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Chaining The Leviathan: The Unconstitutionality of Executing Those Convicted of Treason

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CHAINING THE LEVIATHAN: THE UNCONSTITUTIONALITY OF EXECUTING THOSE CONVICTED OF TREASON†

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I. INTRODUCTION

Martin Buber's observation that "every word must falsify . . ."[1] could mistakenly be dismissed as an unilluminating paradox, another example of the truism that all language is inherently inaccurate.[2] He leaves unanswered the more difficult problem of determining the degree of ambiguity of different words.[3] But Buber is reminding us that the limitations of language include deception as well as uncertainty; linguistic facility simultaneously impedes and enhances perception. The danger is more than perceptual; using words as a guide, many governments have executed many citizens.

1. M. BUBER, I AND THOU 67 (W. Kaufman trans. 1970). Translations create another layer of distortion. How false a translation was the English word "falsify"?

2. By the early nineteenth century, philosophers such as Hamman were considering many of the problems created by language's flaws: "Language is not only the foundation for the whole faculty of thinking, but the central point also from which proceed the misunderstandings of reason by herself." *Quoted in* A. KOESTLER, THE ACT OF CREATION 173 (1964). Platonic glorification of language, of the ideal image or word over the real, has been attacked; no longer is the word "cat," the ideal "cat," necessarily preferable to a real feline. *See* B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 119-32 (1945). Obsession with words has been diagnosed as a symptom of schizophrenia, see J. FRANK, COURTS ON TRIAL 65 (1949).

3. *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947), and Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 90 (1960). The malleability of language has been a long-acknowledged source of income and entertainment for the legal profession. The drafters of the Constitution were aware of the ambiguity of two Constitutional clauses which will play a primary role in this article: "treason" and "cruel and unusual punishments."

The phrase "death by electrocution" may be a collection of deceptive symbols, yet those symbols set the stage for an actual killing.

This article focuses on two words: executing traitors. We have a good idea of what the first word means, even if we repress the sordid details of the actual dying.[4] Treason, however, is a word notable both for its ambiguity and for the powerful emotions it evokes, emotions found in such equally potent words as betrayal, war and defeat. As will be seen, by limiting the crime to two types of actions and by requiring unique procedural protections, the drafters of the Constitution balanced the country's need for protection from treason against their fear that a future administration might instigate improper prosecutions. The primary goal of this article is to demonstrate why the Constitution should be interpreted to require an additional protection: prohibition of the use of capital punishment in treason cases unless the government can also prove aggravated murder.

The Constitution does not provide clear direction concerning how a person convicted of treason and sentenced to die should challenge the death sentence. Aside from utilizing such pliable phrases as "due process" and "privileges and immunities," the defendant's attack could adopt broader theoretical techniques such as the "unwritten constitution,"[5] "emanations and penumbras,"[6] or the overall structure of government implied by the Constitution. Precedent reduces the possibilities; the grants of "privileges and immunities," contained in Article IV, section 2, and in the fourteenth amendment, might have been the sources of many individual rights, but the

4. Warden Lewis, who witnessed several electrocutions while at Sing Sing, described such a death:

> As the switch is thrown into its sockets there is a sputtering —— and the body leaps as if to break the strong leather straps that hold it. Sometimes a thin gray wisp of smoke pushes itself out from under the helmet that holds the head electrode, followed by the faint odor of burning flesh. The hands turn red, then white, and the cords of the neck stand out . . . . The initial voltage of 2,000 to 2,200 and the amperage of 7 to 12 are lowered and reapplied at various intervals.

L. LAWES, LIFE AND DEATH IN SING SING 170 (1928).

5. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Grey argues that the Supreme Court can properly exercise its constitutional power of judicial review to enforce principles of liberty that are not expressly protected by the written Constitution. In a subsequent article he claims that such an expansive reading of the Constitution is consistent with the views of those who lived during the framing of the written Constitution. *See also* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

6. Griswold v. Connecticut, 381 U.S. 479 (1965).

Slaughter House Cases[7] held that the fourteenth amendment's clause only reaffirmed other rights either guaranteed by the Constitution or clearly implied in the relationship between the citizen and the government. Although it is never clear what is "clearly implied," the clause has remained moribund for the last hundred years. The fifth and fourteenth amendments' prohibitions against the taking of life without due process of law could be other candidates, but in *McGautha v. California*[8] the Supreme Court held that due process did not outlaw the death penalty.

The eighth amendment's ban against cruel and unusual punishments has been the focal point of constitutional litigation contesting the use of capital punishment. Perhaps as a result of the conclusory nature of the adjectives "cruel and unusual," the Supreme Court has considered virtually any argument. In 1972, a plurality of the Court in *Furman v. Georgia*[9] struck down existing death penalty statutes because the judge or the jury was allowed total discretion when deciding if a defendant should die; such discretion caused a "wanton and freakish" application of the death penalty. Four years later, *Gregg v. Georgia*[10] answered the initial question of the constitutionality of the death penalty under any circumstances by holding that states could execute someone convicted of murder, "the most heinous of crimes."[11] In *Coker v. Georgia*,[12] however, seven members of the Court concluded that the eighth amendment proscribed the electrocution of a convicted rapist who had not killed anyone while committing his rape (even though he had committed the rape after escaping from prison while serving various sentences for murder, rape, kidnapping and aggravated assault). Justices Brennan and Marshall reaffirmed their position, established in *Furman*, that the death penalty was unconstitutional under any circumstances; Justice

7. 83 U.S. (16 Wall.) 36 (1873).

8. 402 U.S. 183 (1971). Challenges could also be based upon the ninth amendment or perhaps the first amendment. Adverse precedent or history could be distinguished because of changed circumstances. Chief Justice Hughes upheld a Minnesota statute in Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), altering the mortgage foreclosure process, even though he agreed with the dissent that the framers had originally proscribed the impairment of contracts to protect creditors in similar circumstances. For a discussion of the *Blaisdell* decision and dissent, see generally, C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 39-51 (1969).

9. 408 U.S. 238, 310 (1972).

10. 428 U.S. 153 (1976).

11. *Id.* at 187.

12. 433 U.S. 584 (1977).

Powell believed that the facts did not warrant an execution; Justice White, writing the plurality for himself and Justices Stewart, Blackmun and Stevens, held that the death penalty for rape was so "grossly disproportionate" as to be unconstitutional.[13] *Enmund v. Florida*[14] extended *Coker* by forbidding the execution of a robber who neither intended nor participated in two killings that occurred in the course of the robbery.

These cases create a simple syllogism which is this article's primary legal argument.[15] *Gregg* allowed the death penalty, partially because murder was considered the worst crime. *Coker* concluded that although rape was the second most serious crime against a person, the death penalty was constitutionally disproportionate: no life had been taken. *Enmund* limited the application of the death penalty to those who were as culpable as those murderers who deserved to die. In addition, *Godfrey v. Georgia*[16] held that proof of two murders, without any grisly supporting facts, did not, in itself, qualify as the "aggravating circumstance" needed to justify execution; the prosecution also had to prove that the killings manifested particularly depraved behavior. Otherwise, all murders could be characterized as "aggravated," and the Court's prior attempts to force the states and Congress to distinguish between aggravated murders and other murders would be defeated. Thus, so long as the government cannot prove that an aggravated murder resulted from the treasonous act or acts, a convicted traitor should not die since no life has been taken and the traitor is not as culpable as those convicted of aggravated murder.

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13. *Id.* at 592.

14. 102 S. Ct. 3368 (1982).

15. This argument was anticipated by Chief Justice Burger in his dissent in *Coker*: "The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, *e.g.*, treason, airplane hijacking, and kidnapping." 433 U.S. at 621 (Burger, C.J., dissenting).

16. 446 U.S. 420 (1982). In Roberts v. Louisana, 428 U.S. 325 (1976), and Woodson v. North Carolina, 428 U.S. 280 (1976), the Court held that the states could not pass statutes making the death penalty mandatory for certain crimes; there had to be individualized consideration of statutorily defined aggravating circumstances. The *Godfrey* court held that a man who instantly killed two relatives with a shotgun during a family dispute did not meet the Georgia statutory definition, which permitted death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE § 27-2534, 1(b)(7) (1978). Since there was no principled way to distinguish this murder from any other, the defendant should not die, 446 U.S. at 425. Accordingly, the crime of treason must be analogized to aggravated murder, not just to murder.

The Court is under no logical obligation to accept the syllogism. All the recent death penalty cases can be distinguished on the basis that they review capital punishment for physical crimes against specific persons, while treason injures the "state/society." The harm caused by treason—possible destruction of the existing government and society—may far exceed any injury caused by most murders.

The rest of this article will explore several interrelated techniques that the Court can use to reject or accept the syllogism; there is no predetermined way for a Justice to determine the constitutional meaning of such "false" words as "treason" and "cruel and unusual punishments." First, a brief description of the evolution of treason law and of the concept of cruel and unusual punishment will be presented to show how the clauses have been defined and applied by legislatures, prosecutors and judges, before and after the drafting of the Constitution. Second, philosophical theories of punishment will be examined to better understand why, when and how society should punish criminals for different crimes. Then, the eighth amendment case law will be considered to determine if the reasoning in *Coker* and *Enmund* should be controlling, thereby virtually overruling the decision to execute the Rosenbergs for espionage. Finally, the article will evaluate a hypothetical statute that might reduce the likelihood of unjust treason executions. The proposed statute highlights deficiencies in the existing law as well as the difficulties of improvement.

II. EVOLUTION OF THE TREASON CLAUSE

Treason is the only crime considered in the Constitution:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the life of the Person attainted.[17]

This unique treatment reflected the framers' theory of government, based upon their personal experience, historical perspective and

17. U.S. CONST. art. III, § 3.

philosophical theory. Only historical analysis can explain the original meaning of the words chosen.

A. Treason in England Prior to the Revolution

English statutes and cases provided the framework from which American treason law developed. In 1351, an English statute condemned as treason seven types of behavior. The three most important categories were: (1) levying war against the king; (2) adhering to the king's enemies, giving them aid and comfort; and (3) compassing or imagining the death of the king.[18] English courts construed "levying war" to include riots, and "compassing" to include spoken or written words criticizing the king. These "constructive treasons" were brutally applied.[19] In 1710, Dr. Henry Sacheverell preached and published two sermons supporting passive obedience and nonresistance to the king. When the Whig ministry attempted impeachment, many of Sacheverell's sympathizers rioted in the streets of London and tore down several opposition meeting houses because they believed their Church was being attacked. The leaders of the riot were charged with levying war against the king.[20]

Treason was considered the worst crime in England, as evinced by carefully designed statutes protecting the king. For example, a cleric could never claim that he had a right to be tried in the ecclesiastical courts for high treason; he had to face judgment in the king's secular courts.[21] The punishment for treason was grossly unique:

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18. The Treason Act, 1352, 25 Edw. III, st. 5, c.2 (1350). The other four acts considered treasonous were: (4) violation of the king's wife, eldest unmarried daughter, or wife of the heir apparent; (5) counterfeiting; (6) knowingly bringing counterfeit into the country, with fraudulent intent; and (7) slaying the Chancellor, Treasurer, or one of the king's justices.

19. According to Lord Campbell, a tragic application of this statute occurred when William Walker was hanged, drawn, and quartered for telling his son, "Tom, if thou behavest thyself well, I will make thee heir to the Crown." Mr. Walker was jokingly referring to his inn, known as the "Crown." The Court ruled that the language compassed the death of the king and that intent was irrelevant. *See* 1 J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 147-49 (1849 ed.). This account has been disputed. *See* E. FOSS, JUDGES OF ENGLAND 414-16 (1851). *See also* Finer, *Mens Rea, the First Amendment and Threats Against the Life of the President*, 18 ARIZ. L. REV. 863 (1976), for a discussion of the difficulties in applying the old English treason of "compassing" to the modern crime of threatening the life of the president.

20. B. CHAPIN, THE AMERICAN LAW OF TREASON 4-5 (1964). Another chilling example was the conviction of Algernon Sidney for writing an unpublished manuscript on government; the document was found in his study. Rex v. Sidney, Howell's *State Trials*, 9:818 (1683). William Twyn was literally carved up for writing a book supporting the right to revolt. Rex v. Twyn, Howell's *State Trials*, 6:513, 536 (1663).

21. C. REMBAR, THE LAW OF THE LAND 74-75 (1980).

> 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance at length ripened by humanity into law) a sledge or hurdle is allowed. . . . 2. That he be hanged by the neck and then cut down alive. 3. That his entrails be taken out and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the King's disposal.[22]

The Crown's power to confiscate all of the traitor's property added more injury to this savagery. Confiscation was particularly profitable during the Bloody Assizes, which were aptly named; over two hundred followers of Lord Monmouth, who led a revolt in 1685, were executed after they pled guilty upon assurances they would not be killed.[23]

Because there were relatively few treason trials in England and because the trial records that existed were scanty, Professor Hurst emphasized the work of English commentators in his leading study of treason. Hurst concluded that the commentators wanted to limit the scope of treason by requiring proof of an overt act to substantiate treasonable intent, thereby protecting thoughts and words.[24] All of the early commentators agreed (as did Hurst) that the crime of treason was needed to defend the state.[25]

Procedural protections for the defendant were introduced often in treason cases. The Treason Trials Act of 1696, a result of the 1688 Revolution, provided: (1) that a person could only be convicted of treason if two witnesses testified to the same overt act; (2) that the defendant could have a copy of the indictment and a list of the jury panel prior to trial; and (3) that the defendant could use the court's power to compel witnesses to attend the hearing.[26] This statute came too late for Sir William Parkins, who was brought to trial one day before it was to go into effect. He asked for counsel, granted in the new statute's preamble, but was told that the old law

22. 4 W. BLACKSTONE, COMMENTARIES 92 (Tucker's ed. 1803).

23. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 853-54 (1969).

24. Coke apparently wanted evidence of the overt act to prove that the plot had moved from thought to action, not to show intent: "So as it was not a bare compassing or plotting of the death of a man, either by word, or writing, but such an overt deed as is aforesaid, to manifest the same so as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing." 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 5 (1671). *See* J. HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS 56 (1971).

25. J. HURST, *supra* note 24, at 56.

26. The Treason Trials Act, 1696, 7 & 8 Wm., c.3 (1696).

still applied and that he could not postpone his trial. Parkins was convicted and executed.[27]

B. The Colonial Experience With Treason

The early colonial governments did not initially utilize England's treason laws; their definitions were idiosyncratic, frequently containing Biblical citations:

> If any person shall conspire, and attempt any invasion, insurrection, or publick Rebellion against this Jurisdiction, or shall endeavour to suprize, or seize any Plantation, or Town, any Fortification, Platform, or any great Guns, provided for the defence of the Jurisdiction, or any Plantation therein; or shall treacherously and perfidiously attempt the altheration and subversion of the frame of policy, or fundamentall Governmental laid, and settled for this Jurisdiction, he or they shall be put to death. *Num.* 16. 2 *Sam.* 18. 2 *Sam.* 20.[28]

These unique statutes were gradually replaced by language echoing England's statutes. Because of the unavailability of case law, the colonists primarily relied upon the English statutes and commentaries.[29] Yet there were continual attempts to broaden the definition of treason. In response to a local uprising, New York passed a law in 1691 which declared that any act committed "by force of arms or otherwise to disturb the peace good and quiet of this their Majestyes Government" was treason.[30] This statute was later repealed because "said Clause hath been of late misinterpreted to the oppression of her Subjects . . . ."[31] New York's legislators apparently assumed that the clause was capable of interpretation in the first place.

Before the American Revolution, the colonies used the English concept of "constructive treason." In his charge to the Grand Jury in 1765 and 1766, the Chief Justice of Massachusetts Bay defined High Treason as "[l]evying War against the King is High Treason; as where Peiople set about redressing public Wrongs: this, Gentlemen, the Law calls levying War against the King; because it is going in direct Opposition to the King's Authority, who is the Redresser of

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27. C. REMBAR, *supra* note 21, at 383-84.

28. LAWS OF NEW HAVEN COLONY 24 (1656) (Hartford ed. 1858).

29. J. HURST, *supra* note 24, at 71.

30. 1 COLONIAL LAWS (1664-1775) 223, 575 (1894).

31. 1 LABAREE, ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS (1670-1776) 157 (1935). The British also recommended that the colonists look to England's treason law for guidance.

all Wrongs."[32] According to Professor Hurst, such interpretations of the law of treason did not anger the revolutionaries, and were not a major factor either in causing the Revolution or in effecting the later Constitutional efforts to limit the meaning of the crime.[33]

C. Treason During the Revolution and Prior to the Constitution

When the American Revolution began, the new states did not immediately pass treason statutes, perhaps out of reluctance to make such a final step toward complete sovereignty.[34] Pressure for tougher laws and sanctions against political criminals came from the military, particularly from General Washington. On June 24, 1775, the Continental Congress passed the Articles of War, which outlawed sedition and several war crimes. Washington immediately used these laws to hang Thomas Hickey, a member of Washington's personal guard, for counterfeiting and recruiting for the British.[35]

No comparable power existed to punish civilians; Washington was initially unable to punish several civilians, including New York Mayor David Mathews, who worked with Hickey. The General forced the issue when he accused Mathews of treason and apprehended him.[36] On June 24, 1776 (not coincidentally just before the drafting of the Declaration of Independence), Congress recommended that each colony pass its own treason law. Drafted by Thomas Jefferson, the recommendation of June 24 provided the basic outline for all subsequent state statutes:

> That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the

32. QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 176, 221 (1865) *quoted in*, J. HURST, *supra* note 24, at 78.

33. J. HURST, *supra* note 24, at 82. The colonists knew their revolution was treason. Nevertheless, they were infuriated by a Parliamentary statute, passed in 1774, authorizing the Parliament to try any colonist accused of treason in England instead of in the colonies. This venue statute was probably the main source of the complaint in the Declaration of Independence: "For transporting us beyond seas to be tried for pretended offenses." *Id.* at 86.

34. B. CHAPIN, *supra* note 20, at 38.

35. *Id.* at 35-37. Hickey was found guilty of "sedition and mutiny, and also of holding treacherous correspondence with the enemy." 5 THE WRITINGS OF GEORGE WASHINGTON, FROM THE ORIGINAL MANUSCRIPT PROTECTED BY THE WRITTEN CONSTITUTION. IN A SOURCES 1745-1799 at 182 (J. Fitzpatrick ed. 1931-44). Benjamin Church, chief surgeon for the Continental Army, also committed treason. *See* B. CHAPIN, *supra* note 20, at 30-32.

36. Washington claimed that Mathews worked with Hickey. Mathews was not charged with treason by New York, but he was sent to Connecticut. *Id.* at 36. *See also* Nettels, *A Link in the Chain of Events Leading to American Independence*, III WM. & MARY Q., Sec. 3, 36 (1946).

> said colonies within the same, or be adherent to the King of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony.[37]

Jefferson's definition of treason duplicated the language of the English statute, except for an omission of the crime of compassing the death of the king, which was probably excluded for the simple reason that there was no king.[38]

The Continental Congress's proposal was not strictly complied with. The states preferred to define treason more broadly. A typical example is the following statute passed by New York on March 30, 1781, five years after the initial authorization.

> WHEREAS, altho' adhering to the Enemies of this State is by Law, High Treason against the People of this State; yet in Order more effectually to prevent an Adherence to the King of Great Britain it is deemed requisite that farther Provision should be made by law.
>
> *Be it therefore enacted* . . . That if any Person being a Citizen or Subject of this State, or of any of the United States of America and abiding or residing within this State, shall maliciously advisedly and directly by preaching, teaching, speaking, writing or printing declare or maintain that the King of Great Britain hath or of right ought to have, any authority or Dominion in or over this State or the inhibitants thereof, or shall maliciously and advisedly seduce or persuade or attempt to seduce or persuade any inhabitant of this State to renounce his or her allegiance to this State or to acknowledge allegiance or subjection to the King or Crown of Great Britain . . . and be convicted thereof shall be adjudged guilty of Felony and shall suffer the Pains and Penalties prescribed by Law in Cases of Felony without Benefit of Clergy. . . .[39]

In the same year, New Hampshire declared that persons committed High Treason if they wrote that the king had authority in the state.[40] New Hampshire's 1784 Constitution limited the death penalty to

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37. 5 JOURNALS OF THE CONTINENTAL CONGRESS 475 (1906); 6 FORCE, AMERICAN ARCHIVES, 4th ser. 1720 (1846).

38. J. HURST, *supra* note 24, at 87.

39. Laws of the State of N.Y., 1781 (4th Sess.), c. XLVII, 189.

40. 4 LAWS OF NEW HAMPSHIRE 384 (Batchellor ed. 1904). Jefferson drafted a Virginia statute providing for a fine not to exceed 20,000 pounds and imprisonment not exceeding five years

> if any person residing or being within this commonwealth shall . . . by any work, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power, of the king or parliament of Great Britain, heretofore claimed and exercised within this colony, or shall attribute any such authority, jurisdiction, or power, to the king or parliament of Great Britain.

