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### Recognition and Reflection

Kristen Barnes

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# RECOGNITION AND REFLECTION

By Kristen Barnes<sup>†</sup>

I. INTRODUCTION.....	187
II. THE BEGINNINGS OF A PROPERTY SYSTEM .....	188
III. SOCIAL RECOGNITION, LEGITIMACY, COOPERATION, AND COERCION .....	190
IV. REFLECTION, THE PRINCIPLE OF EQUALITY, AND THE VEIL OF IGNORANCE.....	195
V. THE INSISTENCE ON MORALITY .....	201
VI. CONCLUSION .....	203

## I. INTRODUCTION

Peter M. Gerhart takes on the ambitious project of articulating a unified theory of property in his book *Property Law and Social Morality*. He offers descriptive and normative views of the property system as a social legal organism.<sup>1</sup> Central to this vision is his lexicon, which includes the fundamental concepts of “recognition,” “reflection,” “morality,” “values,” “equality,” and “community.” The terms are essential to Gerhart’s development of a narrative about the creation of property systems and their meaning. The lexicon is also vital to the other equally significant component of his project, which is to provide a framework for individuals and legal institutions (e.g., courts, legislatures, agencies) to make responsible decisions about the resources that often serve as the focal point for social interaction.

An empowering aspect of Gerhart’s theory is the idea that individuals are connected to, rather than alienated from, the property law system and that they are instrumental in making and remaking their system. If property emerges from the contributions of all members in society then property can change through those individuals. Indeed, the first sentence of his book emphasizes the relationship between communities and property. Gerhart writes, “[a] society is known by its property system because a society’s property system expresses soci-

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1. Organism refers to: “Any complex thing or system having properties and functions determined not only by the properties and relations of its individual parts, but by the character of the whole that they compose and by the relations of the parts to the whole.” *Organism Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/organism> (last visited Mar. 15, 2015). Gerhart defines his project as “proposing a theory that identifies the factors society uses, and ought to use, to institutionalize structured decisions about society’s resources.” PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 6 (Cambridge Univ. Press 2013).

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ety's values about the distribution and use of its resources."<sup>2</sup> As participants in society, individuals have responsibilities regarding how they act toward one another and in making decisions about how their world is ordered. Gerhart not only seeks to highlight the interconnections between people working together to decide how they want to live and structure the access to and use of resources available to them, he also seeks to mitigate the potential for decisions that threaten the legitimacy of the system and its stability. Those decisions are concerning because they do not adequately take into account the relevant interests that are implicated in the use of a resource. Developing a framework that allows for a fuller consideration of a range of interests and outcomes is a commendable but challenging goal.

This Article focuses on the meaning of the system Gerhart describes by unpacking some of the conclusions he draws regarding legitimacy, cooperation, and morality. The Article also evaluates the framework he proposes for achieving decisions that are "fair and efficient."<sup>3</sup> The Article concludes that Gerhart's theory significantly advances the project of incorporating equalizing concepts into property law which should result in decisions that are more equitable from a participatory and distributive perspective. However, there are aspects of the theory that do not capture the discordant elements of property systems and that do not unearth the inequalities at the root of the systems' beginnings that are often replicated over time.

## II. THE BEGINNINGS OF A PROPERTY SYSTEM

This Section explores Gerhart's explication of how property rights come into being as a prelude to analyzing assumptions his theory makes about legitimacy and coercion. Gerhart states that he is "agnostic" about the initiatory moments of a property system.<sup>4</sup> Instead, what matters is the system that has been created. Nonetheless, he offers a narrative about how property rights come into being that takes into account theories that alternatively posit the state (i.e. government) as the origin of property and that posit nature as the origin.<sup>5</sup>

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2. *Id.* at 3.

3. *Id.* at 21.

4. *Id.* at 315. Gerhart writes:

"The theory here is agnostic about starting points because the theory suggests that cooperation depends on the creation of shared belief systems, and shared belief systems can form around claims to resources, whether those claims are made by individuals or by the state."

*Id.* This Article agrees with the latter idea about the existence of a formal political entity not being required for "shared belief systems . . . [to] form around claims to resources." However, there is more to the question of beginnings than a theory of where rights come from. There are issues of power at play that need to be explored. These issues render suspect whether there is a shared belief system that can be pointed to as a sign of the cooperative nature of property law.

5. *Id.* at 48 ("[T]he evolutionary mechanism by which owners make claims and the community accepts or rejects the claims is at work whether we view property

This narrative is essential for explaining an ongoing dynamic process that is at the heart of his theory. The process entails the exchanges between a pre-legal moment and the legal realm of property law.<sup>6</sup> In the pre-legal moment, individuals make decisions about resources (e.g., ownership, how they will be used, divided, etc.). If those decisions gain acceptance from the community they form customary practices, offering guidance for the future.<sup>7</sup> Owners are recognized as having ownership over certain resources and those resources are recognized as property with restrictions on use and access. Over time, the legal system absorbs the customary practices translating them into legal rules and laws.<sup>8</sup> The legal system, however, is not passive in the process. Courts and other legal institutions, such as the legislature and agencies, may modify and replace the customary rules and practices. The “translated” rules then bind the community. This is the property organism that Gerhart’s work describes. The narrative is rich in its account of property rights because of what the representation highlights—individuals engaged in the act of finding ways to work together to build a stable social order and a legal system that is cognizant of solutions offered by individuals within society and that takes those solutions into account in formulating legal rules. The community contribution element is especially important because Gerhart wishes to underscore the “social construction” of the property system. From the classics of property case law<sup>9</sup> and even in international law,<sup>10</sup> one can identify examples that support Gerhart’s vision of the rise of property rights. While this narrative is useful in giving form to the exchanges that occur between people regarding resources in creating a system, it ignores aspects of what may have transpired at the early stages that have relevance for those interpreting the meaning of an established system.<sup>11</sup>

