

## Response

Carol M. Rose

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## RESPONSE

Carol M. Rose\*

Aw, shucks. Perhaps that is the only thing one should say to such an overwhelming outpouring of accolades, delivered in such a generous manner by illustrious friends, former students and colleagues. In this profession, though, no opportunity for comment can go begging, so I have accepted the invitation of the Review's editors to add a few words of my own after all these lovely remarks.

Anyone who knows Jed Purdy, Dan Sharfstein, Henry Smith and Bob Ellickson will instantly recognize that each is doing his own thing in these essays. Jed's literary flair is as obvious as his understanding of the communal aspects of what seem to be purely economic arrangements. For him, my occasional forays into the more sociable aspects of property are matters of the deepest interest, and it is no surprise that his inquiry begins with a fable and goes on to fictional characters, where with the lightest of touches he unearths meanings far more profound than my own.<sup>1</sup> Jed can even make a word like "performative" sound natural!

For his part, Dan is an historian of great talent, with a consummate feel for complex events and relationships that others would find too far receded into a murky past. His studies of the uncertain past meanings of race are a constant revelation to me in my own recent interest in questions of race and property.<sup>2</sup> No wonder, then, that my clumsy turns to history give Dan an occasion to reflect on the ways that the past can shape the present—and the future.<sup>3</sup>

Bob and Henry are among the legal academy's subtlest analysts of economic institutions, and their comments reflect their own current academic preoccupations, Bob with his new-found interest in comparative matters,<sup>4</sup> and Henry with his explorations into the relationships between the old categories of law and equity.<sup>5</sup>

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<sup>1</sup> Jedediah Purdy, *A Foxy Hedgehog: The Consistent Perceptions of Carol Rose*, 19 WM. & MARY BILL RTS. J. 1033 (2011).

<sup>2</sup> See, e.g., Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473 (2003).

<sup>3</sup> See Daniel J. Sharfstein, *The Backwards Gesture: Historical Narratives in Carol Rose's Property Scholarship*, 19 WM. & MARY BILL RTS. J. 1039 (2011).

<sup>4</sup> Robert C. Ellickson, *Legal Constraints on Household Moves: Should Footloose Americans Envy the Rooted French?* (Yale Law & Econ. Research Paper No. 390, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1445603](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1445603).

<sup>5</sup> See, e.g., Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009).

Since Bob and Henry both posed some questions, I thought I should say a little more in response to them. I will begin with Bob's proposition that in a globalized economy, the signals of property have become universal, a view that challenges my own long-term harping on the cultural differences that inform property understandings.<sup>6</sup> Clearly Bob is right that in its more formal guises, property has become more universally cognizable. International trade on any scale entails what I have called "Big Rights,"<sup>7</sup> or what Henry and his co-author Tom Merrill have called the "optimal standardization" of relatively simply-defined rights.<sup>8</sup> Where far-flung buyers and sellers have to reach accord, standardized Big Rights are essential not just in landed property, but in such matters as financial instruments, contractual assignments and environmental trading markets.<sup>9</sup>

But what about the smaller-scale claims and claimants, the street vendors and parking spaces so dear both to Bob and to me? Well, Bob asserts that he can tell what the street vendors are claiming in Madagascar,<sup>10</sup> and if what he means is the immediate sidewalk space and the goods displayed there, I expect that he is right. But when he moves from this marked-out geographic claim to what Henry has called "governance,"<sup>11</sup> I will bet he needs some more local knowledge. Are all these items actually for sale? Is he supposed to bargain, or not? What is a polite but effective way to say no? If he buys the scarf, can he bring it back when he sees that some threads are unraveling? Those same kinds of "governance" issues are likely to come up in international trade too, where the formal rights seem so much more sharply defined.

On the whole, though, formal or geographic claims are more likely to be widely recognizable than governance claims. To use an example that Bob has taught the world, you may see the perfectly well the fences around the neighboring ranches, but what are you supposed to do when your neighbor's cow wanders into your part of the range?<sup>12</sup> On the other hand, quite a number of geographic claims require some local knowledge too, especially when the geography is slippery. Lobster fishermen can react furiously when some new homeowner on Maine's shore innocently puts out a lobster trap in what she had fondly thought was her own waterfront area—not so, the lobsterman will make clear, the spot "belongs" to him.<sup>13</sup> Until they learned the ropes,

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<sup>6</sup> See Robert C. Ellickson, *The Inevitable Trend Towards Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015, 1023–24 (2011).

