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Comment, The Ex-Convict's Right to Vote

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THE EX-CONVICT'S RIGHT TO VOTE

In recent years state laws limiting effective exercise of the franchise have been consistently invalidated by the United States Supreme Court.[1] Trends in penological theory have at the same time stressed the value of encouraging ex-convicts to assume the role of responsible citizens.[2] Countering the aims of both lines of development are state constitutional and statutory provisions disfranchising persons convicted of various classes of crime.[3] An example is article II, section 1 of the California Constitution which, after setting out residence and citizenship requirements, prescribes:

> No idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State.

The constitutionality of disfranchising persons convicted of an "infamous crime"[4] was challenged in the case of *Otsuka v. Hite*.[5] Infamous crimes had formerly been construed by the California Supreme Court to include all felonies,[6] but the court, in a 4-3 decision, redefined the term to include only "crimes involving moral corruption and dishonesty, thereby branding their perpetrator as a threat to the integrity of the elective process."[7] The court acknowledged that "the state must show it has a compelling interest in abridging the right [to vote], and that, in any event, such restrictions must be drawn with narrow specificity."[8] The court's recognition of equal protection limitations on disfranchisement and its implicit consideration of current penological theories are the virtues of the decision.

But the dissent noted an obvious shortcoming: "By what standard is the Registrar of Voters to determine whether one convicted of crime is

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[1] Reynolds v. Sims, 377 U.S. 533 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Louisiana v. United States, 380 U.S. 145 (1965); Harman v. Forssenius, 380 U.S. 528 (1965).

[2] RUBIN, THE LAW OF CRIMINAL CORRECTION 622 (1963); SUTHERLAND & CRESSEY, PRINCIPLES OF CRIMINOLOGY 590 (5th ed. 1955). See generally *A Symposium of Crime and Correction*, 23 LAW & CONTEMP. PROB. 585-783 (1962).

[3] In nearly every state persons convicted of certain classes of crimes are disqualified from voting. See, *e.g.*, Bruno v. Murdock, 406 S.W.2d 294 (Mo. 1966); MCGOVNEY, THE AMERICAN SUFFRAGE MEDLEY 53-54 (1949); RUBIN, *op. cit. supra* note 2.

[4] CAL. CONST. art. II, § 1.

[5] 64 Adv. Cal. 652, 51 Cal. Rptr. 284, 414 P.2d 412 (1966).

[6] Matter of Westenberg, 167 Cal. 309, 139 Pac. 674 (1914); Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (Dist. Ct. App. 1953); Stephens v. Toomey, 51 Cal. 2d 864, 338 P.2d 182 (1959).

[7] Otsuka v. Hite, 64 Adv. Cal. 652, 667, 51 Cal. Rptr. 284, 294, 414 P.2d 412, 422 (1966).

[8] *Id.* at 658, 51 Cal. Rptr. at 288, 414 P.2d at 416.

thereby branded as a 'threat to the integrity of the elective process'? Or whether the crime involved 'moral corruption and dishonesty'? For example, would murder qualify?"[9] The dissenting justices would have avoided these problems by continuing to restore the right to vote to an ex-convict only upon his obtaining a pardon.[10] Neither the majority nor dissenting justices suggested that the entire provision should have been declared unconstitutional—a conclusion which would have promoted more fully society's interest in the rehabilitation of criminals as well as avoiding numerous practical problems resulting from the decision.

Otsuka v. Hite raised for the first time as a central issue the construction of "infamous crime" as used in the California Constitution.[11] The plain-

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[9] *Id.* at 671, 51 Cal. Rptr. at 297, 414 P.2d at 425.

[10] *Id.* at 674, 51 Cal. Rptr. at 299, 414 P.2d at 427. There may be restoration of the right to vote to persons convicted of crime in California either by court order upon completion of probation under CAL. PEN. CODE § 1203.4 or, if a prison term was served, by executive pardon after completion of rehabilitation proceedings pursuant to CAL. PEN. CODE §§ 4852.01-.17.

