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PETER GERHART AND
CONTEMPORARY PROPERTY THEORY

Dave Fagundes[†]

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INTRODUCTION

Over the course of his decades as a law professor, Peter Gerhart produced a stellar body of work that upended academic trends in a number of ways. In an age when academics burrow into ever-smaller niche areas they claim as specialized fiefdoms, Peter's writing spanned fields as disparate as torts, contracts, and property. While most scholarship emphasizes depth over breadth, Peter went broad, engaging some of the most important and fundamental questions about the law.

These features characterize all of Peter's work but are best reflected in his recent trilogy of monographs that constructs a unified theory of several different areas of law: *Tort Law and Social Morality* (2010), *Property Law and Social Morality* (2014), and *Contract Law and Social Morality* (2021). Toward the end of his career, when many other professors would be enjoying retirement, Peter raised his game and produced perhaps his most memorable work. These three volumes reach across—and call into question the coherence of—major fields of law. They introduce novel ways of thinking about the relationship between the blackletter law of these fields and social mores. And they propound a humane vision of the law that provides an aspirational guidepost for scholars and judges to use in thinking about the development of each of these fields.

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In this short essay honoring Peter's legacy to the legal academy, I seek to make a modest contribution with respect to one of these books.¹ Much warranted praise has been heaped on *Property Law and Social Morality*, including by me.² Here, I make a different move, instead showing how Peter's insights in this volume link into debates in property law more generally, and in particular the tension between scholarship in the tradition of neoclassical economics and its progressive counterpart. Peter's work has more in common with the latter than the former, though it bears a number of distinctive features that promise to enhance the progressive vision of ownership advanced by writers in this school of thought. That Peter's work on property falls cleanly into neither dominant school of thought epitomizes his independence and creativity as a scholar.

This Essay proceeds in three parts. First, I quickly summarize the dyad that characterizes most contemporary property scholarship, one side inflected by law and economics, the other by what has become known as progressive property. Second, I examine how Peter's views expressed in *Property Law and Social Morality* fit into this dyad and show, in particular, how those views contrast with and complement each of them. Finally, I conclude on a personal note, reflecting on my fondness and admiration for Peter as a colleague, mentor, and friend.

I. AN INCREDIBLY BRIEF SKETCH OF CONTEMPORARY PROPERTY THEORY

Volumes have been written on the varieties of contemporary property theory.³ In Part I, I offer a satellite-level overview of two main strains of such theory, which I'll refer to as law and economics ("L&E") and progressive property. This in turn will enable me to situate Peter's work in the context of these theories in Part II.

A. *Law & Economics and Property*

The later-20th century saw the core principles of neoclassical economics pervade legal scholarship to such a degree that the principles of L&E have become a default way for many scholars (and judges and

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1. Namely, PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* (2014).
 2. *See generally* Symposium, *A Review: Peter Gerhart's Property Law and Social Morality*, 2 TEX. A&M J. PROP. L. 187 (2015); Dave Fagundes, *Property, Morality, and Moral Psychology: Comments on Gerhart's Property Law and Social Morality*, 2 TEX. A&M J. PROP. L. 229 (2015).
 3. *See generally, e.g.*, GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *AN INTRODUCTION TO PROPERTY THEORY* (2012).

lawyers) to think about the law and the world.⁴ L&E is a welfarist theory in that it holds that decisions should be made not by reference to rights, but to outcomes.⁵ It is conversant with Bentham's utilitarianism in that it seeks to maximize net social welfare. When considering various decisions, Bentham or an adherent of L&E would agree that the best decision is the one that creates the best on-balance outcome, as measured by some uniform criterion such as "utility."⁶

In terms of property, L&E frames the core challenge as seeking to maximize the social welfare generated by land and chattels—i.e., to manage those resources in the most efficient way possible.⁷ This challenge is best framed by considering Hardin's familiar "tragedy of the commons."⁸ Imagine land that is open for all to use. Assume—as L&E does—that those who seek to use it want to extract the most possible value from it, regardless of the interests of others. Assume further that any one individual's use will exclude another's (i.e., that uses of the resource are "rivalrous"). So framed, the outcome is obvious: people will compete chaotically with one another to use as much of the resource as they can, as quickly as they can, until there's nothing left. The inefficiencies of such a scenario are also obvious: people will extract excessively, the chaos created will be damaging, and the resource will be quickly depleted.

