

1999

Disenfranchisement as Punishment: Reflections on the Racial Uses of *Infamia*

George P. Fletcher
Columbia Law School, gpfrecht@gmail.com

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Law and Philosophy Commons](#)

Recommended Citation

George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 *UCLA L. REV.* 1895 (1999).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1063

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

DISENFRANCHISEMENT AS PUNISHMENT: REFLECTIONS ON THE RACIAL USES OF *INFAMIA*

George P. Fletcher *

The practice of disenfranchising felons, though decreasing, is still widespread. In this Article, Professor George Fletcher reflects on the use of disenfranchisement as punishment, the lack of a convincing theoretical justification for it, and its disproportionate impact on the African-American community. Fletcher presents a number of powerful arguments against the constitutionality of the practice, but he emphasizes that there is a deeper problem with disenfranchisement as punishment: It reinforces the branding of felons as an "untouchable" class and thus helps to prevent their effective reintegration into our society.

INTRODUCTION.....	1895
I. THE CONSTITUTIONAL CRITIQUE.....	1903
A. Equal Protection of the Laws.....	1903
B. Fifteenth Amendment.....	1904
C. Bill of Attainder.....	1904
II. THE DEEPER PROBLEM: CREATING A CASTE SYSTEM IN CRIMINAL JUSTICE.....	1906

INTRODUCTION

One of the conceits of the American literature on criminal justice is that we honestly articulate the purposes of punishment. We are all familiar with the litany about retribution, deterrence, rehabilitation, and confinement as goals of sentencing. The grand debate among the philosophers is whether retribution or social protection should be the defining value of the system. The Kantians are committed to doing justice by visiting upon each criminal act a punishment that represents the offender's just desserts; the utilitarians are dedicated to the use of coercive force only so far as the benefits to society outweigh costs suffered by the offender. Avoiding this conflict in principle, legislators are generally content to list all the possible purposes of punishment and retire from the debate with the hope that in practice the proper mix of purposes will come about.

* Cardozo Professor of Jurisprudence, Columbia University School of Law.

The actual practice of the criminal law, however, suggests that in fact the system often pursues goals other than the ones conventionally articulated. The vindication of the victims' interests might fit into the framework of just punishment. Yet some leading retributivists focus exclusively on the vindication of the violated norm or expressing the outrage of the community, without focusing specifically on the need of the victim to see justice done. More serious departures from both retributive and deterrent approaches to punishment result from schemes of permanent warehousing and supervision of offenders. Here, one need only mention life imprisonment for third-time offenders (three strikes and you're out)¹ and the growing popularity of compulsory registration and public notification of resident sex offenders (Megan's law).²

These fashionable measures of repression hardly make sense under any standard rationale for punishment. For several reasons they fail to meet the accepted criteria of retributive punishment. They are lifelong sanctions, often for minor offenses, and therefore flout the retributive principle that the offender should be required (and permitted) to pay his debt in full to society. These measures could hardly be retributive, for they stand in clear disproportion to the gravity of the offenses that trigger their application: They are in response rather to the perceived dangerousness of the offender. The standard retributive maxim, "Let the punishment fit the crime," is ignored. Preferred is the surrogate slogan: "Let the punishment fit the criminal." Further, these sanctions can hardly be justified by utilitarian considerations. Of course, they achieve some measure of social protection, but at what cost? Confining a habitual embezzler for life would have to prevent a great deal of embezzlement in order to justify the annual \$40,000 cost typically estimated for confining a felon. Given the fact that people can protect themselves against embezzlement by far less costly means, a cost/benefit calculus hardly justifies the application of "three strikes" laws to nonviolent offenders. And a simple utilitarian calculus of immediate costs and benefits ignores the side-effects of having a confinement rate that is among the highest in the world, side-effects that include harm caused within the prison population, the loss of productive services to society, damage to stigmatized and abandoned family members, and, as we shall see, the implications for democratic government.

