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P.T. Babie

Claire Williams

Jessica Viven-Wilksch

James Gilchrist Stewart

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Claire Williams[*], *P. T. Babie*[**], *Jessica Viven-Wilksch*[***], *and James Gilchrist Stewart*[****]

ABSTRACT

This review essay offers a constructive critique of Peter M. Gerhart's Contract Law and Social Morality ('CLSM'); it examines, in a very preliminary way, whether humans—parties to contractual negotiation—ever behave in other-regarding, or altruistic, ways. The essay does this through three explorations or investigations. The first considers other-regarding behavior, or altruism, from a scientific perspective: is it possible that humans ever act out of concern for others? Second, it considers CLSM using ideas of altruism found in an eclectically selective use of philosophy. Third, it investigates the concept of the other-regarding person in relation to contract law itself which, of course, is Gerhart's focus in CLSM. The three explorations address whether humans are ever truly altruistic, or other-regarding, when the aim of liberal life—and so, presumably, of contract—is to satisfy one's own life-projects (goals and objectives). Having considered other-regarding behavior in these three ways, we conclude, tentatively, that Gerhart's theory accurately describes the real behavior of human actors who negotiate and then conclude a contract.

[*] Doctoral Candidate in Law, Adelaide Law School, The University of Adelaide, Australia.

[**] Bonython Chair in Law and Professor of Law, Adelaide Law School, The University of Adelaide, Australia.

[***] Lecturer in Law, Adelaide Law School, The University of Adelaide, Australia.

[****] Senior Lecturer in Law, RMIT University Graduate School of Business and Law, Australia.

Give as much as you take, all shall be well.[1]

At this stage in history we should neither be impressed by man's total rationality nor his total irrationality.[2]

[1] RICHARD TAYLOR, TE IKA A MAUI, OR, NEW ZEALAND AND ITS INHABITANTS 130, proverb 42 (1855).

[2] J.C. SMITH & DAVID N. WEISSTUB, THE WESTERN IDEA OF LAW xi (1983).

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I. INTRODUCTION

A. Law and Morality

Rights discourse tends to focus on those powers conferred upon and held by the individual. Indeed, liberal theory assumes the liberal individual, imbued with freedom and autonomy, as axiomatic. More than that, it is the very raison d'être of the liberal democratic state to protect, with rights, the freedom and autonomy of the individual. It can be hard to accept, for those steeped in rights-based dogma, that rights have limits; indeed, not only that there might be limits, but that those limits might restrain the exercise of rights in a way that protects the wider community interest or public good against the unbridled whim of the liberal individual. In a word, rights come with obligations. That proposition surprises many. American diplomat and political commentator Richard Haas, however, has recently written about just that fact: that as citizens, we have commitments to others—obligations—which we assume involuntarily as part of our public relationships.[3] Those obligations are mediated by public law, largely the Constitution, but also to some extent through administrative law.

But well before Richard Haas wrote about the obligations we assume as part of our public legal life, Peter Gerhart had already revealed that same truth in relation to the obligations we voluntarily assume in our legal relations with others as part of the private law—in tort, property, and contract. Gerhart sought to understand the extent to which obligations form or ought to form part of our private legal relationships. The notion that creating private rights may concomitantly create obligations—that the private law may have an inherent morality—may cause greater surprise than that caused by revealing the same truth about public law.

Yet, in many ways, recognizing the relationship between morality and law presents nothing new to the humanities. As a sociological-anthropological matter, morality, at least as it is expressed through dominant religious traditions known to humankind, may very well be inextricably linked to the development and ongoing existence of law in most societies throughout history.[4] Legal theory, too, grapples with this relationship. Lon Fuller posited an internal morality of law,[5] a stance that made him one of the two protagonists, along with HLA Hart, in what has

[3] *See* RICHARD HAAS, THE BILL OF OBLIGATIONS: THE TEN HABITS OF GOOD CITIZENS (2023).

[4] *See* FERNANDA PIRIE, THE RULE OF LAWS: A 4,000-YEAR QUEST TO ORDER THE WORLD (2021).

[5] LON L. FULLER, THE MORALITY OF LAW (rev. ed., 1964).

since become known as the "Hart-Fuller Debate."[6] Most with even passing knowledge of that monumental dialogue of mid-20th century legal philosophy assume that Hart—the paradigmatic legal positivist—defends the complete absence of morality as a necessary precondition for the existence of law. That position has attained an immovability that Hart appeared to encourage, having famously written in the magisterial *The Concept of Law* that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so"[7] (the "no necessary connection" thesis (NNC) said to be the foundation of legal positivism).[8]

Yet, dig deeper into Hart's theory and one finds support for the proposition that at least part of law's purpose may "overlap" with "things like custom, religion, and morality"—"[l]aw and morality attend to similar tasks; they do so for related reasons; and they use similar techniques."[9] Today, few see morality as entirely irrelevant to what law is and what it seeks to achieve. Ronald Dworkin's *Law's Empire* represents the most significant attempt to counter the hard legal positivism of NNC ascribed to Hart, in which the former claims that in the act of interpreting law, judges necessarily advert to evaluative judgements about what the law is.[10] In other words, judges rely on moral considerations when making law. More recently, John Gardner (perhaps the most significant legal theorist of the early 21st century)[11] writes that NNC "is absurd and no legal philosopher of note has ever endorsed it as it stands."[12] Gardner goes on:

> After all, there is a necessary connection between law and morality if law and morality are necessarily *alike* in any way. And of course they are. If nothing else, they are necessarily alike in both necessarily comprising some valid norms. But there are many other necessary connections between law and morality on top of this rather insubstantial one, and legal positivists have often taken great pains to assert them. Hobbes, Bentham, Austin, Kelsen, Hart, Raz, and Coleman all rely on at least

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[6] This debate is captured in H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 607 (1958) and Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); *see also* THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY (Peter Cane ed. 2010).

[7] H. L. A. HART, THE CONCEPT OF LAW 185–86 (3d ed. 2012).

[8] JOHN GARDNER, LAW AS A LEAP OF FAITH 48–51 (2012).

[9] Leslie Green, *Introduction*, *in* HART, *supra* note 7, at xxxv-xxxvi.

[10] RONALD DWORKIN, LAW'S EMPIRE (1985); *see also* ANDREI MARMOR, PHILOSOPHY OF LAW 84–108 (2011).

[11] *See* GARDNER, *supra* note 8; JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW (2018); JOHN GARDNER, TORTS AND OTHER WRONGS (2019).

[12] GARDNER, *supra* note 8, at 48.

> some more substantial necessary connections between law and morality in explaining various aspects of the nature of law (although they do not all rely on the same ones).[13]

Still, if Gardner is right—that even those most closely associated with legal positivism see law as being in some way related to or dependent upon morality—why is it that NNC persists? Gardner explains, in short, that the myth arises from Hart's early attempts to formulate and defend legal positivism.[14] But, Gardner argues, when formulating the legal positivist position, there is no need to deny the morality of law; morality may go to the success or failure of a law, but that has nothing whatever to do with the "truth or the importance of [legal positivism]."[15] Alternatively, as Lewis D. Sargentich suggests, perhaps it is only when one combines Hart's formality in legal positivism with the internal morality of law found in Weber or Dworkin that one has a complete, and finite, picture of law.[16]

It seems safe to conclude, then, that morality and law share a connection of some sort. Still, few have attempted to put theory into practice to show how law may, in its invocation and practical operation, actively pursue and sometimes achieve moral outcomes. Gardner offers one example of this, arguing that morality matters in private law—or at least contract and tort[17]—because "what [it]…would have us do is best understood by reflecting on what we should be doing *quite apart* from private law, which obviously entails reflection on the reason why we should be doing it."[18] Put another way, the reason why we should be doing anything may not always have its origins in the positive law; instead, it may frequently have its operation in some form of normative morality. Few, though, attempt a grand theory of the private law. Indeed, for at least 100 years, few in the common law tradition even recognize the concept of the private law, thinking instead in discrete doctrinal categories—contract, tort, property—rather than, in the way of the civilians, the omnibus private law.[19] And most in the common law tradition learn the law according to

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[13] *Id.* (emphasis in the original).

[14] *Id.* at 48–49.

[15] *Id.* at 52–53.

[16] LEWIS D. SARGENTICH, LIBERAL LEGALITY: A UNIFIED THEORY OF OUR LAW 114–16 (2018).

[17] *See* GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW, *supra* note 11, at 14–15 (arguing that property is but "a long footnote to the law of torts[;] . . . provid[ing] some of the detailed rules by which things that people do may come to qualify as trespasses, conversions, and detinues"); GARDNER, TORTS AND OTHER WRONGS, *supra* note 11.

[18] GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW, *supra* note 11, at 8 (emphasis added).

[19] *Id.* at 14–15.

doctrinal categories, often missing the deep interconnectedness of the common law in the way that Blackstone first presented it.[20] That is, until Peter Gerhart.

B. Gerhart's Private Law Project

1. Private Law and Social Morality

Peter Gerhart's seminal private law project[21] seeks to break down the walls of division that have been built within the common law, recasting private law through a conception of social morality,[22] at the heart of which lies a "focus[] on the circumstances that require one individual to take into account the well-being of other individuals and that, because of that obligation, give the other a legal claim against the individual."[23] Gerhart sets out the social morality of private law in a trilogy of books published over an eleven year span, beginning with *Tort Law and Social Morality* ("TLSM") in 2010,[24] followed by *Property Law and Social Morality* ("PLSM") in 2014,[25] and completed with *Contract Law and Social Morality* ("CLSM"), published posthumously after Gerhart's untimely passing in 2021.[26]

Gerhart advances a theory of social morality which may be simply stated: the law, in each of the three cognate areas that make up private law, promotes or encourages other-regarding behavior in a values-balancing way (the values are multifaceted, but typically understood by the shorthand "autonomy"[27]).[28] In fact, for Gerhart, private law prioritises such other-regarding, values-balancing behavior over self-interested conduct, and as such, each individual must "evaluate his or her own behaviors in light of the interests of others and to make decisions that

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[20] The University of Chicago Press edition of Blackstone has long been considered the authoritative edition: WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 4 (2002 [Facsimile of the First Edition, 1765–1769]). Recently, though, a new edition published by Oxford University Press has joined the Chicago edition: THE OXFORD EDITION OF BLACKSTONE'S: COMMENTARIES ON THE LAWS OF ENGLAND, 4 (Wilfrid Prest ed. 2016).

[21] Gerhart's project is already the subject of an important body of scholarly literature, to which we hope to contribute with this essay. *See Symposium Edition—A Review: Peter Gerhart's Property Law and Social Morality*, 2 TEX. A&M J. REAL PROP. L. (2015); 72 CASE W. RES. L. REV. (2021) (tributes and articles).

[22] PETER M. GERHART, CONTRACT LAW AND SOCIAL MORALITY 3 nn.5, 9 (2021) [hereinafter GERHART, CLSM].

[23] PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY 5 (2014).

[24] PETER M. GERHART, TORT LAW AND SOCIAL MORALITY (2010).

[25] GERHART, PROPERTY LAW AND SOCIAL MORALITY, *supra* note 23.

[26] GERHART, CLSM, *supra* note 22.