Both opinions ignore problems which arise under the above procedures. Where a person is convicted of a crime in another state which is a felony in both California and the other state, the practice has been to deny him the right to vote in California unless he is granted a full pardon by the other state. A procedure by which the other state's governor restores the ex-convict to all civil rights was insufficient to restore his right to vote in California. Letter from Edward H. Gaylord, Assistant County Counsel, Los Angeles County, to Benjamin S. Hite, Registrar of Voters, March 9, 1966. Such a practice was based on the theory that the governor of another state was powerless to restore rights taken away by the California Constitution. Only if the governor of the other state expunged the conviction by means of a full pardon would the person convicted be able to vote in California. This practice is no longer followed. Now the registrar, in appraising whether or not a person would be a threat to the elective process within the spirit of *Otsuka*, may accept a certificate signed by the governor of another state restoring the rights of citizenship to an ex-convict as good evidence of his rehabilitation. Letter from Edward H. Gaylord, Assistant County Counsel, Los Angeles County to Benjamin S. Hite, Registrar of Voters, June 21, 1966.

Another problem with the administrative procedures for regaining the right to vote is the time involved in carrying them out. Under § 4852.03 of the Penal Code a notice of intention to file for a certificate of rehabilitation must be filed. Dating from that time a period of rehabilitation begins to run. The period is three years plus thirty days for each year of the maximum term prescribed for the crime for which the person was convicted regardless of the time for which he was actually sentenced. CAL. PEN. CODE § 4852.03. Thus, a person convicted of rape, for which the maximum term is fifty years, would have to wait over seven years following release from prison and parole before he could apply for such a certificate entitling him to be restored to his right to vote. CAL. PEN. CODE § 261. The federal procedures for an executive pardon to which plaintiffs in *Otsuka* would be subject take three to five years depending on the crime. 28 C.F.R. § 1.3 (1962).

[11] In Matter of Westenberg, 167 Cal. 309, 139 Pac. 674 (1914), the court stated: "Crimes are infamous either by reason of their punishment or by reason of their nature. In the first class fall all felonies. . . . At common law crimes which rendered the person doing them infamous were treason, felony, and the *crimen falsi*."

tiffs were convicted of violations of the Selective Service Act[12] during World War II.[13] These convictions were determined by the Los Angeles County Registrar of Voters to be convictions for infamous crimes which disqualified them from voting. They brought an action to compel their registration;[14] the superior court, and lower appellate court, denied relief to the plaintiffs finding that any felony described by a federal statute is an infamous crime, rendering a person convicted under the statute ineligible to vote in California. The California Supreme Court reversed, holding that the plaintiffs had not been convicted of an infamous crime.

The plaintiffs contended that the provision was unconstitutional on several grounds. First, they argued that the provision imposed further

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The relevance of using the definition of infamous crime found in *Westenberg* is doubtful. That case involved a question of jurisdiction in a prosecution for criminal libel. The court found that the crime, not being a felony, was not infamous by reason of its punishment and, not being included among the *crimen falsi*, was not infamous by reason of its nature. *Id.* at 319, 139 Pac. at 679. (The *crimen falsi* included offenses involving falsehood, particularly those which injuriously affected the administration of justice.) Definition of infamous crimes as crimes subject to an infamous punishment has relevance in a criminal prosecution where it is proper to consider the seriousness of punishment in light of the offense committed. In determining who is to be eligible to vote, however, seriousness of punishment for a person's crime has no apparent relation to his fitness.

In the second case construing the provision in question, Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (Dist. Ct. App. 1953), the court accepted the definition found in *Westenberg* of "infamous crime" as any crime subject to an infamous punishment. *Truchon* was concerned with voter qualification, but the decision rested on construction of the word "convicted" and not of the term "infamous crime."

The third case which is cited as authority for all felonies being within the definition of "infamous crime" is Stephens v. Toomey, 51 Cal. 2d 864, 338 P.2d 182 (1959). Without elaborating, the court in *Stephens* cited *Westenberg* and accepted the definition therein of an infamous crime. This third case demonstrated that California courts had, by their tacit acceptance, construed "infamous crime" in article II, section 1 of the California Constitution as a crime subject to an infamous punishment—a felony. Nevertheless the force of such judicial acceptance is diminished by the fact that such construction was not made an issue in either *Truchon* or *Stephens*.

