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Dear UCLA Legal Theory Workshop:

Thanks very much for reading this very partial and very early-stage draft—you are the first to look at it besides me! I am currently trying to figure out how to corral this idea into a manageable project; you will see that the second half is mostly sketched out at this stage, since I have done more work collecting the primary source material that I see as connected to the theme.

Your feedback will be extremely helpful to me at this stage, so I am grateful in advance for your questions and suggestions.

Molly Brady
THE KNOWLEDGE OF THE NEIGHBORHOOD

Maureen E. Brady*

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INTRODUCTION

Of all the sometimes-bewildering subjects that a first-year law student is likely to encounter, property often gets top honors—as one law professor put it, the course feels to some “a montage of ill-fitting subjects, jarringly connected by arcane language and obfuscatory rules.”¹ With their origins in long-dead concepts, some parts of the property course have been described as akin to an “alien language.”² There is an irony in this feature, because the

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field is full of scholars preoccupied with language, legibility, and how these concepts illuminate the rules and structures governing what we own. Two of the most-cited property scholars—Carol Rose and Henry Smith—have written extensively about the relationship between property claims and language or communication.\textsuperscript{3} Take, for instance, how much of the law of acquisition is structured around the possessory signals an individual sends out to others—acts communicating “this is mine” or “keep off”—and how those communications are or are not interpreted by the relevant audience.\textsuperscript{4}

Many classic property problems emerge from the possibility that there are different audiences to which any given claim may communicate, and “any given property regime effectively privileges some speakers and audiences over others.”\textsuperscript{5} In some cases, these audiences pit culture against culture, as in Stuart Banner’s work on differing conceptions of property among indigenous populations and colonial settlers.\textsuperscript{6} In other contexts, as Henry Smith has observed, the choice of audience implicates other characteristics—to use an example prompted by the canonical case of \textit{Pierson v. Post},\textsuperscript{7} the “community of fox hunters” versus an audience that also includes “nonhunters.”\textsuperscript{8} In either case, determining which audience’s view matters can have significant consequences for whether a claim has effect.

Many times, the bigger audience wins. Much of property’s architecture seems to derive from its \textit{in rem} nature: the law on the books and on the ground must communicate to a broad audience that includes “out-group duty-holders and government officials,” sometimes up to the world at large.\textsuperscript{9} To be sure, there are still some pockets of doctrine that work only because there is a smaller audience with a “high degree of common knowledge”: doctrines


\textsuperscript{4} Carol M. Rose, \textit{Possession as the Origin of Property}, 52 U. CHI. L. REV. 73, 78 (1985); Smith, \textit{supra} note 3, at 1168 (observing notice-giving function of “maintaining possession”).

\textsuperscript{5} Rose, \textit{supra} note 3, at 6.


\textsuperscript{7} 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

\textsuperscript{8} Smith, \textit{supra} note 3, at 1117–18.

\textsuperscript{9} Henry E. Smith, \textit{Community and Custom in Property}, 10 THEORETICAL INQ. L. 5, 6 (2009).
associated with customary use, for instance.\textsuperscript{10} There are “tradeoffs” between the advantages in tailoring in-group communication and the more formalized or standardized communication necessary to reach and communicate effectively with a broader audience.\textsuperscript{11} The fact that so many outsiders must respect property rights typically makes property’s dynamic of standardization stronger than in cognate fields, like contracts, where the number of duty-holders is usually more confined.\textsuperscript{12} As doctrines become more widely applicable to larger and more heterogenous groups, judges tend to “strip[] out . . . dependence on community context” as more locally-held or idiosyncratic practices become more broadly applicable law.\textsuperscript{13}

Some of property’s smaller audiences are transitory, appearing as significant in a smattering of cases before succumbing to the forces of standardization: Colorado miners, Long Island hunters, Shasta County cattle herders, Cape Cod whaling communities.\textsuperscript{14} But another of property’s smaller audiences has proven quite persistent: the “neighborhood.” The neighborhood is not quite the public, nor is it the state, nor is it fully private or person-to-person. In one sense, its role in property law is totally obvious: notions like “the character of the neighborhood” have a deep pedigree in nuisance law,\textsuperscript{15} and it also appears in parts of property’s most pernicious history, like “there goes the neighborhood” as used to describe changes in an area’s racial or ethnic composition.\textsuperscript{16} But in another sense, the neighborhood’s continued salience as an audience in property demands some explanation. The purpose of this project is to collect different places where the neighborhood remains a distinctly important audience or informational repository in various strands of property doctrine and analyze that feature.

My aim in this work is somewhat distinct from other efforts to study the neighborhood. There is of course a deep tradition in property, land use, and

\begin{enumerate}
\item [\textsuperscript{10}] Id.; see also Carol M. Rose, 	extit{Crystals and Mud in Property Law}, 40 STAN. L. REV. 577 (1988).
\item [\textsuperscript{11}] Smith, supra note 3, at 1112; see Smith, supra note 9, at 15.
\item [\textsuperscript{12}] Smith, supra note 3, at 1184–86.
\item [\textsuperscript{13}] Smith, supra note 9, at 7.
\item [\textsuperscript{14}] Smith discusses each of these examples in Smith, supra note 9. Generally, these examples can be associated with the cases of Pierson v. Post, 3 Cai. 175 (N.Y. 1805), and Ghen v. Rich, 8 F. 159 (D. Mass. 1881), and the scholarship of Andrea McDowell and Bob Ellickson, ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991); Andrea G. McDowell, \textit{From Commons to Claims: Property Rights in the California Gold Rush}, 14 YALE J. L. & HUM. 1 (2002).
\item [\textsuperscript{15}] J. E. Penner, \textit{Nuisance and the Character of the Neighbourhood}, 5 J. ENVTL. L. 1 (1993).
\item [\textsuperscript{16}] For an interesting list of early uses of this phrase, as well as some agreement on its racial overtones, see Sven Yargs, Comment, \textit{ENGLISH LANGUAGE & USAGE}, Feb. 5, 2015 (edited Mar. 23, 2021), https://english.stackexchange.com/questions/59672/what-is-the-origin-of-the-phrase-there-goes-the-neighborhood-and-does-it-have.
\end{enumerate}
local government scholarship of looking at the neighborhood, particularly its interfaces with governing bodies through formal structures like neighborhood associations, business improvement districts, and entities for preservation. 17

Recently, fascinating work by Nestor Davidson and David Fagundes has examined conflicts over neighborhood naming and the implications of these conflicts for both property and local government law. 18 The neighborhood has long preoccupied sociologists and political scientists as well, who consider the values underlying the neighbor relation and compare them to the values underlying other, often more formal institutions. 19 Although this project obviously implicates, and will touch on, related questions about how the identity of a neighborhood is constructed, its primary focus lies elsewhere: in understanding ongoing sites whether the neighborhood audience matters, deserves deference, or requires consultation.

This project proceeds in three parts. In Part I, I catalog some of the myriad ways that property law takes advantage of the neighborhood, both historically and continuing to the present day: in delineating parcels and places for a variety of uses, in doctrines of notice and notoriety relevant to transfer and adverse possession, and in constructing a normative baseline against which change is measured in nuisance and covenant law. Looking at the neighborhood as a source of information connects property with ideas from the law of evidence, criminal law, and even tort and international law, places that have a longer tradition of studying knowledge and reputation.

In Part II, I disaggregate the different reasons why the neighborhood has been or remained privileged in property—justifications that emerge from the sources themselves. While in some cases, resort to the neighborhood comes from necessity, or the absence of better information, in others, the neighborhood’s information is considered superior to what judges or nonmembers might ascertain from other sources. In still other cases, privileging neighborhood knowledge or information can have an exclusionary effect—one that neighborhood “insiders” have at times


19 E.g., NANCY L. ROSENBLUM, GOOD NEIGHBORS: THE DEMOCRACY OF EVERYDAY LIFE IN AMERICA (2016).
intentionally exploited to exclude or regulate the access of others.

In Part III, I draw on social and economic theory to assess whether the neighborhood should be a salient audience in property. Can the positive attributes of the neighborhood be extricated from those that detract from overall welfare? It is plain that the neighborhood has a “dark side;”20 many have a history of racial, class, and other forms of exclusion. But the neighborhood need not be all bad: theories of concepts ranging from the inside joke to the specialized firm illustrate that knowledge shared within a smaller group can yield social and other forms of capital beyond what would be generated in the group’s absence. The piece hopes to consider the parameters under which some informational costs to enter a community might be justified by these sorts of broader gains—not just in an economic, utilitarian sense, but also because of the ways that social information-sharing might ultimately enhance personhood and development of individual identity.