1. See, e.g., CAL. PENAL CODE § 667 (West 1999); WASH. REV. CODE ANN. § 9.92.090 (West 1998); WIS. STAT. ANN. § 939.62 (West Supp. 1998). For courts upholding the constitutionality of "three strikes and you're out" legislation, see, for example, *State v. Thorne*, 921 P.2d 514, 537 (Wash. 1996), and *State v. Lindsey*, 554 N.W.2d 215, 221 (Wis. Ct. App. 1996).

2. For a case upholding Megan's law, see, for example, *Doe v. Pataki*, 120 F.3d 1263, 1284-85 (2d Cir. 1997).

The general pattern of modern sentencing, particularly in the federal courts, is to focus, rather impressionistically and unscientifically, on the dangerousness of the offender. That is why the federal courts can consider as aggravating factors a defendant's prior offenses—even those that have been alleged but never proven beyond a reasonable doubt.³ That is why the criteria for allocating cases to adult court or juvenile court depend heavily on predictions of dangerousness, a judgment made prior to trial and conviction.⁴ To speak of retributive punishment in a system of this sort is to misrepresent crude policies of social protection as punishment that is just and fair. Justifying these policies on cost/benefit grounds becomes feasible only by suppressing a whole range of personal and social costs that policy makers prefer not to think about.

If the standard rationales for punishment fail to account for many of our present practices, we should cut through our inhibitions and accurately describe what we are doing. A good slogan to capture current policies of criminal justice would be "waging war against the criminal class." Policy makers have a good idea of who constitutes dangerous criminals, they target detection procedures against them, and they apprehend them in ever greater numbers. Apparently, as suggested by the composition of our present prison population, the perceived criminal class consists largely of drug users, and among them are an overwhelming number of blacks.⁵

Of course, this war against the "criminal class" cannot be won: There is a permanent supply of potential offenders and particularly of drug users. But the war can have at least one important subsidiary purpose: It can create a permanent undercaste of people who were once in prison, who are stigmatized as felons, and who are subject to an array of collateral disabilities traditionally associated with the status of being a felon. At common law anyone could shoot a suspected felon in flight.⁶ The same right does not apply against those suspected of committing misdemeanors, as though some deep metaphysical distinction accounted for the difference between felonies and misdemeanors. In addition to the informal impact on employment prospects and child custody disputes, the status of being a felon bears

3. See U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 commentary at 367 (1998). For a case upholding the constitutionality of this practice, see, for example, *United States v. Watts*, 519 U.S. 148, 156–57 (1997) (per curiam).

4. See, e.g., *United States v. Nelson*, 90 F.3d 636 (2d Cir. 1996).

5. In 1996, 22% of all adult jail inmates in the United States were incarcerated for drug law violations. See CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES 1996, at 4 (1998). Over 42% of those incarcerated for federal drug law violations, and almost 60% of those in state prisons for drug offenses, are black. See KENDRA E. WRIGHT & PAUL M. LEWIN, COMMON SENSE FOR DRUG POLICY FOUND., DRUG WAR FACTS 41 (1998).

6. See *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

on qualification for jury service,⁷ and, significantly, on losing the right to vote and to hold office. In a large (though decreasing) number of states, felons are disenfranchised for life.⁸

According to voting qualification laws and constitutional provisions in the vast majority of the fifty-one jurisdictions, felons serving time are not allowed to vote.⁹ The disqualification applies in varying degrees to convicted felons on probation, on parole, and after release from prison. Permanent disenfranchisement applies in at least thirteen states. The Sentencing Project reports the mosaic of American law in these terms:

In 46 states and the District of Columbia, felons are prohibited from voting while in prison. In addition, 32 states prohibit offenders from voting while on parole and 29 bar voting while on probation. Felons are barred for life from voting in 14 states, a prohibition that can be waived only through a gubernatorial pardon or some other form of clemency. Only four states—Maine, Massachusetts, New Hampshire and Vermont—allow prison inmates to vote.¹⁰

In Israel, an incarcerated felon led his Party (Shas) in its successful campaign to gain seats in the last election for the Knesset, the Israeli parliament.¹¹ Clearly, there is more than one way to think about the significance of being labeled a felon.

