ONE

CITIZENSHIP AND STATUS HONOR

Premodern Origins of the Contemporary American Practice of Felony Disenfranchisement

INTRODUCTION

This chapter explores the classical, medieval, and Early American genealogy of the modern American practice of felony disenfranchisement. It identifies *atimia*,[1] *infamia*,[2] outlawry, attainder,[3] and (contemporary) felony disenfranchisement as the negative juridical aspects of the positive (juridical) status of citizenship in the family of regimes where that status was an honorific one for a designated, bounded section of the community. It argues that *atimia* was consistent with the Athenian democracy, *infamia* with the Roman republic, outlawry and civil death with the medieval fiefdoms, and felony disenfranchisement with the colonial American and pre-Reconstruction slavocracy[4] because all bestowed (honorific) citizenship *non*universally. This chapter looks at what was common to the Athenian, Roman, feudal, and colonial variations of felony disenfranchisement in order to lay the groundwork for an analysis of its "postmodern" legitimation in the modern American polity.

The chapter begins by reviewing the concept of status honor developed by Max Weber, whose theory describes what I believe is common to all the citizenship regimes that have, historically, institutionalized various versions of felony disenfranchisement. Status, which is instantiated both negatively and positively in reciprocal social, economic, and political relations, controlled the distribution of honor among defined groups of citizens (and "noncitizens") in classical and premodern regimes. Section 2 examines how status honor was institutionalized in the classical "republican" concept of citizenship and how it structured the "dual system of law" in the

Athenian, Roman, and ante-bellum American regimes. Insofar as a core dimension of all those citizenship regimes was their interpretation of honor, only *citizens* were punished for infractions of collective honor by complete or partial withdrawal of their citizen rights. Slaves, women, and noncitizens whose lower status did not confer the property of honor were punished differently. Honor was the positive valence of citizenship in societies based on status, whose negative institutional counterpart was disenfranchisement for the *dis*honor incurred by offending the *demos*, which by definition was an elite, juridically distinct status group. The antithesis of the protected status of citizenship was the existential vulnerability of the disenfranchised, which reciprocally conferred impunity upon enfranchised citizens who could legally violate the person, household members, and property of the convicted member of the demos.

Because the Athenian citizenship regime was the original political organization that institutionalized both citizenship and the penalty of disenfranchisement, or *atimia*—literally "dishonor," section 3 looks closely at the Athenian practice, the offenses that triggered disenfranchisement, and the legalized vulnerability of the disenfranchised. Section 4 glances at the associated Roman concept of *infamia* and at the European penalties of attainder and civil death, which continued the genealogy of disenfranchisement in the post-Roman world. Section 5 reviews the modern instantiation of that genealogy, the "felonies" and "infamous crimes" that warrant disenfranchisement in the contemporary United States. It also looks at what was *not* punished as a felony in order to establish my claim that, until slavery was abolished, the United States, like the classical polities, operated under a "dual legal system" based on status honor.

The purpose of this brief excursus into historical institutionalism is to lay the groundwork for the jurisprudential argument of this book. In that felony disenfranchisement was once a "just" institution in the context of particular, premodern citizenship regimes based on status honor, it is dysfunctional in a high modern political context legitimated by universal citizenship rights. Its "injustice" can be described in terms of the social and political pathologies it generates, which contradict the conception of justice articulated by the regime. Ironically, the normative theoretical framework I am using to distinguish between citizenship regimes—Aristotle's—is quintessentially classical, in that its institutional configuration supported *atimia*.

1. MAX WEBER'S CONCEPT OF STATUS HONOR

Weber defines the "status order" as "the way social honor is distributed in a community between typical groups participating in this distribution." He distinguishes the status order from the social, economic, and legal orders, but

he claims that there is a strong reciprocal influence between the economic and status orders. "All are phenomena of the distribution of power within a community," but what distinguishes "status groups" or *Stände*, from economic classes is their often "amorphous" nature and the fact that they are determined by "a specific, positive or negative, social estimation of *honor*." Weber does not define the criteria of honor, which vary according to the particular societies, but says that honor "may be connected with *any quality shared by a plurality*." The status group with the most power, therefore, defines the criteria of honor and dishonor: normatively acceptable acts and omissions that the legislator, in Aristotle's definition of political ethics, may reward and punish. Status honor, according to Weber can "of course . . . be knit to a class situation: class distinctions are linked in the most varied ways with status distinctions. Property as such is not always recognized as a status qualification, but in the long run it is, and with extraordinary regularity."

Status groups can come into being through a variety of ways, but for the purpose of analyzing citizenship regimes, the most important one is "through monopolistic appropriation of political or hierocratic powers." This emergence, in turn, can be linked to power over land and what Weber calls "special law," which was founded on status derived from certain social relationships related to material objects (such as land—a "copyhold or a manor"). In other words, the privilege of a status group, such as the voting rights of Athenian citizens, originally coincided with land ownership of adult males registered in the *demes* and enrolled in the military association of a *phratry*.

