Further Considerations Relating to Romanist Infamy and the American Constitutional Conception of Impeachment

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The Constitution stipulates that the President “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”\(^1\) It also provides that: “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and punishment, according to Law.”\(^2\)

In an earlier paper\(^3\) it was suggested that the above conception of impeachment, which mentions not felonies, but “high crimes,” reflected the influence of the French enlightenment on the 18th-century Philadelphia constitutional convention, and hence the influence of Roman law, with new or bourgeois qualities, on the text of the Constitution. Therefore, the American bourgeois conception of impeachment should not be understood as based on feudal English common law. There is a confrontation in the Constitution between English feudal common law and French bourgeois Romanist conceptions of impeachment. It has been pointed out that John Taylor held that: “Even in England [impeachment]... is held in disrepute.”\(^4\) Bourgeois-fied and Romanized, impeachment in the United States is not the same as “disreputed” English feudal impeachment.

I. INFAMY-IMPEACHMENT DETERMINED BY UNALIENATED PUBLIC OPINION

Because of the bourgeois Romanism of the enlightenment, the American constitutional idea of impeachment reflects Roman law

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2. U.S. Const. art. I, § 3.
4. Id. at 335 n.84.
ideas relating to infamy—an institution not known in English common law. There were two important types of infamy, or loss of honor, in Roman law. One was based on law (infamia juris); the other was based on fact or act (infamia facti). The latter was justified by what, after the French and American revolutions, would be called public opinion. The protection and justification of public opinion afforded by the first amendment creates a liaison with infamy based on fact or act. Hamilton, in The Federalist No. 65 stated that American constitutional impeachment is political. This means—and he says—that American impeachment is infamy-impeachment. The Constitution, therefore, consecrates Romanist infamy based on fact or act. Hamilton wrote of "[t]he awful discretion which a court of impeach- ments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community."5 Impeachment means "a perpetual ostracism from the esteem and con- fidence, and honors . . . of his country."6 Cesare Beccaria, the most important theorist of the criminal law of the 18th-century enlighten- ment, said that "[i]nfamy is a mark of public disapprobation, that deprives the criminal of the confidence of his country, and of that almost fraternal intimacy which society inspires. It can not be deter- mined by law."7 Hence the Constitution separates infamy-impeach- ment, based on fact or act, from what may be called afflictive punish- ment. Only the latter must be punished "according to law."

It must be reiterated that the American constitutional texts relating to impeachment reflect the influence not of English law, but of the French enlightenment, and hence the influence of Roman law with new or bourgeois content. Plucknett wrote that "there can be no doubt that, as far as the law of land is concerned, England became the most thoroughly and consistently feudal of all the European states."

5. THE FEDERALIST No. 65, at 426 (Modern Library ed. 1937) (A. Hamilton) [hereinafter cited as FEDERALIST No. 65].
6. Id.
still seemed feudal. English common law as such is only secretly bourgeois; or putting the matter dialectically, feudal appearance seemed to mask bourgeois reality. Jefferson wrote to Tyler:

I deride with you the ordinary doctrine, that we brought with us from England the common law rights. This narrow notion was a favorite in the first moment of rallying to our rights against Great Britain. But it was that of men who felt their rights before they had thought of their explanation. The truth is, that we brought with us the rights of men, of expatriated men.¹⁰

The American constitutional theory of bourgeoisified Romanist infamia facti as the basis for impeachment reflects Jefferson's activist anti-feudal presentation. Indeed, Jefferson was hostile to Montesquieu, perceiving in this relatively early French theorist of the enlightenment a penchant toward feudalism. As Hamilton's theory of infamy-impeachment represents an unacknowledged debt to Montesquieu's theory of impeachment as formulated within the latter's presentation of separation of powers, it is suggested that Jefferson would, in part, have condemned Hamilton's discussion of infamy-impeachment in Federalist No. 65 because of the idea stated therein of the role of the Senate in impeachment. "Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in its own situation, to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers?"¹¹ Hamilton here abstractly restated Montesquieu's feudal, limited class-struggle theory of impeachment in which the latter said, as an aspect of his theory of separation of powers, that "in order to preserve the dignity of the people and the security of the subject, the legislative part which represents the people must bring in its charge before the legislative part which represents the nobility, who have neither the same interests nor the same passions."¹²

Hamilton's unhistoric conception of the role of the American Senate, and Montesquieu's historic conception of the role of the French nobility in impeachment, are both alienating or appropriating

¹⁰. 5 T. Jefferson, Writings 65 (1853); see Franklin, The Judiciary State II, 3 Nat'l Lawy. Guild Q. 27, 28 (1940).
¹¹. Federalist No. 65, at 425.
¹². Franklin, supra note 3, at 321 n.31.
conceptions. Thus, both Montesquieu and Hamilton would incur the condemnation of Jefferson who, as has been indicated, wrote of the revolutionary or self-motion of the Americans as that of “expatriated men.” In the impeachment theories of Hamilton and Montesquieu, the American Senate or the French nobility are alienating or socially appropriating forces, whereas to Jefferson, the goal of the American revolution was to overcome or to appropriate an alienating or appropriating force, whether such is historic or unhistoric. Unalienated public opinion enjoys, in Jeffersonian thought, that role. Jeffersonian ideology condemns the mediation of both historic and unhistoric structures or forms of appropriative alienation. The hegemony of public opinion determines impeachment. In other words, the first amendment, understood as the activity of public opinion, determines impeachment. “[P]ublic esteem,” says Holbach, “has more power over men of elevated minds than the terroir of the laws.”

II. INJURIES TO SOCIETY—HIGH CRIMES AND MISDEMEANORS

Hamilton said that impeachments “are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”14 His political conception of impeachment as “injuries” to the “society itself” is an inclusive political conception—wider in scope than violation of positive or formulated criminal law and also wider in scope than noncriminal aggression against the text of the Constitution. It connotes injury to what in the 18th century was called “civil society,” that is, the infrastructural productive and class relations of men prior to and explaining ultimately the creation of the state as superstructure, for instance, through social contract theory. Rawls has recently restated such theory, but presents it as philosophic idealism, as appropriative alienation, as external mediation and as mystification. He writes: “My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant.”15 Rawls abstracts or reduces Hegel to a remote footnote,16 thus eliminating or distorting the role

14. FEDERALIST No. 65, at 423.
16. Id. at 521 n.3.
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of social contract in the dialectic of infrastructure/superstructure. Rawls abstractly continues:

[W]e are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.

But after further discussion Rawls writes that “[t]he principles of justice are chosen behind a veil of ignorance.” This, of course, would not attribute hegemony to unalienated public opinion in determining infamy-impeachment. The idea of the veil, mask, semblance, ambiguity, etc. will appear again in this paper. Here it is sufficient to say that Rawls justifies teleological secrecy as a Kantian unknowable-thing-in-

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17. Id. Rawls here writes: “The notion of private society, or something like it, is found in many places. Well-known examples are in Plato, The Republic . . . and Hegel, Philosophy of Right [Law] . . . under the heading of civil society. The natural habitat of this notion is in economic theory (general equilibrium), and Hegel's discussion reflects his reading of Adam Smith, The Wealth of Nations.”

In a letter, dated at Passy, March 14, 1785, Benjamin Franklin wrote Benjamin Vaughan: “The English author is for hanging all thieves. The Frenchman is for proportioning punishments to offences . . . [A]s the French writer says, Doit-on punir un délit contre la société par un crime contre la nature? . . . Superfluous property is the creature of society. Simple and mild laws were sufficient to guard the property that was merely necessary. The savage's bow, his hatchet, and his coat of skins, were sufficiently secured, without law, by the fear of personal resentment and retaliation. When by virtue of the first laws, part of the society accumulated wealth and grew powerful, they enacted others more severe, and would protect their property at the expense of humanity. This was abusing their power, and commencing a tyranny. If a savage, before he entered into society, had been told, ‘Your neighbor by this means may become owner of an hundred deer; but if your brother, or your son, or yourself, having no deer of your own, and being hungry, should kill one, an infamous death must be the consequence,' he would probably have preferred his liberty, and his common right of killing any deer to all the advantages of society that might be proposed to him.”

2 The Works of Benjamin Franklin 479-80 (J. Sparks ed. 1840). In a footnote Sparks translates “un délit contre la société” as “an offence against society” and “crime contre la nature” as “crime against nature.” Id. at 479. Franklin's letter first appeared anonymously in a small volume published by Sir Samuel Romilly in 1786. Id. at 478. The letter is published in Sparks' edition of Franklin under the title On the Criminal Laws and the Practices of Privateering. Id. at 478-86.

18. Id. at 11.
19. Id. at 12.
 itself, either as a veil for self-determined executive self-condonation of infamia facti or as a mask for congressional grace or pardon for infamia facti. Such subjectivism must be condemned.

Though Hamilton justifies impeachment for "injuries" done to the "society itself" and as such recognizes infamy-impeachment, the Constitution also requires that impeachment be based on "high crimes and misdemeanors." In The Federalist No. 65 Hamilton wrote of infamy-impeachment, but never mentioned the phrase "high crimes." This suggests that bourgeois infamy of "fact" for "high crimes" is interchangeable with infamy of "fact" for "injuries" to the "society itself."

The report by the Staff of the Impeachment Committee of the Committee on the Judiciary, House of Representatives, sets forth the background of the phrase, "high crimes and misdemeanors":

Briefly, and late in the Convention, the framers addressed the question how to describe the grounds for impeachment consistent with its intended function. They did so only after the mode of the President’s election was settled in a way that did not make him (in the words of James Wilson) "the Minion of the Senate." The draft of the Constitution then before the Convention provided for his removal upon impeachment and conviction for "treason or bribery." George Mason objected that these grounds were too limited:

Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is more necessary to extend: the power of impeachments.

Mason then moved to add the word "maladministration" to the other two grounds . . . .

When James Madison objected that "so vague a term will be equivalent to a tenure during the pleasure of the Senate," Mason withdrew "maladministration" and substituted "high crimes and misdemeanors agst. the State," which was adopted eight states to three, apparently with no further debate.20

In a vital footnote to this presentation, the following appears:

Mason’s wording was unanimously changed later the same day from

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“against the State” to “against the United States” in order to avoid ambiguity. This phrase was later dropped in the first draft of the Constitution prepared by the Committee on Style and Revision, which was charged with arranging and improving the language of the articles adopted by the Convention without altering its substance.21

This material, including the work of the Committee on Style and Revision,22 justifies Hamilton’s recognition of infamy-impeachment, including “factual” infamy, for “high crimes” or for “injuries done immediately to the society itself,” that is, to civil society, as aspects of what later in this paper will be described as the concept of friend/foe.

To repeat, Hamilton in The Federalist No. 65 does not discuss the bourgeois constitutional phrase “high crimes and misdemeanors” and does discuss bourgeoisified Romanist infamia facti. This connotes that infamy of fact for “injuries” to the “society itself” and infamy of fact for “high crimes” are interchangeable. The outcome of the Philadelphia convention, so far as this paper is concerned, shows the decline there of the feudal English bill of attainder and the rise of bourgeoisified Romanist infamy, based on infamy of fact or act for “injuries” to the “society itself.”

III. INFAMIA FACTI AND HIGH CRIMES—LOSS OF HONOR

Infamy of “fact” of “act” and the constitutional phrase “high crimes” are not intended to have firm content or firm determination, but they must relate to bourgeoisified loss of honor or of civic honor, including such in civil society. These ideas legitimate what Roscoe Pound calls “standards” as distinguished from “rules” of law.23 Examples of “standards” are the ideas of “due care” and of “due process.” Such flexible legal formulations, lacking in detailed content, may be called “Stoic” or “accordion-type” texts. The Constitution, especially the Bill of Rights (the “second Constitution”), also determines the content of the constitutional text through the structures or forms that

21. Id. at 12 n.48.
22. Of the five members of the Committee on Style and Revision, Hamilton, Madison and Morris were explicitly, or in effect, active adherents of infamy-impeachment, including infamia facti. See generally Franklin, supra note 3 passim.
it creates. An example is the first amendment. The brevity of the first and second Constitutions, due to the Romanist influence, anticipates the succinctness of the 18th century French civil code and of all subsequent Romanist codification. As Hamilton conceives that “high crimes” presuppose infamy of “fact,” the flexibility of content of *infamia facti* connotes the flexibility of content of “high crimes.”

