SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Journal of Property Law

Volume 2
Number 2 *Symposium Edition - A Review: Peter
Gerhart's Property Law and Social Morality*

Article 2

2015

On Corrective Justice and Rights in Property: A Comment on Property Law and Social Morality

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On Corrective Justice and Rights in Property: A Comment on Property Law and Social Morality, 2 Tex.
A&M J. Real Prop. L. 205 (2014).
Available at: <https://doi.org/10.37419/JPL.V2.I2.2>

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ON CORRECTIVE JUSTICE AND RIGHTS IN PROPERTY: A COMMENT ON *PROPERTY LAW AND SOCIAL MORALITY*

By Eric R. Claeys[†]

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I. INTRODUCTION

In previous work, Professor Peter Gerhart has applied to American tort law a theory, of social equality and responsibility, commonly associated with the political theories of John Rawls and Immanuel Kant.¹ In tort scholarship, this understanding is often associated with the moniker “corrective justice.” With qualifications I will develop here,² I will use corrective justice as shorthand to refer to that general understanding here.

In *Property Law and Social Morality*, Professor Gerhart conducts an exercise in legal cross-pollination. Gerhart uses corrective justice to develop a theory of property. He derives from corrective justice four

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1. PETER M. GERHART, *TORT LAW AND SOCIAL MORALITY* 74–101 (Cambridge Univ. Press, 2013).

2. See *infra* Part III.

corollaries especially relevant for property: (1) owners are constrained decision makers; (2) owner decision-making power is constrained by community norms of recognition; (3) that power is also constrained by a (community-recognized) norm to be other-regarding; and (4) other-regarding decisions appropriately assign the burdens and benefits of resource use.³ To illustrate both his understanding of corrective justice and these four corollaries, Gerhart applies them all to trespass, nuisance, cotenancies, future interests, and various issues related to regulation and eminent domain.

Property Law and Social Morality provides a good example for studying whether philosophical tort theory can shed helpful light on property law or philosophy. Among different subfields of “law and philosophy,” philosophical tort scholarship is particularly distinguished in quality and maturity.⁴ The understanding of corrective justice on which Gerhart relies falls comfortably in one of the main streams of philosophical tort scholarship on that topic. Since tort relates so closely to property,⁵ it is reasonable to wonder whether tort insights on equality-and social-responsibility-based corrective justice can shed light on property.⁶ Since Kantian and Rawlsian corrective justice has stimulated excellent thinking about rights in torts, it is just as reasonable to wonder whether it may pollinate rights-based scholarship about property. Some private law theorists (notably, Canadian tort theorists) have explored these possibilities.⁷

Property Law and Social Morality explores these possibilities further, and the book’s insights repay careful study. There is a well-worn trope according to which a book reviewer gives a book two cheers but not three. With apologies to readers—and especially to Professor Gerhart—I will use that trope here.

Cheer one: *Property Law and Social Morality* portrays individual property rights and communal responsibilities in a nice balance. In property scholarship, scholars tend to be familiar with libertarian theories of rights and communitarian theories of obligations. In contrast with both, corrective justice portrays justice as maintaining a community in which individuals (on one hand) enjoy equal spheres of freedom but (on the other hand) are made responsible for the harms that

3. PETER GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 61 (Cambridge Univ. Press, 2013); *see id.* at 46–61.

4. *See* JOHN OBERDIEK, *INTRODUCTION: PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 1 (John Oberdiek ed., Oxford Univ. Press, 2014), *available at* <http://ssrn.com/abstract=2493785>.

5. Along with contract and unjust enrichment, tort and property mark off two of the four most fundamental fields of private law.

6. *See, e.g.,* Martin Stone, *The Significance of Doing and Suffering*, in *PHILOSOPHY AND THE LAW OF TORTS* 131 (Gerald J. Postema ed., 2001).

7. *See* Ernest J. Weinrib, *Corrective Justice*, 77 *IOWA L. REV.* 403 (1992); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 66–68, 86–106 (2009).

their exercise of that freedom inflicts on the equal rights of others. This equality-and social-responsibility-based portrait is much more balanced than libertarian and communitarian alternatives.

Cheer two: Insights from corrective justice shed light on important topics in property law and theory. I find particularly illuminating Gerhart's account of social recognition. If a theory of property is grounded in individual rights, Gerhart explains, the rights must be structured so that a wide range of individuals can understand them and why they deserve protection. The rights must also be structured in a manner that runs with community expectations and conventions about why property is worth protecting, and what responsibilities run with ownership. Although these constraints may sound straightforward, they impose limitations on property that are often overlooked. Although Gerhart derives social recognition constraints from moral principles associated with corrective justice, his insights about social recognition should be of interest to a wide range of property theorists—not only rights-based theorists, but also economic theorists.

No third cheer is forthcoming because Professor Gerhart and I probably disagree about the extent to which corrective justice can justify a system of property. Corrective justice (in the usage on which Gerhart relies) emphasizes considerations about equal freedom and respect. I think these considerations constrain the structure of moral rights. I recognize that they are necessary elements of any fully satisfying account of rights. In my opinion, however, equal freedom and respect are not the most fundamental elements in a satisfying moral account of rights; I prefer foundations resting on the low, solid, common-denominator components of human flourishing. But I hope that disagreement remains a friendly one. There is little enough American scholarship on the rights-based foundations of property law. Many of the lessons from *Property Law and Social Morality* seem compatible with and relevant to any moral theory of property.

In this Review, I hope to critique specific parts of *Property Law and Social Morality* that fairly represent these various reactions. In Part I, I explain the basis for my first cheer, and situate *Property Law and Social Morality* in relation to other prominent moral theories of property. In Part II, I study one representative example confirming my second cheer about Gerhart's cross-pollination experiment—his critique of economic “evolutionary” or “Demsetzian” accounts of property in chapter 4.⁸ In Part III, I offer what I hope is a friendly amendment to *Property Law and Social Morality*, to clarify several possible confusions about the scope of “corrective justice.” In Part IV, I turn to my friendly disagreements.

8. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

II. BALANCING PROPERTY RIGHTS AND RESPONSIBILITIES

Property Law and Social Morality strikes a nice balance between the rights and the responsibilities associated with property. That balance has not always been respected in other, prominent justice-based work on property.