While one could imagine state management as a solution to the tragedy of the commons, L&E proponents spurn such an approach. Government, in their view, is invariably an imperfect predictor of the

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4. People have been observing the influence of L&E for decades. *See generally, e.g.*, Jonathan R. Macey, *The Pervasive Influence of Economic Analysis on Legal Decisionmaking*, 17 HARV. J.L. & PUB. POL'Y 107 (1994).
 5. NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING 33 (2005).
 6. Jonathan Klick & Francesco Parisi, *Wealth, Utility, and the Human Dimension*, 1 N.Y.U. J.L. & LIBERTY 590, 596–97 (2005) (discussing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789)). There's some disagreement as to the appropriate criterion for measuring utility. Bentham himself preferred a view that would embrace an outcome that made most people better off, even if some were made worse off. We now call this the Kaldor-Hicks criterion. *Id.* at 597 (first discussing BENTHAM, *supra*; then discussing Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 549–52 (1939); and then discussing J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939)). A competing, more stringent approach requires that a decision make some people better off, while making none worse-off. This is the Pareto criterion. *Id.* at 596.
 7. Daniel H. Cole, *The Law & Economics Approach to Property*, 3 PROP. L. REV. 212 (2014), *reprinted in* RESEARCHING PROPERTY LAW 106, 107–08 (Susan Bright & Sarah Blandy eds., 2016).
 8. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

optimal allocation of resources.⁹ Far better is to rely on people themselves to allocate property efficiently. After all, private individuals themselves know their own desires better than any agent or proxy, so their decisions will operate as revealed preferences for the best way to organize resources. And a system of private property that grants owners the rights to use, exclude, and transfer enables individuals to reflect these preferences with the state in the background as an enforcer rather than in the foreground as an allocator.¹⁰ If Alice has a pasture and others want to graze their sheep there, Alice can leverage her right to exclude to keep them out, thereby forestalling overexploitation concerns. If Alice then wants to build a house on her pasture, she's free to realize that desire thanks to the right to use. And if it turns out that Alice values her land less than Bo, Bo will be willing to pay an amount Alice finds attractive to acquire the farm himself, allowing Alice to internalize the value of the work she did to improve her land.¹¹

This turbo-sketch leaves much out but does frame three major commitments of L&E for property.

First, this framework centers the concerns, decisions, and interests of individual owners, as opposed to non-owners or the community in general. And L&E imagines these owners to be rational actors who have concern only for their own interests and perfect information about the implications of their decisions with respect to their resources.¹²

Second, L&E is a monist theory. It seeks to evaluate the costs and benefits of all property-related decisions along a single metric. Because it's difficult to find one metric that can capture all the costs and benefits of a given decision, L&E typically defaults to using wealth as a proxy for welfare, hence welfare-maximization often bleeds into wealth-maximization as the lodestar criterion.¹³

Third, L&E tends to favor strong owners' rights. This is not because of a stated normative precommitment in favor of owners, but rather an implication of the belief that private parties are better at achieving

9. Michael J. Trebilcock, *An Introduction to Law and Economics*, 23 MONASH U. L. REV. 123, 132–33 (1997).

10. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

11. The idea that private actors will optimally allocate resources through transactions is typically attributed to Nobelist Ronald Coase as the “Coase theorem,” but this is only half right. Coase argued that such optimal reallocation of resources would happen only absent transaction costs, and the ever presence of those costs suggested that such reallocation was unlikely to happen in every instance. See Robert C. Ellickson, *The Case for Coase and Against “Coaseanism,”* 99 YALE L.J. 611, 612–13 (1989).

