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## Contribution to an Explication of the Activity of the Warren Majority of the Supreme Court

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# CONTRIBUTION TO AN EXPLICATION OF THE ACTIVITY OF THE WARREN MAJORITY OF THE SUPREME COURT

MITCHELL FRANKLIN\*

## INTRODUCTION

The eminence of Chief Justice Warren, in his role of chief justice of the fluctuating majority of the so-called Warren court, is amply justified. This majority struggled both to maintain the integrity of the historic force of 18th- and 19th-century constitutional texts relating to civil rights and to unfetter their explosive force, so that these texts legitimately would determine problems as they have emerged during the late 20th century. The majority thus confronted present-day problems of civil rights without collapsing into the subjectivity with which the anti-Warren faction of the same court opposed the Warren majority.

In what may be called his political poetry, Hegel discussed the "poison" which the fluctuating majority of the Warren court sought to avoid.

The life of a people brings a fruit to maturity, for its activity aims at actualizing its principle. But the fruit does not fall back into the womb of the people which has produced and matured it. On the contrary, it turns into a bitter drink for this people. The people cannot abandon it, for it has an unquenchable thirst for it. But imbibing the drink is the drinker's destruction, yet, at the same time the rise of a new principle.<sup>1</sup>

The importance of the struggle of the Warren majority to maintain and to unfetter the legal force of the texts of the Bill of Rights, so far as the United States is concerned, and to negate the poison of destroying, distorting, weakening civil rights within the American bourgeois social order, has been stated by Marx: "The *republic* is the

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1. G. HEGEL, *REASON IN HISTORY* 94-95 (Hartman transl. 1953).

negation of alienation within alienation."<sup>2</sup> This implies that within social regimes based on appropriation or alienation of work, such alienation may be politically negated within the republic. This republican, political negation is, of course, not yet the negation of the appropriation of work. Elsewhere Marx said:

*Political* emancipation is indeed a great step forward. It is not, to be sure, the final form of universal human emancipation, but it is the final form *within* the prevailing order of things. It is obvious that we are here talking about actual, practical emancipation.<sup>3</sup>

This means that the majority of the Warren court sought to maintain and to develop civil rights legitimately within the bourgeois infrastructure of bourgeois private property, that is, of bourgeois appropriative alienation.

Although this is a contradiction, the activity of the Warren majority was a tremendous accomplishment—and—was challenged by the minority of the Warren court and by Nixon as president. Through his appointments to the Supreme Court Nixon sought to overcome the activity of the majority of the Warren court. In this sphere, Nixon, whose ideology in general reflected the ideology of friend/foe of the Nazi "crown jurist," Carl Schmitt,<sup>4</sup> was inspired by the role of Justice Frankfurter, the leader of the minority of the Warren court which opposed the Warren majority. Philip Kurland wrote that "[o]n the day after he nominated Warren E. Burger to be Chief Justice of the United States, President Nixon asserted that in filling vacancies on the high court he would look for those who could follow in the judicial tradition of the late Mr. Justice Felix Frankfurter."<sup>5</sup> Similarly, S. Sidney Ulmer wrote that

[i]n making his televised announcement on the nominations of Lewis Powell and William Rehnquist for the seats on the Supreme Court, Richard Nixon observed that he was merely fulfilling a campaign promise. For, he said: ". . . during my campaign for the Presidency, I pledged to nominate to the Supreme Court individuals who shared

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2. K. MARX, *Critique of Hegel's Philosophy of the State*, in THE WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 151, 176 (L. Easton & K. Guddat ed. 1967) (emphasis in original).

3. K. MARX, *On the Jewish Question*, *id.* at 212, 227.

4. See Franklin, *Further Considerations Relating to Romanist Infamy and the American Constitutional Conception of Impeachment*, 24 BUFFALO L. REV. 29, 60-61 (1974).

5. P. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* xiii (1971).

my judicial philosophy which is basically a conservative philosophy. . . . As a judicial conservative, I believe some Court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society." In 1968, Mr. Nixon said: "We need more strict constructionists on the highest court of the United States. In my view, the duty of a Justice of the Supreme Court is to interpret the law, not to make the law, and the men I support will share that view."<sup>6</sup>

As will be suggested later in this paper, Mr. Nixon's theory of "strict construction" is a theory which not only weakens the texts of the Bill of Rights, especially the texts of the Second and Third Constitutions, but, above all, condemns the legitimate struggle of the majority of the Warren court to unfetter the particularism and possibilities of such texts. This activity of the majority connotes dialectical struggle relating to such particularism and possibilities of the constitutional texts so as to achieve a unity-in-opposition of particular/general and of actuality/possibility. Nixon's "strict constructionism" was directed to exclude the dialectic or the explosive general force of constitutional texts, although the struggle to achieve the dialectic or motion of the constitution is inevitable or necessary because of the crisis or contradictions within the social infrastructure. What ultimately was of concern to the majority of the Warren court was the legitimacy of its activity regarding the texts of the constitution and their explosive force in liaison with what Hegel called "the interplay of . . . forces."<sup>7</sup> Hegel opposed his conception of the "interplay of . . . forces," here the play of social forces, to opinion or what Nixon called legal or juristic "interpretation." Hegel, in effect, condemned or subordinated the role of such opinion solely within a division of social labor because such opinion connotes subjectivity.<sup>8</sup> Indeed, Hegel wrote of "subjective interpretation."<sup>9</sup>

There have been two great upsurges in recent America. The first is the activity of the Warren majority to maintain and to develop the

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6. Ulmer, *Supreme Court Justices as Strict and Not-so-Strict Constructionists*, 8 *LAW & SOCIETY REV.* 13 (1973) (footnotes omitted).

7. G. HEGEL, *THE PHENOMENOLOGY OF MIND* 186 (2d ed. J. Baillie transl. 1931).

8. *Id.* at 213.

9. 1 G. HEGEL, *THE PHILOSOPHY OF FINE ART* 153 (F. Osmaston transl. 1920) (emphasis omitted). In *United States v. Nixon*, 94 S.Ct. 3090, 3105-06 (1974), Chief Justice Burger, although inspired by Nixon's idea of the role of legal or juristic "interpretation," supported his position with Chief Justice Marshall's theory of "interpretation" in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See note 11 *infra*.

Bill of Rights, so as to negate alienation within alienation, that is, within the bourgeois social order. The second upsurge has emerged as the universal successor or as heir of the Warren majority during the struggle to assert the sacrosanctity of the impeachment power of the Congress against President Nixon. While the latter matter is not relevant to this paper, both activities are justified by the popular or "public opinion state" consecrated by the first amendment, which legitimated both the judiciary activity of the Warren majority and the sacrosanct position of the Congress relative to the executive. Democratic veering or dialectical motion as justified by the public opinion state may mediate or dominate the ambiguity, irony, placement/displacement of the structure of the first or Philadelphia Constitution, which consecrated separation of powers without, however, consecrating the mediating power (the fourth power, so to speak). The mediating power would establish hegemony within the ambiguous state.<sup>10</sup> Hence the three powers mentioned in the Constitution, each of which, in essence, is an "interpreting" power, may struggle for the power to mediate or to determine the hegemony among them. The first amendment as a text of the Second Constitution or Bill of Rights determines the validity of the placement/displacement of the mediating power historically through public opinion, provided the public opinion is itself unalienated or unappropriated. Because of the role of public opinion in relation to the irony or ambiguity of the Philadelphia text, it was possible to justify President Roosevelt's attack on the Supreme Court and later to veer and justify the role of the majority of the Warren court. This author has stated:

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 Public Opinion by the First Amendment, the keystone, as Justice Black believes, of the Constitution, because it dominates the formally ambiguous First or Montesquieuan

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10. In the constitutional convention at Philadelphia, Gerry attacked the constitutional *projet* because he desired a text with a "more mediating shape." See Franklin, *supra* note 4, at 49.

Constitution. This is fortified by the *Encyclopédiste* theory of the republic, the authority of which is guaranteed by the First Constitution itself.

If this thought is rejected it means that the possibilities under the First Constitution permanently become the exclusive property of social forces which indeed were not strong enough 1787 to formulate an unambiguous constitution consecrating their own power exclusively. Said otherwise, the formally ambiguous First Constitution, dominated by the First Amendment, as consecrating the Public Opinion State, indeed may reject or justify the power of the Supreme Court.<sup>11</sup>

## I. THE WARREN MAJORITY AS A SO-CALLED GENERATION COURT

Although the phrase "Warren court" has been widely accepted, this is not an exact description of the historic mission of its varying majority. The words "Warren court" suggest the idea of a generation rupture or discontinuity in which the new generation represents a negation, leap or destruction of an older generation. This is incorrect

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11. Franklin, *Influence of the Abbé de Mably and of Le Mercier de le Rivière on American Constitutional Ideas Concerning the Republic and Judicial Review*, in *PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT* 96, 125 (R. Pound, E. Griswold & A. Sutherland eds. 1964). On the basis of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and, article III, section 1, of the Constitution, Chief Justice Burger in *United States v. Nixon*, 94 S.Ct. 3090, 3105-06 (1974), claimed the exclusive mediating power for the Supreme Court because of a plenary power of interpretation therein. This conception of the role of *Marbury v. Madison* is invalid. Article III, section 2, of the Constitution is the important text. It reads: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . ." Of *Marbury v. Madison* this writer said: "Chief Justice Marshall, in *Marbury v. Madison*, turned this provision into one consecrating judicial supremacy, merely by the casual device of omitting the phrase 'in Law and Equity' from his use of it. 'The judicial power of the United States,' he wrote, 'is extended to all cases arising under the constitution.'" Franklin, *The Judiciary State I*, 2 *NAT'L LAW. GUILD Q.* 244, 254 (1940). Article III, section 2, of the Constitution merely justifies "private law" competence under the Constitution because that is the most that "law and equity" meant in the 18th-century. See Franklin, *Brutus the American Praetor*, 15 *TUL. L. REV.* 1, 18-19 (1940). The phrase "law and equity" may not explode into a conception of general "public law" judicial supremacy under the Constitution because of the several particularistic "public law" competences also created in article III, section 2, of the Constitution. The theory of judicial supremacy really derives from the idea of legal despotism of the French Physiocrats which emerged in the decades before *Marbury v. Madison*. See Franklin, *Influence of the Abbé de Mably and of Le Mercier de le Rivière on American Constitutional Ideas Concerning the Republic and Judicial Review*, *supra* at 102. This discussion leaves open the structural possibilities of struggle for judicial supremacy created by the ambiguous or ironic structure of the First or Philadelphia Constitution and mediated by the first amendment of the Second Constitution or Bill of Rights.

insofar as the new generation is also a social moment or dialectical aspect of an existing social infrastructure and social superstructure. "History is nothing but the succession of the separate generations," Marx and Engels wrote in *The German Ideology*, "each of which exploits the materials, the capital funds, the productive forces handed down to it by all preceding generations, and thus, on the one hand, continues the traditional activity in completely changed circumstances and, on the other, modifies the old circumstances with a completely changed activity."<sup>12</sup> Karlheinz Barck has described generation theory as a

wide-spread theory of bourgeois literary-historical writing of the twentieth century which periodizes and systematizes the objective historical process according to the standard of its subjective bearer. Its defenders have freshly arranged the question of the concept of epochs with the links of history according to the succession of generations and have sought through the succession of generations to preserve the loss of a unified picture of bourgeois history. The introduction of the concept of generations into the methodology of historical and cultural sciences generally expresses the effort to expose historical connections. This design remains planted in subjectivism because the factual historical contradictions and their class character are masked and mystified through the decomposition of historical periods into generation epochs and generation oppositions.<sup>13</sup>

Among the many generation theories and theorists, Karlheinz Barck noted the German romantics, Ranke, Dilthey, *surréalisme*, *dadaismus*, *futurismus*, *expressionismus*, *naturalismus*, Cavaignac, Mannheim, Ortega y Gasset and Marías.<sup>14</sup> He also mentioned the critical role of Werner Kraus.<sup>15</sup> It is hardly necessary to say that American legal theory has been infected by the theory of the succession of generations.

If history is the succession of generations, each of which exploits the materials handed down to it in completely changed activity, it does not follow that the change of activity is completely self-conscious. This too is true of law which may be ideological in that it also may be false or superstructural consciousness which determines the activ-

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12. K. MARX & F. ENGELS, *THE GERMAN IDEOLOGY* 60 (S. Ryazanskaya transl. 1964).

13. Barck, *Generationstheorie*, in 1 *PHILOSOPHISCHES WÖRTERBUCH* 396 (G. Klaus & M. Buhr ed. 1970).

14. *Id.* at 397.

15. *Id.*

ity of the jurist. In a manuscript on Feuerbach (which has been discussed by both Sève and Althusser), Marx wrote:

[In the] law the bourgeois must give themselves a general expression precisely because they rule as a class . . . . There is no history of politics, law, science, etc., of art, religion, etc. . . . . *Why the ideologists turn everything up-side down.*

. . . .  
For this ideological subdivision with a class, 1. *The occupation assumes an independent existence owing to division of labour;* everyone believes his craft to be the true one. The very nature of their craft causes them to succumb the more easily to illusions regarding the connection between their craft and reality. In their consciousness, in jurisprudence, politics, etc., relationships become concepts; since they do not go beyond these relationships, the concepts of the relationships also become fixed concepts in their mind. The judge, for example, applies the code, he therefore regards legislation as the real, active driving force. . . .

Idea of justice, Idea of State. The matter is turned upside-down in *ordinary* consciousness.<sup>16</sup>

Thus, legal activity is not only a thing-in-and-for-itself, as superstructure, but also a thing-for-other, the social infrastructure. Indeed, as the truth of legal activity is also in its other—that is, as it also gets its meaning in its infrastructural other—critics of the so-called Warren majority of the Supreme Court, such as Bickel<sup>17</sup> and Kurland,<sup>18</sup> may be reproached if they have not also mastered the infrastructural reality within which the so-called Warren majority made its determinations, or if they have mystified the infrastructural otherness within which those justices made their decisions. Both Bickel and Kurland invoke the obscurantist, subjectivist, 19th-century philosophy of life of Justice Frankfurter, a bourgeois movement which later fed many of the reactionary philosophical idealisms of the 20th-century, including existentialism and pragmatism. Bickel sums up Frankfurter's thought thus:

Better to recognize candidly that judicial judgment was statesmanship superimposed on the democratic political process, and its final test was the future. So Frankfurter taught. The judge, he wrote in 1954—albeit extra-judicially, not in an opinion—had to be historian,

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16. K. MARK & F. ENGELS, *supra* note 12, at 671-72.

17. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

18. See P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* (1970).



philosopher, and prophet. Even though ill equipped to do so (the task requires "poetic sensibilities" and the "gift of imagination"), he must "pierce the curtain of the future . . . give shape and visage to mysteries still in the womb of time." He must "have antennae registering feeling and judgment beyond logical, let alone quantitative, proof."

Speaking generally, therefore, and reserving judgment on the validity, wisdom and worth of various judicial judgments, one can hardly tax Frankfurter's younger colleagues and his successors for seeing themselves in the role of statesmen, discharging a responsibility for the progress of society. It was their fate, wished on them by the great men, chief among them, over a career of fifty years, Felix Frankfurter, who gave us an age of reason in American law, who disestablished an old faith and made room for a new.<sup>19</sup>

Kurland tells of the outcome of Frankfurter's new rationalism or irrational rationalism, by noting that the "strict constructionists" now look upon Felix Frankfurter as a "hero, though he was once regarded with somewhat less esteem by these same people."<sup>20</sup>

As indicated through Nixon, there seems to be an identity between the poetry of Justice Frankfurter and the prose of the "strict constructionists" who seek to undo the accomplishments of the majority of the so-called Warren court. "Strict constructionism" today does not mean merely the strict constructionism of the pre-civil war southern slaveholders (though the racist demagoguery is obviously intended), but also the general negation of the texts of the formulated constitution which erupted and became a social force during the regime of Chief Justice Warren after having been narcotized in varying degrees and situations for almost two centuries. Above all, the attacks of Bickel and Kurland on the majority of the so-called Warren court are attacks on new constitutional forces that have been unleashed, especially by Justice Douglas' opinion in *Griswold v. Connecticut*.<sup>21</sup> Here Justice Douglas preserved fidelity to the particularism of the texts of the Bill of Rights; but reflecting the analogical method of Roman law justified by the 18th-century ninth amendment, he burst the fetters of particularism and legitimated textually a disciplined new general legal conception appropriate to the 20th-century. This eruption of the ninth amendment was grounded in the dialectic

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19. A. BICKEL, *supra* note 17, at 38-39.

20. P. KURLAND, *supra* note 18, at xv.

21. 381 U.S. 479 (1965).

of the unity-in-opposition of particular/general, and of actuality/possibility. However, philosophy of life and its impending American development into legal existentialism and legal Freudian-existentialism turn away from the objectivity of dialectic to the arbitrariness of subjectivity. Hence there exists today hostility, both academic and political, to the qualitatively new type of constitutional struggle introduced by the Warren majority, which in certain situations both accepts and yet negates the barrier or limit in the constitutional text.

Mention has already been made of Hegel's dialectic of the interplay of forces.<sup>22</sup> The social interplay of forces released or exploded through the text of the ninth amendment reflects methodologically the legal Romanism of the ninth amendment. This is the role of Justice Douglas' opinion in *Griswold v. Connecticut*. In 1958 this writer said:

It is the mission of the Ninth Amendment not only to prevent the weakening of the Second Constitution, but to provide for the development of such texts to control historically new situations. It is not therefore a text consecrating natural rights without content, natural law with a variable content; but it is a text of juridical method. It is a text concerning the judiciary power. This differentiates the Ninth from the Tenth Amendment.

But as the Ninth Amendment is formulated under *Encyclopédiste* domination, it reflects the hostility of the Enlightenment toward the legal method of historically reprobated English feudal common law, which is antagonistic to formulated law, which upholds *stare decisis* in its various manifestations, which examines codified law narrowly and suspiciously, and which turns aside from and ignores the written text when the latter spends its immediate force. However, in place of such legal method of the feudal English common law, it is the mission of the Ninth Amendment to require and to justify the legal method of the Enlightenment, which here seized the legal method of the Roman law. Roman law, as it had its outcome in the great civil codes of the eighteenth century, may employ formulated law by analogy to control the determination of historically novel problems, thus acknowledging historical development without justifying a new arbitrariness in such development.

The great role of the Ninth Amendment thus becomes clearer. It requires consistent judicial development of the first eight amendments to control novel situations which are not immediately subject to the Second Constitution. It recognizes the general constitutional force of the first eight amendments, and makes them sources of con-

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22. See note 7 *supra* & accompanying text.

stitutional law. It breaks any particularism in the first eight amendments. Thus, it excludes a counter-constitution or a paraconstitution.<sup>23</sup>

In his opinion in *Griswold v. Connecticut*, Justice Douglas showed mastery of important Romanist discriminations relative to the Romanist methodology of analogy, which justify struggle to realize possibilities implicit in the Bill of Rights. This is the distinction between *Rechtsanalogie* and *Gesetzesanalogie*. This author has said, in discussing *Griswold v. Connecticut*:

What Justice Douglas described as "emanations" and "penumbras" from texts of the Bill of Rights or Second Constitution is the process of determination by the analogy of such texts. . . . If Justice Douglas had invoked an analogy from a particular text of the Second Constitution this would be called *Gesetzesanalogie*, that is, analogy of a law. But because he invoked an analogy from a group of texts of the Second Constitution, Justice Douglas' opinion . . . is founded on *Rechtsanalogie*, that is, on analogy of the law. In texts of international law *Rechtsanalogie* may perhaps be described in English as "general principles of law." What Justice Douglas described as "penumbras" and "emanations" in 1965 in *Griswold v. Connecticut*, because he invoked *Rechtsanalogie*, he described as "analogy" in 1951 in his dissent in *Dennis v. United States*, where he was concerned with *Gesetzesanalogie*.<sup>24</sup>

The writer added:

[T]he Ninth Amendment . . . defends and deepens the force of the Second Constitution. And it prepares the way for the juridical method of the Third Constitution, conceived as an historical text of the Civil War.

Although Justice Douglas is not a Romanist or a civilian, it may be observed that historical necessity has forced him toward the civil law and away from Anglo-American common law.<sup>25</sup>

Similarly, in discussing the texts of the Uniform Commercial Code, this writer stated:

In modern Roman or civil law a distinction is made between the analogical possibility of a text having the force of law (*Gesetzesana-*

23. Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution*, 4 How. L.J. 170, 176-77 (1958).

24. Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government*, 40 TUL. L. REV. 487, 491 (1966) (footnotes omitted).

25. *Id.* at 491-92.

*logie*) and the analogical possibility of a principle derived from and discovered in a plurality of texts having the force of law (*Rechtsanalogie*). For instance, Wolff says that from Articles 367, 371, 456, 468, 824, 916, 1026, and 1050 of the Austrian civil code, together with other texts, a basic general principle, relating to the protection of third persons who in good faith have given their confidence to an external state of affairs, has been derived and has been given general application. What Wolff treats as a basic concept was developed from the indicated group of particular articles of the Austrian civil code.<sup>26</sup>

Karl Llewellyn, the redactor of the Uniform Commercial Code, was aware of Romanist methodological conceptions. The Romanist methodology justified by the ninth amendment and by the Uniform Commercial Code are parallel. In law books loosely written for Anglo-American legal practice and students, the Romanist methodology of the Code as appreciated by Llewellyn, becomes disguised. Thus in one such work the following appears:

In order to permit the continued expansion of commercial practices the drafting philosophy of the Code was: open-ended drafting, with room for courts to move in and readjust over the decades. K. Llewellyn, *The Common Law Tradition* 183 note 186 (1960). Thus, in the main, the Code was not drafted in the manner a conveyancer would. Llewellyn called these persons: "The metes and bounds boys." Or, as Comment 1 to Section 1-102 states:

"This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason."<sup>27</sup>

In the thought of H. L. A. Hart the problem of legal analogy is presented obscurely and free from any sense of dialectic. In *The Concept of Law*, Hart stated:

All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are

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26. Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW AND CONTEMPORARY PROBLEMS 330, 338 (1951).

27. B. STONE, UNIFORM COMMERCIAL CODE IN A NUTSHELL 6 (1975).

prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules.<sup>28</sup>

Later Hart wrote:

Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these . . . will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*. So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. . . . It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods.<sup>29</sup>

Thus Hart justifies the Kantian jurist who, as unhistoric, external mediator, chooses among antinomies. Because "God is dead," men are gods. What Mr. Wishingrad has said of Justice Frankfurter becomes pertinent:

Holmes is perceived as being "outside of history." But, since "detachment" achieved by Frankfurter was a conscious act of will, not a character trait, he was even more susceptible to Hegel's attack on the subjective elevating alternately one or the other of the Kantian antinomies. In this regard, it might be suggested that Frankfurter in a negative sense, transcended Holmes' ambiguity and achieved "hypocrisy."<sup>30</sup>

The struggle relative to the methodological career of the ninth amendment has already begun, with the Burger court taking the initia-

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28. H.L.A. HART, *THE CONCEPT OF LAW* 119 (1961).

29. *Id.* at 124-25.

30. J. Wishingrad, Oliver Wendell Holmes: Common Law Realist and "Unhistoric Prince," January 28, 1974 (unpublished manuscript on file at *Buffalo Law Review* office) at 19.

tive to weaken it. This is the purport of *Roe v. Wade*.<sup>31</sup> Of this case Wishingrad wrote:

The strongest attack, however, was to come in *Roe v. Wade*. Even though Blackmun writing the majority opinion found that a woman's right to an abortion was a right of privacy recognized by the Constitution his methodological analysis was virtually non-existent. Blackmun felt the right of privacy was founded in the Fourteenth Amendment's concept of personal liberty; but he was willing to admit that it might be found in the Ninth Amendment also. This cavalier attitude toward methodology was appalling.<sup>32</sup>

## II. ON THE "DETTERRORIZATION" MISSION OF THE WARREN MAJORITY

An important mission of the Warren majority was that of the "detterrORIZATION" of American bourgeois society. Although Bickel and Kurland believe the Justices to have been confused, uncertain, irresponsible and perhaps reckless, their determinations acquire meaning because they, in part, have been directed, through the Constitution, against such bourgeois terrorism. It is not necessary to document the actuality of bourgeois terrorism.

Neubert wrote:

The form of practice of domination can be of different types. With the bourgeoisie it is terroristic as well as formal-democratic. The form of domination is dependent on the historic situation of capitalism as well as on the class relations within and without actual states. With state-monopoly capitalism the tendency to further withdrawal of formal-democratic forms of domination grows, in connection with which attempts to establish authoritarian or open dictatorial forms of domination become cunningly veiled.<sup>33</sup>

Hence terror is a wider concept than violence, though violence too is an immediate form of terror. For the moment it is not necessary to distinguish Hegel's concept of fear from the concept of dread, as Heidegger does. Terror is a form of domination grounded in the dread of loss of being or the dread of nothingness, of the terrorized

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31. 410 U.S. 113 (1973).

32. J. Wishingrad, *supra* note 30, at 23.

33. Neubert, *Herrschaft*, in WÖRTERBUCH DER MARXISTISCH-LENINISTISCHEN SOZIOLOGIE 184, 185 (W. Eichhorn I ed. 1969).

social force exercised by the terrorist social force. Such coercion may be the dread of physical death. In its veiled, refined form the dread may be of loss of social relations. As humanity is human only through social relations, dread of the deprivation of such relations is dread of social nothingness or death itself. Sartre stated:

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." . . . [I]n 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>34</sup>

During the period before the French revolution it was not unusual for condemnation of feudalism to take the form of the criticism of a state or period other than one's own. Perhaps Hegel continued this mode of criticism into his own period. What Hegel said of fear among "orientals" may be repeated here as the truth of social fear in all regimes founded on appropriative alienation. That is, in the east

there can but be the relation of lord and slave, and in this despotic sphere fear constitutes the ruling category. . . . This sensation of negation, that something cannot last, is just fear as distinguished from freedom which does not consist in being finite but in being for itself, and this cannot be laid hold of.<sup>35</sup>

Hegel himself makes the fear or terror of the oppressed the centre of the dialectic of oppressor/oppressed, which he pursues virtually exclusively as the history of European appropriative alienation in *The Phenomenology of Mind*. Here, however, the forces struggle reciprocally so that the dialectic of domination/dominated involves a terroristic relation of struggle to negate the negativity of the social death of appropriation. In his *Lectures on the History of Philosophy*, where he wrote of the "East," Hegel said:

The man who lives in fear, and he who rules over men through fear, both stand upon the same platform; the difference between them is

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34. J.-P. SARTRE, BEING AND NOTHINGNESS 237-38 (H. Barnes transl. 1956) (emphasis in original).

35. 1 G. HEGEL, LECTURES ON THE HISTORY OF PHILOSOPHY 96 (E. Haldane transl. 1892).

only in the greater power of will which can go forth to sacrifice all that is finite for some particular end. The despot brings about what his caprice directs, including certainly what is good, not as law, but as arbitrary will: the passive will, like that of slavery, is converted into the active energy of will, which will, however, is arbitrary still.<sup>36</sup>

Moreover, in Hegel's considerations in *The Phenomenology of Mind* the terror becomes veiled and assumes various historic forms, including terror veiled by flattery<sup>37</sup> of the appropriated social force. The theory of the rule of law is such a veil or masking, in so far as it justifies appropriative alienation. This will be discussed later in connection with Kant's categorical imperative.

What has been said permits this essay to focus on the historic mission of the majority of the Warren court. That mission was the "deterioration," so far as possible, of American bourgeois social relations—which are based on appropriative alienation—through the constitutional texts of the Bill of Rights and the expansive or explosive effect thereof legitimated by the ninth amendment. It must be repeated that the Warren majority sought to deterrorize bourgeois social relations within bourgeois social relations. As has been noted, Marx described the republic as the negation of alienation within alienation.<sup>38</sup> The Warren majority sought to defend this contradiction, but it has been rewarded by the subsequent introduction of the Nixon-created Burger court. Madison attempted to confront the problem of the Warren court in *The Federalist No. 10*. Here he said that:

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. . . .

. . . . The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. . . . From the protection of different and unequal faculties of acquiring property . . . ensues a division of the society into different interests and parties.

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36. *Id.* at 97.

37. G. HEGEL, *supra* note 7, at 533.

38. K. MARX, *supra* note 2.



The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. . . .

