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NOTES

HISTORICAL CONCEPT OF TREASON: ENGLISH, AMERICAN

Treason is essentially a violation of allegiance to the community. There have been times in the history of various legal systems when the definition of "treasonous acts" was so broad that it encompassed the whole of criminal law. In early Roman history the concept of treason was sufficiently broad to include, along with betrayal to an external enemy, any act which threatened the safety of the group.¹ *Perduellio*, the earliest Roman concept of treason, was literally the act of a base or evil enemy who assumed a state of war toward his community.² *Perduellio*, meaning "enemy," was committed by a Roman when he acted in any manner hostile to his country. This was especially true if he actually adhered to an external enemy.³ The Romans did not attain even a moderate degree of precision in defining treason, and a lack of records of proceedings makes any analysis of the law extremely difficult. It is generally known that *perduellio* was absorbed by the later law of *crimen majestatis* which encompassed acts injuring the honor or majesty of the Roman people.⁴ In contrast to later broad treason laws, *crimen majestatis* does not seem to have been abused greatly by Roman leaders. Under Tiberius, who is pictured as a tyrant by many, the trials seem to have been fair and the convictions few.⁵ Although capital punishment was the penalty for a conviction under *crimen majestatis* it was not always carried out. For example, it became a common practice to give the accused a period of grace between the time of sentencing and the time of execution so that he could escape from the country. The accused could attend his trial and defend himself; but if he was convicted he could still save his own life by leaving the country.⁶

Even the administration of the law of treason by the Romans in England seemed tender in contrast to the judicial murders of a later age.⁷ With the exception of torture, the accused had every protection which

1. 15 ENCYC. SOC. SCI. 93 (1935).

2. *Ibid.*

3. See JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 327 (1952).

4. 15 ENCYC. SOC. SCI. 93 (1935).

5. See ROGERS, CRIMINAL TRIALS AND CRIMINAL LEGISLATION UNDER TIBERIUS 112 (1875).

6. This practice became so widespread that capital punishment was abandoned in the twelfth century. See JOLOWICZ, *op. cit. supra* note 3, at 327.

7. See FRESHFIELD, MANUAL OF LATER ROMAN LAW AND THE ELOGA 136 (1391).

human forethought could devise: the death penalty was not pronounced unless the accused confessed or all witnesses agreed; the testimony of one witness alone, no matter what his rank, was insufficient; all evidence had to be given on oath; a person was not legally accused until the accusation had been presented in writing; and a quick trial was mandatory.⁸ Unfortunately, England too soon forgot the lessons taught by the Roman conquerors. England had been a barbaric land before the Roman conquest, but the Romans set up their own government and legal system in England.⁹ The comprehensive system which developed over the centuries of Roman rule was never able to survive the invasion of the Saxons who were a barbaric race with no idea of a supreme sovereign.¹⁰ The Saxons did not maintain the Roman safeguards for the accused in treason cases but instead replaced the well-reasoned law of the Romans with their own rude application of superstition and custom.¹¹

In England the crime of treason progressed without much certainty or definition until the reign of Edward III (1327-1377). It had remained, as in Rome, a crime against society, but had been open to a great latitude of construction. A rule of law was developed which provided that when one indicted for treason did not appear, he could be sentenced to death as a traitor and executed without further trial if he were later captured. The case of Sir John Oldcastle shows how such a rule could be abused. Oldcastle's name was entered on an indictment over an obvious erasure. Three or four years after the date of indictment he was captured and sentenced to be hanged without a trial. There was no evidence as to how long his name had been on the indictment but that he was not originally indicted for the crime was a certainty.¹² The punishment for treason was that the prisoner be drawn, hanged, and beheaded; his heart, entrails, and bowels torn out and burned to ashes, and the ashes scattered to the wind; his body cut into four quarters and each quarter hung on a nearby tower; and his head set upon London Bridge, as an example to others that they would never presume to be guilty of such treason.¹³

During the early reign of Edward III a knight forcibly held a man until he paid ninety pounds; this was held to be treason because the

8. It is interesting at this point to note that many of these requirements appear in later English and United States law. See generally 1 PIKE, HISTORY OF CRIME IN ENGLAND 223 (1873).

