

# LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

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VOLUME 3      FALL 2015

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## THE SNOWDEN AFFAIR AND THE LIMITS OF AMERICAN TREASON

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### I. INTRODUCTION

“Treason” is a damning charge. Rhetorically, and legally. It was long considered the most serious of offenses, even more serious than murder. Consider, for example, that in the *Inferno*, Dante places the murderers in the Seventh Circle of Hell.<sup>1</sup> But the traitors occupy the Ninth and lowest Circle.<sup>2</sup>

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<sup>1</sup> See DANTE ALIGHIERI, *INFERNO* 95-99 (Mark Musa, ed. & trans., Indiana Critical Ed. 1995) (1308).

<sup>2</sup> *Id.* at 230-35. Here, in Canto XXXIII, Dante travels through Antenora, where he encounters famous traitors. At one point, he sees two heads frozen inside of a single hole, with the head on top gnawing on the brain of the lower head. *Id.* at 233. See also Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 L. & SOC. INQUIRY 787, 808-13 (2001) (discussing Dante's treatment of political crimes of betrayal).

Blackstone labeled treason the worst of offenses,<sup>3</sup> and other authorities have followed that notion.<sup>4</sup> But “treason” is precisely how many government officials and political leaders described Edward Snowden’s disclosure of sensitive national security information.<sup>5</sup> Senator Dianne Feinstein, then-chair of the Senate Intelligence Committee, said Snowden committed “an act of treason.”<sup>6</sup> House Intelligence Committee chair Mike Rogers of Michigan had similar words: “That is what we call a traitor in this country. He has traded something of value for his own personal gain that jeopardizes the national security of the United States. We call that treason.”<sup>7</sup> Former House Speaker Newt Gingrich said on NBC’s *Meet the Press* about Snowden: “[t]his was treason.”<sup>8</sup> And Richard Clarke, former White House counter-terrorism advisor and appointed

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<sup>3</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*75.

<sup>4</sup> See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807) (opinion of Marshall, C.J.) (remarking that “there is no crime which can more excite and agitate the passions of men than treason”); *Stephan v. United States*, 133 F.2d 87, 90 (6th Cir. 1943) (observing that “[t]reason is the most serious offense that may be committed against the United States”); Erin Creegan, *National Security Crime*, 3 HARV. NAT’L. SEC. J. 373, 376 (2012) (calling treason “the most serious of all offenses against the nation”).

<sup>5</sup> The Snowden affair is, of course, the subject of this symposium and the basic facts are likely well-known to most readers. For a good description of the controversy, though, see Bryan Burrough, et al., *The Snowden Saga: A Shadowland of Secrets and Light*, VANITY FAIR, available at

<http://www.vanityfair.com/news/politics/2014/05/edward-snowden-politics-interview> (May 2014). The Snowden affair was also the subject of a recently released documentary. See CITIZENFOUR (Praxis Films 2014).

<sup>6</sup> See Jeremy Herb & Justin Sink, *Sen. Feinstein calls Snowden’s NSA leaks an ‘act of treason,’* THE HILL (June 10, 2013, 10:19 PM), <http://thehill.com/policy/defense/304573-sen-feinstein-snowdens-leaks-are-treason>.

<sup>7</sup> See Laura Barron-Lopez, *Rogers says Snowden committed treason,* THE HILL (Dec. 22, 2013, 11:15 AM), <http://thehill.com/policy/technology/193832-rep-rogers-says-snowden-committed-treason>.

<sup>8</sup> See Transcript, *Meet the Press*, NBC NEWS (June 1, 2014), available at <http://www.nbcnews.com/meet-the-press/meet-press-transcript-june-1-2014-n121571> (remarks of Newt Gingrich).

member of President Barack Obama's expert panel on the National Security Agency, said, "What Mr. Snowden did is treason, was high crimes."<sup>9</sup>

The fervor to brand Edward Snowden a traitor and convict him of treason is an understandable political response to his conduct. Perhaps "treason" is simply convenient shorthand for describing serious criminal conduct involving an intentional breach of national security, not meant to describe the actual legal status of the conduct. An epithet, but not a serious legal claim.<sup>10</sup> But even if understandable, it nevertheless reflects potential shortcomings in the public understanding – and apparently, the understanding of our political leaders, in particular – about the law of American treason.

This, too, is understandable. Treason has been called one of the great forgotten clauses of the Constitution.<sup>11</sup> Despite its pedigree in our law, treason has received relatively little academic attention. J. Willard Hurst's collection of essays on treason remains the leading academic treatment of the subject,<sup>12</sup> but only recently – over the past decade since the

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<sup>9</sup> Brian Ross & Lee Ferran, *White House NSA Panel Member: Edward Snowden's Leaks Still 'Treasonous,'* ABCNEWS (Dec. 19, 2013), <http://abcnews.go.com/Blotter/white-house-nsa-panel-member-snowdens-leaks-treasonous/story?id=21277856>.

<sup>10</sup> See Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSN'L L. 1443 (2009) ("Treason is both an ancient crime and a popular epithet").

Or, perhaps, the rhetoric of treason can even fall into the category of joke-making. During the 2015 Academy Awards broadcast, host Neil Patrick Harris joked, after *Citizenfour* had received the Academy Award for Best Documentary Feature, that Snowden "could not be here tonight for some treason." See THR Staff, *Edward Snowden: I Laughed at Neil Patrick Harris' Treason Joke*, THE HOLLYWOOD REPORTER (Feb. 23, 2015, 12:44 PM), <http://www.hollywoodreporter.com/news/edward-snowden-i-laughed-at-777125>.

<sup>11</sup> See Carlton F.W. Lawson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 865 (2006).

<sup>12</sup> See J. WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971). See also Willard Hurst, *Treason in the*

September 11 attacks – has the Treason Clause begun to receive greater attention from contemporary scholars.<sup>13</sup> Professor George Fletcher lamented many years ago that treason is no longer part of a law school course on criminal law.<sup>14</sup> The law of American treason thus remains underdeveloped, incomplete, and lousy with gaps. But that might actually be a good thing. A more well-developed treason law would likely require that treason be far more common. Yet treason prosecutions have been sufficiently rare in our history that relatively few opportunities have arisen for courts and lawyers to adequately answer the many questions that could arise from an accusation of, and prosecution for, treason.

Treason was a subject of some interest in the early years of the Republic – Benedict Arnold is perhaps our most famous traitor, though his betrayal at West Point occurred before the Constitution was drafted,<sup>15</sup> and the treason trial of Aaron Burr perhaps the most prominent one of its kind during the era, produced some early Supreme Court precedent on the meaning of American treason law.<sup>16</sup> Quite naturally, treason

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*United States*, 58 HARV. L. REV. 226 & 395 (1945) (explaining law of treason in essays that would later form Hurst's book on treason).

<sup>13</sup> See, e.g., Lawson, *supra* note 11; Eichensehr, *supra* note 10; Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. 635 (2009); Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181 (2002); Suzanne Kelly Babb, *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); George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611 (2004). For a collection of the scholarship that discusses treason history, see Lawson, *supra* note 11, at 866 n.7.

<sup>14</sup> See George P. Fletcher, *The Case for Treason*, 41 MD. L. REV. 193, 194 (1982).

<sup>15</sup> For an excellent account of General Washington's response to the Arnold affair, in a chapter appropriately entitled "Treason," see JAMES THOMAS FLEXNER, *WASHINGTON: THE INDISPENSABLE MAN* 141-48 (1974).

<sup>16</sup> See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). For an excellent account of the Burr trial, see R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION* (2012).

was also a subject of debate during the Civil War period.<sup>17</sup> But it was not until World War II that treason prosecutions became prominent again. The 1940s saw a substantial number of treason prosecutions.<sup>18</sup> Then there was the infamous incident involving Jane Fonda's embrace of the North Vietnamese, which led to public branding of her as a traitor and the unflattering nickname of "Hanoi Jane."<sup>19</sup> Finally, it was in the post-September 11 world and the American effort to grapple with the problem of its own citizens joining forces with international terrorists that treason reemerged as a more serious prosecutorial option for the federal government.

