

The Backwards Gesture: Historical Narratives in Carol Rose's Property Scholarship

Daniel J. Sharfstein

Repository Citation

Daniel J. Sharfstein, *The Backwards Gesture: Historical Narratives in Carol Rose's Property Scholarship*, 19 Wm. & Mary Bill Rts. J. 1039 (2011), <http://scholarship.law.wm.edu/wmborj/vol19/iss4/11>

THE BACKWARDS GESTURE: HISTORICAL NARRATIVES IN CAROL ROSE'S PROPERTY SCHOLARSHIP

Daniel J. Sharfstein*

I was a student in Carol Rose's property course twelve years ago, and she was the first law professor whose scholarship I sought out and read. Going into my 1L spring semester, if I had to guess how I would spend my precious free time, I would not have imagined myself poring over *Crystals and Mud in Property Law*¹ and *The Comedy of the Commons*.² I had not gone to law school to become an academic—I kept telling myself that I was set on being a prosecutor. But there was something about Carol's class and her scholarship that put me on a different path.

Right before law school, when I was a cub reporter for a small daily paper in Southern California, I was told by a more experienced hand that every piece I would ever write—about crime, local politics, the weather, the Rose Parade, even a gathering of basset hound fanciers—was really about land use and property values. Whatever I published, it would be understood and retold by my readers as a story about their communities and about themselves. And deep down, that meant their investment in Craftsman bungalows, Meyer lemon and avocado trees, and patches of grass watered with laundry runoff. I thought I had left that sunny world behind when I moved to New Haven. Carol Rose pulled me back in.

So what was it about Carol's approach to property that inspired me to cast aside my plans for a life of gainful employment and community service? Her work on the primacy of storytelling and narrative in property law leaps out as the main suspect. While property as a field of study is classically the province of economic thinking about resource allocation and individual preferences, Carol has by her own admission made it her scholarly project to show the enduring importance of narratives in understanding property.³ No one, it seems, can escape the spell of a good story. From Hobbes and Locke to the present, the architects of classical property theory as well as some of the most compelling modern economic scholars have resorted to narrative

* Associate Professor of Law, Vanderbilt University Law School. I am grateful to Eric Kades for inviting me to the conference and to Mark Brandon and Kevin Stack for their comments.

¹ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) [hereinafter Rose, *Crystals and Mud*].

² Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) [hereinafter Rose, *Comedy*].

³ Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. 1, 2 (2006) [hereinafter Rose, *Property and Language*].

to explain the development of property regimes.⁴ It is Carol's insight that they need narrative because classical explanations of human nature cannot account for the origins of property. Without the persuasive power of stories to induce people to act contrary to narrow self-interest, rational actors will not be able to form property regimes, or in Carol's words, "to create a community in which cooperation is possible."⁵ Even as they foster utility maximizing, the regimes themselves are cooperative and require something different from participants. As much as property theory depends on predictive models of human behavior, it is rooted in something messier and more immanent. Carol's work keeps our focus on the role in property law of unpredictable narratives and ultimately the push and pull of everyday experience.

Now, Carol certainly conveyed some of this in class, and I know I read and liberally highlighted in pink an excerpt of *Property as Storytelling*⁶ in the reader that supplemented our casebook. But as fascinating as I found Carol's discussions of the modes of storytelling that persist in property theory, I was equally enthralled with her own way with a story. It was front and center in class, and it manifests itself in significant, but subtle ways in her scholarship. In her writing, the discussions of doctrine and theory are unfailingly elegant, startling in their range and clarity. Her ideas can be polished to a sheen—even when she talks about mud, her insights are crystals, compelling the reader to reach out, grasp them, and study the angles and refractions of light. At the same time, Carol has an individual voice that every now and then leaps out from the law review pages, creating a momentary diversion from the proceedings at hand, but also demanding our attention alongside the ideas.⁷ Carol's voice has a way of making scene-stealing appearances, and far from detracting from her argument, it calls attention to the fact that Carol, too, is constructing a story. It is a way of showing the artisanal quality of her work—no one else could construct these ideas.

What do I mean by this? Well, in *Property as Storytelling*, when she describes several alternatives to the rational utility maximizer as the default model for predicting behavior, she first puts them under a heading that sounds like the title of a Victorian novel I would like to read: "The Humdrum and the Weird; or, Predictable and Unpredictable Preferences."⁸ Then she assigns a name to each type of alternative. "The perfectly

⁴ See, e.g., Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 333 (1996) (discussing Locke's narrative of the social compact theory for understanding the foundation of property rights).

⁵ Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 38–39 (1990) [hereinafter Rose, *Property as Storytelling*].

⁶ *Id.*

⁷ See, e.g., CAROL M. ROSE, *Seeing Property*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 267, 272–73 (1994) (following a discussion of a "bleak account" of the "interrelations between property and vision" as "antiquated false consciousness" with the line, "Now, wait a minute").