Virginia, Oct., 1776, c. V, 9 HENING, STATUTES AT LARGE (1823). *See generally* L. LEVY, JEFFER-

murder and treason.[41]

Nor were the revolutionaries reluctant to use these vague laws to destroy support for Great Britain.[42] The treason trials in Pennsylvania were classic examples of selective use of indictments and punishments against political criminals. After the revolutionaries captured Philadelphia, five hundred people were charged with treason under a statute that defined the offense not only as levying war or adhering to the enemy, but also as failing to take an oath of allegiance to the State of Pennsylvania.[43] The supreme executive council then declared that anyone who refused to stand trial on such charges was a traitor.[44] Most of the charges were brought against city-dwelling Quakers, who were members of the old political and social order. Attacking the wealthy Quaker leadership was advantageous not only because it was, in the words of General John Armstrong, "to make examples of the more atrotious (sic),"[45] but also because the prosecutors could not be accused of class bias if they tried wealthy men.[46] The state's power to seize the property of anyone convicted of treason may have been another incentive to accuse the wealthy. Although the seizures proved to be unprofitable for the new regime, the government seized part of the Penn family lands

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SON & CIVIL LIBERTIES, THE DARKER SIDE (1963) [hereinafter cited as CIVIL LIBERTIES]; L. LEVY, LEGACY OF SUPPRESSION (1960) [hereinafter cited as LEGACY].

41. N.H. CONST. pt. 1, art. 18 (1784).

42. In 1781, Virginia indicted leaders of draft riots for treason, B. CHAPIN, *supra* note 20, at 74. After the victory at Yorktown, Virginia indicted many more British supporters; although many were sentenced to hang for treason, all were pardoned by the Virginia legislature. *Id.* at 62. After discussing the uses of treason law, including forfeiture, Chapin concluded that the liberal use of the pardon power and the reluctance to use capital punishment undercut the harshness of the statutory language: "Only a tiny minority of those charged with treason ever experienced the terror of the gallows . . . . There was no reign of terror. The record is one of substantial justice done." *Id.* at 71.

43. 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682-1801 at 18-19 (Harrisburg, 1896-1908).

44. B. CHAPIN, *supra* note 20, at 56.

45. R. CALHOON, THE LOYALISTS IN REVOLUTIONARY AMERICA 1776-1781 at 397 (1973), *quoting* General John Armstrong.

46. Prosecutor Joseph Reed explained:

> [O]ut of the great number of assistants of the British army two of the most notorious were convicted, but it would astonish you to observe the weight of interest exerted to pardon them . . . for none could be more guilty, but these being rich and powerful (both Quakers) we could not for shame have made an example of a poor rogue after forgiving the rich.

Reed to General Nathaniel Greene, Nov. 5, 1788, *quoted in* Meeham, The Pennsylvania Supreme Court in the Law and Politics of the Commonwealth 173 (Ph.D. diss., U. Wisc., 1960).

and distributed it to government supporters.[47] Out of the 113 people initially detained for treason, forty-five were sent to the grand jury. Twenty-two men were indicted and seventeen were tried.[48]

James Wilson led the defense in all the cases; he argued that English law was relevant and that treason should be given a restrictive reading. Chief Justice McKean's notes indicated that Wilson supported the English law because it was "ascertained and fixed." The Attorney General responded: "What was treason at common law, the arbitrary proceeding in arbitrary reigns are nothing to the present question." Wilson countered, "[i]f the Statutes are not extended here, we shall be all afloat as if we were before the [English statute]."[49] Considering the political climate, Wilson was remarkably successful, since only three of the men were convicted. Two of them, however, were sentenced to die.[50] Despite numerous requests for pardons, they were both hanged.[51] After the hangings, virtually everyone took the oath of allegiance and the Quakers no longer challenged the legitimacy of the fledgling state government.[52]

Along with James Wilson, Thomas Jefferson was particularly concerned about improper use of treason law. Jefferson bitterly remembered when British General Gage proclaimed in 1774 that citizens in Massachusetts committed treason if they assembled to consider grievances and formed associations for such purposes.[53] Jefferson noted, incorrectly, that the English statute had limited treason to certain specified actions, not including protests: "[T]his was done to take out of the hands of tyrannical Kings, and of weak

47. Boyd, *Political Choice-Political Justice: The Case of the Pennsylvania Loyalists*, in AMERICAN POLITICAL TRIALS 47-48 (M. Belknap ed. 1981).

48. *Id.* at 48.

49. J. HURST, *supra* note 24, at 119. Hurst believed that Wilson's defense of the Quakers and his conservative interpretation of the law reflected personal beliefs. *Id.* at 119. After the Revolution, Wilson reaffirmed his arguments in his lectures on law delivered to the College of Philadelphia in 1790 and 1791. *Id.* at 11.

50. B. CHAPIN, *supra* note 20, at 58.

51. Boyd, *supra* note 47, at 52. Conclusions about the justice of treason cases vary dramatically. Chapin concluded that the Quakers' trials "were examples of justice, not political reprisals." B. CHAPIN, *supra* note 20, at 59. Boyd disagreed: "Justice was political during the Revolution and because of the political choices they had made, in 1778 two Quakers became victims of this politicized justice." Boyd, *supra* note 47, at 54. Hurst, who concentrated on statutory language drafted during the Revolution, hedged: "None of the decisions in the Pennsylvania treason trials mounted to the level of a legal classic, but the opinions are marked by judicial restraint and it appears that the court was careful of the rights of the defendants." J. HURST, *supra* note 24, at 90. Such diverse opinions about both the process and the resolution of political trials are common.

52. Boyd, *supra* note 47, at 54.

53. 1 THE WRITINGS OF THOMAS JEFFERSON 206, 210 (Ford ed. 1893).

and wicked Ministers, that deadly weapon, which constructive treason has furnished them with, and which had drawn the blood of the best and honest men in the kingdom."[54] Jefferson believed that his draft of the Continental Congress's recommendation—that each state draft treason laws—usefully narrowed treason prosecution. He had used "the very words of the established law,"[55] which had legal precedent resisting judicial expansion. Jefferson thought that once punishment for compassing the king's death was excluded, constructive treason would no longer be possible. Jefferson's and Wilson's anxiety about treason was not just a reaction to mob violence or tyranny by the crown; both men knew they had committed treason by leading the Revolution. Furthermore, their treason was effective.

Jefferson was also concerned about the eagerness of other Americans to use the death penalty. Less than two months after writing the Declaration of Independence and the Continental Congress's recommendation on treason, he agreed with Dr. Edmund Pendleton's concern about excessively bloodthirsty laws, and explicitly considered the problem of executing traitors:

> The fantastical idea of virtue and the public good being a sufficient security to the state against the commission of crimes, which you say you have heard insisted on by some, I assure you was never mine. It is only the sanguinary hue of our penal laws which I meant to object to.

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54. *Id.* at 216.

55. Jefferson's concern about treason was probably influenced by the writings of Montesquieu a French political philosopher and jurist. Montesquieu argued that the greatest threat to political security came from public or private accusations, particularly improper charges of treason: "If the crime of high treason be indeterminate, this alone is sufficient to make the government degenerate into arbitrary power." MONTESQUIEU, THE SPIRIT OF LAWS 197 (1914). Montesquieu used history to support his theory that speech and writing should never be considered treason. A terrible example was the execution of Marsyas for dreaming that he had cut Dionysius' throat: "This was a most tyrannical action: for though it had been the subject of his thoughts, yet he had made no attempt toward it." *Id.* at 204. Montesquieu recommended that the law be limited to punishing appropriate overt acts, and that two witnesses be necessary in any capital case. *Id.* at 207. The two-witness requirement was particularly important in treason cases since perjury was so likely. *Id.* at 198. He concluded that moderation in punishing political crimes was necessary to protect the republican form of government: "Under the pretence of avenging the republic's cause, the avengers would establish tyranny. The business is not to destroy the rebel, but the rebellion." *Id.* at 211. Nevertheless, Montesquieu accepted the use of capital punishment in treason cases. *Id.* at 212. For a discussion of the influence of Montesquieu and Beccaria on the framers of the Constitution, see Schwartz and Wishingrad, *The Eighth Amendment, Beccaria and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975). I am less willing than the authors to incorporate totally the views of the Enlightenment thinkers: "To ignore these philosophers' theories of criminal law, therefore, would be tantamount to cutting oneself off from the very meaning of the Constitution." *Id.* at 813.

> Punishments I know are necessary, and I would provide them, strict and inflexible, but proportioned to the crime. *Death might be inflicted for murther and perhaps for treason if you would take out the description of treason all crimes which are not such in their nature*.[56]

D. The Drafting of the Treason Clause in the Constitution

The framers of the Constitution never heavily debated or analyzed the Constitution's treason clause. The initial proposals for the Constitution, the Pinckney and the New Jersey plans, recommended that Congress be allowed to define the crime.[57] However, the Committee of Detail, which included James Wilson, suggested that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies."[58] Wilson probably was responsible for this incorporation of English statutory language.[59]

During the Convention, James Madison criticized the proposed definition for being too narrow and for failing to leave adequate discretion to Congress.[60] James Mason defended the narrow scope by pointing out that old English law helped make the phrases more definite.[61] Since the Committee's proposal did not require any proof of any overt act, nor any requirement that the overt act be observed by two witnesses, the clause was amended; "Doctor Franklin wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence."[62] The cursory debate also considered the federal aspects of the crime. Madison argued that Congress and the states would have concurrent power to punish treason against the states, but only Congress could punish treason against the United States.[63]

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56. 1 PAPERS OF THOMAS JEFFERSON 505 (J. Boyd ed. 1950) (emphasis added).

57. B. CHAPIN, *supra* note 20, at 81.

58. J. HURST, *supra* note 24, at 129-30.

59. *Id.* at 136. Although there is no absolute proof, Hurst believes that Wilson was the author of the Committee's proposal. In his subsequent lectures to the Philadelphia College in 1790 and 1791, Wilson approved of the limitations on treason "In this manner, the citizens of the Union are secured effectually from even legislative tyranny; and in this instance, as in many others, the happiest, and most approved example of the other times has not only been imitated, but excelled." 2 THE WORKS OF JAMES WILSON 665 (R.G. McCloskey ed. 1967). Hurst believes such enthusiasm reflected pride of authorship, J. HURST, *supra* note 24, at 136.

60. 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 345-50 (1911). These five pages summarize the August 20, 1787, discussion of treason.

61. *Id.*

62. *Id.* at 348.

63. *Id.* at 346.

Although the treason clause did not play a central role in the ensuing ratification debates, there was some discussion of it. Madison, now the advocate, applauded treason's restrictive definition in *The Federalist*, No. 43: "[N]ew-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity of each other."[64] The Anti-Federalists never made the seemingly obvious argument that the treason language gave too much power to the central government due to its vagueness and its incorporation of English law, including the common law concept of "constructive treason" which defined riots as acts of levying war.[65] During the Virginia Convention, Patrick Henry, an Anti-Federalist leader, complained that the proposed Constitution allowed the possibility of "the most grievous oppressions." Federalist leader George Nicholas used the treason clause as part of his rebuttal:

> Treason consists in levying war against the United States, or in adhering to their enemies, giving them aid and comfort. The punishment for this well-defined crime is to be declared by Congress; no oppression, therefore, can arise on this ground. This security does away the objection that the most grievous oppressions might happen under color of punishing crimes against the general government. The limitation of the forfeiture to the life of the criminal is also an additional privilege.[66]

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64. THE FEDERALIST No. 43, at 290 (J. Madison) (J. Cooke ed. 1961). Madison's initial opposition to any definition seems odd given his fear that political factions could easily disrupt the new government. *See generally* G. WILLS, THE MAKING OF AMERICA (1981). Perhaps Madison initially wanted Congress to have such power as part of his hope to increase the strength of the central government. *Id.*

65. According to the decisions of the English courts, in 1787, the levying of war upon the king could consist in any effort by violence to fix or enforce public policy; and this was taken to include forcible resistance to the general execution of a law, or the attempt by force to deprive any class of the people of their rights under law, or to influence the king's choice of counsellors . . . . This, however, was doctrine better suited to an age of royal rather than of parliamentary power, and by the end of the eighteenth century English juries had reflected this basic shift in constitutional politics by acquitting of 'treason' several notable defendants who, like Horne Tooke or Lord George Gordon, had been at most guilty of inciting to riot.

J. HURST, *supra* note 24, at 6.

66. 3 J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 102-03 (2d ed. 1907). Henry was more concerned about the failure to outlaw cruel and unusual punishments.

> Congress, from their general powers, may fully go into the business in human legislation. They may legislate, in criminal cases, from treason to the lowest offense—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.

Nicholas' argument did not prove to be completely satisfactory.[67]

Professor Hurst believes that most leaders wanted flexibility in defining treason to crush violent uprisings such as Shay's Rebellion, which had occurred in Massachusetts the year before the Convention.[68] Captured after their abortive revolt, twelve members of the revolt were sentenced to death. Their fate was an important campaign issue in 1787, when John Hancock defeated Governor James Bowdoin, who wanted the rebels to die.[69] Hancock stopped all the executions but that of one defendant (who was apparently guilty of theft), and later pardoned the rest, including Shay.[70]

E. American Application of Treason After the Constitution

When Congress first convened in 1790, it immediately used its constitutionally granted power to establish the penalty for treason: traitors could be hanged until dead.[71] That same statute also incorporated the procedural protections found in England's Trial of Treasons Act: the defendant was to receive both a copy of the indictment and a list of witnesses at least three days before trial, he had the right to counsel and use of the court's power to subpoena

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Id. at 447.

> Again Nicholas relied upon the treason clause to rebut Henry.
>
> But the gentleman says that . . . we are not free from torture. Treason against the United States is defined in the Constitution, and the forfeiture limited to the life of the person attainted. Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution.

Id. at 451. Nicholas's views of Congress' limited power proved wrong. *See also* J. HURST, *supra* note 24, at 155-60.

67. The first amendment was added as additional protection against political tyranny. See generally J. HURST, *supra* note 24, at 155-60, for a discussion of the relationship between the treason clause and the first amendment. Nicholas's argument did not prove to be completely satisfactory, particularly to refute the Anti-Federalists' claim that the people needed the additional protection of a written Bill of Rights. The Anti-Federalists rejected the Federalists' argument that the treason clause provided adequate protection for freedom of speech and assembly, making the first amendment unnecessary. The first amendment was added as additional protection against political tyranny.

68. *Id.* at 127, 140 n.27.

69. H. APTHEKER, EARLY YEARS OF THE REPUBLIC 144-48 (1976).

70. *Id.* at 146.

71. 1 Stat. 112 (1790), 18 U.S.C. § 2381 (1976). The statute later was enlarged to include the alternative penalties of fines and imprisonment. This prompt use of the death penalty is powerful and relevant proof that the framers of the Constitution believed that such a sanction was constitutional. Since the 1790 act was passed the year after the Constitution was ratified, it is particularly significant in determining original intentions.

witnesses, and he could peremptorily challenge thirty-five potential jurors.[72]

The leaders of the new government aggressively used treason prosecutions against their political enemies. Many of the Constitution's advocates, including Wilson and Jefferson, worked together in 1794 to defeat the Whiskey Rebellion, a violent protest in Western Pennsylvania against the collection of federal whiskey excise taxes. An armed mob had burned down a tax collector's house; there had been sporadic gunfire. Proposals were made to a crowd of five thousand to attack a federal fort in Pittsburgh, but the group decided instead to conduct a noisy march through the city.[73] Alexander Hamilton, the originator of the tax, was eager to use the federal government's treason power and military power to crush the dissent; he successfully argued that the militia should be called out. But while an army of thirteen thousand was being assembled, the opposition disintegrated and many of the leaders fled. Thirty-five indictments for treason were sent to the grand jury, but only two men, John Mitchell and Philip Vigol, were convicted.[74] The main legal issue at the trials was the proper use of the two-witness requirement.[75] Rejecting Mitchell's argument, the trial court adopted the English doctrine construing "levying of war" to include armed political protest: "By the English authorities, it is uniformly and clearly declared, that raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent by force and terror, the execution of a law, is an act of levying war."[76] In *United States v. Vigol*,[77] the trial court concluded that high treason occurred when-

72. *Id.*

73. B. CHAPIN, *supra* note 20, at 86. James Wilson, by then a Justice of the Supreme Court, certified that the process of justice no longer existed in Western Pennsylvania. *Id.* Jefferson signed the official proclamation against the rebellion. CIVIL LIBERTIES, *supra* note 40, at 160. There was no split between the Federalists and the Republicans over suppressing this rebellion.

74. B. CHAPIN, *supra* note 20, at 87-88. For a more detailed discussion of the Whiskey Rebellion, see B. LELAND, WHISKEY REBELS: THE STORY OF A FRONTIER UPRISING (1939).

75. B. CHAPIN, *supra* note 20, at 88. For example, four witnesses saw Mitchell at a meeting prior to the attack on the tax collector's house, but only one witness claimed definitely to have seen Mitchell at the actual attack. The court concluded that the two episodes were a continuous event, thereby satisfying the two-witness rule. *Id.*

76. United States v. Mitchell, 26 F. Cas. 1277, 1278 (C.C.D. Pa. 1795) (No. 15, 788). The district attorney in Mitchell's case argued that the difference between English and American governments was irrelevant: levying war "must be the same, in technical interpretation, whether committed under a republican, or regal, form of government." *Id.*

77. 28 F. Cas. 376 (C.C.D. Pa. 1795) (No. 16, 621). Another tax revolt, the Fries Rebellion, also concluded with treason trials. Samuel Chase conducted the trial while claiming also to defend the unrepresented Fries. Chase held that intention was the factor that distinguished treason

ever an armed party attempted to render any Act of Congress null and void. A traitor, therefore, need not intend to overthrow the government. Both men were sentenced to die, but President Washington pardoned them and all the others who had fled.

When the Republicans gained power in 1800, led by Thomas Jefferson, they also used treason prosecutions against their political enemies.[78] Aaron Burr's alleged scheme—to become leader of a new nation in the western part of the country—led to several spectacular treason cases. The alleged "overt act" of levying war took place when a group of twenty armed men floated in rafts down the Ohio River. The only violence consisted of the group's threatening to kill a man who grabbed one of the leaders just before the voyage began.[79]

One of Burr's supporters, Dr. Eric Bollman, was the first to be tried. Bollman was willing to talk to Jefferson about the plot, but Jefferson was disappointed when Bollman said that Burr only wanted to conquer Mexico, not seize New Orleans and separate the West from the rest of the country. Jefferson convinced Bollman to put a confession in writing, and offered *"his word of honour* that they shall never be used against himself [Bollman], and *that the paper shall never go out of his hand*."[80] Jefferson then sent the signed confession to the United States Attorney, George Hay, advising Hay to use it only to structure the questioning or for impeachment purposes if Bollman contradicted the confession. Jefferson later told Hay to use the document affirmatively in trial.[81] Jefferson also of-

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from riot, while force was an element necessary to both crimes. Chase ordered that Fries should be hanged because it would be expensive to imprison Fries and his death would deter others: "The end of all punishment is example." Case of Fries, 9 F. Cas. 826, 934 (C.C.D. Pa. 1800) (No. 5, 126). Rejecting the advice of his cabinet that Fries should be killed, President Adams pardoned Fries and all the others associated with him. *See generally* B. CHAPIN, *supra* note 20, at 91-97.

78. After a young slave led an unsuccessful revolt in 1800, James Monroe wrote Jefferson, asking him how the many hundreds of slaves should be punished. Jefferson recommended that Monroe exercise whatever mercy he could. That mercy was scant—thirty-five slaves were executed while the rest were sold into slavery in the West Indies. *See* H. APTHEKER, *supra* note 69, 147-48.

79. B. CHAPIN, *supra* note 20, at 99. The Burr story has been told many times. *See generally* W. MCCALAB, THE AARON BURR CONSPIRACY (1936); T. ABERNETHY, THE BURR CONSPIRACY (1968); and N. SCHACHNER, AARON BURR, A BIOGRAPHY (1961).

80. Letter from Thomas Jefferson to Eric Bollman (Jan. 25, 1807), *reprinted in* 2 M. DAVIS, MEMOIRS OF AARON BURR 388 (1837). The words are allegedly Jefferson's, while the italics were presumably added by Davis or Bollman.

81. *See generally* correspondence between Jefferson and Hay in 1807, in 9 THOMAS JEFFERSON: CORRESPONDENCE PRINTED FROM THE ORIGINALS IN THE COLLECTION OF WILLIAM K. BIXBY 52-63 (W. Ford ed. 1916).

fered to pardon Bollman, who indignantly refused the offer since acceptance would imply guilt.[82]

All of Jefferson's manuevers failed. Chief Justice Marshall wrote an opinion for the Supreme Court holding that the evidence against Bollman was insufficient to support a treason indictment; Bollman's *habeas corpus* petition was granted.[83] Marshall discussed the danger of treason prosecutions: "As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry."[84] Marshall agreed with the policy, implied in the Constitution, to narrow the scope of the crime to avoid "those calamaties which result from the extension of treason to offence of minor importance."[85] Levying war must be more than conspiracy to levy war. Once treason has occurred, however, all involved would be considered traitors:

> It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men . . . to constitute a levying of war.[86]

One would have thought that Burr would then be easily convicted.

Jefferson's frustration turned to rage when Marshall, sitting as Circuit Judge, dismissed the treason charge against Burr. Burr had not been present when the small group sailed down the Ohio River and the prosecution had not pled in its indictment that Burr was constructively at the island. Marshall held that the indictment was defective: "[T]hat the conviction of the principal must precede the indictment of the accessory; that the indictment must be specific;

82. 1 REPORTS OF THE TRIALS OF COLONEL AARON BURR . . . FOR TREASON, AND FOR A MISDEMEANOR . . . IN THE CIRCUIT COURT OF THE UNITED STATES 21-30 (D. Robertson ed. 1808).

