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The Case for Treason

George P. Fletcher
Columbia Law School, gpfrecht@gmail.com

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THE CASE FOR TREASON*

GEORGE P. FLETCHER**

"If this be treason, make the most of it."[1] Patrick Henry had no fear of the ultimate crime against his King. Nor did the burghers of Maryland who set ablaze the *Peggy Stewart* in Annapolis Harbor. One would think that for us as Americans the crime of treason would carry special significance. Our nation was born in acts of treason. The threat of prosecution made the crime foremost in the mind of the constitutional draftsmen.[2] Indeed, treason is the only crime to find definition in our basic document.[3]

There are other indications that the crime of treason is central to Anglo-American criminal law. First, the oldest statute in Anglo-American criminal law, enacted in 1351[4] and still partially in force in England,[5] speaks to the first concern of all governments, namely, suppressing treason. Also, the United States Federal Criminal Code once began with a definition of treason.[6] Finally, in the mid-1940's the United States Supreme Court decided two monumental cases — *Cramer v. United States*[7] and *Haupt v. United States*[8]—each containing

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** Professor of Law, University of California, Los Angeles.

1. P. Henry, Speech in the House of Burgesses, Richmond, Virginia (May 29, 1765), *reprinted in* 1 W. HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 86 (1891).

2. For a survey of the framers' concerns see Cramer v. United States, 325 U.S. 1, 14-18 (1945).

3. *See* U.S. CONST. art. III, § 3, cl. 1.

4. Statute of Treasons, 1351, 25 Edw. 3, ch. 2.

5. *See* C. KENNY, OUTLINES OF CRIMINAL LAW ¶ 416 (18th ed. 1976).

6. *See* Pub. L. No. 350, ch. 321, § 1, 35 Stat. 1088 (1909). The treason statute is presently found at 18 U.S.C. § 2381 (1976).

7. 325 U.S. 1 (1945).

8. 330 U.S. 631 (1947).

long and thoughtful opinions on the constitutional foundations of treason.

History, venerable statutes, our own Constitution and prominent cases—all of these sources testify to the significance of treason in the structure of our criminal law. Yet our casebooks and textbooks totally ignore these materials. The basic criminal law course focuses on homicide, sometimes on rape and burglary, but no one discusses treason. The short explanation for this indifference might be simply that treason prosecutions are few in number. In the United States they occur in war time and in the aftermath of war. Since we are not now engaged in a war, there is little point, apparently, in thinking about treason.

My case for treason is that we should take this ancient crime more seriously in thinking about both the theory of criminal law and the mainsprings of criminal conduct. A theory of criminal law tends to abstract general propositions from the details of particular crimes. If we ignore treason in formulating our general principles, we run the risk of distorting the criminal law by overemphasizing violent crimes against persons. In order to convince you that we should thrust treason to the center of our thinking about criminal law, I shall spend most of this lecture surveying the contours of treason. At the conclusion of my argument, I shall turn to the lessons that we can learn from accepting my case for treason.

I. THE HISTORICAL BACKGROUND

We should begin with the English Statute of 1351, which defines two categories of treason, one called high treason and the other, petty treason.[9] High treason focused on disloyalty to the King and various acts, such as counterfeiting the King's seal, that compromised the effectiveness of the King's reign.[10] Petty treason was, in fact, but a species of homicide in which the victim was a superior figure in a relationship of fealty and obedience.[11] The statute mentions homicide by a wife of her husband; by a servant of his master; and by a priest of his prelate.[12] Petty treason eventually merged with the crime of homicide.[13] In its original form, however, it accentuated the breach of a protective relationship as the core of treason. The wrong in petty treason was not

9. Statute of Treasons, 1351, 25 Edw. 3, ch. 2.

10. *Id.*

11. *Id.*

12. *Id.*

13. See, e.g., CAL. PENAL CODE § 191 (West 1981), which explicitly integrates petty treason into the law of homicide.

only killing, but killing a protector to whom one owed particular loyalty.

High treason also reflects the element of betraying a personal protector, namely the King both as the embodiment of divine authority and as the supreme figure in the feudal system. It is important to keep this element of breached personal loyalty in mind, for when we read the Statute of 1351, it appears that high treason was meant to sanction particular harms that had litle to do with loyalty and obedience to the King. The statute prohibits not only counterfeiting, but also importing debased currency, raping the women of the royal house, and levying war against the King.[14] The King would obviously wish to suppress these assaults, whether they were committed at the hands of a foreigner or of a putatively loyal subject.

