



January 2007

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## Recommended Citation

Allegra di Bonaventura, *Beating the Bounds: Property and Perambulation in Early New England*, 19 YALE J.L. & HUMAN. (2007).

Available at: <https://digitalcommons.law.yale.edu/yjlh/vol19/iss2/1>

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# Beating the Bounds: Property and Perambulation in Early New England

Allegra di Bonaventura

## INTRODUCTION

In 1654, lay historian Edward Johnson wrote of the colonial project in New England in flushed, sanguine terms: “Thus hath the Lord been pleased to turn one of the most hideous, boundless, and unknown wildernesses in the world in an instant, as ‘twere, [. . .] to a well-ordered commonwealth.”<sup>1</sup> Colonists who came from England in the seventeenth-century, arriving on New England’s soil, cultivated an array of evolving aspirations from economic opportunity and political consensus to religious reform and even toleration. Their claims to any higher purpose, however, rested first and foremost on establishing a firm hold on the ground below. For colonists, imposing order on this “most hideous, boundless”<sup>2</sup> land usually meant clearing trees, planting crops and constructing buildings, but it also required them to impose their thinking onto the earth, reworking and rewording the land from “wilderness” into a Western idea of “property.”<sup>3</sup> Ordinary New Englanders compelled this legal and symbolic transformation,<sup>4</sup> not simply by writing it into statutes or deeds, pleading it before magistrates at court or even in idle musings over rum or a neighbor’s fence. They enacted the change, scoring it deeply into trees and stumps, heaving it onto mounds of native stones and, of course, by stamping out its lines with the soles of their feet.

During the period of the Protestant Reformation, Europeans’ view of the

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1. EDWARD JOHNSON, *THE WONDER-WORKING PROVIDENCE OF SIONS SAVIOUR IN NEW-ENGLAND: A HISTORY OF NEW-ENGLAND* 210 (printed for Nathaniel Brooke at the Angel in Cornhill, London, 1654).

2. *Id.*

3. For English antipathy to wilderness and to wooded wilds in particular, see KEITH THOMAS, *MAN AND THE NATURAL WORLD: A HISTORY OF THE MODERN SENSIBILITY* 194-96 (1983).

4. For property as symbol, see Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

world<sup>5</sup> underwent a profound transformation. They began to consider the earth, not purely as God's mysterious, eternal creation, but also as a knowable, practical landscape that men could measure, change and control.<sup>6</sup> English Puritans,<sup>7</sup> in particular, embraced this altered world view,<sup>8</sup> adopting a shifting perception of time as a quantifiable, linear continuum, as contrasted with the mystical, place-based circular time embodied in the traditional ritual calendar of the English village.<sup>9</sup> Francis Bacon's articulation of a scientific method in the seventeenth century also appealed to reform-minded Puritans. Just as Puritans sought an unmediated relationship with scripture, Bacon's method advocated acquiring knowledge about the world through the direct observation of nature.<sup>10</sup> These perceptual transformations coincided and collided with significant technological advances in literacy, numeracy, mathematics, geography, law, navigation, surveying and other areas, so that when English colonists touched shore in the American Northeast, the earth underfoot was already a world made new.<sup>11</sup> This New England was one they could remake according to their own perceptions. But it was also one they would never partition completely from an ancient sense of universal, unknowable mystery—the world of wonder<sup>12</sup> that still colonized their imaginations.<sup>13</sup>

This Article considers essential groundwork in the establishment of an Anglo-American property regime in early New England by examining the

5. The concept of world view as "an encompassing system of meaning" comes from Thomas Luckman. MECHAL SOBEL, *THE WORLD THEY MADE TOGETHER: BLACK AND WHITE VALUES IN EIGHTEENTH-CENTURY VIRGINIA* 15 (1987).

6. *Id.* at 15-17.

7. Most Puritans were non-conformist religious reformers who sought to purify the Church of England from within by purging it of rites and ceremony not found in scripture. Some Puritans, including the Pilgrims of Plymouth Colony, advocated separation from the Anglican Church.

8. SOBEL, *supra* note 5, at 17-18.

9. *Id.* For John Demos' musings on the subject, see JOHN DEMOS, *CIRCLES AND LINES: THE SHAPE OF LIFE IN EARLY AMERICA* (2004).

10. For a summary of this transformation in thinking to a more scientific, rational understanding of the world based on unchanging, knowable laws, see KEITH THOMAS, *RELIGION AND THE DECLINE OF MAGIC: STUDIES IN POPULAR BELIEFS IN SIXTEENTH- AND SEVENTEENTH-CENTURY ENGLAND, 1550-1700* (1971). Thomas acknowledges that the particulars of this intellectual transformation remain inevitably ambiguous. *Id.* at 774.

11. Technological advances permitted Europeans to exert more control over their environment. *Id.* at 775.

12. David D. Hall describes popular religious belief and superstition in early New England and finds a world that recognized the supernatural in everyday life. DAVID D. HALL, *WORLDS OF WONDER, DAYS OF JUDGMENT: POPULAR RELIGIOUS BELIEF IN EARLY NEW ENGLAND 1600-1700* 85-86, 93 (1989).

13. For the persistence of belief in superstition and the occult (after God) among New Englanders, see NED C. LANDSMAN, *FROM COLONIALS TO PROVINCIALS: AMERICAN THOUGHT AND CULTURE 1680-1760*, at 12 (1997). See also SOBEL, *supra* note 5, at 74-75. Similarly, Keith Thomas has described how magic and science developed simultaneously and cooperatively for a short time and how science itself retained magical overtones. THOMAS, *supra* note 10, at 769-771, 792-94. The English non-elite viewed the mathematical survey with deep suspicion until the mid seventeenth century. John R. Stilgoe, *Jack 'O Lanterns to Surveyors: The Secularization of Landscape Boundaries*, in *LANDSCAPE AND IMAGES* 47, 52 (2005).

creation and maintenance of property boundaries in one Connecticut county during the first century of English settlement. In the unfamiliar North American terrain, creating and maintaining tangible boundaries, like the clearing of the land itself, required colonists to engage in physical, often repetitive, labor. To make and keep boundaries, however, New Englanders needed to stretch their imaginations onto terrain largely unbound by European conceptions of property. Although boundary features can offer a sense of physical permanence in their primordial boulders, ancient trees or craggy shorelines, the bounds of property are wholly the transient handiwork of the human mind.<sup>14</sup> Fittingly, to foster this mental leap, New Englanders drew on the age-old ritual of beating the bounds, also called hunting the borough,<sup>15</sup> processioning, or perambulation.<sup>16</sup>

Beating the bounds was a customary Old English “performance,” understood here as an enacting of events that 1) evokes the senses and 2) serves to validate that event, especially in law.<sup>17</sup> These perambulations were annual Rogation rites (occurring on the three days preceding Ascension Thursday in the Christian liturgical calendar)<sup>18</sup> at which the inhabitants of an English parish gathered to walk, mark and verify its bounds. As the processional party passed through the landscape, men struck bounds, markers and sometimes children with sticks, stones, or other gear. When the bounders reached significant points along the way, adults might lift a child upside down, memorably touching the spot with the child’s head.<sup>19</sup> The rite of perambulation had legal effect, record of which priests wrote into parish books at a time when church courts had jurisdiction over property and probate matters. Originally, it also carried both religious meaning and spiritual power.<sup>20</sup>

By the seventeenth century, the annual parish perambulation of medieval England was already well along a gradual trod towards legal obsolescence (in terms of affirming the legality of boundaries).<sup>21</sup> What was once

14. Theodore Steinberg, *God’s Terminus: Boundaries, Nature, and Property on the Michigan Shore*, 37 AM. J. LEGAL HIST. 65, 66-67 (1993).

15. BOB BUSHAWAY, BY RITE: CUSTOM, CEREMONY AND COMMUNITY IN ENGLAND 1700-1880, at 82 (1982).

16. For a discussion of terms, see Stilgoe, *supra* note 13, at 51.

17. For my understanding of performance and performance cultures, I am especially indebted to Bernard J. Hibbitts, *Coming to our Senses: Communication and Legal Expression in Performance Cultures*, 41 EMORY L.J. 873 (1992).

18. BUSHAWAY, *supra* note 15, at 81. Perambulations also took place on other days of the year, including Guy Fawkes Night and Oak Apple Day, *id.* at 3, and also on special occasions, such as the change of a manor lord or minister, *id.* at 85.

19. Depending on local parish practice, boys themselves might have beaten bounds with rods or sticks or have been the object of the beatings, all as an aid to memory: RONALD HUTTON, THE RISE AND FALL OF MERRY ENGLAND: THE RITUAL YEAR 1400-1700, at 247 (1994). For a twentieth-century English revival of the ancient ceremony, see Thomas W. Bagshawe, *Beating the Bounds, Aspley Guise, Bedfordshire*, 64 FOLKLORE 349 (1953).

20. Stilgoe, *supra* note 13, at 49-50.

21. J. WICKHAM LEGG, ENGLISH CHURCH LIFE FROM THE RESTORATION TO THE TRACTARIAN

a vital legal performance in property arrangements would become, by the nineteenth and twentieth centuries, simply a traditional, festive celebration with only symbolic and historical legal meaning.<sup>22</sup> During the medieval period, however, the parish was a legal and administrative unit, collectively responsible, for example, for crime and the poor within its borders. The parish perambulation was one more collective legal undertaking, an annual gathering to walk communal bounds by ceremonial procession under the leadership of the parish priest and his churchwardens.<sup>23</sup> The ritual confirmed parish rights and boundaries, and it also united the parish community in prayer for the collective blessing of lands and for God's favor in the next growing season.<sup>24</sup> The beating of parish bounds also fit into a broader pattern of perambulations in medieval England whereby "bounders" regularly walked manorial lands<sup>25</sup> and royal forests.<sup>26</sup>

Colonists to New England in the seventeenth and eighteenth centuries embraced and applied modern, technology-based approaches to boundary keeping as part of a gradual process of rationalization and objectification of property and property rights in Anglo-American law. To achieve this end, they rallied a range of techniques founded to some degree in logic and reason, including written metes and bounds descriptions, surveying and recording legislation. New Englanders nevertheless did not abandon the imaginative, ritual aspect of property determination in the form of the beating of bounds. Instead, they consciously drew on this ancient practice, even as it shed legal consequence in Old England. One more stranger in the foreign landscape, New Englanders stripped the ancient dance of ceremonial and religious trappings, but they could not purge its subjective, sensual and communal essence. New Englanders utilized the old performance to support and inform what became a new and, by contemporary standards, modern and quantitative property regime.

Scholars of early American law have given some consideration to the

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MOVEMENT CONSIDERED IN SOME OF ITS NEGLECTED OR FORGOTTEN FEATURES 230-31 (1914). Relying on diocesan records, scholars of early modern England have identified a decline in Rogation perambulations. See, e.g., THOMAS, *supra* note 10, at 62-65 and DAVID UNDERDOWN, REVEL, RIOT AND REBELLION: POPULAR POLITICS AND CULTURE IN ENGLAND 1603-1660, at 77-81, 90-91, 96-67 (1985). Ronald Hutton has maintained that other evidence refutes the perception of a prolonged decline in perambulations, emphasizing their continuance as festive, communal customs (rather than their legal effect). HUTTON, *supra* note 16, at 175-76, 217-18. Hutton has identified 1700 as the peak year for the popularity of perambulation rituals in eighteenth- and nineteenth-century Britain, followed by prolonged decline after 1750. RONALD HUTTON, THE STATIONS OF THE SUN: A HISTORY OF THE RITUAL YEAR IN BRITAIN 285 (1996)

22. 1 JOHN BRAND, OBSERVATIONS ON POPULAR ANTIQUITIES: CHIEFLY ILLUSTRATING THE ORIGIN OF VULGAR CUSTOMS, CEREMONIES, AND SUPERSTITIONS 167-68 (Henry Ellis ed., London, Nichols, Son, & Bentley 1813).

