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**THE INEVITABLE TREND TOWARD UNIVERSALLY  
RECOGNIZABLE SIGNALS OF PROPERTY CLAIMS:  
AN ESSAY FOR CAROL ROSE**

Robert C. Ellickson\*

It was love at first sight. The first time Carol Rose encountered the field of property she fell madly in love with it.<sup>1</sup> By her own report, this happened when she was a first-year student at the University of Chicago Law School.<sup>2</sup> What attracted her immediately was “property law’s impact on the visible world,”<sup>3</sup> in particular, on the complex cityscapes of Chicago itself.<sup>4</sup> And, during her career she would come to love the variety and flexibility of property institutions and how they could be molded to promote a wide array of human values.

I too was immediately enamored when I took my first property course in law school. As Carol has written, she and I have remarkably similar backgrounds.<sup>5</sup> We both spent our childhoods in or near Washington, D.C., where our fathers held federal jobs that entailed work with statistics on national social and economic conditions. Perhaps our fathers’ fascination with knowing how life is lived on the ground rubbed off on us. Repelled by the social rigidities that then characterized most eastern colleges, Carol and I both chose to attend a co-educational college in a small town in Ohio. At the last available moment, Carol switched her choice from Oberlin, my eventual alma mater, to the even edgier Antioch.<sup>6</sup> Perhaps our years in these close-knit college towns helped to create, or strengthen, the communitarian inclinations that would surface in our scholarship. Of course, Carol and I also differ in many ways. Although we both were active in team sports as youths and remain movie buffs, our adult recreational

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<sup>1</sup> With apologies to JOSEPH HELLER, *CATCH-22*, at 1 (1961). Heller’s novel appeared when Carol was a junior at Antioch. It was an immediate must-read on every campus.

<sup>2</sup> Carol M. Rose, *Property and Language, or, the Ghost of the Fifth Panel*, 18 *YALE J.L. & HUMAN. (SPECIAL ISSUE)* 1, 3–4 (2006) [hereinafter Rose, *Property and Language*] (stressing the influence of Professor Allison Dunham’s tales about the origins of Grant Park on Chicago’s lakefront).

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.*

<sup>5</sup> Carol M. Rose, *Of Natural Threads and Legal Hoops: Bob Ellickson’s Property Scholarship*, 18 *WM. & MARY BILL RTS. J.* 199, 199 (2009). I recall first meeting Carol in Allison Dunham’s office in 1975, near the end of my stint as a visiting professor at the University of Chicago Law School.

<sup>6</sup> *Id.*

interests rarely overlap. I am as bewildered by her interest in dance and playing the recorder as she is by my interest in tournament Scrabble.

Carol's enthusiasm for both the subject of property, and the varied institutions of property, was evident during 1989–2005, her long—for her, uncharacteristically long—stint on the faculty of the Yale Law School. Especially prior to Henry Smith's arrival in 2001, during that period Carol and I bore most of the load of property instruction at Yale. Yale is perhaps the only law school in the United States that does not require a student to take a Property course.<sup>7</sup> During Carol's time at Yale, however, about ninety percent of Yale J.D. students did elect to enroll before graduating. This was the highest percentage for any non-required course, with Business Associations a close runner-up. Carol and I privately both took some pride in this fact.<sup>8</sup> Needless to say, Carol's infectious love of the institutions and puzzles of property helped to draw in Yale students.

#### I. CAROL ROSE THE PERSON

A few years back, at a public event honoring Carol, I stated that at times she brought to mind a member of the comedy team Dean Martin and Jerry Lewis, and that I wasn't thinking of Dean Martin. Our mutual colleague Bill Eskridge immediately suggested that, among the comedic giants of the 1950s, an even better choice would be Lucille Ball. I now accept Bill's friendly amendment.

The smashing success of the television show "I Love Lucy" lay in the appeal of the title character. Lucy had a quick wit, a ready laugh, lacked pretension, and never fell into funks of self-absorption. Just like Carol. And these traits endear. According to Stephen Yandle, when Northwestern University's new law building was about to come on line in the 1980s, he separately asked each Northwestern faculty to name a few colleagues whose office they would prefer to be located nearby.<sup>9</sup> Across this broad and diverse faculty, Carol's name was by far the name most often mentioned. She is as loved as Lucy was.

Carol is an irrepressible explorer, not only of new environs, but, as we shall later see, also of disparate scholarly perspectives. During her adulthood, she has lived for an extended period in an extraordinary variety of regions of the United States. A native of Falls Church, Virginia, she has had stays of at least a year in two or more cities in the South (Atlanta, Austin); in the Midwest (Chicago, Columbus); in the East (Ithaca,

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<sup>7</sup> See *Requirements*, YALE LAW SCH., <http://www.law.yale.edu/academics/jdrequirements.htm> (last visited Apr. 10, 2011). For a survey of law schools' practices, see Peter Wendel & Robert Popovich, *The State of the Property Course: A Statistical Analysis*, 56 J. LEGAL EDUC. 216 (2006).

<sup>8</sup> Perhaps too much pride. Property had been one of the most popular courses at Yale long before Carol and I arrived.

<sup>9</sup> Yandle was a key administrative dean at Northwestern Law School until 1985, when he took on similar responsibilities at Yale, where he later recounted this tale to me.

New Haven, New York City); and in California (Berkeley, Palo Alto). And when Carol retired from the Yale Law School at a relatively youthful age, she set up a complicated annual itinerary that had her cycling through two regions that were fresh for her: the Pacific Northwest (Portland) and the Southwest (Tucson). It is striking that her professional wanderings have rarely taken her, for a long stay, beyond the boundaries of the United States.<sup>10</sup> This may reflect the difficulty of mastering the property law of another nation, and perhaps, on Carol's part, an implicit loyalty to, and affection for, her native land.

As Carol was winding down her career as a historian, she published in *The American Historical Review* a review of a book on the middle-class German women's movement during the mid-nineteenth century.<sup>11</sup> The review refers to the "general meekness" of this movement, to its lack of "an essential element of sheer nerve."<sup>12</sup> The colloquial meaning of *nerve*, which carries negative connotations, is impudent boldness. In this passage, however, Carol is using *nerve* to denote a positive attribute, namely courage.<sup>13</sup>

And courage has always been one of Carol's signature traits. Her wanderlust is one manifestation of it. Another is her willingness to make career moves that status-seekers—that is, most of the rest of us—would reject out of hand.<sup>14</sup> As a teenager, she made the gutsy choice of Antioch. She threw over her tenure-track position at Ohio State in order to go to law school. And, during her distinguished career as a legal scholar, in three instances she has resigned a professorship at a "higher-ranked" law school (at least by conventional metrics) in order to assume a professorship at a "lower-ranked" one.<sup>15</sup>

It also took courage, more than members of younger generations might imagine, for a woman to become a law professor when Carol first chose to go down that path.

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<sup>10</sup> For the record, Carol has also had brief stints as a visiting scholar in Adelaide, Australia, and Cologne, Germany.

<sup>11</sup> Carol M. Rose, *Book Review*, 79 AM. HIST. REV. 174 (1974) (reviewing MARGRIT TWELLMANN, *DIE DEUTSCHE FRAUENBEWEGUNG IM SPIEGEL REPRÄSENTATIVER FRAUENZEITSCHRIFTEN: IHRE ANFÄNGE UND ERSTE ENTWICKLUNG, 1843–1889* (1972)).

<sup>12</sup> *Id.* at 175.

<sup>13</sup> *See id.*

<sup>14</sup> Interestingly, there is a reference to status in the title of Carol's history dissertation, Carol Rose Loss, *Status in Statu: The Concept of Estate in the Organization of German Political Life, 1750–1825* (unpublished Ph.D. dissertation, Cornell University) (on file with Uris Library, Cornell University). Carol would get a better hang at choosing titles as her scholarly career progressed. Starting a title with a Latin phrase that almost no one can fathom is unlikely to attract a general readership.

<sup>15</sup> According to one observer, the turmoil surrounding tenure processes at the University of California Berkeley Law School during Carol's stint there may have played a role in her decision to decamp to Northwestern. *See* Herma Hill Kay, *UC's Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 393 (2003). Knowing Carol's courage, I'd say that it's more likely that she would have been put off by the unpleasantness of the atmosphere within the school than by any risks that the tenure process might pose to her.

She began teaching law in 1978 at Stanford. By that date, the number of female law students nationwide had burgeoned,<sup>16</sup> but there were as yet few female professors.<sup>17</sup> During most of Carol's student days at the University of Chicago Law School, no member of that school's tenure-track faculty was a woman.<sup>18</sup> When Carol joined the Stanford Law faculty, Barbara Babcock was the only other female faculty member. Female role models and mentors plainly were scarce. During that era, many law students—especially female students, according to women law professors of the time—were hypercritical of female professors, judging them by a higher standard. Carol's "nerve" no doubt helped her during that era.

## II. CAROL ROSE THE SCHOLAR

Unlike many property teachers, Carol has a generally sunny view of the property institutions that have evolved in the United States. Although hardly Pollyannaish, Carol, like Elinor Ostrom,<sup>19</sup> one of her sources of inspiration, has confidence that people in a local community such as Yellow Springs, Ohio, are likely to be pretty good—there's a Roseian phrase—at working out institutional arrangements to govern resources. Many other property scholars, by contrast, are gripers. Staunch advocates of strong private property rights—a small minority within the legal academy—tend to view the legal trends of the past century as the start of a possibly irreversible journey down the road to statism.<sup>20</sup> Leftish critics of current property arrangements—a far more numerous group within the academy<sup>21</sup>—commonly regard property institutions, and indeed the rhetoric of property, as baneful forces that foster self-interested behavior and impede progress toward greater distributive justice.<sup>22</sup>

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<sup>16</sup> The percentage of students at ABA-approved law schools who were women increased from 5.9% in 1968 to 30.3% in 1978. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 53 (1993).

<sup>17</sup> In 1978, 9.5% of tenure-track law school professors were women, up from 1.9% in 1968. *Id.* at 219.

<sup>18</sup> One year after Carol arrived at Chicago in 1973, Soia Mentschikoff, the school's only female faculty member, left to become dean of the University of Miami School of Law.

<sup>19</sup> See, e.g., Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 702 & n.56 (2006) [hereinafter Rose, *Privatization*] (citing ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 61–65 (1990)).

<sup>20</sup> See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

<sup>21</sup> Cf. John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L. J. 1167, 1205 (2005) (reporting that about eighty percent of political contributions of law professors at highly-ranked law schools go to Democratic candidates).

<sup>22</sup> See, e.g., JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990); William H. Simon, *Social-Republican Property*, 38 UCLAL. REV. 1335 (1991); Joseph William Singer, *After the Flood: Equality and Humanity in Property Regimes*, 52 LOY. L. REV. 243 (2006).

