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# ROMANIST INFAMY AND THE AMERICAN CONSTITUTIONAL CONCEPTION OF IMPEACHMENT

MITCHELL FRANKLIN\*

## INTRODUCTION

There are certain serious omissions in contemporary American discussion of the constitutional conception of impeachment. Specifically, these are: (1) the force of the Roman law idea of infamy as this was developed during the French and American enlightenment, and as such was reflected, with new or bourgeois qualities, in the constitutional formulations and structure relating to impeachment; (2) the general influence of the 18th century French enlightenment on American constitutional materials; and (3) the relation of the various constitutional texts pertaining to impeachment to the fifth amendment and its formulation regarding "capital or otherwise infamous crime." This paper will examine these aforementioned omissions with a view toward integrating them into contemporary thought on impeachment.

### I

It is suggested that the 18th century American constitutional materials relating to impeachment developed not out of Anglo-American common law, but out of the French enlightenment, and are an aspect both of the American Revolution and of the social crisis of the classes from which the American bourgeoisie benefited after the Revolution. Because of the influence of the French enlightenment, the American constitutional idea of impeachment reflects conceptions of Roman law relating to infamy, though modified by qualities unique to the late 18th century American social structure.

There were two important types of infamy in Roman law. One was based on law, the other was based on fact or act. The latter infamy was justified by what, after the French and American Revolutions, would be called public opinion. Since the first amendment protects public opinion, there is thus a liaison between infamy based on fact or act and the first amendment. Hamilton in *The Federalist No. 65*

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holds that American constitutional impeachment is political.<sup>1</sup> This means that the Constitution consecrates Romanist infamy based on fact or act. Indeed, the Constitution separates infamy-impeachment from what may be called afflictive punishment. The latter must be punished "according to law." Moreover, the Constitution authorizes impeachment for "high crimes and misdemeanors."<sup>2</sup> In this context, the Constitution avoids using the term "felonies" which connotes specific violations. Instead, it intentionally uses the less specific phrase "high crimes." Because this latter phrase is indeterminate in content, the Constitution preserves the political connotation of Romanist infamy, based on fact or act, and justified by public opinion.

Although Hamilton is the theorist of infamy-impeachment, including infamy based on fact or act, he also formulated the structure for mitigating the force of such infamy. He justifies infamy-impeachment in a process initiated by the House and mediated by the Senate. The Senate is conceived as a force acting outside history. Hamilton understands the Senate as the alienating or appropriating force, mediating between hostile forces and dominating them. The Senate enjoys the role of the unhistoric prince, who is prominent in the ideology of the enlightenment.

In contrast, the fifth amendment is concerned with "capital or otherwise infamous crime."<sup>3</sup> This text, too, consecrates Romanist infamy, but confines its role to infaming formulated crime, provided there has been also grand jury indictment and ordinary jury conviction.

Thus, the American constitutional system, which incorporates ideas of Romanist infamy, justifies infamy-impeachment, based on infaming fact or act, against an oppressive executive, but protects the people from infamy through the fifth amendment. For a person other than such executive to be infamed, there must first occur a formulated crime, a grand jury indictment and an ordinary jury conviction.

## II

In *The Federalist No. 65* Hamilton writes of "[t]he awful discretion which a court of impeachments must necessarily have, to doom

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1. THE FEDERALIST NO. 65, at 426 (Modern Library ed. 1937) (A. Hamilton) [hereinafter cited as FEDERALIST 65].

2. U.S. CONST. art. II, § 4.

3. *Id.* amend. V.

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to honor or to infamy the most confidential and the most distinguished characters of the community . . .<sup>4</sup> In the following sentences Hamilton adds that impeachment means “a perpetual ostracism from the esteem and confidence, and honors . . . of his country . . .”<sup>5</sup> 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 of his life and his fortune?”<sup>6</sup>

Here Hamilton is stating that the purpose of impeachment under the Constitution is to declare and to determine the infamy of the President. Impeachment becomes intimately related to and justified by the force of public opinion, which was subsequently consecrated in the first amendment of the Constitution. Thus, there becomes a tie or liaison between the impeachment power consecrated in the first Constitution<sup>7</sup> and the first amendment of what should be called the second Constitution.<sup>8</sup> The first amendment in the second Constitution strengthens the force of the texts on impeachment of the first Constitution in so far as it strengthens the role and power of infamy through impeachment acknowledged in the first Constitution. The infamy-impeachment justified by the first Constitution becomes impregnable through the public-opinion-state of the first amendment of the second Constitution.

American Romanist infamy differs from ancient and feudal Romanist infamy in its bourgeois qualities and structure. Infamy is a concept of Roman law which ruptures the social relations of the infamed. In 1781 Brissot de Warville wrote that “[i]t is more in the power of moral custom rather than in the hands of legislators that there resides this terrible weapon of infamy, this kind of civil excommunication, which deprives the victim of all consideration, which ruptures all the ties which attach his fellow citizens to him, which isolates him in the midst of society.”<sup>9</sup>

Since infamy is not a principle of Anglo-American common law, contemporary discussion of impeachment in the United States may be

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4. FEDERALIST 65, at 426.

5. *Id.*

6. *Id.*

7. The Constitution as originally enacted, without the first ten amendments.

8. The Constitution after the adoption of the first ten amendments.

9. M. BRISSOT DE WARVILLE, THÉORIE DES LOIX CRIMINELLES 190 (1781).

vulnerable because of its failure to recognize its Roman law origins. In 1800 Bexon stated that

civic degradation, properly called, does not appear to me established in the criminal laws of England. I see only the penalty of disqualification for any office, for any public employ, to inherit, to be testamentary executor. This degradation, as one sees it, is not as extensive as that established by the French laws . . . civic degradation truly can be a grave and terrible penalty only in a republic.<sup>10</sup>

Eden, who was aware in 1771 of the role of infamy in Romanist feudal Europe, summed up the limited role and history of English infamy as follows:

There are two kinds of infamy, the one founded in the opinions of the people respecting the mode of punishment, the other in the construction of law respecting the future credibility of the delinquent: The law of England was erroneous, when it declared the latter a consequence of the punishment, not of the crime.<sup>11</sup>

In contrast, under Roman law the idea obtained that a person could be civilly unworthy or dishonored or disgraced or infamed as a result of a judgment against him or even without a judgment against him. This Romanist conception of infamy was maintained during feudalism, but in addition thereto, the parallel idea of religious infamy or excommunication was developed.<sup>12</sup>

Léon Pommeray began his important study of infamy in Roman law, *Études sur l'infamie en droit romain*, published in 1937, by writing that "[i]nfamy is an important notion in the life of the Roman people."<sup>13</sup> Buckland, the greatest Anglo-American Romanist, describes

10. D. BEXON, *PARALLELE DU CODE PÉNAL D'ANGLETERRE AVEC LES LOIS PÉNALES FRANÇAISES* 86 (1800).

11. G. EDEN, *PRINCIPLES OF PENAL LAW* 54 (1771).

12. During feudalism there also existed various Germanic legal ideas which were more or less similar to or suggestive of Romanist infamy, but which probably had their origin and development independent of Romanist infamy.

