2 The Possibility and Defensibility of Nonstate "Censorship"

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Whether social media companies (hereafter, SMCs) such as Twitter and Facebook limit speech is an empirical question. No one disputes that they do. Whether they "censor" speech is a conceptual question, the answer to which is a matter of dispute. Whether they *may* do so is a moral question, also a matter of dispute. We address both of these latter questions and illuminate whether it is morally permissible for SMCs to restrict speech on their platforms. This could be part of a larger argument, which we do not explicitly offer here, that states ought not to forbid SMCs from censoring. We do not focus on legal statutes or precedent. We argue that nonstate actors can (as a conceptual matter) and may (as a moral matter) impede the freedoms of others to express themselves. That is, barring rare emergencies, nonstate actors may censor individuals even when states may not.

We mainly defend our view indirectly. We approach our defense by tackling some important objections. Our targets are critics who deny that property rights in the means of communication confer extensive rights to exclude. As we shall note, however, arbitrary exercise of such rights leaves nonstate actors liable to nonstate punishment from boycotts, public shaming, disassociation, and the vagaries of consumer preferences.

We begin with an account of censorship in Section 2.1. After concluding that private entities, including SMCs, can (conceptually) censor speech, we go on in Section 2.2 to discuss arguments that it is impermissible for them to do so. We consider four such arguments, which appeal in turn to (1) private property serving as a town square, (2) a right to equal status and relational equality, (3) testimonial injustice, and (4) historical injustice. We show how the first three arguments are vulnerable to what we call the *substitution objection*: there are alternatives available that honor the relevant values in political morality and have fewer moral costs. Our response to the fourth argument is different, but nonetheless shows how the objection fails. We conclude the paper in Section 2.3 by considering when SMCs would not justifiably censor.

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2.1 What Censorship Is

In this section, we set out our formal account of censorship. In our view, substantive considerations about the merits or permissibility of an action are separate from whether that action counts as an instance of censorship. Censorship is a constraint on a family of freedoms of expression. Accordingly, states, corporations, and individuals can and routinely do censor.

We take it to be *censorship* when one agent intentionally suppresses, denies, or withholds from a second agent some liberty to express themselves or otherwise communicate.[3] In our view, "censorship" is a success term—failed attempts at censoring another are just that: failed attempts. If Joe knocks Jim off the platform in order to stop him from speaking, but Jim holds on to the microphone, retains his balance, and continues speaking, he has not been censored though Joe *attempted to censor* him.

This formal account rules out the possibility of accidental censorship. If you inadvertently bump into a stranger who is speaking to someone, you restrict the stranger's liberties to speak—especially if you knock that person to the ground. We would not call this censorship. If your neighbor mows her lawn on some weekend afternoon and restricts your liberty to have casual conversation on your nearby back patio, she does not censor you. To censor is *intentionally* to constrain another's opportunities to speak or express themselves.

Our formal account of censorship pays no heed to moral considerations that govern whether (and when and where) one may permissibly impact others' liberties to speak or express themselves. This means that there will be cases of censorship that might not be noted as such because they are not morally problematic. We recognize that people sometimes take the term *censorship* to entail an impermissible or indefensible limit on another's opportunities to speak or express some view. In our view, that is a mistake that involves confusing conceptual with moral matters. We return to this point below.

There are clear cases of censorship by government authorities. Many of them will strike us as misguided or impermissible. Lenny Bruce was arrested for a bit in which he displayed and discussed nudes from *Playboy* magazine (Kirchner 2010, ch. 11). Eugene Debs was incarcerated for sedition when he publicly opposed World War I conscription (Newton-Matza 2017, ch. 4). Prior to the US Supreme Court ruling in 1965 in *Griswold v. Connecticut*, physicians in Connecticut were legally prohibited from advising married couples about methods of contraception. In these and many other such cases, state authorities once used or still use force to restrict, prohibit, or punish the expression of some ideas.

Some critics might challenge the claim that nonstate entities can censor. We caution against conflating conceptual and moral concerns. Speaking purely conceptually, nonstate entities *can* censor. Indeed, they

regularly do so. If they could not, then the term "government" is redundant as a qualifier for "censorship," and we would need another term for what nonstate agents do when they limit speech. Following common usage and in order that we may set out a concept that is sufficiently versatile for theoretical purposes, we hold that censorship is not the unique province of the state. It is a feature of how one party suppresses, constrains, or withholds liberties from another to express certain views in certain ways.

The term "government censorship" is, then, a specification of "censorship," as is "parental censorship," "school censorship," etc. "Social media censorship" would simply be censorship by a SMC.

