

2005

# Information Asymmetries and the Rights to Exclude

Lior Strahilevitz

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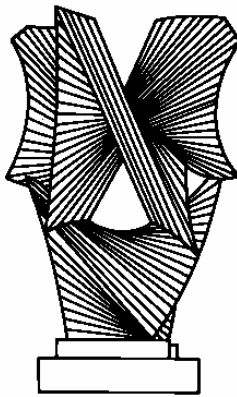
Lior Strahilevitz, "Information Asymmetries and the Rights to Exclude" (John M. Olin Program in Law and Economics Working Paper No. 264, 2005).

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# CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 264  
(2D SERIES)

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 109



## INFORMATION ASYMMETRIES AND THE RIGHTS TO EXCLUDE

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THE UNIVERSITY OF CHICAGO

November 2005

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# Information Asymmetries and the Rights to Exclude

(forthcoming 104 Mich. L. Rev. (Aug. 2006))

Lior Jacob Strahilevitz\*

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The American law generally regards the “bundle of rights” as property’s dominant metaphor. On this conception of property, ownership empowers an individual to control a particular resource in any number of ways. For example, he may use it, transfer it, exclude others from it, divide it, and perhaps even destroy it.<sup>1</sup> The various rights in the bundle, however, are not equal in terms of importance. To the contrary, American courts and commentators have deemed the “right to exclude” foremost among the property rights, with the Supreme Court characterizing it as the “hallmark of a protected property interest”<sup>2</sup> and leading property scholars describing the right as the core, or the essential element, of ownership.<sup>3</sup> Yet for all its centrality, in the minds of courts and legal scholars, there is substantial conceptual confusion about the nature of the “right to exclude.” This confusion manifests itself in the form of inconsistent judicial opinions and unsatisfying commentary on those opinions.

Discussions of a unitary “right to exclude” in Property law obscure more than they reveal, in part because scholars of exclusion have focused entirely on pure in rem exclusion rights protected by trespass law without exploring the interactions of those exclusion rights that are not protected by trespass law. In my view, it is more helpful to think about exclusion more broadly, so as to encompass those rights that are not themselves founded on trespass law, but that can nevertheless substitute for trespass-based exclusion rights. Exclusion, in these terms, includes property owners’ efforts to exclude third parties from his resource, as well as the third parties’ decisions to exclude themselves from the owner’s resource.

Broadly conceived in this manner, the right to exclude can be unbundled into its four component rights:<sup>4</sup> (1) The Hermit’s Right (the right to keep everyone off the resource owners’ property); (2) The Bouncer’s Right (the right to admit third parties selectively to the resource owners’ property); (3) The Exclusionary Vibe (the right to convey messages about who is welcome or unwelcome on the property, enforced primarily by social and psychological sanctions); and (4) The Exclusionary Amenity (the right to embed polarizing and costly club goods on the resource owners’ property in order to sort between desirable and undesirable entrants).<sup>5</sup> Though the first two rights are enforced via

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<sup>1</sup> A.M. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 114-18 (A.G. Guest ed. 1961).

<sup>2</sup> *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). This language arguably elevated the status of the right to exclude beyond the Court’s earlier characterization of it as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)

<sup>3</sup> Felix S. Cohen, *Dialogue on Private Property*, 2 RUTGERS L. REV. 357, 374 (1954); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEBRASKA L. REV. 730, 740-52 (1998); Richard A. Epstein, “More” or “Less” Maximal Conceptions of Property: An Essay in Memory of Jim Harris, at 39 (unpublished manuscript, on file with author); see also Honore, *supra* note 1, at 114 (suggesting that humans are hardwired to want to exclude others from their property).

<sup>4</sup> Cf. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 13 (1985) (noting that the right to exclude “is not one right; it is itself a collection or ‘bundle’ of rights” but applying this insight to the divergent nature of exclusion rights in the trespass and nuisance contexts). On the bundle of rights metaphor, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); and Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1911).

<sup>5</sup> This nomenclature has not appeared previously in the legal literature. A classic Bob Ellickson article noted the right-to-exclude’s importance to hermits and other idiosyncratic types who were extremely protective of their own privacy. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1353-54

trespass law, the latter three rights are substitutes for each other, such that when the law tries to restrict one right this merely encourages an owner to exercise another.

The potential substitutability of trespass-based and nontrespass-based exclusion rights raises an important question that this paper will answer: How does a resource owner choose which exclusion strategy to adopt? This paper's most important insight is that information costs are often the primary factor guiding a resource owner's decision about which right to exclude he should exercise in a particular context. More precisely, where a third party seeking entry has private information about his preferences and behaviors that the resource owner cannot obtain at a low cost, the resource owner essentially will delegate the exclusion function to the third party, using either exclusionary vibes or an exclusionary amenities strategy. Where, by contrast, the third party lacks private information or the resource owner can obtain the third party's private information at a low cost, the resource owner generally will prefer a bouncer's right strategy.

This paper's other primary contribution is to show that the government can, and does, influence resource owners' preferences among the various rights to exclude, not only through direct and selective prohibitions on exclusion (like those contained in the Fair Housing Act) but also through information access regimes, like Megan's Law and privacy tort law. By altering the cost structure associated with resource owners' discovery of third parties' private information, governmental policies can discourage resource owners from exercising those exclusion rights that undermine social welfare.

This paper proceeds as follows. Part I begins with a very brief examination of exclusion more generally, and draws on Henry Smith's illuminating distinction between governance and exclusion. The part then breaks down the "right to exclude" into its component parts, explaining hermit's exclusion, bouncer's exclusion, exclusionary vibes, and exclusionary amenities in more detail. The section concludes by examining the extent to which these various rights to exclude are substitutes for one another.

Part II explains the framework that resource owners use to decide which of the four exclusion strategies they will adopt. This part argues that the presence or absence of private information is the critical heretofore unrecognized factor in this decision. This part then identifies other considerations, such as the nature of the payoff structure, the role of law, the social meaning of various exclusion strategies, and the susceptibility of various exclusion strategies to coordinated action. These considerations may prove decisive for some resource owners contemplating which exclusion strategies to pursue.

Part III asks when the government should intervene to constrain a resource owners' choice of a particular exclusion strategy. There are two dimensions to this argument: The first is an analysis of the negative externalities associated with nonintervention by the government, and the second is an assessment of the costs associated with government intervention, such as the costs of correctly identifying a resource owners' exclusion

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(1993). Reinier H. Kraakman introduced the bouncer metaphor in *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. OF L. ECON. & ORG. 53, 63 (1986), though his discussion does not address property issues, but rather examines the tort liability that bouncers and other gatekeepers might incur if those admitted engage in wrongdoing on the premises. *Id.* at 63-64. Typing the phrase "exclusionary vibes" into Google produces three distinctly nonacademic hits, all of which appear to describe the dominant mood at various social clubs or restaurants. I coined the phrase "Exclusionary Amenity" in an earlier paper. *See infra* note 76.

strategy and the probability of erroneous judgments by the state. Part III then applies this framework to evaluate government policies regarding the residence of sex offenders in residential communities, racial discrimination in the rental market, and voluntary residential segregation by religious groups.

A brief conclusion is provided in Part IV.

## **I. The Rights to Exclude**

This Part introduces the four distinct rights to exclude and elaborates on their uses, importance, and relative merits. Before analyzing the component parts of the right to exclude, it behooves us to consider the right narrowly, in accordance with orthodox property scholarship.

### *A. Exclusion versus Governance*

During the past few years Henry Smith's keyboard has been the source of the most fascinating contemporary scholarship in property law. Beginning with an article in the *Journal of Legal Studies*,<sup>6</sup> Smith has analyzed property regimes as mediating a choice between two strategies for controlling a resource: governance and exclusion.

Exclusion, in Smith's framework, refers to "a low-cost, but low-precision, method that relies on rough informational variables like boundaries to define legal entitlements."<sup>7</sup> When the law grants an owner a right to exclude, it delegates authority over that resource to an owner or group of owners, who can decide whether to fence it off from the outside world or allow users to come and go as they please. These are in rem rights, good against the entire world, and the state will side with the owner where someone seeks to violate those rights.<sup>8</sup>

This delegation to the resource owner can be advantageous for a host of reasons: It assigns the gatekeeper right to the party with the greatest incentive to exercise it in a wealth-maximizing way; it reduces the need to coordinate among multiple stakeholders in order to make decisions about how to use the resource; and it may maximize consumer options if different owners of fungible resources adopt varying exclusion strategies for optimizing the value of their property. At common law, resource owners' exclusion rights tended to maximize their discretion about who to admit, with the important exception of common carriers, whose monopoly position in the marketplace justified very substantial limitations on their rights to exclude.<sup>9</sup> In the modern era, courts and legislatures have rendered exclusion rights less absolute, imposing nondiscrimination obligations on resource owners who lack monopolies, but still conferring upon resource owners substantial discretion over whom to admit.<sup>10</sup>

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<sup>6</sup> Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002).

<sup>7</sup> Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 981 (2004).

<sup>8</sup> Cohen, *supra* note 3, at 374.

<sup>9</sup> See Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2118-19 (1997).

<sup>10</sup> Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 75 (2004); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 641 n. 108 (1988).

Smith contrasts the exclusion strategy with governance rules:

At the pole opposite of exclusion along the organizational dimension are what I am calling governance rules. These rules . . . pick out uses and users in more detail, imposing a more intense informational burden on a smaller audience of duty holders. For example, village herdsman may have rights to graze animals that are circumscribed as to number of animals, time of grazing, and so on. . . . [A] wide range of rules, from contractual provisions, to norms of proper use, to nuisance law and public environmental regulation can be seen as reflecting the governance strategy; compared to basic trespass and property law, all these governance rules require the specification of proper activities.<sup>11</sup>

Governance, in short, manages a resource, not through blunt access restrictions, but through sets of rules or standards that regulate the conduct of those who do have access.<sup>12</sup> While governance might involve governmental decision-making about uses, exclusion involves a delegation of authority to the owners of property, with the government acting only to enforce trespass laws. This distinction is important for my purposes, as shall become clear below.<sup>13</sup>

How should society regulate the use of a scarce resource: through an exclusion regime or a governance regime? Smith argues that the choice hinges on the tradeoffs between exclusion's simplicity and governance's precision:

The exclusion strategy bunches together a lot of uses and does not inquire into details; it lacks the benefits of precision in terms of maximizing the value of individual uses, say from specialization by different actors in different uses of the same asset. At the same time, the exclusion strategy also avoids the costs of precision. By contrast, governance captures the benefits of precision but at a higher cost. Governance deals directly with problems that are left to the owner to handle under exclusion. Thus,

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<sup>11</sup> Smith, *supra* note 6, at 454-55.

<sup>12</sup> This point is important. Smith's exclusion-versus-governance dichotomy is not merely a simple application to property law of the rules versus standards debate in the legal literature more generally. *See generally* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995). Exclusion can take the form of a rule or standard. For example, an owner might be empowered to admit only the first 100 customers seeking entrance, or to admit all men, but no women. Alternatively, an owner might apply a standard for admission, such as "well dressed patrons may dine here." By the same token, governance may take the form of rules, such as "patrons may not smoke in the restaurant," or standards, such as "patrons engaged in rowdy or lascivious conduct will be removed from the premises."

<sup>13</sup> More complex governmental efforts to facilitate exclusion by private parties, such as exclusionary zoning regimes, are appropriately understood as governance mechanisms, notwithstanding the presence of the word "exclusionary" in the term. This is appropriate, as a government-driven process like exclusionary zoning is analytically different in kind from the decentralized, individual-rights-oriented exclusion remedies I discuss in detail below. For discussions of exclusionary and inclusionary zoning, see PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 203-227 (2003); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2357-61 (2003); James C. Clingmayer, *Heresthetics and Happenstance: Intentional and Unintentional Exclusionary Impacts of the Zoning Decision-making Process*, 41 URB. STUD. 377 (2003); and Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981).

exclusion and governance have characteristic and different cost (supply) curves.<sup>14</sup>

Governance, on this model, is the appropriate response to resource controversies where a great deal is at stake. In such circumstances, the likely gains from tailoring a set of rules or norms to the resource in question exceed the (high) costs of creating a governance regime, communicating the rules of that governance regime to stakeholders, and resolving any disputes about whether the rules have been followed.<sup>15</sup> Where there is little at stake, relying on blunt exclusion strategies spares society the substantial information costs associated with governance, and still generates resource allocations that, while perhaps not optimal, are good enough.

As my comments have already indicated, I believe that Smith has done serious intellectual heavy lifting in these articles, and his papers should become foundational texts in short order. It is of course true that, as Smith himself notes, exclusion and governance are best conceptualized as a continuum of strategies, not mutually exclusive corner solutions. Indeed, once we start confronting intermediate strategies like conditional exclusion, we begin to see how the two categories might bleed into each other readily.<sup>16</sup> That said, these caveats neither detract from our ability to characterize particular strategies as exclusion- or governance-oriented, nor prevent us from making general statements about exclusion and governance that substantially advance the cause of property theory. This much is amply demonstrated by Smith's use of his core insight to shed substantial light on fundamental theoretical debates in property law, such as the property-rules versus liability rules framework, the relationship between nuisance law and trespass law, and the appropriate legal responses to self-help.<sup>17</sup>

But in the pages that follow, I want to reveal something important that is obscured by the exclusion-versus-governance dichotomy. Property scholars and students readily understand that there are enormous institutional differences among governance regimes like zoning, nuisance, covenants, social norms in close-knit communities, and environmental regulations, and Smith's work is sensitive to these differences. In this paper, I will demonstrate that there is as much diversity *among* exclusion regimes as there is among governance regimes, and that some exclusion regimes are just as fine-grained and precise as the costliest governance regimes. In any event, now that we understand what governance is, let me introduce a new typology of exclusion. After providing the nomenclature, I will explain the analytic payoffs associated with disaggregating exclusion.

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<sup>14</sup> Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1756 (2004).

<sup>15</sup> Smith's analysis of the information costs associated with governance proceeds from a welfarist perspective. In other words, he would not be satisfied if governance merely shifted the information costs associated with resource management from the state to an individual owner. Rather, he argues, exclusion shifts the decision over a resource's use to the individual who usually can obtain information about that resource most efficiently – its owner. Smith, *supra* note 7, at 985.

<sup>16</sup> By conditional exclusion I mean a rule that says, "third parties will be permitted to enter Blackacre as long as they agree to refrain from engaging in activity *x*." This exclusion regime in effect mirrors a governance rule prohibiting activity *x* enacted by the citizens of Blackacre.

<sup>17</sup> See Smith, *supra* note 7; Smith, *supra* note 14; and Henry E. Smith, *Self-Help and the Nature of Property* (American Law and Economics Association Annual Meetings Working Paper No. 18) (2005).



## B. *The Hermit's Right*

The traditional account of the property right to exclude emphasizes a solitary, isolated individual who excludes all third parties from his land.<sup>18</sup> This is the hermit's property right. Framed so narrowly, it seems to be a right of little value. Few people want to live permanently in total isolation.<sup>19</sup> Rather, the prospect of hosting friends, neighbors, relatives, and service providers on one's property for visits of varying durations is a large part of what makes land ownership valuable. Although the assertion of a hermit's right is rather uncontroversial in the residential context,<sup>20</sup> the law will not let any man truly become an island. Hence the hermit's land may be invaded by another who can raise a necessity defense to trespass,<sup>21</sup> and public agents like firemen or police officers in hot pursuit may be privileged to enter the hermit's land.<sup>22</sup>

The hermit's right, then, is perhaps only useful in a few real property situations. Surely a true recluse will value his solitude. But beyond that, most uses of the hermit's right will be governmental. The state might establish a protected wilderness area for conservation or wildlife protection reasons, or it may create a minefield as a way to prevent invaders (or anyone else) from traversing a strategic space. Alternatively, the state may embrace paternalistic justifications for a rule that excludes everyone. For example, a government that owns a site where nuclear weapons have been tested may want to prevent anyone from setting foot on the property in question.

Intuitively, profit-making enterprises will have little use for a strict keep-out regime. It is difficult to make a profit off land if its owner will allow neither customers nor employees to set foot on it. We can expect to see firms utilizing their hermit's right only in those rare circumstances where permitting entry onto the land might expose them to substantial legal liability, as with a toxic waste dump that cannot be cleaned up in a cost effective manner, or when utilizing the hermit's right arises out of a conflict between management and labor (i.e., a lockout).<sup>23</sup>

In light of the very narrow circumstances in which private land owners seek to assert the hermit's right, it is appropriate to deem this right to exclude as practically trivial, except where legitimate, altruistic conservation interests arise. Permanent isolation is usually so unappealing that virtually no one in their right mind aspires to it. The proof for this assertion is in the pudding. It is almost impossible to locate a reported case that implicates the hermit's right and involves land that has positive economic value but little

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<sup>18</sup> Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. \_\_ (forthcoming 2005).

<sup>19</sup> Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36, 40 (Stephen R. Munzer ed. 2001); Eduardo M. Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 257-60 (2004).

<sup>20</sup> Gerald E. Frug, *The Legal Technology of Exclusion 2* (unpublished working paper, on file with author).

<sup>21</sup> Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1465 (1996).

<sup>22</sup> See, e.g., *Pearson v. Canada Contracting Co., Inc.*, 349 S.E.2d 106, 110 (Va. 1986).

<sup>23</sup> See Susan L. Dolin, *Lockouts in Evolutionary Perspective: The Changing Balance of Power in American Industrial Relations*, 12 VT. L. REV. 335, 342 (1987); Kent Greenfield, *There's a Forest in Those Trees: Teaching About the Roles of Corporations in Society*, 34 GA. L. REV. 1011, 1020-24 (2000).

environmental value. The closest American case, *Brown v. Burdett*,<sup>24</sup> involves a testator's wishes that her home be bricked and boarded up "with good long nails" for twenty years following the testator's death, a will provision that the court invalidated on public policy grounds.<sup>25</sup> So while the hermit's right perhaps retains importance in philosophical discussions of real property rights, its practical import is sufficiently minimal so as to warrant little more discussion here.<sup>26</sup>

### C. *The Bouncer's Right*

Once we move away from extreme and economically unproductive exercises of the right to exclude, we arrive quickly at rights that take on enormous economic importance. As soon as an owner wishes to allow third parties onto his property at certain times of day, or admit some third parties while refusing entry to others, or establish some criteria that will govern entry onto the land, he is exercising the sort of discretion that makes the right to exclude valuable. The greater power to exclude may include the lesser power, but it is the lesser power that takes on greater importance.<sup>27</sup> Moreover, while the hermit's right and the bouncer's right are mutually exclusive, the latter three rights in the bundle are not. Indeed, the bouncer's right, exclusionary vibes, and exclusionary amenities often will be used conjunctively by a resource owner.

The bouncer's right, then, is the landowner's right to discriminate among various third parties, permitting some to enter or use the land while keeping others off the property entirely. Like the bouncer at a night club, the owner must exercise discretion as to who can utilize the resource, and the criteria for exclusion need not be transparent to those seeking admission. There are commercial and noncommercial variations on the bouncer's right, but they are analytically similar. A business owner will value the right to admit some customers and vendors but not others, whereas a homeowner will care about his right to invite friends and family into his home while excluding foes.

Why does the bouncer's right have so much importance? Precisely because that right can replace the narrowly tailored but costly governance regimes used to solve common pool problems. Setting aside certain fugitive resources, such as air, that do not lend themselves to exclusion-oriented strategies, exclusion invariably emerges as an alternative to governance for regulating the way in which a collective resource is exploited. A landowner can admit all comers and then control their use of a common resource through governance (e.g., via zoning laws or environmental regulations), or the

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<sup>24</sup> 21 Ch. D. 667 (1882).

<sup>25</sup> I have argued elsewhere for greater symmetry in the law's treatment of purportedly anti-social impulses by living owners and dead ones. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L. J. 781, 839-52 (2005).

<sup>26</sup> The hermit's right may be more attractive in cases involving chattel property. For example, many people keep diaries and then exclude all others from seeing those diaries. The interest in maintaining the confidentiality of a diary's contents is a more understandable version of the overly pronounced desire for privacy that might prompt a hermit to try to keep everyone off his land.