I. PROPERTY’S RELIANCE ON THE NEIGHBORHOOD

In this Part, I begin by proceeding through three different places in which the neighborhood has played a central role in property: (1) in delineating parcels and places; (2) in both receiving and providing notice; and (3) in acting as a baseline against which change and conformity in the area are measured. This Part will touch on multiple familiar doctrines, ranging from recording institutions to adverse possession. It will also trace the persistence of the neighborhood audience over time.

A. Delineation

1. Common Reputation

From its very beginnings, the Anglo-American property system depended on the “neighborhood”—or at least, members of the surrounding community—in order to identify who counted as an owner and what they owned. Take the instructions William the Conqueror delivered in 1086 in order to fill the Domesday Book, a census of landholdings compiled to assist the Normans in collecting tax revenue in their new territory of England.21 Officers were to inquire from “six villeins of every vill” about the historical

ownership of each individual manor. The testimony of these representatives “was especially vital in consolidating communal memory about previous holders of lands and rights.”

The notion of “communal memory” or “common reputation” is deeply intertwined with the notion of “fama,” a Latin word meaning reputation, rumor, or notoriety. The concept of \textit{fama} is now visible in vestigial form in the terms “infamy” and “defamation” and even “blasphemous.” Common knowledge was, ironically, at once both especially reliable and yet often contested. Parties often proffered competing or inconsistent assertions of common knowledge, leading over the long passage of time to various restrictions on the weight or use of common knowledge or reputational evidence in particular contexts.

Though \textit{fama} has been studied most extensively in the context of criminal law and in studies of the jury, “common knowledge” was critical to both the establishment and the maintenance of the property system. In the sixteenth-century work \textit{A Perambulation of Kent}, for instance, author William Lambarde describes ambiguities surrounding the boundaries of a common forest, “[s]ome men affirming it to begin at one place and some at another.” To settle any issue, Lambarde thought the boundary “ought to be decided by the verdict of twelve men, grounded upon the common reputation 


\textit{27 Wickham, supra note 24, at 17, 22–23.}

\textit{28 Macnair, Vicinage and the Antecedents of the Jury Forum, supra note 24, at 576–78; Wickham, supra note 24, at 18.}

\textit{29 Macnair, Vicinage and the Antecedents of the Jury Forum, supra note 24, at 574.}

\textit{30 Id. at 575.}


\textit{32 Lambarde, supra note 31, at 213. Throughout these citations, in all but source titles, I have modernized the English in quotations for ease of readability.}
of the country thereabouts.”

Fittingly, given the other legal areas in which *fama* has come up, Lambarde’s invocation of “twelve men” plainly evokes the idea of the jury.

From the early modern period onward, the phrase “common reputation” or “common repute” recurs frequently in discussions of boundaries or property siting. In 1681, for example, one source on Scotland described the locations of “fees” there as found in either charters or “by the common reputation of the Neighbourhood.” The phrase “common reputation” can also be found in contemporary discussions of marriage, particularly where ordinary marital solemnities were not followed but the community’s testimony as to the practices of a cohabiting couple might suffice. Relatedly, the term sometimes comes up in discussions of parentage, as when one seventeenth-century author asserted one’s parent could not be identified other than through “the common repute of the Neighbourhood, and the testimony of your Mother . . . .” As the move from marriage to parentage might suggest, courts also accepted reputational evidence to determine race and enslaved status, a topic that other scholars and historians have identified

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33 Id. at 213–14.
35 E.g., Katherine Austin’s Case, Antea 90, 183. 2 Vent. 186. 3 Salk. 393 (1683) (citing importance of “common reputation” in determining whether a road was private or public); Wing v. Earle, (1653) 78 Eng. Rep. 468, 32 Eliz. Roll 208, or 408; Cawley, 130. 1 Hawk. 35. 3 Bac. Abr. 783. 2 Bl. Rep. 969 (K.B.) (using “common reputation” to determine distance in land grant); Richard Barton, *Lectures in Natural Philosophy* 91 (1751) (“[I]t is not requisite to give the strict dimensions, but only such from common repute, that any future inquirer may certainly find the places, as any traveller may find a great road through a country, from the honest information of one who went before him.”); The Lady Ivy’s Trial (1684) in "A Collection of State-Trials and Proceedings upon High-Treason, and Other Crimes and Misdemeanours from The Reign of King Edward VI to the Present Time" (vol. 7) (London: Benj. Motte and C. Bathurst, 1735) (“And it has been constantly the reputation of the Place, that this was the Dean's lands, surveyed as the Dean's lands, sold in the late time of usurpation as the Dean's lands.”); Humphry W. Woolrych, *A Treatise on the Law of Ways*, 9 (London: Saunders and Benning, 1829) (“With respect to a highway, in the words of Hale, C.J., "much depends upon common reputation."”).
36 *James Dalrymple, The Institutions of the Law of Scotland* 282 (1681)
37 See Dalrymple v. Dalrymple (1809) 2 Hag. Con. (App.) 48 (describing historical purpose of a 1503 law to be granting rights to wives held “by common reputation” if not by law); *The True Case of John Butler, B.D., a Minister of the True Church of England in Answer to the Libel of Martha His Sometimes Wife* 3 (1697); Macnair, *Vicinage and the Antecedents of the Jury Forum, supra* note 24, at 577.
39 There are several nineteenth-century cases attempting to slice whether hearsay or reputational evidence could be admitted as to slave versus free status, even if accepted in constructing race. *See, e.g.*, Vaughan v. Phebe, 8 Tenn. 5 (1827); Gregory v. Baugh, 25 Va.
and thoroughly analyzed. In a Supreme Court case from 1813, a sentence by Justice John Marshall illustrates pithily just how well-accepted the link became between general knowledge of families and properties. He noted that despite the general rule rendering hearsay evidence inadmissible, it was “as old as the rule itself” that reputational evidence might nevertheless be taken in “cases of pedigree, of prescription, of custom, and in some cases of boundary.”

What made the utility of this evidence so clear? In addition to some specific reasons why the community was supposed to possess information on these matters, the knowledge of the community was a sort of public good to be protected. Errors relating to property or family could be quite costly, threatening physical violence, economic loss, or spiritual damnation. Both in and well beyond the Anglo-American world, it constituted a serious legal and moral offense to mislead the public about either. The tort of “slander of title” or “disparagement of property”—for false or misleading statements or writings calling an owner’s title into question—is as old as, and was arguably distinct from, the tort of defamation. The Jack-o-Lantern supposedly

611, 644 (1827); Fox v. Lambson, 8 N.J.L 275, 277–78 (1826). Although somewhat later, politicians in Maryland in the nineteenth century evidently began debating whether judges should be able to look to “common reputation” to establish lunacy in ways affecting the franchise. See ANDREW DILTS, IN PUNISHMENT AND INCLUSION: RACE, MEMBERSHIP, AND THE LIMITS OF AMERICAN LIBERALISM 28 (2014).


42 See infra Subsection I.A.2.


44 ALAN DOWLING, EARLY REPORTED CASES ON SLANDER OF TITLE, 57 N. IRELAND LEGAL Q. 246, 247 (2006); ROBERT M. HODGESS, NOTE, DISPARAGEMENT OF PROPERTY: A RIGHT OF ACTION, 65 DICK. L. REV. 145 (1961); W.B. WOOD, DISPARAGEMENT OF TITLE AND QUALITY, 20 CANADIAN BAR REV. 296 (1942). I believe Hodgess is a bit off in his reference to a slander of a “hedge” in 1324; the case seemed actually to involve slander of a “sedge,” a type of plant found in the region where the case was decided. 4 PUBLICATIONS OF THE Selden Society 136 (Frederic William Maitland & William Paley Baildon eds., 1891); H. C. DARBY, THE MEDIEVAL FENLAND 34–35 (Cambridge University Press Aug. 2011).
originated as “the ghost of a former remover of landmarks,”45 and some of the less famous Germanic folk creatures identified by the Brothers Grimm were the “verwünschten Landmesser,” or “cursed surveyors,” who measured boundaries falsely in life and thus were doomed to walk them forever.46 Similarly, Sir William Blackstone, in the Commentaries, describes the arcane cause of action for “jactitation of marriage,” “when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue.”47 Notably, cases involving land or marriage were not always real controversies; a ginned-up lawsuit was sometimes the best way to get a court to declare an interest or union legitimate. Couples certainly sued one another to get a court to recognize otherwise flawed marriages,48 and likewise, one can find lawsuits trying title between “Peter Peaceable” and “Timothy Troublesome” that look an awful lot like collusive efforts to get a court to record a transfer in some public, permanent way.49 If a boast of marriage was indeed false, though, the remedy at least sounded ominous: an injunction of “perpetual silence.”50