13. L. POMMERAY, *ÉTUDES SUR L'INFAMIE EN DROIT ROMAIN* 1 (1937). Pommeray focused attention on the historic work of the English scholar Greenidge, *Infamia*, published in 1894, and added that "[s]ince Greenidge, the study of infamy has been neglected." *Id.* at 3 (the reference is to A. GREENIDGE, *INFAMIA: ITS PLACE IN ROMAN PUBLIC AND PRIVATE LAW* (1894)). But Pommeray adverts to the importance of the writing of Senn. *Id.* at 4 (the reference is to Senn, *Des origines et du contenu de la notion bonnes moeurs*, in 1 *MÉLANGES GENY* 53-67 (1935)). However, he should not have overlooked the work of Edward Livingston on Spanish infamy. E. LIVINGSTON, *A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA* 63 (1833). It is interesting that because of the prominence today of phenomenological philosophy of law outside the

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the infamed "in Justinian's law as a sharply defined group, who, by reason of wrongful or unseemly conduct, are subjected to serious disabilities."<sup>14</sup> The important word "unseemly" should be noted. Cuq and Girard indicate the important distinction in Roman law between *l'infamie de droit* and *l'infamie de fait*, that is, infamy derived from law and infamy derived from fact.<sup>15</sup> For institutional or pedagogic purposes Sohm gives details concerning the categories and distinctions of Roman infamy. He writes:

There were, more particularly, two groups of cases which were contrasted with one another, the cases of "infamia immediata" and of "infamia mediata." Infamy was said to be "immediate," if it attached to a person at once, ipso jure, on the commission of some act which deserved to be visited with social disgrace. Thus it attached to persons engaged in a disreputable trade . . . . On the other hand, infamy was said to be "mediate," if it did not attach directly, but only after a court of law had passed judgment on the delinquent on the ground of some act which deserved to be visited with social disgrace. Such was the effect above all things of every criminal sentence touching life, limb, or liberty. A similar result, however, followed condemnation in certain civil cases, especially if judgment were given against a person in a civil action on account of a dishonourable breach of duty . . . . No codification of the law of honour can, in the nature of things, be complete. It was necessary, therefore, to allow the Roman judges a discretionary power to take account of such cases of infamy as had not been specified in any statute or in a praetorian edict. Looked at from this point of view, there were two kinds of existimationis minutio, "infamia" and "turpitudō." In the case of "infamy" the conditions under which it should attach were fixed by law, viz. by statute and the praetorian edict. In the case of "turpitudō," the conditions under which it should attach were fixed, not by the law, but by the free discretion of the judge acting, in each individual case, on the verdict of public opinion, in other words on the verdict of society.<sup>16</sup>

What is most important in the above is the distinction between infamy based on law and infamy based on fact. Hamilton justifies the

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United States and England, Pommeray included in his bibliography on infamy the work of the Husserlian scholar, Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechts*, published in 1913. L. POMMERAY, *supra*, at xi. For a recent bibliography relating to infamy, see A. BERGER, *ENCYCLOPÆDIC DICTIONARY OF ROMAN LAW* 500 (1953).

14. W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 91 (2d ed. 1932).

15. E. CUQ, *MANUEL DES INSTITUTIONS JURIDIQUES DES ROMAINS* 110 (2d ed. 1929); P. GIRARD, *MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN* 216 (8th ed. 1929).

16. R. SOHM, *THE INSTITUTES* 184 (R. Ledlie, transl. 1907).

latter. Cesare Beccaria, the most important theorist of the criminal law of the 18th century enlightenment, 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 determined by law."<sup>17</sup>

Before Beccaria, excommunication was delimited in Massachusetts by the Massachusetts Body of Liberties, (despite Calvin's support of it) as the result of popular resentment against undemocratic exclusionary ideas.<sup>18</sup> Unfortunately this very complicated aspect of colonial history has long since been forgotten or ignored. However, as will be suggested, infamy-impeachment was introduced into the first Constitution as a democratic weapon against oppression. It was there wrested from the American bourgeoisie at a time when the latter was beset by several vital fears and threatened with historical nothingness because of them. Also before Beccaria, Hobbes wrote, presumably under Romanist influence, that "[i]gnominy, is the infliction of such Evil, as is made Dishonourable; or the deprivation of such Good, as is made Honourable by the Common-wealth."<sup>19</sup>

Beccaria's legal influence extended to the leading American theorist of criminal law through his power over Edward Livingston. Nathaniel Chipman said that "[t]he world is more indebted to the Marquis Beccaria for his little *Treatise on Crimes and Punishments* than to all other writers on the subject."<sup>20</sup> Chief Justice Chipman, of Vermont, was close to Jefferson, the great name in the history of the American enlightenment. Jefferson himself studied Beccaria's discussion of infamy in the Italian text, as his extracts from Beccaria show. Jefferson also extracted the discussion of infamy which appeared in Eden's 18th century commentary on criminal law. Eden was the most important English follower of Beccaria. Eden wrote that "[v]irtue, though of a

17. C. BECCARIA, OF CRIMES AND PUNISHMENTS 54 (W. Paulucci transl. 1963). The most scholarly editing of Beccaria, together with Italian text and Spanish translation, is that of Francisco P. Laplaza of Argentina. See C. BECCARIA, DE LOS DELITOS Y DE LAS PENAS (1955). This edition of 581 pages, contrasted with xxiii plus 99 pages of the English translation cited in this essay, nevertheless almost ignores the Anglo-American texts of Beccaria. However, it is rich in its treatment of the relation of Bacon and Beccaria.

18. See Franklin, *The Encyclopédiste Origin and Meaning of the Fifth Amendment*, 15 LAW GUILD REV. 41, 43 (1955).

19. T. HOBBS, LEVIATHAN 228 (A. Waller ed. 1935).

20. N. CHIPMAN, PRINCIPLES OF PRINCIPLES OF GOVERNMENT 214 n. (1969).

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social nature, will not associate with infamy.”<sup>21</sup> Eden’s presentation states the social dialectic of infamy. As being-for-self has its truth in its otherness, that is, in social being-for-other, infamy, which ruptures being-for-other, destroys being-for-self and condemns the infamed to nothingness.

In his *Lettres persanes*, Montesquieu referred to the ruinous force of infamy in feudal Europe, saying that “the hopelessness of infamy causes torment to a Frenchman condemned to a punishment which would not deprive a Turk of a quarter hour of sleep.”<sup>22</sup> Writing of ignominy, Diderot said that it was “degradation of public character of a man . . . it is better to die with honor than to live with *ignominy*. The man who sinks into ignominy is condemned to proceed with his head lowered to the ground; he has only the resource of effrontery or death.”<sup>23</sup>

In 1773 Helvétius discussed the moral education of man. In a most precise way he presents infamy as a force which may be directed against the prince or head of the state, and thus suggests, as did Hamilton, the relation between infamy and impeachment. Helvétius asks the question: “What are the rewards for virtues?” The answer is given: “Titles, honours, the public esteem, and those pleasures of which that esteem is the representative.” The next question: “What are the punishments for crimes?” The answer: “Sometimes death; often disgrace, accompanied with contempt.” The next question: “Is contempt a punishment?” The answer: “Yes; at least in a free and well governed country. In such a country the punishment of contempt is severe and dreadful; it is capable of keeping the great to their duty: the fear of contempt renders them just, active, and laborious.”<sup>24</sup>

Helvétius possibly may have inspired John Adams, who said that

rewards . . . in this life, are *esteem* and *admiration* of others; the punishments are *neglect* and *contempt*; nor can any one imagine that these are not as real as the others. The desire of the esteem of others is as real a want of nature as hunger; and the neglect and contempt of the world, as severe a pain as the gout or the stone. It sooner and oftener produces despair, and a detestation of existence; of equal importance to individuals, to families and to nations.<sup>25</sup>

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21. G. EDEN, *supra* note 11, at 52.

22. 1 C. MONTESQUIEU, *LETTRES PERSANES* 158 (S. Barckhausen ed. 1931).

23. Diderot, *Ignominie*, in 16 *OEUUVRES DE DENIS DIDEROT* 138 (1821).

24. 2 M. HELVÉTIUS, *A TREATISE ON MAN* 427-28 (W. Hooper transl. 1969).