Despite our efforts to overcome discrimination in the areas of race, gender, illegitimacy, and alienage (as least by state governments), we still yield to the need to stigmatize felons and to treat them as “untouchables.” They are the undercaste of American society. And among the untouchables, the worst are clearly the sex offenders, who are treated as inherently suspect for the rest of their lives.¹²

I want to focus in this Article on political disenfranchisement as a technique for reinforcing the branding of felons as the untouchable class of American society. Those who have served their time are left with the message that they are inherently unreliable members of the democracy. Whether they would vote regularly or not, they are treated as though they were perma-

7. See, e.g., ARIZ. REV. STAT. ANN. § 21-201 (West Supp. 1998); CAL. CIV. PROC. CODE § 203 (West 1999); N.Y. JUD. LAW § 510 (McKinney 1999).

8. I rely in this paper on the data supplied by the Sentencing Project and Human Rights Watch to the *Washington Post*. See Michael A. Fletcher, *Voting Rights for Felons Win Support*, WASH. POST, Feb. 22, 1999, at A1.

9. See *id.*

10. *Id.*

11. Aryeh Deri resigned as head of the Shas Party on June 16, 1999, after announcing his resignation from the parliament on May 18, 1999. See Deborah Sontag, ‘*Second Israel*’ Hails First Big Election Triumph, N.Y. TIMES, May 21, 1999, at A3; Deborah Sontag, *Israel: Shas Party Leader Quits*, N.Y. TIMES, June 16, 1999, at A6.

12. See *supra* note 2 and accompanying text.

nently banished from the political community. Though the franchise has spread in every conceivable manner to eliminate all discriminatory barriers, including literacy tests and poll taxes, the new barrier based on felony conviction has become ever more ominous. True, the trend in state legislatures is to limit the use of permanent disenfranchisement, but the raw numbers of people disenfranchised grows constantly.

The official rationale for this disqualification in American states seems to be that felons, either in prison or after release, will corrupt the voting process. The rhetoric is that disenfranchising felons is necessary to maintain the "purity of the ballot box."¹³ The argument has two forms, one mystical, the other fanciful. The mystical claim is that tainted people will corrupt the electoral process; felons are tainted and therefore will spread their taint to the electoral process. A little more down-to-earth is the fanciful claim that convicted felons pose a danger to the honesty of the process: They are more likely than other people to engage in fraudulent schemes to distort the balloting. Neither of these versions of the alleged need to maintain the "purity of the ballot box" can withstand a minute of rational argument. The argument of metaphysical taint has no place in a secular legal culture, and it seems obvious that electoral officials can, with proper measures, protect the honesty of the balloting process.

The only rationale for disenfranchisement that makes sense is that felons, by virtue of their crime and their conviction, forfeit their right to participate in the political process. They are simply not entitled to the ordinary rights of political participation enjoyed by other people. They suffer a change of status that is sometimes called "civil death."¹⁴ This is the modern version of the idea of *infamia* as applied in Roman law.¹⁵

I suppose that at the time when all felons were in principle subject to capital punishment, it probably did not do much harm to treat felons who were not executed as civilly dead. After all, they were still alive, gratuitously, and therefore if they enjoyed fewer civil rights than others, they had little ground to complain. This rationale obviously has little basis for application in a time when the concept of felony implies simply that the offense is subject to punishment by a year or more in prison.

Enter the racial factor. In the way Americans think about criminal justice, race provides the lens for perceiving the way our institutions go awry.

13. *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972) (quoting *Washington v. State*, 75 Ala. 582, 585 (1884)).

14. See, e.g., Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 869 (1993).

15. See 3 ANTONIO PERTILE, *STORIA DEL DIRITTO ITALIANO DALLA CADUTA DELL'IMPERO ROMANO ALLA CODIFICAZIONE* 230-31, 388 (2d ed. 1966).

