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Deep Pits & Solid Ground: What if property law is both the cause of the affordability crisis & the solution to it?

Joseph William Singer*

BACK IN 2019, REPRESENTATIVE KATIE PORTER grilled JP Morgan Chase CEO Jamie Dimon about the wages his bank paid entry-level workers. Porter constructed a bare-bones budget—the amount one would need to spend every month just to get by. She found out that the wages were not sufficient to pay necessary expenses. Porter asked Dimon about it. "She's short $567. What would you suggest she do?"[1] "I don't know," Dimon said. "I'd have to think about that."[2]

Well, I've been thinking about it, and given that it's all the current rage to worry about "affordability," it seems other people are thinking about it too. Current debates seem to focus on bringing prices down.[3] That's part of the problem, but it may not be the most important thing for

* Joseph William Singer, Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow, Mira Singer, and Tim Mulvaney. James Blanchfield did outstanding work as a research assistant, and I owe the discussion of the debate about affordability to him. I also thank the participants in the 2026 Progressive Property Conference for their helpful comments and suggestions. I am grateful to Harvard Law School for research support for this project. This article is a slightly expanded version of the Keynote Address on *The Rule of Law, Property, and Democracy,* delivered at the *Association for Law, Property, & Society Conference* in New Orleans on June 5, 2026.

[1] Caroline Kelly, *Freshman Democrat presses JPMorgan CEO Jamie Dimon over pay disparity*, CNNPOLITICS, Apr. 11, 2019, https://www.cnn.com/2019/04/10/politics/katie-porter-jamie-dimon-bank-employees.
[2] *Id.*
[3] *See America Needs to Build More Housing*, N.Y. TIMES (May 18, 2026), https://www.nytimes.com/interactive/2026/05/18/opinion/affordable-housing-america.html?campaign_id=39&instance_id=175986&nl=opinion-today&regi_id=1500910&segment_id=220363&user_id=0d2a6dced08d331ad0b381240473599d (arguing that housing is expensive because zoning and building construction and permitting laws have limited the supply of housing).

us to focus on. Porter's point was not that prices are too high, but that wages are too low.[4] Millions of people today do not earn enough resources to pay for the things they need.[5] Another word for "resources" is "property." People do not own enough property.[6] That is because the law allocates property rights, and those legal rules direct a lot of property to the few and very little property to the many. We have an affordability problem *because we have a property law problem.*[7]

While concern over affordability has risen, some commentators have pushed back. They argue that the problem reflects misperception rather than a broad decline in purchasing power. One statistic that proponents of this view look to is that while inflation has been increasing in recent years, average wages have been rising too, resulting in overall real wage growth.[8] Other economists have argued that claims of income stagnation or declining living standards often rely on selective time periods or flawed measurement choices, and that broader data show sustained long-term growth in real incomes.[9] From this perspective, the affordability narrative is driven largely by specific sectors such as housing, and some data show that even housing costs are not overly burdensome on household budgets

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[4] *See* ARINDRAJIT DUBE, THE WAGE STANDARD: WHAT'S WRONG IN THE LABOR MARKET AND HOW TO FIX IT (2026); Josh Bivens, Hilary Wething, & Ben Zippere, *Rising inequality is the root of affordability problems,* ECON. POL'Y INST. (Apr. 27, 2026), https://www.epi.org/blog/rising-inequality-is-the-root-of-affordability-problems/ (showing that middle-class incomes have not kept pace with inflation).

[5] *See* HARV. U. JOINT CENTER FOR HOUS. STUD., *America's Rental Housing 2026,* https://www.jchs.harvard.edu/americas-rental-housing-2026 (showing the increasingly severe problem of not being able to afford rent).

[6] *See* Timothy M. Mulvaney & Joseph William Singer, *Essential Property,* 107 MINN. L. REV. 605, 607–611 (2022). *See also* MATTHEW DESMOND, POVERTY, BY AMERICA (2023).
Cf. ECON. POL'Y INST., *Family Budget Calculator,* https://www.epi.org/resources/budget/ (demonstrating what budgets are needed to live in different parts of the country).

[7] *See* Julie Sweetland, *The "Affordability" Trap: Why Progressives Need to Talk about Design, Not Just Prices,* THE CONTRARIAN (Mar. 17, 2026), https://www.contrariannews.org/p/the-affordability-trap-why-progressives.

