13. Democratic property: things we should not have to bargain for

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INTRODUCTION

What are property rights like in a free and democratic society that treats each human being with equal concern and respect? That question encapsulates the democratic approach to property rights and property law. The key normative concepts are liberty, equality, and democracy. Those values implicate related norms, especially fairness, justice, respect, dignity, self-determination, and human flourishing. A free and democratic society not only has a democratic political system but also regulates social relationships to ensure liberty and equality.

In a free and democratic society, *liberty* means that every person is free to chart the course of their own life, to decide what to believe, what to value, and how to live.[1] Liberty is not meaningful unless one has legal entitlements that are necessary preconditions for exercising freedom. Those include legal rights of security from unwarranted harm by others, access to property, and the social supports that will enable each person to exercise autonomy.[2]

Equality means that every human being is entitled to be treated with dignity. Human beings are irreplaceable and of infinite worth. The equality principle necessarily helps define the liberty principle because people are only free to act in ways that are compatible with the equal rights and freedoms of others. Both equality and liberty require a just distribution of property as well as the social supports necessary to ensure equal opportunity to exercise liberty.

Democracy means adherence to the practice of "government of the people, by the people, [and] for the people."[3] That includes some commitment to representative or republican government that enables citizens to engage in collective self-determination. Freedom in a democratic society does not entail only the freedom to do what you like in your private life consistent with the equal freedom of others, but also the freedom to act with others politically to shape the laws that govern human interactions by setting minimum standards for markets and for social relationships. Legislation and regulation shape the contours of social interaction to ensure that it is free, safe, and consistent with equal dignity. While elected officials have the power to enact regulations, democratically enacted laws must be

[1] *See* CHRISTOPHER MCMAHON, REASONABLENESS AND FAIRNESS: A HISTORICAL THEORY 108 (2016) ("distributive justice plays a role in fostering the pursuit by the members of a polity of distinctive lives of which they are the authors").

[2] On the need for social support to develop autonomy, *see* GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING (2018).

[3] Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm.

consistent with fundamental human rights, especially rights to liberty, equality, and dignity. Government *by* the people is not government *for* the people if it denies individuals the "full promise of liberty," as Justice Kennedy put in the *Obergefell* decision.[4]

The basic democratic values of liberty, equality, and democracy are open to interpretation and spirited disagreement. Moreover, these values may clash in ways that require hard choices about how to define them and which value will prevail in different social contexts. Nonetheless, these values place very real constraints on the rights and liberties that a free and democratic society can recognize through its legal system. They limit the types of property arrangements that are morally acceptable. They provide guidelines for debate about contested issues. Not every property arrangement can be justified by reasons that are compatible with democratic norms and values. The key norms of liberty, equality, and democracy regulate not only the types of property rights that can be recognized by law, but also the types of social relationships those rights enable and the sets of rights and obligations that exist in various relationships.

We are talking about a society of free and equal persons who control their own destinies, both as individuals in their private lives and as citizens acting collectively in their political lives; they simultaneously acknowledge that they have obligations to other human beings who have equal rights to flourish and to participate in the self-governance of political life. That kind of society can exist only if both social relationships and political institutions exhibit certain features. Those features shape the contours of property law and property rights. Free and democratic societies regulate the distribution and use of property so as to ensure that use, control, and transfer rights are consistent with basic democratic values. Within those democratic constraints, people are free to create new types of property rights and to use contractual relationships to share and limit those rights in ways that serve human interests and needs. It is the function of property law to define the basic types of allowable property rights and to facilitate their use and transfer so as to protect all persons and ensure that persons are treated fairly and equally.

The democratic approach to property brings these moral and political principles into the property law system. Property is not merely an institution designed to satisfy preferences or to promote wealth or happiness or efficiency; it is a structural component of a polity that values both liberty and equality and defines the sovereign to be "the people" rather than a monarch or an aristocracy. All the inherent contradictions and conundrums of democratic politics permeate property law and property rights. Collective power is used to pass statutes that define allowable property rights, but that lawmaking power must not be allowed to infringe on fundamental rights. Furthermore, property rights are consistent with democratic values only if their distribution enables all persons to exercise core liberties, to enjoy equal dignity, and to be treated fairly in their relationships with other owners and nonowners.

Private law focuses on relations among persons while public law focuses on relations between persons and government. At the same time, public law permeates the private law system, setting its outer boundaries and shaping the internal ways that private law regulates human relationships.[5] Private law is a structure within which persons of equal

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[4] Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

[5] *See* Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 Iowa L. Rev. 1257 (2014).

worth and dignity exercise their individual and collective liberties. Because it is built on the core values of liberty, equality, and democracy, private law enables freedom while defining structural constraints which are intended to ensure that the distribution, definition, and exercise of individual rights is consistent with those fundamental human values.

While property law allows great freedom to transfer and divide up property rights, it also defines *things we should not have to bargain for.* It does this through both common law and statutory law designed to ensure fairness within social relationships. Things we should not have to bargain for are *things we own.* Our property rights are a platform from which we live and relate to others; they set the stage for our exercise of freedom.

This does not mean that all private law issues can be reduced to debates about norms such as liberty and equality. Many practical and normative questions remain that involve evaluation of facts, evolving sensibilities, consequences of adopting different rules of law, and allocations of power among different law-making officials. It does mean that interpretation of fundamental values and their application through specific legal rules and social contexts is an activity that sets the contours within which these other questions are considered and resolved.