⁸ Rose, *Property as Storytelling*, *supra* note 5, at 43.

ordinary person” is “John Doe.”⁹ Fair enough. A more competitive person is “King of the Mountain.”¹⁰ A reflexive bad actor is “Malice Aforethought.”¹¹ The altruistic person is, simply and charmingly, “Mom.”¹² She is not to be confused with a more compulsively self-sacrificing, but still rational actor: “Portnoy’s Mom.”¹³ And finally, there’s the out-and-out masochist who goes by the name “Hit Me.”¹⁴ Carol says she names the types so they are more easily remembered, but I find it hard to get past the labels. Whenever I think about the article, I chuckle about “Portnoy’s Mom.” Rather than functioning as a mnemonic, the labels call attention to their creator, who is not simply giving us an argument, but is also letting us know, in an article about storytelling, that she has a story to tell.

What stories does Carol Rose tell? Very occasionally, they seem to reveal something about her personal sensibility. One gets the impression, for instance, that Phillip Roth’s oeuvre coexists on her shelves with novels by George Eliot and, if I had to guess, Jane Austen, Charlotte Brontë, and Charles Dickens.¹⁵ She’s watched an episode or two, perhaps more, of *NYPD Blue*.¹⁶ She is no stranger to country music.¹⁷

But the stories that have engaged me the most are the stories Carol tells about the historical past, and that is what I will focus on for the rest of this essay. Her interest in history as a lens for understanding property law is in keeping with a tradition at least as old as Locke and Blackstone.¹⁸ When Carol Rose talks about narrative filling in the gaps of property theory, she often means historical narrative. When she describes the “moral community” that the storyteller creates “by structuring the audience’s experience and imagination,”¹⁹ the verb tense that Carol uses is significant: “[The teller of tales] tells us, ‘Here is what we (or they) *did*, and how we (or they) *did* it.’”²⁰

Carol’s histories are hard to classify. Although her sources are mainly the stuff of intellectual, political, and more purely doctrinal legal history, she infuses them with social and cultural context.²¹ Her work spans time and space, engaging with ideas and

⁹ *Id.*

¹⁰ *Id.* at 44.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 45.

¹⁴ *Id.*

¹⁵ See, e.g., *id.*; Rose, *Property as Storytelling*, *supra* note 3, at 2 (making the unlikely comparison between herself and Casaubon).

¹⁶ Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1682 (2007).

¹⁷ Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1897, 1900 (2007) (theorizing the morality of property in terms of a Patty Loveless song).

¹⁸ Rose, *Property as Storytelling*, *supra* note 5, at 38.

¹⁹ *Id.* at 55.

²⁰ *Id.* (emphasis added).

²¹ Michael Heller has elegantly described Carol’s sense of history and social context as a vision of how “*law accumulates through layers of sediment and sentiment.*” Michael Heller, *The Rose Theorem*, 18 YALE J.L. & HUMAN. 29, 30 (2006) (emphasis in original).

incidents from ancient Greece and Rome, the Middle Ages, the European Enlightenment—which she studied in an earlier incarnation as an academic historian—and the American Republic. Many of her articles begin with a present-day impasse or an established piece of conventional wisdom involving some area of property law.²² Carol then delves into history as a way of denaturalizing the consensus position, only to resurface in the present with a new perspective. It is not exactly the kind of history she was trained to write when she was authoring articles with titles like *The Issue of Parliamentary Suffrage at the Frankfurt National Assembly, 1848–1849*.²³ But Carol’s approach elevates history to a position of central importance. “Ordinary practice is part of a tradition and cannot be entirely reinvented,” she wrote in an early article.²⁴ “But if some of our views about property are dysfunctional remnants, historical inquiry will help to identify them, and it will also highlight those traditional property concepts that are still valid for us.”²⁵

The backwards gesture as a means of going forward: It sounds like a basketball move—could be what got Carol elected to the George Mason High School Athletic Hall of Fame—but it’s also a critical move, even as Carol holds a decidedly less bleak view of property as an institution than scholars flying the Critical Legal Studies flag. Carol has been structuring her arguments in this way since she was an acting professor at Boalt Hall in 1981 writing about *New Directions in the Law of Historic Preservation*.²⁶ Recognizing the vogue for historic preservation, Carol notes a confounding problem: what makes something “historic” and what counts as “preservation” are, in her words, “so elastic that any sort of project can be justified—or any change vilified—in its name.”²⁷ How does she find a principled solid ground? By looking at the history of historic preservation. This is cultural and intellectual history, but it is rooted in the very real social consequences of historic preservation and urban renewal. Carol proposes a set of processes designed to encourage individuals to talk about and debate the future of their neighborhoods. Even as she discusses the emergence of ideas about what old buildings are meant to inspire in us, she pairs the ideas with a more immanent notion of community, neighbor to neighbor and street by street.²⁸

²² See, e.g., Rose, *Comedy*, *supra* note 2, at 711–12; Carol Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003).