As one judge described in the context of jactitation, the problem with these sorts of false claims was not just the “disadvantages of fortune and reputation” suffered by the party subject to the false claim, but also the effect of the untruth upon “the public (which for many reasons is interested in knowing the real state and condition of the individuals who compose it).”51 In this regard, neighborhood reputation and knowledge start to resemble the other intangible, social goods that the law of torts deems worthy of protection. The law of unfair competition protects both the harmed business owner and the consumer who might be damaged by inaccurate or misleading information in the public sphere.52 Recent scholarship has argued that some features of public nuisance law might be understood as protecting one’s security in interacting with others in public and private spaces.53 And of
course, while scholars of defamation have long argued about the nature of the action and the interests that tort protects, many agree that protecting reputation is at some level about protecting both the individual and society, both the subject of a falsehood and its audience.54

One can see legacies of the neighborhood’s involvement in a few pockets of modern doctrine. In 1972, the idea of “common reputation” wound its way into the Federal Rules of Evidence. There are twenty-four exceptions to the general rule that hearsay is inadmissible in court, and buried as number twenty, the Rules state that a declarant can discuss “a reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land.”55 As a result, although it probably surfaces in fewer disputes today than it did historically, reputational evidence pertaining to delineation still crops up in recent court decisions.56

Common knowledge about property and place can also pop up in more remote places in law. Take, for instance, the apparent ambiguities revealed when New York endeavored to ban weapons in “Times Square,” revealing attitudes about the common knowledge as to the boundaries of that area.57 Although the size of the population has dramatically changed, there are signs that some amount of common knowledge persists. As the New York Times recently chronicled with an “extremely detailed map of New York City neighborhoods,” there is a fairly surprising degree of convergence on what New Yorkers identify as the street edges between micro-neighborhoods,58 even though no state or other coordinating institution has set forth the boundaries between these places.


55 FED. R. EVID. 803(20).


2. Common Interest

At least historically, most judges and scholars agreed that reputational evidence had value in the context of pedigree and property because these were matters about which people talked. Recall that *fama*, the term underlying the word "defamation," meant both talk and reputation, both the "information" that community members discussed and the resulting "image." And although it might sound strange to modern readers, at least historically, boundaries were considered the subject of common interest. As one prominent early-twentieth-century property treatise put it, "where many persons, members of a community, are interested in a common boundary, they will know where it is, and their common assent will prove what they know."

Intriguingly, in part because of different types of "talk," American courts diverged from the English in how they considered reputation as to borders. In England, reputational evidence was only admissible as to "boundaries of counties, towns, parishes, or manors," matters involving the borders between important administrative or local entities. Although considered a "vexing question" by at least one English reporter, English jurists rejected invitations to admit similar evidence as to private property, in part because "strangers" were unlikely to know about these matters whereas they would be "conversant" in the public ones.

In the United States, however, courts began accepting reputational evidence as to the extent of private lands. American judges justified this extension using the same rationale underlying the English one: reputational evidence was reliable where boundaries were "a matter of sufficient interest in the neighborhood to have been the subject of observation and conversation among the people." The records of famous Americans even bear this out; at the turn of the nineteenth century, Thomas Jefferson ended up in a land

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59 Fenster & Smail, *supra* note 26, at 2–3.
63 Conn v. Penn, 6 F.Cas. 282, 286 (C.C.D. Pa. 1818) (referring to the "reputation of the neighbourhood" contrasted against survey evidence); Holland v. Overton's Lessee, 12 Tenn. 482, 486 (1833); Beard's Lessee v. Talbot, 2 F. Cas. 1175 (C.C.D. Tenn. 1812); see Caufman v. Presbyterian Congregation of Cedar Spring, 6 Binn. 59, 63 (Pa. 1813). Sometimes the American courts drew rather fine distinctions. The Supreme Court held in 1836 that general reputation as to private boundaries was admissible, but not as to particular facts about surveys and the like. *Ellicott v. Pearl*, 35 U.S. 412, 438 (1836).
64 *Clark v. Hiles*, 2 S.W. 356, 362 (Tex. 1886); see *16 Cyclopaedia of Law and Procedure* 1210 (William Mack ed., 1905).
dispute and sought the assistance of a friend in digging up evidence in his case. To prove the grantor was of age, Jefferson advised the friend “to enquire among the old women of your neighborhood who best remember these things.”

A fascinating Virginia case goes into detail to justify the American departure from the English rule on reputational evidence. Disparaging feudalism, the authoring judge thought it ridiculous that “[b]ecause we have not manors”—for which the English judges would accept reputational evidence—there was no way for courts to use reputational evidence of private boundaries in the United States. In an echo of the discovery doctrine, the judge asserted that new rules must “necessarily arise in a new country like ours, conquered from the savage, and granted out to private adventurers while it still remained a wilderness.” The judge grounded extending the rule as to reputation to private borders by asserting that there was just as much, if not more “talk” about private borders by the settlers colonizing America than about any town boundary in England: “I will venture to conjecture that for one discussion in private conversation as to the boundaries of an English manor, there have been a hundred animated and interested debates about the situation of a corner tree in our western counties.”

This assessment, while surely an exaggeration, does not merely illustrate that nineteenth-century Americans needed better things to talk about. Settlers had numerous legal and social practices that generated talk and memory of boundaries and property lines. As I have written elsewhere in more detail, the practice of perambulation—boundary-walking—was legally compelled in several American colonies to memorialize the lines between individual parcels. Virginia’s first version of this law was indeed titled “Bounds of

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67 Thomas Jefferson to Craven Peyton, supra note 65.
69 Tellingly, the hearsay exception for boundaries was not extended to cover rumors about the ownership of enslaved persons, although the decisions do not provide much clarity on the reasons. Whitsett v. Slater, 23 Ala. 626, 634 (1853).
70 Brady, supra note 3, at 902–4; see also 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 18 (Albany, N.Y., James B. Lyon 1896); William H. Seiler, Land Processioning in Colonial Virginia, 6 THE WILLIAM AND MARY QUARTERLY 416, 419 (1949) (describing extension of perambulation requirement in 1662, five months
lands to be every [four] years renewed by the view of the neighbours,” stating as its objective “the preservation of friendship among neighbors.” This was a departure from earlier English custom, which typically involved perambulations at the town or parish line. On both sides of the Atlantic, informal perambulations clearly took place spontaneously or ceremonially within neighborhoods and families. So a seventeenth-century poet could write: “That ev’ry man might keep his owne possessions, / Our fathers [took part] in reverent Processions.”

Whether formal or informal, perambulation created witnesses. Regular walking of boundaries helped “to make sure that the bounds and marks were not tampered with, to restore them when displaced, and also to establish them in the memory of the folk.” Children—specifically, boys—were often involved, expressly to perpetuate those memories as long as possible, with efforts to improve their recall either by providing gifts or beatings. Witnesses could enhance security in future property transactions and dealings, but they were self-evidently useful in litigation. Nineteenth-century judges still referred to the trustworthiness of testimony from those in the community who had processed or examined borders. Accordingly, an 1837 Virginia case touted the advantages of proof from a “surveyor or chain carrier,” or “of the owner of the tract, or of an adjoining tract . . .; and so of

after law requiring only parish perambulation).

