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## Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States

Kristen E. Eichensehr

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# Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States

*Kristen E. Eichensehr\**

## ABSTRACT

*Treason is an ancient crime, but it fell into disuse in most Western democratic states after World War II. Now it is making a comeback with prosecutions or threatened prosecutions against a new type of enemy—accused terrorists—in the United States, the United Kingdom, and Israel. In the postwar period, commentators wrongly argued that treason would no longer be prosecuted because it is antiliberal, too difficult to prove, unnecessary because modern democracies are stable and secure, and premised on an extinct sense of loyalty to the state. This Article begins by debunking these claims and explaining treason's recent reappearance. First, democratic states have altered their treason laws, without explicit amendment, to make them akin to other criminal laws. Second, technology has made treason both easier to detect and easier to prove. Third, although the states discussed in this Article are generally stable and secure, states are likely to employ treason prosecutions when they perceive an existential threat (even if one does not actually exist). Finally, the betrayal inherent in treason retains both its power to injure and its power to offend, giving treason as much indignant punch as it has ever had. Treason's return is thus explainable, but is it a cause for concern? Treason prosecutions may have several potential benefits including reinforcing societal identity and unity, deterring future treasons, providing retribution against the traitor, and clarifying the procedural system under which terrorism should be addressed. But they may also pose dangers, including*

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*unduly aggrandizing the threat from terrorism, signaling weakness of the government that chooses to prosecute treason, biasing the criminal case against the defendant, and posing a difficult question about whether treason necessarily deserves the death penalty. Based on a weighing of these factors, this Article concludes by arguing that treason prosecutions are not cause for concern when they are confined to instances in which—like the U.S., British, and Israeli cases discussed in this Article—the threat posed by the terrorist group the traitor supports is akin to that posed by an enemy state.*

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## I. INTRODUCTION

Treason is both an ancient crime and a popular epithet.<sup>1</sup> The United States and the United Kingdom prosecuted treason until

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1. See, e.g., ANN COULTER, TREASON: LIBERAL TREACHERY FROM THE COLD WAR TO THE WAR ON TERRORISM 1 (2003); Paul Krugman, *Betraying the Planet*, N.Y.

World War II and its immediate aftermath, but they then seemed to take a hiatus. The disappearance of treason as a prosecuted crime led to speculation that liberal democratic states would no longer prosecute treason. Commentators argued that the crime was antiliberal, too difficult to prove, unnecessary in times of stability and security, and based on a sense of loyalty to the state that has become extinct in the modern era. These assumptions are being challenged now, however, by a treason indictment in the United States against an Al Qaeda propagandist<sup>2</sup> and by suggestions that the crime should be charged against various terrorist-related individuals in Britain.<sup>3</sup> Israel, which adopted a treason law after World War II, when the crime was entering a period of disuse elsewhere, is now considering a treason prosecution against an Arab-Israeli member of the Knesset who is accused of aiding Hezbollah during its 2006 war with Israel.<sup>4</sup>

Using the recent cases, this Article first explores the reasons commentators gave for treason's disappearance in the United States and United Kingdom and explains why the reasons and the assumptions on which they were based were erroneous. Part II provides an overview of the historic development of treason law, with particular focus on twentieth-century cases and current treason investigations. Part III debunks four reasons given for treason's supposed demise: that the crime is antiliberal, too difficult to prove, unnecessary for secure and stable states, and premised on an extinct conception of loyalty. First, this Article argues that states have adjusted their treason laws to conform to liberal conceptions of crime and that this has occurred even in the United States where judicial interpretation rather than statutory amendment effected the change. Second, it explains that while treason was designed to be difficult to prove, technology has fostered new and easier ways to prove types of treason and facilitated the acquisition of evidence for all treason prosecutions. Third, it argues that states' willingness and desire to prosecute treason depends not just on the magnitude of the threat posed by an enemy but on the perceived nature of the threat, namely whether the threat is conceived of as existential. The current terrorist threats faced by the United States, the United Kingdom, and Israel are of a magnitude or nature as to create sufficient insecurity to prompt treason prosecutions. Part III concludes by arguing that the betrayal underlying treason retains both its power to injure and its power to offend, making treason as offensive as ever.

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TIMES, June 29, 2009, at A21, available at [http://www.nytimes.com/2009/06/29/opinion/29krugman.html?\\_r=1](http://www.nytimes.com/2009/06/29/opinion/29krugman.html?_r=1) (calling climate change denial "a form of treason" and accusing Congressmen who opposed a climate change bill to regulate greenhouse gases of "treason against the planet").

2. See *infra* text accompanying notes 92–104.
3. See *infra* text accompanying notes 105–13.
4. See *infra* text accompanying notes 114–18.

Part IV develops a framework for evaluating potential benefits and dangers of treason prosecutions. Potential benefits from treason prosecutions may include reinforcing the societal unity of the prosecuting state by emphasizing the existence and identity of a threatening "other,"<sup>5</sup> deterring future treasons, providing satisfying retribution against the traitor, and clarifying the procedural system that should apply to at least some terrorists. These benefits, however, must be weighed against dangers from the prosecutions, including unjustifiably aggrandizing the threat from a terrorist group, signaling weakness on the part of the prosecuting government and state, biasing the adjudication of the charges against the traitor defendant, and presenting a difficult question of whether the death penalty—the historic punishment for treason—is appropriate for treasons that did not result in death.

Applying this framework, this Article concludes that the major concern in evaluating a potential treason prosecution should be whether the terrorist group the traitor supports poses a state-like threat. If the terrorist group poses a state-like threat, then there is little risk of unduly dignifying the group, and the state stands to benefit from the prosecution by the increased social cohesion, deterrence, and retribution it will occasion. The current treason prosecutions are not cause for concern because the terrorist groups they involve do pose state-like threats to the prosecuting countries. The existence of a state-like threat as a precondition to a treason prosecution serves as a principled limit to the expansion of treason beyond the traditional state-against-state war context. Societies must scrupulously guard, however, against expansion of treason to lesser threats—threats by non-state actors in *non-war* contexts—because such extension could endanger both the liberal and democratic aspects of the prosecuting states.

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5. Whether reinforcing societal identity is a benefit depends on whether the enemy is properly and clearly defined to include only members of the threatening terrorist organization—and to exclude loyal individuals who may share ethnic, racial, or religious characteristics with the organization's members. If construed too broadly, the identification of an enemy could pose significant dangers to minority groups. See *infra* Part IV.A.

## II. TREASON'S DEVELOPMENT AND ITS APPLICATION TO TERRORISM

### A. Historical Origins of Treason in Common Law Countries

In 1351, during the reign of Edward III, England enacted the Treason Act, known as 25 Edward III.<sup>6</sup> Originally written in Norman-French, the Act, as translated, reads in relevant part:

Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth, that is to say; When a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen or of their eldest son and heir; or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and therefore be probably attainted of open deed by the people of their condition: . . . And it is to be understood, that in the cases above rehearsed, that ought to be adjudged treason which extends to our Lord the King, and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our Sovereign Lord, as well of the lands and tenements holden of other, as of himself. . . .<sup>7</sup>

The Act was intended to rein in expansive uses of treason.<sup>8</sup> In later centuries, however, debate arose as to whether 25 Edward III presented an exhaustive list of every act that could be considered treason.<sup>9</sup>

The Tudor monarchs took the view that the treason statute was not exhaustive, and they dramatically expanded treason's scope.<sup>10</sup> For example, King Henry VIII passed a treasonable words statute in

6. Treason Act, 1351, 25 Edw. III, c. 2, stat. 5 (Eng.).

7. *R v. Casement*, [1917] 1 K.B. 98, 98–99 (U.K.) (providing a translation of the relevant portion of the Treason Act). The King's Bench also quoted the original Norman-French, which reads, in relevant part:

*Auxint prceo q divses opinions outnt este einz ces heures qeu cas, qant il avient doit estre dit treson, & en quel cas noun, le Roi a la requeste des Seignr & de la Coe, ad fait declarissement q ensuit, cest assavoir; qant home fait compasser ou ymaginer la mort nre Seignr le Roi, ma dame sa compaigne, ou de lour fitz primer & heir; . . . & si home leve de guerre contre nre dit Seignr le Roi en son Roialme, ou soit aherdant as enemys nre Seignr le Roi en le Roialme, donant a eux eid ou confort en son Roialme ou p aillours, & de ceo pvablement soit atteint de out faite p gentz de lour condicion: . . . [sic] et fait a entendre qen les cases suisnomez doit estre ajugge treson q sestent a nre Seignr le Roi & a sa roial majeste; & de tiele mane de treson la forfait e des eschetes apptient a nre Seignr le Roi, si bien des tres & tenz tenuz des auts, come de lui meismes . . .*

*Id.* (quoting Treason Act, 1351, 25 Edw. III, c. 2, stat. 5 (Eng.)).

8. D. ALAN ORR, *TREASON AND THE STATE: LAW, POLITICS, AND IDEOLOGY IN THE ENGLISH CIVIL WAR* 13 (2002).

9. *Id.* at 15.

10. *Id.* at 16–28.

1534,<sup>11</sup> which prohibited, among other things, harming the king by calling him a “Heretick, Schismatic, Tyrant, Infidel or Usurper of the Crown.”<sup>12</sup> One commentator notes that the treasonable words statute “remains to this day a candidate for the most unpopular act ever passed by parliament in England.”<sup>13</sup> The contours of treason ebbed and flowed with the relative power and weakness of various monarchs, but the same basic law of treason continued after the 1649 death of King Charles I,<sup>14</sup> who was himself executed for treason on the grounds that he had levied war against the “Parliament and Kingdom.”<sup>15</sup>

In the United States, most colonial treason laws were inspired by and drew on 25 Edward III.<sup>16</sup> Eminent treason scholar Willard Hurst<sup>17</sup> notes that legislation similar to or incorporating elements of 25 Edward III was found in Delaware, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and “possibly” Virginia.<sup>18</sup> The colonial treason legislation also adopted procedural guarantees, including the requirement of two witnesses to the same treason, contained in a later English statute, 7 William III.<sup>19</sup> After the Revolution, the colonial treason legislation gave way to the Treason Clause in the Constitution. As Hurst describes the nature of the pre- and post-Revolutionary War laws,

[t]he striking characteristic of all of the pre-Revolutionary legislation in the colonies is the evident emphasis on the safety of the state or government, and the subordinate role of any concern for the liberties of the individual. Whereas the outstanding feature of the treason clause placed in the Constitution of the United States is that it is on its face

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11. Treason Act, 1534, 26 Hen. VII, c. 13 (Eng.).

12. ORR, *supra* note 8, at 18–19 (quoting Treason Act, 1534, 26 Hen. VII, c. 13 (Eng.)).

13. *Id.*

14. *Id.* at 56.

Usurpation of sovereign power remained treasonable in both a republic and in a frankly absolutist state in which all the rights of sovereignty were held exclusively by the prince. . . . Whatever the precise nature of the regime—aristocratic, monarchic, or democratic—the claimants of sovereign power needed the law of treason in order to advance their claims to govern.

*Id.*

15. For an account of the trial of King Charles I, see C.G.L. DU CANN, ENGLISH TREASON TRIALS 161–73 (1964).

16. Willard Hurst, *Treason in the United States* (pt. 1), 58 HARV. L. REV. 226, 229–32 (1944); see also GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 44 (1993) (noting that “[t]he archaic language of this statute bequeathed the terminology of treason to the entire English-speaking world.”).

17. See *infra* text accompanying notes 78–83.

18. Hurst, *supra* note 16, at 232.

19. *Id.* at 244–45.

restrictive of the scope of the offense, the emphasis of colonial legislation is almost wholly affirmative.<sup>20</sup>

The Constitution carefully limits treason's scope and makes the crime difficult to prove by adding innovative procedural protections. The Treason Clause of the U.S. Constitution states:

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.<sup>21</sup>

Treason is the only crime defined in the Constitution—a testament to its gravity. In the United States, however, the gravity of the crime has been juxtaposed with the gravity of its abuse. The Supreme Court has noted that “the basic law of treason in this country was framed by men who . . . were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself.”<sup>22</sup> The Framers, in drafting the Treason Clause, “adopted every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced.”<sup>23</sup> In addition, they

added two of their own which had no precedent. They wrote into the organic act of the new government a prohibition of legislative or judicial creation of new treasons. And a venerable safeguard against false testimony was given a novel application by requiring two witnesses to *the same overt act*.<sup>24</sup>

The Framers intended the procedural safeguards to make treason more difficult to prove and thereby to serve as an assurance of the rectitude of convictions.

The Framers were careful to limit treason to two types of acts: (1) giving aid and comfort to an enemy of the United States; and (2) levying war against the United States.<sup>25</sup> Both of these were included

20. *Id.* at 235.

21. U.S. CONST. art. III, § 3.

22. *Cramer v. United States*, 325 U.S. 1, 21 (1945).

23. *Id.* at 23–24.

24. *Id.* at 24 (emphasis added). The prior English law had required two witnesses, but only in general, not to the same overt act. *See supra* text accompanying note 20.

25. *See, e.g., Stephan v. United States*, 133 F.2d 87, 90 (6th Cir. 1943) (finding that the Constitution's definition of treason was meant to be “meticulously exclusive” and not open to definition of additional treasons); *United States v. Burgman*, 87 F. Supp. 568, 569–70 (D.D.C. 1949) (“Thus, there are only two types of treason against the United States: first, levying war against the United States; and second, adhering to their enemies, giving them aid and comfort.”).



in 25 Edward III.<sup>26</sup> The statutory definition of treason tracks the Treason Clause in identifying two—and only two—types of treason.<sup>27</sup> The statute, 18 U.S.C. § 2381, states, “Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason . . . .”<sup>28</sup> The treason statute prescribed death as the sole punishment for treason until Congress amended it in 1862 to allow imprisonment of “not less than five years” and a fine of “not less than \$10,000.”<sup>29</sup>

The English treason statute was exported not only to the United States but also to Palestine under the British Mandate. A 1943 compilation of the criminal laws in the Palestinian Mandate—laws that were then adopted by the state of Israel after its declaration of independence<sup>30</sup>—lists treason as “levying war against His Majesty or conspiring to levy such war,” for which the punishment is death.<sup>31</sup> It further defines a “treasonable felony,” for which the punishment is life imprisonment, as “[m]anifesting by an overt act the intention to effect (or publishing such an intention) ~ (a) the deposition of His Majesty, or (b) the levying of war against His Majesty, or (c) the

26. See *supra* text accompanying note 7.

27. 18 U.S.C.S. § 2381 (LexisNexis 2009).

28. *Id.*

29. *Id.* (specifying that an individual who is guilty of treason “shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States”); David K. Watson, *The Trial of Jefferson Davis: An Interesting Constitutional Question*, 24 YALE L.J. 669, 675 (1915) (chronicling the history of the treason statute and explaining that Congress allegedly amended the punishment at the urging of President Lincoln who often received petitions to pardon convicted traitors because of their youth and did not believe that such convicts should be sentenced to death).

30. See Provisional Council of State, Law and Administration Ordinance, No. 1 of 5708 (May 14, 1948), § 11 (Isr.).

The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, in so far as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.

*Id.*; see also Norman Bentwich, *The Legal System of Israel*, 13 INT’L. & COMP. L.Q. 236, 236 (1964) (describing Israeli law as a combination of “Ottoman, Moslem, French, Jewish and, above all, English” laws); Uri Yadin, *Sources and Tendencies of Israeli Law*, 99 U. PA. L. REV. 561, 564–65 (1951) (noting that the mandatory law present in Palestine and adopted by Israel “includes a great number of Ordinances, mostly based upon English law and many of them almost identical with corresponding Acts of Parliament” that among other areas, “cover the whole ground of criminal law, [and] criminal and civil procedure,” and explaining that with only a few exceptions, “the Israel legislature took over *holus bolus* what the law was in Palestine on the eve of the Mandate”).

31. E. D. GORDON, A CODE OF THE CRIMINAL LAW OF PALESTINE: A COMPILATION OF SUBSTANTIVE LAW 35 (1943).

instigation of an armed invasion of His Majesty's dominions."<sup>32</sup> The Israeli Supreme Court in the 1950s reinterpreted the treason provision in light of a 1948 ordinance adopting the mandatory laws subject to "such modifications as may result from the establishment of the State and its authorities."<sup>33</sup> The Court noted that "[i]n the place of His Majesty as the sovereign (and the enemy in a war), there now comes the State of Israel,"<sup>34</sup> but the Court otherwise preserved the "essential nature" of the crime.<sup>35</sup> Israel's current treason law is codified in Article 99(a) of the Criminal Code, which states, "If a person with intent to assist an enemy in war against Israel commits an act calculated to do so, he is liable to the death penalty or to life imprisonment."<sup>36</sup>

Thus, 25 Edward III remains on the books as the British law of treason, and the constitutional clause inspired by the 1351 statute continues to serve as the basis for treason prosecutions in the United States. Israel's treason prohibition derives from the same British law. The ancient nature of the crime and its statutory definitions

32. *Id.* (footnote omitted).

33. CrimA 44/52 Diab v. Attorney-General [1959] IsrSC 6, 922 at para. 10 n. 1 (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/52/440/000/\\_Z01/52000440.z01.pdf](http://elyon1.court.gov.il/files_eng/52/440/000/_Z01/52000440.z01.pdf).

34. *Id.* at para. 10.

35. *Id.* The Court's full discussion of the mandatory language and its alteration to accommodate the establishment of the Israeli state is as follows:

I am inclined to think that if an Israel resident, owing allegiance to the State, takes part in a war against the State of Israel, he may be charged with treason and brought to trial under section 49(1) of the Criminal Code Ordinance. This section, in its Mandatory form, imposes the death sentence on 'any person who levies war against His Majesty in order to intimidate or overawe the High Commissioner'. In the place of His Majesty as the sovereign (and the enemy in a war), there now comes the State of Israel, and instead of the High Commissioner as the Governing Authority (and as the object in the war), there comes the Government of Israel. They are, on any reckoning, 'modifications as may result from the establishment of the State and its authority', within the meaning of section 11 of the Law and Administration Ordinance, 1948, and they also alter the content of section 49(1), while preserving its essential nature, namely, the prohibition of war against the sovereign, with the object of deposing the Government of the State or of intimidating it. That being so, it seems to me *prima facie* that we may alter the wording of that section so that it will henceforth read: 'Any person who levies war against the State of Israel in order to intimidate or overawe the Government of Israel is guilty of treason and is liable to the punishment of death.' The outcome will be that if the act is done, as in the present case, by an Israel resident owing allegiance to the State and who does not, therefore, enjoy the defence or exemption deriving from the principles of International Law (namely, that in the absence of a duty of allegiance he cannot be guilty of treason, he may be charged with treason and tried according to section 49(1) of the Criminal Code Ordinance.

*Id.* (citations omitted).

36. Dan Izenberg, et al., *Bishara Suspected of Aiding Enemy During War; MKs Now Call for Bringing Former Balad Head to Justice for Treason*, JERUSALEM POST, Apr. 26, 2007, at 1 (quoting CRIM. CODE art. 99(a) (Isr.)).

have complicated, but not prevented, treason charges in these countries.

### B. *Treason in the World Wars and Its Subsequent Disappearance*

In the twentieth century, instances of treason in the United States and the United Kingdom centered on the First and Second World Wars. This subpart lays out the cases in some detail so that the following subpart can contrast them with the current treason prosecution and considered prosecutions.

The most famous World War I treason prosecution was that of Roger Casement, who was charged with and convicted of providing aid and comfort to Germany.<sup>37</sup> Casement, a British citizen but an Irish nationalist, attempted to convince British prisoners of war in Germany to join an Irish brigade that he was forming, with German support, to fight for Irish independence.<sup>38</sup> In April 1916, Casement, *sans* brigade, traveled to Ireland via a German U-boat, carrying with him arms and ammunition for use in the fight against the British for Irish independence.<sup>39</sup> Casement was charged with treason by adhering to the King's enemies based on six overt acts—five relating to his attempts to recruit the Irish Brigade and one due to his “invasion” of Ireland.<sup>40</sup> He was convicted and hanged.<sup>41</sup>

The best-known British treason prosecution stemming from World War II was that of William Joyce, who broadcast radio propaganda for the Nazis under the moniker “Lord Haw-Haw.”<sup>42</sup> Joyce was actually an American citizen, born in the United States in 1906 to naturalized U.S. citizens.<sup>43</sup> He moved to Ireland when he was three years old and to England when he was fifteen.<sup>44</sup> In 1933, Joyce applied for a British passport, claiming to be a British citizen.<sup>45</sup> He continued to renew the British passport through August 1939, and the renewal was granted through July 1940.<sup>46</sup> During the period when his British passport was valid, Joyce broadcast Nazi radio propaganda.<sup>47</sup> In examining the charge that Joyce had provided aid

37. R v. Casement, [1917] 1 K.B. 98, 98–99 (U.K.).

38. *Id.* at 100–01.