<sup>27</sup> At first glance, the right to engage in fine-grained exclusion might appear to follow logically from the right to engage in blunt exclusion: If an owner can refuse entry to everyone, he can surely refuse entry to some. This greater-power-includes-the-lesser-power argument does not resonate, however. Exclusion often imposes harms on third parties who are excluded from using a particular resource. These burdens associated with exclusion may be palatable, on distributional grounds, if they are distributed in a neutral way, but unpalatable if they are distributed in ways that conflict with egalitarian public policy commitments.

landowner can be selective about who gets to use the resource, weeding out undesirable uses of the resource by refusing to admit those third parties deemed likely to engage in the undesirable uses. *The choice for a real estate developer, for instance, is between controlling what his residents do and controlling who his residents are.* The more effective the real estate developer's selection mechanism, the less need there will be for costly governance mechanisms.<sup>28</sup> Moreover, as I will argue below, there is a large universe of common pool problems, such as those in which the importance of human nature dominates nurture, those that implicate serious agency problems, and those in which individuals will resist what they perceive as social engineering, where exclusion is inherently a far better strategy than governance.

The vast majority of published cases purporting to implicate "the right to exclude" seem to involve landowners' efforts to employ the bouncer's right, not the hermit's right. I will discuss an illustrative New Jersey case, which involved the first major legal challenge to an increasingly prevalent exclusion strategy.

### 1. Sex Offender Residency Restrictions

During recent years, American society has focused great attention on the problems surrounding sex offenders who have served their time and been released into the community. These concerns have manifested themselves in the enactment of Megan's Laws at the state and federal level, which require released sex offenders to register their home addresses with the state.<sup>29</sup> Many states publicize the addresses of sex offenders on web sites, and through other means, often publishing offenders' photographs and other relevant information.<sup>30</sup> More recently, states have enacted legislation that provides for 24-hour electronic monitoring of high-risk sex offenders who have completed their terms and been released into the community.<sup>31</sup>

In the wake of the new laws directed at sex offenders, homeowners associations and other common-interest-communities have recorded covenants prohibiting the sale of homes to registered sex offenders.<sup>32</sup> In *Mulligan v. Panther Valley Property Owners*

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<sup>28</sup> There is an extensive literature on selection effects in organizational and jurisdictional settings. *See, e.g.,* J. Luis Guasch & Andrew Weiss, *Self-Selection in the Labor Market*, 71 AM. ECON. REV. 275 (1981); Robert Nakosteen & Michael Zimmer, *Migration and Income: The Question of Self Selection*, 46 SOUTHERN ECON. J. 840 (1980). In the land use setting, Nicole Stelle Garnett has identified "neighborhood-exclusion strategies," whereby municipal governments try to control the drug problem, not only through aggressive police actions, but also through policies designed to retain or attract law-abiding citizens while causing drug dealers and users to move elsewhere. *See* Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1121-22 (2005).

<sup>29</sup> *See* 42 U.S.C. § 14071; N.J. Stat. Ann. § 2C:7-1 *et seq.* (West 2004). Congress acted after many states had enacted their own versions of Megan's Law, and this congressional action "effectively mandate[d]" that the remaining states follow suit. *See* Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1546 (2004).

<sup>30</sup> The Iowa registry is particularly sophisticated, permitting easy searching and providing a wealth of biographical data about offenders. *See* <http://iowasexoffender.com>.

<sup>31</sup> *See, e.g.,* Jessica Lunsford Act, Fla. House Bill 1877 (enacted 2005), A.P., *States Track Sex Offenders by GPS*, Wired (July 30, 2005), available in <<http://www.wired.com/news/technology/0,1282,68372,00.html>> (visited Sep. 26, 2005).

<sup>32</sup> *Mulligan v. Panther Valley Property Owners Ass'n*, 766 A.2d 1186, 1192 (N.J. App. Div. 2001); Henry Gottlieb, *Fighting a Local Ban on Sex Criminals*, NAT. L.J., May 17, 1999, at A7; Robert Hanley, *Condominiums Consider Barring Some Paroled Sex Offenders*, N.Y. TIMES, May 4, 1998, at B1.

*Association*, the only published legal challenge to such a regime, a resident of one association challenged its prohibition on the sale of her property to Tier 3 sex offenders.<sup>33</sup> Tier 3 sex offenders are those who, the state has determined, pose a high risk of recidivism.<sup>34</sup> The court refused to invalidate the relevant covenants, finding that because there were only 80 Tier 3 registrants living in New Jersey at the time of the litigation, the restriction did not constitute an unreasonable restraint on alienation.<sup>35</sup> The *Mulligan* court had a harder time determining whether the restrictions were contrary to public policy.<sup>36</sup> The court seemed to sympathize with the desire of residents to protect themselves from sexual predators, but expressed worries about what would happen if most homeowners associations in New Jersey mimicked Panther Valley's policies. The court held that the restrictions did not violate public policy at present, but noted that it would revisit the issue if sex offenders had too few residential options in the future.<sup>37</sup>

Bouncer's exclusion seems like an intuitive strategy for a residential community whose residents want to reduce their susceptibility to sex crimes. Although there is a scholarly debate about the level of recidivism for sex offenses and the frequency with which sex offenders prey on strangers,<sup>38</sup> the presence of convicted offenders seems to raise serious alarm among neighbors, such that targeting sex offenders for exclusion may be a rational response for some homeowners associations.<sup>39</sup> So let us situate ourselves in the shoes of the Panther Valley Property Owners' Association and review the various strategies that it could use to protect itself against these sorts of crimes.

Panther Valley's decision to record the covenant restraining residence by sex offenders precluded it from making exceptions to its exclusion policy on a case-by-case basis, as any owner of a home in Panther Valley would have had standing to enforce the covenant if another owner violated it.<sup>40</sup> Hence Panther Valley's choice of strategies seems like a clear instance of bouncer's exclusion. The association merely took away the bouncer's discretion, and forced him to apply a straightforward bright-line rule.

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<sup>33</sup> *Mulligan*, 766 A.2d at 1192.

<sup>34</sup> *Id.* at 1189.

<sup>35</sup> *Id.* at 1192.

<sup>36</sup> *Id.* at 1192-94.

<sup>37</sup> *Id.* at 1193-94.

<sup>38</sup> For a quick overview of the conflicting studies of recidivism rates, see Peter T. Wendel, *The Case Against Plea Bargaining Child Sexual Abuse Charges: "Déjà vu All Over Again,"* 64 MO. L. REV. 317, 331 n.46 (1999). For a more comprehensive analysis of the literature, see John M. Fabian, *Kansas v. Hendricks, Crane, and Beyond*, 29 WM. MITCHELL L. REV. 1367, 1426-33 (2003). For a summary of the studies regarding sexual molestation by strangers versus relatives and acquaintances, see Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 490 n. 21 (1999).

<sup>39</sup> Alternatively, these restrictions may be insufficiently exclusionary in that sex offenders are excluded from residing in the community, but not excluded from entering the community. The calculus here involves a straightforward cost benefit analysis whereby a community would weigh the cost of doing background checks whenever someone enters a community as a visitor against the anticipated decrease in sex offenses associated with such a policy.

<sup>40</sup> In New Jersey, as in other states, any property owner whose land is benefited by a covenant has standing to sue to enforce it. See *Syrian Antiochian Orthodox Archdiocese of New York v. Palisades Assoc.*, 264 A.2d 257, (N.J. Super. Ct. 1970). See generally Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TRUST J. 225, 231 (2000) (describing the law of standing to enforce covenants more generally).

It is possible that Panther Valley could have opted for a governance regime instead of its bouncer's restriction on Tier 3 registrants residing in the community. Indeed, a number of possible governance systems spring to mind in this instance, some of them ordinary and some quite unorthodox. For example, the community could invest in traditional law enforcement strategies, like hiring constables to deter and detect sexual offenses. With the consent of its residents it could install ubiquitous video surveillance cameras in the interiors of homes as well as in public spaces. More provocatively, the association might arm those identified as likely targets of sex offenses and authorize them to use deadly force if they feel threatened. Or the association could use insurance markets to address this problem, requiring that all those who enter the community provide a bond, whose proceeds shall be forfeited to the victim if the entrant was subsequently convicted of a sex offense. As should be readily apparent from these examples, governance strategies seem poorly suited to addressing the danger of sex offenses in Panther Valley. The various governance regimes impose substantial privacy costs, economic costs, personal injury risks, or administrative burdens on the community's residents. Among the strategies we have discussed so far, excluding the likely sex offenders from Panther Valley, while allowing everyone else who can afford to purchase a home to do so, seems to be the cost-effective approach to this problem, especially given the fact that a very small number of prospective Panther Valley residents pose any risk of becoming sex offenders. The lesson here is that bouncer's exclusion strategies can provide more precise and far more efficient solutions to problems than governance.

This idea should surprise no one. It is implicit in agency theory, for example, where scholars have long understood that the most cost effective way to prevent a store's night watchman from robbing the owner blind is not necessarily to watch the watchman's every move while on the job or to provide him with a compensation package that allies his interest with that of the owner's, but to try to hire an honest watchman.<sup>41</sup>

## 2. The Greek System

Suppose a group of college students wishes to maximize some subjective variable within a communal residence. That variable might be physical attractiveness, athletic prowess, intelligence, or sociability. Governance will not work particularly well here,<sup>42</sup> absent some means of exclusion (beyond the university's admissions requirements). If the community has no control over membership composition, then it cannot expect its residents to be any more attractive, athletic, smart, or fun than the average student at its institution. Because of the desire to shape the character of the community, some students devote substantial resources to obtaining information about those who wish to join their communities, and offer admission only to those applicants who convince the majority of

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<sup>41</sup> See Edgar Kiser, *Comparing Varieties of Agency Theory in Economics, Political Science, and Sociology: An Illustration from State Policy Implementation*, 17 *SOCIOLOGICAL THEORY* 146, 149-50 (1999) The Ottoman Turk's selection of eunuchs to guard harems was an extreme (and extremely effective) use of selection effects to solve a principle-agent problem. See Richard Sherr, *Guglielmo Gonzaga and the Castrati*, 33 *RENAISSANCE Q.* 33, 47 (1980).

<sup>42</sup> Governance strategies for maximizing the members' desirability with respect to these characteristics might include mandatory plastic surgery or sessions with a personal trainer or personality coach.

current residents that they would make good housemates. This is an apt description of the pledge and rush processes in the “Greek system” of a typical American university.<sup>43</sup>

Although both the Panther Valley residents and the Greeks seek to exclude large segments of the population from their respective communities, the Greeks’ method of exclusion raises different considerations. The Panther Valley criterion for exclusion is relatively objective and transparent. (Type III sex offenders are excluded and anyone else who can afford to purchase a home may do so.) The Greeks’ criteria for admission, by contrast, hinges on relatively subjective factors like affability and fashion sense,<sup>44</sup> and the members of the community may be reluctant to reveal fully the bases for admission, perhaps out of fear that those seeking admission will misrepresent themselves as a means of obtaining an invitation to join.<sup>45</sup> This distinction has important consequences for both the existing members of a community and those who seek entry.<sup>46</sup>

Applying an objective, readily observable admissions criteria requires few resources. Thus, the residents of Panther Valley need not gather very much information in order to determine whether a would-be owner or occupant will be admitted. By contrast, the members of fraternities and sororities must devote substantial energy to collecting, verifying, synthesizing, and evaluating information about would-be applicants. Not surprisingly, fraternity members apply various heuristics to help them with these complex analyses. Levine and Sussman’s sociological account of fraternity rush quotes members who use these heuristics:

You can tell right away by their faces or the way they shake hands.  
A cold, clammy handshake versus a warm, friendly one. Or by the way they are dressed.

You can see right through them in five minutes.

First, I’m concerned with how they are dressed. It’s not a matter of Ivy League clothes, but looking neat and well-groomed. The next thing is

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<sup>43</sup> The rush process at fraternities and sororities has been studied from both sociological and economic perspectives. For interesting accounts, see Monica Biernat et al., *Selective Self-Stereotyping*, 71 J. PERSONALITY & SOC. PSYCH. 1194 (1996); Gene Norman Levine & Leila A. Sussman, *Social Class and Sociability in Fraternity Pledging*, 65 AM. J. SOCIOLOGY 391 (1960); Susan Mongell & Alvin E. Roth, *Sorority Rush as a Two-Sided Matching Mechanism*, 81 AM. ECON. REV. 441 (1991); Guillermo de los Reyes & Paul Rich, *Housing Students: Fraternities and Residential Colleges*, 585 ANNALS AM. ACADEMY POL. & SOC. SCI. 118 (2003).

<sup>44</sup> Levine & Sussman, *supra* note 43, at 395-96.

<sup>45</sup> Cf. Mongell & Roth, *supra* note 43, at 460 (finding strategic behavior by pledges seeking admission to sororities).

<sup>46</sup> Another potential advantage of vague criteria and bouncer’s discretion is that it makes it more difficult to prevail in a lawsuit against the bouncer for improper exclusion. Some scholars have advocated legal rules requiring the articulation of justifications for why particular people were excluded from property. See, e.g., Cynthia L. Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 STAN. L. REV. 305, 308-09 (1994). The problem with this approach is that articulation of a justification invites costly second guessing and legal intervention. Giving the bouncer the right to exclude unreasonably hardly guarantees that he will behave unreasonably. He has his reputation at stake, after all. But it does permit the parties to waive their rights to sue ex ante, which may maximize their joint welfare.

a hearty handshake with a smile to go with it. A cold, clammy handshake and a tense face don't go with me.<sup>47</sup>

Given the difficulty of evaluating the applicants exhaustively, fraternity members opt for time-saving methodologies like snap judgments, visual cues, and the evidently popular handshake heuristic. To the extent that the individual members apply different criteria or obfuscate about the criteria, the fraternity members must devote resources to aggregating preferences or reconciling conflicting criteria. The difference, in short, between Panther Valley and *Pi Veta*, is the absence of an information asymmetry in the former and the presence of such an asymmetry in the latter. Fraternity members have a much harder time discovering the attributes of applicants and perhaps care about more of these attributes because their members will live in closer proximity, so they keep their admissions criteria a secret. Panther Valley, thanks to Megan's Law, can determine who is a sex offender at a low cost, so they publicize their criteria in unambiguous terms.

The choice of objective or subjective bases for admission have consequences for the applicants as well. Given the clarity of Panther Valley's restrictions on entry, it is unlikely that many ineligible residents will attempt to join the community. Real estate agents will presumably inform would-be buyers who they suspect of having shady pasts about the restrictions before they even look at any properties in Panther Valley. The Greeks' more subjective entry requirements may do a poorer job of dissuading those whose chances of admission are remote from applying. As a result, the Greeks' exclusionary tactics may raise applicant expectations in a manner that ultimately creates great disappointment for those who are not admitted to their fraternity or sorority of choice. To avoid this problem, the Greeks try to send hints to applicants who seek admission but are unlikely to gain entry that they should look elsewhere.<sup>48</sup>

None of this is to say that governance is absent in a campus fraternity. To the contrary, governance functions as an important supplement to fine-grained exclusion.<sup>49</sup> But it appears that in many fraternities and sororities bouncer's exclusion is instrumental in promoting a particular community character, and the exclusion of potential misfits makes fraternity governance far more efficient than it otherwise would be.

### 3. Intellectual Property Rights

Influential property scholarship by Michael Heller and Rebecca Eisenberg has sounded the alarm about the possibility that an anticommons in intellectual property might prevent the development of valuable medical therapies.<sup>50</sup> They hypothesize that in the pharmaceutical and biotechnology research sectors a tragedy of the anticommons might arise, in which any of a plethora of resource owners can block important research from going forward, but no individual has the authority to green light research over the objections of multiple patent holders.<sup>51</sup> Their discussion of the possibility of a tragedy of

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<sup>47</sup> Levine & Sussman, *supra* note 43, at 396.

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., Recognition and Governance of Undergraduate Social Fraternities and Sororities, available in <[http://www.vpul.upenn.edu/osl/recognition\\_policy.pdf](http://www.vpul.upenn.edu/osl/recognition_policy.pdf)> (visited Sep. 26, 2005).

<sup>50</sup> Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998).

<sup>51</sup> *Id.*

the anticommons constitutes an important contribution to property theory, but the evidence that an anticommons actually exists in the biomedical realm has been scant.<sup>52</sup>

If a tragedy of the anticommons has failed to materialize, what explains this? It appears likely that the explanation stems from bouncer's right behavior by holders of the relevant patents, as opposed to hermit's right behavior. Intellectual property scholars have determined that major pharmaceutical and biotechnology firms are acquiring large patent portfolios as a means of trading with their competitor firms, engaging in transactions that permit both firms to engage in profitable lines of research.<sup>53</sup> To be sure, these portfolios might be used to exclude new entrants in the biomedical industries, and in that sense a tragedy might arise. But, to date, the evidence appears to suggest that selective licensing through patent portfolios is helping firms in the industry avert a serious tragedy of the anticommons.

#### D. *Exclusionary Vibes*

When I was an undergraduate at a large, state-subsidized university, I got the sense that there was a fair bit of homogeneity within each of the many fraternity and sorority houses on campus,<sup>54</sup> and attributed this homogeneity to the rush and pledge processes. But then I moved into cooperative student housing and noticed a similar level of homogeneity within particular houses, which was initially puzzling, since any student could move into a campus cooperative.<sup>55</sup> The co-ops did not exercise the bouncer's right at all (except to exclude nonstudent residents), and yet each house seemed to have a distinct personality, not unlike the fraternities and sororities that I occasionally visited. Governance and socialization seemed like incomplete explanations for this homogeneity.<sup>56</sup> If my impressions were correct, this homogeneity in the campus

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<sup>52</sup> Richard A Epstein, *Steady the Course: Property Rights in Genetic Material*, in PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT 153, 166-68 (F. Scott Kieff ed. 2003); David S. Evans & Anne Layne-Farrar, *Software Patents and Open Source: The Battler over Intellectual Property Rights*, 9 VA. L. & TECH. 10, 56-59 (2004); see also Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 TEX. L. REV. 961, 1004-09 (2005) (finding no evidence of an anticommons in the computer software industry).

<sup>53</sup> John H. Barton, *Antitrust Treatment of Oligopolies with Mutually Blocking Patent Portfolios*, 69 ANTITRUST L.J. 851, 853-56 (2002); Michael R. Taylor & Jerry Crawford, *American Patent Policy, Biotechnology, and African Agriculture: The Case for Policy Change*, 17 HARV. J.L. & TECH. 321, 351-52 (2004).

<sup>54</sup> For more on homogeneity within the Greek system, see Ernest T. Pascarella et al., *Influences on Students' Openness to Diversity and Challenge in the First Year of College*, 67 J. HIGHER ED. 174, 190 (1996).

<sup>55</sup> That is not to say that the Greek system in general and the cooperative system in general attracted the same kinds of students. The student populations were quite different, and campus stereotypes evidently were at least somewhat grounded in reality: Cooperative residents as a group appeared to be more liberal and less well-off, more likely to dress like slackers, more politically correct, and less interested in the university's athletic teams. For an interesting exploration of the perceived validity of stereotypes surrounding fraternity and sorority membership, see Biernat et al., *supra* note 43, at 1994.

<sup>56</sup> Nor is it the case that the coops were homogenous because coop members were the "leftovers" of the Greeks' selection process. Approximately 2500 students presently live in Berkeley's fraternities and sororities, and the campus cooperative have approximately 1300 members. See Patrick Hoge et al., *Cal Bans Alcohol at Campus Fraternities*, S.F. CHRON., May 10, 2005; *A Brief History of the USCA*, available at <<http://www.usca.org/about/uscahistory.php>> (visited Sep. 30, 2005). The vast majority of Berkeley's 20,000 undergraduates sought housing in neither the Greek system nor the cooperatives.



cooperatives raised interesting questions about what was substituting for the bouncer's right.

Given the costliness of governance mechanisms, there is great demand for various forms of fine-grained exclusion that can make governance more efficient or eliminate the need for formal governance altogether. But there are costs that arise whenever a resource owner wishes to use the bouncer approach. For example, the bouncer must be trained and paid. The bouncer may make mistakes and admit too many of the wrong people or too few of the right people. Excluded third parties may engage in violent self help if they believe the resource owner has no legal right to exclude them. And people seeking entry may misrepresent themselves as a way of fooling the bouncer into letting them enter a space to which they should not be admitted. Where a resource owner finds both governance and bouncer's exclusion cost prohibitive, he will often employ the "exclusionary vibes" strategy.