25. Adams, *Discourses on Davila*, in 6 *THE WORKS OF JOHN ADAMS* 234 (1851).



Here Adams adumbrates infamy as existential anguish—dread of nothingness—through loss of social relations or social death. Adams recalls what was said by Eden, Diderot, Montesquieu. Adams' thought then seems to unite with that of Helvétius and Hobbes, for he continues:

It is a principal end of government to regulate this passion, which in turn becomes a principal means of government. It is the only adequate instrument of order and subordination in society, and alone commands effectual obedience to laws, since without it neither human reason, nor standing armies, would ever produce that great effect.<sup>26</sup>

In the light of the above mentioned thinking, it may be understood why in *The Federalist No. 65* Hamilton states, entirely correctly, 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.” Hamilton asks: “What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men?”<sup>27</sup> This connotes that infamy-impeachment should be understood as a conception of Roman law with qualities and structure appropriate to the bourgeois essence of the American Revolution. This unites Hamilton with the discussion of infamy-impeachment by Benjamin Franklin made within the Philadelphia convention itself, in which Franklin mentioned the alternative to infamy-impeachment suggested by the bourgeois struggle against Stuart oppression. This will be brought forward later in this paper.<sup>28</sup>

Because infamy as such is not a concept of Anglo-American common law Bentham mentions numerous synonyms for infamy. Though his list is by no means complete he restates infamy as the “moral” and as the “political” sanction.<sup>29</sup>

26. *Id.*

27. FEDERALIST 65, at 424.

28. See note 41 *infra* & accompanying text.

29. Bentham, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 365, 455, 460, 461 (J. Bowring ed. 1838). In his translation and commentary on Gaius, Edward Poste writes that Austin, in laying the bases of jurisprudence, has referred to the law of honour to illustrate the difference of positive law from all law not positive; but in Rome the law of honour, as the law of religion in most modern states, was partially taken up into positive legislation. The public sentiments of esteem and disesteem, that is to say, were armed with political sanctions, and thus certain proceedings were discouraged which were not otherwise prohibited by positive

III

In *The Federalist No. 65* Hamilton not only accepts Romanist infamy or the moral-political sanction as the principle of American constitutional impeachment, but he brings forward and stimulates several important additional ideas.

First, though the concept of infamy-impeachment is bourgeois Romanist, the structure, form or procedure of American constitutional impeachment follows the English "model."<sup>30</sup> It is the constitutional province of the House of Commons to "prefer" the impeachment "and of the House of Lords to decide upon it."<sup>31</sup> This structure satisfies Montesquieuan ideas of separation of powers. More realistically, under late 18th century American conditions it represents the retreat of the

law, and the due application of these sanctions was the function of a special organ appointed by the legislator. This organ was the censor, who had both a discretionary power of branding a man with ignominy by an annotation against his name in the civic register . . . and . . . enforced the disabilities of infamy . . . . [G]raver consequences of infamy were not in the discretion of the censor, but governed by strict rules of consuetudinary law . . . .

GAIUS, *ELEMENTS OF ROMAN LAW* 117 (E. Poste, transl. 1890).

30. *FEDERALIST* 65, at 425. Esmein discusses the matter of the influence, exercised through Blackstone, of the structure and procedure of English criminal law in France, during the French Revolution. A. ESMEIN, *PRECIS ÉLÉMENTAIRE DE L'HISTOIRE DU DROIT FRANÇAIS DE 1789 À 1814*, at 97 (1914).

31. *Id.* However Hamilton seems to have been in truth very firmly influenced by Montesquieu, who said:

It might also happen that a subject intrusted with the administration of public affairs may infringe upon the rights of the people, and be guilty of crimes which the ordinary magistrates either could not or would not punish. But, in general, the legislative power cannot try causes: and much less can it try this particular case, where it represents the party aggrieved, which is the people. It can only, therefore, impeach. But before what court shall it bring its impeachment? Must it go and demean itself before the ordinary tribunals, which are its inferiors, and being composed, moreover, of men who are chosen from the people as well as itself, will naturally be swayed by the authority of so powerful an accuser? No: 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.

Here is an advantage which this government has over most of the ancient republics, where this abuse prevailed, that the people were at the same time both judge and accuser.

1 C. DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 159 (T. Nugent transl. 1949). It is important to mention that recently there has been fresh writing concerning the mediated, appropriate class-struggle theory of separation of powers of Montesquieu. See L. ALTHUSSER, *POLITICS AND HISTORY—MONTESQUIEU, ROUSSEAU, HEGEL AND MARX* ch. 5-6 (M. Brewster transl. 1972). On the writing of C. Eisenmann, see 1 C. MONTESQUIEU, *DE L'ESPRIT DES LOIX* 474-76 (R. Derathé ed. 1973). The above mentioned French materials should be considered in the light of Hegel's much earlier dialectical considerations of Montesquieu.

anguished American bourgeoisie, which nevertheless interposed the Senate to blunt the force of the public opinion which initiated infamy-impeachment through the House. As the American Revolution had been fought and won under the Articles of Confederation, the abbé de Mably condemned executive power as such. He demanded the partition of the executive under legislative hegemony. This necessitated the first Constitution's establishment of the executive, as well as its consecration of the power necessary to impeach him.

Second, the Constitution provides for infamy-impeachment by the Senate, but separates this from what may be called afflictive punishment by the ordinary courts. In Article I, section 3, clause 7 the Constitution 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.<sup>32</sup>

Thus the Constitution attributes inflicting the "moral" or "political" sanction of infamy or of dishonor to the Senate, and the power of what may be called afflictive punishment "according to law" to the ordinary courts. Article I, section 3, clause 7 does more than merely eliminate the problem of double jeopardy and *res judicata*: it separates infamy-impeachment from afflictive punishment.

Hamilton explains that there is "double security intended . . . by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismissal from a present, and disqualification for a future, office."<sup>33</sup> Though Article I, section 3, clause 7 of the Constitution differentiates in infamy-impeachment from what here has been called afflictive punishment, it does not declare, nor establish the order of attack, either in regard to content or in regard to the respective competence, of the congressional authority and the courts involved. While it is not entirely apposite, Hamilton, in *The Federalist No. 65* says that the impeachment "proceeding . . . can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in

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32. U.S. CONST. art. I, § 3.

33. FEDERALIST 65, at 426-27.

the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security.”<sup>34</sup> He writes of “[t]he awful discretion which a court of impeachments must necessarily have, to doom to honor and to infamy the most confidential and the most distinguished characters of the community . . . .”<sup>35</sup> In *The Federalist No. 65* Hamilton presupposes that infamy-impeachment will occur before afflictive process. But if so, he seems to overcome this in *The Federalist No. 66*. Here he discusses the significance of the initiating role of the House as “the most *popular* branch,”<sup>36</sup> and says that as “the favorite of the people, [it] will be as generally a full match, if not an overmatch, for every other member of the Government.”<sup>37</sup> This presentation of infamy-impeachment as a weapon of social struggle between the people and the executive suggests that the matter of the imposition of infamy-impeachment and the matter of determining afflictive punishment, are each permanently independent of the other. It does not acknowledge that the order of attack be determined by the accused. The latter has no *beneficium ordinis*. Nor is there the necessity for such, because the Constitution states the succession of office. The latter has projective value to control novel problems.

Third, in *The Federalist No. 65*, Hamilton conceives of “the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government” and asks, “Is not this the true light in which it ought to be regarded?”<sup>38</sup> What Hamilton means is that the process of infamy-impeachment consecrated in the Constitution was directed toward solving the problem of the destruction of the feudal tyrant-prince. Slightly more than seven centuries ago Bracton, the great English Romanist jurist, or Para-Bracton, had also raised the question of “bridling” the oppressive prince or head of state. In folio 34 Bracton or Para-Bracton said:

<No one may pass upon the king’s act [or his charter] so as to nullify it, but one may say that the king has committed an *injuria*, and thus charge him with amending it, lest he [and the justices] fall into the judgment of the living God because of it. The king has a superior, namely, God. Also the law by which he is made king. Also his *curia*,

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34. *Id.* at 425-26.

