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# Role of Common Law Concepts in Modern Criminal Jurisprudence (A Symposium)--II Infamy and the Officeholder, The

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# THE ROLE OF COMMON LAW CONCEPTS IN MODERN CRIMINAL JURISPRUDENCE (A SYMPOSIUM)

## II. *Infamy and the Officeholder*

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When is a person qualified to hold public office? Oftentimes, considerations of ability, experience, honesty, and temperament are involved. Certainly, a majority of the votes is a prime requisite. Most of the statutes regulating office holding, however, are agreed on at least one point: that persons convicted of an *infamous* crime are not eligible to hold public office. But here the agreement stops, for questions concerning infamous crimes, the effect of convictions in other jurisdictions, the effect of a jury verdict and subsequent appeal, the applicability of statutes, which may or may not be exclusive, defining infamous crimes, are indeed controversial.

Specifically, this comment is concerned with whether a person who has been convicted of income tax evasion in a jurisdiction foreign to the one in which he holds public office must forfeit that office. The highest courts of Colorado[1] and Illinois[2] have given opposite answers to this question. More broadly, we are concerned with the test of infamy, how this test of an officeholder's qualifications came about, and some suggestions for a new concept of infamy to meet the needs of a modern society.

The determination by courts and legislatures of what constitutes an infamous crime has been largely made upon the basis of two tests. In the first, the *nature of the offense* is examined, while, in the second, the *punishment which may be imposed* is considered the dominant factor. Each test was founded upon sound reason and well-ordered thought in its inception, but each has been twisted to fit situations to which it is patently unsuited.

The early view of infamy, under Roman civil law and the English common law, considered the nature of the particular offense. Thus, the conviction for certain crimes evidencing a disregard for law, order and truth resulted in the imposition of a penalty in addition to the ordinary fine or imprisonment. This penalty disqualified the offender from testifying as a witness under oath, on the theory that he probably would not honor that oath. The test applied was whether the crime showed such depravity in its perpetration, or such a disposition to pervert public justice in the courts, as to create a presumption against the offender's truthfulness under oath.[3] This test was applied to determine whether one convicted of petit larceny, a felony at that time, was capable of testifying to the validity of a testamentary instrument.[4] It became generally accepted in the United States as the determinant of whether or not a particular crime was infamous during the early 1800's.[5]

In contrast to the original test of the *nature of the crime*, at the present time the controlling factor seems to be the *nature of the punishment* which may be imposed. This view is the result of a decision of the United States Supreme Court in a case involving the conviction and imprisonment of a person for fifteen years at hard labor without an indictment by a grand jury.[6] The fifth amendment requires that no person shall be prosecuted for a capital or otherwise *infamous* crime unless first indicted by a grand jury.[7] The prevailing definition of infamy was considered by the court, but because the crime for which the sentence was imposed, (possession with intent to sell a security closely resembling those of the United States government) was not within this definition, it was rejected. The deprivation of freedom for such an extended period undoubtedly influenced the court in its decision.

[1] People v. Enlow, 135 Col. 249, 310 P.2d 539 (1957).

[2] People v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168 (1958).

[3] Smith v. State, 129 Ala. 89, 29 So. 699 (1901). This court defined infamous according to the common law in spite of a statutory modification by the legislature.

[4] Pendock v. Mackinder, Willes, 665, 95 Eng. Rep. 662 (K.B. 1755).

[5] Two general classes of cases arose concerning infamy. These were those in which the ability to bear witness was involved, Commonwealth v. Schambers, 110 Pa. Super. Ct. 61, 167 Atl. 645 (1933); Smith v. State, 129 Ala. 89, 29 So. 699 (1901); State v. Bixler, 62 Md. 354 (1884); Little v. Gibson 39 N.H. 505 (1859); Commonwealth v. Dame, 62 Mass. 8 (Cush.) 384 (1851); and those involving the necessity for an indictment when prosecuting an "infamous crime," King v. State, 17 Fla. 183 (1879); United States v. Block, 24 Fed. Cas. 1174, No. 14,609 (D.C. Ore. 1877); State v. Keyes, 8 Vt. 57 (1836).