23. *Id.* at 168.

24. GEORGE EWART EVANS, THE PATTERN UNDER THE PLOUGH: ASPECTS OF THE FOLKLIFE OF EAST ANGLIA 104 (1966).

25. BUSHAWAY, *supra* note 15, at 88.

26. *Id.* at 89.

early formation and maintenance of boundaries in the English colonies. Most have examined property bounds as a means to explore other aspects of the legal order, especially litigation and dispute resolution, rather than the imposition of a concept of property.<sup>27</sup> In his pioneering 1949 article, William H. Seiler provided a still indispensable treatment of beating the bounds or processioning in colonial Virginia. Seiler identified processioning as a land policy that served as a means of reducing or resolving disputes and litigation over ownership.<sup>28</sup> More recently, John K. Nelson revisited Virginia processioning to observe the ecclesiastical/civil jurisdictional overlap between county and Anglican parish during the colonial period. For New England, Jonathan M. Chu's detailed history of one Massachusetts boundary dispute tells us much about the bounds of one particular farm, but ultimately looks to explain the efficacy of litigation as a means to restore social consensus, rather than the law of property.<sup>29</sup> Landscape historian John R. Stilgoe has addressed the practice of boundary keeping directly. In a brief sketch of its history, Stilgoe observed a decline in the superstitious and folkloric elements of boundary keeping, falling away gradually through a process of quantification and secularization.<sup>30</sup> In a related area of inquiry, Andy Wood has considered custom in early modern England and refuted the prevailing historiographical juxtaposition between customary law (as representative of a backward, plebian, oral culture) and the written word of the elite. Wood's view into the interaction between writing and oral culture in the creation and reinforcement of custom corresponds to an analogous interplay between performative and technological aspects of the law in the establishment of the New England property system. New England evidence supports Wood's conclusion that the rise of written culture did not necessarily signal the demise of customary traditions founded on memory and local knowledge, but instead generated a period in which writing and orality could mutually inform and serve one another.<sup>31</sup>

This essay is based on research in the court and local records of New London County, Connecticut, from the 1640s to 1760.<sup>32</sup> It also draws on the private diary (1711-1758) of New Londoner Joshua Hempstead (1678-1758). A yeoman shipwright, Hempstead was a significant legal actor (and enactor) in a number of capacities: as a private individual, as lay legal

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27. Steinberg, *supra* note 14, at 66-67.

28. William H. Seiler, *Land Processioning in Colonial Virginia*, 6 WM. & MARY Q. 416 (1949).

29. Jonathan M. Chu, *Nursing a Poisonous Tree: Litigation and Property Law in Seventeenth-Century Essex County, Massachusetts, the Case of Bishop's Farm*, 31 AM. J. LEGAL HIST. 221 (1987).

30. Stilgoe, *supra* note 13.

31. Andy Wood, *Custom and the Social Organization of Writing in Early Modern England*, 9 TRANSACTIONS ROYAL HIST. SOC'Y 257, 257-58 (1999). In contrast with England, widespread literacy meant that the connection between writing and elite power and culture was more attenuated in the New England setting.

32. Spelling, grammar and punctuation in court and local records have been modernized.

counsel on behalf of others, but especially in his many civic roles as grand juror, Justice of the Peace, selectman, county surveyor and Judge of the Court of Probates.<sup>33</sup>

Although one locale can never embody an entire region, the county of New London can serve as broadly representative of colonial New England civilization in social, political and economic terms. Like other New Englanders, the English inhabitants of the county formed a society of principally middling folk, characterized by a strict adherence to Calvinist Protestantism and one of the highest rates of literacy in the British Atlantic. The county seat of New London was a secondary port engaged in the coastal and West Indian trades, the latter constituting New England's principal source of commerce. The county's economy was primarily agricultural, although it also supported a modicum of artisanal activity, especially in trades serving the maritime industry such as shipbuilding, rope making, coopering and blacksmithing. Government in New London County followed the typical New England pattern, with towns comprising the principal governing unit. Freemen from each town, having reached the age of majority and attained minimum property requirements, met annually at town meetings where they elected officers and appointed committees from the assembled body of locals. The cogs of legal administration – local grand jurors, justices of the peace and even town representatives to the colonial legislature or General Assembly – also came from these ranks of town freemen.

#### PROPERTY AND BOUNDARIES IN NEW LONDON COUNTY

By contrast with conditions in England and continental Europe, individual men in early New England owned land in large numbers. By 1700, for example, a simple majority of heads of household across the region were landowners.<sup>34</sup> Already in several towns in late-seventeenth-century Essex County, Massachusetts, ninety-five percent of men over the age of thirty-six owned land. Similarly in Connecticut Colony, eighty-seven percent of non-indigenous men were owners of real property by the 1690s.<sup>35</sup> The process of imposing English property concepts onto North American land began with original settlement. New Englanders first obtained ownership of land (in English terms) directly by royal charter, sometimes by initial means of a colonial corporation.<sup>36</sup> Thereafter, settlements distributed land

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33. JOSHUA HEMPSTEAD, *THE DIARY OF JOSHUA HEMPSTEAD: A DAILY RECORD OF LIFE IN NEW LONDON, CONNECTICUT 1711-1758*, (New London, New London County Hist. Soc'y 1999).

34. ALLAN KULIKOFF, *FROM BRITISH PEASANTS TO COLONIAL AMERICAN FARMERS* 112-13 (2000).

35. JACKSON TURNER MAIN, *SOCIETY AND ECONOMY IN COLONIAL CONNECTICUT* 68 (1985). Land remained plentiful well into the eighteenth century. H. Roy Merrens, *Historical Geography and Early American History*, 22 WM. & MARY Q. 529, 529-30, 533 (1965).

36. See George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L.

individually either in fee simple to proprietors (original settlers and their heirs who bought into a settlement) or in common for the use of all inhabitants.<sup>37</sup>

Once New Englanders obtained land through distribution or purchase, they needed to establish and stabilize boundaries. Secure boundaries would allow private landowners to gain some certainty in ownership, to invest labor and capital and to sustain a healthy market in real property. The public interest in dependable boundaries was also obvious, whether in securing revenue based on property taxes<sup>38</sup> or in reducing conflict and litigation between adjacent landowners.<sup>39</sup>

In forming English property boundaries, colonists faced the particular challenges of creating (and in a sense re-creating) a property regime from the ground up. At the same time, New Englanders had to struggle with their own unfamiliarity with a new geography and landscape. Seventeenth-century colonial land and court records illustrate the confusion and conflict evident in the profusion of legal disputes regarding boundaries.<sup>40</sup> Along with the logistical difficulties of identifying and maintaining accurate bounds, colonists had to contend with a new and strange topography which they often lacked the words to describe.<sup>41</sup> There was no vocabulary in contemporary English landscape terminology to characterize the glaciated environment of coastal New England.<sup>42</sup> English colonials also encountered a pre-existing vocabulary of place expressed in the Algonquian languages of Native inhabitants.<sup>43</sup> As a result, New England's legal and popular culture developed a combined nomenclature that amalgamated traditional English place and topographical names with Algonquian designations, transcribed phonetically or simply translated into English.<sup>44</sup> For a time, multiple English and Native names often persisted concurrently, so that inhabitants might use them interchangeably to refer to places in the

REV. 281, 283 (1941); Nelson P. Mead, *Land System of the Connecticut Towns*, 21 POL. SCI. Q. 59, 61 (1906).

37. For land distribution, see Mead, *supra* note 36, at 59-76.

38. A. W. RICHESON, *ENGLISH LAND MEASURING TO 1800: INSTRUMENTS AND PRACTICES* 2 (1966).

39. For colonists' propensity to dispute with their neighbors, see JOHN DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY* 49-51 (1970). Trespassing livestock comprised a related source of conflict. Colonial legislation enacted both the English rule (strict liability for owners of livestock) and imposed duties on landowners to maintain adequate fences.

40. Davis Thomas Konig, *Community, Custom, and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEGAL HIST. 137, 137-39, 142-43 (1974).

41. Arthur J. Krim, *Acculturation and the English Toponymy of Eastern Massachusetts*, in *NEW ENGLAND PROSPECT: MAPS, PLACE NAMES, AND THE HISTORICAL LANDSCAPE* 69, 69, 72-75 (Peter Benes ed., 1980) [hereinafter *NEW ENGLAND PROSPECT*].

42. *Id.* at 73, 81, 85.

43. *Id.* at 69; WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 65-66 (1983).

44. Krim, *supra* note 41, at 69.



land.

When colonists to New England transplanted the ancient ritual of the English parish perambulation to support coherence in property boundaries, they divested it of any formal religious or ecclesiastical connection. Because New Englanders had eliminated ecclesiastical jurisdiction over property, probate and even morals offenses,<sup>45</sup> civic leaders (and their appointees), with private parties, took the lead in perambulating, rather than the priests and churchwardens of Old England (and the priests and vestrymen of contemporary Virginia). New Englanders most likely abandoned Bible readings, prayers and other practices that overtly sacralized the perambulation.<sup>46</sup> Even the land New Englanders walked represented either the civic unit or sub-unit of the town (or colony) or the private economic unit of house-, hay- or meadow-lot, rather than the religious, administrative entity of the Old English (or Virginian) parish.

Perambulations in early modern England formed part of a customary calendar of Saints' Days and local rituals, part pagan and part Christianized, that was thoroughly embedded in the lives of English communities.<sup>47</sup> At a time when perambulations were becoming ceremonial in Old England, with most boundaries long since verified both in law and in the collective consciousness, the old enactment of boundaries gained novel significance in the new land of New England. Officially, New England Congregationalism rejected the customary calendars of their English ancestors (and the pagan, Catholic and Anglican associations they evoked),<sup>48</sup> yet in daily life, New Englanders retained some vestiges of these historical customs,<sup>49</sup> including the perambulations of land. As with other religious or quasi-religious English rites, including marriages and funerals,<sup>50</sup> New Englanders secularized and simplified the ritual of perambulation, removing its sanctifying aspect and honing in instead on its practical legal application as a means to stabilize boundaries.

Given New Englanders' colonial circumstances, the performative walk over the land had a special resonance. Walking the legal limits of property did not just determine and affirm physical boundaries. These walks also asserted English legal order in a figurative sense, whether through the rep-

45. Congregations still imposed internal sanctions on members or attendees for some morals offenses.

46. I have found no evidence that New Londoners engaged in any formal religious activity during perambulations. Similarly, Puritan New Englanders desacralized marriage, funerals and other Catholic/Anglican rituals.

47. BUSHAWAY, *supra* note 15, at 34, 47.

48. Sobel describes Anglicans as occupying a "transitional" position, still tied to the liturgical calendar but also concerned with a new, rational use of time. SOBEL, *supra* note 5, at 18.

49. For examples of the retention of local customs, such as Christmas feasting, maypoles, April Fool's Day and Guy Fawkes Day, see HALL, *supra* note 12, at 210-11. For life-long Congregationalist Joshua Hempstead's curiosity at his first Christmas service, see HEMPSTEAD, *supra* note 33, at 228.

50. See HALL, *supra* note 12, at 166-67.

representative march of ownership or in the carefully placed symbolic markers left along the way. That order was also quite literally visible in the markers: in meerstones, rock-piles and bark cuts that turned the chaos of Johnson's "wilderness"<sup>51</sup> into owned and ordered house-, hay- and woodlots with their mere presence. For New Englanders, this walking of the land belonged also to its domination. Perambulating as English ancestors had done for centuries could even have offered solace in a new land, particularly in the seventeenth century when that land still connoted danger, evident in the traces of Algonquian predecessors and co-inhabitants.<sup>52</sup> In the hands (and feet) of New Englanders, the performance of perambulations gained new practical meaning as a highly useful tool in the imposition of property law. New Englanders did not perform perambulations to conjure up or celebrate a medieval past; they enacted legislation to compel the perambulating of public or common lands and private lots as part of legal regime based on reason and quantification (at least in aspiration).<sup>53</sup> In New England, the legal performance worked in concert with the technological to compel and maintain an English sense of boundaries in property.

