THE INEVITABLE TREND TOWARD UNIVERSALLY RECOGNIZABLE SIGNALS OF PROPERTY CLAIMS: AN ESSAY FOR CAROL ROSE

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It was love at first sight. The first time Carol Rose encountered the field of property she fell madly in love with it.1 By her own report, this happened when she was a first-year student at the University of Chicago Law School.2 What attracted her immediately was "property law's impact on the visible world,"3 in particular, on the complex cityscapes of Chicago itself.4 And, during her career she would come to love the variety and flexibility of property institutions and how they could be molded to promote a wide array of human values.

I too was immediately enamored when I took my first property course in law school. As Carol has written, she and I have remarkably similar backgrounds.5 We both spent our childhoods in or near Washington, D.C., where our fathers held federal jobs that entailed work with statistics on national social and economic conditions. Perhaps our fathers' fascination with knowing how life is lived on the ground rubbed off on us. Repelled by the social rigidities that then characterized most eastern colleges, Carol and I both chose to attend a co-educational college in a small town in Ohio. At the last available moment, Carol switched her choice from Oberlin, my eventual alma mater, to the even edgier Antioch.6 Perhaps our years in these close-knit college towns helped to create, or strengthen, the communitarian inclinations that would surface in our scholarship. Of course, Carol and I also differ in many ways. Although we both were active in team sports as youths and remain movie buffs, our adult recreational


1 With apologies to JOSEPH HELLER, CATCH-22, at 1 (1961). Heller's novel appeared when Carol was a junior at Antioch. It was an immediate must-read on every campus.

2 Carol M. Rose, Property and Language, or, the Ghost of the Fifth Panel, 18 YALE J.L. & HUMAN. (SPECIAL ISSUE) 1, 3–4 (2006) [hereinafter Rose, Property and Language] (stressing the influence of Professor Allison Dunham's tales about the origins of Grant Park on Chicago's lakefront).

3 Id. at 3.

4 Id.

5 Carol M. Rose, Of Natural Threads and Legal Hoops: Bob Ellickson's Property Scholarship, 18 WM. & MARY BILL RTS. J. 199, 199 (2009). I recall first meeting Carol in Allison Dunham's office in 1975, near the end of my stint as a visiting professor at the University of Chicago Law School.

6 Id.
interests rarely overlap. I am as bewildered by her interest in dance and playing the recorder as she is by my interest in tournament Scrabble.

Carol’s enthusiasm for both the subject of property, and the varied institutions of property, was evident during 1989–2005, her long—for her, uncharacteristically long—stint on the faculty of the Yale Law School. Especially prior to Henry Smith’s arrival in 2001, during that period Carol and I bore most of the load of property instruction at Yale. Yale is perhaps the only law school in the United States that does not require a student to take a Property course. During Carol’s time at Yale, however, about ninety percent of Yale J.D. students did elect to enroll before graduating. This was the highest percentage for any non-required course, with Business Associations a close runner-up. Carol and I privately both took some pride in this fact. Needless to say, Carol’s infectious love of the institutions and puzzles of property helped to draw in Yale students.

I. CAROL ROSE THE PERSON

A few years back, at a public event honoring Carol, I stated that at times she brought to mind a member of the comedy team Dean Martin and Jerry Lewis, and that I wasn’t thinking of Dean Martin. Our mutual colleague Bill Eskridge immediately suggested that, among the comedic giants of the 1950s, an even better choice would be Lucille Ball. I now accept Bill’s friendly amendment.

The smashing success of the television show “I Love Lucy” lay in the appeal of the title character. Lucy had a quick wit, a ready laugh, lacked pretension, and never fell into funks of self-absorption. Just like Carol. And these traits endear. According to Stephen Yandle, when Northwestern University’s new law building was about to come on line in the 1980s, he separately asked each Northwestern faculty to name a few colleagues whose office they would prefer to be located nearby. Across this broad and diverse faculty, Carol’s name was by far the name most often mentioned. She is as loved as Lucy was.

Carol is an irrepressible explorer, not only of new environs, but, as we shall later see, also of disparate scholarly perspectives. During her adulthood, she has lived for an extended period in an extraordinary variety of regions of the United States. A native of Falls Church, Virginia, she has had stays of at least a year in two or more cities in the South (Atlanta, Austin); in the Midwest (Chicago, Columbus); in the East (Ithaca, 

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8 Perhaps too much pride. Property had been one of the most popular courses at Yale long before Carol and I arrived.

9 Yandle was a key administrative dean at Northwestern Law School until 1985, when he took on similar responsibilities at Yale, where he later recounted this tale to me.
New Haven, New York City); and in California (Berkeley, Palo Alto). And when Carol retired from the Yale Law School at a relatively youthful age, she set up a complicated annual itinerary that had her cycling through two regions that were fresh for her: the Pacific Northwest (Portland) and the Southwest (Tucson). It is striking that her professional wanderings have rarely taken her, for a long stay, beyond the boundaries of the United States.\(^{10}\) This may reflect the difficulty of mastering the property law of another nation, and perhaps, on Carol’s part, an implicit loyalty to, and affection for, her native land.