[6] *Ex parte* Wilson, 114 U.S. 417 (1885).

[7] U. S. CONST. amend. V.

The court applied a new test, the punishment test, as determinative of the infamous character, and granted the requested writ. This test, though probably intended to apply only to cases involving incarceration for long periods, has been extended by the federal and state courts until the common law test has lost nearly all of its former significance.[8]

While conviction of an infamous crime has been recognized by the several states as a ground for removal from, and disqualification from attaining, public office,[9] the real problem arises when attempts are made to determine which crimes shall be deemed infamous.[10] Underlying the restrictions imposed upon public officials as a result of a conviction for an infamous crime is a general public policy against placing trust and confidence in one who has been convicted of a serious crime. The punishment for crimes of a serious nature is usually one year or more, the equivalent of the sentence for a felony, and so some states have gone so far in adopting the punishment test as to make all felonies infamous by statute.[11] The federal courts have adopted this rule also, and conviction of a felony in a federal court today will result in the convicted party suffering the attendant disqualifications.[12] Not all of the states classify every felony as infamous, however. For instance, some states, of which Colorado and Illinois are examples, specifically enumerate the crimes which are to be so considered.[13] These statutes appear to be attempts at combining the common law "nature of the crime test" and the more recent "punishment test."[14]

In the interpretations of their respective statutes regarding infamous crimes the courts of Colorado and Illinois have reached divergent views. In the Colorado case of *People v. Enlow*,[15] it was held that a county officer who had been found guilty of income tax evasion by a federal court was not guilty of an "infamous crime." Because of the fact that the Colorado statute enumerated the specific offenses considered to be infamous,[16] the court construed it to be definitive and exclusive and to preclude the inclusion by the court of any offense not so enumerated. The laws of Colorado, it was held, must determine whether the offense is an infamous one resulting in disqualification from public office. Since income tax evasion was not

[8] The various courts have used the punishment test in divorce proceedings, Hull v. Donze, 164 La. 199, 113 So. 816 (1927), controversies over the admission of evidence, State v. Bezemer, 169 Wash. 559, 14 P.2d 460 (1932), the right to remove from office, People v. Kipley, 171 Ill. 44, 49 N.E. 229 (1897), and in cases involving the necessity of an indictment, United States v. Moreland, 258 U.S. 433 (1922); *Ex parte* Wilson, 114 U.S. 417 (1885); *Ex parte* Brede, 279 Fed. 147 (E. D. N. Y. 1922); Garnsey v. State, 4 Okla. Crim. Rep. 547, 112 Pac. 24 (1910); People v. Russell, 245 Ill. 268, 91 N.E. 1075 (1910); Butler v. Wentworth, 84 Me. 25, 24 Atl. 456 (1891); Territory v. Blomberg, 2 Ariz. 204, 11 Pac. 671 (1886).

[9] The reader will want to ascertain whether the state in which he is interested uses infamy as a test of disqualification for holding of public office. Illinois, for example, has a statue making all persons who have been convicted of specifically enumerated "infamous crimes" ineligible to hold public office. ILL. REV. STAT., c. 38, §587 (1957).

The constitutions and statutes of the several states demonstrate the consequences resulting to a person convicted of an "infamous crime." For instance, in Illinois one convicted of an infamous crime is ineligible to hold public office, ILL. CONST. art. IV §4, may be deprived of the right to vote, *id.* art. VII, §7, and gives his or her spouse grounds for divorce, ILL. REV. STAT., c. 40, §1 (1957). The situation is similar in regard to voting and holding office in other jurisdictions as well E.g., MISS. CONST. art. IV, §44 (office holding); CAL. CONST. art. II, §1 (voting); *id.* art. XX, §11 (office, jury duty, voting); CAL. GOV. CODE §1021 (public office); TEX. CONST. art. 16, §2 (office, jury duty, voting); N. Y. CONST. Art. II, §3 (voting).

[10] Some states have enacted the "punishment" test into law by saying that confinement in the penitentiary will render the crime for which the sentence was given an infamous one. E.g., MISS. CODE ANN. §680 (1942); ILL. REV. STAT., c. 46, §29-38 (1957); N. Y. UNCONSOL. LAWS §510 (McKinney 1949).

