

None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage

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Ryan Norwood, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 Cornell L. Rev. 820 (2002)

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NOTE

NONE DARE CALL IT TREASON: THE CONSTITUTIONALITY OF THE DEATH PENALTY FOR PEACETIME ESPIONAGE

Ryan Norwood†

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INTRODUCTION

Robert Hanssen, a father of six children, was a twenty-five-year veteran of the FBI's counterintelligence division and a churchgoing Catholic.¹ According to his own admission, which accompanied a negotiated guilty plea made on July 6, 2001, Hanssen was also a spy who had operated for the Russian government since 1985.² Under the terms of the plea bargain, Hanssen pleaded guilty to fifteen counts of espionage, and will serve the remainder of his life in federal prison, submitting to extensive debriefings regarding the scope of his activities.³ If Hanssen had not taken this plea and gone to trial, the government would have sought an even greater punishment: the death penalty.⁴

The Hanssen case is not the only example of the government's invocation of capital punishment for an espionage offense. Less than two years earlier, the following exchange occurred between an FBI interrogator and Wen Ho Lee, a suspected spy:

FBI: Do you know who the Rosenbergs are?

Wen Ho Lee: I heard them, yeah, I heard them mention.

FBI: The Rosenbergs are the only people that never cooperated with the [f]ederal [g]overnment in an espionage case. You know what happened to them? They electrocuted them, Wen Ho.

. . . .

FBI: Do you want to go down in history? Whether you're professing your innocence like the Rosenbergs to the day that they take you to the electric chair?⁵

Wen Ho Lee worked as a nuclear scientist at the Los Alamos National Laboratory when he came under suspicion of espionage.⁶ Specifically, the FBI suspected that Lee gave privileged information to

¹ Brooke A. Masters & Dan Eggen, *Plea Bargain Is Planned in FBI Spying Case*, WASH. POST, July 4, 2001, at A1; Richard Sisk, *Nab FBI Agent as Spy, Secrets Fed to Moscow for \$1.4M*, N.Y. DAILY NEWS, Feb. 21, 2001, at 3.

² Brooke A. Masters, *Hanssen Admits Spying, Avoids Death Penalty*, WASH. POST, July 7, 2001, A1.

³ See Press Release, Larry Thompson, Deputy Attorney General, DOJ, Thompson Statement Regarding Hanssen Guilty Plea (July 6, 2001) [hereinafter Thompson Statement], available at <http://www.usdoj.gov/opa/pr/2001/July/308ag.htm> (last visited Oct. 17, 2001).

⁴ See Brooke A. Masters & Walter Pincus, *Spy-Case Indictment Postponed*, WASH. POST, Mar. 2, 2001, at A8 (reporting that federal prosecutors had seriously considered pursuing the death penalty against Hanssen since the time of his arrest); Thompson Statement, *supra* note 3.

⁵ Interview by Carol Covert and John Hudenko, Special Agents, FBI, with Wen Ho Lee (Mar. 7, 1999), at <http://www.wenholee.org/transcript4868.htm> (last visited Oct. 17, 2001). For a discussion of the Rosenberg espionage case, see *infra* note 29.

⁶ Vernon Loeb & Walter Pincus, *FBI Misled Wen Ho Lee into Believing He Failed Polygraph*, WASH. POST, Jan. 8, 2000, at A2.

China concerning the sophisticated W-88 nuclear warhead.⁷ In the interview, FBI agents tried to elicit a confession from Lee, despite his continual protestations of innocence.⁸

In spite of the hysteria that erupted after Lee's arrest, the FBI had no evidence for an espionage prosecution against Lee.⁹ After holding Lee in solitary confinement for nine months, the government was forced to release him, dropping fifty-eight of its fifty-nine charges for lack of evidence.¹⁰

The cases of Robert Hanssen and Wen Ho Lee demonstrate that a capital espionage prosecution remains a very real possibility in the United States of America. This legal recourse has been available since 1994, when Congress resurrected the long-moribund federal death penalty and created two categories of capital peacetime espionage in the Federal Death Penalty Act.¹¹ The government may now seek the death penalty against a convicted spy when the offense leads to the death of an American agent in another country, or when the offense compromises some element of national security.¹²

As of the year 2001, no defendant has received a death penalty sentence under either of these capital espionage provisions. Yet espionage prosecutions are rare in relation to other capital crimes—less than twenty cases have arisen between the passage of the Federal Death Penalty Act and the year 2000.¹³ Moreover, in the eligible espi-

⁷ *Id.*

⁸ *Id.* Lee was never actually charged with espionage; instead, the government indicted him on fifty-nine charges relating to the mishandling of federal documents. *Id.*

⁹ See, e.g., Robert Scheer, *No Defense: How the New York Times Convicted Wen Ho Lee*, NATION, Oct. 23, 2000, at 11–12 (arguing that numerous and prominent reports on the Lee affair by “respected media outlet[s]” such as *The New York Times* and CBS News amounted to “spy hysteria”).

¹⁰ *Id.* Lee pled guilty to one count of mishandling classified data. *Id.*

¹¹ See 18 U.S.C. §§ 3591(a)(1), 794(a) (1994).

¹² See *id.* § 794(a).

¹³ The Department of Defense's Security Research Center has identified fifteen federal espionage cases between 1995 and 1998 involving defendants “implicated in an effort to illegally provide U.S. classified or other sensitive national defense information to a foreign interest.” See SEC. RESEARCH CTR., DEF. SEC. SERV., RECENT ESPIONAGE CASES 1975–1999 [hereinafter RECENT ESPIONAGE CASES], at <http://www.dss.mil/search-dir/training/espionage/rec.pdf>. At least three other cases arose in 1999–2000, amounting to a total of nineteen potential espionage prosecutions since the passage of the Federal Death Penalty Act. See Christopher Marquis, *Onetime Army Employee Is Charged with Spying for Soviets for at Least 25 Years*, N.Y. TIMES, June 15, 2000, at A16 (reporting indictment of George Trofimoff); Roberto Suro, *Australian Arrested on Spy Charge*, WASH. POST, May 18, 1999, at A5 (reporting arrest of Australian military intelligence analyst Jean-Phillipe Wispelaere); David A. Vise, *INS Officer Charged with Spying for Cuba*, WASH. POST, Feb. 18, 2000, at A8 (reporting arrest of Mariano Faget).