Some prominent rights-based works have accentuated the right and obfuscated the responsibility in property. The poster example for this tendency is Robert Nozick's "historical entitlement" theory of rights in *Anarchy, State, and Utopia*.⁹ This theory has been restated fairly as follows: "[A]s long as two conditions are satisfied—justice in acquisition (first possession) and justice in transfer (voluntary exchange)—the current distribution of property is just."¹⁰

This approach may be challenged on the ground that it overstates the right and understates the limitations and the responsibilities associated with property.¹¹ But those challenges may be taken too far as well. Some scholars have suggested that contemporary law is as individualistic as Nozick's theory, or they have assumed that all theories of rights are as individualistic as Nozick's. Those scholars then present a false choice: If a rights-based theory of property entitles rights-holders to disregard the interests of others, then the only acceptable justice-based theory of property must emphasize property's social responsibilities or functions.¹²

There has to be a middle ground. For my part, I am sympathetic to flourishing-based theories of property. I believe that a flourishing- or virtue-based "normative interest lies at the core" of property, "and the rights and correlative duties follow from the interest."¹³ Although *Property Law and Social Morality* focuses on different aspects of social morality, its approach still occupies the same "centrist" ground.¹⁴

For Gerhart, "society" consists of many related individuals all pursuing their own individual life plans together. Each person deserves rights to pursue her own plans, but the rights have to be recognizable by all and they have to be structured as likely to give other society members equal opportunities to pursue their own life plans. As Gerhart explains, "Theories of corrective justice knit individual rights and community rights together because corrective justice understands the

9. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 151 (2013).

10. Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEG. ANALYSIS 459, 498 (2010).

11. See, e.g., JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (1992).

12. Sheila R. Foster & Daniel Bonilla, *Introduction to Symposium, The Social Function of Property: A Comparative Perspective*, 80 FORDHAM L. REV. 1003 (2011); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

13. Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 923 (2009).

14. GERHART, *supra* note 3, at 35.

correlativity of rights and duties and therefore the obligations that each individual in a community owes to every other individual, and to the community, when individuals interact.”¹⁵ Although this insight may seem true or even tautological, not all contemporary scholars accept it. Some contemporary theories of justice continue to suggest that a system of rights cannot be just unless it has a communitarian tilt. It cannot be repeated often enough that, in many serious theories of rights, “rights and responsibilities over resources emanate from shared values, not from opposing forces.”¹⁶

III. SOCIAL RECOGNITION

As the last Part should have made clear, in justice-based theories of property, it is easy and tempting to focus on the two extremes in correlative obligations—either the rights or the duties. But this temptation can and should be avoided. Another strategy is to start somewhere in the middle. Both rights and duties must be structured to apply to a wide range of individuals who have different life needs, starting positions, limitations, and goals. In other words, even if people intend to use the same resources or freedom to pursue different life goals, equality and different uses limit the structure of the social and legal rights covering these resources. Equality and use differences force conventional rights to be a lot more homogenous than the individual uses people seek to make of the protected resources. At least as important, conventional rights and duties must be made accessible to the community members expected to respect the rights and obey the duties. In practice, the best way to make these rights and duties accessible is to make them run with commonly shared pre-legal expectations and norms.

Property Law and Social Morality studies that imperative and derives several interesting lessons. Consider Professor Gerhart’s concept of “social recognition.” Social recognition refers to a constraint on property rights and obligations: Both emerge “because, and to the extent that, the community, or a large proportion of the community, recognizes the justness of the claims of possession, labor, or other attributes of ownership.”¹⁷ Similar lessons can come from economic accounts of information costs,¹⁸ or from disciplines (like sociology or linguistics) focusing more on how communication orders human af-

15. *Id.* at 26.

16. *Id.* at 11.

17. *Id.* at 74.

18. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

fairs.¹⁹ But it helps to study how social-recognition-based constraints work with a theory of justice and rights.²⁰

Law implicates in practice very basic questions raised in political philosophy—about legitimate authority. Laws coerce community members to perform some actions they might otherwise be free to decline to participate in, and they coerce members to refrain from some actions they might otherwise be free to engage in. Either way, the community imposes on the individual a fixed course of conduct, and it restrains what otherwise would be the general freedom of the individual. If individual freedom has any value, the community needs to articulate why it has legitimate authority to make that imposition.

Social-recognition principles help answer questions about legitimate authority. Although individual freedom has value, many otherwise-legitimate exercises of freedom may harm others or prevent them from exercising similar freedom themselves. The state has legitimate authority from preventing individuals from exercising more discretion in pursuing their own affairs than is consistent with all community members' enjoying similar discretion. The state then has authority to define tolerably clear zones of freedom that reflect in positive law good-faith approximations of the equal zones of freedom to which all community members are entitled in principle. But those positive-law zones of freedom are not likely to be enforceable unless community members can recognize them easily and find them just—i.e., unless they accord with social-recognition constraints. Here, Gerhart illustrates nicely with many aspects of nuisance law. Locality principles stop plaintiffs from complaining about dominant local land uses when their own uses are idiosyncratic in their neighborhoods,²¹ and the extra-sensitive plaintiff rule and other similar rules leave “special room in the law of nuisance for cases in which the plaintiff ought, out of a spirit of neighborliness, to absorb the social cost of being a neighbor.”²²

Moreover, by focusing on how social-recognition norms interact with philosophical theories of property, property scholars may learn more about non-philosophical theories they might otherwise take for granted. Here, Professor Gerhart makes an important contribution in Chapter 4 of *Property Law and Social Responsibility*. This chapter sets out as a foil economic, evolutionary accounts of the genesis of property rights—for short, “Demsetzian” accounts of property.²³

19. See, e.g., CAROL M. ROSE, *PROPERTY AND PERSUASION* (1994).

20. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); J.W. HARRIS, *PROPERTY AND JUSTICE* (1996).

21. GERHART, *supra* note 3, at 202–03.

22. *Id.* at 206.

23. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); see also James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009); Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331 (2002). This

Demsetzian accounts explain and justify conventional property rights as solutions to an externality problem. Administratively, property systems are expensive to run. When a resource does not generate high positive or negative externalities, the administrative costs of property overwhelm property's advantages. As resources generate higher-value uses (due to innovation, or scarcity, or other factors), the social benefits of property overtake the administrative costs.