12. See Cole, *supra* note 7, at 10.

13. THOMAS J. MICELI, *ECONOMICS OF THE LAW: TORTS, CONTRACTS, PROPERTY, LITIGATION* 4 (1997).

allocative efficiency than the state. When owners' rights are at their zenith, the theory goes, then owners can best exercise the kind of decision-making that reveals their preferences, rather than having the state override their judgment with public-oriented exceptions.¹⁴

B. Progressive Property

L&E's growing influence as a conceptual framework during the later 1900s did not go unchallenged. Many scholars simply wrote in a different vein, propounding ways to think about property that did not embrace the tenets of neoclassical economics.¹⁵ By the early 2000s, though, several of these writers began to assemble their efforts into a project rooted in the shared features of their work. This counterweight to L&E arose largely as a response to the pervasiveness of economic approaches to property and cast itself as "progressive property."¹⁶ As with any academic movement, it belies quick summary, but I summarize a non-exclusive list of three of its core commitments below, each of which I array against its L&E counterpart.

First, while the protagonist of the L&E story is the rational-actor property owner, progressive property takes a wider lens. It acknowledges, as any perspective on property must, the importance of owners, but attends also to property's roles in creating community as well as wealth.¹⁷ While L&E tends to regard property as socially valuable because it confers on owners the prerogative to "exit" (i.e., subtract themselves from public life and the influence of states), progressives emphasize the capacity of property to facilitate "entrance" (i.e., property's capacity to shape community life and bring people together in shared spaces).¹⁸ Progressive property also casts much shade on the rational actor that occupies the central role in the L&E discourse. Progressives point out that evidence suggests that neither property owners nor anyone else actually have perfect information or

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14. See NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM AND BEYOND* 108 (2nd ed. 2006) (noting that "once [property] rights are defined and assigned, the parties are then free to trade the rights, and will do so if it is in their self-interest"); cf. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1, 60–61 (2000) (challenging the typical L&E view that common-law courts create more efficient property rules than legislatures).
15. *E.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1851 (1987).
16. See generally Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 *CORNELL L. REV.* 743 (2009).
17. *Id.* at 743–44.
18. Compare *id.* at 744, with Trebilcock, *supra* note 9, at 132–33.

engage in optimal decision-making and suggest that this in turn diminishes the import of L&E both descriptively and normatively.¹⁹

Second, progressives reject L&E's attempt to reduce all property-related costs and benefits to a single metric. In part, this is because they think the typical metric L&E uses—wealth as a proxy for welfare—fails to capture the variety of implications at play in property decisions and transactions.²⁰ Even more, progressives are skeptical of the idea of monism because they regard the values implicated by property, which include wealth generation but also safety, civic identity, environmental stewardship, and a sense of home, to be incommensurable.²¹ Progressives are thus committed value pluralists, rejecting the single-value criterion on which L&E relies as a counter-productive distortion, and calling instead for conversations about property that explicitly acknowledge and negotiate plural and incommensurable values.²²

Third, while L&E trends in favor of greater owners' rights, progressive property prefers more public-facing limitation on those rights. Consonant with its consideration for the implications of property law for community, not just owner, interests, progressive property places relatively higher value on securing the well-being of that community, even if it comes at the expense of limited property entitlements.²³ Related, progressives emphasize that owners have not only negative rights to promote their own wealth creation, but also affirmative obligations to promote the flourishing of non-owners.²⁴ Progressives are thus skeptical of the unfettered private property rights that L&E celebrates for these reasons, but also because total ownership confers on only some people power over the resources that we all need to live a full life.

19. See, e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 35–43 (1989) (cataloging empirical evidence tending to cast doubt on rational actors' existence); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 823–24, 823 n.5 (2009) (discussing and collecting L&E's critiques).

20. See Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1124–25 (2012) (first citing Peñalver, *supra* note 19, at 823–24 (2009); and then citing ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 187 (2003)).

21. Alexander et al., *supra* note 16, at 743–44.

22. *Id.* at 744.

23. Bray, *supra* note 20, at 1120–21.

24. *Id.* at 1156.