83. *Ex Parte* Bollman and *Ex Parte* Swartwout, 7 U.S. (4 Cranch) 23, 42 (1807).

84. *Id.* at 36. Marshall criticized frequent use of constructive treasons: "[T]he crime of treason should not be extended by construction to doubtful cases; and . . . crimes not clearly within the constitutional definition, should receive such punishment as the legislative in its wisdom may provide." *Id.* at 37-38.

85. *Id.* at 36.

86. *Id.* at 37.

that the charge must be proved as laid."[87] Jefferson's fury overwhelmed his hatred of tyranny—

> I did wish to see these people get what they deserved; and under the maxim of the law itself, that *inter arma silsent leges*, that in an encampment expecting daily attack from a powerful enemy, self-preservation is paramount to all law, I expected that instead of invoking the forms of law to cover traitors, all good citizens would have concurred in securing them. Should we have ever gained our Revolution, if we had bound our hands by manacles of the law, not only in the beginning, but in any part of the revolutionary conflict? There are extreme cases where the laws become inadequate even to their own preservation, and where the universal resource is a dictator, or martial law.[88]

Prior to the Civil War, treason charges were brought against a variety of political and religious leaders, such as Joseph Smith, the Mormon leader; Thomas Wilson Dorr, leader of a revolt in 1844 in Rhode Island; and John Brown, organizer of the attack on Harper's Ferry. The fates of these three men indicate the passions always found behind such charges. Smith was taken out of his jail by a mob and lynched; Dorr was convicted and sentenced to prison; and Brown was executed.[89]

The trial of Castner Hanway provides the best example of how easily a citizen could be charged with treason. Several Southerners were pursuing runaway slaves into Pennsylvania under the authority of the 1850 Fugitive Slave Law. When they arrived at a farmhouse and served the owner, William Parker, who was also a runaway slave, with a warrant for the slaves, Parker told them that there would be armed resistance. During the discussion, several armed blacks appeared, as did Castner Hanway, a white man who sympathized with the slaves and had written several pamphlets opposing slavery and the Fugitive Slave Law. The United States Deputy, riding with the slaveowner, commanded Hanway "to aid and assist in the prompt and efficient execution of this law." Hanway refused, recommending instead that the posse leave. When the posse refused, shots were fired. By the time the skirmish ended, the slaveowner was dead; his son was seriously wounded; and a cousin was severely beaten. The deputy and three others escaped un-

87. *See supra* note 82, at 13-18.

88. Letter from Thomas Jefferson to Dr. James Brown (Oct. 27, 1808) *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON 211 (Ford ed. 1898).

89. J. HURST, *supra* note 24, at 263-64. In his appendix, Hurst lists thirty-five instances in which the federal treason clause was interpreted by courts. *Id.* at 260-67.

harmed, while the blacks fled to Canada.[90] The South was outraged at the episode, and President Filmore agreed that charging Hanway with treason would be useful even if the legal case were weak.[91]

The government apparently had a sympathetic judge, who told the grand jury that treason "embraces not merely the act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination."[92] Part of Hanway's alleged treason was his publication and distribution of books and pamphlets which "contain[ed] therein, amongst other things, incitement, encouragement, and exhortations, to move, induce, and persuade persons held to service (slavery) in any of the United States by the laws thereof, who had escaped . . . to resist, oppose, and prevent by violence and intimidation, the execution of the said laws."[93] By the end of the trial, the judge had modified the scope of treason: "Resistance of the execution of a law of the United States accompanied with any degree of force, if for a private purpose, is not treason."[94] In addition, the judge held that the jury should not extend treason to doubtful cases. The jury acquitted Hanway.[95]

The Civil War was a massive act of treason, no matter how narrowly the term is defined. On July 17, 1862, Congress authorized a fine of up to $10,000 and punishment—varying from five years of hard labor to death—for anyone convicted of insurrection, conspiracy, or treason.[96] Political criminal charges were brought against several Indiana Democrats, including Lambdin Milligan, who viciously criticized Lincoln while running for governor in 1864. When one of Milligan's political allies, H.H. Dodd, was discovered associating with the Confederates, the Republican Governor counterattacked by calling all of Dodd's associates traitors. Dodd was arrested by a military tribunal after proposing revolt. After Dodd escaped, similar charges were brought against Milligan, who

90. Finkelman, *The Treason Trial of Castner Hanway*, in AMERICAN POLITICAL TRIALS 85-86 (M. Belknap ed. 1981).

91. *Id.* at 88.

92. Charge to the Grand Jury-Treason, 39 F. Cas. 1047, 1048-49 (C.C.E.D. Pa. 1851) (No. 18, 276).

93. The indictment is *reprinted in* J. ROBBINS, REPORT OF THE TRIAL OF CASTNER HANWAY FOR TREASON 18-19 (1852).

94. United States v. Hanway, 26 F. Cas. 105, 128 (C.C.E.D. Pa. 1851) (No. 15, 299).

95. Finkelman, *supra* note 90, at 96.

96. J. ARCHER, TREASON IN AMERICA 58-59 (1971).

was convicted and sentenced to die. As a result, the Democrats were defeated at the election.[97] But after the war, the Supreme Court reversed the conviction because Milligan should have been tried in civilian courts instead of in the military court. The Court emphasized the danger of political tyranny arising through political prosecutions:

> Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in the peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.[98]

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97. Klement, *The Indianapolis Treason Trials and Ex Parte Milligan*, in AMERICAN POLITICAL TRIALS 103-113 (M. Belknap ed. 1981). Milligan was charged and convicted of:

1. Conspiracy against the government of the United States
2. Affording aid and comfort to the rebels against the authority of the United States
3. Inciting insurrection
4. Disloyal practices
5. Violations of the laws of war.

Id. at 110.

98. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866). But the Milligan court apparently accepted the use of the death penalty for certain political crimes.

> Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an enormous crime when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct. It is said the severity of the laws caused them; but Congress was obliged to enact severe laws to meet the crisis; and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

Id. at 130. Indeed, the government did not severely punish the rebels. Jefferson Davis was in-

After the Civil War, the variety of indictments against political opponents demonstrated how the Constitution's attempt to regulate treason could easily be avoided by alleging or creating other crimes. The leaders of the strike that led to the 1892 Homestead Riot were charged with treason;[99] Eugene Debs was convicted of violating the Espionage Act for opposing the draft during World War I;[100] Billings and Moody were convicted (probably improperly) of murder after the July 22, 1915, Haymarket Square bombing;[101] and Jeremiah O'Leary was charged but acquitted of "conspiracy to commit treason" for organizing an American division of the Sinn Fein society, which opposed British occupation of Ireland.[102] It is difficult to define clearly any political crime, much less to distinguish between different types of political crimes.

United States v. Robinson[103] is significant because of Judge Learned Hand's opinion. Robinson had been charged with treason because he had carried messages, and had made an anti-war speech on August 17, 1917. Judge Hand narrowly construed the constitutional definition of treason; not only must the two witnesses testify to the whole overt act, but also the act itself must openly manifest treasonous intent. Thus, the act could not be a neutral act; it had to be an obviously political or violent act. Hand noted that the two-witness rule dated back to the Spanish Inquisition, when two wit-

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dicted for treason, but he was never tried. *See* Case of Jefferson Davis, 7 F. Cas. 63 (C.C.C.D. Va. 1867-1871) (No. 3, 631a). *See also* Watson, *Trial of Jefferson Davis*, 24 YALE L.J. 669 (1915). President Johnson's pardon prevented any treason trials from being completed.

99. The Chief Justice's charge to the grand jury was extremely broad:

> [A] mere mob, collected upon the impulse of the moment, without any definite object beyond the gratification of its sudden passions, does not commit treason, although it destroys property and takes human life.
>
> But when a large number of men arm and organize themselves by divisions and companies, appoint officers and engage in a common purpose to defy the law, to resist its officers, and to deprive any portion of their fellow-citizens of the rights to which they are entitled under the Constitution and laws, it is a levying of war against the state, and the offense is treason.

Commonwealth v. O'Donnel, 12 Pa. C. 97, 104-05 (1892) (Paxson, C.J.). Hurst concluded that such attempts to create "constructive treasons" were rare; the O'Donnel case "met with prompt and unanimous criticism from conservative professional sources." J. HURST, *supra* note 24, at 200.

100. Debs v. United States, 249 U.S. 211 (1919).

101. J. ARCHER, *supra* note 96, at 63-68.

102. *Id.* at 72. The jury may have acquitted O'Leary in part because one witness was exposed as a spy and another as a perjurer. *Id.*

103. 259 F. 685 (S.D.N.Y. 1919).

nesses were needed to prove heresy.[104] Judge Hand was taking a stricter approach to political crimes than was the Supreme Court, which affirmed the convictions of such dissenters as Debs,[105] Stilson,[106] and Schaefer.[107]

The trial of Communist organizer Angelo Herndon for "attempting to incite insurrection" against the State of Georgia provides another dramatic example of the inherently elusive definitions of political crimes and of the peculiar nature of political trials, which more than any other type of trial evolve into forums for debate, not for ascertaining particular facts.[108] During the Depression, Herndon helped organize in Georgia a racially mixed demonstration requesting emergency relief. After the county commissioners voted $6,000 in relief, the police arrested Herndon, a black born in Ohio, because he had tried to recruit members for the Communist Party and had distributed such literature as the *Daily Worker*. The death penalty was authorized for conviction under the state statute outlawing insurrection.[109]

The trial was sordid. The Assistant Solicitor referred to Herndon as "this darkey." Another prosecutor conveniently blurted out during questioning about equal rights for Negroes: "You understand that to mean the right of a colored boy to marry your daughter, if you have one?" Herndon's testimony consisted of the proud declaration of his allegiance to the Communist Party and to the goal of organizing white and black workers so that they could fight their mutual enemy, the capitalists. Both sides concluded with passionate closing arguments. Having joined the Communist Party the night before, Herndon's attorney said that "[a]ny other verdict [aside from not guilty] will be a mockery of justice; any other verdict will be catering to the basest passion of race prejudice. . . ." The prosecutor begged the jury to "send this damnable anarchistic Bol-

104. *Id.* at 691-92.

105. 249 U.S. 211 (1919).

106. Stilson v. United States, 250 U.S. 583 (1919).

107. Schaefer v. United States, 251 U.S. 466 (1919).

108. Professor Kirchheimer argues that political trials are different from ordinary criminal trials in part because "[i]n such cases legal and political considerations constantly intertwine and the outcome of official deliberations depends as much on the political goals of the incumbent administration as on the feasibility consideration of its legal technicians." O. KIRCHHEIMER, POLITICAL JUSTICE 196 (1961). Kirchheimer discusses the differences in detail. *Id.* at 48-53.

109. Herndon v. Lowry, 301 U.S. 242, 245-46 (1936).

sheviki" to the electric chair.[110] The jury found Herndon guilty, but recommended mercy.[111] Herndon received a lengthy prison sentence.

Herndon's first appeal to the Supreme Court was denied for lack of jurisdiction,[112] but his successful *habeas corpus* petition provided the court full review of the statute and the conviction. The majority applied the "clear and present danger" test by analyzing the statute to determine if Herndon could "reasonably foretell" what action was insurrection.[113] Although the Court did not strike down the statute for being so vague as to be facially unconstitutional, the Court held that: "[T]he statute as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect on the future conduct of others."[114] Most political speeches have just such an intent: since Herndon was charged only with speaking, recruiting, and distributing literature, the case was remanded. Georgia did not pursue the case; Herndon was set free after five years in jail.[115] This due process argument of adequate advance notice can be used to demand a more precise definition of treason, particularly when the prosecution seeks death.

In the aftermath of World War II, the Supreme Court reviewed three treason convictions. Since *Ex Parte Bollman* only decided that the government had not presented adequate evidence to warrant commitment of Burr's associate on a treason charge for levying war, the Court was fully interpreting the treason clause for the first time. The three World War II cases are arguably inconsistent—each side has precedent to support broad or narrow interpretations of which overt acts are adherence to the enemy. The possible incon-

110. *See generally* Martin, *The Angelo Herndon Case and Southern Justice*, in AMERICAN POLITICAL TRIALS 117-99, at 177 (M. Belknap ed. 1981).

111. *Id.* at 187.

112. Herndon v. Georgia, 295 U.S. 441 (1935).

113. 301 U.S. at 262. Do the treason definitions provide any more guidance to a political dissident attempting to reasonably foretell which of his planned actions are illegal? Since the doctrine of constructive treason still exists, at least in defining the term levying war, a defendant could argue that such a definition is unconstitutionally vague. Yet it is a bit absurd to argue that the Constitution's own language is unconstitutionally vague. The framers were aware of the ambiguity in the treason clause, and welcomed the flexibility the language gave them. Perhaps the similarity between a proper definition of insurrection and treason's definitions explains why the Court chose to remand the case rather than hold that the statute was unconstitutional on its face.

114. *Id.* at 263-64.

115. Martin, *supra* note 110, at 194.

sistency is vivid because two of the cases emerged out of the same series of events. During the war, the F.B.I. arrested eight German saboteurs who had landed on the Florida coast in rubber rafts launched from a U-Boat. The Germans were tried for war crimes by a military tribunal and were not given the right to a jury, which they claimed violated the sixth amendment. The Supreme Court disagreed, holding in *Ex Parte Quirin*[116] that Congress had the power to create such tribunals and that the Constitution did not require juries in such cases, partially because civilians and uniformed prisoners have more rights than spies. Although most of the saboteurs had once been American citizens, the Court rejected their additional argument that the law of treason, with its constitutionally required standards and procedures, had to be applied; the Court summarily stated that the absence of uniform is an essential part of the war crimes case, but is irrelevant in treason cases.[117] Justice Holmes, in *Frohwerk v. United States*,[118] had previously rejected similar arguments that treason preempted all other political crimes and that the constitutional standards had to be strictly complied with. With a lack of analysis similar to the deficient analysis in the *Quirin* case, Holmes wrote:

> Some reference was made in the proceedings and in argument to the provision in the Constitution concerning treason, and it was suggested on the one hand that some of the matters dealt with in the Act of 1917 were treasonable and punishable as treason or not at all, and on the other that the acts complained of not being treason could not be punished. These suggestions seem to us to need no more than to be stated.[119]

Holmes could have argued that the framers never intended treason to be the exclusive political crime; the Alien and Sedition Act was passed in 1798. Nevertheless, the Supreme Court should be reluc-

116. 317 U.S. 1 (1942).

117. *Id.* at 38.

118. 249 U.S. 204 (1919).

119. *Id.* at 210. Professor Hurst was disappointed in Holmes's conclusory analysis, given the extensive evidence that the framers of the Constitution feared that treason prosecutions could be abused. The procedural and definitional protections would be virtually meaningless if they could be ignored merely by not labelling the crime as treason. Yet the Alien and Sedition Act was passed almost immediately after the drafting of the Constitution; therefore, treason was not the only conceivable political crime. Hurst tentatively agrees with Holmes's result, if not with his methodology. But Hurst concludes: "[T]he restrictive definition of treason carries an admonition of policy concerning the application of such statutes which has not yet been presented with its due weight of persuasion." J. HURST, *supra* note 24, at 166.

tant to allow the government to escape the requirements of the treason clause.

The treason clause also was raised with respect to two Americans who had contacts with the saboteurs. The F.B.I. had discovered the Germans' plot near its inception and had put the saboteurs under surveillance, during which the spies contacted Cramer, a friend of one of the saboteurs when the saboteur lived in America, and Haupt, father of one of the spies. Unlike the saboteurs, Haupt and Cramer were tried and convicted of treason in federal district court. Cramer received a forty-five year prison sentence,[120] while Haupt was initially sentenced to die. When his case was retried, Haupt received life imprisonment and a $10,000 fine.[121]

Constrained by the two-witness requirement,[122] the government could prove only that Cramer twice had lunches with several of the Germans; were those meals "overt acts," as defined in the Constitution? Cramer proposed Learned Hand's restrictive interpretation in *Robinson* by arguing that the meals did not demonstrate in themselves any intention to adhere to the enemy. The prosecution recommended use of traditional conspiracy law—any act which furthers the conspiracy in any way is an overt act. The government's secondary argument, held in reserve, was that Cramer gave aid and comfort to the spies by publicly mingling with them so that, seen with a respectable American, they would be less visible.[123]

Setting aside Cramer's conviction, Justice Jackson wrote the opinion for five members of the Court. Jackson's review of the history of treason emphasized the framers' fear of abuse. Jackson rejected definitions of "overt" acts proposed by both sides: "The very

120. The trial court said at the time of sentencing, "I shall not impose the maximum penalty of death. It does not appear that this defendant Cramer was aware that Thiel and Kerling [the German Saboteurs] were in possession of explosives or other means for destroying factories and property in the United States or planned to do that . . . . If there were any proof that they had confided in him what their real purposes were, or that he knew or believed what they really were, I should not hesitate to impose the death penalty." Cramer v. United States, 325 U.S. 1, 5-6 (1944) (quoting trial court).

121. Haupt v. United States, 330 U.S. 631, 632 (1947). *See* 47 F. Supp. 832 (N.D. Ill. 1942), *rev'd*, 136 F.2d 661 (7th Cir. 1943). (The first case was reversed for a violation of the *McNabb* rule and improper joinder of defendants.) The subsequent conviction was affirmed by the court of appeals, 152 F.2d 771 (7th Cir. 1946).

122. Cramer took some of the saboteurs' funds for safekeeping, but this fact was not considered by the Supreme Court in determining intent, even though Cramer had admitted the deed: "[T]he protection of the two-witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given." 325 U.S. at 33.

123. *Id.* at 37-38.

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."[124] Lunch for three was not enough.

While Jackson's case-by-case technique could not provide clear direction for the future, it avoided limiting treason to actual participation in violent deeds, as Cramer had proposed, or expanding treason to include any knowing contact with any enemy agent. Either of those interpretations would have been easier to apply. Professor George Fletcher characterized Jackson's compromise as a blending of the overt act requirement with the substantive standard of aiding and abetting.[125]

Jackson's test was used to sustain the conviction of Hans Haupt two years later. Haupt had provided a downstairs apartment for his son (who was one of the saboteurs), bought him a car, and helped him get a job at a defense plant. Although such actions were consistent with the normal responses of a loving father, Haupt knew that his son was working for Germany and thus knowingly helped the German cause. Such assistance,[126] given to a known enemy, provided sufficient proof of aiding and abetting; the government did not have to show "proof of purpose" or "unequivocal" acts, and the jury could reasonably infer treasonous intent from Haupt's aid.[127]

Justice Douglas consistently wanted the Court to expand the definition of treason to cover any overt act which proved the defendant had moved from the realm of thought to the realm of action. He dissented in *Cramer* because Cramer had acted by eating with the enemy. In *Haupt*, Douglas concurred, criticizing the plurality for convicting Haupt while freeing Cramer since there was no meaningful distinction between the two cases.[128]

In his dissenting opinion, Justice Murphy agreed with Douglas that there was no distinction between *Cramer* and *Haupt*; Haupt also should not have been convicted of treason. Murphy applied Judge Hand's definition of an overt act—the act must be "consistent only with the treasonable intention."[129] Using as an example a citizen's giving a military map to a known saboteur, Murphy argued

124. *Id.* at 34 (footnote omitted).
125. Fletcher, *The Case for Treason*, 41 MD. L. REV. 193, 204 (1982).
126. 330 U.S. at 635.
127. *Id.* at 641.
128. *Id.* at 644-46 (Douglas, J., concurring).
129. *Id.* at 647 (Murphy, J., dissenting).

that the act must manifest "treason beyond all reasonable doubt."[130] Haupt's aid to his son was too ambiguous to prove treasonous intent. By so limiting the types of acts that could be used to infer treasonous intent, Murphy was reserving use of the crime against the most obviously dangerous traitors.

Douglas's broad interpretation of the clause gained influence when he wrote the opinion, agreed to by four Justices, in *Kawakita v. United States*.[131] Kawakita, an American of Japanese descent, had supported Japan prior to the war. Kawakita lived in Japan before the two countries declared war and remained in Japan after Pearl Harbor. He worked in a war materials factory during the war. While at the factory, he supervised several American prisoners of war, frequently swearing at them and beating them. Justice Douglas first rejected, as a nonreviewable jury decision, Kawakita's argument that he had renounced his citizenship and consequently could not be tried for treason. Douglas found that Kawakita's hostility to the prisoners was treason. Dicta in the opinion indicated that working in the factory might have been sufficient: "In these days of total war manpower becomes critical and everyone who can be placed in a productive position increases the strength of the enemy to wage war."[132] Douglas seized upon Chief Justice Marshall's dicta in *Ex Parte Bollman* to affirm the broad scope of treason: "If war be actually levied . . . all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."[133]

Another recent episode demonstrates the uses and abuses inherent in the prosecution of those charged with political crimes. William Bell harmed national security by selling to a Polish agent documents describing the F-15's radar system, the weaknesses of the TOW anti-armor missile (which hits its moving target so long as the gunner keeps the cross hairs of the viewer on the target), and the techniques explaining "quiet radar," which was to be used on the B-

130. *Id.* at 648.

131. 343 U.S. 717 (1952). Justices Clark and Frankfurter did not participate in the case. Justices Black and Burton joined Chief Justice Vinson's dissent, which stated that Kawakita had renounced his citizenship during the war and thus could not be convicted of treason. *Id.* at 745-46.

132. *Id.* at 734.

133. 8 U.S. 45, 126 (1807).