35. *Id.* at 426.

36. THE FEDERALIST No. 66, at 431 (Modern Library ed. 1937) (A. Hamilton).

37. *Id.* at 432.

38. FEDERALIST 65, at 425.

namely, the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him. [That is why the the earls are called the partners, so to speak, of the king; he who has a partner has a master.] When even they, like the king, are without bridle, then will the subjects cry out and say "Lord Jesus, bind fast their jaws in rein and bridle." To whom the Lord [will answer], "I shall call down upon them a fierce nation and unknown, strangers from afar, whose tongue they shall not understand, who shall destroy them and pluck out their roots from the earth." By such they shall be judged because they will not judge their subjects justly, and in the end, bound hand and foot, He shall send them into the fiery furnace and into outer darkness, where there will be wailing and gnashing of teeth.><sup>39</sup>

It is difficult to believe that Hamilton was not aware of Bracton's "bridling" and he must have known Mably, the last great figure of the French enlightenment and an utopian communist who was hostile to executive power. In the constitutional convention Mason said: "No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice?"<sup>40</sup> As has been already indicated, Benjamin Franklin immediately pursued Mason's thought, seemingly restating it in terms of the English struggle against the Stuarts. Madison records that Franklin

was for retaining the clause as favorable to the Executive. History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out agst. this as unconstitutional. What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive where his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.<sup>41</sup>

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39. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 110 (S. Thorne transl. 1968). For the critical marks of the translator, see *id.* at xiii. Thorne's critical marks here, in general, indicate that the text translated here is one of the various "*ad-diciones* or doubtful passages . . . enclosed in angular brackets." *Id.* This does not impair the historical influence of the material presented, as Hamilton's usage suggests. Whether the text is that of Bracton or of para-Bracton was of no consequence to Hamilton.

40. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 331 (A. Koch ed. 1966) [hereinafter cited as MADISON].

41. *Id.* at 332.

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The three matters just considered structure the process of impeachment; that is, the separation of infamy-impeachment from afflictive responsibility and the theory of "bridling" through infamy-impeachment as a substitute for "bridling" through physical violence in their unity signify that the American concept of impeachment in great measure reflects the public opinion and class struggle through public opinion theory of impeachment. In *The Federalist No. 65* Hamilton justifies the mediating role of the distanced or appropriating or alienating Senate as the infaming authority in a struggle between "the people" and the one they are accusing,<sup>42</sup> who in truth represents a certain social force. Hamilton writes of infamy-impeachments

as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded? 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?*<sup>43</sup>

The Senate thus enjoys the role of the unhistoric prince or external mediator who is prominent in the history of bourgeois social theory. Such senatorial power of appropriative alienation by a force supposedly outside or above social history is what Nietzsche called the "*pathos of distance*."<sup>44</sup>

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42. FEDERALIST 65, at 425.

43. *Id.* (emphasis in original).

44. Nietzsche, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 540 (W. Kaufmann ed. & transl. 1954). Beccaria writes:

[A]n enlightened man is the most precious gift the sovereign may bestow upon the nation and upon himself, making him the depository and guardian of the sacred laws. Used to seeing truth without fearing it, unaffected by most of the needs of reputation, which can never be sufficiently satisfied and which put the virtue of most men on trial; accustomed to contemplate humanity from the most elevated points of view, in his presence his own nation becomes a family of men joined as brothers, and the distance separating the mighty from the common people seems to him so much the less as the mass of humanity he has before his eyes is greater. Philosophers acquire needs and interests unknown to ordinary men, chief among which is that of not denying in public the principles they have taught in obscurity; they also acquire the habit of loving truth for its own sake . . . . Another way of preventing crimes is to direct the interest of the magistracy as a whole to observance rather than corruption of the laws. The greater the number of magistrates, the less dangerous is the abuse of legal power; venality is more difficult among men who observe one another.

C. BECCARIA, OF CRIMES AND PUNISHMENT 97-98 (W. Paulucci transl. 1963).

At the close of the Philadelphia convention Gerry said that though he "respected" the constitutional *projet*,

[h]e hoped he should not violate that respect in declaring on this occasion his fears that a Civil war may result from the present crisis of the U. S. In Massachusetts, particularly he saw the danger of this calamitous event—In that State there are two parties, one devoted to Democracy, the worst he thought of all political evils, the other as violent in the opposite extreme. From the collision of these in opposing and resisting the Constitution, confusion was greatly to be feared. He had thought it necessary, for this & other reasons that the plan should have been proposed in a more mediating shape, in order to abate the heat and opposition of parties. As it has been passed by the Convention, he was persuaded it would have a contrary effect. He could not therefore by signing the Constitution pledge himself to abide by it at all events.<sup>45</sup>

Gerry here stated only one particular aspect of the very critical general situation of the American bourgeoisie after the American revolution which forced that *Angst*-ridden class, resentfully and grudgingly, to formulate a relatively progressive constitution.<sup>46</sup> Hamilton's presentation of the role of the Senate as appropriative mediator in infamy-impeachment in *The Federalist No. 65* should be read in this light and in the light of Gerry's demand for "a more meditating shape."

It may be repeated that it is necessary to relate Gerry's fear of American upheaval, which required bourgeois retreat, to Hamilton's discussion of infamy-impeachment. Hamilton accepts executive impeachment for Romanist infamy, based on fact and justified by public opinion, but also structurally interposes thereto the role of the Senate, as it then was: the distant, alienating, appropriating, unhistoric mediating force to blunt infamy-impeachment.

The abbé de Mably, the friend of both Jefferson and John Adams, "applauds the American victory in the revolution," but like Gerry, "he tells Adams that 'I . . . tremble for the fate which, probably, attends you.'"<sup>47</sup> The abbé writes "Adams that he fears the coming role of the American *bourgeoisie*. Therefore he requires 'some limits to

45. MADISON 657-58.

46. For the six fears of the Philadelphia Convention, see Franklin, *Influence of the Abbé de Mably and of Le Mercier de la Rivière on American Constitutional Ideas Concerning the Republic and Judicial Review*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 128-30 (E. Griswold, R. Pound & A. Sutherland eds. 1964).

47. *Id.* at 100.

the rage of avarice . . . .’”<sup>48</sup> He asks “[b]y what means can riches . . . become prevented from introducing, amongst the Americans, a division of families, under different classes?”<sup>49</sup> He continues: “a Gracchus only will be wanting . . . who will entice the citizens to rise the one against the other, and throw them into anarchy . . . .”<sup>50</sup> The abbé writes John Adams that “[w]ith *you* the authority of the Congress must supply the place of tribunes, provided that you give to this assembly the form and credit which it ought to hold . . . .”<sup>51</sup> Mably says that “[t]he question is . . . . whether you shall invest the Continental Congress with an authority which may enable it to become as useful to you, during the peace you are now preparing to enjoy, as it has proved throughout the war . . . .”<sup>52</sup>

Adams believed that the abbé in his *De la legislation ou principes des loix* was “stark mad.” But when Mably wrote “[l]et us have no illusions: *property divides us into two classes*, into the rich and the poor,”<sup>53</sup> Adams replies “[V]rai.”<sup>54</sup> When Mably writes that “the laws have accomplished nothing and will accomplish nothing, until they have disposed of the private life of the citizen and the resources of the government in such a way that we may find our happiness without the help of avarice and of ambition,”<sup>55</sup> Adams answered that “Les Ressorts du Gouvernement are indeed the only remedy. In *Ballance* there is the only hope. This the Abby was not enough sensible of.”<sup>56</sup> Through

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 101.

