguistic communities or whether the disputants are all competent users of the expression 'going round'.

<sup>12</sup> Chalmers 2011, 522. I have benefited from his article but do not follow it in all respects.

<sup>13</sup> Chalmers 2011, 526.

<sup>14</sup> Chalmers 2011, 525–6.

their dispute goes both to the meaning of 'chef' and to the question of what makes someone a chef.

## 1.2 Disagreement that is partly substantive and partly verbal

I turn to the work of James Penner for a disagreement over property that is both partly substantive and partly verbal. Penner is a well-known opponent of the claim that property is a bundle of rights.<sup>15</sup> Insofar as this claim is a slogan, Penner is not concerned to refute it, because he regards a slogan as 'an expression that conjures up an image, but which does not represent any clear thesis or set of propositions'.<sup>16</sup> *Pace* Penner, I claim that at least my version of the bundle theory is a theory because it sees property as a set of relations between persons with respect to things. In making this claim, I have to confront his insistence that it is 'quite mistaken' to see this claim 'as any kind of *analysis* or substantial *thesis*' because that would take property to be 'a structural composite, *i.e.*, that its nature is that of an aggregate of fundamentally distinct norms'.<sup>17</sup> A chapter of a book I wrote is a conspicuous target of his critique.<sup>18</sup>

### a) Clarifying the disagreement

It is not easy to get clear on what Penner's alternative position is, for he states his position, or perhaps positions, in different ways. The three most prominent ways are:

W<sub>1</sub>—Property is the right to exclude (or, sometimes, the right of exclusive use).

W<sub>2</sub>—The right to property is the right to exclude.

W<sub>3</sub>—The right to (or of) property is the right of exclusive use.

It is not so much that one of these ways dominates Penner's writing as that he oscillates among them. As an example of W<sub>1</sub>, under such headings as 'the definition of property' and 'an alternative definition of property',<sup>19</sup> he writes:

The foregoing analysis of property as the right of exclusive use implicitly undermines the substantive bundle of rights thesis . . . Property qua the right of exclusive use stands for the proposition that property is not by its nature some bundled together aggregate or complex of norms, but a single, coherent right.<sup>20</sup>

Because of his definitional aspirations I take him to be partly concerned with the meaning of 'property' and hence with a partly verbal disagreement. Many passages exemplify W<sub>2</sub>. For instance, he states his 'exclusion thesis' as follows: 'the right to

<sup>15</sup> Penner 1996a; Penner 1997.

<sup>16</sup> Penner 1996a, 714. Cf. Penner 1996a, 767, 769, 778, 819–20.

<sup>17</sup> Penner 1996a, 741 (italics in original).

<sup>18</sup> Penner 1996a, 774–7; Munzer 1990, ch. 2.

<sup>19</sup> Penner 1997, 152 (bold type and initial capital letters omitted) and Penner 1996a, 742 (initial capital letters omitted), respectively. The emphasis on the word 'property' and the concept for which it stands is most evident in Penner 1996a, 767–99.

<sup>20</sup> Penner 1996a, 754.

property is a right to exclude others from things which is grounded by the interest we have in the use of things'.<sup>21</sup> He adds: 'On this formulation use serves as a justificatory role for the right, while exclusion is the formal essence of the right.'<sup>22</sup> As to  $W_3$  he writes, 'We can now reformulate the right of property, or the right of exclusive use, to take account of the element of alienability...'<sup>23</sup>

This tripartite classification clarifies the nature of the disagreement. These three ways of formulating an alternative position are not equivalent, and they propose three different jurisprudential projects.  $W_1$  is a clear competitor with a bundle approach to property in a way that  $W_2$  and  $W_3$  are not.  $W_1$  is about property. According to  $W_1$  property consists of only one normative modality, whereas under my version of the bundle theory property consists of many normative modalities with respect to things.  $W_2$  presupposes that there is a unique right that one can point to as *the* right to property. Possible competitors with  $W_2$  are the claims that the right to property is the right to possess or the right to use.  $W_3$  is something of a compromise proposal compared to  $W_2$ , for one could easily break down  $W_3$  into two rights, the right to exclude and the right to use. A possible competitor with  $W_3$  is the claim that the right to property is the set of the rights to exclude, possess, use, abandon, and destroy. As indicated below, my version of the bundle theory is somewhat, though not entirely, orthogonal to  $W_2$  and  $W_3$ .

I concentrate on  $W_1$ : that property is the right to exclude.<sup>24</sup> If the disagreement between us is partly verbal, one could say that by 'property' he means 'property<sub>1</sub>' whereas I mean 'property<sub>2</sub>'. This move might clarify any partly verbal aspect of our disagreement but it would not resolve it. Yet the main point of interest would still lie in a partly substantive disagreement between us, which has at least two different dimensions: analytical and metaphysical. I explain each in turn, point out how each is also partly verbal, and try to resolve some of the points in dispute. Only at the end do I tackle  $W_2$  and  $W_3$ . What I say in this section clarifies some aspects of our dispute and resolves others.

To launch the investigation, let us confirm that  $W_1$  and my version of the bundle theory meet the test for the pertinent kind of disagreement over the term 'property'. I give both a practical legal example and a more theoretical example. Both examples also illustrate Chalmers's method of elimination.<sup>25</sup> The method's purpose is to give a sufficient condition for determining whether a dispute over  $S$  is wholly or partly verbal with respect to some term  $T$ . The method is first to bar use of the term  $T$  and then to try to find another sentence  $S'$  over which two parties disagree partly substantively such that the disagreement over  $S'$  is part of the disagreement over  $S$ .

Consider the following sentence  $S$ : 'Crosswinds, a large, stately home suitable for use as a quadruplex or as a bed-and-breakfast, is the property of four sisters—Amy, Beth, Cathy, and Donna—as tenants in common'. Suppose the term  $T$  is 'property'. Now consider the sentence  $S'$  which does not contain the term  $T$ : 'Amy has

<sup>21</sup> Penner 1997, 71 (italics omitted).      <sup>22</sup> Penner 1997, 71.      <sup>23</sup> Penner 1997, 103.

<sup>24</sup> For brevity I use the short form 'right to exclude' rather than 'right to exclude (or, sometimes, right of exclusive use)'.

<sup>25</sup> Chalmers 2011, 526–30.



the right to exclude others from setting foot on Crosswinds'. The acute lawyer will immediately pick out an ambiguity in  $S'$ —namely whether Amy has a right to exclude all other persons from Crosswinds, which would be the case for rights *in rem*, or only a right to exclude some persons from Crosswinds. The uncautious lawyer might answer that of course Amy has a right to exclude everyone else. But the acute lawyer will answer that if Crosswinds is used as a quadruplex, then Amy cannot exclude her sister cotenants because of a legal rule in the United States that all cotenants are 'entitled to possession of all parts of the land at all times'.<sup>26</sup> If, instead, Crosswinds is used as a bed-and-breakfast, then it is a public accommodation in the United States and the cotenants may not exclude any potential customers on account of race, natural origin, religion, sexual orientation, disability, or marital status.<sup>27</sup> Thus, a partly substantive disagreement exists over  $S'$  such that the disagreement over  $S'$  is part of the disagreement over  $S$ , for the extent of the right to exclude is part of the dispute over what property is. So the disagreement over  $S$  is partly verbal and partly substantive.

My second property example belongs to the realm of legal theory. Consider the following sentence  $S$ : 'A salient feature of the definition of property is whether it is legally permissible to sell whatever items of property one owns.' Suppose that the term  $T$  in  $S$  is 'the definition of property'. Is  $S$  true? Suppose Abercrombie says yes and Fitch says no. We can use the method of elimination to determine whether the disagreement is wholly or partly verbal with respect to  $T$  by barring that term from the following sentence  $S'$ : 'A woman has the legal right to sell land that she owns in fee simple absolute.' Is  $S'$  true? Again Abercrombie says yes and Fitch says no. Abercrombie follows most thinkers who write about the theory of property by saying, as to  $S'$ , that the woman most assuredly has the right to sell the land. Fitch follows Penner, who says that 'property entails a right to give, but not to sell'.<sup>28</sup> Penner adds that 'the definition of property I have proposed is completely neutral on the question of whether one should be able to sell one's property; that concerns the limit and extent of the justification of a very different interest, the interest in undertaking voluntary obligations by way of a particular kind of agreement, *i.e.*, the bargain'.<sup>29</sup> Consequently, a partly substantive disagreement over  $S'$  is part of the disagreement over  $S$ , since the existence of the right to sell land held in fee simple absolute is part of the dispute over what property is. The disagreement over  $S$  is therefore partly verbal and partly substantive.

<sup>26</sup> Stoeckel and Whitman 2000, 203 (case citations omitted). This rule sometimes leads to amusing classroom discussions about the impenetrability of matter at the macro level.

<sup>27</sup> The limits on whom the cotenants may exclude vary from state to state. Singer 1996.