In the case of war against the King, however, the identity of the aggressor defined the wrong. It was normal for the French and the Spanish to wage war against the King of England. They committed no crime in realizing Clausewitz's maxim: war is but diplomacy by other means.[15] But a subject's turning against his king and waging war against him was and still is a criminal wrong of great proportions. The wrong consists not only in the conduct—the subject's conduct is the same as that of a foreign enemy. It is the element of personal betrayal that makes the treason.

II. THE ROLE OF ALLEGIANCE

The element of breached loyalty, then, represents the first distinguishing feature of treason in the Anglo-American tradition. This feature helps us understand the role of citizenship in limiting the crime. Note the requirement spelled out in the United States Criminal Code: to be guilty of treason one must "owe allegiance to the United States."[16] This means, I take it, that citizenship generates the kind of personal obligation that characterized the feudal duty of English subjects toward their King.[17] In defining treason, the Constitution remains silent on the dimension of personal allegiance,[18] yet Congress has restricted the crime, presumably to highlight the element of personal betrayal. The treason laws of most other Western countries similarly

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14. Statute of Treasons, 1351, 25 Edw. 3, ch. 2.

15. K. VON CLAUSEWITZ, ON WAR 402 (A. Rapoport ed. 1968).

16. 18 U.S.C. § 2381 (1976).

17. *But see* Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154 (1872) (holding that an alien, while domiciled in the United States, owes a local and temporary allegiance during the period of his residence).

18. *See* U.S. CONST. art. III, § 3, cl. 1.

restrict the crime. The English courts have read this qualification into the Statute of 1351.[19] The French[20] and Soviet[21] definitions of treason also apply only to their respective citizens.

Think now about the problem of articulating the person or entity to whom the loyalty is owed. We can easily understand what it means to stand in a personal covenant with God or to stand in a personal, feudal relationship with a protector, such as a king. When the nation becomes disengaged from its personal leader, the notion of allegiance becomes either idolatrous or diffuse. In our own legal culture, we pledge allegiance, quite mysteriously, to the flag and to the American Republic. In cultures presupposing a mystic connection of the people to their soil, loyalty attaches directly to the homeland. Indeed, despite the background of revolution, the current Soviet criminal code relies on ancient and mystical notions in defining its version of treason.[22] The betrayal that lies at the basis of treason in Soviet society is not a betrayal of the Communist Party, or of the Soviet government, but of the Russian Rodina—the motherland.[23] The German National Socialists held an analogous conception of loyalty, directed to the German Volk as well as personally to the Fuhrer.[24]

This way of defining treason, which emphasizes the citizen's loyalty to his protector or his fatherland, is the dominant, but not the only approach to the crime. In reaction against the abuses of the Third Reich, the Federal Republic of Germany has chosen a totally different approach to the crime. Section 81 of the German Penal Code takes the current West German state and its constitutional system to be an interest that the criminal law should protect.[25] The current constitutional order thus becomes analogous to other protectible interests, such as life, liberty and property.[26] Consequently, anyone who employs force or a threat of force and seeks to undermine the current constitutional order commits High Treason against the Federal Republic of Germany.[27] As

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19. *See* Joyce v. Director of Pub. Prosecutions, 1946 C.A. 347, 365 (American holding British passport owed allegiance to the Crown). *See also* R. CROSS & P. JONES, INTRODUCTION TO CRIMINAL LAW 290-91 (9th ed. 1980).

20. CODE PENAL art. 70 (Fr. 1980-1981).

21. Criminal Code of the RSFSR art. 64. The name of the crime is *izmena rodine*, or "betraying the motherland." *Id.*

22. *See id.*

23. *Id.*

24. *See* Freisler, *Der Volksverrat*, 40 DEUTSCHE JURISTEN-ZEITUNG 905, 907 (1935).

25. STRAFGESETZBUCH [StGB] § 81.

26. It is important to underscore the difference betweeen (1) treating the constitutional order as a protectible interest (the current German situation) and (2) focusing on the loyalty of citizens to their constitutional republic (the current American situation).

27. StGB § 81.

aliens can violate the German prohibitions against theft and homicide,[28] they can also violate the prohibition against treason.[29] The German model of treason dispenses with the element of personal betrayal, and therefore, there is no reason to limit the crime to acts committed by citizens.