Connecticut Colony required towns to "procure that their bounds be set out"<sup>54</sup> and then to have them "carefully set out by such marks and boundaries as may be a plain direction for the future."<sup>55</sup> To secure common bounds, the General Assembly required town selectmen to order two or more men "to renew the bounds . . . at least once a year either in the month of March or April."<sup>56</sup> Any town that did "refuse and neglect to join in the perambulation"<sup>57</sup> would forfeit the (not inconsequential) amount of £5, one half to the bordering town and the other to the County Treasury.<sup>58</sup> The selectmen belonging to the "most ancient town"<sup>59</sup> had the privilege of selecting the day of the perambulation and the duty to provide six days' notice to its neighbors.<sup>60</sup> The legislature also admonished that public and

51. JOHNSON, *supra* note 1, at 210.

52. For an example of such traces, see Hempstead's discovery of an Indian grave among a collection of rocks: "my Son John ys day drawing Stones from ye Ledge by his Shop Came a Cross the Scull of a man or woman & also the neck and back bones arms and legs &c where doubtless an Indian hath been buried before the English first Settled here wch was 108 year Since." HEMPSTEAD, *supra* note 33, at 619. For colonists' persistent sense of New England's wildness, even along its most populated coast, see John R. Stilgoe, *A New England Coastal Wilderness*, 71 GEOGRAPHICAL REV. 33 (1981).

53. For the aspiration towards a more rational understanding of the world in early modern English culture more generally, see THOMAS, *supra* note 10, at 785-94.

54. ACTS AND LAWS, OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND 8 (New London, Timothy Green 1715) (1702) [hereinafter ACTS AND LAWS]. For references to similar legislation, see SUSAN ALLPORT, *SERMONS IN STONE: THE STONE WALLS OF NEW ENGLAND AND NEW YORK* 47 (1990); and KULIKOFF, *supra* note 34, at 112.

55. ACTS AND LAWS, *supra* note 54, at 8.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

private “bounds . . . [were] carefully to be maintained and not without great danger to be removed by any, which notwithstanding (by deficiency and decay of marks) may at unawares be done, whereby great jealousies of Persons, troubles in Towns, and in Courts do arise.”<sup>61</sup> Well-perambulated bounds, the members of the Assembly reasoned, diminished conflict and litigation.<sup>62</sup>

Connecticut perambulation legislation applied to private landowners as well as to towns (although the degree to which individuals complied is unknown). The bounds of private owners were “carefully to be maintained”<sup>63</sup> with the obligation to undertake such mutual perambulations invoked at the request of one adjoining landowner. By statute, any property owner or his assignee could request an annual perambulation of his neighbor with just one week’s warning, though only in the months of March, April, October or November, when both the weather and agricultural calendar permitted. If a landowner refused or disregarded a neighbor’s request, he was subject to a small fine of 10 shillings (half to his neighbor and half to the Colony Treasury). In addition, if the County Court so ordered, he would also have to pay 20 shillings for every month he neglected to maintain boundary markers.<sup>64</sup> When property owners had “lost their bounds”<sup>65</sup> for whatever reason, they could apply to a Justice of the Peace to appoint three “disinterested”<sup>66</sup> freeholders to fix the lost bounds under oath, evidence of which the magistrate entered into town records.<sup>67</sup> The death of a landowner often triggered a perambulation to verify boundaries, as when a 1705 New London Probate Court appointed three men to measure and bound out the real property of a recently deceased widow.<sup>68</sup> Similarly, a surveyor in eighteenth-century Maine noted how he accompanied three neighboring property owners and an estate administrator who “all consented to and renewed the bound marks”<sup>69</sup> as they “went on a perambulation.”<sup>70</sup>

Alongside public policy pronouncements and legislative or judicial requirements to beat the bounds of public and private lands, individual in-

61. *Id.*

62. A consequential reduction in disputes did occur in Virginia. Seiler, *supra* note 28.

63. ACTS AND LAWS, *supra* note 54, at 8.

64. *Id.*

65. *Id.* at 112.

66. *Id.*

67. *Id.* A person who “willfully or maliciously” destroyed a “lawful landmark” was subject to the considerable fine of £5. ACTS AND LAWS, *supra* note 54, at 9.

68. *Crossman v. Rogers*, NEW LONDON COUNTY SUPERIOR COURT RECORDS [hereinafter NLCSCR], Files, Box 6, File of September 1735 (on file with Connecticut State Library). For similar examples, see 8 NEW LONDON LAND RECORDS 154, 181 (unpublished records, New London, Office of the City Clerk 1719-1727).

69. Richard M. Candee, *Land Surveys of William and John Godsoe of Kittery, Maine: 1689-1769*, in NEW ENGLAND PROSPECT, *supra* note 41, at 9, 26.

70. *Id.*

habitants in early Connecticut also undertook private perambulations of their own accord.<sup>71</sup> A man might hear of a purchase of land adjacent to his and simply go to the buyer's house and ask him to walk the bounds, as New Londoner Captain John Avery did when he arrived at Benjamin Clarke's sometime in the year 1700. At that time, Avery and Clarke trekked to the lots in question and perambulated them, with Avery showing his markers as Clarke would testify thirty-four years later.<sup>72</sup> Two perambulating landowners might also ask a mutually agreeable witness to accompany them in walking bounds. In the same case, sixty-four-year-old Thomas Stanton of Stonington explained that when he was twenty-four, three men (all since dead) had asked him to attend a perambulation and "go to every one of the . . . bounds."<sup>73</sup> Another man performed a similar function in 1700 for the above-mentioned John Avery. More than three decades later, that witness even recalled that Avery requested his presence expressly "that I might show the above said land and bounds thereof to any person that had a mind to buy it [thereafter]."<sup>74</sup>

Establishing an English law of property in North America, colonists also contended with the existence of indigenous Algonquian inhabitants and with their claims and ideas regarding ownership and territoriality in land. While property conflicts between colonists and Algonquian peoples are not the subject of this essay, indigenous people, who plainly possessed a deep-rooted, seemingly innate, understanding of the landscape,<sup>75</sup> also played a role in colonists' determination of property bounds through performance. Colonists settling along Connecticut's southeastern coast encountered a relative abundance of indigenous inhabitants, including Mohegans, Niantics, Narragansetts and Pequots (a once powerful band devastated by the Pequot War of the 1630s), although the number of Native people fell sharply after the depredations of King Philip's War during the 1670s. Only rough figures for the American Indian population of New London County during the colonial period are ascertainable due to evidentiary challenges (including highly variable and often ambiguous racial terminology), but Native persistence is clear.<sup>76</sup> As late as 1774, census takers reported "Indians" comprising 2.66 percent of the population, or

71. Colonists left no record of the vast majority of these walks (along with most of everyday life).

72. *Hempstead v. Morgan*, NLCSCR, Files, Box 6, File of March 1735 (on file with Connecticut State Library).

73. *Id.*

74. *Id.*

75. The English had comparable "innate" knowledge of surrounding land in England. SOBEL, *supra* note 5, at 75-76.

76. That persistence is evident today in the form of two enormously successful casinos (and other projects, including the Mashantucket Pequot Museum and Research Center): Foxwoods and Mohegan Sun. See, e.g., BRETT D. FROMSON, *HITTING THE JACKPOT: THE INSIDE STORY OF THE RICHEST INDIAN TRIBE IN HISTORY* (2003).

842 out of a total of 31,542 souls in New London County.<sup>77</sup>

When it came to asserting property and property rights, English owners readily called on Algonquian neighbors to contribute their memories to the mutual knowledge and confirmation of boundaries.<sup>78</sup> Obviously, Algonquians native to the region brought special expertise in identifying land, having used collective memory as the sole method of knowing and maintaining territories for centuries before the arrival of Europeans. New England's indigenous peoples did not customarily recognize exclusive ownership of real property, but Algonquians did live in villages that relied on a "symbolic possession"<sup>79</sup> of territory, encompassing enough land for village nutritional sustenance.<sup>80</sup> Native people also recognized (often seasonal) use rights<sup>81</sup>: over a beach in the summer,<sup>82</sup> a planting field in the spring<sup>83</sup> or the "place where the Indians played."<sup>84</sup> Even if they did not regard land as exclusively owned property, members of a village easily recognized where their territory ended and that of other villages began.<sup>85</sup> After colonists' arrival, local Algonquians incorporated an awareness of English bounds (and with it some of the English concept of property) into their sense of the land. From the mid-seventeenth century, English landowners drew on Native memory and knowledge of the land, just as, with the passage of time, they would look to those of their own founding generation for similar memories.<sup>86</sup>

Evidence of English reliance on Native understanding of property and bounds is apparent in the court records of New London County. A case from 1683, for example, shows a Norwich colonist expressly appointed by public authority to "perambulate and run the [neighboring] Mohegan Sa-

77. 14 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM APRIL 1636 TO OCTOBER 1776, at 487 (Hartford, Brown & Parsons 1850-90).

78. Many disputes between Natives and the English revolved not around boundaries, but rather around encroachments by English livestock onto Native lands, particularly onto planting grounds. See Virginia DeJohn Anderson, *King Philip's Herds: Indians, Colonists, and the Problem of Livestock in Early New England*, 51 WM. & MARY Q. 601, 607 (1994). See also CRONON, *supra* note 43, at 131-32.

79. CRONON, *supra* note 39, at 60.

80. *Id.*

81. *Id.* at 63.

82. For oral history regarding the Mohegans' seasonal use of a beach in New London (now on the Harkness public recreation area), see R. B. Wall, *Stories of Waterford: Echoes of Stormy Days*, DAY (New London), June 9, 1915 (R.B. Wall Collection, 3 Scrapbook of Clippings) (on file with New London Hist. Soc'y).

83. See *Tracy v. Indians*, NEW LONDON COUNTY COUNTY COURT RECORDS (hereinafter NLCCCR), Files, Box 154, File of September 1704 (on file with Connecticut State Library).

84. *Perkins v. Indian Squaws*, NLCCCR, Files, Box 153, File of September 1702 (on file with Connecticut State Library) (including August and October Special Sessions).

85. CRONON, *supra* note 43, at 71.

86. Anne Marie Plane describes the incorporation of Native customs into aspects of English legal administration, in particular relating to marriage and property, in ANNE MARIE PLANE, COLONIAL INTIMACIES: INDIAN MARRIAGE IN EARLY NEW ENGLAND 185 (2000).

chem's right and bounds according to Indian testimony"<sup>87</sup> in order to verify Norwich and Mohegan lands. Private landowners also drew on Native land memories, as in an illustrative episode around the year 1706 involving Major John Winthrop, great grandson of the founder of Massachusetts Bay and a large county landholder. Needing to confirm boundaries to lands abutting an unidentified Algonquian village, Winthrop undertook a perambulation. To do so, he enlisted the help of both his Native neighbors and of an aged English informant, an elderly woman who had learned the bounds from her deceased father in childhood. The English woman, Goodwife Houghton, led the party through the landscape, pointing out signifying boundary features.<sup>88</sup>

Playing a role parallel to Goodwife Houghton's was an "old Indian,"<sup>89</sup> a leader among the Native bounders. This old man represented indigenous memory, affirming to Winthrop "in Indian"<sup>90</sup>: "Yes, Old Houghton's daughter knows the bounds well." (Interestingly, he knew not just the bounds, but had also known Old Houghton personally, having perhaps even beaten the bounds with him who was the earliest English memory source.) Perhaps the "old Indian" followed a similar Algonquian practice or perhaps more likely, by the end of the seventeenth century, the indigenous people of southeastern Connecticut were already well versed in the English property performance of beating the bounds. In either case, when Goodwife Houghton led to "the bound on the river,"<sup>91</sup> the "Old Indian" said, "'So it is' and put his stick that he had in his hand down into said little brook where it run through the sandy beach . . ."<sup>92</sup> In the mind and the gestures of the "Old Indian," Native and English memory and performance blended together, mutually informing each other in service of the English property order.