Gerhart’s choice to start from an existing property system is a strategic move. This strategy allows him to make numerous assumptions upon which he builds his theory. By not focusing on property’s origins, Gerhart can concentrate on his main concerns, which are examining how the system operates and making recommendations for how it should operate. Gerhart’s approach, however, prompts questions

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rights as being derived from the sovereign or as arising spontaneously from the state of nature.”).

6. *Id.* at 49 (“[T]he shape and content of rights are constantly in flux. . .”).

7. GERHART, *supra* note 1, at 152–53.

8. *Id.*

9. *See e.g.*, *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881) (the court adheres to customs involving whaling and ownership rights).

10. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

11. *See* Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287 (2014). *See also* Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIFORNIA L. REV. 107 (2013).

about his claims concerning the moral aspect of property laws and of property's participatory nature. If one focuses on the United States, an examination of the beginnings would reveal the wars, conflicts, power struggles, and protests that occurred. There is academic literature to support the connection between those early conflicts over resources and the manifestation of current-day inequalities.<sup>12</sup> Rather than according sufficient attention to the role of power in the construction of a property system, Gerhart's vision privileges those definable moments in which ownership rights over various resources have been solidified. He concentrates on those instances to develop his theory. According to Gerhart's narrative, individuals battle with other individuals and the state over resources, moving through a series of renegotiations, producing moments of agreement that harden into rules, which may be renegotiated at future dates as societal assumptions, perspectives, and social mores change. Gerhart maintains that once the disputes are settled, signaled by an absence of violence, there is assent to the property rights as drawn and the decisions should be respected and adhered to by the formal legal system. It is Gerhart's conclusion regarding assent to the system that needs to be explored further. His narrative may work for rationalizing why society and its institutions should respect, for example, how two farmers negotiated their boundary disputes or how they determined the values they relied upon in reaching a resolution, but it may not work for American Indians attempting to reap the benefits of ownership by conveying title to land in the late 1700s.<sup>13</sup> If one chooses not to consider the beginnings of property and how the origins shape the current state of property rights, then one is leaving untold critical aspects that are relevant to the conclusions that may be drawn regarding the system's meaning.

### III. SOCIAL RECOGNITION, LEGITIMACY, COOPERATION, AND COERCION

Recognition and reflection are two essential productive concepts in Gerhart's book. These ideas are intertwined with other recurring terms that shape his theory. Both concepts exemplify the paradox of an individual building and being bound by the legal order that he is constructing.<sup>14</sup> Those conflicting truisms are evident in Gerhart's use of the phrase "social recognition." Social recognition expresses the idea that "property rights come from and are limited by, the commu-

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12. See generally HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (Harper Collins, 2005). These inequalities involve, *inter alia*, the distribution of property along gender, ethnic, and economic lines.

13. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

14. These productive concepts are tools for Gerhart to address a provocative question posed by property law scholar Joseph Singer: "'How can the state both *define* property rights and be *limited* by them?'" GERHART, *supra* note 1, at 251 (citing Joseph Singer, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1072 (5th ed. 2010).

nity.”<sup>15</sup> Social recognition has several functions in Gerhart’s theory. It signals cooperation and assent to a legal system.<sup>16</sup> Social recognition also performs constitutive<sup>17</sup> and legitimating functions for property rights<sup>18</sup> and for the decision-making individuals and institutions (e.g., courts and legislatures) within a legal order.<sup>19</sup> Social recognition validates that the laws of society are “moral.”<sup>20</sup> Whether or not the rights will be socially recognized depends upon the values of society.<sup>21</sup> Social recognition grows out of society’s “shared beliefs.” The absence of violence is a sign that claims are socially recognized.<sup>22</sup>

On the foundation of social recognition, Gerhart develops ideas about the legitimacy, cooperativeness, and morality of the system that this Article challenges. The following quote highlights some of the theory’s key assumptions:

[A]n individual claiming all the resources of the state, and therefore the right to govern by controlling access to resources of the state, can do so (without coercion) only so long as the individuals subject to that control share beliefs about the legitimacy of that exercise of power. Once those shared beliefs disappear, evolution and revolution are in the wings.<sup>23</sup>

There are elements of truth in the foregoing statement to the extent that it is a comment on a community’s respect for the rule of law. Individuals may prefer a system in which disputes are channeled into a nonviolent structure of adjudication as opposed to living in a society with recurrent outbreaks of violence that leave unclear ownership titles. This preference may be signaled by the absence of ongoing violent uprisings. However, the absence of overt signs of violence may be interpreted in several ways. For Gerhart, the absence of violence is evidence that what has been designated as property grows out of “shared beliefs about what makes each person in the exchange better off and shared beliefs about the appropriate divisions of the gains of exchange.”<sup>24</sup> He advances a theory about individuals, their participa-

15. GERHART, *supra* note 1, at 250; *See also* GERHART, *supra* note 1, at 50 (“[S]ocial recognition is the source of property rights, as well as the source of limitations on property rights. . .”).

