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Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law

Jean Hampton

In the Spring of 1995, I was asked to testify as an expert witness in a case in Canada that raised a number of different philosophical and jurisprudential issues. The case concerned whether prisoners sentenced to two years or more in a Canadian penitentiary had the right to vote. For many years, Canada has denied those incarcerated in its prisons voting rights (following the British practice of doing so), but after the enactment of the Canadian Charter of Rights and Freedoms in 1982,¹ which grants each citizen of Canada the right to vote, that practice was challenged; in a series of court cases, prisoners maintained that denying them the right to vote during their incarceration amounted to denying them one of their basic constitutional rights as Canadian citizens.

One of the most important issues raised by this case was the nature of Canada's political identity. The fact that the political identity of a state can be partly at stake in a law is, I believe, important and insufficiently recognized. A law can be not only a tool for the organization of the community (e.g., by promoting order, or coordination, or public wellbeing), but also a significant expressive force in that community, symbolizing the community's sense of its values and (what I will call) its "political personality". Indeed, for countries which are not culturally homogeneous and in which the unity of the community is primarily purchased through the principles of its polity, the expressive nature of certain laws can be essential in the creation, maintenance or revision of a unifying identity for that society; this is an identity that not only helps to hold the pluralist society together but also helps people to have a sense of themselves as members of that political community. I hope to argue that the controversy surrounding the issue of whether or not prisoners' voting rights should be suspended reflects controversy about what kind of state Canada is and shows the ways in which law can be expressive.

This case also illustrated the way in which feminist inquiry can have a distinctive impact on the nature of political policy and political theory. Philosophers tend to think that feminist concerns can simply be "added" to traditional political theories, and that this movement is much the same in its aims and perspectives as other liberation movements. It isn't, and this case (which many would never expect to trigger feminist worries) nicely illustrates how feminist concerns will force our political society to rethink many political and legal issues.

1. To be precise, the Charter came into force on April 17, 1982.

I. The History of the Litigation

When Canada's charter was enacted in 1982, the existing law regulating voting in federal elections specified that all persons incarcerated, no matter for how long or for what reason, could not vote in any election held during their imprisonment. The Charter provision that raised doubts about the constitutionality of this law is section 3, which says:

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.²

By the mid-80s litigation had begun, based on sections 3 and 15, challenging the denial of voting rights to prisoners.³ The government countered the litigation by denying that there was any discriminatory effect of the law, and by arguing that the Canadian constitution, under section 1 of the Charter, allowed that voting rights could be abridged when there was a compelling reason to do so. The limitation of Charter rights under section 1 is subject to the "Oakes" test⁴, which says that limiting a Charter right may be justified only if the limit is proportionately related to policy objectives of a legislature that the court believes are "pressing and substantial" in a free and democratic society. This proportionality requirement is supposed to be measured by determining whether the limitation: (1) is a reasonable means of achieving the objective, (2) is the least restrictive means of doing so, and (3) will yield benefits to the community that outweigh the burdens of the limitation.⁵ The government's side prevailed in some of the litigation, ending in a decisive case in 1991. In this last case, a federal trial court struck down the law, arguing that the government had not shown that there was any compelling state interest in withholding the right to vote from prisoners. According to Justice Strayer, who heard the case, the only reasonable justification the government had offered for suspending voting rights of prisoners was the fact that such a suspension could be construed as a punitive response. But, said Strayer, since the actual effect of such a suspension would likely not be great, and since the cost of the law on those prisoners who valued their right to vote would be great, he concluded that the law failed to meet the proportionality test necessary under Oakes.

Refusing to accept defeat, the Canadian Parliament enacted a new law, depriving prisoners of the right to vote—but only if they were incarcerated for two years or

2. *Canadian Charter of Rights and Freedoms*, s.3 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, ch.11.

3. See *Badger v. Manitoba (A.G.)* (1986) 27 C.C.C.(3d) 158; *Sauvé v. Canada (A.G.)* (1989), 53 D.L.R. (4th) 595; *Belczowski v. R.* (1992), 12 C.R. (4th) 219. For a complete review of this litigation (up to the early 90s) see Rainer Knopff & F.L. Morton, *Charter Politics* (Scarborough, ON: Nelson, 1992) ch.11.

4. See *R. v. Oakes*, [1986] 1 S.C.R. 103 at 105.

5. For a discussion of s.1 and the Oakes test, see Christopher Manfredi, *Judicial Power and the Charter* (Norman, OK: University of Oklahoma Press, 1993) at 161ff; Knopff & Morton, *supra* note 2 at 39-51; and Roger Kerans, "The Future of Section One of the Charter" (1988/89) 23 U.B.C.L. Rev. 567.

more (a sentence that normally means they will be placed in a federal penitentiary).⁶ By specifying that this response was only appropriate for serious crimes, the government believed it could more successfully defend the law as an appropriate response to serious criminality if it were challenged again.⁷ And challenged it was; several prisoners began litigation against the law, and the case⁸ was heard in a Federal Trial Court (presided over by Judge Wetston) in Winnipeg during the Spring of 1995. The lawyers on both sides succeeded in interesting a number of professors in philosophy and political science in thinking about, and commenting on, the nature of this law.⁹ As an aside, I should note that my perusal of the local Winnipeg papers for the week that I was involved in the trial showed that the local public reaction to the case was highly pro-government; all the editorials railed against the idea of letting criminals vote. This law certainly appeared to be politically popular; the question remained, however, whether it was constitutional.

The government argued its case along four grounds: First, after claiming that Canada's political culture was more communitarian in nature than that of the US (using testimony of Seymour Martin Lipset to buttress this claim), it maintained that a law denying prisoners guilty of serious crimes the right to vote properly expressed Canada's commitment to the values of the community. Second, relying on ideas from the social contract tradition, it argued that prisoners guilty of serious crimes had broken the social contract, and on that basis, deserved to have their right to vote suspended while incarcerated. (Interestingly, this argument was made by one of the editorials in the local press prior to the government having made it. In my recounting of the trial's issues to Canadians and Americans, this is the argument that my interlocutors have been most inclined to make if they are sympathetic to the government's position.) Third, it argued that even though modern democratic societies have dispensed with competency tests for voting, nonetheless criminality justifies the presumption of incompetence with respect to participating in a democratic process, making the denial of voting rights to persons convicted of serious crimes legitimate. Fourth, it argued that the law could be justified as a punitive response to persons convicted of serious crimes.

6. A two year prison term is meted out in Canada only for serious criminal conduct, such as murder, sexual assault, armed robbery, and serious drug offenses. (Among the prisoners who brought the litigation, one (Sauvé) was convicted of aiding and abetting a murder, another (Spence) was convicted of multiple robberies and of violently assaulting his wife. The point of the law is to target the most serious offenders.

7. Statistics offered by Colin Meredith to the court showed that the vast majority of the offences landing someone in a penitentiary are crimes against the person (e.g., murder, assault, sexual assault, kidnap and robbery). A much smaller number are crimes against property (e.g., arson, breaking and entering, and fraud), and a very small number are drug offences (e.g., trafficking, importing/exporting, cultivating).

8. *Sauvé v. Canada (Chief Electoral Officer); McCorrister v. Canada (A.G.)* (1996), 132 D.L.R. (4th) (F.C.T.D.) 136.