52. *Id.*

53. *Id.* at 119.

54. *Id.*

55. *Id.*

56. *Id.*

It is necessary to return to the formal ambiguity of the First Constitution taken by itself. What was thereby deliberately given was not a constitutional determination, but the possibility of placements of power, developed out of the ambiguous, unstable form or structure of that constitution. The First Constitution may be understood as the formally ambiguous constitution, presenting possibilities because of such ambiguity. In this historic period the existentialists have been preoccupied with the theory of ambiguity. . . . In Jeffersonian thought the power that must struggle through the force of public opinion to gain the paramount place in the state, so that its hegemony is recognized, and followed by the others, it has been said, “is the power that at a given historical moment will best defend the American people and their democratic and national attainments; and public opinion becomes a force in Jeffersonian theory ‘while the spirit of the people is up,’ that is, while it is active and ceases to be contemplative.” This is justified by the hegemony given to unalienated



"Ballance" the unhistoric mediator or unhistoric prince, as usual, emerges. Mably asks "How will the legislator attain the end I desire? It is . . . by dividing the magistracy or the executive power into different parts, which will be entrusted to different citizens."<sup>57</sup> Adams answers: "Oh blindness!"<sup>58</sup> Nevertheless it is thought such as Mably's which necessitated the institution of infamy-impeachment.

In 1833 Chief Justice Nathaniel Chipman, of Vermont, published his *Principles of Government*. In this work, he developed his *Sketches of the Principles of Government*, which was published in 1793. President Jefferson presented this work, together with *The Federalist*, to the Czar Alexander thus indicating Jefferson's knowledge of and regard for the author. In *Principles of Government*, Chipman in effect restates Mably's class struggle theory in discussing the antagonistic relations of both monarch and nobles to the people. He said in this volume:

The powers and rights of the monarch are exercised on the same subject,—the people. The restraint of one, as between themselves, is the enlargement of the other. Both are, in their origin, unfounded in natural principles. It is, in some measure a matter of indifference to the people, which has the exercise. These claims of right and power are placed in opposition, and mutual jealousy, sometimes breaking forth into open enmity, is the natural consequence. Every union of their interests, every compromise of their power is a conspiracy against the rights of the people, who have, at times, been justly

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Public Opinion by the First Amendment, the keystone, as Justice Black believes, of the Constitution, because it dominates the formally ambiguous Montesquieuan Constitution. This is fortified by the *Encyclopédiste* theory of the republic, the authority of which is guaranteed by the First Constitution itself. *Id.* at 122-23, 125.

It was said in America that "collisions between spheres are best settled at the bar of public opinion." . . . In war-time Jefferson said that the people look "solely" to the President. On the other hand, Jefferson did not hesitate voluntarily to share his power and responsibility with the other powers of government when he believed that the democratic and national interest was thereby served, as in the case of the confirmation of the Louisiana purchase. . . . In discussing the separation of powers, it must be reiterated that it is incorrect to disregard the underlying social situation. . . . For Jefferson "The good opinion of mankind, like the lever of Archimedes, with the given fulcrum, moves the world." He believed that "The force of public opinion cannot be resisted, when freely permitted to be expressed. . . ." Consequently, Jeffersonian theory was gravely concerned with the problem of public education and of public information.

Franklin, *War Power of the President: An Historical Justification of Mr. Roosevelt's Message of September 7, 1942*, 17 TUL. L. REV. 217, 248, 249, 251 (1942).

57. *Id.* (emphasis in original).

58. *Id.*

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provoked to assert their injured rights against both. As the claims of the monarch and the nobles are hostile to the rights of the people, so the people are naturally hostile to both. Thus there is constituted the government, a perpetual war of each against the other, or at best, an armed truce, attended with constant negotiations, and shifting combinations, as if to prevent mutual destruction; each party in its turn uniting with its enemy against the more powerful enemy. The history of the English nation, from the time of William the Conqueror, furnishes incontestable proof of this truth.<sup>59</sup>

At this point it is appropriate to consider early 19th century Germany to perceive the social problems to which American infamy-impeachment is addressed. Under the influence of the French revolution, Fichte justified infamy through social contract theory, but reified or corporealized the infamed force:

The declaration that a citizen is an outlaw, is the highest punishment which the state can inflict upon any rational being. For the state exists for the individual as state only through the compact. The utmost the state can do, therefore, is to declare this compact annulled. Both the state and the individual do not now exist for each other any more. The compact, the legal relation between them, and indeed all relation between them, has been utterly cancelled . . . . But what, then, are the results of this declaration? The perfectly arbitrary treatment of the outlaw . . . . The outlawed person is, therefore, declared to be a thing—an animal. For, in regard to animals and their relation to us, the question is never one of right, but of physical force . . . . No reason can be shown—from positive law—why the first citizen who meets him should not kill or torture him . . . . [T]he outlaw has no rights; but certainly the contempt of all men, or infamy . . . . The outlaw is considered simply as a wild beast, which must be shot; or as an overflowing river, which must be stopped; in short, as a force of nature, which the state must render harmless by an opposing force of nature.<sup>60</sup>

Fichte's discussion is undialectical, because he does not perceive that the truth of being is in its *otherness* and that infamy destroys being-for-self by rupture of the social relations or otherness of the infamed. Fichte conceals this problem by reifying the *social nothingness* of the infamed person. The nothingness of the infamed is incarnated as an animal. In discussing degrees of infamy, Bentham mentions reifi-

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59. N. CHIPMAN, *supra* note 20, at 171a-72a.

60. J. FICHTE, *THE SCIENCE OF RIGHTS [LAW]* 364-66 (A. Kroeger transl. 1889).

cation of the infamy only in the lower degrees of infamy. He writes, of course, undialectically, that

[w]ith regard to corporal punishments short of death, there is no punishment of this class but is understood to carry with it a very high degree of infamy. The degree of it, however, is not by any means in proportion to the organical pain or inconveniences that are respectively attendant upon those punishments. On the contrary, if there be any difference, it seems as if the less the quantity is which a punishment imparts, of those or any other kind of inconveniences, the greater is the quantity which it imparts of infamy. The reason may be, that since it is manifest the punishment must have been designed to produce suffering in some way or other, the less it seems calculated to produce in any other way, the more manifest it is that it was for this purpose it was made choice of. Accordingly, in regard to punishments to which the highest degrees of infamy are understood to be annexed, one can scarcely find any other suffering which they produce. This is the case with several species of transient disablement; such as the punishments of the stocks, the pillory, and the carcan: and with several species of transient as well as of perpetual disfigurement; such as ignominious dresses and stigmatization. Accordingly, these modes of punishment are all of them regarded as neither more nor less than so many ways of inflicting infamy. Infamy thus produced by corporal punishments, may be styled corporal ignominy or infamy.<sup>61</sup>

Like Eden and Brissot de Warville, Hegel understands the matter of infamy dialectically and hence as social, even if antagonistic. Sartre writes abstractly:

Thus Hegel's brilliant intuition is to make me depend on the Other in *my* being. I am, he said, a being for-itself which is for-itself only through another. Therefore, the Other penetrates me to the heart. I can not doubt him without doubting myself since "self-consciousness is real only in so far as it recognizes its echo (and its reflection) in another" . . . in my essential being I depend on the essential being of the Other, and instead of holding that my being-for-myself is opposed to my being-for-others, I find that being-for-others appears as a necessary condition for my being-for-myself.<sup>62</sup>

Even before Hegel, Beccaria had condemned mass infamy. Without reference to Beccaria, Hegel considers the crisis of French feudalism before the French revolution as a social struggle over infamy. There is a resemblance between Hegel and Chipman, at least in part. With

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61. Bentham, *supra* note 29, at 460-61.

