



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

12-2022

Essential Property

Timothy M. Mulvaney

Joseph William Singer

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Law and Economics Commons](#), and the [Property Law and Real Estate Commons](#)

Article

Essential Property

Timothy M. Mulvaney[†] and Joseph William Singer^{††}

“She’s short \$567 [a month], what would you suggest she do?”¹

-Rep. Katie Porter

INTRODUCTION

In addition to generating new challenges that were appropriately understood as extraordinary, the coronavirus pandemic exposed a preexisting condition that a majority of the nation’s population shares in even the most ordinary of times: many Americans simply do not have enough property to sustain themselves. Representative Katie Porter’s questioning of Jamie Dimon, the CEO of JPMorgan Chase, at a recent congressional hearing depicted this mismatch in the most basic of terms.² Por-

[†] Professor of Law, Texas A&M University School of Law. Thanks to Ashley Hedrick and Finnegan, Jack, and Elliott Mulvaney for their love and support.

^{††} Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow and Mira Singer. The authors collectively thank Vanessa Casado Pérez, Nestor Davidson, Rashmi Dyal-Chand, Nomi Stolzenberg, and Laura Underkuffler, as well as participants in the 2021 Progressive Property and Association for Law, Property, & Society conferences, for their feedback on this project. Thanks, too, to Grace Bennet, Liz Butterworth, Alyssa Mierzejewski, and Jeel Oza for valuable research assistance. The authors are grateful to Texas A&M University School of Law and Harvard Law School for their research support. Copyright © 2022 by Timothy M. Mulvaney and Joseph William Singer.

1. Caroline Kelly, *Freshman Democrat Presses JPMorgan CEO Jamie Dimon over Pay Disparity*, CNN POL. (Apr. 11, 2019), <https://www.cnn.com/2019/04/10/politics/katie-porter-jamie-dimon-bank-employees/index.html> [<https://perma.cc/CN9X-GZEJ>].

2. John Baer, Opinion, *A Rare Example of How Congress Could (and Should) Work*, PHILA. INQUIRER, (Apr. 16, 2019), <https://www.inquirer.com/opinion/john-baer-katie-porter-jamie-dimon-finances-banks-20190416.html> [<https://perma.cc/U79D-XWBJ>].

ter calculated the amount of money that it would take for a person in her congressional district to pay for several of a dignified life's principal necessities: housing, transportation, food, health insurance, and childcare.³ She then compared those costs to the wages earned by an entry-level teller at one of Dimon's banks.⁴ Porter said to Dimon: "She's short \$567 [a month], what would you suggest she do?"⁵

Porter's question prompts reflection on the pathway that led to the current state of affairs in which such a stark mismatch between resources and expenses exists for so many. One prominent contemporary view sees a mismatch of this nature as the result of personal choices and responsibilities.⁶ From this perspective, individuals generally are at fault if they find themselves in dire economic straits.⁷ In contrast, this Article contends that the current mismatch between resources and expenses rests, not exclusively or even predominantly on the shoulders of individual choices, but instead is, in meaningful part, a product of our property laws.

That a social institution like property generated this mismatch is, in one sense, deeply unnerving. Yet its social generation also presents an opportunity to unravel and repair that which has gone astray. In this light, the Article goes on to chart a justice-inspired course for alterations to our background rules of property. This course is centered on a series of norms appropriate for property governance in a free and democratic society,

3. *Id.*

4. *Id.*

5. Kelly, *supra* note 1.

6. See Jennifer Nedelsky, *A Relational Approach to Property*, in THE ROUTLEDGE HANDBOOK OF PROPERTY, LAW AND SOCIETY 325, 329 (Nicole Graham, Margaret Davies & Lee Godden eds., 2022), <https://doi.org/10.4324/9781003139614> ("[M]ost people tacitly assume that property inevitably creates human relations of inequality."); Samantha Mendoza, *GOP Politicians Have Said Some Shocking Things About Poverty*, BUSTLE (May 25, 2017), <https://www.bustle.com/p/7-outrageous-things-politicians-have-actually-said-about-poverty-60344> [<https://perma.cc/56FK-84BA>] (quoting former Presidential candidate Ben Carson as declaring that: "You take somebody that has the right mindset, you can take everything from them and put them on the street, and I guarantee in a little while they'll be right back up there. And you take somebody with the wrong mindset, you could give them everything in the world, they'll work their way right back down to the bottom").

7. See, e.g., Eli Wald, *Success, Merit, and Capital in America*, 101 MARQ. L. REV. 1, 2-4 (2017) (contending that hard work, individual effort, merit, and using different forms of capital are what make people successful in America).

including circumstance sensitivity, antidiscrimination, realistic opportunity, and legal interdependence.

The Article proceeds as follows: Part I makes plain the mismatch between property resources—which consist of both incomes and wealth-creating opportunities—and the expense of securing what is essential to living a dignified and comfortable life. Part II first explains the conventional view that the under-resourced generally are to blame for their plight, before advancing the counterview that the lack of essential property did not arise naturally via individuals' life choices but instead was created and perpetuated by state decision-making within our system of property law. From this alternative perspective, while individual choices are not irrelevant to extant resource allocations, changing our property laws would meaningfully alter those allocations moving forward. Part III then sets out norms that should guide these property law reforms. The Article concludes by explaining why we should change property law to create minimum standards consistent with these norms to ensure that all people have the property resources they need to live with dignity.

I. A MISMATCH BETWEEN RESOURCES AND EXPENSES

In response to Representative Porter's question as to what a full-time teller at Chase Bank should do when she spends only on absolute necessities yet remains \$567 short each month, Jamie Dimon paused before meekly answering, "I don't know, I'd have to think about it."⁸ A teller in that position would join the sizable percentage of the population that says they would have trouble paying an unexpected \$400 bill.⁹ This is in part due to a lack of wealth—many people do not own their homes,¹⁰ have

8. Baer, *supra* note 2.

9. *Report on the Economic Well-Being of U.S. Households in 2018*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (May 2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf> [<https://perma.cc/LQF3-6BR8>]. Forty-one percent of households do not have \$2,000 in liquid savings to cover unexpected necessary expenses. Jonathan Mor Duch & Rachel Schneider, *Mismatch: How Income and Expense Volatility Are Undermining Households*, STAN. SOC. INNOVATION REV. (Jan. 12, 2016), <https://doi.org/10.48558/KA8P-CQ44>.

10. Richard Fry & Anna Brown, *In a Recovering Market, Homeownership Rates Are Down Sharply for Blacks, Young Adults*, PEW RSCH. CTR. (Dec. 15, 2016), <https://www.pewresearch.org/social-trends/2016/12/15/in-a-recovering-market-homeownership-rates-are-down-sharply-for-blacks-young-adults/#most-renters-would-like-to-buy-a-home-in-the-future-but-many-cite-finances-among-major-reasons-for-currently-renting> [<https://perma.cc/P7DK-N3KK>].

little or nothing in the bank,¹¹ and own no stocks or bonds¹²—but is also a product of the fact that their wages are insufficient relative to the cost of living in the places where they work.¹³

A more sizable share of working-age people—those between the ages of eighteen and sixty-five—live in poverty in the United States than in any other country that is part of the Organization for Economic Cooperation and Development. Matthew Desmond, *Capitalism*, in *THE 1619 PROJECT: A NEW ORIGIN STORY* 166–67 (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021).

11. *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. 16 (2020), <https://www.federalreserve.gov/publications/files/scf20.pdf> [<https://perma.cc/D9UW-VEF5>] (“Transaction accounts—which include checking, savings, money market, call accounts, and prepaid debit cards—remained the most commonly held type of financial asset in 2019, with an ownership rate of more than 98 percent. The conditional median value of transaction accounts rose 11 percent between 2016 and 2019, to \$5,300.”).

12. *Id.* (“In 2019, about 53 percent of families owned stocks, compared with nearly 52 percent in 2016. . . . In 2019, about 31 percent of families in the bottom half of the income distribution held stocks, whereas about 70 percent of families in the upper-middle-income group held stock, and more than 90 percent of families in the top decile held stock.”).

13. Ryan Bhandari & David Brown, *The Opportunity Index: Ranking Opportunity in Metropolitan America*, THIRD WAY 1–2 (Oct. 30, 2018), <https://www.thirdway.org/report/the-opportunity-index-ranking-opportunity-in-metropolitan-america> [<https://perma.cc/UA3A-QZYJ>] (“Nationwide, just 38% of jobs pay enough to afford a middle or upper class life for a dual income-earning family with children; 32% of jobs pay a living-wage; and 30% pay what we call a ‘hardship’ wage, which is less than what a single adult living on his or her own needs for basic necessities.”); Heather Boushey, Chauna Brocht, Bethany Gunderson & Jared Bernstein, *Hardships in America: The Real Story of Working Families*, ECON. POL’Y INST. (2001), https://www.epi.org/publication/books_hardships [<https://perma.cc/6QC3-KT2F>] (“The findings in this report confirm what other researchers have found: many families do not meet their basic family budget.”); Stephanie Luce, *Living Wages: A US Perspective*, 39 EMP. RELS. 863, 864 (Oct. 2, 2017) (“For example, when Boston enacted its living wage in 1999, the minimum wage was \$5.25 per hour and the new living wage started at \$8.23 per hour. By 2001, the state had raised its minimum wage to \$6.75 and the city living wage had increased to \$9.11. But according to the Economic Policy Institute Basic Family Budget, a worker in a household with two adults and two children would need to earn \$13.03 per hour just to cover basic needs. A single adult with two children would need to earn \$23.24 per hour.”); Robert Pollin, *Evaluating Living Wage Laws in the United States: Good Intentions and Economic Reality in Conflict?*, at 9 (Pol. Econ. Rsch. Inst., Working Paper No. 61, 2003), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1049&context=peri_workingpapers [<https://perma.cc/KDW6-QPGG>] (“This still leaves [hourly] wage rates between \$10.98 and \$20.60 as the range of values associated with different living wage standards for a three-person family with one working adult. For a four-person family, the corresponding wage rate would be between

Dimon's response to the widespread criticism he received following his testimony is illustrative.

Dimon defended his bank's minimum wage of \$16.50; it sounded pretty good to him.¹⁴ This wage may well seem adequate from the outside; indeed, the current popular political movement is to raise the federal minimum wage to \$15 per hour.¹⁵ But is that outside perspective the best standpoint from which to evaluate a living wage?¹⁶ If Dimon were earning less than what he needed to live on, would he think life was good? Everything, it turns out, looks different from the inside. From the inside, the issue is not how high mean or minimum wages are, or even how high we think in the abstract that they should be. The issue is whether those wages are sufficient to make it realistically possible to pay for the necessities of life—let alone the luxuries that bring life joy—with the money one earns or has on hand. We cannot figure that out by picking a number out of the air, by intuition, or by reference to what we think is a “typical” worker in a “typical” situation, for people do not experience the economy in the aggregate. We figure it out, as Porter did, by doing the math—by comparing income to expenses—and not by using generalized national statistics, but by looking at the cost of living *in the places where working people actually need to live to perform the work they do*.

\$13.82 and \$16.93 with one wage earner in the family. If both adults in a four-person family were working, the average wage for both would need to be \$12.37 for the family to reach the basic needs threshold.”); *On Uneven Ground: ALICE and Financial Hardship in the U.S.*, UNITED FOR ALICE 1–3 (Dec. 2020), https://www.unitedforalice.org/Attachments/AllReports/2020AliceReport_National_Final.pdf [<https://perma.cc/9JUQ-LY4P>] (reporting that in 2018, of the 121 million households in the United States, 42%, or 51 million households, could not afford the basic necessities of housing, childcare, food, transportation, health care, a smartphone plan, and taxes).

14. See Kelly, *supra* note 1 (detailing Dimon's solicited, uninspired offer to “be helpful” to an employee earning the \$16.50 minimum wage and running a personal budget deficit).

15. Gillian Friedman, *Once a Fringe Idea, the \$15 Minimum Wage Is Making Big Gains*, N.Y. TIMES (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/business/economy/minimum-wage-15-dollar-hour.html> [<https://perma.cc/3E5J-W5BX>].

16. Nick Romeo, Opinion, *The M.I.T. Professor Defining What It Means to Live*, N.Y. TIMES (Dec. 28, 2021), <https://www.nytimes.com/2021/12/28/opinion/living-wage-calculator.html?referringSource=articleShare> [<https://perma.cc/2USC-5MMD>] (highlighting the moral and situational elements inherent in determining a “meaningful living wage”).

When we do that, we can see that, for far too many Americans, the costs of housing, food, medical care, transportation, and childcare are often too high to make ends meet.¹⁷ For housing alone, 16.3 million Americans spend thirty percent or more of their income solely on rent.¹⁸ Monetary issues are exacerbated as a majority of families living below the poverty line live in areas where public transportation is underfunded and unreliable, making it difficult to secure employment or obtain medical care.¹⁹

As Porter's approach teaches, a concentration on the cost/supply of necessities—such as, in the housing context, an emphasis on upzoning to enable the construction of affordable

17. Boushey et al., *supra* note 13, at 2 (arguing that “families with income above the poverty line but below basic family budget levels experience as many hardships as poor families” and are unable to meet their basic family budgets, and that we should focus on basic family budgets rather than other measures to determine whether families are poor and in need of supplementary income); Amy K. Glasmeier, *Living Wage Calculator*, MASS. INST. TECH. (2022), <https://livingwage.mit.edu/metros/14460> [<https://perma.cc/CVG2-82VG>] (calculating that the “living wage” for a family of 4 with 2 adults working full-time in Boston is \$32.11 per hour); Luce, *supra* note 13, at 864 (“Most experts agree that the poverty threshold is outdated and inadequate for measuring the true cost of living, particularly because the formula does not vary by geography, but also for other technical problems. Instead, researchers have developed various formulae to measure the true wage needed to cover basic costs. . . . For much of the 1990s and 2000s, there was a great gap between the minimum wage, poverty threshold, and what the methodologies defined as a wage needed to cover basic needs.”); *Out of Reach: The High Cost of Housing*, NAT'L LOW INCOME HOUS. COAL. (2022), <https://reports.nlihc.org/oor> [<https://perma.cc/C4YF-G29L>] (indicating that the hourly wage needed to afford housing is much higher than the minimum wage); JENNY SCHUETZ, FIXER-UPPER: HOW TO REPAIR AMERICA'S BROKEN HOUSING SYSTEMS 61–80 (2022) (suggesting that even if more housing were built, it would still be unaffordable for poor families because their incomes and resources are too low); Whitney Airgood-Obrycki, *Millions of Renters Fall Short of a Comfortable Standard of Living*, HOUS. PERSPS. (Mar. 22, 2022), <https://www.jchs.harvard.edu/blog/millions-renters-fall-short-comfortable-standard-living> [<https://perma.cc/S4F9-V39S>] (“[M]ore than 19 million working-age renter households struggled to meet their basic expenses.”).