Of these eighteen cases, two resulted in convictions for non-capital espionage offenses, two involved current military officers (and thus fell outside of the jurisdiction of § 794(a)), and two others have yet to go to trial. See RECENT ESPIONAGE CASES, *supra*. The remaining twelve cases have all ended in plea bargains, either to charges of espionage, conspiracy to commit espionage, or lesser charges. *Id.*

onage cases to date, national security¹⁴ and ex post facto¹⁵ concerns seem to have deterred prosecutors from aggressively seeking capital punishment. Despite these factors, political determination to execute spies remains strong. The Department of Justice has indicated that it would pursue the death penalty in an appropriate espionage case.¹⁶ Before Hanssen's guilty plea, executive branch officials such as Attorney General John Ashcroft and Acting Deputy Attorney General (and later, FBI director) William S. Mueller argued that the former FBI agent's crimes merited the death penalty.¹⁷ Following Hanssen's guilty plea, the Justice Department emphasized that "the decision to forego the death penalty in this case was a difficult one."¹⁸ Notably, public opinion polls have demonstrated that many Americans would

¹⁴ See Thompson Statement, *supra* note 3 ("[W]e determined that the interests of the United States would be best served by pursuing a course that would enable our government to fully assess the magnitude and scope of Hanssen's espionage activities—an objective we could not achieve if we sought and obtained the death penalty against him."); see also RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILE* 415–18 (2d ed., Yale Univ. Press 1997) (1983) (noting that the government would have commuted the Rosenbergs' execution in exchange for testimony against other members of their alleged spy ring); Brooke A. Masters, *Convicted Spy Says He Did It for His Family*, WASH. POST, June 6, 1997, at A1 (reporting that Harold Nicholson avoided the maximum sentence for espionage because "prosecutors gave him credit for extensive cooperation with FBI and CIA intelligence officials during thrice-weekly debriefing sessions"); Bill Miller & Walter Pincus, *Ex-CIA Agent Given 5 Years in Extortion Case*, WASH. POST, Sept. 26, 1998, at A2 ("By reaching a plea agreement [with Douglas F. Groat], the government avoided a trial that could have required disclosing embarrassing CIA operations against foreign embassies.").

¹⁵ All of the post-Federal Death Penalty Act espionage violations discovered to date began prior to the enactment of the law, when the death penalty for peacetime espionage, although permitted by statute, was unconstitutional due to procedural defects. See sources cited *supra* note 13. If one of these defendants had faced the death penalty under the new statute:

[I]t might be contended that the defendant acted in reliance upon the fact that the death penalty could not be constitutionally imposed under that statute. Therefore, the imposition of the death penalty under new procedural provisions which rendered the previously unconstitutional statute sound would in essence increase the punishment after the crime was committed, in violation of the constitutional prohibition against *ex post facto* laws. Further, it would deprive the defendant of a defense to the penalty available at the time the crime was committed, which is also prohibited by the *Ex Post Facto* Clause of the United States Constitution.

Elizabeth B. Bazan, *Espionage and the Death Penalty*, 41 FED. B. NEWS & J. 615, 618 (1994).

¹⁶ See Vernon Loeb, *Questions About Another Chinese Spy Case*, WASH. POST, Apr. 4, 2000, at A27 (reporting Senator Arlen Specter's criticism of the Justice Department's failure to pursue the death penalty in the case of Peter H. Lee, who had confessed to passing nuclear secrets to China); Sylvia Moreno & Vernon Loeb, *Ex-Army Cryptologist Accused of Spying*, WASH. POST, Oct. 14, 1998, at B1 (reporting that U.S. attorneys were "evaluating" the possibility of capital prosecution in the case of David Sheldon Boone); see also *supra* notes 1–5 and accompanying text (discussing various espionage cases).

¹⁷ See Masters, *supra* note 2; Masters & Eggen, *supra* note 1.

¹⁸ Thompson Statement, *supra* note 3.

support a decision to seek the death penalty against an accused spy or traitor.¹⁹

The “appropriate” espionage case may not be far off on the horizon. The Lee affair reveals the U.S. government’s conviction that China is conducting an extensive espionage campaign to steal military secrets as part of an effort to challenge the United States’ global supremacy.²⁰ The aftermath of the Hanssen arrest, moreover, has affirmed that the era of “open confrontation” between the United States and Russia is not yet over.²¹ U.S. nuclear technology remains in demand in countries seeking to develop their own nuclear weapons programs; the advent of the twenty-first century has not decelerated the threat of political espionage.²²

This Note analyzes the constitutionality of the capital espionage provisions of 18 U.S.C. § 794(a) with respect to the Eighth Amendment’s prohibition against “cruel and unusual punishment.”²³ The analysis focuses on the 1977 Supreme Court case *Coker v. Georgia*²⁴ and on subsequent decisions that have established a proportionality standard of review for determining the suitability of capital punishment for particular crimes.²⁵ This Note does not discuss the constitutionality of capital punishment for crimes involving a breach of loyalty to one’s country, such as treason or wartime espionage, or for espionage crimes that fall under military jurisdiction.²⁶

¹⁹ See GEORGE GALLUP JR., THE GALLUP POLL: PUBLIC OPINION 1988, at 256, 258 (1989) (noting that 42% of those surveyed in 1988 favored “the death penalty for persons convicted of spying for a foreign nation during peacetime,” up from a figure of 36% favoring death for “persons convicted of treason” in 1978); see also James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99, 158 (1983) (arguing that public support for treason and other political crimes would rise during a period of national emergency).

²⁰ See, e.g., James Risen & Jeff Gerth, *China Stole Nuclear Secrets for Bombs, US Aides Say*, N.Y. TIMES, Mar. 6, 1999, at A1. Months later, arguing for Lee’s detention, the government claimed that his alleged espionage activities had risked “hundreds of millions of lives.” See Scheer, *supra* note 9, at 12.

²¹ Fred Weir, *Russia, US Revive Old Rhetoric*, CHRISTIAN SCI. MONITOR, Mar. 26, 2001, at 1 (reporting that the Hanssen arrest was the “trigger” for a series of diplomatic expulsions by the United States and Russia).

²² See RECENT ESPIONAGE CASES, *supra* note 13 (chronicling numerous espionage cases involving developing countries since the end of the Cold War).

²³ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

²⁴ 433 U.S. 584 (1977).