We might not quite see the injustice of capital punishment, but we readily grasp the injustice of discriminatory application of the death penalty.¹⁶ We might not sense the injustice of punishing the use of crack cocaine much more severely than the use of powder cocaine, but when it turns out that the burden of the more severe penalties falls on African Americans we sit up and take notice.¹⁷

And so it is with disenfranchisement as a sanction. The impact of disenfranchisement is felt primarily in the black community. The statistics are indeed disturbing. Fourteen percent of African-American men are ineligible to vote because of criminal convictions.¹⁸ In seven states, one in four black men are permanently barred from voting because of their criminal records.¹⁹

The racial impact of the disenfranchisement means that we will finally take cognizance of an unjust institution—one that betrays a primitive conception of punishment and a deficient commitment to democratic voting. In one promising decision the Supreme Court, without dissent, struck down an Alabama constitutional provision that disenfranchised everyone who committed a crime of moral turpitude.²⁰ The Court found a current of racial motivation in the convention that adopted the disenfranchising amendment to the state constitution, and in fact the rule, as applied, had a disproportionate impact on blacks.²¹

The problem with categorical disenfranchisement is that although the policy clearly has an adverse racial impact today, it came into force without the slightest racial animus. In fact, the reed on which the Supreme Court has rested its general approval of felon disenfranchisement, namely Section 2 of the Fourteenth Amendment, had as its purpose the facilitation of black voting. The amendment provides:

Representatives shall be apportioned among the several states which may be included within this Union according to their respective num-

16. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 286–87, 312–13 (1987) (holding that Georgia's death-sentencing process did not violate the Eighth Amendment even though a study showed that the death penalty was imposed more often on black defendants and killers of white victims than on white defendants or killers of black victims).

17. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 463–71 (1996) (holding that for a defendant to be entitled to discovery on a claim that he was singled out for prosecution because of his or her race, the defendant must make a threshold showing that the government declined to prosecute similarly situated suspects of other races).

18. Some 1.46 million African-American men are ineligible to vote out of an eligible population of 10.4 million, slightly more than 14%. See Pierre Thomas, *Study Suggests Black Male Prison Rate Impinges on Political Process*, WASH. POST, Jan. 30, 1997, at A3.

19. See generally THE SENTENCING PROJECT, POLICY REPORT NO. 9080, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998).

20. See *Hunter v. Underwood*, 471 U.S. 222 (1985).

21. See *id.* at 228–30.

bers, counting the whole number of persons in each State excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.²²

The obvious purpose of this section is to repudiate the stain in Article I, Section 2, Clause 3, which based the apportionment of representation on the number of free persons, "excluding Indians not taxed" and "three-fifths of all other persons."²³ In addition to redefining the basis of representation in Congress, Section 2 of the Fourteenth Amendment provides a sanction that amounts to reducing the basis of representation in cases in which the state had committed either of two wrongs. The first wrong is *denying* the franchise to male citizens not less than twenty-one years of age. The second wrong is *abridging* the franchise for the same group of citizens, except for those who had participated in the Confederate rebellion or who committed some crime. If either of these wrongs is committed and we calculate the ratio of the number of males disenfranchised in relation to the total male electorate, the basis for representation in Congress will be reduced in proportion to that ratio. In this context, the amendment recognizes the possibility of abridging (as opposed to denying) the franchise for the commission of crime.

Thus we have the following paradox of disenfranchisement: A constitutional amendment was enacted to support the voting rights of emancipated slaves. The text of this amendment refers to the possibility of disenfranchising people who have committed crimes. Because patterns of law enforcement have changed over the years, because the number of felons convicted has greatly increased and because a large percent of those convicted are black, the policy of felon disenfranchisement sharply reduces the voting rights of African Americans. Thus, a constitutional provision designed in 1868 to improve the political representation of blacks has turned out in the 1990s to have precisely the opposite effect.

Reform is obviously in the offing. We cannot tolerate a mass denial of voting rights to a significant segment of the population. The only question

22. U.S. CONST. amend. XIV, § 2.

23. *Id.* art. I, § 2, cl. 3.

is whether the reinstatement of voting rights for felons—both in prison and out—will come by way of legislative change or constitutional ruling.