These sorts of negativism dismay Carol. Consider this passage, which Carol wrote in a response to an article written by Milton Regan:

A number of property scholars (and I count myself among them) have been arguing for years that . . . responsibility, cooperation, and attentiveness to others [ ] are essential features of any property regime. Why is this so? The reason is that property is very largely a creature of culture, and property's complex cultural outcroppings depend on the recognition and acquiescence of entire communities of people. That is why it is so dispiriting to see that Professor Regan's article largely dismisses these more cooperative aspects of property, and instead dwells on the most conventional caricatures of property rhetoric . . . exclusivity, boundedness, and me-first-ism.<sup>23</sup>

The most-cited of Carol's many landmark articles is the joyously titled *The Comedy of the Commons*.<sup>24</sup> There she describes how members of local communities succeed in diffuse fashion in creating roads, recreation areas, and other sites for collective activity,<sup>25</sup> and how Anglo-American law for centuries has tended to honor claims of customary collective rights.<sup>26</sup> Among her many examples is one of her favorite judicial decisions: an English case upholding customary community rights to hold maypole dances on the freehold of a landowner who wanted to terminate the practice.<sup>27</sup>

Carol is a committed localist who revels in the potential diversity of community life. Given the predominant centralizing sentiment within the American legal academy, every faculty should include a passel of Carols. Students at U.S. law schools are awash in courses featuring federal law—e.g., the federal constitution, the federal rules of civil procedure, federal administrative law, federal tax law, and on and on. Many distinguished law journals, such as the *William & Mary Bill of Rights Journal*, largely devote themselves to national (and even international) law. Carol is fully aware of the value of larger governments. She has explored, for example, the meaning of the federal Takings Clause<sup>28</sup> and policy options for addressing global warming.<sup>29</sup>

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<sup>23</sup> Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2410 (1994) (citations omitted); see also Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1899 (2007).

<sup>24</sup> See Carol M. Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) [hereinafter Rose, *Comedy*].

<sup>25</sup> *Id.* at 722.

<sup>26</sup> *Id.* at 713–14, 720–22.

<sup>27</sup> *Id.* at 741 n.143, 758 n.231, 767 nn.274–75 (citing *Hull v. Nottingham*, 33 L.T.R. 697 (Ex. D. 1876)).

<sup>28</sup> See, e.g., Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681 (2007).

<sup>29</sup> See, e.g., Carol M. Rose, *From H<sub>2</sub>O To CO<sub>2</sub>: Lessons of Water Rights for Carbon Trading*, 50 ARIZ. L. REV. 91 (2008).

But Carol's heart lies more with local government and informally organized local communities. In her scholarship, she has repeatedly criticized James Madison's assertions in *Federalist No. 10* that factions tend to dominate at the local level.<sup>30</sup> In Carol's view, the members of a minority faction in a locality can resort to the tools of voice and exit (or the threat of exit) to keep a potentially abusive majority faction in check.<sup>31</sup> Better yet, community members may be able to resolve many of their conflicts and produce many useful public goods without much guidance from local officials.<sup>32</sup> Consider, if you will, how maypole dances are likely to be organized.

Carol's high regard for the capacities of members of informal communities is evident in her classic articles on the proper handling of piecemeal zoning changes.<sup>33</sup> As always, she articulates the issue in earthy fashion: should a city authorize the owner of a corner lot "to tear down the Victorian house and build a gas station."<sup>34</sup> Although some legal scholars might see this sort of issue as small beer, the amount of litigation over these sorts of issues indicates that the lot owner and neighbors commonly do not. "Plan jurisprudence," Carol's phrase for the prior legal wisdom on this question, would require judges on a reviewing state court to determine whether a zoning decision to allow, or not allow, the gas station was consistent with the principles set out in the local government's official plan.<sup>35</sup> When a piecemeal change is at issue, this legal approach is far too centralized for Carol. She does want to assure that the local zoning officials are conscientious mediators, and that they provide both the developer and affected neighbors with adequate notice and opportunity to be heard. But in contexts where those conditions have been satisfied, Carol is happy to defer to whatever substantive outcome might emerge from give-and-take among the neighbors.<sup>36</sup> The would-be developer and the affected neighbors, after all, have the best information

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<sup>30</sup> See, e.g., Rose, *What Federalism Tells Us About Takings Jurisprudence*, *supra* note 28, at 1686–88.

<sup>31</sup> See *id.* at 1687 (identifying herself as a "steady critic" of Madison's analysis); *id.* at 1687 n.24 (citing three of her own prior works extolling the potential of local governance); see also *id.* at 1686–88 (identifying some virtues of local governments, but also shortcomings such as "chumminess and lack of technical capacity"); Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131–39 (1996) (reviewing WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS* (1995) and assessing the tradition of "localism bashing").

<sup>32</sup> See, e.g., Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 891 (1983) [hereinafter Rose, *Planning and Dealing*] (providing examples of community mediation).

<sup>33</sup> See, e.g., Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155 (1985); Rose, *Planning and Dealing*, *supra* note 32.

<sup>34</sup> Rose, *New Models for Local Land Use Decisions*, *supra* note 33, 36, at 1170.

<sup>35</sup> See Rose, *Planning and Dealing*, *supra* note 32, at 851–53, 861–62 (discussing two longstanding pillars of the "plan jurisprudence" approach, *Fasano v. Bd. of Cnty. Comm'rs*, 507 P.2d 23 (Or. 1973) and Charles M. Haar, "In Accordance with a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955)).

<sup>36</sup> See, Carol M. Rose, *New Models for Local Land Use Decisions*, *supra* note 33; Rose, *Planning and Dealing*, *supra* note 32.

and the most at stake. Carol, ever the localist, is inclined to let them to hash out their own compromise.<sup>37</sup>

Carol also is notable for her spectacular intellectual range, another manifestation of her wanderlust. She majored in philosophy in college, went on to earn a master's degree in political science, and then a doctorate in European social and constitutional history. After a few years of teaching in the history department at Ohio State, she was off to law school. In her writings, Carol makes use of, and shows a high respect for, scholarship—at least jargon-free and down-to-earth scholarship—in a highly diverse range of disciplines.<sup>38</sup> For many years, Carol has delivered a lecture to the assembled class of beginning first-year Yale law students. She has chosen as the title of this lecture, “Introduction to Law & Economics: The Dismal Science Explained for Poets, Dreamers and the Clueless.” She is perfectly suited to this endeavor because she deeply admires both poets and those who engage in law-and-economics.<sup>39</sup> Another example: To explore feminist issues, she has repeatedly turned to game theory,<sup>40</sup> a rare move in that genre. On her vita she proudly proclaims her memberships in both the American Law and Economics Association and the American Society for Political and Legal Philosophy.<sup>41</sup> The yin of the humanities and the yang of the harder social sciences are, within Carol, nicely in balance.

Carol is as approachable in print as she is in person. She is drawn to earthy examples, such as a maypole dance.<sup>42</sup> She refrains from offering special definitions of terms and otherwise developing her own argot. And, although she happily seeks help from many disciplines, she is an equal opportunity critic of jargon. In her review of a book by Mark Sagoff, there is a passage, and an accompanying footnote, that are pure Carol:

Yeah, yeah, maybe the economics crowd does tout itself as predictive scientists, but it doesn't sound very civil and open-minded to say they are just making 'category mistakes' either—in fact,

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<sup>37</sup> Although Carol's writings include no mention of the principle of subsidiarity, which favors the decentralization of governance responsibilities to the smallest unit capable of handling them, she appears to share my own enthusiasm for this structural principle.

<sup>38</sup> An exception is sociobiology, which typically draws a disdainful remark. See Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 3; Carol M. Rose, Lecture, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 542 (1995).

<sup>39</sup> See Rose, *Property and Language*, *supra* note 2, at 7–8 (arguing that humanities scholars have much to learn from law-and-economics scholars, and vice versa).

<sup>40</sup> See, e.g., Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN 37 (1990).

<sup>41</sup> Carol Marguerite Rose, *Curriculum Vitae*, YALE LAW SCH., <http://www.law.yale.edu/faculty/rosecurriculumvitae.htm> (last visited Apr. 10, 2011).

<sup>42</sup> See *supra* note 27 and accompanying text.



the very phrase sounds like the kind of Intimidator Ray Gun that philosophers whip out to shut up everybody else.

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Not that economists are easy to shut up—they've got some ray guns of their own, like "cross-elasticity." What could be more of a silencer than that?—maybe the lit-crit crowd's *phronesis*, or *trope*, or *aporia*.<sup>43</sup>

The reference to the lit-crit crowd is particularly telling. As I am about to stress, Carol has identified her deepest interest to be the communication of claims to property. Although she is fully aware that many postmodernists share this fascination with communication, in her many writings on the signaling of property claims, she never invokes *semiotics*, the postmodernist term for the analysis of signs. And *hermeneutics*, the postmodern word for the study of texts, appears in an article that Carol published early in her career,<sup>44</sup> but never thereafter.

### III. CAROL'S CENTRAL PROJECT: HOW PROPERTY CLAIMANTS TRUMPET OWNERSHIP TO PASSERSBY

In 2006, on the occasion of Carol's retirement from full-time teaching at Yale, a committee of her colleagues organized a conference at which four panels of commentators celebrated her work. The committee originally had envisioned a fifth panel devoted to "Property and Language." In her contribution to the volume memorializing the conference, Carol lamented the demise of this "ghost fifth panel":

The exploration of property and language is actually what I have often thought to be my central project as a legal scholar. The title of my book, *Property and Persuasion*, even refers to that project. But alas, I have never managed to convince many people how important it is to think of property in connection with language in th[e] larger sense of communication—speech, stories, visual clues, expressions generally.<sup>45</sup>

I'm convinced, and devote the balance of this essay to her self-confessed passion.

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<sup>43</sup> Carol M. Rose, *Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name is Preference*, 87 MICH. L. REV. 1631, 1640 & n.25 (1989) [hereinafter Rose, *Environmental Faust*] (reviewing MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* (1988)).

<sup>44</sup> See Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 82–83 (1985) [hereinafter Rose, *Possession*].

<sup>45</sup> Rose, *Property and Language*, *supra* note 2, at 2 (citation omitted).

In the influential article that was her first foray into the topic, Carol provides a typically matter-of-fact example of an act designed to communicate a property claim:

In my home town of Chicago, one may choose to shovel the snow from a parking place on the street, but in order to establish a claim to it one must put a chair or some other object in the cleared space. The useful act of shoveling snow does not speak as unambiguously as the presence of an object that blocks entry.<sup>46</sup>

This brilliant example triggered a small burst of academic writing on methods of claiming shoveled parking spaces.<sup>47</sup> Soon I was regularly invoking the problem during the first week of my property course.

Carol's example nicely poses the central question of how a person signals a claim of private ownership of a tangible resource that, in the absence of that signal, others might regard as unowned (*res nullius*, at the Romans would put it). John Locke, in his famous discussion of the origins of property rights, argues that a claimant acquires property by mixing labor with it.<sup>48</sup> A person thus acquires the water running in a public fountain by confining it in a pitcher, or a wild animal, by slaying it.<sup>49</sup> Locke's central concern was the normative legitimacy of a claim of private property,<sup>50</sup> for example, whether Chicagoans should honor a shoveler's claim to a parking space. Carol, by contrast, has been more interested in the factual question of how property claims are expressed, for example, how Chicago shovelers choose to communicate to passers-by.<sup>51</sup> These two questions of course are interconnected because a would-be owner can strengthen the legitimacy of a claim by communicating the claim through proper means. The title that Carol chose for one of her books, *Property and Persuasion*, refers to this interdependence.<sup>52</sup>

Some social observers are "lumpers" who stress similarities among human cultures. Others are "splitters" who stress differences among societies. Like many scholars who have been strongly influenced by economics, I myself am inclined to look for universals.<sup>53</sup> Carol, perhaps partly on account of her training in history and her greater

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<sup>46</sup> Rose, *Possession*, *supra* note 44, at 81 (citation omitted).

