Roger Williams University Law Review

Volume 17 | Issue 1 Article 17

Winter 2012

Emerging Issue: Coastal and Marine Spatial Planning:Beach Access, Trespass, and the Social Enactment of Property

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Recommended Citation
Thompson, Robert (2012) "Emerging Issue: Coastal and Marine Spatial Planning:Beach Access, Trespass, and the Social Enactment of Property," *Roger Williams University Law Review*: Vol. 17: Iss. 1, Article 17.
Available at: http://docs.rwu.edu/rwu_LR/vol17/iss1/17

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Beach Access, Tresspass, and the Social Enactment of Property

Robert Thompson*

I. INTRODUCTION

Many people go to the beach each year to relax in the sun, swim in the sea, and beachcomb. Stephen Kellert, who is a leading scholar working in the area of sociobiology, has argued that visiting the beach is an unusually satisfying activity for people:

> Vast numbers of Americans engage in walking and exploring beaches, shores and wetlands. The mental and physical benefits associated with heightened awareness and contact with the coast may be among the most ancient outdoor recreational activities known.[1]

Thus, it should not be surprising that an estimated 122 million people visit American beaches each year.[2] According to the Rhode Island Tourism Division, Rhode Island has over 100 beaches along more than 400 miles of shoreline[3] that the Tourism Division

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1. Stephen R. Kellert, *Coastal Values and a Sense of Place*, *in* AMERICA'S CHANGING COASTS: PRIVATE RIGHTS AND PUBLIC TRUST 12, 17. (Diana M. Whitelaw & Gerald R. Visgilio eds., 2005).

2. NATALIE SPRINGUEL & CATHERINE SCHMITT, ME. SEA GRANT COLL. PROGRAM, ACCESS TO THE WATERFRONT: ISSUES AND SOLUTIONS ACROSS THE NATION 4 (2007). *See also* TIMOTHY BEATLEY, DAVID J. BROWER & ANNA K. SCHWAB, AN INTRODUCTION TO COASTAL ZONE MANAGEMENT 2 (2d ed. 2002) (puting the number of visitors to the coast at 180 million).

3. *Travel Trade*, VISIT RHODE ISLAND, http://www.visitrhodeisland.com/

encourages visitors to come and enjoy:

> [T]he state has numerous ocean beaches with thundering surf and miles of stunning vistas. Doze off listening to the waves, take time to build an amazing sandcastle, stroll the sun-speckled sand beachcombing for shells, or cast a fishing rod into the open water. Welcome to Rhode Island – just another day at the beach.[4]

What the Tourism Division does not tell you is that Rhode Island beaches are also an excellent place to think about property law and the "enactment of property."

What do I mean by the "enactment of property"? There is a long tradition that views rules for property as an important means for establishing the "proper" ordering of social and political life. Once boundaries are established and the land is owned, expectations for behavior can be set for that bounded land. We know only from people's behavior whether property is firmly established. As Nicholas Blomley has explained:

> [P]roperty doesn't just happen . . . . [P]roperty is an enactment. In this sense, a property regime is never complete and self-evident but requires a continual doing. The doing of real property happens not only in courtrooms and the law schools. Property must also be put to work on material spaces and real people . . . .[5]

Rhode Island beaches are a material space where a highly ambiguous line theoretically divides the right of the entire public to relax, stroll, and explore from the right of the shoreline property owner to exclude the world. Because that line is ambiguous, beaches provide us an opportunity to show how property boundaries, rights, and understandings of what is proper can be contested and negotiated through the actions of real people. Rhode Island beaches also provide an example of how the rules of property announced by the courts can differ from the actual practice of property.

This essay in particular explores the connection between the

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travel-trade/ (last visited Oct. 15, 2011).

4. *Explore Rhode Island Beaches*, VISIT RHODE ISLAND, http://www.visitrhodeisland.com/what-to-do/beaches/ (last visited Oct. 15, 2011).

5. Nicholas K. Blomley, *Mud for the Land*, 14 PUB. CULTURE 557, 557 (2002) (citations omitted).

concepts of property and propriety uses, employing the concept of trespass as an example of an impropriety. Thus, the essay begins with a brief discussion on these topics. Then the essay briefly reviews examples of the different methods that various states use for establishing the line between public and private property rights along an ocean beach, that is, the line that should theoretically establish a trespass when it is crossed. The remainder of the essay examines why this line that has been established through court cases might not be respected in practice and what actions shoreline property owners and members of the public might take when this line is not respected as a legitimate property boundary.

