

# Regulating Situational Crime Prevention in Mass Private Property

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Losing Control: Regulating Situational Crime Prevention in Mass Private Property\*\*

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## Introduction

Three young men enter a shopping mall. In a security office in the mall a guard monitors them via closed circuit TV. Based upon their appearance (i.e their ethnicity, the way they are dressed etc.) 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 shop lifting 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 versus the right of the young men to visit the mall, as well as whether the exclusion was based upon factors, such as race, age or ethnicity, that many would find at minimum troubling and perhaps entirely unacceptable.<sup>1</sup> The owner of the shopping mall would likely claim that he need not explain his or her reasons for excluding these men because the mall is private property and as the owner 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 since 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 as well as a fair amount of litigation.<sup>2</sup>

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<sup>1</sup> 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); Amy Benfer, "Policing Gangsta Fashion" *Salon* (May 29, 2002); 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); Courtland Milloy "Teen Stripped of More than Just a Shirt" *Wash. Post* (Nov. 15, 1995).

<sup>2</sup> See, e.g., Andrew von Hirsch & Clifford Shearing, *Exclusion from Public Space*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION 77, 79, 86 (Andrew von Hirsch, David Garland & Alison Wakefield eds. 2001) ("[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.); Singer, *supra note 2* 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."); Richard Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robbins*, 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."); Sarah G. Vincent, *The Cultural Context of the Shopping Mall: Tension between Patron's Right of Access & Owner's Right to Exclude*, 37 U. WEST. L.A. 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?");

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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 space.<sup>3</sup> The extent and manner of states' regulation of owners of mass private property (e.g. shopping malls and amusement parks) in their employment of situational crime prevention ("SCP") (e.g. exclusion of certain groups, 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 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<sup>4</sup>; the *de facto* public nature of the property, however, counsels in favor of allowing the 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.<sup>5</sup> 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.<sup>6</sup>

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 both public and private.<sup>7</sup> Second, this article argues that most cases and articles that have addressed the issue of SCP by owners of mass private property, ignore the role that such properties play in a given community, analyzing the issue as if the property existed in a vacuum, divorced from the city, neighborhood or area in which it is located and the role that a given property plays in a particular locale (what will hereinafter be referred to as the community contingent nature of mass private

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*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."); *State v. Schmid* 423 A.2d 615, 628 (NJ 1980) (effectively treating mass private space as public for free speech purposes; *N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (NJ 1994) (same); *Citizens for Ethical Government, Inc. v. Gwinnett Place Assoc., L.P.*, 260 Ga. 245, 246 (GA 1990). ("The property at issue here is a privately owned and operated shopping mall that 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.").

<sup>3</sup> These terms will be more formally defined in section I of this article

<sup>4</sup> Epstein, *supra* note 2, at 24.

<sup>5</sup> See *Pruneyard Shopping Cntr. 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 2, at 1291.

<sup>6</sup> Compare Epstein *supra* note 2 (arguing that "it is difficult to conceive of any property as private if the right to exclude is rejected" with Singer, *supra* note 2 (asserting that "the common-law rule that grants most businesses the right to exclude at will must be changed."); see also Prueyard, 447 U.S. at 81; Lucia Zedner, *Too Much Security*, INT. J. OF THE SOC. OF LAW (2003); 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. 589 (2002).

<sup>7</sup> See, e.g., Singer, *supra* note 2; Epstein, *supra* note 2; von Hirsch & Shearing, *supra* note 2; section III, *infra*.

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property). In so doing, these cases and articles fail to recognize that the manner in which SCP is to be regulated (if at all) should depend not only upon the nature of the property itself but the characteristics of the setting wherein the property is located, which necessarily has a two-way symbiotic relationship with the property.<sup>8</sup> 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.

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

Section 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 seek to resolve the problem of defining community for all purposes, but, less ambitiously, seek to provide a provisional definition of community that is sufficient for the purposes for evaluating the role of a particular mass private space in a given community. The relationship between community and regulation of mass private property is 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, among other things, expresses the values of the society that undertakes the punishment,<sup>9</sup> the forms of SCP that a community allows or prohibits in mass private space is also expressive of community values since such space plays a public role in the community.<sup>10</sup> For this reason, this paper asserts that the community wherein the mass private

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<sup>8</sup> 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.”).

<sup>9</sup> EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 79-80 (1960) (“In modern societies, in contrast, 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.”); 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.”).

<sup>10</sup> See Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 1999 ARIZ. L. REV. 1, 2 (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.”).

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space is located should, within certain boundaries, be given broad leeway to regulate SCP in such space.

Section V sets forth a framework for regulating SCP in mass private property that is rooted in both the dual public/private nature of mass private property discussed in Section III, and the argument put forth in Section IV that the role that a private space 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, Section V argues that the dual public/private nature of mass private property imposes substantive boundaries upon the community, on one hand, delineating a zone of protection for mass private property owners by providing some limit on the community's putting restrictions upon the SCP measures the owner may employ, and on the other hand providing 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 Section V) be the arbiter of which SCP measures the owner may employ.

### **I. Mass Private Property and Situational Crime Control Defined**

#### **A. Mass Private Property**

Mass private property is a “term coined by Shearing and Stenning to describe large, privately-controlled tracts of property.”<sup>11</sup> Although originally discussed primarily in non-US sources, the term has now frequently been used in American scholarly literature.<sup>12</sup> It is sometimes called “mass private space,” “semi-public space,” or “quasi-public space.” To understand what constitutes mass private property, it is important to 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.”<sup>13</sup>

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.<sup>14</sup> However, there is no

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<sup>11</sup> Alison Wakefield, *Situational Crime Prevention in Mass Private Property*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, *supra* note 2, at 125 n. 1; *see also* von Hirsch & Shearing, *supra* note 2, at 86.

<sup>12</sup> *See, e.g.*, Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 591 (2005) (“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.”).

<sup>13</sup> *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 Center*, 447 U.S. 74 (holding that California’s requiring a shopping mall to 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).

<sup>14</sup> Wakefield, *supra* note 11, 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 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

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precise line demarcating the boundary between mass private space and other forms of private property, the matter being a matter of degree as well as a dynamic concept that continues to evolve.<sup>15</sup> Perhaps the best way to determine what one should consider to be mass private property is the degree to which the property resembles and function as public space.<sup>16</sup> So 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” and a large shopping center that consisted mainly of retail shops but did not contain all the entities that one might find in a shopping mall, such as cinemas, restaurants or other entertainment facilities.<sup>17</sup>

The key distinguishing feature is that the private property is open to the public for multiple uses and even for no particular use. Thus, many users of mass private property will go there to simply walk around or to socialize and not necessary to purchase anything.<sup>18</sup> Moreover, generally the owners/operators of such properties allow people to access these spaces without requiring them to purchase anything.

Thus, mass private spaces are distinguishable from other private spaces that are open to the public for a particular use, such as shops, restaurants and cinemas.<sup>19</sup> The public can generally enter

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the forum role. Thus, it seems natural to define the modern public forum not in terms of ownership but rather as a gathering place . . .”).

<sup>15</sup> See Berger, *supra* note 14, at 656.

<sup>16</sup> See Von Hirsch & Shearing, *supra* note 2, at 86; see also *New Jersey Coalition Against War in the Middle East 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 (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.”).

<sup>17</sup> Wakefield, *supra* note 11, at 125; see also von Hirsch and Shearing, *supra* note 2, at 86 (“At one end of the spectrum lie facilities that are primarily designed for specific 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, (2003) (“[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 quotes omitted)).

<sup>18</sup> See von Hirsch & Shearing, *supra* note 2, at 86 (discussing the stereotype of teenagers spending leisure time at the mall is an example of the “no particular use” aspect of such property); 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 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 among 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.”).

<sup>19</sup> Von Hirsch & Shearing, *supra* note 2, at 86 (“[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

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such places but only for a particular use and a limited time. Certainly 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.<sup>20</sup>

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, and locating the exact point at which private space has sufficient public use to qualify as mass private property would be difficult if not impossible.<sup>21</sup> For this analysis, what I wish to convey is a sense of the type of properties that qualify as mass private space. Moreover, for purposes of the framework I propose, 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 as regards 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 differing things . . . [I]n its broad[est] meaning, it encompasses any attempt to manipulate the environment to reduce opportunities for crime.”<sup>22</sup> Like mass private property, the concept and terminology has made its way into American scholarship.<sup>23</sup> Less abstractly, SCP (sometimes referred to as primary crime prevention or

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for private police.”); Elizabeth Joh, *Criminal Law: The Paradox of Private Policing* 95 J. CRIM. L. & CRIMINOLOGY 49, 63-64.

