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LOSING CONTROL: REGULATING SITUATIONAL CRIME PREVENTION IN MASS PRIVATE PROPERTY*

ROBERT E. PFEFFER**

Introduction

Three young men enter a shopping mall. In a security office in the mall a guard monitors them via closed circuit TV. Based on their appearance, such as their ethnicity or the way they are dressed, he decides to approach them and asks for ID. They are told that if they do not produce ID, they will not be admitted. He then runs their names through the computer and finds that one of them was arrested two years before on a shoplifting charge. He tells all three they must leave.

This not uncommon scenario raises nettlesome issues regarding the general right of the mall owner to exclude persons from the mall property versus the right of the young men to visit the mall, as well as whether the exclusion was based on factors — such as race, age, or ethnicity — that many would find at minimum troubling and perhaps entirely unacceptable.¹ The owner of the

* This Article grew in part out of two presentations made to the faculty of the University of Mississippi. I wish to thank the faculty for the opportunity to present my ideas and for providing helpful feedback. It also was motivated by research performed under the guidance of the Faculty of Law and the Center for Criminological Research at Oxford University, and I wish to extend thanks to those institutions for their guidance and assistance.

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1. See, e.g., Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to the Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1 (2003); Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996); Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987); Judith Evans, *Eddie Bauer's Tarnished Local Image — As Its Fashions Become Popular with Urban Youth, Retailer Deals with the Fallout of P.G. Incident*, WASH. POST, Dec. 30, 1995, at C01; Courtland Milloy, *Teen Stripped of More than Just a Shirt*, WASH. POST, Nov. 15, 1995, at D01; Amy Benfer, *Policing Gangsta Fashion*, SALON, May 29, 2002, <http://dir.salon.com/story/mwt/feature/2002/05/29/nelly/index.html>.

shopping mall likely would claim that he need not explain his or her reasons for excluding these men because the mall is private property and the mall owner therefore retains discretion to exclude anyone for any reason or no reason at all. The young men might counter that the shopping mall is effectively a public space because it is the only place in the vicinity that offers any shopping, entertainment, services, and dining and has replaced the local downtown as the primary place to walk around and interact with others in the vicinity. They might also assert that the mall owner's criteria for exclusion included illegitimate factors such as the young men's age, race, or ethnicity. This type of scenario has resulted in a lively scholarly debate,² as well as a fair amount of litigation.³

2. See, e.g., Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 24 (1997) ("The power of government to regulate and to take is closely tied to the correlative rights and duties of ordinary individuals as regulated and determined in common law adjudication. This position does not require us to pretend that each and every common law decision is part of some seamless intellectual web. Obviously, some strong differences of opinion persist regarding the application of general common law principles to particular cases or even entire classes of problems."); Singer, *supra* note 1, at 1291 ("Both public perception and fundamental legal principles today suggest that businesses open to the public have a duty to serve the public without unjust discrimination. Yet the formal law does not unequivocally reflect this principle. I will argue here that the formal law *should* reflect the settled social consensus behind this principle, and that, in order to do so, the common-law rule that grants most businesses the right to exclude customers at will must be changed."); Sarah G. Vincent, *The Cultural Context of the Shopping Mall: Tension Between Patron's Right of Access & Owner's Right to Exclude*, 37 UWLA L. REV. 221, 222 (2004) ("Which is more important: a protester's First Amendment rights or a private property owner's right to exclude? There are a series of shopping mall cases in which the courts decide whether or not protestors can use shopping malls to disseminate information to the public against private property owners' wishes. I want to use the shopping mall as an example of how new forms of private property were addressed by the courts and whether or not that resolution was satisfactory. I believe we can learn from the shopping mall cases so we do not repeat the same mistakes in future controversies involving new forms of property. . . . Then there is a disagreement between the people who use the space and those who created it. A question arises: who resolves this disagreement? May an owner make up the rules after the game has started or are the rules implicit in the way that the owner invites people to play the game and how the people have begun to play it?"); Andrew von Hirsch & Clifford Shearing, *Exclusion from Public Space*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION 77, 86 (Andrew von Hirsch et al. eds., 2000) ("[I]t suffices that we treat as public in character those spaces that clearly are designed for general public use, such as a large downtown shopping mall replacing a traditional shopping area.").

3. See, e.g., *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968) ("Logan Valley Mall is the functional equivalent of a 'business block' and . . . must be treated in substantially the same manner."), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 392 S.E.2d 8, 10 (Ga. 1990) ("The property at issue here is a privately owned and operated shopping mall that

The technique used to exclude these men is often referred to as situational crime prevention (SCP), and shopping malls fall into a class of property called mass private property.⁴ The extent and manner of states' regulation of owners of mass private property, such as shopping malls and amusement parks, in their employment of SCP techniques, such as exclusion of certain groups or surveillance with video cameras, challenges traditional notions of property law and the states' exercise of police power. The de jure private status of the property supports the argument that the owner should be free to employ whatever methods of SCP — short of criminal acts such as assault and false imprisonment — that the owner deems to be in his or her self-interest;⁵ the de facto public nature of the property, however, counsels in favor of allowing a state to regulate the actions that the owner takes on the property vis-à-vis members, such as excluding those who fit a certain profile, pursuant to the state's inherent police power.⁶ Although courts and commentators have grappled with the issue of the extent to which the owners of shopping malls and the like should be able to employ exclusion, surveillance, or other tactics to reduce crime or other undesirable activities as a matter of their own prerogative, free from legislative or judicial interference, there has been little consensus.⁷

The current Article puts forth two main critiques with regard to the current approach and through such critique provides an alternative approach. First, it posits that current scholarship and doctrine errs by treating mass private property either as if it were the same as other private property or as if it were public space, thus ignoring the dual nature of mass private property as being

is generally open to the public for shopping, dining and entertainment. Since the mall's opening, its owners have enforced a policy prohibiting all solicitation and political activity in the mall. The policy has been applied uniformly to all persons and organizations without regard to the content or format. We hold that nothing in the Georgia Constitution or the Recall Act of 1989, either separately or together, establishes a right of private citizens to enter onto such property to solicit signatures for a recall petition.”); *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994) (effectively treating mass private space as public for free speech purposes); *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980) (same).

4. For a more formal definition of these terms, see *infra* Part I.

5. See Epstein, *supra* note 2, at 24.

6. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (“It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property . . .”); Singer, *supra* note 1, at 1291.

7. Compare Epstein, *supra* note 2, at 22 (arguing that “it is difficult to conceive of any property as private if the right to exclude is rejected”), with Singer, *supra* note 1, at 1291 (asserting that “the common-law rule that grants most businesses the right to exclude customers at will must be changed”). See generally *Pruneyard*, 447 U.S. at 81.

both public and private.⁸ Second, this Article argues that most cases and articles that have addressed the issue of SCP by owners of mass private property analyze the issue as if a given property existed in a vacuum — divorced from the city, neighborhood, or area in which it is located — and ignore the role that such properties play in a given community or locale, hereinafter referred to as the “community contingent nature of mass private property.” In so doing, these cases and articles fail to recognize that the manner in and extent to which states regulate SCP should depend not only upon the nature of the property itself but also upon the characteristics of the setting wherein the property is located, which necessarily has a symbiotic relationship with the property.⁹ In response to the failure of current scholarship and case law with regard to the above issues, the instant Article seeks to establish a framework for regulating SCP in mass private property that incorporates both the dual nature of mass private property and community contingency.

Part I defines mass private property and SCP with more detail and examples than the rather general description put forth here in the introduction. Part II summarizes some prominent literature and case law that seeks to address the conundrum posed by SCP in mass private property. Part III discusses the dual nature of mass property as both private property and public milieu, posits that the private and public features of mass private property are separate aspects, and suggests that, however challenging, the best approach to regulating SCP on such property lies in recognizing and taking account of each of these characteristics.

Part IV discusses the contingent nature of mass private property, asserting that such spaces play different roles in different communities. Because the meaning of community is a contested concept, the section opens with a discussion of some arguments put forth about the meaning of “community.” This Article does not attempt to resolve the problem of defining community for all purposes, but, less ambitiously, seeks to provide a provisional definition of community that is sufficient for evaluating the role of a particular mass

8. See *infra* Part III. See generally, e.g., Epstein, *supra* note 2; Singer, *supra* note 1; Von Hirsch & Shearing, *supra* note 2.

9. James Bernard Murphy, *Equality in Exchange*, 47 AM. J. JURIS. 85, 113 (2002) (“Both Aristotle and Thomas Aquinas understand property ownership as a kind of trust: civil law permits private ownership on the condition that it serve the common good of the community. Each property owner is a kind of trustee who has a duty of justice to ensure that his property meets the needs of his fellow citizens. According to the principle of subsidiarity implicit in their thought, it would be unjust for the government to claim sole responsibility for distributive justice, for this would deny individuals and communities the right to exercise their best judgment and creative initiative in deciding how their wealth could best serve the common good.”).

private property in a given community. Part IV then discusses the relationship between community and regulation of mass private property as two-fold. First, the type of SCP that is acceptable is partly a function of the role that a given mass private property plays in a community. Second, the degree of freedom that an owner of such property has to regulate conduct in his or her space raises questions regarding the values of the community in which it is situated. Just as punishment expresses the values of the society that undertakes the punishment,¹⁰ the forms of SCP that a community allows or prohibits in mass private property are also expressive of community values because such property plays a public role in the community.¹¹ For this reason, this Article asserts that the community wherein the mass private property is located should, within certain boundaries, be given broad leeway to regulate SCP in such space.

Part V sets forth a framework for regulating SCP in mass private property. This framework is rooted in both the dual public/private nature of mass private property discussed in Part III, as well as in the arguments put forth in Part IV that the role that a private property plays in a given community is geographically and demographically variable and that regulating SCP in mass private property is an important means by which a community can express itself. In sum, Part V argues that the dual public/private nature of mass private property imposes substantive boundaries upon the community: on one hand, it delineates a zone of protection for mass private property owners by providing some limit on the community's power to restrict the SCP measures the owner may employ, and on the other hand, it provides a limit as to the SCP measures that a mass private property owner may implement, even if authorized to do so by the community. Within these boundaries, the community should, with some exceptions discussed in Part V, be the arbiter of which SCP measures the owner may employ.

10. See Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 306 (1990) ("The law-abiding public, through its legislatures, has structured the criminal law system to reflect its values and beliefs."); Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 231 (2001) ("In modern societies . . . with moral values that celebrate individual freedom and rationality, acts that violate the moral order do not produce as strong a demand for punishment and punishments reflect those values by emphasizing the humanity of even the offender.").

11. See Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 2-3 (1999) ("Countless Americans practically live their lives in the modern mall. . . . In the late 1960s and the 1970s, the shopping mall had already developed into a significant American institution, but in the intervening decades, malls like the Mall of America in Minnesota, the Sawgrass Mills mall in Florida and many others have literally and figuratively redefined the American landscape." (footnote omitted)).

I. Mass Private Property and Situational Crime Prevention Defined

A. Mass Private Property

Mass private property is “[a] term coined by Shearing and Stenning . . . to describe large, privately-controlled tracts of property.”¹² Although originally discussed primarily in non-U.S. sources, the American scholarly literature now frequently uses the term.¹³ It is sometimes called “mass private space,” “semi-public space,”¹⁴ or “quasi-public space.”¹⁵ To understand what constitutes mass private property, one must realize that the term refers not only to the size of the property, but also to its use: it performs the function of public space.¹⁶

The paradigmatic mass private property is the large shopping mall that contains retail stores, restaurants, theaters, and other entertainment centers, as well as common areas that people often frequent or walk around much like they would in an urban shopping district.¹⁷ There is no precise line, however,

12. Alison Wakefield, *Situational Crime Prevention in Mass Private Property*, in *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION*, *supra* note 2, at 125, 125 n.1 (citation omitted) (citing Clifford D. Shearing & Philip C. Stenning, *Modern Private Security: Its Growth and Implication*, in 3 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 193 (Norval Morris & Michael H. Tonry eds., 1981)); *see also* Von Hirsch & Shearing, *supra* note 2, at 86.

13. *See, e.g.*, Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 *UTAH L. REV.* 573, 591 (“The term ‘mass private property,’ coined by Shearing and Stenning, refers to large, privately owned spaces like shopping malls, gated communities, and commercial and industrial ‘campuses’ that depend upon public use.” (footnotes omitted)).

14. *See, e.g.*, Ethan E. Litwin, Note, *The Investigative Reporter’s Freedom and Responsibility: Reconciling Freedom of the Press with Privacy Rights*, 86 *GEO. L.J.* 1093, 1102 (1998).

15. *See, e.g.*, Joh, *supra* note 13, at 591 n.122. Note that some commentators use the term “mass public space” to denote such properties. *See, e.g.*, Andrew Von Hirsch, *The Ethics of Public Television Surveillance*, in *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION*, *supra* note 2, at 59, 74.

16. *See* *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”); *see also* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that California’s requirement that a shopping mall allow expressive activity in the mall was not a taking within the Just Compensation Clause of the Fifth Amendment given the nature of the activity in relation to the primary purpose to which the owner of the mall had put the property).

17. Wakefield, *supra* note 12, at 125; *see also* Curtis J. Berger, *PruneYard Revisited: Political Activity on Private Lands*, 66 *N.Y.U. L. REV.* 633, 656 (1991) (“Where it is important legally to distinguish between private and public space, as must be done in the search for a public forum, one should look beyond the property’s title, focusing instead on its physical layout, its ongoing activity, and the occupants’ reasonable expectations. Political discourse naturally complements the medley of ongoing activity within the marketplace. As the American

demarcating the boundary between mass private space and other forms of private property, the distinction being a matter of degree as well as a dynamic concept that continues to evolve.¹⁸ Perhaps the best way to determine what qualifies as mass private property is the degree to which the property resembles and functions as public space.¹⁹ While the large shopping mall is the paradigm, mass private property might include such spaces as “an arts centre . . . with visual and performing arts and licensed refreshment facilities” or a large shopping center that consists mainly of retail shops but that does not contain all the entities that one might find in a shopping mall, such as cinemas, restaurants, or other entertainment facilities.²⁰

The key distinguishing feature is that the private property is open to the public for multiple uses and even for no particular use. Many users of mass private property will go there simply to walk around or to socialize and not necessarily to purchase anything.²¹ Moreover, the owners of such properties

city evolved, the market expanded into the streets and sidewalks of the central business district. More recently, as suburban America developed, the privately owned mall has transformed the marketplace once again. Each stage of evolution, from a discrete public marketplace to the expanded central business district to the privately owned mall, has embodied attributes that well suit the forum role. Thus, it seems natural to define the modern public forum not in terms of ownership but rather as a gathering place . . .” (footnotes omitted).

