EXILE IN AMERICA: POLITICAL EXPULSION AND THE LIMITS OF LIBERAL GOVERNMENT

A dissertation submitted to the Faculty of the Graduate School of Arts and Sciences of Georgetown University in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Government

By

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Washington, DC
April 22, 2015
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ABSTRACT

“Exile,” as a concept, remains largely neglected by political theory. Of the few pieces addressing it, most approach exile as a phenomenon peculiar to ancient cultures, or as a tool of the illiberal, even authoritarian, regime. But a survey of American history indicates that although communities may not openly ostracize, outlaw, or exile, they have not suppressed the desire to purge their membership rolls. Rather, they have become more adept at disguising it, draping illiberal exile practices in the language of law, consent, and contract. Perhaps it is the complexity of defining, and consequently recognizing, exile in the twenty-first century that leads us to regard it as a fringe occurrence. Nonetheless, exile is alive and well in the present day.

This project has three aims. First, to offer a working conception of "exile" that clears away rhetorical confusion and returns the idea to the realm of the political. I explore exile as a political phenomenon, wherein the coercive power of government is used to expel members from their home communities for purposes of membership control. Second, to demonstrate that although it may have taken on a more mundane appearance in the democratic age, exile still exists at the sub-national (and, less commonly, at the national) level. Finally, the project situates exile in the particular context of America, where it continues to thrive despite its seeming incompatibility with liberal commitments to individual rights.

Analyzing specific cases of political expulsion, both historical and current, reveals the purposes exile serves in liberal communities. While exile is not necessarily incompatible with fundamental liberal commitments (an opinion expressed by liberal thinkers like Constant, Locke, Tocqueville, and Burke), the uses to which exile has been put in the United States do not meet commitments to toleration and equality. This is, perhaps, why political expulsions have been concealed in the depoliticizing contexts of criminal, administrative, and civil law. The continued existence of exile in America, and its concealment, reveals deep tensions within the idea of “liberal community,” but also the persistence of a strong sense of community in twenty-first century America.
This dissertation is dedicated to my parents, Mike and Terry McGinnis, in gratitude for their invaluable support during the long process of writing it.

My gratitude to everyone who has helped me along the way – to Gabriel Olearnik, Beth Mercurio, and Daniel Silvermint for generously offering their insightful and erudite comments on drafts, and to Frank Meyl for his advice and friendship, and for supplying vital moral support when I needed it most. I would be remiss if I didn’t thank my friends in the Georgetown University political theory graduate program for their helpful advice, feedback, and camaraderie, especially Paula Olearnik, Aimee Barbeau, Gianna Englert, and Christopher Utter. Special thanks to Aimee, my cohort-mate and “second head” for the many of hours scholarly exchange and friendly encouragement, in person and via our long-standing Instant Message Colloquium.

Many thanks to my committee members, Richard Boyd, Doug Reed, Josh Mitchell, and Rogers Smith, for their advice and guidance.

With sincerest thanks,

Briana L. McGinnis
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“It is a mistake to regard exile as a milder penalty [than prison]... We shall see... exile tearing the father away from his children, the husband from his wife, the merchant from his business, forcing parents to abandon the education of their family or to commit it to mercenary hands, separating friend from friend, taking the old man from his accustomed way of life, the industrious man from his speculations, and talent from its labors... We shall see exile surrounded with disfavour, surrounding those it strikes with suspicion and mistrust...”

Benjamin Constant, “Principles of Politics.”

What is “Exile?”

“Exile” is an ancient concept, originating in a variety of political practices aimed at punishing transgressions threatening to the common good, restraining the influential, and protecting the polity from instability or moral contamination. The term remains in common usage now, but it has become so loose as to virtually be without meaning, as the opening sentences of The Oxford Book of Exile unwittingly illustrate:

Each of us is in exile: the thought is a hackneyed one, but it still retains a little force. We are exiles from our mother’s womb, from our childhood, from private happiness, from peace, even if we are not exiles in the more conventional sense of the word.

What even the “conventional” sense of the term means, however, is not entirely clear. Roman Polanski, fleeing prosecution, has been referred to as living “in exile” in France, although American authorities certainly did not force him to leave – indeed, they actively seek his return. James Joyce, feeling his native Ireland to be a hostile environment for his particular style of writing, considered himself “exiled” in Zurich, despite being free to return home at any time.

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1 In Benjamin Constant, Political Writings. Translated by Biancamaria Fontana (New York: Cambridge University Press, 1988): 294.
Other members of his “Lost Generation,” living as expatriates in Paris, famously considered themselves “in exile” as well. Yet Polanski could more accurately be called a “fugitive” than an “exile.” When Joyce and his fellow disaffected artists could return at will, what differentiates them from any other expatriate or visitor?

The word “exile” summons romantic images of a great, persecuted individual, alienated from his homeland but determined to return. Perhaps it is this aspect of the term that led James Joyce to choose it over the rather less dramatic “expatriate.” The reality of forcible expulsion, as so many exile narratives reveal, is far from romantic, however. Ovid’s last writings alternate between lamenting the misery of being separated from his life and family in Rome and sad attempts to ingratiate himself to Augustus in the increasingly desperate hope of being allowed to return. Germaine de Staël’s exile account records her rage, isolation, and anxious sense of alienation from the social and historical context from which she drew much of her identity. Political exiles describe their experiences in language of fear, confusion, and longing – often experienced as a surprisingly intimate, personal sense of betrayal. Indeed, exile is a personal experience, a rare instance in which the government singles out an individual citizen, scrutinizes their character closely, and pronounces their continued membership intolerable. It is difficult to reconcile the accounts of “self-imposed exiles” like Joyce, F. Scott Fitzgerald, and Ernest Hemingway with those of their forcibly expelled counterparts. Despite adopting the same language of “exile,” they simply do not describe the same phenomenon. Political exiles are forced from their communities and forbidden to return – it is the involuntary removal from the home community that defines the exile experience.
The term has lost its clarity in the present day, not only because of its frequent use as a rhetorical device, but also because the phenomenon’s appearance has become increasingly difficult to recognize in the age of the nation-state. Explicit banishment and exile practices now belonging to the realm of what Hannah Arendt terms “totalitarian or half-totalitarian regimes,” the lawful judicial exiles of ancient Athens, medieval England, and early modern Italy no longer exist in liberal societies. Refugees from conflict, those distancing themselves from an unwanted regime, and subjects of ethnic persecution all represent groups who leave their homes for political reasons, but are they all in exile? What about deportees?

This project aims to accomplish three goals. First, to offer a working conception of “exile” that clears away the rhetorical baggage that has virtually robbed the term of meaning and returns it to the realm of the political. Exile is a political phenomenon, wherein the coercive power of government is used to expel particular members from their home communities for purposes of membership control. By their very nature, decisions about who is or is not a recognized member of the political community are political. Second, to demonstrate that although it may have taken on a more mundane appearance in the democratic age, exile remains a living political phenomenon, still used routinely at the sub-national (and, less commonly, at the national) level across the United States. Finally, this project situates exile in the particular context of American communities, where it continues to thrive despite its seeming

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3 Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Inc, 1976): 276. As will be explored in greater depth in chapter three, some forms of judicial exile do persist in the United States, albeit at the sub-national level.
5 The employment of government power is key to present-day exile as it exists in liberal regimes. In an age in which the legitimate use of force is the exclusive possession of the state, and in which the privileges and protections derived from citizenship are either granted by or enforced by the state, only the state can truly coercively remove a member from the political community.
incompatibility with liberal commitments to individual rights. Analyzing specific cases of political expulsion, both historically and in the present, reveals what purposes exile serves in liberal communities. Acknowledging the continued existence of exile in America, its expressive and solidarity-generating uses, and the fact that its operation has been concealed is important to understanding the nature of American communities and frequently incoherent visions of what belonging to them means.

“Exile,” as a concept, remains largely neglected by political theory. Of the few pieces addressing it, the overwhelming majority of them focus on exile in the ancient world, treating it as a phenomenon peculiar to ancient cultures. Although ancient and modern conceptions of the political community and the individual’s place within it (or outside of it) have changed considerably, the practice and experience of exile have retained their core elements over the centuries. While similarities between twentieth-century totalitarianism and the outlawry of Cylon may not be obvious, the persistence of exile practices suggests that the impulse to rid ourselves of fellow members of our political communities who we find “undesirable” may be as universal as those communities themselves, regardless of our liberal identities and aspirations.

Worse, the history of the current era indicates that although polities – even relatively liberal ones – may not openly ostracize, outlaw, or exile, they have not suppressed the desire to purge their membership rolls. Rather, they have merely become more adept at disguising and denying it, draping illiberal exile practices in the liberal language of law, consent, and contract. Perhaps it is the complexity of defining, and consequently recognizing, exile in the twenty-first century that

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7 Louis Brandeis’ opinion in *Ng Fung Ho v. White*, 259 U.S. 276 (1922).
leads us to regard it as a fringe occurrence. Regardless, exile is alive and well in the present day, and although it has become more subtle in appearance since Herodotus and Thucydides recorded instances of it, it is even more pernicious in the age of extensive and bureaucratically complex government than it was in that of the polis. Rather than expulsion being a historically contingent, atavistic political curiosity, I argue that not only has exile remained with us throughout the transition from the pre-modern world to today, but that it is an enmeshed part of the political fabric of today’s liberal societies, reinforcing social ties and defining shared identity.

Judith Shklar, in her essays on exile, argues that exile marks the points at which rule-bound obligations and affective loyalties conflict. American citizenship is built on a number of conflicting ideas, rule-bound and affective, and nowhere are those conflicts more visible than in instances of forced expulsion. Shklar begins the conversation, identifying the tensions between rational obligation and affective ideas like loyalty, but an examination of American expulsions reveal a complex web of (often contradictory) concepts underlying various notions of citizenship, including voluntary ideas like contract or promise, or contingent ones like kinship. In between voluntary and involuntary, one finds ideas of community as friendship or hybrid rational-affective attachment to certain principles or narratives. Even “cultural” or “civic” bases of liberal community, which posit that social solidarity is built on the voluntary sharing of some idea or set of principles, often entail expectations that citizens possess certain inherent characteristics or dispositions, expectations that cannot easily be reconciled with liberal models of voluntary association and legitimation by consent of the governed.

Shklar identifies conflicts arising between rational, rule-bound conceptions of membership and the affective aspects of citizenship. This project, by examining how exile operates in liberal
and proto-liberal American communities, explores not only those conflicts but the underlying confusion they reveal. Conflicts between obligation and loyalty express a fundamental uncertainty about what kind of association a liberal community is, and what sorts of demands its members can legitimately make upon one another. I argue that this confusion reveals itself especially clearly in instances of political expulsion, when those various, incoherent claims are asserted, denied, or questioned. Additionally, this project attends particularly to what Bernard Yack terms “the moral psychology of community.”

This is no accident – the survey of cases discussed here reveals a close link between exile in America and the enforcement of often ill-defined moral norms. While Yack’s work focuses specifically on the moral psychology of nationalism, many of his insights into the nature of political community apply to various levels of belonging.

Yack identifies friendship and sharing as central elements of community. This project builds on those insights, examining how liberal communities in the United States (and in some cases, even the United States itself) negotiate the nature of that friendship and the content of what is shared. The forced expulsion of particular members highlights the points at which those most basic tenets of community are contested, and at which they conflict with liberal commitments. The contests over what exactly it is that a liberal community shares are often emblematic of a pervasive lack of clarity regarding shared liberal identity, as the cases explored in this project will reveal. Is it a rational commitment to shared moral principles that members of

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liberal communities share, or is it a particular innate moral character? Are targeted expulsions expressive of a community’s chosen ethical commitments, or of non-rational intuitions about moral purity and anxiety about uncomfortable similarities we may share with our neighbors? Do we conceive of national citizenship as an exchange relationship, a friendship, or a familial bond? Each of these questions arise in historical and current expulsion practices in the United States. In the face of such issues, ostensibly liberal political communities often respond less like the rule-bound voluntary association of liberal theory and more like the mission-oriented society most often associated with traditional forms of community, or even with a democratized version of the despotic arbitrariness that provoked such deep suspicion in foundational liberal thinkers. The cases of political expulsion explored in this project raise the questions inherent in these conflicts: What kind of community is an exiling community? What kind of community is a liberal community? Ultimately, can the two be reconciled? By exploring current and historical uses of exile, I hope to shed light on these questions.

**Historical Roots**

While the date of its inception is unknown, Homer refers to exile, and it was common practice in archaic Greece.¹⁰ For instance, it appears in Solon’s sixth century B.C. reformed

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legal code as a penalty for serious crimes like murder, blasphemy, attempting to establish a tyranny, and (somewhat bizarrely) failing to participate in the conflict during a time of stasis, or civil war. Although harsh by today’s standards, exile offered an alternative to the death penalty Draco’s laws prescribed for nearly every crime. Outlawry, or atimia, was a variant of exile that stripped the offender of all political rights and privileges, including those to the protection of his property and life. The fact that they could be killed without penalty would have effectively forced atimoi into permanent exile.\(^{11}\) While knowledge of atimia was widespread (as evidenced by its appearance in Plato’s Gorgias) scholars believe that it was only actually imposed on extremely rare occasions.\(^{12}\)

Athens has one of the best-documented histories of expulsion, but it is likely that similar practices were widespread in the Hellenic world. Thucydides, for instance, recounts numerous examples of groups of exiles from various poleis siding with one faction against another. Ancient exile practices generally fall into one of three categories: private exile, judicial exile, and exile to purify pollution. Although the judicial expulsions carried out by city authorities are the most obviously related to politics, moral exile served similar functions. Exile among the ancients was often a private affair; perhaps because the political lives and personal lives of ancient elites shared a near identity, unlike the clearer public/private divide accompanying the

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Snider, “Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment.” *New England Journal on Criminal and Civil Confinement* 24 (1998): 455-509. This project concerns itself with the relationship between exile and liberalism and so will refer most often to the practices of ancient Greece. Early modern liberals and proto-liberals self-consciously construct a narrative unity between the ancient Greek world and what we now consider “the liberal tradition.” As such, this discussion of the theoretical framework underlying exile in the pre-liberal world will focus upon the rhetoric of exile in those ancient city-states like Athens, societies that form the foundation of the ancient/modern narrative in the liberal tradition.

\(^{11}\) Outlawry remained a worse fate than exile or ostracism, however. Although conventional exiles were not allowed within the city, they generally retained their rights as citizens while outside of the territory.

rise of liberalism and a new emphasis on the individual. Of all the types, private exile best fits the romantic ideal, but as a political phenomenon it is less instructive than the judicial and moral forms imposed by the city and its citizens. In archaic Athens, powerful men often expelled one another from the polis using private forces. In such cases the defeated party would retire in exile elsewhere and gather his forces for a counterattack, aiming to press his foe into exile in his stead. While these exchanges caused a great deal of instability in the polis, they occurred without official public involvement. These events were entirely private, explicitly political, and openly conducted via pure, brute force, uncloaked with justificatory political rhetoric. Although private exile’s purpose was to consolidate the victor’s political power, its value to the political community was dubious. Intra-polis fighting between elites was violent and costly. Often the city’s only involvement in intra-elite conflict consisted of watching its people and property become collateral damage.

Alternatively, the political community itself could impose a sentence of exile upon any citizen. Usually this involved a trial and decision by a jury of the defendant’s peers. Exile and fines were the primary punishments to which citizens were subject, especially in the case of

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13 For a full account of how elite infighting and exile affected the political development of Athens and other city-states, see Forsdyke.
14 Additionally, these extralegal struggles often took place between long-time rivals and were not solely about political power, but personality as well. See, for instance, Herodotus’ commentary on the rivalry of Themistocles and Aristides, “…Aristides … came into the council and called forth Themistocles, who was to him not a friend, but a bitter enemy…” Herodotus, Histories. Translated by Walter Blanco (New York: Norton, 1992): 8.79.
15 While most private expulsions mark only the personal rivalries of ambitious men, some conflicts of this type did produce lasting changes in the city. Among the more notable of these is the 508-507 struggle between Isagoras and Cleisthenes, widely considered to have laid the groundwork for later Athenian democracy through the pair’s attempts to win the support of the people against one another. See Herodotus, 5.66.2; Aristotle 1952, 20.1. During the course of the struggle, both men suffered exile, along with seven hundred other Athenian families (Herodotus, 5.72.4, 5.74.1).

aristocratic offenders. As Demosthenes—himself destined for exile—observed, only slaves were subject to corporal punishment (including imprisonment) in ancient Athens. Conventional judicial exiles—meaning those charged with some specific offense—enjoyed the benefit of a relatively impartial, transparent procedure, with a hearing, a verdict, and a clear sentence. Surviving records specify sentences of “exile in perpetuity,” suggesting that others were not permanent. These proceedings, unlike their private counterparts, were punitive in nature. Imposed on the basis of desert, judicial exile controlled individual behavior and served the public purpose of regulating morals and deterring breaches of the law. As he himself notes, had Socrates refrained from antagonizing his jury, he probably would have been formally sentenced to exile. Thucydides recounts the judicial exiles of the generals Pythodorus and Sophocles. Having been found guilty of accepting bribes and allowing themselves to be defeated in the 425 B.C. campaign to conquer Sicily, they fared better than their numerous executed peers. Thucydides notes the hubris of the Athenian people and their unrealistic expectation that they should “…achieve the possible and impossible alike,” suggesting that the generals’ exiles were not entirely a matter of law. Like ostracisms would later do, judicial exile occasionally functioned as a stasis-arresting outlet, releasing the resentment of the polity by sacrificing a few prominent individuals for the good of all.

The phenomenon of self-imposed exile arose as a common means to evade a worse sentence, usually death. It is difficult to determine how often this occurred, as the ancient Greek word for

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19 Forsdyke, 90,180, 194.
21 Thucydides, 4.65.
exile, “pheug,” not only signifies officially imposed exile, but also “to flee,” rendering many accounts ambiguous. Thucydides, exiled in 424 B.C., may be one such case. The language is unclear as to which sense of the word he uses, leading some scholars to speculate that Thucydides fled Athens to avoid being sentenced to permanent exile or death. His response is stoic, casually slipping notice of his exile into an overview of the war:

I have lived through the whole war and applied the full powers of my mind in the prime of my life to knowing exactly what happened. It came about, also, that I was banished from my native Athens for twenty years after my command at Amphipolis. I was present at events on both sides… so I was without distraction, better able to understand them.

He comments no further on the matter. Demosthenes, too, found himself reduced to self-imposed exile after his disastrous defeat at Aegitium, “frightened,” Thucydides tells us, “of what the Athenians might do to him.” It may have been the right decision, as the Athenians had taken by that time to executing unsuccessful generals with some regularity.

A fascinating variant of judicial exile, ostracism (named for the potsherds, or ostraka, that served as ballots), came into being in Athens during the fourth century B.C. Imposing ten-year periods of exile (later amended to five years), ostracism gave non-elite Athenian citizens the opportunity to exercise some control over expulsions through a spectacular vote of over six thousand participants held in the Agora. Alcibiades, notorious for his dissipated lifestyle and fickle allegiances, was famously ostracized for vandalizing the city’s sacred statues. At a set point in the political calendar, the assembly would vote on whether or not to hold an ostracism in

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22 Forsdyke, 179.
23 Thucydides, 5.26.5.
24 Ibid., 137.
a given year. The practice was rare, with only ten confirmed cases. When it was imposed, it was
ostensibly as a preventive measure, to suppress the rise of tyrants. In practice, votes were often
taken in response to perceived offenses like aberrant sexual practices, immoral conduct, or
suspected loyalty to foreign powers. Plutarch, in his life of the much-esteemed Aristides,
explains the process:

> Coming together… from all parts into the city, they banished Aristides by the
ostracism, giving their jealousy of his reputation the name of fear of tyranny.
For ostracism was not the punishment of any criminal act, but was speciously
said to be the mere depression and humiliation of excessive greatness and
power; and was in fact a gentle relief and mitigation of envious feeling, which
was thus allowed to vent itself in inflicting no intolerable injury, only ten
years’ banishment.\(^{26}\)

Plutarch’s rather ambivalent account of the process conveys two faces of ostracism: the salutary
release of potentially destabilizing public frustration, and the simultaneous venting of the ugly
prejudices of the hoi polloi. Although ostracism’s rationale was to suppress tyranny, the line
between citizens whose personal power and influence made them potential tyrants and those who
were merely gifted but benign is not always clear, and it becomes even less so when clouded by
envy.

> Plutarch’s description recalls Aristotle’s critique of democratic regimes, wherein the
jealous drive for equality overpowers all other concerns.\(^{27}\) Aristotle, of course, does not
necessarily oppose expelling the preeminent; in fact, he recommends it.\(^{28}\) According to

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\(^{27}\) Aristotle punctuates his point with an anecdote about Periander, who wordlessly advises his fellow tyrant
Thrasyboulos to ensure his power by ridding himself of the preeminent men of his city, drawing his sword and
lopping off those ears of corn that stood above the rest, “level[ing] the field.” Aristotle, Politics. Translated by
\(^{28}\) Ibid., 1284a1-15.
Plutarch, Coriolanus posed such a problem. Depicting Coriolanus critically, Plutarch notes bluntly that, “… through an obstinate reluctance to yield or accommodate his humours and sentiments to those of a people about him, he rendered himself incapable of acting and associating with others.”

Here is Aristotle’s apolitical man: while he is “like a god among human beings,” his consciousness of his own excellence renders him “incapable of participating…” in political life. Coriolanus is, indeed, “either a beast or a god.”

From Plutarch’s account, it is not clear which.

While envy and personal animosity almost certainly entered the process, Plutarch’s insight into the “venting” function of ostracism is a keen one. Figures like Coriolanus inspire fear, anger, and resentment, emotions that can translate into political instability. Further, Coriolanus presumes to maintain his own positions and personal deliberative authority, even in opposition to the majority – a serious offense in a society premised upon public unity of purpose. In the day of the small city-state, conquest and civil strife were not remote concerns, rendering unity not merely desirable, but vital to the community’s survival. Removing disruptive figures (and especially those with the resources to threaten the current regime), therefore, was a rational response. Aristotle’s argument for exiling the excellent may appear perverse upon the first reading, but accounts of the behavior of ostracized figures like Alcibiades suggest that the most brilliant elites can also be the most destabilizing citizens.

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30 For those who have achieved such excellence that they can no longer occupy the same roles as their fellow citizens, Aristotle sees no alternative. Such a person, he writes, “…can no longer be regarded as a part of the city. For they will be done injustice if it is claimed they merit equal things in spite of being so unequal in virtue and political capacity; for such a person would likely be like a god among human beings.” Aristotle, Politics, 1253a25–30.
Finally, the ancients engaged in expulsion for moral or religious reasons. Part punitive, part remedial, and part political, religious exile sought to repair the damage done by perceived pollution.\(^{31}\) Plagues, pestilence, and famine were often attributed to pollution, as Oedipus’ supplicants in the opening scenes of Oedipus Rex interpret the plague in Thebes. One could be tried (and even exiled) for sacrilege posthumously, as were the Alcmaeonidae for slaying the Cylonians at the altar of Athena. The case of the Alcmaeonidae is an especially instructive one: while no observable disaster followed from the miasma attached to the murder of the Cylonians, the taint was thought sufficiently dangerous that not only the perpetrators were cast out, but their descendents were as well. Aristotle notes of the event not only that, “…the bodies of the guilty men themselves were cast out of their tombs,” but also that “…their family was sentenced to everlasting banishment.” The crime not only attaches to those who committed it, but is transmitted over generations through blood like an inherited disease.\(^{32}\) Purifying exile aimed to excise the entire part of the polis that potentially carried moral infection, even if it meant subjecting innocent parties to “everlasting banishment.”\(^{33}\) Oedipus’ exile is an example of expulsion for the removal of pollution, as he imposes upon himself the moral expulsion he had promised Laius’ murderer before realizing that the offender was himself.

The formality and transparency of ancient expulsion are perhaps its most striking features, especially when compared to the rancorous, ad hoc, and often hidden practices of today. Aside from the private expulsions resulting from simple physical struggles between would-be tyrants, the majority of ancient exiles were relatively peaceful, civil affairs. An air of public

\(^{31}\) This idea will be discussed at length in chapter four.
acceptance surrounds ancient exile, something its later counterparts notably lack. Ancient societies accepted exile as both a legitimate punishment and a solution to political problems that otherwise endangered the cohesion of the polity, threatening at any moment to throw it into internal violence. Elites understood that one of the risks of greatness was expulsion, and those who chose to pursue it anyway knew that exile was a very real possible outcome. Similarly, the great mass of citizens understood that certain transgressions of civil or religious law would result in exile, but that for the most part exile touched the great. Obscurity offered them some protection.

Theorizing Exile in the Present: (re-)Politicizing Expulsion, Recognizing Democratized Exile, and Identifying the Liberal Polity

“Exile,” in contemporary usage, has drifted far from its political moorings for a variety of reasons, chief among them being that its seeming incongruity with liberal politics has forced the practice to adopt more acceptable guises. As a result, exile practices are not necessarily readily recognizable in the democratic age. Additionally, since exiles must first be members, the indeterminate nature of “membership” complicates the matter further. While today, official identity is perhaps more closely monitored by authorities than ever before in history, determining who can or cannot claim membership in a given community is not as easy as it may at first appear. Often, the terms “membership” and “citizenship” are treated interchangeably, but as the ever-growing literature can attest, the term “citizenship,” like “exile,” is a complicated one. Ancient thinkers like Aristotle depict citizenship as an exacting vocation; the political life was a calling for the leisured, as the demands of citizenship did not permit time for labor or trade.
Additionally, little division existed between public and private life – citizenship was demanding, but also rewarding, and involvement in the workings of the political community substantially constituted one’s identity. As Ovid’s work on his own exile experience illustrates, expulsion from the political community was a potentially devastating experience, not only depriving the exile of his public influence, but also stripping him of the social context that provided much of his sense of self. Few citizens of liberal societies can identify with such a conception of citizenship now.

Today, “citizenship” refers to a broad range of concepts, including active participation in one’s government and community, the bestowal of recognition as an “insider” by other members of the community, and a formal status that functions like a kind of property – possessing “citizenship” entitles us to certain rights and protections that those who lack it cannot effectively claim.\(^{34}\) Given the variety of definitions and the range of contexts in which it is invoked, no single term can reasonably be expected to do the work that is demanded of “citizenship.” Further distinctions are necessary. Bearing that in mind, this project will use a broad definition of “citizenship,” one going beyond the legalistic, status-based definition of inclusion. Viewing citizenship merely as a status to which one is or is not entitled fails to account for many other ways of belonging to a political community. Instead, it is more useful to consider a version of “membership” that recognizes not only ideal, but also empirical elements of belonging. Some examples of this empirically based membership include the partial citizenships generated by the lived interactions between individuals and their communities over time – such as economic interactions like owning property, building a business, or paying taxes; cultural interactions like

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\(^{34}\) For an extended exploration of citizenship as a type of inherited property, see Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge: Harvard University Press, 2009).
attending a public school or consuming the same entertainment and information sources as one’s neighbors; and political interactions like sharing the same fundamental political values as the other members of one’s community and living subject to the same laws. While these ties are not sufficient conditions to claim legal citizenship, they are the kinds of bonds that constitute citizenship as most people in the present era experience it. To paraphrase Ernest Gellner, people today form allegiances to a shared way of life more than they do to an abstract state.

The citizen/noncitizen distinction, therefore, fails to accurately describe how citizenship actually exists in practice, and certainly fails to capture the affective ties and bonds of special regard engendered by the sharing that constitutes community. While there are good reasons to object to basing normative theories upon existing conditions, in citizenship theory (perhaps more than in any other subject under the purview of political theory) hewing closely to the empirical realities of membership is vital to maintaining conceptual clarity. The particular context of any government, be it liberal, illiberal, democratic, non-democratic, or any of the infinite combinations of grades on each of these axes, will determine to a large extent what being “included,” “excluded,” or “expelled” actually means. That being the case, while it is evident that the graded levels of inclusion that Elizabeth Cohen and other scholars note make it difficult to mark precisely at what point a person becomes fully included, it does not necessarily follow that we cannot say definitively that a person has been expelled. Just as the extension of certain elements of the bundles of rights that make up membership expresses some degree of acceptance

35 Elizabeth Cohen discusses the problems with what she terms “normative political theory” in Semi-Citizenship. This project is certainly cognizant of Cohen’s critiques, though it does not adopt her definition of “normative theory.” The divisions between description and prescription are clear enough, though why normative theory should exist wholly separate from empirical data certainly is not. Normative theory ought to consider empirical data.

into the political community, the unilateral revocation of the conditions required to claim those rights and privileges expresses the community’s rejection.

The determination of membership within a political community – be it the ancient city-state, today’s nation-state, or anything in between – is a fundamentally political question. To understand what expulsion practices can tell us about citizenship in the current era, we must return the concept of exile to the category of the political. If who we choose to include or exclude provides us with clues about our community’s political identity and values, then surely an examination of why we expel some of those people who we have already accepted as members can give us even greater insight into what membership means in the current day’s professedly liberal societies. What a “liberal society” actually is, of course, remains contested. In the wise words of Louis Hartz, “One can get into a lot of useless arguments if he affirms the liberalness of a liberal society in absolute mathematical fashion.”

As true as that statement was in 1952, it is even more so now, as the intervening sixty years of scholarly debate have generated a host of definitions of “liberal.” Even a brief and circumscribed survey of the expansive liberalism literature reveals a daunting array of different versions.

In *The Liberal Tradition in America*, Hartz himself provides what has become the standard narrative of the United States as the prime exemplar of the ideal Lockean liberal state. Rogers Smith, in *Civic Ideals*, complicates that picture by tracing the history of competing liberal and illiberal traditions in the United States, both stemming from and reacting to Lockean

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elements in U.S. political culture and history. Smith and Hartz both present versions of liberalism premised upon respecting the basic rights of the individual, rights like that to speak freely, to exercise one’s religion without undue interference from authorities, and to associate freely. Smith’s identification of a competing illiberal tradition, one that makes invidious distinctions between individuals on the basis of “ascriptive” characteristics like race and sex, further refines what falls within the description of “liberal” by specifying what does not.

Will Kymlicka and Chandran Kukathas offer an alternate take on liberalism, one that privileges the freedom of association and personal autonomy as defining characteristics of liberal societies. Kymlicka’s *Multicultural Citizenship* attempts to square the often universalistic rhetoric surrounding the rights of the autonomous individual with the particularistic needs of minority associations within larger liberal societies. Kymlicka’s version puts not only the preservation of rights and liberties at the center of liberalism, but also a robust form of toleration. Kukathas, in response to Kymlicka, offers in *The Liberal Archipelago* another attempt to balance the competing claims of association and autonomy. Where Kymlicka entertains the notion of introducing “group-differentiated” rights as a means of allowing a maximum of free association within a liberal society, Kukathas instead suggests that the best liberal state is a very minimal one, and one that protects the liberty to associate freely with as little interference with the inner workings of the society’s various associations as possible. While this is a very cursory look over political theory’s many attempts to define the liberal society, it is enough to illustrate the broad

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range of definitions available. Hartz’s Lockean America scarcely resembles Kukathas’ skeletal state, yet both are set forth as theories of liberal societies.

Despite the many differences between theorists’ definitions of “liberal,” a few key principles recur in the liberalism discourse. First and foremost, liberal societies recognize a politically determined set of core rights and liberties guaranteed to all individuals, which must be preserved even against the pressures of majoritarian preferences. Additionally, liberal societies do not discriminate in the distribution of those rights and liberties on the basis of morally arbitrary criteria, such as race, class, or other ascriptive characteristics. In the current era, this means that authorities are obligated to recognize the basic rights and liberties of each member of their society. Further, liberal societies legitimate government authority by requiring the consent of the governed, prohibiting the arbitrary exercise of coercive power. Finally, they conceptualize membership in the political community as being voluntary and open to those willing to abide by the social contract. This precludes notions of a pre-political community.

This project does not presume to offer an original, comprehensive theory of liberalism. As Hartz’s quote above notes, there is no “mathematical” way to assess whether a society is liberal or not, nor to what extent it may be illiberal. This is because, like citizenship, liberalism is not a concept that should be seen in binary terms – liberalism and illiberalism are characteristics that exist on a continuum. A given regime may combine some highly liberal policies with some that are less so. Consider, for instance, France’s laïcité. The conflict between the legal interdiction of what is thought an illiberal practice within a liberal society has been

\[41\] Despite Kymlicka’s focus on the rights and liberties of minorities, he does make a distinction between rights that are held by groups qua groups and group-differentiated rights, which are held by individuals in virtue of their belonging to a particular group. In Kymlicka’s multicultural liberalism, rights are still an individual possession.
much discussed, especially in the context of the 2004 ban on the wearing of veils in public institutions. Viewing the wearing of the veil by Muslim women as a symbol of female oppression, the ban is premised in part upon a staunchly liberal commitment to the equality of the sexes in the public realm. However, it also represents an incursion of government authority upon individual liberty of expression and religious practice. While many view the pervasive secularism of laïcité as repressive of religious freedom, few would suggest that France ought to be considered, categorically, an illiberal nation as a result.

Similarly, the United States offers all people involved in criminal proceedings extensive protections under the Fourth, Fifth, Eighth and Fourteenth Amendments of the U.S. Constitution, including the entitlement to be made aware of those protections. Yet, in 2011 the Bureau of Immigration Appeals (a bureaucratic body within the executive branch of the federal government) ruled that noncitizens arrested without a warrant are not entitled to the same “Miranda” rights that a citizen would be. This is despite the historically recognized principle that procedural rights ought to be guaranteed not as a privilege of citizenship, but as a fundamental protection of the individual against the disproportionate power of the government. Creating a second, inferior version of “due process” for noncitizens certainly violates the United States’ own constitutional commitments to protect the liberties of individuals, but having an imperfectly liberal set of laws and policies hardly disqualifies the United States from being considered a liberal society. The liberalness of a society is complex and graded, and changeable over time. Lapses in America’s liberal aspirations have been well documented, but the United States nonetheless offers a useful example of a liberal society due to the explicit liberal

commitments that make up the Bill of Rights and its historical interpretation through constitutional law.

This brief exploration of what “liberal” means is a necessary preface to the project of dividing that term from “democratic.” Often, scholars of politics speak of “liberal democratic states,” but the persistent pairing of the two ideas obscures the inherent conflicts between them. Plutarch and other ancient sources describe exile as a fate suffered only by elites, but it seems that Tocqueville’s “march of equality” has succeeded in democratizing exile, if not in displacing it. Despite predictions by the likes of Constant and Tocqueville that each individual would become less and less influential in the age of liberal democracy (be that for better or worse), the persistence of political expulsion suggests otherwise. Today, one need not be particularly powerful or famous to be subjected to political expulsion; merely being a potentially disruptive or undesirable element is sufficient. Exile in America is thoroughly democratized. While it may lack the grandeur and spectacle it carried in earlier ages, it now operates as a tool of popular membership control. Exile once targeted the elite, when only the elite were political actors; in the democratic age, every citizen is a political actor. Today, exile is very much a tool of the people, rather than of the lone tyrant. As will become clear in the next chapters, popular passions drive the impulse to exile.

**Exile: Present-Day Iterations**

Political expulsion can take a variety of forms, each shaped by a society’s cultural and historical contexts. Yet, even across peoples, the varieties of exile share defining characteristics. These different “types” or case clusters of political expulsion cohere in related constellations of
ideas and practices. While there is no precise formula for classifying each iteration of exile as belonging to one type or another, bundling these seemingly unique practices according to the purposes they serve and the ideas undergirding them allows us to gain some purchase on the theoretical underpinnings of the illiberal exile practices hidden within liberal politics. For this reason, I divide the various forms of current and historical political expulsion into five (roughly separate) classes: illiberal exile, transportation, moral exile, purgative exile, and expatriation. Certainly, these categories are not perfect; there will be some examples that partake of characteristics of more than one type. Transportation, for instance, is more a sub-type of moral exile than its own category, but treating it separately in its own historical context is important for understanding the proto-liberal roots of exile in North America. Nonetheless, the categories remain useful analytical tools. Each of these cases encompasses several instances of continuing exile practices, all of which share some normatively relevant defining characteristics.

Exile in the Illiberal Society

Illiberal exile is precisely what it sounds like – present-day expulsion policies that continue to be officially implemented in non-liberal communities. Chapter one will examine the use of banishment in a handful of societies that continue to openly employ it, including Singapore, the Maldives, and a selection of American Indian nations. Considering exile in these societies is useful in that they offer current cases in which exile is used openly and publicly justified. These communities tend to use banishment for characteristically illiberal purposes, such as enforcing moral norms, preserving shared ethnic identity or religious practice, or punishing departures from a shared public mission. The seemingly natural alliance between illiberal, traditional forms of community and exile illustrates the usefulness of exile for imposing
social discipline and strengthening certain types of solidarity. While justifiable by the commitments of each particular illiberal society, such uses of expulsion present intractable problems for the liberal community.

Transportation

The use of large-scale convict transportation in the seventeenth and eighteenth centuries provides a glimpse into how a proto-liberal society employed expulsion as a tool of membership control. As in the case of illiberal exile, transportation offers a case in which expulsion is used openly and justified publicly. Advocates of transportation extol the benefits of excising the infected portions of the polity and removing them to a safe distance, leaving the remainder of English society to flourish, free of the burden, danger, and unpleasantness of the transportees. In contrast to current, furtive uses of expulsion, those witnessing the transportation of tens of thousands of their countrymen freely acknowledge the benefits and drawbacks to selecting certain problematic members for removal – including such liberal luminaries as Alexis de Tocqueville, Jeremy Bentham, and Edmund Burke.

During the era of historical transportation, the political community identified certain individuals as inherently morally deficient, determined that this deficiency disqualified them from membership in the greater society, and saw to it that they were physically relocated a great distance – both geographically and socially – from the “legitimate” members of society. Moral character, in transportation discourse, is presented as being inborn, unchangeable, and intimately tied to one’s identity as a community member. Possession of the correct moral character is constructed not merely a condition of belonging to the English people, but evidence of
membership in a pre-political community of “true” Englishmen. Transportation is an early iteration of what I term “moral exile,” explored in greater detail in chapter three.

*Moral Exile*

Building on the ideas of pre-political community and moral essentialism introduced in chapter two, chapter three explores the use of judicial banishment, the conditional pardon, and spatial restriction ordinances in American communities today. Carrying a distinctly moralized cast, these legal expulsions mirror the “moral turpitude” and “good moral character” standards governing the official toleration of non-citizens’ continued presence. Moral banishment serves a number of purposes in liberal communities. First, it is an effective means of bolstering social ties without relying on ascriptive characteristics like ethnicity, race, or religion – foundations for building social cohesion that are not legitimately available to liberal societies. Expelling disfavored members is a communal activity, one that re-affirms who the “real” members are by making an instructive spectacle of those who are not. In a more nuanced fashion, moral banishment also defines which characteristics are essential to belonging to the group, sorting those kinds or types of people who inherently belong from those who don’t, and producing the sort of ethically constitutive story that communities rely upon to imbue belonging with meaning.

Moral exile separates the morally eligible from the ineligible, assessing the moral character of existing members and testing it against an implicit template of the "true" member. Immoral actions are not treated as discrete decisions, but rather as symptoms of an underlying, permanent condition of moral defectiveness. In communities that use moral exile to control membership, judgments are not of actions, but of actors. While making moral judgments about one's fellows in the private sphere is a routine part of choosing who we wish to associate with
and who to avoid, in cases of moral exile those judgments do not remain in the private sphere – they are made and enforced by government actors, with the full coercive force of government institutions behind them. They are not merely personal judgments between equal citizens, but an official articulation of what moral traits “true members” of the community possess.

The examination of moral exile in chapters two and three raises questions about what exactly it is that liberal communities envision themselves as sharing when they define their membership according to adherence to a particular vision of public morality. Is it a rational, voluntary commitment to certain moral principles these communities expect their members to share? Or do these policies actually suggest that even the seemingly liberal, culturally-bound requirement of “good moral character” is actually articulating a form of membership premised on un-chosen, inherent characteristics?

Purgative Exile: Driving out the Pollution

Pollution imagery haunts the discourse of moral exile, but it takes on a particularly virulent character in expulsions driven by non-rational contagion intuitions. I term this "purgative exile," or expulsion in response to a perceived contact with a source of moral contamination. Purgative exile also enforces moral judgments via official mechanisms, but it differs from the previously examined cases of moral exile in its justifications. Unlike moral exile, in which certain members are found to possess the wrong kind of character needed for membership in the particular expelling community, purgative exile asserts that certain people are unsuitable to belong to any community at all – that they are so radically intolerable that their very presence contaminates.
These removals are prompted not by a reasoned evaluation of having met or failed to meet any ideal of moral character, but by a visceral rejection rooted in contagion intuitions. This chapter explores the close relationship between the concept of “pollution” and exile and the problematic place of contagion intuitions in political argument about public morality. Finally chapter four examines the ways in which pollution intuitions inform American public debate via a study of the pollution-inflected expulsion of the remains of a convicted murderer from Arlington National Cemetery. Present-day purgative expulsions recall the religious exiles and pollution beliefs of ancient Greece, extending even to banishing the dead.

_Purgative Exile: Community and the Dark Side of Sharing_

Similarly, fear of moral contagion drives communities to expel certain particularly reviled individual members who have established ties to their home communities. Publicly, these polices are characterized as necessary for preventing future lawless behavior, certainly a legitimate end of liberal government, but even cursory examinations of the relevant cases undercut arguments based on likely future threat. Considering the most common use of purgative expulsion in American communities today – legal restrictions on the presence of convicted sex offenders – this chapter argues that the states purpose of such laws has little relation to their actual function.

Rather than preventing or containing criminal activity, laws banning registered sex offenders from the specially protected spheres that represent what the community holds in particular reverence are primarily expressive measures. While such costly expressions certainly reinforce the community’s identity as a bastion of moral decency, they also reassure anxious members that the offending former neighbor (or friend, co-worker, or family member), with
whom they shared all of the valued symbols, history, stories, and traditions that make up a community, is, in fact, fundamentally different from themselves. The sympathy and special regard that creates the bond among community members that differentiates them from outsiders also renders us vulnerable to finding that sympathy or fellow-feeling we have extended to our neighbors has led us to share deep commonalities with someone we later find we would prefer not to have any commonalities with at all.

Purgative exile presents an image of the community as a fundamentally unified whole, held together by an overarching similarity and vulnerable to contamination from even the most minimal association with especially reviled (now rejected) members. Citizens, in this model, are not necessarily presented as friends, or members of a club or other voluntary association. In this view, the community is analogous to a family. This metaphor for community posits a shared history, a shared destiny, and acknowledges the significant element of contingency in community membership. Perhaps most importantly, it assumes a fundamental similarity among its members, akin to a family resemblance. In this vision of community, individual members' own characters are intimately bound to that of the community, a bond that not only enriches life, but also exposes them to significant moral danger.

*Expatriation*

Loss of national membership takes a variety of forms, including denationalization, denaturalization, and the relatively recent phenomenon of mass deportation. Underlying many of the current issues surrounding denationalization is not only the tendency for the matter to arise in connection with contentious and emotionally charged issues, but the entanglement of those affective issues of patriotism and loyalty with rational questions of consent. Yasser Hamdi, for
instance, was not “involuntarily expatriated,” but “voluntarily” renounced his citizenship as part
of a plea deal. In fact, while voluntarily swearing an oath of renunciation is one road to the loss
of one’s citizenship, many others are dependent upon certain acts being construed as “giving
consent” or expressing an “intention” to give up one’s citizenship. This problem is as old as
Locke’s _Two Treatises of Government_: which acts constitute tacit consent? And how to separate
that rational query from the desire to use denationalization to punish or remove a disruptive
presence?

As recently as the early twentieth century in the United States, holding unpopular or
potentially destabilizing political opinions incurred the risk of having one’s citizenship revoked
for both native-born and naturalized Americans. For instance, the United States in 1919 revoked
Emma Goldman’s U.S. citizenship and deported her to Russia among the 250 deportees on the
“Red Ark,” ridding itself of her disruptive presence. Goldman writes of the “refined cruelty” of
denaturalization and subsequent deportation in a pamphlet detailing her experience, touching on
some of the less tangible, yet most agonizing aspects of denationalization. Goldman, in the
face of her denationalization, rather than deriding the nation that performed impressive acts of
legal gymnastics to rid itself of her, forcefully asserts her own fundamental American-ness.

Although Goldman’s tone is (characteristically) that of protest, there is also a mournful quality to

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43 This question has been a recurring one for decades: David F. Schwartz, “American Citizenship after _Afroyim_ and
Provost, Jr. and Ralph J. Rohner, “Can Congress Denationalize? The Supreme Court’s View in _Kennedy v.
Mendoza-Martinez._” _Catholic University Law Review_ 12 (1963): 114 –127; Lawrence Abramson, ”United States

44 Emma Goldman and Alexander Berkman, “Deportation, Its Meaning and Menace: Last Message to the People of
America.” New York: M.E. Fitzgerald, 1919. Goldman elaborates on Kershner’s posthumous denaturalization and
its insidious use to denaturalize her by extension in this pamphlet.
her appeal to traditional American commitments to liberty of speech and thought that conveys a
deep, emotionally charged sense of betrayal.45

Denationalization, denaturalization, and deportation not only entail practical risks, but also
humiliate their subjects. The rational, rule-bound ideas of obligation underlying American
citizenship discourse collide with affective elements of loyalty, allegiance, and the experience of
betrayal in these cases. Further complicating the picture is the uncertain importance of national
citizenship in the twenty-first century. As the different conceptions of citizenship expand and
contract, the once-solid linkage between certain rights and protections and national citizenship
status has become destabilized. Simultaneously, more and more nations have accepted (and even
encouraged) dual or even multiple nationalities for their citizens. Despite the intensely personal,
emotionally wrought rhetoric surrounding expatriation, expulsion from the national community
is a relatively uncommon event. But, does that rarity indicate the unquestioned supremacy of
national citizenship, or is it evidence of its declining experiential salience? Is the glorification of
national citizenship evident in denaturalization and denationalization discourse simply
misguided?

Exile: Atavism or Continuity?

The term “exile” seems too grandiose to describe what occurs when Nevada state

officials usher a score of indigent, mentally ill people onto a bus to San Francisco, or when a

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45 This excerpt gives a sampling: “One hundred per cent Americanism is to root out the last vestige, the very
memory, of traditional American freedom. Not alone foreigners, but the naturalized citizen and the native-born are
to be mentally fumigated, made politically ‘reliable’ and governmentally kosher, by eliminating the social critics and
industrial protestants, by denaturalization and banishment, by exile to the Island of Guam or to Alaska, the future
Siberia of the United States.... ARE the Czar's methods, the Third Section, the secret political spy organizations,
amonymous denunciations, star chamber proceedings, deprivation of trial, wholesale deportations and banishment, to
become an established American institution? Let the people speak.”
county judge offers a check forger the option of avoiding a lengthy prison term in exchange for agreeing to leave the state for ten years. The romantic figure summoned by the word “exile” is certainly not middle aged high-school teacher (and registered sex offender) Malcolm Watson, an American citizen whose probation agreement with the Cheektowaga Township, New York municipal court stipulated that he not enter the United States for three years, effectively banishing him to Canada.46 Present-day iterations of political expulsion lack the drama now associated with the word “exile,” but they serve similar purposes despite being scaled down to egalitarian proportions. Few political ideas or institutions existing today can compare in grandeur to their counterparts in the distant past; “rulers” are no longer divinely favored nobility. Rather, they are commoners like ourselves (lawyers, usually). The laws are not sacred pronouncements. The democratic plebiscite of the polis has been replaced by a faceless mass public, represented by professional politicians. The politics of the past have a majestic air about them that the drab realities of the present simply cannot compete with, but the humbler appearance of political practices like exile in the current era does not necessarily indicate diminished significance.

The past is easily idealized. Rousseau, for instance, offers rhapsodic descriptions of the virtues of the ancient Spartans, all the more admirable in comparison with the weak, fearful

46 The agreement was approved by Cheektowaga Town (New York) Judge Thomas S. Kolbert on October 23rd, 2006. In fairness, Watson owned a home in Ontario. His job, however, was in the United States. The case provoked considerable consternation in Canada, and American authorities persuaded the township to accept an agreement allowing Watson to serve his probation in the U.S. According to early American news coverage, Canada often annoyed its southern neighbor by banishing various malefactors to the U.S., so the Watson affair is not without precedent. While Watson’s case was not appealed to a higher court, this is not the first instance in which a New York court reserved the right to banish an American from the national territory. In 1846, the New York Supreme Court ruled that it was within the scope of a state governor’s authority to issue a conditional pardon requiring that the recipient leave the nation. People v. George Potter, Supreme Court of New York, First Circuit. March 26th, 1846. The full text of the decision appears in the New York Legal Observer 4 (May, 1846): 177.
bourgeois man of his own era. However, only a generation later, Benjamin Constant cautions against the dangers of trying to import the ideas of the ancient world into modern institutional and intellectual settings in “The Liberty of the Ancients Compared with That of the Moderns.”

More recently, Stephen Holmes reiterates Constant’s warning for the twentieth and twenty-first centuries. The ancient world, Constant and Holmes caution, has passed out of being, and with it its characteristic institutions and social structures. While this may seem obvious, the stubbornness of the idealized past’s hold on the modern political imagination cannot be denied, nor can the associated temptation to bifurcate political history.

The division of the world into “ancient” and “modern” can mislead, however. Not all political ideas or phenomena fit neatly into one category or the other, and efforts to force them to do so risk distorting our understanding of them. Exile is one such example – while it is tempting to see current iterations of “exile” as atavisms, given the practice’s colorful origins in the ancient world, an examination of their historical roots reveals that they do not merely indicate a novel reappearance of a vanished peculiarity of ancient politics. Such a perception is dangerous because it relegates exile practices to the edges of contemporary political life, transforming them into “exceptions” to the normal workings of liberal politics. This, I argue, is not the case – rather, exile has never passed out of being. Modern exile practices, as they exist in liberal communities like those that comprise the United States, do not represent attempts to retrieve elements of the ancient political world, as Constant and Holmes warn against. Rather, exile has persisted continuously – it various iterations have survived the rise of liberalism. Liberal

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institutions have grown up around and adapted to the presence of these seemingly illiberal expulsion practices – even when “adapting” has meant disguising them in the trappings of liberalism.

Ancient ostracism, exile, and outlawry removed unwanted individuals from the city-state, and reaffirmed the shared commitments and identity of the remaining members. Expelling rejected members is a fundamentally communal activity, one that reinforces the bonds of solidarity and commonality among those who can still claim membership. Present-day iterations of exile perform similar functions, although now the political nature of expulsion is often disguised in the language of administrative law or bureaucratic rules. Though often at least nominally reliant upon some form of “consent” on the part of the exile, current exile practices transform illiberal judgments about the moral fitness, authenticity of pre-political membership, or correct inner states of individual members into legitimized “agreements” between the rejected individual and the political community. Alternately, current forms disguise exile behind the drab, apolitical curtain of administrative regulation, civil law, or criminal justice.

Noncitizens or naturalized Americans may find themselves subject to deportation on the grounds of having committed an “act of moral turpitude,” ranging from minor offenses like possessing small amounts of illegal drugs to writing a bad check. Unsavory characters like sex offenders, prostitutes, perpetrators of domestic violence, or thieves may find themselves cast out of their neighborhoods, counties, or states by their disapproving neighbors, despite having served criminal sentences for their offenses. Notably, the basis for removability is not in the rule of law or some form of contractual reasoning – the deportee has committed a moral offense. While these offenses are not labeled as “pollution,” and the offenders are not “transported,” the desire
to protect the greater body politic from the morally unfit animates expulsion practices aimed at removing the defective to a safe distance. Exiles are seldom sympathetic characters, and the things they have done to lead their communities to reject them frequently stir up strong emotions that cut to the heart of the affective, non-rational aspects of citizenship in modern liberal societies. Conversely, exiles may simply belong to disfavored or stigmatized groups, as in the case of deportable undocumented immigrants.

Exile, in its various iterations, controls post-admission membership, defines the acceptable characteristics of those belonging to the community, strengthens social cohesion and delineates what it is that a given community shares. Liberal communities, forced to mediate between affective, non-rational aspects of citizenship that express themselves in terms of morality, identity, and authenticity, and the rule-bound, rational obligations that characterize liberal government, must constantly negotiate compromises between competing, often internally incoherent demands. The points of conflict between those demands are especially visible in cases of expulsion, which demand justification and the articulation of previously implicit assumptions and arguments. These cases illustrate how American polities navigate these hazardous moments in community-building. By examining these seemingly disparate cases of expulsion in the broader context of “exile” and “liberal community,” this project seeks to use these illuminating moments of conflict to analyze how American citizenship practice aligns with liberal commitments and aspirations, offering a picture of what a “liberal community” is, and what it is exactly that the members of these communities share.
Chapter I

Exile in the Illiberal Society

“Indeed the acts which [repressive] law forbids and stigmatises as crimes are of two kinds: either they manifest directly a too violent dissimilarity between the one who commits them and the collective type; or they offend against the organ of the common consciousness. In both cases the force shocked by the crime and that rejects it is thus the same. It is a result of the most vital social similarities, and its effect is to maintain the social cohesion that arises from these similarities.” Emile Durkheim, The Division of Labor in Society.\(^1\)

The Exiling Society

Categorizing societies according to opposed binary types is a well-established tradition in the history of political thought. Theories of this type posit a break in history, accompanied by a radical reorganization of social relations. Often these dualities correspond to value-laden descriptions of “modern” and “pre-modern,” telling a story of either decline or progress, depending on the author’s particular inclination. Tocqueville, for instance, draws a division is between the centralized nation in the age of hereditary aristocracy and the era of equality’s state comprised of a plurality of independent communities.\(^2\) Similarly, Tönnies distinguishes between traditional, intimate Gemeinschaft and the formalized, rational relations of Gesellschaft, and Durkheim divides societies united by mechanical solidarity from those relying on organic solidarity.\(^3\) More recently, the division between liberalism and communitarianism echo the same tropes, as do theories of civic (or cultural) versus ethnic nationalisms.

\(^{3}\) Ferdinand Tönnies, Community and Civil Society (New York: Cambridge University Press, 2001); Emile Durkheim, The Division of Labor in Society, 1-178.
Traditional societies are typically associated with close personal ties, a high regard for local tradition, and thick moral identities. Their proponents offer a nostalgic image of community defined by a deep sense of unity among members who share a firm foundation rooted in common values, ethnicity, religion or some similar shared trait. The language of “obligation” and “duty” are better at home in these communities than that of “rights.” Critics characterize societies of this kind as parochial and exclusive, even bordering on xenophobic or cruelly intolerant of difference at their worst. The personal nature of authority in traditional societies is given to arbitrary, authoritarian rule – a phenomenon that, at its extreme, Weber terms “sultanism.”

Tocqueville’s aristocratic world illustrates both the best and the worst of the traditional society; while the fixed social organization of the aristocratic world offers members a serene sense of belonging and a ready-made source of meaning unavailable to the atomized individuals of the modern society, it also creates strict – sometimes brutal – hierarchies of power that afford individuals very little autonomy. These societies place the good of the community first, depicting individuals as co-operating parts of a greater whole.

By contrast, modern societies like Tönnies’ Gesellschaft or Durkheim’s community built on the “organic” solidarity arising from interdependence, are portrayed as being much larger – even “mass” – societies. While they may be impersonal, their formal, rationalized institutions offer a degree of impartiality and individual freedom impossible in a society managed by personal relationships. These communities operate on interpersonal relations of exchange and contract, predicated on individual rights. Proponents extol these societies’ virtues of fairness and equal opportunity. Individuals are of prime importance in modern societies, and society exists

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not to further a single shared good, but to referee between individuals as they pursue their own chosen goods. Critics lament the loneliness and moral vacuity of such associations, arguing that they erode the ties between people that give meaning to life and encourage a selfish and coldly economic attitude toward one’s fellows.

An institution like exile is at home in a traditional society that prioritizes the common good over the interests of individuals, but it fits awkwardly with the rationalized, rights-based government of liberal societies. The suggestion that liberal societies continue to exile provokes instinctive resistance. Underlying this response is an intuition that exile is compatible with certain kinds of societies – perhaps ancient societies, or totalitarian or authoritarian states – but certainly not with liberal societies. Benjamin Constant articulates a similar sentiment in “The Liberty of the Ancients Compared with that of the Moderns.” Relating his own narrative of the contrast between the illiberal traditional society (Constant associates this type with the ancient world) and the modern liberal society, Constant offers the use of exile (in the form of ostracism) as evidence of the type of authority built upon “the complete subjection of the individual to the community.”

This totalizing form of authority exercises its power arbitrarily, and one form that power takes is exile:

…[O]stracism, that legal arbitrariness, extolled by all the legislators of the age; ostracism which appears to us, and rightly so, a revolting inquiry, proves that the individual was much more subservient to the supremacy of the social body in Athens, than he is in any of the free states of Europe today.

6 Ibid., 316.
Yet, as this project will demonstrate, exile does endure in the United States today. To understand what work exile does for a liberal society, it is instructive to first look at its use in polities where it can be employed openly and publicly justified. Some present-day communities continue to officially impose exile, including it in their constitutions, or passing laws that prescribe it in response to certain problematic actions, dispositions, or patterns of behavior. The remainder of this project explores the survival of exile practices through the transitions from pre-liberal societies to latter-day liberal societies. But before considering what exile tells us about today’s liberal communities, a brief examination of what exile does for today’s illiberal societies sheds light on what purposes exile serves in today’s world of codified law and territorially bounded polities.

Banishment, openly employed, is extremely rare in the current era. Nonetheless, banishment tenaciously retains its place in a few legal codes. This chapter examines three examples of present-day illiberal societies that continue to openly employ banishment: the city-state of Singapore, the tiny island nation of the Maldives, and a survey of the American Indian nations and bands that have seen a recent appearance (for some, a reappearance) of exile in their constitutions and legal codes. While these societies differ greatly from one another in their

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7 In this section, I use the word “illiberal” in its precise sense – any society that is not liberal. Unfortunately, much of the liberal political theory literature tends to conflate “illiberal” with “unjust” or “bad.” Such connotations are not intended here.

8 The officially acknowledged use of banishment remains very rare. I give the examples of Singapore, the Maldives, and certain American Indian Nations because they all have codified banishment as one of the acceptable tools of government. Additionally, all have records of actually employing it with some regularity. Human Rights Watch has noted isolated incidents of banishment in Tunisia, the Democratic Republic of Congo, and Turkmenistan. On Abdullah Zouari’s banishment, see “Tunisia: End Activist’s Banishment.” Human Rights Watch, July 28th, 2009; “Congo: Government, Rebels Suppress Free Expression.” Human Rights Watch, September 20th, 2000; “Health and Human Rights Organizations Condemn Turkmenistan Plan to Close Hospitals.” Human Rights Watch, March 22nd, 2005. Under Kim Jong-II, banishment was among the tools used by the executive to remove political opposition. Choe Sang-Hun, “North Korea Reinstates Official Banished for Market-Oriented Reforms.” New York Times, August 24th, 2010. Similarly, Haiti and Uruguay both have legal provisions for banishment in their penal codes, but there is no evidence of their regular use.
particular features, the uses to which they put exile are surprisingly similar, outlining the implicit conditions of membership in each particular society. Examining the relationship between exile, community identity, and that conditionality offers an indication of what purposes exile may serve in today’s liberal regimes.

Theorists like Judith Shklar and Michael Oakeshott offer a minimalist image of the liberal society. In this vision, a liberal society is one that aims primarily to maximize the liberty of individuals to choose their own vision of the good life and pursue it to the best of their abilities. This idea of the liberal society treats the political community as being fundamentally agnostic about ends, offering only an orderly structure within which members can choose their own ends, derived from their own particular value systems, and then attempt to realize them with government acting only as arbiter of which means may be employed. The liberal society, in this scheme, offers the greatest freedom possible to all by serving as a referee, minimizing conflicts between various private projects.

Various types of illiberal societies, by contrast, tend to prescribe a more robust role for government, imbuing it with responsibility for the ethical life of the people. Many characteristics contribute to placing a society near the “illiberal” end of the spectrum. Among them are the conflation of public and private life, the privileging of community interests over those of the individual, and the conception of the political community as a vehicle for pursuing a specific vision of “the good.” This list is not, of course, exhaustive. For example, we may consider Singapore quite illiberal because of its longstanding, inegalitarian programs that reward the wealthy and educated for reproducing while penalizing the poor and less educated for doing the same. Similarly, we may view the Maldives as illiberal because its citizenship is open only
to those belonging to the established religion, or place American Indian communities in the same category because membership in them is conditional upon the possession of the ascriptive characteristic of lineage. These features are particular to each community, but they are also indicative of the sorts of characteristics that one expects from an illiberal polity – thick moral identities that, in large part, are maintained by the tight control of membership and of the characteristics that those members are expected to possess.