II. PETER GERHART AND CONTEMPORARY PROPERTY THEORY

Peter Gerhart was an admirably independent scholar. Instead of seeking a narrow niche into which his work could fit, he sought instead to craft his own model of a just and humane common law, including property law. For this reason, Peter's *Property and Social Morality* does not spend much time situating his work in the context of other academics; instead, he jumps right in to propound his own vision. In this Part, I explore that vision. I first summarize Peter's approach to property expressed in his monograph on the topic. I then examine how his perspective matches up with the dominant trends of L&E and progressive-property scholarship.

A. *Gerhart's* Property and Social Morality

Peter's project with respect to property, as with torts and contracts, sought to make sense of the domain of property without adopting a particular methodological approach.²⁵ He sought to "reorient the field to understand it as one about how individuals ought to treat one another if they are to form an authentic community."²⁶ His core thesis was that property rights arise when and only when an individual has no responsibilities to be concerned with the well-being of others; when an individual has such responsibilities, that is where limits to property rights are located.²⁷ Peter was thus primarily concerned with investing this notion of social responsibility with content. He framed this content in terms of "inputs" into decision-making processes.²⁸ In his view, then, property law was not a mere act of balancing the interests of owners and non-owners. It was much more, a reflection of the shared values a society holds dear. By assigning to (or denying) an owner the right to extract value from their resources, society expresses and makes real its values about how individuals should treat each other.²⁹

Peter elaborated his theory through four tensions that arise in property law, showing how his view mediated these familiar dilemmas in distinctive ways. First, is there an essential content to property or is it merely an aggregation of different prerogatives granted by the state?³⁰ Here, Peter argued that the answer lies somewhere in between. The

25. GERHART, *supra* note 1, at 4.

26. *Id.* at ix.

27. *See id.* at 5.

28. *See id.* at 7–8.

29. *See id.* at 9 ("We can understand property by the values that serve as inputs into determining the relationship between individuals.").

30. *Compare, e.g.,* 2 WILLIAM BLACKSTONE, COMMENTARIES *2, with Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 252–53 (2007).

content of property rights is not random or subject to legislative whim but can and should morph over time as social values change.³¹ Second, does property come from an individual's claim of right or society's assent to their ownership? Here, Peter's theory rejects the dichotomy, proposing instead that the scope of an owner's claim of right is subject to that claim meeting "socially valued norms of behavior."³² Third, is there any "public interest" separate from the aggregation of individual interests? Here, too, Peter's theory disputes the premise of the question, arguing that how owners behave towards non-owners to whom they have an obligation is valid only to the extent that it reflects the values with which society has invested property law.³³ Any notion of "public interest" would be subsumed in Peter's model by the moral force of property law itself. Finally, do we understand property in terms of what people value or in terms of the social values that property uses to coordinate resource use? Here, Peter's theory regards property as a site where moral values are expressed but insists that the expression of those values is effectuated through the decisions of individual owners.³⁴

Having parsed out the content of Peter's theory of property, the question remains how to operationalize these abstract ideas? Here, Peter posits a central role for law and institutions. "[L]aw," he explains, "mediates between the diverse interests of a heterogeneous community by determining which decisions of individuals have been made in accordance with values that the community endorses."³⁵ The process of imbuing property with social values begins with owners. A unique feature of Peter's theory of property is his notion of the owner as a "constrained decision maker."³⁶ This model confers on owners the authority to act with respect to their property, but not without limit.³⁷ Those limits are found in values expressed by some community

31. See GERHART, *supra* note 1, at 14.

32. *Id.* at 14–15 ("[R]ights of ownership are validated by the community—giving rights their moral force—while social recognition provides an implicit constraint on the owner's scope of decisions.").

33. *Id.* ("An owner has authority to make a wide variety of decisions about a resource, but only if her behavior reflects decisions that take into account, in an appropriate way, the interest and well-being of individuals toward whom the owner has an obligation.").

34. *Id.* at 16 ("[E]ach decision maker must act in a way that appropriately assigns the burdens and benefits of decisions about resource use (the economic view), taking into account the values the community has developed to determine how to assign burdens and benefits (the philosophical view).").

35. *Id.* at 19.