9. One of these lawyers had been a philosophy major in college, the other was in the process of getting a Master's degree in political science as the case was being heard. Both lawyers believed that their actual legal education did not prepare them well for a case of this nature, so that they were lucky to have had their education in philosophy and political theory to fall back upon. This sort of case raises, in my view, important issues about how legal education should be designed.

The plaintiffs' lawyers took a largely negative stance, arguing that none of the four justifications of this law by the government was successful, so that the government was unable to show any compelling reason to abridge a Charter right in this way. Although the plaintiffs engaged a number of professors as expert witnesses, they also argued that political theory of the sort appealed to by the governments' witnesses, was too abstract and removed from the realities of actual life in Canada to point only in the directions that the government needed in order to justify the voting suspension. They also challenged the idea that any punishment goal could be effectively attained via this legislation. Aside from this burden-shifting approach, the plaintiffs maintained, first, that Canada should want to rehabilitate and heal its criminals, and that the way to do this was to encourage voting, not deny prisoners the right to do so; and second, that since many criminals come from poor and disadvantaged backgrounds, and since in most parts of Canada a disproportionate number of prisoners are of Native origin, it would be a further denial of justice, to people who had already been the victims of societal injustice and/or discrimination, to deprive them of this fundamental political right. This last point was buttressed by appeal to section 15 of the Charter, which says:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹⁰

The plaintiffs were also scornful of any appeal to the idea of a competency test for voting, even one that was entirely negative and that appealed only to criminality as a sign of incompetence to vote, citing the anti-democratic history of competency tests (e.g., in the southern states of the U.S.).

Such were the official arguments of each side. However, there were less obvious issues underlying their opposition that (at least for this philosopher) were even more interesting.

II. Deeper Issues

One of the most basic questions raised for the judge's consideration by this case was whether the law was consistent with the principles animating Canada's democracy. The government's communitarian witnesses (who celebrated Canada's purported willingness to place the concerns of community life before the rights-based claims of atomistic individuals) paired off against the plaintiffs' Trudeau-style liberal expert witnesses, who insisted that Canada was committed to generosity and inclusiveness in its setting of voting policy, and had no business sending moral lessons to its citizenry. The government witnesses preached the importance to Canada not merely of rights, but also of responsibility, so that people who violated the rights of their fellow citizens should be expected to bear responsibility for doing

10. *Canadian Charter of Rights and Freedoms*, s.3 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, ch.11.

so, where this involved, among other things, having their voting rights suspended. The plaintiffs' witnesses preached the importance of opposition to discrimination and poverty, and a commitment to substantive equality that would be compromised by excluding prisoners from the political process. Meanwhile, the judge, through some of his questions and comments to witnesses on both sides, raised another issue: Were the moral concerns raised by the communitarians about Canada's community life consistent with the attitude of neutrality towards its citizenry that a liberal state such as Canada needs in order to govern a multi-cultural and pluralist society?

Another issue raised by this case was the issue of minority discrimination. The government's own evidence established that in most (albeit not all) jurisdictions, the number of native prisoners was significantly disproportionate to their number in the population of that jurisdiction. The plaintiffs claimed this reflected, both directly and indirectly, prejudice and discrimination against Native groups by white Canadians. According to the plaintiffs, not only in their daily lives but also in their treatment by the criminal justice system, natives have been victims of discrimination. Few facts were offered to back up the allegation of bias in the criminal justice system, other than the disproportionate numbers of natives in federal penitentiaries. However, that fact, along with the undeniable reality of discriminatory attitudes towards natives in Canadian life was, in the view of the plaintiffs, sufficient to make it reasonable to assume that these criminals were themselves victims of discrimination in the criminal justice system. To take away a Charter right, in the face of this systemic discrimination, would be, according to the plaintiffs, adding insult to injury, piling yet another injustice upon a people who had already suffered a series of injustices in their lives.

The government responded to this argument by charging that the criminal justice system was ill-equipped to provide a remedy for systemic discrimination in Canadian life generally, and in no position in this trial, given the dearth of evidence, to accuse *itself* of discrimination in its own dealings with native criminals. The plaintiffs, according to the government, were insisting on the unconstitutionality of this voting rights law using an argument that required the court to convict itself of injustice with respect to native defendants—in the face of virtually no evidence that the criminal justice system in Canada was guilty of such injustice. (The mere fact that a disproportionate number of prisoners are native was not, in the government's view, sufficient evidence of discrimination; after all, they noted, the population of prisoners in penitentiaries in Canada is 97% male, but few believe that Canada's legal system is prejudiced against men and in favor of women.) Hence the government argued that the plaintiffs' case required more evidence of discrimination by the criminal justice system, and better remedies to deal with it if such discrimination actually exists, than preserving the right to vote for all criminals (both native and non-native). If there is injustice in the criminal justice system, they maintained, the government should convene a commission to identify it and then root it out; in its view, to try to deal with that injustice by disallowing certain punitive responses such as the suspension of voting rights not only fails to redress the injustice, but also helps too many of the wrong people—namely, all the non-native

defendants who have not suffered from discrimination.¹¹

Yet even if the criminal justice system in Canada is in no way corrupt, and operates perfectly such that it convicts all and only the right people of the right crimes, wouldn't the fact that the criminal behavior of these defendants was, at least in part, caused directly or indirectly by discrimination (which, among other things, leaves these defendants with poor economic prospects, poor schooling, and a sense of being disempowered), place some obligations on a society charged with punishing them to disallow certain forms of punishment, or to punish them differently from other persons convicted of serious crime? The plaintiffs' expert witnesses maintained that if Canada's institutions have operated in a discriminatory way so as to severely damage the life-prospects of certain kinds of people, the government cannot sanguinely recommend punishing them the same way that it punishes other defendants who have suffered no such discrimination. At times, the plaintiffs also suggested that some sort of "disadvantaged background" defense would be appropriately introduced into the Canadian criminal justice system.¹²

The government responded by pointing out that the plaintiffs' expert witnesses were essentially challenging the propriety of *any* punitive response to the crimes of minority defendants, not just a punitive response that involves the suspension of voting rights. The plaintiffs' argument, it contended, did not purport to show that there is anything wrong with a punitive response that denies voting rights, but only that there may be something wrong with using this punishment, or other serious punishments, on defendants who have suffered from injustice in their lives. And if that is the conclusion of the argument, wouldn't the correct response to it be to identify which criminals have suffered from discrimination, then ameliorate their punishment (in a way that would, perhaps, allow them the right to vote), but permit the full range of punishments, including the suspension of the right to vote, for those criminals who have not been subject to such injustice (e.g., white-collar criminals who are not members of any minority group)? The government noted that the problem with the plaintiffs' attack on the voting-suspension law based on section 15 was that it wasn't really an attack on the constitutionality of the law *per se*, but only on its use against a certain kind of defendant. Hence, the remedy for this problem, if the plaintiffs' argument was correct, would be legal recognition of the fact of a disadvantaged background in sentencing policy; but not the wholesale condemnation of any particular punitive response.