**Exile in the Enterprise State**

In *On Human Conduct*, Michael Oakeshott distinguishes between “civil associations” and “enterprise associations” (or “nomocracy” and “telocracy” as he refers to the ideas elsewhere). Liberal societies, characterized by ties between members and legal practices, are (in theory) Oakeshott’s civil associations. Enterprise associations, by contrast, are voluntary associations characterized by members’ devotion to a specific end – it is the relationship between members and this purpose, Oakeshott posits, that constitutes the association. Associations like religious organizations, clubs, or businesses (Oakeshott uses the example of a bassoon factory) are examples of enterprise associations. Voluntary enterprise associations are perfectly compatible with states constituted as civil associations.

A conflict arises, however, when a state seeks to adopt the form of an enterprise association. An enterprise state is “… an inherently compulsory association,” and voluntariness is crucial to establishing the relationships that make up an enterprise association. Not only is such a state necessarily intolerant of internal diversity, it also demands total devotion from its

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members while simultaneously denying them the choice of which cause to dedicate their lives to (or whether they wish to pursue any cause at all). Such a society cannot accommodate
“[c]onduct eccentric or indifferent to the common purpose.” Not only is the enterprise state unable to accommodate such activity, but such conduct “…corresponds to ‘treason’ in a civil association; and an associate not employed in the common enterprise… is the equivalent of an outlaw.”

An association in which members are obligated to direct the entirety of their lives toward achieving the common purpose offers no place for those whose desires, actions, or perceived dispositions deviate from the pursuit of the common cause. In such a state, exile is perfectly at home. Exile places the interests of the community over those of the individual; the enterprise state is premised on the same logic – the purpose (now identified with the state) is more important than any individual rights claim.

The purposive state cannot tolerate “dead wood.” Any member who does not contribute to achieving the shared goal of the community is a burden upon it and upon their fellows, slowing progress and diverting resources owed to the purpose (and, by extension, to the state). There is no room for neutrality or indifference in the enterprise state, so those who cannot or will not contribute cannot be allowed to remain. This leaves two options for the reprobate: death or expulsion. The totalitarian states haunting Oakeshott’s theory (as they did the work of so many twentieth century political theorists) made extensive use of both exile and execution in purging themselves of troublesome members, but not every enterprise state is so brutal. This chapter explores the few remaining communities that exile openly through the coercive institutions of government. Considering what exile does for these illiberal communities reveals what “kind” of

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society a banishing society is. In each, there are common illiberal characteristics, including a vision of the political community as having a “mission” that is the responsibility of the government to identify and pursue (one that is often couched in the language of morality), the subordination of the interests of the individual to those of the group as a whole, and the total merging of public and private life. These qualities are common features of illiberal regimes, and they also offer some of the strongest justifications for preserving exile as a tool of the illiberal society.

**Singapore: A Commercial Enterprise**

Singapore is a unique entity among latter-day nations. It is generally regarded as a “soft authoritarian” regime, but Singapore in no way resembles the emblematic twentieth century authoritarian state, with its unapologetically capitalist bent, flourishing wealth, and efficiently run public services. There are no gulags in Singapore, and Singapore’s longtime (now semi-retired) ruler, Lee Kuan Yew, hardly resembles the traditional dictator. Nonetheless, there are good reasons for Singapore’s reputation. The nation is often portrayed in Western media as a

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11 On Singapore’s authoritarianism, Lee deputy Dr. Goh Keng Swee opines, “It is widely believed among Western observers that ours is an authoritarian political system. No one likes to be called authoritarian but it is no use pretending that this assessment does not exist.” Quoted in Hussin Mutalib, “Illiberal Democracy and the Future of Opposition in Singapore,” *Third World Quarterly* 21.2 (April, 2000): 313-342. Originally from Goh’s speech delivered at seminar on “Role of Residents’ Committees in promoting courtesy,” Tanjong Community Center, Singapore. June 28th, 1980.

12 Lee certainly fits the role of authoritarian ruler – he has effectively never left power since assuming it in 1959, and his PAP is remarkably unified behind him (and now, in Lee’s old age, behind his son). Lee himself admits that his rule has been paternalistic. Singapore is unusual in that its history as an independent entity is inextricable from the personal history of Lee Kuan Yew; even the title of Lee’s autobiography conflates the two: *The Singapore Story: Memoirs of Lee Kwan Yew*. After retiring from his nearly three-decade stint as Prime Minister, Lee became “Senior Minister,” advising his successor Goh Chok Tong, and finally “Minister Mentor” (a title created for him) when his son, Lee Hsien Loong became Prime Minister in 2004. While his paternalistic policies and vigorous suppression of opposition have certainly drawn accusations of despotism, Lee’s brand of authoritarism is “soft.” State violence is rare in Singapore; rather, legal tools like the Banishment Act have become the instruments of political control.
strict but harmless nanny state, with amusingly specific legal prohibitions against the uncivil behavior that might be expected to prompt irritated looks from one’s fellows, but not prosecution. The city-state’s ban on chewing gum, for instance, is emblematic of this view of Singapore. Sensationalistic accounts of corporal punishment raise Western eyebrows, but this reductive image masks less “soft” authoritarian aspects of this exiling society.

Singapore’s national identity has undergone several renovations over the years, but through each it has remained a fundamentally mission-oriented state. Singapore fits the description of Oakeshott’s state as purposive association, depicted in public discourse as a community with a purpose, a shared good. Former Prime Minister (and now Minister Mentor) Lee Kuan Yew and the People’s Action Party (PAP) seized the opportunity to construct a new historical narrative for Singapore when it gained independence in 1959, ultimately fostering a culture merging an aggressive, modern capitalism with a communitarian ethos critical of the social changes that often accompany economic development. What was initially promoted as “survival” in its early days gradually evolved into “economic development,” and pursuit of this development has always been inextricably tied to Singaporean moral character in public discourse. Lee attributes his nation’s phenomenal development to Singapore’s tightly woven social fabric and the moral standards that underlie it, and as Lee’s admirers in the West will attest, Singapore’s strict adherence to its hybrid moral-economic mission seems to have paid

13 What might be viewed as quintessentially “private” activities, like reproduction, sexual relationships, consumption, and elimination are all subject to detailed legal regulation in Singapore. For instance, failure to flush a public toilet can be met with fines in excess of $100 USD (Environmental Public Health Act, Chapter 95, Section 113, Article 16). Under the same act (Article 15), spitting on the street is also forbidden. All homosexual contact is subject to fines, as well as is selling chewing gum, smoking in public places, and eating the noisome durian fruit on the subway (an emphatic prohibition, given that all eating and drinking is already forbidden on the subway). Even being nude in one’s own home, if seen through a window, is a fineable offense (Public Nuisance Act Chapter 184, Part IV, Article 27, “Appearing Nude in Public or Private Place.”

enormous dividends. In a few decades, Singapore has transformed from a natural resource-poor, isolated, and vulnerable developing nation to one of the wealthiest countries in the region.

Prosperity recurs as the ultimate shared purpose in PAP political rhetoric, one given as a justification for often-intrusive government regulation of all aspects of Singaporeans’ lives. As Lee Kuan Yew acknowledged in a 1987 state media interview:

I am often accused of interfering in the private lives of citizens. Ye[t], if I did not . . . we wouldn’t be here today. And I say without the slightest remorse, that we wouldn’t be here, we would not have made economic progress, if we had not intervened on very personal matters—who your neighbor is, how you live, the noise you make, how you spit, or what language you use. We decide what’s right. Never mind what the people think.

He draws here, as elsewhere, on the rhetoric of survival, pairing it with the idea of economic development as the maturing political community’s guiding principle. As Lee’s frank remarks attest, the pursuit of prosperity is Singapore’s summum bonum, and the inculcation of a shared public morality is the means by which it is pursued.

From its earliest days, the PAP cast itself as being guided by a “pragmatic” approach to politics. The PAP’s version of pragmatism is characterized as historically situated, materially oriented, and rooted in an exclusively instrumental rationality. The PAP, in fact, denies that

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16 *Straits Times*, 20 April 1987.
18 Chua, *Communitarian Ideology*, offers a detailed analysis of this, beyond the scope of this chapter. 43-48, 59-78.
their brand of pragmatism is a political philosophy at all. PAP members espouse an approach to politics that presents itself as being ideologically neutral, simply a series of objective, “practical” responses to discrete situations encountered on the road of economic development. While the “pragmatism” that guided the nascent PAP sufficed for Singapore’s early decades, by the 1980s a new generation was growing up in a stable, increasingly wealthy Singapore. Worry grew among PAP leaders that this new generation lacked the moral disposition that had made Singapore’s rapid development possible. Official efforts turned to defining Singaporean philosophical and moral foundations.\(^\text{19}\)

Beginning in the early 1980s, the PAP sought a distinctly Singaporean response to what they perceived as the creeping corruption of Western influence. Noting that, “Singapore is wide open to external influences,” “[m]ost” of which “are from the developed countries of the West,” and detecting a new thread of self-interested individualism and anomie among the younger generation, Lee’s government sought to remedy what was increasingly seen as social decay.\(^\text{20}\) They seized upon the ideas of Confucius, launching an official “Confucian Ethics” campaign in 1982. A course on the subject was offered as one of the required “Religious Knowledge” classes introduced in every school as an early measure to counteract the Westernization of Singapore’s youth.\(^\text{21}\) The introduction of the course was supplemented with similar initiatives in public media, government policy, and in higher education.\(^\text{22}\)


\(^{20}\) Chua, Communitarian Ideology, 16, 35, 13-114, 121, 158, 200. The “Shared Values” campaign, especially, was explicitly portrayed as an anti-Westernization measure, both by its proponents and in the media: “Shared values should help us develop a Singapore identity.” The Straits Times, January 6\(^{\text{th}}\), 1991, pp. 16-17; “Parliamentary panel to identify core values.” The Straits Times, December 4\(^{\text{th}}\), 1988, p. 1; “Green paper, public views to be sought on National Ideology.” The Straits Times, January 21\(^{\text{st}}\), 1989, p. 28.

\(^{21}\) John Wong, “Promoting Confucianism for Socioeconomic Development,” in Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the four Mini-Dragons. Edited by Tu Wei-Ming
Goh Keng Swee, then Minister of Education, states the campaign’s broader purpose plainly, “Confucianism in Singapore will not be merely for the classroom. It will be interpreted as a code of personal conduct for modern Singapore and promoted in the form of public debate and discussion in the media (emphasis added).” Goh’s comment is telling. Not only was the campaign an educational initiative, but this iteration of Confucianism was to be operationalized as a set of criteria for judging conduct in both personal and public life. This is not a moral inclination in the abstract, it is a very specific articulation of what being “Singaporean” is.

The Confucian Ethics campaign was fraught with problems, however, and authorities quietly retired it in 1989. While “Confucian Ethics” had not succeeded as the authoritative articulation of Singaporean values that the government had hoped it would be, the project of articulating a national ethical code was not abandoned. In 1991, the Parliament considered a

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23 Kuo, 299.

24 Englehart, 556-559. In fact, the PAP’s enthusiasm for painting Singapore as historically adhering to unspoken Confucian values contradicts some of its own past policies, like the closure of traditional Chinese schools across Singapore in the 1970s.

25 Upon its release, critics expressed skepticism not only of the relatively recent political Confucianism’s historical roots in Singapore, but also of the campaign’s portrayal of Confucian values as those most congenial to authoritarianism. Arif Dirlik, “Confucius in the Borderlands: Global Capitalism and the Reinvention of Confucianism,” Boundary 2.22.3 (Autumn, 1995): 229-273, 266; Englehart, 559; Kuo, 303. Its emphasis on acceptance of hierarchical social relations, obedience to authority, filial piety, humility, and the prioritization of the society above the self all reinforced the existing, largely paternalistic and undemocratic rule of the PAP. Englehart, 558; Kuo, 306-308; Tremewan, 109. Further, the emphasis on the Chinese thinker stirred suspicions of ethnic Chinese cultural hegemony among the city-state’s substantial Indian and Malay minorities. Chua Communitarian Ideology, 29-31.
A minimalist document, the “White Paper on Shared Values” attempts to capture the moral identity of Singapore in ten trim pages. As then-President Goh Chok Tong told Parliament in an introductory address for “Shared Values:”

[Our] openness has made us a cosmopolitan people, and put us in close touch with new ideas and technologies from abroad. But it has also exposed us to alien lifestyles and values. Under this pressure, in less than a generation, attitudes and outlooks of Singaporeans, especially younger Singaporeans, have shifted. Traditional Asian ideas of morality, duty, and society which have sustained and guided us in the past are giving way to a more Westernized, individualistic, and self-centered outlook on life…. If we are not to lose our bearings, we must … uphold certain common values which capture the essence of being a Singaporean…. We need to enshrine these fundamental ideas in a National Ideology. Such a formal statement will bond us together as Singaporeans, with our own distinct identity and destiny.26

Loosely rooted in the burgeoning “Asian Values” literature, “Shared Values” sought to offer a set of virtues distinct from their Western counterparts, yet culturally neutral enough to be accepted by all Singaporeans.27 “Shared Values” lists five core values:

1. Nation before community and society above self
2. Family as the basic unit of society
3. Regard and community support for the individual
4. Consensus instead of contention
5. Racial and religious harmony

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27 Emerging on the heels of the uptick in scholarly interest in Confucianism in the 1980s and 1990s, the “Asian values” literature centers upon the idea that Asian intellectual traditions (including, but not limited to Confucianism) have produced a distinctly “Asian” way of thinking that not only is ill-suited to democracy, but does not desire it. An inversion of Weber’s Protestant ethic (and in direct contradiction to his predictions about the region’s economic development), proponents of the Asian values argument reject calls for democratization and liberalization as, at best, ignorant and misguided or at worst, cultural imperialism. For an overview of the literature, see Dirlik, 229-273. Englehart challenges this thesis. Lee leans particularly hard on this idea in his often-quoted interview with Zakaria.
The values, explicitly described as “communitarian” in the explanatory text of the White Paper, emphasize duty over rights and stress the importance of unity to maintaining a stable society.\textsuperscript{28} The White Paper explicitly states that the purpose of the list is to define “... the relationship between the individual and society...”\textsuperscript{29} The focus on relationships as the core of society makes for an ecumenical form of communitarianism compatible with each of the city’s dominant religious and ethical traditions.

This particularly Singaporean form of communitarianism works in concert with capitalism to further the nation’s efforts to achieve economic development. While private ethnic and religious associations are encouraged by the state, they exist to administer what in the West are government services, like welfare. In such arrangements, the capitalist virtue of self-reliance is decoupled from the liberal virtue of individualism; Singaporeans are expected to be self-reliant not out of obligation to themselves, but to avoid burdening the community. Similarly, the sacrifices that individuals are asked to make in favor of the common good are economically motivated. For instance, as Singapore transitioned from a manufacturing economy to an information economy, the government launched what have been referred to as “eugenics” campaigns aimed at incentivizing higher birth rates among educated, wealthy Singaporeans, while penalizing poorer and less educated workers for having more than two children.\textsuperscript{30} These population policies demanded the sacrifice of the basic liberty to create the family of one’s

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\textsuperscript{28} “White Paper on Shared Values,” Article 30, p. 6.
\textsuperscript{29} “White Paper on Shared Values,” Article 2, p.1; Article 50, p. 9. The White Paper notes that the relationship between “…the voter and the government…” lies beyond the scope of this articulation of the “national ideology.” This seems a strange distinction to make, as it is not at all clear that there is any meaningful separation between “society” and “state” in Singapore, in which case the “voter” and the “individual” are one. Indeed, the White Paper uses the concepts of “state,” “nation,” and “society” interchangeably.
\textsuperscript{30} Chua, Communitarian Ideology, 69.
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choosing, not for the greater cultivation of any virtue or communal character, but to increase the likelihood that the workforce of the future would be suited to the needs of the changing economy.

Singapore explicitly fosters virtue in its people, but that virtue is inculcated to further economic ends. Given that Singapore’s mission is the pursuit of national prosperity, the city-state’s recent applications of the banishment power become clearer. Banishing for both moral and economic reasons (two ideas that often cannot be separated in the Singaporean context), activities or even identities that interrupt commerce, like those that challenge public morality or threaten the unity of the community, are likely to be met with banishment. Malaysia repealed its 1959 Banishment Act only in 2011, but a nearly identical act remains in force in its former sister society of Singapore. While Singapore has a long history of banishment law, the 1959 Banishment Act is no relic of an earlier, troubled age. Far from being declared obsolete and repealed, as Malaysia’s similar Act was in 2011, Singapore’s Banishment Act was amended in the same year to bring it in line with new due process requirements, reaffirming the state’s commitment to it. The Act empowers the Minister of Home Affairs to order the banishment of any non-citizen whose presence he deems not to be “conducive to the good of Singapore.”

31 Malaysian officials claim that the Act had not been enforced in over thirty years at the time of its repeal. It is worth noting, however, that the Public Order and Crime Prevention Ordinance (usually called the Emergency Ordinance) of 1969 was repealed only in 2011 as well, and the EO contained provisions for banishment under certain circumstances. Relatively little information about the most recent uses of Singapore’s Banishment Act of 1959 is available due to the total government control of records and media within the nation, but international media occasionally documents banishments. The national newspaper, The Straits Times, offers some stories relating to banishment in pre-WWII Singapore. Virtually no coverage of recent Singaporean exile exists in domestic media. Gleeful and detailed coverage of incidents of banishment in Malaysia, however, continued until Malaysia repealed its own Banishment Act in 2011. In 2011/2012, Paris-based nonprofit Reporters Without Borders ranked Singapore as having the 135th freest press of 179 nations ranked. “World Press Freedom Index 2012” January 25th, 2012.

32 The most relevant passage (5.1) reads as follows: “Where the Minister is satisfied after such inquiry or on such written information as he may consider necessary or sufficient that the banishment from Singapore of any person not
The Banishment Act applies only to non-citizens.\(^3^3\) That seemingly robust protection comes with considerable qualifications, however. First, of the 5.26 million people living in Singapore, only 3.27 million are citizens.\(^3^4\) The remaining 1.93 million people living and working in Singapore are permanent residents, work permit or pass holders, and various other economic migrants and their families.\(^3^5\) This leaves a substantial proportion of Singapore’s population outside of the constitutional prohibition.\(^3^6\) Additionally, citizenship in Singapore can be revoked, both from born citizens (who receive their citizenship through a combination of jus soli and jus sanguinis), and from “registered” citizens who must apply for their citizenship.\(^3^7\)

Even native-born Singaporeans are subject to denationalization under a number of constitutional


\(^{34}\) The most recent White Paper on Population (2011) lists the total population as being approximately 5.26 million. Of those, 3.27 million are citizens. Permanent residents make up 540,000, and an additional 1.46 million are work permit holders, students, domestic workers from foreign nations, pass holders, and dependents of the other categories. Department of Statistics, Singapore Ministry of Manpower. “A Dynamic Population for a Dynamic Singapore: Population White Paper,” January, 2013.

\(^{35}\) Ibid.

\(^{36}\) Those born to various classes of resident non-citizens, or to Singaporeans abroad may also apply for registration if they meet certain criteria. This is important because naturalized, enrolled, and registered citizens of Singapore are even more vulnerable to denationalization than born citizens, raising their risk of becoming eligible for banishment. Although the Singaporean constitution contains language of “naturalization,” and “enrollment” dating from the Constitution’s adoption, in practice both processes have been replaced with what is termed “registration.” Non-citizens may apply for registration if they meet certain criteria, and then their application is decided on a case-by-case basis.

\(^{37}\) Constitution of the Republic of Singapore, Part X, 129. The circumstances cited are alarmingly vague. For instance, an enrolled, registered, or naturalized citizen may lose their citizenship “…if the Government is satisfied…” that “…he has shown himself by act or speech to be disloyal or disaffected towards Singapore.” Part X, 129.3.a.i.
provisions. While the Banishment Act may initially seem quite carefully circumscribed, in reality it can reach virtually anyone.

The government does not make banishment statistics public. Foreign media outlets, however, document several instances of expulsion, offering clues as to how banishment benefits a present-day illiberal society like Singapore. The best-publicized case of banishment under the Act in recent years was that of Malaysian-born pilot Ryan Goh. Goh’s union activities ultimately culminated in a confrontation with no less than Minister Mentor Lee Kuan Yew himself in February of 2004. Lee accused Goh of “stirring up trouble” with his leadership of a divisive vote to dismiss members of the pilots’ union who had accepted the state-run Singapore Airlines’ proposal to cut wages and benefits and impose large-scale layoffs. Two days after his acrimonious meeting with Lee, Goh received an order requiring him to leave Singapore by May 1, 2004. Lee justifies his actions in the Goh case in reference to the common good, the ultimate

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38 Living abroad for more than ten years and failing to re-register with a Singaporean consulate, for instance, constitute grounds for loss of citizenship, as does acquiring any additional nationality. Constitution of the Republic of Singapore, Part X, 135. Ibid., Part X, 135.1a, 1.c. Several provisions stipulate that no one can lose their citizenship if it would render them stateless, however. Among the provisions in the Singaporean Constitution that allow for denaturalization of this class of citizen is one that echoes the language of the Banishment Act: “No person shall be deprived of his citizenship under this Article or under Article 130 unless the Government is satisfied that it is not conducive to the public good that that person should continue to be a citizen of Singapore (emphasis added).” Constitution of Singapore, Part X, 129.7.

39 In 1990, approximately 12% of citizens were foreign-born and either naturalized, enrolled, or registered. Singapore’s two most recent censuses did not collect similar information, but statistics from 2000 and 2010 reveal a rapid upward trend in applications for registration, suggesting that the population of vulnerable Singaporeans is at least as large or larger than in 1990. Swee Hock Saw, The Population of Singapore. Singapore: Institute of Southeast Asian Studies, 2012. 48-53.


source of legitimacy in the enterprise state, and his personal involvement illustrates the managerial authority characteristic of this type of association.42

Despite the preservation and occasional use of the Banishment Act, the Singaporean government has also found ways to banish without invoking it.43 Historically, Singapore has used immigration law, in addition to banishment legislation, to facilitate the expulsion of undesirables.44 The present regime continues the tradition: in 2000, Singapore drew criticism for “deporting” nine long-term resident women who tested positive for HIV, retroactively labeling them “prohibited immigrants.”45 The decision amounted to a declaration that the women had never been lawfully admitted, therefore circumventing the need to banish them. Retroactive invalidations of this sort imply the existence of correct and incorrect natures, treating post-admission transgressions as symptomatic of an inherent underlying ineligibility. Similar intuitions arise in American expulsion practices, as will be considered in chapters two and three.

Similarly, twenty-nine of the 171 Chinese bus drivers who took part in an unauthorized strike in November, 2012 were removed from the country after the Ministry of Manpower

42 “…[B]ecause the relationship it constitutes is not only in terms of the authority of the common purpose (from which no divergence is permitted) but also in terms of the authority of the managerial decisions which specify how it shall be contingently pursued.” Oakeshott, OHC 316.

43 The use of lawsuits against political opponents by the PAP and Lee personally has become par for the course in Singaporean politics. With a complicit judiciary, authorities’ suits are invariably upheld, often leaving the opponent facing impossibly high financial penalties should they remain in or ever return to Singapore. See Seong passim; Englehart, 550-552.

44 Also in November 2012, Australian clergyman James Blundell Minchin was refused re-entry to the nation. Minchin’s activities in Singapore date back to the 1960s, when he began working with Christian civil society organizations. Minchin appeared on the opposition Singapore Democratic Party’s (SDP’s) television talk show to discuss his book about Lee Kuan Yew. Upon his return from Australia, he was turned away from the airport, for having “interfered in domestic politics.” “Australian Clergyman James Blundell Minchin Interfered in Domestic Politics: MHA,” Singapore News, November 12th, 2012. The article notes that Minchin had previously garnered the authorities’ attention by speaking publicly about several 1987 arrests under the Internal Security Act. See also Janice Heng, “Aussie Clergyman Denied Entry for Interfering in S’pore Politics.” Straits Times, November 12th, 2012.

retroactively invalidated their work permits.\textsuperscript{46} Strikes are extremely rare in Singapore, the last occurring in 1986. Not only did the strike cause interruptions in the daily workings of the city-state, it also drew attention to racial tensions and to the growing gulf between rich and poor in one of the wealthiest, most expensive cities in the world. Their invalidation had the effect of finding that the permits had never been lawfully issued, again circumventing the need to banish, as in the case of the women deported for testing positive for HIV. Like those women, the strikers’ post-admission actions are treated as evidence of an essential, pre-existing ineligibility for truly belonging to Singapore.

In each of these three recent cases, banishment removes either a threat to Singapore’s economic mission or a group of people seen as lacking the requisite moral character common to all true members of Singaporean society.\textsuperscript{47} Goh’s banishment removes a person threatening to the status quo, and this is precisely how the Minister Mentor frames the dispute, as a threat to public order. The twenty-nine striking bus drivers made themselves – and with them, an entire class of low-skilled, low-paid workers – visible. Suggesting that ethnic prejudices (and not merely the vagaries of the “meritocracy” that is part of Singapore’s core identity narrative) create lasting disadvantage threatens Singapore’s vision of itself as a community built on equal opportunity and industrious virtue. The actions of the banished are inimical to the pursuit of the common Singaporean project, and so the community responds by excising the part of itself that rejects its role in securing the common good.


Moving banishment into the realm of the legal, as under the Banishment Act, or the administrative, as in the use of visa and work permit invalidation, obscures the nakedly political use of power that exile often embodies. The continued use of political expulsion endures as a silent but powerful reminder of just how conditional Singapore’s acceptance of its members continues to be, an acceptance dependent upon participation in the community’s common mission. Singapore is an illiberal regime, and proudly so. Its government envisions state and society as one, and views that entity as an Oakeshotean “enterprise association” existing to create a prosperous society. That prosperity relies upon the maintenance of good order and social cohesion, and those are built upon a foundation of carefully cultivated virtues.

While Oakeshott’s description of the state as purposive association specifically refers to European nations in the twentieth century, the concept describes latter-day Singapore equally well. In the enterprise state, it is the duty of each member “… not to inhibit or prejudice that complete mobilization of resources constitutive of such a state.”48 To do so poses a threat to the common mission. In Singapore, these threats appear as departures from the instrumental common morality of capitalist communitarianism, or as engaging in political activity that disrupts the nation’s march toward economic development. Such deviations cannot be accommodated in the totalizing enterprise state. In a society of this nature, there is no such thing as a private moral failing – morality is of a piece with good citizenship, both of which are defined in reference to the common purpose. Bad people are bad Singaporeans; and Singapore has long shown itself willing to expel bad members to protect the community’s shared purpose.

48 Oakeshott, On Human Conduct, 317.
The Maldives: A Religious Enterprise

Located off the southwest coast of India, The Republic of the Maldives has the dubious distinction of being the lowest-lying on the globe, and so the first to face obliteration in the face of rising sea waters in the coming decades.\(^49\) Aside from its place at the center of the global climate change debate, the nation is best known as a vacation destination, with its beaches, coral reefs, and 1,192 islands soaked with sun year-round. Despite its reputation among outsiders as an upscale holiday paradise, its citizens live in a very different version of the nation, one that hews closely to Islamic law in all aspects of life.\(^50\) The Maldives is an illiberal society in that its government is built around an established religion, Islam. The nation identifies as being “100% Muslim;” indeed, being a Muslim is a constitutional prerequisite of citizenship, and high political office is open only to those of the Sunni sect.\(^51\) Prior to 2010, the only Maldivian to renounce Islam was King Hasan IX in 1552, who converted to Christianity and formed an alliance with the occupying Portuguese. While the Constitution requires all citizens to be Muslim, it simultaneously guarantees that no Maldivian may be deprived of citizenship; a potential conflict

\(^{49}\) Former President Mohamed Nasheed’s efforts to draw international attention to this problem brought some publicity to the Maldives before his ouster in 2012. Filmmaker Jon Shenk records Nasheed’s mission in his documentary, *The Island President*. San Francisco, CA: Afterimage Public Media, 2012.

\(^{50}\) Since the forced resignation of Nasheed in 2012, the Maldives has seen a rise in support for conservative Islamist politicians and religious figures and a related increase in political support for greater implementation of some of the more extreme forms of Shari’a in criminal cases. Broadcast and print media are tightly state-controlled. Freedom House ranks the Maldives as number 118 out of 191 in freedom of the press, labeling it “Partly Free” in its 2013 “Global Press Freedom Rankings.” Freedom House states that online news sources, while facing increased government pressure and censorship, remain among the most important media outlets in the Maldives, and note that the (confusingly titled – “minivan” means “independent” in Dhivehi) independent newspaper *Minivan News* (available in the print edition only in Malé, or online at [www.minivannews.com](http://www.minivannews.com)) has emerged as an especially vital outlet for opposition voices. *Minivan News*, and *The Sun* (published in both English and Dhivehi) both report attempts by the nation’s conservative Islamist Adhaalath Party to add provisions for cross-amputation to the Draft Maldivian Penal Code (DMPC), in addition to calls from the party to punish unmarried rape victims with flogging, for allegedly committing “zina,” a hadd offense meaning unlawful intercourse under very strict interpretations of Shari’a law. “Amputation for Theft Added to Draft Penal Code.” *Minivan News*, March 30\(^{th}\), 2013; “Article added to Penal Code Bill to Require Amputation for Certain Crimes.” *The Sun*, March 29\(^{th}\), 2013.

that has been realized only twice. In 2010, while asking a question at a religious scholar’s public
lecture, Mohamed Nazim stated that he no longer considered himself a Muslim, and later that
year Ismail Mohamed Didi contacted international human rights organizations seeking help with
asylum applications, arguing that his professed atheism endangered his life and freedom in the
Maldives. Neither case resulted in a constitutional crisis, however; as Nazim recanted his
renunciation after two days in custody and Didi was found hanged on the same day his case was
reported by local news.²² So pervasive is Islam in Maldivian society that apostasy is not actually
explicitly addressed in Maldivian law – in practice, it has scarcely been imaginable.

While the Maldives is not unique in blending Shari’a with its constitutional and common
law systems, it is unique in that it continues to make use of exile, a tool granted to lawgivers by
Islamic sacred texts but rejected by most officially Islamic nations. Shari’a, the acknowledged
foundation of the legal systems of many Islamic nations, explicitly prescribes banishment for a
number of specific offenses.²³ However, despite the availability of a clear basis for it in Shari’a,
neither officially Islamic nor Muslim-majority nations actually employ banishment (with the
lone exception of the Maldives).²⁴ This is surprising, given the temptingly simple solutions that
banishment offers and its easy justifiability under the circumstances.²⁵ Instead, those nations’

²² Haveeru Daily, “What Will Happen to the Maldivian Who Renounced Islam?” May 31st, 2010; Minivan News,
²³ Shari’a prescribes banishment for some of the limited set of hadud, or offenses against God. Scholars of different
schools of thought differ on which of these offenses are to be met with which punishments.
²⁴ I use “Islamic nation” to refer to countries that identify Islam as the official state religion in their constitutions or
equivalent documents.
²⁵ Muhammad Al-Madni Busaq, Perspectives on Modern Criminal Policy and Islamic Sharia” (Riyadh, Saudi
Arabia: Naif Arab University for Security Studies Press, 2005): 153-161, 167, 171; Abdel Haleem, M.A. Sharif,
Umar Adil, Kate Daniels, Criminal Justice in Islam: Judicial Procedure in Shari’a (New York: Palgrave
Macmillan, 2003):41, 50, 105. Several Islamic states, like Pakistan, Saudi Arabia, Kuwait, Yemen, Bahrain, and
UAE base their legal systems on Shari’a, yet none of these states banish. Pakistan Penal Code (Act XLV of 1860);
Islamic legal scholars interpret “banishment” as interchangeable with “imprisonment.”

Traditionally, the Maldives is a moderate Islamic nation. Shari’a pervades the legal system, from family and penal law to financial regulation. Exile appears in many of the nation’s laws, though it is primarily concentrated in the Penal Code and Rules Relating to the Conduct of Judicial Proceedings, which govern most criminal matters. While the Maldives’ integration of Shari’a into its legal system does not conflict with the use of exile, it also does not account for it. Rather, there is a tradition of exile particular to the Maldives that has adapted itself to Islamic customs, enforcing them as it enforced older mores in the past.

Exile is a deeply ingrained custom in the Maldives, surviving centuries of social and political change. While current Maldivian law blends Shari’a and exile, it is likely that exile predates the arrival of Islam. Both popular folklore and scholarly sources depict early Maldivian society as one founded by exiles, and the story of the nation’s often-embattled nobility is a long saga of exile and return. From the arrival of the banished founding monarch until the penultimate royal ruler was exiled in 1933, exile has been a regular feature of Maldivian politics. Although it pre-dates the arrival of Islam, with the proliferation of Islam and Shari’a,

Basic Law of Governance, 2.8, 5.23, 26, 38, 6.46, 48, 55; Constitution of the State of Kuwait, Article II; Constitution of the Republic of Yemen, Chapter 1, Article 3; Bahrain Constitution, Chapter 2, Article 2; Constitution of United Arab Emirates, Part 1, Article 7. Oman’s penal code does allow for the expulsion of criminal foreigners and for “residence bans,” meant to place space between convicts and victims, but Oman’s penal code does not claim Shari’a as its basis. Chapter III, Articles 46–49. As noted above, some isolated – and unofficial/extralegal applications of banishment have been documented in other nations (including Islamic nations), but only the Maldives combines both Shari’a and exile as integral components in its formal legal codes.

59 Mohamed Shamsuddine III was deposed in 1933 and went into exile. This marked the effective end of royal rule in the Maldives, which at that time entered a period of instability. After abortive attempts to restore the monarchy, stability returned with the thirty-year dictatorship of Maumoon Abdul Gayoom.
exile transitioned from being the explicitly political tool of the elite to being a legal penalty to which all Maldivians are subject. Today, it is fully democratized: any Maldivian faces the possibility of exile.60

Exile in the Maldives is best understood through the lens of “community,” and community in the Maldives cannot be separated from Islam. Islam forms the center of Maldivian life, and transgressions against its teachings are among the most common exiling offenses.61 Islam is woven into the fabric of Maldivian law, with Shari’a penalties given alongside common punishments like fines or imprisonment. This provision of the Penal Code offers one example:

Where by reason of an assault, an organ for which blood money is awarded in Islamic Law suffers permanent disability or is dismembered or is permanently destroyed or impaired the offender shall be subjected in addition to the payment of blood money in Shari’ah to exile or imprisonment between 5 years and 10 years.62

Exile appears in a number of Maldivian laws, both civil and criminal, including the Penal Code, the Family Act, the Prevention of Terrorism Act, the Law on Narcotic Drugs and Psychotropic Substances, and the Prevention and Prohibition of Corruption Act.63

The Maldivian Constitution empowers courts to adjudicate moral and religious matters as “non-statutory crimes,” in addition to those recorded in the country’s many ad hoc laws.64

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60 The DMPC seeks to fold these disparate acts into a single, codified criminal system, with graded penalties, rather than having penalties specific to each offense.
61 Apostasy, like many other violations of Islamic law, is not specifically addressed in the Penal Code. Rather, such offenses fall under the very broad clause 88 of the Penal Code, which states that, “It is an offence to disobey an order issued lawfully within the Shari’ah or Law,” and offer some gradations of penalty based on harm, but names no specific acts.
62 Penal Code, 129.
63 Penal Code, Act No. 1 of 1961, 32, 34-35, 37, 39-41, 48-50, 53-54, 58, 63-66, 69-71, 73-74, 76-88, 91-99, 111-118, 120, 126-141, 143, 146, 163; Family Act, Act No. 4 of 2000, 63-64, 66-70; Prevention of Terrorism Act, Act No. 10 of 1990, 6(a-b); Law on Narcotic Drugs and Psychotropic Substances, Act No. 17 of 1977, 1(c), 3(d), 4(e-f), 5(b), 6(c), 7(b), 16(b); Prevention and Prohibition of Corruption Act, Act No. 2 of 2000, 2(b), 3(b), 4(b), 5(b), 6(b), 7(b), 8(b), 9(b), 12(b), 13(b), 14(d), 15(c), 16(d), 17(b), 18(c), 20(b), 21(b), 22(b).
religious law is at least somewhat formalized in the workings of the Criminal Court, it is also commonly employed in un-codified form in the nation’s Civil, Family, Drug, and Juvenile Courts. Exile is prescribed in response to a range of religious transgressions, from failing to observe proper Muslim burial customs to criticizing Islam. These non-statutory transgressions can bring periods of exile ranging from eight months to two years and also include illicit sex, drinking alcohol, and eating or drinking during the proscribed hours of Ramadan. Homosexuality, in addition to extra- or pre-marital sex falls under this category. Homosexual conduct is punishable by banishment from one to three years, and several high-profile violations are reported each year. Violations of sexual morality, if made public, are likely to be met with exile, in addition to other penalties like flogging or house arrest. Exile reinforces local sexual

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65 Penal Code, 88; Law on Bathing, Shrouding, and Burying the Dead.


68 Rules Relating to the Conduct of Judicial Proceedings, 173. Possession of pornographic materials, sexual harassment, and conducting a sexual relationship with a minor are also among the reasons for which Maldivians have been exiled in recent years. In a particularly sensational 2002 case, two Dhivehi-language movie stars were sentenced to flogging and eight months’ banishment and house arrest, respectively, when their adulterous affair became public. While not formally excepted from banishment, women are rarely banished in practice, instead usually sentenced to house arrest. Haveeru Daily, “Perhaps They Loved, Too? Film Stars Niuma And Seezan Convicted for Extramarital Affair on the Eve of the Premiere of their New Film ‘Yes, I Loved, Too.’” October 10th, 2002. Similarly, a respected judge and his wife were sentenced to six months’ banishment in 2011 for having sex in a public place. Hawwa Lubna, “Judge and Wife Convicted for Sexual Misconduct Near Hulhumale Rubbish Dump.” Minivan News, December 21st, 2011; Ahmed Nazeer, “Judge’s Public Sexual Misconduct Charge Upheld.” Minivan News, August 28th, 2013.
morality, removing those who transgress from their home communities and making a public spectacle of them in the process.

Maldivian family law also employs exile. Though the Family Act covers matters related to child custody, legitimacy, inheritance, and marriage, the Act prescribes exile for only seven infractions, almost all of which concern marriage and divorce. These infractions include coercion to marry, divorcing without official approval, and giving false information for the purpose of contracting or registering a marriage. As in many cultures, marriage customs are vital to preserving the Maldivian social fabric. However, unlike many cultures, unusually high divorce and remarriage rates are the mechanism by which that social fabric is reinforced in the Maldives. Frequent intermarriage is one way in which Maldivian families build and reaffirm ties with other families, often located on distant atolls. Given the very limited population of approximately 350,000 Maldivians, this has traditionally been made possible by frequent divorce. Divorce and remarriage are extremely common, carry no social stigma, and rarely imply personal animosity. What is often framed in Western media and by UN studies as a “crisis” of “skyrocketing” divorce rates is, in fact, an old and necessary method of maintaining close social ties in the scattered islands, where navigation between islands is difficult, dangerous,

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70 Family Act, sections 63, 64, 66-70. The other violations are contracting a marriage for the purpose of removing the ban on remarriage to a former spouse (according to Maldivian law, a woman who has been divorced three times from the same man must marry a different husband before she can lawfully remarry the man from whom she is divorced – after, of course, divorcing the new spouse), resumption of conjugal relations without revocation of prior divorce, and general provisions for failure to report a violation and forbidding actions “in contravention of a directive or prohibitive provision” of the Family Act.
71 For many years, the Maldives had by far the highest divorce rate in the world, though the rate has dropped in the past decade with increasing religious conservatism and attempts by NGOs to address the “crisis.” United Nations Department of Economic and Social Affairs, Population Division, “World Marriage Data 2008.” The divorce rate has been steadily dropping. As of 2005, the crude divorce rate stood at 5.9 divorces per 1000 people per year. This is still high, but that numbers stood at 26.4 in 1975, 13.9 in 1987, 11.2 in 1995, and 4.0 in 2004. With the exception of 2004, the trend is noticeably toward decline.
72 Maloney, People of the Maldive Islands, xi, 207, 344, 348.
and limited to certain times during the year. Marriage and divorce, conducted within the confines of religious law, are essential to building and maintaining social cohesion. Maldivians who threaten that system by bringing deception into the process or failing to meet traditional obligations find themselves liable to exile.

The Penal Code of the Maldives and the “Rules Relating to the Conduct of Judicial Proceedings” contain the great majority of codified exile-able offenses, most of which are classified as “criminal,” though civil offenses are also punishable by exile. The Penal Code currently imposes terms of exile for a variety of transgressions, including acts forbidden by the Quran, those categorized as “Acts against the State” and those labeled, simply, “Disharmony.” The code prescribes banishment as the penalty for threats to the public peace, like assaulting a public figure or fomenting rebellion, ordinary offenses like theft and assault, and also for a number of infractions related to refusing to aid authorities in the discipline of other citizens.

Similarly, many banishing infractions center upon preserving trust within the community. The Penal Code prescribes exile among the penalties for crimes of fraud or deception, including giving false evidence, counterfeiting, sale of adulterated goods, “criminal breach of trust,” “cheating,” and defamation. Crimes of deception in such a small community damage trust both between ruled and rulers and also laterally, between citizens. Nearly every offense listed in the Prevention and Prohibition of Corruption Act includes exile among the penalties, ranging from

73 “Exile” is defined in the current Maldives Penal Code as follows: “‘Exile’ shall mean confinement of a person to an inhabited island other than the island in which he is domiciled for a certain period of time while restricting his movement to any other inhabited place and his personal freedom or part thereof.” Receiving islands generally have few employment opportunities. The longest term of exile is set at twenty-five years, which is used as the equivalent of a “lifetime” term, according to section 16 of the Penal Code.


75 The code does not define the terms “criminal breach of trust” and “cheating.” 66-67, 91-96, 103-107, 131(a), 143-146, 163.
one year for failing to report knowledge of bribery or corruption to ten years for judicial officials involved with giving or receiving bribes. The stated purpose of the Act is to ensure the “prevention… of attainment of undue advantage… through use of influence from position.” In these Acts, exile is used to reinforce the formal equality of all Maldivians and punish the failure to place the good of the community before particular attachments. It acts as a strong reminder of how valuable the community is to offenders by demonstrating how difficult and isolated life is in its absence.

While exile serves practical purposes when applied to common crimes like theft, exile for moral offenses sends a powerful message. Exiling common criminals removes the offender from his or her social network, preventing further damage to the home community at the hands of the violator, uses the humiliation of removal to deter similar crimes in others, and discourages the offender from committing similar crimes in the future. Such practical benefits are less relevant in the case of moral exile, however. The social circle that, presumably, enables the common criminal’s bad behavior is not a factor in religious and moral violations. These are the transgressions of an individual, first against the deity, and second in against the community’s shared morality. The moral standards that Maldivian exiles transgress form the core of the community to which they belong. Such acts set the offender apart, conveying a lack of respect for the shared religious morality that defines the society. Just as moral transgressions are expressive acts, banishing those who flout them also plays an important expressive role. Banishment reminds both the exile and their neighbors that membership in their community is conditional upon meeting shared moral standards derived from commitments to Islam and to

76 1(a).
preserving community cohesion. Exiles do not cease to be Maldivians, but they are pointedly reminded of the importance of the community that they have offended by being deprived of its support and comfort.

Transgressions against community solidarity – even above transgressions against Islam – bring banishment. Certainly, actions that depart from public morality or the rule of law threaten social cohesion. It is equally clear that rampant fraud and corruption undermine trust among citizens and between citizens and government. Still, perhaps the most striking example of exile being used to preserve solidarity is found in the nation’s response to rising Islamic extremism. Traditionally, the Maldives has been a moderate Islamic state, however; since tourism became the nation’s primary industry in the 1970’s, tensions have arisen between the nation’s Islamic identity and its economic needs. The influx of Western tourists has not always fit comfortably with conservative religious mores, resulting in an increase in support for foreign-educated fundamentalist preachers. Among them was Ali Jaleel, banished for four months in 2008 for teaching religion without permission in violation of the Religious Unity Act. Jaleel later killed twenty-four people in a suicide bombing in Pakistan. Maldivian fundamentalists linked to Al Qaeda were involved in a 2007 altercation with the nation’s military forces, following an unprecedented bomb attack in Malé that left two British tourists dead. Religious conflict has never been a serious problem in the Maldives, but the new threat to Maldivian unity is increasingly met with the banishment of troublemakers.

77 Maloney, “New Stresses.”
The Religious Unity Act has been in effect since 1994, but the rising popularity of fundamentalist leaders prompted the nation’s Islamic Ministry to add the new “Regulation on Protection of Religious Unity Among Maldivian Citizens” to the Act in 2011. Interestingly, the addendum does not focus primarily on matters of doctrine – in fact, it addresses no specific theological issues. While the “Regulation” does limit the discretion of speakers to propagate unorthodox interpretations of sacred texts or represent them as widely accepted teachings, most of its provisions prohibit speech that is likely to incite conflict. For example, the section addressing “General Principles Regarding Explanation of Religious Principles and Delivery of Religious Sermons” requires that speakers:

...(d) Talk and discuss in accordance with the Maldives’ religious and social character.
(e) Information disseminated should not be information about issues disputed among Islamic scholars that serves to create disunity among the people and result in internal conflicts.
(f) Not engage in any talk that may create hatred and anger among the people, nor disseminate any information that incites to violence of any kind.
(g) Not engage in any talk that may be interpreted as racial and gender discrimination…
...(l) Not engage in talk that flaunts human dignity, demeans the character or creates hatred toward people of any religion.  

Failure to abide by the requirements is punishable with sentences of two to five years’ exile, in addition to possible imprisonment.

The Maldives’ current penal code exists in a state of some uncertainty, and has done for several years. Despite the completion of a project in partnership with the University of Pennsylvania Law School aimed at modernizing and codifying its sometimes haphazard, ad-hoc

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criminal laws, the Maldives has not given up exile. The result of the project is a new, comprehensive Draft Maldivian Penal Code (DMPC), combining every offense enumerated in existing law and codifying “non-statutory” Shari’a-based violations. “Revised” (in effect, replaced with a completely different code) in 2006 under the auspices of the United Nations Development Programme, the proposed DMPC remains the subject of controversy in the People’s Majlis (parliament).\(^{82}\) Until the Majlis confirms some version of the DMPC, the nation continues to use the old, un-amended code.

The study offers a number of recommendations for bringing the code into line with “international norms,” and even explicitly questions whether or not banishment ought to be preserved.\(^{83}\) While the future of the DMPC remains uncertain, the proposed changes highlight one of the features of Maldivian exile that would be lost with its acceptance – the assignment of exile only to particular transgressions. While the current system prescribes qualitatively different punishments tailored to different offenses, the new DMPC would offer grades of penalty, instead. In the new scheme, banishment is treated as interchangeable with house arrest, and both roughly correspond to prison terms of similar length.\(^{84}\) The intent of introducing graded penalties, as stated by the authors, is to improve the fairness of penalties and protect

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\(^{82}\) As of this writing, it has not been accepted, despite having been submitted in 2006.

\(^{83}\) There are numerous problems with the Project’s use and definition of the term “international norms.” Robinson et al. claim that the term refers to an amalgamation of United Nations human rights declarations. A comprehensive critique of the DMPC Project is beyond the scope of this chapter, but critics (rightly) point out that this phrase is not solidly rooted in the human rights resolutions it claims to be derived from, and that it tends to appear when it seems that the drafters of the DMPC find existing law or Shari’a requirements objectionable, from a Western point of view. See, for instance, Abdullah Ahmed An-Na’iam, “A Brief Comment on the Maldives Penal Code Project: Failure to Take Shari’a Seriously, not ‘Codifying’ it.” *Journal of Comparative Law* 2.1 (2007): 54-60. Professor An-Na’iam’s article is a response to an article written by the drafters: Paul Robinson, Adnan Zulfiqar, Margaret Kammerud, Michael Orchowski, Elizabeth Gerlach, Adam L. Pollock, Thomas M. O’Brien, John C. Lin, Tom Stenson, Negar Katirai, J. John Lee, and Marc Aaron Melzer: “Codifying Shari’a: International Norms, Legality & the Freedom to Invent New Forms.” *Scholarship at Penn Law* Paper 100 (2006).

\(^{84}\) DMPC, sections 90 and 1005.
against arbitrary judgments. However, standardizing penalties in a Western fashion fails to recognize the expressive purposes of exile.

Unlike in other Shari’-based systems, exile in the Maldives is not treated interchangeably with imprisonment. It is given only for offenses of certain characters – those that undermine social cohesion or flout Islamic morality. In a footnote addressing the issue of whether or not the new, modernized DMPC should even include exile, it appears that the American authors see only the economic aspects of exile in the Maldives:

Issue: Should the Code eliminate the penalty of banishment?
Yes: The penalty is no longer effective today. Banishment to another island may improve the status of an offender, or at least may not pose a serious impairment in the context of modern communication. The punishment has lost much of its stigma. The deportation of an offender to another island tends to disrupt traditional life on the atoll.
No: The penalty is an effective and inexpensive means of punishment. The penalty has a traditional standing in the Maldives which should be maintained.

While the drafters of the new DMPC may view preserving exile primarily as a cost-saving measure, it is nonetheless significant that the practice survived the revision process. The DMPC project has been controversial for its attempts to reconcile Shari’a and Western human rights norms, often at the expense of the former. Flogging, formerly a relatively common penalty, is restricted only to adultery in the DMPC, and would likely have been eliminated were it not specifically prescribed in sacred texts. Exile’s preservation, albeit in a changed context, illustrates how important a part of Maldivian society it is.

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87 See, for instance, An-Na’iam, 54-60.
88 Adultery is one of the few hadd offenses specified in the Quran.
Maldivian exile has always been intranational, moving the banished from one island to another. Today’s exiles, though not stripped of their national membership, are deprived of their home communities. The homestead of one’s birth is significant in forming local identity, evidenced by the fact that most of the nation’s older homes have proper names, regardless of whether the structure is a grand estate or a humble cottage.\textsuperscript{89} Traditionally, Maldivians derive much of their social identity from the island of their birth.\textsuperscript{90} Even today, travel between atolls is difficult, dangerous, and limited by weather conditions and season. In short, life in the Maldives, for most of its residents, is quite isolated, and the social world closely circumscribed. Malé, the largest island in the chain, is scarcely two miles across at its broadest point. Each island is ecologically unique, with no two offering the same environment or resources. The uniqueness of each atoll, combined with their small sizes and geographical isolation, place Maldivians in a position to know their home spaces intimately. Additionally, most Maldivians never leave the Maldives, or do so only briefly to pursue an education.\textsuperscript{91} Given the circumstances, it is not surprising that “[t]he homestead (goti) in the Maldives is not only the source of one’s identity, but…. a refuge.”\textsuperscript{92} Home, for most Maldivians, is not an abstract concept; the ideas and meaning that attach themselves to the idea are of a piece with the small patches of dry land upon which they spend most of their lives.

While a certain amount of commercial and social travel between adjacent islands is common, the atolls are scattered across 90,000 square kilometers, and exile almost always means

\textsuperscript{89} Maloney, \textit{People of the Maldive Islands}, 16-17.
\textsuperscript{90} Ibid., 16-17.
\textsuperscript{91} The Maldives remains a developing nation, with very few of its inhabitants able to afford to travel. For those who can, a single airport serves the string of tiny islands, primarily conveying tourists back and forth from Europe and the Middle East.
\textsuperscript{92} Ibid., 16.
relocation to an isolated island with little commercial activity, and consequently very few visitors. Communication infrastructure on inhabited island remains unreliable, if available at all. As a result, not only are exiles torn from the physical context in which they have lived their lives, but they also lose touch with the social and political life of the home atoll. Relatives, neighbors, and friends marry, divorce, and remarry, reshuffling the arrangement of ties. Children are born, and friends and relatives die. The activities that make up life take place without the exile. When they return (if they are ever able to do so) the home they left behind will be gone, a related but unknown community in the small, familiar space it once occupied.

While exile in Singapore excises the incompatible parts of the nation, the Maldives’ intrastate exile disciplines its members by stripping them of their social context – a context built upon a sense of community characterized by religious unity and moral uniformity. Expulsion serves as a powerful reminder (both to the exile and to any other members who may be contemplating similar actions) that the community’s morality and cohesion receive priority over one’s own desires. Acting in such a way as to threaten that solidarity or flout those morals results in a bitter taste of what rejecting that community means.  

Exile in Indian Country: The Ethnic Nation

American Indian nations inhabit a unique position among latter-day illiberal societies in that they are surrounded (both geographically and culturally) by a powerful, hegemonic liberal

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93 While common criminal and religious transgressions may bring limited terms of exile, incorrigible citizens or perpetrators of especially egregious offenses face the possibility of banishment for life. The current Penal Code defines “life” terms of exile as being limited to 25 years.
Pressure from the United States federal government often forces tribal authorities to carefully articulate justifications for policies that their liberal neighbors find objectionable as a means of preventing the predictable interference with internal policies. While this is, understandably, a great source of frustration to the nations, it also makes them a particularly good case study for the uses of exile in illiberal, modern societies. Because of their peculiar status as “domestic dependent nation[s],” American Indian tribes retain only limited rights of sovereignty. Unfortunately, U.S. Supreme Court rulings over the past three decades have further eroded what sovereignty remains in indigenous hands.

Currently, Indian nations wield broad control over their territories, yet are denied jurisdiction over non-Indians on Indian land. Additionally, the sentences that tribal courts are allowed to impose upon those within their jurisdictions are severely limited by the Indian Civil Rights Act. Indian nations do, however, largely retain the right to control access to their territory. While tribes have limited freedom to govern non-Indians on their lands, they do have the right to expel them. Since the U.S. Supreme Court acknowledged the right to control access to Indian land as one of the inherent powers of sovereignty in 1982, it has become very

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97 ICRA, 25 U.S.C. §1302. The limits are somewhat expanded under the 2010 Tribal Law and Order Act, H.R. 725. Under certain circumstances, tribal courts can now impose sentences of up to three years, rather than one.

98 There are exceptions specified in federal law.
common for tribal laws to include provisions for the expulsion of non-members. The removal of non-members falls outside of this project’s definition of exile, and so the final section of this chapter will examine laws that allow the exile of existing members of Indian communities, and the cases in which those laws have been applied.

Control over membership decisions is an area in which Indian nations find themselves trying, with mixed results, to assert sovereignty. In addition to struggles to define criteria for inclusion, recent decades have seen political battles over efforts to remove enrolled members, either by rejecting their claims to membership via disenrollment or by expelling them from their communities on the basis of individual character through exile. Currently, exile and disenrollment in Indian Country tend to arise together in both popular and legal debate, but there are important theoretical differences between the two. Exile has seen a revival in Indian Country in the past twenty years in response to variety of social problems plaguing Indian communities. During the same time period, mass disenrollments have increased, though for different reasons. While it is true that some exile policies also entail the loss of tribal membership, exile and disenrollment differ fundamentally from each other. Mass disenrollment denies the authenticity of claims to membership, while exile acknowledges the subject’s authentic membership and rejects them on that very basis. It is because the exile’s membership is considered authentic in the first place that their failure to meet its moral requirements is blameworthy, and therefore constitutes grounds for banishment.

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99 Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-145 (1982). Exclusion laws are numerous and varied, but this sampling gives a sense of a typical exclusion provision: Colorado River Indian Tribes’ Law and Order Code Article V and Constitution Article VI, Section 1J; Fort McDowell Yavapai Community’s Law and Order Code, Chapter 15 Exclusion Ordinance; Swinomish Exclusion and Expulsion Code Title 3.5, Makah Law and Order Code, Title 9, Title 6; Nisqually Tribal Code Title 46, Oglala Sioux Ordinance On Tribal Removal And Exclusion Of Nonmembers From the Pine Ridge Reservation, San Ildefonso Pueblo Code, Title VIII.
Disenrollments often occur en masse, not in response to the actions or character of individuals. Additionally, they are most common in nations that possess significant revenue generators like casinos or other enterprises that make membership a lucrative, but scarce, commodity. Several well-publicized instances of mass disenrollment have taken place in recent years, including the revocation of 306 Washington’s Nooksack Indians’ tribal membership in August, 2013.\textsuperscript{100} California tribes, especially, have drawn attention for their large-scale disenrollments, with nearly 3,000 members of different nations losing their membership over the course of a few years.\textsuperscript{101} Similarly, the Cherokee Nation drew criticism in 2011 for disenrolling approximately 2,800 black members descended from slaves owned by affluent Cherokees, despite claims of Cherokee ancestry.\textsuperscript{102} While there are certainly political issues surrounding disenrollment, they are not the same ones underlying banishment. Disenrollment is largely about proving contested lineage, while exile defines the conditions of being and continuing to be a member of a community of a particular character.

Non-member exclusion ordinances have been widespread since the 1980’s, but it is only relatively recently that laws providing for the expulsion of tribal members have gained popularity. The U.S. federal government recognizes more than 500 American Indian nations, each of which is entitled to draft its own constitution and laws, subject to limitation by the U.S.

\textsuperscript{100} Paige Cornwell, “‘Nooksack 306’ Fight to Remain in Tribe.” \textit{The Seattle Times}, August 25\textsuperscript{th}, 2013. They have appealed their disenrollment to federal courts, but as the Indian Civil Rights Act allows federal intervention only in habeas cases, it is uncertain whether the court will be willing to get involved (§1303). A group of Snoqualmie Indians were able to convince a federal court of appeals to reverse their tribe’s decision to disenroll and banish them in \textit{Sweet v. Hinzman}, 634 F.Supp.2d 1196 (2008).


Constitution and federal law. Not surprisingly, there is great variation between legal codes. Each nation or band that has introduced banishment provisions into its constitution, law and order code, or ordinances has its own particular practices. Terms of exile last from months to years, even in rare cases for life. Some tribes allow appeals of banishment orders only after a certain period of time. A few rare exclusion provisions also strip membership from the exiled. However, what each of today’s varied codes has in common both with each other and with their predecessors of centuries ago is that they allow tribes to expel members who fail to meet community standards of behavior and character.

In 1996, several members of the Tonawanda Seneca nation were disenrolled and banished in the wake of intense political strife. They received this notice:

It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca Nation. You are to leave now and never return. According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, no warnings are required before banishment for acts of murder, rape, or treason. Your actions… are considered treason. Therefore, banishment is required. According to the customs and usage of the Tonawanda Band of Seneca Nation and the HAUDENOSAUNEE, your name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.

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103 Nations are entitled, but not required, to draft constitutions under the Indian Reorganization Act, 25 USC § 476 (1934).
104 The Absentee Shawnee Tribe of Indians of Oklahoma, the Cherokee Nation, and the Skokomish Nation remove exiles from their membership rolls for the time of their banishment, which may be up to life. Other nations, like the Osage, do not actually revoke membership from exiles, but they do suspend their financial benefits. Absentee Shawnee Tribe of Indians of Oklahoma Tribal Code Criminal Procedure, Section 404; Code of the Eastern Band of Cherokee Indians, 2-6; Osage Nation Code, 6 § 4-135.
105 The text of this banishment order is available in records from *Poodry v. Tonawanda Band of Seneca Indian*, (2d Cir. 1996) 85 F.3d 874, 889. In this case, the federal court did reverse the decision of the nation, considering the restraint on the liberty of the banished to constitute “detention” and bringing the constitutional due process
Attempting to root their decision in tribal tradition, the band’s authorities drafted a banishment order that recalls the language of the ancient “Great Law of Peace” of the Haudenosaunee, or Iroquois Confederacy. By invoking the language of the fifteenth century “Great Law of Peace,” tribal authorities attempt to link their 1996 decision with the ancient traditions of the nation, casting the exile of the other members as a revival of traditional ways of resolving conflict, rather than as an innovation. The banished challenged their exile and loss of membership under the habeas provision in the Indian Civil Rights Act, resulting in the case, Poodry v. Tonawanda Seneca Indians, an important one in the struggle for tribal control over membership.  

The text of today’s exclusion ordinances and the scholarly debate surrounding them often reference the history of exile in various Indian nations’ traditions. There is evidence that the nations of the Iroquois Confederacy – including the Seneca – did employ exile centuries ago. Additionally, the Cheyenne, Navajo, and Cherokee nations all have documented histories of exile dating back centuries, as do several others. By all accounts, banishment was very rare, requirements of the ICRA into play. The decision remains controversial. Later courts have largely declined to involve themselves with banishment and disenrollment cases, considering them internal tribal matters.  