[8] Allison Schrager, *Affordability Isn't a Hoax. It's not a Crisis for Most, Either, Bloomberg (December 11, 2025), https://www.bloomberg.com/opinion/articles/2025-12-11/affordability-isn-t-a-hoax-it-s-not-a-crisis-for-most-either?srnd=undefined*

[9] Scott Lincicome, *The Annoying Persistence of the Income Stagnation Myth*, Cato Institute (Oct. 9, 2020), https://www.cato.org/commentary/annoying-persistence-income-stagnation-myth

in many counties, particularly for rentals.[10] These analysts contend that public pessimism about affordability reflects lingering perceptions formed due to recent inflation shocks rather than a true crisis.[11] As a result, affordability issues are something of a "mirage."

At best overly optimistic, and at worst intentionally misleading, the "affordability-is-a-mirage" thesis rests on an incomplete picture of economic statistics, often looking at aggregates and means while discounting the impact on the lowest income households. Although true that real wages have risen in recent years, average wages relative to inflation aren't the full story. When compared to productivity, or the actual output of goods and services, wages have completely fallen off, with productivity growing at almost 3 times the rate of pay.[12] Further, the prices of core necessities, such as housing, healthcare, and childcare, have increased far faster than median incomes for decades, forcing low-income households to devote a growing share of their earnings to basic needs.[13] In the housing market, while rent growth has cooled slightly since 2021, the number of cost-burdened renter households hit another record high in 2024, with over a quarter of all renters spending more than 50% of their income on rent and utilities.[14] Low-income renters are disproportionately affected by high rents, with 83% being cost-burdened.[15] According to the Urban Institute, nearly half of all Americans cannot afford to pay for essential resources needed to "live securely in their community."[16]

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10 *America's Affordability Crisis Is Mostly a Mirage*, The Economist (Dec. 30, 2025), https://www.economist.com/briefing/2025/12/30/americas-affordability-crisis-is-mostly-a-mirage.
11 *Id.*
12 *The Productivity-Pay Gap*, ECON. POL'Y INST. (Mar. 23, 2026), https://www.epi.org/productivity-pay-gap/
13 Ana Boata et al, *High prices, thin buffers: America's affordability crisis persists*, Allianz Research 1 (Feb. 11, 2026) (noting that 1/3 of low income households spend 95% of income on basic needs)
14 Joint Center for Housing Studies of Harvard University, America's Rental Housing 3 (2026)
15 *Id.* at 4. *See also* GREGG COLBURN & CLAYTON PAGE ALDERN, HOMELESSNESS IS A HOUSING PROBLEM: HOW STRUCTURAL FACTORS EXPLAIN U.S. PATTERNS (2022.
16 Urban Inst., *The Affordability Tracker* (Apr. 2, 2026), https://www.urban.org/data-tools/american-affordability-tracker; Urb. Inst., *Update 2023: Measuring the True Cost of Economic Security* (Mar. 16, 2026), https://www.urban.org/research/publication/update-2023-measuring-true-cost-economic-security; John Mac Ghlionn, *The next recession could be a middle-class massacre:*

Moreover, the "mirage" narrative largely ignores the role of rising household debt in shaping affordability, which goes beyond the effect of just wages. Americans now carry historically high levels of student-loan, credit-card, and auto debt, which reduces disposable income and leaves many households financially fragile even during periods of general macroeconomic growth.[17] Survey evidence shows a substantial share of Americans would struggle to cover even modest unexpected expenses, suggesting that headline economic indicators do not account for the financial insecurity experienced by many.[18] Properly understood, the affordability crisis is not merely a matter of pessimistic public perception. It reflects real economic pressures that are affecting the lowest earners most.

When the Supreme Court upheld minimum wage laws in 1937, Chief Justice Charles Evans Hughes explained that workers need wages to live on while companies need workers to operate profitably. But if employers do not pay their employees enough to enable workers to provide the services that employers need, then someone else must fill the hole in the employees' budgets. Hughes explained that "the community is not bound to provide what is in effect a subsidy for unconscionable employers."[19] Jamie Dimon may have had no idea what to do about his workers who could not pay their bills, but the Supreme Court knew at least one thing he could do. Stop treating workers as inputs or costs and start treating them like human beings. People cannot provide the services you need if you don't provide them what human beings need to thrive. Start paying them enough to live on. Stop acting like a feudal lord who

We're not read for what's about to hit, BOSTON GLOBE (May 29, 2026), https://www.bostonglobe.com/2026/05/29/opinion/recession-inflation-middle-class-nightmare/.

17 FEDERAL RESERVE BANK OF NEW YORK, CENTER FOR MICROECONOMIC DATA, HOUSEHOLD DEBT AND CREDIT REPORT 3 (Q1 2024) (showing total debt as of Q1 2024 was $17.69 trillion)

18 BOARD OF GOVERNORS OF THE FEDERAL RESERVE, ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2023 31-32 (May 2024) (noting that 37% of all adults said if faced with an unexpected $400 charge they would have to borrow or sell something, or would not be able to pay it at all)

19 West Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937).

drains all the profits from the land to subsidize your lavish lifestyle while your workers get by on gruel.