Congress would have the authority under the Fifteenth Amendment to pass a statute that would suspend, by analogy to the legislation suspending the use of literacy tests, all state laws disenfranchising felons. The Fifteenth Amendment prohibits the states from denying the right to vote on the basis of "race, color, or previous condition of servitude."²⁴ The argument would be that the use of the disenfranchisement had a discriminatory impact on African Americans and therefore would have to give way to legislation enforcing the mandate of the amendment. It might be possible, even without congressional legislation enforcing the amendment, simply to declare the disenfranchisement unconstitutional in those states where its application had a discriminatory impact on black voting rights.

Admittedly, in *Richardson v. Ramirez*,²⁵ the Supreme Court upheld a provision in the California constitution that disqualified as electors in California all those convicted of "infamous" crimes. The grounds of alleged unconstitutionality were a violation of equal protection of the laws under the Fourteenth Amendment.²⁶ The reference to disenfranchisement for "crime" in the second section of the same amendment was thought to be sufficient to overcome even the minimal rationality requirements of equal protection.²⁷ Whatever the merits of that decision, the equal protection argument would obviously be much stronger by adding the factor of racially discriminatory impact.

Yet the very issue posed in *Ramirez* requires reconsideration. Even apart from the racial impact, the use of disenfranchisement violates that conception of democratic equality that we have developed since the Civil War. The current racial impact necessitates a change in the law, but as in many other situations, the racial factor simply brings into focus an institution that is unjust and irrational as applied to anybody.

The basic issue is whether categorical divestment of voting rights introduces an impermissible element of caste into the American political system. My argument is that when properly understood as a continuation of *infamia*, disenfranchisement for the commission of "infamous" crimes (an obviously suggestive term) or felonies should be regarded as unacceptable in the American constitutional system.

24. *Id.* amend. XV, § 1.

25. 418 U.S. 24 (1974).

26. *See id.* at 26–27.

27. *See id.* at 43, 55.

I. THE CONSTITUTIONAL CRITIQUE

There are so many constitutional arguments against the disenfranchisement of felons that one can only wonder at the survival of the practice. Here is a catalogue of reasons, any one of which would be sufficient to prohibit the practice:

A. Equal Protection of the Laws

In the California decision leading to the Supreme Court's upholding felon disenfranchisement in *Ramirez*, the state supreme court struck down the bar against allowing those convicted of "infamous crimes" to vote.²⁸ The court interpreted the "purity of the ballot box" rationale for the disqualification as directed to the risk of electoral fraud. In view of technological changes in recording votes, this disqualification came to appear unnecessary and therefore arbitrary and irrational relative to its supposed purpose. This is a straightforward argument under the Equal Protection Clause and would prevail, were it not for the arguably implicit exception in Section 2 of the same amendment. The California Supreme Court did not even notice this possibility of upholding felon disenfranchisement. Nonetheless, Justice Rehnquist, writing for a majority of six, circumvented the equal protection issue simply by citing the reference to the word "crime" in Section 2.²⁹

The majority's reliance on the text of the amendment hardly warrants much confidence. Justice Marshall's dissent pinpointed the fallacy:

[B]ecause Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by § 2 does not necessarily imply congressional approval of this disenfranchisement. By providing a special remedy for disenfranchisement of a particular class of voters in § 2, Congress did not approve all election discriminations to which the § 2 remedy was inapplicable, and such discriminations thus are not forever immunized from evolving standards of equal protection scrutiny.³⁰

For example, the text of Section 2 refers to male voters over the age of twenty-one. If all references in the text represented constitutionally legitimate exceptions from voting rights, it would be acceptable—in the absence

28. See *Ramirez v. Brown*, 507 P.2d 1345 (Cal. 1973), *rev'd sub nom. Richardson v. Ramirez*, 418 U.S. 24 (1974).

29. See *Ramirez*, 418 U.S. at 41–46.

30. *Id.* at 75–76 (Marshall, J., dissenting).