John Walker Lindh offers an example. Though he traveled to the Middle East to study Arabic, Lindh later trained with a terrorist group and crossed from Pakistan into Afghanistan and joined a group of fighters that were funded by Osama bin Laden.<sup>20</sup> The group sent him to fight with the Taliban against the Northern Alliance.<sup>21</sup> He eventually surrendered to the Northern Alliance, and was recaptured after being temporarily freed during an armed attack by Taliban detainees upon a CIA operative who had been interviewing Lindh.<sup>22</sup> Lindh was indicted and eventually pleaded guilty to charges of providing services to the Taliban and carrying an explosive device during commission of a felony.<sup>23</sup> He is serving a twenty-year sentence in federal prison today. And Yasser Esam Hamdi, a native of Louisiana, rather than being prosecuted in a civilian American court was instead detained on a Naval brig and never charged by the

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<sup>17</sup> See JONATHAN W. WHITE, *ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR* (2011).

<sup>18</sup> See Crane, *supra* note 13, at 638-39, 677-78.

<sup>19</sup> See Holzer, *supra* note 13, at 210-13. Unlike Holzer, Fletcher does not see Fonda's conduct as treasonous. See Fletcher, *supra* note 14, at 200.

<sup>20</sup> See Indictment, *United States v. Lindh*, No. 02-37a (E.D. Va. Feb. 5, 2002).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Some have argued that the Government should have charged Lindh with treason. See, e.g., Holzer, *supra* note 13, at 220-21; Douglas W. Kmiec, *Try Lindh for Treason, It's Not Too Late*, National Review Online, (posted Feb. 12, 2002).

Department of Justice with a crime.<sup>24</sup> His case eventually went to the Supreme Court, which held that the President enjoyed the power to detain Hamdi as an enemy combatant, but that he was entitled to some process to challenge his detention.<sup>25</sup> But it was Justice Scalia's dissent in *Hamdi* that invoked treason. Scalia, joined by Justice Stevens, argued that where an American citizen is captured fighting for the enemy, the government has two options: suspend the writ of habeas corpus, or try him for treason or some other crime.<sup>26</sup> In Hamdi's case, the Government did neither.

Finally, in 2006, the Government obtained its first treason indictment since World War II, when it charged Adam Gadahn with treason after Gadahn appeared in al Qaeda videos.<sup>27</sup> In them, he appeared with bin Laden and Ayman al-Zawahiri, praised the September 11 attacks and encouraged al Qaeda to use its capability to attack the United States again.<sup>28</sup> Gadahn was never captured and tried; rather, he was killed in January 2015 during a counterterrorism operation.<sup>29</sup>

Perhaps treason has fallen out of favor with federal prosecutors because of the enhanced evidentiary requirements that necessarily come with a treason prosecution. Perhaps it is because other statutes exist that reach the same types of conduct without the burdens that come with the definition of treason – material support for terrorism, rebellion or insurrection, seditious conspiracy, advocating overthrow of the government, and recruiting others for service in armed hostility against the United States all come to mind. Perhaps it

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<sup>24</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>25</sup> *Id.* at 524, 533.

<sup>26</sup> *Id.* at 554 (Scalia, J., dissenting).

<sup>27</sup> See First Superseding Indictment, *United States v. Gadahn*, SA CR 05-254 (C.D. Cal. Oct. 11, 2006).

<sup>28</sup> *Id.*

<sup>29</sup> See Greg Botelho & Ralph Ellis, *Adam Gadahn, American mouthpiece for al Qaeda, killed*, CNN.COM, <http://www.cnn.com/2015/04/23/world/adam-gadahn-al-qaeda/> (posted Apr. 23, 2015). For a brief discussion of the Gadahn case, and a suggestion that the Government used the wrong theory of treason with respect to Gadahn's conduct, see Kristen Eichensehr, *Treason's Return*, 116 YALE L.J. POCKET PART 229 (2007). Crane's article on *Cramer* also discusses the Gadahn case. See Crane, *supra* note 13, at 636.

is some combination of these.<sup>30</sup> Perhaps, as George Fletcher has argued, the decline of treason has less to do with proof of the elements and more to do with changing attitudes toward crime and criminal law.<sup>31</sup> The feudal bases of treason are simply inconsistent with the liberal version of the criminal law that prevails today, a criminal law that prefers “systematic and scientific control of violence” to the symbolism of ancient treason law.<sup>32</sup> But perhaps, in some cases at least, the trouble is not with proving the traitor’s actions but, rather, his intent. Intention, Hurst observed, is “at the heart” of treason.<sup>33</sup> How does American treason law apply to one who communicates information that can be, and in fact is, both helpful and readily available to the enemy, or commits an overt act that in fact assists the enemy, but who does not simultaneously specifically intend to betray the United States? American criminal law has long valued the imposition of mens rea, both as a check on the power of the state and as a method for measuring culpability.<sup>34</sup> And a charge as serious as treason most surely requires proof of some heightened state of moral culpability at the time of the alleged overt act.

The Snowden case therefore presents a distinctly modern wrinkle in the application of treason law, one that is implicated by the popular cry of “treason” against Snowden. It raises the problem that one may aid and comfort the enemy without actually intending to do so as a way of betraying America. Can we (should we) still call that treason? That is the specific problem I want to explore. To do that, I will describe the American law of treason by giving special attention to the provision for adhering to the enemy, giving them aid and comfort (what I will call Adherence Treason, to distinguish it from Levying War Treason) and the mental state that American treason law requires for a conviction on this ground. My project, then, is to explain why it is the mens rea element of treason law that complicates that law’s application to Snowden’s case, and indeed in any case in which an

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<sup>30</sup> See Crane, *supra* note 13, at 680-93.

<sup>31</sup> See Fletcher, *supra* note 14, at 1628.

<sup>32</sup> *Id.*

<sup>33</sup> HURST, *supra* note 12, at 15.

<sup>34</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.01, at 117 (6<sup>th</sup> ed. 2012).

American has aided the enemy through an electronic communication.

## II. AMERICAN TREASON LAW AND THE EMERGENCE OF TREASON MENS REA

Treason is the only crime that the federal Constitution explicitly defines. “Treason against the United States,” the text says,

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 the 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 attained.<sup>35</sup>

Congress has also codified treason as a federal crime, at section 2381 of Title 18. But because the crime of treason is constitutionalized, Congress cannot alter or modify the definition of treason by ordinary legislation. So Section 2381 provides that: “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 not less than \$10,000; and shall be incapable of holding any office under the United States.”<sup>36</sup> As treason is punishable by death, Congress has enacted a set of procedures for capital treason prosecutions that is distinct from the procedures employed in typical capital murder prosecutions at the federal level.<sup>37</sup>

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<sup>35</sup> U.S. CONST. art. III, §3.

<sup>36</sup> 18 U.S.C. §2381 (2012).

