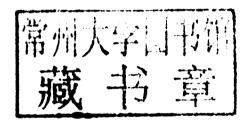
Information and Exclusion
Lior Jacob Strahilevitz

## INFORMATION

**AND** Lior Jacob Strahilevitz

# **EXCLUSION**



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### INFORMATION AND EXCLUSION

FOR IRIS AND ELI

#### **ACKNOWLEDGMENTS**

I began working on the project that would become this book in 2004. The property theory that forms the core of Parts I and II was conceived over the course of a few weeks spent thinking and using colleagues as sounding boards. Several years passed before I started thinking productively about the effects that new technologies might have on racial and other forms of discrimination, and this research formed the basis for Part III of this book. Part III is about information privacy and exclusion at its core, but the three parts together try to advance the argument that property theory has much to say about privacy, and that privacy theory can teach us much about privacy. The book you see before you is therefore substantially different from the manuscript I thought I was starting on in 2004, and hopefully the better for it.

The book draws on several previously published law review articles: Exclusionary Amenities in Residential Communities, 92 Virginia Law Review 437 (2006) (chapters four and seven); Information Asymmetries and the Rights to Exclude, 104 Michigan Law Review 1835 (2006) (chapters one, two, three, five, and six); Privacy versus Antidiscrimination, 75 University of Chicago Law Review 363 (2008) (chapter eight); and Reputation Nation: Law in an Era of Ubiquitous Personal Information, 102 Northwestern University Law Review 1667 (2008) (chapters eight, nine, and ten).

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#### INTRODUCTION

Perhaps because of their proximity to major research universities, campus fraternities and sororities are among the most studied and analyzed residential communities in the United States. Scholars interested in understanding the "Greek system" can draw on a wealth of serious research spanning a period of decades.

We can find some real gems in these archives of fraternity research. For example, during the 1950s, sociologists Gene Levine and Leila Sussman studied the process by which selective fraternities chose which students to admit. Fraternity members were frank about who they were looking to admit and how a student rushing the fraternity could make a favorable impression on them:

[We seek] the man who can express himself maturely, who has an interest in things outside of books; the one who has a neat appearance.

[We are looking for] likeable guys, ones who know how to talk and who aren't loud. Men who'll fit in here . . . one who is the all-American-boy type but with brains.

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

You can see right through them in five minutes.

First, I'm concerned with how they are dressed. It's not a matter of Ivy League clothes, but looking neat and well-groomed. The next thing is a hearty handshake with a smile to go with it. A cold, clammy handshake and a tense face don't go with me.'

The stakes in decisions over who to admit to a fraternity were not trivial. Existing fraternity members would have to live in close proximity to their successful pledges for up to three years. If the fraternity admitted sociable and popular applicants, the brothers would see their status rise, would find their experiences enriched, and could expect a more promising group of applicants in future years. If the fraternity admitted duds, the members would have to live with the consequences of their mistakes.

With that much at stake, one would hope that fraternity members would rely on more than a handshake or an outfit or a five-minute conversation to help them separate the wheat from the chaff. But the fraternity members no doubt thought that one could learn a lot about a student from each of those readily observable characteristics. A weak handshake might signal low self-esteem. A shabby outfit could indicate a shortage of the financial wherewithal necessary to graduate. A stumbling five-minute chat might be a good indicator of low social intelligence. Assessing self-esteem, financial resources, and social intelligence directly would be costly, time consuming, and intrusive. As shortcuts, the handshake, outfit, and conversation heuristics seem to have worked well enough.

Fast forward almost six decades. Fraternities and sororities persist at many colleges and universities, as do selective admissions policies at the more desirable ones. But some things have changed. Fraternity members no longer need to rely as much on proxies like handshakes or clothing to evaluate applicants, though they surely continue to do so. In an era of social networking websites, virtually every freshman student seeking admission will have made available a detailed account of his or her tastes in music, reading materials, and hobbies, along with an informative map of his friends, acquaintances, and intimates. By substituting a five-minute perusal of a Facebook page for a five-minute conversation, the fraternity member can do a better job of evaluating those attributes he deems relevant for admission purposes. It is not surprising that fraternity and sorority members have turned to these social networking websites in recent years to evaluate pledges.<sup>2</sup>