There are many morally innocuous cases of censorship that often receive little notice except to philosophers analyzing the concept. Suppose a committee chair maintains a queue for discussion and denies someone the chance to interrupt out of turn. On our account, that is censorship. If you shush a person in the theater, you attempt to censor them. When you hang up on a telemarketer, you censor them. When parents make their children be quiet at bedtime, they censor them. When a journal editor desk rejects your manuscript, the editor has, on our account, censored you. Many of these are routine and permissible exercises of authority, privacy, and civility.[4] If we understand censorship as the deliberate refusal, withdrawal, or denial to someone of some liberty to speak or express themselves, then these and many other examples are censorship. States regularly do it. Corporations do it. Individuals also do it.

On this formal account, note that the constraint or suppression need not be complete for it to be censorship. X might censor Y by disallowing use of the mail while failing to stop Y from communicating Y's view in other ways. Some acts suppress or deny *more* liberties to communicate than others do. If X locks Y in a prison cell and denies Y all contact with the outside world, that is far more constraining of Y's liberty to speak than if X were simply to confiscate Y's computer. Locking Y in a prison cell is, *prima facie*, more censoring than confiscating Y's computer. Confiscating the computer is, *prima facie*, more censoring than shushing Y in the theatre. Among the factors that determine the extent to which one censors are: how many people's liberties one constrains, how effectively, in how many contexts, and for how long.

When Twitter banned former President Trump from its platform, it prevented him from speaking to a certain audience via a particular medium, thereby limiting his speech. It did not prevent him from speaking elsewhere; he had other available avenues of communication. Even when the government censors someone, they also will typically have other avenues of speech. Consider the Comstock Act of 1873, which made it illegal to send certain "lascivious" material through the mail. Those wishing to share or speak about those materials with others could still do so—for example, by physically handing them the materials.

It seems implausible that only governments can suppress expression or communication. Imagine a teacher in a contemporary private school or private college classroom who tells the female students to be quiet while the class learns about and discusses abortion because, the teacher says, they have nothing of value to contribute. Other things equal, this seems clearly impermissible, but what matters here is that it is a case of censorship that has nothing to do with the role of the government and everything to do with his excluding the female students from the discussion—i.e., his *suppression* of their communication. Some instances of private suppression of communication are permissible and some impermissible. Similarly, some instances of government suppression of communication are permissible (typically, those involving reasonable place, time, and manner restrictions) and some impermissible. Again, we see no conceptual reason to call one censorship and not the other.

Next, we consider common criticisms of the view that nonstate agents may suppress speech. We argue against the leading criticisms.

2.2 Arguments against Stringent Private Rights to Exclude

We begin this section by sketching an account of property that allows for rights over platforms for expression and speech, but which does not prejudge the stringency of such rights. While we do not guarantee our account is neutral among all substantive theories of rights, it is thick enough to allow that individuals, alone or together with others, may claim rights over means of communication but thin enough so as not to determine exhaustively the stringency of various rights claims purely on formal bases. After setting out the formal account, we consider what claims others might have to access such spaces against the owners' will.

On our account, property rights include a bundle of claims. We do not specify all elements in that bundle. We maintain, however, that one item in that bundle is typically a right to exclude others for any reason barring emergency (Schmidtz 2010; Honoré 2013; Alexander and Peñalver 2012, ch. 7).

Enjoying or exercising such property rights does not insulate property owners from the informal reprisals of civil society for unwise or pernicious exercises of that right. Second- or third-parties may, for instance, condemn such uses of rights, rally others to their cause, disassociate from the owners, or exclude owners from access to other resources or opportunities over which the second- or third-parties have rights. Moreover, such second- or third-parties are subject to scrutiny and reprisals over how they exercise their own rights when thus responding.

On our substantive account, this right to exclude ought nearly always to protect bearers from state action. (This is consistent with recognizing that the state ought to protect a right to exclude that is consistent

with others' similar rights.) In short, we hold that in a liberal political morality, there are important moral reasons for understanding rights to exclude as having priority over nearly all other rival claims. We call our substantive view *stringent private rights to exclude*.

According to this view, *nonstate* agents ought to enjoy immensely (but not infinitely) stringent rights to exclude others who seek access to their property, including for the purposes of expression or communication. We do not directly defend *stringent private rights to exclude*. Instead, we approach this issue indirectly by considering the shortfalls of common criticisms of the view. In this way, we hope to leave substantive positions such as ours on more solid footing.

We survey four compelling worries that private rights to exclude expression on, by, or with privately held resources are readily defeasible by non-emergency considerations. They are (a) the *town square* argument, (b) the argument from *equal status*, (c) the appeal to *testimonial injustice*, and (d) the appeal to *historic injustice*. We discuss each in turn.[5]

2.2.1 The Town Square Argument

One common argument subordinates property to free speech rights by appealing to the need for a public forum. We call this the *town square* argument. On this account, free speech uniquely serves crucial roles for the health of a political community. As some US federal and state courts have noted, shopping malls and other privately owned spaces often serve as a sort of town square or town forum (*Alderwood Assocs. v. Envtl. Council* 1981; *State v. Schmid* 1980; *New Jersey Coalition v. JMB* 1994; *Pruneyard Shopping Center v. Robins* 1980). Critics of stringent private rights to exclude might argue that such spaces are the main if not only spots where diverse people from the community mix peacefully. Such spaces, on this sort of view, now serve important *public* functions. Among those functions is being a site for the free exchange of information crucial for sustaining a free society. Thwarting such exchange and expression undermines the opportunity for a people to hold their public institutions accountable in a free, informed, and responsible fashion, and so owners' rights to exclude are thereby subject to constraint.