<sup>37</sup> In a capital treason prosecution, the list of statutory aggravating factors is shorter than for capital homicide prosecutions, 18 U.S.C. § 3591(a) (2012), and the Government need not prove the specific

Notice the word “only” in the constitutional text: there are *only* two ways to commit treason – by levying war against the United States, or by giving aid and comfort to the enemy (which is how one *adheres* to the enemy). This is a product of design. The Framers of the Constitution explicitly desired a limited treason in America.<sup>38</sup> The crime was meant to be narrow, more narrow even, than its chief English antecedent. The Statute of 25 Edward III, enacted in 1351, created seven basic categories of treason for purposes of English law: compassing or imagining the death of the king, or queen, or their eldest son and heir; violating the wife of the king or the wife of the king’s eldest son; levying war against the king in his realm; adhering to the king’s enemies in his realm, giving them aid and comfort in the realm or elsewhere; counterfeiting; killing the chancellor, the treasurer, or the king’s justices; murder of a master by a servant, a husband by a wife, or a prelate by a cleric (this was called “petty treason”; the other categories were “high treason”).<sup>39</sup> This statute did away with the common law of treason in England and was greatly admired not only by English authorities,<sup>40</sup> but also by American colonists and the founders, who drew upon its language in crafting colonial treason law and the constitutional definition.<sup>41</sup> With the development of treason law in America in the aftermath of the Revolution, however, it became clear that certain forms of English treason would not apply here.<sup>42</sup> Of course, many of the categories of English treason were predicated upon acts taken against the monarchy, and America would not be a monarchy. Americans could have adopted some of these provisions and

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statutory mental state factors related to death that are required in a capital homicide prosecution. Compare 18 U.S.C. §3591(a)(1) with 18 U.S.C. §3591(a)(2)(A-D).

<sup>38</sup> See HURST, *supra* note 12, at 130.

<sup>39</sup> Statute of Treasons, 25 Edw. III, ch. 2 (1351).

<sup>40</sup> See EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 2 (London, 5th ed. 1671).

<sup>41</sup> See HURST, *supra* note 12, at 130-40. Curiously, as Hurst explains, the original draft of the Constitution did not contain a treason provision. *Id.* at 129. The Committee of Detail created and inserted the Treason Clause into the Constitution. *Id.* The Convention then fully discussed the new language on August 20, 1787. *Id.* at 130.

<sup>42</sup> *Id.* at 106, 126.

simply made them acts against elected political leaders, but many of these notions were never considered.

Moreover, the leading founder on treason, Pennsylvania's James Wilson (who served on the Committee of Detail that drafted the Treason Clause), argued that 25 Edward III was the chief basis for our treason law and that American treason should be interpreted in light of that statute.<sup>43</sup> Other leading authorities agreed.<sup>44</sup> Wilson remarked that the charge of treason was a dangerous charge, so it was important to limit the Government's power to bring it, thus further explaining the narrowness of American treason under the Constitution.<sup>45</sup> And Chief Justice Marshall, in narrowly construing the text of the Treason Clause in *Ex Parte Bollman*, said that "[a]s there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry."<sup>46</sup> The Constitution offers a limited notion of treason, Marshall wrote, "[t]o prevent the possibility of those calamities which result from the extension of treason to offenses of minor importance."<sup>47</sup> Constructive treasons, in particular, were viewed by the founding generation as a threat to political liberty, so the evolution of American treason law was careful to avoid these dangers.<sup>48</sup> Hamilton, in responding

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<sup>43</sup> See HURST, *supra* note 12, at 135.

<sup>44</sup> *Id.* at 130-31.

<sup>45</sup> JAMES WILSON, 3 COLLECTED WORKS OF JAMES WILSON 1149-50 (Mark David Hall & Kermit Hall, ed. 2007), available at <http://oll.libertyfund.org/titles/wilson-collected-works-of-james-wilson-vol-2>. Wilson says, referring to Montesquieu's observations, that treason "is indeterminate," which "along is sufficient to make any government degenerate into arbitrary power." *Id.* at 1149. He continues that in both monarchies and republics, treason law "furnishes an opportunity to unprincipled courtiers, and to demagogues equally unprincipled, to harass the independent citizen, and the faithful subject, by treasons, and by prosecutions for treasons, constructive, capricious, and oppressive." *Id.*

<sup>46</sup> *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807).

<sup>47</sup> *Id.* at 125-26.

<sup>48</sup> See *Cramer v. United States*, 325 U.S. 1 (1945) (discussing the negative view of constructive treasons among the founding generation). See also *Stephan v. United States*, 133 F.2d 87, 90 (6<sup>th</sup> Cir.

to the complaint that the original Constitution contained no bill of rights, even included the Treason Clause among those constitutional provisions (beyond the structural ones) that offered protections to the individual against government action.<sup>49</sup>

So the first principle we can derive from the definition of American treason – and one that would militate against a treason charge for someone like Snowden – is that it is deliberately narrow and does not embrace constructive or questionable treasons.

The other thing worth noticing about the text's definition of the crime is that it does not include an explicit mens rea term. Or does it? In some ways, this should be unsurprising. The English Treasons Statute, 25 Edward III, did not contain familiar common law mens rea terminology. And still, by the time of the framing, mens rea was well-known to the English courts, the English common law, and to colonial criminal law.<sup>50</sup> Blackstone highlighted the state of mind that makes for treason noted in light of the English law, stating that "a bare intent to commit treason is many times actual treason: as imagining the death of the king, or conspiring to take away his crown."<sup>51</sup> Early treason case law referred to treasonous intention.<sup>52</sup> And Justice Story spoke of "intention" and "treasonable purpose" while adjudicating a treason case in Rhode Island<sup>53</sup> (though he offered his statement of the law with respect to levying war, rather than

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1943) (stating "[t]he Constitution has left no room for constructive treason").

<sup>49</sup> See THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

<sup>50</sup> See Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980). See also WAYNE R. LAFAVE, CRIMINAL LAW §5.1(a), at 253 (5<sup>th</sup> ed. 2010) (noting that since about 1600, common law judges defined crimes to contain some bad state of mind, and setting forth conventional common law mens rea terms).

<sup>51</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*35.

<sup>52</sup> See *United States v. Hoxie*, 26 F. Cas. 397, 399 (C.C.D. Vt. 1808) (No. 15,407); *United States v. Pryor*, 27 F. Cas. 628, 630 (C.C.D. Pa. 1814) (No. 16,096).

<sup>53</sup> See *Charge to the Grand Jury – Treason*, 30 F. Cas. 1046, 1047 (C.C. D. R.I. 1842) (No. 18,275).

adhering to the enemy, and defined the treasonable purpose broadly).<sup>54</sup> But none of these early authorities meaningfully explained the precise culpable mental state that the government must prove to establish treason.

Despite the lack of clarity in the constitutional or statutory text as to the precise mens rea required for treason, it is generally agreed today that treason requires a specific intent to betray the United States. Perhaps the most important treason case of the modern Supreme Court is *Cramer v. United States*,<sup>55</sup> decided in 1945, and it is here where we first encounter the modern Court's discussion of treason mens rea.

In 1942, German submarines arrived at the coasts of Long Island and Florida.<sup>56</sup> Four men exited each sub and buried their Nazi uniforms and then dressed as civilians.<sup>57</sup> They had trained at a sabotage school in Germany and were supposed to destroy American war infrastructure.<sup>58</sup> Although all of the men had lived in the United States, all but one were German citizens.<sup>59</sup> They were eventually arrested and tried in military tribunals, which the Supreme Court validated in *Ex parte Quirin*.<sup>60</sup> Cramer was born in Germany but was naturalized in the United States in 1936.<sup>61</sup> He befriended Warner Thiel, who would become one of the aforementioned

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<sup>54</sup> See Lawson, *supra* note 11, at 911 (explaining Story's view). Lawson also helpfully notes that an early Nevada statute, defining "levying war" treason for state law purposes, contained an explicit mens rea element: "when persons arise in insurrection with the intent to prevent, in general, by force and intimidation, the execution of statute in this state, or to force its repeal." *Id.* at 912 (citing NEV. REV. STAT. ANN. §196.020 (LexisNexis 2011)). The statute includes, but does not define, adhering to the enemies of Nevada, giving them aid and comfort.

<sup>55</sup> 325 U.S. 1 (1945). Crane's article offers a valuable history of the case, as well as of the Justice's decision-making. See generally Crane, *supra* note 13.

<sup>56</sup> See *Ex parte Quirin*, 317 U.S. 1, 21 (1942).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 48. The Court held that Herbert Hans Haupt, one of the saboteurs, could be tried by military commission, rather than by civilian court for treason, even though he may have been an American citizen. *Id.* at 38.