An exclusionary vibes approach involves the landowner's communication to potential entrants about the character of the community's inhabitants. Such communication tells potential entrants that certain people may not feel welcome if they enter the community in question, because they will not share certain affinities with existing or future residents. Although the landowner invokes no legal right to exclude anyone from the property in question, an exclusionary vibe may still be effective at excluding a targeted population thanks to two mechanisms. First, a third party may view the exclusionary vibe as an effective tool for creating a focal point around which people can organize their affairs.<sup>57</sup> A variation on this focal points effect arises if the third party assumes that the exclusionary vibe will create a community population that is likely to embrace bouncer's exclusion at a later date as a means of removing him from the community.<sup>58</sup> Second, the third party may assume, incorrectly, that the exclusionary vibe is backed by a bouncer's right to exclude third parties who are not made to feel welcome by the exclusionary vibe.<sup>59</sup> I will elaborate on both of these mechanisms in detail, using a hypothetical community.

Suppose that a condo developer sees a market niche for residential communities targeted toward extroverted individuals. To that end, the developer advertises his new condominium as "Social Butterfly Place." This advertising should suffice to make the condominium attractive to social butterflies and their families, and unattractive to more

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<sup>57</sup> There is an extensive literature on the use of "cheap talk" (i.e., low-cost communication) to establish focal points in coordination games. See, e.g., Joseph Farrell, *Cheap Talk, Coordination, and Entry*, 18 RAND J. OF ECON. 34, 39 (1987); Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 J. OF ECON. PERSPECTIVES 103, 116-17 (1996). Elsewhere, Richard McAdams has pointed to the value of communication to establish focal points in not only pure coordination games, but also in games that involve a mix of coordination and conflict strategies. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1677-89 (2000). For an invocation of the focal points idea in the property case law, see *United States v. Hunter*, 459 F.2d 205, 213-14 (4th Cir. 1972). For a discussion of sorting in the context of homeowners associations, see Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1394-1400 (1994).

<sup>58</sup> Cf. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1141-44 (1996) (discussing the propensity for local government boundaries to facilitate a citizen's selection of a community containing a solid majority of voters whose values mirror his own).

<sup>59</sup> *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990).

introverted individuals, even if the developer does not invest in any amenities that are designed to appeal to the extroverted.

How come? Here we see the dynamics working together. Extroverted individuals probably will value proximity to fellow extroverts, so that they can easily find outgoing partners for conversation and joint social activities. Introverts may feel left out or marginalized living in the building, and this marginalization may impose real social and psychological costs on them. Because they may anticipate incurring some of these costs if they move in to Social Butterfly Place, many introverts will opt for a residence in some other building, *ceteris paribus*. This phenomenon illustrates the possibility for exclusionary vibes to serve as focal points.

Savvier introverted prospective condominium purchasers may be deterred from moving into Social Butterfly Place as well. These third parties would understand that the developer could do nothing to stop them from purchasing a home in the building, but would recognize the effectiveness of the focal point strategy at establishing a homogeneous population of residents consisting largely of extroverts. Even if one of these introverts did not care whether he felt left out of his neighbor's social interactions, he would rightly worry about the prospects that his extroverted neighbors might in the future: a) decide to use the bouncer's right to expel introverts if they concluded that there were too many introverts in their midst; or b) adopt, by majority vote, governance rules that made life pleasant for extroverts and unpleasant for introverts, such as mandatory weekly condominium association meetings, or lax nighttime noise regulations for hallway conversations and parties within units.

Finally, some would-be condominium purchasers will see the sign "Social Butterfly Place" and erroneously assume that only extroverts are permitted to reside there. In other words, they may misread the exclusionary vibe as indicative of a developer's intent and authority to exercise a trespass-based right to exclude them. If they were to ask the developer whether introverts may reside in the tower, the developer would say that all are welcome, but many people are embarrassed to ask questions of that sort or ignorant of their legal rights. Hence an exclusionary vibe may act as an effective bluff that prevents some third parties who are targeted for exclusion from moving into a community. At some level, then, a fence and a "Beware of Dog" sign are fungible, even if there is no dog.

As these examples indicate, the simple act of naming a new development "Social Butterfly Place" could prove effective at excluding the introverted from residence in the development. Exclusionary vibes thus can function as a substitute for, or a complement to, the bouncer's right. Thus, what might superficially appear to be a developer's First Amendment commercial speech right actually takes on much greater significance as a property right, and it is appropriate to characterize the exclusionary vibe as a right to exclude. It should be equally clear that every exclusionary message is implicitly inclusionary with respect to those people who would prefer to live in a community that is devoid of those people who are targeted for exclusion.

In the real world, real estate developers sometimes do market their residences as paradise for extroverts.<sup>60</sup> The exclusionary vibes strategy is quite prevalent where other groups or attributes are targeted for exclusion or inclusion as well. Condominium buildings adopt names like Cotton Hope Plantation<sup>61</sup> and Sholom House.<sup>62</sup> And individual cooperative houses near my old university campus described the character of their communities in great detail on the Internet.<sup>63</sup> We need not strain our minds too much in order to see the power of exclusionary vibes. Imagine, for example, the sales center for a mixed-income planned development in a large Southern city. The sales center looks identical to any other sales center, with one difference: A large confederate battle flag flies on the flagpole out front. The mere presence of this flag would produce a first generation of homeowners who are overwhelmingly white.<sup>64</sup> What follows is a brief survey of the legal regulation of exclusionary vibes.

### 1. The Regulation of Residential Advertising

Before breaking ground on a new residential community, a real estate developer will spend a great deal of time thinking about the types of residents he would like to attract, given prevailing market conditions and the nature of the property in question. Once he has made that determination, the developer will create a marketing strategy designed to attract those types of people and, simultaneously, convince those types of people who he does not want to attract to take their housing dollars elsewhere.

Today's media outlets enable a great deal of message tailoring, with particular messages intended to reach particular recipients. Real estate developers market directly to consumers, mostly through print and Internet-based advertisements, but occasionally via

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<sup>60</sup> See, e.g., Kevin Weeks, *New Displays, Old Charm at Whittaker's New Town*, Aug. 15, 2005, available in <http://www.stltoday.com/stltoday/realestate/stories.nsf/buildingahome/story/045852EAA8E1C16D862570570051A33C?OpenDocument> (visited Aug. 26, 2005).

<sup>61</sup> See *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 508 S.E.2d 565 (S.C. 1998).

<sup>62</sup> *Aquarian Found. v. Sholom House, Inc.*, 448 So.2d 1166 (Fla. Ct. App. 1984).

<sup>63</sup> The cooperatives have several "theme houses," such as the vegetarian theme house, the African American theme house, and the Gay-Lesbian-Bisexual theme house. See *The Coops*, available in <http://www.usca.org/understand/thecoops/> (visited Sep. 30, 2005). Any student may live in these buildings, but the theme certainly affects the applicant pool. Other houses without themes nevertheless presented differentiated personalities on the Internet. Compare *Ridge House*, ("On the spectrum of studious to social, Ridge House would be on the more studious end. (For example, the study room gets the best afternoon light and you can probably find someone studying in there at any given hour.) We don't host any huge co-op notable parties . . . and you know what?--at Ridge, we're all pretty fine with that. . . . Pretty much we're all kind of normal-looking, with a pretty even spread of majors, and arsty/sportsy/nerdy interests."), available in <http://www.usca.org/understand/thecoops/rid.php>; with *Andres Castro Arms*, ("We will forever host the BEST co-op party ever! . . . The Infamous Disco Party. We will always road trip the hardest; from Tahoe to Joshua Tree – snowboarding to rock climbing – we do it all. . . . Overstuffed sofas so soft that you can melt into them. A game room stocked with Double Dragon, foosball, and a pool table. All the Oreos and Nutella you can eat. And of course...a hot tub for those cold winter nights. Yes...Castro has more luxury features than a Coupe DeVille. If it ain't high livin', we ain't havin' it."), available in <http://www.usca.org/understand/thecoops/aca.php>.

<sup>64</sup> I thank Adam Samaha for suggesting this salient example. For further discussion of the propensity for the battle flag to polarize the races and send hostile signals to African Americans, see *Daniels v. Harrison County Bd. of Supervisors*, 722 So.2d 136, 139 (Miss. 1998) (Banks, J., concurring in result).

television or radio.<sup>65</sup> Developers also market to consumers through real estate agents, and the means of communicating with agents are quite varied. A developers' choice of advertising media may have substantial effects in skewing the audience of potential buyers who hear about a development. The choice to advertise locally, regionally, or nationally may skew the audience. The choice to advertise in mostly English-language publications or non-English publications will make a big difference, as will the choice of program for radio or television advertisements. All these various strategies for marketing are reasonably well understood, and regulated to varying degrees.<sup>66</sup>

Advertising can communicate exclusionary vibes through more subtle means, as well. For example, print advertisements or billboards may make use of models enjoying their idyllic residential surroundings. Advertisements or billboards depicting exclusively Caucasian models will tend to attract Caucasians, whereas those depicting exclusively (or largely) African American models will attract African Americans.<sup>67</sup> Even more subtly, developers may use particular color schemes or themes in advertising, sales centers, or model homes, to "signal" consumers about the characteristics of people they would like to attract.<sup>68</sup> Advertising, in short, can be an effective means for attracting certain types of consumers and dissuading other types of consumers from purchasing in a new development.

In some instances, seemingly innocuous actions steeped in history convey a powerful message to white and black audiences alike. For most of the twentieth century, a siren atop Villa Grove, Illinois's water tower rang out at six o'clock every evening.<sup>69</sup> The siren's purpose was to provide a warning to African Americans that they were required to leave Villa Grove for the night if they had not already done so.<sup>70</sup> When sociologist James Loewen visited Villa Grove to investigate, all twelve of the town's residents that he interviewed independently confirmed the significance of the siren's sounding.<sup>71</sup> Remarkably, the town continued to sound the siren every evening until 1999, when the practice stopped. Loewen writes, "I had hoped it stopped the practice because residents became ashamed of why it was first put in place, no longer cared to explain its origin to their children or guests, and had reconsidered their sundown policy. No, I

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<sup>65</sup> See, e.g., *Plaza Developers Take to the Airways*, REAL ESTATE WEEKLY 39 (April 20, 2005), available in 2005 WLNR 7315083; *What You Can Do If Your Home Isn't Selling*, KANSAS CITY STAR, at K12 (Sep. 19, 2004), available in 2004 WLNR 882993; Lucia Moses, *Grabbing the Rebound*, Editor & Publisher (Jan 1, 2004), available in 2004 WLNR 12668658.

<sup>66</sup> See, e.g., Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69 (1995); Debra Alligood, Comment, *When the Medium Becomes the Message: A Proposal for Principal Media Liability for the Publication of Racially Exclusionary Real Estate Advertisements*, 40 UCLA L. REV. 199 (1992).

<sup>67</sup> See *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 262-64 (7th Cir. 1996); Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 349-52, 373-77 (2003).

<sup>68</sup> On advertising of this nature, see Reginald Leamon Robinson, *White Cultural Matrix and the Language of Nonverbal Advertising in Housing Segregation: Toward an Aggregate Theory of Liability*, 25 CAP. U. L. REV. 101, 204 (1996).

<sup>69</sup> JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 203-04, 384 (2005).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 204.

learned, it stopped owing to complaints about the noise from residents living near the water tower.”<sup>72</sup> In the most recent census, Villa Grove counted just eight African Americans among its 2,553 residents.<sup>73</sup> The nearby community of Champaign, by contrast, is 15.6% African American.<sup>74</sup>

## 2. Aesthetics

After a developer has sold off the lots in a new development, there will no longer be any reason for him to maintain an advertising presence with respect to the new development. This vacuum presents a potential problem for residents who expect to live in the development for a long time and hope that a neighborhood’s character will be maintained beyond the first generation of buyers. What can a developer do to give these residents, who expect to live in the community for the long-haul, some piece of mind?

Obviously, to some extent, a highly effective exclusionary advertising campaign can have second-generation and third-generation consequences. Upon searching for housing, second-generation buyers may attempt to discern some information about the composition of the existing community, and, if there is a real shortage of people with whom they feel affinity, they may elect to purchase elsewhere.<sup>75</sup> But predicting these second-generation decisions is going to be made more difficult by the law’s restrictions on the types of information that second generation buyers can obtain about their neighbors. Real estate agents can get into serious trouble if they answer questions about a neighborhood’s racial or religious composition, for example, and alternative sources of information – such as census data or repeated strolls around the neighborhood – may be imprecise.<sup>76</sup> Moreover, although coordinated purchasing by minority groups is rare, it can happen, and there are historical examples of such purchases snowballing into rapid neighborhood transformation.<sup>77</sup>

In such circumstances, developers and first generation residents may seek more permanent exclusionary devices. For example, a developer may arrange for the construction of homes in his development that exclusively adopt particular architectural styles. Different architectural styles will appeal to divergent groups of people. A subdivision of Tudor style homes may attract stodgy families, whereas a subdivision

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<sup>72</sup> *Id.* at 384.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 388.

<sup>75</sup> Camille Zubrinsky Charles, *Processes of Racial Residential Segregation*, in *URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES* 217, 259 tbl. 4.6 (Alice O’Connor ed. 2001) (noting that 11% of whites responded in a survey that they wanted to live in neighborhoods that were 100% white, and that 2.5% of black respondents said they wanted to live in all-black neighborhoods); *id.* at 230-31 (finding that African Americans are unlikely to move into neighborhoods that are believed to contain a large percentage of residents who do not want African American neighbors); see also Michael O. Emerson et al., *Does Race Matter in Residential Segregation? Exploring the Preferences of White Americans?*, 66 *AM. SOC. REV.* 922, 927-32 (2001) (finding that the presence of Asian Americans and Latinos had little effect on whites’ willingness to move into a neighborhood once crime, public school quality, and anticipated appreciation of real estate were controlled, but that the presence of African Americans had a very substantial effect on whites’ willingness to move into the neighborhood, even after controlling for these variables).

<sup>76</sup> Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, working paper at 6-8, *forthcoming in* 92 *VA. L. REV.* (2006).

<sup>77</sup> See, e.g., ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE & HOUSING IN CHICAGO, 1940-1960*, at 31-36 (1998).

constructed exclusively of homes in the California modern style may attract edgier first and second generation residents. Given the expense of transitioning from one type of architectural style to another, these first generation decisions might lock into place particular homeowner homogeneities for many generations.<sup>78</sup>

### 3. “No Trespassing Signs” and Public Trust Lands

In California and other states that recognize a robust public trust doctrine, members of the general public have statutory, common law, or even constitutional rights to access those portions of the beach that fall below the high tide line.<sup>79</sup> In many cases, these rights are supplemented by dry sand access rights that state or local governments have negotiated on the public’s behalf as a condition of granting a private homeowner a building permit. Notwithstanding these public easements, lots with unspoiled beachfront views remain tremendously desirable for California homeowners. Many of these homeowners have done their best to create the misimpression that the wet sand behind their homes is unencumbered.<sup>80</sup> To that end they have posted “no trespassing signs” on the beach.<sup>81</sup> Even though members of the public would not have been trespassing had they ignored the signs, the signs served their purpose, preventing many members of the public from using the wet sand portions of the beach behind privately owned homes.<sup>82</sup> As a result, the California Coastal Commission has had to fight back, issuing violation notices against these owners and mandating the removal of these signs.<sup>83</sup> That the Commission felt compelled to act in these circumstances underscores the point of this discussion, which is that exclusionary vibes can be quite effective exclusionary devices, even where those vibes merely amount to bluffing by the owner.<sup>84</sup>

### 4. The Inadequacies of Exclusionary Vibes

Exclusionary vibes may diminish the magnitude of these difficulties, but raise a host of new difficulties. For example, exclusionary vibes may be ineffective if too many people who the landowner would prefer to exclude are oblivious to the signal or have contrarian instincts. Alternatively, exclusionary vibes may be too controversial if they are noticed and denounced by third parties who object to the content of the exclusionary

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<sup>78</sup> Costly governance mechanisms, like architectural review boards, will be unnecessary for preserving uniformity, except in those instances where real estate is pricey enough or the existing housing stock is sufficiently deteriorated to encourage “knockdowns” (i.e., the demolition of existing residences, to be replaced by modern, often larger homes).

<sup>79</sup> See, e.g., *Marks v. Whitney*, 491 P.3d 374 (Cal. 1971); Jessica A. Duncan, *Coastal Justice: The Case for Public Access*, 11 HASTINGS W. – N.W. J. ENVTL. L. & POL’Y 55, 59 (2004). In some states, such as New Jersey, these public trust rights also create ancillary rights to use the dry sand as well. See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984).

<sup>80</sup> Duncan, *supra* note 79, at 64-65.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> The prevalence of sundown signs in racist communities throughout the United States is another example of bluffing. Such signs were placed at the town border and typically used the language: “Nigger, Don’t let the sun go down on you in this town.” LOEWEN, *supra* note 69, at 195. James Loewen’s historical research reveals 184 towns that displayed such signs, only seven of which were south of the Mason-Dixon line. *Id.* Such edicts obviously were unenforceable under the Equal Protection Clause, but the presence of the signs undoubtedly emboldened private citizens to use violence and intimidation to keep blacks out of town after sundown. *Id.* at 182, 270-79.

message, asserting that such a message implies second-class citizenship for the part of the community that is targeted for exclusion.<sup>85</sup> In such instances, a landowner may seek an exclusion strategy that is both more effective and less in-your-face than an exclusionary vibe. Exclusionary amenity strategies present an attractive alternative.

#### E. *Exclusionary Amenities*

An exclusionary amenity is a common amenity that is embedded in a residential community at least in part because willingness to pay for the amenity functions as a proxy for some desired characteristic.<sup>86</sup> An exclusionary amenity is a collective resource that provokes a polarizing response among people who are considering purchasing a home or renting an apartment in a particular community. Prospective purchasers (or renters) who the developer (or landlord) would like to attract will regard the community as more attractive because of the presence of the amenity, and prospective purchasers who the developer would not like to attract will regard the community as less attractive because of the amenity's presence. In another paper, I hypothesized that during the 1990s golf courses in residential developments functioned as exclusionary amenities because golf participation was a better proxy for race than wealth, income, or virtually any other characteristic. The paper provided circumstantial evidence to indicate that by purchasing homes in mandatory membership golf communities, some nongolfing homeowners were essentially purchasing Caucasian residential homogeneity.<sup>87</sup> The punch line of that paper was that the exclusionary amenities strategy might permit developers to circumvent laws that prohibit race discrimination in sales (the bouncer's right) and advertising (exclusionary vibes).

The residential golf course is not the only possible manifestation of the exclusionary amenities strategy. On the contrary, real estate developers seeking to create a "Catholic Gated Community" have noticed how placing a new Catholic school – Ave Maria University – at the center of their planned residential community can help promote the overwhelmingly Catholic character of their new development.<sup>88</sup> Virginia real estate developers interested in minimizing the number of families with school-aged children in their condominium building invested heavily in an attractive bar and billiards room, but consciously avoided putting a playroom anywhere in the structure.<sup>89</sup> And, by the same token, many communities forego investing in public transportation hubs or basketball courts that their residents would very much like to use, because of a fear that such inclusionary amenities might attract the wrong kinds of people to the community.<sup>90</sup>

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<sup>85</sup> See *infra* Section III.A.

<sup>86</sup> I have written at length about exclusionary amenities elsewhere, so I will avoid engaging in particularly detailed analysis herein. For an extended treatment of exclusionary amenities, see Strahilevitz, *supra* note 76.

<sup>87</sup> I am in the early stages of a collaborative empirical project to determine the racial composition of mandatory membership golf courses and compare this composition to that of other gated communities.

<sup>88</sup> Adam Reilly, *City of God: Tom Monaghan's Coming Catholic Utopia*, BOSTON PHOENIX, June 17, 2005.

<sup>89</sup> Peter Whoriskey, *No Kids? That's No Problem; Falls Church's Deal with Builder Highlights Area School Crowding*, WASH. POST, May 25, 2003, at A1.

<sup>90</sup> See LOEWEN, *supra* note 69, at 254-55; ZACHARY MOSES SCHRAG, *THE WASHINGTON METRO AS VISION AND VEHICLE, 1955-2001*, at 269-71 (Columbia Univ. PhD Dissertation 2002) (UMI Dissertation No. 3048233); Strahilevitz, *supra* note 76, at 36-38.