When I was in college, my economics professor told us a story.[20] Imagine that you find yourself at the bottom of a deep pit filled with poisonous snakes. Someone comes along with a ladder. He offers to help you get out of the pit. This will save your life. All you have to do is to agree to be his servant and work for him for free for twenty years. What do you do? You don't have a real choice. It is servitude or death. You accept his offer to save your life. He lowers the ladder and you climb out of the deep pit. Now what?

Is the contract enforceable? Well, you agreed to it, didn't you? Nobody forced you. You could have said no. The stranger was not responsible for your being in the deep pit, and American law imposes no duty to help a stranger in distress. He could have just walked on by. It was nice of him to stop. He went out of his way to help you. He offered you something you needed, and you agreed to pay his price, didn't you? The alternative was horrendous, but the benefit was enormous. True, the price was high, but didn't you both benefit from the exchange? And didn't the benefits outweigh the costs?

I tell this story for several reasons. We are too quick to conclude that deals are voluntary. We are also too quick to assume that a deal is fair just because both parties agreed to it. Urgent needs and exigent circumstances are much—*much*—more common than we imagine. We need housing, food, medical care, clothing, transportation, childcare. We can pay for those things only if we have enough money to do so. Freedom ***of*** contract does not mean that you are free ***to*** contract. If you do not have enough property to register on the demand curve, then you are not free to make contracts. And that may mean that you are not able to get the things that you need.

[20] The professor was Randall Bartlett at Williams College. *See* Randall Bartlett, Economics and Power: An Inquiry into Human Relations and Markets (1989).

One hundred years ago, Robert Hale taught us that bargains occur in the shadow of the property rights we bring to the bargaining table. Those with more property have more bargaining power. They have things others need and they have the freedom to "just say no" and walk away from the transaction.[21] In the language of negotiation theory, no one will agree to a bargain if you cannot offer them something better than their BATNA—their best alternative to a negotiated agreement. As Hale explained,

> Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others. [¶] It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining. There may be sound reasons of economic policy to justify all the economic inequalities that flow from unequal rights. If so, these reasons must be more specific than a broad policy of private property and freedom of contract. With different rules as to the assignment of property rights, particularly by way of inheritance or government grant, we could have just as strict a protection of each person's property rights, and just as little governmental interference with freedom of contract, but a very different pattern of economic relationships. Moreover, by judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.[22]

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[21] *See* ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952); Robert L. Hale, *Bargaining, Duress, and Economic Liberty,* 43 COLUM. L. REV. 603 (1943); Robert L. Hale, *Coercion and Distribution in a supposedly Non-coercive State,* 38 POL. SCI. Q. 470 (1923); Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale,* 27 U. MIAMI L. REV. 261 (173). *See also* Joseph William Singer, *Legal Realism Now,* 76 CALIF. L. REV. 465, 482–495 (1988).

[22] Hale, *Bargaining, supra* note 21, at 627–628.

We typically value freedom of contract because we also have the freedom *not* to contract. No one can take our money without our consent. If both sides agree to the arrangement, that can be *prima facie* evidence that the agreement is not only voluntary but fair. We each feel better off after the deal; the benefits outweigh the costs for both of us. But the story of the deep pit should make us wonder about all this. The fact of the matter is that our legal system tempers freedom of contract by regulating agreements to ensure they comply with minimum standards of fairness. Employment agreements must pay a minimum wage.[23] Workplaces must be safe. The food in restaurants must not be rancid. Landlords cannot refuse to rent to us because of our race or religion. Some of these minimum standards regulations are in statutes, but others are in the common law.

Because we embrace individual rights to freedom and equality, the law regulates our relations with each other to ensure that we treat each other with a minimum amount of respect and dignity. Jed Purdy invented an elegant term for this. The law sets minimum standards for what he called "terms of recruitment."[24] When we collaborate with others in market ventures, the laws of a free and democratic society do not allow people to forfeit basic rights of personhood and autonomy. We set minimum standards for all market relationships, and that includes transactions that define and allocate property rights.

Property scholars typically find this point easier to understand than contracts scholars do. Contract law scholars are entranced with the idea of "freedom of contract." They tend to see regulation of contract terms as deeply problematic because it limits our liberty to do what we want. But property scholars understand that our property system began

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[23] On the economic effects of minimum wage laws, see Sebastian Martinez Hickey, *Myths v. facts about the minimum wage,* ECON. POL'Y INST. (June 1, 2026), https://www.epi.org/publication/myths-vs-facts-about-the-minimum-wage-an-faq-on-the-economics-of-increasing-wage-floors/.