The town square argument holds that owners of spaces that serve public forum functions may not deny persons reasonable opportunities to exercise freedoms that are key to maintaining an accountable public order, such as those to petition, disseminate information peaceably, and assemble. Case law in the United States, though, holds that such freedoms are subject to time, place, and manner restrictions even in public spaces; the same restrictions used to preserve the commercial functions of the venue have also been imposed on those wishing to use privately held spaces (*Pruneyard* at 83). We need not settle what would count as

"reasonable opportunities" to exercise the relevant freedoms in order to explore this argument. We shall suppose that proponents of this argument would unpack it in a way that would allow at least some non-emergency cases as among such reasonable opportunities.

Since ours is an exercise of social philosophy and not legal theory, we also pass over details about applications of and limits to the state action doctrine (which limits the protection of speech freedoms to encroachments by state actors only), due process protections, and other important constitutional and legal considerations. We consider only whether the *town square* argument succeeds in light of what we call *the substitution objection*: the town square argument fails when there are alternative outlets for expression that can substitute for one's preferred venue to communicate.

Under *stringent private rights to exclude*, absent certain emergencies, one does not have any right to petition, speak, or express (which for simplicity we call *the right to speak*) using property over which one otherwise has no claim—especially without the owner's consent. If the sole reason for giving priority to the right to speak is that it is the *only* way to disseminate a message or exercise other important freedoms, opponents of stringent private rights to exclude must demonstrate that there is no substitution available to speaking via the putative private property. We argue, however, that there are substitutions routinely available. We do not deny that some such substitutions might be less effective or more expensive. We simply reject the view that there are no substitutes. For instance, those who wish to speak can stand on sidewalks, rent a billboard, buy radio airtime, write letters to the editor of a local newspaper, disseminate information in the park, speak with neighbors, and so on.

Of course, most proponents of town square arguments will object that the alternatives are unfairly more difficult to exercise and/or more expensive. This might be a regrettable feature of our civil society, but it is not, without further argument, a reason to deny stringent private rights to exclude. There are, after all, many circumstances and considerations that make other things more difficult or expensive to use—and which are not ordinarily taken to justify constraining property owners' rights. If you open a coffee shop near mine, your competition makes mine more expensive to operate, but we do not think competition should be prohibited. There are always gains and losses when living in society with others; a justificatory burden must be met before interfering with such.

The whole idea of a "town square" where people congregate and civically engage, discussing the political issues of the day, seems a quaint relic or myth. At best, it has been a very long time since communities had that, and many contemporary communities never had it.

Town square proponents might have in mind a model from the United States in which a nine block grid included a town hall, green space, and centrally located stores (Brady 2014). This was a location wherein all could engage in discussion about the issues of the day, whether political

in nature or not. Unsurprisingly, there are problems with this view. First, it is clear that the history of slavery and racism generally in this country limited the extent of general participation in any public discussion forum, *especially* those in public spaces. Granted, one might think this provides additional reason to want private spaces for public discourse (as minorities might be more likely to engage in the discussion therein). When these spaces are owned by others, though, justification is needed to limit the rights of those others.

There is a second problem with the idea of preserving or reconstructing a public forum that allows discussion for community decisions. Perhaps under some ideal town square model, individuals freely participate in robust discussion. What we actually see, historically, are not the "rugged" individuals of American myth but people committed to their local groups. As B.A. Shain says, "what made Americans so different from others in the Western world was the degree to which familial and local communal concerns were sanctioned and not overawed by those of higher levels of integration" (Shain 1996, 100; see also Butterfield 2015, 12). In short, then, whatever discussion that was present at the town square would have been limited by the local communal interests of the citizens—about which there would be considerable overlap, especially as slaves would be excluded.[6]

A more accurate historical understanding, then, is that it was never the case that everyone had a town square within which to speak. Some people, of course, simply lived too far from a town to engage in discourse within one. Others would have been prohibited from doing so. An honest appraisal of the town squares as they actually existed (where they did) would also have to recognize that many would be subject to significant racist and sexist norms that meant only some could even potentially engage in whatever civic discourse there was. Given all of this, the claim that any particular SMC or mall should be required to abide by policies making it a "town square" could not be a matter of reviving something that was once, but is no longer, present. Rather, it has to be recognized as a demand that property rights be limited so that others can have a place for public discourse where little or none had been before—indeed, where government authorities or local groups would have prevented such.

