

Visions of Guadalupe: Traces of the Ghost Panel

Gerald Torres*

INTRODUCTION

Professor Rose remarked that she wished that a panel on her contributions to narrative theory had been included in this symposium. Since that work is lurking in the background, Professor Rose suggested that it is really a ghost panel. Professor Been did an excellent job of synthesizing Carol's work on takings, ultimately proposing that Professor Rose write a book about takings using her journal articles as feedstock for that book.¹ I have little to add to Professor Been's analysis of Professor Rose's work on takings.² Instead, my remarks will look at her contribution to the takings literature through the lens of her contribution to narrative theory. I think that understanding Carol's contribution to narrative theory and law is actually quite important to fully appreciating her contribution to the takings debate. It is the confluence of these two streams of thought in Carol's work that makes her work so significant.

I will organize my remarks around a central observation that may be more or less controversial, but which I regard as obvious as a pig in a parlor.³ About a generation ago it became clear that the macro-social

* Bryant Smith Chair in Law, University of Texas at Austin. I would like to thank TRP for her help throughout.

1. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) [hereinafter Rose, *Crystals and Mud*]; Carol M. Rose, *Planning And Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983) [hereinafter Rose, *Planning and Dealing*]; Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990); Carol M. Rose, *The Story of Lucas*, in ENVIRONMENTAL LAW STORIES 237 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

2. Vicki Been, *Tribute to Carol Rose*, 18 YALE J.L. & HUMAN. 141 (2006).

3. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (“Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”).

debates over the architecture of our social life would get played out through arguments about property and property rights in a way that those debates were previously played out in the civil rights movement using the equal protection and commerce clause. I am not suggesting that the struggle over the meaning of the civil rights movement is over, but that a new front was opened in an effort to limit legitimate government action. This challenge to governmental action would get articulated through the Takings and Due Process Clauses of the Constitution.⁴ The activists in this story identified themselves as defenders of property rights. Their movement has come to frame both the popular and legal debates about the nature of property and the proper role of government in regulating social life.

What Professor Rose's work does is to show us how we might understand the changes the property rights activists were pursuing. It is here that her work on narrative theory is crucial and so I will develop my remarks by demonstrating how the central observation noted above might be understood. I will proceed in three basic steps. First, I will show how stories about place become stories about identity and how identity is tied to questions of civic respect. The idea of social (and civic) respect is one of the basic tropes in the stories about the social meaning of civil rights. Second, I will show how these stories become persuasive. Finally, in order to be persuasive in the sense that is meaningful here, they have to affect how legal claims get framed and decided. This is where Carol's work is particularly illuminating. It demonstrates how a narrative principle gets translated into a normative principle.

I. IDENTITY AND PLACE

A. *Identity, Respect, and Belonging*

According to Professor Rose, property needs stories.⁵ What the stories do is to situate current actors within a framework that appears to be as she puts it "just there." The power of narrative is found in just that capacity. This is true whether the stories are told by Blackstone, Locke, the Cree or the Hopi. To illustrate the power that lies coiled in the stories we tell ourselves, novelist and essayist Joan Didion, a writer whose sense of place

4. Without wanting to enter the debate (which would be far beyond the scope of this small essay), the general articulation of what has come to be called "Our Federalism," see *Younger v. Harris*, 401 U.S. 37, 44 (1971), is the general rubric under which most of these ideological and doctrinal struggles have taken place. It is an ongoing debate that has now directly engaged the dimension of public international law in almost equally profound ways. See, e.g., *Mayagna (Sumo) Community of Awastingni v. Nicaragua*, Case 11.577, Inter-Am. C.H.R., (ser. C) No. 79 (Aug. 31, 2001).

5. Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990).

is central to her work, offers an example in the elaborate and compelling myths constructed in about California. The redwoods, so emblematic of the natural cathedral grandeur of the golden state, reproduce only in the inferno of forest fire and remain upright by spreading roots not down, but wide over the unstable earth and through thin soil. The spectacular height and girth of the trees leads one to imagine them supported by some prodigious taproot locked deep in the earth rather than being vulnerable to the maunderings of mere surface activity. So it is with the stories Californians tell about themselves.