[24] Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates,* 72 U. CHI. L. REV. 1237, 1285 (2005) ("[P]roperty rights define how people can recruit *one another,* and the resources they control, for collaborative projects."); Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property,* 56 DUKE L.J. 1047, 1095–1098 (2007) (analyzing the "terms of recruitment" of others for collaborative projects).

by rejecting feudalism. Many of our property law rules regulate the packages of property rights we are allowed to create. We do this so we can be the lords of our own castles, rather than subject to the arbitrary power of a hereditary nobility.

You only get from feudalism to democracy by outlawing property relations that entail submission to arbitrary authority. The common law that developed under King Henry II in the twelfth century limited the property rights of the lords in order to protect the property rights of their tenants. And the Magna Carta in the thirteenth century was initially adopted under King John when the nobles sought to limit the arbitrary power of the King over the lords' property.

Both moments in history redistributed property rights to protect the security and liberty of underlings or servants. It took a while for the "servant" idea to go away. Under feudalism, everyone other than the King was a servant to someone else. A republic outlaws titles of nobility and views everyone as a person, a human being. That only happens by limiting the property rights of lords and redistributing them to peasants. Nor was this process limited to Great Britain. Upon Independence, the American states got rid of some of the remaining vestiges of feudalism by outlawing quitrents, subinfeudation, primogeniture, fees tail, and coverture. And, of course, the Thirteenth Amendment abolished millions of dollars of property by transferring power from enslavers to those they had enslaved.

But giving people property rights is often not enough. Rights without remedies are not rights at all. Think about housing codes. They apply to most residential tenancies, but the thing is that many people cannot afford the protections granted by housing codes. Poor tenants generally have poor housing that violates the housing code. Poor tenants often have poor landlords. Poor landlords may well lack the resources necessary to bring their housing up to code. And if those landlords did have such resources and upgraded their housing to be consistent with minimum standards regulations, the landlord would likely raise the rent and price those tenants out of the market. Housing codes are the law, but poor tenants literally cannot afford the rule of law. Even if we somehow built millions of units of housing so there was a house for every person that needed it, many people could still not afford a decent home.[25] They are in a deep pit, and they have no way out unless someone comes along with a ladder.

The same is true for tenants facing eviction. Their home may have multiple housing code violations. The windows leak, the walls have mold, the building has cockroaches, the furnace is creaky and won't heat the apartment properly, and the lock on the front door is broken. All these things violate the housing code and the implied warranty of habitability. It is the landlord's responsibility to fix these things. But the tenant does not know this, because the lease says that it is the *tenant's* job to maintain the premises.

That clause is common in leases in the Boston area. This lease clause is illegal, and the landlord knows it, but the tenant doesn't know it. It is a violation of the state consumer protection act to include an illegal term in a lease, but according to the Supreme Judicial Court of the Commonwealth of Massachusetts, the remedy is a nominal one dollar.[26] It may also violate the ethical duties of lawyers to include illegal terms in leases, but the tenant does not know this, so who is going to make a complaint?[27]

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[25] CENTER FOR AM. PROGRESS, *Build, Baby, Build: A Plan to Lower Housing Costs for All* (Nov. 17, 2025), https://www.americanprogress.org/article/build-baby-build-a-plan-to-lower-housing-costs-for-all/ (explaining why we need a variety of policies and legal changes beyond reforming zoning law to make housing affordable); Alexander von Hoffman, *To restore the American dream, Greater Boston needs to build more single-family homes,* BOSTON GLOBE (Mar. 21, 2026), https://www.bostonglobe.com/2026/03/21/opinion/boston-housing-crisis-single-family-homes/?p1=BGSearch_Overlay_Results (also explaining several law reforms that would be essential to making housing available and affordable).

[26] *See* Leardi v. Brown, 474 N.E.2d 1094 (Mass. 1985).

[27] AMERICAN BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT RULE 8.4 ("It is professional misconduct for a lawyer to…(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation"), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/?login.

If the tenant had a lawyer or knew her legal rights, she might ask the landlord to fix the place. If the landlord refuses, the tenant can stop paying rent until the repairs are made. The tenant could also call the housing inspector, and the law protects the tenant from eviction for doing so. But the tenant does not know any of this.

Now the tenant has a bad month and gets behind on her rent. The landlord sues to evict her and gives her fourteen days to move out. She doesn't have a lawyer, so she doesn't know that this is illegal under Massachusetts law. Massachusetts law says that no one can be evicted without a court order.[28] Perhaps she will leave voluntarily because she does not know this. If that happens, she will lose her property rights *even though the law says that she has a right to keep them.* That is both a failure of the rule of law and a deprivation of property without just compensation.