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108 Cousins, passim; Johansen, 186-195, Kunesh, 85-145; Wilkins, 235-262.
employed when all other remedies were exhausted or in the face of a truly reprehensible offense. Today, with their formal options for maintaining internal social control limited, several tribes have turned to banishment to combat problems plaguing native communities. For some of the nations now using exile, the practice has deep historical roots; for others, it is new.\textsuperscript{110} In one high-profile case, Judge James Allendoerfer sentenced two Tlingit teenagers to twelve to eighteen months’ exile on isolated islands, an action the judge claimed to derive from Tlingit tradition.\textsuperscript{111} Ultimately, the banishment sentence proved untenable, and the boys were jailed amid controversy about whether exile had any precedent in Tlingit history after all.\textsuperscript{112} Debates over the historicity of banishment in American Indian communities approach exile as an atavism, failing to recognize its consistency with current practices in banishing communities. Exile need not have deep historical roots to claim legitimacy as a membership control device, it needs only to be consistent with the commitments of the community employing it. For these cohesive, illiberal communities, the case for exile is not a difficult one to make.

Scholars of American Indian law suggest that traditional Indian notions of justice and crime view breaches of tribal law not only as an injury to the immediate victim, but as a wrong against the entire community.\textsuperscript{113} Emphasis in many tribal justice systems has traditionally been

\textsuperscript{110} The question of whether banishment was a traditional practice became a matter of contention in the first highly publicized Indian banishment of recent decades, that of two Tlingit teenagers who robbed and badly beat a pizza delivery driver in 1993. John Balzar, “Two Alaska Indian Youths Banished to Islands for Robbery.” Los Angeles Times, July 15\textsuperscript{th}, 1994.
\textsuperscript{112} While the case better illustrated the problematic aspects of instituting exile in the present era than it did the benefits, it nonetheless signaled the introduction (or reintroduction) of an ancient practice to many modern Indian communities.
upon “restorative justice,” which generally entails reparations, mediation, and community efforts to correct and reintegrate the offender. While there are certainly expressive and disciplinary aspects to exile in Indian Country (just as in the Maldives and Singapore), the uses to which Indian nations now put it are largely defensive. After centuries of preserving besieged cultural identities, native communities now find both their members and the communities themselves threatened by social contagions like drug addiction and gang violence. Their response, though painful, has been to excise the offending parts of the community in an effort to prevent further damage to the whole.

A small minority of member exclusion codes include banishment as one option, along with prison and fines, for virtually all crimes, but these are exceptions. Most banishment ordinances address a select few offenses, with the penalty tailored to the transgression. Exile provisions target antisocial behavior that threatens the stability of the community, displays of disrespect for the tribe’s shared culture, and individuals whose repeated offenses suggest incorrigibility. Often, exclusion codes use language of collective self-defense. This statement of purpose from the Sault Sainte Marie Tribe of Chippewa Indians’ exclusion code is typical:


115 The voluminous Osage Nation Code falls into this category, as does the Law and Order Code of the Pawnee Tribe of Oklahoma, Title VI.
The Sault Ste. Marie Tribe of Chippewa Indians hereby finds … that it is necessary to provide a means whereby the Tribe can protect itself, its members, and other persons living on Tribal Lands, from people whose presence on Tribal Lands is harmful to, or threatens harm to, the peace, health, safety, morals, general welfare or environmental quality of life on Tribal Lands. Such action is deemed necessary as a result of the Tribe’s interest in maintaining the aforementioned interests free from harm, to protect the cultural identity of the Tribe, and to protect those residents of Tribal Lands who may be imposed upon, harmed or otherwise disadvantaged.116

In recent years, two of the greatest threats to Indian communities have been increases in drug use and trade, and the related problem of gang violence.117

   Indeed, drug violations are among the most common enumerated grounds for expulsion. The Lummi, based in Washington, have suffered enormously from illegal trade in methamphetamine and OxyContin, with tribal authorities estimating that nearly one quarter of the small community of 2,000 members was addicted to painkillers or other controlled substances in 2004. To reduce the damage, the Lummi have resorted to banishing any members involved in supplying the drugs that are killing their neighbors and destroying the relationships that form the fabric of the community.118 In 2008, the Lummi nation adopted its own exclusion code, with the manufacture and distribution of illegal drugs listed among the grounds for exclusion.119 In at least two cases, the Lummi have also stripped exiles of their enrollment,

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118 Eugenia Phair and seven adult members of one family were banished from Lummi lands for drug trafficking after an incident that resulted in the death of an infant. Johansen, 186-195; Shukovsky, 2003; Kershaw and Davey, 2004; Austin, 2013.
119 Title 12, Lummi Nation Code of Laws.
ending their association with the tribe. In the Midwest, the Lac du Flambeau Band of Lake Superior Chippewa, the Mille Lacs Band of Ojibwe, the Red Lake Band of Ojibwe, and the Upper Sioux Community have adopted similar codes to combat growing drug problems, as well.

Exclusion ordinances have become one of the few weapons Indian communities have for combating the rapidly growing problem of gangs on their lands. Though few banishment laws target gang activity specifically, broad provisions in constitutions and legal codes give tribal authorities the power to exile members whose violent behavior or criminal actions strain community ties. Notably, Midwestern tribes use their exclusion ordinances to protect their communities from further entrenchment of both American gangs and local American Indian gangs on Indian lands. As recently as late March, 2013, tribal police on the Lac du Flambeau Band of Lake Superior Chippewa Reservation declared a state of emergency in response to a

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120 Kay Commodore and John Jefferson were not only banished for selling illegal drugs, but also disenrolled. Johansen, 186-195; Shukovsky, 2003; Kershaw and Davey, 2004; Austin, 2013.


122 One exception to this generalization is the Lac du Flambeau Band of Lake Superior Chippewa. Their Law and Order Code does include prohibitions against gang activity, though it does not name banishment among the penalties (Tribal Code 70, Title VI). The recent exile of dangerous gang members has been carried out under broad provisions in the Band’s constitution (Constitution and Bylaws of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, Article VI, l,n,q,u.). Many codes include the power to implement exclusion ordinances among the enumerated powers of tribal councils or tribal courts, or have vaguely worded provisions that give tribal authorities broad powers, including those to draft and impose exclusion ordinances. Among those tribes are the Confederated Salish and Kootenai Tribes (Laws of the Confederated Salish and Kootenai Tribes, Codified. Article VI), the Skokomish Nation (Civil Exclusion and Removal Ordinance, Article III, Section 8(c) and Article V, Section 3 “reserve to the Skokomish General Council the power to establish procedures for the exclusion of enrolled tribal members from the Reservation”), the Hoopa Valley Tribe (Constitution, Article 9, 1.1), The Yankton Sioux (Exclusion and Removal Code, section H forbids, “Doing or threatening to do any act upon the Reservation which seriously threatens the peace, health, safety, morals or general welfare of the Tribe, its members, or other persons living on the Reservation…”), and the Lower Sioux Community of Mdewakanton Indians, (Constitution, Article V, 1i,j). The same provisions, if not in conflict with constitutional or other explicit legal protections, also give tribal authorities the discretion to either impose disenrollment along with banishment, even if loss of membership is not part of the banishment ordinance.
spike in gang violence and drug-related medical emergencies.\textsuperscript{123} Indian communities located near metro areas, especially, suffer from the predations of rapidly growing Indian gangs like “the Native Mob,” “Sovereign Nation Warriors,” and “Native Soldiers.”\textsuperscript{124} The Mille Lacs Band of Ojibwe, located outside of the Minneapolis-St. Paul metro area, has taken to banishing members of these gangs in an attempt to prevent further entrenchment in their territory.\textsuperscript{125} Those banished from Mille Lacs lands are repeat offenders who have not responded to imprisonment or the imposition of fines. The use of exile in these cases is not merely a matter of convenience. Rather, the defensive use of exile in tightly knit Indian communities is an extension of placing a high value on maintaining a particular shared community life. These exiles do not merely damage themselves and their immediate victims; the use of drugs damages relationships between family and neighbors, and the demands of loyalty to the gang compete with loyalty to the tribe. Casting drug dealers and gang members out is not intended as a punitive measure or one of convenience, but is a necessary step in protecting the internal solidarity of the community itself.

Every instance of exile has two aspects: what the event means for the exiled, and what it means for the exiling community. While many exclusion codes rely on the language of community protection, the Exclusion Code of the Lummi Nation acknowledges both facets:

\begin{quote}
(b) The fundamental purposes of this Exclusion Code are two-fold: the first is to protect the health, safety, and welfare of the Lummi Nation and the Lummi Reservation community; the second is to provide the person to be excluded with the motivation and means to seek treatment and rehabilitation so that their
\end{quote}

\begin{footnotes}
\item[123] Austin, 2013.
\item[124] Austin, 2013; Steil, 2006.
\item[125] Andy Mannix, “Mille Lacs Ojibwe Fighting Violent Offenders with Banishment.” Minneapolis, MN: City Pages, November 9th, 2011. Benjamin Garbow, Patrick Provo Jr., (prosecuted for two assaults prior to being banished), Zachary Nayquonabe (previously prosecuted for DWI, theft, assault with a deadly weapon), Darrick Williams, (who had prior convictions for multiple counts of assault), and Blaine Beauliu, (previously convicted for two DWI’s, and eight assaults) are a few of the gang members recently exiled from Mille Lacs land. On exclusion for drug crimes, see Mille Lacs Band Statutes, Annotated. Title 23, 2 § 201.
\end{footnotes}
conduct may no longer be a threat to the health, safety, and welfare of the Lummi Nation.\textsuperscript{126}

Banishment in Indian nations is often an intensely personal matter. In addition to the hardships of involuntary relocation and the humiliation that accompanies public rejection, the former member must also bear the psychological burden of having been deemed morally unfit to be who they previously were. Tribal communities vary in size from a few hundred to several thousand, but many are very small, and the person banished may be related to those who have sentenced them to exile. Tribal authorities routinely comment on how difficult and emotionally taxing the decisions are.\textsuperscript{127} While the removal of the member is itself inflicting a wound on the community, the greater purpose is to halt the escalation of conflicts that would ultimately be more damaging to the community as a whole.

Actions that insult cultural or religious identity frequently appear in exclusion codes. This includes the abuse of tribal lands, damaging cultural or religious artifacts, or disrupting community ceremonies.\textsuperscript{128} Abuses of land access privileges, including environmental damage and unauthorized exploitation of natural resources, appear as grounds for exclusion in a number of codes. For instance, of the nine grounds for exclusion listed in the Yankton Sioux Exclusion and Removal Code, four of them concern the unauthorized taking of resources like timber or game from the land, or searching for natural resources within the Reservation without permission.\textsuperscript{129} The Ho-Chunk Nation includes “[d]isturbing or excavating items, sites, or

\textsuperscript{126} Lummi Nation Code of Laws, 12.01.010.
\textsuperscript{128} See, for instance, the Yankton Sioux Tribal Criminal Code, 10-1-3(E).
\textsuperscript{129} The Yankton Sioux Tribal Criminal Code, 10-1-3(E).
locations of religious, historic, [or] cultural… significance without the authority of the Nation…” among its grounds for exclusion, and the Siletz Tribal Code prescribes banishment in its “Cultural Resource Lands and Sacred Sites Ordinance,” though it does not for any other offense.130

Finally, American Indian communities use exile to permanently remove members who have, through a long-term pattern of bad behavior or for particularly egregious offenses, shown themselves to lack the requisite moral character to belong to their home communities. Permanent banishment is rare in the various codes, but when it does appear it is for offenses like arson resulting in death, premeditated murder, or especially reprehensible sexual offenses.131 Sex offenders are often subject to exclusion, even in the codes of nations that do not otherwise employ exile. In addition to those (like murderers or sex offenders) who are deemed morally defective beyond retrieval, habitual troublemakers are common targets for indefinite exclusion.132 Established patterns of disorderly behavior by some residents of the Susanville Indian Rancheria in California prompted the tribe to pass an exclusion ordinance, arguing that, “…[t]he Tribal Business Council finds …that these conditions justify extraordinary measures… to restore order, safety, tranquility and stability to the Rancheria….”133 The Osage Nation Code, one of the most comprehensive American Indian codes, prescribes terms of exile up to life for

130 Ho-Chunk Nation Code, 3 HCC § 10; Cultural Resource Lands and Sacred Sites Ordinance, Siletz Tribal Code § 9.001; The Confederated Tribes of the Colville Reservation Tribal Code, Chapter 9-4 “Interference With Tribal And Indian Property;” Constitution, Article V (d) includes similar provisions.
132 Ordinance No. 2010-002 Ordinance Of The Tribal Business Council Of The Susanville Indian Rancheria Providing For The Exclusion Of Persons From The Rancheria.
133 Ibid.
repeat offenders in a number of realms, including malfeasance on the part of public officials, or those committing various forms of fraud.\textsuperscript{134}

Banishment for specified terms holds out the hope, as expressed in the Lummi Exclusion Code, that those exiled will be able to shed their harmful ways and rejoin their fellows. Exiling members of gangs, drug addicts and dealers, and those who show disrespect for cultural artifacts or practices for limited terms suggests that these behaviors are viewed as remediable. Disrupting gang ties weakens the gang and allows the member to escape their influence, opening the door to reform. Similarly, many drug dealers – though unquestionably doing damage to their neighbors and communities – are also addicts. With treatment, it is possible that they will recover and become eligible for reintegration, and deprivation of their community may well prove the necessary impetus for seeking treatment. Those who desecrate cultural objects or ceremonies, especially, will likely benefit from exile; losing the community they insult with their actions demonstrates exactly what it is that they reject with their actions, and how valuable it is to them. This serves the dual purpose of allowing for the possibility of readmitting a penitent and reformed member while also creating space between the banished and the rest of the community. This distance interrupts what might otherwise become an escalating conflict within the community, while also insulating the other members from the bad influence of the exile.

Exile, in American Indian societies, takes a number of forms. Most often, Indian communities use banishment as a protective measure, limiting the damage a disruptive member might cause and creating the space between an offender and those he or she has victimized

\textsuperscript{134} 6 ONC §3-104C, § 4-107A(12), §4-111A(2), §4-112A(3), §4-151B. Ysleta Del Sur Pueblo Tribal Resolution TC-99-99, Pertaining to Amendments of Article 4 of the tribe’s Code of Laws Entitled "Peace Code," also includes possible lifetime banishment for repeated serious, or “Class A” civil infractions, Section 4.2.40.
necessary for damaged relationships to heal. Generally, the many and varied American Indian societies that use exile use it to preserve communities threatened from without by the encroachments of their “host” nation and from within by social problems that threaten to weaken the fabric of these traditionally small and cohesive communities. At its most extreme, tribal banishment exiles deviant members from not only the territory, but from membership in the nation itself. These most wretched latter-day exiles lose not only their homes, access to their economic and social networks, but are actually stripped of recognition as Indian people. Their rejection is total. Such cases are rare, but perhaps speak most eloquently of the frightening power of exile. However moderated, however carefully enforced, exile represents the rejection of an individual by their home community.

**Exile in the Illiberal Society**

In the illiberal communities examined here, the conditions of membership are clear: morality is articulated in law, actions or traits that threaten the community’s shared mission are not tolerated, and social cohesion is resolutely defended, even at the cost of individual interests. In each of the illiberal societies considered here, exile emerges as a tool used to purge the community of those members who cannot or will not meet the conditions of membership. Illiberal societies, by their nature, enjoy a freedom to form and articulate official community identities. This power lies beyond the legitimate purview of liberal regimes, which purport to act merely as referees among private pursuits, not as parties with pursuits of their own. This fundamental difference between liberal and illiberal societies explains, to a large extent, the visceral intuition that exile and liberalism are incompatible.
These remaining banishing societies envision themselves as having particular identities as communities. The identity narrative espoused by the community is the basis from which the conditions of membership – both those governing actions and those governing personal traits – are derived. Those identities may be religious, ethnic, or explicitly dedicated to a particular purpose, as in the case of Singapore. Regardless of type, these identities are pervasive, governing both public and private life (even obliterating the distinction) and forming intimate bonds between individual and state. Because for most members, entrance into their communities is via the accident of birth, some citizens will be better suited to meeting the requirements of membership than others, and some will be utterly unsuited. The conditionality of belonging to these latter-day exiling societies is ongoing; meeting conditions at the time of admission or birth is not sufficient. In light of their thick, morally and civically demanding identities, this continued conditionality of membership makes perfect sense. Purposive associations require certain “sorts” of citizens, citizens able and willing to support shared ends. Those who cannot or will not support those ends cannot be tolerated.

Liberal societies, however, supposedly lack such robust moral identities and shared purposes. This is, in fact, one of the most common critiques of liberalism – that a state without a shared identity is sterile, shallow, and fails to direct its members in the pursuit of the good life. If liberal societies lack the distinct, purposive identities that justify strictly controlling which kinds of person can be tolerated, it is much more difficult to justify making membership in a liberal society conditional upon possessing a certain kind of character.\textsuperscript{135} Of course, if the

\textsuperscript{135} Matthew J. Gibney, “Should Citizenship be Conditional? The Ethics of Denationalization.” \textit{The Journal of Politics} 75.3 (July, 2013): 646-658. Gibney makes a surprisingly strong case for allowing liberal nations to make citizenship conditional, however he ultimately concludes that the arbitrariness with which the United Kingdom has
standard view of liberal societies as voluntary, contractual associations is accepted, the failure to meet the terms of the contract might be seen as failing to meet conditions of sorts. However, on the commonly cited Lockean contract model, the terms of the contract are minimal, requiring only the surrender of freedoms unnecessary in a functioning modern state. While members are required to abide by the law in their actions, this does not imply that certain character traits or moral dispositions are necessary to belong to a liberal society, so long as the member’s actions remain within the pale of the law. Illiberal societies like those considered in this chapter, unsurprisingly, use illiberal grounds to justify expulsion. What grounds do liberal societies have, then, for exiling their troublesome members? Liberal communities, be they states, counties, cities, neighborhoods, or in rare instances even nation-states, do continue to exile. What are legitimate conditions for maintaining membership in a liberal community? This examination of the continued, open use of exile in illiberal regimes gives an account of what exile does for communities that continue to openly employ it. The proceeding chapters will turn to liberal communities, first historical and finally in the present day, in an attempt to answer the questions, “Are there liberal grounds for exile? If so, what are they?”

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136 Liberal societies require that members abide by the laws to which they have (theoretically) already consented. Breaches of that agreement are met with penalties, but do not typically result in the revocation of membership – at least not openly.
Chapter II

Exile in the Proto-Liberal Society: The Transportation Project and Purifying the Body Politic

“With regard to every herd, one who takes up the task of a shepherd ... will never attempt to care for his charges otherwise than by first instituting the purge appropriate to each group. Picking out the healthy from those who are not, and the well born from those not well born, he will send the latter away ... and direct his care to the former.”
Plato, *Laws*¹

In early December, 2012 Amsterdam mayor Eberhard van der Laan announced the city’s intention to implement a plan under which problem neighbors would be relocated to state-financed housing made from converted shipping containers. The resettlement housing – labeled “scum villages” in the popular press – is meant to solve the intractable problem of recurrent anti-social behavior by certain Amsterdam residents. These “problem” citizens have records of intimidating or harassing their neighbors, and rather than inconvenience their victims with relocation, Amsterdam opted to move the offenders, instead.² Media responses reflect the mixed reception across Europe, including denunciations of the “Illiberal New Face of Northern Europe.”³ The choice of the term “illiberal” raises the question: What exactly is so illiberal about this policy?

Why shouldn’t liberal communities use geographic removal to deal with “problem” members? Critics suggest that the spatial separation of those unable (or unwilling) to live in

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² The story was originally reported in the November 30th, 2012 issue of the Dutch newspaper “Parool,” but was quickly picked up by the English language media. See, for instance Bruno Waterfield, “Amsterdam to Create ‘Scum Villages.’” *The Telegraph*, December 3rd, 2012; Owen Hatherley, “Amsterdam’s ‘Scum Villages’ Show the Illiberal New Face of Northern Europe.” *The Guardian*, December 7th, 2012.
harmony with their fellows is in some way incompatible with liberal commitments. Yet, every political theory carries with it an implicit notion of what a citizen ought to be – liberalism included. Republican theories expect prospective citizens to possess certain virtues necessary for active participation in public life, and contractual theories generally rely upon capabilities, like rationality and autonomy. Just as every type of society requires certain characteristics of its members, demarcating this community inevitably creates another category: those who are ineligible for membership. The history of liberal political thought includes an abundance of arguments for excluding those who, for a variety of reasons, ought not to be accepted as citizens of liberal societies. John Locke’s premise that all those entering into the social contract must possess “reason,” for instance, disqualifies the mentally ill or developmentally disabled (or as he rather less kindly refers to them, “Lunaticks and Ideots”) from full membership.4 Mill, similarly, sets aside entire peoples as lacking the moral disposition requisite for free self-rule. He applies his inventory of disqualifying characteristics – “indolence…carelessness, or cowardice” – to whole societies, but it is at least as well suited to describing excludable individuals.5

Such exceptions are revealing not only of a particular society’s character, but also of what lies at the heart of what we call “liberal government.” Just as all societies have notions of the citizen, they also have conceptions of the unwanted and the intolerable. Liberal societies, which define themselves in large part by their toleration and inclusiveness, are ill suited to acknowledging that they, too, have such ideas. However, it is just these commitments to toleration and inclusiveness that make it all the more important for these communities to be able

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to offer justifications for expulsion that are consistent with their own norms. People who explicitly reject the social contract, like suspected terrorists, could arguably be expelled on contractual grounds, as could those (like undocumented immigrants) who defy the requirements of membership by consent – both of these examples represent potentially liberal grounds for expulsion. But, perhaps most difficult for a liberal society to cope with is the person who is simply bad. After all, if liberal societies are, as Michael Oakeshott argues, civil associations with merely “adverbial” aims, and not enterprise associations capable of and justified in setting substantive normative purposes, there is no reason for the government of a liberal society to concern itself with policing the morals of its members, so long as they remain law-abiding.\(^6\)

Toleration, as Judith Shklar notes, is an extraordinarily difficult commitment to adhere to in practice.\(^7\) America is a nation of diverse communities within which the limits of toleration are constantly contested. This is especially true in communities that are increasingly ethnically, religiously, and culturally diverse. Moral exile offers these communities a method by which to delineate the limits of toleration, defining the set of acceptable and unacceptable members. Such distinctions enable communities to balance the demands of maintaining social cohesion and meeting commitments to toleration and equality. Moral exile, as it emerges in transportation discourse, asserts that one of the objects of sharing that is definitive of the proto-liberal society of early modern England is a common morality. Moral commitments are basic components of

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\(^6\) While it is true that Locke, in “A Letter Concerning Toleration” argues that atheists and those whose religious leaders give them permission to disregard the civil laws ought not to be tolerated, even in this case it is a matter of prudence, not principle. Atheists are excluded because Locke sees them as incapable of giving a meaningful promise without the belief in a God to punish its breaking, and those whose religion divides their political loyalties cannot fully give a promise to one sovereign. John Locke, *Political Writings*. Edited by David Wootton (Indianapolis: Hackett, 1993): 424-426.

culture, and so privileging them in membership decisions ought not to offer any insurmountable barriers to inclusion that would substantially depart from liberal ideals of citizenship.

However, the type of moral exile at work in the convict transportation project trades not in adhering to certain moral commitments in one’s conduct, but in the possession of the requisite moral disposition. This seemingly minor distinction introduces serious problems into the logic of moral exile, obliterating the distinction between doer and deed necessary to holding an agent morally responsible for their actions. Exile requires reconstructing members as non-members, and moral exile does so by identifying the dispositions that are incompatible with a particular community. While early theorists like Mill and Locke certainly do not shy away from excluding those judged to be possessed of certain dispositions from eligibility for membership, later liberal commitments to voluntariness and toleration render doing so problematic. Which moral dispositions, in a diverse society like the United States, are so intolerable as to be considered disqualifiers for continued membership? Can any such standard be justified? And should making and enforcing such judgments be the business of government?

As I argue in Chapter One, exile is a powerful tool for controlling membership, offering a clear articulation of the conditions of belonging and projecting an image of solidarity among remaining members. Singapore and the Maldives, particularly, use exile to enforce community ethical and religious norms. Exile allows such communities to define not only the set of tolerable actions, but also what sort of person is eligible for membership. In these societies, exile forcefully asserts the community’s story about its own moral identity by identifying and removing those essentially ineligible to belong. In Singapore, we find that those who impose burdens on their neighbors (especially financial burdens) lack the stuff definitive of a true
Singaporean. In the Maldives, we see that those who abuse and erode the trust among members of their small communities are also the wrong kind of person; they lack the essential characteristic of valuing the community over the self. The expulsion of the deviant member reasserts each community’s commitment to its chosen enterprise, and the act of exiling is one that the remaining members perform together. In sum, exile is not only a tool of control, but it is also a means of communal expression and a method of generating feelings of sharing and solidarity. Each of these functions contributes to the perceived stability and sense of community of the exiling society.

As widely used as exile is for these purposes in latter-day illiberal communities, it serves surprisingly similar ones in avowedly liberal American communities. Moral exile may not be so easily reconciled with the rationalistic or prudential concerns so often associated with political life, but its effectiveness in reinforcing which characteristics make up the community’s core identity and asserting the community’s power to define (and redefine) legitimate membership cannot be ignored. While exile is at its most obviously political when it results from failure in an overt struggle for public power or when levied judicially, moral exile should not be dismissed as apolitical; all forms of exile are tools for controlling membership, a core element of sovereignty and a fundamentally political power.

Moral exile serves a number of purposes in liberal communities. First, it is an effective means of bolstering social ties without relying on ascriptive characteristics like ethnicity, race, or religion – ways of building social cohesion that are not legitimately available to liberal societies. Expelling disfavored members is a communal activity, one that re-affirms who the “real” members are by making an instructive spectacle of those who are not. In a more nuanced
fashion, moral exile also defines which characteristics are definitive of belonging to the group – sorting those kinds or types of people who authentically belong from those who don’t – and producing the sort of ethically constitutive story that communities rely upon to imbue belonging with meaning.⁸ In considering the roots of exile in the liberal polity, this chapter will explore of the idea of “community” in the context of the liberal society. An enormous literature on the subject of community already exists, so a lengthy consideration is beyond the scope of this project. However, the logic underlying moral exile depends on a belief in some morally relevant commonality shared by all true community members and lacking in those deemed intolerable, and so this discussion will focus in part upon what that “sharing” means.

This chapter first considers how morally motivated exile and liberalism have co-existed in the past, during the age of convict transportation in proto-liberal England. The most obvious, large-scale example of moral exile came into being during liberalism’s infancy, a time during which political thinkers paid careful attention to what constituted a legitimate justification for government interference with the basic rights of individuals. Tellingly, even early modern authorities were keen to avoid labeling the benignly titled policy as “exile” or “banishment,” due to the association of those ideas with despotism and arbitrary rule. As in later centuries, early modern communities used moral exile to root out members who ran afoul of shared identity and values, whose moral defects were viewed as symptomatic of an inherent incompatibility with dispositions identified with authentic membership. Moral exile, whether in the English vill or in American cities, counties, and states, offers an tempting solution to threats that morally suspect

⁸ Rogers Smith describes what he terms “ethically constitutive stories” and their functions in Stories of Peoplehood: The Politics and Morals of Political Membership (Cambridge: Cambridge University Press, 2003): 64. My use of the idea here to elucidate the function of moral exile may be a rather literal interpretation of the ethically constitutive story, but it is one that I think is compatible with Smith’s intention.
members represent to the identity narratives and social solidarity of the communities to which they belong.

**Moral Exile in Modernity: England and the North American Colonies**

To best understand how the practice of moral exile operates in a liberal society, it is instructive to examine one particularly well-documented, publicly debated case in which it was implemented openly. While this project argues that moral exile continues to exist in American communities today, identifying it is challenging, given that it is seldom labeled as “exile” and is often disguised in the depoliticizing language of law or administrative regulation. This problem does not afflict debates about convict transportation, an earlier mode of moral exile. For most of the eighteenth and nineteenth centuries, England enthusiastically seized the opportunity to separate its troublesome citizens from the “...inoffensive, wise, and useful part of Mankind,” through the policy of convict transportation.\(^9\) During the age of transportation, discussions about the moral fitness or unfitness of the “Scum of People” jettisoned from the realm took place in public discourse – supporters and opponents voiced their justifications quite frankly and openly (and often colorfully).\(^10\) By exploring the political nature of moral exile in this proto-liberal society, the political underpinnings of today’s seemingly apolitical expulsion policies become more readily visible.

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Exile and outlawry were common practices in Medieval England and earlier. Though Pollock and Maitland breezily posit that “true exile is unknown” in English history, later historians document a vibrant tradition of political expulsion dating (at least) to the reign of King Edmund in the tenth century A.D. Before the advent of transportation, political expulsion took a number of forms in England. Very early English law included outlawry, the ancestor of the legal concept of “attaint” that would later legitimize many early impositions of transportation. The outlaw was not actually ordered to leave the country, but as in the cases of the ancient Greek atimoi, leaving was prudent. The attainted were dead in the eyes of the law and so no longer entitled to its protection. The origin of outlawry in England remains obscure, but it was in common enough use to be codified in law by the eleventh century.

Ecclesiastical law enabled “abjuration” to take root by the early Medieval period. Abjuration generally followed a claim of sanctuary, made on consecrated ground. After gaining sanctuary, the option to “abjure” or permanently leave the realm was available to those facing a

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11 For a complete analysis, see Melissa Sartore, Outlawry, Governance, and Law in Medieval England (New York: Peter Lang, 2013).


14 Sanctuary appeared in Ethelbert of Kent’s legal code of 602 or 603 A.D., but it is likely that the practice predates this. Lauren Maclaren Trenholme, The Right of Sanctuary in England: A Study in Institutional History (Columbia, MO: University of Missouri, 1903): 308.
death sentence, the penalty for an overwhelming array of offenses under English law well into the eighteenth century.\textsuperscript{15} Sanctuary and abjuration tempered the severity of the law as written, offering a merciful alternative to execution.\textsuperscript{16} Sanctuary declined under Henry VIII and Elizabeth I, and abjuration transformed into something akin to a penalty more closely resembling transportation, often including a formal oath to leave the kingdom.\textsuperscript{17}

Chapter 39 of the Magna Carta limits the sovereign’s power to exile, “except by the judgment of his equals or by the law of the land.” This limiting of the monarch’s power to exile expresses a deep-seated suspicion of the potential for sovereign arbitrariness inherent in exile, establishing a check on monarchical control over expulsions.\textsuperscript{18} The first law delineating something akin to transportation remained within the Magna Carta’s limits by devolving the exiling power to the Privy Council, authorizing it to order certain unsavory subjects to unspecified “parts beyond the seas.”\textsuperscript{19} This Elizabethan “Act for the Punishment of Rogues Vagabonds and Sturdy Beggars” marks the first recognizable sign of what would later become transportation to the nascent North American colonies, authorizing justices of the peace to banish those adjudged “incorrigible rogues” from the realm.\textsuperscript{20} There are no records of this power being used to exile large groups of people, as would occur under the 1718 Transportation Act, but

\textsuperscript{17} Kesselring: 357.
\textsuperscript{18} An anxiety that Constant would later repeat and analyze. Benjamin Constant, “The Liberty of the Ancients Compared with that of the Moderns.” \textit{Political Writings}: 321-322, 292-295.
\textsuperscript{19} Magna Carta, Chapter 39, “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.” 39\textsuperscript{th} Elizabeth Chapter 4 (1597), “An Act for the Punishment of Rogues Vagabonds and Sturdy Beggars.”
\textsuperscript{20} Frederic William Maitland and Francis C. Montague, \textit{A Sketch of English Legal History} (London, G.P. Putnam’s Sons, 1915).
during this time, English authorities did order Anabaptists, “Gypsies,” “vagabonds,” recalcitrant Catholics, and assorted other unwelcome residents to “abjure the realm.” Early legislation did not specify a destination or what the exile was to do there, it merely required that they leave.21

While Elizabeth authorized the Privy Council to banish poor and disfavored subjects, James I adopted a different approach, one that would prove popular for centuries: rather than directly ordering members to leave, he offered them conditional pardons. Conditional pardons placed an additional mediating level between the sovereign and the exile by not merely empowering the Privy Council to exile, but also making the exile himself or herself complicit in the person’s own expulsion – an innovation that added a legitimizing veneer of consent to the subject’s exile and mitigated fears of arbitrariness on the part of the monarch. In 1615, the Privy Council declared that thanks to the King’s Clemency, subjects sentenced to die (with the exception of those convicted of particularly heinous crimes) would be offered pardons conditioned upon giving consent to be transported.23 The conditional pardon transformed transportation into a voluntary act, rather than a legally questionable sentence or a potentially arbitrary abuse of monarchical power. Of course, given that the alternative was death, the “voluntariness” remained nominal.24

21 22 Henry VIII Chapter 10; Acts of the Privy Council of London, III. 28-29; IV. 59, 166, 223; V. 185; State Papers 12/246/82; 35 Elizabeth I, Chapter 2.
24 Blackstone later succinctly articulates the principle supporting transportation: “But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of Parliament.” *Commentaries on the Laws of England.* Edited by J.F. Hargrave (New York: Harper and Brothers, 1852): Vol. I, 137. Nonetheless, not all transportations prior to 1718 were due to conditional pardons. For a detailed history of the various regulations related to transportation, see Abbot Emerson
During the first decades of the transportation experiment, England used both the conditional pardon and the authority of the Elizabethan statutes to banish “incorrigible rogues,” and ridding itself not only of common criminals but also of political rebels, religious dissenters, the chronically impoverished, and a seemingly limitless supply of unpopular subjects. The Crown used transportation to purify the mass of the people and also to quash various political enemies. Cromwell followed its example. In 1651, the Protectorate effected the transportation 1,200 Scottish Rebels to New England, and 300 Irish rebels to Virginia two years later. While a number of early transportations were explicitly political affairs, for the most part transportation allowed the kingdom to relieve itself of several thousand felons and paupers. In 1656, Cromwell ordered all counties to send lists of dangerous persons, rogues, and vagabonds who authorities recommended for transportation. Eventually, some conditional pardons (at the request of colonial governors) stipulated that recipients remove themselves to North America. By the reign of Charles II, legislation had begun to specify colonial destinations for transportees.

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27 18th Charles II Chapter 3 (1666) designates “any of his majesty’s dominions in North America” as possible destinations for transportees. 13th Anne, Chapter 26 (1714) authorizes sending beggars or “dangerous and incorrigible rogues” to work for private citizens overseas, but also domestically. 4th George I, Chapter 11 (1718) is the primary act codifying transportation and controlled the policy until the American Revolution. 24th George III, Stat. 2, Chapter 56 (1784) re-authorizes transportation, with an important revision allowing that convicts may be “transported beyond seas, either within his majesty’s dominions or elsewhere.” 27th George III, Chapter 2 (1787) authorizes transportation to New South Wales, which continued until 1867. 16th and 17th Victoria Chapter 99 (1853) substituted “penal servitude” for transportation in all cases in which the convict would be transported for less than fourteen years.
Bad and Wicked Members

Transportation would eventually become a powerful institution in English political life, ridding the kingdom not only of political agitators and convicted felons, but also offering a tantalizing opportunity for communities to dispose of their habitually ill-behaved, unpopular, and dependent. While the average transportee to North America had been convicted of a specific offense, many communities used the policy as a welcome opportunity to disburden themselves of their most despised members. This was especially true in transportation’s early days, prior to its use being fixed and circumscribed in the Transportation Act. For instance, in 1656 one county official sent sixteen people to London for transportation without charges, trial, or conviction.²⁸ In a letter to his superior, Major-General William Boteler enumerates the reasons for their transportation: three had no employment and were “very drunken fellows and quarrelsome,” one, who had “a wife in London” had reportedly “wandered up and down this twelvemonth … wooing to two maids in this [county], and got monies of them… upon promise of marriage.” Four more were suspected highwaymen, and another kept a “lewd house.”

Remaining suspected offenses included abuse of power in the office of bailiff, reputed habitual domestic abuse (though this was not, at the time, a crime), being “a pitiful drunken wretch, every way as profane as the devil can make him,” being “a profane jester,” and “swearing.”²⁹ Boteler lists one Goddard Pemberton, giving no specific offense, but asserting that one is not necessary since he was “so notorious.” Finally, he caps the list with Paine Clarke,

²⁹ Thurloe, 632.
guilty of “scandalous… filthiness.”\textsuperscript{30} What all of Boteler’s transported misfits have in common is that they were clearly terrible members of their communities, resented by their more virtuous neighbors. Most of their offenses were not technically crimes, but rather cases in which individual citizens abused their neighbors’ trust, disrupted the peace, became burdens on their fellows, or behaved uncivilly – even despicably. Like later moral expulsions, the removal of these community members would likely have enjoyed considerable popular support locally.

A widely circulated 1609 pamphlet, “Nova Britannia,” expresses what was a common opinion in England during the seventeenth and eighteenth centuries, namely that the nation was experiencing an explosion in poverty, vice, and crime:

\begin{quote}
[O]ur land abounding with swarmes of idle persons, which having no meanes of labour to relieve their misery, doe likewise swarme in lewd and naughtie practises, so that if we seeke not some waies for their forreign employment, wee must provide shortly more prisons and corrections for their bad conditions . . . so that you see it no new thing, but most profitable for our State, to rid our multitudes of such as lie at home, pestering the land with pestilence and penury, and infecting one another with vice and villanie, worse then the plague it selfe: whose very misery drives many of them, by meanes to be cutte off, as bad and wicked members…\textsuperscript{31}
\end{quote}

This pamphlet invokes what would emerge as a common trope in discussions of the social benefits of transportation: the description of England as a diseased body, and of the vice-ridden poor as infected flesh that, for the good of the whole, could only be dealt with by excision. Not only are these “members” that need to be “cutte off” not contributing to their communities, but they are, notably, “bad and wicked.” They are not merely burdensome; they pose a positive

\textsuperscript{30} Ibid., 632. Notably, the scandalously filthy Mr. Clarke had also “spoken most scandalous words of the Protector,” but Boteler adds this overtly political offense almost as an afterthought.

moral threat. The excerpt also indulges another rhetorical trope common in transportation debates – moral defect as disease, here described as the multitudes’ pattern of “infecting one another with vice and villanie, worse than the plague it selfe…” Early modern transportation discourse displays a marked preoccupation with the likeness of immorality and poverty to disease. The transportable are gangrenous appendages that must be amputated, or they are illness-ridden excretions from a diseased body politic – foreign substances, in both metaphors, that are no longer of the same stuff that makes up the healthy body, and they cannot be allowed to remain.

Descriptions of other early transportees are no more flattering, but they do give a sense of what use authorities made of the policy. Prior to the 1718 Transportation Act that institutionalized transportation, transportees were chosen on a largely ad hoc basis, usually in relatively small, hand-picked groups. The selection criteria are illuminating. One Protectorate official writes to his superiors in London:

…[Y]ou would please to help me to a vent for those idle vile rogues that I have secured for the present… being not able to provide security for their peaceable demeanour, nor fit to live on this side… of our plantations. I could help you to two or three hundred at twenty-four hours’ warning, and the [counties] would think themselves well rid of them.

Authorities seized the opportunity to clear out their “idle vile rogues” and other unpopular residents. The magistrates of Edinburgh, for example, petitioned the Privy Council in 1662 to arrange for the transportation of a group of thieves and prostitutes who were creating

32 4 George I, Chapter 11.
33 Gardiner, 33-34.
disturbances in the city, though there is no record of a trial or even charges against them. Three years later, another Edinburgh faction offered to hire their ships to authorities, motivated by an eagerness to promote their own interests in the West Indies, and also this patriotic purpose:

… to free the kingdom of the burden of many strong and idle beggars, Egyptians, common and notorious whores and thieves and other disolute and louse persons banished or stigmatized for grosse crymes.  

Any “rogue” or “vagabond” was likely to be scooped up for transportation in the period between James I’s ascent to the throne and the passage of the 1718 Transportation Act. Such language singles out the poor, disorderly, and morally loose for transportation, often conflating the three.

The first laws allowing for transportation are contemporary with the Elizabethan Poor Laws, so it is unsurprising that the indigent are included in the inventory of transportable miscreants. After the Civil War, the poor and dispossessed were especially visible, a problem answered with the 1662 “Act for the Better Relief of the Poor of this Kingdom,” which included a provision allowing for the apprehension of any “rogue,” “vagabond,” or “sturdy beggar,” and authorizing justices of the peace in any county to have them transported if they were adjudged “incorrigible.” There is not a clear line between poverty and immorality in the Anglo-American tradition of poor relief historically, and this was certainly the case during the time when local officials were rounding up unwanted community members for exile beyond the

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35 Ibid., 144-145. “Egyptians,” or some variation on the term, had been used since the fifteenth century to refer (never kindly) to nomadic groups like “Gypsies” or Travelers. 39 Elizabeth Chapter 4, mentioned above, employs similar language.
seas.\textsuperscript{37} Virtually every discussion of the immoral character of English transportees includes some reference to the “idle” poor, depicted as lewd, drunken, irresponsible, dissolute, and often able-bodied, yet dependent.

Poverty, in transportation discourse, is depicted not as a misfortune or a social problem to be solved, but as a personal transgression meriting punishment – and a moral transgression at that.\textsuperscript{38} Often attributed to drunkenness or sloth, the pauper’s own responsibility for their dependence offends the community burdened by their presence. George Ollyffe, a prolific London political pamphleteer during the eighteenth century, offers this in support of transporting the indigent:

Yet whilst notwithstanding all the Punishment that can be contrived, till there be some effectual stop to put to the Vagrancy of our common Beggars, and other pretended compassionate Travelers, there will be still a Nursery of the Vilest Hands, who having no Edge for Work, and yet having many craving undisciplined Desires and nothing wherewithal to satisfy them…. Notwithstanding divers Laws made to confine them, the Nation is as much gall’d with them as ever; If there can’t be made room for them in Places that may be procured at home for the most punishing Work of Criminals, there is a very feasible way to clear the Nation of them; that is, by ordering that such as are not decrepit and decayed, who are able to Work, should be Transported to our Plantations, and sold for Slaves to pay their freight, or sent to be chained down to work in some Gallies for Guard of our Sease and Forts….\textsuperscript{39}

That Ollyffe suggests selling the poor into slavery in the colonies makes it clear that he views paupers as a different category of people from “the Nation;” they are people who can be enslaved and certainly not his fellow community members. The author assumes a sympathetic audience,


\textsuperscript{38} See, for example, Beer, 37, 111-112, 143. A Victorian history of vagrancy is especially instructive, as it not only offers a comprehensive summary of English poor law up to 1887, but is also saturated with this moralizing tone: C.J. Ribton-Turner, \textit{A History of Vagrants and Vagrancy, and Beggars and Begging} (London: Chapman and Hall, 1887).

\textsuperscript{39} Ollyffe, 14-15.
using the language of “we,” not “I.” Speaking of the seas and plantations as “ours” is both inclusive of the audience and exclusive of the poor under discussion. Assuming implicit distinctions between true community members (us) and those whose membership represents a mistake to be corrected (them) is a key element in justifying moral expulsion, one that cuts across spatial, cultural, and temporal divides.

Ollyffe here invokes the enduring image of “sturdy beggars” as thoroughly corrupt characters; ruled by appetites they cannot afford to support by work, they have no scruples about foisting those costs onto their neighbors. The able-bodied poor, like those Ollyffe so vividly describes, represent an affront to the existing social order: by living without working for their maintenance, they usurp the privilege of leisure, reserved to the aristocracy. By placing the burden of their existence on their parishes, they also insult their equals, assuming an illegitimate entitlement to live on the labor of others. This image of the poor describes them as not only morally blameworthy people, but also as bad citizens and bad neighbors. A few decades later, Blackstone pronounces that “[i]dleness in any person whatsoever is also a high offence to the public economy.”

The people transported from England were no better liked by their new neighbors in the colonies than they were by the people of their home communities. As in Nova Britannia, the image of the body politic looms behind both popular and official historical discussions of convict transportation in North America. Rhetoric surrounding transportation adopts the imagery of disease, the moral illness borne by those transported posing a serious danger from which the public must be guarded. This danger arises not only from any possible harm resulting from

40 Blackstone, 162.
crimes that might later be committed by the convict if not transported or executed, but primarily clung to the idea of “moral contagion.” Both critics and proponents of convict transportation depict not merely common concerns about crime, but an implicit belief in the existence of an identifiable “criminal class” menacing the shared good of British society.

Richard Whately, Archbishop of Dublin and a prominent critic of transportation, likens the presence of transported convicts to exposure to an infectious disease, describing the convicts as being “…sent to inoculate with crime an infant nation.” Jeremy Bentham, too, speculates as to the possible “moral effects” remaining on the former convict-receiving colonies of North America after a century’s exposure to “all possible kinds of depravity” from “this early inoculation of vice.” Similarly, a nineteenth century historian of Australian transportation wonders “…[w]hat inducement a right-minded emigrant has to take his family within the moral contagion of these colonies….” Envisioning the political community as a single biological whole emphasizes unity of purpose and identity, reinforces a purportedly natural basis for the existing social order, and creates a clear and unequivocal picture of what a good – or healthy – state ought look like. It discourages deviation from the standards of the community, depicting it as an illness or disorder requiring correction; the failure to cure civic disease threatens the life of

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41 See, for instance, “Convict Discipline and Transportation: Further Correspondence on the Subject of Convict Discipline and Transportation.” *Accounts and Papers of the House of Commons* (London: William Clowes and Sons, Stamford Street, 1851): 204; Richard Whately, *Substance of a Speech on Transportation, Delivered in the House of Lords on the 19th of May, 1840* (London: B. Fellowes, Ludgate Street, 1840); John Stephens, *The history of the rise and progress of the new British province of South Australia: including particulars descriptive of its soil, climate, natural productions, &c. ... Embracing also a full account of the South Australian Company, with hints to various classes of emigrants, and numerous letters from settlers concerning wages, provisions, their satisfaction with the colony, &c.* (London: Smith, Elder, and Co., Cornhill, 1839).


43 Whately, 118.


45 Stephens, 3.
the community just as neglecting a physical disorder could kill the biological body. Even the term “membership” reflects this way of understanding community. Archaic usage of the word “member” referred to any part of the physical body, from arms and legs to reproductive organs. Thus, the body politic could be “dismembered,” or maimed by civil strife.

Employing the language of the body politic and disease also conveys a visceral sense of revulsion. Such a response is not only an emotional experience, but also implies a normative judgment. The repulsive is something unlike the observer, something intolerable. The experience of revulsion is closely related to the senses, and many critics of transportation use vivid sensory imagery to express it. A particularly illuminating debate takes place in the pages of the *Maryland Gazette* of 1767, between “The Author” and “A.B.” Initially a dispute about whether or not convicts had brought a literal plague of “jail fever” (typhus) with them, threatening to infect their colonist neighbors, the lines between metaphorical moral sickness and literal physical illness quickly blur, a common theme in North American transportation discourse. After reaching no agreement on the facts of the typhus question, The Author suggests that a quarantine law remain in effect “…whilst these Vermin are forced upon Us.” The image of convicts as animalistic disease vectors then gives way to another disgust-provoking metaphor, as The Author bemoans that “the Mother-Country shou'd disgorged the foulest Pollutions of her Jails upon Us.” This is a thoroughly biological, thoroughly disgusting image – England is a diseased body, regurgitating the revolting masses that the transportees seemed to their neighbors.

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47 *Maryland Gazette*, Annapolis, Maryland. August 20th, 1767.
48 Bentham, similarly, would later describe transportees to New South Wales as “an excrementitious mass.”
Benjamin Franklin published several objections to being forced to receive transportees. One is particularly evocative of the interaction of body politic imagery, the language of infectious moral disease, and that of bodily disgust:

These are some of thy Favours Britain. Thou art called our Mother Country; but what good Mother ever sent Thieves and Villains to accompany her children; to corrupt some with their infectious Vices and murder the rest? What Father ever endeavour’d to spread the Plague in his Family? We do not ask Fish, but thou gavest us Serpents, and more than Serpents! In what can Britain show a more Sovereign contempt for us than by emptying their jails into our settlements; unless they would likewise empty their Jakes on our tables!49

Franklin goes so far as to lead his readers to envision English night-soil being heaped upon the tables where good colonial families eat; he could scarcely have chosen a more disgusting metaphor. These recurrent depictions of a convulsed body forcefully spewing out disease-ridden, stinking, repulsive filth demonstrate a keen public awareness of the expulsive role of convict transportation – of England seizing its opportunity to “drain… the Nation of its offensive Rubbish.”50

The emphasis on revulsion in the moral disease imagery surrounding convict transportation is significant because it emphasizes the total otherness of the expelled. The transportees described in early modern pamphlets and newspapers are depraved individuals. Their moral sickness extends beyond the commission of whatever bad deed earned them transportation, but is an indication of a thoroughly rotten character. Public discourse about

49 Benjamin Franklin, *Virginia Gazette*, May 24th, 1751. Comparisons of transportees to animals are also very common. Franklin elsewhere compares them to rattlesnakes, Bentham to wolves and foxes. Making the outcast into an inhuman animal recalls the Medieval practice of referring to outlaws as “wearing the wolf’s head.”

50 Ollyffe, 12.
transportation consistently depicts the transported as both a symptom of disorder in the body politic and also as a dangerous source of moral contagion.

Two Models of Transportation: Reform versus Disposal

With the passage of the 1718 Transportation Act, transportation could be imposed directly without the offer of a conditional pardon. This change ushered in the era of convict transportation as the large-scale institution it would remain for over a century and a half. Before the American Revolution forced Great Britain to send its convicts to Australia, an estimated 50,000 convicts were transported to North America, with the vast majority going to Virginia and Maryland. That Britain transported tens of thousands of convicts to North America long before undertaking its famous convict colonization project in Australia is not well known among the American public; the United States has never embraced its convict-receiving colonial past as Australia has done. Australian transportation took on a very different character from its North American predecessor. While superficially similar, transportation to North America differed in key aspects from its Australian successor, most importantly in the absence of penal colonies.

Australian transportation focused primarily on “sending to,” while North American transportation was more concerned with “sending from.” The distinction is an important one. The penal colonies established on the Australian continent in the late eighteenth and early nineteenth centuries focused on repairing the moral and civic defects of criminal transportees, rather than treating those flaws as immutable grounds for exclusion. Centered upon what occurs

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after the convict is transported, the penal colony model represents a carefully planned process designed to transform a morally defective individual into a reformed citizen.\textsuperscript{52} During the days of Australian transportation, systems of convict re-education abounded. Blending education, religious instruction, and the experience of hard labor, each offered another strategy for rooting out the source of corruption and replacing it with the virtues of industry and fortitude needed to build a new English colony in Australia.\textsuperscript{53}

Ideally, the result of such efforts would be to prepare the reformed convicts to rejoin the community from which they had been expelled, or at the very least to help them become contributing members of the new political communities growing in the Australian colonies. This model assumes a continuing tie of obligation between the damaged member and the larger body politic. Those expelled, in this model, are redeemable and forgivable. Further, not only is it possible to redeem them, but the penal colony model of transportation assumes an \textit{obligation} on the part of the larger community to at least attempt to forgive and reintegrate damaged members. While earlier constructions of convicts rely upon assumptions of inherent defect that makes redemption difficult, if not impossible, the penal colony model recognizes a more robust and enduring tie between individual and community.

\textsuperscript{52} As many opponents of transportation asserted, whether or not this actually occurred was doubtful. Regardless, the theory behind the penal colony differs from the theory underlying exilic transportation.

\textsuperscript{53} A sampling of the many works include: William Howitt, \textit{Letters on transportation, as the only means of effectual convict reform: partly reprinted from the "Times" the "Morning Advertiser", and "Morning Star" ; also letters on the revolting cruelties practised under the game laws, showing these laws to be one of the most prolific sources of convictism} (London: A.W. Bennett, 1863); \textit{Convict Discipline and Transportation, Correspondence on the Subject of Convict Discipline and Transportation}; Sir William Molesworth, \textit{Speech on Transportation, Delivered in the House of Commons on the 5th May, 1840} (London: H. Hooper, Pall Mall East, 1840); Colin Arrott Browning, \textit{England’s Exiles, or, A View of a System of Instruction and Discipline: as Carried into Effect During the Voyage to the Penal Colonies of Australia} (New York: Gale, Making of Modern Law, 2010).
By contrast, the earlier system of transportation to the North American colonies made no pretense of reforming offenders, and the sending society in no way concerned itself with the expelled person’s future. During its first centuries, little or no attention was paid to where the transportees went, so long as they “abjured the realm.” These early transportees, though in many cases only formally sentenced to a limited number of years’ expulsion from England, were not being prepared for an eventual return. North American transportation served a single purpose, and that was to protect the home community by excising its troubled parts. Transportation’s defenders openly lauded the policy’s efficiency at purifying the body politic, rooting out the vicious and making it possible for their infected communities to repair themselves.  

Currently, what scholarly attention transportation receives is largely devoted to its history as a tool of economic expansion and empire building. For instance, economic histories note that the later colonies at Botany Bay produced the hemp and timber necessary for maintaining England’s maritime supremacy. Additionally, the desperate need for labor in the North American colonies is well documented. The economic effects of transportation are important, but the relationship between the results and the intentions behind instituting the policy in the first place is easily overstated. In the last century of transportation (to New South Wales), a shift in public opinion appears, expressing a perception that excess laborers existed in England and that shipping them to the colonies was economically beneficial. This was not the case in the beginning, however. English economic thought in the sixteenth, seventeenth, and eighteenth centuries did not favor giving up able-bodied workers who could have benefitted domestic

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54 Ollyffe, passim.
55 Atkinson, 88-115.
production – the transported convicts were not viewed by the sending communities as anything remotely resembling a valuable (or even salvageable) resource to be invested.

It is certainly true that the transported convicts offered a source of cheap labor for the colonies first in North America and later in New South Wales and Van Dieman’s Land, but it is also important to note that receiving colonies were extremely reluctant – in many cases completely unwilling – to accept the “the scum of people” the mother country sent them, regardless of their labor situation.\(^{56}\) From a historical perspective, the economic benefits of transportation are obvious, but at the time the policy was instituted and for some time after, this was not at all the case. While transportation certainly became an important empire-building tool for England, especially in the nineteenth century, transportation to the North American colonies and its predecessors were firmly focused on the benefits of expulsion. As the public rhetoric surrounding the transportation project shows, convict transportation was not merely a method of dealing with individual criminals – it was an attempt to purify the body politic.

**Conclusion: The Liberal Community (Minus the Poxes, Foxes, Wolves, and Polecats)**

Reviewing these public discussions of transportation yields two types of justification for expelling the unwanted. First, there is the simple argument that removing the offending minority is just because it protects the interests of the majority in belonging to a society made up of morally sound (or at least morally similar) members. This is simply weighing the good of the few versus the good of the many. On liberal grounds, privileging the will of the majority is not necessarily illegitimate. However, this justification implies that membership is not such a

\(^{56}\)Bacon, passim.
fundamental right that it cannot be overruled by majoritarian preferences. The majority, in this case, identify certain members of the community as being morally inferior to such a degree that they are judged to be of a totally different moral nature from themselves. Assuming this to be sufficient reason to refuse to tolerate their continued equal membership, the community expels them using coercive means only available to government, like sheriffs, justices of the peace, the Privy Council, and other government institutions of varying levels.

The second justification is built on a concept of “essence.” In *Stories of Peoplehood*, Rogers Smith elucidates this idea, which he terms “ethically constitutive stories,” explaining its role as a tool of community building. Smith writes,

> The meaning of this term [ethically constitutive stories] may be less intuitively clear…. It refers to a wide variety of accounts that present membership in a particular people as somehow intrinsic to who its members really are, because of traits that are imbued with ethical significance.\(^5\)

Smith discusses ethically constitutive stories that rely on particular narratives about “culture, religion, language, race, ethnicity, ancestry,” or “history;” in this case, “Englishmen” are presented as possessing an inherently virtuous character – it is what defines who they “really are.” The transportees, described as disorderly, corrupt, dependent, and lewd, can be expelled because they are not true members of their communities.

Underlying all of the colorful denunciations of the transportee is an assumption that such a thing as a “true” Englishman exists, and that they are defined by the possession of a certain particular nature or essence, one that is virtuous, prosperous, and independent. This aspect of the true English character is definitive: lacking it is grounds for re-definition as something other than

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a real member of the category; being morally virtuous is an inborn characteristic that all members of truly English communities share in common. The exclusion of transportees outlines the criteria for belonging, criteria that cannot be met by choice but must be met by nature. Such a concept of what is “shared” by the community in question poses obvious problems from a liberal standpoint. Community membership predicated not on the voluntary adoption of particular moral commitments, but on the possession of an un-chosen (and involuntarily acquired) moral character is hardly open to newcomers, nor is it voluntary.

This assumption that the defining elements of membership inhere in a person’s nature (or do not) may explain the dearth of attention that transportation receives from political theorists writing during its era. While a handful of liberal thinkers write of transportation, its relative absence from the writings of contemporary canonical thinkers is remarkable. After all, transportation took place during the very early days of what would come to be called “liberalism,” while political philosophers were actively questioning to what extent government could legitimately interfere with individual liberties. Meanwhile, the various levels of English government were busily (in many cases even eagerly) sorting out the transportable from the fit and shipping them away from their homes, property, families, and social networks – a considerable interference by any measure. 58 Nonetheless, only Jeremy Bentham, Edmund Burke, and Alexis de Tocqueville comment on the phenomenon, and then only briefly. For the most part, they do not make principled arguments about the legitimacy of transportation, instead dwelling on its effectiveness and cost. All three accept the justification from majority interest, extolling the benefits of removing the corrupt from their otherwise pure communities. An image

58 Locke protests the banishment of religious dissenters in his Third Letter Concerning Toleration.
emerges in their accounts of the transportee as representative of a distinct class of flawed members, clearly identifiable and fundamentally different from their neighbors.

Edmund Burke does not substantially comment on transportation until after the American Revolution interrupted England’s access to the North American colonies, though he was actively involved in choosing a new destination for the growing Empire’s unwanted convict class. Burke summarizes his opinion on transportation in a letter to William Eden:

Transportation always seemed to me to be a good expedient for preventing the cruelty of capital Punishments, the danger of letting wicked people loose upon the publick, or the infinite charge and difficulty of making those useful, whose disposition it is to be mischievous.

Here, as in his Parliamentary speeches, Burke’s primary concerns are with practical matters. While Burke found transportation more humane than execution, he nonetheless expresses reservations about its inability to discriminate between serious and trivial crimes, noting that the same level of suffering results from each. Notable in Burke’s statement, however, is his judgment that those facing transportation have reached this position because they possess a certain “disposition” “to be mischievous.” Here, again, the “wicked people” are distinct from “the publick.” They possess the wrong nature, and so they are redefined as something other than members, something from which members must be protected. Once so redefined, expelling them scarcely requires further justification.

Bentham makes no pretense of distinguishing between “transportation” and exile. Unconvinced by the benign name, Bentham recognizes the policy for what it is, referring to “transportation... that is to say, banishment.” Bentham’s personal investment in seeing his Panopticon replace other penal models leads some to doubt the sincerity of his published views of alternative practices, including transportation. Nonetheless, his comments remain instructive. Bentham’s objections hinge on transportation’s effectiveness as a punishment, not its place in a legitimately liberal society. He opposed transportation, arguing that it failed to meet any of the purposes of punishment and that it represented an abuse of authority because government policies forced convicts whose sentences had expired to remain in their former penal colonies. Here, Bentham makes a rare argument against transportation based in principle, rather than upon concerns about cost or effectiveness, but this is the extent of his commentary on the subject. He is markedly pessimistic about the futures of the transported, describing Australian transports as “…a society of refractory and wily profligates – a society of wolves and foxes.” Elsewhere, he describes them as “an excrementitious mass,” again, distinct from the citizens who must be protected from them.

Tocqueville and Beaumont include an essay on penal colonies in On the Penitentiary System, in which they evaluate transportation as a possible policy for France, ultimately finding it

[64] Bentham, Works, 490-495.
unsuitable. On the matter of penal colonies, the authors are less than sanguine, though they see the advantages of transportation to the sending community. Tocqueville and Beaumont immediately note its expulsive potential, observing:

The system of transportation presents some advantages which we do not hesitate to acknowledge.... [O]nly transportation... frees society from the presence of the guilty. The imprisoned criminal may break his chains; restored to liberty on the expiration of his sentence, he becomes an object of well founded fear to all who surround him; the transported criminal re-appears but rarely in his native country; with him, a fertile germ of disorder and new crimes is removed. This advantage is undoubtedly great; and it cannot but strike the thinking part of a nation, with whom the number of prisoners is increasing, and in the midst of whom already rises a whole people of malefactors.