1. A HISTORY LESSON

To understand the democratic approach to property, it will help to focus on what kinds of property rights are not democratic. To do that, we need only consult history. Doing so will expose the role that property law plays in the private law system of a free and democratic society. Property law, as traditionally taught in American law schools, notes the importance of a statute passed in 1290 during the reign of Edward I, called *Quia Emptores.* That statute was a reaction to the Norman invasion of England in 1066 by William the Conqueror.[6] This is, so to speak, ancient history. What relevance could it possibly have today? The answer is that our modern property law system is designed to prohibit feudalism and prevent its re-emergence. To do that, modern property law prohibits property and contractual arrangements that are incompatible with the values of a free and democratic society.

William the Conqueror took England by force of arms. After conquest, he treated all England as his private property. He was both ruler and owner of all the land. Everyone was, so to speak, living in his house. Property law was what William said it should be. Sovereignty and property were not only linked, they were the same thing. He was the master of all. His word was the law. He was the landlord of all. When you are in his house, you follow his rules.[7]

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[6] Joseph William Singer, No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis 32–57 (2015).

[7] David Carpenter, The Struggle for Mastery: The Penguin History of Britain, 1066–1284, 86 (2003) (explaining how William brought "all secular land into the hands of the king," making him the "head of a tenurial hierarchy with all its attendant rights and revenues").

Rulers cannot hold power if they do not combine force with favor.[8] A ruler needs laws that are not so oppressive that people rebel. Doing so requires ensuring the well-being of the people, at least to some extent. It also requires getting the loyalty of anyone who might challenge the ruler's power. King William I did this by parceling out the country to his trusted men, giving them both property tenure and the right to rule in different parts of the country. He divided up the country in exchange for asking his vassals to pledge fealty to him and defer to his rule, and to help him protect the country from invasion and from revolution. Service to the king was the price William's trusted men paid for becoming lords of the realm.

The lords too needed services from underlings to enable the lords to hold the land, to rule their subjects, and to comply with their promises to the king. The lords made arrangements with vassals of their own, and so on, down the feudal ladder.[9] These feudal relationships parceled out land and the right to use it, but they also created relationships of servitude. *Everyone was someone's servant.* Many relationships of fealty defined service obligations by contract. However, the people at the very bottom of the ladder who lived on the land had no contractual relations with their lords at all; they were simply *in servitude* to the lord of the land and subject to his will. They did not have the benefit of promises in exchange for service; all they had were obligations to serve. They were subjects, not citizens. Nothing but custom and the lord's will made them different from slaves.

Feudal property law was obviously very different from property law in a free and democratic society. First, there was no equality before the law. Feudal law divided people into classes, distinguishing nobility from commoners, and both from the sovereign monarch, and all of those from church officials. Men and women had vastly different roles and opportunities. Feudal relationships built status hierarchies. There are no "persons"; rather, there are different "statuses" that rank human beings into different classes. One cannot change one's stars and move, by one's own efforts, from one class to another. A commoner cannot become a noble unless the king makes him a noble. All relationships are hierarchical and deferential. Every person also occupies a status as a vassal or servant to some lord. You are not a citizen, you are the lord's man. One was subject to the lord's will, limited by laws created and enforced by royal courts.

Second, a feudal society denied individuals the freedom to move and start over elsewhere. One could not escape a feudal relationship on one's own. Feudal relationships were not like modern contractual relationships where one is free to change one's mind and breach a contract so long as one is willing to pay damages for doing so. In contrast, you cannot escape a feudal relationship unless the lord agrees to release you from the

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[8] Niccolò Machiavelli, The Prince 90 (Luigi Ricci & Eric Vincent trans., New American Library 1952) (1532) ("one ought to be both feared and loved"); *id.* at 92 ("[T]here are two methods of fighting, the one by law, the other by force: the first method is that of men, the second of beasts; but as the first method is often insufficient, one must have recourse to the second. It is therefore necessary for a prince to know well how to use both the beast and the man"); *id.* at 95 ("The prince must … avoid those things which will make him hated or despised").

[9] Many sources explain the historical details of the feudal system. *See generally* Carpenter, *supra* note 7. *See also* Frank Barlow, The Feudal Kingdom of England, 1042–1216 (5th ed. 1999); Richard Huscroft, Ruling England 1042–1217 (2005); Edmund King, Medieval England: From Hastings to Bosworth (2009); A.W.B. Simpson, A History of the Land Law (2d ed. 1986).

obligations. One has no right to sell land or move elsewhere without the lord's consent. One was a servant, not a free citizen.

Third, political power in a feudal society is concentrated in the hands of the king and his lords (and the church). Power does not rest in the people, who have no formal role in government; the people are subjects, not citizens.

The picture I have drawn is a gross exaggeration. The church did preach that human beings have souls; that is the germ of the idea that every human being is created equal, with equal rights to life and liberty. Ecclesiastical officials served as the conscience of the king, seeking sometimes to prevent oppressive actions and laws to ensure the safety of the soul of the sovereign ruler. There was freedom (of a sort) to shape the feudal relationships by agreements between lords and vassals. The lords did form a council that became Parliament, which passed laws limiting the power of the king. Conversely, the king created royal courts that increasingly protected the property rights of commoners, protecting them from the arbitrary power of their lords. Eventually, the House of Commons allowed the people to share in running the government.