<sup>47</sup> See, e.g., Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515, 528–33 (2002).

<sup>48</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–90 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 94–95, 287–88.

<sup>51</sup> Rose, *Possession*, *supra* note 44, at 81–85.

<sup>52</sup> CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP (1994) [hereinafter ROSE, PROPERTY AND PERSUASION].

<sup>53</sup> *But cf.* Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989) (urging law-and-economics scholars to be alert to cultural variations).

immersion in literary theory, tends to be more of a splitter. In her scholarship, Carol frequently invokes the postmodernist axiom that the meaning of a sign depends on the conventions of an “interpretative community.”<sup>54</sup> And these she thinks exist in profusion: “[T]he audience has to ‘get it.’ This . . . is a very freighted matter, because some audiences do not get it, given that there are quite a variety of cultural ‘worlds’ in the larger world.”<sup>55</sup>

To illustrate this point, in a number of works she asserts that English colonists commonly were unable to recognize the signs that indigenous peoples were using to communicate land claims.<sup>56</sup> This viewpoint is consistent with her passion for localism, referred to above. I soon raise the possibility, however, that, when claims to tangible property are being communicated, interpretative communities are in fact not all that diverse.

When writing about property claiming, Carol frequently refers to the “language” and “rhetoric” that claimants employ. The subtitle of *Property and Persuasion*, for example, is *Essays on the History, Theory, and Rhetoric of Ownership*.<sup>57</sup> A superficial reader thus might suppose that she thinks that a claimant of property typically uses words to communicate with passersby. Not so. For Carol, *language* denotes far more than verbal forms. For the cover of *Property and Persuasion*, for example, she chose a photograph of a ramshackle gate in a sagging barbed-wire fence protecting a hard-scrabble ranch in the American West.<sup>58</sup> No words appear in the picture. Carol starts the book with this passage:

Picture property. Use your mind’s eye: what do you see? Perhaps a bank vault full of money or a house or maybe a fence—all common images in musings about property. . . . [T]he dilapidated object in the picture [on the book cover] does not look like much of a fence, but it certainly does assert something about property. It says pretty clearly, “This is *mine*.”<sup>59</sup>

A gate communicates. It “says” things.<sup>60</sup> Carol thus stresses that a property claimant commonly uses a nonverbal visual cue, such as a fence or a chair placed in a shoveled parking space, to assert a property claim.

<sup>54</sup> See, e.g., Rose, *Possession*, *supra* note 44, at 84.

<sup>55</sup> Rose, *Property and Language*, *supra* note 2, at 6; see also Rose, *Possession*, *supra* note 44, at 84–85.

<sup>56</sup> See *infra* note 85 and accompanying text.

<sup>57</sup> ROSE, PROPERTY AND PERSUASION, *supra* note 52.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1.

<sup>60</sup> See also Rose, *Property and Language*, *supra* note 2, at 2 (referencing “speech, stories, visual clues, expressions generally”); *id.* at 12 (describing acts that signal ownership, such as a hunter’s killing of a fox, as “‘texts’ of property”).

IV. SOME (OVERLY ECONOMIC?) THOUGHTS ON THE COMMUNICATION OF  
PROPERTY CLAIMS

To add a bit of spice to this festschrift, I now try to build on Carol's fundamental insights into the nature of property claiming. My thoughts are somewhat less humanistic than hers because I am less inclined to soften economics with poetry. And, being more of a lumpen, I question whether the relevant interpretive communities are quite so diverse. Indeed, my central thesis in this section is that humans have been developing, over the past several millennia, a *universal sign language* (i.e., a set of nonverbal visual cues) for asserting claims to tangible property. Increasing urbanization and international travel have both fueled this trend.

To assess the intuitive plausibility of these assertions, imagine that you have just arrived in a large city in a land completely foreign to you. Consider, for example, a contemporary voyage to Antananarivo (the capital of Madagascar), or a voyage 3,700 years ago to Hammurabi's Babylon. Even in such unfamiliar surroundings, I hypothesize that you would be able to readily understand the actions that the residents of these cities had taken to communicate to a passerby such as yourself their claims to private ownership of land and other tangible assets. This is an empirical claim, and potentially refutable through actual travel to exotic settings.<sup>61</sup> Here is the reasoning behind it.

*A. A Property Claimant as a Rational Actor: The Costs and Benefits of Signs*

Law-and-economics scholars start from the premise that an individual acts rationally and self-interestedly. During the past generation, advances in the field of behavioral economics have forced some tweaking of this basic model, but hardly its abandonment.<sup>62</sup> As a first approximation, a Chicago resident who wants to signal ownership of a shoveled-out parking space can be expected to weigh the costs and benefits of alternative methods of signaling, and to choose the method that promises

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<sup>61</sup> Investigators unsurprisingly have found that the people in different societies, in some contexts, do behave differently. See, e.g., Joseph Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. 73 (2001).

<sup>62</sup> Carol herself has noted that the traditional rational-actor model exaggerates the selfishness of actors. See Rose, *Property and Language*, *supra* note 2, at 8; see also Rose, *Environmental Faust*, *supra* note 43, at 1642–43. See generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (stressing limits on individuals' self-interest, cognitive capacity, and self-control). Behavioral economics potentially may enrich analysis of property signaling. The act of communicating a signal of ownership perhaps might itself increase the claimant's subjective valuation of the resource being claimed. In some classic experiments on endowment effects, the experimenter distributes a coffee mug to selected students in her class. See Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 195–97 (1991). If a student recipient were to immediately place the mug in his backpack, that act by itself conceivably might enhance his valuation of it.

to be personally the most advantageous.<sup>63</sup> It is less costly, for example, to use the placement of a lawn chair, as opposed to a laptop computer, as a signal because there is a risk that the placed item will be stolen.<sup>64</sup> The expected benefits of a given signal are a function of the number of passersby who can be expected to understand that the claimant is asserting a claim of proprietorship and also their recognition of the intensity of that claim. Placing a copy of yesterday's Chicago Tribune in a shoveled space is even less costly than placing a lawn chair there, but that act also would be far less beneficial. A stale newspaper is: a more ambiguous signal than a lawn chair because a passerby is more likely to regard it as an abandoned object; a less emphatic signal because it doesn't block entry (a point Carol made when she introduced this example),<sup>65</sup> and, because an old newspaper is so valueless, a less intense signal of proprietorship. In a social setting where there are conventional means of signaling claims to property, by hewing to those conventions a claimant can obtain advantages on both the cost side and the benefit side. Copying what others have done requires little thought, and passersby are more likely to comprehend a conventional signal than an unconventional one.

*B. The Key Distinction Between an Ownership Earmark and Title Assurance Information*

As Thomas Merrill and Henry Smith have repeatedly stressed, a property right operates *in rem*.<sup>66</sup> It confers on an owner a general right to exclude, which all other persons in the world, except in rare circumstances, have a duty to honor.<sup>67</sup> A passerby who sees a valuable object or land surface may have difficulty determining whether the observed resource is up for grabs. In some instances, it is. Items of clothing, tools, and other artifacts become *res nullius* when abandoned by a prior owner.<sup>68</sup> Until captured or domesticated, animals are unowned. In cities, about one-third of the land area is devoted to open-access streets and parks.<sup>69</sup> Because nonprivate property is

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<sup>63</sup> See Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1108 (2003); see also Rose, *Possession*, *supra* note 44, at 84 & n.46 (noting that, all else equal, a claimant of property should prefer to signal a claim in low-cost fashion).

<sup>64</sup> Animals may also be alert to the costs and benefits of various means of property claiming. For a wolf, urination is a much cheaper method of marking territory than, say, trying to build a cairn. And, because wolves have an unusually acute sense of smell, an act of urination is a prominent, if time-limited, signal.

<sup>65</sup> Rose, *Possession*, *supra* note 44, at 81.

<sup>66</sup> They first introduce this theme in Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8, 32, 54–55 (2000).

<sup>67</sup> *Id.*

<sup>68</sup> See Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010); see also Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010).

<sup>69</sup> See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 15 (3d ed. 2005).

so prevalent, a person who wishes to claim exclusive ownership of a resource has reason to affix an ownership earmark on it in order to signal to passersby to keep their hands and feet off.<sup>70</sup> Providing an effective ownership earmark is a challenge, however, because the peoples of the world speak myriad different languages and increasingly travel long distances to visit strange lands.

These basic facts underlie the hypothesis that property claimants everywhere increasingly make use of a universal sign language to communicate *in rem* claims to passersby. In Antananarivo, Madagascar, for example, a house owner or merchant showing wares must anticipate that some total strangers will happen by. To prevent these strangers from wrongly entering the house or wrongly taking the goods, these property owners are drawn to employing simple signals of proprietorship that foreigners are likely to comprehend.

An owner also commonly has reason to communicate much more detailed information to members of a much narrower audience, namely those who wish to engage in a transaction involving a particular asset. An owner of land, for example, may wish to sell it, lease it, mortgage it, or encumber it with a servitude. A transferee involved in one of these sorts of transactions commonly will offer the owner better contract terms if the owner can assure the transferee that third parties who historically have been associated with the resource have previously relinquished to the owner all their rights to it. To provide this sort of title assurance information to transferees, a property claimant typically uses forms of communication that are quite different from the ones a claimant uses to communicate to casual passersby.<sup>71</sup> Title assurance information is much more particularized than an ownership earmark, the audience for title assurance information is far smaller, and the members of that audience have more time and greater incentive to engage in careful research. Beginning in ancient Mesopotamia, states have encouraged the development of recording and registration systems to facilitate the communication of detailed information about the quality of land titles.<sup>72</sup> Unlike an ownership earmark, title assurance information typically is communicated by means of words, indeed, written words. This may create complications when transacting parties don't speak the same language, but the parties commonly have both the time and motivation to seek the assistance of translators.

This distinction between ownership earmarks addressed to the world, and detailed title assurance information addressed to transferees, is fundamental. My hypothesis that there is an inevitable trend toward a universal sign language of property claiming applies only to the former, that is, to patterns of ownership earmarking.<sup>73</sup>

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<sup>70</sup> See generally Smith, *supra* note 63, at 1115–25 (discussing the communication of property claims, particularly those based on possession).

<sup>71</sup> See *id.* at 1141–44, 1167–73.

<sup>72</sup> See Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 384–87 (1995).

<sup>73</sup> Because the intended audiences are different, the establishment of a recording or registration system does not obviate the need to place physical markers of ownership on the ground.

*C. The Advantages of Permanent Nonverbal Visual Cues as Ownership Earmarks*

A person who places a chair in a shoveled parking space has chosen to alert other potential claimants through their sense of sight. Why sight, as opposed to one of the other four human senses?<sup>74</sup> Why wouldn't a claimant spray a cleared parking space with a cheap perfume, much like a wolf urinates to establish the boundary of a territorial claim? Why not place electronic speakers (hypothetically invisible) in a shoveled space, and program them to repetitively broadcast an appropriate message, perhaps Michael Jackson's megahit *Beat It*.