36. GERHART, *supra* note 1, at 46.

37. See *id.* at 47 (noting that, "[f]rom the time humans began collecting in communities," society has put "constraints" on individual owners).

consensus. Social morality thus determines the content of and the constraints on an owner's property rights.³⁸

Familiar institutions then enter the picture as the bodies that police the legitimacy of owners' decisions. Peter invokes a principal/agent model to link owners with community mores.³⁹ Courts and legislators act as agents of the community in assuring that owners act in a sufficiently other-regarding manner. Courts can invalidate owner conduct by limiting the scope of property rights and substituting a better decisionmaker. For example, Peter reads *Hinman v. Pacific Air Transport*⁴⁰ as holding that owners were not good governors of the airspace high over their houses, and that the state could do a better job via agency coordination.⁴¹ Legislatures, too, can determine the content of the constraints on owners' rights. Peter uses takings as an example, as lawmakers invoke the power of eminent domain to shift decision-making authority over a resource from a private owner to the public.⁴²

And what happens if institutions begin to drift from social consensus? Here, Peter makes the interesting suggestion that "threats of violence and social pressure" will remind the sovereign when their law needs to change to accommodate developing community norms.⁴³ By means of this organic process where institutions are necessarily responsive to social change, the shape and content of property rights will remain constantly in "flux."⁴⁴

B. Gerhart v. L&E

At first glance, Peter's vision of property seems profoundly different than those imbued with the influence of neoclassical economics. These views are, probably in most respects, distinct. Peter's view is neither monist nor (necessarily) welfarist. On the contrary, he accepts the inevitability of multiple values determining the content of property law through individual decisions as governed by institutions.⁴⁵ And while Peter disclaims any particular methodological inclination, he asserts as

38. *Id.* at 74 ("[Property] [r]ights come 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.").

39. *Id.* at 50.

40. 84 F.2d 755 (9th Cir. 1936).

41. GERHART, *supra* note 1, at 51.

42. *Id.* at 257.

43. *Id.* at 48. Peter recognizes the costs of making violence against institutions a part of his theory, and tempers this assertion later by suggesting that institutions should be open to incorporating social norms as they change "in order to limit self-help and violence as means of changing shared belief systems." *Id.* at 96.

44. *Id.* at 49.

45. *Id.* at 19.

the “foundational principle” of his theory “the principle of equal freedom,” rather than maximal utility.⁴⁶ Moreover, Peter’s theory is—to an extent nearly absent in L&E—concerned with the other-regarding obligations of owners. While L&E would ask simply whether a property owner’s decision is welfare-maximizing, Peter’s theory focuses instead on whether the decision attends to the concerns of non-owners in a way consonant with social mores.⁴⁷ Finally, and related, while L&E centers the rational-actor individual in its narrative, Peter’s approach invokes the greater community as an object of concern. In fact, one goal of property law in his model is to “form an authentic community.”⁴⁸

While Peter’s take on property largely diverges from L&E, it would be too quick to simply conclude that they are entirely dissimilar. On the contrary, closer observation reveals two important points of significant—though incomplete—consonance between the two. First, consider each theory from the perspective of individualism. L&E regards the owner herself as the primary actor and nearly exclusive object of concern, because honoring her revealed preferences is the best way to maximize the value of property.⁴⁹ In a slightly different register, Peter’s theory, too, centers on the individual. One of his major descriptive insights is to regard the property owner as a constrained decision maker.⁵⁰ In this respect, Peter, like L&E adherents, orients his theory around individual owners, who have presumptively broad power to act until constrained by the state. Similarly, Peter’s approach acknowledges the positive aspects of conferring power on owners (as opposed to progressives, who regard that power with much more skepticism).

The individualism of Peter’s theory is, of course, distinct from L&E’s. For one thing, central to Peter’s view of individual decision-making authority are the constraints on that authority, which L&E backgrounds to a much greater extent.⁵¹ And in giving content to these constraints, Peter invites the state to take a greater role in managing private property rights than adherents of L&E would. Even so, the fact that the individual plays a central role in Peter’s theory, and indeed that the process of determining the content of property law begins with and inevitably runs through owners provides a less obvious point of convergence with L&E’s strong, though distinct, individualism.