62. J. SARTRE, *BEING AND NOTHINGNESS* 237-38 (H. Barnes transl. 1956).

Hegel, the activist, hostile social forces which seek to alienate or to appropriate each other confront each other, as Hyppolite says, as "noble consciousness" and as "base (or infamed) consciousness."<sup>63</sup> The activist noble consciousness which seeks to infame the base consciousness is a limited consciousness, limited because of its property, and is vulnerable to the activist infaming power of the base or infamed consciousness. Perhaps the influence of Diderot on Hegel may be discovered in this veering of the infamy of the oppressed into the infamy of the oppressor.

As has been said, Fichte's reification of the infamed into animal existence conceals what is essential. The rupture of the social relations of the infamed connotes the nothingness of the infamed-animal; for being-for-self has its reality in being-for-other, that is, in historic social relations, although such social relations may be antagonistic. Though Hegel is dialectically superior to Fichte in his considerations on the dialectic of infamy, Fichte's reification of the infamy reflects the ideology of the enlightenment, explains Goya and perhaps anticipates the artistry of Kathe Kollwitz in the 20th century. La Bruyère conceived of the infamed French peasant as the animal that walked upright. Fear of the infamed animal that walked upright, that is, fear of the black American slave, affects Madison's thinking in *The Federalist No. 43*. Madison writes that

I take no notice of the unhappy species of population abounding 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, and give a superiority of strength to any party with which they may associate themselves.<sup>64</sup>

Hamilton's discussion of infamy-impeachment of the executive in *The Federalist No. 65* is the opposite pole of the infamed-oppressed gen-

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63. J. HYPPOLITE, *ÉTUDES SUR MARX ET HEGEL* 57 (1955). Hyppolite's phrase "*la conscience basse (ou infâme)*" appears as "the base consciousness" in the English translation. J. HYPPOLITE, *STUDIES ON MARX AND HEGEL* (J. O'Neill transl. 1969). For Diderot's discussion of "*Bas*" and of "*Bassesse, abjection*," see 13 *OEUVRÉS DE DENIS DIDEROT* 415-19 (1821). Rawls discusses individualistic "shame" and Kantian "respect" and "self-respect," but ignores or evades the Romanist and enlightenment conception of social infamy. See J. RAWLS, *A THEORY OF JUSTICE* 227, 256, 440-46, 483-84, 575 (1971). As a utilitarian theorist, Beccaria considered both fame and infamy, honor and dishonor, reward and punishment. See C. BECCARIA, *supra* note 44, at 8, 98. For the aspects of the history of the words "common people (*bas-peuple*)", see L. ALTHUSSER, *supra* note 31, at 104.

64. *THE FEDERALIST* No. 43, at 285 (Modern Library ed. 1937) (J. Madison).

eralized and politicized. In his important considerations Beccaria showed the absurdity of mass infamy of the oppressed.<sup>65</sup> Writing of Beccaria, Diderot ambiguously said that "I wish that the author had made known the imprudence of rendering a man infamous and of leaving him free. This absurd method peoples our forests with murderers."<sup>66</sup> Diderot perhaps does explain the afflictive aspect of impeachment, which in a proceeding independent of infaming-impeachment and in a regular court justifies afflictive, individual punishment.

## IV

Among others, former Vice President Agnew misunderstands Romanist infamy-impeachment. He quotes Calhoun, who on December 29, 1826, wrote to the House of Representatives, saying that "[c]harges have been made against me of the most serious nature, and which, if true ought to degrade me . . . and consign my name to perpetual infamy."<sup>67</sup> If infamy-impeachment is independent of afflictive punishment and if infamy-impeachment reflects social struggle, the House in its discretion was justified in rejecting Agnew's request for action by the House at the moment desired by him.

It is important to indicate here that with the exception of Edward Livingston, Calhoun is probably the only American Romanist who has held a high place in American politics. Not only is Calhoun's conception of infamy Romanist, but in his public career, which culminates in the American Civil War, he skillfully invoked Romanist structures or forms, especially the structure of the unanimity or tribunital idea of Roman law.<sup>68</sup> Without pursuing this, it is sufficient to suggest that Calhoun's Romanism probably was inspired by Thomas Cooper, a philosophical materialist and friend of Jefferson. For a long period Cooper was president of the University of South Carolina, and as such could have been close to Calhoun. American philosophical materialism, as represented by Cooper, was overcome by the philosophical idealism of Emerson at Harvard. The defeat of both Cooper's legal Romanism and of his philosophical materialism connotes important

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65. See C. BECCARIA, *supra* note 44, at 55.

66. C. BECCARIA, *TRAITÉ DES DÉLITS ET DES PEINES . . . ACCOMPAGNÉE DE NOTES DE DIDEROT ET SUIVIE D'UNE THÉORIE DES LOIS PÉNALES PAR JÉRÉMIE BENTHAM* 95 (A. Morellet ed. 1795). See Franklin, *supra* note 18, at 44 n.23.

67. N.Y. Times, Sept. 26, 1973, at 23, col. 1.

68. Franklin, *The Roman Origin and the American Justification of the Tribunital or Veto Power in the Charter of the United Nations*, 22 *TUL. L. REV.* 24, 48 (1947).

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turning points in American history. Nonetheless, it remains significant that in 1826 Calhoun confirmed the theory that Romanist infamy-impeachment is consecrated by the Constitution.

### V

The Constitution, in Article II, says that “[t]he President, Vice President, and all Civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>69</sup> It must be asked whether this text maintains the separation between infamy-impeachment and afflictive punishment. Even though the accused has no *beneficium ordinis*, Article II, section 4, seems to threaten infamy-impeachment with particularism not consistent with class struggle through public opinion conceptions suggested in this essay and not consistent with Hamilton’s presentation in *The Federalist No. 65*. Hamilton there acknowledged that infamy-impeachment rested on political grounds, but nonetheless thought that the Senate could be interposed as the mediating power or the unhistoric prince.

Article III of the Constitution states the elements of treason.<sup>70</sup> In *The Federalist No. 43* Madison writes that the purpose of including this definition was to prevent “new-fangled and artificial treasons,”<sup>71</sup> presumably even by the Senate as the distanced, unhistoric mediator. But, bribery is not defined—a matter of importance if there are to be no common law crimes under the Constitution. Moreover, there is no formulation of “high crimes and misdemeanors” in the Constitution, for these relate to the infamy ideas of the French enlightenment. This means, in consequence, that the separation between infamy-impeachment and afflictive punishment is maintained. Since “high crimes and misdemeanors” lacks content or determination, this phrase, unlike “treason,” is not a fetter on infamy-impeachment. As will be indicated later, Madison justified impeachment “for any act which might be called a misdemesnor.”<sup>72</sup> The constitutional language does not “bridle”

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69. U.S. CONST. art. II, § 4.

70. *Id.* art. III, § 3.

71. THE FEDERALIST No. 43, at 280 (Modern Library ed. 1937) (J. Madison).

72. MADISON 605. “Mr. Madison thought it indispensable that some provision should be made for defending the Community agst. the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security . . . . He might pervert his administration into a scheme of peculation or oppression.” MADISON 332.

infamy-impeachment because it is the mission of infamy-impeachment to "bridle" the executive power, as both Hamilton and Bracton suggest.<sup>73</sup>

Furthermore, the text of Article II, section 4 reads "high crimes and misdemeanors" rather than "felonies and misdemeanors." This distinction seems intentional, not only because of the conceptions stated in this paper, but because the Constitution elsewhere explicitly condemns certain "felonies." For example, in Article I, section 6, clause 1 of the Constitution, members of the Congress are privileged from arrest "in all Cases, except Treason, Felony and Breach of the Peace . . . ." Article IV, section 2, clause 2, is concerned with the matter of "Treason, Felony, or other Crime" in connection with interstate rendition. Article I gives the Congress power "to define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations."<sup>74</sup> There is thus an internal distinction between "high crimes and misdemeanors" and "felonies."