This historical argument is not decisive against a normative argument for a requirement on malls (or SMCs) that they serve as public fora, but it lays bare what the demand really is: a demand for something to be provided because some happen to think it a good thing. As with other cases where some wish to use government force to satisfy some group's preferences, further argument is needed to justify interfering with how individuals wish to make use of their property. Even if public discourse is important (and we agree that it is), that commitment alone is insufficient to justify limiting stringent private rights to exclude. Government could,

after all, supply what is desired through taxation, with all sharing the burden rather than imposing on particular property owners.

Presumably, defense of the *town square argument* will involve something about the value of democracy or being heard. We discuss such arguments in the next section. For now, we note that such arguments must satisfy two requirements. First, they must show there is a need for "town square"-like spaces—spaces where public discourse is allowed or encouraged. Second, they must show that these must be provided by private parties. That is, it is not enough to say there must be a space for public discourse, but we must also know why the state itself cannot provide such a space rather than forcing a group of property owners to do so.[7]

Some might be inclined to make some sort of efficiency argument for requiring Malls (or SMCs) to allow extensive use of their property for the purpose of enabling or encouraging speech. The space already exists, after all, so using it would obviate the need to create another space. But there are many spaces that exist. Critics seem to ignore how people can simply engage in public discourse on their neighborhood streets, in public parks, at bars, in bowling alleys with friends, etc. Even if it is true that open opportunities for public discourse serve important moral purposes—and we agree that without such, a community is morally impoverished—there is little reason to place the burden for such provision on specific owners.

We believe owners of malls or SMCS could reply to the claim that their property is the "town square" by noting that other venues can satisfy town square functions. Malls, for instance, compete for customers—with each other and with other sites, not all of which are commercial. Perhaps one mall wants to appeal to liberal customers while another wants the conservative customers. Mall owners might wish to provide customers with a certain atmosphere such as one that excludes certain political solicitations or only provides certain political solicitations. Proponents of limiting stringent private rights to exclude must then show that owners' rights to their spaces must yield to the demands of others to access such spaces against owners' wishes.

Our claim, to reiterate, is that to defeat *stringent private rights to exclude*, critics must show that the right to speak on/through/with some property takes precedence over the owner's right to exclude despite available substitute venues for speech. While an individual is and should be free to speak in their own home and in genuinely public spaces (those owned or controlled by the state), they are not usually so free in property owned by someone else.

We do not claim to have defeated the *Town Square* objection. We argue only that proponents must overcome the substitution objection. Since there are multiple alternative venues available for speech, there is no need to restrict stringent private rights to exclude. The Town Square objection at best highlights the importance of certain types of civic

participation. Without showing the unique significance of particular private spaces for speech, the town square objection is an incomplete challenge. We next turn to appeals to relational equality and equal status.

2.2.2 The Argument from Equal Status

A defense of stringent private rights to exclude need not hold that such rights are infinitely stringent. This opens the door to competing views about how to weigh the importance of rights to exclude against other considerations. In this section, we consider how one might appeal to the importance of public discourse as a way to challenge stringent private rights to exclude. We take it to be a cousin of the "town square" argument. It roots the significance of opportunities to speak not so much in providing political accountability but in securing equal status. After setting out this objection, we note how it also faces an important challenge from the substitution objection.

The allure of democracy is and has always been the idea that it provides a way that everyone living under a given regime can *have a say* in the way the regime is run. When everyone has such opportunities, that gives law legitimacy (Christiano 2002, 31–50). In a new paper, Teresa Bejan (Bejan 2021) considers the way people have a say by comparing the Ancient Greek notions of *parrhesia* and *isegoria*.

With the model of *parrhesia*, all members of the group get to have a say; with *isegoria,* by contrast, all members *with standing* must be allowed equal communicative contributions to the group. The change in emphasis here is no small affair. With *isegoria*, all *who are peers in the regime* must be *treated as equals* and have their statements heard (with "equal shares of speaking rights, turns, times, audience attention, and so forth" (Bejan 2021, 161)). What matters is that the citizens are equal, *qua* citizens. With *parrhesia*, everyone might get a say, but that means literally *everyone* with no discrimination of those qualified to contribute and those not; putting the point somewhat hyperbolically, this allows for cacophony with everyone having a right to speak, regardless of the value they contribute. By contrast, again, *isegoria* (at least in the ideal form Bejan supports) applies to all who are "peers in virtue of their epistemic dignity and independence" (Bejan 2021, 163). This allows that "deference might still be given to those with greater experience or knowledge" (Bejan 2021, 163), though "crucially, those who [are] epistemically privileged [do] not have any authority over their peers. All remained 'equal speakers' in this sense" (Bejan 2021, 163). With *isegoria*, in other words, "[o]ne's value as a speaker must be acknowledged by one's audience" if one is a peer (Bejan 2021, 164) whereas with *parrhesia*, there is no concern for the relations at all—instead, the emphasis is merely on letting all speak (again, regardless of the value contributed or expected).