<sup>20</sup> Additionally, there are some places that charge admission that might be considered mass private space, such as amusement parks. The analysis in this paper 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, my analysis applies.

<sup>21</sup> 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).

<sup>22</sup> Ronald Clarke, *Situation Prevention, Criminology and Social Values*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, at 97, 99.

<sup>23</sup> See, e.g., Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 N.W. 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 J. LAW & 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.

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reduction) describes steps taken to prevent (or more realistically reduce) crime before it occurs by reducing opportunities.<sup>24</sup> This 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.<sup>25</sup>

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 to get into and out of such areas.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> In fact, as Zedner has argued, some SCP measures that seek to reduce crime may increase people's anxiety about crime by raising their awareness of risk.<sup>30</sup>

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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.”).

<sup>24</sup> See Ken Pease, *Crime Reduction*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 947, 950 (Mike Maguire, Rod Morgan & Robert Reiner eds., 2002).

<sup>25</sup> See *id.* at 948-49.

<sup>26</sup> 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, at 17; see also Cheng, *supra* note 23, 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); Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1454 (Oct. 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.”).

<sup>27</sup> See Pease, *supra* note 24, at 953; 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.”).

<sup>28</sup> See Duff & Marshall, *supra* note 23, at 27, 31; 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 (Spring 1994) (“The fear of rape has been described as one that “most women experience . . . a nagging, gnawing sense that something awful could happen, an angst that keeps them from doing things they want or need to do, or from doing them at the time or in the way they might otherwise do.” Women share this fear in many unspoken ways: looking in the back seat of a car before entering alone, avoiding walking alone on a dark street, and checking out the surroundings when going somewhere new.”).

<sup>29</sup> See Zedner, *supra* note 6, at 15; Wendy Holloway & Tony Jefferson, *The Role of Anxiety in Fear of Crime*, in CRIME, RISK AND INSECURITY 31 (Tim Hope & Richard Sparks eds., 2000); compare David Weisburd and John Eck, *What Can Police Do to Reduce Crime, Disorder, and Fear?*, 593 ANNALS 42, 56 (May 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 27, at 204-05 (2000) (“Those responsible for security on public transportation systems can be seen as having two principal goals: to make the system as safe as possible by reducing levels of crime and to make passengers feel safer when riding their

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As regards mass private property, the two primary SCP issues with which the instant article is are: (1) exclusion from such spaces; (2) behavioral standards. In a sense these are just different flavors of the same strategy. Exclusion is often based on behavior in which one has previously engaged at the property in question.<sup>31</sup> And behavioral standards are generally enforced by removing (and thereby excluding at least temporarily) those who refuse to abide by the behavioral standards.<sup>32</sup>

SCP in mass private property may involve several types of exclusion and behavioral standards. Exclusion from a space may be “permanent or of substantial duration,”<sup>33</sup> or the exclusion may be brief, such as asking someone who has behaved in a way unacceptable to the owner/operator to leave the premises and not return for the rest of the day or until he ceases “engaging in the behavior.”<sup>34</sup>

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systems. Several studies have found that fear of crime is related to personal and vicarious experience of crime or to feelings of personal vulnerability . . . . It might seem therefore that achieving the first goal would help achieve the second. However, as in other environments, the relationship between actual safety and fear of crime on public transport is not always direct.”).

<sup>30</sup> *See id.*

<sup>31</sup> *See* Wakefield, *supra* note 11, at 132-33; von Hirsch & Shearing, *supra* note 2, at 92; Gregory Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 121 (November 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.”).

<sup>32</sup> *See id.* 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.”); *Skirt Stake*, MIAMI NEW TIMES, August 4, 2005 (“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.”); Amy Benfer, *Policing Gangsta Fashion*, May 24, 2006, <http://dir.salon.com/story/mwt/feature/2002/05/29/nelly/index.html> (“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.”).

<sup>33</sup> Von Hirsch & Shearing, *supra* note 2, at 88.

<sup>34</sup> *Id.* at 92; *see also* Wakefield, *supra* note 11, at 134.

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The basis for exclusion and the extent that such is employed varies from one mass private space to another.<sup>35</sup> As already mentioned, the owner of the private space might exclude a person based upon his or her behavior at that particular moment.<sup>36</sup> Additionally, an owner of mass private property might attempt to ban persons convicted of criminal offenses (either committed in that particular space or elsewhere).<sup>37</sup> Further, and most controversially, SCP in mass private space may take the form of excluding persons who fit a particular profile.<sup>38</sup> Thus, security guards may exclude people “whose behavior or body language is perceived as suspicious [or] who seem out of place in relation to the area or time of day.”<sup>39</sup> Moreover, security guards might exclude persons who fit a particular demographic or social circumstance, such as young people or the homeless.<sup>40</sup>

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<sup>35</sup> See Wakefield, *supra* note 11, at 134.

<sup>36</sup> Von Hirsch & Shearing, *supra* note 2, at 87; Wakefield, *supra* note 11, at 132; ZEPP, *supra* note 29; Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of PruneYard*, 13 CORNELL J. L. & PUB. POL’Y 533, 534 (2004) (“However, private interests, usually corporations, control the simulated spaces—the shopping malls, the gated communities, and the private parks. Because these simulated spaces are privately-owned and controlled, owners regulate behavior within by exerting the most fundamental property right—the right to exclude.”).

<sup>37</sup> See *id.* at 90-91; Wakefield, *supra* note 11, at 131-32.

<sup>38</sup> *Id.*; see also Wakefield, *supra* note 11, at 130-31; Harris, *supra* note 2, 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 “revenue-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.”).

<sup>39</sup> Wakefield, *supra* note 11, at 130.

<sup>40</sup> 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 US to the UK. And, in the US, the standards are different from state to state. In the UK, the owner of a property that is generally open to the public can exclude someone without giving any reason. *CIN Properties Ltd. v. Rawlins*, [1995] 2 E.G.L.R. 130. The US 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 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 to not exclude persons arbitrarily does not violate the property owner’s rights. *PruneYard Shopping Center*, 447 U.S. 74; Klear, *supra* note 6. 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.

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Other forms of SCP, such as CCTV surveillance<sup>41</sup> or employment of private security guards may also take place on mass private property. However, the use of SCP techniques other than exclusion and the imposition of behavioral standards in mass private space do not raise issues peculiar to their use there—they raise the same type of legal, ethical and other issues when used in mass private space as they do if used in other private or public spaces.<sup>42</sup>

### **II. Current Conceptions/Theories of Regulating Situational Crime Control 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 I put forth in Sections III, IV and V.

Arguments as to the authority that owners/operators of mass private property should have with regard to SCP have generally been substantive and fixed. Such arguments thus 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 and/or would wish to frequent it.<sup>43</sup> Moreover, the arguments 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,<sup>44</sup>

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<sup>41</sup> Andrew von Hirsch, *The Ethics of Public Television Surveillance*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, at 59; see also Marcus Nieto, *Public Video Surveillance: Is It An Effective Crime Prevention Tool?*, <http://www.library.ca.gov/CRB/97/05> (last visited Aug. 9, 2006).

<sup>42</sup> Private security guards on mass private property of course do raise issues with which this paper 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 that a public good may end up going to the highest bidder, fall outside the scope of this paper, 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.

<sup>43</sup> See, e.g. 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); Clarke, *supra* note 22, at 110 (putting forth a generally favorable view of SCP, 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).

<sup>44</sup> David Garland, *Ideas, Institutions and Situational Crime Prevention*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, at 13 (“SCP also allows a form of local or even individual action that can be undertaken directly by those fearful of crime.”); Duff & Marshall, *supra* note 23, at 17 (“[T]here are morally significant differences between the groups on which SCP measures impact.”); 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.”).