9. See PALGRAVE, HISTORY OF THE ANGLO-SAXONS 19 (1869).

10. *Id.* at 60.

11. *Id.* at 61.

12. See 1 PIKE, *op. cit. supra* note 8, at 346.

13. *Id.* at 226.

knight was guilty of accroaching, or attempting to exercise, royal power.¹⁴ A motive behind such "constructive" treasons was that the traitor forfeited his land to the king.¹⁵ It was the mischievous nature of this forfeiture which led the Lords to demand that Parliament declare the bounds of an accroachment of royal power.¹⁶ They were disappointed when parliament replied that whenever a judgment was given, the points making up accroachment were declared therein.¹⁷ A few years later, however, the famous statute of 25 Edward III was handed down declaring what should and should not be considered treason. This statute attempted to define the law and abolish the latitude for construction which the local courts had exercised up to that time. Every English subject owed an allegiance to the sovereign—the allegiance which bound him to be true and faithful to the king in return for the protection which the king afforded him. The statute of Edward III divided breaches of this allegiance into two categories. The minor breaches of allegiance, of private and domestic faith, were denominated petit treason. But when a subject became so disloyal as to attack the majesty itself, the statute made the offender guilty of high treason.¹⁸ The section of the statute making it treason to compass the death of the king was held to refer to the king in possession of the throne, without any respect to his title. Under this construction a usurper, who obtained possession of the throne, was king within the meaning of the statute and any one who helped the rightful king or his heir to restoration was guilty of treason.¹⁹

The terms compassing or imagining the death of the king are synonymous words signifying the purpose or design of the mind.²⁰ Naturally the mere imagining of the death of the king could not come under judicial cognizance unless it was demonstrated by some open or overt

14. See 3 REEVES, HISTORY OF ENGLISH LAW 315 (1880).

15. High treason has already been defined as breach of allegiance to a government. See text accompanying note 1 *supra*. Constructive treason, on the other hand, is an attempt to establish treason by circumstantiality and not by the simple and genuine letter of the law. 9 Geo. 4, c. 31, § 2 (1771). The statute of 25 Edw. 3, c. 2 (1352) was the first definition of petit treason. In later English law petit treason was declared to be murder. It has never been recognized in the United States. *State v. Belansky*, 3 Minn. 246 (1874).

16. Petition to Parliament, 21 Edw. 3, c. 15 (1346).

17. *Ibid.*

18. High treason, by which the forfeiture of escheats went to the king, was defined as: to compass or imagine the death of the king, queen, or heir; to violate the king's eldest daughter or the wife of the king's heir; to levy war against the king; to adhere to the king's enemies or give them aid and comfort; to counterfeit the king's seal or money; and to slay the chancellor, treasurer, or king's justices. Petit treason, by which forfeiture of escheats went to the lord of the fee, was defined as: a servant slaying his master; a wife slaying her husband; and a religious man slaying his prelate. 25 Edw. 3, st. 5, c. 2 (1350).

19. EHRLICH, BLACKSTONE 784 (1958).

20. *Id.* at 786.

act; but as will be shown later the requirement of an overt act to convict one of treason did not necessarily mean an act designed toward carrying out the treasonous intent.²¹ In many of the arbitrary reigns the "overt" act of speaking or writing words of compassing the king's death was sufficient to convict their author of treason. Thus, for all practical purposes, the overt act requirement disappeared in these reigns.