<sup>28</sup> Penner 1996a, 746 (footnote omitted). My example follows Penner in using the term 'right' to sell rather than, as I would prefer, the legal 'power' to sell. The right/power distinction is a side issue in our dispute. Most legal systems contain both a right and a power to exclude. Later, when Penner refers to a right to give, that would involve a correlative duty to accept. That is odd because in most legal systems a donee can refuse the gift. It would be better to say that donor has a power to give, and the donee has both a liberty-right and a power to accept or refuse the gift.

<sup>29</sup> Penner 1996a, 746–7.

b) *The analysis of property*

With this spadework done, I turn to the first dimension in which Penner and I disagree in relation to  $W_1$ —namely, the analysis of property. I maintain that property is a set of relations between the owner and other persons with respect to things, and that a good many normative modalities are involved in property besides the right to exclude. I regard this right as salient but consider other normative modalities, such as the owner's rights to use and possess and her power to transfer, to be important, too. In addition, the owner has other claim-rights, liberty-rights, powers, and immunities as well as a duty not to use the thing in certain ways that harm others. Recently I gave reasons for preferring my view to a view like Penner's.<sup>30</sup> I remain unrepentant.

By contrast, Penner contends that the right to exclude is not merely the core of property but its 'formal essence'.<sup>31</sup> True, he makes room for the rights to use and to abandon. He allows the right holder to give the thing to someone else. But he makes some startling claims in mapping out what property or the right to property does not encompass. Chief among them is that his definition of property takes no position on 'whether one should be able to sell one's property'.<sup>32</sup> Here Penner moves what is commonly regarded as a salient topic in the theory of property to the theory of contract.<sup>33</sup> Moreover, in partial opposition to Honoré, Penner maintains that liability of property to execution and an owner's duty not to use her property harmfully are not incidents of property.<sup>34</sup> Finally, Penner's explication of the right to exclude is itself somewhat unusual. He stresses the duty on all others (in the case of property rights *in rem*) 'to exclude themselves' from the owner's property.<sup>35</sup> It would, he writes, be 'a serious misconception' to understand the 'right to exclude' as a right or power on the part of an owner to physically boot others off her land or to order others off or even to put up a fence so as actually to exclude others.<sup>36</sup> To a degree, these remarks are common sense. Others have duties not to interfere, and the law limits what an owner can do to keep others off her land. Yet to some scholars, Penner might seem not to give due weight to the owner's claim-rights and liberty-rights, and her powers, to exclude interlopers. For instance, the owner can exercise her liberty-right to erect a fence provided that doing so violates no governmental or private restrictions. Again, if someone damages her land by repeatedly crossing over it, she can exercise her power to bring an action for trespass in order to obtain damages and an injunction.

Alas, resolving the substantive dimension of this disagreement regarding the analysis of property would require more ink than I am allowed to spill here. I would have to answer all objections he lodges against my view in the works under discussion.<sup>37</sup> Perhaps not even Penner and I could sustain interest in such a fine mincing.

<sup>30</sup> Munzer 2011. <sup>31</sup> Penner 1997, 71. <sup>32</sup> Penner 1996a, 746.

<sup>33</sup> Penner 1996a, 747. <sup>34</sup> Penner 1996a, 761–5. <sup>35</sup> Penner 1997, 71.

<sup>36</sup> Penner 1997, 71–2; Penner 1997, 743–4. <sup>37</sup> Penner 1996a; Penner 1997.

Nevertheless, deference to community usage might help to resolve the verbal aspect of our disagreement with respect to  $W_1$ .<sup>38</sup> Here the relevant linguistic community is all speakers of English who talk and write about property in a given legal system. These speakers include not only judges, lawyers, and law teachers but also homeowners and tenants, real estate agents, land-use experts, state condemnation authorities, licensors of copyrights and patents, and financiers of the purchase and leasing of land, office buildings, and aircraft. In the United States, the bundle approach to property dominates, and not just as a slogan.

Of course, Penner and others are free to make a proposal that is partly linguistic: that 'property' is the right to exclude. I doubt that the proposal will enjoy much support in the United States once members of the pertinent community learn that, so far as the legal theory of property goes, for Penner property does not include a power to sell, a liability to attachment in bankruptcy or to execution to satisfy a court judgment, a duty to refrain from certain harmful uses, a power to sue others for trespass or nuisance, or, apparently, an immunity against government expropriation for public use unless it pays the owner just compensation.<sup>39</sup>

His proposal, or some other, might jibe better with community usage in some other legal system, but it does not seem to work any better in England than it does in the United States. Boiling down the meaning of 'property' in English law to the right to exclude is closer to a linguistic recommendation than it is a faithful report on usage in British English within the relevant linguistic community, namely English judges, lawyers, law teachers, and others. For example, Gray and Gray's treatise on English land law observes:

'Property' in land means no more and no less than what the state actually permits an individual to do with 'his' or 'her' land . . . . On this analysis, each individuated element of utility within the bundle of rights (or 'bundle of sticks') which comprises an estate or interest can itself be characterised as a species of 'property'.<sup>40</sup>

Although this treatise notices the importance of the right to exclude, it also sees property as 'a socially constructed concept' that includes a bundle of limitations as well as a bundle of rights, and points out that the state can augment or curtail the bundle of rights.<sup>41</sup> Judges, too, point out the partly offsetting 'sticks' in the bundle. 'The [defendants'] liability is simply an incident of the ownership of the land which gives rise to it. The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges.'<sup>42</sup>

<sup>38</sup> This dispute could be explicitly verbal or implicitly verbal under a refinement introduced by Chalmers 2011, 525 n. 8.

<sup>39</sup> Penner 1996a, 746, 761–4, 815; US Constitution, amendment V.

<sup>40</sup> Gray and Gray 2009, 111 (footnote omitted). '[C]asual lay concepts of "ownership" [sometimes] dissolve into differently constituted aggregations or bundles of power exercisable over land.' Gray and Gray 2009, 93.

<sup>41</sup> Gray and Gray 2009, 91, 102, 111.

<sup>42</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* 2004, 572 (per Lord Hope of Craighead), cited by Gray and Gray 2009, 92 n. 3. Here land is the thing with respect to which the owner and other persons have various relations.

Of course, arguments based on community usage have limitations. Even if such arguments can sometimes uncover errors in accurately grasping the usage of different linguistic communities, they can also stymie intellectual progress. Penner has an important insight: if one stripped the right to exclude from the other normative modalities associated with property, what remains would be vastly impoverished. Still, this insight should not blind us to the fact that if one stripped out either the right to use, or the power to transfer, from the other modalities (including the right to exclude) associated with property, what remains would also be vastly poorer.

c) *The metaphysics of property*

A second dimension of our disagreement in relation to  $W_1$  is distantly linked to the metaphysical problem of the one and the many.<sup>43</sup> Penner's preferred view is that 'exclusion frames the practical essence of the right' to property.<sup>44</sup> Later, he puts what seems to be the same point by saying that exclusion is the 'formal essence' of that right.<sup>45</sup> I do not know what either 'practical' or 'formal' means in this context, or what distinction, if any, exists between practical essence and formal essence. So let us use 'essence' without any adjectival qualification, and regard the essence of something as that which makes it what it is. For Penner, the essence of both property and the right to property is the right to exclude. He is for the one.<sup>46</sup>

Now, Penner also holds that the right to property includes, among other normative modalities, the right to possess, the rights to use, manage, and receive income, and the power to give.<sup>47</sup> These are included only because he apparently considers them derivable from or already encompassed by the right to exclude. But I am not willing to grant him this step in his argument. The right to exclude others is one thing. That right does not, so far as I can see, entail the rights to use, manage, and receive income. Surely it does not entail the power to give; a power is a distinct normative modality from a right. Further, he pays little attention to exceptions to and limitations on the right to exclude arising from necessity, custom, circumscribed self-help, antidiscrimination laws, and public policy as well as public accommodations law.<sup>48</sup> These exceptions and limitations become even more complicated in the case of what some call 'entity property' such as leases, condominiums, cooperatives, trusts, corporations, and partnerships.<sup>49</sup> Accordingly, Penner's right to exclude is a good deal less robust than he believes.

<sup>43</sup> The classic form of the problem lies in the difference between the hylomorphism of Aristotle and Plato's mature account of how all things called by a common name, say 'bed', partake of the Form of the Bed. The 'one over many' argument appears in *Republic* 596a–b, but there is more sophisticated discussion in *Parmenides*, *Sophist*, and *Philebus*. It is doubtful that Plato's works contain just one problem of the one and the many. Cresswell 1972.

<sup>44</sup> Penner 1996a, 743. <sup>45</sup> Penner 1997, 71.

<sup>46</sup> The distant link to Plato is not that Penner believes that a Form of Property exists but that he claims property has something that makes it what it is: its essence is the right to exclude.

<sup>47</sup> Penner 1996a, 746, 755–64. <sup>48</sup> E.g. Merrill and Smith 2012, 387–94, 399–49.

<sup>49</sup> Merrill and Smith 2012, 646–806.