1 Bomber.[134] Bell was convicted of treason, but was sentenced to only eight years in prison because he had helped the FBI trap the Polish spy, who was sentenced to life imprisonment.

The handling of the political trials discussed above validates political scientist Otto Kirchheimer's view that such cases are radically different from other criminal cases. The prosecution may have many motives for bringing cases, and the inevitably vague definition of any political crime creates a temptation to attack any perceived political enemy. This country has not been immune from such behavior. Outlawing the death penalty is one way to preserve the existing flexibility inherent in treason's two definitions while preventing the administration from being tempted to kill, either unnecessarily or improperly, its political opponents. With this background, we can now consider the primary legal argument that would probably be made against the killing of those guilty of treason: execution would constitute illegal "cruel and unusual punishment" under the eighth amendment.

III. History of Cruel and Unusual Punishment

A. The Framers' Interpretation

The eighth amendment's prohibition against cruel and unusual punishment also evolved from English law. According to Anthony Grannuci, something was lost in the transportation. Grannuci believes that the English Bill of Rights of 1689, which prohibited cruel and unusual punishments, was drafted to outlaw excessive punishments, not to prohibit certain punishments, such as torture, for being cruel *per se*. But the Constitutional framers used the latter meaning, perhaps because there was so little English precedent actually applying the language.[135]

When the Virginia delegates met in 1776 to decide if they should declare independence from Great Britain, they also considered internal affairs and drafted a Declaration of Rights. George Mason proposed a bill of rights and a constitution, including a section which adopted the prohibition against cruel and unusual punishments contained within the English Bill of Rights of 1689. That same language was used later by eight other states and by the fed-

134. Sixty Minutes, March 14, 1982, Vol. XIV, Number 24, at 5-6 (transcript, CBS Television Network broadcast, 7:00-8:00 P.M., EST).

135. Granucci, *supra* note 23.

eral government in the Northwest Ordinance of 1787.[136] Grannuci agrees with Leonard Levy that the clause became constitutional "boiler-plate"—undebated rhetoric that did not interest the politicians.[137]

But the Anti-Federalists claimed that the failure to include such amendments in a bill of rights flawed the proposed Federal Constitution. Patrick Henry feared the use of tortures and other barbarous punishments if there were no prohibition against cruel and unusual punishments.[138] After initially denying the need for amendments, the Federalists silenced such criticisms by including a Bill of Rights. Discussion about the eighth amendment was limited; two members of the First Congress briefly complained about the phrase's ambiguity:[139]

> MR. SMITH, (of South Carolina), objected to the words 'nor cruel and unusual punishments;' the import of them being too indefinite.
> MR. LIVERMORE (of New Hampshire)—the clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villians often deserve whipping, and perhaps having their ears cut off, but are we in future to be prevented from

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136. *Id.* at 840.

137. *Id.* at 840-41. Professor Levy has made a career out of revealing the nonlibertarian actions of the framers. His description of the amendment process is sarcastic.

> The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles-or for some of them. That task was executed in a disordered fashion that verged on ineptness. The inclusion or exclusion of any particular right neither proved nor disproved its existence in a state's colonial history.

L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 411 (1968).

Other historians find the framers' commitment to liberty to be greater than in the present: "Perhaps individual liberty has become a secondary concern, subordinate to the paramount issue of safety of the nation. It is quite likely that the great men of the Revolution would be extremely uncomfortable in such a climate of opinion, since they had risked their lives for the principle that individual liberty was the *sine qua non* of good government." R. RUTLAND, THE BIRTH OF THE BILLS OF RIGHTS: 1776-1791, at 230 (1955). Historian Adrienne Koch praises Jefferson and Madison without reservations: "For no other two men in the American past had a more pervasive philosophy of democracy, a firmer faith in human intelligence, or a more progressive view of the American experiment as a 'workshop of liberty.'" A. KOCH, JEFFERSON AND MADISON iv (1964).

138. 3 J. ELLIOT, *supra* note 66, at 447-48.

139. Smith (South Carolina) and Livermore (New Hampshire) were the two members who found the phrasing to be indefinite. 1 ANNALS OF CONG. 782-83 (1789).

inflicting these punishments because they are cruel?[140]

The framers had available to them alternative constitutional limitations on punishments which more clearly prohibited disproportionate penalties and outlawed inherently brutal penalties. For example, New Hampshire's Constitution had created a hierarchy of crimes very relevant to this article's subject:

> All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, *which they do to those of murder and treason*; where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.[141]

An opponent of the death penalty in treason cases would have a difficult time showing that his position is consistent with the framers' original conception of cruel and unusual punishment.

B. Supreme Court's Definition of Cruel and Unusual Punishments

1. Early Cases

Wilkerson v. Utah[142] is the first Supreme Court case that considered the eighth amendment. Wilkerson was not challenging the use of the death penalty, but only the decision to use a firing squad instead of a noose. The Court concluded that such a form of execution was not cruel *per se*, particularly when compared to hanging.[143] This result is not surprising since the death penalty was used frequently after the ratification of the Constitution. South Carolina had authorized its use against 165 crimes,[144] while Kentucky reformed its laws by limiting the sanction to murder.[145]

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140. *See, e.g.*, R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 29-58 (1982).

141. N.H. CONST., Bill of Rights art. 1, § 18 (1783), in 1 THE BILL OF RIGHTS 377 (B. Schwartz ed. 1971) (emphasis added). South Carolina's Constitution recommended that the legislature make punishments "more proportionate to the crime." S.C. CONST. § XL (1778), *id.* at 335. This sentiment had also been expressed in the 1776 Pennsylvania Constitution, PA. CONST. § 38 (1776).

142. 99 U.S. 130 (1878).

143. *Id.* at 136-37.

144. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 250 (1973).

145. *Id.*

In Re Kemmler[146] reinforced the argument that the *Wilkerson* Court had impliedly found the death penalty a permissible type of punishment. The *Kemmler* Court distinguished cruel punishments from the death penalty: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."[147] Casting doubt on the strength of the above statement, perhaps reducing it to dictum, was the Court's expressed doubt about the applicability of the eighth amendment to the states. The *Kemmler* Court also observed that the judiciary should defer generally to the legislature in choosing the mode of execution.[148] The Court was adopting the framers' views that the eighth amendment proscribed certain types of punishments; the 1689 English statute's emphasis on proportionality was not considered.

Two years later, three dissenting Justices in *O'Neil v. Vermont*[149] added the factor of proportionality, stating that an otherwise acceptable type of punishment could be cruel because it was disproportionately severe, given the crime. O'Neil had been fined $9,140 for 475 separate offenses of selling liquor without a license. By ruling that the eighth amendment did not apply to the states, the majority did not reach the merits of the state court's holding that the punishment was not cruel because of the sentences' cumulative effect as long as no single punishment was excessive.[150] Justice Field dissented, maintaining that in comparison with other crimes, the severity of the punishment was both unusual and cruel.[151] Justice Harlan agreed, noting the character of the offenses committed.[152]

146. 136 U.S. 436 (1890). The majority referred to the Parliament Act of 1688 to support its interpretation of cruelty:

> So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.

Id. at 446. Thus, the Court was misinterpreting an Act which was actually more concerned with proportionality than with certain forms of punishment. *See* Granucci, *supra* note 23.

147. *Kemmer*, 133 U.S. at 447.

148. *Id.*

149. 144 U.S. 323 (1892).

150. *Id.* at 331.

151. *Id.* at 339 (Field, J., dissenting).

152. *Id.* at 371 (Harlan, J., dissenting).

Although for many years it was perceived as limited to its bizarre facts, *Weems v. United States*[153] was the most important interpretation of the eighth amendment prior to the recent death penalty cases. In *Weems*, a majority of the Court held that an excessive punishment could be an unconstitutionally cruel punishment. Weems was a federal disbursing officer charged with intentionally defrauding the United States Government in the Phillipine Islands by making false entries concerning wage payments. After his conviction, Weems was sentenced to fifteen years in hard labor (constantly having to wear chains on his ankles and wrists), a 4,000 pesetas fine, costs, and, upon release, loss of his rights to vote, to hold public office, or to receive retirement pay.[154] The prosecution did not have to prove the element of intent to convict Weems under the statute. After discussing the history of the eighth amendment and prior Court interpretations, Justice McKenna concluded that the eighth amendment was a dynamic part of the Constitution: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions."[155]

Justice McKenna compared Weems's punishment to punishments authorized for other crimes—including certain degrees of homicide, misprision of treason, forgery of bonds and robbery: criminals convicted under those laws could not fare as poorly as had Weems.[156] McKenna rejected the government's argument that the death penalty was more severe yet was not considered cruel, thereby making Weems's appeal inappropriate since he had not received that ultimate sanction: "It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind."[157]

Seven years later, Oliver Wendell Holmes drastically reduced the impact of *Weems*. Writing for an unanimous court in *Badders v.*

153. 217 U.S. 349 (1910). *Weems* has been frequently analyzed. *See* Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145 (1967); Schwartz and Wishingrad, *supra* note 55.

154. 217 U.S. at 357-58.

155. *Id.* at 373.

156. *Id.* at 380.

157. *Id.* at 377.

United States,[158] Holmes affirmed Badders's cumulative prison sentence of thirty-five years for being convicted of seven separate offenses of mail fraud by depositing seven letters into a box. Justice Holmes refused to apply the *Weems* technique of comparing crimes and their respective penalties to determine the constitutionality of a given penalty. Holmes instead endorsed the holding in *Howard v. Fleming*[159] where the Court had said, "[t]hat for other offenses which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel."[160] Holmes's approach appeared to limit *Weems* to its facts.

2. *Pre-Modern Cases*

The Supreme Court did not consider any other eighth amendment cases until the 1940's. Implying once again that the death penalty was constitutional, the Court affirmed a capital sentence for kidnapping (with no murder) in *Robinson v. United States* in 1945.[161] Two years later the Court rejected an inmate's claim that his rights under the due process clauses and the eighth amendment were violated when the state of Louisiana wanted to return him to the electric chair after the first electrocution had failed.[162] The *Resweber* majority used *Kemmler* to hold that an unconstitutional punishment had to be something worse than taking a life in the most humane way possible: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."[163] Justice Frankfurter concurred in the opinion and commented that there are considerations aside from necessity. "It [the eighth amendment] did mean to withdraw from

158. 240 U.S. 391 (1916). Holmes found that the apparently neutral act of mailing a letter can be enough of an "overt act" to justify criminal conviction: "Intent may make an otherwise innocent act criminal, if it is a step in a plot." *Id.* at 394. Of course, it is not logically necessary that the definition of "overt act" for most crimes should be the proper definition of "overt act" for treason, since treason presents more difficult problems of definition and of prosecutorial abuse.

Badders' acceptance of cumulative sentences is factually similar to the *O'Neil* opinion. Since the *O'Neil* dissent had been accepted by the *Weems* majority, Holmes was telling all defendants that comparative analysis of punishments for different crimes and/or challenges to cumulative sentences were not going to be successful grounds for striking down most sentences. For years *Weems* was not a very powerful precedent.

159. 191 U.S. 126 (1903).

160. *Id.* at 135-36.

161. 324 U.S. 282 (1945).

162. Louisiana v. Resweber, 329 U.S. 459 (1947).

163. *Id.* at 463.

the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom."[164] Defendants then began challenging the process used in deciding if they should be executed.[165]

The conviction and execution of Ethel and Julius Rosenberg for selling atomic secrets to the Russians has been a continual source of controversy. Although the Supreme Court considered the case several times and eventually affirmed the trial court's death sentence,[166] the Court never discussed Judge Frank's rejection of the

164. *Id.* at 468 (Frankfurter, J., concurring).

165. Williams v. New York, 337 U.S. 241 (1949), was the first of a series of cases challenging the constitutionality of the process used in determining who should die. Williams unsuccessfully argued that he had a due process right to be able to cross-examine witnesses during the sentencing hearing by the Court, particularly after the jury had recommended life imprisonment. The Court concluded that the death penalty did not change normal procedural rights; although retribution was not the dominant purpose of punishment, the punishment was directed at the offender, not merely at the crime. Probation reports were useful for the trial court, and thus should be admitted.

In Solesbee v. Balkcom, 339 U.S. 9 (1950), the Court held that an inmate had no right to challenge the clemency process used to determine if he had become insane after he was sentenced to death.

Williams v. Oklahoma, 358 U.S. 576 (1959), rejected the defendant's double jeopardy argument and the defendant's contention that he could not be executed for kidnapping after he had received only a life sentence for a murder in the same case. The Court preferred to defer to the legislature: "But the Due Process Clause of the Fourteenth Amendment does not, nor does anything in the Constitution, require a State to fix or impose any particular penalty for any crime it may define or to impose the same or 'proportionate sentences for separate and independent crimes.'" *Id.* at 586.

In 1961, the Court overturned a Georgia law prohibiting a defendant in a capital case from testifying under oath on his own behalf although he could make only a "statement." Ferguson v. Georgia, 365 U.S. 570 (1961). In 1967, the Court held that a defendant's right to a jury in a kidnapping case was unconstitutionally compromised when the law authorized the death penalty only if the defendant requested a jury trial instead of a bench trial. United States v. Jackson, 390 U.S. 570 (1968).

The power of the State to exclude as a matter of law all those who were opposed to capital punishment was considered a violation of the defendant's right to be tried by a cross-section of the community: "[T]his jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." Witherspoon v. Illinois, 391 U.S. 510, 518 (1967).

Although the issue of the underlying validity of the death penalty was attacked in Boykin v. Alabama, 395 U.S. 238 (1969), the Court reversed the conviction because the plea had not been sufficiently voluntary—the defendant did not know what rights were being waived.

166. United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952). The lengthy list of citations indicate the complex development of the case: *cert. denied*, 344 U.S. 838 (1952), *reh'g denied*, 344 U.S. 889 (1952), *cert. denied*, 345 U.S. 965 (1953), *stay of execution denied*, 345 U.S. 989 (1953), *reh'g denied*, 345 U.S. 1003 (1953), *motion for leave to file original writ of habeas corpus denied*, 346 U.S. 271 (1953), *stay vacated*, 346 U.S. 273 (1953), *stay granted*, 346 U.S. 313 (1953), *stay denied*, 346 U.S. 322 (1953), *motion denied*, 346 U.S. 324 (1953).

Rosenbergs' claim that their execution would be unconstitutionally cruel and unusual. Frank first noted that no such challenge had ever successfully defeated a statute on its face; he assumed that the statute was facially valid.[167] He then dismissed the derivative argument that the death penalty was inappropriately applied; he held the punishment did not "shock the conscience and sense of justice of the people of the United States."[168] Judge Frank conceded that the application of the "shock the conscience" test was elusive at best. He deferred to the trial court's assessment of the extent of injury caused by the crime: "[I]t is impossible to say that the community is shocked and outraged by such sentences resting on such facts."[169] Frank also dismissed the Rosenbergs' argument, contained in their Petition for Rehearing, that they should have been tried under the treason clause, thereby receiving all of its procedural protections. Although he acknowledged Professor Hurst's criticism that the *Quirin* decision did not adequately consider that argument, Frank felt bound by *Quirin* and held that the Rosenbergs had no right to be tried under the treason clause since the elements of the two crimes were not identical: "In the Quirin case, the absence of uniform was an additional element, essential to Haupt's non-treason offense although irrelevant to his treason; in the Rosenbergs' case, an essential element of treason, giving aid to an 'enemy,' is irrelevant to the espionage charge."[170]

Consequently, the *Rosenberg* case is imperfect precedent for permitting the death penalty in treason cases, since the cruel and unusual claim was never analyzed by the Supreme Court. Furthermore, Judge Frank's inquiry is no longer appropriately premised since the Court subsequently used the eighth amendment to void statutes completely in such cases as *Furman* and *Coker*.

In 1957, Chief Justice Warren revived the eighth amendment in *Trop v. Dulles* when he linked the "fundamental right" to United States citizenship with the "dignity of man," which was "[t]he basic concept underlying the Eighth Amendment . . . ."[171] Warren

167. United States v. Rosenberg, 195 F.2d 583, 607 (1952).

168. *Id.* at 608, n.33, *quoting Resweber*, 329 U.S. at 473: "Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man."

169. 195 F.2d at 609. Judge Frank agreed that taking a public opinion poll would not be conclusive; he emphasized the findings of the trial judge and the discretion that all trial judges have at the sentencing proceeding.

170. *Id.* at 611.

171. 356 U.S. 86, 100 (1957). Since *Trop* was decided in 1957, the eighth amendment has

struck down a Congressional statute permitting the State Department to deny Trop a passport on the ground that he had lost his citizenship as a result of being convicted and dishonorably discharged for desertion during wartime.[172] The Chief Justice did not hold that the penalty was so excessive as to violate *Weems*'s proportionality principle; he decided that, like torture, the penalty's nature was impermissibly cruel. Warren dismissed the government's argument that Trop was fortunate since Trop could have been executed for the same crime (and executions are not cruel *per se*):

> At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds, and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.[173]

The Chief Justice also noted, without deciding, that the punishment might also have been unusual since such a sanction had never been proposed until 1940, and had never been litigated until *Trop*.[174]

3. Contemporary Cases

Despite the Supreme Court's history of reviewing death penalty cases without condemning the penalty, and despite the damaging statement in *Trop* that the penalty was not unconstitutionally cruel, opponents began to directly attack the constitutionality of the death

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gained importance. In Lambert v. California, 355 U.S. 225 (1957), in a dissent, Justice Frankfurter accepted the concept of proportionality as a limitation on punishment: "Then, too, a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and, in respect to the states, even offend the Due Process Clause of the [f]ourteenth [a]mendment." *Id.* at 231.

Robinson v. California, 370 U.S. 660 (1961), is one of those marvelous cases the meaning of which is so unclear that critics can argue about it forever—the Court held that California's conviction of Robinson for drug addiction violated the eighth amendment. *Robinson* was limited by Powell v. Texas, 392 U.S. 514 (1967), which upheld a conviction for public drunkeness. However, *Robinson* is relevant to this article since it holds that the eighth amendment applies to the states, and consequently to any state treason trials.

172. 356 U.S. at 101.

173. *Id.* at 99.

174. *Id.* at 100-01 n.32.

penalty.[175] After being briefed on the issue and hearing oral argument in *Boykin v. Alabama*,[176] the Court set aside Boykin's sentence—not because the death penalty violated the eighth amendment, but because Boykin's guilty plea was improperly obtained. In *McGautha v. California*,[177] the Court was not persuaded by the defendant's argument that the death penalty was a violation of due process; the jury could have complete discretion in a nonbifurcated processing to decide who should die.

Only a year after *McGautha*, *Furman v. Georgia* destroyed any equilibrium about the death penalty's legal status. By giving the judge and jury total discretion in deciding which convicted criminals should die, the eighth amendment was violated. Justice Stewart condemned such total discretion since executions were wantonly and freakishly applied.[178] Justice Douglas believed that the existing system fostered racial oppression because the penalty was used more frequently against blacks than whites.[179] Justice Marshall concluded that the death penalty was always unconstitutional since there was no proof that it deterred crime; absent a deterrent justification, retribution alone was insufficient.[180] Using Frankfurter's and Warren's imagery, Justice Brennan believed that proof of deterrence was irrelevant because the penalty violated the "basic dignity of man," the underlying value contained within the eighth amendment.[181]

Because *Furman* only proscribed total discretion in death penalty sentencing and did not reach the fundamental question of the death penalty's constitutionality under any circumstances, the

175. Surprisingly, the first scholarly attack on the constitutionality of the death penalty under any circumstances was in 1961. *See* Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 268 (1961). *See also* Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970), and Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355 (1973).

176. 395 U.S. 238 (1969). The constitutionality of executing rapists was first considered by the Court in 1963, but certiorari was denied. Justice Goldberg wrote a vigorous dissent to the denial, joined by Justices Douglas and Brennan. Rudolph v. Alabama, 375 U.S. 889-91 (1963) (Goldberg, J., dissenting). Goldberg's argument was condemned by Professor Packer; see Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1073 (1964). Goldberg pointed to his dissent with pleasure after *Coker* later held that the death penalty was unconstitutionally disproportionate; see Goldberg, *The Death Penalty for Rape*, 5 HASTINGS CONST. L.Q. 1 (1978).

177. 402 U.S. 183 (1971).

178. 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

179. *Id.* at 250 (Douglas, J., concurring).

180. *Id.* at 345-55 (Marshall, J., concurring).

181. *Id.* at 270 (Brennan, J., concurring).

Supreme Court had to answer several intertwined questions in *Gregg v. Georgia*[182] before allowing the state to execute Troy Leon Gregg for murder. Only Justices Marshall and Brennan accepted Gregg's threshold argument that the death penalty is a type of punishment completely outlawed by the eighth amendment.[183] Writing for a three judge plurality, Justice Stewart held that the death penalty was a legitimate response to Gregg's crime since murder involves the deliberate taking of life, and is consequently "the most extreme of crimes."[184] The other four justices, who agreed with Stewart's conclusion, did not even discuss in their concurrences why murderers could be killed; apparently they assumed, at least for murder, that the death penalty must be permissible. Otherwise, they would have been approving the penalty in theory, but precluding its usual application, since the death penalty has primarily been used against murderers.

Having decided that the death penalty was constitutional, at least in murder cases, the Court then had to decide if the statute properly determined which murderers should die. The statute provided that the jury must first find certain statutorily defined aggravating circumstances, and then consider any mitigating circumstances before sentencing Gregg to death.[185] According to the Court, the jury no longer had the complete discretion condemned in *Furman*. Similar statutory systems in Texas and Florida were also accepted the same day.[186]

In two other companion cases to *Gregg*, state legislatures had

182. 428 U.S. 153 (1976).

