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Introduction to the Meador Lectures on Boundaries

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Introduction to the Meador Lectures on Boundaries

by Meredith M. Render

MEADOR LECTURES ON BOUNDARIES (2013)

MEADOR LECTURE SERIES 2011–2012: BOUNDARIES

INTRODUCTION TO THE MEADOR LECTURES ON BOUNDARIES

Meredith Render*

"Before I built a wall I'd ask to know
What I was walling in or walling out."[1]

I.

The 2011–2012 Meador Lecture Series on Boundaries illuminates a weighty and—paradoxically—somewhat unbounded notion.[2] The expansiveness of the concept of "boundaries" issues in part from various related but distinct senses of the word.[3] In one sense, as the epigraph suggests, a boundary is a *bulwark* that prevents entry into (or escape from) a given arena. The perimeter of a prison is such a boundary. The speed of light is also an example of this type of limit. Light travels at a rate of 299,792,458 meters per second.[4] It is a boundary that permits no transgression—there is no possibility of faster light travel. In this sense of the word, a boundary might be capable of effectively "walling out" a neighbor's cow or excluding a set of alternative possibilities. When we use the term in this sense, a boundary seems concrete, specific, and verifiable.

A second sense of the word "boundary" connotes a *threshold* or juncture at which an entity ceases to be one thing and begins to be another. In this sense a boundary can be abstract, vague, unverifiable, or even

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1.   Robert Frost, *Mending Wall* (1914), *reprinted in* THE POETRY OF ROBERT FROST: THE COLLECTED POEMS 33 (Edward Lathem ed., Henry Holt & Co. 1969).

2.   The Meador Lectures are named in honor of Daniel J. Meador, a graduate of and the former Dean of the University of Alabama School of Law. With this year's series we are particularly mindful of honoring Dean Meador, who passed away in February 2013. Prior to his death, Dean Meador was the James Monroe Professor of Law Emeritus at the University of Virginia School of Law.

3.   The *Oxford English Dictionary*, arguably the foremost authority on the use of English words, reports a similarly expansive understanding of the word "boundaries." It defines a "boundary" as "[t]hat which serves to indicate the bounds or limits of anything whether material or immaterial; also the limit itself." OXFORD ENGLISH DICTIONARY 1022 (1971).

4.   JEAN PHILLIPPE UZAN & BÉNÉDICTE LECLERCQ, THE NATURAL LAWS OF THE UNIVERSE 44 (Bob Mizon trans., 2008).

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imaginary (though it need not be).[5] The boundary between the colors blue and green may illustrate this point. If we begin with a palette covered in blue oil paint and gradually add the color yellow to it, the palette will, at some point, become green. The point at which the color ceases to be blue and begins to be green is a boundary. The precise point at which the color shifts may be difficult to identify, but a boundary—however blurry—can be fairly said to delineate the color blue from the color green. As Achille Varzi notes in his helpful essay on the topic: "Sometimes the exact location of a boundary is unclear or otherwise controversial . . . . But whether sharp or blurry, natural or artificial, for every object there appears to be a boundary that marks it off from the rest of the world."[6]

Varzi's observation leads us to a third sense in which we might use the term "boundary." When we use the word "boundary," we may be referring to partitions of *physical space*. When employing this third sense of the word, we may, for example, speak of the boundaries of the Great Barrier Reef, or even the manner in which Central Park West serves as a boundary for a particular neighborhood. Here we are primarily thinking about the manner in which physical space is concretely (e.g., a mountain range) rather than abstractly (i.e., a national boundary) partitioned. This sense of boundary is distinct from the sense of boundary as bulwark, in that the boundary of the Great Barrier Reef does not itself prevent the reef from shrinking or growing larger.

Finally, there is a fourth sense of the word "boundary." When we use the term "boundary," we may refer to a *rule* that designates a limit but is not itself a limit. The phrase "the speed limit is thirty miles per hour" refers to a boundary in this sense. Political limits and laws of all stripes are boundaries in this sense. When we speak about the boundaries of the Czech Republic, we are also referring to this sense of the word.

So when we speak of a boundary it is possible that we are speaking of a limit that serves as (1) a bulwark (as in the case of the speed of light), (2) a threshold (as with the distinction between blue and green), (3) a partition of physical space (as with a mountain range), or (4) a rule-bounded limit (as with the speed limit).

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5.   Consider, for example, the following description:

[I]t may be observed that ordinary objects and events, as well as the extensions of many ordinary concepts, may have boundaries that are in some sense fuzzy or indeterminate. Clouds, deserts, mountains, let alone the figures of an impressionist painting, all seem to elude the idealized notion of a sharply bounded object.

Achille Varzi, *Boundary*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed.) (Winter 2012 ed.), http://plato.stanford.edu/archives/win2012/entries/boundary/.

6.   *Id*.

