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Titles of Nobility: Poverty, Immigration, and Property in a Free and Democratic Society

Joseph William Singer*

Sherlock Holmes and Dr. Watson go on a camping trip. They set up their tent, have a modest meal, and go to sleep. In the middle of the night, Holmes wakes Watson up and asks him, “What do you see?” Watson looks up and sees the night sky and he tells Holmes so. “What does it mean?” Holmes asks. Watson looks at Holmes, trying to figure out what he’s getting at. He’s sure to be wrong, of course, whatever he says, but he gives it a try nevertheless: “It means,” Watson says, “that the universe is vast and mysterious and our knowledge limited. It means that we only understand what we can observe and that –” Holmes interrupts him. “No, you idiot,” he says. “It means someone has stolen our tent.”

Sometimes it is important to state the obvious, to confront truths so fundamental we have forgotten to see them. Here is a simple truth. Human beings have needs, and we cannot live without access to the things we need. Here is another truth: both sovereignty and property are premised on exclusion.¹ That leaves us with a problem. How do we reconcile our needs and our borders?

* Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow and Mira Singer. Versions of this talk were delivered at the AALS Conference on Poverty, Immigration, and Property held in San Diego, June 2013, and at the Association of Law, Property, and Society Annual Conference held in Vancouver, May 2014.

¹ LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 141 (2003) (“The very nature of these resources, and of individual property claims to

The American tradition emphasizes the equal status of all persons. “We hold these truths to be self-evident, that all [human beings] are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.”² If all human beings are free and equal, then each person is entitled to belong somewhere and to obtain the things they need to live and to be free. Yet not all sovereigns enable their people to live in freedom; nor do they ensure that their people can obtain basic sustenance, much less live fulfilling lives. If people cannot obtain what they need where they are, or if they have no place where they are entitled to be, then our exclusion of them denies their humanity.

What do immigration and poverty have in common? They concern the economy of belonging; they distinguish insiders and outsiders. I am the son of an immigrant and the grandson of immigrants. My father was born in Poland, but if anyone asks I do not say I have Polish ancestry. I am Jewish and the Jews in Poland were a people apart. They had been welcomed and flourished for hundreds of years but by the twentieth century, the welcome had worn away. At the time of my father’s birth in 1919, Jews were increasingly subject to racist violence and discrimination. They were in constant physical danger. They had lived in Poland for centuries, but they were not at home.

My grandparents escaped the pogroms and brought my father to this country as a small child in 1922. My grandparents left their brothers and sisters behind. The Nazis came to power and my father’s cousins – *my* cousins – all died in the *Shoah*, the Holocaust. I

them, means that the extension of property protection in such resources to one person necessarily and inevitably denies the same rights to others.”).

² THE DECLARATION OF INDEPENDENCE (U.S. 1776).

am lucky my grandparents passed through Ellis Island when they did.

A few years ago a politically conservative man in our synagogue was bemoaning taxes and regulations. He said, "what has the government ever done for me?" I was astonished to hear him say this. I asked him when his family came to United States. They came around the time my father came with all the other Jews escaping oppression and poverty in Europe. I thought of my cousins and I said to him, "well that's one thing the US government did for you - it let you in. You think the US government never did anything for you? It saved your life."

The problem of access is not limited to entry to the land; it also concerns entry to opportunity. I grew up in New Jersey. All right, I've heard all the New Jersey jokes; I've even told a few of them myself. And I admit it - the New Jersey Turnpike is one of the ugliest pieces of real estate on the eastern seaboard. But I am proud of my roots. New Jersey is called the Garden State and for good reason. I grew up near woods and farms and sandy beaches.

My parents moved to New Jersey in the 1950s because my father could not find an engineering job in New York City. At that time, many companies in New York would not hire Jewish engineers. Discrimination was widespread. But Monmouth County in New Jersey was home to Fort Monmouth and to Bell Laboratories and both of them hired Jews. I grew up in New Jersey because it let us in. I grew up in New Jersey because the United States gave my father a job; he was not turned away because he was different. New Jersey saved my father's life.

