ELECTIONS—CALIFORNIA CONSTITUTIONAL PROVISION PROHIBITING PERSONS CONVICTED OF INFAMOUS CRIMES FROM EXERCISING VOTING PRIVILEGES HELD INAPPLICABLE TO CONSCIENTIOUS OBJECTORS CONVICTED FOR VIOLATION OF FEDERAL SELECTIVE SERVICE ACT. *Otsuka v. Hite* (Cal. 1966).

Plaintiffs Otsuka and Abbott brought suit against the Los Angeles County Registrar of Voters to compel their registration.[1] The reason for defendant's denial of the plaintiffs' affidavits of registration was plaintiffs' conviction more than twenty years ago[2] for violating the federal Selective Training and Service Act of 1940.[3] Defendant's action was in accordance with the California constitutional provision prohibiting the exercise of electoral privileges by one convicted of an infamous crime.[4] The trial court found that each plaintiff had acted pursuant to his own personal objection to any form of war and thus was a bona fide conscientious objector. Nevertheless, as a matter of law, the plaintiffs were convicted felons, and thus ineligible to vote.

The Second District Court of Appeal affirmed,[5] and plaintiffs appealed to the California Supreme Court, contending that their crimes were not "infamous" within the meaning of article II, section 1 of the California Constitution. *Held*, reversed: To preserve its constitutionality,[6] the disfranchising provision must be limited to crimes involving

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1 Plaintiffs brought their action pursuant to section 350 of the California Elections Code, which provides the following:

> If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to compel his registration. In an action under this section, as many persons may join as plaintiffs as have causes of action.

2 Plaintiff Otsuka was sentenced for a term of three years, which he served; plaintiff Abbott served two years in the penitentiary.

3 Ch. 720, § 11, 54 Stat. 885. Violators of this provision were punished "by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

4 CAL. CONST. art. II, § 1. In relevant part the provision provides that:

> Every native citizen of the United States of America . . . shall be entitled to vote at all elections which are now or may hereafter be authorized by law . . . provided . . . no alien ineligible to citizenship, 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.* . . . (Emphasis added.)

5 44 Cal. Rptr. 251 (1965).

6 In this case, the California Supreme Court did not explicitly indicate the particular federal constitutional provisions involved [art. I, §§ 2, 4]. However, the court did give full discussion to constitutional problems arising from the interpretation given article II, section 1 of the California Constitution by the District Court of Appeal. Among these problems was: "[T]he fact that a state is dealing with a distinct class and treats the members of the class equally [under the Equal Protection Clause of the

moral corruption and dishonesty which, presumably, would deem their perpetrator a threat to the integrity of the elective process. *Otsuka v. Hite,* 64 Adv. Cal. 652, 414 P.2d 412, 51 Cal. Rptr. 284 (1966).

The *Otsuka* decision imparts a new interpretation of "infamous crime" within the context of the voting qualification of the California constitution. The initial California case defining "infamous crime" within the voting context was *Truchon v. Toomey.*[7] In *Truchon,* the District Court of Appeal cited *In the Matter of Westenberg,*[8] a habeas corpus proceeding held to determine whether the petitioner had been convicted of an "infamous crime" necessitating indictment by a grand jury.[9] The *Westenberg* court stated:

> Crimes are infamous either by reason of their punishment or by reason of their nature. In the first class fall all felonies, as the punishment therefor is imprisonment in the state prison. . . . At common law, crimes which rendered the person doing them infamous were treason, felony, and the *crimen falsi,* the latter embracing not only offenses, involving falsehood, but offenses injuriously affecting the administration of justice. . . .[10]

The issues in *Truchon* presented a problem similar to the one in *Otsuka,* namely, whether the plaintiff was convicted of an infamous crime within the meaning of the constitutional provision. Although more concerned with the word "convicted"[11] than with the phrase "infamous crime," *Truchon* did hold that under article II, section 1 of the California constitution, a felony is an infamous crime.[12] The California Supreme Court cited *Truchon* with approval in *Stephens*

14th Amendment] does not end the judicial inquiry. 'The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . . .'" Otsuka v. Hite, 64 Adv. Cal. 652, 661, 414 P.2d 412, 418, 51 Cal. Rptr. 284, 290 (1966) (citing and quoting from McLaughlin v. Florida, 379 U.S. 184, 191 (1964)). See also notes 21 and 22 *infra.* In effect, the *Otsuka* court felt that it was unnecessary to decide the case on a constitutional basis.