I have exaggerated this picture of feudalism to dramatize the practical, philosophical, and normative differences between a feudal property system and property in a free and democratic society. Modern property law is based on the idea that each person is free and equal; it regulates the substantive terms of contracts and prohibits property arrangements that would recreate the unfree hierarchical servitude arrangements typical of a feudal society. This contrast between feudalism and democracy highlights the ways that modern property law promotes democratic values by adopting structural constraints on the kinds of property rights that can be validly recognized.

We can see this by looking at the effects of the statute of *Quia Emptores* in 1290. At that time, the lords were handing off their estates to vassals in ways that denied feudal dues otherwise owed to the king. To stop them from doing that, *Quia Emptores* prohibited further subinfeudation, instead requiring all transfers to be horizontal in nature. Henceforth, there would be *sales* of property rather than new *lord-tenant* relationships. Land became, for the first time, fully "alienable." Over time, that had the effect of removing many of the lords from the feudal ladder and limiting their powers over their tenants.

That law reform, among others, effectively pushed power downward from the lords to the common people. These law reforms gave ordinary people greater security in their property rights and greater freedom to use their own property as they saw fit. They enabled servants to become owners who had the freedom to sell their land and move elsewhere without the lord's consent. That gave ordinary people greater liberty to control their own destinies in their personal lives. They also gained the liberty to shape their lives by electing representatives to the House of Commons, which now shared lawmaking power with the House of Lords. The trajectory of history over many centuries changed from one of class distinctions, hierarchy, monarchy, and servitude, to one of liberty, (greater) equality, and (limited) democracy.

2. DEMOCRATIC THEORY

The details of this history do not matter for the moment. What matters is that modern property law is premised on structural rules designed, first, to ensure *equal status* of all persons; second, to ensure *liberty* for all persons so they can choose how

to live, where to live, and what to do; and third, to enable all citizens to participate in *democratic governance.* Those norms have been crystallized and made popular through philosophical stories. The most important for the United States are the social contract stories of Thomas Hobbes and John Locke, modernized by John Rawls, as well as the American constitutional story that abolishes titles of nobility, embraces the idea that all human beings have equal rights to life and liberty, and makes the people the sovereign.

Thomas Hobbes rejected the idea that people fit into classes with inherited status. Instead, he imagined that government grew from a state of nature in which every person had equal freedom. He assumed that people wanted the things needed for life and security and that they were self-centered, combative, and insatiable. The result was a "time of Warre, where every man is Enemy to every man … and which is worst of all, continuall feare, and danger of violent death: And the life of man, solitary, poore, nasty, brutish, and short."[10] There was a reason for his pessimism. Hobbes lived through the beheading of King Charles I and the subsequent civil war and his own banishment to France.[11] He knew what it was like to live in a time of civil war and in a place without a clear political authority to which everyone gave deference.

Hobbes therefore created a normative structure that envisioned a social contract among all men who agreed to a central government. He assumed that government would be a monarchy, but it could just as well have been a democracy. What mattered was the centralization of the legitimate use of force in a sovereign ruler that all would obey. Each person had reason to understand why it was important to obey the ruler; the alternative to obedience was constant war, death, and poverty.

While the social contract Hobbes envisioned gave absolute power to a ruler, he also assumed that there would be many limits on the power and ability of the ruler to become a despot, including fear of rebellion and concern for the ruler's immortal soul. A hundred years later, John Locke modified Hobbes' social contract idea.[12] Unlike Hobbes, Locke was not convinced that rulers could be trusted to protect the rights of the people. Locke argued, instead, that a rational people would never confer absolute power on the sovereign. Because the only reason they created the sovereign was to protect their rights, they would not give the sovereign the legitimate authority to infringe on those rights.

The core ideas in the social contract story are (a) equal status for all persons; (b) equal freedom to seek the things one needs to live comfortably and to follow one's own conscience; (c) equal rights in creating a political government that will set rules so that people can live together in peace and so they can achieve prosperity. Those were the ideals adopted by Americans in the Declaration of Independence and the U.S. Constitution. Those documents together affirmed individual rights to life, liberty, and the pursuit of happiness, and the power of "we the people" to institute governments to promote our interests and values and to ensure the public welfare.

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[10] Thomas Hobbes, Leviathan 89 (Richard Tuck ed., Cambridge Univ. Press, 2d rev. student ed. 1996) (1651).

[11] 2 Alan Ryan, On Politics: A History of Political Thought: From Herodotus to the Present 414–16 (2012).

[12] John Locke, Two Treatises of Government (Peter Laslett ed., 1988) (1689).

John Rawls modernized this social contract story by suggesting that we adopt a "veil of ignorance" to ensure that the contract actually creates a society of free and equal persons.[13] He asks us to ask ourselves what arrangement of property, liberty, and government we would favor if we did not know what role we would play or what personal, social, economic, or familial circumstances we would find ourselves in. That technique was designed to ensure Golden Rule reasoning so that we could imagine accepting a set of arrangements without knowing morally irrelevant things about ourselves such as our race, sex, religion, capacity, and so on.