18. See Berger, *supra* note 17, at 656.

19. See Von Hirsch & Shearing, *supra* note 2, at 86; see also N.J. Coal. Against War in the Middle E. v. J.M.B Realty Corp., 650 A.2d 757, 781 (N.J. 1994) (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 581 n.5 (1972) (Marshall, J., dissenting)) (“We realize there may be differences of degree and that some cases might approach a closeness that would otherwise give us pause. Similar concerns apparently infused the debate among Justices of the United States Supreme Court on these issues. Addressing precisely the same concerns expressed by defendants, Justice Marshall said: ‘Every member of the Court was acutely aware [in *Logan*] that we were dealing with degrees, not absolutes. But we found that degrees of difference can be of constitutional dimension.’ Despite the degrees, the entity to which we apply the free speech right, the regional shopping center, is clearly and easily discernible and distinguishable from all others in its constitutional satisfaction of the standard of *Schmid*; it is distinguishable in its physical size, its multitude of uses, its layout, and its combination of characteristics that together compel the imposition of the constitutional obligation.” (citation omitted)).

20. Wakefield, *supra* note 12, at 125; see also Von Hirsch & Shearing, *supra* note 2, at 86 (“At one end of the spectrum lie facilities that are primarily designed for specified uses: say, a small atrium in front of a few shops, meant for the convenience of customers but not for general use. At the other end, is the large shopping mall which contains numerous retail outlets, restaurants, recreational facilities, and parking spaces — and which is meant for general public use.”); Brian Libby, *Shopping Around for Second Lives*, N.Y. TIMES, June 15, 2003, § 2, at 32 (“[M]alls gather a variety of goods into a central cluster, . . . [and] to have an ongoing life, malls need to take on more uses: social services, housing, religious institutions.” (internal quotation marks omitted)).

21. See M. Neil Browne, Virginia Morrison & Kara Jo Jennings, *The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casino Gambling?*, 78

generally allow people to access these spaces without requiring them to purchase anything.

Mass private spaces thus are distinguishable from other private spaces, such as shops, restaurants and cinemas that are open to the public for a particular use.²² The public can enter such places but only for a particular use and a limited time. On the other hand, some shops allow people to browse for various periods of time, and department stores are probably on the border of what might be considered mass private space, as they often have many departments and are set up to encourage people to wander from department to department.²³

For the purposes of the framework put forth here it is not necessary to delineate the exact line that demarcates mass private property and other private property. Locating the exact point at which private space has sufficient public use to qualify as mass private property would be difficult if not impossible.²⁴ This analysis requires only a sense of the type of properties that qualify as

NEB. L. REV. 37, 62 (1999) (“Also alarming is that young adults are spending more time in malls than any prior generation. Dr. James Roberts, assistant professor of marketing at Baylor University, comments that shopping centers are becoming hangout places where adolescents seek entertainment and socialization amongst friends.”); Jerry Kang & Dana Cuff, *Pervasive Computing: Embedding the Public Sphere*, 62 WASH. & LEE L. REV. 93, 131 (2005) (“In addition to the manifest function of a shopping mall — namely shopping — the mall serves myriad latent functions, ranging from adolescent socializing to senior citizen physical exercise. As any urban teenager can testify, the mall is a prime site for dating, hanging out, and meeting new friends.”); Vincent, *supra* note 2, at 221 (“The shopping mall is the cathedral of contemporary culture. It is the focus of what little social life many of us share with others.”).

22. Elizabeth Joh, *Criminal Law: The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 63-64 (2004) (“[T]he mass private property concept identifies a change in the structure of modern life — where and how Americans live, work, and spend leisure time — that has led to a more prominent role for private police.”); Von Hirsch & Shearing, *supra* note 2, at 86.

23. Additionally, there are some places that charge admission that might be considered mass private space, such as amusement parks. The analysis in this Article will focus on mass private property that one may enter free of charge. Nonetheless, to the extent that a property that charges an entry fee has aspects of mass private property, the same analysis applies.

24. See Von Hirsch & Shearing, *supra* note 2, at 86. Richard Epstein picks up on this problem, suggesting that the point at which private property becomes subject to public considerations is marked not by any quality inherent in the property itself, but rather in the way a particular court is going to evaluate it. Epstein, *supra* note 2, at 34-35. Furthermore, Michael Heller notes that “[p]rivate property is a complicated idea to pin down precisely, as its boundaries fray at the edges.” Michael A. Heller, *Critical Approaches to Property Institutions: Three Faces of Private Property*, 79 OR. L. REV. 417, 418 (2000) (citing Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in ETHICS, ECONOMICS, AND THE LAW 3, 5 (Am. Soc’y for Political & Legal Philosophy, Nomos Series No. XXIV, J. Roland Pennock & John W. Chapman eds., 1982)).

mass private space. For purposes of the framework this Article proposes, one can assume that the property in question is at the end of the spectrum closest to public property — such as a mall with shops, restaurants, services, entertainment facilities, and other attributes that one would find in a typical public commercial district — because such property raises the most difficult issues regarding SCP. By providing an analysis with reference primarily to such property, although with some degree of acknowledgement of “less massive” and “less public” mass private space, this Article develops a framework applicable to various types of mass private space.

B. Situational Crime Prevention

Situational Crime Prevention (SCP) is a term most associated with the British criminologist Ronald Clarke, who notes that while SCP “has come to mean different things[,] . . . [i]n its broad[est] meaning, it encompasses any attempt to manipulate the environment to reduce opportunities for crime.”²⁵ Like mass private property, the concept and terminology has made its way into American scholarship.²⁶ Less abstractly, SCP, sometimes referred to as primary crime prevention or reduction, describes steps taken to prevent or reduce crime before it occurs by reducing opportunities to commit crime.²⁷ SCP stands in contrast to traditional crime control, which seeks to reduce crime through the deterrent and incapacitating effects of punishment or by addressing the social and economic causes of crime.²⁸

SCP includes measures such as designing cars with steering locks and closing off roads in high crime areas to make it harder for potential offenders

25. Ronald Clarke, *Situation Prevention, Criminology and Social Values*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, *supra* note 2, at 97, 99.

26. *See, e.g.*, Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 662 (2006) (“Situational Crime Prevention (‘SCP’) arose out of a growing realization in the 1970s and 1980s that changes in policing and punishment were failing to reduce crime levels.”); Richard H. Schneider, *American Anti-Terrorism Planning and Design Strategies: Applications for Florida Growth Management, Comprehensive Planning and Urban Design*, 15 U. FLA. J.L. & PUB. POL’Y 129, 138 (2003) (“Articulated by Ronald V. Clarke from ideas developed while he was at the British home office in the 1960s and early 1970s, situational crime prevention suggests that effective crime prevention depends upon opportunity reduction. This can be accomplished by increasing the perpetrator’s risk of being seen or apprehended, by increasing the effort required to commit a criminal act, or by decreasing the rewards of the act. According to the theory, any one of these factors may be sufficient in and of themselves to deter or prevent criminal (or, by extension, terrorist) acts.” (footnote omitted)).

27. *See* Ken Pease, *Crime Reduction*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 947, 950 (Mike Maguire, Rod Morgan & Robert Reiner eds., 2002).

28. *See id.* at 948-49.

to get into and out of such areas.²⁹ It also includes providing better street lighting at night, outfitting merchandise with tags that trigger an alarm if one tries to remove the item from a shop without paying, and the installation of CCTV cameras in shops or in public places.³⁰ Some SCP comes in the form of advice to individuals to take certain steps to reduce their risks of being crime victims, such as not walking alone at night or avoiding certain neighborhoods.³¹

To foreshadow an issue that will be addressed in subsequent sections, SCP involves both an objective element (reducing crime) and a subjective one (making people feel safer), which may not be directly correlated with each other.³² In fact, some SCP measures that seek to reduce crime may increase people's anxiety about crime by raising their awareness of risk.³³

As regards mass private property, the two primary SCP techniques the instant Article addresses are (1) exclusion from such spaces and (2) imposition of behavioral standards. In a sense these techniques are just different flavors

29. See R. A. Duff & S. E. Marshall, *Benefits, Burdens and Responsibilities: Some Ethical Dimensions of Situational Crime Prevention*, in *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION*, *supra* note 2, at 17; see also Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1454 (1999) ("For example, studies have found that the presence of two cashiers greatly reduced the incidence of convenience store robberies. In some cases, even simple measures such as increased exterior lighting have been effective in reducing crime and the fear of crime in particular areas."); Cheng, *supra* note 26, at 662 (citing steel mailboxes as an example of SCP in that the design of the box itself encourages a default pattern of behavior in which people do not steal mail).

30. See Pease, *supra* note 27, at 953-56; Martha J. Smith and Ronald V. Clarke, *Crime and Public Transport*, 27 CRIME & JUST. 169, 171 (2000) ("Increased supervision would deter many offenders anxious to avoid detection and arrest. This can be accomplished through the use of more conductors and station staff, and by the provision of closed-circuit television (CCTV) surveillance.").

31. See Duff & Marshall, *supra* note 29, at 27, 31; cf. Allison West, *Tougher Prosecution When the Rapist Is Not a Stranger: Suggested Reform to the California Penal Code*, 24 GOLDEN GATE U. L. REV. 169, 179 (1994) (discussing the steps that some women take in order to avoid being raped).

32. See Wendy Holloway & Tony Jefferson, *The Role of Anxiety in Fear of Crime*, in *CRIME, RISK AND INSECURITY* 31, 31-35 (Tim Hope & Richard Sparks eds., 2000); Lucia Zedner, *Too Much Security?*, 31 INT'L J. SOC. L. 155, 158 (2003). Compare David Weisburd & John Eck, *What Can Police Do to Reduce Crime, Disorder, and Fear?*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 56 (2004) ("Evidence of the effectiveness of situational and opportunity-blocking strategies, while not necessarily police based, provides indirect support for the effectiveness of problem solving in reducing crime and disorder."), with Smith and Clarke, *supra* note 30, at 204-05 (noting that several studies have shown that actually making a place safer does not always cause people to feel safer and, conversely, that people can be made to feel safer even if in reality they are not safer).

33. See Zedner, *supra* note 32, at 163-66.

of the same strategy. Exclusion is often based on behavior in which one has previously engaged at the property in question.³⁴ And property owners usually enforce behavioral standards by removing, and thereby excluding at least temporarily, those individuals who refuse to abide by the behavioral standards.³⁵

SCP in mass private property may involve several types of exclusion and behavioral standards. Exclusion from a space may be “for a lengthy period.”³⁶ The exclusion also may be brief, such as asking someone who has behaved in a way unacceptable to the owner to leave the premises and not return for the rest of the day or until he ceases “engaging in the behaviour.”³⁷

34. See Gregory Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 121 (2004) (“During the campaign against international terrorism, numerous property owners of this sort have clamped down on political debate, barring critics of government policies from channels of expression opened by their own invitations for the public to use their property. The most emblematic incidents involved the expulsion of lone, peaceful protesters from spaces frequented by the public. Stephen Downs’s arrest at the Crossgates Mall followed an incident a few months earlier in which the same mall had called the police to expel several local peace activists who had taped antiwar messages to their clothing and entered the mall.”); Von Hirsch & Shearing, *supra* note 2, at 92; Wakefield, *supra* note 12, at 132-33.

35. See Wakefield, *supra* note 12, at 132; see also IRA G. ZEPP, JR., *THE NEW RELIGIOUS IMAGE OF URBAN AMERICA: THE SHOPPING MALL AS CEREMONIAL CENTER* 171 (1986) (“When the number of teens reaches critical mass and their behavior, especially excessive noise and the blocking of store entrances, has reached unacceptable levels, security is called. At the extreme, security personnel or police will ban the young perpetrators from the mall. For many teenagers, to be shunned by the mall and thereby isolated from their peers is a fate worse than death. This has proved to be an effective deterrent.”); Benfer, *supra* note 1 (“In late April, the rap star Nelly entered the Union Station Mall in his hometown of St. Louis to purchase 20 Cardinals jerseys for a video he was shooting at Busch stadium. Nelly (given name, Cornelius Haynes Jr.) is a local celebrity whose presence is usually welcomed. But on this day he was asked to leave by the Union Station security staff. The reason? He was wearing a do-rag, which is explicitly prohibited under the Union Station dress code as an item of ‘commonly known gang-related paraphernalia’ — a category the mall defines as ‘including, but not limited to: wearing or showing a bandana or do rag of any color, a hat tilted or turned to the side, a single sleeve or pant leg pulled/rolled up and flashing gang signs.’ . . . But in this mall, as in many others across America, one doesn’t have to be a gang member to be evicted under anti-gang ordinances; one merely has to dress in a way that makes one *look* like a gang member, as defined by the mall in question.”); *Skirt Stake*, MIAMI NEW TIMES, August 4, 2005, http://www.miaminewtimes.com/Issues/2005-08-04/news/bitch_full.html (“Although tight, revealing garb and Burberry tams are venerated as South Florida cultural standards, Lior Gonda, a Web designer from Weston, was asked to leave a popular mall because he was wearing a demure floor-dusting skirt.”).

36. Von Hirsch & Shearing, *supra* note 2, at 88.

37. *Id.* at 92; see also Wakefield, *supra* note 12, at 134.

The basis for exclusion and the extent to which it is employed varies from one mass private space to another.³⁸ As already mentioned, the owner of the private space might exclude a person based upon his or her behavior at that particular moment.³⁹ Additionally, an owner of mass private property might attempt to ban persons convicted of criminal offenses committed in that particular space or elsewhere.⁴⁰ Further, and most controversially, SCP in mass private space may take the form of excluding persons who fit a particular profile.⁴¹ Security guards thus may exclude people “whose behaviour or body language [is] perceived as suspicious . . . [or] who seem[] to be out of place in relation to the area or time of day.”⁴² Moreover, security guards might exclude persons who fit a particular demographic or social circumstance, such as young people or the homeless.⁴³

38. See Wakefield, *supra* note 12, at 134.

39. ZEPP, *supra* note 35, at 171; Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Prune Yard*, 13 CORNELL J.L. & PUB. POL'Y 533, 534 (2004) (“Because [mass private] spaces are privately-owned and controlled, owners regulate behavior within by exerting the most fundamental property right — the right to exclude.”); Von Hirsch & Shearing, *supra* note 2, at 87; Wakefield, *supra* note 12, at 132.

40. See Von Hirsch & Shearing, *supra* note 2, at 90-91; Wakefield, *supra* note 12, at 131-32.

41. See Von Hirsch & Shearing, *supra* note 2, at 131-32; see also Harris, *supra* note 1, at 8-10 (“Consumer Racial Profiling (CRP) is defined as any type of differential treatment of consumers in the marketplace based on race or ethnicity that constitutes a denial or degradation in the product or service offered to the consumer. In a retail environment, CRP can take many forms, ranging from overt or outright confrontation to very subtle differences in treatment, often manifested in forms of harassment. Outright confrontation includes verbal attacks, such as shouting racial epithets, and physical attacks, such as removing customers from the store. Customer harassment includes slow or rude service, required pre-payment, surveillance, searches of belongings, and neglect, such as refusing to serve African-American customers. . . . On the other hand, some statistical theories suggest that overt disparate treatment simply arises from a retailer’s desire to maximize profits and minimize costs, and does not reflect animus towards a particular group. A retailer who engages in ‘[r]evenue-based statistical discrimination’ makes a presumption about the potential revenue he or she may receive from different types of customers and acts accordingly. . . . Unwittingly, some retailers make assumptions about their black customers based on stereotypes relating to the propensity of African Americans to commit crimes and their inability to pay for goods.” (footnotes omitted)); Wakefield, *supra* note 12, at 130-31.