²⁵ See *Tison v. Arizona*, 481 U.S. 137 (1987) (using proportionality review); *Enmund v. Florida*, 458 U.S. 782, 783–785 (1982) (same).

²⁶ Politicians and even jurists have been known to confuse “treason” with other “crimes against the state” such as espionage. See, e.g., H.R. 4060, 103d Cong. (1994); 140 CONG. REC. H2225 (daily ed. Apr. 13, 1994) (statement of Rep. Stearns) (labeling espionage committed by Aldrich Ames as “treason”); RADOSH & MILTON, *supra* note 14, at 284 (noting that Judge Irving Kaufman, while sentencing Julius and Ethel Rosenberg for wartime espionage, addressed the defendants’ betrayal as “treason”).

Part I of this Note traces the history of the death penalty for peacetime espionage from its origin in the Espionage and Sabotage Act of 1954 to its resurrection in the Federal Death Penalty Act of 1994. Part II analyzes the framework of proportionality review, which involves an objective and a subjective comparative inquiry into the death penalty's reasonableness.²⁷ Parts III and IV, respectively, apply the objective and subjective analyses to the capital espionage crimes delineated in § 794(a), comparing those crimes with both murder and treason under the subjective analysis. This Note concludes that the death penalty for espionage fails both the objective and subjective proportionality tests under *Coker*, and is thus unconstitutional under the Eighth Amendment.

I

THE HISTORY OF THE DEATH PENALTY FOR PEACETIME ESPIONAGE

A. The 1954 Espionage Act and *Furman v. Georgia*

The institution of the death penalty for espionage is a relatively recent development in this country. The Espionage and Sabotage Act of 1954 stands as the first congressional legislation authorizing capital punishment for civilian peacetime espionage.²⁸ Congress intended

In fact, the two crimes have distinct legal definitions. Treason is the only crime defined or even considered in the United States Constitution. According to Article III, Section 3, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST. art. III, § 3. American courts have consistently favored a narrow interpretation of this definition. See, e.g., *Cramer v. United States*, 325 U.S. 1, 48 (1945) (explaining that "the treason rule . . . is severely restrictive"); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 110-12 (1807) (rejecting the English notion of "constructive treason"). See generally JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES 186-235* (Contributions in American History, No. 12, Stanley I. Kutler ed., 1945) (surveying treason under the Constitution).

Espionage under § 794, on the other hand, occurs when a person "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates . . . to any foreign government . . . any document . . . relating to the national defense." 18 U.S.C. § 794(a) (1994). Although it is possible for the same act to constitute both treason and espionage, the latter is a distinct crime that encompasses activity outside the scope of treason. See *United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965) (finding that the Treason Clause does not bar the creation of peacetime espionage offenses because the crimes require different specific intents); *United States v. Rosenberg*, 195 F.2d 583, 609-11 (2d Cir. 1952) (holding that the Treason Clause does not bar wartime espionage offenses because the "essential element" of giving aid to an enemy in a treason prosecution is "irrelevant" to wartime espionage).

²⁷ See *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion).

²⁸ Espionage and Sabotage Act of 1954, ch. 1261, § 201, 68 Stat. 1216, 1219 (current version at 18 U.S.C. § 794 (1994)). The current version of the law reads in relevant part: Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government . . . or to any representative, officer, agent, em-

the Act to permit the execution of spies without resort to the legal technicalities used in the case of Julius and Ethel Rosenberg, who were executed in 1954 for providing the Russians with information regarding the atomic bomb.²⁹ In that case, the government sought the death penalty under the 1917 Espionage Act, which permitted capital punishment for espionage committed during times of war.³⁰ Despite the Second Circuit's affirmation of the constitutionality of the death penalty for the crime of wartime espionage,³¹ no court has ever sentenced anyone to death for peacetime espionage under the Espionage and Sabotage Act of 1954—also known as the "Rosenberg law."³²

Certainly one reason for this unwillingness to implement the capital provision in the Espionage Act was the constitutional uncertainty that hung over the death penalty during the later part of the provision's history. In 1972, the Supreme Court handed down its decision in *Furman v. Georgia*,³³ which invalidated the death penalty in forty-six states.³⁴ Five members of the Court agreed that the state capital murder statutes violated the Eighth Amendment's prohibition against

ployee, subject, or citizen thereof, either directly or indirectly, any document . . . or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life . . .

18 U.S.C. § 794(a) (1994).

²⁹ See RADOSH & MILTON, *supra* note 14, at 448–49. The Rosenbergs were tried and executed under the wartime espionage provision of the 1917 Espionage Act. The government alleged that Julius and Ethel Rosenberg participated in a conspiracy, beginning in 1944 and lasting until 1950, to provide the Soviet Union with information regarding the hydrogen bomb. The prosecution successfully argued that the "in times of war" provision of the 1917 Espionage Act could apply to the conspiracy, because the conspiracy allegedly began in 1944 while the United States was still fighting Germany and Japan in the Second World War, despite the fact that the Soviet Union was allied with the United States during this conflict, and that most of the conspiracy took place after the war was over. See *United States v. Rosenberg*, 109 F. Supp. 108, 111–12 (S.D.N.Y. 1953) ("Congress wisely did not distinguish between a friendly or an enemy country in prescribing punishments for acts of espionage. The law was intended to protect and to keep inviolate our military secrets from all foreign powers."). See generally RADOSH & MILTON, *supra* note 14, at 170–274 (describing in detail the prosecution of the Rosenbergs under the 1917 Espionage Act).

Under the facts in the government's indictment, the Rosenbergs did not and could not have faced treason charges under the Constitution. See *Rosenberg*, 195 F.2d at 609–11 (explaining that the Rosenbergs were not entitled to the procedural safeguards of a treason trial because their offense was "distinct from the crime of treason defined in . . . the Constitution").

³⁰ Espionage Act, ch. 30, § 2, 40 Stat. 217, 218 (1917) (current version at 18 U.S.C. § 794 (1994)). The 1917 Espionage Act, from which the 1954 Act derives much of its wording, authorized the death penalty for espionage "in time of war" but limited peacetime infractions to a sentence of twenty years in prison. *Id.* § 2, 40 Stat. at 218–19.

³¹ *United States v. Rosenberg*, 195 F.2d 611 (2d Cir. 1952) (rejecting the petitioners' claim that the death penalty for an offense against the state "similar but less grave" than treason violates the Eighth Amendment, but adding that the Supreme Court "may well think it desirable to review that aspect of our decision in this case").