It is an expensive proposition, of course, to construct a golf course or religious university at the center of a residential development. So why would someone seeking to achieve residential homogeneity go to all that trouble? Precisely because an exclusionary amenities strategy may prove more effective than exclusionary vibes alone. After all, an exclusionary amenity may be as successful in establishing a focal point as an exclusionary vibe, allowing people with similar preferences or attributes to find each other and live as neighbors. And the exclusionary amenity will provide added punch: a tax that falls most heavily on people who lack those similar preferences or attributes. So, let us assume that the Ave Maria Township residents subsidize the adjacent university by picking up the costs of its police protection, utilities, and land acquisition costs. As a result, homeowners in Ave Maria Township will face higher monthly assessments than homeowners in a neighboring homeowners association that is not affiliated with an institution of higher learning. A devout, traditionalist Catholic homeowner might be happy to pay this extra assessment, perhaps because he plans to make use of the theological books in the university's library and values proximity to it, or because he wants to live near the sorts of neighbors who would value proximity to such a library. But a non-Catholic Ave Maria homeowner who did not particularly want to live in an overwhelmingly Catholic neighborhood would get nothing of value in exchange for his higher monthly assessment: He would not use the library himself, and would not particularly care about whether his neighbors used the library or not. If there are otherwise similar neighborhoods surrounding Ave Maria, we should expect to see Ave Maria Township take on an overwhelmingly Catholic character and other neighborhoods take on a relatively non-Catholic character. The result will be religious residential segregation, achieved with no overt discrimination and an advertising campaign that need not include blatant exclusionary vibes. The differential tax on non-Catholic homeowners in Ave Maria will serve the same focal points purpose as the exclusionary vibe, and will further exclude third parties who might have been impervious to, or oblivious of, exclusionary vibes. Furthermore, unlike a one-time advertising campaign, the presence of the university will directly affect the purchasing decisions of several generations of owners.

*F. Nontrespas-Based Rights as Property Rights*

My suggestion that there is a distinction between the hermit's right and the bouncer's right will no doubt prove relatively uncontroversial. A few property scholars may bristle, however, at my suggestion that nontrespas-based rights, such as exclusionary vibes and exclusionary amenities, also belong in the category of "property rights." This skepticism warrants a brief treatment of the subject.

As an initial matter, I want to undermine the traditionalist conception that only "in rem" rights are the subject of "Property." This paper has pointed out the enormous economic importance associated with the right to emit exclusionary vibes, and the trivial economic role of the hermit's right. If an owner is deprived of the former, he will often lose his shirt, but if deprived of the latter, he will most likely shrug and continue going about his business. The right to emit exclusionary vibes and, to a lesser extent, the right to embed exclusionary amenities, is a large part of what it means to own a resource. What's more, the nontrespas based exclusion rights are functional substitutes for the



pure in-rem exclusion rights that are enforced via trespass law. That makes the nontrespass-based rights, in my view, genuine property rights.

A critic of my view would point out that one can communicate exclusionary vibes with respect to a resource without owning that resource. This criticism is correct, but largely beside the point. Exclusionary or inclusionary messages will be taken most seriously by third parties in those instances where it is the resource owner herself who is conveying the message. After all, the owner of the resource typically has the greatest incentive to engage in speech concerning his resource and the most information about who is likely to be joining the community in question. For this reason, an owner of a resource almost always will be more successful than a third party at establishing a focal point around which potential users of that resource can organize themselves. Third parties understand this, and will weigh the owners' speech most heavily as a consequence. Communicative exclusion, then, does not require a res, but the exclusionary message is most persuasive when articulated by the res's owner. I think that pragmatic point should end the discussion, but readers interested in further thoughts on the place of nontrespass-based rights in an in-rem / in-personam framework can chew on these three paragraphs of footnote text.<sup>91</sup>

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<sup>91</sup> In the traditionalist conception, property rights are said to be in rem, whereas contract rights are in personam. Thomas W. Merrill & Henry E. Smith, *The Property / Contract Interface*, 101 COLUM. L. REV. 773, 777 (2001). The essence of an "in rem" right consists of a right characterized by an indefinite and large class of dutyholders, a right that attaches "to persons through their relationships to particular things," and that involves third parties' duties to abstain from engaging in particular conduct. *Id.* at 783. That said, many of the rights that are traditionally understood to be part of the property rubric, such as bailments, landlord-tenant law, security interests, and trusts, manifest themselves as hybrids of in rem and in personam rights. *Id.* at 850.

Exclusionary vibes and exclusionary amenities belong in the hybrid category of property rights as well. Exclusionary vibes look like in rem rights in that the right to communicate a particular message about a resource cannot be interfered with by third parties without incurring legal liability. If a developer conveys an exclusionary message, and a third party tries to squelch that message through, say, defacing his billboards or jamming his radio broadcasts, the third party is liable to the developer in tort. While third parties have no duty to listen to the developer's exclusionary vibes, their exposure to those exclusionary vibes will in some sense be unavoidable if the developer chooses to advertise in the broader community. In that sense, then, commercial free speech rights, like the right to engage in exclusionary vibes, are in rem in nature. *Cf.* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1556 n. 74 (1995) (describing First Amendment free speech rights as in rem rights). To be sure, the First Amendment only binds state actors, but torts such as intentional interference with contractual relations, trademark infringement, defamation, and false light substantially constrain the abilities of third parties to prevent a resource owner from addressing an exclusionary message to his intended audience.

Similarly, exclusionary amenities will have aspects of both in rem and in personam rights. Covenants to pay for exclusionary amenities run with the land. Hence they will bind not only the initial generation of purchasers in a new residential development, but also their successors in interest. More importantly, some exclusionary amenities, such as residential golf courses, will be costly and difficult to excise once constructed. They may bind successors in interest even more than ordinary covenants, which can be changed by a super-majority vote of the homeowners within a particular association. At the same time, exclusionary amenities look like in personam rights in that the relationships being regulated are voluntary in nature and involve affirmative promises to pay for amenities.

### G. *Exclusionary Strategies as Substitutes in Property Theory and Caselaw*

As a general matter, discussions of the “right to exclude” in property theory refer to a unified right, as opposed to a fragmented one. Courts typically do the same thing. And yet this linguistic convention is undercut by a common analytical move made by some courts and scholars, which is to minimize the scope of laws that infringe on the right to exclude by invoking the logic of fragmentation. In so doing, these courts and scholars have implicitly recognized a principle that I have made explicit: The various rights to exclude are substitutes for one another. At the same time, their analysis often obscures an important caveat, which is that these rights are not perfect substitutes.

#### 1. Takings

The fragmentation of the right to exclude takes on real importance in takings cases. Takings doctrine places substantial weight on the distinction between partial deprivations of property interests and complete deprivations of property interests.<sup>92</sup> Drawing the line here is highly problematic, given that so much of black letter property law deals with the various ways in which interests in land can be divided. Hence, those of us who are interested in takings law must endure the spectacle of Supreme Court justices sniping at one another over the unanswerable question of whether a temporary moratorium on the development of land is a total taking of a term-of-years leasehold interest, for which the Constitution compels compensation, or a partial taking of a fee simple interest, in which case compensation is not mandated by the case law.<sup>93</sup> It therefore should not be surprising to see the same debates play out in controversies where the plaintiff alleges that a government regulation has completely deprived him of his right to exclude. In recent years, the federal courts seem to have moved toward fragmentation of the right to exclude, though perhaps unwittingly. A comparison of the Supreme Court’s takings opinions from the 1980s and lower appellate court opinions from the 1990s is particularly revealing.

The plaintiff in *Pruneyard Shopping Center v. Robins*, a shopping center owner, alleged that a state constitutional provision mandating that he provide reasonable access to political pamphleteers constituted a regulatory taking of his right to exclude.<sup>94</sup> The state provision was a classic interference with the bouncer’s right.<sup>95</sup> Still thinking in unitary terms, the Court characterized the provision as a taking of the right to exclude itself.<sup>96</sup> Yet the Court concluded that the state constitutional provision did not amount to

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<sup>92</sup> See, e.g., *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agen.*, 535 U.S. 302, 329-30 (2002); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-19 (1992).

<sup>93</sup> In the law of takings, this issue is described as a denominator problem, where the numerator over the denominator represents what the owner lost divided by what the owner owned in the first instance. See Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUP. CT. REV. 5, 22-23. The denominator problem seems intractable as a conceptual matter for the reason identified in the text. In any event, the Supreme Court’s latest pronouncement is that the denominator for takings analysis is the “parcel as a whole.” See *Tahoe-Sierra Preservation Council*, 535 U.S. at 331-32. This solution seems appealing, as far as it goes, but it leaves unresolved a series of thorny issues, such as what happens if a landowner, anticipating government regulation, sells a fraction of his property to a third party, and then the government takes this fraction in its entirety?

<sup>94</sup> 447 U.S. 74, 82 (1980).

<sup>95</sup> *Id.* at 83-84.

<sup>96</sup> *Id.* at 82, 84.

a taking of the plaintiff's property for the purposes of the Fifth Amendment because the plaintiff "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"<sup>97</sup> Thus, said the Court, a loss of the right to exclude was not decisive in takings law. What mattered was the extent to which the government regulation adversely affected the plaintiff's economic interests.

Just two years later, however, in *Loretto v. Teleprompter Manhattan CATV Corporation*,<sup>98</sup> the Supreme Court suggested that a permanent deprivation of the right to exclude *would* amount to a per se taking, even if the economic impact of the deprivation was de minimis.<sup>99</sup> *Loretto* seemed to elevate the importance of the right to exclude in takings doctrine. Inevitably, commentators trying to make sense of the Supreme Court's about-face seized on the idea of fragmenting the right to exclude:

At first glance, *Pruneyard* might appear to undermine the right to exclude others so explicitly protected by . . . *Loretto*. However, *Pruneyard* is clearly distinguishable from [*Loretto*] on the following grounds: 1) The property owner in *Pruneyard* was already inviting the general public onto his premises but sought to exclude only those with whose speech he disagreed.<sup>100</sup>

This analysis is satisfying in one respect and flawed in another. It is satisfying in the sense that it implicitly recognizes what the *Pruneyard* and *Loretto* Courts missed, which is that there are several different types of exclusion, and depriving an owner of one right to exclude does not deprive the owner of all rights to exclude. But the analysis is disappointing in the sense that it seems to suggest there is an important difference between the deprivation of both the hermit's right and the bouncer's right in *Loretto* and a mere deprivation of a bouncer's right in *Pruneyard*.<sup>101</sup> The notion that this distinction makes a difference rests on the untenable idea that the hermit's right is somehow valuable to the owner of a for-profit shopping center.<sup>102</sup> In short, scholarly efforts to reconcile *Pruneyard* and *Loretto* have moved us toward the important idea that the various rights to

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<sup>97</sup> *Id.* at 84.

<sup>98</sup> 458 U.S. 419 (1982). It is sensible to read *Loretto* as a restoration of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), which seemed to elevate the importance of right-to-exclude deprivations in takings doctrine. *Id.* at 179-80.

<sup>99</sup> *Id.* at 435-36.

<sup>100</sup> David L. Callies & J. David Breener, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J. L. & POL'Y 39, 52 (2000).

<sup>101</sup> The regulation at issue in *Loretto* deprived the plaintiff's right of both the hermit's right and the bouncer's right with respect to a tiny fragment of her larger parcel. *Loretto* objected to a city ordinance mandating that she permit the local cable company to install cable wires on the exterior of her building, so as to facilitate tenants' access to cable television. 458 U.S. at 424-25. As a result of this ordinance, she was unable to leave the space occupied by the cable empty (as she would have preferred), and the presence of the cable in that portion of the larger property precluded her from admitting third parties to that sliver of her land.

<sup>102</sup> There is a better basis for distinguishing *Loretto* and *Pruneyard*: Namely, that the plaintiff in the former case was completely deprived of the bouncer's right (at least with respect to a small portion of her property), whereas the plaintiff in the latter case suffered only a partial deprivation of the bouncer's right. After all, the shopping center owner retained authority to selectively exclude entrants on the basis of criteria other than the content of their speech and to impose reasonable time, place, and manner restrictions on prospective entrants seeking to exercise free speech rights.

exclude are substitutes for each other, but obscured the fact that they are *imperfect* substitutes, such that the deprivation of one right to exclude in a particular context can be devastating for its owner. Work by other distinguished scholars has fallen into the same trap.<sup>103</sup>

Lower federal court opinions after *Loretto* have continued making a mess of things, issuing inconsistent pronouncements about what it means to be deprived of the right to exclude. The Eleventh Circuit, in particular, has been all over the map. In *Cable Holdings of Georgia v. McNeal Real Estate Fund VI*, the court held that a federal law mandating that cable companies receive access to private property via rights-of-way that had already been obtained by other utilities would likely deprive a property owner of his right to exclude and therefore amount to a taking for which compensation was owed.<sup>104</sup> Hence the court adopted a saving construction of the federal statute to avoid this constitutional difficulty.<sup>105</sup> Note that the federal law at issue in *Cable Holdings* would have, at most, deprived a property owner of the right to exclude a few parties for a particular purpose, thus amounting to a partial deprivation of the bouncer's right. But the court equated this partial deprivation of the bouncer's right with a total deprivation of the unitary right to exclude.

Four years later, in *New Port Largo v. Monroe County*, the same court was faced with a much more severe restriction on a property owner's bouncer's right.<sup>106</sup> The landowner, New Port Largo, purchased a large parcel shortly before the land was rezoned from residential use to private airport use. New Port Largo argued that this zoning change completely deprived it of discretion to admit residential owners to the property, zoning "private property so it could only be used for the public good" as an airport. Without citing *Cable Holdings*, the court rejected New Port Largo's claim that the rezone constituted "a deprivation of the right to exclude."

The County's act of rezoning the property to private airport was not, in itself, a deprivation of the right to exclude. NPL nowhere contends that, as a matter of law, the rezoning to private airport required it to admit the public. Because the property could have remained dormant, consistent

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<sup>103</sup> See, e.g., Estlund, *supra* note 46, at 353 (defending the constitutionality of a proposal to mandate the accessibility of workplaces to union organizers on the grounds that "[l]ike the access the Court allowed in *Pruneyard*, the right of access my proposal guarantees would arise only after the employer chooses to open its property to outsiders; it would not affect truly 'private' private property."); Singer, *supra* note 21, at 1448 ("[T]he common-law rule allowing arbitrary exclusion of customers is based on an illegitimate conception of private property, which supposes that businesses open to the public are distinguishable from private homes. On the contrary, by opening one's property to the public for business purposes, the owner waives a part of her right to exclude, since she no longer can claim any legitimate privacy interests."). For a more convincing defense of *Pruneyard*, see Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 61 (1997) (defending *Pruneyard* on the basis of need to create social capital in shopping malls, and analogizing the destruction of public "Main Streets" and their replacement with private shopping centers as a kind of nuisance.) For a response to this idea and a sharp critique of *Pruneyard*, see Richard A. Epstein, *Takings, Exclusivity, and Speech: The Legacy of Pruneyard v. Robins*, 64 U. CHI. L. REV. 21 (1997).

<sup>104</sup> 953 F.2d 600, 604-05 (11th Cir. 1992).

<sup>105</sup> *Id.* at 605.

<sup>106</sup> 95 F.3d 1084 (11th Cir. 1996).

with the PA zoning, NPL cannot argue that the rezoning was a deprivation of the right to exclude in the traditional sense.<sup>107</sup>

To restate the court's conclusion, there was no taking because even though the infringement on the bouncer's right was very substantial, New Port Lago retained the (worthless) hermit's right.

I do not cite to these conflicting pronouncements about the right to exclude from the Supreme Court and the Eleventh Circuit because I am interested in taking a position here about the rightness of *Pruneyard* and *New Port Lago* and the wrongness of *Loretto* and *Cable Holdings*, or vice versa. Indeed, I believe it is a fool's errand to try to decide whether a taking has occurred on the basis of whether there has been a deprivation of the right to exclude, or two rights to exclude, or one-half of a right to exclude. Rather, my purpose in citing the case law and the scholarship about the right to exclude in the takings context is two-fold. First, I want to show that while several courts and commentators have implicitly and conveniently embraced efforts to fragment the right to exclude, they have done so in a haphazard way. Hence, there is a genuine need for the kind of conceptual clarity that can come from systematic fragmentation and reconstruction of the right to exclude. Second, those courts and commentators that have taken baby steps toward the fragmentation project, often in service of favored outcomes, have paid insufficient attention to the extent to which the various rights to exclude are imperfect substitutes for one another.

This discussion of takings law suggests that although courts recognize that the hermit's right and bouncer's right may be disaggregated, courts have not given any consideration to the relationship between these rights and the exclusionary vibe or the exclusionary amenity. As we turn to the law of adverse possession and the Fair Housing Act, however, we begin to see property doctrine recognizing the distinction between trespass-based exclusion rights, like the hermit's right and the bouncer's right, and nontrespass-based exclusion rights, like exclusionary vibes and exclusionary amenities.

## 2. Adverse Possession

Adverse possession is one of the older doctrines in Anglo-American property law, tracing its origins to thirteenth-century English law.<sup>108</sup> American rules requiring that an adverse possessor occupy the land in an "open and notorious" and "exclusive" manner are of ancient vintage by American standards, dating to the early nineteenth century.<sup>109</sup> The "open and notorious" element requires that the trespasser seeking to establish ownership by adverse possession must have communicated his exclusive ownership to the community, such that neighbors or passersby would have assumed, incorrectly, that the trespasser was in fact the owner of the land.<sup>110</sup> Thus, one element of adverse

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<sup>107</sup> *Id.* at 1087.

<sup>108</sup> William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L.Q. REV. 532, 532 (1939) (tracing the origins of English adverse possession law to the Statute of Westminster I, c. 39, 3 Edw. I (1275)); see also Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 137-39(1918) (discussing more of the history).

<sup>109</sup> See, e.g., *Johnston v. Irwin*, 3 Serg. & Rawle 291 (Pa. 1817), available at 1817 WL 1814, at \*3; *Small v. Procter*, 15 Mass. 495, 498 (Mass. 1819).

<sup>110</sup> See *Striefel v. Charles-Keyt-Leaman P'ship*, 733 A.2d 984, 990-91 (Maine 1999).

possession requires that the trespasser demonstrate the kind of exclusionary vibe “bluff” that I discussed previously.<sup>111</sup>

Quite apart from the “open and notorious” element, the law also requires the trespasser to demonstrate exclusivity, which means that neither the true owner nor any other trespasser physically possessed the property during the statute of limitations period.<sup>112</sup> Now the law is referencing, not the trespasser’s success at communicating exclusionary messages, but rather his success in physically excluding all outsiders who lack the trespasser’s permission to be on the land. By disaggregating these aspects of exclusion into two separate elements for the purposes of adverse possession claims, the law has long recognized that one form of exclusion is an imperfect substitute for the other, and that only when both are present has a trespasser effectively exercised the right to exclude, such that the law should recognize his newly respectable status as a landowner.<sup>113</sup>

Previous property scholarship on exclusion has focused on trespass law. In the law of trespass, communicative exclusion is legally irrelevant. But this brief exploration of adverse possession law demonstrates that communicative exclusion, quite apart from a legal right to exclude founded on trespass law, has long been important in the American law. Hence, the point I have made herein, about the interconnectedness of trespass-based exclusion rights and communication-based exclusion rights, really has been lurking within the structure of property law for centuries.

Indeed, the presence of adverse possession law itself in American law underscores a presumption about the effectiveness of communicative exclusion. Remember that an adverse possessor is, in essence, a trespasser who manages, for several years to convince those around him of his exclusive legal right to occupy land and exclude all others from it, even though he in fact has no such right. The success of adverse possession claims, then, is a testament to the power of the communicative bluff, even when something quite valuable is at stake.

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<sup>111</sup> See *supra* section I.D.

<sup>112</sup> *Striefel*, 733 A.2d at 993; *Vela v. Hester*, 280 S.W.2d 389, 371 (Tex. Civ. App. 1955).

<sup>113</sup> Why require both? It seems plain that communicative exclusion without effective exclusion (i.e., satisfying adverse possession’s “open and notorious” prong, but not its “exclusivity” prong) should be insufficient to transform a trespasser into a landowner. After all, if the trespasser cannot show exclusive possession of the land during the statute of limitations period, this suggests that the communicative message was not particularly effective, and there is no reason to reward trespassers whose exclusionary messages are ignored by the relevant third parties. But why is the exclusionary message mandated? Why isn’t evidence of successful exclusion sufficient? In the adverse possession context, the answer appears to be that exclusive possession provides insufficient notice to the owner of a resource that he might be losing something of value. Hence, the law dictates that the obvious adverse possessor may win, but the subtle adverse possessor should lose. See *Mannillo v. Gorski*, 255 A.2d 258, 263-264 (N.J. 1969). The law’s approach here is based on the understandable intuition that a prior landowner need not be expected to be particularly vigilant in order to maintain ownership of land that he has lawfully obtained. This insight perhaps has application beyond adverse possession law. Cf. *Boy Scouts of America v. Dale*, 530 U.S. 640, 663, 686-87 (Stevens, J., dissenting) (arguing that if the Boy Scouts want to invoke an associational freedom exception to state antidiscrimination laws, they should at least be required to advertise their exclusionary policies broadly). Justice Stevens might have noted that an additional benefit of requiring an organization to proclaim its discriminatory policies publicly in order to benefit from the First Amendment’s defense against antidiscrimination laws is that such a requirement would alert potential opponents and provide fair warning to the homosexuals who cannot be scouts under the organization’s policies.