[11] *Ibid.*

[12] Falconi v. United States, 280 Fed. 766 (1922). The court states, as settled law, that all felonies are regarded as infamous crimes. The case involved a sentence imposed upon petitioners by a district court by which they were to serve a number of months in a county workhouse. They argued that this was hard labor and therefore infamous and that an indictment was necessary. The court disposed of this by showing that the petitioners would not necessarily be forced to work at the hard labor which was given to other inmates. The punishment was not infamous nor was the violation a felony, so no indictment was necessary.

[13] The list in Illinois includes "murder, rape, kidnapping, willful and corrupt perjury or subornation of perjury, arson, burglary, robbery, sale of narcotic drugs, sodomy, or other crime against nature, incest, forgery, counterfeiting, bigamy, or larceny, if the punishment for said larceny is by imprisonment in the penitentiary. . . ." ILL. REV. STAT., c. 38, §587 (1957). The Colorado statute contains fewer of the crimes but is nearly the same. COLO. REV. STAT., c. 39, §10-18 (1953).

[14] While all the crimes so enumerated are felonies, the punishment is not the only factor considered in rendering these crimes "infamous." The nature of the particular crime has been given equal weight in the determination. This type of statute, however, leaves little room for judicial expansion to cover situations which were not contemplated by the legislature and is therefore less than an adequate solution to the problem.

[15] 135 Col. 249, 310 P.2d 539 (1957).

[16] See note 13 *supra.*

mentioned in the statute, the official was not automatically ineligible to hold his office.[17]

The official involved in this Colorado case was the county sheriff at the time of his conviction for tax evasion, and, although ordered out by the county board to make room for an appointee, he had refused to allow himself to be removed. Some time later he resigned and another man was appointed to fill the vacancy. The subsequent litigation was between the two appointees over the right to that office.

In a somewhat similar Illinois case, *People v. McGuane*,[18] the issue arose as to a county assessor's right to hold office after a federal income tax evasion conviction.

The Illinois statute defining and enumerating infamous crimes which could disqualify an officeholder was relied upon by the deposed assessor since, like the Colorado statute, no mention was made of income tax evasion. However, the Illinois court relied upon the state Constitution and other statutes to show that the enumeration was not intended to be exclusive.[19] Under the construction applied, any crime which would fall within the purview of the court's announced test would categorically become a disqualifying crime:

"Accordingly, we conclude that any public officer convicted, in the Federal court or in the court of any sister State, of a felony which falls within the general classification of being *inconsistent with commonly accepted principles of honesty and decency, or which involves moral turpitude*, stands convicted of an infamous crime under the common law as interpreted when our constitution was adopted in 1870, and that such conviction creates a vacancy in such office.

While we recognize that at common law there was no such offense as income tax evasion, yet we are not concerned with the nomenclature of the offense, but rather with its characteristics. The glory of the common law is, and has been, its capacity for growth and development to meet the needs of society. For the purpose of effecting a vacancy in office, we hold a felony to be infamous within the concept of the common law, if it contains the above attributes. We find that the crime of which the petitioner stands convicted was federally denominated as felonious and infamous and that it falls within this classification."[20]

In all the legal literature regarding infamous crimes, the offense of bribery has been overlooked in a consideration of disqualifying crimes.[21] Blackstone defined bribery as an offense against public justice which occurs when a judge or some other person concerned with the administration of justice takes a reward to influence his performance in office,[22] and the concept has been widened in the United States to include all public officers and also to make the mere offer of a bribe a crime of equal gravity.[23] This logically should classify bribery as a common law infamous crime, but no record of its having been so considered has been found. It is significant that this particular crime, like perjury, is set out in many states as grounds for disqualifi-

[17] Conviction of one of the enumerated offenses creates an automatic, involuntary vacancy in the office under many of the governing statutes.

[18] 13 ILL. 2d 520, 150 N.E.2d 168 (1958).