16. *Id.* at 48–51.

17. *Id.* at 48 (positing that it is because of social recognition that property rights “function as rights” and “social recognition determines the scope of the rights”).

18. *Id.* at 253 (“[P]roperty rights can be defined only by socially recognized processes using values that the community develops through social interaction.”).

19. *Id.* at 252 (stating that “social recognition requires that the authority and legitimacy of courts and legislatures itself be socially recognized.”).

20. GERHART, *supra* note 1, at 154–57.

21. *Id.* at 50 (“[W]e understand the strength of property rights by understanding the values that shape their recognition.”).

22. *Id.* at 48 (“Over time, the pre-political community settles on the recognition of claims that can be made without the threat of renegotiation through violence.”); *Id.* at 49 (explaining “threats of violence are a substitute for social recognition.”).

23. *Id.* at 315.

24. *Id.* at 316.

tion in society, and their agreement with the decisions about who is deemed an owner and which resources are appropriately treated as private property.

This Article critically intervenes to argue that substantial widespread disagreement regarding “what makes each person in [an] exchange better off [and] the appropriate divisions of the gains of exchange” may exist in society even though a revolution has not been initiated. An example from the environmental justice<sup>25</sup> realm illustrates this point. Lower-income community residents may voice their objections to the municipality concerning the placement of a hazardous waste landfill within or immediately adjacent to their neighborhood. The larger community may ignore their voices and disregard their objections. The residents may rely upon the legal process (e.g., participate in public hearings, appeal local land use decisions in court) and engage in socially-endorsed forms of petition and protest to resolve the land use dispute even though they take issue with the legitimacy of the structures and the ultimate outcome (i.e. the decision to allow Company X to proceed with its plans to dump waste).<sup>26</sup> The absence of an outcry from the majority of the community regarding the siting of the landfill does not mean that the landfill’s placement grows out of a “shared belief system” about how to properly allocate land uses. The practice of siting hazardous materials may continue on for years,<sup>27</sup> without revolution, but questions would still remain about the rights of the community in relation to the rights of the property owner who engages in the dumping of waste.

Coercion exists in systems, even when it is not always apparent. Distilling the coercive elements within society from the non-coercive socially agreed upon aspects is difficult, if not impossible. Coercion is an implement of power. As French philosopher Michel Foucault theorized, “power is ‘always already there’, . . . one is never ‘outside’ it, . . . there are no ‘margins’ for those who break with the system to gambol in.”<sup>28</sup> Coercion exists in many forms. It does not always in-

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25. OFFICE OF GENERAL COUNSEL, U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 13 (2003) [hereinafter NOT IN MY BACKYARD] <http://www.usccr.gov/pubs/envjust/ej0104.pdf> (quoting CHRISTINE TODD WHITMAN, ADMINISTRATOR, U.S. ENVTL. PROT. AGENCY, EPA’S COMMITMENT TO ENVIRONMENTAL JUSTICE (Aug. 9, 2001) [http://mde.maryland.gov/programs/ResearchCenter/Report-sandPublications/GeneralPublications/Documents/www.mde.state.md.us/assets/document/environmental\\_justice/ejreport01/ej\\_2001\\_Annual\\_Report\\_partE.pdf](http://mde.maryland.gov/programs/ResearchCenter/Report-sandPublications/GeneralPublications/Documents/www.mde.state.md.us/assets/document/environmental_justice/ejreport01/ej_2001_Annual_Report_partE.pdf)).

26. See e.g., *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979); See also NOT IN MY BACKYARD, *supra* note 25, at 13 (discussing the *Bean* case).

27. See LUKE W. COLE AND SHELIA R. FOSTER, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* 74–76 (New York Univ. Press, 2001); See also NOT IN MY BACKYARD, *supra* note 25, at 13–28.

28. In commenting on government and power, Foucault theorized:

Basically power is less a confrontation between two adversaries or the linking of one to the other than a question of government. This word must be

volve an overt wielding of power by physical violence. The presence of a legal system with its institutions, processes, and procedures signals that there is coercion. When you are born into a legal system, you are coerced from the moment you begin making decisions.<sup>29</sup> If you migrate across the borders into another legal system, you are coerced even if you do so voluntarily. That is, you may reject the procedures imposed to legally cross a boundary and view them as unfair, but you nonetheless comply because you conclude that the benefit in crossing is greater than the negative effect you will suffer if you depart from the norm. Your compliance under protest suggests that you are coerced in your decision. If you illegally migrate across the borders, you will take precautions not to get caught, and in doing so, you recognize that the territory you are seeking to enter has laws in place that you are attempting to circumnavigate. The destination territory is coercing your maneuvers along with the territory that is prompting your border crossing. Coercion is always present. One's status as a property owner or a non-owner is likely to impact how one experiences the coercive effect. The property owner has advantages that the non-owner does not.<sup>30</sup> Owners have resources to bargain with and the benefits associated with those resources.<sup>31</sup>

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allowed the very broad meaning which it had in the sixteenth century. 'Government' did not refer only to political structures or to the management of states; rather it designated the way in which the conduct of individuals or of groups might be directed: the government of children, of souls, of communities, of families, of the sick. It did not only cover the legitimately constituted forms of political or economic subjection, but also modes of action, more or less considered and calculated, which were destined to act upon the possibilities of action of other people. To govern, in this sense, is to structure the possible field of action of others. The relationship proper to power would not therefore be sought on the side of violence or of struggle, nor on that of voluntary linking (all of which can, at best, only be the instruments of power), but rather in the area of the singular mode of action, neither warlike nor juridical, which is government.

Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* 141 (Colin Gordon ed. & et al. trans., 1980); Michel Foucault, *Afterword: The Subject and Power* to HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS, 208 (2nd ed. 1983). See also Dino Felluga, *Modules on Foucault: On Power*, INTRODUCTORY GUIDE TO CRITICAL THEORY (last updated Jan. 31, 2011), <http://www.cla.purdue.edu/english/theory/newhistoricism/modules/foucaultpower.html>.

29. See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (Colin Gordon ed. & et al. trans., 1980). See also *Foucault: Power is Everywhere*, POWERCUBE UNDERSTANDING POWER FOR SOCIAL CHANGE (last visited Feb. 3, 2015), <http://www.powercube.net/other-forms-of-power/foucault-power-is-everywhere/>.

30. The historical beginnings of property systems are relevant to the determinations of owner and non-owner status.

31. The government confers numerous advantages such as tax benefits on owners in contrast to non-owners. For a discussion of the government policies favoring homeowners, see generally Edward Glaeser, *Rethinking the Federal Bias Towards Homeownership*, 13 *Cityscape: A J. of Policy Dev. and Research* (No. 2) 5 (2011).



Applying Gerhart's theory, one could conclude that if there are no obvious signs of coercion, the system is legitimate because, in general, society adheres to its rules. Society "recognizes" the decisions. From this perspective, obedience may be viewed as confirming social recognition of rules and the legitimacy of property laws. While this explanation is an insightful account of part of property's story, it does not fully address those moments involving the violence it took to establish a legal system and the force that it takes to maintain it. Those narratives challenge Gerhart's characterizations of property systems as cooperative and moral. Societies invest many resources to ensure that there is conformity and cooperation. Society's actions of educating people, inculcating values, and training people to conform to the prevailing rules, involve coercion.<sup>32</sup> Obedience may be viewed as a sign of coercion rather than an absence of it. The important question here is: How should one weigh the fact that the coercive effect is always present against the fact that sometimes people do reach agreements in society about how to deal with various resources? One of the many positives of Gerhart's theory is that he foregrounds those ongoing occurrences of agreement. His project involves finding ways to improve the exchanges that individuals have with one another and exchanges individuals have with the government concerning resources. He proposes a framework to account for the range of relevant interests in an exchange and to guide decision makers so that they will "appropriately assign the burdens and benefits."<sup>33</sup>

Gerhart's vision underplays the role and operation of power and overestimates the ability of non-owners to curb that power by setting the limits on property rights.<sup>34</sup> As an intervention to widen the focus of his theory, this Article argues that a system's coercive elements should always be kept in mind.<sup>35</sup> This consideration is necessary even though the presence of coercion or power can be positive. Power acts on people and people exercise power. At times, individuals simultaneously experience situations of being subjected to power and exercising power.<sup>36</sup> If one remains mindful of the influence of coercion, it will impact the valid conclusions that may be drawn regarding the ex-

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32. Regardless of how one views these acts of socialization (e.g., necessary, bad, or good), it is important to note the presence of coercion even if there are no apparent signs of it.

33. GERHART, *supra* note 1, at 133 (for Gerhart, "the appropriate assignment of burdens and benefits" is the "essence" of property); *Id.* at 258.

34. *Id.* at 48. ("[T]he scope of property rights with respect to particular resources is determined by the terms under which non-rights-holding members of the community recognize them.").

35. *Id.* at 316. The book's lack of emphasis on how coercion works can be explained by the author's goals, which include articulating a unifying theory that privileges "shared beliefs" and "cooperation;" *see generally id.*

36. Gerhart recognizes that duality when discussing the property owner, a powerful decision maker who enjoys the freedom to make decisions but who is also constrained by society. GERHART, *supra* note 1, at 62-72.

istence of a property system that has the roles of owners and non-owners staked out. In contrast to Gerhart's propositions that the presence of factors constituting property are a sign that the system is cooperative, formed by shared beliefs and values, and deserving of the description "moral," this Article maintains that, even with the system's existing defining elements, there remain questions of legitimacy and morality.<sup>37</sup> To demonstrate this point, the argument herein examines whether the theory is responsive to all parts of a community, which include not only the majority but also its more vulnerable members.

The foregoing discussion emphasizes Gerhart's pointing to the absence of overt acts of resistance (e.g., revolution, violent protests) as a sign of the community's assent to the values of the system and of society's recognition of its legitimacy. It is worth exploring further what counts as signs of resistance and what counts as signs of assent and legitimacy. There appears to be an unstated component to Gerhart's theory that the majority represents the whole of society. If the majority fails to object in ways that can be recognized as registering objection, then it means that individuals "share beliefs about the legitimacy of the exercise of power."<sup>38</sup> There is no accounting for moments when minority opposition exists but is stifled. Peaceful protest by a sizeable minority regarding how resources should be distributed or regarding how they have been allocated in the past may be stymied<sup>39</sup> just as violent protests may be suppressed. Governments may quash expressions of resistance to prevailing values and the distribution of resources according to those values by relying upon the instruments of a property law system. Referencing the United States as an example, protest movements adhering to the rule of law may be frustrated through the denial of permits to assemble on property, the government's assertion of zoning regulations, or the placing of other restrictions on land use.