And yet no sovereign has open borders and no owner can let everyone in. Owners and non-owners are not on equal footing; nor are citizens and noncitizens. Equality before the law does not mean that we do not allocate entitlements; I have rights in my home that

you do not have. And this does not, by itself, treat you unequally or deny you equal concern and respect. The law makes distinctions and the distinction between those who are entitled to be in a place and those who are not is one of the most fundamental. It is a core norm of both sovereignty and ownership.

Borders protect those who are entitled to be inside but they leave others out in the cold. Jeremy Waldron teaches us that “[e]verything that is done has to be done somewhere.”³ If a city prohibits homeless persons from sleeping in public parks, and it does not provide sufficient shelters for them, then it has effectively passed a law forbidding the homeless to sleep. If all cities can do this, they would turn homeless persons into outlaws. Denying a person a place to be denies that person’s humanity. Nations cannot make it illegal for a person to exist but neither nations nor owners can open themselves to all comers.

What happens if we let someone in or they happen to find their way in? What then? The subject of the stranger is an old one. The book of Leviticus says something about it. “When a stranger resides with you in your land, you shall not wrong him. The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I the Lord am your God.”⁴ This famous passage does not require us to erase the distinction between strangers and citizens; what it requires is love.

What does love mean in this context? The reference to Egypt is a clue. At the very least, treating a stranger with love means that you cannot treat the stranger as a slave, as something less than human. Yet love is something more than this. The Bible talks over and over

³ Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991).

⁴ Leviticus (Vayikra) 19:34.

again about our obligations to the stranger. We are told that Abraham and Sarah were sitting at the entrance of their tent at the hottest part of the day, and they saw three strangers approach. Abraham ran to greet them and invited them in. He and Sarah fed and sheltered them. They did not invite the strangers to stay permanently, but they did what was necessary for people far from home.

I am from Boston and I lived through the Marathon bombings. One of the gunfights in Watertown took place about a mile from my home. I have read the anxious musings about the fact that the bombers came from elsewhere and somehow rejected American values. I have read with distress the few stories about people who have been accosted or attacked because they were thought to be Moslem and some idiot thought that meant they must be terrorists. But these anti-immigrant feelings have been scarce. It was a pair of immigrants, after all, who showed extraordinary bravery in helping capture the bombers. It was immigrants who rushed to help strangers injured by the bombs. It did not matter whether those strangers were from Boston or Ethiopia, from Texas or Mexico. At that moment, they were people in need; at that moment, it did not matter if they were from Boston or from elsewhere. At that moment, they were our people.

Whenever I am depressed about the state of the world, I re-read a book by Philip Hallie about a small town in France called Le Chambon-sur-Lignon. That town sheltered thousands of Jews during World War II, protecting them from the occupying Nazi forces. When Jews appeared at the doors of the homes in Le Chambon, the people let them in, at great risk to themselves. Years later, when they were asked why this did this dangerous thing, the villagers were annoyed. "Look," one of them said, "who else would have taken care of them if we didn't? They needed our help, and

they needed it *then*.”⁵ Jews appeared at their gates and the villagers did not see strangers; they saw human beings, standing outside, in need. They invited them in.

The strangers who visited Abraham and Sarah were actually angels. The word angel in Hebrew means “messenger from God.” The angels were there with a message, that Sarah would bear a child. The news they brought made Sarah laugh. If she and her husband had not invited them in, they would not have received the message and perhaps there would have been no Isaac and perhaps there would have been no laughter. The people of Le Chambon saw the refugees flooding their town and knew the danger they brought with them, but the villagers did not turn them away. They had read that “you shall not oppress a stranger, for you know the feelings of the stranger, having yourselves been strangers in the land of Egypt.”⁶ The townspeople of Le Chambon were Protestants in a Catholic country and they had themselves suffered many years of oppression and been refugees themselves. They remembered. There were strangers at their gates whose very presence put them in danger, and all they could think of was that they should love them as themselves.

