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Boundaries of Exclusion

Geogrette Chapman Phillips

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Georgette Chapman Phillips[*]

My boundaries enclose a pleasant land;
indeed, I have a goodly heritage
Psalm 16 v. 6

I. INTRODUCTION

Dale Whitman is a giant in the field of property law. Generations of law students have read from his texts, hornbooks and treatises. I am honored to be invited to participate in this celebration of his scholarship. We all owe him a great debt for his comprehensive and expansive works in the field. I would humbly like to work my own "patch of land" in this field by taking the traditional concepts of individual property rights and molding them around the community.

This article is a story about boundaries and exclusion and about how – or whether – there is a community based right to exclude nonresidents. The right of the individual to own property, to defend that property and to exclude others from entering that property are sticks in the bundle of rights enshrined in US property law.[1] The limitations on that exclusion are determined by the creation of a legally defined property line that bounds these rights. That part of our story is relatively straightforward. However, we do not live our lives in isolation. We surround ourselves with a chosen community that, in large part, serves as a reflection of self-identity. So, to take this one step further, the complexity grows when we raise the questions of if, when and how a community (i.e., a group of individuals bound together by owning property in the same political jurisdiction) can exercise the same type of property rights,

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* David B. Ford Professor of Real Estate Wharton School, Professor of Law University of Pennsylvania Law School. Professor Phillips previously published under the name Georgette Chapman Poindexter. The author gratefully acknowledges the hard work of her research associate Pam Loughman with assistance from Leslie Schwab, Lindsay Spadoni, Xun Zeng and Robert Heller. Thanks also to all who commented on drafts of this paper including Vernon Francis, participants in the Festschrift in honor of Dale Whitman and the participants in the Wharton Real Estate Seminar series. Errors, omissions, and egregious misstatements, however, remain my own.

1. The United States Supreme Court has recognized the right of exclusion as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).

particularly the right to exclude which would prohibit entry for non-residents.[2]

The rights of a community will not be defined by a private property line. Rather they will be determined by the legal boundary of the local community. In this fashion politically created jurisdictional boundaries would become imbued with notions of private property rights. This line of reasoning forces us to delineate the intersection between traditional property law (the law of the individual) and local government law (the law of the community).

Is there such a thing as "communal ownership" that will bring to bear the same rights to exclude and defend? If so, where do these rights grow from? Fashioning such a right requires a joining of private property rights with public municipal rights. Another way of viewing the exercise is to permit a transitivity of rights. Meaning, if a citizen can defend and exclude based on individual property rights, can a community that is composed of citizens likewise defend and exclude non-community members from community property? What are the implications here on notions of civic duty?

Moreover, if these rights exist, we then are faced with placing limitations on such rights. Municipal boundaries, although superficially quite porous, reify when utilized to differentiate residents from non-residents. Oftentimes these politically drawn distinctions become social artifacts that serve as a proxy for division of self-identification. The porous nature of these boundaries will be tested by examining their power to impede freedom of movement in the same way that individual property lines have the power to restrict free movement.

I will contextualize this somewhat theoretical exercise in a real world event. The Crescent City Connection is a bridge across the Mississippi River spanning between New Orleans and the West Bank town of Gretna, Louisiana.[3] In the aftermath of the devastation of Hurricane Katrina in 2005 people trapped by decimated buildings and rising flood waters within New Orleans searched for routes to safety. Two days after Katrina struck, several hundred people tried to cross the Crescent City Connection to escape the flooding in New Orleans. They were met by officers of the Gretna police department who warned them to turn back. When the evacuees continued across the bridge the officers fired warning shots, reiterating the command to turn back.

The police officers contend they undertook their action based on concerns for public safety in Gretna. However, there was no sign that the people trying to cross the bridge were looters, rioters or hooligans. Rather they were people simply trying to flee to dry land. This brings to focus the kernel of the question presented in this paper: can a community (in this case its police department) prevent non-citizens from entering the community? If so, what are

2. As will be elaborated further, by exclusion I do not refer to whether certain people are prevented from becoming residents of a community. Rather, I draw the distinction between residents and non-residents having access to community property.

3. It is on U.S. Highway 90, also known as the Crescent City Connection.

the limitations on such exclusion? Specifically this paper will examine the parallelisms and divergences from traditional property rights when "ownership" is in the hands of a community versus an individual. Local government lines, generally thought of as porous, solidify into barriers when they impede the fundamental freedom of movement.

The first order of business is to sketch out the relevant sources of legal power of both the individual and the community in this situation. Namely, first property law and then local government law will be discussed to set the framework under which each of our actors can deal with others vis-à-vis real property rights. In undertaking this comparison, a natural intermediate step will be to consider the rights of private homeowners' associations.

The next step in the analysis is demarcating the limitations on the right to exclude. People (and communities) certainly have rights. But along with the rights come correlative responsibilities. In other words, do the political boundaries that create local communities overpower any moral (as opposed to legal) responsibility to those outside of the boundaries? This question will be addressed in both a descriptive and a normative fashion to craft the limitations on exclusion. Although there is a natural inclination to look to the cases on exclusionary zoning in answering these questions, this impulse should be restrained. Exclusionary zoning rests on the notion of how and when a community can prevent an outsider from becoming a member of the community, i.e., exclusion from ownership. That is not the issue here. Rather, the focus of this article will remain on the community's right to exclude outsiders from using community property. The right of owners of beach front properties to completely exclude or impede access provides an ideal context for discussion.

All of this comes together when we examine the events that transpired in New Orleans after Hurricane Katrina. By grafting the normative construct onto a real life problem the structure can be tested from a theoretical as well as a practical perspective.

II. THE RIGHT TO EXCLUDE

The right to exclude others is one of the incidents of property ownership. According to one leading school of thought, property ownership is comprised of numerous "sticks in a bundle of rights."[4] Taking this notion a step further, it has been argued that the right to exclude others is the most

4. Hohfeld's theory of nominalism holds all the "sticks" to be of equal importance. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 745-47 (1917). The sticks "represent[] a societal balance of interests, which should be subject to constant re-evaluation and revision in light of current needs and norms." Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 539 (2006).

important stick in the bundle, the "irreducible core attribute of property."[5] It is a core value of private property ownership that the law will support a landowner's right to exclude.[6] The United States Supreme Court affirmed this view in *Kaiser Aetna v. United States*, wherein the right to exclude is described as "so universally held to be a fundamental element of the property right."[7] More recently in *Lingle v. Chevron USA, Inc.*, the Court stated the right to exclude is "perhaps the most fundamental of all property interests."[8]

There is ample historical evidence for the right to exclude as central to the notion of property ownership. Primitive land rights systems granted the right to exclude via the usufruct, described as "an exclusive right to engage in particular uses of the land that is nontransferable and terminates when the owner dies or ceases the use."[9] An influential history of land regimes by Bob Ellickson concludes that the usufruct was probably the earliest form of ownership of land,[10] lending further support to the essentialism of the right to exclude.

A. The Tort of Trespass

The correlative remedy for infringement on the right of exclusive possession is the tort of trespass.[11] It presupposes exclusivity in that no one (other than the owner) may enter. Historically an aspect of remedying breaches of the peace, trespass protects the right to possession.[12] Although certainly not the only instance where a tort is used to protect a real property interest,[13] it is fascinating to contemplate the concept that the right to possession extends beyond property-based remedies such as ejectment and/or evic-

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5. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB L. REV. 730, 734 (1998) (discussing philosophers Blackstone, Benthem, Cohen and the "single variable essentialism" view of property).

6. Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1680 (2001).

7. 444 US 164, 179-80 (1979).

8. 544 U.S. 528, 539 (2005).

9. Merrill, *supra* note 5, at 745-46. *See also* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 459 (2002).

10. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1365 (1993).

11. *See, e.g.*, Cooper v. Horn, 448 S.E.2d 403, 406 (Va. 1994); Rosenblatt v. Exxon Co., U.S.A., 642 A.2d 180, 189 (Md. 1994).

12. *See* Melissa Morris Cresson, *The Louisiana Trespass Action: A "Real" Problem*, 56 LA. L. REV. 477, 484 (1995).