II. DISCUSSION

A. Property as Propriety and Trespass as Impropriety.

There is a long tradition that views rules for property as an important means for establishing the "proper" ordering of social and political life. Once boundaries are established and the land is owned, expectations for behavior can be set for that bounded land. As Peñalver and Katyal explain:

> Ownership of land and the structures attached to land provide the spaces and places in which we carry out our social existence and clarify the divisions of labor, responsibility, and authority necessary for the very conduct of human society. Accordingly, property rights and the social norms that accompany (and are often reinforced by) property ownership play an important role in ordering our interactions with other human beings.[6]

In fact, we often use property to metaphorically conceptualize proper behavior when we speak about interpersonal relations in terms of "setting boundaries" and "crossing boundaries."

This connection between conceptualizing proper behavior and property is very old and deeply rooted in our language and thought. The *English Oxford Dictionary* defines the word "propriety" as "[t]he quality of being proper, or that which is

6. Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1132 (2007).

proper."[7] The etymology of "propriety," however, indicates that in Anglo-Norman and Middle French the word referred to the ownership of property. Initially, it referred to personal property. However, as early as 1377, the word "propriety" was used to refer to landed property as well. It is important to remember that one's ownership in landed property in the Middle Ages always included responsibilities to the community that were intended to ensure proper social order and a functional society.[8] Indeed, within the long development of property theory and practice, there is a tradition of understanding property and propriety as being inextricably linked. Within this tradition, the main purpose of property is not to separate people by creating boundaries, but instead to play an important role in establishing the "proper" ordering of social and political life.[9] According to this older tradition,

> property is the material foundation for creating and maintaining the proper social order, the private basis for the public good. This tradition, whose roots can be traced back to Aristotle, has continuously understood the individual human as an inherently social being, inevitably dependent on others not only to thrive but even just to survive.[10]

Once boundaries are established and the land is owned, expectations for behavior can be set for that bounded land.

While the word "trespass" is more commonly understood today in terms of trespass to property (as exhibited in the "No

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7. *Propriety Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com (search for "propriety") (last visited Oct. 20, 2011).

8. *See* RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 66-73 (1996).

9. CAROL M. ROSE, *"Takings" and the Practices of Property: Property as Wealth, Property as "Propriety"*, *in* PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 49, 58-66 (1994). *See also* Donald A. Krueckeburg, *The Difficult Character of Property: To Whom Do Things Belong?*, 61 J. AM. PLAN. ASS'N 301, 302 (1995) (commenting, while bemoaning the emphasis on profit in modern property theory, that "[t]here are also normative connotations to property, linked to the French *propre*, suggesting correctness, cleanliness, honesty, decency – being proper. Hence property historically seems to have to do with the good character of things which identify us.").

10. GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 1-2 (1997).

Trespassing" signs nailed to trees and fences), the *Oxford English Dictionary* indicates that the older meaning of the word was "To commit a transgression or offence; to transgress, offend; to sin."[11] In fact, according to the *Oxford English Dictionary*, the use of trespass to indicate a sin or transgression can be found as early as 1303, whereas the use of trespass to specifically mean illegally entering onto another's land does not appear until 1455.[12] As will be shown below, knowing whether one has legally trespassed upon private land is very difficult along a sandy beach; consequently, this essay will argue that the older sense of trespass as a community recognized transgression against a person often seems more important in determining where people walk or relax on the beach.

B. Physical Boundaries, Clear Signs, and Trespass.

As Blomley has explained,

> The environment of the everyday is . . . propertied, divided into both thine and mine and more generally into public and private domains, all of which depend upon and presuppose the internalization of subtle and diverse property rules that enjoin comportment, movement, and action.[13]

Yet someone claiming ownership has to somehow let the rest of the public know what they are claiming both in terms of space and behavioral expectations. Thus, Carol Rose and others have argued that to "possess" property and to claim rights requires one to engage in acts that put the community on notice.[14] When

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11. *Trespass Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com (search for "trespass") (last visited Oct. 20, 2011).

12. *Id.*

13. Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 121, 131 (2003) [hereinafter *Law, Property, and the Geography of Violence*].

14. For example, when discussing claims based upon first-in-time or adverse possession, Rose writes:

> Possession now begins to look even more like something that requires a kind of communication, and the original claim to the property looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question. Moreover, some venerable statutory law requires the acquirer to

trespass is understood as the unauthorized entering onto the property of another, then the clear communication of property boundaries would seem to be paramount, particularly when the United States Supreme Court has recently described the right to exclude others from one's property as a fundamental property right.[15]

While a focus on boundaries might be relatively unproblematic with inland parcels, it has been long recognized that ocean shores are not like other boundaries. On the shore, the right of the individual to exclude and the right of the entire nation not to be excluded collide at a line in the sand. Yet, in the United States, the conceptualization of where public dominion ends and individual dominion begins is not clear or shared. In fact, different states follow different rules to set the boundary between private and public rights. For example, Massachusetts uses the mean low tide line, California and Rhode Island use the mean high tide line, Hawaii uses the debris line, and in Oregon the public has access to the dry sand area.[16] While it is quite likely that many, if not most, residents of coastal communities do not know their state's definition of the legal boundary on the beach, conceivably most of the users of the beach during the peak season – when trespass is most likely to occur – might be tourists, the vast majority of whom almost certainly do not know what the rule is in the state that they are visiting.