Status honor is linked to "maintenance of a specific style of life," which is expected of all those who wish to belong to the circle, and marriage is an important link between all members of the circle. Thus in almost all societies where status honor is distributed, there are legal and customary restrictions on social intercourse that may "lead to completely endogamous closure" between groups. This closure becomes particularly important in societies where status honor is distributed on the basis of ethnicity and ethnic segregation has evolved into a system of caste. Weber calls "ethnic groups"

> Those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization and migration; this belief must be important for the propagation of group formation; conversely, it does not matter whether or not an objective blood relationship exists . . . It is primarily the political community, no matter how artificially organized, that inspires the belief in common ethnicity. (389)

Status distinctions based on ethnic consciousness that have hardened into caste hierarchies are then guaranteed not merely by conventions and laws, but also by religious sanctions. "This occurs in such a way that every physical contact with a member of any caste that is considered to be lower by the members of a higher caste is considered as making for a ritualistic impurity and a stigma which must be expiated by a religious act." Caste segregation is the "normal form in which ethnic communities that believe in blood relationship and exclude exogamous marriage and social intercourse usually interact with one another." In societies where status honor has fossilized into caste hierarchies, laws against intermarriage or sexual relations between ethnic groups are strictly enforced.[5]

To sum up the relation between the concepts of status groups, ethnic groups, political communities, legal privilege, and honor, we might say that a particular ethnic group with its own sense of honor appropriates and monopolizes political power and legal privilege. It then can define itself in the social, legal, and political terms of what is theoretically called a "status group." Weber is clear that status groups can be "positive" and "negative" and that "the road to legal privilege, positive or negative, is easily traveled as soon as a certain stratification of the social order has in fact been 'lived in' and has achieved stability by virtue of a stable distribution of economic power." Moreover, law does not just protect economic interests, "but rather the most diverse interests ranging from the most elementary one of protection and personal security to such purely ideal goods as personal honor or honor of the divine powers. Above all, it guarantees political . . . and other positions of authority." This relation between law, status honor, and citizenship converged clearly in the Athenian, Roman, and antebellum American *poleis*. Its negative instantiations were the punishments of *atimia*, *infamia*, outlawry, and disenfranchisement, which literally entailed that a citizen be deprived of his honor, and existentially of his safety, should he transgress the norms of citizenship.

2. STATUS HONOR INSTITUTIONALIZED: CITIZENSHIP IN THE "REPUBLICAN" TRADITION

In what is called the civic republican tradition, the *practice* of citizenship as political participation reflected collective agreement among the select few who enjoyed the status of citizenship as defined by the laws of their particular polity about a particular set of values. In the Athenian polity that status was literally, etymologically, related to the possession of honor, or *timē*.

> Honor was a concept used to designate a specific political or legal status assigned to the different classes in the city such as slaves, metics, and citizens. To have political rights was to be *epitimos*; to

> have none—or to be deprived of some—was to be *atimos*. To hold office was to be *entimos*. Demosthenes called citizens the class (*taxis*) in which the greatest amount of honor (*timē*) is present (*taxis en hei pleistes an tungchaoi timēs*, so we can say that full *timē* was for male citizens; demi-*timē* was for female citizens; certain bits of *timē* were for metics; while nearly none was available for slaves. All citizens were equal before the law and thus had the same level of honor in this one sense. But every public competition gave an Athenian citizen a chance to increase (or risk) the honor that he received due to his personal characteristics and thereby to raise his status-role in the community. The manipulation of honor thus allowed for rank and distinction within the citizenry despite the equality of citizens and allowed the Athenians to establish and maintain social hierarchies. The competitive ethos in Athens was fueled by the construction of honor, which provided simultaneously for equality and rank (Allen 2000, 60).

In the civic republican tradition the honor of the "good citizen" derived from his publicly displayed love of liberty and the laws over his private interests. Since the legal status of citizenship denoted equality before the law and under the law, it acted symbolically on citizens to produce love of country—*pietas*, *caridad:* the desire to serve all who shared the territory (Viroli 1998, 77). Montesquieu reformulated the classical "spirit of citizenship" for the moderns as "a love of the laws and the common good, even when it conflicts with particular interests."[6]

The political equality between citizens that obtained in republican polities and served as the foundation of the ideal of republican honor and virtue *cannot*, and this is the key point, be equated with the political equality that obtains in modern liberal democracies where citizenship is a birthright status distributed by the state. This is because the citizenry in the classical republican polities was a distinct status group that was not identified with the population of the polity as a whole, as it is in the modern nation-state. The legal structure defining the equal citizenship that obtained between members of the status group was embedded within a larger structure characterized by political and legal *in*equality.[7] Citizens were a select group of persons identified primarily by descent and distinguished by law from those coinhabitants of the polity who did not possess the requisite genealogical or material qualifications of citizenship and were thus identified with negative status groups.[8] The laws and liberties virtuous citizens were required to love and defend *included* those that distinguished them from noncitizens and maintained their privileged status in civil and criminal law. Again, according to Aristotle, the particular concept of justice obtaining in a regime was linked to the particular concept of equality:

> [Political justice] consists chiefly in equality; for the citizens are associates of a sort, and tend to be peers by nature, though they differ in their habits. But there does not seem to be any justice between a son and his father, or a servant and his master—any more than one can speak of justice between my foot and me, or my hand, and so on for each of my limbs. For a son is, as it were, a part (*meros*) of his father, until he attains the rank (*taxin*) of manhood and is separated from him. Then he is in a relationship of equality and parity with the father. This is what citizens are like. In the same way and for the same reason there is no justice between master and servant. For a servant is some-thing of his master's . . . Political justice seems to consist in equality and parity. (*Magna Moralia* 1194b5–23)[9]

Where one expression of political justice in modern liberal-democratic states is a single legal system based on the civil equality of all citizens, political justice in classical or republican polities was based on a "dual," or two-tiered system of justice. This "distribution" in Weber's sense reflected the distribution of honor inscribed in the distinct legal status of citizens (*polites* in Athens, *honestiores* in Rome, and whites in the antebellum United States) and noncitizens (women, slaves, *metics*, and *humiliores*). The citizens in these polities enjoyed membership in what Weber calls special "law communities" where "all law appeared as the privilege of particular individuals or objects or of particular constellations of individuals or objects." As Hansen (1976) points out in his detailed discussion of punishment in Athens, there was a marked difference between the way *atimoi* and *kakourgoi* were punished.