The focal points of any perambulation were the markers and monuments that signaled boundary lines and in particular that marked changes in the direction of those lines. Because there was no regular or preferred shape in New England land lots,<sup>93</sup> these markers were essential to finding one's way along boundary lines in the rocky, hilly terrain. While many, if not most, markers were natural monuments, such as boulders, rivers or trees, landowners and bounders created other markers artificially, usually from

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87. Mohegan (Deposition of John Post), NLCCCR, Files, Box 153, File of June 1700 (on file with Connecticut State Library).

88. *Id.*

89. Deposition of Samuel Rogers, NLCSRC, Files, File of March 1746 (on file with Connecticut State Library).

90. *Id.*

91. *Id.*

92. *Id.*

93. EDWARD T. PRICE, *DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSIAC* 6 (1995).

surrounding natural materials.<sup>94</sup> These markers provided New Englanders with a simultaneous connection to both performative and rationally based legal culture. In boundary markers, colonists imposed English order on the land symbolically, but also literally, making that order visible and tangibly real.<sup>95</sup>

The fence or wall was one of the most common artificial markers in New England and one about which colonists passed considerable legislation.<sup>96</sup> Early New Englanders used an assortment of wooden fence-types to enclose land and livestock, but also to designate ownership. Many were merely crude and short-lived constructions: board fences of plain unfinished pine<sup>97</sup> and brush, or brush pike fences of bracken, briars and thorny branches that formed a raw but effective barrier.<sup>98</sup> Many other wooden fences in early New England were some variation of the post-and-rail that English hands had made since their first days on North American soil, in particular the costly and time-consuming five- or six-rail variety.<sup>99</sup>

While colonists in other parts of English North America dropped the post-and-rail quickly in favor of simpler, less onerous and less permanent options,<sup>100</sup> those who settled New England continued to commit the extra time, labor and maintenance the fence type required, confident that future generations would hold the land long enough to warrant such an investment. New Englanders also maintained the dominance of the post-and-rail fence in law. The four-foot, five-rail fence was the enforceable community standard for all common lands in Connecticut Colony, a standard imposed by the locally elected fence-viewers.<sup>101</sup> A second common artificial

94. Comparing English and Maori conceptions of property, Stuart Banner describes the Maori's "strategic use of landmarks, such as stones and marks in trees . . . to aid the memory" as "baffling" to the English who relied on written instruments, but he overlooks a similar English tradition. Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 *LAW & SOC. INQUIRY* 807, 812-13 (1999).

95. CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 2 (1994).

96. Although the English rule required "fencing out" livestock, early New England employed both "fencing in" and "fencing out" statutes to cope with the monumental problem of property damage by livestock. ALLPORT, *supra* note 54, at 26, 34. For examples of fencing out in Massachusetts, see DAVID GRAYSON ALLEN, *IN ENGLISH WAYS: THE MOVEMENT OF SOCIETIES AND THE TRANSFERAL OF ENGLISH LOCAL LAW AND CUSTOM TO MASSACHUSETTS BAY IN THE SEVENTEENTH CENTURY* 49 (1981). Anyone who left open a gate or bar in Connecticut was subject to the criminal sanction of a small fine of 10 shillings (although prosecutions appear to have been very rare). *ACTS AND LAWS, supra* note 54, at 45.

97. See HEMPSTEAD, *supra* note 33, at 78.

98. See *id.* at 211, 218, 238.

99. For examples of six-rail fencing, see *id.* at 113, 480, 589, 594. General information regarding post-and-rail fencing appears in DAVID FREEMAN HAWKE, *EVERYDAY LIFE IN EARLY AMERICA* 34-35 (1988).

100. Of all the fence types used in early America, the Virginia or zigzag (with ten-foot rails criss-crossed on top of each other to form a fence in the shape of a zigzag) required a minimum of labor and a maximum of lumber and land. For the zigzag, see ALLPORT, *supra* note 54, at 37-39.

101. Pertinent fencing statutes appear in *ACTS AND LAWS, supra* note 54, at 17, 19, 33, 66, 121. The degree of compliance is unknown. Landowners could also bring civil suit in trespass for the in-

marker was the stone fence built from the rocky soil that surrounded it. Like the five-rail post-and-rail, the four- to five-foot stone wall was also a legal standard,<sup>102</sup> the implied and actual permanence of which made it one of the great symbols of English civilization in New England. Effective as it could be in keeping animals in and out of land, the well-made stone fence also connoted a well-run and well-ordered settlement.<sup>103</sup> Perambulating along these formidable fences of stone affirmed English men's sense of their place and (inherently fragile) dominance in their New World.

Although New Englanders used stones and stone fences to assert their rule over the land, they could associate the same stones with the otherworldly. Markers could evocatively connect New Englanders to the natural but sometimes even to the supernatural they perceived around them. Until the seventeenth century, the English commonly associated land and places in the land with ritual moments and spiritual power.<sup>104</sup> Even as New Englanders of the seventeenth and eighteenth-centuries strove to a more rational, logical understanding of the world, traditional ideas and even superstitions connected to land and place did not die out entirely.<sup>105</sup>

In the natural world, colonists routinely observed "portents that betokened either God's anger or his protection."<sup>106</sup> The "Swiming Rock"<sup>107</sup> of Poquiogh,<sup>108</sup> as it was known, inspired this kind of spiritual wonderment in New London County during the 1730s. As Joshua Hempstead reported, visitors saw this great rock move "unaccountably,"<sup>109</sup> its motion possible evidence of otherworldly intervention: "no one could tell by what means it was moved whether the Thunder as some Suppose or Some other Superna-

tentional destruction of fences. *E.g.*, *Coit v. Edgcombe*, NLCCCR, Files, Box 159, File of November 1715 (on file with Connecticut State Library).

102. For the stone fence as the Connecticut legal standard (equivalent to the four-foot, five-rail post-and-rail), see *ACTS AND LAWS*, *supra* note 54, at 17. In a day's work, two men could build around ten feet of stone fence (including carting the stones and laying a foundation). *ALLPORT*, *supra* note 54, at 18.

103. *ALLPORT*, *supra* note 54, at 20.

104. *SOBEL*, *supra* note 5, at 76-77. The English non-elite viewed the mathematical survey with considerable suspicion well into the seventeenth century. See F.M.L. THOMPSON, *CHARTERED SURVEYORS: THE GROWTH OF A PROFESSION* 13-15 (1968).

105. *SOBEL*, *supra* note 5, at 75-77; see also *HALL*, *supra* note 12, at 101-02.

106. *HALL*, *supra* note 12, at 221.

107. *HEMPSTEAD*, *supra* note 33, at 348-49. The rock is located near the Millstone Power Station around three miles west-southwest from the city of New London. I am indebted to New London's Municipal Historian, Sally Ryan, for this information. When Hempstead took company to visit the rock, the party also "rid down into the Neck to See the Tree that was Remarkably Split with the Thunder and Lightning." *Id.*

108. Hempstead referred to the rock's location as "Poquoyag." *Id.* at 303. Poquoyag is likely a part of Waterford east of Jordan's Cove with the Algonquian name, Poquiogh, meaning clear, open land. R.A. DOUGLAS-LITHGOW, *NATIVE PLACE NAMES OF CONNECTICUT* 29 (Applewood Books, photo. reprint 2000) (1909)

109. *HEMPSTEAD*, *supra* note 33, at 305.



taral Power.”<sup>110</sup> Across New England, other colonists, too, saw rocks move inexplicably. The inhabitants of Gloucester, Massachusetts, watched a “moveable rarity,”<sup>111</sup> as Boston minister and theologian Cotton Mather described in a 1724 letter to the Royal Society in London. This was just one of several New England “stories of a rock”<sup>112</sup> Mather related to the Society over many years.<sup>113</sup> In early New England, a rock could serve as rational, legal monument, but it might also appear a portal to the otherworldly, engaged in its own performance in moving “unaccountably”<sup>114</sup> towards an unknown.

A great number of New England boundary markers were neither statutorily mandated fences nor awe-inspiring “supernatural” rocks, but rather highly idiosyncratic representations of corners, turns and endpoints. These symbols marked at once the technical legal moment – the carefully measured directional shift in a surveyor’s plan – but they marked also the survival of ancient folkways, even of a form of commonplace aesthetic expression carried over from Old England.<sup>115</sup> Many of these markings mimicked those New Englanders’ grandparents and great-grandparents had carried out on the ancestral landscape.<sup>116</sup> Colonists’ markings evoked and asserted ownership (perhaps even the individual identities of owners), but they also reminded onlookers of a larger imposition of order on the natural world, the colonial enterprise itself.

For English colonists, the ideal relationship with nature was to impel cultivation, building and structure – all English markings – onto the land.<sup>117</sup> One common marker in New England was the surveyor’s meerstone the square tops of which (sometimes carved with an owner’s initials or other distinguishing ornament) frequently peeked out at the edges of English land. Of all New England markers, the meerstone was most representative of an aspiration towards legal rationality, evidenced in its statutorily mandated standardization. Statutes required official surveyors’ meerstones to be at least eighteen inches long, with one foot underground

110. *Id.* at 303.

111. Letter from Cotton Mather to Dr. James Jurin (Sept. 24, 1724), COTTON MATHER: LETTERS TO THE ROYAL SOCIETY, FREDERICK LEWIS GAY TRANSCRIPTS RELATING TO THE HISTORY OF NEW ENGLAND, 1630-1776, at 231-32 (on file with Mass. Hist. Soc’y).

112. *Id.*

113. *Id.*

114. HEMPSTEAD, *supra* note 33, at 305.

115. The bark cuts of New England boundary markers, for example, call to mind the very ancient measurement notations of sawyers once found on the ends of wood boards across England. GEORGE STURT, THE WHEELWRIGHT’S SHOP 38 (paperback ed., 5th prtg. 1993).

116. See, for example, a Somerset perambulation in which participants dug holes and put stones in as markers or carried hooks with which to mark trees. BUSHAWAY, *supra* note 15, at 83.

117. Robert Blair St. George, “Set Thine House in Order”: *The Domestication of the Yeomanry in Seventeenth-Century New England*, in 2 NEW ENGLAND BEGINS: THE SEVENTEENTH CENTURY 159, 161-62 (1982).

and six inches above ground.<sup>118</sup> By contrast, other markers epitomized the performative folkway in their sheer variety, irregularity and idiosyncrasy. Examples of these expressive, inherently performative, markers include a heap of stones with a stick jammed into it,<sup>119</sup> a “rock with stones on it and small cracks in it,”<sup>120</sup> and a “heap of splitten rocks [that] stands up edge-ways.”<sup>121</sup> Others incorporated trees, like the chestnut tree marked “TA” for its owner,<sup>122</sup> the white oak marked “SR” with three sides “chipped with an ax,”<sup>123</sup> or the “white oak tree marked F:S:T:S.”<sup>124</sup> Lettered trees were both folk marking and literate expression, uniting and mutually informing the performative and the technological use of writing. These carvings echoed the images of other marks that straddled the folk and literate legal worlds: the letters or symbolic “marks” of illiterates used as signatures<sup>125</sup> and the branded foreheads of convicted felons that read “A” for adultery<sup>126</sup> or “B” for burglary.<sup>127</sup>

The New England landscape held other marks that bridged performative and rationally based legal culture.<sup>128</sup> Like real property, living chattel in the form of horse kind and livestock bore the marks of their owners and their place in the English ordering of an owned, natural world. By statute, Connecticut horses carried brands with the town of their origin, each town having its own assigned brand: “L” for New London, “N” for Norwich and “K” for Stonington.<sup>129</sup> Horses also wore the initials of their owners, sometimes three and four times over.<sup>130</sup> A horse’s hide revealed a written record of legal ownership, not to mention a history of the animal’s movements through the local geography of ownership. Colonists marked swine

118. ACTS AND LAWS, *supra* note 54, at 8.

119. Edgecombe v. Coit, NLCCCR, Files, Box 161, File of March 1718 (on file with Connecticut State Library).

120. HEMPSTEAD, *supra* note 33, at 84. For a similar marker consisting of a large stone with a smaller pile on top (noted by one of diarist Joshua’s sons), see John Hempstead, *Surveyors’ Notes*, 4 March 1769 (on file with New London County Hist. Soc’y).