Philosopher Brian Barry further refined this vision by asking what social and legal arrangements would be necessary for us to have *genuinely* equal opportunity.[14] Barry used history and facts to show how unequal opportunities actually were in the United States at the time he wrote. For equal opportunity to be *really* equal, we must imagine that we would not know whether we would be growing up in a poor or a rich family, with two parents or only one (or none), a rich or poor community, and so on, and then ask whether we would be indifferent as to the circumstances, family life, job prospects, and so on that we would face if we grew up and lived in those circumstances. By this thought experiment, Barry turned equal opportunity from a conservative justification for existing relationships into a radical principle that would justify enormous changes in property distribution, educational and work opportunities and rights, social welfare programs, and laws of inheritance.

Jeremy Waldron has argued that the norms of freedom and equality require property to be distributed to every person so as to ensure that each person has the material basis to exercise freedom. Waldron explains that "anything a person does has to be done somewhere."[15] If one has no place to do something, then one is not free to do it. This means that liberty requires space where one can live and exercise freedom. No property, no liberty.[16]

Laura Underkuffler-Freund agrees that property law concerns things needed for survival, and that, unlike other legal rights, property is allocative in nature; giving one person control over a parcel of land excludes others from controlling that same parcel.[17] If those things are true, then a free and democratic society must adopt property law rules

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[13] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001); JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, A THEORY OF JUSTICE (1971).

[14] BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS (2005). *Cf.* Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085 (2017) (explaining when the law should give greater [asymmetrical] protection to groups that face barriers to entry in order to achieve equal opportunity).

[15] Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 302 (1991).

[16] JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 410–11 (1988) ("[T]he distribution of property has a direct impact on the distribution of negative liberty. A person who owns nothing in a society (where everything is privately owned) is not at liberty, in a negative sense, to make use of anything—indeed for everything that he *might* use, someone else has a right that he should refrain from using it, and it is a right which they are entitled to enforce. If it is true that all (or most) human actions require a material component over and above the use of one's own body—a location, for example, or an implement—then the unfreedom in a negative sense of the propertyless man is more or less comprehensive. There is literally nothing or next to nothing that he is free to do.").

[17] Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1038 (1996) ("Property involves *allocation;* with regard to property, *the giving to one person*

which ensure that every person has access to property. Also, the distribution of property cannot be so unequal as to deny equal opportunity to live a free life as a democratic citizen. Because human beings cannot live without resources such as land, food, medical care, income, education, and the like, democratic societies must determine how to distribute and regulate control over those resources to ensure that each person has property sufficient to live in dignity.

Greg Alexander expands on the approaches of Waldron and Underkuffler-Freund by arguing that property law is designed to promote human flourishing and equal dignity.[18] "As a matter of human dignity," he writes, "every person is equally entitled to flourish."[19] This means that every person is entitled to the material and social resources necessary to develop their human capabilities that will allow them to exercise autonomy and become the authors of their own lives.

The U.S. Constitution prohibits any political body from granting titles of nobility.[20] These provisions are not only intended to prevent the creation of a House of Lords and a House of Commons or inherited government offices. They also preserve equality before the law and prevent the division of people into social classes or castes. For that to be true, private law must regulate human relationships to prevent the emergence of caste systems, and everyone must have enough property to establish sufficient independence to participate in social life on an equal basis. Property arrangements must be regulated to ensure that they prevent oppressive power relationships.

To give some everyday examples, this means that homeowners associations must be regulated to ensure that they do not exercise unfair or arbitrary power over individual homeowners. It means that landlords cannot deny tenants the right to marry or have friends over for dinner. It means that people do not have the freedom to abuse their domestic partners. It means that access to markets cannot be denied on the basis of race or sex or religion or disability or sexual orientation or gender identity. Property laws promote efficiency, investment, coordination, wealth creation, and social welfare, but those laws are built on a foundation of rules designed to ensure that social relationships reflect the egalitarian and dignity-based values of a free and democratic society. The democratic approach to property law focuses on defining that foundation.

3. PROPERTY LAW AS A FOUNDATION FOR CONTRACTS

Property and contract law are treated by law schools as almost entirely different subjects even though a great deal of property law involves agreements with regard to control of land. The segregation of these two subjects conveys a number of messages. First, property agreements are subject to technical regulatory rules that limit formation, interpretation, and enforcement, whereas ordinary contracts are not subject to such technical formalities or regulations.

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necessarily denies or takes from another."); *id.* at 1039 ("Property rights are also special because they alone deal with rights that—at their most basic level— are necessary for the survival of life itself.").

[18] ALEXANDER, *supra* note 2.

[19] *Id.*

[20] U.S. CONST. art. I, § 9, cl. 8; §10.

Second, contract and property law are usually presented as having very different core normative structures and norms. The basic principle of contract law is freedom of contract, while the core norm of property law is promoting the alienability of land by limiting the packages of property rights that can be validly created. This difference suggests that property is an area of regulation, whereas contract law is an area of free exchange with few limits on that freedom.

Third, this disjunction between contract and property norms is expressed through alternative histories. Modern contract law is supposedly based on a movement from status to contract; property law is premised on a movement from feudal tenancy to democratic ownership.