13. Harrison v. Hous. Res. Mgmt., Inc., 588 So. 2d 64 (Fla. Dist. Ct. App. 1991) (appellate court reversed and remanded case for new trial where tenants alleged landlord's negligent building security allowed intruders to enter their apartment and inflict personal injuries, and sought damages for pain and suffering and medical expenses).

tion (which also protect the right to exclusive possession). A tort remedy personalizes the harm of invasion onto one's property by imposing personal as well as property damages.[14]

As it relates to the arguments set forth in this paper, one of the most interesting aspects of the tort of trespass is that it is a strict liability tort.[15] Therefore it does not require a showing of harm. Simply invading (or causing something to invade) the private property of another constitutes trespass.[16] In fact, even entry by mistake constitutes trespass.[17] Possession and unauthorized entry form the prongs of the prima facie proof of the tort.[18]

This creates a powerful right in the hands of the possessor of land and a fundamental tenant of property law – possession entitles exclusion. It negates other, more communal, interpretations of property.[19] Although there may be exceptions for necessity and exigency[20] the presumption is clear: a person may not enter the land of another without permission. In this way the tort of trespass helps build walls - in both a real and hypothetical sense - around property.[21]

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14. A person who enters land in possession of another, whether intentionally, negligently, recklessly or resulting from an ultra-hazardous activity, and interferes with the possessor's right to exclude others from the land is subject to liability for physical harm to the possessor, or a member of his household, or to the land or to his things. *See* RESTATEMENT (SECOND) OF TORTS §§ 162-165 (1965).

15. In fact one may be liable for intentional trespass even if the intrusion was by mistake. *See* Joseph F. Falcone III & Daniel Utain, *You Can Teach an Old Dog New Tricks: The Application of Common Law in Present-Day Environmental Disputes*, 11 VILL. ENVTL. L.J. 59, 71 (2000).

16. Rosenfeld v. Thoele, 28 S.W.3d 446, 449 (Mo. App. E.D. 2000) (quoting Crook v. Sheehan Enter., Inc., 740 S.W.2d 333, 335 (Mo. App. E.D. 1987)) ("'[T]respass is the unauthorized entry by a person upon the land of another, regardless of the degree of force used, even if no damage is done, or the injury is slight.'").

17. Burger v. Singh, 816 N.Y.S.2d 478 (N.Y. App. Div. 2006) (quoting Golonka v. Plaza at Latham, 704 N.Y.S.2d 703 (N.Y. App. Div. 2000)) ("A person who enters upon the land of another, without the owner's permission, 'whether innocently or by mistake, is a trespasser.'").

18. Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc., 20 N.E.2d 158, 164 (Ind. Ct. App. 2005) (quoting Ind. Mich. Power Co. v. Runge, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999) ("[I]n a trespass claim a plaintiff must prove that 'he was in possession of the land and that the defendant entered the land without right.'")

19. Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 662 (1988) (arguing for an understanding of property as social relations); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 207 (1990) (the interdependence between individuals); Eduardo M. Peñalver, *Property as Entrance*, 91 Va. L. Rev. 1889 (2005) (arguing property rights facilitate human relationships and social participation).

20. *See infra* Part II.B.

21. This idea has also been introduced in the context of trespass in cyberspace. *See* Adam Mossoff, *Spam – Oy, What a Nuisance!*, 19 BERKELEY TECH. L.J. 625, 660

B. Limitations on the Right to Exclude

The right to exclude others from private property is not absolute.[22] The exclusive control of private property is, instead, "subordinate to the exigencies of public safety and private necessity, and legal sanction is given in such a case to the requirements of morality and social duty."[23] The doctrine of necessity, in both tort and criminal law, excuses actions not usually permitted in order to avoid impending harm.[24] It is a utilitarian defense that justifies actions taken to avert greater harm thereby maximizing social welfare.[25] The policy behind the necessity defense is "the promotion of greater values at the expense of lesser values."[26] Prof. Whitman astutely notes that "[n]ecessity is always a matter of degree" and courts must decide "where the line between 'necessity' and ordinary police power regulations is to be placed."[27]

Tort law recognizes two branches of the doctrine of necessity that curtail the property owner's right to exclude: public necessity and private necessity. Public necessity occurs where necessary to "avert[] an imminent public disaster."[28] Thus, to destroy a building on the property of another to prevent a fire from spreading is legally justified by the doctrine of public necessity.[29] Private necessity is distinguished from public necessity by the scope of the imminent harm, thus it occurs where necessary to prevent serious harm to the

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(2004) (discussing the "problems associated with erecting impenetrable virtual 'walls' on the Internet").

22. Merrill, *supra* note 5, at 753 (discussing the nominalist view accepted by the U.S. Supreme Court).

23. Am. Sheet & Tin Plate Co. v. Pittsburgh & L.E.R. Co., 143 F. 789, 793 (3d Cir. 1906) (the laying of a hose across the lands of another to save property from destruction by fire).

24. *See, e.g.*, Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006).

25. U.S. v. Schoon, 939 F.2d 826, 828 (9th Cir. 1991).

26. *Id.* (citing U.S. v. Dorrell, 758 F.2d 427 (9th Cir. 1985)).

27. Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573, 589-90 (2007).

28. RESTATEMENT (SECOND) OF TORTS § 196 (1965).

29. Bowditch v. Boston, 101 U.S. 16 (1879); Respublica v. Sparhawk, 1 Dall. 357, 363 (Pa. 1788) ("We find, indeed, a memorable instance of folly recorded in the 3 Vol. of Clarendon's History [of England], where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, & c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.")

actor, or his land, or his chattels, or another person.[30] However, where a person enters without the requisite degree of danger, she is trespassing.[31]

"[N]ecessity, especially in the interest of preservation of human life, will legally excuse or justify trespass."[32] In the well known case of *Ploof v. Putnam*, a family sailing on Lake Champlain took refuge from a "sudden and violent tempest" and moored their boat to a private dock on a private island.[33] The owner of the dock and his servant unmoored the boat causing it to be destroyed and the family to be injured. The court held the necessity of mooring the boat justified the family's trespass, stating the "doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape his assailant."[34] Likewise, "[o]ne may sacrifice the personal property of another to save his life or the lives of his fellows."[35]

Under exigent circumstances public safety concerns are superior to the right to exclude, as discussed in the following Third Circuit opinion:

> It is an actionable wrong for a person . . . to interfere with the rights of others growing out of the emergency of a fire or conflagration. Where such emergency exists the right to use one's property as he sees fit is subordinated to the exigencies of public safety and private necessity, and society imposes a duty not to use property in such a way as will interfere with activities necessary to the abatement of the emergency.[36]

In addition to the rights of others arising from emergencies, the state may regulate the use of property for the general safety, the public welfare, and the peace, good order, and morals of the community.[37] Moreover, there is no legally protected right to use property in a manner that is injurious to the safety of the general public.[38] Thus, "[w]hile the right to use one's own real

30. RESTATEMENT (SECOND) OF TORTS § 197 (1965).

31. Surocco v. Geary, 3 Cal. 69 (1853) (destroying a house in the path of a conflagration to prevent the fire from spreading to adjacent buildings demonstrated private necessity).

32. State v. Hoyt, 128 N.W.2d 645, 652 (Wis. 1964).

33. 71 A. 188, 188 (Vt. 1908).

34. *Id.* at 189 (citing 37 Hen. VII, pl. 26).

35. *Id.*

36. Felter v. Del. & H. R. Corp., 19 F. Supp. 852, 854 (M.D. Pa. 1937) (citing Am. Sheet & Tin Plate Co. v. Pittsburgh & L.E.R. Co., 143 F. 789, 793 (3d Cir. 1906)). *See also* Richardson v. City of Little Rock Planning Comm'n, 747 S.W.2d 116 (Ark. 1988); Erb v. Md. Dept. of Env't, 676 A.2d 1017 (Md. Ct. Spec. App. 1996); Andrews v. Lake Serene Prop. Owners Ass'n, 434 So. 2d 1328 (Miss. 1983).

37. *See* State v Picciochi, 241 N.E.2d 407, 408 (Ohio Ct. Com. Pl. 1968); State v Dexter, 202 P.2d 906, 907 (Wash. 1949), *aff'd*, 338 U.S. 863 (1949).

38. Allied-Gen. Nuclear Servs. v. U.S., 839 F.2d 1572, 1573 (Fed. Cir. 1988).

property as one sees fit is a property right fully protected by the due process clause[s] of the federal and state constitutions, [such] use is subject to the proper exercise of local police powers."[39]

In addition to the legal limitations, moral exigencies may limit the right to exclude. Consider the intentions and actions of people who harbored fugitive slaves in defiance of the Fugitive Slave Act of 1850. Following an incident known as the "Christiana Riots," three men from Lancaster County Pennsylvania were charged with treason for harboring runaway slaves and inciting over one hundred people to resist the efforts of the federal government to recapture them in 1851.[40] Thus, the right to exclude may be tempered by ethical norms of sympathy, empathy, and inclusion.[41] Moral and ethical prerogatives may justify actions that contravene a property owner's right to exclude.[42] Even in the absence of a moral or ethical duty, supererogatory actions may justify infringing on private property.