³² RADOSH & MILTON, *supra* note 14, at 448–49.

³³ 408 U.S. 238 (1972) (per curiam).

³⁴ See *id.* at 239–40 (per curiam).

cruel and unusual punishment.³⁵ In response, many of these states developed new statutory schemes providing the sentencing court with guidelines for imposing the death penalty, including a requirement that the sentencing court weigh aggravating and mitigating circumstances.³⁶ In 1976, the Court approved these new statutory death penalty schemes in *Gregg v. Georgia*.³⁷

The courts had no immediate opportunity to apply these cases to the death penalty provision in the 1954 Espionage Act because the Department of Justice took the official position that the Supreme Court decisions had invalidated most of the federal death penalty provisions, and thus declined to enforce them.³⁸ When the Ninth Circuit finally addressed the issue in 1984, it found the provision in the Espionage Act deficient because "the Constitution . . . requires legislative guidelines in death penalty cases."³⁹

B. The Restoration of the Death Penalty for Espionage in the 1994 Death Penalty Act

After several unsuccessful attempts, Congress finally restored the federal death penalty in 1994. In an effort to comply with *Furman*, the Federal Death Penalty Act imposes legislative guidelines for a number of homicide and non-homicide capital crimes, including peacetime espionage.⁴⁰ In effect, the Act creates two categories of capital peace-

³⁵ *Id.* The *Furman* plurality consisted of five separate concurring opinions. Justices Douglas, Stewart, and White argued that the current statutory death penalty schemes were unconstitutionally arbitrary. *See id.* at 240–57 (Douglas, J., concurring); *id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring). Justices Brennan and Marshall went further, maintaining that the death penalty for murder was an inherently cruel and unusual punishment. *See id.* at 257–306 (Brennan, J., concurring); *id.* at 314–71 (Marshall, J., concurring).

³⁶ *See Gregg v. Georgia*, 428 U.S. 153, 162–66 (1976) (plurality opinion).

³⁷ *Id.* at 207 (plurality opinion).

³⁸ *See* Paul D. Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes Is Unnecessary: It Just Needs a Little Re-Enforcement*, 24 WAKE FOREST L. REV. 881, 881 & n.3 (1989) (citing a Department of Justice manual).

³⁹ *United States v. Harper*, 729 F.2d 1216, 1225–26 (9th Cir. 1984). The trial court had not sentenced the defendant to death; rather, the defendant, charged with selling national defense secrets to Poland, filed a writ of mandamus to challenge the trial court's preliminary determination that the death penalty under the 1954 Espionage Act was constitutional. The prosecution, in fact, agreed with the defendant that *Furman* had rendered the death penalty provision of the Act unconstitutional, but argued unsuccessfully that mandamus was improper in the case. *Id.* at 1217–18, 1221–24.

Oddly enough, the Justice Department reversed its stance against the death penalty four years after the *Harper* decision, concluding that capital punishment may in fact be permissible for "narrowly drawn offenses against the United States and its officials." Kamenar, *supra* note 38, at 882 n.7 (quoting 3(a) UNITED STATES ATTORNEYS' MANUAL § 9-10.010 (1988)).

⁴⁰ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60003(a)(2), 108 Stat. 1796, 1968–69 (1994) (codified at 18 U.S.C. § 794(a) (1994)).

time espionage.⁴¹ The first category, present in earlier versions of the 1994 Death Penalty Act, permits the death penalty only when “the offense . . . directly concern[s] nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.”⁴²

The second category arose in response to the arrest of Aldrich Ames, labeled by one author as “Moscow’s most valuable mole in the entire history of the cold war.”⁴³ Ames was a high-ranking CIA analyst who had worked undetected for almost ten years as a spy for the KGB, supplying the Soviet intelligence agency with the names of Russians who were spying for the United States.⁴⁴ The government alleged that Ames’s disclosures eviscerated America’s intelligence operations within the Soviet Union, and led directly to the deaths of several CIA agents.⁴⁵ Unhappy with the inability to impose the death penalty on criminals like Ames,⁴⁶ Congress added an amendment that made espionage a capital crime when “the offense result[s] in the identification

⁴¹ These categories of capital espionage should not be confused with the aggravating circumstances for the crime, which Congress set forth in the Federal Death Penalty Act. *See* 18 U.S.C. § 3592(b) (1994). The aggravating circumstances for capital espionage and treason consist of: (a) prior convictions for treason or espionage, for which death or life in prison was authorized; (b) knowingly creating a grave risk to national security; (c) knowingly creating a grave risk of death to another person; and (d) “any other aggravating factor for which notice has been given.” *Id.* After determining that a defendant is guilty of a capital crime, the fact finder must (in a separate sentencing phase) consider all of the possible aggravating circumstances, as well as the mitigating factors set forth in § 3592(a), before determining whether the “imposition of a sentence of death is justified.” *Id.* §§ 3591, 3593 (1994 & Supp. V 1999).

The categories of capital espionage, in contrast, come into play before the court considers aggravating circumstances. After a defendant is found guilty of espionage, the jury or court must determine whether his crime constitutes capital espionage. *Id.* § 794(a). If so, the tribunal then shifts to the sentencing phase. In this sense, the capital espionage designations are analogous to those in § 3591(a)(2) for murder prosecutions, which require that the prosecution demonstrate certain mens rea elements before moving to the capital sentencing phase. *See id.* § 3591(a)(1)–(2).

⁴² *Id.* § 794(a); *see also* S. 114, 97th Cong. (1981) (containing similar language).

⁴³ DAVID WISE, NIGHTMOVER: HOW ALDRICH AMES SOLD THE CIA TO THE KGB FOR \$4.6 MILLION, at 5 (1995).

⁴⁴ *See id.* at 107–271; *see also* TIM WEINER ET AL., BETRAYAL: THE STORY OF ALDRICH AMES, AN AMERICAN SPY 26–252 (1995) (detailing Ames’s crimes while working for the CIA).

⁴⁵ *See* WEINER ET AL., *supra* note 44, at 258–60; WISE, *supra* note 43, at 254–71.