42. Wakefield, *supra* note 12, at 130-31.

43. See *id.* at 130. The right of an owner of mass private property to exclude someone without having a valid basis for such varies from the United States to the United Kingdom. And, in the United States, the standards are different from state to state. In the United Kingdom, the owner of a property that is generally open to the public can exclude someone without giving any reason. See *CIN Props. Ltd. v. Rawlins*, [1995] 2 E.G.L.R. 130 (C.A.) (Eng.). The U.S. Supreme Court has given states the power to decide whether property owners may exclude persons arbitrarily, holding that one does not have a federal constitutional right to

Other forms of SCP, such as CCTV surveillance⁴⁴ or employment of private security guards, may also take place on mass private property. Nevertheless, the use of SCP techniques other than exclusion and the imposition of behavioral standards in mass private space does not raise issues peculiar to the context of mass private space. It instead raises the same types of legal, ethical, and other issues in mass private space as in other private or public spaces.⁴⁵

II. Current Conceptions and Theories of Regulating Situational Crime Prevention in Mass Private Space

This section provides an overview and critique of some of the arguments raised concerning regulating SCP in mass private space. Additional critique of these arguments will inhere in the arguments set forth in Parts III, IV, and V.

Arguments as to the authority that owners of mass private property should have with regard to SCP have generally been substantive and fixed. Such arguments seek to reach a conclusion as to what techniques are appropriate on mass private property and do not take account of the variability of relationships that may exist between mass private property and the people who live near the property or would wish to frequent it.⁴⁶ Moreover, the arguments

enter private property, even if it is generally open to the public, but also holding that a state's requiring a property owner who opens her property to the general public not to exclude persons arbitrarily does not violate the property owner's rights. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); Jennifer Klear, *Comparison of the Federal Courts' and the New Jersey Supreme Court's Treatment of Free Speech on Private Property: Where Won't We Have the Freedom to Speak Next?*, 33 RUTGERS L.J. 509 (2002). In light of this holding, several state supreme courts have interpreted their respective constitutions in various ways as regards the right to exclude from mass private property. For example, in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994), the New Jersey Supreme Court held that regional shopping centers could not exclude persons wanting to hand out literature on their property concerning policy issues but could impose reasonable restrictions upon such activity.

44. Von Hirsch, *supra* note 15, at 59; *see also* MARCUS NIETO, CAL. STATE LIBRARY, PUBL'N NO. CRB-97-005, PUBLIC VIDEO SURVEILLANCE: IS IT AN EFFECTIVE CRIME PREVENTION TOOL? (1997), available at <http://www.library.ca.gov/CRB/97/05/crb97-005.pdf>.

45. Private security guards on mass private property, of course, do raise issues with which this Article is concerned to the extent that the guards are involved in excluding persons and enforcing behavioral codes. Other issues that employment of private security raises, such as lack of training, the fact that private actors are carrying out traditionally public functions, and the fact that a public good may end up going to the highest bidder, fall outside the scope of this Article because those issues, while present with regard to private security guards on mass private property, are not limited in their employment to mass private space. These same concerns are raised with regard to private security guards employed in other settings.

46. *See, e.g.*, Clarke, *supra* note 25, at 110 (putting forth a generally favorable view of SCP

do not engage the issue of the mechanism by which decisions should be made as to what forms of SCP are acceptable in a given mass property. And although some scholars have recognized that the quantity and quality of SCP that one may employ might vary from person to person or place to place,⁴⁷ existing scholarship does not address the issue of what role communities in which mass private properties are located should play as arbiters of what is and is not appropriate SCP on such properties.⁴⁸ Some of these scholars have focused upon SCP (including exclusion) in terms of mass private space,⁴⁹ while others have focused on barring given members of the public (and other SCP techniques) more generally, whether or not such occurs in mass private space or elsewhere.⁵⁰

and bemoaning its lack of acceptance among most academics, but failing to focus upon places and populations as important factors in determining the costs and benefits of SCP); Von Hirsch & Shearing, *supra* note 2, at 87-95 (setting forth a model delineating what forms of exclusion from mass private — and public — property are acceptable without taking account of the role that such space may play in a given locality).

47. Duff & Marshall, *supra* note 29, at 17 (“[T]here are morally significant differences between the groups on which SCP measures impact.”); David Garland, *Ideas, Institutions and Situational Crime Prevention*, in *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION*, *supra* note 2, at 1, 13 (“[SCP] also allows a form of local or even individual action that can be undertaken directly by those fearful of crime.”); Michael S. Scott, *Community Justice in Policing*, 42 *IDAHO L. REV.* 415, 433, 436-37 (2006) (“One dimension of the broad community justice approach is that the systems in which offenders are adjudicated ought to take better account of the desires, needs, perspectives, and interests of the community most directly affected by the offenders’ conduct. While crime can be said to have consequences to society as a whole, it has more immediate and tangible consequences for the smaller communities in which particular crimes occur. . . . Just as individuals have different capacities and competences to solve problems, so too do communities. Not all communities or community groups are equally staffed, organized, trained, resourced, connected, or skilled to push the buttons and pull the levers of social control to bring about purposeful, significant, and lasting improvements to public safety.”).

48. See, e.g., Judy Johnson, *The Importance of Obtaining Community Support to Reduce Crime*, in *HANDBOOK OF LOSS PREVENTION AND CRIME PREVENTION* 599, 609 (Lawrence J. Fennelly ed., 1982) (“If crime prevention is to be effective in improving the quality of life, the role of the community-at-large must be expanded to include supportive efforts from a broad base of existing private sector groups . . . within a jurisdiction.”); Wakefield, *supra* note 12, at 144 (stating that “[f]or privately-controlled territories to operate as sites for public life, there is a need to strike a balance in the controls that are adopted, so that they may serve their local communities effectively as truly communal spaces” while failing to expand upon this kernel).

49. See, e.g., Wakefield, *supra* note 12, at 144.

50. See, e.g., John Kleinig, *The Burdens of Situational Crime Prevention: An Ethical Commentary*, in *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION*, *supra* note 2, at 37 (noting the “tendencies . . . associated with attempts to legitimise and elevate SCP, but which . . . lead it to overreach its capabilities.”); Von Hirsch, *supra* note 15 (discussing the ethics of CCTV surveillance in mass private space and elsewhere).

A. Commentary Opposed to SCP Because Mass Private Space Functions as Public Space

Many commentators have formulated their analysis by explicitly or implicitly treating mass private property as if it were purely public space or close to being public space and arguing in favor of strong limits on exclusion and other forms of SCP. This group of commentators includes Singer, Garland, Von Hirsch, Shearing, Gray and Gray, and Duff and Marshall.

Singer argues that in contemporary society the common law rule that private business owners generally have the right to exclude at their discretion should be changed in favor of a regime that would take as a given that any member of the public would have the right to enter shopping malls, retail shops, restaurants, places of entertainment, and similar businesses.⁵¹ Thus, Singer does not limit his argument regarding the use of the SCP technique of exclusion to mass private space.⁵²

Garland, focusing on SCP primarily in the mass private space setting, describes exclusion from such spaces and other such techniques in wholly negative terms:

In these private settings (many of which are mass public spaces such as shopping malls that happen to be privately owned and administered) individuals may be required to submit to searches, or be monitored and filmed, and they may be subject to exclusion without cause shown. There is here a rough justice of *exclusion* and *full-force surveillance* that has become more and more routine in our experience and which is increasingly viewed as a necessary condition for securing the safety and pleasure of consumers and decent citizens⁵³

Von Hirsch and Shearing, also focusing on mass private space, argue that owners of such properties should not have broad exclusionary powers because such property “performs the functions of public space.”⁵⁴ Although they note

51. See Singer, *supra* note 1, at 1291.

52. See *id.*

53. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 160 (2001).

54. Von Hirsch & Shearing, *supra* note 2, at 86; see also *Lloyd Corp. v. Whiffen*, 773 P.2d 1294, 1300 (Or. 1989) (“Shopping malls have become part of American life. Large numbers of the public gather there. Although plaintiff tries to cloak a public mall as a private place, it is the antithesis of a private place.”); Alexander, *supra* note 11, at 44 (“[T]he modern mall is the new downtown. . . . [T]he malls of today have replaced the downtowns of yesterday, and as such, the malls have taken on a public function which resembles that of the company town of *Marsh*, even including streets, restaurants, hotels and churches.” (referencing *Marsh v.*

that SCP steps such as exclusion may serve to reduce crime, the use of such measures “in areas having public use entails serious losses of personal liberty.”⁵⁵ They therefore conclude that a mass private space, such as “a large privately-owned mall that invites the public to enter without specification of purpose is . . . offering a public service, and thus may be called upon to ensure that all members of the public have proper access.”⁵⁶ Their analysis therefore “treat[s] as public in character those spaces that clearly are designed for general public use.”⁵⁷

Alabama, 326 U.S. 501 (1946)); Mulligan, *supra* note 39, at 539 (“Malls have also shouldered widespread community functions.”).

55. Von Hirsch & Shearing, *supra* note 2, at 79; *see also* Magarian, *supra* note 34, at 121, 124 (“Private property is often essential for political debate because so much public interaction takes place in privately owned space, from shopping malls to the Internet. No one advocates wholesale appropriation of private property for the sake of public discourse, but expressive activity is a natural and appropriate byproduct of the general uses to which certain property owners — such as shopping mall owners, media corporations that depend on advertising revenues, and Internet service providers — choose for self-interested reasons to dedicate their property. During the campaign against international terrorism, numerous property owners of this sort have clamped down on political debate, barring critics of government policies from channels of expression opened by their own invitations for the public to use their property. . . . First Amendment law has always reflected a central concern with the chilling of speech — the danger that threats or reprisals against unpopular speakers will dissuade others from speaking their minds and challenging the status quo. The anticommunist purges that followed the two World Wars are only the most prominent examples of how nongovernmental reprisals and intimidation can chill political expression.”).

56. Von Hirsch & Shearing, *supra* note 2, at 87; *see also* Marsh, 326 U.S. at 506 (“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.” (citation and footnote omitted)).

57. Von Hirsch & Shearing, *supra* note 2, at 86; *see also* Alexander, *supra* note 11, at 1 (“Unfortunately, the United States Supreme Court has held that there is no constitutional right to engage in expressive activity in privately owned shopping malls. While the Court has recognized the individual states’ right to extend to their citizens greater protections under the state constitution, only a few have done so in this area. Many instead have turned a cold shoulder to those seeking to express themselves. In this context, the promise of American democracy is being thwarted.”); Christopher M. Kelly, “*The Spectre of a Wired Nation*”: Denver Area Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace, 10 HARV. J.L. & TECH. 559, 627-28 (1997) (“Claims that the Internet is a public forum neglect one major factor that was a significant dividing line among the Justices in *Denver Area*: one of the primary questions in determining whether a potential ‘place’ for speech can be a public forum is whether it is in fact public. Privately controlled space cannot generally be deemed a forum open to expression without some prior regulatory involvement. There are of course the hard cases of company towns and shopping malls that make this distinction a bit

Beyond this, Von Hirsch and Shearing then put forth a detailed framework for regulating SCP in mass private space.⁵⁸ They distinguish between long-term or permanent exclusion and short-term exclusion.⁵⁹ Inherent in their assertions are arguments about regulation of conduct in mass private property,⁶⁰ because short- or long-term exclusion is the general enforcement mechanism for not complying with the behavioral standards set by the owner.⁶¹ Von Hirsch and Shearing see long-term or permanent exclusion from mass private space, whether based on profiling or conduct, as problematic under almost any circumstance.⁶² However, they see brief conduct-related exclusion as acceptable.⁶³

Similarly, Gray and Gray argue against giving broad powers of exclusion to owners of mass property, asserting that the English court decision in *CIN Properties Ltd. v. Rawlins*,⁶⁴ which held that owners of mass private property retain the right of arbitrary exclusion,⁶⁵ was wrongly decided because the

more blurry. But that does not mean that there is no public/private property distinction, especially when it comes to government action that ‘opens up’ a space for speech access. The different approaches of the plurality, Justice Kennedy, and Justice Thomas above indicate how characterization of the space at issue affects the outcome. Establishing a World Wide Web site, for example, requires both the use of a portion of cyberspace that is generally public in character — the network of networks that comprises the Internet — and one that is generally private in character — the host computer that the individual posting the page either owns or on which she has leased space. When another user aims to access an individual’s web page, she goes through the public network to reach the private one. Does this somehow trigger a public forum analysis?” (footnote omitted)).

58. Von Hirsch & Shearing, *supra* note 2, at 88-93.

59. *Id.*

60. Von Hirsch and Shearing actually do not focus solely on mass private property and, in fact, speak in terms of public space throughout much of their essay. *See, e.g., id.* Because they view mass private property as public space for purposes of evaluating SCP, however, their public space arguments are also arguments about mass private property.

61. *Id.* at 92; Wakefield, *supra* note 12, at 134-35.

62. Von Hirsch & Shearing, *supra* note 2, at 88-92.

63. *Id.* at 92-93.

64. [1995] 2 E.G.L.R. 130 (C.A.) (Eng.).