> *Kakourgoi* were typically first offenders executed without trial if they confessed and only brought before jurors if they pleaded not guilty when arrested and handed over to the Eleven. *Atimoi* on the other hand, were persons guilty of a previous offense for which they had incurred a loss of rights—procedures could only be employed against them if they committed a second offense by not respecting the *atimia*. With the exception of homicides and adulterers, *kakourgoi* invariably belonged to the lower classes. They were thieves, cutpurses, burglars and robbers who, if they failed in their crime, were usually caught in the act and summarily executed . . . The largest group of *atimoi* was undoubtedly state debtors, who were mostly public officials who had administered public funds, wealthy citizens who had farmed one of the public revenues or discharged a *leiturgia*, and prominent Athenians who, in a public action, had incurred a heavy fine which they could not pay.

Moreover, in the economy of citizenship the life of a citizen commanded the highest price. The murderer of a citizen (or his Athenian wife or daughter) was tried before the court of the Areopagos and could receive the death sentence; the murderer of a *metoikos* or *doulos* went before a lesser court, the Palladion, and was liable only to exile. "Athenian law held Athenian life dearer and maintained a firm separation between members and non-members of the polis" (Manville 1990,12).

Since the murderer of a citizen had deprived the polis of a portion of its collective honor, he was punished more severely than the man who killed someone without honor. In discussing the dual legal system of the Roman republic, Patterson (1982) relates status honor to legal privilege:

> The privileged were tried in a different court, and the penalties they received differed from those meted out to the non-privileged who had committed the same offense. There were several channels of privilege; these included birth, Roman citizenship, wealth, and proximity to power. However, the main channel of legal privilege was the possession of *honor* or *dignitas*, which derived from character, birth, office, and wealth. (89)

In the United States, before the abolition of slavery, when ethnic status (in the Weberian sense) was defined and regulated by law, slaveholders (most of whom were citizens) were granted entirely different legal protections than were slaves and freedmen. As in the classical republics, the law also gave men and women—members of different (gender) status groups within the same ethnic group—entirely different sets of rights under civil and criminal law.[10] Moreover, the dual system of law was institutionalized throughout the several states as well as nationally by means of such laws as the Fugitive Slave Act.[11] As Fredrickson (1988) points out, "The South wanted slavery and blacks—it was committed to a hierarchical biracial society—and the North wanted neither—the popular preference was for white homogeneity. In one case ethnic status was based on direct domination and in the other on exclusion" (225).

Members of the citizen body of republican polities were not only "passively" qualified for their privileged status by ascertainable descent and/or property ownership; they were also required to embody the specific values that constituted the substantive "virtue" or "honor" of being a citizen. These included serving in the military (with valor), marrying within the citizen status group, and respecting the constitution. Evident possession and exercise of citizen virtue in Athens was rewarded with "honors" and offices (*timē*), while a deficit was penalized with "dishonor" or disenfranchisement (*atimia*). Aristotle's conflation of the two uses of *timē* as both "office" and "honors"

in the following passage nicely illustrates the civic meaning of *timē,* which can be understood as both an institutional and an evaluative concept:

> There are several different kinds of citizen, and the name of citizen is particularly applicable to those who share in the offices and honors of the state. Homer accordingly speaks in the *Iliad* of a man being treated
>
> Like an alien man, *without honor*
>
> And it is true that those who do not share in the offices and honors of the state are just like resident aliens. (*Politics*1278a)[12]

As Ward (2001) argues, honor was a "fundamental political phenomenon" for Aristotle's political science, since it provides a bridge between moral virtue, which is not necessarily political, and necessity, which can be morally and politically vacuous. Honor, because it is socially constituted, depends on the judgment of others—citizen peers—and honors are distributed by the legislator. As

> the active moral principle of the citizen soldier, [honor] links the individual and the community in a way not possible in the perspective dominated by the extremes of nobility and necessity. One is publicly honored both for one's own merit and for service to the political community. In describing honor as "something noble" Aristotle defines the relation between the two as that between the particular and the universal (*NE* 1116a28). The noble transcends any particular, and honor operates as a particular manifestation of the noble expressed through public and private rewards. (80)

Since a citizen in a classical polity was a man who participated in "ruling and being ruled in turn," who had a "share in the polis," he naturally, *natally,* possessed the property of honor that was distributed to his status group of citizens. The theoretical propositions, like many of Aristotle's, are tautological and descriptive, since someone who did not share in the polis (was not a citizen)—a woman, a slave or a metic, by definition had no honor and therefore, of course, could not be *dis*-honored—could not be *atimos*. They were natally dishonored and natally vulnerable to the violence of their husbands, masters, and fellow citizens. They could not *dis*honor the polis by their actions. Yet when a citizen dishonored him*self* by an individual act or omission, he dishonored the polis as a whole and therefore lost his civic rights. He forfeited his share in the polis, either temporarily or perma-

nently, depending on the nature of his transgression. He became one of the "Others"—members of status groups who "naturally" had a negative share in the distribution of honor and were physically, existentially vulnerable in a way enfranchised citizens were not. The citizenship/honor/protection-disenfranchisement/dishonor/vulnerability syllogism implies that citizenship status is synonymous with safety and protection. The classical theorists called a constitution or regime based on an economy of honor a "timocracy."[13]