The flexible constitutional phrase relating to impeachment is “high crimes,” and not “felonies.” It is not necessary to repeat the criticism of “felonies” as a constitutional weapon which was made in the Philadelphia convention. To this criticism it may be added that “felony” had a feudal history and meaning and was not, even in masked form, suited to a bourgeois conception of Romanist infamy, or loss of honor, as the basis for presidential impeachment. The social forces hostile to or suspicious of the existence of a presidency could not be thus satisfied. Hence in situations other than impeachment the Constitution does accept “felony.”

The relation between “felony” and feudal infamy or feudal loss of honor was presented to Tocqueville after the French and American revolutions.

The peculiar rule, which was called honour by our forefathers, is so far from being an arbitrary law in my eyes, that I would readily engage to ascribe its most incoherent and fantastical injunctions to a small number of fixed and invariable wants inherent in feudal society . . . . The state of society and the political institutions of the middle ages were such, that the supreme power of the nation never governed the community directly. That power did not exist in the eyes of the people: every man looked up to a certain individual whom he was bound to obey; by that intermediate personage he was connected with all the others. Thus in feudal society the whole system of the commonwealth rested upon the sentiment of fidelity to the person of the lord: to destroy that sentiment was to open the sluices of anarchy . . . . To remain faithful to the lord, to sacrifice oneself for him in his feudal undertakings whatever they might be —such were the first injunctions of feudal honour . . . . The treachery of a vassal was branded with extraordinary severity by opinion, and a particularly infaming name was created for the offence, which was called *felony* [felonie] . . . . The rules of honour will therefore

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24. It will be shown that Savigny, the great feudal German Romanist of the 19th century, was hostile to infamy of “fact” because it permitted “free” or “sound” “discretion.” However, the American Constitution permits such “discretion” through infamy of “fact” or the constitutional phrase “high crimes.”

always be less numerous among a people not divided into castes than among any other . . . . Thus the laws of honour will be less peculiar and less multifarious among a democratic people than in an aristocracy . . . . Among a democratic nation, like the Americans, in which ranks are identified, and the whole of society forms one single mass . . . it is impossible ever to agree beforehand on what shall or shall not be allowed by the laws of honour . . . . Consequently, the dictates of honour will be there less imperious and less stringent; for honour acts solely for the public eye—differing in this respect from mere virtue, which lives upon itself contented with its own approval.26

In writing that honor "acts solely for the public eye," Tocqueville parallels Hegel's fundamental conception of recognitive being—the heart of the theory of infamy-impeachment. But Hegel also said: "[I]nasmuch, then, as honour is not only a semblance in me myself, but must exist also in the mind and recognition of another which again on its part makes a claim to a similar honorable recognition, honour is the extreme embodiment of vulnerability."27 This may be veered into what may be called the bourgeois meaning of infamy indicated by the Constitution. The first, or Philadelphia Constitution, through infamy-impeachment or infamy as loss of bourgeois honor, justifies the vulnerability of the bourgeois honor of the executive. This concept is strengthened by the second Constitution, for the first amendment consecrates the Public Opinion State. On the other hand, the second Constitution shields American public opinion from "vulnerability" through the fifth amendment, which condemns mass infamy (for instance, racism by the President), by requiring grand jury indictment and petit jury conviction for a formulated, infaming crime.28

Hegel also shows that Montesquieu's and, of course, Tocqueville's discussion of honor masks historical struggle over property and thus class or factional rivalry. Hegel wrote that

the fact that Montesquieu discerns "honour" as the principle of monarchy at once makes it clear that by "monarchy" he understands, not the patriarchal or any ancient type . . . but only feudal monarchy, the type in which the relationships recognized in its constitutional law are crystalized into the rights of private property and the privileges

26. 2 A. TOCQUEVILLE, DEMOCRACY IN AMERICA 248-49, 354-56 (1877) (translation slightly altered by this author for sake of exactness).
27. 2 G. HEGEL, THE PHILOSOPHY OF FINE ART 335 (1920).
28. Franklin, supra note 3, at 337.
of individuals and Corporations . . . . [I]t is not duty but only honour which holds the state together.29

When Tocqueville's feudal particularism, that overlooks mass infamy and the struggle between the "noble" and "base" or mass consciousness, already discussed elsewhere through Beccaria and Hegel,30 is developed by negation into the flexible American constitutional conception of "factual" infamy-impeachment, the bourgeois significance of Hamilton's "bridling"31 thought that infamy-impeachment concerns "injuries" done historically by the President to the "society itself," including civil society which exists prior to the state itself, appears with all its brilliance. The relation between a flexible, historic conception of "factual" infamy-impeachment and "high crimes" stands out when it is perceived that American bourgeois, Romanist infamy-impeachment concerns infrastructural civil society.

It is essential to recognize that the content of "factual" bourgeois, American infamy-impeachment and of "high crimes" or loss of bourgeois honor is flexible, or, to be more exact, determined historically by unalienated public opinion. Max Scheler, the phenomenological existentialist, would hold to the contrary. "The fact that one does or does not possess honor does not depend originally on the judgment carried by the ambient world—but it exists as such, independently of this ambient world . . . ."32 Scheler thus only recognizes the "essence" of honor or infamy apart from social history. Since infamy is historical infamy, however, it was a mistake for Agnew to quote Calhoun, who said infamy, if true "ought to degrade me . . . and consign my name to perpetual infamy."33 Because infamy is historical, it may not be permanent. The social nothingness of the infamed may be veered by honor-

30. Franklin, supra note 3, at 331. "According to Confucius, the fate of man is ordained by 'Heaven'; all men are unalterably either 'noble' or 'base'. The younger must humbly submit to their seniors, subordinates to their superiors." M. Rosenthal & P. Yudin, A Dictionary of Philosophy 91 (1967).
31. Franklin, supra note 3, at 323.
33. Franklin, supra note 3, at 332. It is suggested that Calhoun's knowledge of Romanist infamy came through Thomas Cooper, whose Institutes of Justinian appeared in 1812, supplementing the civilian activity of Edward Livingston in Louisiana during the same period. Livingston wrote of Spanish infamy. Id. at 316 n.13.
able act or fact from social nothingness to social being.\textsuperscript{34} In \textit{The Federalist No. 43}, Madison wrote “of an unhappy species of population bounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character.”\textsuperscript{35}

Max Scheler, not a jurist, was apparently unaware of Romanist infamy. Savigny, the most important Romanist of the 19th century, and the head of the feudal counter revolutionary German historical school of law, contrary to Hamilton and contrary to the American Constitution, condemns Roman \textit{infamia facti} as arbitrary. In 1840 he wrote:

Beside this juridically determined infamy, there are many cases in which the customary-moral judgment of right minded and rational men either because of individual acts, or because of entire life-style, suffices to give judgment decisively against honor, as if the conditions of infamy really existed. The innovations ground upon this the classification into \textit{infamia juris} and \textit{infamia facti}. In fact only for the first is the name of infamy made use of juridically, and the mentioned artificial expressions therefore are not merely corrupt because they do not conform to the sources, but because they easily seduce to wrong process, for \textit{infamia facti} seeks fresh determined conditions and effects which nevertheless can be valid only for true infamy (\textit{infamia juris}). All effects, which one has sought to attribute \textit{infamia facti}, resolve themselves into fully free discretion [\textit{freien Ermessen}], at one time of the highest power and its authorities (at the post of officials), at another time also by the judge (for instance, in the credibility of witnesses) . . . . [I]n that way every mediating concept of \textit{infamia facti} however appears not only as dispensable, but also as perplexing and misleading to error. The total lack of equality of so called \textit{infamia facti} and true infamy is exhibited in that it lacks all secure earmarks: partly because the usually grounded opinion comes forth in different shadings, without firm boundaries; partly public opinion is often wrong in that it permits determination through prejudice instead of customary-moral grounds, or through groundlessly acceptable fact.\textsuperscript{36}

Savigny’s criticism justifies the attack on political \textit{infamia facti} imposed for decades by congressional committee and by executive

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\textsuperscript{34} The real crime at Attica was the official belief that convicted or infamed prisoners through resistance to prison oppression could not regain their fame.

\textsuperscript{35} \textit{The Federalist} No. 43, at 285 (Modern Library ed. 1937) (J. Madison).

\textsuperscript{36} 2 F. Savigny, \textit{System des heutigen Römischen Rechts} 187 (1840); cf. 16 D. Diderot, \textit{Oeuvres Complètes de Diderot} 138 (1821) (\textit{ignominie}).
activity in violation of the fifth amendment. But he ignored constitutional infamia facti directed against the oppressive President. What Hamilton regarded as vital in The Federalist No. 65 is flexible infamia facti or infamy-impeachment of the President for “injuries” to the “society itself.” The feudal theorist, Savigny, flourishing during the period of Metternich and European counter revolution, would not accept this. Writing of English criminal law seven centuries ago, Bracton, who has been prominent in the discussion of impeachment, quoted Digest 3.2.22 saying “‘It is not the beating that imposes the stigma of infamy, but the reason for which it merited imposition.’” This relates Bracton to Hamilton’s position that infamy-impeachment, including infamia facti, connotes “injuries” to the “society itself” (including civil society), or “high crimes.”

Although Savigny, as quoted, appears hostile to infamia facti he must be taken to admit that American constitutional infamy-impeachment is Stoic or flexible, determined by public opinion, and, as Hamilton said, may be directed against “injuries” done to the “society itself.” It must be repeated that Savigny, as leader of the distinguished German historical school of law, plays a counter revolutionary role, confronting the French revolution both in practice and in ideology. Although infamy was the weapon of the feudal noble consciousness against the base and oppressed, Savigny resented the veering of infamy against the noble consciousness. This appears more clearly in Savigny’s discussion of capitis deminutio and of civil death in the French law as a weapon against the ancient regime.

A. Crime and Delict

The consecration in the American Constitution of infamy-impeachment, as justified by unalienated public opinion, indicates, as noted above, that infamy-impeachment, including infamia facti, explains, embraces and signifies the constitutional requirement that the President be guilty of “high crimes and misdemeanors.” That the language of the Constitution embodies Romanist ideas of the French

37. Franklin, supra note 3, at 337.
38. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 290 n.98b (1968). It is unfortunate that Thorne, the translator of Bracton, has, at least here, translated “causa” as “the reason.” Romanist causa should be taken to connote social justification or social presupposition.
enlightenment also bears repetition. In the history of Roman law, the word "crimes" need not necessarily connote criminal law, but is also a synonym for delict, or what in Anglo-American common law, means "tort." The Romanist constitutional text (article two, section four), relating to "high crimes" relates to "factual" Romanist infamy-impeachment which is not necessarily responsibility to the positive criminal law. Hence, article one, section three of the Constitution provides (with appropriate emphasis indicated by this writer) that: "Judgment in cases of impeachment shall not extend further than removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law." Article one, section three, and article two, section four, are thus consistent because "crimes" in article two, section four, connote the Romanist sense of "crimes," which, as has been said, may mean infamy for delict (or even quasi-delict) in the sense of responsibility which may exist, but which may owe nothing to positive criminal law and which may mean infamy-impeachment as justified by unalienated public opinion for wrongs to offences against, or "injuries" to the "society itself."