The government had another response to the plaintiffs' section 15 challenge. Many of the government's expert witnesses insisted that criminality, whatever its connection to economic or social problems, is something that at bottom, the individual criminal must take responsibility for. One witness for the government persistently talked about criminals as "volunteering for" punishment; it was a phrase that irritated and angered the plaintiffs' witnesses. The issue of whether anti-social behavior is the product of social forces or of personal choice is one that has

11. For a U.S. case that raised similar issues, see *Wesley v. Collins*, 605 F.Supp. 802 (1985).

12. See Richard Delgado, "Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?" in Jeffrie Murphy, ed., *Punishment and Rehabilitation*, 3d ed. (Belmont, CA: Wadsworth, 1995).

traditionally separated left-wing and right-wing thinkers. Left-wing thinkers, going back to the days of Marx, have insisted on the reality of systemic causes for behavior and have criticized right-wing thinkers for failing to appreciate that reality. In contrast, right-wing thinkers insist that personal responsibility must be acknowledged as the true reality, lest we fail to hold individuals accountable for their actions and suffer the consequences of lawlessness as a result. The judge in the courtroom watched this debate unfold and he openly (and naively) lamented the fact that there were no psychologists present who could tell us the extent to which individuals could be held personally responsible for their actions; but alas, psychology has little to say that would resolve this particular issue, and it remains central to a significant political divide in western societies.

There was one more underlying issue. It is one that I introduced in my testimony, and it involves feminist concerns. The fact that there should be any feminist issues in a case like this surprised all the lawyers as well as the judge. It is also instructive to note that apart from the court reporter, the court clerk and a wife of one of the lawyers, I was the only woman in the courtroom. There were no women lawyers involved in the case and no other expert witnesses on either side that were women. Had I not been involved, none of the issues that I will now present would have been aired, discussed or considered. It is also worth pointing out that although one of the prisoners who brought the litigation was a native, there were no members of any minority community in the courtroom and in particular, none involved as lawyers, court personnel or expert witnesses. This was almost entirely a white male trial. I will come back to reflect upon what that meant for the character of the arguments at the close of this article.

III. The Feminist Aspect of this Case

I was asked to participate by the government's lawyers because of my work on theories of punishment—especially my work on the moral education theory and the retributive theory of punishment. They asked if I could offer a punitive justification of the practice of suspending the right to vote during imprisonment of prisoners convicted of serious crimes on the basis of one or both of these two punishment theories.

I reflected upon this question a week before getting back to them. It seemed to me to be fairly easy to argue that the law could be defended along retributive or morally educative lines in ways that I will explain below. But I was worried about two issues: one was the issue of systemic discrimination that had been raised by the plaintiffs at the trial. The other issue was related but different. I believe, and have argued, that a democratic form of government is committed, in a powerful sense, to a repudiation of the idea of what I will call "natural subordination," that is, the idea that some people are "by nature" the superiors of other people (either because of their race, class, religion or gender), such that they are entitled to rule over those "inferiors". By granting each adult the right to vote, no matter what group they come from in society, democratic societies have institutionally committed themselves to the political equality of all their citizenry and have thereby denied

the thesis of natural subordination. The history of democratic societies shows how difficult it has been to achieve universal suffrage, in large part because some members of these societies have attempted to preserve elements of natural subordination (e.g., men over women, whites over blacks) within the confines of the democratic polity. The Canadian Charter's late emergence enabled it to articulate an idea that many people fought hard in our history to vindicate, namely, that the right to vote is owed to each person insofar as each of us is the political equal of every other person. So I was worried about the following issue: does a law depriving prisoners of the right to vote in any way compromise a democracy's commitment to political equality, a principle which universal suffrage realizes?

This question, which so worried me, was ironically never raised by the lawyers for the plaintiffs. I will discuss why I believe they neglected it later in the paper. But note the kind of worry that it is: it is a worry about what this law *means*—what it expresses or symbolizes in the polity. It is a worry that someone would have only if she saw laws as capable of having expressive significance.

I ended up resolving both the concern about systemic discrimination, and the concern about denying people the right to vote given the expressive significance of universal suffrage, in ways that allowed me to testify on behalf of the government's case. But my testimony didn't fit with the right-wing communitarian/conservative point of view of the other witnesses for the government, and although I consider myself a left-wing thinker, my testimony did not fit with the left-wing 60s—style point of view characteristic of witnesses for the plaintiffs. I take it as no accident that the only woman who participated in the trial had a point of view that didn't "fit" with any other.

The other expert witnesses exemplified two different families of political positions common in western societies, sometimes (but frequently not) linked to philosophical positions. What I will call "traditional left-wing" thinkers, expert witnesses, on the side of the plaintiffs, sympathized with criminals insofar as their victimization is taken to derive (in the main) from a low socio-economic and/or disadvantaged minority background. They favored rehabilitation as the main goal to be pursued during prison, and were concerned to change the socio-political system that "criminalized" these offenders. They tended to reject heaping blame and tough punishment on offenders or regarding them with hate or contempt. On their view, the problem with right-wing analysis is that it fails to understand the culpability of the *system*: by continually railing against the criminal, the right fails to appreciate the victimization of the criminal himself, and it fails to focus on the importance of remedying the causes of crime by mistakenly lashing out at the criminal. In contrast, what I will call the "traditional right-wing" witnesses for the government blamed the criminal rather than the system for the wrongdoing and welcomed punitive responses such as retribution that aim to (in some way) stigmatize the wrongdoer because of his conduct. These people believed their left-wing opponents were denying personal responsibility and naively hoping for utopian political remedies for what, in their view, was essentially a personal problem.

My perspective on the issues raised by this case cannot be assimilated to either point of view. Indeed my arguments did not fit because they took into account the

distinctive experiences and problems of women. It is notable that these experiences were not taken to be worthy of mention by any of the other witnesses for either the government or the plaintiffs. In their arguments there are workers and capitalists, disadvantaged people and advantaged people, criminalized people and non-criminalized people, and the assumption is that any of these categories can include males or females. Hence, none of the witnesses for either side (other than me) thought there was any need to represent males and females differently in their arguments: the conservatives, the communitarians and the left-wing liberals all agreed on this point.

Yet, if gender is brought into the picture, the picture must change. For what is one of the most important—perhaps the most important, tool in the oppression of women? Surely it is violence against women, in the form of rape, domestic violence, incest (really just another name for rape of a child by a family member) and murder. It has become commonplace in feminist analysis to recognize the importance of violence in achieving the subordination of women. Nor are the women who are actually hurt by violence the only (or primary) victims of it:¹³ When all women, regardless of their background, fear the threat of male violence (and modify their behavior so as to avoid it), this violence is not some private affair but a societal practice—with a point. The violence expresses—and helps to realize—the view that men are entitled to dominate over women. The threat of rape, which leads women to watch where they go, whom they go with, and what they do, sends a message that women must beware of the power of men, that their reality is such that they can be used by men, and that unless they are with, or have, a male protector (in the form of a boyfriend, husband or father) they are vulnerable to male violence because they are *lesser beings*, with lesser value and lesser standing, than men. “Rape and domestic violence are both forms of terrorism, a backdrop to the daily lives of women in sexist societies.”¹⁴ So every woman in societies such as Canada or the U.S., where rape and other forms of violence against women are common (regardless of whether she has ever been raped or violently assaulted by a man) is victimized by the reality of this practice, insofar as where she lives, what she does, what activities she undertakes, and what her family life is like, are all affected either by the threat of such violence, or by the fact of it.

So if crime against women is central to women’s subordination in societies such as ours, how can women adopt the sympathetic attitude toward violent men of the sort urged by the plaintiffs’ left-wing expert witnesses? Western societies such as Canada are confronting a serious problem with *male* violence (as I said, 97% of the people in Canada’s Federal Penitentiaries are male), and while much of that violence is directed against men, its affect on women is distinctive and politically important insofar as it is central to the continuation of patriarchal practices. So a traditional left-wing analysis of crime that laments the “criminalization” of people

13. To quote Claudia Card: “...rape has two targets: ‘bad girls’ and ‘good girls,’ those who are expendable (‘throw-away women’) and those to whom a message is sent by way of the treatment of the former.” See C. Card, “Rape as a Terrorist Institution” in R.G. Frey & C. Morris, eds., *Violence, Terrorism and Justice* (Cambridge: Cambridge University Press, 1991) 296 at 302.