Demsetzian, evolutionary accounts of property formation resemble evolutionary accounts of other developments in private law—including economic accounts of the geneses of strict-liability and negligence rules as responses to accident liability in torts. Those latter, tort-based evolutionary accounts have come under philosophical criticism. Such accounts claim that “the outcome of efficiency is the function of tort law, even though efficiency was not part of the intentions of the developers, and remains alien to the intentions of the bulk of its contemporary participants.” Such accounts leave a mismatch—between the intentions of officials making and administering the law and the net effects of their official decisions. But “[i]f a practice or institution really is to be explained by an outcome that lies outside the intentions of those who have developed and maintained it, then a particular kind of causal relationship must be shown,” and such a relationship has not yet been shown for accident liability.²⁴

Demsetzian accounts of property rights suffer from similar criticisms. As far as I am aware, Gerhart is the first scholar to notice and explore such criticism at length.²⁵ As he frames the challenge, “the evolution of private property begs the issue of how a community that cannot coordinate the management of common property is able to coordinate successfully to develop a system of private property.”²⁶ (P. 74.) Demsetz cited transitions in property rights in land among fur-trading Montaigne Indians.²⁷ If the Montaignes could not make an open-access regime work, how could they cooperate well enough to transition to a regime of private land? And if efficiency gains are supposed to justify the transition, is there any evidence suggesting that

is as good a place as any to lodge one other criticism of PROPERTY LAW AND SOCIAL MORALITY: The end materials leave a bit to be desired. In the list of references, Merrill's article is cited as starting on p. 331. In fact, the article was published in a supplemental issue with “S” pagination, so the article started on p. S331. The list of references list Rawls's *A Theory of Justice*, but the index doesn't have a reference for the author or work, just references to specific Rawlsian topics like the veil of ignorance.

24. JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 25–26 (2001); see also Stephen R. Perry, *Method and Principle in Legal Theory*, 111 YALE L.J. 1757, 1761–70 (2002) (book review critiquing the success and limitations of Coleman's critique).

25. This gap was noted in Eric R. Claeys, *Exclusion and Private Law Theory: A Comment on Property as the Law of Things*, 125 HARV. L. REV. FORUM 133, 133–34, 138–40 (2012).

26. GERHART, *supra* note 3, at 74.

27. Demsetz, *supra* note 8, at 351–52.

the Montaignes justified the transition on the ground that it promoted efficiency?

Property Law and Social Morality supplies reasonable answers to these questions. It helps “complete[] the economic theory of evolution[,] by making explicit that claims to property are accepted on the basis of shared value formation.”²⁸ As Gerhart rightly observes, Demsetz’s account of the Montaigne Indians “hid . . . assumptions” about how the Montaignes understood property and the social networks associated with property.²⁹ The Montaignes must have shared common values, specifying when it was justifiable to claim exclusive ownership in land and when it was appropriate to insist that land was better held in open access. These values were binding in part because they were commonly held, and in part because they justified both forms of property (exclusive and open access) back to the normative interests (in using things to survive, to better one’s life, or to produce life conveniences) that justify property rights. Through trial and error, individual Montaignes must have challenged older consensuses in favor of open access, and argued that a regime of exclusive land ownership better secured community goals. It is reasonable to believe that “many claims failed to be acceptable to those excluded,” that “violence was a necessary part of norm formulation,” but that “[s]lowly the claims were made and accepted, and the threat of violence was replaced by a norm of recognition. That completes the causative story that Demsetz omitted.”³⁰

IV. HOW DO CORRECTIVE AND DISTRIBUTIVE JUSTICE RELATE TO EACH OTHER?

Yet cross-pollination has downsides as well as upsides, and I worry that *Property Law and Social Morality* suffers from one of the former. “Corrective justice” means many different things in different contexts. I think I understand the usage Gerhart assumes and applies, but I also suspect that this usage may not be the usages most familiar to American property scholars. (In Gerhart’s terms, maybe property scholars follow social-recognition norms different from the ones that hold among tort scholars!) In this Part, I would like to flag a couple of possible translation problems, specify why I think *Property Law and Social Morality* is impliedly meant to avoid them, and suggest a couple of friendly amendments to make these implied reservations explicit.

A. Two Usages of Corrective Justice in Tort

One source of possible confusion comes from tort scholarship itself. Within tort scholarship, although different usages of “corrective jus-

28. GERHART, *supra* note 3, at 75.

29. *Id.* at 98.

30. *Id.*

tice” may be sorted in different ways, for our purposes these usages may be sorted as falling along a continuum with two extremes. Gerhart draws on usages falling toward one extreme, which I will call the “substantive” approach to corrective justice. In this approach, “corrective justice” has substantive content; it can offer determinate and direct prescriptions about specific, substantive questions of rights and duties in a given recurring dispute. Gerhart’s four main principles are representative of such prescriptions.

At the other extreme end fall what I’ll call here “remedial” understandings of corrective justice. In remedial usages, citizens have moral responsibilities not to wrong their neighbors or their neighbors’ rights. Those responsibilities follow from primary duties that a community institutes to implement principles of justice unqualified and writ large (here, “general justice”³¹). To determine what general justice requires, decision makers must reason about equality, responsibility, respect, and many other salient considerations. Corrective justice comes into the picture only after a wrongdoer violates a primary duty established as a matter of general justice. When a primary duty is violated, the wrongdoer is obligated to erase and repair to the extent possible the bad effects of the primary wrong. The remedial understanding of corrective justice refers to this secondary duty to remedy the primary wrong.³²

To illustrate both, consider with a case Gerhart covers briefly, *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.* The Fontainebleau Hotel Corporation built an additional tower on its property, and the new tower blocked light to the cabana and swimming pool of the Eden Roc hotel. The owners of the Eden Roc complained (among other things) that the tower addition inflicted a nuisance on the Eden Roc; the Florida appellate court held there was no nuisance. “[I]n the absence of some contractual or statutory obligation,” the court insisted, there is “no legal right to the free flow of light and air from the adjoining land.”³³

In tort-based terms, in *Fontainebleau* the court of appeals needed to decide whether the managers of the Fontainebleau hotel had committed a nuisance—a wrong—to the proprietors of the Eden Roc hotel. In property-based terms, though, the case forced the court of appeals to lay down a precedent specifying the contours of Floridian land owners’ possessory interests in controlling, using, and enjoying land. Those interests could have been specified into two different packages

31. See JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 164–65 (Oxford Univ. Press, 2d ed. 2011).

32. See, e.g., Gregory C. Keating, *The Priority of Respect Over Repair*, 18 *LEGAL THEORY* 293, 305 (2012) see John Gardner, *What Is Tort Law For? Part I—The Place of Corrective Justice*, 30 *L. & Phil.* 1, 21 (2011); Jules L. Coleman, *Corrective Justice and Property Rights*, 11 *SOC. PHIL. & POL’Y* 124 (1994).