What happens if the tenant ignores the notice to quit and stays? Eventually, the court will hold an eviction hearing. Under the substantive law, the tenant has a right to stay in the apartment because the landlord is violating the implied warranty of habitability and did not fix the place when asked to do so. The judge knows that. The landlord knows that. The landlord's lawyer knows that. The only person in the courtroom who doesn't know it is the tenant. The implied warranty must be raised as a defense to an eviction claim.[29] The tenant will not raise it because the tenant doesn't know the law. The landlord will win the case even though the substantive law says that the tenant should win.

Why doesn't this violate due process of law? Why isn't it an unconstitutional taking of the tenant's property without just compensation? Why isn't this a violation of rule of law principles? We have a rule about property, but the state is actively violating the tenant's property rights. The state has adopted procedures that enable someone to appropriate the property of another in violation of law. In Thucydides'

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[28] MASS. GEN. LAWS ch. 186, §15F, §31.

[29] *See* Adjartey v. Cent. Div. of the Hous. Ct. Dep't, 120 N.E.3d 297, 319 (Mass. 2019) (tenant may raise breach of the implied warranty of habitability as a defense to a claim for possession by the landlord): Jablonski v. Casey, 835 N.E.2d 615, 618 (Mass. App. Ct. 2005) (same).

Pelopponeisan War, he lamented that "the strong do what they can and the weak suffer what they must."[30] Our law sometimes protects the weak, but only in theory, while in reality the strong do what they can, and the judges help them do it.

Are there rule of law remedies here? We could recognize that the adversary model does not function when one of the parties is unrepresented. We could furnish a lawyer for tenants facing eviction. We could require the judge or the clerk of the court to ask the tenant about the housing conditions before an eviction will be granted. Or we could change the burden of proof. Why is it the tenant's job to bring up the fact that the landlord is violating the housing code? Why not make the landlord prove compliance with the code as a precondition to being granted an eviction? Why not require the landlord to show a certificate of compliance with the housing code as an element of the claim to recover possession of the property?[31] That would better enforce the housing code as well as the tenant's property rights. It would place the court on the side of the rule of law rather than the ruling class. It would protect the property rights of the vulnerable while preventing the powerful from stripping poor people of what little property they have.

Surprisingly, we have identified a case where the person in the deep pit actually owns a ladder and has a right to have it lowered into the pit so they can escape danger. But *they don't know that they own a ladder.* They don't know that the guy at the top is asking them to pay for something they already own. They don't understand that *someone has stolen their ladder.*

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[30] THUCYDIDES, THE PELOPONNESIAN WAR 331 (Crawley trans. Modern Library 1951)(431 B.C.E.).
[31] A bill like this has been introduced in the legislature in New York. *Clean Hands Eviction Bill,* N.Y. Senate B. 4098 Reg. Sess. (2025–2026), https://legislation.nysenate.gov/pdf/bills/2025/S4098. Both Washington, D.C. and the City of Philadelphia require landlords to prove compliance with the housing code as a precondition to renting housing to tenants. D.C. CODE §47-2828(c)(1), D.C. Municipal Reg. §14-202 (compliance with housing code required to get a rental buseinss license); Philadelphia Municipal Ct. Rule 109(c)(4)(c) (complaint for eviction must include the "Certificate of Rental Suitability" which is given to show that the property complied with the housing code at the inception of the tenancy), https://www.courts.phila.gov/pdf/rules/MC-Civil-Division-Compiled-rules.pdf.

Now we assumed that it was a mystery why someone found themselves at the bottom of a deep pit. Maybe they fell in by accident. In that case, the question is whether we have any duty to help a stranger in distress. Should the federal government, for example, abolish FEMA and stop helping people who are victims of natural disasters? Should we repeal the federal EMTALA statute that requires hospital emergency rooms to give life-saving medical care to people regardless of their ability to pay?[32]

But maybe they are in the pit, not by accident, but because they jumped in, like a teenager on a dare. Or maybe they got addicted to drugs. Maybe they took an unreasonable risk, like the millions of homeowners who agreed to subprime mortgages. In that case, the question is whether we have any duty to help people who make human mistakes and find themselves in desperate circumstances. That requires us to wrestle with our moral obligations to people who are imperfect—people like us. It is not just other people who stumble. It is not just other people who fall into deep pits.