....  
 A Republic . . . promises the cure for which we are seeking.<sup>39</sup>

Before the bourgeois revolutions, the bourgeoisie were represented by the outlook of the French enlightenment, and the Warren court, in effect, through its relation to the Bill of Rights, continued this connection. The position of the Enlightenment was that human "rationalism" had been appropriated, alienated or seized by feudalism. Lost reason could be restored by education. The property idea of feudalism was maintained, but negated and repositioned by bourgeois property ideas. The bourgeois laws (codes, constitutions) would reeducate and, through enlightened public opinion, alienate the feudal alienation. "If the laws are good, morals are good," wrote Diderot, "if the laws are bad, morals are bad."<sup>40</sup> In his concurring opinion in *Cooper v. Aaron*,<sup>41</sup> condemning states' rightist, racial interposition against school integration, Justice Frankfurter, said: "Local customs, however hardened by time, are not decreed in heaven. . . . Experience attests that such local habits and feelings will yield . . . to law and education."<sup>42</sup> The Bill of Rights, especially the first amendment, was derived from the theory of enlightened public opinion and of the role of the enlightening laws. Hegel pushed the theory of the Enlightenment to a higher level, suggesting that the educational role of enlightening law justified the abolition of the state itself. Ignoring both the appropriative alienation and terror in the class-controlled state, he urged this through his discussions of the laws of Solon and the expulsion of Pisistratus. It is not necessary to discuss here this side of Hegel, save to suggest that it may have been anticipation of the Marxist theory of the withering of the state under socialism. Though it also touches the matter of "interiorization," which will be mentioned later in this paper, it will suffice to indicate that the problem must be solved materialistically as Diderot perhaps suggests and

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39. THE FEDERALIST No. 10, at 56-62 (Modern Library ed. 1937) (J. Madison).

40. D. DIDEROT, *Supplement to Bougainville's Voyage*, in DIDEROT INTERPRETER OF NATURE 146, 181 (J. Stewart & J. Kemp transl. 1937).

41. 358 U.S. 1 (1958).

42. *Id.* at 25.

Hegel hints.<sup>43</sup> What is now required is to pursue Hegel's thought relating to terror and to relate it to the activity of the majority of the Warren court.

Although Hegel, in his *Philosophy of Law* and elsewhere, was the theorist of bourgeois hegemony, he realized that the bourgeoisie had come to power in France through terrorism. He set himself the theoretical task of considering the "deteriorizing" of bourgeois power. He discussed Montesquieu's conception of separation of powers, which, through certain mediations, nevertheless maintained the state as a unity of the powers-in-separation, as a design to negate bourgeois terrorism. Montesquieu's conception of separation of powers and the related idea of federalism was the truth, juridically expressed, of infrastructural terroristic social rivalries. The conception of separation of powers unleashed rather than confined terror. In the *Grundrisse*, Marx' notes written in preparation for writing *Capital*, he indicated that terrorism was inherent in the infrastructure of capitalism; and, could not be overcome merely superstructurally. Marx perceived that inherent in the simplest form of bourgeois social relation, that is, in the sale of a commodity, there was social separation and social eruption.<sup>44</sup> The sale split the artifact into its use-value and into its surplus-value. This split is a social eruption, resulting in social relations based on the contradiction of domination and of subordination. Surplus-value is alienation in the juridical meaning of alienation as selfdetermined, as willed, or as free surrender in which the selfdetermination is nevertheless also seizure, appropriation, *occupatio* by the dominant or alienating social force. In a not entirely satisfactory discussion Răceanu described "alienationization" as "an explosive, accusatory content of social criticism."<sup>45</sup> The domination is maintained by violence or terror which emerges directly, as in bourgeois fascism, or threatens to emerge, as in bourgeois democracy. In *Dombrowski v. Pfister*<sup>46</sup> the Warren court acknowledged the threat of bourgeois state terrorism particularly when it condemned the "chilling"<sup>47</sup> effect of certain state

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43. See G. HEGEL, *supra* note 35, at 160; cf. G. THOMSON, AESCHYLUS AND ATHENS 92 (2d ed. 1946).

44. K. MARX, GRUNDRISSE DER KRITIK DER POLITISCHEN ÖKONOMIE 68 (1953).

45. Răceanu, *Entfremdung als menschliche Entwicklungsform*, 15 *Revue roumaine des sciences sociales, serie de philosophie et logique* 105, 109 (1971).

46. 380 U.S. 479 (1965).

47. *Id.* at 487.

action. In *Wilkinson v. United States*,<sup>48</sup> Justice Black, dissenting, condemned "government by intimidation."<sup>49</sup>

Before coming to power through its revolution, the French bourgeoisie condemned feudal terrorism, though its own infrastructure later required terror or terrorism masked by the so-called rule of law. Rousseau wrote in the famous first sentence of *Contract Social* that: "Man was born free, and everywhere he is in chains."<sup>50</sup> Jefferson echoed Rousseau when he claimed for Americans "*the rights of men, of expatriated men.*"<sup>51</sup> Jefferson echoed Rousseau in his first inaugural address in 1801, speaking of "the agonising spasms of infuriated man, seeking through blood and slaughter his long-lost liberty . . ."<sup>52</sup>

Rousseau was stating the general alienation or seizure or appropriation which feudalism expressed. But within this presentation the problem of the bourgeoisie itself also may be discovered. This problem was whether in social relations there could be bourgeois appropriative alienation or estrangement without terror. As appropriative alienation was reified, fetishized, corporealized or "chosedified" in what was presented juridically as private property, the problem was whether the alienation-reification was maintained by terror. Of course, bourgeois theory denied that bourgeois power rested on terror and sought through natural law theory or its derivative, social contract theory, to eternalize bourgeois power and to justify it through unhistorical or supra-historical rationalist theory. In effect, Hobbes stated the crisis of the bourgeoisie in his theory that the terror of one against all in civil society justified the monopoly of the state to be terroristic. What he masked was that terroristic state power became the monopoly of the social class which controlled the state through the terrorism inherent in the property relations of civil society or of the social infrastructure.

As bourgeois thought developed, the crisis of the reciprocity of bourgeois property and of state terrorism was further felt. If private property could justify state terrorism, state terrorism could justify private property. This appears in the theory of bourgeois criminal

48. 365 U.S. 399 (1961).

49. *Id.* at 421.

50. J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN OF INEQUALITY* 7 (L. Crocker ed. 1967).

51. 5 T. JEFFERSON, *WRITINGS* 65 (1853).

52. Inauguration Address, March 4, 1801, in 3 *WRITINGS OF THOMAS JEFFERSON* 317, 319 (A. Lipscomb ed. 1903).

law during the Enlightenment, though it must be reiterated that the crisis was a general crisis and not solely a crisis of criminal law. Beccaria condemned capital punishment because it violated the selfdetermination of the criminal and social contract theory. In the United States, Livingston advanced beyond Beccaria in that he too condemned capital punishment on the basis of the selfdetermination of the accused, as justified by the social contract. In effect, he explained selfdetermination because the so-called criminal act was produced by criminal economic conditions, for instance, unemployment. Livingston probably was influenced by Holbach who condemned the criminality of the terroristic state and absolved the criminal (as Hegel did in a variation on this in *The Phenomenology of Mind*). In *The System of Nature*, Holbach, writing in 1770, said:

[I]f each society, less partial, bestowed on its members the care, the education, and the assistance which they have the right to expect, if governments less covetous, and more vigilant, were sedulous to render their subjects more happy, there would not be seen such number of malefactors . . . they would not be obliged to destroy life in order to punish a wickedness, which is commonly ascribable to the vices of their own institutions . . .<sup>53</sup>

In writing of Hegel's theory of selfdetermined criminal responsibility, Marx and Engels, in *The Holy Family*, in effect strengthened Holbach's criticism of terroristic criminal law.

Hegel holds that the criminal must as punishment pass sentence on himself. . . . In Hegel this is the *speculative disguise* of the old *ius talionis* that Kant developed as the *only legal penal theory*. . . . A *penal* theory that at the same time sees in the criminal the *man* can do so only in *abstraction*, in imagination, precisely because *punishment, coercion* is contrary to *human* conduct. . . . [U]nder *human* conditions punishment will *really* be nothing but the sentence passed by the culprit on himself. There will be no attempt to persuade him

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53. 1 P. HOLBACH, *THE SYSTEM OF NATURE* 132 (H. Robinson transl. 1868). Montesquieu, stating the ideology of the bourgeois Enlightenment, said that virtue may be defined as the love of the laws and of our country. As such love requires a constant preference of public to private interest, it is the source of all private virtues . . .

This love is peculiar to democracies. . . .

Every thing, therefore, depends on establishing this love in a republic; and to inspire it ought to be the principal business of education . . . .

1 C. DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 34 (T. Nugent transl. 1949). But in assessing feudal law, Holbach wrote that "[p]ublic esteem has more power over men of elevated minds than the terrour of the laws." 1 P. HOLBACH, *supra*, at 131.

that *violence* from *without*, exerted on him by others, is violence exerted on himself by himself. On the contrary, he will see in *other* men his natural saviours from the sentence which he has pronounced on himself; in other words the relation will be reversed.<sup>54</sup>

An important aspect of the greatness of the Warren majority is that its determinations in criminal law, which as *praxis* tend to be consistent with the theory of the Enlightenment and of Marx and Engels that the state should not be terroristic, are condemned by Kurland and Bickel.

As has been said, the crisis of criminal law, both during the 18th- and 20th-centuries has been a particular aspect of the general problem of the terroristic state. It may be said that Chief Justice Warren, Justice Douglas and Justice Black perceived most clearly the unity of particularist state terror with general state terrorism; and that the aim of such particularist terror was that of introducing universal terror. The generalized force of the work of these justices in criminal law perhaps has been accepted primarily by laymen and by new forces now entering the law. This explains the intensity of the attack on the Warren majority from within the world of law. The attack assumed many unwarranted forms, including that on the methodological competence and integrity of the Warren majority, designed to drive away lay support for the Warren majority.

In this context, the *abbé* de Mably, a French utopian communist writing in the 18th-century as a theorist of both the French and American revolutions, becomes extremely important. Through him social criticism of American state terrorism was sharply indicated a full half-century before Marx and Engels. Mably personally was very closely identified with both Jefferson and John Adams. In 1783 or 1784 Mably published the thought which is pertinent to this article in the fourth and last of a series of letters to John Adams, then American minister plenipotentiary to Holland and a negotiator of the peace treaty with the English government. In the English translation, published in 1784, the fourth letter bears this heading: "Concerning the Dangers to which the American Confederation stands exposed; the Circumstances which will rise to Troubles and Divisions; and the Necessity of augmenting the Power of the Continental Congress."<sup>55</sup>

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54. K. MARX & F. ENGELS, *THE HOLY FAMILY* 238-39 (R. Dixon transl. 1956).

55. DE MABLY, *REMARKS CONCERNING THE GOVERNMENT AND THE LAWS OF THE UNITED STATES OF AMERICA IN FOUR LETTERS ADDRESSED TO MR. ADAMS* 183 (1785).

Although Mably supported the American victory in the revolution, he wrote Adams that "I . . . tremble for the fate which, probably, attends you."<sup>56</sup> He told Adams that he feared the coming role of the American bourgeoisie, and hoped that "some limits to the rage of avarice" would be set.<sup>57</sup> Because "money is the soul of all their operations,"<sup>58</sup> he inquired of Adams:

With what eyes, therefore, will they look upon that equality which your laws have endeavoured to establish amongst the citizens? They will not deign to comprehend those unalienable privileges and rights of sovereignty which you attribute to the people. By what means can riches . . . become prevented from introducing amongst the Americans, a division of families, under different classes?<sup>59</sup>

Mably continued: "[A] Gracchus only will be wanting . . . who will entice the citizens to rise the one against the other, and throw them into anarchy . . . ."<sup>60</sup> These class rivalries were more of a threat to America, Mably wrote than the fears of intervention or of protection by England, Spain or Canada.

With *you*, the authority of the Congress must supply the place of [Roman] tribunes . . . . The rich, when they perceived a body impowered to sit in judgment upon their actions, would prove guarded in their enterprises; and the people would, certainly, feel less disquiet and suspicions. . . . [E]ither the hope or fear of a juridical decision would calm the raging of sedition in America.<sup>61</sup>

56. *Id.* at 184.

57. *Id.* at 259.

58. *Id.* at 193.

59. *Id.* at 203.

60. *Id.* at 206.

61. *Id.* at 241. In *The Federalist No. 34*, Hamilton said:

It is well known that in the Roman republic the legislative authority, in the last resort, resided for ages in two different political bodies—not as branches of the same legislature, but as distinct and independent legislatures, in each of which an opposite interest prevailed: in one the patrician; in the other, the plebeian. Many arguments might have been adduced to prove the unfitness of two such seemingly contradictory authorities, each having power to *annul* or *repeal* the acts of the other. But a man would have been regarded as frantic who should have attempted at Rome to disprove their existence. . . . [T]hese two legislatures coexisted for ages, and the Roman republic attained to the utmost height of human greatness.

THE FEDERALIST No. 34, at 203-04 (Modern Library ed. 1937) (A. Hamilton). In discussing "federal interposition" against the states through the constitutional guarantee of republican form of government (Article 4, section 4 of the Constitution), Madison wrote in the *The Federalist No. 43* that "[t]he existence of a right to interpose will generally prevent the necessity of exerting it." THE FEDERALIST No. 43, *supra*, at 284. See Calhoun, *infra* note 131 & accompanying text on cassation.

Thus it emerges from Mably's considerations that social terror develops out of class relations in alienating bourgeois society and that bourgeois terror dialectically engenders social counter-terror as its opposite, so that the terrors struggle as a unity-of-opposites.

The role of Mably in the history of American law has been ignored because he suggested a conception of American history founded on class struggle. The position which ignores his conception of American history tends to take the form of suggesting that the American revolution was not a social revolution, but merely a national liberation movement. Hence it has been assumed that the text of the American constitution should be treated as an Anglo-American common-law document, and therefore not as a text requiring new legal methodology appropriate to a successful social revolution. The prevailing outlook ignores John Adams' theory of the revolution as, in effect, an anti-imperialist struggle to prevent an anticipated English feudalization of the American colonies even though the English metropolis itself was bourgeois.