of the Nineteenth Amendment—to deny women the right to vote. Yet under current standards of equal protection analysis, attempting to justify the denial of the franchise to women by invoking the text of Section 2 would be laughed out of court. Surprisingly, there is no similar laughter attendant upon the parallel argument that the text of Section 2 warrants denial to citizens “who have fully paid their debt to society” of their fundamental right to vote.³¹

B. Fifteenth Amendment

The Fifteenth Amendment, adopted two years after the Fourteenth, explicitly prohibits the denial of voting rights on the basis of “previous condition of servitude.”³² Therefore, even if there were an argument in Section 2 of the Fourteenth Amendment to support felon disenfranchisement for crime, this argument should be seen as superseded by the prohibition in the later enacted amendment. “Servitude” seems to convey the same meaning in this context as it does in the Thirteenth Amendment, which prohibits “involuntary servitude” except as punishment for crime.³³ Joining the two phrases generates a plausible reading that the Fifteenth Amendment, on its face, prohibits depriving felons of their voting rights simply because they were subject to “involuntary servitude” as punishment for their crime.³⁴

C. Bill of Attainder

The strongest possible case in favor of felon disenfranchisement is that the commission of a felony reveals a fundamental flaw of character that properly disqualifies someone from voting. It is similar, as many disqualification statutes suggest, to being insane or feebleminded.³⁵ At first blush this seems like an extraordinary generalization, but because it is the best argument one can make for felon disenfranchisement, let us take the argument seriously.

31. *Id.* at 56 (Marshall, J., dissenting).

32. U.S. CONST. amend. XV, § 1.

33. *Id.* amend. XIII, § 1.

34. See Walter Matthews Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1218–33 (1970); Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721 (1973).

35. For statutes that disqualify potential jurors from jury service on the basis of soundness of mind, see, for example, ARIZ. REV. STAT. § 21-201(4) (West Supp. 1998); 705 ILL. COMP. STAT. ANN. 305/2(3) (West Supp. 1999); and TEX. GOV'T CODE ANN. § 62.102(4) (West 1998).

The problem is determining the inference that can be properly drawn from the fact that an individual has committed a felony some time in his or her life. Suppose the inference is that felons are not competent to drive and that therefore they should not receive driver's licenses. The inference would be patently unwarranted and therefore discriminatory against the category of those once convicted of a felony. The conclusion comes easily that the arbitrary classification would affront the Equal Protection Clause. More interestingly, it would violate the prohibition of bills of attainder,³⁶ as understood in John Ely's interpretation of the clause³⁷ and the decision in labor leader Archie Brown's successful attack on his being disqualified, by virtue of being a member of the Communist Party, from serving as the officer of a labor organization.³⁸ The vice in bill of attainder legislation is that it violates the separation of powers by a legislative determination that a particular person is guilty. Concluding that all Communists would be likely to call political strikes, the Court concluded, was an impermissible legislative intrusion in the process of applying general norms to a particular people.³⁹ The general norm was: Those who call political strikes should not be labor officials. Finding that all Communists were suspect as advocates of political strikes, the legislature, in effect, determined that Brown and other members of the party were guilty of political unreliability.

Finding that all felons are unlikely to be safe and competent drivers would qualify as the same kind of impermissible legislative inference. Denying someone a driver's license requires a particularized determination of incompetence. A wholesale judgment by the legislature that some act, such as conviction for a felony, constitutes a per se disqualification would appear just as defective as a judgment that all Communists were inherently suspect as labor union officials.

If the legislature may not make a wholesale judgment about who can qualify as a labor official or who may receive a driver's license, why should it be able to make a categorical judgment that felons are inherently unqualified to exercise the democratic franchise? The Bill of Attainder Clause comes into play, therefore, as an additional argument against the constitutionality of the current practice of disenfranchising felons.

