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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 mud¹—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.² 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.³ 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.⁴ 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 mind⁵—would have a difficult time getting the system off the ground.

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¹ 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”).

² *Id.* at 595–604.

³ 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*].

⁴ *Id.* at 38–40.

⁵ 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).⁶ Indeed, Carol notes that gifts and commercial exchanges partake of each other and are not so easy to separate.⁷ 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.⁸ This takes the formless form of muddying things up, of making exceptions and second-guessing.⁹ If this happens enough, some actor—a legislator or contracting party—may crisp things up into crystal again and start the process over.¹⁰

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,¹¹ bright lines and vagueness,¹² analyzed

⁶ 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”).

⁷ Rose, *Giving*, *supra* note 6, at 296.

⁸ Rose, *Crystals and Mud*, *supra* note 1, at 604.

⁹ *Id.* at 578.

¹⁰ *Id.* at 597–601.

¹¹ *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).

¹² *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.¹³ 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.¹⁴ 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 mopes¹⁵—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.¹⁶ Fearing being duped, some will avoid transacting or take excessive precaution.¹⁷

Carol sees this dynamic and the pound of flesh it results in as the beginning of a dynamic of oscillation.¹⁸ Thus, in the demise of caveat emptor, in mortgage law, and the recording acts, Carol sees an endless cycle of crystals and mud.¹⁹ 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.²⁰

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:

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>.

¹³ Kaplow, *supra* note 11, at 568–86.

¹⁴ 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).

¹⁵ 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).

¹⁶ *Id.* at 587, 600.

¹⁷ *Id.* at 599.

¹⁸ *Id.* at 596.

¹⁹ *Id.* at 580–90, 596–97.

²⁰ *Id.* at 601–04.

preventing opportunism.²¹ 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.”²² 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.²³ 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.²⁴ 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.”²⁵

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.²⁶ First of all, equity was

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

²² 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.”).

²³ Smith, *supra* note 21, at 3, 19.

²⁴ 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).

²⁵ 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”).

²⁶ 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.²⁷ But because, as Justice Story once said, “[f]raud is infinite” given the “fertility of man’s invention,”²⁸ 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 evasatory behavior begins immediately.²⁹ 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.³⁰ 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.³¹ It is like a crude thermostat: it is too cool so we raise the thermostat,

²⁷ 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”).

²⁸ 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))).

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

³⁰ 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).

³¹ 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*,³² which interestingly formed the springboard for Ronald Dworkin's discussion of the jurisprudence of principles.³³ 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.³⁴ That would be to profit from his own wrong.³⁵ 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."³⁶ These days states tend to have "slayer" statutes that take care of this situation.³⁷ 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.³⁸ But once the courts read in a notice requirement in to take care of the opportunists, legislatures were happy to go along.³⁹ 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

³² 22 N.E. 188 (N.Y. 1889).

³³ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–45 (1977).

³⁴ *Riggs*, 22 N.E. at 188–90.

³⁵ *Id.* at 190.

³⁶ *Id.*

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

³⁸ 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).

³⁹ 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.⁴⁰

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,⁴¹ 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.⁴² She makes reference as well to the long tradition of policing bargains for gross inequality (not mere inequality).⁴³

But I would say that disproportionate hardship is a theme all over equity, and it is very effective in picking out opportunism.⁴⁴ 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.⁴⁵ We don't like forcing a good-faith building encroacher to tear down a barely encroaching structure at great cost.⁴⁶ We don't like

⁴⁰ *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).

⁴¹ 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).

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

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

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

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

⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.*,⁵⁰ involving asset freezing injunctions. Do we ask if this particular type of equitable device was used in the late eighteenth century,⁵¹ 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?⁵² 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

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).

⁴⁷ 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.").

⁴⁸ Smith, *supra* note 21, at 37.

⁴⁹ *Id.* at 3, 51.

⁵⁰ 527 U.S. 308 (1999).

⁵¹ *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).

⁵² *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,”⁵³ Mom,⁵⁴ or Good Citizen George,⁵⁵ 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.

⁵³ 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”).

⁵⁴ 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”).

⁵⁵ *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).