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Rule-Bounded Limits

Further, as though this taxonomy were not baroque enough, within each of these senses we may be describing either a so-called natural or *bona fide* limit (although this is certainly a contested concept in itself)[7] or *fiat* limit.[8] A natural limit may be material (as with the boundaries of the Great Barrier Reef) or it may be abstract (as with a mathematical limit).[9] Similarly, a *fiat* limit may also be either material (as with Central Park West's bounding of the Upper-West Side) or it may be abstract (as in the case of a speed limit). When we speak of a boundary, we may, therefore, be describing something ephemeral or concrete, vague or specific, compulsory or volitional. It is indeed an expansive topic.

It is ironic, perhaps, that the concept of a "limit" turns out to be the great unifying feature of this expansive topic. More interesting still, even the distinction between natural and fiat boundaries can be further collapsed. Physical or natural limits such as the Great Barrier Reef or the speed of light are generally dependent upon two types of abstract limits.[10] The first of these limits is criterial or possibly even semantic: before we can measure the distance of the Great Barrier Reef, we must decide what "counts" as part of the "reef" and what does not. Similarly, before we can settle upon the speed of light, we must know first what "counts" as light, and so forth. The second type of limit is epistemic: we may hypothesize that the Great Barrier Reef has a boundary, but we may not know where that boundary lies.[11] Yet to resolve these criterial, semantic, or epistemic difficulties, we must rely on intellectual frames and concepts that are themselves bounded by fiat limits: notions like distance, time, and so forth.[12]

In this way, the concept of a boundary plays a role in our capacity to understand *everything*. Herein enters the weightiness of boundaries: insofar as concepts can be said to have boundaries, those boundaries are responsible for rendering coherent all of our notions and settled

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7. *See* Barry Smith & Achille Varzi, *Fiat and Bona Fide Boundaries*, 60 PHIL. & PHENOMENOLOGICAL RES. 401 (Mar. 2000), *available at* http://www.jstor.org/stable/pdfplus/2653492. pdf?acceptTC=true.

8. *Id*.

9. *Id*. at 402–03.

10. *See* Varzi, *supra* note 5 (comparing *bona fide* (i.e., natural) boundaries with *fiat* boundaries). As Varzi states:

   Geo-political boundaries such as the Mason–Dixon line are of the *fiat* sort, and it may well be that even the surfaces of ordinary material objects such as tables or tennis balls involve, on closer inspection, *fiat* articulations of some kind. So the question is, are there *any bona fide* boundaries?

Id.

11. *See generally* ROY SORENSEN, VAGUENESS AND CONTRADICTION (2001).

12. *See* Barry Smith & Achille Varzi, *supra* note 7, at 402–04.

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understandings.[13] The coherence of every concept that we hold depends upon its limitation. To be coherent, a concept must encompass a set of criteria that distinguishes the concept from other concepts.[14] The concept of "green," for example, would have no content if anything could be fairly described as green and nothing could be excluded from it. The same may be said for each concept that is contained within the complex complement of human understanding.

But the manner in which boundaries render concepts coherent can present something of a mystery in itself. Consider, for example, the phenomenon of baldness.[15] A person who possesses a full head of hair— imagine, for example, the Brothers Grimm's Rapunzel[16]—is clearly not bald. If you remove a single hair from Rapunzel's head, she would still not be bald because a single hair could not render a haired person bald. Yet if you continued plucking hairs, one at a time, eventually Rapunzel would have no hair at all. But at what point in the hair-plucking process did Rapunzel cross the threshold from haired to bald? On the haired-to-bald continuum, does a single hair delineate between designations of bald and haired—and if so, which hair is it?

The difficulty we face in arriving at a specific answer to this question is peculiar. We know that there is such a thing as being bald and such a thing as being haired, and we can identify examples of each. But it both *cannot* be the case that a single hair distinguishes the two states, and, at the same time, it *must* be the case that a single hair distinguishes the two states. This difficulty has been described by philosophers as the sorites paradox.[17] Since no one hair can transform a haired person into a bald person, how is it possible that anyone is bald? Another way of thinking about this problem

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13.   It should be noted that whether concepts have boundaries is a matter of considerable philosophical debate. *See, e.g.*, SORENSEN, *supra* note 11. This statement is contested in that some philosophers understand concepts to be coherent in the absence of "boundaries" in the conventional sense of the word. For example, some understand the truth values of a concept to be set on a continuum of truthness to falseness rather than to be strictly criterial. Others argue that concepts have boundaries, but we may not know what they are. The issue of concept limits is the subject of a discussion and literature too extensive to recap here, but for a general overview, see *id*.

14.   This statement is, obviously, contingent on the fact that concepts have boundaries, which is a contested position. *See id.*

15.   The example of baldness is often used to describe what is known as "little-by-little" arguments (also described as the sorites paradox, which is discussed infra). The specific example of baldness has been attributed to the Megarian logician Eubulides of Miletus. Dominic Hyde, *Sorites Paradox*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed.) (Winter 2011 ed.), http://plato.stanford.edu/archives/win2011/entries/sorites-paradox/.

16.   Jacob Grimm & Wilhelm Grimm, *Rapunzel*, *in* FAIRY TALES FROM THE BROTHERS GRIMM 58 (Philip Pullman trans., Viking Penguin 2012) (1812).