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existing scholarship is noticeably void of arguments addressing 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.<sup>45</sup> Some of these scholars have focused upon SCP (including exclusion) in terms of mass private space,<sup>46</sup> 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).<sup>47</sup>

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 as such arguing in favor of strong limits on exclusion and other forms of SCP. These include Singer, Garland, Von Hirsch and Shearing 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.<sup>48</sup> Thus, Singer does not limit his argument regarding the use of the SCP technique of exclusion to mass private space.<sup>49</sup>

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

In these private settings (many of which are mass private 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 pleasures of consumers and decent citizens.<sup>50</sup>

Von Hirsch and Shearing, also focusing on mass private space, argue that owners/operators of such properties should not have broad exclusionary powers since such property “performs the

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<sup>45</sup> See, e.g., Wakefield, *supra* note 11, 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 local communal space” while failing to expand upon this kernel); 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 must be expanded to include supportive efforts from a broad base of organized groups within a jurisdiction.”).

<sup>46</sup> See, e.g., *id.* 144 (“For privately-controlled territories to operate as sites for public life, there is a need to strike a balance in the controls that are adopted. . .”).

<sup>47</sup> See, e.g., von Hirsch, *supra* note 38 (discussing the ethics of CCTV surveillance in mass private space and elsewhere); John Kleinig, *The Burdens of Situational Crime Prevention*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, at 37 (noting the “tendencies. . . associated with attempts to legitimize and elevate SCP, but which. . . lead it to overreach its capabilities.”).

<sup>48</sup> See Singer, *supra* note 2, at 1291.

<sup>49</sup> See *id.*

<sup>50</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 160 (2001).

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functions of public space.”<sup>51</sup> Although they note 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.”<sup>52</sup> 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.”<sup>53</sup> Therefore, their analysis “treat[s] as public in character those spaces that clearly are designed for general public use.”<sup>54</sup>

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<sup>51</sup> 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 10, at 44 (1999) (“[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.”); Mulligan, *supra* note 33, at 539 (“Malls have also shouldered widespread community functions.”).

<sup>52</sup> Von Hirsch & Shearing, *supra* note 2, at 79; see also Magarian, *supra* note 28, 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.”).

<sup>53</sup> Von Hirsch & Shearing, *supra* note 2, at 87; see also *Marsh v. Alabama*, 326 U.S. at \_\_\_\_ (“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.”).

<sup>54</sup> *Id.* at 86. See also Christopher M. Kelly, “*The Spectre of a Wired Nation*”: *Denver Area Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace*, 10 HARV. J. LAW & TEC. 559, 627-28 (Summer 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 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?”); Alexander, *supra* note 10, at 44 (“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.”).

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Beyond this, Von Hirsch and Shearing then put forth a detailed framework for regulating SCP in mass private space.<sup>55</sup> They distinguish between long-term/permanent exclusion and short-term exclusion.<sup>56</sup> Inherent in their assertions are arguments about regulation of conduct in mass-private property,<sup>57</sup> since short or long-term exclusion is the general enforcement mechanism for not complying with the behavioral standards set by the owner/operator.<sup>58</sup> Von Hirsch and Shearing see long-term/permanent exclusion from mass private space, whether based on profiling or conduct, as problematic under almost any circumstance.<sup>59</sup> However, they see brief conduct-related exclusion as acceptable.<sup>60</sup>

Similarly, Gray and Gray argue against giving broad powers of exclusion to owners of mass property, asserting that the English court decision *Rawlins*, holding that owners of mass private property retain the right of arbitrary exclusion,<sup>61</sup> was wrongly decided because the power to exclude from mass private space, which is functionally public, should be limited to public interest concerns.<sup>62</sup> Likewise Duff and Marshall, “assume that the mall is or should be a public space, providing public goods. . . .”<sup>63</sup> Thus, they assert that SCP measures that curtail people’s freedom to

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<sup>55</sup> *Id.* at 88-93.

<sup>56</sup> *Id.*

<sup>57</sup> Von Hirsch & Shearing actually do not focus solely on mass private property and in fact speak in terms of public space throughout much of their essay. However, because they view mass private property as public space for purposes of evaluating SCP, their public space arguments are also arguments about mass private property.

<sup>58</sup> Von Hirsch & Shearing, *supra* note 2, at 92; Wakefield, *supra* note 11, at 132.

<sup>59</sup> Von Hirsch & Shearing, *supra* note 2, at 88-90.

<sup>60</sup> *Id.* at 92-93.

<sup>61</sup> See *Rawlins*, 2 E.G.L.R. 134H-134JJ (Eng.); Joan L. McGregor, *Property Rights and Environmental Protection: Is this Land Made for You and Me?* 31 ARIZ. ST. L.J. 391, 427 (“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 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.”); 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.”).

<sup>62</sup> Kevin Gray & Susan Francis Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, 1 EUR. HUM. RTS. L. REV. 46, 49-50, 63 (1999).

<sup>63</sup> Duff & Marshall, *supra* note 23, at 21, 28 n. 23; See also Mulligan, *supra* note 33, 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.”).

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enter mass private spaces (either by generally excluding them or ejecting them based upon behavior) “exclude[s] them from access to goods. . . in which they should as citizens be able to share. . . .”<sup>64</sup> 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.”<sup>65</sup>

The theorists who are more favorable to exclusion and/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 live or work near it.

For example, Ronald Clarke, “[t]he person most closely associated with SCP,”<sup>66</sup> calls for greater use of SCP in mass private space and elsewhere<sup>67</sup> 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.”<sup>68</sup> Clark grudgingly acknowledges this concern but fails to resolve the issue or seek a solution that takes account of the variability of the cost and benefits of SCP from one property to another.<sup>69</sup>

Callies and Breemer, and Epstein, focus their respective analyses in this area on the issue of the property owner’s right to exclude.<sup>70</sup> These scholars are not focused particularly on the issue of crime control. However, because the focus their articles is exclusion (perhaps the most controversial form of SCP) from mass private space,<sup>71</sup> the issue that is the topic of the instant article inheres in their analysis. 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. Each argues that such is a fundamental right of the private property owner, irrespective of the public characteristics of the property.<sup>72</sup>

The above noted scholarship (as well as other analyses of the present issue), assume that the practices that take place there 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

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<sup>64</sup> Duff & Marshall, *supra* note 23, at 21.

<sup>65</sup> *Id.*

<sup>66</sup> David Garland, *Ideas, Institutions and Situational Crime Prevention*, in *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION*, at 9.

<sup>67</sup> Clarke, *supra* note 22, at 110.

<sup>68</sup> *Id.* at 104.

<sup>69</sup> *See id.*

<sup>70</sup> David L. Callies and J. David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 *WASH. U. J. OF L & POL’Y* 39, 43 (2000); Epstein, *supra* note 2, at 24.

<sup>71</sup> *See id.*; Epstein, *supra* note 2, at 24.

<sup>72</sup> *See id.*; Epstein, *supra* note 2, at 24.

that the owners of such properties may employ. In contract, the present article incorporates this relationship between a given property and the community in which it is located as paramount in finding a workable solution to the challenge presented by the use of SCP in mass private space.

### **III. Re-envisioning mass private space in its dual nature**

Commentators have recognized that mass private space does not fit neatly into previous conceptions of property.<sup>73</sup> However, as noted in the previous section, 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.<sup>74</sup> Thus “English law now treats mass private space much like purely private property [while] American law has important qualifications of that approach, relating for example to racial discrimination.”<sup>75</sup> While it is true that the American law has been less extreme in its treatment of access as compared to the English approach and approaches put forth by scholars, 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; there are generally no statutes geared specifically for mass private space. Second, while some court decisions have treated mass private spaces as public spaces,<sup>76</sup> in doing so they overlook the private nature of the property altogether. In short, the United States 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, some of which treat mass private spaces as public; some of which treat the spaces as private.<sup>77</sup>

The instant article posits that mass private property is both private property and public space in a sense that neither true (i.e. *de jure*) public space nor non-massforms of private property is. Therefore, in formulating a model, both the private property interests and the public access interests need to be taken into account—both are legitimate and the contradictions they raise, while presenting a challenge, do not warrant ignoring one interest in favor of the other.<sup>78</sup> Put differently, mass private space remains private property and that fact cannot be ignored.<sup>79</sup> However, at the same time, 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.<sup>80</sup>

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<sup>73</sup> See, e.g., Mulligan, *supra* note \_\_\_, at 539-540; Von Hirsch & Shearing, *supra* note 2, at 80.