65. *See id.* at 134H-134JJ; JEROLD S. KAYDEN, PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE 21 (2000) (“Furthermore, private owners who openly invite ‘general’ members of the public to enter and use their property might expose themselves to certain restrictions on their ability to exclude ‘specific’ members of the public.”); Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?*, 31 ARIZ. ST. L.J. 391, 427 (1999) (“For example, in *Pruneyard Shopping Center v. Robins*, the owner of a shopping mall asserted that his right to exclude permitted him to stop persons from passing out pamphlets at the mall. The state required mall owners to allow private individuals to ‘exercise state-protected rights of free expression.’ The mall owners claimed this requirement constituted a taking under the Fourteenth Amendment, but the court rejected the mall owner’s taking argument. Having control over who enters one’s house protects vital

power to exclude from mass private property that is functionally public should be limited to public interest concerns.⁶⁶ Likewise, Duff and Marshall “assum[e] that the mall is or should be a public space, providing public goods.”⁶⁷ Thus, they assert that SCP measures that curtail people’s freedom to enter mass private spaces, either by generally excluding them or ejecting them based upon behavior, “exclude them from access to goods . . . in which they should as citizens be able to share.”⁶⁸ Therefore, SCP that involves limiting access or activity in mass private space “is *intrinsically* inappropriate to the proper end of securing the *public* good of crime prevention, since it prevents crime only by transforming, and distorting, that public good into a private good.”⁶⁹

B. Commentary in Favor of SCP Based on a Fixed View of Mass Private Space’s Relationship to Community

The theorists who are more favorable to the use of exclusion or other SCP techniques in shopping malls and elsewhere also posit arguments rooted in a fixed view of the relationship between a given property and the population who frequents the property and lives or works near it. For example, Ronald Clarke, “[t]he person most closely associated with the development of SCP,”⁷⁰ calls for greater use of SCP in mass private space and elsewhere.⁷¹ He notes criticism that some have made that “[t]he use of situational crime prevention results in the exclusion of so-called ‘undesirables’ (vagrants, the homeless, minorities and unemployed young people) from public places such as shopping malls, parks and entertainment facilities.”⁷² Clarke grudgingly acknowledges this concern but fails to resolve the issue or seek a solution that

interests, such as keeping secure private and personal space. Mall owners cannot claim those same vital interests are violated by not being able to exclude persons, who are exercising their right to free expression, from a public mall. Merely weighing the interests involved — namely the interest in excluding speakers from a mall and the interest in speaking in a place where the public congregates — demonstrates that the more weighty interest is the interest in speech in a public place. This shows we cannot, contrary to Blackstone’s beliefs, maintain there is a single incident of ownership that is essential to all property claims.” (footnotes omitted)).

66. Kevin Gray & Susan Francis Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, 1999 EUR. HUM. RTS. L. REV. 46, 49-50, 63 (U.K.).

67. Duff & Marshall, *supra* note 29, at 21; *see also* Mulligan, *supra* note 39, at 561 (“A superior rule would hold that wherever the public is freely and openly invited to gather for no particular purpose, the space will be considered public, and whoever owns the property will exert control as a state actor.”).

68. Duff & Marshall, *supra* note 29, at 21.

69. *Id.*

70. Garland, *supra* note 47, at 9.

71. *See* Clarke, *supra* note 25, at 110.

72. *Id.* at 104.

takes account of the variability of the costs and benefits of SCP from one property to another.⁷³

Callies, Breemer, and Epstein focus their respective analyses in this area on the issue of the property owner's right to exclude.⁷⁴ These scholars are not focused particularly on the issue of crime control. Nevertheless, because the focus of their articles is exclusion (perhaps the most controversial form of SCP) from mass private space,⁷⁵ the issue that is the topic of the instant Article inheres in their analyses. Each scholar argues that the right to exclude is a fundamental right of the private property owner, irrespective of the public characteristics of the property.⁷⁶ Therefore, they do not feel compelled to question the extent to which the relationship between a particular property and its locale should enter the analysis.

The above noted scholarship assumes that SCP practices are the same in quality and degree in mass private spaces across all communities. These articles ignore the variations among communities in which various properties are located and the implications those differences have for formulating policy as to the techniques that the owners of such properties may employ. Furthermore, the articles fail to fully appreciate the dual nature of mass private space as both private and public space. In contrast, the present Article treats both the relationship between a given property and the community in which it is located and the dual nature of mass private space as paramount in finding a workable solution to the challenge presented by the use of SCP in mass private space.

III. Reenvisioning Mass Private Space in Its Dual Nature

Commentators have recognized that mass private space does not fit neatly into previous conceptions of property.⁷⁷ As noted in the previous section, however, courts and commentators have generally tried to treat mass private property as if it were public space or as if it were purely private property.⁷⁸ Thus, "English law now treats mass private space much like purely private property [while] American law has important qualifications of that approach,

73. *See id.*

74. *See* David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39, 43 (2000); Epstein, *supra* note 2, at 24.

75. *See* Callies & Breemer, *supra* note 74, at 43; Epstein, *supra* note 2, at 24.

76. *See* Callies & Breemer, *supra* note 74, at 43; Epstein, *supra* note 2, at 24.

77. *See, e.g.*, Mulligan, *supra* note 39, at 539-40; Von Hirsch & Shearing, *supra* note 2, at 80.

78. *See, e.g.*, Epstein, *supra* note 2, at 24; Singer, *supra* note 1, at 1291.

relating for example to racial discrimination”⁷⁹ While it is true that the American law has been more attuned than English law to the differences between mass private property and other private property, the approach of American legislatures and courts still does not recognize the dual nature of mass private space. First, some laws, such as those prohibiting exclusion based upon race or gender, apply equally to almost all properties open to the public in some sense;⁸⁰ there are generally no statutes geared specifically for mass private space. Second, while some court decisions have treated mass private spaces as public spaces,⁸¹ in doing so they overlook the private nature of the property altogether. In short, the American approach involves a set of federal and state statutes that cut back on exclusion generally, irrespective of whether the property is in any sense mass private space, and inconsistent court decisions treating mass private spaces as either purely public or purely private.

The instant Article posits that mass private property is both private property and public space in a sense that neither true (de jure) public space nor non-mass forms of private property open to the public, such as restaurants, hardware stores, and clothiers not located in a mall, are. Therefore, in formulating a model, both the private property interests and the public access interests need to be taken into account. Both interests are legitimate and the contradictions they raise, while presenting a challenge, do not warrant ignoring one interest in favor of the other.⁸² Put differently, mass private space remains private property, a fact that cannot be ignored.⁸³ At the same time, however, traditional approaches to regulating private property and, for purposes of this Article, SCP on private property must be reexamined given the de facto public nature of the property.⁸⁴

Despite scholarly and doctrinal debate as to whether private space should be treated as public space for purposes of SCP, this colloquy has not further developed the notion of mass private space having a dual quality. Von Hirsch’s approach is illustrative. He states:

79. Von Hirsch, *supra* note 15, at 74; *see also* Gray & Gray, *supra* note 66, at 49-50, 63 (arguing that mass private space is functionally public and should be treated as such).

80. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000). *See generally* Singer, *supra* note 1, at 1374-75 (collecting state civil rights statutes that address the right of access and rules against discriminating based on various factors such as race and ethnicity in places of public accommodation).

81. *See, e.g.*, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968).

82. *Cf.* Heller, *supra* note 24, at 418 (“Private property is a complicated idea to pin down precisely, as its boundaries fray at the edges.”).

83. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84 (1980); Epstein, *supra* note 2, at 22.

84. *See Mulligan, supra* note 39, at 539-41.

[T]he public character of [mass private] space and its uses would appear to warrant regulation comparable to that appropriate for publicly-owned space with similar functions. Underlying this view is the notion of property as constituted by a bundle of rights held by the property owner: some of these may be restricted while preserving others. The owner of mass [private] space thus should be entitled to operate and seek to make a profit on it much like other private investment. But if the facility's use is comparable to that of public space, there should be restrictions on practices that infringe the privacy of its users comparable to those that should be applicable to public spaces.⁸⁵

While this description is apt, it argues that mass private space is effectively public space.⁸⁶ The model proposed in the instant Article, in contrast, is based upon the realization that mass private property, despite having a public aspect, also retains facets of private property. It ensures that the owner retains some rights — including the right to employ some forms of SCP, particularly exclusion and regulation of behavior on her property — and is rooted in the “bundle of rights” paradigm.⁸⁷ Similarly, the fact the property is being put to a particular public use means that the private property rights that the owner retains from the bundle will be fewer than for other forms of private property.⁸⁸

The importance of this dual public/private concept of mass private property to the framework proposed here is as follows. The framework has both a procedural and substantive quality. Procedurally it envisions the community⁸⁹ as the primary regulators of SCP in mass private space.⁹⁰ Substantively, however, it puts boundaries on the legitimate scope of regulation, both in terms of what limits the community can impose on the property owner's use of SCP and what the community may allow the owner to do. The dual nature of the

85. Von Hirsch, *supra* note 15, at 74 (citation omitted) (citing Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L.J. 252 (1991)); *see also* Mulligan, *supra* note 39, at 560 (“The court concluded that *Robins v. Pruneyard* does not require that a ‘shopping center’s obligations vis-à-vis expressive activities completely mirror those of the government. Such a conclusion would fly in the face of the reality that a shopping center wears two hats: *one is as a center of commerce and the other is as a public forum located on private property.*” (quoting *Union of Needletrades, Indus. & Textile Employees v. Superior Court*, 65 Cal. Rptr. 2d 838, 852-53 (Ct. App. 1997))).

86. *See* Von Hirsch, *supra* note 15, at 74.

87. *See* Callies & Breemer, *supra* note 74, at 43.

88. *See PruneYard*, 447 U.S. at 82-84.

89. For further discussion of the concept of community, *see infra* Parts IV-V.

90. *See generally* Lawrence W. Sherman, *Public Regulation of Private Crime Prevention*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 102 (1995).

property has implications both for these boundaries as well as for the procedural components of the framework.

The first boundary is rooted in the concept that the space in question is in fact private property. The fact that it is open to the public generally and therefore has a major impact on civic life does not of itself merit the conclusion that the property owner has forfeited all property-based rights.⁹¹ Conversely, the fact that the space is privately owned does not merit treating the space as though it were the same as non-mass private spaces and allowing the property owner to engage in SCP measures merely because he would be allowed to do so if in fact the space in question were purely private or open to the public for only limited purposes.⁹²

Another aspect of the proposed framework is that although the community ought to be able to generally decide (within the above mentioned boundaries) which SCP measures are acceptable in mass private property to which the community has a connection,⁹³ there are situations in which the mechanism of representative community decision making is suspect.⁹⁴ Recognizing the dual nature of mass private property plays two roles with regard to the issue of procedurally suspect community decision making. First, such recognition may provide some indication as to when community decision making has run afoul of accepted norms. Second, it may provide a basis for imposing a solution when the community has not acted properly in regulating mass private space.

IV. Situational Crime Prevention, Mass Private Space, and Community Contingency

As discussed earlier,⁹⁵ most judicial decisions and commentary concerning the regulation of SCP on mass private property have been substantive in nature, delineating which types of exclusion and behavior regulation in such spaces are acceptable and which are not.⁹⁶ These writings do not generally call for the community affected by such measures to play a role in regulating SCP.

91. Epstein, *supra* note 2, at 34.

92. See Vincent, *supra* note 2, at 221-22. For further discussion of this argument, see *infra* Part V.

93. For further discussion of what types of connections to mass private property are necessary to give a community a legitimate interest in regulation, see *infra* Part V.

94. Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST 103 (1980) (discussing the role of judicial intervention when the representative process does not function properly).

95. See *supra* Part II.

96. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); CIN Props. Ltd. v. Rawlins, [1995] 2 E.G.L.R. 130 (C.A.) (Eng.); Von Hirsch & Shearing, *supra* note 2, at 85-95; Wakefield, *supra* note 12, at 143-44; discussion *supra* note 43.

Part IV.A will provide a definition of community for purposes of this Article; it does not seek to define this often amorphous term for all contexts in which it might be used. Part IV.B. then asserts that SCP in mass private space is contingent upon the relevant community (as that term is defined in Part IV.A) in which it is employed. The assertion here is that SCP in mass private space cannot be evaluated either in the abstract or in general terms, but rather must be analyzed by examining it in actual application in specific spaces and places.

A. *What Is Community?*

Community is a contentious and contested term.⁹⁷ As used in the

97. Used either on its own or as part of a phrase, the word “community” is an emotive one. Like “family,” it has often been put forth as an unquestionably good thing, which many people, especially those who have public exposure, are loathe to challenge. Nicola Lacey & Lucia Zedner, *Discourse of Community in Criminal Justice*, 22 JOURNAL OF LAW AND SOCIETY [J.L.S.] 301, 302 (1995) (U.K.) (noting that community “carries with it a certain normative force”); Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375, 400 (1982) (“Thus, in the community, with all that word’s connotations of a warm, caring group of neighbors and friends, the deviant would mysteriously be reconstituted.”). After all, how could any decent person be against “strengthening the community” or challenge the need for “family values”? It has an appeal for both the Left and Right on the political spectrum: after years of pessimism that “nothing works” with regard to the crime problem, starting in the 1970s there was a new optimism and agreement across the political spectrum that “something can be done about crime if it is done . . . with the support of the community.” Gordon Hughes, *Crime and Disorder Reduction Partnerships: The Future of Community Safety*, in CRIME PREVENTION AND COMMUNITY SAFETY: NEW DIRECTIONS 123, 124 (Gordon Hughes, Eugene McLaughlin & John Muncie eds., 2002) (quoting Daniel Gilling, *Community Safety: A Critique*, BRIT. CRIMINOLOGY CONFS.: SELECTED PROC., March 1999, at 1, <http://www.britsocrim.org/volume2/007.pdf>); see also Devin J. Doolan, Jr., Comment, *Community Prosecution: A Revolution in Crime Fighting*, 51 CATH. U. L. REV. 547, 553-54 (2002) (“During the 1960’s, a major transformation took place in the United States criminal justice system. The method of policing shifted from crime prevention and community involvement to a reactive system of criminal apprehension and office centralization. . . . The uniformity of the traditional criminal justice system prevented law enforcement officials from identifying and addressing citizens’ local concerns.” (footnotes omitted)). Doolan suggests that the tide began to turn against this uniform approach to criminal justice in 1982 with the publication of an article by criminologists James Q. Wilson and George E. Kelling in the *Atlantic Monthly*. *Id.* at 556. This article introduced the “broken window” theory, which “established a connection between low-level crime and serious crime” and, according to Doolan, inspired the concept of community policing. *Id.* at 557.

“Community penalties” and “community policing” conjure up images of progressive and decent ways of dealing with crime. The Left finds such rhetoric appealing as it implies an understanding and less harsh way of dealing with criminals and victims — perhaps bringing them together to understand each other and reach a mutually agreeable solution. The Right takes comfort in calls for a return to “community” and for more emphasis on “community

sociological sense, the term “[c]ommunity . . . ranges across, and hence borrows meaning from, spatial, temporal, kinship, ethnic, institutional, and many other reference points.”⁹⁸ In the last twenty-five to thirty years politicians and some academics from a wide spectrum of persuasions have used “community” as a catchall word, either alone or in connection with other words.⁹⁹ Thus, one often hears or reads about “community values,” “community penalties,” and “community policing.”¹⁰⁰ “Community” has been used in connection with a range of social and political issues, including, for purposes of this Article, the causes of and solutions to the problem of criminal behavior.¹⁰¹ In choosing the word “community” as an instrument for regulating SCP, this Article employs a term that can mean any number of things (or in a sense have no meaning at all). Nevertheless, although “community” is necessarily a problematic term, by sufficiently defining the manner in which it is used here, the term has a meaning that serves the purposes of the proposed model. That is, the instant analysis does not purport to settle the problem of finding one true meaning of community, but rather

values,” as such conjures up images of a time when decent people looked out for one another and had rigidly defined roles — a time before there was poverty, racial tension, serious crime, and ambiguously defined gender roles and family units. If crime, racism, homosexuality, or drug and alcohol abuse existed, it only existed in other places — it did not “openly” exist in “decent communities.” In reality, as much recent critical scholarship has indicated, the “community” — whose loss so many cite as the source of modern-day problems, from crime to divorce and economic instability, and whose resurrection will be salvation for both the deviant and the victim of deviance — probably never really existed in the manner and to the degree that those who invoke its name claim. Furthermore, “community” has been used so broadly in recent rhetoric that it in some sense has no fixed meaning. GARLAND, *supra* note 53, at 124; INDEP. COMM’N ON POLICING FOR N. IR., A NEW BEGINNING: POLICING IN NORTHERN IRELAND 40 (1999), available at <http://www.belfast.org.uk/report/chapter07.pdf> (“[Community policing] has many definitions and has become somewhat devalued by frequent and indiscriminate use.”)