Second, and related, there are interesting similarities between Peter and L&E in terms of how the content of property law arises. L&E and

46. *Id.* at 20.

47. *Id.* at 15.

48. *Id.* at ix.

49. *See supra* Part I.

50. *See supra* Part II(A).

51. GERHART, *supra* note 1, at 15.

libertarian theories of law's genesis more generally celebrate the efficiency of allowing law to bubble up from below, allowing behavior to cohere around shared norms until it represents a consensus adopted by courts or legislators.⁵² This model of investing law with content bears striking similarity to Peter's answer to the question of how we should arrive at the shared values that constitute property law. Where some progressives advocate particular values that state actors should impose top-down on owners, Peter argues that, in managing constraints on owners' rights, law should defer to and explicitly adopt only those values that society has first developed.⁵³ Here, Peter often invokes the term "social recognition" to describe values that have enough community consensus behind them that they warrant adoption as governing principles for property law.⁵⁴ In this respect, his view is a close cousin to L&E's premise that a legal system that defers to and prioritizes individuals' revealed preferences will result in optimal outcomes.

This similarity leaves Peter open to a criticism that is often lodged against L&E as well. If we let revealed preferences run free, then what happens if those preferences result in unjust outcomes? With respect to L&E, this concern invokes the "utility monster" critique of Benthamite utilitarianism.⁵⁵ If one owner derives an outsized amount of value from occupying all the land in a given area, allocating all that land to her would be the efficient outcome, even if that leaves everyone else homeless. In terms of Peter's view, a different but related concern arises. If property law should be invested with values that arise as social norms arise and cohere into consensus, what is to say that those values will respect the concerns of non-owners, or of political or social minorities? It seems not only possible but plausible that values determined by general social recognition would tend to underrepresent the interests of those who did not recognize that view. This is especially problematic for a theory like Peter's that aspires toward decency and equal treatment of all individuals.⁵⁶

52. Robert Sugden, *Contractarianism and Norms*, 100 *ETHICS* 768, 769–70 (1990).

53. GERHART, *supra* note 1, at 16 (arguing that the constraints on owners' decision-making authority with respect to resources must "tak[e] into account the values the community has developed to determine how to assign burdens and benefits").

54. *Id.* at 73.

55. Matti Häyry, *Just Better Utilitarianism*, 30 *CAMBRIDGE Q. HEALTHCARE ETHICS* 343, 347 (2020).

56. GERHART, *supra* note 1, at 20 (emphasizing as a core principle of his theory that "each individual is entitled to respect equal to the respect given to every other individual").

C. *Gerhart v. Progressive Property*

Just as one might quickly conclude that Peter's property views were wholly at odds with L&E, so might an unreflective glance suggest that he is simply a fellow traveler with progressive property theorists. And in many respects Peter's work is conversant with the progressives'. Both express concern about the interests of and law's effects on the greater community rather than prioritizing the interest of owners.⁵⁷ Related, both emphasize the importance of values apart from welfare or wealth maximization, invoking notions of dignity and distributive justice that are largely absent in the L&E property literatures.⁵⁸ Peter's emphasis on the other-regarding duties of property owners echoes the work of leading progressive-property scholar Gregory Alexander. Alexander's major contribution to this school of thought is to locate what he calls "social obligation norm[s]" in the body of American property law that obligate owners to act in the interests of non-owners.⁵⁹ By the same token, on Peter's account, the very shape of property law hinges on the extent to which owners act as "ideal decision maker[s]," which in turn is defined as an owner who makes decisions that "appropriately account[] for the well-being of others."⁶⁰

Yet as a closer look revealed unexpected points of consonance between Peter's views and L&E, so does scrutiny reveal surprising points of dissonance between his theory and progressive property. Consider, for example, how each view supplies the values meant to guide property law. In contrast to the welfarist monism of L&E, progressives embrace value pluralism.⁶¹ They reject the notion that any particular value should dominate property, and instead insist on the inclusion of different kinds of values to animate debates about the appropriate scope of ownership.⁶² Peter's view is in one sense copacetic with the progressives, since he does not espouse a single criterion that should determine the shape of property law. Instead, Peter is agnostic about values, preferring to leave their choice to the community whose norms and institutions give rise to that law.