<sup>74</sup> See, e.g., Epstein, *supra* note 2, at 24; Singer, *supra* note 2, at 1291.

<sup>75</sup> Von Hirsch, *supra* note 38, at 74. See also Gray & Gray, *supra* note 53, at 49-50, 63 (arguing that mass private space is functionally public and should be treated as such).

<sup>76</sup> See, e.g., *Amalgamated Food Employees Union Local 590*, at 25.

<sup>77</sup> See federal Civil Rights Act of 1964; Singer, *supra* note 2, 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).

<sup>78</sup> Cf. Heller, *supra* note 21, at 418 (“Private property is a complicated idea to pin down precisely, as its boundaries fray at the edges.”).

<sup>79</sup> See Epstein, *supra* note 2, at 22; *Pruneyard Shopping Center*, 447 U.S. at 82-84.

<sup>80</sup> See Mulligan, *supra* note 2, at 539-541.

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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:

“[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.”<sup>81</sup>

While this description is apt, it argues that mass private space is effectively public space.<sup>82</sup> 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 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.<sup>83</sup> Similarly, the fact the property is being put to a particular public use means that the private property rights that the owner/operator retains from the bundle will be fewer than for other forms of private property.<sup>84</sup>

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 community (a concept to be discussed in more detail in Sections IV and V) as the primary regulators of SCP in mass private space.<sup>85</sup> Substantively, however, it puts boundaries on what is the legitimate scope of regulation, both in terms of what limits the community can impose on the property owner's use of SCP and on what the community may allow the owner to do.<sup>86</sup> The dual nature of the property has implications both for these boundaries as well as for the procedural components of my 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

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<sup>81</sup> Von Hirsch, *supra* note 38, at 74 (citing Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L. J. 252 (1991)); see also Mulligan, *supra* note 33, at 560 (“The court concluded that *Robins v. Pruneyard* does not require that a shopping center's obligations vis-a-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.”).

<sup>82</sup> *See id.*

<sup>83</sup> *See* Callies and Breemer, *supra* note \_\_\_\_, at 43..

<sup>84</sup> *See Pruneyard Shopping Center*, 447 U.S. at 82-84.

<sup>85</sup> *See generally* Lawrence W. Sherman, *Public Regulation of Private Crime Prevention*, 539 ANNALS 102 (1995).

<sup>86</sup> *Cf.* Scott, *supra* note 43, at 432 (2006) (“One dimension of the broad community justice approach is that the systems in which the 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.”).

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life, does not of itself merit the conclusion that the property owner has forfeited all property based rights.<sup>87</sup> 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.<sup>88</sup> This argument will be spelled out in Section V.

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,<sup>89</sup> there are situations in which the mechanism of representative community decision-making is suspect.<sup>90</sup> Recognizing the dual nature of mass private property plays two roles with regard to the issue of procedurally suspect community decision-making. First, it 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. Section V will expand upon this.

### **IV. Situational Crime Control, Mass Private Space and Community Contingency**

As discussed in Section II above, most judicial decisions and commentary concerning the regulation of SCP on mass private property has been substantive in nature, delineating which types of exclusion and behavior regulation in such spaces are acceptable and which are not.<sup>91</sup> These writings do not generally call for the community affected by such measures to play a role in regulating SCP.

#### **A. What is Community?**

Community is a contentious and contested term. As used in the sociological sense the term “[c]ommunity. . . ranges across, and hence borrow meaning from spatial, temporal, kinship, ethnic, and institutional reference points.”<sup>92</sup> 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

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<sup>87</sup> Epstein, *supra* note 2, at 34.

<sup>88</sup> See Vincent, *supra* note 2, at 221.

<sup>89</sup> I will discuss what types of connections to mass private property are necessary to give a community a legitimate interest in regulation in Section V.

<sup>90</sup> Cf. John Hart Ely, DEMOCRACY AND DISTRUST 103 (discussing the role of judicial intervention when the representative process does not function properly).

<sup>91</sup> See, e.g., discussion *supra* at note \_\_\_; von Hirsch & Shearing, *supra* note 2, at 85-95; Wakefield, *supra* note 11, at 143-44; *Prune Yard Shopping Center*, 447 U.S. 74; *Rawlins*, 2 E.G.L.R. 130 (Eng.).

<sup>92</sup> Nicola Lacey & Lucia Zedner, *Discourses of Community in Criminal Justice*, 22 J. L. & SOC’Y 301, 302 (1995). See also Scott, *supra* note 41, 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.”).

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alone, or in connection with other words.<sup>93</sup> Thus, one often hears or reads about “community values,” “community penalties” and “community policing.”<sup>94</sup> “Community” has been used in connection with a range of social and political issues, including, for purposes of this paper, the causes of and solutions to the problem of criminal behavior.<sup>95</sup>

Used either on its own or as part of a phrase, the word “community” is an emotive one, and like “family,” has often been put forth as a unquestionably good thing,<sup>96</sup> which many people, especially those who have public exposure, are loathe to challenge.<sup>97</sup> After all, how could any decent person be against “strengthening the community” or challenge the need for “family values?” And, 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 “that something can be done about crime if it is done. . . with the support of the community.”<sup>98</sup>

For example, “community penalties” and “community policing” conjure up images of progressing 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 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 unties. If crime, racism, homosexuality, 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 pointed out, the “community” whose loss so many

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<sup>93</sup> GARLAND, *supra* note 50, at 123.

<sup>94</sup> *Id.*

<sup>95</sup> Lacey & Zedner, *supra* note 71, at 301; GARLAND, *supra* note 59, at 123; Robert M. Chiappetta, Book Note, 27 AM. J. CRIM. L. 433 (Summer 2000) (reviewing Todd R. Clear & David R. Karp, BRINGING THE TOOLS OF JUSTICE INTO THE COMMUNITY THE COMMUNITY JUSTICE IDEAL: PREVENTING CRIME AND ACHIEVING JUSTICE) (“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.”).

<sup>96</sup> Lacey & Zedner, *supra* note 71, at 302; Nancy K. Rhoden, *Law and Psychiatry Part II: The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375, 400 (Spring 1982) (Thus, in the community, with all that word's connotations of a warm, caring group of neighbors and friends, the deviant mysteriously would be reconstituted.”).

<sup>97</sup> See Lacey & Zedner, *supra* note 71, at 302 (noting that “community. . . carries with it a certain normative force”).

<sup>98</sup> Gordon Hughes, *Crime and Disorder Reduction Partnerships*, in CRIME PREVENTION AND COMMUNITY SAFETY: NEW DIRECTIONS 123, 124 (Gordon Hughes, Eugene McLaughlin & John Muncie, eds., 2002) (internal quotes omitted). See also Devin J. Doolan Jr., Comment, *Community Prosecution: A Revolution in Crime Fighting*, 51 CATH. U.L. REV. 547, 553-54, (Winter 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.”). 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. Termed the “broken windows” theory, it “established a connection between low-level crime and serious crime.” *Id.* at 557. Doolan then suggests that “the broken windows theory inspired the concept of community policing.” *Id.*

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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; and “community” has been used so broadly in recent rhetoric that it in some sense has no fixed meaning.<sup>99</sup>

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). However, 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 seek 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.<sup>100</sup> 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.<sup>101</sup>

More 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 and is therefore flexible.<sup>102</sup> Thus, in many cases representatives, rather than all the members who comprise the relevant community, will take action to regulate SCP in mass private space, although, in some 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 in Section V, the types of SCP that an owner/operator 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.<sup>103</sup> Thus, the model here rejects the

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<sup>99</sup> GARLAND, *supra* note 50, at 124; *Independent Commission on Policing in Northern Ireland*, at 40 (1999), <http://www.belfast.org.uk/report/chapter07.pdf>. (last visited Aug. 9, 2006) (“[C]ommunity policing has many definitions and has become devalued by frequent and indiscriminate use.”).

<sup>100</sup> Lacey & Zedner, *supra* note 71, at 303; David Nelken, *Community Involvement in Crime Control*, 38 CURRENT LEGAL PROBLEMS 239, 239 n.1 (1985); James V. Schall, *The Corporation, What is it?*, 4 AVE MARIA L. REV. 105, 109 (Winter 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*, 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.”).