17.   *Cf.* LINDA C. BURNS, VAGUENESS: AN INVESTIGATION INTO NATURAL LANGUAGES AND THE SORITES PARADOX 4–5 (1991) (discussing an alternative philosophical view under which vague or imprecise boundaries are inherently defective).

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is: what is it, exactly, that renders stable and coherent our understanding of the word "bald"?

It is interesting to observe that our understanding of "bald" may be rendered more specific—which is, of course, not a synonym for coherent, but is nonetheless a start—if we had an authoritative rule to refer to when applying the term.[18] If, for example, the term "bald" referred to any person with less than twenty hairs on her head, then we would be able to point to the "rule of twenty" as a justification for our use of the term "bald." The "rule of twenty," were it to exist, may also serve as a basis of criticism of someone's "incorrect" use of the term.

Of course, if we applied the "rule of twenty" to our use of the term "bald," we would not solve the single-hair paradox. The puzzle of how any one hair could constitute the threshold between haired and baldness would persist. But we would be able to resolve the threshold question of *which* hair stands between haired status and bald status. If we adopted the "rule of twenty," we would know the answer to be the twentieth-to-last hair.

It should be noted that in terms of accurately capturing our sense of what "bald" means, the "rule of twenty" may have drawbacks. For example, it would fail to capture instances in which a person appears to be bald, but has more than twenty hairs, which might turn out to be a majority of cases. A rule that imposes a specific set of criteria upon the application of a vague term necessarily sacrifices some of the nuance of the original term.[19] Rules govern the general case and, as such, the factual predicate of every rule is a generalization.[20] In the "rule of twenty" example, the generalization is that bald people have less than twenty hairs. This generalization (like any other that we could fashion) is necessarily both over and under inclusive in light of what we typically mean by the term "bald."[21]

It may also be the case that by applying a rule such as the "rule of twenty" we are merely obscuring, but not eliminating, the problem highlighted by the sorites paradox. It may be that by applying the "rule of twenty" to our use of the term "bald" we have only managed to shift the

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18.   For a brief discussion of authoritarian rules, see Meredith Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133, 169–70 (2010) ("Some formulated rules are mediated by an authority that arbitrates disputes about when and how to apply the rules (such as a court in the case of the Rule Against Perpetuities or the Major League Baseball Commission in the case of baseball). Other formulated rules are not mediated by such authorities. For example, no one institution or person is authorized to determine when or how the Golden Rule has been violated.").

19.   *See* FREDERICK SCHAUER, PLAYING BY THE RULES 31–34 (1991) [hereinafter SCHAUER, RULES]; FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 45–46 (2003) [hereinafter SCHAUER, PROFILES].

20.   SCHAUER, RULES, *supra* note 19, at 31.

21.   For a discussion of rules as generalizations that can be both under and over inclusive, see *id.* at 31–34; and SCHAUER, PROFILES, *supra* note 19, at 45–46.

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controversy regarding conceptual boundaries to another locus. Rather than grappling with the criterial and paradoxical problems inherent within the concept of "bald," we now grapple with criterial and paradoxical problems inherent within the concept of "hair." Do microscopic hairs "count" (in which case, perhaps no one would be bald)? If not, how large must a hair be to "count" as one of the twenty? Assuming an infinitesimally small increase in size (e.g., an increase of 0.00000001 mm) cannot transform a hair that is too small to "count" into one that is large enough to "count" as one of the twenty, how is it possible that any hairs are large enough to count?

There is a further difficulty with a rule-based answer to the sorites paradox: there is no authority that has jurisdiction over our use of the word "bald." Unlike a concept like the speed of light (which is mediated by scientific authority), the concept of baldness is not primarily defined as a term of art that is regulated by a community of specialists. As a result, if I were to adopt the "rule of twenty," I would face difficulty defending my rule against other equally plausible rules (i.e., what is wrong with a "rule of thirty"?). Any defense I could muster would fall into the same crevices revealed by the sorites paradox: there is no one particular hair (or number of hairs) that can definitely capture the notion of baldness. So in terms of describing or delimiting the ontological phenomenon of baldness, the "rule of twenty" would be difficult to justify.

A final problem with the process of imposing a rule-bounded limit on a vague threshold-bounded concept[22] is perhaps the gravest. If we rely upon a rule to delineate the boundaries of a vague concept, and the rule becomes accepted by the relevant community (as it must be to "count" as a rule at all), the rule may become entrenched or reified such that it supersedes the original sense of the term.[23] For example, if we were to employ the "rule of twenty" to bound the term "baldness," then "less than twenty hairs" may literally become what we mean when we refer to people as "bald." We may lose the sense altogether that "baldness" once referred to a person without any (or much) hair.

