

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

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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.

<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.