Supererogatory acts are those that are morally good, but not necessarily required by any legal obligation or duty, and therefore entirely voluntary. They are a "technical term for the class of actions that go 'beyond the call of duty.'" [43] As one scholar has noted:

> One line of support for supererogatory ideals might be traceable to the now celebrated distinction between "causing harm" and "preventing good." The gist of the distinction is that to fail to act to bring about good may involve an omission to achieve a positive benefit on behalf of another. However such inaction by itself does not necessarily close off all options for the realization of the good. Even if one fails to act to advance the good of a fellow human-

39. Sundheim v. Bd. of County Comm'rs, 904 P.2d 1337, 1346 (Colo. Ct. App. 1995), *aff'd*, 926 P.2d 545 (Colo. 1996). *See also* Beeding v. Miller, 520 N.E.2d 1058, 1067 (Ill. App. Ct. 1988); Pa. Med. Soc'y v. Foster, 585 A.2d 595, 599 (Pa. Commw. Ct. 1991).

40. Castner Hanaway, Elijah Lewis and Joseph Scarlet were charged with treason for their actions in connection with the Christiana Riots. Christiana "Riot" Case Papers, http://www.archives.gov/northeast/education/slavery/images/christiana.pdf (last visited Sept. 20. 2007).

41. *See* RESTATEMENT (SECOND) OF TORTS § 196 (1965).

42. See James A. Albert, *The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News – A Call for the Recognition of a Newsgathering Tort Privilege*, 45 N.Y.L. SCH. L. REV. 331 (2002) (discussing in part, two cases in which defenses of ethical grounds were unsuccessfully invoked to justify trespass).

43. Stanford Encyclopedia of Philosophy, Supererogation, http://plato.stanford.edu/entries/supererogation/ (last visited May 22, 2007).

> being, at least the option is left open for someone else to come along and benefit the person in need.[44]

What are the ethical norms that motivate a person to help others under such circumstances? The utilitarianism philosopher David Hume believed the common bond of humanity requires us to give assistance to others. He wrote: "Tho' there was no obligation to relieve the miserable, our humanity wou'd lead us to it; and when we omit that duty, the immorality of the omission arises from its being a proof, that we want the natural sentiments of humanity."[45] Hume comments that while "[s]ympathy interests us in the good of mankind" our sense of duty is relatively circumscribed by innate preferences for family over others: all else being equal, our "sense of duty" and "natural course of our passions" leads us to prefer those with whom we share commonality.[46]

One commentator discusses the nature of duty according to Hume as follows:

> [o]nce this narrow circle of family and intimate acquaintances is broadened to encompass strangers, the force of a 'morality of duty' fades more nearly into what may be termed a 'morality of supererogation.' A narrow, yet not completely implausible, interpretation of Hume's doctrine of limited generosity would be to regard all duties based on special relationships as morally required,

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44. Rudolph V. Vanterpool, *Hume on the "Duty" of Benevolence*, 14 HUME STUDIES 93 (1988), *available at* http://www.humesociety.org/hs/issues//v14n1/vanterpool/vanterpool-v14n1.pdf.

45. DAVID HUME, A TREATISE OF HUMAN NATURE 333 (David Fate Norton & Mary J. Norton eds., 2000).

46. *Id.* at 311, 373. Adam Smith similarly wrote of sympathy as the foundation of other virtues and it declared it a condition common to all men :

> How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it. Of this kind is pity or compassion, the emotion which we feel for the misery of others, when we either see it, or are made to conceive it in a very lively manner. That we often derive sorrow from the sorrow of others, is a matter of fact too obvious to require any instances to prove it; for this sentiment, like all the other original passions of human nature, is by no means confined to the virtuous and humane, though they perhaps may feel it with the most exquisite sensibility. The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it.

ADAM SMITH, THE THEORY OF MORAL SENTIMENTS I.I.I. (1759).

> whereas the more exceptional acts of extended generosity would, more properly speaking, be termed supra-obligatory.[47]

Therefore, we must draw a distinction between imposing a duty to "do good" versus the accepted prohibition not to harm. Although there is a strong duty not to harm others, there is not an equally strong symmetrical duty to help others avoid harm. If exclusion is prohibited in cases of causing harm, can it nonetheless stand in the face of affirmative actions of giving aid? The lack of symmetry will create a sharp tension when applied to the New Orleans scenario.

The right to exclude others from one's property is a fundamental right of private property ownership in the United States. It is an expansive right which gives rise to causes of action not only in property (e.g., ejectment) but also in tort. This right is legally limited only in times of emergency and/or necessity. The normative imperative to limit exclusion places a sociological burden on this right. These limitations will play a crucial role in the attempt to expand the right to exclude beyond the individual. In order to encompass an entire community we face an inherent conflict between the notion of communal living that at the same time seeks to take on attributes of self interested individualism.

Notwithstanding such limitations, the right to exclude remains a powerful weapon in the property ownership chest. Although some commentators have sought to minimize its analytical importance,[48] the tort of trespass continues to retain its centrality in cases of legal attempts to effectuate absolute exclusion. The next step in the analysis is to take this defined right of the individual property owner to exclude and endeavor to determine if it can or should be broadened in its application. If a community is an agglomeration of individuals bound by municipal delineations, does this agglomeration possess the same legal rights as the individual?

III. CREATION OF THE LOCAL COMMUNITY

As shown above, the theory of individual private property ownership creates the right of exclusive possession of property. Hence, before this possessory right can be extended to a community the question of ownership must be addressed. In other words, for a community to emulate the right to exclusive possession held by an individual, the community must have some sort of ownership rights in the property. The next problem will be to determine

47. Vanterpool, *supra* note 44, at 98.

48. *See, e.g.*, Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835 (2006) (arguing that the property owner's right to exclude is indirectly tempered by the government's control over information access policy). "By rendering private information public or public information private, the state can alter, sometimes radically, the mix of exclusion strategies that landowners employ." *Id.* at 1898.

whether a corollary possessory interest can be granted to a community in the same manner as an individual gains these rights in the granting of a deed.

A. Legal Definition of the Community

In order to compare the property rights of the individual and the property rights of the community we must first define the scope of community. While the idea of blocks, or even neighborhoods, has a certain grass roots attraction in delineating the community, the immediate question of clear boundary emerges. Obviously there must be a defined limit to the property subject to such a right of exclusivity so as to segregate ownership between possibly competing property interests. Therefore the cleanest definition of community should rest with the boundaries of the local (municipal) government.[49] The attractiveness of the municipal boundary is twofold. On the one hand, these boundaries occur as a result of objective state creation rather than an amorphous gathering of individuals. Second, because the delineation is a creature of the state, it is not subject to interpretation or ambiguity. If other boundaries – such as a subdivision for a gated community – can be objectively drawn with such precision they, likewise, will serve the same purpose.

Municipal governments are created by and under the authority of the state.[50] In some sense the charter from the state can be analogized to the deed received by an individual. Just as the boundaries are fixed upon granting of the deed (precluding attack by third parties) only the state can fix the boundaries of a municipality,[51] thus insulating the community from boundary

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49. Municipal boundaries erect powerful barriers that feed community self-identification. Urban/suburban boundaries have long been the fodder of academic research. An interesting example is found in Orange County, New York, where the incorporated town of Kiryas Joel (a Hassidic Jewish community) seeks to expand its borders by annexing the surrounding unincorporated land. In response, neighboring cities have quickly begun incorporating villages to establish barriers to this expansion. Fernanda Santos, *Reverberations of a Baby Boom*, N.Y. TIMES, Aug. 27, 2006, *available at* http://www.nytimes.com/2006/08/27/nyregion/27orange.html?ex=1314331200&en=83b68620dd591a29&ei=5088&partner=rssnyt&emc=rss.

50. People *ex rel.* Redman v. Wren, 5 Ill. (4 Scam.) 269 (1843) (the legislature "has absolute control over municipal corporations, to create, change, modify, or destroy them at pleasure"); City of Tuscon v. Pima County, 19 P.3d 650, 656 (2001) (citing Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907)) ("[T]he state has very broad powers to establish municipalities and manage their growth because the cities and towns are no more than political entities created as the legislature deems wise.").

51. Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) ("The state . . . may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the [municipal] corporation. . . . The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."). Indeed municipalities can fix boundaries without vote of the residents. *See* Karen E. Ubell, *Consent Not Required: Mu-*

changes emanating from other communities.[52] Once established, these boundaries serve not only to insulate but also to isolate one municipality from another. Citizens, acting through their municipal governments, can now determine many things, including how revenue is raised, how income is spent, how the municipality is zoned, and, in some cases, how their children will be educated. Note that all of this occurs without regard to the needs or desires of their regional neighbors.[53] While numerous commentators have lamented this situation,[54] the fact remains that boundaries create autonomy that empowers civic identification.

Creation of these municipal boundaries, just as the delineation of property lines, serves to facilitate the "outsider" mentality that underpins the notion of right to exclusive possession. One only need look to the numerous failed attempts at regionalization[55] to realize that indeed the citizens of a town do not view the town boundary as a mere "political subdivision."[56] Rather, it is a reified delineation that separates them from the outside world, granting them control over what happens within those boundaries. Using this line of logic, it is possible to argue that this sense of ownership creates an entitlement to local citizens to treat communal property as exclusive to those within the community.

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nicipal Annexation in North Carolina, 83 N.C. L. REV. 1634, 1634 (2005). The state is limited however, when using this power to circumvent a federally protected right such as voting. *See* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

52. Furthermore, since the overwhelming majority of states have passed home rule statutes, the notion that local governments are nothing more than creatures of the state has all but lost its meaning. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2260-61 (2003). However, the author does point out that rather than a singular stroke of home rule autonomy, local governments tend to operate on a mix of home rule and other legislative and regulatory enactments. *Id.* at 2263.

53. *See, e.g.*, Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 97 (2003) (discussing how a "variety of legal rules shore up the insular and insulated status of American municipalities").

54. *See, e.g.*, *id.* at 99; Sheryll D. Cashin, Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism, 88 GEO. L.J. 1985, 1987 (2000).

55. Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 YALE L.J. POCKET PART 203, 207 (2006) ("In the past half-century, regionalism has had little political traction, and apart from a handful of mostly small and mid-sized areas, there are relatively few regional governing bodies."); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1117-18 (1996); Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 519-20 (2005).

56. Gray v. Crockett, 1P. 50, 56 (Kan. 1883) (noting that the doctrine that cities are "mere political subdivisions of the state" was established by *Brewis v. Duluth*).

B. Exclusion from the Community

Much of the current literature on municipal exclusion focuses on the effects that such boundaries have on a community's ability to exclude outsiders from moving to that community. For example, a common argument is that local zoning regulations make it impossible for lower income people to move into a jurisdiction thus contributing to the economic segregation that disproportionately requires some municipalities to shoulder the burden of a region's poverty.[57] In the present analysis, however, the discussion focuses not on exclusion from membership but rather exclusion from use. One legal scholar has dubbed this the "Hermit's Right."[58] The landowner (or community) demands that all non-owners be barred from entering the property. The exclusionary tactics undertaken to prevent outsiders from joining the community lie outside the scope of this paper.[59] I wish to make the subtle distinction that once the community has been identified (those living within the legally defined boundaries), then the question presented is whether an outsider can be prevented from using the resources of the defined community without the requisite membership.

One of the most common and widely accepted exclusions from use based on residency in a community is the public school system. While the district lines for schools may not be completely co-terminus with the local government boundary, the illustration still holds. If a student does not live within the proscribed geographic boundaries, that student has no right to attend the public school absent special circumstances.[60] One can think of this situation as a "private" public school limited exclusively to those that are residents of the geographically-defined district. Exclusion is not only permitted, it is enforced.

On the other end of the spectrum are United States Constitutional limitations on municipal restrictions. For example, local boundaries cannot be used to discriminate against interstate commerce.[61] In this manner residency re-

57. Cashin, *supra* note 54, at 1993-94.

58. Strahilevitz, *supra* note 48, at 1837.

59. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 367 n.1 (1982) (defining "racial steering" as a "practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups"); Heights Cmty. Congress v. Hilltop Realty, 774 F.2d 135 (6th Cir. 1985) (discussing "blockbusting").

60. No Child Left Behind Act of 2001, 20 U.S.C. § 6316(b)(1)(A), (b)(6)(F), (c)(i) (2002) (providing for parental choice of schools for students of public schools that fail to make adequate yearly progress for two consecutive years).

61. *See* City of Phila. v. New Jersey, 437 U.S. 617 (1978) (preventing the state from isolating itself from a problem common to many by erecting a barrier against the

strictions for employment with a town that favor residents for no reason other than their residency have consistently been struck down.[62] Furthermore, local or state regulation cannot interfere with the right to interstate travel.[63] Interestingly, the United States Supreme Court has never recognized a right to *intrastate* travel.[64]

Between these poles lies a vast expanse. In this span we must weigh the rights of those outside the community against those privileges to which the members of the community believe they are entitled. More specifically we

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movement of interstate trade); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 438 F.3d 150 (2d Cir. 2006), *aff'd*, 127 S.Ct. 1786 (2007).

62. *See, e.g.*, Serv. Mach. & Shipbuilding Corp. v. Edwards, 617 F.2d 70, 74 (5th Cir. 1980) (finding registration ordinance requiring registration of non-residents seeking their first job but not of residents applying for their first employment to be discriminatory against the non-residents); Wallace v. Town of Palm Beach, 624 F. Supp. 864 (S.D. Fla. 1985) (striking down a Palm Beach regulation requiring almost all non-resident workers to register their employment with the town and carry identification cards). This regulation was brilliantly lampooned by Gary Trudeau in his Doonesbury comic strip and led to the so called "Doonesbury Bill" that vacated the ordinance. FLA. STAT. § 166.0443, 125.581 (1995)

63. Saenz v. Roe, 526 U.S. 489 (1999) (striking down a residency requirement for welfare benefits as violative of the right to interstate travel). *See also* Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down a durational residency requirement for voting); Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 262-69 (1974) (striking down residency requirement for free non-emergency medical care). For a fuller discussion of the interstate travel limitations see Peter M. Flanagan, *Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those With a Criminal Past*, 79 NOTRE DAME L. REV. 327, 349-64 (2003).

64. In fact they explicitly declined to decide the issue. Mem'l Hosp., 415 U.S. at 255-56 (1974) ("[Whether] to draw a constitutional distinction between interstate and intrastate travel [is] a question we do not now consider . . . ."). *See also* Lutz v. City of York, 899 F.2d 255, 259 (3d Cir. 1990) (stating that the Supreme Court has not had an opportunity to consider whether a right to travel includes the right to intrastate travel); Flanagan, *supra* note 63, at 353.

While the U.S. Supreme Court has not recognized this right, several federal circuits and district courts have done so. *See, e.g.*, King v. New Rochelle Mun. Hous. Dep't., 442 F.2d 646, 648 (2d Cir. 1971); *Lutz*, 899 F.2d at 268; Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002), *cert. denied*, 539 U.S. 915 (2003); State v. Burnett, 755 N.E.2d 857 (Ohio 2001), *cert. denied*, 535 U.S. 1034 (2002); Hawk v. Fenner, 396 F. Supp. 1, 4 (D. S.D. 1975); Schleifer v. City of Charlottesville, 973 F. Supp. 534, 542-43 (W.D. Va. 1997).

The state constitutions of Wisconsin, Michigan and Minnesota recognize the right to intrastate travel. *See* Brandmiller v. Arreola, 544 N.W.2d 894 (Wis. 1996) (interpreting WIS. CONST. art. I, §§ 1, 22); Musto v. Redford Twp. 357 N.W.2d 791, 792-93 (Mich. Ct. App. 1984) (discussing MICH. CONST. art. I, § 2). Some states recognize the right in their case law. *See* Eggert v. City of Seattle, 505 P.2d 801, 804 (Wash. 1973); Toledo v. Wacenske, 642 N.E.2d 407, 411 (Ohio Ct. App. 1994) (recognizing qualified right to travel in dicta).

are searching for the fulcrum which tips the balance of acceptability of municipal exclusion.

IV. PUBLIC USE OR PRIVATE SPACE

The right to exclusive possession compels a zero-sum game. For a community to exercise a remedy akin to trespass against a non-community member, the non-member can hold no right to use. The community would have the right to bar entry onto municipal land by all non-community members unless specifically invited. At first this notion is somewhat unsettling. We intuitively recoil against the notion of exclusive rights to communal or "public" property. Let's decontextualize it. Say that City A decides that all of its citizens should have access to wireless broadband service; so it levies a tax on property owners to pay for such service. Upon payment of the tax (either by herself or her landlord) Alicia, a citizen of A, gets a password that connects her to the internet while she is within City A. Meanwhile Bradford, a citizen of City B, lives right across the border from A and could (with the proper password) connect over the A network. However, since Bradford is not a citizen of A he is prevented from obtaining the password. In this circumstance, it should not be troublesome to make the argument that access to the network is predicated upon paying taxes, so Bradford is denied access. Should access to other municipal benefits (e.g., streets, parks, beaches) be different than access to the internet?