There is another possibility, though—another reason someone might be at the bottom of a deep pit—and that is *because we put them there*. Maybe they are in a dangerous and vulnerable situation, not by choice and not by accident, but because they are the victims of powerful forces that shoved them over the edge. What if they did everything that we expect of them? What if they worked hard and played by the rules? What if they looked diligently for a job that would pay enough so they could pay their bills? What if they went to college to get an education as people told them to, and their job just doesn't pay enough to get rid of their student debt while paying for housing, food, health care,[33] and a Netflix subscription?

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[32] Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. §1395dd.

[33] Ellyn Maese, *One-Third of Americans Cut Back to Cover Healthcare Expenses: Cost of healthcare also causing many to delay pursuing milestones and life-enhancing goals,* GALLUP (Mar. 12, 2026), https://news.gallup.com/poll/702596/one-third-americans-cut-back-cover-healthcare-expenses.aspx.

Last fall I was reading the weekly *parasha* or Torah portion. It was the story of Joseph in the book of *B'reishit* (Genesis). Joseph wound up in a deep pit because his brothers threw him in there. True, they were mad at him, and that was because he antagonized them by claiming to be better than them. We can't let Joseph totally off the hook. He wasn't a great brother, at least not then. But he was their brother. That didn't matter to them. They threw him into a deep pit and sold him into slavery. His brother Reuven tried to save him, but Reuven did not speak up soon enough, and by the time he decided to act, it was too late. Reuven lost his brother because he stood by and did nothing while his brothers pushed Joseph over the edge.

It has taken me awhile to get here, but this is what I really want to talk about. Too many people have too few resources from either family wealth or yearly income to be able to afford to pay for what they need to live, let alone to enjoy life. And *that is not their fault.* Nor is it the fault of disembodied forces like "the economy" or "evolving technology" or "trade" or "the times we live in." The distribution of property is what it is because the legal system allocates property through a host of legal rules. Inequality of wealth and income is caused, not by indifferent forces of nature. *It is caused by law.*[34]

We might call the laws that determine the distribution of resources "property law." But this kind of property law is not limited to common law rules about future interests or covenants running with the land or the law of trespass. This kind of property law encompasses the whole of our legal system, from family law, to tax law, to employment and labor law, to bankruptcy law, securities law, antitrust law, consumer protection law, corporate law, tax law, healthcare law, and inheritance law. We made those laws, and they have collectively made it impossible for people to acquire the property they need to live comfortably. We have tossed people

[34] *See* MEHRSA BARADARAN, THE QUIET COUP: NEOLIBERALISM AND THE LOOTING OF AMERICA (2024) (on the ways law shapes markets and allocates property).

into a deep pit. We made people responsible for earning a living and *then we made it impossible for them to do so.*

We could deal with the problem of affordability by redistribution through taxing the wealthy to provide resources to the needy. That could involve changes in the law of inheritance, gifts, taxation, and welfare programs that subsidize the costs of housing, food, medical care, and childcare. But what we really need is law reform to enable *pre-distribution*.[35] We need laws that enable people to earn their fair share of the resources they help in producing. We need to treat people with honor; they are human beings, not inputs or costs. In our current political culture, redistribution is seen as a handout to the undeserving. That is why we need to alter the rules of *distribution* to make *redistribution* unnecessary. That may involve changes in minimum wage laws, childcare laws, elder law, labor laws, consumer protection laws, antitrust laws, employment laws, real covenants law, zoning laws, housing codes, family law, disability law.

We need also to finally listen to the feminists who have told us for almost two centuries that work in the home taking care of children, the elderly, or family members with disabilities is work, and the fact that it is not remunerated is a policy choice rather than a law of nature. The fact that schoolteachers need to take a second job to get by or that they have to use their own money to pay for school supplies for children is a policy choice enacted in law, not a reflection of the social or economic value of teachers.

In addition, we need legal changes to prevent the super wealthy from buying up all the things that other people need and charging so much for them that people find themselves living on the edge—living in fear. What we need is law reform. It should be a task of property scholars to figure out all the key changes in law that are needed to ensure that every

[35] Jacob S. Hacker, *The institutional foundations of middle-class democracy*, POL'Y NETWORK 33, 35 (2011),https://assets.websitefiles.com/64a8727f61fabfaa63b7b770/64aab85cf813ccbee57ce07f_hacker_pn.pdf

person earns their fair share of property. People are in difficulty, not because they are lazy, but because we have not made it possible for them to acquire the resources they need.

The rule of law presumes that we have fair rules for social life – *rules that we can follow*. If the rules allocate property to the favored few and deny it to the many, we do not have a democratic property system, but a quasi-feudal one. It is quasi-feudal since it subjects some people to the arbitrary power of others. It is quasi-feudal because it grants property to the few while denying it to many.