Those who came from the east to California wrote stories of that pilgrimage that allowed them to adopt the conceit of throwing roots deep into the western land and taking up the values that it represented. What Didion shows is that like the California redwoods, those roots were shallow and fragile to the reality of the west.

What troubled Didion was that the stories these early Californians told themselves “did not add up.” The narrative was so powerful that it sowed “confusions about the place . . . confusions as much about America as about California, misapprehensions and misunderstandings so much a part of who I became that I can still to this day confront them only obliquely.”⁶

Linkage to place almost always means linkage to the community that authenticates the legitimacy of the claim you are making. The stories that get told about the community’s relation to place are at the center of the construction of a self that is formed out of local material reality. It is this relationship at the heart of the constitution of the self that emerges through an identity of place and community. Respect for the place becomes a form of respect for the person and through that person a respect for the community. Didion’s meditation on her family history and how it came to be integrated into the story of California is affecting, both for its honesty and for the insight into how topophilia, the love of place, as Yi-Fu-Tuan has called it, has both an interior and exterior dimension.⁷

Of course, the stories we tell that revolve around place serve many functions. The point of Didion’s essay is that among the most important functions are those that open a window into our idea of who we are, what we come to value and thus how we come to define the good. The interior dimension can root our character in the attributes of the landscape.⁸ The

6. JOAN DIDION, *WHERE I WAS FROM* 18 (2003).

7. YI-FU TUAN, *TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTION, ATTITUDES, AND VALUES* (1974).

8. Perhaps the most honored exponent of this idea is Thomas Jefferson, although it can be found throughout American literature and journalism. “Jefferson—at least the young Jefferson—advocated a therapeutic view of land. It was not merely a commodity, but an agency, a crucible nurturing good citizens in vitro. . . . The earth itself could act sculpturally, as a mold for character.” ROGER G. KENNEDY, *MR. JEFFERSON’S LOST CAUSE* 41 (2003); *see also* RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* (3d ed. 1967).

character of the landscape, its surpluses and scarcities, can lead to an understanding about what the land requires in the way of social arrangements.⁹ Even as those social imperatives diverge from what the law on its face seems to require, they produce a binding force of their own. Those binding forces reflect an understanding of the good and, if they are common enough, they come to be reflected in the law.

One of the processes through which they come to have legally binding meaning is the construction of an authoritative story about why things are as they are and perhaps more importantly why they *have* to be that way. To the extent that you agree with the authoritative narrative, your views, whether supportive or critical, will be accorded the weight of someone in the community. It is at the edges that things become problematic. Even more destabilizing is the social struggle over the legitimizing background story that frames a community (whether local, regional, or ultimately national).

The movement for civil rights for black people in the United States illustrates some of these points and suggests some of the lesson the property rights movement learned. The litigation strategy of the NAACP that ultimately led to *Brown v. Board of Education*¹⁰ had to lead to the general repudiation of the fraud that was “separate but equal.” By getting the Supreme Court to essentially overrule *Plessy v. Ferguson*¹¹ legal theory had to confront the meaning of segregation. That meant that the court had to retreat from abstraction rather than treat the plaintiffs as mere ciphers. Confrontation with the lived experience of segregation and its social meaning through principles of human rights expressed through law (especially the post-civil war constitution) allowed activists to denaturalize the conventional story.

Movement activists and their legal allies were speaking to two principal audiences, those who made up the community of which they were a part and the culture at large, but an important point to remember here is that they were speaking to themselves as well. Before they could effect a change in the law they first had to change the stories they told themselves. Only by legitimizing an alternative view could they preserve the distinction between ideological difference and epistemological difference. As summarized by Professor Black, civil rights activists were saying what they knew to be true against a background of principles for the world as they wanted it.¹²

9. In Colorado, for example, prior appropriation was always held to be the law of the land even though those coming from the east came from a riparian world. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

10. 347 U.S. 483 (1954).

11. 163 U.S. 537 (1896).