[27] *Id.* at 67–69.

[28] *Id.* at 9 nn.15–16, nn.75–84.

appropriately integrate those interests as a part of the actor's self-interest."[29] In this way, self-interest becomes both self- and other-regarding. While this may strike us as unusual, given the assumed focus of liberal law on the primacy of the individual, Gerhart finds a social cohesion that serves as the goal of private law, which justifies the state in stepping in to order the affairs of individuals.[30] In this way, Gerhart's project is not mere description, but a normative claim, too; not merely what the law is, but what it ought to be. And it begins with other-regarding behavior, from which we find the social morality which, Gerhart claims, binds the private law together.

Private law's coalescence around other-regarding behavior represents society's attempt to address and respond to a coordination or cooperation problem[31] inherent in conflicts arising between divergent claims to "freedom of action, bodily security, property, and emotional well-being."[32] Individual actors hold differing positions as part of choosing a life project, which one in turn seeks to achieve through satisfying one's preferences. Each project and its preferences can, and very often do, conflict with the projects and preferences of others.[33] How can a society reconcile these seemingly irreconcilable claims? For Gerhart, private law provides the answer, with each of the discrete cognate areas of law operating to find a person (a defendant) to be responsible for and, in acting, to consider the well-being of another (a plaintiff).[34] Other-regarding behavior, then, is the core goal around which the entirety of private law revolves.[35]

What may seem paradoxical, however, is the fact that other-regarding behavior is a matter of personal well-being: "Life is dangerous and uncertain, nasty and brutish. People face risks—of nature, of our own making, and of others' making."[36] But our well-being is only partially in our own control. For a great part of it, we rely upon others, and we do that as members of a community—"[w]e act as if we were interconnected with others and we count on others. We hope that others will look out for our well-being, just as we look out for the well-being of others. Those on

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[29] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 7; GERHART, PROPERTY LAW AND SOCIAL MORALITY, *supra* note 23, at 109–28.

[30] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 22.

[31] *Id.* at 3–6; GERHART, PROPERTY LAW AND SOCIAL MORALITY, *supra* note 23, at 3–7; GERHART, CLSM, *supra* note 22, at 53–66.

[32] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 3.

[33] *Id.* at 7.

[34] *Id.* at 5.

[35] *Id.*

[36] *Id.* at 5–6.

whom we can count become our community."[37] And our community involves expectations about how one person will look out for others.[38]

Gerhart's theory of responsibility concerns "an implicit social contract formed in a social community that determines when one person will think about his own well-being in the light of the well-being of others."[39] Every "actor exists both as an individual decision-making unit and as part of a community of individuals who are decision-making units, and an actor must make choices that meet the actor's personal projects and preferences in the context of a community of projects and preferences."[40] Self-interested but other-regarding behavior therefore builds community;[41] it creates a glue that holds the community together. Gerhart calls this binding effect of self-interest, which is also other-directed, "social cohesion."[42]

Social cohesion not only resolves the coordination problem through its balance of self-interest with other-regarding behavior, but it also becomes the institutional goal of law. Three well-known concepts allow law to deploy social cohesion: efficiency, fairness, and stability.[43] Efficiency involves maximizing the ability of each person to achieve projects, which may sometimes give way to the life projects of others when both cannot be achieved. Fairness ensures efficiency without resentment—rights and obligations that members of a society see, at least broadly, as fair. And stability allows for the adjustment of rights and obligations in order to meet changing circumstances while continuing to ensure that efficiency and fairness are met.[44]

As the institutional goal of law, social cohesion forms "part of the socially constructed set of incentives and constraints (some defined by the individual and some defined by the community) that allow human beings to coordinate their projects and preferences in a world of scarce resources by reducing frictions and enhancing shared values."[45] Social cohesion results because "people make decisions by factoring the well-being of others into how they determine their own well-being in a way that society regards as optimum because it enhances overall efficiency, fairness, and

[37] *Id.* at 6.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 7–8.
[41] *Id.* at 9.
[42] *Id.* at 6, 10.
[43] *Id.* at 15–16.
[44] *Id.* at 16.
[45] *Id.*

stability."[46] In tones redolent of Bentham, "social cohesion relies on other-regarding behavior and disintegrates in its absence."[47]

Social cohesion, then, represents the law's balance of self-interested and other-regarding conduct, and while the branches of private law may be "differentiated by the source of the obligations to others, [they are] not [distinguished] by the scope of the obligations or the method of reasoning that determines the scope."[48] In deciding cases, a legal system's judges take into account social cohesion, where "the goals of the law and the values of the community are aligned, diverging only when judges think that the community as a whole is not sufficiently other-regarding."[49]

In the tort context, for instance, "appropriate other-regarding behavior is the central characteristic of the reasonable person, for reasonable decision-making means giving appropriate regard to the well-being of others when making decisions."[50] The obligation to others arises in taking a risk or standing in relationship to some other(s) that results in the actor taking responsibility for risks created.[51] People are said to be reasonable when they "make decisions using a certain mental apparatus and with a certain mental disposition" that takes account of both others and their own interests.[52] In contract, a promise constitutes the source of the obligation. What an owner owes others in property is nonetheless a product of the responsibility of the owner for the well-being of others assumed when the owner makes decisions about resources subject to the decision-making power that comes with holding property.[53] The source of the property obligation, in other words, flows from the concept of ownership.[54] And both tort and contract recognize that obligations arise through the choices people make, arrived at by values-balancing, and other-regarding decision-making, with the process of reasoning labeled "reasonable";[55] one encounters this process at work in tort's "reasonable person" standard, or in the context of bargaining to produce a contract.[56]

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[46] *Id.* at 17; GERHART, PROPERTY LAW AND SOCIAL MORALITY, *supra* note 23, at 6.

[47] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 17.

[48] GERHART, CLSM, *supra* note 22, at 9 n.16.

[49] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 17; GERHART, CLSM, *supra* note 22, at 9–14.

[50] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 10, 16–18.

[51] GERHART, CLSM, *supra* note 22, at 9 n.16.

[52] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 16–17.

[53] GERHART, PROPERTY LAW AND SOCIAL MORALITY, *supra* note 23, at 6.

[54] GERHART, CLSM, *supra* note 22, at 9 n.16.

[55] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 17.

[56] *Id.* at 24–58; GERHART, CLSM, *supra* note 22, at 75, 86.

In short, people pursue private projects through personal preferences, and in so doing, absorb burdens—in conduct, bargaining, and use of resources—that benefit not only oneself, but others, too.[57] In every case:

> the existence and scope of any obligation is determined . . . by the obligation to reason in the kind of values-balancing way . . . which requires each person in a relationship to account . . . for the well-being of the person who would otherwise bear an avoidable loss. This principle applies to issues of formation (the existence of a duty), performance (the scope of a duty), and remedy (the losses that could have been, and should have been, avoided).[58]

In "identifying and enforcing appropriate other-regarding behavior"[59] the law therefore contains a significant moral dimension, which Gerhart calls the social morality of interpersonal conduct, the "what we owe each other"[60] that binds the community together.[61] It involves moral decision-making on the part of actors that finds its source in the Rawlsian original position and the veil of ignorance as well as the Kantian categorical imperative.[62] As such, it blends consequentialist and deontic thought;[63] Gerhart argues that the social morality of law "integrates the deontic duty to think in the appropriate other-regarding way with an appreciation of which consequences are appropriate to consider."[64] "Reasoning morally about consequences is not an oxymoron because the method of moral reasoning that satisfies the requirements of moral thought (the deontic and universal) is separate from its contextual implementation (which takes consequences into account in a moral way)."[65] In this way, social cohesion—seen as a process of moral reasoning engaged in by individual liberal actors, and endorsed and applied by the law through its judges (deciding cases)—aims also to correct imbalances between the individual and the other, and to deter those modes of decision-making that led to the

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[57] GERHART, CLSM, *supra* note 22, at 9.

[58] *Id.* at 9 n.16.

[59] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 12.

[60] GERHART, CLSM, *supra* note 22, at 9 n.15; GERHART, PROPERTY LAW AND SOCIAL MORALITY, *supra* note 23, at 5.

[61] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 12.

[62] Rawls's original position posits the adoption of a fair and impartial point of view from which fundamental principles of justice can be reasoned. Kant's categorical imperative constitutes a way of evaluating motivations for action.

[63] *Id.* at 61–101; GERHART, CLSM, *supra* note 22, at 75–84; GERHART, PROPERTY LAW AND SOCIAL MORALITY, *supra* note 23, at 129–57.

[64] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 17.

[65] GERHART, CLSM, *supra* note 22, at 14.

imbalance.[66] Diagram 1 illustrates the role played by a process of value-based reasoning that links the context within which the parties interact or negotiate and the place of morals and law in the conclusion and enforcement of the resulting legal outcome, be it in a tortious obligation, binding contract, or recognized property relationship.

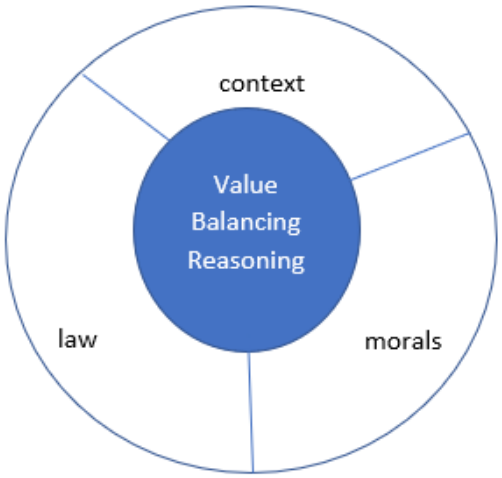

Diagram 1. Gerhart's Theory of Private Law

The novelty, and significance, of Gerhart's theory of private law as one that seeks values-balancing, other-regarding behavior lies in breaking down the doctrinal boundaries that have developed in common law. Gerhart reveals, refreshingly, that rather than looking for bargained-for obligations—in contract—or unbargained for obligations—in tort or in property—what we ought to look for, and what in fact binds the three together, is a form of values-balancing reasoning about the obligations one assumes or bears toward others.[67] While not denying that law is shaped by disputes and conflict, Gerhart considers what happens when relationships do not break down, what Gardner said we do *quite apart* from law.[68] In the realm of contract, this involves looking at the good will of the parties to see the contract performed, and when it is not, looking for what the parties would have done had it been. This, for Gerhart, depends upon values-balancing and other-regarding—in a word, reasonable—decision-making.[69] Some may see this as optimistic, others as idyllic, and still others as naïve. Gerhart saw it as what people do. The law simply follows.

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[66] GERHART, TORT LAW AND SOCIAL MORALITY, *supra* note 24, at 17.
[67] GERHART, CLSM, *supra* note 22, at 14.
[68] GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW, *supra* note 11, at 8.
[69] GERHART, CLSM, *supra* note 22, at 9.