98. Lacey & Zedner, *supra* note 97, at 302; see also Scott, *supra* note 47, at 435 (“Determining what is a community and who speaks for it is more than just a semantic exercise. To be sure, the term ‘community’ has varied definitions: (1) a group of people living in the same locality and under the same government, (2) the district or locality in which such a group of people lives, (3) a group of people having common interests, similarity, or identity, (4) society as a whole.” (footnote omitted)).

99. GARLAND, *supra* note 53, at 123.

100. *Id.*

101. *Id.*; Lacey & Zedner, *supra* note 97, at 301; Robert M. Chiappetta, Book Note, *Bringing the Tools of Justice into the Community*, 27 AM. J. CRIM. L. 433 (2000) (reviewing TODD R. CLEAR & DAVID R. KARP, *THE COMMUNITY JUSTICE IDEAL: PREVENTING CRIME AND ACHIEVING JUSTICE* (1999)) (“The institutions of justice, such as courts, parole offices, and justice centers, must be geographically located within the neighborhood they serve (preferably within the same complex). The process of crime prevention also begins and ends in the community.”).

seeks a working meaning of community that is sufficient for purposes of the argument put forth herein.

The uses of “community” can be broken down into community as an *end* and community as a *means* to other ends.¹⁰² The present Article employs the term as a means for regulating SCP in mass private space. Moreover, this analysis uses the term community both as an instrumentality for regulating SCP in mass private space and as a place in which such regulation takes place.¹⁰³ Specifically, the structure that this Article puts forth envisions a model in which relatively local political entities play a major role in regulating SCP in mass private space located within the community to which such political entities are accountable. The proposed model is therefore flexible.¹⁰⁴ In many cases, representatives, rather than all the members who comprise the relevant community, will take action to regulate SCP in mass private space; in other jurisdictions, communities may act through referendum.

Another way of understanding the argument in favor of the community as a regulator of SCP in mass private space is to examine what should *not* be the primary manner of regulating SCP in mass private space. Within some broad boundaries discussed later,¹⁰⁵ the types of SCP that an owner of mass private property should be allowed to employ should not be decided a priori, with no reference to the particular property and its role in relation to the place in which it is located and the people who would seek to use the space.¹⁰⁶ Thus, the model here rejects the arguments in favor of a detailed, substantive framework

102. Lacey & Zedner, *supra* note 97, at 303; David Nelken, *Community Involvement in Crime Control*, 38 CURRENT LEGAL PROBLEMS [C.L.P.] 239, 260 n.2 (1985) (U.K.); James V. Schall, *The Corporation: What Is It?*, 4 AVE MARIA L. REV. 105, 109 (2006) (“There are two common goods, but in different senses of that word. In Latin they are called *bonum commune hominis* [the common good of man] and *bonum commune communitatis* [the common good of the community]. The first of these is identical in meaning with happiness. It is common in the sense that it is the same in essence among all human beings The other, the *bonum commune communitatis* [sic], or the good of the social community, is a means, not an end. It is common in the sense that all individuals, in their pursuit of happiness, must employ it as a means to that end.” (quoting MORTIMER J. ADLER, ADLER’S PHILOSOPHICAL DICTIONARY 67-68 (1996))).

103. See Lacey & Zedner, *supra* note 97, at 304 (noting that “[c]ommunity may be construed as an agency by which social policy is pursued and upon which responsibility should be thrust . . . [or] as the locus in which policy initiative may be sited”).

104. See generally Scott, *supra* note 47, at 435-36.

105. See *infra* Part V.

106. Cf. CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 11 (1996) (discussing views held by William Blackstone, Felix Frankfurter, and John Marshall Harlan that placed a high value on law making at the point of application tailored to the particulars of the circumstance in contrast to the formulation of broader rules to be applied across the board).

that is meant to apply in all places.¹⁰⁷ Moreover, regulation of SCP on mass private property should generally not be imposed from without by distant judicial, legislative, or executive agents.¹⁰⁸

Thus, as regards SCP in mass private space, community refers to (1) the people who (themselves or through representation) will effect the regulation and (2) the manner in which they will do so, although the model leaves much leeway with regard to the latter issue. At this point, the specifics of the community as a population and as a mechanism are still somewhat abstract. The discussion in Part V.B, *infra*, will add specificity to the general framework developed here.

B. SCP in Mass Private Space as Contingent upon the Relevant Community

Keeping in mind the above concept of community as both agency and location,¹⁰⁹ this Part argues that SCP in mass private space is a reflection of (and therefore contingent upon) the relevant community. It also argues that for this and additional reasons set forth herein, communities should be the primary regulators of SCP in mass private space. Part V.B, *infra*, then elaborates on the logistics of the community as primary regulator of SCP in mass private space. Thus, the instant part is the “why” of community regulation of SCP, while Part V.B is the “how.”

1. The Role of Community in SCP

As Garland notes, “[s]ocial groups and individuals are differentially placed in respect to crime — differentially vulnerable to victimization, differentially fearful about its risks, differentially oriented by values, beliefs and education in their attitudes to its causes and remedies.”¹¹⁰ Garland adds:

[T]he present-day world of private-sector crime prevention exists in a reflexive relationship to the theories and prescriptions of situational crime prevention. It is in this interchange — between

107. *Cf. id.*

108. *See* Scott, *supra* note 47, at 433.

109. ZEPP, *supra* note 35, at 65-66 (“The phrase ‘meet you at the mall’ has become part of our language. Although community is, by definition and experience, not something we create, the mall has been successful in fostering a sense of community. Regardless of the negative judgments made against them, malls are indisputably an alternative to the ennui and isolation found in urban and suburban America.”); Lacey & Zedner, *supra* note 97, at 303.

110. GARLAND, *supra* note 53, at 148; *see also* MICHAEL S. SCOTT, PROBLEM-ORIENTED GUIDES FOR POLICE SERIES NO. 6: DISORDERLY YOUTH IN PUBLIC PLACES 3 (2002) (“Communities are often divided over what constitutes acceptable youth conduct. This is especially true in areas undergoing substantial demographic change — for example, an influx of youth where older residents predominated, or an influx of a new ethnic or racial group.”).

the practical recipes of the commercial sector managers and the worked-out rationalities of criminologists and government policy-makers — that one must locate the strategy or preventative partnership and the habits of thought and action upon which it depends.¹¹¹

Thus, although Garland sees the social groups as being central to crime and crime control, in discussing SCP in the private sector, it is as if the community as it had existed has disappeared, both in terms of what does take place and what he believes should take place.¹¹² This is curious in that Garland himself argues that the road to SCP in mass private property (as well as other types of late-modern crime control) lies in changes in communities.¹¹³ Yet, when he discusses the tangible manifestations of the changes in the late twentieth century and early twenty-first century, it is as if extracommunity entities have hijacked the institutions in question from the very society that makes such institutions possible.¹¹⁴ Most importantly for the issue with which the present Article is concerned, while Garland admits that the types of changes that have taken place could not have occurred but for changes in society itself (i.e., communities), even if politicians, the media, and corporations were able to build upon such changes, he does not look to communities as a possible regulating force for SCP.¹¹⁵

Nonetheless, one of Garland's arguments is that changes in late modernity "eventually resulted in settled *cultural* effects."¹¹⁶ Culture effects and affects the changes that have occurred.¹¹⁷ Most importantly for the model presented in this Article is the strong link that culture (and therefore community) has with crime control. This relationship, however, is not a one-way street, and, as such, the most appropriate source for regulating SCP in mass private space is the community.¹¹⁸

111. GARLAND, *supra* note 53, at 161.

112. *Id.* at 161-65, 201-03.

113. *Id.* at 123-24; Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1575 (2003) ("Community courts are part of a number of new government models encouraging 'community' participation and aspiring to community empowerment. These models attempt to narrow the gap between top-down bureaucratic control and participatory local democracy.").

114. GARLAND, *supra* note 53, at 131-38.

115. *Id.* at 201-03.

116. *Id.* at 163.

117. *Id.* at 158-63.

118. *Id.* at 163-65.

Additionally, it is at the community level that crime and SCP manifests itself.¹¹⁹ While there is a myriad of data on aggregate criminal activity, crime and the fear of crime manifests itself in the forms of discrete events affecting individuals living in a given community, and the reality and fear of crime has become part of everyday life in many communities.¹²⁰ Similarly, while the emergence of SCP or mass private space can arguably be examined across nations or as a phenomenon of late modernity,¹²¹ it also is something that affects individuals and communities. Some groups of people are excluded or feel unwelcome in a particular mass private space. Just as crime has become a part of everyday life for many people, so too has being the subject or target of SCP in mass private space.¹²² Thus crime victims and those who fear crimes are part of the community that should be given a say as to the nature and extent of SCP in mass private property.

2. *SCP as an Indirect Expression of Community Values*

There is another reason for making the community the primary regulator of SCP in mass private space. SCP involves core and fundamental issues as to what weight should be accorded certain values.¹²³ Given that both crime and SCP take place in real communities — not in the abstract — and that a mass private property is part of a community, the nature and degree of SCP that an owner of a mass private property may implement will not only affect the community greatly but, in a sense, will be an expression of the values of the community.¹²⁴ Further, many aspects “about crime control which purport to be universal in fact take their sense and limits of applicability from . . . cultural connections.”¹²⁵

119. Cf. Scott, *supra* note 47, at 417 (“[I]t is the community, as opposed to say, territory, that [police] are policing, . . . [and] it is the interests of the community, and not just the government, that police ought to take into account when policing[.]”).

120. Garland, *supra* note 47, at 12.

121. See, e.g., GARLAND, *supra* note 53, at 159; Von Hirsch & Shearing, *supra* note 2, at 80-81.

122. Garland, *supra* note 47, at 12.

123. Cf. SUNSTEIN, *supra* note 106, at 42 (recognizing that society’s understanding of facts and values is the society’s “very identity” and is subject to shift over time, rather than being some fixed exogenous truth).

124. As Vincent, *supra* note 2, at 221, discusses: “The shopping mall is the cathedral of contemporary culture. It is the focus of what little social life many of us share with others.” Thus, because the mall is so central to social life and culture in many places, the rules that determine who may or may not enter the mall are an expression of who is deemed worthy to partake in a central component of modern public life.

125. David Nelken, *Whom Can You Trust: The Future of Comparative Criminology*, in *THE FUTURES OF CRIMINOLOGY* 220, 221 (David Nelken ed., 1994).

There is no objective answer to how much weight to give to the safety of easily victimized members of society (or their subjective feeling of security) relative to the right of access to community members that are easily marginalized.¹²⁶ And for any set of variables, there will be a number of competing values for which the correct balance admits to no predetermined formula: the freedom of one to express himself against the interest in being able to have a setting free from offensive conduct and speech;¹²⁷ the interest of people in congregating in a large group in a fixed area versus the interests of those who wish to walk comfortably around the space and the interest of the business owners in not having the entranceways to their shops impeded; the interest of teenagers in having a place to go (and perhaps the interest of their parents in their having a place to go that is safer than local neighborhood streets) versus the desire that some adults might have in going to a place that is free from teenagers. In addition, the interest of the owner of the mass private space in creating an environment that is in her (and her tenants') pecuniary interest, as well as one consistent with her ethical and personal concerns,¹²⁸ may clash with the interest of those who wish to take advantage

126. Cf. SUNSTEIN, *supra* note 106, at 42.

127. It is here that a crucial difference between public and private property emerges. While there may well be good reason for protecting freedom of expression on private property, the interests involved are not the same as when the property is public. With public property there is the special concern about the government's quashing of disfavored speech. See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 386 (1992) ("The government may not regulate [speech] based upon hostility — or favoritism — towards the underlying message expressed."); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2446 (2003) ("[L]imiting official opportunities to suppress disfavored speech is one of the important purposes served by . . . the First Amendment."). While there may be concerns about a private interest quashing expression, even in post-modern society, government maintains a monopoly on enforcement that is qualitatively and quantitatively different from any private interest.

128. While pecuniary concerns may overwhelmingly be the focus of owners and operators of mass private space, they may not be the only ones. Certainly where the owner is an individual or a company that is controlled by one or a small number of individuals, it is not unreasonable that the owner would not want people who are wearing garb expressing a hateful message or simply an insensitive one on his property, such as somebody who appears in Nazi regalia either because he subscribes to the tenets of Nazism or because he gets amusement out of it. In the case of public property, one's right to so express himself or herself ought to be protected lest the government have the power to allow the expression of one viewpoint over another. See *Hill v. Colorado*, 530 U.S. 703, 722-23 (2000). However, the owner of a piece of mass private property may be highly offended by such a display (or may not wish to allow such offensive display), and there is an argument that he should not have to tolerate such on his property. See Winnie Hu, *A Message of Peace on 2 Shirts Touches Off Hostilities at a Mall*, N.Y. TIMES, Mar. 6, 2003, at B1 (reporting a case in which the operator of a mall sought to expel a patron who was wearing a sweatshirt that expressed opposition to America's fighting

of the space.

In addition, within certain bounds,¹²⁹ the extent and nature of SCP techniques employed in mass private space are matters that not only are *best* decided by the community in question but also are *important* for the community to decide.¹³⁰ It is not just that the community is best situated to evaluate the various concerns that are present within it, but that the community can express itself by regulating the relationships between spaces that may be the major public place of interaction, the people who may wish to enter the space, and the risks to and fears of those individuals invited to enter.¹³¹

In that a community by definition expresses itself by its manner of punishment, so too does it express itself by where it draws the line between safety levels and degrees of freedom and between property rights and access rights.¹³² This argument treads closely to discussing mass private space as though it were public space. There is, however, a key distinction. Under the proposal put forth herein, communities or their representatives would not directly regulate conduct. Rather they would be giving more or less leeway to the owner of private property to regulate conduct solely on the property in question based upon the particular circumstances of the community and its ethics and values. Additionally, the boundaries alluded to in Part III, *supra*, and detailed in Part V, *infra*, distinguish this model from one that treats mass private property as purely public space.