We can now abstract away from the world of community service projects, keg parties, and sweatshirts sporting Greek letters. The trend I just

highlighted on college campuses is indicative of a dynamic that arises whenever people seek to establish exclusive communities, clubs, or workplaces. In each case, someone wants to ensure that the right sorts of people gain admission, and the wrong sorts of people are turned away. This book asks a central question, but one that scholars have largely ignored: What predicts which mechanisms individuals will use in order to promote exclusivity? The short answer to that fundamental question is that the choice among strategies for achieving exclusivity will be driven largely by information economics. In the story above, the availability of a new and informative resource (Facebook) for evaluating fraternity pledges permits members to reduce their reliance on crude and often misleading evaluative proxies like handshakes, clothing, and short conversations. What's more, once we see how access to information enables or constrains private actors' exclusion strategies, we begin to realize the wealth of strategies at the state's disposal if it wants to curtail problematic exclusion or promote desirable exclusion.

In the pages that follow, we will explore a host of settings in which information affects the mechanisms that a real estate developer, landlord, business owner, website proprietor, philanthropist, or city planner employs in order to achieve the desired level of exclusivity. Our journey will take us through British poorhouses in the 1830s, Manhattan apartment buildings in the 1960s, suburban residential golf communities in the 1990s, and present-day virtual communities. We will see similar themes playing out across these eras: the use of crude proxies for desirable and undesirable characteristics, efforts to refine those proxies so as to achieve greater precision, the displacement of crude proxies with more refined metrics as information economics makes greater precision possible, and, in some cases, social and economic dislocation as once-reliable bases for sorting individuals become less trustworthy.

We will use our fuller understanding of the relationship between information and exclusion to help us tackle a number of contemporary puzzles about the world in which we live: Why do homeowners associations frequently permit murderers and arsonists, but not sex offenders, to live within their gated walls? Why might doctors be more willing to prescribe narcotic pain medication to Caucasians than minorities? What might explain the astonishing appeal of homes built surrounding golf courses during the 1980s and 1990s and the near collapse of residential

golf construction today? How come blue-collar African American males face better job prospects at firms that routinely conduct criminal background checks than at those that do not? Read on.

Chapter one begins with a brief primer on exclusion. It introduces in an accessible way two important developments in legal scholarship. First, it explains the centrality of what are called in rem exclusion rights—rights that are good against the entire world, not just against parties to a contract. Second, it explains the relationship between exclusion and governance as competing strategies for regulating access to a collective resource. Along the way, the chapter explains what makes exclusion so enticing and important in some contexts, yet so dangerous and damaging in other settings.

Chapter two introduces the most familiar form of exclusion, what I call the "bouncer's right." This sort of exclusion is backed by trespass law, and is enforced by a device for regulating access—perhaps the bouncer at a nightclub, a gate with a combination lock, a rule governing who is admitted to a sorority or a covenant delineating who is permitted to buy a home in a gated community. When scholars of property refer to the right to exclude, it is this bouncer's exclusion that they typically have in mind. Much of the law that tries to clamp down on discriminatory exclusion has bouncer's exclusion as its target. But I will argue that bouncer's exclusion is hardly where all of the action has been, when it comes to exclusion, and an overemphasis on that single mechanism of exclusion can blind us to the effects of exclusion achieved via other means.

Chapter three introduces the concept of "exclusionary vibes," where language, aesthetics, and marketing choices facilitate exclusion—not by physically restraining people from accessing a collective resource, but by encouraging people to exclude themselves from that resource. Exclusionary vibes are at their most effective in those instances where people prefer to be sorted with like-minded individuals. In such instances, exclusionary vibes can perform a valuable role. In other instances, however, the types of sorting that consumers might want individually may not be optimal for society. Those are the domains in which the regulation of exclusionary vibes is warranted. While housing discrimination laws do regulate some uses of exclusionary vibes, the use of communicative tools to create homogeneity is by and large unregulated by law.