121. HEMPSTEAD, *supra* note 33, at 84.

122. 4 NEW LONDON TOWN RECORDS 196 (unpublished records, New London, Office of the City Clerk).

123. *Id.* at 209.

124. *Id.* at 224.

125. For two samples of a signature mark, see the “H” mark of Elizabeth Hempstead (mother of diarist Joshua) in a 1671 deed of sale in 5 NEW LONDON TOWN RECORDS, *supra* note 122, at 15, and the “X” mark of Native American Samuel Quang in *Rogers v. Quang*, NLCCCR, Files, Box 179, File of November 1738 (on file with Connecticut State Library).

126. ACTS AND LAWS, *supra* note 54, at 4.

127. *Id.* at 11.

128. I am indebted to Robert Blair St. George for my understanding of a “marked, symbolic world.” ROBERT BLAIR ST. GEORGE, *CONVERSING BY SIGNS: POETICS OF IMPLICATION IN COLONIAL NEW ENGLAND CULTURE* (1998).

129. ACTS AND LAWS, *supra* note 54, at 9.

130. For examples of multiple brands, see *Hempstead v. Morgan*, NLCCCR, Files, Box 161, File of June 1718 (on file with Connecticut State Library); and *Hempstead v. Estate of John Colefax*, NLCCCR, Files, Box 196, Files of February 1751 (A-G) and June 1751 (76-152) (on file with Connecticut State Library).

and cattle with earmarks.<sup>131</sup> Inhabitants registered these in town records, sometimes even passing the marks from generation to generation.<sup>132</sup> Over time, the marks themselves, like the land identified by initials in trees, were indelibly linked to certain families.

New Englanders were not the only colonists to revitalize the rite of English perambulation on North American soil and to combine the performative past with a new legal order. The Virginia legislature, for example, passed its first perambulation or processioning statute in 1661. It enacted the policy at a critical time in the development of property law in the Colony while the last of the first English generation (and their memories of the land) still lived.<sup>133</sup> This first statute applied exclusively to parishes, Virginia's smallest administrative unit, as in England.<sup>134</sup> The Anglican Church was the Colony's official religion, allowing Virginians, in contrast to their Connecticut cousins, to retain an express connection between the established Church and processioning in both administration and content. By statute, Virginia's church vestrymen (rather than civil authorities) had to organize and lead freeholders in processioning parish boundaries every four years.<sup>135</sup> Within five months of passing this initial parish perambulation statute, the Virginia legislature extended the duty to process boundaries to all private landowners in the Colony.<sup>136</sup>

In Connecticut, authorities severed the statutorily sanctioned perambulation from any official religious administration and from religious content, although the perambulations themselves retained many of the performative, memorial<sup>137</sup> aspects of Old English beating the bounds rituals. Child participation, so that memories of an event could survive long into the future, was one traditional characteristic that colonial perambulations usu-

131. Laws regarding livestock markings appear in *ACTS AND LAWS*, *supra* note 54, at 9, 15. See also *ALLPORT*, *supra* note 54, at 51-52.

132. See, e.g., Labour Horton's inheritance of his grandfather's earmark, *RECORD OF EARMARKS*, 1691-1807, *FREEMEN*, 1730-1775, at 29 (unpublished manuscript, New London, Office of the City Clerk).

133. Seiler, *supra* note 28, at 420.

134. *Id.* at 419-20.

135. *Id.* at 416.

136. *Id.* at 419. For a description of a Virginia processioning, see RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA 1740-1790*, at 19-20 (1982).

137. I am indebted to Richard Ross for the concept of memorial culture. Richard Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640*, 10 *Yale J.L. & Human.* 229 (1998). Ross identifies the centrality of memory in early modern English legal culture. Ross challenged a progressive model for the development of legal communications and affirmed the continued cultural importance of memory, even as its legal functionality declined. This essay supports Ross's challenge by showing the continuing and special cultural importance of memory in early New England. However, it argues that, in the realm of property bounds, memory retained its functional legal significance well into the eighteenth century.

In the analogous realm of English customary law, Andy Wood described the expectation that the aged should pass their memory and local knowledge on to the young so that a locality could maintain its "common voice." Wood, *supra* note 31, at 261.

ally preserved.<sup>138</sup> Connecticut colonists included children in statutorily or judicially mandated perambulations, but men also regularly and informally taught children, especially sons, the bounds to their private holdings. Highly conscious of their own mortality, colonial fathers wanted children to know visually and viscerally their prospective rights in property.

In 1724, for example, then forty-six-year-old diarist Joshua Hempstead brought his fourteen-year-old boy to his Colchester property to walk and learn its bounds.<sup>139</sup> Similarly, brothers Noah and Ephraim Wells together offered testimony in a 1700 land dispute, telling of the bounds their father had taught them as children.<sup>140</sup> In a different dispute, John Morgan told of going, also at the age of fourteen, “with [his] honored father” and two others to beat the bounds of his father’s land in Preston sometime around the year 1680. At the age of sixty-seven, Morgan recalled this father-son enactment of ownership, drawing on it to verify the same boundaries in the company of two county surveyors. His memory conveyed the passage of time between the two perambulations: when he pointed out the northeast corner, Morgan noted a change: “[A] white oak tree which then stood upon a small hill and had a stone then put into the crock of said tree which tree and stump thereof is since removed by some person or persons.”<sup>141</sup> Although such evidence is scant, a childless man or a father with very young children might also have called on a trusted servant to walk and learn his bounds. One servant in his forties in colonial Maryland, for example, recalled doing just that some twenty years earlier when his master had taken him to view the bounds of his land so “that he might be of service to his [master’s] children after his death.”<sup>142</sup>

Given that women (unless widowed) could only hold property through fathers, husbands or brothers (and that girls were often at home helping their mothers), New England fathers understandably appeared to favor sons when teaching bounds. Nevertheless, fathers (even those with male heirs) also asked daughters to remember the land. As her testimony in a 1701 dispute illustrates, teenager Patience Hempstead (sister to diarist Joshua) was conversant enough with bounds to describe “one of [neighboring] Mr. Hawke’s family amowing grass in a little meadow near [her brother’s] house . . . the grass growing in said meadow to the eastward of where my [long dead] Father and Brother Hempstead’s fence stood and also to the eastward of the run of water that runs between their

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138. See comments in KULIKOFF, *supra* note 34, at 112. Virginia processions also regularly included children. Seiler, *supra* note 28, at 419 n.16.

139. HEMPSTEAD, *supra* note 33, at 144.

140. Beebe v. Rogers, NLCCCR, Files, Box 153, File of September 1700 (on file with Connecticut State Library).

141. Hempstead v. Morgan, NLCSOR, Files, Box 6, File of March 1735 (on file with Connecticut State Library).

142. KULIKOFF, *supra* note 34, at 112.

lots.”<sup>143</sup> So too in 1746 Samuel Rogers recalled having carried his elderly mother on horseback some thirty years earlier to verify boundaries her father had taught her in girlhood, telling of the moment “when we came to the place that my mother said her father had always told her was the bounds.”<sup>144</sup> Rogers’s grandfather had walked his daughter along these bounds, not once, but many times.<sup>145</sup>

The old custom of including children as bounders was especially useful in the context of colonial New England. When colonists summoned the young to perambulate, they correspondingly privileged the testimony of the aged in the legal authentication of property.<sup>146</sup> A boy who learned bounds might some day play a decisive or even determinative role as an old man in defining property rights and limits after boundaries had fallen into doubt. Landowners, heirs and litigants routinely sought out old men and women to recall property boundaries “to the best of [their] remembrance,”<sup>147</sup> and their testimony was crucial evidence in legal disputes.<sup>148</sup> When Joshua Hempstead held land with bounds in controversy in 1749 and feared a lawsuit, he searched the town for two older inhabitants as potential witnesses. From them, he wanted “to Larn of them if they knew the Saxafrax Stump which is a Midle bounds of my north Side . . . .”<sup>149</sup> In this case, Hempstead needed bounders’ memories to corroborate the surveyor’s measure. Asking them if they recalled the sassafras tree marker, Hempstead reported with satisfaction, “they both know itt.”<sup>150</sup> In a similar way, a woman between seventy and eighty years of age (for she was not sure) displayed her local knowledge, telling how “many years ago she was out looking for a cow and she discussed and looked at the boundaries of the Christophers’ land.”<sup>151</sup> Her chance enactment of the Christophers’

143. *Hempsted v. Hawke*, NLCCCR, Files, Box 153, File of September 1701 (on file with Connecticut State Library).

144. Deposition of Samuel Rogers, NLCSER, Files, Box 10, File of March 1746 (on file with Connecticut State Library).

145. The inclusion of women as carriers of legal memory represented a significant deviation from Old English practice. In a sample of around 12,000 depositions at central courts, Andy Wood found 90 to 95 percent of deponents attesting to local customary law to be male. Wood, *supra* note 31, at 264.

146. Similarly, courts in England used the memories of the oldest local inhabitants (in the absence of earlier contradictory written sources) as one criterion in determining the legitimacy of local customary law. Wood, *supra* note 31, at 259.

147. *Coit v. Edgcombe*, NLCSER, Files, Box 2, File of March 1717 (on file with Connecticut State Library).

148. This privileging of the testimony of the aged was hardly new. In seventeenth-century England, for example, “legal monographs discussing proof of particular custom placed aged recollectors in central, not vestigial, roles.” Ross, *supra* note 137, at 261. As Ross indicates, “John Cowell’s Interpreter (1607) reported that common lawyers accepted a custom ‘if two of more witnesses can depose, that they heard their fathers say that it was a custom all their time and that their fathers heard their fathers also say, that it was likewise a custom in their time.’” *Id.*

149. *HEMPSTEAD*, *supra* note 33, at 507.

150. *Id.*

151. *Christophers v. Avery*, NLCSER, Files, Box 9, File of March 1744 (on file with Connecticut

bounds while in search of a heifer provided critical data in determining the limits of ownership.

The New England property order conferred great determinative weight on the testimony of elders, based in performative, memorial experience. A relevant precedent in English procedure was perhaps the authority of elders' memories in establishing unwritten custom in medieval England.<sup>152</sup> Colonists' reliance on elder testimony was a rational choice; it was often the best available evidence in boundary disputes. New England's particular demographic context, however, gave these memories of the old a special significance. The population of seventeenth-century New England grew at rates far in excess of Europeans in England and on the Continent.<sup>153</sup> Enjoying more healthful living conditions,<sup>154</sup> New Englanders were able to sustain an exceptionally high birth rate and a low death rate. If a colonist survived childhood, he or she might reasonably expect to lead a long and healthy life.<sup>155</sup> In the town of Andover, Massachusetts, for example, men of the first generation (who survived childhood) died at the average age of 71.8 years; Andover women at 70.8 years.<sup>156</sup> Second generation Andoverians also enjoyed considerable longevity, achieving average ages of death of 64.2 years for men and 61.6 years for women.<sup>157</sup>

Descendants of the first colonial generation regarded these founders with considerable reverence.<sup>158</sup> Veneration of the original planters intensified with the passage of time, as New Englanders judged themselves to have degenerated into a state of spiritual decline beginning in the late seventeenth century. The exceptional longevity of the first generation fostered their image as old lions, revered pioneers and religious stalwarts who had defied adversity, prevailed without the support of kin<sup>159</sup> or country, and created New England in its best form, a form never to be equaled.