18. Katherine Schaeffer, *Key Facts About Housing Affordability in the U.S.*, PEW RSCH. CTR. (Mar. 23, 2022), <https://www.pewresearch.org/fact-tank/2022/03/23/key-facts-about-housing-affordability-in-the-u-s> [<https://perma.cc/3CTN-V7ZP>].

19. Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2139–41 (2021); David A. Super, *Acute Poverty: The Fatal Flaw in U.S. Anti-Poverty Law*, 10 U.C. IRVINE L. REV. 1273, 1292 (2020); Samina T. Syed, Ben S. Gerber & Lisa K. Sharp, *Traveling Towards Disease: Transportation Barriers to Health Care Access*, 38 J. CMTY. HEALTH 976, 977 (2013).

units—must be accompanied by an equivalent concentration on the income/demand side of the ledger.²⁰ The question is not just how much housing can be lawfully built, but whether people can afford that housing with their current wages. A recent study revealed that minimum wage employees working full-time cannot afford to pay rent in even a single U.S. state.²¹ It is not a foregone conclusion that building more housing will reduce its costs so much that it will be affordable to people at the lower end of the wage scale. We must pay as much attention to demand—to income—as we do to the supply of housing.

The coronavirus pandemic puts all of this into starker view. To prevent the spread of COVID-19, many businesses were shut

20. See Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability*, N.Y.U. FURMAN CTR. 3 (Aug. 20, 2018), https://furmancenter.org/files/Supply_Skepticism_-_Final.pdf [<https://perma.cc/M72A-3994>] (“[M]ore new housing will not fully address affordability challenges; efforts to increase supply must be paired with subsidies and other tools to ensure that communities remain (or become) economically diverse as they grow.”).

21. *New Report from National Low Income Housing Coalition: “Out of Reach” Rents in Context of COVID-19*, NAT’L LOW INCOME HOUS. COAL. (July 14, 2020), <https://nlihc.org/news/new-report-national-low-income-housing-coalition-out-reach-rents-context-covid-19> [<https://perma.cc/Y2SK-P8HH>] (explaining that housing is presumed affordable if one spends no more than thirty percent of their income on housing; on that basis, “in no state, metropolitan area, or county can a full-time minimum-wage worker afford a modest two-bedroom rental home, and full-time minimum wage workers cannot afford modest one-bedroom apartments in 95% of U.S. counties”); Suzy Strutner & Casey Bond, *The Hourly Income You Need to Afford Rent Around the U.S.*, HUFFPOST (Aug. 25, 2022), https://www.huffpost.com/entry/how-much-you-need-for-rent_n_5942cc92e4b0f15cd5b9e2ee [<https://perma.cc/Q65Z-8N7A>]; see also Jamelle Bouie, Opinion, *Where Are the Least Fortunate Americans Supposed to Live?*, N.Y. TIMES, (Apr. 2, 2021), <https://www.nytimes.com/2021/04/02/opinion/biden-jobs-plan-housing.html> [<https://perma.cc/9ZCG-5ENA>] (noting that 30% of all American households spend half or more of their income on housing, and that their hardships are partly caused by low incomes and stagnant wages and partly by the increasing cost of building homes); Sarah Ruiz-Grossman, *People Working a Minimum Wage Job Can’t Afford Rent Anywhere in the U.S.*, HUFFPOST (July 15, 2021), https://www.huffpost.com/entry/minimum-wage-workers-cant-afford-rent_n_60ef49bce4b022142cf48c1b [<https://perma.cc/SL5K-5BAX>] (highlighting the racial disparities in the affordable housing crisis); Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 829 (2021) (“Even taking account [sic] state and municipal mandates that raise the minimum wage above the federal floor [of \$7.25], ‘the average minimum wage worker must work nearly 97 hours per week (more than two full-time jobs) to afford a two-bedroom rental home.’”) (citation omitted).

down by government order in 2020.²² Others continued operating because their services were considered critical to human survival.²³ At grave risk to their own safety,²⁴ the “essential workers” on the frontlines of the businesses that remained open continued to perform a range of life-sustaining jobs. They kept communities, from big cities to small towns, moving. They went out of their homes—at great risk to themselves—so others could safely stay in. They were the economic and social glue that kept us connected. They saved our lives.

Some of these workers, like doctors and pharmacists, have always been recognized as essential and handsomely compensated for their work. However, many more of them—including the tellers at Dimon’s banks—continued to subsist on meager wages throughout the pandemic while performing their vital but often low-status jobs.²⁵ In addition to Dimon’s tellers, this group

22. *COVID-19 Resources for State Leaders*, THE COUNCIL OF STATE GOV’TS, <https://web.csg.org/covid19/executive-orders> [<https://perma.cc/TR93-KGJM>].

23. *COVID-19: Essential Workers in the States*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 11, 2021), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx#:~:text=Workers%20in%20the%20following%20settings,supply%20stores%20and%20liquor%20stores> [<https://perma.cc/S3YY-6KMR>].

24. Justin George, *For Many ‘Essential Workers,’ Public Transit Is a Fearful Ride They Must Take*, WASH. POST (Apr. 11, 2020), https://www.washingtonpost.com/local/trafficandcommuting/for-many-essential-workers-public-transit-is-a-fearful-ride-they-must-take/2020/04/11/8dec874a-79ad-11ea-a130-df573469f094_story.html [<https://perma.cc/SDA8-XG53>] (explaining that “essential workers” who had to use public transit to get to work did not have the luxury of social distancing); Sujatha Gidla, Opinion, *‘We Are Not Essential. We Are Sacrificial.’*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/opinion/coronavirus-nyc-subway.html> [<https://perma.cc/8Y32-NBEX>] (explaining how subway conductors lacked access to masks, soap, or clean restrooms); Clare Hammonds, Jasmine Kerrissey & Donald Tomaskovic-Devey, *Stressed, Unsafe, and Insecure: Essential Workers Need a New, New Deal*, CTR. FOR EMP. EQUITY (June 5, 2020), <https://www.umass.edu/employmentequity/stressed-unsafe-and-insecure-essential-workers-need-new-new-deal> [<https://perma.cc/5DAW-PPZX>] (detailing lack of adequate personal protective equipment for employees); Daniel Schneider & Kristen Harknett, *Essential and Unprotected: COVID-19 Related Health and Safety Procedures for Service-Sector Workers*, SHIFT PROJECT (May 2020), <https://shift.hks.harvard.edu/essential-and-unprotected-covid-19-related-health-and-safety-procedures-for-service-sector-workers> [<https://perma.cc/2AXX-9RYL>] (detailing shortages in personal protective equipment for workers).

25. Taylor Mooney, *Essential Workers Provide a Lifeline in the Coronavirus Lockdown. Will America Reward Their Sacrifice?*, CBS NEWS (Apr. 10, 2020), <https://www.cbsnews.com/news/coronavirus-essential-workers-covid-19-pandemic-lifelines-lockdown-cbsn-originals-documentary> [<https://perma.cc/>

of low-wage essential workers—who often have been pejoratively referred to as “unskilled”—included grocery store cashiers, shelf stockers, food deliverers, nursing home staff, home caregivers, homeless shelter providers, truckers, agricultural workers, warehouse workers, sanitation workers, postal workers, electric and water utility workers, and the like.²⁶

In the recent decades leading up to the pandemic, the incomes of those working in many of these fields failed to increase adequately as the costs of housing, childcare, medical care, and education skyrocketed.²⁷ Corporate employers, facing pressures to maximize profits, continued to pay low wages.²⁸ Moreover, in a sizable number of cases, they converted employees into independent contractors to avoid paying for health and pension benefits and to evade minimum wage laws.²⁹ Over this period, wages

4QHV-H7Q6] (“Often unnoticed and undervalued by society, [essential workers] now put themselves at risk so that daily life can continue to function.”).

26. In reality, performing such work well requires extensive experience and training. Barbara Ehrenreich wrote movingly about her inability to do hotel housekeeping work anywhere near as competently as the regular employees. BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* 193 (2001).

27. Annie Lowrey, *The Great Affordability Crisis Breaking America*, ATLANTIC (Feb. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/great-affordability-crisis-breaking-america/606046> [<https://perma.cc/F7BY-XJEG>] (“Along with the rise of inequality, the slowdown in productivity growth, and the shrinking of the middle class, the spiraling cost of living has become a central facet of American economic life.”).

28. Christopher Ingraham, *The Race for Shareholder Profits Has Left Workers in the Dust, According to New Research*, WASH. POST (Feb. 25, 2019), <https://www.washingtonpost.com/us-policy/2019/02/25/race-shareholder-profits-has-left-workers-dust-according-new-research> [<https://perma.cc/Z9MV-WGW8>].

29. Corey Husak, *How U.S. Companies Harm Workers by Making Them Independent Contractors*, WASH. CTR. FOR EQUITABLE GROWTH (July 31, 2019), <https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors> [<https://perma.cc/6FJL-HU96>]. Today’s so-called “gig economy” reflects as much—those who drive for passenger and food delivery apps in New York City, while recently bearing an outsized risk of contracting COVID-19, make on average less than half of the city’s minimum wage and often are shorted on the tips that, according to the app companies, are supposed to make up the difference. Patrick McGeehan, *They Risked Their Lives During COVID. They Still Don’t Earn Minimum Wage.*, N.Y. TIMES (July 15, 2021), <https://www.nytimes.com/2021/07/15/nyregion/nyc-gig-workers-pay.html> [<https://perma.cc/L96M-CXEA>]. According to James Parrot, an economist at the New School’s Center for New York City Affairs: “There is such an infatuation with technology as new and somehow making possible great conveniences. These are companies people have idolized. But fundamentally it’s a business

stayed low while the cost of living rose.³⁰ As this happened, the mismatch between what these workers earned and what they needed to live comfortably widened and widened, until the difference became a chasm.³¹ For example, in 2009, when the federal minimum wage was raised to its current value of \$7.25 per hour, the average rent was approximately \$1,132.³² In the intervening years, the average rent has increased to almost \$1,470 and the cost of living has risen by 20%, resulting in a decrease in the purchasing power and real value of the federal minimum wage.³³ Additionally, rising costs of expenses such as prescript-

model that only works because it's based on exploitation." Todd Heisler & David Gonzalez, *These 115 Workers Helped Keep New York Alive in Its Darkest Months*, N.Y. TIMES (July 20, 2021), <https://www.nytimes.com/interactive/2021/07/20/nyregion/ny-service-workers-covid.html> [<https://perma.cc/23EX-9EQ8>].

30. David Cooper, Elise Gould & Ben Zipperer, *Low-Wage Workers Are Suffering from a Decline in the Real Value of the Federal Minimum Wage*, ECON. POLY INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-minimum-wage> [<https://perma.cc/CY8R-P8AJ>] ("The real value of the federal minimum wage has dropped 17% since 2009 and 31% since 1968. Workers earning the federal minimum wage today have \$6,800 less per year to spend on food, rent, and other essentials than did their counterparts 50 years ago."); Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RSCH. CTR. (Aug. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades> [<https://perma.cc/Z6XQ-X556>] ("In fact, despite some ups and downs over the past several decades, today's real average wage (that is, the wage after accounting for inflation) has about the same purchasing power it did 40 years ago. And what wage gains there have been have mostly flowed to the highest-paid tier of workers."); SARAH A. DONOVAN & DAVID H. BRADLEY, CONG. RSCH. SERV., R45090, REAL WAGE TRENDS, 1979 TO 2019, at 9 (2020) (asserting that real wages either rose at lower rates or fell in the middle and bottom of the wage range).

31. UNITED FOR ALICE, *supra* note 13 ("The core of the problem is a simple fact: The cost of household basics is higher than the wages of many of the most common occupations."); Bhandari & Brown, *supra* note 13 ("Based on our model, only 38% of the jobs in the 204 most populous metro areas examined can be considered middle class or professional jobs. Within that share, 23% are middle class jobs and 15% are professional jobs. A stunningly high 30% of jobs in America's metros are hardship jobs, failing to provide a decent standard of living for a single adult living on their own. Another 32%, the largest share, are living-wage jobs, enough for a worker to get by but not enough to meet commonly held expectations for a middle class life.")

32. Aimee Picchi, *It's Been a Record 11 Years Since the Last Increase in the U.S. Minimum Wage*, CBS NEWS (July 24, 2020), <https://www.cbsnews.com/news/minimum-wage-no-increases-11-years> [<https://perma.cc/4M9U-K75M>].

33. *Id.*

tion drugs, childcare, and education have further strained the budgets of low-income Americans.³⁴

The pandemic compounded matters. Many high-wage and low-wage essential workers acted out of a sense of responsibility and appreciation for the humanity of others. Their efforts were heroic.³⁵ However, the high-wage and low-wage camps were not equally situated. Many in the high-wage camp faced a choice between: (1) staying safe at home and relying on their reserves to see the pandemic through; or, instead, (2) continuing to work for others despite the dangers of contracting and spreading a deadly and frightening illness. To the contrary, many workers in the low-wage camp had no real choice. They could not stay home because they had no savings to tide them over.

Further exacerbating things, the loss of access to schools and childcare services turned every parent of a young child in America into a teacher, a childcare provider, or a therapist; likewise, family members, friends, and religious congregants took over care of the elderly when personal care providers were told to stay home.³⁶ None of this work could be put on hold. It had to be done—it was essential to human life—and that meant someone had to do it. So, in these circumstances, many an essential worker simultaneously doubled as an essential volunteer.³⁷

34. *The Cost of Living in America: Helping Families Move Ahead*, WHITE HOUSE (2021), <https://www.whitehouse.gov/cea/written-materials/2021/08/11/the-cost-of-living-in-america-helping-families-move-ahead> [<https://perma.cc/3Q7N-NLHJ>].

35. For a particularly gripping illustration, staff members at a group home for those with developmental disabilities in New York City worked as many as *eight* consecutive shifts to help their anxious charges, napping if they could on the home's couches. Heisler & Gonzalez *supra* note 29.

36. Shari Cohen, *The 'Virtual Synagogue': Congregations Offer More Than Prayer and Education During COVID-19*, DETROIT JEWISH NEWS (May 13, 2020), <https://thejewishnews.com/2020/05/13/the-virtual-synagogue-congregations-offer-more-than-prayer-and-education-during-covid-19-pandemic> [<https://perma.cc/X27T-8MB2>]; Ed Stetzer, *Ways Churches Are Stepping Up During the COVID-19 Crisis*, CHRISTIANITY TODAY (Mar. 24, 2020), <https://www.christianitytoday.com/edstetzer/2020/march/lots-of-ways-churches-are-stepping-up-for-their-communities.html> [<https://perma.cc/W3QE-TNYS>].