7 116 Cal. App. 2d 736, 254 P.2d 638 (1953).

8 167 Cal. 309, 139 Pac. 674 (1914).

9 CAL. CONST. art. I, § 8 refers to offenses which are required to be prosecuted by indictment. The *Westenberg* court stated that these offenses are capital or otherwise infamous crimes. *Id.* at 319, 139 Pac. at 679.

10 167 Cal. at 319-20, 139 Pac. at 679; see generally 17 CAL. JUR. 2d *Elections* § 14; PERKINS, CRIMINAL LAW 14 (1957); 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 31 (12th ed. 1957).

11 116 Cal. App. 2d at 738, 254 P.2d at 639; see Annot., 36 A.L.R.2d 1238 (1954); see generally 25 AM. JUR. 2d *Elections* § 94 (1966); Holland, *"Conviction" Defined,* 40 CAL. S.B.J. 36 (1965); 27 So. CAL. L. REV. 327 (1954).

12 116 Cal. App. 2d at 738, 254 P.2d at 639.

v. Toomey,[13] thus giving impetus to the definition of infamous crime as "any felony" for purposes of disfranchisement.[14]

Dissatisfied with the syllogism utilized by the District Court of Appeal to resolve the question of whether plaintiffs' crimes were infamous,[15] the *Otsuka* court held that state-imposed restrictions on the right to vote are valid only if there is a showing of a compelling state interest in abridging such right. Furthermore, such restrictions must be drawn with narrow specificity and be germane to one's right to vote.[16]

Decisions from several jurisdictions have indicated that the "compelling state interest" is to preserve the integrity of the ballot box.[17] The widespread assumption that one convicted of an infamous crime was morally corrupt at the time of commission gives rise to a further assumption that he may still be morally corrupt, and hence, may casually barter his ballot. This compelling state interest of denying the franchise to one convicted of an infamous crime is manifested in most state constitutions.[18]

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13 51 Cal. 2d 864, 338 P.2d 182 (1959).

14 *Id.* at 869, 338 P.2d at 184, where the court states: "Robbery of the first degree is *punishable by imprisonment in state prison and is an infamous crime.*" (Emphasis added.)

15 64 Adv. Cal. at 661, 414 P.2d at 418, 51 Cal. Rptr. at 290. The District Court of Appeal syllogism was: The state constitution disqualifies from voting those who have been convicted of infamous crimes. CAL. CONST. art. II, § 1. Conviction of any felony is a conviction of an infamous crime. Truchon v. Toomey, 116 Cal. App. 2d 736, 738, 254 P.2d 638, 639 (1953). Plaintiffs have been convicted of a felony. See notes 2 and 3 *supra*; 18 U.S.C. § 1 (1950); see also *In re* Claasen, 140 U.S. 200, 205 (1891); Mackin v. United States, 117 U.S. 348, 352 (1886); Falconi v. United States, 280 Fed. 766, 767 (6th Cir. 1922). Therefore, plaintiffs are disqualified from the elective process.

16 64 Adv. Cal. at 661, 414 P.2d at 418, 51 Cal. Rptr. at 290; *accord*, Fort. v. Civil Service Commission, 61 Cal. 2d 331, 337, 392 P.2d 385, 389, 38 Cal. Rptr. 625, 629 (1964); see Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

17 *E.g.*, Washington v. State, 75 Ala. 582 (1884); see State *ex rel.* Barrett v. Sartorious, 351 Mo. 1237, 175 S.W.2d 787 (1943); Application of Marino, 23 N.J. Misc. 159, 42 A.2d 469 (1945); State *ex rel.* Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934); 29 C.J.S. *Elections* § 33 (1965).