Yet, even if rules for establishing the shoreline boundary were uniform and widely understood, the boundary still might not be adequately knowable to enable the owner to exercise his or her right to exclude others or for the public user to avoid trespass with any level of certainty. Few visitors or beachfront residents would be able to locate accurately the location of a mean high tide line that is

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> *keep on* speaking, lest she lose title through the odd but fascinating doctrine of adverse possession.

CAROL M. ROSE, *Possession as the Origin of Property*, *in* PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP, *supra* note 9, at 11, 14 (1994). *See also* PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492–1640, at 28-29 (1995) (explaining that the gardens of the Colonists were seen as "a symbol of possession").

15. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (calling the right to exclude "perhaps the most fundamental of all property interests").

16. GEORGE M. COLE, WATER BOUNDARIES 4-5 (1997).

legally defined as the line at which a shifting sandy shore meets the theoretical horizontal tidal plane that is established by measuring the arithmetic average of high-water heights observed over an 18.6-year cycle.[17]

Figure 1: Tree with private property sign torn down by coastal storm surge.

If we move away from the shoreline, we always need visual markers to identify property boundaries accurately. Fences, hedges, walls, survey markers, and such are signifiers of property claims that help to maintain property rights, direct social behavior, and avoid conflict. Such markings on the land are examples of the communicative acts to which Rose refers. The ocean, however, seems to treat attempts to establish claims of ownership along the shore with contempt. A stormy ocean can quickly obliterate common boundary markers (see figure 1).

17. The United States Supreme Court adopted the mean high tide line as measured over a 18.6 year period as the boundary between the tideland and upland in *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935).

The further property markers are from the permanent vegetation line and the closer they are to the water, the more frequently they will have to be replaced after storms. More importantly, though, the shoreline property boundary along a sandy beach is constantly changing its position because the beach profile changes over time (even in the absence of storms).[18] Consequently, to maintain accurate boundary markers on a beach face, the boundary would have to be resurveyed after every winter storm (when a beach can become lower, flatter, and wider as sediment is moved offshore) and even periodically during the calmer summer months (when the beach tends to gain sediment and height).[19]

C. An Unknowable Line and the Forgivable Trespass.

If one considers that in its earliest usage "trespasser" meant a "transgressor, a law-breaker; a wrong-doer, sinner, offender,"[20] and that trespassing only later came to be closely associated with trespass on land, then it helps us to focus on the fact that we are really concerned about an intentional breach of the social order that is morally culpable. But if one cannot easily identify the boundary line on the beach between private and public property, is a person morally blameworthy for a social impropriety if that person unknowingly strays across it?

In *State v. Ibbison*,[21] the Rhode Island Supreme Court faced this very question and reached a conclusion that, as will be shown below, allows us to focus on the actual practice of property and the construction of behavioral expectations for space. In *Ibbison*, the defendants, who were involved in a beach cleanup, were arrested by a local police officer at the request of a littoral property owner.[22] In this case, the shoreline property owner and the defendants were not arguing over whether the defendants had a right to be on the shoreline property owner's land, (e.g., through a public servitude); instead, the parties were arguing over where the

18. ROBIN DAVIDSON-ARNOTT, INTRODUCTION TO COASTAL PROCESSES AND GEOMORPHOLOGY 216-17 (2010).

19. *See, e.g.*, ORRIN H. PILKEY ET AL., THE NORTH CAROLINA SHORE AND ITS BARRIER ISLANDS 56-59 (1998).

20. *Trespasser Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com (search for "trespasser") (last visited Sept. 24, 2011).

21. 448 A.2d 728 (R.I. 1982).

22. *Id.* at 729.

line between public and private property was. The *Ibbison* court succinctly explained the property line dispute as follows:

> Kay, believing his private property extended to the *mean-high-water line*, had staked out that line previously. He informed defendants that they were not permitted to cross the landward side of it. The defendants, on the other hand, believed that their right to traverse the shore extended to the high-water mark. This line was defined by defendants in the Superior Court as a visible line on the shore indicated by the reach of *an average high tide* and further indicated by drifts and seaweed along the shore.[23]

The property owner and the public users seem to be using essentially the same definition for the boundary line: the mean-high-water line and the average high tide. However, they clearly had differing ideas on how one would find the mean or average high tide mark. The public users equated this line with a "visible" line that was indicated at least in part by the drift or wrack line, which will be discussed below. The property owner had evidently surveyed the line using an unspecified method that set the line seaward of the visible wrack line and then attempted to communicate his property claim to the public by driving a line of stakes into the ground.