Hamilton made very clear the consistency of the relationship between article one, section three, and article two, section four, in The Federalist No. 65. He wrote of "[t]he awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community." In the following sentences Hamilton added that impeachment means "a perpetual ostracism from the esteem and confidence, and honors . . . of his country." This is a reference to the "high crimes" or infamy responsibility created in article two, section four. Hamilton then asks: "Would it be proper that the persons who had disposed of his fame, and his valuable rights as a citizen, in one trial, should, in another trial, for the same offence, be also the disposers

39. Without reference to Roman law this matter is excellently discussed in Staff Report 22-25.
40. Diderot, in his account of "offense" relates it to the "wrong" ["tort"] "which another receives from it." 18 D. Diderot, Oeuvres Complètes de Diderot 17 (1821) (offense).
41. Federalist No. 65, at 426.
42. Id.
of his life and his fortune?" This is a reference to article one, section three, of the Constitution which imposes responsibility to the positive criminal law.

As has been said in Roman law, the word "crimes" may connote responsibility which is not a violation of positive criminal law. Likewise, positive criminal law may be described as "delictal," or as "tort" in the sense of Anglo-American common law. Reference has already been made to the influence of Beccaria within the United States during the late 18th century as the great theorist of the enlightenment concerning criminal law. The title of his work on criminal law is usually translated into English as "On Crimes and Punishments." The title of the Italian text, however, is "Dei delitti e delle penne." Laplaza's Spanish translation is entitled "De los delitos y de las penas." Morellet's influential French translation of 1765 is entitled "Traité des délits et des peines." J.-A.-S. Collin de Plancy's French edition of Beccaria, dated 1823, is entitled "Des délits et des peines" with "various notes and commentaries" of "Franklin" and others—"Voltaire, Montesquieu, Diderot, Roederer, Brissot de Warville, Morellet, Bérenger, Rizzi, Servan, . . ." Another late edition of 1797 by Roederer, based on Morellet's "Traité des délits et des peines par Beccaria" has material by "Jérémie Bentham." Indeed, all thirty-six texts relating to Beccaria listed by Laplaza (the list is incomplete) employs the appropriate word for "delict" in the Italian, French and Spanish languages. Laplaza mentions that Morellet's French translation of 1765 or 1766 was reprinted at least six times in 1766, possibly in Lausanne, Philadelphia, Bern, and Amsterdam. Laplaza mentions a Spanish translation of Beccaria, "Disertacion sobre los delitos y las penas," as having been printed by "Robert Wright" in Philadelphia in 1823.

The Romanist reciprocity or indifference in delict/crime and crime/delict is discussed by Buckland and McNair, and supported by Lawson, the editor of their second and revised edition. They wrote:

[In principle an action in tort is an action for compensation . . . .

43. Id.
44. C. BECCARIA, DE LOS DELITOS Y DE LAS PENAS 313 (1955).
45. Id. at 171.
46. Id. at 529.
47. Id. at 532.
48. Id. at 533.
49. Id. at 529.
50. Id. at 536-37. See also id. at 161.
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For the Roman action on delict we must reverse these propositions. Delict is imbued with the idea of vengeance and the action is primarily not for damages, but for a penalty . . . . [T]he primary aim is not compensation . . . . The distinction is fundamental. It allies the law of delict with that of crime rather than with that of other civil obligation, so much so that Mommsen in his Strafrecht, somewhat to the confusion of his readers, hardly distinguishes between delict and crime except in matters of procedure. And while delictum and maleficium are the appropriate names for a delict and crimen is used mainly in connexion with crime, the distinction is not maintained clearly in Justinian’s books and not entirely in the surviving classical texts. A similar blurring of the line between tort and crime, a line which can easily enough be drawn for practical purposes, but is very hard to fix scientifically, is found in our law. The old appeals of felony straddled across the line, and the writ of trespass, which perhaps arose out of them about the middle of the thirteenth century, for many centuries more showed some signs of a criminal ancestry by often including the words “vi et armis . . . et contra pacem nostram.” . . . But although the criminal association of our early conception of tort or torts has left its mark, we seem to have had less difficulty than the Romans in differentiating between the two conceptions. The Roman law of delict has far more affinity to the criminal law than to the law of tort; the penalty is indeed paid to the injured party, not to the State, but still it is a penalty and not damages.51

In his masterwork, Buckland stated his thought more succinctly, writing in a footnote:

For G[aius] delictum or maleficium is a civil delict. The word crimen is appropriate to public wrongs . . . . But the usage is not so constant as to require, as he claims, expulsion of any text conflicting, e.g. G. 1.128, 2.181 where it seems to mean misdeed of any kind, 3.197, 208 where crimen must refer to furtum as a civil wrong, P.5.26.2 where delictum is a crime; still less, pompus enactments of the late classical age . . . . 52

The presentation of Schulz, as it touches the relationship of Roman law and Roman equity, is too complicated to be discussed here, save in certain of its aspects. He wrote that:

In the legal language of the dominant classical lawyers delictum

51. W. BUCKLAND & A. McNAIR, ROMAN LAW AND COMMON LAW 344-45 (2d ed. F. Lawson 1965). The presentation would have been slightly stronger if the word “reparation” instead of “compensation” would have been used.

52. W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 576 n.7 (2d ed. 1932) (citations omitted).
meant an offence from which resulted *iure civili* a penal obligation (*obligatio ex delicto*) and a penal action (*civili actio poenalis*). Instead of delictum the lawyers sometimes used the term *maleficium* .... *Crimen* was used by the classical lawyers to designate an offence which was punishable by public criminal law .... This was the terminology of the leading classical lawyers and perhaps also of the imperial chancery. Gaius, however, who was not one of the dominant lawyers, went his own way .... Apparently he did not find followers during the classical period, but the post-classical lawyers caught up his idea and developed it further .... *Crimen* was now also used to designate offences from which resulted penal actions .... In this book we will ignore the classical terminology and adopt the post-classical usage .... For that reason we define delict as follows: Delictum was an offence from which resulted a penal obligation and a penal action, either *iure civili* or *iure honorario.*

Schulz, aware of the dialectic of law, discussed Roman social history which resulted in a tendency toward the indifference of delict and criminal law. He wrote:

The classical penal actions afforded a powerful protection for material and immaterial interests .... nevertheless, the wide scope of these actions comes as a surprise to us. Within the civilization, and particularly legal civilization, of the classical period they seem to us very primitive and old-fashioned, for we hold today that it is on principle the duty of the State to punish its subjects and that private law should be confined to actions for damages; a private penal action seems justified only for the protection of immaterial interests (*actio inuiuriarum*). However, Roman public criminal law at the end of the Republic was still far below the standard of civil law; two centuries of revolution and war had paralyzed the administrative activity and had prevented the development of criminal law .... Thus the penal actions served as a supplement to the unsatisfactory criminal law.

Schultz then made a comparative reference through Pollock and Maitland to the history of English feudal law:

Under Edward I a favorite device of our legislators is that of giving double or treble damages to "the party grieved." They have little faith in "communal accusation" or in any procedure that expects either royal officials or people in general to be active in bringing malefactors to justice. More was to be hoped from the man who had suffered. He would move if they made it worth his while. And so in a characteristically English fashion punishment was to be in-

53. F. SCHULZ, CLASSICAL ROMAN LAW 572 (1951).
54. Id. at 573.
flicted in the course of civil actions: it took the form of manyfold reparation.\textsuperscript{55}

Schulz added: "This is also a good description of the legal situation in Rome at the end of the Republic."\textsuperscript{56} Schulz continued:

Under the Principate, criminal justice was administered more promptly, but the private penal actions remained unaltered . . . . Most probably the competing criminal procedure in which the judge was also entitled to award damages to the offended came in practice to supersede gradually the private penal actions, particularly in the provinces; but the classical lawyers in Rome as usual took no notice of this development and continued to discuss eagerly the law of penal actions as if it were still living law. The post-classical history of the penal actions is still obscure; not even Justinian's law has been fully analyzed. But this much is clear: the penal actions were not abolished by Justinian . . . . In modern Roman law the penal actions gradually developed into mere actions for compensation; in England they served as a model to the legislators under Edward I.\textsuperscript{57}

Pound, the only American Romanist of the 20th century possessing international stature, may be here mentioned.

In Roman law there was a contractual theory of delicts. A wrong gave rise to a claim on the part of the person injured to a penalty recoverable from the wrongdoer by the legal proceeding appropriate to collection of a debt. When the penalty came to be thought of as a penalty of reparation, the debt analogy had fixed the conception of an obligation \textit{ex delicto} . . . .

In the common law, on the other hand, for historical reasons, there is a tort theory of contracts. One sues for damages for non-performance of a promise instead of to exact performance.\textsuperscript{58}

Pound here indicates that, in Roman law, penalty, which is criminal, is also regarded as "obligation," \textit{obligatio ex delicto}, which is not criminal. Probably the indifference of criminal law/delict possible in Roman legal history, so that "delict" may be either civil or criminal, is due not only to the social history mentioned by Schulz, Buckland, McNair, Lawson, but also to the role of \textit{litis contestatio} in Roman law. Roman law process virtually begins with \textit{litis contestatio} or the proce-

\textsuperscript{55} Id. (citations omitted).
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 573-74. Here again "reparation" should have been employed instead of "compensation."
\textsuperscript{58} R. \textsc{Pound}, \textit{supra} note 23, at 186.
dural contract by which the parties to the litigation contractually submit to the competence of the adjudicating force. This resulted in what here may be called a novation in which the wrong is replaced by contract. Of importance is that the constitutional American public law phrase "high crimes" not only avoids "felony," but develops the Romanist idea that "delict" may be a "crime." The "delict," wrong, or "high crime" justifying impeachment is the infamia facti discussed by Hamilton in The Federalist No. 65. Infamy, including infamia facti, as Beccaria said, "cannot be determined by law," but is political condemnation for a wrong, an offence, a maleficium, a "delict," a "high crime."

Strachan-Davidson wrote of the process of indifference in Roman delict/crime through the focus of Mommsen's scholarly contribution on Roman criminal law. Strachan-Davidson points out that Mommsen accomplishes two tasks which become important in the American constitutional conception of impeachment. In the first place, Mommsen justifies the process of the indifference historically. Strachan-Davidson wrote:

"The extent to which the primitive self-help is to be reckoned a source of Roman criminal law may be roughly gauged by ascertaining what offences were at any historical time dealt with, as delicta under the forms of civil action . . . . Theft in all its forms, including fraud, embezzlement, and breach of trust, all personal outrages, assaults, woundings and insults (injuriae), all trespass on the rights of property, all libel, all slander, and false witness, all invasion of the chastity of members of the family (stuprum), are dealt with, in whole or in part, as private wrongs . . . ."

Mommsen rightly refuses to allow the differences of procedure to obscure the essential fact that such trials are really part of the criminal law. "The fundamental characteristic," he says, "of a moral law broken, and a reparation prescribed therefore by the State, unites the two spheres in an essential identity, and the difference, whether the reparation is realized is a suit at public or at private law, appears in comparison superficial and accidental." . . . In these suits under the forms of private law, the penalty inflicted . . . may be hardly less severe than that which the State dispenses in its "public" justice.

In the second place, Strachan-Davidson relates the indifference of delict/crime to Mommsen's discussion of the self-determined or self-
help role of the Roman tribunate in confronting Roman patrician power through *intercessio* or of veto. Strachan-Davidson quoting Mommsen: "The 'sacrosancta potestas' of the tribune is originally an euphemism for revolutionary self-help;" and again, "[i]n place of the death penalty prescribed by law for the violation of the magistrate, we find the political self-help, confirmed by oath, which intervenes whenever the law is exhausted, especially in the case of the ban laid on the kingship or any equivalent power." 62 With regard to American constitutional impeachment, this indicates that the Congress, justified by unalienated public opinion, is sacrosanct in regard to its power of impeachment. It makes its own tribunitial determination of what are "high crimes" and may understand "high crimes" as meaning "high delicts" in the sense stated by Hamilton, who justified infamy-impeachment for "injuries" to the "society itself." The Congress, justified by such public opinion, may not, in its impeachment determinations, be subject either to the President or the Judiciary. The sacrosanct position of the impeaching Congress is threatened by the opinion of Chief Justice Burger in *United States v. Nixon.* 63 This maintains

62. *Id.* at 13. "Because of this principle of self-determined concurrence, founded on the veto or negative power (*intercessio*) of the plebeian tribunes, it may be said that social power during this period was based on the concurrence of two great social classes. Mommsen calls this a period of 'class struggle.'" Franklin, *Concerning the Mission and Contemporary Force of Romanist Intercessio,* in 2 STUDIO IN HONORE DI VINCENZO ARANZIO-RUIZ 269, 270 (1952).