As Carol was winding down her career as a historian, she published in *The American Historical Review* a review of a book on the middle-class German women’s movement during the mid-nineteenth century.\(^{11}\) The review refers to the “general meekness” of this movement, to its lack of “an essential element of sheer nerve.”\(^{12}\) The colloquial meaning of *nerve*, which carries negative connotations, is impudent boldness. In this passage, however, Carol is using *nerve* to denote a positive attribute, namely courage.\(^{13}\)

And courage has always been one of Carol’s signature traits. Her wanderlust is one manifestation of it. Another is her willingness to make career moves that status-seekers—that is, most of the rest of us—would reject out of hand.\(^{14}\) As a teenager, she made the gutsy choice of Antioch. She threw over her tenure-track position at Ohio State in order to go to law school. And, during her distinguished career as a legal scholar, in three instances she has resigned a professorship at a “higher-ranked” law school (at least by conventional metrics) in order to assume a professorship at a “lower-ranked” one.\(^{15}\)

It also took courage, more than members of younger generations might imagine, for a woman to become a law professor when Carol first chose to go down that path.

\(^{10}\) For the record, Carol has also had brief stints as a visiting scholar in Adelaide, Australia, and Cologne, Germany.


\(^{12}\) *Id.* at 175.

\(^{13}\) *See id.*

\(^{14}\) Interestingly, there is a reference to status in the title of Carol’s history dissertation, Carol Rose Loss, Status in Statu: The Concept of Estate in the Organization of German Political Life, 1750–1825 (unpublished Ph.D. dissertation, Cornell University) (on file with Uris Library, Cornell University). Carol would get a better hang at choosing titles as her scholarly career progressed. Starting a title with a Latin phrase that almost no one can fathom is unlikely to attract a general readership.

\(^{15}\) According to one observer, the turmoil surrounding tenure processes at the University of California Berkeley Law School during Carol’s stint there may have played a role in her decision to decamp to Northwestern. *See* Herma Hill Kay, *UC’s Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 393 (2003). Knowing Carol’s courage, I’d say that it’s more likely that she would have be put off by the unpleasantness of the atmosphere within the school than by any risks that the tenure process might pose to her.
She began teaching law in 1978 at Stanford. By that date, the number of female law students nationwide had burgeoned, but there were as yet few female professors. During most of Carol’s student days at the University of Chicago Law School, no member of that school’s tenure-track faculty was a woman. When Carol joined the Stanford Law faculty, Barbara Babcock was the only other female faculty member. Female role models and mentors plainly were scarce. During that era, many law students—especially female students, according to women law professors of the time—were hypercritical of female professors, judging them by a higher standard. Carol’s “nerve” no doubt helped her during that era.

II. CAROL ROSE THE SCHOLAR

Unlike many property teachers, Carol has a generally sunny view of the property institutions that have evolved in the United States. Although hardly Pollyannaish, Carol, like Elinor Ostrom, one of her sources of inspiration, has confidence that people in a local community such as Yellow Springs, Ohio, are likely to be pretty good—there’s a Roseian phrase—at working out institutional arrangements to govern resources. Many other property scholars, by contrast, are grippers. Staunch advocates of strong private property rights—a small minority within the legal academy—tend to view the legal trends of the past century as the start of a possibly irreversible journey down the road to statism. Leftish critics of current property arrangements—a far more numerous group within the academy—commonly regard property institutions, and indeed the rhetoric of property, as baneful forces that foster self-interested behavior and impede progress toward greater distributive justice.
These sorts of negativism dismay Carol. Consider this passage, which Carol wrote in a response to an article written by Milton Regan:

A number of property scholars (and I count myself among them) have been arguing for years that... responsibility, cooperation, and attentiveness to others [...] are essential features of any property regime. Why is this so? The reason is that property is very largely a creature of culture, and property’s complex cultural outcroppings depend on the recognition and acquiescence of entire communities of people. That is why it is so dispiriting to see that Professor Regan’s article largely dismisses these more cooperative aspects of property, and instead dwells on the most conventional caricatures of property rhetoric... exclusivity, boundedness, and me-first-ism. 23

The most-cited of Carol’s many landmark articles is the joyously titled The Comedy of the Commons. 24 There she describes how members of local communities succeed in diffuse fashion in creating roads, recreation areas, and other sites for collective activity, 25 and how Anglo-American law for centuries has tended to honor claims of customary collective rights. 26 Among her many examples is one of her favorite judicial decisions: an English case upholding customary community rights to hold maypole dances on the freehold of a landowner who wanted to terminate the practice. 27

Carol is a committed localist who revels in the potential diversity of community life. Given the predominant centralizing sentiment within the American legal academy, every faculty should include a passel of Carols. Students at U.S. law schools are awash in courses featuring federal law—e.g., the federal constitution, the federal rules of civil procedure, federal administrative law, federal tax law, and on and on. Many distinguished law journals, such as the William & Mary Bill of Rights Journal, largely devote themselves to national (and even international) law. Carol is fully aware of the value of larger governments. She has explored, for example, the meaning of the federal Takings Clause 28 and policy options for addressing global warming. 29