A quite reasonable response to this hypothetical is that high speed wireless access is not a crucial staple of life and substitute service is easy to obtain. Therefore, it does not offend our sensibilities that its access is denied upon the arbitrariness of address. However, there are other, more difficult examples of communal exclusive possession that we can investigate. Through this exercise we begin to plot points along a continuum that will posit the notion that moving from "private" to "public" is not a discrete, defined jump. Rather, just as green slowly modulates into yellow, the slide between these concepts is one of continuous motion.

But what is the analytical tool that will signal movement? I propose that we gauge placement along the private or public continuum based on the expectation of privacy of the community members. At first blush this looks like a self-fulfilling prophecy: if the community expects privacy and exclusion, then exclusion should be permitted. To rein in self-interested motivations, an objective reasonableness standard must be applied. In other words is there a reasonable expectation of privacy that a community can enforce against outsiders? Note there is a slight difference from the substantially unfettered right to exclusion that an individual has against a private actor. However, it is not unlike the constitutionally based expectation of privacy that individuals have against governmental intrusion.

A. Privacy Expectations

Probably the clearest manifestation of an expectation of communal privacy is a gated community. With its physical barriers, private streets and deed restrictions, members of the community definitely expect privacy. The separation between public and private is symbolized by a gate that unequivocally announces that non-residents may enter by invitation only. In fact, in 2001 there were 7,058,427 households living year-round in gated[65] communities in the United States.[66] This is an example of what one commentator has called a "new de facto private collective right to the neighborhood environment."[67] Whether one agrees or disagrees with the existence of gated communities, the privacy expectations of the residents cannot be disregarded.[68] Residents of such communities are making an unambiguous statement that they expect their right to exclusive use of community property to be enforced.

Indeed the law upholds these expectations. Through the use of private covenants (deed restrictions), homeowners insure that their expectations of exclusion will be enforced.[69] To be sure, these restrictions cannot violate Constitutional restrictions on equal protection[70] or fair housing laws.[71] How-

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65. There are multiple meanings of the word "gated." David W. Chapman & John R. Lombard, *Determinants of Neighborhood Satisfaction in Fee-Based Gated and Non-Gated Communities*, 41 URB. AFF. REV. 769, 769 (2006)

66. Thomas W. Sanchez, Robert E. Lang & Dawn M. Dhavale, *Security Versus Status? A First Look at the Census's Gated Community Data*, 24 J. OF PLANNING AND EDUC. RES. 281 (2005) ("Of the 119,116,517 housing units represented by the AHS, 106,406,951 were occupied year-round, with 7,058,427 (5.9 percent) households reporting that they lived in communities surrounded by walls or fences and 4,013,665 (3.4 percent) households reporting that access to their communities was controlled by some means. Only respondents who said they lived in a walled or fenced community answered the survey question about controlled access, which means that nearly 60 percent of the walled or gated communities also had controlled entries (i.e., gates).").

67. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 841 (1999).

68. *See* Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 304 (1997) ("Whenever we confront the argument that a party should be morally or legally bound by his choice, we need to inspect the conditions that led the party to make that choice.").

69. David L. Callies, Paula A. Franzese & Heidi Kai Guth, *Ramapo Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177, 178 (2003) (noting that the use of private covenants or "real" covenants run with the land and, as such, are enforceable through generations).

70. *See* Shelley v. Kramer, 334 U.S. 1, 20-21 (1948).

71. Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2006). It should come as no surprise that there are ways of determining community make-up with circumventing Constitutional and legislative prohibitions. The most obvious are economic restrictions which put the housing out of reach of a significant proportion of the population.

ever, within those limitations homeowners are free to determine who can and cannot enter their community. In fact, the courts have held that gated communities are permitted to prohibit entry to entire classifications of the public (e.g., deliverers of free, unsolicited newspapers).[72]

Public access to community streets lies on the other end of the spectrum.[73] Access to public roads can be justified on the basis of necessity and Constitutional constraints as discussed above.[74] Furthermore, there is no expectation of privacy. Dedicated streets are clearly public and access cannot be conditioned on residency. One step closer to the center are private streets within a municipality. Private streets are those that are maintained by a subset of the municipality and are not dedicated to the municipality for public use. While we tend to think of private streets in conjunction with gated communities, there are numerous instances of private streets dispersed throughout a municipality. For example, since the mid-19th century St. Louis has had an extensive system of private streets.[75] Another instance of private streets is the crime-combating technique of conveyance of public streets and sidewalks by a city to a public housing project in order to allow exclusion of non-residents.[76] The courts have upheld these private "no trespassing" zones.[77]

A more subtle approach (dubbed "exclusionary amenities" and "exclusionary vibes" by one commentator) is to structure the community to overtly (e.g., mandatory golf club membership) or covertly (e.g., flying the rebel flag at the model home) determine the composition of the community. *See* Strahilevitz, *supra* note 48, at 1851.

72. However, they may not discriminate between members of the same class. *See* Laguna Publ'g v. Golden Rain Found., 131 Cal. App. 3d 816, 830 (1982) (holding that "if this activity represents an unacceptable intrusion upon the privacy of the residents of Leisure World, a privacy which it is argued they paid for when they bought homes there, then Golden Rain should cease its discrimination and exclude *all* newspapers to which individual residents have not *personally* subscribed").

73. Even small streets winding through purely residential neighborhoods have been held to be public. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 480-81(1988) ("In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.'") (citations omitted).

74. *Id.* at 481.

75. David Beito, *The Private Places of St. Louis: Urban Infrastructure Through Private Planning*, *in* THE VOLUNTARY CITY (David Beito, Peter Gordon & Alexander Tabarrok, eds., 2002) (private streets grew out of several needs: exclusivity, enforcement power (discouraging free riders) and notoriously bad public infrastructure).

76. *See* Virginia v. Hicks, 539 U.S. 113, 123 (2003).

77. Another example of the privatizing of public streets occurs in residential neighborhoods adjacent to the Philadelphia Sports Complex which have "resident only" parking during events, enforced by the police with barricades and towing of non-resident cars. *See* Angela Couloumbis, *Eagles, City Tells Fans: Take Train to Game: SEPTA Scheudles*, PHILA. INQUIRER, Jan. 8, 2004, at B4; Murray Dublin,

Contrast these situations though with a gated community trying to cordon off streets which were previously public streets. When Whitley Heights, California convinced the municipal government to withdraw its streets from public use so gates could be erected, citizens outside the newly gated community who used the roads for transit, exercise and convenient access to recreational venues successfully fought the privatization of the streets with a petition drive and a lawsuit.[78] The difference in these scenarios fits within the framework of our analysis. First of all, there was no expectation of privacy when the homeowners bought into the development – the streets were public. Second, there was a shown necessity on the part of the outsiders without a countervailing argument for the homeowners (such as crime prevention).

B. Private Rights in Public Property

To further fine tune this issue we need to examine what rights may accrue to members of the community if the property in question is nominally public but held back for the exclusive use of members of the community. There are numerous instances in between a gated community and a public street where the community will attempt to exclude outsiders (e.g., pools, parks, beaches). None of these uses falls under the category of necessity but there is at least a facial argument by the ownership community of an investment backed expectation of privacy.

One approach might be to analyze the role of custom and norms in creating private rights in public property. Creation of this private right relies on the imposition of private (albeit informal) contracting to whittle away public rights. In other words, a homeowner can informally contract with his

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Frenzy Over the Eagles Hits Close to Homes: The Influx of Fans for Tomorrow's Game Has People Who Live Near the Stadium Fearing for Their Parking, Peace and Quiet: Neighbor to Fans: We Need Our Space!, PHILA. INQUIRER, Jan. 10, 2004, at B01; R. Jonathan Tuleya, *Relief Down the Road?*, S. PHILLY REV., Feb. 19, 2004, *available at* http://www.southphillyreview.com/view_article.php?id=1656&highlight=.

A more colorful example of this type of exclusion occurred in Santa Cruz, CA in 1868, during a smallpox epidemic. As the epidemic hit closer and closer a group of Santa Cruz residents demolished the bridge that connected them to the town of Aptos and posted a guard to prevent any non-resident from entering from the east and south. Alas these measures were useless to prevent the spread of small pox and the only effect was to create a rift between the citizens of Santa Cruz and Aptos. *See* Phil Reader, Voices of the Heart: Introduction (1993), http://www.santacruzpl.org/history/disaster/voices2.shtml (last visited June 18, 2007).