39. *Id.* at 101; accord DU CANN, *supra* note 15, at 229–30.

40. DU CANN, *supra* note 15, at 232.

41. *Id.* at 244.

42. *Id.* at 246.

43. Joyce v. Dir. of Pub. Prosecutions, [1946] A.C. 347, 348 (H.L.) (U.K.).

44. *Id.*

45. *Id.*

46. *Id.* at 348–49.

47. See DU CANN, *supra* note 15, at 248.

Several times a day, from the autumn of 1939 to the spring of 1945, that distinctive and insistent voice, beginning its pronouncements with the words ‘Germany calling’—he pronounced it ‘Jairmany’, probably designed to attract

and comfort to Germany,<sup>48</sup> British courts focused on the issue of allegiance—particularly whether it extended to Joyce once the court realized that he was not a British citizen.

Under common law, aliens in Britain owe a duty of allegiance for the time that they are present in Britain and under the king's (or later, the government's) protection.<sup>49</sup> This principle was established in 1608 in *Calvin's Case*, when a British court held that in addition to the natural or permanent allegiance owed by a natural-born subject, an "alien that is in amity [who] cometh into England, because as long as he is within England, he is within the King's protection [and] therefore so long as he is here, . . . oweth unto the King a local obedience or ligeance . . ."<sup>50</sup> The House of Lords in Joyce's case extended this duty of local allegiance to Joyce after his departure from England because of his British passport. The opinion of Lord Jowitt explains, "The question is . . . whether by [the passport's] receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad."<sup>51</sup> Lord Jowitt also noted that "the special value to the enemy of [Joyce's] services as a broadcaster was that he could be represented as speaking as a British subject and his German work book showed that it was in this character that he was employed, for which his passport was doubtless accepted as the voucher."<sup>52</sup> The House of Lords upheld Joyce's conviction for treason for providing aid and comfort to Germany,<sup>53</sup> and he was hanged on January 3, 1946.<sup>54</sup>

In the United States, treason prosecutions last occurred during and following World War II.<sup>55</sup> Two treason prosecutions were appealed to the Supreme Court of the United States. In *Cramer v.*

initial attention was a feature of English life in wartime. It gave news—which might be true or false or a compound of both—and views which were heavily pro-Axis. The quality of the exposition varied from brilliance to ineptitude; it might arouse anger, contempt, amusement or disbelief but, at any rate, it was listened to.

*Id.*; *Joyce*, [1946] A.C. at 349 ("It was proved by uncontradicted evidence that he had, between September 3, 1939, and December 10, 1939, broadcast propaganda on behalf of the enemy.").

48. *Joyce*, [1946] A.C. at 348.

49. *Id.* at 366–70.

50. *Calvin's Case*, (1608) 77 Eng. Rep. 377, 383 (K.B.). For discussion of this case and its conception of allegiance and the state, see ORR, *supra* note 8, at 49–50.

51. *Joyce*, [1946] A.C. at 370.

52. *Id.* at 371–72.

53. *Id.* at 347.

54. See Cameron Simpson, *Terror Suspect Arrested After Extradition from Zambia; Extremists Could Face Treason Charges*, HERALD (Glasgow), Aug. 8, 2005, at 4.

55. See *infra* note 74.

*United States*,<sup>56</sup> the Supreme Court overturned the conviction of an associate of the *Quirin* saboteurs.<sup>57</sup> The government had charged Cramer, a naturalized citizen, with treason for providing aid and comfort to the *Quirin* saboteurs, one of whom, Werner Thiel, was a friend of Cramer's from the time that both had lived in New York.<sup>58</sup> Cramer knew that Thiel supported the Nazis and had gone to Germany, but he did not know in advance of Thiel's return to the United States or of Thiel's sabotage mission.<sup>59</sup> Cramer met with Thiel and his saboteur partner to eat and drink, and Cramer apparently agreed to hold money for Thiel (a charge later withdrawn from the jury due to lack of evidence<sup>60</sup>) and to arrange for Thiel's fiancée to meet them.<sup>61</sup> Cramer admitted that he suspected that Thiel had arrived by submarine from Germany, but he denied knowledge of Thiel's sabotage mission.<sup>62</sup> After their second meeting, the men were arrested.<sup>63</sup> The Court explained, "The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy."<sup>64</sup> Following the Treason Clause, the Court further noted, "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses."<sup>65</sup> Applying these legal standards to Cramer's case, the Court held that the alleged overt act was insufficient to constitute treason, given that there was no proof that Cramer "gave them information or established any 'contact' for them with any person other than an attempt to bring about a rendezvous between Thiel and a girl, or that being 'seen in public with a citizen above suspicion' was of any assistance to the enemy."<sup>66</sup> In fact, "[m]eeting with Cramer in public drinking places to tipple and trifle was no part of the saboteurs' mission and did not advance it. It may well have been a digression which jeopardized its success."<sup>67</sup> Thus, the Court set a high bar for what constitutes an overt act of aid and comfort<sup>68</sup> and reversed Cramer's conviction.

56. *Cramer v. United States*, 325 U.S. 1 (1945).

57. *Ex parte Quirin*, 317 U.S. 1, 48 (1942).

58. *Cramer*, 325 U.S. at 3-4.

59. *Id.* at 5.

60. *Id.* at 38-39.

61. *Id.* at 5.

62. *Id.*

63. *Id.*

64. *Id.* at 34.

65. *Id.* at 34-35.

66. *Id.* at 38.

67. *Id.*

68. See *infra* notes 80-83 and accompanying text.

In the other World War II case decided by the Supreme Court, *Haupt v. United States*, the Court upheld the treason conviction of the father of one of the other *Quirin* saboteurs.<sup>69</sup> Max Haupt was charged with treason for providing aid and comfort to his son, Herbert Haupt, with knowledge of his son's sabotage mission on behalf of Germany.<sup>70</sup> The Court held, "[T]here can be no question that sheltering, or helping to buy a car, or helping to get employment is helpful to an enemy agent, that they were of aid and comfort to Herbert Haupt in his mission of sabotage."<sup>71</sup> The Court noted that these actions had "the unmistakable quality which was found lacking in the *Cramer* case of forwarding the saboteur in his mission."<sup>72</sup> The Court affirmed Haupt's conviction, rejecting the argument that Max Haupt acted only with parental solicitude and should be acquitted on that basis.<sup>73</sup>

Although no other treason cases reached the Supreme Court, the lower federal courts decided several others, all of which affirmed convictions of treason by adhering and giving aid and comfort to U.S. enemies.<sup>74</sup> Other than the two *Quirin*-saboteur-related cases decided by the Supreme Court and one Ninth Circuit case regarding a U.S. citizen who abused U.S. prisoners of war while employed by Japan,<sup>75</sup> the treason cases all affirmed treason convictions of U.S. citizens who acted as propagandists for Germany or Japan. The propagandist cases are important for several reasons. First, they are the most recent treason prosecutions and convictions in the United States, and they were the first treason prosecutions of propagandists. Second, they establish a commonality between the U.S. and U.K. laws of treason, as Britain used the same "aid and comfort" theory to prosecute William Joyce for his propaganda broadcasts.<sup>76</sup> Finally, the example of the World War II propagandists and the precedents that courts developed to deal with their treasonous acts facilitated the most recent and only post-World War II treason indictment in the United States, the 2006 indictment of U.S. citizen Adam Gadahn, who appears in propaganda videos for Al Qaeda.<sup>77</sup>

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69. *Haupt v. United States*, 330 U.S. 631, 644 (1947).

70. *Id.* at 634–35.

71. *Id.* at 635.

72. *Id.*

73. *Id.* at 641–42.

74. *See D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Kawakita v. United States*, 190 F.2d 506 (9th Cir. 1951); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948); *United States v. Burgman*, 87 F. Supp. 568 (D.D.C. 1949).

75. *Kawakita*, 190 F.2d at 520–21.

76. *Joyce v. Dir. of Public Prosecutions*, [1946] A.C. 347, 348 (H.L.) (U.K.).

77. *See infra* Part III.C.

After the World War II prosecutions, treason faded from prominence. Commentators both at the time and since have predicted that treason prosecutions had become obsolete and would no longer be brought. Authoritative U.S. commentator James Willard Hurst compiled a historic appendix on English and U.S. treason law on behalf of the Department of Justice to support the Solicitor General's brief in *Cramer*.<sup>78</sup> Hurst then published his amended historical appendix in a series of law review articles in 1944 and 1945.<sup>79</sup> In the final article,<sup>80</sup> Hurst critiqued the *Cramer* case, particularly its analysis of the requirement that the overt act actually aid the enemy<sup>81</sup> and evidence intent.<sup>82</sup> He concluded that the Court's opinion in *Cramer* "cast such a net of ambiguous limitations about the crime of 'treason' that it is doubtful whether a careful prosecutor will ever again chance an indictment under that head," and "[t]he uncertain meaning of the decision will alone be as strong a deterrent as any doctrine elicited from it."<sup>83</sup> From the British perspective, Dame Rebecca West, who chronicled the treason trial of William Joyce for the *New Yorker*, published her observations about Joyce and other traitors and spies in a 1949 book entitled *The Meaning of Treason*.<sup>84</sup> West titled part four of the book "The Decline and Fall of Treason."<sup>85</sup> The declining focus on treason in the postwar period is also evidenced by the declining coverage the crime has received in criminal law treatises during the same period.<sup>86</sup>

78. See JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS*, at vii (1971) (explaining the origin of Hurst's assignment and of the book, which is a compilation of the law review articles that were published at the end of WWII).

79. The three articles published by Hurst were all titled *Treason in the United States*. See Hurst *supra* note 16; Willard Hurst, *Treason in the United States* (pt. 2), 58 HARV. L. REV. 395 (1945) [hereinafter *Treason—Part II*]; Willard Hurst, *Treason in the United States* (pt. 3), 58 HARV. L. REV. 806 (1945) [hereinafter *Treason—Part III*].

80. *Treason—Part III*, *supra* note 79.

81. *Id.* at 837 ("To wait for aid to be 'actually' given the enemy risks stultification: the treason may be successful to the point at which there will no longer be a sovereign to punish it.").

82. *Id.* at 845.

Certainly there is no sound basis in English or American history to require that the overt act be such as to evidence the intent . . . The Constitution in its terms requires only the testimony of two witnesses to an 'act,' not to the effect of that act.

*Id.*

83. *Id.*

84. REBECCA WEST, *THE MEANING OF TREASON* 9 (rev. ed. 1965).

85. *Id.*

86. The Author's investigations show that treason received several pages of coverage in treatises in the early 1900s, declining to several paragraphs in the interwar period, a paragraph in the post-World War II period, and no mention at all in current treatises.

The few commentators who have worked on treason in the intervening period have confirmed treason's decline. In 1982, George Fletcher wrote, "History, venerable statutes, our own Constitution and prominent cases—all of these sources testify to the significance of treason in the structure of our criminal law. Yet our casebooks and textbooks totally ignore these materials."<sup>87</sup> As recently as 2004, Fletcher predicted, "For various reasons the government will probably not bring another treason prosecution for many years to come, if ever."<sup>88</sup> A 2006 article on the topic is entitled "The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem."<sup>89</sup> The persistent predictions of treason's demise were, however, premature.

### C. Current Treason Cases and Potential Cases

In October 2006, the United States issued its first indictment for treason since World War II.<sup>90</sup> Treason charges have been at least bandied about for various terrorist-linked figures in Britain as well, and Israel is considering a treason prosecution against an Arab-Israeli lawmaker for allegedly providing targeting information to Hezbollah during its 2006 conflict with Israel.<sup>91</sup> These actual or considered treason charges against individuals because of their links with terrorism signal renewed interest in treason and a possible expansion and reconceptualization of the crime to extend to the provision of aid to terrorist organizations—a departure from the enemy-state-based treasons of the World War era.

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87. George P. Fletcher, *The Case for Treason*, 41 MD. L. REV. 193, 194 (1982) [hereinafter *The Case for Treason*].

88. George P. Fletcher, *Law, Loyalty, and Treason: How Can the Law Regulate Loyalty Without Imperiling It?: Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1627 (2004) [hereinafter *Law, Loyalty, and Treason*]; see also *id.* at 1619.

In the literature of criminal law, treason was always considered something of an 'outlier.' However central it might have been to the interests of the state, it was never taken to be the paradigmatic offense for understanding the general elements of criminal liability (harm, actus reus, mens rea). Casebooks ignore the offense. Treatise writers show little interest. The tendency to ignore treason in theorizing about criminal law testifies to its atavistic character.

*Id.*

89. Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006) (confirming the "forgotten" nature of treason, but arguing that it could be applied in some enemy combatant cases).

90. See First Superseding Indictment, United States v. Adam Gadahn a.k.a. Azzam al-Amriki, SA CR 05-254(A) (C.D. Cal. Oct. 11, 2006), available at [http://www.usdoj.gov/opa/documents/adam\\_indictment.pdf](http://www.usdoj.gov/opa/documents/adam_indictment.pdf) [hereinafter Indictment of Adam Gadahn].

91. See *infra* notes 115–24 and accompanying text.



The U.S. treason indictment was issued by a grand jury in the Central District of California against Adam Gadahn, a U.S. citizen, for appearing in several Al Qaeda propaganda videos.<sup>92</sup> The Gadahn indictment is very similar to the treason prosecutions of propagandists in World War II—prosecution under the aid-and-comfort prong for producing enemy propaganda—but it is the first in the United States to allege that a terrorist organization can be considered an enemy for the purposes of treason. The indictment alleges that Gadahn, “owing allegiance to the United States, knowingly adhered to an enemy of the United States, namely, al-Qaeda, and gave al-Qaeda aid and comfort, within the United States and elsewhere, with intent to betray the United States.”<sup>93</sup> The indictment sets the stage for the allegation of the offense by noting that Al Qaeda is a terrorist organization designated by the U.S. Secretary of State;<sup>94</sup> that Al Qaeda took credit for the 9/11 attacks on the United States and the July 7, 2005, subway bombings in London;<sup>95</sup> and that the U.S. Congress passed a resolution (the Authorization for Use of Military Force<sup>96</sup>) on September 18, 2001, authorizing the U.S. President to use “all necessary and appropriate force against those responsible” for the 9/11 attacks.<sup>97</sup>

The listed overt acts “witnessed by two or more witnesses” include “appear[ing] in” specific Al Qaeda videos and speaking in each video.<sup>98</sup> For example, in a September 2, 2006, video, Ayman al-Zawahiri appeared and “introduced Gadahn as ‘our brother Azzam the American,’” and Gadahn stated, specifically addressing U.S. troops fighting in Afghanistan, “You know you’re considered . . . as nothing more than expendable cannon fodder, a means to an end,” and, “Escape from the unbelieving army and join the winning side.”<sup>99</sup> The indictment alleges five overt acts, “appear[ing] in” five Al Qaeda videos.<sup>100</sup> In the press conference announcing the Gadahn indictment, Deputy Attorney General Paul McNulty acknowledged that there was no evidence that Gadahn participated in any of the terrorist attacks of which he warned<sup>101</sup> but emphasized that “[t]he significance of the propaganda part should not be underestimated. . . .

92. Indictment of Adam Gadahn, *supra* note 90, para. 8.

93. *Id.* para. 8.

94. *Id.* para. 1.

95. *Id.* paras. 4, 7.

96. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I) (2001)).

97. Indictment of Adam Gadahn, *supra* note 90, para. 5.

98. *Id.* para. 8.

99. *Id.*

100. *Id.*

101. Paul McNulty, Deputy Attorney General, et al., U.S. Dep’t of Justice, Transcript of Press Conference Announcing Indictment of U.S. Citizen for Treason and Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006), available at [http://www.usdoj.gov/archive/dag/speeches/2006/dag\\_speech\\_061011.htm](http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061011.htm).

[T]his is a very significant piece of the way an enemy does business, to demoralize the troops, to encourage the spread of fear.”<sup>102</sup> Since the indictment was issued, Gadahn has appeared in at least four more videos, including one in January 2008 when he tore up his U.S. passport and called for attacks on President Bush during the President’s visit to the Middle East.<sup>103</sup> The continuing priority the U.S. government places on capturing Gadahn is evidenced by Gadahn’s inclusion with thirty-eight others as a “Wanted Terrorist” on the government’s Rewards for Justice website, which offers “up to” a “\$1 million reward” for information about Gadahn.<sup>104</sup>

In the United Kingdom, treason prosecutions have been considered for several terrorism suspects. Soon after the 9/11 attacks, Home Office Minister Lord Rooker told the House of Lords that Britons who fought for the Taliban would be prosecuted for treason.<sup>105</sup> The issue then arose when it became clear that the United States was detaining several British citizens at Guantanamo Bay. The British press and members of Parliament called for them to be repatriated to Britain and prosecuted, possibly for treason.<sup>106</sup> As the prisoners’ return to Britain approached, however, the practical difficulties of proving treason became obvious, though the possibility of a treason charge was still considered.<sup>107</sup> The press and

102. *Id.*

103. *Al Qaeda Spokesman Urges Attacks on Bush*, CHL TRIB., Jan. 7, 2008, at 9; see Perry Chiramonte, *NYPD on the Alert for Qaeda ‘Bomb’; Teams Hit Streets After ‘Net Chatter’*, N.Y. POST, Aug. 11, 2007, at 4 (describing Gadahn video threatening U.S. embassies); James Gordon Meek, *Al Qaeda Warns U.S. of New Horrors*, DAILY NEWS (New York), May 30, 2007, at 19 (describing a May 2007 Gadahn Al-Qaeda video); Hadeel Al-shalchi, *Al-Qaida Video Suggests Crisis Is Proof of Defeat*, GRAND RAPIDS PRESS (Mich.), Oct. 5, 2008, at A3 (describing video in which Gadahn “taunted Americans over their economic crisis,” and blamed the economic problems on the U.S. actions in Afghanistan and Iraq). The indictment may have been updated to include these more recent videos, but an updated version, if it exists, has not been released. The indictment also charges Gadahn under 18 U.S.C. § 2339B with providing material support to a designated foreign terrorist organization. Indictment of Adam Gadahn, *supra* note 90, at 9.

104. Rewards for Justice: Seeking Information Against International Terrorism, [http://www.rewardsforjustice.net/index.cfm?page=wanted\\_terrorist&language=english](http://www.rewardsforjustice.net/index.cfm?page=wanted_terrorist&language=english) (last visited Oct. 18, 2009) (listing Gadahn and thirty-eight other wanted terrorists); see also Rewards for Justice—Gadahn; <http://www.rewardsforjustice.net/index.cfm?page=gadahn&language=english> (last visited Oct. 18, 2009) (describing Gadahn and the one million dollar reward). The Author became aware of the program—and its inclusion of Gadahn—while viewing a “Rewards for Justice” poster in an airport security line.

105. Ian Burrell, *Volunteers for Taliban Face Trial for Treason*, INDEPENDENT (London), Oct. 31, 2001, at 5.

106. See Colin Brown, *Campaign Against Terror: MPs Want Captives Flown to UK*, INDEPENDENT (London), Jan. 20, 2002, at 2; Simon Heffer, *Commentary, Why They Must Be Tried for Treason in Britain*, DAILY MAIL (London), Jan. 16, 2002, at 13.