The court rejected the visible wrack line as the boundary line, not because it was not the mean high tide line, but because there was no reliable evidence that it was the mean high tide line:

> Similarly, defendants have defined the high-water mark in terms of an average. The defendants contend that their high-water mark is such, however, that it is readily observable because of drifts and the presence of seaweed. Our difficulty in accepting this position is that we have absolutely no evidence before us from which we could determine that this is generally true.[24]

The *Ibbison* court ended up settling on a boundary between public and private that is the mean high tide as "determined over

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23. *Id.* (emphasis added).
24. *Id.* at 730.

a period of years using modern scientific techniques . . . ."[25] The court, however, also made this very important admission: "We doubt, however, that any boundary could be set that would be readily apparent to an observer when we consider the varied topography of our shoreline."[26] So even though the court was able to adopt a line that was scientifically precise, it is impractical in practice; the line could not be used to clearly communicate expectations of behavior and, hence, it could not be readily used to punish improprieties because public users could not be clearly put on notice that they were about to trespass.

The *Ibbison* court explained as follows:

> We affirm the dismissals [of trespass charges] since basic due process provides that no man shall be held criminally responsible for conduct that he could not reasonably understand to be proscribed. Although this situation most often occurs when statutes are challenged for vagueness, we find that the facts of this case are such that these defendants are entitled to similar protection.
>
> In the future, any municipality that intends to impose criminal penalties for trespass on waterfront property above the mean-high-tide line must prove beyond reasonable doubt that the defendant knew the location of the boundary line and intentionally trespassed across it.[27]

So the court first admits that it doubts that any boundary can be chosen that is "readily apparent" to public users; then it chooses a line that can be identified only with expensive equipment and extensive expertise; and finally the court announces that a public user can be punished for the transgression of trespass only if the State proves beyond a reasonable doubt that the public user knew where the line (that is not readily apparent) was and intentionally crossed it. In short, the legally defined boundary between public and private is pretty much worthless for purposes of prosecuting criminal trespass. The line that the court announced cannot do the work of property.

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25. *Id.* at 732. *See generally id.* at 731-733 (discussing the Common Law and the decision to adopt the mean high tide line as measured over an 18.6 year lunar cycle).

26. *Id.* at 732.

27. *Id.* at 733 (citations omitted).

But if as a society we believe that trespass to property is bad and that private owners have some rights to exclude others and to privacy, then how can shoreline property owners protect their property and public users respect private property when the property boundary chosen by the court is unworkable? The facetious answer is that the State prosecutes only professional surveyors with specialized training. The serious answer is that the State prosecutes only public users who are so far up on the backshore (i.e., the area that forms above the seasonal high tide level)[28] or even into a landscaped yard that the user had to have known that he or she was well beyond the line. However, there is often a good deal of space between the property owner's landscaping and the ocean, between the clear, knowing trespass and the clearly not trespassing. What is to be done here?

D. Creating a New Social Boundary through the Enactment of Property.

There are three ways to potentially explain what is going on down on the beach when it comes to boundaries for behavior. First, public beach users and property owners agree (even if only begrudgingly) that property owners have a right to exclude walkers from some portion of the shoreline and they are trying to enact a workable boundary (although not necessarily a sharp boundary) that is different from the boundary that is established by the court. Second, some public beach users might disagree with the decisions of the court that the shoreline property owners should be able to exclude the public from any portion of the beach and these members of the public are engaged in intentional trespass or they are completely indifferent as to whether they are trespassing. Third, some walkers probably have no idea what the actual law or custom might be and they simply watch other walkers to try to get cues as to where they are allowed to walk without getting into trouble; in other words, they might be looking for directions as to where to walk to not trespass or at least where they can trespass without being harassed or even arrested. This latter behavior is similar to figuring out how fast you can drive on a freeway without worrying about getting a ticket. This essay is

28. COLIN D. WOODROFFE, COASTS: FORM, PROCESS, AND EVOLUTION 265 (2002).

primarily interested in the first group of public users: those who are looking for a workable boundary that will allow them to use the beach but still respect the shoreline owners.

Even though the legal definition of the boundary between private and public is very scientifically precise, we have seen that it cannot be identified with any precision when trying to enact property in a real world with oceans in motion and shifting sands. In practice, though, the boundary line does not need to be precise to avoid trespass in the sense of trespass against a person, i.e., committing an offensive act. For example, when I was recently walking down a Rhode Island beach with a history professor who grew up near the Connecticut shoreline,[29] he explained that he did not know what the legal rule was for establishing the property boundary, but for as long as he could remember he had simply tried to walk far enough from the houses to respect the owners' privacy. For him, property was still about proper behavior and proper social order. Yet, he was more concerned about respecting the person than respecting a precise line. Consequently, he was able to use rough distances, which were influenced by such factors as the distance of houses from the beach and the width of the beach, rather than depend on knowing where any precise, legally defined line was located. In his mind, proper behavior and social order were still connected to the ownership of property, but the enactment of property depended on his sense of propriety rather than the owner's ability to communicate clear property lines and demand his exclusion.