As Carol herself has stressed, a visual signal is, in most contexts, the most cost-effective method of informing the world of an assertion of ownership.<sup>75</sup> An odor or sound commonly sends a less precise message than a visual earmark does. In the process of seeking a shoveled parking space, a Chicago motorist who gets a whiff of a cheap perfume, or hears the sounds of *Beat It*, might not be able to deduce the boundaries of the tangible object that the claimant was trying to brand.<sup>76</sup> Moreover, unlike many smells and sounds, a passerby commonly can detect a visual cue at a long distance. It is likely that a passerby's hopes of being successful at making a grab rise as he nears the object in question. By providing a long-distance signal, a claimant lessens the risks of raising and then dashing the expectations of passersby, and thus angering them. Partly because a passerby can instantly turn away from a visual cue, it also is less likely than an olfactory or auditory cue to be regarded as a nuisance.

Most important, the placement of a brand or other physical mark typically endures far longer than a smell or sound would. Smells dissipate. Electronic speakers are vulnerable to power failure. For the same reason, a visual cue that is ephemeral is less

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*But see* Carol M. Rose, *Big Roads, Big Rights: Varieties of Public Infrastructure and Their Impact on Environmental Resources*, 50 ARIZ. L. REV. 409, 433 (2008) [hereinafter Rose, *Big Roads*].

<sup>74</sup> A valuable exploration of the possibilities of addressing communication to the various five senses is Bernard J. Hibbitts, "Coming to Our Senses": *Communication and Legal Expression in Performance Cultures*, 41 EMORY L.J. 873 (1992), cited in Carol M. Rose, *Privatization*, *supra* note 19, at 703 n.65 (2006).

<sup>75</sup> Carol's last chapter in *Property and Persuasion* is a stimulating and previously unpublished essay entitled *Seeing Property*. ROSE, PROPERTY AND PERSUASION, *supra* note 52, at 267–304. The chapter's title underscores her sense of the predominance of visual cues in property claiming. See also *id.* at 269–94 (discussing the relative strengths and weaknesses of a fence or other nonverbal cue designed for detection by eyesight).

<sup>76</sup> Members of some species use sounds to claim property. For example, natural selection has favored the survival of birds capable of using songs to assert a territorial claim. See Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 455 (2005). When rivals can enter a claimed space by air as well as by foot, the placement of effective visual cues on the three-dimensional boundaries of the space may be impossible or foolhardy. In such situations, sounds and smells are likely to be better signals.

likely to be cost-effective than one that is more enduring. For example, after completing the shoveling of a parking space, a shoveler could signal ownership of it by dancing a jig within the space. But this act would communicate a proprietary claim only to those who happened to witness the dance or to hear about it from a neighbor who saw it.<sup>77</sup> A placed lawn chair, by contrast, speaks day after day.

Let's turn to a resource far more momentous than a parking space. How have people communicated to the world claims of private ownership of parcels of land they are cultivating? This has been a key issue in human civilization since the invention of agriculture in the Fertile Crescent ten thousand years ago.<sup>78</sup> Acts of cultivation themselves can incorporate visual signals. For example, a farmer who starts to grow crops on lands previously collectively accessible to all members of her tribe can sow seeds in an unnatural pattern such as rows, or through weeding create a monoculture that looks different from nearby natural patterns of vegetation. Anyone seeing a visual cue of this sort should know better than to reap where she has not sown.<sup>79</sup>

A cultivation pattern, however, may provide a visual cue only during the actual period of cultivation. A claimant who aspires to enduring ownership of a field must send out a more enduring visual signal. One relatively inexpensive option is to place, at well-trafficked perimeter points, cairns, wooden posts, or other objects that are obviously artificial, just as a lawn chair is when seen in a parking space. The Hebrew Bible is full of injunctions against moving a neighbor's boundary stones, evidence that methods of this sort were once commonly in use, but also hardly tamper-proof.<sup>80</sup> Many land claimants therefore turn to more costly options such as erecting a fence, wall, or moat to signal the boundary of claimed territory. This is hardly news to Carol, who of course chose to place a photograph of a fence on the cover of *Property and Persuasion*.<sup>81</sup>

In that photographed scene, there might also have been a "no trespassing" sign, but there isn't.<sup>82</sup> A snow shoveler in Chicago might place a handwritten sign (perhaps,

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<sup>77</sup> Cf. Rose, *Property and Language*, *supra* note 2, at 7 (discussing the highly contested issue in Australian law of whether Aborigines' stories, songs, and celebrations about specific lands that they had never occupied should be regarded as sufficient to support claims to those lands).

<sup>78</sup> See Ellickson & Thorland, *supra* note 72, at 330 n.37 (discussing the rise of agriculture in the Fertile Crescent).

<sup>79</sup> In the United States, a passerby traditionally has been privileged to enter rural private land to hunt or fish, but not if the land is enclosed or under cultivation. See *McKee v. Gratz*, 260 U.S. 127, 136 (1922).

<sup>80</sup> See Ellickson & Thorland, *supra* note 72, at 344 & n.121.

<sup>81</sup> A noncontractual land claim that fails to provide a visual cue is itself likely to fail. American law has always been hostile to claims of negative prescriptive easements—for example, of light, air, or view—because the claimant has made no "visible trace" that the owner of burdened property could notice. See ROSE, *PROPERTY AND PERSUASION*, *supra* note 52, at 269.

<sup>82</sup> On the legal significance of these signs in rural areas, see Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 *DUKE L.J.* 549 (2004).



“I shoveled this. Stay away.”) in a cleared parking space, but instead places a chair. Why? In many contexts a nonverbal cue promises to reach a broader audience than a verbal message would. Especially until the last few centuries, most adults were illiterate.<sup>83</sup> A five-year-old who is too young to read can well understand the meaning of a fence. And, in a city such as Chicago that teems with tourists and recent immigrants, a passerby literate in some languages may be unable to comprehend a message in English. When the goal is to communicate to the entire world, a property claimant therefore commonly prefers to use not words, but a visual marker—such as a fence, brand, tag, or pictorial image—that will be more widely recognized.

*D. The Inevitable Rise of Universal Conventions for Communicating In Rem Property Claims to Passersby*

My hypothesis that there is an inevitable trend toward a universal sign language of property claiming is in tension with the notion that distinct interpretative communities exist in profusion. Certainly, in a social environment where strangers virtually never appear, the members of a community may be able to sustain a special system for signaling property claims. Close-knit whalers, for example, developed visual cues governing claims of ownership of high-seas whales that would not be transparent to non-whalers.<sup>84</sup> Many of Carol’s own examples of distinctive interpretive communities are drawn from Stuart Banner’s work on pre-colonial Australia, New Zealand, and Hawaii.<sup>85</sup> Prior to Anglo-American colonization, the natives of each of these islands were isolated by the waters of the Pacific. These places thus are intuitively plausible locales for the emergence of a special system of property claiming.

For several reasons, however, the number of distinct interpretative communities has been fast dwindling.<sup>86</sup> The inexorable forces of globalization scatter strangers everywhere. Life in contemporary Madagascar, the most exotic large island that comes

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<sup>83</sup> For example, in the early seventeenth century literacy rates of men in England, France and Scotland ranged from roughly twenty to somewhat over thirty-three percent. KENNETH A. LOCKRIDGE, *LITERACY IN COLONIAL NEW ENGLAND: AN ENQUIRY INTO THE SOCIAL CONTEXT OF LITERACY IN THE EARLY MODERN WEST* 45–46 (1974).

<sup>84</sup> See Smith, *supra* note 63, at 1120–22.

<sup>85</sup> See, e.g., Rose, *Property and Language*, *supra* note 2, at 6 nn.14–15 and accompanying text (citing Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 L. & HIST. REV. 95, 100–04, 107–12 (2005)); see also ROSE, *PROPERTY AND PERSUASION*, *supra* note 52, at 294–96 (discussing instances of colonists’ blindness to native land claims in both Hawaii and North America); Rose, *Possession*, *supra* note 44, at 85–88 (discussing judicial indifference to Native American land claims).

<sup>86</sup> Carol has recently written that “to mark the land physically, for example by cutting trees, erecting fences, and/or farming or mining. . . . is modernist in the sense that the markers are intended to be observable by any stranger at all (rather than only by insiders to a community) . . . .” Rose, *Big Roads*, *supra* note 73, at 433. If she regards the current world to be awash in modernism, as she likely does, she may be willing to endorse my general thesis.

to my mind, hardly resembles life in pre-colonial Australia or Hawaii. The website TripAdvisor identifies forty-one hotels in Madagascar's capital, Antananarivo.<sup>87</sup>

Moreover, some observers might be skeptical of the claim that the interpretative communities of the various Pacific islanders differed greatly from those of the colonizers. There are at least two ways of explaining, for example, why English colonists referred to Australia as *terra nullius* despite the presence of aboriginal people. The first, supportive of the notion of distinct interpretative communities, is that the English couldn't comprehend that Australia's natives actually claimed ownership interests in the lands that they had long nomadically occupied.<sup>88</sup> The second, arguably more consistent with the evidence, is that the English colonists quickly did come to understand the reality of aboriginal land claims, but decided that it would be cheaper to expropriate native lands than to negotiate for their purchase.<sup>89</sup> By asserting that Australia was *terra nullius*, the conquering English could soothe their consciences and perhaps also mute criticism from outside observers. The historical root of Australian land conflicts thus may have been greed, not a failure of communication.

Travel and urbanization are the primary forces that erode the usefulness of special claiming languages and usher in a universal sign language of property. These forces have long been at work. Ancient Babylon, for example, was a center of international trade and thus a magnet for strangers.<sup>90</sup> Babylonian property owners could see the advantages of communicating with passersby by means of walls, fences, closed doors, and other signals that urbanites of the present era could readily comprehend.

Is it plausible that Chicagoans would have developed a unique local language for the claiming of a shoveled parking space? Probably not. Of course, to resolve the question, what is ultimately needed is an empirical study of space-claiming practices in other cold-weather cities, such as Minneapolis, Montreal, and Moscow, to list a few in the order of their increasing cultural distance from Chicago.

Minor cultural variations in claiming practices of course are to be expected. For Chicagoans, a lawn chair might be a quintessentially summery object that, when placed in the snow, is an emphatic signal on account of this incongruity. For Muscovites, a different object might be quintessentially summery. In a social context where individuals have unusual sensory abilities or disabilities, for example, an institution for

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<sup>87</sup> TRIPADVISOR, ANTANANARIVO HOTELS, <http://www.tripadvisor.com/Hotels-g293809-Antananarivo-Hotels.html> (last visited Apr. 10, 2011).

<sup>88</sup> Rose, *Property and Language*, *supra* note 2, at 6–7.