37. And what about the things that were put on hold, such as art and religious gatherings? No theater performances, no music concerts, no production of new videos or movies. *All the Live Events, Movie Releases, and Productions Affected by the Coronavirus*, VULTURE (Jan. 24, 2021), <https://www.vulture.com/2021/01/events-cancelled-coronavirus.html> [<https://perma.cc/R76U-84HS>]; *A List of What's Been Canceled Because of the Coronavirus*, N.Y. TIMES (Mar. 9, 2020), <https://www.nytimes.com/article/cancelled-events-coronavirus.html> [<https://perma.cc/6HB2-UDGV>]. And yet how eagerly many of us consumed

As for the other low-wage workers—those whose work was not deemed “essential”—they were required to stay home temporarily without pay or, worse, laid off for good.³⁸ Only short-term extensions of unemployment benefits and moratoria on evictions and foreclosures staved off homelessness and starvation. As these interim government provisions lapsed, the mismatch between resources and expenses returned in full force for these “non-essential” workers, making eviction and nutritional deprivation very real possibilities.³⁹ Within just one month after the expiration of COVID relief benefits, food insecurity rose to nearly four in ten among those who experienced a job loss during the pandemic.⁴⁰ Similarly, the expiration of eviction moratoria placed more than 15 million Americans at risk of eviction and will likely lead to many renters becoming homeless or housing

these things. Many of us binge-watched television series or replayed comforting favorite movies or listened to our favorite bands and singers as we walked around the block at a safe distance from others. We watched Zoom performances by actors, musicians, and poets. Art, it turned out, was equally essential to our well-being, to our psychological health, to our ability to cope—and yet it was too dangerous for artists to perform or for fans to listen in person, so the income that sustained actors and musicians and museums dried up. The same was true for religious ceremonies and practices; most of us migrated to Zoom services to stay connected, to pray, to comfort each other, to mourn our dead. And yet, because many were laid off or fired, the dues necessary to sustain the religious buildings and staffs began to disappear, even though these things were, and are, to many Americans, as essential as the food we eat. Michelle Boorstein, *Church Donations Have Plunged Because of the Coronavirus. Some Churches Won't Survive.*, WASH. POST (Aug. 24, 2020), <https://www.washingtonpost.com/religion/2020/04/24/church-budgets-coronavirus-debt> [https://perma.cc/69K4-NLFV]; Michelle Conlin, *Empty Pews, Empty Collection Baskets: Coronavirus Hits U.S. Church Finances*, REUTERS (Apr. 11, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-church-finance/empty-pews-empty-collection-baskets-coronavirus-hits-u-s-church-finances-idUSKCN21T0EH> [https://perma.cc/296H-7KGU].

38. See Elise Gould & Melat Kassa, *Low-Wage, Low-Hours Workers Were Hit the Hardest in the COVID-19 Recession*, ECON. POL'Y INST. 1 (May 20, 2021), <https://files.epi.org/uploads/224913.pdf> [https://perma.cc/HT8G-QXGF] (finding that employment losses between February 2020 and February 2021 were concentrated in the low-wage and low-hour occupations).

39. Annie Gowen, *She Wanted to Stay. Her Landlord Wanted Her Out.*, WASH. POST (June 28, 2021), <https://www.washingtonpost.com/nation/interactive/2021/eviction-moratorium-lifts> [https://perma.cc/HJS3-MW9S].

40. Elaine Waxman, Poonam Gupta & Dulce Gonzalez, *Food Insecurity Edged Back up After COVID-19 Relief Expired*, URB. INST. (Oct. 27, 2020), https://www.urban.org/sites/default/files/publication/103117/food-insecurity-edged-back-up-after-covid-19-relief-expired_1.pdf [https://perma.cc/HUT5-EVLP].

insecure unless wages rise sufficiently to prevent this from happening.⁴¹ Those workers who were asked to stay home during the height of the pandemic often bore these burdens as a consequence of their serving a vital human need: they protected others from infection.

* * *

The pandemic taught us three related lessons. First, every human being is vulnerable in the sense that we have basic needs. Second, to fulfill these basic needs, we require resources ample enough to pay for goods and services necessary for human life, including housing, food, medical care, childcare, educational training, and the like. Third, these necessities are things that only other people can provide for us.⁴² Yet for many people in the United States, wealth is insufficient, and wages are inadequate—and, for certain jobs such as caregiving, *absent altogether*—to allow people to pay for and to acquire from others these necessities of life.⁴³ How can it be that such a stark mismatch between resources and expenses exists for so many?

41. Sam Gilman, Jacqueline Woo, Katherine Lucas McKay, Zach Neumann & Tim Shaw, *With Federal Moratorium Expiring, 15 Million People at Risk of Eviction*, ASPEN INST. (July 27, 2021), <https://www.aspeninstitute.org/publications/with-federal-moratorium-expiring-15-million-people-at-risk-of-eviction> [<https://perma.cc/9CFX-4SLE>]; Rachel Reed, *Eviction Moratorium's End Could Cause Homelessness or Housing Insecurity for Millions of Families*, HARV. L. TODAY (Aug. 3, 2021), <https://clinics.law.harvard.edu/blog/2021/08/eviction-moratoriums-end-could-cause-homelessness-or-housing-insecurity-for-millions-of-families> [<https://perma.cc/9CP7-PZH7>].

42. Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 142–43 (2017) (asserting that human beings are vulnerable subjects reliant on social relationships and institutions).

43. Michael Karpman, Stephen Zuckerman, & Dulce Gonzalez, *Material Hardship Among Nonelderly Adults and Their Families in 2017*, URB. INST. 6 (Aug. 28, 2018), <https://www.urban.org/research/publication/material-hardship-among-nonelderly-adults-and-their-families-2017> [<https://perma.cc/N2FM-XWSP>] (“Even with the economy approaching full employment, nearly 40 percent of adults reported that they or their families had trouble meeting at least one basic need for food, health care, housing, or utilities in 2017.”); *see also Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES (June 16, 2021), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> [<https://perma.cc/C6MR-EA38>] (reporting Census Bureau Pulse Survey data that families experienced difficulty paying rent, difficulty affording food, and difficulty paying household expenses during COVID-19). Making matters worse, these two disadvantages operate in concert: wage inadequacies lead to high debts, such as educational debt, that

II. EXPLAINING THE MISMATCH BETWEEN RESOURCES AND EXPENSES: STRUCTURAL DEFECTS IN THE PROPERTY SYSTEM

The low-wage “essential workers” of the pandemic went to work every day—often at grave risk to their own safety in banks, grocery stores, warehouses, nursing homes, and the like—because they were needed in the moment to help the rest of us live at some level of comfort and dignity. The pandemic forced us to confront the fact that we are, and always have been, dependent on the services these workers provide.⁴⁴ And yet their wages and wealth often are insufficient to assure that they can live at the

weigh down the ability for many people, including a disproportionately large number of young people, to generate wealth-creating opportunities. Richard Fry, *Young Adults, Student Debt and Overall Economic Well-Being*, PEW RSCH. CTR. (May 14, 2014), <https://www.pewresearch.org/social-trends/2014/05/14/section-1-student-debt-and-overall-economic-well-being> [https://perma.cc/X6KN-R3VA] (“[Y]oung student debtor households have much less wealth than their peers not owing such debt. Among the college educated, those lacking student debt had a median wealth of \$64,700 in 2010. By comparison those owing student debt had a median wealth of only \$8,700. Among households headed by a young adult without a bachelor’s degree, those with no student debt had a median net worth of \$10,900, while those with student debt had about a tenth of that (\$1,200).”); Alvaro Mezza, Daniel Ringo & Kamila Sommer, *Can Student Loan Debt Explain Low Homeownership Rates for Young Adults?*, 1 CONSUMER & CMTY. CONTEXT 2, 3, 6 (2019), <https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf> [https://perma.cc/XX5N-H7J2] (“[W]e estimate that roughly 20 percent of the decline in homeownership among young adults can be attributed to their increased student loan debts since 2005. . . . We also find that, all else equal, increased student loan debt causes borrowers to be more likely to default on their student loan debt, which has a major adverse effect on their credit scores, thereby impacting their ability to qualify for a mortgage.”).

44. Barbara Ehrenreich noted this fact and argued that we should feel “shame at our *own* dependency . . . on the underpaid labor of others.” EHRENRICH, *supra* note 26, at 221. In Ehrenreich’s words:

When someone works for less pay than she can live on—when, for example, she goes hungry so that you can eat more cheaply and conveniently—then she has made a great sacrifice for you, she has made you a gift of some part of her abilities, her health, and her life. The “working poor,” as they are approvingly termed, are in fact the major philanthropists of our society. They neglect their own children so that the children of others will be cared for; they live in substandard housing so that other homes will be shiny and perfect; they endure privation so that inflation will be low and stock prices high. To be a member of the working poor is to be an anonymous donor, a nameless benefactor, to everyone else.

Id.

same level of comfort and dignity that they help provide to others through their work. This Part explores two possible explanations for this gap between incomes and wealth, on one hand, and expenses, on the other.

One explanation, explored in Section A below, is to blame the under-resourced victim by suggesting that resource deficiencies are avoidable through self-reliance. If competitive markets ensure that people are paid what their work is worth, this thinking goes, we can rest assured that people can take care of themselves by securing a job. If people are working as hard as they can but still find that their wages are too low to subsist, it must be because they have little to contribute to the world (and, thus, must seek out charity). It follows, on this view, that Representative Porter's hypothetical teller must not be contributing enough to JPMorgan Chase to make it profitable for the company to pay her a dignified living wage.⁴⁵ She has no right to a living wage if competition pushes wages down below what she needs to survive.

An alternative explanation, set out in Section B below, is to recognize that the rules of property constitute barriers to earning a sufficient income and to accumulating wealth. Property law, therefore, bears a sizable responsibility for the disparity between resources and expenses. Property law, after all, does not only encompass legal rules that protect the property rights of the haves; it also encompasses legal rules that limit the power of the have-nots to acquire property. The distribution of property is determined not just by individual people's actions but also by the legal structure within which people act.

This explanation sees property laws as defining what Jedediah Purdy has called the "terms of recruitment"—the rules that define the minimum standards set by law for market relationships.⁴⁶ These laws determine whether it is possible to enter the marketplace and earn enough to support a comfortable life. If this is not possible, then wages are the result not of inadequacy on the part of workers but of the legal rules that bar access to

45. See *supra* notes 1–5 and accompanying text.

46. 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, 1095–98 (2007) [hereinafter *People as Resources*] (analyzing the "terms of recruitment" of others for collaborative projects).

property acquisition. Employers cannot make money without recruiting the assistance of workers; they need the work that workers provide. If existing laws allow employers to benefit from the work that workers perform while refusing to pay them enough to live on, then these laws actively deny property rights to workers that they would have had if the legal rules had required employers to pay a living wage. From this perspective, workers lack the bargaining power to demand wages that are sufficient to live on, not because their work is not valuable, but because the current laws defining the terms of recruitment allow those with resources to take from those without resources. Different legal rules would produce different distributions of property. Many workers—including many “essential” workers—are not being compensated in a manner commensurate with the importance and social value of their work, and that is not because they are unproductive but because the law allows employers to benefit from their work without paying them what they need to have to continue providing that useful work.

A. BLAMING THE VICTIM

What does it mean to “blame the victim?” Blaming the victim involves shifting attention away from a wrongdoer or excusing the wrongdoer by arguing that the victim could have avoided the harm. Blaming the victim ordinarily finds moral failing in the person who has come on hard times and assumes that, in those exceptional instances where moral failing cannot explain a person’s given predicament, our system of private charity and public welfare works well enough.⁴⁷

1. Moral Suspicion

Blaming the victim often has moral suspicion at its root. Consider, as an exemplar, the 1973 Supreme Court case of *United States v. Kras*.⁴⁸ A debtor, one Robert William Kras, had hoped to seek relief under state bankruptcy law.⁴⁹ The state did not contest Mr. Kras’s circumstances: He lived in a two-room apartment with his wife, mother, and three young children, one

47. *But see, e.g.*, *Commonwealth v. Magadini*, 52 N.E.3d 1041, 1050 (Mass. 2016) (rejecting the Commonwealth’s argument that a defendant who trespassed on cold nights was not entitled to a necessity defense jury instruction because he had not tried to find shelter prior to the nights in question).

48. 409 U.S. 434 (1973).

49. *Id.*

of whom was undergoing treatment for cystic fibrosis.⁵⁰ He diligently sought employment; the household subsisted exclusively on public assistance, all of which went to rent and other necessities; and his sole assets included select articles of clothing and \$50 worth of household goods.⁵¹ In light of these circumstances, Mr. Kras could not afford the \$50 filing fee for the bankruptcy petition.⁵² The Court held that enforcement of the filing fee did not violate the Constitution's Due Process or Equal Protection Clauses.⁵³ Writing for the Court, Justice Harry Blackmun concluded that "[i]f, as Kras alleges in his affidavit, a discharge in bankruptcy will afford him that new start he so desires . . . and if he really needs and desires that discharge, this much available revenue should be within his able-bodied reach . . ."⁵⁴

The perspective endorsed in Justice Blackmun's opinion invites observers to see most people in poverty as morally suspect.⁵⁵ It assumes that all "able-bodied" persons possess the tools needed to solve the problem of being "short" each month, and that all have ready opportunities to use those tools to survive and thrive in the marketplace. Each person, according to the *Kras* Court, need only drum up the fortitude to do what has to be done. It follows, on this view, that people in the type of financial predicament in which Mr. Kras found himself could have avoided that predicament if only they "so desire[d]."⁵⁶ If only they had been more responsible—had worked harder, studied more, took more initiative, moved to the right place, or developed more supportive personal relationships—they would have earned more in income and had more wealth.⁵⁷

50. *Id.* at 437–38.

51. *Id.*

52. *Id.* at 436, 438.

53. *Id.* at 446.

54. *Id.* at 449.

55. See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1500 n.2 (1991) ("This part of Blackmun's opinion draws its rhetorical punch from the assumption that Kras, by virtue of his poverty, is different from us—that he is dishonest and lazy.").

56. *Kras*, 409 U.S. at 449.

57. MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 6–7 (1989) (contending that much of the writing on the poor sees poverty "to some degree [as] a matter of personal responsibility, and [that] its alleviation requires personal transformation, such as the acquisition of skills, commitment to the work ethic, or the practice of chastity"); JODY HEYMANN, *THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN*

This blame-the-victim mentality has not faded from view since Justice Blackmun's utterance in *Kras* a half-century ago; indeed, it may be an even more common trope today.⁵⁸ In one particularly prominent contemporary illustration, Mitt Romney and Paul Ryan, while serving on the Republican Presidential ticket in 2012, pitched a view of the nation as consisting of “makers and takers.”⁵⁹ To Romney, Ryan, and their sympathizers,

JEOPARDY AND WHAT CAN BE DONE ABOUT IT 136 (2000) (explaining how Congressional repeal of federally guaranteed income support for families living in poverty reflected “[a] fundamental shift in the public debate Instead of believing it was impossible for most single parents to care for their children adequately while earning enough money for subsistence, the public contended that nothing other than insufficient willpower was stopping single poor parents from working full-time and caring for their children as well.”).

58. Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 125 (2009) (“[T]here is a deep-seated belief that the poor are responsible for their own fate.”); Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1309 (2018) (“Politicians and media increasingly attributed poverty to ‘culture’—a set of behavioral ‘pathologies’ that poor parents pass down to their children. These pathologies include lack of self-discipline, aberrance of traditional moral and family values, laziness, and disinterest in education.”). This mentality, of course, pre-dated *Kras*, too. On the history of conceiving of the poor as immoral, see, e.g., MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 86–89 (1986) (citing a flawed nineteenth century study of poorhouse residents as evidence of the view that the poor are “unworthy” of concern given their imprudent decision-making); HARREL R. ROGERS, JR., *POVERTY AMID PLENTY: A POLITICAL AND ECONOMIC ANALYSIS* 209 (1979) (“Rather than accept the fact that poverty in this country results primarily from racism, sexism, and a scarcity of genuine opportunity, many attempt to delude and comfort themselves with the belief that the poor are the victims of their own weaknesses.”); William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POLY REV. 101, 103 (1998) (describing the regulation of the poor in the English Poor Laws of 1349 to 1601 as resting on a perception of poverty “not as a social or economic problem but as an individual problem”).

59. On various uses of the trope of “makers and takers,” see Barbara Reynolds, *Mitt Romney’s America: Makers vs. Takers*, WASH. POST (Sept. 21, 2012), https://www.washingtonpost.com/blogs/therootdc/post/mitt-romneys-america-makers-vs-takers/2012/09/21/687dd204-0384-11e2-9b24-ff730c7f6312_blog.html [<https://perma.cc/8L4Z-FGXE>] (criticizing Romney’s “state of mind that sees the non-rich as belonging on the wrong side of the tracks”); Ezra Klein, *Romney’s Theory of the “Taker Class,” and Why It Matters*, WASH. POST (Sept. 17, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/09/17/romneys-theory-of-the-taker-class-and-why-it-matters> [<https://perma.cc/X97Z-JKVX>] (disputing the factual reality of the division between “makers” and “takers”); Ben Crow & Zach Carter, *Paul Ryan: 60 Percent of Americans Are ‘Takers,’ Not ‘Makers,’* HUFFPOST (Oct. 10, 2012), <https://www.huffpost.com/entry/paul-ryan>

those persons who do not earn a lot of money or who, like Mr. Kras, do not have jobs at all, are the “takers” in the sense that they are looking to freeloader off the “makers,” i.e., the entrepreneurs who are doing the real work to move society along.⁶⁰ They see the takers as criticizing the makers for not offering jobs that pay wages that are higher than the value of their work and, until those wages are offered, seeking economic subsidies to support everything from housing to food to health care to, as in Kras’s case, filing fees.⁶¹

Endorsers of this maker-taker approach usually concede that, in what they deem the exceptional situations in which persons are incapable of caring for themselves through no fault of their own (e.g., by way of a genetic disability or losses suffered during a natural disaster), assistance from external sources may be appropriate.⁶² Such assistance, though, generally should come in the form of charitable handouts from family and friends, religious organizations, or private foodbanks and homeless shelters.⁶³ Only in those rare events of market imperfections, which reveal that even the exhaustion of these private sources is insufficient, might government handouts—through lean welfare pro-

-60-percent-of-a_n_1943073 [https://perma.cc/M5QL-SE3C] (outlining Ryan’s repetitive use of the trope); Francis Wilkinson, *Republicans Stuck on Makers vs. Takers’ Myth*, HERALD (May 31, 2017), <https://www.heraldonline.com/opinion/article153445509.html> [https://perma.cc/PM9Q-APG9] (tracing the idea back to remarks made by Ronald Reagan in 1965).

60. Klein, *supra* note 59 (“Romney is arguing that about 47 percent of the country is a ‘taker class’ that pays little or nothing into the federal government but wants to tax the productive classes for free health care, food, housing, etc.”).

61. *Id.*; *United States v. Kras*, 409 U.S. 434, 438 (1973).

62. *Cf.* RALPH SEGALMAN & ASOKE BASU, *POVERTY IN AMERICA: THE WELFARE DILEMMA* 73–74 (1981) (“[A] firm distinction was made [in Elizabethan law and transposed into American law] between more deserving and less deserving indigents. Persons who were in need through no fault of their own or who were not able-bodied and employable were given more generous aid and with less stringency. We can recognize elements of natural law in the fact that widows and orphans were considered the community’s primary aid responsibilities. In the same instance of priority for the handicapped, elements of both natural and cultural-historical law are present.”).

63. *See* Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 24 (2007) (“Liberarians may, and often do, favor ample support for the capabilities of poorer citizens, in the sense that they think poor people should get support from some generous source. . . . [T]hey believe that poor people ought to have a wide range of central capabilities—it is just that they think this should be a matter of private charity, not a matter of public entitlement.”).

grams that offer the likes of food stamps and Social Security disability payments—prove appropriate.⁶⁴

With the exception of these persons who are incapable of caring for themselves through no fault of their own, takers are, under this approach, unworthy of any solicitude at all.⁶⁵ Rather than criticizing the makers, the takers should be looking in the mirror when seeking to cast blame for their plight. Those who own capital are the makers—they are the ones who *generate* capital, and, thus, the ones who, to perform this generative exercise, need the freedom to determine how much of their property to convey to their employees in the form of wages. If an owner of capital cannot exclude employees from earning more than their work is worth to that owner, the owner has no guarantee of being able to manufacture *any* profit, let alone to maximize profits.⁶⁶

2. Property and Suspicion

The approach set out in the previous section rests on an understanding of the property system as facilitating the free exchange of resources within a self-regulating market for all persons, except for the small slice of the population that is justifiably dependent on government assistance. This vision of

64. *Cf. id.* (noting the common libertarian belief that an unfettered market system “will actually work out better than trusting government action”). The perspective we have summarized here suggests that those who could help themselves have no claim to government assistance; it is only those who deserve sympathy who should be the beneficiaries of community support. A related justification for government assistance is a refusal to witness suffering; for instance, given that the worthy see the suffering of the unworthy in emergency rooms, a law requiring that emergency rooms who receive state funding must serve all persons regardless of their ability to pay and regardless of their deservedness is justified. On this view, suffering of the unworthy in corners in which the worthy do not routinely visit is of no matter.

65. On the division of the poor into deserved and undeserved classes, see, e.g., Ross, *supra* note 55, at 1504–08 (discussing new focus in late eighteenth and early nineteenth century America on “[t]he problem [of] the able-bodied, and hence undeserving, recipient of public assistance,” noting that “[t]his moral censure of the able-bodied recipient of public assistance has never left us,” and observing that by the 1980s, many Americans believed that “[m]embership in the underclass was determined by behavior which was either patently immoral or socially deviant”).

66. Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 925–26 (1989) (noting how “courts argue that management needs absolute power to fire employees as a necessary incentive for owners of capital to put it to productive use” and that “managerial discretion increases worker effort and therefore maximizes worker productivity”).

the market consists of individuals transacting in a manner disconnected from the public sphere of government power and control.⁶⁷ It follows on this view that if people make mistakes—like agreeing to mortgage terms they are unable to pay given the wages they earn—they should face the consequences.⁶⁸ From this perspective, the government is neither involved in nor responsible for any outcomes produced in this private sphere; the free market ensures that workers are paid the wages that their work is worth.

On this approach, almost any government intervention into the market would only make things worse, both for low-wage workers and for their employers. Government regulation of minimum wages, environmental conditions, and workplace safety, the argument goes, often increases the costs of doing business and thus disincentivizes job creation, thereby hurting the very people the regulations were designed to protect.⁶⁹ Government aid would merely validate the irresponsible habits of the poor that caused their poverty in the first instance by making reliance on such support more attractive than working at minimum wage.⁷⁰ On this view, as William Quigley has explained, “the surest antidote to poverty is not assistance but starvation.”⁷¹

67. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 534 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986)) (“[T]he classical view [is] that the market is a self-regulating system made up of individual, free transactions fundamentally separate from the public sphere of state power.”).

68. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1014–15 (2009).

69. Duncan Kennedy called this the “landlord will raise the rent” argument. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 604 (1982) (describing this reasoning as the “landlord will raise the rent and evict the grandmother” argument); see also Joseph William Singer, *Anti Anti-Paternalism*, 50 NEW. ENG. L. REV. 277, 287 (2016) (explaining that regulation does not inevitably hurt those it is intended to help); Timothy M. Mulvaney, *Compulsory Terms in Property*, 117 NW. UNIV. L. REV. 191, 191 (2022) (identifying a range of “circumstances in which the state’s compelling terms in social and market relationships surrounding property may well be justified” to confront inequalities).

70. Quigley, *supra* note 58, at 105 (referring to efforts to ensure that government assistance is offered at a level less than that available to the lowest compensated workers as the “principle of ‘less eligibility’”).

71. *Id.* Sonny Perdue, while serving as the Secretary of Agriculture in President Trump’s administration, indicated as much in claiming that a reduction in access to food stamps “restores the dignity of work to a sizable segment of our population.” Danielle Paquette & Jeff Stein, *Trump Administration Aims to*

The conception of the property system on which the blame-the-victim perspective rests has four interrelated premises at its core: (1) persons cannot be forced to contract over resources and labor when they choose not to do so; (2) persons can contract over resources and labor when they choose to do so; (3) enforcing contracts over resources and labor that people voluntarily agree to, by definition, gives them what they want and serves the interests of both sides; and (4) regulating the terms of contracts only makes both parties worse off by denying them the things they wanted to reap from the contractual relationship.⁷² The state, on this view, should not limit the subjects on which private parties can voluntarily contract, regulate the terms of any contracts, or establish conditions for the development of contractual relations in the marketplace.⁷³ People are free to act on their own behalf without concern for the interests, needs, or expectations of others.⁷⁴ If workers are being paid a low amount—even if that amount is so low that it makes it infeasible for certain persons working full-time to meet life’s essential nutritional, housing, and healthcare needs—that is because there are others ready, willing, and able to work for those same wages. Those workers do not have enough to offer their employers to justify paying them what they need to live in dignity. After all, wages are determined by the property rights of employers and the ability of employees to convince employers that sharing those rights is worth more to employers than it costs. Bargaining determines what work is worth. This simply is the law of supply and demand at work. It reflects the normal operation of a free market, which is consistent, as such, with the “liberty” that underlies our legal and constitutional system.

Toughen Work Requirements for Food Stamps Recipients, WASH. POST (Dec. 20, 2018), https://www.washingtonpost.com/business/economy/trump-administration-aims-to-toughen-work-requirements-for-food-stamps-recipients/2018/12/20/cf687136-03e6-11e9-b6a9-0aa5c2fcc9e4_story.html [https://perma.cc/NS3Y-AX5A].

72. See Singer, *supra* note 67, at 479–80.

73. Cf. HENRY SUMNER MAINE, *ANCIENT LAW* 165 (1888) (characterizing movement toward freedom of contract as an indication of social progress).

74. Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L.L. REV. 91, 106 (2011) (explaining a view of the “free market” as “a realm where people have no duties to each other beyond those they voluntarily assume”).

B. BLAMING THE SYSTEM

The practice of blaming the victim described above does not exist in a vacuum. Rather, this way of thinking is necessarily, if at times unconsciously, paired with its mirror image: Seeing moral failing in persons who are paid low wages and who lack resources assumes that the high wages and resource accumulations of others are moral successes. When we think of ourselves as exclusively self-reliant in this way, we are inclined either to kick ourselves for earning a low income or pat ourselves on the back for earning a high one.⁷⁵ On this view, through a combination of talent and hard work—or the lack of one or both—people on all sides of the inequality divide deserve their fate.⁷⁶

At first glance, this theory has several things going for it. For one, it is efficient in the sense that it incentivizes initiative and effort. It also is fair, in the sense that it does not discriminate against anyone for reasons unrelated to their accomplishments. Still further, it affirms a conception of liberty under which we are free to rise as high as our skills and determination take us; it is therefore empowering in the sense that it sees us as personally responsible for our own destinies, rather than subject to forces beyond our control.⁷⁷

75. See MICHAEL J. SANDEL, *THE TYRANNY OF MERIT* 48 (2020) (explaining that, where “suffering is a sign of sin,” prosperity is a “sign of salvation”).

76. See Max Weber, *The Social Psychology of the World Religions*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 271 (1946) (“The fortunate [person] is seldom satisfied with the fact of being fortunate . . . [H]e needs to know that he has a *right* to his good fortune. He wants to be convinced that he ‘deserves’ it, and above all, that he deserves it in comparison with others. He wishes to be allowed the belief that the less fortunate also merely experience [their] due.”).

77. There is an uncomfortable contradiction, however, between the idea that corporate executives need monumental pay packages in order to give them incentives to work hard while workers will only value working if they get as little financial help from government as possible. Today’s businesses are complaining that they cannot find workers willing to work for them. See Áine Cain, *I Traveled Across the East Coast for My Honeymoon, and I Saw Firsthand That the Labor Shortage Is Worse Than Ever*, BUS. INSIDER (July 7, 2021), <https://www.businessinsider.com/some-business-owners-are-blaming-workers-for-the-labor-shortage-2021-7> [<https://perma.cc/6GFT-SR6A>] (reporting that businesses are griping about workers’ “laziness” and alleging that “no one wants to work anymore”). The theory of the free market is that this should cause businesses to pay more to induce workers to work for them, and some businesses are doing just that. Kelly Ann Smith, *8 Big Companies Raising Their Minimum Wages During Covid*, FORBES (Oct. 5, 2021), <https://www.forbes.com/advisor/personal-finance/companies-paying-15-an-hour> [<https://perma.cc/9BXY-6EVN>]. But others refuse to pay more, either because they cannot afford to do so or because they think that workers only deserve what they were being paid

Incentives to innovate and work hard, a level playing field, and notions of personal responsibility are, of course, not precepts to reject wholesale. Yet relying on these precepts alone obscures a reality of which the pandemic has so starkly reminded us: There is little that we can accomplish on our own. We are nowhere near *wholly* responsible for our current place in the world, regardless of how much we innovated, how hard we worked, or how many opportunities we seized.⁷⁸ Instructing low-wage workers—bank tellers, grocery store clerks, school teachers, and on and on—to make better investments, to secure side jobs, or to cut spending shifts accountability from the state to these burdened individuals without taking into account the civic importance of their work, as well as the resources they need to perform it.⁷⁹ A competition that simply pits one person’s income against another’s as the measure of civic virtue absolves the state of responsibility for creating the relational conditions, networks, and structures—via our system of property laws—to which the disparities in those incomes are inevitably tied.

