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The Gilded Age of Ascriptive Americanism, 1876-1898

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…Accordingly, American citizenship policies during this era were dominated by the massive new immigration from Europe and Asia and the nation's response of heightening restrictions. Only the subsequent and interlinked construction of Jim Crow laws approached immigration in importance.

Three main developments in immigration law reconfigured citizenship laws in this era. First was the adoption and repeated strengthening of more restrictive federal immigration laws. They excluded applicants due to moral, political, and economic concerns but desires to prevent "inferior races" from acquiring U.S. citizenship were strikingly prominent. Second, the Supreme Court adopted a new understanding of federal power to exclude immigrants, moving from reliance on the commerce clause, which presented immigration as an economic issue, to reliance on the implicit but inherent sovereign powers of the national government. That argument echoed the new historicist emphasis on the organic nation in ways hospitable to racial conceptions of "true" American identity. Third was a recurring pattern of initial judicial resistance followed by increasing deference to executive decisions on immigration made by new national administrative agents. For years, many judges tried to uphold liberal procedural principles, as well as their own powers, in ways that limited racist immigration policies. Over time, however, the courts, led by the Supreme Court, became compliant.

Although the chief civic innovation of these years expressed narrow Americanist views, they did not yet efface the dominant liberal character of U.S. immigration policy. Immigration remained virtually unrestricted until 1882. Generally applicable restrictions came only in the 1890's, and even then most who tried to come succeeded. During the Gilded Age the U.S. accepted just under10 million immigrants, an unprecedented influx.

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…..The Transfer of authority over immigration to the federal level was formally another defeat for states' rights republicanism. Yet in reality, it was a victory for policies that most states favored but had been judicially barred from enacting. It was also a major defeat for racial liberalism. The congressional debates over Chinese exclusion provide a rich survey of the Gilded Age elite's civic conceptions. They show that exclusionist congressmen redefined or even decried the nation's liberal traditions in favor of grim but popular Americanist stances, defended via evolutionary theories as well as economic and republican concerns.

The opponents of exclusion, led by Massachusetts Republican Senator George Hoar, skillfully deployed all the arguments in the nation's liberal legacies to urge nonracial immigration policies. They also invoked inclusive views of what republican government and America's Christian civilization meant. The center piece of Hoar's presentation was an appeal to the natural rights in the Declaration of Independence, which he held, to include rights to seek better opportunities in new lands on an equal footing with all others. The "doctrine that free institutions are a monopoly of the favored races," he insisted, was a "canard of quite recent origin."

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…The most popular proposal to curb immigration significantly was the literacy test championed by Henry Cabot Lodge, first in the House and then the Senate, and by his allies in the Immigration Restriction League, a group originating among Harvard graduates who were influential in academic, political, and business circles.
….But, as Lodge acknowledged openly, the true aim of his literacy test was to weed out "inferior races". In 1896, Lodge stated that committee research showed that the test would most affect the races "most alien to the great body of the people of the United States," including "the Italian, Russians, Poles, Hungarians, Greeks, and Asiatics" (including Jews). English speakers, Germans, Scandinavians, and the French would be affected "very slightly or not at all."

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…Set against the accelerating flood of restrictive laws, many judicial decisions on immigration during this period appear as brave, lonely islands of humanitarianism amid a sea of hostility. As many of the federal judges involved expressly opposed Chinese immigration, and all faced great political pressures to stem it, it is striking that they so often checked the new racist initiatives. That fact is strong evidence of the power of legal traditions and the value of written constitutional strictures. But though they argued for humane statutory interpretations and insisted on some recognition of due process and equal protection, few judges denied that citizenship could be denied or limited on racial grounds. And as hostility grew toward the "new" European arrivals as well as Chinese immigrants, judges acquiesced in arbitrary treatment of those "races."