<sup>61</sup> *Cramer*, 325 U.S. at 3-4.

Nazi saboteurs.<sup>62</sup> They were roommates and even engaged in a joint business venture.<sup>63</sup> Responding to an anonymous note, Cramer went to Grand Central Station and met Thiel for drinks.<sup>64</sup> They then met two more times and Thiel gave Cramer a money belt with \$3,600 in it.<sup>65</sup> Cramer kept a portion, set aside a portion in case Thiel needed it, and then put the rest in a safe deposit box.<sup>66</sup> The FBI observed two of the meetings and arrested Cramer.<sup>67</sup> Cramer was tried for treason, but said he lacked any treasonous intent and that his overt acts did not, on their face, manifest treason.<sup>68</sup>

The Supreme Court held for *Cramer*. In the course of doing so, the Court held that Congress could criminalize treasonous conduct under other statutory crimes without all of the procedural safeguards and limitations that attend treason itself.<sup>69</sup> The Court also recognized that the overt act need not manifest treasonous intent.<sup>70</sup> However, the overt act must actually give aid and comfort to the enemy.<sup>71</sup> Cramer's meetings with Thiel did not satisfy this standard.<sup>72</sup> With respect to the mental element of the crime, the Court grounded treason mens rea in the textual requirement of "adherence" to the enemy. "A citizen 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 or comfort to the enemy, there is no treason," Justice Jackson's opinion declared.<sup>73</sup>

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<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Id.* at 3-4.

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 31. See also Crane, *supra* note 13, at 642 (describing Cramer's claims before the Court). According to Crane, Cramer claimed he did not possess treasonous intent because he was unaware of Thiel's sabotage plans and met with Thiel simply as a friend. *Id.*

<sup>69</sup> *Cramer*, 325 U.S. at 45.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 39-40.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 29.

On the other hand, a citizen may take actions, which do aid and comfort the enemy – making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength – but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.<sup>74</sup>

The opinion elaborated upon treason *mens rea* by stating that “[q]uestions of intent in a treason case are even more complicated than in most criminal cases because of the peculiarity of the two different elements which together make the offense.”<sup>75</sup> Treasonous intent cannot be shown through overt acts that are negligent or undesigned.<sup>76</sup> Rather, “to make treason the defendant must not only intend the act, but he must intend to betray his country by means of the act.”<sup>77</sup> Treasonous intent can be inferred from conduct (including the relevant overt act itself), and one is deemed to intend the natural consequences of his actions.<sup>78</sup> Here, however, the overt acts that the Government alleged were relatively trivial and did not themselves demonstrate treasonous intent.<sup>79</sup> The Court also proved unwilling to find treason merely from an alleged treasonous intent in meeting with Thiel and another man named Edward Kerling (leader of the saboteurs), concluding that those acts did not actually have the effect of giving aid and comfort to the enemy.<sup>80</sup> To conclude otherwise would “carry us back to constructive treasons.”<sup>81</sup>

The first time that the Court ever affirmed a treason conviction was in *Haupt v. United States*.<sup>82</sup> There, a father of one of the Nazi saboteurs and an American citizen – Hans

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 31.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 31-32.

<sup>79</sup> *Id.* at 39-40.

<sup>80</sup> *Id.* at 40.

<sup>81</sup> *Id.*

<sup>82</sup> 330 U.S. 631 (1947).

Max Haupt – was convicted of treason after giving his son (Herbert Hans Haupt) shelter, finding him a job, and giving him a car, all while knowing that his son was on the sabotage mission.<sup>83</sup> Relying on the understanding of the overt act from *Cramer*, the Court held that these acts by Haupt were sufficient to actually give aid and comfort to the enemy.<sup>84</sup> But the Court was also satisfied that Haupt possessed the requisite treasonous intent.<sup>85</sup> Because Haupt knew of his son's role, his aid to his son was not mere fatherly care. It was done with the purpose of assisting his son in executing the German sabotage effort, not just of aiding his son as a son.<sup>86</sup>

Following the lessons of *Haupt* and *Cramer* in the world of treason mens rea is *Kawakita v. United States*,<sup>87</sup> another case arising out of actions amid World War II. There, Tomoya Kawakita was a dual Japanese-American citizen who traveled to Japan to study at Meiji University.<sup>88</sup> He renewed his passport in 1941 and took the oath of allegiance to America.<sup>89</sup> After school, and after registering with a family census registry in Japan (the Koseki), he later accepted a job with Oeyama Nickel Industry Company, that provided metals for the Japanese war effort.<sup>90</sup> That company also employed American prisoners of war, and Kawakita was originally hired as an interpreter for communications between the Japanese and the American POWs.<sup>91</sup> Kawakita's treason charge was based on several different alleged overt acts, all of which involved severe maltreatment of the American POWs who

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<sup>83</sup> *Id.* at 632-33. The son Herbert, of course, was among those convicted in *Quirin*.

<sup>84</sup> *Id.* at 636.

<sup>85</sup> *Id.* at 641-42.

<sup>86</sup> *Id.*

<sup>87</sup> 343 U.S. 717 (1952).

<sup>88</sup> *Id.* at 720. The threshold issue before the Supreme Court was whether Kawakita had renounced his American citizenship, thus exempting him from American treason law (because, if true, he would no longer owe allegiance to the United States). *Id.* at 720-36. The Court rejected his claim, finding that he retained his dual citizenship. *Id.* at 736. This issue was the basis for Chief Justice Vinson's dissent. *Id.* at 745-46 (Vinson, C.J., dissenting).

<sup>89</sup> *Id.* at 720.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 720-21.

worked at the company.<sup>92</sup> He was tried for, and convicted of, treason when, after returning to the United States in 1946, a former American POW at the nickel company recognized Kawakita.<sup>93</sup>

In affirming the conviction, Justice Douglas's opinion for the Court explained that treason requires both giving aid and comfort to the enemy (the physical act required) and treasonous intent (the mens rea). "One may think disloyal thoughts and have his heart on the side of the enemy. Yet if he commits no act giving aid and comfort to the enemy, he is not guilty of treason," Douglas wrote.<sup>94</sup> "He may on the other hand commit acts which do give aid and comfort to the enemy and yet not be guilty of treason, as for example when he acts impulsively with no intent to betray."<sup>95</sup> The Court then explained that although the constitutional requirement of two witnesses applies to the physical overt act, the requirement does not extend to the mens rea.<sup>96</sup> Rather, the Court said, the treasonous intent is inferred from conduct, from the overt acts, from the defendant's statements about the war, and, as here, from the defendant's professions of loyalty to the enemy nation.<sup>97</sup>

Against this judicial backdrop, one can see why a treason prosecution against Edward Snowden would be a daunting task. Snowden himself has publicly discussed the controversy (in Moscow, he has apparently built his own studio for conducting interviews).<sup>98</sup> He has stated publicly

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<sup>92</sup> *Id.* at 737-39.

<sup>93</sup> *Id.* at 722.

<sup>94</sup> *Id.* at 736.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 742-43.

<sup>98</sup> See Katrina vanden Heuvel & Stephen F. Cohen, *Edward Snowden: A 'Nation' Interview*, THE NATION (Oct. 28, 2014), <http://www.thenation.com/article/186129/snowden-exile-exclusive-interview#>; James Bamford, *The Most Wanted Man in the World*, WIRED, Aug. 13, 2014, <http://www.wired.com/2014/08/edward-snowden/>; Alan Rusbridger & Ewen MacAskill, *Edward Snowden interview - the edited transcript*, THE GUARDIAN (July 18, 2014), <http://www.theguardian.com/world/2014/jul/18/-sp-edward-snowden-nsa-whistleblower-interview-transcript>; Burrough, et al.,

that his desire – his intent, if you will – was to alert the public to the scope of the American surveillance regime and to spur changes that would mitigate the surveillance state and hold public officials accountable.<sup>99</sup> At no point does he state that it was his intention to aid the enemy in a war against America or to assist in planning an attack on the United States. Now, of course, one might imagine that he would *never* publicly say that, even if it were true. He is fully aware that he faces criminal charges and his statements seem naturally self-serving. But the point is that in the absence of such a confession, the prosecution would have to obtain other objective evidence of a desire to do just that, to adhere to the enemy by intending to betray the United States. At least on the existing publicly-available evidence, that would be difficult indeed. One need not agree with his actions in order to concede that there is insufficient evidence of his adherence to the enemy.