> His political equals assessed an individual citizen's honor by comparing his personal attributes with those of their peers. Honor was a social and *public* property: men established their own worth by monitoring their standing vis-à-vis other men in their status group. In such a polity, "social relations define themselves through a politics of reputation, and the currency of that politics is honor, together with the social virtues which constitute it. (Cohen 1995, 63)

Patterson (1982), citing the work of John Hope Franklin (1964), calls the antebellum South a timocracy, because Franklin "correctly emphasizes the notion of honor—not romanticism—as the central articulating principle of southern life and culture."[14]

> Franklin shows how the notion of honor diffused down to all free members of the society from its ruling-class origins. Third, and most important, he demonstrates the direct causal link between the southern ruling class's excessively developed sense of honor and the institution of slavery. More specifically, he shows how the master's sense of honor was derived directly from the degradation of his slave. (95)

Drawing on Aristotle's discussion in *The Rhetoric*, Cohen (1991) notes that "The man who confines his activities to the private sphere in the narrowest sense, the house, loses his honor, for such self-confinement is woman-like . . . To win honor, a man must live his life in public. Honor exists only in the evaluation of the community and requires openness and publicity" (80). Hence the inverse of honor (*timē*)—the punishment of *atimia*—demanded that punished citizens refrain from appearing in public and confine themselves to the private sphere like women and slaves. Except that, unlike women and slaves whose "head of household" was *not atimos*, women and slaves who were therefore protected to a certain extent by *his* (the master's) untainted citizenship, the *atimos* was *un*protected, as were the members of his household.

Josiah Ober (1996) distinguishes between honor in an oligarchic citizenship regime—aristocratic honor—and in a democratic regime—citizen

dignity—the former being a scarce resource in a zero-sum game, the latter "a collective possession of the demos" created by the power of collective action (102). Ober argues that where aristocratic honor was personal, the "most precious possession of the ordinary Athenian citizen was, for want of a better term, the dignity he enjoyed because he was a citizen" (101). Citizen dignity, according to Ober, is a composite of individual freedom, political equality, and security. It is won through collective action of the demos, and because it is "a collective possession of the demos" can only be defended by collective action.[15] Hence stripping an individual citizen of his rights, making him *atimos*, disenfranchised, was an act of self-defense on the part of the demos. In Ober's theoretical framework, it was self-defense against pretensions of the oligarchy, rather than against either fellow citizens or the "Others" of the polity, against whom no defense was necessary. No defense was necessary because the "Others" were not *and could never be* political equals with whom citizens would be called to compete for social honor. Postbellum and contemporary American felony disenfranchisement turns the Athenian practice on its head, because as we will see in chapter 4, it was the American "oligarchy" that was defending itself (and its honor) against the "pretensions" of the (reconstituted) demos. (The former slaves—during Reconstruction—and their descendants who clamored for their citizenship rights.)[16] This fits Aristotle's analysis of the causes of *stasis*. Stasis is an existential condition of the polity in which all citizens are vulnerable to violence and loss of livelihood, but particularly those who feel that their *honor* is threatened by those who aspire to equality.[17] This is because democratic equality displaces the aristocratic notion of honor, which as the *sine qua non* of the aristocratic citizenship identity cannot be relinquished without loss of that identity and the protections it confers.

Here Bourdieu's (1980) analysis of the fundamental principle of "equality in honor" is helpful, since the "exchange of honor" is always addressed to a man capable of playing the "game of honor." Bourdieu stresses the principle of "reciprocity" in honor, noting that "only a challenge issued by a man equal in honor deserves to be taken up." Conversely, a man who enters into an exchange of honor with someone who is not his equal in honor *dishonors* himself. Bourdieu argues that this is a "fundamental principle" in the universe of practices really observed that "impress both by their inexhaustible diversity and apparent necessity." Thus when a citizen dishonored his citizenship status and by extension his polity by transgressing certain norms, and was punished for doing so, he was forced into exile in the private realm. In that realm, where honor has no currency, the boundary between the public and private worlds defines the meaning—the positive valence—of citizenship. We now turn to the negative valence, the inverse of the citizenship regime, as it was expressed in the practice of disenfranchisement.

3. THE PUNISHMENT OF *ATIMIA* IN ATHENS AND SPARTA

The most common Greek word for punishment was *timoria*, another cognate of *timē*, or honor, while "to punish" was *timoreisthai*, which we might translate as "to assess and to distribute honor" (Allen 2000, 61). Punishment of citizens that resulted in *atimia* was a form of collective "forgetting" of an individual: it required that the citizen "disappear" from the polity so that his act would cease to pollute its collective honor. Thus *atimia* can be construed as a *negative distribution of honor*, in terms of Weber's spatialized framework. Unless, however, the *atimos* (dishonored citizen) chose exile, he did not disappear from the polity at all; he faded into the ranks of metics, slaves, and women whose negative status prevented them from appearing at the Assembly or the law courts, and only rarely at the temples. Therefore, when citizens punished one of their own, they redistributed equality—or justice, in the Aristotelian definition given above—such that the *atimos* forfeited both his honor and his political equality. As Hedrick points out,