14. *Ibid.* at 296.

by certain systemic forces in our society and calls for us to rehabilitate them, but then says nothing whatsoever about the victims, particularly the female victims, of these “criminalized” people, is blind to the way these offenders are actually encouraging and helping to enforce a form of oppression in our society. While the traditional left-wing analysis tells us that crime should be understood as the *product* of oppression, it fails to acknowledge the fact that crime is also the *tool* of oppression. Indeed, in any traditional left-wing analysis, the victims are simply not present, except as the reason for the appearance of the criminal in the courtroom or the prison.

Moreover, in the case in which I participated, the reports of the expert witnesses called by the plaintiffs assume that victims of serious crimes who are from disadvantaged communities are and should be in sympathy with disadvantaged criminals, since they share the same disadvantaged background (and likely have experienced the same kinds of discrimination, poverty, etc.). Yet many of the women from disadvantaged communities, none of whom was present in that courtroom, have a different point of view. Their experiences, like the experiences of many white women, affirm the linkage between violence and political inequality. Indeed, the Royal Commission on Aboriginal Peoples identified as native women’s number one concern the issue of violence, and particularly family violence, in their communities.¹⁵ Yet, as one native woman laments, it has been a concern that they have had difficulty getting their leaders to take seriously:

[O]ur attempts to convince our elected Aboriginal leadership of the need to treat the issue of violence against Aboriginal women and children as a political concern equal in importance to achieving recognition of our inherent rights and [the right to] govern ourselves was unsuccessful. In fact, we believe that self-government is not possible without the resolution of violence within Aboriginal communities.¹⁶

I have personally heard this point of view from female students from minority communities in my classrooms in America. One woman from Watts who took a political theory course from me and who was the most avid proponent of the retributive theory of punishment of any student I have ever had, complained bitterly about how crime had terrorized her family. She noted that most members of her community did not commit crime, but many were the victims of it, and that she and her family had grown fed up with mitigated sentences and judicial leniency in the name of “rehabilitation”—a rehabilitation which nonetheless never seemed to occur. Her sense of crime as a male phenomenon that most people in Watts rejected, and that was a particular burden for women and children in her community, is not a point of view that fits with any of the arguments put forward by any of the expert witnesses for either side in this voting-suspension case.

I believe the failure of traditional left analysis to accommodate the experience

15. Royal Commission on Aboriginal Peoples, *Discussion Paper I: Framing the Issues* (Ottawa: The Commission, 1992) at 12; cited in Katherine Beaty Chiste, “Aboriginal Women and Self-Government: Challenging Leviathan” (1994) 18:3 *Am. Indian Culture and Research J.* at 29.

16. Marilyn Fontaine-Brightstar, “Breaking the Silence”, (1992) 26:2 *Canadian Dimension* at 5-6 cited in Chiste, *ibid.* at 29.

of these women illustrates the problem of what Sandra Harding calls a “single focus emancipatory agenda.”¹⁷ In this type of analysis, a certain class, or race, or religious group or gender that has suffered oppression is the focus of the analysis; and measures to counter that oppression are proposed and advocated. The author assumes that such measures will surely be useful in overcoming the oppression of other groups as well. “Here’s a way we can end a particular form of oppression,” says the theorist,—and oh, by the way, this would help with other types of oppression too.” But it isn’t that easy. There are cross-currents in the workings of oppression, in part because those who are oppressed are not immune to the attractions of oppression against others.

This is especially true if remedying the oppression that some minority men suffer seems, in their minds, to *require* that they engage in the oppression of women. That is, if, as some theorists have maintained, the dominant notion of manhood in western societies has *built into it* the idea that men are the sort of beings who are the superiors of women, and who are entitled to govern them both within the family and in the public sphere, then it may seem to some disadvantaged men that achieving equal standing *as men* with the men of the dominant group requires that they define themselves as dominant over women—using violence if necessary.¹⁸

One lesson we learn from this analysis is that the burdens that all women face in a patriarchal society are particularly acute for some women of color who face a double-dose of inequality. As one Canadian aboriginal woman puts it:

Aboriginal women have been reluctant in the past to challenge the positions taken by the leadership out of the perceived need to present a united front to the outside society that oppresses us equally as Aboriginal peoples. However, it must be understood that Aboriginal women suffer the additional oppression of sexism within our community. Not only are we the victims of violence at the hands of Aboriginal men, but our voice as women is not valued in the male-dominated political structures.¹⁹

This means that violence against women poses particularly difficult problems for native women in constructing effective political action:

The goal that we set for ourselves should be to eliminate the disadvantage that women face because it is more profound. It is the greatest of the challenges that face Aboriginal people. By confronting the disadvantage that women face as both women and as Aboriginal, we will also be confronting the discrimination, disadvantage, oppression and dependency faced by our fathers, uncles, brothers, sons, and husbands. We must also accept that in some circumstances it is no longer the European settlers that oppress us, but it is Aboriginal men in our communities who now fulfill this role.²⁰

These women cannot simply rest content aligning themselves in solidarity with their group to combat the attempts at domination by the white majority, because

17. Sandra Harding, “Taking Responsibility for Our Own Gender, Race, Class: Transforming Science and the Social Studies of Science” (1989) 2:3 *Rethinking Marxism* 8 at 14.

18. One African-American philosopher who holds this view is Laurence Thomas, “Sexism and Racism: Some Conceptual Differences” (1980) 90:2 *Ethics* 239.

19. Fontaine-Brightstar, at 6 cited in Chiste, *supra* note 13 at 31.

20. Monture-Okanee, “Reclaiming Justice” at 115 cited in Chiste, *supra* note 13 at 31.

elements of that group seek to dominate them and deny them the political equality they seek. This puts such women in the grim position of having to fight on two fronts, simultaneously trying to maintain an alliance with people that they must also, on certain occasions, oppose. Whereas women from dominant groups are lucky enough to have to fight only one battle (which is bad enough), these women have to fight two, and they to have to wage one of them partly against people that they would much rather be aligned *with* rather than against.

Nonetheless, some native women have accepted this as their task. To quote from one native woman theorist:

All too often oppressed people refuse to address conflicts of abuse of power within their ranks in the interest of maintaining solidarity...[but] overcoming internal problems is an essential component of the power struggle for justice and equality.²¹

This viewpoint has affected the political action of native women's groups. In 1992, during the debate over the Charlottetown Accord, the Assembly of First Nations, representing status natives on reserves, argued that the accord should be supported because of its provisions on aboriginal self-government. In their view, the Charter's liberal, individualistic values conflicted with aboriginal political traditions, so that aboriginal governments should not be bound by the Charter. This position was supported by the Native Council of Canada, the Métis National Council, and the Inuit Tapirisat of Canada. However, the Native Women's Association of Canada (NWAC) took exception to this position, arguing that these male-dominated groups and the male-dominated aboriginal governments had shown hostility to their legitimate interests, and they advocated the application of Charter rights in their communities to promote gender equality and an equal political voice for women. Moreover, the NWAC sued the government of Canada, claiming that the government provided far more funding to the other (largely male) native organizations than it did to them, in a way that, in their view, discriminated against them as women. (They contended, among other things, that the government had "exhibited historical preference for the views of male-dominated Aboriginal groups" in a way that infringed on freedom of speech [Section 2b of the Charter], and violated the Charter's sex discrimination provision in section 15.²²) This legal action in and of itself displays the failure of single-focus emancipatory strategies in a world where those who need emancipating are not all oppressed in the same way, nor all innocent of oppressive strategies themselves.