107. See Bob Sherwood, *Five ‘Unlikely To Face Trial on Return’*, FIN. TIMES (London), Feb. 20, 2004, at 3 (quoting Shadow Home Secretary David Davis stating his belief that there “may be a case for treason” if the “US provides the UK authorities

government officials, implicitly criticizing the United States, noted that “[i]t is unlikely that any admissions or confessions made by the detainees at Guantanamo Bay would be admissible in an English court, given the decision of the US authorities to deny them access to legal advice.”<sup>108</sup> Although a treason charge would be possible “if there is evidence that the men, as British nationals, fought against British troops in Afghanistan,”<sup>109</sup> commentators noted that “[f]inding witnesses to acts in Afghanistan in the chaos of the collapse of the Taliban regime, and then bringing them to the UK to stand in the Old Bailey witness box, is also a daunting task.”<sup>110</sup>

The idea of treason charges was also bandied about for Omar Bakri Mohammed, a Muslim cleric who was the spiritual leader of a radical Muslim group, the al-Muhajiroun.<sup>111</sup> The cleric allegedly supported the 7/7 London bombers and was an outspoken supporter of radical Islam.<sup>112</sup> In August 2005, a month after the 7/7 attacks, he fled to Lebanon, escaping possible charge in Britain.<sup>113</sup>

Thus, Britain has not launched any treason prosecutions against its repatriated nationals, but given the identified evidentiary difficulties, it is impossible to know whether the lack of prosecutions represents merely the result of tainted or inadmissible evidence—that is, that treason could not be proven in court—or the actual belief of the U.K. Crown Prosecution Service and government that treason did not occur. Similarly, Bakri Mohammed fled Britain, so it is impossible to know whether the government would have charged him with treason had he remained.

Israel is also investigating terrorism-related treason. According to information released at the end of April and in early May 2007 after the partial lifting of a court gag order, the Israeli government is investigating whether an Arab-Israeli member of the Knesset, Azmi Bishara, committed treason by aiding Hezbollah during its summer

with evidence that these people supported or offered comfort to the Taliban or al-Qaeda”).

108. Joshua Rozenberg, *Prosecution in Britain Would Face Difficulties*, DAILY TELEGRAPH (London), July 11, 2003, at 8; see also John Steele, *'Fog of War' Will Make Bringing Charges in the UK Difficult*, DAILY TELEGRAPH (London), Feb. 20, 2004, at 4 (“Legal experts question whether evidence gathered from interviews with the men in Guantanamo Bay, without legal representation and the safeguards of British legislation, would be admissible in a British court.”).

109. Steele, *supra* note 108, at 4.

110. *Id.*; see also Rozenberg, *supra* note 108, at 8 (“It is even less likely that eyewitnesses could be found to give evidence of events in which they were said to have taken part before these men were detained.”); Steele, *supra* note 108, at 4 (“Anti-terrorist police and prosecutors face major legal and evidential hurdles in forming terrorist-related charges and in gathering admissible evidence from events that occurred ‘in the fog of the Afghan war.’”).

111. Nigel Morris, *Radical Cleric Flees Britain After Threat of Treason Trial*, BELFAST TELEGRAPH, Aug. 9, 2005.

112. *Id.*

113. *Id.*

2006 war with Israel.<sup>114</sup> Bishara is alleged to have violated Article 99(a) of the Criminal Code, entitled "Treason," which states: "If a person with intent to assist an enemy in war against Israel commits an act calculated to do so, he is liable to the death penalty or to life imprisonment."<sup>115</sup> Specifically, Israeli police accuse Bishara of receiving hundreds of thousands of dollars from Hezbollah in exchange for advising the group "on 'how to cause further damage to Israel' by giving his contacts geographical information and urging them 'to strike further south than Haifa.'"<sup>116</sup> In April 2006, Bishara left Israel and resigned his Knesset seat; he has remained abroad since that time.<sup>117</sup> Israeli police have warned that Bishara will be arrested if he returns to Israel.<sup>118</sup> As of this writing, information about whether Bishara has been formally indicted is not available.

The investigation of Bishara would not be the first treason prosecution in Israel. Notably, Israel adopted its treason law at its founding in 1948<sup>119</sup>—precisely the time at which the U.S. and U.K. treason laws were entering disuse. Israel has used its treason law several times, perhaps most notably in the case of Mordechai Vanunu, who worked for nine years as a nuclear technician at the Israeli nuclear research facility at Dimona.<sup>120</sup> Vanunu quit his job in October 1985 and revealed to a journalist in Australia that he had taken photographs of the Dimona plant.<sup>121</sup> The information he provided confirmed that Israel had nuclear armaments and suggested that Israel possessed sufficient plutonium to arm 150 weapons.<sup>122</sup> Just before the story was scheduled to run in the *Sunday Times* in London, a Mossad agent lured Vanunu from London to Rome.<sup>123</sup> In Rome, he was drugged and taken back to Israel, where he was tried in secret and convicted of treason.<sup>124</sup> Thus, treason in Bishara's case is not viewed as the anachronism that it is in the United States and United Kingdom, but Bishara's case is still a new development because it involves treason via support of a terrorist group.

114. See, e.g., Ken Ellingwood, *Arab Israeli Is Suspected of Advising Hezbollah*, L.A. TIMES, May 3, 2007, at A6; Rory McCarthy, *Wanted, for Crimes Against the State*, THE GUARDIAN (London), July 24, 2007, at 12.

115. Izenberg, et al., *supra* note 36 (quoting of the CRIM. CODE art. 99(a) (Isr.)).

116. See, e.g., Isabel Kershner, *Israel Reveals New Details of Allegations Against Ex-Lawmaker*, N.Y. TIMES, May 3, 2007, at A10. (quoting police spokesman Micky Rosenfeld); see also Ellingwood, *supra* note 114, at A6 (describing Bishara's actions).

117. Kershner, *supra* note 116, at A10.

118. *Id.*

119. See *supra* note 31 and accompanying text.

120. THE FABER BOOK OF TREACHERY 363 (Nigel West ed., 1995) [hereinafter FABER].

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 363–64.

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The same ancient 1351 statute permeates the current treason law of the United Kingdom, United States, and Israel, and, in all three, the old idea of treason is being applied to betrayal in aid of a new type of enemy: non-state-based terrorist groups. The current treason cases or possible cases display continuity with cases throughout the twentieth century but diverge from the older cases because of the nature of the enemy. The new sort of enemy, however, serves as a further continuity across countries: Not only do all three states have similar foundational laws of treason, but they have turned to the almost obscure crime of treason in the face of terrorist threats. The reappearance of treason prosecutions discredits the arguments of those who had claimed that treason was obsolete. The next Part examines the reasons given in the post-World War II period and as recently as 2004 for why treason was (allegedly) obsolete and would not be charged again, and it explains why the disappearance rationales were erroneous at the time of their exposition and have now been proven incorrect.

### III. DEBUNKING THE REASONS FOR TREASON'S ALLEGED DISAPPEARANCE

This Part takes up four major arguments put forward to explain why treason prosecutions had ceased and shows that each was either incorrect in its premises or that circumstances have changed sufficiently such that the argument no longer applies.

#### A. Antiliberal

Writing from the U.S. perspective, eminent Columbia Law Professor George Fletcher argues that “because of its feudal origins, treason no longer conforms to our shared assumptions about the liberal nature and purpose of criminal law.”<sup>125</sup> Fletcher argues that treason displays two antiliberal facets that are inconsistent with the “nature and purpose” of criminal law.<sup>126</sup> First, “the crime is addressed to the bond of loyalty between a particular sovereign and subordinate subjects.”<sup>127</sup> Second, the “core of the crime” is not “external actions,” but rather “internal attitudes,” namely the “mental actions of compassing or lusting in one’s heart.”<sup>128</sup> Fletcher

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125. *Law, Loyalty, and Treason*, *supra* note 88, at 1612.

126. *Id.* at 1612, 1621.

127. *Id.* at 1621.

128. *Id.* Elsewhere, Fletcher explains, “As clothed in the crimes of treason and adultery, the figure of disloyalty enters where morality generally fears to tread. It

notes that countries other than the United States have made “legislative moves” “to convert the offense into a crime with liberal contours.”<sup>129</sup> He identifies two techniques for this conversion. First, treason can be redefined as a type of espionage, which France has done.<sup>130</sup> Fletcher explains that in France now, “[t]he essence of the crime is betraying state secrets. It is applicable to everyone, but the term ‘treason’ is reserved for French citizens who commit espionage.”<sup>131</sup> The French penal code defines the acts that constitute treason/espionage<sup>132</sup> and specifies that the acts “constitute treason where they are committed by a French national or a soldier in the service of France, and constitute espionage where they are committed by any other person.”<sup>133</sup> Second, treason can be “collapse[d]” into “disloyalty or sedition toward the established government,” which Fletcher identifies as the German approach.<sup>134</sup> He explains that, under German law, “[a]nyone, foreigners as well as Germans, can commit Hochverrat [high treason] by using force or the threat of force to undermine the Basic Law, the German constitution.”<sup>135</sup> The French and German approaches are certainly illustrative of attempts

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passes as an external crime, but its essence is in the spirit.” FLETCHER, *supra* note 16, at 47.

129. *Law, Loyalty, and Treason, supra* note 88, at 1612–13.

130. *Id.* at 1623.

131. *Id.*

132. The penal code specifies various actions that constitute treason/espionage in Articles 411-2 to 411-11, including “[h]anding over troops belonging to the French armed forces, or all or part of the national territory, to a foreign power, to a foreign organization or to an organization under foreign control, or to their agents,” CODE PÉNAL [C. PÉN.] art. 411-2 (Fr.), and “[h]anding over equipment, constructions, installations, or apparatus assigned to the national defence to a foreign power, to a foreign undertaking or organization or to an enterprise or organization under foreign control, or to their agents,” *id.* art. 411-3. The punishment for the various types of treason/espionage varies from life imprisonment and a 750,000 Euro fine, *id.* art. 411-2, downward to thirty years imprisonment and a 450,000 Euro fine, *id.* art. 411-3, and below, for example

[d]irect incitement by promises, offers, pressure, threats or violence, to commit one of the felonies set out in the present Chapter, where the incitement was ineffective because of circumstances independent of the offender’s will, is punished by seven years imprisonment and a fine of €100,000.

*Id.* art. 411-11.

133. *Id.* art. 411-1.

134. *Law, Loyalty, and Treason, supra* note 88, at 1624.

135. *Id.* at 1623, 1624 n.55.

81 StGB (providing that high treason against the Federal Republic is committed by anyone, anywhere, who ‘undertakes’ with force or the threat of force to undermine the constitutional order of Germany); 82 StGB (providing that treason against a state is committed by anyone, anyplace, who undertakes with force or the threat of force to undermine the constitutional order of a state [Bundesland] or to seize part of its territory).

to make treason a more normal or, in Fletcher's words, more liberal crime, because they focus inquiry on the perpetrator's actions and remove the requirement that the perpetrator stand in any particular relation to the state. But Fletcher ignores the doctrinal moves that have been made in U.S. treason law as steps toward the same end.

Turning to Fletcher's first antiliberal characteristic of treason—that the crime is “addressed to the bond of loyalty between a particular sovereign and subordinate subjects”<sup>136</sup>—it is not at all clear why the “relational”<sup>137</sup> aspect of treason is antiliberal. Fletcher notes other “relational” crimes including adultery and child neglect,<sup>138</sup> but saves his antiliberal or “feudal” label for “cases in which a subordinate is under special duties of respect and loyalty toward a superior,” which “was true in the history of treason and partially true in the history of adultery.”<sup>139</sup> Though Fletcher's argument is not fully worked out,<sup>140</sup> his principal claim is that treason's relational aspect violates the so-called “harm principle” laid out in John Stuart Mill's *On Liberty*. As Mill explained, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>141</sup> Fletcher argues, “The harm principle implies the same harm should be the basis of punishment regardless of the identity of the victim. Thus the harm principle, as an expression of a liberal and universal system of criminal justice, excludes parochial crimes

136. *Law, Loyalty, and Treason*, *supra* note 88, at 1621; see also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*75.

[F]or treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such his superior or lord. . . . [T]herefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these being breaches of the lower allegiance, of private and domestic faith, are denominated petit treasons. But when disloyalty so rears its crest, as to attack even majesty itself, it is called by way of eminent distinction high treason . . . .

*Id.*

137. *Law, Loyalty, and Treason*, *supra* note 88, at 1621.

138. *Id.* at 1618.

139. *Id.* at 1619. With respect to adultery, Fletcher specifically refers to Jewish law in which the wife could commit the crime of adultery, but the husband could not. *Id.* at 1618.

140. Fletcher cites Mill only once, *id.* at 1619 n.36, and cites to only one commentator, *id.* at 1619 n.37.

141. JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND OTHER ESSAYS 13 (Ashley H. Thorndike ed., MacMillan Co. 1926) (1859) (“The only part of the conduct of any one for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind the individual is sovereign.”).

directed toward specifically marked groups . . .”<sup>142</sup> Treason violates the harm principle, according to Fletcher, because it is not universal—it can only be committed against a particular group.

Even taking for granted both Fletcher’s understanding of Mill’s harm principle and his assumption that the harm principle is central to the “nature and purpose” of criminal law,<sup>143</sup> there is still reason to disagree with Fletcher on his own terms. The current U.S. understanding of treason does not necessarily preclude universality in the class of potential victims. As Fletcher elsewhere recognizes,<sup>144</sup> the group of individuals who owe allegiance to the United States and who can thus commit treason extends beyond citizens. The group includes individuals who are present in the United States.<sup>145</sup> As

142. *Law, Loyalty, and Treason*, *supra* note 88, at 1620.

143. *Id.* at 1612.

144. *See* FLETCHER, *supra* note 16, at 57.

From whom may the modern nation-state exact a duty of loyalty? . . . The answer in conventional legal terms is that loyalty is due only from citizens and those like permanent residents of the state who stand in an ongoing relationship of interdependence and expected gratitude with the society the state represents. This, then, is the modern domain of loyalty. These are the people who are subject to prosecution for treason if they act disloyally toward their country.

*Id.*

145. For the common law origins of this concept, see *supra* note 51 and accompanying text. This principle has been adopted in the United States as well. In *Carlisle v. United States*, 83 U.S. 147 (1873), British citizens resident in the United States sued for the return of cotton that the Union Army had seized from them. They argued that they had committed treason by aiding the Confederacy and thereby were subject to the presidential pardon that had been issued for all Civil War treasons. *Id.* at 150–51. The Supreme Court held that the British citizens could sue for return of their cotton, accepting the Britons’ argument that they had committed treason. *Id.* at 155–56. The Court explained the difference between the allegiance owed by an alien and that owed by a citizen as follows:

The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

*Id.* at 154. The Court also noted that “This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen.” *Id.*; *see also* Radich v. Hutchins, 95 U.S. 210, 211–12 (1877).

As a foreigner domiciled in this country, he was bound to obey all the laws of the United States not immediately relating to citizenship, and was equally amenable with citizens to the penalties prescribed for their infraction. He owed allegiance to the government of the country so long as he resided within its limits, and can claim no exemption from the statutes passed to punish treason, or the giving of aid and comfort to the insurgent States. The law on this subject is well settled and universally recognized.

*Id.*



Blackstone explains, those who owe allegiance to a sovereign may commit treason against it, and “this allegiance . . . was distinguished into [two sorts or] species: the one natural and perpetual, which is inherent only in natives of the king’s dominions; the other local and temporary, which is incident to aliens also.”<sup>146</sup> The logical corollary of this delimitation is that those who can commit treason are also constitutive of those to whom all others in the group owe allegiance. Thus, the group of potential victims of treason—those injured by the traitor’s betrayal—extends to any individual present in the United States.<sup>147</sup> The cohort of individuals present in the United States will not be universal at any single point in time, but it is in fact a fluid group whose membership is open to any individual of any citizenship who enters the United States.<sup>148</sup> It is therefore not clear that treason can be committed only against a particular, limited group. The examples Fletcher gives of such groups are “women or blacks.”<sup>149</sup> These groups are immutable; the category of persons against whom treason against the United States may be committed is not.

Another possible antiliberal aspect of treason, building on Fletcher’s statements, is that it stems from the relationship between “a *particular* sovereign and subordinate subjects.”<sup>150</sup> “A particular sovereign” evokes images of the British kings and queens of old, who were the original objects of the subjects’ duty of allegiance. But even in Britain the object of the duty shifted over time from the person of the king to the political polity. By the British Civil War, “[t]reason was not simply a crime against the king’s natural person or a breach of allegiance but had increasingly become the unlawful seizure of sovereign or state power.”<sup>151</sup> The violence of the Civil War and the “ideological demands of regicide led to the appropriation of a fully impersonal conception of the state in which the king, acting beyond

146. BLACKSTONE, *supra* note 136, at \*74.

147. One exception to this rule is those individuals who enter the United States for the purpose of attacking the country. Such hostile invaders are never under the protection of the sovereign that they attack, and they therefore cannot commit treason against the sovereign because they do not owe the sovereign allegiance. In the United States, the non-U.S. citizen *Quirin* saboteurs are examples of hostile invaders. In Britain, a famous example of a hostile invader is Perkin Warbeck. JOHN BAKER, 6 THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, at 216–217 (2003). Warbeck was a citizen of Flanders, which was not at war with England, and he claimed to be the Duke of York. *Id.* Warbeck was captured after several armed attempts to invade England and overthrow Henry VII. *Id.* The English courts held that Warbeck could not be tried for treason because he was a hostile invader and owed no allegiance; instead, he was prosecuted under martial law. *See id.*

148. Some individuals, like those prohibited from entering the United States because they are on terrorist watchlists, would obviously be excluded, but by in large, the category of persons is wide open.

149. *Law, Loyalty, and Treason*, *supra* note 88, at 1620.

150. *Id.* at 1621 (emphasis added).

151. ORR, *supra* note 8, at 2.

his commission as an inferior magistrate, had derogated from the sovereign authority of the people.”<sup>152</sup>

The Framers avoided the problem of loyalty to the king by redefining the sovereign as the people of the democracy, as represented by the United States.<sup>153</sup> This is a liberal and democratic construction: treason is now the violation of allegiance of a member of a polity to the whole, a breach of allegiance by the people (a person) of the people.<sup>154</sup> Israel made a similar shift in redefining treason to be waging war against Israel rather than against the British King.<sup>155</sup> Thus, although it might be antiliberal if treason were to be based on loyalty to the person of the king, this is no longer the conception of the object to which allegiance is due in the United Kingdom, United States, or Israel.<sup>156</sup>

Fletcher’s second argument, which also relies on Mill’s harm principle, is stronger than his first one. He is correct that, in English

152. *Id.* at 4. For a detailed explanation of the development of the conception of the English state for purposes of treason law, see *id.* at 30–58 (chapter entitled “Sovereignty and State”).

153. See U.S. CONST. art. III, § 3, cl. 2 (banning “Treason against the United States”).

154. Some liberals might argue that continued valorization of the state itself and the idea that citizens owe any duty to their state is itself an outmoded and antiliberal construction. Part III.D addresses this argument and proposes that loyalty is still due to the state even on a liberal contractarian model because individuals derive numerous benefits from their state or states of citizenship and/or residence.

155. See *supra* notes 33–35 and accompanying text.

156. In March 2008, Lord Goldsmith, a former U.K. Attorney General, issued a report on citizenship in the United Kingdom in which he suggested modernizing and updating the law of treason. Lord Goldsmith, *Citizenship: Our Common Bond*, CITIZENSHIP REV., Mar. 2008, available at <http://www.justice.gov.uk/reviews/docs/citizenship-report-full.pdf>. Goldsmith identified numerous ambiguities in the law due to its ancient character, but concluded

[T]he offence of treason nevertheless ought to be retained in order to recognize the particularly grave nature of acts that are committed with the aim of overthrowing the government or harming fellow members of society by those who, either as UK citizens or residents, owe a duty of loyalty to the UK.