3. The Objective and Subjective Effects of SCP on Different Segments of Society

Another justification for regulation of SCP at the community level stems from the fact that “the burdens and benefits of a particular technique for preventing or controlling crime (such as SCP) fall on different parts of

a war in Iraq).

129. For a definition of those boundaries, see *supra* text accompanying notes 91-94 and *infra* Part V.A.

130. See Duff & Marshall, *supra* note 29, at 21 (arguing that beyond the costs and benefits of SCP on different groups, “[w]e should also attend . . . to [SCP measures’] *meanings*: to the attitudes, the conceptions of citizens and their mutual relationships, that they manifest.”).

131. See *id.*

132. This reference to the expressive use of punishment, is not meant to indicate that the community affirmatively takes steps to punish with the purpose of expressing itself. Rather, expressive use of punishment refers to the notion that, when society punishes, whatever the impetus for such, that it inevitably expresses itself. Cf. ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 56 (W.D. Halls trans., Free Press 1984) (1893) (recognizing that methods and degrees of punishment reflect the culture of a society); Simon, *supra* note 10, at 231-32 (same).

society.”¹³³ Consequently, the benefits, costs, ethics, and other consequences of SCP cannot be evaluated in a vacuum; one must evaluate these from one or more perspectives.¹³⁴ Indeed, Shapland calls for “examin[ing] what SCP looks like from each perspective.”¹³⁵ For example, SCP might be a net gain from the government’s perspective or from the standpoint of those who can afford protective devices or are allowed to enter mass private spaces without much problem but a net loss for the poor and/or excluded members of society.¹³⁶

Nevertheless, these types of multiperspective analyses of the benefits and detriments of SCP in mass private property (and elsewhere) are dependent upon the nature of the mass private space and upon the effects of different SCP measures in various types of properties.¹³⁷ Because of this dependent relationship, the analysis of community variability that the literature has generally ignored is of central importance in properly analyzing SCP in mass private space. The role that a given mass private property plays in a community depends not only on the characteristics of the property¹³⁸ but also upon the demographics, location, and other aspects of the community in which it is located, as well as upon any other communities from which it draws patrons.¹³⁹ The role that such a mass space occupies also depends on crime rates in the area, whether or not alternative locations to the mass private property exist, either in other mass private spaces or in public places, and other factors. As Garland acknowledges, “SCP has no fixed ideological meaning or determinate fixed political affiliations,”¹⁴⁰ while Shapland argues “that SCP does not itself contain the ethical boundaries and constraints necessary to set

133. Joanna Shapland, *Situational Prevention: Social Values and Social Viewpoints*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, *supra* note 2, at 113, 115.

134. See GARLAND, *supra* note 53, at 163; Shapland, *supra* note 133, at 115-16.

135. Shapland, *supra* note 133, at 115.

136. *Id.* at 115-16.

137. See *id.*

138. See Wakefield, *supra* note 12, for a description of three such properties and the different persons that tend to use these facilities, as well as differences in the types of persons who were likely to be excluded or to be the subject of other SCP measures.

139. For example, all other factors being equal, mass private space is likely to play a more important role in cold-weather cities where most people would rather shop or spend leisure time in an indoor facility than in a warmer climate. So too, one might expect that in a cold-weather city there would be more mass private properties, thus providing patrons (and potentially excluded individuals) alternative locations. Conversely it might be argued that exclusion from a mass private space in a cold-weather city in winter may be overly oppressive because the excluded person may then be faced with spending time either at home or in inclement weather, whereas the person excluded from such an establishment in a city with milder weather is more likely to have the option of walking around or shopping in the public downtown area.

140. Garland, *supra* note 47, at 14.

acceptable limits to the choice of techniques to apply. SCP merely provides a palette of techniques.”¹⁴¹ Thus, the impact of SCP in mass private space can be determined only with regard to both the manner in which it is employed and also to the relationship between a given mass private space and the community relevant to that space; one cannot make a general evaluation of SCP in mass private space that is valid for all times and places.¹⁴² Many scholars seem to be aware of these facets but do not look to them as a source for making, to paraphrase Shapland, difficult choices.¹⁴³

The meaning and impact of SCP measures employed in a given space are both objectively and subjectively contingent upon the communities where the space is located and upon the ones it serves. They are objectively contingent, in the sense that the characteristics of the community, the mass private space in question, and the nature of the SCP employed have different impacts in different communities.¹⁴⁴ That is, the actual effect on crime and access varies depending on each of these three factors. The effects are also subjectively contingent, as the individual and collective experiences of a given community are a partial determinant of how members of that community experience SCP measures that an owner of mass private space employs.¹⁴⁵

For example, consider the objective and subjective implications of excluding people under a certain age at certain hours from a shopping mall. Suppose that the mall is essentially the only public place where most of the community’s senior citizens can go, in that many do not drive and there is no convenient public transportation for them. Also assume, however, that the mall is located in a community where there are other choices available for young people; perhaps other malls are too far away for many elderly or physically challenged persons to reach given their relative immobility, but which teenagers excluded from this space could reach without great difficulty.¹⁴⁶ Objectively and subjectively speaking, the positive impact on the seniors and others who have limited mobility would likely be quite strong while the negative impact on the excluded teenagers would probably be small. The former group may be particularly susceptible to crime, and excluding youths may lower the risk of the elderly and physically challenged being

141. See Shapland, *supra* note 133, at 121.

142. See *id.*

143. See *id.*

144. Kleinig, *supra* note 50, at 48; Von Hirsch & Shearing, *supra* note 2, at 89.

145. Shapland, *supra* note 133, at 117.

146. See Alysa B. Freeman, Comment, *Go to the Mall with My Parents? A Constitutional Analysis of the Mall of America’s Juvenile Curfew*, 102 DICK. L. REV. 481, 481-82 (1998) (discussing the Mall of America’s barring unaccompanied juveniles from the mall during certain hours).

victims of crime (objective) and may make them feel safer (subjective) while at the mall.¹⁴⁷ If such SCP is not employed, the seniors and those with disabilities will have to choose between foregoing engaging in public interaction and exposing themselves to risk and fear. The excluded group has other options (objective) and also may not feel particularly stigmatized by their exclusion (subjective) because they are not being kept out of a space to which their peers have access and are being kept out for the protection and peace of mind of the elderly, a purpose that is arguably not a stigmatizing one for youths. That is, in some cases the excluded group will not be stigmatized by being excluded.

Consider a second scenario in which, as in the above example, a mall engages in a policy whereby no one under a certain age may enter unless accompanied by an adult.¹⁴⁸ Assume also that this mall is in a poor neighborhood and that the youths who live in this neighborhood do not have reasonable access to a similar facility. Assume that there are other malls located some distance away, in wealthier neighborhoods that are too far away for the excluded youths to reach, but that the young people in those neighborhoods are situated such that they can frequent these other venues, which do not have a similar exclusionary policy. In this case, members of the excluded group are denied the only available shopping or public interaction experience (objective) and may feel stigmatized, knowing that their peers in wealthier districts have access to shopping malls or other facilities to which they do not (subjective).

The variability of the communities in which the mass private spaces are located and the relationship between the spaces and the communities in the first and second examples show that, objectively and subjectively, the consequences of the exclusionary policy will differ from the perspective of both excluded and nonexcluded or protected groups. These examples support the argument that one cannot derive a broad substantive formula that will apply to a given SCP practice in a given type of mass private property that is applicable to all communities. As Shapland describes it:

SCP is not the kind of crime reduction initiative that can be delivered top-down in a uniform manner

147. *Cf.* Zedner, *supra* note 32, at 163-66 (discussing situational crime prevention as involving steps that attempt to make people safer and that make them feel safer and the fact that accomplishing one of these goals will not necessarily accomplish the other, as well as arguing that in some cases more visible safety measures may make people feel less safe by making them more aware of the risk of crime).

148. *See* Freeman, *supra* note 146, at 483 (describing the implementation of such a policy at the Mall of America).

This means that SCP has to be usable for those implementing it locally. It is they who need to understand the palette and its applicability to their situation. It is also they who will need to work through the ethical implications of their chosen SCP activity.¹⁴⁹

Therefore, given that there are so many variables, the community in which the mass private property is located is best suited to make a determination as to what types of SCP practices are and are not acceptable.¹⁵⁰

V. Creating a Framework for Regulating SCP in Mass Private Property in Terms of Its Dualistic Nature, Its Role in the Community, and Community Values

Having argued in previous sections that regulation of SCP in mass private property involves taking account of both the fact that the property is privately owned and is put to use much as public property is, and also that such regulation should be undertaken by the community, this Part of the Article builds a framework for such regulation that takes account of these aspects of mass private property and SCP. Moreover, in addition to substantive differences that argue in favor of different communities having the power to regulate the substance of SCP that owners of mass private property may employ, there is also a procedural variability from place to place. That is, different communities may wish to have not only different substantive standards of permissible SCP but also wish to have different procedural mechanisms for the formulation of such standards. Despite this variability and flexibility, the model presented can provide a broad framework as to the role of and the limits upon community involvement. This framework has three components: (1) boundaries, (2) scope of relevant populations, and (3) mechanisms.

Part V.A discusses the first component. This component calls for placing boundaries on community decision-making. That is, while the present analysis argues for giving communities broad discretion to regulate SCP, at the same time there should be limits on such community regulation that are imposed by institutions not controlled by the community itself. Next, Part V.B discusses the second component, which involves a determination of who should and

149. Shapland, *supra* note 133, at 121-22; *see also* Johnson, *supra* note 48, at 602 (“*Participation in community ‘crime prevention efforts is not merely desirable but necessary. Police and other specialists cannot control crime; they need all the help the community can give them.*” (quoting NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, COMMUNITY CRIME PREVENTION 7 (1973))).

150. *See infra* Part V for a further discussion of both what constitutes the relative community and issues about decision making, representation, and problems of externalities.

should not count as a member of the community for purposes of the proposed framework. This Part explores the challenges of delineating geographically and demographically who is in a given community vis-a-vis a given mass private space and suggests tools for meeting these challenges. Lastly, Part V.C discusses the third component, mechanisms for diagnosing and remedying breakdowns of community decision-making. This Part asserts that one cannot expect community decision-making to function ideally in all cases. This Part provides a methodology for evaluating when community decision making has broken down and suggests multiple remedies for such breakdowns.

A. Boundaries

As used here, boundaries provide upper and lower limits on what communities may allow or forbid regarding SCP in mass private property and are determined in light of a mass private property's dual public/private nature. The term "boundaries" is used here to argue that extracommunity actors should be able to draw lines as to what the community may and may not do. The upper limit would prohibit communities from imposing overly restrictive barriers on a mass private property owner's use of SCP, while the lower limit would prohibit the community from ceding too much authority to the property owner to employ SCP.

1. Existing Boundaries

The United States Supreme Court has essentially delegated the power to rule on the right to exclude from mass private space (and to employ other forms of SCP) to Congress and to the states.¹⁵¹ As such, in the United States, regulation of SCP has taken place in the form of federal regulation such as the 1964 Civil Rights Act¹⁵² as well as through state court rulings and state legislation.¹⁵³ While this creates variation among jurisdictions, "[t]he message of the contemporary American cases, although as yet far from uniform, thus suggests a resurgence of concern that the territorial control of large-scale private owners should not be permitted to overreach the essential liberties of the citizen."¹⁵⁴

151. See Klear, *supra* note 43, at 589. Compare *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (holding that there is no federal constitutional right of access to a shopping mall because the mall is private property), with *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (holding that notwithstanding *Lloyd*, states may exercise their police power to prevent property owners from excluding those seeking access).

152. 42 U.S.C. § 2000a (2000).

153. See Singer, *supra* note 1, at 1373-83 (discussing various state and federal statutes and cases involving exclusion and access to places of public accommodation).

154. Gray & Gray, *supra* note 66, at 76-77 (footnote omitted). By way of contrast, the

2. Envisioning Boundaries

There should be both substantive and procedural limits on what measures a community should allow and what limits it may impose vis-à-vis SCP in mass private property. This part provides a framework for substantive limits or boundaries.¹⁵⁵ Procedural limitations inhere in the discussion of the role that communities should play in being the primary arbiters of SCP in mass private property.¹⁵⁶

The concept of private property has played a long and important role in the legal history of the United States.¹⁵⁷ At the same time, modern court cases and commentary recognize that private property should not always and automatically trump social justice, fairness, and equal opportunity and access. While conceptions of what limits can be put on an individual's use of his or her property may change as new forms of property arise, this change calls only

United Kingdom has different boundaries in place than the United States (and most other common law countries). *Id.* at 60. Compare *CIN Props. Ltd. v. Rawlins*, [1995] 2 E.G.L.R. 130 (C.A.) (Eng.), with *PruneYard*, 447 U.S. 74. Under *Rawlins*, in the United Kingdom the owner of mass private property can arbitrarily exclude whomever he likes and need not make a showing of good cause to do so. See *Rawlins*, [1995] 2 E.G.L.R. at 134 (refusing to accept the reasoning that "members of the public are privileged visitors whose privilege is revocable only upon misbehaviour" (quoting *Harrison v. Carswell*, [1975] 62 D.L.R. 68, 74 (Can.) (Laskin, C.J., dissenting))); see also Gray & Gray, *supra* note 66, at 48-49. This holding "contrasts remarkably with the legal stance now adopted in many other parts of the common law world with respect to quasi-public property." Gray & Gray, *supra* note 66, at 60. Further, the coming into force of the Human Right's Act may lead English courts to revisit the *Rawlins* decision and reach an outcome consistent with other common law jurisdictions. While the main point of this Article is to focus on SCP in the United States, it is important to recognize that the boundaries that the United States has currently chosen are not the only possible choices for a modern nation.

155. Cf. Duff & Marshall, *supra* note 29, at 19 (discussing "side constrained consequentialism" in connection with SCP). Under the theory of side constrained consequentialism, even if one is trying to maximize social goods (through whatever mechanism), there may be constraints that must be respected even if maximizing social goods would call for not so respecting them: the constraints "trump." *Id.* For example, if person A has two luxury cars while person B has one run-down car, it is likely that forcing person A to give one of her cars to person B would increase social good, since person B would likely benefit more from selling one of A's cars than A would feel from losing one of her cars. Yet side constrained consequentialism would say that the value of not simply taking away an individual's property would trump the increase in social value from forcing A to give B A's extra luxury car. Similarly, in the present formulation for regulating SCP on mass private space, boundaries trump community preferences.

