Michigan Law Review

Volume 110 | Issue 3

2011

Property's Morale

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Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437 (2011).
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PROPERTY'S MORALE

*Nestor M. Davidson**

A foundational argument long invoked to justify stable property rights is that property law must protect settled expectations. Respect for expectations unites otherwise disparate strands of property theory focused on ex ante incentives, individual identity, and community. It also privileges resistance to legal transitions that transgress reliance interests. When changes in law unsettle expectations, such changes are thought to generate disincentives that Frank Michelman famously labeled "demoralization costs."

Although rarely approached in these terms, arguments for legal certainty reflect underlying psychological assumptions about how people contemplate property rights when choosing whether and how to work, invest, create, bolster identity, join a community, and make other decisions at property's core. More precisely, demoralization is predicated on a kind of paralysis flowing from anxieties about instability, unfair singling out, and majoritarian expropriation that can be sparked in legal transitions.

This prevailing psychological portrait of expectations has considerable intuitive appeal and is widely influential. It is, however, distinctly incomplete. This Article offers an alternative picture of the expectations with which people approach property and the corresponding anxieties that might cause people to hesitate. From this perspective, stability is less important than assurances that the legal system will respond when external forces threaten to overwhelm the value owners create, that it will provide a fair process of adjustment over time, and that it will ensure inclusion.

In short, property law can offer morale benefits that are every bit as critical as demoralization costs. Property theory and doctrine often juxtapose ex ante certainty against ex post flexibility; however, a morale lens underscores that legal transitions can signal responsiveness as easily as instability. Doctrinally, this understanding recalibrates property law's approach to expectation. Normatively, property's largely ignored, but absolutely vital, morale function provides a framework for understanding how the legal system can buoy confidence in greater balance, fostering all of the work with which property is so rightly associated.

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* Associate Professor, Fordham Law School. For helpful comments and discussion of earlier drafts, I am grateful to Ben Barros, Jeremy Blumenthal, Daniel Bonilla, Hanoch Dagan, Clare Huntington, Jim Kainen, Sonia Katyal, John Lovett, Jonathan Nash, John Pfaff, David Reiss, Chris Serkin, Joe Singer, Stewart Sterk, Stephanie Stern, and Nelson Tebbe. Josh Kutticherry, Nicolas Schumann, and Kristen Van Slyke provided valuable research support.

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"Property is nothing but a basis of expectation . . . ."

—Jeremy Bentham[1]

INTRODUCTION

Property law's approach to the life of the mind is unbalanced. One of the most enduring arguments deployed in favor of strong property rights is the imperative to protect the "settled expectations" of property holders.[2] This reflects the prevailing, often visceral, idea that the values inherent in our system of property—rewarding investment, promoting exchange, bolstering individual identity, and fostering community—are best served by long-term stability in a legal regime on which people can rely.[3] Concern with protecting expectation has taken root both in constitutional property law as well as in a variety of traditional doctrinal areas of property.[4]

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1. JEREMY BENTHAM, THE THEORY OF LEGISLATION 111 (C.K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802).

2. As John Lovett recently noted, "[M]ost property law observers would apparently agree that much, if not all, of property law is designed to create stable environments in which people can exercise predictable control over the tangible and intangible objects of value in their world and to exchange those objects within stable and predictable parameters." John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463, 475–76 (2007). *But see* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1275 (2009) (arguing that "the history of property law in this country is the history of promoting increasingly intensive uses" of land, chattels, and ideas, as well as that the "guiding principle has not been maintaining stability but rather encouraging productivity").

3. Arguments for stability of expectations in the design of property law have played out across a variety of theoretical approaches. With utilitarian roots stretching back to Bentham and others, *see* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 330–31 (1996), the argument finds contemporary expression in accounts of optimal ex ante incentives for investment as well as the information cost minimization and network benefits of stable entitlements. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 40 (8th ed. 2011); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 538 (2005); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 64 (2000). Focus on expectations has echoes as well in accounts that emphasize the need for stability to foster personal attachment to property, *see* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 977 (1982), and undergirds some strains of relational approaches to property, reflecting the normative value of legal stability at the community level. *See, e.g.*, Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 64–78 (1994); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1894 (2005).

4. For example, the extent to which legal transitions transgress owners' "distinct investment-backed expectations" is a central element of the prevailing *Penn Central* test for regulatory takings. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)). Protecting expectations has also been invoked as a baseline for acceptable change to property rights under the Due Process Clause. *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring). Courts also regularly invoke expectations in certainty in nonconstitutional areas of property such as servitudes, trusts and estates, landlord-tenant law, and water law. *See infra* Section I.B.

Lurking beneath arguments for property's valorization of expectation lays a set of psychological assumptions about the anxieties that are sparked by legal transitions.[5] Changes in the law, for example, may raise fears of general instability—if the law changes now, the law may similarly and in unforeseen ways change again. Moreover, there is something palpably troubling about the unfairness of a process under which the state intentionally picks winners and losers. Finally, when the majority harms the property of a minority in a way that does not even out over time, such majoritarian abuse tells other owners that they, too, might be singled out. Frank Michelman famously labeled the disincentives flowing from legal transitions that unsettle expectations "demoralization costs."[6]

This compelling portrait of the psychology of expectations has been widely influential in legal theory and doctrine,[7] and has considerable merit.[8]

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5. Legal transitions broadly refer to situations where changes in law raise the question of possible invalidation or compensation for existing entitlement holders beyond the strict retroactive application of new law. *See, e.g.*, Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 3, 11–12 (2003); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 515–16 (1986); Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Process*, 13 J. CONTEMP. LEGAL ISSUES 211, 211–12 (2003). This Article likewise considers a variety of situations in which changes in law are understood to cause economic or other harm to property holders.

6. Demoralization costs, as Michelman describes them, reflect both direct "disutilities" from the realization on the part of an owner harmed by a legal transition that he will not be compensated and also, in a tone redolent perhaps of a Shirley Jackson short story, "the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

7. Michelman's concept of the demoralization engendered by legal transitions has had tremendous influence both on property theory and on the role of expectations in constitutional doctrine. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 141–42 (1995) (noting that Michelman's account has "dominated the academic discussion of the takings issue for more than a quarter century"); Serkin, *supra* note 2, at 1255 & n.162 (discussing the account's enduring influence and role in providing the intellectual foundation for the regulatory takings test that Justice Brennan articulated in *Penn Central*). For other Supreme Court takings cases invoking Michelman's analysis, see, for example, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). The influence of Michelman's account has not been limited to real property. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 322 (1970) (arguing that given creators' reliance on existing copyright law, "[t]he 'demoralization' costs of undermining these expectations may be considerable").

It is important to note at the outset that Michelman's exegesis of demoralization focuses on the question of compensation for legal transitions. However, the concept of demoralization has grown beyond this context and is now regularly invoked as an argument against flexibility in property. *See infra* Section I.C.

8. There are obvious costs to venerating stability, and a number of scholars have challenged the normative implications of invocations of settled expectations in property law, emphasizing the need for the legal system to adjust property interests over time. *E.g.*, EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS,

It is, however, distinctly incomplete. As the aftermath of the recent economic crisis has painfully evinced—in which ordinary investors retreated from committing capital[9] and housing markets locked up in part because potential buyers were concerned about further market shocks[10]—other long-term concerns are vitally important when people decide whether and how to approach property. These concerns reflect anxieties that mirror what demoralization assumes. Thus, some people fear that when uncertainty arises, the legal system will not be responsive. Likewise, some people need to know that when circumstances change, there will be a fair process of adjustment. And those facing private exclusion at the hands of a majority may be concerned with whether there will be an adequate remedy. These animating anxieties essentially focus on whether law will respond or stand idly by when events beyond the control of owners threaten the value of their property.[11] For some people, then, it is the very risk that a legal transition might *not* be forthcoming that will cause them to be cautious.

This landscape of concerns finds support in behavioral and psychological literature on decisionmaking and risk. Experimental and observational work, for example, has documented that people tend to respond to certain negative events by overcompensating toward risk aversion.[12] Psychological research on procedural justice has further underscored that perceptions of fairness and systemic legitimacy are important determinants when people contemplate engaging in an activity.[13] And there is empirical support for the

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PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 11 (2010) (emphasizing property's "need for dynamism, its ability to change and to fluctuate according to shifting norms, values, and social realities"); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (1964) ("The essence of property, as we actually use the term, is not fixity at all, but fluidity."). *See generally* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 30–42 (1997) (discussing dialectics of stability and dynamism in early American property thought). For further discussion of the critique of stability and arguments for flexibility, see *infra* Section I.A.2.

9. The risk of a significant pullback from equity markets by ordinary investors has been in the news in the wake of the recent economic crisis, even as overall equity prices have stabilized. *See, e.g.*, Adam Shell, *Could Investors Fleeing Stocks Become a Lost Generation?*, USA TODAY, Sept. 2, 2010, at 6A (discussing equity investor skittishness and fears of another "lost generation" of investors as with the Great Depression and the recession of the early 1970s); Robert J. Shiller, *The Survival of the Safest*, N.Y. TIMES, Oct. 3, 2010, at BU7 ("In a broad sense, damage to morale—which John Maynard Keynes called 'animal spirits'—surely ranks as one of the most important reasons for the American economy's persistent weakness.").

10. *See* Editorial, *Housing on the Brink*, N.Y. TIMES, Sept. 3, 2010, at A20 (discussing "paralysis in the housing market" as "reluctant buyers obviously outnumber willing ones"); Joe Nocera, *Widespread Fear Freezes Housing Market*, N.Y. TIMES, Aug. 28, 2010, at B1 ("Essentially, every participant in the housing market has a reason to be afraid. And that fear is paralyzing.").

11. *Cf.* LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 184–87 (2009) (disaggregating the value in homeownership into consumption value, gains and losses internal to an owner's own investment, and gains and losses that reflect forces outside the household's control).

12. *See infra* Section II.A.

13. *See infra* Section II.B.

proposition that signals of exclusion, explicit and implicit, can disincentivize and marginalize those receiving such signals, again making them hesitate before committing.[14]

This alternative psychological portrait suggests—and it is the work of this Article to delineate—a very different kind of expectation for the institutions of property to respect. As much as people worry about instability, unfair singling out, and majoritarian exploitation, people are also concerned about responsiveness, fair adjustment, and inclusion. In other words, some people are motivated to engage with property not because they take comfort that the law will not change but rather because they know at the outset that the system will be flexible. As a result, legal transitions can communicate to those people that the boundaries of risk inherent in property have reasonable limits; that society will, however imperfectly, provide processes to mediate competing property interests; and that the system of property will protect those perceived to be outsiders. In short, for some people, demoralization costs have an underappreciated obverse in what this Article calls "morale benefits."[15]

Descriptively, sending signals that resonate for expectations of flexibility is an important part of what the legal system is doing unintentionally much of the time when it muddies supposedly crystalline rules.[16] In any number of areas, legal institutions are confronted with changed circumstances arising from new understandings of harm or new opportunities, and the law shifts to accommodate these changes, even at the cost of unsettling previous reliance. This dynamism in property is often understood to reside in the realm of ex post adjustment and reinterpretation of rights. But these shifts can also be understood as sending an ex ante signal to those who value flexibility—an important psychological consideration to bolster confidence.[17]

Understanding morale's role leads to a broader palette of interests for courts to consider when approaching questions of expectation.[18] The prevailing focus on one type of expectation and the demoralization that follows its transgression presents a fundamentally inaccurate picture of the "ingrained

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14. *See infra* Section II.C.

15. *See infra* Section III.A.

16. *Cf.* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578–79 (1988) (describing how crystalline rules have been muddied by "exceptions and equitable second-guessing," requiring courts or legislatures to later adopt new crystalline rules). Just as expectations in certainty refers to a range of reliance interests in existing rules, "expectations in flexibility" as this Article uses the phrase reflects related concerns about the anticipation of responsiveness, the fairness of adjustment, and assurances of equal treatment.

17. To be clear, not every legal transition will signal in the same way to the same people. Context, culture, the particular channels of communication, and the nature of the audience clearly matter. Moreover, some people may be more likely to respond to certainty, while others may be more likely to respond to flexibility. *See infra* Section II.D. Thus, though some changes in the law may resonate more in terms of demoralization and others may resonate more in terms of morale, many have the potential to signal both.

18. *See infra* Section III.B.

habits of mind"[19] that inform the choices people make in approaching property. A more balanced perspective would not render reliance on legal rules less salient but would mean that courts evaluating the costs and benefits of legal transitions would recognize the inherent tradeoffs in choosing traditional expectations of certainty over expectations of flexibility. Similarly, a morale lens can illuminate otherwise puzzling aspects of regulation that are as much about signaling responsiveness and systemic strength as they are about correcting specific market failures.[20]

Normatively, recognizing that morale benefits counterbalance demoralization costs gives a conceptual vocabulary for reshaping our understanding of expectations. Any owner can potentially be not only the victim but also the beneficiary of legal change, and the legal system should recognize the inherent reciprocity of expectations that this implies. Accordingly, the ex ante signal of flexibility, rather than being orthogonal or even adverse to the structure of decisionmaking about property, may stand at the legal system's core.

This Article, in short, argues for a recalibration that recognizes the ways in which both stability *and* dynamism are important at the outset when people engage with property. This understanding points toward a richer vision of what is necessary to foster confidence in the conditions under which work, investment, and creativity are rewarded; personal and community attachments take place; and the rest of what our property system seeks to encourage can flourish.[21]

This Article proceeds as follows. Part I lays out the debate about settled expectations and flexibility in property theory, describes how this debate finds doctrinal expression, and analyzes the anxieties underlying demoralization. Part II then complicates the prevailing picture of the psychological frame through which people approach property. The Part discusses heuristics relevant to fear of loss, perceptions of fairness, and signals of exclusion to paint an alternative portrait focused less on unyielding legal stability and more on the ex ante need for regulatory responsiveness and inclusiveness.

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19. Michelman, *supra* note 6, at 1209.

20. *See infra* Section III.C.

21. It is perhaps a truism that "property law—like all law—is based on assumptions about human behavior and cognition and emotion," Jeremy A. Blumenthal, *"To Be Human": A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609, 611 (2009), but those assumptions are deeply influential and bear examination nonetheless. Indeed, in recent years there has been a wonderful flowering in scholarship exploring psychological aspects of property. *E.g.*, Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 (2010) (drawing on literature exploring the psychology of creativity to distinguish creativity in science and engineering from artistic creativity); Jonathan Remy Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449 (2010) (drawing on experimental data involving cognitive framing to argue that framing property in "bundle of rights" terms and forewarning of limitations can decrease resistance to restrictions); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1099–1120 (2009) (citing psychological research to challenge prevailing conceptions of the role of home as property for personhood). For an overview of recent trends in this literature, see Jeremy A. Blumenthal, *A Psychological Perspective on Property Law*, 83 TUL. L. REV. 601 (2009).

Finally, Part III argues that recognizing the largely ignored, but vital, role of morale benefits as the legal system responds to these alternative concerns has implications for property theory, common law and constitutional doctrines, and regulatory approaches to property.

I. THE PSYCHOLOGY OF EXPECTATIONS IN PROPERTY THEORY

Justifications for property rights reflect varying and often implicit assumptions about the habits of mind that animate the work of property. This Part explores debates in property theory about respecting settled expectations and focuses on the anxieties that seem to underlie arguments for certainty.

A. *Stability Justifications in Property (and Their Discontents)*

Scholars have argued from a variety of perspectives for the instrumental and normative value of long-term legal stability in our property system—assertions that this Article calls expectationalism.[22] These arguments focus on how individuals contemplating choices involving property react to the signals that legal transitions send in terms of incentives, personal identity, and community.[23] They have engendered an equally sophisticated critique, emphasizing the necessity for adjustments in legal rules as understandings of harm evolve and public necessity changes. This Section outlines this perennial debate over ex ante certainty and ex post flexibility.[24]

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22. Carol Rose has identified basic contexts in which our property system is confronted with questions of legal stability. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1. First, in ordinary private conflicts, the state must decide whether to side with "those who *disrupt* formally correct claims" as a matter of systemic housekeeping. *Id.* at 5. Next, societal changes at times necessitate adjusting formal property rights, generating "regulatory disruptions." *Id.* at 6. Finally, what Rose calls "extraordinary" shifts involve fundamental "rights alterations that accompany revolutions and warfare or other upheavals." *Id.*

23. An important stability rationale derives from democratic theory. *See* Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 916 (1993) (arguing that "one of the best ways to destroy a democratic system is to ensure that the distribution of wealth and resources is unstable and constantly vulnerable to reevaluation by the political process"). This Section, however, focuses on more immediate pragmatic concerns, addressing questions of majoritarian abuse as well as legitimate democratic process in terms of the signaling effects of legal transitions, rather than as an independent value.