12 Selective Service and Training Act of 1940, ch. 720, § 11, 54 Stat. 894.

13 Katsuki Otsuka, a Quaker, was classified as IA-O: a conscientious objector subject to service in the armed forces as a non-combatant. He felt, however, that by reason of his religious training and belief he could not perform military service of any kind, and that he should have been classified as 4-E: subject to work of national importance under civilian direction. The draft board refused to reclassify him, and he surrendered himself to the New York District Attorney. Plaintiff Abbott was also a conscientious objector but was classified by his draft board as 4-E. Having been called for work of national importance he complied; but he thereafter left the civilian public service camp to which he was assigned because it appeared to him that this camp was an integral part of the war and that he could not participate. Both men pleaded guilty to violations of the Selective Service Act and were convicted in federal court. Both were sentenced to the federal penitentiary where they served their terms and were duly released. Otsuka v. Hite, 64 Adv. Cal. 652, 655-56, 51 Cal. Rptr. 284, 287, 414 P.2d 412, 415 (1966).

14 CAL. ELECTIONS CODE § 350.

punishment on persons already convicted of crimes. Since plaintiffs were convicted and punished for a crime by a federal court, the power of California to impose additional punishment was questionable.[15] Second, they argued that article II, section 1 of the California Constitution violated the fourteenth amendment guarantees of due process and equal protection of law. They contended that the provision was overbroad and an unreasonable classification in its inclusion of all felonies as disqualifications, and overbroad in time, since it disqualifies a person from voting permanently. Third, plaintiffs urged that modern penological principles which stress rehabilitation of the criminal rather than punishment[16] are inconsistent with permanent disfranchisement.

The court rejected the first argument, interpreting the provision as a non-punitive disqualification. This interpretation is consistent with that of courts in other states with similar provisions.[17] The United States Supreme Court has also held that the denial of the right to vote is not the imposition of a penalty.[18]

The contention that the provision was overbroad in time since it permanently disqualifies persons included within its terms was also rejected by the court.[19] Because there are administrative procedures for regaining

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15 *Cf.* Trop v. Dulles, 356 U.S. 86 (1958). Dependent on the success of the argument that the disfranchisement constituted a punishment was the argument that it was a cruel and unusual punishment. Brief of Appellant, pp. 24-42, Otsuka v. Hite, 64 Adv. Cal. 652, 51 Cal. Rptr. 284, 414 P.2d 412 (1966). See, *e.g.*, Cort v. Herter, 187 F. Supp. 683 (D.D.C. 1960), *jurisdictional question postponed*, 365 U.S. 808 (1961) (expatriation for remaining outside the United States is cruel and unusual punishment). *But see, e.g.*, Matter of Coffey, 123 Cal. 522, 56 Pac. 448 (1899) (disbarment for conviction of extortion not cruel or unusual punishment).

16 See, *e.g.*, Abbott v. City of Los Angeles, 53 Cal. 2d 674, 3 Cal. Rptr. 185, 349 P.2d 974 (1960). The plaintiff in this case was one of the plaintiffs in *Otsuka*.

17 Application of Merino, 23 N.J. Misc. 159, 42 A.2d 469 (1945) (upholding a constitutional disqualification for persons "convicted of a crime"); Boyd v. Mills, 53 Kan. 594, 37 Pac. 15 (1894) (upholding a constitutional disqualification for persons "who [have] ever voluntarily borue arms against the government of the United States"); State *ex rel.* Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934) (dictum supporting voter disqualification for conviction); *Cf.* State *ex rel.* Barnett v. Sartorious, 351 Mo. 1237, 175 S.W.2d 787 (1943); Sheridan v. Gardner, 347 Mass. 8, 196 N.E.2d 303 (1964); State *ex rel.* Attorney General v. Irby, 190 Ark. 786, 81 S.W.2d 419 (1935); Shepherd v. Grimmett, 3 Idaho 403, 31 Pac. 793 (1892); Washington v. State, 75 Ala. 582 (1884). *Contra*, Huber v. Reily, 53 Pa. 112 (1866) (denying deserters the right to vote imposed a penalty and was unconstitutional).