### 3. Fair Housing Act

Case law interpreting the federal Fair Housing Act also has recognized communicative exclusion as a form of behavior that should be regulated, regardless of whether that communication is successful in achieving residential segregation. The Fourth Circuit has held that in enacting the Fair Housing Act, Congress prohibited racially discriminatory advertisements for rental housing, even by those landlords who were free, under the “Mrs. Murphy” exception for owner-occupied buildings containing four units or less, to refuse to rent their apartments on the basis of race or other suspect criteria.<sup>114</sup> (Mrs. Murphy was the hypothetical “mom and pop” landlord who rented out a few extra bedrooms in her home to supplement her income.)<sup>115</sup> To rationalize this counterintuitive result, the court noted the negative externalities that might result from racist advertising by Mrs. Murphy landlords:

In combating racial discrimination in housing, Congress is not limited to prohibiting only discriminatory refusals to sell or rent. Widespread appearance of discriminatory advertisements in public or private media may reasonably be thought to have a harmful effect on the general aims of the Act: seeing large numbers of ‘white only’ advertisements in one part of a city may deter nonwhites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a nondiscriminatory basis.<sup>116</sup>

Thus, held the court, there are public policy justifications that justify a congressional policy whereby landlords are allowed to exercise the bouncer’s right, but not to disseminate exclusionary vibes. Because of these externalities and the structure of the FHA, a Mrs. Murphy landlord who advertises her racial preferences may be liable even if her own unit is either racially integrated or no more segregated than it would have been in the absence of such an advertisement.

Legal discussions of exclusionary amenity-style arguments have been almost nonexistent. Still, there is some indication that the courts will treat exclusionary amenities and exclusionary vibes differently under the FHA. In the only published case that implicitly addresses a plaintiff’s exclusionary amenities style of argument, the Second Circuit held that in order to recover under a housing discrimination-by-amenity theory, a plaintiff asserting housing discrimination must show, not only the potential for such an amenity to promote housing segregation, but also that the presence of an amenity actually did produce a segregated residential environment.<sup>117</sup> Hence, it was not enough for

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<sup>114</sup> *United States v. Hunter*, 459 F.2d 205, 213-14 (4th Cir. 1972). 42 U.S.C. § 3603(b)(2). For a criticism of the persistence of the Mrs. Murphy exception, see James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R. & C.L. L. REV. 605 (1999). The Seventh Circuit has held that a nineteenth century federal statute, 42 U.S.C. § 1982, bars private discrimination by Mrs. Murphy landlords, see *Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974). For further discussion, see Walsh, *supra*, at 625-630.

<sup>115</sup> Walsh, *supra* note 114, at 605 n.3 & 608.

<sup>116</sup> *Id.* at 214. See also *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (Bader Ginsburg, J.) (noting, in the FHA standing context, that discriminatory ads could create “a public impression that segregation in housing is legal, thus facilitating discrimination by . . . other property owners”).

<sup>117</sup> *Hack v. President and Fellows of Yale College*, 237 F.3d 81, 91 (2d Cir. 2000).

Orthodox Jewish students at Yale to show that Yale's exclusively coeducational dormitories forced them to choose between following their religious beliefs and paying for a dormitory room that they would never use.<sup>118</sup>

Surveying this terrain, discriminatory exclusionary vibes alone violate the FHA, regardless of their effectiveness in promoting segregation, but exclusionary amenities do not. In some respects, this dichotomy is puzzling, since the Second Circuit has taken a very hard line on exclusionary vibes under the Fair Housing Act.<sup>119</sup> But perhaps the court's differentiation between the two exclusion strategies under the FHA stemmed from a hunch that the negative externalities associated with Yale's exclusionary amenities were insubstantial.

In the part that follows, I will consider in a more systematic way the benefits and costs, both private and social, associated with the various exclusion strategies. In the course of examining why a resource owner might opt for one exclusion strategy over another, I also will explore what the imperfect substitutability of these various exclusionary strategies tells us about appropriate legal responses.

## II. The Resource Owner's Choice of Exclusion Strategies

So far we have established that the four exclusion strategies can substitute for one another, that they are imperfect substitutes, and that the law sometimes recognizes and sometimes ignores this substitutability. Given all of that, it is worth situating ourselves in the shoes of a resource owner so that we can evaluate the tradeoffs among the various exclusion strategies and decide which strategy is optimal in a particular context.

At this stage it remains appropriate to focus on the three exclusion rights that really matter. For most resource owners, the hermit's right strategy will not be a viable option,<sup>120</sup> so she faces a choice among the bouncer's right, exclusionary vibes, exclusionary amenities, or governance. What factors drive the decision among these options? I will discuss them below, beginning with the most important unrecognized consideration.

### A. *Private Information*

The central claim in this paper is the following: Where third parties who are potential targets for exclusion possess private information about their own attributes and intentions, and where it is costly for a landowner to obtain or verify this information, the landowner will be more likely to employ a nontrespass-based exclusion strategy, such as exclusionary vibes or exclusionary amenities. Where, by contrast, those third parties who might be excluded have no private information, the landowner will be more likely to exercise the bouncer's right, a trespass-based exclusion strategy.<sup>121</sup> This central claim is

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<sup>118</sup> *Id.* at 88. Perhaps the court went easy on Yale because it was thinking in terms of antidiscrimination law more generally, where facially neutral classifications with a racially disparate impact are viewed with less skepticism than the sort of express classifications that might be referenced via an exclusionary vibe.

<sup>119</sup> *See, e.g.,* *Ragin v. New York Times*, 923 F.2d 995 (2d Cir. 1991).

<sup>120</sup> *See supra* section I.B.

<sup>121</sup> The story underlying this hypothesis draws on a fundamental premise of agency theory. Namely, the landowner is ordinarily a better agent for his own interests than a third party seeking entry would be. Hence, if the landowner can make decisions about who to exclude at the same cost as the potential entrants, he will prefer to keep this discretion for himself.



based on a dynamic whereby sorting among desirable and undesirable third-party entrants to the landowner's property will be costly to the landowner, sometimes costly enough to warrant delegating that sorting process to the third parties themselves.<sup>122</sup> Analytically, the case for exclusionary amenities or exclusionary vibes looks a lot like the law-and-economics case for liability rules in a world of positive transaction costs.<sup>123</sup>

A few illustrations will be helpful in explaining the centrality of information costs in a resource owner's choice among multiple exclusionary strategies. Recall our hypothetical real estate developer who determines that in a world of declining social capital and increasing atomization, pent-up demand exists for a subdivision whose residents are enormously outgoing and social.<sup>124</sup> To make things more concrete, we will assume that if the developer can promise potential purchasers, credibly, that enthusiastic social entrepreneurs will be over-represented in the new development, homeowners will be willing to pay a five percent premium for new homes. How might our developer go about capturing that premium?

He might opt to exercise the bouncer's right. He could, for example, interview all people who wish to purchase homes in his new development, and only permit those homeowners who seem particularly friendly, gregarious, and warm to purchase units. Conducting these interviews will be time-consuming for the developer and for the applicants. And, of course, the interviews might fail to sort potential purchasers effectively if the developer exercises poor judgment by mistaking physically attractive or eloquent applicants for extroverts, or is overly responsive to his idiosyncratic notions of what makes someone a social butterfly. Because of these concerns, the developer might ask each potential purchaser for personal references, who can then be interviewed, or perhaps a list of social, charitable, or professional organizations with which each potential purchaser is involved. Again, however, relying on these proxies for sociability will be costly and imprecise. References may have incentives to be overly rosy in their assessments, applicants may mischaracterize their involvement in civic society in ways that are difficult for the developer to discover, and extroverted potential purchasers may regard such a rigorous background investigation as unduly intrusive of their personal

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<sup>122</sup> My thesis here can be conceptualized as a contribution to the economics literature on mechanism design, which examines the ways in which actors can structure their affairs so as to induce third parties to reveal private information that they would otherwise prefer to keep secret for strategic reasons. This literature begins with A. Michael's Spence's work on signaling in the employment context, which discussed employees' strategy of investing in costly, but readily observed educational credentials as a means of signaling to employers that they possess other desirable, but less easily observed, characteristics. A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES 26-28 (1974). For more recent mechanism design research, see, e.g., Dirk Bergemann & Juuso Valimäki, *Information Acquisition and Efficient Mechanism Design*, 70 ECONOMETRICA 1007 (2002); and Zvika Neeman, *The Relevance of Private Information in Mechanism Design*, 117 J. ECON. THEORY 55 (2004).

<sup>123</sup> There is an extensive literature on the extent to which liability rules are preferable to property rules as a means of forcing the parties to reveal private information about their utility functions. For some of the more important contributions to this rich and extensive literature, see Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1414-32 (2005); Smith, *supra* note 14, at 1741-90; Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Bargaining*, 104 YALE L.J. 1027, 1036-72 (1995).

<sup>124</sup> See *supra* text accompanying notes 59-60.

privacy. The problem with a bouncer's right approach to this problem, then, is that each potential purchaser possesses private information about his own propensity for sociability, and it may be inordinately costly for our developer to discover this private information.<sup>125</sup>

What if the developer opts for an exclusionary vibe instead? He might, for example, name his development in a manner that conveys its status as a mecca for social butterflies. He could advertise using testimonials for purchasers who talked about how they bought homes in this particular community because the neighbors they met were so outgoing and actively involved in community affairs. He might entice a few particularly well-known social entrepreneurs to purchase homes in the new community and then invest resources in publicizing these high-profile purchases.<sup>126</sup> Now the developer can avoid having to judge whether a particular homeowner is indeed a social butterfly. Rather, he can rely on a focal points strategy, and assume that introverted people will be deterred from purchasing homes in the new community by the fear of feeling left out among their neighbors. The developer no longer needs to spend time or resources discovering prospective purchasers' private information because they will be making the decision about who joins the community and who does not. In this setting, what game theorists would dub a pure coordination game,<sup>127</sup> self-sorting replaces developer sorting.

Of course, it may be that exclusionary vibes will not be up to the task. For example, the developer's ads might be too vague about the developments' focal points, or too many unperceptive and introverted prospective purchasers may be oblivious to the messages. Alternatively, the payoff structure may deviate from that of a pure coordination game in that some introverted prospective purchasers might want to buy homes in an extroverted development, because they anticipate that they can successfully free ride off the lower crime or higher property value appreciation that could result from

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<sup>125</sup> The unattractiveness of utilizing the bouncer's right might discourage the real estate developer enough so that he starts contemplating governance solutions. For example, he may explore whether he can include rules mandating socialization among residents of his community in the covenants, conditions and restrictions (CC&Rs) that govern his development. But trying to mandate socialization directly through such covenants would be problematic. In the first place, it would be hard to create rules that defined socialization among neighbors with sufficient provision. Enforcing the rules would be cumbersome and costly; residents might resent the rules and consequently honor their letter rather than their spirit. Furthermore, there may be an important difference in the quality of mandatory socialization versus voluntary socialization. It seems likely that people resent the former and enjoy the latter, and that only the latter produces the welfare gains that would prompt prospective purchasers to pay a premium. *Cf.* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 581 (2001) (finding that voluntary association engenders higher levels of cooperation than involuntary association).

<sup>126</sup> Developers and cooperative boards do sometimes publicize purchases of homes by celebrities, civic leaders, or captains of industry. *See* Ralph Gardner Jr., *There Goes the Nabe: Up, Up, Up*, N.Y. TIMES, Jan. 16, 2003, at F1.

<sup>127</sup> A pure coordination game is one in which there are two or more possible equilibrium, none inherently superior to the others, but the players all have incentives to coordinate "on some equilibrium." Judith Mehta et al., *The Nature of Salience: An Experimental Investigation of Pure Coordination Games*, 84 AM. ECON. REV. 658, 658 (1994). Thomas Schelling devised the most famous pure coordination game experiment, where he instructed Yale graduate students that they were to meet another student (unknown to the subject) in New York City on a particular day, promising a reward if they successfully met up despite their inability to communicate. A majority of the students identified the clock at Grand Central Station and noon on the relevant day as the natural focal points, and claimed the prize by meeting their partners there and then. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 55-56 & 55 n.1 (1980).

their neighbors' contact with one another. To that end, the developer may feel the need to combine a focal points strategy with some monetary inducement that helps sort out the introverted and extroverted: an inducement that will prevent many free riders from moving into the community, but will not deter genuine socialites from buying a home. For example, the developer may devote large swaths of land within the development to playgrounds, dog runs, swimming pools, and club houses, then mandate that the costs of creating and maintaining these social spaces be assessed against all homeowners in the community. At the margins, these amenities may discourage the introverted from purchasing a home within the development, because they will face the prospect of paying hefty monthly assessments for costly amenities that they will never use. Because willingness to pay for social amenities may function as a proxy for sociability, the exclusionary amenities strategy seems like a promising tack for the developer to pursue. And this strategy, like the exclusionary vibes approach, permits the developer to avoid most of the information costs that make the bouncer's right so inefficient in this context. The developer merely needs to choose some basis for exclusion, and self-sorting will take care of the rest, since third parties will have social and economic incentives to sort themselves in accordance with the selected criteria.

In instances where private information is easily discovered by a landowner, the costs of exercising the bouncer's right are far lower. Recall our previous discussion of sex offender-free subdivisions. Robust demand for sex-offender-free developments has coincided with the widespread availability of data about sex offenders, circulated easily as a result of the Megan's Laws enacted by all fifty states.<sup>128</sup> Because of these laws, an individual's status as a sex offender can be discovered by a residential developer at very low cost.<sup>129</sup> Since the value of excluding sex offenders from a residential development appears to be high, and the costs for a developer of sorting among sex offenders and nonsex offenders has become quite low, we should have expected to see the prevalence of the bouncer's right strategy here, as opposed to exclusionary vibes or exclusionary amenities. And indeed, that is evidently the dominant strategy that real estate developers have used.

The nonfungible and communal nature of real property renders private information decisive in shaping owners' strategies and makes exclusion a particularly intriguing strategy. Compare relatively fungible resources, like automobiles or designer clothing. In both cases, potential buyers have private information that is relevant to their purchasing decision. In the former case, car dealers try to obtain this private information to engage in price discrimination, and in the latter case, clothing boutiques elect not to invest resources in trying to discover a buyer's private willingness to pay, selling garments at pre-set prices. So the process by which private information is extracted or ignored by sellers is rather straightforward, constrained largely by transaction costs and arbitrage possibilities. And someone excluded from a fungible resource for which there is

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<sup>128</sup> Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355, 415 (2005).

<sup>129</sup> It is appropriate to flag the government's role in making previously private information about prospective purchasers widely available over the Internet. I will argue in the next part that by regulating the information market, the government can alter the incentives for resource owners to choose one exclusion strategy over another.

a competitive market would lack standing to complain in court, since the availability of perfect substitutes would prevent him from suffering an injury in fact.

In the real property context, by contrast, perfect market substitutes for particular homes and communities do not exist. Hence exclusion might engender real social harms that cannot be solved by market competition and arbitrage. Moreover, an individual's enjoyment of a home may be heavily dependent on the identity of his neighbors, whereas someone's enjoyment of a car or dress is only slightly dependent on the identities of particular individuals who have purchased the same cars or suits. The possibility of substituting various exclusion strategies for governance, which is practically a nonsequitur in the context of nonsocial goods such as cars or garments, takes on much greater importance in the real property context.

My information-asymmetries hypothesis finds support in the economics literature on tagging. The tagging literature has focused on the problems associated with government wealth distribution policies, which require the state to distinguish between those deserving of welfare and imposters who try to obtain welfare payments even though they are capable of obtaining gainful employment. In a recent study of nineteenth-century poor laws, Besley, Coate, and Guinnane argue that new informational burdens brought on by rapid economic change explained the English government's 1834 mandate that only citizens who resided in government workhouses would be eligible for welfare.<sup>130</sup> Although building and staffing these workhouses entailed far higher per-pauper expenditures than the prior regime of locally dispensed monetary assistance, the English government nevertheless adopted the workhouse mandate because of its effectiveness at sorting among the deserving and undeserving poor.<sup>131</sup> The sorting device was effective because life in the workhouse was so unpleasant that no one with other options would be willing to endure it.<sup>132</sup> During earlier epochs, English workers lived and died in a single county. This stability allowed the state to rely on the local vestry to dole out welfare, since those officials knew who was destitute because of economic circumstance and who was a loafer or a drunk.<sup>133</sup> But in the early nineteenth century, as "society became increasingly anonymous and market relations supplanted personal relations," this old system broke down.<sup>134</sup> Once the government could no longer rely on the bouncer to sort the deserving from the undeserving, it had to turn to something akin to

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<sup>130</sup> Timothy Besley et al., *Incentives, Information, and Welfare: England's New Poor Law and the Workhouse Test* (2001 Working Paper) (final version published in *HISTORY MATTERS: ESSAYS ON ECONOMIC GROWTH, TECHNOLOGY, AND DEMOGRAPHIC CHANGE* 245 (Timothy W. Guinnane et al., eds 2004)). The analysis by Besley and his co-authors echoes earlier work on tagging as a means of sorting among deserving and undeserving recipients of welfare. See, e.g., George A. Akerlof, *The Economics of "Tagging" as Applied to the Optimal Income Tax, Welfare Programs, and Manpower Planning*, 68 *AM. ECON. REV.* 8, 15-17 (1978); Albert L. Nichols & Richard J. Zeckhauser, *Targeting Transfers Through Restrictions on Recipients*, 72 *AEA PAPERS & PROCEEDINGS* 372, 375-77 (1982). I thank David Weisbach for alerting me to this literature.

<sup>131</sup> *Id.* at 11-12.

<sup>132</sup> Workhouse residents were denied contact with members of the opposite sex, including family members. They were deprived of tobacco, served terrible food, forced to work in difficult circumstances, and had their waking hours strictly regulated. *Id.* at 10.

<sup>133</sup> *Id.* at 7-8.

<sup>134</sup> *Id.* at 7.

an exclusionary amenity.<sup>135</sup> It seems plain that the same kinds of information shocks that would prompt the government to rethink its sorting strategies in the welfare context should cause a private resource owner to re-evaluate its exclusion strategies in the property context.

Before leaving the topic of private information, it is worth mentioning that private information is a two-way street. There may be, on occasion, a few instances in which the landowner has private information about the prospective entrants that the entrants themselves do not possess. Credit-worthiness scores are an example of such private information. Many landlords check these credit scores before leasing an apartment to a new tenant,<sup>136</sup> and these credit reports may reflect information to which the prospective tenant herself is not privy.<sup>137</sup> In such settings, the resource owner's strategy is obvious: He has the relevant information and the right incentives to use it in a way that maximizes his profit. The landlord will use the bouncer's right to exclude those prospective tenants whose credit worthiness is deemed too problematic.

That said, there may be cases in which potential entrants are poor at self-assessing. For instance, we might imagine the delusional introvert who believes she is an extrovert, or who unrealistically expects to be extroverted if she can just maneuver herself into the right social setting. This paper's analysis so far has been premised on the notion that individuals are almost always better at assessing themselves than third parties are at assessing them, but readers who do not share that supposition can simply supplement my model by adding self-assessment as an additional variable. *Ceteris paribus*, where self-assessment skills are high, resource owners will be more likely to employ nontrespass-based exclusion, but in instances where self-assessment skills are poor, bouncer's exclusion will become more common.

As a general matter, prospective entrants' private information will be a concern more often than a resource owner's private information. After all, vagueness on the part of the resource owner may discourage applicants from seeking entry into the relevant community because they fear being dissatisfied with their fellow resource users or because they are concerned that they will expend resources in an ultimately futile effort to gain admission.<sup>138</sup> In that respect, then, resource owners will often have an economic incentive to disclose publicly at least some otherwise private information about the desired mix of entrants. For example, fraternities and sororities do brand themselves with niche personalities so as to attract like-minded rushees, and many Greek houses try to

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<sup>135</sup> *Id.* at 14 (“Screening is necessary only because obtaining information on the state of the poor required costly and potentially acrimonious and fraudulent investigation. The workhouse test dispensed with all investigation. By accepting or declining the workhouse, the applicant in effect told the Guardians whether he or she was needy.”).