24. Each of the expectationalist arguments discussed in this Section can be framed not only in terms of ex ante signals but also in terms of the purported structural benefits of stable entitlements over time, in contrast to the critique from ossification discussed below. *See infra* Section I.A.2. Legal stability can be understood to validate reliance, constrain public actors, and reduce the costs of responding to regulatory change. *See* Doremus, *supra* note 5, at 14–18. This Article largely sets aside these structural arguments, focusing instead on reactions to legal transitions in order to unpack the psychology of expectation.

1. The Ex Ante Value of Legal Certainty

a. *Security and Incentives in Utilitarian Accounts*

Although accounts of the role of expectations of certainty have many roots,[25] the contemporary discourse that emphasizes incentives and stable legal structure grows primarily out of the utilitarian tradition that developed from David Hume but found its strongest adherent in Jeremy Bentham.[26] Bentham considered property essentially "the institutionally established understanding that extant rules governing the relationships among men with respect to resources will continue in existence."[27] This continuity was vital because "men will not labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings."[28]

This kind of expectationalism will sound familiar from any number of modern accounts, primarily in economics.[29] Richard Posner, for example, has translated the need to respect expectations into the proposition that property rights are the necessary precondition to investment.[30] "Imagine," Posner writes, "a society in which all property rights have been abolished."[31] In this society, even if there were great net value in a crop, the farmer would

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25. *See, e.g.*, Rose, *supra* note 16, at 592 (describing legal stability as a Lockean argument).

26. Bentham's utilitarian views of property echoed his famous proposition that natural rights are "nonsense upon stilts," 2 JEREMY BENTHAM, *Anarchical Fallacies*, *in* THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., Elibron Classics 2005) (1843), which led Bentham to assert that property was merely a creature of positive law. *See* BENTHAM, *supra* note 1, at 113 ("Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.").

27. Michelman, *supra* note 6, at 1212. This institutional focus produced a corresponding normative reliance claim. As Bentham put it, "The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil." BENTHAM, *supra* note 1, at 113. Bentham seems to have understood (and even embraced) the distributional consequences of his expectationalism. *See id.* at 114 ("Men universally desire to enjoy speedily—to enjoy without labour. It is that desire which is terrible; since it arms all who have not against all who have. The law which restrains that desire is the noblest triumph of humanity over itself."). For further discussion, see D.G. Long, *Bentham on Property*, *in* THEORIES OF PROPERTY 221, 225–26 (Anthony Parel & Thomas Flanagan eds., 1979).

28. Michelman, *supra* note 6, at 1212; *cf.* Rose, *supra* note 16, at 592 (canvassing arguments that industry and productivity require "crystal" rules as opposed to "muddy" standards because "[t]he industrious and rational need to know that the consequences of their dealings are fixed, at least legally; no shifts of responsibility after the fact").

29. To some economists, property rights are only about expectations. *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967) ("Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others.").

30. *See* POSNER, *supra* note 3, at 44.

31. *Id.* at 40.

soon abandon sowing; "there is no incentive to incur [relevant] costs because there is no reasonably assured reward for incurring them."[32] Posner's formulation assumes a simple binary—there will or will not be an enforceable right to exclude—but the same argument applies with respect to any expectation in a given surplus value subject to potential loss without specific legal protection in terms of other property rights.[33]

Extending the proposition that legal certainty creates appropriate ex ante incentives, Abraham Bell and Gideon Parchomovsky argue that property law is organized around the value of "stable ownership."[34] Bell and Parchomovsky assert that each potential owner in a world without property law, like the state of nature Posner imagines, would have to discount expected utility by the probability of retaining possession, factoring in the cost and probability of defending the property.[35] Property law's primary effects are thus to substitute public enforcement for private defense and increase the owner's likelihood of retaining possession.[36] This changes the calculus of investment, they argue, and is best accomplished at the scale available by a legal system that creates and polices uniform property rights. The increase in value of assets, moreover, correlates with the degree of stability those rights enjoy.[37]

For Bell and Parchomovsky, stable ownership has transactional value as well, reducing search costs and creating network benefits to the extent stable rights facilitate investment in compatible uses of property.[38] In a series of articles, Thomas Merrill and Henry Smith have developed a theory of the texture of property rights that similarly emphasizes information costs.[39] This communication theory carries with it a kernel of expectationalism in that those interacting with a long-standing and relatively stable rule "are more apt to have encountered the rule in the past and to have made some previous

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32. *Id.*

33. This argument, moreover, can apply to any resource, not just land. In the discourse of appropriate ex ante incentives for creation that dominates intellectual property scholarship, a recurring and at times controversial theme is stability of expectations for potential creators. *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009) (arguing for foreseeability as an outer limit to a copyright owner's entitlement to internalize gains); Breyer, *supra* note 7, at 322 (discussing the expectations of authors and publishers in existing copyright law); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433 (2007).

34. Bell & Parchomovsky, *supra* note 3, at 538. "Property law," they argue, "both recognizes and helps create stable relationships between persons and assets, allowing owners to extract utility that is otherwise unavailable." *Id.*

35. *Id.* at 553.

36. *Id.* at 555.

37. *Id.* at 552.

38. *Id.* at 557–58.

39. *E.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) ("[P]roperty rights must be communicated to a wide and disparate group of potential violators . . . [and thus] must be easily comprehended and must resist possible misinterpretation."); *see also* Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

investment in comprehending the rule."[40] Informational continuity thus reduces costs to indeterminate potential actors over time, forming an important facilitating factor when people are deciding whether and how to invest or act.

Scholars who highlight the efficiency of ex ante signals of legal certainty marshal other arguments against changes in law and recognize countervailing reasons—grounded in efficiency and other values—for tempering that stability. But a clear theme emerges across these accounts: Bentham's basic concept that property law exists to protect expectations endures in contemporary arguments that law should not only preserve existing entitlements but also communicate that protection to those contemplating working, investing, and otherwise interacting with property.[41]

b. *Legal Stability for Personhood and Community*

Expectationalism emerges as well in theories of property that focus on the nature of individual attachment to objects and to the properties of communities. To begin with, personhood, the concept that property forms a foundational component of individual identity—generally associated in philosophical terms with Hegel[42] and in psychological terms with William James[43]—implicates the need for legal stability in that connection over time. To Margaret Radin, the idea of attachment embodied in external objects "reminds us that people and things have ongoing relationships."[44] As a result, Radin notes the connection between attachment and personhood:

> This view . . . gives us insight into why protecting people's "expectations" of continuing control over objects seems so important. If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that

40. Merrill & Smith, *supra* note 3, at 64.

41. For a time, echoes of expectationalism, to the extent they reflect conceptualism, seemed to be ceding in centrality in law and economics accounts of property to a focus on entitlements and transaction cost considerations. *See* Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 24 (2002); *see also* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 366 (2001) (noting the progression from expectationalist perspectives to Legal Realism to Coasean disaggregation in conceptualizing property rights). Information cost accounts and Bell and Parchomovsky's work on stability of ownership have begun to revive protecting expectations as a contemporary subject in economically oriented property scholarship.

42. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 353 (1988) (discussing Hegel's theory of the embodiment of individual will in external objects).

43. *See* 1 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 291 (Cosimo, Inc. 2007) (1890) ("[I]t is clear that between what a man calls *me* and what he simply calls *mine* the line is difficult to draw. We feel and act about certain things that are ours very much as we feel and act about ourselves.").

44. Radin, *supra* note 3, at 977.

> make you a person, then your personhood depends on the realization of these expectations.[45]

In order to attach to an external object—to make property a part of one's personhood—some measure of certainty that the legal system will respect that attachment seems intuitively important.

Likewise, where the attachment is to a place or to a community, stability and the legal platform that it implies can be an important consideration.[46] Eduardo Peñalver, for example, has argued for a conception of "property as entrance" that is meant to capture the need for "stable community life."[47] Drawing on Aristotelian and Thomistic understandings of human nature as inherently social, Peñalver argues that acquiring property is less about facilitating isolation but more about reinforcing bonds to a community.[48] This is not explicitly expectationalist in the way that incentive and personhood theories can be,[49] but it implicitly recognizes that legal stability can be important for a community's ability to foster the social connections embodied in property.

Other scholars similarly recognize a need to protect investment in—and the right to rely on—collective expectations at the community level.[50] Bradley Karkkainen has offered a justification for zoning, which is often conceptualized in terms of the benefits of planning and the reduction in conflicts arising from incompatible land uses, as a method to protect the "[n]eighborhood [c]ommons."[51] This physical embodiment of collective expectations in a given pattern of land use suggests the instrumental value those contemplating joining such a community might place on the ex ante signal of legal stability.[52]

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45. *Id.* at 968. Radin quickly retreated from the apparently objectionable "Benthamite" associations of this invocation of expectations. *Id.* (distinguishing from "Benthamite" justifications by limiting the argument for recognizing expectations to situations where "the person is bound up with the object to a great enough extent" and "the relationship belongs to the class of 'good' rather than 'bad' object-relations").

46. So too can property's ability to preserve "connections, heritage, and history." Rachel A. Van Cleave, *Property Lessons in August Wilson's* The Piano Lesson *and the Wake of Hurricane Katrina*, 43 CAL. W. L. REV. 97, 128 (2006); *see also* Lovett, *supra* note 2, at 527 (discussing this connection between the individual and the community through property).

47. Peñalver, *supra* note 3, at 1894.

48. *Id.*; *cf. id.* at 1939 (arguing that property as entrance is "a means of anchoring the individual in the structure of power and virtue" (quoting ALEXANDER, *supra* note 8, at 31)) (internal quotation mark omitted).

49. Peñalver's conception of the communitarian aspects of property, for example, includes redistribution to ensure broad access to property's benefits. *Id.* at 1961–62.

50. *Cf.* Georgette Chapman Phillips, *Boundaries of Exclusion*, 72 Mo. L. REV. 1287, 1302 (2007) (discussing ways that law validates community expectations in exclusion).

51. Karkkainen, *supra* note 3, at 64–78.

52. A variation of collective expectations that hints at the importance of long-term stability, albeit under a much richer vision of property, is the work of Kristen Carpenter, Sonia Katyal, and Angela Riley exploring stewardship of cultural resources for the peoplehood of indigenous peoples. Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009). Carpenter, Katyal, and Riley illuminate the consequences of the legal system's failure

c. *Moral Intuitions and Perceptions of Fairness*

A final strand of expectationalism bears mention, although here the value of respecting expectations is both more foundational and more attenuated. For some scholars, the extent to which the legal system comports with the moral intuitions of those approaching property is itself an important ex ante signal. Merrill and Smith, for example, argue that property should respect intuitive moral urges because the in rem nature of property requires a tremendous amount of coordination and enforcement. Given the corresponding need for property law to communicate to a broad and heterogeneous group of strangers, property functions "only if the vast preponderance of persons recognize that property is a moral right."[53] For Merrill and Smith, this implies that such morally inflected property rights must be not only "simple and accessible"[54] but also stable.[55] People will invest more readily in a system in which relatively clear and simple entitlements are understood to be enduring.[56]

The extent to which property law comports with moral intuitions can have broader implications. Bruce Ackerman argues that ordinary social understandings have an important role to play in an often technical constitutional discourse about property.[57] This has given rise to the argument that the judicial system should honor those common expectations.[58] Taken to its logical conclusion, this kind of cultural expectationalism means that reliance is not just a question of individual incentives and coordination but also a reflection of underlying social norms foundational to the system as a whole.[59]

Setting aside for the moment counterarguments that the particular moral intuition on which these accounts are predicated is hardly the only normative

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to protect the collective (and badly damaged) expectations of tribes in resources vital to their cultural survival.

53. Merrill & Smith, *supra* note 39, at 1850; *see also id.* at 1853–54.

54. *Id.* at 1850; *see also id.* at 1858–66.

55. *Id.* at 1851 (arguing that a conception of property that "continually mutates from one context to the next as legislatures and courts" define property rights "would make impossible the maintenance of a system of simple moral duties comprehensible to all").

56. *Id.* at 1857 (arguing that simple moral rules are necessary to "produce the stability of expectation needed for widespread coordination"). Similarly, William Fisher noted that legal transitions generate what he called "search costs." William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1780 (1988). As Fisher put it, such transitions "risk[] undermining people's faith that, by and large, the law comports with their sense of justice," which in turn requires greater investment in ascertaining the content of applicable legal rules. *Id.*

57. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10–20 (1977) (delineating "ordinary" and "scientific" approaches).

58. Fisher, *supra* note 56, at 1776 (arguing that a commitment to "the notion that law should support dominant social expectations as these are expressed in ordinary language" requires understanding those expectations and the role of the judiciary in shaping them (quoting ACKERMAN, *supra* note 57, at 94) (internal quotation marks omitted)).

59. *See* Rose, *supra* note 16, at 579 (noting that a shift from certain to uncertain rules "seems disruptive to the very practice of a private property/contractual exchange society").

claim at issue,[60] the signal of systemic stability sent here is still distinct. It tries to forestall a visceral sense that if the rules can change too easily, too quickly, or too often, then property itself becomes unstable.[61] From this perspective, legal stability communicates that people can have faith that the property system as a whole will honor certain salient moral intuitions.

2. The Costs of Stability and the Critique of Expectationalism

For all of the force of expectationalism, there is a significant literature challenging its tendency to ossify existing patterns of ownership and entitlement, and highlighting the value of ex post flexibility as circumstances change.[62] Some scholars, for example, contest efficiency arguments for certainty's ex ante signal.[63] Radin cautions that attachment to property can risk object fetishism.[64] There is a long-standing critique of the exclusionary tendencies of communitarian legal stability.[65] Consonance with moral intuition, moreover, has a strong counternarrative.[66] And, more generally, scholars have argued against respecting reliance on institutional arrangements that lock in entitlements that are normatively or pragmatically troubling.[67]

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60. *See infra* Section III.C.2.

61. *See, e.g.*, Doremus, *supra* note 5, at 15–16.

62. *See supra* note 8. Eduardo Peñalver and Sonia Katyal note that property law's inherent resistance to change creates the perennial risk that property's institutions fall out of line with social reality. *See* PEÑALVER & KATYAL, *supra* note 8, at 16; *see also* Doremus, *supra* note 5, at 18–24 (discussing the risk that property law's failure to adapt to new information about harm, technological advances, and changing social mores may lead to "overinvestment in reliance on stable legal rules").

63. Duncan Kennedy and Frank Michelman, for example, argue against the proposition that stability of expectation reflected in law is necessarily more efficient. Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV 3, 25 (J. Roland Pennock & John W. Chapman eds., 1982); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 719–722 (1980). This has provoked inevitable responses. *E.g.*, POSNER, *supra* note 3, at 40 n.1. Other scholars highlight the risk that parties will attempt to game the protection for expectation or inefficiently overinvest in property. *E.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 618–20 (1984); Serkin, *supra* note 2, at 1283.

64. Radin, *supra* note 3, at 968–70; *see also* Stern, *supra* note 21, at 1110–20 (disputing claims that home is central to self and identity, as well as claims that residential dislocation damages mental health and the link between homeownership and self-esteem).

65. *See, e.g.*, J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2269 (1997) (reviewing CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES (1996) and DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995)).

66. *See infra* Section III.C.