<sup>89</sup> See Banner, *supra* note 85, at 103–04, 110–11, 114–23. Compare Banner's analysis of Australia with Eric Kades's analysis of the colonization of the United States. American colonists could either use force to conquer the indigenous peoples or settle with them by treaty. Kades asserts that the colonists tended, in a given context, to choose the option that was cheaper for them. See Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

<sup>90</sup> See Russ Versteeg, *Early Mesopotamian Commercial Law*, 30 U. TOL. L. REV. 183, 189–91 (1999).

the blind, signaling practices can be expected to differ.<sup>91</sup> And more cultural variations in claiming practices are to be expected when the tangible resource in question is physically difficult to earmark, such as a liquid or gas. When an intangible resource, such as an idea, invention, or artistic performance is at issue, claiming practices are likely to be highly varied, in part because the normative appropriateness of private property in these instances is highly contested. But, with these several caveats, I still hypothesize that there has been an inevitable trend toward a universal sign language of property claiming.

#### V. A CONCLUDING TRIBUTE

Although Carol's career and mine may have been joined at the hip, our frameworks for analyzing property issues do differ. The yin of the humanities and the yang of economics are more in balance in her. She thus is more inclined to resist cross-cultural generalizations, and to reject the use of stripped-down models of human motivation. Intellectual differences of these sorts tend to spark debate and contribute, in the long run, to the stock of legal knowledge. Or, at least, that's the self-glorifying premise that sustains those of us in the academy.

Carol has been a giant in the field of property law both on account of her ideas and her style. In 1970, three residents of Hyde Park, Ronald Coase, Harold Demsetz, and George Stigler, had recently published the pioneering works related to the economics of information.<sup>92</sup> When Carol arrived at the University of Chicago Law School a few years later, these works may have planted, through some indirect means, a seed in her mind. Carol, when playing the role of economist, has had the prescience to see that people tend to shape their property institutions with an eye to reducing information costs. Carol the poet has also known that more than this is going on.

Countless scholars and students have benefitted from her many insights on this and other subjects. Her unpretentious scholarly style has also served as a role model: the rejection of jargon, the love of the earthy example, the respect for the competence of ordinary people who make decisions on the ground.

Let's overcome our tendency to free-ride and all chip in and buy our friend both a snow shovel and a lawn chair. Or, better yet, buy her whatever the folks in snowless Tucson, Carol's primary new home, employ to signal proprietorship.

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<sup>91</sup> Because someone who is blind cannot hold a driver's license, a shoveler who places a chair in a parking space can be confident that any would-be parker could detect it. By contrast, in a residential institution for the blind and aged, a resident who wished to assert ownership of a walking cane would be wise to place on the cane distinctive bumps or indentations that other residents could feel.

<sup>92</sup> R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); George J. Stigler, *The Economics of Information*, 69 J. POL. & ECON. 213 (1961).

## A FOXY HEDGEHOG: THE CONSISTENT PERCEPTIONS OF CAROL ROSE

Jedediah Purdy\*

In a tribute like this, the question arises unavoidably: is Carol a fox or a hedgehog? That is, following Isaiah Berlin's iconic distinction, does she know many things, like the fox, or, like the hedgehog, does she know one big thing?<sup>1</sup>

It may seem strange that the ecosystem of legal scholarship should contain so little biodiversity; but the question engaged me. I started out thinking that Carol must be a fox, but I may have thought so for the wrong reasons: reasons of style, basically, having to do with her light-footedness, her deftness, and the recurrent sense that, just when you thought you had caught her, your trap closes on air and you see a tuft of frizzy hair disappearing into the trees.

Characteristically, Carol set me straight. When I told her that I found writing this reflection challenging because each of her pieces is a distinctive meditation, she replied that she thought I was wrong, that in fact she had just a handful of guiding ideas. Even allowing for modesty, Carol is nothing if not candid, so I decided that I should at least have a try at thinking of her as a hedgehog.

Again, the problem may be partly a lack of biodiversity in our metaphors, but I found myself drawn to this conclusion: Carol is, as she insisted to me, a kind of hedgehog; but she is a very foxy hedgehog.

What I mean by this is, I hope, a little more than the obvious. Carol's work does revolve around a consistent set of perceptions. In fact, I would like to say that it revolves around a pair of facts that go together, but tend to unsettle each other, and that it is the oscillation between these tensely related facts that accounts for her foxiness.

We find Carol's two signal facts together in her 1989 review of another scholar's book on economics and environmental values.<sup>2</sup> After disagreeing with the author's premises, his conclusions, and the path he takes between them, she credits him with a pair of important perceptions.<sup>3</sup> They may in fact have been his: in any case, I feel clear

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<sup>1</sup> See ISAIAH BERLIN, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History*, in *THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* 436 (Henry Hardy ed., 1998) (internal citation and quotation marks omitted).

<sup>2</sup> See Carol M. Rose, *Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name is Preference*, 87 MICH. L. REV. 1631 (1989) [hereinafter Rose, *Environmental Faust*] (reviewing MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* (1988)).

<sup>3</sup> *Id.* at 1646.

that they are Carol's. First "we live in an imperfect world of limited resources . . ." <sup>4</sup> This, of course, is the practical and irresistible starting point of all economic analysis of property since Blackstone, if not since Aristotle. <sup>5</sup> The second is more unexpected. Carol says, "we live in a limited rhetorical world, too." <sup>6</sup> This second observation gave her some appreciation of the other scholar's argument because, she decided, he was trying to find a way to get beyond "all this pinched yakking about what's mine, and what's yours, and how much you are going to have to pay me if you want to get what's mine." <sup>7</sup>

I think the mood of Carol's work stems from her holding two potentially inconsistent thoughts in mind at once—and, for some very good reasons, being impatient with anyone who embraces one to the exclusion of the other. The first thought is that property law is a response to *the economic problem*: life in a world of scarce and desired resources, among people whose interests often conflict and who have limited, but real, capacity to make those interests more overlapping by setting up schemes of cooperation. <sup>8</sup> The second is that our imaginative and moral investment in these "resources" goes well beyond the distinctions that the conventional tools of economic analysis encompass. <sup>9</sup>

This can put us in something of a Catch-22. When we discuss our houses, heirlooms, forests, and so forth in the language of economics, we either leave out or distort some of how we value them, what they mean to us. If, however, we pretend that our relation to them is not basically shaped by their being scarce and desired resources—by the economic problem—then we commit an arguably greater distortion.

And so, if there is a single master-idea in Carol's work, it is a product of the relation between the economic dimension of our lives and the everything-else dimension. Carol has returned again and again to the theme that the language and forms of property law bridge this divide, and produce forms of partial reconciliation between the two sides.

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<sup>4</sup> *Id.*

<sup>5</sup> See JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 1–5 (2010) (describing the role of this idea in the history of property thought).

<sup>6</sup> Rose, *Environmental Faust*, *supra* note 2, at 1646.

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Carol M. Rose, *Cannons of Property Talk, or, Blackstone's Anxiety*, 108 *YALE L.J.* 601, 631–32 (1998) ("Property regimes always consist of some individual rights, mixed with some rights shared with nearby associates or neighbors, mixed with still more rights shared with a larger community, all held in relatively stable but nevertheless changing and subtly renegotiated relationships."); Carol M. Rose, *The Shadow of The Cathedral*, 106 *YALE L.J.* 2175, 2196–97 (1997) ("In situations of competition for scarce resources, property rights allow disparate parties to find each other, to bargain, to trade, and to leave the bargaining table with stable entitlements that allow them to plan for their future investments and efforts").

<sup>9</sup> See, e.g., Carol M. Rose, *Privatization—The Road to Democracy?*, 50 *ST. LOUIS U. L.J.* 691, 714 (2006) ("Property thus appears to be more available to the imagination than many other rights . . .").

Consider Carol's discussion of inherently public property in her great piece, *The Comedy of the Commons*.<sup>10</sup> There she praises commerce as the most expansive and important commons in modern life, one that trains its members in mutual sympathy, regard, and forbearance.<sup>11</sup> Carol says that commercial life may be as much a community organized by custom as "the community using the village green to dance."<sup>12</sup> With that link, Carol ties recent cases securing beach access for recreation and use of private property for free speech—interpretations of property rights that secure "civic" or "community" values—back in an organic line of development to their predecessor doctrines, especially the traditional public trust.<sup>13</sup> And at the same time she reminds us that the public trust began, not as a law of pastoral ancient rights, but as a way of ensuring that the channels of commerce, often literally waterways, were open to all and thus able to produce their ever-increasing returns to scale.<sup>14</sup> The commercial commons of the markets that classic property helps create, and the more conventional commons of civic or community land that all may use just by virtue of their social membership, are not opposites at all, but complementary ways of producing a rich set of social benefits, and both are parts of the doctrinal grammar and moral vision of property.<sup>15</sup> This is a vision in which "economic" values and all the "other kinds" of values are essentially integrated and mutually supportive, and not just as a matter of social theory, but very much within property thinking.

For a sense of how non-obvious this might be, contrast it with a classic expression of the thought that property and commerce on the one hand, are opposed to community and nature on the other. Writing about Enclosure, the creation of private property out of common land,<sup>16</sup> John Clare, the nineteenth-century English poet, wrote of noble oaks that "to the axe of the spoiler and self-interest fell a prey."<sup>17</sup> He concluded, Enclosure left "little parcels little minds to please."<sup>18</sup> That's a very familiar story, whether it comes from conservative nostalgia, romantic pastoral, or the left-wing tradition of Karl Marx's sulfurous portrayal of Enclosure as part of commerce's modernization

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<sup>10</sup> Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

<sup>11</sup> See *id.* at 775–77 (discussing the relationship between commerce and sociability).

<sup>12</sup> *Id.* at 776.

<sup>13</sup> *Id.* at 713–14 (beach access); *id.* at 778 (free speech).

<sup>14</sup> *Id.* at 723.

<sup>15</sup> See *id.* at 717–23 (discussing classic economic theories and public commons).

<sup>16</sup> Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1246 (2005) (defining "Enclosure" as "the conversion of common fields and pastures into private land—much of it in the hands of nobility and other large land-holders—that transformed the English countryside in the seventeenth and eighteenth centuries.").

<sup>17</sup> JOHN CLARE, *Remembrances*, in "I AM": THE SELECTED POETRY OF JOHN CLARE 132, 134 (Jonathan Bate ed., 2003).

<sup>18</sup> JOHN CLARE, *The Moors*, in I AM, *supra* note 17, at 89, 90.

process by which “all that is solid melts into air.”<sup>19</sup> I think Carol might reply that, with commerce, all that is solid becomes more complicatedly interdependent.

Carol makes a similar kind of connection in a discussion-by-indirection of the republican strand in property theory. Her paper, *The Ancient Constitution vs. the Federalist Empire*, is superficially among the least property-focused of Carol’s writings, but really she is engaging the issue in political theory that underlays the republican-revival literature, in property scholarship as elsewhere: is American constitutional democracy better understood, descriptively and normatively, as the extensive commercial republic of formally equal rights-bearers, or with reference to the anti-federalist or ancient-constitutional values of local self-rule, virtue, and the particularization of certain rights and responsibilities?<sup>20</sup> Not surprisingly, Carol will accept no moralistic slurs against the commercial republic: she concludes that, if it is Babylon rather than noble Sparta, “there are many people who really like Babylon, who prefer its coarseness to noble character, who revel in its remarkable energy, and find charm in the very vulgarity of its dynamism.”<sup>21</sup> Indeed. But Carol also insists that, if we look closely at our actual practices, we will find that Babylon and Sparta are interwoven, and that the spirits of localism and voluntary effort enrich the tapestry on which the drama of commercial individualism takes place,<sup>22</sup> while that drama gives local and voluntary life a zest that Sparta lacked—“Spartan,” after all, is euphemism for “drab.” So again we’re back to the inseparable and mutually supporting relationship between two classes of values that are sometimes styled as implacably opposed.