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…The other prominent concern of the new immigration laws - to keep radical leftists out of America – was also manifest in this area. Many naturalizing judges became more vigilant on behalf of the requirement that applicants display "attachment to the principles" of the U.S. Constitution. In an 1891 Texas case, for example, a judge denied naturalization to a German applicant who expressed belief in the doctrines of the socialist Johann Most. Although, in liberal fashion, Judge Paschal conceded Richard Sauer's right to hold and express such beliefs, he termed them "un-American, impracticable, and dangerous in the extreme," and adequate grounds to refuse citizenship. Along with Americanism, liberal republican precepts provided arguments on behalf of these restrictions because they presented allegiance to proper political ideals as the core requirement for membership. But they could also have been used to challenge demands for ideological conformity, because the clash of political opinions had long been seen as an engine of effective democratic self-governance. Those Americans with the resources to litigate, however, seemed to feel that the system had all the clashes it needed. Hence, these ideological restrictions did not face powerful legal challenges.

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….Despite the restrictive laws of the 1880s and 1890s, immigration continued to be central to American civic life during the Progressive years. From 1901 to 1910 the rate of immigration relative to the national population was the highest in U.S. history, more than ten per thousand.

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….Woodrow Wilson then vetoed new literacy test laws in 1915 and 1917, invoking the more left progressive cosmopolitan ideals of U.S. citizenship that appealed to white immigrant Democrats, even though he firmly supported both Jim Crow and Asian exclusion. The test was finally enacted over his veto in 1917 amid the anti-foreigner "100-per-cent Americanism" fervor stirring by the coming of World War I…..It further barred entry to foreign radicals and provided for the deportation of any aliens who engaged in radical agitation.

THE CRIMMIGRATION CRISIS: IMMIGRANTS, CRIME, AND SOVEREIGN POWER

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……This Article …..unearths the roots of the confluence of criminal and immigration law and maps the theoretical impulses that motivate the merger. It offers a unifying theory for this crimmigration crisis intended to illuminate how and why these two areas of law have converged, and why that convergence may be troubling. I propose here that membership theory, which limits individual rights and privileges to the members of a social contract between the government and the people,[40] is at work in the convergence of criminal and immigration law. Membership theory has the potential to include individuals in the social contract or exclude them from it.[41] It marks out the boundaries of who is an accepted member of society.[42] It operates in this new area to define an ever-expanding group of immigrants and ex-offenders who are denied badges of membership in society such as voting rights or the right to remain in the United States. Membership theory manifests in this new area through two tools of the sovereign state: the power to punish and the power to express moral condemnation. The application of membership theory places the law on the edge of a crimmigration crisis. This convergence of immigration and criminal law brings to bear only the harshest elements of each area of law, and the apparatus of the state is used to expel from society those deemed criminally alien. The undesirable result is an ever-expanding population of the excluded and alienated. Excluding and alienating a population with strong ties to family, communities, and business interests in the United States fractures our society in ways that extend well beyond the immediate deportation or state-imposed criminal penalty.[43]

37. *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893-94 (2000) (describing the way in which deportation, as seen through criminal law theory, serves as a form of criminal punishment, incapacitating the deportee, deterring other potential offenders, and achieving retribution). *See generally* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

38. *See, e.g.*, Kanstroom, *supra* note 37, at 1935 (suggesting that the deportation of lawful permanent residents, if recognized as punishment, necessitates substantive constitutional protections, especially when applied retroactively or without counsel or the right to post bail).

39. *See Citizenship & Severity*, *supra* note 5, at 617-18 (noting that the phrase "criminalization of immigration law" fails to adequately capture the creation of a new system of social control that includes both immigration and criminal justice, but which is purely neither).

40. *See generally* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 34 (1975); MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 82-95 (1st ed. 1992); T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1490 (1986) [hereinafter *Theories*]; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 20 (2002).

41. *See* Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79, 87-96 (2004) (explaining how the Supreme Court's use of social contract theory has paved the way for the development of a class of "pseudo-citizens" who are excluded from full membership in the citizenry).

42. *Id.*

43. *See* Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 63-64 (1997) (suggesting that the long-term exclusion of permanent residents from the social and political benefits of society threatens to undermine the idea of the "American dream," creating a population of disenchanted individuals poised to rebel in the form of riots or civil war).