21. Fontaine-Brightstar, at 5 cited in Chiste, *supra* note 13 at 32.

22. See Chiste, *ibid.* at 33. In the end, although the native women won in the lower courts, the Canadian Supreme Court reversed the lower court ruling by a unanimous decision. (See *R. v. Native Women's Association of Canada, Gail Stacey Moore and Sharon Mclvor*, [1994] 3 S.C.R. 627), arguing that the government was under no obligation to consult with any particular group, and that "there was no evidence in this case to suggest that the funding or consultation of the four Aboriginal groups infringed the respondents' equal right of freedom of expression." (Sopinka J. at 664) In my view, such an opinion raises interesting (and in some ways disturbing) political issues in its own right (which I cannot explore further here) regarding how government action can (inadvertently or deliberately) privilege certain points of view at the expense of others. I am indebted to Hamish Stewart for providing me with information on this decision.

There are other problems with traditional left analysis. For example, members of minority groups are represented in this kind of analysis as disempowered and subject to abusing social forces that impair their ability to hold jobs, maintain healthy families, do well at school, and so forth. Whereas this analysis tells us that white male criminals can and should be held fully accountable for their misdeeds, we are nonetheless supposed to excuse the crimes of the disadvantaged. But doesn't this analysis turn disadvantaged people into perennial victims, lacking the robust agency that would allow us to hold them fully culpable if they commit acts of violence and abuse? Indeed, doesn't it make these perennial victims into perennial children? Whereas their agency as human beings is represented as damaged, the agency of the dominant group is represented as healthy and robust. Why isn't this disrespectful? (Indeed, why isn't it racist, especially given the way it tends to deny the very real differences in the histories, practices, economies and crime rates of different minority communities?)

Moreover, don't perennial victims need saving? And who does the saving? The good guys in the dominant culture (i.e., the left-wing elite)? It would seem that members of the dominant group must gallop to the rescue, because the victims themselves are not represented as having the robust agency that would enable them to rescue themselves.²³ And if only those with robust agency have the ability and the enlightenment to do the rescuing, is this analysis inadvertently echoing some of the most offensive features of the old doctrine of "white man's burden?"

Anyone concerned about the suffering of all people, both men and women, in our societies must worry about all these questions. Yet the answers, in my view, cannot involve a dismissal of traditional left-wing analysis entirely, since the systemic discrimination against many types of people is a fact of life in our societies. And it is also a fact of life that (largely male) violence in some of our communities, insofar as it is associated with poverty, poor education, and unemployment, is causally connected to discrimination and economic injustice. So how do you put together the fact of systemic discrimination and its devastating affects on people, with a commitment to the equal autonomy of all people? How do you end the oppression of certain minority groups by a racist majority culture, even while fighting the oppression that some of these minority groups engage in against their own female members? And how do you combine the respect for criminals' personal responsibility and agency to which conservatives are committed, with the compassion that leftist analysis would have us show these criminals, especially given the variety of ways that the legacy of various forms of oppression will be implicated in the criminal acts of some of them?

To put it succinctly: When there are cross-currents of oppression in a society,

23. Some feminists have worried about this problem. As one writer notes, "it seems safest to counter the notion of woman as free agent by emphasizing her victimization. However, unless we include in this a complex sense of agency, we run the risk of producing a discourse which sets women up to be saved. This would situate women within feminist analysis in ways that are similar to their positioning within colonialist or nationalist discourse." Lani Mati, "Multiple Mediations: Feminist Scholarship in the Age of Multinational Reception" in H. Crowley & S. Himmelweit, eds., *Knowing Women* (Cambridge: Polity Press and Open University, 1992) at 321.

how do we develop a theory that will give us a blueprint for dealing with them? No matter which group any of us comes from in our societies, these cross-currents will be a burden for us. Members of a dominant group often find that the racists whom they oppose turn out to be their fathers, mothers, grandparents—people whom they love, but whom they have to be prepared to fight when the time comes. But how do you fight people that you also love? It is hard to fight a demon when he persists in hiding in the hearts of our friends, as well as our enemies. Indeed, given that I doubt any of us is immune from racist or sexist ideas, how do we fight such views within ourselves? In particular, how do we resist both the temptation to deny that such ideas are present in our minds, along with the temptation to engage either in self-loathing or self-justification when an acknowledgement of their presence is inescapable?

IV. Theories of Punishment

The questions I've posed require complicated answers, most of which I don't have. Humility is surely required of anyone who would do political theory in the face of the problems I've just reviewed. That humility is increased by the realization that no matter what political course of action we take, some legitimate interest will be hurt. There is no way, I believe, that we can construct policy on this issue without, to some degree or other, "drawing blood". Or, to put it another way, there is no way to resolve this issue in a way that will allow us to be what Hegel called "a beautiful soul", with perfectly clean moral hands.

Still, some political courses of action are morally better than others. And they are morally better not only because they promise better consequences, but also because of what they express. That is, their meaning is more consistent with the values of a free and democratic society than other possible courses of action.

Let me start by outlining two courses of action that are clearly unacceptable. First, imagine a state that decided to deprive prisoners of the right to vote so as to denounce not only their conduct but also *them*. On this view, disenfranchising prisoners would be a way of condemning them as outlaws—people who are outside the state and the community as a whole. I regard this way of understanding prisoner disenfranchisement as abusive, degrading, and unjust: abusive because of its message of hate, degrading because of what is said to be his "bad" nature (so that its message makes it akin to banishment) and unjust because of its unresponsiveness to possible systemic forces that can provoke criminal conduct.

Second, imagine a state that insisted on giving all prisoners the right to vote because it saw punishment primarily as a rehabilitative process, designed to return the offender to the community a reformed person. On this view, voting would be understood as the community's way to "welcome the criminal back to the fold"—to let him know he remained "one of us". Yet, if this is what prisoner enfranchisement is thought to mean (in the context where only rehabilitation and not retribution is the aim of incarceration) the victims of these offender's actions are given nothing—indeed, they are given worse than nothing, because by failing to express any kind of condemnation of the criminal's conduct, that conduct, and its meaning,

stands unchallenged. So, for example, if this policy were enacted, women who were raped and other women whose lives were threatened because of rape, would have to watch while their rapists were systematically embraced by the community and given the political levers of power, without any denunciatory message with respect to what those rapists had done to them. Even the imprisonment of the rapist would be understood to have a reforming aim, rather than a denunciatory aim. Such a policy would treat victims' suffering, even their oppression, as not important enough for the state to take it seriously in its response to criminal conduct. Hence, I regard the expressive nature of such a policy to be too unjust to victims to be acceptable.

These two examples illustrate two points. First, they show that the meaning of a law is something that must be read in the context of society's other meaningful political policies and acts. (In a similar way, the meaning of a word in a sentence depends on the other elements of the sentence.) There are lots of possible contexts in which policies having to do with prisoner enfranchisement can be placed, and hence many meanings that such policies can have. The task, of course, is to construct a policy, within a context, that approximates justice as closely as possible.