[19] The court in its opinion, considered the language of article 4, sec. 4, and article 7, sec. 7 of the Illinois Constitution to be determinative of the issues involved. They recognized that this language was implemented by c. 38,sec. 587 of the ILL. REV. STAT. and further by c. 46, sec.'s 25-2 and 29-38 of the Illinois election code. Since sec. 25-2 provided for removal of a public official upon conviction of an infamous crime without specifying these offenses, as was done in c. 38, sec. 587, the broad language of the constitution was applied. Under this construction, any crime which would fall within the purview of common law or statutory infamy would categorically become a crime which, for the conviction thereof, disqualification from holding office would result.

[20] 150 N.E. 2d at 177.

[21] This absence takes on even more questionable form when an apparent inconsistency between a state's constitution and its statutes is discovered. In Illinois, for instance, the constitution provides, at art. IV §4, that no person convicted of bribery, perjury or *other infamous crime* is elegible for public office, while the Illinois statute enumerating infamous crimes, c. 38, §587 of ILL. REV. STAT. (1957) fails to mention bribery.

The Illinois court was given a chance to take a position on this particular discrepancy in the case of Christie v. People, 206 Ill. 337, 69 N. E. 33 (1903). The court there merely said that bribery was regarded as infamous by the constitution and the lack of its presence in the statute did not preclude a court of law from finding it to be infamous. The inconsistency could have resulted in the statute being declared unconstitutional, but such was not the result.

The Illinois Statute, ILL. REV. STAT., c. 46, §29-38 (1957) makes any violation of that act, punishable by imprisonment in the penitentiary, an infamous crime though undoubtedly not all violations are listed in the c. 38 statute referred to above.

[22] CHASE, BLACKSTONE 911 (4th Ed. 1938). The offense was considered very serious, especially when related to a superior judge. Chief Justice Thorpe was hanged during the reign of Edward III for having taken a bribe.

[23] State v. Ellis, 33 N. J. L. 102 (1868); Walsh v. People, 65 Ill. 58 (1872); State v. Duncan, 153 Ind. 318, 54 N. E. 1066 (1899); *Ex parte* Winters, 10 Okla. Crim. Rep. 592, 140 Pac. 164 (1914). In all of these cases bribery is considered to be an offense against public justice. In *State v. Duncan*, supra, the court said, "That essence of it (bribery) is the prostitution of a public trust, the betrayal of public interests, the debauchment of the public conscience." 153 Ind. at 320.

cation from public office either under state statutes or constitutions, but not by reason of its infamous character.[24] Therefore, in states which do not specifically enumerate bribery as grounds for disqualification, if it is not otherwise considered an infamous crime, apparently no disqualification would result from its commission. And yet, an offense like bribery is one of the worst crimes which a holder of public office can commit. It strikes at the very roots of political and social structures when a public official can be influenced to misuse the trust reposed in him by the electors.[25] At common law, infamy included not only forgery, making false declaration, taking false oath, and the variety of crimes referred to as *crimen falsi*,[26] but also those crimes which injuriously affected the administration of public justice. The omission of bribery from the common law infamy classification is thus difficult to comprehend.[27]

That such a crime as bribery should be a ground for disqualification from public office is clearly apparent. It is also clear that unless recognized as a felony no disqualification would result under the "punishment test" of infamy. The continued use, then, of the "punishment test" would exclude bribery as infamous because of the relatively light prison sentence incident to that crime. It is submitted, therefore, that a revival of the common law "nature of the crime" test of infamy is urgently needed in the public office disqualification cases.

There are many offenses other than the ones already discussed which, if tested by the current "nature of the punishment" test of infamy, would fall far short of compelling removal of an official who should be disqualified. In this group might be included those offenses involving localized crimes such as bookmaking, the numbers' racket, prostitution, and a host of similarly related offenses. These violations cannot be openly carried on without the support and cooperation of public officials. Yet, if an official is found to have abetted or participated in one or more of these offenses, the charge is usually a misdemeanor resulting in a fine or short internment in a county jail. Under the punishment test such conduct would not result in disqualification.[28]