Now, this is not to say that such evidence is impossible to discover. In *Kawakita*, for example, the defendant made repeated statements about his desire to see America harmed. The statements included “It looks like MacArthur took a run-out powder on you boys;” “The Japanese were a little superior to your American soldiers;” “You Americans don’t have no chance. We will win the war;” “Well, you guys needn’t be interested in when the war will be over because you won’t go back; you will stay here and work. I will go back to the States because I am an American citizen;” “We will kill all you prisoners right here anyway, whether you win the war or lose it. You will never get back to the States;” “I will be glad when all of the Americans is dead, and then I can go home and live happy.”<sup>100</sup> If the Government could find such statements from Snowden – for example, that he hoped his disclosures would assist the enemy in perpetrating an attack, or that an attack on

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*supra* note 3. See also Inside the Mind of Edward Snowden: Interview with Brian Williams, NBC NEWS, available at <http://www.nbcnews.com/feature/edward-snowden-interview> (aired May 29, 2014) (appearing on television for interview with NBC anchor Brian Williams).

<sup>99</sup> James Bamford, *The Most Wanted Man in the World*, WIRED, Aug. 13, 2014, <http://www.wired.com/2014/08/edward-snowden/>.

<sup>100</sup> *Kawakita*, 343 U.S. at 743.

American interests, citizens, or military capabilities would teach us a valuable lesson about our national intelligence policies – then the case for treason would be measurably stronger. But if Snowden’s desire was merely to alert the public to policies with which he disagreed, then, however misguided his tactics, that state of mind is an unlikely candidate for treasonous intent.<sup>101</sup>

The “intent” of treason, then, seems a lot like motive. Indeed it is. One may object that intent and motive are not the same. And they are not. But “intent,” as such, is a difficult word to understand in isolation. The criminal law, particularly in the world of specific intent crimes, often makes motive relevant to proof of the offense.<sup>102</sup> For example, one of the ways in which we distinguish a traditional specific-intent crime is to say that it is one that requires some special motivation for its commission (such as when we require “the intent to steal” or the “intent to kill”).<sup>103</sup> Moreover, other crimes, such as hate crimes,<sup>104</sup> are defined by the special motive that attends their commission. Though the relevant act (e.g., causing bodily harm) may be performed intentionally or knowingly, it is a hate crime only when the act is performed with a particular bias motivation (e.g., because of the victim’s actual or perceived race or religion).<sup>105</sup> Treason is substantially similar. The Government must prove that the underlying overt act of providing aid and comfort to the enemy was done with a purpose to betray the United States and that purpose will often merge with the particular motive to see harm befall the country. Still, courts have been reluctant to make too much of this overlap. In two of the World War II treason prosecutions involving Americans who worked as radio broadcasters for the Germans – *Chandler v. United States*<sup>106</sup> and *Best v. United States*<sup>107</sup> – the defendants argued

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<sup>101</sup> This conclusion makes comments like those of Speaker Gingrich on *Meet the Press* all the more perplexing. Gingrich said that Snowden “may be a patriotic traitor. He may think, in his own mind, he did the right thing. This was treason.” See *Meet the Press Transcript*, *supra* note 8.

<sup>102</sup> See DRESSLER, *supra* note 34, §10.04[A][2], at 123.

<sup>103</sup> *Id.* at 138.

<sup>104</sup> See 18 U.S.C. § 249 (2012).

<sup>105</sup> *Id.*

<sup>106</sup> 171 F.2d 921 (1<sup>st</sup> Cir. 1948).

that even though they intended to aid the German war effort and to create disunity and harm to American morale during the war, they had the special motive of rendering such aid because, they argued, it would be better for Americans by halting the pursuit of world domination by Jewish Communism.<sup>108</sup> In each case, the First Circuit rejected the claim that this motive negated their intent to betray, because each defendant had the purpose of aiding the enemy.<sup>109</sup> Contrary to the First Circuit's analysis,<sup>110</sup> though, motive was actually *not* irrelevant in these cases. The defendants *had* a treasonous motive – in addition to their purpose to render aid to Germany, they also were motivated directly by a desire to see Germany prevail in the war (which would necessarily mean an American defeat).<sup>111</sup> It was simply mixed with yet another, somewhat more attenuated, motive. In this sense, the mixed motives appear similar to the mixed motives of Hans Max Haupt.<sup>112</sup> It is difficult to imagine a case in which the actor has the *purpose* of aiding the enemy in harming or defeating the United States, and yet he is acting solely with a motive that does not involve such harm or defeat but rather

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<sup>107</sup> 184 F.2d 131 (1st Cir. 1950).

<sup>108</sup> See *Chandler*, 171 F.2d at 925. In each case, the defendant had served as a broadcaster for a German radio station. See *id.* at 926; *Best*, 184 F.2d at 134. The purpose of the broadcasts was to engage in “psychological warfare” to support the German war effort. *Chandler*, 171 F.2d at 926. The radio broadcasts were directed by the German Propaganda Ministry. *Id.* Broadcasting for the enemy was a popular basis for a treason charge during this period. See also *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950) (involving broadcasting for the Germans); *D’Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951) (involving broadcasting for the Japanese).

<sup>109</sup> *Chandler*, 171 F.2d at 942-45; *Best*, 184 F.2d at 137-38.

<sup>110</sup> *Chandler*, 171 F.2d at 944 (holding that one who “trafficks with enemy agents” and gives them aid and comfort “is guilty of treason, whatever his motive.”).

<sup>111</sup> *Id.* at 944.

<sup>112</sup> See HURST, *supra* note 12, at 245 (arguing that *Haupt* holds that as long as one of the mixed motives is to betray the United States, the existence of a more pure motive is irrelevant). Hurst argues that *Chandler* and *Best* are related, but distinct, on the question of motive. *Id.* As indicated here, I find them more similar on this point than does Hurst.

would benefit America. The specific “intent” of treason, and the bad  *motive* that distinguishes it, simply converge.

One may argue (the Government certainly did in *Cramer*)<sup>113</sup> that the Court’s approach makes treason too difficult to prove. Treason, one may contend, could be an especially powerful prosecutorial tool in times of national emergency or, as today, when grave dangers can be posed to national security as a result of advances in technology that make communicating with the enemy so easy. The Court’s response to this, and one that arguably would fit the view of the Constitution’s Framers, was simple: treason is supposed to be hard to prove.<sup>114</sup> Its difficulty helps to protect against politically vindictive prosecutions or the punishment of those who merely think disloyal thoughts. Yet, as *Haupt* and *Kawakita* certainly show us, the task is not impossible. Specific intent is not, and has never been, an insurmountable barrier to conviction, even in treason law.<sup>115</sup> And in light of the ways in which electronic or digital communication can ease the provision of aid and comfort to America’s enemies, Adherence Treason could arguably form a larger share of federal prosecutorial energy and resources in the coming years. After all, as the many stories of Americans who have lately sought to join forces with the Islamic State in Iraq and Syria (ISIS) demonstrate, many of those who have joined the cause of America’s enemies have not been shy about expressing their adherence to those that would harm us.<sup>116</sup>

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<sup>113</sup> *Cramer*, 325 U.S. at 45.

<sup>114</sup> See *supra* text accompanying notes 42-44.

<sup>115</sup> See *Haupt*, 330 U.S. at 641-42; *Kawakita*, 343 U.S. at 743.