*Id.* at 81. Goldsmith and press commentators situated their concern about treason law in the ongoing debate about the meaning of being British. One commentator noted, “Before the crime of treason can be redefined, it’s necessary for the UK to determine how we shall define the relationship between the citizen and the state. You can’t define treachery unless you’ve first defined allegiance. What duties of allegiance do citizens owe to the state?” Gary Slapper, *The Law Explored: Treason*, TIMES ONLINE (U.K.), Mar. 19, 2008, <http://business.timesonline.co.uk/tol/business/law/columnists/article3583851.ece>. He continued, “[H]ow [treason is] defined is vitally important because it rests on whatever duty we collectively agree as citizens to owe to the state.” *Id.* To demonstrate how out of date the current treason law is, commentators also noted that 25 Edward III’s prohibition on “violating” the wife of the king’s son and heir could have resulted in treason charges for the five men alleged to have had sexual relations with Princess Diana while she was married to Prince Charles. Michael Herman, *An Ancient Law with Modern Resonance*, TIMES ONLINE (U.K.), Mar. 11, 2008, <http://business.timesonline.co.uk/tol/business/law/article3531015.ece>; Slapper, *supra*.

law, treason likely did violate the harm principle by focusing exclusively on internal attitudes in some cases. One of the headings of treason in 25 Edward III was to “compass or imagine the Death of our Lord the King.”<sup>157</sup> With 25 Edward III as an example, the *Oxford English Dictionary* defines “compass” to mean, “To contrive, devise, machinate (a purpose). Usually in a bad sense.”<sup>158</sup> The idea that a mere compassing or imagining could constitute treason casts a broad net for the crime and does not require actual harm or even the potentiality of harm to the King. In the “compassing the death of the King” formulation, treason likely did violate Mill’s harm principle, as Fletcher suggests. Willard Hurst notes:

The charge of compassing the king’s death had been the principal instrument by which ‘treason’ had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king’s death to the mere speaking or writing of views restrictive of the royal authority.<sup>159</sup>

But the compassing prong of 25 Edward III was deliberately omitted from the U.S. Constitution. The Framers, by omitting “any provision analogous to that in English law which punished compassing the death of the king[,] removed the foundation on which the English judges had built much of the reprobated structure of ‘constructive’ treasons.”<sup>160</sup>

The elimination of compassing-thought treasons in the United States takes the wind out of Fletcher’s sails by ruling out the historic category of cases that would have been most likely to violate the harm principle. Additionally, precedents arising from World War II propagandist cases have shifted the “gravamen” of the crime to the accused traitors’ actions rather than their “internal attitudes.”<sup>161</sup> The Supreme Court has held that the “adhering to their enemies, giving them aid and comfort” prong of the Treason Clause requires proof of two elements: “adherence to the enemy; and rendering [the enemy] aid and comfort.”<sup>162</sup> The adherence requirement evokes the internal attitudes that Fletcher argues are antiliberal. The courts have held that an act of aid and comfort absent intent to betray is not treason, nor is intent to betray without an overt act of aid and comfort.<sup>163</sup> The intent requirement, however, is not a subjective

157. Treason Act, 1351, 25 Edw. III, c. 2, stat. 5 (Eng.).

158. OXFORD ENGLISH DICTIONARY (2008) (entry for “Compass”).

159. *Treason—Part II*, *supra* note 79, at 429.

160. *Id.* at 411.

161. *Law, Loyalty, and Treason*, *supra* note 88, at 1621.

162. *Cramer v. United States*, 325 U.S. 1, 29 (1945).

163. *E.g.*, *Kawakita v. United States*, 343 U.S. 717, 736 (1952) (“Intent to adhere to the enemy is required in treason.”); *Cramer v. United States*, 325 U.S. 1, 29 (1945) (“A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country’s policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason.”).

inquiry. Several of the World War II propagandists argued that they acted out of patriotism and in the best interests of the United States, and that they had no intent to betray the United States. They claimed that their propaganda urging the United States to stay out of the war and later to surrender was an attempt to aid the United States.<sup>164</sup> The courts rejected all such arguments. The First Circuit in the *Chandler* case—the first and most widely cited of the propagandist cases—explained, “Whether Chandler was ‘sincere’ in what he did, whether he had the heart of a patriot, is a matter that may be sifted out at the last Great Judgment Seat; but the law of treason is concerned with matters more immediate.”<sup>165</sup> The courts focused on the accused traitors’ actions and from those actions presumed that the intent element was satisfied; in doing so, they put the focus of the treason trial and appellate review on the actions themselves rather than on the “internal attitudes” about which Fletcher is concerned.<sup>166</sup> Thus, the United States has kept its definition of treason and avoided the more drastic redefinitions undertaken by France and Germany, but it has not ignored the antiliberal characteristics that Fletcher identifies. The U.S. courts have responded, perhaps to Fletcher’s “liberal” discomfort, by working

164. See, e.g., *D’Aquino*, 192 F.2d 338, 353–54 (9th Cir. 1951) (summarizing the defendant’s claim that the radio program’s purpose was to boost the morale of U.S. troops); *Chandler*, 171 F.2d 921, 943–44 (1st Cir. 1948) (rejecting the defendant’s argument that he acted from patriotic motives and thus had no intent to betray).

165. *Chandler*, 171 F.2d at 943.

166. It is, perhaps, a separate question whether this approach is faithful to the intention of the Framers in drafting the Constitutional definition of treason or of the early Congress that adopted the treason statute. It could be argued that the admittedly difficult inquiry into the traitor’s intention was supposed to be a hurdle for treason prosecutions and that the courts have essentially written it out of the Treason Clause by presuming intent from the actions. But perhaps this hurdle would have been entirely prohibitive, which is a result the Framers surely did not intend. Willard Hurst deals with this issue by arguing, though not in the context of propagandists, that what the courts ignore is *motive* rather than *intent*. HURST, *supra* note 78, at 195.

The crucial fact in the court’s mind in these situations seems always to be . . . the defendant’s knowledge that he is dealing with the enemy or rebel. If, having such knowledge, the defendant then sells supplies or gives money or concealment, he in fact specifically intends the ultimate, prohibited effect, to aid the enemy, or to contribute to the levy of war. In this state of proof, the plea of profit or friendship seeks to raise not the issue of his intention, but the more remote question of his motive; and it is merely applying the elementary doctrine to hold that if defendant had the specific intention to bring about a result which the law seeks to prevent, his motive is irrelevant.

*Id.* It may be, however, that in the case of a propagandist, whose entire act of aid and comfort consists in transmitting a message, the content of the message and the intent of the propagandist in propagating the message might be more relevant than in a more traditional aid and comfort scenario, such as the Haupt case where the father gave his traitor son shelter and helped his son to obtain employment.

within the old definition of treason but shifting their inquiry to the defendant's actions rather than his or her intent.

By claiming that treason violates the harm principle,<sup>167</sup> Fletcher seems to assume that because treason has a mental element it does not cause harm. As just discussed, the U.S. courts have put the focus in treason inquiries on the accused's actions, which presumably do cause harm. The courts have been less than clear about what "aid and comfort" (i.e., harm) a propagandist's actions provide,<sup>168</sup> but the presumed harm is the demoralization the propaganda causes among American listeners, particularly American troops who hear the broadcasts. In non-propagandist cases, the harm is even clearer. In *Haupt*, for example, the father who provided his saboteur son with food, shelter, and assistance in obtaining a car and employment "forward[ed] the saboteur in his mission,"<sup>169</sup> thereby assisting the enemy of the United States. Aid to a U.S. enemy is necessarily (even if indirectly) harmful to the United States because it both strengthens the enemy and weakens the United States via demoralization when the aid to the enemy becomes known. Although the potential punishment for treason may in some instances be disproportionate to the harm caused by the traitor,<sup>170</sup> that issue should be taken into account at sentencing, and thus mere *prosecution* for treason does not violate the harm principle unless one assumes that the treason itself is harmless.

In sum, Fletcher's two-pronged antiliberal critique of treason seems unavailing. The community against which treason may be committed is fluid and therefore does not violate the universality Fletcher argues is required by the harm principle. Neither the United Kingdom nor the United States nor Israel conceives of the sovereign as the person of a king but rather as the polity of which the traitor is a part and whose protection the traitor has enjoyed. Finally, the United States, while not explicitly revising its treason statute or Treason Clause, has refocused its law of treason via court interpretations away from internal attitudes and toward external actions.

### B. Too Difficult To Prove

From the time of the treason statute of Edward III in 1351, statutory framers have attempted to cabin treason. The treason

167. *Law, Loyalty, and Treason*, *supra* note 88, at 1621.

168. Hurst notes generally, "In view of the potentialities for good and evil in the instrument of treason prosecutions, it is surprising how little judicial imagination has been stirred to clarifying analysis in such cases as have presented themselves." HURST, *supra* note 78, at 186.

169. *Haupt v. United States*, 330 U.S. 631, 635 (1947).

170. *See infra* pp. 1498–1502.

statute of Edward III was itself an attempt to limit the actions that could bring about a treason charge, and English commentaries from the seventeenth through nineteenth centuries evidence a restrictive interpretation of treason.<sup>171</sup> In addition to limiting the range of conduct that can be prosecuted as treason in 25 Edward III, English law increased the evidentiary difficulty of proving treason by requiring two witnesses.<sup>172</sup>

The Framers of the U.S. Constitution restricted treason even further by narrowing the behavior chargeable as treason only to acts of levying war against the United States or giving aid and comfort to its enemies.<sup>173</sup> They also increased the evidentiary burden by requiring two witnesses to the *same* overt act.<sup>174</sup> As the U.S. Supreme Court explained in *Cramer*, “Certainly the treason rule, whether wisely or not, is severely restrictive. . . . The provision was adopted not merely in spite of the difficulties it put in the way of prosecution but because of them.”<sup>175</sup> The Framers—and their English predecessors—intended treason to be difficult to prove; the evidentiary burden served as a guarantee against fraudulent, politically motivated treason prosecutions by ensuring the convictions would not be obtained based on flimsy evidence.

Some have suggested that the evidentiary requirements for proving treason mean that it will no longer be used, particularly against terrorist-related offenses, because the United States and

171. Willard Hurst, *English Sources of the American Law of Treason*, 1945 WIS. L. REV. 315, 355 (discussing the Supreme Court’s treatment of British treaties in the *Cramer* case and stating “[f]rom these sources [the Court] recognized the deep historic roots of the general policy restrictive of the scope of the crime”).

The English commentaries undertake to implement the general restrictive policy adopted toward the crime of treason particularly by trying to set defined limits to the scope of treasonable intent, and by insisting on the showing of an overt act as protection against persecution for thought or belief, or peaceful political activity.

*Id.* at 356.

172. See *supra* note 19 and accompanying text.

173. U.S. CONST. art. III, § 3, cl. 2; see also *Ex parte Bollman*, 8 U.S. 75, 127 (1807) (“It is . . . more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases.”).

174. *Cramer v. United States*, 325 U.S. 1, 24 (“[The Framers] wrote into the organic act of the new government a prohibition of legislative or judicial creation of new treasons. And a venerable safeguard against false testimony was given a novel application by requiring two witnesses to the same overt act.”).

175. *Id.* at 47–48. But see Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. (forthcoming 2009) (manuscript at 53), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1322445](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1322445) (“If the holding in *Cramer* had made treason prosecutions too difficult to pursue and convictions too difficult to obtain, the DOJ must have missed the memo, because it continued to bring prosecutions at a healthy rate during the decade following *Cramer*.”).

United Kingdom have other laws—for example, the material support laws in the United States—to address terrorist-related crimes.<sup>176</sup> As an illustration, George Fletcher noted that the U.S. government failed to prosecute the “American Taliban” John Walker Lindh for treason and speculated that “the government has a whole array of other offenses at its disposal, all of which are easier to prove in court than is treason.”<sup>177</sup> Similarly, the United Kingdom’s Lord Carlile, the Independent Reviewer of terrorism legislation,<sup>178</sup> noted in relation to a possible treason charge against the radical cleric Omar Bakri Mohammed,<sup>179</sup> “[T]reason law is very specific. I suspect that there are far more appropriate crimes already on the statute book.”<sup>180</sup> On

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176. U.S. Code provisions that are used to combat support to terrorist organizations include, among others: 18 U.S.C. § 2339 (2006) (“Harboring or concealing terrorists”); 18 U.S.C. § 2339A (2006) (“Providing material support to terrorists”); 18 U.S.C. § 2339B (2006) (“Providing material support or resources to designated foreign terrorist organizations”); 18 U.S.C. § 2339C (2006) (“Prohibitions against the financing of terrorism”); and 18 U.S.C. § 2339D (2006) (“Receiving military-type training from a foreign terrorist organization”). See also Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2009) (partially invalidating 18 U.S.C. §2339A), cert. granted sub nom. Humanitarian Law Project v. Holder, 2009 U.S. Lexis 5147 (Sept. 30, 2009). In the United Kingdom, similar provisions are found in the Terrorism Act 2000. See, e.g., Terrorism Act, 2000, c. 11, §§ 11–12, 14–18 (Eng.).

177. *Law, Loyalty, and Treason*, supra note 88, at 1627; see generally Crane, supra note 175 (arguing that the Court’s sanction in *Cramer* for prosecutors to charge treasonous conduct under various other criminal headings and the relative ease of obtaining conviction under such alternative headings largely accounted for prosecutors’ failure to charge treason until the Gadahn indictment). The recent case of Bryant Neal Vinas, a U.S. citizen and Muslim convert from Long Island, may support their argument. Vinas was captured in Pakistan in November 2008 fighting with Al Qaeda, and in January 2009, he pleaded guilty to charges of material support and conspiracy to commit murder, a charge stemming from firing rockets at a U.S. military base in Afghanistan. Sebastian Rotella & Josh Meyer, *U.S.-Born Militant Who Fought for Al Qaeda is in Custody*, L.A. TIMES, July 23, 2009, available at <http://articles.latimes.com/2009/jul/23/nation/na-american-jihad23>. On the other hand, Vinas is in U.S. custody and pleaded guilty. It is possible that the government agreed to forego a treason charge, with its possible accompanying death penalty, obtain the guilty plea on lesser charges and Vinas’s assistance with additional investigations.

178. See LORD CARLILE OF BERRIEW Q.C., A REPORT BY LORD CARLILE OF BERRIEW Q.C.: INDEPENDENT REVIEWER OF TERRORISM LEGISLATION (2007), available at <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/carlile-terrorism-definition.pdf?view=Binary> (Lord Carlile’s report on the definition of terrorism).

179. See supra notes 111–13 and accompanying text.

180. Morris, supra note 111; see also DU CANN, supra note 15, at 265.

Treason in peacetime has become anachronistic. The prosecuting authorities naturally fight shy of invoking the difficult and obscure Norman-French feudalistic statute of Edward III when they have more up-to-date, more efficient, if slighter weapons to hand in modern times. The Official Secrets Acts of 1911 and 1920 and the Treachery Act of 1940 are good examples of such alternative weapons. Such forms of treason as can be more conveniently dealt with under the laws relating to sedition or to incitement to ‘mutiny or disaffection’ are invariably dealt with in peacetime under such relatively minor laws as these.

their face, terrorism laws passed in the last fifteen years in both the United States and United Kingdom do appear easier to prove than the specific elements and heightened evidentiary requirements in the treason statutes. However, technological advancements have made treason easier to prove in several ways.

First, Fletcher and Lord Carlile overlook how the changed nature of some treasonous acts decreases the intended evidentiary difficulty. The statute of Edward III was aimed primarily at prosecuting barons who plotted in their castles with a small group of like-minded individuals to attack the king's installations or the king himself. Or in the U.S. context, the treason statute was supposed to allow prosecution of individuals such as Aaron Burr, who allegedly plotted to challenge the authority of the United States and claim land in the southwest for the establishment of a new government.<sup>181</sup> In these archetypal treason cases, the two-witness requirement presented a significant guarantee of evidentiary reliability. The two-witness requirement continued to fulfill this function into the twentieth century. The requirement caused Cramer's acquittal for his association with the *Quirin* saboteurs.<sup>182</sup> The two witness requirement may have provided some protection for the propagandists who were convicted of treason. Propagandists constituted five of the seven treason convictions in the United States as a result of World War II actions,<sup>183</sup> and in Britain, Joyce was convicted for his propaganda activities.<sup>184</sup> The evidence against the World War II propagandists consisted of not only their own recordings but also witnesses to the making of those recordings.<sup>185</sup>

*Id.*

181. See *United States v. Burr*, 25 F. Cas. 55, 133 (C.C.D. Va. 1807) (Marshall, C.J.); NATHANIEL WEYL, *TREASON: THE STORY OF DISLOYALTY AND BETRAYAL IN AMERICAN HISTORY* 110–62 (1950) (providing a colorful account of the Burr conspiracy and subsequent trials).

182. See *Cramer v. United States*, 325 U.S. 1, 67 (1945) (reversing the lower courts' finding that Cramer was guilty of treason).

183. The World War II propagandist cases that resulted in federal opinions are as follows: *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948); *United States v. Burgman*, 87 F. Supp. 568 (D.D.C. 1949). The other two treason convictions that were upheld occurred in *Haupt v. United States*, 330 U.S. 631 (1947) and *Kawakita v. United States*, 190 F.2d 506 (9th Cir. 1951).

184. *Joyce v. Dir. of Public Prosecutions*, [1946] A.C. 347, 348 (H.L.) (U.K.).

185. See *D'Aquino*, 192 F.2d at 352.

The overt act No. 6 was testified to by the requisite number of witnesses who observed and listened to the broadcast in question. One of them was a participant in the same Zero Hour program. He told the appellant of a release from Japanese General Headquarters giving the American ship losses in one of the Leyte Gulf battles and requested appellant to allude to those losses. She proceeded, as this witness and another testified, to type a script about the loss of ships. That evening, when appellant was present in the studio, the news



The march of technology, however, may have greatly decreased the protective power of the two witness requirement, at least for certain types of treason, since the World War II propagandists were convicted. The World War II cases are unclear about whether the recordings themselves plus two witnesses identifying a defendant by his or her voice in the recording would have been sufficient to satisfy the two witness requirement. Such a determination was unnecessary because the prosecution procured witnesses to the overt acts of making the recordings.<sup>186</sup> All of the propagandists were regular employees of the German and Japanese propaganda ministries,<sup>187</sup> so finding coworkers who could testify to the making of the recordings was possible and likely was more convincing to a jury than witnesses testifying solely to recognizing the defendants' voices in the recordings. The cases, therefore, do not settle the legal question of whether two witnesses would have to testify to seeing Gadahn make a propaganda video or instead whether identification of Gadahn in a broadcast video would be sufficient. The latter view appears to be consistent with the letter of the constitutional text and likely also satisfies its purpose of assuring reliability. The accuracy of an identification by someone viewing a video, as opposed to just listening to a World War II-era audio recording, would be quite high.

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announcer broadcast that the Americans had lost many ships in the battle of Leyte Gulf. Thereupon appellant was introduced on the radio and proceeded to say in substance: 'Now you fellows have lost all your ships. You really are orphans of the Pacific. Now how do you think you will ever get home?'

*Id.*; *Gillars*, 182 F.2d at 968 ("As to the overt act No. 10, on the basis of which she was convicted, three witnesses, Schnell, Haupt and von Richter, testified to her participation in the recording of [the radio drama] *Vision of Invasion* and she admits so doing.").

Not two, but half a dozen or more witnesses testified of their personal knowledge to his continuous day-by-day participation in the work of the short wave station, attendance at conferences to receive directives as to the current propaganda line, the preparation of manuscripts for his regular Paul Revere broadcasts, and the submission of them subsequently for censorship, collaboration occasionally with other employees of the short wave station in the preparation of special programs to be broadcast jointly, the making of recordings for subsequent broadcasts, etc. The authenticity of the twelve sample Paul Revere recordings introduced into evidence was established by competent testimony, and is not challenged by the defendant.

*Chandler*, 171 F.2d at 940; *cf. Burgman*, 87 F. Supp. at 571 (noting that defendant's propaganda recordings were admitted into evidence and played at trial, but discussing the recordings only in determining that they did not violate the Fifth Amendment privilege against self-incrimination).

186. See *supra* note 185 and accompanying text.

187. See *D'Aquino*, 192 F.2d at 347 (Broadcasting Corporation of Japan); *Best*, 184 F.2d at 133 (German Radio Broadcasting Company); *Gillars*, 182 F.2d at 966 (German Radio Broadcasting Company); *Chandler*, 171 F.2d at 924 (German Radio Broadcasting Company); *Burgman*, 87 F. Supp. at 569 (German Radio Broadcasting Company).

Additional technology, such as various types of biometric identification, would also allow Gadahn to be identified with confidence from the visual images in the videos. Gadahn has also helped to identify himself by destroying his U.S. passport in one video.<sup>188</sup>

The meaning of the evidentiary requirement—two witnesses to making a video versus two witnesses identifying the propagandist based upon viewing a video—may be determined by how the overt act is phrased in the indictment in any particular case. In the World War II cases, the overt acts alleged were making propaganda recordings or participating in meetings to plan such recordings.<sup>189</sup>

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188. See *supra* note 103 and accompanying text.

189. See *D'Aquino*, 192 F.2d at 348.

Appellant was found guilty of the commission of overt act No. 6 only, which in the language of the indictment, was: 'That on a day during October, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, in a broadcasting studio of the Broadcasting Corporation of Japan, did speak into a microphone concerning the loss of ships.'