Edward III, by abolishing many constructive treasons and by clearly defining the law of treason, was said to have written a new Magna Charta. His statute, with a few changes, was the basis for the law of treason in England until 1795, but this statute was greatly abused.²² It left open the opportunity to create a new abundance of constructive treasons under the heading of compassing or imagining the king's death.²³ The courts in the years following the reign of Edward III construed this to mean that if a man imagined the death of the king, he should be put to death for such imagining, without having done anything—that is, without any overt act.²⁴ Thus, under Richard II (1377-1399), a law was passed allowing parliament to judge high treason and the new statute made it treason to attempt to repeal the new law of treasons.²⁵ This new law of treasons was short-lived however, since Henry IV (1399-1413) repealed it and enacted again the statute of 25 Edward III.²⁶

Under the reign of Henry VI (1422-1461), the courts again held that no overt act was necessary, and construed the clause on petit treason to include a man slaying the wife of his master.²⁷ This idea that no overt act was necessary for one to be guilty of treason prevailed throughout the reigns of Edward IV (1461-1483), and Richard III (1483-1485).²⁸ Even the kings were not exempt from the wrath of treason. After being indicted and convicted of treason, King Charles I (1625-1649) went to his execution with much splendour. As was the common practice the king made a speech on his own behalf before the people and, being proud of his beautiful hair, tucked it all under his night-cap and laid his head on the block. The executioner adjusted the cap and severed the king's head from his body with one mighty blow. He then held it up and said, "Behold, the head of a traitor."²⁹

21. *Ibid.*

22. The statute of 21 Rich. 2, c. 3 (1398) revised the treason clause, but 1 Hen. 4, c. 37 (1399) revised 21 Rich. 2.

23. 4 BLACKSTONE, COMMENTARIES 885 (3d ed. 1899).

24. See 4 REEVES, HISTORY OF ENGLISH LAW 48 (1880).

25. 21 Rich. 2, c. 3 (1898).

26. 1 Hen. 4, c. 37 (1399).

27. 35 Hen. 6, c. 50 (1437).

28. 4 BLACKSTONE, COMMENTARIES 885 (3d ed. 1899).

29. See *Dying Speeches and Behaviour of Traitors* (1720) (rare book in the Indiana University Eli Lilly Library).

Because of the decency due their sex which forbade exposing or mangling their bodies, women were usually not beheaded but instead were sentenced to be burned. The women were covered with tar and hung from a high stake while logs, also saturated with tar, were placed under them. The fire was then lighted and the women were quickly burned. Before this punishment was abolished in 1790, it was mitigated considerably in practice—the common method being the executioner's strangling the victim with the rope with which he bound her to the stake, before the logs were ignited.³⁰ These burnings were always great holidays for the people and great crowds turned out to witness the event. As late as 1786, 20,000 spectators were present at the burning of a female traitor.³¹

The greatest abuse of the crime of treason came under the reign of Henry VIII (1509-1547). The penal acts under his reign relating to the King's person and government were entirely of a new impression, differing from the crimes that had preceded, both in the description of the crimes and the severity with which criminals were punished. In these statutes, treason and misprison of treason were made the consequences of every act or word that tended to effect regal dignity; the obedience of men was secured by oaths, and the discovery of guilt facilitated by methods previously unheard of in the common law.³² After divorcing his queen, Catherine, and marrying Anne Boleyn, Henry VIII felt he should confirm the divorce and marriage by an act of parliament. It was therefore passed that anyone who by writing or act did anything to peril the King's person or crown, or did anything to prejudice or slander Queen Anne or her issue should be guilty of high treason.³³ In order to assure the obedience of the preceding statute, the act further provided that everyone had to take an oath to maintain the act and anyone who refused was guilty of misprison of treason.³⁴ The next year another act was passed to include more protection to the king's person and reputation.³⁵ After the death of Anne Boleyn, the former acts were repealed and similar provisions were made to protect Queen Jane.³⁶ It was also made treason for anyone to believe that either of the former marriages were lawful, or to call or accept any of the children of these marriages as legitimate. Again, the act provided for an oath, but an additional provi-

30. BLEAKLEY, *HANGMEN OF ENGLAND* 293 (1929).

31. SYDNEY, *ENGLAND AND THE ENGLISH IN THE 18TH CENTURY* 193 (1892).

32. See 4 REEVES, *HISTORY OF ENGLISH LAW* 48 (1880).

33. 25 Hen. 8, c. 22 (1534).