#### IV. REFLECTION, THE PRINCIPLE OF EQUALITY, AND THE VEIL OF IGNORANCE

Gerhart develops descriptive and normative aspects of his project relying upon the concept of reflection. He positions the owner deci-

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37. Section V explores the concept of morality in more depth.

38. GERHART, *supra* note 1, at 315. This Article agrees with Gerhart's insight that one can interpret a choice to participate in the existing legal system as assent to resolve disputes through the system's structures rather than resorting to physical violence. However, it is important to distinguish between accepting the rule of law and accepting the prevailing social values regarding property rights and the distribution of resources.

39. Consider the various Occupy movements; See Sarah Knuckey, Katherine Glenn, Emi MacLean, *Suppressing Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street*, PROTEST AND ASSEMBLY HUMAN RIGHTS PROJECT (2012).

sion maker at the center of his theory.<sup>40</sup> In doing so, Gerhart is able to focus on the decision-making process and offer suggestions for the proper considerations that should inform those decisions. He develops a framework according to which an ideal decision maker should operate in order to arrive at decisions about resources that will accurately reflect society. The notion that owner decision makers are not unfettered in their decision-making<sup>41</sup> but rather have social responsibilities that require them to function in ways that appreciate that their actions affect others by imposing harms and benefits, reveals the progressive strands of his work.<sup>42</sup> Gerhart's dedication to crafting a means to insert others into the calculus of the decision-making process is impressive. This attention to others and their role in constructing the property system is connected to the concept of reflection. If one is making the claim that the system reflects the values of the community, as Gerhart does, then one needs to identify how owners and non-owners influence the system. Further, if one is operating in the deontic realm of prescribing the appropriate conduct of individuals regarding their distribution and redistribution of resources within society, one needs to ensure adherence to the recommendations advanced. Gerhart proposes a vehicle to accomplish these goals. This Section explores whether the principles and mechanisms identified achieve Gerhart's objective of producing better decisions that are more reflective of society.

First, however, it is necessary to explain the concept of reflection and its relationship to Gerhart's vision of property. Reflection encompasses the two actions of mirroring<sup>43</sup> and thinking.<sup>44</sup> Both ideas are at work in Gerhart's definition of a legal system:

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40. See GERHART, *supra* note 1, at 46 (commenting that his theory "is unique in putting the concept of owner as constrained decision maker at the heart of a theory of property"); *Id.*

41. See *id.* at 62 (stating owners are "constrained" decision makers); *Id.* (explaining that, "an owner's decisions are constrained because the owner must act as the owner would if the owner accounted appropriately for the social values implicated by her decision.").

42. There are, however, clear differences between Gerhart's theories and the progressive property law camp. Notably, Gerhart's view of "rights and responsibilities over resources flow[ing] from a single set of values" differs from the progressive view which recognizes competing "plural and incommensurable" values within property systems. See Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer, and Laura S. Underkuffler, *A Statement of Progressive Property*, see also Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, Vol. 94 CORNELL L. REV. 745-820; GERHART, *supra* note 1, at 5.

43. Reflection may be defined as the "image given back by a reflecting surface" that shows "the effect, existence, or character of something else." *Reflection*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/reflection>.

44. Reflection is also defined as "a thought, idea, or opinion formed or a remark made as a result of meditation." *Reflection*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/reflection>.

A system of law is a reflection of the values a society uses and expects an individual to use, to make judgments about which of various positions the law might take on issues it confronts.<sup>45</sup>

The framework Gerhart proposes for making decisions that will be reflective of society's values includes two germane constructs, the equality principle, and the veil of ignorance. The ideal decision maker must act in accordance with the equality principle,<sup>46</sup> which means that, "in all dealings between individuals or between individuals and the state, each individual is entitled to respect equal to the respect given to every other individual."<sup>47</sup> This principle is critical in challenging hierarchies and belief systems that advocate assigning individuals various socioeconomic roles. The equality principle advances the idea that all humans are on an equal plane and deserving of dignity and mutual respect.<sup>48</sup> By including the principle within the decision-making structure, Gerhart moves closer to the goal of making the system reflective of society's values, in that the equality principle supports the idea that the differing interests of all members of society are worthy of consideration regardless of socioeconomic position.<sup>49</sup> However, the principle is limited in what it can accomplish. Applying the equality principle is likely to result in a stalemate with the bias tilting in favor of the status quo. At some point, the individual or governmental entity following the rule must make decisions about the use of resources and whether ownership rights will be recognized. According equal respect to positions and interests does not guarantee that the ultimate decisions emerging from the process will be any different from those that do not adhere to the equality principle. The status quo property owner may remain in place opting to use his property in a way that deprives others of benefits after he engages in the exercise of applying the equality principle. For example, notwithstanding property law's maxim for owners to use their property in a way so as not to harm others (*sic utere tuo ut alienum non laedas*), property owners do harm others<sup>50</sup> and, sometimes, the harm inflicted is intentional.<sup>51</sup>

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45. GERHART, *supra* note 1, at 8.

46. *Id.* at 20 ("The foundational principle animating the theory here, as is true for most moral theory,[] is the principle of equal freedom. . .") (citation omitted).

47. *Id.* at 20.

48. *Id.* at 20–21.

49. *Id.* at 156.

50. ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: Finding Common Ground on the Ownership of Land 22 (2009) (commenting on the changing views of the do-no-harm maxim).

51. *Id.* Take for example, the construction of the "middle finger" buildings in Washington, D.C.; see Walter Hickey, *D.C. Homeowner Turns House into a Giant Middle Finger Pointed Straight at the Government*, in BUS. INSIDER, (Mar. 29, 2013 1:36 PM), <http://www.businessinsider.com/middle-finger-dc-capitol-2013-3>. These structures depart from the height levels of the other buildings on their block, protruding upward in a manner that from a distance resembles a middle finger being raised from a closed fist. The buildings are also referred to as "pop-up" housing. In addition to the pop-up building featured in Hickey's article, there are apparently other similar

In recognizing that more is required to achieve proper “other-regarding”<sup>52</sup> decision-making, Gerhart relies upon the veil of ignorance, which is a construct prevalent in the work of legal philosopher John Rawls.<sup>53</sup> Gerhart introduces this apparatus as a means to both ensure equality and to think about the process of decision-making.<sup>54</sup> He writes:

Behind the veil of ignorance, each individual is required to reason toward a decision without knowing how he or she will be affected by the decision; each individual will therefore assign the burdens and benefits of the decision using neutral values that are common to the community and eschewing values that advance only an individual’s personal agenda. The resulting decision will be one that the community as a whole would endorse and that we can view to be both fair and efficient.<sup>55</sup>

There is tremendous value in conceptualizing decision-making in this way. In the theoretical realm, it allows for the isolation of a critical part (i.e. one’s identity) that shapes the process of analyzing a question concerning resources and reaching a decision. This apparatus also allows for the clarification of different sources that individuals may draw from when engaged in the act of decision-making. It forces the decision maker to think about the act of rendering a decision. This meta-exercise of thinking about thinking is essential for Gerhart, as well, in that it allows him to identify and propose recommendations for changing the owner decision-making process to improve that process so that society will accept those decisions because they encompass varied interests rather than just the decision maker’s. Gerhart argues that if decisions are made conforming to the proposed paradigm, they will have legitimacy; they will be “socially-recognized” to use his terminology. Notwithstanding the utility of the veil mechanism, there is a dichotomy between theory and reality. From a practi-

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developments springing up in D.C., *See* Kriston Capps, *Income Inequality Lurks Beneath D.C.’s ‘Pop-Up’ Housing Debate*, CITYLAB (July 2, 2014), <http://www.citylab.com/housing/2014/07/income-inequality-lurks-beneath-dcs-pop-up-housing-debate/373804/>. Developers are making money by taking advantage of vertical space regardless of whether their choices obstruct the views of others or detract from the positive aesthetic aspects of a neighborhood, arguably causing economic harm to neighbors.

52. GERHART, *supra* note 1, at 54, 55 (defining “other-regarding” as “a form of rational decision making” involving “incorporat[ing] the well-being of others” into one’s decision making).

53. *Id.* at 21, n.44.

54. Gerhart describes the veil of ignorance as:

“[A] thought experiment that allows an individual to reason about the appropriate way to make a decision (and the appropriate decision to make) when the individual must integrate her self-regarding and her other-regarding obligations.”

*Id.* at 154.

55. *Id.* at 21 (citation omitted).

cal standpoint, it is doubtful that an individual could suspend knowledge regarding his “status”<sup>56</sup> in the outcome of the decision.

It is necessary to explore how the veil of ignorance would operate in order to assess whether it leads to the decision maker arriving at “fairer” decisions—meaning that they consider a broader range of effects, interests, and outcomes—than if the decision maker was left to his own devices to produce self-interested decisions.<sup>57</sup> The application of the construct would probably result in a decision maker asking at least one additional question than he might have asked otherwise. Outside of Gerhart’s paradigm the decision maker would likely ask: How will this decision affect me? The decision maker’s evaluation of the rule or law proposed would flow from that perspective. With the veil of ignorance applied, the decision maker would probably ask the two questions: How would this decision affect me if I were X? How would this decision affect me if I were Y? The “I” can be excised from the questions to ask: How would the decision affect X and Y? This result is in keeping with the goals of the book to move in the direction of making decisions that properly consider others. However, to pose appropriate questions about the issue being decided, the decision maker has to draw upon aspects of his identity, which include his store of knowledge from his life experience. There are questions that may interfere with complying with the requirement that the decision maker suspend knowledge of his status. For example, questions such as: How does the decision maker know the things he knows? How does he understand the information that he has been exposed to? Even if those questions do not arise, in answering the first two queries posed regarding the effect of a certain decision if one is X as opposed to Y, there are other influences that have the potential to undermine the objectivity the exercise is intended to achieve.

If you are ignorant about your status in the matter being considered, then you will need to turn to what you do know to make your decision. Gerhart proposes that decision makers will turn to “values that are common to the community.”<sup>58</sup> The decision maker may draw from, for example, religious values, patriotic values that have been inculcated as part of one’s education, democratic values, cultural values, and family values. Gerhart describes these values as being “neutral” because they are shared in common and because they do not

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56. *Id.* at 156 (defining “status” as a designation that concerns “the socioeconomic position of the decision maker and identifies factors that would allow the decision maker to either gain or lose from the decision.”).