<sup>116</sup> See, e.g., Ed Payne, *More Americans volunteering to help ISIS*, CNN (posted Mar. 5, 2015, 4:55 PM), available at <http://www.cnn.com/2015/03/05/us/isis-us-arrests/>; see also Gadahn Indictment, *supra* note 27.

Incidentally, whether ISIS (or, ISIL) currently constitutes an “enemy” of the United States for purposes of treason law is perhaps an open question, particularly in the absence of a specific authorization for the use of force against that group. I leave that question for another time, and assume for the purposes of this article that ISIS could be an enemy for treason purposes (and I currently believe that is the better understanding of the issue). Eichensehr offers an excellent discussion of this issue in her piece, though ISIS did not emerge until after her piece was published, and so her focus

### III. ADHERENCE TREASON AS A SPECIES OF COMPLICITY?

This “intent to betray” doctrine that I have discussed is now well-established. It has been repeated in the Supreme Court, repeated by other courts, and repeated in the literature on treason. More than anything, as I have explained, that is the principle that would foreclose treason liability for Edward Snowden. And yet, established though it is, the derivation of this notion remains unclear.

I asked earlier whether the text really does contain a mens rea element. It does not, after all, do so in the conventional way. There is no familiar, common law mens rea term (no “intentionally,” or “willfully,” for example), and especially no language common to the notion of specific intent (such as “with the intent to . . .”). But it is nearly impossible to imagine treason as a strict liability offense and it has never been understood that way in American law. The federal criminal law of mens rea has been inconsistent about its rationales for requiring mens rea where it is not codified in the statute.<sup>117</sup> There is no federal common law of crimes (all federal criminal law is statutory) and federal courts have been reluctant at times to force common law notions onto congressional legislation or federal criminal law doctrine.<sup>118</sup> Still, federal criminal law has developed the following principle: absent evidence that Congress intended something to the contrary, and unless the offense falls into a category of public welfare regulations that would permit strict liability, courts presume Congress meant for some mens rea to apply to federal crimes.<sup>119</sup> This is particularly true, the Court has said,

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is on other non-state actors. See Eichensehr, *supra* note 10, at 1491-98, 1505.

<sup>117</sup> Compare *Morrisette v. United States*, 342 U.S. 246 (1952) with *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922). See also *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (describing the Court’s approach to mens rea in federal cases where mens rea terms are missing from statute).

<sup>118</sup> See *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812).

<sup>119</sup> See *Morrisette*, 342 U.S. at 252-53. See also *Staples v. United States*, 511 U.S. 600, 605 (1994) (stating the preference for requiring mens rea, and that congress must clearly intend for a criminal statute to dispense with mens rea).

where the crime is one against the state (like treason), the person, property, or public morals.<sup>120</sup> So even in the absence of an explicit mens rea element, our natural inclination would be to interpret the Treason Clause to impose one. There is no sound reason, then, to doubt *Cramer's* explication (or that of earlier cases from lower courts) of the law of treason as requiring a culpable mental state.

*Cramer*, though, understands the word “adhering” as necessarily embracing the mental element of *intentional* betrayal. “Adherence to the enemy,” Justice Jackson said, is the “disloyal state of mind” that the Government must prove.<sup>121</sup> This, presumably, is because one cannot *adhere* to the enemy by anything less than a conscious object to do so. The modern dictionary definition of *adhere* recognizes such a connection between the adherent and the person who receives the adherence, as to “give support or maintain loyalty.”<sup>122</sup> And Samuel Johnson’s dictionary of 1755 defined *adhere* primarily as “sticking to,” or “holding together,” but also as “[t]o remain firmly fixed to a party, person, or opinion.”<sup>123</sup> There is, therefore, support in English usage for the Court’s understanding of the mental state that accompanies one’s adherence to the enemy. Of course, one could argue that *Cramer* and *Kawakita* make too much of the specific intent to betray as a corollary of “adhering,” and that treason could be found with something less than specific intent to betray America. For example, one might argue that the constitutional text stipulates only that one “adheres” to the enemy when he aids and comforts them. Therefore, the argument goes, so long as he actually gives aid and comfort, it matters not whether he intends specifically to betray the United States or simply desires some firm connection to a different group or idea, nor would it matter whether he gives aid and comfort only knowingly (in the sense that he is aware that is aiding an enemy of the United States), or even recklessly (in the sense

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<sup>120</sup> *Morrisette*, 342 U.S. at 252-53.

<sup>121</sup> *Cramer*, 325 U.S. at 30.

<sup>122</sup> See MERRIAM-WEBSTER DICTIONARY 14 (10<sup>th</sup> ed. 2002).

<sup>123</sup> A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON 81 (1755) (Brandi Besalke, ed.), available at

[http://johnsonsdictionaryonline.com/?page\\_id=7070&i=81](http://johnsonsdictionaryonline.com/?page_id=7070&i=81).

that he is subjectively at fault for consciously choosing a course of conduct in which there is a substantial risk that he will aid and comfort the enemy). In any of these scenarios, so long as he remains fixed to an enemy in some way, he is by definition adhering to the enemy and has committed treason as the Constitution describes it. In this way, the law of treason still resists strict liability and maintains some substantial mens rea to accompany the relevant overt act, but is not what we would think of as a specific intent crime. If we do not accept “adhering” as necessarily requiring the specific intent to betray, then this reading of the Treason Clause seems plausible.

Hurst’s work on treason also reached the conclusion that a specific intent to betray is an element of treason, and cites early cases rejecting guilt for treason based on a lack of intent to betray, yet even Hurst acknowledges authority to the contrary.<sup>124</sup> Hurst alludes only briefly to the disagreement in a footnote that compares the law of treason to the law of attempt, which requires the specific intent to carry out the target crime.<sup>125</sup> Hurst is correct that this is the general approach to attempt mens rea. But, for one thing, federal criminal law contains no general attempt statute, so there is no congressional enactment to which we can look to draw the comparison. Also, Hurst appears to be describing Levying War Treason, not Adherence Treason.<sup>126</sup> It is true that the specific intent would be the same for criminal liability under either theory, but because he discusses that specific intent as deriving from the natural betrayal of allegiance that would exist when levying war against one’s country, he does not consider, as *Cramer* does, whether the specific intent to betray constitutes a natural reading of the word “adhering.”<sup>127</sup> Indeed, he concedes that *Cramer* is ambiguous about the specific intent.<sup>128</sup> Finally, if Hurst was looking for a criminal law analogue to bolster the requirement of a specific intent, attempt seems to be the wrong analogue to Adherence Treason because the giving of aid and comfort with the

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<sup>124</sup> See HURST, *supra* note 12, at 193-203.

<sup>125</sup> *Id.* 222-23 n.25.

<sup>126</sup> See *id.* at 193 (discussing “intent” in the context of levying war).

<sup>127</sup> See *Cramer*, 325 U.S. at 30.

<sup>128</sup> See HURST, *supra* note 12, at 193, 202.

requisite intent would complete the crime, thus taking it out of the law of attempts.

I would suggest still another way of thinking about the Treason Clause, and why it requires this kind of “intent,” or purpose (or, as discussed previously, *motive*) to betray. Treason has been described as an “outlier” in criminal law, at least in the sense that it does not retain the structure of modern criminal law.<sup>129</sup> If that is true, then there is little reason to think it should employ the general parts of crime (actus reus, mens rea, causation) in the ways that modern criminal law would. And yet, if we consider the constitutional text closely, we see that Adherence Treason (as opposed to Levying War Treason) bears much resemblance to the law of complicity, and particularly the law of accomplice liability. This is not to say that one can be an accomplice to treason or that treason prosecutions can be based upon a theory of derivative liability. At common law, which applied the law of parties – now overwhelmingly abolished in American criminal law, but with which the Framers would have been familiar – treason was not among the crimes to which the law of parties applied.<sup>130</sup> Blackstone, in fact, reminds us that all who commit treason are principals.<sup>131</sup> Of course, that would be functionally true under existing federal criminal law as well, as it explicitly treats aiders and abettors as principals.<sup>132</sup> My point, rather, is merely to explain that there is symmetry between the law of Adherence Treason and the law of complicity.