156. See *infra* Part V.C.

157. Callies & Breemer, *supra* note 74, at 39; see also O. Lee Reed, *What Is Property?*, 41 AM. BUS. L.J. 459, 463 (2004) ("There is increasing conviction that the material rise of the West during the last 300 years has been directly attributable to property's legal institution . . .").

for an ongoing reevaluation of the property and constitutional rights of owners of less traditional forms of property, not for the jettisoning of the concept of private property once it is put to a particular use.¹⁵⁸ Moreover, treating mass private property as public property has severe fairness and economic consequences.¹⁵⁹ Those who have invested in private property would effectively lose their investment, and those who might wish to invest in mass private property might be stripped of their incentive to do so.¹⁶⁰ Thus, although the model presented here envisions mass private property as qualitatively different from other types of private property, the dual public/private quality inherent in the model allows traditional property law to serve as a beacon, even if not as an exact marker, in setting the boundary on a community's right to limit SCP.

The substantive boundaries are rooted in the dual nature of mass private space as both public and private property.¹⁶¹ As private property, there are certain rights that the owner retains irrespective of the fact that she has opened the space to general public use.¹⁶² Unlike public property, the owner has made an investment in the property and has a personal stake.¹⁶³ As such, the community should not be allowed to so limit what measures the owner of the property may undertake that the property ceases to resemble property.¹⁶⁴

On the other hand, as a space open to the public for general use, there are certain forms of SCP that are inherently inconsistent with the property's use as a space open to the public.¹⁶⁵ These limitations will not be the same as those which would apply were the property truly public, where the issue would concern unacceptable government coercion. Rather, while drawing to some

158. See *PruneYard*, 447 U.S. at 81; Vincent, *supra* note 2, at 222.

159. See generally Epstein, *supra* note 2, at 48-50 (noting that requiring an owner of mass private space to allow uses generally associated with public space will impose costs on the owner, which unlike with public space, cannot be passed on via taxation).

160. Richard Epstein, *Protecting Property Rights with Legal Remedies: A Common Sense Reply to Professor Ayres*, 32 VAL. U. L. REV. 833, 837 (1998).

161. See *supra* text accompanying notes 91-94.

162. See generally Callies & Breemer, *supra* note 74; Epstein, *supra* note 2 (asserting that merely because a property owner chooses to admit some people, that does not mean the property owner has given up entirely the right to exclude anyone).

163. See Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 61, 83-85 (2000) (discussing the Supreme Court's takings jurisprudence in terms of the property owner's investment-backed expectations).

164. Von Hirsch, *supra* note 15, at 74. To the extent that the community would limit the mass private property owner's right to exclude, Epstein's words bear some relevance: "[I]t is difficult to conceive of any property as private if the right to exclude is rejected." Epstein, *supra* note 2, at 22.

165. Von Hirsch, *supra* note 15, at 74; Von Hirsch & Shearing, *supra* note 2, at 85.

degree on the fact that mass private space resembles public property, the central guiding principle in setting up a substantive boundary on unacceptable SCP is that the practices cannot be inconsistent with a facility to which the entire community and beyond — the entire world in fact — is invited to enter.

The model put forth here does not seek to formulate a detailed reservoir of property rights that an owner of mass private property retains so as to delineate which controls on SCP are within communities' purviews. Nonetheless, the fact that a property owner opens his premises to general public use does not, as many theorists have argued, turn private property into public property. Under the model, the owner retains some portion of the bundle of rights associated with private property, even if the public is generally invited to enter for no particular purpose.¹⁶⁶ Conversely, because this invitation to the public gives mass private space certain characteristics and functions akin to those of public property, the bundle of rights that the owner retains is markedly different and necessarily smaller than those retained even by the owner of private property that is open to the public for a particular use, such as a restaurant.¹⁶⁷

The traditional view that the right to exclude is inherent in the concept of private property does play a role in setting some boundary upon the limits that communities can impose on SCP measures that owners may employ.¹⁶⁸ On the other end are boundaries on what SCP exclusion and behavioral standards the community may allow the owner of mass private space to impose. This boundary is rooted in the fact that the property is so public in nature.¹⁶⁹ So, not only may an owner not be given authority to exclude based upon race, religion, or nationality — bases that would be illegitimate even with private property open to the public only for a specific use¹⁷⁰ — but arguably the owner should not be able to exclude groups generally afforded less protection than those just

166. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

167. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”); Von Hirsch & Shearing, *supra* note 2, at 86.

168. Cf. *PruneYard*, 447 U.S. at 82-83 (“[T]he determination whether a state law unlawfully infringes a landowner’s property in violation of the Taking Clause requires an examination of whether the restriction on private property ‘forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

169. See Vincent, *supra* note 2, at 238.

170. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. 2000a (2000)) (outlawing discrimination or segregation on the basis of race, religion, or national origin in places of public accommodation).

listed, such as teenagers or the homeless, without at least providing a sound basis for doing so.¹⁷¹

These bases are illustrative, not comprehensive, and it is not possible to enumerate all the bases for exclusion that fall beyond this boundary. While it is important that such a boundary exists, given the broad range that the model proposes in terms of community regulation, the territory that this boundary demarcates is quite limited; the bulk of the substance of what SCP measures an owner may employ should be in the province of community regulation.

Moreover, even the boundaries are somewhat contingent, but the important difference is that, unlike the range of choices within the boundaries, the boundaries themselves should not be left to the political choice of communities. They are properly the province of constitutional and common law court decisions (or perhaps broader political choice, such as at the nation, state, or county — as opposed to the village, town or, city — level). The precise boundary against incursion into property rights cannot be delineated in the abstract. The important point for this analysis is that such a boundary does exist and that it clearly falls somewhere outside allowing the community to impose limits on the property owner's ability to use SCP that would be valid only if the mass private property were treated as public property. Notwithstanding its general openness to the public, mass private property ought to be treated as a form of private property, and this limits the restrictions that the community may place on the property owner's use of SCP.

B. Scope of Relevant Populations

To this point, this Article has dealt with community without addressing the problem of defining the contours of the community that is to take part in regulating a particular mass private space. The actual location of mass private property provides a starting point for defining the relevant community that should regulate SCP on such property. However, a proper analysis requires examination of multiple factors.

There is no exact demarcation of the bounds of community that applies in all circumstances.¹⁷² Rather, there are two primary criteria by which to

171. See ELY, *supra* note 94, at 76 (“Paragraph three [of the famous *Carolene Products* footnote 4] suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning laws ‘directed at’ religious, national, and racial minorities and those infected by prejudice against them.” (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938))).

172. See Scott, *supra* note 47, at 435 (“Determining what is a community and who speaks for it is more than just a semantic exercise. To be sure, the term ‘community’ has varied definitions: (1) a group of people living in the same locality and under the same government, (2) the district or locality in which such a group of people lives, (3) a group of people having

evaluate scopes of communities: geographic and demographic.¹⁷³ It is important that the relevant geographic and demographic communities that are affected by SCP on mass private property are represented in the decision-making process for implementing regulation of SCP within the outer bounds of appropriate community regulation.¹⁷⁴ Only if the affected communities, defined in both aspects, have a place at the table, will regulation of SCP be able to take account of the costs and benefits that SCP measures will have on the affected population.¹⁷⁵ Moreover, regulation of SCP will serve the further step of expressing and reinforcing the views, preferences, ethics, and mores of the relevant communities only if the relevant communities are represented in the decision-making process.

1. Geographic Community

The above issue raises two subsidiary questions: (1) how to determine the geographic dimensions of the relevant community, and (2) once the first determination is made, how to construct a mechanism that effects the proper representation.

There are no exact geographic boundaries that delineate the relevant community.¹⁷⁶ Further, there will be no way to determine precisely the location of the populace who wishes to frequent a particular mass private property.¹⁷⁷ Also, the question of how many users of a mass private space need come from a given community (or what percentage of that community need use the mass private space) for the community to be deemed sufficiently important vis-à-vis the space and to be part of the decision-making process does not lend itself to a precise numerical answer.¹⁷⁸ There are, however, certain fundamental principles that should be considered when defining the relevant geographic community.

First, a mass private property located in a particular city, town, or village will likely serve people from adjacent and even nonadjacent municipalities.¹⁷⁹

common interests, similarity, or identity, (4) society as a whole.”).

173. *See id.*

174. *See id.*

175. *Cf. id.* at 433 (“One dimension of the broad community justice approach is that the systems in which offenders are adjudicated ought to take better account of the desires, needs, perspectives, and interests of the community most directly affected by the offenders’ conduct.”).

176. *See* discussion *supra* text accompanying notes 172-75.

177. *See id.*

178. *See id.*

179. *See* Johnson, *supra* note 48, at 610 (“The group organizers must provide opportunities for all groups or individuals to participate in the community-wide program (while allowing groups to retain their identity if this is important to them).”); Shapland, *supra* note 133, at 117 (discussing the burden of exclusion “from the point of view of local communities near the

Therefore, simply nominating the governing unit wherein the property is located as the decision-making body of the relevant community will not satisfy the geographic component of the analysis. Rather, all those whom SCP in mass private space is likely to affect should be party to formulating regulations.¹⁸⁰

Second, certainly usage of mass private space does not have to be undertaken by anything close to one hundred percent of a community for that community to be relevant, because such a standard would effectively rule out all communities, including the one in which the property is located.¹⁸¹ Conversely, the fact that a small percentage or number from a given community might wish access to the mass private property is not sufficient for such community to have a say in regulation under the model, as this will likely include such a broad swath that the result would swallow the concept of a communitarian model of SCP regulation.¹⁸²

Third, the geographic community wherein the mass private property is located should not decide which geographic and demographic communities should be allowed input into regulation of SCP in such space.¹⁸³ There is obviously a conflict of interest because allowing other communities to take part will necessarily dilute the input of the community in question. It would be equivalent to allowing voters to decide who else is eligible to vote in an election. Instead, just as boundaries need to be demarcated by some authority outside the community, so too must the question of community participation be decided at a broader level than the community itself, either legislatively or by judicial decree.

mall”); Robert White, *Youth Crime, Community Development, and Social Justice*, in *YOUTH IN CITIES: A CROSS-NATIONAL PERSPECTIVE* 138, 155-56, 158 (Marta Tienda & William Julius Wilson eds., 2002) (“Acknowledgment of the rights, worth, and dignity of youth is integral to successful approaches to problem behavior. Young people share many commonalities, including lack of adequate resources, a dearth of youth-friendly amenities, frequent harassment from authority figures, fear of being victimized, and exclusion from decision-making processes. These circumstances constitute a recipe for resentment, frustration, alienation, and retaliation. . . . The provision of legitimate alternative activities is a vital ingredient for successful youth crime prevention. . . . [T]he first task of crime prevention is to *rebuild communities*, and as part of this to foster the ideas of solidarity and cooperation. This can initially be approached through the democratization of decision making at the neighborhood level, and by inclusion of young people, especially young offenders, in the process.”).

180. See Johnson, *supra* note 48, at 610.

181. See *id.*

182. See *id.*

183. Cf. ELY, *supra* note 94, at 83 (discussing the Privileges and Immunities Clause of Article IV as ensuring that those who make the decisions in a given jurisdiction — namely a state — do not discriminate against citizens from outside the jurisdiction, who by definition are politically powerless within the jurisdiction in question).

Deciding what percentage of members of a given community must use a mass private space before such a community will be awarded a say in regulating SCP therein is essentially a first-order policy question, not something for which there is a precise answer, such as thirty percent.¹⁸⁴ Other than saying that the guiding principle should be whether a given community has a significant stake in SCP policies in a given mass private property (an admittedly slippery formulation), any policy that this Article advocated would necessarily be a matter of the author's opinion as opposed to an answer that would help policy makers make a choice.

Nonetheless, to say that no precise answer can be given in the abstract, is not to admit that a meaningful analysis of the relevant geographic community is futile.¹⁸⁵ Although it is not possible to gauge exactly how many or what percentage of people from a given community use a given mass private property, reasonable estimates can be made through surveys at mass private spaces as well as within the communities themselves.

Two additional points are in order. First, the instant proposal is put forth as a starting point for further academic analysis and policy implementation, not as an ultimate solution. As such, if policy makers do adopt the approach advocated herein, over time the question of whether a community should or should not be included will become a workable, even if always a contested, matter.

2. Demographic Community

In some ways, delineating demographic community is more problematic than geographic community, or at least more controversial. Much of the commentary criticizing SCP exclusions from mass private space points to the fact that the most marginalized groups are the most likely to be targets of SCP.¹⁸⁶ Identifying and including marginalized groups, however, is an easier

184. *See id.* (noting that for some, community — in the context of community policing — means a majority or plurality of those who work or live in a relatively small geographic area, whereas for others, it means the group of persons who would be affected by a particular decision involving this issue).

185. *See* Scott, *supra* note 47, at 435 (discussing possible ways in which to demarcate the boundaries of a community).

186. *See* Gray & Gray, *supra* note 66, at 66; Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1087 (2005) (“To those who tend to be skeptical of the exercise of local power because it has traditionally been used to exclude marginalized groups, Sandel’s politics will appear retrograde. And to those who believe that one cannot effectively protect local economies from the expansion of global markets without serious social welfare losses, the protectionist economic policy that Sandel celebrates will appear naïve.”); Shapland, *supra* note 133, at 117; Von Hirsch & Shearing, *supra* note 2, at 88-90; Wakefield, *supra* note 12, at 130-

task than delineating relevant geographic communities.

Groups such as racial and ethnic minorities and the poor, assuming they are part of the geographic community, would by definition be included in any mechanism by which a community would make decisions regulating SCP on mass private space, whether it be legislatively or by referendum. That is to say, it is unlikely that anyone would put forth an argument (and if they did it would fall on deaf ears) that minorities or those earning less than a certain amount per year cannot take part in decisions based on such status.¹⁸⁷ Beyond this, however, there is surely an issue as to whether these groups would have sufficient representation either with regard to a direct referendum or in terms of electoral politics for their concerns to be heard.¹⁸⁸ This is an issue addressed in the next Part. Also, there are some groups within the geographic community that may face resistance to their inclusion in direct community decision making or to their choosing community representatives.¹⁸⁹ The groups that stand out in this regard are the homeless or vagrants, persons with criminal records, and youths.¹⁹⁰ SCP may particularly target these groups.¹⁹¹

31.

187. Cf. ELY, *supra* note 94, at 75-76 (discussing the famous *Carolene Products* footnote 4, seen as ensuring that insular minorities are not excluded from representative decision making).