Along with longevity and revered status, the men and women of the first generation were also eminently important in terms of their relationship to the land. Unlike their peers in England, the elders of New England were the first colonial generation to know and remember a North American landscape. The first generation (and anyone connected to them through lineage or personal knowledge) had a special claim on memorial culture in early New England. When later generations invoked the memory of a first

State Library).

152. See Ross, *supra* note 137, at 261.

153. PHILIP J. GREVEN, JR., *FOUR GENERATIONS: POPULATION, LAND, AND FAMILY IN COLONIAL ANDOVER, MASSACHUSETTS* 24-25 (1970).

154. *Id.* at 178.

155. For Connecticut, see MAIN, *supra* note 35, at 11-12.

156. GREVEN, *supra* note 153, at 26.

157. *Id.* at 26-27.

158. JOHN P. DEMOS, *Old Age in Early New England*, in *PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY* 139, 180 (1986).

159. GREVEN, *supra* note 153, at 72.

settler to establish bounds, for example, they duly noted the memory's superior provenance. During his long life, diarist Joshua Hempstead was involved in innumerable property disputes in various capacities, including as Judge of the Probate Court, Justice of the Peace, county surveyor and as a private individual. In one particular episode in 1744, some one hundred years after New London's first settlement, Hempstead wrote explicitly of seeking out founders to settle claims: "[W]e went to the S.E. Quarter of the Town after wee had a Conference with old Ebenezar Harris & John fellows. 2 of ye first Settlers. Said Fellows went with us . . . to the land claimed by James Dean."<sup>160</sup>

Individual boundary markers could even evoke a specific founder, creating a lasting monument to a foundational legal moment. An ancient pear tree bounding his house-lot, for example, spoke to Hempstead of his grandfather, Robert, whom he had never known. A century later, the grandson could write: "[A] very old Tree . . . of my Grandfathers planting who Lived but Seven year after the Town was first Settled wch was in 1646. 99 year ago in January."<sup>161</sup> Robert Hempstead was long gone, but his memory and ownership lived on, both figuratively and literally, in the old boundary tree he had planted, probably using stock brought with care on the Atlantic passage. In the context of early New England, the emphasis on the memorial testimony of the old (who in this land were also the first) in defining property rights mimicked medieval performance culture. But New Englanders did not rely on the past for its own sake. They redeployed the old memorial practice because it proved highly effective in underpinning nascent rationalization in property law. The Old English custom had never anticipated a New England, but it nevertheless proved particularly suited to the circumstances of this unimaginable legal reincarnation.

#### THE ORIGINS OF NEW ENGLAND PERAMBULATIONS

When New Englanders beat bounds to define rights in property, they drew on a long performative and memorial tradition in Western European law and particularly in the Anglo-Saxon legal tradition. Pre-modern European legal culture invoked and valorized human multi-sensory perception to an extent unfamiliar today. Particularly in the realm of everyday experience, English society in the seventeenth century was still in many ways a performance culture: intensely sociable and communal, relying on multi-sensory physical enactment or performance to legitimize and

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160. HEMPSTEAD, *supra* note 33, at 423.

161. *Id.* at 448. For the pear tree as a boundary marker, see The Division of the Estate of Joseph Truman to His Sons Thomas and Joseph (Apr. 20, 1728), in HEMPSTEAD FAMILY PROBATE DOCUMENTS (1600-1700) (New London, Hempstead House Archives) (on file with New London County Hist. Soc.).

authenticate important social acts and spiritual abstractions.<sup>162</sup> Ritualized group activities in early modern England simultaneously rallied sight, sound, touch and movement to convey meaning,<sup>163</sup> including to give effect to legal process and outcome. One such performance rite was the practice of beating the bounds or perambulating.<sup>164</sup>

The practice of beating the bounds also had its origins in a deep-rooted preference in Germanic property law for the physical and performative delivery of land in conveyancing. Under early Germanic law, valid land transfers needed to be executed openly and within view and earshot of witnesses. A Germanic land “giver” first made an oral declaration of intent or *sala* and then undertook the *gerwerida*, a ritual by which he personally handed over the land to its recipient who then physically entered the plot in view of onlookers.<sup>165</sup> The land “giver” showed the boundaries to witnesses who could later testify to the truth and extent of the transfer.<sup>166</sup> Similarly, Anglo-Saxon landowners could give legal force to the relinquishment of property by the physical enactment of jumping over a hedge.<sup>167</sup>

From at least the eleventh century, English law required the actual delivery of land to effectuate a legal transfer. Such a requirement, and the strong preference for the performative that it represented, deviated significantly from the Roman legal tradition and continental custom. Under Roman law and many continental customary regimes, even the symbolic transfer of land had legal effect:<sup>168</sup> a staff or wand could take the place of the land itself as could a house door or ring for land with housing.<sup>169</sup> Such symbolic transfers had a distinct visual component, of course, but not the literal, land-bound performance of the English tradition.<sup>170</sup>

Medieval English law after the Norman Conquest, including manorial custom, perpetuated the preference in English land law for performance and especially for the literal, visual performance.<sup>171</sup> In the Norman<sup>172</sup> and

162. Hibbitts, *supra* note 17, at 956-59.

163. *Id.* at 883-84, 956.

164. *Id.* at 960.

165. S. E. Thorne, *Livery of Seisin*, 52 L.Q. REV. 345, 348 (1936).

166. *Id.* at 349. Thorne indicates that written documents could eventually replace such witness testimony. However, a medieval description of land could never supercede an actual visual knowledge of boundaries. *Id.* at 350.

167. Hibbitts, *supra* note 17, at 918.

168. Thorne, *supra* note 165, at 355.

169. *Id.* at 362.

170. This tradition traveled to colonial Virginia where a twig and a bit of turf could accompany a conveyance in symbolic representation of the land conveyed. ISAAC, *supra* note 136, at 20. I have taken the term “visual” and other ideas from Bernard J. Hibbitts, *Making Sense of Metaphor: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 257-61 (1994).

171. W. B. SIMPSON, *THE HISTORY OF THE LAND LAW* 113 (2d ed. 1986).

172. *Id.* at 119.



English customary traditions,<sup>173</sup> for example, actual physical delivery of legal possession or seisin was necessary to convey land. The rite of livery of seisin in land transfers, which remained legally valid until the twentieth century, required the transferee to enter the land and for the transferor (or his tenants) to vacate the land physically, all within view of witnesses. A transferor might also deliver a symbolic gift of words or perhaps turf or a branch to the transferee, but without physical transfer, these symbols lacked legal effect. The preference in English customary law for the visual, and even the literal, performance relates to a broader “hegemony of the visual”<sup>174</sup> in Western culture, as Stephen Tyler has termed it, traceable to its Indo-European origins<sup>175</sup> and found in Indo-European languages themselves. To the English speaker, for example, the statement, “I see,” equates conceptually to “I know.”<sup>176</sup> In medieval England, a landowner had to see, and know, real property in order to transfer it.<sup>177</sup>

Some of the early preference for performance in early English legal culture, and particularly regarding land, is certainly evident in continental legal traditions. However, as legal cultures continued to develop on either side of the Channel, their trajectories diverged to allow the performative in English land law to retain relevance and meaning. From the twelfth and thirteenth centuries, continental Europeans in general began to turn away from multi-sensory performance to convey legal meaning in favor of the written instrument.<sup>178</sup> While written legislation gradually ascended to become the principal source of law in European civil tradition, English law continued to privilege custom as a source, whether in common law judicial decisions or long-established local or manorial practices. The English law of property, in particular, applied customary law with legal effect well into the eighteenth century as practices recorded in the custom books of local manorial courts or through legal memory from time immemorial<sup>179</sup> (the time before legal memory, fixed by statute in 1276 as the time before the reign of Richard I in 1189).<sup>180</sup> By contrast to legislation emanating remotely from above, different forms of English local customary law, like the parish perambulation, retained the multi-sensory aspects of legal per-

173. W.S. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 113 (1927).

174. Stephen A. Tyler, *The Vision Quest in the West, or What the Mind's Eye Sees*, 40 J. ANTHROPOLOGICAL RES. 23, 23 (1984).

175. *Id.* at 29.

176. *Id.* at 23, 28; *see also* ROSE, *supra* note 95, at 270. Hibbitts discusses this kind of visual hegemony in American legal discourse. Hibbitts, *supra* note 170, at 230-33, 238-242.

177. Rose too describes “vision [as] the essential part of the rhetorical and persuasive equipment of property.” ROSE, *supra* note 95, at 268.

178. Hibbitts, *supra* note 17, at 875.

179. *See* ALLEN, *supra* note 96, at 47-48; Holdsworth, *supra* note 173, at 134. As late as 1832, the English Crown acknowledged manorial customary laws found in court rolls and in oral history. Konig, *supra* note 40, at 165 n.85. *See also* Ross, *supra* note 137, at 260.

180. After the 1276 statute, for example, rights-holders in land needed to prove unbroken possession or use from 1189 forward when they lacked evidence of an original grant of the right.

formance well into the modern era.<sup>181</sup>

Medieval English perambulations had deep origins in Western legal culture leading back to the ancient Roman rituals of *terminalia*, *ambarvalia*<sup>182</sup> and *robigalia*.<sup>183</sup> Through the annual *terminalia*, for example, Roman landowners consecrated the stones that marked mutual boundaries by decorating them with garlands, sharing wine and sacrificing an animal.<sup>184</sup> A celebration in honor of Ceres, the *ambarvalia* took place in ploughed fields at winter's end when people gathered to sing, dance and perform sacrifices to sanctify boundaries and bless crops. During the *ambarvalia*, celebrants took sticks and beat the ground, symbolically driving away evil from the land.<sup>185</sup> In the *robigalia*, Roman citizens marched and prayed to the god Robigus to protect their crops, an annual ritual gradually appropriated and Christianized by the early Church.<sup>186</sup>

In medieval Christian Europe, formal and informal boundary processions by whole communities and between private landowners persisted.<sup>187</sup> The Church eventually assumed and legitimated many forms of perambulation, inserting Christian prayers, blessings and Bible readings as an integral part of the ritual.<sup>188</sup> After the Protestant Reformation, the Anglican Church assumed this role in England.<sup>189</sup>

The pre-modern English perambulation epitomized performance in law. Medieval English law was highly resourceful in demonstratively invoking the senses to stimulate the memory,<sup>190</sup> as memory was vital to the transmission of cultural knowledge and information from generation to generation.<sup>191</sup> Given the role of memory as an essential receptacle for the law itself, legal performances such as beating the bounds could function as elaborate multi-sensory calls to remember that used a variety of express mnemonic inducements through vision, touch, taste and sound.<sup>192</sup> At per-

181. The written word, of course, also belongs to the visual. Still, written language is an indirect, attenuated visibility separate from the actual experience of the thing described. In comparing English and Maori conceptions of property, Stuart Banner underestimates the historical use of performance in the English property system. Banner, *supra* note 94, at 807, 812.