Carol gives a kind of *summa* of this view in a *William and Mary Law Review* piece that, typically, takes the posture not of high theory, but of a character sketch—the character of “the moral subject of property,” the kind of person that property law implicitly supposes its participants to be.<sup>23</sup> Property’s moral subject is neither a utopian perfectionist, motivated mainly by visions of justice and fairness, nor the polemicist’s caricature of *homo economicus*, someone who is merely selfish.<sup>24</sup> Instead, she is a practitioner of Alexis de Tocqueville’s “self-interest rightly understood,” who looks out for herself and her own, chiefly but not exclusively; who can be moved by higher ideals, but not to the point of letting her feet get off the ground; and who prefers to contribute to the common good *when she knows everyone else will do the same*, so that she is not nagged by the fear of being everyone else’s sucker.<sup>25</sup> Carol shows

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<sup>19</sup> See KARL MARX, MANIFESTO OF THE COMMUNIST PARTY (1888), *reprinted in* THE MARX-ENGELS READER 469, 473, 476 (Robert C. Tucker ed., 2d. ed. 1978).

<sup>20</sup> Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74 (1989).

<sup>21</sup> *Id.* at 105.

<sup>22</sup> *Id.*

<sup>23</sup> See Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897 (2007) [hereinafter Rose, *Moral Subject*].

<sup>24</sup> *Id.* at 1898–99; see also PURDY, *supra* note 5, at 4 (discussing *homo economicus*).

<sup>25</sup> See Rose, *Moral Subject*, *supra* note 23, at 1901–03 (citing Tocqueville and explaining why a property owner would “give ground”).

that the major moral objections to classic property are all tempered by the insight that property law is based in compromises with this kind of human nature—and that this is not a bad kind of nature, really, that it has marked redeeming virtues and is, in any case and most of the time, who we are. In its low-built decency and its capacity to trust and give, it even has, in Carol’s phrase, a streak of divinity.<sup>26</sup> I like that. I had thought when I remembered the phrase that it must be a “spark” of divinity, a more conventional image, suggesting something that could start a wildfire. A streak can’t set anything aflame—but it is a part of the larger composition, a line without which the whole painting would be something else altogether.

What would the moral subject of property say to someone who wanted to stick to one side or the other of a stylized opposition between economic evaluation and other kinds of values? I picture Carol reenacting Samuel Johnson’s famous refutation of skepticism, except that, instead of kicking a stone, she would clap her two hands together, point to her own irresistibly grinning face, and say, “Thus I refute you.”<sup>27</sup>

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A thought in concluding: As her student and sometime colleague, I know in Carol’s way of being a teacher, collaborator, or friend, there is nothing to suggest that the world is poor in time, resources, or rhetorical imagination. If I am right about her work, then she may be caught in a performative contradiction—the kind of quasi-Kantian argument that she would hate, which is why I might make it—in which her actions are inconsistent with her premises and therefore undercut her premises. There must be no problem of scarce resources, or Carol wouldn’t be so generous! There must be no rhetorical shortage, or she couldn’t be so funny! And that would be a chance for her to invoke her most impudent line ever, answering her own question, “What do I say to Immanuel Kant’s moral imperative? Hey, take gas, Manny, baby.”<sup>28</sup>

Anyway, I think the paradox is not Carol’s, but mine, and is built into the task of trying to capture Carol within the four corners of any description, even one built on complexity. So, as sometimes happens, I am driven back to my first instinct. Because, as I said, it is characteristic of the intellectual animal that is not a hedgehog that you are never sure where to find it, and that if you do spot it somewhere, you can expect not to see it there the next time you go looking for it, but be surprised by it in some other place. The more confidently you believe you have pinned it down, the more acute your surprise will be.

And so I conclude with my first thought about Carol. Whatever she says, she is a fox. Don’t believe her if she denies it. That is exactly what a fox would do.

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<sup>26</sup> See *id.* at 1926 (“[The moral subject of property] has her own streak of divinity.”).

<sup>27</sup> The precise quotation from Samuel Johnson, addressed to skepticism, is “I refute it thus.” 1 JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 397 (Dublin, John Chambers 1792).

<sup>28</sup> Rose, *Environmental Faust*, *supra* note 2, at 1642.





## 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*<sup>1</sup> and *The Comedy of the Commons*.<sup>2</sup> 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.<sup>3</sup> 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

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

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

<sup>3</sup> 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.<sup>4</sup> 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."<sup>5</sup> 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*<sup>6</sup> 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.<sup>7</sup> 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."<sup>8</sup> Then she assigns a name to each type of alternative. "The perfectly

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<sup>4</sup> 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).

<sup>5</sup> 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*].

<sup>6</sup> *Id.*

<sup>7</sup> 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").

<sup>8</sup> Rose, *Property as Storytelling*, *supra* note 5, at 43.

ordinary person” is “John Doe.”<sup>9</sup> Fair enough. A more competitive person is “King of the Mountain.”<sup>10</sup> A reflexive bad actor is “Malice Aforethought.”<sup>11</sup> The altruistic person is, simply and charmingly, “Mom.”<sup>12</sup> She is not to be confused with a more compulsively self-sacrificing, but still rational actor: “Portnoy’s Mom.”<sup>13</sup> And finally, there’s the out-and-out masochist who goes by the name “Hit Me.”<sup>14</sup> 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.<sup>15</sup> She’s watched an episode or two, perhaps more, of *NYPD Blue*.<sup>16</sup> She is no stranger to country music.<sup>17</sup>

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.<sup>18</sup> 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,”<sup>19</sup> 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.’”<sup>20</sup>

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.<sup>21</sup> Her work spans time and space, engaging with ideas and

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 44.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 45.

<sup>14</sup> *Id.*

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

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

<sup>17</sup> 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).

<sup>18</sup> Rose, *Property as Storytelling*, *supra* note 5, at 38.

<sup>19</sup> *Id.* at 55.

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> 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.<sup>22</sup> 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*.<sup>23</sup> 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.<sup>24</sup> “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.”<sup>25</sup>

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*.<sup>26</sup> 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.”<sup>27</sup> 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.<sup>28</sup>

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<sup>22</sup> 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).

<sup>23</sup> 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.

<sup>24</sup> 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*].

<sup>25</sup> *Id.*

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

<sup>27</sup> *Id.* at 476.

<sup>28</sup> *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.<sup>29</sup> Theory and doctrine lead to an insight grounded in everyday life, the idea of “possession as some kind of *statement*.”<sup>30</sup> 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.”<sup>31</sup> It is what people think, to use an example from the essay, when they see fenced-in land where cows are grazing.<sup>32</sup> Although the piece concludes by suggesting that rules of possession embody and structure a relationship between people and nature,<sup>33</sup> 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.”<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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

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

<sup>30</sup> *Id.* at 77 (emphasis in original).

<sup>31</sup> *Id.* at 82, 84–85, 88.

<sup>32</sup> *Id.* at 77–78.

<sup>33</sup> *Id.* at 87.

<sup>34</sup> Rose, *Comedy*, *supra* note 2, at 720–21.

<sup>35</sup> *Id.* at 722–23, 740–41.

<sup>36</sup> *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.<sup>37</sup> These examples draw from what her colleague Robert Gordon would call “mandarin” legal materials,<sup>38</sup> citing to a lot of old appellate decisions.<sup>39</sup> 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.”<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> Carol uses Blackstone's statements—an expression of anxiety that there may be “some defect in our title”<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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

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<sup>37</sup> Rose, *Crystals and Mud*, *supra* note 1, at 580–90.

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

<sup>39</sup> Rose, *Crystals and Mud*, *supra* note 1, at 580–88.

<sup>40</sup> *Id.* at 587.

<sup>41</sup> *Id.* at 587, 610.

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

<sup>43</sup> *Id.* at 604.

<sup>44</sup> *Id.* at 605–06.

<sup>45</sup> *Id.* at 632.

the present is common in constitutional law.<sup>46</sup> 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*,<sup>47</sup> only to move even further back to ideas about property in the early Republic.<sup>48</sup> Like a good constitutional law scholar, she cites Madison and Jefferson, refers to "Antifederalists," and checks in with Tocqueville.<sup>49</sup> 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.<sup>50</sup>

In Carol's compelling view, the muddle in regulatory takings law reflects the persistence of dual—and at times dueling—conceptions of property.<sup>51</sup> 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.<sup>52</sup> The muddle reflects a tradition, and a grand one at that.

Finally, in a rich narrative about *Shelley v. Kraemer*,<sup>53</sup> 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.<sup>54</sup> The retreat into common law rules about restrictions on alienation, perpetuities, horizontal privity, touch and concern, and changed circumstances<sup>55</sup> yields a fascinating suggestion: judicial enforcement becomes state actions by giving legal force to a set of implicit

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

<sup>47</sup> 260 U.S. 393 (1922).

<sup>48</sup> Rose, *Mahon Reconstructed*, *supra* note 24.

<sup>49</sup> *Id.* at 588–92.

<sup>50</sup> *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.

<sup>51</sup> See Rose, *Mahon Reconstructed*, *supra* note 24, at 566–69.

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

<sup>53</sup> 334 U.S. 1 (1948).

<sup>54</sup> 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).

<sup>55</sup> *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.<sup>56</sup> Describing state action as “intimately connected to the law of property,”<sup>57</sup> 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.<sup>58</sup> In reflecting “the best instincts in property law,” *Shelley* becomes more coherent as constitutional law.<sup>59</sup> 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.

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<sup>56</sup> *Id.* at 215–18.

<sup>57</sup> *Id.* at 218.

<sup>58</sup> *Id.* at 220.

<sup>59</sup> *Id.* at 218, 220.

## ROSE'S HUMAN NATURE OF PROPERTY

Henry E. Smith\*

Many social theories claim to have the human being at their center. That has been more a matter of theory than practice in many of those theories. But in the case of Carol Rose's scholarship on property it could not be more true. In many of her works, Carol develops sophisticated theories about property by focusing in on characters. While they are sometimes humorous and colorful, the characters capture something important about human nature, and Carol, like an older tradition that we could learn a lot from, explores property through the lens of human nature. In it she finds many twists and turns. I will focus on how the characters of the ninny and the scoundrel call for crystals and mud<sup>1</sup>—bright line rules and vague standards, yes, but quite a bit more than that. In Carol's view a variety of the tragedy of the commons with crystals and mud leads to endless cycling between crystals and mud.<sup>2</sup> At the end I will argue that human nature may also lead to a sort of equilibrium in the law, an equilibrium we could associate with the traditions of law versus equity. But for that to occur we do need some significant degree of moral consensus, upon which we can ground our equitable interventions. This need for moral consensus takes us back to Carol's insights about human nature and to her humanistic bourgeois view of property based on narrative.