<sup>101</sup> See Lacey & Zedner, *supra* note 71, at 304 (noting that “community may be construed as an agency *by* which social policy is pursued and upon which responsibility may be thrust [and] as the locus *in* which policy initiative may be sited.”).

<sup>102</sup> See generally Scott, *supra* note 43, at 435-435

<sup>103</sup> Cf. Cass R. Sunstein, LEGAL REASONING AND POLITICAL CONFLICT 11 (discussing views held by William Blackstone, Felix Frankfurter and John Marshall Harlan that placed a high value on law making at the point of

arguments in favor of a detailed, substantive framework that is meant to apply in all places.<sup>104</sup> Moreover, regulation of SCP on mass private property should generally not be imposed from without by distant judicial, legislative or executive agents.<sup>105</sup>

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 Section V.B., *infra*, will add specificity to the general framework developed in the present subsection.

### **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,<sup>106</sup> this subsection argues that SCP in mass private space is both 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. Subsection V.B. then elaborates on the logistics of the community as primary regulator of SCP in mass private space. Thus, the instant subsection is the “why” of community regulation of SCP, while Subsection V.B. is the “how.”

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/operator of SCP may take will not only affect the community greatly but in a sense will be an expression of the values of the community.<sup>107</sup> Further, many aspects about “crime control which purport to be universal in fact take their sense and limits of applicability from. . .cultural connections.”<sup>108</sup>

Moreover, as Garland notes: “Social groups and individuals are differently placed in respect to crime—differently vulnerable to victimization, differently fearful about its risks, differently oriented by values, beliefs and education in their attitudes to its causes and remedies.”<sup>109</sup> Garland adds:

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application tailored to the particulars of the circumstance in contrast to the formulation of broader rules to be applied across the board).

<sup>104</sup> *See id.*

<sup>105</sup> *See Scott, supra* note 43, at 433.

<sup>106</sup> *Id.* at 303; Zepp, *supra* note 29, 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.”).

<sup>107</sup> *See 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.”).

<sup>108</sup> David Nelken, *The Future of Comparative Criminology*, in *THE FUTURES OF CRIMINOLOGY* 220, 221 (David Nelken ed., 1994).

<sup>109</sup> Garland, *supra* note 50, at 148; *see also* Michael S. Scott, *Disorderly Youth in Public Places*, <http://www.proboticsamerica.com/COPS/pubs/COPS05.pdf>. (last visited Aug. 9, 2006) (“Communities are often

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[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 the practical recipes of the commercial sector managers and the worked-out rationales of criminologists and government policymakers—that one must locate the strategy or preventative partnership and the habits of thought and action upon which it depends.<sup>110</sup>

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.<sup>111</sup> 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) lie in changes in communities.<sup>112</sup> Yet, when he discusses the tangible manifestations of the changes in late 20<sup>th</sup> and early 21<sup>st</sup> century, it is as if extra-community entities have hijacked the institutions in question from the very society that make such institutions possible.<sup>113</sup> Most importantly for the issue with which the present paper is concerned, while he 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.<sup>114</sup>

Thus, one of Garland's arguments is that changes in late modernity "eventually resulted in cultural effects."<sup>115</sup> Culture effects and affects the changes that have occurred.<sup>116</sup> Most importantly for the model presented in this paper, 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.<sup>117</sup>

Similarly, Shapland notes that "the burdens and benefits of a particular technique for preventing or controlling crime (such as SCP) fall on different parts of society."<sup>118</sup> She calls for

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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.”).

<sup>110</sup> Garland, *supra* note 50, at 161.

<sup>111</sup> *Id.* at 161-65, 201-03.

<sup>112</sup> *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 (Fall 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.”).

<sup>113</sup> Garland, *supra* note 50, at 131-38.

<sup>114</sup> *Id.* at 201-03.

<sup>115</sup> *Id.* at 163.

<sup>116</sup> *Id.* at 158-63.

<sup>117</sup> *Id.* at 163-65.

<sup>118</sup> Joanna Shapland, *Situational Prevention: Social Values and Social Viewpoints*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, *supra* note 2, at 113, 115.

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“examin[ing] what SCP looks like from each perspective.”<sup>119</sup> She thus points out that 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.<sup>120</sup>

Shapland’s and Garland’s arguments point out an important issue in terms of evaluating the benefits, costs, ethics and other consequences of SCP: these cannot be evaluated in a vacuum; one must evaluate these from one or more perspectives.<sup>121</sup> However, their arguments also are illustrative of the fact that multi-perspective analyses of pros and cons 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.<sup>122</sup>

As important as the above insights are, the analysis of community variability that the literature has generally ignored is equally important. The role that a given mass private property plays in a community will be highly dependent not only on the characteristics of the property<sup>123</sup> 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.<sup>124</sup> The role that such a mass space occupies is also dependent upon 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 as well as other factors. Garland acknowledges, “SCP has no fixed ideological meaning or determinate fixed political affiliations,”<sup>125</sup> while Shapland argues that SCP does not itself contain the ethical boundaries and constraints necessary to set acceptable limits to the choice of technique to apply, SCP merely provides a palette of techniques.<sup>126</sup> Thus the impact of SCP in mass private space can be fixed 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.<sup>127</sup> Many scholars

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 115-16.

<sup>121</sup> *See id.*; Garland, *supra* note 50, at 163.

<sup>122</sup> *See id.*

<sup>123</sup> *See generally* Wakefield, *supra* note 11, 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 be the subject of other SCP measures.

<sup>124</sup> 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 on city streets than in a warmer climate. So too, one might expect that in a cold weather city that there would be more mass private properties, thus providing patrons (and thus potentially excluded individuals) alternative locations. Conversely it might be argued that in a cold weather city in winter exclusion from a mass private space may be more oppressive since the excluded person may have 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.

<sup>125</sup> Garland, *supra* note 44, at 14.

<sup>126</sup> *See* Shapland, *supra* note 91, at 121.

<sup>127</sup> *See id.*

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seem to be aware of these facets but do not look to them as a source for making, to paraphrase Shapland, difficult choices.<sup>128</sup>

The meaning and impact of SCP measures employed in a given space will be both objectively and subjectively contingent upon the communities where the space is located and upon the ones it serves. They are likely to be objectively contingent, in the sense that the characteristics of the community, the mass private space in question, as well as the nature of the SCP employed will have different impacts in different communities.<sup>129</sup> The effects are also subjectively contingent, as the individual and collective experiences of a given community will be a partial determinant of how members of that community experience SCP measures that an owner/operator of mass private space employs.<sup>130</sup>

For example, consider the objective and subjective implications of excluding people under a certain age (unless accompanied by an adult) from a shopping mall that 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, but that is located in a community where there are other choices available for young people (perhaps other mall that 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).<sup>131</sup> Objectively and subjectively speaking, the positive impact on the seniors and others who have limited mobility may be quite strong while the negative impact on the excluded teenagers small. The former group may be particularly suspect to crime and excluding youths, while painting with a broad brush, may lower the risk of the elderly and physically challenged being victims of crime (objective) and their feeling unsafe (subjective) while at the mall.<sup>132</sup> And if such SCP is not employed, the seniors and those with disabilities will have to choose between forgoing 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), since they are not being kept out of a space to which their peers have access and are being kept out for the protection of the elderly, a purpose that is arguably not a stigmatizing one for youths.

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.<sup>133</sup> 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, which are too far away for the excluded youth to reach, but that

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<sup>128</sup> *See id.*

<sup>129</sup> Kleinig, *supra* note 58, at 48; von Hirsch & Shearing, *supra* note 2, at 89.

<sup>130</sup> Shapland, *supra* note 91, at 117.

<sup>131</sup> *See* Alysa B. Freeman, *Comment: Go to the Mall with my Parents? A Constitutional Analysis of the Mall of America's Juvenile Curfew*, 102 *DICKINSON LAW REV.* 481, 481-82 (1998).

<sup>132</sup> *Cf.* Zedner, *supra* note 6, at 15 (discussing situational crime prevention as involving steps that attempt to make people safer as well as to 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).

<sup>133</sup> *See* Freeman, *supra* note 231, at 481-482.

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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 have been foreclosed from taking advantage of 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). Thus, 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 shows that objectively and subjectively the consequences of the exclusionary policy will be different from the standpoint of both excluded and non-excluded/protected groups.