<sup>136</sup> Brian S. Prestes, Comment, *Application of the Equal Credit Opportunity Act to Housing Leases*, 67 U. CHI. L. REV. 865, 866 (2000).

<sup>137</sup> See Martha F. Davis, *Solving Statute of Limitations Problems Under Fair Credit Reporting Act*, 18 IND. L. REV. 507, 515 (1985).

<sup>138</sup> Resource owners generally do not sell “grab bags” to members of the public, in which the resource owner knows exactly what the purchaser is buying but the purchaser hasn't a clue. Still, it is often the case that a resource owner has some private information about his product, though in the context of social goods, this private information will not typically concern the resource's most salient aspects.

give hints to those rushees who are unlikely to be admitted as pledges, so that they will instead spend their time rushing houses to which they seem better suited.<sup>139</sup>

To summarize, where potential entrants have private information that the landowner cannot easily discover, it is likely that the landowner will employ a nontrespass-based exclusion strategy. Where, by contrast, there are few information asymmetries, the landowner likely will use trespass-based exclusion. In those rare settings where the resource owner has private information about the would-be entrants, the owner probably will rely on bouncer's exclusion.

Although private information will often be the most important factor in determining which exclusion strategy a resource owner should pursue, it will not be the only relevant factor. In the discussion that follows, I explore factors that may prove decisive in particular contexts.

### B. *The Nature of the Game*

On a conventional economic account, it is not private information that drives the resource owner's choice of strategies, but rather the nature of the game. If the game is structured as a pure coordination game, we should expect to see reliance on the communication strategies that economists dub "cheap talk."<sup>140</sup> If, on the other hand, the game is structured as a conflict game, we should expect to see the resource owner relying on the bouncer's right, because cheap talk is thought to be relatively ineffective when potential users of the resource have conflicting and competitive interests vis-à-vis each other.<sup>141</sup> Thus, the conventional economic account, especially the mechanism design literature, suggests that the nature of the game is the decisive consideration.

The central problem with the conventional account is its unrealistic assumptions, at least in the real estate setting. The cheap talk model introduced by Farrell and others suggests that in a game with some conflict, cheap talk will be ignored by rational actors. But if cheap talk influences some potential purchasers even a little bit, then rational actors should pay a great deal of attention to it. I argued before that some people will confuse an exclusionary vibe for an indication that the resource owner intends to exercise the bouncer's right to preclude undesired types from entering. If even a few folks make this mistake in an association that is to be governed by majority rule, then the development will have the propensity to tip in the direction of desired types, because rational actors will assume that after the development has been populated the majority (of desired types) may gang up on the minority (of undesired types) through onerous governance rules, or exclusionary amenities that tax the undesired without offering them a commensurate benefit.<sup>142</sup> Hence, exclusionary vibes are not exactly the sort of "cheap

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<sup>139</sup> See *supra* text accompanying note 48.

<sup>140</sup> Farrell, *supra* note 57, at 39; Farrell & Rabin, *supra* note 57, at 116-17.

<sup>141</sup> *Id.*

<sup>142</sup> This analysis assumes simple majoritarian voting rules in the relevant homeowners associations. If an association's covenants provide for super-majority voting rule requirements in order to change governance rules or buy out existing residents, then exclusionary vibes may prove insufficient for solving this conflict game, and the developer will have to turn to exclusionary amenities or bouncer's exclusion. Relatedly, we might conceptualize super-majority voting requirements in condominium associations as voluntarily imposed protections for idiosyncratic or tone-deaf prospective purchasers against subsequent exclusion.

talk” referenced in the economics literature, and in a subdivision that has not embraced super-majority voting rules, they may well prove up to the task in a game setting characterized by conflict.

Similarly, it is not obvious that exclusionary vibes will always be the exclusion mechanism of choice in a pure coordination game. Even in strong seller’s markets for real estate exclusionary vibes often involve substantial investments of resources.<sup>143</sup> In some settings, the costs of disseminating effective exclusionary vibes may be higher than the costs associated with exercising the bouncer’s right effectively. The choice among exclusion strategies will depend on these costs, and the associated benefits.

This analysis shows why it is appropriate to think of resource owners’ actions and potential entrants’ actions as a repeated game. At time one, private information will drive the resource owner’s choice of strategies, but this choice of strategies also will affect the potential for the entrants to take corrective action at time two or thereafter, and this possibility of subsequent shifting exclusion strategies will alter potential entrants’ incentives at time one. When a resource owner selects an exclusion strategy, she is simultaneously stacking the deck with respect to future decisions that the entrants will make about exclusion and governance. Put another way, the owner influences future governance by controlling present exclusion.

But what if potential entrants understand this dynamic too well, and try to engage in coordinated action that undermines the resource owners’ objectives? In the real estate context, block-busting is the most prominent sort of aggressive collective action. Block busting occurs when real estate agents arrange the sale of a few homes in an ethnically homogenous neighborhood as a means of triggering panic selling and prompting rapid neighborhood turnover, thereby obtaining many commissions.<sup>144</sup> Buyers may find participation in endgame block busting advantageous because it may allow them to purchase more attractive housing stock than they would otherwise be able to afford.

The bouncer’s right provides the best protection against these forms of collective action. For example, a cooperative apartment board typically exercises the bouncer’s right with respect to new purchasers,<sup>145</sup> and for that reason excels at maintaining the community’s character. Exclusionary amenities offer the next most robust protection against collective action of this sort. Existing homeowners in an exclusionary amenity community may find themselves saddled with substantial debt to pay off the amenity’s construction, and replacing the amenity with something else after it has been constructed may prove exceedingly costly or contentious.<sup>146</sup> Hence, an exclusionary amenity strategy

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<sup>143</sup> By the end of this decade, U.S. real estate agents are expected to spend more than \$9 billion on advertising, of which approximately \$3 billion will be devoted to on-line advertisements. See Broderick Perkins, *Online Real Estate’s Quantum Shifts*, May 20, 2005, available in <[http://realtimes.com/rtcpages/20050520\\_onlineadsgrowing.htm](http://realtimes.com/rtcpages/20050520_onlineadsgrowing.htm)> (visited Sep. 28, 2005).

<sup>144</sup> GERALD GAMM, *URBAN EXODUS: WHY THE JEWS LEFT BOSTON AND THE CATHOLICS STAYED* 41-42 (1999); Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics and Race-Based Real Estate Speculation*, 67 *FORDHAM L. REV.* 1145, 1145 (1998).

<sup>145</sup> Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 *J. LEGAL STUD.* 25 (1991).

<sup>146</sup> See Yoram Barzel & Tim R. Sass, *The Allocation of Resources by Voting*, *Q. J. ECON.* 745, 764-70 (1990).

deters opportunistic collective action by raising the costs associated with neighborhood demographic transition.

Exclusionary vibes, of course, provide an exceedingly poor defense against collective action. Recall that an exclusionary vibes strategy relies entirely on the establishment of focal points among those permitted to enter a property. But a group of like-minded individuals acting in concert could avoid the social or psychological costs associated with entering a property where one is not wanted. And if enough people ignore the exclusionary vibe, then members of the pre-existing population will feel like outsiders, and may decide to move elsewhere.

### C. Law

There will be circumstances in which a developer's choice of exclusion strategies is dictated, not by information asymmetries or the nature of the game, but by legal regimes that favor some forms of exclusion over others. Sometimes the law merely discourages a particular exclusion strategy. For example, consider the current legal landscape governing bouncer's exclusion and exclusionary vibes. The courts conceptualize the former as a property right and the latter as an expressive right. Accordingly, government infringements of the bouncer's right are analyzed, doctrinally, under takings law, whereas government infringements of the right to emit exclusionary vibes are analyzed under the First Amendment's commercial free speech doctrine. Prior to the Supreme Court's 1976 decision in *Virginia State Board of Pharmacy*,<sup>147</sup> commercial speech was not protected by the First Amendment at all. Since that decision, however, the Court has gradually expanded commercial speech protections,<sup>148</sup> and it seems plausible that the Court may eventually scrutinize restrictions on commercial speech with the same framework that it currently applies to core political speech.<sup>149</sup> This ratcheting up of commercial speech protection has coincided with a ratcheting down of takings protections,<sup>150</sup> such that the takings clause, applied properly, seems to have become a less severe check on the government regulation of exclusion than the First Amendment. In this environment, we should expect to see the government take advantage of these arbitrage possibilities by overregulating bouncer's exclusion and underregulating exclusionary vibes.<sup>151</sup>

In other instances, government prohibitions dictate a resource owner's choice among exclusionary strategies. The clearest example of this is my suggestion that real

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<sup>147</sup> *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>148</sup> *See, e.g., See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

<sup>149</sup> *See Note, Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2853-54 (2005).

<sup>150</sup> *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agen.*, 535 U.S. 302 (2002); *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

<sup>151</sup> The growing gap between takings scrutiny and commercial speech scrutiny, along with the behavioral distortions likely to result, provide a strong justification for returning to the dominant pre-1976 view of speech concerning an owner's resource, which is that the right to advertise a resource is a property right, not a free speech right. *See, e.g., THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 105 n.46 (1966) ("Communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression.").



estate developers may have used golf courses during the 1990s as part of an exclusionary amenities strategy to promote Caucasian residential homogeneity.<sup>152</sup> This behavior probably did not stem from the presence of private information. In many cases, a prospective entrant's race is discernible through visible inspection. But of course, the law prohibits discriminatory refusals to sell, as well as most race-based exclusionary vibes in the housing sector. Yet the law leaves exclusionary amenities largely unregulated. Hence exclusionary vibes are the only lawful racially exclusionary strategies open to real estate developers.

Note, however, that if what real estate developers are trying to achieve isn't so much racial homogeneity as cultural homogeneity ("acting white"), then the golf course strategy may be explained with reference to information asymmetries. Cultural orientation may be difficult to discern through short-lived interpersonal interactions. Suppose that Dan is a member of a minority racial group who feels more comfortable among members of a majority racial group. Suppose further that a developer seeks to set up a residential community for members of the majority racial group and could do so without violating the law. If the developer adopts a bouncer's right approach to regulating access, then it is likely that Dan will be excluded from the development, since his racial status will probably be discerned easily by the bouncer.<sup>153</sup> If, on the other hand, the developer selects an exclusionary vibes approach or an exclusionary amenities approach, then Dan may well wind up entering the community, since he values the prospect of living in a community that is comprised overwhelmingly of majority racial group members and may be willing to pay extra for that "privilege." *Ceteris paribus*, we can expect to find greater heterogeneity in those communities that employ nontrespass-based exclusion strategies, at least in those instances where the criteria for exclusion can be applied efficiently by a bouncer (because of a lack of private information). In a dynamic world, this propensity may trouble homogeneity-preferring prospective entrants enough to cause them to choose a community that controls access via bouncer's exclusion.

On the other hand, it may be that what homogeneity-loving prospective purchasers prefer is not a community that consists entirely of members of a majority racial group. Rather, they might prefer a community that consists entirely of members who accept the cultural preferences and practices commonly associated with majority racial group membership.<sup>154</sup> These citizens would prefer to live with Dan, rather than a

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<sup>152</sup> See *supra* text accompanying note 87.

<sup>153</sup> There are, of course, exceptions. It may be difficult to determine the racial status of a mixed-race person, and some bouncers may be unable to differentiate between members of particular racial groups through visual inspection (i.e., between East Asians and Native Americans) or reliance on surnames (i.e., between Latinos and Filipinos). See generally Amanda E. Lewis, *Everyday Race-Making*, 47 AM. BEHAV. SCI. 283, 291-94 (2003); EJ Perez-Stable et al., *Use of Spanish Surnames to Identify Latinos: Comparison to Self-Identification*, 18 J. NAT'L CANCER INST. MONOGRAPH 11 (1995); Mary C. Waters, *The Everyday Use of Surname to Determine Ethnic Ancestry*, 12 QUALITATIVE SOCIOLOGY 303 (1989). Note that in this context I am referring to race in a biological sense, rather than in a socially defined sense.

<sup>154</sup> Alternatively, their preferences for homogeneity may shift over time. They might begin with preferences for racial homogeneity, but their contact with the Dans of the world may convince them that their preference for racial homogeneity was misplaced. For scholarship providing support for this "contact hypothesis" in the racial setting, see Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URBAN AFF. 379, 389 (2004); Robert D. Tollison, *Consumption Sharing and Non-Exclusion Rules*, 39 ECONOMICA 276, 283 (1972).

majority-group member who nevertheless embraces minority-group values. Thus, the critical question concerns what type of homogeneity is demanded by the market. The answer to that question all boils down to the private information considerations identified at the outset of this Part. If there is market demand for homogeneity across a dimension characterized by private information (such as cultural affinity), then the landowner is likely to employ a nontrespass-based exclusion strategy. If the market demands homogeneity across a dimension characterized by easily discoverable information (such as racial status, most of the time), then the landowner is likely to employ a trespass-based strategy, assuming the law permits him to do so.

#### D. *Social Meaning*

There must be a universe of situations in which a private information story suggests that a landowner ought to be indifferent as between exercising the bouncer's right or exclusionary vibes to achieve a desired level of homogeneity within a new residential development. In other situations, a private information analysis might suggest the superiority of one strategy or another, but the magnitude of the difference will not be particularly great. Under these circumstances, a landowner should pay substantial attention to the ways in which differing exclusion strategies might carry with them divergent social meanings.<sup>155</sup>

Social meanings differ substantially with respect to various exclusion strategies. Bouncers police popular dance clubs, letting the famous, beautiful, and well-dressed people enter, and keeping out the less famous, less beautiful, less-well-dressed clientele. This conduct by nightclub bouncers is relatively uncontroversial.<sup>156</sup> But society does not seem to tolerate bouncers at restaurants, so restaurants seeking to establish an exclusive atmosphere must rely on blunt exclusion strategies (e.g., high prices or Byzantine systems for allocating reservations); governance rules ("no smoking," "no shirt, no shoes, no service," or "jacket required"); or exclusionary vibes (via advertising, background music, or décor choices). Why is blunt exclusion tolerable in one context, but not in another? The answer plausibly lies in the richness and nature of social interactions among those who enter the facility. That is to say, patrons can expect to interact substantially in the dance club, but not in the restaurant. Recognizing this, prevalent social norms tolerate more obvious forms of exclusion. Moreover, because the parties' objectives when interacting with strangers in a dance club will often be romantic, and because exclusionary interactions based on snap aesthetic judgments are de rigueur in romantic settings, what would be offensive in the restaurant setting seems perfectly natural at the entrance to the club.

Where race, religion, gender, or some other suspect classification is used as the basis for exclusion, the social meaning associated with blatant exclusionary vibes or well-publicized exercises of the bouncer's right can be substantial. Members of the public may be willing to tolerate subtle exclusion far more than obvious exclusion. Hence, in his

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<sup>155</sup> Classic legal scholarship on social meaning includes Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); and Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

<sup>156</sup> See generally Coco Henson Scales, *The Hostess Diaries: My Year at a Hot Spot*, N.Y. TIMES, July 11, 2004, at 9 (describing a bouncer's interactions with would-be entrants to a trendy club).

study of exclusionary zoning,<sup>157</sup> political scientist James Clingermayer found that because arguments about excluding the poor and minorities from middle-class and affluent neighborhoods are politically unpopular, advocates of such separation invoke nonexclusionary rationales for exclusionary policies.

Therefore, justifications that have exclusionary impacts, whatever the intent behind them, are generally couched in terms of neighborhood protection, defense of property values, good planning principles, enhancing environmental quality, promoting historical preservation, etc. Sometimes, the justification can even be couched in terms of a need for more land devoted to industrial purposes. . . . On [some] occasions, political actors may refer to many values other than the ones that are most dear to their hearts. In doing so, they shift the terms of the debate and manipulate the agenda in such a way as to lead to their more preferred result.<sup>158</sup>

There is every reason to think that some of the same considerations play out in the context of exclusionary vibes as in the exclusionary zoning context. To the extent that landowners seeking to establish or preserve homogeneity in their surroundings exercise the bouncer's right, they will point to some criteria less controversial for exclusion than race or religion. Exclusionary vibes often will be more subtle than usual where the basis for exclusion is problematic. And exclusionary amenities may be marketed using code words or proxies for race that are understood by both blacks and whites, but avoid the more confrontational aspects of overt racial appeals.<sup>159</sup>

As a general matter, then, the controversial and divisive social meaning of exclusionary vibes and visible bouncer's right activities in the racial segregation domain will help explain the choice of some developers to opt for exclusionary amenity strategies. And even where the bouncer's right or exclusionary vibes are employed, concerns about social meaning and popular backlashes will modify the nature of the exclusion.<sup>160</sup> For example, a landowner excluding some people on the basis of race or religion may seek out an effective proxy or leave his criteria exceptionally vague. As a general matter, the more controversy would be generated by an exclusionary criterion, the more subtle a landowner will be about the existence and content of that criterion.<sup>161</sup>

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<sup>157</sup> Despite its name, exclusionary zoning does not fit into my typology of exclusion. For the reasons why, see *supra* note 13.

<sup>158</sup> Clingermayer, *supra* note 13, at 382-83.

<sup>159</sup> Strahilevitz, *supra* note 76, at 15 n.61.

<sup>160</sup> Loewen describes this phenomenon as the "paradox of exclusivity," whereby overwhelmingly white communities greatly desire racial homogeneity but "develop a motivated blindness to the workings of social structure" and adamantly take issue with any suggestion that racist sentiment pervades the community or motivates its policies. LOEWEN, *supra* note 69, at 316-20.

<sup>161</sup> These concerns about backlash are interesting in and of themselves. Consumers who feel some shame about their own preferences may blame real estate developers for responding to those same consumer preferences, as a psychological coping mechanism. Cf. Lyn H. Lofland, *The Real-Estate Developer as Villain: Notes on a Stigmatized Occupation*, 27 *STUDIES IN SYMBOLIC INTERACTION* 85, 98 (2004) (noting that housing consumers simultaneously demanded suburban homes and vilified developers for providing suburbanized homes for the masses).

This account of social meaning is, of course, descriptive rather than normative. From a normative perspective, it is not entirely clear why we should differentiate between, say, bouncer's exclusion and exclusionary amenities, if we suppose that the two strategies would be equally effective at excluding third parties who would like to gain admittance if the exclusionary policy was eliminated. Moral equivalency seems particularly appropriate where the landowners intentionally chooses an amenity because of its anticipated exclusionary effects.

*E. Mistakes*

While concerns about controversial social meanings may tempt a landowner to employ a less transparent criteria for exercising the bouncer's right, or a less obviously exclusionary vibe, there is a countervailing concern. The greater the vagueness, the higher the likelihood that third parties targeted for inclusion or exclusion will make errors. These mistakes will arise when parties targeted for inclusion or exclusion fail to realize it. Such errors impose costs on the landowner.<sup>162</sup>

Vagueness in the exclusionary criteria behind bouncer's exclusion will be costly for the landowner in that it will force her to spend substantial time and resources turning away those who do not meet the criteria. While this turning away of people targeted for exclusion may be valuable in some sense for the resource owner,<sup>163</sup> much of this effort will be of little utility to her. Moreover, if the owner repeatedly turns away third parties without identifying any applicable criteria for entry, she runs the risk that those excluded

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<sup>162</sup> For an extended discussion of the costs of communicating various sorts of property rights to the outside world, see William Hubbard, Note, *Communicating Entitlements: Property and the Internet*, 22 YALE L. & POL'Y REV. 401 (2004). An additional factor relevant to analyzing the importance of mistakes in the exclusion context concerns the nature of the resource. In some contexts, there are so many potential entrants that the costs of underinclusiveness may be minor. For example, the extremely trendy New York night club can afford to turn away a under-dressed millionaires without losing too much revenue. See Scales, *supra* note 156, at 9. This dynamic is becoming an increasingly apt metaphor for United States immigration policy. See Nina Bernstein, *Study Finds Immigration Peaked in U.S. in 2000*, N.Y. TIMES, Sep. 28, 2005, at 1.