Carol points out that famous accounts of property from Locke and Blackstone to Demsetz all involve a view—or views—of human nature.<sup>3</sup> All of them ground a picture of property in self-interest, possible enlightened self-interest, but then import covertly a more cooperative or even altruistic aspect of people when it comes time to set up the property system.<sup>4</sup> A system of private property requires collective action, and a world of narrowly rational utility maximizers—a character Carol once called “RUM” with, I think, the British meaning of “odd” in mind<sup>5</sup>—would have a difficult time getting the system off the ground.

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<sup>1</sup> Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–78, 587 (1988) [hereinafter Rose, *Crystals and Mud*] (describing the “characters” who muck up bright line rules to include “ninnies, hard-luck cases, and the occasional scoundrels who take advantage of them”).

<sup>2</sup> *Id.* at 595–604.

<sup>3</sup> 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*].

<sup>4</sup> *Id.* at 38–40.

<sup>5</sup> Carol M. Rose, “*Enough, and as Good*” of What?, 81 NW. U. L. REV. 417, 417–22 (1987) (introducing the fictional character “Rational Utility Maximizer,” or “RUM”).

At the same time, almost uniquely among property theorists, Carol is open to elements of the *doux commerce* theory: that commerce is a sociable institution and can be expected to cultivate virtues (in addition to the now more familiar vices).<sup>6</sup> Indeed, Carol notes that gifts and commercial exchanges partake of each other and are not so easy to separate.<sup>7</sup> Overall, Carol is one of the few theorists these days to see how humane and lovely the mundane and the bourgeois can be.

These elements feature prominently in Carol's work on crystals and mud, which I'd like to focus on here. In drawing this distinction, Carol has made a characteristically deep insight into the nature of the legal system. Crystals and mud roughly—but only roughly—track rules versus standards, but potentially imply much more. The law may start out with a crisp rule that gives a clear and sharp boundary between states of the world—is there a contract or isn't there, was there a trespass or wasn't there? But because the results don't always look pretty, there is a temptation—and especially for judges who see matters in all their particularity after they have gone wrong—to start tinkering.<sup>8</sup> This takes the formless form of muddying things up, of making exceptions and second-guessing.<sup>9</sup> If this happens enough, some actor—a legislator or contracting party—may crisp things up into crystal again and start the process over.<sup>10</sup>

Later I would like to return to the oscillation that Carol sees as inherent in crystals and mud and offer an alternative that may sometimes occur, but first, notice how far the notion of crystals and mud by itself gets us. The literature is certainly filled with related theories about rules versus standards,<sup>11</sup> bright lines and vagueness,<sup>12</sup> analyzed

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<sup>6</sup> Rose, *Crystals and Mud*, *supra* note 1, at 607 (noting that enlightenment thinkers hoped “commerce would enlarge sociability”); Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 302 (1992) [hereinafter Rose, *Giving*] (arguing that gifts play an important role in commerce); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 775–81 (1986); *see also* ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 56–63 (1977) (explaining historical background of the “*douceur* of commerce”).

<sup>7</sup> Rose, *Giving*, *supra* note 6, at 296.

<sup>8</sup> Rose, *Crystals and Mud*, *supra* note 1, at 604.

<sup>9</sup> *Id.* at 578.

<sup>10</sup> *Id.* at 597–601.

<sup>11</sup> *See, e.g.*, FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 6–8 (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992); Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L.J. (forthcoming 2011); Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56–69 (1992).

<sup>12</sup> *See, e.g.*, TIMOTHY A. O. ENDICOTT, *VAGUENESS IN LAW* (2000); John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848 (2010); Michael F. Ferguson &

through economic and philosophical lenses among others. Rules are more expensive to formulate but cheaper to apply.<sup>13</sup> Rules give certainty and standards are vague and uncertain. Some, especially those associated with critical legal studies, see rules as reflecting individualism and domination and standards as embodying community and altruism.<sup>14</sup> All these theories are fairly abstract and try to see rules versus standards in their most general light.

But Carol approaches crystals and mud in a bottom-up way, through a set of characters and their stories. Yes, much of the time people handle rules just fine and we have reasonable, rational people going about their business without too many worries. But what happens to the hapless—or to use Carol's terms, the ninnies or mopes<sup>15</sup>—who are improvident or foolish, and make mistakes? We could just let them bear the consequences of their folly and relentlessly apply crystalline rules. A lesson will be learned. But there is a big problem. The ninnies can be prey to the scoundrels and sharp dealers who are looking for ninnies to exploit.<sup>16</sup> Fearing being duped, some will avoid transacting or take excessive precaution.<sup>17</sup>

Carol sees this dynamic and the pound of flesh it results in as the beginning of a dynamic of oscillation.<sup>18</sup> Thus, in the demise of caveat emptor, in mortgage law, and the recording acts, Carol sees an endless cycle of crystals and mud.<sup>19</sup> Legislatures and parties put in crystalline rules and in some sense overuse them—put them under too much strain—because courts do not like punishing the hapless or letting the scoundrels get away with sharp dealing.<sup>20</sup>

Let me offer another possibility about some of the phenomena that Carol groups under crystals and mud, to which we can add a lot more similar phenomena beyond property. Some of the examples of crystals and mud, and in particular the ones involving mortgages and to some extent recording, are the result of the interventions by equity courts or by courts acting in an equity mode. I suggest that this is no accident and no artifact of ancient procedure either. Rather, I argue elsewhere that going all the way back to Aristotle and carried forward by the early modern thinkers from whom Carol draws some of her inspiration, equity in the private law has a major theme:

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Stephen R. Peters, *But I Know it When I See it: An Economic Analysis of Vague Rules* (Jan. 2000) (unpublished manuscript), <http://ssrn.com/abstract=218968>.

<sup>13</sup> Kaplow, *supra* note 11, at 568–86.

<sup>14</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685, 1773–74 (1976); *see also* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15, 38, 54–55 (1987) (explaining the “competing political paradigms” of individuals and altruism).

<sup>15</sup> Rose, *Crystals and Mud*, *supra* note 1, at 587, 599–600 (explaining “ninnies” and “mopes” as “hard luck cases,” the latter being a Chicago term for the victims of petty con artists).

<sup>16</sup> *Id.* at 587, 600.

<sup>17</sup> *Id.* at 599.

<sup>18</sup> *Id.* at 596.

<sup>19</sup> *Id.* at 580–90, 596–97.

<sup>20</sup> *Id.* at 601–04.

preventing opportunism.<sup>21</sup> That is a tall order, and the rap on equity was always that it was arbitrary and destabilizing—of being measured by the “Chancellor’s foot.”<sup>22</sup> And the common law lawyers never ceased to bring out the dark side of equity. Although equity “won” the battle with the common law, it professed modesty: it was meant only as a safety valve for the law on account of the law’s inadequacy—particularly in the face of opportunism.<sup>23</sup> And by “opportunism,” I mean the use of the system in hard-to-foresee ways by better informed parties even at the expense of shrinking total surplus.<sup>24</sup> Like theft and fraud, opportunism would be contracted away if contracting were costless, which of course it is not. The civilians seem to have something like this in mind when they speak of “abuse of right.”<sup>25</sup>

To serve as a safety valve against opportunism, equity is a holistic mode of decision making that is not fully captured by rules versus standards.<sup>26</sup> First of all, equity was

<sup>21</sup> Henry E. Smith, *An Economic Analysis of Law Versus Equity* 17–18 (Oct. 22, 2010) (unpublished manuscript) (on file with author).

<sup>22</sup> See JOHN SELDEN, *TABLE TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ.* 46 (Edward Arber ed., 1869) (1689) (“Equity is a Roguish thing, for Law we have a measure, know what to trust to, Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. ‘Tis all one as if they should make the Standard for the measure we call a Chancellor’s foot, what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. ‘Tis the same thing in the Chancellors Conscience.”).

<sup>23</sup> Smith, *supra* note 21, at 3, 19.

<sup>24</sup> For discussions of opportunism in economics, see, for example, OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 47 (1985) (defining “opportunism” as “self-interest seeking with guile”); Margaret F. Brinig & Steven M. Crafton, *Marriage Opportunism*, 22 J. LEGAL STUD. 869, 871 (1994) (defining “opportunistic behavior” in the marital context as “undertaking activities inconsistent with the marital agreement”); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 522 (1981) (discussing “how certain legal principles . . . can be low-cost methods of deterring opportunistic behavior”); Oliver E. Williamson, *Opportunism and its Critics*, 14 MANAGERIAL & DECISION ECON. 97, 105 (1993) (discussing the role of opportunism in economic analysis).

<sup>25</sup> See, e.g., Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37 (1995) (arguing that a concept of abuse of rights is implicit in the common law); Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687, 689–90 (2010) (“Abuse of rights was a most typical ‘invention’ of the wave of social legal thought that developed . . . in the mid-nineteenth century [and] called for a sociological and organicistic mode of reasoning that took into account the purpose of legal rules and the complexity of ‘social mechanics.’”); A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New . . .*, 54 LA. L. REV. 1173, 1192–93 (1994) (noting similarities and differences between abuse of right and equity); Larissa M. Katz, *A Jurisdictional Principle of Abuse of Right* 4 (Feb. 8, 2010) (unpublished manuscript), <http://ssrn.com/abstract=1417955> (arguing that abuse of right is consistent with common law idea of ownership); Lehari, *supra* note 11, at 69–71 (explaining “abuse of rights” occurs when a party with property rights exercises them in a way that “may turn the legitimate use into legally prohibited abuse”).

<sup>26</sup> Smith, *supra* note 21, at 38–40.

only supposed to be an exception. Unlike property, it was *in personam*—it operated on the person and did not announce general rules—and concomitantly it was supposed to tread carefully when property rights were involved.<sup>27</sup> But because, as Justice Story once said, “[f]raud is infinite” given the “fertility of man’s invention,”<sup>28</sup> equity too needed to be open-ended, with ex post discretion and an irreducible vagueness. As is familiar in tax law, if you announce a bright line rule, the evasory behavior begins immediately.<sup>29</sup> Closing nine out of ten loopholes does not do the trick either, because the sophisticated will rush through the tenth one. And not coincidentally, tax law has a stable of equity-like doctrines like substance over form, sham transaction, and step transaction, that aim to deter opportunists.<sup>30</sup> Finally, in view of its targeting opportunism and its origins with a clerical official—the Chancellor—equity is based on common sense morality and emphasizes good faith and intent.

What does this have to do with crystals and mud? The problem for equity has always been how to cabin it—how to ensure that it was a safety valve and did not take over all the time. This presents a particular problem today in our post-fusion, post-Legal Realist era, and I will return to this inherent expansionary quality of equity. Carol sees these limits as ultimately futile: crystals and mud will always alternate in an endless cycle.<sup>31</sup> It is like a crude thermostat: it is too cool so we raise the thermostat,

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<sup>27</sup> See, e.g., Charles M. Gray, *The Boundaries of the Equitable Function*, 20 AM. J. LEGAL HIST. 192, 202–06 (1976) (illustrating how courts of equity were prohibited from addressing real estate disputes); Roger Young & Stephen Spitz, *SUEM—Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C.L. REV. 175, 177 (2003) (listing nine equitable principles used by the South Carolina courts, including “[e]quity follows the law” and “[e]quity acts in personam, not in rem”).