33. *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959).

of specific use-interests. The content of those two packages can be described using Hohfeldian terminology.³⁴ One package creates an “exclusion” regime.³⁵ In this regime, the relevant rights and responsibilities are built around land boundaries and notions of harm associated with physical, trespassory entries. Light generates no specific property rights or responsibilities because photons do not generate physical trespasses. Thus, in the exclusion regime, all land owners are entitled to liberties (Hohfeldian privileges) to build extra stories on their buildings without considering the impact on neighbors. If all owners hold such liberties, every owner also holds correlative exposures (no-rights)—against the possibility that her neighbors may exercise the same liberty on *their* own lots.

The other package creates an “access to light” regime. In this package, sunlight is a resource valuable enough to override all the policies (simplicity, clarity, and so forth) that ordinarily justify the exclusion approach. Thus, in the access to light approach, land owners owe duties not to build additions without considering certain effects on their neighbors. In so, those owners also hold correlative rights, to enjoin their neighbors from exercising what would otherwise be liberties to build additions with the proscribed effects.

Gerhart believes that the exclusion package is preferable to the access to light package.³⁶ I agree, though with reservations to be explained in Part V. For the time being, I have an analytical question: To what extent does this substantive choice sound in corrective justice? Gerhart uses *Fontainebleau* to illustrate how Rawlsian veil-of-ignorance principles work.³⁷ The veil of ignorance is relevant because it implements a strategy whereby nuisance “assess[es] the decisions made by each neighbor in light of what each neighbor should have understood about the decisions (past, present, and future) of other neighbors (assuming that the other neighbors will make reasonable decisions)”³⁸) That strategy is required by Gerhart’s four starting principles, which all implement a broad, substantive understanding of corrective justice. If corrective justice is merely remedial, however, this train of reasoning never leaves the station.

B. *Corrective Justice and Distributive Justice in Property Scholarship*

The other translation difficulty arises not from multiple usages in tort scholarship but rather from a rival usage familiar in property

34. See Wesley N. Hohfeld, *Some Fundamental Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30–58 (1913).

35. Cf. Henry E. Smith, *Exclusion Verses Governance: Two Strategies for Delineating Property Rights*, 31 J. Legal Stud. S453 (2002).

36. GERHART, *supra* note 3, at 210.

37. See *id.* at 208–10.

38. *Id.* at 192.

scholarship. Many property scholars associate “corrective justice” with Robert Nozick’s justification and Richard Epstein’s early justification for property, and they may resist theories associated with Nozick and Epstein’s work.

Many property scholars place great value in distributive justice, specifically distributive justice understood as “call[ing] on the state to guarantee that property is distributed throughout society so that everyone is supplied with a certain level of material means.”³⁹ The wide admiration and influence of John Rawls’s *A Theory of Justice* confirms as much.⁴⁰

Nozick wrote *Anarchy, State, and Utopia* in large part to respond to and supply a significant theoretical alternative to *A Theory of Justice*.⁴¹ Although Nozick himself did not describe his alternative as a theory of corrective justice, he came close. Nozick developed an “entitlement” theory of justice, by which he meant that people deserve to retain holdings they acquire originally or acquire by transfer from someone else who acquires them originally.⁴² This entitlement theory makes holdings not susceptible to reordering on the basis of context-specific desert criteria of members of a community. That characteristic makes Nozick’s entitlement theory “historical”—in opposition to Rawls’s theory, which makes “patterned” prescriptions of justice.⁴³

Even if Nozick did not rely primarily on corrective justice to ground his entitlement theory, it is understandable why that theory is associated with corrective justice. If one of the state’s main goals is to protect legitimate entitlements, one of the state’s main functions is to oversee “the rectification of injustice in holdings.”⁴⁴ For scholars who prize distributive justice, then, “corrective justice” seems to refer to an understanding of justice according to which existing entitlements are legitimate. Corrective justice also seems to leave the state with little discretion to reorder such entitlements consistent with distributive, patterned, and (usually) need-based principles of justice.

These reactions are fairly illustrated with *State v. Shack* and other migrant worker cases. In *Shack*, a government-funded caseworker

39. SAMUEL FLEISCHACKER, *A SHORT HISTORY OF DISTRIBUTIVE JUSTICE* 4 (Harvard Univ. Press, 2004).

40. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press, Rev. ed., 1971); see also Symposium, *Rawls and the Law*, 72 *FORDHAM L. REV.* 1381 (2004). As proof, consider how Thomas W. Merrill uses (and criticizes) distributive justice in *Wealth and Property*, 38 *UCLA L. REV.* 489 (1990) (book review).

41. See, e.g., NOZICK, *supra* note 9, at 183 (praising *A THEORY OF JUSTICE* as a “powerful, deep, subtle, wide-ranging, systematic work in political and moral philosophy which has not seen it’s like since the writings of John Stuart Mill, if then”).

42. See *id.* at 150–52.

43. See *id.* at 153–64.

44. *Id.* at 152; see also Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 *J. LEGAL STUD.* 49 (1979); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 *J. LEGAL STUD.* 165 (1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151 (1973).

and a Legal Services Corporation attorney wanted to meet a migrant worker housed in a camp on the grounds of the farmer employing him. The farmer refused the caseworker and attorney permission to enter but offered to notify the worker that they wanted to meet him; the caseworker and attorney entered the farmer's land anyway. The New Jersey Supreme Court held that migrant-residents were entitled to invite social-service workers, members of the press, and other visitors of their choosing as long as visitors behaved reasonably.⁴⁵

Gerhart reads *Shack* as enforcing principles of equality, respect, and social obligation.⁴⁶ This interpretation has some support in some passages of *Shack*. When Chief Justice Weintraub says, "Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises," he could be interpreted as making claims about equal freedom and respect characteristic of substantive corrective justice.⁴⁷ I disagree with this justification for *Shack*'s result, for reasons I have set forth elsewhere.⁴⁸ Here, however, I want to focus on *Shack* because it provides one of the clearest examples in core property doctrine of distributive justice in the sense being discussed. Distributive justice in this sense is implemented most often in public law schemes redistributing private property—especially progressive taxation and public-assistance programs. *Shack* gets prominence among property scholars because it provides an unusually clear example in which the same distributive commitments are used to structure property rights from the inside, within property law.⁴⁹

To such scholars, *Shack* seems better justified as an application of distributive justice: "Here we are concerned with a highly disadvantaged segment of our society."⁵⁰ More generally, to scholars who value distributive justice, it may seem confusing or threatening to reintroduce to property corrective justice in any form—because any such project may be a Trojan Horse for Nozickean corrective justice. Hence a second analytical question: To what extent is the result in *Shack* required by corrective justice, and not distributive justice or some other form of justice?