…Immigration law has evolved from a primarily administrative civil process to the present day system that is intertwined with criminal law. In the beginning, immigration law intersected with criminal law only in denying entry to those with a criminal history.[61] Entering without authorization was not punished, and those who committed crimes after entering the country were not deportable.[62] Once immigrants had crossed the border, with or without government sanction, the federal government did little to expel them.[63] Only in 1917 did the government begin to deport convicted noncitizens.[64]

Over time, immigration law became infused with the substance of criminal law itself.[65] First, there has been "unprecedented growth in the scope of criminal grounds for the exclusion and deportation of foreign-born non-U.S. citizens."[66] Second, violations of immigration law are now criminal when they were previously civil, or carry greater criminal consequences than ever before.[67] Third, recent changes in immigration law have focused on detaining and deporting those deemed likely to commit crimes that pose a threat to national security

……Until 1929, violations of immigration laws were essentially civil matters.[81] In 1929, unlawful entry became a misdemeanor, and unlawful re-entry a felony.[82] In recent decades, the number and types of immigration-related acts that carry criminal consequences have proliferated.[83] In 1986, Congress passed legislation that for the first time sanctioned employers for knowingly hiring undocumented workers and provided for imprisonment and criminal fines for a pattern or practice of such hiring.[84] Since 1990, marrying to evade immigration laws, voting in a federal election as a noncitizen, and falsely claiming citizenship to obtain a benefit or employment have become criminal violations leading to both incarceration and deportation.[85] The criminal penalty for unlawfully re-entering the United States after deportation or exclusion increased from two years to a maximum of ten or twenty years,[86] and enforcement of these violations has increased dramatically.[87]

61. *See* Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477 (excluding from entry those convicted of nonpolitical felonies); Kanstroom, *supra* note 37, at 1908 (noting that early colonial and state laws focused on the exclusion of convicted criminals, rather than on the deportation of noncitizens for criminal conduct after entry). Earlier state laws banning entry of convicted criminals were primarily directed at those who brought the convict, rather than the convicted alien. NEUMAN, *supra* note 52, at 21.

62. EDWARD PRINCE HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 11-46 (Univ. of Pa. Press 1981).

63. *Id.*

64. NEUMAN, *supra* note 52, at 22.

65. *Blurring the Boundaries*, *supra* note 36, at 114. The turn toward criminalization of immigration law seems correlated with a downturn in public opinion toward immigrants. Some have described the 1960s, 1970s, and early 1980s as a heyday for immigrant rights due to the influence of the Civil Rights Movement. *See Citizenship & Severity*, *supra* note 5, at 615 (contrasting immigration's status as a civil rights issue in the 1960s and 1970s to its current status as an issue of national security). However, little has been written about why the solution to this newly perceived problem was to turn to increased criminalization rather than, for example, increased civil enforcement. By the 1990s, immigrants were "accused of exploiting the nation's welfare system, of committing a host of serious offenses against its population, and of being involved in terrorist activity." *Misguided Prevention*, *supra* note 36, at 553. Various rationales have been offered to explain why public opinion toward immigration took on such a negative cast. Events cited as affecting the change in public opinion include the volume of Southeast Asian refugees and those from other countries needing resettlement in the United States, Mexicans crossing the border illegally after Mexico's financial collapse in 1983, and the Mariel boatlift, in which the Cuban government encouraged disaffected Cubans and convicted criminals to take to the sea to seek asylum in the United States. *Citizenship & Severity*, *supra* note 5, at 626.

66. *Citizenship & Severity*, *supra* note 5, at 619.

…….Membership theory influences immigration and criminal law in similar ways. Membership theory is based in the idea that positive rights arise from a social contract between the government and the people.[170] Those who are not parties to that agreement and yet are subject to government action have no claim to such positive rights, or rights equivalent to those held by members.[171] "Only members and beneficiaries of the social contract are able to make claims against the government and are entitled to the contract's protections, and the government may act outside of the contract's constraints against individuals who are non-members."[172] When membership theory is at play in legal decisionmaking, whole categories of constitutional rights depend on the decisionmaker's vision of who belongs.[173] Membership theory is thus extraordinarily flexible.[174] Expansive notions of membership may broaden the scope of constitutional rights; stingier membership criteria restrict rights and privileges.[175] In *Plyler v. Doe*,[176] the Court's reasoning that undocumented schoolchildren are potential members of the United States citizenry led to a ruling that Texas could not deny those children equal access to a public school education.[177] More often, membership theory has been used to narrow constitutional coverage by defining the scope of "the People" to exclude noncitizens at the perimeter of society.[178]