Peter's approach leaves space for a community to invoke a variety of values when supplying its property law with normative content. But

57. See *id.* at 54–55; *supra* Part I(B) (discussing progressive theory).

58. See GERHART, *supra* note 1, at 7–8; *supra* Part I(B).

59. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748 (2009).

60. GERHART, *supra* note 1, at 54.

61. *E.g.*, Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1020, 1035–52 (2011) (discussing value monism and pluralism, and deciding in favor of pluralism); Alexander et al., *supra* note 16, at 743–44.

62. *E.g.*, Alexander, *supra* note 61, at 1020; Alexander et al., *supra* note 16, at 744.

unlike the progressives, Peter's approach does not require that ownership rights be infused with plural values. Since the community may decide which values it uses, it remains possible under his model that it would choose a single criterion, even the welfarist one that progressives spurn. The better way to think about the issue is that while L&E is monist and progressive property is value pluralist, Peter's approach is simply indifferent to this issue, devolving not only the choice of values, but the meta-choice whether to embrace a single value versus plural ones, onto the relevant decision-makers. This again highlights the tension inherent in Peter's aspiration that property law reflects principles like respect and equality, while choosing to effectuate that end by allowing bodies to make that decision that might not share those principles.⁶³

Consider a second point of divergence: the role of value promotion for the state in the view of Peter and the progressives. The latter espouse value pluralism, but in many instances individual exponents of a progressive perspective also advocate particular (non-exclusive) normative criteria they believe should animate property, such as human flourishing⁶⁴ or democracy promotion.⁶⁵ This connotes a top-down vision of values in property, where those values are chosen and then become a framework used by the state for crafting the rights of owners versus those of the community.⁶⁶ For Peter, the state takes a less prominent role. Peter's model situates the owner, not the state, as the primary decision-maker, albeit one subject to constraints. Those constraints are policed by the state, but only if the owner's conduct fails to express sufficient regard for non-owners. And whether the owner has overstepped is itself a question that is a product of social consensus that arises out of shared norms that coalesce into law, rather than ideal principles at which institutions arrive and then use to manage the scope of ownership rights.

For Peter, then, the state invokes values only as necessary to prevent owners from violating community norms about other-oriented conduct. For the progressives, the state takes a more active role in value

63. See *supra* Part II(A).

64. See, e.g., Peñalver, *supra* note 20, at 828; see, e.g., Alexander, *supra* note 59, at 745 (2009).

65. See, e.g., Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1055 (2009).

66. Progressives insist on plural voices in determining that outcome, noting that "plural values implicated by property are incommensurable." Alexander et al., *supra* note 16, at 744. Because those values "cannot be adequately understood or analyzed through a single metric," it is important, in the progressive view, not to assume that any one individual can understand or evaluate all values, or that any one value can capture the human experience. *Id.* ("Reducing such values as health, friendship, human dignity, and environmental integrity to one common currency distorts their intrinsic worth.").

development and promotion, setting the terms—inspired by plural values—institutions use to manage the scope of property rights. Each of these approaches has its virtues and drawbacks. One possible push-back to Peter’s view is that allowing norms to bubble up from below and become law is that this process can be both gradualist and messy, at times even violent when there is significant social dissensus about the content of norms. When the state can simply determine the content of values, it can act more swiftly and without having to wait to observe social consensus develop. But the downside of this approach is that it risks the state adopting values that are at odds with social consensus, especially when the primary institutional actor responsible for these acts are courts that need not respond to democratic processes. And as Peter warns, when the values expressed by institutions diverge from social norms, that too can risk conflict, as people feel alienated from the values imposed on them by those institutions.⁶⁷

A final point of divergence between Peter’s views and progressive property is a place where those views diverge from L&E as well. Peter regarded both L&E and progressive property as efforts to balance the interests of owners and non-owners.⁶⁸ This oppositional model of “clashing interests, clashing rights, or clashing values,” in his view, could give rise to theories of owners’ or non-owners’ rights but not to the single, elegant theory of property that Peter sought to develop.⁶⁹ Moreover, conceiving property theory as the effort to reconcile competing interests would invariably run afoul of the incommensurability of the different values at stake and the impossibility of defining the contours of the different entitlements at stake.⁷⁰ He aspired, instead, to create a theory that would account at once for property rights and their limitations, rather than predominantly for one or the other, thereby avoiding the need to engage in the balancing that, in his view, hamstrung both L&E and progressive property.