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25 Id. at 722.
26 Id. at 713–14, 720–22.
27 Id. at 741 n.143, 758 n.231, 767 nn.274–75 (citing Hull v. Nottingham, 33 L.T.R. 697 (Ex. D. 1876)).
But Carol’s heart lies more with local government and informally organized local communities. In her scholarship, she has repeatedly criticized James Madison’s assertions in *Federalist No. 10* that factions tend to dominate at the local level. In Carol’s view, the members of a minority faction in a locality can resort to the tools of voice and exit (or the threat of exit) to keep a potentially abusive majority faction in check. Better yet, community members may be able to resolve many of their conflicts and produce many useful public goods without much guidance from local officials. Consider, if you will, how maypole dances are likely to be organized.

Carol’s high regard for the capacities of members of informal communities is evident in her classic articles on the proper handling of piecemeal zoning changes. As always, she articulates the issue in earthy fashion: should a city authorize the owner of a corner lot “to tear down the Victorian house and build a gas station.” Although some legal scholars might see this sort of issue as small beer, the amount of litigation over these sorts of issues indicates that the lot owner and neighbors commonly do not. “Plan jurisprudence,” Carol’s phrase for the prior legal wisdom on this question, would require judges on a reviewing state court to determine whether a zoning decision to allow, or not allow, the gas station was consistent with the principles set out in the local government’s official plan. When a piecemeal change is at issue, this legal approach is far too centralized for Carol. She does want to assure that the local zoning officials are conscientious mediators, and that they provide both the developer and affected neighbors with adequate notice and opportunity to be heard. But in contexts where those conditions have been satisfied, Carol is happy to defer to whatever substantive outcome might emerge from give-and-take among the neighbors. The would-be developer and the affected neighbors, after all, have the best information

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31 See id. at 1687 (identifying herself as a “steady critic” of Madison’s analysis); *id. at 1687 n.24* (citing three of her own prior works extolling the potential of local governance); see also id. at 1686–88 (identifying some virtues of local governments, but also shortcomings such as “chumminess and lack of technical capacity”); Carol M. Rose, *Takings, Federalism, Norms, 105 YALE L.J. 1121, 1131–39 (1996)* (reviewing WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS* (1995) and assessing the tradition of “localism bashing”).


36 See, Carol M. Rose, *New Models for Local Land Use Decisions*, supra note 33; *Rose, Planning and Dealing*, supra note 32.
and the most at stake. Carol, ever the localist, is inclined to let them to hash out their own compromise.\(^\text{37}\)

Carol also is notable for her spectacular intellectual range, another manifestation of her wanderlust. She majored in philosophy in college, went on to earn a master’s degree in political science, and then a doctorate in European social and constitutional history. After a few years of teaching in the history department at Ohio State, she was off to law school. In her writings, Carol makes use of, and shows a high respect for, scholarship—at least jargon-free and down-to-earth scholarship—in a highly diverse range of disciplines.\(^\text{38}\) For many years, Carol has delivered a lecture to the assembled class of beginning first-year Yale law students. She has chosen as the title of this lecture, “Introduction to Law & Economics: The Dismal Science Explained for Poets, Dreamers and the Clueless.” She is perfectly suited to this endeavor because she deeply admires both poets and those who engage in law-and-economics.\(^\text{39}\) Another example: To explore feminist issues, she has repeatedly turned to game theory,\(^\text{40}\) a rare move in that genre. On her vita she proudly proclaims her memberships in both the American Law and Economics Association and the American Society for Political and Legal Philosophy.\(^\text{41}\) The yin of the humanities and the yang of the harder social sciences are, within Carol, nicely in balance.

Carol is as approachable in print as she is in person. She is drawn to earthy examples, such as a maypole dance.\(^\text{42}\) She refrains from offering special definitions of terms and otherwise developing her own argot. And, although she happily seeks help from many disciplines, she is an equal opportunity critic of jargon. In her review of a book by Mark Sagoff, there is a passage, and an accompanying footnote, that are pure Carol:

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Yeah, yeah, maybe the economics crowd does tout itself as predictive scientists, but it doesn’t sound very civil and open-minded to say they are just making ‘category mistakes’ either—in fact,
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\(^{37}\) Although Carol’s writings include no mention of the principle of subsidiarity, which favors the decentralization of governance responsibilities to the smallest unit capable of handling them, she appears to share my own enthusiasm for this structural principle.

\(^{38}\) An exception is sociobiology, which typically draws a disdainful remark. See Carol M. Rose, Property and Expropriation: Themes and Variations in American Law, 2000 UTAH L. REV. 1, 3; Carol M. Rose, Lecture, Trust in the Mirror of Betrayal, 75 B.U. L. REV. 531, 542 (1995).

\(^{39}\) See Rose, Property and Language, supra note 2, at 7–8 (arguing that humanities scholars have much to learn from law-and-economics scholars, and vice versa).