Assuming a conviction for an infamous crime, another problem frequently appears in public office disqualification cases. This is the effect to be given a conviction in a jurisdiction foreign to the one in which the office is held. Though one state may consider a particular crime infamous, the question is whether it is necessarily incumbent upon other states to recognize the conviction as involving an infamous crime when the crime would not be considered infamous in the state where the previously convicted person now holds office. Wigmore has said that personal disqualifications arising from the law of one jurisdiction have no extraterritorial effect, especially when they are of a penal nature.[29] The federal courts, in agreement with Wigmore, have said that, "Federal practice enforces the principle that a judgment of infamy has, at best, no extraterritorial applicability."[30] This is based upon the theory that one jurisdiction cannot take cognizance of violations of the penal statutes of another through attempted enforcement and execution of the penal foreign judgment.[31]

[24] See generally note 9 *supra*.

[25] To be sure, Americans have long recognized the severity of the offense and taken steps to keep such people out of public office. The very first Crimes Act of the United States, passed by Congress in 1790, included a provision that the conviction for bribery would thereafter disqualify one from holding public office. Crimes Act, c. 9 §21, 1 Stat. 112 (1790).

[26] These are the class of crimes involving deceit and falsification by the perpetrater.

[27] It is of some interest to note that the civil law punished bribery as a serious offense, but tacitly approved its use in moderation. Public officials were allowed to receive a limited sum each year as bribes to influence their performance in office. CHASE, BLACKSTONE 911 (4th Ed. 1938).

[28] Those jurisdictions applying the "punishment" test to determine whether a crime was infamous limit themselves to imprisonment in a penitentiary as an infamous punishment. Since misdemeanors, by definition, are punishable by less than one year, usually in a county jail, they do not fall within the rule. On the other hand, every felony, because of the statutory provisions allowing incarceration beyond a year only in the penitentiary, would be considered infamous.

[29] 2 WIGMORE, EVIDENCE, §522 (3d ed. 1940). This is substantiated by many cases cited by Wigmore in his treatise and is the majority view today.

[30] Brown v. United States, 233 Fed. 353 (6th Cir. 1916). The court relied upon this principle while upholding the government's contention that a witness was not disqualified by reason of a prior conviction of a felony under state law.

[31] Samuels v. Commonwealth, 110 Va. 901, 66 S. E. 222 (1909). The principle was enunciated specifically by this court but the limitations upon the applicability of criminal statutes beyond the jurisdiction in which they are enacted is well known to the law. The conflicts problem presented can be traced in any of the several jurisdictions by the reader. As an example: Hildreth v. Heath, 1 Ill. App. 82 (1878), held that the Chicago city charter, which provided that no one would be eligible to be an alderman who had been "convicted of malfeasance, bribery, or other corrupt practices or crimes," did not encompass a conviction in a jurisdiction other than Illinois. The Illinois supreme court applied the same rationale in People v. Kirkpatrick, 413 Ill. 595, 110 N. E. 2d 519 (1953), involving the admission of

This type of restriction circumvents the public policy militating against allowing a person of low moral character to hold office.

In spite of this prevailing law, foreign convictions have been urged as grounds upon which to base a removal from office[32] and also to bar an electee from assuming office.[33] Most of the litigation in this area arises from convictions under federal laws which are later used in an attempt to prevent the convicted party from assuming a state office or to remove an incumbent. The state courts have almost unanimously[34] held that a conviction cannot work such a disqualification unless it was obtained for a violation of the law of the state of attempted enforcement.[35] This reasoning was supported by the United States Supreme Court in the case of *Logan v. United States*,[36] where it was held that in the absence of an express statute, conviction or sentence under the laws of another state cannot affect an offender, by way of penalty or personal disability or disqualification, beyond the limits of the state in which the judgment was rendered. Furthermore, in cases involving violations of federal law, it has been held that if the offense would not be a crime within the state except for the federal law, then only the federal courts can take cognizance of a conviction for such an offense.[37] Disqualification for conviction in a foreign jurisdiction has been limited to those cases in which the crime committed was one which would have been infamous within the state of enforcement, even though the conviction was actually obtained in another jurisdiction.[38]

The inadequacies of the present "nature of the punishment" test of infamy are clearly shown when the tests are applied to the forfeiture of public office cases. If only felonies are infamous, persons convicted of bribing a juror, maintaining a house of prostitution, receiving stolen goods,

certain evidence to disqualify a witness. Under the procedural law of Illinois, a prior conviction could be shown to impeach a witness only if it was for an infamous crime. The prior conviction there was for a federal offense which was not a crime in Illinois and the evidence was therefore excluded.