The current German model of treason encompasses acts of internal subversion.[30] Most countries, including the United States and the Soviet Union, distinguish clearly between treason and internal subversion.[31] Only citizens can commit the former;[32] anyone can make himself liable for seeking to overthrow the government.[33] Subversion need not derive from a foreign power, but treason typically entails identification with a foreign enemy. The German model lumps these distinct crimes into one.[34]

The current German model of treason, with its shift of focus to the protection of a particular constitutional order, helps us understand what our own conception of treason is *not*. We stand in the tradition emphasizing the citizen's personal loyalty to his protector or to his homeland. This tradition of loyalty yields a persistent tension in defining the contours of treason. The evil of treason consists not only in threatening the security of the state or the constitutional order, but also in breaching a personal obligation of fidelity.

III. THE GRAVAMEN OF TREASON: THOUGHTS OR ACTION?

How then does a citizen breach his obligation to the state? Is disloyalty a matter of the heart or need the disloyalty be incorporated in action that threatens the independence and security of the State? This tension between disloyalty of attitude and disloyalty in action pervades the history of treason in England and the United States. The conflict comes to the fore under two distinct headings of treason. The first is the historic crime of compassing the death of the King, and the second, the contemporary problem of adhering to the enemy.

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28. *Id.* § 7 (if these acts are committed against German citizens).

29. *Id.* § 5.

30. *See id.* § 81.

31. *Compare* 18 U.S.C. § 2381 (1976) (treason presupposes allegiance) *with* 18 U.S.C. § 2385 (1976) (crime of advocating overthrow of government does not presuppose allegiance).

32. *But see* Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154 (1872) (holding that an alien, while domiciled in the United States, owes a local and temporary allegiance during the period of his residence).

33. *See* 18 U.S.C. §§ 2383-2385 (1976).

34. *See supra* notes 27-29 and accompanying text. In addition, the German Code contains an array of offenses designed to protect internal security. *See also* STGB §§ 84-86 (provisions bearing on unconstitutional political parties).

A. *The Crime of Compassing*

The English Statute of 1351 suggests the possibility of treason by thoughts alone, for it labels a traitor anyone who "compasses or imagines the death" of the King, the Queen, or the King's heir.[35] The statute requires that the compassing or imagining be "provably attainted by open deed," as other instances of high treason must be.[36] Yet there is room to argue, as one finds the Philosopher arguing in Hobbes' famous *Dialogue Between a Philosopher and a Student*, that the crime of compassing "lyeth hidden in the breast of him that is accused."[37] The open deed that declares the treason merely provides the proof; it appears unconnected to the evil proscribed and punished.

The statute's design might have been to punish as a traitor anyone who contemplated, and in that sense, "compassed" the King's death. It is dubious, however, whether a totally subjective conception of treason inspired the 1351 statute. Prior to the early nineteenth century, the common law had no theory of criminal attempts.[38] Therefore, in approaching this language from the fourteenth century, we have considerable difficulty distinguishing between an effort to prohibit attempted assassination of the King and language designed to stigmatize the mere intention to kill the King.

The debate whether compassing alone constituted treason has considerable practical significance. If mere compassing was the crime, then the overt act required by the statute merely functioned to provide proof of the inner state. It would follow that spoken words would be sufficient to constitute treason. Some royalists in the seventeenth century favored this interpretation, thus endorsing a view of treason that encompassed verbal expressions of disloyalty.[39] Sir Edward Coke, however, had argued strenuously against penalizing the oral expression of opinion as treason.[40] The mere expression of one's thoughts might provide evidence of compassing, but in Coke's view, the required overt act had to tend toward completion of the crime.[41] The open deed of

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35. Statute of Treasons, 1351, 25 Edw. 3, ch. 2.

36. *Id.*

37. T. HOBBES, DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 97 (London 1681).

38. For a history of the law of attempts and a summary of the early cases recognizing the doctrine, see G. FLETCHER, RETHINKING CRIMINAL LAW § 3.3 (1978).

39. *See* J. KELYNG, A REPORT OF DIVERS CASES IN PLEAS OF THE CROWN 15 (London 1789); *cf.* T. HOBBES, *supra* note 37, at 97 (The Philosopher, speaking for Hobbes, argues that the "compassing" is the essence of the crime and "what other Proof can there be had of it than words Spoken or Written.").

40. *See* E. COKE, THIRD INSTITUTE 14 (London 1644).

41. *Id.*

compassing had to be an act, such as acquiring weapons or taking other steps to organize the regicide, that manifested and declared the treasonous intention.[42] Restricting the overt deed in this way made little sense unless one viewed the act as part of the crime of attempting regicide.[43] Coke's views on these matters stood in opposition to those of royalists who favored a broader conception of treason. The matter was open to continuous debate and we can hardly claim that we know definitively what the correct interpretation of the Statute of 1351 should have been.