\(^{40}\) See, e.g., Carol M. Rose, Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, 2 YALE J.L. & HUMAN 37 (1990).


\(^{42}\) See supra note 27 and accompanying text.
the very phrase sounds like the kind of Intimidator Ray Gun that philosophers whip out to shut up everybody else.

. . . .
Not that economists are easy to shut up—they've got some ray guns of their own, like "cross-elasticity." What could be more of a silencer than that?—maybe the lit-crit crowd's _phronesis_, or _trope_, or _aporia._

The reference to the lit-crit crowd is particularly telling. As I am about to stress, Carol has identified her deepest interest to be the communication of claims to property. Although she is fully aware that many postmodernists share this fascination with communication, in her many writings on the signaling of property claims, she never invokes _semiotics_, the postmodernist term for the analysis of signs. And _hermeneutics_, the postmodern word for the study of texts, appears in an article that Carol published early in her career, but never thereafter.

III. CAROL'S CENTRAL PROJECT: HOW PROPERTY CLAIMANTS TRUMPET OWNERSHIP TO PASSERSBY

In 2006, on the occasion of Carol's retirement from full-time teaching at Yale, a committee of her colleagues organized a conference at which four panels of commentators celebrated her work. The committee originally had envisioned a fifth panel devoted to "Property and Language." In her contribution to the volume memorializing the conference, Carol lamented the demise of this "ghost fifth panel":

The exploration of property and language is actually what I have often thought to be my central project as a legal scholar. The title of my book, _Property and Persuasion_, even refers to that project. But alas, I have never managed to convince many people how important it is to think of property in connection with language in the larger sense of communication—speech, stories, visual clues, expressions generally.

I'm convinced, and devote the balance of this essay to her self-confessed passion.

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43 Carol M. Rose, _Environmental Faust Succumbs to Temptations of Economic Mephistopheles_, or, _Value by Any Other Name is Preference_, 87 Mich. L. Rev. 1631, 1640 & n.25 (1989) [hereinafter Rose, _Environmental Faust_] (reviewing Mark Sagoff, _The Economy of the Earth: Philosophy, Law, and the Environment_ (1988)).

44 See Carol M. Rose, _Possession as the Origin of Property_, 52 U. Chi. L. Rev. 73, 82–83 (1985) [hereinafter Rose, _Possession_].

45 Rose, _Property and Language, supra_ note 2, at 2 (citation omitted).
In the influential article that was her first foray into the topic, Carol provides a typically matter-of-fact example of an act designed to communicate a property claim:

In my home town of Chicago, one may choose to shovel the snow from a parking place on the street, but in order to establish a claim to it one must put a chair or some other object in the cleared space. The useful act of shoveling snow does not speak as unambiguously as the presence of an object that blocks entry.  

This brilliant example triggered a small burst of academic writing on methods of claiming shoveled parking spaces. Soon I was regularly invoking the problem during the first week of my property course.

Carol’s example nicely poses the central question of how a person signals a claim of private ownership of a tangible resource that, in the absence of that signal, others might regard as unowned (res nullius, at the Romans would put it). John Locke, in his famous discussion of the origins of property rights, argues that a claimant acquires property by mixing labor with it. A person thus acquires the water running in a public fountain by confining it in a pitcher, or a wild animal, by slaying it. Locke’s central concern was the normative legitimacy of a claim of private property, for example, whether Chicagoans should honor a shoveler’s claim to a parking space. Carol, by contrast, has been more interested in the factual question of how property claims are expressed, for example, how Chicago shovelers choose to communicate to passersby. These two questions of course are interconnected because a would-be owner can strengthen the legitimacy of a claim by communicating the claim through proper means. The title that Carol chose for one of her books, Property and Persuasion, refers to this interdependence.

Some social observers are “lumpers” who stress similarities among human cultures. Others are “splitters” who stress differences among societies. Like many scholars who have been strongly influenced by economics, I myself am inclined to look for universals. Carol, perhaps partly on account of her training in history and her greater

46 Rose, Possession, supra note 44, at 81 (citation omitted).
49 Id.
50 Id. at 94–95, 287–88.
51 Rose, Possession, supra note 44, at 81–85.
52 CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP (1994) [hereinafter ROSE, PROPERTY AND PERSUASION].
immersion in literary theory, tends to be more of a splitter. In her scholarship, Carol frequently invokes the postmodernist axiom that the meaning of a sign depends on the conventions of an "interpretative community." And these she thinks exist in profusion: "[T]he audience has to 'get it.' This . . . is a very freighted matter, because some audiences do not get it, given that there are quite a variety of cultural 'worlds' in the larger world." To illustrate this point, in a number of works she asserts that English colonists commonly were unable to recognize the signs that indigenous peoples were using to communicate land claims. This viewpoint is consistent with her passion for localism, referred to above. I soon raise the possibility, however, that, when claims to tangible property are being communicated, interpretative communities are in fact not all that diverse.