The self-reliance conception of the property system on which the blame-the-victim approach rests largely abandons the democratic project of persuading state officials to adopt property laws that define and allocate property interests in a manner that treats each person as a valuable contributor to the common good, due equal concern and respect, and vulnerable to circumstances outside their control. It is, in important respects, a contemporary

before the pandemic started. E.J. Dionne has commented that we seem to have contradictory intuitions about the incentives needed to make people work. “Forgive me for noting,” he wrote, “that conservatives seem to believe that the rich will work harder if we give them more, and the poor will work harder if we give them less.” E.J. Dionne, Opinion, *Can This Campaign Be Constructive?*, WASH. POST (June 3, 2012), https://www.washingtonpost.com/opinions/can-this-campaign-be-constructive/2012/06/03/gJQAB4W7BV_story.html [<https://perma.cc/RK7Q-JNKY>].

78. In the words of Robert F. Kennedy: “Fellowship, community, shared patriotism . . . come from . . . a shared sense of individual independence . . . We need jobs, dignified employment at decent pay; the kind of employment that lets a [person] say to [their] community, to [their] family, and, most important, to [themselves], ‘I helped to build this country. I am a participant in its great public ventures.’” ROBERT F. KENNEDY, RFK: COLLECTED SPEECHES 385 (Edwin O. Guthman & C. Richard Allen eds., 1993).

79. In the words of Martin Luther King, Jr.: “One day our society will come to respect the sanitation worker if it is to survive, for the person who picks up our garbage, in the final analysis, is as significant as the physician, for if he doesn’t do his job, diseases are rampant. All labor has dignity.” MARTIN LUTHER KING, JR., *THE RADICAL KING* 246 (Cornel West ed., 2015).

reincarnation of the understanding of property against which the legal realists so adroitly pushed nearly a century ago.⁸⁰ In this Section, we offer a realist-inspired perspective that highlights what is wrong with the self-reliance framework.

This alternative perspective recognizes that self-reliance is an important but often insufficient basis for property allocation. Few choose to be desperately poor. Few delight in having trouble paying rent, buying food, or securing medicine. And few are solely responsible for their economic adversity; such adversity very often strikes individuals as a result of events—some imme-

80. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558 (1933) (“At no times does a community completely abdicate its right to limit and regulate the effect of private agreements, a right that it must exercise to safeguard what it regards as the interest of *all* its members.”); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 16, 27 (1927) [hereinafter *Property and Sovereignty*] (“That everyone is entitled to the full produce of his labor is assumed as self-evident by both socialists and conservatives who believe that capital is the result of the savings of labor. However, as economic goods are never the result of any one man’s unaided labor, our maxim is altogether inapplicable. How shall we determine what part of the value of a table should belong to the carpenter, to the lumberman, to the transport worker, to the policeman who guarded the peace while the work was being done, and to the indefinitely large numbers of others whose cooperation was necessary? . . . If the discussion of property by those interested in private law has suffered from a lack of realism and from too great a reliance on vague *a priori* plausibilities, much the same can be said about political discussion as to the proper limits of state action in regard to property and economic enterprise.”); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779, 797 (1918) (arguing that in two cases—*Eagle Glass & Manufacturing Co. v. Rowe*, 245 U.S. 275 (1917), and *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917)—the United States Supreme Court relied on fallacious reasoning under the façade of freedom of contract doctrine, going so far as to grant an injunction, without justifying it, that asserted one employer could contract to have a “right to a free flow of labor”); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627 (1943) [hereinafter *Bargaining*] (“The employer’s power to induce people to work for him depends largely on the fact that the law previously restricts the liberty of these people to consume, while he has the power, through the payment of wages, to release them to some extent from these restrictions.”); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923) [hereinafter *Coercion and Distribution*] (arguing against a hands-off approach to economic theory); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909) (criticizing how courts “force upon legislation an academic theory of equality in the face of practical considerations of inequality”). See generally Singer, *supra* note 67, at 475–78 (characterizing legal realism as “a reaction against classical legal thought,” which “tried to separate strictly the private sphere of individual contractual freedom from the public sphere of government regulation”).

diate, others cumulative over time—that are beyond their control. It is, instead, the *system of property laws* that has put so many in a position where they not only lack the social and dignitary recognition that should accompany work that produces what others need, but the resources to pay for their own needs.

1. Property as Allocation

The levers of supply and demand do not, all by themselves, create the social and economic relationships we see in everyday life. Rather, when we unpack the laws that constrain access to resources, it becomes evident that property rights, at root, reflect state-derived decisions to allocate interests in land, capital, and the like in ways that define the content of those social and economic relationships. Property laws, for instance, regulate all relationships surrounding shelter, such as those between landlords and tenants, developers and purchasers, residents and their neighbors, individuals and their domestic partners and families, and creditors and debtors. Property laws define rights in most other resources, as well; hence, for example, they similarly reign over the relationships between those controlling natural resources and the general population, employers and employees, taxpayers and their representatives, and more. By delineating the rights we bring to the bargaining table, they set the terms within which we can and cannot collaborate with others. In setting minimum standards for social and economic relationships, federal, state, and local lawmakers make qualitative judgments about our way of life in the face of changing times and conditions. By adopting public laws that determine the rules of the game, lawmakers distribute market power and shape interactions in the private sphere. Lawmakers are not part of the story of ownership design—they *are* the story of ownership design.⁸¹ Their public decisions about law determine when the exercise of private power is legitimate and when it is not.⁸²

Given that the legitimacy of the exercise of private power *over others* is at stake, property cannot be defined in terms of an employer-owner's rights—either to liberty or to a return on economic investments—without considering the employer-owner's responsibilities to act consistently with the liberty and economic

81. See MICHAEL HELLER & JAMES SALZMAN, MINE! 93 (2021) (“Ownership design is only as good as the designers.”).

82. Cf. *Property and Sovereignty*, *supra* note 80, at 8 (noting Montesquieu's view “that political laws must in no way retrench on private property because no public good is greater than the maintenance of private property”).

rights of their employees.⁸³ In this light, the metaphor of “makers and takers” may well have it backwards. If individuals are working hard but not earning enough to live on, their employers are making money off of their labor but not providing them with the resources they need to be able to sustain that labor.⁸⁴ Because employees’ labor is necessary to *make* the profits that their employers *take*, employers take too much if they make money via practices that do not ensure that those whose services are necessary to their success are able to earn enough to continue to provide those services while meeting their own dignified life’s basic necessities. Employers need employees, but employees have their own needs. As Laura Underkuffler reminds us, property is essential for human beings *to survive*.⁸⁵ If we accept the undeniable truths that: (1) affording property protection is an exercise of public power; and (2) an interest in sheer survival—which is dependent on property—is one in which all persons in a democracy should share, we cannot be indifferent to the distribution of property rights in a labor market that is inevitably structured by law.

If employees’ labor is a precondition to an employer’s earning profits, those employees can only provide that labor if they earn enough to enable them to live in dignity. *Their dignified*

83. Cf. Laura S. Underkuffler, *What Does the Constitutional Protection of Property Mean?*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 109, 115 (2016) (making a parallel argument with respect to a land-owner’s rights over her land, where “because of [real property’s interconnectedness], the claimed rights and actions of an owner of land cannot be viewed in isolation”).

84. Cf. RANA FOROOHAR, *MAKERS AND TAKERS: THE RISE OF FINANCE AND THE FALL OF AMERICAN BUSINESS* 73 (2016) (“Workers and engineers in the factories made parts, and managers made money.”).

85. Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1039–40 (1996); see also Frank I. Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13–16 (1969) (advocating a constitutional interpretation that the state afford all persons access to a resource threshold that provides “minimum protection against economic hazard”); Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. REV. 145, 171 (2018) (“Property allocates to individuals interests in resources to the exclusion of others that, at a threshold level, are necessary for human existence. Other constitutional rights are of limited import if one does not have access to the minimum threshold of resources to subsist. The government must therefore inevitably not only make choices as to who gets what, but also, taken to its logical end, determine whether some will subsist and others will not.”).

*survival must be a condition of their being able to work.*⁸⁶ The employer, then, has no right to benefit from their work without paying them the amount that is necessary for them to maintain their ability to perform. If the employer is making profits off their labor yet refuses to pay them enough to survive, the employees are being exploited, treated as servants whose place in life is to serve others without adequate recompense. If the employer is making profits off the employees' labor yet refuses to pay them enough to survive, the employees' role is to expand and manage the property holdings of others, but not to share in them. If the employer is making profits off the employees' labor yet refuses to pay them enough to survive, it is the employer that is stealing from the employees, expropriating their labor but not paying its basic cost.

In the New Deal era, the Supreme Court recognized this reality. In the decades that preceded it, during the era of *Lochner v. New York* and *Adkins v. Children's Hospital*, the Court infamously concluded that minimum wage and maximum hours laws took property from employers and transferred it to employees.⁸⁷ Repudiating this thinking in the 1930s, beginning with the case of *West Coast Hotel v. Parrish*, the Court realized that employers who pay employees too little to live on are extracting their labor value without paying what is necessary to maintain the workers' lives.⁸⁸ The Court became conscious of the fact that

86. Timothy M. Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy*, in TRANSFORMATIVE PROPERTY LAW 15 (Gustav Muller, Reghard Brits, Bradley Slade & Jeannie van Wyk eds., 2018) ("Property rights do not exist in a vacuum. We recognize them *because* they promote values such as dignity and equality."); AJ van der Walt, *The Modest Systemic Status of Property Rights*, 1 J.L. PROP. & SOC'Y 15, 101–02 (2014) ("[P]roperty must reflect, and must be accountable to, the fundamental choices we have made in favour of living in a democracy characterised by dignity and equality.").

87. *Adkins v. Children's Hosp.*, 261 U.S. 525, 561 (1923) ("If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction."); *Lochner v. New York*, 198 U.S. 45, 49 (1905) (characterizing the minimum wage law at issue as "invad[ing] the rights of persons [i.e., employers] and property under the guise of the police regulation").

88. *W. Coast Hotel v. Parrish*, 300 U.S. 379, 387 (1937) ("If after investigation the commission found that in any occupation, trade, or industry the wages

paying inadequate wages had the effect of imposing obligations on others—family, charities, governments—to pay to sustain the employers’ workers.⁸⁹ In affirming the constitutionality of minimum wage laws, Chief Justice Charles Evans Hughes asserted that “[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers.”⁹⁰

As Chief Justice Hughes’ words attest, the fact that employees signed contracts indicating they would work for substandard wages does not make those terms just or efficient. Competitive markets do not ensure that employers pay fair wages; indeed, they may pressure employers to pay *exploitative* wages.⁹¹ Minimum wage laws do not necessarily force employers to subsidize workers; they can prevent employers from stealing from workers.⁹² Lawmakers who endorsed minimum wage laws understood that the “takers” actually were the employers. Such employers were taking labor from employees without paying enough for them to provide that labor. They were also taking from third parties—family, charity, and governments—that had to sustain the employees through the subsidies to which Chief Justice Hughes referred to enable them to work for these employers.⁹³

This inversion of the makers-takers imagery situates employers as responding to competitive pressures. But the employers were responding to competitive pressures in the context of the rules governing the distribution of property, and the rules that shape relationships between employers and employees. The

paid to women were ‘inadequate to supply them necessary cost of living and to maintain the workers in health,’ the commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public.”)

89. *Id.* at 399 (“The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.”).

90. *Id.*

91. *See id.* at 398–99 (describing one example of such a failing market in terms of the “evils of the ‘sweating system,’ the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition”).

92. *See id.* at 399 (classifying the laws at issue as the legislature’s “policy of protection”).

93. *Id.* (describing the burden that underpaying workers imposes on others in society).

point of minimum wage laws was to stop exploitation or expropriation of labor value, to reverse the rules that allowed relationships in which employers could “take” from employees, and to put all employers on an even playing field so that business competition would no longer induce businesses to lower wages to a level that would require workers to be subsidized by others. Such regulations do not deprive employers of “liberty” as the due process clause conceives it; on the contrary, they protect the liberties of workers to provide useful services and earn enough to continue to do so. Justice, the Court came to realize, requires assessing whether one could accept the terms of an employment relationship if one did not know whether he or she were in the shoes of the employer or the employee.⁹⁴ The freedom to work is not the freedom to be a servant; it is the freedom to participate in the employment market and to garner wages sufficient for a human being to build a life on.

As the legal realist vision underpinning this repudiation of *Lochner* and *Adkins* taught us, the market is not independent of either government or law.⁹⁵ Both markets and property rights—and the qualitative nature of the relations they do and do not bless—depend on legal rules to define how markets and the property system work and what rights and responsibilities people have when they interact in social and economic life. Property law sets the rules that govern the conditions we are and are not allowed to demand of others in market and social relationships.⁹⁶

The only societies with no laws governing these conditions are those dominated by warlords; even slave societies such as the United States of the 1800s had *some* rules about treatment of enslaved persons, little as they were enforced.⁹⁷ Emancipation

94. See JOHN RAWLS, A THEORY OF JUSTICE 12–13 (1971) (articulating the “veil of ignorance” reasoning paradigm where “impartiality implies consideration of the person ‘without regard to persons’” to “prevent a decision being taken with a view to one’s own personal benefit or that of one’s group”).

95. See, e.g., *Parrish*, 300 U.S. at 391 (“[T]he liberty safeguarded [by the federal Constitution] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”).

96. See *People as Resources*, *supra* note 46, at 1094–98 (describing the “rules of recruitment,” “circumstances of recruitment,” and “terms of recruitment” through which law facilitates individuals’ relationships).

97. See, e.g., *Missouri’s Early Slave Laws: A History in Documents*, MO. SEC’Y OF STATE, <https://www.sos.mo.gov/archives/education/aahi/>

meant that the government needed to fashion new sets of rules about how to distribute land and wealth in a post-slavery world. The Civil Rights Act of 1866, for example, was designed to ensure the ability of formerly enslaved persons to contract with others and to acquire property.⁹⁸ That law placed obligations on employers to enter into contracts without regard to race; that meant creating an obligation to enter into contracts on the same terms that were offered to white citizens. With a different background rule governing contracting in the marketplace, there would have been different distributive outcomes.⁹⁹

2. Just Allocations

It follows that vast inequalities of wealth and income are not a natural feature of a market economy but instead a correctable social and legal problem. Equity and inequity are public and systemic rather than private and individual. The challenge is to determine how the legal rules of the property system have, in contemporary society, led to the inability of workers to earn enough to live on. This challenging question is one political scientist Jacob Hacker deems a matter of “predistribution”: which decisions on which rules have contributed to depriving so many people of the ability to earn and accumulate sufficient resources to sustain themselves and to be safe and secure in an uncertain world?¹⁰⁰ And, in addressing this question, it is crucial to pay heed to the reality that while these deprivations are widespread, they are not equally distributed. The particularly pronounced inequities

earlyslavelaws/slavelaws.asp [https://perma.cc/WP7P-8W3K] (“The French code [applicable in the area that later became the state of Missouri] did not simply govern slave behavior. Owners also lived under particular guidelines with respect to their slaves. The code instructed them to not torture, mutilate, or kill their slaves, though masters who did so were rarely rebuked. The law also prohibited owners, in the process of selling slaves, to break up a family unit of a husband, wife, and children under the age of fourteen. By not recognizing slave marriages as legal, owners routinely evaded this section of the code.”).