In contrast to the way many in the classical liberal tradition have discussed the value of free speech—as recognizing that each person has a right to speak her mind—Bejan tells us that "the ideal of equal speech [*isegoria*] grounds its value instead in the claims, judgments, and arguments of those with epistemic dignity" (Bejan 2021, 164). Orderly discourse is preserved by the ideal of *isegoria*, not by *parrhesia*. As she puts it, the exclusion necessary to *isegoria* is "essential, not incidental" (Bejan 2021, 165). She is not suggesting that we should cease all exclusions, nor is she justifying *existing* exclusions. She is, instead, pressing us to recognize that any exclusions must be appropriate. Those who participate in the discourse must be valued in the same way (as equal citizens); those valued thusly must have the opportunity to be included in the discussion. We should not exclude anyone from participating in public discourse because of their race or sex, of course; we can exclude those who are simply not capable of the right sort of discussion or who are not, in the relevant sense, citizens. Hence, when we allow students into a "college seminar, in which those with differential expertise and ability nevertheless participate as equal speakers" (Bejan 2021, 168), they are all treated as peers, with valid claims to the "attention and consideration" (Bejan 2021, 155) of all of the seminarians—and those without the requisite abilities are not participants at all.

The requirement that all fully mature citizens must be recognized as valued speakers bears some resemblance to the *Town Square* argument. Here, however, the emphasis is on acknowledging and institutionalizing our status as equals to be heard. The relevant equality for Bejan is of our status as speakers. Recall that the basic claim in *Town Square* is that SMCs now, or malls in their heyday, serve public forum functions and so must permit everyone reasonable opportunities to exercise freedoms that are key to maintaining an accountable public order. Here we see a defense of robust opportunities to speak as a way of acknowledging our equal status as speakers. Each must be recognized as a valued speaker by the state.[8] The fora of such recognition, on this account, was once a literal square in the center of town, but at other times was the courtyard in the (privately held) mall or, as is supposedly the case now, on the platforms owned by SMCs.

The problem with the argument just made should be clear given what was said above. It is their co-citizens that must recognize each as a valued speaker, perhaps through the state (and/or its agents), not any private entity. The claim that the owner of a SMC or mall is so obligated could only succeed—if ever—if the SMC or mall were the only place in a territory where such discourse was possible. Put differently, the owner's right to exclude would take second place to a putative right to speak (or be heard as an equal) only if the resource were somehow uniquely suited as a site for *isegoria*, where each can be recognized as of equal value. That, though, is extremely unlikely to be the case. There are other

locations where such equal discourse is possible. We doubt it will ever be the case—as if individuals will completely cease speaking to their neighbors, writing and reading newspapers, magazines, blogs, books, etc. The substitution objection stands.

Perhaps it will be objected that those wishing to limit private rights to exclude need not show that the private property, whether mall or social media, is the only fora for civil discourse, but only that it is the *best*. Critics must then show that the resource is the best forum—and that entails not only showing that it is currently used as such in some way that makes it better than other fora but also showing that a government provided alternative would not be better still.

The argument from equal status—as persuasive as it is regarding the need for treating co-citizens as equal contributors to public discourse—fares no better than the town square argument for those attempting to override the right to exclude that property owners have in malls, SMCs, or other not-yet-invented property. We turn, then, to another argument meant to show that rights to exclude should be limited by rights to speak.

2.2.3 The Argument from Testimonial Injustice

Critics of *stringent private rights to exclude* might argue that denying persons access to a platform unduly marginalizes them. On this type of argument, exclusion is a form of *injustice* because it denies potential speakers an opportunity to engage robustly in a knowledge economy in which they have a significant stake. We construct one form of this argument by drawing on Miranda Fricker and others inspired by her work (Fricker 2007; Dotson 2014; Fricker 2017; Dotson 2016). As we argue, critics who constrain rights to exclude out of concerns with unjustly oppressing persons as knowers face challenges from the substitution objection.

Fricker draws our attention to *epistemic injustice*. There are many features to this idea, but for the purposes of this discussion, we need only focus on how exclusion from communication venues, media, and platforms, might fail to respect speakers *as knowers*. On Fricker's account, epistemic injustice is "a kind of injustice in which someone is wronged specifically in her capacity as a knower" (Fricker 2007, 27). One of the types of injustice Fricker identifies is "testimonial injustice." In cases of testimonial injustice, persons discount the credibility of a speaker, and often because of some identity-based prejudice (Fricker 2007, Sec 1.3; ch. 2). A clear case of such testimonial injustice would be denying that someone is able to know something or testify to something that others might need to know—and denying this *because of* the speaker's identity as part of some socially marginalized group.