When writing about property claiming, Carol frequently refers to the "language" and "rhetoric" that claimants employ. The subtitle of Property and Persuasion, for example, is Essays on the History, Theory, and Rhetoric of Ownership. A superficial reader thus might suppose that she thinks that a claimant of property typically uses words to communicate with passersby. Not so. For Carol, language denotes far more than verbal forms. For the cover of Property and Persuasion, for example, she chose a photograph of a ramshackle gate in a sagging barbed-wire fence protecting a hard-scrabble ranch in the American West. No words appear in the picture. Carol starts the book with this passage:

Picture property. Use your mind's eye: what do you see? Perhaps a bank vault full of money or a house or maybe a fence—all common images in musings about property. . . . [T]he dilapidated object in the picture [on the book cover] does not look like much of a fence, but it certainly does assert something about property. It says pretty clearly, "This is mine."

A gate communicates. It "says" things. Carol thus stresses that a property claimant commonly uses a nonverbal visual cue, such as a fence or a chair placed in a shoveled parking space, to assert a property claim.

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54 See, e.g., Rose, Possession, supra note 44, at 84.
55 Rose, Property and Language, supra note 2, at 6; see also Rose, Possession, supra note 44, at 84–85.
56 See infra note 85 and accompanying text.
57 ROSE, PROPERTY AND PERSUASION, supra note 52.
58 Id.
59 Id. at 1.
60 See also Rose, Property and Language, supra note 2, at 2 (referencing "speech, stories, visual clues, expressions generally"); id. at 12 (describing acts that signal ownership, such as a hunter's killing of a fox, as "'texts' of property").
IV. SOME (OVERLY ECONOMISTIC?) THOUGHTS ON THE COMMUNICATION OF PROPERTY CLAIMS

To add a bit of spice to this festschrift, I now try to build on Carol's fundamental insights into the nature of property claiming. My thoughts are somewhat less humanistic than hers because I am less inclined to soften economics with poetry. And, being more of a lumper, I question whether the relevant interpretive communities are quite so diverse. Indeed, my central thesis in this section is that humans have been developing, over the past several millennia, a universal sign language (i.e., a set of nonverbal visual cues) for asserting claims to tangible property. Increasing urbanization and international travel have both fueled this trend.

To assess the intuitive plausibility of these assertions, imagine that you have just arrived in a large city in a land completely foreign to you. Consider, for example, a contemporary voyage to Antananarivo (the capital of Madagascar), or a voyage 3,700 years ago to Hammurabi’s Babylon. Even in such unfamiliar surroundings, I hypothesize that you would be able to readily understand the actions that the residents of these cities had taken to communicate to a passerby such as yourself their claims to private ownership of land and other tangible assets. This is an empirical claim, and potentially refutable through actual travel to exotic settings. Here is the reasoning behind it.

A. A Property Claimant as a Rational Actor: The Costs and Benefits of Signs

Law-and-economics scholars start from the premise that an individual acts rationally and self-interestedly. During the past generation, advances in the field of behavioral economics have forced some tweaking of this basic model, but hardly its abandonment. Investigators unsurprisingly have found that the people in different societies, in some contexts, do behave differently. See, e.g., Joseph Henrich et al., In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies, 91 AM. ECON. REV. 73 (2001).

Carol herself has noted that the traditional rational-actor model exaggerates the selfishness of actors. See Rose, Property and Language, supra note 2, at 8; see also Rose, Environmental Faust, supra note 43, at 1642–43. See generally Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471 (1998) (stressing limits on individuals’ self-interest, cognitive capacity, and self-control). Behavioral economics potentially may enrich analysis of property signaling. The act of communicating a signal of ownership perhaps might itself increase the claimant’s subjective valuation of the resource being claimed. In some classic experiments on endowment effects, the experimenter distributes a coffee mug to selected students in her class. See Daniel Kahneman et al., Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 J. ECON. PERSP. 193, 195–97 (1991). If a student recipient were to immediately place the mug in his backpack, that act by itself conceivably might enhance his valuation of it.
to be personally the most advantageous. It is less costly, for example, to use the
placement of a lawn chair, as opposed to a laptop computer, as a signal because there
is a risk that the placed item will be stolen. The expected benefits of a given signal
are a function of the number of passersby who can be expected to understand that the
claimant is asserting a claim of proprietorship and also their recognition of the intensity
of that claim. Placing a copy of yesterday's Chicago Tribune in a shoveled space is
even less costly than placing a lawn chair there, but that act also would be far less ben-
eficial. A stale newspaper is: a more ambiguous signal than a lawn chair because a pass-
erby is more likely to regard it as an abandoned object; a less emphatic signal because
it doesn't block entry (a point Carol made when she introduced this example); and,
because an old newspaper is so valueless, a less intense signal of proprietorship. In a
social setting where there are conventional means of signaling claims to property, by
hewing to those conventions a claimant can obtain advantages on both the cost side and
the benefit side. Copying what others have done requires little thought, and passersby
are more likely to comprehend a conventional signal than an unconventional one.