The contract story is that the law once defined the obligations of people in contractual relationships. Rather than freedom to choose the terms of your association with others, the law regulated what obligations and rights you would have if you entered a limited set of pre-existing social relationships. The first contract law book in the United States, written by Theophilus Parsons, had sections about contract formation and several other general topics, but most of the two volumes were filled with details about the rights and duties inhering in various established relationships, such as principal/agent, master/servant, guardian/ward, bailor/bailee, master/slave, and so on.[21] One could choose to enter such relationships or not (of course slaves had no such freedom), but once one did agree, one was bound by the terms the law imposed on parties to that type of relationship. One would enter a status and do what was required of someone in that status; there was no real freedom to alter the terms of the arrangement. Over time, the classical notion of freedom of contract became central, and any laws (whether common law or statutory) that denied freedom to choose contract terms was seen as a violation of individual rights to liberty. History represented progress from status to contract, from regulation of agreements to freedom of contract.

"Freedom of contract" as a norm was modified in limited ways in the twentieth century by the doctrines of unconscionability and duress. More importantly, it was altered by statutes that regulate particular types of contracts and ensure minimum standards for particular contracts, such as consumer, employment, insurance, banking, and family agreements. Although statutory regulation of market relationships is quite extensive, contract law, as taught in most law schools, refuses to recognize that fact. Most statutory limitations on freedom of contract are banished to the second and third year of law school, allowing the pristine core of "free contract" to be the key to contract law doctrines taught in the first year.

Property law as taught in law schools, in contrast, tells some version of the story I outlined earlier. The abolition of feudal estates required outlawing feudal arrangements and promoting consolidation of property rights in "owners" who have full freedom to use their own property and to transfer it without any restraint on alienation. Consolidation of power in an owner with broad use powers requires regulating contracts that limit the owner's prerogatives. Property is based on a principle which says that freedom of contract must be limited if we want to have owners with capacious power over their property.

This contrast between the contract norm of "freedom of contract" and the property norm of "alienability" is exaggerated, but it does suggest a few things about the role

[21] Theophilus Parsons, The Law of Contracts (1857).

that property law (broadly conceived) plays in the private law system. First, contract law assumes that *someone else* has distributed ownership of land and other resources so that contracting parties have something to bargain about and some place to engage in economic activity and home life. For people to have things to bargain about, property law has to allocate those things. Contract law also ensures that someone else takes care of providing education and other needed supports for the development of the human capabilities needed for human flourishing.

Second, because people need property to survive, property law must ensure that everyone has *access to sufficient property* so that nonowners are not so desperate that they will agree to whatever terms owners ask of them—no matter how onerous. Otherwise, tenants will become servants of the lords of the land; the have-nots will be forced to agree to serve the haves in order to get access to the things the have-nots need to live … and we would be back to feudal servitude.

Contract law, in other words, assumes that *someone* (or some other area of law) has ensured that there is a sufficiently equal division of property to justify deferring to private bargains. If people have (relatively) equal bargaining power, then an exchange is Pareto superior; both parties are free not to agree (because they have enough to live on and others to contract with and alternative courses of action). They will only agree if they will be better off after agreement than before. In other words, *they are okay* and the contract is only going to make them *better off*. This assumes that someone (or something) else ensures that they are okay absent the contract. *That something else is property law,* which is assumed to have made it such that every potentially contracting party has a starting place of property and capability from which to make their lives better.

Third, contract law assumes that there are background rules that define *things we should not have to bargain for.* Those rules prevent people from simply taking things from other people or coercing them physically. Tort and property law (supplemented by criminal and statutory law) define the baselines and minimum standards within which markets function and within which contractual freedom can be exercised.[22] Contract law can be based on the law of promises (and the general freedom to contract or not to contract) because other areas of law impose obligations on people *in the absence of promises.* Those more fundamental obligations ensure that market relationships will not be exploitative.

This is true only if other areas of law actually do prohibit oppressive and unfair relationships. Many of the regulations that do this are relegated to statutory law that is taught in the upper-level courses in law school, including the law of corporations, bankruptcy, secured transactions, securities regulation, labor and employment law, environmental and land use law, banking law, antidiscrimination law, insurance law, and so on. All those areas of law combine contract and property principles; they are contractual because they involve agreements, but they are property-like in that the law prescribes minimum standards for various social and market relationships to ensure that they are compatible with human dignity and that they do not impose undesirable externalities on third parties. These "property"-type rules create minimum standards for market relationships to protect justified expectations, to ensure a basis from which contractual freedom can be deemed

[22] SINGER, *supra* note 6, at 58–94.

to be free and fair. By creating *entitlements that one should not have to bargain for* when one enters the market, these regulations give people property rights.

Fourth, contract law assumes that statutory law limits the *freedom not to contract* by requiring market actors to provide goods and services without regard to race or other kinds of invidious discrimination.

Fifth, contract law assumes that people should have no obligations in the absence of reciprocal promises. Property law, in contrast, often recognizes obligations in the absence of formal promises. Adverse possession law adjusts property rights in the absence of a promise in order to protect settled, justified expectations based on longstanding acquiescence. Obligation in property law comes not just from a discrete promise, but from justified expectations based on custom, a course of dealing, or neighborly obligations. Contract law does recognize customary norms, but property law traditionally recognizes these more easily than does than contract law expectations that arise from both informal and longstanding arrangements, as well as social norms and customs. Whereas contract law focuses on the morality of promising, property law focuses on justified expectations more generally.