34. *Ibid.*

35. 26 Hen. 8, c. 2 (1535).

36. 28 Hen. 8, c. 7 (1537).

sion was added to protect the king from the wrath of his subjects. If anyone refused to take the oath or even objected that they were not bound to reveal their conscience that person was guilty of high treason and could be put to death. Under these broad treason acts the famous Sir Thomas More, the Lord Chancellor, and author of *Utopia*, was executed as a traitor. Having gone from his cell in a manner similar to Charles I, he made his speech to the people and kissed and forgave the executioner. He then laid his head upon the block and bid that the executioner wait until he laid his beard aside, making the oft-quoted statement, "for my beard hath committed no treason."³⁷

With the coming of the reign of Edward VI (1547-1553), England was undergoing a complete religious reformation. The treason statutes passed by Edward VI were representative of the times. The statute of 1 Edward VI³⁸ repealed the harsh treason laws under Henry VIII, and re-enacted 25 Edward III.³⁹ In the preamble to the statute, Edward VI stated that the statutes under Henry VIII were strait, sore, extreme, and terrible because of the troubled times; but since his was a more quiet reign the severity of these laws should be mitigated.⁴⁰ Again the statute made some overt act or deed necessary for high treason in contrast to the laws under Henry VIII, and also added that two witnesses were necessary to convict one of treason.⁴¹

When Queen Mary (1553-1587) succeeded her brother Edward to the throne, she soon overturned all that had been done for a reformation of religion. She repealed all of the laws concerning religion passed under her brother's reign and placed the church in the same position which it had maintained at the end of Henry VIII's reign.⁴² A later act stated that all trials for treason should be carried out in accordance with common law, and the judges construed this to mean that there was no longer a need of two witnesses.⁴³ In later trials, whenever anyone attempted to base an argument on the ground that two witnesses were required, the judges held that the statutes of Edward VI had been repealed.⁴⁴

Under the reign of Elizabeth many new and harsh treason laws were passed. Almost all of these laws were in some way connected with re-

37. Sir Walter Raleigh was also convicted of treason under Henry VIII with a very dubious charge of plotting with France given as the reason. See *DYING SPEECHES AND BEHAVIOUR OF TRAITORS* (1720) (rare book in the Indiana University Eli Lilly Library).

38. 1 Edw. 6, c. 12 (1547).

39. See note 18 *supra*.

40. 1 Edw. 6, c. 12 (1547).

41. *Ibid.*

42. 1 Mary, st. 2, c. 2 (1553).

43. See 5 REEVES, *HISTORY OF ENGLISH LAW* 126 (1880).

44. *Ibid.*

ligion, and were as harsh on the Protestants as on the Catholics. The spirit of persecution under Elizabeth, as under Henry, was born not of sincere religious belief but of love of tyranny—it was generally treason for any religious body to fail to conform to the religion of the crown; all laws reflected royal authority and royal will.⁴⁵

If we reflect on the evaluation of the English law one fact stands out. Treason was never removed from politics, from conflicts for power. It has been shown that the loyalty owed by a British subject was owed to a *de facto* king rather than a *de jure* king. It naturally follows that in a struggle for power the losing faction would contain many traitors though their leader was the rightful heir to the throne. These men were not traitors as we think of them today; they were not always conspiring with a foreign government for their own benefit; often they were leaders of the country, who belonged to the wrong political faction. It will be interesting to compare this concept with the progression of treason through United States' history.

When the pioneers emigrated from England and settled in the new land, they kept most of the legal concepts that had prevailed in England;⁴⁶ and, as in England, individual liberty was of little concern.⁴⁷ But even in the early legislation of the colonies, which, in these troubled times,⁴⁸ were surrounded by hostile Indians and greedy empires,⁴⁹ the two witness requirement prevailed.⁵⁰ With the coming of the Revolution, new treason legislation was naturally in order since new entities had arisen to which allegiance was owed. Although as in early Rome and England, court records make little contribution to a study of the attitudes of that day, the Constitution reveals a great deal about the attitudes of the new Americans toward treason:

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.⁵¹

The similarity of this clause to the statute of Edward III is immediately evident. Making it treason "to levy war against the several states

45. HUME, *HISTORY OF ENGLAND* 284 (1880).

46. *Colonial Laws of Massachusetts* 128 (1660).