78. *See* Citizens Against Gated Enclaves v. Whitley Heights Civic Ass'n, 28 Cal. Rptr. 2d 451 (Ct. App. 1994); City of Layfayette v. County of Contra Costa, 154 Cal. Rptr. 374 (Ct. App. 1977) (gating of public road to prevent through traffic, and in effect restricting convenient access to recreational facilities and state park, except for local residents, was found to be an improper exercise of police power).

neighbors for a segregated use of the public street (for example, after a snow storm placing trashcans on a recently shoveled parking space on a pubic street).[79] Enforcement of these informal contracts is problematic, especially when the conflict is between a resident and an outsider unfamiliar with the social order. Furthermore, it violates one of the basic criteria of a private zone because there is no objective geographic delineation to the practice. Therefore a more formal system, complete with enforcement mechanism, is necessary.

Another analytical method is to examine whether such granting of private rights within public spaces can be enforced through governmental regulation. Does the government validate the expectation of privacy? A classic example of this dilemma is whether a town can limit access to public spaces, such as parks and beaches, to residents of the town and their guests through the use of law enforcement. These cases get to the heart of the discussion as they are based upon membership in a defined community. An expectation of privacy weighs against the notion that these types of property are held in the public trust. The public trust doctrine acknowledges that there are resources that must be held by the government for the good of all, not just the immediate members of a community. It rejects the notion that private property rights must exist in every situation. Rather, there are some resources that deserve to be shared by all without regard to private property rights.[80] Historically parks (including public beaches) have fallen into this category.[81] In fact, the United States Supreme Court stated that "parks . . . have immemorially been held in trust for the use of the public."[82] Likewise, courts in both New Jersey and New York have required that beaches and parks be held open not just to the residents of the town but also to the public at large.[83] Furthermore, a town cannot set aside part of the public beach for residents only.[84] In fact, a mu-

79. Another example is the respect fellow food truck operators have for the order established by custom rather than regulation. *See* Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 200 (2006).

80. These resources initially included "fish, wild animals, and rivers." Reza Dibadj, *Regulatory Giving and the Anticommons*, 64 OHIO ST. L.J. 1041, 1107 (2003).

81. The exception to this broad statement is when the land is acquired by the municipality subject to the explicit deed restriction that it is for the benefit of residents only. Campbell v. Town of Hamburg, 281 N.Y.S. 753, 757 (N.Y. Sup. Ct. 1935).

82. Frisby v. Schultz, 487 U.S. 474, 481 (1988) (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

83. State v. Vogt, 775 A.2d 551, 560-61 (N.J. Super. Ct. App. Div. 2001); Gewirtz v. City of Long Beach, 330 N.Y.S.2d 495, 509 (N.Y. Sup. Ct. 1972). *See also* Borough of Fenwick v. Town of Old Saybrook, 47 A.2d 849, 853 (Conn. 1946) (stating that land held for park purposes is ordinarily held for the benefit of the people of the state at large and not only for the benefit of the local inhabitants).

84. Van Ness v. Borough of Deal, 393 A.2d 571, 574 (N.J. 1978).

nicipality is not required to give residents in abutting properties any access rights different from those of the public at large.[85]

However, just because the courts frown on residency requirements for parks does not mean certain municipalities do not impose them. Imposition of these restrictions may arise from the classic "public goods" dilemma.[86] Unrestricted access to a good results in overuse and ultimate demise. Therefore, for the good of all, access is necessarily limited to preserve the asset. This is why there is a limit to the number of camping permits issued in many National Parks. There are, however, more insidious restrictive policies based not on a public goods argument but rather for exclusionary purposes. For example, Garden City, New York has a residency requirement for its parks. However, this residency requirement was primarily enforced against minorities. After an investigation by the New York Attorney General's office the town promised to enforce its residency requirement in a non-discriminatory fashion.[87] The residency requirement remains the law.

A more interesting question arises when the public space (a beach or a park) can only be accessed through private roads. Must private land owners allow public use of their property for access to the park or beach? This is, perhaps, the purest collision of the two competing doctrines – public trust versus private property.

This issue has been litigated from California to Connecticut.[88] The arguments from both sides are, at the same time, predictable and compelling.

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85. Trautvetter v. Town of Old Orchard Beach, 566 A.2d 82, 83 (Me. 1989).

86. Public goods have properties of nonrivalness and nonexcludablity, such that "each individual's consumption of such a good leads to no subtraction from any other individual's consumption of that good." Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. OF ECON. & STAT. 387, 387-89 (1954).

87. *See* Press Release, Office of the N.Y. State Attorney Gen. Andrew M. Cuomo, Garden City to Adopt New Policies Regarding Access to Parks (May 19, 2005), *available at* http://www.oag.state.ny.us/press/2005/may/may19a_05.html.

88. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 75 (Mich. 2005) (noting that "[t]he public trust doctrine cannot serve to justify trespass on private property"); Sheftel v. Lebel, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998) ("The public has, however, no right of perpendicular access across private upland property, i.e., no right to cross, without permission, the dry land of another for the purpose of gaining access to the water or the flats in order to exercise public trust rights; doing so constitutes a trespass."); Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (upholding shorefront landowners' right to exclude public from dry sand even though limited easement on intertidal land existed); La. Att'y Gen. Op. No. 96-257 (1996), 1996 WL 656196, at *4 (1996) (no law requires "riparian owner to allow the public ingress and egress from a public highway to the water's edge where there is no road, public right-of-way or public passageway connecting the two"); Charpentier v. Von Geldern, 236 Cal. Rptr. 233, 238 (Ct. App. 1987) ("it is settled that a person has no right to enter onto and cross private property to reach navigable water"); Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974) (proposed statute creating on foot right of passage for public along shoreline held to be a constitutionally defective taking).

Those decrying the lack of public access to the beach cite the social and economic discrimination of denying recreation and beauty based on residency.[89] The property owners champion their private rights and investment decisions by resorting to posting signs to deter outsiders.[90] In *Leydon v. Town of Greenwich*, the Town of Greenwich enacted "a town ordinance limiting access to . . . a town park with a beachfront . . . to residents of the town and their guests."[91] This ordinance was struck down by the Connecticut Supreme Court under the public forum doctrine along with constitutional limitations. Beach use was afforded to all people regardless of residency.[92] Therefore the general public was granted access to the beach. However, access to the beach was controlled by privately held community property. In response to the question of whether private landowners had to make their property open to the public, the court held that private landowners did not have to open their property to the public.[93]

In the end, then, it appears that an expectation of privacy through the ownership of property overcomes the openness of the public trust. If a community can establish the requisite showing of this expectation, the public will be excluded (assuming there is no showing of necessity or emergency). Access becomes the powerful tool that controls the openness of even "public" space. Limitations on access are increasingly sold as market driven commodities whose values are subsumed into the price of the underlying real

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89. *See* Regina Austin, *"Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667, 673-74 (1998); Robert García & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J. C.R. & C.L. 143 (2005) (discussing the implicit privatization of Malibu and other California beaches).

90. In California some owners even bluffed their ownership by posting ambiguous signs implying a greater ownership than existed. *See* Strahilevitz,, *supra* note 48, at 1857.

91. 777 A.2d 552, 558 (Conn. 2001).

92. *Id.* at 568-69.

93. *See id.* at 578; Sheftel v. Lebel, 689 N.E. 500, 505 (1998) ("public has . . . no right of perpendicular access across private . . . property . . . for the purpose of gaining access to the water or the flats in order to exercise public trust rights"); Larman v. State, 552 N.W.2d 158, 161 (Iowa 1996) (access to waters held in public trust is "protected only to the extent the land providing such access is owned by the State"); Heist v. County of Colusa, 213 Cal. Rptr. 278, 285 (Ct. App. 1984) (noting that crossing private property to reach navigable water is trespass). *But cf.* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363 (N.J. 1984) (private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine, and thus public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 851 A.2d 19, 32-33 (N.J. Super. Ct. App. Div. 2004) (addressing barriers to access in physical and financial terms and holding a private beach club must allow public access to public trust area for a reasonable fee).

estate.[94] As access develops into a market driven commodity, perhaps the distinction between public and private space will decrease in importance. It is not the classification of the *space* – it is the classification of the *access* to that space.[95]

There are societal implications of the exclusionary aspects of the privatization of public space. If a community is permitted to exclude non-residents from privatized (communally public) space, should there be moral limitations on exclusion? Just as necessity and emergency open individual private land, must they also unlock communal private land? Of course, the same difficult question of duty to aid must again be addressed.