Sixth, contract law generally allows people to change their minds by breaching contracts upon payment of damages, while property law presumes that promises regarding land should be enforced by injunctive relief and specific performance. Rather than treating promises as sacred and inviolable, contract law limits remedies to promote freedom from burdensome obligations and the right to change one's mind, whereas property law presumes that owners have a right to control the property they own and that this requires controlling the behavior of nonowners to ensure that they act in a manner consistent with the rights of owners.

All this means that property law often protects entitlements we should not have to bargain for. For that reason, it is a foundation for both market and social relationships. Properly structured, it promotes both liberty and equality. It does this by ensuring that each person can develop capabilities necessary for human flourishing, distributing resources equitably so that each person is actually able to exercise autonomy, and in setting minimum standards for relationships.[23] This is why property law serves a foundational role in the private law system. Although contract law is not inherently inegalitarian or antithetical to regulation, its basic vocabulary, norms, and rules are less hospitable than those of property law to the ways that regulations establish minimum standards for social relationships, thus promoting—rather than limiting—liberty and equal dignity.

4. HOW STATUTES SHAPE THE CONTOURS OF PROPERTY RIGHTS

There is a disturbing tendency these days among sophisticated law professors to imagine that a great deal of legislation is the result of untoward "rent-seeking" through which powerful groups seize the benefits of economic activity for themselves when they have

[23] *Id.*

neither earned nor deserved them. This makes some scholars skeptical that statutes promote the public interest.[24]

This skepticism about statutes and regulations is disturbing because it is not clear what that means for democracy. If inequalities of private wealth and power are not going away, and if those inequalities pervert the legislative process, what then? If legislatures are broken, does that mean we should not rely on them? Does it mean that we would be better off to have the government run by experts rather than elected representatives? Does it mean that any time a statute diverges from what experts say is best, it should be ruled unconstitutional? Does it mean that democracy—rule by the people—is a bad idea and we should go back to monarchy or aristocracy? More fundamentally, what remains if we get rid of all "rent-seeking" statutes? What are the baseline laws against which statutes are being judged? Is it the common law as it is, or the common law as the experts think it should be? Is it the distribution of wealth as it is, or as the experts think it should be?

When we remember our normative commitment to "government by the people," it should be evident that we are committed to democratic government. Election of leaders has its problems, but so do monarchy, inherited nobility, and aristocracy. If we are not about to get rid of democracy as a political system, we need to focus on fixing our political system. But we also need to look at our statutes in a new light. While it is true that some (many?) statutes do not promote the public welfare, it is also true that many federal and state laws do indeed promote it. Some statutes create an infrastructure for private relationships (such as recording statutes, statutes of fraud, antitrust laws, and anti-discrimination laws). Others set minimum standards for economic and social relationships (such as zoning, environmental, consumer protection, anti-discrimination, and minimum wage laws).

Some scholars assume that we make free choices in the private world of the marketplace while most statutes constitute public laws that limit our choices. In this view, statutes coerce us rather than make us free. But this ignores the role that property law plays in our lives. Zoning law may limit what you can do on your own land, but it ensures that you can buy a particular type of property (for example, a house in a neighborhood of other houses free from business establishments or skyscrapers). Property regulations enable us to create homeowners associations because they define management structures and enable contractual deviation from standard terms while allowing associations to enforce reasonable rules on their members. Property law enlarges our liberty by setting minimum standards for social relationships so that our entitlements promote our justified expectations.

Moreover, we exercise choice in the private sphere partly by engaging in market transactions and partly by electing representatives who enact consumer protection and other minimum standards laws which ensure that we get what we want when we enter market transactions. Legislatures often pass laws because *we the voters want them to do so*. In democracies, we make collective choices about the laws that set the minimum standards for social and economic relationships. Denying us the ability

[24] For one thoughtful treatment of rent-seeking, *see* Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012).

to act collectively to set minimum standards for private relationships would go a long way in undermining both liberty and equality. Moreover, it would deny us our choices.

Of course legislatures can pass bad laws, but we want legislatures to pass laws setting minimum standards. We want this because we should not have to bargain about those minimum standards. They are things *we would like to take for granted.* We should not have to bargain to be treated equally regardless of our race; we should not have to bargain for safe consumer products and working conditions. Democracy, as I use the term, does require both liberty and equality, but it also means a commitment to collective self-determination through statutes passed by elected representatives. Those laws shape the allowable contours of property rights and they are as legitimate a source of property law as is the common law. They do not limit choices; they are the result of collective choices about the rules of the road that enable us to live flourishing lives.