47. Hurst, *Treason in United States*, 58 *HARV. L. REV.* 226 (1944).

48. It is interesting to note that the excuse of "troubled times" was often used to explain the reason for a strict treason law. *Cf.* text accompanying note 42 *supra*.

49. Hurst, *supra* note 47, at 236.

50. *Id.* at 240.

51. U.S. CONST. art. III, § 3.

and adhere to their enemies, giving them aid and comfort," is identical to the language of the old English statute.⁵² Noticeably absent, however, is the clause pertaining to encompassing the king's death and added is the clause that demands that two witnesses to the same overt act are necessary.

An obvious explanation of the absence of the clause pertaining to encompassing the king's death is that since there was no longer a king there was no need for such a clause. Although this explanation may fully explain the reason for some of the states' constitutional clauses, it is doubtful that it holds true for the final proposal in the United States Constitution—particularly in view of the great limitation the "two witnesses to the same overt act" has on treason conviction. Some further explanation of our treason clause is therefore necessary.

After the revolution, when a new definition of treason was in order, the emphasis of the framers of the Constitution was naturally the protection of the new sovereignty. This was particularly true at the convention in 1787 since Shay's Rebellion of 1786 was still fresh in the minds of the framers.⁵³ The idea that force could be used against the government when change by legislation had failed sent a shudder through many of the conservative elements at the convention. Thus, to adopt such a limiting clause for treason in the Constitution must have required deeply rooted feelings on the part of those who were authors of the clause.⁵⁴

The first evidence of the views on treason appears in the Pinckney plan for the new government.⁵⁵ He suggested leaving the definition of treason to the executive department. In disagreement with this however was the New Jersey plan which suggested that a definition of the acts constituting the offense of treason should be spelled out. This plan, however, was probably more concerned with delimitation of the central government than with individual protection.⁵⁶

Except for these plans there seems to be no more evidence on treason until the Committee of Detail submitted its draft constitution to the convention in August, 1787.⁵⁷ The report by the Committee of Detail did not require an overt act or the words "giving them aid and comfort"

52. See note 18 *supra*.

53. In 1783 Daniel Shays led a group of heavily-taxed farmers from western Massachusetts in a revolt against the moneyed class because the legislature had failed to redress their grievances. BRANT, *STORM OF THE CONSTITUTION* 72 (1936).

54. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 157 (1911).

55. *Ibid.*

56. *Ibid.*

57. See 2 CURTIS, *HISTORY OF THE CONSTITUTION OF THE UNITED STATES* 561 (1889); MEIGS, *GROWTH OF THE CONSTITUTION* 14 (1919).

but was otherwise the same as the clause finally adopted at the Convention.⁵⁸ These two additions were made by the Committee of the Whole since they felt it necessary to clearly define what was treason and did not want the "overt act" in our definition of treason to disappear as sometimes had happened in England during "troubled times."⁵⁹

Except for James Wilson who was probably the ablest lawyer at the convention,⁶⁰ very little is known about the members of the Committee of Detail and their views on treason. During the revolution, Wilson was defense counsel for several prominent Philadelphia men who were severely handled in a treason trial because of their relations with the British while the latter occupied the city.⁶¹ Going against public sentiment by joining their defense, Wilson felt very strongly that the law of treason should be limited, and it seems that the drafting of the clause was in no small part due to his work.⁶²

Although not a member of the Committee of Detail, James Madison was another outstanding leader at the convention. His fundamental gift to the Constitution was the concept of national supremacy with checks and balances to guard against legislative or executive tyranny.⁶³ The definition of treason placed in the Constitution fit in well with his plan to check both the executive and the legislature, and he showed utmost skill in judging what would and would not achieve this balance.⁶⁴ Madison and Wilson stand out as the constructive statesmen of the convention.