The rule of law in a free and democratic society that treats each person with equal concern and respect is a system that makes it *realistically possible* for every person *to acquire the resources they need to live* a comfortable and joyful life. If the law does not do this — if it denies people a fair opportunity to attain what they need, then it is not consistent with rule of law principles. Rules must be ones we can follow. If we follow the rules and still cannot make it, then the problem is not with us, but with the rules themselves. They are what needs to change. People need ladders, but that's not the only thing they need. They need legal rules that will *stop them from falling into deep pits*. They need *fences that keep them on solid ground.*

A passage in the Talmud says that the average person believes that "what is mine is mine and what is yours is yours."[36] But then the Talmud goes on to say something startling. "Some say [such people] are like the people of Sodom."[37] How could respect for property rights be the mark of a people so irredeemable that God saw fit to destroy them? After all, the Ten Commandments includes an injunction to honor the property of others.

After the Flood, God promised never to destroy the world again. And God set out a rainbow as a mark of that promise. Instead of death,

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[36] RABBI RAMI M. SHAPIRO: WISDOM OF THE JEWISH SAGES: A MODERN READING OF *PIRKEI AVOT* V:13, at 110 (1993).
[37] *Id.*

God would give human beings a chance at life — a chance to do good instead of evil. But when God destroyed everyone in two cities for their wickedness, the early rabbis were confused. Why did God not give the people of Sodom a chance to reform? What happened to the promise of the rainbow?

To understand the destruction of Sodom and Gomorrah, the rabbis needed to know what the people did that was so incredibly evil. They found their answer in the book of *Y'khezkel* (Ezekiel). The cities were destroyed because they did not understand the property rights of the poor. Ezekiel explains that Sodom was rich but cruel. He tells us: "[Sodom] had plenty of bread and untroubled tranquility; yet she did not hold the hand of the poor and the needy."[38] According to Jewish tradition, charity was against the law in Sodom. In one story, the people of Sodom saw a young woman giving food to a starving neighbor. This was forbidden in Sodom, and they reacted by burning her alive.[39] What is mine is mine and what is yours is yours.

Jewish law requires us to leave the edges of our fields to the widow, the orphan, the stranger, and the poor. Part of our wealth is owned by those who have no other means to live with dignity. It is their property. They own it. It belongs to them. The rabbis tell us that the people of Sodom only pretended to comply with the obligation to ensure that everyone had enough to survive. The people of Sodom gave coins to the poor, but they wrote their names on those coins. When the coins were offered to the store owners for bread, the shopkeepers would see the names and refuse to accept the marked money. The poor had money but no one would take it. They would die in the streets, with money in their hands. And then the residents would come to take their money back.[40] What's mine is mine and what's yours is yours.

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[38] Ezekiel 16:49.
[39] MIDRASH RABAH, Genesis I, Vayera 49:6, at 424-25.
[40] TALMUD, Sanhedrin 109a.

We are acting like the people of Sodom. We exhort people to get jobs and take care of their families. We *seem* to pay them wages. But *their money is no good.* They offer it to get housing, childcare, healthcare, food, but it is not enough; it is not good enough, and we turn them away. Our legal system has not made it possible for people to take care of their families. They cannot afford to live comfortably because we have prevented them from doing so. We need to stop gaslighting people by making them think it is their fault that they cannot afford to put food on the table or get a doctor. It is not their fault. Nor is it the fault of immigrants, especially when the only ones of us that are not immigrants are people who lived here before the Europeans came and people who were forced to come here from Africa. Whose fault is all this? It is the fault of the law. And who makes the law? We do. We do it through the representatives we elect, the judges we choose, the rules that we enact.

Professor Robert Hargrove Montgomery taught economics at the University of Texas from 1922 until 1963.[41] He was a liberal Democrat who served in the Franklin Delano Roosevelt administration. Because he was an outspoken proponent of government regulation of business, he was accused of teaching communism, and was condemned in the 1940s by conservatives in the Texas legislature and the University Board of Regents. In 1948, he was haled before the legislature to defend himself. The legislative committee asked him if he belonged to any radical organizations. He answered "that he belonged to the two most radical organizations in existence, 'the Methodist Church and the Democratic Party.'"[42] And when they asked him if he believed in private property, he said, "I do, sir, and I believe in it so strongly that I want everyone in Texas to have some."[43]

That is one of the core issues of our time. What if it's our fault that people cannot afford to live comfortably? What if it is the fault of the laws

[41] https://www.tshaonline.org/handbook/entries/montgomery-robert-hargrove.
[42] *Id.*
[43] JOHN KENNETH GALBRAITH, THE ANATOMY OF POWER 87 n.3 (1983).

we have made?[44] What if we have voted for politicians who adopt laws that funnel wealth and property away from the many and toward the few? The Talmud tells us that some people think that what's mine is mine and *what's yours is also mine*. Those people, the Talmud says, are *rasha* – evil. What if our laws work this way? What if they ensure that what's mine is mine and what's yours is also mine?