18 Gray v. Sanders, 372 U.S. 368 (1963); Lassiter v. Board of Elections, 360 U.S. 45 (1959); Trop v. Dulles, 356 U.S. 86 (1958); Hawker v. New York, 170 U.S. 189 (1898); Davis v. Beason, 133 U.S. 333 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885).

19 64 Adv. Cal. at 660, 51 Cal. Rptr. at 290, 414 P.2d at 418. The convictions of the plaintiffs were over twenty years old. It was pointed out in the appellants' brief that they could live another forty or fifty years but they would never be able to vote. Brief for Appellant, p. 20, Otsuka v. Hite, *supra*.

the right to vote by court order after completing probation,[20] or by executive pardon following a prison term,[21] the court felt that the objection to permanent disfranchisement was invalid. Plaintiffs, having been convicted of federal crimes, had available to them procedures under federal law for regaining the right to vote by means of an executive pardon.[22]

In answer to the argument stressing modern penological theory and legislation directed toward rehabilitation of criminals, the court found that the aims of modern penology were satisfied by administrative procedures restoring the right to vote[23]—the same rationale used to justify disfranchisement for an indefinite period.

The court agreed with the contentions that the provision was overbroad in its inclusion of offenses and that the classification was unreasonable if held to include all felonies. Classifications must be reasonable in light of their purposes;[24] thus offenses which are disqualifying must be related to the ability to exercise the elective franchise. The court noted that many felonies, although serious crimes, do not threaten the "integrity of the elective process." Finding that violation of the Selective Service Act was among those felonies unrelated to the elective process and not involving "moral corruption and dishonesty," the court held that plaintiffs had not been convicted of infamous crimes and should not be disfranchised.

The history of the provision[25] demonstrates that infamous crime had

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20 CAL. PEN. CODE § 1203.4.

21 CAL. PEN. CODE §§ 4852.01-.17.

22 28 C.F.R. §§ 1.1-.9 (1962).

23 See note 10 *supra*.

24 Carrington v. Rash, 380 U.S. 89, 93 (1965).

25 The term "infamous crime" first appeared in our Constitution of 1849, which similarly declared in article II, section 5, that "No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector." "Infamous crime" was not further defined in the Constitution, but the first session of the Legislature soon filled the gap. Article II of "An Act to Regulate Elections," passed on March 23, 1850, dealt with the qualifications and disabilities of electors. Section 12 thereof was identical with the just-quoted provision of article II, section 5, of the Constitution of 1849; and section 14 declared, "A crime shall be deemed infamous which is punishable by death or by imprisonment in the state prison." (Comp. Laws of Cal. (1850-1853), ch. 140, p. 775.) For 22 years that definition of "infamous crime" remained on the statute books. In 1872, however, the election laws of 1850 and intervening years were superseded by the new Political Code. Section 1084 of that code restated the general disqualification that "No idiot or insane person, or person convicted of any infamous crime, is entitled to the privilege of an elector." But the statutory definition of "infamous crime" was not reenacted in the new code, nor was any substitute definition provided. Seven years later the adoption of the Constitution of 1879 further complicated matters. Article II, section 1, of the new Constitution repeated the now-familiar general language denying the right to vote to persons "convicted of any infamous crime." . . . 64 Adv. Cal. at 663, 51 Cal. Rptr. at 291, 414 P.2d at 419.

In 1960, California voters rejected a constitutional amendment which would have

always been equated with "any felony," a definition having simplicity of application as its only virtue. The *Otsuka* majority followed the principle of construction that where a provision of the California Constitution is capable of two constructions, "one of which would cause a conflict with the federal constitution, the other must be adopted."[26] The court brought the disqualification within the ambit of constitutionality by *redefining* an infamous crime to be "such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process."[27]

It is now clear that bona fide conscientious objectors who are convicted under the Selective Service Act of failure to report for induction are not convicted of an infamous crime.[28] What other crimes are infamous is left in question. The decision dictates only that "the inquiry must focus more precisely on the nature of the crime itself."[29] Uncertainty in the new definition has created serious practical problems for those charged with registration of voters and for prospective registrants.