Before taking this argument seriously, we note that some may suggest that only particular socially marginalized groups are candidates

for victimization by epistemic injustice. To make the argument stronger, then, we note that it can be recast to include as the relevant socially marginalized group those who are *politically marginalized* or persons who do not otherwise have access to a platform through which they can reach wide and diverse swaths of the populace.[9] Thus reformed, the argument can be used to defend a general right to speak that could limit a property owner's right to exclude. Indeed, proponents of arguments about epistemic injustice might think that persons who must *ask* for permission to speak are thereby in a subordinate social status with respect to the mall owner and with respect to the mall's customers (or the owners of SMCs).[10]

Imagine, then, a mall or SMC censors many by refusing access to any potential speakers to distribute information or solicit signatures on a petition. The reply is to note that it is but one mall or but one SMC. The substitution objection would, in such a situation, be decisive. It would be so even if *all malls* or *all SMCs* were to refuse such speakers, provided there were other venues for discourse.

Testimonial injustice is particularly pernicious when it is systemic. Suppose *no private venue* gives access to some prospective speaker. It might seem they then have no opportunity to reach an audience. They might then seem to be systematically deprived of voice. This might be a form of what Kristie Dotson calls "epistemic silencing" (Dotson 2017). Audiences have no chance to consider the testimony of the speaker, since they do not encounter the speaker's ideas or concerns.

We have two responses to the appeal to testimonial injustice. First, we deny that exercises of *stringent private rights to exclude* by owners of communications venues are necessarily epistemic injustices. Suppose a particular communications platform/venue denies to anyone, regardless of background, the opportunity to speak or petition on behalf of political causes.[11] This need not involve testimonial injustice even if it does involve censorship. If a mall or SMC censors all equally, it is hard to see how "someone is wronged specifically in her capacity as a knower."[12] Second, even in cases where the exercise of such a right seems to involve a testimonial injustice, we believe critics who would thereby constrain stringent private rights to exclude bear a significant argumentative burden. To see this, strengthen the case on behalf of critics of stringent private rights to exclude. Suppose *all* mall owners and all major SMCs routinely permitted peaceful political discussion or solicitation on their premises or platforms *except* if the persons advocated for rights for LGBTQ+ persons, or BLM causes, women's reproductive rights, or immigration reform, or …. (fill in the blank with any political cause that is sometimes linked with persons from traditionally socially marginalized categories). To make the case harder, let us also suppose the SMCs or mall owners *conspire* to keep out those groups. We are prepared to stipulate that the SMCs and mall owners thereby engage in the injustice of epistemic silencing against

the prospective speakers. They specifically target for exclusion certain persons because of their identities as members of socially, politically, and/or economically unprivileged categories. Even in this unseemly case, though, critics of stringent private rights to exclude bear an argumentative burden. They must show that the vice of such an epistemic injustice also justifies the particular reprisals that are available to state entities, namely, state sanctioned coercion to limit private rights to exclude.

Even if we think there is something deeply problematic about a system that leaves some without an enclosed space or major social media venue to speak, this would not be the fault of a single owner, nor even a collection of all the relevant owners. Those wishing to speak have venues other than malls and SMCs—they can speak to their neighbors in bars, in supermarkets, in editorials, in parks, etc. If there were no substitute venues available, state action might be warranted—perhaps through the state creation of such a venue (using taxes raised with a fair system).[13] We are, though, optimistic about uncoerced private provision of venues.

Importantly, there are forms of social punishment available against agents of testimonial injustice that do not involve state power and that seem more reasonable than restricting private rights to exclude. These include protests, boycotts, shaming, letter-writing, negative publicity, and so forth. Given that these options are typically available in reasonably free societies, and given that prospective speakers have venues in which to speak other than malls (or SMCs), the substitution objection seems once again an important obstacle to critics of a stringent right to exclude, even when the challenge is based on an appeal to epistemic injustice.

We do not claim to have undermined the significance of appeals to epistemic injustice. We only hope to have shown, once again, that the availability of substitutes for speech and outlets for peaceful protest increases the argumentative burdens on those who appeal to epistemic injustice for government actions of the relevant sorts. Critics who see a reason to constrain stringent private rights to exclude cannot simply note that mall or SMC owners behave (by hypothesis) with vice. They must show that the resulting injustice warrants crimping rights to exclude.

2.2.4 The Appeal to Historic Injustice

The final criticism of stringent rights to exclude that we consider is one based on unresolved historic injustice. On this account, inequitable access to platforms for disseminating ideas rests importantly on transgressions that were visited on ancestor generations and whose effects persist today. Appeals to such historic injustices might then be a reason to object to stringent private rights to exclude. We briefly sketch below how one such argument might proceed. As we argue, proponents of such an account must show how restricting any or all stringent rights to exclude is appropriate as a remedy for historic injustice.