In the constitutional convention Wilson "thought 'felonies' sufficiently defined by common law."<sup>75</sup> Madison replied that "felony at common law is vague. It is also defective. One defect is supplied by Stat: of Anne . . . ."<sup>76</sup> Hence the Congress was given power "[t]o define and punish Piracies and Felonies committed on the high seas . . . ."<sup>77</sup> But since nothing is said in the Constitution requiring the Congress to "define high crimes and misdemeanors" the separation between infamy-impeachment and afflictive punishment is maintained.

Earlier in the constitutional convention Morris thought impeachment should be "defined."<sup>78</sup> He said that he "admits corruption & some other offenses to be such as ought to be enumerated and defined."<sup>79</sup> But later his position seems similar to that of Hamilton, in that he justifies infamy-impeachment. Madison had objected "to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemesnor. The President under these circumstances was

73. See 2 H. BRACTON, *supra* note 39, at 110; FEDERALIST 65, at 425.

74. U.S. CONST. art. I, § 8.

75. MADISON 473.

76. *Id.* See also THE FEDERALIST No. 42, at 271-72 (Modern Library ed. 1937) (J. Madison).

77. U.S. CONST. art. I, § 8.

78. MADISON 332.

79. *Id.*

made improperly dependent. He would prefer the Supreme Court for the trial of impeachments . . . .”<sup>80</sup> Morris “thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted. He was agst. a dependence of the Executive on the Legislature, considering that Legislative tyranny was the great danger to be apprehended; but there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out.”<sup>81</sup> Thus Morris shifted his position from demanding that impeachment be “enumerated and defined” to that advanced by Hamilton in *The Federalist No. 65*—that the “distanced” Senate could interpose against “undefined” infamy-impeachment. Moreover, Morris even used the very important and decisive words “guilty of crimes or facts.” This preserves and maintains the Roman law distinction, justifying *l’infamie de droit* and *l’infamie de fait*, that is, infamy derived from law and infamy derived from fact. The latter sub-category of infamy consecrates infamy-impeachment even without justification for afflictive punishment. This unites Morris to Madison’s thought justifying impeachment “for any act which might be called a *misde-mesnor*.”<sup>82</sup>

Even before Morris’ earlier thought that the grounds for impeachment should be “enumerated and defined,” Mason said that “[n]o point is of more importance than that the right should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.”<sup>83</sup> Later in the convention Mason asked:

Why is the provision [for impeachment] restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings was 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 the more necessary to extend: the power of impeachments.<sup>84</sup>

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80. *Id.* at 605.

81. *Id.*

82. *Id.* (emphasis added).

83. *Id.* at 331.

84. *Id.* at 605.

Impeachable offenses fall into two general categories: those that are broadly political, involving unconstitutional extension of Presidential powers



Thus the outcome of the Philadelphia convention, so far as this paper is concerned, shows the decline there of the English bill of attainder and the rise of Romanist infamy, based on infaming fact or act.

Bentham wrote that "[a] certain degree of infamy or disrepute, we have already remarked, is what necessarily attends on every kind of political punishment. But there are some that reflect a much larger portion of infamy than others." He added in a footnote:

Aware of this circumstance, the Roman lawyers have taken a distinction between the *infamia facti* and the *infamia juris*—the natural infamy resulting from the offense, and the artificial infamy produced through the means of punishment by the law. See Heinecc. *Elementa Jur. Civil Pand.* 1.3, tit.2. § 399, whose, explanation, however, is not very precise.<sup>85</sup>

or unconstitutional limitation of Congressional prerogatives, and those that could be termed more distinctly criminal, involving alleged violations of law that in the case of an ordinary citizen might be criminally indictable but in the case of the President of the United States are reachable only through the impeachment process.

Editorial, *Articles of Impeachment*, N.Y. Times, Nov. 29, 1973, at 42, col. 1. This is a groping for the Romanist distinction between infamy of fact and infamy of law.

Writing of John Taylor of Caroline, E.T. Mudge says:

If it is suggested that the threat of impeachment is a sufficient control upon the judiciary, Taylor replies that this remedy is inadequate because it applies only to a specified crime and cannot be used to rectify judicial error or to remove an institutional weakness. The states could never put the whole Supreme Court on trial. Impeachment is generally the weapon of political parties and seldom carries honest conviction with it. Even in England it is held in disrepute.

E. MUDGE, *THE SOCIAL PHILOSOPHY OF JOHN TAYLOR OF CAROLINE* 123 (1939). On the consequences of the complicity of the impeaching force with the impeachable force, cf. 2 H. BRACTON, *supra* note 39.

85. Bentham, *supra* note 29, at 460. Bentham's discussion of infamy of law and infamy of fact, in so far as it concerns impeachment, is correct. The Mexican Constitution, in article I, discusses infamy in connection with "unusual or extreme penalties," thus seems to relate infamy to the eighth amendment of the Constitution of the United States, which forbids the infliction of "cruel and unusual punishments." Hence it is necessary to reiterate that Bentham is discussing "political punishment."

In folio 104(b) Bracton writes:

The kinds of punishments visited upon malefactors are these. Some take away life or member; others entail the abjuration of a city, borough or county, others abjuration [of the realm], permanent or temporary, or bodily restraint, that is, imprisonment, for a time or for life. Others entail cudgelling, flogging, the pillory and the ducking-stool and a judgement with infamy. Others bring about deposition from a dignity or an order or the prohibition or denial of some activity.

2 H. BRACTON, *supra* note 39, at 298-99.

## VI

The problem that now emerges is whether the material of the first Constitution, consecrating the separation of Romanist infamy-impeachment, including both *l'infamie de droit* and *l'infamie de fait*, from afflictive punishment, is overcome by the fifth amendment, as part of the second Constitution. The pertinent part of the fifth amendment reads that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."<sup>86</sup>

As has been said, what is called the Constitution is in reality three constitutions, "each of which states in legal formulations the outcome of vital historic changes in American social history. This means that old constitutional texts may be overcome or subordinated by later constitutional texts, unless they strengthen or deepen the force of the newer constitutional provisions."<sup>87</sup> This conception of the three constitutions indicates the problem which has emerged; for although the first Constitution accepts infamy-impeachment, independent of afflictive punishment, the fifth amendment reprobates infamy unless it is united with afflictive punishment. The fifth amendment requires that infaming criminal responsibility rest on an infaming formulated crime, grand jury indictment and petit jury conviction. Over a period of years this writer has sharply criticized violations of this force of the fifth amendment through executive or legislative committee action which intentionally was infaming and hence destructive of the social relations of those thus infamed.

Although the phrase "capital or otherwise infamous crime" is a text of Roman law, such meaning has been disregarded in the United States, as it has been in the formulation relating to infamy-impeachment. However, on one occasion Justice Douglas, in a dissenting opinion in *Ullmann v. United States*,<sup>88</sup> accepted the Romanist meaning of these words. He wrote that "[t]he critical point is that the Constitution places the right of silence *beyond the reach of government*. The Fifth Amendment stands between the citizen and his government. When public opinion casts a person into the outer darkness, as happens

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86. U.S. CONST. amend. V.