12. Of course, Professor Black put this much more pithily:

But if a whole race of people finds itself confined within a system which is set up and continued

Litigation played an important role in changing the narrative about race. Litigation as the public articulation of a transformative counter narrative has to function on several levels. First, it must, on some fundamental level, reframe the issues at stake. (The attack on segregation was not about states rights, but human rights and the constitution stood with human rights named and unnamed.) Second, within the structure of the claims, litigation needs to define what is both acceptable and necessary as evidence in making out the claim. Third, litigation must reframe *in law*, through the binding force of precedent, the first two points. This has the effect of converting the social argument into a legal argument. Finally, if these changes unsettle both the law and the social context within which the law arose, it becomes possible to use the change in the law to reframe politics. The cautionary tale is just this: you need social change to move law more than you need law to move social change.¹³

B. *How Stories Persuade*

In the first section I have tried to show that stories about place and identity represent points of struggle and that courts can be used to authenticate one form of telling, but the process of using the state in the form of litigation involves politics and not just law. In order for a court to validate what would seem to some a dramatic change (*Plessy*, after all, was good law in the Supreme Court for fifty-eight years at the time of *Brown*) you have to transform the ways in which the court conceives of and structures a problem.¹⁴

for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description.

Here, I must confess to a tendency to start laughing all over again. I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of "equality" is just about on the level with the fiction of "finding" in the action of trover.

Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

13. Grant Gilmore captured this point when he said, "Law reflects, but in no sense determines the moral worth of a society. The values of a reasonably just society with reflect themselves in a reasonably just law. . . . The values of an unjust society will reflect themselves in an unjust law." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110-11 (1977).

14. The brief filed by Professor Tribe in *Romer v. Evans*, 517 U.S. 620 (1996), is an example of this:

Amendment 2 is a rare example of a per se violation of the Equal Protection Clause. The Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Nearly all the cases explicating that command focus on two questions: First, what features of a law—such as its impact on fundamental rights or its use of suspect classifications—should trigger heightened scrutiny of differences in treatment? Second, using the appropriate level of scrutiny, which differences in treatment should be deemed unjustified and therefore discriminatory? Amendment 2, in stark contrast, involves a prior and more basic question, whose answer does not require any inquiry into the nature of the rights that Amendment 2 might be thought to restrict, or of the class it might be said to target: May a state set some persons apart by declaring that a personal characteristic that they share may not be

Both the civil rights movement and the property rights movement seem to be making a basic moral demand: the actions of the community are demeaning our humanity; our constitutional claims are rooted in the desire to join the community as full members. In each story there is a dark side: a malevolent government that is fundamentally unrepresentative.

The challenge facing both movements was to escape the claim of special pleading. To do so, each movement had to make their complaint sufficiently general that it could be convincingly argued that it was more representative than the power they were opposing. The general explanatory power of the story is what separates the politically powerful movements from cranks.

The constitutive role of story telling in the construction of a community comes from the capacity both to create a vision of the possible (especially by exposing false necessity) and to de-center power in order to move politics to a different terrain. Professor Rose suggests that attention to property stories reveals the ways in which they gain power as normative positions.¹⁵ As I have said elsewhere:

It is not enough to say of a particular formulation that it is merely one way of telling the story, especially when a particular narrative has popular political resonance. The political power of a particular story delegitimizes other explanations and viewpoints, and structures the form of political and legal contestation.¹⁶

The property rights movement began as a complaint about the overreaching of federal regulators and the effects of federal ownership on opportunities to freely use the resources of western states. But the underlying political claim was not just one of unjustified use of the police power, but a challenge to the idea that there was any legitimate regulatory power at all.¹⁷ The idea that grew out of the western complaints about

made the basis for any protection pursuant to the state's laws from any instance of discrimination, however invidious and unwarranted?

The answer to that question must be no. To decree that some identifying feature or characteristic of a person or group may not be invoked as the basis of any claim of discrimination under any law or regulation enacted, previously or in the future, by the state, its agencies, or its localities—when persons and groups not sharing this characteristic are not similarly handicapped—is, by definition, to deny the “equal protection of the laws” to persons having that characteristic. Yet this is precisely what the State of Colorado has done.

Brief of Laurence H. Tribe et al. as Amici Curiae in Support of Respondents at 3-4, *Romer*, 517 U.S. 620 (No. 94-1039), 1995 WL 17008432.