The fact that a rule of application may eventually supersede the meaning of term may not be overly concerning in the context of a concept like "baldness" that boasts little inherent gravitas, but what about a concept

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22.   It should be noted that some "threshold limits"—in the sense the term is used here—are also bounded by specific rules. For example, in baseball, there is a point at which an initially fair ball may become a foul ball. A previously fair ball becomes a foul ball when the ball crosses the foul line. Thus the boundary distinguishing a fair ball from a foul ball is aptly described as a threshold (the juncture at which the ball ceases to be one thing (i.e., fair) and begins to be another (i.e., foul)), but it is not a vague threshold. Instead, the threshold is bounded by a specific rule that makes reference to physical line on the ground.

23.   SCHAUER, RULES, *supra* note 19, at 42–52 (explaining that rules become "entrenched" when they have been sufficiently accepted by the relevant community).

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like "human life"? The same paradoxes and criterial, semantic, and epistemic problems that attend the boundaries of the concept of "baldness" attend the boundaries of the concept of "human life." The term "human life" is generally thought to connote a notion of some import, and yet whether an entity (e.g., a frozen embryo, fetus, or individual in a persistent vegetative state) can be said to fall within the extension of the concept of "human life" remains a deeply (and perhaps even essentially)[24] contested question.

If we were to impose a rule-bounded limit on the concept of "human life"—say, for example, a "rule of breathing"—we would better be able to distinguish which entities fall within the extension of the concept (e.g., an individual in a persistent vegetative state) and those that do not (e.g., a frozen embryo or fetus). However, a "rule of breathing" would be terribly over inclusive, as there are obviously many nonhuman entities that breathe (e.g., a dog). To avoid this over inclusiveness, we might switch to a narrower criterion, embracing, for example, a rule that any entity that is capable of sapient thought "counts" as "human life." This narrower criterion eliminates non-sapient entities like a dog, but would also exclude entities that fall pretty squarely within our intuition of what "counts" as "human life"—like, for example, a newborn baby.

In the end, whatever criteria we settle upon will require justification. The pressure that is placed on that justification may vary depending on the concept. For example, if we are deciding what behaviors "count" as "polite," it may not matter as much which behaviors are ultimately included within the extension of the concept "polite." It may be more important that we are able to clearly identify what counts as "polite"—even at the cost of excluding some plausible behaviors—because knowing what is and is not polite serves as an important social lubricant, while nothing much turns on the actual content of the behaviors. So bright-line boundaries are more important than accuracy with a concept like "polite." On the other hand, if we are dealing with a concept like "human life," much may turn on the content of the concept. In such an instance, it may be very important that our criteria for inclusion are justified.

In light of the difficulties created by imposing a rule-bounded limit on concepts like "baldness," "politeness," or "human life" what reasons might we have for doing so? The primary—if not sole—advantage of imposing a rule-bounded limit on a concept like "baldness" is to create increased certainty as to its correct application. It does not, of course, create perfect

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24.   It is possible this concept may fall within what W.B. Gallie described as an "essentially contested concept"—that is a concept that "the proper use of which inevitably involves endless disputes about their proper uses on the part of their users." W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956).

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certainty, because a rule-bounded limit is prey to versions of the same criterial, semantic, and epistemic difficulties that were discussed in connection to other limits, plus a myriad of others that are too contested and voluminous to detail here. Imposing a rule-bounded limit achieves only the modest goal of making the threshold more specific and, therefore, easier to apply.

In this way, the practice of imposing a rule-bounded limit on a threshold-bounded concept creates a kind of conceptual sleight of hand. Imposing the rule-bounded limit seems to make pressing ontological problems disappear—we now know the minimum number of hairs Rapunzel needs to avoid baldness—but it does so by redirecting our attention from one set of questions (e.g., *how* is baldness possible?) to another set of questions (e.g., *when* is baldness possible?). In the process, descriptive and ontological accuracy fall by the wayside in favor of producing well-landscaped boundary lines.

In this light, then, it would seem that we should impose a rule-bounded limit on a vague threshold-bounded concept only when the advantages produced by the increased certainty in application outweigh the disadvantages attributable to the over and under inclusiveness of the rule. It is interesting, then, to briefly consider the degree to which this particular sleight of hand is a (if not *the*) central mechanism of some forms of legal decisionmaking.

Legal Boundaries

It would be difficult to overstate the significance of the concept of boundaries within the discipline of law. On the most accessible level, the law is itself a series of rules that designate the boundaries of permissible and punishable behavior. Laws also constitute categories of behaviors (e.g., first-degree murder, manslaughter, misdemeanor) and corresponding categories of consequences (e.g., death penalty, imprisonment, fine). In constructing these categories, the law sets forth rules about the type of behavior that "counts" as manslaughter and "counts" as murder and so forth. On this understanding, a given law may be understood to resemble *both* a rule-bounded threshold that is itself a limit, and a rule that designates a limit but is not itself a limit.[25]

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25.   Law also acts as a boundary in a second sense. Insofar as a law supplies a reason for acting in accordance with its proscription (e.g., moral obligation or fear of sanction) then that law can be said to "bound" human behavior. For a discussion of the possibility that law provides a reason for acting in accordance with its proscription, see JOSEPH RAZ, PRACTICAL REASON AND NORMS 149–77 (1975). On this understanding a legal boundary resembles a bulwark limit, applying direct pressure to human behavior. Some limits, of course, are more intractable than others. The limit on how long a human being can hold her breath is less malleable than, for example, a speed limit. Transgressing a speed limit is obviously more possible than transgressing the breathlessness limit. This would seem to suggest that not