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71 2 W. HENING, THE STATUTES AT LARGE 101–2 (1823). The Virginia law actually considered the neighborhood’s opinion superior to the surveyor’s, and set out that if there was no common agreement, two surveyors should re-lay the land out. Id. at 102.
73 Brady, supra note 3, at 904.
74 GEORGE WITHER, A COLLECTION OF EMBLEMES, ANCIENT AND MODERNE QUICKENED VVITH METRICALL ILLUSTRATIONS, BOTH MORALL AND DIVINE 161 (1635).
75 Brady, supra note 3, at 904–5.
79 Brady, supra note 3, at 905.
80 It is challenging to determine when these practices ceased in any given town, let alone across early America. I have suggested some evidence of decline in the eighteenth century in New Haven, Connecticut. Id. at 924. But Virginia continued to require perambulations into that time, apparently having seen less compliance earlier on (not altogether surprising, given differences in population density). See An Act for Settling the Titles and Bounds of Lands (1710), in 3 W. HENING, THE STATUTES AT LARGE 517, 530–34 (1823); An Act Concerning the Granting, Seating, and Planting, and for Settling the Titles and Bounds of Land (1705), in HENING, supra, at 304, 323–26.
tenants, processioners, and others whose duty or interest would lead them to
diligent enquiry and accurate information of the fact . . . .”81 In 1848, the
English Court of Common Pleas described the ordinary forms of proving
boundaries as “the usual perambulations, common reputation, known metes
and divisions, and the like.”82

Matters of parcel delineation were thus of neighborhood interest, both
organically and by design. And in a fitting twist, members of the community
could themselves become part of delineation, forming human landmarks in a
foreign place. In prior work, I have examined the ubiquity of neighbors and
colloquial neighborhood names—more than perimeters, more than
measurements, more than trees and rocks and other nature features—in
colonial Connecticut deeds.83 Across multiple states, courts have used
evidence about what the neighborhood calls a particular spot to settle suits
between two putative claimants.84

Of course, the neighborhood does not seem to play the same role today—
at least in all places, as it did historically—in talking about property, let alone
in delineating property and maintaining those demarcations. As property
transactions occurred in a broader social context, some degree of
standardization—legibility to outsiders—helped facilitate desired
transactions. Nevertheless, the legacy of the neighborhood is still visible
today, in the modern deeds that plainly refer to community members long
gone.85 Despite calls for metes and bounds demarcation to be supplanted by
precise measurements or geographic positioning system (GPS) coordinates,
these descriptors continue to proliferate in American recording institutions,
and legal doctrine continues to recognize these old descriptors as sufficient
for the purposes of defining real property in the course of a transaction.86

B. Notice and Notoriety

Although the neighborhood’s role in initially delineating and maintaining
boundaries has waned somewhat, its role in other contexts remains
significant: particularly those property doctrines involving “notice” and

83 Brady, supra note 3, at 894.
84 Hall v. Mathias, 1842 WL 4854, at *1 (Pa. 1842); Jackson ex dem. Bowen v. Burton,
1828 WL 2257 (N.Y. Sup. Ct. 1828); Wickes v. Lake, 25 Wis. 71, 74–75 (1869).
85 The deed to my own home, for instance, refers to “J.W. Wilbur,” a developer who
died in 1917 (on file with author). I am grateful to my student Katie Kraska for an example
of a recent deed using racial language in describing historic occupants. Deed of January 10,
2022, 3909 Fayette County Land Records 677 (referring to “the lots of John Washington,
colored, on the Southeast and Mrs. Walker on the Northwest”) (on file with author).
86 Restatement (Fourth) of Property, Draft, [Section on Sufficiency of Description].
“notoriety.” In this section, I will trace the prevalence of the “neighborhood” in doctrines relating to both consensual and nonconsensual transfers of title.

1. Memorializing Transfer

Tracing the history of “publicity” of land records is a challenge. Sovereigns have long been interested in keeping track of transfers for the purposes of taxation, as have others seeking to extract commodities or labor from the things and people on land, like English manorial lords.\(^87\) Like the maintenance of boundaries, however, the tracking of transfers was also a community affair—about notice to neighbors, not just those in charge. There is no better example than the old chestnut “livery of seisin,” loosely translated into modern English as “delivery of possession.”\(^88\) Livery of seisin referred to a “public ceremony” wherein the grantor frequently transferred some thing—dirt, a twig, or the like—to the grantee in the presence of witnesses, in order to symbolize the conveyance.\(^89\)

The example of livery of seisin raises a question: exactly who constituted the audience for this performance? On this, jurist William Blackstone’s discussion of livery of seisin offers some leads. Blackstone discusses the formalities of the proceeding, including the lesser-known (and somewhat comical) practice wherein a grantor transferring a house would apparently hand over the latch and then the grantee would have to “enter alone, and shut the door, and then open it, and let in all the others.”\(^90\) Blackstone goes on to explain that if a given conveyance involved multiple parcels in different counties, “there must be as many liveries as there are counties.”\(^91\) Why? Blackstone goes on to explain:

> For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, antiently this seisin was obliged to be delivered \textit{coram paribus de vicineto}, before the peers of freeholders of the neighbourhood . . . .\(^92\)

Speaking a few decades later, in deciding a complicated land title dispute involving the validity of grants from Virginia, the Supreme Court seems to have translated the phrase in describing the ancient tradition of livery of

\(^{87}\) Brady, \textit{supra} note 3, at 891.
\(^{88}\) \textit{Livery of Seisin}, \textit{BLACK’S LAW DICTIONARY} (11th ed. 2019).
\(^{89}\) \textit{Id.}; see Claire Priest, \textit{Credit Nation: Property Laws and Legal Institutions in Early America} 46–47 (2021).
\(^{90}\) 2 \textit{William Blackstone, Commentaries} *315.
\(^{91}\) \textit{Id.}
\(^{92}\) \textit{Id.}
The Latin term *vicinus* is often translated to “neighborhood.” But there were arguments about the scale of the vicinage even in Blackstone’s time. Blackstone’s discussion of the jury is telling. Drafting the Bill of Rights, James Madison originally included the term “vicinage” in the phrase “an impartial jury of the vicinage,” describing the constitutional parameters for selecting a jury in a criminal trial. The term spawned significant floor debate and amendments trying to clarify whether it meant area, county, state, or something in between. Eventually, “vicinage” was replaced with the phrase “of the State and district wherein the crime shall have been committed” in what became the Sixth Amendment.

Juries for much of England’s early modern history were “self-informing,” in that they “based their verdicts on information they actively gathered in anticipation of trial or which they learned by living in small, tight-knit communities where rumor, gossip, and local courts kept everyone informed about their neighbors’ affairs.” Though much of the American scholarship on juries is preoccupied with their role in criminal cases, jurors have just as long a pedigree as the arbiters of property claims and disputes. In the 1100s, when two claimants disputed property, the local sheriff would summon twelve knights “from the same neighbourhood who best knew the truth” to resolve the affair, using knowledge they had gleaned with their own senses or derived from the “statements of their fathers.”

Creating notice, then, was partially about providing information to future potential jurors; but that was not the only reason. Blackstone offers further insight as he continues:

[The neighbourhood] attested such delivery in the body or on the back of the deed; according to the rule of the feudal law, *pares debent interesse investituras feudi, et non aliis*; for which this reason is expressly given;

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93 Green v. Liter, 12 U.S. 229, 244, 3 L. Ed. 545 (1814).
94 *Vicinage*, OXFORD ENGLISH DICTIONARY (2022 ed.).
96 Id. at 406.
97 Klerman, *supra* note 34, at 123.
100 Another source translates this phrase as: “Freeholders should be present at the investiture of a fee, and none others.” THOMAS TAYLER, THE LAW GLOSSARY: BEING A
because the peers or vasals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at.101

To put it differently, the practice of livery of seisin piggybacked off of attestations of allegiance among the owners beneath a particular lord, as a mechanism for preventing frauds. But the persistence of livery of seisin outlasted feudal oaths and hierarchies, and the dichotomy between trusted “neighbor” and untrustworthy “stranger” persisted.102

Beginning in the American colonial period and continuing through today, deeds and land recording institutions have taken the place of this ritual, providing notice of claims to those searching for information on the status of title.103 (Interestingly, for at least some periods in European history, even deed records had to be supplemented with personal notice, taking the form of a “herald” who was sent “into the appropriate streets and neighborhoods to proclaim the legal deed.”)104 As Claire Priest has shown, the governors of the American colonies actually decentralized the maintenance of evidence on land transfers to county courts, away from colonial capitals.105 While the main reason for this change was likely ensuring that parties to a transaction did not have to travel far to register properties,106 it is also the case that county judges, surveyors, and clerks were community members, “typically lifetime civil servants who inherited the position from family members.”107 In New Haven, Connecticut, for example, just three men—including a grandfather and grandson—recorded every transfer of property between 1695 and 1803. Recent scholarship has called into question whether “[p]ublic access to deeds” is really “essential to a system of private property,” given some of the attendant risks to privacy in a digitized world.108

SELECTION OF THE GREEK, LATIN, SAXON, FRENCH, NORMAN, AND ITALIAN SENTENCES, PHRASES, AND MAXIMS... 375 (Lewis & Blood 1855).

101 2 WILLIAM BLACKSTONE, COMMENTARIES *315-16.

102 This bifurcation—the neighbors versus the strangers—has interesting dimensions. Bruce Mann has written about the transition from neighbor to stranger and the legal meaning of “stranger,” sometimes meaning simply third party, in BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 162–63 (1987).