<sup>163</sup> One virtue of the bouncer's right as an exclusionary strategy is that it provides the landowner with accurate information about the lost economic opportunities associated with exclusion. More specifically, the landowner no longer need rely on guesswork about the gross private costs associated with turning away particular customers who can afford to pay the applicable entrance fee. As a consequence of exercising the bouncer's right, the landowner necessarily learns more about the customers he is turning away. Such information is not easily discernable if the landowner chooses an exclusionary vibes or exclusionary amenities strategy instead. Bouncer's exclusion thus has an advantage of providing the landowner with some useful information, and reliance on the bouncer's right may be particularly attractive under circumstances characterized by substantial uncertainty or boundedly rational landowners. In this sense, bouncer's exclusion may be similar to information-forcing property mechanisms that I have advocated in other settings. See Strahilevitz, *supra* note 25, at 849-51; see also Russell Robinson, *Caste and Casting* (Working Paper 2005) (arguing for a regime in which directors are forced to give auditions to actors' whose race and ethnicity may not correspond with that of a character's, so as to force the directors to confront the costs associated with race-limited casting calls). Of course, this additional information may be of marginal utility, since exercising the bouncer's right does not accurately inform the landowner of the *net* costs associated with exclusion. After all, while the landowner knows how many customers he is turning away, he is far from certain how many of his existing customers he would lose if he stopped being so selective about entry. As a result, this consideration will usually be a minor consideration in the landowner's choice among exclusionary strategies.

will become frustrated by having expended resources in a futile effort, and will engage in violent self help against the landlord as a result.

Dampening or ambiguating the message contained in an exclusionary vibe imposes a different set of costs on the landowner. Recall that through exclusionary vibes, the landlord expects to command some sort of premium by virtue of his successful effort to establish a focal point around which similar people can organize themselves. But the less obvious the exclusionary message, the less confident prospective purchasers or entrants will be in the success of the landowners' effort to establish a focal point. Moreover, some prospective purchasers or entrants may not realize that they are targeted for inclusion by the landowners' message, and this will depress the size of the market, thereby further reducing the premium that the landowner can expect to command.<sup>164</sup> Indeed, as a general matter, we can expect to find a higher percentage of "tone-deaf" entrants in communities whose access is regulated by exclusionary vibes than in those in which a bouncer restricts entry. Because some prospective purchasers or entrants will fail to understand the content of an exclusionary vibe, there may be a substantial portion of the population targeted for exclusion that nevertheless purchases access to the landowners' community. Most of these people will realize that they failed to perceive an exclusionary message in hindsight, and their lack of fit with their neighbors may trigger either buyers' remorse – with rapid and costly turnover in homes as they decide to move to a community where people are more like them – or efforts to undermine the community's homogeneity from within – which may trigger the exodus of those homeowners who purchased after correctly perceiving the content of the exclusionary vibe.

The same sort of mistakes can occur in the exclusionary amenities setting. Here the problems arise if a potential purchaser or renter underestimates the expenses associated with a costly, polarizing amenity. For example, in the rental environment, a prospective tenant may not know how much of his monthly rent payment is used to subsidize an adjacent amenity. The renter can probably rely on educated guesses here, however, and use the amenity's apparent quality as a proxy for its monthly costs. In a homeowners association or condominium association, mistake costs will be lower, both because a prospective purchaser will have access to a budget specifying association expenses by line item, and because the prospective purchaser who plans to live in a residence for many years will probably invest more time than the transient renter in discerning where his assessment dollars will be going.

### **III. Societal Considerations in Regulating Owners' Exclusion Strategies**

The previous section analyzed the important variables that affect a resource owner's decision to choose among the three primary exclusion strategies. With a few exceptions, we can expect that resource owners will act to maximize their private welfare in restricting access to their property. Of course, resource owners' decisions about exclusion necessarily affect the interests of third parties, and may implicate broader societal values as well. Where a resource owner's exclusion of third parties generates

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<sup>164</sup> Some people who plainly belong to the group targeted for inclusion will not respond to an ambiguous message if they are too busy to make deciphering the message worthwhile.

substantial negative externalities, intervention by the state may be warranted.<sup>165</sup> In this part, I will explore some of the social considerations that ought to guide the law's response to various exclusion strategies. I will also point to various ways in which the law, consciously or not, alters the incentives for individual resource owners to engage in particular forms of exclusion.

A. *Symbolic Externalities*

As alluded to earlier, certain forms of residential exclusion are highly controversial. Exclusionary actions by a landowner might upset prospective purchasers or tenants, who would like to enter the landowners' property but are deterred or prevented from doing so. Such actions might also impose genuinely felt harms on people who have no interest in entering the landowners' problem but object to the exclusionary device all the same. These sentiments might arise among bystanders because they feel special kinship with the disappointed group of prospective entrants, or because they resent the exclusionary device as a matter of principle.

As an exclusionary device becomes increasingly obvious, we might expect that these bystanders will become increasingly offended by its use. This analysis suggests that exclusionary vibes may prove particularly problematic. After all, exclusionary vibes necessitate some form of advertising visible to third parties as a means of enticing compatible people to enter the property in question. While savvy landowners will work hard to target their advertisements to a receptive audience by selecting the media outlets thought to provide the most sympathetic eyeballs, there will inevitably be some disclosure of an exclusionary message to people who will be offended by such a message.

From a social welfare perspective, bouncer's exclusion and exclusionary amenities will be better strategies in circumstances where large numbers of people object to the exclusion that is occurring. It might be difficult for bystanders to learn that a landowner is exercising the bouncer's right in a controversial or problematic manner, unless the landowner for some reason publicizes this fact. Similarly, one of the advantages of exclusionary amenities is that they can sort people in subtle ways and that subtlety keeps exclusionary amenities off the radar screens of many bystanders.

B. *Misperception Externalities*

I have already pointed to the possibility that exclusionary vibes might be misunderstood by third parties seeking entry onto a particular property.<sup>166</sup> Not all of this misperception amounts to an externality, however, since the landowner will suffer economic repercussions if too few people understand his exclusionary message. One set of externalities consists of the costs imposed on prospective purchasers or tenants, who are forced to relocate or experience regret after they learn that the property differs from their expectations. A second set of externalities arises when third parties reach mistaken conclusions based on the messages implicit in a landowners' choice of exclusion strategies.

Misperception externalities of the first sort will be minimized in instances where the resource owner opts for bouncer's exclusion or exclusionary amenities instead. In the

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<sup>165</sup> See *State v. Shack*, 277 A.2d 369, 374-75 (N.J. 1971).

<sup>166</sup> See *supra* section II.E.

bouncer's exclusion case, the prospective purchaser's misperception is ordinarily irrelevant, since the bouncer will prevent the mistaken third party from entering the property in any event. In the exclusionary amenities setting, misperception externalities might arise if an individual finds a particular amenity attractive, but finds the residential homogeneity that is created by the amenity surprising and unattractive. As a general matter, these forms of misperception will be rare since people who value costly social amenities enough to buy homes that include them usually have some prior exposure to the demographics of that amenity's user base.

Misperception externalities of the second sort also will be most prominent in the exclusionary vibes setting. Indeed, two separate circuit courts have explained the Fair Housing Act's peculiar treatment of Mrs. Murphy homeowners with reference to these sorts of externalities. Recall that the FHA permits mom-and-pop landlords to refuse to rent a unit based on discriminatory criteria, but does not permit those landlords to advertise their discriminatory criteria and renders newspapers liable for any discriminatory advertisements that run in their pages.<sup>167</sup>

The Fourth Circuit has defended the Mrs. Murphy exception by noting that Congress might have worried that potential renters would assume, falsely, that if one apartment in a Mrs. Murphy building was advertised as being "for whites only" many other apartments in larger buildings (which are subject to FHA restrictions on the bouncer's right) were also available only to whites.<sup>168</sup> The D.C. Circuit has embraced somewhat different logic, noting in the standing context that permitting Mrs. Murphy landlords to publish discriminatory advertisements "created a public impression that segregation in housing is legal, thus facilitating discrimination by . . . other property owners and requiring a consequent increase in [civil rights] organizations' educational programs on the illegality of housing discrimination."<sup>169</sup> Both these courts correctly pointed out the possibility that members of the public might draw erroneous conclusions that undermine public policy objectives if Mrs. Murphy landlords are permitted to advertise their ability to discriminate against tenants without violating the FHA. Relatedly, other scholarship has suggested that racially exclusionary advertisements perpetuate unflattering stereotypes about the excluded groups or stimulate demand for racial homogeneity among members of majority groups.<sup>170</sup>

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<sup>167</sup> See *supra* text accompanying notes 114-116.

<sup>168</sup> *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972) ("Widespread appearance of discriminatory advertisements in public or private media may reasonably be thought to have a harmful effect on the general aims of the Act: seeing large numbers of 'white only' advertisements in one part of a city may deter nonwhites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a nondiscriminatory basis.").

<sup>169</sup> *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990); see also Felicia R. Lee, *ABC Drops Show After Complaints by Civil Rights Groups*, N.Y. TIMES, June 30, 2005, at C3 (describing how a television network pulled the plug on a reality television program in which neighbors selected which of seven diverse families would live in a new home in a Christian, Republican subdivision, after civil rights groups complained that this program would cause members of the public to believe that racial and other forms of discrimination are permissible).

<sup>170</sup> Petty et al., *supra* note 67, at 358-363; Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 975-77 (2002).

Given the Supreme Court's increasing hostility to various restrictions on commercial speech,<sup>171</sup> it is not clear whether these earlier circuit court decisions remain good law. Most likely, the doctrinal answer would hinge on whether discriminatory advertisements by Mrs. Murphy landlords qualify as "misleading" statements for the purposes of the Supreme Court's *Central Hudson* test.<sup>172</sup> But what is most interesting about the decisions is the recognition by both courts that exclusionary vibes could be powerful and overbroad influencers of decisions as important to individuals as the question of where to live.

### C. *Liberty Externalities*

Free-market societies pride themselves on offering their citizens a wide array of choices, and the variety of homes available in most industrialized societies reflects the diversity of preferences along that dimension. Still, there are constraints on citizen mobility, and many people face very high social or economic costs if they are forced to relocate to another community. Within a given metropolitan area, there may be few, if any, close substitutes for particular residential communities. Under such circumstances, a resource owners' decision to exclude third parties may impose substantial restrictions on the liberty of those excluded. Bouncer's exclusion regimes that are based on immutable characteristics will be particularly problematic in that respect, since excluded third parties will not be able to gain admission to the property in question by altering their behaviors or preferences. Compared to bouncer's exclusion, exclusionary amenities and exclusionary vibes score well on this front. Someone who the resource owner has targeted for exclusion can circumvent the resource owner's wishes, either by absorbing the costs of being an outlier, or by paying for a costly amenity that he does not value highly.

There is a particularly troubling form of the liberty externality, best dubbed the "dumping grounds" problem. The concern here is that there will be some types of people who are so universally loathed and economically disadvantaged that they are denied effective choice among some subdivisions, and come to be concentrated in the few communities that are willing to accept them or unable to keep them out. In twenty-first century America, sex offenders seem to represent the least desirable neighbors of all. Perhaps puzzlingly, they have been singled out for harsher post-release restrictions than murderers.

If this particular dumping grounds problem worsens in the future, courts may crack down on exclusion rights. After refusing to enjoin a homeowners association ban on sales to sex offenders, the court in *Mulligan v. Panther Valley Property Owners Association* warned that it might well change its mind in the future if too many homeowners associations followed Panther Valley's lead, such that "large segments of the State could entirely close their doors to such individuals, confining them to a narrow

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<sup>171</sup> See *supra* text accompanying notes 147-149.

<sup>172</sup> *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). Another relevant precedent here would be *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 87-88 (1977). In that case, the Court rejected municipal restrictions that prohibited homeowners from posting "For Sale" signs on their property, based on the municipality's fear that the proliferation of such signs gave prospective purchasers the impression that white flight was occurring. *Id.* at 95-98.



corridor.”<sup>173</sup> Courts considering limitations on other forms of exclusion by landowners have embraced similar reasoning and voiced analogous misgivings about unduly constraining the choices of third parties subject to exclusion.<sup>174</sup>

#### D. *Mechanisms for Selective Regulation of Exclusion Rights*

In symbolic externalities, misperception externalities, and liberty externalities, I have identified three possible considerations that may warrant government restrictions on certain exclusion rights, even in those instances where one suspects the resource owner’s decision to exclude maximizes his private welfare. When the government does elect to intervene, there are essentially two kinds of strategies available.

First, the government might attempt direct regulation of the various rights to exclude. So far, we have already seen various efforts along these lines: Restrictions on the exclusionary vibe, but not the exclusionary amenity or bouncer’s exclusion in the Mrs. Murphy context; restrictions on bouncer’s exclusion and exclusionary vibes but not exclusionary amenities in most other fair housing-related contexts; requirements for simultaneous bouncer’s exclusion and exclusionary vibes in the adverse possession context; and administrative crackdowns on exclusionary vibe “bluffs” in the beachfront public trust context. These “hard shove” legal strategies are straightforward enough.<sup>175</sup> The government permits activities that it is willing to tolerate and prohibits those forms of exclusion that it deems harmful to social welfare.

Less obvious are the ways in which government information policy can alter the incentives for private parties to adopt various exclusion strategies. Yet these information

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<sup>173</sup> 766 A.2d 1186, 1193 (N.J. Super. Ct. 2001); *see also* Frug, *supra* note 20, at 3-4 (“Let’s say that these enclaves can exclude anybody for any reason whatsoever. These days, a common justification for this position is framed in the language of security: exclusion is necessary to protect insiders from violence. . . . Exclusion simply allocates outsiders identified as potential criminals, along with many others, to certain parts of the metropolitan area. Only the areas that remain classified as public will be open to anyone who wants to go there.”). It is not only homeowners associations that are restricting the residential choices of sex offenders. More recently, state and local governments have ushered in the era of “zoning people” by enacting laws restricting sex offenders from residing, working, or even approaching within 1,000 or 2,000 feet of schools, day-care facilities, and other areas where minors congregate. *See* Robert F. Worth, *Exiling Sex Offenders from Town*, N.Y. TIMES, Oct. 3, 2005, at A20. Iowa’s law rendered 77% of the state’s housing units off limits to sex offenders, and most of the remaining 23% of the state’s units consisted of rural farmhouses. Nevertheless, the Eighth Circuit upheld the constitutionality of the statute. *Doe v. Miller*, 405 F.3d 700, 706 n.2, 714-15 (8th Cir. 2005).

<sup>174</sup> Perhaps the most influential case on this score is *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984), a staple of Property casebooks. In *Matthews* the New Jersey Supreme Court held that the owners of land abutting beachfront public trust lands were not required to permit public access across their property as long as sufficient numbers of their neighbors voluntarily permitted the public to cross their property to reach the beach. *Id.* at 369. The court warned that if too many neighbors stopped permitting the public to access the beach via their lands, then the court would mandate that all owners of beachfront property in the area be subject to a public easement. *Id.* Thus, the court embraced an analog to the dumping grounds argument, permitting exclusion by private landowners only insofar as that exclusion did not unduly limit the options available to third parties.

<sup>175</sup> The distinction between “hard shove” regulatory approaches and “gentle nudge” approaches is Dan Kahan’s. Kahan argues that when the law tries to prohibit conduct that is tolerated by prevalent social norms, a backlash against the law often undermines the prohibition’s goals. Counterintuitively, more incrementalist approaches by the government may prove more effective, in that they trigger a gradual shift in social norms. *See* Dan M. Kahan, *Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 610-18 (2000).

policies may be just as powerful as governmental prohibitions in shaping the incentives of private parties to adopt particular exclusion strategies. As I shall argue below, many governmental policies, such as privacy tort laws, as well as government publication outlets like Megan's Law and FOIA, and government subsidies for the Internet and other information technologies, alter parties' incentives to exclude. Because the presence or absence of private information is so critical in determining what exclusion strategy a party adopts, "gentle nudge" government policies that affect the costs of obtaining private information may spark dramatic shifts in the ways that resource owners order their affairs. More provocatively, where concerns about negative externalities associated with exclusion are prominent, prohibitions on worrisome forms of exclusion are not the only way to go. Rather, the government might more effectively discourage undesirable forms of exclusion by tweaking information policy.

### *E. Applications*

The foregoing analysis provides an analytical framework that explains why landowners choose one exclusion strategy over another, and why the state sometimes regulates some exclusion strategies but not others. So let us apply this framework to a few real world cases.

#### 1. Sex Offenders

Sensitivity to government information policy helps us understand the recent popularity of homeowners associations restrictions on sex offender residency. Prior to the enactment of Megan's Law, it was difficult for a landlord or real estate developer to learn whether a prospective resident was a convicted sex offender. New Jersey initiated the Megan's Law trend in 1994, and every state eventually followed suit, prompted in part by congressional legislation that gave the states very strong incentives to adopt their own versions of Megan's Law.<sup>176</sup>

The key part of various Megan's Laws is the Internet registry provision. Almost every state now publishes a list of its sex offenders on the Internet.<sup>177</sup> Many of these internet registries do not restrict access in any meaningful way and do not charge for access.<sup>178</sup> In recent months, efforts have been undertaken to nationalize the database in a

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<sup>176</sup> For a thorough review of the legislative debates, see Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 315, 327 (2001).

<sup>177</sup> See Dan Eggen, *Sex Offender Registry Announced*, FT. WORTH STAR-TELEGRAM, May 21, 2005, at A11 (48 states as of 2005); Note, *Making Outcasts out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731, 2731 n.5 (2004) (45 states as of 2004).

<sup>178</sup> See Meghann J. Dugan, *Megan's Law or Sarah's Law: A Comparative Analysis of Public Notification Statutes in the United States and England*, 33 LOYOLA L.A. INT'L & COMP. L. REV. 617, 622 (2001) (describing variations among the state with respect to the ease of accessing information about sex offenders); cf. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1061 (2003) ("Megan's Law data are beneficial when disclosed for certain purposes, but not necessarily for all purposes. When placed on the Internet for any curious individual around the world to see, Megan's Law information becomes disconnected from its goals."). California appears to be something of an outlier in that respect, in that the state permits ready access to its sex offender registry, but criminalizes the use of information so obtained in housing, employment, and other contexts. See Calif. Penal Code § 290.46(j)(2). For a debate over that prohibition's constitutionality, see <<http://volokh.com/posts/1128719838.shtml>> (visited Oct. 12, 2005) (Eugene Volokh suggesting the penal code provision is unconstitutional), and

way that will allow for the easy tracking of sex offenders who move interstate.<sup>179</sup> These days, then, someone's status as a convicted sex offender is hardly private, in that a landlord or developer can obtain this information about a potential entrant almost costlessly.<sup>180</sup>

My account of exclusion suggests that as the government reduces the extent to which sex offender status is private information, those interested in excluding sex offenders will rely increasingly on bouncer's exclusion. This is borne out by recent events. Indeed, prior to the enactment of Megan's Law, sex offender exclusions were practically unknown in common interest communities, but they appear to have proliferated in recent years. Rather, common interest communities tried to keep sex offenders out by holding meetings designed to raise awareness about the threats posed by sex offenders and then publicizing those meetings to the community at large, or used Neighborhood Watch signs and meetings as a means of signaling sex offenders and other criminals that they were not welcome.<sup>181</sup> Megan's Law, then, may have caused homeowners associations to substitute bouncer's exclusion for exclusionary vibes.

What's particularly revealing about the proliferation of sex offender residency restrictions is the relationship between homeowners associations' restrictions on sex offenders and those same associations' lack of restrictions on potential purchasers who have committed even more serious crimes (such as murder) or crimes more likely to target proximate strangers (such as burglary and automobile theft). Perhaps the most important explanation for this disparity is the lack of readily available Megan's Law-style lists for murderers. If this information was available for free, we would expect to see significant numbers of homeowners associations prohibiting the sale of units to murderers, burglars, and car thieves as well.<sup>182</sup>

I do not mean to suggest that state governments enacted Megan's Law because they wanted to encourage a shift to bouncer's exclusion in the sex offender context. I actually suspect that exclusion regimes were not on the minds of the relevant elected officials at the time. But this analysis of Megan's Law underscores the possibility that government information policy might function as an alternative mechanism for

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<[http://www.concurringopinions.com/archives/2005/10/why\\_volokh\\_is\\_w.html](http://www.concurringopinions.com/archives/2005/10/why_volokh_is_w.html)> (visited Oct. 12, 2005) (Daniel Solove arguing that the provision is constitutionally permissible).

<sup>179</sup> Eggen, *supra* note 177, at A11.

<sup>180</sup> On the (close) connection between privacy as a legal concept and obscurity, see Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 930-31 (2005).