C. *On the Right Relations Between Corrective and Distributive Justice*

These questions tread on a treacherously difficult topic—the relations between corrective justice, distributive justice, and general jus-

45. *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971).

46. GERHART, *supra* note 3, at 170–71.

47. *Shack*, 277 A.2d at 372.

48. Claey's, *supra* note 13, at 939–46.

49. See JOSEPH W. SINGER, *PROPERTY LAW: RULES, POLICIES AND PRACTICES* xi (5th ed., 2010) (quoting from *Shack* for the epigraph).

50. *Id.*

tice. There are ambiguities between these three fields, as one can see just by looking at Aristotle's seminal definition of corrective justice: a "form of justice . . . that sets things straight in transactions. . . . For it makes no difference whether a decent person cheated someone of a low sort, or a low sort of person cheated a decent one. . . . but the law looks only to the difference arising from the harm."⁵¹ Does the form of justice that sets things straight also encompass the substantive principles that determine how things should be laid when they *are* straight, or are these two separate domains of justice?

The same ambiguity is also evident in common sense reasoning and basic legal practice. For a variety of reasons, it makes practical sense for groups and legal systems to defer the work of specifying substantive rights until two parties care enough to force a settlement whether one is wronging the other. *Fontainebleau* sets an important precedent about the scope of the possessory interest in using land, but it does so in a tort suit. *Shack* limits the substantive interest in control and enlarges the substantive interest of a resident-licensee, but it makes both of these declarations in a criminal prosecution. Do the property-specifying parts of these cases sound in corrective justice (or, since *Shack* is a criminal case, maybe retributive justice), or a separate domain of justice?⁵²

These boundary issues get more complicated because the meaning of the term "distributive justice" has evolved over the last several centuries. Aristotle defined distributive justice as "that which is involved in distributions of honor or money, or as many other things as are divisible, among those who share in the political community." As Samuel Fleischacker has helpfully recounted, since the early nineteenth century, distributive justice has gradually developed into a goal of guaranteeing that all citizens have adequate resources for survival and improvement regardless of their life stations. "[T]he ancient principle" of distributive justice "has to do with distribution according to merit," Fleischacker explains, "while the modern principle demands a distribution *independent of merit*."⁵³ These are two possible usages but not the only two. Distributive justice might focus not on the distribution of honor to a few, or the distribution of material resources to all, but on the distribution of *rights*—i.e., general and impersonal spheres of opportunity by which all can work and acquire and use resources to fulfill their own life goals.⁵⁴

51. ARISTOTLE, NICOMACHEAN ETHICS bk. V, chs. 2, 4, at 83, 85–86 (Albert Keith Whitaker ed., Joe Sachs trans., Focus Publishing 2002).

52. See Eric R. Claeys, *On the "Property" and the "Tort" in Trespass*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 122, 124–25 (John Oberdiek ed., Oxford Univ. Press 2014); see also Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

53. FLEISCHACKER, *supra* note 39, at 5.

54. See, e.g., FINNIS, *supra* note 31, at 165–66.

There are at least three ways to resolve these ambiguities. One is to make corrective and distributive justice track the basic examples Aristotle used. In this solution, corrective justice covers both the wrong-rectifying and the substantive-rights-specifying aspects of disputes about personal wrongs, breaches of contract, or disputes about property. By contrast, distributive justice involves situations in which a people or its government makes discretionary awards of honor or honor-like goods to individual citizens.⁵⁵

Another approach is to construe corrective justice narrowly and distributive justice broadly. In this view, corrective justice is limited to its remedial functions. Distributive justice of justice structures the rights of bodily autonomy, contract, and property wronged in each respective case.⁵⁶

The two preceding views assume that corrective and distributive justice exhaust the coverage of general justice.⁵⁷ A third approach rejects this assumption. As in the second view, corrective justice creates wrongs and obligations to repair wrongs; unlike the second view, some subdomain of justice that is neither distributive nor corrective explains why substantive rights of bodily autonomy, contract, liberty to compete, reputation, property, and so forth are structured as they are.⁵⁸

D. *On Corrective and Distributive Justice in Property Law and Social Morality*

In his argument, Professor Gerhart doesn't adequately anticipate or bracket these questions. These criticisms detract significantly from *Property Law and Social Morality*, but some readers would have been spared some confusion if these questions had been anticipated.

In that spirit, I offer two friendly amendments to and clarifications of Gerhart's project. First, *Property Law and Social Morality*'s basic argument stands whether or not one agrees that its interpretive framework is a "corrective justice" framework. Debates about the spheres of corrective, distributive, and general justice are important, but they are analytical, and distinct from the implications Gerhart draws out.

55. See FLEISCHACKER, *supra* note 39, at 13–15, 20–21; see, e.g., Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992).

56. See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 348–54 (1992); W.J. WALUCHOW, PROFESSOR WEINREB ON CORRECTIVE JUSTICE, in *Justice Law and Method in Plato and Aristotle*, (ed. Spiro Panagiotou) 153, 155–56 (1987). Finnis admits this possibility, *Natural Law & Natural Rights*, pp. 169–74, but he assumes that particular legal transactions raise not only distributive issues but also corrective (he would say "commutative" issues). *Id.* at 179–84.

57. See FINNIS, *supra* note 31, at 164–67 (Finnis portrays justice in this fashion).

58. See, e.g., Gardner, *supra* note 32, at 8; Dennis Klimchuk, *On the Autonomy of Corrective Justice*, 23 OXFORD J. LEG. STUD. 49 (2003); Stephen Perry, *On the Relationship between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE, 237 (Jeremy Horder ed., Series No. 4, 2000).