We shall suppose without argument that there are significant historic injustices whose transgressors provided neither reparation nor compensation, and whose effects persist today. Centuries of chattel slavery and the Jim Crow era in the United States are prime examples, but we have no objections to stipulating to any others that critics might suggest as candidates, e.g., and in no particular order, Chinese exclusion acts, marginalization of Jews, slaughter and depredations against Native Americans, discrimination against LGBTQ+ persons, and so on.

Persons who appeal to historic injustice might first stipulate that property owners enjoy *ex ante* stringent private rights to exclude, but then insist that uncorrected historic injustice is a reason to restrict the stringency of those otherwise justified rights. In this way, appeals to historic injustice can justify constraining stringent private rights to exclude as a way of making reparation for the past injustice. We admit that *if* property owners themselves owe reparation to a person or members of a group, their right to exclude might be constrained by obligations to provide reparation, perhaps including a limitation on the right to exclude. We do not, though, think that this is the most plausible version of an argument based on reparations.

The burdens for such an argument to succeed seem quite steep. First, one must show that the owners whose rights to exclude are thereby curtailed are indeed transgressors in some relevant fashion. Owners of SMCs, for instance, many of whom are significant numbers of stockholders, might have little if anything to do with any identifiable uncorrected historic transgression. Of course, critics might point to their complicity in persisting structural injustice, but they must show that the *owners* (and not simply any random privileged persons) are appropriately understood as transgressors. Supposing critics can show owners are transgressors, they must, second, show that the persons seeking not to be excluded are either the victims of the property owners' transgressions in some relevant respect, or they are proper beneficiaries of the performance of duties of reparation that the property owners owe to absent or deceased transgressed parties. James Dale, the gay plaintiff who sought judicial relief when the Boy Scouts of America expelled him, *might be* an appropriate claimant of some redress (*Boy Scouts of America et al. v. Dale* 2000). Whether he has some claims to redress against SMCs or shopping malls is another matter. This is not the start of an objection to appeals to historic injustice. It merely notes the limits of such arguments for constraining otherwise stringent private rights to exclude. To succeed in limiting stringent private rights to exclude, appeals to historic injustice must show in such history the bases for the relevant claims and duties. Finally, even if we were to show that prospective speakers and property owners are indeed parties to some uncorrected historic injustice, to constrain owners' rights to exclude, we must show that denying or curtailing rights to exclude is *the* (or, at least, *an*) appropriate form of

reparation. This is not obvious. If you negligently break our toes, we do not then automatically get to issue, as a binding demand for reparation, a claim to your kidney, your pocket protector, or a weekend in your timeshare in Pensacola. There must be an argument for why some particular form of reparation, whatever it is, is appropriate as a remedy to the transgression. Other forms of redress might be (more) appropriate, such as memorialization, commemoration, or a public apology by owners (A.I. Cohen 2020). Figuring out what form of moral repair is fitting is not easy. Critics who point to historic injustice as a basis for restricting stringent private rights to exclude must do that hard work in making their case.

We think it important to note that in significant cases of historical injustice, it is likely that either governments or entire societies are to blame for the injustice. It may be, for example, that the US Federal Government is the main aggressor that ought to make reparation to African Americans for historical injustices against them (Boonin 2011, chs. 2–3). For the US government to make such reparations, of course, would require taxation—just as a government paying any debt requires taxation. The burden would be justly shared in the same way that any tax burden would be shared. This would not be a means of forcing taxpayers to pay reparations, but a means of collecting the revenues the government needs to pay its debts. This seems to us entirely appropriate.

Allowing the possibility of some justified reparations is not a concession that there are no substitutions available for the desired communicative functions for which some private property might serve as a platform. Here we only note that if such reparation were made, there might be resolution to the problems that worry critics of stringent rights to exclude. The reparations might include the provision of (the funds for) creating the property on or through which the desired communicative functions take place. As should be clear, the argument from historical injustice—as persuasive as it is with regard to the conclusion that some remedy is required—is either incomplete or insufficient for rejecting stringent private rights to exclude.

2.3 Conclusion: Emergencies

We have not provided a positive argument for stringent rights to exclude. What we have argued is that the arguments against such rights either founder on a substitution objection or gain little traction in light of alternative remedies. Insofar as limiting stringent rights to exclude is a response to historic injustice, we must show it is *a* (let alone *the*) fitting response to such unresolved depredations.

We freely admit that stringent rights to exclude are not infinitely stringent. We admit there are exceptions, though they are exceedingly rare. Suppose you are skiing on a mountain and had no reason to expect extreme weather but are suddenly faced with an avalanche. The only

shelter you can find is a locked cabin. On many political moralities, you may enter the cabin without the owner's permission (Feinberg 1978, 102). We take this to be as it should be—in extreme emergencies, the right to exclude may well need to be set aside.[14] Your life (and your impending doom without shelter) takes precedence over an owner's right to exclude. You have no other option for shelter. Something similar may be true when discussing the right to speak.