As has been said, Hegel condemned the terror of the French revolution and as a supporter of the French revolution sought to create and justify "deteriorized" social relations. Without here presenting Hegel's dialectical considerations, he said of the terroristic state that:

By no manner of means, therefore, can it exhibit itself as anything but a *faction*. The victorious faction 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. . . . Being suspected . . . takes the place, or has the significance and effect, of being guilty . . .<sup>62</sup>

Earlier he wrote:

The sole and only work and deed accomplished by universal freedom is therefore *death*—a death that achieves nothing, embraces nothing within its grasp; for what is negated is the unachieved, unfulfilled punctual entity of the absolutely free self. It is thus the most cold-blooded and meaningless death of all, with no more significance than cleaving a head of cabbage or swallowing a draught of water.

In this single expressionless syllable consists the wisdom of the government . . . . The government is itself nothing but the self-established focus, the individual embodiment of the universal will. . . .

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62. G. HEGEL, *supra* note 7, at 605-06.

[I]t . . . excludes other individuals from a share in its deed, and . . . thereby constitutes itself a form of government which is a specifically determinate will and *eo ipso* opposed to the universal will.<sup>63</sup>

Hegel considered bourgeois state terrorism by studying the Montesquieuan principle of separation of powers, which, however, were interconnected by a series of mediations, so as to achieve or to maintain the unity or totality of the state. Thus Hegel's mediations of Montesquieuan separation of powers, the latter of which disunite the state, issue through such mediations as a Rousseauan state. But because each of the Hegelian-Montesquieuan powers is mediated through the others, each is itself a totality, and the mediated unity once more may collapse into the disunity and rivalry of the powers. Thus, Hegel's study of the weakness of unmediated separation of powers had its truth in infrastructural rivalry. Bernard Bourgeois stated:

This immanence of the state-whole in each of its powers is the negation of the thesis of separation of powers, which truly contains the differentiation required by rationality as its reality, but under the form where abstract understanding seizes it, that is to say, as the absolute independence of the powers, the external relations of which are of pure reciprocal limitation and of hostility. This thesis of Montesquieu which presupposes among the citizens plebeian absence from state sense, replaces by a dead equilibrium the living unity of the organism of the state. It is not the separating understanding which can apprehend the concrete essence of the state, but it is reason which conceives it according to the three organic moments binding the concept: universality, particularity and singularity.<sup>64</sup>

B. Bourgeois is correct in understanding that Hegel explained Montesquieuisim, as perceiving "among the citizens, plebeian absence from state sense." But Hegel also knew that the French terror, in subordinating the French masses, continued, under bourgeois conditions, the historic struggle of domination/dominated—that is, the struggle to alienate work and the inevitable dialectical struggle to negate such alienation. Perhaps for Hegel the terror was "meaningless death" because historically it also precipitated the death of the meaningless. Hegel wrote:

This objective otherness would there be the differentiation which enabled it to divide itself into stable spiritual spheres and into the

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63. *Id.*

64. B. BOURGEOIS, *LA PENSÉE POLITIQUE DE HEGEL* 127 (1969).



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 . . . could apportion the plurality of individuals to its several organic parts.

The activity and being of personality would, however, find itself by this process confined to a branch of the whole, to one kind of action and existence; . . . it would cease to be in reality universal self-consciousness.<sup>65</sup>

Hegel continued:

Absolute freedom *qua* pure self-identity of universal will thus carries with it negation . . . [T]he organization of the spiritual spheres or "masses" of the substance, to which the plurality of conscious individuals is assigned, thus takes shape and form once more. These individuals, who felt the fear of death, their absolute lord and master, submit to negation and distinction once more, arrange themselves under the "spheres," and return to a restricted and apportioned task, but thereby to their substantial reality.<sup>66</sup>

Without pausing to examine the thought of Althusser concerning the infrastructural meaning of separation of powers as given by Montesquieu, B. Bourgeois' thought is of importance in considering the more or less veiled attack by Bickel and Kurland on the Warren majority for violating older superstructural ideas of separation of powers, and thus of determinations relating to voting rights and to aspects of *Brown v. Board of Education*,<sup>67</sup> relating to the unconstitutionality of racial segregation. The spectre of the "political" decision, to which Bickel and Kurland are unfriendly, is unfounded. Even though each of the powers of state has its own outer structure and its own methodology or methodologies, each of the activist powers also has its truth in the infrastructure of society. Each may, as a "faction" (to invoke the idea of both Hegel and Mably), enter into rivalry with other powers or other "factions" for the mediating power, limited only by the impeaching power of the Congress, which is sacrosanct.<sup>68</sup> Because the Warren majority has understood this and has exerted its com-

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65. G. HEGEL, *supra* note 7, at 603.

66. *Id.* at 607.

67. 347 U.S. 483 (1954).

68. Franklin, *supra* note 4, at 47, 66.

petence contrary to superstructural ideas of separation of powers, Bickel and Kurland condemned the Warren majority and hypocritically, President Nixon demanded "strict" construction or interpretation of the Constitution.<sup>69</sup> The collapse of separation of powers in the United States is justified dialectically: though each of the powers is a whole, the mediating hegemony among them, necessitated by their reciprocity, is constitutionally ambiguous, shifting, equivocal or ironical, depending on the movement and struggle within the infrastructure. Although the Warren majority sought to deterrorize the American state without otherwise endangering appropriative alienation—that is, as a negation of the alienation within alienation<sup>70</sup>—the emergence of an anti-Warren court had led to a new struggle for hegemony among the constitutionally total, but also ambiguous or ironical, powers.

Although, in essence, each of the powers of state is an Hegelian totality and their reciprocity is historically ambiguous, nevertheless the unity of the powers, though not the hegemony of anyone, is also required by the analogical force of article four, section four of the Constitution: "The United States shall guarantee to every State in this Union a Republican Form of Government." While the full force of this text of the Constitution has been narcotized for almost two hundred years (in part before the civil war because of slavery), the Warren majority tended in *praxis* to allow this text to erupt into actuality. As has been indicated, it is the explosions and the possibility of eruptions of narcotized texts of the Constitution which disturb the theorists of so-called "strict" construction or interpretation.

### III. THE PERMANENCE OF BOURGEOIS TERRORISM

As has been said, Hegel conceived in *The Phenomenology of Mind* that the French terror could be overcome by mediating Montesquieuan powers of state and achieving a Rousseauan totality or unity of the state. Despite what he said of the terror, there can be no mistake that Hegel was one of the great defenders of the French revolution. Indeed, in his *Philosophy of Law*, he indirectly defended the terror. In 1920 Albert Mathiez wrote: "When revolutionary France, attacked

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69. See Ulmer, *supra* note 6.

70. See K. MARX, *supra* note 2.

on all its frontiers by monarchial Europe and torn from within by a part of its offspring who compromised with the enemy, resolved to overcome or to die, it concentrated its forces in a supreme effort, it organized the terror, which was the necessary instrument to victory."<sup>71</sup> Writing before Mathiez, in his *Philosophy of Law*, Hegel stated that

if the state as such, if its autonomy, is in jeopardy, all its citizens are in duty bound to answer the summons to its defence. If in such circumstances the entire state is under arms and is torn from its domestic life at home to fight abroad, the war of defence turns into a war of conquest.<sup>72</sup>

Thus, Hegel here perceived what he did not overtly acknowledge in *The Phenomenology of Mind*. But, because the infrastructure of the French revolution issued as Napoleonic bourgeois imperialism, Marx and Engels wrote in *The Holy Family* that:

Napoleon already discerned the essence of the *modern state*; he understood that it is based on the unhampered development of bourgeois society, on the free movement of private interest, etc. He decided to recognize and protect that basis. He was no terrorist with his head in the clouds. Yet at the same time he still regarded the *state* as an *end in itself* and civil life only as a treasurer and his *subordinate* which must have *no will of its own*. He *perfected the Terror by substituting permanent war for permanent revolution*.<sup>73</sup>

In *The Holy Family* Marx and Engels described the terror as reflecting an inner crisis within the French revolutionary bourgeoisie itself. This unites with the above-stated considerations of Mathiez and Hegel in *The Philosophy of Law* relative to the terror.

During the French revolution terrorist law was open, not veiled.

"Every revolution is a conquest," said Portalis, speaking for *la commission du gouvernement*, on 24 *thermidor* of the year VIII, in submitting to France the *projet* of the civil code. "How are laws made in the passage from the ancient to the new government? By the very force of things, these laws are necessarily antagonistic, partial, disruptive. The necessity triumphs for weakening all habits, for weakening all ties, for widening all discontents. The private relations of men among themselves are no longer a concern; only the political and general aim is noticed; allies instead of fellow citizens are sought for. All becomes public law.

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71. A. MATHIEZ, *ÉTUDES SUR ROBESPIERRE* 63 (1958).

72. G. HEGEL, *PHILOSOPHY OF RIGHT* [LAW] 210-11 (T. Knox transl. 1952).

73. K. MARX & F. ENGELS, *supra* note 54, at 166 (emphasis in original).

"If attention is fixed on the civil laws, it is less to make them more sage or more just, than to make them more favorable to those to whom it is necessary to give a liking for the regime which it is intended to establish. . . . We call *revolutionary esprit* the exalted desire of sacrificing violently all rights to a political end and of no longer admitting any consideration but that of a mysterious and variable interest of the state.

"In such a moment, it is impossible to regulate things and men, with the sagesness that resides in durable establishments, and according to the principles of natural equity of which human legislators should only be respectful interpreters.

"Today France is at rest; and the constitution which guarantees this repose permits fruitful thought.

"From good civil laws comes the greatest good that men can give and receive; they are the source of *moeurs*, the *palladium* of property, and the guarantee of all public and private peace: if they do not establish the government, they maintain it."<sup>74</sup>

Of this the present writer said in 1942: "Portalis, above all, perceived that law could pass into its opposite, lawlessness, and enjoy a socially disruptive and socially provocative role, so as to create the conditions for a new law, which would absorb and yet also overcome both the old law and its lawless opposite."<sup>75</sup>

To a degree, Hegel, in his *Philosophy of History*, spoke of Napoleon's state, after the earlier terror, in much the same way as Marx and Engels.

*Napoleon* restored it as a military power, and followed up this step by establishing himself as an individual will at the head of the State: he knew how to rule, and soon settled the internal affairs of France. The *avocats*, ideologues and abstract-principle men who ventured to show themselves he sent "to the right-about," and the sway of mistrust was exchanged for that of respect and fear.<sup>76</sup>

As will be suggested later, Hegel's reference to Napoleonic terrorism is also a reference to the terrorism of Kant, masked in the latter's

74. Franklin, *The Eighteenth Brumaire in Louisiana*, 16 TUL. L. REV. 514, 514-15 (1942) (emphasis in original) (footnote omitted), quoting *Discours préliminaire prononcé par Portalis, le 24 thermidor an 8, lors de la présentation du projet arrêté par la commission du gouvernement* (1800), in 1 FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 464-65 (1827).

75. *Id.* at 516 (emphasis in original).

76. G. HEGEL, *PHILOSOPHY OF HISTORY* 451 (J. Sibree transl. 1956) (emphasis in original).

formalistic categorical imperative and duty ideas. Moreover, it may be added that the concept of "respect" for Napoleon reappears in the period of Hitler in Heidegger's theory of "respect," a terroristic principle hidden in the "impure," Husserlian intentionality theory of Heidegger in his work, *Kant and the Problem of Metaphysics*. Hegel pursued his discussion of Napoleon, saying that Napoleon "then . . . turned his attention to foreign relations, subjected all Europe, and diffused his liberal institutions in every quarter."<sup>77</sup> In the restoration, Hegel continued:

the main feature of incompatibility still presents itself, in the requirement that the ideal general will should also be the *empirically* general—i.e. that the units of the State, in their individual capacity, should rule, or at any rate take part in the government. . . . [T]he party in question allows no political organization to be firmly established. The particular arrangements of the government are forthwith opposed by the advocates of Liberty as the mandates of a particular will, and branded as displays of arbitrary power. . . . [A]gitation and unrest are perpetuated. This collision, this nodus, this problem is that with which history is now occupied, and whose solution it has to work out in the future.<sup>78</sup>

In *The Critique of Dialectical Reason* Sartre absolutized the problem of the French terror, restating the problem of the divided bourgeoisie during the terror by his existential conception of "*Fraternité-Terreur*"<sup>79</sup>—of terror both as death and as freedom from death. Hyppolite recently wrote of the terror that

in this very process Absolute Liberty was actualized, though in reality it achieved the reverse of what it sought. Whereas it conceived itself to be a positive force, it was merely a negative principle which resulted in the destruction of the individuals identified with it. . . .

. . . A total democracy emerged, but as the very opposite of what it claimed to be. . . . Robespierre resorted to religion for a focus and support for the Republic. "Robespierre," says Hegel, "set up the principle of virtue as supreme, and it may be said that he was serious about virtue."

As to the outcome of this turmoil, Hegel's reflections in the *Phenomenology* are hardly unambiguous. After Robespierre there

77. *Id.*

78. *Id.* at 452 (emphasis in original).

79. J.-P. SARTRE, *CRITIQUE DE LA RAISON DIALECTIQUE* 646 (1960) (emphasis in original).

follows a name unmentioned as such, but surely we are meant to read between the lines of the name of Napoleon. For it is Napoleon who restored the State.<sup>80</sup>

But obviously Hyppolite, unlike Marx and Engels, detests the state as a thing-in-itself, whereas Marx and Engels, and to a certain extent Hegel, perceived an opposition between the state and the terroristic state, each of which is what it is because it is the apex of definite infrastructure. Heidegger's theory of *Angst* or dread in *Being and Time* also seems to be an existential absolutization of bourgeois terror. In general, Heidegger's writing is saturated with the language of violence. In discussing the terror, Hegel said that:

The sole and only work and deed accomplished by universal freedom is therefore *death*—a death that achieves nothing, embraces nothing within its grasp; for what is negated is the unachieved, unfulfilled punctual entity of the absolutely free self. It is thus the most cold-blooded and meaningless death of all, with no more significance than cleaving a head of cabbage or swallowing a draught of water.<sup>81</sup>

This is an echo of Hegel's already mentioned concern with death and dread of death in his basic discussion of appropriative alienation in the dialectic of domination and oppression, which is the very heart of *The Phenomenology of Mind*. He wrote:

We have seen what bondage is only in relation to lordship. But it is a self-consciousness, and we have now to consider what it is, in this regard, in and for itself. In the first instance, the master is taken to be the essential reality for the state of bondage; hence, for it, the truth is the independent consciousness existing for itself, although this truth is not taken yet as inherent in bondage itself. Still, it does in fact contain within itself this truth of pure negativity and self-existence, because it has experienced this reality within it. For this consciousness was not in peril and fear for this element or that, nor for this or that moment of time, it was afraid for its entire being; it felt the fear of death, the sovereign master. It has been in that experience melted to its inmost soul, has trembled throughout its every fibre, and all that was fixed and steadfast has quaked within it.<sup>82</sup>

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80. J. HYPPOLITE, *STUDIES ON MARX AND HEGEL* 57-58 (J. O'Neill transl. 1969) (footnotes omitted).

