

Beyond Exclusion

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J. E. Penner, [Property Rights, A Re-Examination](#) (2020).

In my last year of law school, through the dark days of an Alberta winter, I read a book about property law by a young professor visiting from England. It was a dazzling book, brilliant and witty, learned and ambitious. It made clear that the idea of property was the proper subject of philosophical inquiry, something both obvious and marvelous that would repay close attention. That book, [The Idea of Property in Law](#) (1997), and its author, James Penner, have stood as a source of inspiration for property theorists (myself included) ever since. Now almost twenty-five years later, James Penner has revisited that account of property in a new book, the aptly-named, *Property Rights: A Re-Examination*.

What was so striking about *The Idea of Property in Law*, then and now? The first is its attempt to account for property in terms of its two essential features: the excludability of others from the object of the property right (the thing) and the separability of the thing from its owner. The second is its attempt to reconcile the idea of property as a right to a thing with the idea of property as a correlative jural relation. Penner insisted that property was both relational *and* a right to a thing and indeed that the relationality of property depended on its thingness. His claim was that the thing (the *res*) mediates between the duties of non-owners and the rights of owners. Property rights are correlative, on Penner's account. Unlike other private law rights, they depend on the mediating role of things to achieve that correlativity. An owner may enter into any number of direct, personal relationships with others, individuals who become that owner's tenants, licensees, buyers. But the owner's relationship with everyone else is on a different footing, Penner pointed out. They may have no personal relationship with the owner at all: Their relationship to him is only "through his property" and that relationship is regulated by a *general* duty not to interfere with the property of others. (1997, P. 27.)

Penner's account was not just a blueprint for thinking about property in terms of exclusion; it also was a devastating attack on a previously dominant contemporary account of property as a bundle of rights. The bundle-of-rights approach had taken the view of property as a right to a thing to be incompatible with a legal understanding of property rights as jural, involving correlative rights and duties. The force of Penner's attack came not only from showing what bundle of rights theories missed about the nature of property (exclusion and separability) but also from explaining how property was a distinctive, in rem form of jural relation. Bundle-of-rights thinking has never fully recovered.

In *Property Rights, A Re-Examination*, Penner deepens and extends his account of property with his signature clarity and vigor. In this new book, he argues that the central case of property, ownership of tangible things, has a tripartite structure, composed of a right to exclude and two title-powers, the power to grant possessory licenses and the power to deal with title in a variety of ways, by granting lesser titles in the form of a leasehold or transferring title outright to someone else. (Other forms of property, like intangible choses in action, do not have exclusion as a basic norm, on Penner's account: intangible property does not require exclusion because, he argues, there is nothing to exclude anyone from.)

There are two important insights in Penner's book that will continue to guide thinking about property in law for legal theory. The first concerns Penner's revisionist approach to Hohfeld's famous analytical framework of jural relations. Penner works out in more granular detail how the correlativity of rights and duties, powers and liabilities in private law is achieved only through what he calls the mediating function of rules—and it is these general rules, not the particular jural relations they generate, that reveal what is important and distinctive about the idea of property. The mediating function of property law consists in property's use of impersonal, epistemically undemanding rules, chief amongst which is the duty not to interfere with property that is not one's own. This marks, I think, an important shift in

philosophical focus, from the personal, rights-based relations that property generates (how things stand between you and me with respect to a particular thing) to impersonal rules (governing how we relate to things and the general duty of non-interference with things that do not belong to us). Penner's structural insight about property law is that the latter explain the former. A second insight, made explicit in his new book, is Penner's view that our common interest in the Earth sets land apart from other things. Our common interest in the planet, our shared habitat, is not adequately served by a system of private property rights in land, he suggests. That is not because we own the Earth in common but because, in a sense, the Earth as our home is inseparable from us. As such, it is not the kind of thing that ought to be treated as the object of property in law. While Penner does not fully explain what it means for the Earth to be a part of us and so not appropriately the object of property rights, he sets out the contours of such an account and why it matters.

Property Rights: A Re-Examination completes the task Penner began a quarter century earlier in *The Idea of Property in Law* and offers a thicker philosophical foundation for his account of the nature of property and the interests that justify it. In doing so, this book will no doubt serve to inspire another generation of philosophically-minded property scholars.

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