B. *Treason Under the Constitution*

Treason by compassing failed to find its way into the American Constitution.[44] We do not regard the president as the embodiment of the state or as the object of our allegiance. Assassinating the president might be part of a subversive plan, but when there is no intent to aid our enemies, the killing falls short of treason. And if the killing would not constitute treason, then compassing the president's death should hardly qualify either. In addition to these reasons for excluding the English notion of compassing from our constitutional definition of treason, the framers might well have feared the abuse of a provision that comes close to linking treason to that "which lyeth hidden in the breast of him that is accused."[45]

Treason under the Constitution consists either in levying war against the United States or in adhering to the enemy, giving them aid and comfort.[46] Apart from the unsuccessful effort to convict Aaron Burr,[47] the first clause has hardly figured in our national history. The appellate cases center exclusively on the problems of adherence, giving aid and comfort, and on the evidentiary requirement specified in the Constitution, namely that the treason be established either by two witnesses to the overt act of treason or by confession in open court.[48]

The interplay of these constitutional components poses the same tension between treason in the heart and treason in conduct that we

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42. *Id.* at 5.

43. For further discussion of this historical debate, see G. FLETCHER, *supra* note 38, at § 3.5.1.

44. *See* U.S. CONST. art. III, § 3, cl. 1 (treason limited to "levying war [against the United States and] adhering to [its] Enemies, giving them Aid and Comfort.").

45. T. HOBBES, *supra* note 37, at 97. For a survey of the framers' concerns in drafting the treason clause, see Justice Jackson's opinion for the Court in Cramer v. United States, 325 U.S. 1, 9-20 (1945).

46. U.S. CONST. art. III, § 3, cl. 1.

47. United States v. Burr, 8 U.S. (4 Cranch) 470 (1807).

48. For a summary of the decided cases, see Cramer v. United States, 325 U.S. 1, 25 n.38 (1945).

observed in the English crime of compassing.[49] The requirement of adherence brings into focus the element of inner emotional identification with the enemy. Adhering is an internal process, even more subtle than "compassing" regicide. The term originates in the English Statute of 1351.[50] Despite 600 years of thinking about the concept, we have yet to clarify the particular attitudes and emotions that constitute adhering to the enemy.

It's fairly clear, for example, that Iva Toguri, also known as Tokyo Rose, adhered to the enemy as she made radio broadcasts on behalf of the Japanese war effort.[51] It is not so clear, however, that Jane Fonda adhered to the enemy as she broadcast from Hanoi and attempted to persuade American flyers to desist from their bombing missions.[52] Because the military action in Vietnam was not a declared war,[53] the North Vietnamese may not have constituted the enemy in a constitutional sense. Moreoever, apart from that technical problem, the degree of Jane Fonda's attachment to the North Vietnamese may not have qualified as adherence. It is one thing to commit oneself to the Japanese war effort with a view to defeating the United States. It is quite another to take measures to induce the United States' withdrawal from a foreign military venture, even if those measures might benefit an enemy. Jane Fonda could claim quite plausibly, as Tokyo Rose could not, that she was acting in the long-range interests of the country to which she always remained loyal.

If treason is simply a matter of infidelity, then the psychological phenomenon of adherence to the enemy requires no external manifestation. If the citizen becomes emotionally identified with the enemy, the relationship of fidelity suffers irreparable breach. One is reminded of Jesus' admonition that a man who lusts after a woman commits adultery in his heart.[54] It is no accident, in my view, that Jesus chose adultery in emphasizing the criminality of feelings. Adultery resembles treason, for both represent a breach of fidelity. Indeed in Hebrew the same word — *bgidah*—refers to both crimes. Adhering to the enemy,

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49. *See supra* notes 35-43 and accompanying text.

50. *See* Statute of Treasons, 1351, 25 Edw. 3, ch. 2.

51. *See* D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951).

52. *See* N.Y. Times, July 15, 1972, § 1, at 9, col. 2.

53. *See* United States v. McWilliams, 54 F. Supp. 791, 793 (D.D.C. 1944) (Germany did not become a "statutory enemy" until war was officially declared in December 1941). Some commentators have argued that the concept of "enemy" should be broadened to include opponents of the United States in undeclared wars such as Korea and Vietnam. *See, e.g.*, Ruddy, *Permissible Dissent or Treason?*, 4 CRIM. L. BULL. 145, 151-53 (1968).