Here it is worth attending to a point made over a century ago by William James: the 'Oneness' or 'union' in the world 'may be enormous, colossal; but absolute monism is shattered if, along with all the union, there has to be granted the slightest modicum, the most incipient nascency, or the most residual trace, of a separation that is not "overcome".'<sup>50</sup> James's rhetoric is overblown. My point is more limited: if Penner's insistence that property has an essence which is the right to exclude amounts to a property-monism, then his position will be hard to sustain, for he will need some other means to make room for rights to use, manage, and receive income and the power to give.

Moreover, a strong independent case can be made for the many. Recall that Penner writes that it is a mistake to regard property as a 'structural composite, *i.e.*, that its nature is that of an aggregate of fundamentally distinct norms'.<sup>51</sup> Why is this position a mistake? We don't think it is a mistake that other fields of inquiry include composites. In chemistry, for example, we study suspensions, emulsions, solutions, and compounds, and the different isotopes characteristic of most elements. In the law of contract, measures of monetary recovery for breach can be based, at least in the United States, on fundamentally different norms coming from contract damages, restitution, and tort-like non-economic damages.<sup>52</sup>

Here it is useful to remind ourselves of the historical contingency of property arrangements and property law. To illustrate, the tenurial system that evolved after the Norman Conquest was a pyramidal structure that had the King at the top, mesne lords below him, and tenants who held of the mesne lords. The set of rights attached to mesne lords, known as a seignory, was, though an abstraction, nonetheless conceived of materially. The lord who had the seignory of Blackacre was 'seised in service of Blackacre'. The tenant who had actual possession of the land was 'seised *in demesne* of Blackacre'.<sup>53</sup> This division of rights was such that both the holder of the seignory and the tenant could be said to be the 'owners' of Blackacre. In that respect, the situation was quite different from the modern liberal idea of ownership so capably explicated by Honoré, especially in allodial systems of property. Much later, in the late nineteenth century, when the idea of property as a bundle of rights began to dominate judicial and academic thinking, in many quarters it was thought to give greater constitutional protection to property rights and to be in that respect 'anti-statist'.<sup>54</sup> The point of this abbreviated survey is that the ways in which people think of property vary across time and place, and often legal systems have seen property in ways that are plural and aggregated. It is no defect to think of property in terms of the many.

The foregoing considerations affect this second dimension of our substantive disagreement in relation to  $W_1$  as follows. First, as to substance, many of the subjects of other fields of inquiry are composites. Some of these subjects are also

<sup>50</sup> James 1907, 152, 160–1.

<sup>51</sup> Penner 1996a, 741.

<sup>52</sup> Farnsworth 2004, ch. 12; *Decker v Browning-Ferris Industries of Colorado, Inc.* 1997.

<sup>53</sup> Simpson 1986, 47–8.

<sup>54</sup> Banner 2011, ch. 3; Epstein 2011. My sympathy for the bundle approach to property has never turned on whether it is anti-statist or pro-statist. I just think the approach is analytically useful. E.g. Munzer 2009 illustrates its analytical utility.

historically contingent. They are also partly the product of human artifice in the context of specific socioeconomic conditions. As varied as these conditions are, it is understandable that property might turn out to be a structural composite. Seeing property as a set of relations among persons with respect to things fits well here. Second, as to partly verbal disagreement, the foregoing considerations help to explain why most versions of the bundle theory tally nicely with relevant community usage in the United States and, I believe, in England, and why Penner's linguistic proposal does not.

*d) What about  $W_2$  and  $W_3$ ?*

Penner's positions  $W_2$  and  $W_3$  merit a brief treatment. They are not direct competitors with my version of the bundle theory, because my version addresses property rather than the so-called right to property. A salient difficulty with both  $W_2$  and  $W_3$  is why *any* single right should be considered *the* right to property. No doubt one can pick out some rights that are more important than others in the functioning of a system of property. One might acknowledge that the right to exclude is functionally more important than, say, the right to pledge. But there are many rights—such as the rights to use and to possess—that are almost as functionally important as the right to exclude. Other highly functionally important rights include the rights to receive income, to abandon, and to destroy. For these reasons, Penner's search for the essence of the right to property in  $W_2$  and  $W_3$  is misguided.

Penner could try to skirt this criticism by weakening his claims in at least two ways. First, he could say that 'the' right to property is the *set* of the rights to exclude, use, possess, receive income, abandon, and destroy—call this position  $W_4$ . Second, he could map out layers of 'the' right to property based on the functional importance of various rights. This second move—call it  $W_5$ —would take Penner farthest from  $W_1$  and  $W_2$ . Clearly, either  $W_4$  or  $W_5$  would cede the distinctive features of Penner's approach to property.

## 2. Concepts, their Individuation, and the Incomplete Understanding of Concepts

I shift now to disagreements that turn on the nature of concepts. Word meanings and concepts differ partly because word meanings are often conventional in a Humean sense and concepts are not ordinarily conventional in that or any other sense. Philosophers of mind and language will object to some of my remarks on concepts, if only because they often object to one another's writings. They are unlikely to find anything here that is both sound and novel. There is no current philosophical consensus on concepts, but the following quite tentative account may have some promise. If this account proves defective, Wittgenstein's family-resemblance account of concepts will enable my argument to go through. Concepts, as types, are abstract

objects. Concepts, as tokens of those types, are mental representations.<sup>55</sup> The particularity of the concept of property, as a mental-representation token of that type, helps to explain how each person can think and express thoughts about property. The abstractness of the concept of property as a type helps to explain how people can understand each other when they talk or write about property. In my view, all or almost all concepts as types are mind-dependent abstract objects—that is, they did not exist until some thinking entity first used them.<sup>56</sup> Concepts qua types are causally inefficacious.<sup>57</sup> Some philosophers and some cognitive scientists hold that concepts qua tokens are causally inefficacious and others do not. I leave the matter open.

The extension of a concept qua type is the set of all items that fall under that concept. For classical ('crisp') sets, each item in a universe of discourse either falls under a given concept or it does not. 'Fuzzy' sets are a generalization of classical sets, and in fact classical sets are thought of as a special case of fuzzy sets. In the universe of discourse, any item that is neither fully within nor fully outside a fuzzy set is typically given a grade of membership value between 0 and 1.<sup>58</sup> Following a current philosophical convention, I will sometimes write 'the concept PROPERTY' as well as 'the concept of property'.

Even though concepts as tokens are mental representations, it is unnecessary for present purposes to subscribe to any position of the exact nature of these representations. It is doubtful that all or even some representations are mental images, as the classical empiricist philosophers believed.<sup>59</sup> It is unknown whether mental representations have some semantic or syntactic or other structure. Perhaps some complicated concepts qua tokens, such as that of a vested remainder subject to partial divestment, have a structure. Yet simple concepts qua tokens, like that of water, might not. Neither is it evident that the concept of property has the same, i.e. qualitatively identical, mental-representation tokens across all persons, or within each given person over time.<sup>60</sup> I take no position on the ontological status of concepts as tokens.

Sometimes it is difficult to tell whether two scholars who use a concept qua type, such as the concept of property, are using the same concept as type, or are using two different concepts of property as type. Difficulties of this sort raise issues about the individuation of concepts. One can find these difficulties in many fields of inquiry.

<sup>55</sup> Fodor 1983, 260, 331. For the type/token distinction, see Wetzel 2009. The species *Ursus arctos horribilis* (grizzly bear) is a type. Members of that species are tokens of that type. Wetzel 2009, xi. For an excellent discussion of abstract objects of various sorts, see Hale 1987.

<sup>56</sup> Cf. Raz 2009, 23: 'The fact that for the most part concepts are there independently of any one of us does not mean of course that they are independent of us collectively.' Perhaps, as Frege 1884, 105 held, numbers are mind-independent abstract objects. Still, one must distinguish the number 1 from the concept of the number 1.

<sup>57</sup> Rosen 2012, s. 3.2.

<sup>58</sup> Ross 2010, 25–47.

<sup>59</sup> Prinz 2002 surveys the philosophical landscape from classical empiricism to radical concept nativism.

<sup>60</sup> This statement is sympathetic to the scientific project of some psychologists, e.g. Carey 2009, but one should not suppose that contemporary philosophers interested in concepts have the same project.

Does the history of biology, for example, contain a single concept of a gene, or does it have two or more such concepts in light of the progress between Gregor Mendel and contemporary molecular and cell biology? In the history of philosophy, is there a single concept of weakness of will, or two or more such concepts?

I distinguish between two propositions. P1: the concept of property is incomplete. P2: the understanding of the concept of property is incomplete. I take no position on the truth value of P1. However, I assert that P2 is sometimes true. Thus, I am ascribing incompleteness not to the concept of property itself but to some understandings of that concept.