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Because the law imposes boundaries on human behavior, its delimiting conditions are necessarily multidimensional, contingent, interdependent, and complex. For example, striking someone in the head with a lead pipe may be excusable if it is accidental, justified if is undertaken in self-defense, manslaughter if it is the product of a drunken stupor, or murder if it is premeditated. In each instance, the conduct that proximately injures the victim is the same: pipe meets skull. Yet the legal significance of the behavior—whether it falls into one or another of these legally constituted categories—depends upon the construction of a tangle of interdependent facts, which is why the charge of umpiring the boundary ultimately must lie with an adjudicator.

The work of umpiring legally constituted boundaries depends inevitably and parasitically upon umpiring the boundaries of innumerable concepts that are extrinsic to the law. A well-worn example of this phenomenon issues from the Hart–Fuller debate.[26] In their 1958 colloquy, H.L.A. Hart and Lon Fuller famously passed upon the boundaries of the concept of "vehicle."[27] To apply the rule "no vehicles in the park," an adjudicator must be able to determine whether a given entity falls within the extension of the concept of "vehicle" as that concept is expressed by the rule.[28] Because the rule offers no secondary rules for its application, to apply the rule the adjudicator must depend upon background understandings of the word "vehicle."[29]

"Vehicle" is not a legally constituted term or category. Moreover, the term "vehicle," like most of our words, is neither especially vague (as the word "tall" is thought to be)[30] nor is it especially specific (as the phrase "1935 Model T" may be said to be). Nonetheless, to know whether an entity falls within the extension of the concept of "vehicle" (as the concept is expressed by the rule), an adjudicator must consider the criteria for inclusion in the extension. What "counts" as a "vehicle" within the context of the rule? We may borrow Fuller's example to illustrate this point: is a

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all bulwark limits are created equal: some are inherently more limiting than others, but an exploration of this phenomenon unfortunately exceeds the scope of this introductory essay.

26. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); s*ee also* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109–10 (2008) (describing the vehicles in the park hypothetical as "the most famous hypothetical in the common law world.").

27. Hart, *supra* note 26, at 606–15.

28. *Id.*

29. *Id.*

30. The idea of vagueness is the subject of considerable philosophical inquiry. For a general discussion see, ISRAEL SCHEFFLER, BEYOND THE LETTER: A PHILOSOPHICAL INQUIRY INTO AMBIGUITY, VAGUENESS AND METAPHOR IN LANGUAGE 40–42 (1979).

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military truck in full working order that is mounted on a pedestal as a memorial a "vehicle" within the meaning of rule?[31]

Some entities are clearly not "vehicles"—a toaster is one example.[32] These entities fall within what Hart described as the clear cases that comprise the "core" of the rule. However, as Hart acknowledged, hard cases, such as Fuller's example of the military vehicle, lie at the rule's penumbra.[33] It is the job of the adjudicator to resolve the hard cases in light of the meaning of the term at hand. If the term in question is a term of art, the adjudicator may seek an extrinsic authority—such as a community of experts—to resolve questions at the rule's penumbra. However, "vehicle" is not a term whose usage is arbitrated by an external source of authority to whom an adjudicator could defer—as might be the case with a term such as "transubstantiation" (the meaning of which one would expect to be mediated by some manner of religious authority) or "absolute zero" (the meaning of which one would expect to be mediated by some manner of scientific authority). Instead, "vehicle" as it is expressed in the rule is a word in ordinary usage. How then is it possible for an adjudicator to determine what "counts" as a vehicle in a given context?

It is at this point that we are able to see the central role that boundaries play in some forms of legal decisionmaking. More specifically, we may observe how some modes of legal decisionmaking impose instrumental generalizations upon background concepts to resolve specific questions about the boundaries of these concepts. For example, for the concept of "vehicle" to be coherent, some entities must be excluded from the extension of the concept. But *which* entities are excluded? To determine this, it is necessary to think about vehicles in general terms.

There are several generalizations that might capture our intuitions about what "counts" as a vehicle. A vehicle may be something motorized. It may be something with wheels. It may be capable of transporting a person. Although each of these offers a plausible criterion for application of the concept "vehicle," objections may follow from the use of any one (or combination of) these generalizations as a limit on the concept "vehicle." A motorized wheelchair meets all the aforementioned criteria—is it possible that a motorized wheelchair is a "vehicle" within the meaning of the rule, such that motorized wheelchairs are excluded from the park?

While some criteria may serve better than others to capture the "core" of our intuitions about what "counts" as a vehicle, any set of criteria that we settle upon will ultimately be vulnerable to critiques of over or under

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31.   Hart, *supra* note 26, at 606–15.

32.   Of course, even an example like a toaster could be problematic. If we attach wheels, a seat, and a motor to a toast does it become a vehicle? However, these possibilities do little to illuminate the project at hand.