Just as a mall owner may not exclude ambulance workers from entering the mall to save Harry's life if he has a heart attack within, perhaps Facebook should divulge certain information to the FBI if doing so would prevent a high-fatality bombing. In the case of *the right to speak*, however, the substitution objection provides a significant burden to any argument that the right to exclude be limited. That is, emergencies requiring that the mall (or SMC platform) owners' right to exclude be set aside so that Jack or Jill may speak within or on the property are pretty rare.

We are prepared to admit there might be possible emergencies of the sort that would permit setting aside the right to exclude. Two examples come to mind. In the first, perhaps the world must be alerted to the fact that an alien race from another galaxy has invaded and is destroying city after city. In the second, perhaps our neighbors must all be warned that (as in *Birdbox* 2018) people must not look at the zombies now walking around on pain of death. In these cases, the right to exclude should be set aside. In each case, SMCs must provide adequate opportunities to avoid "catastrophic moral horror" (Nozick 1974, 29 at *). Again, in these circumstances, the owners' right to exclude is set aside. We do not think there are many such circumstances.

Some might argue that, e.g., the climate crisis is *so urgent* that owners cannot exclude people who wish to get the word out. Critics must show that the mall, SMC platform, or whatever property they are attempting to use, is uniquely suited to get the word out. We note, though, that there are many things that seem urgent to some people and not others. Some think we must up our recycling game immediately, others think we must stop using gasoline powered automobiles immediately, etc. Our view is that substitutions are possible in all such cases and that this undermines the arguments in favor of limiting rights to exclude in nearly all cases.

Given that there are almost always substitutions available—some of which have not yet been invented—we think the right to exclude will nearly always remain relevant and that rights to speak on someone else's property will fail.[15]

Notes

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3 See a related discussion of censorship as restricting freedom in Horton (2011, at 94).

4 Some will think this account is over-inclusive. We believe, though, that it is theoretically adequate insofar as it captures all of the relevant cases. We mean this to be a morally neutral account of the phenomena. On this account, shushing someone in a theater, posting theater rules against talking, enacting state prohibitions against speaking in theaters, and gagging a person, are each likely intended acts of censorship though the options will vary in effectiveness.

5 Theorists who prefer to dwell on what a full specification of rights would entail are welcome to construe the discussion with the formally equivalent language under specificationism. For related discussion, see, for instance Shafer-Landau (1995), Oberdiek (2008), and Rainbolt (2006, ch. 6).

6 Indeed, if we move from the mostly mythical fora of American history to current conditions, we are struck by recent cases such as the crackdowns on protests witnessed in the summer of 2021. That is, the governing authorities did not seem disposed to treat the public forum for discussion as of significant importance. Perhaps, our interlocutor will reply, this is a problem, but not a problem for them: they, after all, want a protected forum for discussion. We likely agree, but do not see this as a decisive argument against stringent private rights to exclude.

7 A full defense of stringent rights to exclude might condition the stringency of such rights on how much if at all bearers of the right benefited from public subsidies, tax rebates, and other forms of state support. We pass over such details here, but are certainly open to having requirements that property owners who benefited from such discharge that debt by providing a public forum.

8 Bejan's arguments would really be about co-citizens, but it is a quick step from them to the state. See also Ceva (2011).

9 There might be significant overlaps between those platformless persons and other historically marginalized groups, but we pass over those linkages here. For a discussion about the possibility of testimonial injustice against political minorities, see Spencer Case (2021).

10 If critics insist that only particular socially marginalized groups can be victims of testimonial injustice, we will not press the point. Those unconvinced by our application of this term to prospective speakers might then show how those otherwise unable to speak are not thus epistemically marginalized—especially when they advocate non-yet-popular causes.

11 This was the case for owners of the Pruneyard shopping center, which had "a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy [had] been strictly enforced in a nondiscriminatory fashion" (*Pruneyard* 1980, 77).

12 As we note in §2.1, not all silencing is unjust. For related discussion, see A.J. Cohen (2021). We admit, however, that discriminatory censoring of groups by a mall owner may count as testimonial injustice.

13 Indeed, we are tempted by the thought that the state has already created such a venue: the internet itself. That is, we take the internet *in toto* to be a public square, not any particular SMC. Just as local coffee shops or Starbucks shops are *on* the physical town square but not themselves the town square, we think individual SMCs—Facebook, Twitter, etc.—are *on* the digital town square, not themselves the town square. We take this point from Tarnell Brown (in conversation on social media!).

14 We remain agnostic on whether the right to exclude is, in these rare cases, overridden, outweighed, merely diminished, or defeated.

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