Both the majority and the dissent in *Otsuka* anticipated that the decision would cause some confusion. A footnote in the majority opinion says,

> We perceive no real danger that, as intimated by defendant, registrars of voters throughout the state will be flooded by applications of ex-felons and burdened by a discretion to determine whether their crimes were of a nature to disfranchise them under the views here expressed. That issue remains ultimately a judicial one, and the Legislature has provided a special procedure for resolving it. (Elec. Code, § 350.) In any event, "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state." (*Carrington v. Rash* (1965). . . , 380 U.S. 89, 96).[30]

The California Elections Code permits persons who have been refused registration to bring an action in superior court to compel their registration.[31] Does the court intend that registrars should continue to refuse to register all former felons and force them to bring an action to show that their conviction would not make them a "threat to the integrity of the elective process"? Such interpretation is unreasonable. Some felonies are

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removed the prohibition of eligibility to vote from those convicted of infamous crimes. The voters were aware that persons convicted of felonies lost privileges as electors at that time and voted to retain the provisions as then construed. See Analysis by the Legislative Counsel of the State of California, Proposed Amendments to Constitution, Ballot Pamphlet 8 (1960).

26 64 Adv. Cal. at 663, 51 Cal. Rptr. at 291, 414 P.2d at 419.

27 *Id.* at 667, 51 Cal. Rptr. at 294, 414 P.2d at 422.

28 *Id.* at 671, 51 Cal. Rptr. at 297, 414 P.2d at 425.

29 *Id.* at 667, 51 Cal. Rptr. at 294, 414 P.2d at 422.

30 *Id.* at 667 n.13, 51 Cal. Rptr. at 294 n.13, 414 P.2d at 422 n.13.

31 CAL. ELECTIONS CODE § 350.

obviously irrelevant to one's capacity to vote.[32] The standard set by the court in *Otsuka* is a subjective one. If fully implemented it would demand an examination into each individual case. The decision makes it necessary for registrars of voters to take immediate action to change their present practices,[33] but even if registrars are able to set up an objective yardstick and instruct their deputies in its application, there will be no assurance of uniformity among the counties of the state. If the counties differ in their interpretations of the law, a disfranchised voter might argue that he is being denied equal protection of the laws.

Problems are raised for the registrant as well. First, in registering to vote, he is likely to be misled for he must sign an affidavit stating, "I am not disqualified to vote by reason of a felony conviction."[34] An uninformed ex-felon would assume that any felony conviction disqualifies a person from voting.[35] Second, Elections Code procedures do not provide the registrant with an efficient means of determining his eligibility to vote. Few people can afford the time and expense of litigation to determine their eligibility. And even the referral of "questionable" cases to the main office of the registrar is a complication most persons would rather avoid.[36] Thus,

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32 *E.g.*, seduction under promise of marriage (CAL. PEN. CODE § 268); failure to provide family support (CAL. PEN. CODE § 270); wife-beating (CAL. PEN. CODE § 273d); second-offense indecent exposure (CAL. PEN. CODE § 311); and conspiracy to commit a misdemeanor (CAL. PEN. CODE § 182(1)).

33 In an attempt to find a workable test to determine who is to be registered, the Los Angeles County Registrar of Voters is compiling a list of all felonies. Upon completion the list will be submitted to the county counsel, who will advise the registrar which felonies under the holding in *Otsuka v. Hite* are, in his opinion, grounds for disfranchisement. Interview with Mr. James Allison, Office of Los Angeles County Registrar of Voters, in Los Angeles, August 16, 1966.

34 CAL. ELECTIONS CODE §§ 310, 321.

35 In the opinion of the county counsel, the requirement that a registrant sign an affidavit indicating he is not disqualified to vote by reason of a felony conviction can be applied consistently with the holding in *Otsuka*. The affidavit merely means that "I am not disqualified to vote by reason of a felony conviction for a crime which makes me a threat to the integrity of the elective process." Persons determining for themselves, based on instructions given to the deputies, that they are not disqualified can sign the affidavit in good faith. Interview with Mr. Edward H. Gaylord, Assistant County Counsel, Los Angeles County, in Los Angeles, August 16, 1966.