2. Contract Law and Social Morality

CLSM applies Gerhart's theory of private law to contract law, seeking to demonstrate the substructure of law as it is found in contractual practice.[70] At its core, CLSM analyses those factors that lead to a successful contractual relationship or, put another way, it explores the nature of the reasoning that leads parties to act and courts to decide in a particular manner.[71] As we have already seen, Gerhart seeks not to restructure contract law, but rather, to provide a supplemental approach that highlights what is typically left unsaid in a contractual relationship. As with Gerhart's theory of private law as a whole—developed in TRSM and PLSM—CLSM draws upon quasi-legal approaches, thus supplementing the first two books to form a trilogy covering the entirety of the private law. Although others utilize similar approaches, Gerhart's focus underpins his project as opposed merely to informing or playing a minor role in a larger narrative.[72] The result is a profound transformation of the way in which we have understood private law for at least the last century.

In CLSM, Gerhart breaks the analysis of contract into four parts. The first, entitled "Grounds for a Supplemental Approach," provides an overview of doctrine and law with the objective of highlighting existing gaps and limits.[73] For Gerhart, a contract is a combination of self-directed goals, relationality, and contextuality.[74] Instead of focusing on promises and obligations, Gerhart argues that the focus ought to be law's reasoning substructure: "to break down doctrinal boundaries that form the law's structure."[75] Gerhart highlights the importance of the relationality of a contractual relationship, the limits of the contractual agreement and its meaning, the commonality of values-based reasoning between morality and law, and the need for a successful relationship to maximize co-operation.[76] In this, Gerhart examines "why the limitations of reasoning from authority give rise to the need for a form of moral reasoning that can successfully balance the values that determine the scope and content of promissory obligations."[77]

The second part of CLSM, "Values-Balancing Legal Reasoning," identifies how such reasoning can fill the gaps exposed in the first part of

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[70] *Id.* at 14.

[71] *Id.* at 9–10.

[72] *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 14–17 (Oxford Univ. Press, 2d ed. 2015).

[73] GERHART, CLSM, *supra* note 22, at 17.

[74] *Id.* at 26–27.

[75] *Id.* at 14.

[76] *Id.* at 19, 28, 65, 95.

[77] *Id.* at 65.

the analysis.[78] For Gerhart, such reasoning "helpfully supplements, and illuminates contract theory and doctrine,"[79] and guides the parties' decisions between two sets of possible behaviors and the values underpinning their choice.[80] It is also grounded in other-regarding perspectives "that affirm[] that it is within rational self-interest to be interested in the well-being of others."[81] After determining the foundations of his approach and the scope of obligations, Gerhart elaborates on the sources of the legal obligation itself, arguing that "obligations are implied by the decisions a person has made and are therefore self-imposed in the sense that obligations flow from a person's will."[82]

The third part of Gerhart's analysis, "Applications", outlines the difference between law on the ground and law on the books, further exemplifying that successful relationships are ultimately supported by values-based reasoning.[83] "[R]elationships that are characterized by fidelity to the relationship, adjustment, and accommodation"[84] are most likely to reach the outcome specified in the contract and will not lead to a dispute presented before the courts. This is because "when private parties settle their relational disputes they resort to a method of reasoning about their own well-being in the context of the well-being of their counterparty [t]hat allows the parties to be faithful to the relationality of their collaboration."[85]

The final step, in "Applications," examines the life of a contract, from formation to completion, and highlights possible determination of disputes by the courts.[86] This illustrates the ways in which value-balancing reasoning is already at play, albeit often below the surface of the relationship. Common to the different stages of the life of a contract is the way in which consideration of the well-being of the other party impacts the enforcement of an obligation,[87] as well as both the implication and interpretation of a term.[88] Here, Gerhart demonstrates that particular concepts, including consumer contracts and standard terms, the allocation of risks, and remedies allow "courts to freely invalidate seller-supplied

[78] *Id.*
[79] *Id.* at 105.
[80] *Id.* at 74.
[81] *Id.* at 83.
[82] *Id.* at 92.
[83] *Id.* at 105.
[84] *Id.* at 102.
[85] *Id.* at 105.
[86] *Id.* at 105–06.
[87] *Id.* at 121.
[88] *Id.* at 131, 156.

terms that do not adequately account for the buyer's wellbeing,"[89] and how those concepts thereby allow parties to "adjust their obligations in ways that reflect the allocation of risks in the exchange in the fact of changed circumstances."[90] This in turn aids the courts in determining an appropriate remedy through the consideration of "the party's private projects, allocation of risks and understanding of each other's private projects."[91]

Never losing sight of the individual interests at play in contract law, Gerhart builds the values-balancing approach into the analysis: maximization of individual gain is balanced against obligations owed to the other party. As we have already seen, this "values-balancing reasoning,"[92] predicated upon "other-regarding" behavior, links party A's success within the contractual relationship to Party B's success, and vice-versa. At its core, then, Gerhart's theory of contract explores how parties employ a system of reasoning in legal agreements and how those parties behave within the framework of the legally binding agreements they create.[93] In short, Gerhart's theory reveals the way in which parties balance their own values (read: interests) against the other parties' values (interests) to achieve the best possible outcome.

From this position, Gerhart argues that courts may, and very often do, use the same process of reasoning to evaluate trade-offs between the parties' interests, finding a balanced and rational outcome when disputes arise. Party A may, in some instances, benefit to the detriment of Party B, and vice-versa. Traditionally, courts might use existing remedies—detrimental reliance, estoppel, unconscionability, and other legal triggers—to vitiate a contract. But Gerhart, while not eschewing these specific doctrinal solutions, presents doctrine itself as part of the problem to be resolved through values-balancing reasoning, ensuring that the relationship between contracting parties flourishes, and simultaneously advancing the projects of both parties. Because this understanding of the relationship between the parties sees the conduct of the parties as "other-regarding," the resulting relationship is inherently moral.[94]

By invoking its social morality, Gerhart does not suggest that contract law is separable from private law as a whole; doing so would defeat the very project of recasting the private law around the organizing theme of social cohesion. Instead, in CLSM and throughout the TLSM-PLSM-CLSM trilogy, Gerhart is at pains to make clear the deep interconnectedness of the entirety of private law, turning attention

[89] *Id.* at 167.
[90] *Id.* at 184.
[91] *Id.* at 205.
[92] *Id.* at 6.
[93] *Id.* at 105.
[94] *Id.* at 6.

specifically to contract law. Far from positing a strict doctrinal category, however, Gerhart demonstrates that this broad unifying theory looks beyond the bargained agreement and the terms of the contract as being the source of its obligations, and rather to the reasons that lead parties to behave in a particular way. By acknowledging the relevance of context in this way, Gerhart questions the almost sacred nature of textual interpretation and the law surrounding legal agreements, bringing the contracting party's character to the fore. The party to a contract evolves not in a vacuum, but as part of a society holding community values, including the totality of the private law, illustrating the notion that no one part of the private law can be segregated from the whole.

Yet, while courts may employ values-balancing reasoning—albeit without expressly saying so—it seems less clear that parties always do so in their contractual relationships. And this notwithstanding that it is the parties that would stand to benefit most if they did employ Gerhart's approach in the pre-conflict or pre-litigation setting. This review essay, then, offers a constructive critique of CLSM, examining whether parties to contractual negotiations may sometimes engage in values-balancing reasoning. Put another way, we examine, in a very preliminary way, whether humans—parties to negotiation—ever behave in other-regarding, or altruistic, ways.

The essay contains four parts. The first considers other-regarding behavior, or altruism, from a scientific perspective and asks: Is it possible that humans ever act out of concern for others? Second, we consider CLSM using ideas of altruism found in an eclectically selective use of philosophy. Just as we do in relation to science, we make no claim here to be comprehensive in our account of either altruism or of the way it is treated philosophically; instead, we merely point to the fact that philosophy, broadly, sometimes concerns itself with ideas of altruism, which can orientate our consideration of CLSM. As such, we unpack the meaning of values, as distinguished from mere interests, and explore those circumstances in which we can balance (or perhaps compromise?) values in order to get what we want within a contractual relationship. Third, we investigate the concept of the other-regarding person in relation to the *praxis* of contract law itself, which is Gerhart's focus in CLSM. These three sections address whether humans are ever truly altruistic, or other-regarding, when the aim of liberal life—and so, presumably, of contract—is to satisfy one's own life-projects (goals and objectives, or values). Having considered other-regarding behavior from these three perspectives, we conclude, tentatively, that Gerhart's theory accurately describes the real behavior of human actors who negotiate and then execute a contract. The final part of the essay offers concluding reflections upon the vitality of Gerhart's contribution to an understanding of private law and the interplay of law and morality.

II. SCIENCE

The central tenet of Gerhart's theory posits that "when private parties settle their relational disputes they resort to a method of reasoning about their own well-being in the context of the well-being of their counterparty."[95] Moreover, Gerhart claims, it is:

> rational to take into account the well-being of others when making decisions, and thus to make other-regarding decisions. Economic rationality is not limited to self-interest; it is often efficient to rely on others and to internalize their well-being into one's decisions. Humans do not choose between self-interested or altruistic motivations; their self-interest also leads humans to be other regarding.[96]

But how is it that law might motivate people to act in such ways, especially once a legal relationship otherwise voluntarily entered into might begin to break down, with a corresponding breakdown in the balance between self-interested and other-regarding motivations? Gerhart points to the work of Stewart Macaulay in support of his claim, who argues that often "[c]ontracting parties act[] as if what matters is the relationship, not the contractual or legal authority governing the relationship."[97] Can we find support for this notion in the science of human behavior?

Across the world, and dating back to early human civilization, the major transfer of goods has always been via cycles of obligatory reciprocated gifts. The theory of the gift, and the roots of contracting, is a story of human solidarity. Gift-giving is based in politics and economics rather than religion. There are also certain moral implications that come with the practice. Marcel Mauss famously examined what rule of legality and self-interest in archaic societies compels that a gift received must be obligatorily reciprocated, as well as what power might reside in the object given which results in its recipient paying it back.[98] The contracting parties are legal entities, whether individuals, families, or tribes.[99] The theory of the gift demonstrates forms of contracting predating those we might recognize as modern, such as the Semitic, Hellenic, Hellenistic, and Roman systems of market and institutions of traders and the development of money proper. In those systems, transactions of gifts contained an

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[95] *Id.* at 105.

[96] *Id.* at 6–7.

[97] *Id.* at 94.

[98] MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES (1990).

[99] *Id.*

internal morality and organisation. Along similar lines, Gerhart contends that:

> the law expects people who make promises and contracts to behave as if they had thought in a moral way about their obligation, and the law determines what behavior is required under promise or contract by examining how a person in that situation would have behaved if the person had used moral reasoning.[100]

And,

> [p]romissory and contractual commitments, no matter what the contextual features, have one thing in common, each requires the parties to think in a moral way about the obligations implied by promising and contracting, given the contextual circumstances they face. In this way a theory of values-balancing reasoning provides the unified and unifying theory of promising and contracting that no other theory is able to provide.[101]

However, we might respond that even if "the law expects people who make promises and contracts to behave as if they had thought in a moral way about their obligations,"[102] do people in practice necessarily "think in a moral way" about their obligations?