67. *E.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1730 (1993) (arguing that in "a society structured on racial subordination, white privilege became an expectation and . . . whiteness became the quintessential property for personhood"); *cf.* Diana Tietjens Meyers, *Social Exclusion, Moral Reflection, and Rights*, 12 L. & PHIL. 217, 218 (1993) ("When established institutions and the policies they implement are taken to be natural

From these concerns, critics of expectationalism make two primary arguments. First, critics argue that in any challenged legal transition, the party asserting reliance does not have, or should not have had, expectations that are worthy of legal recognition. Thus, in terms of efficiently balancing risk and incentives, Louis Kaplow argues that losses from governmental action are essentially indistinguishable from market risk.[68] From this proposition, Kaplow concludes that people should be indifferent as to whether any likelihood of loss might arise from competitors, natural disaster, the state, or otherwise.[69] Similarly, as conceptions of harm change, owners should not reasonably form expectations that such harm will simply be ignored.[70]

There is a second, perhaps more blunt, response to the potentially distorting or ossifying effect of expectationalism. That is to argue that in weighing the balance between individual reliance and public exigencies, even reasonable expectations must at times yield to other values.[71] Reliance on a bad rule—whether it is as pernicious as slavery[72] or as commonplace as legal protection for existing uses of land[73]—should not shield that rule from change.[74] Where overriding public need and expectations of certainty clash, the argument goes, stability should yield.

In these critiques of expectationalism, the discourse frequently juxtaposes ex ante certainty against ex post flexibility. As we will see, this frame and its assumptions about expectations also play out in the case law.

B. *Doctrinal Protection for Stable Expectation*

Although expectationalism is important in property law, the doctrine does not simply reify reliance. Indeed, one's expectation is at times the

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and fair, any change that accommodates 'different' people will disrupt the settled expectations of members of the dominant group—the people for whom these arrangements were designed and who accept them.").

68. Kaplow, *supra* note 5, at 534.

69. *Id.*

70. *See* Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 325 (2006) ("The key issue for property owners is that investments, after all, involve risk, and one risk that investors should be forced to internalize is that of foreseeable new regulations designed to protect the public from the harms attendant on the cumulative effects of individual acts of ownership.").

71. *See, e.g.*, T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1717 (1988) ("The subordinate position of stability relative to equality is reflected in the fact that if the substantial satisfaction of what seems to be a reasonably formed expectation turns out to be inconsistent with the equality to which we are committed (for example, equal voting rights or equal protection of the laws), then the expectation must be sacrificed.").

72. Rose, *supra* note 22, at 24–25, 29.

73. *See* Serkin, *supra* note 2, at 1283–87 (highlighting the costs of deference to existing uses of land in both undermining comprehensive planning and creating perverse incentives around development choices).

74. *Id.* at 1262 (noting that "even the strongest attacks against retroactive legislation recognize that the government must have some ability to enact laws that affect settled expectations in order to be able to legislate at all").

precise *absence* of a property right, as in the case of "the expectation that a child has under a will, a revocable inter vivos trust, or even the laws of inheritance,"[75] all of which "can be dashed without recourse."[76] Nonetheless, property law does recognize expectations, albeit sometimes with barely a nod before trampling reliance and at other times by providing very strong protection.[77] Accordingly, expectationalism echoes in areas of property law where reliance on legal continuity shapes both individual property conflicts—as with servitudes, cotenancies, trusts, leases, and other long-term interactions through property—and, in constitutional property law, the system of property itself.[78]

To begin, security of expectations plays out with respect to specific rights of use, alienation, descent, and others in the so-called bundle.[79] Rigorous enforcement of trespass may protect the supposedly paramount right to exclude,[80] but many of the cases where expectation finds traction involve development rights,[81] grantor control of future interests, interpretation of servitudes,[82] and other contexts in which courts are confronted long after the fact with honoring or upsetting some property holder's earlier-formed sense

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75. Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1380 (1993).

76. *Id.* As Epstein notes, even recognized property interests may reflect expectations that never come to pass, as with the distinction between vested and contingent remainders. *Id.*

77. *See* PEÑALVER & KATYAL, *supra* note 8, at 29 (noting that "American property law is full of doctrines whose principal purpose appears to be the hindrance of nonconsensual alterations in existing property allocations and entitlements"); Serkin, *supra* note 2, at 1261–81.

78. The notion of recognizing expectation is familiar in a variety of other private-law contexts, particularly in the law of contracts. *See* E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 951 (1967) ("The object of contract law is to protect the justifiable expectations of the contracting parties . . . .").

79. *Cf.* A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK 107, 112–28 (A.G. Guest ed., 1961) (disaggregating ownership into rights of possession, use, management, income, capital, security, transfer, residuarity, as well as restrictions on harm and liability to execution).

80. For an argument that exclusion is the defining constituent right of property, see Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

81. *See, e.g.*, Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368, 1374 (Conn. 1991) (barring wetlands agency from denying building application if owner purchased the land "with the reasonable expectation of developing it for residential or business purposes"); Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 572–74 (Fla. Dist. Ct. App. 1975) (ruling for developer who began constructing a multifamily development that a community then rezoned for single family, explicitly invoking the developer's expectations to prevail over the community's interest in limiting development).

82. *See, e.g.*, Herren v. Pettingill, 538 S.E.2d 735, 736 (Ga. 2000) (declining to adopt new rule allowing unilateral relocation of easements, citing the uncertainty this would sow across the law of real property); Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980) (denying a request to relocate an easement on the argument that validating flexibility "would definitely introduce considerable uncertainty into land ownership, as well as upon the real estate market").

of the contours of their rights.[83] It is also common for courts, when evaluating legal transitions, to weigh the reliance interests of those not before the court as a brake on the pace of legal change.[84]

On the other hand, property law can flout seemingly settled expectations with the recognition, hesitant or forthright, that when circumstances change, flexibility becomes necessary.[85] This is variously seen as a begrudging concession or as a necessary element of the balance between individual reliance and other imperatives.

Respect for certainty likewise influences the limits of acceptable legal change to property in constitutional law. The most notable example is the role of investment-backed expectations in regulatory takings.[86] In *Penn Central Transportation Co. v. New York City*, the Supreme Court indicated that determining when regulatory change violates the Takings Clause requires an "essentially ad hoc, factual inquir[y]" that implicates several significant considerations.[87] Among these factors are what Justice Brennan described as the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[88] Since *Penn Central*, this inquiry has come to focus on "reasonable" as opposed to "distinct" expectations[89] and has become central in

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83. *Cf.* Lovett, *supra* note 2, at 476–81 (mapping the temporal dimensions of relations mediated through property and the extent to which such long-term relationships are voluntary).

84. It is common for courts when considering a shift in some relatively long-standing precedent to weigh the reliance interest of some interest group—landlords, for example, or trust settlors—and either resist a legal transition given that reliance or acknowledge and reject the interest in the name of modernizing the law. *See, e.g.*, Matte v. Shippee Auto, Inc., 876 A.2d 167, 172 (N.H. 2005) (rejecting mutually dependent covenants in part out of concern for settled expectations of landlords and tenants).

85. *See, e.g.*, Albuquerque Commons P'ship v. City Council, 184 P.3d 411, 420 (N.M. 2008) (invoking "the need for planning and zoning flexibility" in holding that "a municipality may be able to justify an amendment that downzones a particular property by demonstrating that the change is more advantageous to the community" (internal quotation marks omitted)); Soderberg v. Weisel, 687 A.2d 839, 844 (Pa. Super. Ct. 1997) ("[A] court may compel relocation of an easement if that relocation would not substantially interfere with the easement holder's use and enjoyment of the right of way and it advances the interests of justice.").

86. The literature on the Court's still-evolving approach to expectation in takings jurisprudence is significant. *E.g.*, Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations"*, 32 URB. LAW. 437 (2000); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215 (1995); Hannah Jacobs Wiseman, *Notice and Expectation Under Bounded Uncertainty: Defining Evolving Property Rights Boundaries Through Public Trust and Takings*, 21 TUL. ENVTL. L.J. 233 (2008).

87. 438 U.S. 104, 124 (1978).

88. *Penn Central*, 438 U.S. at 124.

89. As commentators have pointed out, the Court's formulation of the expectations at issue varies. *E.g.*, Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J.L. & JURISPRUDENCE 161, 170 n.45 (1996). Generally, the relevant inquiry is into the "reasonable" expectations of the claimant before the Court, but not infrequently, justices talk of expectations that are "objective," "historically rooted," or even "settled" and "public." *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519, 538 (1992) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982)); Connolly v. Pension Benefit Guar. Corp.,

regulatory takings jurisprudence, although often as a threshold to be satisfied before a court will inquire about the extent of economic harm and other factors.[90]

Discussion of expectationalism also arises in the due process context.[91] This line of constitutional doctrine intersects with the broader discourse on retroactive lawmaking, where the Court has declared a presumption against retroactivity in part because "settled expectations should not be lightly disrupted."[92] Extending this to legal transitions involving property, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, Justice Kennedy argued that "a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause."[93] To Kennedy, the due process limitation on legal change turns on "what owners might have expected" about their property rights.[94] Kennedy added, however, that "owners may reasonably expect or anticipate courts to make certain changes in property law."[95]

As *Penn Central* and *Stop the Beach Renourishment* illustrate, expectationalism in constitutional property theory raises a so-called circularity problem: the unavoidable ambiguity arising from legal recognition of an

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475 U.S. 211, 223 (1986) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–16 (1976)).

90. *See* Eagle, *supra* note 86, at 441 (noting that in applying *Penn Central*, "the recent trend has been to treat the need for investment-backed expectations as an absolute requirement"); *see also* Serkin, *supra* note 2, at 1251 (noting that in development, the element "is now principally used to distinguish a property owner's reasonable expectations from pie-in-the-sky development dreams").

Another area of takings jurisprudence where expectations have significance is in conceptual severance—the still-vexing question of the "relevant parcel" for regulatory takings analysis. *See* Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 414 (2003); *see also* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674–78 (1988) (discussing conceptual severance). This is the issue that first arose in Justice Holmes's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413–14 (1922), that in determining the factors at issue in a regulatory takings claim, the predicate question is against which property interest are those factors to be weighed. Although the Court has reaffirmed the "parcel as a whole" approach, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002), lower courts continue to grapple with this principle, resorting at times to owners' expectations to help discern the relevant parcel, *see* Keith Woffinden, Comment, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 641 n.85 (citing example cases).

91. For a discussion of the historical antecedents of the modern doctrine in this context, see James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 103–11 (1993) (canvassing vested-rights retroactivity in early nineteenth-century constitutional economic rights jurisprudence).

92. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (reaffirming the canon of interpretation requiring "clear intent" for retroactive application of civil legislation).

93. 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring) (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005)).

94. *Stop the Beach Renourishment*, 130 S. Ct. at 2615.

95. *Id.*

interest that is itself shaped by law.[96] It is possible to take this feedback loop to a fairly extreme conclusion—as Kaplow arguably does[97]—and argue that as long as the government announces that, going forward, property rights are subject to change, no expectations may ever reasonably form in contravention of that expectation.[98] Circularity, however, has not proven an insuperable barrier to the resolution of constitutional property claims.[99] Nonetheless, the dilemma raises questions about what should inform the legitimate boundaries of expectation.[100]

In short, both in traditional doctrinal areas of property and in constitutional law, courts attempt to respect assumptions about both reliance on existing law and the importance of signals of stability. In doing so, however, the jurisprudence tends to recapitulate the contours of the scholarly debate that pits ex ante certainty against ex post flexibility, valorizing change when necessary. Understanding this juxtaposition requires digging deeper into the psychology on which the debate is predicated.

C. *Michelman's Formula on the Couch: Analyzing Demoralization*

Expectationalism is conventionally understood in terms of the practical and normative benefits of legal certainty, but underneath it lies a set of basic, if often implicit, psychological assumptions. In particular, the supposed importance of stability to individuals evaluating risk and deciding whether and how to engage with property suggests a set of anxieties about

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96. *See, e.g.*, Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 56 (1996) (arguing that using "reasonable expectations" to define the limits of property rights is "hopelessly circular" given that "reasonable expectations are founded on perceptions of what the law will protect, so the law's protections cannot be based on reasonable expectations"). *But see* Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 21 (1997) (arguing that rather than being tautological, reasonable expectations and the law form a mutual feedback loop). For a general discussion of circularity in constitutional law, see Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 60–66 (2001).

97. Kaplow, *supra* note 5, at 541, 551, 602–06 (arguing that from the perspective of rational risk assessment and appropriate investment incentives, there should generally be no compensation for takings).

98. FISCHEL, *supra* note 7, at 185; *see also* Epstein, *supra* note 75, at 1371 ("The Supreme Court's inability to understand the role of reasonable expectations in generating entitlements paves the way for the rapid elimination of all perceived entitlements by simply claiming that the enactment of a single government regulation reasonably creates an expectation that further regulations will follow.").

99. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 626–27 (2001).

100. *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 28–30 (2003). Continuing ambiguity about the sources and extent of expectation in constitutional property, moreover, reflects an uneasy line between objective and subjective expectation in the doctrine. On one level, invocations of expectation reflect some external metric, pegging the reasonableness of individual expectation to collectively or socially acceptable levels of reliance. On the other hand, the cases evince an ineluctable subjectivity given the nature of an inquiry that focuses on particular contexts and claimants. *Cf.* Epstein, *supra* note 75, at 1378 (noting the variability of popular understandings of property rights and the difficulty this poses for determining the reasonableness of expectations).

the consequences if the rules turn out to change.[101] These animating fears focus on the instability generated by arbitrary state action, the singling out that state action implies, and the broader risk of majoritarian exploitation. When legal transitions transgress expectation, they can spark these anxieties, generating hesitation, uncertainty, and malaise.

Frank Michelman's *Property, Utility, and Fairness* provides the literature's classic frame for unpacking this dynamic. Although crafted as an exegesis of utilitarian and early Rawlsian perspectives on just compensation,[102] the article also offers a fairly vivid psychological portrait of the anxieties at the heart of expectationalism. To Michelman, the critical dynamic is a kind of collective flinch reaction from witnessing a redistributive alteration in governing law.[103] What gives expectation-altering legal transitions a particularly *in terrorem* effect is what Michelman calls "the power of suggestion of insecurity."[104] Drawing on Hume and Bentham, Michelman argues that as a result of "ingrained habits of mind" shaped by the historical need to establish social relations in a context of mutual distrust, "events which are inconsistent with, or which threaten, stabilized private possession are the cause of a kind of instinctive unease which demands rectification."[105]

To Michelman, then, "there is a serious disvalue in the spectacle of any encroachment on possession by public authority which is suggestive of arbitrary exploitation of a few at the hands of the many."[106] Indeed, any "newly conceived redistribution" of existing entitlements, "no matter how accomplished or to what end, is always something of a disappointment" from an

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101. *See* Rose, *supra* note 16, at 592.

102. Michelman devotes the bulk of his analysis to a utilitarian calculus, *see* Michelman, *supra* note 6, at 1214–18, but also argues that the same outcome would accrue under what he calls a "convention of the circumspect," drawing on work of John Rawls from the late 1950s and early 1960s. *See id.* at 1219 & n.104, 1220.

103. Indeed, the major disjunction that Michelman identifies between a utilitarian approach and a Rawlsian perspective is that the former requires actual knowledge on the part of psychologically impacted owners. *See id.* at 1223–24 (discussing behavioral assumptions that utilitarian decisionmakers might consider that would lead to a different compensation regime than for decisionmakers seeking justice).

104. *Id.* at 1209 (discussing DAVID HUME, A TREATISE OF HUMAN NATURE bk. 3, pt. 2, §§ 2–4, at 436–59 (Dolphin Books 1961) (1739–1740)).

105. *Id.* at 1209–10. Bentham was more colorful in his description of the psychological predicates for the importance of security:

> [M]an is not like the animals, limited to the present, whether as respects suffering or enjoyment; but . . . he is susceptible of pains and pleasures by anticipation; and . . . it is not enough to secure him from actual loss, but it is necessary to guarantee him, as far as possible, against future loss. It is necessary to prolong the idea of his security through all the perspective which his imagination is capable of measuring.
>
> This presentiment, which has so marked an influence upon the fate of man, is called *expectation.*

BENTHAM, *supra* note 1, at 110–11.