In our criminal law, we understand that when X aids D in the commission of a crime, with the purpose of facilitating D’s completion of the crime, then X is guilty of the underlying crime on the theory of accomplice liability.<sup>133</sup> Modern penal codes have worked some variation into this model, but the model itself prevails throughout American criminal law.<sup>134</sup> Of

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<sup>129</sup> See Fletcher, *supra* note 14, at 1619.

<sup>130</sup> See DRESSLER, *supra* note 34, §30.03[A][1], at 460.

<sup>131</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*35.

<sup>132</sup> See 18 U.S.C. § 2(a) (2012).

<sup>133</sup> See LAFAVE, *supra* note 50, §13.2, at 708 (“It may generally be said that one is liable as an accomplice to the crime of another if he (a) gave assistance or encouragement or failed to perform a legal duty to prevent it (b) with the intent thereby to promote or facilitate commission of the crime.”).

<sup>134</sup> See *id.* §13.1(e), at 706-07.

course, the mental state required for accomplice liability is a subject of considerable debate,<sup>135</sup> and I do not purport to answer here the many questions that this debate raises. Nonetheless, it is fair to conclude that a consistent theme of the prevailing legal model is that, to be guilty as an accomplice, the one providing aid must provide it with the purpose of facilitating or promoting or encouraging the commission of the target offense, as well as with the mental state required by the target offense.<sup>136</sup> These are the so-called dual intents of accomplice liability.<sup>137</sup>

This is true under existing federal law, as well. Federal accomplice liability is governed by statute, section 2 of Title 18, which provides that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.”<sup>138</sup> Although the federal law of accomplice mens rea has been uneven, it has been generally agreed that the defendant must “intend” that the target crime be committed (though, again, there is considerable dispute about what “intent” means in this context – whether it requires the purpose that the target crime be committed, or simply knowledge that the assistance will aid the commission of the target crime).<sup>139</sup> In Judge Hand’s words, the aider and abettor must have “associated himself with the venture, participated in it as in something he wished to bring about, and sought by his actions to make it succeed.”<sup>140</sup> The Supreme Court, in fact, recently reaffirmed

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<sup>135</sup> *Id.* §13.2(b), at 712-13. See also Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341 (2002) (analyzing federal case law); John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 *S.C. L. REV.* 237 (2008) (analyzing various state law approaches); Grace Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 *S. CAL. L. REV.* 2169, 2172 (1988) (discussing various theories).

<sup>136</sup> See *DRESSLER*, *supra* note 34, § 30.05, at 469-70.

<sup>137</sup> *Id.* at 469.

<sup>138</sup> 18 U.S.C. § 2(a) (2012).

<sup>139</sup> See *LAFAVE*, *supra* note 50, § 13.2(b)-(d), at 712-18.

<sup>140</sup> *United States v. Peoni*, 100 F.2d 401 (2nd Cir. 1938). The *Peoni* decision has been subject to question. See, e.g., Stephen P. Garvey, *Reading Rosemond*, 12 *OHIO ST. J. CRIM. L.* 233, 239 n.23 (2014); Weiss, *supra* note 135, at 1424.

this standard and its kinship to the common law of accomplice liability.<sup>141</sup> Moreover, even under the law of accomplice liability, knowledge does not foreclose a finding of intent. Courts can sometimes infer intent from knowledge.<sup>142</sup> And to complicate matters further, there is authority, in federal criminal law as well, for the proposition that accomplice liability can be found where the accomplice simply has knowledge that her aid will facilitate a crime.<sup>143</sup> Again, though, the point is not to resolve the debate over mens rea of federal accomplice liability. The point, rather, is that because the constitutional text speaks in terms of “aiding” another (the enemy), there is a natural relationship between the Treason Clause and the law of accomplice liability, the law of aiding another. Understanding Adherence Treason as a species of complicity – or at least as a close cousin – may help improve our understanding of the Treason Clause and how it functions in the modern world of criminal law.

Both *Cramer* and *Kawakita*, in fact, use language that only amplifies the sounds of complicity doctrine that accompany the Treason Clause. In *Cramer*, the Court speaks in terms that remind us of the dual intents.<sup>144</sup> And although Hurst criticized the *Cramer* Court’s conclusion that the

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<sup>141</sup> See *Rosemond v. United States*, 134 S. Ct. 1240 (2014). This is not to say that *Rosemond* definitively answers problems related to the mens rea of accomplice liability. See Garvey, *supra* note 140, at 238-50.

<sup>142</sup> A well-known case on this subject (though it appears in the conspiracy context) is *People v. Lauria*, 251 Cal. App. 2d 471 (Cal. Dist. Ct. App. 1967), in which the operator of telephone answering service permitted participants in a prostitution ring to use his service, knowing that the service was used for this purpose. The court explained the circumstances under which intent may be inferred from knowledge, *id.* at 478-81, but that none of those circumstances existed in Lauria’s case because he had no special interest or stake in the success of the prostitution venture. *Id.* at 482-83.

<sup>143</sup> See, e.g., *United States v. Fountain*, 768 F.2d 790, *modified*, 777 F.2d 345 (7<sup>th</sup> Cir. 1985); *United States v. Campisi*, 306 F.2d 308 (2<sup>nd</sup> Cir. 1962). See also Weiss, *supra* note 135, at 1396-1409 (analyzing federal case law on knowledge).

<sup>144</sup> *Cramer*, 325 U.S. at 31.

treasonous overt act must actually aid the enemy,<sup>145</sup> that particular reading of the Treason Clause – whatever the other shortcomings of the *Cramer* opinion – would at least be consistent with the common law understanding of aid for accomplice liability, which required that the accomplice’s aid in fact assist the principal.<sup>146</sup> Moreover, in *Kawakita*, the Court explained that Adherence Treason does not require that the overt act be one that turns the tide in the enemy’s efforts, or even that it be one of great significance to the enemy.<sup>147</sup> The overt act can be insubstantial and have little or no ultimate effect on the war effort against the United States.<sup>148</sup> So long as the aid that the traitor provides would, at a minimum, embolden the enemy in its efforts, the aid is sufficient for treason (when joined with the relevant treasonous intent).<sup>149</sup> A parallel principle exists in the law of accomplice liability. The aid need not be significant.<sup>150</sup> Rather, even trivial assistance or even mere psychological encouragement, combined with the relevant specific intent, is sufficient for guilt on a theory of accomplice liability.<sup>151</sup>

The Snowden affair offers an example of how this principle functions. Because of the scope of the information that he disclosed, and the likelihood that this information reached an American enemy (ISIS, al Qaeda, etc.), it is certainly plausible to think that the disclosure aided them.<sup>152</sup>

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<sup>145</sup> See HURST, *supra* note 12, at 210. See also Crane, *supra* note 13, at 654-56 (surveying scholarly criticism of Justice Jackson’s *Cramer* opinion).

<sup>146</sup> See DRESSLER, *supra* note 34, § 30.04[B][1], at 467.

<sup>147</sup> See *Kawakita*, 343 U.S. at 738.

<sup>148</sup> *Id.* The Court also cited *Haupt*, saying that “harboring the spy in *Haupt v. United States* . . . was also insignificant in the total war effort of Germany during the recent war. Yet it was a treasonable act.” *Id.*

<sup>149</sup> See LAFAYE, *supra* note 50, § 13.2(a), at 708-09 (describing how encouragement may allow guilt on accomplice liability theory).

<sup>150</sup> See *United States v. Bennett*, 75 F.3d 40, 45 (1<sup>st</sup> Cir. 1996).

<sup>151</sup> See DRESSLER, *supra* note 34, § 30.04[B][1], at 467. The law of trivial assistance has come under fire. See Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427 (2008).