This preamble is important for the discussion of Harris and Honoré in Section 3. It plays a significant role in the examination of Penner's views on concepts in Section 4. It requires, in each setting, further elaboration. The elaboration is partly metaphysical and partly epistemic.<sup>61</sup>

### 3. A Minor Disagreement that is both Substantive and Conceptual

Applying this view of concepts facilitates a new approach to a disagreement between Harris and Honoré on the one hand and me on the other. Harris writes that the items we call property, which he labels 'items on the ownership spectrum', all 'involve a juridical relation between a person (or group) and a resource'.<sup>62</sup> Citing Harris, Honoré says: 'Property relations all involve a juridical relation between a person or group and a resource, in law a "thing"'.<sup>63</sup> He continues:

[P]roperty interests are not to be analysed merely as consisting in relations between people, but as relations between people and things, protected by rules that impose restraints on others . . . .

The contrary view, that property is always concerned with relations between people as to the use or exploitation of things is attributed, I am glad to say, to *illegitimate* inferences drawn from treatments of the topic by Hohfeld and myself.<sup>64</sup>

I shall argue that there is little substantive or conceptual difference between their view and mine, and that Honoré's comment on which relations are primary and which are secondary is open to another interpretation. In short, I clarify this dispute in some respects and dissolve it in another.

The first point is that the view espoused by Harris and Honoré is truth-functionally equivalent to the view that I hold, even though there is some difference in verbal formulation and perhaps also in meaning.<sup>65</sup> On my view, the concept of property involves a set of three-place relations among a person, other persons (all

<sup>61</sup> Raz 2009, 18–24, 53–87, avoids most metaphysical issues but attends more than I to epistemic issues.

<sup>62</sup> Harris 1996, 5. <sup>63</sup> Honoré 2006, 131 (footnote omitted).

<sup>64</sup> Honoré 2006, (italics in original, footnote omitted).

<sup>65</sup> In this chapter I use 'truth-functional equivalence' to include first-order equivalence in predicate logic.



other persons if the right is *in rem*), and a thing. On their view, the concept of property involves a set of three-place relations among a person, a thing or 'resource', and trespassory rules (Harris) or 'rules that impose restraints on others' (Honoré).<sup>66</sup>

These two sets of three-place relations are different ways of saying basically the same thing, for the various normative modalities imposed on others (my view) seem not to differ from the restraints imposed by certain rules (their view). If that is correct, then the concept of property has the same extension for all three of us. Accordingly, propositions of property law on my view are truth-functionally equivalent to counterpart propositions of property law on their view. Obviously, the term 'counterpart propositions' has to be explained so as not to beg the question. But here is a straightforward example: the proposition that a fee simple absolute in Blackacre is protected in part by duties on others to the owner not to trespass or create a nuisance on Blackacre (my view) is truth-functionally equivalent to the proposition that a fee simple absolute in Blackacre is protected in part by rules that impose restraints on others in favour of the owner pertaining to trespass and nuisance on Blackacre (their view).

A possible reply to the argument that their view and my view are truth-functionally equivalent is that it takes into account only the extension of the concept of property. It does not include the intension of that concept. But debate exists over the nature of the intension of concepts. A current position is to characterize intension as a function from a possible world to an extension. This position will cut no ice with those who see possible worlds metaphysics as misguided. Even those who have no difficulty with possible worlds have various intensional and modal logics from which to choose. Thus, to make the reply stick anyone offering it will have to do some preliminary work on intension for the counter-argument to get off the ground.<sup>67</sup> In contrast, there is general philosophical consensus that the extension of a concept is all of the things that fall under it (with appropriate adjustments for fuzzy concepts).

So much for the first point. The second is that Honoré adds a comment that is separate from the extension of the concept of property and that does not contradict anything that I have written:

Indeed, Harris could argue that the relation of the holder of the interest to the thing is primary, since the main task of the law of property is to regulate the use of resources. The relation of the holder of the interest to other people, though a necessary element in a property relationship, is secondary in the sense that it presupposes and serves to uphold the relation of the holder to the thing.<sup>68</sup>

<sup>66</sup> Honoré puts the point a bit differently when he says that 'property interests require that there should be legal relations of various sorts between the holder of the interest and others', Honoré 2006, 131 n. 10.

<sup>67</sup> It is unclear to me whether Smith this volume is attracted to a possible worlds approach as he characterizes intensions in various non-equivalent ways. In intensional and modal logic, the distinction between 'intension' and 'extension'—the words Smith employs most often—was first powerfully developed by Carnap (1956) but earlier and later logicians contributed to the enterprise. Carnap does not speak of possible worlds.

<sup>68</sup> Honoré 2006, 131.

Honoré's comment concerns the primacy of *things* in the analysis of property.<sup>69</sup> In my version of the bundle theory, property always has to do with relations between persons with respect to things, so it would be incorrect to say that I fail to give attention to things. Beyond that, I believe that I am free to accept or reject what Honoré adds. Still, whether I accept or reject his appended comment, there is another sense in which the first relation in the passage quoted is secondary (because the holder is an agent and the thing or resource is rarely an agent) and the second relation is primary (because a central aim of property law is to regulate behaviour between persons with respect to things).<sup>70</sup> By parity of reasoning, Honoré would be free to accept or reject what I just wrote. The underlying reason for this intellectual freedom on each side is that 'primary' and 'secondary' are being used in two different ways.<sup>71</sup>

A possible objection is that I have misattributed a set of three-place relations to Harris and Honoré, for they couch their theory in terms of a set of two two-place relations that are tied to each other. This objection is unsound. Using capital letters for relations, and omitting lower case letters for relata, let us characterize my position as  $RST$ , whereas their position would be either  $(RS)T$  or  $R(ST)$ . However, under the associative law of the composition of relations,  $(RS)T = R(ST) = RST$ .<sup>72</sup> Elsewhere I allow that the concept of property is imprecise at the margins.<sup>73</sup> For example, some might debate whether a licence coupled with an interest counted as property under the original Restatement.<sup>74</sup> Given this allowance, some might complain that my version of the bundle theory leaves the limits of property inadequately defined. I disagree with the complaint.<sup>75</sup> But even if the complaint were well taken, it would pose no obstacle to my argument against this objection. Just as there are crisp sets and fuzzy sets, there are classical ('crisp') relations and 'fuzzy' relations—with the latter commonly indicated by a squiggle under a capital letter.<sup>76</sup> The associative law for the composition of relations also holds for fuzzy relations.<sup>77</sup> Hence,  $(\underline{R}\underline{S})\underline{T} = \underline{R}(\underline{S}\underline{T}) = \underline{R}\underline{S}\underline{T}$ .<sup>78</sup>

There seem to be no differences between Harris and Honoré and me on the extension of the concept of property. Only minor differences survive between us on the best way to articulate or explain the concept of property. To that extent, any tempest here appears to belong in a very small cup.<sup>79</sup> The analysis offered here

<sup>69</sup> See also Penner 1997, 105–27; Smith 2012b. Penner's separability thesis requires 'things' that are property to be 'contingently associated with any particular owner'. Penner 1997, 111. But if people have any property rights in parts of their own bodies, these body parts are rarely only contingently associated with them. Body parts acquired from others, e.g. a transplanted kidney, are an exception.

<sup>70</sup> I say 'rarely an agent' because slavery is outlawed almost everywhere and informed opinions differ over which non-human animals, if any, are agents.

<sup>71</sup> The same point applies to Smith this volume. <sup>72</sup> Ross 2010, 52.

<sup>73</sup> Munzer 1990, 24. <sup>74</sup> American Law Institute 1944, s. 513, Illustration 3.

<sup>75</sup> Munzer 2011, 271. <sup>76</sup> Ross 2010, 48–88. <sup>77</sup> Ross 2010, 55.

<sup>78</sup> The Appendix gives a slightly more formal treatment of the objection in the text.

<sup>79</sup> I do not know whether Honoré had me in mind when he spoke of illegitimate inferences from the work of Hohfeld and himself. From my perspective, I *inferred* nothing—validly or invalidly, legitimately or illegitimately—from their work. I merely *adapted* Hohfeld's vocabulary to the analysis of property and *conjoined* it with Honoré's work on ownership. Munzer 1990, 22.

almost entirely dissolves the disagreement between us, and otherwise it resolves the dispute in my favour.

#### 4. Penner Redux: A Major Disagreement that is both Substantive and Conceptual

Penner is one of the few lawyer-philosophers to devote sustained attention to the nature of concepts. In a major article he separates a Classical view of concepts from a Criterial view.<sup>80</sup> Under the Classical view, concepts are tied to a rigorous semantics. In a rigorous semantics, the word 'property' has a definite meaning if, and only if, one can give necessary and sufficient conditions for its application. In turn, the Classical concept of property must have a correspondingly definite extension: each item of property falls under the concept of property, and each item that is not property is outside its extension. Though Penner makes little mention of sets, evidently his précis of the Classical view of concepts rests on classical set theory. This section is concerned with Penner's positions earlier labelled  $W_1$  and to a lesser extent  $W_2$  and  $W_3$ . I clarify the nature of our conceptual disagreement and resolve it in favour of a tentative account of concepts that addresses their individuation and incomplete understanding. I also show that Wittgensteinian family-resemblance concepts favour my position over Penner's.