106. Michelman, *supra* note 6, at 1210–11.

expectationalist view.[107] And maybe the most important psychological signal is that "the very act of redistributing implies that society will not scruple to effect like redistributions in the future."[108] This reaction, Michelman argues, can be stark, with governmental invasions of an owner's "territory" yielding not only "psychological shock" and "emotional protest" but also a "symbolic threat to all property and security,"[109] which is perhaps most significant.

From this public spectacle, Michelman distills the concept of "demoralization costs."[110] These costs, in a utilitarian calculus or in Michelman's version of welfare economics,[111] represent not only individual harm but disincentives from two kinds of impacts on other owners or potential owners. First, and most tangibly, there is the "dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered."[112] Demoralization costs, however, also include the "present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion."[113] Michelman argues that compensation should be paid to those who are the subject of the policy, assuming an otherwise efficient policy, when demoralization costs exceed the cost of compensating, but otherwise legal transitions should not require compensation.[114]

From a psychological perspective, demoralization can be understood to involve three distinctive elements. First, any legal transition has the potential to signal general uncertainty.[115] To holders of property or those who might invest or work to obtain property, legal change that generates an

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107. *Id.* at 1212.

108. *Id.*

109. *Id.* at 1228.

110. *Id.* at 1214.

111. *See* FISCHEL, *supra* note 7, at 147–48 (noting that Michelman's approach was more permissive toward governmental action than a consent-based Pareto-superiority requirement and less permissive than a Kaldor-Hicks criterion of actual compensation that ignores the distributional consequences of legal transitions).

112. Michelman, *supra* note 6, at 1214.

113. *Id.*

114. Michelman argues that if the benefits of a policy outweighed its costs (not including demoralization or settlement costs), compensation should be given only when settlement costs are less than demoralization costs, given that the state will incur one or the other. In other words, if an action's social benefits are greater than its demoralization and settlement costs, and settlement costs exceed the costs of demoralization that would occur from the spectacle of not compensating, the government should take the action and not compensate. *Id.* at 1215. Michelman concludes, moreover, that this is an outcome that would roughly be arrived at by considering the issue from behind the Rawlsian veil. *See id.* at 1218–24.

115. *Cf.* ACKERMAN, *supra* note 57, at 44 (asserting that the "Appeal to General Uncertainty" holds that "when any institution makes any decision which increases the level of uncertainty, this imposes costs upon all those citizens who already found their general social environment too risky").

uncompensated economic injury threatens not just the security of a particular loser in a legal transition but also the stability of the legal system as a whole. This shakes the faith of anyone witnessing a legal transition, raising the concern that the law might easily change again and, accordingly, disincentivizing those who might engage with property.[116]

Next, because demoralization stands apart from what is captured in the predicate cost-benefit analysis, there must be some particular reason why these subjective factors are not like other risks that owners face.[117] Given that most economic losses are not insured against, "there must be at work a tacit assumption that losses which seem the proximate results of deliberate collective decision have a special counterproductive potency beyond any which may be contained in other kinds of losses."[118] Demoralization costs thus reflect the particular psychic harm that flows from intentional collective action—watching a neighbor being singled out and wondering, "am I next?" This means that part of why people witnessing legal transitions might then be cautious is fear of the procedural unfairness represented by the intentionality of the harm an owner might suffer.

Finally, part of the psychic harm is a signal of exclusion created by legal transitions that seem to single out only some to bear a collective burden. When someone is made the victim of majoritarian redistribution and loses faith that in the long run the benefits and burdens of public action will even out, they suffer from the sense that they are not valued as part of that community.[119] Carol Rose observes as follows:

> [Legal transitions] can raise the prospect that some persons are treated as strangers to the community. This may be one reason why takings claims arouse such heated emotions on the part of owners; it is not simply that owners perceive the loss of a valuable asset, but also that they sense that

116. Echoing Bentham's identification of the violation of expectations with evil, *see supra* note 27 and accompanying text, Bell and Parchomovsky have made a variation on the general instability argument couched in terms of the systemic cost of regulatory interference with property. As they put it, "[T]he government's power to take property not only threatens expropriation of an asset's market value; it also reduces the stability of all property and seizes the nonmarket subjective value that inheres in the asset." Bell & Parchomovsky, *supra* note 3, at 607. As a result, they conclude rather dryly, "there may be reason to push the government toward acquiring its revenue and assets by means" other than those that adversely affect property rights. *Id.*

117. "If I am able to mobilize my productive facilities under the general conditions of uncertainty which prevail in the universe," Michelman asks, "why should I be paralyzed by a realization that I am at the mercy of majorities?" Michelman, *supra* note 6, at 1217; *see also* FISCHEL, *supra* note 7, at 148–50 (discussing Michelman's distinction between ordinary risks (captured in his threshold efficiency calculus) and the distinctive risks associated with the intentionality of the majoritarian exercise). *But see* Kaplow, *supra* note 5, at 560–61 (arguing that risk aversion already accounts for disutility to losers).

118. Michelman, *supra* note 6, at 1216.

119. This reflects the "classic concern about democratic governments . . . that they are ruled by majorities, that majorities can be taken over by factions, and that factions unsettle property rights by shortsightedly advancing their own projects at the expense of those who are out of power." Rose, *supra* note 22, at 4 (citing THE FEDERALIST No. 10, at 78–81 (James Madison) (Clinton Rossiter ed., 1961) and Kainen, *supra* note 91, at 91–102).

> others are saying, in effect, we can take your things and we don't care, because you are not one of us.[120]

Michelman thoughtfully focuses on the question of compensation in takings,[121] but his accounting for demoralization has had broader influence on property theory.[122] Demoralization has grown beyond Michelman's cabined approach and has become a shorthand for any general fear that legal transitions will undermine the security of property rights, that the pace of legal change is too rapid, or that the state will act strategically.[123] And, as noted, particularly in modern takings jurisprudence, the legal system has in some respects grown to reflect Michelman's concerns.[124]

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120. *Id.* at 37; *see also id.* at 29 (noting that in Revolutionary confiscations and slave emancipations, "radical expropriation gave rise to no demoralization among *us*, because .... [*t*]*hey* were not members of *our* moral and political community, and disruption of what they thought their property was thus a matter of relative indifference").

121. Michelman, *supra* note 6, at 1165. With respect to anxieties about both changes in law and abuse of acknowledged powers to alter property rights, the latter fear has traditionally manifested in concern about expropriation—the exercise of the power of eminent domain—but increasingly in the modern context anxiety about instability has come to center on regulatory change to permitted uses.

122. *See, e.g.*, Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 109–10 (2006) [hereinafter Garnett, *Neglected Political Economy*] (noting that strong emotional reactions may come from eminent domain for purposes such as economic development, given the feeling of vulnerability this creates for all owners); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 944–49 (2003) (arguing that demoralization costs support heightened scrutiny for public use questions); *see also* Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 721 (2008) (associating Garnett's "dignitary harms" with "emotional reactions" such as "outrage, resentment, and insult" that arise from perceptions of unfairness in condemnation actions (quoting Garnett, *Neglected Political Economy, supra*, and Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443 (2007)) (internal quotation marks omitted)).

123. *See, e.g.*, Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 28 (1986) (arguing that the idea that property should protect "well-established expectations against undue shock . . . can easily be extended throughout the whole realm of property law"). Demoralization is often invoked to bolster the normative value of more limited scope for eminent domain or a broader conception of when legal transitions constitute regulatory takings. Indeed, concern for demoralization stemming from strategic public action has even been applied to contexts where it is a government *benefit*, not an economic harm, at issue. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 579 (2001) (arguing that just as owners "remain on edge when contemplating the possibility of strategically determined losses," so too when a "windfall arrives as a result of a strategic and deliberate decision of the government, the reaction may turn to resentment and frustration" (quoting Michelman, *supra* note 6, at 1217) (internal quotations omitted)).

124. Critically for subsequent doctrinal development, Michelman reframed Justice Holmes's diminution in value test from a quest for some point at which regulation "goes too far," Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), to an inquiry into "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation." Michelman, *supra* note 6, at 1233. As noted, that formulation influenced Justice Brennan's articulation of the prevailing *Penn Central* regulatory takings test. *See supra* note 7 and accompanying text.

Popular sentiment around high-profile property controversies—and much of the political force of the property rights movement—seems to bear out the demoralizing effect of transitions around property, even in the presence of compensation.[125] Public anxiety about eminent domain for economic development following the Court's decision in *Kelo v. City of New London*,[126] for example, seemed entirely out of proportion with the decision's modest reaffirmation of existing law.[127] Rather, the decision seems to have represented a clear felt sense by many that property was somehow rendered less safe from the state.[128]

Two responses to these psychological dynamics come immediately to mind. First, even if this is how people react to changes in law that transgress expectation, they should not be so irrational, and the legal system should not sanction this kind of reaction. This is a theme in the legal transitions literature, exemplified by Kaplow and others.[129] Another response might be to contest the underlying empirical grounding for demoralization's psychology of fear. Janice Nadler and Shari Diamond, for example, adduce evidence that what people may find disturbing about redistribution has less to do with the destabilization of property rights and more to do with their perceptions of the legitimacy of the public purpose at issue.[130]

There is, however, a third approach. Given the deep influence and continuing visceral power the concept of demoralization seems to have on courts and commentators, it is worth approaching the psychology of expectationalism on its own terms and asking a different question. What if the

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125. *See* Fisher, *supra* note 56. Presumably, in the case of high profile decisions understood popularly to favor owners, there is a converse potential to moderate a collective sense of vulnerability, although for reasons explored below, *see infra* Section III.A.3, there may be reasons why the valence of the respective signals may not be parallel.

126. 545 U.S. 469 (2005).

127. *See* David Fagundes, *Explaining the Persistent Myth of Property Absolutism*, *in* THE PUBLIC NATURE OF PRIVATE PROPERTY (Michael Diamond & Robin Paul Malloy eds., 2011).

128. Janice Nadler and Shari Diamond see this kind of emotional reaction in the post-*Kelo* backlash. As they write, Justice O'Connor's dissent in *Kelo*—which argued that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory," *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting)—fuels the fear that "no one's property is safe." Nadler & Diamond, *supra* note 122, at 721. This "general anxiety about the slippery slope," Nadler and Diamond argue, "is salient not only for the already targeted property owner, but also for owners who have not yet been targeted, but who now feel a heightened sense of vulnerability." *Id.*

129. It would be fair to ask, moreover, "[i]f owners might suffer so much from takings of their property, why don't they get insurance?" Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1689 (2007). One answer is that no private market has had to develop because takings law is already in place. *Id.* at 1690. Another answer is that if the concern is demoralization, having to purchase insurance against legal transitions might replicate the very psychic harm against which demoralization costs are meant to police. *See* FISCHEL, *supra* note 7, at 192–93.

130. Nadler & Diamond, *supra* note 122, at 715–16 ("In general, people were much more comfortable with being displaced for a laudatory purpose such as building a new children's hospital, than for a purely commercial purpose such as a shopping mall.").

assumption that fear of legal change is an important ex ante psychological barrier to engagement with property is not so much wrong as incomplete, and perhaps significantly so? The next Part sets out to answer that question.

II. Alternative Anxieties: Nonresponsiveness, Unfairness, and Exclusion

In the wake of the current economic crisis, in which hundreds of billions of dollars in housing wealth evaporating seemingly overnight, outrage has focused on the sense that the rules of fair play have broken down in many areas central to property. The lack of confidence this kind of reaction evinces seems very much at play in the hesitation and shellshock that many seem to be experiencing in an ongoing failure to reengage.[131] It should not be surprising, however, that someone contemplating an engagement with property might hesitate because markets can fail, sometimes spectacularly, the value of an investment can disappear overnight, and the return on one's labor is shaped in many ways by coworkers, neighbors, and the health of the entire economy. In other words, legal transitions can generate anxiety, but other anxiety-inducing external factors might themselves require a legal transition to remedy.

All of this suggests an underlying psychological landscape quite different than what drives Michelman's demoralized crowd, with anxieties that differ markedly from those enervating Michelman's paradigmatic owner. Indeed, each of the primary instincts that animate the narrative of demoralization has an obverse. A legal transition that signals instability and insecuri-insecurity to some can make clear to others that the tools of property are responsive to unforeseen risks. Likewise, such a transition can signal procedural fairness, so that the outcome is understood not in terms of the palpable harm of intentional state action but rather as a sign of a functioning governmental process. Finally, rather than a message that someone falls outside the community, an active public response in the face of private exclusion might communicate that the law will protect a person's place in the community. This Part traces each of these alternative anxieties—about public responsiveness, fair process, and inclusion—that might drive some to seek comfort in ex ante signals of flexibility.

A. *Regret Avoidance, Volatility, and Systemic Risk*

Approaches to decisionmaking can as easily privilege a need for regulatory responsiveness as the traditional narrative privileges legal certainty.[132] In particular, certain heuristics suggest that some people experience a marked risk aversion in contexts where volatility and systemic risk render their investments in property vulnerable to external forces—distinct from legal transitions—that may be hard for owners to anticipate.

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131. *See supra* notes 9–10.

132. *See supra* text accompanying notes 115–116.

Although the endowment effect has received significant attention—both accepting and skeptical—in property scholarship,[133] it is part of a general set of heuristics that Daniel Kahneman and Amos Tversky call loss aversion.[134] Kahneman and Tversky find that people have a tendency to prefer to avoid losses at the risk of foregoing greater gains.[135] This phenomenon has a predictive element, in that people make choices based on their anticipated responses to likely outcomes.[136] In short, some people will tend to be hesitant in taking actions that might lead to loss.[137]

Moreover, some people have a tendency not to make a decision if they can even imagine they would regret a possible negative outcome.[138] As suggested by regret theory, people react—positively or negatively—to their perception of whether an anticipated outcome might be good or bad.[139] This anticipation can lead some people to avoid the potential for negative emotions from possible losses.[140] Regret avoidance feeds on input that comes from negative events, so that when someone experiences loss they tend to shape future decisionmaking to avoid similar losses. This may lead not only to risk minimization but also to regret minimization, which is to say failure to engage.[141] Fear of loss causes some people to discount the foregone opportunity in not acting. Accordingly, people may hesitate to invest in or form an attachment to an object because they lack confidence that that relationship will be preserved.

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133. *See, e.g.*, Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1545–46 (1998) (exploring the endowment effect's interplay with the Calabresi and Melamed property rule/liability rule framework).

134. *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193 (discussing Kahneman and Tversky's work on loss aversion).

135. *See* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 454 (1981) (summarizing studies). *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

136. *See* Deborah A. Kermer et al., *Loss Aversion Is an Affective Forecasting Error*, 17 PSYCHOL. SCI. 649, 651 (2006) (discussing experimental evidence that people tend to exhibit loss aversion when predicting how they will react to potential events).

137. Indeed, one implication of loss aversion is that some people tend to remain in the status quo because the disadvantages of changing position are perceived to outweigh the advantages. *See* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988).

138. *See* Graham Loomes & Robert Sugden, *Regret Theory: An Alternative Theory of Rational Choice Under Uncertainty*, 92 ECON. J. 805, 820 (1982).

139. *Id.*

140. Marcel Zeelenberg et al., *Consequences of Regret Aversion: Effects of Expected Feedback on Risky Decision Making*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 148, 149 (1996) ("[T]endencies to avoid negative post-decisional emotions such as regret, disappointment, and self-recrimination and to strive for positive feelings and emotions such as rejoicing, elation and pride are assumed to be important determinants of individual decision making.").

141. *Id. Contra id.* at 156 (noting that where people can incorporate feedback about risk, the anticipation of regret can generate risk seeking in addition to risk aversion).