183. *Id.* at 227-31 (Brennan's dissent); *id.* at 231-41 (Marshall's dissent).

184. *Id.* at 187. The Stewart plurality accepted *Weems*' prohibition against excessive punishments because such punishments would violate the dignity of man. A penalty could be excessive if the government wantonly inflicted pain or administered a grossly disproportionate penalty. *Id.* at 173. By refusing to be bound by either the early English or American interpretations of cruel and unusual punishments, the plurality reaffirmed a commitment to a dynamic, evolutionary reading of the eighth amendment. *Id.* at 169, 173. Justice Rehnquist disliked the ambiguous concept of "contemporary standards" being applied to the eighth and fourteenth amendments; he argued that particularly in light of the historical use of the death penalty and the recent holding supporting the penalty in *McGautha*, it was the Supreme Court that was acting freakishly. *See* Woodson v. North Carolina, 428 U.S. 280, 308-09 (1976).

185. 428 U.S. at 163.

186. Jurek v. Texas, 428 U.S. 262 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976). *Proffitt* also limited the defendant's rights by holding that the trial judge could decide who can die, allegedly because such decisions would be more consistent. 428 U.S. at 252. This entire system of finding aggravating and mitigating circumstances was denounced by Professor Black. *See* Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U. L. REV. 1 (1976).

attempted to limit jury discretion by making the death penalty mandatory once the defendant was convicted of certain crimes. The Stewart plurality prohibited this approach because it camouflaged discretion which would occur when juries simply refused to convict otherwise doomed defendants, and because the system was too crude: "Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development."[187] Thus, the jury had to consider all mitigating factors, not just aggravating factors.[188]

Justice White dissented, joined by Chief Justice Burger and Justice Rehnquist. White observed that some discretion was inevitable under any system; the limited discretion available to the jury through its "raw power" of jury nullification was not equivalent to the total jury discretion proscribed by *Furman*.[189] Mandatory death penalties were as reasonable a means of limiting discretion as the system of aggravating and mitigating circumstances upheld that same day in *Gregg*, *Jurek*, and *Proffitt*.

a. Coker v. Georgia

In a typically multi-opinioned decision reflecting the divergent views about the use of the death penalty, seven Justices held in *Coker v. Georgia*[190] that the state of Georgia could not electrocute Ehrlich Anthony Coker for rape. Writing for a four judge plurality (consisting of Justices Blackmun, Stewart, Stevens, and himself), Justice White adopted *Gregg*'s definition of unconstitutionally excessive punishment: "[I]t (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[191] Perhaps because all four of these Justices had previously assumed in *Gregg* that there was inadequate proof of the death penalty's nondeterrence or deterrence, they did not dwell upon the first prong of their definition to determine if the penalty made no "measurable contri-

187. Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). The *Woodson* plurality upheld these unique procedures because the death penalty was fundamentally different than any other punishment. 428 U.S. at 305.

188. 428 U.S. at 291.

189. *Id.* at 306-07 (White, J., dissenting).

190. 433 U.S. 584 (1977).

191. *Id.* at 592. *Weems* and *Trop* did not provide any test to determine which punishments were unconstitutionally excessive.

bution." The plurality used two analytical techniques to decide that the penalty was grossly disproportionate. First engaging in an "objective" test, they discussed how the states, other countries and juries punished rapists.[192] They observed that many jurisdictions did not kill rapists. The plurality wished to demonstrate that their decision was not based entirely upon bias, personal belief, and/or the second test—the "subjective" test: "[I]n the end our own judgment will be brought to bear on the question . . . ."[193] However, their "subjective" test was also not totally intuitive; they considered such external factors as the crime's impact on the victim and on society.

The plurality's survey of punishments for rapists showed that since *Furman*, (which had the effect of voiding all death penalty statutes in 1972) only Georgia, North Carolina and Louisiana passed new laws authorizing the death penalty for rapists, while sixteen states had done so before *Furman*. (In the last fifty years, less than half of the states had ever killed rapists).[194] After the Supreme Court had voided North Carolina's and Louisiana's mandatory capital punishment statutes for first degree murder and rape, those states did not reinstate the death penalty for rape. Three other states allowed executions only when the rapist was an adult and the victim was a child,[195] and only three of sixty major countries still permitted executions for rape when there was no murder.[196] After the Georgia statute was modified in response to *Furman*, juries rarely used the sanction, authorizing it at most in ten percent of rape convictions.[197]

Shifting to the subjective test, the plurality compared the relative culpability of rape and murder by first assessing the injury to the victim and the public, and then the moral depravity of the de-

192. *Id.*

193. *Id.* at 597.

194. *Id.* at 593.

195. *Id.* at 595. Subsequently the Florida Supreme Court held that the death penalty was an unconstitutionally disproportionate punishment for the crime of sexually assaulting an eleven year old child (whom the defendant also murdered). Buford v. Florida, 403 So. 2d 943 (1981). The Supreme Court denied certiorari, Florida v. Buford, 102 S. Ct. 1037 (1982). Apparently, a traitor must be shown to be more depraved and cause more injury than a child molester.

196. 433 U.S. at 596 n.10, *citing* United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968).

197. 433 U.S. at 596-97. Six rapists had been sentenced to death by Georgia juries since the law was passed in 1973. Sixty-three rape cases had been reviewed by the Georgia Supreme Court. Since many rape convictions had presumably not been appealed, at least when the defendant did not receive the death sentence, the incidence of using capital punishment was probably less than ten percent.

fendant.[198] The plurality felt that since murder is a final act for the victim and the injuries are, by definition, beyond repair, murder is a far greater evil than rape, which may not include lasting physical injury to the victim. Although the rapist is morally depraved, as shown by the commission of a crime which "short of homicide, . . . is the ultimate violation of self,"[199] that depravity, even when combined with a jury's required finding of an aggravating circumstance, does not justify execution. The legal system would become cruelly unfair if many non-murdering rapists died while many murderers lived because the jury did not find any aggravating circumstances or found adequate mitigating factors. The plurality concluded that the penalty was grossly excessive and, thus, unconstitutional. In very brief concurrences, Justice Brennan and Justice Marshall accepted the plurality's holding since it coincided with their continuing opposition to the use of the death penalty under any circumstances.[200]

In his concurrence/dissent, Justice Powell maintained that the death penalty was permissible when used against those appropriately convicted of aggravated rape. Coker had not behaved so savagely as to deserve death. Escaping from prison, where he was serving time for rape and murder, Coker broke into a couple's home, tied up the husband, and then raped the wife at knifepoint. Although Coker told the husband he would kill the man's wife if the police were contacted, Coker did not kill or harm her after he took her hostage in the couple's car. A police officer testified at trial that Coker had ample opportunity to injure the woman after the police trapped Coker at the end of a dirt road; in addition, the record did not indicate any proof of long-lasting psychological injury.[201] Powell concluded that the facts failed to show that "[p]etitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury."[202] However, if the rape had been more brutal, the death penalty would have been constitutionally acceptable. Drawing a "bright line" between murder and rape, solely because of the death of the victim, was appealing, but excessively

198. *Id.* at 597-98.

199. *Id.* at 597.

200. *Id.* at 600 (Brennan, J., concurring) (Marshall, J., concurring).

201. *Petition for Writ of Certiorari* to the Supreme Court of Georgia, Coker v. Georgia, No. 75-5444, Oct. Term, 1975, at 16, in 97 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 685 (P. Kurkland and G. Casper eds. 1975).

202. 433 U.S. at 601 (Powell, J., concurring and dissenting).

reflected the plurality's personal beliefs. Powell concluded that "it has not been shown that society finds the penalty disproportionate for all rapists,"[203] and that the plurality had not adequately considered that a rapist could be more culpable than a murderer. Yet any penal statute can be defended under the theory that society has not found the penalty disproportionate; a majority of the legislators passed the law.

In his dissent, joined by Justice Rehnquist, Chief Justice Burger accepted the plurality's two-pronged definition of excessiveness. Burger attacked the plurality's "objective" and "subjective" application of the second prong by arguing that the plurality rigidly imposed their own beliefs upon the elected legislative branches: "We cannot know which among this range of possibilities [of forms of punishment] is correct, but today's holding forecloses the very exploration we have said federalism was intended to foster."[204] Burger also complained about the unnecessary breadth of the decision—the prohibition of the use of the death penalty against all rapists, not just Coker; the Chief Justice believed that Coker, a recidivist previously convicted of murder, could constitutionally be killed. The Chief Justice accepted the plurality's estimation of inflicted harm (aside from murder, rape is the "ultimate violation of the self," causing long-term psychological damage to the victim and her family), but found that level of injury sufficient justification for capital punishment.[205]

Burger demonstrated the ambigious nature of the plurality's objective data by showing how they myopically emphasized legislative behavior during the five years following *Furman*'s voiding of all existing capital punishment laws. Burger did not interpret the subsequent reduced use of the death penalty against rapists as any clear manifestation of legislative intent; he explained that the legislatures might have been unsure of *Furman*'s meaning. Furthermore, the

203. *Id.* at 604.

204. *Id.* at 617-18 (Burger, C.J., dissenting). This argument was far more successful when it was used to uphold the constitutionality of a forty-five year sentence for possession of less than nine ounces of marijuana in Hutto v. Davis, 102 S. Ct. 703 (1982), and a life imprisonment sentence for recidivism, based upon three relatively minor felonies in Rummel v. Estelle, 445 U.S. 263 (1980). The death penalty's irrevocable impact and incomparable injury to the defendant justify a more rigorous application of the eighth amendment:

> "[T]he imposition of death by public authority is . . . profoundly different from all other penalties . . . ." Lockett v. Ohio, 438 U.S. 586, 605 (1978).

205. 433 U.S. at 612 (Burger, C.J., dissenting). Burger was agreeing with Justice White's characterization of the injury; the significance of that degree of injury was the central dispute.

plurality ignored the frequent use of the death penalty against rapists during the earlier part of the twentieth century (Burger did not mention, however, that most of those who died were black Southerners).[206]

According to the Chief Justice, the plurality's subjective analysis suffered from "primitive simplicity" by virtually establishing, as constitutional law, the Biblical injunction of an eye for an eye, the *lex talionis*. The legislature has a duty to protect its citizens from "criminal activity which consistently poses serious danger of death or grave bodily harm."[207] Rape is not a "minor crime;" the eighth amendment should not shield rapists from the death penalty, but should only protect minor criminals from death.[208] Burger believed that the *Coker* holding cast doubt on the constitutionality of all criminal statutes authorizing the death penalty when no life has immediately been taken, including treason, airplane hijacking and kidnapping.[209]

b. Lockett v. Ohio

In *Lockett v. Ohio*[210] Chief Justice Burger set aside an Ohio statute which so narrowly limited the sentencer's discretion that a jury could not consider the following mitigating factors: Sandra Lockett was sitting in a car as part of a robbery scheme while her boyfriend went into a store and killed the owner; she did not intend to have the owner killed; and she was not sufficiently culpable because of her character, prior record, and age. Burger concluded: "The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."[211] Because of this procedural defect, Burger did not consider Lockett's claim that the death penalty was unconstitutionally disproportionate for one who has not taken a life, attempted to take a life, or intended to take a life.[212]

206. *Id.* at 614. Burger believes that the death penalty might have some deterrent effect, particularly on someone like Coker, an escaped convict who, if he were to face life imprisonment as the maximum sentence, has nothing more to lose if he is recaptured. *Id.* at 617. At the very least, Georgia's law should be given time to function so that data can be obtained to evaluate its possible deterrent effect, since the entire question of deterrence is still unresolved. *Id.* at 618.

207. *Id.* at 620.

208. *Id.* at 604.

209. *Id.* at 621.

210. 438 U.S. 586 (1978).

211. *Id.* at 605.

212. *Id.* at 609 n.16.

c. Enmund v. Florida

Convicted of felony-murder under Florida law, Earl Enmund was sentended to die for sitting in a getaway car while his two cohorts engaged in a deadly shootout during the robbery of an elderly couple. Since he neither took life, attempted to take life, nor intended that any life be taken, Enmund claimed that his death sentence was so disproportionate that it violated the fourteenth and eighth amendments.[213] Enmund's disproportionality argument forced the Court to consider not only the nature of the crime, but also the relationship of the defendant to the crime—to determine if the defendant was so "depraved" that death was appropriate.

Relying heavily on his *Coker* opinion, Justice White wrote the plurality opinion, joined by Justices Stevens, Marshall, and Blackmun. White again engaged in an elaborate "objective" test, surveying state laws, jury application of the death penalty in similar circumstances and, as a new factor, the number of individuals presently sitting on death row who were sentenced for crimes similar to Enmund's. White also inferred prosecutorial reluctance to seek the death penalty in such cases because "[i]n only one case—Enmund's—there was no finding of an intent to kill and the defendant was not the triggerman."[214] White then applied the "subjective" test by assessing Enmund's culpability; White agreed with H.L.A. Hart that "causing harm intentionally must be punished more severely than causing the same harm unintentionally."[215] Furthermore, killing Enmund would not deter others like him since he had not planned for the shootout to occur; fear of the death penalty would probably only affect those who act deliberately.[216] Thus deterrence, which White had not considered in *Coker*, became a factor.

Justice O'Connor's dissent, joined by Chief Justice Burger and Justices Powell and Rehnquist, criticized the plurality for creating an eighth amendment standard of intent, thereby interfering with the states' power to assess guilt. The difficult question of assessing degrees of culpability should be left under state law to the trier of fact who must consider all mitigating factors, including the defendant's intent.[217] O'Connor concluded that the case should be re-

213. 102 S. Ct. 3368 (1982).
214. *Id.* at 3376.
215. *Id.* at 3377.
216. *Id.*
217. *Id.* at 3391 (O'Connor, J., dissenting).

manded to the trial court for consideration of Enmund's less active role in the killings as a possible mitigating factor.

O'Connor did not reject *Coker*'s holding, its acceptance of proportionality, or its use of objective data and subjective views to prohibit the execution of rapists;[218] she believed that the plurality misapplied the relevant data. Twenty-four states allowed the death penalty in felony-murder cases, even though the defendant had neither killed nor intended to kill anyone. To claim, as the plurality did, that only nine states followed Florida's scheme, distorted the motivation behind all the felony-murder capital statutes to punish those who significantly participate in a lethal crime.[219]

IV. Does Cruel and Unusual Punishment Really Mean Anything?: Philosophical Justifications for Punishment and Proportional Punishment

After reviewing the eighth amendment cases decided by the Supreme Court, one may be inclined to agree with the two members of the First Congress who said that the amendment is "too indefinite," having "no meaning in it."[220] Can this language help us decide if traitors should die? The adjectives "cruel and unusual" actually provide some emotional reaction and analytical direction, even if they fail to clarify whether the amendment was intended to prohibit only certain types of punishments, or also to outlaw excessive application of otherwise acceptable punishments.[221]

Because death is a permissible weapon against murderers, the convicted traitor cannot argue that the death penalty is a form of punishment which, like torture, is cruel *per se*. The defendant must argue that the government's motives and justifications are (or frequently can be) cruel, and/or claim that those justifications are insufficient, thereby making the penalty grossly excessive. Moral philosophy has long wrestled with both issues—justifications of punishment and proportionality—and can help one appreciate the issues' complexity; numerous assumptions must be made, even though there may be no answers beyond leaps of faith concerning

218. *Id.* at 3391.

219. *Id.* at 3390.

220. 1 Annals, *supra* note 139, at 382-83.

221. One reason for the confusion over the use of the two contrasting techniques to determine which punishments are "cruel," is that the techniques are based upon the same premise of stopping disproportionate punishments. Some penalties are always disproportionate, while others are disproportionate for some crimes but acceptable for others.

man's proper relationship to man.[222]

Since the phrase "cruel and unusual" does not explicitly limit the justifications one can use in support of a given punishment, the vague clause becomes a vehicle through which advocates can assert any conceivable goal of criminal law.[223] How is one to determine which justifications are so "rational" that they are not cruel: permitting such goals as deterrence while proscribing such motivations as punishing only (or perhaps partially) for the pleasure of making another suffer? "Rationality" must have a moral perspective if sadism is to be excluded. And once acceptable reasons for punishment have been agreed upon, how is one to determine which punishments are acceptable for which crimes?

Most philosophers considering justifications for punishment have narrowed the issue of permissible purposes by evaluating two competing schools of thought, utilitarianism (teleological) and retributivism. Accepting the legitimacy of one of the two theories (or some combination) may not beg the question; philosopher Joel Feinberg claims that if one first defines utilitarianism fairly precisely, and then defines retributivism as utilitarianism's logical contradictory, the "two theories are not only mutually exclusive but jointly exhaustive as well."[224] Yet difficulties abound in creating a fairly precise definition of utilitarianism; comparing pleasures and pains to determine if a given action will create more pleasure than

222. This article is a testimony to such premises, which were formed during the author's adolescence. Not only did Albert Camus provide reasons for living, but Camus also provided the intellectual links which triggered this article's birth. I was reading some unremembered article discussing the limits of governmental power and it triggered a word association with Camus's theory of limits, which specifically condemned the killing of men and women for political goals. It was then a matter of studying the cases. *See generally* A. CAMUS, THE REBEL (A. Bower trans. 1957). For another example of existential legal scholarship, *see* Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (1979).

223. There are limits to arguments that can be made about the meaning of the eighth amendment:

> The Cruel and Unusual Punishment Clause does invite the person interpreting it to freelance to a degree, but the freelancing is bounded. The subject is punishments, not the entire range of government action, and even in that limited area the delegation to the interpreter is not entirely unguided; only those punishments that are in some way serious ("cruel") and susceptible to sporadic imposition ("unusual") are to be disallowed.

J. ELY, DEMOCRACY AND DISTRUST 14 (1980).

224. J. FEINBERG, *Punishment*, in PUNISHMENT 2 (1975) [hereinafter referred to as PUNISHMENT]. *See also* Ellis, *Commentary; Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for its Justification*, 34 OKLA. L. REV. 567 (1981) and Gardner, *Capital Punishment: The Philosophers and the Court*, 29 SYRACUSE L. REV. 1175 (1978).

pain for a person necessitates reducing that person's pleasures and pains to some common denominator. Even if such a denominator can be agreed upon, and even if one concedes that interpersonal comparisons of utility can then be made[225] (based upon either the previously defined internal system or some other external common denominator), a choice must be made between an ever-growing number of theories of utilitarianism, all of which apply costs and benefits differently. For instance, Professor Donald Regan combines elements of act-utilitarianism, which emphasizes the costs and benefits of a single action, with rule-utilitarianism, which assesses the costs and benefits of generalized application of a given policy, to create "co-operative utilitarianism."[226]

Retributivism does not have the gloss of efficiency, of applying cost-benefit ratios, which makes utilitiarianism initially appear more objective. The retributivists state that a criminal should be punished if, and only if, the criminal deserves the punishment because he is guilty. Immanuel Kant formulated a classic hypothetical that dramatizes the retributivists' viewpoint. Assume that someone committed a murder on an island and was caught, but after the arrest everyone living there decided to leave and separate when they reached the mainland. According to Kant, the islanders would still be morally bound to punish the murderer even if the pain of the punishment outweighed any practical effects, which would be minimal since the society would no longer exist. The right of equal retaliation, the *lex talionis*, is one of justice's fundamental categorical imperatives. Reliance upon utilitarianism, which is willing to sacrifice an individual for the benefit of community, would result in the destruction of justice.[227] Philosopher H.J. McCloskey elaborates:

225. *See* L. ROBBINS, ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE, ch. 6 (1932) and I. LITTLE, A CRITIQUE OF WELFARE ECONOMICS, chs. 4-6 (1957). Bruce Ackerman believes that one can conceivably make such impartial comparisons. *See* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 45 (1980) for an interesting discussion of utilitarianism.

226. D. REGAN, UTILITARIANISM AND CO-OPERATION (1980). Regan's sophisticated defense of his theory is intimidating, both because of its erudition and because of its numerous assumptions about human nature. A judge would be making many unknown assumptions if he declares he is or is not a utilitarian.

227. I. KANT, THE PHILOSOPHY OF LAW, PART II, 194-98 (W. Hastie trans. 1887). Hegel goes further, arguing that the criminal has a right to be punished:

> Further, what is involved in the action of the criminal is not only the concept of the crime, the rational aspect present in crime as such whether the individual wills it or not, the aspect which the state has to vindicate, but also the abstract rationality of the individual's *volition*. Since that is so, punishment is regarded as containing the criminal's right and hence by being punished he is honored as a rational being.

"The real quarrel between the retributivists and the utilitarian is whether a system of inflictions of suffering on people without reference to the gravity of their offenses or even to whether they have committed offenses, is just and morally permissible."[228]

More sophisticated utilitarian theories have attempted to refute Kant's criticisms; a rule-utilitarian might claim that systematically punishing such murderers could be justified to make the islanders better citizens on the mainland or to deter future criminals who would be deterred because they could not hope that later societal disintegration would protect them. Kant's retributivism could even be characterized as a form of long-run utilitarianism since he condemned utilitarianism for its detrimental effects: "For if justice and righteousness perish, human life would no longer have any value in the world."[229]

Thus, depending upon one's definitions of "utility" and "desert," utilitaranism and retributivism can use different analytical techniques to achieve identical systems of punishment. Every theory of punishment has utilitarian characteristics; each theory seeks to maximize its notion of "the Good." Kant could justify the death penalty as a punishment for murder under his theory of equal retaliation, while a utilitarian might approve of the sanction because of its alleged deterrent effects. Kant would easily condemn the punishment of a person known to be innocent since the punishment was not deserved, while John Rawls believes that the practice of telishment—systematically punishing people known to be innocent—would be counterproductive by alienating the citizenry, who would

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G. HEGEL, THE PHILOSOPHY OF RIGHT § 100 (T. Knox trans. 1969). *See also* B. AUNE, KANT'S THEORY OF MORALS 160-69 (1979).