The line between lawful and unlawful residence in a place is more complicated than we may assume. When Suzette Kelo’s case was decided by the Supreme Court, there was an outcry by many in the country. Never before, many claimed, had the government taken the property of some to transfer it to others simply because the new owner would make a better or more productive use of the land.⁷ I

⁵ PHILIP HALLIE, *LEST INNOCENT BLOOD BE SHED: THE STORY OF THE VILLAGE OF LE CHAMBON AND HOW GOODNESS HAPPENED THERE* 127 (1994).

⁶ Exodus (Shemot) 23:9.

⁷ See, e.g., Orlando E. Delogu, *Kelo v. City of New London—Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 ME. L. REV. 17 (2006); Gideon Kanner, *Kelo v. New London: Bad Law, Bad*

specialize in federal Indian law and I can tell you that when I heard that argument, it made me cringe. *The origin of land titles in the United States rests on this very principle.* Land was taken from the few for redistribution to the many because Indian nations were thought to have more than they needed and because they were using the property inefficiently; non-Indians thought that if the Indians adopted a different lifestyle, then more people could live on less land. Non-Indians needed that land and they thought it would be selfish of the Indians to continue their inferior lifestyle while withholding land that good Christians needed.⁸

The hue and cry about so-called “illegal immigration” should lead us to a greater humility than we may yet have found. After all, if the forced seizure of land from Indian nations cannot be justified from a moral point of view, then illegal immigration is a greater problem than we have imagined. But it is not Mexican immigrants we should be worrying about; it is the ninety-eight percent of us who are non-Indians occupying tribal lands.

We do not like to think about this painful fact from our history. After all, the land seizures happened long ago. Well, how long does it take before a resident has the right to be treated like a citizen? This

Policy, and Bad Judgment, 38 URB. LAWYER 201 (Spring 2006); Douglas W. Kmiec, *Eminent Domain Post-Kelo*, 9 U. PA. J. CONST. L. 501 (2007) (all arguing that the *Kelo* decision represented a radical change from precedent). See also Rep. John Boozman, *Protecting Private Property*, U.S. FED. NEWS (Nov. 13, 2005), 2005 WLNR 18431884 (arguing that "never before has the [Supreme] Court included 'the promotion of economic development' in its list of public uses").

⁸ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §1.04, at 71-79 (Nell Jessup Newton ed., 2012) (explaining the allotment policy at the end of the 19th century designed to open up reservations to white settlement and to destroy tribal land use patterns, "civilize" and Christianize Indians, and turn Indian men into farmers); Joseph William Singer, *Lone Wolf, Or How to Take Property by Calling it a "Mere Change in the Form of Investment,"* 38 TULSA L. REV. 37, 46-47 (2002) (land was taken from Indian nations because they were thought to have more than they needed, non-Indians needed that land, and the Indians were misusing the land by failing to farm it).

is a question that millions of undocumented persons would like to know. If time heals no wounds and confers no rights, then the entire country is in jeopardy. Our nation was founded on illegal immigration. The arguments against rewarding wrongdoing and law breaking are ones we should be hesitant to make; they may come back to haunt us.