Another heuristic relevant in contemplating the ex ante structure of decisionmaking around property is the tendency people have to evaluate the likelihood of an event by reference to examples that are most readily at hand.[142] This heuristic—commonly called the availability heuristic—can be a useful mental shortcut in contexts where something particularly memorable has occurred that is worth paying attention to going forward. The shortcut, however, can also systematically cause people to overreact to vivid risks and underreact to more significant, but less obvious, risks.[143]

The tendency to panic over relatively minor risks can be shaped by significant negative events, but the same risks alternatively may lead to paralysis.[144] In other words, just as people can be spurred to act despite the small probability that a risk would really require action, so too can people react to the salience of loss by hesitating to act despite relatively low risk. Thus the experience of loss can give rise to a tendency to respond to the vividness of adversity by reflexively overcompensating in favor of security.

In terms of property, an important dynamic is the shock that can arise when private arrangements are affected by systemic breakdown. At the market level, for example, the generation that lived through the Great Depression was famously reluctant to return to equity investing, and there is concern that the current economic crisis may generate a similar cultural response.[145] The dynamic can also manifest itself at the more fine-grained individual and community levels, for example, when a person has the unpleasant but unavoidable realization that the security of her investment in her home is deeply tied up in the risk that a neighbor may face foreclosure.[146]

In the presence of the kind of volatility that marks many aspects of ownership, the availability heuristic implies that people who witness market

142. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974); *see also* Paul Slovic, Baruch Fischoff & Sarah Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 463 (Daniel Kahneman et al. eds., 1982) ("People respond to the hazards they perceive.").

143. *See* Richard Zeckhauser & Cass R. Sunstein, *Overreaction to Fearsome Risks* (Harvard Envtl. Econ. Program, Discussion Paper No. 09-02, 2009).

144. *Id.* (noting that in response to risk, the availability heuristic can generate paralysis as well as panic, citing President Roosevelt's concern from his first inaugural address with "nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance" (quoting President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933)) (internal quotation marks omitted)); *see also* Olivier Chanel & Graciela Chichilnisky, *The Influence of Fear in Decisions: Experimental Evidence*, 39 J. RISK & UNCERTAINTY 271 (2009) (adducing experimental evidence that decisionmaking in the presence of potentially catastrophic risk can lead to an excessive focus on low-probability events).

145. *See supra* note 9.

146. *See supra* note 11 (discussing Lee Anne Fennell's internal-external perspectives on risk). Fennell's unbundling of values associated with homeownership underscores aspects of the broader psychology of ownership over which an owner has immediate control and aspects over which it is difficult to assert such control. Fennell suggests several insurance and market mechanisms for hedging against this external risk. The mechanisms are discussed *infra* in Section III.C.3.

failures and related losses may tend to place great weight on the psychological consequences of such losses. Moreover, because so much of property is interconnected,[147] systemic risk is endemic to the experience of ownership. When property values, for example, drop for some homeowners on a block, this may have a psychological cascade effect on other owners and even potential buyers.[148] The failure of the legal system to block such cascades can allow negative events to spiral and can further reinforce the sense of vulnerability that interconnected owners may feel. All of this may leave owners hesitant to reengage, leaving a suboptimal level of work, investment, attachment, and the like.

These heuristics suggest that some people may be reluctant to try to obtain what they do not have confidence they will be able to retain, and all the more so when they witness systemic losses with no response. Fear of loss can be triggered, as Michelman argued, by the spectacle of expropriation, thus undermining incentives to produce. But this anxiety can likewise be sparked when the legal system is seen as incapable of moderating risks beyond the control of an owner. Thus, whatever the demoralizing signal legal transitions might send, the signal sent by the failure of the legal system to respond to the need for regulatory action can powerfully reinforce hesitation in the face of negative events. In such situations—where external factors might make someone wary about creating value—a legal response may be critical to mitigating these factors. In this way, legal transitions can signal a kind of responsiveness that can help counteract risk aversion.

B. *Fairness, Flexibility, and Engagement*

Michelman appropriately highlights the sharp psychological reaction that can arise from the unfairness of a process under which someone is intentionally targeted by the state.[149] In the decades since *Property, Utility, and Fairness* was published, scholars have continued to explore the psychology of procedural fairness and the link between perceptions of the legitimacy of the legal system and individual behavior. This research supports Michelman's intuitions about the demoralizing potential of expropriation (if perceived as unfair) but also suggests an alternative and

147. *See, e.g.*, Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971).

148. *See* David Streitfeld, *Housing Woes Bring a New Cry: Let the Market Fall*, N.Y. TIMES, Sept. 6, 2010, at A1. This is all the more compelling a fear in contexts in which a particular property's value depends on the value of surrounding properties. Reinforcing this dynamic is a variety of what behavioral economists describe as "herd" reactions, where an information cascade or intentional calibration can lead people to react to circumstances en masse. *Cf.* David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465 (1990) (discussing "herd" behavior in the realm of corporate investment). This makes those interconnected through property vulnerable to collective shifts in value.

149. *See supra* text accompanying notes 118–119.

equally important set of procedural concerns that might influence decisionmaking around property.

Tom Tyler, in his groundbreaking research on the link between legitimacy and legality, highlighted the determinants of voluntary compliance with law and trust in authority, as well as the emotional underpinnings of obligation.[150] A core insight of Tyler's work is that people will feel more inclined to accept legal mandates and trust authority if there is a fair decisionmaking process in place.[151] This understanding underscores the relationship between legitimacy and motivation—a person is more likely to act if doing so is consonant with the perceived procedural fairness of the system through which those actions will be mediated.[152]

Psychological research also supports the intuition that some people will be disinclined to engage in an activity or a trade—will refuse to play—if they think that the rules are not fair.[153] A feeling of being "duped," for example, has been shown to elicit clear negative emotional reactions that influence the motivation of someone being treated unfairly.[154] And game theory has illustrated that some people have such an aversion to being treated unfairly that they will reject offers they view as unfair even if accepting an unfair offer would be to their benefit—as in the "ultimatum game" where players regularly reject low offers even though that means that they receive nothing.[155] Accordingly, ex ante signals of the fairness of any given process

150. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (Princeton Univ. Press 2006) (1990).

151. *Id.* at 63, 73, 172 (discussing the connection between experience of procedural fairness on perceptions of legitimacy and, in turn, on motivation); *cf.* Nadler & Diamond, *supra* note 122, at 745 (noting that perceptions of procedural justice may influence reactions to eminent domain but can be overshadowed by other, more powerful emotional reactions, such as attachment to home).

152. *See* TYLER, *supra* note 150, at 173 ("People want to feel that they will generally benefit from membership in the group. They judge whether they will by examining the procedures according to which allocations are made and disputes resolved.").

153. *Cf.* Kees van den Bos & Joost Miedema, *Toward Understanding Why Fairness Matters: The Influence of Mortality Salience on Reactions to Procedural Fairness*, 79 J. PERSONALITY & SOC. PSYCHOL. 355, 355–56 (2000) (collecting studies on fairness and motivation and noting that fairness is a particularly salient factor in contexts of social interdependence). *See generally* E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988). Even dogs will stop playing if they feel that they are not being treated fairly. Friederike Range et al., *The Absence of Reward Induces Inequity Aversion in Dogs*, 106 PROC. NAT'L ACAD. SCI. U.S. 340 (2009) (describing how dogs performing handshake tricks that perceived that other dogs were being treated better refused to perform).

154. Kathleen D. Vohs et al., *Feeling Duped: Emotional, Motivational, and Cognitive Aspects of Being Exploited by Others*, 11 REV. GEN. PSYCHOL. 127, 139 (2007).

155. *See, e.g.*, Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. S237, S246–49 (2002) (discussing game-theoretical work emphasizing the role of perceptions of strategic behavior on the part of other players); Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993); *see also* Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986) (discussing perceptions of fairness as constraints on firm behavior and citing game-theoretical research that indicates that participants are willing to forsake significant gains to punish unfair actors).

of adjustment might either incentivize or deter someone contemplating a transaction involving property rights, no less than any other set of legal rights.[156]

This suggests that some people can be motivated by the comfort that as risks and contingencies emerge, the legal system—both macroscopically and in any particular context—will provide a fair process for adjustment. For legal transitions, this means that in weighing all of the factors that might be at play in a policy that generates economic harm, one factor to be considered is the signal that the legal system can work fairly to make necessary adjustments. Put another way, a potential holder of property may have a need for a sense of the legitimacy and responsiveness of the legal system as a precondition for committing.

Thus, whatever the value of moral intuitions that comport with legal stability,[157] an alternative intuition based on conceptions of fairness that emphasize flexibility suggests different friction points as people contemplate engaging with property. This, in turn, underscores the potential value of a corresponding set of ex ante signals of fair adjustment that the legal system might send in light of those friction points.[158]

In a simple ultimatum game, there are two players, one of whom decides how to divide a stake between the two of them. Though the first player determines the distribution, the second player can reject the offer and veto the transaction, resulting in both players receiving nothing. Richard H. Thaler, *Anomalies: The Ultimatum Game*, J. ECON. PERSP., Fall 2008, at 195, 195–96. "The traditional game theoretic prediction was that the first player would keep almost all the 'stake', reasoning that the second player will take whatever they can get." Terrence Chorvat & Kevin McCabe, *The Brain and the Law*, 358 PHIL. TRANSACTIONS ROYAL SOC'Y B 1727, 1731 (2004). However, studies have shown that the second player often rejects low offers, even though rejecting the offer will result in that player receiving less. *E.g.*, Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 817, 825–26 (1999).

156. *Cf.* Rose, *supra* note 22, at 3 ("Because property is a productive pattern of mutual self-denial, modern game [theory] would suggest that property relations present a prisoner's dilemma, where people's individual interests defeat their own larger collective good. But somehow or other, property regimes also represent the quintessentially human solution to this dilemma." (footnote omitted)).

157. *See supra* Section I.A.1.c.

158. This discussion sets to one side another important moral intuition invoked in property theory—namely, concern for the distributional consequences of the system of property. *See* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 182–83 (2002) (arguing that a person's senses of "fairness, equal allocation, and equal treatment are also preexisting expectations *about property*"). Distributional consequences and the obligations of ownership are as central to property as any other value (such as exclusion, stability, or the like), *see* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009), and it is conceivable that someone may need comfort that those excluded from property have, say, some minimal level of resources before they commit. This Article, however, focuses on the internal psychological costs and benefits and, primarily for reasons of space rather than denigration, brackets psychological concerns with distribution that may be at play.

C. *Perceptions of Exclusion and Barriers to Commitment*

Finally, as noted, a critical aspect of demoralization is the feeling that the law has been commandeered to victimize a minority on the losing end of a redistributive legal transition.[159] There is, however, a broader psychological dimension to the risk in engaging with property faced by those in the minority; this risk derives as much from nonintervention as it does from state action. The communitarian vision of property as a locus of mutual obligation and personal fulfillment through the relationships that property supports is predicated on equal access to, and respect for, property in that community. This vision breaks down where members of a community are treated invidiously by their neighbors, and the perception of that kind of exclusion can be a powerful ex ante deterrent.[160]

Researchers have explored the proposition that when a place in which one is contemplating investing or a community that one is contemplating joining is exclusionary, one's motivation to do so is impacted. For example, there is psychological evidence suggesting that signals that people will be rejected or treated inequitably tend to deter taking action.[161] Being excluded from some context or relationship can be motivating to some people, spurring them to seek greater acceptance, but for many people the perception that they are not welcome generates significant negative emotions and leads them to seek alternatives.[162] This exclusionary disincentive can translate into transactional contexts relating to property, such as buying a home in a given community, where the perception that the community will subject someone to invidious treatment may be a significant deterrent even if the signal is subtle.[163]

In some respects, this is a variation on the psychological reaction to majoritarian exploitation through law that Michelman highlighted. Here, however, the risk is that the law will fail to protect against private exclusion,

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159. *See supra* text accompanying notes 119–120.

160. In this context, "exclusion" refers not to the right to exclude in traditional property terms but instead to the manner in which the concept is used in zoning and similar policy areas. *See* Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 454 n.48 (2006).

161. *See, e.g.*, Kristin L. Sommer & Yonata S. Rubin, *Role of Social Expectancies in Cognitive and Behavioral Responses to Social Rejection*, *in* THE SOCIAL OUTCAST: OSTRACISM, SOCIAL EXCLUSION, REJECTION, AND BULLYING 171, 172 (Kipling D. Williams et al. eds., 2005) (discussing dynamics under which people who sense potential rejection can withdraw from relationships).

162. *See generally* Paul Hutchison et al., *The Social Psychology of Exclusion*, *in* MULTIDISCIPLINARY HANDBOOK OF SOCIAL EXCLUSION RESEARCH 29 (Dominic Abrams et al. eds., 2007) (surveying reactions to being excluded that included individual negative emotions as well as withdrawal, but also prosocial behaviors in some circumstances); *id.* at 34–35 (noting research indicating that some people in response to social exclusion "withdraw completely from situations and relationships where the potential for exclusion exists").

163. The signaling effect of exclusion can linger long after the specific signifiers are removed. *See* JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005) (discussing the history and continuing effects of communities that deployed a variety of tools to exclude racial minorities).

whether as pernicious as overt racial discrimination or as subtle as the kinds of exclusionary amenities Lior Strahilevitz has explored.[164] This highlights a different kind of vulnerability to majoritarian abuse—not of expropriation, but of exclusion insufficiently remedied by law. Thus, the ability of a legal transition to signal that the law will respond to preserve inclusion, if an intervention is made in response to the risk of private targeting, can be critical.[165]

D. *An Alternative Portrait for Ex Ante Confidence*

This discussion should make clear that if one tries to understand the nature of expectations tied up in property not only as a question of ethics or abstract incentives but also in terms of the actual texture of individual decisionmaking, the unitary expectationalist edifice seems woefully incomplete. Fear of systemic instability in expectationalism mirrors fear of insufficient responsiveness and prospective concern about market failure in this Article's alternative understanding. Fear of intentional public targeting likewise parallels concerns that the procedures governing adjustments will not be fair. And the exclusionary signals that redistribution might send can be counterbalanced against the fear of insufficient protection against private exclusion.

This is not to argue for the primacy—or even the categorical stability—of this alternative landscape of concerns.[166] These anxieties are hardly universal or necessarily any more common than what undergirds expectationalist accounts that emphasize fear of legal change.[167]

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164. *See* Strahilevitz, *supra* note 160, at 454–57 (exploring the role of exclusionary club goods as amenities that serve as expensive, visible sorting devices where more direct mechanisms for exclusion are not allowed); Valerie Jaffee, Note, *Private Law or Social Norms? The Use of Restrictive Covenants in Beaver Hills*, 116 YALE L.J. 1302, 1326–30, 1341–42 (2007) (discussing restrictive covenants as devices to signal a community's character and noting the potential of even unenforceable covenants to send racially segregative signals).

165. It may be that enforcement that responds to invidious exclusion involves preexisting law that prohibits such behavior, in which case that intervention would not, in the terms of the literature, be a legal transition. But given the uneven enforcement of civil rights law, there are contexts in which the choice to enforce existing law can seem unsettling to expectations, however unreasonable. More to the point, much exclusion is not so overt and can require changes in law to remedy.

166. One objection to any discussion of the habits of the mind that might inform the design of property is the proposition that because much property is owned by entities and institutions, arguments about the nature of individual motivation around property have limited applicability. *Cf.* Alexander, *supra* note 158, at 816–17 (describing the theoretical challenges posed by corporate ownership). This is a fair point, and there is indeed a breadth of entity interests in property, including corporations, trusts, homeowners' associations, and others. That said, acknowledging the limits of psychological insights in such contexts should not be taken too far given that institutional dynamics are informed by the individuals that shape those institutions.