63. 94 S. Ct. 3090 (1974).

Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" . . .

In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

. . . Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

. . . The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

*Id.* at 3109-10 (footnotes omitted). In a footnote the Court added:

We are not here concerned with the balance between the President's generalized
the Kantian method of choice of placement/displacement, determined by what Hegel called the external or holy moral legislator, which is a method of appropriative alienation among Kantian antinomies.64

There appears to be a struggle, inherent in the mechanistic structure of separation of powers, between Burger and Hamilton as to what power ultimately will enjoy or seize the alienating hegemony of external mediation, of the holy moral legislator, of the unhistoric prince of the enlightenment. Although Hamilton, as has been shown, justifies infamy-impeachment, he, in The Federalist No. 65, seizes, appropriates, occupies, alienates such power of infamy-impeachment, including infamia facti, by attributing to the Senate a role outside history. “What other body would be likely to feel confidence enough in its own situation,” Hamilton wrote, “to preserve unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers?”65 Thus, unlike Mommsen, but resembling Burger, Hamilton pretends that there is a power, situated outside history, which mediates among other powers of state. To Hamilton, the Senate, in infamy-impeachment, thus enjoys the role of the unhistoric mediator or unhistoric prince of the enlightenment; to Burger, the Supreme Court enjoys the power of the

interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence in criminal trials. Id. at 3109, n.19. See also note 130, infra.

64. The moral attitude is, therefore, in fact nothing else than the developed expression of this fundamental contradiction in its various aspects. It is—to use a Kantian phrase which is here most appropriate—a 'perfect nest' of thoughtless contradictions. Consciousness, in developing this situation, proceeds by fixing definitely one moment, passing thence immediately over to another and doing away with the first. But, as soon as it has now set up this second moment, it also “shifts” (verstellt) this again, and really makes the opposite the essential element. At the same time, it is conscious of its contradiction and of its shuffling, for it passes from one moment, immediately in its relation to this very moment, right over to the opposite. Because a moment has for it no reality at all, it affirms that very moment as real: or, what comes to the same thing, in order to assert one moment as per se existent, it asserts the opposite as the per se existent. It thereby confesses that, as a matter of fact, it is in earnest about neither of them. The various moments of this vertiginous fraudulent process we must look at more closely.


65. Federalist No. 65, at 425.
magistrature, justified by idealistic natural law ideas of the legal theory of the 18th century French physiocrats and received within the United States by Chief Justice Marshall. Gerry, in his attack on the constitutional projet of Philadelphia said he wanted a text with a "more mediating shape." Hamilton, Marshall, and Burger are each concerned with the mediating power—their quarrel is a quarrel as to its placement.

There is certainly a conflict between Mommsen and Hamilton in that the latter justified senatorial unhistoric mediation in the process of impeachment. The position of Hamilton (and perhaps Gerry) derives from the thought of Montesquieu, who in impeachment activity justified the appropriating or mediating role of the nobility, which had neither the same interests nor the same passions as the impeaching accusers and the impeachable accused. Hamilton differs from Montesquieu in that the former masks the interests and passions


In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court . . . have unequivocally reaffirmed the holding of Marbury v. Madison, 1 Cranch. 137, 2 L.Ed. 60 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is." Id. at 177 . . .

. . .

Our system of Government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." . . . And in Baker v. Carr, 369 U.S. at 211, 82 S. Ct. at 706, the Court stated: "[D]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Article III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (C. F. Mittel ed. 1938). We therefore reaffirm that it is "emphatically the province and the duty" [of] this Court "to say what the law is" with respect to the claim of privilege presented in this case. Marbury v. Madison, supra, 1 Cranch. at 177, 2 L.Ed. at 60.

Id. at 3105-06. See also note 130 infra.
of the Senate by removing the Senate from history whereas the latter refrains from such veiling of the appropriation or alienation.67

Perhaps the discussion, indicating the identity in Roman law of delict/crime, and justifying infamia facti, may be concluded and extended by referring to the succinct formulations of Adolf Berger in his Encyclopedic Dictionary of Roman Law. In his essay on “Crimen” Berger wrote that the antonym is “delictum . . . in classical terminology . . . applied to private offences to be punished by the aggrieved person himself and punished by a penalty to be paid to the latter. In post-classical language the two terms are used interchangeably since public prosecution absorbed the wrong-doings previously classified as delicta.”68 In his essay on “Delictum,” Berger stated that it is “[a] wrong-doing prosecuted through a private action of the injured individual and punishment by a pecuniary penalty paid to the plaintiff . . . . The actions by which the injured person sued for a penalty were ACTIONES POENALES, and the procedure was that of a civil action . . . . The distinction delicta privata-publica which corresponds to the classical distinction of delicta and crimina, is of post-classical origin.”69 Of “Crimina publica” Berger wrote: “Crimes against the public and social order which were defined by special statutes (leges iudiciorum publicorum) . . . . New kinds of crimes, unknown in the past, were . . . submitted to criminal prosecution, and some wrongs previously defined as private offences (as some kinds of theft . . .) were treated as public crimes and prosecuted through public accusation.”70

It is now possible to examine the Romanist word “crime” as it was used during the 18th century and hence by the French enlightenment. As such it gave meaning to the American constitutional text stipulating impeachment for “high crimes and misdemeanors.” It already has been shown at some length that Beccaria used the word “delict,” not in a private law sense of “tort,” but in a criminal law sense. Beccaria thus continued the Romanist indifference of crime/delict. Of course the American Constitution could not translate “delict” as “tort,” in part because Samuel Johnson’s dictionary of the 18th century

67. Philosophically the methodology of mediation or appropriation of antinomies, here discussed, has its origin even before Kant, who, as has been shown, was condemned for such by Hegel, in that it appears as early as Descartes, the founder of modern philosophy.
68. A. BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 418 (1953).
69. Id. at 430.
70. Id. at 418.
said that the word "tort" was obsolete (though it was used in France). However, even if the word "tort" had been in use, it lacked public or constitutional law value, and thus had to be translated as "crimes".

Book III, title IV of the Romanist bilingual Louisiana civil code or digest of 180871 shows the interchangeability of French "delict" and "crime." The English text reads: "Of Engagements Formed Without Agreements, or of Quasi Contracts and Quasi Offences."72 The French text reads "Des Engagemens qui se forment sans convention, ou des Quasi-Contrats et Quasi-Délits."73 Section II of the same title is translated "Of Quasi Crimes or Offences,"74 but the French title of the same section is "Des Quasi-Délits."75

Book III, title IV, article 4 reads in English: "Quasi offences are a man's acts on his part faulty, not liable indeed to be punished by the simple correctional or criminal police, but obliging him to make some reparation of the damage resulting from them."76 In French this reads: "Les quasi délits, sont les faits de l'homme qui contiennent, de sa part, une faute non susceptible d'être punie par la police simple, correctionnelle ou criminelle, et qui l'obligent à quelque réparation du dommage qui en est résulte."77

Book III, title IV, Section II, article 16 reads: "Every act whatever of man, that causes damage to another, obliges him by whose fault it happened, to repair it, even though the fault be not of the nature of those which expose to the penalties of simple or correctional police."78 The French text says: "Tout fait quelconque, qui cause à autrui un dommage, oblige celui, par la faute duquel il est arrivé, à le réparer, encore que la faute ne soit point de la nature de celles qui exposent à des peines de police simple ou correctionnelle."79

71. These Louisiana references may be found in The de la Vergne Volume, published in 1968, which is a reprint of Moreau-Lislet's Copy of A Digest of The Civil Law Now in Force in The Territory of Orleans (1808) [hereinafter cited as The de la Vergne Volume].
72. Id. at 318.
73. Id. at 319.
74. Id. at 320.
75. Id. at 321.
76. Id. at 318.
77. Id. at 319.
78. Id. at 320.
79. Id. at 321. The de la Vergne Volume notes the Roman, French, and feudal Spanish commentaries and texts which relate to the above materials from the Louisiana civil code of 1808. Other parts of the bilingual Louisiana civil code of 1808 indicate the indifference of crime/delict and ensuing problems. Book III, title II, chapter VI, section IV, article 130, stipulates, in English, that: "The just causes for
Jean Domat (1625-1696) and Robert Joseph Pothier (1699-1772) are the great French jurists who most influenced the legal history which culminated in the bourgeois French civil code of 1804. Domat seems most worthy of discussion relative to the words "crime" and "délit" in connection with the American constitutional phrase "high crimes." Like Beccaria in the 18th century, Domat seems to have been a Jansenist, and was, indeed, close to Pascal. Domat wrote of "crimes et délits" in book III and book III, title I of Le droit public, suite des lois civiles dans leur ordre naturel. The discussion of delict which parents may disinherit their children are twelve in number, to wit . . . 2dly. If the child has been guilty towards a parent of cruelty, a crime or grievous injury," Id. at 230. The French text uses, in the appropriate place, "délits ou injures graves." The same article continues: "4thly. If the child has accused a parent of any capital crime, except however that of high treason." Id. at 237. The French text employs the words "quelque crime capital." Article 132 also employs the phrase "capital crime" or "crime capital" in a related problem.

Book I, title VII, chapter V, section I, article 57, says in English that: "Fathers and mothers are answerable for the offences, or quasi offences, committed by their children in the cases prescribed under the title of the quasi contracts and quasi offences." Id. at 54. The French text uses in appropriate places the words "délits et quasi délits." Id. at 55.

Book III, title II, chapter V, section III, article 67, provides in English that revocation of donation inter vivos "on account of ingratitude by the donee to the donor can take place . . . 2d. If he has been guilty towards him of cruel treatments, crimes or grievous injuries." Id. at 222. The appropriate French text says "délits ou injures graves." Id. at 223.

Book III, title II, chapter VI, section VII, article 198, translates the French word "fault" (faute) as "offence." Id. at 252. In Book III, title IV, section II, articles 20, 21, the word "délit" is six times translated as "delinquency." In a seventh instance "délit" is translated as "trespass." Id. at 320-21.

60. The only important interest shown in Domat within the English-speaking world, despite his importance in French legal history, is the recent pamphlet of R. Batiza, Domat, Pothier and the Code Napoléon (1973). This is a meticulous study or concordance of the relation between particular texts of Pothier and Domat and particular formulations or articles of the French projet of the Year VIII (1800) and the French civil code of 1804. It supplements Moreau-Lislet's materials in The de la Vergne Volume, (see note 71 supra), and is an excellent work. "A knowledge of the Civil Law, sufficient for the purposes of an American Lawyer, north of New Orleans, may be obtained from Domat and Wood [and others named]; but neither Domat nor Wood, are superseded by any or all the rest." T. Cooper, The Institutes of Justinian vi (3d ed. 1852).

81. The edition of Domat used in writing this paper (from the Faculty of Law and Jurisprudence of the State University of New York at Buffalo) has a book-plate which reads: "Charles F. Claiborne, attorney-at-law, 13 Carondelet St., New Orleans." Presumably this owner was related to the first American governor of Louisiana, who was close to Jefferson and Madison. The name "Rawle" also appears in pencil in the various volumes. This may refer to William Rawle, who, in 1825, wrote of the importance of the constitutional guarantee of the republican form of government.