58. *Ibid.*

59. Compare note 48 *supra*. To better understand the importance of the exact wording of the clause, something must be known about the general scheme of draftsmanship in the 18th century. An 18th century draftsman carefully stated, in general terms, the overall purpose of a document; details were put in only where, for some particular purpose, details were required; and the rest was left to the rules of interpretation generally followed by the courts. Thus the addition of the "overt act" phrase points out that preciseness and detail in the definition of treason were thought to be important by the men at the convention. See II CROSSKEY, *POLITICS AND THE CONSTITUTION* 472 (1953).

60. James Wilson was a learned man. His life's work contains many references to Blackstone, Coke, Montesquieu, and Eden—each of whom had written about the evils of the English treason laws, and Eden led the fight in 1795 to modernize the English law of treason. Wilson was also familiar with the histories of Rome and England and knew of the great abuses which had resulted under the guise of treason laws.

61. See 2 CURTIS, *op. cit. supra* note 57, at 561; MEIGS, *op. cit. supra* note 57, at 14.

62. "A person of a very different description appears in view—pale, trembling, emaciated. Who is he? The slave of a bad constitution and a tyrannical government. He is afraid to act, speak, or look. He knows that his actions or words, however guarded, may be construed to be criminal; he knows that even his looks and countenance may be considered as the signs and evidences of treasonable conspiracies, that he is at mercy of those who, upon slightest suspicion, may seize and hang him. Can such a man's views be great or exalted? Can he feel affection for his country? No. Such a man must be cunning, deceitful, and selfish. Surely, then, the first consideration of a state and its most important duty is to form a constitution which will best be adapted to the genius, character, and manners of her citizens." I ANDREWS, *WILSON'S WORKS* 380 (1895).

63. BRANT, *JAMES MADISON FATHER OF CONSTITUTION* 153 (1950).

64. *Id.* at 65.

Both had a profound knowledge of public law, drawn from the history of it, and were strong nationalists. Both were committed to rule by the people under moderate safeguards against the passions and impetuosity of democracy.⁶⁵ Primarily through the work and thought of these two men, the crime of treason was radically changed from its English predecessor. It was removed from the political arena where for centuries it had been used as a means of punishing one's political enemies and as a stepping stone to power. By inserting nothing in the clause comparable to encompassing the king's death, the framers left neither the courts nor Congress any method for creating constructive treasons which terrorized the people of former years.⁶⁶

If we turn from the Philadelphia convention to the great debate which surged throughout the country over the ratification of the Constitution other reasons for the clause appear. The Constitution was everywhere under attack because it contained no bill of rights and created a strong government with broad powers, which the imagination of its opponents foresaw could be turned in many ways to destroy the liberties of the citizen. In this situation it is of the highest significance that the treason clause was adduced only by proponents of the Constitution, as a prideful argument for the protection with which that document surrounded the individual; and that there was no real effort made at any time, so far as the record shows, to claim that the new government could oppress its people under the guise of prosecutions for treason.⁶⁷ In most of the state legislatures, the Constitution was discussed section by section and no complaints were registered against the treason clause. It appears, therefore, that the clause, as finally adopted, served a twofold purpose. It clearly defined the crime of treason so that individuals were relatively safe from the abuses of an earlier age; and it gave the framers of the Constitution a political talking point to secure ratification of the newly formed Constitution.

Treason trials under this clause have proved that the framers of the Constitution were wise. Throughout several wars and a civil war the treason clause has remained the same. No individual has received the

65. *Id.* at 66.

66. "As treason may be committed against the U.S., the authority of the U.S. ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author." THE FEDERALIST No. 43, at 220 (BELOFF ed. 1948) (MADISON).

67. II ANDREWS, WILSON'S WORKS 382 (1895).

abuse and unfairness which broad definitions of treason brought about in other countries; and no individual has had to fear that the election of a tyrannical leader of different convictions or belief could ever cause him to lose his life, family, or fortune.