103 Haynes v. Bennett, 18 N.W. 529 (Mich. 1884); see Norcross v. Widgery, 2 Mass. 506 (1807) (“The provision of the statute for registering conveyances is to prevent fraud, by giving notoriety to alienations.”).

104 Thomas Kuehn, Fama as a Legal Status in Renaissance France, in Fenster & Smail, supra note 26, at 38.

105 PRIEST, supra note 87, at 50–51.


107 Brady, supra note 3, at 933.

108 Reid K. Weisbord & Stewart E. Sterk, The Commodification of Public Land Records,
creditors, at least, has a deep historical pedigree.

2. The Duty to Inquire

Rituals like livery of seisin, and later deed recording, provided the neighborhood or community with notice of a transfer. But possession could provide similar notoriety. The earliest land recording acts indeed “required recording only if the grantor remained in possession,” because colonists had evidently gotten in the habit of defrauding creditors into loaning on the basis of security in plots they had conveyed away.109 The need for such a law reflects a belief that parties should be able to rely on observable facts indicating possession in determining how to go about their affairs.

In the eighteenth century, the idea that possession furnishes notice extended in an interesting way. By that time, the English courts of equity had begun to deem parties on notice not just of actual facts made known to them, but those that should have led them to ask further questions. As the Chancery Court put it in a 1739 case, Smith v. Low, “what is sufficient to put the party upon an inquiry, is good notice in equity.”110 Herein lies an early instantiation of the concept of “inquiry notice,” considered by some a subspecies of constructive notice—the idea that one can be treated as having knowledge of some fact one does not actually know. This seems obvious enough, perhaps particularly to twenty-first century lawyers learned in the concept of a person with “reason to know” of something. Across various silos, the law imposes a “duty to inquire” on parties that may affect the contours of subsequent rights; it emerges in contexts ranging from contract law to the Fourth Amendment.111 In many of these examples, the demand on the inquirer involves follow-up with a specific, readily identifiable party: the party on the other end of a bargain, a lawyer’s client, or the like.

The duty to inquire took on a different shape in property.112 The concept

109 Brady, supra note 3, at 890 n. 59. See PRIEST, supra note 87, at 50–51.
110 Smith v. Low (1739) 1 Atk. 490, 26 Eng. Rep. 310 (Ch.).
112 For a much deeper dive into inquiry notice, including some examples that are more like the contract-law duty to inquire, see Donald J. Kochan, James Charles Smith, When Inquiring Minds Ought to Know ..., Prob. & Prop., July/August 2017, at 57; Donald J. Kochan, James Charles Smith, When Inquiring Minds Ought to Know ..., Part II, Prob. & Prop., January/February 2018, at 48, 50. Oddly, the securities law “duty to inquire” may previously have more closely resembled the one in property; in 2009, the Supreme Court
Knowledge of the Neighborhood

of inquiry notice was early on extended to matters involving possession. Initially, it resembled other duties to inquire, in that the duty was somewhat limited. Plainly, a person seeking to purchase a tract of land should ask questions of someone in possession, if other than the purported seller: “The Occupant . . . is prima Facie supposed to be the owner of [the] land, and, upon Inquiry, will be found so. No fair purchaser, in such Cases, is in Danger of being defrauded, if he uses [the] Caution he ought to do.”113

It was not long, however, before courts began suggesting parties should inquire in the neighborhood—not of a specific possessor—to glean the status of property when engaging in transactions. This redounded particularly to the benefit of individuals who failed to record deeds but persisted in using property. An 1836 case from Pennsylvania, for example, presented the classic problem where a property was conveyed to Lafferty at one date, though Lafferty never recorded a deed, and to Krider later on. In a suit between Krider and Lafferty for title to the property, the court contended that Krider had notice of Lafferty’s claim because he should have inquired in the neighborhood about the status of the parcel. Lafferty had yearly planted the parcel with willows, which “could not well fail to attract the notice of the neighbourhood.” By asking around, he might have discovered the planter with some minor effort.114

As I have already repeated, discussion of the identities of possible owners, and chain of title matters, evidently preoccupied early Americans deciding whether to purchase property.115 Well into the nineteenth and twentieth centuries, courts adjudicating disputes across the United States impugn purchasers for failing to ask around under certain conditions: as one Kansas case put the concept, the later claimant could have discovered an earlier claim if he “had inquired of any person in the neighborhood, any man, woman, or even child of school-age.”116 A New Jersey defendant succeeded


113 Anonymous, 1 Super. Ct. Jud. 370 (1770), in [Reports of Cases Argued and Adjudged in the Superior Court of Judicature.]; see also Norcross v. Widgery, 2 Mass. 506 (1807); Ross v. Eason, 1804 WL 938, at *7 (Pa. 1804).


115 See Brady, supra note 3, at 916–17 (discussing primary evidence of process of colonial land buying, which involved visits with multiple residents and discussions among them).

116 Sch. Dist. No. 82, Montgomery Cty. v. Taylor, 19 Kan. 287, 292 (1877); see Bryan v. Bradford, 1 Ky. 108, 118 (1795); Willey v. Snyder, 34 Mich. 60, 61 (1876) (in case involving chattel mortgage, asserting that a party should interpret written description with
in satisfying a court that he could not have had notice of an earlier claim by asserting that he had “made inquiry in the neighborhood of officials, and any one he could get to talk with that knew anything about the land; that he made inquiries of old residents of the town, ‘I suppose I could name a hundred, maybe, if I could think of them; most everybody I could talk with . . . .”"117 In a case involving the sufficiency of a deed description, one Tennessee court drew the line around whether the description would be sufficient only if “by reasonable inquiry” in the neighborhood of the county, “a stranger would have found and identified the place.”118 A Texas judge reversed a finding for a subsequent “good-faith” purchaser, finding he could not be so given the testimony of community members: these individuals “kept themselves informed usually about each other's transactions,” demonstrated by the “familiarity and certainty with which witnesses speak of transactions that took place from twenty-five to forty years previous to their giving their evidence.”119

Not all jurisdictions recognized the obligation to inquire in the neighborhood in all cases,120 and to this day, Massachusetts still does not recognize inquiry notice at all.121 And courts certainly struggled to define the line between neighborhood knowledge no person could ignore and idle rumor or gossip.122 Further, courts struggled as to whether it was fair to require a purchaser remote from the community to undertake this burden. Eventually, more courts came to sharply limit such evidence. As the Texas Supreme Court put it, despite having allowed such evidence in earlier decisions, “[w]e know of no rule of law which requires one who is about to purchase land to make inquiries of persons living near it.”123

Though evidence of neighborhood talk may be less relevant today than it

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118 Wood v. Zeigler, 99 Tenn. 515, 42 S.W. 447, 448 (1897)
119 Littleton v. Giddings, 47 Tex. 109, 115 (1877).
120 For cases rejecting the duty to inquire in the neighborhood, see Butler v. Stevens, 26 Me. 484, 489 (1847)
122 Flagg v. Mann, 9 F. Cas. 202, 226 (C.C.D. Mass. 1837) (Story, J.) (“Vague reports and rumors from strangers are not a sufficient foundation, on which to charge a purchaser with notice of a title in a third person.”).
123 Bounds v. Little, 12 S.W. 1109, 1110 (Tex. 1889); see generally 109 A.L.R. 746 (Originally published in 1937).
was in furnishing notice in the past, it is worth observing the similarities between this operation of inquiry notice in the neighborhood and the concept of “trade usage” in the law of contracts. In both contexts, specialized knowledge among some subgroup can change the legal effect of words and actions.\textsuperscript{124} The Uniform Commercial Code and Second Restatement of Contracts define trade usage as a word use “having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement.”\textsuperscript{125} One of the classic cases opens with the classic line, “The issue is, what is chicken?,” in adjudicating a dispute over whether that term should be interpreted to describe a bird suitable for broiling and frying or a lesser-quality bird.\textsuperscript{126} Henry Smith has cataloged how in interpreting trade usage, courts have thus been able to find “measured in vehicles” to mean “four cubic yards,” “Albert” to mean “B.S. Bibb & Co.,” “Bunker Hill Monument” to mean “Old South Church,” and “five” to mean “ten.”\textsuperscript{127}

In both the trade usage context and the neighborhood notice context, courts have always considered the position of new entrants at least somewhat relevant. Contract interpretation thus may differ if a party is new to a trade, imposing a greater burden regarding the extent of trade usage when it is applied against someone inexperienced in that field.\textsuperscript{128} But the incentive in both cases is clearly to encourage acquiring information, at least as time and opportunity present. The history of inquiry notice, at least, illustrates the ways that information from the neighborhood might be viewed as a sort of “secret code” that entrants may be charged with learning.\textsuperscript{129}

3. Adverse Possession

It is surely not surprising, given the role of the neighborhood in receiving notice elsewhere in property, that it came to play a significant role in adverse possession. Adverse possessors, of course, are those who meet various state-law-imposed requirements to establish a new root of title, ranging from continuity for the required statutory period to evidence of nonpermissive use (commonly called adversity or hostility). The precise history of adverse possession is murky, in part because the doctrine is a creature of statute,

\textsuperscript{124}\ Henry Smith made this observation in Smith, \textit{supra} note 3, at 1183.
\textsuperscript{125}\ U.C.C. § 1-205; Restatement (Second) of Contracts § 222 (1981).
\textsuperscript{127} Smith, \textit{supra} note 3, at 1183.
\textsuperscript{129} 1A PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW §3:61 (2020).
common law, and equitable principle. Its antecedents include statutes of limitations and other laws establishing dates beyond which proof of title would be disregarded. The most obvious forerunner of modern adverse possession statutes emerged in England in the early 1600s, which were rapidly copied in the future United States.