228. McCloskey, *A Non-Utilitarian Approach to Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 123 (G. Ezorsky ed. 1977).

229. I. KANT, *supra* note 227, at 195-96. H.L.A. Hart believes that all such theories that conclude that the use of punishment is of value whenever there has been a crime involving guilt, are really disguised utilitarian theories. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 8-9 (1968). Indeed, as Professor Joel Finer said to me, it is hard to think of any moral philosophy of punishment that does not base its theory upon some optimization of some predefined "good." If one substitutes that "good" for Bentham's "happiness," most philosophical analysis appears utilitarian.

> *I. The end of law is, to augment happiness.*
>
> *II. But punishment is an evil.* But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil. (Bentham's emphasis).

J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. 13, sec. 1 (W. Harrison ed. 1948).

not know why a person was punished, how to feel about that person, and what behavior was reprehensible. Such doubts would diminish community loyalty.[230]

Rawls tries to resolve the tension by combining the two theories. Utilitarian considerations should be used exclusively to determine which acts deserve which punishments, while retribution requires that only those found guilty should actually be punished. Utility limits the ambiguous, powerful urge to give the criminal what he deserves, while retribution guarantees that punishment is limited to those who have actually committed a crime, as determined by the legal system to the best of its ability.[231] H.L.A. Hart finds utilitarianism useful to fix the maximum amount of punishment that can be given someone, but uses other moral principles—such as not punishing the innocent—to complete a system of just punishment.[232]

The appropriate level of punishment—proportionality—has been another major issue that each camp has used to discredit the other. Retributivists argue that the concept of equal retaliation limits the amount of punishment a criminal deserves. To give the criminal more punishment than he merits would violate his continuing right to be treated as an equal person, not as a means. It would be unjust to execute someone for jaywalking even if it could be shown that more lives would be saved since other jaywalkers would be deterred. Equality of retaliation is not identity of retaliation, which could be either too mild or too severe. To rape a rapist or burn down an arson's house might be considered equal retaliation, but nobody deserves such punishment; a just state must not stoop to the techniques of its most savage members. To punish a thief by assessing a fine only for the cost of the goods stolen would be insufficient; theft is a serious offense, inflicting harm exceeding the amount taken. Such analysis is somewhat conclusory; retributivist philosopher H.J. McCloskey concedes that determining the relative gravity of offenses is difficult under any system, including utilitarianism; the best method is "to look at the nature of the offense."[233]

230. Rawls, *Two Concepts of Rules*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 91 (G. Ezorsky ed. 1977).

231. *Id.* at 84.

232. H.L.A. HART, *supra* note 229, at 80. W.D. Ross sees the primary justification for punishment to be the promise to the victim and society that criminals will be punished. *See* W.D. ROSS, THE RIGHT AND THE GOOD 64 (1965).

233. McCloskey, *supra* note 228, at 134.

To the utilitarian charge that such vague words as "dessert," "equality" and "retribution" are fancy words for revenge, retributivists have two responses. They either deny such an allegation, claiming that retribution is society's reaction while revenge is personal, or they agree that punishment is partially and appropriately motivated by revenge, a legitimate part of the criminal justice system so long as it does not overwhelm the continuing rights of the criminal to be treated as a person and receive only punishment equal to his crime.[234]

Utilitarians believe that their system provides a much more concrete technique for comparing crimes and assessing appropriate punishments. Jaywalkers should not be executed because the populace would be horrified and intimidated; because no one would be convicted by a jury; because people would feel sorry for jaywalkers; and/or because many more jaywalkers might be executed than lives saved through reduced accidents. Jaywalking creates very little pain and does provide the pleasure of convenience; therefore, to inflict such pain upon someone who has committed such a negligible injury would create an imbalance of pain and pleasure. Fining a thief for the amount taken would not deter thieves, while raping rapists would dehumanize everyone involved. Yet those arguments reaffirm McCloskey's point that utilitarian definitions of pains and pleasures are uncertain, similar to ambiguities affecting retributivist rankings of culpability based upon the gravity of the offense. Utilitarians must rebut the argument that the only way they can condemn public torture, assuming proof exists that the pleasure for the masses (including deterrence) outweighs the individual suffering, is to incorporate personal, non-utilitarian values into their cost-benefit analysis.[235]

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234. E. VAN DEN HAAG, PUNISHING CRIMINALS 10-14 (1975). Van den Haag cites approvingly James Fitzjames Stephens's famous aphorism: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." Stephens elaborated: "[O]ne of the arguments in favor of exemplary punishments (death, flogging, and the like) is that they emphatically justify and gratify the public desire for vengeance upon such offenders." 2 J. STEPHENS, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80 (1863).

235. Bruce Ackerman wonders if utilitarian arguments against slavery really reflect personal opposition to slavery.

> I feel very certain that the ideal observer would find the liberal state happier than the slave society, even after full allowance is made for the peculiar miseries suffered by some in the liberal condition. Yet, as soon as I make this judgment, doubts begin to form: the convergence between my own personal views and those of the ideal observer strikes me as downright suspicious.

As if the issues were not already complex, A.J. Ayer throws a monkey wrench into the debate by asserting that both retributivism, which is based upon "dessert," and utilitarianism, which erroneously equates "pleasure" with "good,"[236] are literally senseless tautologies that may appear to be somewhat empirical but actually are personal expressions of value. Ayer maintains that one can have reasoned debates only over the facts surrounding any proposed action, such as probable effects, the actors' motives and special circumstances. These facts may lead to different conclusions under different moral philosophies, but the subsequent step of evaluating the competing moral philosophies is logically impossible:

> Given that a man has certain moral principles, we argue that he must, in order to be consistent, react morally to certain things in a certain way. What we do not and cannot argue about is the validity of these moral principles. We merely praise or condemn in light of our own feelings.[237]

Applying Ayer's analysis to treason, one should first determine what might happen if traitors are or are not executed. Those predictions may not be completely verifiable, given the limitations of psychology and the vagaries of history, but such imprecision does not make the predictions of effects logically invalid in the same sense that Ayer claims retributivism and utilitarianism are meaningless. Once all the possible effects are considered, feelings control. Ayer's analysis does not prevent evaluation of many effects that are considered utilitarian benefits or costs: executing a traitor will prevent that person from committing treason again. Yet characterizing prevention of recidivism as a utilitarian benefit obscures the emotional bias underlying utilitarian analysis. The effects usually labelled utilitarian benefits constitute an emotionally reassuring group: specific deterrence of potential criminals, general deterrence of the popula-

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B. ACKERMAN, *supra* note 225, at 328. Sprigge's utilitarian reply to McCloskey virtually admits that there are other emotional values that affect the theories of punishment.

> First, a man who was not sad at producing suffering would lack the basic sentiment which inspires the utility principle, namely a revulsion at the suffering and a delight in the happiness of any sentient being. Second, sentiments such as the love of justice, respect for human life and so on, are sentiments which utilitarian considerations bid us cherish in ourselves and others.

T.L.S. Sprigge, *A Utilitarian Reply to Dr. McCloskey*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT at 74 (G. Ezorsky ed. 1977).

236. A.J. AYER, LANGUAGE, TRUTH AND LOGIC 104-05 (1952). Ayer's theory has been frequently attacked. *See* R. HARE, THE LANGUAGE OF MORALS 9-31 (1964).

237. *Id.* at 111-12.

tion,[238] education of the populace, expression of community outrage,[239] incarceration or obliteration of the offender so he can do no more harm, rehabilitation,[240] and perhaps expiation. Another arguably desirable consequence, never acknowledged by the Supreme Court, is particularly relevant to this article: the perpetuation and legitimation of the existing government through intimidation and the satisfaction of the citizenry attained by destroying perceived enemies.[241]

Even if the Supreme Court were to accept Ayer's thesis that competing moral philosophies can only be evaluated through feelings, that there is no logical way to prove that Hitler was morally inferior to Albert Schweitzer, the Court would still turn to traditional moral philosophy for guidance. The Court must ground its interpretation of the eighth amendment upon some theory or theories of punishment in terms that society can understand and evaluate, so that all of us can assess both the quality of the Court's feelings and the internal consistency of the application of those feelings to varying facts.[242] Utilitarian and retributivist systems both serve this purpose since they incorporate numerous assumptions about human nature, "rationality," "consistency," behavior and relationships that are consistent with modern American beliefs (very few theorists support torture). Both systems force the reader (or the Justice) to test his or her feelings by considering issues that each

238. For a summary of the various justifications for punishment, see Gardiner, *The Purposes of Criminal Punishment*, 21 MOD. L. REV. 117 (1958).

239. *See* J. FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING 95 (1970).

240. Plato applauded the rehabilitative goal: "A just penalty disciplines us and makes us more just and cures us of evil." PLATO, *Gorgias*, in THE COLLECTED DIALOGUES OF PLATO 262 (E. Hamilton and H. Cairns eds. 1961). The rehabilitative ideal, not relevant to those supporting the death penalty (except that those who were not killed might be so grateful that they would be more easily rehabilitated), has declined in influence. *See* Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., CRIMINOLOGY, AND POL. SCI. 226 (1959), and Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147 (1978).

241. *See* T. HOBBES, LEVIATHAN 266 (1950). Joel Feinberg believes that Hobbes's views represent a third school of thought—the vindictive theory of punishment—which anthropologists have traced back to forms of tribal morality. FEINBERG, *supra* note 224, at 8. Since treason is such a direct threat to community solidarity, the community's response can be uniquely vindictive: "Societies, it has been cleverly argued by Rene Girard, are founded in blood. The ruling class pursues the same game and is united in the sacrifice of the same animal, and the consumption of its flesh. Girard claims that the first sacrifice was always that of a human scapegoat. Those who kill together, pray together, he claims." Raphael, *Dirty Tricks are the Tricks We Haven't Thought Of*, in THE LISTENER 13 (Nov. 18, 1982).

242. AYER, *supra* note 236, at 111.

camp emphasizes and problems that each side claims cripple the other. Philosophical analysis, like legal analysis, can sometimes change feelings and positions by demonstrating to a decision maker that implementing those initial views can lead to results that would violate more powerful emotions.

As has been the case in legal history and scholarship, the Supreme Court's application of jurisprudence has been *ad hoc*. A typical example is Justice White's use in *Enmund* of H.L.A. Hart's theory that unintentional acts are less culpable than intentional acts.[243] Perhaps this lack of philosophical rigor is justified. A Justice's commitment to a philosophical theory, be it rule-utilarianism or Kant's categorical imperative of retribution, would force that Justice into erudite analysis and into making many assumptions that could bind the Justice far more than precedent. Furthermore, the jurisprudence of punishment raises more questions than it answers; since none of the philosophies seem to be self-evidently dominant, one should be wary of attacking the Justices for acting somewhat intuitively. The moral philosophers' attempts to rank crimes seem to be as conclusory as the Justices' attempts.

The Court's unanimous acceptance of deterrence and other practical goals under the term "utilitarian," and their acceptance of retribution (with the exception of Justice Marshall),[244] reflect many unarticulated values and resolutions of basic issues. Wanton sadism is not acceptable; that emotional conclusion is a crucial premise in deciding which punishments are "wrong." Using the criminal justice system solely to keep oneself in power is another illegitimate justification. Even if the Court does state its numerous premises more clearly, critics will challenge the transitions, via the "reasoning" process, from the basic premises—"dignity of man," for example—to evaluation of specific penalties for specific crimes.

All of this intellectual conflict and ambiguity does not provide any easy way to decide if traitors deserve to die, or if the costs outweigh the benefits in killing traitors. Virtually any punishment, including torture, can be defended for its alleged deterrent effect or because the criminal "deserved" the punishment. Unless the Court prefers to defer totally to the legislature, thereby gutting the eighth amendment, it must somehow draw lines. Even Rehnquist, the Justice most deferential to the legislature in eighth amendment cases,

243. 102 S. Ct. at 3377.

244. *Furman*, 408 U.S. at 345.

would probably rely on the framers' views to prohibit drawing and quartering.[245] The next section shall explore how each of the Justices might resolve a capital treason case in a manner consistent with his or her prior opinions.

V. Deciding How To Decide

Both to evaluate their previous decisions and to make some predictions as to what arguments might be persuasive, this section is written under the assumption that each of the nine Justices would evaluate a capital treason case similarly to the way they decided *Gregg*, *Coker*, and *Enmund*. This apparently straightforward approach is imperfect; although all of the Justices would consider virtually any and all of the information and arguments gathered in this article's descriptive section—historical episodes, legal precedents, the framers' thoughts about the Constitution, and philosophical justifications for punishment—one cannot know which factors would be controlling, particularly since treason is a significantly different crime from murder or rape. Further complications arise because the Justices have not completely exposed their conscious decision-making process, either because they prefer to maintain the image of not imposing their own political views, or because they do not want to commit themselves to a position until a case forces them to do so.[246] Finally, legal scholars have published hundreds of articles on the death penalty and on judicial review, creating a multitude of arguments, challenging each other, criticizing the Justices' various decisions, and modifying their positions as the debate continues.[247] Certain Justices, however, may be persuaded if an advocate can cite eminent scholars for support. For example, I shall apply Professor Charles Black's opposition to the death penalty, which is based upon the inevitability of caprice and mistake, to capital treason cases.

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245. *Woodson*, 428 U.S. at 308-09.

246. For an approach using literary analysis to reveal how judges can obfuscate, see Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist*, 57 N.Y.U. L. Rev. 1 (1982).

247. Two recent law review symposia provide an ample introduction to the competing theories of judicial review. *See generally Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. Rev. 259 (1981) and *Symposium: Judicial Review Versus Democracy*, 42 Ohio St. L.J. 1 (1981).

A. Applying Justice White's "Objective" and "Subjective" Tests to a Capital Treason Case

Justice White proscribed the death penalty for rape under the second prong of his definition of "excessive punishment" which disallows any punishment that "is grossly out of proportion to the severity of the crime."[248] White never used the first prong of his test to make a determination of the death penalty's "measurable contribution;" White's approach may have resulted from his prior acceptance of the death penalty against murderers in *Gregg*. Even less data existed on the possible deterrent effect of the death penalty on rape than on murder. If White claimed that such lack of proof meant there was no measurable contribution to the acceptable goals of punishment, he arguably would have been contradicting his previous acceptance of inconclusive data in *Gregg*.

White reduced this definition to an objective test—the study of how various jurisdictions have punished rapists to help determine the "evolving standards of decency"; and a "subjective" test—the plurality's personal reactions to killing rapists. The heated debate in *Coker* and *Enmund* over the significance of the objective data would continue in a treason case. Only eight people have been executed for any political crimes since 1930—the two Rosenbergs and six of the eight German saboteurs who landed in Florida during World War II.[249] (One could possibly include the shooting of Private Slovik for desertion.) Nobody has been executed for treason since John Brown in 1859, and nobody is currently sentenced to death for the crime. White might conclude that juries and prosecutors are not eager to kill political criminals. Such infrequent use of the penalty for political crimes could be interpreted as society's evolving distate for the penalty, at least against political criminals.

Legislative treatment of treason has been uneven. In 1955, twenty-one states permitted the use of the death penalty in treason cases.[250] In 1982, thirteen states and the federal government still retained the death penalty for treason,[251] while sixteen other states

248. *Coker*, 433 U.S. at 592.

249. W. BOWERS, EXECUTIONS IN AMERICA 54, n.g (1974).

250. Bedau, *Offenses Punishable by Death*, in THE DEATH PENALTY IN AMERICA 43 (H. Bedau, ed.) (1967).

251. 18 U.S.C.A. § 2381 (West. Supp. 1982); ARK. STAT. ANN. § 41-3942 (1976); CAL. ANN. PENAL CODE § 37 (West 1970); COLO. REV. STAT. § 18-11-101 (1973); GA. CODE ANN. 17-10-30 (1982); ILL. ANN. STAT. ch. 38 § 30-1 (Smith-Hurd 1966); LA. REV. STAT. ANN. § 14-113 (West 1974); MISS. CODE ANN. § 97-7-67 (1972); MO. ANN. STAT. § 576,070 (Vernon 1979); NEV. REV.

have authorized only prison sentences for the crime.[252] Another sixteen states define the crime of treason in their constitutions but do not provide any specific penalty for the crime.[253] Four states do not define the crime under either their constitutions or their statutes.[254] Hawaii is the only state to make no reference to the crime. Certainly these laws do not demonstrate any more legislative support for the death penalty than existed in *Enmund*.

No studies exist on jury decisions sentencing traitors to death in comparison to those where traitors receive lesser sentences. The Court will always have little data when the death penalty is being applied to crimes aside from murder, if only because the penalty was not previously being used. The *Enmund* plurality's use of data

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STAT. § 196.010 (1981) (10 year to life sentence); S.C. CODE ANN. §§ 25-7-30, 25-7-40 (Law Co-op 1976); VT. STAT. ANN. tit. 13 § 3401 (1974); WASH. REV. CODE ANN. § 9.82.010 (1977).

Two states, New Hampshire and Nebraska, (not included in the list of twelve states above) refer in their State Code Indexes to the U.S. Constitution, art. 3, § 3 ch. 2, to establish the proper penalty. The U.S. Constitution provides that Congress should set the penalty for treason, and Congress has authorized the death penalty. 18 U.S.C.A. § 2381. Whether this Congressional penalty would be legally applicable to treason against a state is unclear. *See* NEB. REV. STAT. Index (1908); N.H. REV. STAT. ANN. Index (1976).

South Carolina's law is unique, for it only authorizes the death penalty in time of "war." Also, the South Carolina statute defines treason to include only giving information to or gathering information for an enemy. The statute is different from the South Carolina Constitution, which only outlaws "levying war against it [the state], adhering to its enemies, giving them aid and comfort." S.C. CONST. art. 1 § 17. *See* S.C. CODE ANN. §§ 25-7-30, 25-7-40 (Law Co-op 1976).

252. Of the 16 states that exclusively authorize prison sentences, 12 authorize life imprisonment for treason. ALA. CODE § 13-11-2 (1975); KAN. STAT. ANN. § 21-3801 (1981); MASS. ANN. LAWS ch. 264 § 1.2 (Michie/Law Co-op 1966); MICH. COMP. LAWS ANN. § 750-544 (West 1971); MINN. STAT. ANN. § 609.385 (West 1947); OKLA. STAT. ANN. tit. 21 § 1266 (West 1972); OR. REV. STAT. § 166.005 (1981); R.I. GEN. LAWS § 11-43-1 (1978); S.D. CODIFIED LAWS ANN. § 22-8-1 (1981); VA. CODE § 18.2-481 (1982); W. VA. CODE §§ 61-1-1, 61-12 (1977); WIS. STAT. ANN. § 946.01 (West 1982).

Three states authorize shorter prison sentences. Tennessee punishes treason with a ten to twenty year sentence, Florida, one to thirty year sentence and North Dakota, one to twenty year sentence. FLA. STAT. ANN. § 876.32 (West 1973); N.D. CENT. CODE § 12.1-07-01 (1971) (repealed 1976); TENN. CODE ANN. §§ 39-4402, 39-4403 (1975).

New Hampshire does not have a treason statute, but its subversive advocacy statute is somewhat similar. N.H. REV. STAT. ANN. § 648:2 (1976).

253. ALASKA CONST. art. I, § 10; ARIZ. CONST. art. II, § 28; CONN. CONST. art. IX, § 4; DEL. CONST. art. VI, § 3; IDAHO CONST. art. V, § 5; IND. CONST. art. I, § 28; IOWA CONST. art. I, § 16; KY. CONST. § 229; ME. CONST. art. I, § 12; MONT. CONST. art. II, § 30; N.J. CONST. art. I, § 17; N.M. CONST. art. II. § 16; N.C. CONST. art. I, § 29; TEX. CONST. art. I, § 22; UTAH CONST. art. I, § 19; WYO. CONST. art. I, § 26.

254. Some references to treason are made in the constitutions or statutes of Ohio, Nebraska, Pennsylvania, New York, and Maryland, but no definition of the crime of treason against the state is found. *See* NEB. CONST. art. I, § 14; N.Y. CONST. art. IV, § 4; OHIO CONST. art. III, § 11; PA. CONST. art. I, § 18; *contra* MO. CONST. B. of R. art. I, § 30.

puts the government in a bind whenever it wants to extend the death penalty; any extension will be for the "first time," and can be characterized as unrepresentative prosecutional behaviour. The defendant can also claim that there was far more active use of executions against rapists than against any other criminals except murderers, but that even that level of use was not sufficient "objective" support.

Judge Frank observed in *Rosenberg* that public opinion polls are not very helpful in determining attitudes that change with the political climate.[255] A poll taken in Minnesota in May, 1973, after *Furman*, indicated that thirty-nine percent of those surveyed favored "automatic" capital punishment for "crime against the federal government such as treason, sabotage and espionage."[256] In a survey taken to rank the seriousness of a crime by asking what penalty offenders should receive, spying was considered the thirteenth worst crime out of eighteen—worse than mugging but not as bad as a politician's accepting bribes.[257] While a defendant could argue that this low percentage and low ranking indicate lack of support for the death penalty, support for capital punishment would probably increase during a war or insurrection.