*Id.*

The overt acts, like those submitted to the jury in the Chandler case, related for the most part to typical routine activities of Best, on identified occasions, in fulfillment of the purpose of his continuous employment as radio commentator and news editor for the German Propaganda Ministry. For instance, one of the overt acts related to Best's participation in a particular round-table conference of commentators, whose unrehearsed discussion and colloquy were recorded by a microphone and subsequently broadcast to the United States. Another overt act established by two-witness proof was Best's making of a live broadcast of a special program prepared by him, in conjunction with a German Luftwaffe officer who had accompanied the German paratroopers participating in the 'liberation' of Mussolini.

*Best*, 184 F.2d at 137.

A verdict of guilty was returned, based on the commission of overt act No. 10, which is set forth in the indictment as follows: '10. That on a day between January 1, 1944 and June 6, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Berlin, Germany, did speak into a microphone in a recording studio of the German Radio Broadcasting Company, and thereby did participate in a phonographic recording and cause to be phonographically recorded a radio drama . . . well knowing that said recorded radio drama was to be subsequently broadcast by the German Radio Broadcasting Company to the United States and to its citizens and soldiers at home and abroad as an element of German propaganda and an instrument of psychological warfare.'

*Gillars*, 182 F.2d at 966.

Generally described, one of these overt acts was arranging for the making of a recording, two were speaking into a microphone in the actual recording of talks for broadcast, one was participation in a conference for improvement in the operation of the Short Wave Station, two were attendance and participation in conferences of radio commentators at which directives were received from higher authority relative to the content of broadcasts, four were participation in

The government had and introduced co-worker witnesses to substantiate the defendants' actions.<sup>190</sup> In contrast, the Gadahn indictment alleges five overt acts of "appear[ing] in" Al Qaeda videos.<sup>191</sup> From this phrasing it seems likely that the government intends to argue that identification of Gadahn from the broadcast videos is sufficient to satisfy the two-witness requirement. Gadahn's video appearances have been broadcast over the internet and replayed on media outlets.<sup>192</sup> Thus, they have been available to U.S. audiences, including individuals who knew Gadahn prior to his departure from the United States and who can identify him. The ease of satisfying the two witness requirement for propagandists suggests that it may be no more difficult to prove they committed treason than to prove that they committed other crimes, such as material support, with which Gadahn is also charged.<sup>193</sup>

Second, technological advances have made some types of treason easier to detect. Governments are now able to use sophisticated technology to track the movement of money internationally and to wiretap various lines of communication linked to an individual under suspicion. In the Bishara case, for example, the Israeli police and Shin Bet used wiretaps to record Bishara's conversations during the June 2006 war,<sup>194</sup> and thus presumably an Israeli prosecutor would introduce at trial audiotapes that could be authenticated by the police and by voice matching software. In the wake of 9/11, various countries have cracked down on terrorist financing (the provision of which could, in certain circumstances, amount to treason), in part ordered by the U.N. Security Council, and have shown themselves adept at tracking the movement of funds, though criticism has arisen that some governments are too invasive in their information gathering.<sup>195</sup> New technologies have allowed them not only to obtain

conferences aimed at securing the resumption or continuance of defendant's broadcasting activities.

*Chandler*, 171 F.2d at 928; *Burgman*, 87 F. Supp. at 569 ("Each overt act consisted of making a specific recording.").

190. See *supra* note 185.

191. Indictment of Adam Gadahn, *supra* note 90, at para. 8.

192. See Raffi Khatchadourian, *Azzam the American: The Making of an Al Qaeda homegrown*, NEW YORKER, Jan. 22, 2007, at 50 ("[Gadahn] has addressed the United States in five videos, most of which reach a wide audience on the Internet and, in some form or another, have been discussed on the evening news.").

193. See Indictment of Adam Gadahn, *supra* note 90, at 9 ("Beginning on or about September 11, 2005 . . . defendant ADAM GADAHN . . . did knowingly provide, and aid and abet the provision of, material support and resources . . . to a foreign terrorist organization . . .").

194. McCarthy, *supra* note 114.

195. See, e.g., James Risen, *U.S. Reaches Tentative Deal with Europe on Bank Data*, N.Y. TIMES, June 29, 2007, at A6 (discussing the reasons for and implications of "[a] new agreement between the Bush administration and the European Union [that] will allow the United States government to continue a once secret program to obtain

the information quickly but also to sort and thereby utilize it more efficiently.

Finally, technological developments since World War II have made the transmission of information from the battlefield easier and faster. If a citizen were captured fighting against his home state on the battlefield, it would now be much easier to transmit and thereby preserve evidence regarding his actions for use in a future prosecution. Though this has not yet arisen in the contemplated treason prosecutions and battlefield evidence would undoubtedly still be difficult to obtain, the ability to transmit photos, videos, and documents over the internet and to preserve and duplicate them means that evidence of treason is more likely to be available today than it was in the World War II era.

### C. *Stability and Security*

Commentators have suggested that treason fell into disuse because the relevant states did not face conflict like World War II, which last prompted them to employ treason. The *Cramer* Court at the end of World War II noted, "We have managed to do without treason prosecutions to a degree that probably would be impossible except while a people was singularly confident of external security and internal stability."<sup>196</sup> George Fletcher hypothesized, "Insecure states are more likely to sense betrayal and to invoke criminal sanctions as a way of demonstrating their supremacy over threats from within. More secure states, such as the United States, might find that they can live quite well without the crime of treason."<sup>197</sup> These statements make intuitive sense, and thus raise the question of why the United States, the United Kingdom, and Israel are all considering or actually charging treason. The answer may lie in teasing out what exactly about the World War II context prompted treason prosecutions. Two possible answers would be the magnitude of the threat and the nature of the threat.

Taking first the issue of the magnitude of the threat, there is no doubt that the Axis powers in World War II posed an enormous threat to the United States and particularly to Britain. The Nazis

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banking records . . . for use in counterterrorism investigations . . ."); Jamie Smyth, *EU Says Secret Transfer of Bank Data to US Was Illegal*, IRISH TIMES, Nov. 23, 2006, at 19 (discussing how the Society for Worldwide Interbank Financial Telecommunications' (Swift) agreement to "secretly [pass] European citizens' banking records to the US" after 9/11 violated the EU data protection directive).

196. *Cramer v. United States*, 325 U.S. 1, 26 (1945).

197. *Law, Loyalty, and Treason*, *supra* note 88, at 1627; *see also* Larson, *supra* note 89, at 925 ("Forgetting the law of treason, of course, is a luxury of stable societies.").

had plans to invade Britain<sup>198</sup> and subjected Britain to intense bombing campaigns.<sup>199</sup> The attacks on Britain and the proximity of enemy-occupied territory just across the English Channel brought the threat home to the British. The United States also suffered an assault on its territory when the Japanese attacked Pearl Harbor. Additionally, the United States patrolled its shores for Nazi U-boats, and some, like the submarines that deposited the *Quirin* saboteurs, reached or approached the U.S. mainland. The sheer numbers of military casualties suffered by the Allies also demonstrated the great magnitude of the threat posed by the Axis powers.

It is possible that some government officials view the current terrorist threats facing the United States and the United Kingdom as sufficiently strong to spark the insecurity that commentators suggest is a prerequisite to treason charges. The 9/11 attacks in the United States inflicted over nearly 3,000 casualties in a single day,<sup>200</sup> and they occurred in U.S. cities, centers of power. In their aftermath, the U.S. public lived in fear of additional attacks, though such attacks have not materialized and the level of fear has abated. The London subway and bus bombings of July 2005 caused fifty deaths, the largest number of civilian deaths in an attack on London since the German bombing runs in World War II.<sup>201</sup> A failed bombing in London shortly after the successful 7/7 suicide bombings further increased insecurity in Britain.<sup>202</sup> Israel, though it has not suffered from a single attack of the magnitude of 9/11, has suffered terribly from suicide bombings, especially since the beginning of the second Palestinian *intifada* in September 2000.<sup>203</sup> According to the BBC, the

198. See, e.g., John P. Campbell, *A British Plan to Invade England, 1941*, 58 J. MIL. HIST. 663 (1994) (describing the British attempt in 1941 to predict what the planned German invasion of Britain, termed Operation Sealion, in 1940 would have entailed in order to defend against presumed future attack); H.A. DeWeerd, *Hitler's Plans for Invading Britain*, 12 MIL. AFF. 142 (1948) (discussing Hitler's preparation for landing operation against Britain in 1940 and the reasons for his decision not to execute the planned attack).

199. See DeWeerd, *supra* note 198, at 145–46.

200. See, e.g., NAT'L COMM'N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY 1–2 (2004), available at <http://govinfo.library.unt.edu/911/report/index.htm> ("More than 2,600 people died at the World Trade Center; 125 died at the Pentagon; 256 died on the four planes.").

201. See, e.g., Alan Cowell, *Subway and Bus Blasts in London Kill at Least 37*, N.Y. TIMES, July 8, 2005, at A1 ("Bomb explosions tore through three subway trains and a red-painted double-decker bus in a coordinated terror attack during London's morning rush hour on Thursday, killing at least 37 people, wounding about 700 . . . . The attacks were the worst in British memory since World War II."); Kevin Cullen, *In WWII Remembrance, Londoners Look Ahead with Bombings, Patriotic Tribute Has New Meaning*, BOSTON GLOBE, July 11, 2005, at A8.

202. See, e.g., Alan Cowell, *Bombs Set at 4 London Sites, but Fail to Explode*, N.Y. TIMES, July 22, 2005, at A1.

203. See, e.g., IAN J. BICKERTON & CARLA L. KLAUSNER, A CONCISE HISTORY OF THE ARAB-ISRAELI CONFLICT 339–43 (Charlyce Jones Owen et al. eds., 4th ed. 2005); Robert Fisk, *Horror in the Afternoon: Israel Retaliates with Air Strikes After 15 Killed*

death toll among Israelis during the *intifada* from 2000 to the beginning of 2005 surpassed nine hundred.<sup>204</sup> Taken cumulatively, the death toll exceeds that incurred by Israel during the Six-Day War in 1967.<sup>205</sup>

It is difficult, if not impossible, to quantify precisely the magnitude of threat. The magnitude assessment is ultimately an objective one, however, so attacked states can and should resort to the opinions of outside organizations and states. In the case of the 9/11 attacks, the U.N. Security Council, NATO, and the Organization of American States deemed the 9/11 attacks to be the equivalent of an armed attack and thus sufficient to permit an armed response.<sup>206</sup> Israel went to war with a terrorist group in 2006 when it attacked Hezbollah in Lebanon;<sup>207</sup> the conflict was emphatically not between Israel and the state of Lebanon.<sup>208</sup> It is unclear whether the objective

*in Jerusalem Bombing*, INDEPENDENT (London), Aug. 10, 2001, at 1; Howard Witt, *19 Israelis Die in Passover Bombing; 120 Wounded in Blast During Holiday Dinner*, CHI. TRIB., Mar. 28, 2002, at N1.

204. BBC News, *Intifada Toll 2000-2005*, [http://news.bbc.co.uk/2/hi/middle\\_east/3694350.stm](http://news.bbc.co.uk/2/hi/middle_east/3694350.stm) (last visited Oct. 18, 2009). The toll among Palestinians was over three thousand for the same period. *Id.*

205. According to the Israeli Ministry of Foreign Affairs, the death toll among Israelis in the 1967 war was 759. Isr. Ministry of Foreign Affairs, *The Six-Day War - Introduction*, in 1-2 HISTORICAL DOCUMENTS: 1947-1974 (2003), <http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/THE+SIX-DAY+WAR+-+INTRODUCTION.htm>.

206. See *infra* notes 295-97 and accompanying text.

207. See, e.g., Greg Myre & Steven Erlanger, *Clashes Spread to Lebanon as Hezbollah Raids Israel*, N.Y. TIMES, July 13, 2006, at 1 (discussing Israel's military response to the Hezbollah "daylight assault across the border on Wednesday, leading to fighting in which two Israeli soldiers were captured and at least eight killed . . ."); Letter from Dan Gillerman, Permanent Representative of Isr. to the United Nations, to Sec'y-Gen. and President of the Security Council, United Nations, U.N. Doc. A/60/937-S/2006/515 (July 12, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/426/71/PDF/N0642671.pdf?OpenElement>.

This morning, Hezbollah terrorists unleashed a barrage of heavy artillery and rockets into Israel, causing a number of deaths. In the midst of this horrific and unprovoked act, the terrorists infiltrated Israel and kidnapped two Israeli soldiers, taking them into Lebanon. Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the Government of the Islamic Republic of Iran and the Syrian Arab Republic, which support and embrace those who carried out this attack.

208. Israel blamed Lebanon for allowing Hezbollah to operate in Lebanese territory, see Letter from Dan Gillerman, Permanent Representative of Isr. to the United Nations, to Sec'y-Gen. and President of the Security Council, United Nations, U.N. Doc. A/60/937-S/2006/515 (July 12, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/426/71/PDF/N0642671.pdf?OpenElement> ("The ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years."), but recognized that the military action against Israel was done by Hezbollah, see *id.* ("In this vacuum festers the Axis of Terror: Hezbollah and the terrorist States of Iran and Syria, which today

threat from Hezbollah prior to the start of the conflict would have been sufficient to justify a treason charge had Bishara's actions been revealed earlier. Once the conflict was underway, however, Hezbollah's state-like capacity became evident to international observers.<sup>209</sup> Thus, in practice, terrorist groups can pose the magnitude of threat that prior to 9/11 was viewed as arising only from another state, and if a group does pose such a threat, the international community has proven willing to recognize the state-like capacity of terrorist groups. International opinion about the magnitude of a threat can assist in an objective evaluation of the threat's magnitude, freeing the assessment from dependence on the opinion of the targeted state.

Another factor in the evaluation of the magnitude of harm posed by terrorism might be the state's susceptibility to and history of terrorist attacks. This would suggest that the United States, which prior to 9/11 had no history of suffering foreign-organization-sponsored terrorist attacks on its soil, would be most susceptible to feelings of insecurity from an attack. Britain, which has a history of domestic terrorist attacks, particularly stemming from Irish nationalist groups,<sup>210</sup> would be more inured to terrorism. Israel, which has recently suffered large numbers of terrorist attacks, would therefore be the most immune to feelings of insecurity from a single additional attack. This lineup may shed light on why the United States would be prone to indict for treason, while Britain—which has a higher historic tolerance of terrorism and which suffered far less destruction in the 7/7 attacks than did the United States in the 9/11 attacks—would be less likely to bend to insecurity that might spur a treason prosecution. This typology suggests that Israel would be the least likely to prosecute for treason, though Bishara's case indicates

have opened another chapter in their war of terror.”); Foreign Minister Tzipi Livni, Joint Press Conference by Foreign Minister Tzipi Livni and E.U. Envoy Javier Solana (July 19, 2006) (transcript available at <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2006/Joint+press+conference+by+FM+Tzipi+Livni+and+EU+Envoy+Javier+Solana+19-Jul-2006.htm>) (“Israel has no conflict with Lebanon. Hizbullah opens a front with Israel to the Iranians, not to Lebanon.”); *see also id.* (“Israel is fighting to end the control of Hizbullah over the lives of both Lebanese and Israelis and to bring an end to its attempts to destabilize the region.”).

209. *See, e.g.,* Steven Erlanger & Richard A. Opiel, Jr., *A Disciplined Hezbollah Surprises Israel with Its Training, Tactics and Weapons*, N.Y. TIMES, Aug. 7, 2006, at 8 (“Hezbollah is a militia trained like an army and equipped like a state . . .”); John Kifner, *Hezbollah Leads Work to Rebuild, Gaining Stature*, N.Y. TIMES, Aug. 16, 2006, at 1 (“Hezbollah was not, [Professor Amal Saad-Ghorayeb] said, a state within a state, but rather ‘a state within a non-state, actually.’”).

210. *See, e.g.,* *London Bombs Were Huge, Police Say*, N.Y. TIMES, Apr. 26, 1996, at A8; T.R. Reid, *Terror Returns to London; IRA Spinoff Responsible for Car Bombing, Police Say*, WASH. POST, Mar. 5, 2001, at A14; Richard W. Stevenson, *I.R.A. Issues Claim of Responsibility for London Bomb*, N.Y. TIMES, Feb. 11, 1996, at 1.

that Israel at this point might be closer to a treason prosecution than Britain.

A simple explanation for this is that although Israel has become somewhat accustomed to minor terror attacks, the Hezbollah conflict in summer 2006 far exceeded Israel's tolerance level—rising to the level of an armed attack equivalent to one that could have been levied by a state. More basically, Israel's small size and hostile neighborhood likely contribute to greater feelings of insecurity for the Israeli government than for its British and American counterparts. The higher baseline level of insecurity might explain Israel's willingness to employ treason charges throughout its history, as in the Vanunu case,<sup>211</sup> and to adopt a treason law after World War II, just when the crime was disappearing in other democracies.

Although terrorist attacks inflicting large numbers of casualties on a state's home territory are cause for insecurity and although terrorist groups have been recognized as capable of armed attacks sufficient to provoke lawful armed response, the magnitude of the threat posed by terrorist groups in an objective evaluation does not approach that posed by the Axis powers in World War II. Magnitude of the threat may explain the return of treason, but an alternate or complementary explanation might be the perceived *nature* of the threat. That is, both the World War II Axis powers and today's terrorist groups might be perceived as posing an existential threat to the target state.<sup>212</sup> Whereas magnitude describes the objective seriousness of the threat in reality, nature (i.e., whether the threat is existential or not) describes the subjective perception of the threat, which may or may not align with an objective evaluation of its magnitude. As argued above, a threat of a state-like magnitude from a terrorist group would support a treason prosecution in an objective evaluation. The subjective perception of the threat may align with the objective evaluation, or it may outpace a correct objective evaluation of the threat's seriousness. If the threat is perceived as more serious than it actually is, the perception of the threat may explain the increased likelihood that a treason charge will be

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211. See text accompanying notes 119–24.

212. See, e.g., Ralph M. Carney, *The Enemy Within: A Social History of Treason*, in *CITIZEN ESPIONAGE: STUDIES IN TRUST AND BETRAYAL* 19, 37 (Theodore R. Sarbin, Ralph M. Carney & Carson Eoyang eds., 1994).

Societies conduct their affairs with an understanding that events can take place that may cause the society to cease to exist. And these threats can come from internal as well as external sources. This fear of national harm is the psychological underpinning for the context of national security. The laws of treason, espionage, sedition, and mutiny are established to lessen the fear about the internal threat by declaring that betrayal will be severely punished.



employed, though perception alone cannot normatively justify a treason charge.

George Fletcher discounts the affective power of subjective perceptions of the threat's nature. He writes, "Treason belongs to an era in which crimes were understood primarily as personal moral dramas."<sup>213</sup> He argues, "treason has declined because in the pragmatic thinking of the West, we no longer perceive great symbolic messages in criminal action. . . . The decline of treason expresses a general shift in our culture away from symbolic struggles toward the systematic and scientific control of violence."<sup>214</sup> Specifically addressing 9/11, he claims, "Those who perpetrated the attacks of 9/11 saw them as symbolic victories against the despised values of the West. We saw them as the malicious homicide of roughly three thousand people and the meaningless destruction of the twin towers."<sup>215</sup>

These comments fit neatly with Fletcher's thesis, but they ignore reality. Fletcher fails to acknowledge that though treason has symbolic aspects, it may have uses beyond symbolism. Harsh and public punishment of traitors may serve as an effective deterrent against future treasuries.<sup>216</sup> More pointedly, Fletcher ignores the fact that U.S. governmental leaders have framed the conflict with Al Qaeda in precisely the symbolic terms that Fletcher claims the West has eschewed. President Bush and others in his administration repeatedly characterized the conflict as one against "evil" forces.<sup>217</sup> President Bush also explicitly likened it to World War II.<sup>218</sup> Thus, in

213. *Law, Loyalty, and Treason*, *supra* note 88, at 1627–28.

214. *Id.* at 1628.

215. *Id.*

216. *See infra* text accompanying note 251.