81. G. HEGEL, *supra* note 7, at 605 (emphasis in original).

82. *Id.* at 237.

But in Heidegger's *Angst* or dread or anxiety, as distinguished from Hegel's *Furcht* or fear, the force of infrastructurally created terror is absolutized, existentialized, along with the materiality of the infrastructure itself which is veered into idealist hyperstructure. In his discussion of terrorism, Hegel may be said to have "deontologized" Heidegger's *Angst* by returning it to infrastructural bourgeois history. In *The Phenomenology of Mind* Hegel, as an early bourgeois, said that the negation of

[a]bsolute freedom *qua* pure self-identity of universal will thus carries with it negation . . . . These individuals, who felt the fear of death, their absolute lord and master, submit to negation and distinction once more, arrange themselves under the "spheres," and return to a restricted and apportioned task, but thereby to their substantial reality.<sup>83</sup>

Here Hegel related terror to the bourgeois alienation or appropriation of work, and ultimately to language as socially related to social work or *praxis*.

In the *Introduction to Metaphysics* the latter-day Heidegger's bourgeois terrorism is masked: it is more subtle and also more socially organized than in earlier writing. "Only if we understand that the use of power in language, in understanding, in forming and building helps to create (i.e. always, to bring forth) the violent act (*Gewalttat*) of laying out paths into the enviroing power of the essent, only then shall we understand the strangeness, the uncanniness of all violence."<sup>84</sup> Heidegger suggests the relation between language, which is the world of the jurist, and violence, which, as has been said, is a form of terror. He continued:

The power, the powerful, in which the action of the violent one moves, is the entire scope of the machination (*Machenschaft*), *machanoen*, entrusted to him. We do not take the word "machination" in a disparaging sense. We have in mind something essential that is disclosed to us in the Greek word *technē*. *Technē* means neither art nor skill, to say nothing of technique in the modern sense. We translate *technē* by "knowledge." . . . Knowledge in the authentic sense of *technē* is the initial and persistent looking out

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83. *Id.* at 607 (emphasis in original).

84. M. HEIDEGGER, AN INTRODUCTION TO METAPHYSICS 132 (R. Manheim transl. 1961).

beyond what is given at any time. . . . The Greeks called art in the true sense of the work of art *technē*, because art is what most immediately brings being (i.e. the appearing that stands there in itself) to stand, stabilizes it in something present (the work). . . . [I]t brings about the phenomenon in which the emerging power . . . comes to shine. . . .

. . . Art is knowledge and therefore *technē*. Art is not *technē* because it involves "technical" skill, tools, materials. . . .

. . . Thus *technē* provides the basic trait of . . . the violent; for violence . . . is the use of power . . . against the overpowering . . . : through knowledge it wrests being from concealment into the manifest as the essent.<sup>85</sup>

It is not at all difficult to suggest that Heidegger is justifying legal methodology as such as terroristic. In *The Philosophy of Law* Hegel condemned judicial power because it was founded on the alienating relation of domination and subordination which already has been sketched in this paper.<sup>86</sup> This, too, is the force of Kafka's *The Trial*, in which the subject of law is veered by the terroristic, secretive legal order into an object of law and is destroyed. Nevertheless, the Warren majority set itself the task of deterrorizing American constitutional law, while maintaining bourgeois appropriative alienation.

This author has condemned segregation "where cold terror intimidates law, where the force of the Constitution is overcome by the constitution of force."<sup>87</sup> In the contemporary American law school, the terror of present-day social relations has been particularistically admitted, though without confession of bourgeois power, bourgeois legal methodology, bourgeois content, bourgeois ambiguity, and bourgeois structure. Charles A. Reich has written that: "The tendency of administration, while it may appear to be benign and peaceful, as opposed to the turbulence of conflict, is actually violent."<sup>88</sup> The American sociologist Talcott Parsons noted that:

Though there is no formally defined administrative structure segregated from non-political functions one may say that the limits of this loyalty are essentially those of acceptability or belongingness in the requisite collectivity. Barnard's well-known criterion applies

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85. *Id.* at 133 (emphasis in original).

86. G. HEGEL, *supra* note 72, at 145.

87. Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution*, 4 HOW. L.J. 170, 192 (1958).

88. C. REICH, *THE GREENING OF AMERICA* 107 (1970).



here; that defiance of authority is essentially a bid to take over the responsibility of the agent of authority. The outcome of successful resistance to such bid is, if the defiance is persisted in, extrusion of the bidder from the collectivity—in extreme cases perhaps by execution.<sup>89</sup>

In his own way, even Merleau-Ponty at one time, in effect, restated the amplitude and permanence of bourgeois state terrorism. "Within the U.S.S.R. violence and deception have official status while humanity is to be found in daily life. On the contrary, in democracies the principles are humane but deception and violence rule daily life."<sup>90</sup> Describing the position of Merleau-Ponty in French existentialist thought, Burnier stated that: "The Communists did not invent terror; they found it already established. Anti-Communists 'refuse to see that violence is everywhere.'"<sup>91</sup> Elsewhere Burnier said "Merleau-Ponty attacked progressivism mercilessly for 'its dreamy gentleness, its incurable stubbornness, its velvet-gloved violence.'"<sup>92</sup> At the time in which Merleau-Ponty thus wrote, he regarded bourgeois terrorism not as the outcome of the thought or bourgeois "extremists," but as permanently inherent in bourgeois society, though he did not offer an infrastructural explanation for humanism or terrorism.

In the above presentation Hegel both condemned the French terror and defended the French revolution by explicitly invoking Montesquieuan ideas of separation of powers. These, however, erupt into new terroristic struggles, more or less disguised, brought about by infrastructural crisis. Thus terroristic appropriative alienation seems permanent or inherent in the bourgeois state. Nevertheless, the Warren majority sought to negate bourgeois terror without condemning bourgeois appropriative alienation. The Warren court was, without qualification, a bourgeois court. Its critics did not perceive the problem of the Warren majority nor the differentiation it sought to realize between the terror of alienation and the alienation of terror.

Although Hegel's resort to Montesquieuan conceptions was directed against bourgeois terrorism, the further development of his thought against Kant suggests that bourgeois terrorism was masked,

89. Parsons, *Authority, Legitimation, and Political Action*, in *AUTHORITY* 197, 212 (C. Friedrich ed. 1958).

90. M. MERLEAU-PONTY, *HUMANISM AND TERROR* 180 (J. O'Neill transl. 1969).

91. M. BURNIER, *CHOICE OF ACTION* 47 (B. Murchland transl. 1968).

92. *Id.* at 92.

but not overcome, by Kant's categorical imperative. Thus, there is a development from the French terror to Kant to Heidegger. However, the problem of the mask, of the incognito, of the disguise, of guile, of the image, of semblance (which in the modern civil law becomes the problem of simulation and of the interposed person) was stated by Diderot before the French revolution.

It is necessary to veil certain ideas. Is it necessary to veil its wickedness? Is it necessary to let it come to light? Is it necessary to be shameless or hypocritical? . . . Desire is hidden under the veil; lift the veil, desire is augmented, and pleasure commences.<sup>93</sup>

Hegel saw that Kant maintained, but also concealed, bourgeois terrorism. This is important because it indicates the difficulty of the methodology of the Warren majority. Although Hegel in *The Phenomenology of Mind* believed that his theory of mediated Montesquieuan separation of powers in semblance might for a period seem to deterrorize the bourgeois state, he also perceived that after the French revolution Kant had not solved but had hidden the problem of bourgeois terrorism. Findlay, as a philosophic idealist, described this, first restating Hegel's discussion of the French terror. "And since, after the destruction of all social estates and positions, there is nothing positive left to liquidate, this fury can only be turned inward on itself."<sup>94</sup> Findlay then continued:

An absolute Freedom which liquidates the complex, positive organization of society therefore shows itself to be self-liquidating. Its principle must be carried over into that of a freedom which develops a social order as part of itself. From being a *negative* will which impartially liquidates anyone and everyone, it must swing over into being a *positive* will which is the impartial will of all. It must rise to the freedom which is a freedom from particular interest, to the 'autonomy' of Kant's Categorical Imperative. Hegel sees in the positive impartiality of the Categorical Imperative a mere transformation of the death-dealing negative impartiality of the guillotine.<sup>95</sup>

In *The Phenomenology of Mind* Hegel brings forward Kant's categorical imperative as only the formal negation of bourgeois terrorism, supplemented by his discussion in section 135 of his *Philosophy*

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93. 20 OEUUVRES COMPLÈTES DE DIDEROT 353 (1821).

94. J. FINDLAY, HEGEL: A RE-EXAMINATION 124 (1958).

95. *Id.* at 124-25 (footnote omitted) (emphasis in original).

of Law.<sup>96</sup> Hegel wrote in *The Phenomenology of Mind* that after the French terror the

single self . . . is merely the form of the subject or concrete real action, a form which by it is known as form. In the same way objective reality, 'being,' is for it absolutely self-less form; for that objective reality would be what is not known: this knowledge, however, knows knowledge to be the essential fact.

Absolute freedom has thus squared and balanced the self-opposition of universal and single will.<sup>97</sup>

But the formal negation of Kant's negation of the French terror does not end the negated terror. What Hegel said of the French terror is also true in Kant's formalism. Of the French terror, Hegel wrote, "[a]ll these determinate elements disappear with the disaster and ruin that overtake the self in the state of absolute freedom; its negation is meaningless death, sheer horror of the negative which has nothing positive in it, nothing that gives a filling."<sup>98</sup> Because Kant's formal categorical imperative also lacked "filling," that is, content or determination, it was a negation which concealed or masked terror of the bourgeois infrastructure. Kant's bourgeois secretiveness reflected his position as a bourgeois philosopher in feudal Germany, which lagged behind the great accomplishments of the French, English and American revolutions. It is one of Hegel's own greatest accomplishments that he showed Kant's formalism to be veiled or secreted bourgeois terrorism.

Hegel's thinking has the utmost juridical importance, especially in measuring the work of the Warren majority. This relation must be further explained. In introducing the formal categorical imperative Kant methodologically subordinated the content of bourgeois terroristic power to bourgeois form, which was thus undialectically separated from the bourgeois content. Moreover, Kant's "contentless" bourgeois form was also subject to the principle of postponeability—the formal categorical imperative was a bourgeois imperative which must be realized in the future of then feudal Germany. This is Kant's response to the immediacy of the French bourgeois terror. But the principles of postponeability or futurity for him postulate immortality

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96. G. HEGEL, *supra* note 72, at 89-90.

97. G. HEGEL, *supra* note 7, at 609-10.

98. *Id.* at 608 (footnote omitted).

and the postulate of immortality requires the postulate of the holy moral legislator. This holy moral legislator (secularized in the 20th-century) may, because of its hierarchical position act arbitrarily, ambiguously, ironically, equivocally, or hypocritically. It may, in the language of Sartre, justify bad faith. In the language of Bracton in the 13th-century and of Hegel in the 19th-century it may exercise juridical agility. Kant's agile holy moral legislator may, in German, be guilty of *Verstellung*, or, in French, of *déplacement*. As the holy moral legislator may be arbitrary, Kant both concealed and strengthened bourgeois terrorism. It seems obvious that the hegemony of Kant's holy moral legislator may be restated as the hegemony of the methodology of the "neutral" bourgeois jurist of the 19th- and 20th-centuries, which masks terror. In *An Introduction to Metaphysics* Heidegger wrote: "Every essential form of spiritual life is marked by ambiguity."<sup>99</sup> In ambiguity the aim is to move from possibility to actuality. Hence it is not exactly the same as *Verstellung*, *déplacement*, equivocation, or shuffling, where the aim is to shift from actuality to possibility. However, both maintain contingency as terrorist. In *Verstellung*, or shuffling, Hegel said consciousness is confronted by "a perfect nest" of Kantian contradictions. Here consciousness "proceeds by fixing definitely one moment, passing thence immediately over to another and doing away with the first."<sup>100</sup> Hegel continued:

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. . . . 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.<sup>101</sup>

But in the theory of ambiguity as well as in that of *Verstellung* or *déplacement*, the legal subject dominates the legal object. Both in ambiguity and in *Verstellung* contingency enters, but hidden by Kantian formalist methodology. In both, arbitrariness lurks and terror, or fear of nothingness, may annihilate being.

Some of the criticism of the Warren majority rests in the fact that it, too, has employed shifting, ambiguity, balance, irony, Sartrean bad faith, agility, equivocation, *Verstellung*, *déplacement*, and pos-

99. M. HEIDEGGER, *supra* note 84, at 8.

100. G. HEGEL, *supra* note 7, at 629.

101. *Id.* at 629-30 (emphasis in original).

sibility. But, as suggested earlier in this essay, Justice Frankfurter was a theorist of *Lebensphilosophie*, or philosophy of life—a Kantian bourgeois philosophic tendency that anticipated existentialism—which is philosophy of formal possibility or abstract possibility and hence masked terrorism. The Kantian antinomies or “nest of contradictions” were mediated secretly and hyperstructurally, that is, by *déplacement*, by the unhistoric prince of the 18th-century, by Kant’s formalist holy moral legislator, by Kant’s artist-genius of his *Critique of Judgment*, by Leibniz’ holy watch-maker, by Descartes’ god-assistant, and by external mediation in general, all of which suggest Hegel’s fear-producing, “oriental” despot. In the early 19th-century this was called irony; in the later 19th-century tragedy. Perhaps this is Hegel’s theory of comedy as mask or veil of the *persona*. Though he did not acknowledge that Justice Frankfurter was Kantian, Bickel noted that he

never successfully identified sources from which this judgment was to be drawn that would securely limit as well as nourish it, he never achieved a rigorous general accord between judicial supremacy and democratic theory, so that the boundaries of the one could be described with some precision in terms of the other, and he was thus unable to ensure that the teaching of a duty of judgment would be received as subordinate to the teaching of abstention, for the relationship between the two is itself a matter for the judgment of statesmen.