167. None of this discussion, moreover, should suggest a psychologically complete portrait of any individual owner or potential property holder. There are other documented cognitive biases and psychological phenomena that can complicate the picture significantly. The fact that people, for example, tend to be overly optimistic, *see* David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, *in* HEURISTICS AND

Some cognitive theorists argue that perceptions of risk fall into identifiable and predictable categories, which might suggest that the alternative portrait laid out above represents an entirely different kind of decisionmaker than the type of owner demoralization assumes.[168] Cultural cognition scholars posit that people's perceptions of significant, disputed matters tend to conform to cultural preconceptions and hence vary markedly in the face of seemingly objective facts.[169] Viewing a videotape of a suspect fleeing the police, for example, people belonging to groups with an orientation toward egalitarianism and social solidarity might see relatively less danger, while those who tend toward hierarchical and individualistic values might look at the same tape and see greater danger.[170]

In this typology, perhaps those demoralized by legal change are responding to signals that resonate more for the individualist and hierarchical frames. Conversely, those concerned about the failure of the legal system to respond adequately might approach property from a perspective informed more by egalitarian and communitarian impulses. This would suggest that alternative visions of certainty and flexibility may reflect a set of competing cultural preconceptions as much as any underlying psychological dynamic.[171]

BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 334 (Thomas Gilovich et al. eds., 2002), might suggest that some people invest in property without due regard for the real risk of loss. This proposition seems well borne out by the choices made by many homeowners (and lenders, securitizers, and others facilitating these choices) in the run-up to the subprime crisis. *See* Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1120–21 (2009) (identifying borrowers' overoptimism as a factor in the subprime mortgage crisis). The point here is to outline a plausible and supportable set of assumptions about what might drive property-related choices as an alternative to the assumptions at work in traditional expectationalism.

168. *Cf.* Logue, *supra* note 5, at 227–35 (disaggregating types of actors and institutional contexts where the capacity to rationally anticipate legal change varies).

169. Generally speaking, cultural cognition asserts that individual perceptions of risk reflect worldviews that can be delineated along axes of "grid" (aligned from hierarchical to egalitarian) and "group" (similarly arrayed from individualism to communitarianism). Scholars use this typology to identify "four ways of life," described as "hierarchical individualism," "hierarchical communitarianism," "egalitarian individualism," and "egalitarian communitarianism." Dan M. Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, *in* HANDBOOK OF RISK THEORY: EPISTEMOLOGY, DECISION THEORY, ETHICS AND SOCIAL IMPLICATIONS OF RISK 10 (Sabine Roeser et al. eds., forthcoming 2012).

170. *See* Dan M. Kahan et al., *Whose Eyes Are You Going To Believe?:* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (noting the starkly differing results from a survey of 1,350 individuals asked to review the same videotape of a high-speed chase posted by the Supreme Court in conjunction with its decision in *Scott v. Harris*).

171. Similarly, it is also possible that those drawn to the comfort of legal stability may be reacting to a set of moral intuitions about the relationship between the individual and the state that George Lakoff has identified with the metaphor of the "strict father," while those drawn to the comfort of a responsive legal system view the same relationship in terms of what Lakoff describes as a nurturant parent model. GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 32–36 (2d ed. 2002). As with cultural cognition's approach to categories of risk perception, there is reason to be cautious about an overly reductionist

The evidence that cultural cognition scholars have marshaled in favor of categorical filters that might be at play in perceptions of risk is impressive. There is good reason, however, to be cautious about being overly reductionist in positing supposedly unified mental states. Culture is contingent and any categorical approach should reflect this protean reality. The point here is simply that the strand of property theory that privileges expectations of legal stability tends to make a one-sided set of assumptions about human intuition, and there are alternatives that bear exploration. It is to how those alternatives might recalibrate some core areas of property theory and doctrine that we now turn.

III. Recalibrating Expectation and Security in Property

The discourse in property about expectations and legal transitions is locked in a clash between competing claims for the value of ex ante certainty on one hand and the necessity of ex post flexibility on the other. In this dichotomy, expectations are often seen as the crystalline and unremitting realm of legal stability. As Carol Rose observes, "[T]he ex ante perspective generally means sticking it to those who fail to protect themselves in advance against contingencies that, as it happens, work out badly for them."[172] Legal transitions are correspondingly seen as ex post adjustments that renege on this implicit bargain by denying owners' expectations.[173]

However, as Part II illustrated, signals other than the assurance that rules will not change may be equally—and in some contexts *more*—important psychologically as people approach property. Circumstances surrounding property can change, rapidly and radically at times,[174] and there are situations in which people can anticipate needing a responsive legal system when the nature of those changes is itself hard to anticipate. Thus, the up-front understanding that the rules can adjust under the right circumstances and will do so fairly and inclusively may be the inducement needed for someone to work, invest, create, attach, join, or do any of the other things traditionally associated with the signal of legal stability.

This Part accordingly explains what responding to expectations of flexibility means for property's ex ante psychological calculus. It then explores

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approach to human nature, but the idea that people can approach the same normative and institutional questions from significantly different cognitive frames is an important insight.

172. Rose, *supra* note 16, at 592.

173. There is another way to think about the ex post perspective that focuses less on changes in law and more on the reality that "the extent of a legal right cannot be fixed without knowing the effect the exercise of that right has on others." Joseph William Singer, Entitlement: Paradoxes of Property 84 (2000). This is an important perspective, and a reminder both that the sources of property law are not limited to formal title and that uncertainty is inherent in ownership. That does not detract from the proposition, however, that commentators frequently respond to that uncertainty by privileging legal stability in a reductionist sense that assumes fixed entitlements at the outset.

174. *See* Lovett, *supra* note 2, at 471–74.

the consequences of this understanding for property doctrine and regulation, noting some limits to this recalibrated view of expectation.

A. *From Demoralization Costs to Morale Benefits*

1. *A New Variable in the Expectational Calculus*

Classically, property regimes create incentives to act and produce more property, which is a core justification for creating expectations of stability and then respecting them.[175] There is a tendency among some commentators to assume that people have fairly uniform instincts about property and will thus react uniformly to signals of legal change.[176] However, the landscape of concerns explored above underscores that focusing on negative reactions to state actions that cause economic adjustments is at best a reductionist view of what expectations people might have when engaging with property.

The alternative anxieties suggest that when people contemplate working, investing, attaching, or joining a community they may be relying not only on the expectation that they will be left alone. People may also need to know that if markets fail in unexpected ways, external forces overwhelm the value of their investment, or those with whom they have become bound up through property undermine their place in the community, some avenue will exist for adjustment and response. Given that dynamic, legal transitions that respond to these concerns have the potential to generate signals of positive legal change as motivating as the disincentives that have been so well recognized—morale benefits every bit as distinct as demoralization costs.[177]

Thus, for a developer who owns a parcel and is contemplating some new project, the classic expectationalist narrative is that the developer needs to know the rules that will apply so as to plan accordingly. If a local government were to suddenly limit some aspect of the development, for example, to foster historic preservation, that decision would not only undermine the developer's incentives but also demoralize anyone else contemplating a similar investment in that community. However, some developers choose to invest precisely because some communities offer reasonable prospects that the rules can adapt as circumstances warrant—indeed, a significant source of value for many developers is recognizing the potential of assets that can

175. *See* CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 55–56 (1994) (noting that the reason property gives people the expectations that form the basis for demoralization is that respect for such expectations is thought to generate more aggregate resources and goods); *cf.* Logue, *supra* note 5, at 215–20 (discussing transition policy as a question of private incentives).

176. *See, e.g.*, Merrill & Smith, *supra* note 3.

177. Expectationalist arguments shaped around responsiveness, fair process, and inclusion may have some traction in areas of intellectual property as well. After all, some creation of property in ideas involves concerns not only about reaping gains, but also about the environments in which creative output will live. Knowing that a work of art will be part of a system of creativity that balances the creator's interests with the need to support and contribute to other artistic work may be an important motivation and, if so, may be an important signal for the legal system to reinforce.

benefit from such regulatory change. The same could be said of a potential homeowner thinking about renovations or a member of a common interest community thinking about the stringency of a set of restrictions, among others. This is not to valorize regulatory arbitrage[178] but simply to note that some people may rely on the continuity of existing rules while others may just as plausibly rely on the existence (and perhaps fairness) of a process to change the existing rules.

Recognizing morale benefits has theoretical consequences for the dichotomy between up-front certainty and after-the-fact flexibility, adding a new variable to the ex ante expectationalist calculus.[179] A critical question in legal transitions that affect property is how to distribute the costs of redirecting economic resources.[180] In answering this, it is important to pay attention not only to the opportunity costs of those dispirited by change but also to the benefits of those motivated by responsiveness.[181] The standard tradeoff has long been seen as a conflict between individual harm and social gain, which is true, conceptually.[182] But instead of weighing only the disap-

178. As with any interest, expectations in flexibility are subject to manipulation. Such interests, moreover, may have greater normative value where the reason for flexibility is market failure rather than simply the hope of change. That does not, however, alter the basic psychological dynamic.

179. To model this based on Michelman's formula would involve adding a variable—*M* for "morale benefits"—to the equation. Under Michelman's calculus, for governmental actions where benefits (*B*) exceed costs (*C*), the action should not be taken if $B-C$ is less than either demoralization costs (*D*) or settlement costs (*S*) (in mathematical terms, if $(B-C)<\min(D, S)$). FISCHEL, *supra* note 7, at 146 (translating Michelman's argument into this formula). If this threshold is crossed, determining whether compensation should be paid requires taking the lower of *S* or *D* (so, act and compensate if $(B-C)>S$ and $S<D$; act but do not compensate if $(B-C)>D$ and $D<S$). *Id.* Adding *M*, then, would yield a threshold calculus of $(B-C) < \min((D-M), S)$ and a compensation calculus of $(B-C)>S$ and $S>D-M$ versus $(B-C)>(D-M)$ and $(D-M)<S$.

As noted, the concept of demoralization has expanded beyond the carefully delineated box in which Michelman placed it, morphing into a general concern about the destabilizing signal to the property system of legal transitions, compensated or not. *See supra* text accompanying notes 121–128.

180. Michelman, *supra* note 6, at 1169 (noting that when "a social decision to redirect economic resources entails painfully obvious opportunity costs," the question is "how shall these costs ultimately be distributed among all the members of society"). This sentiment echoes the oft-stated proposition that "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). For a discussion of the *Armstrong* principle and distributive norms in takings theory, see Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1 (2008).

181. Any argument that perceptions of risk should influence the nature of the legal response—for fewer exercises of eminent domain given the calculus of demoralization costs, for example, or conversely for a more consumer-oriented foreclosure regime given the calculus of morale benefits—has to further contend that perceptions of risk are not fixed and are subject to response. *Cf.* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 636 (1999) (discussing consumer risk perceptions as "determined or altered by the market contexts being analyzed").

182. And the "givings" or "windfall" literature has highlighted an element of the reverse of this proposition—namely, that when the state acts in a way that creates what might be

pointment suffered by those "disturbed by the thought that they themselves may be subjected to similar treatment,"[183] the signal of flexibility sent to other owners or those potentially engaging with property bears consideration as well.

The kind of security that boosts morale through signals of responsiveness similarly provides a new way to assess the perennial tension between rules and standards—crystals and mud—in the property context.[184] Expectationalism classically privileges the crystalline side of the ledger in property,[185] and ex post adjustment embodies supposedly hard-to-plan-for standards.[186] There has been a decided shift in the discourse toward the rule-oriented end of this perennial balance,[187] but the ex ante value of the communication of a stable landscape only responds to a part of what owners may expect. The possibility for morale benefits underscores that the existence of standards may itself be a critical motivator where the need for adjustment may reasonably be anticipated.[188]

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called a "painfully obvious" benefit, there are arguments from efficiency and justice that would allow society to socialize that gain. *See, e.g.*, Bell & Parchomovsky, *supra* note 123; Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1496–97 (1999).

183. Michelman, *supra* note 6, at 1214.

184. *See* Rose, *supra* note 16; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

185. Carol Rose stated as follows:

> If, as Jeremy Bentham said long ago, property is "nothing but a basis of expectation," then crystal rules are the very stuff of property: their great advantage, or so it is commonly thought, is that they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests.

Rose, *supra* note 16, at 577 (footnote omitted).

186. *Id.* at 603 ("We call for mud and exceptions only later, after things have gone awry . . . ."). The rules versus standards debate tends to overstate questions of predictability and uncertainty. In practice, standards are applied within the confines of precedent, and rules can be distinguished.

187. *See, e.g.*, Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); *see also* HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 38–40 (2011) (discussing the resurgence of exclusion as "the regulative idea of private property" in the contemporary discourse). This is not to say that the ex ante perspective is ineluctably bound to rules and the ex post to standards—that is certainly not the case as a practical matter. Rather, it is simply to note that in the discourse of expectation and the calculus of the costs of legal transitions, the crystalline aspects of property law tend to take primacy.

188. In addition to altering the decisional calculus for legal transitions from a utilitarian perspective and placing counterweight on property's continued emphasis on the ex ante value of sharp, rule-like approaches, recognizing morale benefits can shift the valence of reliance in the Rawlsian terms in which Michelman reframed his analysis. *See supra* note 102. It cannot be lightly assumed that when standing behind the veil of ignorance, potential owners might not contemplate that they would be in a position to benefit from active intervention and give some moral weight to a system that not only allows that intervention but also signals its potential in times of uncertainty.

To be concrete, just as some legal transitions are likely to raise particularly significant demoralization costs,[189] it is possible to imagine contexts where morale benefits may be especially salient. For example, during periods of volatility, particularly where systemic risk is hard to manage (as in the aftermath of a general economic crisis), responsiveness may be particularly important. In that context, intervention that adjusts property rights may incentivize people contemplating engagement who are overly risk averse in reaction to market failures.

Similarly, signals of flexibility may resonate where property arrangements are likely to be long lasting and transaction costs are likely to undermine the ability to bargain for flexibility when needed. Thus a lender who understands that the foreclosure practices of other lenders may undermine the value of their collateral and also realizes that there will be times when there is no practical market mechanism to influence that negative spiral may draw comfort from the fact that the government can provide a firebreak if necessary. Collective action problems are endemic to property, and the signal that there is a reasonable prospect that the legal system will find a way to facilitate solving those problems may be an important variable in deciding whether to undertake a given risk.

Finally, in situations where property is particularly embedded in a web of connected relations, as with the decision to join a partnership or a neighborhood, it may be critical to know that there will be an avenue for intervention, if needed, in the event of overly risky or invidious actions by others closely linked through property. Owners may feel vulnerable to exogenous risks where interconnection is most palpable, and knowing that the legal system can respond to ensure equal treatment may be an important ex ante consideration.

In many conflicts, traditional expectations of stability may outweigh any expectations on the other side, but there will also be circumstances when the opposite is true. Moreover, the types of people and institutions that might respond to the inducement offered by morale benefits may differ from those who would be demoralized by legal change. This can be a function of cultural preconceptions[190] but also can reflect the sophistication and resources someone brings to bear in approaching property. It may be, then, that individuals contemplating putting their retirement in mutual funds or purchasers for whom homeownership may be a rare and tremendously fraught transaction would be more motivated by the signal of a responsive legal system than hedge fund managers who essentially evaluate risk for a living. And there may be reasons why those with relatively little property feel the risk of the loss of that property more pointedly. In short, for some people, in some

189. Michelman, in a typology that anticipated much of the subsequent doctrinal development in regulatory takings, highlighted the particular psychic harms flowing from physical occupation of property, interference with "sharply crystallized, investment-backed expectation," and contexts where the benefits of a given public action are unclear. Michelman, *supra* note 6, at 1226–35.

190. *See supra* Section II.D.

contexts—and perhaps more than might seem intuitively obvious at first blush—witnessing legal change can be reassuring, not destabilizing.

2. The Reciprocity of Expectations

In addition to the ex ante/ex post dichotomy, the conflict between certainty and flexibility is often framed as a choice between the prerogatives of ownership and the imperatives of the community or state. Joseph Singer, for example, argues in favor of ex post recognition of the rights of nonowners who reasonably rely on actions taken by an owner.[191] This posits a tradeoff between a property holder and some other claimant standing outside traditional conceptions of ownership whose needs the legal system recognizes for reasons of distributive justice and the morality of induced reliance.

An important aspect of recognizing morale benefits as a converse to demoralization costs is that it sidesteps this owner-versus-public paradigm, revealing the hidden reciprocity of expectations.[192] Any legal transition sends ex ante signals both to potential winners and to potential losers, and any property holder can be either.[193] As with a developer whose reliance on legal stability clashes with another developer's reliance on the possibility of legal change, every choice to privilege one type of expectation has the potential to disappoint the other.