<sup>152</sup> See James Gordon Meek, et al., *Intel Heads: Edward Snowden Did ‘Profound Damage’ to U.S. Security*, ABC NEWS (Jan. 29, 2014), available at <http://abcnews.go.com/Blotter/intel-heads-edward-snowden->

Even if the disclosure did not directly result in any American casualties, or even have any significant role in an enemy attack, the disclosures at least could have emboldened the enemy or strengthened the enemy's fortitude in planning or perhaps even executing an attack. And yet, again, in the absence of an intent that the enemy launch a successful attack, the aid that the disclosures provided would not be treasonous aid and comfort. The Snowden example, in fact, shows how the overlap of treason law with complicity law would resolve the knowledge/purpose debate. That is, even if Snowden was aware (had knowledge) that his actions would aid the enemy (and this is a fair bet), he still would not be guilty of treason because he lacked the specific purpose to betray.

But think about a different example. Imagine an American citizen who decides to join the cause of, for instance, al Qaeda or ISIS. He or she then communicates information digitally – such as via YouTube, Twitter, email, or posted on a personal blog – so that the enemy could have easy access to it, indeed, with the hope that the enemy would gain access to it for purposes of planning an attack or doing some harm to America or its security interests. This could be sensitive national security information to which the person has access (like the information Snowden disclosed), or it could be other information that may benefit those enemy groups in planning or executing an attack. It could even be information pledging support for the terrorist cause and a hope for the killing of Americans, or the destruction of the United States. If the enemy never sees or receives the communication, then even though the citizen intended to betray America, a treason prosecution is likely barred. It offered no aid. As in the common law of accomplice liability, attempted aid is insufficient for proving guilt, unless the attempted aid is known to the principal actor and thus serves as encouragement.<sup>153</sup> The overt act must actually offer some aid and comfort.

The Constitution does not mandate *significant* aid and comfort, however. So if the enemy receives and sees or hears

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profound-damage-us-security/story?id=22285388 (describing views of James Clapper, Director of National Intelligence, and John Brennan, CIA Director).

<sup>153</sup> See LAFAVE, *supra* note 50, §13.2(a), at 712.

the communication, and even if the information merely encourages them or bolsters their fortitude to harm America or is otherwise only minimally helpful to their cause, this is arguably treasonous (assuming, of course, satisfaction of the constitutional proof requirements).<sup>154</sup> The same could be said of Americans who have taken affirmative steps to not only indicate their support for ISIS, but to personally, and more directly, assist ISIS.<sup>155</sup> Even if those citizens never actually reached a destination in which they would fight alongside other ISIS cohorts, the key question is whether the steps they have taken to join ISIS fighters would encourage ISIS in its mission. These are somewhat closer cases, at least where the person has not actually reached the point of actual fighting or other direct aid beyond expressions of support or encouragement for the terrorists. Material support for terrorism (or conspiracy to provide it, or attempt to provide it) offers a clearer legal basis for prosecution,<sup>156</sup> and indeed, that has been the charge of choice for federal prosecutors in those cases.<sup>157</sup> But many of the acts that constitute material support

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<sup>154</sup> See *Kawakita*, 343 U.S. at 738. See also *Bollman*, 8 U.S. (4 Cranch) at 126 (“[i]f war actually be levied, . . . all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.”).

<sup>155</sup> See, e.g., *More young Americans arrested for joining ISIS*, AOL (Mar. 4, 2015, 11:10 PM), <http://www.aol.com/article/2015/03/04/more-young-americans-arrested-for-joining-isis/21149844/> (noting comments by James Clapper that about 180 Americans have traveled to Syria to fight alongside ISIS); Elizabeth Whitman, *Americans Joining ISIS: Arrests Suggest Young Muslims Lured by Social Media*, INTERNATIONAL BUSINESS TIMES (Feb. 25, 2015, 3:22 PM), <http://www.ibtimes.com/americans-joining-isis-arrests-suggest-young-muslims-lured-social-media-1828286> (noting various citizens or American residents who have tried to join ISIS); *How many Americans have joined ISIS?*, CBS NEWS (Aug. 22, 2014, 2:09 PM), <http://www.cbsnews.com/news/how-many-americans-have-joined-isis/>.

<sup>156</sup> See 18 U.S.C. §§ 2339A, 2339B (2012).

<sup>157</sup> See Press Release, U.S. Dept. of Justice, Philadelphia Woman Arrested for Attempting to Provide Material Support to ISIL (Apr. 3, 2015); Press Release, U.S. Dept. of Justice, Madison, Wisconsin Man Charged with Attempting to Provide Material Support to ISIL (Apr. 9, 2015); Press Release, U.S. Dept. of Justice, Fourth Brooklyn, New

would also likely constitute “aid and comfort” for purposes of Adherence Treason.<sup>158</sup> So prosecutors should not rule out the possibility of treason, based on the complicity theory articulated here.<sup>159</sup> Notice, though, how these scenarios differ significantly from the Snowden affair – they, unlike the Snowden affair, couple assistance (and an intent to render the assistance) with an intent to betray.

Though the parallels are there, the Court – in its few treason cases – has not discussed the law of Adherence Treason in these accomplice liability terms. And the parallels are admittedly imperfect, chiefly because we do not prosecute Adherence Treason on a theory of complicity. Accomplice liability is derivative, and treason liability is always direct. Adherence, with the provision of aid and comfort, *is* the crime. Nonetheless, we see that there are important parallels between Adherence Treason and complicity law – especially the law of accomplice liability, an older version of which the Framers would have known – that may explain the outcomes in both *Cramer* and *Kawakita* and help us better approach future problems involving the nature of one’s aid to the enemy and the mental state that must accompany that aid. This is especially true at time when, thanks to digital technology accessible anywhere in the world, aiding or encouraging the enemy can be easy, instantaneous, and potentially quite harmful to American institutions and interests.

#### IV. CONCLUSION

Whatever else Edward Snowden is guilty of, he is most likely not guilty of treason. That does not mean that we, and our political leaders with us, should not condemn his conduct. Rather, it simply means that we should endeavor to be more accurate in our use of treason as serious political rhetoric and more conscientious about developing a complete – or, as

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York Resident Charged with Attempt and Conspiracy to Provide Material Support to ISIL (Apr. 6, 2015).

<sup>158</sup> See 18 U.S.C. §2339A(b) (2012) (broadly defining “material support”).

<sup>159</sup> Cf. Eichensehr, *supra* note 10, at 1503-05 (arguing that, in balancing advantages and disadvantages of treason prosecutions for assisting non-state actors, often the benefits will outweigh the risks).

complete as can be expected, given the complexity and nature of it - understanding of American treason law. American treason is supposed to be hard to prove, hard to prosecute, and hard to punish. Yet where it exists, as the Constitution defines it, federal prosecutors should be more ready to enforce it and to seek severe punishment for it. Modern technology and social media, and the demonstrated willingness of some Americans to join forces with modern terrorists, could make treason prosecutions more plausible than they have been in American history. As the Snowden affair reveals, however, treason against the United States requires that only with the confluence of a sufficiently guilty act and guilty mind devoted to betraying America will a treason prosecution represent a constitutionally acceptable legal response to conduct that harms American national security and the institutions of American government. Merely doing harm to American interests may be criminal, but it is not necessarily treasonous. This might make us inclined to broaden American treason, for broadening treason law might make it easier for us to allege and prove treason with respect to Americans who do harm to American institutions and interests by aiding our enemies. And it might make us feel better about having a criminal law that comports with our rhetorical and psychological sensibilities about disloyalty. But doing so would be inconsistent with the narrow and limited version of treason that the founding generation - which well understood the politics and consequences of disloyalty - not only desired, but provided in the constitutional text. Weakening the limits on American treason could undermine the delicate balance that the Constitution has struck to ensure sober use of the federal power to punish treachery against the Nation.