57. Presumably, everyone has an opportunity to make decisions. That is, all individuals within society would have the opportunity to be in the decision maker role drawing upon the scheme that Gerhart’s theory develops. Perhaps, the equality principle accomplishes that moment of conferring upon everyone decision-making powers. If not, then any inequities of the existing property system are incorporated into Gerhart’s model.

58. GERHART, *supra* note 1, at 21.

focus solely on a self-interested decision maker. In contrast to Gerhart's characterization, this Article argues that commonality is not the same as neutrality. The prevalence of certain societal values does not make them neutral. As an individual considers these values, he will be drawing upon his experience. His experience tells him something about himself and his identity. Knowledge creeps into the framework. The veil of ignorance becomes suspect as a neutral mechanism because the individual will be relying upon facets of his identity and experience in order to decide. The decision maker must assume the difficult position of being disinterested enough to make the decision and engaged enough to know society's values. Despite the concerns, this Essay agrees that if all the aforementioned considerations are taken into account the resulting process is likely to be more comprehensive than it would have been without the veil of ignorance. It makes sense that a decision maker will be more careful and thoughtful in his decisions if he is unsure whether he will suffer the harsh consequences.

A concrete example brings to light other positives associated with the veil of ignorance and another limitation. Assume that the decision maker must decide whether to vote for a proposed regulation that would permit farmers in a certain geographic region to expand their crops to include medical marijuana. The decision maker is a farmer who would benefit from the change. Behind the veil of ignorance, the decision maker does not know whether he is: (1) a farmer seeking the change; (2) an environmentalist who is concerned about the negative impact a marijuana crop will have on fish, wildlife, and plants; (3) a legislator with a constituency that is divided on the issue; (4) a patient who would benefit from the availability of medical marijuana within the region; (5) a parent who does not want the state to host this kind of agriculture; or (6) a neighboring homeowner who is concerned that some of the chemicals used in cultivating the crop might cause damage to his property. Since the decision maker does not know who he is and how a "yes" or "no" vote will impact him, he should ask numerous questions regarding the consequences of voting in a particular way. In order to be able to ask the right questions, the decision maker has to either have broad knowledge about the interests involved or have those interests and consequences presented to him. There is a danger that if the decision maker is not well-versed in matters concerning medical marijuana crops or if some interests are not presented to him, then the decision will not be reflective of all of society's values. The decision maker will consider some of the values but the disenfranchised interests will not be taken into account. Consequently, the resulting marginalized interests will raise questions about the fairness of the decision and the process.

Social values and their place in Gerhart's decision-making framework merit further attention. Gerhart imposes the limitation that the

reasoning that occurs behind the veil of ignorance “requires an assessment of how the community is likely to view the relative value of the freedom from harm that must be allocated.”<sup>59</sup> The resort back to prevalent values threatens to undermine one of the main objectives of the book, which is to promote a theory of “responsibility”<sup>60</sup> that will lead to decisions “that the community as a whole would endorse and that we can view to be both fair and efficient.”<sup>61</sup> The root of the concern raised in this Section is the theory’s reference to social values, notwithstanding the possibility that they are marked by inequities, as the ultimate check on whether the decision maker has determined the apt contours of the exchange, weighed all of the significant factors, and properly assessed the benefits and burdens. This Article highlights the theory’s blind spots to moments of resistance and inequalities that are muted or disregarded altogether by the system. Gerhart’s system aims to exclude the potential for bias with the veil of ignorance and the equal freedom principle but then enfolds the potential for bias back into the model when he includes the values of society, which will reflect the favored interests and biases of people.<sup>62</sup>

#### V. THE INSISTENCE ON MORALITY

This Section explores the use of the term “morality” and the purposes it serves in Gerhart’s system. Gerhart characterizes his theory as “both descriptive and justificatory.”<sup>63</sup> The justificatory elements are apparent when he discusses how decisions that conform to his paradigm should be treated. He asserts that those decisions “are entitled to be called moral.”<sup>64</sup> Further, he argues that, “a right [is] a claim that others have a moral obligation to respect, and social recognition provides the moral basis for respecting property rights.”<sup>65</sup> This formulation is restrictive and binding in that those who participate in a legal system are compelled to adhere to the prevailing structure of social values or risk being labeled as operating outside the moral realm. Gerhart defines moral decision-making in the property realm in several ways. At the core is the requisite to make decisions that are in accordance with society’s values, meaning that the decisions should

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59. *Id.* at 157.

60. *Id.* at 3–7.

61. *Id.* at 21.

62. *Id.* at 4 (“The unification of rights and responsibilities requires a theory that justifies both the existence and the scope of rights, so that rights and their limitations can be understood to emanate from a *single set of values.*”) (emphasis added).

63. GERHART, *supra* note 1, at 6.

64. *Id.* at 57 (“From behind the veil of ignorance, decisions will have the kind of neutrality, and will be grounded on social values concerning the well-being of interacting individuals, that non-interested decision makers would take into account; those decisions are entitled to be called moral.”).

65. *Id.* at 50.



“appropriately assign benefits and burdens,”<sup>66</sup> as determined by society.<sup>67</sup> Morality is defined by society. Once moral rules are determined, individuals have an obligation to obey them. The comfort level an individual may have with this statement is likely to vary depending upon whether the person agrees with what society has decided. From this perspective, the term morality appears to serve the protective function of maintaining the status quo.