For Gerhart, the answer is not that an individual thinks about one's obligations in a moral way, but rather, one engages in a method of reasoning about one's obligations "that, because of its properties, displays the hallmarks of moral reasoning about relationships: neutrality, universality, and allegiance to relational expectations. We might also find that the same method of reasoning is used by people who want to minimize costs and maximize the gains from exchange."[103] In short, this is a method of reasoning which, while beginning with self-interest, is capable also of embracing the interests of those with whom one contracts. This idea requires an examination of the connection between ideal reasoning and behavior. For Gerhart, "before there is behavior there is reasoning, however fleeting, unreasonable, or badly motivated."[104]

Even so, we run into another difficulty: humans, while perhaps uniquely capable of reasoning, do at times act purely on animalistic

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[100] GERHART, CLSM, *supra* note 22, at 13–14.
[101] *Id.* at 15.
[102] *Id.* at 13–14.
[103] *Id.* at 3.
[104] *Id.* at 70.

instinct. So, the idea that reasoning *ought* to determine how we behave may best be understood through the Kantian notion that thinking through how one should act comes before action.[105] But is this how human beings actually behave in the empirical world? Life scientists are well aware of the ecological concept of a "carrying capacity," that is, the capacity of an environment to indefinitely sustain a biological species' maximum population.[106] We do not have a built-in adaptation to evade ecological overshoot. Rather, our psychological adaptations are designed to outdo our genetic competition.[107] In order to increase our inclusive fitness, that is, our number of offspring, evolution supports a continuous expansion in status, control, and resource acquisition.[108] There is now evidence that we are in fact "hard-wired" to seek exterior ambitions of wealth, power, and attractiveness as it improves our chance of survival.[109] We must remember that in the eyes of evolution we are simply another species of animals competing for mates and resources. David Wood explains further:

> In this light it is not hard to conclude in yet another narrative; that Homo sapiens are not actually smart enough to override more deeply seated instincts. . . . Human beings are an animal species, one who kills its own kind. One whose constituent members naturally favours short-term pleasure over long term interests, despite being remarkably creative in dreaming of utopian alternatives. Surely morality is little more than a day dream.[110]

Reason is generally understood as the capacity consciously to apply logic to gain some form of insight or truth, and draw conclusions based on such truth.[111] Reasoning is thus connected to the notions of thinking and

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[105] *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor et al. 2d ed. 2012).

[106] For explanation of a K value, *see* W. J. Edwards & C. T. Edwards, *Population Limiting Factors*, 3(10) NATURE EDUC. KNOWLEDGE 1 (2011).

[107] *See* CHARLES DARWIN, ON THE ORIGIN OF SPECIES (John Murray 1st ed. 1859). Darwin of course did not know about genes, but he had the idea right.

[108] Michael E. Mills, *Evolutionary Psychology and the Prospects for Human Sustainability*, 3 THE EVOLUTIONARY REV. 171, 175–76 (2012).

[109] Kennon M. Sheldon & Tim Kasser, *Psychological Threat and Extrinsic Goal Striving*, 32(1) MOTIVATION AND EMOTION 37, 38 (2008).

[110] David Wood, *Responsibility in an Age of Climate Change*, BIG IDEAS (May 13, 2015).

[111] MICHAEL PROUDFOOT & A. R. LACEY, THE ROUTLEDGE DICTIONARY OF PHILOSOPHY (4th ed., 2009).

cognitive thought.[112] It is the ability to use one's intellect. It is the ability to consider a course of action in a logical and sensible way. However, it is now well understood that belief is stronger than fact, and that personal values will take preference over rational thought.[113] As human beings, we have genetically evolved to respond to stimuli within our close proximity. Reacting to complex problems requires the utilization of reflective reasoning, which is comparatively far less powerful than instinct.[114] Instinctive reactions such as fear, worry, and panic are immediate responses to risk appraisal. Rational thought and cognitive assessment are secondary reactions.[115]

Still, we may not be genetically coded to serve only our self-interest to the exclusion of all else.[116] In 1964, W. D. Hamilton mathematically showed that a gene could increase its evolutionary success indirectly, by supporting the survival and procreation of other individual members in a population that shared identical genes.[117] This theory of inclusive fitness, together with Robert Trivers's concept of reciprocal altruism—demonstrating that an organism may temporarily act against its interests to benefit another in the hope that the other organism will reciprocate later on—are the founding models for the evolution of social behaviors in our species.[118] At the very least, we will self-sacrifice for those closest to us.

There is also evidence that living in groups has required *Homo sapiens* to develop compromise and social cohesiveness to at least the

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[112] NICHOLAS RESCHER, RATIONALITY: A PHILOSOPHICAL INQUIRY INTO THE NATURE AND THE RATIONALE OF REASON (1988); IMMANUEL KANT, CRITIQUE OF PURE REASON (Cambridge Univ. Press 1999).

[113] *See, e.g.*, MATT RIDLEY, THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION (1998).

[114] Dan Kahan et al., *Cultural Cognition of Scientific Consensus*, 14 J. RISK RSCH. 147 (2011); Elke U. Weber, *Experience-Based and Description-Based Perceptions of Long-Term Risks: Why Global Warming Does Not Scare Us (Yet)*, 77 CLIMATE CHANGE 103 (2006).

[115] CLIVE HAMILTON, REQUIEM FOR A SPECIES: WHY WE RESIST THE TRUTH ABOUT CLIMATE CHANGE (2010); JANET SWIM ET AL., PSYCHOLOGY AND GLOBAL CLIMATE CHANGE: ADDRESSING A MULTI-FACETED PHENOMENON AND SET OF CHALLENGES: A REPORT BY THE AMERICAN PSYCHOLOGICAL ASSOCIATION'S TASK FORCE ON THE INTERFACE BETWEEN PSYCHOLOGY AND GLOBAL CLIMATE CHANGE (2011).

[116] RIDLEY, *supra* note 113.

[117] The most obvious example is, of course, our close genetic relatives, *see* W. D. Hamilton, *The Genetical Evolution of Social Behaviour I*, 7(1) J. THEORETICAL BIOLOGY 1 (1964); W. D. Hamilton, *The Genetical Evolution of Social Behaviour II*, 7(1) J. THEORETICAL BIOLOGY 17 (1964).

[118] Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46(1) Q. REV. BIOLOGY 35 (1971). The concept is analogous to the strategy of 'tit for tat' in game theory, for discussion *see* RICHARD DAWKINS, THE SELFISH GENE (2d ed. 1990).

same degree as selfishness.[119] When our ancestors were forced to move from the jungle to savannah habitats due to climatic changes, the new environment likely made it impossible for mothers to raise their offspring alone, leading to altruistic, cooperative behavior, and eventually leading to the development of language and complex civilizations.[120] So, it is possible that altruism may motivate some of our behavior.

Yet, the fact remains that there are strong indications that while we may act altruistically in some limited cases, on the whole, as *Homo sapiens*, we only do so to the extent that such behavior is in some way beneficial to us, even if that benefit is not immediately obvious.[121] We give as little as possible in order to get as much as we can in return.[122] True, this may be what Gerhart calls "value-balancing reasoning" or "other-regarding behavior," but in the context of contractual disputes involving legal obligations and consequences, it does not have the ethical or altruistic element or component that we so often associate with values. The idea of values-balancing reasoning, particularly in an adversarial setting where there is often no benefit to us or our closest kin or group, at the least warrants further inquiry.[123]

There is no doubt that the ability to reason is considered a decidedly human aptitude,[124] often associated with human endeavours including philosophy, science, and language. The field of logic examines the different ways humans use reasoning to produce logically valid conclusions. Depending on context and purpose, reasoning through logic may be deductive, inductive, or abductive.[125] The formal rules and applications of logical reasoning need not be unpacked here.[126] Rather, in the context of what we understand Gerhart to mean by "value-balancing reasoning," it is perhaps more helpful to examine closer the differences and tensions between what Aristotle referred to as discursive reasoning, or

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[119] Donald Pfaff explains the neuroscience of altruism, and how our brains process communal attachment, which is the basis of compassion and prosocial behavior, is in fact similar to all other species of mammal: DONALD PFAFF, THE ALTRUISTIC BRAIN: HOW WE ARE NATURALLY GOOD (2014). For a slightly contrasting view *see* RIDLEY, *supra* note 113.

[120] *See* Michael Balter, *Why We're Different: Probing the Gap Between Apes and Humans*, 319 SCI. 404 (2008); J. M. Burkart et al., *The Evolutionary Origin of Human Hyper-Cooperation*, 5 NATURE COMMC'NS 1 (2014).

[121] For discussion on this point, *see* EDWARD O. WILSON, ON HUMAN NATURE (2d ed. 2004).

[122] Trivers, *supra* note 118.

[123] DAWKINS, *supra* note 118.

[124] HUGO MERCIER & DAN SPERBER, THE ENIGMA OF REASON 2 (2017).

[125] CHARLES SANDERS PEIRCE, PEIRCE ON SIGNS: WRITINGS ON SEMIOTIC (1991).

[126] For such a discussion *see* Stewart Shapiro & Teresa Kouri Kissel, *Classical Logic*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N Zalta ed. 2021).

reasoning proper, and intuitive reasoning, which carries the potential for reliance on the underlying values that the individual holds.[127] The former strives to be objective, while the latter tends to be subjectively opaque.[128]

Conceiving reasoning through this lens offers insight into human capacity for resolving, through reflection, what one *ought* to do.[129] This type of reasoning is practical in the sense that it prioritizes both a course of action and its consequences. Capacity for this type of reflective reasoning raises several theoretical queries, such as assumptions that presume that parties do, in fact, engage in this process of reasoning as part of action, as well as which standards or norms one assumes will be used as part of this type of deliberative reflection.[130] In turn, these questions highlight the conditions in which moral norms provide effective standards on which to base reasoning. Moral reasoning may be best thought of as what one ought to do and how one thinks about and reasons over what one ought to do. That is, what considerations of ourselves and of others ought to be taken into account when deciding on a course of action, as part of a process of balancing those considerations.[131] When assessing the best moral course of action, morality is taken as "the effort to guide one's conduct by reason—that is, doing what there are the best reasons for doing—while giving equal [and impartial] weight to the interests of all those affected by what one does."[132]

Thus, while scientific evidence may be mixed, there is some support for the proposition that humans may, in limited circumstances, act with the interests of others in mind. Philosophy, too, has had much to say about

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[127] Reasoning may be likened to intuition in that they are both methods by which thinking moves between ideas. It may be distinguished from intuition in that reasoning allows for those ideas to be reflected upon. It is one way in which we make sense of our environment, as well as conceptualizing abstract contradictions such as cause and effect or true and false. Taken as a part of our decision-making process, reasoning is closely linked with our ability to change our goals, beliefs and traditions, *see* MICHEL FOUCAULT, THE ESSENTIAL FOUCAULT 308 (Paul Rabinow & Nikolas Rose eds., 2003); Nikolas Kompridis, *So We Need Something Else for Reason to Mean*, 8 INT'L J. OF PHIL. STUD. 271 (2000).

[128] ARISTOTLE, NICOMACHEAN ETHICS: BOOK VI (Cambridge Univ. Press 2000) (350 BCE).

[129] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011).

[130] JAY R. WALLACE, *Practical Reason*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2020).

[131] Cognitive scientists have tried to explain how individuals reason, the cognitive and neurological processes involved, and how cultural differences might impact decisions. The first to do this was Jean Piaget, who developed a theory of reasoning from birth to adulthood: Jean Piaget, *The Role of Action in the Development of Thinking*, *in* KNOWLEDGE AND DEVELOPMENT 17 (Willis F. Overton & Jeanette McCarthy Gallagher eds., 1977).