This passage includes a hint as to how its authors view the “whole” rising “people of malefactors.” While holding that it may be possible for them to reform themselves if they commit to membership in their new communities, they flatly reject any possibility of reintegrating transportees into their original homes. Tocqueville and Beaumont, like Bentham, speak of transportees as a distinct class of person, different from their fellows, and best sent as far away from them as possible.

The transportable were precisely the people bracketed by early liberal theorists – the “quarrelsome and contentious,” irrational “polecats,” “foxes,” and “wolves” of Locke and Bentham. Lacking the reason and sociability of those who construct and perpetuate the social contract, they are drunken, lewd, and burdensome to their neighbors. In short, they do not fit the mold of the liberal citizen, yet they continue to be born into liberal societies that have no place

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67 Beaumont and Tocqueville, 131.
for them in their models. These few thinkers who do comment on transportation clearly do not identify with the transported – and more importantly, do not describe a citizenry with space for them. Burke, Bentham, and Tocqueville assume a discrete and identifiable criminal class separate from the core constituents of the liberal polity. The “sort” of people these early liberal theorists envision being transported are fundamentally unlike their neighbors, who are capable of building and maintaining a liberal society. Is it so surprising, then, that liberal societies, in practice, fail to accommodate those members excluded from them in theory?

Liberal aversions to exile are best articulated by Benjamin Constant, one of the rare early liberal thinkers to give the issue a theoretical treatment.68 Constant could scarcely have ignored the close relationship between exile and the arbitrary exercise of power, given his familiarity with de Staël’s exile ordeal. While he qualifies his condemnation of exile with the provision that the right procedures for imposing it may render it legitimate, Constant’s lengthiest treatments of exile clearly depict it as a natural ally of arbitrary rule.69 “All political exile,” he concludes, “is political abuse.”70 Constant’s suspicion of exile resonates today. Constant’s implication that there are some types of exile that are “political” and some that are not reflect the common intuition that matters of crime and criminal law are in some way fundamentally different from politics. As this project argues, any forcible means of membership control is inherently political, drawing into question Constant’s implication that non-political, and therefore non-abusive or non-arbitrary, forms of exile exist.

68 Constant, “The Liberty of the Ancients,” 311, 316. Constant regards exile with ambivalence. Despite acknowledging its affinity with a form of political life incompatible with modern liberty, he is reluctant rule it entirely illegitimate as a tool of liberal government.
70 Constant, “The Liberty of the Ancients,” 322.
The intuition that exile is incompatible with liberal forms of government reflects the longstanding suspicion that exile is inseparable from the arbitrary exercise of power. In the era of mass convict transportation, such objections to the legitimacy of expelling unwanted members were circumvented by in two ways. First, transportation discourse strips away the stain of arbitrariness from exile by portraying it not as an affirmative matter of state agency, but as a natural consequence of something inherent in the people expelled. Moralizing exile solves the arbitrariness problem by locating the cause of banishment within the person banished – specifically, in the person’s moral character. A response that is deserved is not arbitrary, but justified.

As the study of transportation discourse here illustrates, however, the Anglo-American tradition has a long history of constructing moral character as an immutable, un-chosen feature. Transferred convicts were re-constructed as morally ineligible to be true Englishmen, a process reliant on an assumption of a shared, particularly English “moral essence.” Basing assessments of the authenticity of a person’s membership on any essential characteristic is problematic from the perspective of liberal commitments, but basing it on a characteristic constructed as un-chosen is patently illiberal. Moral essentialism as justification for expulsion is on clear display in the convict transportation discourse. The next chapter will explore in greater detail how a less obvious form of this principle continues to drive exile in America today.

Transportation resisted arbitrariness challenges by a second method, by tacitly accepting an assumption like Constant’s – that some forms of expulsion are non-political, and therefore permissible. The discourse surrounding transportation is uniquely illuminating in that it

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71 While Constant’s later discussion of the association between the two is better developed, it is the same suspicion expressed in the Magna Carta’s limitations on monarchical power to exile.
simultaneously celebrates the virtues of expelling the unwanted and also attempts to de-politicize those expulsions by linking them to notions of crime and criminality. Linking expulsion to the criminal justice system shifts the question of exile from a substantive one (Is exile permissible under this form of government?) to a merely procedural one (What due process is necessary to banish?). Moving exile into the realm of law circumvents the question of arbitrariness bracketing the question of whether any process renders exile legitimate. The practice of depoliticizing exile by cloaking it in the language and institutions of law was an innovation of the transportation project, and it remains an effective shield for latter day exile practices. The next chapter will take up the ideas established here, illustrating how the same exilic logic that animated convict transportation continues to drive expulsions in American communities today.
Chapter III

Moral Exile and Liberal Community

“We can say that anything which is in agreement with the inner character of a community relationship constitutes its law, and will be respected as the true, essential ‘will’ of all those bound together in it.”

Ferdinand Tönnies, *Community and Civil Society* ¹

As this chapter will illustrate, American communities regularly use the apparatus of government to enforce judgments about moral fitness for membership via expulsion – what I refer to as “moral exile.” Is this merely a failure of American polities to live up to the tolerant ideals enshrined in the Constitution that governs them? Certainly, it is possible to argue that the continued existence of moral exile represents an aberration. Contemporary cases of moral expulsion are not, however, isolated or even rare occurrences. Moral exile remains a commonplace event in twenty-first century American communities. Nor are these latter-day instances of moral banishment holdovers from a distant past. Moral expulsion remains contested in courtrooms at the county, state, and federal levels across the United States, and while some districts reject the practice, others enthusiastically embrace it.² This ongoing use of moral exile casts doubt on the image of moral expulsion as an anachronistic anomaly and forces us to consider the alternative: not only is moral expulsion not a departure from liberal democratic commitments, but that it is a tool by which they are preserved.

² George H. Hartwig, District Attorney of Houston County, Georgia, issued a statement outlining the benefits that banishment brings. Additionally, Hartwig’s office issued a press release boasting that since banishment was adopted in 1998, more than 500 people had been banished from Houston County. Becky Purser, “More Than 500 People Have Been Banished from Houston County,” accessed 03/31/2014 at www.houstonda.org/local.
The last chapter examined the uses to which a budding liberal society put moral exile in the past. This chapter will build on that foundation, illustrating how the same ideas that drove the open expulsion of the morally undesirable in the era of convict transportation persist in American political communities today. In this chapter, I outline the unbroken tradition of moral exile in America and analyze its significance to the communities employing it. Tracing the history of political expulsion through the nineteenth and twentieth centuries, clear patterns emerge that endure into the twenty-first. Tensions between commitments to toleration and discomfort with moral difference in the private sphere erupt in cases of moral exile time and time again, though they are seldom labeled as such. As in the discourse surrounding transportation, present-day moral expulsions confuse a shared commitment to certain moral principles with the possession of the correct moral character.

Legal constructions like “crimes involving moral turpitude,” “good moral character” requirements, and “likely to become a public charge” exceptions to citizenship reveal how moral judgment operates as a membership control device in immigration law. Similar principles emerge in latter-day banishment orders leveled against citizens in state, county, and municipal law. The chapter will conclude with an examination of present-day iterations of moral exile in American communities. An analysis of public discourse surrounding policies that expel

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3 While there are good reasons to be wary of dividing the world into public and private spheres, I use the word here to describe those aspects of life that a particular society elects to place beyond the reach of coercive government control, or within which government control is highly restricted. One example is family life. While Americans are largely free to assemble families of their own design, not all facets of family life are immune from regulation. Currently, bigamy is criminalized in many jurisdictions, and parents do not have absolute dominion over their children. Often the activities that comprise the private sphere correspond to rights of association and expression, but may encompass much more. Singapore, for instance, has a much more circumscribed private sphere than does the United States. This is not to imply that some Platonic form of a “the private” exists; private and public are politically determined and mutable.
unwanted residents from their home communities reveals that the ideas and emotions motivating early modern moral exile continue to operate in the moral psychology of American communities.

**Exile in America: Open Affirmation or Quiet Discomfort?**

The U.S. Constitution does not explicitly prohibit exile; in fact one of the few Supreme Court cases to ever address the subject, *Cooper v. Telfair*, explicitly acknowledges the power of banishment as one reserved to government.4 Stipulating that the power ought only to belong to the legislative branch and not the judicial or executive, the Court of 1800 unequivocally affirms that the power of banishment is a legitimate tool of government:

> But the power of... banishment does not belong to the judicial authority...; and yet, it is a power that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested or transferred, without an express provision of the constitution.5

Justice Paterson’s assessment not only justifies retaining banishment, it asserts that it is perfectly compatible with the Constitution. Paterson’s efforts to identify the proper authorities to wield the power of exile reflect the idea’s co-evolution with liberal democracy. The Justice finds no inherent conflict between American commitments and exile, but revives the Medieval fears of arbitrary government expressed in the Magna Carta, emphasizing that the power’s legitimacy rests upon its belonging to the legislative branch only, the most representative of the will of the people.

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5 Justice Paterson’s concurrence, *Cooper v. Telfair*. 

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Paterson is not alone in this conclusion. In the same case, Justice Cushing also lends his support to the legislature’s right to banish:

The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power… it, naturally, as well as tacitly, belongs to the legislature.6

The Justices’ dicta may strike today’s readers as surprising, considering the atavistic air surrounding exile, but their comments echo liberal thinkers like Locke and Constant. Locke, like Paterson, suggests that the power to banish inheres in the social compact. He notes without further comment that anyone who has consented to belong to a political community can no longer dissolve his obligations to it, with a few exceptions, one of which being if “…some publick Act cuts him off from being any longer a Member of it.”7 Constant, too, considers the legitimacy of exile. His reservations, like those of so many before him, grow from a suspicion that the use of exile is characteristic of arbitrary government. For Constant, the remedy lies in ensuring that it is only imposed with due process of law.8 Placing the power beyond the reach of the (at least theoretically) least democratic branches of government reflects the same impulse.

The facts of Cooper v. Telfair are unique, echoing the law of a much earlier era. The case involved a lawsuit against one Basil Cooper, a citizen of the colony of Georgia prior to the Revolution. Cooper, who remained loyal to “his Britannic Majesty,” was banished and attained for treason under an act of the Georgia legislature before the colony became part of the United

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6 Justice Cushing’s concurrence, Cooper v. Telfair.
States. Because the Georgia constitution contained no provision prohibiting either bills of attainder or banishment, the Court upheld the decision. Similar cases are unlikely to arise again, for obvious reasons. Still, *Cooper v. Telfair* has never been overturned. While the Court has ruled exile from the nation impermissible (especially when such action would result in statelessness), cases of banishment from sub-national polities continue to arise with surprising frequency. The U.S. Supreme Court has been curiously reluctant to rule on the subject. In *Loving v. Virginia*, for instance, the Court sidesteps commenting on an important provision included in the original decision, allowing the couple at the center of the case to avoid imprisonment on the condition that they leave the state of Virginia for twenty-five years.⁹

This avoidance is symptomatic of broader discomfort with the idea of exile among Americans. Present-day iterations of exile, like intrastate banishment, conditional pardons and orders forbidding presence in certain neighborhoods, tend to obscure the political aspects of banishment, expressing an instinctive resistance to acknowledging that exile continues to exist in America.¹⁰ This raises the same questions surrounding Amsterdam’s “scum villages,” encountered in the last chapter. The reluctance to acknowledge the continuing existence of political expulsion suggests a widely-held intuition that exile and liberalism are not compatible with one another. Clearly, foundational liberal thinkers like Locke and Constant do not agree.

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⁹ *Loving v. Virginia*, 388 U.S. 1 (1967). Had the couple accepted this offer and allowed themselves to be banished from the state, the case would never have received the attention that made it a prime candidate for being a Supreme Court case. These state of Georgia is currently home to an enormous number of banishment cases each year, but the Supreme Court has declined to hear a 2008 case that raised the question of intrastate banishment’s constitutionality. Brief of Respondent-Appellee at 24, *Terry v. Hamrick*, 663 S.E.2d 256 (Ga. 2008) (No.S08A0170), cert. denied, 129 S. Ct. 510 (2008).

¹⁰ Ordinances in many American cities (including Seattle, New York, Los Angeles, and Las Vegas among others) allow courts to issue civil orders that forbid residents from entering neighborhoods that have been designated areas of prostitution, drug activity, or gang activity.
Nor do Tocqueville, Burke, and Bentham, judging from their remarks on transportation.\textsuperscript{11} What principles underlie this response? The other chapters of this project explore this question as it arises in the context of different types of expulsion, but this chapter will begin answering it by examining the use of moral exile in America today.

**Moral Exile in America**

The idea of shipping off the morally deficient is not an alien one to the American tradition – in fact, it has its roots in the very earliest days of the nascent U.S. Even while (grudgingly) receiving tens of thousands of rejected Englishmen, the colonies set to work instituting their own systems of banishment. The movement from township to township (or “warning out”) of paupers is well documented, but the expulsion of “unfit” members extended to religious dissenters, rabble-rousers, and generally unsavory characters as well.\textsuperscript{12} Nan Goodman documents the use of banishment in the North American colonies, an event that occurred with surprising frequency.\textsuperscript{13} Colonies banished disorderly members for offenses like “contempt of authorities” or sending slanderous reports of the colony back to England. One often-quoted exile, “Captain Stone,” was banished for calling a magistrate “not a justice but a just-ass.”\textsuperscript{14} The Puritans were prolific banishers, expelling hundreds, perhaps thousands, from Plymouth Colony

\textsuperscript{11} Tocqueville, in fact, makes note of clear parallels between transportation and exile, and comments on the advantages of exile. Beaumont and Tocqueville, 133.


alone.\textsuperscript{15} The Puritan banishments, while at times for worldly offenses, often responded to moral infractions like lascivious behavior, prostitution, and promulgating heretical views.\textsuperscript{16} Two of the era’s most famous exiles, Roger Williams and Anne Hutchinson, were banished from the Puritan Massachusetts Bay Colony.

The Puritan colonies, like any community defined by creed, are clear examples of Oakeshott’s enterprise associations. They existed for the purpose of perpetuating a community living by the principles of their religion. Naturally, those members who threatened that purpose, or the solidarity that supported the mission, could not be tolerated. In such a society the presence of exile is not surprising. While such open, formal colonial banishment ceased with the revocation of the Bay Colony’s charter and re-assertion of Crown power from 1684 through the early 1690’s, the “warning out” of paupers and vagrants would continue. Public discourse regarding poverty, or “pauperism” as it was more often called when referring to a chronic state, continues the older colonial and early modern English tradition of both moralizing poverty and legitimating expulsion as a response to it.

At present, non-citizens, and even non-native-born citizens, face dangers from moral exile from which the native-born are protected.\textsuperscript{17} While aliens are also subjected to banishment at sub-national levels, immigration law empowers the U.S. government to revoke citizenship on moral grounds.\textsuperscript{18} Immigration law openly posits “good moral character” as a condition for U.S. citizenship, a criterion that the nation has the luxury of applying to those seeking membership, if


\textsuperscript{16} Goodman, 2-4.

\textsuperscript{17} As will be discussed in the next chapter, this has not always been the case, and it may not always be so in the future.

\textsuperscript{18} This will be explored in greater detail in Chapter 6.
not to native-born members.\(^{19}\) The requirement is a vague one, open to abuse. For instance, the “good moral character” requirement was used to deny naturalization to gay and lesbian non-citizens before the passage of the Immigration Act of 1990.\(^{20}\)

As Emma Goldman’s case demonstrates, immigration law offers a particularly unvarnished picture of how moral judgment and membership control operate together in U.S. citizenship policy. In the realm of immigration, American authorities make demands upon the characters of would-be or naturalized citizens that they cannot (openly) make on the native-born. Arguably, conditioning acceptance upon good moral character is the best option in the face of the brute fact that states cannot admit all would-be members. Certainly turning people away on the basis of their actions is far more justifiable on liberal democratic grounds than for reasons of race, creed, or other ascriptive characteristics. However, a brief examination of how morality is constructed in the practice of immigration control reveals the same, ultimately illiberal, essentialism at work in earlier expulsion policies.

The early twentieth century saw this moralized membership control emerge in the evaluation of alien deportability on the grounds of the LPC (liable to become a public charge) exception to admission.\(^{21}\) Because admission to the territory confers a greater level of constitutional protections (including certain due process requirements in removal proceedings), the distinction between being an admitted non-citizen and one seeking admission is an important one. The

\(^{19}\) Immigration and Nationality Act, 8 U.S.C. § 1427 (a).
\(^{21}\) The LPC exclusion was introduced in the 1882 Immigration Act, but the widespread abuse of it to police the morals of residents of alien birth was at its height during the 1920s. Mae Ngai offers a more detailed account of this in *Impossible Subjects: Illegal Aliens and the Making of Modern America*. 77-86.
1920s saw an upsurge in the use of the LPC provision to police the morals – and especially the sexual morals – of admitted non-citizens. Construing certain “symptoms” of moral unsoundness appearing after admission as evidence that the non-citizen was liable to become a public charge at the time of entry, immigration officials created a legal fiction that allowed them to consider the unfortunate subjects of this process to have never entered the country at all, by virtue of their newly-discovered retroactive inadmissibility.\textsuperscript{22} In this application of the LPC exception, the idea of an essential, pre-political character definitive of “true members” re-emerges.

Mae Ngai, in her \textit{Impossible Subjects: Illegal Aliens and the Making of Modern America} documents several cases in which women who bore children outside of wedlock, were divorced or abandoned by their husbands, or cohabited with men outside of marriage were retroactively found “inadmissible” under the LPC fiction and summarily deported, despite having lived lawfully and independently in the United States for years.\textsuperscript{23} The idea that certain disapproved actions indicated a likelihood to become dependent on the community, even in the absence of any record of actual dependence, shows the continuing, moralized conflation of poverty, dependence, and sexual deviance. More importantly, it expresses a vision of what a real American citizen is: prosperous, chaste, and obedient to traditional family structures and the rigid gender roles underlying them. Though unable to exercise such power over native-born moral non-conformists, the LPC exception allowed authorities to root out new members whose moral characters challenged established identity narratives.\textsuperscript{24}

\textsuperscript{22} This is the same logic at work in Singapore’s more recent expulsions.
\textsuperscript{23} Ngai 2004, 77-86.
\textsuperscript{24} This power to police sexual morals did reach to some female native-born citizens, however. Until 1922, women derived their citizenship from their husbands and marriage to non-citizen men (and especially men of “inassimilable” races) constituted grounds for expatriation.
The 1930s saw a decline of such abuses of the LPC exception. Immigration law, however, still provides an outlet for the desire to purge those admitted members who are later determined to be “undesirable” from American communities. While for most purposes, naturalized citizens are indistinguishable before the law from the native-born, the past decades have seen that picture become further complicated in potentially far-reaching ways. Because the Immigration and Nationality Act (INA) requires “good moral character” as a qualification for naturalization, naturalized citizens are vulnerable to retroactive findings of ineligibility if they are deemed to have lacked good moral character at the time of their naturalization.25

Both the “good moral character” requirement and the category of “crimes involving moral turpitude” that would come to control the moral eligibility of would-be Americans arose from an attempt to combat the “dumping” of transported convicts from other nations, beginning in 1788, when the Continental Congress finally recommended that the several states enact laws prohibiting “the transportation of convicted malefactors from foreign countries in to the United States.”26 In 1866, President Andrew Jackson issued a formal statement via Congress “protesting against pardons by foreign governments of persons convicted of infamous offenses, on condition of emigration to the United States.”27 Similar sentiments appear in the 1875 Immigration act, and an 1888 congressional investigation reporting that “many persons belonging to the criminal class” of Europe had been sent to the United states ultimately led to the inclusion of the first “moral turpitude” language in U.S. immigration law.28

26 13 Journal of Congress 105-106 (September 16th, 1788).
28 Harms, 261-262.
For the most part, the “good moral character” provision is reserved for those having committed the serious offenses prior to naturalization. It is only recently that histories of lesser moral failings have become grounds for denaturalization. Convictions related to drug trafficking constituted cause for deporting aliens under various iterations of the INA throughout the 1950s, but extending these provisions to reach naturalized citizens was a rare and controversial event during that decade. A handful of naturalized citizens whose unlawful acts were committed between the initiation of the naturalization process and its completion were denaturalized and deported as recently as 1966, but the practice fell out of favor in later decades, when denaturalization gradually came to be viewed as an extraordinary measure best reserved for former Nazis and other war criminals.

In the intervening decades, the denaturalization of even these citizens was limited to those having been found to have obtained their citizenship fraudulently, not merely those failing to display good moral character while their naturalization was in process. The trend was reversed in 2005, however, when Haitian-born Lionel Jean-Baptiste became the first naturalized citizen of the United States since the 1960s to be denaturalized in response to involvement with drug activity that occurred after he had begun the process of naturalizing. Jean-Baptiste’s case

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29 Most undesirables targeted for denaturalization are stripped of their citizenship not on explicitly moral grounds, but for having committed some form of lying or withholding information during the naturalization process. The exile of Nazis will be further explored in the next chapter. Nazis are not the only war criminals singled out for denaturalization, Kelbessa Negewo and Gilberto Jordan were denaturalized for committing human rights abuses in their home countries of Ethiopia and Guatemala in 2006 and 2010, respectively. Negewo was deported, and Jordan will be upon the completion of a U.S. prison sentence for immigration violations.


31 See U.S. v. Lionel Jean-Baptiste, 11th Circuit Court of Appeals. No. 04-10144 (January 04, 2005). Jean-Baptiste claims merely to have given directions to a known drug area to an undercover officer, in response to her query about where to buy drugs in the area. Regardless, Jean-Baptiste was convicted, and because the criminal conduct took place before his naturalization process was complete, he was denaturalized and ordered deported. His native Haiti
received relatively little attention, but the shift in attitudes toward the “good moral character” requirement is a significant one. Jean-Baptiste’s denaturalization represents a significant lowering of the standard of moral unworthiness for naturalized citizens.

In addition to the dangers posed by running afoul of the “good moral character” provision of the INA, aliens are vulnerable to rendering themselves deportable by the commission of certain offenses, termed “crimes involving moral turpitude.” The term has no single authoritative definition, evolving through case law since it first appeared in federal immigration law in 1891. Because Congress has left the term undefined, individual courts have broad discretion in determining which offenses qualify. This common law approach affords considerable latitude to judges, and also encourages decisions to be tailored to particular circumstances. Such an approach enables moral turpitude cases to act as a sort of barometer, reflecting which kinds of offenses provoke moral disapprobation in particular times and places. What has emerged is a general category of offenses that has varied with changing social mores. For instance, violations of the liquor laws were often treated as crimes of moral turpitude during Prohibition, but would not be so today. Until the 1940’s, “bastardy” qualified.

refused to accept him, and although he remains denaturalized, authorities have been unable to deport him in the absence of a willing recipient nation.

32 An alien is deportable for one crime of moral turpitude committed within 5 years of admission, if a sentence of one year or longer is possible, 8 U.S.C. §1227(a)(2)(A)(i). Two crimes of moral turpitude committed at any time, unless they were in a "single scheme of criminal misconduct," also render an alien deportable, 8 U.S.C. § 1 227(a)(2)(A)(ii).

33 Johnson, 149. 1891 Immigration Act, Sess. II Chap. 551; 26 Stat. 1084. 51st Congress; March 3, 1891.

34 Attorney General Eric Holder attempted to clarify the tentative standard established in the Silva-Trevino case, but Holder’s solution was overturned in a Fifth Circuit precedential opinion in 2014. Matter of Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008).


While there are no codified rules, treating a crime as belonging to this class generally rests upon an assessment of intent, and a determination that a crime is not merely bad because it is prohibited, but that it is that “malum in se,” or bad in itself. Gauging the wickedness of another’s intentions and determining which actions are truly evil in themselves invite open-ended expressions of folk morality. In each case, judges offer a rationale that they (presumably) expect to resonate with the greater society, or at the very least to be tolerated by it. For this reason, the justifications of judges in banishment cases offer a theoretically rich representation of community sentiments. 37 A number of cases from the 1920’s and 1930’s make this explicit, including a 1927 larceny case in which the judge opines:

A thief is a debased man; he has no moral character. The fact that a statute may classify his acts as grand and petit larceny, and not punish the latter with imprisonment and declare it to be only a misdemeanor, does not destroy the fact that theft, whether it be grand or petit larceny, involves moral turpitude. It is malum in se, and so the consensus of opinion — statute or no statute — deduces from the commission of crimes mala in se the conclusion that the perpetrator is depraved in mind and is without moral character, because, forsooth, his very act involves moral turpitude. 38

It is the moral nature of these crimes that sets them apart, not their severity, and their commission is not merely an instance of bad judgment nor an isolated event, but a symptom of having “no moral character” and being “a debased man.” 39

Currently, most crimes involving moral turpitude fall in to the categories of malicious crimes against persons (including aggravated violent offenses and crimes against family members),

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37 Certainly there is always contestation and communities virtually never speak unanimously, but just as laws are roughly representative of the political cultures that enact (and tolerate) them, so are the utterances of judges professing to enforce those laws. Judges speak the language of moral judgment Hume articulates, as will be discussed below.
38 Bartos v. United States, 19 F.2d 722 (8th Cir. 1927). See also, Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).
property crimes involving fraud or deception, sex crimes, and crimes involving fraud against the
government. These crimes are set apart by intent; involuntary manslaughter, for instance,
would not qualify unless there was evidence of willfulness, recklessness, or malice. Some
form of lying characterizes the greater part of the property offenses and those against
government authority. At issue is not the measurable harm resulting from the act, rather it is
what the commission of the crime is believed to reveal about the person committing it. The
construction malum in se refers as much to the actor as to the action.

“Moral turpitude” encompasses deception, malevolent violence against others, lewdness, and
defrauding one’s neighbors and rulers. These categories, though dressed in modernized names,
reflect the very classes of offenses that earned early modern Englishmen transportation to the
North American colonies. Like the older inventory of transportable crimes, the existence of this
class of offenses is a clear imposition of a particular vision of community morality on the
eligibility for membership. It is the immorality of the crime (or rather, the immorality of the
criminal), not the severity of the damage inflicted, that makes the offending alien liable to
expulsion. The commission of a crime involving moral turpitude is treated not as an isolated act,
which could be punished and forgiven, but as a symptom of a fundamentally ineligible character.
This moral corruption cannot be corrected, it must be met with expulsion, and the expelling
community washes its hands of the offender.

Of course, immigration law does not apply to all members of American communities, and
many to which it applies are not full members per se (at least legally, though more will be said
about this in Chapter 6). Nonetheless, it is especially instructive in revealing the moral

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40 For a more detailed breakdown, see Harms, 267-270.
expectations of citizenship, at least at the national level. Such criteria are not as clear in the present day, as expelling citizens from the nation is an extremely rare occurrence in the twenty-first century. Today, “the right to a nationality” is generally accepted to be a basic human right, and it is one that the U.S. Supreme Court affirms domestically.42 The nation marks the limit beyond which Americans are not allowed to banish one another.43 It is true that since the World War II, a particular importance has been attached to nation-state citizenship, a development that spurred a number of decisions forbidding the involuntary revocation of U.S. citizenship.44 These decisions hinge not on the intrinsic value of national membership, but rather on the dangers that befall those rendered stateless.

This prohibition may mark the particular importance attached to national membership, that it is the paramount marker of membership and so protected from the majoritarian passions that drive the various iterations of exile. However, it is not self-evident that the national level of politics is the only level with which scholars, politicians, and members of a liberal democratic society ought to concern themselves. Seeking the protection of the law, the right underlying the prohibition of statelessness, occurs at sub-national levels as well. Membership – and especially the most experientially meaningful types of membership, built on ties between citizens – exists as much (or more) at the neighborhood, city, county, and state levels as well as at the national. Arguably, it is precisely at the sub-national level that membership becomes “thicker,” as few people ever have substantial involvement with government at the national level. It is the nature

42 United Nations Universal Declaration of Human Rights, Article 15.
43 Under most circumstances, exceptions will be discussed in the next chapters.
of exile to originate in the smallest of our concentric circles of belonging, because at its heart, exile’s greatest power lies in its ability to deprive its victims of their homes.

Consider the example of Madame de Stäel, one of the liberal tradition’s famous exiles. De Stäel’s suffering did not reach its peak when she was driven from France. Her profound sense of disconnection did not only strike her at the national border. Nor did the political benefits that Napoleon Bonaparte reaped from her expulsion begin only when she was forced off of French soil.  

De Stäel’s political identity was firmly rooted in her salon – in her home (in this case, her house). Her supporters, her friends, her resources, all of the mediating entities between the individual and their varying levels of political community, were rooted in Paris; for her, the city was France:

> This love of country, which has attached the most strongly constituted minds, lays still stronger hold of us, when it unites the enjoyments of intellect with the affections of the heart, and the habits of imagination. French conversation exists nowhere but in Paris, and conversation has been since my infancy, my greatest pleasure. I experienced such grief at the apprehension of being deprived of this residence, that my reason could not support itself against it.  

While de Stäel was ordered out of France in 1795, her readmission was conditioned upon her remaining at least twenty miles outside of Paris, and in 1803 Bonaparte exiled her again, prohibiting her from coming within forty miles of Paris. Though she laments her being cast out of France, even when she speaks of the injustice of that, she objects to being kept from Paris.

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45 In “Political Power,” she repines, “Yet I was to learn, in the midst of the transports of joy with which the city of the conquerors reverberated, that Paris was in the power of the Allies. At that moment I felt there was no longer a France: I believed Burke’s prediction realized and that where France had existed we should see only an abyss.” In Germaine de Stäel, Politics, Literature, and National Character. Translated and edited by Morroe Berger (New Brunswick, New Jersey: Transaction Publishers, 2000): 106.


47 de Stäel, “Political Power,” 103-104.
Exile may be at its most dramatic when it occurs at the national level, but at the humbler levels of government – and more importantly, of community – its effects are felt every bit as keenly by those subjected to it, and its expressive powers are undiminished by the decrease in scale. Keeping banishment below the national level is necessary for maintaining its depoliticized veneer. Exile’s continued survival under the institutions of liberal government depends upon its concealment, and political actions at the national level receive a level of citizen attention that lower levels simply do not. In the cases of intrastate banishment and the conditional pardon, the criminal law context removes the act of exiling from the realm of politics and defines it instead as a punitive, criminal measure. Alternately, it is framed as an administrative issue, like the “stay out” orders issued in the drug and prostitution cases discussed later in this chapter. This depoliticizes banishment, making it a matter for debate among legal experts and bureaucrats, not members of the political community. Being merely a matter of civil or administrative law, exile quietly slips beneath the purview of political contestation.

**Moral Exile in America Today**

The issue of exile is far from settled in American law. Even after *Cooper v. Telfair* declared banishment a right of the legislature, it remained a matter of debate in various jurisdictions throughout the nineteenth and twentieth centuries. *Trop v. Dulles* is regarded as the case that places banishment from the nation outside of even the legislative power, with Justice Brennan declaring banishment to be “universally decried by civilized people.”⁴⁸ This sentiment would be

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⁴⁸ *Trop v. Dulles* 356 U.S. 86 (1958). Continued challenges show that courts at the sub-national level continue to make departure from the nation a condition of parole or pardon, despite lacking the authority to deport. These
reaffirmed in *Afroyim v. Rusk* in 1967.\(^9\) No such consensus exists at the sub-national level, however. In the years since, some federal courts have asserted that the imposition of banishment, regardless of process, would constitute cruel and unusual punishment.\(^{50}\) Others, just as forcefully, disagree.\(^{51}\) The conditions under which an American can be banished from their home continue to be contested at the state, county, and city levels, yielding mixed results across jurisdictions.

One of the most frequently cited opinions opposing banishment is from a 1930 Michigan Supreme Court case, *People v. Baum*. The *Baum* court declares the use of banishment to be contrary to public policy, arguing not that it is in any way incompatible with American political principles, but that it threatens the peace between states:

> To permit one State to dump its convicted criminals into another would entitle the State believing itself injured thereby to exercise its police and military power in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several States which is the basis of the Union itself.\(^{52}\)


Eva Baum was banished from Michigan for violating the liquor law, an offense colored by the moral opprobrium characteristic of the prohibition movement. The language of the Baum decision closely echoes objections to the “dumping” of unwanted English subjects on their fellows in the colonies.

While there is no consistency across federal, state, or county courts, what is striking in reviewing banishment cases is the sheer number that arise, successful or not. A search for banishment cases reveals hundreds, distributed widely across decades and states. The number of actual banishments likely far exceeds those represented in court cases, as well. Only those who decide to challenge their banishment appear in these cases, and those who are cast out have few incentives to challenge their expulsion. Banishment almost always appears as a condition of pardon, parole, or probation. Significant jail terms may be suspended on condition banishment; challenging it almost always results in incarceration for the full sentence. Refusing a present-day conditional pardon may not be as foolish as it was in the days of transportation (and death sentences for virtually every substantial offense), but contesting banishment from today’s American communities is still a poor bargain.

As in the past, today’s lines between dependence and immorality blur in the categories of people banished from their homes in American communities. Some represent clear cases of simple moral disapproval, like the expulsion of stalkers, domestic abusers, and thieves. Others, however, are more complicated. Unprecedented civil/criminal hybrid city ordinances have become popular in the past twenty years, aimed at drug users, prostitutes, and homeless people.
There is considerable drift between the latter three categories, and the label of “homeless” often also includes a large class of chronically mentally ill people.

Banishment is not commonly considered a tool available to American authorities, although it is one that is used often, if discreetly. In this sense, it is a special power, presumably reserved for special cases. Of all the many offenses, civil and criminal, that exist in various jurisdictions, only a handful are singled out as calling for banishment. As such, close attention to which cases draw the usage of this unique tool is merited – the community doing the banishing views them as qualitatively different from other possible offenses. For instance, murderers are very seldom targeted for expulsion, unless their case is considered particularly heinous and draws an unusual amount of ire from the community.54 Examining the class of offenders subject to banishment in American communities uncovers close parallels with the immigration law construction, “crimes involving moral turpitude,” although American communities add to that category an assortment of dependent offenders, as well – the paupers or public charges of the past.

Moral Banishment: *Malam in se:*

At various federal, state, and county levels, the use of government authority to remove existing members from communities has been continually contested since the Founding and remains so today. Currently, several state constitutions explicitly forbid banishment from the

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54 These particularly anger-provoking cases often result in failed attempts to exile the reviled offender. One such case occurred in 2002, in Grays Harbor Washington (a particularly active banishing state). David Schimelpfenig murdered an elderly woman in her home, a victim the trial court declared “particularly vulnerable.” For this reason, to his sentence of 33 years in prison was an order prohibiting Schmelpfenig from ever again living in Grays Harbor County. The banishment provision was ultimately struck down by a state appellate court as “overly broad.” *State v. Schimelpfenig*, 115 P.3d 338, 339 (Washington Court of Appeals 2005).
state, an action unlikely to survive a federal constitutional challenge, regardless of state constitutional provisions.\textsuperscript{55} However, many states that forbid \textit{inter}state banishment are among the most prolific \textit{intra}state banishers. Some jurisdictions are more active in generating banishment cases than others. Georgia and Mississippi are particularly prolific. A single Georgia county has banished over 500 people since 1998.\textsuperscript{56} Certainly, Georgia is overrepresented, but banishment cases continue to arise all over the country, even in states with a history of overturning such decisions.\textsuperscript{57} While the states that explicitly allow intrastate banishment are in the minority, it is significant that such decisions continue to crop up elsewhere, indicating that the impulse to expel persists. For every case that is challenged (even if overturned), there may be others that remain obscure, the banishment condition accepted quietly. States do not keep records of banishments, in part because banishment is seldom imposed directly as a sentence due to concerns about “cruel and unusual punishment” challenges. Rather, banishment most often appears as a condition of parole or probation.

Certain patterns emerge in reviewing banishment cases. The vast majority involve sex offenders, a phenomenon that will be discussed at length in Chapter 5. Aside from the mass of sex offender expulsions, banishment cases tend to cluster around what, in the immigration context, would be considered “crimes of moral turpitude.” Offenses incurring terms of

\begin{footnotesize}
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\item \textsuperscript{55} Alabama Article I §30; Arkansas Article II §21; Georgia Article I §6.21; Illinois Article I §11; Kansas §12, Maryland Article XXIV; Massachusetts Part I, Article XII, Nebraska Article I §15, New Hampshire Part I, Article XIV; North Carolina Article I §19; Ohio Article I §12; Oklahoma Article II §29; Tennessee Article I §8; Texas Article I §20; Vermont Chapter I, Article XXI; West Virginia Article III §5. Tennessee and Maryland only prohibit interstate banishment in the absence of due process, though doing so would likely violate the federal constitutional right to free travel.
\item \textsuperscript{56} Cameron Carpino gives a full account of banishment in Georgia. “Banishment in Georgia: A New Approach to Domestic Violence.” \textit{Georgia State Law Review} 27.4 (Summer, 2011): 802-828. Houston County, Georgia is an anomaly.
\item \textsuperscript{57} Minnesota, for instance, amends its position between \textit{Minnesota ex rel Halvorson v. Young}, 154 N.W.2d 699 (1967) and \textit{State v. Franklin}, 604 N.W.2d 79 (Minn. 2000).
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banishment in American communities include manslaughter resulting from drunk driving, stalking, and serious cases of assault and battery. Similarly, domestic abusers and those involved in drug trafficking are banished. Drug trafficking is one of the most common banishment-provoking offenses. Former Houston County, Georgia District Attorney Kelly Burke openly declared that he had effected the banishment of at least 400 people, most for drug-related violations.

These exemplify precisely the sorts of “crimes against the person,” which, if committed by a non-citizen, would likely be (and have been) considered crimes involving moral turpitude.

Consider the case of Sherrill Chestnut, who in 1953 entered a plea of guilty to two counts of second-degree burglary and grand larceny. The court offered him probation, on the condition

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61 Comparable immigration cases r

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that he remain outside of Sevier County, Utah for a period of seven years. Chestnut unsuccessfully challenged the provision before the Utah Supreme Court. More recently, Wiley Z. Carroll (also unsuccessfully) contested his five-year banishment from the Third Circuit Court District of Mississippi, encompassing seven counties. Carroll had been convicted of attempted robbery.

The bulk of these offenses are not particularly severe; they did not result in unusually extensive harm to anyone’s interests. Murderers, by contrast, very seldom incur banishment. Rather, it is the nature of the crimes that renders them banishing offenses – or rather, the perceived nature of the person who commits the offense. Thieves and housebreakers violate the public trust that lies at the foundation of civil society. Those who abuse their family members or stalk their neighbors demonstrate a lack of respect for the safety and autonomy of their fellows. The actions of these offenders are construed as symptomatic of a “depraved” nature, just as the judge quoted above asserts. Trust-breaking offenses draw banishment because they portray a particular kind of character that is incompatible with that of the community expelling them.

Sex workers, historically, are popular targets for expulsion. Many of the women transported to early American colonies were prostitutes, and Puritan colonies at least

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63 Wiley Z. Carroll v. State of Mississippi, 120 So. 3d 471 (Mississippi, 2013)

64 There are many possible reasons for the dearth of banished murderers. Most practically, a murder conviction often involves a very long prison sentence, which may render the additional rejection inherent in banishment redundant. The imposition of exile is seldom linked to practical concerns, however. It is also significant that murderers are among the least likely offenders to recidivate – most homicides arise from a particular relationship between killer and victim. This may lend a “private” character to homicide that was absent from, for instance, ancient Athenian homicides, which virtually guaranteed to incur the exile of the killer. As will be further explored in Chapter 4, homicide brought exile upon the offender for a variety of reasons, not the least of which being that the possibility that extended networks of family and allies would seek vengeance against the killer (and his or her own networks) threatened the public peace. Homicide in such a society thus carries a far more “public” character than it does in latter-day America; as this project argues, exile is a fundamentally communal, public activity.
Sex workers represent a dual cause for moral disapproval: they are both the historical “lewd” figure, as well as a particular kind of pauper. Their presence is both a nuisance and a reproach to the community to which they belong: prostitution is largely local and market-driven, after all. Communities with sex workers are communities with clients. Like prostitutes, those who buy and sell drugs are viewed as a nuisance to their neighbors, despite their lawful claims to residence. Since the 1990s, American communities have experimented with various local-level measures to manage the problem that these classes of community member pose by their simple, undesired presence.

Current attempts to rid communities of sex workers and addicts employ a number of methods. Criminal law allows for their expulsion via the conditional pardon or conditions of parole. Administrative and civil law offers new tools in the forms of exclusionary zones like the Prostitution-Free Zone (PFZ), which vary by city and are generally classified as administrative regulations. For example, three small Florida towns along a federal highway passed PFZ ordinances in 2000. The measures directly targeted sex workers (and not clients) deemed “repeat offenders,” prohibiting them from presence within the zones. Merely existing in the prohibited space made them liable to arrest, despite the administrative, not criminal, laws.

65 Goodman, 3; Ekirch (1987) 43, 227;
66 Cities in the states of Washington, California, Florida, Louisiana, Missouri, Nevada, and Oregon continue to issue SOAP orders, in some jurisdictions to both prostitutes and clients. Cities that have imposed SODA ordinances include Honolulu, Hawaii; Las Vegas, Nevada; Fort Lauderdale, Florida; Portland, Oregon; Richmond, Virginia and Oakland, California. Seattle, Washington’s first SODA orders were allowed to lapse in the late 1990s, but the city revived them in 2004. Karen H. Bancroft, “Zones of Exclusion: Urban Spatial Policies, Social Justice, and Social Services.” Journal of Sociology and Social Welfare 39.3 (September, 2012): 63-83.
67 Hill, 177.
69 Moser, 1101-1103.
classification of the ordinances. Such legal hybridism is characteristic of municipal spatial exclusion measures, protecting them from constitutional challenges that might arise if the laws were explicitly punitive.

From the 1990s until the present, city governments have used their authority to banish unwanted residents from areas ranging from a few blocks to virtually whole cities using specialized exclusion zones and SOAP (Stay Out of Area of Prostitution) and SODA (Stay Out of Drug Area) orders. SOAP and SODA orders are issued to specific people, usually (but not always) people who have been convicted, or at least arrested, for prohibited conduct. While these policies are usually municipal, in 2002, the Washington State Legislature passed a law enabling court statewide to issue “off-limits orders” to those convicted of “a drug offense.” While such expulsions can hardly aspire to the grandeur surrounding terms like “exile” and “banishment,” they represent precisely the same attempts by communities to define their membership via government-backed expulsions. In these cases, that involves using public power to enforce moral judgments that some community members make about others. Laws of this kind draw a clear division between “citizens” and “prostitutes” or “drug users,” refusing to acknowledge that the people singled out for removal are members of the very community that wishes to be rid of them. In addition to the relatively new PFZ’s and SOAP orders, sex workers

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and addicts continue to be banished from their neighborhoods and cities via the more traditional avenues of parole or probation conditions. Like the conditional pardon of the transportation era, these banishments rely on a legitimizing element of consent and are especially unlikely to be challenged, as the alternative is generally incarceration.73

While some of the areas from which modern civil and administrative laws banish community members are (admittedly) relatively small, the expulsion is nonetheless significant. First, these sites are likely important to the person banished, as they often live, work, or have substantial social connections in the zones from which they are expelled. Additionally, these orders are in force for that person at all times, regardless of their actions. Perfectly legal acts, if committed by that person, are forbidden in that space. This places the banished in a position of constant criminality in relation to his or her neighbors should they remain. For the duration of their order, regardless of what the recipient of a SOAP or SODA order is doing in the forbidden zone, he or she is always “a prostitute” or “a drug user” in that space, and never simply one community member among others. Their banishment, however small-scale, places them in a constant state of exception, and makes the same statement of rejection and moral ineligibility.

Like sex workers and drug users, homeless people are often subject to removal orders. The case of homeless expulsion is especially illustrative of how significant banishment from even relatively small geographic areas can be. Because homeless people are citizens, but citizens who do not own property, their removal from the public spaces that they inhabit is comparable to another citizen’s expulsion from their own home or neighborhood. Like the paupers and vagrants of earlier ages, homeless people make their fellow community members uncomfortable.

They are often unsightly, interrupting the otherwise orderly daily experience of one’s community. The mere presence of homeless people seems to make demands on their more prosperous neighbors, demands for support, for compassion, for the uncomfortable recognition of the role of misfortune in determining the course of a human life. Some actually beg, making demands on their fellow citizens in a direct and intrusive fashion. Others frighten them with the outward signs of mental illnesses. They are not ideal community members, and acknowledging homeless residents as fellow citizens is often a challenge for their neighbors.

While the U.S. Supreme Court ruled vagrancy laws unconstitutional in 1972 with *Papachristou v. City of Jacksonville*, American cities continue to use municipal law to remove homeless citizens from the public spaces they inhabit. In September, 2014 the City Council of Sarasota, Florida approved a $1,000 city budget dedicated to purchasing one-way bus tickets for the city’s homeless, something the Colorado Springs, Colorado Police Department had done in 2010. New York City’s “Project Reconnect” provides “one-way travel assistance by train, bus, or domestic or international airline” to qualifying homeless residents. While many of these projects bear benign, even benevolent-sounding titles, public discussions often return to the issue of “dumping” homeless citizens on other communities. The city of San Francisco threatened to sue the state of Nevada, for instance, after officials from a Nevada state hospital provided nearly

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75 City of New York Department of Homeless Services: http://www1.nyc.gov/nyc-resources/service/3601/project-reconnect-homeless-assistance.

500 homeless psychiatric patients with bus tickets to San Francisco, a practice referred to as “Greyhound therapy.” The City of San Francisco’s Human Services Agency, in turn, maintains its own program, “Homeward Bound.” It provides one-way bus tickets out of town to the indigent. Here the construction of the homeless as people who do not belong, whose homes are elsewhere, is particularly obvious – the program purports to send them not “away,” but “homeward.”

These city-run programs address “the homeless problem” as something alien to the city. While pinning down the citizenship claims of people whose geographic “homes” are not clearly defined poses some problems, failing to own property or to have a lease is not a crime. Nor does city, state, or national citizenship entail property requirements. Homeless people are certainly citizens of somewhere. Sociologists who have interviewed homeless people subject to removal orders in Seattle report that the neighborhoods, parks, and public spaces from which they are expelled via expanded trespass laws, “off-limits” and “parks exclusion” orders are the centers of their lives – these places are their homes. While no one can claim an entitlement to exclusive use of public lands, or to use those lands in ways that are not legally permissible, barring the homeless from public places denies their right as community members to be there, in essence, treating them as something other than equal citizens.77

Why do communities single out particular offenses as meriting banishment? I posit that offenses – or rather offenders, because it is the morality of the person and not the offense that is truly at issue – deviating from the core moral identity of banishing communities are most likely to draw this response. Banishment does not merely inflict suffering, it radically revises the

77 Steve Herbert and Katherine Beckett, “‘This is Home for Us:’ Questioning Banishment from the Ground Up.” *Social & Cultural Geography* 11.3 (May, 2010): 231-245.
relationship between the community and the banished, redefining “member” as “outsider.” In cases of moral banishment, the offending member is reconstructed as lacking the requisite character that defines true community members.

**Conclusion: Moral Exile and Liberal Community**

While some morally objectionable people may have criminal histories, at its root, moral exile is not concerned with criminals or with the concept of criminality. Nor is it about punishment. Criminals are people who have committed specific offenses against the laws of the state; moral exiles may or may not commit criminal acts. Punishment is the response to a specific bad act, intended to accomplish the purposes of retribution, restraining the offender from causing further harm, rehabilitation, or deterring others by example. While the law and its trappings may be used to obscure political decisions, at its base moral exile is not simply one procedural tool of law or punishment among many. It is a powerful method for communities to assert control over membership and over defining shared identity. Moral expulsion is based upon judgments about a member’s possession or lack of certain ethical qualities adjudged necessary for membership, a judgment that may not initially appear to be obviously political. However, any official efforts to define who is and who is not a full member of the community are, by nature, political.

Attempts to depoliticize or conceal the practices through which communities expel undesirable members ought to draw suspicion, yet the very drabness and ordinariness in which present-day exile is cloaked discourages such inquiries. Compounding the problem is the issue at the heart of moral exile: those subjected to it are seldom sympathetic figures. The people

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78 John Locke, *Second Treatise*, 21, 42.
selected by their fellows to be expelled for their bad moral character are generally singled out for a reason. They are bad neighbors, Locke’s “foxes” and “polecats,” posing a nuisance to their fellow citizens. Their fellows, relieved at their absence, are unlikely to question their expulsion. For the same reasons, few elected representatives are likely to leap to their defense. Nonetheless, liberal societies define themselves in part by the separation of private from public, and within the public sphere, toleration is the rule. We do not permit the use of government resources to allow us to choose our neighbors – this is why, for instance, racial and religious restrictive covenants are not enforced in the United States.  

The private sphere, by contrast, is where various and conflicting particular commitments can flourish without sparking potentially violent civic conflict. Personal morality is intimately intertwined with religious commitments and liberty of conscience, certainly areas in which government interference should be regarded with suspicion. Morality is a key element of private life, a part of life that liberal societies jealously guard against the creeping reach of government. Nonetheless, as this brief survey of American cases shows, these very qualities routinely form the basis for government-enforced expulsion. While the banishment of domestic abusers, stalkers, or thieves could be justified by a desire to prevent them from committing further offenses, the selective application of banishment to only certain classes of lawbreakers whose offenses provoke moral outrage among their fellows suggests that there are other motives at work behind this particular form of membership control.  

79 The U.S. Supreme Court ruled in Shelley v. Kraemer that private parties could voluntarily honor restrictive covenants, but would not be granted state enforcement of such contracts. On this principle, it is not unconstitutional for private associations to restrict access on whatever basis they choose (although they may then run afoul of legislation like the Fair Housing Act or the Civil Rights Act of 1964). Shelley v. Kraemer, 334 U.S. 1 (1948).
David Hume speaks of the role that moral approbation and disapprobation play in forging solidarity. First positing that blaming and praising are tendencies separate from mere desire and aversion, Hume assigns moral judgment a special place in human nature. While Hume speaks of moral intuitions common to all mankind, he goes on to note that the language of moral disapproval expresses a perception of shared opinion with his audience, suggesting that there is a much smaller and more particular group doing the sharing:

When a Man denominates another his Enemy, his Rival, his Antagonist, his Adversary, he is understood to speak the Language of Self-love, and to express Sentiments, peculiar to himself, and arising from his particular Circumstances and Situation: But when he bestows on any Man the Epithets of vicious or odious or deprav'd, he then speaks another Language, and expresses Sentiments, in which he expects all his Audience are to concur with him. He must here, therefore, depart from his private and particular Situation, and must choose a Point of View, common to him with others.

Community – including liberal community – arises from the consciousness of sharing something in common with each other. While the sources of that commonality vary from community to community (perhaps by lineage, as in the case of Indian nations; a shared religion as in the Maldives, or a shared public mission as in Singapore), communities require social ties to hold them together. These bonds are rooted in a basic belief in some morally relevant similarity between all members, and lacking in non-members. Making moral judgments and enforcing them as a community generates solidarity between members; expelling members who deviate

80 “The Notion of Morals implies some Sentiment, common to all Mankind, which recommends the same Object to general Approbation, and makes every Man, or most Men, agree in the same Opinion or Decision concerning it. … The other Passions produce, in every Breast, many strong Sentiments of Desire and Aversion, Affection and Hatred; but these neither are felt so much in common, nor are so comprehensive, as to be the Foundation of any general System and establish'd Theory of Blame or Approbation….While the human Heart is compounded of the same Elements as at present, it will never be altogether indifferent to the Good of Mankind, nor entirely unaffected with the Tendencies of Characters and Manners” David Hume, An Enquiry Concerning the Principles of Morals (Ann Arbor, Michigan: University of Michigan Library, 2007): 177-178.

81 Hume, An Enquiry Concerning the Principles of Morals, 177-178.
from the shared moral commitments of the community reaffirms that they *are* a community, and that they continue to control what that means. As Hume says, the language of judgment is one we speak together, with others we believe to be like ourselves.

The persistence of moral exile into the current age suggests that liberal theorists have, perhaps, been too quick to cede the notion of community to their critics. This is because exile, in addition to its practical function of removing undesirable members from the community, serves the additional purpose of expression. Exile requires the reconstruction of an insider as an outsider. To do this, the rationale for expulsion must emphasize the otherness of the expelled member, and therefore reaffirm the incompatibility of such people with the existing community. This reaffirmation of shared identity lies at the center of moral exile. The persistence of such practices might be interpreted as a symptom of some crisis in liberal communities, a desperate response to once-established traditional identities now under siege by the destabilizing forces of modernity. Viewing the use of moral exile as a signifier of crisis would be a mistake, however. The use of banishment is nothing new in U.S. history. Beginning with *Cooper v. Telfair* and continuing through the intervening centuries is a steady line of banishment cases, arising all across the country and in every historical period. In the parlance of Silicon Valley, exile is not a bug in the system; it is a feature.

What, then, do liberal communities get from moral expulsion? While moral exile does not indicate any ongoing crisis of community, it does offer liberal communities a way of bolstering social ties. Liberal commitments forbid recourse to common methods of building solidarity that were accepted in the past, methods like appealing to race or ethnicity, a primordial tie to the land, or shared religion. In the absence of such ready-made identities, liberal communities must find
something else to share. In the context of community, “identity” refers to what the members share with each other (and not with outsiders). Basing distinctions on morality offers robust content for that identity without running afoul of liberal commitments.

Still, the idea of using coercive legal means to remove people whose neighbors deem them “morally bad” from their home communities will likely rest uneasily with today’s liberals. It recalls earlier, shameful episodes in American history that saw morality invoked to justify practices based on invidious distinctions. Opponents of interracial marriage once cast it as “immoral,” as same-sex marriage has more recently been labeled by opponents of its legal recognition. Making government authorities the arbiters and enforcers of public morality also raises concerns about privileging a particular religion’s moral standards, to the detriment of religious minorities and secularists. Yet, among the reasons for which liberal communities exile, moral exile may also be the most justifiable on liberal grounds. Unlike past criteria for exclusion based on ascriptive characteristics like race, sex, or religious affiliation, moral exile appears to discriminate on the basis of an individual’s conduct, not on the basis of who the exile is or what un-chosen characteristics they possess. Holding actors responsible for their own decisions and deeds certainly accords with liberal values, so it is not unreasonable to assert that good moral character is an acceptable condition of liberal citizenship.

However, moral expulsion is not so straightforward as simply examining the actions of the exile and responding accordingly. Moral expulsion rests upon an assumption of persistent defect, as evidenced by the selection of banishment-incurring offenses. The commission of certain “immoral” acts, the set of which reflects the current inclinations of the banishing community, is portrayed not merely as conduct, but as a symptom of a lasting – even permanent
– disposition. As such, it is not that certain actions disqualify moral exiles from membership, but that being the wrong sort of person does so. Although today, courts and municipalities offer unwanted members one-way bus tickets rather than arranging passage on a convict ship, current iterations of moral exile serve the same functions that they did centuries ago, sorting out those who are essentially eligible for membership from those who are not.

Although it is often veiled in criminal and civil law, present-day exile practices control community membership by expelling the unwanted. This is particularly clear in the case of moral exile; the reasons for the member’s undesirability are the very reasons for his or her expulsion. This exclusion on the basis of who a person is – what sort of nature they possess, rather than what actions they have taken – certainly explains latter-day squeamishness about exile in liberal communities. Exile effaces the distinction between doer and deed necessary to holding an actor accountable in any meaningful way, yet then justifies itself by the very accountability it undermines. Further, it smacks of the arbitrariness that Medieval and early modern critics of banishment sought to stifle. Judgments about the moral character of one’s neighbors are particularly vulnerable to arbitrariness and to introducing particular prejudices. Finally, by premising membership on essentialist grounds, moral exile assumes the existence of a pre-political community of “true” members. Liberal communities, in theory, are voluntary, tolerant associations. The idea that one must be born a true member – regardless of the criterion for that membership – is incompatible with liberal commitments. Despite its seemingly “cultural” appearance, the morality animating moral exile is merely a new ascriptive characteristic.
Expelling disfavored members is a communal activity, one that re-affirms who the “real” members are by making an instructive spectacle of those who are not. In a more nuanced fashion, moral banishment also defines which characteristics are essential to belonging to the group – sorting those who belong from those who don’t – and producing the sort of ethically constitutive story that communities rely upon to imbue belonging with meaning. This chapter explored the construction of an essentialist community of “true members” through the use of exile to sort the morally worthy from the unworthy. While moral exile serves what might be described as “constitutive” purposes, defining the character of a particular community by expelling those who do not meet the pre-political membership template, the next chapter will examine a different use of exile in the liberal polity. In contrast to the reasoned veneer characteristic of moral exile, the “purgative” exiles of the next chapter respond to non-rational contagion intuitions and visceral disgust responses. Such motivations for expelling the unwanted are nothing new; pollution anxieties often drove the judicially sanctioned exiles of ancient Greece. While such beliefs may seem at home in the ancient polis, they persist into the seemingly disenchanted world of the present day, shaping the contours of public citizenship discourses and generating the popular power that drives purgative exile.
Chapter IV
Driving Out the Pollution: From the Acropolis to Arlington National Cemetery

“And the guilt of pollution having been brought home to them, their dead bodies were cast out of their tombs, and their family was banished forever. On this, Epimenides the Cretan purified the city.”


Exile as Purification

Pollution imagery is tempting to the rhetorician, and especially to those adopting the language of morality. Invoking pollution immediately clears away any nuanced shades of meaning and replaces them with a dichotomy of “pure” and “impure.” There are no morally neutral positions remaining, only a pristine social landscape threatened by a creeping evil that must be repelled at all costs. When that moral stain is envisioned as attaching to a particular physical entity, the impulse to place as much distance as possible between oneself and the tainted object is easily comprehensible. When the contaminating entity is a member of one’s community, exile is an obvious solution to the problem (even threat) that their presence poses. Exile and moral taint share a long history of association in the Western tradition from which liberalism eventually grew, dating at least to the sixth century B.C. in Greece and persisting in one form or another into the present day.² The idea of a contagious, supernatural moral taint is not unique to ancient Greece. As anthropologist Mary Douglas notes in her seminal study of the

² The Western tradition certainly has no monopoly on moral or religious exile, but because this discussion is about the relationship between liberalism and exile, liberalism’s own penchant for identifying itself as the descendent of the Classical tradition makes ancient Greek and Roman accounts particularly relevant.
concept of impurity, the idea of “pollution” is universal, not only in societies having had virtually no contact with the rest of the world, but also in developed societies. Recent work in experimental psychology confirms this near universality, but with the important additional insight that beliefs about supernatural moral contagion extend to industrialized societies, even if they appear in less formalized ways. This chapter examines the role of pollution intuitions in driving popular purificatory expulsions, or as I will term them, “purgative exiles,” in America today.

First, this chapter explores the history of the idea of “pollution,” situating it in its early Western context of ancient Greece. After outlining the contours of the idea and its use, I re-situate it in the very different context of present-day America, using recent studies by moral psychologists to establish that the core intuitions underlying belief in the miasma and agos of the ancient polis remain at work in American communities today. Finally, I consider a recent case of purgative expulsion in the United States, tracing the use of the idea of pollution in the unusual case of Russell Wayne Wagner, a Vietnam War veteran and convicted murderer whose remains were expelled from Arlington National Cemetery. Wagner’s remains were removed amid popular outrage at his ashes being placed in the Cemetery’s columbarium, despite his established legal entitlement to be included among the nation’s honored dead, an action lacking instrumental justification and ultimately explained in semi-coherent terms of pollution and purity.

What this exploration of the relationship between pollution intuitions and exile reveals is, first, that we should exercise caution in accepting pollution intuitions as evidence of any sort of reasoned moral commitment, despite their appearance as a “judgment.” Second, contagion

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intuitions, because their specific forms are culturally particular, do offer some indication of which qualities a given community finds so radically intolerable that they render their possessor not only an unsuitable member of that particular community, but of any community at all.

Pollution intuitions offer an articulation, if not a justification, of the absolutely intolerable for a particular community. Whether that articulation should find expression in the coercive power of law must be decided politically, with the proviso that pollution intuitions be approached with the same care and restraint as any other political passion like anger or fear, and not afforded the heightened value assigned to a community’s shared moral judgments. Finally, while contagion intuitions are unreliable indicators of a community’s “true” moral commitments, they do outline some of the objects of sharing that define a given community, placing certain symbols in a position of special public reverence.