98. 42 U.S.C. §§ 1981–82 (establishing that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . [and] to inherit, purchase, lease, sell, hold, and convey real and personal property”).

99. *Cf. Coercion and Distribution*, *supra* note 80 (“[C]oercive restrictions are bound to affect the distribution of income . . .”).

100. Jacob Hacker, *How to Reinvigorate the Centre-Left? Predistribution*, *GUARDIAN* (June 12, 2013), <https://www.theguardian.com/commentisfree/2013/jun/12/reinvigorate-centre-left-predistribution> [https://perma.cc/MCS8-58ND] (outlining the opportunities for “predistribution” that could “make markets work for the middle class”).

in access to wealth and wages across racial and gender lines is a product, again, not of competitive markets, but of legal rules and public policies that denied—and, in many cases, continue to deny—African Americans, Latines, Asian Americans, Native Americans, and women of all races access to wealth and livable wages.¹⁰¹

If the rules in force have denied persons the ability to accumulate wealth, and if those persons have no other resources to sustain them, they are forced to agree to labor bargains that they are offered, even if those bargains result in pay that is too little to live on. Such contracts are not “voluntary.”¹⁰² They do not reflect the terms the parties would agree on if they had the power to bargain fairly. Accepting essential work for low pay is not a choice but an imposition that is exploitative. Seen in this light, regulations that protect the interests of vulnerable employees, such as minimum wage laws, simply shift some of this coercive effect onto employers previously afforded a disproportionate share in the dispersal of ownership, all in an effort to ensure that

101. See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at x–xv (2017) (explaining that today’s residential segregation is not the unintended consequence of individual choices or neutral laws, but rather of public policy that explicitly segregated every metropolitan area in the United States and persists as “*de jure*” segregation). The pandemic has only shed greater light on these racial disparities. See, e.g., Isaac Chotiner, *A Black Lives Matter Co-Founder Explains Why This Time Is Different*, *NEW YORKER* (June 3, 2020), <https://www.newyorker.com/news/q-and-a/a-black-lives-matter-co-founder-explains-why-this-time-is-different> [<https://perma.cc/T4CU-ETTT>] (detailing the history of the Black Lives Matter movement, its significance, and the way in which it has been fueled by concern that “the government does not seem to have a plan of action that . . . seeks to address the core concerns that the average American has”); *Under the Blacklight: The Intersectional Vulnerabilities that COVID Lays Bare*, *AFR. AM. POL’Y F.*, <https://www.aapf.org/blacklight> [<https://perma.cc/2WJJ-8562>] (“Though the COVID-19 pandemic did not create the stark social, financial, and political inequalities that define life for many Americans, it has made them more strikingly visible than any moment in recent history.”); Elise Gould & Valerie Eilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality*, *ECON. POL’Y INST.* (June 1, 2020), <https://www.epi.org/publication/black-workers-covid> [<https://perma.cc/EWR7-LN39>] (detailing the disparate racial impact of COVID-19 and arguing that it is the result of pre-pandemic structural inequalities in employment, income, housing, and healthcare).

102. Beermann & Singer, *supra* note 66, at 972 (raising the possibility that unequal bargaining power should be construed as “represent[ing] an impediment to the ‘free’ flow of resources because it allows one party to use her market power to coerce the other party to agree to unfavorable terms”).

employees do not fail to earn a fair wage simply because the rules of acquisition deny them the power to do so.

As the realists taught, voluntariness is a relative concept, given that choices are constrained by the legally available alternatives.¹⁰³ The central issue surrounds the extent to which coercive powers are used and abused.¹⁰⁴ Only moral and political choices about which property rules to endorse in the face of alternatives can give content to the market structure within which legitimate exchanges can occur. Laws set the minimum standards for labor and other market relationships that are acceptable in a free and democratic society.¹⁰⁵ These choices, thus, shape the distribution of power in society and the nature of wealth-creating economic activity. Such legitimating choices are a great and unavoidable state responsibility in a democracy. Nothing is a given—the choices that the state makes regarding property provide contemporary meaning to our most cherished democratic values, including freedom, equality, industry, and dignity.

Reform, then, is more than a matter of ensuring a merely formal equality of opportunity and letting the victors and victims fall where they may; it is also more than securing an equality of results via redistribution of the victor's spoils. Reform, instead, must come in the form of structural reconfigurations that shape the economic and social relations that connect and constitute us.¹⁰⁶ Instead of doubling down on the premise that everyone has full control over their circumstances, such reconfigurations would emphasize solidarity and mutual obligation.¹⁰⁷ Over time,

103. See *Bargaining*, *supra* note 80, at 627 (explaining that employers, relying on “the fact that the law previously restricts the liberty of [certain] people to consume” induce those people to work for them); *cf.* *Coercion and Distribution*, *supra* note 80, at 477–78 (“[T]he [average] worker is frequently deprived, during working hours and even beyond, of all choice over his own activities.”).

104. Singer, *supra* note 67, at 534.

105. JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 26–57, 177 (2015) (“Freedom requires regulation, and free markets work only because they are structured by law.”).

106. SANDEL, *supra* note 75, at 224 (advocating that we “repair the conditions” that weigh people down).

107. See *id.* at 44 (“A culture less intent on the individual’s responsibility to master destiny might be more capacious, more generous, more gracious. A keener awareness of the unpredictable character of fortune and fate might encourage fortunate people to imagine their own misfortune and transcend the arrogance of the meritocratic myth—to acknowledge how fitfully and unpredictably people get what they deserve.”).

we have engaged in this type of reform by reallocating and redefining property rights to outlaw relationships characterized by the likes of feudalism, oligarchism, aristocratism, enslavement, and apartheid. We have the ability to determine whether relationships characterized by economic oppression and exploitation will join these others in the dustbin of history.

* * *

Individuals are responsible for many of the choices they make in life, but we are collectively responsible for the laws that determine whether we have the power to acquire property. It is law, not just individual choices, that determines whether parents have property they can pass on to their children after death. It is law, not just individual choices, that determines the circumstances under which workers can be dismissed. It is law, not just individual choices, that determines whether individuals can enter the marketplace to acquire the property necessary to secure food, housing, health care, childcare, and education on a day-to-day basis, as well as to save enough to sustain themselves in hard times. Yes, companies that employ the likes of the bank teller described by Representative Porter make choices about how to distribute their profits among workers, executives, and shareholders. But those choices are constrained by law: The rules in force define allowable distributions. Again, with different rules of law, different distributions would ensue. The question that must be asked is whether our society should: (1) protect the power of employers to make profits from the work of employees while denying those same employees the resources they need to live in dignity; or, (2) ensure that all participants in cooperative economic enterprises have a moral and legal right to a share of those earnings sufficient to enable them to continue to provide their essential services and to live a comfortable and dignified life. The market does not determine the answer to that question; property law does.

III. ALIGNING RESOURCES AND EXPENSES: NORMS FOR REFORMING THE PROPERTY SYSTEM

We do not need to sacrifice equity to live in a market economy. Rather, inequities often arise only because our system of property laws has made it impossible for many people to earn a

dignified living.¹⁰⁸ We should not cast blame on the victims of these inequities; instead, we should focus on *how we might change the rules of the game that cause these inequities to arise in a market economy in the first place*.

Having highlighted what we have misunderstood about the cause of the rampant inequities that threaten many Americans' access to life's essential resources, a number of challenging inquiries come to mind. What specific policies and laws have stood in the way of spreading wealth across the population? What resources—incomes and otherwise—must workers have to both sustain themselves and fulfill their crucial roles in the lives of others? What obligations must be placed on employers so that their businesses can thrive at the same time that their workers thrive? This Part sketches a conceptual framework for developing property reforms that respond to inquiries of this sort. The framework rests on four norms that, in our view, must be adopted if society is both to chart a course for property law that is far more equitable than the status quo and to prevent us from descending into complacency in the future when new course corrections are required. These norms, addressed in turn below, include circumstance sensitivity, antidiscrimination, realistic opportunity, and legal integration.

A. PROPERTY NORM #1: ATTENDING TO CIRCUMSTANCES

We must pay attention to facts about how things are rather than how we imagine them to be. We cannot invent an abstract model of a competitive market that assumes everyone has the ability to learn marketable skills, find remunerative employment or open a business, and earn enough to live comfortably. We need to look at our *actual circumstances*. As noted above, we assuredly must look at the places where working people actually need to live to perform their work to determine whether their incomes are sufficient to meet their expenses.¹⁰⁹ As this Section

108. Cf. STEPHEN R. MUNZER, A THEORY OF PROPERTY 227 (1990) (contending that property systems are just only if all have access to own a minimum threshold of property and the gap between owners in terms of the amount of property held does not undermine anyone's ability to experience a "fully human life in society").

109. See *S. Burlington Cnty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 743 (N.J. 1975) (finding that, without sustaining the heavy burden of peculiar circumstances, a zoning ordinance cannot exclude working-class persons from a municipality when the region benefits from their employment).

explains, though, other aspects of the labor market also affect access to essential property.

For starters, we must recognize that we live in an increasingly *collusive* economy, in which concentration-centered corporate practices have made workers worse off.¹¹⁰ Mergers too often lead to monopsony conditions, in which workers have few alternatives in deciding for whom to work and are thus short on leverage to negotiate a dignified wage.¹¹¹ Relatedly, corporations have leaned heavily on noncompete clauses in employment contracts, which have the effect of limiting workers' ability to cease working for an employer when more desirable employment opportunities present themselves.¹¹²

We also live in a *gig* economy. Over the course of the pandemic, for example, workers delivered food that others needed to survive and ferried passengers to places they desperately needed to go, all as unprotected independent contractors and at serious risk to their own health.¹¹³ According to a recent study by researchers at Cornell University's Worker Institute, delivery

110. William A. Galston & Clara Hendrickson, *The Consequences of Increasing Concentration and Decreasing Competition—and How to Remedy Them*, BROOKINGS (Jan. 5, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/05/the-consequences-of-increasing-concentration-and-decreasing-competition-and-how-to-remedy-them> [https://perma.cc/RQU8-SXXP].

111. See José Azar, Ioana Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. S167, S167, S169 (2022) (finding that, where job markets are heavily concentrated, wages are 5–17% lower).

112. See HELLER & SALZMAN, *supra* note 81, at 197 (“About 20 percent of American workers are currently subject to a noncompete agreement, and almost 40 percent have signed one at some point in their working lives. . . . [I]t’s not just the highly paid professionals that are tied up—the restrictions often cover temp warehouse workers, hair stylists, yoga instructors, even teenage camp counselors.”). In one of the more notorious instances in recent years, the fast-food franchise Jimmy John’s imposed a non-compete clause on its sandwich makers that precluded them from taking jobs at any business that sells “submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches” within two miles of any of the more than 2,000 Jimmy John’s shops in the United States for a period of two years after working at one of those Jimmy John’s shops. See Daniel Wiessner, *Jimmy John’s Settles Illinois Lawsuit Over Non-Compete Agreements*, REUTERS (Dec. 7, 2016), <https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA> [https://perma.cc/L5GP-UX57] (discussing a legal settlement over Jimmy John’s non-compete agreements).

113. See Chase Purdy, *Food Delivery During a Pandemic Exposes the Gig Economy’s Biggest Rift*, QUARTZ (Feb. 28, 2020), <https://qz.com/1809629/the-coronavirus-exposes-the-biggest-rift-in-the-gig-economy> [https://perma.cc/

workers in New York City make between \$6.57 and \$7.87 per hour on net, or less than half of the city's \$15 minimum wage.¹¹⁴ And, for all the talk of the flexibility for people to turn to such jobs as a side hustle, a recent survey of the Community Service Society of New York revealed that most app-based workers in the city said such work was their primary source of income.¹¹⁵

Still further, we live in a *caretaker* economy in which huge amounts of work are done “for free.”¹¹⁶ That includes volunteer work in churches, mosques, synagogues, and charitable organizations, all of whose services are necessary to our living in dignity. But it also includes work in the home—taking care of children, the elderly, and persons with disabilities—that is disproportionately distributed across gender lines.¹¹⁷ Feminists have long argued that this work deserves both recognition and remuneration.¹¹⁸ Such work is costly, not only with respect to supplies but also in terms of foregone labor, for those who work in the home are not available to work simultaneously in the paid workplace. The traditional model assumes that someone (namely, a husband) will generate the income needed to sustain those persons (namely, wives and children) who remain at home. An alternative traditional model assumes that mothers should pay someone to take care of their children when they go to work (and that, somehow, other people will be paid to take care of those childcare providers' children while they do so). Neither assumption holds, though, in a modern world in which wage levels make the prospect of single-earner households a rarity and the

D967-Q4DT] (highlighting the lack of legal protections for gig workers during the COVID-19 pandemic).

114. McGeehan, *supra* note 29 (determining net wages after factoring in the costs of maintaining a working smartphone and operating the vehicle necessary to fulfill requests).

115. *Id.*

116. See Anne-Marie Slaughter & Hilary Cottam, *We Need a New Economic Category*, ATLANTIC (Sept. 23, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/new-economy-caregiving/620160> [https://perma.cc/FN8N-HDG4] (arguing for economic recognition of care work).

117. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1883 (2000) (discussing “the gender-based distribution of work that is at the root of women's disadvantage”).

118. See generally Maxine Eichner, *The Free-Market Family and Children's Caretaking*, 71 FLA. L. REV. F. 45, 45 (2019) (analyzing the impacts of government support for families when raising their children); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983) (discussing how a traditional, gendered worldview impacts reforms made in support of families).

costs of care for children—and the elderly and those with disabilities¹¹⁹—are enormous (even though childcare workers are themselves not paid enough to live comfortably).¹²⁰ And another, especially disturbing assumption continues to cloud the attention paid to caretaker work: the idea that government support somehow prompts people—in Ronald Reagan’s eyes, racialized “welfare queens”—to situate themselves in a way that allows them to garner a meager government income.¹²¹ Even today, Senator Joe Manchin insists on means-testing government benefit programs so we do not develop an “entitlement mentality.”¹²² On the view espoused by the likes of Reagan and Manchin, we are somehow better off if mothers take care of other people’s children or parents rather than their own.¹²³

Having someone take care of your children or parents while you take care of their children or parents does not change the economic value of the work, just its social meaning. This work

119. See Jonathan Cohn, *The Fight for a Key Biden Health Care Policy Is Personal for This House Democrat*, HUFFPOST (July 19, 2021), https://www.huffpost.com/entry/home-care-elderly-disabilities-dingell_n_60f4381ae4b01ba8eed71236 [https://perma.cc/UC4T-BG9N] (discussing the high costs of home care for the elderly and persons with disabilities); Amber Ferguson, *Unpaid Caregivers: How America Treats Women Caring for Paralyzed Partners*, WASH. POST. (Aug. 6, 2021), <https://www.washingtonpost.com/business/interactive/2021/caregiver-partner-paralyzed-marriage-pandemic> [https://perma.cc/YDU7-FXQG] (highlighting the lack of financial support in some states for women caring for their disabled partners).