82. The text of Domat here used is part of a four-volume printing. J. Domat, Oeuvres complètes de J. Domat (Nouvelle ed. . . . augmentée de l'indication des articles de nos codes qui se rapprochent aux différentes questions traitées par cet auteur.
and crime consists of twenty-nine pages. Domat's presentation, which should be translated and published in full, can only be cursorily considered here. It will show the uncertainties and complexities, which explain the constitutional phrase "high crimes" as meaning "crime" in the sense of delict and not in the sense of modern criminal law. Domat's presentation confronts the indifference of delict/crime in the history of Romanist law. Because of that indifference, delict may connote Hamilton's "injuries" to the "society itself" or infamia facti as based on "injury," "crime," "delict," maleficium, wrong, offence, "guilt" as used by Hegel in the sense that only a stone is innocent.

In Book III, Domat wrote:

We do not have in our language a common word which comprehends in general and precisely the two words, crimes and delicts; for the word misdeed [mêfaits], which could signify both is no longer in use; but not only do we not have the appropriate word the significance of which comprehends both crimes and delicts, we do not even have rule or usage which distinguishes precisely the sense of the word delict and that of crime . . . . And although one commonly understands by the word crime a theft, a murder, a homicide, a falsification and other evil actions, which merit the punishment of death, the galleys, banishment and other high [grandes] punishment; and as the simple word delict is ordinarily understood to extend to actions less evil and less punishable, but which can deserve some punishment, such as some insult; some wound in a quarrel; one does not leave off from making use of the word delict in order to express the highest crimes [les plus grandes crimes] . . . . [B]ut one never gives the name crime to insults, nor to wounds in a quarrel; and these are called simple delicts. Thus the word delict sometimes means crimes, but the word crime is never spoken of a slight delict [un léger dilit].

It is out of this consideration of a lack of our language of a common term which suits all crimes and all delicts that this book has been entitled: crimes and delicts; and as these two words have different significations, but which are not sufficiently distinguished; in order to give a just and precise idea, it has been necessary, before speaking of crimes and delicts, to make this principal reflection on the usage of these two words; and it is necessary moreover to add thereto that in the Roman law, from which these words have been taken, they also have no significiation appropriate to each one, and do not accord with the other, but often there are confounded; there is also no just and appropriate word in the Roman law which signifies exactly and
precisely all that the two words, crimes and delicts, respecting which it would be useless to enlarge here; but it is necessary to remark here a difference which is made in the Roman law between the two sorts of crimes or of delicts which contain them all, and divide them into two species, which it is necessary to understand because of the relation they have to our usage.

The first of these two species of crimes and delicts were those which were called public, and the second of them, were called private. Public crimes were those of which some law permits every sort of person to form the accusation in justice, even one who has no interest therein; and private delicts were those the prosecution of which was only permitted to interested persons . . . . It will be seen in the following what there is in this distinction between public and private delicts which is related to our usage; but it is necessary early to remark that though in the Roman law one might use commonly the words delicts for private delicts, and the word crime for public crimes, one gave the name of crimes to private delicts and the name of delicts to every sort of crime without distinction . . . .

After some discussion, too long to be considered here, Domat added: "[I]t suffices to know that by our usage one considers as crimes and public crimes all crimes and all delicts the punishment of which it is important to the public not to remain unpunished . . . ."

In 1755 Samuel Johnson published his great English dictionary. However, this cannot be unqualifiedly accepted in so far as he purports to define or to state thought relating to the French and American enlightenment. For instance, it is a mistake to determine the meaning of article four, section four of the Constitution relating to the guarantee of republican form of government, from Johnson's dictionary, and, in regard to the problems of American constitutional infamy-impeachment, the same reservations must be stated. What Johnson shows is a lack of firmness in his presentations relevant to this essay. Johnson did not include delict in his text and stated that the word "tort" was obsolete. Domat used this word freely, though not in an Anglo-American common law sense. Some discussion by Johnson follows, with commentary by this author.

83. 3 Domat 535.
84. Id. at 538. Domat also wrote of honor and of infamy in connection with delicts and crimes. Id. at 553. It is not necessary, however, to restate his thought here.
85. At the time the Constitution was adopted, "crime" and "punishment for crime" were terms used far more broadly than today. The seventh edition of Samuel Johnson's dictionary, published in 1785, defines "crime" as "an act
“Crime . . . [a]n act contrary to right; an offence; a great fault; an act of wickedness.” The Louisiana civil code of 1808, which is Romanist, in Book III, title IV, Section II, translates “Quasi-Délits” as “Quasi Crimes or Offences.” Schulz wrote that “instead of delictum the lawyers used sometimes the term maleficium.” Buckland in part wrote that for Gaius “delictum or maleficium is a civil delict.” In the 13th century, Bracton wrote of actions that of those ex maleficio,

some are criminal, others civil. Of the criminal, some are major, others minor, and others of the heaviest kind, according to the magnitude of the crimes committed. There are the major crimes, called capital because they involve the supreme penalty or the loss of members or exile, perpetual or temporary. The minor which entail flogging, or the pillory or ducking-stool or imprisonment, sometimes with, sometimes without infamy, depending on what the reason is. “It is not the beating that imposes the stigma of infamy, but the reason for which it merited imposition.” And so of those that are in personam and arise ex delicto or quasi, as the actio iniuriarum, which is sued civilly, for an iniuria may be grievous or slight and accordingly a heavier or lighter punishment will follow, according to the verse, “I will show you what the punishment is when the wrong is admitted.”

Elsewhere Bracton wrote: “Of personal actions arising ex maleficio or quasi some are criminal, others civil. Of the criminal, some are major, others minor; of the civil the same is true.” Adolf Berger spoke of “Maleficium. A crime, wrongdoing. It is not a technical juristic term and is used as syn. with both crimen and delictum.” This is the matter that plagued Domat. Berger continued: “At times it is syn. with magia; see Maleficus.” The latter, Berger wrote, “Com-
monly denotes a sorcerer... In similar connection maleficus (adj.) is syn. with magicus.\textsuperscript{93}

To continue with Samuel Johnson's formulations:

To infame... to defame; to censure publickly; to make infamous; to brand. [Johnson's confusion of infamy and defamation is a serious mistake and appears repeatedly in contemporary usage.]

Infamous. Publickly branded with guilt; openly censured; of bad report.

Infamousness... Infamy... Publick reproach; notoriety of bad character.

Criminal... Wicked; criminal, faulty to a high degree; contrary to duty; contrary to virtue. [Johnson here quotes Hamlet]: So crimeful and so capital in nature.

Misdemeanor... offence; ill behavior; something less than an atrocious crime.

Offence... 1. crime, act of wickedness.\textsuperscript{94}

IV. UNALIENATED PUBLIC OPINION: THE MEDIATING POWER

In accordance with Hamilton's thesis that infamy-impeachment or loss of honor is to be determined by "injuries" to the "society itself" it must be repeated that, after the consecration of the first amendment of the second Constitution (the Bill of Rights), the determination of infamy must be responsive to public opinion. To this two important ideas should be added.

1. If necessary, the "veiling" of reality, behind which impeachable infamia facti lurks, must be lifted. In modern Roman law this masking is called "simulation." Diderot, speaking of the enlightenment, condemned "veiling"\textsuperscript{95} and, indeed, the idea of the enlightenment is enlightenment. The problem of impeachable "veiling" by George III was discussed by Kant in 1798:

Another, although easily penetrated, but still nevertheless regular

\textsuperscript{93} Id. Although the American newspapers have thrown up a wall against a Romanist and enlightenment conception of infamy-impeachment, the irrational, magical sense of maleficium has been welcomed. Thus, Russell Baker wrote: "What worries you, Mr. Lincoln?" I asked. "That sinister force that General Haig said erased the famous tape," he said, 'Nobody took it seriously, but there is a sinister force, and it is at large right here in the White House.'" N. Y. Times, Feb. 12, 1974, at 33, col. 6. On "malefice", see 17 D. DIDEROT, OEUVRES COMPLÈTES DE DIDEROT 516-21 (1821).

\textsuperscript{94} S. JOHNSON, DICTIONARY (1st ed. 1755). On "capital" reference may be made to the discussion of capitis deminutio in the first article on infamy-impeachment.

Franklin, \textit{supra} note 3, at 338. See also H. BRACTON, \textit{supra} note 38, at 290, Folio 101b.

\textsuperscript{95} See "voiler" in 20 D. DIDEROT, OEUVRES COMPLÈTES DE DIDEROT 333 (1821).
concealment directed against a people, is that of the true nature of its constitution. It would be the violation of the majesty of the people of Great Britain to say to it that it may be an unlimited monarchy; but it is maintained that the will of the monarch is constitutionally limited through the two houses of parliament, and yet everyone knows very well that the influence of the same on these representatives is so great and unfailing that nothing different is determined by the aforesaid houses from what he desired and through his minister proposes; he then indeed all at once proposes decisions, with which he knows and also effects it that opposition to it will grow (for instance, regarding the trade in Negroes) in order to give a semblance of evidence of the freedom of parliament. This presentation of the nature of the matter has in it the illusion that the constitution truly conforming to law becomes looked for no more; because one considers to have found it in an already available instance, and a mendacious publicity deceives the people with illusion of a monarchy limited through law proceeding from it, in which its deputies, won through corruption, subject it secretly to an absolute monarchy.\footnote{I. Kant, Der Streit der Fakultäten, in 6 Werke 361, 363 (1964).}

In a footnote to the above, Kant says of the limited monarchy of George III:

\begin{quote}
A cause, the nature of which one does not discern directly, is revealed through the operations on which its lack of openness depends.—What is an absolute monarch? It is he who on whose command if he says: there ought to be war, there forthwith is war.—What is a limited monarch? He, who must ask the people in advance, whether there should be war or not, and if the people say that there ought not to be war, thus there is no war.—For war is a situation, in which the sovereignty of all state force must stand in command. Now the monarch of Great Britain truly conducts much war, without seeking any consent thereto. Thus, this king is an absolute monarch, which he indeed should not be under the constitution; this he however continually can overcome; precisely because through each state force, namely, as he has in his power to bestow all offices and honors, he can keep securely to himself the agreement of the representatives of the people. To be sure, this covering-up system must however have no publicity in order to succeed. It remains therefore under the transparent veil of secrecy.\footnote{Id. at 363-64.}
\end{quote}

2. It has been shown that Scheler regarded honor as a thing-in-itself which owed nothing to its ambience, that is, to property or the infrastructure of society. It has also been shown that Tocqueville's
The idea of honor was superstructural feudal. The position of Domat, because of his relation to Pascal, is interesting. As God, he says, "judges the heart," there may be a secular law of crimes and delicts. God has absconded or hidden. With regard to civil death, Domat wrote: "One calls civil death the status of those condemned to death, or to other punishments which carry confiscation of goods. This is done as this state is compared to natural death, because it suppresses from society and from life those who sink there, and renders them as slaves of the punishment which is imposed on them." Savigny criticizes Domat for writing that civil death makes the condemned "a slave of the punishment." But as Domat related such enslavement to "confiscation of goods," he, in effect, made it possible to say that civil death and, of course, infamy get their meaning of non-being or nothingness from the property and class relations of the social infrastructure. Hegel related the law of honor not to the ideology of the feudal superstructure, but to feudal property relations. Despite the validity of certain details of Savigny's comments on Domat, the latter has implicitly contributed much to a constitutional and legal theory of civil death and of infamy, in that, although the now civilly dead and the infamous are such because of appropriative alienation, the victims of such appropriation, through their struggle to negate the appropriation, had alienated such alienation. This influences Hegel's conception of the dialectic of oppressor/oppressed, and so far as infamy-impeachment is concerned, the latter is the alienation of the appropriative alienation for which Kant condemned George III. Bracton appears to have anticipated Domat's thinking. In his discussion of patrimony or property and outlawry, Bracton contended that the meaning of outlawry is the social nothingness or non-being of the outlaw because of his loss of social relations: "When one has thus been outlawed, properly and according to the law of the land, we must see what he forfeits by the outlawry .... It is clear that he first forfeits the country and the realm and is made an exile, such as the English call an 'outlaw'; in ancient times he used to be called by another name, that is, 'friendless man,' from which it is apparent that he forfeits his friends." This "friendless man" may be an