V. INCIDENT ON THE CRESCENT CITY CONNECTION

Desperate times call for desperate measures. Few times in the history of the United States were more desperate than in the New Orleans area in the aftermath of Hurricane Katrina. While the visceral reaction to the episode on the Crescent City Connection certainly is one of shock and dismay, an event of this magnitude deserves a more reasoned and objective consideration. Why did the citizens of one municipality attempt to blockade their border and exclude others? The framework established above (namely, defined municipal borders with an expectation of privacy but tempered by emergency) permits us to analyze the bridge incident from such a dispassionate perspective.

Gretna, Louisiana (population approximately 17,500[96]) lies across from New Orleans on the west bank of the Mississippi River. Connected to the center of New Orleans by the Crescent City Connection, a huge expanse of a bridge spanning the river, Gretna is bordered on one side by the New Orleans neighborhood of Algiers and on the other sides by unincorporated portions of Jefferson Parish.[97] While not as ethnically diverse as the city of New Orleans, according to the 2000 census Gretna's population is 35.5% African American and 6% Hispanic.[98] Economically it does not differ drastically

94. Houses within gated communities have higher property values than comparable houses in non-gated areas, discussed in Michael LaCour-Little and Stephen Malpezzi, *Gated Communities and Property Values* (2001), *available at* http://www.bus.wisc.edu/realestate/--oldsite/pdf/pdf/Private%20Streets%20Paper%20June%202001.pdf.

95. Although I concentrate on private access there is a compelling argument that as "public" transportation is replaced by "private" cars, access to public recreation areas will be severely limited. *See* Austin, *supra* note 89, at 681-82.

96. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, PHC-3-20, LOUISIANA: 2000, POPULATION AND HOUSING UNIT COUNTS 10 tbl.5 (2003).

97. A Parish is a political subdivision akin to a county.

98. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, PHC-1-20, LOUISIANA: 2000, SUMMARY POPULATION AND HOUSING CHARACTERISTICS 60 tbl.3 (2003). New Orleans was 67% African American and 3% Hispanic. *Id.* at 66 tbl.3.

from the city of New Orleans. The median family income (in 1999 dollars) was $32,000 and 21% of the families were below poverty.[99]

Hurricane Katrina, a Category Four hurricane, hit the New Orleans area on Monday, August 29, 2005, at 6:10 a.m. By 9:00 a.m. there were reports of the levees breaching in the Lower Ninth Ward of New Orleans. As the flood waters engulfed the city, those who were not fortunate enough to evacuate the area prior to the storm were stranded in attics, on rooftops, in the Superdome and in the Convention Center.

Food and water were precious commodities in extraordinarily short supply in New Orleans. The same was true across the Mississippi River where the City of Gretna and Jefferson Parish (while certainly not flooded like New Orleans) were likewise cut off from drinking water, electricity and communication. Nonetheless people stranded at the Convention Center were being told that food and water was available across the bridge. Believing this information, hundreds of people in the sweltering days after Katrina undertook the four-mile trek from the Convention Center and across the Crescent City Connection with the hope of finding food and water on the other side of the river. No provisions were forthcoming when they arrived in Gretna. Initially Gretna police officers drove buses that shuttled the evacuees back across the river to New Orleans to a way station with food and water set up by the National Guard.[100] Eventually, though, fuel for the buses ran out and the people that had walked for miles in the blistering sun found nothing on the other side of the bridge.

The Gretna city officials decided that the influx of people from New Orleans had to be stopped. They indicated that they were not only worried about people walking the miles across the bridge with no relief provisions at the end; they were also worried that their local resources, already stretched thin, were dwindling quickly. Therefore, in conjunction with the Louisiana State Police and the Jefferson Parish Sheriff's office, the Gretna police positioned themselves on the bridge attempting to block pedestrian traffic from crossing.[101] Accounts differ but everyone reporting agrees that the mob of people that were stopped by the Gretna police officers were neither looters nor hooligans and that they were turned back with a firearm discharge from the Gretna police. Actually that is about all people agree on. The account has taken on a life form of its own with each side putting forth facts that support their position (ranging from allegations of police brutality from the

99. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, PHC-2-20, LOUISIANA: 2000, SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS 102 tbl.9, 171 tbl.15 (2003). New Orleans was median family income was $32,000 and 24% of the families were below the poverty level. *Id.* at 105 tbl.9, 175 tbl.15.

100. Gretna Police Department estimates shuttling 6,000 people to the National Guard station.

101. *See* Andrea Shaw, *Bridge to Nowhere, Discord and Anger over CCC Incident*, NEW ORLEANS TIMES-PICAYUNE, Dec. 24, 2006. Vehicular traffic was allowed to pass.

evacuees to claims of self-defense on the part of the police officers). The Attorney General of Louisiana has compiled a report on the incident, but refused to release it to the public and instead referred the report to the District Attorney's Office of Orleans Parish.[102] The Grand Jury subsequently refused to issue an indictment and the District Attorney closed the case.[103]

Instead of judging the right and wrong of *how* this situation unfolded, a better question in the context of this research would revolve around *why* the citizens of Gretna, acting through their police department, closed their borders to non-residents. Indeed a border closing was announced (but not enforced) on the first day of the Hurricane. Jefferson Parish President Aaron Broussard issued a press release stating that he was "exercising his authority under the Louisiana Disaster Act and issuing a lock down order for all Jefferson Parish citizens until 6 am Monday, September 5, 2006."[104] Indeed, under this statute[105] Parish Presidents do have the right to control ingress and egress in the Parish after a declared emergency.[106]

The easiest resolution to this dilemma is to fault the citizens of Gretna for selfish actions in the face of an emergency. After all, what is a more urgent situation than mass flooding, dehydration and starvation? Quite frankly, this is why the incident on the bridge is so troubling on its face. However, this superficial approach fails to catch the subtle, yet overpowering, importance of motivation. In the words of Gretna Police Chief Arthur Lawson, he was "doing the right thing" by simply trying "to take care of the residents

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102. *Grand Jury to Look into Bridge Roadblock*, NEW ORLEANS TIMES-PICAYUNE, Aug. 4, 2006. The ACLU requested the report with no success. *See* Letter from ACLU of La. to U.S. Dep't of Justice (Feb. 17, 2006), http://www.laaclu.org/News/2006/Feb2106Gretnaltr.htm. Likewise the author requested the report but was met with similar refusal.

103. Paul Purpura, *No Charges Filed in Standoff on Bridge*, NEW ORLEANS TIMES-PICAYUNE, Nov. 1, 2007; Allen Powell II & Paul Purpura, *Jeff DA Says Bridge Case Closed*, NEW ORLEANS TIMES-PICAYUNE, Nov. 3, 2007.

104. Press Release, Jefferson Parish Dep't of Pub. Info., Hurricane Katrina Advisory 13 (Aug. 29, 2005), *available at* http://www.jeffparish.net/downloads/4440/4454-katrina_13_lock_down.pdf. He also took the further step of declaring the Parish to be the Kingdom of Jeffertonia and proclaiming himself King on radio station WWL-AM 870 on August 31, 2005. *See* Jeff Amy, NO Radio Station Defies Hurricane: 'The Big 870' Served as a Vital Communication Tool Throughout the City's Ordeal (Sept. 1, 2005), http://www.radiowaves.fm/newsstand/usa/everything alabama/050904.shtml. I will leave the discussion of the constitutionality of this action for another day.

105. LA. REV. STAT. ANN. § 29:727.

106. *Id.* § 29:727(F)(7). Two other states give local executives these broad powers: New York and Mississippi. *See* N.Y. EXEC. LAW § 24; MISS. CODE ANN. § 33-15-17(c)(7). Other states, such as Rhode Island and Virginia, vest the power in the governor. *See* R.I. GEN. LAWS § 30-15-9(e)(7); VA. CODE ANN. § 44.146.17.

who stayed in Gretna."[107] Just as individuals used force to defend their property after the floods,[108] so was the Chief of Police defending the communal property of his town. Even today, the Police Chief stands by his decision – and the people of Gretna stand firmly with their Chief.[109]

From a strictly legal perspective, here is a cold analysis. First, there is no constitutionally recognized right to *intrastate* travel.[110] Furthermore, using the analytical tools sketched above there is a clearly legal defined municipal border. The hard question becomes whether the citizens of Gretna had a reasonable expectation of privacy. Even if such a reasonable expectation exists, the necessity exception must be addressed. A logical difficulty emerges because the reasonableness standard requires us not only to rely on legal reasoning but also on normative constraints of morality and social duty to others in this situation. Returning to the previous discussion of private necessity, one must ask whether this situation rises to the necessary standard:

> Where such emergency exists the right to use one's property as he sees fit is subordinated to the exigencies of public safety and private necessity, and society imposes a duty not to use property in such a way as will interfere with activities necessary to the abatement of the emergency.[111]

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107. Interview with Arthur Lawson, Police Chief, Gretna Police Department, in Gretna, La. (Oct. 24, 2006).