Penner believes that what he calls the Classical concept of property does not tally at all well with bundle theories of property as he understands them. Bundle theories offered by Christman, Grey, Hoffmaster, Honoré, Waldron, and A. Weinrib are, despite their differences, all found wanting to a greater or lesser extent.<sup>81</sup> They come up short because they leave indefinite the metes and bounds of the concept of property. I am in the dock with the others, though charitably Penner finds it more difficult to detect a fixed position in my book.<sup>82</sup> I acknowledge, with thanks, his charity and caution. I agree with him, if on different grounds, that it is not possible to supply necessary and sufficient conditions for the concept of property.

Furthermore, Penner is right to be unsatisfied by the concept/conception distinction that Waldron borrows from Dworkin and employs in Waldron's book on property. Penner seems to hold that the distinction just allows Waldron to avoid issues about which 'things' can be property.<sup>83</sup> Reasons exist to think that Dworkin's distinction, at least as drawn as late as 1977, suffers from considerable infirmities.<sup>84</sup> It is, moreover, difficult to figure out how it is possible even in principle to distinguish concepts from conceptions. How can I tell, in writing this sentence, whether my thought involves the concept of property rather than

<sup>80</sup> Penner 1996a, 767–98. Penner 1997 replicates little of his earlier discussion, and talks more about the idea rather than the concept of property—e.g. at 1–3, 169–86.

<sup>81</sup> Penner 1996a, 770–9.

<sup>82</sup> Penner 1996a, 774–7. In 1990, I had no well-considered view on concepts.

<sup>83</sup> Penner 1996a, 778. Cf. Waldron 1988, 52 and n. 53; Dworkin 1978, 103, 134–6. Dworkin in turn seems to get the distinction from Rawls 1955, 3–4, 19, 24–30, 32; Rawls 1971, 5–11.

<sup>84</sup> Munzer and Nickel 1977, 1037–41.

some conception of that concept, or somehow both of them? For the moment I lay to one side whether Dworkin's later work, in *Law's Empire* and *Justice for Hedgehogs*, solves or sidesteps these problems.<sup>85</sup>

Penner turns to the Criterial view of concepts for a congenial analysis of the concept of property.<sup>86</sup> This view, he says, rests largely 'on Wittgenstein's later writings on language and rule-following in the *Philosophical Investigations*'.<sup>87</sup> As to the concept of property, the chief value of the Criterial view, he writes, is that 'it allows us to outline a theory of terms on which the absence of Classical definition [through necessary and sufficient conditions] is not to be regarded as a sign that a term has a diminished, much less no, meaning'.<sup>88</sup> The thrust of his argument is that the Criterial view helps to 'explain the determinate character of concepts . . . while recognizing the real diversity of phenomena which, in a real diversity of circumstances, satisfy complex concepts underpinning terms like "property"'.<sup>89</sup> Just as Wittgenstein's notion of family resemblance arguably enables us to elucidate the concept of a game, so, Penner reasons, that notion arguably helps us to explain the concept of property—in terms not only of criteria but also of the circumstances in which the concept and the term for that concept are correctly applied.<sup>90</sup> The concept of property and related concepts such as that of ownership are useful because, Penner holds, similarities illuminated by family resemblance give those concepts, within limits, a determinateness unblemished by rigidity.<sup>91</sup> So the Criterial view, Penner suggests, explains why the concept of property has a unitary content whose essence is the right to exclude rather than dissolving into the composite fluidity of, he believes, a bundle theory.

#### 4.1 Reservations: of Wittgenstein and Dworkin

A significant worry about Penner's account of the Criterial view is his heavy reliance on Wittgenstein in arguing for  $W_1$ . The relevant section of his article is headed 'The Criterial View of Concepts'.<sup>92</sup> Throughout that section he frequently refers to concepts generally and to particular concepts, such as those of property and games. He peppers these reflections with discussions of meaning, sense, Wittgenstein's philosophy of language and rule following, Criterial semantics, the defeasibility of the correct use of terms and expressions, and internal relations of grammar.<sup>93</sup> Penner's heavy reliance on Wittgenstein's notion of family resemblance, I think, undoes his project  $W_1$ . Games may exhibit a family resemblance, but they do not have an essence. It is baffling how Penner can think that property has an essence if a family resemblance is in play.<sup>94</sup>

<sup>85</sup> Dworkin 1986; Dworkin 2011. <sup>86</sup> Penner 1996a, 779–98.

<sup>87</sup> Penner 1996a, 779–80 (footnote omitted). <sup>88</sup> Penner 1996a, 780.

<sup>89</sup> Penner 1996a, 780. <sup>90</sup> Penner 1996a, 783–5. <sup>91</sup> Penner 1996a, 787–9.

<sup>92</sup> Penner 1996a, 779.

<sup>93</sup> Penner 1996a, 779–98. Penner does not mention work on concepts done by cognitive scientists such as Fodor 1975 and Fodor 1983.

<sup>94</sup> Penner 1996a, 798–818.

I offer a stronger claim: a Wittgensteinian view of concepts in terms of family resemblance actually favours, not Penner's position  $W_1$ , but the idea that property is a set of relations among persons with respect to things. Wittgenstein explains family resemblance in various passages of the *Philosophical Investigations* and other works.<sup>95</sup> 'I can give the concept of number rigid boundaries . . . but I can also use it so that the extension of the concept is *not* closed by a boundary. And this is how we use the word "game".'<sup>96</sup> In response to the objection that a 'blurred concept' is not a concept at all, Wittgenstein points out we do not always need a sharp photograph and that sometimes 'one that isn't sharp [is] just what we need'.<sup>97</sup> We see similarities and affinities, 'a complicated network of similarities overlapping and criss-crossing'.<sup>98</sup> Baker and Hacker's masterful exposition of Wittgenstein on concepts and family resemblance simultaneously gives an overall picture and attends to detail.<sup>99</sup> They observe that his idea of 'family resemblance concepts' performs, among other jobs, 'the negative task of shaking us free from the illusions of real definitions, of the mythology of analysis as disclosing the essences of things'.<sup>100</sup>

I do not consider myself a follower of Wittgenstein, but if for the moment I occupy that role it is easy to see why a family resemblance concept would do quite nicely as an explanation of the concept of property, including its blurriness at the edges. The place to start is not with some definition of property or with an analysis that tries to identify its essence. Rather, one should start by looking at particular legal systems and taking note of what those working within the system mark out as 'property' (or 'Eigentum' or 'propriété' etc.). One is likely to see that the region marked out varies somewhat from one legal system to another, but that there are many similarities and affinities. One is also likely to see that within any given legal system the region identified as property includes a welter of different rules and subsidiary concepts that vary a good deal in their functional importance. Consider this remark of Wittgenstein's:

Frege compares a concept to a region, and says that a region without clear boundaries can't be called a region at all. This presumably means that we can't do anything with it.—But is it senseless to say 'Stay roughly here'? Imagine that I were standing with someone in a city square and said that.<sup>101</sup>

The blurriness of Wittgenstein's family resemblance concepts is something that I would prefer to think of in terms of fuzzy sets, fuzzy concepts, and fuzzy relations. It is hard to know whether Wittgenstein would have been receptive to such an idea. He died in 1951. Lofti Zadeh's influential article on fuzzy sets did not appear until 1965.<sup>102</sup>

<sup>95</sup> E.g. Wittgenstein 1953, ss. 67–77; cf. Wittgenstein 1967, ss. 326, 373–81, 441.

<sup>96</sup> Wittgenstein 1953, s. 68 (italics in original). <sup>97</sup> Wittgenstein 1953, s. 71.

<sup>98</sup> Wittgenstein 1953, s. 66.

<sup>99</sup> Baker and Hacker 2009, vol. 1, part 1, 201–26, and part 2, 153–71; vol. 2, 48 n. 1, 91.

<sup>100</sup> Baker and Hacker 2009, vol. 1, part 1, 226. <sup>101</sup> Wittgenstein 1953, s. 38.

<sup>102</sup> Zadeh 1965.

It is important to get clear on two different though connected strands of inquiry: the theory of concepts and the theory of language. As brought out at the beginning of Section 2, concepts qua types are abstract objects whereas concepts qua tokens are mental representations. Concepts qua types are not conventional. But the relation between words and their meanings is conventional. These theories are no longer the sole domain of philosophers. Psychology, linguistics, and cognitive science have made many contributions of their own.

One way to connect these strands of inquiry is to clarify an issue about words and reference. Modifying Strawson, one can say that people can use certain words to refer.<sup>103</sup> Take the word 'dog'. People can use this word to refer to the set of all dogs. Differently, they can also use it to refer to the concept DOG. The first use refers to the extension of the concept whereas the second refers to the concept itself. There are many natural languages. People can use the words 'Hund' and 'chien' to refer to all dogs or to the concept DOG, and use the words 'Eigentum' and 'propriété' to refer to all items of property or to the concept PROPERTY.

The options for explicating the concept of property are fewer once we reject the Classical view and the Criterial view. There remain Ronald Dworkin's interpretive account of concepts and an account of the individuation of concepts and the incomplete understanding of them. I look first at Dworkin's most recent work.