54. *Matthew* 5:28.

like lusting, occurs in the inner self. The betrayal is complete, as Jesus perceived, even before one begins to act.

The National Socialists in fact took the theory of inner betrayal or *Treubruch* to extreme. The infamous *Volksgericht* in Berlin found evidence of disloyalty in telling jokes about the Fuehrer and even in expressing relief that one's child was a girl, who would not have to fight for the Third Reich.[55] These deviant comments were sufficient to establish the inner dissent sufficient to constitute a breach of loyalty.

Neither English nor American law has ever carried the concept of treason by adherence to the extreme represented by National Socialist practice. Two provisions of the Statute of 1351 hedged against a theory of treason by thought alone.[56] First, the statute required action on behalf of the enemy as well as inner adherence: the action had to amount to aid and comfort given to the enemy.[57] Further, the combined act of adhering and giving aid and comfort had to "be provably attainted by open deed."[58] Both these hedges against totalitarian abuses of treason found their way into the United States Constitution.[59] The elements of adherence and giving aid and comfort are carried forward in the constitutional text; the requirement of an open deed became the evidentiary requirement of an overt treasonous act.[60]

It was not until this century, however, that courts confronted the problem of clarifying the extent to which disloyal intentions and feelings could make out a case of treason. The objective requirements of aid and comfort and of an overt act militate against finding treason in thoughts alone. Yet the impact of these provisions remained unclear until we faced alleged incidents of treason during World Wars I and II.

In *United States v. Robinson*[61] decided in 1917, Judge Learned Hand wrote a scholarly and influential opinion that stood squarely opposed to finding treason in the disloyal intentions of the suspect.[62] The question was whether the Government had adequately alleged an overt act of treason in claiming that Robinson had made a trip to Holland and that on a different occasion he made a public speech against send-

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55. *See, e.g.*, L.A. Times, Aug. 17, 1980, § VII, at 4, col. 1 (article on current prosecutions of judges who sentenced others for treason violations in Germany during the Third Reich).

56. *See* Statute of Treasons, 1351, 25 Edw. 3, ch. 2.

57. *Id.*

58. *Id.*

59. *See* U.S. CONST. art. III, § 3, cl. 1.

60. *See* Haupt v. United States, 330 U.S. at 634-35; Cramer v. United States, 325 U.S. at 34.

61. 259 F. 685 (S.D.N.Y. 1919).

62. *Id.* at 690.

ing American troops to France. The Government introduced evidence that the purpose of Robinson's trip was to carry secret messages to the Germans.[63] Indeed, there was little doubt that Robinson intended to aid the German war effort. Despite this evidence of adherence, Judge Hand reasoned, as had Sir Edward Coke three centuries before him, that the requirement of overtness precluded conviction on the basis of unincriminating, innocuous acts.[64] Neither traveling to Rotterdam nor delivering an isolationist speech in itself incriminated the suspect. These acts acquired "their treasonable character," Learned Hand reasoned, "only from some covert and undeclared intent."[65] The acts were innocent on their face, and therefore they could not, in Learned Hand's view, support an indictment for treason.[66]

Robinson was the leading interpretation of the overt act requirement when the first important treason cases reached the Supreme Court in the wake of World War II. Both cases—*Cramer* and *Haupt*—had their roots in a daring expedition by German saboteurs in June, 1942. These saboteurs crossed the ocean in a submarine, landed in a rubber dinghy off the coast of Florida, buried their explosives, and then proceeded to northern cities—at least two agents to New York and one named Herbert Haupt, to Chicago.[67] The two bound for New York made contact with a German-American named Anthony Cramer. They met at the Twin Oaks Inn on Lexington Avenue and at Thompson's Cafeteria on 42nd Street.[68] At one point Cramer agreed to take and hold a German agent's money belt.[69] During these meetings, the three men were under surveillance by the FBI. At the second meeting, the FBI agents intervened, arrested the two Germans, and turned them over to a military tribunal for trial.[70]

Herbert Haupt went to Chicago and looked up his parents, both of whom were naturalized Americans. While under constant FBI surveillance, Herbert spent several nights at his parents' apartment. His father Hans accompanied him while he bought a car, and further, more seriously, Hans helped Herbert secure a job at a defense plant.[71]

In both of these cases there was ample evidence that the defend-

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63. *Id.* at 686-89.
64. *Id.* at 690.
65. *Id.*
66. *Id.*
67. *See Ex parte* Quirin, 317 U.S. 1, 21-22 (1942) (summary discussion of sabotage mission).
68. *See Cramer,* 325 U.S. at 36-37.
69. *Id.* at 38.
70. *Id.* at 37-38.
71. *See Haupt,* 330 U.S. at 633.