The above 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 . . . . 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 work through the ethical implications of their chosen SCP activities.<sup>134</sup>

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.<sup>135</sup>

There is another reason that calls for making the community the primary regulator of SCP in mass private space. SCP involves first order issues as to what weight should be accorded certain values.<sup>136</sup> There is no objective answer to how much weight the safety of easily victimized members of society (or their subjective feeling of security) should be given relative to that of the right of access to community members that are easily marginalized.<sup>137</sup> 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;<sup>138</sup> the interest of people to hang about in a large group in a fixed area versus the interests of those who wish to walk comfortably around the

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<sup>134</sup> Shapland, *supra* note 91, at 121-22; *see also* Johnson, *supra* note 42, 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, CMTY. CRIME PREVENTION 7 (1973)).

<sup>135</sup> In the next subsection and in Section V, I will further explore the issue of what constitutes the relative community and explore issues about decision-making, representation and problems of externalities.

<sup>136</sup> *Cf.* Sunstein, *supra* note 4, 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).

<sup>137</sup> *Cf. id.*

<sup>138</sup> 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. While there may be concerns about a private interest quashing expression, I submit that even in post-modern society, government maintains a monopoly on enforcement that is qualitatively and quantitatively different than any private interest.

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space, as well as the interest of the owners of various businesses in not having the entranceways to their shops impeded; the interest that teenagers have 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/operator 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<sup>139</sup> may clash with the interest of those who wish to take advantage of the space.

Also, it is at the community level that crime and SCP manifests itself.<sup>140</sup> While there is a myriad of data on aggregate criminal activity, crime and the fear of such 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.<sup>141</sup> Similarly, while the emergence of SCP or mass private space can arguably be examined across nations or as a phenomenon of late modernity,<sup>142</sup> 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.<sup>143</sup> This community of people is thus affected and in this sense are part of the community that should be given a say as to the nature and extent of SCP in mass private property.

In addition, within certain bounds, discussed in Section III, *supra*, and in Section V, *infra*, 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 ones that are important for the community to decide.<sup>144</sup> 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 manner in which spaces that may be the major public place of interaction deal with people who may

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<sup>139</sup> While pecuniary concerns may be overwhelmingly the focus of owners/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 and insensitive one. For example, 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 themselves ought to be protected lest the government have the power to allow the expression of one viewpoint over another. *Hill v. Colorado*, 120 S. Ct. 2480, 2492-93 (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, *Message of Peace on 2 Shirts Touches off Hostilities at a Mall*, N.Y. TIMES, March 6, 2003 (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 a war in Iraq).

<sup>140</sup> Cf. Scott, *supra* \_\_\_, at 417 (“[I]t is the community, as opposed to say, territory that [police] are policing [and] the interests of the community, and not just the government, that the police ought to take into account when policing.”).

<sup>141</sup> Garland, *supra* note 44, at 12.

<sup>142</sup> Garland, *supra* note 50, at 159; von Hirsch & Shearing, *supra* note 2, at 80-81.

<sup>143</sup> Garland, *supra* note 44, at 12.

<sup>144</sup> See Duff & Marshall, *supra* note 23, 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”).

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wish to enter the space as well as with how these spaces deal with the risks to and fears of those who it invites to enter.<sup>145</sup>

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.<sup>146</sup> This argument treads closely to discussing mass private space as though it were public space. However, there is a key distinction. Under the proposal put forth herein, communities and/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 in Section III, above, and detailed in Section V, below, distinguish my model from one that treats mass private property as purely public space.

The community role in regulating SCP on mass private property is narrower in some sense and broader than others than direct community and/or the state regulation of public spaces. It is narrower for the reasons that as discussed in Section III, above, and V, below, that a mass private property owner/operator may (and ought to) be given more leeway to control access and activity in her space than the government may on public property. It is broader in the sense that the community is only putting limits (and the limits it may impose are bounded) on what the mass private property owner/operator may do vis-à-vis his or her space (but will inevitably be giving the property owner leeway since he or she may do less than the community allows or more than the community requires), not regulating the conduct itself. And it is qualitatively different since the community is acting directly only upon the SCP measures that the owner/operator might apply in the mass space, not upon the patrons themselves, as it would be in regulating conduct in public spaces.

### **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 also is put to use much as public property is, and also that such regulation should be undertaken by the community, in this section the article spells out 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 about the way they formulate 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 categories: (1) boundaries; (2) scope of relevant populations; and (3) mechanisms.

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<sup>145</sup> *See id.*

<sup>146</sup> In referring to the expressive use of punishment, I do not mean in the sense that the community affirmatively takes steps to punish with the purpose of expressing itself. Rather, I am putting forth the view that when society punishes, whatever the impetus for such, that it inevitably expresses itself. Durkheim, *supra* note 9, at 79-80.

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### A. Boundaries

As used here, boundaries provide upper and lower limits on what communities may allow or forbid regarding SCP in mass private property. This is one way in which mass private property's dual public/private nature is important.

#### 1. Existing Boundaries

The United States Supreme Court has essentially delegated the power to rule on the right to exclude (and employ other forms of SCP) from mass private space to Congress and to states.<sup>147</sup> As such, in the US, regulation of SCP has taken place in the form of federal regulation such as the 1964 civil rights act as well as through state court rulings and state legislation.<sup>148</sup> 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.”<sup>149</sup>

#### 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 subsection provides a framework for substantive limits or boundaries.<sup>150</sup> Procedural limitations inhere in the discussion in subsequent subsections of the role that communities should play in being the primary arbiters of SCP in mass private property.

The substantive boundaries are rooted in the dual nature of mass private space as both public and private property.<sup>151</sup> As private property, there are certain rights that the owner retains

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<sup>147</sup> See Klear, *supra* note 6, at 589; compare *Lloyd, with Pruneyard Shopping Center*, 447 U.S. at 81.

<sup>148</sup> See Singer, *supra* note 2, at 1373-83 (discussing various state and federal statutes and cases involving exclusion and access to places of public accommodation).

<sup>149</sup> Gray & Gray, *supra* note 53, at 76-77. By way of contrast, the United Kingdom has different boundaries in place than the US (and most other common law countries). Gray & Gray, *supra* note 53, at 60; compare *Rawlins*, 2 E.G.L.R. 130 (Eng) with *PruneYard Shopping Center*, 447 U.S. 74. Under *Rawlins*, in the UK the owner of mass private property can arbitrarily exclude whomever he likes and need not make a showing of good cause to do so. *Rawlins*, 2 E.G.L.R. 130, [134h-134J] (Eng.); Gray & Gray, *supra* note 53, at 48-49. This holding “contrasts remarkably with the legal stance now adopted in many parts of the common law world with respect to quasi-public property.” 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 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.

<sup>150</sup> See Duff & Marshall, *supra* note 23, at 19. (Discussing ‘side constraint consequentialism’ in connection with SCP). Under this view, 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.’ Similarly, in my formulation for regulating SCP on mass private space, boundaries trump community preferences.

<sup>151</sup> See Section III, *supra*.

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irrespective of the fact that she has opened the space to general public use.<sup>152</sup> Unlike public property, the owner has made an investment in the property and also has a personal stake.<sup>153</sup> 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.<sup>154</sup>

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 being put to such use.<sup>155</sup> These limitations will not be the same as that which would apply were the property truly public, where the issue would concern unacceptable government coercion. Rather, while drawing to some 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.<sup>156</sup> 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.<sup>157</sup>

The concept of private property has played a long and important role in the legal history of the United States.<sup>158</sup> At the same time, modern court cases and commentary recognize that private property should not 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 exist, this calls only for an ongoing re-evaluation 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.<sup>159</sup> Moreover, treating mass private property as public property has severe fairness and economic consequences.<sup>160</sup> Those who have

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<sup>152</sup> See generally Epstein, *supra* note 2; Callies and Breemer, *supra* note \_\_\_\_.

<sup>153</sup> See generally *id.*

<sup>154</sup> Von Hirsch, *supra* note 38, at 74. To the extent that the community would limit the mass private property's 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.

<sup>155</sup> Von Hirsch, *supra* note 38; von Hirsch & Shearing, *supra* note 2, at 85.

<sup>156</sup> See *Pruneyard Shopping Center*, 447 U.S. at 81.