98. 3 Domat 558.
99. 1 Domat 106.
100. 2 F. Savigny, supra note 36, at 151-52.
101. 2 H. Bracton, supra note 38, at 361, Folio 128b.
ancestor of Heidegger's 20th century "homeless" humanity. Bracton added: "Hence if anyone wittingly feeds him after his outlawry and expulsion, or harbours him or communicates with him in some way or hides or keeps him, he ought to receive the same punishment as the outlaw . . . ." Thus, Bracton's outlaw is similar to Domat's "slave of the punishment," though Bracton's "outlaw" and Heidegger's "homeless" humanity are perhaps described differently from Domat's "slave" and from Fichte's "animal," mentioned in the first essay on infamy-impeachment, and from Madison's and LaBruyère's self-manumitting or self-emancipating animal that walks upright, mentioned earlier in this essay. Bracton is closer to Domat when he describes the property consequences of "inlawry." "A man lawfully and properly outlawed is restored to nothing but the peace so that he may come and go and have peace; he cannot be restored to his actions nor to other things because he is as it were a child newly born and a man newly created. [sic] nor restore him to his previous actions and obligations." This is related to the questionable theory of Calhoun and Agnew and possibly Cooper that infamy is permanent or perpetual. After the above discussion, Shakespeare is not only refreshing, but also presents problems which Hegel later considered. Shakespeare contributed much to the discussion of the relation of property to honor and to the loss of honor in the struggle to determine infamy-impeachment. Falstaff, speaking to Pistol in Act II, scene II of The Merry Wives of Windsor, says: "[Y]ou stand upon your honour! Why, thou unconfinable baseness, it is as much as I can do to keep the terms of mine honour precise. I, I, I, myself sometimes, leaving the fear of God on the left hand and hiding my honour in my necessity, am fain to shuffle, to hedge and to lurch." Shakespeare has shown here that crisis of property is reflected in crisis of honor. As has been said, Hegel, in his criticism of Kant indicated that Kant, himself, like George III, was guilty of masked placement and displacement, of irony, of Verstellung, of shifting, of equivocation, of shuffling. Shakespeare put this as "to shuffle, to hedge and to lurch."

103. 2 H. Bracton, supra note 38, at 361, Folio 128b.
104. Id. at 373, Folio 132b.
105. Franklin, supra note 3, at 332.
106. T. Cooper, Institutes of Justinian (1812). This work was used by my predecessor in teaching Roman law at the University of Tulane. My teaching began in 1930.
To Shakespeare, "baseness" or infamy is individual; to Hegel it is social and is an aspect of his discussion of the social struggle between the feudal "base" consciousness and the "noble" consciousness. The "noble" struggles to appropriate or to alienate the "base," and the "base," through its discovery of its self-consciousness by its work for the "noble," seeks to alienate the alienation, to debase the noble consciousness, and ennobling the "base." This, then, is the meaning of the struggle in infamy-impeachment of the debased Congress, moved by appropriative alienating presidential "injuries" to the "society itself," as Hamilton put it. Phrased somewhat more precisely, the debasement or infaming of the American mass by the American President, which may be negated by infamy-impeachment of the President, is thus an aspect of social struggle inspired by appropriative alienation, or by "injuries" to the "society itself."

A. Theory of Friend/Foe—Presidential Hegemony

The American presidential theory of appropriative alienation is inspired largely by the existential theory of friend/foe propounded by the Nazi "crown jurist" and existentialist, Carl Schmitt, who said in 1932: "The specific political discrimination of which political affairs and motives permit themselves to be reduced, is the discrimination between friend and foe." This writer has stated that Schmitt's discrimination between friend and foe "understood as a conception of geopolitical distance, was also a conception of anthropological 'distance.'" Such "distance," when "unveiled," is a theory of appropriative alienation. "The conceptions of friend and foe," Schmitt wrote in Der Begriff des Politischen, published in 1932, "are received in their concrete, existential sense, not as metaphors or symbols, nor mixed or

107. What this writer says of Schmitt owes something to a paper on Schmitt prepared several years ago by Peter R. Engelhardt, Esq., a member of the New York Bar, for my course in philosophy of law. The literature on Schmitt is vast. See, e.g., A. Hernandez-Gil, Metodologia del Derecho 314 (1945) (for legal theory); G. Lukács, Die Zerstörung der Vernunft der Weg des Irrationalismus von Schelling zu Hitler 516-24 (1955) (for philosophical ideology). Marcuse describes Schmitt as "the one serious political theorist of National Socialism." H. Marcuse, Reason and Revolution 419 (1941).

weakened through economic, moral and other presentations.”  

Re-stated as an American presidential idea of friend/foe, Schmitt’s conception particularizes or specifies the “injuries” to the “society itself” which Hamilton presented as the justification for infamy-impeachment for presidential constitutionally condemned “high crimes.”

B. Constitutional Separation of Powers

Because of historical conditions now obtaining within the United States, including the infrastructure, American thinking which justifies the domination or “distancing” by the presidential power exploits the ambiguity of the first Constitution in that the President largely reflects Carl Schmitt’s ideology of friend/foe. The first (or ironic) Constitution consecrated Montesquieu’s theory of separation of powers, and did so ambiguously, so that harmony or unification of the three state powers required either an absurd, philosophically idealistic “moral” harmonizing force or justified struggle among the three powers for mediating hegemony. That struggle would take the form of the already mentioned Kantian placement and displacement of such powers in order to achieve a unifying hegemony or mediation among them. In part, this explains the mission of the hegemony of the “distancing” presidential ideology of friend/foe, which Carl Schmitt inspires. In the earlier article on infamy-impeachment, this author directed attention to the consideration of Althusser and Eisenmann relative to the weakness and role of Montesquieuau constitutional ideology in French legal history. This weakness has been exploited in the United States by the concept of the struggle for hegemony among the powers as friend/foe. American Montesquieuisism is perhaps more vulnerable than French to the ideology of the struggle of friend/foe. The conception of separation of powers, which in France

109. C. Schmitt, Der Begriff des Politischen 15 (1932). Schmitt’s existential conception of friend and foe justifies not only Nazi aggression, but also that aggression within Germany itself. After the Second World War, Schmitt stated his thought as a theory of international law in Der Nomos der Erde, published in 1950.

110. At the conclusion of the constitutional convention at Philadelphia in 1787 Madison wrote Jefferson in Paris regarding “the impossibility of dividing powers of legislation in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial.” Letter from James Madison to Thomas Jefferson, Oct. 24, 1787, in 5 Writings of James Madison 17, 26 (1904).

111. Franklin, supra note 3, at 321.
had a certain historical bias or *penchant* toward the mediating role of the nobility in impeachment, has been understood in the United States either feudally or abstractly and formalistically, save through the possibility of actualizing sacrosanct congressional power of infamy-impeachment, as strengthened by the public opinion state created by the first amendment of the second Constitution. Contemporary American presidential ideology of friend/foe, however, is directed against such congressional hegemony and against its power of infamy-impeachment.

Engels said of Montesquieu and Rousseau ideologically that "the constitutional Montesquieu is indirectly 'overcome' by Rousseau with his 'Social Contract'..." The problem of the Rousseauan struggle for the state, especially when infamy-impeachment is forgotten, is the legacy of the ironic, unstable first or Philadelphia Constitution. Infamy-impeachment, sacrosanct and justified by the first Constitution itself and by the public opinion state, consecrated in the first amendment as a text of the second Constitution, is a constitutional weapon within the texts of the two Constitutions mentioned. This is possible only if public opinion is not appropriated or alienated public opinion. But what has been said of struggle for hegemony must be understood, not merely superstructurally, but infrastructurally. It is the infrastructure, the "otherness" of the superstructure, which gives social meaning to ideology including the ideology of separation of powers and the struggle for hegemony to mediate among them. In a famous letter to Mehring, written in London on 14 July 1893, Engels said:

Ideology is a process accomplished by the so-called thinker consciously indeed, but with a false consciousness. The real motives impelling him remain unknown to him, otherwise it would not be an ideological process at all. Hence he imagines false or apparent motives... The ideologist who deals with history (history is here meant to comprise all the spheres—political, juridical, philosophical, theological—belonging to society and not only to nature) possesses in every sphere of science material which has formed itself independently out of the thought of previous generations and has gone through an independent series of developments in the brains of these successive generations. True, external facts belonging to its own or other spheres may have exercised a co-determining influence

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on this development, but the tacit pre-supposition is that these facts themselves are also only the fruits of a process of thought.\textsuperscript{113}

The jurist will be alert to Engels' use not only of the words "false consciousness," but also "tacit pre-supposition."\textsuperscript{114} Herein, "tacit pre-supposition" connotes that the struggle for hegemony or to mediate among the separated powers indicates that the meaning of such struggle is infrastructural, but seems to be ideological in a pejorative sense, that is, exclusively superstructural. What Althusser says of the infrastructural basis of the role of feudal honor may be restated as the infrastructural or phenomenological impure intention of bourgeois honor. "Honour is thus \textit{the passion of a social class}."\textsuperscript{115} This matter has already been discussed in connection with the theory of the relation between honor and property. It is the mission of infamy-impeachment (impeachment for loss of bourgeois honor, that is, for "injuries" to "society itself") to struggle against bourgeois passion, to struggle against the aim of Schmitt's ideology of friend/foe, as received in the United States. That ideology only serves to actualize undemocratic hegemony by eliminating the force of the infrastructure of society from the struggle to achieve the hegemony of this or that power. It exploits the original ambiguity, irony, equivocation which is the truth of the separation of powers structurally established by the first Constitution. It is today the mission of sacrosanct infamy-impeachment, as determined by the first amendment, to justify struggle to prevent or to negate an undemocratic presidential hegemony based on the ideology of friend/foe.

It must be emphasized, however, that Montesquieu candidly, and Hamilton in veiled form, justify separation of powers as weapons of appropriative alienation, although at the same time Hamilton brilliantly presented the theory and role of impeachment for \textit{infamia}

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\textsuperscript{113} Id.; see N. Thevenin, \textit{Ideologie juridique et ideologie bourgeois}, 173 \textit{La Pensée} 71 (1974).

\textsuperscript{114} The latter, for instance, explains Cardozo's "presupposition imminent" and similar thought in some recent history of American law. Franklin, \textit{A Précis of the American Law of Contract for Foreign Civilians}, 39 \textit{Tul. L. Rev.} 635, 681-86 (1965). However, the really great idealist theorist of "presupposition" is Windscheid, the 19th-century German Romanist scholar. The opposition thereto is represented in the idealist phenomenology of Husserl, which, vulgarized, becomes part of the history of the revival of idealist natural law in this century.

\textsuperscript{115} L. ALTHUSser, \textit{Politics and History} 72 (1972). Of the extensive scholarship relating to Althusser, among the most important is D'Amico, \textit{The Contours and Coupsures of Structural Theory}, \textit{Telos}, Fall, 1973, at 84-89.
As indicated, Montesquieu justifies impeachment through the mediation of the nobility because the nobility "have neither the same interests nor the same passions" as the impeaching and impeachable social force. This appears in the midst of Montesquieu's discussion of separation of powers, and is an aspect of Montesquieu's fear of the requirement of self-mediated unanimity of social classes, as true social classes, contained in the early Roman tribunitial or intercessio principle, which controlled the relations of Roman plebeians and Roman patricians. But Hamilton veils or dissimulates the infrastructural force by an alienating methodology which is external to history and abstract compared to Montesquieu's historical, alienating, mediating methodology, justifying the impeaching hegemony of the nobility. Hamilton reserves the appropriating hegemony or the power of alienation or role of "distancing" to the Senate as the latter was intended to be in the 18th century. "What other body would be likely to feel confidence enough in its own situation to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers [in infamy-impeachment process]?" (Hamilton did not always have this confidence in the "distancing" of the Senate.)