> None of the rights and privileges of Athenian citizenship are "essential" qualities; they are only defining characteristics of the citizen insofar as they are not allowed to non-citizens. If both "citizens" and "non-citizens" were commonly permitted to vote, for instance, then the franchise would not be a quality of the citizen, nor would it be any more significant or deserving of mention in a discussion of citizenship than say breathing or the ability to walk, or any of the other qualities and characteristics that humanity shares. (297) . . . Boundaries, in other words, are made apparent and concrete by those excluded, not by some abstract, intrinsic, positive qualities possessed by those living within the edges. (295)

What was most "apparent and concrete" about those excluded was that they were socially, physically, legally, and economically vulnerable in ways that *nondishonored* citizens *were not*. So long as a citizen retained his honor, he retained his personal and psychic safety, his existential sense of intactness, which insofar as it was *politically* conferred by the demos, could be withdrawn or withheld by the demos.

Judith Shklar (1991) made this same point about status in her study of American citizenship, emphasizing the value of citizenship to white men as long as women and slaves were *un*enfranchised, but did not connect it to safety:

> The value of citizenship was derived primarily from its denial to slaves, to some white men, and to all women (16) . . . The civil

> standing that these creatures could *not* have, defined its importance for the white male, because it distinguished him from the majority of his degraded inferiors. (49)

It was the very legally codified *existence* and negative status of those Shklar called "degraded inferiors" that conferred honor and distinction on the citizen class in a status-based regime. Yet in her compelling 1991 study of American citizenship, which emphasizes the centrality of voting and earning, Shklar misses the existential *function* of status. This could not simply have been the "feeling" of superiority, but was a very visceral sense of safety, of immunity (from random violence), and even of impunity (for the commission of random violence). That was the sense slaves, women, and the *atimos,* lacked as the victims, rather than the perpetrators of legalized violence.

And as Patterson (1982) emphasized in his discussion of honor and slavery in the U.S. South, honor and degradation were reciprocal properties: "the master's sense of honor was derived directly from the degradation of his slave." Thus the punishments of *atimia* or *infamia,* which involved the citizen's degradation and relegation to the ranks of the civilly dishonored served to sharpen and clarify the boundaries and principles of justice that defined the honorific qualities of the citizen status group. *Atimia* comprised a defensive tactic on the part of the demos that allowed it to identify itself against the noncitizen class by expelling those who had dishonored the demos. In doing so, however, the demos created a "dangerous class": it wielded a double-edged sword that simultaneously made the *atimos* existentially vulnerable individually—endangered by potential attack—and itself, *the demos,* vulnerable, in danger of attack or subversion from those outside the citizen body, "for a state with a body of disenfranchised citizens who are numerous and poor must necessarily be a state which is full of enemies" (*Politics* III, xi., 1281b).

The ethical "contents" of the honorific core of citizenship, the virtues that constituted it, were specified in both law and custom. When those virtues were evidently absent, or violated through particular proscribed behavior, it fell to a citizen (as prosecutor) to bring the deficit to the attention of a citizen jury, which (unless the *atimia* was automatic) would convict and sentence their fellow citizen if they found him guilty. According to Hansen (1976) *atimia* was used as a penalty for not complying with an injunction, rather than for defying a prohibition. Thus it could be imposed for *not* appearing when called up for military service, for not obeying the general's order, or for desertion. Similarly, it could be imposed for cowardice, for abstaining from a naval battle, or for desertion from the navy. Failure to do one's duty: to serve as an arbitrator upon turning sixty, to care for elderly parents, to pay state or temple debts, or to drop a public lawsuit, could all result in *atimia.*

When *atimia* was imposed for an act—rather than for an omission or failure to act—it was usually either a punishment for a second or subsequent offense or an additional penalty. *Atimia* for a second or subsequent offense was inflicted on persons convicted for the third time of the crime of giving false evidence, making unconstitutional proposals to the Assembly, and habitual idleness. These were clearly political offenses against the *demos* itself, which had the direct responsibility of ruling Athens and funding the Athenian wars. Since most of the revenue of the state came from court fees and fines, and leases of state property such as mines, rather than taxes, private debt had serious public implications, rendering debt a political offense that resulted in temporary, and possibly permanent disenfranchisement:[18]

> The largest group of *atimoi* was undoubtedly state debtors, who were mostly public officials who had administered public funds, wealthy citizens who had farmed one of the public revenues or discharged a *leiturgia*, and prominent Athenians who, in a public action, had incurred a heavy fine which they could not pay. *Atimia* may be described as the typical penalty for failure to perform civil duties or abuse of civil rights. Accordingly, politicians especially were in constant danger of incurring *atimia*. (Hansen 1976, 54)

Atimia meant that the citizen lost his *timē*, because his status honor as a citizen consisted in his right to go to the assembly and vote, to serve on a jury, worship at the temple, bring any type of civil or criminal prosecution, fight in the army, appear in public places, or receive any of the material benefits of citizenship such as grain distributions. Some of these rights were also obligations to the polity and included the obligation to marry a female citizen, or *asta*. A male citizen could be *atimos* if he married a female alien after 451/50. If someone gave an alien woman in marriage to a male citizen as if she were a woman of his family, he suffered loss of civic rights, his property was confiscated, and a third of it was assigned to the prosecutor. Any Athenian could open suit against him before the *thesmothetai*, as in the procedure against an alien who poses as a citizen (Sealey, 1990). In his discussion of ethnic honor, Weber emphasized the point that marriage was a key element in the preservation of the status group.[19] As Garner (1987) points out, a hereditary *atimia* could be imposed for refusing to divorce a foreigner, marrying a foreigner, and adopting a descendent of an *atimos*. These were all instances of trespassing the laws by which citizen rights were reserved for legitimate Athenians.[20]