<sup>181</sup> See, e.g., Maria Giordano, *Lookout Group's Effort Curbs Crime*, N.O. TIMES PICAYUNE, July 4, 1993, at F1; Ignacio Lobos, *Mill Creek Rape Causes Fear Beyond City Limits*, SEATTLE TIMES, May 21, 1991, at A1; Dale Rodebaugh, *M.H. Parents to Discuss Kids Being Accosted*, SAN JOSE MERCURY NEWS, May 3, 1989, at 1B. In one instance, neighbors sent a signal to potential sex offenders by taunting a sex offender who had moved into a group home. See Lois M. Takahashi & Michael J. Dear, *The Changing Dynamics of Community Opposition to Human Service Facilities*, 63 J. AM. PLANNING ASS'N 79, 79 (1997).

<sup>182</sup> In pointing to the potential for information policy to cause resource owners to substitute bouncer's exclusion for nontrespass-based exclusion strategies, or vice versa, I am not suggesting that government information policies have no effect on aggregate exclusion levels. To the contrary, the various Megan's Laws plausibly further stigmatized sex offenders, resulting in an increase in the private resources devoted to excluding sex offenders from neighborhoods. Cf. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 61 n.261 (2000).

influencing the extent to which private parties pursue particular exclusion strategies. Where there are public policy rationales for favoring bouncer's exclusion over exclusionary vibes, but restricting exclusionary vibes is problematic in other dimensions – perhaps because of First Amendment limitations – the government can accomplish its goal by collecting and publishing the applicable private information.

Alternatively, the government might subsidize private enterprise to disseminate previously private information more widely. This has happened in the past, but only indirectly. For example, the United States government substantially subsidized the creation of the Internet through the Department of Defense.<sup>183</sup> The Internet gave rise to Google, which has dramatically lowered the costs associated with aggregating public but obscure information about individuals. Google's search and rating technologies lower the costs for developers and landlords to engage in bouncer's exclusion across a host of different criteria. Indeed, more recently, the Internet has facilitated the development of Friendster<sup>184</sup> and other social networking sites, which by rendering the existence of individuals' social ties public, might even allow our hypothetical real estate developer<sup>185</sup> to lower the costs of discerning who is an introvert and who is an extrovert.

So far, this analysis has shown how government information policy can shift the incentives for landlords to use bouncer's exclusion instead of exclusionary amenities. Can it work in the opposite direction, to help shift landowners from trespass-based strategies to nontrespass-based strategies? Absolutely. The body of law that regulates shifts in this direction is information privacy law. For example, in 1994 Georgia courts held that it was a tortuous invasion of privacy to disseminate someone's HIV positive status without his consent, even if the plaintiff's HIV status was already known to fifty or sixty people.<sup>186</sup> This ruling had the effect of making it more difficult for landowners to discover whether a prospective purchaser or tenant was HIV positive, and inhibited bouncer's exclusion of HIV positive individuals. To the extent that landowners still wanted to exclude HIV positive individuals from their property, they would likely have to resort to exclusionary vibes.

Statutory privacy protections can have the same incentive-shifting consequences. For instance, in 1970, Congress enacted the Fair Credit Reporting Act.<sup>187</sup> The Act limits the information that credit reporting agencies can provide about individuals. Section 1681c(a) of the Act prohibits credit reporting agencies from providing a landlord with information about any bankruptcy proceedings involving a prospective tenant that are more than ten years old, or any civil suits, judgments, or criminal convictions that are

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<sup>183</sup> See Janet Abbate, *Government, Business, and the Making of the Internet*, 75 BUS. HIST. REV. 147 (2001).

<sup>184</sup> See <<http://www.friendster.com>>. For an early ethnographic account of Friendster, see Dana Michele Boyd, *Friendster and Publicly Articulated Social Networking*, CHI 2004: LATE BREAKING RESULTS PAPER 1279 (2004). Boyd points out that Friendster provides imperfect information about individuals' social networks, since some friends do not have Friendster profiles, some Friendster profiles represent fictitious people, and Friendster does not facilitate adequate descriptions of the richness of particular relationships. *Id.* at 1280-82.

<sup>185</sup> See *supra* text accompanying notes 59-63.

<sup>186</sup> *Multimedia WMAZ v. Kubach*, 212 Ga App 707, 443 SE2d 491 (1994).

<sup>187</sup> Pub. L. No. 90-321, 15 U.S.C. § 1681b.

more than seven years old.<sup>188</sup> By obscuring information that a landlord might use to weed out tenants with potentially problematic backgrounds or credit histories, this law gave landlords incentives to substitute toward exclusionary vibes, or, more likely, onerous governance regimes, such as resort to summary evictions and increased surveillance in common areas. State legislation designed to prevent landlords from blacklisting prospective tenants on the basis of landlord-tenant suits in which the tenants were the prevailing party likely would have shifted landlords' incentives in similar ways.<sup>189</sup>

## 2. Racial Discrimination in Rental Housing

Since the mid 1960s, the federal government has committed substantial resources to preventing landlords from engaging in racist behavior that promotes racial residential segregation. These efforts, combined with less vigorous fair housing enforcement efforts by the states, have probably contributed to declining racial segregation over the past two decades, although other economic and demographic factors no doubt have played a part.<sup>190</sup>

In the realm of racial discrimination, it appears that the law treats exclusionary vibes with great hostility, treats bouncer's exclusion with substantial hostility, and leaves exclusionary amenity strategies largely unregulated. The law's permissive attitude toward exclusionary amenities probably reflects ignorance about a strategy that has only recently been discussed in the legal literature. The relationship between bouncer's exclusion and exclusionary vibes might indicate a predominant concern with the symbolic harms associated with racial discrimination, where discriminatory statements and messages are conceptualized as a kind of hate speech, but discriminatory outcomes are tolerated if they are shrouded behind sufficiently polite messages that obscure a discriminatory objective. While exclusionary vibes engender more misperception and symbolic externalities than bouncer's exclusion, the greater liberty externalities associated with bouncer's exclusion seem especially troublesome. Here, I suspect that the law's hands off approach to bouncer's exclusion in certain contexts is only partially tied to the symbolic harms that are magnified by exclusionary vibes. A fuller explanation for the Fair Housing Act's hierarchy no doubt stems from the fact that discriminatory exclusionary vibes are much easier to detect than discriminatory bouncer's exclusion, particularly in those instances where a landlord rents out only a few units, and random statistical variation conceivably explains segregation within the landlord's building.<sup>191</sup> In short, it may well be that the

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<sup>188</sup> 15 U.S.C. § 1681c(a). The Act applies to landlords. See *Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 688 (6th Cir. 1995).

<sup>189</sup> For a description of such legislative efforts, see Gary Williams, *Can Government Limit Tenant Blacklisting*, 24 SW. U. L. REV. 1077, 1086-90 (1995). California's law tried to prevent landlord blacklisting by regulating the conduct of the information brokerage firms that screen tenants for landlords. *Id.* at 1087-90. The law was invalidated on constitutional grounds. See *U.D. Registry, Inc. v. State*, 40 Cal. Rptr. 2d 228, 233 (Ct. App. 1995).

<sup>190</sup> See Avraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1975-81 (2000); David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455 (1999); Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 40-41 (1994).

<sup>191</sup> As a general matter, violations of exclusionary vibes prohibitions will be easiest to detect. After all, exclusionary vibes must be publicized to outsiders in order for them to work effectively. In the process of advertising to their intended (and unintended) audiences, a resource owner pursuing an exclusionary vibe strategy will be alerting law enforcers to the nature of his conduct as well. Improper exercises of the

costs of enforcement efforts by the state explain the law's attitude toward bouncer's exclusion in the racial segregation context.

In the context of racial discrimination, the law has relied heavily on selective prohibitions on the exercise of certain rights to exclude. By and large, the law has not tried to shift the incentives for private parties to adopt particular exclusion strategies through information policy. The explanation for this is fairly straightforward, in that most apartment rentals involve face-to-face interactions between landlords and prospective tenants, and through these interactions, landlords can easily discover the racial affiliation of most potential tenants.<sup>192</sup> At present, it would be difficult for government policymakers to render the racial status of a prospective tenants private information. In order to do so, the law would have to prevent face-to-face encounters between landlords and tenants, which seems impractical since tenants probably will want to see the premises before putting down a deposit, and may well want to evaluate the character of the landlord as well. Moreover, even eliminating face-to-face interactions might not solve the problem, since racial identity can often be assessed somewhat accurately with reference to the prospective tenant's name. At present, then, information policy strategies for altering landlord exclusion incentives would require a cumbersome administrative apparatus and deprive both landlords and tenants of justifiably relevant information regarding an important transaction. In future decades, as Internet listings for real estate rentals and sales become increasingly sophisticated, and communications technologies advance, information policy may provide an increasingly attractive avenue for altering landlords' and developers' incentives.

### 3. Religious Exclusion in Housing

*Theosophical Community v. Silver*,<sup>193</sup> typifies the effort to replace governance with bouncer's exclusion in a residential community. The Theosophical Society is not technically a religion.<sup>194</sup> Rather, it is an association with "three basic objectives: to work towards the universal brotherhood of man; to study and to compare religions, sciences, and philosophies, and . . . to explore the psychical powers latent in man."<sup>195</sup> There were approximately 6000 members of the Theosophical Society living in the United States during the pendency of the litigation.<sup>196</sup>

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bouncer's right would seem to be much harder to detect. In the case of the bouncer's right, the resource owner makes no representation of who he wants to attract, and may not keep records about who he has turned away. Discovering a prohibited use of the bouncer's right therefore involves substantial effort by law enforcers. Problems of proof seem to go hand-in-hand with problems of detection, too. Indeed, resource owners can often get away with controversial bouncer's right strategies, and tend to get caught only if they are loose-lipped. The fact that exclusionary vibes are so easy to detect strengthens the case for policing them more than other forms of exclusion, but perhaps also suggests that penalties should be higher when individuals violate prohibitions on bouncer's exclusion. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 189-96 (1968).

<sup>192</sup> There will, of course, be cases in which a prospective tenant's racial status is ambiguous, or the landlord fails to identify the prospective tenant's racial status accurately. See *supra* note 153.

<sup>193</sup> 140 Cal.App.3d 964 (1983).

<sup>194</sup> *Id.* at 969.

<sup>195</sup> *Id.* at 976. Readers interested in more background on Theosophy might enjoy visiting <http://theosophy.org>, or <http://www.theohistory.org>

<sup>196</sup> 140 Cal.App.3d at 973.

In 1967, a nonprofit corporation purchased two tracts of land in California for the purpose of founding a retirement community for Theosophists.<sup>197</sup> To that end, the corporation recorded covenants, conditions, and restrictions (CCRs) limiting ownership and occupancy of land within the community to persons aged 50 or over who had been members of the Theosophical Society for more than 3 years.<sup>198</sup> The CCRs gave Taormina a right of first refusal to prevent transfers of property within the community that would violate the occupancy or ownership limitations. Note the coupling of a bouncer's right with reliance on readily verifiable information (age and membership in an affiliated association).<sup>199</sup> The Silvers bought land in the community with actual knowledge of these CCRs.<sup>200</sup> As Robert Silver was under 50 years of age and Esther Silver had not been a Theosophist for the requisite three years, Taormina invoked its right of first refusal.

Because Theosophy was not a religion, the trial court held that the CCRs did not directly violate any housing discrimination laws.<sup>201</sup> The appellate court, however, found that the restrictions on religion did violate the purpose of the antidiscrimination laws, thereby warranting the court's refusal to enforce the occupancy restriction on equitable grounds.<sup>202</sup> The more interesting part of the opinion dealt with the ownership restrictions. The appellate court invalidated Taormina's as an unreasonable restraint on alienation:

In determining whether a restraint is unreasonable, the court must balance the justification for the restriction against the quantum of the restraint. . . .

On balance, we find that the covenant restricting *ownership* of land in Taormina to Theosophists older than 50 is unreasonable. The quantum of restraint in this case is very great. Southern California is a highly desirable place to live and people from all over the country seek to buy property here. In contrast to a vast potential market, the number of Theosophists in the United States is exceptionally small.

The purpose of the restriction is to insure that those who settle in Taormina are sincere in their commitment to Theosophy. Taormina was expressly developed as a retirement community for people who share interests in the study of comparative religions and the latent powers of men. While the gathering together of like minded people may be a

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<sup>197</sup> *Id.* at 968.

<sup>198</sup> *Id.* at 968-69. Purchasers who had been members for less than 3 years would be allowed to purchase or occupy homes in the community with the consent of Taormina's Board of Trustees. *Id.*

<sup>199</sup> Thinking about the religion issue from a private information perspective is also revealing. An individual's religious affiliation is almost never evident from visual inspection, and some people may refuse to disclose their religious affiliations or give misleading answers if asked. Moreover, even where religious affiliation is readily observable, the intensity of one's devotion to one's faith is not, absent access to the religious leaders of a particular congregation. If a developer seeks to set up a new religious community, as opposed to one that will draw exclusively on the members of an existing congregation, it will be very difficult for him to differentiate among potential residents on the basis of the intensity of their ties to the religion. Hence, costly club goods in the form of an exclusionary amenities strategy might have real appeal quite apart from the law's stance toward bouncer's exclusion and exclusionary vibes.

<sup>200</sup> *Id.* at 969.

<sup>201</sup> *Id.* at 974.

<sup>202</sup> *Id.* at 976.

laudable goal, such purpose is not sufficient to sustain the heavy burden of alienability.<sup>203</sup>

Thus, held the court, the exclusion of so many people from the pool of potential purchasers of the homes in Taormina rendered the restraint on alienation unpalatable, however laudable the motivations of the community's founders.

In economic terms, the members of the Taormina Theosophic Society were trying to benefit from the network effects associated with bringing together people who share interests and values. When everyone at a local café, post office, or general store shares an affiliation with a particular group, the opportunities for conversations of mutual interest are enhanced. There may be substantial gains from limiting membership in a club to law school professors,<sup>204</sup> Boston Red Sox fans,<sup>205</sup> or people with high I.Q.s but middling accomplishments.<sup>206</sup> The imposition of such a membership criteria facilitates conversation about specialized or advanced topics that would be inaccessible to most members of the general population.

Of course, that is not the only possible benefit of deferring to the CCRs at issue in *Taormina*. It may well be that membership in the Taormina Theosophic Society correlates strongly with other attributes that may be desirable in a residential setting. Perhaps Theosophists are perceived to be more honest, more neighborly, more engaged, or less boisterous than ordinary Americans. If so, selecting for Theosophist membership might permit a community to devote fewer resources to the kinds of governance regimes necessary to settle disagreements, prevent litigation, encourage civic participation, or regulate noise. Taormina's ownership and occupancy restrictions thus might engender first-order benefits, like communities of interest, as well as second-order benefits, like better neighborly relations. To be sure, however, there will be costs associated with the Theosophists' residential homogeneity,<sup>207</sup> though in the American context the costs associated with religious homogeneity are surely lower than the costs associated with residential racial segregation.<sup>208</sup>

Once Taormina is barred from enforcing its covenants via bouncer's exclusion, it must opt for alternative strategies. Do governance mechanisms allow the community to capture the aforementioned benefits? It would appear not. Taormina could enact rules mandating that each resident receive five hours per week of instruction in comparative religion, science, philosophy, and E.S.P. Fines could be instituted for members who skipped these classes. Moreover, residents who failed to discuss religion, science, philosophy, or psychic phenomena in an intelligent manner when invited to do so by a

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<sup>203</sup> *Id.* at 973-74.

<sup>204</sup> *See, e.g.*, American Association of Law Schools.

<sup>205</sup> *See, e.g.*, Sons of Sam Horn.

<sup>206</sup> *See, e.g.*, MENSA.

<sup>207</sup> *See, e.g.*, Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 50, 52 (1989) (arguing that exclusion might decrease sympathy for outsiders; intentional communities typically want to isolate selves from outside world.); J. Eric Oliver, *The Effects of Metropolitan Economic Segregation on Local Civic Participation*, 43 AM. J. OF POLI. SCI. 186, 198-200 (1999) (finding that residential homogeneity leads to declining political participation); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 98-102, 108-111 (2000) (arguing that heterogeneous groups are likely to deliberate more effectively than homogenous groups).

<sup>208</sup> Alexander, *supra* note 207, at 38; Dagan & Heller, *supra* note 125, at 571.



fellow resident in a public space might face monetary fines. Numerous community rules could be enacted to encourage neighborliness, civic participation, and quiet coexistence, including various neighborhood easements, voting inducements, and noise restrictions. Of course, the community would need to set up a comprehensive governance apparatus to determine whether residents were violating these rules and to resolve the inevitable disputes about whether Mr. Silver's contributions to his neighborhood's conversations about Eastern philosophy were sufficiently cogent to ward off a hefty fine. And the rules will no doubt need to be fine-tuned to prevent people from circumventing their communal obligations. The limitations on liberty necessary to effectuate such a community would be quite substantial. The reader, no doubt, sees where this is going. It is impossible to design a governance regime that will generate the same level of first-order and second-order benefits as the fine-grained exclusion regime that Taormina sought to put into place. Any governance regime will be done in by the enormous costs and complexity associated with designing, interpreting, applying, and enforcing pro-Theosophic rules.<sup>209</sup> In this instance, and no doubt many others, exclusion turns out to be *more precise and far more efficient* than governance.<sup>210</sup>

So what are the options left open to religious orders seeking neighborhood homogeneity, particularly those that, unlike the Theosophists, are classified as religions under applicable laws? They must rely on exclusionary vibes and exclusionary amenity strategies. But exclusionary vibes must be rather subtle, lest an advertising campaign violate the Fair Housing Act. And the subtler they are, the less homogeneity they will engender. So, to avoid the problems associated with misperception externalities, religious organizations are beginning to turn to an exclusionary amenity strategy, whereby all members of the community must subsidize the creation of a house of worship or religious university.<sup>211</sup> All else being equal, then, efforts to engender religious homogeneity may result in the diversion of more resources to religion-oriented club goods. Hence a ban on religious discrimination in residential sales or advertising brings about the creation of more churches and religious institutions than one might otherwise expect to find.

#### **IV. Conclusion**

Orthodox property scholarship has equated the right to exclude with those rights that arise under trespass law. This paper has suggested that much can be gained from thinking about exclusion with a bigger tent approach, one that is sensitive to the ways in which nontrespass-based exclusion rights substitute for in rem, trespass-based rights. Such an approach further underscores the extent to which various exclusion strategies can

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<sup>209</sup> Seen in this light, the presence of lengthy, detailed CC&Rs in a homeowners associations founding documents might be a symptom of weakness and dysfunction in a community. A community that can substitute exclusion for governance probably need not regulate resident conduct heavily through CC&Rs because selection effects prevent conflicting uses and preferences from arising. Note further that given the late date on which CC&Rs are usually disclosed to a buyer (after the seller accepts an offer, but before closing) renders CC&Rs themselves largely irrelevant in prompting sorting by purchasers. Stephanie Stern, *Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing*, 2005 UTAH L. REV. 57, 93-94.

<sup>210</sup> Note that this argument diverges from Henry Smith's discussion of exclusion and governance. See *supra* text accompanying note 14.

<sup>211</sup> See *supra* text accompanying note 88.

prove superior to governance regimes or more dangerous than governance regimes in instances where the basis for exclusion is problematic.

After identifying a plurality of exclusion strategies, it is natural to ask what factors cause a landowner to choose one over another. It turns out that the presence or absence of private information drives many landowner decisions about what exclusion strategy to adopt. Where third parties seeking to enter property possess private information about their own preferences, behaviors, and intentions, and the landowner cannot discover this private information at a low cost, we can expect to see the landowner employ nontrespass based exclusion strategies. Where there is little private information involved, or private information can be discovered by the landowner at a low cost, we can expect to see the landowner employing trespass-based exclusion rights.

Finally, when externalities warrant government intervention to regulate a landowners' choice among exclusion strategies, there are two strategies the government might pursue. First, the government can engage in hard-shove strategies, where the government prohibits some forms of exclusion and permits other forms of exclusion. This is the strategy the government has adopted in the housing discrimination arena. Alternatively, the government can opt for gentle nudges; strategies that alter the incentives of landowners by making various types of exclusion more or less attractive. Megan's Law is the most prominent and far-reaching example of the "gentle nudge" approach, although many aspects of information privacy law affect landowner incentives in much the same way. What unifies these strategies is the government's ability to regulate exclusion indirectly, through its control over information access policy. By rendering private information public or public information private, the state can alter, sometimes radically, the mix of exclusion strategies that landowners employ.

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