It is intriguing, though probably coincidental, that the term “notorious” first appears in the English language in this same time frame. The word “notorious” is defined in the Oxford English Dictionary as applying to a fact that is “well known; commonly or generally known; forming a matter of common knowledge.” Today, it is hornbook law that another common adverse possession requirement is that the adverse possessor’s use be “open and notorious.” Given the historical connection between the role of common knowledge in matters involving the family and property, it is not altogether shocking that “open and notorious” occasionally appeared in another context: criminal laws against adultery or fornication, which required the parties’ behavior to cross that line.

“One and notorious” in the adverse possession context has come to be a sort of hendiadys, requiring that the adverse possessor undertake acts that “would put reasonably attentive property owners on notice that someone is on their property.” To be sure, “open” seems somewhat interchangeable

130 See 16 Richard Powell, Powell on Real Property § 91.01 (Michael Alan Wolf ed. 2020).

131 Id.

132 See Henry W. Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 138–40 (1918); supra note xx.

133 See E. W. Ives, The Genesis of the Statute of Uses, 82 Eng. Hist. Rev. 673, 674–75 (1967) (describing also some earlier efforts along these lines); John H. Scheid, Down Labyrinthine Ways: A Recording Acts Guide for First Year Law Students, 80 U. Det. Mercy L. Rev. 91, 98 (2002). There was a lot of action on property in this period, of course. During the reign of King Henry VIII, Parliament passed the 1535 Statute of Uses and the 1536 Statute of Enrollments, the latter being the forerunner of modern recording acts. Brady, supra note 3, at 890–91. All of these doctrines were intended to help the English government in its struggle to keep track of land conveyances.

134 Notorious, Oxford English Dictionary (2022 ed.).

135 See supra note 41 and accompanying paragraph.

136 Copeland v. State, 133 P. 258, 258 (Okla. Crim. 1913) (“open and notorious adultery”); King v. United States, 17 F.2d 61, 61 (4th Cir. 1927) (describing “open and notorious illicit cohabitation”); U S v. Bollman, 73 F.2d 133, 134 (8th Cir. 1934) (interpreting federal law involving insurance that forbid benefits when “illicit intercourse” was “open and notorious”).


with “visible.” But notoriety once had a closer link to talk and reputation than matters which were necessarily seen.

One can see the distinction in early adverse possession cases, particularly on this side of the Atlantic. These cases frequently describe as significant the opinion or knowledge of the “neighborhood,” particularly what could be gleaned through conversation or, as the court occasionally called it, “rumor.” One of the recurring features given special deference was what the neighborhood or community called the tract or area during conversation. To provide a few examples, in an 1842 case, a widow attempting to assert adverse possession against her deceased husband’s children introduced testimony that “the land, in the neighborhood, was called the Widow Hall’s.” A Wisconsin court in the 1860s gave weight to the fact that property was called “Lake’s land” among the “few inhabitants here.” Name evidence could also be used to defeat an adverse possession claimant, as when a New York court denied an adverse possessor title against one Bowen because “the premises have, ever since the conveyance [to Bowen], been known in the neighborhood, as “Bowen’s mill seat.”

A question that repeatedly confronted courts deciding adverse possession cases was how widely established reputation had to be. In an 1837 case arising out of Ohio and presenting the question whether unimproved land could be adversely possessed, the Supreme Court used the term “notorious to the public,” but others are quite consciously narrower. One treatise asserts that a claimant’s possession was notorious if “generally known in the vicinity of the land.” A fascinating case in Michigan in the 1880s consisted of a squabble over a jury instruction as to whether the neighborhood or the

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139 E.g., Maxwell Land-Grant Co v. Dawson, 151 U.S. 586, 603 (1894) (describing knowledge of “neighborhood” as to intermittent pasturing of cattle); Davis' Lessee v. Butterbach, 1797 WL 720, at *2 (Pa. 1797) (“The notoriety of an adverse claim in the neighbourhood, may be shewn in testimony . . . .”); Grafton v. Grafton, 16 Miss. 77, 90 (Miss. Err. & App. 1846) (describing the “general understanding in the neighborhood that James held as a purchaser” in assessing notoriety); Casey's Lessee v. Inloes, 1 Gill 430, 469 (Md. 1844) (describing “prevalent opinion in that neighborhood” as to title); Clapp v. Bromagham, 9 Cow. 530, 537 (N.Y. 1827) (describing how “it was understood in the neighborhood” that claimant was the owner).

140 Clapp, 9 Cow. at 540.

141 Hall v. Mathias, 1842 WL 4854, at *1 (Pa. 1842).

142 Wickes v. Lake, 25 Wis. 71, 74–75 (1869); see Banner v. Ward, 21 F. 820, 821 (C.C.D. Minn. 1884) (describing tract “recognized in the sparsely-settled neighborhood as ‘Sutherland's land’”).

143 Jackson ex dem. Bowen v. Burton, 1828 WL 2257 (N.Y. Sup. Ct. 1828); see also Sparrow v. Hovey, 6 N.W. 93, 94 (Mich. 1880); McAuliff v. Parker, 38 P. 744, 745 (Wash. 1894); 1 Cyclopedia of Law and Procedure 1148 (William Mack & Howard P. Nash eds., 1901).


145 Cyclopedia of Law and Procedure, supra note 144, at 1151.
broader public was the required audience for an adverse possessor’s claim. The Michigan Supreme Court upheld an instruction that the possession had to give “notice to the persons living in the immediate neighborhood,” not “of such a character as would indicate to persons passing the land, and the community, an intention to hold possession.” 146 Further, it was certainly the case that if a person failed to prove sufficient membership in the neighborhood, their testimony would not be given weight. In 1842, a Pennsylvania court rejected the testimony of an individual as to reputation about ownership because he “was never on the lands in dispute, never resided nearer to [the Lehigh River] than Philadelphia, nor was there a residence of any person nearer to them than from three to seven miles.” 147

Of course, many acts by adverse possessors, such as planting or tilling a contested field, were both visible—that is, open—and simultaneously generated notoriety or talk, since they were public challenges to contrary claims. 148 But another interesting possibility is that notoriety proved a sort of community assent to the adverse possessor’s acts, illustrating once again how property centrally pits an owner’s rights to exclude against social obligations. In South Carolina, courts actually drew a distinction between “neighborhood” uses and other acts of prescription on this basis. 149 “Prescription” is a doctrine closely related to adverse possession that recognizes the hostile acquisition of an easement or right-of-way by uninterrupted use. One nineteenth-century lawyer described the balancing of individual and neighborhood in cases involving “neighborhood” prescription aptly: the “community” was a check on landowner capriciousness, since the community would turn on an owner who unfairly excluded persons from crossing unimproved land, but the community understood that circumstances might change and render the owner free to exclude them at some future date: “If [an owner] were to forbid this travelling, he would be considered a most unkind neighbor and selfish man,” but at the same time, “[t]he whole community know that when he wishes to close his lands he has a right to do so . . . .” 150 Community understanding and assent both enabled property rights and acted as an informal limitation on unruly behavior.