Conceptually, this reciprocity of expectations is one way to underscore how legal dynamism is embodied within the nature of ownership. Tension between certainty and flexibility can just as much pit property holders against other property holders. Accordingly, it is possible to reframe Singer's claim in ex ante signaling terms. Some workers, bondholders, and even potential investors in an enterprise may need to know that in the long run, when economic conditions change, there will be a fair system to respond to external forces and preserve the collective value of the property at issue. The result, ex post, in any judicial resolution may be similar, but any claim would be grounded in part in the same ex ante norms of expectation on which the legal system more often protects owners' entitlements.[194]

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191. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 621 (1988). Gregory Alexander's social-obligation theory likewise highlights the contextual obligations of ownership. *See* Alexander, *supra* note 158.

192. Because the granular details of legal transitions may vary in the strength of the message they send on either end, it is important to be clear that while demoralization costs and morale benefits are conceptually reciprocal, they are unlikely to be at issue to the same degree for the same person in any given instance.

193. One might argue that the threshold cost-benefit analysis already incorporates benefits to "winners" in a legal transition, and it would be, in some sense, double counting to take into account the expectations of those who might benefit from regulatory responsiveness. The same critique, however, could be (and has been) made of demoralization, *see, e.g.*, Leonard R. Jaffee, *The Troubles with Law and Economics*, 20 HOFSTRA L. REV. 777, 795 n.12 (1992), and the same reasons why transgression of expectations in certainty carry weight for their psychological effect on other owners and potential owners apply to expectations in flexibility.

194. Recognizing the morale of property holders not directly involved in a conflict does raise the issue of line drawing. If, in any given instance, the interest of some diffuse population of

This does not vitiate owner/nonowner conflicts but does mean that there is an additional intraproperty tradeoff to recognize. Doctrinal invocations of general expectations—the interests of Michelman's demoralized bystanders so often assumed—should, at a minimum, consider the interconnection between signals of destabilization and responsiveness as competing property concerns. This, in turn, could help open up a culture of property still wedded to exclusionary tropes, so that claims that property must at times sacrifice individual interests to the collective good—a valid proposition as well in the right circumstances[195]—can be complemented by the recognition that flexibility is a dynamic that any supposed Blackstonian may have every reason to value.[196]

3. Moral Intuitions Revisited

As the discourse on expectation makes clear, moral intuitions are indeed important to how people decide to approach property.[197] The plurality of those intuitions in psychological terms, however, renders incomplete any singular vision of what the legal system should credit. Thus, for every invocation of cases such as *Jacque v. Steenberg Homes, Inc.*,[198] where the court privileged an absolutist vision of the right to exclude, there are rejoinders that cite to equally iconic cases such as *State v. Shack*,[199] which famously recognized limits to trespass based on the proposition that "[p]roperty rights serve human values."[200]

Indeed, Joseph Singer offers a moral account of reliance in property that recognizes that owners can create legitimate expectations in "relations of mutual dependence" that ought to be respected in property law.[201] For Singer, legal recognition for property purposes can derive not just from formal

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owners and potential owners in flexibility is to be taken into account, that expectation might be infinite. Demoralization as a paradigm, however, suggests a limitation on morale benefits in that it is really those most directly impacted by the signal of either instability or flexibility that matter. This does not yield a definitive outer limit but does mean that for the same reasons that reasonable assumptions have been made about the limits of the demoralizing ripples cast by legal change, similar boundaries can apply to morale benefits.

195. *See* Alexander, *supra* note 158, at 748; *see also* Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007).

196. On invocations of Blackstone in the discourse of property's absolutism, see David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103 (2009).

197. *See supra* Section I.A.1.c.

198. *See e.g.*, Merrill & Smith, *supra* note 39, at 1871–74 (citing *Jacque*, 563 N.W.2d 154 (Wis. 1997)).

199. 277 A.2d 369 (N.J. 1971); *see also* Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 149–54 (2009); John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act of 2003*, 89 NEB. L. REV. 739 (2010) (discussing legislation that creates a right of "responsible access" for recreation, education, and passage across most land and inland water in Scotland).

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

201. Singer, *supra* note 191, at 622.

title, as classically understood, but also from conduct that diverges from that formality, if such relationships induce reliance. Irrevocable licenses, constructive trusts, and other equitable adjustments recognize entitlements that contravene the terms of formal title, underscoring the fact that informality often has as much to do with the texture of property as formality. This is less an ex ante story than it is an explication of how interdependence might be worthy of legal recognition in property despite classic liberal conceptions of the isolated and exclusive owner. Accordingly, a view of expectations that considers a pluralist vision of reliance might acknowledge the moral valence of signals of responsiveness and flexibility as people contemplate engagement in the first place.

For some people, assurance that the legal system will not interfere with their property is the instinctive sense that they need in order to engage. But taking the expectationalist frame seriously with respect to such intuitions requires the inclusion of other moral senses as equally valid desiderata. For other people, engagement requires reassurance that their intuitions about belonging, mutual respect, and the ability to get a fair hearing when things go wrong will be heeded as well. Legal transitions can support such intuitions as easily as they can signal instability.

B. *Correcting for Expectation Asymmetry in Property Doctrine*

Just as courts weigh expectations of stability,[202] so too could courts consider what signals their decisions send in terms of the kinds of reasonable adjustments over time such decisions represent to property holders. This can be seen in both individual property conflicts as well as areas of constitutional property doctrine that invoke expectations as a baseline norm.[203]

1. Sensitivity to Expectational Tradeoffs in Property Conflicts

Although courts have been wary of validating expectations of change, it is possible that a claimant could assert a reasonable, investment-backed expectation in a more favorable regulatory environment. However, this would require reliance on the likelihood of a specific change that is unlikely to be frequently credited, given the discretion with which the relevant legal institutions generally act.[204] It is thus more likely that expectations of flexibility

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202. *See supra* Section I.B.

203. One way to think about these doctrinal invocations of expectations is through concentric circles building out from an individual asserting reliance, to other parties to a conflict, to a general group of similarly situated property holders, and finally to all of those who interact with property. The breadth and content of expectations can be relevant in all of those domains.

204. *Cf.* Blais, *supra* note 96, at 3 n.7 (citing *Habersham at Northridge v. Fulton County*, 632 F. Supp. 815, 823 (N.D. Ga. 1985), *aff'd*, 791 F.2d 170 (11th Cir. 1986), as an example of a case where an owner "who bought property subject to zoning restriction did not suffer a compensable taking when the county refused to rezone it for a more profitable use, because the owner had no reasonable investment backed expectation in the use he sought").

will become a factor as courts consider the broader interests implicated in a given dispute.

Courts often struggle in contexts where an individual property dispute will potentially impact parties beyond the suit—nuisance is a classic example.[205] But some courts do consider the expectations of nonparties. Indeed, demoralization costs paradigmatically reflect signals to those not directly the subject of a legal transition, and morale benefits can play the same kind of communicative role beyond a dispute. When courts consider these signals, however, they tend to make relatively narrow assumptions about the reliance interests of property holders not party to a dispute.

Take, for example, the California Supreme Court's decision in *Nahrstedt v. Lakeside Village Condominium Ass'n.*[206] In *Nahrstedt*, the plaintiff—an owner of three cats—purchased a condominium allegedly without reading the pet restrictions contained in the development's covenants, conditions, and restrictions.[207] In ruling against the owner and affirming general deference to the enforcement of common interest communities' governing documents, the Court cited the importance of "protect[ing] the general expectations of condominium owners 'that restrictions in place at the time they purchase their units will be enforceable.' "[208] No doubt some, perhaps most, of the numerous other condominium owners read and intended to rely on the strict enforcement of the covenants, conditions, and restrictions—and reasonably so.

Surely, however, some of those owners focused on the fact that they were committing to a regime of common ownership and an ongoing community subject to the reasonable give-and-take that community living requires. Such potential owners would not necessarily have scrutinized the lengthy documents that formed the declaration but would instead have primarily wanted to know that they were entering a governance regime that would provide fair mechanisms for reasonable adjustments.[209] If so, then the expectational calculus that the Court so quickly assumed could shift to balance expectations of certainty against expectations of flexibility.

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205. For example, the court in *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970), in adjudicating the claim of landowners against the operator of a dust-spewing cement factory, cited the fact that there were many potentially significant interests not before the court that could be impacted by enjoining the cement factory in puzzling through the line between injunctive relief and damages.

206. 878 P.2d 1275 (Cal. 1994).

207. *Nahrstedt*, 878 P.2d at 1278 & n.3 (noting that the development prohibited owners from keeping "animals (which shall mean dogs and cats), livestock, reptiles or poultry" but allowed "domestic fish and birds" (internal quotation marks omitted)).

208. *Id.* at 1284 (quoting Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 653 (1981)).

209. Certainly the fact that there was a condominium board in place with the power to make adjustments could create some expectation of a fair hearing for individualized concerns. In *Nahrstedt* the board was not only unwilling to entertain the plaintiffs' claim, but litigated its right to reject that claim all the way to the California Supreme Court. *See id.*

There are areas where courts implicitly recognize this balance but could do so with greater clarity. In servitude law, for example, the prevailing approach to questions of modification over time, particularly for relocation, is to require mutual consent of the dominant and servient tenement holders.[210] A modern trend, however, embraced by the *Restatement (Third) of Property* and by a minority of courts, takes a more dynamic approach, allowing reasonable unilateral modification in light of changed circumstances.[211] In adopting this modern rule, some courts have alluded to the value that parties to servitudes might place on the possibility for flexibility where relocation or other changes become necessary and are not amenable to bargaining.[212]

Making clear the asymmetry of expectation that now pervades the invocation of reliance in many property contexts thus could recalibrate a question too often answered without full consideration of the full range of what legal change can actually signal.

2. Takings, Due Process, and "Common, Shared Understandings"

A morale-benefits lens has implications as well for the expectational calculus in takings and due process. In a general sense, inquiries into expectations in constitutional property cases focus on the extent to which there is a variance between a claimant's subjective expectations and a still poorly defined objective baseline. Though cases vary, claimants most commonly assert reliance on prior law,[213] and the question becomes whether that reliance should have been tempered by some external limitation or, regardless, whether exigencies outweigh even reasonable expectations.[214]

As noted, the Supreme Court has provided almost no guidance or mechanism for defining the reasonableness of expectations.[215] In attempting to cabin circularity, the Court has alluded to general understanding,[216] historical

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210. John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New* Restatement (Third) of Property: Servitudes, 38 CONN. L. REV. 1, 2 (2005).

211. *Id.*

212. *See, e.g.*, Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1234–35 (Colo. 2001); M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057–59 (Mass. 2004).

213. Although "investment-backed" perhaps adds some Lockean-reward heft, someone who acquires property by gift or inheritance may make a similar claim.

214. *See supra* text accompanying notes 86–100.

215. For example, the Court has drawn a distinction between real and personal property, *see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992) (invoking "the State's traditionally high degree of control over commercial dealings"), but that simply reifies the fact that the legal system has at some points and in some ways regulated personal property more directly, which is circularity writ large. And, as a number of commentators have noted, *see, e.g.*, Blais, *supra* note 96, at 55–56, the Court has yet to demarcate the limits on the legislature's power to redefine not only individual expectations through specific notice but also the "background principles" of property law that define the baseline for the legal system.

216. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001) (noting that although the question of expectation focuses on "common, shared understandings of permissible limitations derived from a State's legal tradition," under some circumstances "a legislative

common law doctrine,[217] regulatory notice,[218] and the legitimacy of a property right,[219] but these formulations generally devolve into other potentially circular inquiries.[220] Put simply, the Court has invoked the expectations of ownership to define the limits of legal change but has not resolved how this expectational baseline should be evaluated, largely eschewing thoughtful reflection on the challenges inherent in the feedback loop represented by the circularity problem.

Recognizing the challenges that this conceptual quagmire poses, it is still possible to disaggregate the sources of expectations relevant to forming evolving "common, shared understandings" of the limits of expectations.[221] Understanding that owners and potential owners can have expectations of flexibility, responsiveness, and inclusion means that in evaluating sources of external limitations—whether understood through conceptions of regulatory notice, limitations that "inhere in the title itself,"[222] or otherwise—the judicial inquiry should be broadened to balance multiple expectations. It may still be that a particular claimant can reasonably assert reliance on a specific legal regime and other owners' reliance on the possibility of change does not itself vitiate that claimant's position. But it will require courts that are considering the constitutional limits of change to property law to recognize the breadth and reciprocity of expectation.

A morale-benefits perspective is also relevant to so-called "judicial takings"—changes in law by judicial rather than legislative or executive action—about which interest has spiked in the wake of the Court's recent split decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[223] Barton Thompson, the scholar largely responsible for defining the terms of the discourse about judicial takings, has argued that "[a]lthough no psychological studies exist, the mysteries and political insularity of the judicial process might well lead to greater demor-

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enactment can be deemed a background principle of state law" (citing *Lucas*, 505 U.S. 1029–30)).

217. *See, e.g.*, *Lucas*, 505 U.S. at 1016 n.7 (citing the "rich tradition of protection at common law" for fee simple interests as resolving the question of how a claimant's expectations may have been shaped by state law).

218. Some commentators see glimmers of the notice-defeats-reasonable-expectation argument in cases such as *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), where the Court cited the existing regulatory regime (allowing disclosure of certain data arguably constituting trade secrets) to defeat a claim of a reasonable investment-backed expectation. *See, e.g.*, Eagle, *supra* note 86, at 443–44.

219. *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005) ("[T]he *Penn Central* inquiry turns in large part . . . upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests . . . .").

220. Resort, for example, to "background principles" simply reframes the circularity problem in alternative terms, requiring some external measure of those principles, whether it be Justice Scalia's unchanging common law in *Lucas*, for example, or Justice Kennedy's evolving common, shared understandings of the nature of property rights in *Palazzolo*.

221. *See Palazzolo*, 533 U.S. at 629–30.

222. *Lucas*, 505 U.S. at 1029.

223. *See* 130 S. Ct. 2592, 2615 (2010).

alization when courts act to strip property holders of expected rights."[224] Under a morale-benefits lens, well-ordered and well-reasoned evolution in common law property doctrine in response to change could have the opposite effect.

C. *Regulating for Morale Boosting in Property*

Courts, from their ex post adjudicatory perch, may not always be suited to judge the impact of their decisions on the future structure of ex ante decisionmaking; this is an unavoidable consequence of any process of dispute resolution. But other legal institutions—such as legislatures and agencies—can take cognizance of property's morale benefits.

1. Security, Flexibility, and Signals of Systemic Risk Regulation

Viewed through the lens of morale rather than demoralization, a number of regulatory mechanisms in property law can be understood not just as tools of ex post adjustment but also as ex ante signals of flexibility and responsiveness. Take zoning, for example. The traditional paradigm of expectations in zoning is that owners and their neighbors should be able to rely on height limitations, viewsheds, use patterns, and the like.[225] This stability, however, has classically been limited by "safety valve" tools such as variances and special exceptions for individual cases that require comprehensive planning to have play in the joints.[226] That is true, but what is missing from this juxtaposition of certainty and flexibility is the proposition that some people are likely to value, ex ante, the fact that the rules are supple. A homeowner contemplating a fixer-upper, an entrepreneur opening her first small store with hopes of expanding, a developer seeing the potential for a community's future growth despite existing restrictions—all of these current or potential property holders may be looking for reassurance that the city council, board of zoning adjustment, or other public body will provide a forum to recognize the need for change.

Institutionally, morale benefits seem to be playing an important role in current approaches to regulatory design, even if they are not articulated in these terms.[227] Many regulatory interventions around property have as an

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224. Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 909–10 (1996).

225. William Fischel has explained why the relative lack of diversification represented by homeownership for many homeowners tends to make them particularly vigilant about protecting that investment. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2005).

226. *See* JESSE DUKEMINIER ET AL., PROPERTY 944 (7th ed. 2010) ("Zoning [has] become a much more reactive enterprise, responding piece by piece to changing conditions, unanticipated demands, and specific proposals."). *See generally* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 286–302 (3d ed. 2005).