Second, these policies are unjust because each of them is too skewed in the direction of one of the parties involved in the dilemma: the denunciatory policy is unacceptably indifferent to the plight of the offender; the rehabilitative policy is unacceptably indifferent to the plight of victims. So the right policy must involve an acknowledgement of both parties—and the fact that this can be only imperfectly done is the main reason that we have to accept that no matter how hard we try, it is unlikely that we will be able to construct a policy that will give both parties their due.

But we can, and surely must, try. To succeed, we need a more sophisticated way of thinking about the nature and goals of a punitive response—one that incorporates both compassion and condemnation, both healing and justice. To show how I think this can be done, let me review several philosophical theories of the nature of punishment. Philosophers, legal theorists and criminologists standardly distinguish between three aims of punishment that are thought to justify it: the aim of deterrence, the aim of retribution, and the aim of reform.

The aim of deterrence is suggested by the very nature of law: insofar as we think of law as consisting of an imperative directing the citizenry either to take, or to desist from, certain kinds of action (e.g., "don't steal", or "pay your income tax") coupled with a threat (e.g., "you'll go to jail" or "you'll pay a fine"), we think that the threat, which specifies the infliction of a sanction if the imperative is not obeyed, gives people a nonmoral incentive, i.e., the avoidance of pain, to refrain from the prohibited action. In this way, the law aims to deter a person from doing (or not doing) something that violates the imperative (or to deter him again, if he has already violated it and the punishment is inflicted on him now).

Theorists also distinguish between "specific deterrence", i.e., deterring a specific person who has already committed a crime from doing so again, and "general deterrence," i.e., deterring people in the larger community from committing the crime. General deterrence is the more important of the two deterrent goals, insofar as protection of the community, and of the rights of its members, depends upon

minimizing the general level of crime.

A retributive response to a wrongdoer involves a commitment to punishing only the guilty (a commitment that does not come from the deterrent justification, insofar as it is theoretically possible that a deterrent goal could be achieved by punishing an innocent person). But retributivists also say that wrongdoers “deserve” retribution proportionate to the offence they have committed. What is it about a wrongdoer’s action that merits or deserves such a punitive response?

Building on the ideas of Immanuel Kant,²⁴ the philosopher G.W.F. Hegel argued that a proportionate punitive response attempts to “negate the wrong” committed by the offender.²⁵ Contemporary philosophers influenced by Hegel have elaborated on this idea. Clearly a punishment cannot *literally* negate a wrong—nothing will undo what the criminal has done. But it can attempt to *say* something about the crime and thereby express something about it as a way of “nullifying” its effects. Joel Feinberg has described punishment as “a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority itself or of those “in whose name” the punishment is inflicted.”²⁶ The government that inflicts a criminal sanction on an offender is authoritatively disavowing his action, refusing to acquiesce in his deed, and vindicating the rightness of the law forbidding his conduct. To use Feinberg’s example, an old Texas Law that allowed a cuckolded husband to commit justifiable homicide against a man found committing adultery with his wife is ‘saying something’ profound about the rights of men and women, and the value of life relative to the pain of being cuckolded. The refusal to punish such a murder is expressive indeed—of an attitude toward women that regards them as the property of any man to whom they are married, and an attitude toward human life that puts it second to male pride.

I have argued in a number of places, building on Feinberg’s ideas, that actions which we make criminal offenses are ones that diminish the value or dignity of the victims, either through the harm committed, or because of the nature of the action itself.²⁷ We evaluate people in many ways (morally, athletically, musically, etc.) but none of these values establishes our worth as *persons*. Whereas these evaluations, particularly moral evaluations, may well be important to our assessment of a person’s success as a human being, they are irrelevant to his worth *as* a human being. The assumption of democratic societies is that human beings have a worth that is high—and also the equal of every other person. Hence, for a criminal to behave so as to hurt, brutalize, or damage the interests of another individual to further his own purposes is indirectly a way of saying to that individual “I am up here,

24. See I. Kant, *The Metaphysical Elements of Justice*, trans. J. Ladd (Indianapolis, IN: Bobbs-Merrill, 1979).

25. G.W.F. Hegel, *The Philosophy of Right*, trans. T.M. Knox (London: Oxford University Press, 1969); See especially sections 99 and 100.

26. Joel Feinberg, “The Expressive Function of Punishment” in J. Feinberg, ed., *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970) 95 at 98.

27. See e.g. Jean Hampton, “Correcting Harms versus Righting Wrongs: The Goal of Retribution” (1992) 39:6 *UCLA L. Rev.* 1659-1702; and J. Murphy & J. Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988) ch. 4.

and you are down there; so I can use you for my purposes.”²⁸ This is most obvious for crimes that are serious, such as rape or murder (where the victim is used for purposes of securing a feeling of power or mastery, or regarded as “in the way”—a person to be dispensed with). But it also holds true for crimes of theft or burglary (in which the victim is not treated as someone with the right to property that the wrongdoer feels he must respect). It is because these actions ‘say’ something that diminishes the victims’ value that we wish to inflict punishment that says something in return in order to insist on the victim’s true (equal) value, and deny the wrongdoer’s claim to elevation.

Having such a goal explains why proportionality of punishment with the crime is so important to those who construct retributive punishments. On this view, punishment aims to express the victim’s (equal) value. But this goal cannot be accomplished by the infliction of suffering that is in any way aimed at degrading the criminal’s value, or that has the effect of denying or lowering his worth. If the idea is to show the equality of wrongdoer and offender, that goal is not achieved by treatment that represents him as inferior, or less than fully human. Hence, a “proportionate” punishment, on this view, is one that has the right expressive content, consistent with the wrongdoer’s own human dignity.

This last point is important in appreciating the difference between a retributive response to crime and a vengeful response to it. Revenge and retribution differ in a number of ways. First, they differ in the morality of their aims: the avenger wishes to degrade and destroy the wrongdoer, whereas the retributive punisher wishes to vindicate the value of the victim and not denigrate or destroy the wrongdoer. Second, they differ in their commitment to proportionality: the avenger eschews proportionality because he is after degradation, whereas the retributive punisher is committed to proportionality as a way of expressing the wrongfulness of the criminal’s act and the value of the victim demeaned by the criminal’s action. Third, they differ emotionally: the avenger acts from malice or spite, whereas the retributive punisher need have no emotional motivation for his actions (wishing only to vindicate the victim’s value via the punishment); and, if he does act from emotion, it is from what might be called “righteous indignation” arising from the thought of the deeds of the criminal being punished. To be succinct, whereas the avenger wants degradation, the retributive punisher wants justice.

A reformative response to a criminal can come in two forms, the first of which I will call *Rehabilitation*, and the second of which I will call *Moral Education*. Rehabilitation aims to provide ways of dealing with or treating the criminal such that he will, after being released from prison, conform to society’s behavioral expectations and be economically productive rather than economically parasitical. Programs that aim to achieve literacy or teach economically valuable skills are directed at the latter goal; therapeutic responses that attempt to treat mental illness or behavioral disorders are directed at the former goal.

Moral education is a very different kind of reformative response. A punitive

28. See Jeffrie Murphy’s discussion of what wrongdoing ‘says’ in Murphy & Hampton, *ibid.* ch. 1.

response that aims to be morally educative attempts to teach both the wrongdoer, and the public at large, that there are important moral reasons for choosing not to perform the criminal offense. The punishment is therefore conceived as an educative communication, aimed to benefit the criminal and the larger society, conveying an idea that, should they choose to listen to it, ought to lead them to repudiate, on moral grounds, criminal behavior.