182. EVANS, *supra* note 24, at 104; *see also* I BRAND, *supra* note 22, at 169; HUTTON, *supra* note 16, at 52.

183. Stilgoe, *supra* note 13, at 49.

184. EVANS, *supra* note 24, at 104; *see also* I BRAND, *supra* note 22, at 169.

185. EVANS, *supra* note 24, at 104.

186. Stilgoe, *supra* note 13, at 47.

187. Hibbitts, *supra* note 17, at 920-21. Walking boundaries occurs in many non-European cultures as well, including the African Kamba. *Id.* at 921; *see also* ROSE, *supra* note 95, at 269-70.

188. BUSHAWAY, *supra* note 15, at 82.

189. For a brief history of communal rituals linked to Rogationtide (including perambulations), *see* HUTTON, *supra* note 19, at 277-87 (1996).

190. Hibbitts, *supra* note 17, at 951. Mnemonic inducements are also present in written legal culture. In seventeenth-century England, for example, the design of law books for legal practitioners was specifically intended to facilitate memory. Ross, *supra* note 137, at 275, 283.

191. Hibbitts, *supra* note 17, at 951.

192. There is a resemblance between perambulations and the classical art of memory, a branch of classical rhetoric by which the ancients developed oratorical skills. Using the art, a speaker memo-

ambulations, as at other performances including marriage,<sup>193</sup> participants ate and drank, sharing customary food and drink like bread, cakes and beer.<sup>194</sup> Music, a typical sensory element of the performative,<sup>195</sup> also accompanied some boundary walks through the English countryside.<sup>196</sup> As bounders outlined the limits of land, they made a variety of particular movements or gestures. In certain regions, men carried metal tools to take down fences erected without permission.<sup>197</sup> Often walkers carried and gestured with sticks or branches<sup>198</sup> that they sometimes adorned with flowers.<sup>199</sup> With them or with other instruments, participants beat at markers,<sup>200</sup> affirming rights and boundaries with sound, sight and touch. Before the most critical markers, bounders shared a Bible reading<sup>201</sup> (or, after its publication in 1562, an excerpt from the Book of Homilies).<sup>202</sup> At the end of a parish perambulation, priests recorded the event, creating a visual and written expression of its performance in books of the parish.<sup>203</sup>

In medieval and early modern England, children, especially boys, played a significant role in boundary keeping.<sup>204</sup> Perambulating groups typically included a large number of children expected to learn the boundaries in youth and remember them in old age. When they accompanied bounders, children were enticed to remember by various means.<sup>205</sup> After walkers beat boundary markers, for example, they sometimes turned

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alized a series of *loci* or places such as the rooms of a building, and then, in his mind's eye, he "placed" objects representing concepts in his speech in different *loci*. To perform the oration, the speaker "stepped" through the *loci* in his imagination, "picking up" objects in order and delivering his oration accordingly. Although the memories of participants in medieval perambulations were clearly natural, i.e. born of actual, physical experience of the marked *loci* of the land rather than of the imagination, these very real perambulations from marker to marker bear a striking similarity to the artificial mnemonics of the classical art. The parallels between the practice of artificial memory and the enactment of perambulations perhaps suggests their effectiveness at imprinting experience on the memories of participants. See FRANCES A. YATES, *THE ART OF MEMORY* 18-22 (1966).

193. Hibbitts, *supra* note 17, at 938. Many African cultures view food and drink as an essential ingredient in the law. *Id.* at 939.

194. 1 BRAND, *supra* note 22, at 174 n.g; BUSHAWAY, *supra* note 15, at 83-84. For examples of early New England rituals in which food and drink played a central role, see HALL, *supra* note 12, at 210-11. During calamities, such as in a war or during an epidemic, New Englanders turned to fast days and thanksgivings for rectification. *Id.* at 169.

195. BUSHAWAY, *supra* note 15, at 85.

196. Hibbitts, *supra* note 17, at 903.

197. BUSHAWAY, *supra* note 15, at 83.

198. EVANS, *supra* note 24, at 105.

199. See, e.g., 1 BRAND, *supra* note 22, at 170 n.c (describing a perambulation in Staffordshire); EVANS, *supra* note 24, at 105.

200. BUSHAWAY, *supra* note 15, at 85; EVANS, *supra* note 24, at 105.

201. See, e.g., 1 BRAND, *supra* note 22, at 170 n.c.

202. BUSHAWAY, *supra* note 15, at 80-81; see also 1 BRAND, *supra* note 22, at 169-70.

203. *Id.* at 84. Perambulations, in particular of the parish, have continued in many English localities into the nineteenth, twentieth and twenty-first centuries. With boundaries firmly established, processions became largely if not entirely ceremonial. BUSHAWAY, *supra* note 15, at 96; EVANS, *supra* note 24, at 106.

204. Some English parishes specifically brought along "charity children" for the event. 1 BRAND, *supra* note 22, at 170 n.c.

205. *Id.* at 175 n.i.

their sticks and poles onto their young companions, blithely beating the knowledge of the land into the children's minds. In some parishes, children and even adults were pushed into markers, bumping them with their bottoms to hearten their memories.<sup>206</sup> At other times, bounders also threw accompanying children coins<sup>207</sup> or bits of cake at pivotal marking points—just after beating the markers with sticks—to further impress the memory.<sup>208</sup>

The presence and even the striking of children at times of legal moment is characteristic of performance culture. Participation of the young ensures the existence of witnesses long into the future; their striking instills and reinforces the memory of what they and other witnesses experienced.<sup>209</sup> In early medieval France, for example, participants boxed or pinched the ears of child witnesses at some legal proceedings.<sup>210</sup> Eleventh-century Normans sought out youths to participate in legal enactments during which they struck or whipped the children to aid the memory.<sup>211</sup> In one recorded instance, attendees at a legal transaction struck a Norman child before an altar and many witnesses.<sup>212</sup> Beatings could be effective at imprinting events on the memories of children who may have had no grasp of their legal significance. A child needed only to remember where his father whacked him on the head, for example, to recall the location of a given boundary stone. Moreover, beating a child provided a focal point for the memories of other witnesses. These calculated blows did not simply fortify memories; however, the use of force also emphasized the weight or import of a legal event. Perhaps they could even serve as a symbol for the event itself, as a slap to the face or neck could signify the conferral of knighthood.<sup>213</sup>

#### PROPERTY AND TECHNOLOGY IN NEW ENGLAND

In imposing legal order, New England colonists utilized available technologies<sup>214</sup> that reflected their aspirations towards a more rational, logical relationship with nature and the world. The use of technology was especially true in the realm of property where colonists contended with unfac-

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206. Fetwell.org, Beating the Bounds, [http://www.fetwell.org/fetwell2/written/beatings\\_bounds.htm](http://www.fetwell.org/fetwell2/written/beatings_bounds.htm) (last visited May 5, 2007).

207. BUSHAWAY, *supra* note 15, at 85; EVANS, *supra* note 24, at 105.

208. BUSHAWAY, *supra* note 15, at 86-87.

209. Hibbits, *supra* note 17, at 932.

210. *Id.*

211. EMILY ZACK TABUTEAU, TRANSFERS OF PROPERTY IN ELEVENTH-CENTURY NORMAN LAW 149-50 (1988).

212. Hibbits, *supra* note 17, at 932.

213. *Id.* at 931.

214. Here I define technology broadly to include literacy, writing, legal procedure and legal administration.

miliar (and undeveloped) land, an unprecedented magnitude of land conveyancing and technological developments in a number of areas, including: surveying, engineering, legal recording and the spread of basic literacy and numeracy.

As a society (rather than as individuals), New Englanders had a number of advantages in utilizing certain technologies in the assertion of an English concept of property. Early New England was among the most literate societies in the Western world. Their relatively broad-based literacy gave ordinary New Englanders unprecedented entrée into the written world of law, legal procedure and administration. Through reading and writing, colonists had access to basic legal information and process. Similarly, widespread service in local offices (as constables, fence-viewers, sheriffs, rate collectors, jurors, grand jurors, magistrates and the like) gave ordinary colonial freemen experience and facility with legal procedure and administration. New Englanders also brought with them a new orientation towards numbers, having already participated in the rise of numeracy and applied mathematics that had begun before the first of their number had left England.<sup>215</sup> New Englanders' numeracy, in turn, provided them with the quantitative skills they needed to establish and execute a technologically innovative and motivated property regime.

Early New England's legal institutions and administration may have been provincial, even rudimentary, by the standards of the royal courts and sergeants in Westminster. Nevertheless, though basic in its structure, New England's legal system during the first one hundred years of settlement was adequate to address most of the needs of the small social, economic and political world it served. For the vast majority of New Englanders, those legal needs were decidedly local. Connecticut created a basic statutory regime and eventually provided statute books (once published) for colony-wide public distribution.<sup>216</sup> By the late seventeenth century, the Colony also had a fully formed court structure leading from local, one-man justice courts, to county-wide inferior and superior courts and finally to the General Court of Assistants comprised of members of the colonial legislature. On rare occasions, litigants pursued appeals all the way to the court of last resort with jurisdiction over the colonies, the Privy Council in London.

For most New Englanders, their principal contacts with the law occurred when buying and selling property, writing or probating a will, serving in a local administrative or judicial office, or when asserting or answering

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215. See PATRICIA CLINE COHEN, A CALCULATING PEOPLE: THE SPREAD OF NUMERACY IN EARLY AMERICA 16-17 (1982). See generally *id.* I am defining numeracy as "basic numerical skills." *Id.* at 6.

216. For the case of Connecticut, see 5 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 77, at 242.

claims in court. The majority of cases heard by the colonial judiciary involved county administration, debt, property and petty crimes (particularly morals offenses). Although its institutions and processes were simple and straightforward relative to the wider English Atlantic world, New England's legal regime nevertheless permitted colonists to create a serviceable property regime and even to contribute technologically to the articulation of property in Anglo-American law.

Early New Englanders' most significant technological contribution to creating and sustaining a property regime was the development of a recording system. The systematic, centrally mandated recording of deeds and conveyances was new to English legal culture. Historically, English customary law did not include deed registration.<sup>217</sup> To verify ownership, an English landowner needed only an unrecorded deed.<sup>218</sup> Although it maintained no central recordation of any kind, English law still offered several models on which New Englanders could draw in establishing statutory recording. One important predecessor was the 1536 English Statute of Enrollments, which required the enrollment of certain land transfers at a court of record within six months of a conveyance.<sup>219</sup> Customary law under England's manorial courts provided another. Since at least the thirteenth century, the record books of many manorial jurisdictions noted conveyances, leases, wills and other legal documents, although this recordation was not systematic.<sup>220</sup> By custom, manorial courts (or manorial officers) in some jurisdictions also provided acknowledgements of deeds and other legal documents.<sup>221</sup>

In North America, English colonials quickly began the process of establishing recordation. By 1640, four young colonies, including Connecticut, already had recording acts requiring some recordation of deeds and conveyances in local land records.<sup>222</sup> In Connecticut and Virginia, recording acts resembled the English statute of fraudulent conveyances, deeming all unrecorded transfers inherently fraudulent.<sup>223</sup> As early as the mid seventeenth century, Plymouth Colony adopted all the main ingredients of modern American recording, including the prior acknowledgement of deeds by magistrates, deed recordation and the legal supremacy of the recorded

217. Haskins, *supra* note 36, at 295-96. Haskins indicates that in 1703 there was only one county registry in all of England (to protect grantees from fraudulent conveyances).

218. *Id.* at 289, 303.

219. *Id.* at 291. Rose points out, however, that the statute applied restrictively and lawyers were adept at avoiding registration under the statute. ROSE, *supra* note 95, at 206. Note that Haskins also suggests that Pilgrims in Plymouth may have followed Dutch models learned during their exile. GEORGE L. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 172 (1960).