Both teachings were his, unresolved from the beginning. His posterity was free to receive both. It inhered in the Court’s past, in contemporary demands upon it . . . .<sup>102</sup>

It has been mentioned that in his considerations on “eastern” philosophy Hegel said that

there can but be the relation of lord and slave, and in this despotic sphere fear constitutes the ruling category. Because the will is not yet free from what is finite, it can therein be comprehended and the finite can be shown forth as negative. This sensation of negation, that something cannot last, is just fear as distinguished from freedom which does not consist in being finite but in being for itself, and this cannot be laid hold of. Religion necessarily has this character, since the fear of the Lord is the essential element beyond which we cannot get.<sup>103</sup>

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102. A. BICKEL, *supra* note 17, at 34.

103. G. HEGEL, *supra* note 35.

In the history of law and of bourgeois life in the 20th-century in general, the above-mentioned "Lord" has been secularized and corporealized, but terror has been maintained. Because the secular and corporealized lord is veered by the formalism of Kant's categorical imperative into the god-like jurist, the categorical formalism justifies to itself its own content, which it masks as the real content. As the real content is only the semblance of content, Kantian ambiguity, placement/displacement, equivocation, irony, and *Verstellung* reign in and behind the agility of the jurist and of the legal text as semblance. Thus, Kant's categorical imperative, through its formalism, becomes the terrorism of legal method. And behind this and ultimately explaining the agility of legal method is infrastructural appropriative alienation.

As early as 1928 Marcuse wrote:

A fact obtains its historical purity only if it is placed within the concrete context out of which it became a fact. But, as such, it becomes ambiguous as a result of the multiplicity of meanings that it had for that period. And this ambiguity must be preserved.

This seems to indicate an internal inconsistency of the dialectic. Are the facts not accepted if they are grasped in their historical necessity? Does not this dialectical undifferentiated appraisal threaten the inner meaning of facts in their radical implications? Henceforth the dialectic is inescapably faced with the problem of value.<sup>104</sup>

In general the theory of ambiguity has been the preoccupation of subsequent existentialist philosophical literature. In 1954 Wahl wrote:

[W]e can remark that it is less the idea of paradox and the idea of tension and of dialectic which, for example, Sartre and Merleau-Ponty present, than the idea of ambiguity. . . . Different interpretations are possible, different possible decipherants of human action, and we are free to choose and we are, at the same time, is a situation to choose the interpretation which we prefer to give.<sup>105</sup>

In the United States, Wild and Edie, writing in 1963, stated that:

Nothing historical ever has just *one* meaning; meaning is ambiguous and is seen from an infinity of viewpoints. Everything is always *becoming* meaningful . . .<sup>106</sup>

104. Marcuse, *Contributions to a Phenomenology of Historical Materialism*, 4 TELOS 3, 23 (1969).

105. J. WAHL, LES PHILOSOPHIES DE L'EXISTENCE 129-30 (1954).

106. Wild & Edie, *Preface to M. MERLEAU-PONTY, IN PRAISE OF PHILOSOPHY* at xix (J. Wild & J. Edie transl. 1963) (emphasis in original).

Sartre said: "In irony a man annihilates what he posits within one and the same act; he leads us to believe in order not to be believed; he affirms to deny and denies to affirm; he creates a positive object but it has no being other than its nothingness."<sup>107</sup> This is similar to what Sartre in *Being and Nothingness* called bad faith.

The role of ambiguity or subjective irony or what Hegel called Kantian *Verstellung* and Vuillemin *déplacement*, which in 1928 Marcuse said "must be preserved," is required by Marcuse's relation to existentialism. In 1927 Heidegger wrote that "ambiguity has already established itself in the understanding as a potentiality-for-Being, and and in the way Dasein projects itself and presents itself with possibilities."<sup>108</sup> This formal or subjective possibility, as distinguished from Hegel's conception of real possibility as a unity-in-opposition of actuality and real possibility, is the mark of existentialism. Abbagnano penetrates to the philosophical kernel of existentialism when he indicates that the criterion of existentialism is the existential theory of possibility.

The conceptual instrument, i.e., the category that existentialism employs in all its forms is that of *possibility*. In fact it carries out the analysis of human existence . . . in the world as the analysis of the possibilities open to man in his confrontation with men and things.<sup>109</sup>

The full import of the existentialist theory of possibility is indicated by Schrader in his discussion of Kant's *Critique of Judgment*.

No man, in Kant's view, is born with a moral character. He is endowed at birth with neither the actuality nor the potentiality of one. If he is to have a character at all, he must create it. It is a possibility which confronts him, but again not as anything determinate. He has no model to guide him, but must construct it. The model is the form in which he represents himself to himself under the idea of freedom. If he takes the model too seriously, he negates the freedom which it was intended to serve and instruct. To use Kant's terminology, the model is a schema and functions symbolically. It gives expression to the ideal in concrete form and thus provides a rule for action; but at the same time it refers beyond itself as does the work of art. A

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107. J.-P. SARTRE, *BEING AND NOTHINGNESS* 47 (H. Barnes transl. 1956).

108. M. HEIDEGGER, *BEING AND TIME* 217 (J. Macquarrie & E. Robinson transl. 1962) (footnote omitted).

109. N. ABBAGNANO, *CRITICAL EXISTENTIALISM* 226 (N. Langiulli transl. 1969) (emphasis in original).

## WARREN MAJORITY

morally good life, like a work of art, must be taken as the symbolic expression of freedom.<sup>110</sup>

Bickel did not seem to realize that Kantian formalist methodological ambiguity is inherent in bourgeois social activity, including law, and that it is inherently terroristic because of the crisis of the bourgeois infrastructure. In his essay *On the Jewish Question* Marx said:

To be sure, in periods when the political state as such is forcibly born from civil society, when men strive to liberate themselves under the form of political self-liberation, the state can and must go as far as to *abolish* and *destroy religion*, but only in the way it abolishes private property by setting a maximum, confiscation, and progressive taxation or only in the way it abolishes life by the *guillotine*. In moments of special concern for itself political life seeks to repress its presupposition, civil society and its elements, and to constitute itself the actual, harmonious species-life of man. But it can do this only in *violent* contradiction with its own conditions of existence by declaring the revolution to be *permanent*, and thus the political drama is bound to end with the restoration of religion, private property, and all the elements of civil society just as war ends with peace.<sup>111</sup>

As has been said, the Warren majority, in *Dombrowski v. Pfister*, sought to condemn the “chilling” effect of terror.<sup>112</sup> The majority of the Burger court has sought to “chill” or to terrorize this “deteriorization.” In *Laird v. Tatum*,<sup>113</sup> Chief Justice Burger presented himself as interested in the “philosophical underpinnings”<sup>114</sup> of the Bill of Rights. This philosopher-jurist restated “chill,” not as social terror related to appropriative alienation, but as thermal chill—indeed, as the thermal chill of a Heideggerian homeless, or an isolated, particularistic bourgeois Robinson Crusoe at the North Pole in a cotton seer-sucker. But in truth, Chief Justice Burger’s thermal chill is Thermidorian heat. He said of the respondents’ “alleged chill”<sup>115</sup> that

they have also cast considerable doubt on whether they themselves are in fact suffering from any such chill. . . . Even assuming a justi-

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110. Schrader, *The Philosophy of Existence*, in *THE PHILOSOPHY OF KANT AND OUR MODERN WORLD* 25, 42-43 (C. Hendel ed. 1957).

111. MARX, *supra* note 3, at 227-28 (emphasis in original).

112. See text accompanying note 46 *supra*.

113. 408 U.S. 1 (1972).

114. *Id.* at 15.

115. *Id.* at 13 n.7.



cial controversy, if respondents themselves are not chilled, but seek only to represent those "millions" whom they believe are so chilled, respondents clearly lack that "personal stake in the outcome of the controversy" essential to standing.<sup>116</sup>

In his dissent Justice Douglas said that "As Chief Justice Warren has observed, the safeguards in the main body of the Constitution did not satisfy the people on their fear and concern of military dominance . . . ." <sup>117</sup> Douglas condemned the "'present inhibiting effect'" <sup>118</sup> of army surveillance on first amendment rights.

The Warren majority, when it was the majority, sought to mitigate terror, that is, to veer the terror of contingency into the contingency of terror, to veer the terror of ambiguity into the ambiguity of terror. The Burger majority seeks to veer the contingency of terror into the terror of contingency, the ambiguity of terror into the terror of ambiguity.

What is lacking both in the Warren and the Burger majorities is the struggle to present accurately categories which reflect reality. In *Science of Logic* Hegel said of the categories:

First they serve as *abbreviations* through their universality (for what a host of particulars of outer existence and actions is embraced by a conception . . . .). Secondly, the categories serve for the more exact determination and discovery of *objective relations* . . . .<sup>119</sup>

Bickel did not seem to realize that the weak position of the American bourgeoisie as such at the time of the formulation of the first or Philadelphia constitution is reflected in the structural instability or ambiguity of the first Constitution. After the conclusion of the constitutional convention of 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 . . . ." <sup>120</sup> To this may be added what already has been said regarding the role of the Warren majority in seizing or restoring the

116. *Id.* at 13-14 n.7.

117. *Id.* at 22 (Douglas, J., dissenting).

118. *Id.* at 25 (emphasis omitted).

119. G. HEGEL, *SCIENCE OF LOGIC* 34-35 (A. Miller transl. 1969) (emphasis in original).

120. Letter from James Madison to Thomas Jefferson, Oct. 24, 1787, in 5 *WRITINGS OF JAMES MADISON* 17, 26 (G. Hunt ed. 1904).

original 18th-century determinate or determinable force of the Constitution, especially the hierarchical role of the second Constitution or Bill of Rights, which mitigates the force of ambiguity of the first Constitution. Because ambiguities were exploited by reactionary forces before the emergence of the Warren majority, its critics are not justified in suggesting that, in effect, acquired rights are based on the appropriation of ambiguous constitutional texts or constitutional structures by justices who dominated the court prior to the situation represented by the Warren majority. In 1964 this author said that:

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

If this thought is rejected it means that the possibilities under the First Constitution permanently become the exclusive property of social forces which indeed were not strong enough in 1787 to formulate an unambiguous constitution consecrating their own power exclusively. Said otherwise, the formally ambiguous First Constitution, dominated by the First Amendment, as consecrating the Public Opinion State, indeed may reject or justify the power of the Supreme Court.<sup>121</sup>

This is not the thought of Justice Frankfurter. Kurland notices that Frankfurter acknowledged the ambiguity of the Constitution, although he stated this as textual ambiguity, while overlooking that there also was structural and methodological ambiguity. Frankfurter said of the constitutional texts that "[t]heir ambiguity is such that the Court is compelled to put meaning into the Constitution not to take it

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121. 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* 96, 125 (1964). What has been said is fortified by the impeachment power.

out."<sup>122</sup> This justifies the appropriation or alienation of the constitutional texts and structure by the Kantian terroristic, agile external-mediator-jurist, who subordinates the constitution by himself choosing among his possibilities. Philosophy of life, *Lebensphilosophie*, justifies this Kantian agility. To reiterate what Schrader said: "If he takes the model too seriously, he negates the freedom which it was intended to serve and instruct. To use Kant's terminology, the model is a schema and functions symbolically."<sup>123</sup> The Constitution thus collapses into *projet* or *schema*, although it was intended to be the promulgation of a *projet* or *schema*.

Beyer suggests that "there is a relation between the latter-day Heidegger and Schleiermacher, who says that one of the basic missions of hermeneutics [or interpretation] reads: 'to comprehend . . . a writer better than he comprehends himself.'"<sup>124</sup> Heidegger himself wrote: "Nor is interpretation the acquiring of information about what is understood; it is rather the working-out of possibilities projected in understanding."<sup>125</sup>

S. Körner refers to Heine's famous position that Kant is "the thinker 'whose terrorism by far exceeded that of Maximilien Robespierre.'"<sup>126</sup> Though Ebbinghaus is shocked by lack of "respect" (a word which really connotes submission to appropriative alienation) to Kant,<sup>127</sup> Jean Hyppolite perceives "terror" in Rousseau's "general will," which becomes "interiorized" in the thought of Kant.<sup>128</sup> It is beyond the scope of this paper to relate "interiorization" to the terrorism which develops from Kant's formal categorical imperative, or to the agility of bourgeois legal methodology which is terroristic because it justifies the arbitrary choices of the jurist and makes the constitutional text the mere semblance of itself.

122. P. KURLAND, *supra* note 5, at 3.

123. Schrader, *supra* note 110, at 43.

124. See Franklin, *The Mandarinism of Phenomenological Philosophy of Law*, in 2 PHENOMENOLOGY AND THE SOCIAL SCIENCES 541 (M. Natanson ed. 1973) (emphasis in original).

125. M. HEIDEGGER, *supra* note 108, at 188-89.

126. S. KÖRNER, KANT 206 (1955).

127. See generally Ebbinghaus, *Interpretation and Misinterpretation of the Categorical Imperative*, in KANT 211 (R. Wolff ed. 1967).

128. 2 G. HEGEL, LA PHÉNOMÉNOLOGIE DE L'ESPRIT 139 n.212 (J. Hyppolite transl. 1947). See also J. HYPPOLITE, GENÈSE ET STRUCTURE DE LA PHÉNOMÉNOLOGIE DE L'ESPRIT DE HEGEL 166 (1946). Of Kant, Hyppolite wrote "[t]he maxim of action is not fear of God or the desire to please him; it is always the will of pure duty." *Id.* at 465.

Günter Rohrmöser says that he is in part influenced by Joachim Ritter's *Hegel et la révolution française*<sup>129</sup> to indicate that Fichte's "perpetual" terrorism is "a possibility pertaining to the divided reality of the modern world."<sup>130</sup> This should be taken to state the relationship between appropriative alienation and bourgeois terror. In a sense it is a summary of what has been discussed largely through Kant.