18 Forty-two state constitutions explicitly provide for disfranchisement in their constitutions of persons convicted of either infamous crimes, felonies, certain specified crimes, or a combination of the three. The various constitutional phrases and the states which employ them are listed below:

(a) Fourteen states use the phrase "convicted of felony": Alaska, Ark., Conn., Del., Fla., Hawaii, Kan., La., Mo., Mont., N.C., Okla., Ore., and Tex.
(b) Ten states employ "convicted of felony" and certain specified crimes: Ariz., Ky., Minn., Neb., Nev., N.D., S.D., Va., W.Va., and Wis.
(c) Six states prefer usage of the phrase "convicted of an infamous crime": Ill., Ind., Iowa, Tenn., Wash., and Wyo.
(d) Six states make only certain crimes the basis for disfranchisement: Ga., Miss., N.H., N.J., S.C., and Utah.
(e) Five states use "convicted of an infamous crime" in conjunction with certain specified crimes: Cal., Md., N.Y., Ohio, and R.I.

It is of particular importance that deprivation of one's electoral right be determined with narrow specificity, not only with respect to the plaintiffs or others convicted of felonies, but also to persons excluded from the franchise because of other constitutional disqualifying provisions such as non-payment of poll taxes[19] or lack of literacy.[20] The problem with the provision confronting the *Otsuka* court is that to disfranchise all felons would mean the exclusion of many whose crimes bear no relation to preserving the integrity of the ballot box.[21] Hence, the *Otsuka* court concluded that "no reasonable relation is apparent between . . . [the result of the lower court] and the purpose of protecting the integrity of the elective process."[22] Thus, the California Supreme Court met the syllogism of the lower court and effectively limited the definition of "infamous crimes" to those offenses which threaten the purity of the ballot box.

Justice Burke, writing for the dissent, posed two provocative questions: (1) What guide lines should a registrar of voters follow in determining whether a specified crime is within the definition of "infamous crime" as set forth by the majority?[23] and (2) should not a plaintiff exhaust his administrative remedies before instituting an action of this type?[24]

With respect to the first question raised by the dissent, the majority stated that the problem of "guide lines" is for the court to resolve under the procedure provided by section 350 of the California Elec-

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(f) Two states use "infamous crime" and "felony" and certain specified crimes: Ala. and Idaho.
(g) New Mexico is the only state to use both phrases, *i.e.*, "infamous crime" and "felony," without reference to certain specified crimes.
(h) The following states place no voter restrictions in their constitutions dealing with past criminality: Colo., Me., Mass., Mich., Pa., and Vt.

19 *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); see generally, Annot., 139 A.L.R. 561 (1942).

20 *E.g.*, Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); see also Katzenbach v. Morgan, 384 U.S. 641 (1966).

21 64 Adv. Cal. at 661, 414 P.2d at 418, 51 Cal. Rptr. at 290, where the court indicates that "since conspiracy to commit a misdemeanor is itself a felony (Pen. Code, § 182, subd. 1), disfranchisement would automatically follow from conviction of conspiracy to operate a motor vehicle without a muffler (Veh. Code § 27150) or to violate any other of the myriads of lesser misdemeanor statutes on the books. . . ."

22 *Id.* at 661, 414 P.2d at 418, 51 Cal. Rptr. at 290; *but see* S.C. CONST. art. 2, § 6:

> The following persons are disqualified from being registered or voting:
> First, Persons convicted of . . . wife-beating . . . fornication, sodomy, incest . . . miscegenation . . . .

It would appear that the California court would consider that these bear no reasonable relation to the elective process. 64 Adv. Cal. at 661, 414 P.2d at 418, 51 Cal. Rptr. at 290.

23 64 Adv. Cal. at 667, 414 P.2d at 425, 51 Cal. Rptr. at 297.

24 *Id.* at 673, 414 P.2d at 426, 51 Cal. Rptr. at 298.

tions Code.[25] The court may view section 350 together with section 310 of the California Elections Code, which reads in part: "The affidavit of registration shall show . . . (h) that the affiant is not disqualified to vote by reason of a felony conviction. . . ."[26] Following the cancellation of his affidavit of registration,[27] it is incumbent upon the affiant to demonstrate that he should not be disfranchised solely because of a prior felony conviction. In essence, he must establish to the satisfaction of the registrar that the conviction was not for a crime that involved moral corruption or dishonesty.[28] If the affiant fails to show that his felony conviction did not involve moral turpitude, he would be relegated to filing an "action in the superior court to compel his registration," pursuant to section 350 of the California Elections Code.[29]

The answer to the second question posed by the dissent, dealing with the exhaustion of administrative remedies by plaintiffs, includes reference to California Penal Code sections 1203.4[30] and 4852.01 through 4852.17[31] in conjunction with section 4853.[32] In compliance

25 *Id.* at 667 n.13, 414 P.2d at 422 n.13, 51 Cal. Rptr. at 294 n.13; see statute cited note 1 *supra.*

26 The other portion of this section deals with other voter qualifications, *i.e.*, residence, citizenship, and ability to read the Constitution in the English language.