⁴⁶ *See* H.R. 4060, 103d Cong. (1994); 140 CONG. REC. H2225 (daily ed. Apr. 13, 1994) (statement of Rep. Stearns) (advocating death penalty for treason that “results in the death of an agent acting on behalf of the United States” and citing Aldrich Ames case as an example); *see also* 140 CONG. REC. S1820 (daily ed. Feb. 24, 1994) (statement of Sen. Hatch) (using Ames case to support the Senate’s version of a capital espionage bill).

by a foreign power . . . of an individual acting as an agent of the United States and consequently in the death of that individual."⁴⁷

II

THE OBJECTIVE-SUBJECTIVE PROPORTIONALITY REVIEW OF *COKER V. GEORGIA*

*Coker v. Georgia*⁴⁸ is the benchmark case for adjudicating whether the Eighth Amendment prohibits the death penalty for crimes other than murder.⁴⁹ The defendant in *Coker* faced capital punishment for a rape in which the victim was not killed. The plurality opinion, written by Justice White, established a two-part inquiry for determining whether capital punishment for a particular crime constitutes cruel and unusual punishment.⁵⁰ First, the plurality used an "objective" test, seeking "guidance in history and from the objective evidence . . . concerning the acceptability of death as a penalty."⁵¹ Second, the plurality applied a "subjective" test, using its own judgment to test the severity of the death penalty in relation to other crimes for which the

⁴⁷ 18 U.S.C. § 794(a).

⁴⁸ 433 U.S. 584 (1977) (plurality opinion).

⁴⁹ Many commentators have used *Coker* as a springboard to discuss the constitutional viability of the death penalty for non-murder capital crimes, including drug trafficking, treason, and child rape. See, e.g., Eric Pinkard, *The Death Penalty for Drug Kingpins: Constitutional and International Implications*, 24 VT. L. REV. 1 (1999); Neil C. Schur, *Assessing the Constitutionality and Policy Implications of the 1994 Drug Kingpin Death Penalty*, 2 TEX. F. ON C.L. & C.R. 141 (1996); Wilson, *supra* note 19; J. Chandler Bailey, Note, *Death is Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute*, 55 WASH. & LEE L. REV. 1335 (1998); Meryl P. Diamond, Note, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 ST. JOHN'S L. REV. 1159 (1999); Annaliese Flynn Fleming, Comment, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. CRIM. L. & CRIMINOLOGY 717 (1999); Elizabeth Gray, Comment, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS U. L.J. 1443 (1998); Pamela J. Lormand, Comment, *Proportionate Sentencing for Rape of a Minor: The Death Penalty Dilemma*, 73 TUL. L. REV. 981 (1999); Emily Marie Moeller, Comment, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621 (1998); Bridgette M. Palmer, Note, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843 (1999); David W. Schaaf, Note, *What if the Victim Is a Child? Examining the Constitutionality of Louisiana's Challenge to Coker v. Georgia*, 2000 U. ILL. L. REV. 347. See generally Jeffrey J. Matura, Note, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249 (1998) (discussing the constitutional implications of statutes that authorize the death penalty for non-homicide crimes).

⁵⁰ Although the plurality opinion garnered the support of only four Justices, two of the concurring Justices, Brennan and Marshall, wrote separately to reaffirm their view that the death penalty constituted "cruel and unusual punishment" in all circumstances. *Coker*, 433 U.S. at 600 (Brennan, J., concurring); *id.* at 600-01 (Marshall, J., concurring). Thus, the plurality's less sweeping conclusion that the death penalty for rape was unconstitutional effectively garnered the support of six Justices. See *id.* at 612 n.7 (Burger, C.J., dissenting) (acknowledging that the plurality's opinion is "the view of this Court"); see also *id.* at 601-03 (Powell, J., concurring in part dissenting in part) (agreeing with the holding on the facts of the case but arguing that the death penalty could be appropriate in certain cases of aggravated rape).

⁵¹ *Id.* at 593 (plurality opinion).

Court has upheld the use of the death penalty.⁵² Using this two-part test, the *Coker* plurality decided that the death penalty was an unconstitutional punishment for the rape of an adult woman.⁵³

A. Facts of *Coker*

Serving time for several violent offenses, including murder and kidnapping, Eldrich Coker escaped from a Georgia state prison in 1974. He broke into the home of a nearby couple, Allen and Elnita Carver. Coker threatened Mrs. Carver with a knife and raped her in the presence of her husband. He then drove away in the Carver's automobile, forcing Mrs. Carver to accompany him. Soon thereafter, the police apprehended Coker, who had not harmed Mrs. Carver after the rape.⁵⁴

The state tried and convicted Coker, inter alia, for raping Mrs. Carver. Georgia law permitted the death penalty for rape if the jury found at least one of three statutory aggravating circumstances.⁵⁵ At Coker's sentencing hearing the jury found two aggravating circumstances: his previous record and his robbery of the victim. The jury returned a verdict of death by electrocution.⁵⁶

B. The Objective Proportionality Test

The *Coker* plurality sought to determine whether the death penalty for rape was "grossly out of proportion to the severity of the crime," and thus unconstitutional.⁵⁷ To this end, the plurality began by reviewing two types of objective evidence relating to the severity of Georgia's punishment for rape.

⁵² See *id.* at 597–99 (plurality opinion).

⁵³ *Id.* at 592 (plurality opinion).

⁵⁴ *Id.* at 587 (plurality opinion).

⁵⁵ Georgia held that the following circumstances could make rape a capital crime: (1) the rape was committed by a "person with a prior record of conviction for a capital felony," (2) the rape was committed "while the offender was engaged in the commission of another capital felony, or aggravated battery," and (3) the rape was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 587 n.3 (plurality opinion) (citing the relevant Georgia statute).

⁵⁶ Specifically, the defendant's prior murder conviction and the jury's finding that the rape was committed in the course of an armed robbery provided the two aggravating circumstances. See *id.* at 587–91 (plurality opinion).

⁵⁷ *Id.* at 592 (plurality opinion). The Court noted that *Gregg v. Georgia* established a separate ground for invalidating the death penalty under the Eighth Amendment—if the punishment "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Id.* (plurality opinion) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion)). Although the plurality did not discuss this element of *Gregg* in *Coker*, it did observe that the objective unpopularity of capital punishment undermined the "claim that the death penalty for rape is an indispensable part of the States' criminal justice system." *Id.* at 592 n.4 (plurality opinion).