With *Law's Empire*, Dworkin's work took an interpretive turn; that turn included a chapter on interpretive concepts.<sup>104</sup> A quarter-century later, in *Justice for Hedgehogs*, he returned to interpretation in earnest.<sup>105</sup> The latter work devotes an entire chapter to conceptual interpretation and interpretive concepts.<sup>106</sup> My exposition rests on his account in *Justice for Hedgehogs* as his final view, and I ignore minor differences between the two books.

Dworkin's taxonomy recognizes criterial (small 'c') concepts, natural-kind concepts, and interpretive concepts. Although Dworkin holds that not all concepts have necessary and sufficient conditions for their application, he does not use the term 'criterial concepts' in the same way as Penner. Penner regards Criterial (capital 'C') concepts as definite enough, while Dworkin admits of both precise criterial concepts, e.g. of an equilateral triangle, and vague criterial concepts, e.g. of baldness.<sup>107</sup> Dworkin pays little attention to natural-kind concepts, such as those of a chemical compound or an animal species; these seem almost entirely irrelevant

<sup>103</sup> Strawson 1950. Strawson was concerned, not with all words or even all nouns, but with referring expressions such as demonstrative pronouns, proper names, and phrases beginning with 'the' followed by a noun or noun phrase.

<sup>104</sup> Dworkin 1986, 45–86. <sup>105</sup> Dworkin 2011, 97–188.

<sup>106</sup> Dworkin 2011, 157–88. The concept/conception distinction pops up from time to time, e.g. at 161, but it is on the fringe of the inquiry. Some literature on concepts and conceptions in the philosophy of mind distinguishes between having a concept and mastering it. E.g. Villanueva 1998, 149–96. Dworkin does not cite this literature and it may not be relevant to his project. It may, however, be pertinent to the incomplete understanding of concepts, which I consider later in this section.

<sup>107</sup> Dworkin 2011, 158–9.

to his project.<sup>108</sup> His attention centres on interpretive concepts, such as the concepts we find in morality, politics, and law, including the concept of property.<sup>109</sup> A concept is interpretive if we (1) 'share [it] in spite of not agreeing about a decisive test', (2) regard the best way of understanding it to be justifying its operation in our shared value-practices, and (3) use the concept 'as interpreting the practices in which [it] figure[s]'.<sup>110</sup>

Property counts as an interpretive concept under Dworkin's account of interpretation. It would be inappropriate to list him as a supporter of a bundle theory of property, because though he writes in this way he does not mention, let alone consider, any alternative to a bundle theory.<sup>111</sup> Still, one can deploy his view of interpretive concepts in favour of a bundle theory. The way that the concept of property functions and is understood in contemporary legal systems outstrips the right to exclude with a correlative duty not to trespass on or harm the owner's land. Lawyers today recognize that zoning and covenants, land transfer and finance, defence against government intrusion, appropriate use of eminent domain, and many other practice areas are within the repertoire of property lawyers. Intellectual property is a booming area. One could hardly make sense of these features of legal systems and law practice without recourse to powers to transfer, lease and licence, immunities against expropriation without compensation, and a vast array of other rights, powers, liberty-rights, immunities, and disabilities. Even if disagreement exists on the exact contours of property, conceptual interpretation helps in understanding these disagreements while pointing out the huge domain of property on which our practices and justifications for inclusion agree.

This argument should not be thought of in terms of linguistic deference. Deference of that sort might help to reduce, if not dissolve, the partly verbal disagreement between Penner and me treated in Section 1. In this conceptual context, however, the intellectual work is done by justificatory arguments for interpreting our practices regarding property and the concept of property along the lines of my version of the bundle theory. Even if Penner were minded to appeal to Dworkin on interpretive concepts, it would aid Penner hardly at all. Dworkin's interpretive concepts and the legal and social practices they illuminate are far richer than Penner's insistence on the right to exclude.

At the same time, I am not comfortable with relying on Dworkin's account of conceptual interpretation and interpretive concepts in responding to Penner. First, I do not accept Dworkin's claim that conceptual 'interpretation is interpretive all the way down', unless of course that claim is tautological.<sup>112</sup> He is willing to travel down Friedrichstrasse farther than I am. Second, I do not accept the 'overall theme

<sup>108</sup> Dworkin 2011, 159–60.

<sup>109</sup> Dworkin 2011, 160–3, 166–70, 180–8, 327–415. He mentions property on 374–5, where he seems to assume that some version of the bundle theory is sound.

<sup>110</sup> Dworkin 2011, 160, 162, 164.

<sup>111</sup> Dworkin 2011, 375. At 374–5 he is more concerned with libertarian versus non-libertarian concepts of property.

<sup>112</sup> Dworkin 2011, 162.

of [his] book: the unity of value'.<sup>113</sup> For me, value is sometimes discontinuous or fragmented. Third, though Dworkin does not conflate the theory of concepts and the theory of language, he once says that conceptual disagreements that seem to be merely apparent are 'only verbal', 'spurious', or 'illusory'.<sup>114</sup> Indeed, the sole verbal disagreements he seems to recognize are ones labelled 'only' or 'merely' verbal.

#### 4.2 Individuation and incomplete understanding

To see whether another account of concepts besides Wittgenstein's can shed light on the disagreement between Penner and me on the concept of property, let us incorporate here my remarks at the beginning of Section 2. Two main topics will occupy our attention: the individuation of concepts and the incomplete understanding of concepts. I suggest provisionally that either Penner and I use different concepts of property or that, if we share a single concept of property, possibly neither of us has mastered it. This suggestion, I believe, helps to resolve part of our conceptual dispute.

Anyone who surveys the history of different disciplines is likely to conclude that at one time people used a certain word for one concept and at a later time used the same word for a different though related concept.<sup>115</sup> In psychoanalysis, various analysts have different concepts of identification. Even within a given historical period and culture, libertarians have a different concept of freedom from left-wing liberals. Perhaps not all stem cell biologists share the same concept of stemness.<sup>116</sup>

One's view of concepts has a part to play in their individuation. In regard to the individuation of concepts as types, it might seem appealing to do so by their extensions. But this proposal is vulnerable to undesirable results. For instance, the concept UNICORN and the concept PHLOGISTON have the same extension—the null set—but are different concepts, because the former concerns a mythical animal and the latter a bogus explanation of fire. Or, to use a familiar example, the concept WELL-FORMED CREATURE WITH A HEART and the concept WELL-FORMED CREATURE WITH A KIDNEY are extensionally equivalent but they are plainly two different concepts. In these examples as with the concept PROPERTY, it is crucial to pay heed to both the intension and the extension of a concept.

Given my view that concepts as types are mind-dependent abstract entities, one can say: two concepts  $C_1$  and  $C_2$  are distinct if, and only if, there are two distinct propositions in which  $C_2$  has been substituted for  $C_1$  and the two propositions are not informationally equivalent. The proposition that the morning star is the morning star and the proposition that the morning star is the evening star are not informationally equivalent propositions.<sup>117</sup> As to the individuation of concepts

<sup>113</sup> Dworkin 2011, 1–2, 163.      <sup>114</sup> Dworkin 2011, 158.

<sup>115</sup> I do not believe that concepts themselves, as types, change.

<sup>116</sup> Leychikis, Munzer, and Richardson 2009.

<sup>117</sup> My account is superior to the view that concepts are individuated by their roles in inferences, for the reasons given in Fodor 1994. If Raz has an account of the individuation of concepts, I do not understand it. Sometimes he seems to think of individuation in terms of possession conditions. Raz 2009, 22, 55–6. Cf. Peacocke 1992; Peacocke 2004, and the criticisms



as tokens, given my view that these are mental representations, these representations are distinct so long as they belong to different individuals, or to the same individual at different times. This criterion for concepts as tokens gives a sufficient but not necessary condition for individuation.

Penner and I seem to have two different concepts of property qua type because his is narrower than mine. For him, the concept of property applies only to the right to exclude.<sup>118</sup> To my mind, he takes a central feature of property and idealizes it into the only feature of property. He might prefer to say that he has discerned the central organizing norm of property, though I think that formulation fits  $W_1$  less well than mine. In any case,  $W_2$  and  $W_3$  make different claims from  $W_1$ . For me, the concept of property includes a great deal besides the right to exclude, or even the right to exclusive use. It also includes powers to sell, devise/bequeath, mortgage/pledge, and lease to others; liberties to consume and, within some limits, to destroy; immunities against expropriation; and some duties not to use one's property to harm others.

Now to incomplete understanding: understanding a concept as type is a matter of degree. Consider the concept of glaucoma. Some laypersons in the United States could tell you that glaucoma is an eye disease that can cause blindness. Other laypersons could tell you that glaucoma has something to do with pressure inside the eyeball. Neither lay group has mastered the concept of glaucoma; the understanding of both groups is incomplete. If, however, someone else said that glaucoma is an eye disease in which high intraocular pressure damages the optic nerve and can thereby cause blindness, his or her understanding reveals mastery of the concept.<sup>119</sup> Generally, what makes an understanding of a concept incomplete is that the understanding is underinclusive or overinclusive, or fails to assemble properly the components of a complex concept such as that of a vested remainder subject to partial divestment.