²³ See Rose, *Property and Language*, *supra* note 3, at 3 n.3. The move from present to past to present more closely mirrors how readers today comprehend long-ago events, and it parallels the ex-post perspectives of judges, who are constantly trying to bring the past into the present. Rose, *Crystals and Mud*, *supra* note 1, at 603.

²⁴ Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 599 (1984) [hereinafter Rose, Mahon *Reconstructed*].

²⁵ *Id.*

²⁶ Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

²⁷ *Id.* at 476.

²⁸ *Id.* at 481–91, 534.

Within a few years Carol was writing classic works of property theory, but her basic approach remained the same. *Possession as the Origin of Property* answers the fundamental question of property, “How do things come to be owned?”, first by historicizing the question with views from intellectual history—Locke, Grotius, Puffendorf, and Blackstone—and then quickly moving to a trio of nineteenth-century cases.²⁹ Theory and doctrine lead to an insight grounded in everyday life, the idea of “possession as some kind of *statement*.”³⁰ While Carol uses the language of literary criticism, what matters most is that a statement is a social act. Acts of possession may be “texts,” but they are “texts . . . of cultivation, manufacture, and development.”³¹ It is what people think, to use an example from the essay, when they see fenced-in land where cows are grazing.³² Although the piece concludes by suggesting that rules of possession embody and structure a relationship between people and nature,³³ these rules just as significantly shape and represent how people relate to each other. Possession requires communication to an audience, and the audience’s response determines the validity of the communication.

Carol’s next article, *The Comedy of the Commons*, burrows beneath the conventional wisdom regarding the right to exclude and the tragedy of the commons by exploring “historic doctrines about ‘inherently public’ property [that] vested property rights in the ‘unorganized public’ rather than in a governmentally-organized public.”³⁴ Masterfully interpreting old doctrines dealing with roads, waterways, and sites for traditional recreational activities, Carol connects the legal principles of public property with the social content of property law.³⁵ She suggests that, despite words to the contrary in American decisions, these types of uses all engage with custom, the “social glue” that allows “indefinite and informal” groups to manage themselves, fosters the “educative and socializing” effects of commerce, and nurtures emotional attachments to particular types of uses in particular places.³⁶ Using history to emphasize the individual relationships and pastimes that property fosters, the article, in effect, dances a maypole dance around the consensus position about public and private rights.

Carol returns repeatedly to the economic story of scarcity, self-interest and exclusion, and while she finds compelling insights in the utilitarian justifications for property, her work complicates those narratives by juxtaposing past and present, high

²⁹ Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73–77, 85 (1985).

³⁰ *Id.* at 77 (emphasis in original).

³¹ *Id.* at 82, 84–85, 88.

³² *Id.* at 77–78.

³³ *Id.* at 87.

³⁴ Rose, *Comedy*, *supra* note 2, at 720–21.

³⁵ *Id.* at 722–23, 740–41.

³⁶ *Id.* at 742, 759, 775, 779. In an informal aside, Carol Rose makes her point with a rhetorical question that has since attained a tragic resonance, at least in certain parts of Michigan: “To Detroit residents, does it matter that the Tigers play in Tiger Stadium?” *Id.* at 759.

theory and the nitty gritty of everyday experience. I'll talk about two more of my favorite pieces before concluding. *Crystals and Mud in Property Law* questions the notion that scarcity begets hard-edged property entitlements through examples in the law concerning caveat emptor, mortgages, and land registration.³⁷ These examples draw from what her colleague Robert Gordon would call “mandarin” legal materials,³⁸ citing to a lot of old appellate decisions.³⁹ Yet when Carol moves on to explain the cycles of hard-edged crystalline rules and muddier standards, what matters most are the individual characters who walk through the decisions, the “ninnies, hard-luck cases, and the occasional scoundrels who take advantage of them.”⁴⁰ The piece becomes a story of people who are “snookered” and people who do the snookering, how they overload a property regime that is in essence a commons, and how crystal rules and mud rules embody “different modes of conversation and interaction” when people engage with each other as strangers or neighbors.⁴¹ It is social history wrapped in mandarin robes.