[132] JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY (4th ed. 2002).

the potential for altruism as motivation for behavior. We turn, then, to that issue.

III. PHILOSOPHY

The major premise of Gerhart's thesis posits that the liberal individual who enters contractual relations acts not only out of self-interest but also, to a degree, with regard to the interests of those with whom one contracts. Here, we assess Gerhart's use of those philosophical perspectives upon which that proposition is founded.

A. Morality of Promising: T. M. Scanlon

As the titles to the TLSM-PLSM-CLSM trilogy make clear, Gerhart seeks to reframe contract law through a form of legal morality in order to close the "gap [that] exists between the act of promising and the source of moral and legal obligation . . . that result from the act of promising."[133] The two major theories that have been advanced regarding the moral obligations that we owe to each other are T. M. Scanlon's "moral principle theory" and David Hume's and John Rawls's "practice theories."[134] Gerhart argues that Scanlon provides a basis for the moral principle theory and that an agreement between two reasonable people should be governed by moral principles,[135] while social practice theory leads individuals to accept and implement obligations.[136] While these legal theorists and other philosophers inform CLSM, Gerhart draws specifically upon Scanlon's work on "contractualism."[137]

In *What We Owe Each Other*, Scanlon presented contractualism as "the aim of finding principles that others, insofar as they too have this aim, could not reasonably reject."[138] This focuses on both parties' point of view, allowing them to choose between right and wrong to their satisfaction. The morality of promising is regulated by values discoverable through a method of reasoning regarding obligations owed to one another.[139] Thus, reasoning must allow a party to locate the values underlying a moral principle and employ those values to craft a response to a particular situation.[140] It is true that social practices, and in particular those of a

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[133] GERHART, CLSM, *supra* note 22, at 41.

[134] *Id.*; T. M. SCANLON, WHAT WE OWE EACH OTHER (1998).

[135] GERHART, CLSM, *supra* note 22, at 41–42.

[136] *Id.* at 42.

[137] *Id.* at 41–42.

[138] SCANLON, *supra* note 134, at 191.

[139] *Id.*; *see also* GERHART, CLSM, *supra* note 22, at 42.

[140] SCANLON, *supra* note 134, at 190; *see also* GERHART, CLSM, *supra* note 22, at 45.

moral nature, tend to reflect a set of values which people use to guide their behavior.[141] That is, "a set of reasons for acting and a method of moral reasoning about how to behave."[142]

Still, trying to quantify the nature of "values" which underly a moral principle is a complex task. For Gerhart, Scanlon is too general. This matters for Gerhart's theory, because "[w]hen the reasons that support ideal behavior are the appropriate reasons, moral social practices align with moral principles."[143] In its simplest form, then, the application of Scanlon's contractualism can be applied to a legal contract. Take, for example, a basic bilateral contract between party A and party B, which due to the fault of party B results in the breach of a condition. Legally, party A has the right to terminate the contract, but the question then becomes fact specific. What led to the breach, and for the purposes of efficacy, is termination in party A's best interest? The depth Gerhart adds to this simple scenario through Scanlon's contractualism can be seen by removing the initial adversarial implication in private law and "A v. B" scenarios, opting instead for a solution that neither party could reasonably reject because it is in both of their interests. While one option may be termination of the contract, Scanlon's approach, as applied by Gerhart, would broaden the possibilities open to party A.[144]

In this way, Gerhart's appropriation of Scanlon makes sense in a way that adopting the work of earlier philosophers would not. That being said, Scanlon's work draws upon earlier philosophers, notably Kant, Gauthier, Habermas, Hare, and Rawls.[145] Indeed, Scanlon's work expressly draws upon Rawls' *Theory of Justice* and its focus on the "conception of justice as social cooperation."[146] And Gerhart notes a discernible thread through this philosophical canon that focuses on relationships, contracts, and other-regarding understandings. Theoretically, these existing works provide ways to think about private law, and in CLSM, about contract law

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[141] GERHART, CLSM, *supra* note 22, at 49.

[142] *Id.*

[143] *Id.* at 52.

[144] At its core, Gerhart's implementation of contractualism challenges the one-sided and finite nature of contractual resolutions. If we consider the parties' interests during the formation of a contract there is a discernible mutual benefit. However, if and when an issue arises during the fulfilment of the contract's legal obligations, the parties' original unification is replaced with adversarial options. The parties to the bargain are now in competition with each other, rather than working towards their original obligations and their mutual benefit. Gerhart's rationale offers the parties a return to their original state to rebuild "trust and foster cooperation", *see* GERHART, CLSM, *supra* note 22, at 42, which can be achieved through an application of moral method reasoning. *Id.* at 51.

[145] SCANLON, *supra* note 134, at 189–90.

[146] *Id.* at 228; JOHN RAWLS, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Leif Wenar, 2021).

specifically. However, in his adaptation, Gerhart's focus is more on the application of moral philosophy to an idea of law and legal doctrine than on the social "reality" of law in its contemporary state.

B. Individual Morality and Emotion: David Hume

Gerhart uses David Hume as a key thinker for "practice theories", differentiating from Scanlon and "moral principle theories".[147] Gerhart highlights Hume's identification of fidelity of promises as an "artificial virtue",[148] but this interesting argument is not developed further. There is some mention of "virtue" within the footnoting of the book, but little detailed exegesis of how those thoughts on virtues assist in understanding social practice theory or moral philosophy more generally. Given Gerhart's approach to rethinking the resolution of contractual disputes as other-regarding and a conscious move away from traditional contract doctrine, there is surely scope to highlight the virtuous nature of a new or significantly more moral approach.

David Hume maintained that individual morality is based on emotions including love, passion, and happiness, rather than on reason or logical analysis of a given situation.[149] This conclusion is also reflected in more recent theory. Jonathon Haidt,[150] for example, argues that intuition comes first—our moral reactions are based on initial instincts, with any form of moral reasoning tending to follow.[151] Similarly, Scanlon, in asking what we owe each other, argues that when deciding what we ought to do, our approach to each possibility is informed by reasoning.[152] While reason on its own may not motivate us, our desires may respond to reason.[153] Scanlon maintains that we have "the capacity to recognize, assess, and be moved by reasons . . . every action that we take with even a minimum of deliberation about what to do reflects a judgment that a certain reason is worth acting on."[154]

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[147] GERHART, CLSM, *supra* note 22, at 41.

[148] *Id.* at 46 n.11.

[149] Monika Bucciasrelli, Sangeet S. Khemlani, & P. N. Johnson-Laird, *The Psychology of Moral Reasoning*, 3 JUDGMENT AND DECISION MAKING 121–22 (2008); Sangeet S. Khemlani, Ruth M. J. Byrne, & P. N. Johnson-Laird, *Facts and Possibilities: A Model-Based Theory of Sentential Reasoning*, 42 COGNITIVE SCIENCE: A MULTIDISCIPLINARY JOURNAL 1887 (2018).

[150] *See also* Andrew Shtulman & Joshua Valcarcel, *Scientific Knowledge Suppresses but does not Supplant Earlier Intuitions*, 124 COGNITION 209 (2012).

[151] Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108(4) PSYCH. REV. 814 (2001).

[152] SCANLON, *supra* note 134, at 23.

[153] *Id.* at 23.

[154] *Id.*

C. Doing the Right Thing for the Right Reasons: Immanuel Kant

Immanuel Kant viewed morality as a set of universal laws independent of emotion and discoverable through reason, arguing that reason, rather than emotions or faith, was the best way to distinguish right and wrong.[155] Influenced by the advance of human knowledge during the Enlightenment, Kant posited that we live in an ordered universe in which our intellect and our reason render us qualified to investigate;[156] thus, a universal law applicable to everyone exists when an individual does the right thing.[157] Kant states that simply being human is valuable in itself, and thus every human owes moral responsibilities to every other human, and is owed responsibilities in return.[158] This idea, known as the "categorical imperative," has been influential in moral philosophy ever since.[159]

Because self-interest, or pleasure, always affects how we choose to act,[160] morality cannot be founded on perceptions that may differ between individuals.[161] In deciding our actions, there must be another element capable of influence, which Kant suggests can only be reason. The connection between reason and morality arises from the ability to choose one's course of action freely and independently of our desires. We do not hold to account other animals, small children, or mentally unwell individuals, who may only be capable of acting on want or instinct, the way we do most adults.[162]

Both reason and morality are independent of what we might want or desire and may be considered universal; the same is true for everyone. As such, Kant contends that acting morally is the same as acting rationally.[163] Kant takes the goodwill of the individual as the source of moral argument because other human goods, such as strength, can be used to bully, or wit to humiliate, that is, they can be used for evil purposes.[164] Having good intentions remains constant. This is how the transition from subjective

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[155] KANT, *supra* note 105.

[156] Garrath Williams, *Nietzsche's Response to Kant's Morality*, 30 THE PHILOSOPHICAL FORUM (1999).

[157] KANT, *supra* note 105.

[158] *Id.*

[159] *Id.* at 33.

[160] *See generally id.*

[161] *Id.* at 25.

[162] For example, in Australian contract law, the principle of capacity ensures that those under the age of majority are subject to different rules and may only enter legally binding contracts if they are for necessaries or for a beneficial contract of service. *See, e.g.*, *Scarborough v Sturzaker* (1905) 1 Tas LR 117; *Bojczuk v Gregorcewicz* [1961] SASR 128; *Gadd v Thompson* [1911] 1 KB 304; *Bromley v Smith* [1909] 2 KB 235.

[163] *See generally* KANT, *supra* note 105.

[164] *Id.* at 9.

goodwill to moral objectivity may be discovered through individual motivation. Kant considers goodwill is "the personal legislator of morality."[165] It is not enough, Kant argues, to do the right thing—one must do the right thing for the right reasons.[166] But does law make this possible?

D. The Structure of Law and Reasoning: Michel Foucault

In his introduction, Gerhart spends time discussing the structure and substructure of law, highlighting their distinction: "[t]he substructure . . . consists of the method of reasoning that led to the authorities and to structural relationships, a method that the structure may not reveal."[167] While important for the development of Gerhart's theory, the concept of law's structures and hidden substructures or meanings is not new. Since the early 1970s there have been clear references to structuralism, post-structuralism, and the law in an American context,[168] which has addressed similar issues *especially* within the private law sphere.[169]

Gerhart highlights the method with a challenge redolent of Michel Foucault's dispositif:[170]

> To implement authority when new disputes arise, we need to extract and replicate the method of reasoning that led to the authority, and then apply the method and content of that reasoning to the dispute that must be decided. This approach turns conventional legal reasoning on its head; rather than start with authority, we start with the factors and values that led to the authority, making the implementation of authority the output of the reasoning (and a new basis for reasoning about how to implement authority).[171]

While Gerhart does not reference Foucault, or others who follow a similar line of inquiry, this excerpt demonstrates his consideration for the effect of other less obvious forces on law. The passage also illuminates the fact

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[165] Melvyn Bragg et al., *On 'Kant's Categorical Imperative'*, BBC: IN OUR TIME (Sept. 21, 2017), https://www.bbc.co.uk/sounds/play/b0952zl3 [https://perma.cc/4KTY-5UQR].