217. *See, e.g.,* Peter Baker, *President Who Sees in Absolutes Awaits Voters' Definitive Answer*, WASH. POST, Nov. 7, 2006, at A01 (noting that President Bush's world "is a world of absolutes" and quoting him as saying "I view this as a struggle of good versus evil" regarding the war on terrorism); President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://transcripts.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/> (coining the term "axis of evil" in the following statement: "States like [North Korea, Iran, and Iraq], and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world."); *cf.* Craig Gilbert, *Parties Divided by Language on Terror; Candidates' Word Choices Might Reflect Different Views of What Battle Entails*, MILWAUKEE J. SENTINEL, Oct. 29, 2007, at A1.

It is clear in the '08 campaign that Republicans are more apt to frame the war on terror in epic terms—as a clash of civilizations—than their Democratic counterparts. Echoing President Bush, they liken the conflict to the great 20th century struggles against fascism and communism—a battle to save the West.

*Id.*

218. *See, e.g.,* Tim Harper, *Bush Likens Terror Fight to WWII*, TORONTO STAR, June 3, 2004, at A10 (describing President Bush's graduation speech at the U.S. Air Force Academy); Ron Hutchenson, *Bush Says Iraq Conflict, Like WWII, a 'Crucial' Test*, ST. PAUL PIONEER PRESS, Aug. 31, 2005, at 3A ("Speaking to a crowd of sailors and

the wake of 9/11 the Bush Administration framed the “War on Terrorism” as an existential struggle. A struggle that is perceived as existential—the forces of good battling to survive against the forces of evil—is laden with symbolism. In this environment, a citizen’s actions in support of the “evil” enemy can be viewed through the same symbolic lens, with the actions dramatized as betrayal of the polity—a conception in line with the historic conception of treason. Contra Fletcher, symbolism is not incompatible with “the systematic and scientific control of violence.”<sup>219</sup> Leaders can layer symbolism over a mechanized, high-tech, and violent conflict.

Israel provides a further example of deployment of symbolism to describe and explain a conflict. Israel has mythologized its founding, existence, and continued defense in existential terms. The attacks Israel suffered from its neighbors in 1967 and 1973 might rightly have been viewed as existential—determining the continued existence of the state—due to the magnitude of forces arrayed against Israel. The 2006 conflict with Hezbollah did not inflict nearly the same amount of damage on Israel, and Hezbollah did not have the same firepower as Egypt, Syria, and Jordan in past wars. Hezbollah displayed considerably more firepower than anticipated, however, and throughout the conflict, Israel feared that Hezbollah’s patrons, Iran and Syria, would provide the group with more—and more powerful—weapons or authorize the group to use the weapons it had already received.<sup>220</sup> Psychologically, the conflict troubled and shook Israelis because it was the first major foreign attack on Israel since the 1991 Gulf War. The information about and encouragement to strike targets south of Haifa—twenty miles into Israel proper—that Bishara allegedly provided inflicted particular harm on the Israeli psyche by disabusing Israelis of notions of safe zones within Israel.<sup>221</sup> Foreign press reports noted that “[p]oliticians and pundits crowded television studios [in Israel] to argue that Israel was fighting for its survival in its battle to wipe out [Hezbollah].”<sup>222</sup> Whether or not this

Marines near San Diego, Bush described the Iraq war and World War II as crucial tests of American resolve in the face of evil.”)

219. *Law, Loyalty, and Treason*, *supra* note 88, at 1628.

220. *See, e.g., Erlanger & Opiel, supra* note 209 (describing the nature of weapons and other equipment and training provided by Syria and Iran to Hezbollah).

221. *See Ellingwood, supra* note 114 (“Police believe Bishara counseled Hezbollah on wartime strategy against Israel, including recommending that its fighters fire rockets south of the port city of Haifa . . . . Israelis were especially shaken when longer-range weapons hit Haifa and points south of the city . . .”).

222. McCarthy, *supra* note 114; *see also* Steven Erlanger, *Left or Right, Israelis Are Pro-War*, N.Y. TIMES, Aug. 9, 2006, at 1.

Abroad, Israel is criticized for having overreacted and for causing disproportionate damage to Lebanon and its civilian population and even for indiscriminate bombing. But within Israel, the sense is nearly universal that

was the case in reality, Israel was fighting for its existence in rhetoric and in psychology.

In contrast, Britain throughout the twentieth century has conceived of terrorism as a law enforcement problem. Britain dealt with the decades of conflict and terrorist violence stemming from the Northern Ireland unrest with (sometimes extreme) police tactics.<sup>223</sup> It authorized harsh interrogations and detentions, but with characteristic British stoicism, the authorities and society in general downplayed the scope and threat of the violence. The country's response to the 7/7 bombings displayed this historical approach to terrorism. Although the country was clearly shocked when suicide bombers blew up three Tube trains and a London bus during the morning rush hour, authorities emphasized the police efforts to find the perpetrators (in the end a futile effort since the attacks were suicide bombings), and the attacks were not framed in existential terms.<sup>224</sup> When it became clear that the attackers were homegrown British Muslims with Al Qaeda links, discussion ensued about the causes of such hatred among Britain's own citizens.<sup>225</sup> But unlike the U.S. and Israeli responses, Britons viewed the London attacks as just another in a long line of terrorist attacks that the United Kingdom had faced,<sup>226</sup> and they did not dramatize the attacks as symbolic of a larger existential struggle or threat to the United Kingdom.

As these contrasts between the United States and Israel on the one hand and the United Kingdom on the other illustrate, it seems that greater willingness to employ treason charges might correlate

unlike its invasion of Lebanon in 1982, this war is a matter of survival, not choice, and its legitimacy is unquestioned.

*Id.*; Dion Nissenbaum, *Israel; A Hard-Line Attitude; Little Sympathy for the Lebanese; Most Israelis View the War as a Battle for National Survival and Support the Military's Action*, STAR TRIB. (Minneapolis), July 30, 2006, at 7A (reporting on opinion polls in Israel); Naftali Tamir, *We Fight for Our Survival*, HERALD SUN (Austl.), Aug. 3, 2006, at 20 (Israeli ambassador to Australia).

223. See, e.g., Ian Burrell, *UN Attacks Britain's Rights Record*, INDEPENDENT (London), Nov. 20, 1998, at 13; Sarah Lyall, *Britain Found to Violate Rights in Ulster Cases*, N.Y. TIMES, May 5, 2001, at A6.

224. See, e.g., *Blair: They Will Never Succeed*, GUARDIAN (London), July 8, 2008, at 14 ("There will now be the most intense police and security action to make sure we bring those responsible to justice. I would also pay tribute to the stoicism and resilience of the people of London who have responded in a way typical of them.") (quoting Prime Minister Tony Blair, Statement from Downing Street (July 7, 2005)).

225. See, e.g., Jon Ungoed-Thomas, *The 'Hearts and Minds' Battle for British Muslims that Failed*, SUNDAY TIMES (London), Aug. 13, 2006, at 15; Burhan Wazir, *7/7: One Year On*, TIMES (London), July 4, 2006, at 4.

226. See, e.g., Christine Spolar & Tom Hundley, *Repeat London Bombing Fizzles; Devices on 3 Trains, Bus Don't Detonate*, CHI. TRIB., July 22, 2005, at C1 ("London Mayor Ken Livingstone, recalling the extended bombing campaigns of the Irish Republican Army in the 1970s and 1980s, said a second terrorist strike was 'not surprising.' 'We got through that,' he said of the IRA terror campaign, 'and we will get through this.'").

with how a country conceptualizes the terrorist threat.<sup>227</sup> If the country perceives itself to be fighting an existential conflict either for its survival or against an “evil” enemy, then symbolism becomes very important. The historic pedigree of treason as a crime founded on betrayal of an owed duty or allegiance meshes with this symbolism. When a state perceives itself to be in greatest danger—as when it confronts an existential threat—it expects and demands the greatest faithfulness and support from its citizens and residents. If an individual breaks the bond of allegiance at precisely the point when the state feels most threatened, the state may feel the need to demand the expected bonds of allegiance by charging treason when they are breached. Treason’s historical focus on betrayal hits at the heart of why the traitor’s offense is so troubling to the state—the offense itself may be harmful, but the fact of an enemy from within those who are supposed to support and even die for the state signals vulnerability at the precise moment when the state needs to project strength vis-à-vis the external enemy.<sup>228</sup> Thus, regardless of the magnitude of the external threat, the nature and conceptualization of the threat as existential increases the level of symbolic conflict, which may prompt the state to respond to a symbolic attack with a symbolic charge and punishment—a reassertion of the demand for the allegiance of its own residents.

#### D. Loyalty

The analysis of the preceding section also casts doubt on the fourth reason offered for treason’s supposed demise: the loyalty to the state that is a necessary precondition to treason has no place in the modern world. Margaret Boveri, writing about treason in 1956, focused on the “atomisation of society.”<sup>229</sup> George Fletcher in 1993 did not agree that loyalty had devolved quite so far as to rest solely on individuals, but he does claim that the state has lost its place as a

227. It may be that Britain has not charged the former Guantanamo detainees with treason purely due to evidentiary problems, see, e.g., Rozenberg, *supra* note 108; Steele, *supra* note 108, so this non-prosecution critique primarily applies to Omar Bakri Mohammed, the Islamic cleric discussed above, and others who may have assisted the 7/7 bombers.

228. Cf. Carney, *supra* note 212, at 36.

Sovereignty is like a fabric, and betrayals, great or small, create a tear that could ultimately unravel the society. From early Roman times to the present, citizens are expected to cause no damage to the integrity of their country of birth. This is a common duty taught to citizens of all nations. In this context, treason is the worst of crimes.

*Id.*

229. MARGRET BOVERI, TREASON IN THE TWENTIETH CENTURY 391 (Jonathan Steinberg trans., 1961) (1956).

locus of loyalty. Fletcher writes, "In a world of dual and conflicting loyalties, the state's demand for exclusive loyalty is rapidly losing its grip."<sup>230</sup> From the perspective of the individual, Fletcher argues, "In a world history of conquest, taking slaves, free-flowing migration, and expelled refugees, the union of state and society has long been a myth. The objects of our loyalty are families, tribes, or communities that at best overlap haphazardly with organized political authority."<sup>231</sup> Fletcher believes that the decline in focus on loyalty is, however, mutual because, he argues, "[g]overnments seem no longer to care about actual sentiments of loyalty. Of concern today are the control and dissemination of information."<sup>232</sup> Thus, founded on the idea of demise from mutual neglect, Fletcher claims, "[t]he crime of treason to a nation-state can survive only if the principle 'thou shalt not betray me' as applied to the state retains as much moral coherence as the imperatives of interpersonal crime—for example, 'thou shalt not kill' and 'thou shalt not steal.'"<sup>233</sup>

Thankfully, society has not degraded so far as Fletcher suggests. Three counterpoints challenge Fletcher's prediction that treason is outmoded. First, treason is but one incarnation of betrayal, and Fletcher and others recognize that the betrayal characteristic of treason has analogues in personal relations. Indeed, "[t]reason operates against the background of the fundamental human need to form social groups where members are trustworthy and loyal."<sup>234</sup> Other human relationships also suffer betrayals. Betrayal is the key to acts such as adultery and idolatry, betrayal of a spouse and God, respectively.<sup>235</sup> The same moral intuition that condemns these personal betrayals also underlies treason. One commentator has argued that the moral condemnation of treason stems from the unity of the divine Roman emperor and the Roman state: "since the emperor embodied the state, the state was also sacrosanct, and acts

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230. FLETCHER, *supra* note 16, at 58.

231. *Id.*

232. *Id.* at 59.

233. *Id.* at 58.

234. Carney, *supra* note 212, at 20.

235. See FLETCHER, *supra* note 16, at 41.

The worst epithets are reserved for the sin of betrayal. Worse than murder, worse than incest, betrayal of country invites universal scorn. Betrayal of a lover is regarded by many as an irremediable breach. For the religious, betrayal of God is the supreme vice. The specific forms of betrayal—adultery, treason, and idolatry—all reek with evil.

*Id.*; see also NACHMAN BEN-YEHUDA, BETRAYALS AND TREASON: VIOLATIONS OF TRUST AND LOYALTY 126 (Crime & Society Series, John Hagan et al. eds., 2001) ("Violations of trust and loyalty on the personal level are commonly referred to as 'betrayal' . . . . For example, marriage typically means sexual exclusivity. Violating that is interpreted as betrayal . . . .").

that defamed the state were desecrations that signified moral corruption.”<sup>236</sup>

Although adultery is no longer a prosecuted offense, there is no reason to believe that the offense it gives to a victim is any less than it was in prior eras. While moral condemnation of and indignation at adultery and other personal betrayals continues, why would treason—betrayal writ large—be spared the same condemnation? Offense at and punishment of betrayal is a fundamental human reaction at both the personal and the group level. In the state context, “treason affronts the public trust. Betrayal threatens the conditions for trust, diminishes the strength of the social contract, and ultimately threatens the survival of the group.”<sup>237</sup> Fletcher, though recognizing the similarity between personal and public betrayal, offers no persuasive explanation of why betrayal in one realm—the personal realm—would remain a vital source of condemnation, while betrayal in the public realm would prove no affront, as he claims is the case. Contrary to his prediction, but predictably when one realizes the continued private vitality of condemnations of betrayal, governments in fact do “care about actual sentiments of loyalty,” as evidenced by treason’s return.<sup>238</sup>

Second, individual loyalty to one’s state of citizenship may be greater today than in centuries past because the benefits derived from the state have increased. An individual in a modern democratic state receives many sorts of benefits from being a member of the social community. Benefits may include social services, healthcare, unemployment insurance, and public goods, such as defense, emergency services, public transportation, etc. Because modern states are more powerful than their predecessors, individuals are required to have a greater connection to their states. Though this connection may not always be positive (for example, widespread enforcement of unpopular laws might breed discontent) and familiarity may breed contempt, generally the benefits to be gained from living in a modern state are great, suggesting that the cost of treason would be higher than it was in the past when the state did not offer as much to its citizens.

Finally, Fletcher is correct that the world today is full of burgeoning sub-state identities, based on family, religion, ethnicity, and other attributes. Fletcher notes, “We are witnessing . . . increasing demands for loyalty within smaller and smaller units of group identification. The intense need to belong, the craving for reciprocal attention and devotion, the quest for meaning in group action—all of

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236. Carney, *supra* note 212, at 24.

237. *Id.* at 20.

238. FLETCHER, *supra* note 16, at 59.

these ever-present yearnings put pressure on our loyalties.”<sup>239</sup> But Fletcher ignores the fact that in the realm of international relations—precisely the arena where national enemies appear and are confronted—the state remains the primary actor. For centuries, states have been the primary unit in international law—including laws governing the use of force—and they remain so, despite recent developments, particularly in the area of human rights, that empower sub- and supra-state groups and individuals.<sup>240</sup> When acting internationally, individuals are still conceptualized primarily by their state of citizenship. Passports and consulates are arranged by citizenship, not family, ethnicity, or religion. Thus, a state’s assertion of its primacy as the locus of loyalty vis-à-vis foreign enemies follows a centuries-old tradition and current practice of deference to states as the major actors in international relations.<sup>241</sup> It should be unsurprising then that states will punish disloyalty when it manifests as aid to the states’ enemies because the state is the unit that confronts foreign enemies and enforces discipline internally in the service of its international role, as discussed in the next part.

#### IV. THE POTENTIAL EFFECTS OF TREASON PROSECUTIONS

The preceding Parts have offered an account of the reappearance of treason prosecutions in the United States, the United Kingdom, and Israel, and an explanation of why predictions of treason’s demise were incorrect. This Part evaluates whether the reappearance of treason in these democratic societies should be cause for concern, and if so, under what circumstances. It identifies four possible benefits and four possible dangers of treason prosecutions. The benefits and dangers are in some sense converses of one another, which should caution states contemplating a treason prosecution to consider not just the benefit they hope to gain but also the potential downside of the supposed benefit. These potential effects provide a framework for evaluating whether the benefits of treason prosecutions outweigh the potential dangers.

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239. *Id.* at 60.

240. *See infra* note 241 and accompanying text.

241. This is not to say that non-state and sub-state actors, and even individuals, lack roles in international relations and international law. *See generally* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 502–04 (2005) (discussing how domestic actors, for example, “nongovernmental advocacy groups,” affect states’ treaty commitment and compliance); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 646–47 (1998) (discussing “transnational norm entrepreneurs”). I merely mean to emphasize that when it comes to international political and legal conceptions about the use of force, the state remains the primary relevant unit.

### A. Potential Benefits of Treason Prosecutions

There are several possible positive effects of prosecuting treason. First, treason's emphasis on the duty of allegiance owed by the accused traitor can reinforce societal identity. The prosecution directly reinforces the duty of allegiance and social cohesion by reminding the rest of society that the allegiance is due<sup>242</sup> and demonstrating that the state will enforce the allegiance owed to it. For example, in the press conference announcing Gadhafi's indictment, Deputy Attorney General Paul McNulty declared, "Today's indictment should serve as notice that the United States will protect itself against all enemies, foreign and domestic. . . . Betrayal of our country will bring severe consequences."<sup>243</sup>

The prosecution also can reinforce the identity indirectly by highlighting the enemy's identity and showing that the state opposes the enemy. The identification of an enemy allows a state's leaders to take advantage of the in-group bias that results from the perception of an out-group "other." Social psychological literature has long documented the group reinforcement effect that results from identification of an other, particularly a threatening one. For example, studies show that

being told that one belongs to a particular group as opposed to another—even if one has never seen or met any other members of that group—is enough to make the individual prefer the group over others. This group is perceived as better, friendlier, more competent and stronger than other groups.<sup>244</sup>

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242. See, e.g., BEN-YEHUDA, *supra* note 235, at 108.

Conflict . . . is a time for crystallization of internal conformity in the face of challenges to the state. During such periods, state definitions of trust and loyalty expand and harden, and what otherwise would be considered as normal activity may become defined as treason or sedition. In times of conflict, nation-states tend to increase restrictions, which also increases the temptation to violate them.

*Cf.* FLETCHER, *supra* note 16, at 41 ("Precisely because national betrayal is no longer clearly perceived, the courts and other officials overcompensate for public doubts with apparently excessive punishment.")

243. Deputy Attorney General Paul McNulty, et al., U.S. Dept. of Justice, Transcript of Press Conference Announcing Indictment of U.S. Citizen for Treason and Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006) (transcript available at [http://www.usdoj.gov/archive/dag/speeches/2006/dag\\_speech\\_061011.htm](http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061011.htm)).

244. Daniel Druckman, *Nationalism, Patriotism, and Group Loyalty: A Social Psychological Perspective*, 38 MERSHON INT'L STUD. REV. 43, 48 (1994) (citing experiments by Tajfel and Brewer and noting the well-known study of group bias based on whether one is an over- or under-estimator of dot patterns); see also Mark Schafer, *Cooperative and Conflictual Policy Preferences: The Effect of Identity, Security, and Image of the Other*, 20 POL. PSYCHOL. 829, 832 (1999) ("Ingroup identity is enhanced . . . if the members of the outgroup have significantly different characteristics



Throughout history the existence of an external enemy has served to unify the state against which the enemy is arrayed, causing intrasocietal rifts to decrease in importance with the reminder that external threats pose greater dangers.<sup>245</sup> The external enemy provokes feelings of nationalism—group identity writ large in the social psychological literature—because “[a]ttacks on the ingroup are threatening not only because they are dangerous, but because they are attacks on the fundamental identity of its individual members.”<sup>246</sup> In-group identity is further bolstered in the wake of a terrorist attack by a “rally around the flag” effect: a boost in the popularity of the government in power resulting from an international attack or military event.<sup>247</sup> Society “rallies around” the

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from the members of the ingroup (in terms of language, ethnicity, and so on) and especially if the outgroup is seen as a threat to the ingroup.”).

245. See BEN-YEHUDA, *supra* note 235, at 124.

Charges of disloyalty and treason can be effective symbolic tools in the hands of determined leaders in campaigns to redefine moral boundaries and bolster their own agendas. During conflict, the boundaries between patriotism and treason, between loyalty and betrayal, become clearly delineated; rhetoric creates a social reality where good is pitted against evil, with no middle ground.