<sup>157</sup> Von Hirsch & Shearing, *supra* note 2, at 86; *Marsh v. Alabama*, 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.").

<sup>158</sup> Callies and Breemer, *supra* note \_\_\_\_, at 39.

<sup>159</sup> See *Pruneyard Shopping Center*, 447 U.S. at 81; Vincent, *supra* note 2, at 221.

<sup>160</sup> See generally Epstein, *supra* note 2, at 48-50.

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invested in private property would effectively lose their investment; those who might wish to invest in mass private property might be stripped of their incentive to do so.<sup>161</sup> 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 traditional view that inherent in the concept of private property is the right to exclude does play a role in setting some boundary upon the limits that communities can impose on SCP measures that owner/operators may employ.<sup>162</sup> On the other end are boundaries on what SCP exclusion and behavioral standard 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.<sup>163</sup> So, not only may an owner/operator 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 use), but arguably the owner/operator should not be able to exclude groups generally afforded less protection than those just listed, such as teenagers or the homeless, without at least providing a sound basis for doing so.<sup>164</sup>

These bases are illustrative, not comprehensive and it is not possible to enumerate all the bases for exclusion that fall beyond this boundary. What is important to note is that such a boundary clearly exists but given the broad range that the model proposes in terms of community regulation the territory that this boundary demarcates (just as that which the other boundary, limiting community incursion onto a mass private space owner's property rights) is quite limited; the bulk of the substance of what SCP measures an owner/operator 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 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 my 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.

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<sup>161</sup> Richard Epstein, *Protecting Property Rights with Legal Remedies: A Common Sense Reply to Professor Ayres*, 32 VAL. U. L. REV. 833, 837 (1998).

<sup>162</sup> Cf. *Pruneyard Shopping Center*, 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 along to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”) (internal quotes and cites omitted).

<sup>163</sup> See Vincent, *supra* note 2.

<sup>164</sup> See Ely, *supra* note 90, at 76 (citing *U.S. v. Carolene Prods. Co.*, 304 U.S. 152-53 n.4 (1938) (“Paragraph three [of the *Carolene Products* footnote] 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.”)).

## 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. While actual location of mass private property provides a starting point for defining the relevant community that should regulate SCP on such property, it does not end the inquiry.

There is no exact demarcation of the bounds of community that applies in all circumstances.<sup>165</sup> Rather, there are two primary criteria by which to evaluate scopes of communities: geographic and demographic.<sup>166</sup> A key necessity for the validity of my argument is 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.<sup>167</sup> Only if the affected communities, viewed from both of these aspects, have a place at the table, will it be possible for regulation of SCP to take account of the costs and benefits that SCP measures will have on the affected population.<sup>168</sup> Moreover, only if such representation occurs will regulation of SCP serve the further step of expressing and reinforcing the views, preferences, ethics and mores of the relevant communities.

### 1. Geographic Community

A mass private space is located in a particular city, town and village will likely serve people from adjacent and even non-adjacent municipalities.<sup>169</sup> Therefore, simply nominating the governing unit wherein the property is located as the relevant community will not satisfy the geographic component of my analysis. Rather, all those whom SCP in mass private space is likely to affect should be party to formulating regulations.<sup>170</sup>

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<sup>165</sup> See Scott, *supra* note 43, 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.”).

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

<sup>168</sup> 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.”).

<sup>169</sup> See Shapland, *supra* note 91, at 117 (discussing the burden of exclusion “from the point of view of local communities near the mall”); Robert White, *Youth Crime, Community Development, and Social Justice, Youth, in CITIES: A CROSS-NATIONAL PERSPECTIVE* 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.”); Johnson, *supra* note 42, 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.”).

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The above issue raises two subsidiary ones: (1) how to determine the geographic dimensions of the relevant community; (2) once the first determination is made, constructing a mechanism that effects the proper representation. There is no exact relevant community.<sup>171</sup> There will be no way to determine precisely the location of the populace who wishes to frequent a particular mass private property.<sup>172</sup> 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) in order for the community to be deemed sufficiently important vis-à-vis the space in order to be part of the decision making process does not lend itself to a precise numerical answer.<sup>173</sup>

Certainly usage of mass private space does not have to be undertaken by anything close to 100% of a community in order for that community to be relevant, since such a standard would effectively rule out all communities, including the one in which the property is located.<sup>174</sup> 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 my model, as this will likely include such a broad swath that the result would swallow the concept of a communitarian model of SCP regulation.<sup>175</sup>

Nonetheless, to say that a precise answer cannot be provided in the abstract is not to admit that no meaningful analysis of the relevant geographic community can be undertaken.<sup>176</sup> Although it is not possible to gage 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.

Deciding how much a given community need use a mass private space in order to be given a say in regulating SCP thereon is essentially a first-order policy question not something for which there is a precise answer, such as 30%.<sup>177</sup> 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.

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 a final package. As such, if policy makers do adopt the approach herein advocated that over time the question of whether a community should or should not be included will become a workable, even if always a contested, matter.

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<sup>170</sup> *See id.*

<sup>171</sup> *See discussion supra*, at notes 166-168.

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

<sup>176</sup> *See Scott, supra* note 43, at 435 (discussing possible ways in which to demarcate the boundaries of a community).

<sup>177</sup> *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).

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Second, the community wherein the mass private property is located should not decide which communities should be allowed input into regulation of SCP in such space.<sup>178</sup> There is obviously a conflict of interest since 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.

### 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.<sup>179</sup> However, identifying and including marginalized groups will be an easier task than delineating relevant geographic communities.

Groups such as racial and ethnic minorities and the poor, assuming they are part of the geographic community, will 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.<sup>180</sup> Beyond this, however, there is surely an issue as to whether these groups may not have sufficient representation either with regard to a direct referendum or in terms of electoral politics for their concerns to be heard.<sup>181</sup> This is an issue I address in the next subsection. Also, there are some groups that will fall in the geographic community who may face resistance to their inclusion in direct community decision-making or to their choosing community representatives.<sup>182</sup> The groups that stand out in this regard are the homeless and/or vagrants, persons with criminal records and youths.<sup>183</sup> SCP may particularly target these groups.<sup>184</sup>

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<sup>178</sup> Cf. Ely, *supra* note 90, 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).

<sup>179</sup> Von Hirsch & Shearing, *supra* note 2, at 88-90; Shapland, *supra* note 91, at 117; Wakefield, *supra* note 11, at 130-31; Gray & Gray, *supra* note 53, 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 (March 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 naive.”).

<sup>180</sup> Cf. Ely, *supra* note 90, at 75-76 (discussing the famous *Carolene Products* footnote, seen as ensuring that insular minorities are not excluded from representative decision-making).

<sup>181</sup> *See id.*

<sup>182</sup> *See* Wakefield, *supra* note 11, at 130-131;

<sup>183</sup> *See id.*

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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 those who are without established addresses may be *de facto*, even if not *de jure*, disenfranchised. Also, those who have criminal records, also a frequent target of SCP,<sup>185</sup> may also 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 my analysis further will have to grapple if attempts to implement the proposed approach are undertaken. However, the problems about lack of representation of the groups just mentioned are not particular to SCP (it is true for any issue, some of which may affect such groups more severely than SCP measures in mass private space).<sup>186</sup> It may be that in cases the question of lack of proper representation will require politically insulated bodies to intervene (as discussed in the next subsection). However, depending upon the circumstances, the interests of these persons may be protected by others as they have been with regard to issues other than SCP and mass private space.

Parents certainly have a direct interest in the options open to their children. Various groups advocate on the behalf of criminals, ex-cons and the homeless. Moreover, communities may look beyond narrow self-interest in setting policies, in that “people may. . .want to. . .act fairly. . .and to be seen as acting fairly. . .[and] may sacrifice their. . .self interest in order to [do so]. . . .”<sup>187</sup> The extent to which communities will take these interests into account will probably vary from community to community. My expectation is that my approach will require some intervention, but not exclusive control, by extra-community decision-makers, whether these are courts or political actors that are beholden to a wider constituency.

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<sup>184</sup> See *id.*; Gray & Gray, *supra* note 53, at 66; Michael Myers, *Roundtable: Law and Disorder: Is Effective Law Enforcement Inconsistent with Good Police-Community Relations?*, 28 *FORDHAM URB. L.J.* 363, 391-92 (December 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.”); Mulligan, *supra* note 33, 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.”).