Hegel himself passed from Kant's formalism, which, as has been said, masked terror, to the formalism of Fichte, which as Rohrmöser said, also masked terror. Hegel wrote:

Now if we abide in these entirely vacant forms, . . . nothing can then be regarded as of value in itself, that is, essentially and on its own account. It is exclusively produced by the subjectivity of the Ego. But this being so, it follows that the Ego remains lord and master over everything. In no sphere of morals or law . . . is there anything at all which would not in the first instance have to be posited by the Ego, and which consequently could not equally be nullified by the same agency. This is nothing less than making all that exists on its own actual and independent warranty a mere semblance, . . . a mere *show* in virtue of the Ego . . .

. . . At the standpoint at which the artist is the Ego, which both posits and resolves everything through its own essential fiat, for which no content of consciousness appears as absolute and essentially independent, but only as itself a semblance created and destroyable, . . . seriousness can find no place, nothing here receiving a right to be save the formalism of the Ego.<sup>131</sup>

Hegel said that the formalism of both Kant and Fichte resulted in "chill duty."<sup>132</sup>

Reference has already been made to the relation between Carl Schmitt, the Nazi "crown jurist," and the friend/foe social and legal ideas of Nixon,<sup>133</sup> the enemy of the "deterrorization" aims of the Warren majority of the Supreme Court. W. R. Beyer wrote:

Carl Schmitt, the legal theorist of the fascist period, feigns a certain remoteness of the content of law, in that he introduces "the decision

129. J. RITTER, *HEGEL ET LA RÉVOLUTION FRANÇAISE* (1970).

130. G. ROHRMÖSER, *THÉOLOGIE ET ALIÉNATION DANS LA PENSÉE DU JEUNE HEGEL* 85 (1970).

131. 1 G. HEGEL, *supra* note 9, at 88-90 (footnotes omitted) (emphasis in original).

132. 3 G. HEGEL, *LECTURES ON THE HISTORY OF PHILOSOPHY* 461 (E. Haldane & F. Simson transl. 1896).

133. See Franklin, *supra* note 4.

as a specific form-element," confirms by an exceptional state of affairs, and relinquishes the monopoly of decision over the totality of the concrete situation to the "sovereign." The "what of law" passes back to him. Arbitrariness and terror of the dominant class thus become concealed. Domination over the situation of conflict acquires content only through the decision-establishing order with help founded within the value-bounds of friend/foe theory.<sup>134</sup>

Beyer thus indicated the Neo-Kantianism of Schmitt. Such "form-element" or formalism separated from content, veers the content of law into the nothingness of the semblance of content through the crises of the presence of Kantian antinomies (Schmitt's "exceptional" situation); and such agony, tragedy or comedy of the dominant social force is then mastered by the *a priori* of legal method, which is a mask or disguise for its terrorism of the dominated. This is an echo of the methodology of the terror of certain Roman and of all Anglo-American "equity." In these the hegemony of the terrorizing, mediating force is established by the polarity or "exceptionalism" of law/equity, *actio/exceptio*, justifying the hegemony of the methodology of the jurist or sovereign, who is now "distanced" and masked from the content of law and obtains his masked Kantian-existential freedom to be terroristic or arbitrary in decision. This is not the methodology of the ninth amendment or of Justice Douglas in *Griswold v. Connecticut*. There the "equity" or the force of the content of law itself justifies the methodological struggle to explode the content itself, to unearth its possibilities, to identify the particularism of the text with its opposite, that is, the general force of such text. This "equity" is also Romanist, but such Romanist equity, which is methodologically grounded in the content, was virtually unknown in modern Anglo-American law prior to the ninth amendment and Douglas' opinion in *Griswold*. Schmitt's "equity" freed of the content of law ("remoteness"), unleashes terror. Douglas' "equity," methodologically controlled by the content of law, "deteriorizes" terror.<sup>135</sup>

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134. Beyer, *Rechtsphilosophie*, in 2 PHILOSOPHISCHES WÖRTERBUCH 916, 919 (7th ed. 1970) (emphasis in original). Hans Schueler in discussing recent work of West German courts refers to a revival of the influence of Carl Schmitt. Schueler, *Die Sittenwächter der Nation*, *Die Zeit* (Hamburg), March 7, 1975, at 1, col. 2. I am indebted to Peter R. Engelhardt for sending me this material.

135. See Franklin, *A New Conception of the Relation between Law and Equity*, 11 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 474 (1951); Franklin, *Equity in*

It is bourgeois terrorism, which has been more or less actual for almost two centuries, that the Warren majority opposed and sought to condemn and overcome by means of the texts of the Bill of Rights, and by means of the textually disciplined methodological activism therein released by the ninth amendment. The constitutional texts derive from the legal Romanism of that side of the French Enlightenment which, in the presentation by Marx and Engels in *The Holy Family*, conceived of the French revolution primarily as masking a Roman, virtuous superstructure and secondly as an infrastructural upheaval. It derives from that side of the Enlightenment, the bourgeois terrorism of which was overcome by the organized, imperialistic bourgeois terrorism of Napoleon, which ultimately came to represent bourgeois infrastructuralism. Among American thinkers, Jefferson was foremost in his understanding of this derivation. The Warren majority enjoyed this Jeffersonian legacy.

As has been indicated, Marx, in his essay *On the Jewish Question*,<sup>136</sup> perceived that it was civil society or the social infrastructure, and not the superstructure, including the civil liberties and civil rights of the superstructure, which ultimately determines human freedom. However, if the bourgeois infrastructure is weak, the bourgeoisie retreats or is forced to retreat superstructurally in order to gain social strength. This it did in the United States through the recognition of the Bill of Rights. These "amendments" state the historic hegemony of the second Constitution over the first or Philadelphia Constitution. The second Constitution was acknowledged by the American bourgeoisie because of its weak position after the revolution. As has been said, Mably saw that class struggle existed in the United States when the English recognized American independence. This writer has sketched elsewhere the crisis which then obtained in the United States.<sup>137</sup> Perhaps it is not necessary to restate these several weaknesses here. The influence of these bourgeois fears may, in part, be felt in

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*Louisiana: The Role of Article 21*, 9 TUL. L. REV. 485 (1935). It is not necessary to discuss the place of Aristotle in this presentation of "equity." Aristotle abstractly leads both to the exploding, "deteriorizing" opinion of Justice Douglas in the *Griswold* case and to Carl Schmitt's Kantian terroristic "exceptionalist" "equity," as justified by his Kantian formalism.

136. Marx, *supra* note 3, at 216.

137. Franklin, *supra* note 121, at 128-30; see THE FEDERALIST, No. 6, at 29 (Modern Library ed. 1937) (A. Hamilton); *id.* No. 11, at 69; *id.* No. 34, at 206; *id.* No. 43, at 282-85 (J. Madison).

*The Federalist*. It is important to mention, using the veiled language of La Bruyère found in *The Federalist*, that the enslaved blacks, through the alliances that they could make, would determine what, in effect, was the outcome of class struggle in the United States. The formulation and acceptance of the second Constitution was imposed on the more reactionary sector of the American bourgeoisie under such circumstances. The Warren majority legitimately seized on these texts in order to "deteriorize" the contemporary bourgeoisie as much as possible during a social period of bourgeois decline. In so doing, it weakened the theses of Marcuse and others that there is no realistic social struggle in this country. The work of the Warren majority shows not only the presence in the United States of social forces more or less particularistically hostile to the bourgeoisie, but also the rivalries and cleavages existing within the American bourgeoisie itself. This indicates both the aim, deterioration, and the limits of the aim of the Warren majority, the preservation of appropriative alienation without terror. As this is merely a superstructural position, the question today is whether the "deteriorization" activism of the Warren majority can maintain its actuality in view of the Thermidorian reaction of the Burger court.

#### IV. DETERRORIZATION AND THE FIFTH AMENDMENT

The fifth amendment states a problem of deterioration to which the Warren majority addressed itself. Perhaps it will be helpful to reproduce the text itself:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Part of this text seeks to deteriorize criminal law of despotism by "deteriorizing" infamy.

The bourgeois theorists of the Enlightenment condemned not only the terrorism of feudal torture, but also the terrorism of feudal *capitis deminutio* and feudal *infamia*. Both "capital" crime and "infamous" crimes are conceptions of Roman law. The "capital" crime of the fifth amendment relates to the degrees of impairment of personality by *capitis deminutio* of Roman law. These degrees include not only the degrees of physical death, but also the degrees of other impairment of legal or juridical social relations. The "infamous" crimes of the fifth amendment relate pejoratively to the *infamia* or infamy of Roman law. Infamy was a conception of Roman law, the force of which was to destroy the social relations of the infamed person. Because the human being is dialectically human only because of the realities or actualities of his social relations, infamy resulted in living death or living nothingness.<sup>138</sup> The terrorism for which Hegel criticized the French terror was the terrorism of death, including all the manifestations of death, through the destruction of social relations. Hegel, it will be recalled, described the victims of terrorism as cabbages or glasses of water, that is, as human nullities. This terrorism could be justified if the feudal infrastructure was itself ready to vanish from history, because new bourgeois possibilities had established their actuality through revolutionary *praxis*. If Hegel's presentation is set on its feet or restated as prose (to quote Marx in another connection), it states the terrorism hidden in the bourgeois infrastructure. But this is masked by the bourgeois idea of the rule of law, or of the *Rechtsstaat*, justified by Kant's categorical imperative. Hegel's aim was the deterrorization of bourgeois terrorism after the bourgeois conquest of the state. Deterrorization is in part stated, so far as the Warren majority is concerned, in the fifth amendment, which, unlike impeachment-infamy of the executive, forbids state acknowledged infamy, save after grand jury indictment and petit jury conviction for a textually posited crime. However, this amendment has not prevented American bourgeois terroristic infamy through congressional and presidential declarations of infamy. This has been resisted in various ways by the Warren majority and is one of the marks of its deterrorizing mission.

Although the Warren majority confronted unconstitutionally imposed infamy, it lacked the cultural strength to give consistently what was required. This is because infamy is not an Anglo-American

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138. See J.-P. SARTRE, *supra* note 34.



common-law conception, but a Romanist conception. Nevertheless Jefferson, Hobbes and Bentham knew the idea of infamy. In 1956, in *Ullman v. United States*,<sup>139</sup> Justice Douglas said that

[w]hen public opinion casts a person into the outer darkness, as happens 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>140</sup>

Justice Frankfurter, speaking for the majority in the same case, ignored the Romanist conception of the fifth amendment advanced by Justice Douglas in his dissent. In *Watkins v. United States*,<sup>141</sup> Chief Justice Warren said that "[w]e have no doubt that there is no congressional power to expose for the sake of exposure."<sup>142</sup>

It must be emphasized that the deterrorizing activity of the Warren majority in relation to the fifth amendment is subject to reproach because the Court did not acknowledge or consciously know that the Bill of Rights or second Constitution is not founded merely on English legal history, but is a *précis* of the thought of the European Enlightenment against feudalism stated in appropriately adapted concepts of Roman law. If the Warren majority did not know this, it was due to the default of the American law schools, which regard the Bill of Rights or second Constitution as a text of English legal history. However, the Mexican constitution indicates not only the deterrorizing force of the fifth amendment, but perfects it by uniting to it what is contained in the eighth amendment of the American text. The Mexican text says that

[p]unishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property and any other unusual or extreme penalties are prohibited.

....  
Capital punishment for political offenses is likewise prohibited....<sup>143</sup>

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139. 350 U.S. 422 (1956).

140. *Id.* at 454 (Douglas, J., dissenting).

141. 354 U.S. 178 (1957).

142. *Id.* at 200.

143. CONSTITUCION tit. I, art. 22 (Mexico, 1917). One commentator has noted that Mr. Justice Field, in his dissenting opinion in *O'Neil v. Vermont*, 144 U.S. 323, 337 (1892), forged a similar link between the texts of the fifth and eighth amendments in order constitutionally to determine the novel historical problem raised by the imposition of excessive terms of imprisonment. Comment, *The Eighth Amendment*,

## WARREN MAJORITY

### V. THE METHODOLOGY OF THE WARREN MAJORITY OF THE SUPREME COURT

A large part of the criticism of the Warren majority consists of a dreary discussion of particular constitutional decisions (though here there is a serious gap because of the failure to consider the constitutional activity of the court in matters of conflict of laws). This is not satisfactory. What is required today, relative to the Bill of Rights or second Constitution, is the dialectic of the unity-in-opposition of content and form. This means that the content, indeed, is prior; but it also means that the content is negated, but not separated as in Kant, by the structure or form that the content necessitates. The form established by the text projects the legitimate futurity of the text. The form is an eruption which develops, generalizes, enriches, and unfetters the content. As indicated, the eruptive dialectic of form and content is not Kantian formalism or the formalism of American law school study of legal method, which separates or "doubles" form and content. On the contrary, both form and content as a dialectical unity-of-opposites are historical. Each negates its own historic other. It is appropriate to consider the work of the Warren majority as historical form in order to master its historical fury. Therefore, certain aspects of the form or of the legal method of the Warren majority must be brought forward.

The Warren majority was more or less forced to recapture the bourgeois legal Romanism of the constitutional texts, especially those of the second Constitution or Bill of Rights. This is a task that the Court could not accomplish adequately or even self-consciously because of the hegemony of Anglo-American common law in this country; but the infrastructural crisis, that is, the infrastructure as subject, imposed this responsibility on its object, the Warren majority.

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*Beccaria, and the Enlightenment*, 24 BUFFALO LAW REV. 783, (1975). This commentator wrote that Justice Field, while relying on the language of the eighth amendment did not rest his argument solely on [that] amendment. He correctly invoked the fifth amendment which limits the government's ability to infame private citizens and clearly recognized the interrelationships that pertain among the amendments that comprise the Bill of Rights. He did not intend to let the individual amendments or clauses within an amendment be limited or made impotent by viewing them in splendid isolation. As Justice Field stated, "the cruelty of it, in this case, by the imprisonment at hard labor, is further increased by the offenses being thus made *infamous crimes*."

*Id.* at 794-95 (footnotes omitted) (emphasis in original).

The infrastructural crisis is so intense that it drove the Warren majority to the higher level of a Romanist methodology—a level that Anglo-American methodology could not produce. Pound had stated the American-Romanist methodological problem earlier in the century.