An incomplete understanding of concepts might seem to be just the sort of thing that leads people to talk past each other. To some observers they might seem not really to disagree with each other at all. That would be a mistake. Consider the concept of property, and lay to one side for the moment my earlier suggestion that Penner and I have two different concepts of property. Suppose that Penner and I disagree about the concept of property because neither of us understands the concept completely. This supposition might seem bizarre. Penner knows pretty well how I understand the concept of property; he just thinks I am partly wrong. I reckon that I know less about property law than he does. But I believe that I know pretty well how he understands the concept of property; I just think he is partly

in Davis 2005. At other times Raz suggests that the 'identity' of a concept turns on 'idealizations' of conceptual practices. Raz 2009, 23.

<sup>118</sup> I do not know whether Penner 1997, 111, takes the separability thesis to be part of the concept of property, or an observation about that concept. Cf. my n. 69.

<sup>119</sup> Philosophers draw the line between incomplete understanding and mastery in different places. E.g. Greenberg 2000; Raz 2009.

wrong. Sometimes it is hard to tell whether (1) incomplete understandings of the same concept, or (2) complete or incomplete understandings of two or more concepts, are in play.

So how is the debate over the concept of property to move forward? Deference to experts is not the answer.<sup>120</sup> No party to this debate is in the position of a lay patient asking his physician to explain more thoroughly what glaucoma is. Of course, a scholar might come along whose understanding of the concept of property is far deeper than that of either of us. Such a scholar might conclude that Penner and I are each partly right and partly wrong. Thus, our conceptual disagreement is not spurious, and we are not just talking past each other. Yet this imagined scholar is not infallible and cannot just make pronouncements about the concept of property. She has to supply arguments for them, and others might spot flaws in those arguments.

A first step forward is to isolate some varieties of indeterminacy that pertain to incomplete understanding.<sup>121</sup> Metaphysical Extensional Indeterminacy (MEI) holds that the concept-type PROPERTY is extensionally fuzzy because some items fall under it only to a matter of degree. MEI is compatible with the view that some items can be categorically outside and others categorically inside the extension of the concept-type PROPERTY. MEI involves cases where there is no matter of fact as to whether a particular individual falls under the concept—e.g. the concept BALD in the proposition that Joe Biden is bald, despite the fact that one can determine how many hairs he has on his head. Metaphysical Intensional Indeterminacy (MII) holds that the concept-type PROPERTY does not have an essence. MII involves cases where a concept has no unproblematic essentialist or conceptual reductions—e.g. if one reduced the concept GAME to the proposition that a game is a strategic interaction between multiple players, then it is hard to see how *solitaire* fulfils this condition. Epistemic Conceptual Indeterminacy (ECI) holds that some concept-tokens of PROPERTY do not fully capture the concept-type PROPERTY. Mark Greenberg has suggested to me that even if the concept FUNNY is metaphysically determinate extensionally and intensionally, there might be a limit on human cognitive faculties to understanding this concept: either to grasp completely what falls under the concept or to give a reductive explanation of what makes funny things funny.

As to the concept PROPERTY, I subscribe to MEI and MII. Either is enough to entail ECI if an understanding of the concept-type PROPERTY is incomplete. Penner would reject MII. Perhaps his texts do not commit him to any position regarding MEI or ECI. Even if some understandings of the concept-type PROPERTY are incomplete, ECI would not entail either MEI or MII. However, ECI would be evidence for MEI and MII. Once these different positions and their interrelations are out in the open, a move in the right direction is to shift from metaphysical analysis to an epistemic inquiry regarding incomplete understandings of the concept of property.

<sup>120</sup> Rey 1998, 98, suggests such a move.

<sup>121</sup> Paul Daniell prompted these remarks.

The next step is to see that argument can reduce or eliminate incomplete understandings of the concept of property. But the most promising appeal to argument is not, I suggest, the Dworkinian method of arguments about interpreting the concept of property. Neither is it the Hegelian dialectical method of a never-ending sequence of thesis-antithesis-synthesis, with each synthesis giving rise to the next thesis.<sup>122</sup> Something more down to earth is preferable: a Peircean method of inquiry that explicates concepts. We owe to Cheryl Misak a remarkably patient and insightful stitching together of Peircean—not necessarily Peirce’s—views on inquiry, truth, and the fixation of belief.<sup>123</sup> For her, Peirce does not have either a correspondence or a coherence theory of truth; nor does he offer a definition of truth. Rather, for Peirce truth (T) applies to a hypothesis (H) that one believes to be true at the end of inquiry (I) and deliberation. More precisely, there are two different theses here, and even both together yield only a ‘practical’, not a ‘transcendental’, truth:

(T-I): If *H* is true, then, if inquiry relevant to *H* were pursued as far as it could fruitfully go, *H* would be believed;

and

(I-T): If, if inquiry were pursued as far as it could go, *H* would be believed, then *H* is true.<sup>124</sup>

We have beliefs about many things. Among them are beliefs about concepts qua types. To my knowledge, nowhere in Peirce’s sprawling corpus does he discuss the concept of property. But we can adapt what he says about the elucidation of other concepts, such as the concept of truth, to the concept of property. To paraphrase a Peircean position that Misak adopts from Christopher Hookway, if we commit ourselves to a belief about the concept of property, we expect our practical experience to jibe with this belief or ‘with some successor of it’, i.e. that the belief ‘in some form will survive future inquiry’, even if the content of our belief is ‘indeterminate’.<sup>125</sup>

Some might object that anyone who adopts a Peircean, practical view of the concept of truth is committed to adopting analyses of all concepts that have the most fruitful practical consequences. I am not sure that such a broad commitment follows. But even if it did, no problem results so far as the concept of property is concerned. Property law is a practical enterprise. It creates no difficulty to have a concept of property that serves the practical objective of analytical clarity claimed in the introduction for my version of the bundle theory.

<sup>122</sup> Hegel 1820a, 40–57, does, however, contribute insightfully to our understanding of property. Munzer 1990, 67–74, 80–3, 150–7; Waldron 1988, 343–89. Those who ignore Hegel’s contributions do so at their peril.

<sup>123</sup> Misak 2004.

<sup>124</sup> Misak 2004, 125 (initial capital letters added); cf. Misak 2004, 43.

<sup>125</sup> Misak 2004, x; Hookway 2000, 57.

## 5. The Nature of Property

To this point I have stuck to the letter of Penner's treatment of the concept of property and the definition of 'property'. Only by doing so could I be faithful to his texts. I want now to address the possibility that we do not disagree about either of these. Instead, we disagree about the nature of property. Approaching the disagreement in this fashion will also help to clarify the extent to which Smith's recent 'architectural' or 'modular' discussion of property differs from my version of the bundle theory. Throughout I understand the nature of property broadly to include the essence of property (if it has one), the indispensable characteristics of property (if it has any), and the explication of property.<sup>126</sup> As to essence, some philosophers do not think that mastery of a concept requires knowledge of the essence of the things to which the concept applies. They might say, for instance, that mastery of the concept of water does not require knowing that according to the best current theory water is H<sub>2</sub>O with two hydrogen atoms covalently bonded to one oxygen atom. Thus, insofar as Penner's conceptual inquiry considers the essence of property, it could be that the essence of property (if it has one) actually belongs to an inquiry into the nature of property. In some cases, inquiries into the nature of property brush up against inquiries into the meaning of 'property' or the concept of property. I do not claim that a rigid trichotomy exists.

### 5.1 Penner: definition, concept, and nature

Sometimes when philosophers write about definition they are not concerned with the definition of a word, such as the word 'property'. If that is correct, then they might not be proposing that, say, the word 'property' has a different meaning from what other philosophers mean by that word. So what are they proposing? A somewhat technical possibility is that they are proposing what philosophers call a 'real' definition—that is, an account that gives the essence of something. It could be that Penner is attempting to do so in the case of property, because he does talk about the 'formal essence' and the 'practical essence' of property, which for him centre on the right to exclude. Another possibility is that Penner is using the word 'definition' loosely and that he aims only to give an account of the nature of property: its indispensable characteristics, and an explication of property. Both philosophers and non-philosophers sometimes use the word 'definition' in this loose fashion.

On these possibilities, one could conclude that Penner and I are not giving different meanings to the word 'property' and hence that no verbal disagreement exists between us. We would, however, still have some substantive disagreements: whether property has an essence, whether the right to exclude is an indispensable characteristic of property, and whether the best way to explicate property is in terms

<sup>126</sup> Mark Greenberg has helped me with this inquiry but at times I have, no doubt rashly, gone my own way.

of a right to exclude. We would also have some subordinate substantive disagreements: whether the justification of a right or power to sell belongs to the theory of property or the theory of contract, and whether property is as historically contingent an institution as I claim. For that reason, the substantive dimensions of my arguments against Penner remain at the heart of the disagreements between us.