Unlike rape, treason and similar political crimes are still punishable by death in many other countries. The United Nations report, cited in *Coker*, stated that it is lawful in fifty-three countries to kill those convicted of treason and other political crimes.[258] The Court can accept severe punishments, perhaps including torture, if it looks to other governments to determine evolving standards of decency in punishing political criminals. For example, in 1982, Polish authorities indicted four leaders of a dissident intellectual group, KOR, for trying to overthrow the state by force, a crime punishable by death.[259]

Even if a consensus could be reached on the meaning of the objective data, conflict would reappear over the subjective comparisons of murder, rape, and treason—in terms of the acts themselves

255. *See supra* note 169.

256. Vidmar and Ellsworth, *Public Opinion and the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES 129 (H. Bedau ed. 1975).

257. Hamilton and Rotkin, *Interpreting the Eighth Amendment: Perceived Seriousness of Crime and Severity of Punishment*, in CAPITAL PUNISHMENT IN THE UNITED STATES 516 (H. Bedau ed. 1975).

258. U.N. Department of Economic and Social Affairs, CAPITAL PUNISHMENT, U.N. Sales No. 62, IV, 2 (1962).

259. N.Y. Times, Sept. 4, 1982, § 1, at 3, col. 5.

and the depravity of the actors. In *Coker*, the plurality only considered harm to the victim and harm to the public to determine the degree of moral depravity. The *Enmund* plurality emphasized the defendant's personal culpability: "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys."[260]

How does treason fit into these two hierarchies ranking the crime and ranking the criminal's depravity? There are a number of competing schemes: (1) treason could be considered worse than murder or rape; (2) treason could be seen as not as venal as either rape or murder; (3) treason could be equated with either rape or murder; (4) treason could be viewed as less heinous than murder but more so than rape; (5) treason could be considered so different from rape or murder that comparisons would only be misleading; or (6) treason encompasses so many activities that it may fall into any of the five previous rankings. According to McCloskey, there is no self-evident answer to determine which ranking is appropriate, much less which one is constitutionally required:

> We do disagree, and most of us would have doubts about the right order of the gravity of crimes. This shows very little. We have the same doubts—and disagreements—in other areas of morality where we are uncertain about which duties are most stringent and where we differ from others in our ordering of duties.[261]

Even once we have agreed that there is an "ought," in terms of condemning certain behaviors, this particular transition from "is" to "ought" is complicated tremendously by comparisons.

By emphasizing the victim's injury, the *Coker* plurality may have consciously been avoiding evaluation of political crimes: "Short of homicide, it [rape] is the 'ultimate violation of self.' " The "public injury," which was defined as the "undermining of the community's sense of security,"[262] was not so grave. In treason, however, the injury could be characterized as the "ultimate violation of community security."

Applying philosopher Joel Feinberg's thesis that a major purpose of punishment is to express community outrage,[263] a supporter

260. 102 S. Ct. at 3377.
261. McCloskey, *supra* note 228, at 134.
262. *Coker*, 433 U.S. at 597-98.
263. J. FEINBERG, *supra* note 239.

of the penalty can claim that since treason may ultimately destroy a government, and thus a community, the community should be able to express its anger and fear against this heinous crime by using the ultimate penalty, especially since the death penalty has been preserved for the lesser crime of murder. The execution of traitors can unify the community by eliminating more deviant members. Even someone initially opposed to the death penalty might agree that once the sanction is allowed against murderers, society can fairly use it against traitors. Under Richard Posner's economic imagery, the community sets a price on crimes by the penalty,[264] and the price for murder and treason should at least be the same. Furthermore, one argument against killing criminals such as rapists or kidnappers—that they will be pressured into killing their victim so there will be no adverse witness—does not apply to most traitors since the crime is usually unobserved and there is no particular victim who is directly and immediately affected.

In support of the argument that treason will usually cause less injury, the defendant can contrast the widespread harm that might be caused by treason to the total, individual harm caused by murder. Feinberg believes that murder inflicts the most injury and violates the most interests because it destroys the "supreme welfare interest" one has in life, a vital precondition to enjoyment of all other rights.[265] When no deaths can be attributed to the treason, the severity of the harm is harder to assess. When antitrust violations or the sale (with knowledge) of faulty products occur, for instance, there are widespread violations of the public's rights, which cause more total injury than a single theft or a single murder. Nevertheless, courts do not punish those who commit such crimes as severely. The greatest sanctions in criminal law are usually reserved for personal injuries. Murder is a unique crime, deserving a unique punishment, because the defendant took the life of another. The murderer cannot claim that the state is doing something to him that he would never do to anyone; he arguably has waived any contractual right[266] to continued life since he took a life. Of course, every

264. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

265. FEINBERG, *Harm and Self Interest*, in RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY 60 (1980).

266. Retreating behind John Rawls's "veil of ignorance" does not help much, partially because punishment is rarely discussed in his classic work, A THEORY OF JUSTICE. All of the negotiators might agree that murder is an obvious evil which can be punishable by death, while the unclear meaning of treason creates too great a possibility of misuse or error. On the other hand,

crime breaches the relationship between the criminal and society, and the government could reply that treason represents a more total rejection of the society than murder.

There are practical reasons to draw a bright line for the death penalty at murder. Courts would not have to face perpetual case-by-case determinations which would inevitably result in uneven application. Nor would some traitors die while some convicted murderers live. The Court could justify this limitation under the principle of a life for a life. Such a standard would be more of a "neutral principle"[267] than most others, such as Chief Justice Burger's "life endangering" and "grievous affronts to humanity" standards, which allow continued discretion, arbitrary application and the balancing of the defendant's life against any number of factors. Reliance upon the valid concern for community security to justify executing traitors allows the state's power to expand in many unpredictable, dangerous directions. Certain traitors may cause more harm than most murderers, but it will be very difficult to make that determination, particularly when nobody has died.

It is also harder to determine the "depravity" of a traitor than of a murderer. Unlike treason, everyone knows what murder is and there is a consensus against murder. "Treason," however, may be the act of a patriot; this country was founded as a result of a collective act of treason. Philosopher W.D. Ross claims that the state is not the equivalent of the community; therefore, supporting the state can be treason to the community.[268] Thus, the state should not be

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the negotiators might conclude that treason represents the greatest threat to the effective implementation of their agreement, the most total repudiation of their contract and of any rights it guarantees. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971) [hereinafter referred to as THEORY]. Robert Nozick's emerging libertarians could react either way; they may conclude that the process of determining traitors is so unreliable that convicted traitors should not be killed. R. NOZICK, ANARCHY, STATE, AND UTOPIA 96 (1974). Certainly Nozick would oppose treason against the "State"; someone would have to be victimized so that they were owed the duty by the state to punish the victimizer. *Id.* at 136-37. Nevertheless, all parties might originally agree to join the dominant protective agency in part because it would kill anyone who tried to destroy it. For a more elaborate extrapolation of Rawls's views on capital punishment, see Donnelly, *A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment*, 29 SYRACUSE L. REV. 1109 (1978).

267. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). I do not know what a "neutral principle" is. As will be seen, I agree with A.J. Ayer that all value judgments are based upon feelings, and cannot be neutral. Certainly the subsidiary argument—certain conclusions are inconsistent with predetermined premises—is "neutral," but Wechsler believed that neutrality alone could evaluate cases such as Brown v. Board of Education, 347 U.S. 483 (1954).

268. W.D. ROSS, THE RIGHT AND THE GOOD 56-64 (1965).

delegated the power to decide which political opponents should live or die. Erroneous or biased treason convictions can be partially cured only as long as the person lives.

Enmund reinforces the argument that murder is an element necessary to justify the death penalty. The State of Florida did not prove that Enmund intended the murders or actively participated in the death of the elderly robbery victims. In treason cases, where murder cannot be proven, the defendant can claim that not only did he not intend any deaths or participate in any killings, but also that he did not cause any deaths. Thus his personal culpability was less than that of Enmund, much less than that of aggravated murderers.

B. Justices Marshall and Brennan's Absolute Opposition

Justices Marshall and Brennan would probably extend to treason cases their opposition to the death penalty. They would reject the argument that since murderers can now be killed, traitors should also be executed because treason is at least as venal as murder. Brennan based his opposition upon his philosophical belief in the "dignity of man," the underlying premise of the eighth amendment. Brennan's foundation is a vague natural law concept that intermingles his general philosophy with the specific facts of capital punishment. Critics complain that Brennan ignores the criminal's violation of the victim's dignity. Nevertheless, the death penalty is a unique penalty, inflicting great suffering on the waiting defendant.

Taking a pragmatic approach, Justice Marshall would emphasize that no proof of capital punishment's alleged deterrent power exists. If the public knew this fact, most people would oppose the penalty, since retribution alone does not justify death. Assuming that Marshall is correct about the lack of deterrence, one wonders about how an "informed public" would react in a treason case.[269] It

269. *See* Sarat and Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976). The authors agree with Marshall that many members of the public are "uninformed" about the deterrent effect of the death penalty, but the authors conclude that because there are strong retributive values that also generate support for the death penalty, knowledge about deterrence would primarily affect those who did not believe in retribution, but who did support the death penalty for deterrent purposes. After all the data was presented from various polls, "the percentage of subjects favoring the death penalty was reduced to less than a majority." *Id.* at 175. Assuming the various surveys were precise and that one should and could extrapolate from those samples into the future, I remain troubled about defining constitutional rights based upon the beliefs of a temporary majority. For a general discussion of the problems in relying on statistics see Handlin, *How to Count a Number*, in TRUTH IN HISTORY 194 (1979).

is easy to believe that Marshall's "informed public" is actually himself. There are many articulate, informed critics, such as Herbert Packer, Ernst Van Den Hagg, and Walter Berns, who do accept the death penalty and who would accept it even if deterrence could not be proven. Berns based his defense on retribition:

> [A]s I see it, the argument about it [capital punishment] does not turn on the answer to the utilitarian question of whether the death penalty is a deterrent; . . . the evidence on this is unclear and, besides, as it is usually understood, deterrence is irrelevant. The real issue is whether justice permits or even requires the death penalty.[270]

C. The Inevitability of Mistake, Caprice, and Bias

1. Charles Black's Argument Against the Death Penalty

Professor Charles Black combines legal analysis—describing the enormous discretion permeating the criminal justice system—with the philosophical belief in language's innate inaccuracy to argue that any legal system that uses the death penalty will not only execute some innocent people but also will capriciously allow some guilty to live while killing other guilty people. A diverse group participates in the process used to decide if someone should die: police, prosecutor, witness, judge, jury, appellate court, governor or clemency board, and even defendant (as well as defendant's attorney).[271] After a few years of using the death penalty, one will be unable to distinguish between those murderers who sit on death row and those who receive a prison sentence. In Georgia, many killers have been sentenced to death but Wayne Williams received a life sentence, despite Williams's conviction for two of the mass murders of young black boys in Atlanta. Professor Black has concluded that the Supreme Court's attempt to reduce such inconsistencies must fail; the Court has only created "apparent standards" by requiring the jury to consider all mitigating circumstances and to find at least one statutorily defined aggravating circumstance. If the stakes were not so high, Black would find the statutes' definitions of such circumstances humorously vague and circular: "I think I have partly shown why, as ought to be obvious without all this, a jury must either resolve all these verbal puzzles for itself, without sufficient grounds for the resolution given, or else proceed in puzzlement to its

270. W. BERNS, FOR CAPITAL PUNISHMENT 8 (1979).

271. *See generally* C. BLACK, CAPITAL PUNISHMENT (2d Ed. augmented, 1981).

own standardless decision—or a bit of both."[272]

Black's views have never been accepted by any members of the Supreme Court (Marshall and Brennan apparently found such arguments unnecessary), but his arguments will deserve reconsideration if the Court ever has to decide the constitutionality of a capital treason case. There will be even more discretion and a greater possibility of error in a treason case since even the initial step of defining the crime is far more difficult than defining murder, where there is a dead or missing body and usually some evidence of foul play. As the historical survey in this article indicated, government officials will be tempted to use treason prosecutions to destroy their political opponents; the possibility of such bias, which Black deliberately does not consider, dramatically increases the likelihood of mistake or caprice. These three factors—mistake, caprice, and bias—affect all aspects of treason cases—initial definitions, litigation of any single case, and application of the crime against different people.

Despite the framers' efforts to regulate treason cases, the Constitution's procedural and substantive protections are unclear. Although the clause probably precludes Jacque Barzun's opinion that bad manners during a legislative meeting are treasonous,[273] its two definitions of treason can easily be interpreted to cover legitimate political dissent or minor, disruptive political acts. First, the Supreme Court has never rejected the constructive treason which interprets "levying war" to include political riots.[274] Those who participated in the Weathermens' "Days of Rage," a violent demonstration that took place in Chicago in 1969, may have been guilty of the lesser crimes of assault and destruction of property, but they could

272. *Id.* at 119.

273. "I can for example imagine a truly democratic state in which it would be deemed a form of treason punishable by death to create a disturbance in any court of deliberative assembly." Barzun, *In Favor of Capital Punishment*, in THE DEATH PENALTY IN AMERICA 161 (H. Bedau ed. 1964). Sir Patrick Devlin has analogized homosexuality with treason.

274. Even the meaning of "war" is debatable:

> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.

The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863). Although the Supreme Court has not ruled on the issue, several state courts and lower courts have found there was "levying of war" without any formal declaration of war. Of course, any treason against the states could occur without a Congressional declaration of war. There are no reported cases of convictions for "aiding and abetting the enemy" when war had not been declared—that is an open question.

have been charged with treason and possibly been convicted. Their actions were similar to those of Whiskey Rebels. Second, the Supreme Court's interpretation of "aiding and abetting the enemy, giving them comfort" does not define clearly what "overt acts" are illegal.[275] Even if *Cramer* still contains vitality after *Kawakita* invoked the image of total war, who can be sure what activities—beyond having lunch with an enemy—are not treasonous? Since there is no requirement that Congress first formally declare war before the clause is invoked, a person may be unsure of who the enemy is or when a group has become the enemy. Were the Argentines the "enemy" during the recent Falkland Islands conflict either before or after the United States allied itself with Great Britain? The law has not clarified what part or parts of the "overt act" the two witnesses must observe, either together or alone. Additionally, the jury has the difficult task of inferring treasonous intent from the overt act. Such ambiguities revive the *Herndon* due process concern of adequate advance notice (particularly when a life is at stake): "While a coercive mechanism is necessary, it is obviously essential to define precisely the tendency of its operations. Knowing what things it penalizes and knowing that these are within their power to do or not to do, citizens can draw up their plans accordingly."[276]

American politicians have not been immune from the temptation to initiate or manipulate treason cases improperly. Thomas Jefferson's unscrupulous treatment of Bollman exemplifies how the crime of treason tempts the best of men to engage in deceitful practices. President Filmore encouraged the indictment of abolitionist Caster Hanway, even though Filmore thought there was little likelihood of success. The Justice Department tried "Tokyo Rose" for treason despite internal studies indicating that the case was weak. Unpopular political or religious figures ranging from Joseph Smith, leader of the Mormons, to Joseph Herndon, Communist organizer, faced the possibility of the death sentence for their noncriminal actions. Once a political trial has begun, the prosecution is under enormous pressure to win. The FBI may have known that Ethel Rosenberg was innocent, but it used this knowledge in attempts to

275. For an early attempt to define the phrase, see Warren, *What is Giving Aid and Comfort to the Enemy?*, 27 YALE L.J. 331 (1917). Warren argued that words alone can be treason. *Id.* at 340.

276. THEORY, *supra* note 266, at 241.

pressure her husband into admitting guilt so he would save her.[277]

Assuming an act of treason has occurred, proving the crime remains difficult. Judge Jerome Frank emphasizes that all legal proof is tainted with speculation and misapprehension, first by the witness and then by the trier of fact who hears and observes the witness.[278] Examples abound. Historian Mary-Joe Kline claims that a coded letter—used to help prove that Burr intended to seize part of the United States, not to invade Mexico—was a forgery written by an associate, Johnathan Dayton. Dr. Kline concludes: "Burr was probably guilty of something, but no one's absolutely sure of what."[279] As theorists ranging from Montesquieu to Benjamin Franklin observed, perjury is extremely likely in treason cases. Prosecutorial deals with co-conspirators also facing the death penalty are inevitable. The Hughes Aircraft engineer confessed agreeing to engage in a scheme to catch the Polish spy who originally recruited him; the engineer received only an eight-year prison sentence.[280] Threats of execution distort the plea-bargaining process and tempt defendants to make allegations of a broader conspiracy.

The jury deciding the case will frequently be under enormous pressure to convict people accused of treason. The jury may legitimately feel directly threatened and injured by the defendant. Treason can injure all citizens, while such crimes as murder primarily harm the victim and those who know the victim. The trial itself may be a political circus—at the risk of his life, the defendant may turn the trial into a forum to express his beliefs. As the *Herndon* case showed, the prosecution can use despicable tactics. The publicity would be enormous at a capital treason case, particularly if the trial were televised. According to a study headed by Professor Franklin Zimring, publicity can be dangerous for defendants: "An important minority of killings—the 'retail' cases—receive more attention, more complete due process, and penalties done to an order of a magnitude higher than the low-visibility wholesale cases."[281] Conversely, the death sentence can also distort the jury's already

277. Stern and Radosh, *The Hidden Rosenberg Case*, 180 NEW REPUBLIC at 13-14, June 23, 1979. *See, e.g.*, R. RADOSH AND J. MILTON, THE ROSENBERG FILE (1983).

278. FRANK, *supra* note 2, at 14-37.

279. N.Y. Times, July 11, 1981, § 1, at 1, col. 1.

280. Sixty Minutes, *supra* note 134, at 18.

281. Zimring, O'Malley, and Eigen, *The Going Price of Criminal Homicide in Philadelphia*, in CAPITAL PUNISHMENT IN THE UNITED STATES 83 (H. Bedau ed. 1976) [hereinafter cited as CAPITAL PUNISHMENT].

taxed judgment by pressuring them to acquit a person they believe is guilty, solely because they do not think he should die. Since there is no dead body at which to point, the jury will tend to base its judgment as to whether a traitor should live or die on the traitor's personality and/or beliefs.

Even after finding the defendant guilty of treason, the jury will have to decide if he deserves to die. Assuming they can resist all the pressures to recommend execution because of community solidarity or because of the publicity, the jury must apply standards similar to those condemned by Professor Black. For example, a recently proposed federal statute included a death penalty section which explicitly required the jury to consider mitigating factors, including political beliefs, to determine if the act was committed "under circumstances which the offender believed to provide a moral justification or extenuation for his conduct and which is reasonable, in fact, by ordinary standards of morality, for his conduct."[282] All traitors can claim that their actions would benefit the populace in the long run. If their defense is a belief in Marxism or facism, does that ideological commitment make their defense a "moral justification" which is "reasonable," and is that belief one that is an "ordinary standard of morality"? Or does the "ordinary standard" test really justify execution of anyone who does not have the views of the average citizen? The meaning of this mish-mash of words is unknown.

There are additional practical and constitutional problems in assessing the defendant's depravity. Treason can be an inchoate crime; the trial may occur before the extent of the harm is known. Also, the prosecution may attempt to impute many injuries to the activity. For example, the prosecutor may claim that an allied regime was overthrown because of the treason even though that government would have fallen anyway. Treason frequently is a group activity. Since *Ex Parte Bollman* held that all members of such a group were principals, the jury would have to decide which members of the group deserve to die. *Enmund* required that aggravated murder not be imputed to a distant principal via the felony-murder doctrine. Applying *Enmund's* analysis to treason, the death penalty should only be applied to those traitors whose treason actually caused a harm equal to death (assuming such a harm exists), and

282. Report of Senate Judiciary Committee, *To Establish Rational Criteria for the Imposition of Capital Punishment*, 93rd Cong., 1st Sess., in BEDAU, THE DEATH PENALTY IN AMERICA, *supra* note 250, at 33.

who intended such harm and/or actually participated in the harm. Yet, it will be far more difficult to exclude marginal members of a treasonous plot than to exclude all members of a felonious plot who neither planned a murder, killed anyone, nor were present at the murder scene; all members of the treasonous plot are "present" at the crime to some degree. To kill someone who knowingly let a rioter stay in his home, while letting murderers live, would be bizarre. The best way to avoid the injustice of killing people who are less depraved than murderers is to kill only murderers.

Professor Otto Kirchheimer observed that clemency plays a uniquely active role in political crimes.[283] From the treason trial of the two Quakers during the Revolution to the deaths of the Rosenbergs, requests for pardons or reprieves inevitably followed death sentences in political cases. No pattern emerges: the two Quakers died, Shays lived, John Brown died, all but a few of the Confederates lived, and the Rosenbergs died. During war, the government is under enormous pressure to kill opponents, if only to satisfy the blood lust of the citizenry, many of whom are dying for the country. Each war seems to be more threatening; the nuclear age has increased anxieties. But after the threat has passed, certain repressive deeds, such as the internment of the American-Japanese[284] or the incarceration of Milligan, appear wrong. Furthermore, given the delays in the appellate system, any political criminal who appealed his conviction would probably not be executed promptly after his trial, much less after his crime. Yet the later execution would be final; an executed traitor, unlike the American-Japanese or Milligan, could never be released. Government officials will also use convicted traitors as bargaining chips with opposing political forces. Both sides can threaten to kill, imprison, or trade traitors and/or spies whom they have caught. Who will live and who will die could be a function of international politics, not individual depravity.