The principles animating Gerhart's project are equality and human agency. Free moral agents deserve equal freedom and opportunities to set and act on their own life goals, and the principles that entitle them to such freedom and agency impose on them responsibilities to respect fellow community members' similar freedom and agency. Although these principles are often associated with substantive corrective justice, they aren't necessarily or logically intertwined with corrective justice. Indeed, much of the corrective justice scholarship makes this clear. For example, in some accounts, corrective justice is portrayed as desirable not in and of itself but as an implication of a more fundamental Kantian theory of equal right.⁵⁹

Normative principles of equality and agency can be attractive and relevant to a theory of property regardless of how the reader pigeonholes them in different taxonomies of justice. Assume that corrective justice and distributive justice are both understood narrowly, in the third possibility outlined above. Even so, in general justice, it matters very much that community members have equal opportunities to acquire and use resources for different reasonable life goals. The substantive policy choices lurking in a case like *Fontainebleau* stay the same; they just migrate from corrective justice to general justice. By contrast, in the second possibility outlined above, the veil of ignorance analysis that Gerhart conducts as a matter of corrective justice instead becomes an application of distributive justice. Justice requires distributions of rights and responsibilities likely to give landowners equal opportunities to use their own land and equal responsibility for the effects of their uses on others. Property law is the forum where these distributive choices are made and implemented, while tort law provides the forum where violations of the distributions are corrected. As long as principles of equal freedom and responsibility are internalized in the process, it's not important to Gerhart's project whether those principles are applied in the course of distributive or corrective reasoning.

Revisions like these do not obviously deal with distributive justice in its modern sense. My second suggestion: *Property Law and Social Morality*'s project makes sense as long as understood within reasonable limits. Even if one believes that a system of property should facilitate equal access to material resources, it does not follow that every institution in a legal system has to guarantee equal access to those resources. Even in a political system in which fair distribution is valuable, individual freedom and social prosperity can both be valuable as well. Some legal and political institutions can focus on securing freedom and prosperity. Moreover, if increasing prosperity is broad-based, it can lessen the need for targeted redistribution.

59. See JULES L. COLEMAN, *RISKS AND WRONGS* 433; see, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 84–144 (Harvard Univ. Press, 1995).

Professor Gerhart focuses on property doctrines—land-use torts, cotenancies, and government police and eminent domain powers—that happen to be particularly fundamental and basic. These doctrines secure and order freedom. Although there are empirical questions, it is at least reasonable to assume that these doctrines take an indirect but at least somewhat-effective first cut at enlarging prosperity and satisfying many individual needs. If these doctrines leave residual inequalities, those inequalities may be covered in other property-related doctrines, or in related fields like tax or public-assistance policy. *Property Law and Social Morality* doesn't need to cover every property doctrine or every distributive problem to succeed within its own limits. Readers merely need to have clarified what those limits are.

V. HOW IMPORTANT IS FLOURISHING TO CORRECTIVE JUSTICE OR RIGHTS?

Let me turn from my friendly amendments to my disagreement. With Gerhart, I certainly agree that equal freedom, and respect for the consequences of one's agency on others, are two important goals of and constraints on a system of private law. But I also doubt that these values give as much determinate guidance to law as *Property Law and Social Morality*.

A. *The Priorities of Equality, Responsibility, Rights—and Flourishing*

Because I have developed these themes elsewhere,⁶⁰ I will restate my preferred approach here in extremely compressed form. Political and legal rights are grounded most solidly in people's interests in pursuing their own flourishing—their happiness understood rationally. Yet, even though happiness is an objective phenomenon, in ordinary social and political life most people are bad judges of others' happinesses. This disjunction is especially pronounced in large modern nation-states. In such states, citizens have few linguistic, cultural, ethnic, religious, or other common ties. Because they have hardly any direct interactions with most fellow citizens, they have no way to know the backgrounds, characters, needs, or genuine interests of fellow citizens.

In such conditions, the most realistic, least controversial, and most humane way to promote flourishing is not to use law to promote flourishing directly but to do so indirectly. Well-ordered political and legal rights can give citizens broad zones of non-interference. Citizens may reasonably be expected to use these rights to pursue at least the low and solid preconditions of their flourishing—survival, health, accommodation, safety, and prosperity—and the most common and uncon-

60. See Claeys, *supra* note 13, at 916–34; Eric R. Claeys, *The Private Society and the Liberal Public Good in John Locke's Thought*, 25 SOC. PHIL. & POL'Y 201 (2008).

troversial forms of flourishing—particularly the goods associated with family, private friendships, and self-governance in small associations.

From those starting premises, the principles Gerhart associates with corrective justice state important, even necessary, constraints on moral rights.⁶¹ Even if citizens need broad spheres of liberty to pursue their own understandings of flourishing, they all participate in a common political enterprise, in which all citizens enjoy a state of “*Equality*, where in all the Power and Jurisdiction is reciprocal, no one having more than another.”⁶² But equality, power, jurisdiction, reciprocity, and other terms have to be understood in reference to the different forms of flourishing community members practice in public and private. As a result, in revealing cases, the legal system has to clarify how equal rights and responsibilities relate to flourishing.

B. *Private Law: Establishing Basic Property Rights*

Professor Gerhart illustrates his approach using doctrines of trespass and nuisance. These are excellent starting doctrines, because they⁶³ supply the first and most basic level of ordering in American private law. Here, too, *Fontainebleau* provides an excellent point of contrast between Professor Gerhart’s and my approaches to basic property torts.

In Gerhart’s opinion, behind the veil of ignorance, most (reasonable) local land owners would prefer freedom to develop and use land actively over freedom to enjoy quiet uses of land enhanced with extra sunlight.⁶⁴ True, to an extent, equality-based concerns help justify using the veil of ignorance; owners must accept a legal rule in which they swallow the bitter with the sweet. Under the access-to-light package, owners get a claim-right against light blockages, but by implication from the logic of equal rights, they owe neighbors correlative duties not to block light to their lots. Under the exclusion package, owners have a liberty to build light-blocking edifices, but they also are subject to reciprocal exposures against the possibility that their neighbors will build structures blocking light to their lots. By itself, equality cannot say which of these two packages is preferable.

Gerhart argues that people are not normally expected to consider the impact of building on others’ light, neighbors can buy extra land, and the access-to-light package is costly to administer.⁶⁵ The claims

61. See JULES L. COLEMAN, *RISKS AND WRONGS*, *supra*, at 351.

62. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, at 269 (Peter Laslett ed., Cambridge Univ. Press 1988) (1960).

63. Along with other property-based tort doctrines. Other relevant doctrines include the rules of strict liability and negligence made applicable to land, and parallel doctrines for chattels (conversion, trespass to chattels, and negligence-related chattel doctrines).