<sup>185</sup> Wakefield, *supra* note 11, at 131-32; Jerry Kang and Dana Cuff, *Pervasive Computing: Embedding the Public Sphere*, 62 *WASH & LEE L. REV.* 93, 122 (Winter 2005) (“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.”).

<sup>186</sup> Consider issues such as the age of consent for sexual relations, the drinking age and 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.

<sup>187</sup> 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.<sup>188</sup> The framework does include substantive dimensions, in terms of boundaries as well as mechanisms for defining the relevant community.<sup>189</sup> 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 harkens back to the procedural issue referenced in Section IV and also addresses matters alluded to in the preceding subsection regarding the concern that even if technically allowed to participate in decision-making, certain populations in the community affected by SCP on mass private property may not be effectively represented. This may occur with SCP on mass private property as well as with regard to any issue that affects under-represented groups since “[n]o matter how open the process, those with the most votes are in a position to rate themselves advantages at the expense of others, or otherwise refuse to take their interest into account.”<sup>190</sup>

As mentioned above, the fact that a given group is under-represented does not necessarily mean that its interests will be ignored. This is not only an important fact in itself, but also a prelude to determining when deliberative community decisions may disregard legitimate interests of marginalized groups. There are two reasons that seemingly under represented 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.<sup>191</sup> This is because it may be the case that people having different underlying beliefs or higher order preferences may agree on a lower level outcome because this outcome is consistent with the higher order preference of each group.<sup>192</sup> An example of this phenomenon (what Sunstein refers to as incompletely theorized agreements)<sup>193</sup> from outside criminology is two people agreeing that some form of elective abortion should be legal, where one person reaches this outcome because he believes that a woman’s right to reproductive choice is a fundamental aspect of a free society while the other person does not believe this but concludes that if made illegal, abortion would still take place at the same rate on the black market, thereby not reducing the number of abortions while increasing the risk to woman undergoing the procedure. An example from the mass private property/SCP field involves those under eighteen who may wish access to a given mass private space. Their parents may wish that they have access, since they may see this as a good social outlet and a safe setting. Store owners as well as other members of the community

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<sup>188</sup> *Independent Commission on Policing for Northern Ireland*, *supra* note 74 (setting forth a model whereby ‘the community participat[es] in its own policing’ as an example of an area in which a procedural solution was proposed).

<sup>189</sup> See discussion *supra*, at subsections V.A and V.B.

<sup>190</sup> See Ely, *supra* note 90, at 135.

<sup>191</sup> CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 137 (1996).

<sup>192</sup> See *id.*

<sup>193</sup> See *id.*

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may conclude that excluding people based upon their age is bad for the community because it excludes a portion of the population that will spend money within the community and if excluded, will spend the money outside the community (to the detriment of merchants and others in the community that may reap tax revenue or simply a stronger economy in the community from the purchases of this under represented group).<sup>194</sup> 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 in their self-interest or that from which they get utility is not necessarily narrowly defined.<sup>195</sup> Thus, “people, in their capacity as political actors may attempt to satisfy altruistic or other-regarding desires which diverge from self-interested preferences. . . .”<sup>196</sup> Thus, to some degree people get utility out of actions or supporting policies that benefit others and not taking actions or opposing policies that harm others.<sup>197</sup> The extent of this obviously varies from person to person and from issue to issue. Thus, some people may donate a large percentage of their income to charity while others will not. In the field of both civil rights and criminal justice, the fact that popularly elected governments have implemented policies that put limitations on punishment or protect certain groups from discrimination is an example of this.

The US (as well as the UK 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.<sup>198</sup> 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. However, these points demonstrate that one cannot simply rebut the call for community regulation of SCP on mass private property by pointing out that in any community there are groups that are in the minority that will be harmed by policies implemented by the majority.<sup>199</sup>

With the above in mind, the issue becomes to what extent within the boundaries discussed above should a community, as defined it herin, be the sole arbiter of what SCP measures may be

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<sup>194</sup> 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.

<sup>195</sup> CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 22 (1997); 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. . . . The 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.”).

<sup>196</sup> *Id.*; see Posner, *supra* note 295, at 46.

<sup>197</sup> See *id.*; Posner, *supra* note 295, at 46.

<sup>198</sup> Garland, *supra* note 50, at 132.

<sup>199</sup> See Ely, *supra* note 90, at 75-76.

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taken by an owner/operator of mass private space.<sup>200</sup> The model presented here posits that under ideal conditions, members or representatives of the community should formulate such regulation. However, as previously alluded, communities and/or their representatives will not always function properly or fairly.<sup>201</sup>

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 section opened.<sup>202</sup> 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.<sup>203</sup> And as mentioned in Section III, one of the guideposts for this portion of the analysis is examining the dual aspects of mass private space as private property and also as a facility generally open to the public in a manner that other private property is not.<sup>204</sup>

To be clear on this point, to conclude that a decision of a community harms some while benefiting others based upon differences in preferences is not sufficient to say that the community decision-making mechanism is not functioning properly.<sup>205</sup> To so conclude would be to cast aspersion 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 established above. Thus, at this stage one need not be concerned with policies that no matter how popular violate fundamental principles such as that one should not be denied access to a mass private space based upon his race. Rather, the problem must be within the mechanism itself, not in the ultimate outcome.<sup>206</sup> One may look at the outcome as evidence of mechanistic dysfunction.<sup>207</sup> 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.<sup>208</sup> 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

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<sup>200</sup> Cf. Scott, *supra* note 44, at 435 ("Determining what is a community and who speaks for it is more than just a semantic exercise.").

<sup>201</sup> See discussion *supra*, at notes \_\_\_\_\_. [basically earlier part of section V and some of section IV]

<sup>202</sup> See *id.*

<sup>203</sup> Ely, *supra* note 90, at 135.

<sup>204</sup> See section III, *supra*,.

<sup>205</sup> See Ely, *supra* note 90, at 135.

<sup>206</sup> *Id.* at 76; *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

<sup>207</sup> See Ely, *supra* note 230, at 73-74; Adam Crawford, *The Partnership Approach to Community Crime Prevention: Corporatism at the Local Level?*, 3 SOCIAL AND LEGAL STUDIES 497, 502 (1994) (noting that some private groups may hold particular sway, especially of public/private partnerships, which play an important policy formation role in late modernity).

<sup>208</sup> Ely, *supra* note 230, at 135.

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determination of such 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.<sup>209</sup>

If within boundaries the community decision-making process is not properly functioning, then it is necessary to have recourse to remedial measures. Once again, there is 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 substantive standards.<sup>210</sup> 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.<sup>211</sup>

A third possibility, most associated with Ely, is for courts to intervene, not to impose their own substantive standards, but to “police the process or representation.”<sup>212</sup> Under this approach, which Ely asserts is the basis behind much important American Supreme Court jurisprudence, courts imposes “procedural protections. . . [that ensure] 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 all those who their decisions affect.”<sup>213</sup> 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. At the same time, this approach is the most ambitious one put forth here.

Regarding the other two approaches, each has advantages and disadvantages vis-à-vis 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.<sup>214</sup> 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 representative of it.<sup>215</sup>

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. However, this latter disadvantage is the very reason

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<sup>209</sup> *See id.* at 75-76.

<sup>210</sup> J. Skelly Wright, *Professor Bickel, the Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769 (1971) (“The ultimate interest of [courts], I suggest, must be goodness. . .”).

<sup>211</sup> *See Heart of Atlanta Motel, Inc. v. U.S.*, 85 S. Ct. 348 (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 extra-community mechanism of effecting each of these aspects of the model.

<sup>212</sup> Ely, *supra note* 230, at 73.

<sup>213</sup> *Id.*

<sup>214</sup> *Cf.* Cass R. Sunstein, AFTER THE RIGHTS REVOLUTION 58 (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).

<sup>215</sup> *Cf. id.* at 34 (discussing the issue of individual preferences and the challenges that regulation poses in fulfilling such).

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why this option is a possibility.<sup>216</sup> 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.

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<sup>216</sup> *Cf.* Sunstein, *supra note* 203, at 37 (discussing how groups that disagree on fundamental first order issues might nonetheless reach consensus on important outcomes).