Other crimes that triggered hereditary *atimia* were treason, attempts to overthrow the democratic constitution, bribery, theft of public property, and proposals to abolish certain laws. The descendants of state debtors did not

inherit the *atimia* until the debtor died, unlike the descendants of traitors and thieves, who suffered it immediately. Anyone adopting heirs of someone convicted of such crimes was subject to *atimia*. (See also Garner [1987] on hereditary *atimia*.) Another distinction was made between *atimia* that was automatic and that which was imposed by sentence.[21]

> Thus we have automatic *atimia* in all cases where a person had committed an offense for which he immediately incurred *atimia* prescribed by law or decree. The sanction took effect automatically without trial, and if the person did not respect the *atimia*, he could be prosecuted and incur a penalty more severe than the original *atimia*.

If the offender ventured to appear in public after the conviction he could be prosecuted anew and could then be given a sentence more severe than the original *atimia* (66–67). *Atimia* was never a penalty directly imposed by jurors, and not prescribed by law. Hansen is unclear, though, about which crimes require *atimia* by sentence.

It is remarkable, and a significant contrast to the contemporary American system, as Hansen (1976) points out, that *atimia* was never inflicted on persons guilty of acts of violence (homicide, assault, rape, etc.) or offenses against property (theft, burglary, robbery, etc.). As such, he concludes: "*atimia* was the penalty *par excellence* which an Athenian might incur in his capacity of a citizen, but not for offenses he had committed as a private individual." This did not mean, however, that *atimia* was a purely symbolic or abstract penalty, without potentially harmful consequences for the individual who suffered it. First of all, what to moderns might be considered a peripheral right or even a burden, the right to appear in the Assembly or to vote, was a core *privilege* for Athenians. Moreover, since prosecutions for crimes such as assault or rape (of household members, for instance) were not brought by the state as they are today, but by the individual citizen affected by the crime, the *atimos* was potentially vulnerable to all manner of assaults against his person and his property, including members of his household, since total *atimia* included the loss of the right to prosecute in public as well as in private actions. Since this right to prosecute, to resort to self-help, was the only legal defense Athenians had against infringements of their personal rights, to lose it meant that all other, ostensibly "private" rights (to enforce contracts, for instance) were compromised.[22]

Although there was a difference between archaic and classical *atimia*, Hansen comments that the contrast with classical and archaic is not so great as it initially appeared. In archaic times, the *atimos*, like the outlaw in later European law, could be killed with impunity: "it must have been almost a

civil duty," Hansen says, whereas in classical times it was only a possibility.[23] Aside from the inability to implement the essential "self-help" mechanisms of Athenian justice, the *atimos* lost the right to receive food during public distributions to citizens, such as the grain given by an African prince in 445 BC. This particular distribution led to a purge of the citizen roster because some non-citizens, falsely inscribed as citizens, were claiming a privilege to which they were not entitled (Finley, 82). Moreover, during periods of *stasis*, when the *diapsephismos* of 510 took place, the contrast between those who were "truly" citizens ("without defect" in Aristotle's words) and those who were vulnerable to *atimia* is dramatically described by Manville (1990):

> This "scrutiny" was not an orderly or parliamentary review of citizen lists. It was a reign of terror, caught up in the bitter civil war among aristocrats, ruthless leaders striving for political power . . . During 510/9 for the many men who were not aristocrats—and the many others who were—exile and "disenfranchisement" (and with it uncertainty about one's very life) were to be feared as much as anything they had ever known. It is against this background of the *diapsephismos*—a reign of terror in which "true" citizenship was a man's only defense—that the enormous popularity of Kleisthenes' reforms (which regularized the status of citizenship and the appropriate records) can be appreciated.[24]

Finally, turning briefly to Sparta, where *atimia* was a humiliating and defamatory penalty according to Xenophon, the link between status honor and citizenship was decisive. *Atimia* involved both loss of personal and public honor and civil rights. MacDowell (1986, 61) attributes the more total nature of Spartan *atimia* to the link between citizenship and the Spartan "way of life."[25] He says that "it was a fundamental principle of the 'laws of Lykourgos' that a man lost his status as a citizen if he failed to keep to the Spartiates' way of life," translating this as "the life of honor." "It included both toils and privileges, and a man who deviated from it ceased to be a Spartiate peer" (42). For instance, a citizen who did not belong to a mess or who engaged in menial work or crafts for money could be disenfranchised. Just as in Athens, citizens could be condemned for a serious offense like treason or cowardice in battle. "Thuciydides, describing the action taken against the Spartans who surrendered at Sphakteria, after they returned home, clearly uses *atimia* to mean a loss of specific rights." The *atimia* seems to have been temporary, though, since they were later reenfranchised.[26] MacDowell says that although we don't know much about it, it is reasonable to assume that "the life of honor" was central to being a Spartan citizen.