The *Hildreth* case also involved the effect of a pardon upon the prior conviction. It was held that a pardon removed a disability which may have been upon the petitioner.

The United States Supreme Court, in *Ex parte* Garland, 71 U. S. (4 Wall.) 333 (1866), held that a pardon reaches the punishment and the guilt and expunges both. The result is that the pardoned person is as innocent as though the offense had never been committed.

The same case ruled, by dictum, that a pardon would not restore an office forfeited by reason of the conviction. To the same effect was Becker v. Green County, 176 Wis. 120, 184 N. W. 715 (1922), which was an action to recover salary for a period during which the plaintiff had been removed as a county judge by reason of a federal conviction which was later reversed. The salary was unrecoverable because the reversal could not return the forfeited office.

[32] State v. Fousek, 91 Mont. 448, 8 P.2d 791 (1932); Briggs v. Board of County Commissioners, 202 Okla. 684, 217 P.2d 827 (1950); State v. McDonald, 164 Miss. 405, 145 So. 508 (1933); State v. Todd, 225 Minn. 91, 29 N. W. 2d 810 (1947); People v. Enlow, 135 Col. 249, 310 P.2d 539 (1957); Attorney General v. Montgomery, 275 Mich. 504, 267 N. W. 550 (1936); Davis v. Impelliteri, 94 N.Y.S.2d 159 (Sup. Ct. 1950); State v. Chapman, 187 Wash. 327, 60 P.2d 245 (1936); Becker v. Green County, 176 Wis. 120, 184 N. W. 715 (1922). The majority of these cases deal with conviction of a state official in a federal court and the resulting conflict over disqualification and removal.

[33] Hildreth v. Heath, 1 Ill. App. 82 (1878); Crampton v. O'Mara, 193 Ind. 551, 139 N. E. 360 (1923). In the Illinois case, the petitioner had been elected to a city council but the council refused him admittance. The Indiana case was brought to contest the election of a councilman on the basis of a prior conviction under the laws of the United States.

[34] Three cases have been found which are contrary to the general line of decisions. One of these, Crampton v. O'Mara, 193 Ind. 551, 139 N.E. 360 (1923) construes the state statute as encompassing convictions in other jurisdictions. The other two cases, Briggs v. Board of County Commissioners, 202 Okla. 684, 217 P.2d 827 (1950), and State v. Fousek, 91 Mont. 448, 8 P.2d 791 (1932), were decided upon the grounds of public policy against allowing persons who have been convicted of a serious crime to hold public office. Though the decisions are relatively weak, it is submitted that they reflect the better view upon this subject.

[35] See notes 32 and 33 *supra* for representation of the various state approaches to the problem.

[36] 144 U.S. 263 (1892). The particular case was concerned with the ability to bear witness in a court of law, but the doctrine has been applied by other courts without limitation.

[37] The offense in People v. Gutterson, 244 N.Y. 243, 155 N.E. 113 (1926), was one involving use of the mails to defraud. This was not a crime under the laws of New York since the mail is a federal function. The Court of Appeals ruled that the conviction for such an exlusive offense could work no disqualification upon a person in matters which were local.

The Illinois case of People v. Kirkpatrick, 413 Ill. 595, 110 N.E.2d 519 (1953), employed the same rationale in excluding testimony of a federal conviction in an action under Illinois criminal law.

[38] State v. Fousek, 91 Mont. 448, 8 P.2d 791 (1932); Briggs v. Board of County Commissioners, 202 Okla. 684, 217 P.2d 827 (1950). Both of these cases involved a violation of the federal law regulating the sale of liquor. In each case, the crime charged was also an offense under the state statutes. The courts ruled that the violation of state and federal law with the resultant federal prosecution and conviction combined to remove the respective defendants from their public offices.