87. Franklin, *The Relation of the Fifth, Ninth, and Fourteenth Amendments to the Third Constitution*, 4 How. L.J. 170 (1958).

88. 350 U.S. 422 (1956).

today when a person is exposed as a Communist, the government brings infamy on the head of the witness when it compels disclosure. That is precisely what the Fifth Amendment prohibits."<sup>89</sup>

The word "capital" is Romanist. It connotes *capitis diminutio* by affecting the existence of legal personality, through death or otherwise. In Roman law *capitis diminutio* in its various degrees, affecting the existence of legal personality, was differentiated from *infamia* or loss of honor. *Capitis diminutio* was not necessarily infaming, as for instance, when a person underwent *capitis diminutio minima* by entering a new household or by leaving a household of origin. However, under feudal Roman law the differentiation between *capitis diminutio*, change or loss of legal personality . . . and *infamia* . . . tended to collapse.<sup>90</sup>

Under feudalism outlawry and civil death emerged. Brissaud writes that in French feudal law "[t]he term civil death became a technical one and below it was placed infamy, with its two degrees—infamy at law and infamy in fact."<sup>91</sup>

The revulsion of the enlightenment against infamy was an aspect of the revolutionary upsurge against the mass infamy of feudalism, which Beccaria criticized and which Hegel presented. Precisely because mass infamy was condemned by the bourgeois thinkers of the enlightenment it was retained against the feudal forces which infamed the feudal masses. Diderot described criminal law as "war."<sup>92</sup> Robespierre first sought attention, when as a young lawyer, he attacked the scope of infamy because it was a form of aggression against the people. "The ancient French laws," it was pointed out, "prosecuted the actor, only punishing the crimes of nobles by the loss of their privileges, corporal penalties being reserved for the non-noble, the prejudice of dishonor only attaching to that part of the nation disgraced by servitude."<sup>93</sup>

89. *Id.* at 454.

90. Franklin, *supra* note 87, at 185-86. In his translation and commentary on Gaius, Poste says that "infamia may at one time have been regarded as *capitis minutio*." GAIUS, *supra* note 29, at 117-18.

91. J. BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 883-84 (M. Howell transl. 1912).

92. See Diderot, *supra* note 23, at 68 n. "The punishment of death, therefore, is not a right, for I have demonstrated that it cannot be such; but it is the war of a nation against a citizen whose destruction it judges to be necessary or useful." C. BECCARIA, *supra* note 44, at 45.

93. Franklin, *supra* note 18, at 47 n.40.

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Robespierre thus showed that the law of infamy had been a contradiction for the rulers of France who had declared themselves to be honorable could not be dishonored, whereas the serfs, who were declared to have no honor, could be deprived of honor or infamed. What was required for the negation of such history was both the infamy-impeachment of the oppressive head of state, justified ultimately by the public opinion state created by the first amendment, and the safeguards against infamy of the oppressed, justified by the fifth amendment.

Thus, it appears that the texts of the fifth amendment relating to infamy-impeachment and the text of the fifth amendment are dialectically necessitated in that they emerge as a constitutional scheme accepted by the crisis ridden American bourgeoisie after the American revolution. In existential dread of historical nothingness or annihilation the American bourgeoisie acknowledged the constitutional force of infamy-impeachment, based on fact or act, by the House and Senate, but delimited the role of infamy against the people.

## VII

Raoul Berger's important book, *Impeachment: The Constitutional Problems*,<sup>94</sup> shows no awareness that the first and second American Constitutions should be understood in terms of the French enlightenment and of the American involvement with Roman law.

This relationship has already been discussed. It should be pursued. Adrienne Koch, perhaps timidly, writes in her recent printing of Madison's notes of the debates in the constitutional convention of 1787 that

[i]n the highly interesting intervening period between Annapolis in the fall of 1786 and the Federal Convention in Philadelphia, Madison found the time, despite his pressing political activities, to reeducate himself in the literature of political history and ancient and distinctly modern political thought. Through the friendship of Jefferson, Madison deliberately procured for himself . . . the social philosophy of the Enlightenment, including the Baconian-inspired 37 volume set of the *Encyclopédie*, the Summa of eighteenth century knowledge.<sup>95</sup>

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94. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973).

95. MADISON xiv.

It may be added that during the period of the Philadelphia convention itself, Jefferson, who was in Paris at the time, procured and shipped certain writings, including Mably, to Madison.<sup>96</sup>

As to the influence of Beccaria in the United States, Bernard Bailyn writes that "[i]n pamphlet after pamphlet the American writers cited . . . Beccaria on the reform of criminal law."<sup>97</sup> The writer himself has added that "[t]here were three American translations of Beccaria, together with translations of Voltaire's commentary, published during the period culminating in the formulation of the Fifth Amendment. Two of these were published in Philadelphia, the third in Charleston."<sup>98</sup> In 1941 Barr wrote that "Beccaria's *Essay on Crimes and Punishment* with its famous commentary by Voltaire was known in America immediately after its first appearance in France . . . . It was popular in lending libraries and as a quickly sold item in bookstores, because of general interest in the formation of a new social order. A separate monograph would be necessary to trace the influence of this epoch-making tract."<sup>99</sup>

Berger's book on impeachments shows the limitations of late 19th century historical activity relating to American constitutional law. These weaknesses include: (1) Such a focus attempts to divert American attention from the French enlightenment and from the relation of the enlightenment to Roman law. Thus it remains seemingly feudal in theory and practice, though such feudal orientation unconsciously masked latter-day American bourgeois interest. In a sense, this school continued the monadic *Volksgeist* ideology of Savigny and of the German historical school of law. This has led to an excessive preoccupation with Anglo-American common law. (2) In this American writing there is only the semblance of historical motion. Historical particularism, presented and understood as a chaos of details, emasculates the reality of historical motion. (3) No relation between law as superstructure and social-infra-structure is recognized. There is no conception of contradiction within historical totality. American legal history has been not only indifferent to historical materialism, but also to its rival, American legal realism, which, at least, presents the prob-

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96. Franklin, *supra* note 46, at 116-18.

97. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967).

98. Franklin, *supra* note 18, at 57, *citing* C. BARR, *VOLTAIRE IN AMERICA 1744-1800*, at 121-22 (1941).

99. *Id.*

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lem of the otherness of law, and of the meaning of law as related to the otherness of such law. Because of the above weaknesses, American legal history has not been consciously aware of its most urgent and its most difficult responsibility even within its own self-limited or monadic feudal presuppositions. This is the very important technical and methodological task of showing that common law materials, seemingly still feudal, nevertheless have acquired bourgeois meaning in the United States and in England. The legal and social activism of the truly liberating 18th century constitutional and social period seems unknowable, incoherent and hence Kantian. The legal monadism, here criticized, is unwarranted because it is in England itself that classical bourgeois economic theory emerged and developed.

In 1955 this writer said:

On the legal scholar there is imposed the task of grasping the import of the original text of the Bill of Rights, of discovering and mastering its sources and origins. It is the duty of recovering the eighteenth century materials, which have been torn from the book of American ideological history. . . . Thomas Cooper was forced to complain that American libraries "do not contain the means of tracing the history of questions; this is a want which the literary people feel very much . . ."100

It is hoped that this essay will help provide the means for tracing the history of impeachment to its Romanist origins. It is necessary that this be done, in order that the constitutional formulation of impeachment powers may be considered in their proper perspective.

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100. Franklin, *supra* note 18, at 61-62. For Cooper's remarks, see T. COOPER, *SOME INFORMATION RESPECTING AMERICA* 65 (1794). See Franklin, *supra* note 18, at 62. For possible presuppositional significance, see *THE FEDERALIST* No. 81, at 531-32 (Modern Library ed. 1937) (A. Hamilton); *MADISON* 539.