5. HOW INEQUALITY UNDERMINES DEMOCRACY

"Almost half of U.S. families can't afford basics like rent and food."[25] So reads the title to a CNN article published in May 2018. "A minimum-wage worker can't afford a 2-bedroom apartment anywhere in the U.S.," says a *Washington Post* article published June 13, 2018.[26] What, if anything, is wrong with this state of affairs? The unemployment rate is 3.8 percent, the lowest it has been in years and a rate that some economists think is about as close as we can get to "full" employment.[27] Businesses are having trouble finding workers for jobs that remain open.[28] Still, analysts are puzzled about why wages are not rising.[29] Traditional economic theory says that when demand exceeds supply, prices should go up. Yet both those who are not working and those who are working are struggling to pay for basic necessities while both income and wealth wildly increase for the wealthy. In recent decades, the top 1 percent have taken most of the gains in income and

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[25] Tami Luhby, *Almost Half of US Families Can't Afford Basics like Rent and Food*, CNN Money (May 18, 2018), http://money.cnn.com/2018/05/17/news/economy/us-middle-class-basics-study/index.html. *See also* Cory Booker, *The American Dream Deferred*, Brookings (June 2018), https://www.brookings.edu/essay/senator-booker-american-dream-deferred; United for Alice, *Alice: A New Lens for Financial Hardship*, https://www.unitedwayalice.org/in-the-us.

[26] Tracy Jan, *A Minimum-Wage Worker Can't Afford a 2-Bedroom Apartment Anywhere in the U.S.*, Wash. Post (June 13, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/13/a-minimum-wage-worker-cant-afford-a-2-bedroom-apartment-anywhere-in-the-u-s/?utm_term=.96d434b53169. *See* National Low Income Housing Coalition, *Out of Reach 2018: The High Cost of Housing*, https://nlihc.org/sites/default/files/oor/OOR_2018.pdf.

[27] National Conference of State Legislatures (NCSL), *National Employment Monthly Update* (June 1, 2018), http://www.ncsl.org/research/labor-and-employment/national-employment-monthly-update.aspx.

[28] Binyamin Appelbaum, *Lack of Workers, Not Work, Weighs on the Nation's Economy*, N.Y. Times (May 21, 2017), https://www.nytimes.com/2017/05/21/us/politics/utah-economy-jobs.html.

[29] Lydia DePillis, *What's Really Going on with Wages in America*, CNN Money (June 13, 2018), https://money.cnn.com/2018/06/13/news/economy/wage-growth-workers/index.html.

wealth that we have enjoyed since 1970.[30] As of 2018, the top 1 percent owned as much wealth as the bottom 90 percent.[31]

I will leave it to others to figure out the exact causes of this situation. I can say, as a property law expert, that part of the reason is the fact that our legal rules and institutions governing property have allowed it to happen; those rules affect the distribution of income and wealth. It is the legal rules governing employment that allow employers to allocate most corporate profits to the top executives and shareholders while leaving the workers behind. It is the rules governing public employment that protect private employers from the need to compete with government jobs paying living wages.[32] It is the legal rules governing taxation and inheritance that enable wealth to remain concentrated. It is the legal rules governing the family that make much of the work of taking care of children and the elderly to be unpaid work. It is the legal rules governing funding of education that ensure that primary and secondary school teachers need second and third jobs just to pay the rent.

It is ultimately property law—broadly conceived—that determines the distribution of both wealth and income. Of course, contract law plays its part too, by assuming that most bargains are voluntary and enforceable unless the terms of agreements are so egregiously unfair as to shock the conscience. These days, it seems, there is little that does shock the conscience of lawmakers. Employers routinely pay employees less than they need to stay alive (to pay rent, buy food, clothing, medical care, etc.).

The Supreme Court explained what is wrong with this in the case of *West Coast Hotel v. Parrish.*[33] Chief Justice Hughes noted that people have to live and if they are

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[30] John Cassidy, *Piketty's Inequality Story in Six Charts*, The New Yorker (Mar. 26, 2014), https://www.newyorker.com/news/john-cassidy/pikettys-inequality-story-in-six-charts; Drew DeSilver, *U.S. Income Inequality, on Rise for Decades, Is Now Highest Since 1928*, FactTank, Pew Research Center (Dec. 5, 2013), http://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928; Christopher Ingraham, *The Richest 1 Percent Now Owns More of the Country's Wealth than at Any Time in the Past 50 Years*, Wash. Post (Dec. 6, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/06/the-richest-1-percent-now-owns-more-of-the-countrys-wealth-than-at-any-time-in-the-past-50-years/?noredirect=on&utm_term=.e71780bcbc49; Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States (Updated with 2012 Preliminary Estimates)* (Sept. 3, 2013), https://eml.berkeley.edu//~saez/saez-UStopincomes-2012.pdf; Chad Stone, Danilo Trisi, Arloc Sherman & Roderick Taylor, *A Guide to Statistics on Historical Trends in Income Inequality*, Center on Budget and Policy Priorities (May 15, 2018), https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality.

[31] Ingraham, *supra* note 30.

[32] There is an emerging debate on the feasibility and wisdom of a federal jobs guarantee that ensures payment of a living wage. *Compare* David Dayen, *Whether America Can Afford a Job Guarantee Program Is Not Up for Debate*, The Intercept (Apr. 30, 2018), https://theintercept.com/2018/04/30/federal-job-guarantee-program-cost, *and* Eric Loomis, *The Case for a Federal Jobs Guarantee*, N.Y. Times (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/opinion/sanders-booker-gillibrand-humphrey-hawkins.html, *with* Greg Ip, *The Problem With a Federal Jobs Guarantee (Hint: It's Not the Price Tag)*, Wall St. J. (May 2, 2018), https://www.wsj.com/articles/the-problem-with-a-federal-jobs-guarantee-hint-its-not-the-price-tag-1525267192, *and* Lawrence H. Summers, *Jobs for All? Take the Idea Seriously but Not Literally*, Wash. Post (July 2, 2018), https://www.washingtonpost.com/opinions/jobs-for-all-take-the-idea-seriously-but-not-literally/2018/07/02/32a93c12-7dfa-11e8-bb6b-c1cb691f1402_story.html.