*Id.*

246. Schafer, *supra* note 244, at 831.

247. Early research and theorizing on the “rally around the flag effect” studied the United States, and particularly the effect on presidential popularity of war and other military confrontation. In this context, John E. Mueller explained, “In general, a rally point must be associated with an event which 1) is international and 2) involves the United States and particularly the President directly; and it must be 3) specific, dramatic, and sharply focused.” John E. Mueller, *Presidential Popularity from Truman to Johnson*, 64 AM. POL. SCI. REV. 18, 21 (1970). For additional support, see Brett Ashley Leeds & David R. Davis, *Domestic Political Vulnerability and International Disputes*, 41 J. CONFLICT RESOL. 814, 816 (1997):

Although the in-group/out-group hypothesis was developed with small groups in mind, political scientists have argued that the theory applies at the level of the nation-state as well, that conflict in the international system unites a divided domestic population. The salient and potent danger of a foreign adversary quells domestic dissension and increases nationalist feelings and government support. The ‘rally around the flag’ effect, a tendency discovered in the United States for public approval of the president to increase following involvement in major international events, is cited as empirical support for this proposition.

*Id.*; cf. Diana Richards et al., *Good Times, Bad Times, and the Diversionary Use of Force: A Tale of Some Not-So-Free Agents*, 37 J. CONFLICT RESOL. 504, 507–08 (1993) (discussing the “rally around the flag” effect as proof of the applicability of the in-group/out-group hypothesis to nation-states and noting that “[i]t is only a small step from this to the conclusion that state leaders would deliberately use force externally in an effort to divert attention from internal problems.”). I do not mean to suggest that the states discussed herein have launched fights against terrorism as diversionary wars but merely that the literature has shown that leaders understand how external threats affect domestic politics and so can evoke such threats to produce a desired effect, such as increasing feelings of national unity.

government in power as the government confronts the external threat. After a terrorist attack, government leaders evoke the event to remind the public of the unity required to face the threat.<sup>248</sup>

Such a boost in societal unity can only be beneficial if the enemy is clearly and properly defined as the members of a terrorist group like Al Qaeda. Misdefinition of the enemy by ethnic or religious characteristics could cause grave harm to both society and individuals by encompassing not just members of the threatening group but also loyal individuals who share ethnic or religious characteristics with the group's members.<sup>249</sup> The danger is heightened because leaders who may in fact provide the correct definition of the enemy do not retain sole control over the discourse and framing of the enemy; other independent actors can misdefine the enemy along ethnic, racial, or religious lines, leading to grave abuses against innocents.<sup>250</sup> If the danger of misdefinition is avoided, however, and the enemy is correctly defined as only members of the organization actually threatening the state, then identification of the external other can promote inclusion and unity with minority groups by clearly including them in the definition of the state that is being defended. The external threat becomes more important than other intrasocietal rifts that might otherwise gain or might previously have had prominence.

Second, treason prosecutions may deter future treasons—the deterrence rationale present elsewhere in criminal law.<sup>251</sup> Deterrence can result from the demonstration that the state will prosecute traitors and that severe punishment can accompany a conviction. This is deterrence through fear or a desire to avoid punishment. More positively, prosecution could deter treasons by reinforcing societal identity and cohesion, as just discussed, thus making individuals less prone to a desire to betray their community.

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248. Cf. Richards et al., *supra* note 247, at 507 (“It is widely accepted that international conflict is a unifying force for nations and that state leaders often use external enemies to rally domestic support.”).

249. See, e.g., OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (Apr. 2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (describing critically the rounding up of Arab and Muslim men in the New York City area in the aftermath of 9/11 and the subsequent maltreatment to which they were subjected).

250. See, e.g., OFFICE OF THE INSPECTOR GENERAL, *supra* note 249, at 157–64 (detailing harsh treatment of detainees at the Metropolitan Detention Center after 9/11); Caroline E. Mayer, *Passenger Fears, Bias Laws May Clash; Terrorism Raises Legal Concerns*, WASH. POST, Sept. 29, 2001, at A12.

251. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649–50 (2008) (“[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.” (citing *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991)), *reh’g denied*, 129 S. Ct. 1 (2008)).

Third, treason prosecutions can be satisfying to the society whose members have been betrayed by the traitor—the retribution rationale that is at least one basis for criminal law.<sup>252</sup> The particular military harm the traitor's actions have caused may be unclear, but the traitor often seeks to harm his home society by a demonstration effect. That is, it is demoralizing to see one's fellow citizen associating with or aiding the enemy. In this instance, treason prosecutions allow the society to strike back at the traitor and to do so while emphasizing the particular reason for its anger—the betrayal—which may be greater than the actual military harm the traitor has caused. The in-group identification that is sparked by the external enemy makes a symbol-laden response, the punishment of the betrayal itself, additionally satisfying as a reinforcement of group solidarity.<sup>253</sup>

Finally, treason might clarify the procedural system under which some terrorist acts should be addressed and in the process satisfy those with divergent views about the appropriate framework for handling terrorism. A major legal debate following the 9/11 attacks has centered on whether terrorism should be dealt with as a military issue or a criminal one.<sup>254</sup> Treason, however, bridges this divide.

252. *Id.*

253. *Cf.* Paul C. Stern, *Why Do People Sacrifice for Their Nations?*, 16 POL. PSYCHOL. 217, 221 (1995) (“When the threatened group is a nation-state, the prediction is that a foreign attack or military threat leads to stronger identification with the nominal nation of the nation-state and increased support for the regime in power.”).

254. *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1094–96 (2008) (describing historical evolution of U.S. policy toward terrorism from a law enforcement model to a military model). *Compare* David Held, *Violence, Law, and Justice in a Global Age*, in UNDERSTANDING SEPTEMBER 11, at 92, 101 (Craig Calhoun et al. eds., 2002) (“[T]errorists must be treated as criminals and not glamorized as military adversaries.”) and Harold Hongju Koh, *Preserving American Values: The Challenge at Home and Abroad*, in THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11, at 143, 150 (Strobe Talbott & Nayan Chanda eds., 2001) (“Terrorist acts have been committed by international criminals who belong to an international criminal network that uses textbook criminal techniques. Time-tested methods of law enforcement remain the best tools to bring those criminals to justice.”), with Seyla Benhabib, *Unholy Wars: Reclaiming Democratic Virtues After September 11*, in UNDERSTANDING SEPTEMBER 11, *supra*, at 241, 246.

The presence of an enemy who is neither a military adversary nor a representative agent of a known state creates confusion as to whether it is the police and other law enforcement agencies or the military who should take the lead in the investigation and the struggle—the lines between acts of crime and acts of war get blurred.

and Charles Hill, *A Herculean Task: The Myth and Reality of Arab Terrorism*, in THE AGE OF TERROR, *supra*, at 81, 87.

Throughout the 1990s the U.S. relied heavily on law enforcement mechanisms to try to investigate and punish terrorists. The results, predictably, were interminable legalistic entanglements that focused on the lower suspects and

Treason is prosecuted in the normal, civilian criminal justice system but is premised on the existence of a war, or at least a military conflict of the same scope and intensity as a war.<sup>255</sup> It neither precludes a military response to severe terrorist attacks nor departs from the regular criminal prosecution system in dealing with individuals captured in the conflict who owe allegiance to the capturing states. In the United States, for example, Yasser Esam Hamdi, Jose Padilla, and Ali Saleh Kahlah al-Marri, all of whom were held as enemy combatants, could have been tried for treason.<sup>256</sup> Hamdi and Padilla are U.S. citizens, and al-Marri was a lawful resident at the time of his detention.<sup>257</sup> All owed allegiance to the United States, and thus could have been subject to treason charges

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left the masterminds alone. Courtroom standards of evidence served the interests of international terrorist networks and the states that supported them.

*But see* Chesney & Goldsmith, *supra*, at 1081.

During the past five years, the military detention system has instituted new rights and procedures designed to prevent erroneous detentions, and some courts have urged detention criteria more oriented toward individual conduct than was traditionally the case. At the same time, the criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has quietly established the capacity for convicting terrorists based on criteria that come close to associational status. Each detention model, in short, has become more like the other.

*Id.*

255. HURST, *supra* note 78, at 3–4.

256. *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (“Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.”).

Justice O’Connor, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy *aliens*. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.

*Id.* at 558–59 (citation omitted). *See generally* Benjamin A. Lewis, Note, *An Old Means to a Different End: The War on Terror, American Citizens . . . and the Treason Clause*, 34 HOFSTRA L. REV. 1215 (2006) (arguing that Hamdi and Padilla should have been charged with treason). *But cf.* Suzanne Kelly Babb, Note, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1721 (2003) (arguing that the government could not have proven that Lindh committed treason and that treason charges in the war on terrorism would be dangerous).

257. *See* Hamdi, 542 U.S. at 509–10 (noting Hamdi’s U.S. citizenship); Al-Marri v. Wright, 487 F.3d 160, 163 (4th Cir. 2007) (noting that al-Marri was an alien residing lawfully in the United States at the time he was arrested), *cert. granted sub nom.* Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008), *and vacated and remanded with instructions to dismiss as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1054 (2009); Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2005) (noting Padilla’s U.S. citizenship).

for violations of that allegiance.<sup>258</sup> Such charges could have avoided the debates and litigation that followed from their indefinite detention as enemy combatants. In these particular cases and more generally, treason would be viewed as more legitimate than alternative procedural regimes, like Combatant Status Review Tribunals, that are designed in an ad hoc manner to deal with suspected terrorists when the issue arises. For example, a *Washington Post* editorial called Gadahn's indictment a "constructive development" because "[u]nlike the murky terrain governing the holding of American citizens as enemy combatants, treason is defined in the Constitution. So there's no doubt as to the government's authority to pursue its case or the propriety of doing so."<sup>259</sup> Treason could not be charged against all of those held as enemy combatants, rather only against those who owed some allegiance, either permanent or temporary, to the United States.<sup>260</sup> But at least in those cases, treason charges would likely be viewed as more legitimate because they occur in the normal criminal justice system, with evidentiary rules and standards of proof well established in non-conflict times. At the same time, treason should appease proponents of treating terrorism as a war because treason presupposes a war, or at least an armed conflict approaching the level of a war, and thus would not undermine the rationale for using military force against the implicated terrorist group.

Because treason could only possibly be charged against a small percentage of those the United States has detained or continues to detain, it is not a panacea for the problem of Guantanamo Bay. It is beyond this Article's scope to delve far into the ongoing debates about how to close the Guantanamo Bay detention center and particularly whether it will be necessary to create new national security courts to deal with the remaining detainees. However, treason prosecutions, with the regularized criminal process and heightened procedural protections they require, may prove useful if national security courts are created. Treason prosecutions have the potential to minimize two dangers that commentators have identified with regard to national

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258. *But see Hamdi*, 542 U.S. at 577 (Scalia, J., dissenting) ("They apply only to citizens accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla."). Historical evidence, discussed above, demonstrates that under pre-Constitution English common law, allegiance, and therefore the ability to violate it and commit treason, extended beyond citizens to individuals resident in Britain. Al-Marri would fall within the Treason Clause under this historical interpretation, though Justice Scalia's *Hamdi* dissent would exclude him.

259. Editorial, *The Treason Puzzle: The Administration Tries a New Legal Tack Against Terrorism*, WASH. POST, Oct. 16, 2006, at A20, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/15/AR2006101500730.html>.

260. See *supra* note 145–47 and accompanying text.

security courts. “The first danger is that the executive’s power to conduct war will displace the area previously assumed to fall within the criminal justice system.”<sup>261</sup> Treason prosecutions minimize this danger because one of treason’s predicates is the existence of a war or, at a minimum, an armed conflict equivalent to a war, thus bridging the war-or-criminal process dichotomy. The Constitution provides treason as a way for at least a small part of the executive’s power to conduct war to be mediated through the criminal justice system. A second danger is that “the criminal justice system will become increasingly like the parallel track” of national security courts in that “it will lose the civil liberties protections, checks and balances, and oversight by independent actors (e.g., judges) that we normally associate with the criminal process in the United States.”<sup>262</sup> Treason minimizes this danger because the Constitution’s Treason Clause provides specific procedural and evidentiary requirements for treason that establish a non-derogable floor of protections in treason prosecutions. Therefore, the danger of slippage away from the “protections . . . we normally associate with the criminal process”<sup>263</sup> is nearly impossible in the treason context and is certainly less than it is with any other criminal charges.<sup>264</sup>

### B. Potential Detriments of Treason Prosecutions

In contradistinction to these four potential benefits from treason prosecutions, there are also four major potential downsides. First, using treason prosecutions in the context of a terrorist group could dignify or build up the perceived threat from terrorism to an unjustified level. Treason in the United States and the United Kingdom requires either a levying of war or giving aid and comfort to an enemy. For the United States, the enemy in question has always been a foreign state.<sup>265</sup> The Gadahn treason indictment expands the

261. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 523 (2006).

262. *Id.* at 524.

263. *Id.*

264. *Cf.* Chesney & Goldsmith, *supra* note 254, at 1101–06 (discussing the interpretive modifications prosecutors have made to broaden the scope of liability under the material support and conspiracy laws for terrorism cases).

265. In the U.S. context, George Fletcher highlighted this point in 2004 and queried whether the United States would ever see another formally declared war and thus would ever have another treason prosecution. But his doubtfulness seems to have been overtaken by events, namely the Gadahn indictment wherein the government has conceptualized Al Qaeda as an “enemy.” See *Law, Loyalty, and Treason*, *supra* note 88 at 1612.

According to a persuasive line of cases, the concept of the ‘enemy’ applies only to enemies in a declared war. The armies of North Korea, North Vietnam, the Taliban, Afghanistan, Iraq—none of these met the technical standard of being

concept of enemy to include a non-state actor, namely Al Qaeda; similarly, the Bishara investigation would expand the idea of enemy in Israel to include Hezbollah.

Legally, this shift is not unprecedented. Blackstone explained that treason could be committed by aiding pirates:

As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason: either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against his majesty.<sup>266</sup>

Pirates in this context were dangerous, non-state actors, not dissimilar to some of today's terrorist groups. Indeed, Harold Koh has argued that the "legal state of affairs" with respect to terrorists today "most closely resembles one we experienced at the founding of the Republic," when "pirates, privateers and other early terrorists posed as great a threat to our nation as sovereign states bent on war."<sup>267</sup> This historical extension of treason to pirates is important not just for its extension of treason to non-state actors, but also for its pragmatic approach to the magnitude of the threat posed by pirates. Piracy in Blackstone's era through to the early years of the United States was not the anachronism it seems today (or at least until recently),<sup>268</sup> but instead was a major threat to the world's powerful states. The U.S. Constitution specifically mentions piracy, giving Congress the power to "define and punish Piracies," which it did in 1790.<sup>269</sup> Shortly thereafter, the United States engaged in military hostilities with the Barbary pirates, who repeatedly seized U.S. ships and held them for ransom.<sup>270</sup> The equivalence between the magnitude of the threat posed by pirates and the threat posed by foreign state enemies is key to understanding Blackstone's inclusion of pirates as enemies for the purposes of treason.

enemies in a declared war. Indeed, with the entire congressional practice of declaring war in limbo, one wonders whether we will ever witness another American war formally declared in advance.

*Id.*

266. BLACKSTONE, *supra* note 136, at \*83.

267. Koh, *supra* note 254, at 158.

268. Resurgent piracy off the coast of Somalia has prompted the United States and NATO to deploy military vessels to patrol a naval corridor to protect shipping. *See, e.g.*, Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, N.Y. TIMES, Oct. 31, 2008, at A1 (discussing Somalia's booming pirate economy); Caroline Wyatt, *Navy Shoots Pirate Suspects Dead*, BBC NEWS, Nov. 12, 2008, [http://news.bbc.co.uk/2/hi/uk\\_news/7725771.stm](http://news.bbc.co.uk/2/hi/uk_news/7725771.stm) (last visited Oct. 19, 2009) (describing deadly incident between U.K. Royal Navy vessel and Somali pirates).

269. *See* Koh, *supra* note 254, at 158–59; *see also* 18 U.S.C. §§ 1651–61 (LexisNexis2009) (criminalizing piracy and privateering).

270. *See, e.g.*, MICHAEL B. OREN, POWER, FAITH, AND FANTASY: AMERICA IN THE MIDDLE EAST, 1776 TO THE PRESENT 51–79 (2007).

This historical background clarifies that the element of change in applying treason to today's terrorists is not the equation of non-state threats with state-based threats. In some circumstances, as discussed below, this equivalence may be warranted. But the potential expansion and danger comes from the possibility that in the future the precedent of applying treason in the context of modern non-state actors may be applied against terrorist groups that pose much less of a threat than Al Qaeda to the United States or Hezbollah to Israel. Comparatively less powerful and threatening groups could be successfully dealt with in the normal criminal system. But the application of treason to terrorist groups will "lie[] about like a loaded weapon"<sup>271</sup> to be applied to comparatively non-threatening terrorist groups when treason's application would exaggerate the threat posed to the prosecuting state. Thus, as a counterpoint to the potential benefit of reinforcing societal cohesion, a treason prosecution could exaggerate the threat from a terrorist group and divert energy and resources to dealing with the group as a state-like war enemy, when the more successful strategy would be to address it through less drastic criminal measures, such as material support.<sup>272</sup>

A second and related potential problem with treason prosecutions is what they signal about the society that chooses to prosecute the traitor. The Supreme Court in *Cramer* noted that the United States had avoided using treason because it had been "singularly confident of external security and internal stability."<sup>273</sup> Does the revival of treason in the United States, Israel, and potentially the United Kingdom signal that the states are now either not secure, not stable, or both? Though there may be beneficial effects to the society of prosecuting treason, as discussed above, treason prosecutions may also signal the government's concern about additional traitors. If the prosecution is undertaken for deterrent and society-reinforcing reasons, then the government might be signaling (unintentionally) that it believes there are potential traitors who need to be deterred and citizens for whom the reinforcement of the

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271. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

272. There is, perhaps, a separate question whether it is faithful to the Constitution to charge acts that could be charged as treason as a different crime, like material support, to which the two-witness requirement does not apply. A full examination of how treason differs from, among other things, material support must await additional research. As practically implicated in the cases at issue here, however, it should be noted that courts have rejected an attempted defense based on the fact that the defendants' actions constituted and should have been charged as treason and that the defendants' conviction was invalid because the prosecution failed to satisfy the Treason Clause's two-witness requirement. *United States v. Rosenberg et al.*, 195 F.2d 583, 609–11 (2d Cir. 1952).

273. *Cramer v. United States*, 325 U.S. 1, 26 (1945).



national identity and allegiance is necessary. Renewed treason prosecutions, particularly if they were to become more frequent, might signal government paranoia—that is, a government that is seen to need to reinforce its residents' allegiance in this manner may thereby unnecessarily show its insecurity about its residents' loyalty and about the magnitude of the threat from within. Despite the intended deterrent effect of prosecution, the government might actually signal weakness sufficient to spark, rather than deter, additional treasons.

Third, a treason charge might tend to bias the adjudication of a criminal case against the defendant. Other crimes with which the traitor might be charged, like material support, sound more antisepitic—a crime merely against the government. Treason, on the other hand, has popular resonance and is imbued with the idea that the accused has betrayed not just the government but the people, and in the United States, the very people composing the jury.<sup>274</sup> Willard Hurst notes that the mere accusation of treason carries “peculiar intimidation and stigma” as compared to other crimes.<sup>275</sup> The society-reinforcing effect of treason might slant the jury against the defendant who allegedly has allied himself against them, not just against an abstract entity. Although retribution is one potential benefit of treason, retribution must be had only in the context of a fair and constitutional criminal conviction—perhaps an unattainable goal in a treason case because of the possibility of bias. As the Supreme Court has noted, of the rationales for punishment, “retribution . . . most often can contradict the law's own ends.”<sup>276</sup>

A final potential problem with treason prosecutions is that treason is a death-penalty-eligible crime in both the United States

274. See *United States v. Rosenberg*, 109 F. Supp. 108, 110 (S.D.N.Y. 1953) (“The murderer kills only his victim while the traitor violates all the members of his society, all the members of the group to which he owes his allegiance.”). The Rosenbergs were charged with espionage, not treason, but the judge's sentiment is apt. See also BLACKSTONE, *supra* note 136, at \*75, calling treason “the highest civil crime, which (considered as a member of the community) any man can possibly commit.”

275. *Treason—Part II*, *supra* note 79, at 424. Hurst, however, draws the opposite conclusion about how a treason charge would bias a jury. He argues that the fact that treason is a death-eligible crime would make juries unlikely to convict. *Id.* at 423.