27 CAL. ELEC. CODE § 389.

> The county clerk shall, in the first week of September in each year, examine the records of the courts having jurisdiction in case of infamous crimes and the embezzlement or misappropriation of public money, and shall cancel the affidavits of registration of all voters who have been finally convicted of an infamous crime or of the embezzlement or misappropriation of public money.

28 64 Adv. Cal. at 655, 414 P.2d at 414, 51 Cal. Rptr. at 286; see Letter From the Office of Harold W. Kennedy, Los Angeles County Counsel, to Benjamin S. Hite, Registrar of Voters, Los Angeles, May 31, 1966, p. 3.

29 Statute cited note 1 *supra*; 64 Adv. Cal. at 667 n.13, 414 P.2d at 426 n.13, 51 Cal. Rptr. at 294 n.13. In cases arising after Otsuka, the superior court must "determine whether the elements of the crime are such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process. . . ." 64 Adv. Cal. at 667, 414 P.2d at 426, 51 Cal. Rptr. at 294.

30 CAL. PEN. CODE § 1203.4.

> Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. . . .

31 These sections provide a "Procedure For Restoration of Rights and Application for Pardon." Section 4852.17 states in part:

> Whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, *the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including but not limited to: (1) The right to vote* . . . . (Emphasis added.)

32 CAL. PEN. CODE § 4853.

with section 1203.4, a felon may be restored to voter eligibility upon satisfactory completion of probation.[33] Likewise, if sections 4852.01 through 4852.17 are employed, one may regain his elective status upon completion of rehabilitation proceedings.[34] While recognizing the availability of statutory or administrative processes as a means of restoring one to his full rights of citizenship,[35] the *Otsuka* majority declared that:

> [T]his procedural deficiency [failure to exhaust administrative procedure] should not bar plaintiffs from challenging the constitutionality of the underlying classification: i.e., if in the first place it was unconstitutional to deprive them of their right to vote on the ground here in issue, it should be immaterial that they did not thereafter apply for restoration of that right by act of executive clemency.[36]

By redefining "infamous crime" in terms of a "compelling state interest" to preserve ballot box integrity, the California Supreme Court has declared that not all felonies are crimes of infamy. Such redefinition has the effect of gauging the infamy of a crime by its nature rather than by its punishment.[37] Although still a definite minority,[38] this redefinition of "infamous crime" would seem to produce a better result.[39] Unfortunately, the criterion of infamy as presented by this court requires further clarification. It would seem that either a judicial or legislative specification of the various crimes meeting the *Otsuka* definition of "infamous" is in order.

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> In all cases in which a full pardon has been granted by the Governor of this State or will hereafter be granted by said Governor to a person convicted of an offense to which said pardon applies, it shall operate to restore to such convicted person, all the rights, privileges, and franchises of which he has been deprived in consequence of said conviction or by any reason of any matter involved therein . . . .

33 Statute cited note 30 *supra*; Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (1953); see also Stephens v. Toomey, 51 Cal. 2d 864, 338 P.2d 182 (1959).

34 Statutes cited notes 31 and 32 *supra*; 64 Adv. Cal. at 673, 414 P.2d at 426, 51 Cal. Rptr. at 298.

35 64 Adv. Cal. at 661, 414 P.2d at 418, 51 Cal. Rptr. at 290.

36 *Ibid.* The *Otsuka* court stated that "it was *unconstitutional* to deprive [plaintiffs] . . . of their right to vote . . . ." (Emphasis added.) It should be reiterated that, although there were constitutional problems, the court felt that a redefinition of "infamous crime," made in light of the purpose of article II, section 1 of the California Constitution, would eliminate the need to decide the case on constitutional grounds. See note 6 *supra*.

37 *Contra*, In the Matter of Westenberg, 167 Cal. 309, 319, 139 Pac. 674, 679.

38 PERKINS, CRIMINAL LAW 21 (1957).

39 *Ibid.*