ants identified with the German war effort. There was little difficulty in establishing psychological adherence to the enemy. Cramer may not have known about the sabotage mission, but his admitted supposition that the agents were in the United States illegally sufficed to demonstrate his adherence.[72] Upon his conviction for treason, Cramer received a forty-five year sentence.[73] Hans Haupt knew of the extent of the mission, and for that reason, he received a death sentence following his first trial and conviction;[74] upon retrial his sentence was reduced to life imprisonment.[75] On appeal, there was little hope of challenging the evidence of adherence, and therefore in both cases, the appellants had to build their arguments on the Constitution's objective requirements for treason. In *Cramer*, one could well dispute whether the suspect's meeting with the saboteurs amounted to giving them aid and comfort. Further, under the *Robinson* theory of overtness, nothing about Cramer's having a meal with two German agents manifested his intent to further the German war effort. This nominally innocuous incident on Lexington Avenue appeared like the first step of betrayal only if one knew from other sources that Cramer sympathized with the German cause.

Cramer relied on Learned Hand's theory of overtness, arguing that the testimony of the two FBI agents did not establish an act manifesting an intent to side with the enemy.[76] The Government replied with its own theory of overtness: the overt act should mean the same in treason cases as it does in the law of conspiracy.[77] In the latter context, a line of cases holds that any act in furtherance of the conspiracy suffices as the overt act required by the definition of the crime.[78] It does not matter whether the act is incriminating on its face. Meeting with coconspirators would obviously be enough. These were the conflicting theories, both of them plausible, that engaged the Supreme Court in 1945.

Five justices favored the reversal of Cramer's conviction[79]—a courageous decision, as American troops were still dying on the battlefields

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72. *Cramer,* 325 U.S. at 40 n.46 (summary of testimony of prosecution witness Norma Kopp).

73. United States v. Cramer, 137 F.2d 888, 890 (2d Cir. 1943), *rev'd*, 325 U.S. 1 (1945).

74. United States v. Haupt, 136 F.2d 661, 663 (7th Cir. 1943), *aff'd*, 330 U.S. 631 (1947).

75. *Haupt*, 330 U.S. at 632.

76. *See Cramer*, 325 U.S. at 30-33.

77. *See id.* at 34 (summary of government's argument that overt act requirement was met).

78. *See, e.g.*, Smith v. United States, 92 F.2d 460 (9th Cir. 1937) (making a telephone call in furtherance of conspiracy sufficient as overt act); Hyde v. United States, 225 U.S. 347 (1912) (mailing a letter in furtherance of conspiracy sufficient as overt act).

79. Justice Douglas was joined by three other justices in dissent.

of Europe. In Justice Jackson's majority opinion, however, it was not Cramer's argument that prevailed. The Court opted instead for a compromise between the conflicting theories of overtness. Justice Jackson wrote, "The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy."[80] This, the prosecution failed to do, for proof of the meeting on Lexington Avenue did not demonstrate that the defendant gave aid and comfort to the enemy.[81] The Government argued that the saboteurs had gained psychological comfort by "mingling normally with the citizens of the country with which they were at war."[82] The Court, however, held that the degree of comfort did not rise to the standard of aid and comfort implicit in the constitutional definition.[83]

Justice Jackson commented that by contrast with these innocuous meetings at the cafeteria, another incident could have constituted the constitutionally required overt act.[84] Cramer had allegedly taken and stored a money belt with a large amount of cash as a favor to one of the German agents. Though this act might have been sufficient to sustain the conviction, the Government had withdrawn the allegation at trial—apparently for want of evidence.

Having merged the issue of overtness with that of aid and comfort, the Court had a clear basis two years later to affirm the conviction of Hans Haupt,[85] who had provided shelter to his son, assisted him in buying a car and helped him get a job at a defense plant. These actions provided sufficient aid to satisfy the Constitution's threshold requirement. Eight justices favored affirmance.[86]

Justice Douglas wrote two opinons in these landmark cases, and in both he strongly urged a theory of treason at odds with the majority's. On behalf of four dissenters in *Cramer*[87] and in a concurring opinion in *Haupt*,[88] Justice Douglas argued that the overt act required by the Constitution had nothing to do with either proving injury (aid and comfort) or with establishing the defendant's mental state (adherence to the enemy). The sole purpose of the constitutional requirement in Justice Douglas' view, was to establish that the treason had moved

80. *Cramer*, 325 U.S. at 34.
81. *Id.* at 37-38.
82. *Id.* at 38.
83. *See id.* at 45-48.
84. *Id.* at 38-39.
85. *Haupt*, 330 U.S. 631.
86. *Id.*
87. 325 U.S. at 48 (Douglas, J., dissenting).
88. 330 U.S. at 644 (Douglas, J., concurring).

from the realm of thought into the realm of action.[89] Under this theory of treason, virtually any action on behalf of the enemy would be sufficient to convict.