B. The Key Distinction Between an Ownership Earmark and Title Assurance
Information

As Thomas Merrill and Henry Smith have repeatedly stressed, a property right
operates *in rem*. It confers on an owner a general right to exclude, which all other
persons in the world, except in rare circumstances, have a duty to honor. A pass-
erby who sees a valuable object or land surface may have difficulty determining whether
the observed resource is up for grabs. In some instances, it is. Items of clothing, tools,
and other artifacts become *res nullius* when abandoned by a prior owner. Until cap-
tured or domesticated, animals are unowned. In cities, about one-third of the land
area is devoted to open-access streets and parks. Because nonprivate property is

63 See Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN.
  L. REV. 1105, 1108 (2003); see also Rose, *Possession*, supra note 44, at 84 & n.46 (noting
  that, all else equal, a claimant of property should prefer to signal a claim in low-cost fashion).
64 Animals may also be alert to the costs and benefits of various means of property claiming.
  For a wolf, urination is a much cheaper method of marking territory than, say, trying to build
  a cairn. And, because wolves have an unusually acute sense of smell, an act of urination is
  a prominent, if time-limited, signal.
66 They first introduce this theme in Thomas W. Merrill & Henry E. Smith, *Optimal
  Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1,
67 Id.
68 See Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010); see
69 See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND
so prevalent, a person who wishes to claim exclusive ownership of a resource has reason to affix an ownership earmark on it in order to signal to passersby to keep their hands and feet off.70 Providing an effective ownership earmark is a challenge, however, because the peoples of the world speak myriad different languages and increasingly travel long distances to visit strange lands.

These basic facts underlie the hypothesis that property claimants everywhere increasingly make use of a universal sign language to communicate in rem claims to passersby. In Antananarivo, Madagascar, for example, a house owner or merchant showing wares must anticipate that some total strangers will happen by. To prevent these strangers from wrongly entering the house or wrongly taking the goods, these property owners are drawn to employing simple signals of proprietorship that foreigners are likely to comprehend.

An owner also commonly has reason to communicate much more detailed information to members of a much narrower audience, namely those who wish to engage in a transaction involving a particular asset. An owner of land, for example, may wish to sell it, lease it, mortgage it, or encumber it with a servitude. A transferee involved in one of these sorts of transactions commonly will offer the owner better contract terms if the owner can assure the transferee that third parties who historically have been associated with the resource have previously relinquished to the owner all their rights to it. To provide this sort of title assurance information to transferees, a property claimant typically uses forms of communication that are quite different from the ones a claimant uses to communicate to casual passersby.71 Title assurance information is much more particularized than an ownership earmark, the audience for title assurance information is far smaller, and the members of that audience have more time and greater incentive to engage in careful research. Beginning in ancient Mesopotamia, states have encouraged the development of recording and registration systems to facilitate the communication of detailed information about the quality of land titles.72 Unlike an ownership earmark, title assurance information typically is communicated by means of words, indeed, written words. This may create complications when transacting parties don't speak the same language, but the parties commonly have both the time and motivation to seek the assistance of translators.

This distinction between ownership earmarks addressed to the world, and detailed title assurance information addressed to transferees, is fundamental. My hypothesis that there is an inevitable trend toward a universal sign language of property claiming applies only to the former, that is, to patterns of ownership earmarking.73

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70 See generally Smith, supra note 63, at 1115–25 (discussing the communication of property claims, particularly those based on possession).
71 See id. at 1141–44, 1167–73.
73 Because the intended audiences are different, the establishment of a recording or registration system does not obviate the need to place physical markers of ownership on the ground.
C. The Advantages of Permanent Nonverbal Visual Cues as Ownership Earmarks

A person who places a chair in a shoveled parking space has chosen to alert other potential claimants through their sense of sight. Why sight, as opposed to one of the other four human senses? Why wouldn’t a claimant spray a cleared parking space with a cheap perfume, much like a wolf urinates to establish the boundary of a territorial claim? Why not place electronic speakers (hypothetically invisible) in a shoveled space, and program them to repetitively broadcast an appropriate message, perhaps Michael Jackson’s megahit Beat It.

As Carol herself has stressed, a visual signal is, in most contexts, the most cost-effective method of informing the world of an assertion of ownership. An odor or sound commonly sends a less precise message than a visual earmark does. In the process of seeking a shoveled parking space, a Chicago motorist who gets a whiff of a cheap perfume, or hears the sounds of Beat It, might not be able to deduce the boundaries of the tangible object that the claimant was trying to brand. Moreover, unlike many smells and sounds, a passerby commonly can detect a visual cue at a long distance. It is likely that a passerby’s hopes of being successful at making a grab rise as he nears the object in question. By providing a long-distance signal, a claimant lessens the risks of raising and then dashing the expectations of passersby, and thus angering them. Partly because a passerby can instantly turn away from a visual cue, it also is less likely than an olfactory or auditory cue to be regarded as a nuisance.