[33] 300 U.S. 379 (1937).

not getting enough from work to pay for necessities—if they are getting "wages so low as to be insufficient to meet the bare cost of living"[34]—they must get resources from somewhere else. That somewhere else could be family, it could be the taxpayers through the welfare system, it could be the church. When that happens, the business is getting the benefit of the worker's time without paying what is needed to make it possible for her to work. Just as machines have to be maintained and fixed, so do workers have maintenance costs. Payment of a wage below the minimum needed to sustain the worker externalizes that cost onto someone else. In effect, such an employer is being subsidized by others.

> 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. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met … The community is not bound to provide what is in effect a subsidy for unconscionable employers.[35]

The language of "exploitation" seems almost quaint, yet it is no less true today than it was then. The problem here is not one of economics, but the fact that the legal structures that allocate property rights have allowed some to use their right to exclude in a way that prevents disempowered groups from acquiring their fair share of the collective products of economic life.

Barbara Ehrenreich has argued that low-wage workers are subsidizing not only employers but also the customers of the businesses they work for. She argues that the rest of us are dependent on the services those workers provide because those low wages mean cheap goods and services for us. She says that we should feel "shame at our *own* dependency … on the underpaid labor of others."[36]

> 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.[37]

This is not a case of envy.[38] It is not a case of airline passengers walking through first class and being resentful of the privileges of the rich when they could have worked harder and become rich themselves. Envy is meaningful as a concept of moral blame only if we imagine that those who covet what others have should, first, be content with what they have, and second, that they had an equal opportunity to acquire the goods

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[34] *Id.* at 398.
[35] *Id.* at 399.
[36] Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting by in America 221 (2001).
[37] *Id.*
[38] On the differences between "envy" and the legitimate reasons why inequality is unjust, *see* T.M. Scanlon, Why Does Inequality Matter? (2018).

they covet. If those conditions are not met, we are dealing not with envy but with injustice.

There are two problems here: a problem of poverty and a problem of inequality. Poverty is an injustice because the legal rules could exist such that both those who work and those who cannot work could earn enough for a comfortable and dignified human life. Equal opportunity requires that opportunities *actually exist* that make it *realistically possible for each and every person* to obtain the resources necessary for a dignified life.

Extreme inequality is an injustice for different reason. First, it divides us into classes with not only unequal life prospects and unequal power but also warped values. Those who work hard and get rich may imagine that anyone could do it; yet if that is not true, then wealth has distorted human perception to enable indifference to the suffering of others who face barriers that are invisible to the wealthy. Conversely, those who are poor cannot imagine what it is like for someone to have more money than they need; they cannot imagine what it is like to not have to look at one's wallet to figure out whether one can afford to buy food for dinner. While the poor can imagine being wealthy, they often vote against taxing the rich because they imagine that the taxes will affect the rich as harshly as they would affect those with low income. They cannot imagine the fact that the rich will not even notice the tax increases because they have more than they need.

Inequality is unjust for a second reason. It exists not because the top 1 percent are hundreds or thousands of times more "productive" than the rest of us or because they somehow earned the right to appropriate most of the wealth being produced by society. They scoop off the benefits of social production because the rules of property law allow them to do it by giving them power over other people—power to determine the wages and rewards of others and power to deny others a fair fraction of the wealth created and earned by cooperative enterprises. The injustice comes not from the mere fact of inequality, but from oppressive social relationships established and backed up by the coercive power of the state through property law.[39] To see this clearly, one need only imagine the arguments of the lords in medieval England who believed that the nobility had the right to rule and to receive a disproportionate share of social wealth. They did not earn or deserve the wealth their social class conferred on them. Although markets work through contracts rather than status, they are skewed by property law rules that enable the few to write the terms of the contracts suffered by the many. Some people steal money with guns, others with contracts and property rights.

Inequality that is extreme, unnecessary, and based on exploitation and indifference to human need betrays the core values of free and democratic societies that embrace the notion that each person has the right to life, liberty, and the pursuit of happiness. Property law, and related areas of statutory law, determine the rules by which people acquire and enjoy the things they need to live and thrive. Contract law can revel in the way that bargains make people's lives better only because it assumes that some other area of law protects people from discriminatory exclusion from markets, prevents unfair and deceptive practices, and ensures that people are safe and secure and sufficiently entitled

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[39] Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 Ethics 287 (1999).

to enter the marketplace on equal terms. Those other areas of civil law are property, torts, criminal law, and the regulatory statutes that help define them.

Property law in a free and democratic society should ensure that we are truly free, that opportunity is really equal, and that we the people get to collectively determine the minimum standards for social relationships through our lawmaking institutions, including legislatures, agencies, and courts. Property law helps us coordinate the way we live in the world and the way we control resources, but more fundamentally it is the bedrock of social justice and democratic liberty.