188. See *id.* at 77. For further discussion of this issue, see *infra* Part V.C.

189. See Wakefield, *supra* note 12, at 130-31.

190. See *id.*

191. See Gray & Gray, *supra* note 66, at 66; Mulligan, *supra* note 39, at 541 (“Even when clothing does not display a controversial political message, shopping malls routinely expel shoppers for their attire. An article in the online magazine *Salon* details the growing trend of malls forbidding shoppers from wearing ‘gang related’ clothing while on the premises. One St. Louis area mall even expelled rap star Nelly from mall property for wearing a ‘do-rag,’ which was an item of clothing the mall’s dress code expressly forbade. Because it is exceedingly difficult to tell exactly what gang clothing is, the real purpose of the policy appears to be to give mall security *carte blanche* to expel black youths from mall premises, rather than to prevent gang activity. Some critics agree, charging that the anti-gang clothing policies are actually a form of ‘ethnic cleansing’ aimed at young black males.” (footnotes omitted)); Michael Myers, Roundtable, *Law and Disorder: Is Effective Law Enforcement Inconsistent with Good Police-Community Relations?*, 28 *FORDHAM URB. L.J.* 363, 391-92 (2000) (“We have substituted a War on Poverty with a war on the poor. There are many things they can do in the war on the poor that are constitutional, that have been upheld by the United States Supreme Court. In law enforcement matters, the so-called Broken Windows theory is the linchpin of the war on the poor; the war on the homeless; the war on the vagrants; the war to bring decent citizens back to ‘our public spaces’; the war to ‘take back the streets’ and subways; the war to make sure that ‘aggressive panhandlers’ are not hanging around the ATM when you withdraw money, whether or not they intend to rob you; the war against truancy by picking up students on their way to school, even if they are just stragglers, rather than truants; and the war on squeegee people.”); Wakefield, *supra* note 12, at 130-31.

It is admittedly a concern that those under a certain age neither have the right to vote nor to take part in community meetings and that those who are without established addresses may be de facto, even if not de jure, disenfranchised. Those individuals who have criminal records — also a frequent target of SCP¹⁹² — may not have voting privileges, depending upon the jurisdiction and the crimes for which they have been convicted.

The above concerns are certainly issues with which those who might wish to take the analysis further will have to grapple if attempts to implement the proposed approach are undertaken. Nevertheless, the problems regarding lack of representation of the groups just mentioned are not particular to SCP.¹⁹³ It may be that in some cases the question of lack of proper representation will require politically insulated bodies to intervene.¹⁹⁴ Alternatively, depending upon the circumstances, the interests of these persons may be protected by other individuals, as they have been with regard to issues other than SCP and mass private space.

For example, parents certainly have a direct interest in the options open to their children. Various groups advocate on behalf of criminals, ex-convicts, and the homeless.¹⁹⁵ Moreover, communities may look beyond narrow self-interest in setting policies, in that “people . . . may want . . . to act fairly, and . . . to be seen to act fairly, . . . [and] may sacrifice their . . . self-interest in order to be, or to appear, fair.”¹⁹⁶ The extent to which communities will take these interests into account will probably vary from community to community. This approach likely will require some intervention, but not exclusive control, by extracommunity decision makers, whether by courts or political actors that are beholden to a wider constituency.

192. See Kang & Cuff, *supra* note 21, at 122 (“An individual could also be discouraged from entry because her identity is linked to recent context trails, such as a visit to the gun store or negative reputation in a permanent financial, criminal, marketing, or other ‘blacklist’ database.” (footnote omitted)); Wakefield, *supra* note 12, at 131-32.

193. The concern regarding the lack of representation of affected populations pervades many public policy issues, such as the age of consent for sexual relations, the drinking age, and the driving age, all of which are determined without the direct input of those affected. Similar arguments could be made regarding a variety of policies that affect the homeless and those with criminal records.

194. For further discussion, see *infra* Part V.C.

195. See, e.g., American Friends Service Committee, Criminal Justice, <http://www.afsc.org/issues/issues.php?id=323> (last visited Aug. 6, 2007); Homeless.org, <http://homeless.org/do/Home> (last visited Aug. 6, 2007).

196. CASS SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS 8 (2000).

C. Evaluating the Validity of Community Decision Making and Remediating the Process When Necessary

This Article has set forth a primarily procedural solution to what scholars and policy makers have generally tackled as a substantive problem.¹⁹⁷ Nonetheless, the framework does include substantive dimensions, in terms of boundaries as well as mechanisms for defining the relevant community.¹⁹⁸ Beyond this, although the analysis has pointed to the problem of defining community, the issue of what amounts to legitimate community decision making remains to be evaluated. This matter may arise with SCP on mass private property as well as with regard to any issue that affects underrepresented groups because “[n]o matter how open the process, those with the most votes are in a position to vote themselves advantages at the expense of others, or otherwise to refuse to take their interests into account.”¹⁹⁹

As mentioned above, the fact that a given group is underrepresented does not necessarily mean that its interests will be ignored. This fact is an important consideration in determining when deliberative community decisions may disregard legitimate interests of marginalized groups. There are two reasons that seemingly underrepresented groups’ interests will be protected.

First, even if one were to assume that the members of the relevant community will act in pure self-interest, it is possible that a plurality or even majority may agree on a policy that favors a minority group.²⁰⁰ It may be the case that people having different underlying beliefs about fundamental truths agree on a lower-level outcome because this outcome is consistent with achieving the important goals of each group.²⁰¹ For example, a person might believe that abortion amounts to the taking of a human life, but may think that laws restricting abortion are counter-productive and only serve to increase risky “black market” abortions. Another person might believe that abortion does not result in taking a human life and, therefore, should be wholly left to the discretion of the pregnant woman. Accordingly, these two individuals have a fundamental disagreement about abortion, but both believe it should be legal.

197. INDEP. COMM’N ON POLICING FOR N. IR., *supra* note 97, at 40 (setting forth a model whereby “the community participat[es] in its own policing” as an example of an area in which a substantive solution was proposed).

198. *See* discussion *supra* Parts V.A-B.

199. *See* ELY, *supra* note 94, at 135.

200. *See* SUNSTEIN, *supra* note 106, at 137.

201. *See id.* (referring to this phenomenon as an incompletely theorized agreement).

An example from the mass private property/SCP field involves those under eighteen who may desire to access a given mass private space. Parents may wish that their children have access, because they may see the space as a good social outlet and a safe setting. Store owners, as well as other members of the community, may conclude that excluding people based upon their age is bad for the community because it excludes a portion of the population that would spend money within the community and that, if excluded, will spend the money outside the community. Moreover, such extracommunity spending may result in a detriment to merchants and others in the community that would otherwise reap tax revenue or simply a stronger economy in the community from the purchases of this underrepresented group.²⁰² Thus, although those under eighteen may have no direct say in the decision-making process and their parents may not be a large enough group to protect their interests, their interest in access may ultimately be protected due to the agreement on outcome by different groups motivated to reach that outcome for different reasons.

Second, recent studies have shown that even when acting in their self-interest as economic maximizers, what individuals view as being in their self-interest is not necessarily narrowly defined.²⁰³ Thus, “people, in their capacity as political actors may attempt to satisfy altruistic or other-regarding desires which diverge from self-interested preferences”²⁰⁴ In other words, to some degree people get utility out of taking actions or supporting policies that benefit others and not taking actions or opposing policies that harm others.²⁰⁵ In both the civil rights and criminal justice fields, the fact that popularly elected governments have implemented policies that put limitations on punishment or protect certain groups from discrimination is an example of the

202. This example is merely illustrative. Merchants that lease space in mass private property may conclude that the presence of large groups of youths is a net loss as may be the case for adult members of the community who do not have children younger than eighteen who would wish to frequent the property.

203. See RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 46 (1999) (“To advise a person or, for that matter, an entire society about the consequences of alternative paths to the goal that the person or society has chosen is not to commit oneself to a moral view. . . . [T]he expert, the scholar, does not choose the goal, but is confined to studying the paths to the goal and so avoids moral issues. If, as is sometimes the case, the goals of the society are contested — some people want prosperity while others would sacrifice prosperity to equality — then all the expert can do is show how particular policies advance or retard each goal. He cannot arbitrate between the goals unless they are intermediate goals — way stations to a goal that commands a consensus.”).

204. CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 22 (1997); see also POSNER, *supra* note 203, at 46.

205. See POSNER, *supra* note 203, at 46; SUNSTEIN, *supra* note 204, at 22.

phenomena of those with the power to determine policy implementing choices that further goes beyond their narrow self-interest.²⁰⁶

Admittedly, there are weaknesses in the reliance on this type of protection. For example, the United States (as well as the United Kingdom and some other countries) certainly have become more punitive in the last several decades and more willing to implement SCP policies that fall most harshly on marginalized groups.²⁰⁷ Also, the extent of unselfish behavior obviously varies from person to person and from issue to issue. Some people may donate a large percentage of their income to charity while others will not. Moreover, there is no way to measure the exact amount of utility maximization present in a society that goes beyond pure self-interest, in general or with regard to SCP on mass private property. The fact that representative bodies have passed legislation protecting non-majority groups, however, demonstrates that one cannot simply rebut the call for community regulation of SCP on mass private property by asserting that, in any community, there are minority groups that will be harmed by policies implemented by the majority.²⁰⁸

With the above in mind, the issue becomes to what extent, within the boundaries previously discussed, a community, as defined herein, should be the sole arbiter of what SCP measures may be taken by an owner of mass private space.²⁰⁹ The model presented here posits that under ideal conditions, members or representatives of the community should formulate such regulation. As previously noted, however, communities or their representatives will not always function properly or fairly.²¹⁰

This raises two issues: determining when the community falls short of being an ideal arbiter and what to do when it does so. In terms of not functioning ideally, this model looks at this as a procedural issue, rooted in the concepts with which this Part began. That is to say, the power structure of the community may be such that some groups are simply harmed based on power differential combined with the self-interest of a majority or concentrated minority.²¹¹ And as mentioned earlier, one of the guideposts for this portion of the analysis is examining the dual aspects of mass private space as private

206. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101-12213 (2000 & Supp. IV 2004)).

207. *See* GARLAND, *supra* note 53, at 132.

208. *See* ELY, *supra* note 94, at 75-76.

209. *Cf.* Scott, *supra* note 47, at 435 (“Determining what is a community and who speaks for it is more than just a semantic exercise.”).

210. *See* discussion *supra* notes 94-95, 189-98 and accompanying text.

211. *See* ELY, *supra* note 94, at 135.

property and also as a facility generally open to the public in a manner that other private property is not.²¹²

To be clear on this point, one cannot conclude that the community decision-making mechanism is not functioning properly merely because a decision of the community harms some individuals while benefitting others on the basis of different preferences.²¹³ To so conclude would essentially cast aspersions on any policy implemented in a democratic state. Also, it is important to keep in mind that the playing field at this point is only that which is between the boundaries already established.²¹⁴ Thus, at this stage one need not be concerned with policies that, regardless of their popularity, violate fundamental principles, such as the denial of access to a mass private space on the basis of race. Rather, the problem must be within the mechanism itself, not in the ultimate outcome.²¹⁵ One may look at the outcome as evidence of mechanistic dysfunction.²¹⁶ But the outcome itself cannot be the sole reason for taking steps to override community preference.

The concept of illegitimate community decision making is thus a somewhat elusive concept, although Ely's seminal work on policing the political process provides a point of reference.²¹⁷ The key is that however desirable community decision making is with regard to SCP in mass private property, it is only desirable to the extent that the community acts in a fair manner. The determination of this issue cannot be based simply on undesirable results but rather must be rooted in a process that does not allow full and fair participation of interested parties.²¹⁸

If the community decision-making process is not properly functioning, then it is necessary to have recourse to remedial measures. Once again, there is not a single correct solution to this problem that will work in all cases; there are several possibilities. One approach is for courts to impose their own

212. See *supra* Part III.

213. See ELY, *supra* note 94, at 135.

214. See *supra* Part V.A.

215. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 94, at 76.

216. See ELY, *supra* note 94, at 73-74; Adam Crawford, *The Partnership Approach to Community Crime Prevention: Corporatism at the Local Level?*, 3 SOCIAL AND LEGAL STUDIES [SOC. & LEG. S.] 497, 502 (1994) (U.K.) (noting that some private groups may hold particular sway, especially of public/private partnerships, which play an important policy formation role in late modernity). This type of dysfunction might occur if a determined majority or even a plurality were able to exercise power so as to reap benefits at the expense of those outside such bloc.

217. ELY, *supra* note 94, at 135.

218. See *id.* at 75-76.

substantive standards.²¹⁹ A second possibility is to bring the decision-making process to a broader and higher democratically accountable body. This might mean formulating legislation at the county, state, or national level (as opposed to at the village, town, or city level). An example of this is American federal civil rights legislation, in which the federal government imposed limits on racial discrimination by privately owned places of accommodation (such as hotels) due to the failure of many states to do so.²²⁰

A third possibility, most associated with Ely, is for courts to intervene — not to impose their own substantive standards, but to “[p]olic[e] the [p]rocess of [r]epresentation.”²²¹ Under this approach, which Ely asserts is the basis behind much important United States Supreme Court jurisprudence, courts impose “procedural protections . . . [that] ensure that in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-makers held to a duty to take into account the interests of all those who their decisions affect.”²²² Ideally, this is the best approach if it can be implemented successfully because, although it involves court intervention, ultimately substantive decisions are made by democratic actors comprised of members or representatives of the community.

Regarding the other two approaches, each has advantages and disadvantages within the context of community regulation of SCP. The first has the advantage of being able to seek the best substantive results in that decisions are made by politically insulated actors.²²³ But this is also its biggest disadvantage in terms of the model put forth here because decisions are being made that affect the community by actors that are neither part of the community nor representatives of it.²²⁴

219. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769, 797 (1971) (“The ultimate test of [a court’s work], I suggest, must be goodness. . .”).

220. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). This particular example, racial discrimination, would almost certainly fall outside the boundaries of the range for community regulation. However, the important point here, whether it is boundary setting or incursion into the community decision-making process under certain circumstances, is that this is an extracommunity mechanism of effecting each of these aspects of the model.

221. ELY, *supra* note 94, at 73.

222. *Id.* at 100.

223. Cf. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 58 (1990) (discussing situations in which citizens might choose in advance to have politically insulated administrative actors make certain decisions, where personal preferences might result in worse substantive outcomes).

224. Cf. *id.* at 34 (discussing the issue of individual preferences and the challenges that regulation poses in fulfilling such).

The second possibility is a compromise. Although the decision making is taking place by politically accountable representatives, some, but not all, of these actors will not be members or representatives of the community in question. Nevertheless, this latter disadvantage is the very reason why this option is a possibility.²²⁵ It is only when actors who are directly accountable to the community act in a manner that is unfair that these three options are considered. As such, actors who are politically accountable to a broader base than the community itself may serve to balance out the partisanship that leads to unacceptable results in cases in which decisions on the community level operate unfairly.

Conclusion

The proposed model accomplishes two things. First, by recognizing that mass private property is highly location specific, it avoids a one-size-fits-all solution that is implicit in much scholarship on SCP and mass private space. Second, by asserting the primacy of the community, it provides a framework for reinforcing community participation in formulating fundamental policy. The framework does put some boundaries on community preferences. Outer boundaries are rooted in property law and in the public character of the property. Also, the model provides for alternative mechanisms for when the community does not act in a procedurally fair model.

225. *Cf.* SUNSTEIN, *supra* note 106, at 37 (discussing how groups that disagree on fundamental first-order issues might nonetheless reach consensus on important outcomes).