My colleagues and students often ask me why we have tribal sovereignty. Why should Indians have special rights that no other Americans have? I understand why people ask this question but I have to complain about the way it is framed. The question shows ignorance of both US history and law. It suggests that the US conquered the Indians long ago and that tribal sovereignty is a recent innovation by liberals in Washington DC. The truth is that conquest was never complete. There are 566 federally-recognized Indian nations within US borders and their sovereignty *precedes* that of the United States. The US recognizes their sovereignty because it was diminished but never abrogated.⁹

If you ask why we should have tribal sovereignty, you are really asking, “why don’t we get rid of it?” And, although you may not realize it, that is the same as asking “why don’t we invade Canada”? To ask *that* question is to answer it. The current debates about immigration reform should lead us to reflect on – and to better understand – the historical origins of tribal sovereignty and its place within the United States. If we do that, we will recognize that almost

⁹ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §4.01[1][a], at 207 (Nell Jessup Newton ed., 2012) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978) (tribal powers are "inherent powers" that have "never been extinguished"); Joseph William Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, — AM. INDIAN L. REV. — (forthcoming, 2014) (explaining that conquest was incomplete and that the United States shares its territory with sovereigns who preexist the United States and that the Indian Nations continue today to enjoy a government-to-government relationship with the United States).

all of us are immigrants and that we settled this land illegally; colonialism violates international law as we now understand it. The Indian nations who were here before the rest of us have been more than hospitable and we should be grateful that we can share the land with them.

The image of the immigrant as the poor supplicant ignores the economic reality that the United States is dependent on immigrant labor, both documented and undocumented. The low wages paid to many workers brings us to the problem of poverty. We should worry, not just for those who cannot work or who cannot find work, but for those who work for wages inadequate to a comfortable and joyful human life. In her book *Nickel and Dimed* Barbara Ehrenreich describes her attempt to live on the minimum wage for a year. She tried valiantly to do this but she failed. She simply could not do it. "We should feel 'shame,' she says, 'at our own dependence . . . on the underpaid labor of others.'"

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.¹⁰

¹⁰ BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* 221 (2001).

Poverty has been surprisingly hard to abolish. Yet if we understand the ideals on which our country was founded, we will discover that doing so is a moral imperative. Our nation was born in a fit of idealism. While failing to abolish slavery, the Founding Fathers firmly rejected feudalism. My own state of New Jersey was born a feudal domain in the 1660s with two lords and many tenants. Yet for a hundred years, many of the tenants refused to submit to the lords or to pay their feudal rents. They claimed freehold title to their lands and independence from feudal ties.¹¹ The conflict ended about the time of American Independence. To this day, the governing body of my home of Monmouth County is called the Board of Chosen Freeholders. Our county seat, where Bruce Springsteen went to high school, is called Freehold. The freeholders in New Jersey threw off lordly rule and helped invent democracy. But they also helped invent and propagate the idea that all human beings are created equal.

We may have titles to land but we have no titles of nobility. In two little-noted clauses, the US Constitution absolutely prohibits both states and the Congress from granting any titles of nobility.¹² The nobility clauses are not outdated relics; they embody the core values of a free and democratic society. To outlaw titles of nobility is to outlaw the practice of distinguishing human beings into classes or castes, of treating some as nobility and others as commoners, of distinguishing between gentlemen and the “meaner” classes.¹³ As

¹¹ See BRENDAN McCONVILLE, *THOSE DARING DISTURBERS OF THE PUBLIC PEACE: THE STRUGGLE FOR PROPERTY AND POWER IN EARLY NEW JERSEY* (UNIV. OF PENN. PRESS 1999).

¹² U.S. CONST. art. I, §9 (“No Title of Nobility shall be granted by the United States”); U.S. CONST. art. I, §10 (prohibiting the states from granting any “Title of Nobility”).

¹³ GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 23 (1991).

Gordon Wood explains in *The Radicalism of the American Revolution*, our nation extended the concept of dignity from lords and gentleman to the people.¹⁴ It took later generations to extend it from masters to servants, from slave owners to slaves, from men to women, from Christians to non-Christians, from the temporarily-abled to those with disabilities, and from the rich to the poor.

I visited South Africa last year and attended a conference of property law professors. That nation is wrestling with the problem of how to respect property rights while redistributing them to undo decades of racial oppression. How can the rights of owners be respected while righting the historic wrongs of apartheid? How can one protect property while taking it away? The question begs the question; that is to say, ownership of property is only *presumptively* legitimate and lawful. Possession may be nine-tenths of the law but that other tenth matters. Property rights in a free and democratic society cannot be justified unless they are open to all.