**Miasma, Agos, and Exile: Pollution and Shared Danger**

While beliefs about pollution are common, this project is concerned with the idea of political expulsion in the liberal tradition specifically, which self-consciously styles itself the intellectual descendent of ancient Greece. For this reason, I will begin my exploration of the idea of purgative exile— or exile imposed to limit or purify pollution— there. Ancient Greek theater, law, philosophy, and histories abound with examples of *miasma* and *agos*, or contagious, supernatural moral taint. Once incurred, pollution could not simply be ignored— at least not safely. References to pollution generally involve one of two words, “*miasma*” and “*agos*.” The

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two concepts are quite similar, and the words very often appear in one another’s company.\textsuperscript{5} Both signify metaphorical defilement, and by the fifth century B.C. the words had converged in usage, both referring to pollution, or a dangerous, contagious supernatural stain.\textsuperscript{6}

While \textit{agos} generally appears in the context of a specific action (one that is deliberate, or at least preventable, even if not strictly voluntary), the causes of \textit{miasma} are less easily pinpointed. \textit{Miasma} could be brought upon oneself automatically by acting carelessly or might be sent as the vengeance of an offended god or murdered mortal. Alternately, it might inhere in an object or situation, or be inherited. For example, the famous \textit{miasma} attached to the Alcmaeonidae after the Cylonian Affair required no divine enforcement – it spontaneously came into being and spread itself throughout the entire line as a natural consequence of slaughtering supplicants. Corpses radiate a contagious \textit{miasma}. So, however, does a woman who has very recently given birth.\textsuperscript{7} Certain biological processes, especially those that involve some interruption of bodily integrity, generate \textit{miasma}. Some objects, because of their association with a particular transgression, also exude \textit{miasma}, like the rope and branch used in a suicide by hanging.\textsuperscript{8} Pollution becomes an especially frightening threat when its causes are so nebulous, and thus so unpredictable. Taking sweeping measures to combat it becomes rational in such a situation, especially given that terrible consequences could befall an entire community when even just one of its members incurred pollution.

\textsuperscript{5} Ibid., 5-7. Parker notes that there is some scholarly controversy about whether \textit{agos} and \textit{miasma} share any roots, or merely converge in usage. For the purposes of this book, it is the concept and not the etymology that is important, so the two will be taken together.
\textsuperscript{6} Ibid., 5-7.
\textsuperscript{7} Parker, 41-42, 51.
\textsuperscript{8} Parker, 41-42,
The hazy causality of pollution is perhaps best illustrated by Sophocles’ use of the idea in Antigone. Teiresias reports that dogs and carrion birds have carried remnants of Polyneices’ unburied corpse to the city’s hearths and altars, desecrating them – a dual pollution derived not only from the inherent miasma in the material of the corpse but also that arising from the serious transgression of leaving one’s kin unburied. This scene encapsulates much of the meaning that Sophocles’ audience would have attached to pollution: it springs from a moral transgression, it is contagious, and it threatens the very heart of the society’s shared value system – represented here by the defiled hearths and altars. Indeed, altars are often depicted as being particularly vulnerable to pollution, as are hearth fires in the home. Respectively, they represent the public and private centers of virtue in the community, so it is not surprising that their contamination should be especially feared. With the desecration of the hearths and altars, Sophocles conveys to his audience that Creon’s pollution – and its attendant dangers – have infected the whole of Thebes.

While the causes and sources of pollution may vary from one account to another, one characteristic remains constant: collective suffering leading to collective responsibility for its mitigation. As Robert Parker notes in his definitive study of pollution in ancient Greece, the resulting danger was always, ultimately, communal. The plagues, earthquakes, famines, outbreaks of civil war, and other catastrophes that ancient minds attributed to the presence of pollution made the offender’s burden a public one. While there is no evidence of cities

9 Sophocles, Antigone, lines 995-1025.
10 Parker, 21, 38, 51, 77, 167, 184, 293.
11 Parker, 10, 178. In Parker’s words, “a punishment that is confined to the guilty parties deserves special comment.”
12 Parker, 278-279; Thucydides, 7.18.2; 1.128.1, 4.97.2-99, 3.104.1-2, 5.32.1; Herodotus 5.72.1.
organizing parties to hunt down the individual responsible for pollution-induced disasters, there is plenty of evidence that the threat of pollution spreading from its source to the whole community was a very real concern. Pollution appears not only in literary or allegorical sources, it also appears in historical accounts and instructive works, a phenomenon treated as self-evidently real as the weather. A particularly telling example is the Tetralogies of Antiphon, a sophistic text modeling successful argumentation in court. The Tetralogies return to the threat again and again, suggesting that tolerating the presence of even a single polluted murderer could bring ruin upon a city. Antiphon’s confidence in the threat of pollution as an effective rhetorical weapon suggests that the idea wielded considerable persuasive power during the Classical period.

Pollution attached to animals, objects, places, and people, and it could infect entire bloodlines for generations. In certain cases, it could be wiped away by ritual purification; some pollutions required time to dissipate, but some stains could never be removed. A few offenses had fixed penalties under the Homicide Law of Draco; intentional homicide required the guilty be executed, accidental homicide called for exile. Homicide almost always incurred pollution so enduring and absolute that could only be expiated by execution or exile. Within that category, Antiphon’s Tetralogies show a particular preoccupation with the diffusion of pollution arising from juries, prosecutors, and spectators permitting the passage of unjust verdicts, and the disasters that would rain down upon the community as a result. Antiphon, 2.1.15, 2.1.10-11, 2.3.9, 2.3.11, 3.1.2, 3.3.11-12, 4.1.3-5, 4.2.8-9, 4.3.7, 4.4.10-11, 5.82-3.

13 Thucydides, 1.128.1, 5.1, 4.97.2-99, 3.104.1-2, 5.32.1; Herodotus, 5.72.1.
14 Antiphon’s Tetralogies show a particular preoccupation with the diffusion of pollution arising from juries, prosecutors, and spectators permitting the passage of unjust verdicts, and the disasters that would rain down upon the community as a result. Antiphon, 2.1.15, 2.1.10-11, 2.3.9, 2.3.11, 3.1.2, 3.3.11-12, 4.1.3-5, 4.2.8-9, 4.3.7, 4.4.10-11, 5.82-3.
15 Some cases of self-defense or justifiable homicide were arguably not pollution-inducing, but this assessment varied over time. Alcmeon’s original mythic matricide, for instance, would have qualified as a justifiable homicide, yet the pollution it incurred was believed to be the original stain on his descendents, thought to have lain dormant long before the Cylonian Affair.
transgressions against public morality viewed as particularly heinous were certain to produce pollution. Kin-slaying, and especially the almost unthinkable offenses of matricide and patricide, generated particularly virulent strains of pollution, regardless of intentionality.16

Impiety and perjury – offenses against public morality and public trust, respectively – also engendered pollution.17 Polluting acts were not merely religious violations, they were often also codified in law. Offenses that did not have fixed penalties were left to the discretion of juries, and terms of exile or exile for life were common in cases too serious for fines and ritual purification, but not thought to merit death.18

Mythology and drama are rife with characters who commit an offense (often unknowingly), pollute themselves, and bring disaster to their community simply via their continued presence. In Sophocles’ *Oedipus King*, Oedipus (not only a kin slayer, but a parricide to boot) brings crop failure, the widespread stillbirth of infants and livestock, and a plague upon Thebes, despite his total lack of intention (or even knowledge) of committing a polluting offense. Thebes’ catastrophe can only be ended with the removal of its polluting source, Oedipus.19 The mythical Hippotes, a Heraclid, mistook the seer Carnus for a malevolent sorcerer and killed him, polluting himself and bringing a plague to all of the Heracleidae. To rid themselves of the

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16 Plato, in his *Laws*, displays a marked concern about containing removing pollution from his Cretan city. Despite rejecting most of the customs and laws of his day, he retains severe penalties for homicides and assaults incurring pollution, and especially for those against one’s parents. He even goes so far as to deny sons and daughters the right to defend their lives if assaulted by parents. Not only do the assailants incur pollution in this case, but Plato argues that bystanders who fail to intervene, or anyone who associates with the unpunished assailant, should also be considered polluted. 880e-882a. It is a unique feature of the *Laws* among the ancient texts that refer to pollution that its author approaches it as something that can be constructed and legislated, rather than a force operating independent of human will.

17 Parker, 10, 186-9, 199.

18 Forsdyke, 179.

19 While the Oedipus story predates Sophocles’ dramatic treatment, it is noteworthy that the introduction of exile was Sophocles’ own innovation. Earlier versions leave him in Thebes. Parker, 384; at 23.679, the *Iliad* refers to Oedipus’ death, still on the throne in Thebes, suggesting a different ending to older versions of the story.
disease, they exiled Hippotes for ten years.\textsuperscript{20} Alcmaeon, long before the Cylonian affair rendered his descendants the most infamously polluted Athenians, incurred his own pollution by murdering his mother, causing the ground surrounding Psophis to become barren until he went into exile.\textsuperscript{21} These ancient stories express the anxiety that pollution provoked and demonstrate why exile was a common response to those offenses that generated pollution – the exile of the polluted transgressor was not only a matter of justice, but also an act of self-defense on the part of the exiling community.

Pollution, to the ancient Greeks, was a supernatural hazard anchored to a material entity. As a result, the geographical location of the polluted object or being was important. Pollution could spread to others through simple exposure, so placing physical distance between the community and the offender was a sure way of preventing the contagion from spreading. Even objects or animals that had accidentally caused the death of humans incurred a stain that could not be tolerated without danger. For this purpose, the Athenians maintained a specialized court, the Prytaneion, dedicated to trying inanimate objects and non-human animals involved in accidental homicides.\textsuperscript{22} Pausinias, in his \textit{Description of Greece}, tells the story of a statue of the athlete Theagenes, and its prosecution for homicide. An unnamed enemy of Theagenes reportedly whipped the heavy bronze statue in a fit of spite, whereupon it fell from its base and killed him. The man’s sons successfully prosecuted the statue for murder and it was exiled.\textsuperscript{23}

\textsuperscript{21} Apollodorus, 3.7.5
\textsuperscript{23} Pausinaias, 6.11.6. The statue was later recalled from exile.
The same source records similar institutions beyond Athens.\textsuperscript{24} In each of these courts, a guilty verdict called for the convicted beast or item to be expelled beyond the borders of the city, taking its pollution with it.\textsuperscript{25} It is this attachment of pollution to a physical entity that makes exile a rational response to pollutions that cannot be purified – remove the offender (even if it is a statue), and remove the danger.

This brief examination is meant to situate the idea of pollution in the Western tradition, observing it in its natural habitat, so to speak, and outlining its longstanding relationship with exile. In the Greek \textit{polis}, pollution arose from violations, and especially those of the moral and social orders – no meaningful distinction existed between the two. Many polluting offenses were sufficiently serious that they required expiation, often by exile; continued association with the tainted could not be tolerated without risk.\textsuperscript{26} Pollution was a danger to the entire community, not only because of the belief that its very presence invited disaster, but also because it could be transmitted from its source to other citizens, spreading the moral disorder.\textsuperscript{27}

The classes of legal offense that were believed to generate pollution are invariably examples of acts considered particularly heinous or socially disruptive. The killing of a parent, for instance, was a violation of the natural hierarchy of authority.\textsuperscript{28} Slaying supplicants, temple robbing, and impiety all show a potentially destabilizing disdain for the religious customs of the city. This attachment to preserving shared values is characteristic of pollution beliefs around the

\textsuperscript{24} Pausinias, 5.27.10, 6.11.6.
\textsuperscript{25} Pausinias, 5.27.10, 6.11.6. Plato preserves the custom of exiling animals and objects that kill in the city outlined in the \textit{Laws}, 873e-874a.
\textsuperscript{26} Parker, 124-125.
\textsuperscript{27} Ibid., 124-125, Douglas (2002), 114,
\textsuperscript{28} Parker, 124-126; Aristotle \textit{Politics}, 1262a 31-32; Lysias, \textit{Against Theomnestes}, 10.1 Translated by W.R.M. (Cambridge: Harvard University Press, 1930). The city of Plato’s \textit{Laws} would consider the un-absolved killing of a parent not only homicide, but also impiety, likening it to temple robbing. 869b-c.
world. As public attitudes changed, so did the list of polluting crimes. While the specific causes of pollution varied with changes in culture, the idea retained its core elements, appearing as a dangerous, contagious moral stain clinging to a person and threatening any community foolish enough to allow them to remain within it.

**American Contagion Beliefs: Pollution in the Liberal Democracy**

Pollution beliefs may seem archaic, but there is ample evidence that they remain at work in the twenty-first century imagination. Nor are they likely to disappear any time soon. Experimental psychologists now posit that intuitions about supernatural contagion are not a periodic failure of the reasoning process, but are instead a basic feature of human cognition, functioning as a “heuristic” by which we make sense of imperfect or incomplete information.

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30 Parker, 164.
Pollution beliefs are one example of the set of intuitions that anthropologists and psychologists refer to as “contagion” beliefs; pollution is simply contagion in its negative form. The idea is not a new one, but it is currently drawing increasing attention from moral psychologists. Political theorists interested in the concept of community should also consider the implications of how contagion intuitions shape the attitudes of members toward each other.\textsuperscript{33} As the exploration of pollution above illustrates, beliefs in supernatural contagion do not only affect how individuals view themselves, they also shape how members of communities imagine one another, both as neighbors and as possible threats.

Early anthropologists, writing during the long nineteenth century, identify a broad class of beliefs they term “magical thinking,” including the subtype, “sympathetic magic.”\textsuperscript{34} James Frazer describes certain “laws” of sympathetic magic, including “the law of contagion.”\textsuperscript{35} The law of contagion describes a supernatural process by which essential properties are transferred from a source to a recipient entity.\textsuperscript{36} Contagion relies on contact, which may be direct or mediated. The pollution beliefs of the ancient Greeks exemplify the law of contagion, but so does latter-day reverence for religious relics, or even the high value attached to objects once belonging to celebrities.\textsuperscript{37} While most of Frazer’s work has been dismissed as ethnocentric Victoriana, anthropologists, and more recently experimental psychologists, show a continued

\textsuperscript{33} Rozin and Nemeroff (2002), 201-216.
\textsuperscript{35} Ibid., I 52-53. The third law of sympathetic magic, “the law of opposites” is the inverse of the law of similarity, and applies in limited cases. It has not captured the attention of current scholars as the laws of contagion and similarity have, lacking their apparent universality.
interest in sympathetic magic beliefs across cultures, and what they can tell us about the workings of the human mind.

Cultural evolutionists like Sir Edward Burnett Tylor and James Frazer deemed beliefs in supernatural contagion to be a common feature of “primitive” cultures.\(^\text{38}\) Though later scholars reject simplified narratives of progress from a primitive belief in magic, through religion, and finally to the acceptance of scientific reasoning, a certain stigma still clings to magical thinking. It appears backward, out of place modern societies that view themselves as being rooted in reason and science.\(^\text{39}\) This stigma makes acknowledging the continued existence of contagion beliefs uncomfortable, especially in societies that place a premium on human reason.\(^\text{40}\) Recognizing the persistence of pollution beliefs in American communities, like those that are the subject of this project, challenges fundamental liberal assumptions about human nature as being primarily defined by rationality. It is important to note, however, that although beliefs in sympathetic magic offer an account of how the material world operates that is contrary to scientific ideas, the two conflicting worldviews can (and very often do) exist side-by-side in the practices of both individuals and societies.\(^\text{41}\) Knowing that beliefs in supernatural contagion do not “make sense” does not prevent people from behaving as though they do.

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\(^{40}\) Participants in laboratory experiments commonly express embarrassment and are at a loss to explain their own intuitions about contagion, even as they continue to assert them. Rozin, Millman, and Nemeroff, 703-712; Nemeroff and Rozin (1994), 158-186, 181; Nemeroff and Rozin, 2000; Paul Rozin, Heidi Grant, Stephanie Weinberg, and Scott Parker, “‘Head Versus Heart’: Effect of Monetary Frames on Expression of Sympathetic Magical Concerns.” *Judgment and Decision Making* 2.4 (August, 2007): 217-224.

Social science is taking a second look at these “primitive” ways of thinking, and finding that intuitions about contagious moral stain remain tenaciously entrenched in societies (supposedly) long since disenchanted. Experimental psychologists Paul Rozin and Carol Nemeroff are responsible for the bulk of current work on magical thinking in the United States and other industrialized democracies. Rozin and Nemeroff’s pioneering work on contagion developed from a growing body of literature on the moral psychology of disgust, as the two concepts are closely linked – many cross-cultural disgust elicitors are also commonly constructed as sources of contagion. Both disgust and contagion beliefs identify material and interpersonal elicitors of intense aversion, and Rozin and Nemeroff’s experiments test for belief in contagion emitted both by disgusting substances and by detested people. While experimental data on disgust and contagion perceptions prompted by exposure to repulsive substances is important for establishing the parameters and persistence of contagion beliefs in latter-day Americans, their work on interpersonal sources is more relevant to understanding how pollution beliefs drive expulsion, so I will focus on interpersonal contagion for the remainder of this discussion.

Disgust is both an emotional response and an implicit judgment of unacceptability; it demands redress, usually by placing distance between oneself and the disgusting entity.


43 For Rozin’s own account of the connections between scholarship on disgust and that on contagion, see Rozin, Haidt, and McCauley, 9-29.


45 William Ian Miller, 9.
Disgust prompts us to recoil, not to attack or destroy, as anger or fear might. Assessments of contagion operate in a similar fashion. The things that we find disgusting are not necessarily harmful to us, but we are compelled to reject them on the basis of “ideational concerns” about a source’s perceived nature or history. Like disgust, perceptions of contagion stem from knowledge of a source’s past; contaminating people are not readily distinguishable from others without considerable context. While classifying moral revulsion as “disgust” remains somewhat controversial among experimental psychologists, there is substantial evidence that moral disgust is indeed experienced via the same qualia and neurological activity that disgust at revolting materials is. Using the same word for the revulsion that we feel at seeing a gory automobile accident as we use for that provoked by moral transgressions like incest or particularly heinous acts of violence is not merely a matter of confused English terminology. The same phenomenon

occurs across very different languages and cultures. Like contagion intuitions, the experience of disgust is universal, but its specific elicitors are culturally specific.

While the role of disgust in politics has received some theoretical attention, the effects of contagion beliefs have not, as they are often subsumed in arguments about disgust as a reliable or unreliable moral intuition. Understanding contagion is vital to understanding why disgust is such a dangerous emotion when it enters into democratic politics. Both disgust and contagion express anxieties about protecting the “pure” self from contamination, but only an understanding of contagion intuitions sheds light on why those fears are important to political life. Contagion beliefs are the social expression of disgust – they identify certain members of the community not only as impure, but as sources of moral danger to the society around them. The relationship between contagion and community is oddly absent from experimental studies on contagion, which tend only to focus on individual concerns about the self. This is, perhaps, because these

48 Haidt, Rozin, McCauley, and Imada document similar terms and usage in French, German, Russian, Spanish, Hebrew, Japanese, Chinese, Hopi, and Bengali.
studies were conducted in the modern United States. By its nature, contagion is not primarily an individual matter. It is something that occurs between individuals, not within them.

Perceived human sources of contagion are members with whom associating is not only unpleasant, but also dangerous. Collective responses to contagion fears articulate which qualities render a member impure and intolerable, thus expressing (albeit in the negative) which qualities define the pure or true character of membership in that community. Contagion is not merely a stand-in for a rational aversion to disapproved conduct, nor is it a simple concern about possible moral influence; it is a power unto itself. Like the *agos* and *miasma* of the ancient world, contagion is a supernatural force that operates in the physical world, attaching to both objects and people, and it is associated with forbidden actions, moral character, misfortune, and bodily infirmity. Also like *agos* and *miasma*, the current conception of contagion at work in American minds does not rely on any human or divine will to wreak havoc in the world, it operates spontaneously. Rozin, Nemeroff, and their colleagues document a few defining characteristics of contagion.

First, it arises from physical contact between a contaminating source and a recipient. This makes proximity important. While it can be passed on through successive contacts,
contagion is still a localized force, anchored to physical carriers.\textsuperscript{54} It is important to note that not all objects are perceived to be equally conductive of contagion; material objects that carry some special moral or cultural meaning are far more likely to be described as acquiring and spreading contagion than more quotidian ones. For instance, wearing clothing worn or belonging to a contagion source is far more likely to be seen as conveying contagion than driving the same car.\textsuperscript{55} Similarly, “chain” contacts were perceived to pass only between objects sharing some quality. One pencil could pass contagion to other pencils, but subjects expressed no concern about touching the table upon which all of the contaminated pencils lay.\textsuperscript{56} To acquire contagion, both source and recipient must occupy the same moral world. That sharing of meaning is what makes recipients vulnerable to contamination, and it is also characteristic of community membership. Members of the same community inhabit the same interpretive world, sharing beliefs and narratives that make them vulnerable to each other’s influence. If moral contagion requires some moral commonality to spread, then the sharing at the core of community opens members to possible contamination by association with tainted fellow citizens.

Second, the stain is durable, perhaps even permanent. As Marcel Mauss describes this aspect of contagion, “once in contact, always in contact.”\textsuperscript{57} Once the transmission of essence from source to recipient occurs, it cannot be reversed without employing extraordinary measures


\textsuperscript{55} Rozin, Markwith, and McCauley (1994), 495-504.

\textsuperscript{56} Cisler et al., 28–35.

\textsuperscript{57} Mauss, 1972.
(and the effects of particularly virulent contagions may be impossible to reverse, even in the face of purificatory measures). Given that contagion can be spread from entity to entity, this durability is especially dangerous, as it widens the contaminant’s potential reach. In societies that openly espouse pollution beliefs, there are almost always accompanying systems of purification that ameliorate contagion’s durability and limit its spread. In societies that deny the operation of contagion ideas, however, there can be no established purifying practices. Purification allows the previously polluted member to be reintegrated into the normal workings of the community; it effaces the mark of moral difference. For communities that lack this tool, contagion is an especially pernicious threat, leaving those it mars with no clear pathway to expiation and reintegration.

Additionally, contagion is “holographic” or “metonymic” in character – that is, every part of the source is fully representative of the whole, and every part of the contaminant is equally contaminating. In short, there are no safe contacts with a source. Similarly, contagion beliefs include an assumption of “dose insensitivity,” even very minimal contact is sufficient for transmission. Sources are subject to what Rozin and Nemeroff term “negativity potency,” meaning that the negative features carry a perceived potency that is much greater than positive or neutral ones. In the case of contagion, this means that no amount of good in the source can overrule, or even diminish, the bad. Finally, a wide range of properties can be transmitted, from physical characteristics to moral traits, and even intentions.

59 Rozin and Royzman, 296-320.
60 Rozin and Nemeroff, 2002; Nemeroff and Rozin (2000), 1-34, 1-5; Rozin and Nemeroff (2002), 201-216.
These attributes should seem familiar – they appear throughout the ancient pollution stories discussed above, albeit in less systematized form. In ancient pollution narratives, an actor’s intent bears no relation to their acquisition of pollution, though they may still be treated as blameworthy.\(^{61}\) This is one aspect in which current American contagion intuitions are unlike their ancient predecessors. This is unsurprising, given the different moral foundations and social organizations of the two societies. It might be expected that American contagion ideas track concepts of sin closely, but this is not entirely the case, either. While Nemeroff and Rozin’s subjects viewed those who had willingly committed bad acts (specified in the experiments as “murderer,” “mass murderer,” and “personal enemy”) to be contaminating, faultless victims of injury, illness, and other misfortunes prompted similar responses.\(^{62}\) Still, the greatest interpersonal revulsion was reserved for those that individual participants found morally objectionable.\(^{63}\)

In interviews, participants express not only disgust, but they also voice a strong aversion to associating, even in very minor ways, with people they deem contaminating. Below is a sampling of interview responses from participants asked to explain the reasons for their aversions. One respondent described her reaction to being asked to wear a sweater belonging to a murderer:

It’s the fact that he came into contact with it. Creepy. That he could somehow transmit – uh, somehow the object would pick up some negativeness. I’m not


\(^{63}\) For instance, participants who expressed moral objections to homosexuality reported higher levels of aversion to coming into contact with garments or bed sheets used by a gay man, even after laundering. Rozin, Markwith, and McCauley.
saying it would smell or have dandruff on it, but it would be creepy because he’s a creepy person.\textsuperscript{64}

Another participant, in response to the same question:

I guess with evil people I feel the events have been absorbed by them, within their person, and they carry them around with them, so it doesn’t matter [how long he owned or was in contact with the sweater]... like evil has the potential to be more infectious and more potent.\textsuperscript{65}

And finally, when asked about her feelings about wearing a sweater belonging to a personal enemy, a subject answered:

Very negative. I just don’t want to be around him or his objects.... Because he’d give it cooties, not that I think he has cooties – but he’s just a nasty person and oozes nastiness.\textsuperscript{66}

These descriptions are less elegant than those of Sophocles or Plutarch, but they convey similar perceptions. The use of the term “nasty” in the last example is particularly telling, given the term’s dual meaning of “malicious” and “disgusting;” “nastiness” is something a reviled person “oozes.”

Rozin and Nemeroff’s work with educated, twenty-first century Americans makes a strong case for accepting that contagion intuitions continue to shape how people perceive one another. The implications for understanding how members of communities conceive of each other are troubling. Current contagion beliefs, like their ancient counterparts depict a moral stain transmitted by simple exposure to a tainted person. The transmission of contagion alters both source and recipient, making each more like the other. However, because of the vastly greater

\textsuperscript{64} Nemeroff and Rozin (1994), 178-179.

\textsuperscript{65} Nemeroff and Rozin (1994), 158-186. 178-179.

\textsuperscript{66} Ibid., 178-179.
potency of negative contagion (pollution), contact between a negative source and another entity will make the recipient more like the polluted source, while leaving the source of contamination as impure as before. According to contagion intuitions, the source corrupts everything it reaches, in potentially profound and enduring ways, and it cannot be elevated or purified by association with any number of pure others.

When that source is another person – a person who belongs to the same community as oneself – the tendency of contagion intuitions to translate moral disapproval into a perception of threat is understandable, if still not rationally justified. The contagion heuristic is only one of many biases that warp the ways in which we think about morality, but it is an especially important one in examining the persistence of another ancient atavism: exile. Contagion’s transmissibility via mere physical proximity, the powerful internal experience of disgust, and the urge to place distance between oneself and the disgust elicitor all conspire to make expelling the contaminating person an irresistible solution to the threat that a polluted person poses to a community and its individual members.

**Authentic Moral Sentiments or Dangerous Passions? What Purgative Expulsions Really Tell Us About Liberal Political Community**

Evidence of the continued influence of contagion beliefs in the thought processes of twenty-first century Americans merits the attention of theorists of the moral psychology of political community for a number of reasons. First, the belief in moral contagion is a cognitive bias that presents itself as a moral judgment, despite lacking a publicly justifiable rational basis. This feature of the contagion intuition makes it especially likely to distort any discussion of shared
moral judgments into which it is introduced. Traditional liberal models of moral judgment assume that assessments of our fellows’ moral blameworthiness are the result of a reasoned evaluative process.\textsuperscript{67} The heuristic value of cognitive biases (maladaptive as they may be) is that they circumvent that very reasoning process, offering a “shortcut.”\textsuperscript{68} The fact that a contagion intuition is experienced – even if it were unanimously shared by all community members – is not evidence that good reasons have been identified for perceiving the source as contaminating, dangerous, or even undesirable. While privileging certain shared moral commitments in public institutions and policies may be a legitimate exercise of democratic power (even in liberal communities), it is a mistake to conflate intuitions with judgments when making such policies.\textsuperscript{69} This is especially true in the drastic case of expelling a person from his or her community – an action both highly coercive and also costly to both community and banished person. Liberal communities must be able to give a reasonable justification for such an extreme interference.

A related difficulty arises with the temptation to interpret contagion intuitions as spontaneous, authentic expressions of a community’s “true” moral identity, and so to assign them undue value in political decision-making. Claims of this type appear in debates about the usefulness of disgust as a criterion for moral evaluation or the permissibility of shaming.


\textsuperscript{68} Jonathan Haidt and Craig Joseph offer an account of how pollution intuitions once operated as useful heuristics at an earlier evolutionary stage, including additional evidence that pollution intuitions may be evolutionarily “primed” in human cognition. “Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues.” \textit{Daedalus} 133.3 (Fall, 2004): 55-66.

\textsuperscript{69} The debate motivating a large and growing philosophy literature on the legitimacy of “intuitions” in moral argument generally is beyond the scope of this project and cannot be summarized here. For the purposes of examining how moral intuitions can a) distort interpersonal perception and b) shape relations between citizens, this chapter will limit its inquiry to the effects of contagion intuitions, as they are most relevant to the subject. Intuitions suffer from serious limitations in political argument from a public reason standpoint.
Certainly, contagion beliefs are shaped by the cultures around them, and so have considerable expressive value. Indeed, this project does interpret the particular forms in which contagion intuitions appear as symptomatic of deeply held but unarticulated ideas about community membership. However, the ideas expressed in contagion intuitions should not be uncritically accepted as the being particularly foundational or especially valuable or authentic simply because they are pervasive and implicit. Contagion intuitions reflect a sort of “folk morality” that may be an especially unvarnished reflection of a community’s moral identity, but that does not imply that it is the most important or most “true” expression of that identity.

Additionally, invidious biases of all kinds also appear draped in the particular language and symbolism of the culture harboring them; they may even be legitimately expressive of some aspect of that community’s identity. Regardless, simply being expressive of community identity is not sufficient justification for affording pollution intuitions a place of special justificatory privilege in the set of ideas and symbols shared by members of a community. Nor should the lack of rational reflection accompanying contagion beliefs be too readily accepted as evidence of authenticity or spontaneity. Pollution intuitions have changed form over the centuries, but they reappear regularly, clothed in whatever aversion is fashionable. For instance, in the 1840s and 1850s, newspapers and popular books across the country describe Mormons in the language of

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pollution, especially when referring to the practice of “the plague spot” of polygamy.\textsuperscript{71} In the years approaching the Civil War, both abolitionists and pro-slavery writers deploy pollution imagery: abolitionists depicting slavery as an indelible and spreading stain on the national character and defenders of slavery insinuating that manumission was merely the first step toward the dreaded “amalgamation.”\textsuperscript{72}

During the 1880s, Chinese Americans were depicted as contagion-bearers, especially in California, which hosted large Chinese population centers. One of them was San Francisco, home to an established (and easily targeted) Chinatown. In the 1880s, the San Francisco Board of Health pronounced the whole of Chinatown a public nuisance, describing it as “a great reservoir of moral, social, and physical pollution” that threatened to “engulf within its filthiness and immorality the fairest portion of our city.” Decades earlier, in 1854, city authorities had attempted to use similar nuisance law to effect the “immediate expulsion of the whole Chinese race from the city.”\textsuperscript{73} Not surprisingly, the same groups subject to construction as polluted (and

\textsuperscript{71} Edmund Clay, The Doctrines and Practices of “The Mormons,” and the Immoral Character of their Prophet Joseph Smith Delineated from Authentic Sources (London: Wertheim and Maclntosh, 1854):32, 12, 17. This passage is typical: “Yes, the [M]ormons have been persecuted, as debauchees and felons usually are, but never on account of their religion. They have ever been a bubbling and seething cauldron of pollution, and can no more be tolerated in the bozom of civilized society than gangs of counterfeiters and thieves.” The article repeatedly refers to Mormon men as “debauchees,” and lists how many wives each man has. “THE MORMONITES: Affairs in Utah – the Gladdenites – General Character of the Mormons.” Special Correspondence of the New-York Daily Times, April 20\textsuperscript{th}, 1854. An 1854 New York Times article refers to the possible spreading of “the plague spot” of polygamy, referring to Mormonism as “this sink of pollution.” “The Mormons in Utah.” New York Daily Times, June 30\textsuperscript{th}, 1854, p.2. Additionally: “Bill for the Suppression of Polygamy.” New York Daily Times, June 30\textsuperscript{th}, 1856, p.3; “Letter from Salt Lake: Brigham Young Still Determined to Rebel, Memorial from the Legislature to Congress, Mormon Harangues in the Tabernacle.” New York Times, February 17\textsuperscript{th}, 1858.


polluting) have historically been targeted for expulsion.\textsuperscript{74} In the twentieth century, racist policies forbidding interracial marriage adopted the language of purity and hygiene, as did xenophobic eugenics movements.\textsuperscript{75} While all of these shameful episodes in American history are expressive of some (in these cases, ugly) facet of American identity, there are not good reasons to consider them to be exclusively indicative of America’s “true” or authentic character.

Similarly, because pollution intuitions carry the imprint of the particular culture housing them, that fact is not itself sufficient evidence to accept that contagion beliefs are the “true” or authentic indicator of a community’s moral identity, and so deserving of special consideration. While pollution intuitions do offer an indication of what a given community deems radically intolerable, they do not offer a justification for arriving at that conclusion. This is not to say that pollution beliefs have no moral value whatsoever, or no place in political discourse. Rather,

\textsuperscript{74} Both African Americans and Mormons are groups often accused of harboring “polluting” influences, and both are groups once subjected to mass expulsions from American cities, counties and states. Over the course of the nineteenth century, various states enacted “black laws,” or policies forbidding the admittance of free blacks. Some went further, also barring existing black residents from remaining, or so severely restricting the conditions under which they could remain that they were effectively expelled; some states required free blacks to provide documentation of their freedom, in addition to impossibly burdensome sureties of as much as $1,000. For example, Oregon, designated a non-slave territory under the Northwest Ordinance of 1787, never had a large black population, and in an effort to deter their immigration the territory passed a number of exclusionary laws. The first, the Exclusion Law of 1844 (also known as legislator “Peter Burnett’s Lash Law), required free black residents to leave the state within a specified period of time or suffer lashing; one year for black men, three for women. The law was viewed as excessively harsh and rescinded in 1845. A later exclusion law enacted in 1849 forbade the admittance of “any negro or mulatto,” but excepted “any negro or mulatto now resident in this territory” or their offspring. A Bill To Prevent Negroes And Mulattoes From Coming To, Or Residing In Oregon §1. Territorial Legislature, September 21\textsuperscript{st}, 1849. Oregon became the only free state admitted to the Union with an exclusion provision in its constitution in 1857. The legacy of Oregon’s exclusion laws remains – in 2013, only 2% of Oregon’s population identified as black. Mormons were formally expelled first from several counties in Missouri, then from the entire state in 1838, with the issuance of Missouri Executive Order 44. Later, after repeated clashes with authorities centering in Nauvoo, Illinois, they were also driven out of that state in 1846. The Illinois state legislature issued an official apology in 2004, with House Resolution 793. The resolution expressed regret and also acknowledged the state’s role in the expulsion.

pollution intuitions ought to be treated as any other non-rational passion like anger or fear when introduced into the realm of politics – carefully and with considerable skepticism. Liberal political institutions are meant to restrain our natural impulses, protecting citizens from their own immoderate and often destructive passions. Pollution intuitions, despite their seeming similarity to moral judgments, should be counted among those passions, not afforded the same high value in political argument that considered, shared moral judgments receive.

While partisans of thick, particular community identities may be disappointed by this analysis of the role that pollution intuitions (and the expulsions they inspire) play in expressing community values, all is not lost. Pollution beliefs are not only disciplinary, marking the totally unacceptable as distinct from the legitimate member; they also identify some of the content of the “sharing” that defines a community. Bernard Yack, in *Nationalism and the Moral Psychology of Community*, refers to a shared sense of “social connection or friendship” that arises from sharing within a community. On its surface, this may appear an idealized, even romanticized, image of community. As ought to be abundantly clear from the preceding chapters, not all relations between community members are particularly friendly. But as Yack points out elsewhere, friendship is complicated, and the type of social friendship that he argues characterizes communities is made up not only of harmony between individuals, but also of a controlled conflict. This conflict arises from the very differences between community members that allow for the complimentarity and interdependence that both Aristotle and Durkheim see as generative of the solidarity or fellow-feeling that holds communities together.
While interdependence accounts for the existence of social solidarity despite the presence of constant (if controlled) conflict, that possible instability is also mitigated by a strong sense of sharing. Again, in Yack’s words:

Community… thus has two key features: sharing and a sense of social connection or friendship derived therefrom. A community is a group of individuals who imagine themselves connected to each other as objects of special concern and loyalty by something that they share.76

As he points out elsewhere, “community” is notoriously difficult to define without resorting to circular descriptions of imagination and fellow-feeling. Yack’s account of “sharing” lends some substantive content to the affective dimensions of community, and invites further consideration. “Sharing” is a word that commonly occurs in discussions of community and solidarity, but what it signifies is not always clear. Certainly, envisioning all members as partaking in a unified identity is one form of sharing, the sort most important in societies built on Durkheim’s “mechanical solidarity.” The societies discussed in chapter one make extensive use of this sort of sharing as a source of social cohesion, though it does not appear exclusively in such communities. The meaning attached to histories, symbolic sites, and the traditions that tie every community together relies, to some extent, on a sense of unity or sameness among members. The specific content of those community symbols varies, but in every case they are important because they are conceived of as carrying roughly the same meaning for every member of the community – members are members because they share the same conceptual framework for interpreting the world.

Liberal communities are relatively limited in what objects of sharing are available to them. This problem has been discussed extensively in the nationalism literature, with liberal nationalists offering visions of nations sharing a common culture or civic commitments, contrasted with older, illiberal nationalisms built on common ethnicity, religion, race, or other exclusive characteristics. Questions of how to generate solidarity without running afoul of liberal commitments are certainly not limited to the nation. Liberal communities at all levels wrestle with reconciling contingent, unstructured local identities with liberal requirements of toleration and equality. As the other chapters of this project make abundantly clear, liberal communities suffer from considerable confusion about which objects of sharing are legitimately available to them and how to reconcile liberal limitations with popular longings for substantial community identities.

Purgative expulsions offer an insight into one way in which American communities use exile to define certain objects of community sharing. Using exile to cleanse away pollutants also creates a category of the “pure,” those people, places, and symbols from which contagions must be kept separate. While contagion intuitions attach to particular people, the desire to expel them often attaches to particular places or symbols. It is true that some polluting people are simply barred from as large an area as possible in an effort to maximize the distance between them and those who cast them out. More often, communities must operate within certain limits, and so they prioritize the protection of certain symbolically meaningful locations or people. In so doing, they create a sphere that is not exactly sacred (in that those within it may not possess any element of transcendence of the material world), but that is, at least, treated with reverence.
Whatever (and whoever) falls within this is shared and valued by the entire community, deemed worthy of its protection.

The set of people, places, or things within the protected sphere embodies an agreement among the members of the community to regard the object of sharing as settled, beyond political or moral contestation. In reality, of course, that is not the case, since these objects of reverence change with the culture around them. Those who fight in the nation’s wars, the subject of this chapter’s discussion, were certainly not exempt from political or moral criticism during the Viet Nam war era. Children, the subject of the next chapter, have not been envisioned as delicate, fragile innocents until relatively recently. Regardless of the actual historical variability in spheres of protection, what is most important is not the specific classes of person or place within a given sphere, but the fact that it exists. By classifying some symbols as “pure,” a community comes to an agreement to value it together: they share what they protect. The final part of this chapter will consider one particularly dramatic manifestation of purgative exile, illustrating how pollution intuitions emerge in a popular American political debate, how they drive the expulsion of a person deemed “polluting,” and how the symbolic significance placed on the place and role contaminated by his occupying them outlines an object of shared national reverence.

**Nothing New Under the Sun: Russell Wayne Wagner, Murderer and Posthumous Exile**

Before considering what the fate of veteran and convicted murderer Russell Wayne Wagner can tell us about contagion, exile, and liberal community, a brief return to the ancient world is in order. Like community membership, exile is not reserved only for the living. The ancient Athenians knew this, and did not hesitate to exile the dead when necessary. In the years
following the Cylonian affair, Megacles, head of the Alcmaeonidae at the time of the slayings, came to represent all of the archons who had participated in the slaughter of the supplicants, and so, too, came to represent all of the pollution that the event had brought upon Athens. To purge the pollution clinging to Athens since the mass murder, Megacles (who had died), his followers, and his descendents were tried and sentenced to exile in perpetuity. The bones of Megacles and the other Alcmaeonidae dead were exhumed, transported to the borders of Attica and flung beyond them. It has not escaped the notice of scholars that “driving out the pollution” by expelling the living Alcmaeonidae had clear instrumental value for Cylon’s surviving supporters in the city, excising most of Megacles’ faction from the center of Athenian politics and suppressing the civil unrest that had destabilized the city for nearly three decades. But such a practical explanation cannot explain the expulsion of the bones of the dead. Surely they could no longer provide support in a political struggle. No prudential concerns about bad influence or future disruptive activity can explain exiling the dead. Only a very real dread of pollution explains such an action.

77 Following the trial of the magistrates, only Megacles (dead by the time of the trial, much to the advantage of his fellow defendants) and his family were found guilty.
78 Plutarch, *Solon*, 113; Aristotle, *The Athenian Constitution*, 1. The Cylonian Affair, and the transgenerational taint of Alcmaeonidae pollution that arose from it, would haunt Athenian politics for generations. In the late sixth century, Spartan opponents of Cleisthenes invoked the Alcmaeonid curse in their effort to expel him. As late as 432, Pericles was forced to contend with politically motivated accusations of pollution from his Spartan enemies. Parker, 16; Plutarch, *Pericles* 229.
79 The Cylonian Affair and its aftermath directly shaped Athenian politics for over three decades. Cylon’s attempt to institute a tyranny and the subsequent murder of his supporters took place in 636 B.C. Cylon fled into exile immediately thereafter. The magistrates tried him in absentia, sentencing him, his family, and his supporters to outlawry. Strife between the factions persisted, however, to the extent that it is widely believed that Draco’s Homicide Laws were drafted with an eye to the ongoing calls for the archons to be punished. This was in 621. In 606, the Alcmaeonidae were expelled and Epimenides called upon to cleanse Athens of the pollution the event was believed to have caused. The primary sources on the Cylonian affair are Thucydides, 1.126; Herodotus, 5.71; Plutarch *Solon* 112-114; Pausinaias, 1.28.1, 7.25.3.
The Athenians of the seventh century B.C., in exiling even the bones of the polluted, illustrate the power of contagion ideas over a community’s collective imagination, driving its members to such lengths simply with the fear that keeping even the harmless material remnants of the transgressors’ bodies close would somehow promulgate the moral taint that led them to transgress in the first place. The act is also a deeply symbolic public spectacle. Removing the sacrilegious Alcmaeonidae root and branch from the city makes a decisive collective statement about who Athenians were, and more importantly, were not. Pious Athenians would not accept association with sacrilegious Alcmaeonidae, even in death. It is, perhaps, not so surprising that an ancient society that held pollution in such superstitious awe that it instituted an entire court dedicated to trying – and consequently exiling – inanimate objects and animals responsible for human deaths would also engage in such bizarre and extreme measures to protect themselves from the pollution of Megacles and the Alcmaeonidae dead.

Such theatrics hardly belong in the disenchanted world of the twenty-first century, however. Nonetheless, on December 29th, 2006, the ashes of Vietnam War veteran, heroin addict, and convicted murderer Russell Wayne Wagner were taken from their resting place in the columbarium of Arlington National Cemetery and removed from the grounds. Despite the expressed wishes of his victims’ kin to witness Wagner’s humiliating expulsion, his remains were disinurned without ceremony.80 In accordance with federal law – one amended especially

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80 Andrew Schotz, “Killer’s Ashes are Removed from Arlington.” Hagerstown, Maryland: Herald-Mail, January 3, 2007; Tara Bahrampour, “Ashes Removed Under Law Disqualifying Felons.” Washington Post, Thursday January 4, 2007. Because Wagner was not actually buried in the ground, he cannot be described as having been “disinterred” or “exhumed,” leaving the rather more awkward, but accurate, “disinurned” as the only available descriptor.
for the purpose – the cemetery’s deputy superintendent turned the murderer’s ashes over to his next of kin for disposal beyond the bounds of Arlington National Cemetery.81

In his youth, Wagner had served in the Vietnam War, and his honorable discharge in 1972 legally entitled him to be laid to rest with standard military honors in Arlington National Cemetery upon his death.82 In 2005, Wagner died of a heroin overdose in prison, where he had been serving two life sentences for the 1994 home invasion murders of an elderly Maryland couple. Within a month of Wagner’s funeral, local news reported that Wagner’s ashes rested among the remains of the nation’s honored dead in Arlington National Cemetery, and outrage erupted. Maryland veteran Ed Davis (unrelated to the victims) gathered the signatures of more than 400 area veterans protesting Wagner’s inurnment in the National Cemetery. He told local reporters that many of the veterans who signed the petition had expressed an unwillingness to be buried in Arlington National Cemetery so long as Wagner’s ashes remained there.83 Within two months of Wagner’s inurnment, U.S. Senators Barbara Mikulski and Larry Craig were involved.84 The murdered couple’s son, fellow veteran Vernon G. Davis, Mikulski, and Craig led a campaign to have Wagner’s remains expelled, with the support of mounting public outrage as national media outlets picked up the story.85

82 While those convicted of capital crimes and sentenced to life in prison without the possibility of parole were, at the time of Wagner’s death, barred from interment in the Cemetery, Wagner was eligible for parole at the time of his death, leaving him legally entitled to burial with standard military honors. Though the cemetery was not informed of Wagner’s criminal history at the time of his inurnment, it would not have changed his eligibility.
There was, however, no legal basis for expelling Wagner’s remains. While an exclusionary law was rushed through Congress on the eve of Timothy McVeigh’s execution years before (McVeigh, too, was a veteran), it did not apply to Wagner. Although Wagner had been convicted of a capital crime, he was eligible for parole. According to the earlier law, this exempted him from the class of excluded dead. At the time of his death, Wagner was legally entitled to burial in the National Cemetery. A new bill was drafted, excluding all capital convicts from burial in national cemeteries, but there was still no legal apparatus for removing accepted remains from the grounds. Ultimately, Senators Mikulski and Craig added an amendment ordering the expulsion of Wagner’s ashes from the National Cemetery to an already pending bill providing health care and other benefits to veterans. Remarkably, the amendment singles out Wagner by name.

Wagner’s removal alone is extraordinary (he was hardly likely to cause any further trouble to his neighbors), but the public commentary surrounding the event is especially

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86 A 1997 bill (Public Law 105-116, 1997) prohibits the burial of anyone convicted of a capital crime or serving a sentence of life without the possibility of parole in Arlington National Cemetery. Wagner’s eligibility for parole exempted him from the limited class of excluded dead.

87 The assertion that Wagner’s inclusion was a terrible error is repeated throughout the hearings, with the legal provision allowing veterans convicted of capital crimes, but eligible for parole, to retain their rights to burial and military honors repeatedly called a “loophole,” to be “corrected” rather than simply a part of a democratically enacted piece of legislation. In fact, the provision that allowed veterans whose life sentences included the possibility of parole to be buried in national cemeteries was clearly spelled out in the bill governing limiting burial benefits. “Preserving Sacred Ground: Should Capital Offenders Be Buried in America’s National Cemeteries?” 2-5, 8-9, 13, 16-19, 20-21, 23-25, 27. This retroactive re-classifying of an unpopular member’s inclusion as a “mistake” is typical of the revisionism common in appeals to moral essentialism. Similar claims are made about the admission of morally turpitudinous aliens in the United States and the HIV positive women deported from Singapore mentioned in Chapter 1.


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significant. Jon Towers, a spokesman for the Veterans’ Affairs Committee, noted that before Wagner’s removal, his office had fielded several calls from veterans “…saying they would not like to be near such a person in death.” Mikulski and Craig held a hearing before the Senate Committee on Veterans’ Affairs devoted solely to Wagner’s removal, entitled “Preserving Sacred Ground: Should Capital Offenders Be Buried in America's National Cemeteries?” As Craig notes in the debate transcript, assigning a title to debates is highly unusual, but the title in this case certainly befits the pious tone of the hearing. Both Senators (and several others) argue that removing Wagner’s remains, and preventing the future inclusion capital offenders’ remains, would be necessary to preserving the “sanctity” of national cemeteries’ “hallowed grounds.” No participant in the proceedings opposed the measure or objected to the reasoning behind it.

Repeatedly the idea recurs that the simple presence of Wagner’s ashes was sufficient to desecrate the whole of Arlington National Cemetery. Mikulski explicitly employs the language of pollution in her verbal statement:

…Arlington National Cemetery and all of our nation’s national cemeteries are hallowed ground. They should not be tainted by the remains of a convicted murderer.

Mikulski’s written statement is even more explicit:

Thank you Mr. Chairman and Senator Akaka, for convening today’s hearing: to help us preserve our national cemeteries as places of honor…. They should not be polluted by the remains of convicted murderers.

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90 Preserving Sacred Ground,” Mikulski’s speech 3,4; Mikulski’s prepared statement, 5, 6; Craig’s speech 1, 2; Craig, 21, Cullinan’s testimony 25.
91 Ibid., Mikulski, 3.
92 Ibid., Mikulski, 4.
Perhaps Mikulski did not literally believe that allowing Wagner’s remains to continue resting on hallowed national soil would bring plague, famine, or other supernatural disasters upon Washington D.C., but it is clear from her statements that the simple presence of Wagner’s ashes itself constituted a harm to those among whom he rested, one that the nation to whom those dead belonged was obligated to address.

The tone of “Preserving Sacred Ground” differs substantially from that of the untitled hearings on denying Timothy McVeigh burial in national cemetery grounds.\(^9^3\) Objection to Wagner’s presence (which was already an established fact by the time Senators became involved) rested on the idea that his simply being on hallowed soil constituted a violation of decency. By contrast, arguments for preventing McVeigh’s burial center upon ideas of distribution and desert. In the McVeigh hearings, burial in a national cemetery is simply a “benefit,” like health insurance or a retirement plan. Representatives describe space in national cemeteries as a “scarce resource” that should be distributed fairly, with the deserving coming before those whose claims, like McVeigh’s, were devalued by their actions.

Economic terms like “scarcity” or “resource” never appear in “Preserving Sacred Ground.” In the Wagner debate, the soil of national cemeteries is, quite literally, sacred and in need of protection from defilement – not a commodity to be distributed justly or unjustly.\(^9^4\) Why


\(^9^4\) There is ample rhetoric of “honor” and “dishonor” at work in the McVeigh hearing, but even that is in service of separating those deserving of resources from the undeserving. It is still concerned with distributing a scarce commodity. Representative Joseph Knollenberg (R-Michigan) departs from the general tone of the McVeigh hearing, referring to national cemeteries as “sacred ground.” 6, 50-51. Additionally, Spencer Bachus makes reference once to “stain[ing] the memory” of the war dead. These are, however, departures from the dominant tone, which focuses primarily on who deserves what. “S. 923 and H.R. 2040, To Deny Burial in a Federally Funded Cemetery and Other Benefits to Veterans Convicted of Certain Capital Crimes,” 3.
the difference? McVeigh killed 168 people, including children, in an act of terrorism. Wagner, by contrast, was a fairly run of the mill murderer (if there is such a thing); it is unlikely that the lawmakers and constituents who called for the respective measures judged Wagner to be more evil than McVeigh. The primary difference was that Wagner was already physically present in the place both were deemed not to belong. The violation was already occurring. Once the comfortable buffer of the hypothetical was removed, the contagion intuitions underlying both Wagner’s expulsion and (in all likelihood) McVeigh’s rejection could no longer be phrased in rationalized terms of justly distributing scarce resources. Nor could such arguments justify as unprecedented a measure as “evicting” a human body from its resting place. In Wagner’s case, to effect his expulsion, those calling for it were forced to articulate the non-rational, but widely shared, intuitions that made it obligatory.

Wagner provoked particularly intense public disgust not only because of the heinousness of his crime, which was brutal, but similar to thousands of other offenses that did not meet such a response. Rather, it was due to the especially venerated character of those he joined in death. The dead amongst whom Russell Wayne Wagner’s ashes lay were a special class of revered ancestors: the military dead. In the words of Senator Ken Salazar, Wagner is “a real monster” “...allowed burial next to real American heroes.” Arlington National Cemetery is more than simply a burial ground; it is a shared national symbol, worthy of public reverence and protection. This becomes clear during the debates about Wagner’s expulsion, in which the cemetery appears as a romanticized representation of American ideals, or rather of idealized Americans:

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96 “Preserving Sacred Ground: Should Capital Offenders Be Buried In America's National Cemeteries?” Statement of Senator Ken Salazar, 8.
This loophole enabled the man who murdered [two people] to be placed alongside of our heroes…. You know, to all of America, Arlington is one of our national icons. It is like the Statue of Liberty. The flag over Arlington, the Eternal Flame of President Kennedy, the distinguished people who died there, the Tomb of the Unknown Soldier that honors the sacrifice. Even if we do not know your name, we want to salute you and honor you, even at death.  

A space must be sacred before it can be desecrated, just as a symbol must having meaning before that meaning can be tainted. The presence of the graves of America’s war dead makes the space of Arlington National Cemetery especially rich with meaning, and so it is especially vulnerable to being tarnished by association with Wagner.

In the passage above, Mikulski invokes an obligation to the dead of Arlington, one that in allowing Wagner to stay, the American people would be failing to meet. Arlington’s war dead are characterized here by sharing something definitive: an ethos of military honor and exemplary conduct. Wagner’s military service gave him a claim to share that same ethos, but his later conduct contradicted the legitimacy of that claim. However, it is not what the occupants of Arlington National Cemetery share in common that imbues the Wagner debacle with such moral intensity, nor is it that Wagner is inherently tainted with pollution. Rather, it is the importance of Arlington National Cemetery, and its image as a place of honor for those who have adhered to an unusually high standard of conduct and courage, to the nation. Had Wagner been inurned in any other cemetery, his inclusion would have met with no reaction. Rather, his association with the revered dead of Arlington National Cemetery threatened to taint and devalue Arlington National Cemetery and the idealized military it represents, objects of special public reverence in America at that time. It was the elevated position of Arlington National Cemetery and a romanticized

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97 “Preserving Sacred Ground,” 4.
view of the military in the American national narrative that lent them their particular moral purity, rendering Wagner’s presence defiling.

Wagner, being dead, may seem an odd candidate for the title of “exile,” which I have defined in previous chapters as existing members who are expelled from their communities via the coercive powers of government. It is not self-evident that Wagner was not a rightful member of the community from which he was removed, however. Wagner’s inclusion in Arlington National Cemetery was legitimate; he met the conditions for inclusion and violated no prohibition that existed at the time of his admission. Nor should he be considered to have passed out of membership simply because he had died. There are good reasons to consider the dead as community members, especially given the importance of intergenerational sharing in generating community in the first place – community exists not only in space, but also across time.98 Obviously, some would reject this conception of community, arguing, like Jefferson that, “…by the law of nature, one generation is to another as one independent nation to another.”99

But communities do not operate according to the laws of nature, they are products of human imagination, and the “temporal depth” that accompanies the consciousness of having inherited established customs, symbols, institutions, and beliefs stems from the sense of

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connection to generations that have passed out of the world. Often, stories about attachment to territory, and to the home cities and nations built upon it, invoke the image of ancestral graves lending special meaning to land. While they may not still walk the same streets as the living or cast ballots, the dead are among those we imagine when we conjure images of communities rooted in rich local histories. In this case, the members who cast Wagner out were not the dead within the bounds of Arlington National Cemetery, but the generation of Americans who inherited that ground, and its shared meaning, from them.

Wagner’s expulsion was a necessary purifying rite for Arlington National Cemetery, not only protecting the honored dead from his defiling presence, but also reaffirming the status of Arlington National cemetery and the American military as objects value and meaning shared by the nation. By enforcing the expulsion of Wagner’s ashes from Arlington National Cemetery, Americans following the events unfolding on C-SPAN and in newspapers shared the experience of articulating Wagner’s total unacceptability. In their vicarious participation, they reaffirmed their own fundamental difference from him and commonality with each other – at least in regard to the special value afforded these national symbols; much else would remain contested.

Mikulski, Craig, and the veterans who voiced their reluctance to associate with Wagner, even only spatially and in death, all struggle to articulate the intuitions underlying their outrage, ultimately seizing upon the imagery of pollution, desecration, and contamination. Deeming the mere physical presence of Russell Wayne Wagner’s ashes sufficient to taint both the physical space (“hallowed ground”) and the sense of shared national veneration in which it was held,

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these twenty-first century actors responded just as those of ancient Athens did. They cast the offender and his pollution beyond the bounds of the space they threatened to desecrate.

In the wake of Wagner’s expulsion, federal law governing eligibility for burial in national cemeteries was amended to exclude any veteran sentenced to death or to life imprisonment following conviction for a capital crime. The law was tested only a few years later, when in 2012 veteran Michael L. Anderson shot several people in his Indianapolis apartment complex, killing manager Alicia Koehl before turning his gun on himself. Because he was never tried or convicted, Anderson was buried in Custer National Cemetery in Michigan. Custer National Cemetery, of course, does not carry the same national symbolic weight as the ground in which John F. Kennedy is interred and which holds the Tomb of the Unknown Soldier, so Anderson’s burial did not draw the same nationwide attention as Wagner’s. Still, upon objections from the victim’s family, Indiana Senator Dan Coates introduced the “Alicia Dawn Koehl Respect for National Cemeteries Act.” In debate, lawmakers refer to the law as giving officials the power to “reconsider” burials, a euphemism for standing authority to exhume interred bodies. In addition to providing for possible future disinterments, Section 3 of the bill requires the exhumation of Anderson by name. The bill was signed into law in December 2013, and Anderson’s body was removed shortly thereafter.

Considering why the American public might be so invested in expelling someone who is dead from inclusion in a place of shared symbolic value shows the uniquely non-rational underpinnings of the impulse to expel. There are rational reasons to expel existing members whose continued presence is perceived to pose the risk of exposing the rest of the community to

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101 See, for instance H7640, (December 11, 2013): 1244-1245.
102 Public Law 113-65.
future bad acts. This (while itself problematic) is part of the calculation in moral exile. Neither Russell Wayne Wagner nor Michael L. Anderson posed any danger of committing further crimes, obviously. There may be some argument from “punishment,” or that expelling the dead is symptomatic not of contagion fears, but a desire to continue punishing the offenders after death. Punishment has several aims, including deterrence of others, which seems unlikely in these situations, as disinterment lacks the clear hindrance to individual interests, visibility, and likelihood of occurrence that punishments like incarceration or levying fines threaten. Additionally, in legal regimes that have used the punishment of corpses as a deterrent, it is a gruesome and frightening spectacle involving some public display of the body, as in the eighteenth century British practice of gibbeting certain executed criminals. This is not the case here. Alternately, punishment is meant to rehabilitate – also not a plausible reason for punishing a dead person. The only possible purpose of punishment expelling the dead could serve is retaliation.

Historically, some societies have treated the dead as possible subjects of retaliation. The practice of leaving certain offenders unburied was not uncommon in ancient Greece and Rome. In early modern England disinterment was itself a punishment, as it desecrated the corpse of the punished. Corpses, in the eyes of U.S. law, cannot be punished, having no...
interests or rights to be constrained. American laws punishing the desecration of a corpse exist for the sake of the living; it is the friends and relatives of the dead who suffer the harm, not the dead person. Even if the American people may entertain some ideas about punishing the dead, why reserve additional retaliation for only Wagner and Anderson? Why not force every murderer out of every cemetery? Expelling the dead is not merely an overzealous expression of the impulse to punish; it serves another purpose. Expelling the remains of those who have betrayed the values invested in the symbols they touch expresses the special status the expelling community assigns to the protected sphere.

Conclusion: Pollution Intuitions and the Moral Psychology of Exile

The ancient world offers a detailed picture of the early relationship between pollution beliefs and exile in the Western tradition. Examining pollution beliefs as they appear in ancient Greek culture illustrates how these intuitions can align with culture to produce an ontology in which exile is a perfectly rational response. The religious system and shared morals (often enshrined in law) of the ancient polis offered pollution intuitions fertile ground, allowing them to become inextricably intertwined with the society’s moral commitments. Pollution intuitions, in ancient Greece, closely reflected communal religious and moral identity, and so using them as a guide in evaluating membership decisions does not present obvious problems. The same intuitions expressed by ancient Greek pollution beliefs undergird later ideas of communicable

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106 Indeed, Larry Craig is very careful to point this out in “Preserving Sacred Ground.” There may be some suspicious motivated reasoning at work here, as the lawmakers were constrained by the need to keep the label of “punitive” away from Wagner’s expulsion. If framed as a punitive measure, a bill singling out a specific person would run afoul of the constitutional prohibition on bills of attainder. However, Craig also asserts not only that the bill’s intent is non-punitive (which one might suspect), but that the dead cannot, in the eyes of the law, be punished. In this, U.S. law agrees with Craig.
moral danger, although such ideas are ill-suited to the disenchanted world of the twenty-first century.