The barbarous or oppressive penalties which were once a distinguishing mark of the crime have been abolished, but treason is still a capital crime; and thus it may be of consequence whether the prosecutor can make out a case under that heading, or is restricted to a lesser penalty under another charge. This is likely to be a consideration only in most unusual cases, however; the history has been one of decreasing penalties, not simply as a matter of humane policy, but because juries are reluctant to convict on a capital charge.

*Id.*

276. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008).

and Israel.<sup>277</sup> Britain abolished the death penalty for treason and piracy only in 1998.<sup>278</sup> In the United States and Israel, the punishment for treason may not be proportional to the crime, or rather to the harm caused by the crime.<sup>279</sup> The U.S. Supreme Court

277. In the United States, the death penalty for treason is specified in the treason statute. 18 U.S.C. § 2381 (2001).

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.

*Id.* Treason does carry the death penalty in Israel, see Kershner, *supra* note 116; McCarthy, *supra* note 114, but no one has ever been executed for treason. Glenn Frankel, *Israel Convicts Vanunu of Treason for Divulging A-Secrets to Paper; 7-Month Trial of Former Nuclear Technician Conducted in Secrecy*, WASH. POST, Mar. 25, 1988, at A28; Kershner, *supra* note 116 (noting that Adolph Eichmann is the only person Israel has civilly executed).

278. Crime and Disorder Act, 1998, c. 37, § 36 (Eng.), available at [http://www.opsi.gov.uk/Acts/acts1998/ukpga\\_19980037\\_en\\_4#pt2-pb3-1lg36](http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980037_en_4#pt2-pb3-1lg36).

279. See FLETCHER, *supra* note 16, at 42–43.

The language of treason and treachery incites passions. It is hard, in principle, to know how to punish treason. Is it a crime worse than homicide, worse than rape? If the death penalty is unconstitutional as applied in rape cases, does it follow that it should be equally suspect in cases of treason? There is no law on this question, for we lack an appropriate methodology for thinking about the gravity of treason . . . . The theory of punishment does not mesh with the crime when there is no tangible harm, no friction against the physical welfare of the victim. Traitors betray, but their breach of faith is complete without anyone suffering actual harm. Their disloyalty disturbs us, but not because of traces left by their treachery in the physical world.

*Id.*; see also *id.* at 44 (“Without a theory to guide us, we are likely to fall prey to emotional attacks on the disloyal. Breaching bonds of loyalty takes on the quality of an absolute wrong, and no punishment seems excessive to counteract this fissure in the ties that bind us together.”); James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99, 103 (1983) (reviewing the Court’s death penalty case law and arguing that “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”). *But see* Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181, 221–22 (2002), for an argument criticizing the United States for *not* charging Jane Fonda and John Walker Lindh, among others, for treason.

By not indicting Batchelor, Garwood, Fonda, and Walker for treason the United States has ignored its constitutional mandate to prosecute those who may be guilty of ‘adhering to their enemies, giving aid and comfort.’ By not indicting these four citizens of the United States for treason, the government has not confronted them with the prospect of death, as a consequence of betraying their country and its people. This possibility—death—is not only constitutionally appropriate upon conviction of treason; it is morally imperative treatment for those who would betray to its enemies the freest Nation ever to grace this earth.

has found the death penalty permissible only in a narrow range of crimes that cause death.<sup>280</sup> Not all traitors necessarily cause death, raising the question of whether the Supreme Court would make an exception for treason, when it has refused to do so in other heinous but non-death-causing contexts.<sup>281</sup> The Court specifically limited its most recent pronouncement on the death penalty in *Kennedy v. Louisiana* to “crimes against individual persons,” stating that it “do[es] not address, for example, crimes defining and punishing treason, espionage, terrorism and drug kingpin activity, which are offenses against the State.”<sup>282</sup> If Adam Gadahn were caught, tried, and convicted, prosecutors could seek the death penalty, which would likely force an appellate review of whether death is proportional to the crime in non-death-causing treason cases, as Gadahn’s seems to be. If Bishara were convicted, Israeli courts could sentence him to death under the Israeli treason law. It would be an open question, however, whether the sentence would be carried out. The only non-military death penalty Israel has carried out was against Adolf Eichmann.<sup>283</sup>

The U.S. Supreme Court would face a difficult question in evaluating the death penalty for non-death-causing treasons. Although the Constitution does not specify any particular punishment for treason,<sup>284</sup> the historical pedigree of imposing the

*Id.*

280. See *Coker v. Georgia*, 433 U.S. 584, 597 (1977). *Coker* reversed a death sentence for a rapist because

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability,’ is an excessive penalty for the rapist who, as such, does not take human life.

*Id.* (citations omitted); *Gregg v. Georgia*, 428 U.S. 153, 221 (1976) (upholding the imposition of the death penalty for murder).

281. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008) (“As it relates to crimes against individuals . . . the death penalty should not be expanded to instances where the victim’s life was not taken.”); see also Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/death-penalty-barred-for-child-rape/> (June 25, 2008, 10:11 EST) (“The broad declaration that death sentences should be reserved ‘for crimes that take the life of the victim’ will apply, the Court said, to crimes against individuals—thus leaving intact, for example, a possible death sentence for treason.”).

282. 28 S. Ct. at 2659.

283. Kershner, *supra* note 116.

284. U.S. CONST. art. III, § 3.

death penalty for treason runs deep:<sup>285</sup> death was the only prescribed punishment for treason in the United States until 1862 when Congress amended the treason statute to allow for imprisonment and a fine in lieu of death.<sup>286</sup> But as in Israel, convictions and death sentences in the United States have not resulted in executions. Among the World War II traitors, some were sentenced only to imprisonment; the others were sentenced to death, but by the grace of executive clemency, none were actually executed.<sup>287</sup>

If Justice Kennedy's majority opinion in *Kennedy v. Louisiana* continues to be the guiding death penalty precedent, then the views of society—as embodied in “[e]volving standards of decency”—will influence the outcome.<sup>288</sup> The legal propriety of the death penalty for non-death-causing treason may well depend on the course and outcome of the national debate about the death penalty in general, an issue that sparks strong feelings from both proponents and opponents. The debate's application to treason would depend on the

285. Blackstone describes not just the fact of the death penalty's imposition for treason in England, but the gory details of the precise manner of execution:

The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually . . . a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 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.

BLACKSTONE, *supra* note 136, at \*92; *see also* Carney, *supra* note 212, at 26.

Death did not end the punishment for treason. All lands and titles were forfeited to the king, and heirs were tainted with the same infamy as the traitor under the presumption that the corruption that led to the bill of attainder was transmitted via the bloodline to male heirs. Only the wife and daughters were spared ignominy by being allowed to keep a portion of the wife's dowry. A traitor was stripped of all identity: physical, social, or civil. The penalty for betrayal was the removal of all trace of existence.

*Id.*

286. Watson, *supra* note 29, at 675.

287. *See* J.H. Leek, *Treason and the Constitution*, 13 J. POL. 604, 617 (1951).

288. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008).

Whether this requirement [of proportionality] has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.' The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.' This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

*Id.* (second and third alterations in original) (citations omitted)).

answers to profound questions about the meaning of treason in the society. For example, is treason necessarily equivalent to murder?

An interesting contemporary perspective on treason's severity relative to other crimes comes from the Federal Sentencing Guidelines.<sup>289</sup> The Guidelines assign treason the highest possible base offense level—forty-three—if the “conduct is tantamount to waging war against the United States.”<sup>290</sup> The base offense level of forty-three requires life imprisonment, regardless of the offender's criminal history;<sup>291</sup> a death-qualified jury would, of course, be necessary to impose the death penalty. Under the Guidelines, the only other crimes to which the highest base offense level—and mandatory life imprisonment—apply are first degree murder<sup>292</sup> and “unlawful manufacturing, importing, exporting, or trafficking” large quantities of substances including cocaine and heroin *if* “death or serious bodily injury resulted from the use of the substance and . . . the defendant committed the offense after one or more prior convictions for a similar offense.”<sup>293</sup> In contrast to these crimes, which require death or, at the very least, serious bodily injury more than once, the Guideline for treason does not require death or even any bodily injury to result. Thus, the Guidelines suggest equivalence between treason and murder.

Given the current trend toward prohibiting the death penalty for crimes that do not result in death, permitting it for non-death-causing treasons would seem anomalous. But perhaps the anomaly could be justified. For example, the potential harm from a traitor's actions extends to a far larger number of people than harm from a crime against an individual;<sup>294</sup> additionally, due to the requirement that there be an enemy, treason necessarily occurs in a time of crisis that makes the state less willing or less able to tolerate harm. If this

289. The Federal Sentencing Guidelines are, of course, now only advisory, not binding, for federal judges. See *United States v. Booker*, 543 U.S. 220, 259 (2005) (holding that the Sentencing Guidelines are not binding on federal judges and are instead only advisory).

290. U.S. SENTENCING GUIDELINES MANUAL § 2M1.1(a)(1) (2008). The Manual's choice of phrasing is interesting and raises the question of whether “waging war” is intended to be coterminous with the treason prong of “levying war” or whether “waging war” for Guidelines purposes could also encompass certain types of “aid and comfort” treasons. *Id.* Section 2M1.1(a)(2) states that for all treasons not “tantamount to waging war” the offense level is that “applicable to the most analogous offense.” *Id.*

291. *Id.* at ch. 5, pt. A, Sentencing Table. For purposes of comparison, the base offense level for providing material support to a terrorist organization is twenty-six. *Id.* § 2M5.3. This corresponds to a range of sixty-three to 150 months' imprisonment, depending on the defendant's criminal history category. *Id.* at ch. 5, pt. A, Sentencing Table.

292. *Id.* § 2A1.1.

293. *Id.* § 2D1.1.

294. *Cf. Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008) (“Our concern here is limited to crimes against *individual persons*. We do not address . . . crimes defining and punishing treason . . . which are offenses *against the State*.” (emphasis added)).

question arises in U.S. courts, the debate will be profound and fierce. Thus, the major benefit of clarifying the procedural regime for dealing with some terrorist suspects comes with a major difficulty—determining the constitutionality or unconstitutionality of the death penalty for non-death-causing crimes.

### *C. Reconciling the Balance Sheet*

Applying the benefit-danger framework, are the recent treason prosecution and considered prosecutions cause for concern?

Applying the first pairing—reinforcing societal cohesion versus unjustifiably dignifying the enemy—to the current cases, the potential harm from dignifying the enemy seems slim, whether or not there has been any benefit in terms of societal cohesion. The Gadahn prosecution, the likely Bishara prosecution, and the considered prosecution of the British Guantanamo detainees have all arisen in traditional war contexts that are exceptional only because the opponent is a non-state actor. Gadahn broadcasts propaganda for Al Qaeda, with which U.S. and NATO military forces have been engaged in military conflict in Afghanistan since 2001. The British Guantanamo detainees were detained as part of the same conflict, in which British troops are also fighting. Israel's treason investigation into Bishara began with his actions during Hezbollah's major military conflict with Israel in the summer of 2006.

All of these contexts look very similar to the traditional war scenario in which treason has historically applied, with the consistent difference that the enemy the alleged traitor is accused of aiding is not another state but a terrorist organization. In the case of Al Qaeda, numerous international organizations and legal scholars recognized the equivalence between the 9/11 attacks and attacks launched by a state. In the aftermath of 9/11, the U.N. Security Council adopted Resolution 1368, which condemned the 9/11 attacks and deemed them a "threat to international peace and security" sufficient to invoke the U.S. "inherent right" of self-defense under international law—a right formerly permitted only against attacks by states.<sup>295</sup> NATO and the Organization of American States also recognized the 9/11 attacks as armed attacks.<sup>296</sup> In the Israeli-

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295. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

296. The NATO Charter states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked . . . .

Palestinian context (though not specifically with regard to Hezbollah), widely respected jurists on the International Court of Justice have also noted, "There is . . . nothing in the text of Article 51 [defining self-defense] that *thus* stipulates that self-defence is available only when an armed attack is made by a State,"<sup>297</sup> and that the U.N. Charter, "in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by *another State*."<sup>298</sup> Thus, under international law, the terrorist groups implicated in the treason prosecutions have already been recognized as inflicting harm equivalent to that which could be inflicted by a state. It is a small step—not an unjustified promotion in threat characterization—to make the same recognition for the definition of enemy for treason purposes.

So far the treason prosecutions have not strayed far beyond their traditional context. In this situation, there is little risk that a treason prosecution would exaggerate the threat posed by the terrorist organization because the magnitude of the threat is indeed great. But the recent treason cases harbor an as-yet-unrealized danger: by extending treason to encompass aid to non-state enemies, treason may be extended to aiding such groups in all circumstances, including those less threatening than the traditional war context.<sup>299</sup> By

North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. The OAS was more explicit, specifically declaring that "these terrorist attacks against the United States of America are attacks against all American States." Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 18 (2003) (quoting OAS statement).

297. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 207, 215 (July 9) (separate opinion of Judge Higgins at para. 33).

298. *Id.* at 242 (declaration of Judge Buergenthal at para. 6 (emphasis added)). Additionally, Judge Kooijmans notes:

Resolutions 1368 . . . and 1373 . . . recognize the inherent right of individual or collective self-defence *without making any reference to an armed attack by a State*," which, he concludes, "is not excluded by the terms of Article 51" since Article 51 does not specify that an "armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.

*Id.* at 229, 231 (separate opinion of Judge Kooijmans at para. 35).

299. Particularly in the case of propagandists, there may be First Amendment problems with prosecution for treason. See *The Treason Puzzle*, *supra* note 259.

Yet treason charges could come to pose civil liberties concerns of their own. The Constitution cannot, by definition, be unconstitutional—yet its definition of treason is so broad and vague that, were it merely written in statute, it would probably be so. . . . Where exactly that bleeds into protected speech is no easy question.

*Id.*; see also Kristen E. Eichensehr, *Treason's Return*, 116 YALE L.J. POCKET PART 229, 230 (2007), available at <http://thepocketpart.org/2007/01/16/eichensehr.html> (discussing the application of the aid and comfort prong of treason to propagandists).

allowing treason prosecutions for aid to terrorist groups when the groups act like enemy states and conduct wars, the definition of enemy has been expanded in a way that could be used to justify the enemy designation when the threat posed by the terrorist group is not so severe or state-like.<sup>300</sup> This redefinition creates the risk that the government could exploit treason prosecutions for their society-reinforcing tendencies or other benefits when the threat to the state is neither severe nor the traditional type posed by an enemy state. Societies must guard against this risk.

As long as treason prosecutions remain limited to contexts in which terrorist organizations pose the same scope and nature of threat as states, then the possible benefits from the prosecutions will outweigh the minimal or nonexistent cost of dignifying a terrorist enemy. If a terrorist organization poses a state-like threat, then in essence, it has promoted itself, justifying state-like enemy status without any over-dramatization by the target state. If, however, states begin to use treason prosecutions against terrorist sympathizers outside of a war context, then the balance tips against treason because of the extreme governmental and perhaps societal weakness the prosecutions would evidence and because of the likelihood that the government is exploiting treason precisely for the society-reinforcing effects a treason prosecution can provoke.

This does not mean that governments cannot combat terrorist organizations that are causing violence short of war; it just means that in doing so the governments must use the other criminal tools at their disposal, reserving treason only for when a terrorist organization acts like a state waging war.<sup>301</sup> Under this framework, Al Qaeda and Hezbollah have both demonstrated their state-like destructive capacities, and thus “giving aid and comfort” to one of these groups should be sufficient to support a treason charge. Aid to less powerful groups and to groups that are not waging an armed conflict of state-like magnitude with the prosecuting state, however, would not constitute treason. For United States residents, for example, aid to the Japanese terrorist group Aum Shinrikyo or the Basque separatist group ETA would not be treasonous. But such conduct could still be prosecuted as material support.<sup>302</sup>

Turning to the second dyad—deterring other treasonous acts versus signaling weakness—the effect of the current treason cases is

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300. See *supra* note 249 and accompanying text.

301. See *Cramer v. United States*, 325 U.S. 1, 45 (1945) (“[T]he treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security.”).

302. Both groups are designated foreign terrorist organization in the United States. Office of the Coordinator for Counterterrorism, U.S. Dep’t of State, Foreign Terrorist Organizations (July 7, 2009), <http://www.state.gov/s/ct/rls/other/des/123085.htm>.



unclear. The renewed specter of treason prosecutions was certainly a surprise and perhaps is sufficient to deter additional individuals from undertaking treasonous conduct in aid of terrorist enemies. But such cases, particularly the Gadahn case, may also signal weakness. Gadahn's propaganda broadcasts are embarrassing for the government, but it is not clear that he is attracting any recruits or causing significant harm. More importantly, neither Gadahn nor Bishara have been apprehended, and both have continued to make well-publicized statements against their home governments—adding to their governments' annoyance and embarrassment, and emphasizing the fact that the governments have not been able to arrest them. The balance of factors in this analysis is unclear, but it seems that there is at least some downside for Israel and the United States stemming from their accused traitor's continued—and vocal—freedom.

The third set of opposing factors will often not provide clear guidance because they will usually rise and fall in tandem. The value to society of exacting retribution for the accused traitors' actions will likely be greater than zero, but so will the magnitude or existence of bias at trial. One would imagine that the utility of exacting retribution would increase if the accused traitor's crimes were particularly heinous or if the accused traitor had a particularly high profile. So too though would the likelihood and magnitude of bias in the trial. Though not often determinative in the weighing of costs and benefits, consideration of these factors is important for the rare case in which one would clearly outweigh the other. For example, if an accused Al Qaeda operative were to be tried in the Southern District of New York or in an area where many of the residents have family and friends serving in Afghanistan, then the risk of bias might be extremely high, whereas the utility of retribution could still be obtained if the trial were held in another venue.

The fourth dyad—the benefit from clarifying the procedural system versus the constitutional questions raised by pursuing the death penalty in non-death-causing treason cases—is under the prosecutor's control. Charging the death penalty in a non-death-causing treason case would raise serious constitutional questions, but the prosecutor can tilt this factor entirely in favor of charging treason by declining to seek the death penalty in cases where the accused traitor has not caused death. Of course, if a prosecutor does elect to seek the death penalty, then a jury or the judiciary could still serve as a backstop and prevent the issuance of a death sentence.

Thus, to evaluate the current cases and the early stages of any future treason cases, the main factor to consider is whether the enemy in question, if it is a terrorist group, poses a state-like threat sufficient to eliminate the danger of unjustifiably dignifying the enemy. This inquiry is an objective one based on the strength, proximity, power, and capabilities of the terrorist group. In a

traditional war context, where the only variation from traditional treason cases is that the enemy is a terrorist group, the potential detriments from a treason prosecution will likely be outweighed by the potential benefits, though the final analysis of all four pairs of factors will depend on the particular cases that prosecutors charge.

## V. CONCLUSION

Commentators who predicted that liberal democratic states had outgrown treason prosecutions have been proven wrong. This Article has endeavored to explain why the reasons offered for treason's disappearance were incorrect. First, treason is not antiliberal because states, including the United States, have amended or interpreted their treason laws to focus on the traitor's acts rather than his internal beliefs. Second, treason is not as difficult to prove in today's technological era because technology has enabled new, easy-to-prove types of treason and has facilitated detection and collection of evidence of traditional types of treason. Finally, the occurrence of treason prosecutions may depend on the perceived nature of the threat as existential, rather than just on the magnitude of the threat.

Treason prosecutions offer both potential benefits and potential detriments. The biggest danger is that the new expansion of treason to encompass aid to non-state actors in a war-like context could open the door for further expansion to non-state actors in non-war contexts. The framework developed in Part IV clarifies that when prosecutors consider bringing a treason charge, their major concern should be whether the risk of dignifying a terrorist group as an enemy is outweighed by benefits including increased societal cohesion, deterrence of other treasons, and retribution. In a situation where the relevant terrorist group is waging a state-like armed conflict against the prosecuting state, then the risk of dignifying the enemy is very low because the terrorist group has already proven its own stature. In such instances, the benefits likely do outweigh the harm. If a terrorist group does not pose a state-like threat, then the potential costs of dignifying the group as an enemy and signaling state weakness likely outweigh the potential benefits of a treason charge, as compared with other available charges, particularly material support. Prosecutors and government officials should scrupulously guard against expansion of treason to comparatively weaker terrorist groups. Lawyers and statutory drafters have spent centuries limiting treason to only the most serious and threatening of enemies. Modern liberal democracies should not revert to expanding its application.

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