Justice Douglas theorized that treason might inhere in acts that are totally innocent on their face.[90] Yet if the evidence of adherence does not derive from the acts themselves, inordinate emphasis tends to fall on the surrounding evidence of loyalty and patriotism. In its case against Cramer, for example, the Government relied on proof that Cramer once spoke rudely to someone soliciting war bonds[91] and that further, he had in his room a copy of the Constitution with check marks next to the treason clause.[92] This kind of inflammatory evidence insinuates that the suspect was the kind of person who probably would have adhered to the enemy.

Appreciating the dangers of drawing these inferences from background incidents, Justice Murphy dissented in the *Haupt* case and argued that the overt act must be the centerpiece in the government's proof of adherence.[93] Thus the required overt act should be one that is "consistent only with the treasonable intention."[94] It must be one that "manifests treason beyond all reasonable doubt."[95] A good example would be giving a military map to a known saboteur.[96] In the *Haupt* case, the defendant was the saboteur's father and this, in Justice Murphy's view, rendered his acts ambiguous.[97] Even though Hans Haupt knew of his son's mission, providing him with food and lodging might well have sprung from feelings of paternal affection rather than from adherence to the enemy. As one of the alleged overt acts supporting the conviction, sheltering his son was too ambiguous to meet the constitutional standard. Thus, Justice Murphy reasoned that the entire conviction should have been reversed.[98]

IV. LESSONS FROM THE TREASON CASES

Of these various approaches to the overt act requirement, Justice

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89. *Haupt*, 330 U.S. at 645 (Douglas, J., concurring); *Cramer*, 325 U.S. at 61 (Douglas, J., dissenting).

90. *Id.*

91. 325 U.S. at 42 n.49.

92. *Id.* at 42 n.50.

93. *Haupt*, 330 U.S. at 647-48 (Murphy, J., dissenting).

94. *Id.* at 647.

95. *Id.* at 648.

96. *Id.* at 647.

97. *Id.* at 648-49.

98. *Id.*

Douglas' and Justice Murphy's views are particularly significant. They both represent theories of liability that inform not only the treason cases, but many other offenses as well. Consider the recurring question whether we should punish as attempted homicide someone's putting sugar in an intended victim's coffee cup. The would-be killer takes the white powder from the wrong can; he thinks it is poison when in fact it is sugar. If we extend Justice Murphy's theory about overt acts to the general requirement of an actus reus or criminal act, then we might ask whether the act of sprinkling sugar in a coffee cup properly constitutes a criminal act. The act is innocent on its face; it does not manifest an intent to kill. Therefore, Justice Murphy's theory would lead us to say that the act is not criminal; and if not, there is no warrant for reaching through the act to the intent and grounding liability solely on a subjective attitude toward killing. In contrast, Justice Douglas' theory would tend to support liability for a criminal attempt. If we know that the defendant thought the sugar was poison, sprinkling sugar does reveal that the defendant's criminal plan has passed from the realm of thought into the realm of action and therefore, according to Justice Douglas, we have ample justification for punishing the mistaken effort to act out an evil intent.

The conflict between these two general theories of criminal liability remains unresolved.[99] The Model Penal Code favors Justice Douglas' subjective approach,[100] but many judicial decisions in recent years reveal strong support for Justice Murphy's position—that perhaps the act itself should be the primary source of incriminating evidence.[101]

The tension between these two theories proves to be one of the basic themes in the history of criminal law. The development of the modern law of theft illustrates the conflict between the view that a trespassory taking must manifest the criminal intent and the view that any taking, even one that appears innocent on its face, should suffice.[102] This general dialectic between what I have called manifest criminality, on the one hand, and subjective criminality, on the other, lies anchored in the rich waters of the treason cases. An appreciation of this broader

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99. For an airing of some of the theoretical issues on both sides of this conflict, see G. FLETCHER, *supra* note 38, §§ 3.3.3 - .3.7.