And in *Canons of Property Talk, or, Blackstone's Anxiety*, an essay I greatly admired as a second-year grunt on a law journal edit team, Carol decenters the right to exclude by placing Blackstone's chestnut about “sole and despotic dominion” beside other, more ambiguous statements in the *Commentaries* about property rights.⁴² Carol uses Blackstone's statements—an expression of anxiety that there may be “some defect in our title”⁴³ and in the existing distribution of entitlements; a utilitarian justification for property rights; and a lengthy, neutral, positivist description of property doctrine—to draw an intellectual genealogy for three modern takes on property; Critical Legal Studies, law and economics, and doctrinal accounts.⁴⁴ In rooting all three modes of scholarship in the same historical source, in understanding how Blackstone could contain these multitudes along with his statement of the primacy of exclusion, Carol again moves from intellectual history to an account of property's social role. Property is a legal regime that continually balances individual rights, rights shared by neighbors, and community claims. It is the “most profoundly sociable of human institutions,” keeping people apart but also bringing them together.⁴⁵

By way of conclusion, I want to discuss Carol's historical approach to regulatory takings and racially restrictive covenants, issues that occupy the hazy boundary between property and constitutional law. Digging through the past to shed light on

³⁷ Rose, *Crystals and Mud*, *supra* note 1, at 580–90.

³⁸ Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984).

³⁹ Rose, *Crystals and Mud*, *supra* note 1, at 580–88.

⁴⁰ *Id.* at 587.

⁴¹ *Id.* at 587, 610.

⁴² Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 601 (1998).

⁴³ *Id.* at 604.

⁴⁴ *Id.* at 605–06.

⁴⁵ *Id.* at 632.

the present is common in constitutional law.⁴⁶ But Carol's histories are not fixated on original meaning, with the Framers and the text that they produced as alpha and omega. Her work situates these constitutional issues within property's larger intellectual and social traditions.

When she first encountered the "takings muddle" in 1984, she retreated to the apparent source of the confusion, Holmes and Brandeis's opinions in *Pennsylvania Coal Co. v. Mahon*,⁴⁷ only to move even further back to ideas about property in the early Republic.⁴⁸ Like a good constitutional law scholar, she cites Madison and Jefferson, refers to "Antifederalists," and checks in with Tocqueville.⁴⁹ But she embeds Madison within the classical utilitarian/economic vision of property—tellingly referring to his position as the "Lockean/Madisonian/Benthamite argument for acquisition"—while Jefferson is paired with Aristotelian ideas of civic virtue.⁵⁰

In Carol's compelling view, the muddle in regulatory takings law reflects the persistence of dual—and at times dueling—conceptions of property.⁵¹ Our property regime has multiple missions, and sometimes there are no pat solutions. Revisiting the issue fifteen years later, Carol framed the regulatory takings debate within the larger context of expropriations in the American experience, suggesting a "historic pattern of takings compromises" inherent to property law's complex balance of collective and individual interests.⁵² The muddle reflects a tradition, and a grand one at that.

Finally, in a rich narrative about *Shelley v. Kraemer*,⁵³ Carol confronts the major constitutional issue—whether judicial enforcement of a racially restrictive covenant constitutes state action under the Fourteenth Amendment—by focusing on how racially restrictive covenants would fare under various property doctrines.⁵⁴ The retreat into common law rules about restrictions on alienation, perpetuities, horizontal privity, touch and concern, and changed circumstances⁵⁵ yields a fascinating suggestion: judicial enforcement becomes state actions by giving legal force to a set of implicit

⁴⁶ See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

⁴⁷ 260 U.S. 393 (1922).

⁴⁸ Rose, *Mahon Reconstructed*, *supra* note 24.

⁴⁹ *Id.* at 588–92.

⁵⁰ *Id.* at 590–91, 593. These are issues Carol Rose returned to in *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 85–87 (1989), and in her work on traditions of property as "propriety" in "Takings" and the Practices of Property: Property as Wealth, Property as "Propriety," in PROPERTY AND PERSUASION, *supra* note 7, at 49.

⁵¹ See Rose, *Mahon Reconstructed*, *supra* note 24, at 566–69.

⁵² Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 22, 38.

⁵³ 334 U.S. 1 (1948).

⁵⁴ See Carol M. Rose, *Property Stories: Shelley v. Kraemer*, in PROPERTY STORIES 189–90, 197–204 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

⁵⁵ *Id.* at 197–204, 208.

assumptions about race and property values that landowners in St. Louis might have made in the 1940s and thereby enforcing customs otherwise unrecognized by property law.⁵⁶ Describing state action as “intimately connected to the law of property,”⁵⁷ the essay makes the narrow question of state action secondary to the social effects of property law. It can, Carol writes, “exclude, insult and grievously injure those who are considered outsiders,” but at the same time it allows people into the regime on a neutral basis and fosters their participation on terms of equality.⁵⁸ In reflecting “the best instincts in property law,” *Shelley* becomes more coherent as constitutional law.⁵⁹ And the Constitution emerges not as a catalog of categorical rights, but as one text among many that gives meaning to the daily give-and-take of life in a community.

⁵⁶ *Id.* at 215–18.

⁵⁷ *Id.* at 218.

⁵⁸ *Id.* at 220.

⁵⁹ *Id.* at 218, 220.