Consequently, application of the inherently and necessarily vague law of treason leads to "wanton and freakish" results. Who could have predicted that Cramer was not guilty of treason while Haupt was? This inability to determine what behavior is treasonous and what treasonous behavior is worthy of death violates *Herndon's* due process requirement that a person have adequate prior notice of

283. O. KIRCHHEIMER, *supra* note 108, at 389-418.

284. Korematsu v. United States, 323 U.S. 214 (1944).

what actions are capital offenses. Nor is it obvious why John Brown had to be shot for his treason but Jefferson Davis, who led the Civil War for the South, could live. Innocent people, such as Herndon, Smith, and Hanway, will inevitably be caught up in political, legal conflicts. (Admittedly there might be even more treason trials if there were no possibility of the use of the death penalty; the prosecutor could gain the political benefit of trying the person while not being criticized for failing to ask for death.)

The history in other relatively civilized countries is equally dismal. Frenchmen Louis Malvy and Joseph Caillaux were tried for treason because they led a coalition opposing continuation of the First World War during its last bloody days.[285] Consider also the description of the rise of the Nazi regime by Hans Frank, Hitler's legal theorist, as "the first large revolution in history that was carried out by applying the existing formal code of law at the moment of seizing power."[286] The Nazis' justification for killing those convicted of treason was neither retributivist nor utilitarian:

> Punishment is not a means of education, as our apostles of humanity pretend. Nor is it vengeance. Punishments (and here we are speaking of offense which sully one's honor) is the simple elimination of foreign types . . . . A man who doesn't regard the essence of the people *(Volkstum)* and their honor as the highest value has lost the right of being protected by the people. As for cases of treason against the Volk or treason against the country, penitentiary confinement and the death penalty are the only punishment that ought to be used; that goes without saying.[287] (Emphasis in original.)

Killing political criminals unleashes many undesirable side ef-

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285. B. INGRAHAM, POLITICAL CRIME IN EUROPE 229 (1979). Malvy was later acquitted of treason, but convicted of "culpable misfeasance of office." Caillaux was also convicted of a lesser crime. When a leftist government returned to power in 1924, Caillaux's record was expunged, and he served as Minister of Finance. *Id.* at 229, n.2.

286. *Id.* at 257. Kirchheimer provides many examples of how governments use political trials primarily for propaganda purposes. For example, the Nazi leadership wavered, for reasons unrelated to the merits of the case, in deciding to initiate a treason/murder charge against Herceil Corynazpan for killing a German diplomat: "The trial thus offers a possibility to prove to the whole world the decisive participation of world-Jewry in the outbreak of the present war," wrote Goebbels to Hitler. Hitler eventually decided to drop the case, apparently because he wished to claim that France was responsible for the war. O. KIRCHHEIMER, *supra* note 108, at 101-04.

287. B. INGRAHAM, *supra* note 285, at 260. Kirchheimer concludes that the nature of the charge and the course of the trial will primarily reflect the values and needs of the government, O. KIRCHHEIMER, *supra* note 108, at 118. *See generally* R. GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA (1978), for a detailed discussion of political persecution from the suppression of labor in the 1800's to the Viet Nam era.

fects. Controversy pervades political trials, polarizes the community and creates martyrs. Debates continue for years about the government's motives, the defendant's guilt, and the propriety of the punishment.[288] Supporters of the executed traitor frequently seek vengeance, escalating domestic violence (while proponents of the death penalty would reply that killing the traitor eliminates the possibility that supporters would engage in terrorism to secure the traitor's release).[289] Assuming that the treasonous faction eventually succeeds, leaders may be far more vengeful if many of their members were killed when they were not in power. A positive effect of refusing to kill traitors is that a form of solidarity and pride may be created in the country. This country has a record, reflected through the first amendment, of not repressing political opposition as savagely as most other societies. It is a tradition that gives this country moral and political strength, a tradition that could be easily destroyed by frequent use of political executions.

2. Responses to the Charges of Mistake, Caprice and Bias

In *Gregg*, Justice Stewart rejected Charles Black's conclusions about the inevitability of mistake and caprice. Stewart thought that Georgia's system of aggravating and mitigating circumstances adequately prevented the total discretion previously condemned in *Furman*.[290] Furthermore, the Georgia Supreme Court would provide appellate review which would clarify the standards, preventing them from being reduced to the tautology that every murder could be characterized as "outrageously or wantonly vile, horrible or inhuman." Stewart considered discretionary decisions not to administer the death penalty as "mercy" decisions.[291] Yet mercy is, and should be, an integral part of any criminal justice system, and should not be ignored when evaluating the impact of society's most severe and final sanction.[292] Many discretionary decisions are not motivated by mercy; the prosecutor might not seek the death pen-

288. The endless debates over the guilt of the Rosenbergs and of Alger Hiss are classic examples.

289. *See* Thornton, *Terrorism and the Death Penalty*, in THE DEATH PENALTY IN AMERICA 181-85 (H. Bedau ed. 1982).

290. *Gregg*, 428 U.S. at 198.

291. *Id.* at 199.

292. For a discussion of the use of the death penalty and the use of mercy in place of the death penalty during eighteenth century England, see Hay, *Property, Authority, and the Criminal Law*, in ALBION'S FATAL TREE 17 (1975).

alty because he hopes to increase the chances of conviction. In his concurring opinion, Justice White also found adequate protection in appellate review. White conceded that mistakes would occur, but he claimed, without proof, that the system was fundamentally fair.[293]

Black's response is simple. He agrees that the legal system normally tolerates error and inconsistency as inevitable products of a system of language, interpretation, and uncertain proof. Yet in these cases lives are at stake.[294] Black then dissects the various statutes' definitions of aggravating circumstances to show that these attempts to reduce discretion are illusory. State statutes authorizing the death penalty for treason against the state are even more poorly drafted than the murder statutes Black condemned. Violating *Gregg*, *Woodson*, *Lockett* and the rest of the cases, Georgia's statute does not even require consideration of aggravating and mitigating circumstances: "(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case."[295] The Mississippi law asks the jury to apply the same standards it would use in a murder case, such as (5)(g), "[t]he capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws"; and (5)(h), "[t]he capital offense was especially heinous, atrocious or cruel."[296] To paraphase Justice Holmes, the sections only have to be stated to be rebutted.

D. Why Traitors Should Die: Applying Burger's Coker *Dissent To Treason*

Chief Justice Burger's criticism of the *Coker* decision can be reduced to four intertwined arguments: (1) the plurality misapplied the subjective test; (2) the plurality misinterpreted the objective data; (3) the plurality did not give adequate weight to the beneficial effects of the death penalty; and (4) the plurality inappropriately imposed their own views upon the legislatures. Surprisingly, Burger did not discuss retributive justifications for the death penalty.

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293. 428 U.S. at 226.

294. "But death is unique, and the procedures we must use, having no better, in our entire system of justice—and that is really the kindest thing one can say of that system—may still not be good enough for the death choice." C. BLACK, *supra* note 271, at 128.

295. GA. CODE ANN. § 17-10-30(a) (1982).

296. MISS. CODE ANN. § 99-19-101 (1977).

1. The Subjective Test

The argument that the death penalty could not be used in treason cases whenever murder had not been proved confirms Burger's belief that the *Coker* plurality's original conception of proportionality was wrong. Even though the Chief Justice had agreed with the plurality that rape was the most heinous crime aside from murder, he could easily use his dissent to justify the killing of traitors. The same underlying principle supported the execution of both killers and rapists: to protect society from those who have "shown total and *repeated disregard* for the welfare, safety, personal integrity and human worth of others, and who seemingly cannot be deterred from continuing such conduct."[297] (Emphasis added.) In *Gregg*, the Court held that the death penalty could be used against those who had committed "crimes," implying that acts other than murder were covered. Certain acts of treason, such as selling military secrets to the Soviet Union, or initiating civil insurrection, arguably could cause more injury to more people than a single murder, even though no life had yet been taken and there would be uncertainty if any lives would ever be taken. By constitutionalizing the principle of the *lex talionis*, the plurality created a standard which limits society's ability to defend itself and adapt to changing political circumstances. The decision to kill traitors should be based upon numerous factors, such as the motives of the traitor, the harm caused, potential harm and the number of acts committed, and be resolved by the trier of fact (with appellate review to prevent abuse).

The defense could attempt to narrow Burger's analysis by arguing that an act of treason does not show disregard for any individual; the crime is an inchoate injury against a mythical entity, the "state." But Burger might respond that enforcing treason laws does not only protect the "state," or the existing regime. Such enforcement also helps prevent military defeats and violent revolutions, both of which inflict great suffering upon ordinary citizens. Consequently, Burger would probably categorize treason as a "major" crime, "a criminal activity which consistently poses serious danger of death or grave bodily harm . . .,"[298] punishable by death.

Burger's tests require as many, if not more, subjective assumptions as the plurality's approach: (a) that certain penalties are un-

297. 433 U.S. at 610 (Burger, J., dissenting).

298. *Id.* at 620.

constitutionally disproportionate; (b) that the state cannot kill for "minor" crimes; (c) that there may be a difference between recidivists (the undeterrable) and first-time offenders; and (d) that judicial deference to death penalty legislation should be triggered exactly at the point of life-endangering activities (wherever that point is). Under a principle debatably less "neutral" than "a life for a life," he has left enormous power to the government under his tests.

2. The Objective Test

The Chief Justice would probably not be swayed by objective proof indicating that few states allow the execution of traitors. He would not care that there have been no jury-determined death sentences or executions for any political crimes since the Rosenbergs and that no political prisoners—aside from those making the challenge at the time of the case—would be on death row. He might reply that the lack of cases and the lack of defendants are proof of the death penalty's deterrence. Furthermore, he would claim it is unwise to determine the evolving standards of decency contained in the eighth amendment by freezing the analysis at any given time; the federal government and the states are constantly experimenting with new sanctions, as well as responding to the numerous Supreme Court opinions on the death penalty. Unless the objective data showed virtually universal rejection of the penalty for treason, the Court should defer to the legislature. Declaring a punishment unconstitutional precludes continued consideration of that penalty, which in this instance might be disastrous since treason might flourish in a deteriorating political climate.

Nevertheless, the Chief Justice and his fellow dissenters would have to refute the argument that the American society has long survived without killing many people for any political crimes. Certainly there have been many opportunities. The state has more power than ever over citizens because of nuclear weapons, computers, media manipulation, and increased loyalty. To accept the death penalty for treason could well undermine our fragile political values, which tolerate political dissent while resisting violent opposition.

VI. Is There A Statutory Compromise?

The Justices have created two competing remedies in response to constitutional challenges to the death penalty. Either the Court

has agreed with defendant and voided the statute, or else the Court has required that the trial court use more intensely the system of aggravating and mitigating circumstances. Although I believe that any capital treason statute should be voided, such a decision would be unsettling; we can all think of acts of treason which cause deaths (although proof of murder would be difficult), or acts of treason which cause far more suffering, costs, and increased insecurity than most murders.[299] But just using the circumstances test insufficiently reduces the likelihood that people would be improperly tried for treason and/or sentenced to death for treason. The Court could instead invoke the vagueness doctrines, inferred from the first amendment and the due process clauses, and successfully used in cases such as *Herndon*, to require that the legislature limit and define treason as much as possible before authorizing capital punishment. Vagueness arguments are often rejected because the Court concludes that the language is as precise as possible. The following proposed statute indicates that such is not the case in capital treason cases.

A. The Proposed Statute

> Treason may be punishable by death only if the defendant has been convicted of "aggravated treason" under at least one of the following two definitions:
>
> I. The defendant, who is a citizen of the United States, was guilty of "aggravated levying of war." The judge or jury must make all of the following findings of fact prior to convicting the defendant:
>
> A. The defendant engaged in armed combat or directed others to engage in armed combat within the immediate future;

299. Even if the Court were to agree that executing nonmurdering traitors was unconstitutional, the government's power—to execute for murder those traitors who caused a death with sufficient malice aforethought—creates an enormous loophole that can be abused easily. The one accusation more damaging than calling someone a traitor is to label someone a murderous traitor. An angry jury might agree with the prosecution that virtually any act could have caused the deaths of American soldiers during wartime, and that any dissent was treason. Many people could be rounded up in one murder-treason trial under *Bollman's* holding that all are principals who act in a case that is treason. Thus, in a volatile political climate, many people could be threatened with unfair murder charges. For a discussion of the use of murder charges as a political weapon, see O. KIRCHHEIMER, *supra* note 108, at 53-62.

On the other hand, the constitutionality of executing murderers reduces the risks of not killing traitors. Potential traitors will know that many of their deeds may be construed as murder and thus will be deterred. Many of the worst acts of treason—blowing up a factory or releasing the location of troop ships—lead to murder. The most effective forms of treason usually result in the deaths of many soldiers and/or citizens.

B. The defendant did not act alone;
C. The defendant either directed or participated in armed, life-endangering acts of violence; and
D. The judge or jury must find that the defendant intended that such acts occur, and that the defendant intended that said violent act or acts would lead to the immediate overthrow of the government.
Furthermore, said act or acts must unequivocally manifest treacherous intent to levy war.

II. The defendant, who is a citizen of the United States, was guilty of "aggravated adherence to the enemy." The judge or jury must find the facts under subsections A, B, and D, as well as under at least one part of subsection C. prior to convicting the defendant:

A. The Congress had formally declared war against a country or countries [hereinafter referred to as the "enemy"];
B. The defendant's act or acts set forth in subsection C occurred after said declaration of war; and
C. The act or acts consisted of one or more of the following:
1. The defendant gave life-endangering military secrets to the enemy;
2. The defendant participated with the enemy in armed attacks on this country by engaging in armed combat, knowing that his participation might immediately lead to deaths of American citizens.
D. The judge or jury must find that such act or acts were intentionally made by the defendant, and that such act or acts unequivocally manifested treacherous intent to adhere to the enemy.

III. After finding the defendant guilty under Part I and/or Part II of this Act, the judge or jury shall not authorize the death penalty unless they find in a subsequent proceeding that the aggravating circumstances of the case outweigh any mitigating factors, which include, but are not limited to:

A. insanity;
B. age;
C. moral or political belief in the propriety of said acts; and/or
D. degree of injury actually inflicted upon the country.

The trier of fact will have found sufficient aggravating circumstances by having found the defendant guilty of aggravated treason under Part I and/or Part II. The prosecution is allowed to include, as an additional aggravating circumstance, proof of actual injury caused by the acts if the prosecution can prove beyond a

reasonable doubt that the injuries were proximately caused by the defendant's aggravated treason.

IV. The death penalty cannot be used against any citizen for any crimes aside from treason or murder, unless said citizen is a member of the Armed Forces during a time of armed conflict. This statute does not preclude the government from trying the defendant for murder even if the defendant may have engaged in activities which may have constituted treason and/or aggravated treason.

V. The defendant is to receive the following procedural protections in addition to those granted all criminal defendants:

A. Two witnesses simultaneously observed the act or acts set forth in Part I A through D and/or under Part II B, C and D.

B. The defendant has a waivable right to a jury to determine if he is guilty of "aggravated treason." The defendant also has a waivable right to a jury to decide if death should be imposed. If the jury recommends mercy, that opinion shall be accepted by the trial judge. The trial judge has the discretion to set aside a jury recommendation that the defendant die.

B. A Section-by-Section Analysis of the Proposed Statute

The introductory section stating that treason *may* be punishable by death incorporates the holding of *Jurek* and *Woodson* that the death penalty cannot be mandatory for any crime. The Court would probably reject the government's argument that treason is so different from murder that all traitors deserve to die. Individualized determinations are even more necessary in treason cases since the crime covers so many activities.

The definition of "aggravated levying of war" limits the death penalty to armed insurrections by groups intending to overthrow the government. Thus, draft riots and other forms of resistance against one policy of the government (segregation, the fugitive slave law, desegregation, a war, etc.) would be excluded. Requiring proof of carrying arms and of the actuality of violence limits the death penalty to the most extreme forms of resistance. Requiring that this form of treason be a collective act also reduces the likelihood that the government can use the death penalty to destroy selected individual opponents. Under this definition, Caster Hanway could not have been killed since he neither carried arms nor intended to overthrow the government. The Confederates would have been guilty of aggravated treason. Aaron Burr might have been guilty since he

allegedly directed an insurrection that would have used arms to seize part of the country.

The limitation of "aggravated adherence to the enemy" to acts occurring after a formal declaration of war eliminates both unfair executions caused by improper notice and *ex post facto* treason. The defendant could not argue that he did not know who the enemy was, given the formal declaration of war, or that he was acting legally at the time of the crime. Since the overt act of "aiding and abetting" may include anything worse than lunches with the enemy (*Cramer*), the proposed definition only allows the death penalty for the worst overt acts where the treason is likely to cause death (but proof of murder under the "beyond a reasonable doubt" standard might be impossible)—the release of life-endangering military secrets and/or participating with the enemy in its armed attacks.

The procedural protections contained within the Constitution are enhanced by incorporating Learned Hand's theory in *United States v. Robinson* that the overt act must, by itself, unequivocally manifest treasonous intent.[300] Thus, Cramer and Haupt could not be killed since neither of their acts unequivocally manifested treasonous intent. Kawakita could have been in more peril since he beat American prisoners of war, which might be considered participation with the enemy, yet he was not armed and did not intend the deaths of any American citizens. Since they did not carry weapons, convicted traitors such as Tokyo Rose or Ezra Pound would not die. The two witness requirement is tightened to reduce the likelihood of mistake or perjury.

The traitor must also have intended that the aggravated treasonous acts actually occur. This section incorporates the standard of depraved intent presented in *Enmund*. Someone may have joined a radical group to protest a war and agreed to join a potentially violent demonstration (even to carry a club), without wanting to overthrow the government. That person should not be executed even if the government can show that some of his colleagues were guilty of aggravated treason.

Otto Kirchheimer has noted that repressive governments want to remove political crimes from juries; judges will often be more

300. *See also* The King v. Barker: "For this purpose the only evidence of criminal intent is to be found in the nature and circumstances of the act itself." The King v. Barker, [1924] N.Z.L.R. 865, 876.

sympathetic to the regime.[301] Establishing the right to have a jury both determine guilt and the death sentence limits the possibility of institutional abuse by "hanging judges." Even after conviction, the jury must make an additional determination before sentencing the person to death that the statutorily defined aggravating circumstances contained in the treason definitions outweigh any and all mitigating factors.

The degree of injury actually inflicted will be a factor in deciding if a person should die, both as an aggravating and mitigating circumstance. This factor can be difficult to determine and can be used by the prosecution to make the defendant appear responsible for any number of problems. Requiring the strictest level of causation will help reduce abuse.

The final section incorporates Professor Hurst's position that the treason clause's protections are weakened when they can be skirted by charging the defendant with some other political crime. Since aggravated treason is the most venal political crime, and since the underlying death penalty is the most severe sanction, limiting the penalty to that crime both precludes evasion of the treason clause's procedural and substantive requirements while supporting the proposed statute's goal to limit the death penalty to crimes as depraved as aggravated murder.

VII. CONCLUSION

This article has considered the constitutionality of using the state's ultimate sanction (the death penalty) against what arguably is the ultimate crime against the state (treason) by studying the three interrelated fields of history, moral philosophy, and legal doctrine. Advocates for both sides can find numerous supporting facts and arguments. The history of treason reveals treason's real threat to state sovereignty as well as political leaders' willingness to use political crimes to stifle their legitimate opponents; political justice can be a unique form of legal injustice. The philosophical debate between the utilitarians and the retributivists both complicates and simplifies the analysis by revealing how many premises enter into any effort to create a hierarchy of crime. Even if the philosophical argument were not stalemated, no theorist can precisely explain how one should rank crimes and assess individual culpability. Nor does

301. *See* O. KIRCHHEIMER, *supra* note 108, 1553-62.

legal precedent provide a clear answer; the *Coker* proportionality argument may not prevail over the earlier decision to execute the Rosenbergs and the long-standing treason laws authorizing death.

The inability to resolve this problem conclusively might be an example of Martin Buber's claim that words "falsify." No matter how elaborate or erudite the analysis becomes, the issue may primarily be decided by the adjudicators' own emotional reaction to two legitimate, competing fears. Most of us dread the midnight knock on the door; we do not want to confront our own police, much less an invading army or armed rebels. Nobody can know which fear is more likely to be realized: the use of executions to destroy political opposition or the defeat of the country because it could not kill its enemies.

My personal opposition to the death penalty is based upon more than a greater distrust of our government. Although I also fear foreign powers and violent revolutionaries (as well as murderers), I believe this obviously brutal penalty requires us unnecessarily and dangerously to take the place of the "official executioner," Inevitable Death. An ancient poem by Lao Tzu summarizes my underlying reaction:

> If men are not afraid to die,
> It is of no avail to threaten them with death.
> If men live in constant fear of dying,
> And if breaking the law means that a man
> will be killed,
> Who will dare to break the law?
> There is always an official executioner.
> If you try to take his place,
> It is like trying to be a master
> carpenter and cutting wood.
> If you try to cut wood like a master
> carpenter, you will only hurt your hand.[302]

302. LAO TZU, TAO TE CHING, NO. SEVENTY-FOUR (G. FENG and J. ENGLISH trans. 1972). Copyright © 1972 by Gia-fu Feng and Jane English. Reprinted by permission of Alfred A. Knopf, Inc.