80. *Citizenship & Severity*, *supra* note 5, at 639-45; *Immigration Threats*, *supra* note 36, at 1062-63.
81. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 75-76 (2003).
82. *Id.* at 76.
83. *See Citizenship & Severity*, *supra* note 5, at 639 (detailing the increase, since the 1900s, in the number of noncitizens who face punishment in the criminal justice system for crimes that were once only civil violations).
84. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a).
85. IIRIRA, Pub. L. No. 104-208, Div. C., §§ 215-216, 110 Stat. 3009-546, 3009-627 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43)(F)-(G) (2000)); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.); *Citizenship and Severity*, *supra* note 5, at 640.
86. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 13001, 108 Stat. 1796, 2023 (codified at 8 U.S.C. § 1326 (1994)); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4471 (increasing the maximum sentence to five to fifteen years for unlawful re-entry depending upon whether the noncitizen's prior deportation was based on an aggravated felony offense); *Citizenship and Severity*, *supra* note 5, at 640.
87. Press Release, DHS, DHS Announces Long-Term Border and Immigration Strategy (Nov. 2, 2005), *available at* http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0795.xml.

170. Bickel, *supra* note 40, at 34; Cleveland, *supra* note 40, at 20; *see* NEUMAN, *supra*note 52, at 5 (noting that the Constitution's Preamble can arguably be construed as containing a social contract between the people and the government).
171. Cleveland, *supra* note 40, at 20; *see* WALZER, *supra* note 40, at 82-95 (describing citizens as members of a political community who are entitled to certain benefits from the state and who must fulfill common expectations pertaining to that membership); Aleinikoff, *supra* note 40, at 1490 (describing citizenship as a mutual membership in a state created by the consent of both a person and the state).
172. Cleveland, *supra* note 40, at 20.
173. *See supra* notes 140-146 and accompanying text (explaining how various criminal constitutional rights are not applicable to nonmember immigrants).
174. *See* Cleveland, *supra* note 40, at 21 (portraying the social contract theory as elastic, such that the contract can be narrowly or broadly defined to exclude or include groups of individuals).
175. *Id.* at 21-22.
176. 457 U.S. 202 (1982).
177. *Id.* at 218 & n.17, 222 n.20.
178. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 260 (1990) (denying constitutional protection to a noncitizen because he had no voluntary connection to the United States that might place him among "the People" and reasoning that "those cases in which aliens have been determined to enjoy certain constitutional rights establish only that aliens receive such protections when they have come within the territory of, and have developed substantial connections with, this country").

……From the 1950s through the 1970s, both criminal and immigration sanctions reflected a rehabilitation model.[211] Criminal penology favored indeterminate sentences that could be shortened for good behavior, alternatives to incarceration, individualized treatment, and re-education.[212] This philosophy was consistent with the idea that the criminal act was separable from the individual actor, and that the actor could be rehabilitated, integrated into society, and given a second chance.[213] It was grounded in a social ideology that sought to redeem offenders and restore "full social citizenship with equal rights and equal opportunities."[214]
…..In immigration law prior to the 1980s, most crimes did not trigger immigration sanctions for permanent residents.[238] Only the most serious crimes or crimes involving "moral turpitude" that presumably revealed an inherent moral flaw in the individual resulted in the ultimate sanction of deportation.[239] Otherwise, criminal conduct was handled as a domestic affair through the criminal justice system, not as an immigration matter.[240] In both areas of the law, this approach affirms the individual's claim to membership in the society.[241] Members obtain the club's benefits, but are also bound by the club's rules and are subject to its processes and sanctions for breaking those rules.[242]

The emphasis on retribution, deterrence, and incapacitation in immigration law is apparent from the expanded use of deportation as a sanction for violating either immigration or criminal laws.[243] With few exceptions, immigration sanctions including deportation now result from a wide variety of even minor crimes, regardless of the noncitizen's ties to the United States.[244] Permanent residents are as easily deported for crimes defined as "aggravated felonies" as is a noncitizen without any connection to the United States or without permission to be in the country.[245]

211. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 34-35 (U. Chicago Press 2001) (tracking the rise of the rehabilitative policy framework in penology and its role as "the hegemonic, organizing principle, the intellectual framework and value system that bound together the whole structure . . . ."); Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277,
278 (2005) (explaining that the rehabilitative model dominated criminal penology for a century before a shift to retribution); *see also* Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759,
802 (2005) (comparing the decline of the pre-1970s rehabilitative approach to the decline of the modern welfare state).
212. *See* Berman, *supra* note 211, at 278 (explaining that judges and parole officers had great leniency to tailor sentences to the offender's individual capacity for rehabilitation).
213. *See id.* (observing that the rehabilitative ideal was "[b]orn of a deep belief in the possibility for personal change and improvement" and "conceived and discussed in medical terms with offenders described as 'sick' and punishments aspiring to 'cure the patient'"); GARLAND, *supra* note 211, at 34-35 (stating that the rehabilitative model emphasized re-education and support for the ex-offender upon reentering society).
214. GARLAND, *supra* note 211, at 46; *see* Williams v. New York, 337 U.S. 241, 249 (1949) (embracing rehabilitation as a penological goal, and advocating for indeterminate sentences based upon consideration of the attributes of ndividual offenders).

238. *See Immigration Threats*, *supra* note 36, at 1061 (noting that since the enactment of the 1988 Anti-Drug Abuse Act, crimes for which citizens can be deported have increased greatly); Newcomb, *supra* note 71, at 698-700 (describing a series of laws passed beginning in 1988 that severely increased the offenses for which a noncitizen could be deported); *Citizenship and Severity*, *supra* note 5, at 622-23 (concluding that the change in the scope of deportable crimes after the mid-1980s reflected a shift in the INS to prioritizing law enforcement and criminal sanctions).
239. *Citizenship and Severity*, *supra* note 5, at 622; *see* HARPER, *supra* note 70, at 612-13 (presenting immigration laws relating to deportation procedure that mandated removal of aliens found to be "member[s] of the criminal, subversive, narcotic, or immoral classes").
240. *See* Newcomb, *supra* note 71, at 698 (explaining how the enactment of the Anti-Drug Abuse Act of 1988 created the basis for deportation of an alien that committed an aggravated felony, formerly an offense which had been handled by the criminal justice system without immigration implications).
241. *See* Berman, *supra* note 211, at 279 (opining that a rehabilitative rather than punitive approach to criminal justice reflected a desire to return offenders to roles as constructive members of society).

……The state's expressive role is the same in immigration law as in criminal law. By imposing the sanction of deportation for crimes and by criminalizing immigration violations, the state expresses moral condemnation both for the crime through criminal punishment and for the individual's status as a noncitizen offender.[272] As such, the sovereign state strategy expresses the insider or outsider status of the offender.[273] The expressive dimension of punishment in this context communicates exclusion.[274] Unlike the rehabilitative model, which sought to protect the public by re-integrating the offender into a community, the use of sovereign power has the effect of excluding the offender and the immigrant from society.[275] Under the sovereign state model, ex-offenders and immigrants become the "outsiders" from whom citizens need protection.[276] Several explanations have been offered for this turn to the state's expressive powers and the emphasis on harsh punishment. One theory is that a shift from smaller, more close-knit communities to the more disparate structure of modern society made community imposed shame sanctions less effective and generated reliance on the more formal political mechanisms of the state.[277]
This change is intricately bound up with membership theory. With the move away from closer communities, punishment that relied on public humiliation (such as the stocks) became less effective when the offender was not a member of that community.[278] A need arose for punishment that depended less on community ties and more on loss of personal liberty.[279] In the modern social structure, it is much easier to equate the criminal offender with the alien and exclude him from society than when the offender was well known by and considered part of a smaller community.[280]
An alternative theory is that persistently high rates of crime and unauthorized immigration have led to distrust of the state's ability to control both crime and immigration.[281] It is politically infeasible to acknowledge that the state's ability to control crime is limited.[282]
Politicians, therefore, employ the sovereign power of the state more heavily to reassure the public of their commitment to controlling crime.[283] As a result, the sovereign state power is used in ways that are divorced from effective control of either crime or unauthorized immigration. Imposing increasingly harsh sentences and using deportation as a means of expressing moral outrage is attractive from a political standpoint, regardless of its efficacy in controlling crime or unauthorized immigration.[284]