[166] KANT, *supra* note 105, at 10.

[167] GERHART, CLSM, *supra* note 22, at 9.

[168] Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 4 LEGAL STUD. F. 327, 351–62 (1991).

[169] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1977).

[170] *See* MICHEL FOUCAULT, POWER/KNOWLEDGE 194–228 (Colin Gordon ed. & trans., 1980).

[171] GERHART, CLSM, *supra* note 22, at 10.

that the law makes doing the right thing possible and, as Kant would demand, for the right reasons. The question then turns to the legal actor and how this character may best be understood; which brings us to the reasonable person.

E. Reasonable Person: Oliver Wendell Holmes

The concept of the "reasonable person," or the "man on the Clapham omnibus,"[172] represents a hypothetical ordinary person, who, even under provocation, can be expected to conform to an objective standard of behavior expected by society and against which the conduct of others can be measured.[173] The reasonable person is intelligent, yet nondescript,[174] drawing upon the physical characteristics of human beings assumed to be possessed by most people, and which stand behind the motivations of such people when participating in society.[175] The standard finds a place in contract law as a means of determining the intent to enter contractual obligations or where there arises a duty of care to establish a breach of the agreement.[176] Intent is determined by surveying the understanding of the "reasonable person," as established by the relevant circumstances of the case and including negotiations between parties, practices the parties may have established between themselves, and any subsequent behavior of those parties.[177]

Oliver Wendell Holmes Jr. explained the logic of the standard of behavior that the law expects from the reasonable person as stemming from the difficult task of "measuring a man's powers and limitations."[178] For a society to function, Holmes asserts, "a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare [of that society]."[179] The standard employed operates under the assumption that people get along with one another. Thus, prior to acting, the reasonable person weighs the foreseeable risk of harm their actions may cause others against the benefit or advantage to oneself of those actions, the extent of the risk, the likelihood that the risk may in fact cause harm to others, alternatives which would reduce any such risk, and the expense of those alternatives. It

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[172] The origin of the phase is attributed to Lord Bowen in 1903: HAROLD LUNTZ & DAVID HAMBLY, TORTS: CASES AND COMMENTARY 244 (2002).

[173] *Id.*

[174] *Id.* at 246.

[175] *See* ADOLPHE QUETELET, ON MAN AND THE DEVELOPMENT OF HIS FACULTIES (1835).

[176] LUNTZ & HAMBLY, *supra* note 172.

[177] *Id.*

[178] OLIVER WENDELL HOLMES JR, THE COMMON LAW 108 (1991).

[179] *Id.*

follows that the reasonable person must be well-informed, capable of sound judgement, non-discriminatory, and mindful of the law. The reasonable person has thus been described as "excellent but odious [in] character"[180]—whatever such a person does, whether ordinary or extraordinary, it is always reasonable.

In addition to being a legal fiction, the standard of the reasonable person is a legal necessity, for the law requires a standard against which human behavior can be measured. In this way the law can ascribe a benchmark for how an individual *ought* to act under a particular set of circumstances. By using the reasonable person standard, judges, and juries at judges' direction, avoid subjective evaluations of a person's reasonableness, character, or intellect. Law therefore employs an objective standard of human behavior which allows it to anticipate how one might behave in a way that is foreseeable, uniform, and neutral.

Of course, this is not how people actually behave in real life. Nor is it a standard most contracting parties would even be aware of when entering into legally binding obligations. So, while an objective standard of reasonableness is found in the legal profession, and may be used in value-balancing legal reasoning, the idea of reasoning in its everyday context, and more specifically in the context of people entering into contractual obligations, requires further attention. This is particularly true given the tension between our values and our ability to act rationally.[181]

How, then, can one reconcile law with the perceptions of most people? What is meant by the reality of law in this context? As a matter of legal theory, the various lenses and applications that stem from various theories shape law's reality concerning altruistic behavior. Many scholars attempt to tackle this difficult issue—most notably, Jeremy Bentham and John Austin in the UK and Oliver Wendell Holmes Jr. and Karl Llewellyn in the US.[182] Gerhart's investigation suggests that late-20th and early-21st century theory has been dominated, at least in the US, by law and economics which, following legal realists like Holmes by applying more stringent economic lenses to legal problems, has shaped the reality of law and especially private law.[183] Yet, given the similarities between the private law project and law and economics,[184] such as other-regarding

[180] A. P. HERBERT, MISLEADING CASES IN THE COMMON LAW 12 (4th ed., 1989).

[181] *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2013); Kahan et al., *supra* note 114.

[182] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Bottom of the Hill, 2011); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E Rumble, ed., Cambridge Univ. Press, 1995); OLIVER WENDELL HOLMES JR., THE COMMON LAW (Dover Publ'ns, 1991); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (Little, Brown & Co., 1960).

[183] GERHART, CLSM, *supra* note 22.

[184] *Id.* at 20–21.

values and economic staples like "Pareto superior" outcomes,[185]Gerhart makes only cursory mention of the latter. The same is true of the opportunities to discern the morality of law found in critical legal studies and legal realism.[186] One can, of course, read between the lines in order to impose the structure of existing knowledge onto Gerhart's theory, but given the focus on praxis and the stated aim of translating moral philosophy to contract law, these omissions could be viewed as undermining the practical impact of the work.

Still, while such omissions may weaken the power of Gerhart's analysis, we may nonetheless conclude that legal theory can support Gerhart's claim that individuals act with the interests of others in mind. Moreover, Gerhart's approach seems commensurate with the general trend of the theory we consider here. Thus, while admittedly far from definitive, it is possible that one can find support for Gerhart's claim of altruism in the wider canon of philosophy, and it is that foundation which Gerhart uses to demonstrate the morality of contract law. We turn in Part IV to consider whether Gerhart's theoretical claims concerning contracts can be sustained when applied to the contract law *praxis* itself.

IV. PRAXIS

A. Classical Contract Theory

The principle of party autonomy emerges as an element of the freedom to enter a legal contract; for that reason, the classical theory of contract law considers sacrosanct the terms of the contract between the parties. The terms, and only the terms, are to be considered when determining the rights and obligations of the parties. Classical theory further posits that any contract emerges from the environment in which it was drafted, and so its terms must be interpreted through an objective lens formed by the presumed intention of the parties, itself founded upon rationality and self-interest.[187] Yet the underlying assumptions of the classical theory—equal footing and rational action—are fiction. In most, although not all, instances a contract favors the party holding bargaining power and who offers terms on a take it or leave it basis. And so, while the law clings to the classical theory, both case law and legislation

[185] *See* BRIAN H. BIX, JURISPRUDENCE: THEORY AND CONTEXT 216 (2023).

[186] GERHART, CLSM, *supra* note 22, at 11.

[187] Cento G. Veljanovski, *Economic Approach to Law: A Critical Introduction*, 7 BRITISH J. L. & SOC'Y 158, 162 (1980); JEANNIE PATERSON, ANDREW ROBERTSON, & ARLEN DUKE, PRINCIPLES OF CONTRACT LAW 18 (5th ed. 2016).

recognize the divide between reality and fiction, and so design doctrines to combat abuse of power by one party.[188]

Diagram 2. Gerhart's Theory of the Contract

Gerhart challenges classical theory, positing that a contract does not exist in a vacuum—parties are not rational and self-interested parties. While the terms of a contract remain touchstones for determining rights and obligations, and while parties remain driven by "self-directed goals," neither exist in isolation. Gerhart instead argues that for a contract to exist as part of a (liberal) private project, a party must be driven also by relationality—an understanding of the other party's projects (chosen as part of a liberal project)—and contextuality—which helps allocate risk between the parties. For Gerhart, both relationality and contextuality serve important purposes in the interpretation of the contract.[189] This means, significantly, that "[t]he common distinction between rational self-interest and altruism is inadequate, for it suggests a dichotomy between actors who think only of their own interests and actors who think only of other people's interest."[190] Instead, "people are often simultaneously self-

[188] Sarah Worthington, *Common Law Values: The Role of Party Autonomy in Private Law*, *in* THE COMMON LAW OF OBLIGATIONS: DIVERGENCE AND UNITY 303–06 (A. Robertson & M. Tilbury eds., 2016); for further discussion on the limits to party autonomy, *see* PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY IN CONTRACT LAW (2019); DAVID CAMPBELL: CONTRACTUAL RELATIONS: A CONTRIBUTION TO THE CRITIQUE OF THE CLASSICAL LAW OF CONTRACT (2022); CATHERINE MITCHELL, VANISHING CONTRACT LAW: COMMON LAW IN THE AGE OF CONTRACTS 115–45 (2022).

[189] GERHART, CLSM, *supra* note 22, at 26.

[190] *Id.* at 75.

interested *and* other-regarding. It is often in an actor's self-interest to be other-regarding—that is, to take the interests of another into account when making decisions."[191] Diagram 2 illustrates this interrelationship of self-interest/directedness and relationality/other-regarding behaviour within the context of risk allocation. What matters in such a theory, then, is the extent to which people are other-regarding, and under what circumstances they are likely to act that way. And that involves a closer look at the relations between the parties and the terms they create. We consider each in turn.

1. Relationality

Gerhart's overarching concern involves an attempt to reconcile morality, legal rules, and parties' behavior and reasoning. Long-term contracts perhaps best illustrate this relationship between morals and legal rules, given that they focus more on the relationship between the parties rather than on strict terms. Long-term relationships are also bound to future experiences and changes in circumstances unthinkable at the time the contract was drafted. As such, an agreement "can [become] inconsistent with the actual expectations of the parties."[192] In such situations, while the terms of the contract might not provide the necessary solutions, morals and the common purpose that brought the parties together might. So how does that effect a role for morals in contract?

Gerhart identifies the origin of relationality in Ian MacNeil's work:[193] a relational contract describes the relationship parties enter when concluding an agreement. In doing so, a party moves beyond terms, rights, and obligations and considers the other party's interests.[194] As one would expect in a long-term relationship, changes of circumstances inevitably shape that relationship, challenging both the parties and the contract they have made. If the contractual relationship is to be maintained and the

[191] *Id.* (emphasis added).

[192] Stewart Macaulay, *The Real and the Paper Deal*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL, AND NETWORK CONTRACTS 51 (David Campbell, Hugh Collins & John Wightman eds., 2003) [hereinafter Macaulay, *The Real and the Paper Deal*].

[193] GERHART, CLSM, *supra* note 22, at 21.