Chapter four introduces another tool of exclusion, dubbed the "exclusionary amenity." An exclusionary amenity bundles access to a resource with the use of a polarizing and costly communal good. If some groups are predictably willing to pay for the communal good, and others are not, then the decision to bundle the amenity with the collective resource may engender significant homogeneity. The chapter discusses at some length the evidence suggesting that during the 1980s and 1990s some golf course communities may have facilitated residential racial segregation. It also discusses the current development of Ave Maria Township in Florida, which has used the exclusionary amenities strategy to create an overwhelmingly conservative Catholic municipality. Interestingly, exclusionary amenities are essentially a blind spot where the law is concerned—their use is unregulated, which means they can be used to circumvent antidiscrimination protections.

Chapter five proposes a theory to explains why the entity controlling a resource might favor one exclusionary strategy over another. It suggests that the most important, and heretofore unrecognized, factor that governs when a resource owner opts for one exclusion strategy or another is asymmetric information concerning the attributes of potential resource users. If the person controlling access to the resource can easily and accurately determine whether a prospective user possesses the desirable attributes that the owner is hoping to screen for, then bouncer's exclusion will be the most suitable strategy. If, on the other hand, it would be very difficult for a bouncer to discover which prospective entrants should be admitted and which should be excluded, it will usually be optimal to shift the decision concerning exclusion to the prospective entrants themselves, via exclusionary vibes or exclusionary amenities. The chapter concludes by pointing out how legal considerations, social meaning, and other factors might also influence a resource owner's choice among exclusion strategies.

Chapter six examines what is at stake for society when a resource owner chooses whether to exclude and via what mechanism. Not surprisingly given how much is at stake, exclusion itself is often controversial. Interestingly, as this chapter will suggest, some forms of exclusion are much more visible than others, so an owner can often achieve a result via subtle strategies that never could have been achieved had the mechanism and results of his strategy been more transparent.

Chapter seven returns to some of the themes introduced in chapter four and examines what a legal framework that took exclusionary amenity strategies seriously and sought to regulate their more pernicious effects might look like. It explains that requiring developers to embed "inclusionary amenities" in communities can often offset some of the polarizing effects achieved via the use of exclusionary vibes or amenities. It then suggests that there is a role for law to play in requiring that inclusionary amenities be bundled into new residential developments, or that the absence of inclusionary amenities in new developments be viewed skeptically by the state.

Chapter eight observes that in the last decade or so, industrialized societies have begun to embrace technologies that will facilitate much more finely grained exclusion than would have been possible since the onset of industrialization and urbanization. This development, called the "reputation revolution," has the potential to fundamentally change the nature of the game when it comes to exclusion. More precisely, the chapter shows how this revolution has often caused resource owners to shift back toward bouncer's exclusion, precisely because bouncers can now gather and analyze information about prospective entrants so much more easily than before. Notably, however, the move toward greater precision sometimes has very laudable effects. For example, empirical research suggests that when employers have more accurate information about which job seekers have criminal records and which ones do not, their hiring decisions will be less racially discriminatory than those of employers who lack access to reliable criminal history information. Using this body of research as a model, the chapter shows how information policy—whereby the state makes transparent information about individuals that would otherwise be obscure (searchlight strategies), or obscuring information that would otherwise be readily apparent (curtain strategies)—can be an essential tool of twenty-first-century antidiscrimination strategies.

Chapter nine discusses at a higher level of generality the suggestion that information policy be used as a tool for influencing the propensity of private actors to discriminate. It discusses the circumstances under which moving away from traditional legal interventions like carrots and sticks, and toward interventions like searchlights and curtains, is appropriate. It turns out that the effectiveness of searchlight and curtain strategies will be

driven by considerations such as the ratio of animus-based discrimination to statistical discrimination, the reliability of the reputation information to which decision makers might have access, and the ability of prospective entrants to create misleading profiles of themselves.

Chapter ten tackles the issue of carrots and sticks versus searchlights and curtains from a distributive framework. Specifically, who wins and who loses when information policy is used to constrain or promote exclusion by private actors? The answers to that question are both interesting and important. Focusing on a case study like the United States' evolving treatment of sex offenders who have completed their terms of incarceration provides a useful glimpse of the sorts of issues that will arise with greater frequency in the coming years. The chapter then steps back to consider briefly normative questions about what it might feel like to live in a world where exclusionary and inclusionary judgments are made on the basis of increasingly fine-grained and accurate information about individuals, rather than blunt and imprecise information about visible groups.