120. See Ellen McCarthy, *Many Moms Left the Workforce During the Pandemic. For Some, Going Back Isn't So Simple.*, WASH. POST (June 29, 2021), https://www.washingtonpost.com/lifestyle/style/working-moms-pandemic-jobs/2021/06/28/a1abcb8c-c93a-11eb-81b1-34796c7393af_story.html [https://perma.cc/3MQ6-KKPP] (discussing the difficulty for some women to return to the workforce due to the cost of childcare); Julie Sullivan, *Comparing Characteristics and Selected Expenditures of Dual- And Single-Income Households with Children*, U.S. BUREAU OF LAB. STAT. (Sept. 2020), <https://doi.org/10.21916/mlr.2020.19> (discussing the difference in average income between dual and single-income households and pointing out that the difference is small, especially for households with children).

121. See Gene Demby, *The Truth Behind the Lies of the Original “Welfare Queen,”* NPR (Dec. 20, 2013), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen> [https://perma.cc/HA3Y-SPRF] (detailing the origins of the “welfare queen” myth).

122. Jonathan Weisman & Emily Cochrane, *Benefits for All or Just the Needy? Manchin’s Demand Focuses Debate*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/us/politics/manchin-democrats-means-testing.html> [https://perma.cc/SVX6-NXAQ].

123. Cf. *id.* (detailing the opposition of Senator Manchin to a proposal for lowering the cost of childcare).

must be structured to enable both caretakers and those in care to have sufficient property to sustain themselves and to lead comfortable lives. There are various routes to accomplish this end. But one route that should be foreclosed is one that rests on the supposition that someone, somehow, will take care of the problem without any need for the property law system to adopt rules and policies to ensure—to *actually ensure*—that those in need of care can receive it and that those providing the care have the property resources needed to conduct this essential work.¹²⁴

Adopting a circumstance-sensitive norm—one that recognizes the realities of the collusion economy, the gig economy, the caretaker economy, and the like—will help frame the most pressing resource acquisition questions of the day in contextual light and guide conversation on the development and implementation of reforms with those contexts in mind.

B. PROPERTY NORM #2: ANTIDISCRIMINATION

While attending to factual circumstances is crucial, we need additional norms to tell us whether those circumstances are acceptable as a matter of social justice. Facts alone cannot define whether a given practice treats people with equal dignity. We need to give normative content to a conception of equal dignity that is consistent with the kind of society we want to advance. One means of doing so is through antidiscrimination laws and policies, which must outlaw contractual relations that deny equal access to the market system. They must also effectively undo the continuing effects of past discrimination.¹²⁵

124. Cf. Jason DeParle, *When Child Care Costs Twice as Much as the Mortgage*, N.Y. TIMES (Oct. 9, 2021), <https://www.nytimes.com/2021/10/09/us/politics/child-care-costs-wages-legislation.html> [https://perma.cc/Z8ZA-ZD2E] (discussing the high cost of childcare relative to average incomes and other expenses); *President Biden's Home Care Proposal Would Create Massive Job Growth in Every State*, CTR. FOR AM. PROGRESS (Aug. 17, 2021), <https://www.americanprogress.org/issues/economy/news/2021/08/17/502466/president-bidens-home-care-proposal-create-massive-job-growth-every-state> [https://perma.cc/63PC-AAMH] (analyzing the childcare provision of President Biden's proposed Build Back Better bill); Katie Johnston, *For Unpaid Family Caregivers in the Workforce, The Burden Grows*, BOS. GLOBE (Apr. 9, 2022), https://www.bostonglobe.com/2022/04/09/business/unpaid-family-caregivers-workforce-burden-grows/?s_campaign=breakingnews:newsletter [https://perma.cc/6J37-93B6] (discussing difficulties working people have in taking care of ailing or aging loved ones).

125. See Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 878–79 (2013) (detailing the racist effects of past federal economic acts).

Consider, for instance, how—despite the civil rights movement and civil rights laws—property laws continue to enshrine and even exacerbate racial inequities in wealth-creation opportunities to the point where the typical white family in the United States holds eight times the wealth of a typical Black family.¹²⁶ The property rules that constitute disaster relief law offer one illustration of racial caste. Predominantly white neighborhoods in counties that receive federal investments via various Federal Emergency Management Agency programs in the wake of natural disasters see, on average, a significant increase in wealth as a result of increasing home values.¹²⁷ However, predominantly Black neighborhoods in those same counties see their wealth shrink in the wake of disasters.¹²⁸ In part, these statistics are a product of the fact that individual disaster assistance tends to benefit those who own homes more than those who rent.¹²⁹ As a result of a broad array of discriminatory barriers—some from the past and others from the present—Black people are far more likely than white people to rent.¹³⁰

The illusory nature of flat-rate property taxes offers another example. That system only works if properties are accurately as-

126. Neil Bhutta, Andrew C. Chang, Lisa J. Dettling, & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html> [<https://perma.cc/P5MN-3GBU>]; see also Eleanor Brown & June Carbone, *Race, Property, and Citizenship*, 116 NW. U. L. REV. 120, 129–30 (2021) (explaining how wealth creation for African Americans has been hampered by inadequate or counterproductive regulation); Richard D. Kahlenberg, *The “New Redlining” Is Deciding Who Lives in Your Neighborhood*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/2021/04/19/opinion/biden-zoning-social-justice.html> [<https://perma.cc/4RGE-J2PW>] (discussing how redlining has contributed to the wealth gap between white families and Black families).

127. Junia Howell & James R. Elliott, *Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States*, 66 SOC. PROBS. 448, 464 (2019).

128. *Id.*

129. *Id.* at 451 n.2, 455, 457 (finding that “race, education, and homeownership” lead to statistically significant differences in the amount of natural disaster relief funding).

130. *Id.* at 450. Among those discriminatory barriers of present vintage, consider the reality that tax provisions incentivizing homeownership are of value only for those who can afford a home.

sessed. Yet more expensive properties are regularly undervalued, while less expensive properties regularly are overvalued.¹³¹ For one striking illustration, 1,015 homes in Cook County, Illinois—of which Chicago is the county seat—sold for exactly \$100,000 between 2007 and 2016.¹³² These homes had an average pre-sale assessed value of \$151,585.¹³³ Over the same period, 149 homes sold for exactly \$1 million.¹³⁴ Their average assessed value prior to sale was \$647,030.¹³⁵ The burden of property taxation is, thus, regressive in such an enforcement environment: local governments are collecting a larger share of income from low-income households than from high-income households as a result of inadequate or underenforced assessment protocol laws.¹³⁶ In some cases, unjust tax assessments lead to missed taxes or mortgage payments and, ultimately, evictions, thereby destroying families' chances to build generational wealth.¹³⁷ To boot, property tax policy's worsening of inequality in terms of the distribution of income and wealth is falling disproportionately on minorities: as a result of the cumulative impact of racist policies of the past, Black and Latine people are more likely than

131. Christopher Berry, *Reassessing the Property Tax 2* (Mar. 1, 2021) (unpublished manuscript), <https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/6/2330/files/2019/04/Berry-Reassessing-the-Property-Tax-3121.pdf> [<https://perma.cc/77CB-PHPL>].

132. *Id.* at 9.

133. *Id.*

134. *Id.*

135. *Id.* Many states require that assessments conform to industry standards. The sufficiency of the industry standard, though, is assumed; moreover, and in any event, the efficacy of those standards is belied by a lack of enforcement. *Assessment Equity in New York: Results from the 2019 Market Value Survey*, N.Y. STATE DEP'T OF TAX'N & FIN., <https://www.tax.ny.gov/research/property/reports/cod/2019mvs/reporttext.htm#1> [<https://perma.cc/JC7A-7AET>]. On the prospect of the non-enforcement of property regulations serving as grounds for a takings challenge, see generally Mulvaney, *supra* note 85.

136. A state court in Delaware recently deemed the inequities between the assessments of low-income and high-income housing violative of the state's Constitution. Xerxes Wilson & Jeanne Kuang, *Judge Rules Delaware Property Tax System Unconstitutional; Major Changes to Residents' Bills Could Follow*, DEL. NEWS J. (May 11, 2020), <https://www.delawareonline.com/story/news/2020/05/08/judge-delaware-property-tax-system-unconstitutional-changes-coming/4889814002> [<https://perma.cc/3FCH-M8HD>].

137. See Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 U.C. IRVINE L. REV. 847, 850–52 (2019) (providing specific examples of how high property tax assessments negatively impacted recipients).

white people to live in neighborhoods that command lower sales prices yet are assessed at overstated values.¹³⁸

These inequities across racial groups are further intensified via the homestead exemption and valuation appeal processes. Few local governments apply homestead exemptions—which shelter a portion of the assessed value of a primary residence from property taxation—automatically, and low-income Black and Latine communities are the least likely to request them.¹³⁹ Similarly, while assessment appeals have a high success rate, these same low-income communities are the least likely to file such appeals.¹⁴⁰

The law of partition reflects yet another of the racial injustices in the property system. When interests in a parcel of land are passed on via intestate succession, they splinter by law into smaller and smaller shares. Black owners of such “heirs’ property” are often at a special disadvantage when one interest holder seeks partition of the property by sale, for they lack the resources necessary—and are unable to use their heirs’ property as collateral to secure a loan—to competitively bid against developers at auction.¹⁴¹

Compounding the problem, discriminatory laws in the past have continuing consequences in the present.¹⁴² Property laws

138. See Carlos Avenancio-León & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation* 15 (Dec. 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465010 (documenting that Black and Latine homeowners paid ten to thirteen percent more in property taxes than the white owners of similar houses subject to the same taxation policies).

139. Keith Ihlanfeldt & Luke P. Rodgers, *Explaining Racial Gaps in Property Assessment and Property Taxation* 11 (July 2021) (unpublished manuscript), https://ihlanfeldt.com/wp-content/uploads/2021/08/racial_disparities_property_tax_July20211590.pdf [<https://perma.cc/8VDX-USYS>] (“White homeowners . . . have a higher take-up rate of the homestead exemption . . .”).

140. *Id.* at 17.

141. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001); Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 29–31 (2014).

142. See, e.g., Dorothy Roberts, *Race*, in *THE 1619 PROJECT: A NEW ORIGIN STORY* 56 (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021) (countering the theory, prominently espoused in a 1965 report by Daniel Patrick Moynihan, that “Black mothers were responsible for the disintegration of the Black family and the consequent failure of Black people to succeed in America,” by explaining that “hundreds of years of state-imposed

are “sticky.” Even if all intentional discrimination stopped for good from this point forward, we would still be living with racially unequal distributions of property because some persons would be starting the “race of life” leagues ahead of others. And it is not a violation of property rights to set rules that can, over time, redress these historically-grounded injustices. On the contrary, doing so would *respect* property rights by ensuring that they are not unjustly denied to some because of invidious discrimination. An antidiscrimination norm can prompt implicit or explicit disparate impact analyses across the full gamut of property laws to assure that certain segments of the population are not being excluded disproportionately from access to the property system and from the essential resources needed to live in dignity and comfort. In turn, by drawing attention to racially discriminatory denials of opportunities to acquire property, such a norm places on the table the question of what obligations of reparation we have today to counteract the present-day effects of unjust property laws of the past.

C. PROPERTY NORM #3: CREATING REALISTIC OPPORTUNITIES

If we are to treat people with equal dignity, we must ensure that it is readily possible for them to earn a dignified living.¹⁴³ Our system, thus, must create *realistic opportunities* to earn an adequate income and to accumulate wealth to pay for a dignified life’s necessities. This is a monumental undertaking. Any effort to ensure such realistic opportunities would take multiple generations, even if the state were to proceed with all deliberate speed in advancing justice-inspired property reforms. Drawing on imagery employed by Brian Barry, we can understand as much by envisioning runners on the starting blocks of a track.¹⁴⁴ Seeking to determine the extent to which runners have a realistic opportunity to win a given race is not simply a matter of looking ahead to the runners’ performance between the starting blocks and the finish line; it is rather, in far more substantial

hardship and unequal treatment made such success nearly impossible for most Black people”).

143. HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 72 (2021) (“The first requirement from a liberal legal system that adopts property for the critical purpose of promoting self-determination is to afford everyone the material, social, and intellectual preconditions needed for self-authorship.”); Hanoch Dagan, *Liberal Property for Skeptics* 11–12 (Feb. 4, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3779397> (contending that property regimes are justifiable only if they make it possible for everyone to acquire ownership).

144. BRIAN BARRY, *WHY SOCIAL JUSTICE MATTERS* 44–45 (2005).

part, in looking back on the vastly differentiated nature of the resources those runners bring to the starting blocks at the outset of the race.¹⁴⁵ That a runner is crowned the victor is not adequate evidence that said runner is the most meritorious if the opportunities to achieve merit are unequal.

The process of resource differentiation begins early, and the differentiations accumulate over time. Consider, for instance, the reality that many women in the United States do not have access to prenatal care, for such sessions can be expensive and require flexible work hours to attend.¹⁴⁶ The disadvantages to a child stemming from the lack of prenatal care are magnified where paid leave for the mother is limited (if it exists at all) and affordable high-quality childcare is lacking.¹⁴⁷ These magnified disadvantages are carried by the child into an educational system in which schools are often funded through the taxation of properties within school districts that are homogenously arranged by income. This process of perpetuating cumulative inequality is the product of social institutions like the property system. A society dedicated to the development of realistic opportunities to earn an adequate income and to amass wealth to pay for a dignified life's necessities must reverse the disadvantages that children carry with them as a result of their home and neighborly environments. Those disadvantages were created by law, and they can be reversed by law reform.

We must consider both supply-side issues and demand-side issues. We cannot, for example, overcome disadvantage simply by increasing the supply of affordable housing; we also need to ensure that people have adequate incomes to pay for that housing. On the supply side, reform might mean adjusting zoning laws to jettison mandatory parking requirements, minimum lot sizes, and bans on the construction of multifamily housing, all of which exclude people unless they can afford a single-family home

145. *Id.*

146. See Stefanie Romine, *Too Many Mothers Are Unable to Access Prenatal Care—A New Program Aims to Change That*, USA TODAY (Feb. 25, 2021), <https://www.usatoday.com/story/sponsor-story/better-stats-for-all/2021/02/25/too-many-mothers-unable-access-prenatal-care-new-program-aims-change/4573433001> [<https://perma.cc/S9XL-VZTC>] (citing expense of health care for prenatal care).