Hegel has at least two important discussions of separation of powers and of its role in the French revolution. In The Phenomenology of Mind he shows that the superstructural legal outcome of the class character of the French revolution took the form of consecrating separation of powers on the basis of bourgeois social relations. He wrote:

The accomplished result at which this freedom . . . might manage

117. Federalist No. 65, at 425.
118. He stated, at the Philadelphia convention on September 8, the day on which the constitutional determination relating to impeachment was virtually settled, that: "He was seriously of opinion that the House of Representatives was on so narrow a scale as to be really dangerous, and to warrant a jealousy in the people for their liberties. He remarked that the connection between the President and Senate would tend to perpetuate him, by corrupt influence. It was the more necessary on this account that a numerous representation in the other branch of the Legislature should be established." J. Madison, Notes of Debates in the Federal Convention of 1787 at 608 (1966). At this moment, then, Hamilton's thought relating to the Senate as unhistoric or external mediator in impeachment is not that stated by him in The Federalist No. 65. Rather, it is closer to that of Kant in the latter's considerations relating to George III and to the "veiling" or dissimulation of power by a monarch-president over parliament.
to arrive, would consist in the fact that such freedom _qua_ universal substance made itself into an object and an abiding existence. This objective otherness would there be the differentiation which enabled it to divide itself into stable spiritual spheres and into the members of distinct powers. These spheres would partly be the thought-constituted factors of a power that is differentiated into legislative, judicial and executive... and, since the content of universal action would be more closely taken note of, they would be the particular spheres of labour, which are further distinguished as more specific "estates" or social ranks. Universal freedom, which would have differentiated itself in this manner into its various parts, and by the very fact of doing so would have made itself an existing substance, would thereby be free from particular individualities, and could apportion the plurality of individuals to its several organic parts.  

C. _Infamy-Impeachment—Negation of Presidential Hegemony_  

Because regimes based on separation of powers are masked or veiled class regimes, so that "universal freedom is therefore _death_," Hegel continued:

The government is itself nothing but the self-established focus, the individual embodiment of the universal will. Government, a power to will and perform proceeding from a single focus, wills and performs at the same time a determinate order and action. In doing so it, on the one hand, excludes other individuals from a share in its deed, and, on the other, thereby constitutes itself a form of government which is a specifically determinate will and _eo ipso_ opposed to the universal will. By no manner of means, therefore, can it exhibit itself as anything but a _faction_. The victorious faction only is called the government; and just in that it is a faction lies the direct necessity of its overthrow; and its being government makes it conversely, into a faction and hence guilty. 

Herein is the germ of the structural weakness of separation of powers and of the instrument of Schmitt's idea of friend/foe for exploiting such weakness; therein exists also the necessity for infamy-impeachment to negate faction-government grounded in the ideology of friend/foe with its quest for the amity or friendship line, as Schmitt called it, where the foe confronted establishes the reality of its own strength and is recognized or acknowledged thereby as friend.

119. G. Hegel, _supra_ note 64, at 603.
120. _Id._ at 605.
121. _Id._ at 605-06. See G. Hegel, _The Philosophy of History_ 452 (1956).
In his *Philosophy of Law* Hegel unwillingly develops his thought to present the dialectic implicit in the ironic doctrine of separation of powers, which precipitates fluctuating struggle among the powers or factions for hegemony among them, or, to be more precise, precipitates fluctuating struggle among them to become the mediating power among them. The struggle is a fluctuating struggle because the bourgeois infrastructure is unstable and necessitates bourgeois factionalism. The dominant or mediating power is potentially dominant because each of the powers is internally the same as the other in that each power essentially possesses the moment of judgment. The sixth and seventh amendments deal only with judicial judgment. The state powers, each capable of judgment, constitute, dialectically, a unity-of-opposites. As each power is a judgment-power, it is essentially the same as the others, and may engage in struggle with the others to become the mediating power, as factionalism necessitates because of the instability of the infrastructure. In paragraph 272 of his *Philosophy of Law*, Hegel wrote that

> the principle of the division of powers contains the essential moment of difference, of rationality *realized*. But when the abstract Understanding handles it, it reads into it the false doctrine of the absolute self-subsistence of each of the powers against the others . . . .

This view implies that the attitude adopted by each power to the others is hostile and apprehensive, as if the others were evils . . . .

If the powers (e.g. what are called the “Executive” and the “Legislature”) become self-subsistent . . . the destruction of the state is forthwith a *fait accompli*. Alternatively, if the state is maintained in essentials, it is strife which through the subjection by one power of the others, produces unity at least, however defective, and so secures the bare essential, the maintenance of the state.122

It is hardly necessary to belabor the role today of American presidential theory of friend/foe in thus seeking presidential hegemony. The mission of infamy-impeachment is to negate such hegemony. Hegel probably would not understand this. He wrote that: “To take the merely negative as the starting-point and to exalt to the first place the volition of evil and mistrust of this volition, and then on the basis of this presupposition slyly to construct dikes whose efficiency simply necessitates corresponding dikes over against them, is characteristic in thought of the negative Understanding and in sentiment the out-

look of the rabble." However, in the addition to Paragraph 272, Hegel says:

The truth is that the powers are to be distinguished only as moments of the concept. If instead they subsist independently in abstraction from one another, then it is as clear as day that two independent units cannot constitute a unity but must of course give rise to strife, whereby either the whole is destroyed or else unity is restored by force. Thus, in the French Revolution, the legislative power sometimes engulfed the so-called "executive," the executive sometimes engulfed the legislative, and in such a case it must be stupid to formulate e.g. the moral demand for harmony.... The vital point... is that since the fixed characters of the powers are implicitly the whole, so also all the powers as existents constitute the concept as a whole.124

Because they are bourgeois or feudal-bourgeois theorists, there is an aspect of the ideology of separation of powers, which is more or less vulnerable to Schmitt's presidential friend/foe, whether the theorist is Montesquieu, Hamilton or Hegel. Earlier in this essay it was said in passing that Montesquieu's theory of separation of powers was directed against the early Romanist legal idea of intercessio or the tribunitial power, according to which state determinations required the unanimity of the two acknowledged social classes, the plebeians and the patricians (slavery was ignored). The ideology of separation of powers is an ideology in which bourgeois (or feudal) factions struggle for the alienating or mediating power in the state, but from which the masses are excluded or in which the masses are subordinated. This is the force of Hamilton's "distancing" of the Senate in the process of infamy-impeachment, even though he gives the masses the impeaching or accusing role in infamy-impeachment. Although he does not mention Romanist intercessio (which, as has been said, was understood by Montesquieu) and though he is, in general, undialectical in his thought, Althusser has much of importance to say relative to the privileged and exclusionary position of the bourgeois factions which struggle among themselves for the mediating power (to recall Gerry's demand, in the Philadelphia convention for "a more mediating

123. Id.
124. Id. at 286.
shape” or structure of the first Constitution). (Althusser mechanistically in truth writes:

We can illuminate the meaning of this division and its ulterior motives, given of course that Montesquieu is concerned with the *combination of puissances* and not with the *separation of powers*, by examining all the possible encroachments of one power on another and the possible combinations of one power with another, in order to find which encroachments and combinations are absolutely excluded. I have found two, which are of prime importance.

The first excluded combination is for the legislature to usurp the powers of the executive: which would immediately consummate the collapse of monarchy into popular despotism. But the inverse is not the case. Montesquieu accepts that monarchy may survive and even retain its *moderation*, if the king controls not only the executive, but also the legislative power. But let the people become the prince and all will be lost.

The second excluded combination is more famous, but to my mind it has been treated as too obvious and for that reason not fully examined. It concerns the investment of the judiciary in the executive, the king. Montesquieu is strict: *this arrangement is enough to bring about a collapse of monarchy into despotism.* If the king himself judged, “the constitution by such means would be subverted, and the dependent intermediate powers annihilated” (SL, VI, 5), and the example he cites in the following pages is that of Louis XIII, who wanted to judge a gentleman himself (ibid.). If we compare this exclusion and the arguments for it (that if the king judges, the intermediate bodies are annihilated) on the one hand with the arrangement that only calls nobles before a tribunal of their peers, and on the other with the misfortunes the despot reserves primarily for the great, we can see that *this special clause depriving the king of judiciary power is important above all for the protection of the nobility against the political and legal arbitration of the prince*, and that once again the despotism Montesquieu threatens us with designates a policy directed quite precisely *against the nobility* first of all.

If we now return to the famous balance of the *puissances*, we can, I think, propose an answer to the question: *to whose advantage does the division work?*

It is not necessary to pursue the thought of Althusser further. But certain matters must be added. First, Schmitt’s conception of presidential friend/foe can be the intention of destroying or subordinating all powers of state, without historic distinction, to the appropriative alien-

IMPEACHMENT

ating, mediating authority or hegemony of the President. Second, Hegel's crypto-infrastructural considerations relative to separation of powers is dialectical and avoids a certain mechanistic or absolutizing conception of separation of powers which creeps into Althusser's presentation depriving it of full force today when feudal rivalries are no longer significant and bourgeois instability is significant. Third, the American constitutional conception of sacrosanct infamy-impeachment and of "high crimes" (or crimes of the high) emerges as a Stoic-like force to confront and to negate presidential theory of friend/foe, provided that the Senate is not regarded as the unhistoric force, functioning "distantly" from the "society itself." And fourth, more must be said concerning the mediating role of the judiciary power, which in a certain sense is a converted ancestor of the idea of presidential hegemony under a theory of friend/foe. As shown, Hegel, in The Phenomenology of Mind, accepts the principle of the role of the three powers, executive, legislative, judiciary. But in his addition to Paragraph 272 of his Philosophy of Law he explicitly excludes the judiciary from the highest powers of state. This may be due in part to the primary role he gives to codification. More likely it is due to his Kafka-like conception of the judiciary itself as an appropriative alienating force which veers process into the relation of oppressor/oppressed, his fundamental philosophical idea. It is in The Phenomenology of Mind that Hegel most firmly relates the powers and actions of the state to factionalism grounded in the crypto-infrastructure.

Article one, section five, of the first Constitution states in part: "Each house shall keep a journal of its proceedings, and from time to time publish the same excepting such parts as may in their judgment require secrecy." Article two, section three, requires the executive "from time to time to give to the Congress Information of the State of the Union." These texts are significant in that they give a certain firmness to an area of separation of powers, though the form or structure of the first Constitution as a thing-in-itself is ambiguous and precipitates strife or struggle for hegemony or the mediating power among the three divisions. Because the enlightenment, both French and American, represented a struggle against obscurantism or secrecy, it seems correct to suggest that the secrecy or "confidentiality" power

127. G. Hegel, supra note 29, at 286.
128. Id. at 145.
of the Congress consecrates a limited privilege; and that the duty of the President to give the Congress "information" consecrates the essential thought of the enlightenment. The attack of Kant on the concealments of George III and Hegel's attack on Kant's own philosophy of dissemblance are echoes of the theory of the enlightenment in its struggle against feudal secrecy and feudal obscurantism. Madison records that "Mr. Gerry, stated the objections which determined him to withhold his name from the Constitution . . . 2. the power of the House of Representatives to conceal their journals."

The ninth amendment, in accordance with the methodology of the Roman law, justifies struggle to explode or to develop a certain text or texts of the Constitution in order to overcome or negate the particularism of such text or texts and to state the general force thereof as historical change necessitates. In regard to the problem of secrecy, it would appear that article one, section five, and article two, section three, preclude the development of or the universalization of executive secrecy.

