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Introduction: Traditional Knowledge and Property in Moral Communities

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In her article introducing this Special Edition on protecting traditional knowledge, Carol M. Rose brings some much-needed clarity to the relationship between traditional knowledge and property.[1] The relation is not promising: Rose identifies a pervasive incompatibility between traditional knowledge and what she calls "modernist" property. To show the uneasy relationship between traditional knowledge and property, she describes how the case for the protection of traditional knowledge lines up with three types of scenarios familiar to property law.[2] First, when someone from outside a community uses traditional knowledge to develop a drug, and maybe even patent it, such an act looks like stealing.[3] (This presupposes that we can speak of the conversion of intangibles, which by their nature cannot be possessed: a harbinger of the problems on which Rose focuses). Second, where outsiders produce items with designs that imitate and compete with community members' creations that embody traditional knowledge, an objection could be framed in terms of unfair competition. And thirdly, where traditional knowledge involves sacred rituals and lore, publicizing it could be thought of as an invasion of privacy. The question is what, if anything, law can do to protect traditional knowledge in such scenarios. Is property or intellectual property up to that task?

Rose largely answers "no" and offers a host of insights into the mismatch between traditional knowledge and property that runs very deep indeed. Rose lays bare some of the limits of property law itself that pose challenges in all contexts, especially in the case of traditional knowledge.[4] To set up property rights, we need to know who owns the thing, and what that thing is. In traditional knowledge, both the "who" and "what" questions are problematic. As for the "who," it is often hard to identify an owner where knowledge involves people

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1. Carol M. Rose, *Traditional Knowledge and the Limits of Property*, 66 Harv. Int'l L.J. 81 (2025) (Special Edition).

2. *Id.* at 83.

3. *Id.*

4. *Id.* at 101.

of the past and present, different groups, and groups and individuals whose interests may diverge. One aspect of property is the need for a subject matter that is separate from the person, and this is central to tangible property: Cut hair can be property, but the hair on someone's head cannot.[5] Tangible property involves physical objects and land that can be demarcated with boundaries, but intangible property is much harder to delineate. When it comes to the "what," traditional knowledge presents extreme difficulties. If anything, traditional knowledge is even more difficult to separate into an asset than conventional intangible property like intellectual property. It is part of the very nature of traditional knowledge that it is not easily depersonalized in this way, at either the individual or group level. Part of what makes traditional knowledge traditional is that it is hard to disentangle from the community and its identity. Sometimes, it is even undesirable to depersonalize it, which might do harm to the community and its members.

Here is where the strengths and weaknesses of the modernism in Rose's conception of property come in.[6] Property rights, not only but especially modern ones in developed economies, separate assets and designate owners—the what and who—so that property can be traded. This is often beneficial not just in terms of getting resources to those who value them but also in heading off alternative methods of allocation, like violence.[7]

The who and what of property need to be communicated to those on the other side of the property equation: those who need to avoid violating rights and those who want to acquire rights. As Rose has argued, even something as basic as possession is a message: Claims have to be of the kinds that are understood—and accepted—by those to whom they are addressed.[8] Although we often think of law as being about coercion and property as being about power,

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5. For discussions of separation or separateness as a condition for property treatment, *see, e.g.*, David Hume, A Treatise of Human Nature 487–88, 502–04 (L.A. Selby-Bigge ed., 2d ed. 1978); J.E. Penner, The Idea of Property in Law 111 (1997); Frederick Pollock, *What Is a Thing?*, 10 L.Q. Rev. 318, 318 (1894).

6. Rose, *supra* note 1, at 82–86.

7. Rose has long been interested in the *doux commerce* theory, in which property and markets improve manners and sociable virtues. Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 607 (1988); *see also* Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 Wm. & Mary Bill Rts. J. 1015, 1048 (2011) ("[A]lmost 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)."). On *doux commerce*, see Albert O. Hirschman, The Passions and the Interests: Political Arguments for Capitalism before Its Triumph 56–63 (1977); Deirdre N. McCloskey, The Bourgeois Virtues: Ethics for an Age of Commerce 28–32 (2006).

8. Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 82–83 (1985); *see also* Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 Stan. L. Rev. 1105, 1108 (2003).

in an important sense, property is persuasion—communicating claims that are accepted by others.[9]

So, who is this "audience" for possible property rights in the case of traditional knowledge? This raises all sorts of questions. In a given society, the set of duty-bearers is part of the same society. And in some property theories, the idea of who the "we" is turns out to be central. How so? To begin with, property is a group phenomenon. Property theories based on a hypothetical story about the formation of political community obviously have this character. If there is a social contract, there is a set of contracting parties.[10] Or, if with Kant we talk of entering the civil condition, there is an important "we" at work here, however elusive that may be.[11] Even in less ambitious theories like Hume's, the conventions for possession and accession emerge from interactions that occur in a society, not necessarily from the world at large or some set of ethereal beings.[12] In the real world, property often grows out of custom, and custom arises in particular communities.[13]

Communities are not given; they are formed. Property is a set of practices that helps form the community itself. For example, boundary walking helps form community, and the practice of all kinds of property customs is a social glue.[14] Given this contingency and dynamism, it is no surprise that the boundaries of communities are not necessarily static, and membership is not always

9. Carol M. Rose, Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership 3 (1994) ("One person's property can only exist, by and large, because other people accept it. In turn, that social relationship of claim and recognition only exists because people are able to communicate their claims and because others understand and more or less agree to honor them."); Carol M. Rose, *Property and Language, or, the Ghost of the Fifth Panel*, 18 Yale J.L. & Human. 1, 2 (2006) (Special Issue) ("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.").