242. *See Internal Exile*, *supra* note 167, at 158 (explaining that membership is akin to citizenship, in which members adhere to a social contract denoting the rights and obligations of membership).
243. *See Immigration Threats*, *supra* note 36, at 1067 (contending that while deportation is not considered to be a criminal penalty, it has the effect of inflicting punishment on the deported individual).
244. *See id.* at 1066-67 (noting that deportation is now mandated for permanent residents who commit an aggravated felony regardless of whether they entered the United States as children, their familial status in the United States, or how long they have lived in the country).
245. *See* Newcomb, *supra* note 71, at 699 (describing the constriction of relief from removal for noncitizens convicted of aggravated felonies); *see also* INA, 8 U.S.C. § 1182(h) (2000) (denying to resident aliens convicted of aggravated felonies a waiver from the Attorney General that would prevent deportation).

272. *See* Kanstroom, *supra* note 37, at 1894 (illustrating the retributive aspects of deportation for civil immigration violations, but without constitutional protection since the offenders are noncitizens).
273. *Cf.* David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. OF CRIMINOLOGY 445, 461 (1996) (acknowledging that criminology of the alien other presents criminals as dangerous members of an outside racial and social group apart from "us," the insiders). 274. *See id.* (stating that the rhetoric surrounding "offenders as outsiders" recognizes that the only rational response to ex-offenders is to have them "taken out of circulation").
275. *Id.*
276. *Cf. id.* (stating that criminology of the other characterizes offenders as threatening outcasts and fearsome strangers).
277. *See* Kahan, *supra* note 262, at 642-43 (stating the theory that shaming will not work in modern society which has vitiated a citizen's stake in their community).
278. *See id.* at 644 (presenting the example of a corporate executive who could care less if an auto mechanic in a remote area of town knew of his crime, but would be mortified if close family and friends discovered his criminality).

…. Excluding individuals who have a stake in public affairs and the fairness of the judicial process, such as exoffenders and noncitizens who pay taxes or raise children, seems contrary to the democratic ideal that those governed have a say in the composition of the government.[295] Moreover, excluding ex-offenders and noncitizens from public benefits and public participation seems to conflict with the need to integrate these groups into society, especially if lack of resources and exclusion from participation results in alienation and contributes to the commission of further crimes.[296]

These significant costs seem to outweigh the uncertain benefits outlined above. The costs become greater upon examining who is most often excluded. Both immigration and criminal law tend to exclude certain people of color and members of lower socioeconomic classes.[297]

Immigration law does this explicitly. Immigration law takes socioeconomic status into account when it excludes a noncitizen likely to become a public charge because of lack of financial resources,[298] and by prioritizing entry of certain professionals, managers, executives, and investors.[299] The prevalence of sovereign power in immigration law has its roots in excluding racial and cultural groups, beginning with the Chinese and other Asian Americans in the late 1880s, and including the deportation of U.S. citizens of Mexican origin in the 1930s.[300]

279. *See id.* (acknowledging the weaknesses of a pure shame approach to punishment, implying that other more severe techniques would be needed).

280. *See Internal Exile*, *supra* note 167, at 158 (paralleling the denial of membership rights to ex-offenders to the denial of rights to permanent residents).

281. *See* GARLAND, *supra* note 211, at 110 (acknowledging the limitations of the state's ability to govern social life and control crime).

282. *Id.*

283. *See id.* (equating the denial of the state's ability to control crime with political suicide). 284. *See id.* (reflecting the tension between ineffective state sovereign power and crime).

284. *See id.* (reflecting the tension between ineffective state sovereign power and crime).

295. *See id.* (illustrating the denial of voting rights as a "particularly dramatic" and symbolically important denial of membership in the democratic political community).

296. *See id.* at 158 (paralleling the denial of membership rights to ex-offenders to the denial of rights to permanent residents).

297. *See id.* at 159 (emphasizing the creation of a group of second-class citizens by alienating racial minorities from the political and legal system).

298. *See* INA, 8 U.S.C. § 1182(a)(4)(B) (2000) (enumerating assets, resources, and financial status as a factor in determining whether an alien is an inadmissible alien).