Recognizing that contagion intuitions continue to inform the cognition – and especially the moral cognition – of members of current American polities is important to situating where purificatory expulsions fit into the moral landscape of liberal community. Pollution beliefs are persistent (perhaps even ineradicable), and their particular manifestations are culturally specific. For these reasons, their appearance in public moral discourse requires careful attention from political theorists. While they may appear to be both rational moral judgments and instinctive expressions of authentic identity, they operate as reflections not necessarily the “true” bedrock commitments of a community, but as indicators of what is perceived as inimical to the image the community holds of itself. These intuitions may be accurate reflections of a community’s sentiments, but they are not reliable indicators of moral commitments. In light of this, contagion intuitions represent the sorts of unreasoned and potentially damaging public passions that liberal institutions are meant to manage.

Community identities are constantly changing and contested, and unarticulated folk moralities mingle with explicitly stated aspirations in both rhetoric and practice every day. Understanding contagion intuitions is important to understanding how communities envision themselves because they reveal assumptions that often go unexamined. Pollution intuitions, like continuing exile practices, reveal important pieces of how liberal communities imagine themselves, but they are only pieces of a much larger puzzle. What they can offer is an indication of some of the objects of sharing through which a communities define themselves. Pollution ideas, and the purgative expulsions they drive, are treacherous guides to moral
evaluation, but they do outline those important symbols that communities seek to protect from contamination, symbols constructed as spheres of purity or special moral standing. These ideas play out in the oddly superstitious, but highly reverent, debates surrounding the removal of Russell Wayne Wagner’s remains from Arlington National Cemetery.

For the purposes of this project, Wagner’s expulsion is especially instructive because it places current American contagion intuitions on full display, it draws connections between moral contagion and the sharing of values that characterizes community, and it shows the enduring impulse to use exile to protect community solidarity. The Wagner controversy depicts national cemeteries and the institution of the military as examples of pure symbols meriting protection from pollution by association with unfit people, regardless of the validity of their claims to inclusion. Anderson’s disinterment reaffirms this image. A final piece of legislation governing the exclusion of certain offending veterans from burial in national cemeteries bears consideration: the “Hallowed Grounds Act.”\textsuperscript{107} Adopted between Wagner’s and Anderson’s removals, the bill did not receive national attention.

The title “Hallowed Grounds Act” alone conveys the pollution intuitions articulated in the “Preserving Sacred Ground” hearings. The Act expands the class of excludable veterans to include an especially loathed group of Americans: sex offenders.\textsuperscript{108} Contrasting a sphere of purity (the “Hallowed Ground”) with the implied impurity of the sex offender is a common trope in public discourse about sex offenders. This group will be the subject of the next chapter.

\textsuperscript{107} Section 1.105 of the Dignified Burial and Other Veterans' Benefits Improvement Act of 2012.
\textsuperscript{108} The Hallowed Grounds Act prohibits burial in national or state military cemeteries and funeral honors for veterans classified as Tier III offenders under national legislation, and who have also been sentenced to life in prison for their offenses. It is a circumscribed but highly symbolic class of rejected veterans. The Koehl Act does not appear to authorize the Secretary of Veterans Affairs and the Secretary of the Army to actually disinter these excluded veterans should they be laid to rest on forbidden grounds by mistake, and the act applies only to burials taking place after its enactment, so no cases testing this question have yet arisen.
representing the most common current use of purgative exile in American communities. Like the moral expulsions discussed in the last chapters, purgative banishment is seldom a dramatic national event. In this, Wagner’s case is exceptional. Rather, most purgative exiles are made ordinary and apolitical, routinized and concealed by their incorporation into sub-national legal and regulatory systems. Like Wagner’s expulsion, these purgative exiles also outline a negative space of purity to be protected from them. Unlike Wagner, these reviled expellees are numerous, coming from all walks of life, and resembling their neighbors in almost every way. The next chapter will take up the idea of “sharing” in liberal community again, this time examining it in its most mundane and quotidian forms and the uncomfortable implications of solidarity and fellow-feeling.
Chapter V

Sympathy, Liberal Community, and the Dark Side of Sharing

“Does not the company of wicked men pollute our life if they insinuate themselves into our affections and win our assent?” Saint Augustine, The City of God

Decent People and Their Neighbors

In March 2014, advertisements depicting black and white photos of concentration camp crematoria, Nazi soldiers burning Jewish businesses, and Jewish families being marched out of their homes at gunpoint appeared in various New York City newspapers and in MTA bus shelters. Over these striking images, in evocative Fraktur font, is the question “Would You Be a Nazi’s Neighbor?” Beneath this reads, “Join the Call to Remove All Nazis from the U.S.,” and information about State Assemblyman Dov Hikind’s petition demanding that the U.S. Department of Justice deport alleged Nazi war criminal Jakiw Palij, who lived in Queens at the time. The campaign was the work of Hikind, who represents a largely Jewish district in Brooklyn. The Assemblyman took up the issue in an official capacity following an informal neighborhood demonstration outside of Palij’s home, at which neighbors chanted, “Kick him out!” In Hikind’s words,

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This is unacceptable. I’m certain that all decent people, regardless of their nationality, would also find this unacceptable if they were aware of it, so I intend to bring this reprehensible situation to everyone’s attention. Decent people don’t want Nazi neighbors.\(^4\)

Hikind is undoubtedly correct: decent people do not want Nazi neighbors. The idea Hikind and his posters articulate is that former Nazi war criminals are a class of people so reviled that asking any community to accept them is beyond the pale of reasonable expectation. Indeed, it is because no other nation has been willing to accept them that the U.S. has had so much difficulty deporting Palij and people like him, even after they have been denaturalized. In fact, when Hikind launched his campaign the Department of Justice’s Human Rights and Special Prosecutions Section had already been trying to deport the denaturalized Palij for eleven years.\(^5\)

The example of Hikind’s anti-Palij campaign is instructive in the context of various types of political expulsion for three reasons. First, it is a bottom-up affair: Palij is to be expelled because his community decisively rejects him. Although the push to deport Palij became a matter of government, it began on solidly popular grounds. Second, the question Hikind’s signs ask is significant: “Would You Be a Nazi’s Neighbor?” The question is one of what one is willing to tolerate, not what one’s preferences are – implying that there is some choice in the matter. Indeed, this is the assumption behind the entire effort: Hikind (on behalf of his constituents) asserts a moral right to expel an especially reviled member from a community that, in light of his history, is no longer willing to associate with him. Moreover, Hikind does not merely claim the right to expel him, but he further posits that it is the duty of government to effect the expulsion,


as an extension of a presumed obligation to protect the greater community from the harm that Palij’s inclusion inflicts upon it. Third, the campaign frames the issue in terms of “decency.” In asserting that decent people do not want Nazis for neighbors, and simultaneously suggesting that there is some element of voluntariness on the part of the community in allowing Palij’s presence to continue, Hikind calls the decency of that community into question. The implication is not only that the community has a right to expel this repulsive member, but that it has an obligation to do so if it wished to maintain its status as “decent,” or morally upright.

The furor surrounding Palij is not unique. Popular cries for the expulsion of particularly despised people drive official banishment practices across the United States. This chapter further explores the use of “purgative exile.” Like moral exile, purgative exile represents an effort on the part of a community to protect its own moral status by separating the real members from the false – or in the language more often at work in purgative exile, the pure members from the impure. Unlike moral exile, which labels certain members as lacking the right kind of character required for membership in the particular expelling community, purgative exile asserts that certain people are unsuitable to belong to any community at all – their fellows regard them not merely with disapproval or suspicion, but with categorical rejection. These are members who have committed especially heinous transgressions in the past, actions that have led their fellows to place them into special categories of extreme outsider status.

Purgative exile presents an image of community as a unified whole, underpinned by some fundamental, definitive similarity between members. Members define themselves by what commonalities unite them – their shared decency, for instance. But what, exactly, is shared by such a community? Consider the example of the “decent” community. Is it an agreement about
which offenses are morally repugnant that defines members? A consensus as to why those offenses are repugnant? Hikind insinuates not only that there may be something amiss with the moral commitments of a community that would tolerate the inclusion of a Nazi, but there is something wrong, or morally defective, with the community itself (and with the people who comprise it). The last chapter discussed problems arising from treating pollution intuitions as evaluative criteria. Perhaps this is the mistake that Hikind’s campaign is making with such insinuations. Or perhaps Hikind identifies (and exploits) a deep anxiety experienced by communities that have harbored – or even produced – monstrous people. If the sharing at the center of community identity is genuinely valued as something profound and closely tied to individual character, then members may fear that they share something deeper and more pervasive than simple agreements or commitments with those rejected, despised neighbors.

In this vision of community, the community as a whole and also its constituent parts are vulnerable to contamination by association with members who seriously transgress shared norms. This model blends metaphors. Like the contractual image of community, it assumes that there is some level of voluntariness in membership that makes each individual person in the community morally responsible for the decision to associate with (or even merely tolerate) every other person. But unlike most contractual models, which are often accused of moral poverty and the tendency toward excessive atomism, the idea of community that emerges from purgative exile also presents community membership as something that reflects who members are – as evident in Hikind’s comment about what “decent people” are willing to accept (and, by extension, what they are obligated to reject). In this vision of community, individual members' own characters are intimately bound to that of the community. In this sense, the exiling
community is presented as something more like a family – a group whose sharing is not merely voluntary or even only historical, but who share something more primordial and pervasive.

There is no question as to whether or not the exiles considered in this chapter have done things that are morally blameworthy, or whether their neighbors are justified in regarding them with revulsion. The question, rather, is whether, and why, the extreme aversion of their fellows might justify revoking their community membership. Despite rhetorical appeals to preventing future offenses, the violations that define these members are very much matters of the person's past. War criminals like Palij are not subjects of revulsion because of any fear that they will repeat their violations, just as a veteran convicted of a grisly murder poses no worldly threat to the honored war dead beside whom he is buried. Similarly, there is no research supporting the myth of the sex offender as perpetual recidivist – a fact that lawmakers have been well aware of for years, yet which does not prevent them from passing ever more restrictive laws targeting these people.

Purgative expulsions are popular affairs, and they are backward-looking, fixated on the lasting stain that particular bad acts leave on the soul. Acknowledging a person with such a mark as a fellow community member inspires a certain amount of rational fear, but it also raises anxiety about what the sympathy we have previously extended that person might express about our own inner moral nature. If we have, in the past, regarded that person with special moral consideration, or worse – regarded them as someone with whom we shared a number of morally weighty characteristics as fellow community members – then it is possible that the darkness in them may also exist, in some form, in us.
This is not precisely the same motivation for expelling the polluted discussed in the last chapter. These anxieties involve a certain amount of rational moral evaluation, both of the offender and of the self, in addition to the panicked rejection response accompanying the experience of pollution intuitions. Expulsions driven by the recognition of similarity between oneself and a polluted (and polluting) fellow are expressive, much like other purgative expulsions, but the audience for these expressive acts is twofold: the expulsion sends a message both to the other members of the community, reaffirming their ties of special concern and solidarity, but these removals also send a reassuring message to the individual members involved in the action themselves.

By forcefully rejecting the flawed fellow, individual community members are able to quiet the unsettling sense that they and the exile are more similar than anyone may wish to acknowledge. The same senses of extreme vulnerability and permeability of the self implicit in pollution beliefs support purgative expulsions intended to distance the pollutant who is very much like us from ourselves. The inclusion of members of these especially demonized groups in American communities casts a shadow upon the character of that community and on the characters of the individuals who comprise it. What kind of community tolerates a monster? What sort of person associates with one? Decent people do not want such neighbors, and we are decent people, aren’t we?

**Sex offenders: “The Neighbors Nobody Wants.”**

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It is safe to say that the “sex offender” is the single most despised figure in American culture at the present time, with only the “terrorist” offering any real competition for the title. Sex offenders make up the largest single category of people regularly subjected to expulsion measures in the United States.\(^7\) Currently, thirty-three states have residency restrictions for sex offenders in place. Despite legal challenges in some jurisdictions, municipal restrictions continue to gain popularity both within states with residency restrictions and elsewhere.\(^8\) In addition to the increasing use of administrative residency laws, some jurisdictions also use judicial banishment to rid themselves of these unwanted citizens. While the classification of “sex offender” has received some critical attention in recent years, attempts to challenge the usefulness of popular sex offender restrictions remain cautious. Most criticism of banishing sex offenders begins with some attempt to rehabilitate the category itself, pointing out that some sex offenders are “not so bad,” added to registries for relatively minor crimes like streaking, public urination, or statutory rape stemming from a consensual teenage relationship. That critics feel the need to mitigate the “badness” of the category prior to objecting to widespread banishment policies highlights why the issue of purgative political expulsion receives so little attention: those most likely to suffer it are not sympathetic figures. Often, their neighbors are only too happy to be rid of them, and no candidate wants to run on the “pro-sex-offender” ticket.

This discussion is not a defense of sex offenders or an attempt to advocate for any particular policy for dealing with them. Rather, it re-evaluates the popular perceptions of sex offenders overcrowded trailers on the edge of Southampton. The measure, meant to be a stop-gap, had been in place for six years at the time the article was published in 2013.

\(^7\) As of 2013, there were more than 750,000 people listed on the federal sex offender registry.

articulated in expulsion policies, comparing how those perceptions color both the stated purpose and actual effects of those policies. Justifications for banishing sex offenders rely on a number of problematic factual assumptions and rhetorical tropes, like the image of the community as semi-sacred sphere of moral purity, the sex offender as a dangerous stranger seeking to prey on the innocent around him, and the total separation between the categories of “citizen” and “offender.” Depicting sex offenders as an external threat to an otherwise peaceful, moral community denies the reality of American communities, in which the good, the wicked, and the vast majority who are a bit of both share membership and all that goes with it. In turn, these perceptions provoke an aggressive moral disgust in offenders’ fellow citizens, one that manifests itself in expulsion policies.

Sex offenders, like former Nazis, are people who inspire profound disgust in their neighbors. American communities, in response, have spent the past two decades building systems of surveillance and control by which the movements and living conditions of registered sex offenders can be carefully monitored, both by authorities and by their fellow citizens. Increasingly, these systems of control have developed into administrative methods of expelling offenders from communities. That the first sex offender residency restriction laws were themselves modeled on public nuisance laws is telling: sex offender residency restriction laws draw a clear dividing line between “offender” and “community,” depicting the sex offender as an

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9 In the case of Suffolk County, New York, authorities have actually outsourced sex offender monitoring to a group of civilians working for the non-profit, “Parents for Megan’s Law.” They call themselves, “The Trackers.” Charles Lane, “N.Y. County Outsources the Job of Monitoring Sex Offenders.” National Public Radio, August 24th, 2013.
outsider, a threat, and a burden to be borne by those who lack the power or resources to refuse it.  

Americans go to unprecedented lengths in enshrining popular loathing for sex offenders in public policy. No other offense has inspired a national registry. Many jurisdictions include some process by which an offender’s community is notified of his or her presence and history – a measure that is not taken in the case of other potentially threatening neighbors, like murderers, arsonists, or burglars. Of the hundreds of post-conviction restrictions (termed “collateral consequences”) that federal and state law impose on people convicted of crimes, the most invasive and zealous are restricted for this despised class. Among those that can be rationally connected to (at least certain) sexually oriented offenses are prohibitions on adopting children, holding licenses for daycare facilities, or working in institutions serving vulnerable populations. These generally apply to all registered sex offenders, regardless of whether their offense was against a minor. Many other restrictions have no such relation, however, like Mississippi’s prohibition against entering state parks, Kentucky’s revocation of licensure to work as a land surveyor, or Wisconsin’s interdiction against transporting hazardous waste. Every state maintains its own publicly accessible registry, in addition to the federal one. After serving their sentences, released sex offenders in several jurisdictions are subject to lifetime public registration (regardless of severity or type of offense in at least two states), others are required to

11 Illinois, a state with a special enthusiasm for registries, maintains public registries for arsonists and those convicted of “child murder” (apparently an offense distinct from simply “murder”) but include no community notification requirements.
submit to GPS tracking for the rest of their lives. In sum, laws controlling sex offenders express the high degree of repugnance with which they are regarded in the American imagination.

If the many and strict laws governing the post-conviction lives of convicted sex offenders are insufficient to illustrate American attitudes toward them, consider the controversies that have arisen around offenders who have won large sums in state lotteries. These cases indicate a popular instinct that when good things come to sex offenders, an injustice has occurred – one that calls for legal redress. Since the first sex offender registries were instituted in the 1990s, a handful of the people on them have won large state lottery payouts. Invariably, media coverage questions why sex offenders are eligible to collect winnings, as if the rightness of barring them from doing so were self-evident. In one story, Fox News notes with dismay that lottery officials inform them “…that winnings can be intercepted by the IRS or Department of Revenue, but a payout cannot be withheld ‘based on someone’s character.’”


In addition to the cases discussed, Michigan resident Fred Topous won $57 million in the multi-state “Mega Millions” lottery in 2008 and Edward R. Cowal won $14 million in the Florida lottery in 2007.


“Massachusetts Official Seeks to Prevent Sex Offenders from Collecting Payouts.” Fox News, March 18th, 2014. The report quotes an unnamed “director of the state’s lottery.”
Public outcries frequently lead elected representatives to step in with legal remedies, as in 2008, when registered Tier III offender Daniel Snay won $10 million in the Massachusetts state lottery. He was charged with a new offense in 2014, and public indignation prompted lawmakers to cast about for legal means of depriving him of his 2008 winnings. Suggesting that the resources might aid in the commission of crimes “by helping him gain favor with people,” police officials attempted to draw a connection between Snay’s lottery winnings and the subsequent offense. State Senator Bruce Tarr suggested that the assets ought to be subject to civil forfeiture, drawing a tortured comparison to the seizure of properties used in the production of drugs. The same event prompted Massachusetts state Senator Richard Moore to propose legislation barring sex offenders from receiving lottery winnings. As he explained to the *Boston Herald*:

> Should someone on the sex offender list purchase a ticket and win, I think we should find a way from preventing them from enjoying the proceeds…. This doesn't smell right to start with.

Moore’s language, describing the circumstances as bearing a foul odor, is significant. Lacking any obvious rational justification for denying Richard Moore the benefits of his good luck, Moore uses the sensory language of disgust, the moral emotion lurking behind public objections to sex offenders’ winning lottery jackpots. That disgust is visceral, and powerful enough to motivate demands for what are clearly unreasonable policy responses, in this case subjecting unrelated assets to forfeiture or passing laws that bar sex offenders (but not citizens who have

18 Massachusetts Official Seeks to Prevent Sex Offenders from Collecting Payouts.” Fox News, March 18th, 2014.
committed other offenses) from collecting lottery winnings. Participating in state lotteries hardly qualifies as a core marker of citizenship in the way that being able to vote might, but the disproportionate public response in these situations illustrates the depth and breadth of public loathing for the sex offender, and also the implicit belief that the proper outlet for expressing that hostility is public policy.

The current American idea of the “sex offender” is a relatively recent construction, dating to the early 1990s. Currently, in the popular imagination, the sex offender appears as a perpetual recidivist who blends in among the law-abiding citizens of peaceful, prosperous neighborhoods, looking for opportunities to prey upon the most innocent. The idea that certain types not only of offense, but also of offender, are qualitatively different arose in the late nineteenth century, as early psychologists turned their attention crime and criminality. Since then, variations on the sexually deviant criminal have gained and lost acceptance in both popular and expert imaginations over the years. The violent “sexual psychopath,” a figure similar to the current image of the “sex offender,” arose in the wake of high-profile killings in the 1930s and 1940s. The sexual psychopath inspired waves of popular legal measures, many similar today’s policies, including the establishment of registries and subjecting “sex fiends” to civil commitment. The trend was reversed in the 1960s and 1970s, when scholars and officials, reacting to the hysteria

22 Philip Jenkins offers a comprehensive history of the sex offender in Moral Panic: Changing Concepts of the Child Molester in Modern America.
23 The idea of “perversion,” or any sexual act that could not lead to procreation, transformed from a moral concern to a medical one in the hands of psychologists and penal reformers during the Progressive era. Jenkins, 36-45.
24 Jenkins, 52-53, 80-89. The U.S. Supreme Court upheld the imposition of civil commitment on certain offenders upon their release from prison in Kansas v. Hendricks, 521 U.S. 346 (1997).
of previous decades, expressed skepticism about the seriousness and lasting harm of sex crimes.\textsuperscript{25} This period saw the dangerous sex psychopath replaced with the pitiful, but generally not malicious “child molester.”\textsuperscript{26} The restrictive laws of the prior decades were repealed by the late 1970s. Moral panic about ritualized child abuse and organized pedophilia during the 1980s laid the groundwork for the return of harsh sex offense laws following a series of high-profile crimes in the early 1990s.

Unfortunately, the term’s historical construction is not reflected in current usage. The term “sex offender” is not merely a reference to a criminal act – it is a persistent label that implies a global judgment on its bearer; there is no such thing as a “former sex offender.” The term connotes not merely a person who has committed a sex offense, but a classifiable kind of person, one who is utterly depraved. Sex offenders, unlike, for instance, those convicted of larceny or murder, are entered into registries so that authorities will not lose track of them, mistaking them for a normal part of the citizenry – something they will never be again. “Sex offender,” like “criminal,” implicitly points to a distinct, identifiable kind of person who is fundamentally different from the average citizen. Just as “criminal” refers to a diverse group of people who have committed a an array of offenses of varying natures and levels of harmfulness, so does “sex offender.”

Among the crimes classified as “sex offenses,” most are expected, but it is not uncommon for relatively minor violations to be included in that designation as well. Some examples include prostitution-related offenses involving only consenting adults, public urination, consensual sex between teenagers, and any public exposure of genitals (rendering streaking or skinny dipping

\textsuperscript{25} Jenkins, 102-108.
\textsuperscript{26} Jenkins, 58-81, 94-117.
sex offenses).\textsuperscript{27} Only recently have empirical studies begun to draw attention to the internal heterogeneity of the sex offender category.\textsuperscript{28} The restrictions in federal sex offender legislation, or “Megan’s Laws,” apply to all registered offenders, yet the legislative debates depict potential victims almost exclusively as children. Certainly, for rhetorical purposes, invoking the image of the innocent child in need of protection carries considerable persuasive power – or it at least

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precludes objection. In congressional debates about the mid-1990s sex offender restriction laws, children are depicted as “the most innocent victims of all.” The effect of contrasting the dangerous stranger with the innocent child is to paint a picture of communities as pure spaces that must be protected from pollution, which appears in the form of the threatening physical presence of offending members. At the time when the first federal statutes were enacted, offenses against people under the age of eighteen accounted for fewer than half of all reported sex crimes in the United States, including the offenses that trigger registration requirements.

Nonetheless, popular and official political rhetoric focuses almost exclusively on the threat that sexual predators pose to children. In fact, the popular image of the sexual predator as a dangerous child-stalking stranger is woefully inaccurate, with a reported 86% of offenses against adults and 93% of offenses against children perpetrated by people known to their victims, usually family members or friends of the family. Additionally, more than one third of offenses against victims under the age of eighteen are committed by other minors. The increasing population of juvenile sex offenders complicates the image of polluting outsider and innocent

29 The disturbing implication of this descriptor is that perhaps the adult victims are not so blameless. Comments of Representative Sheila Jackson-Lee. Congressional Record, “Megan’s Law,” H-4455. For an extended discussion of how the sphere of purity is constructed in sex offender legislation, see Mona Lynch, “Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation.” Law & Social Inquiry 27 (2002): 529-566.

30 Roughly 44% of sexual assault victims were under the age of 18. Lawrence A. Greenfield, “Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault.” U.S. Department of Justice, Bureau of Justice Statistics, 1997.


32 David Finkelhor, Richard Ormrod, and Mark Chaffin, “Juveniles Who Commit Sex Offenses Against Minors.” U.S. Department of Justice, Office of Justice Programs, December 2009. Juvenile offenders account for 35.6% of offenders against children and 25.8% of all sex offenders. These percentages do not reflect proportions of registered sex offenders, as registration requirements for minors differ from those for adult offenders. This may change, however, as more states enact strict registration and notification laws for minor offenders. For instance, between 2007 and 2012, Florida, Louisiana, Maryland, Mississippi, Nevada, Tennessee, and Wyoming changed their laws, now mandating that minor offenders be subjected to community notification requirements. Human Rights Watch, “Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S.” (May, 2013): 42.
community in uncomfortable ways, serving as a reminder that sex offenders are not separate from the community, and that even the citizens depicted as being the most innocent are not always paragons of moral purity. Offenders (be they adults or minors) are citizens themselves, and also the family members, co-workers, co-religionists, neighbors, and friends of citizens.

Depictions of sex offenders as preying upon children paint them as purity-defiling monsters, not as citizens of the communities in which their crimes are committed. While some jurisdictions have assessment procedures for labeling someone a “sexual predator” much as one might have been adjudicated a “sex degenerate” in the 1930s, the term’s use in congressional debate is indiscriminant. Words like “monster” and “predator” are common in the legislative record. Casting sex offenders as “predators” summons images of malicious, uncontrolled animals and plays upon the ill-supported characterization of sex offenders as perpetual recidivists. While these rhetorical constructions seek to re-create the offender as fundamentally different from the other members of the community to which he or she belongs, efforts to banish them express an anxiety on behalf of the community that simply asserting such difference is not sufficient to sever the ties between the offender and itself. Expelling morally disgusting members suggests a sense of shame – perhaps even of partial responsibility – on the part of the community that would be rid of them.

33 Jenkins, 81. Perhaps the most familiar example of how uncritically the label of “predator” for sex offenses is accepted by the American public is the controversial NBC television show, “To Catch a Predator,” which featured reporters teaming up with authorities to lure potential sex offenders into assignations with adults posing as underage (usually ages 12-15) people via the internet.
Residency restrictions allow communities to reject members without having to engage the reasons (or causes) for their unacceptability publicly. The restrictions, often civil or administrative in nature, quietly serve this purpose, effectively driving offenders out of neighborhoods, cities, or entire counties without drawing the political scrutiny that openly casting them out might. Some form of residency restrictions are in place in at least thirty states. Some apply to all registered offenders, others specify only those whose victims were minors. Alabama, for instance, forbids all adult sex offenders from living within 2,000 feet of schools or childcare facilities, while South Dakota law authorizes the creation of “community safe zones,” from which all registered sex offenders are excluded.\textsuperscript{35} The vast majority of spatial restrictions are imposed at the county and local levels. For example, there were at least ninety-six municipalities in New York with residency restriction laws in place in 2009.\textsuperscript{36} In Florida, municipal ordinances have multiplied rapidly as well, with twenty-seven in effect in Broward County alone. Miami-Dade County drew national attention when its local ordinance forced 70-100 registered offenders to resort to living under an overpass on the Julia Tuttle Causeway, forming a tent colony outside the forbidden zones that persisted between 2006 and 2010.\textsuperscript{37} While this was an unusually severe situation, similar problems of offender homelessness have arisen in other areas of the country as well.

Commonly, ordinances specify zones in which sex offenders are not allowed to live, work, and sometimes even “loiter.”\textsuperscript{38} Bus stops, public parks, daycare centers, schools, and churches

\textsuperscript{38} Michigan, MCLS § 28.734.
are frequent centers of exclusion zones, with sex offenders prohibited from entering within a specified radius, usually of 500-2,000 feet.\textsuperscript{39} The most extreme ordinances specify a radius as wide as one mile.\textsuperscript{40} Overlapping zones can, and often do, effectively bar sex offenders from being anywhere within the bounds of the municipality. It is not unusual for ordinances to force the families of offenders to give up long-term residences or to sell their homes, forcing both offenders and their families out.\textsuperscript{41} Many of these policies effectively bar sex offenders from entire cities, counties, or states.\textsuperscript{42}

The exclusion of offenders from large areas is not necessarily an unintended consequence. The U.S. Supreme Court has not ruled on residency restrictions, but the Eighth Circuit Court of Appeals rejected arguments that large, overlapping exclusion zones amounted to banishment, ruling that Iowa’s 2002 residency restriction law was a “nonpunitive, civil regulatory measure” necessary to protect the public.\textsuperscript{43} The opinion defers to lawmakers’ stated intent, setting aside the law’s effects as epiphenomenal. This is a very generous reading. In a handful of cases, lawmakers have made comments admitting that the motives behind residency restrictions are not entirely innocent. In Lake Charles, Louisiana, for instance, a councilman stated on the record,

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    \item \textsuperscript{40} For an example of an extreme ordinance see the Town of Southampton, New York Code, Chapter 215-1. A lawsuit challenging the especially restrictive ordinance and arguing that more lenient state laws ought to pre-empt them was rejected by a federal judge in 2014. \textit{Troy C. Wallace, et al., Plaintiffs v. State of New York, et al., Defendants}, 12-CV-5866 (PKC).
    \item \textsuperscript{41} Andrea E. Yang, “Historical Criminal Punishments, Punitive Aims and Un-‘Civil’ Post-Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights.” \textit{University of Cincinnati Law Review} 75 (2007): 1299-1338.
    \item \textsuperscript{42} Formally banishing anyone from a state, as discussed in previous chapters, cannot withstand constitutional challenges as it violates the right to interstate travel. As will be discussed, however, some states have found ways to circumvent this.
    \item \textsuperscript{43} \textit{Doe v. Miller}, 405 F.3d 700 (8th Circuit, 2005).
\end{itemize}
“We have zero tolerance for sex offenders. I wanted to be crystal clear, and not politically correct, that we don’t want sex offenders living in Lake Charles.”

Lake Charles also imposes a one-time registration fee of $600, and annual fees of $200. The fees pose a significant burden for low-income offenders, presenting a strong incentive to leave the city.

In recent years, residency restrictions have become privatized as well, as homeowner associations and private development companies have begun adopting restrictive covenants prohibiting the sale of properties to registered sex offenders. When private associations reject sex offenders, the action lacks the same color of government coercion that restrictive laws and ordinances carry, but so far courts have upheld challenges to the restrictive covenants, lending them an implicit stamp of official approval. The proliferation of restrictive covenants is a disturbing development as it makes the obligation to accept unpopular fellow citizens an issue of socioeconomic class. Association, in such cases, is less a matter of liberal obligation or expressive conduct and more a matter of purchasing power. Wealthy Americans who can afford these expensive private communities purchase the luxury of reassuring themselves that they live only among the righteous. Critics of restrictive covenants object to the consequent “dumping” of unwanted citizens on economically disadvantaged neighborhoods. These objections, while understandable, also perpetuate the idea that some citizens are community members, while others are public nuisances. Regardless, the moralized selectiveness in association inherent in purgative exile is explicit in restrictive covenants.

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Debates about sex offender laws contrast the offender with the community, uncritically presenting registered offenders as forces external to the community, threatening it:

[W]hen he gets out, I want a law like Megan's law, so whether he goes to St. Joe or Kalamazoo or South Bend, anyplace else, the victim, the family, the police, the community are going to be able to watch him forever. He is going to have a tattoo on his head that is going to be there forever.  

This is not a description of someone who can be forgiven and reintegrated. The offender is not only described as something other than “the community,” but the moral fault separating him from it is permanent. Even scholars who favor reform in harsh sex offender legislation employ this idea of the offender/community dichotomy. One legal scholar earnestly compares sex offenders to toxic waste, even coining her own acronym, “LUDI,” or “Locally Undesirable and Dangerous Individual,” inspired by the term “Locally Undesirable Land Use (LULU) common in debates about sites for toxic waste dumps. Waste disposal is a recurring metaphor. Even in sympathetic scholarly discussions of sex offender residency issues, references to “dumping” problem citizens on other jurisdictions abound. Sex offenders are compared not only to waste, but often to toxic waste – refuse that is aggressively harmful by its mere presence.

46 Comments of Fred Upton of Michigan, “Megan’s Law.”
47 Saxer, 1397-1453.
49 In the Megan’s Law debate, Representative Randall Cunningham makes the contrast between community (portrayed as “citizerny” and “families”) and “toxic” offender explicit: “Would my colleagues want that individual to move in next door to their family[?]…[P]erhaps a sexual predator’s life should be just a little more toxic than someone else in the American citizenry… an individual that preys on children, that maybe their rights should be secondary to children’s and families’?”
In addition to municipal exclusion zones, some jurisdictions also employ judicial banishment. Georgia is the most flagrant banisher of sex offenders. For decades, circumventing both federal constitutional guarantees of the right to interstate travel and state constitutional prohibitions on banishment from the state, Georgia judges effectively banished citizens from the state by imposing orders banishing them from 158 of the state’s 159 counties.\(^50\) Typically, the remaining accessible county would be one as distant from an offender’s home as possible, or an especially rural county in which housing, work, and social services were not available.\(^51\) The state Supreme Court upheld the practice in \textit{State v. Collett}, but changes to Georgia’s 2006 probation law preclude it, requiring instead that the portion of Georgia still accessible to the banished be no smaller than a single judicial circuit and that access to court-ordered services be possible.\(^52\) While Texas’ constitution also bans banishment from the state (along with “transportation” and “outlawry”) in at least two cases, offenders have been released on the condition that they never return to Texas.\(^53\) Mississippi, too, has made use of judicial banishment. In 2009, a judge sentenced Richard A. Simoneaux to twenty-five years in prison for several charges related to sexually abusing an elderly nursing home resident.\(^54\) As part of Simoneaux’s plea deal, he was banned from the state of Mississippi upon release.

Although Simoneaux successfully challenged his banishment in, it was the flagrant \textit{interstate} banishment that drew the court’s disapproval. So long as the banishment remains (at least technically) intrastate, regardless of how small an area remains accessible, Mississippi courts

\(^{50}\) Alloy, 1083-1108.
\(^{51}\) Alloy, 1084.
\(^{52}\) \textit{State V. Collett}, 208 S.E.2d 472 (Georgia 1974); Georgia Code Ann. § 42-8-35(a)(6).
\(^{53}\) Mike Ward and Anita Hassan, “Sex Offenders Banished from Texas Committed Assaults in Other States.” \textit{Houston Chronicle}, September 18\textsuperscript{th}, 2014. District Judge Lee Alworth ordered Melvin Cody Whipple to move to Bluff, Utah and Judge Putnam Reiter ordered Lloyd J. Wilson to live in Virginia.
\(^{54}\) \textit{Simoneaux v. State}, 29 So.3d 26, 38 (Mississippi Court of Appeals 2009).
uphold judicial banishments.\textsuperscript{55} In other states, courts have ordered the banishment of sex offenders from counties and cities, though these are often reversed on appeal.\textsuperscript{56} While these attempts are not always successful, it is nonetheless significant that they continue to be made. Even in the face of likely reversal, expulsion remains an irresistible alternative to reintegrating despised citizens into communities that would happily be rid of them.

Exclusion zones outline a sphere of pure space from which the offender’s stain must be kept. Schools, playgrounds, and daycare centers symbolize not only the innocence of the children these regulations purport to protect, but also represent the heart of the community, not unlike the altars and hearths Sophocles invokes in \textit{Antigone}. These places are the centers of local communities, and expelling sex offenders from them firmly articulates the offender’s outsider status and the status of family and childhood as revered symbols shared by community members. Again, the image of the innocent child victim is implied in the selection of zones of safety or purity. Most of the areas are places in which children congregate, like schools, daycare centers, and playgrounds. A desire to mark children as one of the classes afforded special moral regard by the community certainly explains the selection of these sites.

Churches, however, are less obvious choices. While families certainly attend church events, they also take their children to grocery stores, doctors’ offices, and dozens of other public places, yet those places are not specifically protected from the sullying touch of the offender. The inclusion of churches in many exclusion ordinances suggests a lingering association between pollution containment and sacred spaces. While the other community centers identified in

\textsuperscript{55} McCreary v. State, 582 So.2d 425 (Mississippi, 1991).
\textsuperscript{56} For instance, A juvenile sex offender was banished from his hometown of Elgin, Illinois in \textit{In re J. W.}, 787 N.E.2d 747, 750-53, 757-66 (Illinois, 2003). The Illinois Supreme Court struck the banishment down as overbroad.
exclusion regulations may approximate the sense of shared reverence or respect for the innocence represented by children and families, the desire to protect literal sacred spaces from exposure to contaminating people strongly implicates the supernatural undercurrents characteristic of pollution beliefs.

The stated intent of residency restriction laws is to prevent further crime and protect community members from sex offenders who, presumably, prey upon those near them. A popular California measure, “Jessica’s Law,” articulates the purpose as follows:

(b) Sex offenders have very high recidivism rates. According to a 1998 report by the U.S. Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend, and they prey on the most innocent members of our society. More than two-thirds of the victims of rape and sexual assault are under the age of 18. Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon.

(e) With these changes, Californians will be in a better position to keep themselves, their children, and their communities safe from the threat posed by sex offenders.

(f) It is the intent of the People in enacting this measure to help Californians better protect themselves, their children, and their communities; it is not the intent of the People to embarrass or harass persons convicted of sex offenses.  

Jessica’s Law passed with the support of 70.5% of voters. The law, which was on the ballot in 2006, creatively interprets the 1998 Department of Justice findings. By 2006, ample research existed refuting these claims, including new Department of Justice victimization studies. While considering statutes of their own, the states of Minnesota (in 2003) and Colorado (in 2004) commissioned empirical studies measuring the effects that residence restrictions had in other jurisdictions. Both studies found that residential proximity to schools, parks, and other

58 Criminal Victimization reports are released annually, making California’s decision to rely on the 1998 report in 2006 especially questionable.
community spaces featured in restriction laws had no effect on crime, even when those restrictions focused on high-risk Tier III offenders. At the time of the law’s adoption, this information was readily available to the law’s drafters and to California voters. Unsupported claims that sex offenders were especially likely to recidivate had been debunked by researchers, as well, as had the belief in significant “stranger danger” inherent in residency restrictions. While Jessica’s Law is particularly explicit in stating the rationale for residency restrictions, the same justifications underlie similar laws elsewhere.

Since then, a growing body of research has continued to cast grave doubts on the usefulness of residency restrictions. The research is not all new. Indeed, when Bill Clinton addressed reporters about the passage of Megan’s Law in 1996, he acknowledged objections that congressional assertions of likely recidivism were empirically questionable. Studies reflecting the ineffectiveness of residency restrictions were available within five years of the passage of


Megan’s Law, yet Congress passed further restrictive laws in 2006 and 2008.\textsuperscript{63} State residency restrictions remain in place across the country, with Connecticut, North Carolina, Rhode Island, and Tennessee expanding their state residency restrictions in 2014.\textsuperscript{64} County and municipal ordinances also continue to multiply, despite evidence of ineffectiveness. Similarly, restrictive covenants proliferate. Courts in Georgia, Mississippi, Texas and elsewhere show no indication of abandoning judicial banishment, despite the wealth of evidence that locality has little to no role in the commission of sex crimes.

In the face of evidence that residency restrictions fail to meet their stated purposes, communities across the country continue to invest in them. Are all of these policies simply failures? Laws restricting the rights of sex offenders may offer representatives an easy way to score political points, but they also draw expensive legal challenges and, in some cases, generate new problems like the colony under the Julia Tuttle Causeway or the moving trailer villages of Suffolk County, New York. Despite the clear disjuncture between the stated purpose of these expulsion policies and the reality of their application, they persist. This is not because the policies have failed. Rather, they have succeeded, only not in achieving their stated purposes. Instead of preventing recidivism or protecting citizens from predation, policies that drive sex

\textsuperscript{63} Richard Tewksbury, 1–21; Richard Tewksbury and Elizabeth Ehrhardt Mustaine, “Collateral Consequences and Community Re-entry for Registered Sex Offenders with Child Victims: Are the Challenges Even Greater?” \textit{Journal of Offender Rehabilitation} 46 (2007): 113–132; Sex Offender Registration and Notification Act, Title One of the Adam Walsh Child Protection and Safety Act of 2006. Public Law 109–248. SORNA expanded the jurisdictions in which registry is required, expanded the class of offenses requiring registration, established minimum durations for registration, and mandated more extensive information be given to registries and in community notification. The Adam Walsh Act also established a federal office to oversee the implementation of federal requirements. In 2008, Congress passed the “Keeping the Internet Devoid of Predators Act” (KIDS Act). It limits internet access for certain registered offenders.

\textsuperscript{64} Alabama Acts 2014-214 and 2014-421. 2014-421 applies specifically to Chilton County, and requires sex offenders’ residences to be at least 300 feet from the residences of other registered offenders; Connecticut Act 14-20, North Carolina Act 2014-21; Rhode Island Act 2014-506, Tennessee Act No. 992.
offenders out of their home communities function primarily as membership control measures, allowing citizens to refuse to associate with fellow members they deem morally repulsive. Neighborhoods, now free to expel unwanted members, use residency restrictions to restore a reassuring sense of decency that the presence of noxious neighbors threatens. Cities, counties, and in some cases even states, are able to symbolically wash their hands of those embarrassing and disturbing associations.

Expelling sex offenders from their home communities is useless for preventing future offenses or protecting the other members from future victimization, but it is a very effective way of expressing community outrage. By collectively rejecting the offender, the remaining community members share in a common declaration of disgust. This could be interpreted (uncharitably) as an act of moral narcissism on the part of the banishing community. After all, by banishing the disgraced member, the community foregoes any attempt to rehabilitate or reintegrate them, which would both recognize the ties that he or she still shares with their fellow citizens and also offer a greater likelihood of reducing future harm stemming from an unstable living situation and isolation. Instead, the community chooses to treat the offender’s return as a chance to express its outrage, reassuring itself of its own moral purity in rejecting the offender, regardless of the potential costs.

There is an alternate interpretation, however. The need to collectively label the offending member an “outsider” may not simply be rooted in a desire on the part of the community to congratulate itself on its moral superiority. Rejecting the offender so emphatically, instead, is an act of self-defense by which the community distances itself from an association it perceives as damaging to its moral integrity. Community, as Bernard Yack notes in *Nationalism and the*
Moral Psychology of Community, is generated by various forms of sharing, from merely occupying the same geographical terrain to sharing deeply valued practices, beliefs, and moral commitments.65

We imagine other community members as people with whom we share definitive characteristics. Members share histories, ethical commitments, traditions, common cultural practices, and stories about what all of those things mean. “Sharing” is an idea easily romanticized, but sharing can be dangerous, as well, especially when we share stories about who we are. We must trust the other people with whom we share those narratives to be good custodians of them. When they fail us, showing themselves to be something we ardently do not wish to be, they not only repulse us as individuals but also raise unsettling questions about the extent to which we might share qualities that are not sources of pride, but of revulsion. The affective ties that bind communities together are not spontaneous products of human nature, rather they are derived from an awareness of sharing something morally significant with other members. The more important an idea is to those sharing it, the greater the sense of betrayal experienced when one of those people acts in such a way that their association with the group’s shared values calls their truth or goodness into question.

It is not because the community really believes the sex offender to be an inhuman outsider that they respond in so threatened a fashion. Rather, it is because these despicable people are citizens with whom the other members of the expelling community once identified (or could have identified). The very fact of their belonging is an accusation. To acknowledge that a person connected in some morally significant way to oneself is also a figure worthy of disgust is to risk

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65 Bernard Yack, Problems of a Political Animal: Community, Justice, and Conflict in Aristotelian Political Thought (Berkeley: University of California Press, 1993); Nationalism and the Moral Psychology of Community.
believing that their moral taint may also be something that their fellows could possibly share. It is because the dreaded “sex offender” is not only a citizen, but also a person with deep affective ties to other citizens, that they provoke such an extreme rejection response from their fellows. Expulsion expresses the community members’ shared disgust, and that common disgust presents the remaining members of the exiling community with something new to share, something that the rejected person cannot partake in. Expelling the contaminating person restores the community’s belief in its own goodness, something shaken by the fact that a person deserving of disgust had also (legitimately) shared the treasured stories, practices, and commitments that lie at the heart of that community.

**Conclusion: The Dark Side of Sharing**

Why do the rational citizens of liberal political communities continue to use the coercive powers of government to expel neighbors who (despite being unsavory characters) pose no threat to their material interests, who have legitimate claims to belonging, and who live lawfully? While it is possible that continuing purgative exile practices are merely failures of individual communities to meet liberal commitments, the prevalence, continual contestation, and official reluctance to acknowledge them as political matters suggests that the answer is not so simple. The premise of this chapter is not exactly shocking: one of the purposes for which Americans employ exile is to rid themselves of community members they find morally repulsive. But the aim of this chapter has not been merely to catalogue novel uses of expulsion. Rather, it is to raise questions about what purposes exile actually serves, and whether those purposes can be justified according to liberal commitments. The cases in this chapter are hard cases – there are
excellent reasons to wish to deny the membership of people like former Nazi war criminals and sex offenders. But that desire, while understandable, is not itself sufficient justification for expelling despised members from communities of which they, too, are members – whether their neighbors like it or not.

Exile in America is a democratized affair. The purgative exiles considered in this chapter are events that take place between equal citizens, not the arbitrary actions of a tyrannical government. In each of these cases, the expelled person or people are singled out by their fellows as unacceptable, and it is these same fellow citizens who demand that government effect the banishments. The democratic character of purgative exile lends it a certain legitimacy. In each case of expulsion examined here, authorities offer seemingly rational justifications for each restrictive policy. But those rationales seldom hold up under scrutiny; they are based on faulty assumptions, they willfully disregard important evidence, or the given rationale has no connection to the course of action taken. Rather, these expulsions are driven by powerful moral impulses rooted in the experience of disgust and in the contagion intuitions discussed in the last chapter. But contagion intuitions are not the only driving force behind the expulsions discussed in this chapter. The experience of sympathy with our fellow community members also exposes us to an intolerable sense of vulnerability when those fellows prove to be people with whom we wish to share nothing.

Is Augustine correct in suggesting that we sully ourselves in associating with the wicked? And when we allow our reprehensible neighbors to remain among us, do we not “give them our assent?” Ideas of special concern and friendship connecting community members with each other become very uncomfortable when our communities also encompass those who we find
repulsive – and often with good reason. The notion of giving our assent is the source of a great deal of confusion in how liberal communities conceive of themselves. Liberal communities are conceptualized as being voluntary associations based on consent and existing simply as a means for members to further their individual self-interest. Theoretically, they are contractual, with the community defined by the set of people agreeing to submit to the same laws and legitimate authority. As many a communitarian theorist has lamented, this does not describe a cohesive community, unified by bonds of loyalty or mutual concern. According to this model, citizens owe each other very little. Members of such an association ought to have little reason to concern themselves with the characters of their fellows – after all, anyone can enter into a contract, even a “nation of devils” so long as they meet their obligations. They also should have little basis for experiencing feelings of betrayal if the contract is broken – disappointment, perhaps, or anger, but not betrayal. Agreeing to share a contract with other people reveals very little about the parties’ inner moral selves. However, liberal communities are not merely theoretical voluntary associations. Liberal communities, like all communities, take on a particular character, and that character does reflect upon members. A voluntary, contractual model leaves little room for the affective ties and mutual moral judgment that actually characterizes much of the experience of community membership.

The vast majority of Americans do not live in private, gated communities, and so do not explicitly consent to living with anyone. By not exercising the right to exit, citizens tacitly consent to belonging to a given community, but this is a very limited sort of voluntariness. After all, giving up one’s membership (perhaps in protest, perhaps because of an objectionable change in community character) means rejecting more than the immediate cause of one’s unwillingness
to associate. Exit means severing all the various ties of concern and friendship that community membership entails, making its exercise extremely costly. The high cost of exit casts doubt on the usefulness of the right of exit as a proxy for choice or consent. At the same time, members of liberal communities can claim no right to choose their neighbors, and so the people who economic necessity, birth, or chance bring to a community are the people who share the ties of mutual concern that define it. Members are left with few options when faced with the prospect of sharing the community they treasure with a person they believe sullies it by their association with it. Belonging to a community compels us to associate our own moral identities with those of our fellow members. It is not surprising, then, that the neighbors of particularly despised people, even knowing that they pose no immediate threat, invent ways of pushing them out of the community and denying any commonality between the offender and the other members.

The great mass of purgative exiles, at first glance, appear to be simple cases in which communities fail to meet commitments to toleration. Being expected to live with people whose past conduct we find repugnant certainly raises questions about the limits of toleration in the realm of moral diversity. Indeed, if one believes (even if only implicitly), that the foul moral character of one’s neighbor poses a threat to damage the integrity of one’s own character or that of the community, then the threat of that harm would justify official interference. While the belief that another person’s wickedness could be contagious is flawed, the logic behind choosing not to tolerate is not. As this chapter shows, however, purgative exile arises less from a refusal to tolerate and more from an excessive scrupulosity in the assertion of rights to associate (and to refuse to associate). To tolerate is to refrain from interfering with the activities of our fellows,
however much we may oppose them. Framing purgative banishment as matters of toleration overlooks an important dimension of how these expulsions are conceptualized by those demanding them, however.

Questions of toleration lead us to scrutinize the other (as in the cases explored in the last chapter), ultimately arriving at some judgment about them. Association turns our gaze back onto ourselves, and the nature our relationships with our fellows. Toleration does not speak in the language of “we,” it is something that passes between distinct (and usually at least somewhat opposed) entities. Association, by contrast, exists only in a collective. Our associations reflect our choices, and this element of choice lends an expressive element to association that is not present in toleration. Who we choose to associate with reflects upon who we are. As the cases considered here demonstrate, our associations make us vulnerable. When another member of our group is revealed to be something we deem repulsive, the very sense of sharing that characterizes community membership becomes a potential condemnation, a vector by which the taint in one’s associate may creep into oneself – or almost equally frighteningly, reveal that a similar hidden taint was already there all along. While in theory, liberal political associations are contractual and dependent upon the consent of members, in practice the makeup of American political communities is contingent. This disjuncture between liberal ideals and practical reality, I argue,

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66 As philosopher Andrew J. Cohen persuasively argues, toleration is “the intentional and principled refraining from interfering with another whom one opposes.” This is, admittedly, different from many common uses of the word. Often, “toleration” and “acceptance” are used interchangeably. However, given the pluralism of real liberal communities (and liberal arguments that this pluralism is itself a good), cultivating acceptance of all of the possible incommensurable moral commitments within a community is extremely unlikely, if not impossible. Cohen’s definition is more suitable to liberal government, which aims to mediate between various conflicting commitments, not resolve them. Andrew Jason Cohen, *Toleration* (Cambridge: Polity Press, 2014): 2.

67 Generally, those we “tolerate” are not people we would choose to associate with, as some aspect of the person prompts the impulse to interfere, the restraint of which characterizes toleration. The idea of expressive association, and the right to refuse to associate, is elaborated in *Boy Scouts of America et al. v. Dale*, 530 U.S. 640 (2000).
creates confusion in what “kind” of association American communities are, and this confusion engenders anxiety about what sharing a community with those we find utterly objectionable may imply about one’s own good or bad nature. This tension expresses itself in purgative exile. Similar tensions and conflicts arise in varying conceptions of national citizenship, and its value. The next, and final, chapter will explore how the complicated web of ideas animating political expulsion at the sub-national levels of political community manifest themselves at the most explicitly political level of citizenship: that of national membership.
Chapter VI

Exile and the Liberal Nation: Conflicts of Affect and Reason

“Rousseau... cherished all theories of liberty, while offering pretexts for every claim that tyranny makes. ‘There is,’ he writes, ‘a purely civil profession of faith, of which it is the privilege of the sovereign to fix the articles, not exactly as dogmas of religion, but as feelings of sociability. If he cannot force anyone to believe in those dogmas, the sovereign can banish from the country whoever does not believe in them. He can banish them not as impious but as unsociable.’ What is the state, then, for it to decide which feelings must be adopted? What good is it to me that the sovereign may not force me to believe, when he punishes me if I fail to do so?... What does it matter if authority abstains from meddling with the subtleties of theology, when it loses itself in this hypothetical morality, no less subtle and no less foreign to its jurisdiction?”

Benjamin Constant, Principles of Politics

Obligation, Loyalty, Exile

Judith Shklar took up exile as a subject of political theory in the 1990s, in a pair of short, related essays. Shklar, writing in the shadow of the twentieth century’s political horrors, viewed exile as a prism through which theorists could see the conflicts and connections between obligation and loyalty, both in political life and in the areas where politics border personal life. Shklar, following Cicero, Plutarch, Xenophon, Aristotle, and Thucydides, regards exile as a burden of the elite. The ancient authors she considers hold up each exile in turn, examining his conduct for evidence of having honored the correct obligations or, as in the case of the reviled Coriolanus, having “wholly unacceptable loyalties.” Shklar studies the judgment of exiles by others, those doing the judging use the criteria of obligation and loyalty.

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1 Constant, “Principles of Politics,” 275.
Obligation, Shklar argues, is rule-bound and given to speak in the language of reason. Loyalty, by contrast, is deeply affective: while “obligation is rule-driven, loyalty is motivated by the entire personality of an agent.” In “Obligation, Loyalty, Exile” Shklar admits skepticism of drawing conclusions in “a discourse that is unending,” but does suggest that the lessons of exile are that it has the power to cancel obligations and undermine loyalty if imposed unjustly, and that it “engenders the conflicts between obligation and the affective ties that bind us.” This conflict between rule-oriented, rational obligation and affective loyalty is especially intractable in the context of the liberal society. The preceding chapters have drawn out the affective, non-rational aspects of exile in a liberal society at differing levels of sub-national community. This chapter will address how the tensions between loyalty and obligation shape the most dramatic form of present-day liberal exile: expulsion from the nation. At the national level, the jarring disjuncture between the contractual claims and affective expectations surrounding in the idea of citizenship is particularly clear.

Exile from the nation showcases a peculiarity of exile in the democratic age, imputing an affective experience not only to individual citizens, but to the greater society that expels them. The state expresses an oddly emotional sense of betrayal in these cases, often awkwardly couched in terms of broken promises or unmet contractual conditions. While membership at the sub-national level is seldom explicitly discussed in liberal terms of contract or consent, such discourse is characteristic of debates about national citizenship – one need look no further than the furor surrounding “illegal immigration” to see this vividly illustrated and painstakingly argued. Nonetheless, an exploration of cases in which members of the American polity find

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3 “Loyalty, Obligation, Exile,” 41.
4 Shklar, “Obligation, Loyalty, Exile.” Political Thought and Political Thinkers, 55.
themselves expelled reveals justifications for their removal relying not only on ideas of broken contract or promise, but on the failure of the exile to possess the correct inner state. In effect, citizenship is conditioned upon an obligation to love.

Can a person justly be obligated to feel a particular emotion? Contracts posit conditions that must be met, but requiring the possession of the correct emotional state hardly seems a just condition. If affect defies will, how can a person justly be bound by an agreement to experience a certain emotion? Further, how can authorities reliably judge the affective state of a prospective expellee? Is loyalty an attitude or disposition, rather than merely an emotional experience? If so, is its lack an indicator of bad moral character on the part of the would-be citizen, or a failure to cultivate the correct feelings? Viewing loyalty as an attitude may ameliorate some of the difficulties in holding citizens responsible for its absence, but it raises stubborn problems with essentialism that are no more easily solved. Turning from “loyalty” to some concept of “allegiance” may avoid these problems, making the crucial issue one of promises kept or broken, rather than of having experienced or not experienced an authentic affective state.

Many challenges to assigning accountability underlie the notion of “loyalty” or “allegiance” in liberal citizenship discourse, raising questions about the usefulness, even the reasonableness, of demanding allegiance as a formal condition of citizenship. Among the problems plaguing such tangled questions is the slippery usage of the terms “allegiance” and “loyalty.” Following Judith Shklar, I will make a distinction between the two: “loyalty” describes the affective attachment that we feel to groups, including political communities. By contrast, “allegiance” encompasses those feelings, but also includes an element of promise or oath that adds a dimension of rule-bound obligation to the idea. Both loyalty and allegiance are
conceptualized in different ways in different contexts. They are alternately characterized as emotional states, as conditions in a contract (subject to evaluations of performance or non-performance), or as property that can be given, withdrawn, or divided. Clarifying what these terms refer to and in which way they are deployed in a given context is necessary to considering whether their use is justifiable or not.

In exploring the often contradictory interplay of rational notions of obligation and contract with affective ideas of allegiance, fidelity, and loyalty, this chapter will examine the three mechanisms by which members of the American polity experience expulsion in the twenty-first century: denaturalization, denationalization, and selective deportation. Considering the historical deployment of denaturalization illuminates the problem of “allegiance” or loyalty in acknowledging or denying American citizenship. Next, a survey of current and historic denationalization cases raises questions about allegiance and the place of voluntariness or consent in liberal citizenship, considering whether they are justifiable criteria for determining whether the social contract has been broken. The chapter will conclude with a study of selective deportation enforcement, exploring liberal notions of tacit and explicit consent, challenging the binary distinction between “insider” and “outsider,” and considering the role of obligation in recognizing or denying membership.

**Denaturalization: True Faith and Allegiance**

Naturalized citizens occupy a unique place in the American citizenry: they are the only citizens who have explicitly consented to belonging. With naturalization, would-be citizens become new Americans, completing a lengthy bureaucratic process ending with the recitation of
an oath of allegiance. The Oath suggests a much more robust form of national citizenship than a purely contractual one, requiring that the new citizen transfer allegiance exclusively to the United States (a requirement not imposed on the native-born, who can no longer be denationalized merely for holding additional nationalities) and that they agree to perform a specific duty of citizenship, serving the military in wartime. The road to naturalization requires both measurable actions on the part of the prospective citizen and also a promise to hold the correct affective attitudes. Currently, the naturalization oath required of all new citizens reads:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

The Oath of Allegiance reads less like a theoretical social contract and more like a wedding vow, obligating the new citizen to not only give “true faith and allegiance” to the United States, but also to forsake all others before the authority of no less than God. As an additional assurance that the oath taker possesses the desired inner state, the text includes an affirmation that they take the vow without “mental reservation” or proscribed purpose.

Denaturalization combines both rule-based and affective justifications for the revocation of American nationality. Historically, it has offered authorities a method for rendering unwanted foreign-born citizens deportable, transforming a troublesome insider into an outsider who can be

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5 The required content of the Oath is outlined in the INA, §337(a).
easily expelled. Denaturalization is often couched in terms of correction, representing not an affirmative political action on the part of authorities, but a simple administrative measure necessary to correct the “mistaken,” or illegitimate, acceptance of an essentially unacceptable person. This logic should be familiar, as it is the same idea underlying the moral exiles discussed in chapters one and two. Denaturalization has generally been justified in one of two ways, by claims of fraud or lack of the correct attachments. Fraud is readily justifiable by traditional liberal ideas of contract. The misrepresented actions of the admitted person constitute a failure to meet agreed-upon terms of admission, which usually stipulate that they not have engaged in certain prohibited actions or that they possess “good moral character,” as discussed in chapter three.

Allegiance presents a number of challenges to liberal justification. While the language of loyalty surrounds many national banishments, the term implies not merely affective attachment but also performance of some action inconsistent with the obligations of citizenship. Judith Shklar makes a similar distinction between the emotional experience that is “loyalty” and the hybrid affective/obligation-bound idea of “allegiance.” Allegiance is an inheritance of the feudal era, entailing an oath or covenant. It implies not only feeling the right things, but also a promise to act (or to refrain from acting) in certain ways. “Allegiance” is conceptualized in conflicting ways in different citizenship-related contexts. At times, it appears as an agreement to conditions that can be broken or kept – this concept of “allegiance” can be evaluated by observable actions. Alternately, it appears as an emotion, attitude, or mental state. This is far more problematic, as emotions are not voluntary, nor are attitudes or mental states clearly so.

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Punishing a contracting party for failing to meet a condition that is beyond their control is not just. As the Kantian maxim says, “ought” implies “can” – and in the language of contract, certainly any reasonable or just conception of “will” (as in, “will do,” or “will not do”) implies “can.” Finally, allegiance appears as property, a possession that can be given, withdrawn, or transferred to another party at will. Before accepting or rejecting allegiance as a legitimate requirement of liberal citizenship, it is necessary to evaluate these three conceptions of the idea and determine which one is actually being employed in a given argument.

Fraud appears to be an easily justified, largely apolitical basis for denaturalizing a citizen. Based on the logic of contract, fraudulently obtaining naturalization constitutes unmet obligations on the part of the applicant, a failure to meet conditions then concealed by deceit. In theory, a fraudulent naturalization is one obtained by the concealment of facts that would otherwise have rendered the applicant ineligible for naturalization in the first place. It represents a mistake on the part of the naturalizing nation and deliberate deception on the part of the applicant. Under such circumstances, withdrawal of naturalization is a simple matter of correcting an error. The majority of denaturalizations today are on the grounds of fraud, as were the greatest portion of historical naturalizations. Historically, allegations of fraud rested not necessarily upon having made false statements, but were inferred from residence abroad. How residence abroad constitutes “fraud” is not readily apparent, but a brief exploration of this historical construction of fraud in denaturalization policy is useful to revealing the political complexities of this seemingly straightforward idea.