First, the plurality surveyed the use of the death penalty in the other forty-nine states and in the federal government, and discovered that Georgia was the only jurisdiction in the country to that allowed capital punishment for the rape of an adult woman.⁵⁸ The plurality also noted that the “climate of international opinion” disfavored capital punishment for rapists.⁵⁹ The court concluded that these factors “weigh[] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”⁶⁰ Second, the plurality reviewed Georgia’s recent sentencing decisions in rape cases. After noting that juries are a “significant and reliable objective index of contemporary values,”⁶¹ the plurality found that they had not imposed death “in the vast majority of cases.”⁶²

The Court later adopted a third objective criterion for proportionality review: the historical use of the death penalty for particular crimes.⁶³ Under this approach, the Court considers the death penalty from the Framers’ perspective.⁶⁴ The underlying theory is that “the Eighth Amendment’s ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted”;⁶⁵ or in other words, “those practices condemned by the common law in 1789.”⁶⁶ In practice, because of the common law’s liberal approval of the death penalty,⁶⁷ the Court has rarely had the

⁵⁸ See *id.* at 593–96 (plurality opinion).

⁵⁹ *Id.* at 596 & n.10 (plurality opinion); see also *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (including “international opinion” as an objective indicia).

⁶⁰ *Coker*, 433 U.S. at 596 (plurality opinion).

⁶¹ *Id.* (plurality opinion) (quoting *Gregg*, 428 U.S. at 181 (plurality opinion)); see also *Enmund*, 458 U.S. at 788 (including “the sentencing decisions juries have made” as an objective indicia).

⁶² *Coker*, 433 U.S. at 597 (plurality opinion).

⁶³ The dissent, in fact, raised this point in *Coker*, noting that “since the turn of this century . . . more than one-third of American jurisdictions have consistently provided the death penalty for rape” and criticizing the plurality’s “focus on the experience of the immediate past.” *Id.* at 614 (Burger, C.J., dissenting).

⁶⁴ See, e.g., *Solem v. Helm*, 463 U.S. 277, 285–86 (1983).

⁶⁵ *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). In *Solem* the Court explained:

Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

463 U.S. at 286 (emphasis added).

⁶⁶ *Ford*, 477 U.S. at 406.

⁶⁷ Blackstone recognized 160 crimes under English law “worthy of instant death.” 4 WILLIAM BLACKSTONE, COMMENTARIES *18. Due to the profligacy of capital statutes during the eighteenth century, this may have been a conservative estimate. See LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 3–5 (1948). The list of potentially capital crimes in the late eighteenth century included, inter alia, marking coins, “cutting . . . hop-bmds growing on poles,” pocket-picking, and “being in the

opportunity to invoke historical use as a bar under the objective proportionality test.⁶⁸

C. The Subjective Proportionality Test

The *Coker* plurality insisted that objective evidence was not wholly dispositive, because "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."⁶⁹ To this end, the plurality created a subjective analysis, attempting to discern whether capital punishment for rape was a "disproportionate penalty."⁷⁰

Beyond the disproportionate criterion, the *Coker* plurality failed to expound on the exact nature of the subjective test. In practice the plurality's analysis was comparative, examining rape in relation to murder, a crime for which the plurality had recently held the death penalty permissible, and thus proportionate, under the Eighth Amendment.⁷¹ The plurality acknowledged that rape was indeed a terrible crime: "Short of homicide, it is the 'ultimate violation of self.'"⁷² Yet the plurality also stressed that rape, "in terms of moral depravity and of the injury to the person and to the public,"⁷³ is inherently less severe than murder, which involves "the unjustified taking of human life."⁷⁴ In contrast to murder, "rape by definition does not include the death of or even the serious injury to another person."⁷⁵ Refusing to create the possibility that a convicted rapist could be punished by death while a convicted murderer could live, the plurality determined that capital punishment for rape was unduly severe and thus in violation of the Eighth Amendment.⁷⁶

The plurality similarly dispatched arguments that aggravating factors such as prior convictions and the concurrent commission of other crimes could nevertheless justify the death penalty for rape, noting that "[n]either of these circumstances, nor both of them together, change our conclusion that the death sentence imposed . . . is a dis-

company of gypsies." *Id.* at 10-11 (surveying the capital statutes of the eighteenth century in England).

⁶⁸ *But see Ford*, 477 U.S. at 406-10 (ruling that the execution of the insane violates the Eighth Amendment under the historical use approach).

⁶⁹ *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

⁷⁰ *Id.* (plurality opinion).

⁷¹ *See Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (plurality opinion).

⁷² *Coker*, 433 U.S. at 597 (plurality opinion).

⁷³ *Id.* at 598 (plurality opinion).

⁷⁴ *Id.* (plurality opinion) ("Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.").

⁷⁵ *Id.* (plurality opinion).

⁷⁶ *Id.* at 600 (plurality opinion).

proportionate punishment for rape."⁷⁷ The plurality emphasized that prior convictions, even convictions for capital crimes, "do not change the fact that the instant crime being punished is a rape not involving the taking of life."⁷⁸ Likewise, the plurality insisted that the commission of a concurrent crime could not justify the death penalty unless that concurrent crime was itself deemed "deserving of the death penalty."⁷⁹

Commentators and courts have generally agreed that the *Coker* decision prohibits the death penalty for crimes against individuals that do not involve the taking of another human life, such as kidnapping⁸⁰ or the rape of a child.⁸¹ Since *Coker*, the Supreme Court has not found any crime subjectively proportionate to the crime of murder for purposes of allowing the imposition of the death penalty.⁸²

III

OBJECTIVE PROPORTIONALITY REVIEW OF THE DEATH PENALTY FOR PEACETIME ESPIONAGE

The *Coker* system of proportionality review emphasized the importance of considering objective criteria in determining whether the death penalty is an unconstitutionally excessive punishment.⁸³ Although the basic principles of *Coker's* objective test are applicable to the crime of espionage, the nature of this crime requires the proportionality inquiry to proceed by analogy.

A. Co-Sovereigns

The first principle of objective proportionality analysis concerns the policies of a jurisdiction's co-sovereigns. In *Coker*, the plurality dealt with a state law, and thus could compare Georgia's death penalty

⁷⁷ *Id.* at 599 (plurality opinion).

⁷⁸ *Id.* (plurality opinion).