<sup>7</sup> Carol M. Rose, *Big Roads, Big Rights: Varieties of Public Infrastructure and Their Impact on Environmental Resources*, 50 ARIZ. L. REV. 409 (2008).

<sup>8</sup> Thomas Merrill & Henry E. Smith, *Optimal Standardization: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

<sup>9</sup> Rose, *supra* note 7, at 423–32.

<sup>10</sup> Ellickson, *supra* note 6, at 1025.

<sup>11</sup> Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1728, 1751–52 (2004).

<sup>12</sup> ROBERT ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>13</sup> See *id.* at 218.

relocated Vietnamese fishermen in Texas placed their crab-pots too close to those of the Texans, with the tragic result of at least one murder.<sup>14</sup> Or to take an example discussed by one of Bob's students, newcomer panhandlers can erroneously assume that they can ply their trade on a sidewalk spot that has already been claimed by one of the "regulars."<sup>15</sup> In short, even geographic claims have a cultural component. You had better know who else has a claim, and what it is, before you start lobstering or crabbing or panhandling.

Just as important, the most universally recognizable and certain of signals are likely to be the work of what Bob has somewhat disparagingly called legal centralism. These kinds of rights are the products of recording and registration systems, and the regular dispositions of tort and contract law—simple, transparent, and statist. Globalization surely does enhance the significance of Big Rights like those. But no one knows better than Bob how much play in the joints there is in Big Rights, and how much room for local end-runs—for those in the know. So, while I am in complete agreement with Bob that global trade has brought more standardized property rights to the fore, I still think that culture and interpretation are critically important in understanding much of what is claimed as property.

Henry's comment questions whether a phenomenon that has much interested me really does occur regularly—that is, the oscillation over time between dominating styles for approaching property problems, from hard-edged rules to softer post-hoc behavioral standards, or as I called these styles, "crystals" and "mud."<sup>16</sup> Drawing on his recent interest in the relationship between law and equity, Henry points out that in some areas, matters stabilize in a process that he calls "sedimentation," that is, an equilibrium mode in which rules (or law, or crystals) dominate everyday matter but post-hoc standards (or equity, or mud) deal with extraordinary issues.<sup>17</sup>

But where does this sedimentation occur? Henry focuses on the recording system (which was one of my examples of oscillation); he argues that the see-saw has actually stopped with respect to our land records, and that our "notice" system has for some time repelled efforts to reform it by turning it into some version of a harder-edged "race" system, akin to the civil law registration systems.<sup>18</sup> In those systems, non-record notice does not count, and the official documents represent the only cognizable property claims.<sup>19</sup> While I am not sure the oscillation is entirely over, I do think he is onto something; in the twenty-odd years since I used the recording system as an

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<sup>14</sup> David McLemore, *Troubled Costal Waters Calming: Texas-Vietnamese Fishermen Mending Relations After Years of Disputes*, DALLAS MORNING NEWS, Apr. 29, 1985, at 12A.

<sup>15</sup> See Brandt J. Goldstein, *Panhandlers at Yale: A Case Study in the Limits of Law*, 27 IND. L. REV. 295 (1993).

<sup>16</sup> See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 585–90 (1988); Henry E. Smith, *Rose's Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1052–53 (2011).

<sup>17</sup> *Smith*, *supra* note 16, at 1052.

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

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

example of oscillation, the pressures have certainly abated for race-like reform. A couple of interesting questions are left over. One is the question why “sedimentation” occurs with some subjects, and oscillation continues with respect to others, seemingly generated by endogenous pressures within a property system. Another is why sedimentations, when they do occur, arrive at different equilibrium points. The civil law countries, for example, have “sedimented” on registration systems, which are far closer to the crystal end of the spectrum than our muddier recording systems. I wonder whether once again, we are not dealing with some differences in property cultures.

Bob and I are going to watch with great interest as Henry tackles issues like these, and as Jed and Dan tackle still others that never even occurred to us. I join Bob with great humility in accepting the wonderful Brigham-Kanner prize in property rights scholarship. But both Bob and I know that the future lies with the fresh insights of scholars like Jed, Henry, and Dan. So, to my “aw, shucks,” let me add for those three another chestnut to which I know Bob will agree: Carry on!