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Historically, the vast majority of denaturalizations in America were imposed for extended residence abroad. The policy was an innovation of the Naturalization Act of 1906. Surprisingly, extended residence abroad was not initially treated as an expatriating act because of an assumed intention to relinquish citizenship, but rather because it was construed as evidence of having fraudulently obtained naturalization in the first place. Section 15 of the 1906 Act stipulates that:

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancelation of his certificate of citizenship as fraudulent…

The reasoning in this passage is significant. Despite the seemingly rule-bound, rational nature of fraud determinations, there are often attempts to divine the true state of an individual’s mind and heart at the time of naturalization lurking behind seemingly rational conditions. In this case, subsequent actions are interpreted to reveal the naturalized citizen’s true intentions at the time of naturalization, presented as a bad-faith attempt by the newcomer to take advantage of American citizenship without offering the expected affective attachment.

Fraud is currently the primary reason for denaturalization. Denaturalization has declined steeply since the 1960s, with the Court’s increasingly strict stance on the revocation of nationality generally. The exception to this trend is a concentrated effort by the Department of

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8 Naturalization Act, 34 Stat. 596 (1906). The time period was extended a year later, in An Act in Reference to the Expatriation of Citizens and their Protection Abroad, 34 Stat. 1228 (1907).
9 A year later, the 1907 Expatriation Act would eliminate the five-year time limit, asserting that a naturalized alien who lived abroad for two years at any time following their naturalization would be considered to have “ceased to be an American citizen. 34 Stat. 1228 (1907) §2.
Justice to locate, denaturalize, and deport war criminals and those guilty of human rights abuses. The DOJ created the Office of Special Investigations in 1979, charging it with the task of investigating naturalized citizens believed to have concealed their Nazi affiliation at the time of their application for naturalization. Technically, the basis for those denaturalized in these investigations is not running afoul of the good moral character requirement or any other affective obligation, but for lying on the naturalization application – fraud. Renamed the Human Rights and Special Prosecutions Section, the office has turned its focus to naturalized Americans thought to have participated in genocide, torture, or other human rights abuses. Among those denaturalized by the office is Gilberto Jordan, a native Guatemalan, denaturalized for failing to disclose his involvement in the infamous slaughter of 162 civilians in the village of Dos Erres during the Guatemalan Civil War. As recently as February of 2015, the HRSPS initiated the deportation of at least 150 legal permanent resident and naturalized Bosnians accused of concealing military service or other offenses associated with the Bosnian Civil War. Again, the charge is fraud.

During the 1970s and 1980s, most denaturalizations were limited to former Nazis and other human rights abusers, but in the past fifteen years, denaturalization proceedings have been initiated against citizens who have committed criminal offenses, usually before their naturalization application was filed. In the case of Lionel Jean-Baptiste (discussed in chapter three) the offense took place after his naturalization, setting an unsettling example. Others have been denaturalized for committing offenses between the initiation of the process and its end.

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10 Jordan lost his citizenship in 2010 and was sentenced to ten years in prison for immigration-related offenses.
(naturalization can take years). In these cases, there are always charges of fraud. Interestingly, in some the fraud charge is joined by an allegation of having failed the “good moral character” requirement, as well. Denaturalization is still relatively rare, but the turn from war criminals to common criminals suggests a movement in the direction of using denaturalization as a tool of social control. The use of fraud charges to rid the polity of some of its most despised naturalized citizens again illustrates the use of contractual language of obligation to mask affective responses to naturalized citizens who reveal themselves, after acceptance, to not be the person we believed them to be. Such a response arises from an emotional experience of betrayal.

Naturalization requirements have co-evolved with changing mores and commitments. For instance, the 1917 Immigration act included racial provisions precluding Asians from naturalization and included similar provisions excluding “homosexuals,” “epileptics,” and “feeble-minded persons.” As recently as the 1980s, homosexuality could be construed as a violation of the good moral character requirement of the INA, a prohibition to naturalization not abolished until the passage of the Immigration Act of 1990. Currently, requirements include a demonstrated understanding of the English language and a basic knowledge of the American

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system of government and U.S. history, and geographic presence within the nation for specific periods of time. Section 316 of the INA contains some of the most subjective and affective requirements, including “attachment to the principles of the Constitution,” “Good moral character,” and “favorable disposition toward the United States.”

While recent denaturalization cases do level the charge of having lacked good moral character at the time of naturalization, in the past failing to meet conditions of loyalty was a common cause of denaturalization. German-Americans were subjected to this during both World Wars. During the First, naturalized German-Americans who expressed sympathy for the German cause were charged with not having fully withdrawn their allegiance to their former nation, lacked attachment to the Constitution, or harbored a mental reservation in taking their oath. Each charge outlines a violation of the conditions of their naturalization. Disloyal expressions uttered after naturalization were projected backward in time (in two extreme cases, as long as thirty five and forty-two years after naturalization) and taken as evidence that the original oath of allegiance had not been made sincerely. Similarly, anarchists became targets of denaturalization for lack of attachment to the principles of the Constitution. During World War II, naturalized citizens from Axis nations suffered targeted denaturalization, often as a prelude to arrest and internment. Naturalized members of the German-American Bund, a suspected pro-Nazi organization, were of particular interest to federal authorities.

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14 Weil, 68.
16 Weil, 74-75.
In 1942, Attorney General Francis Biddle instituted a formal denaturalization program, specifically targeting German-Americans active in the German-American Bund. Biddle argued that “[t]he aims and purposes of the Bund are wholly inconsistent with American citizenship. Loyalty to one excludes loyalty to the other,” and so any German-Americans who were members at the time of naturalization “…are guilty of fraud. Their oaths of allegiance were not honestly taken.” Ultimately, only a small fraction of investigations resulted in denaturalization. The Supreme Court, in *Schneiderman v. U.S.*, overturned the denaturalization of a German-American on the grounds that his involvement in the Communist Party of California constituted a violation of the requirement that petitioners for naturalization “be and behave as a person attached to the principles of the Constitution and well disposed to the good order and happiness of the United States.” The decision, handed down in 1943, presented an obstacle to the denaturalization program’s remaining cases, which depended heavily on similar claims of retroactive disloyalty.

Notably, the *Schneiderman* decision makes a distinction between an obligation to be attached to American principles and to *behave* as a person who is attached to them. It seems a minor distinction, but here the Court recognizes difficulty in determining whether an obligation has been met or not when that obligation involves feeling something, and “attachment” is certainly the language of affect, not reason. The observation runs counter to the reasoning in an earlier case, denying naturalization to a pacifist unwilling to swear her willingness to take up

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17 Ibid., 100.
19 *Schneiderman v. United States* 320 U.S. 118 (1943). Section 4 of the 1906 Nationality Act requires that at the time of naturalization and for five years prior the applicant "has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."
arms in defense of the nation.\textsuperscript{20} Ms. Schwimmer was charged with being “unable, without mental reservation, to take the prescribed oath of allegiance, and not attached to the principles of the Constitution of the United States, and not well disposed to the good order and happiness of the same.” The Court pronounced that:

\begin{quote}
[O]ne who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization…. It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act.
\end{quote}

In Schwimmer, Justice Butler confidently assumes the competence of the Court to discern Ms. Schwimmer’s true attachments, and whether she gave them with or without mental reservation.\textsuperscript{21}

Denaturalization offers a confused image of citizenship that is part contract, or exchange relationship, and part affective relationship, comparable to a friendship or familial bond. While an exchange relationship entails meeting conditions of action, affective relationships defy the logic of contract and promise. Although liberal ideas like consent and contractual obligation can be offered to justify most expatriation policies, making decisions on the basis of allegiance, loyalty or some other emotional attachment remains an important component of the logic in each case, even in seemingly straightforward, rule-bound cases of fraud. Allegiance, in the context of denaturalization, is a strangely personal construct. Newcomers are not expected merely to abide by the laws, but they must promise to experience the right inner state in their emotions and attitudes toward their new nation. They must promise, in short, to love.

\textsuperscript{20} United States v. Schwimmer, 279 U.S. 644 (1929).
\textsuperscript{21} Weil, 134-143.
And not only must the alien promise to love the United States, but they must promise to love it for the right reasons, and without “mental reservation.” As Bonnie Honig notes, appreciating the benefits that U.S. citizenship affords the new citizen is not sufficient, they have to love “us” for non-instrumental reasons. This is not a rational, Tocquevillean sense of self-interest rightly understood, but something akin to real love and attachment of the sort that characterizes interpersonal relationships like friendship, family, or marriage. Merely recognizing the material advantages of belonging, even merely feeling gratitude (itself a substantial affective experience), is not enough to constitute true allegiance. Aliens are expected, rather, to display something akin to what Judith Shklar, in her exile essays, terms “fidelity.” Fidelity differs from loyalty in that it is primarily personal. This formulation places the state in the role of a person with feelings – hurt feelings, specifically. The alien who lacks true allegiance has not merely failed to meet their obligations to the United States, they have betrayed it in a very personal, affective way.

**Denationalization: The Sting of Betrayal**

Denationalization, or the involuntary loss of American birthright citizenship, is the rarest form of national expulsion. While not limited exclusively to cases of treason, denationalization policies have long had a close relationship with betrayal. Betrayal, in the context of political community, takes a number of forms. In its most extreme form, it is treason, or actively working against the interests (or even existence) of one’s own nation. Acts of treason are not necessarily related to war or conflict, but they do arise most often in times of national crisis, when decisions about where one’s loyalties lie become particularly pressing. Less extreme acts of betrayal
include breaking promises or transferring one’s loyalties to another nation – at least if we are to accept that loyalty is indivisible.

It is not surprising that issues of loyalty take on a particular urgency during wartime. As Michael Oakeshott notes, even the most civil states take on the cast of the telocracy in times of war, and every member is expected to prove their commitment to the cause. Historically, expelling disloyal citizens in times of conflict is not unknown to the United States. After the Revolutionary War, loyalists to the British crown (like Basil Cooper of Cooper v. Telfair fame) were subjected to the seizure of their property and banishment in several states, including New York, New Hampshire, Massachusetts, and South Carolina. While loyalists were often banished from the newly forged nation, Civil War banishments rarely rose to the level of denationalization, in part because what actually constituted the national territory was constantly contested. Union officials made extensive use of banishment during the Civil War. The infamous Presidential Proclamation 94 of 1862 justified the suspension of habeas corpus by positing that, “disloyal persons are not adequately restrained by the ordinary processes of law.” One of the extraordinary measures employed by the Union to manage the disloyal was expulsion from contested territories, and even from the Union.

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22 On Human Conduct, 146-147, 272-274. “War is the paradigm case of a situation in which the variety of ‘admitted goods’ in a society is reduced, or almost reduced, to one; a ‘state’ at war is a paradigm case of telocracy. And it is not insignificant that the rhetoric of telocratic belief is always liberally sprinkled with military analogy.” Oakeshott, “The Office of Government II,” Lectures in the History of Political Thought, 496.
An 1866 biography of Andrew Johnson documents instances in which he, while Governor of Tennessee, banished supporters of the Confederacy from Nashville or from the state, in an effort to contain their destabilizing influence upon a population already torn by conflicting personal fidelities and group loyalties.\textsuperscript{24} After 1863, Union military officials deployed banishment as a method of controlling guerrilla fighters; unable to suppress guerilla activity directly, the families of alleged fighters were subjected to banishment from their home county or state in many contested regions.\textsuperscript{25} Banishments were especially frequent in border states like Missouri, Kansas, Kentucky, and Tennessee.\textsuperscript{26} For instance, Union General Thomas Ewing, facing a particularly obdurate challenge in William Clarke Quantrill’s pro-Confederate “Bushwhackers,” first ordered that “the wives and children of known guerrillas, and also women who are heads of families and are willfully engaged in aiding guerillas” to “remove out of this district and out of the State of Missouri forthwith.” Shortly thereafter, he banished every resident of three Missouri counties and the adjoining region under his command.\textsuperscript{27} Only those able to “establish their loyalty to the satisfaction of the commanding officer of the military station near their present place of residence” were allowed to return.\textsuperscript{28} Such banishments often

\textsuperscript{24} John Savage, \textit{The Life and Public Services of Andrew Johnson: Including His State Papers, Speeches, and Addresses} (New York: Derby and Miller, 1866): 257-258. Savage identifies “Mrs. Washington Barrow, wife of a very rich and prominent secessionist” (Washington Barrow was a member of the U.S. House of Representatives and Minister to Portugal prior to the war) and General Zebulon Montgomery Pike Maury as having been banished.


\textsuperscript{26} General Benjamin Loan used banishment extensively in Kentucky, as did General Thomas Ewing in Kansas and Missouri. Kansas and Missouri were especially torn by guerrilla warfare, and many Union officials resorted to mass banishments to root out supporters. For a detailed account, see Michael Fellman, \textit{Inside War: The Guerrilla Conflict in Missouri During the American Civil War} (New York: Oxford University Press): 35, 46-47, 126-127, 224, 252.

\textsuperscript{27} General Thomas Ewing, General Order Number 10 (Kansas City, August 18\textsuperscript{th}, 1864).

\textsuperscript{28} General Thomas Ewing, General Order Number 11 (Kansas City, August 23\textsuperscript{th}, 1863). “Section 1” of the Order reads, “All persons living in Jackson, Cass, and Bates counties, Missouri, and in that part of Vernon included in this district, except those living within one mile of the limits of Independence, Hickman's Mills, Pleasant Hill, and
targeted women, who could not serve as combatants themselves but provided material support to pro-Confederate men. The newspaper coverage of the time adopts a tone of characteristically florid outrage.²⁹

Some enemy agents, though guilty of treason, could not be executed without the risk of making them martyrs to the Confederate cause, and these few were singled out for exile. Among this class were a number of female spies, including Rose O’Neal Greenhow, Eugenia Levy Phillips, and actress Belle Boyd, all banished beyond Confederate lines and forbidden to return to Union soil for the duration of the conflict.³⁰ At least one Confederate sympathizer, Senator Clement Vallandigham of Ohio, famously met with expulsion from the nation.³¹ Vallandigham

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³⁰ Stephanie McCurry, Confederate Reckoning: Power and Politics in the Civil War South. 89-90, 104, 108. Belle Boyd repeatedly disregarded the prohibition, and was repeatedly banished in turn.

³¹ Despite his banishment, Vallandigham maintained that he was a citizen of Ohio, sent away against his will, and that the Confederacy detained him as an enemy alien, so whether he was actually denationalized is arguable. Additionally, newspapers report the 1865 presidential pardon of Lieutenant Colonel William E. Mulford of Indiana, conditional on his leaving the United States. “Lieut.-Col. Wm. E. Mulford, of the rebel army, formerly of Indiana, is permitted by the President to leave the United States never to Return.” Troy Daily Times (New York), Saturday
was arrested after giving a polemical speech opposing the war, and upon his conviction for
treason, President Lincoln commuted his sentence from death to banishment to the Confederacy.

The charge was as follows:

Publicly expressing, in violation of General Orders No. 38, from Head-quarters, Department of the Ohio, sympathy for those in arms against the Government of the United States, and declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts to suppress an unlawful rebellion.\textsuperscript{32}

Vallandigham’s conviction met with criticism on free speech grounds even at the time.

Vallandigham’s crime was not merely one of speech, however, but of misplaced sympathies and treacherous loyalty. While loyalty is certainly at issue in all of these banishments, there is something more than simply an affective state in question. The membership of these exiles was not nullified because they refused to participate, or opted to remain neutral. Nor were they expelled for merely harboring the wrong sentiments (although they are certainly accused of that as well). In the Revolutionary War and Civil War cases, exile and denationalization were imposed upon those who took actions against their home community for the advancement of the opponent’s cause – they committed acts of betrayal.

Despite the language of “loyalty” surrounding these cases, the element of proscribed action reveals that the key idea in these denationalizations is better described as “allegiance.” They not only feel the wrong attachments, they transgress against the obligations of citizenship.

\textsuperscript{32} “The Trial Hon. Clement L. Vallandigham, by A. and the Proceedings Under His Application For A Writ Of Habeas Corpus In The Circuit Court Of The United States For The Southern District Of Ohio” (Cincinnati, Ohio: Rickey And Carroll, 1863).
Further, in these Civil War and Revolutionary War banishments, allegiance is not simply withdrawn or absent, but it is transferred. This is “allegiance” in the form of a possession that can be rationally distributed or withheld. Banished loyalists and Confederates did not merely withdraw their loyalty, they affirmatively placed it elsewhere – and in the circumstances of war, transferring one’s loyalties to the opposing side represents a willingness to relinquish original claims to membership that it would not in times of peace. By giving their allegiance to the enemy, these exiles tacitly consented to surrendering claims to membership in their home political community.

Other American denationalization policies also arose in times of national crisis, based not on consent or allegiance, but on an obligation to meet certain implicit conditions of national citizenship. For instance, desertion from the armed forces or draft evasion during war have been grounds for loss of nationality in the past. These policies imply that certain duties of citizenship are not merely expected or desired, but required for its retention. Such policies condition national citizenship on a set of ill-defined (but ruthlessly enforced) obligations. The Supreme Court forbade all punitive uses of denationalization in *Trop v. Dulles*, a case in which a native-born American was denationalized for desertion under the Nationality Act of 1940. In *Trop*, the Court proscribes denationalization as punishment under the Eighth Amendment prohibition on cruel and unusual punishments. But in forbidding denationalization on punitive

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33 An 1865 amendment of the 1863 Enrollment Act authorizes denationalization of deserters and draft evaders. 13 Stat. 487 (1865), Section 21. It was relaxed in 1867 as part of the Reconstruction effort to re-integrate deserters, and again in 1912, to apply only during wartime. Deserters and draft evaders could also be denationalized under the Nationality Act of 1940, 401(g). *Trop v. Dulles* marked the end of denationalization punishment for military (or other) offenses under the Eighth Amendment. 356 U.S. 86 (1958). The provisions of the 1940 Nationality Act were the basis for similar provisions in the 1952 Nationality Act. Although the later case, *Kennedy v. Mendoza-Martinez*, also dealt with a provision of the 1940 Nationality Act that allowed for the denationalization of those who left the country to avoid the draft, that was not the charge that the case was ultimately decided upon. 372 U.S. 144 (1963).

grounds, the Court sidesteps issues of obligation and the conditionality of native-born citizenship raised by the legal provisions that generated *Trop* and cases like it in the first place, leaving them largely unchallenged. They lurk, unresolved, in the substrate of national citizenship discourse.

Allegiance-based conceptions of national citizenship incorporate similar elements of conditionality, assuming the possession of attitudes to be conditions of citizenship. Similarly, holding certain beliefs may be treated as a condition of citizenship. Under the Expatriation Act of 1954, native-born Americans faced the possibility of denationalization for subscribing to anarchist or communist beliefs, as prohibited by specified sections of the Smith Act, a law normally only applicable to naturalized Americans or non-citizen residents.  

In the same year, Eisenhower’s State of the Union address included this passage:

> … I turn now to a matter relating to American citizenship. The subversive character of the Communist Party in the United States has been clearly demonstrated in many ways…. We should recognize by law a fact that is plain to all thoughtful citizens—that we are dealing here with actions akin to treason—that when a citizen knowingly participates in the Communist conspiracy he no longer holds allegiance to the United States. I recommend that Congress enact legislation to provide that a citizen of the United States who is convicted in the courts of hereafter conspiring to advocate the overthrow of this government by force or violence be treated as having, by such act, renounced his allegiance to the United States and forfeited his United States citizenship.\(^\text{36}\)


All of these conditions, dependent on harboring particular inner states, pose obvious problems when treated as contractual obligations. Particular actions may be interpreted as indicative of these inner states, certain statements (such as the oath of allegiance that still

\(^\text{35}\) 8 U.S. Code §1481(a).
accompanies naturalization in the U.S.) may also be treated as evidence that the desired state exists, but treating beliefs and attitudes as conditions to be met or unmet places bureaucratic (or, in the past, judicial) authorities in the untenable position of trying to divine a citizen’s true beliefs or emotions from outward signs, often of questionable evidentiary value.

A close relative to the implicit condition of citizenship is the expatriating act, or an action treated as evidence of intent to relinquish citizenship. The 1868 Expatriation Act, establishing a right to expatriate, dealt primarily with terminating American obligations to protect naturalized citizens who returned to their home nations from being pressed into military service there, but the later 1907 Expatriation Act carried very different provisions. Under the 1907 Act, native-born Americans could tacitly relinquish their citizenship simply by naturalizing in another country or taking an oath of allegiance to another nation. Additionally, American women were deemed to have expatriated themselves upon marriage to a foreign man, at least for the duration of the marriage. Prior to the 1940 Nationality Act, expatriating acts were limited to these three actions, each set forth as evidence of transferred allegiance. The 1940 Act would add new provisions unrelated to assuming a new nationality.

Chapter IV of the 1940 Nationality Act sets out the conditions under which a “person who is a national of the United States, whether by birth or naturalization, shall lose his

37 1907 Expatriation Act, 34 Stat. 1228 (1907), §2
38 Ibid., §3. The 1790 Naturalization Act had proscribed the naturalization of non-white immigrants, a restriction relaxed in later legislation. Notably, the Naturalization Act of 1870 opened naturalization to people of African descent. However, Asians fit into neither the “white” nor the “African descent” categories, and were excluded from naturalization. The Chinese had been excluded from naturalization since 1882, and remained so until the 1943 Magnuson Act repealed the Chinese Exclusion Act. Prohibitions against the naturalization of Japanese, Filipinos, and other Asians were gradually abolished during the 1940s, and were finally eliminated in the 1952 Walter-McCarran Act. The national quotas imposed by the McCarran-Walter Act nonetheless severely restricted Asian immigration. The 1922 Cable Act put an end to denationalization upon marriage to a foreigner, with the important exception of American women who married foreign men who were “ineligible for naturalization.” This clause referred to Asian men, who were excluded from naturalization by the Immigration Act of 1917.
nationality....” The list includes acts indicative of adopting a new nationality, like naturalization, taking an oath of allegiance, serving in the armed forces, accepting employment restricted only to citizens of a particular nation, or voting in a foreign election. In addition to these actions, the 1940 Act adds “making a formal renunciation,” deserting the armed forces in wartime, and committing treason. These expatriating acts indicate either a failure to meet the obligations of citizenship (as in evading military service) or a transfer of allegiance to another state. The concept of allegiance underlying these policies is a jealous one – it is portrayed as an attachment that is exclusive and indivisible. To show attachment to another nation is not simply to have multiple centers of attachment, but rather is interpreted as a rejection of the original nation, a betrayal of the original loyalty instead of an addition to it. As in the case of the oath of naturalization, such a conception of political allegiance takes on a bizarrely personal cast, as if claiming more than one nationality were the moral equivalent of two-timing a trusting spouse.

The final vision of national citizenship emerging from American denationalization practice is citizenship held by consent. The right to give up one’s American citizenship was established in the 1868 Expatriation Act, although it has been limited in times of war. Denationalization by renunciation depends upon an element of voluntariness, or consent, and so is perhaps the form of denationalization most easily reconciled with conceptions of citizenship by contract. Current denationalization law specifies that voluntary renunciation is the only permissible method by which a native-born American citizen can lose his or her citizenship.39 This conclusion was not easily reached. The mid-twentieth century saw a parade of contradictory Supreme Court decisions on involuntary expatriation, with intense contestation.

between justices accompanying each. In 1958, the *Perez v. Brownell* decision confirmed that Congress could deprive citizens of their nationality upon the performance of acts evidencing allegiance to a foreign state (in this case, voting in a foreign election).\(^{40}\) Only nine years later, the Court would do a complete about-face with *Afroyim v. Rusk*, forbidding denationalization under the same circumstances.

Determining what constitutes an expression of intent to expatriate continued to pose problems after *Afroyim*. The 1980 case *Vance v. Terrazas* established that an American cannot be deprived of citizenship by an expatriating act unless they were found to have acted with the intention of surrendering U.S. citizenship. This standard still leaves considerable room for interpretation. While *Terrazas* requires a clear demonstration of expatriating intent, the set of actions qualifying as consent to expatriate are subject to political determination, and so to the passions and prejudices of the time. After all, women who married “racially ineligible” men were believed to have tacitly consented to relinquish their U.S. citizenship for the duration of the marriage. Even setting aside the many possible abuses of the expatriating act, explicitly given consent to loss of nationality also suffers from questions about how meaningful the voluntariness legitimating it might be.

Consider the case of the Japanese Americans who renounced their citizenship after internment in 1944 and 1945.\(^{41}\) The illegal mass arrest and detention of 112,000 Japanese Americans certainly qualifies as the sort of betrayal by a government of its citizens that Shklar argues is sufficient to nullify any claims to their allegiance. In the midst of this, 5,589 interned

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Americans of Japanese descent were “permitted” to renounce their citizenship during wartime and return to Japan. While technically effected by consent, how meaningful is voluntary expatriation after one’s citizenship has been effectively denied by the state? Similarly, the Department of Justice released Louisiana-born Yaser Hamdi to Saudi Arabia without charges on the condition that he voluntarily surrender his U.S. citizenship. Although Hamdi was never formally charged, he had been detained for nearly three years as an “enemy combatant,” and his fate if he declined the DOJ offer was uncertain. Under such circumstances, voluntariness is nominal.

The history of U.S. denationalization law offers a muddled image of national citizenship. At times, citizenship is presented as conditional upon performing, or refraining from performing, certain actions, like serving honorably in the military in times of war (for men) or marrying a suitably American man (for women). However, even these rule-bound obligations are laden with normative burdens about gender-differentiated citizenship and what a “true” American character is; men, required to serve honorably, are to be at least minimally courageous, loyal, and willing to sacrifice for the good of the nation. Women, expected to marry (and presumably, reproduce with) ethnically and racially approved men, are guardians of racial purity.42 Attaching heavy normative implications to the required action raises the question of whether it is the performance of the correct actions or the possession of the correct inner state that is actually represented by the condition. While conditions like geographic presence or English proficiency can be easily evaluated as met or unmet, conditions based on possessing the desired attitude or character

42 Eugenics were a very real concern for immigration officials at the time of the 1922 Act’s passage. In 1921, the US House Committee on Immigration and Naturalization appointed Harry Laughlin, as the Committee’s “Expert Eugenics Agent.” Judy Scales-Trent, “Racial Purity Laws in the United States and Nazi Germany: The Targeting Process.” Human Rights Quarterly 23.2 (May, 2001): 260-307, 288.
introduce much more subjective, personal judgments into what is presented as a rigid bureaucratic process. When a citizen fails to meet those more personal “obligations,” the response of the community (in this case the nation) is to frame the failure as a betrayal.

The sense of betrayal haunting the various constructions of treason, disloyalty, or lack of good character is, at base, a personal one. In a bureaucratically complex mass democracy like the United States, this image of citizenship as an interpersonal, affective relationship is out of place. It expresses a fundamental confusion between two incompatible concepts of the relationship that citizenship represents: one, a personal, affective tie between individuals and the other an exchange relationship based on measurable obligations or conditions. The second model is the prototypical “social contract” model, in which citizens make a rational decision to give up the right to perform certain actions in exchange for the increased opportunities for security and prosperity provided by the rule of law. The first, however, is a legacy of an older model of allegiance, more at home in a feudal relationship than in a mass democracy.

Allegiance is a relationship built on a promise of fealty to a personal authority. The locus of loyalty and obligation is clear, embodied in a person. Even in swearing allegiance to a kingdom or territory, under this model the tie is a personal one, as sovereignty remains vested in the person, with the political association under their charge depicted as an artificial extension of their person.43 As such, it is a fundamentally personal relationship, encompassing not only the performance of duties, but the cultivation of feelings of loyalty and attachment. In its original Medieval context, the oath of allegiance would be sworn to another person before God – a process echoed in current American naturalization. Swearing not only to perform certain actions

43 This is a very rough summary of the argument developed by Ernst H. Kantorowicz in The King’s Two Bodies: A Study in Mediaeval Political Theology. Princeton: Princeton University press, 1957.
but also to harbor certain feelings or beliefs is less problematic when the authority overseeing the keeping of such an oath is omniscient. Today, despite invoking divine authority in the oath of allegiance, the authorities enforcing the promises constituting citizenship are not divine ones, but judges and bureaucrats. Carrying over the personal, affective obligations of feudal fealty into the contract-based idea of liberal citizenship results in doomed attempts by officials to discern the true inner state of citizens, and then to hold them morally (and legally) accountable for that inner state. This poses obvious practical difficulties, but beyond those it illustrates the basic incompatibility of personal ideas of allegiance with modern conceptions of citizenship.

Theories of civic and cultural nationalism are heavily invested in both the feasibility and the desirability of cultivating similar affective attachments to the nation, but as this survey of denationalization in American history suggests, the project is misguided. In a mass democracy, the locus of attachment is often slippery. Sometimes it is depicted as being the principles of the Constitution; of course, the principles of the Constitution are constantly contested, so treating them as the recipient of our promises of allegiance presents some difficulties. At others, it is the abstract “nation” to which we pledge.\textsuperscript{44} Is the nation the government? Is the government a single unitary entity? The constant power struggles within and between branches and agencies would suggest otherwise. Is the “nation” actually a collective term for our fellow citizens? All of them?

The numerous, perpetual conflicts defining political life in a liberal democracy illustrate the difficulties of formally obligating citizens to maintain certain affective states or attitudes toward their government and their fellows. Disagreement about basic values, even hostility, is

\textsuperscript{44} Although this is not actually in the language of the Oath. By contrast, the Australian oath of allegiance does specify the people as sharing in the oath, reading in part “I pledge my loyalty to Australia and its people.”
an inherent element of public life in a democracy.\textsuperscript{45} Disappointing our rulers and our neighbors should not be framed as a personal betrayal, but simply as a common feature of the experience of democratic citizenship. While legalistic, contractual constructions of citizenship may be morally unsatisfying in comparison to more robust ones, they are better suited to citizenship at the national level, a level at which the political community it describes is enormously diverse. As the other chapters of this project illustrate, thick, particularistic conceptions of citizenship are alive and well in the United States – at the sub-national levels of political community. While those instantiations of liberal citizenship entail their own problems with balancing the requirements of liberalism with the demands of local identity, the sense of interpersonal connection characterizing American denationalization policy is better supported by those more local associations, and the conflicts engendering them are better addressed by the more nimble machinery of state and local government than by national legislation or constitutional pronouncement.

**Deportation: “The Common Consent of All Civilized Peoples”**

Denationalization and denaturalization are not insignificant forms of national expulsion, but their occurrence is relatively rare – especially in comparison to the dramatic increase in deportations in recent decades. Since 1997, over five million non-citizens have been deported, more than the sum of all deportations prior to 1997.\textsuperscript{46} Most deportees, unsurprisingly, are


undocumented immigrants, a perennially unpopular section of the American population combining the traditionally suspicious categories of “foreigner” and “law breaker.”

Undocumented immigrants are one of the few groups at which Americans can direct open resentment and hostility, the surface disapproval of criminality available to mask racial, ethnic, or religious biases that are no longer socially acceptable to express explicitly. Today, there are an estimated 11.2 million undocumented migrants living in the United States, all of whom are deportable. Despite unprecedented deportation levels under the Obama administration, expelling every deportable person in the nation is a task beyond the capabilities of the U.S. federal government. And so, authorities must prioritize who is to be deported, picking and choosing among the removable masses.

These decisions, like those about who do denaturalize, denationalize, or otherwise expel from American political communities, reveals implicit assumptions about who are and are not acceptable members. In the case of mass deportation, the profile of the “illegal alien” most often targeted is male, South or Central American, and increasingly constructed as a dangerous criminal. Deportation is remarkable for its sheer scale, which far surpasses both denationalization and denaturalization. Relying on the identification of its subjects as non-members, deportation receives little popular criticism. Considering what American citizenship actually entails, however, suggests that the non-member status of undocumented immigrants (who make up the bulk of deportees) is not as unassailable as it is presented as being.

comparison, approximately 120,000 Americans were either denaturalized or denationalized between 1945 and 1977. Weil, 198-199. Changes to immigration law in 1996 limited options for deportation relief, reduced judicial discretion in removal decisions, and created a large class of actions mandating deportation. Illegal Immigration Reform and Immigrant Responsibility Act, 110 Stat. 3009-546 (1996); Antiterrorism and Effective Death Penalty Act, 110 Stat. 1214 (1996).
As the mechanism by which people are expelled from the national territory, deportation gives teeth to denationalization and denaturalization policies, but it also operates as an important membership control device in its own right. Even absent its actual enforcement, the threat of deportation is a palpable presence in the lives of those subject to it, shaping their everyday activities and decisions. Deportation, despite its administrative classification, is a tool employed in a highly selective – and therefore highly political – fashion. The cases of people targeted for deportation, like those of formally recognized citizens deprived of their nationality, reveal underlying assumptions and anxieties about competing visions of American citizenship. Conflicting ideas of rational obligation and affective judgments plague deportation discourse as well, leaving a hotly contested muddle of legalistic rhetoric and emotional, moralized assumptions of desert (or, more often, its lack).

Selective deportation is nothing new in American history. In the late eighteenth and early nineteenth centuries, deportation was a popular method of disposing of one particularly unwelcome population of non-citizens: newly manumitted slaves and other free black people. Jefferson’s assessment that free black and white Americans could not live peacefully together was not a rare one; many abolitionists also favored “colonization,” or the mass deportation of free, American-born black people “back” to their “homeland.” Aside from the large-scale plans of organizations like the American Colonization Society, many jurisdictions imposed deportation or “transportation” of free black people, in some cases limited to those who committed crimes or

47 The chilling effects of deportation have been extensively documented. For an in-depth discussion of the place deportation currently occupies in the American socio-legal landscape, see Daniel Kanstroom documents the experiences of many deportees in Aftermath: Deportation Law and the New American Diaspora (Oxford: Oxford University Press, 2012).
otherwise ran afoul of local authorities, but not in all.\textsuperscript{48} Later, between the 1880s and 1940s, deportation was used to enforce Chinese exclusion laws, relying on similar justifications alleging that the Chinese were inherently incapable of assimilating culturally, or of internalizing democratic principles.\textsuperscript{49}

In addition to disfavored groups, prominent dissidents have also been targets of selective deportation efforts in the past. Emma Goldman is the most famous political deportee in American history, but others have met with similar fates. Australian-born labor leader Harry Bridges resisted repeated attempts by federal authorities to denaturalize and deport him between 1934 and 1955.\textsuperscript{50} Other troublesome “undesirables” like composer Hanns Eisler were targeted for deportation during the Red Scare.\textsuperscript{51} Not every deportee is a prominent troublemaker, of course. In 1913, the Supreme Court considered the case of an alien woman who was to be deported for engaging in prostitution. Justice Holmes, in the opinion of the Court, argues that deportation “is simply a refusal by the government to harbor persons whom it does not want.”\textsuperscript{52} Today, the persons the government “does not want” are ordinary working people. Deportees today are overwhelmingly poor, male, and from Central and South America. Of the five million deportees sent out of the nation since 1997, almost 90% were from the Americas and 97% were male.\textsuperscript{53}

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\textsuperscript{49} Kanstroom, \textit{Deportation Nation}, 68-133; Weil, 55-64;
\textsuperscript{50} Weil, 112, 138; Kanstroom, \textit{Deportation Nation}, 186-200
\textsuperscript{51} After enduring two HUAC interrogations in 1947, Eisler was deported in 1948.
\textsuperscript{52} Bugajewitz v. Adams, 228 U.S. 585 (1913).
\textsuperscript{53} Golash-Boza and Hondageu-Sotelo, 4,13.
\end{footnotesize}
Currently, there are an estimated 11.2 million undocumented immigrants in the United States, all of whom are deportable. While many are deported indiscriminately, U.S. deportation policy prioritizes the expulsion of some removable immigrants over others. In addition to the racialized and gendered demographic skewing of deportation, recent decades have produced a new selection criterion for deportation: criminality. The “criminal alien” has become a recurrent trope in the promotion of mass deportation, figuring especially prominently in Immigration and Customs Enforcement literature. ICE has a dedicated Criminal Alien Program (CAP) devoted to assisting local law enforcement agencies in ferreting out “criminal aliens” and consequently deporting them. The Department of Homeland Security describes the program’s work thus, “[t]he program ensures the safety of our citizens as well as the national security of the United States by removing dangerous, often recidivist, criminal aliens before they engage in additional criminal activity.”  

If some deportations must be prioritized, it is difficult to fault ICE for beginning with deportable immigrants whose actions indicate that they are likely to pose a threat to public safety or who have inflicted harm on their neighbors. However, the term “criminal alien” does not discriminate between “criminals,” and enforcement is often arbitrary, removing those who have committed minor infractions along with those whose histories suggest a potential threat. Most of the offenses are non-violent crimes, with drug-related violations occurring most often. While deportation initiatives too often involve racial profiling, the effect is worsened in the pursuit of the criminal alien. The factors that cause minorities in the U.S. to be more likely to be first

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55 Kanstroom, Aftermath, 86-87.
arrested, and then prosecuted, aggravate the racial biases already glaringly evident in mass deportation when the possession of a criminal record becomes a primary criterion for pursuing removal.

Today, deportation is widely regarded (when it is regarded at all) as an uncontroversial necessity, but this was not always the case. Deportation appears in the American legal landscape as early as 1798, with the Alien Enemies Act and the Alien Friends Act, which authorized the President to remove aliens deemed dangerous to the nation. The 1891 Immigration Act allowed for the deportation of aliens who became public charges, but only within one year of entry. Later law extended the deportable period to five years and expanded the classes of immigrant subject to it. Statutes of limitations on deportation recognize the fact that regardless of immigration status, people establish lives in their new home communities and that breaking those ties ought not be done lightly. Learned Hand, in a frequently cited 1926 opinion, exemplifies this view, arguing, “deportation is… exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.” Hand is not the first prominent American jurist to take such a position. In 1893 Supreme Court Justice Stephen Fields, in a dissenting opinion, forcefully rejects deporting established non-citizens, stating, “[a]s to its

56 While President Obama came under fire for the large numbers of deportations effected under his administration, it was largely the scale, not the nature, of the policy that drew criticism.  
59 U.S. ex rel Klonis v. Davis 13 F2d. 630 (2d Cir., 1926). The particulars of the case involve an alien who immigrated to the United States as a child, but the logic underlying Hand’s remarks applies to other non-citizens who have established lives in the U.S., as well. Hand makes an argument from an idea of belonging based on lived experience as a community member rather than on legal status, pointing to the immigrant’s American language and habits as support for his claim of membership. Hand concludes that deporting someone with such ties to his or her community would be “cruel and barbarous.”
cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business there contracted.\[^{60}\]

While earlier law authorized the removal of excludable aliens, it was not until the restrictive Immigration Act of 1924 that deportation became the established institution it is at present, although the scale at which it exists today would take decades to appear. The Act abolished statutes of limitations for deporting most aliens who had already entered unlawfully, and eliminated them for anyone entering unlawfully after July 1\(^{st}\), 1924. Effectively, the 1924 Act created the “illegal immigrant.” With the appearance of the illegal alien, divisions between “us” and “them” were no longer clearly marked by the national borders; now a foreign neighbor might not merely be unsettlingly different, but actually *criminal*.

Deportation may appear to differ from exile in that exile affects members, transforming an insider into an outsider, while deportation merely corrects the problem of the unwanted presence of a non-member with no legitimate claim to belonging. If denationalization and denaturalization are akin to exile, then deportation, only affecting outsiders, seems to more closely resemble the Spartan *xenelasia*. Mass deportation, as the policy exists currently, rests on the assumption that legal status is the lone relevant measure of citizenship, presuming that insiders can be reliably distinguished from outsiders.\[^{61}\] Focusing solely on binary, status-based conceptions of citizenship is administratively expedient, but glosses over every other aspect of membership in a political community. Not only is this an impoverished theoretical view, but such an approach paints an inaccurate picture of reality. The United States has a long and storied

\[^{60}\] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

history of offering different grades of citizenship, both to those born within its borders and to those who immigrate, beginning with the “denizenship” of the colonial era and continuing today.62

Currently, American governments offer different benefits and responsibilities of citizenship to different classifications of residents, even when those residents are formally recognized citizens.63 To be President, for instance, one must be born in the U.S., excluding naturalized citizens. That is, to be sure, an extreme example, but state authorities routinely deny the franchise (certainly a mark of membership) not only to non-naturalized aliens, but even to American-born felons in certain U.S. states. Similar distinctions exist between residents who can claim social benefits like food stamps and state-sponsored healthcare or elder care in certain jurisdictions, with those convicted of certain crimes excluded from eligibility.64 Characterizing citizenship as a binary status offers an incomplete picture; even among formal “insiders” the rights and protections of citizenship are not equally distributed.

Of course, there is more to citizenship than legal status – an idea clearly established in the high moral and civic expectations expressed by the denaturalization and denationalization policies reviewed above. Even at the sub-national level, as the other chapters of this project demonstrate, citizenship in America retains a substantial volume of (often confused) normative content extending far beyond status claims. The citizenship literature abounds with different classifications and typologies, each unraveling the tangle of normative and descriptive ideas

63 For a detailed treatment, see Cohen, *Semi-Citizenship*.
64 For an overview of the staggering number of “collateral consequences” of conviction at work in state and federal law (as well as their lasting impact), see “Collateral Consequences : Hearing before the Over-Criminalization Task Force of 2014.” June 26, 2014. United States Congress, House Committee on the Judiciary. Over-Criminalization Task Force of 2014.
referred to as “citizenship.” For the purposes of unpacking what citizenship means in deportation discourse, Linda Bosniak’s brief overview is suited to clarifying the role of nationality in each facet of citizenship. Bosniak breaks citizenship down into four categories: legal status, rights, political activity, and citizenship as identity or solidarity.65

Legal status is relatively straightforward.66 Political activity corresponds to civic nationalist conceptions of citizenship, an approach underlying many of the notions of obligation associated with citizenship.67 There is considerable overlap and conceptual drift between the “political activity” and “identity/solidarity” images of citizenship. While identity is often invoked by cultural nationalists, the moral and affective demands undergirding even the most seemingly contractual obligations are implicitly characterized not merely as actions to be performed, but expressions of an underlying shared identity. For this reason, I hesitate to approach the political activity (civic) and identity (cultural) categories as being truly separate. Finally, the “rights” conception of citizenship depicts it as a form of standing, describing the freedoms and protections that the citizen can legitimately expect the state to enforce. Seldom do these different images of citizenship appear in pure form, and deportation discourse is no exception.

Moving beyond an exclusively status-based conception of citizenship, undocumented immigrants mar the line dividing “insider” from “outsider” beyond recognition: although Americans treat them as outsiders under the law, undocumented immigrants live among us,

66 Although even this seemingly simple picture of citizenship is considerably complicated when status is conceptualized as inherited property, as Ayelet Shachar does in *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge: Harvard University Press, 2009).
67 And as Bosniak points out in the same article, these common views of citizenship do tend to assume that citizenship is located primarily (or exclusively) at the national level.
occupying the same physical and cultural space. Long-term undocumented residents behave very much like their citizen neighbors – according to a cultural or “identity” conception of citizenship, undocumented immigrants have a strong claim to membership. Purchasing a home, for example, denotes a major investment in one’s community and a commitment to be a part of it in the long term. By purchasing property, participating in local activities (such as those of the local school), raising families (often of mixed citizenship status), working in U.S. businesses, and paying taxes, undocumented immigrants become stakeholders in their political communities. Although formally excluded from crucial elements of full citizenship, undocumented immigrants establish homes, careers, and lives. They partake in the actions that constitute the experience of citizenship for the majority of average Americans, and in so doing generate a form of de facto citizenship.

Undocumented immigrants are limited in their ability to participate in a civic or “political activity” type of citizenship, as typical political activities like voting or running for office are forbidden to them (and, for the most part, also to legally present non-citizens). Additionally, informal political activity invites the danger of deportation that accompanies drawing attention to oneself. For instance, Rocio Hernandez Perez, an activist involved in promoting the Dream Act was arrested and deported as a result of her participation in protest activity in 2013. This sort of political activity, as many have lamented, is no longer the norm among American citizens, either, however. Failing to vote, declining to run for office, and refraining from engaging in

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68 The New York Times recently noted the furor surrounding voting by undocumented aliens in Missouri, to which the state has responded with a proposed constitutional amendment requiring proof of citizenship to vote. The desire to vote in elections among the undocumented is yet another expression of their effort to become a full part of the political community. Ian Urbina, “Voter ID Battle Shifts to Proof of Citizenship.” New York Times, May 12, 2008.

political activities like protests are typical activities (or inactivities, perhaps) of the American citizen.

Undocumented aliens have no claim at all to citizenship in its strictly legal-status based form. Supporters of mass deportation tend to rely heavily on citizenship as legal status, maintaining a clear line between “us” and “them,” and emphasizing the criminality of the undocumented alien. Even these arguments, however, invoke identity markers and arguments about the rule of law that are heavily inflected with civic republican visions of membership. Prioritizing legality stems from a particular conception of what sovereignty means, including the idea that every political community is entitled to define itself, that it be allowed to consent to the admission of some and withhold its consent from others. But as discussed in the previous section, “consent” in the context of citizenship is not as simple as it may seem. Theoretically, a nation says “yes” or it says “no” to those petitioning for entry. But what if it says both at once? This is the situation undocumented immigrants face in the United States.

Formally, they are denied national membership, the most glaring reminder of which is the constant menace of deportation to which they are subjected. Informally, however, different messages are sent from business, civil society, and from differing levels of government, from the township to federal agencies. Although officially unwelcome and often the subject of political invective and scapegoating, undocumented immigrants are nonetheless extended tokens of

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acceptance from businesses (both those that employ them and those whose goods and services they consume) and, increasingly, from state, local, and federal governments.71

Employing undocumented immigrants remains the most obvious and enduring example of the informal ways in which Americans “say yes” to undocumented immigrants. American businesses benefit from the low-cost labor of undocumented immigrants and continue to provide the “pull” factor for illegal entry. Additionally, the Internal Revenue Service has begun issuing taxpayer identification numbers to undocumented immigrants. Certainly, paying taxes is a typical experience of American citizenship in the twenty-first century, and by accepting their contributions the federal government (or the IRS, at least) tacitly consents to their presence.72 The same numbers allow undocumented workers to contribute to the Social Security fund. With the aid of taxpayer ID numbers, undocumented immigrants can become not only taxpayers, but homeowners as well. Additionally, several state and local governments have instituted non-reporting policies regarding immigration status in matters involving crime reporting or use of emergency services.73

While some of these expressions of acceptance can certainly be traced to simple prudence, the fact remains that governments and businesses that institute such policies acknowledge the role that undocumented immigrants play in American communities. Joseph Carens (despite arguing in favor of extending citizenship many undocumented immigrants)

72 A linkage illustrated by the phenomenon of “tax exiles,” or Americans who renounce their citizenship to avoid paying taxes.
cautions against placing too much moral weight on “the state’s complicity” in the entry of large numbers of unauthorized migrants, noting that many of the structural causes (both “push” and “pull”) that drive migrant flows are not under its control. While this is certainly true to an extent, “the state” is not a unitary actor in American relations with undocumented immigrants. While ICE and DHS emphatically refuse to consent to their membership, the IRS and Social Security Administration are only too happy to accept the contributions of undocumented immigrants. And that is only at the federal level; states and municipalities send their own bundles of mixed messages.

Rights-based visions of citizenship are experiencing significant challenges. Increasingly, in the United States, certain rights once available only to citizens have been extended to non-citizens within the territory as well, a development many theorists fear have devalued national citizenship. While it is true that undocumented immigrants enjoy many of the same civil rights as citizens and aliens present legally, it is premature to conclude that undocumented aliens have the same rights-based citizenship experience that citizens and authorized immigrants enjoy. Social rights like benefits programs, especially, are denied to undocumented aliens. Social programs like Social Security Insurance, Medicaid, food stamps and funding for higher

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education are not available to them, although the same programs are offered to legal residents and refugees.\textsuperscript{76}

The civil and procedural rights of undocumented aliens are similar to those of lawfully present aliens and citizens, with the glaring exception of their liability to arrest, detention, and deportation without the robust procedural protections guaranteed in criminal actions.\textsuperscript{77}

Additionally, U.S. Constitutional law has established a tradition of recognizing territorial status as a basis for conferring some procedural protections, even if not the rights of full membership, to aliens within the borders.\textsuperscript{78} Legal scholar Hiroshi Motomura refers to this concept as “territorial personhood,” meaning that the U.S. Constitution offers some basic rights to every person within the territory, regardless of their citizenship status, simply by virtue of their being here.\textsuperscript{79} However, at the same time that the rights and protections traditionally associated with citizenship have gradually expanded to include non-citizens, the protections that American citizens enjoy have also become detached from their citizenship status. For instance, U.S. citizenship did nothing to protect New Mexico-born Anwar al-Awlaki from being killed by an


\textsuperscript{77} In criminal matters, both authorized and unauthorized immigrants have most of the same rights as citizens. Because removal is an administrative procedure, however, constitutional due process guarantees that apply in criminal matters are not applicable. Citizens, by contrast, cannot generally be detained or imprisoned for non-criminal charges.

\textsuperscript{78} Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Mathews v. Diaz, 426 U.S. 67, 77 (1976). The \textit{Yick Wo} decision reads, in part, “The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: ‘Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.” “All persons within the territorial jurisdiction” unequivocally extends “the equal protection of the laws” to citizen and alien alike.

American drone strike in Yemen, absent a trial or sentencing. Nor did their citizenship save the three other Americans “not specifically targeted,” but nonetheless killed in similar actions during the same time period, including al-Awlaki’s sixteen-year-old son.

Rather, territorial presence has become a crucial factor in determining the distribution of national benefits and protections. In a letter to the Committee on the Judiciary justifying the killings, Attorney General Eric Holder outlines the conditions under which a person whom “the United States government has determined, after thorough and careful review” to pose “an imminent threat of violent attack against the United States” and whose capture is “not feasible” can be killed by their government. Holder is careful to point out that citizenship is not the crucial factor in such decisions, but territorial presence:

…[I]t is clear and logical that United States citizenship alone does not make such individuals immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to U.S. citizens - even those who are leading efforts to kill their fellow, innocent Americans. Such considerations allow for the use of lethal force in a foreign country against a U.S. citizen….(emphasis in original)

In light of these developments, it is the guarantee of access to the national territory accompanying full citizenship that preserves national citizenship’s unique importance, not necessarily the possession of citizenship itself. However, even that guarantee is not absolute, as

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81 Eric Holder, letter to Patrick Leahy and the Committee on the Judiciary of May 22nd, 2013. Holder’s letter names the other Americans killed as Jude Kenan Mohamed and blogger Samir Kahn.
82 Eric Holder, letter to Patrick Leahy and the Committee on the Judiciary of May 22nd, 2013. Emphasis in original.
Americans on the mysterious “no-fly” list have learned. Similarly, the U.S. State Department has revoked the passports of a number of Americans suspected of involvement with terrorism, restricting their ability to return to U.S. territory should they leave it. Anwar Al-Awlaki’s passport was revoked shortly before his death (although there is no evidence that Al-Awlaki was aware of the revocation), preventing him from re-entering the United States had he wished to.

While citizenship status remains an important distinction between full members and non-members, its value is complicated. Social rights are directly tied to citizenship status, but increasingly civil rights attach not to status, but to territorial presence. Of course, holding legal status greatly increases the ease of access to the territory, and it is the constant threat of deportation that primarily marks the difference between the citizenship experiences of those formally entitled to remain and those who are not. But today, those rights and protections are increasingly dissociated from the possession of citizenship (in its strictly legal sense) and attached instead to physical presence. In light of these developments, a more meaningful loss of “nationality” – or rather, of the rights and protections that the term generally signifies – occurs

83 Mohammed Ismail, a naturalized citizen from Pakistan, and his American-born son, Jaber Ismail, were prevented from re-entering the United States after a trip to Pakistan in 2006. They were informed that they had been added to the “no-fly” list due to their association with an American-born cousin who had been convicted of providing material support to a terrorist organization and of attending a terrorist training camp. Randal C. Archibold, “U.S. Blocks Men’s Return to California from Pakistan.” New York Times, August 29th, 2006, A17. For a full treatment, see Leti Volpp, “Citizenship Undone.” Fordham Law Review 75 (2007): 2579-2586. The Ismailis were permitted to return to the United States in October, 2006. The State Department offered no explanation. Randal C. Archibold, “Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry.” New York Times, Oct. 2nd, 2006, A10.

84 While many targets of passport revocation are naturalized citizens, the relevant statutes controlling the use of passports do not specify anything about the status of the holder and concern the document exclusively. 2 C.F.R. § 51.62(a)(2); Ramzi Kassem, “Passport Revocation as Proxy Denaturalization: Examining the Yemeni Cases.” Fordham Law Review 82 (2014): 2099-2113.

85 State Department cable from Regina L. Ballard to Jonathan M. Rolbin, Director, Office of Legal Affairs & Law Enforcement Liaison, Bureau of Consular Affairs, Passport Services (Oct. 15, 2012). This is particularly significant, given that part of the Attorney General’s rationale for killing Al-Awlaki rested on the fact that he was not on U.S. soil and his arrest would have been “unfeasible.” Without a passport, Al-Awlaki would not have been able to avoid meeting those conditions.
not with denaturalization or denationalization, but with deportation. It is the forced geographic relocation that deportation imposes that inflicts the greatest difficulties. It is being deprived of one’s home, the same harm experienced by those subjected to expulsion at all levels of political community, that makes deportation damaging.

The purpose of this survey of the elements of citizenship and their relationship with the membership experiences of undocumented immigrants is meant to illustrate that those subject to deportation in the U.S. are not necessarily non-members, despite their formal exclusion from citizenship. Rather, they are very much like the average American, aside from being far more vulnerable to expulsion from the nation. In the past twenty years, five million people have been deported, a significant number. Selecting among the 11.2 million removable people in the nation, deportation removes primarily low-income Hispanic men who are increasingly depicted as dangerous criminals. While the association between undocumented status and criminality has been central to justifying mass deportation, there is no evidence that non-citizens (legally or illegally present) commit more crimes than citizens; in fact, the opposite appears to be true.\(^{86}\)

Despite its formal neutrality as an administrative procedure, the actual application of deportation delineates a conception of American national citizenship focused on legal status and membership by consent to the exclusion of all other considerations. This vision of citizenship may be parsimonious, but it is completely divorced from the reality of citizenship for the average American, which is a complicated mixture of civic involvement (or, more often, apathy), cultural participation, and claims to certain protections and entitlements increasingly shared not only with co-citizens, but with everyone occupying the same sovereign territory. Drawing out the

\(^{86}\) A 2008 RAND Corporation study found that the incarceration rate of native-born Americans is roughly four times that of the foreign-born. Kanstroom, *Aftermath*, 87-88.
overlapping and often conflicting levels and types of membership that make up American citizenship (or rather, American citizenships), a closer examination of mass deportation reveals that the seemingly simple, legalistic construction of national insiders and outsiders not as clear as it appears. By challenging us to re-examine the various ways of constructing membership – many of them decidedly local – deportation practices destabilize the nation-centric focus of citizenship discourse, despite their own common framing as a national issue.

**Conclusion:**

Expulsion from the nation takes a number of forms, usually defying romanticized images of the exile as lone dissident. Rather, national expulsion legitimates itself by creating categories of ineligible members, much like the sub-national iterations of exile explored in the preceding chapters do. In constructing and then applying (or refraining from applying) these expellable categories, American law and policy outline a negative image of national citizenship. Often the resulting image is emotionally charged, defined by such intense betrayal experiences as treason or the discovery of feigned devotion. Alternately, it may be outlined in rigidly rational, contractual terms, pronouncing the absolute and inviolable conditions for holding (and deserving) U.S. citizenship. But what should we actually look for in national citizenship? These constructs are remarkable largely in their remoteness from everyday experience and in the extremity of their assumptions. The highly dramatized discourse, in contrast with the decidedly bureaucratized reality, of national expulsion illustrates a sharp disjuncture between theoretical constructions of national citizenship and its actual experience in the early twenty-first century.
Denaturalization discourse conveys an image of the nation as a person, complete with emotions that can be hurt by the betrayal or oddly personalized infidelity of its naturalized citizens. Devising methods of ensuring that naturalized citizens “really love” the nation and are not merely using it for their own instrumental purposes is a preoccupation of naturalization discourse, one that plays out dramatically in denaturalization policy. But the nation is not a person; it is not capable of experiencing the intense emotional pain imputed to it. What, exactly, is betrayed by naturalized members harboring “mental reservations” is not clear. If the person’s behavior is lawful, then certainly it is not the laws of the nation that have been betrayed. Allegiance is not sworn to the sovereign, but to the Constitution and the abstract “nation.” While we may fault our friends or loved ones for insincerity in their devotion to us – or a divergence between their professed feelings and their true inner state – political betrayals like treason are betrayals of action, not affect. To depict national citizenship as a personal relationship premised on harboring the correct feelings and affections is to envision the liberal polity as a friendship or familial association, not a voluntary agreement among equal citizens. Conceptualizing the polity as a family or affectionate friendship is at home in the traditional communities described by Durkheim, Tocqueville, and Tönnies, but not in a political association defined by relationships between citizens and the law. While such “thick” conceptions of citizenship offer nonmaterial goods that human beings crave, seeking them at the level of the nation produces the oddly personal, often arbitrary relationship between citizen and state depicted in denaturalization discourse.

Denationalization rhetoric centers on the language of betrayal even more forcefully than that of denaturalization. Centered on an implicit template of the true citizen, denationalization
discourse demands not only the allegiance of members, but also that they conduct themselves in accordance with certain unstated semi-contractual conditions of citizenship. While imposing obligations is certainly consistent with voluntaristic notions of liberal citizenship, those obligations must be clearly defined before they can be meaningfully accepted. American citizenship does not entail a codified list of obligations. The U.S. Constitution includes a Bill of Rights, but it does not list a corollary “Bill of Responsibilities,” as the constitutions of some nations (including, notably, the Maldives) do. Without these, conditioning citizenship on a constantly shifting set of unstated performative and affective requirements is to warp the idea of contractual citizenship beyond recognition, and to invite betrayal by rendering the terms of an obligation’s fulfillment unclear, unpredictable, and resistant to shared acceptance.

Further, denationalization discourse builds a seemingly steady, rule-bound regime of obligation on the very unsteady grounds of affect and attitude. Conditioning citizenship on feelings of loyalty and allegiance (as in the case of denaturalization) is to require the performance of a contractual obligation that is not clearly within the control of the obligated party. Can we justly hold a person accountable for their emotions? Ethicists continue to disagree, some positing that emotions are transitory, involuntary states unrelated to the rational choices and decisions for which we can justly be held accountable. Others suggest that rather than being spontaneous, morally arbitrary inner experiences, our emotional states are

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symptomatic of something deeper for which we can be held accountable without injustice. The first position suggests that demanding that citizens experience a particular inner state as an obligation of citizenship is unjust and unreasonable – even setting aside the obvious difficulties with verifying which particular emotions or attitudes a person is experiencing.

The second position merits closer consideration, as it suggests that meeting such obligations rests not upon experiencing an involuntary inner state, but on cultivating the kind of character that is likely to produce the required affective experiences or attitudes. This view of responsibility for emotional dispositions returns the control to the person obligated, requiring them to perform the actions and cultivate the habits that are likely to produce the kind of character disposed to feeling a particular way. While these questions remain contested in the realm of interpersonal moral relations, they become even more complicated in the context of citizenship. Beyond the question of whether or not it is just to hold a person accountable for their emotional states, situating those conclusions within the issues of contract and performance relevant to considering the affective obligations of citizenship also demands that the role of coercive authority be justified. However, even if we are to conclude that a person is morally responsible for cultivating the kind of character that is likely to produce the feelings of allegiance and loyalty required for meeting the obligations of citizenship, it still remains to be established that judicial or administrative officials are capable of assessing whether the desired character or emotions are present in the person. Historically, attempts to divine the true inner state of a loyal

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or disloyal citizen have tended toward zealotry and persecution, offering excellent reasons to be wary of charging officials with such a delicate and important task.