Still, many if not most people might prefer some visible line between private and public property and, if one looks at a typical sandy beach, public users have a handful of natural features that they can use as a boundary line. Starting on the ocean side, the first natural line is typically the swash line, which is the line that forms at the landward edge of a wave as the water and foam either sink into the sand or slide back down the foreshore as gravity overtakes the wave's inertia (see figure 2). While every wave will leave a thin line of sand at this edge, most people probably simply distinguish a line between dry and wet sand.

29. In Connecticut the public trust land does extend up to the mean high tide line. *See Living on the Shore, Who Owns the Shore: The Public Trust*, CONN. DEP'T ENERGY & ENVTL. PROTECTION, http://www.ct.gov/dep/cwp/view.asp?A=2705&Q=323804 (last visited Oct. 17, 2011).

Because it is likely that most people do not take wave run-up into account, staying on the wet side of the swash line probably seems quite safe to anyone who knows that he or she is in a mean high tide line state.

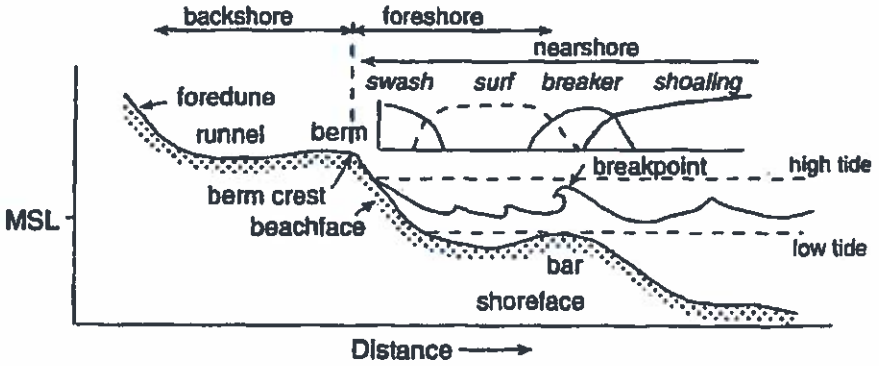

Figure 2: Shoreface profile.

Of course, as the tide goes out, the wet/dry line (that is, the swash line formed by the combination of tide height and wave power that produced the highest wave run-up) stays above the succession of receding swash lines. Thus, until the sand dries, the public has a choice between the swash line and the more generous wet/dry line.

The next possible line might be the wrack line. This line forms where the waves deposit seaweed and, regrettably, trash. The wrack line might seem to be the sensible line. Indeed, the defendants in *Ibbison* argued that the wrack line should be used to mark the boundary.[30] While the defendants in *Ibbison* may have been unsuccessful in establishing the wrack line as the legally recognized boundary, the Department of Energy and Environmental Protection in neighboring Connecticut still advises the public to use the wrack line as a proxy for the mean high tide line:

> The public trust area includes submerged lands and waters waterward of the mean high water line in tidal, coastal, or navigable waters of the state of Connecticut. On the ground, the mean high water boundary of the -

30. 448 A.2d at 732.

> public trust area can often be determined by a prominent wrack line, debris line, or water mark. In general, if an area is regularly wet by the tides, you are probably safe to assume that it is in the public trust.[31]

In truth, though, there can be multiple wrack lines on an ocean beach because the height of the high tides and the size of the waves changes from day to day.[32] The largest accumulations of wrack are left by storms. These larger deposits of wrack form lines that are high up on the beach, well above the mean high tide line. The lowest possible wrack line would correspond at least to the last highest swash line. Consequently, wrack lines are never less generous to the public user than the swash line.[33] The wrack line also has three clear advantages for a public user looking for a line. First, while the wrack line is not permanent, it is more stable than the swash line or the wet/dry line. Second, the public user will have room to walk on the beach without getting his or her feet wet most of the time. Third, the wrack line frequently provides the public user with more dry beach than the swash line, which allows for a wider variety of uses. This is particularly true if one uses the wrack line from the last storm as the boundary for trespass.

The wrack line also probably seems reasonable to the public user for two reasons. First, for the public user, it might be easy to conceptualize the end of private property as being a point where the ocean, which is public, has been under normal conditions; in other words, if the wrack is from a typical storm (rather than something like a hurricane storm surge), then the public user is just following the path of the public ocean.[34] Second, many public

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31. *Living on the Shore*, *supra* note 29.