V. THE CONSTITUTION—RECENT THEORY OF INTERPRETATION

Much of what has been discussed in this essay concerns the conception of juridical interpretation, including the methodology of closing lacunae in the Constitution. The Anglo-American world has a meagre history of theorists of interpretation save perhaps Coke and Hobbes. The enlightenment, and the Roman law which it constitutionally justifies, has had a history of twenty-six centuries of theory and practice of interpretation, quite often of interpretation of formulated law. The American Constitution, which should have been part

129. J. Madison, supra note 118, at 652.
130. Franklin, The Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government, 40 Tul. L. Rev. 487 (1966). The opinion of Chief Justice Burger in United States v. Nixon, 94 S. Ct. 3090 (1974), which really rests on Pound's theory of balance of interests, makes the United States Supreme Court the unhistoric prince or lord of the Kantian antinomies, in determining governmental secrecy. Such heroic self-sacrifice to the Kantian idea of duty is not required by the Constitution. In his dissent in Wilkinson v. United States, 365 U.S. 399, 420-21 (1961), Justice Black said: "The truth of the matter is that the balancing test, at least as applied to date, means that the Committee may engage in any inquiry a majority of this Court happens to think could possibly be for a legitimate purpose . . . And under the tests of legitimacy that are used in this area, any first-year law school student worth his salt could construct a rationalization . . . ." See supra notes 63, 66.
of the history of codified law, has been engulfed by Anglo-American
theories of legal methodology, which have become increasingly sub-
jectivistic. On the other hand, the theories of interpretation have had
their varied history in the Roman law. In recent decades there has been
an upsurge of interest in appropriative alienation theories of interpre-
tation in other than England and the United States. This interest re-
fects bourgeois social crisis in national states possessing Romanist
civil codes. The literature is present also in spheres of social life other
than law-theology, for instance. The most influential Marxist critic
of these developments probably has been W. R. Beyer, writing in the
German Democratic Republic. The great bourgeois names are Husserl
in Germany, Heidegger in the German Federal Republic, Gadamer
in the German Federal Republic, Ricoeur in France, Sartre in
France, Marias in Spain and Betti in Italy. Of these, undoubtedly the
most important are Betti, Heidegger and Gadamer. Betti and Gadamer
write monumental works; only Betti is a jurist. In the English-speak-
ing world, the most important names are probably Sang-ki Kim, E. D.
Hirsch, Frederic Jameson, Theodore Kisiel and John O'Neill, none of
whom is a jurist. A representative journal is The New Literary History.

Michel Dufrenne in France suggests the role today of appropriative
alienation of language in bourgeois ideology of interpretation. He writes:

"Who speaks to me, with my own voice?" The genius yielding to in-
spiration no longer belongs to himself; he is a force of nature; his
"I" is another. Thus the imagination is an origin [est originaire]
because it alienates man to join him to that which he is not. But the
imagination conceived ontologically is not this faculty of losing one-
self in a strange speech [parole] that may end in madness; it is this
speech itself, the truth of being anterior to (though expressed by)
the distinction between the subjective self and the objective world.¹³¹

In France, Foucault says of his unthought "man" that "it is both
exterior to him and indispensable to him . . . . For though this double
may be close, it is alien."¹³² Schleiermacher, writing in Germany in the
earlier part of the 19th century has also been influential. This author
has written: "Beyer suggests that there is a relation between the latter-
day Heidegger and Schleiermacher, who says that one of the basic mis-
sions of hermeneutics reads: 'to comprehend [zu verstehen] a writer

better than he comprehends himself.' "133 The importance of this in a theory of interpretation supporting the aggressiveness of presidential friend/foe theory in confronting the texts of the Constitution is obvious. Of Schleiermacher, Hegel, who himself writes of appropriative alienation both of work and of language, says: "Dialectic is the last thing to arise and to maintain its place."134 With Heidegger, too, there is no dialectic. In Being and Time, Heidegger passes from one "moment" to another (universal-particular) without necessitated negation. "Our investigation itself will show that the meaning of phenomenological description as a method lies in interpretation."136 Later in the same work, Heidegger states:

As understanding Dasein projects its Being upon possibilities. This Being-toward-possibilities which understands is itself a potentiality-for-Being . . . The projecting of the understanding has its own possibility—that of developing itself. This development of the understanding we call "interpretation" . . . In it the understanding appropriates understandingly that which is understood by it. In interpretation, understanding does not become something different. It becomes itself. Such interpretation is grounded existentially in understanding; the latter does not arise from the former. Nor is interpretation the acquiring of information about what is understood; it is rather the working-out of possibilities projected in understanding.138

Beyer has written of Betti, a Romanist jurist: "Betti describes interpretation as triadic."137 He further stated that the triadic interpretation process has the following character: "Indication (Deutung) (thought production) of a sign, a task, a role, never resulting in the opposition of subject-object, but, instead, mediated through an 'inner linking' with strange spirit, and, indeed, through the mediation of meaningful stable forms in which this has objectivized itself."138 Betti's own Italian text, of which "Deutung" is presumably the translation of "a intendere il senso," could be translated as "to comprehend the meaning." The "inner linking" with other spirit in interpretation which Betti mentions shows the presence of double idealism, that is, both subjective and objective idealism, and his theory of mediation

133. Franklin, supra note 108, at 541.
134. 3 G. Hegel, Lectures on the History of Philosophy 508 (1896).
136. Id. at 188-99.
138. Id.
indicates the place of legal method in authentic meaningful stable form.139

The work of Gadamer deserves study140 by jurists though he is not one himself. It is sufficient here to mention Palmer’s remarks.

For Betti, Gadamer is lost in a standardless existential subjectivity. In the preface to the 1965 edition of Wahrheit und Methode, Gadamer again replies to Betti, this time emphasizing the nonsubjective character of understanding. The ontological turn of this work (which Betti deplores) leads Gadamer to view the functioning of the “historically operative consciousness” not as a subjective but as an ontological process.141

The full fury of such “historically operative consciousness” is the full fury of the ontological intentionality of existential, presidential ideology of friend/foe.

Ricoeur’s ideology of interpretation incorrectly relates Marx, Nietzsche and Freud, a characteristic of revisionism. “If we go back,” he writes, “to the intention they had in common, we find in it the decision to look upon the whole of consciousness, primarily as ‘false’ consciousness.”142 This identification of thinkers is incorrect inasmuch as Marxism is a materialism, and inasmuch as the historically ascending force, the force becoming strong enough to negate the appropriative consciousness, negates such false consciousness of the declining appropriating force. It is false because it is historically limited or fettered. Ricoeur proceeds to write that Marx, Nietzsche and Freud are “three masters of suspicion . . . . All three clear the horizon . . . . not only by means of a ‘destructive’ critique, but by the invention of an art of interpreting.”143 But then Ricoeur admits that “the Marxists are stubbornly insistent on the ‘reflex’ theory.”144 Despite Ricoeur, this means that legal meaning or interpreting has its force in its reflection of its


143. Id.

144. Id. at 34.
material otherness, that is, in the infrastructure which prevails independently of consciousness. This actuality necessitates possibilities and not the formalist illusions of constitutional interpretation imagined within the idealist theory of presidential friend/foe, anguished because of its crisis of infamia facti. In another connection, this writer said:

In twentieth-century legal thought interpretation or hermeneutics mediates . . . possibilities or choices . . . “No one interpretation is the reality,” Marías writes, “but all of them are reality: in other words, reality is not exhausted by any one of its interpretations, but only manifests itself in them.”

Marías adds: “The perspective, then, is an ingredient of reality; and as the possible perspectives are many, reality as such implies an essential multiplicity, and consists precisely in being a repertory of possibilities.”

POSTSCRIPT: THE PRESIDENTIAL PARDONING POWER

The explosive or analogical role of the ninth amendment also affects article two, section two, of the Constitution, which provides that the President “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” As indicated earlier, the constitutional word “offences” encompasses not only what here have been called “afflictive” crimes, which are to be punished “according to law,” but also impeachment for infamia facti and “high crimes” for “injuries done immediately to the society itself.” The problem presented by President Ford’s recent exercise of the pardoning power is whether former President Nixon’s resignation from the presidency saves him from the limitation put in the pardoning power by article two, section two. It is clear that Nixon’s resignation cannot save him from infamy. As Beccaria said, infamy “cannot be determined by law.” As infamy is determined by public opinion, it cannot be pardoned by Nixon’s presidential successor. Nixon himself, in “accepting” Ford’s pardon, said “[t]hat the way I tried to deal with Watergate was the wrong way is a burden I shall bear for every day

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146. J. Marías, Reason and Life 125 (1956).
147. Franklin, supra note 3, at 318.
of the life that is left to me.”148 Ford stated of Nixon that “you have a President who was forced to resign because of circumstances involving his Administration and he has been shamed and disgraced by that resignation.”149 It is suggested that analogical force of article two, section two, of the Constitution, denying the presidential power of pardon for impeachment, justifies a struggle to determine that Ford was without constitutional power to “pardon” a President “forced to resign” and “disgraced by that resignation.” Puchta wrote that, in Roman law, “pardon . . . frees only from suffering punishment, concerning which infamy is independent.”150 It should be noted that Moyers has warned that, already, Nixon’s apologists “are quoting the Supreme Court pronouncement in 1866 that a pardon makes the offender ‘as innocent as if he had never committed the offense,’ and last week the former President suggested that his guilt is not in his conduct but in the minds of other people.”151

In view of the fact that Ford was virtually appointed to the presidency by Nixon, it is appropriate to suggest that Nixon, and not Ford, pardoned himself. Anthony Lewis wrote of Ford that “sometimes he makes it hard to be sure who is President. During the press conference he referred to Mr. Nixon eight times as ‘the President’. Was that just slowness of mind, or something more revealing?”152 In the private law thought, even of Anglo-American law, Ford may have sought to pardon Nixon, his undisclosed principal. In the antiformalist thought of the modern civil law, Ford may have been an interposed person, that is, a person whose act seems to be self-determined, but which in reality has been determined by another, in this case by Nixon. The role of the interposed person should be exposed and the appropriate legal effects then determined. In the immediate situation, the appropriate legal effect of such exposure should be that Ford lacked constitutional power to “pardon” Nixon.153

Reference has already been made to the sacrosanct or tribunitial or mediation role of the Congress in impeachment. The sacrosanct

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148. N.Y. Times, Sept. 9, 1974, at 1, cols. 4-5.
150. F.G. PUCHTA, PANDEKTEN 180-81 & n.y (12th ed. 1877).
151. B. Moyers, Mercy Without Justice, NEWSWEEK, Sept. 23, 1974, at 108. I acknowledge my indebtedness to Mr. Jay Wishingrad for pointing out the importance of Moyers’ essay.
153. The theory of interposition of person is an aspect of the general civil law concept of simulation.
Congress is justified (indeed, required by Bracton), by the ninth amendment in engaging in an inner struggle to assert an analogical power to determine whether its power of impeachment comprehends what Ford, himself, called a "forced resignation." The sacrosanct Congress, moreover, is justified in asserting a power of research to determine whether Ford has been an interposed person. Even if Ford is not an interposed person, the sacrosanct Congress is certainly justified in authorizing research to determine whether the pardon of Nixon is a fraud on the Constitution—that is, a fraud directed against its sacrosanct power of impeachment.154

154. The idea of fraud on the law obtains in the civil law. In writing on the subject of conflict of laws, this author stated: "American legal thought is not as scientific as is theory of conflict of laws in Romanist national states in which the concepts of the ordre public of the forum or of fraud on the law are prominent, thus admitting that the sovereign, at least of the forum, may fully emerge as such during the seeming struggle of the immediate or interposed subjects of the private law." Franklin, Sketch of an Historical Foundation for a Tribunitial Theory of Conflict of Laws, 41 TUL. L. REV. 579, 585-86 (1967). On fraud on the law in Roman law, see A. Berger, supra note 68, at 477 ("Fraudare legum; Fraus legi facta" (bibliography)); E. Betti, Teoria general del negocio juridico 283, 298 (c. 1943) (bibliography); H. Dernberg, Pandekten 70 (1896); G. Ripert, La règle morale dans les obligations civiles 345-51 (3d ed. 1955); J. Rousseau, Simulation et Fiducie 56 (1937).