4. THE ROMAN *INFAMIA*

In Rome, whose citizen body was vastly larger than that of Athens, the formal divisions between citizen classes, divisions that did not obtain in Athens, are revealed by the different kinds of punishments each received for the same crime. In other words, differences in citizen status delineated the different degrees of physical and psychic violence the various classes were subjected to. The primary citizen division was between the plebeians (*humiliores*) and higher status citizens (*honestiores*). In Athens, all citizens received the same punishment under the democracy, and their punishments were distinguished, as we saw, from those of slaves and *metics*, by being noncorporal. In Rome, by contrast, lower class citizens could receive all sorts of corporal punishments, as well as gruesome capital punishments, which in many ways mitigated the distinction between citizen and slave.[27]

The Roman instantiation of Athenian *atimia* was *infamia*, which applied differently to different types of citizens because the Roman polity comprehended a spectrum of citizenships based, broadly speaking, upon property and status. Roman *infamia* struck directly at the civic honor (*existimatio)* of the high-status citizen,[28] who either held or aspired to hold a public position.[29] Standards of citizen conduct were conformable to rank, to the notion of *dignitas* peculiar to the *public* position held by the citizen. Therefore, the notion of *existimatio* was not

> a simple and universal conception, attaching to *honores* in general, or to *jura publica* in general, but attaching to a class, or *ordo,* which is presumed to have a lifelong tenure of its position, and to which necessarily but few of the citizens can belong . . . *Infamia* could not have been a uniform procedure if *existimatio* was not a uniform conception. (Greenridge 1894, 10–11)

During the heyday of the Roman Republic, *infamia* was a penalty that carried serious civic and political consequences. As political participation waned, though, and power of the Ceasars predominated, the force of *infamia* was proportionally reduced and became virtually meaningless.[30]

The penalty of *infamia* applied when a man was awaiting trial, and followed him after conviction and into exile, if that was the penalty (only available to citizens) he claimed. If he returned to Rome after exile, he could be killed on sight, with impunity. His property was confiscated upon conviction, and he was without political or civil rights. Some people chose exile over trial because they did not want the shame of even temporary *infamia*. It seems as though the severity of punishment in Rome made *infamia* a weaker penalty than the Greek *atimia*: in Athens, *atimia* and fines were

really the only elite punishments available, whereas in Rome, execution, exile, the mines, and confiscation were the primary punishments of the elite. Execution and exile seem to make *infamia* irrelevant.[31]

A Roman citizen could suffer the penalty of *infamia* if he acted in bad faith under the law of what we might call today private contract, or mandate in Roman law. Under the Emperor Julianus, *infamia* was incurred upon dishonorable discharge from the army, as well as for conviction of theft, robbery, *injuria*, or fraud. Citizens who engaged in certain professions, such acting or procuring, were declared *infamis*, as were false accusers in criminal actions. A citizen who was derelict in his duties as a guardian of more vulnerable citizens, suffered *infamia*. For instance, if he was convicted of failing in his duty of guardianship, *mandatum*, or *depositum*; or if he married off a widow under his paternal authority before she had legally completed her period of mourning; or who married a widow before such completion; and other marriage "crimes."[32] While from the modern perspective the above, partial list may appear to comprehend a spectrum of unrelated offenses, a "grab bag" so to speak having no internal consistency, the common thread lies in the "injury to reputation" (*laesa existimatio*) incurred by the citizen who committed any of those offenses:

> The questions to which [special disqualifications based on an injury to reputation] give rise are partly moral, partly juristic: since the institution (*infamia*) itself depended on the theory that a moral taint involved a civic disability. It was this civic disability, conceived consciously as based on a moral imperfection, that was generally spoken of by the Romans as *infamia*. (Greenridge 1894, 13)

The earlier Roman *Infamia* was imposed by censors at their discretion,[33] and although in the later Republic offenses giving rise to *infamia* were codified, there is no necessary connection between the pronouncement of a convicted offender as *infamis* and exclusion from political rights. Greenridge's (1894) exhaustive study concludes:

> It is obvious . . . that the criminal law of Rome knew of no one perpetual disqualification attendant on a *minutio existimationis* brought about by conviction. Above all, loss of the most distinctive right of citizenship—the *suffragium*—is never mentioned in these cases. Sometimes these laws disqualify from *honores* and from the Senate, sometimes from the *album judicum*, sometimes they go so far as to inhibit the evidence of the condemned; but nowhere do they imply the loss of all political privileges. (33)

The later practice of *infamia* saw a marked change as a result of "the transference of law-making from the judges and the interpreting jurisconsults to the sole person of the Emperor. The infamia no longer has a natural growth: it almost loses its moral significance. It is employed merely as a very powerful weapon in the hands of the Emperor to check the evils of administration as they arose" (Greenridge, 144–45). This most interesting contrast with the American practice of felony disenfranchisement, instead of punishing petty criminals, brought the full wrath of the state down on negligent, corrupt, and abusive judges, lawyers, and prosecutors. Suppression of documentary evidence necessary for the full solution of disputes, toleration of harsh treatment of prisoners, and failure to punish guardians of prisoners guilty of such treatment could all render administrators and judges *infamis*.[34] Treason, of course, was a crime that conferred infamy, and for the first time the penalty was made hereditary, and citizens who refused to fill the offices of their native places, to be senators, suffered the penalty of *infamia*. Heretics, under the later Empire, were *infamis*, although pagans, interestingly enough were not.

In conclusion, the Roman *infamia*, like Greek *atimia*, rendered the citizen vulnerable to private and public attack, since the *infamis* could not resort to the "self-help" system of prosecution and protection. He could not bring criminal accusations, testify in court, or protect his family's honor by slaying an adulterer. Greenridge calls this a "serious disability" attendant on the pronouncement of *infamia*. As I will argue in chapter 3, below, once the modern office of the public prosecutor, the representative of "the People," replaced the classical "self-help" systems, in which private citizens were the protagonist of criminal trials, the punishment of the *atimia* and *infamia* became institutionally superfluous and unjust.