Gerhart’s concept of “morality” has grounding in the philosophical realm. In philosophy, morality refers to “some codes of conduct put forward by society” or refers “to a code of conduct that, given specified conditions, would be put forward by all rational persons.”<sup>68</sup> It is worth noting that these definitions do not address the substance of the code of conduct that emerges, which may be profoundly disturbing in terms of how individuals are treated (i.e. how they are expected to live, and what resources they have available to them). To the extent that Gerhart is focused on other-regarding behavior and the equality principle, he is also accessing another meaning of “morality.” The other meaning concerns the connotation of morality as being fair, just, and good.<sup>69</sup> But what society decides upon for its values may not be fair, just, or good. Here, it is important to recognize that one can take different philosophical approaches to rights and morality.<sup>70</sup> One approach envisions rights and values as universals that are inviolable and normatives for all humankind.<sup>71</sup> Another approach is relativist and views questions of moral rightness, goodness, and fairness in fluctuation and open to determination by different societies.<sup>72</sup> Gerhart’s theory evidences both approaches. On the one hand, it presents equal

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66. Gerhart states that: “In private law, each decision about property must appropriately assign the burdens and benefits of the decision in light of the need to respect the equality of all individuals.” *Id.* at 254.

67. Gerhart maintains that “property rights arise and are worthy of moral respect, because they follow the terms under which the community recognizes claims over resources.” *Id.* at 48. The values that serve as the measure of whether decisions are moral arise from society. *Id.* at 251 (“[Social Recognition] is centered on the social values that develop over time from countless interactions of individuals over claims about how resources ought to be used and over the equitable division of burdens and benefits within the society.”).

68. *The Definition of Morality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/morality-definition/> (last updated May 14, 2011).

69. Morality, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) (Houghton Mifflin Harcourt Publ’g Co.), available at <http://www.thefreedictionary.com/morality>. (“The quality of being in accord with standards of right or good conduct.”).

70. See generally Joseph Raz, *Human Rights Without Foundations*, THE UNIV. OF OXFORD FACULTY OF LAW LEGAL STUDIES RESEARCH PAPER SERIES, March 2007, available at <http://ssrn.com/abstract=999874>. (discussing the difficulties of defining universal human rights and creating a framework for identification).

71. STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 68.

72. *Id.*; see entry by Manuel Velasquez, Claire Andre, Thomas Shanks, and Michael J. Meyer on “ethical relativism”:

freedom and the maxim “treat others as you wish them to treat you,”<sup>73</sup> expressed through the veil of ignorance, as universals to which the ideal decision maker must adhere. On the other hand, the theory requires deference to the values that society decides.<sup>74</sup>

Even though Gerhart builds in conditions concerning equal freedom<sup>75</sup> and the importance of being mindful of the well-being of others, the question of what is “appropriate” ultimately comes down to what the community thinks (or has decided) is appropriate.<sup>76</sup> Gerhart’s framework does not allow for nonviolent disruptive protests of property systems that challenge the designations of owners and non-owners and the assignments of benefits and burdens on the basis that the distributions are inequitable. According to Gerhart’s theory, individuals who assert through civil disobedience a right to housing, grounded in the notion that this is a universal human right, risk having their claim labeled as immoral because it is outside the scope of recognizable rights as defined by their community. If society views the claim as immoral, not only will it lack legitimacy and have little chance of succeeding, those presenting the claim will have the label of immorality reflected back on them. This Article differs from Gerhart’s approach regarding the degree of control he cedes to society in promoting the social cooperativeness component of his theory. While it is permissible for the decision maker to take into account prevailing social values, it is acceptable, and at times necessary, to reach decisions that conflict with or challenge those values.

## VI. CONCLUSION

Gerhart’s decision-making paradigm, which insists on social responsibility and equal freedom, is a valuable contribution to the field. His

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“Ethical relativism is the theory that holds that morality is relative to the norms of one’s culture. That is, whether an action is right or wrong depends on the moral norms of the society in which it is practiced. The same action may be morally right in one society but be morally wrong in another. For the ethical relativist, there are no universal moral standards—standards that can be universally applied to all peoples at all times. The only moral standards against which a society’s practices can be judged are its own. If ethical relativism is correct, there can be no common framework for resolving moral disputes or for reaching agreement on ethical matters among members of different societies.”

Manuel Velasquez et al., *Ethical Relativism*, SANTA CLARA UNIV., <http://www.scu.edu/ethics/practicing/decision/ethicalrelativism.html#sthash.Rtsfi1Oq.dpuf>.

73. GERHART, *supra* note 1, at 21, n.45.

74. *Id.* at 155, n.38, (commenting that “[t]he implementation of the universal requirements of a moral decision will vary with the values that are taken into account in making the decision and will therefore result in a wide variety of social systems, each of which is considered by its participants, to be moral”).

75. *Id.* at 20 (“This is the obligation of equal treatment of the dignity and self-rule of every individual.”).

76. *See id.* at 157 (stating that the decision maker “must resort to values that are commonly used in the community for making decisions of that kind.”).

theory recognizes the mutually reinforcing relationships between individuals and the systems in which they live. Yet, there are significant limitations to the framework he proposes. An examination of the origins of property systems is critical for understanding them and for generating theories about their meaning and nature. By omitting this aspect from the narrative, one cannot fully account for the persistent role of force in maintaining a legal system or do justice to those who are resistant to prevailing values and decisions that, from alternative vantage points (e.g., universal human rights), are objectionable.