C. Land Use

147 Urket v. Coryell, 5 Watts & Serg. 60, 80 (Pa. 1842).
148 Wickham, supra note 24, at 20.
149 Capers v. McKee, 1 Strob. 64, 164 (S.C. App. L. 1847) (“private neighborhood road”); Nash v. Peden, 1 Spears 17, 19 (S.C. App. L. 1842) (“private path,’ or neighborhood road”).
150 Nash v. Peden, 1 Speers 17, 19 (S.C. 1842).
[In this Section, I intend to collect some evidence on how courts construct the “neighborhood” used as the baseline in nuisance cases and in cases in covenant law. In nuisance, the “character of the neighborhood” has long been deemed relevant to an assessment of the tortiousness of a defendant’s conduct, and that concept has bled out into covenants and beyond (e.g., the Fourth Amendment, where the “character of the neighborhood” informs what counts as reasonable suspicion for police to stop an individual). 151 I am examining how courts define the neighborhood in these cases and have defined the neighborhood across time, particularly when determining that the neighborhood has firm borders or has “changed.” I am also debating to what extent to discuss/delve into the role of other neighborhood custom/usage in property here—like neighborhood habit of harvesting honey from beehives on private land, on which I have an interesting case 152—and whether I think I have anything uniquely to add to other work on the subject.]

II. DISAGGREGATING THE FUNCTIONS OF THE NEIGHBORHOOD

In this Part, I split the cases differently—not by doctrine, but by the ways that they illustrate the different functions that neighborhoods can serve. Some cases suggest that resort to information in the neighborhood is warranted because it is the best, though an imperfect, source given other institutional and evidentiary limitations. Others suggest that the neighborhood has superior information, or information that will yield more just results than rote application of a more objective standard. Relatedly, additional cases suggest that the neighborhood is a salient “interpretive community” for particular acts and communications, a characteristic that can distinguish in-group members from out-group members in a given area with variable consequences. I explore these functions in turn.

A. Institutional Limitations

[In justifying the use of “neighborhood reputation,” several sources speak in terms of “necessity”, 153 “although such observations may not lead to absolute certainty, yet it is the best method which we have to ascertain the fact . . . .” 154 The parallel to family law is helpful; instead of looking to

152 Fisher v. Steward, 1 Smith 60 (N.H. 1804).
reputational evidence on parentage, today, litigants have scientific ways of proving biological relationships. But for boundaries, then as now, the degree of specificity used to separate one parcel from another can leave something to be desired. Early property descriptions in deeds often relied on decaying boundary marks or markers, making testimony as to the borders—even as to the statements or actions of those long dead—an obviously second-best way of getting at the truth.¹⁵⁵

Courts’ thus might turn to reputational evidence not because it is a particularly reliable source of information, but because it is the only source, given other limitations. Limits on information may be technological, as in the decay of boundary trees, which were at one point the best means of measuring distances in the absence of superior surveying methods. Alternatively, limits on information may be institutional. If the state or other coordinating institutions are weak, they may fail to collect or maintain the necessary information, necessitating a turn to less formal repositories.

B. Superior Local Knowledge

[Other sources—and sometimes, the same sources—suggest that the neighborhood’s view of things yields superior, not inferior results. If a court’s goal is to discern some “truth,” then social consensus is one way of measuring it. The conscious parallels to the jury in many of these contexts are telling.

Along those lines, the neighborhood’s view is sometimes valued because it gets closer to the “right” answer where objective analysis from an outsider might fail to do justice. Carol Rose has helpfully described standardized and customized property rules and institutions in terms of “crystals and mud,” noting how American law has cycled between them.¹⁵⁶ In her words, “[a]t least in some instances, there is a great deal more clarity and certainty about a mud rule than a crystal one.”¹⁵⁷ “Mud rules” take on “greater clarity in a social setting among persons with some common understanding.”¹⁵⁸]

¹⁵⁵ 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE § 34, at 54 (1824); Daggett v. Willey, 6 Fla. 482, 511 (1855). An 1825 case states that the acceptance of reputational evidence emerged from courts’ acceptance of testimony from parties about what they had been told about borders by those now dead, including where “a certain tree in a remote wood was a line or a corner tree.” Taylor v. Shufford, 11 N.C. 116, 132-33 (1825). One Tennessee judge lamented that with decaying markers, “[s]hortly, we will have little but reputation . . . .” Holland v. Overton's Lessee, 12 Tenn. 482, 486 (1833).


¹⁵⁷ Rose, supra note 10, at 609.

¹⁵⁸ Id.
C. Exclusion, Inclusion, and the Interpretive Community

A third, and related role that the neighborhood plays is as “interpretive community.” The notion of an “interpretive community” has caused much consternation and disagreement in literary, philosophical, and legal circles. Without wading anywhere near the fault lines in those battles, here I intend only to use the term to indicate that different audiences can receive and interpret information differently based on preexisting “social contexts, cultures, practices, and training,” leading to a phenomenon akin to “acoustic separation” between the in-group and the out-group. This creates the possibility of “selective transmission”—the possibility that communicators may transmit messages differently to these different audiences.

The neighborhood might be thought of as one form of “interpretive community”: a group connected by (at least typically) residential status, geographic proximity, and a culture built on the mundane social and personal interactions deriving from those facts. The community receives messaging differently as a result of its constituency. As I have explained, the neighborhood played a crucial role historically in determining who owned what and in perpetuating information about that status. This is why the old “metes and bounds” descriptions of parcels encoded in early transfer documents can be quite revealing of the social life of a place, including its prominent community members, the sorts of industry it featured, and the natural monuments that made an impression on locals. And as I have also argued, the effectiveness of a given communication must be understood in light of its interpretive community: a property delineated by reference to “where Philo Blake killed the bear” may mean nothing in 2024, but it might have been easily understood by some earlier historical group, and may in fact have transmitted more useful information than some alternative.

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159 It is often associated with Stanley Fish, see STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980), or (albeit not a user of the phrase) Ludwig Wittgenstein. See BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 54–55 (1995).

160 BIX, supra note 159, at 55.

161 For the article associated with uses of the term “acoustic separation” to describe the ways different audiences receive different messages, see Meir Dan-Cohen, Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV 625, 630–31 (1984).

162 Id. at 636–37.

163 Brady, supra note 3, at 898–900.

164 Id. at 879 n.22, Id. at 947–49.941–42.
Whether by design or simply by effect, this information could make ownership and property matters more comprehensible to those within a neighborhood or community than those outside of it. Metes and bounds descriptions had the effect of limiting who could interpret information about property in order to transact in it, as I have elsewhere described, although there is no evidence to suggest anyone consciously opted for that system to obtain that result. Elsewhere, however, there are illustrations of communities behaving more strategically in increasing informational costs. Take the example of the street names in New York City’s Upper West Side as an example.

The Upper West Side began to develop in the 1870s and 1880s, and in 1884, owners and developers of land in the area formed the West End Association to lobby the city for improvements and begin publicizing their plots. Despite some initial false starts—including one 1880 meeting at which a member apparently (and not facetiously?) suggested renaming Central Park and then, renaming New York—the Association eventually succeeded in one massive respect: renaming a number of the streets. The initial proposal that the West End Association made to the New York City Streets Committee was to rename Eleventh Avenue to West End, Tenth Avenue to Columbus Avenue, and Ninth Avenue to Holland Avenue (though eventually, this was changed to “Holland or Amsterdam,” and Amsterdam won). Their “rationale was that new names would distinguish the haut-bourgeois West Side from the lower part of the city through which the numbered avenues ran, particularly the undistinguished factories, flats and tenements of the West 30s, 40s and 50s.” A column in the Real Estate Record from the week before the name-change proposal encouraged east siders to visit the area, noting “no attractions for the objectionable classes of society” and that all the people were “well-dressed and prosperous-looking,” as contrasted with elsewhere in the city. A few months later, two letters bemoaned in the Real Estate Record and New York Times that individuals did not know where these avenues were or found the names “too long and cumbrous both in writing and speaking.” But that was part of the point. Those willing to incur the costs, or those in the

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166 West Side Names, 25 REAL ESTATE RECORD AND BUILDERS GUIDE 126 (1880).
167 To Change Their Names, Real Estate Record, Feb. 8, 1890 [see email].
169 $1,000,000 Worth of Property in a Week, Real Estate Record, Feb. 1, 1890.
170 T.L.C., A Suggestion As to Streets’ Names, N.Y.TIMES, Mar. 8, 1891, at 20; Real Estate Notes, Real Estate Record, Sept. 27, 2890 at 398.
knowledge, could identify the desirable area. Those who could not were left out. [Other examples might include: secret owners of property, i.e. trusts and LLCs; the deliberate use of anti-commons to make acquisition by a single party more costly.171]

III. EVALUATING THE ROLE OF THE NEIGHBORHOOD

[In this Part, I will discuss some of the economic and sociological theories that help us reason about these different functions.]