5. INFAMY, CIVIL DEATH, ATTAINDER, AND "FELONY" IN EUROPEAN AND AMERICAN LAW

Since eleven American states disenfranchise offenders for "infamous crimes,"[35] and four states—Idaho, New York, Rhode Island, and Mississippi—have "civil death" statutes on the books, we will briefly investigate the medieval and feudal practices of outlawry, civil death, and attainder, which were punishments for "infamous" crimes. It will be noted that the "citizen's" franchise (*jus suffragim*) was not at stake during this historical juncture, as it was both in the *polis* and at Rome, since "citizenship," and the privileges and obligations that attached thereto, was not an institution associated with the medieval tribes or feudal fiefdoms. What was at stake for subjects were their lives and property, their existential safety, and that of their descendants.

Subjects could be declared civilly dead for serious crimes such as "treason against the community," homicide, severe wounding, and heresy. According to Itzkowitz and Oldak (1973), after the fall of the Roman Empire, the Germanic tribes of Europe and England used outlawry to punish those who committed particular crimes involving serious harms to society and to compel wrongdoers to comply with orders of the court. The offender was expelled from the community and completely deprived of his civil rights and society's protection. Thus the consequences of outlawry were severe: resulting in a denouncement as "infamous," the deprivation of all rights, confiscation of property, exposure to injury and even to death, since the outlaw could be killed with impunity by anyone.[36]

> Civic death means the absolute loss of all civil rights . . . it sunders completely every bond between society and the man who has incurred it; he has ceased to be a citizen,[37] but cannot be looked upon as an alien, for he is without a country; he does not exist save as a human being, and this, by a sort of commiseration which has no source in law." (von Bar 1916, 272, quoting Guyot, "Repertoire" "*mort civile*")

Civil death implied absolute vulnerability, since it "closed the doors to most of the honest occupations, and the frequent banishments from the cities and the country districts made the offenders homeless and deprived them of means of livelihood. In addition to this a deplorable part was played by confiscations (partial or total) of property."[38] The beneficiaries of the confiscations were the feudal lords and judges, to whom the traitors' lands reverted upon conviction. "Closely akin to confiscation is the other consequence of capital punishments, namely *civic death*. It is derived, in part from the rules of the feudal law regarding the loss of "*respons en cour*" in part from the Roman law notions of "*infamia*" and the "*dominatio in metallum*."[39]

While the sanctions of outlawry, civil death, and infamy evolved in continental Europe, England developed its own method of imposing civil disabilities: attainder. Under the English system, a person pronounced "attainted" after conviction for a felony or the crime of treason was subject to three penalties: forfeiture, corruption of the blood, and loss of civil rights (Itzkowitz and Oldak, 724, citing Blackstone, *Commentaries* 381–89).[40] As they colonized North America, the English settlers transplanted much of their common law heritage, including the imposition of civil disabilities and forfeiture of property that resulted from the procedure of attainder.[41] In some colonies, the concepts of infamy and outlawry were introduced into their criminal codes.[42]

Following the American Revolution, the newly independent states rejected some of their inherited legal tradition, specifically prohibiting in the United States Constitution ex-post facto laws and bills of attainder,[43] as well as forfeiture and corruption of blood except during the life of a person convicted of treason.[44] Nonetheless, eleven states retained civil disabilities in their constitutions adopted between 1776 and 1821, denying voting rights to convicted felons or authorizing their state legislatures to do so.[45] Before the Civil War, 19 of the 34 states in the Union excluded serious offenders from the franchise.

A random survey of Table A.7 "Suffrage Exclusions for Criminal Offenses: 1790–1857" in Keyssar (2000) describes the constitutional exclusions. California: "persons convicted of any infamous crime;" Connecticut: "Those convicted of bribery, forgery, perjury, dueling, fraudulent bankruptcy, theft, or other offenses for which an infamous punishment is inflicted;" Iowa: "those convicted of any infamous crime;" Maryland: "Persons convicted of larceny or other infamous crime;" New Jersey: "those convicted of felonies;" Minnesota: "those convicted of treason or felony." The language in at least twenty of the constitutionally authorized state statutes restricting the franchise lists conviction for "high crimes and misdemeanors," along with "bribery, perjury, forgery," and "infamous" crimes as causes for disqualification.

Under American law, the term "infamous" may signify the mode of criminal punishment inflicted, or may refer to the fact that one is disqualified from testifying in a court of justice.[46]

> It is in this latter sense that our law is similar to the Roman Law concerning *infamia*. In our law, it is only crime that works infamy and renders the criminal incompetent as a witness. The crimes that so result are treason, felony, and every species of *crimen falsi*, such as forgery, perjury, subordination of perjury, false pretenses, public cheating, and any other similar offense which involves falsehood and affects the public administration of justice.[47]

Since "felony" is one of the classes of crimes which, along with treason, result in infamy, and still, in seven American states, lifetime (exoffender) disenfranchisement, it is worth reviewing the origin of the word. The Oxford English Dictionary traces the etymology of "felony" to the Old French *vil*, meaning "treachery, ill will, misdeed" from *villein*, which translates as "villain," or "rogue," and from the Middle English *vilein*, or *villain*, "of base or depraved character: wicked, dastardly; of common birth or origin." A "felony" is defined as