33.   Hart, *supra* note 26, 607–15.

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inclusiveness in light of our general sense of what "counts" as a vehicle under the statute. So how does a legal decisionmaker formulate the criteria necessary to resolve the question of whether a military truck (or other entity) falls within the extension of the concept "vehicle"?

To answer this, it is helpful to consider again the spectrum of boundaries previously identified. The limit that distinguishes "vehicle" from "nonvehicle"—whatever its formulation—is obviously not a bulwark nor is it a partition of physical space. It is also not a rule that designates a limit. Instead, like many, if not most, of the background concepts that a legal adjudicator must umpire, "vehicle" seems to be bounded by a *non-rule-bounded threshold*. If we started with a sheet of metal, we would not have a vehicle. Yet, if we added some parts to it: a seat, perhaps, a steering wheel, some tires, maybe a motor—at some point we would have a vehicle. The exact point at which we would have a vehicle is not obvious. Intuitively, we know that a vehicle is something more than a sheet of metal, even if we intend to use that sheet of metal to make a vehicle. We also know intuitively that while some vehicles have heated seats, heated seats are not a necessary feature of a vehicle. A car without heated seats should still "count" as a vehicle. But what then are the necessary features of a vehicle? It is in this sense that we may describe the boundary of the concept of "vehicle" as a non-rule-bounded threshold. We do not have rule akin to the "rule of twenty" to tell us which entities fall within its extension.

So as with "baldness," an inquiry into the boundaries of "vehicle" presents criterial, semantic, and even epistemic challenges. Moreover, the term itself offers little in the way of recommending one plausible formulation of its boundaries over another. In such a circumstance, an adjudicator must nevertheless settle upon a formulation of the boundaries of "vehicle" that is responsive to the inquiry at hand. Consider again Fuller's military truck. An adjudicator charged with determining whether the truck is prohibited by the rule must identify relevant criteria for determining whether a truck "counts" as a "vehicle." This identification of criteria will inevitably assume the form of a generalization about vehicles. For example, an adjudicator may decide that a "vehicle" is an entity with wheels that is designed to transport people. Under this "rule of wheels" formation, Fuller's military truck "counts" as a vehicle and is excluded from the park. In this hypothetical, the adjudicator necessarily imposes a rule akin to the "rule of twenty" onto the term "vehicle" in order to answer the specific question at bar.

However, it is the prospective effect of this method of decisionmaking that is of most significance. Insofar as the adjudicator's decision is binding with respect to subsequent decisions, the "rule of wheels" becomes part of the boundary that distinguishes "vehicles" from "nonvehicles" going

forward. If a future case poses the question of whether a motorized wheelchair "counts" as a "vehicle," the "rule of wheels" will constrain the application of the concept of "vehicle" in that case as well. Of course it is the hallmark of the common law method of adjudication that future adjudicators can refine, revise, or even reverse the "rule of wheels," but insofar as the rule becomes entrenched, it can gradually supersede more nuanced understandings of the concept.

This is the magic of some forms of legal decisionmaking. The imposition of rule-bounded limits on background concepts like "vehicle" appears to resolve vexing criterial, semantic, and even epistemic questions about the boundaries of the concept. Yet, rather than satisfactorily resolving ontological questions, the process simply selects one set of criteria for the application of the concept to the peril of other plausible contenders. Ultimately the criteria selected—no matter how well intended or how neatly wed to our intuitions about "vehicles"—will fail to capture all of the nuance encompassed by the concept of "vehicle." Going forward, our path of inquiry is narrowed. Rather than asking what "counts" as a vehicle, we now need only ask whether the entity in question has wheels, which is a different kind of question.

Thus, when we use a rule to tidy up the boundaries of background concepts, some measure of implicature is lost. Yet the necessity of adjudication by rule and the impossibility of any generalization capturing all the salient features of a background concept suggest that we would do well to resign ourselves to the inevitability of these losses. Moreover, what is lost may well be outweighed by what is gained in terms of increased certainty as to the application of background concepts.

This accuracy-versus-certainty calculus resembles a bit the phenomenon of "agreed boundaries" in property law.[34] In that context, when two adjacent landowners both behave as though a common boundary line is in a particular location, courts will, under certain circumstances, recognize the agreed-upon boundary, even where a survey reveals the actual boundary lies elsewhere. In this, courts make an exception to the rule that property can be transferred only in accordance with the Statute of Frauds. Why do courts make this exception, especially in light of the demonstrable inaccuracy? It may be the case that the benefit of the owners *knowing* where the boundary is (much less agreeing to its placement) is more important than the actual placement of the boundary. So too may be the case when we delineate the boundaries of background concepts: the

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34.   *See* Joan Williams, *The Rhetoric of Property*, 83 Iowa L. Rev. 277, 356–57 (1998) (describing the doctrine of agreed boundaries as comprised of three elements: "(1) uncertainty as to the boundary line; (2) an agreement; and (3) acceptance and acquiescence in the new boundary").

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benefit of agreeing upon a boundary—however flawed it may be—might be greater than the loss of the senses and meanings that become obscured.