64. GERHART, *supra* note 3, at 209–10.

65. *Id.* at 210.

about normal expectations are empirical but Gerhart offers no citations or empirics. By and large, the argument seems instead to appeal to intuitive reactions about how hypothetically-reasonable onlookers would react behind the veil of ignorance. I am not necessarily averse to intuitive judgments; there is some truth and wisdom in the joke that evidence is “good enough for government work.” But Gerhart’s judgment here, which seems representative of many judgments throughout the book, seems underdetermined. One cannot reason about which package of use-interests is most just without having some sense how and why owners use land. That inquiry turns out to be difficult to settle. Some people like to use land for recreational or aesthetic uses; they would prefer the access-to-light package. Others like to use land for many legitimate but active and utilitarian purposes; they would prefer the exclusion package.

In my (similarly intuitive) judgment, the exclusion package seems more just for two overlapping reasons. First, if one were to catalog all the possible legitimate land uses that owners might want to pursue, intuitively, it seems likely that more of them are facilitated by the exclusion package and restricted by the access-to-light package than the other way around. Second, and separately, the land uses facilitated by exclusionary rights tend to facilitate more basic and solid forms of human flourishing. Some people like enjoying land passively; all people need to occupy and engage with some land actively, to have a residence and carry on their lives. If passive and active uses of land can’t be reconciled with each other, in case of conflict better to err on the side of facilitating the low, solid and active uses.

C. *Private Law: Ordering Property Rights toward Flourishing*

If basic property-tort doctrines supply the first layer of private ordering for property, a second level is provided in specialized doctrines in contract and property. Property law generates default rules for property held in different communal arrangements, and contract law can generate similar defaults when owners make relations with non-owners. In these fields as well, equal right and obligation shape and inform the law—but flourishing seems another and more fundamental influence.

Professor Gerhart spends two chapters on co-tenants, estates, and future interests.⁶⁶ His treatment of one issue of cotenancy law—ouster—provides another fair point of contact. Ordinarily, all cotenants hold concurrent liberties to use and enjoy a commonly-owned premise, and none owes the other any profits from her own particular use. Yet any cotenant has a power to oust the others and establish sole possession, provided that he account for his profits to the others in proportion to their interests in the cotenancy. Gerhart sees ouster

66. *Id.* at 215–46.

as a “difficult issue” because nonpossessing owners are treated unequally. After all, ouster deprives nonpossessing owners “of the income-producing benefits of ownership but [forces them] to retain their share of the burdens.”⁶⁷

According to Professor Gerhart, ouster rules have two justifications. These rules clarify property relations, by making ousted tenants make good faith claims for possession as a precondition for an accounting, and they also free cotenants in possession from needing to consider the interests of other cotenants except when those cotenants make demands for exclusive possession.⁶⁸ But neither justification accounts for why any one cotenant is entitled to oust the others—in violation of equality between the cotenants.

Here, too, property rights and equality both get aligned to secure interests in flourishing. In a flourishing-based natural rights approach, “*Law*, in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest, and prescribes no farther than is for the general Good of those under that Law.”⁶⁹ The pre-ouster and ouster models both respect the equal rights and interests of cotenants—but they vary the legal rights to fit what can reasonably be presumed about the interests on the facts. If all one knows is that several co-owners share a co-tenancy, it makes sense to assume that they would all like equal opportunities to use the premises. That is why ordinary cotenancy rules guarantee formally-equal rights of access, use, and enjoyment.

In some situations, however, one or a few cotenants may be more assertive and entrepreneurial than the others. The law must continue to presume that all of the cotenants continue to have some common interest in remaining in the same association; any cotenant who didn’t have such an interest could partition. But the cotenants might have different individual interests in the community. In my own personal experience, many associations operate on a model whereby a few active and spirited members do most of the work, have most of the control, and get most of the credit, and the rest of the members get the benefits of the association’s activities without doing the work. It’s perfectly reasonable to create a property institution enabling this model for joint ownership of property.

In the ouster model, all of the cotenants have equal general normative interests in the commonly-owned premises, but one or a few have a specific interest in the active use and control of the premises and the rest have specific interests in the passive enjoyment of income or profits. The act of ouster is a rough but clear and symbolic proxy for those different interests, and the exclusion-with-accounting model respects

67. *Id.* at 216–17.

68. *Id.* at 217.

69. LOCKE, *supra* note 62, at 305.

both the retail differences and wholesale equality. As in nuisance law, though, the equal freedom and respect among the cotenants is one of several factors shaping the law. And what equality requires turns on the cotenants' flourishing-based interests in using the premises.

D. *Public Law: Securing a Community of Equal Owners*

The limits of an equality-based approach become most obvious when one compares Professor Gerhart's treatment of the private law of property with his treatment of the corresponding public law. For this discrepancy, the clearest point of contact comes in Gerhart's treatments of trespass *Kelo v. City of New London*. In *Kelo*, the U.S. Supreme Court held that a local development corporation didn't violate federal public use limitations by condemning private lots and assigning them to a commercial developer, not when the corporation had a minimally-plausible basis for believing that the condemnations were part of a broader local plan to increase economic development, growth, and tax revenues.⁷⁰

Ultimately, Gerhart believes that *Kelo* can be justified on the ground that the government may apply public power to remedy likely market failure. Ordinarily, Gerhart assumes, government regulation focuses on upholding the conditions of private ordering. But "[t]he state has the power to replace market forces when, because of market failures, the market cannot successfully coordinate decisions of disparate users."⁷¹ "[W]hen owners are so few that they can raise their prices above competitive levels, the property system is not functioning as anticipated and the state is justified in intervening and re-delegating decision-making authority,"⁷² and Gerhart concludes that these conditions were satisfied in *Kelo*.

This treatment of *Kelo* is hard to reconcile with Gerhart's general understanding of corrective justice, or with his treatment of parallel doctrines in private law. Those other contributions justify the presumption Gerhart applies to *Kelo* as a starting point: "Mrs. Kelo's decision to stay in her home, even as her neighborhood changed, provides no justification, by intervening . . . to replace her as decision maker for the property." Ordinarily, "an owner's decisions [shouldn't be] second-guessed by the state, or even [be] *capable* of being second-guessed by the state."⁷³

Gerhart cites market failure as a basis for departing from this presumption. Gerhart's case for market failure hinges on a combination of empirical judgment and normative assumptions. Gerhart and I probably disagree about the empirical issues, but set those differences

70. *Kelo v. City of New London*, 545 U.S. 469, 482–490 (2005).