<sup>28</sup> 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 200 n.4 (Melville M. Bigelow ed., 13th ed. 1886) (1839) (quoting Letter from Lord Hardwicke to Lord Kaimes (June 30, 1759)). Or, as Chancellor Ellesmere put the point: “The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.” Earl of Oxford’s Case, (1615) 21 Eng. Rep. 485, 486 (Ch.); see also Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall’s Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 948 (2000) (discussing Carl Dibble’s identification of a “moderate Enlightenment” tradition of legal interpretation associated with Grotius, Blackstone, and Marshall, which emphasized the role of equity and located the need for interpreting laws not in the ambiguity of language but in the possibility “that corrupt, duplicitous persons will ‘treat the law in a sophisticated manner’ in order to advance their own individual interests” (quoting Carl M. Dibble, *The Lost Tradition of Modern Legal Interpretation* 5 (1994) (unpublished manuscript) (essay prepared for delivery at the 1994 Annual Meeting of the American Political Science Association))).

<sup>29</sup> David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 860 (1990).

<sup>30</sup> See *id.* at 861; see also Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 L. & CONTEMP. PROBS. 673, 707 n.31 (1969) (arguing that broad anti-avoidance standards allow for reduction in the complexity of tax law).

<sup>31</sup> Rose, *Crystals and Mud*, *supra* note 1, at 582–83, 585, 588–89, 596–97.

but then we notice that it is too hot and we put the thermostat way down again, which is too cold for our liking, and so on.

But I think another dynamic can happen and at various times did happen with law and equity. We could call it *sedimentation*. Take the equitable principle that one may not profit from one's own wrong. The classic here is *Riggs v. Palmer*,<sup>32</sup> which interestingly formed the springboard for Ronald Dworkin's discussion of the jurisprudence of principles.<sup>33</sup> There the court held that a grandson could not share in his grandfather's estate after he killed the grandfather to prevent him from changing his will.<sup>34</sup> That would be to profit from his own wrong.<sup>35</sup> The court used equity both to interpret the wills statute and as a directly applicable general principle: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."<sup>36</sup> These days states tend to have "slayer" statutes that take care of this situation.<sup>37</sup> Yes, there can be borderline cases, but the *Riggs* problem is now a familiar one and not an unanticipated defect in the wills statute that an opportunist (and worse) might take advantage of. The mud of equity has at least partly sedimented, not because the legislature did not like muddiness, but because once the problem became known it was not that hard to solve. Does this mean that equity is out of business? Not at all, because the scoundrels are ever with us, looking for the interstices in our ever changing legal landscape. Equity needs to be constantly vigilant for new opportunism, and so it can be thought of as a moving frontier leaving sediment or even crystals in its wake. So here crystals come from mud and there is a long-term equilibrium that involves them both. But they do not exactly oscillate here.

One of Carol's examples, recording acts, may partake of this sedimentation process. The early race statutes—whoever won the race to the recoding office won a title contest even if the winner knew of an earlier unrecorded deed—were unstable for all the reasons Carol mentions.<sup>38</sup> But once the courts read in a notice requirement in to take care of the opportunists, legislatures were happy to go along.<sup>39</sup> This sedimented equity has had incredible staying power. Although there are controversies around the edges and things can still go wrong, the broad outlines—roughly half the states with

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<sup>32</sup> 22 N.E. 188 (N.Y. 1889).

<sup>33</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–45 (1977).

<sup>34</sup> *Riggs*, 22 N.E. at 188–90.

<sup>35</sup> *Id.* at 190.

<sup>36</sup> *Id.*

<sup>37</sup> See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 149–51 (8th ed. 2009).

<sup>38</sup> Rose, *Crystals and Mud*, *supra* note 1, at 587–88 (noting that sympathies for the "luckless unrecorded owner" and distrust of the "nasty second buyer" led to "the muddying" of the recording system).

<sup>39</sup> 14 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 82.02[1][c][iii] (Michael Allan Wolf, ed., 2000).

notice statutes and half with race-notice statutes, and almost none with race statutes—seem to be a relatively stable equilibrium.<sup>40</sup>

What seems to be necessary for the oscillation between crystals and mud is for courts, and here I mean equity courts, to overshoot. This has happened, but it is hard to tell exactly when. The currently important topic of mortgage foreclosures is illustrative. Aside from the question of whether the cycling here is regular or more like punctuated equilibrium,<sup>41</sup> the response of private parties like lenders is ambiguous in the absence of a lot of contextual information. When it comes to forfeitures, if it is private parties trying to get around the procedural protections associated with mortgages, why isn't that sometimes just the opportunists finding new avenues of opportunism and evading the substance of the law?

One way that we might distinguish oscillation from sedimentation is in terms of the directness of the role of equity courts. What I have in mind is a limited intervention to stop opportunists. To do this, we need good proxies for opportunism. One such is disproportionate hardship, which Carol very insightfully notes can be the result of sharp dealing.<sup>42</sup> She makes reference as well to the long tradition of policing bargains for gross inequality (not mere inequality).<sup>43</sup>

But I would say that disproportionate hardship is a theme all over equity, and it is very effective in picking out opportunism.<sup>44</sup> It is not as much a sign of sympathy with the hapless, although it can be that too, but a red flag raising the specter of opportunism. Thus, disproportionate hardship turns out to be important not just in forfeitures, as Carol notes, but also in other areas.<sup>45</sup> We don't like forcing a good-faith building encroacher to tear down a barely encroaching structure at great cost.<sup>46</sup> We don't like

<sup>40</sup> *Id.* § 82.02[1][c][ii]. On some of the problems, see, for example, D. BARLOW BURKE, JR., *AMERICAN CONVEYANCING PATTERNS: PAST IMPROVEMENTS AND CURRENT DEBATES* 103–04, 120 n.2 (William N. Kinnard, Jr. ed., 1978); Francis S. Philbrick, *Limits of Record Search and Therefore of Notice: Part 1*, 93 U. PA. L. REV. 125, 125–26 (1944).

<sup>41</sup> For a variety of views on whether and in what sense change occurs in the area of mortgages, see, e.g., A. H. Feller, *Moratory Legislation: A Comparative Study*, 46 HARV. L. REV. 1061 (1933) (discussing devices implemented to save credit systems during down-cycles); Robert H. Skilton, *Developments in Mortgage Law and Practice*, 17 TEMP. U. L.Q. 315, 318–20, 321–31 (1943) (discussing various types of foreclosures); Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 U. CHI. L. REV. 575, 577–81, 588–90, 595 (1937) (comparing English reform in foreclosures with American law of mortgages).

<sup>42</sup> Rose, *Crystals and Mud*, *supra* note 1, at 587–88, 598–99.

<sup>43</sup> *Id.* at 598 (citing James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587 (1981)).

<sup>44</sup> Smith, *supra* note 21, at 15–16, 33–34, 37, 48–49.

<sup>45</sup> See Rose, *Crystals and Mud*, *supra* note 1, at 597–601.

<sup>46</sup> See *Raab v. Casper*, 124 Cal. Rptr. 590, 593 (Cal. Ct. App. 1975) (upholding California's good faith improver legislation); *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951) (“Where defendant's encroachment is unintentional and slight, plaintiff's use not affected and his damage small and fairly compensable, while the cost of removal is so great as to cause grave hardship or otherwise make its removal unconscionable, mandatory injunction may properly be denied and plaintiff relegated to compensation in damages.”); Kelvin H. Dickinson,



seeing one who has innocently labored on relatively cheap materials lose everything to the owner of the stuff under the doctrine of accession.<sup>47</sup> And we don't like giving injunctions where it secures a little benefit at the cost of gross harm or disproportionate hardship on the one enjoined.<sup>48</sup> Indeed, this is what "balancing the equities" for injunctions is really about—not cost benefit tests, nor all-things-considered contextualized analysis.

The problem is that equity is quite controversial. Formalists would like to read it out of our system and post-Realists like to see context available to decision making everywhere.<sup>49</sup> Indeed, we have an oscillation of a sort between of crystals and mud in the eternal dispute between the Justice Scalias of the world and the Justice Ginsburgs of the world, as was on display in the case of *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,<sup>50</sup> involving asset freezing injunctions. Do we ask if this particular type of equitable device was used in the late eighteenth century,<sup>51</sup> or do we celebrate the flexibility of injunctions and assume that recitation of the factors for an injunction like inadequacy of the legal remedy will constrain their use?<sup>52</sup> I would say neither. Rather it is a crystal filled with mud. Equity is a highly structured safety valve within which courts are highly flexible, and stringent, and not least moralistic. Equity relies as it must on common sense morality—on a consensus about what is proper—not fairness in a deeply theoretical sense or in great detail, but fairness and morality in rough and widely acceptable outlines.

Do we have such a consensus? I am somewhat optimistic, but only somewhat. For one thing, we have to stop teaching our students that legal materials are clay in their hands. We, including judges, need a consensus on what is a rule and what is an exception, what is a baseline and what is a departure from it, and, not least, what is a

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*Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 42–49 (1985) (offering a survey of various statutory and judicial relief for mistaken improvers across jurisdictions).

<sup>47</sup> See, e.g., *Wetherbee v. Green*, 22 Mich. 311, 313 (1871) ("The objections to allowing the owner of the trees to reclaim the property under such circumstances are, that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. . . . Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.").

<sup>48</sup> Smith, *supra* note 21, at 37.

<sup>49</sup> *Id.* at 3, 51.

<sup>50</sup> 527 U.S. 308 (1999).

<sup>51</sup> *Id.* at 318–33 (holding that federal district courts lacked power to issue asset freezing injunctions because they were historically unavailable from a court of equity and arguing that unbounded equity would be arbitrary, and that Congress is the place to decide such a power over creditors).

<sup>52</sup> *Id.* at 333–42 (Ginsburg, J., dissenting) (noting historical flexibility and generativity of equity and arguing that the standards for issuing injunctions cabin power adequately).

legitimate use of the system and what is not. Where does this consensus come from in our highly contentious age? I think it has to come from a view of human nature much like the one Carol offers in her work. A person who is rational but has human foibles, and who wants to do the right thing: “that kind of girl,”<sup>53</sup> Mom,<sup>54</sup> or Good Citizen George,<sup>55</sup> for example. Someone who is bourgeois but has her sights on higher things as well. Someone practical and sociable. For law and equity to coexist we need a new-old narrative.

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<sup>53</sup> Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1897 (2007) (quoting PATTY LOVELESS, *I'm That Kind of Girl*, on ON DOWN THE LINE (MCA Records 1990) (“I ain’t the woman in red, I ain’t the girl next door / But if somewhere in the middle’s what you’re lookin’ for / I’m that kind of girl . . .”)) (identifying the moral subject of property with “that kind of girl”).

<sup>54</sup> Rose, *Property as Storytelling*, *supra* note 3, at 44–45 (introducing Mom, or Good Citizen, who is an altruist who wants herself and the other both to do well but then puts the other first); *id.* at 55 (explaining that “Mom the cooperator takes risks for a common good”).

<sup>55</sup> *Id.* at 52 (describing “Good Citizen George” as a character “who would be willing to do some work for the sake of the common good,” much like the Mom character).