II.

Having considered some preliminary thoughts about various types of boundaries and their significance, we turn now to the work of four luminaries to shed light on this weighty and expansive topic. In seeking to deepen our understanding of the concept of boundaries, this series' Meador Lecturers—Lauren Benton,[35] Robert Ellickson,[36] Richard Thompson Ford,[37] and Brian Leiter[38]—discuss the significance of boundaries from a diverse yet highly complementary set of perspectives and methodologies. The lecturers explore aspects of the concept of "boundaries" from distinct vantage points, including historical, philosophical, critical, and economic perspectives.

A sense of these distinct approaches can be seen in the types of boundaries each lecturer pursues. Of the four types of boundaries introduced earlier (bulwark, threshold, rule, and partition of physical space), three serve as the subject of these lectures. Two authors (Benton and Ford) are focused primarily on political boundaries designated by formal or informal rules.[39] Benton, writing from a historical perspective, is concerned with how shifting and intersecting boundaries of public and private power in the Nineteenth Century conspired to produce consequences of exceptional legal and moral significance.[40] Ford, too, is concerned with shifting boundaries and with formal and informal power, but he explores his subject from a critical perspective, drawing parallels and illuminating inconsistencies across a diverse field of bounded and unbounded territories.[41] On the other hand, a third author (Ellickson) is concerned with the sense of boundary as a physical partition of space.[42]

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35.   Lauren Benton, *This Melancholy Labyrinth: The Trial of Arthur Hodge and the Boundaries of Imperial Law*, 64 ALA. L. REV. 91 (2012). Lauren Benton is Dean of the Graduate School of Arts and Sciences at New York University, where she is also a Professor of History and an Affiliate Professor of Law.

36.   Robert C. Ellickson, *The Law and Economics of Street Layouts: How a Grid Pattern Benefits a Downtown*, 64 ALA. L. REV. 463 (2013). Robert Ellickson is the Walter E. Meyer Professor of Property and Urban Law at Yale Law School.

37.   Richard Thompson Ford, *Law and Borders*, 64 ALA. L. REV. 123 (2012). Richard Ford is the George E. Osborne Professor of Law at Stanford Law School.

38.   Brian Leiter, *The Boundaries of the Moral (and Legal) Community*, 64 ALA. L. REV. 511 (2013). Brian Leiter is the Karl N. Llewellyn Professor of Jurisprudence and the Director of Center for Law, Philosophy, and Human Values at the University of Chicago Law School.

39.   Benton, *supra* note 35; Ford, *supra* note 37.

40.   Benton, *supra* note 35.

41.   Ford, *supra* note 37.

42.   Ellickson, *supra* note 36.

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Ellickson, writing from a law and economics perspective, elucidates the manner in which physical partitions such as streets impact the quality of lives lived among and between those partitions.[43] Finally, a fourth author (Leiter), adopts the sense of boundary as a threshold as the subject of his examination.[44] Leiter, writing from a philosophical perspective, interrogates the expansion of what he describes as "the moral community," offering both possible explanations of its expansion as well as insights into the community's possible limits.[45]

Of course, in focusing on distinct senses of the term "boundaries," the Meador Lecturers also call upon others. For example, Leiter's interrogation of the threshold of the moral community also implicates boundaries in the sense of limits designated by rules. Similarly, while Ford and Benton consider political limits, physical partitions also play a role in their respective analyses. It is these crosscurrents coupled with the deep treatment of the concept of "boundaries" that each author offers from his or her particular vantage point that makes this particular Meador Lecture series such a rich and remarkably coherent project as a whole.

Lauren Benton's lecture tells the story of the trial of sadistic slave owner Arthur Hodge, a wealthy planter in the British Virgin Islands at the turn of the Nineteenth Century.[46] Hodge is tried for the murder of his slave, Prosper, despite the fact that the murder occurred in "a setting in which local legislation had for decades been heavily focused on curtailing slaves' movement and economic activities rather than checking the prerogatives of masters."[47] Benton situates Hodge's trial amid "a set of transformative global legal trends" that included, among other things, emerging questions concerning the "boundaries of imperial and inter-imperial law."[48] Benton then traces the causal forces that made such a trial possible, while exposing the politically and territorially bounded relationships constituting those forces.[49] To illuminate the various interconnected boundary struggles that led to Hodge's trial, Benton points to the intersection of a number of distinct and shifting power arenas.[50] Some of these power struggles were concentrated on the relatively small stage of Tortola (the island where Hodge resided), while others spanned the boundaries of the British Empire, and still others involved inter-imperial relationships.[51] Benton's piece does

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43.   *Id.*
44.   Leiter, *supra* note 38.
45.   *Id.*
46.   Benton, *supra* note 35, at 91.
47.   *Id.* at 96.
48.   *Id.* at 94.
49.   *Id.*
50.   *Id* at 98–108.
51.   *Id.*

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the remarkable work of drawing together these seemingly atomized and diverse causal threads into a compelling narrative mosaic of a profoundly "melancholic" yet also emblematically catalytic crisis.