71. GERHART, *supra* note 3, at 276.

72. *Id.* at 284.

73. *Id.* at 281.

aside here. Here, what's revealing are the normative assumptions. Any reasonable political theory has to justify some involuntary transactions with property, but these justifications are difficult to make.⁷⁴ I doubt that, by themselves, principles of equal freedom and responsibility for one's actions on others can supply such a justification. I am even more skeptical that such principles can generate any specific prescriptions about whether it is desirable or undesirable for a government to intervene to rectify market failures. Gerhart's position probably hinges on unstated priors that political communities succeed fairly often when they enact legislation aimed at market failures.

A flourishing-and rights-based approach confronts those issues more directly.⁷⁵ Again, two of the main justifications for a natural rights-based approach are: (first) that groups tend to apprehend the genuine interests of individuals less often than those individuals do themselves; and (second) that, in a dispersed society groups often have factious incentives to pursue the collective interests of the group and not the true interests of the individuals affected by group policies. *Kelo* confirmed both points to me when it was in court, and it seems to confirm both points even more strongly now.

Kelo confirms that political processes can fail at least as badly as market processes.⁷⁶ New London officials had planned to assign large tracts of land to a commercial developer called Corcoran Jennison. Later, officials had to decertify the developer because it failed to meet several financing benchmarks. By December 2008, three and a half years after *Kelo* was handed down, builders had started construction on only one building, a museum. While the Fort Trumbull project was tied up in litigation and local political disputes, private developers built office buildings and hotels outside the redevelopment area. That construction eliminated the need for offices and hotels called for in the comprehensive plan. In November 2009, Pfizer shut down its New London plant and removed the anchor for the Fort Trumbull development plan. In the words of investigative journalist Jeff Benedict, "Over \$100 million in taxpayer money has been spent there. And what do you have to show for it? Dirt and weeds."⁷⁷

74. See, e.g., Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

75. See Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877 (2004).

76. This Review relies on journalistic accounts of the Fort Trumbull project at issue in *Kelo*, but my general argument has been developed considerably more extensively in ILYA SOMIN, *THE GRASPING HAND: Kelo v. City of New London and the Limits of Eminent Domain* (forthcoming 2015).

77. Chris Kilmer & Christina Caron, *John Stossel on Eminent Domain Run Amok*, ABC NEWS (Mar. 3, 2009), <http://abcnews.go.com/Politics/Stossel/story?id=69927238&page=1>; see also *Kelo v. City of New London*, 545 U.S. 469 (2005); Kathleen Edgecomb, *Deed Gives NL Building a New Address*, THE DAY (New London, CT) (Jan. 6, 2009, 4:00 AM), <http://www.theday.com/article/20090106/DAYARC/301069968/0/search>; Karin Crompton, *NLDC Resumes Efforts To Move Ahead With Fort*

Separately, *Kelo* also illustrates how political processes can get co-opted by factional groups. Corcoran Jennison received the *Kelo* plaintiffs' properties on a ninety-nine-year lease for a dollar a year. Suzette Kelo and other homeowners were ousted as part of one of many sweeteners (totaling up to \$118 million in financial incentives) for the Pfizer Corporation to build a pharmaceutical plant in New London. When the New London project was approved by the New London Development Corporation, the chair of the corporation was the wife of a high-ranking Pfizer official.⁷⁸ This dispute had class overtones as well. As one former Connecticut state official explained, "[Pfizer officials] were trying to attract people with Ph.D.'s who make \$150,000 to \$200,000 a year to eastern Connecticut . . . and they were not going to tell them they had to drive to work through a blighted community."⁷⁹

In fact, the backlash against *Kelo* confirms Gerhart's understanding of equal freedom and social recognition as much as *Kelo* itself contradicts that understanding. As Gerhart himself stresses, property is recognized not only in law but also in social morality. A major component of that morality is an expectation: "the state ordinarily does not coerce individuals to give up their discrete property rights unless they have done something wrong, such as default on a loan or commit a crime."⁸⁰ *Kelo* has sparked unusual criticism and backlash—precisely because it offends the sorts of social-recognition norms that Gerhart brings to our attention.

VI. CONCLUSION

By suggesting that *Property Law and Social Morality's* theory has limits, however, I don't mean to suggest that the theory is fundamentally flawed. Any worthwhile theory applies in some contexts and not others; this Review means only to show where a theory of equality ceases to supply determinate prescriptions and other moral ap-

Trumbull Development, THE DAY (New London, CT) (Oct. 22, 2008, 4:00 AM), <http://www.theday.com/article/20081022/DAYARC/310229936/0/search>; Elaine Stoll, *Fort Trumbull Developer Asks For More Time, Misses Deadline*, THE DAY (New London, CT) (Nov. 27, 2007, 4:00 AM), <http://www.theday.com/article/20071127/DAYARC/311279954/0/Search>.

78. *Kelo*, 545 U.S. at 476 n.4; Jane Ellen Dee, *Oh Claire*, THE HARTFORD COURANT (Feb. 25, 2001), http://articles.courant.com/2001-02-25/news/0102250811_1_african-aids-kitchen-connecticut-college; Carrie Budoff, *A Battle Against Eminent Domain*, THE HARTFORD COURANT, Jan. 1, 2001, at A1, available at http://articles.courant.com/2001-01-01/news/0101010379_1_suzette-kelo-fort-trumbull-battle-against-eminant-domain; *Kelo v. City of New London*, 843 A.2d 500, 509–10, (Conn. 2004); *Id.* at 538 (Zarella, J., dissenting); Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY (New London, CT), Oct. 16, 2005, at A1, <http://www.theday.com/article/20051016/BIZ04/911119999>; Carrie Budoff, *Gritty Dispute in New London*, THE HARTFORD COURANT (Jan. 1, 2001), http://articles.courant.com/2001-01-01/news/0101010379_1_suzette-kelo-fort-trumbull-battle-against-eminant-domain/2.

79. Mann, *supra* note 78.

80. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1882–83 (2007).

proaches must carry forth. *Property Law and Social Morality* stimulates discussion about rights-based approaches to property, and it does a fine job bringing concerns about equality and corrective justice to property law and theory. We should be grateful to Professor Gerhart for these contributions.