⁷⁹ *Coker's* concurrent capital crime was armed robbery, a crime for which Georgia statutes authorized the death penalty. The jury, however, gave *Coker* a separate life sentence for this crime. *Id.* (plurality opinion).

The plurality acknowledged that murder as a concurrent crime to rape could be "deserving of the death penalty." *Id.* at 599 & n.16 (plurality opinion). Resolving the constitutional difficulties with this possibility, however, was academic because the state, if such a case arose, could simply try the defendant separately for the murder. *Id.* at 599 n.16 (plurality opinion).

⁸⁰ *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam), *vacating in part* 206 S.E.2d 12 (Ga. 1974) (upholding death sentence for convicted kidnapper and rapist).

⁸¹ See *Lormand*, *supra* note 49, at 996; *Moeller*, *supra* note 49, at 633; *Schaaf*, *supra* note 49, at 349. *But see State v. Wilson*, 685 So. 2d 1063, 1073 (La. 1996), *cert. denied*, 520 U.S. 1259 (1997) (upholding Louisiana law permitting the death penalty for child rapists).

⁸² *But see Tison v. Arizona*, 481 U.S. 137, 158 (1987) (upholding death penalty for participant in felony murder despite a lack of intent to kill).

⁸³ See *Coker*, 433 U.S. at 592-96 (plurality opinion).

policy with those of the other forty-nine states.⁸⁴ Yet peacetime espionage is only a crime under federal law and is not subject to the same state-by-state inquiry.⁸⁵

By analogy to the *Coker* analysis, however, one could compare the United States federal government's punishment for peacetime espionage with that of other nations.⁸⁶ Many countries, including some that prohibit the death penalty for "ordinary crimes" such as murder, still allow capital punishment for extraordinary crimes "under military law or . . . committed in exceptional circumstances such as wartime."⁸⁷ Peacetime espionage, however, often does not qualify as a sufficiently extraordinary crime in these jurisdictions.⁸⁸ Notably, even countries that do allow expansive use of the death penalty for both ordinary and extraordinary crimes have been reluctant to include peacetime espionage as a capital crime.⁸⁹ Moreover, the international trend favors abolishing the death penalty for all crimes, extraordinary or not.⁹⁰ For

⁸⁴ See *id.* at 593–96 (plurality opinion).

⁸⁵ Under the principles of federalism, however, individual states retain the power to proscribe other crimes against the state, as opposed to crimes against the United States. See HURST, *supra* note 26, at 134. As of 1993, for example, three states (California, Georgia, Louisiana) still included treason against the state as a death penalty crime. See THE DEATH PENALTY IN AMERICA 36–37 (Hugo Adam Bedau ed., 1997). No one has faced execution for a crime against an individual state since at least 1930. See *id.* at 7.

⁸⁶ *Coker* itself noted that the "climate of international opinion concerning the acceptability of a particular punishment" was "not irrelevant" in a proportionality analysis. 433 U.S. at 596 n.10 (plurality opinion) (citing *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (noting that only three out of sixty "major nations" allowed the death penalty for rape)); see also *A Bill to Establish Constitutional Procedures for the Imposition of the Sentence of Death, and for Other Purposes: Hearing on S. 114 Before the Senate Comm. on the Judiciary*, 97th Cong. 24–25 (1981) [hereinafter *Capital Punishment Hearings*] (letter from Michael W. Dolan, Acting Assistant Attorney General, Office of Legislative Affairs) (arguing that imposing the death penalty for treason was not excessive under *Coker* because of its international acceptance).

⁸⁷ Amnesty Int'l, *The Death Penalty List of Abolitionist and Retentionist Countries (as of 01 April 1999)* [hereinafter *Abolitionist and Retentionist Countries*], at <http://www.amnesty-usa.org/abolish/abret.html> (last visited Oct. 19, 2001). Major countries that have abolished the death penalty for ordinary crimes but retained it for "extraordinary" offenses include Argentina, Brazil, Israel, and Mexico. *Id.*

⁸⁸ See *Tison v. Arizona*, 481 U.S. 137, 177 n.15 (1987) (Brennan, J., dissenting) (noting that Cyprus, El Salvador, and Argentina "have abolished [the death penalty] for all crimes except those committed in wartime or in violation of military law").

⁸⁹ See, e.g., Amnesty Int'l, *China: No One Is Safe*, ch. 5, at <http://www.amnesty.org/ailib/intcam/china/china96/report/cc5.htm> (last visited Oct. 19, 2001) (noting that China, which regularly uses capital punishment for over sixty-eight offenses including theft, "seriously disrupting public order," and bigamy); *id.* ch. 1, at <http://www.amnesty.org/ailib/intcam/china/china96/report/ccl.htm> (last visited Oct. 19, 2001) (explaining that China's law did not allow punishment for stealing state secrets until 1993, and that the penalty has never been carried out).

⁹⁰ Since 1994, for example, Canada, Italy, South Africa, and the United Kingdom (all of which had initially retained capital punishment for certain "extraordinary crimes") have abolished the death penalty for all crimes. See *Abolitionist and Retentionist Countries, supra* note 87.

these reasons, the weight of international opinion disfavors the death penalty for peacetime espionage.

B. Contemporary Values

The second principle of objective proportionality analysis concerns the contemporary values found within the jurisdiction. *Coker* sought to evaluate contemporary values by analyzing Georgia's jury verdicts in rape cases eligible for the death penalty.⁹¹ A parallel analysis is impossible for peacetime espionage because no jury in the United States has ever considered imposing the death penalty for this crime. Of course, the very fact that no federal prosecutor or judge has pursued or allowed a capital trial on a peacetime espionage charge may itself be some indication of the country's contemporary values. As noted previously, however, the reluctance to seek the death penalty may stem more from national security and *ex post facto* concerns than from value judgments of federal officials.⁹² In any case, a precise analysis of espionage under this method suffers from a small sample size.⁹³

Other indicia of contemporary values, however, have demonstrated that support for the death penalty for peacetime espionage is lukewarm at best. The last Gallup poll to address the question, in 1988, revealed that only 43% of Americans supported the death penalty for peacetime espionage.⁹⁴ Significantly more respondents favored the death penalty not only for murder (79%), but for other non-homicidal crimes such as attempting to assassinate the President (63%), hijacking an airplane (49%), and even rape (51%)⁹⁵—a crime for which the Supreme Court had already found capital punishment objectively disproportionate. During the debate over an earlier version of the Death Penalty Act, the Department of Justice objected to the institution of the death penalty for peacetime espionage,⁹⁶ while at the same time defending the restoration of the death penalty for murder, treason, and wartime espionage.⁹⁷ Contemporary values,

⁹¹ See *Coker*, 433 U.S. at 596–97 (plurality opinion).