10. *See generally, e.g.*, John Locke, Two Treatises of Government and A Letter Concerning Toleration (Yale University Press 2003) (refuting divinely sanctioned patriarchalism and proposing a view of society based on a contract between the government and the governed and the latter's consent); Jean-Jacques Rousseau, The Basic Political Writings (Donald A. Cress, trans. 1987) (proposing a view of society based on a social contract wherein free and equal individuals submit individual wills to a collective will generated through agreement).

11. *See, e.g.*, Immanuel Kant, The Metaphysics of Morals 6:264, 6:312 (1797); John Rawls, A Theory of Justice 18–22 (Belknap Press 1971).

12. *See generally* Hume, *supra* note 5.

13. *See generally* Henry E. Smith, *Community and Custom in Property*, 10 Theoretical Inquiries L. 5 (2009) (proposing an informational theory of custom in property law, exploring how variation in the audience for custom impacts its formalization into law); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 Wm. & Mary L. Rev. 1849 (2007) (arguing that property rights systems rely on kinds of morality congruent with their function, including their intedned audience).

14. *See* Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 Yale L.J. 872, 944–45 (2019).

so easy to determine. Moreover, once we know who is in and who is out, we can ask whether and under what circumstances it makes sense or is even fair to hold outsiders to the custom of the community.[15] If whalers have customs about claiming whales, when should a non-whaler blundering into a whaling situation be bound? Where is the consent? Where is the knowledge? This problem is especially acute when in rem rights are created: the duties imposed are non-consensual.

The problem of community needed for in rem rights is controversial enough within one society or among similar societies. What about traditional societies and the kind of societies that have modernist property? Some cultures are into remixing and adapting new ideas from outside, and others would like to be more secluded, communal, and enduring.[16] Whose mixing or nonmixing norms should prevail, and on what terms?

Property is more likely persuasion if we are in the same moral community. We might typically think of small groups as moral communities, but general norms like those of property appeal to shared beliefs about right and wrong in the large group of those participating, even as "in rem" duty bearers, in property law and institutions. Property norms can then—at least aspirationally—draw on shared cultural background and rest on a shared sense of morality.[17] Could community, in that sense, for some purposes, be all of humanity? Maybe, but the greater the detail, the more likely the relevant community will have to be narrower. Otherwise, at some point, property becomes coercion.

Property, intellectual property, and theory-associated norms simply do not answer these more basic questions. Or, if they are taken to furnish answers, those answers are likely to presuppose a modernist answer, as Rose shows in detail.[18]

At the end of her article, Rose mentions other possibilities for protecting traditional knowledge that do not rely so heavily on property and all its baggage—baggage that includes assumptions about community.[19]

If property presupposes too much, how about taking inspiration from other areas of private law? Might one ground the claims of Indigenous communities to traditional knowledge in unjust enrichment?[20] Or equitable rights, such that the right to be compensated would follow information into remote hands and

15. *See* Smith, *supra*, note 13, at 6, 11, 14.

16. To see the hazards here, consider how much social science work is based on undergraduates from North America, Europe, and Northeast Asia, and how those societies are unusual in many ways. *See generally* Joseph Henrich, The WEIRDest People in the World: How the West Became Psychologically Peculiar and Particularly Prosperous (2020).

17. *See generally* Merrill & Smith, *supra* note 13.

18. Rose, *supra* note 1, at 93.

19. *Id.* at 101.

20. Ruth L. Okediji, *Traditional Knowledge and Private Law*, *in* The Oxford Handbook of the New Private Law 427, 443–44 (Andrew Gold et al. eds., 2020).

would bind those with notice?[21] Take the problem of body parts Rose discusses.[22] In *Moore*, the court held that Moore had no property in his spleen cells—hence no conversion claim—and allowed only claims for lack of informed consent by the doctors who had taken the cells for their own research and patenting activities.[23] Among other things, the court was worried about possible conversion liability on downstream researchers who did not know the provenance of the cells.[24] One could imagine allowing someone like Moore to assert an equitable claim that would bind the defendants and downstream users unless they were in good faith.[25] Or, going beyond law, as Rose suggests, perhaps we could use shaming and norms to inculcate respect for traditional knowledge.[26]

What all these potential modes of protection for traditional knowledge have in common is some source of morality or morally infused norms outside the law. Should we be looking to natural law, perhaps along the lines of human rights law? The rationale would not be scarcity (as it is for regular property), or even incentives (as is often proposed for intellectual property), but would be a different kind of moral claim.[27] Likewise, the possibility of unjust enrichment and equity implicates morality. Whose morality, and where does it come from? The natural law or human rights solution rests on the idea of universals and a

21. *See id*.; Henry E. Smith, *Equitable Meta-Law: The Spectrum of Property*, *in* Equity Today: 150 Years After the Judicature Reforms 319, 329–30 (Ben McFarlane & Seven Elliott eds., 2023). Equitable rights are robust in some ways, and yet vulnerable in situations of good faith purchase, the latter being is the source of the lesser informational demands they make as compared to full-blown property rights.