[194] Ian MacNeil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 736–37 (1974); GERHART, CLSM, *supra* note 22, at 75. *See also* Paul Finn, *Commerce, the Common Law and Morality*, 17 MELBOURNE UNIV. L. REV. 87 (1984). For a broader discussion on relational contracting, *see* Z. X. Tan, *Disrupting Doctrine? Revisiting the Doctrinal Impact of Relational Contract Theory*, 39 LEGAL STUD. 98 (2019); D. Christie, S. Saintier, & J. Viven-Wilksch, *Industry-Led Standards, Relational Contracts and Good Faith: Are the UK and Australia Setting the Pace in (Construction) Contract Law?*, 43 LIVERPOOL L. REV. 287, 288 (2022).

contract performed, parties must adapt and compromise. MacNeil posits ten norms for mediating these conditions:

> (1) role integrity (requiring consistency, involving internal conflict, and being inherently complex); (2) reciprocity (the principle of getting something back for something given); (3) implementation of planning; (4) effectuation of consent; (5) flexibility; (6) contractual solidarity; (7) the restitution, reliance and expectation interests (the 'linking norms'); (8) creation and restraint of power (the 'power norm'); (9) propriety of means; and (10) harmonisation with the social matrix, that is, with 'supracontract' norms.[195]

Motivated by mutual trust and cooperation, as a matter of law, these other-regarding norms provide a counter-perspective to the classical theory of contract law with its emphasis on self-interest. Interestingly, however, MacNeil did not try to develop a new theory of contract law, reflecting instead on the sociological aspects seen in contract practice. This explains, at least in part, why these norms have stimulated academic interest,[196] but with only modest doctrinal impact.[197] As such, Gerhart looks not to judicial adoption, but to legal philosophy as support for the theory propounded,[198] an approach not without its supporters. Catherine Mitchell, for instance, argues that there is a difference between what contract law dictates, what contract law should regulate, and what practice shows.[199] Similarly, Stewart Macaulay distinguishes a real deal, which can be articulated by the parties to a contract, from a paper deal, representing the formal agreement between the parties.[200] Macaulay's reasoning hinges on the distinction between the two and the fact that the

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[195] Ian MacNeil, *Relational Contract Theory, Challenges and Queries*, 94 N.W. U. L. REV. 877, 879–80 (2000).

[196] Hugh Collins, *Is a Relational Contract a Legal Concept?*, *in* CONTRACT IN COMMERCIAL LAW 37 (S. Degeling, J. Edelman, & J. Goudkamp eds., 2016); Jessica Viven-Wilksch, *The Importance of Being Relational: Comparative Reflections on Relational Contracts in Australia and the United Kingdom*, 73 NILQ 94 (2022); DAVID CAMPBELL, HUGH COLLINS, & JOHN WIGHTMAN, IMPLICIT DIMENSIONS OF CONTRACT, DISCRETE, RELATIONAL, AND NETWORK CONTRACTS (2003).

[197] Tan, *supra* note 194, at 98; *see* Yam Seng v. Int'l Trade Corp. Ltd. [2013] 1 All ER (Comm) 1321; Al Nehayan v. Kent [2018] EWHC (Comm) 333; Amey Birmingham Highways Ltd. v. Birmingham City Council [2018] EWCA (Civ) 264; Bates v. Post Office Ltd. (No. 3) [2019] EWHC 606 (QB).

[198] *See infra* discussion in Part III; GERHART, CLSM, *supra* note 22, at 42.

[199] CATHERINE MITCHELL, CONTRACT LAW AND CONTRACT PRACTICE: BRIDGING THE GAP BETWEEN LEGAL REASONING AND COMMERCIAL EXPECTATION (2014).

[200] Macaulay, *The Real and the Paper Deal*, *supra* note 192, at 51.

paper deal often does not reflect the real deal or the implicit dimension of the contract.[201]

In short, these theorists discern a gap between law and practice.[202] According to Macaulay, whose stance Gerhart adopts,[203] a relational contract defines different situations: encouragement of a settlement between parties; the interpretation of indeterminate legal principles; the reduction of costs associated with a long-term relationship due to the lack of foreseeability associated with it.[204] When people who have entered into a relationship disagree about their respective obligations to each other, they must find ways either to continue the relationship or to bring the relationship to its conclusion in a way that ideally satisfies the welfare of both parties. This process inevitably requires that each party balance private interests against those of the other party. What role, then, does the balancing of private interests, as reflected by the terms of the contract, play?

2. Values and Good Faith

Basing his perspective on the ideal of "other-regarding virtues," Gerhart proposes a method of reasoning, which, he claims, is reflective of how people ought to work through such disagreements, as well as how courts ought to make doctrine based on reasoning with regard to the obligations that arise from the contractual relationship.[205] This other-regarding method of reasoning, which allows one party to combine personal interests with those of the other party, presents a way for diverse interests, or values, to be balanced. Gerhart builds on this with "values-balancing reasoning" or, in the case of judicial deliberation, "values-balancing legal reasoning."[206] Gerhart's approach allows for transparency of the values of each party and provides an objective way to identify and evaluate competing interests so that a compromise, or a just resolution, may be found.

Values comprise the content of good faith, a controversial principle of contract law in common law jurisdictions.[207] In the United States, the

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[201] *Id.* at 45.

[202] MITCHELL, *supra* note 199; Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom: Thoughts about the Ideas of Ian MacNeil and Lisa Bernstein*, 94 N. W. U. L. REV. 775 (1999).

[203] GERHART, CLSM, *supra* note 22, at 94.

[204] Macaulay, *The Real and the Paper Deal*, *supra* note 192, at 83.

[205] The idea of "other-regarding virtues" arises from the work of John Stuart Mill. JOHN STUART MILL, ON LIBERTY (1859).

[206] GERHART, CLSM, *supra* note 22, at xiii.

[207] *See, e.g.*, Gunter Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 11–31 (1998);

presence of good faith is anchored in the Uniform Commercial Code ("UCC")[208] and the Restatement (Second) of Contracts.[209] Today, both form significant parts of the way in which contracts are understood, the former being one of the major sources of commercial law in the U.S. (used in all states except Louisiana), and the latter a significant non-binding authority in U.S. contract law, although devoid of defined contours and in the absence of context.[210] For Gerhart, good faith represents an example of values-balancing reasoning.[211] Daniel Markovits explains that good faith does not impose a new obligation, but rather serves as a core moral value to the agreement requiring parties to adopt behavior that is reasonable.[212]

For Gerhart, the doctrine of good faith serves an important function of filling gaps when problems occur within the contractual relationship.[213] Where courts are hesitant to adjust contractual terms or to fill gaps unnecessarily, Gerhart's proposal is for contracting parties to enter into their agreements with a clearer understanding of the other's expectations and specifically their well-being in a values-balancing way.[214] This way, the values prized by the parties themselves constitute good faith, which is used to fill gaps in the contract to address problems as they arise. In effect, Gerhart takes a meta-view of the nature of contracts and sees benefits for the contracting parties through understanding one another's positions—the parties have more in common than not and, as such, they will receive better satisfaction from this method than court-imposed doctrinal solutions.

B. Dispute Resolution

To understand exactly how Gerhart envisions his method as applicable to parties entering into contracts or, perhaps more importantly, how he conceives of such a method being utilised when the formal contractual relationship breaks down, the concept of "values-balancing reasoning" needs to be unpacked. This necessarily involves an assessment of human values, what they are and how they come to be held. Once we

Michael G. Bridge, *Does Anglo-Canadian Law Need a Doctrine of Good Faith?*, 9 CANADIAN BUS. L.J. 385 (1984).

[208] U.C.C. § 1-201(b)(20) (amended 2012).

[209] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[210] GERHART, CLSM, *supra* note 22, at 32 n.7.

[211] *Id.* at 33–34.

[212] Daniel Markovits, *Good Faith as Contract's Core Value*, *in* EUROPEAN CONTRACT LAW AND THE CREATION OF NORMS 47 (Stefan Grundmann & Mateusz Grochowski eds., 2021).

[213] *See, e.g.*, Liverpool City Council v. Irwin [1977] A.C. 239 (Eng.); Davis Contractors Ltd. v. Fareham Urb. Dist. Council [1956] A.C. 696 (Eng.).

[214] GERHART, CLSM, *supra* note 22, at 9.

understand values, it becomes possible to determine how one's values can be balanced against those of others.

For Gerhart, while values in the context of bargaining to have one's own interests met naturally tend to be absolutes on par with beliefs,[215] people are able, or ought to be able, to balance one's own values against those of others. Doing so involves reasoning, for only through a process of reasoning can one's own interests, or values, be balanced against those of the party with whom one is bargaining.[216] This, in turn, involves a "determination of which party's values count, and why, [and that] is ultimately a values-balancing choice because it is based on the values that each party presents to the court as a basis for resolving the dispute."[217]

To begin, then, we must understand what Gerhart means by values. The term "value," like much of the English language, has a variety of meanings including the monetary worth of a thing, the relative worth or importance of a thing, and the worth of a principle or quality intrinsically valuable to someone.[218] As a system of ethics, values determine the importance of a thing or action to us, with the goal of determining the best course of action or best way to live. Values are both prospective and prescriptive beliefs, in that they either directly affect behavior or form the basis for intentions that affect behavior. We balance our own values against those of others all the time. The tension between even strongly held convictions and our desires, often darker in nature, are in constant flux. It is this tension between values that makes us decisively human, and ultimately, forever, flawed.

The ability to balance our own values, interests, or needs against those of others arises under certain conditions, and has been much explored in game theory, particularly in the case of the "prisoner's dilemma" or "tit for tat." We are altruistic, but only to an extent.[219] And

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[215] GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!/ HOW DEMOCRATS AND PROGRESSIVES CAN WIN: KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES (2005); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2013).

[216] *See generally* DAVID HUME, A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS (1739–1740); KANT, *supra* note 105; RICHARD GARNER & BERNARD ROSEN, MORAL PHILOSOPHY: A SYSTEMATIC INTRODUCTION TO NORMATIVE ETHICS AND META-ETHICS (1967).

[217] GERHART, CLSM, *supra* note 22, at xii–xiii.

[218] For a discussion of consideration and values, *see* GERHART, CLSM, *supra* note 22, at 109–10.

[219] HART, *supra* note 7. Donald Pfaff explains the neuroscience of altruism, and how our brains process communal attachment, which is the basis of compassion and prosocial behavior, is in fact similar to all other species of mammal: PFAFF, *supra* note 119. For a contrasting view, *see* RIDLEY, *supra* note 113; Trivers, *supra* note 118. The concept is analogous to the strategy of 'tit for tat' in game theory, for discussion *see* DAWKINS, *supra* note 118.

it is perhaps through the idea of "values" that this can be more meaningfully explored. In law, "[t]he ideal reasoning commanded…[what] people do when they want to determine what the right thing to do is."[220] The difficulty, of course, emerges with a dispute; it is one thing to reason altruistically when nothing is "on the line," but what happens when a dispute emerges?

Gerhart concedes that "[i]n any dispute, one party is likely to have a selfish, opportunistic interest, but we do not know which party that is until we fully understand the parties' obligations. Thus, we need first to understand the values each party represents – values such as reliance or freedom from contract."[221] Gerhart continues, "[v]alues balancing reasoning posits that a contractual dispute represents a context between conflicting values, say reliance and freedom to change one's mind. It identifies those values and provides a method for determining how to reconcile them in particular contexts."[222] Thus, "[b]ecause the mental model takes into account the values presented by two autonomous persons, it serves to supplement and implement approaches that are based on a simple value – such as fairness or efficiency."[223] The terms "fairness" and "efficiency" take shape through the way in which Gerhart defines "values."