220. HASKINS, *supra* note 219, at 172; Haskins, *supra* note 36, at 297.

221. HASKINS, *supra* note 219, at 172-73; Haskins, *supra* note 36, at 298.

222. Haskins, *supra* note 36, at 284.

223. *Id.*

deed over other instruments.<sup>224</sup> As “race” statutes,<sup>225</sup> colonial recording legislation gave priority to deeds and conveyances recorded first in time and made the land record book the preeminent source for legal title to property.<sup>226</sup>

Early New England’s status as one of the most collectively literate societies in the contemporary world facilitated the legal innovation of a recording system. A high number of New Englanders possessed what David D. Hall has termed “traditional literacy.”<sup>227</sup> Simply stated, Hall’s characteristics of traditional literacy include an emphasis on reading (over writing), the teaching of reading through the memorization of certain texts, especially religious ones, and access to a very limited number of widely circulated books.<sup>228</sup> In addition, pre-modern literacy did not signify one particular set of skills as it does today, but rather a broad range of abilities from reading print and signing one’s name to reading and writing complex or even erudite manuscripts.<sup>229</sup> Pre-modern literacy of this kind did not imply any connection to a cosmopolitan book or learned culture. Though a significant technological stride, widespread traditional literacy did not imply a total breach with performative memorial culture, however. Traditional literacy emphasized collective, ritualized oral readings of familiar texts and their memorization. Rather than a quiet, solitary activity, reading for colonial New Englanders was itself usually a sensory, communal performance.

Early New Englanders were more literate, in Hall’s traditional sense, than most European contemporaries. English colonists emanated from one of the world’s most literate countries: seventeenth-century English men enjoyed a literacy rate of around thirty-three percent, as compared to around twenty percent in Scotland or France.<sup>230</sup> Initially, a large proportion of emigrants to New England formed a self-selected group of highly religious Puritans for whom reading scripture was fundamental to faith. Accordingly, New England colonists possessed an adult male literacy rate of sixty percent—nearly double that of men in contemporary England.<sup>231</sup>

224. *Id.* at 285, 302.

225. ROSE, *supra* note 95, at 206.

226. *Id.*

227. David D. Hall, *The Uses of Literacy in New England, 1600-1850*, in *CULTURES OF PRINT: ESSAYS IN THE HISTORY OF THE BOOK* 36, 57 (1996).

228. *Id.*

229. See Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 *YALE J.L. & HUMAN.* 47, 55-56 (1999).

230. KENNETH A. LOCKRIDGE, *LITERACY IN COLONIAL NEW ENGLAND: AN ENQUIRY INTO THE SOCIAL CONTEXT OF LITERACY IN THE EARLY MODERN WEST* 45-46 (1974). For literacy and schooling, see E. JENNIFER MONAGHAN, *LEARNING TO READ AND WRITE IN COLONIAL AMERICA*, *STUDIES IN PRINT CULTURE AND THE HISTORY OF THE BOOK* (2005).

231. LOCKRIDGE, *supra* note 230, at 46. Lockridge puts New England literacy into a broader context of increasing literacy in Protestant countries. Most remarkable in this regard is Sweden’s achievement of universal (male and female) literacy before 1800. *Id.* at 99.

By the end of the eighteenth century, New Englanders would come close to achieving universal adult male literacy at around ninety percent.<sup>232</sup> By contrast, adult male literacy in Old England hovered around sixty percent into the nineteenth century.<sup>233</sup>

Besides their relative literacy, New Englanders enjoyed a corresponding degree of numeracy, a new fluency and even pleasure with numbers and counting that they brought with them from Old England.<sup>234</sup> In the sixteenth and seventeenth centuries, Englishmen increasingly relied on numbers and quantification as a means to both acquire knowledge and to understand the world.<sup>235</sup> Using written numbers, mathematics, thermometers, barometers and other means at their disposal, the numerate in seventeenth-century England and New England engaged in pantometry, the measuring of all things.<sup>236</sup> In turn, increasing numeracy and pantometry led to the wider development of various forms of applied mathematics in seventeenth-century England and elsewhere, including navigation, gunnery, accounting, architecture and, not least of all, surveying.<sup>237</sup> The agricultural and artisanal society of early New England, aspiring as it did to more rational and methodical knowledge of the world, perpetuated the new numerical emphasis by prizing factuality, measurement and quantification. In crates below deck on the Atlantic crossing, accompanying men who had a penchant and facility for numbers, colonists to New England brought the tools of the surveyor so that the new land too might be counted.

Like its literacy, New England's numeracy did not represent an unmitigated rupture with a memorial past or an unrelenting acceptance of a more rational, scientific world view. Just as the literate could unlock the divine through reading scripture, the numerate could also use quantification to connect to the mysterious ways of Providence.<sup>238</sup> Counting supplied some sense of order in a world that, despite one's best efforts in prayer or at the hornbook, often defied meaningful, rational explanation. Although much of their quantifying was highly practical, many New Englanders also appeared gratified to count for its own sake.<sup>239</sup> Arithmetic as then practiced, in fact, did not usually require logical, mathematical reasoning to reach a

232. *Id.* at 13.

233. *Id.* at 87-88.

234. COHEN, *supra* note 215, at 47. Hempstead's diary, and diaries like it, are replete with examples of what appears to be counting for counting's sake. *E.g.*, HEMPSTEAD *supra* note 33, at 165, 527.

235. COHEN, *supra* note 215, at 17. For quantification in the eighteenth century, see TORE FRÅNGSMYR, J.L. HEILBRONAND & ROBIN E. RIDER, *THE QUANTIFYING SPIRIT IN THE EIGHTEENTH CENTURY* (1990).

236. COHEN, *supra* note 215, at 16.

237. *Id.* at 16, 20-23.

238. *Id.* at 86-90; Hall, *supra* note 12, at 93-94, 214, 221-24.

239. COHEN, *supra* note 215, at 108-09.



result, remaining instead largely a memory art even into the eighteenth century.<sup>240</sup> Like traditional literacy, it too could prove an apt bridge between the memorial and the rational.

Applying the new numeracy and pantometry permitted New Englanders to incorporate another significant development into their formal property regime: surveying. Modern European surveying began in the sixteenth century as the pursuit of scholars and intellectuals, requiring as it did the use of applied mathematics and geometry.<sup>241</sup> By appointing manorial surveyors to perambulate, to measure bounds, and to make appraisals within a jurisdiction, local English manorial courts quickly seized on surveying knowledge and its practical applications.<sup>242</sup> New Englanders replicated this aspect of English manorial administration at the county level (as they did many manorial customs) by requiring the appointment of at least one county surveyor officially authorized to measure and verify legal boundaries. Answering this call were a goodly number of pragmatic New Englanders who had arrived with surveying instruments in tow. These amateur technicians often conveyed their skills, along with their tools, to sons and nephews so that the art of surveying passed from generation to generation in many New England families.<sup>243</sup>

To undertake a survey, New Englanders carried with them a Gunther's chain. Developed by astronomer Edmund Gunther in the early seventeenth century,<sup>244</sup> the Gunther's chain was sixty-six feet of one hundred heavy, iron links with a brass ring marking each ten-foot interval.<sup>245</sup> Applying the Gunther's chain to measure square areas, the New England surveyor then used a circumferentor, or surveyor's compass, for angle measures and to fix a location. With the geometry and trigonometry in his head, he could carry out triangulations and final calculations.<sup>246</sup> Even as more sophisticated instrument techniques emerged in Europe, the Gunther's chain remained the favored method of Old and New England surveyors throughout the eighteenth century.<sup>247</sup> New England's surveyors, in particular, were reluctant to adopt more advanced techniques that would be expensive and difficult to purchase, implement and maintain in North

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240. *Id.* at 8, 121.

241. Candee, *supra* note 69, at 10. Surveying in various forms existed long before the early modern period. In England, Anglo-Saxon surveying practices were standardized after the Norman Conquest, including the measurement of the English rod (16 ½ feet) and acre (160 square rods). RICHESON, *supra* note 38, at 17, 25.

242. RICHESON, *supra* note 38, at 30-31.

243. *See* Candee, *supra* note 69, at 40.

244. THOMPSON, *supra* note 104, at 10.

245. RICHESON, *supra* note 38, at 109, 141. For an image of a Gunther's chain, see ALLPORT, *supra* note 54, at 48. On the Gunther's chain, ten square chains equal one acre and eighty chain links equal one mile. *See id.* at 49.

246. THOMPSON, *supra* note 104, at 10.

247. RICHESON, *supra* note 38, at 159.

America. Newer techniques also required superior technical skills to operate accurately, in particular to negotiate the angle measurements of a hilly, rocky terrain such as New England's. Early colonial surveyors were unlikely to possess such advanced skills.<sup>248</sup>

Although surveying represented the quantitative, technological new world, its practice on the ground also harkened back to a performative past, providing explicit parallels to beating the bounds. A man with a Gunther's chain was no solitary technician who could work unaccompanied. He needed chainmen to hold the chain and together move from marker to marker across the landscape in an inherently social progression. Often chainmen were young boys, even sons, who learned both the bounds and technique of surveying while walking the land just as young medievals had done with their elders. In fact, the survey itself could appear both a technological expression of legal and scientific culture and a conspicuous reenactment of the old perambulation, complete with child witnesses.

Once written as a metes and bounds description in a deed or in the land records in compliance with the new recording statutes, a survey provided a technical summary of property. At the same time, a description was an expressly personal narrative through time and space.<sup>249</sup> Originally given to town clerks by spoken word, metes and bounds descriptions allow readers and listeners to "perambulate" the property over and over again in the mind's eye, reliving both the survey and the walk from marker to marker through a land vividly depicted.<sup>250</sup>

#### CONCLUSION

Many vestiges of the early American legal landscape have endured, recalling a time when all land was not yet property. Among them are colonial metes and bounds descriptions, holding fast in the often cramped, overburdened archives of town and city clerks across New England. These small narratives, now jarringly anachronistic, remain a functional element of the modern regional property regime, even as advancements in surveying have rendered their method clumsy and quaint. Also in force are recording statutes, founded on innovative legislation enacted in the earliest years of English settlement. Despite the inefficiencies and confusion they can engender, the recording statutes remain the colonial New Englanders' most important legacy in the articulation of property: the first standardized recordation of deeds.

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248. *Id.* at 160.

249. Richard Lyman Bushman, *Farmers in Court, Orange County, North Carolina, 1750-1776*, in *THE MANY LEGALITIES OF EARLY AMERICA* 388, 395 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

250. Candee, *supra* note 69, at 9.

Both of these remnants testify loudly to the aims of colonial New Englanders in establishing a law of property in a new land. In large part, colonials attempted to re-create familiar English law and circumstances, but New Englanders also aspired to implement the new, more rational conception of the world. They even dared to submit nature to their will through counting, measuring and explaining. Still, for their new world to flourish, it needed stable and coherent boundaries in the land. To achieve stability in property arrangements, New Englanders did not hesitate to draw from ancient performative custom. They recognized perambulations as an effective and relatively efficient legal procedure for New England's distinctive social and legal geography.

In perambulating their bounds, New Englanders also asserted their own history onto the landscape. They colonized it with peculiar rock arrangements and notched trees, creating visual hybrids of a law based in reason and the folkway. This synthesis embodied in the landscape contributed to the functionality of New England's property system. Perhaps it also gave New Englanders some transcendence from the here and now to an age-old past and to the providential properties of the everyday.

Much like the text of a metes and bounds, or the idea of a recording statute, a literal reminder of the old perambulations also lingers, visible at the edges of strip malls and in the midst of suburban sprawl. Even as they crumble at the side of a modern interstate highway, New England's stone walls still tell of the bounds they once made known and also of bounders who walked and tapped with sticks. As American legal culture continues to strive towards the rational and knowable, traces of the performative past endure and inform. Like the crumbling roadside walls, much of the meaning they now offer is perhaps expressive. Fringe relics and ornaments along modern developments in property, they can appear eloquent nonetheless.