The most important accomplishment of the enlightened crypto-Romanism of the Warren majority was that of Justice Douglas in the *Griswold* case, which already has been weakened by the Burger court. Here the Warren majority acknowledged that the ninth amendment justified civilly the analogical development of the texts of the second Constitution. This means that, as in Roman law, the general force of the texts of the Bill of Rights may erupt through a struggle to negate the particularism of the original text or group of texts. Charles Black stated the importance of the *Griswold* case, which is almost ignored or inadequately considered by others.<sup>144</sup> Moreover, the constitutional text of the guarantee of republican form of government in the first or Philadelphia Constitution, and the texts of the third or civil war Constitution, may also be developed by analogy. Perhaps it is correct to say that the constitutional force of the guarantee of republican form of government has been both masked and denarcotized by the Warren majority.

The Warren majority also seems to have been infrastructurally dominated by the Romanist *actio in factum*. Such a Romanist action is exploratory. It may or may not be a legitimate *projet* of the constitutional text as exploded. Its legitimacy may not yet be acknowledged. Its legitimacy becomes the concern of academic doctrine, as understood in the history of Roman and civil law. It may or may not be developed in subsequent history. Buckland, the only classic English-speaking Romanist, wrote in *A Text-Book of Roman Law* that

there was nothing *utilis*, nothing like extension of an existing action, in many *actiones in factum*. There were indeed cases in which an *actio in factum* was itself extended as *utilis* to new cases.<sup>145</sup>

There is also implicit in the crypto-Romanist activity of the Warren majority a theory reprobating fraud on the Constitution.

As the Warren majority was in some respects a Romanist cassa-

144. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 32-39 (1970).

145. W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 687 (1932) (footnote omitted) (emphasis in original).

tional court, its "reasoning" or its own formulations are not always as important as its determinations as justified ultimately by appropriately indicated textual foundations in the Constitution. The work of the Warren majority may be called cassational insofar as its task was to "quash" determinations of inferior authorities which were hostile or which may have been hostile to the indicated texts or force of the second and third Constitutions. This idea develops out of the power of the Roman plebeian tribunes to veto through their power of *intercessio* patrician determinations hostile to plebeians. The tribunes had no responsibility to justify their negation of patrician authority. The slave-holder theorist, Calhoun, complained, in effect, that the Supreme Court, under section 25 of the Judiciary Act of 1789, had a tribunitial or cassational power over the state courts. He said that the provisions of this legislation

provide for appeals only in cases where the decision is *adverse* to the power claimed [for the United States], or in *favor* of that of the latter [that is, the particular states]. They assume that the courts of the States are always *right* when they decide in *favor* of the government of the United States, and always *wrong*, when they decide in *favor* of the power of their respective States; and, hence, they provide for an appeal in the latter case, but none in the former.<sup>146</sup>

The cassational power of the Supreme Court had its counter-part, subsequently, in the French tribunal of cassation of the French revolution. Cassation derives from the *intercessio* of Roman law and was understood as legislative activity.<sup>147</sup>

Early in his judicial career, Justice Frankfurter raised the question of the justification of the role of Anglo-American judicial opinion as such under a formulated constitution. He wrote that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."<sup>148</sup>

There should have arisen within the American faculties of law a new division of legal labor which would scientifically condemn or criticize the determinations of the Supreme Court, insofar as these con-

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146. J. CALHOUN, *A Discourse on the Constitution and Government of the United States*, in 1 THE WORKS OF JOHN C. CALHOUN 111, 326 (R. Cralle ed. 1854) (emphasis in original).

147. Franklin, *Problems Relating to the Influence of the Roman Idea of the Veto Power in the History of Law*, 22 TUL. L. REV. 443, 448-50 (1948).

148. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

cern the content as such, the content as exploded, the structure, the methodology, the categories of constitutional activity. This in turn could inspire the Supreme Court. As the law faculties have not struggled for recognition of this critical power, it has not been acknowledged. On the other hand, the presence both of the texts and of the role of doctrine (or of learned writing of the law faculties) did develop in the history of Roman law. American legal scholars do not really offer this criticism because they presuppose the work of the Supreme Court as a thing-in-itself-and-for-itself and enjoy their academic role only within limits set by Coke and Anglo-American uncoded law in general, and within the limits of Anglo-American ideas of legal method. The relationship between the justices and the faculties of law is based on the idea that the Constitution is not a revolutionary document, influenced by bourgeoisified Roman law ideas of the Enlightenment. The existing relationship reflects an idea that the American revolution was only a national liberation movement, which therefore continued to consecrate Anglo-American common-law ideas of *stare decisis* and of the negation or manipulation of *stare decisis* within the framework of Anglo-American common-law ideas.

Certain texts of the Constitution, for instance "due process," establish general clauses or standards rather than rules. Pound is the leading American theorist of legislative technique and of the legal method which it justified. In the sphere of the standard, which is prominent in codified law and in formulated constitutions, Anglo-American legal ideas of consistency or of continuity of determination should enjoy no decisive role. If this is correct, certain criticism of the Warren majority, which finds the work of the Warren majority discontinuous or chaotic, collapses because the constitutional text, through general clauses, standards, accordion formulations and Stoic abstract universals, justifies the veerings of the Warren majority.

However, the Warren majority, like all bourgeois legal institutions, was part of the history of legal ambiguity and the like. The problem of the role of legal ambiguity or of legal irony is not the same as the problem of the legal standard or of the Stoic abstract universal, because in the sphere of the latter the formulated law itself requires and justifies individualized determination. The problem of ambiguity, which Heidegger held was always buried in historical determinations, has been brought forward earlier in this paper. Kantian agility has also been mentioned in this connection. But the problem

of the justification of legal arbitrariness was presented before Kant and has assumed many forms since Kant. Justice Frankfurter's *Lebensphilosophie* or philosophy of life, an ancestor of contemporary existentialism, has been mentioned. In juridical *Lebensphilosophie* an hierarchical supremacy is attributed to the American judge. As has been suggested, this supremacy is justified because the judge enjoys the Kantian role of the aesthetic or "beautiful soul," described by Hegel in *The Phenomenology of Mind*.<sup>149</sup> The American judge is peculiarly a "beautiful soul," because he incarnates legal method(s). The "beautiful soul" abstains, withdraws or distances itself. But this distancing is a form of appropriative alienation involving bourgeois terror. Nietzsche justified the so-called "pathos of distance." This sanctified the choices or possibilities of the "beautiful soul," the external or distanced mediator who masks his historical relation to an historical infrastructure. Norberto Bobbio, the Italian jurist, stated the identity of the "beautiful soul" or distanced, external mediator, with the "violence" of Nietzsche.<sup>150</sup>

However, the chief American juridical theorist of ambiguity or *Verstellung* has been Pound. Pound's idea of balance of interest (which seems to owe something to John Adams' conception of balance of Montesquieuan powers) justified the external mediation of the jurist who selects among the possibilities offered by limited, opposed interests. This necessitates the elite position of the judge, or rather of the legal method of the judge. In his dissent in *Wilkinson v. United States*, Justice Black said

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 . . . .<sup>151</sup>

Here again reference may be made to the *Griswold* case.<sup>152</sup> The opinion of Justice Douglas through which the general civil textual force of the second Constitution explodes or erupts is free of *Verstellung*

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149. G. HEGEL, *supra* note 7, at 664.

150. N. BOBBIO, *INTRODUZIONE ALLA FILOSOFIA DEL DIRITTO* 104 (1948).

151. 365 U.S. 399, 420-21 (1961).

152. 381 U.S. 479 (1965).

or irony because it is founded on the formulated Constitution, either through the analogy of a single constitutional text (*Gesetzesanalogie*) or of a group of constitutional texts (*Rechtsanalogie*). Through struggle it justifies legal development and also preserves the 18th-century origin of the text, which it also dialectically negates. The critics of the Warren majority have not understood the importance of this textual unfolding of the Constitution, which, as has been said, also appears in the history of the formulation of the text of the Uniform Commercial Code. This may be called the *lex Llewellyn*.

In its own way the Warren majority attempted to justify the theory of the three Constitutions, as suggested in this essay. Because the academic critics of the Warren majority apparently conceive that the three Constitutions were formulated at one historical moment, they may deny certain texts—the second and third Constitutions and the guarantee of republican form of government in the first constitution—are privileged. To these “sheltered” texts may be added the sacrosanct impeachment power of the Congress.

## VI. THE WARREN MAJORITY AS A BOURGEOIS MAJORITY

Although the mission of the Warren court was that of attempting to deterrorize bourgeois social relations, it was nevertheless a consistently bourgeois court. It maintained bourgeois appropriative, infrastructural alienation, attempting at the same time to purge terror from this alienation. Indeed, it strengthened bourgeois appropriative alienation in its policy of deterrorizing appropriative alienation. Hegel and Marx showed that the basic alienation or seizure was that of work, and that language, too, is appropriated. As the appropriative alienation of language reflects the alienation of labor, legal activity also derives its meaning from the struggle to alienate, or to prevent the alienation of, posited constitutional formulations (“meaning,”<sup>153</sup> “interplay of . . . forces”<sup>154</sup>). Though the Warren majority defended the integrity of the constitutional texts, especially of the second and third Constitutions, it did not sincerely relate this struggle to the genuine social infrastructure.

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153. G. HEGEL, *supra* note 7, at 213.

154. *Id.* at 186.

The content of the determinations of the Warren majority essentially justifies appropriative, infrastructural alienation, provided the problem of bourgeois terrorism is not unveiled. Of course the materials brought forward in this essay suggest that appropriative alienation and bourgeois terrorism cannot permanently be separated under capitalism. But this, of course, was not the thesis of the Warren majority.

In *Hanson v. Denckla*,<sup>155</sup> Chief Justice Warren protected the vital interests of late capitalism. This was a problem of conflict of laws. Much simplified, the question was whether the law of the corporate trustee or the law of the beneficiaries should determine the case. The Chief Justice held that the law of the corporate trustee controlled. In effect he created an alienating relation of domination and subordination between the latter-day capitalist and the so-called beneficiaries. This was correctly condemned by Justice Douglas who perceived that, despite Anglo-American feudal-bourgeois legal conceptions of trustee and beneficiary, the trustee was "purely and simply a stakeholder or an agent . . ." <sup>156</sup> Here Justice Douglas' thinking is interesting in that he realized that the problem of the trust was the problem of the mask, which has been so prominent in this essay as a general bourgeois phenomenon. The problem of the trust is really what may be called in Roman law a problem of simulation, or, particularly here, a problem of interposed person. The Anglo-American corporate trustee, who is the legal "owner," is discovered to be in truth the corporate representative and not the corporate master of the beneficiary. Moreover, Justice Douglas realized that the economic power of domination or alienation concentrated by the Chief Justice in the corporate "representative" reflects the contemporary situation, in general, in which, for the sake of late capitalism, "volitional" relations may overcome earlier bourgeois "property" relations.

Furthermore, the Chief Justice in *Hanson v. Denckla* said that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>157</sup> He justified appropriative alienation in this case,

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155. 357 U.S. 235 (1958).

156. *Id.* at 263.

157. *Id.* at 253.



not only in terms of a suppletive or alienation idea of *litis contestatio* or of "volitional" consent to the competence of state power, but also in terms of "bargain"<sup>158</sup> consideration of Anglo-American contract law, which developed in response to bourgeois appropriation or alienation of surplus-value. Detriment consideration has come to mean bargain in the sense of a reciprocally inspired "volitional" transaction of interest in bourgeois society. What has happened is that the idea of feudal delictal consideration has come to mean alienating bourgeois "bargain" consideration. The Chief Justice made this "bargain" consideration the criterion of judicial competence within the sphere of conflict of laws, a sphere of the greatest importance to the latter-day American bourgeoisie.

The general constitutional law of conflict of laws, as it developed under the Warren majority, may conceal new alienation requirements of the late bourgeoisie. To the late bourgeoisie, choice of law or choice of competence based on apparent political boundaries of sovereigns may have become unsuitable. If so, Kantian semblance and Kantian formalism may here emerge. The instances of Hitler's racial invasions, the Suez crisis, the American invasion of Vietnam, Ford's and Kissinger's threats to the oil lands of Arab states, intrusion in Chile, and elsewhere come to mind. Carl Schmitt, the Nazi "crown jurist," developed a theory of boundaries based on existentialism and determined by the existentialist sovereign to justify the negation of historically posited boundaries as illusory boundaries. Part of the Warren majority may have created a theory of boundaries of American states which recognizes existential boundaries or anthropological boundaries, not positive ones, in order to create, when required, new bourgeois bases for choice of law and for choice of competences. This may reflect the interest in appropriative alienation of the late bourgeoisie, though it may be given the mask or incognito or semblance of bourgeois social or national welfare theory, and thus may in truth be passed off as the opposite of what it is.

This may indicate, perhaps, the limits of the deterrorization of alienation sought by part of the Warren majority. The scope and limits of its deterrorization of alienation or appropriation seem set by the texts of the second and third Constitutions, further developed by the civil possibilities of the explosive force of the *Griswold* case and

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158. See Marx, *supra* note 2, at 243, 244.

of the ninth amendment, unless these texts and their analogies confront the existential claims of the late bourgeoisie. In their discussions of the Warren majority, Bickel and Kurland invoke the role of Justice Frankfurter, who, as an opponent within the Warren court, condemned the Warren majority. Justice Frankfurter's thinking, which it is customary to relate to that of his predecessor, Justice Holmes, shows, as has been said, the influence of 19th-century philosophy of life—one of the irrational bourgeois currents of thought which emerged during the history of the late bourgeoisie. Today philosophy of life, as developed under the subsequent influence or outcome of Husserl, appears in more refined form as existentialism.

It may be feared by existentialist theorists of law that the semblance of bourgeois social welfare in the hidden alienation theory of part of the Warren majority may, in conflict of laws, be not semblance, but genuine, as it truly was on constitutionally justified grounds with Justices Black and Douglas. If this is correct, it may be that criticism of the Warren majority will be aimed against both the de-terrorization ideas of the Warren majority and the fear that the bourgeois social welfare theory of part of the Warren majority would not be merely the semblance of such bourgeois social welfare but genuine bourgeois social welfare theory. This becomes a matter of confrontation and struggle to maintain the relatively limited social accomplishments of the majority of the Warren court.