A. Economic Theory

[I intend to begin with an overview of the literature on the problems conventionally associated with high information costs. These are familiar arguments: impenetrable information increases the cost of transacting, frustrating efficient or welfare-enhancing exchanges. No doubt, there is the possibility of inefficiency.172 Consider, for example, the inefficiencies evident in one property dispute in an area contested by Virginia and Kentucky. The two different groups of settlers were quite literally talking past one another because they used different names for different natural features used in property deeds, “Stoney creek’ from the peculiar rocks at its mouth” to a Kentucky court, “Woolper’s” for the name of the man granted the property in 1775.173

The law and economics literature is saturated with reasons why obtuseness and lack of clarity may depress markets and thus, overall welfare. There is a robust literature on “incomprehensibility” within legislative processes and the administrative state.174 Scholars of intellectual property have developed theories of “notice externalities” premised when the costs of ascertaining “ownership/boundary facts as well as legal standards governing the scope of property rights” will lead to market failures.175

And yet, property continues to resort to neighborhood knowledge or reputation in the matters described in Part I, demanding some explanation. One can marshal economic theories in support of higher information costs in some contexts. Given particular assumptions, an individual who is more

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172 Rose, supra note 10.
173 Thruston v. Masterson, 9 Dana (39 Ky.) 228, 228–29 (1840).
175 Peter S. Menell & Michael J. Meurer, Notice Failure and Notice Externalities, 5 J. Legal Analysis 1, 5 (2013).
"sociable"—more likely to engage in the sort of talk that spreads information, and more likely to engage in positive social behavior, like taking out the trash—may find the costs of entry “cheaper” than those who lack that characteristic, aiding individuals in sorting into neighborhoods and making it net positive and welfare-enhancing from a game-theoretical perspective. More recent scholarship by Mitchell Johnston has more systematically explored how these sorts of transactions costs might be welfare-enhancing across a range of legal contexts, including property law (discussing my own work on metes and bounds as evidence of this theory).¹⁷⁶

I also intend to explore theories of “loyalty,” “team spirit,” and the firm, such as the work of Armen Alchian and Harold Demsetz.¹⁷⁷ This economic theory suggests that firms try to build loyalty not necessarily for negative reasons (i.e., maximizing profits by overworking loyal employees), but because these sorts of relationships and social ties reduce “tendencies to shirk” in ways that ultimately redound to the benefit of both company and worker.¹⁷⁸ Similarly, when firms inculcate firm-specific knowledge and loyalty, individuals may be less likely to defect. Although there are losses associated with declines in individual mobility, there are also benefits to rootedness: individuals tend to acclimate better and turnover less, which ultimately also redounds to the benefit of the firm as a whole.¹⁷⁹ Drawing an analogy to the neighborhood, requiring individuals to endure the costs of learning neighborhood-specific know-how may be costly in the short term, but may help to build a stronger, better-off neighborhood in the long run.

B. Sociological Theory

[In this Section, I hope to use sociological theories to explore the potential of costly information to generate social capital—and simultaneously, some emergent threats that may extinguish that potential.

I first plan to draw on an unconventional literature, at least in legal scholarship: theories of humor. The paradigm example of insider information is the inside joke, which depends on “cryptic allusions to some shared common ground” to provoke its intended response within families, firms, and other institutions.¹⁸⁰ The relationship between secrets and social

¹⁷⁶ Mitchell Johnston, Systemically Valuable Transaction Costs (unpublished manuscript) (on file with author).
¹⁷⁸ Id. at 790.
¹⁸⁰ Ernest G. Bormann, Symbolic Convergence Theory and Communication in Group Decision Making, in COMMUNICATION AND GROUP DECISION MAKING 81, 96 (Marshall
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categorization has been well studied in other fields, where researchers have pointed out for the better part of a century that there may be benefits in the way that “secrets set the ‘us’ apart from the ‘them.’”\textsuperscript{181} Again, there can be a more dark side: in a more sinister refraction of this principle, the phenomenon of “hazing” associated with fraternities, sororities, and other social clubs often involves “memoriz[ing] and keep[ing] secret special songs and histories meant to distinguish the group from the larger society.”\textsuperscript{182} There is also a fascinating psychological literature on “gossip” that I hope to draw upon, which helps to illuminate both its risks and its benefits.\textsuperscript{183}

I also hope to draw on the work associated with the very term “social capital,” Robert Putnam’s \textit{Bowling Alone}.\textsuperscript{184} That work has generated its own literature and controversy; its central claim is about the ebbs, flows, and consequences of American participation in civic life, as measured by evidence ranging from voting rates to membership in various associations (as the title would suggest, including bowling leagues). In addition to trying to explain the demise of all of these forms of participation in the late twentieth century, the book postulates various benefits. Most controversially, perhaps, the book suggests connections between activities that generate social capital and crime reduction. But it also argues that social capital is associated with increases in health and well-being, useful information sharing, and beneficial norms of trust and reciprocity.\textsuperscript{185}

It is not at all new to suggest that the neighborhood—and the value of neighborliness—can generate this kind of social capital. The neighborhood has a common subject of study in sociological and anthropological studies for about a century.\textsuperscript{186} The neighborhood has been the subject of additional recent scholarship examining how everyday interactions in residential life can affect democratic processes.\textsuperscript{187} And over the past few decades, even property scholars have “advocat[ed] laws and property arrangements to


\textsuperscript{184} Johnston has also connected \textit{Bowling Alone} and the notion of net-beneficial costs. Johnston, \textit{supra} note 176, at ___.


\textsuperscript{187} ROSENBLUM, \textit{supra} note 19.
promote social capital and relied on social capital to devolve property governance from legal institutions to resident groups."188

But the role that property’s informational systems might play in constructing these dynamics is the object of my interest. Having to ask around means having to engage in repeat social interaction before investing in or entering a neighborhood. Economic, social, and psychological theories suggest that to the extent law facilitates pro-social information sharing in neighborhoods, it is a net benefit to individuals. And it may not be coincidental that property exhibits some doctrines that require that kind of interaction, because at least some evidence suggests that property systems themselves stand to gain. Social connections among neighbors may lessen the frequency of disputes and increase cooperation, an especially valuable consequence given the sunk costs and difficulty of exiting once one becomes an owner or renter in a particular place.189

On the other hand, the neighborhood’s exclusionary potential is all too familiar, not least of all from the history of racial exclusion associated with the suburb and the American vision of “neighborhood.” As I have written elsewhere, “regimes that are hostile to outsiders can be associated with the powerful disenfranchising the powerless in morally reprehensible or undemocratic ways,” and insularity harms insiders as well as outsiders [by] limiting resident mobility” in ways that can prevent economic and personal growth.190 Relatively recent innovations, both technological and legal, also suggest that the pessimistic vision of the neighborhood is closer to the truth. The neighborhood association, particularly the homeowners’ association, has disturbing historical origins,191 and several have achieved cartoon villain status for their draconian restrictions and even more draconian enforcement practices (e.g., requiring “tree-shaped trees,” and in documents that are never shared with purchasers before acquisition).192 More recently, neighborhood-specific social media apps, like Nextdoor, have illustrated how neighborhood communications can surface and reinforce racist and other disturbing views among their members.193 Indeed, other strands of property scholarship

188 Stern, supra note 20.
189 See Brady, supra note 3, at 948; Goldberg, supra note 53.
190 Brady, supra note 3, at 948.
192 See “Homeowners Associations: Last Week Tonight with John Oliver (HBO),” Youtube, uploaded by LastWeekTonight, 23 Apr. 2023, https://www.youtube.com/watch?v=qrizmAo17Os&t=8s;
193 E.g., Makena Kelly, Inside NextDoor’s ‘Karen Problem’, The Verge (Jun. 8, 2020),
suggest that “social capital” does more harm than good in residential property law overall.194

I am still working out my thoughts, but I hope to explore whether economic and social theory might ultimately offer a more nuanced, positive spin on the neighborhood and its information functions, given both its persistence descriptively and its multiple potential roles, or whether intervening changes in society and technology suggest there can be no rehabilitation. Then I hope to examine whether there is still a place for the neighborhood in the doctrines explored in Part I—whether in this century, these delineation measures, notice doctrines, and land use baselines still make sense; whether their positive attributes in those specific contexts outweigh their potentially negative ones; and whether there are doctrinal or systemic tweaks that might help root out the pernicious forms of exclusivity from the sort that generates beneficial social capital.}


194 Stern, supra note 20.