Like the deterrence theory, the moral education theory has a general and a specific form. In its specific form, it justifies punishment aimed at communicating the wrongness of his action to the criminal himself. Apart from any literacy problems, occupational problems, or mental problems, this view holds that those who are guilty of a criminal offense have a moral problem. In particular, they do not accept that in view of the way their action was morally offensive, it should not have occurred. Hence, it is this last problem that punishment is meant to address. To quote one advocate of this theory, the criminal's "soul is in jeopardy as his victim's is not".²⁹ The theory therefore, views punishment as a way of benefitting the criminal, and through this benefit, it hopes ultimately to deter the criminal from committing such a crime again by causing him to reflect in a way that will lead to a renewal of his allegiance to the values of the society precluding that crime.

The moral education theory also has a general form: it justifies punishment as a way to educate the larger community about those values in the name of which the state is punishing. Any society that embraces the Texas law making a cuckolded man's murder of his wife's adulterous lover justifiable homicide, is expressing its values by understanding, and failing to punish, the murder in this case. A society that insists on punishing such a homicide has a very different conception of the value of life and a very different conception of the relative worth of men and women. Our moral convictions as a community are implicit in the stand we take either for or against certain kinds of behavior. A free and democratic society expresses, and ought to express, through its punishment, its commitment to behavior that respects the freedom and equal dignity of all its citizens. To the extent that this commitment is conveyed through the operation of the criminal justice system, the larger society is benefitting from the moral messages this system sends, insofar as its values are reinforced in a way that may strengthen people's allegiance to those values and deter behavior that violates those values.

Clearly there is a close connection between the expressivist understanding of retribution and the moral education theory of punishment. Ideally, one would hope that a punishment that is properly vindicative of the victims' value will also be a communication that is morally educative for the criminal—if he will but listen to it. One would also hope that it is a message that the larger society will hear, so that the community will see the values of a free and democratic society implicit in the punishment process of those who have behaved in ways that are violative of those values.

So now our question comes down to this: can we justify the disenfranchising

29. Herbert Morris, "A Paternalistic Theory of Punishment" (1981) 18 *Am. Phil. Quart.* 263 at 268.

of offenders sentenced to two years or more of prison as a deterrent, or a retributive, or a morally educative response?

V. Suspending Prisoners' Right to Vote

If the morally educative nature of a punitive response is tied to its retributive meaning, then we must begin by thinking about the retributive meaning of disenfranchisement as a response to crime. In the right context, I believe that meaning can be powerful and appropriate.

When we vote, we do something. We participate in the governing process. Our hands are on the levers of political power. Now we would not give that lever to an enemy of our state—someone who would want to destroy it, or who wants to undermine the values animating it. We would not do such a thing because it would be a betrayal both of our country and of the values we believe it stands for, especially the values of freedom and equality.

So now imagine someone who has committed treason in the name of fascist principles and is sentenced to, let us say, twenty-five years imprisonment. What political message is sent if we let him vote? I would submit a very bad one is sent: i.e., that despite the fact that he tried to destroy our government and showed contempt for the values animating it, we will nonetheless let him participate in running it. This is no way to stand up for those values, or to support a democratic form of government. To embrace someone when he is your enemy is not only dangerous and foolish, but also expresses a kind of acquiescence in his deed, and an undermining of the values that opposed it.

This is *not* to say that such a person should be treated with hate or contempt. As I suggested earlier, retribution requires that offenders be treated with dignity insofar as the point of retribution is among other things, to vindicate the *equality* of victim and offender. But you don't secure that vindication by refusing, in the name of being "nice" to him, to take a punitive stand against his offence. And to let him vote in the face of his treason is to act as if he hadn't tried to destroy the state that you're now allowing him to help to run.

Now imagine a group of white young men who are convicted of murdering a black youth in a crime of racial hate. Once these men are incarcerated, do we let them vote as a way of welcoming them back to the community? I find it morally upsetting—even repulsive—to contemplate such a policy. While we want these men to be, eventually, upstanding citizens living among us, we don't want them to return as murderous racists. Their contempt for the values of our society was extreme. Hence, we incarcerate them as a way of holding them at arms length, both in order to protect ourselves and in order to uphold the values they flouted. To let them vote is therefore like allowing the treasonous offender to vote: it hands political power to people who want to destroy the foundations of equality in our society. The message that such a policy conveys is not only insulting to those values, but also to the people who are the target of their hate.

Next, consider violent crimes against women. As I've discussed, these are also forms of hate crimes—ways not only of hurting particular women but also of

subordinating women as a whole. To hand the levers of political power over to someone whose behavior manifests an intention to accomplish the subordination of women to men undermines not only the democratic value of equality but also the status and safety of women in that society. It is a policy that involves no politically charged retributive condemnation of the violent action, given its oppressive political significance.

The pattern of all these examples is the same: the crimes that seem rightly punished by, in part, disenfranchisement during imprisonment are those that have political significance—and in particular, those that are destructive of the values and functioning of a democratic society. Hence, these must be an expressive retributive response that negates their significance, lest the meaning of a crime go unanswered and the flouted values go unvindicated in a way what would surely encourage future harms to the nation as a whole and some of its members in particular, such as women and visible minorities.

The crimes that I have reviewed as appropriate subjects of prisoner disenfranchisement all have what I called “political significance”. I suspect (but have not yet argued) that such political significance is a necessary condition that a crime must have for it to be appropriately subject to this punitive response. If so, the Canadian law may well err by being too inclusive, covering crimes whose lack of political significance means that they are not appropriate targets for this response. To explore whether or not this is correct, however, we would need to investigate which crimes do and do not have political significance. Might not, for example, the criminal actions of a white-collar criminal who embezzles millions from a pension fund be politically charged—expressive of an inequality in his economic position relative to others that enabled him (indeed, perhaps in his view, entitled him) to steal from the retirement funds of ordinary people?

I leave these issues aside for now. However they are resolved, the policy that I am advocating will have costs, just as I said any policy on disenfranchisement would. And they are costs that the criminal would be paying. It is surely true, as the traditional left insists, that crime is often linked to systemic forces that are themselves linked to oppression, such as poverty and racism. So to disenfranchise a prisoner whose offense is causally connected to those oppressive forces fails to respond to the injustice of those forces. And this I take to be a serious cost of the policy I am advocating. However, even if, say, poverty and a history of discrimination played a part in a young man turning to violence, our failing to punish him, or our punishing him lightly, ends up further hurting the people who were already hurt by his violence. It means that there will be no decisive statement made by the state, saying: “This harm should never have happened; the offender’s way of relating to the victim is completely unacceptable and fails to honor that victim’s value.” The victims are not wrong, in my view, to see a state that fails to make such a statement through its punishment of those who hurt them, as covertly complicit in their harm. And when the crime is central to the oppression of some of those victims, in the way that violence is central to the oppression of women, the state’s refusal to respond strongly and firmly to that violence amounts to an acquiescence in that violence and a refusal to affirm the value of equality that is supposedly the

foundation of the polity. Such a refusal can help to reinforce, rather than combat, socially oppressive practices that take the form of violence. It has been insufficiently appreciated that well-meaning compassion toward offenders can, in and of itself, do damage. Kindness toward the criminal can be an act of cruelty toward his victims, and the larger community.