100. MODEL PENAL CODE § 5.01(1) (1962). For an analysis of the state statutes adopting and modifying the standard of the Model Penal Code, see Fletcher, *Manifest Criminality, Criminal Intent and the Metamorphosis of Lloyd Weinreb*, 90 YALE L.J. 319, 338-39 (1980).

101. *See, e.g.*, United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976) (reversing conviction for attempted sale of heroin); Haughton v. Smith, 1974 2 W.L.R. 1 (reversing conviction for attempted receipt of stolen property).

102. *See generally* G. FLETCHER, *supra* note 38, at §§ 2.1 - .4.2.

tension in the criminal law derives from paying closer attention to theories of treason.

There are other important lessons that emerge from the study of treason. Our general theory of criminal law holds that motives are irrelevant in assessing liability. If someone steals intentionally, it matters not what his ultimate purpose might be, whether to supply his heroin habit or buy Christmas presents for the poor. The secrets of the heart, the ultimate wellsprings of human conduct, are thought to be irrelevant. Yet in the Anglo-American theory of treason we find that these deeper subjective considerations lie at the core of the crime.[103] Adherence to the enemy requires more than intent to render aid and comfort. In principle it requires a deep emotional identification with the enemy.[104] Now we could say that treason is but an exception from the general rule. Yet the "normal" and the "exceptional" are but reflections of the way we view the criminal law. We could as well say that as the crime that protects our national independence, treason represents the norm. Larceny and rape, as crimes that disregard motives, arguably represent the exceptions.

If we tried to formulate general principles of criminal law on the basis of treason, we should derive some intriguing results. The theory of justification figures prominently in most crimes. Self-defense justifies battery and homicide; necessity or lesser evils make it right and permissible to commit larceny, abortion and some minor offenses.[105] Yet there appears to be no way to justify treason. Treason in self-defense makes no sense, and similarly, treason as a lesser evil would be hard to imagine. In contrast, the emphasis on adherence to the enemy in treason cases invites counsel to rely on duress as a possible excuse.[106] If the defendant acts under coercion by the enemy, one could hardly find that as a psychological matter he or she adhered to the enemy cause.

There is one important excuse, however, that figures less prominently in treason cases. I speak of insanity. Our courts found Ezra Pound mentally incompetent to stand trial on charges of treason.[107]

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103. *See supra* notes 9-19 and accompanying text.

104. *See supra* notes 48-49 and accompanying text.

105. *See* MODEL PENAL CODE § 3.02(1)(1962). *See also* Chicago v. Mayer, 56 Ill. 2d 366, 308 N.E.2d 601 (1974) (conviction for disorderly conduct and interfering with a police officer reversed on the basis of an Illinois statute adopting the Model Penal Code standard).

106. Rex v. Steane, 1947 K.B. 997 (Crim. App.) (coercive circumstances sufficient to disprove an intent to aid the enemy). Claims of duress were asserted unsuccessfully in D'Aquina v. United States, 192 F.2d 338 (9th Cir. 1951) and Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950).

107. *See* M. BOVERI, TREASON IN THE TWENTIETH CENTURY 182-83 (1961).

Apart from this questionable incident, I know of no case in which the issue of the alleged traitor's moral or mental competence came into issue. We think of treason as a freely chosen betrayal. Traitors might be mad — but not in the sense that psychiatrists can illuminate. Their anger stems from their convictions. They hear the enemy drummer and they choose to follow.

If we took treason as the representative crime, we would be more skeptical about the claims of those who seek to brand all criminals as sick or as the creatures of circumstance. Of course we would still find the insane among those who commit criminal acts, but if treason had anything to teach us, then we should appreciate more deeply the elements of choice and will in all forms of criminality.

If treason came centerstage in the drama of crime and punishment, we would be more inclined to support retributive theories of punishment. Those who choose to do wrong deserve punishment. Yet if we thought of murderers and thieves as we think of traitors, we might also be more compassionate in our approach to criminals. We would not think of the "criminal element" as a class apart—persons different from ourselves. We can identify with the treasonous acts of the Founding Fathers and the treasonous efforts of a group of Jews in Leningrad to seize an airplane and escape from the Soviet Union.[108] If we lived under Soviet tyranny, even under the domination of George III, we could contemplate disloyalty. That we do not commit either treason or other crime means that we may properly condemn those who do; but that we are often closer to crime than we would like to admit, means that we must feel a common bond with those whom we punish.

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108. *See* T. TAYLOR, COURTS OF TERROR 6-13 (1976).