32. On relatively undisturbed beaches,

> as many as three separate wrack lines can sometimes be seen. The lowest line of debris marks the normal high-tide line. The next, a foot or two higher, is from the last spring or full-moon tide, and the highest is from the last big storm.

ORRIN H. PILKEY, TRACY MONEGAN RICE & WILLIAM J. NEAL, HOW TO READ A NORTH CAROLINA BEACH 75 (2004).

33. On some beaches the wrack line does not exist because the beach is mechanically raked to remove the seaweed and garbage. *See* Robert Thompson, *Cultural Models and Shoreline Social Conflict*, 35 COASTAL MGMT. 211, 226-227 (2007).

34. Indeed, it was this very action of the ocean that made the beach

users know they have some right to access and use the ocean and its resources, even if they do not know exactly what their rights are. The wrack line actually allows more reasonable access to ocean uses than the swash line. In fact, the use of anything less than the wrack line seems illogical and historically indefensible in Rhode Island or any other state where early farmers collected seaweed to manure their fields. The historic right to collect seaweed is still protected in the Rhode Island Constitution.[35] The best time to collect seaweed is after storms and the best place to collect it is well up on the beach where the storm surge and waves deposited it. For example, in *Cape Cod*, Henry David Thoreau goes down to the beach, along with numerous other spectators, to witness the wreckage of a ship that sank in a storm during the night. After viewing the wreckage, Thoreau continues down the beach (seemingly without concern that he might be trespassing) and comes upon "an old man and his son collecting, with their team, the seaweed which that fatal storm had cast up."[36]

Another feature found on sandy beaches that might be used as a dividing line is the berm, which is the slight ridge-like formation that separates the foreshore from the backshore (see figure 3). The berm is a long, narrow ridge of sand that has a steeper slope facing the sea and a gentler slope facing the backshore.[37] The berm is formed during quieter weather as relatively gentle waves move sand from offshore up onto the beach. The berm tends to form at the upper most reaches of the swash zone as waves carry sand up the beach and deposit it high

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unsuitable for agriculture and permanent structures and hence public lands under Roman Law. *See* DAVID C. SLADE, R. KERRY KEHOE & JANE K. STAHL, COASTAL STATES ORG. INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 1 (2d ed. 1997).

35. R.I. CONST. art. I, § 17 ("The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed . . . .").

36. HENRY DAVID THOREAU, CAPE COD 20 (Bramhall House 1951) (1865). Anyone who visited a Rhode Island beach after Tropical Storm Irene would have seen huge amounts of seaweed. Today most people just perceive the seaweed as a smelly mess; but for farmers laboring in the days prior to industrially produced fertilizer, such an accumulation of seaweed would have meant a bountiful harvest.

37. PILKEY, *supra* note 19, at 24.

up on the berm when the water infiltrates into the sand. Lower on the beach face, the exfiltration of water helps to erode sand and steepen this slope of the berm (see figure 3). As the tidal cycle moves from neap to spring tides, the swash will overtop the berm for a short portion of the tidal cycle and deposit sand on the landward side of the berm, increasing its width and height.[38] Storm waves tend to attack and destroy the berm, moving the sediment from the berm to an offshore bar.[39] The top of the berm can be a very popular path for strollers because it is usually above the swash zone and relatively level. Also, if a runnel forms behind the berm and fills with water for part of the day (see figure 3), then the berm seems very much within reach of the public's ocean.

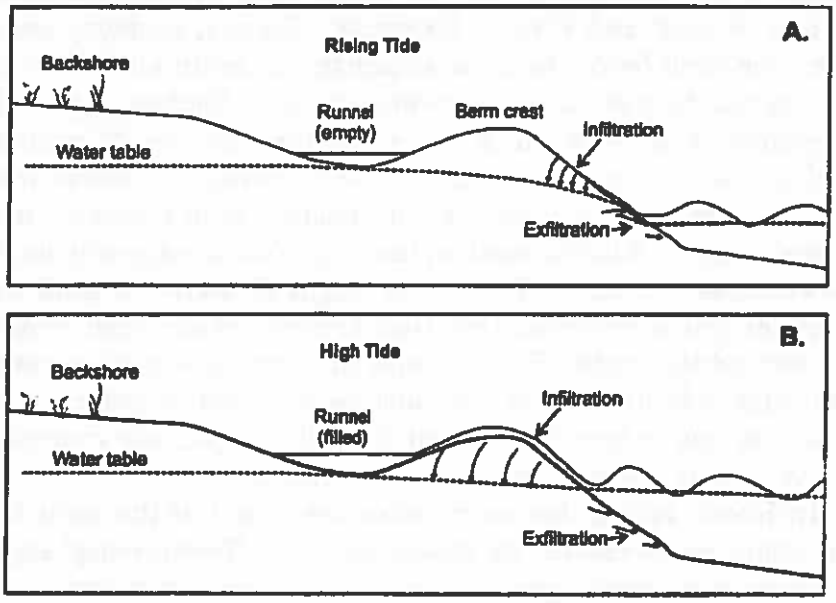

Figure 3. Berm profile

Beyond the berm is the backshore. While a spring tide or an earlier storm may have created a wrack line on the backshore, the backshore often has no features that could be used to mark a boundary until plants start to establish themselves, which is really the upper limit of the beach. This "pioneer" zone is