147. See Derek Thompson, *Why Child Care Is So Ridiculously Expensive*, ATLANTIC (Nov. 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/why-child-care-so-expensive/602599> [<https://perma.cc/WR47-9CL9>] (analyzing how child care has become so expensive).

on a large tract of land.¹⁴⁸ It also might mean adopting inclusionary housing policies or regulating rents so they provide landlords with a reasonable return on their investment while enabling people toward the bottom of the economic ladder to secure housing.¹⁴⁹ Yet even if all of these supply-side proposals were fully enacted across the nation, we would still have a major problem: not enough people could afford that housing.¹⁵⁰ The costs of housing are simply too high relative to incomes to solve the affordable housing problem on the supply side alone.¹⁵¹ We need to focus on the demand side as well. We have to think about laws that can boost income and wealth for those who have been denied them, rather than to continue to sponsor laws that constrain wages while making it illegal to construct the types of housing that people on those wages can afford. We have experienced increasing incomes and reductions in poverty through various demand-side laws such as minimum wage laws, labor laws, and government grants.¹⁵² We know how to increase incomes and reduce poverty; what we need is the will to adopt the policies that will do so. Only by considering the opportunities issue from both the supply side and the demand side will property reforms generate meaningful progress toward ensuring that all have the income and wealth sufficient to afford a dignified life's necessities.

148. In most U.S. cities, ordinances preclude the construction of duplexes, triplexes, and larger multi-family units on more than seventy-five percent of land zoned residential. Kahlenberg, *supra* note 126. These ordinances generate not only the housing segregation described in the text; they also, by lengthening commutes and thereby increasing the emission of greenhouses gases, accelerate climate change. See Kathleen McCormick, *Rezoning History*, LINCOLN INST. OF LAND POL'Y (Jan. 16, 2020), <https://www.lincolninst.edu/publications/articles/2020-01-rezoning-history-minneapolis-policy-shift-links-affordability-equity> [<https://perma.cc/PV7R-JLFV>] (explaining that “higher density is good for social and economic diversity and for climate resilience”). Minneapolis represents an outlier, having recently eliminated zoning districts that exclude all but single-family homes as a matter of housing affordability, environmentalism, and racial justice. *Id.*

149. Jenny Schuetz, Rachel Meltzer & Vicki Been, *Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets in the United States*, 48 URB. STUD. 297, 320–22 (2011).

150. See SCHUETZ, *supra* note 17.

151. *Id.*

152. See, e.g., Heather Long & Amy Goldstein, *Poverty Fell Overall in 2020 as Result of Massive Stimulus Checks and Unemployment Aid*, *Census Bureau Says*, WASH. POST (Sept. 21, 2021), <https://www.washingtonpost.com/business/2021/09/14/us-census-poverty-health-insurance-2020> [<https://perma.cc/Q2ML-VDU9>] (reporting on how COVID relief reduced poverty).

And when one conceives of a *dignified* life, it may well behoove us to broaden the goal of meeting the needs of those who are paid low incomes and lack wealth to include closure of the *gap* between these persons' incomes and wealth and the incomes and wealth of those who are far better advantaged economically. Closing this gap can serve a range of important objectives beyond increasing the buying power of the disadvantaged.¹⁵³ Among many others, these objectives include the avoidance of shame: even where people are no worse off with respect to the resources they have at hand in absolute terms, there are demoralizing consequences when their resource position grows more distant relative to the resource position of others.

Consider, for a simple illustration, the matter of teeth. Since the advent of advanced dentistry after the Second World War, many Americans have received dental care that has produced a rather homogenous neat-lined bite.¹⁵⁴ In the wake of this movement, though, lie those who cannot afford such dental care and have, therefore, lost social standing without changing their absolute position.¹⁵⁵ A similar story could be told with respect to any number of other resources, from cars to mobile phones to the ability to order food from a restaurant. And inequality, of course, produces many types of impacts beyond inducing shame, including shaping what we aspire to, the extent to which we place trust in others, and our faith in a democratic political system.¹⁵⁶ Vast inequality in wealth harms not only the poor, but the rich as well. Where rich people believe that they deserve their wealth

153. See Good Morning, Bad News, *100% Supertax on Billionaires? feat. Robert Reich*, YOUTUBE (Oct. 9, 2021), https://www.youtube.com/watch?v=zq0H2CRN8Fw&list=FLK3fN4PWcPWH5skJmnM_9LQ&index=20 (defending a maximum wage).

154. BARRY, *supra* note 144, at 173; *cf.* Garry A. Rayant & Mario A. Vilardi, *The Evolution of Advanced Dental Care*, DEAR DR., <https://www.deardr.com/articles/the-evolution-of-advanced-dental-care> [<https://perma.cc/4WCN-JKWS>] (surveying advances in dentistry).

155. BARRY, *supra* note 144, at 173.

156. On aspirations, see JULIET SCHOR, *THE OVERSPENT AMERICAN* 14 (1st ed. 1998) (reporting that the incomes to which people aspired in 1994 were double that of the incomes to which people aspired in 1986). With respect to trust, see Henrik Jordahl, *Inequality and Trust* 17–18 (Rsch. Inst. of Indus. Econ., IFN Working Paper No. 715, 2007) (concluding economic inequality correlates with social distrust). With respect to democracy, see Oren M. Levin-Waldman, *How Inequality Undermines Democracy*, E-INT'L RELS. (Dec. 10, 2016), <https://www.e-ir.info/pdf/66901> [<https://perma.cc/TLM5-D254>] (concluding economic inequality negatively impacts democratic institutions and civic participation).

solely because they worked hard to take advantage of wealth-generating opportunities to which the poor could have but did not avail themselves, it can be difficult for those rich persons to empathize with the poor as equivalent moral beings, to exercise humility, and to show gratitude.¹⁵⁷ Vast inequalities of wealth are thus associated not just with undue shame by those at the bottom, but with an unjustified aura of self-assurance by those at the top. The rub is that a strong conception of realistic opportunities to earn an adequate income and to accumulate wealth to pay for a dignified life's necessities is bound up with the view that poverty should be defined in relative terms.¹⁵⁸

D. PROPERTY NORM #4: RECOGNIZING LAW'S INTERDEPENDENCIES

Defining disadvantage in relative terms is consistent with an ethic of social solidarity: people who live together share a common fate and their lives are inherently intertwined.¹⁵⁹ It follows that, in thinking about matching incomes and wealth to a dignified life's expenses, we cannot confine our attention to the laws that have traditionally been viewed as the keys to working relationships, such as a narrowly defined subset of the common law of contract and property. The bargaining power of employees and their ability to obtain skills and to work in the marketplace depends on a whole host of property-adjacent laws and institutional structures, including labor and employment law, tax law, corporate law, local government law, family law, elder law, disability law, health law, consumer protection law, mortgage lending law, zoning law, antidiscrimination law, and environmental law, among others. And, importantly, these laws and structures are interdependent: the mismatch between incomes and wealth, on one hand, and expenses, on the other, cannot be alleviated if we tackle them in isolation. We must, instead, look to the *full range of laws* that affect the ability of workers to obtain essential property.¹⁶⁰

157. On leaning too heavily on the notion of personal responsibility to explain resourced positions, see *supra* notes 6–7 and accompanying text.

158. See, e.g., Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 LAW & CONTEMP. PROBS. 285, 289–97 (2010) (discussing the importance of measuring relative poverty).

159. See Lynda L. Butler, *The Importance of Viewing Property as a System*, 58 SAN DIEGO L. REV. 73, 84–85, 96–97 (2021) (arguing for a collective view of social welfare).

160. See, e.g., Wash. Post Ed. Bd., Opinion, *Sharing the Wealth*, WASH. POST

These laws must, in concert with one another, set the minimum standards for all market relationships. It is inconsistent with the values of liberty, equality, and democracy, for instance, for employers to establish and maintain exploitative relationships with their workforce. Employers must pay a living wage. This might be accomplished through, for instance, not only reviving unions, but reconstructing them as far more inclusive environs than their rather sordid history of racialized exclusion reveals.¹⁶¹ Progress toward a living wage might also be advanced through the provision of high-quality, affordable childcare and health care for all. Robust training and retraining programs that equip persons with the skills that the current day's employment market needs could play a role, too.¹⁶² And if government programs ensure a basic safety net financed through various forms of taxation, then competitive pressures to pay workers as little as possible will not result in their earning too little to live on. It is a matter of policy to choose the right combination of wage policy and government benefits, but the combination should be geared toward enabling every person to live with dignity. If, particularly in such a reformed system, employers are not able to pay their workers a living wage, then those employers do not have a viable business model. We may, in any event, choose to subsidize some of these employers—perhaps, for instance, those operating small businesses central to localities' culture and character—by helping them pay their workers; such subsidies, though, should not be seen as a boon only to workers but to employers, as well.¹⁶³

(July 16, 2021), https://www.washingtonpost.com/opinions/2021/07/16/sharing-the-wealth/?utm_campaign=wp_week_in_ideas&utm_medium=email&utm_source=newsletter&wpisrc=nl_ideas [<https://perma.cc/MYT5-YZ8T>] (highlighting a collection of articles that discuss the shortcomings that led to the wealth gap and potential solutions).

161. See Desmond, *supra* note 10, at 181–83 (explaining how employers leveraged enslavement to divide workers across racial lines as a strategy and that “white-led unions embraced it until it was too late, undercutting their movement and creating conditions for worker exploitation and inequality that exist to this day”).

162. Some European countries spend more than one percent of their Gross Domestic Product on such active labor market policies. The United States spends approximately 0.1%, which, Isabel Sawhill notes, is less than we spend on prisons. ISABEL SAWHILL, *THE FORGOTTEN AMERICANS: AN ECONOMIC AGENDA FOR A DIVIDED NATION* 111–13 (2018).

163. If we want certain businesses to exist despite their inability to pay their employees a living wage, we can make public decisions to subsidize them through direct supports to those businesses or via wage supports for employees,

When we denigrate workers about their inability to make financial ends meet, we are pretending that we can live without them. But the truth is, as the so-called “unskilled” yet “essential” workers of the pandemic so starkly revealed, we cannot. We are all vulnerable, and we are all mutually reliant on others to build resilience against our vulnerabilities.¹⁶⁴ Attending to the interlocking network of property laws is the only way to ensure that every person has the property resources essential to a dignified life.

* * *

The pandemic has highlighted not only how interdependent human beings are, but how so many lack the property that is essential to sustaining them in hard times and ordinary times alike. With the understanding that the distribution of property is determined not only by individual choices, but by our property law system, it becomes incumbent upon us to adopt norms to guide reshaping that system’s rules to ensure that every person has access to essential property. These norms include attention to circumstances of the labor market, full acknowledgment of the current effects of racially discriminatory practices and laws, the need to create realistic opportunities for the acquisition of property, and attention to the full range of laws that affects such acquisition.

CONCLUSION

In a memorable episode of *Star Trek: The Next Generation*, the ship’s physician, Beverly Crusher, is transported to another dimension where her crewmates begin disappearing one by one and she is the only person who remembers those who are gone.¹⁶⁵ At first, Crusher turns inward to explain this predicament. As

such as the Earned Income Tax Credit or a negative income tax. See Oren Cass, *A Better Wage Hike*, U.S. NEWS (Aug. 19, 2015), <https://www.usnews.com/opinion/economic-intelligence/2015/08/19/wage-subsidies-are-better-than-raising-the-minimum-wage> [https://perma.cc/ADQ9-PK9J] (discussing policy alternatives to the minimum wage to increase wages).

164. Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 17–21 (Martha Albertson Fineman & Anna Grear eds., 2013).

165. *Star Trek: The Next Generation: Remember Me* (television broadcast Oct. 22, 1990) [hereinafter *Remember Me*].

the lone person to remember those crewmembers who have vanished, she ponders whether there is something wrong with her. Is she, she wonders, losing touch with reality?

Workers in the United States have been conditioned to think in a manner consistent with Crusher's initial instincts—that if they do not have enough income and wealth to afford a dignified life's necessities, there must be something wrong with them.¹⁶⁶ But what if they are doing everything anyone could reasonably expect of them, and they are still not able to make ends meet?

Crusher, for her part, came to recognize that she was not to blame. She shifted her focus to her environment. Suppose she was correct that her crewmates were disappearing; what might actually explain that? She had a revelation: "If there's nothing wrong with me . . . maybe there's something wrong with the universe."¹⁶⁷ That revelation led Crusher to diagnose the problem—that she was caught in a bizarre time-space bubble—and it allowed her to emerge from it, ultimately with the help of her crewmates, who, it turns out, had been frantically trying to save her.

The moral of Crusher's escapade is akin to the one shared here: if there is nothing wrong with workers who lack the resources necessary to secure what is essential to living a dignified and comfortable life, then maybe there is something wrong with the universe. Maybe, that is, the fault lies not in those who are struggling, but with the legal system itself. Maybe those struggling—like the full-time bank teller, so ably depicted by Representative Porter, who is \$567 short each month¹⁶⁸—cannot acquire property because the rules in force allocate the property they need and deserve to someone else.

The notion that Americans will be okay if they just get a job and work hard is a fantasy. This tale has generated an ideology that makes people believe that they are solely responsible for their own problems and that our system of laws and public policies is not placing stumbling blocks in their path. In turn, this line of thinking can cause those who are well-off to lack empathy for those who are not. People believe this fantasy because they have been repeatedly told it is so. Those who are the purveyors of this myth have gone to a lot of effort to make us believe that "the system works" and that opportunity is there for the taking. But, as social critic Dara Horn remarks, "[b]elieving in a fantasy

166. See *supra* notes 57–58 and accompanying text.

167. *Remember Me*, *supra* note 165.

168. See *supra* text accompanying notes 1–5.

takes conscious effort.”¹⁶⁹ It requires us to deny our own experience, to participate in our own gaslighting.¹⁷⁰

The truth is that we are dependent on each other. And that does not mean that workers are dependent on vigorous entrepreneurs; it means that businesses cannot make profits or provide goods and services without the people who do the work to get this done. Recognizing our dependence on others can prompt us to reflect on what we owe the fellow members of our communities. Only by engaging in such reflection will we be able to see that everyday workers need not rise to some artificial plateau to be appreciated; they should be appreciated and able to live in dignity *in place*.

To ensure that people have the property they need to thrive, we need to rethink the relationship between property law and society. We need to conceive of property as a social *and a legal* institution—one that includes all laws that affect access to resources. Property law depends on self-reliance, but it also depends on other values. We have a range of choices to make about the kind of civic society in which we want to live. This society must appreciate the indispensable contributions of its workers by putting structures in place to assure that they all have access to wages and other resources necessary to a dignified life. There *is* something wrong with the universe, and it is time to change the rules of the game so that a bank teller in southern California need not confront living costs far greater than her income and wealth. That teller has a right to a dignified and comfortable and joyful life, and our legal system must adopt rules and institutions that can make that possible for her and everyone in her shoes.

169. DARA HORN, PEOPLE LOVE DEAD JEWS: REPORTS FROM A HAUNTED PRESENT 101 (2021).

170. Jessica Wildfire, *We Can't Afford to Live Anymore, and the Rich Are Gaslighting Us*, AN INJUSTICE! (Mar. 10, 2021), <https://aninjusticemag.com/we-cant-afford-to-live-anymore-and-the-rich-are-gaslighting-us-ac8e5bc9b455> [https://perma.cc/4VG5-PYTE].