Robert Ellickson's lecture directs our attention to a set of boundaries so ubiquitous that we may rarely consider them: the physical partition effectuated by our streets.[52] Ellickson's piece presents two central and related queries. First, he questions whether a grid street design succeeds in maximizing the market value of the private lots that abut the streets.[53] Ellickson views this criterion as a measure of how "city dwellers trade off" the costs and benefits of city living, including factors such as "noise levels, safety, . . . access to light and air[,] . . . ease of orientation, pedestrian circulation, and vehicular access" because both the "positive and negative effects of a street layout can be expected to be capitalized into the values of abutting lots."[54] Ellickson concludes that a grid street design succeeds by this measure, which allows both street users and the occupiers of the abutting lots to increase their "agglomeration benefits" which include "positive spillovers from information flows, transport cost reductions, and enhanced specialization of labor and capital."[55] Having deduced the benefits of a grid street design, Ellickson then turns to his second inquiry: does the occasion of a disaster (such as a devastating tornado or hurricane) present an especially fruitful opportunity to redesign a city's street layout?[56] While it perhaps seems intuitive that the postdisaster period of rebuilding would present an optimal opportunity to redesign the city's streets, Ellickson offers a number of reasons why this intuition is flawed.[57] Ultimately, Ellickson's piece illuminates the dramatic impact that street design has not only on the value of abutting properties but on the character and quality of life within our cities.

Richard Thompson Ford's lecture considers the phenomenon of boundaries in light of his central thesis that "territories are made, not found."[58] Observing that "almost anything that is organized territorially could be organized in some other way," Ford challenges the conventional understanding of territorial jurisdiction as a fixed, physical entity.[59] Ford instead proposes that a primarily spatial understanding of jurisdictional boundaries neglects more salient aspects of these types of limits. Drawing on four diverse jurisdictional contexts—"cyberspace"; Holt, Alabama;

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52. Ellickson, *supra* note 36.
53. *Id*. at 474–85.
54. *Id*. at 475.
55. *Id*.
56. *Id*. at 493–508.
57. *Id*.
58. Ford, *supra* note 37, at 127.
59. *Id*. at 127–30.

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Siam; and Detroit, Michigan—Ford illustrates the degree to which borders can be deeply contingent.[60] Ford's work offers us an extraordinary opportunity: to think about territorial jurisdictions as "a set of social practices."[61] Ford conceives of territorial jurisdiction as "practices that are performed by individuals and groups who learn to 'dance the jurisdiction' by reading descriptions of jurisdictions and by looking at maps."[62] Ford argues that jurisdictional borders are "real," not because they are fixed and territorial, but instead because we behave as though they were.[63] The work of tax assessors, police officers, and voter registrars, for example, all cohere around jurisdictional borders, and the practices of these individuals in turn reinforce and even constitute the very boundaries to which they seem to respond.[64]

Finally, Brian Leiter's lecture examines the "remarkable expansion" over the last two or three hundred years of what he describes as the boundaries of "the moral community."[65] The moral community to which Leiter refers is "the community of creatures that are thought entitled to equal moral consideration."[66] This means that "no one can be treated differently based on their gender, race, ethnicity, religion, class, and, increasingly, sexual orientation unless there is a further reason beyond simply the fact of having those characteristics for doing so."[67] This emerging moral consensus, Leiter contends, presents "a stark challenge" to the meta-ethical view of moral anti-realism.[68] Moral anti-realism adopts the view that there are not "any objective facts about what is morally right and wrong."[69] The emerging consensus about the moral community challenges this view in that this convergence of opinion might plausibly be explained as a convergence on newly discovered moral facts about who is entitled to moral consideration.[70] However, Leiter maintains the phenomenon cannot be satisfactorily explained "in solely epistemic terms."[71] Instead, Leiter offers a set of alternative explanations of the phenomenon that do not rely on the existence of objective moral facts.[72] Leiter concludes that "the holistic character of all justification requires us, of course, to consider the

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60.   *Id*. 128–30.
61.   *Id*. at 133 (emphasis omitted).
62.   *Id*.
63.   *Id*. 130–34.
64.   *Id*.
65.   Leiter, *supra* note 38, at 511.
66.   *Id*.
67.   *Id*. at 512 (emphasis omitted).
68.   *Id*. at 514.
69.   *Id*.
70.   *Id*. at 515.
71.   *Id*. at 520.
72.   *Id*. at 521–25.

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costs of alternatives," adding that the "costs to a plausible metaphysics and epistemology that admits the existence of objective moral facts into our overall picture of what the world is like are too great."[73] Leiter then makes a nuanced and engaging prediction about whether the boundaries of the moral community will further expand to include nonhuman animals and other entities.[74] Based on considerations put forward in the first part of his lecture, Leiter predicts that the boundaries of the moral community are not likely to expand to include nonhuman animals as "fully equal members."[75]

And now, on to the 2011–2012 Meador Lecture Series on Boundaries.

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73. *Id.* at 525.
74. *Id.* at 525–31.
75. *Id.* at 531.