The irony of allowing registrants to determine for themselves whether or not they are eligible to vote is that the same people who are thought "dishonest" or "morally corrupt" and therefore a "threat to the elective process" are made judges of their own capabilities as voters. Establishment of more concrete and objective standards for registrars is further necessitated by CAL. ELECTIONS CODE § 389 requiring the "affidavits of registration of all voters . . . convicted of an infamous crime . . . ." to be cancelled yearly. There is an annual review of persons registered at which time the registration of those convicted of infamous crimes is cancelled. This review is carried on in the clerk's or registrar's office and cannot rely on the individual recognizance of the registrant.

36 Interview, *supra* note 32. Mr. Allison acknowledges that persons who have been

present law is inconsistent with the goal of giving potential voters the fullest opportunity to register.

Disqualification of persons convicted of felonies is a remnant of the period in which only the propertied male members of society were allowed to vote.[37] When fewer than 10%[38] of the population were granted the privilege,[39] disqualification of criminals did not appear unreasonable. As the franchise has been consistently extended, however, disqualifications have become increasingly discriminatory and subject to challenge on equal protection grounds, for increased participation in popular government has changed the character of voting from privilege to right and has also decreased any supposed danger to the elective process from relatively small groups.

Further, the California Supreme Court has acknowledged that rehabilitation is a paramount consideration in the treatment of criminals,[40] and effective rehabilitation seems to require the termination of unnecessary punitive disabilities. Ex-convict status is itself a severe hindrance to an individual's readjustment to society and needs to be offset by the maximum restoration of civil rights consistent with public safety.[41] If an individual is permitted and encouraged to register his preferences in selection of political leaders and public policies, his identification with persons who seek

convicted and have served time for a crime would rather forego registration than become involved with an inquiry to "the authorities." There are some inquiries, however. On the day of the interview Mr. Allison received a call from a person who had been convicted of auto theft and wished to register. Mr. Allison determined on the spot that this was not an "infamous crime" under the holding in *Otsuka* and authorized the person's registration. *Ibid.* In a subsequent interview on November 23, 1966, Mr. Allison stated that he had received approximately 50 such telephone calls since *Otsuka* was decided.

37 McGOVNEY, *op. cit. supra* note 3 at 1-17.

38 See STOREY, OUR UNALIENABLE RIGHTS 47 (1965), where it is estimated that between two and ten per cent of the colonial population voted.

39 "To the Founding Fathers, the suffrage was not at all a natural right but rather was a privilege granted the citizen by the grace of the sovereign, namely the state." *Ibid.*

40 Abbott v. City of Los Angeles, 53 Cal. 2d 674, 687, 3 Cal. Rptr. 158, 167, 349 P.2d 974, 983 (1960). *Cf.* American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950).

41 RUBIN, *op. cit. supra* note 2, at 638-44. In Colorado, Idaho, Oklahoma, Indiana, Maine, Michigan, and Vermont convicts are only disfranchised during the period of confinement. McGOVNEY, *op. cit. supra* note 3 at 55. In nearly every jurisdiction convicts may not vote during imprisonment. It is not certain whether the motive for this is protection of society or part of the penal process designed to remind the criminal of the importance of his civil rights. It has been suggested that disfranchisement during confinement ought to be done away with as a step toward eliminating the lack of contact with the outside world which is "destructive of morale and personal confidence." RUBIN, *op. cit. supra* note 2 at 622. After *Otsuka*, the only impediment to registration of a convict during imprisonment would seem to be a lack of registrars in the prison.

to attain personal objectives in an orderly and peaceful manner is likely to be increased and his frustrations diminished.[42]