38. DAVIDSON-ARNOTT, *supra* note 18, at 218-19.
39. TONY BUTT & PAUL RUSSEL, SURF SCIENCE: AN INTRODUCTION TO WAVES FOR SURFING 71-72 (2002).

moisture deficient, exposed to salt spray, low in nutrients, and subject to burial by wind transported sand. Consequently, the plants in this area are limited to a few stress-adapted species, such as dune grasses. Plants that have adapted to this harsh environment are still vulnerable to destruction from waves during larger storms.[40] If there is enough sand in the system, an embryonic dune or even a foredune will begin to form within or just behind this pioneer zone.[41]

It is not uncommon for property owners to erect sand fences in the pioneer zone just in front of the frontal dune. There are at least three possible explanations as to why owners put up these fences. First, sand fences can be used to keep people off of dunes. Human traffic can destroy the stabilizing dune grasses and lead to the loss of sand and even to blowouts. Second, property owners might use sand fences to try to expedite the accumulation of sand and the building of dunes. However, if sand fencing is placed in the pioneer zone seaward of where the foredune would naturally develop, the accumulated sand will be vulnerable to storm waves and the fence will also interfere with aeolian sand transport to the natural area for dune formation, leading to an unnaturally narrow and vulnerable dune.[42] The owner might also erect a sand fence to put the public on notice that they are clearly excluded from the area behind the fence. Even though the fence is clearly above the mean high tide line set by the court as the legal boundary, it is a defensible line in practice; a sand fence in the pioneer zone might survive all but the most intense winter storms.

In Rhode Island, the communicative intent of the sand fence is at times made clearer by attaching a "No Trespassing" sign to the fence on a nearby post, which is of course a standard way of putting the public on notice in the United States. Quite interestingly, though, the "No Trespassing" signs that frequently appear on Rhode Island beaches are strikingly different than the commanding and even threatening signs that one typically sees. Figure 4 shows a sign that appears in front of many residences in Narragansett, Rhode Island. The sign begins by notifying the

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40. DAVIDSON-ARNOTT, *supra* note 18, at 228.

41. *Id.* at 256.

42. Karl F. Nordstrom, Reinhard Lampe & Lisa M. Vandemark, *Reestablishing Naturally Functioning Dunes on Developed Coasts*, 25 ENVTL. MGMT. 37, 40, 42, 47 (2000).

public that this is a private beach, but then it makes a polite request rather than a command: "Please Respect Our Privacy." Even the italicized script is pleasant and upbeat. The letters are an attractive green and the background is white, which is markedly more attractive and less aggressive than the typical color combinations of red on white; red on black; black on white; red, white, and black; or yellow and black that one normally sees on "No Trespassing" signs. These common colors are bold combinations aimed at making bold statements. While the "NO TRESPASSING" is in all-caps, it comes last. And while it is not quite an afterthought, the more commanding language and font seem to be reserved only for those members of the public who ignore the request for respectful treatment of people – because people can have privacy, but land cannot.

Figure 4: "No Trespassing" sign in Narragansett, Rhode Island.

A Google image search provided a sense of just how unusual these types of "No Trespassing" signs are. The search produced over 500 images of "No Trespassing" signs.[43] None of those signs included the word "please." Many of them were in fact rather hostile. For example, a rather popular and presumably facetious

43. Image Search Results for "No Trespassing Signs", GOOGLE IMAGES, http://images.google.com (enter "No Trespassing Signs" in search box and click "Search Images") (last visited Oct. 17. 2011).

one read, "Trespassers will be shot. Survivors will be shot again." Many included a phrase announcing the violators would be prosecuted, which we have seen is very difficult to do in Rhode Island. Perhaps without a clear line between public and private, property owners on the Rhode Island coast know that they cannot command proper behavior and threaten those who do not comply, but instead must appeal to the community's sense of proper behavior, which includes respecting one another's privacy.

But how do we respect privacy? We respect privacy by giving people space, by discretely averting our eyes, not by meticulously avoiding stepping over a line. If the mean high tide line was accurately surveyed and marked and then the public just stood at the line gawking at the shoreline owner's beach, house, and activities, then the public would not be respecting the owner's privacy. On the other hand, my historian friend, who had no clear idea of what the legal rule was or where the dividing line might be, was nonetheless very concerned about respecting the owner's privacy.