There is a moment in the second Harry Potter book where Harry is talking to a house elf named Dobby. It is the first time Harry has ever seen a house elf; indeed, he did not even know they exist. In the course of things, Harry does a simple, ordinary act; he says, politely, "Sit down."¹⁵ A simple thing, not the stuff of legends, not an astonishing act of wizardly power, but an act of ordinary kindness. Yet this simple, seemingly innocuous act drives Dobby into convulsive tears. Dobby has never met a wizard who treated him with common decency; the only wizards he has known look at him with contempt. And as the story develops, Dobby plays a larger role until, one day, he frees Harry and his friends from prison and saves Harry's life at the cost of his own. Harry sees a creature very

¹⁴ *Id.* at 229–86.

¹⁵ J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS 15 (1998).

different from himself, someone who is not even human, but Harry does not see someone who therefore does not deserve respect. Quite the opposite. He sees a stranger in distress in his house and he asks him to sit down.

Jeremy Waldron has argued we should support the institution of private property because it promotes liberty. But because we *also* believe in equality, we must enable every person to become an owner so every person can be free.¹⁶ Poverty is, in principle, incompatible with democracy. And we will not solve poverty simply by redistributing money from the rich to the poor. The poor do not need charity; what they need is equality. What they need is what the United States and the state of New Jersey did for my family; they let us in. We tend to naturalize the results of the market economy, contrasting the free market and government regulation. But markets do not exist in nature; they are established and defined by law. Poverty results not from natural market forces but from the way we have shaped corporate law, labor law, employment law, trade law, education law, and also property law. Poverty is neither a natural disaster nor an act of God. It is a preventable disease. The question is not whether we can do anything about it; the question is whether we want to.

There is a story about a rabbi who enters the sanctuary before the High Holy Days and who prostrates himself on the floor. "Oh God before you I am nothing." The cantor sees the rabbi praying on the floor and what does he do? He throws himself down next to the rabbi, and echoes "before you God I am nothing, I am less than the

¹⁶ See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 329 (1988) (stating that "people need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person's private property away from him, and . . . why it is wrong that some individuals should have no private property at all"). See also JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 167-71 (2000) (asserting that everyone deserves the right to private property).

dust in the wind.” The janitor in the back of the room sees the rabbi and the cantor on the floor and what can he do but copy them? He too throws himself down on the floor and says, “Oh God before you I am nothing; I am less than the squeak of the door.” The cantor nudges the rabbi and points back to the janitor and says, “look who thinks he’s nothing”

We have no titles of nobility in America; we have no lords, no commoners. And yet we continue to treat some as more worthy than others. Some of those distinctions can be justified, but others cannot be defended from a moral point of view. We may have title to land but we have no titles of nobility. We cannot benefit from the labor of millions of immigrants and then deny their humanity. We cannot organize our economy so that its bounty is captured by the top one-tenth of one percent. We cannot allow poverty to persist and then call ourselves a democracy. We cannot claim we have an immigration problem while refusing to recognize that *we* are the immigrants. We cannot wrong the stranger while forgetting that we are strangers ourselves.

Thomas Paine wrote that “dignities and high sounding names . . . over-awe [and] bewitch” us.¹⁷ He thought that we sacrifice common sense, as well as our liberty, when we treat some as inherently more worthy than others. We should be especially careful if the ones we glorify are ourselves. There is nothing wrong with calling ourselves by high-sounding names, as long as we deserve it. But there is something wrong if we find strangers among us who are in distress and we forget to ask them to sit down.

¹⁷ Thomas Paine, 1 THE WRITINGS OF THOMAS PAINE 46 (Moncure Daniel Conway ed. 1894)(original in PA. MAGAZINE (May, 1775))