Denationalization raises many of the same questions as denaturalization, contrasting the emotionally loaded rhetoric of loyalty and betrayal with the prosaic administrative realities of expatriation. Currently, native-born Americans can only undergo denationalization upon their own explicit consent, a development that suggests that consent and voluntariness retain a privileged position in American citizenship. Even this seemingly strong assertion of consent’s primacy is subject to interpretation and possibly manipulation, however. As Yasser Hamdi learned, if the United States is truly committed to revoking the nationality of one of its own, it is still fully capable of seeing that accomplished. Further undermining the link between expatriation and a robust conception of national citizenship are those who do voluntarily expatriate themselves currently do not necessarily do so for explicitly “political,” or principled reasons, but for purposes of avoiding heavy American tax burdens.89

The ideas surrounding denationalization and denaturalization align with anxieties about loyalty, allegiance, and the obligations of citizenship. The normative issues related to deportation – although seemingly different in its focus on ostensible non-members – involve many of the same anxieties about the content or “true” meaning of American citizenship. These ideas are particularly prominent in debates about national citizenship, but as the preceding

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89 Voluntary expatriations have increased dramatically in the last five years. While statistics do not offer the reasons for expatriation, a number of high-profile renunciations by wealthy Americans stirred up suspicions that the increase in renunciations is motivated by economic concerns. The phenomenon is still relatively small, including only a few thousand per year, but it was sufficient to prompt Senators Chuck Schumer, Bob Casey, Jr., Richard Blumenthal, and Tom Harkin to propose legislation punishing those who expatriate with “tax avoidance intent” with monetary penalties and a ban on re-entry to the United States. The legislation was not successful. Expatriation Prevention by Abolishing Tax-Related Incentives for Offshore Tenancy (Ex-PATRIOT) Act, S. 3205. 112th Congress, second session, May 17th, 2012.
chapters illustrate, the rational and affective aspects of citizenship encapsulated in ideas of loyalty and obligation collide at all levels of belonging, and are expressed in similar impulses to expel members caught at the point of conflict. This is particularly clear in evaluating what Linda Bosniak terms “the citizenship of aliens” (and especially undocumented aliens). The citizenship experiences of those who cannot claim legal status reveal a strong form of de facto citizenship that strongly resembles the formal citizenship of their neighbors in American cities, counties, and states. It is only in the constant threat of deportation that citizenship as a national construct asserts its existence in the lives of undocumented aliens, and then it is an intrusion indifferent to and destructive of the lives they have built as members of American political communities.

National-level expulsion policies illustrate the internal incoherence plaguing American conceptions of national citizenship. Historically, national citizenship discourse has carried often heated, emotionally loaded connotations, depicting national citizenship as something akin to a sacred trust, the abuse of which merits its righteous revocation. But in recent decades, citizenship has become more complicated. Certainly, statelessness remains a condition of great vulnerability, but at the opening of the twenty-first century, multiple nationalities are more common and more accepted internationally than they once were. Once touted as “the right to have rights,” national citizenship is no longer the sine qua non it once was in the United States. Recent developments call not only the content, but the significance of citizenship as a primarily national construct into question.

As an illustration, consider the case of the “Terrorist Expatriation Act.” In 2010, Senators Joseph Lieberman and Scott Brown introduced a bill allowing federal authorities to presume that engaging in certain forms of support for designated terrorist organizations
constitutes a declaration of intent to relinquish citizenship within the requirements of Terrazas. The bill was not successful, meeting with a tepid reception. Undeterred, Lieberman and Brown proposed a slightly modified version in 2011, now entitled the “Enemy Expatriation Act.” The original act included a “material support” provision that made supporting several NGO’s potentially prosecutable offenses. The clause was omitted from the second version, but the 2011 bill met the same fate as its predecessor. Although both bills likely would have withstood constitutional challenges, they roused little congressional support. They also roused no active opposition, but were rather met with a collective congressional shrug and allowed to fail quietly.

Peter J. Spiro analyzes the failure of the acts, suggesting that congressional reluctance to expatriate terror suspects may not have been rooted in any constitutional reverence for national citizenship as the oft-quoted “right to have rights,” but rather an expression of the reduced salience of national citizenship. Theorists express alarm at the “devaluation of citizenship” as the differential in benefits and protections enjoyed by citizens and non-citizens has narrowed over the years, suggesting that citizens might take more responsible ownership of their status if citizenship offered clear and substantial benefits denied to non-citizens.

Certainly, forced expulsion from the nation-state is the rarest form of exile in the current age (excepting the contestable practice of mass deportation). While this could be interpreted as evidence of the special significance of national citizenship, as the revered and inviolable right...
that Earl Warren depicts it as being, it is equally plausible that the relative rarity and general obscenity of national expulsions is symptomatic of the reduced centrality of the nation in the experience of citizenship. Not only have the rights and protections of citizenship undergone a gradual migration to different loci of enforcement, but civic and cultural nationalist discourses are increasingly met with skepticism. This may trouble citizenship theorists, perhaps suggesting a decline in the normative significance of citizenship itself. This project cautions against adopting a tone of alarm prematurely. Citizenship retains a great deal of normative force at the sub-national level, as evidenced by the persistence of expulsion practices that are so difficult to justify by liberal norms that they must be concealed, depoliticized or denied. Adopting these membership control (and identity preservation) devices is costly to the communities employing them. The willingness of American communities to shoulder the burdens of enforcing and justifying them is evidence that the thick (sometimes too thick to be reconciled with liberal commitments) conceptions of citizenship that expulsion practices protect and prop up are alive and well in America – just not necessarily at the national level.

Theorists who place a high value on these morally rich, affectively demanding types of citizenship would do better to seek them at the sub-national level, where their existence is not so much a matter of carefully concerted cultivation, but of management. As the preceding chapters illustrate, state and municipal political communities constantly generate and contest normatively rich, particularistic civic identities; this aspect of citizenship has not disappeared, but lamenting its absence at the national level in a pluralistic mass democracy is to neglect its continued, vibrant existence elsewhere. Managing these spontaneously emerging, constantly evolving civic identities so that they can be reconciled with liberal commitments ought to be the priority of
those who truly value civic and cultural aspects of citizenship, rather than attempting to bring it forth in a single unified form at the level of the nation.
Conclusion:
Political Expulsion and the Limits of Liberal Government

“When arbitrariness is tolerated, it spreads to such an extent that then the obscurest citizen can all of a sudden find it armed against himself. It is not sufficient to keep out of the way and to let others be struck. A thousand bonds unite us to our fellows, and the most anxious egoism could hardly succeed in severing them all. You believe yourself invulnerable in your deliberate obscurity. But you have a son, youth carries him away; a brother, less prudent than yourself, dares to express his disagreement; an old enemy, whom you have offended in the past has succeeded in capturing some influence. What will you do then? After having bitterly stigmatized all protests, all complaints, will it be your turn to complain? You are condemned in advance, by your own conscience and by that debased public opinion which you have yourself contributed to form.”

Benjamin Constant, *Principles of Politics*¹

Exile in America: Reconciling Political Expulsion with Liberal Politics

Each chapter of this project has examined a different facet of exile, or political expulsion. Historically, exile functioned as a way to control political actors, reaffirm shared identity narratives, and protect the stability of the larger community. Today, exile has been democratized, and its use continues, albeit in less obvious forms than in the past. While its grandeur and melodrama may be diminished, exile retains its core characteristics in the democratic age. Now the in the hands of the sovereign people rather than in those of the lone tyrant, exile continues to work as a tool of membership control. In the past, exile primarily threatened the great, those most likely to draw the envy of the fractious multitude or the ire of the despot. Today, every member of a liberal democratic political community is a political actor,

and even the most humble are susceptible to expulsion from a home community that deems their continued membership intolerable. In each case examined here, the purposes expulsion serves and the justifications offered for it reveal various aspects of how ostensibly liberal American communities (communities that continue to exile) envision themselves – what kind of community they imagine themselves to be. Patterns emerge in the history of exile in America, patterns that persist into the present day.

Currently, political expulsion occurs with surprising regularity in American communities, especially at the level of municipal and state government. Exile is always a tool of membership control, but it manifests in various ways. While the use of exile is not necessarily incompatible with fundamental liberal commitments (an opinion expressed by canonical liberal thinkers like Constant, Locke, Tocqueville, and Burke), the uses to which exile has been put in the United States have not always been consistent with liberal commitments to toleration and equality. This is, perhaps, why political expulsions have been concealed in the depoliticizing contexts of the criminal justice system, administrative law, and civil law. What every case explored here has in common is the implicit assumption that some members of communities are "real" members, and others are not.

The criteria used to separate the true members from the false vary by circumstances. Possession of the correct moral character, for instance, may be a condition of retaining community membership. Alternately, experiencing the expected emotional state – love, devotion, or loyalty – might be required. Related to these moralized, affective expectations are expulsions based on an unwillingness on the part of the community to associate with members deemed morally repugnant. These expulsions are expressive, like other morally-motivated
exiles, but also appear as acts of communal self-defense, forcefully re-asserting the community’s right to define itself, even against the lawful claims of the embarrassing member. In addition to these non-rational aspects of eligibility for inclusion, liberal communities also expel members for reasons seemingly related to failing to meet certain unstated obligations. Undermining the public trust upon which all social transactions depend, for instance, may incur the loss of membership, as may actions that may be interpreted as tacit consent to removal. These failures to meet obligations are treated as breaches of the social contract, and met with the termination of the violator’s position as community member. While each of these conditions of belonging may be plausibly reconcilable with liberal commitments, they often blur the lines between voluntary action and un-chosen dispositions or affective experiences.

At the outset of this work, I set three goals: first, to establish a coherent political definition of exile as a political phenomenon. Second, to illustrate that exile still exists in the present day, even in liberal communities like those comprising the United States (and, at times, even the United States itself). Finally, to offer an analysis and critique of how the various iterations of exile are employed by those communities, what conceptual space exile occupies, and what work it performs for the communities using it. In exploring these questions, this I approach exile not focusing primarily on the exiled (although the experiences of the expelled are certainly important, and well-documented elsewhere), but from with an eye to discerning what kind of society is an exiling society, and whether that kind of community can also be a liberal community.

Exile is Political
In an effort to situate exile in a theoretical context, chapter one examines what uses latter-day illiberal societies make of it. The reasons for this are twofold: first, to see how exile operates in the twenty-first century, which is characterized by officially regulated citizenship, national border control, and increasingly liberal international norms regarding citizenship, such as those articulated in the United Nations Universal Declaration of Human Rights’ Articles 9 and 15; second, to analyze how exile, as a political practice, “fits” with different types of society. “Fit” entails the ease with which exile can be justified according to the society’s own commitments, and also the obvious benefits of exile in a given society.

“Exile,” in addition to its romanticized image, is typically associated with either ancient forms of political organization or with oppressive authoritarian regimes, and not with current liberal societies. In its ancient forms, exile posed none of the problems it raises today. Obviously, human rights concerns or objections to rendering citizens stateless were not issues in the ancient world, where neither human rights nor states existed in any recognizable form. Further, there were fewer of the barriers to entering a new community than exist in the age of strictly enforced national borders. Additionally, as Benjamin Constant notes, the relationship of authority between the community and the individual was one of “the complete subjection of the individual to the community,” removing the potential problem of public justification.

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2 Article 9 prohibits arbitrary arrest, detention and exile. Article 15 proclaims that, “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

3 In ancient Athens, for instance, citizenship was officially regulated within the city-state (for instance, a citizen continued to maintain his or her protections and entitlements as a citizen so long as they remained outside the city boundaries for the duration of their exile; it was only within the polis that they lacked them), but there was generally a great deal of freedom of movement between poleis.

4 Constant, “The Liberty of the Ancients, Compared with that of the Moderns,” 311.
In the present day, exile is primarily associated with the totalitarian regimes of the twentieth century or with current illiberal authoritarian states. Bahrain and Kuwait, for instance, recently drew criticism for revoking the citizenship of a number of residents, including journalists and dissidents. Both nations are monarchies, and the constitutions of both include provisions establishing an official state religion, so both nations fall solidly within the “illiberal” category. While media coverage (both from Western outlets like the BBC and Middle Eastern ones like Al Jazeera) expressed disapproval, none carried the same sense of shock and outrage accompanying either the coverage of the establishment of Amsterdam’s Scum Villages or of the passage of citizenship-stripping legislation in the UK. The disparity in tone is indicative of a widespread assumption that such provisions are to be expected from an illiberal state, but are illegitimate when adopted by liberal societies. This perception springs from the assumption that the arbitrary exercise of power is a common feature of illiberal states, and from the long-standing association between exile and arbitrary rule.

While there is no necessary connection between authoritarian government and exile, the case of Singapore, at least in part, supports the perception that exile is at home in an authoritarian state. For most of its history, Singapore has been ruled by Lee Kuan Yew, his supporters in the

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People’s Action Party, or his family members – precisely the sort of personal “managerial” authority Oakeshott attributes to the “telocracy” or enterprise association. In many cases Yew or his associates have been personally involved in banishing “troublemakers,” recalling the arbitrary and petty orders of exile Constant condemns throughout “Principles of Politics.” While I make no causal claims about the relationship between authoritarian or personal types of authority and the use of exile, it is worth noting that both exile and largely unchecked personal authority are at home in the enterprise state. As Oakeshott warns, no departure from the public mission can be tolerated in the enterprise state. A member need not even behave in a way contrary to the shared purpose to incur the ire of authorities; even to refrain from participation in pursuit of the common end is akin to treason.

Tightly controlled unity of purpose is characteristic of the enterprise state, and in any political association reliant upon unity (be it of purpose, religion, ethnicity, or other identity) as its basis for social solidarity, the usefulness of exile is obvious. Singapore offers a useful illustration of a society in which the instrumental benefits of banishment are clear, and in which the grounds for justification are equally straightforward. Singapore, long constructed as an enterprise association dedicated to the pursuit of prosperity, is able to justify the expulsion of intractable members by appeals to the ultimate authority of the common cause. A particular aspect of the Singaporean enterprise narrative is also conducive to justifying exile: the established tradition in PAP rhetoric of depicting Singapore as a society under siege, first fighting for its survival against its own lack of natural resources and relative isolation, and later (during wealthier times) as a beleaguered society of communitarian virtue struggling to stave off the corrupting influence of Western decadence accompanying industrialization. Imagining itself
a society under attack, Singapore can more easily justify removing those members whose ideas, actions, or identities threaten not only Singapore’s image of itself, but (according to the siege narrative) the existence of the community itself.

Singapore offers an example of an illiberal society that exiles for purposes directly stemming from the society’s illiberal elements. While Singapore is soft authoritarian state, it is too hasty to conclude that authoritarian rule is necessarily the cause of the nation’s retention of exile, although exile is certainly a convenient tool for authoritarian rule. Beyond its authoritarian nature, Singapore is also an enterprise state, and enterprise states can easily justify the use of expulsion for membership control. Controlling public morality, disciplining those who challenge the shared pursuit of prosperity, and enforcing the unity that lies at the heart of Singaporean solidarity stories, exile offers clear benefits to Singaporean society, and is easily justified according to

While banishment legislation is certainly liable to criticism on a number of grounds, codifying banishment policy reduces the sense of arbitrariness historically clinging to exile (even if its uses, in some cases, still raise the specter). This suggests that the close association between illiberal government, arbitrary power, and exile (assumed in the popular press accounts of citizenship stripping laws, but also in the comments of Constant and Arendt) is not necessarily accurate in every case. In the Maldives and in the American Indian communities that use banishment law, expulsion policies are codified and subject to precisely the sorts of transparent, consistent procedures that Constant argues legitimate exile as a tool of government and exonerate it of charges of necessary arbitrariness.8 These societies, like Singapore, are illiberal

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8 Constant, “Principles of Politics,” 29-293.
societies, limiting membership to those adhering to the state religion (in the Maldives) or to those able to claim the correct lineage (in American Indian nations). In neither case is the “enterprise” as clearly (or forcefully) stated as in Singapore, but shaping a society around a religious identity in the case of the Maldives, or an inherited ethnic identity in the case of American Indian communities, are also practices consistent with the enterprise association. Like Singapore, these exiling communities also imagine themselves to be under siege from the outside – although their claims to endangerment are much more easily substantiated. The Maldives faces not only increasing religious radicalism imported from abroad, but also the very real threat of the nation’s physical obliteration by rising sea waters. American Indian nations not only struggle with rampant internal social problems from drug trafficking and gang activity, but also the constant erosion of tribal sovereignty from U.S. authorities.

These societies, too, rely on unity of identity and purpose to produce the ties that hold the communities together, and envision themselves as communities defined by those particular unities. These aspects alone provide ample justification for expelling members who undermine community solidarity. With the addition of looming threats to each community’s continued existence (real or perceived), both the instrumental value of exile and the ease of justifying it become clear. With membership predicated upon participation in, or at least support of, shared religious or ethnic purposes, revoking it for threatening the social cohesion needed to preserve central identity narratives is both rational and justifiable. As in the case of Singapore, exile in the Maldives and American Indian communities derives both its instrumental value and its grounds for justification from the very aspects of those communities that identify them as being illiberal.
The study of current exiling societies in chapter one clarifies what uses political expulsion might serve in the twenty-first century and how it might be justified, but also reinforce the intuitive linkage of exile with illiberal (albeit not necessarily arbitrary) government. Chapter one establishes the political nature of exile, but also suggests that the exiling society of the present day is an illiberal society. Why, then, do the professedly liberal communities that comprise the United States continue to employ exile? How does it fit with those communities? In an attempt to answer the questions raised by the picture of exile emerging in chapter one, the remainder of this project explored the forms in which exile has appeared in America and the forms in which it continues to appear there. From those discussions, it is clear that in political communities across the United States (at all levels of government), the coercive machinery of government continues to be employed to enforce the removal of members whose fellows deem their continued membership intolerable.

**Exile is Still With Us**

The bulk of this manuscript has been devoted to documenting historical forms of exile and the ideas animating them, and then demonstrating how similar ideas continue to drive expulsion policies today, so I will not belabor the point by recalling every form of exile still at work in the United States today. Rather, I will offer a few observations about the nature of the exile practices that remain with us in American communities. Exile appears out of place in the liberal communities of the twenty-first century, and yet it remains, woven into the fabric of law and policy. Exile, in the various levels of political community that make up the U.S., takes on a different appearance than it did in the *polis* of the ancient world. It also differs from the explicit,
codified banishment policies of present-day illiberal communities. Although it has adapted its appearance to blend into its surroundings, exile is alive and well in America today.

The preservation of exile practices in the liberal communities making up the United States presents a number of puzzling questions. If exile in the ancient world was built upon ontological assumptions about the workings of supernatural forces in the world and on forms of political organization no longer in existence, why would it remain useful in the disenchanted, bureaucratized political world of the present? If its use in those few societies that preserve it openly is directly related to the illiberal nature of those societies, what possible purpose could exile serve in the liberal communities of the United States? Above all, how can it be justified, given the evident disjuncture between latter-day liberal political norms and the thoroughly illiberal conceptual contexts in which exile has traditionally existed?

One of the most striking differences between the exiles of the ancient and early modern world and those of the present day is the popular character that many forms of exile today exhibit. While it is true that in ancient Greece, the institution of ostracism offered a democratized form of expulsion, ostracism was a highly formalized procedure lacking the spontaneity and personal rancor typical of today’s sex offender residency restrictions, popular campaigns to denationalize human rights abusers, or even the quieter resentment driving PFZ’s, SOAP and SODA orders, or ordinances designed to exclude homeless citizens from public parks and other public areas. Unlike the largely rational, or alternately purely forceful, exiles of the ancient world, American exile practices tend to be emotionally and morally charged affairs, often initiated by popular efforts and only becoming matters of state authority at the behest of outraged or frustrated citizens. Also unlike the exiles of the early modern despot haunting the writings of
Constant, today’s expulsions are not the work of a lone tyrant abusing a weapon of personal authority. Instead, exile is the weapon of the masses, although it is not at all clear that its newly democratized character has freed exile from arbitrariness. In the next section, I will explore the purposes exile serves, some justifiable and some not. In the liberal democracy, exile has transformed from the signature weapon of the arbitrary despot to the covert weapon of the sometimes equally arbitrary majority.

Recognizing exile in today’s American communities is not as easy as in the illiberal society, where expulsion policies are clearly and unapologetically labeled as “banishment” or “exile.” Rather, exile in American communities is quietly exercised under the depoliticizing cloaks of criminal, civil, and administrative law. Both currently and historically, most expulsion policies in America (and in the English society from which the first American colonies were drawn) are presented not as political measures, but as criminal penalties. As I have argued throughout this manuscript, drawing a clear distinction between “criminal” and “political” (or “legal” and “political,” for that matter) is not as simple as it may seem. Law is the product of a given society, not an unchanging set of principles and formulae beyond the influence of cultural or historical particularities. And while it may not offer a perfect expression of that community’s values and expectations for members, existing law at least delineates an official articulation of those values and obligations that the community governed by that law tolerates (when that changes, the law eventually changes, as well).

Treating expulsion not as a decision about community membership (in this case, its revocation), but instead a merely procedural matter of punishment, conceals the basically political nature of exile. But it is a mistake to view expulsion as merely one penalty among
many. Expulsion is different. It is imposed ad hoc, reserved for select cases rather than being applied categorically according to codified sentencing guidelines. It is not an extralegal sanction, nor is it an informal disciplinary device, but it is also not quite a fully acceptable tool of regular law enforcement. It is certainly treated as special, even if it is used far more commonly than most people (often including those who impose it) realize.\textsuperscript{9}

Exile policies carry an air of shadiness about them, as if something about their use is not quite proper, even if not actually illegal. The word “exile” is never used today – rather expulsion policies appear in the benign, seemingly apolitical form of criminal law, generally as parole, probation, or pardon conditions – hardly the stuff of political debate. Alternately, they appear as humble municipal ordinances, or that dullest of legal entities: the administrative regulation. In their most obvious form, “judicial banishment,” they appear in popular media (when they appear at all) as novelties, backwards legal peculiarities of already-suspect Southern states like Georgia. Of course, judicial banishment is not limited only to the South; it is as likely to appear in New York, Utah, or Illinois as in Texas or Louisiana, although it is, perhaps, less likely to receive as much amused media attention in those areas. Nonetheless, American communities continue to expel unwanted members, inventing new measures suited to changing conditions, as in the case of the relatively recent emergence of restrictive covenants forcing the removal of registered sex offenders from housing developments (and backed by courts), or the new laws empowering federal authorities to “reconsider” the burials of particularly despised military personnel in the

\textsuperscript{9} Newspaper accounts of banishments from the twentieth century and later often present banishment as an atavism, often describing each case as novel or extremely unusual, despite the fact that banishment is not, in fact, nearly as rare as one might think. See the index of U.S. banishments for details.
symbolically rich sacred ground of national cemeteries. The legal forms change, but the expulsions continue.

**What Does Exile Do for Us?**

As I argue above, the idea that exile “fits” better with certain types of societies than with others involves assessments of the evident instrumental benefit it provides the society, and also whether it can be adequately justified according to that society’s own commitments. Exile fits awkwardly with liberal government, and while the use of exile is not necessarily incompatible with fundamental liberal commitments, both the history of exile in America and its current uses tend to press the limits of liberal commitments when they do not transgress them outright. Exile cannot easily be reconciled with the liberal aspirations of American communities, and yet it flourishes in spite of its uncertain foundation and vulnerability to challenge. This suggests that despite its costs (which are many), exile offers liberal communities something valuable enough to go to great efforts to preserve it.

One of the most fascinating aspects of the persistence of exile in current American communities is that it utterly defies the logic of instrumental rationality. Decisions to expel a person cannot be explained as simple cost/benefit calculations. Exile is costly, difficult to justify, and uncomfortable to recognize – yet American communities persist in using it, just as they have done with some regularity since the earliest days of the nation. The instrumental use of exile in the context of convict transportation is obvious – the comments of Tocqueville, Burke, and Bentham on the subject primarily focus upon the practical political and economic benefits of expelling the most burdensome and ill-behaved members of a good liberal society. In
the age of convict transportation, sending the poor and vice-ridden away to far-off colonies to shift for themselves was far less expensive and logistically troublesome than imprisoning them would have been, especially given the penal system of the time. It was also better-received by a public offended by the notion of setting free-born Englishmen to forced labor, and also rested better upon the public conscience than executing ever-increasing number of petty, mostly indigent, criminals.¹⁰

Describing expulsion as “costly” may seem counterintuitive, but that is only if the only possible alternative considered is imprisonment. This is a mistake, arising from the presentation of expulsion as a simple penalty – one among many. Seeing expulsion in this way fails to recognize its political nature and significance. It is true that imprisonment is extremely expensive, requiring the state to provide the total support of the person it controls. But if expulsion were merely a cost-saving measure (as the Americans revising the Draft Maldivian Penal Code conclude, an assumption also incorrect in the Maldivian context), then it would stand to reason that exile would be more commonly imposed than imprisonment for all sorts of offenses, and in jurisdictions across the country. Instead, the kinds of cases in which banishment terms are offered as conditions of parole, probation, are for select offenses, and even then only in select cases. Those banished could easily be confined to house arrest, or serve simple terms of supervised release instead of being offered the option to leave the community, if cost were the only (or even primary) motivation for expulsion.

But exile is not simply a penalty, interchangeable with any other like incarceration or the imposition of fines. Sending someone away from the community is qualitatively different,

¹⁰ English discomfort with seeing other Englishmen forced into labor was limited to what was readily visible. By 1718, transported convicts were routinely indentured.
imposing a much more morally inflected form of discipline. Additionally, the imposition of banishment in America today is very much a matter of official discretion. Expulsion policies, even where they exist in codified form like residency restriction ordinances, PFZ’s, SOAP/SODA orders, parks restriction orders, or even benignly titled removal programs like “Homeward Bound,” are selectively applied. When they are applied, they leave officials broad discretion in how they are enforced. Judicial banishment results not from sentencing guidelines or any codified law, but from often formally unenforceable parole, pardon, or probation conditions.11 These practices are descendents of the conditional pardon of the transportation era, which also relied greatly upon official discretion in separating the “rogues” and “vagabonds” from the “publick,” a “useful” people distinct from the “excrementitious mass” shipped off to North America.

It is apparent from the cases explored here that today’s exile practices resist the rationalization and systemization so characteristic of law and policy in present-day America. This resistance to systemization is symptomatic of the general reluctance of Americans to acknowledge the continued use of exile in their own communities. If Americans see expulsion as a legitimate tool of government, why not codify it and subject it to legal scrutiny and political contestation, like any other policy? Even the death penalty – which certainly inflicts greater harm than expulsion – is open to public debate and legal regulation. The reluctance to label expulsions policies as what they are, in addition to the great efforts put forth in denying the political nature of those expulsion policies indicates that Americans are not convinced that expelling their fellows is a legitimate option for members of liberal polities. Yet, the trouble

11 Georgia is a rare exception to this rule, with the areas from which a person can be banished limited in regulations governing probation. Georgia Code Ann. § 42-8-35(a)(6).
these polities endure to continue expelling their unwanted members also indicates that the work
exile does for those communities is valuable enough to incur the costs of keeping it.

Those costs are manifold. Most expulsion policies rest on shaky legal ground, and so are
open to expensive legal challenges, as California’s most zealous sex offender residency and
tavel restriction ordinances recently illustrated. When challenged, the costs are not only
economic but political, as publicly justifying most expulsion policies proves difficult or
impossible. What could be worth so much trouble and discomfort? Despite being embedded in
a liberal political landscape, exile does retain some of its traditional uses. It still offers
communities a powerful tool for removing existing members deemed unacceptable, it still
protects the shared identity of the community using it, and it still expresses both ontological and
normative assumptions about the social world. The instrumental value of exile in present-day
American communities is minimal, but it provides important intangible benefits, many of which
are challenging for liberal communities to find elsewhere.

First, expulsion offers liberal communities a tool for bolstering community solidarity
without relying on characteristics like ethnicity, race, or religion – foundations for building
social cohesion that are not legitimately available to liberal societies. Expelling disfavored
members is a communal activity, one that re-affirms who the “real” members are by making an
instructive spectacle of those whose membership is reconstructed as illegitimate or false. This
function of exile should not be underestimated. It is not new to argue that America has a long-
standing tradition of defining citizenship negatively, gauging the value of full citizenship by
comparison with the privileges and protections denied to non-citizens or those whose full
citizenship was not recognized. This way of valuing (or devaluing, depending upon your perspective) citizenship remains alive in debates about the value of national citizenship, as discussed in chapter six.

Historically, American communities have used highly illiberal policies to regulate community membership, policies that allowed communities to both select their own membership and also to enforce those decisions together. State and local religious residence restrictions were common during the colonial era. In the nineteenth century, state “black laws” were common, prohibiting admission to free black people and in some cases ordering the removal of those already in residence. California (unsuccessfully) tried to ban Chinese immigration before Chinese exclusion became a national policy, and the Chinese Exclusion Act was not repealed until 1943. Restrictive covenants formally excluding Jews and Catholics from living in certain neighborhoods were once common, and racial discrimination in housing was enforced by the Federal Housing Administration not so long ago.

The racial segregation of neighborhoods could be legally enforced via city ordinance until 1917, a practice that continued long after its legal basis disappeared. “Sundown towns” were once common across the North, so named because of either formal or informal municipal policies excluding minorities from living there (“letting the sun go down” with them still in town). Usually sundown towns targeted African Americans, but in some regions they excluded

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14 *Buchanan v. Warley* 245 U.S. 60 (1917).
Jews, Chinese, and Native Americans as well. While the formal legal measures once common in sundown towns disappeared with the passage of the Civil Rights Act, the practices and attitudes that once supported them, in many communities, have not. Perhaps the most dramatic example of historical methods of membership control are the “racial cleasings” of American towns and counties that took place in the first half of the twentieth century, often with the cooperation of local authorities. Journalist Elliot Jaspin recounts dozens of documented cases in which the black residents of counties across the country were offered the choice to leave their homes or be killed.

These ugly episodes in American history are uncomfortable reminders that community has a dark side, one that uses exclusion to define and assign value to membership. In these extreme cases, those membership decisions were made according to templates of true citizenship built on an implicit belief that and disfavored religious and racial minorities did not qualify as “real” or legitimate community members. The enforcement of those decisions by coalitions of government actors and citizens is important, as well. Many of these events were local affairs, and citizens were directly involved with the expulsion of their rejected neighbors – these were communal activities. Historical racial and religious expulsions not only sent a message to the rejected members that they were not really accepted members, it also sent a message to those who remained – white residents, Christians, or more narrowly, Protestants – that they were true

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17 In *Buried in the Bitter Waters: The Hidden History of Racial Cleansing in America*, Elliot Jaspin documents dozens of cases in which entire counties and hundreds of cases in which towns were “racially cleansed,” either informally or with official cooperation. These events specifically targeted black populations, and census figures show effects lasting for generations.
18 Jaspin, passim.
members, and affirmed the importance of those racial or religious characteristics they shared with each other within the community.

American attitudes toward racial and religious discrimination have changed, and overt prejudice is no longer socially acceptable, much less an option for serving as a basis upon which to build community identity. With older methods of affirming community solidarity based on illiberal exclusions denied to them, communities have changed their focus. They still reaffirm shared identity through exclusion, expelling certain members deemed ineligible for true membership, but today’s expulsions cluster not around race or religion, but around vaguely defined concepts of morality. Moral banishment, like earlier forms of expulsion based on illiberal definitions of community, allows community members to share in the common enterprise of rejecting certain members, thus reaffirming their own bonds to each other.

Another benefit that liberal communities derive from preserving exile is that it offers them a powerful means by which to express particular commitments viewed as constituent of community membership. The ongoing contest between the demands of affective loyalties and rule-based obligations characteristic of the discourse surrounding the loss of national membership illustrate the complexities of attempting to first manufacture, and then articulate, a shared set of principles that define membership. Nevertheless, political communities continue to use expulsion to identify the unwanted and unacceptable, thereby also defining (albeit negatively) the commitments those rejected members have failed to live up to.

This project illustrates the particularly moral cast that exile in America displays. That is not entirely new – certain types of criminals (those who committed crimes of dishonesty (like a boy of fifteen who committed forgery in 1900), or crimes that disrupted the community’s order
(like the man banished for “stealing” slaves in 1857, or a slave who murdered a white man in his attempt to escape his condition in 1845) incurred banishment in the past, even as communities were driving out unwanted members for solidly illiberal reasons. Justifying expulsion on the basis of morality is, nonetheless, characteristic of present-day American banishment, perhaps because of a paucity of other acceptable justifications.

Moral banishment offers members of liberal communities something to share – something that is shared among all members and not with non-members. This sense of sharing is central to constructing community identity, and the objects of sharing available to liberal societies are more limited than those available to illiberal ones. In the cases of moral exile examined in this project, the offenses met with expulsion outlined a sort of folk morality, shared by all community members, and constitutive of belonging to the particular exiling community. Similarly, the more intuitively driven purgative banishments discussed in chapters four and five offer communities opportunities to express their moral revulsion together while simultaneously outlining some of the symbols of particular reverence to them. The significance of current exile practices’ tendency to attach themselves to matters of morality will be discussed in greater detail in the final section of this chapter.

19 In 1845, James Henry was banished from the United States as a condition of pardon. The crime took place in Fairfax, Virginia. Henry, a slave (identified as being owned by Mr. Seth Brawner of Prince William County), killed James T. Vermillion, who had apprehended him in the course of his escape from slavery. Governor James McDonald granted his conditional pardon. “Sentence Commuted.” Baltimore, Maryland, The Sun, November 27th, 1845, p.1; Jane Douma Pearson, “Coroner Inquests 1837-1911.” Northern Virginia Genealogy 8 (2003): 1109. Clinton, Massachusetts, 1900: Fifteen-year-old Arthur Payne was banished from the state of Massachusetts for two years, after being convicted of check forgery. His father agreed to take him to California for the duration of the banishment. “Banished for Crime.” San Francisco Call, February 21st, 1900, p. 2; “Banished to California.” Los Angeles Herald, February 21st, 1900, p. 2; “Boy Banished for Two Years.” New York Times, February 21st, 1900, p. 7. Darling Beam was banished from South Carolina for theft of slaves in 1857. “Sentenced to Banishment for Negro Stealing.” The Sun, January 30th, 1857, p. 1.
Finally, exile provides the benefit of defining not only which commitments the community shares, but also which kinds of people are and are not acceptable members. As discussed in chapters two and three, moral exile defines which characteristics are essential to belonging, sorting those kinds or types of people who inherently belong from those who don’t. Moral exile separates the morally eligible from the ineligible, assessing the moral character of select existing members and testing it against an implicit template of the "true" member. In the process of sorting citizens, this type of expulsion contributes to the production of the sort of ethically constitutive story that communities rely upon to imbue belonging with meaning.

The purgative exiles considered in chapters three and four draw distinctions not between true members and false, but between members and monsters. Members are constructed as those people who share not only stories, traditions, and history with each other, but also a deep similarity responsible for the feelings of sympathy and fellowship members of a community experience. However, that sympathy (and the similarity it implies) generates intense moral anxiety when a fellow member is revealed to be a kind of person deemed morally disgusting to the community. This anxiety drives members of expelling communities to use exile to place as much moral (and geographic) distance as possible between themselves and fellows found to be morally. These expulsions make an unequivocal statement about which characteristics or characters are absolutely intolerable to the community, and also reassure existing members that the value of that membership remains unpolluted, despite having once encompassed a radically intolerable member.

The Difficult Task of Liberal Justification
The benefits of exile to a liberal community may not be readily apparent if viewed from the perspective of instrumental value, but exile offers liberal communities a potent tool for defining, controlling, and strengthening shared narratives – facilitating a thickening of community identity widely believed to pose a challenge to liberal polities. In exploring whether the liberal communities that make up the America can be reconciled with exile, an examination of how to justify the use of political expulsion in a way that is consistent with liberal commitments is necessary. As the foregoing discussion of the exiling society and the uses of exile in a liberal community establish, the traditional justifications for exile in the ancient world and those of the illiberal society cannot justify exile in a liberal society. Then, how can a liberal society justify the use of exile?

As discussed in chapters two and three, foundational liberal thinkers did not foreclose the possibility of liberal governments employing exile. The primary caveat comes from Constant, who cautions against the arbitrary exercise of government power, of which exile is only one possible manifestation. In the presence of the proper procedures, Constant contends, exile can be a legitimate tool of liberal rule. The U.S. Supreme Court expressed similar thoughts in *Cooper v. Telfair*, with the proviso that the power rest only in the hands of the legislature, to guard against its arbitrary employment. The proto-liberal society of transportation-era England attempted to circumvent these anxieties about arbitrariness and exile by terming their expulsion project “transportation,” rather than “exile” or banishment.” More substantively, transportation avoided charges of arbitrariness by appealing to morality for its justification.

By constructing transported convicts as morally depraved, the English society that expelled them was able to shift responsibility for the convicts’ removal to the convicts
themselves, and also to redefine the expelled members as lacking true or legitimate membership, which was predicated upon possessing the correct inborn moral character. Thus, England began the (largely successful) practice of reconciling expulsion with liberal commitments, justifying expulsion by judgments of moral unfitness. On its surface, expelling members for their moral failures appears potentially justifiable on liberal grounds. After all, holding an actor accountable for his or her actions is the foundation of personal responsibility, and the autonomous, rational liberal citizen can certainly be brought to account by his or her fellows if those actions violate legitimate laws. Nonetheless, as the cases examined in this project show, morally justified expulsion oversteps the bounds of liberal commitments to meeting voluntarily adopted obligations or respect for the rights of others, requiring not merely minimal levels of law-abidingness, but a set of particular moral traits that are privileged over others.

Using moral judgment to justify expulsion from latter-day liberal communities appears promising upon first inspection, but as the cases examined here illustrate, moral judgments can be treacherous in political argument – and the decision to exile is always a political decision. Moral judgments combine volatile affective elements like the emotional experiences of fear, anger, or disgust with reasoned, principled commitments. These features of moral argument are sufficient to warrant caution and restraint when introducing moral judgments into the ultimately coercive arena of law and policy. In addition to this already precarious grounding for the use of moral judgment in membership decisions, there is the troubling effect of cognitive biases like the contagion intuitions described by modern moral psychologists, but also abundantly evident in the influential position of “pollution” beliefs in the ancient Greek culture to which liberalism self-consciously traces its origins.
In chapters two and three, the historical and current uses of moral exile in America reveal the ease with which culturally or civically based expectations that members adopt a certain set of principles – in this case moral principles – can be confused with the far more problematic conditioning of membership upon possession of the correct moral character. While obligating citizens to adopt specific principles poses certain problems arising from the limited knowledge authorities can have of a person’s inner state (have they really internalized those principles?), requiring would-be members to voluntarily agree to meet that obligation poses no problems with liberal expectations that political communities be reasonably open, voluntary associations. Problems arise when possessing the requisite moral character becomes a condition for retaining membership.

While it is possible to argue that character is something that individuals cultivate over a lifetime of decisions and actions, and so it is reasonable to hold a person accountable for their moral character, the construction evident in the cases examined in chapters two and three quite clearly imagines moral character as an immutable, un-chosen trait. When Burke refers to “those… whose disposition it is to be mischievous,” he is not describing people capable of change. When Tocqueville and Beaumont warn “the thinking part of [the] nation” that amongst them there “…already rises a whole people of malefactors,” they do not portray the prospective transportees as belonging to the same “nation” that comprises their audience. Rather, they describe a people apart, of a different nature from their fellows. Currently, the tendency for offenses incurring banishment to reflect those classified as “crimes involving moral

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20 Edmund Burke, letter to William Eden of March 17th, 1776. *Correspondence of Edmund Burke*, Edited by George H. Guttridge (Chicago: University of Chicago Press, 1961); Vol. III, 252-253. Burke is particularly concerned with preventing any plan to send convicts to Africa due to the difficult conditions and the prevalence of disease.

21 Beaumont and Tocqueville, 131.
turpitude” reflects the same assumption that committing an act that is “bad in itself” offers a reliable indication that the person’s inner moral self is defective.

Current practices of morally motivated exile assume first, that each person possesses an inherent, immutable moral character, and second that this true moral character can be discerned and understood by other community members simply by observing certain particular, symptomatic actions like stealing, lying, or acting violently. Thus a person's neighbors can reliably conclude that he is and always will be "a thief" because he stole, or that she is possessed of a thoroughly untrustworthy nature because she kited a check. Such actions are not treated as discrete decisions, but rather as symptoms of an underlying, permanent, condition of moral defectiveness. In communities that use moral exile to control membership, judgments are not of actions, but of actors.

Even when the required moral essences acquire a liberal flavor, such as exhibiting independence, rationality, or respect for the autonomy of others, conditioning community membership on the possession of a particular character – especially one constructed as pervasive, un-chosen, and unchangeable – creates an imagined pre-political community of true members. Despite the cultural nature of morality, in this vision of community that moral content is not the product of culture, but an essential trait. Expelling members on the basis of lacking membership in the “true” pre-political people cannot be justified on liberal terms. Moral exile rests on a number of troubling assumptions that disqualify it from liberal justification. First, that an essential character, stable over time and shared by all members of the community, exists. Possession of this essence is what lies at the core of membership, it is what makes the member who he or she truly is. This assumption constructs a pre-political community of “true,” morally
fit members, leaving an image of community that is not open to newcomers on a voluntary basis. Second, it assumes that moral character is an unchanging, unchangeable feature of an individual's makeup. As such, conditioning membership upon the possession of the correct character is to require an ascriptive, essential characteristic. Making membership conditional upon possessing an un-chosen feature is a far cry from obligating members to adopt a particular set of principles. Morally motivated exile constructs moral character as unchanging and un-chosen, effacing the distinction between doer and deed that makes any meaningful notion of accountability possible, yet then uses that very accountability as justification for the subject’s expulsion.

A different set of problems with using morality to justify expulsion arises in the cases of purgative exile examined in chapters four and five. While moral exile confuses moral commitment with moral character, purgative exile illustrates the dangers inherent in introducing moral judgments into membership decisions. While the moral reasoning implicit in moral exile decisions may be misguided in its confidence in our abilities to judge one another’s inner selves or in envisioning character as an unchanging moral nature, the reasoning driving purgative exile is not necessarily reasoning at all. Rather, it is a confused admixture of reasoned moral judgments of wrongness and blameworthiness (the people involved in the cases discussed in chapters four and five are certainly legitimately blameworthy), emotional experiences of anger, disgust, and anxiety, and the contagion intuition, a cognitive bias that threatens to distort both rational reflection and proportionate emotional response. While this combination of conflicting affective and rational impulses is challenging enough in making private moral judgments, it should inspire particular caution in political decision-making.
The persistence of morally motivated expulsion in each of its forms suggests that the people who make up American communities consistently crave a more substantial community identity than civic or contractual models of political community can offer. While instantiating moral commitments in policy can be both legitimate and beneficial in a democratic community, public moral judgments involving public revulsion or disgust ought to be approached with caution. As the cases of purgative exile considered in chapters four and five show, confusing potentially distorted moral intuitions with moral judgments is easily done. Such confusion lends itself to popularly driven, yet still arbitrary and potentially unjust, excesses in membership control policies.

National membership control, in the form of denaturalization, also employs moral judgment as justification for expulsion. Positing “good moral character” as a condition of citizenship, denaturalization law leaves officials broad discretion in interpreting what actions constitute evidence that this good moral character was lacking at the time of naturalization. As in the case of moral exile, such policies place authorities in the untenable position of judging the true state of a person’s moral self, framing certain actions as being symptomatic of a pervasive, underlying condition of moral defect. Historically, moral judgments found their expression in the widely abused “Likely Public Charge” bar to admission, rendering admitted aliens retroactively “un-admitted” and removable. While such flagrant imposition of arbitrary moral judgment is no longer widespread, recent years have seen a resurgence of denaturalizations justified by the lack of good moral character.

**Implications:**
What should we take away from this study of exile in America? In addition to the analysis of what exile offers and how it can (and cannot) be justified in liberal communities, the very persistence of exile – despite its many conflicts with liberal commitments – suggests a number of things about American communities. First, that “citizenship,” like expulsion, is not exclusively, or even primarily, a national matter. In every form – ancient or modern, liberal or illiberal – exile exercises its power over those subjected to it by depriving them of “home,” or the locality associated with all their most meaningful attachments and habits. Germain de Staël’s longings not for France, nor necessarily even for Paris, but for her own salon illustrate this aspect of exile poignantly. Exile in America takes place primarily at the sub-national level, although emotionally charged, morally loaded rhetoric continues to surround expulsion at the national level as well. The relatively local focus of popular expulsion policies indicates a particular significance of sub-national forms of citizenship, forms too often neglected by citizenship theorists.

Not only are such citizenships meaningful enough to those deprived of them to make banishment sting, but the community effecting the banishment evidently perceives something valuable enough in its own particular identity and makeup to justify the risk and trouble of expelling the troublesome member. In addition to indicating that sub-national forms of citizenship carry particular meaning, current exile practices also suggest that much-lamented “community” is actually alive and well in the United States. The cases studied in this project paint a picture of a multitude of political communities busily working to construct and preserve substantial particular identities. Further, the expulsions examined in this project tend to arise at points of conflict between popular, particular values or preferences and liberal commitments.
The continual production of those particular local demands – and the considerable pressure they evidently exert not only on fellow citizens, but also on government actors – suggest that the spontaneous, authentic manifestations of local identity so dear to theorists of democratic community remain in steady supply, even if their consistency with liberal commitments is sometimes questionable.

Finally, the continued use of expulsion in American communities, and especially in its current, heavily moralized forms, expresses both a longing for more substantial shared identities on the parts of citizens, and also a profound confusion about what the objects of that sharing can or ought to be, given the frequent conflicts between popular impulses and liberal aspirations. Rational ideas of “obligation” and shared principles blend with affective expectations of special regard, sympathy, and loyalty. Complicating the picture is the fact that despite voluntary, contractual models of liberal citizenship, most of us do not choose our neighbors and so inevitably we are obliged to share traditions, values, and stories about ourselves with people we would prefer not to associate with. In extreme cases, the vulnerability that sharing meaningful aspects of our social lives with others exposes us to may lead to feelings of betrayal or anxiety. Despite these risks, the continuing efforts of American communities to use some form of shared morality to control membership indicates that shared moral identity remains highly valued by the members of those communities.

The expulsions examined in this project show a strong popular desire to construct shared public moralities, but there is also little apparent clarity as to what those should entail, or what foundations they should be built upon. The folk moralities driving different forms of political expulsion rely on varying and often conflicting moral foundations. For instance, the
moral exiles discussed in chapter two punish trust violations (like fraud or forgery), the sort of morality you might expect to be privileged in a modern exchange-based society. Similarly, actions displaying a wanton disregard for the dignity and autonomy of others incur banishment, as might be expected from an individualistic society. While those moralities might be reconcilable, the purity concerns evident in cases of purgative exile offer a radically different foundation for shared morality. Purity concerns stem from shared conceptions of the sacred, a type of morality typically associated with traditional, illiberal societies. Sex offender restriction ordinances offer an interesting case in which purity concerns are presented as being based in respect for autonomy and harm prevention, but this internal confusion reflects a similar incoherence afflicting each case considered here.

The desires and anxieties that drive the enduring impulse to exile unwanted fellow members are unlikely to disappear any time soon. This project has attempted to offer a theoretical account of what exile is and what it means in American communities, not to sound any alarms or suggest that expulsions policies must be stamped out, or codified, or celebrated. This is not a prescriptive work. If there is any such implication arising from these observations, it is twofold. First, that while we are unlikely to root out the desire to exile, members of liberal communities can make efforts to examine and acknowledge the assumptions about citizenship implicit in their membership control policies, and make good faith efforts to reconcile them with liberal political commitments. Second, it is to caution against too readily accepting narratives about radical breaks between modernity and pre-modernity, or between types of community, or any such story of decline or progress. If a relic of the ancient world like exile can be found sheltering beneath a modern bureaucratic regulations, then it is wholly possible that there are
many other aspects of political life in which the ancient and modern merge, building new structures with old materials.
Appendix: U.S. Banishments

Virginia, 1785: Commonwealth v. Fowler, 8 Va. (4 Call) 35 (1785). Fowler, an attainted felon, was pardoned on condition of departure from the Commonwealth. The pardon was upheld on appeal, but the condition ruled illegal.

New York, 1804: People v. James, 2 Cai. R. 57 (N.Y. Sup. Ct. 1804). The petitioner was convicted of forgery, pardoned on condition that he leave the United States.

South Carolina, 1821: State v. Fuller, 1 McCord178 (S.C. 1821). Mary Fuller was convicted of trading with a slave, but was pardoned by the Governor on the condition that she leave the state.

South Carolina, 1829: State v. Smith, 1 Bailey 283 (S.C. 1829). Convicted of slave theft and pardoned by the Governor Bennett on condition that he leave the state and never return.

Pennsylvania, 1844: Flavell's Case, 8 W. & S. 197 (Pa.1844). The defendant was convicted of murder, then pardoned by the Governor on the condition that he leave the country.

Virginia, 1845: James Henry, banished from the United States as a condition of pardon. Henry, a slave (identified as being owned by Mr. Seth Brawner of Prince William County), killed James T. Vermillion, who had apprehended him in the course of his escape from slavery. Governor James McDonald granted his conditional pardon. “Sentence Commuted.” Baltimore, Maryland, The Sun, November 27th, 1845, p.1; Jane Douma Pearson, "Coroner Inquests 1837-1911." Northern Virginia Genealogy 8 (2003): 1109.


Ohio, 1855: Ex Parte Lockhart, 1 Disn. 105, 12 Ohio Dec. Reprint 515 (Super. Ct.1855). The defendant was pardoned by the Governor on the condition that he leave the state for five years. He challenged the condition, and lost his pardon.


California, 1883: Ex Parte Marks, 64 Cal. 29, 28 Pac. 109 (1883). Convicted of second degree murder, the petitioner (who was reputed to be developmentally disabled), was pardoned on the condition that he leave the state for life.

South Carolina, 1890: State v. Barnes, 32 S.C. 14, 10 S.E. 611 (1890). Convicted of grand larceny, pardoned on condition that he leave the state, never to return.
Minnesota, 1893: *State ex rel. O'Connor v. Wolfer*, 53 Minn. 135, 54 N.W. 1065 (1893). Thomas O’Connor was convicted of first degree murder, and sentenced to life in prison. Governor William Merriam, pardoned him on the condition that he leave Minnesota and not return. He agreed to go to Michigan, but was arrested after remaining in Minnesota to procure medical care for his wife.

Massachusetts, 1900: Fifteen-year-old Arthur Payne was banished from the state of Massachusetts for two years, after being convicted of check forgery. His father agreed to take him to California for the duration of the banishment. “Banished for Crime.” *San Francisco Call*, February 21st, 1900, p. 2; “Banished to California.” *Los Angeles Herald*, February 21st, 1900, p. 2; “Boy Banished for Two Years.” *New York Times*, February 21st, 1900, p. 7.

South Carolina, 1901: R.W. Wilkes was banished from the state for twenty years for selling whiskey. Wilkes’ banishment was the condition of a pardon. “Banished for Twenty Years: Young Carolinian Man Must Keep Away from His Home Now.” *The Atlanta Constitution*, July 26th, 1901, p. 3.

Illinois, 1907: Matthew Habiski was banished from the state of Illinois, despite not having been convicted of the robbery charges against him. Judge Michael F. Girten of the Municipal Court of South Chicago pronounced Habiski an “undesirable citizen” and ordered him to leave the state permanently. “Sentenced to Leave Illinois: Prisoner Says He’s Glad to Be Banished from State of Such Hard Luck.” *Chicago Daily Tribune*, December 31st, 1907, p.14.

California, 1912: William Desmond plead guilty to charges related to stockpiling dynamite, and was paroled for five years on the condition that he leave California and go instead to Arizona. “Five Years’ Banishment for Dynamite Suspect.” *San Francisco Call*, September 18th, 1912, p.3.

Georgia, 1913: *Hancock v. Rogers*, 140 Ga. 688, 79 S.E. 558 (1913). Emory Hancock was given probation for a gambling charge, on the condition he leave the county. The provision was struck down on appeal.

California, 1914: Kavalin v. White, 44 F.2d 49(10th Cir. 1930). George Kavalin was convicted of charges related to arranging for the interstate transport of two women for the purposes of “debauching” them. His sentence, totaling eight years, was suspended on the condition that he be “deported” from the United States. Kavalin did not leave the U.S. and was imprisoned.

Missouri, 1924: *Ex parte Strauss*, 320 Mo. 349, 7 S.W.2d 1000 (1928). The defendant was convicted of robbery and offered a pardon on the condition that he remain outside of Cole County, Missouri indefinitely. Return would result in imposition of the original sentence of five years’ imprisonment.
Nebraska, 1926: Edwin L. Huntley, editor of the “Weekly Mediator” newspaper in Omaha, convicted of libel and ordered to leave the state for five years (as a condition of his parole) by judge Charles A. Goss. “Editor of Paper Sent Into Exile for Five Years.” The Atlanta Constitution, September 9th, 1926, p. 18.

Michigan, 1929: People v. Smith, 252 Mich. 4, 232 N.W. 397 (1930). Floyd Smith was convicted of disturbing the peace. He was placed on probation and ordered to move out of the neighborhood. The order was struck down on appeal.


Maryland, 1932: Alphonse Cantalupo was banished from the whole of Baltimore County as a condition of a suspended sentence. Cantalupo had assaulted his wife, biting off a piece of her ear. Disturbingly, the magistrate (Harry Kerber) ordered both Alphonse Cantalupo and his wife “never to return to Baltimore County.” “Banished from County for Biting His Wife’s Ear During Argument.” The Sun, June 25th, 1932, p. 22.

California, 1935: Paul Brown was convicted of petty theft and offered a suspended sentence, conditional upon his leaving Los Angeles for at least two years. The sentence was given by Judge A. A. Scott. “Thief Who Robbed Jail Trusty Gets Banished.” Los Angeles Times, June 17th, 1935, p. A8.

Connecticut, 1936: Professional golfer Cyril Tolley and his wife (referred to in all media coverage simply as “the former Mrs. Rov Atwell”) ordered to leave Westport by Judge Frank V. McMahon. The charges were public intoxication and breach of the peace, and no term is given. The order was a condition of a suspended sentence. “Court Orders Tolley and Wife to Leave Westport.” The Lewiston Daily Sun, October 19th, 1936, p. 9; “Ordered Out of Town, Tolleys Hunt New Home.” Chicago Daily Tribune, October 20th, 1936, p. 5.

California, 1938: British-born Leopold McLaglen was convicted of extortion and sentenced to a prison term of one to five years, suspended on the condition that he leave the United States for five years. Superior Court Judge Thomas Ambrose handed down the decision. “McLaglen Banished from U.S. for 5 Years as Fraud Penalty: Los Angeles Judge Puts Film Actor’s Brother on Probation After Extortion Case Conviction.” Sun, April 6th, 1938, p.1.

Georgia, 1941: Pippin v. Johnson, 192 Ga. 450, 15 S.E.2d 712 (1941). Lula Mae Johnson was convicted of two charges stemming from running an illegal lottery. She was pardoned on the condition that she remain outside of Fulton County for the duration of her sentence. The court affirmed the banishment condition on appeal.

Oklahoma, 1945: Ex parte Sherman, 81 Okla. Crim. 41, 159 P.2d 755 (1945). Jake Sherman was offered parole, conditioned upon remaining outside of Oklahoma for twenty years.
Oklahoma, 1945: *Ex parte Snyder*, 81 Okla. Crim. 34, 159 P.2d 752 (1945). Frank Snyder (alias Frank Pavelench) convicted of robbery, paroled on condition that he leave the state for twenty years.

California, 1946: *Ex parte Scarborough*, 76 Cal. App. 2d 648, 173 P.2d 825 (Dist. Ct. App. 1946). Troy Scarborough was convicted of vehicle code violations, but he had a record of misdemeanors and was on probation. His sentencing agreement stipulated that he leave the city of Stockton and San Joaquin County for two years.

Michigan, 1945: *People v. George*, 318 Mich. 329, 28 N.W.2d 86 (1947). Alex George pleaded guilty to taking indecent liberties with a seven-year-old girl. The sentencing court gave him three years’ probation, and stipulated that he move out of the neighborhood. He appealed and the condition was overturned.

Michigan, 1954: *In re Cammarata*, 341 Mich. 528, 67 N.W.2d 677 (1954). Frank Cammarata was convicted of armed robbery and sentenced to fifteen to thirty years in prison, suspended on the condition that he return to his native Italy. The U.S. Supreme Court denied this case certiorari.

California, 1959: *People v. Blakeman*, 170 Cal. App. 2d 596, 339 P.2d 202 (Dist. Ct. App.1959). Seth Blakeman entered a plea of guilty to a reduced charge of assault and battery. Among the deal’s conditions was that he leave the county. He was arrested for violating the agreement, and the banishment condition was voided on appeal.

Maryland, 1963: Adela Garcia Bird was convicted of assault, and offered a suspended sentence of three years by Criminal Court of Baltimore Judge Joseph L. Carter, conditional upon her returning to her native Puerto Rico. The sentence was overturned by the Maryland Court of Appeals. *Bird v. State*, 190 A.2d 804, 231 Md. 432 (1963).

Virginia, 1973: Jerry Webster was sentenced to ten years in prison and forty years probation for possessing one ounce of marijuana. The sentence was suspended on the condition that he remain outside of the state of Virginia for forty years. Webster appealed the decision in 1974, succeeding in reducing the forbidden area to only the municipality of Chesapeake. When Webster visited his ill parents in 1981, he was arrested and sentenced to five years’ imprisonment by Judge William Hodges. The Virginia State Supreme Court declined to hear the case. “Man Banished for Marijuana Jailed After Visiting Parents.” *The Washington Post*, August 14th, 1981, p. B3.

Texas, 1978: Anthony Salinas was given a two-year suspended sentence and five years’ parole on the condition that he serve them in Las Vegas, Nevada. He had been charged with bookmaking. The sentencing judge was D.W. Suttle, of the U.S. District Court for the Western District of Texas (misidentified in media accounts as “D.M. Shuttle”). Carol Oppenheim, “Court
Sentence No Handicap to Bookie.” Chicago Tribune, May 2nd, 1982, p.3. Had Salinas chosen to challenge the sentence, it would not likely have been upheld.

Louisiana, 1980: State of Louisiana v. Rae Morgan 389 So.2d 364 (La. 1980). Rae Morgan was convicted of attempted prostitution and given a suspended sentence that required her to remain outside of the French Quarter of New Orleans for the duration of her probation. Morgan’s appeal was unsuccessful.

Ohio, 1980: Carchedi v. Rhodes, 560 F. Supp. 1010 (S.D. Ohio 1982). Anthony Carchedi sought a commutation of his fifty-year sentence for two counts of armed robbery and one of unlawfully operating a motor vehicle. In his request, he promised Governor Rhodes that if his sentence were commuted, he would “leave the State of Ohio, for good.” Rhodes issued a conditional commutation of the sentence, requiring that Carchedi leave Ohio and remain outside of it, “never to return.” Carchedi’s challenge was not successful.

New York, 1988: Salvatore Reale was banished from the Eastern and Southern judicial districts of the state, including all of New York City, as well as Naussau, Suffolk, Westchester, Putnam, Rockland, Orange, Dutchess, and Sullivan Counties. Reale was an associate of the Gambino crime family, convicted in federal court of labor racketeering. The banishment was a condition of a 15-year suspended sentence. Reale’s case is unusual, in that it is the result of a federal, not state or local, ruling. The judge was Jack B. Weinstein of the Federal District Court in Brooklyn. Leonard Buder, “Crime Figure Given Exile, Not Prison.” New York Times, February 5th, 1988, p. B1.

Massachusetts, 1998: Commonwealth vs. Richard C. Pike, 428 Mass. 393 (1998). Richard Pike was convicted of assault and battery. One condition of his parole required that he remain outside of the state of Massachusetts for the duration of his probationary period. The provision was struck down on appeal.

Washington, 2005: State v. Schimelpfenig, 115 P.3d 338, 339 (Wash. Ct. App. 2005). David Ellis Schimelpfenig was convicted of first degree murder. A condition of his sentence required that upon release from prison, he could not reside in Grays Harbor County for the remainder of his life, arguing that this was to protect the well-being of his victim’s family, who still resided there. The court vacated the banishment order, but noted that “[i]n so ruling, we do not imply that countywide or other types of jurisdictional prohibitions will always be inappropriate. Relying on the well-defined boundaries of a county or city fosters the uniform enforcement of such a restriction. But the propriety of such restrictions must turn on the facts of each case.”

California, 2006: People v. Al Husainy 143 Cal.App.4th 385 (2006). Abbas Al Husainy was convicted of multiple counts of domestic abuse, felony child abuse, and assault with a deadly weapon. His plea deal included a provision requiring him to remove himself from the state. The provision barring him from the state was struck down.

Tennessee, 2015: *Porecca v. Tennessee*, (unpublished) Court of Criminal Appeals at Jackson, No. W2013-02443-CCA-R3-PC (January, 2015). Edward Porecca was convicted of rape. A condition of his probation included a provision that he move to New York. The court dismissed Porecca’s claim that it amounted to interstate banishment on the grounds that Porecca was unable to prove the existence of a specific prohibition from re-entering Tennessee. The court does not rule out the possibility of banishment in future cases, however, noting that, “… we will not address Petitioner's argument that the special condition of probation violates public policy because that issue is waived. Thus, we do not hold in this case that a special condition of ‘exile’ does violate the public policy of Tennessee or that a special condition of ‘exile’ does not violate the public policy of Tennessee.”


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