Most important, the placement of a brand or other physical mark typically endures far longer than a smell or sound would. Smells dissipate. Electronic speakers are vulnerable to power failure. For the same reason, a visual cue that is ephemeral is less

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74 A valuable exploration of the possibilities of addressing communication to the various five senses is Bernard J. Hibbitts, “Coming to Our Senses”: Communication and Legal Expression in Performance Cultures, 41 EMORY L.J. 873 (1992), cited in Carol M. Rose, Privatization, supra note 19, at 703 n.65 (2006).

75 Carol’s last chapter in Property and Persuasion is a stimulating and previously unpublished essay entitled Seeing Property. ROSE, PROPERTY AND PERSUASION, supra note 52, at 267–304. The chapter’s title underscores her sense of the predominance of visual cues in property claiming. See also id. at 269–94 (discussing the relative strengths and weaknesses of a fence or other nonverbal cue designed for detection by eyesight).

76 Members of some species use sounds to claim property. For example, natural selection has favored the survival of birds capable of using songs to assert a territorial claim. See Owen D. Jones & Timothy H. Goldsmith, Law and Behavioral Biology, 105 COLUM. L. REV. 405, 455 (2005). When rivals can enter a claimed space by air as well as by foot, the placement of effective visual cues on the three-dimensional boundaries of the space may be impossible or foolhardy. In such situations, sounds and smells are likely to be better signals.
likely to be cost-effective than one that is more enduring. For example, after completing the shoveling of a parking space, a shoveler could signal ownership of it by dancing a jig within the space. But this act would communicate a proprietary claim only to those who happened to witness the dance or to hear about it from a neighbor who saw it. A placed lawn chair, by contrast, speaks day after day.

Let's turn to a resource far more momentous than a parking space. How have people communicated to the world claims of private ownership of parcels of land they are cultivating? This has been a key issue in human civilization since the invention of agriculture in the Fertile Crescent ten thousand years ago. Acts of cultivation themselves can incorporate visual signals. For example, a farmer who starts to grow crops on lands previously collectively accessible to all members of her tribe can sow seeds in an unnatural pattern such as rows, or through weeding create a monoculture that looks different from nearby natural patterns of vegetation. Anyone seeing a visual cue of this sort should know better than to reap where she has not sown.

A cultivation pattern, however, may provide a visual cue only during the actual period of cultivation. A claimant who aspires to enduring ownership of a field must send out a more enduring visual signal. One relatively inexpensive option is to place, at well-trafficked perimeter points, cairns, wooden posts, or other objects that are obviously artificial, just as a lawn chair is when seen in a parking space. The Hebrew Bible is full of injunctions against moving a neighbor's boundary stones, evidence that methods of this sort were once commonly in use, but also hardly tamper-proof. Many land claimants therefore turn to more costly options such as erecting a fence, wall, or moat to signal the boundary of claimed territory. This is hardly news to Carol, who of course chose to place a photograph of a fence on the cover of *Property and Persuasion*.

In that photographed scene, there might also have been a “no trespassing” sign, but there isn’t. A snow shoveler in Chicago might place a handwritten sign (perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps, perhaps,perhaps, perhaps, perhaps, perhaps,
"I shoveled this. Stay away.") in a cleared parking space, but instead places a chair. Why? In many contexts a nonverbal cue promises to reach a broader audience than a verbal message would. Especially until the last few centuries, most adults were illiterate. A five-year-old who is too young to read can well understand the meaning of a fence. And, in a city such as Chicago that teems with tourists and recent immigrants, a passerby literate in some languages may be unable to comprehend a message in English. When the goal is to communicate to the entire world, a property claimant therefore commonly prefers to use not words, but a visual marker—such as a fence, brand, tag, or pictorial image—that will be more widely recognized.

D. The Inevitable Rise of Universal Conventions for Communicating In Rem Property Claims to Passersby

My hypothesis that there is an inevitable trend toward a universal sign language of property claiming is in tension with the notion that distinct interpretative communities exist in profusion. Certainly, in a social environment where strangers virtually never appear, the members of a community may be able to sustain a special system for signaling property claims. Close-knit whalers, for example, developed visual cues governing claims of ownership of high-seas whales that would not be transparent to non-whalers. Many of Carol’s own examples of distinctive interpretive communities are drawn from Stuart Banner’s work on pre-colonial Australia, New Zealand, and Hawaii. Prior to Anglo-American colonization, the natives of each of these islands were isolated by the waters of the Pacific. These places thus are intuitively plausible locales for the emergence of a special system of property claiming.

For several reasons, however, the number of distinct interpretative communities has been fast dwindling. The inexorable forces of globalization scatter strangers everywhere. Life in contemporary Madagascar, the most exotic large island that comes

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83 For example, in the early seventeenth century literary rates of men in England, France and Scotland ranged from roughly twenty to somewhat over thirty-three percent. KENNETH A. LOCKRIDGE, LITERACY IN COLONIAL NEW ENGLAND: AN ENQUIRY INTO THE SOCIAL CONTEXT OF LITERACY IN THE EARLY MODERN WEST 45–46 (1974).

