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Reconsidering the Strength of the Boundary Line

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Date : October 21, 2019

David A. Dana & Nadav Shoked, *Property's Edges*, 60 **B.C. L. Rev.** 753 (2019).

I was thrilled when I discovered Property's Edges, a recent article by David Dana and Nadav Shoked, who are both at Northwestern University School of Law. Their article sets up an extremely helpful framework to think about boundaries, borders, and the liminal spaces in between purely public and purely private. Specifically, Dana and Shoked suggest that property law distinguishes the borders of an asset from its center. Thus, we have (or should have) weaker rights of ownership in the edges of an asset, which are close to its boundary with private property, than we do at its core.

They use this framework—viewing ownership on a continuum from public to private—to dismantle the prevailing belief, espoused by many lawmakers and some scholars, that private property protections are unitary across a given asset, with the boundary line serving as a hard division between private and public space.

Shoked and Dana begin by examining existing property narratives, which the authors view as including this unitary idea of private property, or what we might think of as a formal boundary approach to property.

According to this view, property theory presumes entitlements are just as strong at the center of the property as at its edges. Thus, if the border is crossed, some sort of wrong has been committed and harm ensues. However, the authors assert that the law in fact does not uphold this unitary vision of property ownership.

Rather, they suggest that "the law treats property not as a binary private/public choice, but as a spectrum proceeding from a core of intensely-protected private property into much less protected edges of private property that blend into the public space." In making this argument, Shoked and Dana look at three examples: trespass, aerial navigation, and police searches.

With respect to their example of trespass, the authors admit that a tort claim for trespass might exist regardless of where on a person's property the offender enters. However, there will typically only be meaningful harm, and thus a substantial award of damages, if the trespass occurs on the "core" of the property (e.g., "the residence, the place of business, the cultivated area," rather than the area near its boundary).

Similarly, while police need a warrant to search a person's house or its "curtilage," they do not need one to search the "open fields" surrounding it. Thus, these examples support the claim that the law already acknowledges the idea of property "edges," despite what some lawmakers might believe.

The article then focuses on the reasons that the law tends to protect certain parts of private property more than others. The authors present normative, empirical, and administrative points, suggesting that both efficient development of land and privacy are advanced more by protecting the core of property than its edges.

They also suggest that there are public interests at stake: "At some physical point, as the space draws closer to the public realm or to the property of others, the public becomes a better arbiter of the space's best uses."

The idea here is that the public use of this space should be more efficient than a private owner's use or decision about its use would be. Further, a conception of ownership that offers greater protection for the home than a parcel's boundaries comports with public expectations about privacy and property, a point that has been corroborated by

experiments and surveys.

Finally, the authors argue that, if we actually protected all parts of property equally, too much would wind up being litigated, including small and harmless intrusions.

The article then relies on three disparate ideas—lead poisoning caused by lead pipes; drones flying over private property; and shoreline rights in the face of climate change—to illustrate the problems that arise when legislators rely on a unitary vision of property, especially as technological advances stretch the workability of existing legal frameworks. One of the article's strengths is the way that it relies on these varied examples to show how the law already views core and edges differently, and the problems that arise when relying on strict boundary demarcations between public and private land.

The authors begin this part of the paper by examining the need to replace lead pipes in residential areas. Here, they point to the problems that arise in deciding which pipes are the responsibility of the private homeowner, which are the responsibility of the government, and where to draw those lines.

In another example, the authors recognize that the unitary vision of property has inspired our current shoreline property ownership regime, which often sets a demarcation between public beach and private upland sand.

Further, the law establishes clear rules and different outcomes for gradual versus sudden changes in land, and additions versus subtractions to land. The problem with this approach, according to the article, is that shorelines are not constant; they are malleable and will continue to move over time. Specifically, oceans are rising because of climate change. This means current shoreline changes generally take the form of a decrease in dry sand, which results in beachfront property owners losing property.

Shoked and Dana suggest that if courts used an edges approach to considering public and private beach rights, they would not need to try to characterize shorefront land as solely public or solely private. The authors suggest that courts already do this in part through an application of the public trust doctrine, which recognizes that there are both public and private entitlements to beaches.

The article concludes by extending the idea of property edges from real property to intellectual property. Here, the authors focus on music sampling and the idea that copyright law distinguishes the core, or signature essence, of a work of art from its edges.

In sum, the article's success lies in its introduction of a new term for a familiar concept: the "edges" of property. By defining this space—where both private and public interests exist—Shoked and Dana allow us to understand court decisions and statutes that stray from the formal boundary approach to property law, and to recognize the problems that can arise from "boundary fetishism."

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