Another rather unusual type of "No Trespassing" sign has been showing up along the Rhode Island shore. These signs encourage public users to respect the environment rather than the property owners. The sign in figure 5, like the one in figure 4, is more of a gentle request than a typical "No Trespassing" sign, which tend to be a loud command. Figure 5, however, leads with the assertion that a "Dune restoration [is] in progress" and then follows with the polite request, "Please do not trespass." The simple "Private Property" notice comes only at the very end. Again, the sign is less assertive than a typical "No Trespassing" sign. The use of blue letters on a white background is subtle. While this sign does not use an upbeat italicized font as in figure 4, it does not follow the normal "No Trespassing" sign convention of using all capital letters – a convention that essentially shouts a command at the public. But unlike the sign pictured in figure 4, the one in figure 5 does not ask the public to respect the owner's privacy, but instead to respect the beach ecosystem itself.

Figure 5: "No Trespassing" sing emphasizing the environment rather than the property owner.

In this particular case, the request for respect of the environment seems disingenuous because the front porch of this house sits seaward of where a dune would naturally form. Sea level rise has caused the dune field to migrate past the house. The owners have installed massive, coconut fiber sand bags to protect the house. These bags, however, are too frequently inundated by storm waves for a lasting dune to form. However, if a genuine dune restoration were taking place, the typical signs of private ownership might not exist. There would be no landscaping or structures. In the absence of such signs of occupation, public users might not think they are trespassing on private property. Even if public users know that the dune area is privately owned, the absence of uses physically occupying the space might allow public users to believe that they can properly enter the dunes because they are not disrespecting anyone's privacy. Hence, a special sign requesting respect for the fragile dunes might be quite necessary.

So how might we interpret these "No Trespassing" signs that do not put the public on notice that the line is here and that crossing it will result in prosecution, but that instead ask the public to respect the owner's privacy or the fragility of the dunes? After the *Ibbison* decision, property owners seem to be faced with

a situation where the state cannot guarantee that the property owner will have the right – or at least the ability – to exclude the public from the private part of the beach. In other words, while arguably the threat of state-sanctioned force typically underlies every property system,[44] the *Ibbison* court has created a burden of proof that is so difficult – knowingly crossing an unknowable line – that the threat of state-sanctioned force is unavailable for all but the clearest transgressions. Hence, the "No Trespassing" signs are not written in forceful all-caps and they do not use forceful colors. When would a public user clearly know that he or she had crossed the line? Obviously if one leaves the beach and enters the landscaped yard, then an intentional trespass will have occurred. Once off of the beach, the trespasser should notice all of the indicators of privately managed property. Yet the area between the waves and the dunes is a far more uncertain space. Thus, in the absence of sanctioned state force, property owners appeal for propriety from the public users: respect our privacy and respect the environment.

III. CONCLUSION

Perhaps one of the problems with what might be called the property rights movement is that it has lost sight of the fact that the institution of property evolved to satisfy societal needs. Property was an important means for establishing social order and the character of property has changed as the needs of society changed. They have become obsessed with the idea that property is fundamentally about excluding others rather than ordering social interaction. By looking at actual behavior down on Rhode Island beaches, we can see that the enactment of property does not necessarily involve clearly marking lines and controlling space up to that line. The right to exclude everyone from all of your property is not essential to the enactment of property. The cost of beachfront real estate in Rhode Island is very high despite the ambiguity of the beachfront boundary. Would the cost be even higher if the owners could exclude the public from the entire beach? It seems safe to assume that it would. Would the cost be higher if the owners could prosecute any member of the public who crossed over the mean high tide line whether they knowingly

44. *Law, Property, and the Geography of Violence*, *supra* note 13, at 131.

did so or not? This seems less certain; it is not clear that the owner would have any more privacy because it is not clear that the public is crossing the line. However, perhaps more importantly, if the public is respecting the owner's privacy by keeping a respectful distance from the house, not gawking, and so forth, then the societal goal of respecting one another's privacy is met and the actual location of the mean high tide line is not of great consequence.

So why is the mean high tide line the legal boundary between public and private rights in Rhode Island? While it is beyond the scope of this essay to fully discuss how this choice of boundaries is poorly reasoned, scientifically naïve, and ahistorical with respect to the life of everyday coastal residents, it is also unnecessary because the line is unusable on an open ocean shoreline with sandy beaches. In other words, it cannot really be a property boundary that can achieve a social purpose. The mean high tide line is essentially a nonfunctional fiction. It cannot do the work of property. Therefore, the Rhode Island Supreme Court should perhaps revisit this boundary issue if given the opportunity and choose one of the more workable lines (such as the wrack line or berm) that can create a more orderly beach. I say "perhaps" because the property owners and public seem to be enacting a reasonable form of property along these beaches and because, so far, no one has threatened to charge me with trespass.