108. Brian Thevenot, Gordon Russell, Keith Spera & Doug MacCash, *City a Woeful Scene*, TIMES-PICAYUNE (New Orleans), Aug. 30, 2005, *available at* http://www.nola.com/katrina/updates/index.ssf?/mtlogs/nola_Times-Picayune/archives/2005_08_30.html.

109. Chris Kirkham & Paul Purpura, *Bridge Blockade After Katrina Remains a Divisive Issue*, TIMES-PICAYUNE (New Orleans), Sept. 1, 2007, *available at* http://blog.nola.com/times-picayune/2007/09/bridge_blockade_after_katrina.html.

110. Dickerson v. City of Gretna, No. 05-6667, 2007 WL 1098787 (E.D. La. Apr. 11, 2007) ("While there is no doubt that a fundamental right of interstate travel exists, the Supreme Court has not ruled on whether a right of intrastate travel exists.").

111. Felter v. Del. & H. R. Corp., 19 F. Supp. 852, 854 (M.D. Pa. 1937) (citing Am. Sheet & Tin Plate Co. v. Pittsburgh & L.E.R. Co., 143 F. 789, 793 (3d Cir. 1906)). *See also* Richardson v. City of Little Rock Planning Comm'n, 747 S.W.2d 116, 117 (Ark. 1988) ("[T]he police power and health and welfare doctrines clearly permit restrictions on property use so as to prevent detriment to the rights of the public."); Erb v. Md. Dep't of Env't, 676 A.2d 1017, 1025 (Md. Ct. Spec. App. 1996) (noting that "this State has broad police powers that it may use to further public safety, health, and welfare"); Andrews v. Lake Serene Prop. Owners Ass'n, 434 So. 2d 1328, 1331 (Miss. 1983) ("Ordinarily, that miniscule portion of this planet's soil as a person owns may be put to such use as that person desires . . . . [T]here are those limitations created by public law emanating from an indentifiable [sic] sovereign, limitations such as zoning laws, building codes and fire codes.").

Or, considering there was no food, water or shelter available in Gretna, is this the situation of a person trespassing without the requisite degree of danger?[112]

If viewed from another angle perhaps all that the town of Gretna can be faulted with is the failure to help others avoid harm. Although there is a strong duty not to harm others, one commentator has noted that there is not an equally strong symmetrical duty to help others avoid harm, thus "moral relativism [is] the only plausible foundation" for the natural right to be free from harm.[113] We come to the intrinsically ironic dilemma of requiring supererogatory acts. However, as much as our caring society may desire it to be so, sympathy, empathy and inclusion cannot be legally mandated.[114]

While society certainly desires acts of compassion, based on the present legal framework individuals within society cannot be compelled to act compassionately. One answer might be to require the intervention of a higher governmental authority in cases such as New Orleans. Community would then be defined not as the locally bounded jurisdiction but rather as the more inclusive wider jurisdiction. Exercise of this power should only arise, though, in times of public emergency. To allow otherwise would eviscerate the power of communally held private property.

VI. CONCLUSION

I began this paper by stating that it was a story about exclusion. I demonstrated how the law permits an individual to indeed lead a hermit's life, excluding all from her land. Of course there are the exceptions of necessity and emergency but otherwise the power of exclusion remains broad. Even giving a nod to the normative considerations of harm prevention (if that can even be enforced), the remedy of trespass will prevent most incursions by outsiders.

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112. *See, e.g.*, Surocco v. Geary, 3 Cal. 69 (1853) (destroying a house in the path of a conflagration to prevent the fire from spreading to adjacent buildings demonstrated private necessity).

113. Glibert Harmon, *Moral Relativism as a Foundation for Natural Rights*, 4 J. LIBERTARIAN STUD. 367, 370 (1980), *available at* http://www.mises.org/journals/jls/4_4/4_4_3.pdf. *Cf.* ERICH FROMM, MAN FOR HIMSELF: AN INQUIRY INTO THE PSYCHOLOGY OF ETHICS 7 (Holt, Rhinehart & Winston 1947) ("[O]ur knowledge of human nature does not lead to ethical realism but, on the contrary, to the conviction that the sources of norms for ethical conduct are to be found in man's nature itself; that moral norms are based upon man's inherent qualities, and that their violation results in mental and emotional disintegration.").

114. Joseph William Singer makes a case for why our governmental institutions should act with compassion in governing. His "humanity test" would require the government to consider the human consequences of law. Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 339 (2006).

This concept of exclusion translates, albeit imperfectly, to the community setting. If clear boundaries are established that delineate and define the community (as we had with the hermit and her property line) along with a reasonable expectation of privacy, exclusion of outsiders may be legally permitted. The expectation of privacy is sometimes phrased as an "investment backed" expectation. I would suggest that instead this expectation be more firmly grounded in a legal right such as a deed restriction or a filed restrictive covenant. Gated communities fit neatly into this box. Public parks do not. As discussed above, the most difficult scenario we confront is public space limited by private access.

Perhaps the real question is not whether an individual or a community can exclude others. Rather the issue is what is lost by exclusion (or, inversely, gained by inclusion). One scholar claims that essential social connectivity of property ownership has been long obscured by viewing property through the lens of exclusion.[115] In his view, ownership should be "not primarily as a means of separating individuals off from each other, but of tying them together into social groups."[116] The political philosopher Brian Barry has written that social exclusion has negative effects on social justice[117] and social solidarity.[118] He argues that social solidarity is intrinsically valuable because "human lives tend to go better in a society whose members share some kind of existence."[119]

The focus on individual rights should have the correlative responsibility of civic duty. Because exclusion affects civic engagement, there are broad civic implications on how exclusion impacts public life. Social interactions profoundly affect the quality of civic life. A key point in the literature is that random face-to-face interactions among people of different ethnic, socioeconomic, and generational backgrounds have a profound effect on the level of trust and, hence, social capital that individuals develop.[120] In short, such interactions influence individuals to be more "other-regarding," a key element of strong civic life. According to Eduardo M. Penalver, espousing the right to exclude as the fundamental right means that exclusion is incorrectly equated

115. Peñalver, *supra* note 19, at 1939.

116. *Id.* at 1938.

117. Social justice is broadly defined as equality of opportunity. *See* Brian Barry, *Social Exclusion, Social Isolation and Distribution of Income*, *in* UNDERSTANDING SOCIAL EXCLUSION 13, 18 (John Hills et al. eds., 2002).

118. Social solidarity is described as "a sense of fellow-feeling that extends beyond people with whom one is in personal contact. At a minimum, it is the acceptance that strangers are still human beings with the same basic needs, and rights, at a maximum it is (in Benedict Anderson's terms) an 'imagined community.'" *Id.* at 23.

119. *Id.* at 24.

120. *See* JOHN FIELD, SOCIAL CAPITAL (Routledge 2004) (2003); Fane Adam & Borut Rončević, *Social Capital: Recent Debates and Research Trends*, 42 SOC. SCI. INFO. 155 (2003); Kent E. Portney & Jeffrey M. Berry, *Neighborhoods and Social Capital*, *in* CIVIL SOCIETY IN THE UNITED STATES (Virginia Hodgkinson, ed., 2000).

with liberty and freedom, a "singularly implausible understanding of human nature and the dynamics of human communities."[121]

I am certainly not advocating the eradication of private property nor the evisceration of the hermit's right. Rather I encourage the acknowledgment of the power of the border in delineating and dividing society. Boundaries, when allowed to reify and solidify, become insurmountable barriers to understanding the plight of those who live outside the walls. I agree that municipal boundaries have become more than "mere political subdivisions." They serve as means for delineating "us" from "them."[122] I propose that discourse about a community's reasonable expectations of privacy include an elaboration of how unreasonable social disconnectivity can be. We are better able to judge the ability to exclude upon that basis.

121. Peñalver, *supra* note 19, at 1972.

122. This is even more true in the case of gated communities.