Once we acknowledge that we can't have clean hands, we have to choose. On my view, for the sake of victims and our communities, we can't pull back on or mitigate the appropriate retributive response to criminal conduct; hence, we have to choose a criminal code that is committed to retribution. In the cases that I have reviewed, I have argued that there must be a political component to the retributive message in a way that makes disenfranchisement appropriate. But can we nonetheless make this choice morally easier by adding something to this retributive response in order to express a kind of compassion for the criminal himself, in ways that might do him some good and, if he has been the victim of injustice, acknowledge and address that injustice?

I believe that we can; indeed, there are two sorts of "additions" to a retributive response that may allow us to better realize justice with respect to the offender as well as to the victim and the community.

First, we can add to retributive punishment a reformative aim, which can be both rehabilitative and morally educative in function. While a reformist aim isn't the *point* of imprisonment (that comes, on my view, mainly from retribution and deterrence), it can be an important component of that experience, allowing the state to respond appropriately to the criminal. That reformative aim can involve providing experiences (e.g., schooling, job experience) that will help him to overcome the disadvantages of his background. But it should also involve a morally educative aim. Recall that I argued earlier that a retributive response, if it is well-crafted, can also be educative for the individual criminal affected by it, not by being a conditioning or a therapeutic response to his act, but by setting him *thinking*. Expressive punitive responses, such as the suspension of voting rights, have the potential for provoking thought that can bring about a change in the wrongdoer's way of thinking about himself and his society.

Moreover, the hope that the larger society will reflect upon what the loss of voting rights during imprisonment means is another way in which this punishment can be morally educative, and therefore *good*, for everyone else. By telling people "you can have your right to vote suspended if, through your actions, you show contempt for the values that make our society possible", this law links the exercise of freedom with responsibility for its effects. Indeed, *not* to construct a punishment that sends this message is, as I've said, to indirectly undermine the values of a democratic society.

Moreover, any deterrent effect from this law will come from the way its expressiveness has an educative effect. This law deters not because it is "threatening" the criminal or potential criminal with the loss of something that is in his self-interest, which is what I will call a "fear-based" deterrent. Instead, the law hopes to achieve an educative deterrent effect, based upon its ability to make us think. Whether or not prisoners in penitentiaries reflect on what this law means, perhaps the rest of

us will, reaching conclusions about what society expects of us in our conduct and attitudes toward others that will make us better citizens.

I would also make a second addition to the retributive punishments of offenders. This is not, however, an addition to the criminal justice system. It is an additional response that operates outside of that system, directed at those who are players in the systemic forces in our societies that encourage impoverishment of and discrimination against some members of society. I am a firm believer in the reality of retributive responses outside the criminal law; in little private ways we try to punish those who hurt us, and in big, public ways, political policy is often shaped with punitive ideas in mind. In our societies there are members of dominant groups who have the power to abuse members of oppressed groups, and who never run afoul of the criminal law because, given their power, they haven't needed to break any law to do damage to those whom they would subordinate. (They can use such things as money, or economic and political clout to do so). Such people escape the retributive arm of the criminal law. But I believe that such people can still be sent a retributive message. This retribution has to be inflicted not by criminal sentences, but by other means, e.g., by tort law,³⁰ or political legislation, or by the shaping of public opinion against the systems that such people control.

To be properly retributive, and genuinely effective at achieving respect, however, such policies must be fair yet not hateful, healing yet not complicit in the harm. As such they will, I submit, need to have within them the expressive elements that both vindicate the value of the victim and also act like radioactive elements inside the heads of the abusers, killing their taste for disrespect and domination. This is the essence of a well-crafted retributive response. Hence, just as those who operate the criminal justice system have to think about the way that law is expressive, so too do those who operate as reformists outside that system have to advocate retributively expressive political policies that vindicate the values of freedom and equality and eschew domination and discrimination, in a way that is firm but respectful, and concerned ultimately with justice rather than revenge. For people who are committed to the values of a free and equal democratic society, a retributive response to any person who violates those values, whether that person is rich or poor, powerless or powerful, our enemy, or our friend, or one of *us*, is demanded by those values themselves.

This way of viewing the multiple aims of the punitive response rejects the hatefulness and contempt of a mean-minded and vengeful response to those whose behavior violates the values of freedom and equality (whether or not that behavior is officially labelled 'criminal'); it is meant to be respectful to the offender, and yet the very opposite of a lenient, permissive attitude that would also be disrespectful to victims and to the larger community. The idea is to show the way in which justice and healing needn't be opposed.³¹

30. Consider, for example, the way that the Violence Against Women Act enacted by Congress in 1994 enables women to sue men who have used violence against them—a right that is particularly important in a society where prosecutors may be reluctant to argue their case in a criminal court.

31. Chiste argues that native women are much more likely to advocate a non-punitive response, in the name of healing an offender, *supra* note 13 at 29. The problem with this observation, however,

VI. The Expressiveness of Law and Morality

In modern political theory, liberals often talk about the importance of government being neutral. There is more than one way that this neutrality is understood: e.g., as neutrality with respect to conceptions of the good, or neutrality with respect to moral, religious or metaphysical “comprehensive conceptions”.³² A theorist with this point of view generally has no taste for the idea that law serves a morally expressive function (although Joel Feinberg is a notable exception).³³ These liberals want the state to address harm, but not to “enforce morality”. They want the government to maximize each persons’ freedom, but do so without any preaching or moralizing. Isn’t this the right way to think about government in a pluralist and multi-cultural society?

It is my deep belief that this is entirely the wrong way, and that searching for freedom and equality demands that political figures, whether or not they hold government office, realize and craft legislation, sentencing policy and reformist political action guided by two moral principles: namely that human beings must always be regarded as free, and that all human beings in our society are political equals.³⁴

is that we do not know what conception of punishment such women are rejecting. They may well be rejecting a punitive response that is hateful and condemnatory, but may want a punitive response that heals by being morally educative and that vindicates the victims’ value; hence it may be that the view of punishment I suggest is more congenial to native conceptions of appropriate treatment for offenders than it might initially appear. But I do not know enough about various native conceptions of sentencing to evaluate the extent to which any of them are in accordance with, or contradict, retributive or morally educative ideas.

32. Both conceptions are associated with the work of John Rawls, the former in his classic *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); the latter in his more recent book *Political Liberalism* (New York: Columbia University Press, 1993).

33. To quote Feinberg: “The liberal does *not* urge that the legislators of criminal law be unconcerned with “a man’s morals”. Indeed, everything about a person that the criminal law should be concerned with is included in his morals. But not everything in a person’s morals should be the concern of the law, only his disposition to violate the rights of other parties. He may be morally blameworthy for his beliefs and desires, his taboo infractions, his tastes, his harmless exploitations, and other free-floating evils, but *these* moral judgments are not the business of the criminal law.” Joel Feinberg, “Some Unswept Debris From the Hart/Devlin Debate”(1987) 72 *Synthese* 249 at 259.

34. I am grateful to Gerald Chartier and Glenn Joyal, of the Winnipeg office of the Canadian Department of Justice, for their invitation to become involved in the case, and for all the information they provided me about the issues involved in it. Thanks also go to Cindy Holder, for her research assistance and for her conversations with me on this topic, Hamish Stewart for providing me with information regarding Canadian law, and audiences at the University of Toronto Law School, the University of Oklahoma, the University of Sussex and the University of Bristol who heard this paper delivered and whose comments I found very valuable.