15. Rose, *supra* note 5.

16. Gerald Torres, *Taking and Giving: Police Power, Public Value and Private Right*, 26 ENVTL. L. 1, 9 (1996).

17. *Id.* at 10 (“The Sagebrush Rebellion, for example, began with the cry that federal land should ‘revert’ to the states and their citizens. The idea of reversion has both a vernacular and technical valence. The two meanings are deeply at odds. The popular meaning of reversion is ‘give us back what rightfully belongs to us.’ The technical meaning appears similar, yet is critically different. For property to revert, the claimant must be vested with an interest that arose prior to the claims of the current claimants. If a technical reversionary interest existed, then release of the current possessory interest

federal oversight of activities on federal land was joined with a general attack on federal regulatory power. The idea that was at the heart of the complaints of the sagebrush rebels is the same one that at the heart of the current attacks on regulatory schemes such as the Clean Water Act.¹⁸ The narrative force comes from the twin ideas that the federal government was trying to exercise power that was illegitimate and, as a corollary, it could not be trusted because it was not a part of the community it was trying to regulate.¹⁹ This is the mirror image of the claim those in the civil rights movement were making even if they were being made for a parallel moral claim. How the claim of property rights advocates got translated into politics and then into law is the remaining part of the story.

II. TURNING NARRATIVE INTO NORMATIVE

How do you convert a narrative principle into a normative principle that is broader than the community for whom you are constructing the story?²⁰ How can it become *the* principle that drives policy and legal decision-making? The point I have been making is that the narrative principle comes first and that courts, by instantiating the narrative principle in their decision-making, create the normative principle.

The stories that the property rights advocates have been telling are really aimed at two goals: first is to mark off some forms of regulation at all levels as illegitimate and second is to circumscribe the reach of federal regulation as a general matter. I have outlined their strategy and claims elsewhere.²¹ As I suggested at the beginning of this essay, the struggle over property rights is really about the contours of our social life and the definitions of community: who counts? Professor Rose's interventions in the debate have been so important because of the ways in which her understanding of the takings debate is of a piece with an older story about American social life. Though she may reject it, I want to suggest that she is shoulder to shoulder with Holmes. Not the Holmes who has been caricatured with the ubiquitously cited "goes too far" language of *Pennsylvania Coal*,²² but Holmes the pragmatist.

At the most basic level claims of inverse condemnation are inquiries

would cause the land to 'go back' to the original owner (or her heirs). Thus, with that simple exclamation, the 'Sagebrush Rebels' asserted a revolutionary idea: that the federal government had no constitutional claim to the land it was administering and thus the current occupiers were the legitimate heirs to the fee interest.").

18. See, for example, the analysis of former Chief Justice Rehnquist in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

19. Compare this to arguments made in Carol M. Rose, *Planning And Dealing*, *supra* note 1.

20. For a discussion of this point in the context of feminist theory, see Susan E. Roche & Gale Goldberg Wood, *A Narrative Principle for Feminist Social Work with Survivors of Male Violence*, 20 *AFFILIA* 465 (2005).

21. Torres, *supra* note 16.

22. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

into the due process of law making and as such are designed to keep legislatures honest. Professor Joseph Sax made this point in his still important article on takings in *The Yale Law Journal*.²³ When the state is acting to resolve a dispute between competing land uses, but does not use the occasion of that intercession to add to its own resource base, no compensation is required.²⁴ It is clear that the regulation of nuisance may result in a near total elimination of either exchange value or use value without triggering any obligation to compensate.²⁵ This may be done in the adjudication of a dispute, or in the general regulation of a particular class of odious uses. (Of course, odious is completely contextual but not arbitrary.) The modern law has focused on the obligations on the state arising from a diminution of value of the total parcel or a complete diminution of one aspect of ownership. It is here that the property rights movement has tried to fix a principle that would trigger compensation or effectively prohibit government from acting.

The idea that there might be a single principle that would resolve every land use or property conflict is seductive. It is especially intoxicating if this principle would rule entire classes of regulations out of bounds. It would not only preserve the current distribution of property, but would limit government intervention in any redistributist scheme.²⁶ The existence of per se rules merely sets out some boundaries but does not fill in all of the points on the line. Holmes argued that we should resist the siren call of abstract purity in ordering the affairs of people.²⁷ Instead, in the area of the police power, we know what the law ought to be only through a series of approximations. He captured this method in the *Hudson County Water Co.*²⁸ case:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but

23. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

24. *Id.* at 39.

25. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding an ordinance where the value of the parcel was diminished by over ninety percent); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

26. There are some per se rules. When the state destroys all of the use value of a parcel it has to have a very good reason. The harm it is preventing must be commensurate with the loss. Otherwise it must compensate. When the state effectively occupies private property it must compensate the owner for the loss.

27. See generally LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001).

28. *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.²⁹

This is the structure of the argument Professor Rose advances in her famous essay entitled *Crystals and Mud*.³⁰ While she focuses on both contemporary economic and historical analysis of property rules, the phenomenon she identifies is the tension and cycling between hard edged “crystalline” rules and more loosely defined or “muddy” rules. Why prefer one or the other? Why would certain aspects of doctrine yield more readily to rules in one form than another?

[T]he history of property law tells us that we seem to be stuck with both [crystals and mud] . . . and instead of really choosing, we seem to oscillate between them. Because this pattern recurs so often in so many areas, it is difficult to believe that it is due to abnormal foolishness or turpitude, or that it can be permanently overcome by a more thoughtful or more virtuous choice of one side or the other.³¹

We are always fixing points on the line. We shouldn't be unhappy with the realization that they are not all fixed in advance and the even the most far-sighted legislator would fail in the attempt. The law when it works produces a kind of temporary coherence. Sometimes it is doctrinal coherence; sometimes it is space for social coherence to emerge through private ordering that will reflect itself in the language of law. The underlying narrative of our social life sketches out what is at stake and that changes as our sense of who we are as a community changes. Sometimes the changes are quick and dramatic, sometimes, and more often, they are tortuously slow. The reason coherence is temporary is because it reflects a community that is almost always in the process of becoming. Principles that are mediated by interpretive or narrative necessity cannot be written in stone. Professor Rose summarizes it this way:

But it is precisely as metaphor or rhetoric that the choice between crystal and mud matters. The lapse of community may occur only infrequently in our everyday lives, but this world of estrangement has had a robust life in our highly individualistic *talk* about politics and economics since the seventeenth century. In the context of that talk of universal individualism, the metaphoric or rhetorical character of crystals and mud has a certain independent significance. . . . Thus, crystal rhetoric suggests that we view friends, family, and fellow citizens from the same cool distance as those we don't know at all; while mud rhetoric suggests that we treat even those to whom we have no real connection with the kind of engagement that we

29. *Id.* at 355.

30. Carol M. Rose, *Crystals and Mud*, *supra* note 1.

31. *Id.* at 593.

normally reserve for friends and partners. And for this reason—for the sake of the different social didactics, the different modes of conversation and interaction implicit in the two rhetorical styles—we debate endlessly the respective merits of crystals and mud.³²

CONCLUSION

I have tried to draw together two parts of Professor Rose's investigations. I have wandered from the topic of takings in order to draw attention to the importance of storytelling and narrative theory in Professor Rose's work. I hoped to show that the stories we tell to constitute our communities have analogs in the law: stories about justice, if sufficiently generalized, can get a hearing by changing the way courts understand the issues in front of them. It is not always conscious, but the process of finding the narrative voice that will galvanize a community and shift the grounds on which policy get made is a conscious and social process. The property rights movement has its share of cranks, but the reason it has gained such a purchase on policy makers and judges is that it has been able to tell a story with emotional and ideological resonance that connects it to what we think about ourselves. A government that is out of step with the community is producing the kinds of injustices property rights and civil rights advocates warned about. The felt injustices described by advocates in the property rights movement have explanatory narrative power for those caught up in an economy or way of life being transformed more quickly than is explainable by natural evolution, globalization or the like or in the claims of long time residents of New London, Connecticut who experience the city disrespecting them when it would sacrifice their homes in the service of "economic development."³³

People want crystals and all they get is mud. What they thought was stable has come unglued from both the material cultural structures that ground them and the legal structures that validate them. What Professor Rose has demonstrated is that deciding issues like the limits of the police power can never be done in the abstract even in the service of principles that masquerade as neutral and universal. For the parties, especially for those whose identity is tied to the place that is the subject of the litigation, the issue being litigated is the measure of truth. And part of that truth is what is revealed about the community we live in.

32. *Id.* at 610 (footnotes omitted).

33. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).