In California there had been only one judicially recognized meaning for the term "infamous crime," but the court formulated another, so that there were two "possible meanings," and then chose the meaning which made the provision constitutional. The principle of construction that statutes should be upheld by interpreting them in a manner consistent with the federal constitution perhaps should not be applied where redefinition by the court cannot furnish guidelines for future decisions. Indeed, the meaning selected by the court to uphold the provision is itself not unlike statutes which have been held "void for vagueness."[43] Although statutes have been voided for vagueness most often where they have limited freedom of speech, the same reasoning would seem applicable to ambiguous attempts to limit the right to vote. In the free speech cases the courts could have attributed constitutional meanings to restrictive statutes but instead chose to remove any possibility of improper application. Desirable conduct, whether it is voting or other forms of expression of one's opinions, is deterred by a vague law. On the other hand, invalidation of the provision on equal protection grounds would have required a more immediate and thorough inquiry by the legislature into the relationship between past criminal activity and the franchise. This approach seems preferable in that it would have avoided the problems of decentralized administrative interpretation and deterrence of prospective registrants through vagueness created by *Otsuka*'s attempt to supply a constitutional meaning.

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42 *Ibid.*; CALDWELL, CRIMINOLOGY 670 (2d ed. 1965); MCGOVNEY, *op. cit. supra* note 3 at 53-54.

43 *E.g.*, Winters v. New York, 333 U.S. 507 (1948); In re Porterfield, 28 Cal. 2d 91, 168 P.2d 706 (1946); Katzev v. Los Angeles, 52 Cal. 2d 360, 341 P.2d 390 (1960). *Cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940). The statutes involved in the free speech cases were penal in nature. Civil statutes have been also invalidated on findings that they were uncertain. Seaboard Acc. Corp. v. Shay, 214 Cal. 361, 5 P.2d 882 (1931); Small v. American Sugar Refining Co., 267 U.S. 233 (1925); Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948); Bess v. Park, 144 Cal. App. 2d 798, 301 P.2d 978 (Dist. Ct. App. 1956).

The *Otsuka* court acknowledged that a voting qualification must adhere to the dictates of the fourteenth amendment's equal protection clause. Although the court found that article II, § 1 is not a penalty, it did not deny that disfranchisement is similar to penal laws in its effect on a person's rights. The United States Supreme Court and the California Supreme Court have made it clear that they recognize the importance of the right to vote and are "zealous" to protect it. *E.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1965); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Harman v. Forssenius, 380 U.S. 528 (1965); Ex Parte Yarbrough, 110 U.S. 651 (1884); Talley v. California, 362 U.S. 60 (1959); Fort v. Civil Service Commission, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385 (1964); Communist Party v. Peek, 20 Cal. 2d 536, 127 P.2d 889 (1942); Britton v. Board of Election, 129 Cal. 337, 61 Pac. 115 (1900); Spier v. Baker, 120 Cal. 370, 52 Pac. 34 (1922). If the right to vote is to be treated with particular care, it seems that the judicial intolerance of questionable penal statutes based on the importance of their sanctions ought to be applied to unclear voting disqualifications.

Since the court did not so act but instead redefined the provision, those problems wait final solution by constitutional revision, statutory changes by the legislature, or further court action.[44]

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[44] The Constitution Revision Commission, presently involved in a major overhaul of the California Constitution, might undertake clarification and revision of voting disqualifications of ex-convicts. The most progressive revision would delete all disfranchising provisions applicable to ex-convicts. However, there is a stumbling block in the form of public approval necessary to adopt the revision. In order to facilitate a major revision it is desirable to include as much revision as possible in a proposition presented to the voters. The commission would not be anxious to include changes which are not politically efficacious, thereby jeopardizing the whole revision.

To minimize opposition to a revision it might be necessary to first enact legislation aimed at persons convicted of specific crimes. This would be done under article XX, § 11 which directs the legislature to make laws to exclude from the right of suffrage persons convicted of "high crimes."

Legislative action is needed even if constitutional revision does result, for it will be 1968 before the next opportunity to submit the revision to the voters. The need for clarification is present. Decision by the registrars of each county as to which crimes are to be the basis of disfranchisement gives rise to equal protection problems. Besides the need for statewide uniformity, the difficulties resulting from vague laws are present. Prospective registrants will be deterred from attempting to register and persons will be denied registration on the basis of questionable administrative decisions. That there are procedures for compelling registration wrongfully denied does not obviate the evils of a vague law.

An alternative to legislation might be an attorney general's opinion. Such an opinion does not have the force of a law or decision but is a point of reference for administrative officials. See CAL. GOVT. CODE § 12519.