Disputes, then, are nothing more than a clash of values; resolving those disputes involves reconciling those values.[224] Here, we can distinguish interests and values by taking interests to be inward looking—reflecting only a person's self-interested view of the world. Interests, Gerhart claims, do not allow for an other-centred outlook. For this reason, Gerhart contends, "equality before the law must mean that a person's well-being should be subjected only to neutral and universal values."[225] While values may be subjective absolutes, Gerhart argues that they are also "universal and neutral because they represent aspects of human flourishing that all respect."[226]

In this way, values reflect a person's sense of right and wrong or what "ought" to be. Personal values provide an internal reference point for what an individual considers good, important, or worthwhile. Beside needs, habits, and interests, values generate behavior, and influence choices and decisions made by an individual. Moreover, values determine human

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[220] GERHART, CLSM, *supra* note 22, at 74.
[221] *Id.* at xii.
[222] *Id.* at 6.
[223] *Id.*
[224] *Id.* at 67.
[225] *Id.*
[226] *Id.*

survival problems through assigning priorities.[227] Values therefore provide insight into why people do the things they do and the order in which they do them; over time, the public expression of personal values provides the foundations of custom, tradition, and law.[228]

What one finds, then, is that individuals tend to form perceptions of risk based on their self-defining values.[229] The greatest deciding factor in someone's beliefs and values is fitting in with the people around them.[230] We have an overwhelming desire to be part of a community, and tend to alter our beliefs and values to conform to those of that community.[231] Human beings are very "groupish."[232] Political affiliation perhaps best illustrates this: most people align with one of two sets of values.[233] Those who are "hierarchical" and "individualistic" are wary of government and support the growth of private industry, while those who are "communitarian" and "egalitarian" have conventionally supported wider government regulation and intervention, at least in the context of corporate power and free trade, as well as areas such as health care and education.[234] Divisions most often emerge around morality and values.[235] Or, put another way: values generally prevail over facts.[236]

So, when faced with a dispute, shared values must also be weighed or traded off against one other. Hypothetically, even if we have a set of values which are universally shared by both contractual parties, the values themselves will fall into a hierarchy of preference, which both parties may not agree upon. Such a stalemate results in Gerhart's values-balancing reasoning, a form of "moral reasoning because it recognizes that reasoning is built on values that are universal, neutral, and attentive to relational expectations. The model is maximizing, because it recognizes that values must be traded off against each other and that what matters are the

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[227] Lilach Sagiv & Shalom H. Schwartz, *Personal Values Across Cultures*, 73 ANN. REV. PSYCH. 517 (2021).

[228] *Id.*

[229] Kahan et al., *supra* note 114.

[230] Joel Achenbach, *Why do Reasonable People Doubt Science?*, NAT'L GEOGRAPHIC (Mar. 2015), https://www.nationalgeographic.com/magazine/article/science-doubters-climate-change-vaccinations-gmos [https://perma.cc/BKN3-AQHU].

[231] LAKOFF, *supra* note 215.

[232] HAIDT, *supra* note 215.

[233] LAKOFF, *supra* note 215.

[234] RAND KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM (1994); J. BRAITHWAITE & P. DRAHOS, GLOBAL BUSINESS REGULATION (2000); Kahan et al., *supra* note 114.

[235] Ezra M. Markowitz & Azim F. Shariff, *Climate Change and Moral Judgment*, 2 NATURE CLIMATE CHANGE 243, 246 (2012).

[236] HAIDT, *supra* note 215; LAKOFF, *supra* note 215.

consequences of that trade-off for the well-being of two persons."[237] How is this process invoked when parties and their representatives negotiate and conclude contracts?

C. Contract as Practice

Legal reasoning is generally understood as a method of thought and argument that members of the legal profession utilise when applying legal principles to specific issues or cases. It is an objective approach to reasoning which aims to arrive at fair, just, and practical outcomes taking account of a set of subjective circumstances. The doctrine of precedent applies where the facts of the matter are deemed the same and thus legal reasoning and legal decisions of an earlier case apply to later ones. Reasoning by analogy is used when the facts of the two cases are so similar that the law applicable to the first ought to apply to later cases. Law is certainly not immune to growth or change and, in this way, typically aspires to develop with internal consistency and logic.

Importantly, in both types of legal reasoning, "values" per se do not (or at least *ought* not) play a role.[238] But legal reasoning must be separated from a system of reasoning used by those untrained in law; in other words, what judges, lawyers, and legal scholars mean by "reasoning" is quite unlike the perspective of the contracting parties. This is the practice of negotiation between parties which leads to a contract, as opposed to the formal law of contracts.

The chasm between law and practice reveals itself when performance of a contract fails and a breakdown in communication and cooperation occurs between the parties that typically catalyses the intervention of a court. Of greatest interest to Gerhart: what is the process of reasoning that leads a party to adopt a particular behavior that leads to a dispute? Whatever it may be, this reasoning leads to action in three different ways: when a party enters a contract, when a party is allowed to alter behavior when the contractual circumstances change, or, on a breakdown in the parties' relationship, the courts stepping in to interpret terms and to determine implied terms and remedies. And Gerhart contends that "the method of reasoning that persons ought to use to determine their promissory behavior is the method of reasoning that judges use to implement doctrine."[239] If that is so, Gerhart argues, "[w]hen people behave as they would if they had used the same method of reasoning as judges, the law's normativity is unified with the normativity of people's

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[237] GERHART, CLSM, *supra* note 22, at 6.

[238] MICHAEL EVAN GOLD, A PRIMER ON LEGAL REASONING 82–84 (2018); JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 27–28 (2007).

[239] GERHART, CLSM, *supra* note 22, at xi.

own reasoning. When that happens, the distance between law on the books (how people ought to behave) and law on the ground (how people actually behave) shrinks."[240] At the same time, under Gerhart's theory, "judges resolve disputes that arise from promising and contracting by using a method of values-balancing reasoning about a person's obligations, and that method of reasoning is the one they believe people should use when people in a promissory, contractual, relationship decide how to behave."[241]

What Gerhart posits is that rather than the court substituting its own legal reasoning to resolve a dispute, it ought to turn to the practice of contracting between the parties themselves, and the initial reasoning that those parties used when they reached an agreement to contract. Thus, the binding reason should come from the parties and not *stare decisis*. What this means is that parties would engage in reasoning similar to that which the law employs, for "successful dispute resolution depends on both parties adopting a method of reasoning about the authority's instructions that allows the parties to reach the conclusion that the authority would reach itself."[242] In other words, when "the parties understand how conflicting values have been reconciled in previous, analogous disputes, they can understand how legal authorities expect the parties to reconcile the conflicting values that give rise to their disputes."[243] But, again, when that occurs, "[v]alues matter, and, in particular, it matters how judges balance values against each other."[244]

Yet, even though judges might consider "contextual factors and circumstances that determine how doctrine be applied,"[245] is this the same as "values-balancing legal reasoning?" A problem, might, in other words, arise with Gerhart's claim, a problem that turns on the notion of values. Even if parties try to balance values in reasoning, is it not the case that self-interest will somehow prevail? The reason people enter into contracts is to get something they want, even if it is in exchange for something else. If parties were capable of utilising the same reasoning as judges, we would have less need for judges, indeed following this line of thought, contractual disputes would be drastically reduced. Even if it was possible for parties to employ the same sort of objectivity in their reasoning that judges do, it is unclear how Gerhart intends to move people towards this way of contracting. Changing people's behavior, especially when the stakes are high, may not be possible. Changing peoples' behavior can be difficult under any circumstances, but is particularly so when "values" are

[240] *Id.*
[241] *Id.*
[242] *Id.* at 28.
[243] *Id.*
[244] *Id.* at 12.
[245] *Id.* at xi.

involved. Even in the context of "cooperative relationships," or "other regarding" behavior, self-interest tends to dominate.[246]

But what Gerhart argues is not that the parties will use a method of reasoning known only to those trained in the law. Instead, the theory proposed is "animated by the straightforward claim that we can identify a way of nondoctrinal reasoning about obligations that a reasonable person would use, given the promises and contracts she has made. This method of reasoning determines how we ought to treat each other in the context of promising and contracting."[247] So, it "does not start with authority, doctrine, or theory. Instead it displays a method of reasoning about the contest of values implicated in a dispute, suggests a method of choosing among the relevant values, and ends up with a decision that respects both sets of values but reconciles them in a fair and efficient way."[248] Judges, too, "evaluate[] the legal obligations that arise from promising and contracting, implementing legal doctrine in the context of a dispute" as well as "employ[ing] a method of reasoning about the determinants of legal obligations . . . [that] considers the contextual factors and circumstances that determine how doctrine ought to be applied."[249] In this way, finding the law involves a considerable degree of *judgement*, a mental faculty ungoverned by quantifiable rules and procedures found in statues or cases.[250] Particularly in "hard cases" judges are forced to rely on normative considerations in order to resolve disputes.[251]

Those considerations to which judges must, then, advert, include "when parties have different views of their obligations and cannot resolve their different views:" then judges "need a method of reasoning that allows them to reach a mutually acceptable accommodation. If people have developed a method of reasoning that they use to enter, continue, or to wind down relationships, then it would make sense for courts to use that method of reasoning to determine how parties ought to view their obligations when unresolvable disputes arise."[252] For Gerhart, the parties, "knowing the deal they did make, also know of the deal they would have made if they had used values-balancing reasoning to fill in the gaps."[253] This bridges the gap between "what reasonable people might decide and what the bargaining parties did decide."[254] In this way, moral reasoning allows judges the opportunity to respond to disputes that emerge between

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[246] *Id.* at xii.
[247] *Id.*
[248] *Id.* at 6.
[249] *Id.* at xi.
[250] SCOTT J. SHAPIRO, LEGALITY 237 (2011).
[251] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).
[252] GERHART, CLSM, *supra* note 22, at 103; *see also* DWORKIN, *supra* note 251.
[253] *Id.* at 127.
[254] *Id.* at 126.

contracting parties brought about by the changing social imperatives held by those parties;[255] this is what is meant by value-balancing reasoning engaged in by parties who enter into contracts.[256]

V. CONCLUSION

Gerhart seeks not to remake contract law but to illuminate the ways in which contractual disputes may be resolved. And to demonstrate this, the model proposed in CLSM undertakes the proposed "values-balancing legal reasoning" as a mental model designed to complement and re-focus existing understandings of contract law. The model corresponds to judicial analysis, which treats individual interests as secondary to legal obligations, establishing an important reflection of broader social values. The framing Gerhart presents positions values-balancing reasoning as a gap-filler to aid difficult questions around power relations within a contract when disputes emerge among the parties. The constant tension between how we act and how we ought to act, between innate human behavior and cultural conditioning, between law, morality, and philosophy, is evident throughout Gerhart's theory.

While scientific and philosophical analysis may expose weaknesses in Gerhart's claim for contract law, they do not obviate the thesis that values-balancing reasoning may already form an essential component of the *praxis* of contract—what parties do when they contract. And if that is so, then we can accept, perhaps tentatively, Gerhart's argument that courts ought to advert to such reasoning in resolving disputes before turning to the traditional legal resources of statute and case law. The true test of CLSM, as with all theory, will only be shown in its adoption by those who matter: parties to contract and those legal actors—judges, legislators, and lawyers—charged with resolving disputes. In short, it can only be proven in practice.

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[255] *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 (Austl.); Brown v. Board of Educ., 347 U.S. 483 (1954).

[256] GERHART, CLSM, *supra* note 22, at xi.