84 See Smith, supra note 63, at 1120–22.

85 See, e.g., Rose, Property and Language, supra note 2, at 6 nn.14–15 and accompanying text (citing Stuart Banner, Why Terra Nullius? Anthropology and Property Law in Early Australia, 23 L. & HIST. REV. 95, 100–04, 107–12 (2005)); see also ROSE, PROPERTY AND PERSUASION, supra note 52, at 294–96 (discussing instances of colonists’ blindness to native land claims in both Hawaii and North America); Rose, Possession, supra note 44, at 85–88 (discussing judicial indifference to Native American land claims).

86 Carol has recently written that “to mark the land physically, for example by cutting trees, erecting fences, and/or farming or mining. . . . is modernist in the sense that the markers are intended to be observable by any stranger at all (rather than only by insiders to a community) . . . .” Rose, Big Roads, supra note 73, at 433. If she regards the current world to be awash in modernism, as she likely does, she may be willing to endorse my general thesis.
to my mind, hardly resembles life in pre-colonial Australia or Hawaii. The website TripAdvisor identifies forty-one hotels in Madagascar's capital, Antananarivo.\(^87\)

Moreover, some observers might be skeptical of the claim that the interpretative communities of the various Pacific islanders differed greatly from those of the colonizers. There are at least two ways of explaining, for example, why English colonists referred to Australia as *terra nullius* despite the presence of aboriginal people. The first, supportive of the notion of distinct interpretative communities, is that the English couldn't comprehend that Australia's natives actually claimed ownership interests in the lands that they had long nomadically occupied.\(^88\) The second, arguably more consistent with the evidence, is that the English colonists quickly did come to understand the reality of aboriginal land claims, but decided that it would be cheaper to expropriate native lands than to negotiate for their purchase.\(^89\) By asserting that Australia was *terra nullius*, the conquering English could soothe their consciences and perhaps also mute criticism from outside observers. The historical root of Australian land conflicts thus may have been greed, not a failure of communication.

Travel and urbanization are the primary forces that erode the usefulness of special claiming languages and usher in a universal sign language of property. These forces have long been at work. Ancient Babylon, for example, was a center of international trade and thus a magnet for strangers.\(^90\) Babylonian property owners could see the advantages of communicating with passersby by means of walls, fences, closed doors, and other signals that urbanites of the present era could readily comprehend.

Is it plausible that Chicagoans would have developed a unique local language for the claiming of a shoveled parking space? Probably not. Of course, to resolve the question, what is ultimately needed is an empirical study of space-claiming practices in other cold-weather cities, such as Minneapolis, Montreal, and Moscow, to list a few in the order of their increasing cultural distance from Chicago.

Minor cultural variations in claiming practices of course are to be expected. For Chicagoans, a lawn chair might be a quintessentially summery object that, when placed in the snow, is an emphatic signal on account of this incongruity. For Muscovites, a different object might be quintessentially summery. In a social context where individuals have unusual sensory abilities or disabilities, for example, an institution for


\(^88\) Rose, Property and Language, supra note 2, at 6–7.


the blind, signaling practices can be expected to differ. And more cultural variations in claiming practices are to be expected when the tangible resource in question is physically difficult to earmark, such as a liquid or gas. When an intangible resource, such as an idea, invention, or artistic performance is at issue, claiming practices are likely to be highly varied, in part because the normative appropriateness of private property in these instances is highly contested. But, with these several caveats, I still hypothesize that there has been an inevitable trend toward a universal sign language of property claiming.

V. A CONCLUDING TRIBUTE

Although Carol’s career and mine may have been joined at the hip, our frameworks for analyzing property issues do differ. The yin of the humanities and the yang of economics are more in balance in her. She thus is more inclined to resist cross-cultural generalizations, and to reject the use of stripped-down models of human motivation. Intellectual differences of these sorts tend to spark debate and contribute, in the long run, to the stock of legal knowledge. Or, at least, that’s the self-glorifying premise that sustains those of us in the academy.

Carol has been a giant in the field of property law both on account of her ideas and her style. In 1970, three residents of Hyde Park, Ronald Coase, Harold Demsetz, and George Stigler, had recently published the pioneering works related to the economics of information. When Carol arrived at the University of Chicago Law School a few years later, these works may have planted, through some indirect means, a seed in her mind. Carol, when playing the role of economist, has had the prescience to see that people tend to shape their property institutions with an eye to reducing information costs. Carol the poet has also known that more than this is going on.

Countless scholars and students have benefitted from her many insights on this and other subjects. Her unpretentious scholarly style has also served as a role model: the rejection of jargon, the love of the earthy example, the respect for the competence of ordinary people who make decisions on the ground.

Let’s overcome our tendency to free-ride and all chip in and buy our friend both a snow shovel and a lawn chair. Or, better yet, buy her whatever the folks in snowless Tucson, Carol’s primary new home, employ to signal proprietorship.

91 Because someone who is blind cannot hold a driver’s license, a shoveler who places a chair in a parking space can be confident that any would-be parker could detect it. By contrast, in a residential institution for the blind and aged, a resident who wished to assert ownership of a walking cane would be wise to place on the cane distinctive bumps or indentations that other residents could feel.