One can perform a partly similar manoeuvre in the case of the concept of property. The question is: are the differences between Penner and me disagreements over the concept of property? Some of them once were. Penner's invocation of Wittgensteinian family-resemblance concepts as a foundation for his conceptual arguments is the leading case in point. As argued in Section 4, Wittgenstein's view of concepts actually supports the bundle theory, not Penner's essentialism about property. But that is ancient history, for in commenting on a draft of this chapter Penner advised me that he is not now an adherent of many of the conceptual views that he espoused in his 1996 article on the 'bundle of rights' picture of property. In addition, Penner could take or leave my musings about concepts qua types and concepts qua tokens, about fuzzy concepts and fuzzy relations, and about seeking any help from Dworkin's interpretive concepts. Penner has let me know that he does not think that we are using different concepts of property. Whether one or both of us have incomplete understandings of the concept is perhaps a closer question.

Here, too, Penner could say that our substantive disagreements go to the nature of property. Our dispute is over the matters listed two paragraphs ago. I remain sceptical that property has an essence. If it has any indispensable characteristics, then both the right to use and the right and power to transfer are every bit as indispensable as the right to exclude. And one can usefully explicate property as a set of normative relations with respect to things such that some relations are functionally much more important than others.

## 5.2 Smith and the architecture of property

Henry Smith's most recent work, mentioned in the introduction, takes the inquiry into property in a new direction. This work is daring, insightful, and creative. It has considerable explanatory power and illuminates many purposes of property law. It is certain to be the subject of close study in coming years.

This work is not definitional. Part of it is conceptual, or at least Smith writes as if it is. He makes much of the distinction between the intensions and extensions of concepts. He flirts with Frege's views on *Sinn*, or 'sense', which Smith usually cashes out as intension. Smith's ruminations on concepts and their intensions are insufficiently clear for me to say whether we have any conceptual disagreements over property. His flirtation with Frege's views leaves undecided whether concepts are mind independent or mind dependent.<sup>127</sup> As noted, it is not clear whether his recent work has just one consistent account of intensions.<sup>128</sup>

<sup>127</sup> Smith this volume.

<sup>128</sup> See my n. 67.

Smith and I may disagree on whether property has indispensable characteristics. I believe that various normative relations with respect to things are objective characteristics of particular systems of property law. I also believe that if a system of property law lacked a right and power to exclude, a power to transfer, and a right to use, then it would be so etiolated that one would be hard put to regard it as property at all. It is unclear to me whether Smith would hold that if a property system were not modular, then it could not be property at all. Perhaps he would say only that such a system would be hugely defective. Whichever position Smith takes on this matter, it might not mark out a difference between us. Smith finds bundle theories of little use, but that is different from saying that a subset of normative relations with respect to things would be indispensable. In my view, modularity is a quite useful feature of systems of property law.

We are more likely to disagree on the usefulness of modular theories and bundle theories regarding the explication of property. I find the underpinnings of Smith's modular theory puzzling. At times his theory appears to rest on parsimony.<sup>129</sup> But without canvassing the options one cannot say whether it is the most parsimonious theory, or whether the most parsimonious theory is the likeliest to be true, or the likeliest to be useful. At other times his theory seems to rest on tractability, i.e. ease of use as a matter of human psychology.<sup>130</sup> Yet it is not obvious that the modular theory is the most tractable theory, or that the most tractable theory has the best chance of being true, or the best chance of being useful. Neither is it obvious that his modular theory is both the most parsimonious and the most tractable. Smith could say that his modular theory need not be the best such theory from the standpoint of either parsimony, tractability, truth, or usefulness let alone all of these. However, his modular theory would be especially appealing if he could show that it is in fact the best such theory from all of these standpoints.

As regards bundle theories, to think of property in terms of the many is not to suppose that all elements of the set of relations with respect to things are equally important, malleable at will, or closely tied to legal realism. This supposition, or something close to it, mars Smith's 'Property as the Law of Things'.<sup>131</sup> Most contemporary defenders of a bundle theory would agree that the rights to use and exclude and the power to transfer are functionally much more important than, say, the right to pledge or the duty to observe a conservation easement. There is plenty of middle ground between Penner's essentialism on the one hand and the disintegrative view of Thomas Grey and the conclusory labelling of Edward Rubin on the other.<sup>132</sup>

As to bundle theorists and their connection to Hohfeld and legal realism, Smith highlights the role of the legal realists, and largely ignores the much more astringent and unpoliticized use of Hohfeld by philosophers.<sup>133</sup> Like many philosophers

<sup>129</sup> Smith 2012b, 1694–5, 1726.

<sup>130</sup> Smith 2012b, 1704; Smith 2012a, 2107–20.

<sup>131</sup> Smith 2012b.

<sup>132</sup> Smith 2012b, 1692, 1697. Cf. Grey 1980, discussed in Munzer 1990, 31–6; Rubin 1984, 1086.

<sup>133</sup> Philosophers influenced by Hohfeld, who are often drawn to some version of the bundle theory, include Becker 1977, 7–23; Stoljar 1984a; Thomson 1990, 37–78, 322–47; Upton 2000; Wellman

influenced by Hohfeld's work, I find his analytical vocabulary useful but have never been much impressed by legal realism. When Smith writes 'property is a bundle of rights and other legal relations between persons', he is referring to the legal realist Felix Cohen.<sup>134</sup> Smith ignores the fact that other thinkers concerned with property could add, as I do, 'with respect to things'. For Smith to have an effective argument against better versions of a bundle theory, he might reconsider his intense focus on legal realism. Once that is done, he will find that a perceptive bundle theory need not regard his modular theory as a competitor. Moreover, even if a Hohfeldian analysis supports the modularity of property law, it also shows that Hohfeld's legal relations unveil the distinct role of property rights in legal systems.<sup>135</sup> As to the centrality of things to property law, my dissolution of the two-place relations versus three-place relations disagreement with Harris and Honoré in Section 3 should largely lay this dispute to rest. Beyond that, Smith and I just have two rather different projects with rather different objectives.

## 6. Conclusion

It requires patience to determine whether recent disagreements in the theory of property, though in part certainly substantive, are also verbal or conceptual, or perhaps concern the nature of property. Penner makes a case for the idea that the right to exclude is the essence of property. The case crumbles for many reasons. But all who think about property are indebted to his boldness, even if at day's end we must conclude that the right to use and the power to transfer are as central to property as the right to exclude. Smith's modular theory of property breaks new ground. However, its aims and accomplishments are quite different from those of a well-crafted bundle theory of property. The two theories illuminate different features of property law and are not, save at the margin, competitors with each other. They certainly do not exhaust the many issues that confront the moral, political, and legal theory of property.

## Appendix

For simplicity's sake, my response in Section 3 to a possible objection on behalf of Harris and Honoré omitted lower case letters for the relata. I now include them. Let the individual variables  $x$ ,  $y$ , and  $z$  range over an owner, a thing or resource, and another person or group of persons who does not own the thing or resource, respectively. Let the letter  $C$  stand for the two-place relation 'is owner of' between  $x$  and  $y$  and the letter  $D$  for the two-place relation 'can exclude' between  $x$  and  $z$ . In a common notation, we have  $C(x, y)$  and  $D(x, z)$ .

1985; Wellman 1995. Many philosophers, myself included, are critical of some features of Hohfeld's fundamental legal conceptions. For example, Hart 1972 argues that Bentham has a deeper analysis of legal powers than Hohfeld.

<sup>134</sup> Smith 2012b, 1691 n. 2.

<sup>135</sup> Douglas and McFarlane this volume so argue.

respectively.<sup>136</sup> These two two-place relations, it is said on behalf of Harris and Honoré, suffice to explain some of the rudiments of the concept of property. For if  $x$  has a right of exclusion with respect to  $y$ , and if  $x$  can exclude  $z$ , then we have a central piece of the concept of property, viz. the right to exclude. However, the objection to my argument depends on a connection between the two relations just specified; the connection is, as Honoré says, a 'necessary element in a property relationship'.<sup>137</sup> There is no reasonable way to understand  $D$  other than by making it relative to a thing or resource. We can express this connection by the following three-place relation:  $x$  has the right to exclude  $z$  from  $y$ . Let the letter  $E$  stand for the relation '... is owner of ... and can exclude ...'. So the hitching of  $C(x, y)$  and  $D(x, z)$  yields  $E(x, z, y)$ . The argument thus far applies just to the relation of exclusion. Yet it can easily be extended to all of the three-place relations that make up my account of the bundle theory, be those relations crisp or fuzzy. Of course, a defender of Harris and Honoré could say that one could just as easily decompose my set of three-place relations into a set of connected two-place relations. True. But that just supports my point that, owing to the argument above and the associative law of the composition of relations, little difference if any exists between their view and mine from the standpoint of truth-functional equivalence.

<sup>136</sup> Swart 1998, 79–82, uses this simple notation. Set-theoretic notations are more complicated, as is evident from Barker-Plummer, Barwise, and Etchemendy 2011, 431–6, and, especially, Whitehead and Russell 1927, 1: 187–326.

<sup>137</sup> Honoré 2006, 131.