CONCLUSION

Peter Gerhart’s *Property and Social Morality* took a strong position about the role of values, especially other-oriented values, in American property law, and developed a distinctive model for how institutions should reflect those values doctrinally. Ever the fiercely independent thinker, Peter did not pause long to situate his theory in the context of property scholarship generally, preferring instead to use his time

67. GERHART, *supra* note 1, at 96 (arguing that it makes sense to “institutionalize norm development through governance in order to limit self-help and violence as a means of changing shared belief systems.”).

68. *See id.* at 9.

69. *Id.* at 10.

70. *See id.* at 11.

propounding his own ideas. Hence, the ambition of this short essay has been to supply some sense of how Peter's work does fit in with the major currents of U.S. property scholarship. Space does not permit a full analysis of this issue, but this brief sketch revealed that while Peter's theory lies closer to the progressive property than the L&E end of the spectrum, his views bear notable divergences with the latter and surprising convergences with the former. Peter's work thus does not fit comfortably with the mainstream of property theory, in the best possible way. It diverges from both dominant views, and in so doing challenges each of them, and us, to think critically and constructively about what property should be.

That Peter's views on property are as unorthodox as they are original and provocative is unsurprising. All of these encomiums and more fit with his entire body of work, which extends far beyond *Property and Social Morality*, his work with which I am most familiar. That familiarity, and my meeting Peter, grew out of one of the fortunate bits of serendipity that often occur in academia. In 2014, the *Texas A&M Journal of Real Property Law* was hosting a panel on Peter's recently released monograph. A panelist had dropped out, and I was selected as a late replacement, presumably because at the time I was writing about the intersection of moral psychology and intangible property. The event supplied an invaluable chance to explore how moral psychology reflected on real property generally, and to explore Peter's work in particular.

It also gave me a chance to meet Peter and learn about his work. All the qualities that distinguished Peter's scholarship and his presence as a leading light in the academy were on display during the panel, particularly in his responses to the various contributions on and critiques about his work. The panelists—self included—generally admired *Property and Social Morality* but raised some tough questions about it as well. At the end of the day, Peter rose to respond to his critics. Rather than seeming defensive or dismissive of our various perspectives, Peter seemed delighted. He clearly relished the opportunity to have a variety of scholars engage with his work and regarded the critiques as a chance to deepen and strengthen his theory. He pushed back as necessary when he felt that our objections were not on point, but on the whole operated as a model that I, as a then-still-young scholar, found invaluable for engaging with critics.

Happily, my professional interactions with Peter continued after the Texas A&M panel. He invited me to participate in another panel he formed at the annual meeting of the Association of Law, Property & Society (ALPS) the next year. He was also an influential supporter soon after, when I was a candidate for a lateral position at the University of Houston Law Center. I most recently saw Peter virtually when I presented a paper on copyright and administrative law at a faculty workshop at Case Western Reserve University School of Law just last November. These topics were far afield from Peter's private-

law wheelhouse, but all his best qualities were on display nonetheless. He had read the paper and was able to engage with it, equal parts challenging and helpful, all the while joking about his shaky broadband connection.

Peter's passing this February came as a shock to me, as it did to so many others. And while his loss is an incalculable one to the legal academy, in the months since, I've sought to remain somewhat upbeat by thinking not about what we've lost but what Peter gave us. His three recent books alone constitute a major rethinking of core common-law topics, providing rich fodder for legal scholars for decades to come. There's no easy cure for the sadness occasioned by Peter's absence, but there is so much to celebrate in the scholarship he created and the legacy he left for all of us.