I am nearing retirement, and if I could give the next generation a charge, it would be this: People do not have enough to live on, and that is the fault of property law. Other people have more property than anyone should have in a free and democratic society that treats every person with equal concern and respect.[45] They have too much power and too much control of property. Yet the distribution of resources would be different *if property law were different.* We need to figure out how property law needs to change to solve this problem.[46]

You need to figure this out. We need property to live, so how must property law change to ensure that everyone can have some? What laws must be in place, so we are not scared all the time? What laws do we need so we can feed our families and find a place to live? *How can we fill the deep pits?* And if we can't fill them all, then what fences do we need to build so people can stay on solid ground? And how on earth do we get the people walking by to realize that they are holding our ladder? That they are trying to sell us our own ladder?

We face what looks like an affordability crisis, but it really is a *property law crisis.* Property law is the problem, but property law is also

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[44] *See* Christopher Serkin & Ganesh Sitaraman, *Post-Neoliberal Housing Policy,* — U. PA. L. REV. — (forthcoming, 2026), available at SSRN: https://ssrn.com/abstract=5227899 (detailing the multiple problems of the housing market and the various policy and legal changed needed to fix the lack of affordable housing).

[45] *See* Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States,* 38 POL. & SOC'Y 152 (2010) (on the recent concentration of wealth in the United States).

[46] *See* RAY D. MADOFF, THE SECOND ESTATE: HOW THE TAX CODE MADE AN AMERICAN ARISTOCRACY (2025) (on how the tax code promoted concentration of wealth and how it would need to be to changed to restore fair opportunity to acquire property).

the solution—at least it can be, if we put our minds to it. That brings me back to the rule of law.

Many years ago, I saw a chamber music performance of a piece composed by Andrew Imbrie. He wrote it to work through his grief at the death of his son. Five musicians came on stage. They were a wind quintet with flute, oboe, clarinet, French horn, and bassoon. But there was a string quartet off stage. The players out in the hall never came on stage, not even to take a bow. We never saw them.

The piece began with joyful music on stage and a steady beautiful hymn off stage. Life was good. It had complications, but there was also joy. But then the son dies and the second movement is one of disorder and dissonance and chaos. But the music off stage never changed. The string quartet played the same music, steadily. It was hauntingly beautiful but seemingly indifferent to the chaos happening in the world onstage. And then the third movement began and the music onstage recapitulated the themes from the first movement. Those themes were recognizable but distorted. It was the same music as in the beginning—but not the same. Every beautiful melody had a note that was wrong. Every chord had a dissonant note. Joy was tempered with sorrow. The music was not the same. Nothing could ever be the same. And the music offstage by the unseen string players continued, beautiful and constant.

The composer told us that the first movement represented daily life while his son was in the world while the second movement depicted his grief at the loss of his son. The third movement represented life returning to "normal," but of course, nothing would ever be normal again. And what about the music offstage?

At first, the composer wanted the music offstage to represent a God who was indifferent to the suffering onstage. Things were going wrong—very wrong—on stage, and God did not seem to notice, did not intervene, did not help. Over time, however, as he worked through his grief, Imbrie's perspective changed. He had thought that God was indifferent, but now he realized that the music off-stage had never stopped, not for a second.

It was there. It was always there. *It's still there.* He just could not hear it. He could not focus on it because he was so distraught. But after a time, he began to listen to what was there all along. He could hear it again. The offstage music was there all along. All he had to do was to listen.

We are in a situation like that. The rule of law is like the music offstage. It is not strong enough to drown out the chaos we are living through. Sometimes it seems impotent, naïve. But it is present. It is still there. It is here. We are the players who must keep it going. We are the ones who can model what law should be. We scholars, we teachers, we lawyers, we philosophers, we citizens. Presidents and politicians may ignore the music offstage. They may not hear it. They may delight in ignoring it. But that does not mean we can stop playing.

We can model what the rule of law is and should be. We can teach it to our students. We can write words that can never be erased. The rule of law, like property, is what gives us solid ground. We can nurture it. Our work is not meaningless. Our work is necessary. We may not be onstage. We may never take a bow. But we can provide an alternative to the chaos happening onstage. We can seek solutions not slogans. The deep pits are all around us. But holes can be filled and fences can be built. And if we don't do it, who will?