One might have some doubts about this argument as a result of the impact of a conviction for a felony on qualifications for jury service. As an

36. Neither Congress nor the state legislatures may enact bills of attainder. See U.S. CONST. art. I, § 9, cl. 3 (Congress); *id.* art. I, § 10, cl. 1 (states).

37. See Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962).

38. See *United States v. Brown*, 381 U.S. 437 (1965).

39. See *id.* at 454-56.

example, the New York statute is typical in requiring that those who serve on juries be residents of the county, citizens of the country, at least eighteen years of age, competent in English, and, in addition, must "not have been convicted of a felony."⁴⁰ The disqualification of felons in this context seems almost reasonable, largely because jury service is about deciding whether other people shall be labeled felons or not. That one is a felon oneself arguably generates an implicit bias, and because other sources of bias result in automatic disqualification—e.g., being related to the victim or to the accused—it does not seem excessive to disqualify convicted felons as presumptively biased.

By analogy, one might argue, voting rights should be treated the same way. Since one of the primary tasks of elections is to determine policies toward crime and punishment, someone who has fallen prey to the system is likely to have too large a personal interest at stake to be neutral about the issues. Yet bias does not disqualify people from voting. Indeed voting is precisely about expressing biases, loyalties, commitments, and personal values. Excluding from the electorate those who have felt the sting of the criminal law obviously skews the politics of criminal justice toward one side of the debate.

The arguments against the disenfranchisement of felons line up in a convincing and powerful array. For legitimating the deprivation of voting rights, one finds only the textual reference in Section 2 of the Fourteenth Amendment. The latter should give way to the claims of constitutional reason. The reason of Section 2, it should be remembered, is historically tied to the aftermath of the Civil War. Like Section 3 (disqualifying rebels from holding office) and Section 4 (confederate debt cancelled) of the same amendment, this provision on calculating the basis for congressional representation was designed merely to address a problem posed by the war. It was not meant to provide lasting constitutional guidance.

The very fact that there are so many compelling arguments against felon disenfranchisement must make us wonder about the survival of the practice. When the legislatures and the courts ignore the claims of reason, there must be powerful interests and motives at stake.

II. THE DEEPER PROBLEM: CREATING A CASTE SYSTEM IN CRIMINAL JUSTICE

It is difficult to deny that the criminal law treats convicted felons as members of a special class. They are treated as inherently unreliable not

40. N.Y. JUD. LAW § 510 (McKinney 1999).

only for purposes of voting but also in giving sworn testimony at trial. Their prior convictions are admissible in order to undermine their credibility, the assumption being that felons are likely to be liars. The more serious burden on the class of felons is that they are subject to more severe penalties for committing the same crimes that others commit. Their prior convictions are admissible in order to enhance their penalties as "recidivists." The most Draconian enhancement of this type is life imprisonment for the commission of the third felony.

How could one possibly justify this system of using the criminal law to create a subordinate class of persons subject to differential treatment for their entire lives? Of course, one could always argue that these measures deter crime. The only problem is that there is no proof that they do, and even if they did, one might have qualms about creating a caste system as a means of deterrence. For those of us inclined to think in the idiom of retributive justice, the problem is more acute.

The way some people write about retributive justice, all that seems to matter is the imposition of punishment either as an end itself or as a means of expressing the outrage of the community. This strikes me as very odd. Punishment as an imperative of justice hardly makes sense if the program of punishment fails to include an opportunity for the offender's reintegration into society. There is no point to the metaphor of paying one's debt to society unless the serving of the punishment actually cancels out the fact of having committed the crime. The idea that you would pay the debt and be treated as a debtor (felon) forever verges on the macabre.

The challenge of recognizing that we implicitly endorse a caste system in criminal law is to reformulate our theories of punishment. The emphasis on reintegration into society should come front and center. Once we acknowledge the necessity of reintegration, we could hardly maintain the practice of disenfranchising felons. On the contrary, we should be encouraging inmates to begin thinking of themselves as useful members of society with all the attendant responsibilities. Having the responsibility to vote should be the minimal condition for inculcating the sense that felons too are citizens.