227. *Cf.* Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 985–1003 (2004) (arguing that, in undertaking

implicit rationale a collective signal about the bounds of risk. When, for example, the federal government more than doubles the amount of Federal Deposit Insurance Corporation ("FDIC") insurance,[228] it may be a necessary market intervention to shore up assets. But it also clearly sends the signal that the regulatory and political system is taking active and visible steps to short-circuit a dynamic of market panic. Similarly, the creation of the new Consumer Financial Protection Bureau will have significant consequences for many aspects of domestic credit markets, but it also sends an immediate signal to consumers that the kind of regulatory breakdown that contributed so clearly to the economic crisis is not going unheeded.

Some scholars have been critical of the "action bias" that the government may evince in response to relatively low probability harms.[229] A responsiveness-signaling regulatory strategy may be a rational response to paralyzing fear—to demonstrate immediate responsiveness—and may avoid overregulatory problems by more carefully weighing costs and benefits in the long run. This is not to suggest that immediate moves to calm markets and the like are inherently disingenuous but rather that visible regulatory action in response to such shocks might allow for a more reasoned response as panic subsides.

2. From Neutrality to Antidiscrimination to Inclusion

Focusing on the calculus of morale benefits also suggests that in responding to exclusionary practices, there are ex ante signaling benefits to a regulatory regime that moves beyond the reactive nature of traditional civil rights law and instead takes a more active role in ensuring inclusion. Much of current antidiscrimination law begins with a concern for messages of exclusion. Policing exclusionary market signals is an important aspect of provisions such as the Fair Housing Act's prohibition on discriminatory advertising.[230] That said, many seemingly neutral acts—such as the kinds of amenities that a subdivision offers—can be powerful signifiers that fall outside the ambit of civil rights law.[231]

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cost-benefit analyses, agencies should consider psychological constituents of welfare on par with physical issues).

228. *See What's in the Revamped Bailout Plan*, CHI. TRIB., Oct. 15, 2008, at C37 (noting that the financial bailout raised the FDIC insurance cap from $100,000 to $250,000).

229. *See, e.g.*, Zeckhauser & Sunstein, *supra* note 143, at 13.

230. The Act's prohibition reads as follows:

> [I]t shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Fair Housing Act § 804, 42 U.S.C. § 3604(c) (2006). *See generally* Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187 (2001).

231. Strahilevitz, *supra* note 160.

An ex ante morale signaling perspective would suggest a proactive regulatory strategy of inclusion, beyond formal legal neutrality. Current civil rights law is focused primarily, although not exclusively, on paradigms of equal treatment—no member of a protected class should be treated less favorably or, without sufficient justification, differently on the basis of their protected classification.[232] That equality norm is fundamental and itself signals formal commitment to barring differential treatment, but civil rights laws have been underenforced, and signals of private exclusion continue to have resonance.[233]

Although it has received relatively little scholarly attention, a version of this more resonant strategy is already embedded in the Fair Housing Act.[234] The Act directs all federal executive departments and agencies to administer "programs and activities relating to housing and urban development . . . in a manner affirmatively to further" fair housing.[235] This mandate has been interpreted to require not just antidiscrimination or neutrality in government action, but active steps to ensure diverse communities.[236] This kind of intervention—if adopted broadly—would recognize a particular kind of housing-market failure to which even antidiscrimination remedies are insufficient to respond, generating a regulatory response that would seek to replace the uncertainty of private exclusion with the stability of active inclusion.

3. A Word on the Market for Morale

This Section has focused on regulatory approaches to bolstering property's morale benefits, but it should not be taken as an argument that it is impossible for a market to develop that responds to some of the same risks. Take, for example, market shocks in homeownership arising from factors entirely outside the control of the homeowner. Lee Fennell, drawing on the work of Robert Shiller and others, argues that the legal system can alter the risks associated with homeownership through the creation of a form of tenure

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232. *See, e.g.*, Anita Bernstein, *Civil Rights Violations = Broken Windows:* De Minimus Curet Lex, 62 FLA. L. REV. 895, 898–99, 933 (2010).

233. *See, e.g.*, Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379 (2004); *see also* Raphael W. Bostic & Richard W. Martin, *Have Anti-Discrimination Housing Laws Worked? Evidence from Trends in Black Homeownership*, 31 J. REAL EST. FIN. & ECON. 5 (2005) (noting a consensus in the literature that civil rights legislation has failed to materially alter housing outcomes, but surveying evidence to suggest positive impacts of such legislation despite continued segregation).

234. *See, e.g.*, Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 353 (2007).

235. 42 U.S.C. § 3608(d).

236. *See, e.g.*, NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987) (noting that affirmatively furthering fair housing means that "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation" (quoting Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973))).

she calls "Homeownership 2.0."[237] This form would reconfigure homeownership to offer owners a default bundle of rights that would begin with the "risks associated with on-site factors," from which they could select additional risk pertaining to off-site factors, transferring unwanted risk to investors who could hold that risk in a diversified portfolio.[238]

Although Fennell is trying to solve the problem of a misalignment between those factors under a homeowner's control and those attributable to external market forces, the kind of derivative market she calls for could also be a psychological hedge to respond to fear of volatility.[239] This parallels William Fischel's argument that the problem with insurance for takings is that it may induce demoralization well before a demoralizing event takes place, simply by virtue of having to have such insurance in the first place.[240] The opposite psychological dynamic could also be true—that this kind of hedge can provide comfort to those concerned about volatility and regulatory failure. Thus, Fennell's option approach might be adapted to focus on lack of regulatory responsiveness, and understanding the texture of morale benefits offers a new vocabulary with which to think about how those who trade in risk might target this particular set of concerns.

D. *Opacity and the Risk of "Morale Hazard"*

If all this might flow from morale benefits, why hasn't the interest been more clearly recognized? And are there risks inherent in an approach to expectations that emphasizes responsiveness? This Section explores both questions.

1. The Opacity of Alternative Expectations

There are reasons why stability has been the prevailing psychological dynamic in the discourse of expectation. It may be that in comparing expectations of stability to expectations of flexibility, the contexts in which the former matter may be more ubiquitous. It may also be that the percentage of people in our culture who value stability outnumber those who value flexibility and responsiveness. Or perhaps people need the morale-boosting signal that might come from a legal transition more often in times of crisis than in supposedly ordinary times. These are empirical questions, and it would be difficult to move beyond intuition with respect to these variables with any certainty.

Institutionally, however, the legal system may find it challenging to acknowledge a kind of morale signal in legal transitions. A simple reason why courts tend to take cognizance of disappointed expectations of stability but leave out other interests in the psychological balance is that the kind of

237. FENNELL, *supra* note 11, at 180–96.

238. *Id.* at 189–90, 197–205.

239. *See id.* at 207–09 (discussing regret avoidance).

240. *See* FISCHEL, *supra* note 7, at 192–93.

owner paradigmatically aggrieved when demoralization is an issue tends to have clear, litigation-worthy claims. Redress in the courts, however, is much harder to contemplate for those deterred or excluded because of poor morale; the operative problem in such cases is the failure of the legal regime to respond to change, so people may be more reticent (or even unable) to bring a case. There is thus an inherent asymmetry between these types of ex ante perspectives in that expectation in stability tends to reflect the specific, knowable conditions represented by the status quo, whereas expectation in flexibility reflects inherently contingent future states. Redress for disappointed expectations that do not generate morale benefits is more often through political channels, and that tends to obscure the interest when courts contemplate the costs and benefits of legal change.

In a broader sense, the imbalance between expectations of stability and expectations of flexibility may reflect a kind of collective endowment effect—our legal institutions tend to recognize individualized harms that flow from particular governmental actions and have a much harder time conceptualizing individualized benefits that flow from the reality of state ordering. The proposition that property law can not only provide a bulwark against the state in the classic liberal tradition but also represent the invocation of the state to assert or mediate private coercion is a well-recognized Legal Realist insight.[241] As the Realists argued, the structure of state nonintervention is less transparent than its obverse,[242] and this differential expressiveness makes it easier to take cognizance of the supposedly intentional exploitation represented by redistribution. Changes to the law may simply register more vividly than the failure to respond.[243]

Moreover, in times of crisis, an intervention's signals about systemic risk and market privations may be inextricably intertwined with concerns about the reliance interests impinged upon by the transition.[244] While not all market failures result in public pressure for legal intervention, the instinct

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241. *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1928); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923). For a general discussion of the Legal Realist approach to property, see SINGER, *supra* note 173, at 81–84.

242. *See, e.g.*, Hale, *supra* note 241, at 474–75, 489.

243. As Jeffrey Rachlinski notes, "people rely on fixed reference points to evaluate choices, paying more attention to changes in the status quo than to absolute values." Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 740 (2000) (citing Tversky & Kahneman, *supra* note 142, at 1124).

244. It may be that expectations in flexibility are articulated through proxy emotions, and it might be difficult to disaggregate interactions between anxieties. Thus, a potential homeowner who is concerned about both the probability that investment in housing will not yield the returns that it once did and the risk that a functioning regulatory system might not protect against future market shocks will likely take both into account in deciding whether to shift from renting to owning. But the fear of market failure can be understood as bound up with the fear of a lack of regulatory responsiveness, even if not articulated in those terms.

that "there ought to be a law" runs deep in American culture.[245] This same sentiment, usually expressed when things go wrong, is relevant when people think about the potential for things to go wrong, reflecting concerns about whether the system will work in the first place. This may be less vivid, and is certainly less obvious, than after-the-fact invocation of the need for reform, and may be hard to isolate.[246]

Similar psychological dynamics may be at play in other areas of the law but seem particularly salient for property law. Perhaps because property law paradigmatically sets rules that are "good against the world,"[247] the role of the state in structuring property rights may tend to send stronger signals than in other areas of the law where anxiety about protection against or from the state is less of a central trope.[248] Moreover, given the deeply embedded nature of much property and the ways in which the legal system approaches the design of property law to reflect such long-term investment, changes in law that are not strictly retroactive may tend to impact property rights more broadly than in other doctrinal areas, again raising the profile of legal transitions for property.

2. Overincentive Problems and the Limits of Expectation

Finally, it is worth briefly addressing the obvious risk of overincentivizing investment, attachment, and the other potential benefits associated with expectation.[249] Emphasizing that some aspects of property law can signal a kind of security that is amenable to equitable adjustment and sensitive to

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245. The phrase apparently derives from a syndicated cartoon strip by Jimmy Hatlo that ran from the 1920s through the 1960s. *See* Linda A. McGuire, *Commentary: There Ought To Be a Law*, 1 J. GENDER RACE & JUST. 547, 547 (1998).

246. It is important to be clear that the kind of security of expectation—the signal that there is fairness and play in the joints, even if that requires adjustment of formerly established property rights—is a function that is arguably unique to our culture and historical moment, and this Article is not asserting an acontextual universal norm. *Cf.* Rose, *supra* note 22, at 13 (noting that the fact that property adjustments in everyday transactions are unremarkable in the United States is not a proposition that would hold in countries with less well-developed legal systems).

247. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780 (2001) (internal quotation marks omitted).

248. That certainly seems evident in the reaction to cases like *Kelo*. *See supra* text accompanying notes 125–128.

249. It bears noting that, as with traditional expectations doctrine, recognition of morale benefits requires the ability to invest or otherwise make the choice to engage with property in the first place, a predicate with clear distributional consequences. It might be argued that it is unseemly to overly focus on what the institutions of property might do to coax reluctant bystanders into engaging when the distribution of property remains so uneven and when for many the problem is much more of simple need than any fear or hesitation. *See, e.g.*, Jeremy Waldron, *Community and Property—For Those Who Have Neither*, 10 THEORETICAL INQUIRIES L. 161, 166–67 (2009) (arguing that justifications for property must pay special attention to the interests of those who enjoy no rights of private property). That is true, but the morale boosting that property law may do in many circumstances can help those excluded by property's more crystalline hard edges gain access in the first place.

inclusion can certainly give rise to the pendulum swinging too far toward numbing what might otherwise be an appropriate level of caution.[250] There are many well-recognized problems with this kind of encouragement—people can be brought into homeownership, for example, unprepared for market shifts and vulnerable to devastating loss.[251] This represents a kind of "morale" hazard akin to the traditional moral hazard that comes from assuming the risk of someone's actions.[252]

This is a valid concern and a reason to be cautious about overly privileging responsiveness in the ex ante calculus. Perhaps the best response is that recognizing the reciprocity of expectations of certainty and flexibility can serve as a corrective to what is now an overly unitary exercise. To the extent that the legal system regularly invokes one type of expectation, it is inherently making a choice to disregard the other. Whatever distortion attends a choice in expectations can thus be mitigated by a broader view of the tradeoffs inherent in expectations. This more balanced view can still veer too far in either direction—toward unreasonably inducing people to risk engagement with property or unreasonably restricting the legal system's ability to respond as needed—but would allow for a more contextual approach.

A closely related concern is that respecting expectations of flexibility can be as distorting or irrational as traditional expectations in legal stability. Courts have not been able to resolve the line between subjective and objective expectations, the circularity problem continues to bedevil regulatory takings and due process in this area, and there are many other normative and instrumental crosscurrents that undercut reliance interests.[253] Moreover, there is something inherently indeterminate about a legal inquiry that tends to shade from reason into emotion. Given all this, perhaps the law should look to factors entirely outside individual expectations when structuring entitlements.[254]

However, expectations, incentives, and ex ante legal signaling remain deeply embedded in the discourse of property. This is not entirely without cause, as long as properly contextualized. Reliance is a normative value worth weighing, crystalline entitlements do have potential efficiencies, and stability can be quite comforting. And any system that does not account for

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250. *See, e.g.*, Kaplow, *supra* note 5, at 551–52.

251. *See, e.g.*, Lorna Fox O'Mahony, *Homeownership, Debt, and Default: The Affective Value of Home and the Challenge of Affordability*, *in* AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 169 (Nestor M. Davidson & Robin Paul Malloy eds., 2009).

252. The idea of "morale hazard" has been invoked at times as a variation on traditional moral hazard. *See, e.g.*, Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 338 n.117 (1990) (distinguishing moral and "morale" hazards).

253. *See supra* text accompanying notes 86–100 (concerning *Penn Central* and investment-backed expectations), 213–221 (concerning *Lingle* and the reasonableness of those expectations).

254. *Cf.* Epstein, *supra* note 75 (arguing that an expectations-based approach stands on weak theoretical foundations).

the reality of visceral, even at times seemingly irrational, responses to legal rules will be resolving disputes and setting regulatory frameworks from an inherently inaccurate perspective.

A better approach, then, would be not to reject expectation but to begin to bring some psychological realism to the often one-sided assumptions that courts and other legal actors make about what signals legal transitions actually send. The psychological dynamics of expectation, moreover, do not stand apart from but instead are intimately bound up with other normative and instrumental claims about property. This makes it all the more important to understand the range of expectations that might find expression in law.

CONCLUSION

Frank Michelman once noted that in property theory "[s]ecurity of expectation is cherished, not for its own sake, but only as a shield for morale."[255] Much of our current thinking about the nature of this psychologically protective role for property law has elaborated one side of a mental equation, emphasizing demoralization and, in particular, the fear of arbitrary and oppressive interference with expectations of legal stability. This is a legitimate concern for property theory and doctrine.

This Article has argued, however, that the expectations associated with property also call for paying attention to a very different kind of up-front morale. In this vision, property rights are dynamic not only in reacting after the fact as the world changes but also, crucially, in making clear that people can have some confidence from the start that when problems emerge, the system they are contemplating entering will not grind its inexorable way forward unmindful of change. In other words, for some people, what they need to know ahead of time is not that the system is constant but that it will work.

Bolstering the confidence of those for whom responsiveness is every bit as important as stability is not without its risks, and the psychological portrait it reflects should not be taken as any more universal than the one that undergirds the discourse of demoralization. But with appropriate caution, there are good reasons for the legal system to be as self-conscious of morale benefits as it is of demoralization costs. This more balanced approach to property's life of the mind can expand the range of considerations for the legal system to weigh in considering expectations and, ultimately, form an important part of ensuring that the world of property is not just clear but also welcoming.

255. Michelman, *supra* note 6, at 1213.