22. Rose, *supra* note 1, at 98.

23. Moore v. Regents of the Univ. of California, 793 P.2d 479, 483, 488–97 (Cal. 1990).

24. *Id.* at 487, 493–94, 497.

25. Smith, *supra* note 21, at 329–30.

26. Rose, *supra* note 1, at 101.

27. Natural law and natural rights accounts have pointed in many different directions. *See generally, e.g.*, Mala Chatterjee, *Lockean Copyright versus Lockean Property*, 12 J. Legal Analysis 136 (2020) (arguing that Lockean copyright, favoring more limited rights than modern law, is more plausible than Lockean property in the context of philosophical critiques often overlooked by legal scholars); Eric R. Claeys, *Intellectual Property and Practical Reason*, 9 Jurisprudence 251 (2017) (applying practical reason to intellectual property law); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533 (1993) (arguing that natural rights theory of intellectual property provides significant free speech protections); Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287 (1988) (exploring various justifications, including Lockean labor theory, personality theory, and utilitarianism, for intellectual property law); John M. Kraft & Robert Hovden, *Natural Rights, Scarcity & Intellectual Property*, 7 NYU J.L. & Liberty 464 (2013) (applying a natural rights approach to property and the tangible versus intangible distinction). On how protection for traditional knowledge might be rooted in human rights and the flourishing of communities, see generally, Hans Morten Haugen, *Traditional Knowledge and Human Rights*, 8 J. World IP 663 (2005); Ruth L. Okediji, *Is the Public Domain Just?: Biblical Stewardship and Legal Protection For Traditional Knowledge Assets*, 45 Colum. J.L. & Arts 4 (2022).

community of everyone, both those in groups with traditional knowledge and those from the outside world who might interact with them.

Is a moral community developing at the international level? Is there something universal to point to or a consensus that can be expected to emerge? That is an attractive vision, but we certainly can point to cautionary tales. As a natural law theorist, G.W. Leibniz developed a three-tier system of law (strict right, equity, and piety, in ascending order), which could serve as a universal framework.[28] However, despite intense theorizing, Leibniz did not succeed in his general efforts to bring about a reconciliation of religious differences in the German lands of his day.[29] Likewise, John Rawls' theory of justice has inspired many, but it is subject to a communitarian critique of thin and individualistic ideas like the veil of ignorance that is highly relevant to traditional knowledge, which is tied to thick notions of community.[30] Although open to a variety of interpretations, Rawls' very thin notion of the person behind the veil of ignorance would seem to strip away and put into question much of what makes a society unique, both the private law baselines (including property entitlements) in developed societies and the norms and values of indigenous communities.[31] Indeed, the question of how, if at all, Rawls' justice as fairness can extend to people living in different societies has been a source of difficulty and much effort.[32]

If all this is a circle that resists squaring, then Rose's diagnosis that property is not a good fit for traditional knowledge is a robust one. The problems she identifies are woven into the presuppositions of property. Unless a moral community of the right sort can be found, property or its absence will, at some point, be a zero-sum game. Can we maximize persuasion and minimize coercion, and if so, how? The articles in this Special Edition are a good place to start for thinking about these important and timely questions.

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28. G.W. Leibniz, *Codex Iuris Gentium (Praefatio)*, *in* Leibniz: Political Writings 165, 171–72 (Patrick Riley, ed. & trans., 2d ed. 1988); *see also* Matthias Armgardt, *Justice and Truth: A Leibnizian Perspective on Modern Jurisprudence*, 12 Laws 1, 2–4 (2023) (specifically, article 38); Andrew Youpa, *Leibniz's Ethics*, *in* Stanford Encyclopedia of Philosophy (Edward N. Zalta & Uri Nodelman eds., 2024).

29. Maria Rosa Antognazza, Leibniz: An Intellectual Biography 398–406 (2009).

30. Michael J. Sandel, Liberalism and the Limits of Justice 179 (1982).

31. On how private law is within the basic framework in Rawls and subject to construction in the original position, see generally David Blankfein-Tabachnick & Kevin A. Kordana, *On Rawlsian Contractualism and the Private Law*, 108 Va. L. Rev. 1657 (2022).

32. *See* John Rawls, The Law of Peoples 59–88 (1999); *see also* Leif Wenar, *John Rawls*, *in* Stanford Encyclopedia of Philosophy (Edward N. Zalta & Uri Nodelman eds., 2021). On some of the difficulties in extending the Rawlsian approach to the international scene, see generally Brian E. Butler, *There are Peoples and There are Peoples: A Critique of Rawls's The Law of Peoples*, 1 Fla. Phil. Rev. 6 (2001).