⁹² See *supra* notes 14–15.

⁹³ Only sixteen espionage cases arose under federal civilian law between 1994 and 2000. In at least a few of these cases, however, the conduct of the defendant did not amount to capital espionage under 18 U.S.C. § 794(a). See, e.g., sources cited *supra* note 13.

⁹⁴ GALLUP, *supra* note 19, at 256.

⁹⁵ *Id.* at 258.

⁹⁶ See *Capital Punishment Hearings*, *supra* note 86, at 25 (letter from Michael W. Dolan, Acting Assistant Attorney General, Office of Legislative Affairs) (stating that “[w]hile the Department [of Justice] does not view . . . the death penalty unconstitutionally excessive in relation to the offense of peacetime espionage, we do believe that as a matter of policy, serious consideration should be given to deleting the death penalty . . . under 18 U.S.C. § 794(a)”).

⁹⁷ See *id.* at 23–33.

thus, do not provide any bedrock of support for capital peacetime espionage offenses.

C. Historical Use

The third principle of objective proportionality review concerns the historical use of the death penalty. In effect, this prong asks whether the death penalty would offend the drafters of the Eighth Amendment,⁹⁸ based on standards of cruel and unusual punishment under the common law in 1789.⁹⁹ Indeed, supporters of the capital espionage statutes have claimed that crimes such as espionage and treason have traditionally merited the death penalty.¹⁰⁰

This belief is certainly half true. Treason has been a capital crime throughout the history of the United States,¹⁰¹ and death was usually the least of the punishments imposed on traitors under the common law.¹⁰² The common law in 1789, however, did not recognize espionage as a separate felony meriting the death penalty;¹⁰³ nor did early

⁹⁸ See, e.g., *Solem v. Helm*, 463 U.S. 277, 285–86 (1983).

⁹⁹ See *Ford v. Wainwright*, 477 U.S. 399, 406 (1986).

¹⁰⁰ See, e.g., 137 CONG. REC. S8499 (daily ed. June 24, 1991) (Statement of Sen. Hatch) (“[T]here has always been a Federal death penalty for non-homicide offenses. . . . [D]eath has always been the traditional and accepted punishment for treason, as well as for some forms of espionage.”).

¹⁰¹ See BRADLEY CHAPIN, *THE AMERICAN LAW OF TREASON* 35 (1964) (noting the 1776 execution for treason of Thomas Hickey, a member of General George Washington’s personal guard); HURST, *supra* note 26, at 68–82 (chronicling the colonial laws against treason, most of which mandate the death penalty). In one of its first Acts, Congress permitted the death penalty for persons convicted of treason against the United States. Act of April 30, 1790, ch. 9, § 1, 1 Stat. 112, 112 (current version at 18 U.S.C. § 2381 (1994)); JULES ARCHER, *TREASON IN AMERICA* 23–24 (1971). Treason remains a capital crime under modern-day 18 U.S.C. § 2381.

¹⁰² “The Great Statute of Treasons, enacted in England in 1352, has served as the landmark legislation that defines the crime of treason.” Ralph M. Carney, *The Enemy Within: A Social History of Treason*, in *CITIZEN ESPIONAGE* 19, 27 (Theodore R. Sarbin et al. eds., 1994). The law saved the most gruesome and terrible punishments for traitors. In a mutilation ceremony designed to obviate the possibility of spiritual redemption, the traitor was dragged behind a horse to the place of execution, hung, cut down while still alive, disemboweled, beheaded, and then drawn and quartered. *Id.* at 26. Perhaps even more severe than the physical punishment was the “lasting social punishment” involving the traitor’s forfeiture of property and the resulting disinheritance of his heirs. *Id.* at 26, 29. These punishments were still used in England during the time of Blackstone and the framing of the Constitution. See 4 BLACKSTONE, *supra* note 67, at *92–*93.

¹⁰³ See generally 4 BLACKSTONE, *supra* note 67, at *94–*118. Blackstone recognized a number of lesser felonies under the English law, besides treason, “injurious to the king’s prerogative.” *Id.* at *94–*101. These offenses included mutilation of coinage, *id.* at *98–*100, killing, attempting to kill, or assaulting members of the king’s council, *id.* at *100, leaving the realm and entering the military service of a foreign state, *id.* at *100–*101, “imbezling the king’s armour or warlike stores,” *id.* at *101 (emphasis in original), deserting the army in times of war, *id.*, and praemunire (allegiance to the pope), *id.* at *102–*118. None of these lesser crimes, however, encompassed peacetime espionage. Persons found guilty of these lesser felonies against the king, moreover, were usually per-

American legislation proscribe espionage specifically as either a felony or a misdemeanor.¹⁰⁴

The drafters of the Eighth Amendment, moreover, would not have categorized peacetime espionage as a type of treason. Certainly, as one commentator has noted, “[b]oth in its general usage and in English legal history, ‘treason’ has at one time or another embraced about everything which could fairly be called subversive activity, and a good deal that could not be.”¹⁰⁵ Yet even in the eighteenth century, the law recognized substantive limits on the scope of treason,¹⁰⁶ one of which was a requirement that the party benefiting from the treason be an enemy—defined as a subject of foreign powers with whom we are openly at war.¹⁰⁷ The Treason Clause of the American Constitution embodies these same restrictions.¹⁰⁸ While espionage committed in peacetime may have constituted a lesser crime from the perspective of the Founders,¹⁰⁹ it was not a felony punishable by death. Combined with the other *Coker* factors, therefore, the historical-use prong weighs against the death penalty for peacetime espionage under the objective proportionality analysis.

IV

SUBJECTIVE PROPORTIONALITY REVIEW OF THE DEATH PENALTY FOR PEACETIME ESPIONAGE

A. The Necessity of a Two-Pronged Comparison

In its subjective proportionality analysis, the *Coker* plurality compared rape with murder, a crime for which the Court had previously upheld the use of the death penalty.¹¹⁰ The *Coker* plurality found that because the crime of rape is inherently less severe than murder, exe-

mitted the “benefit of clergy” after a first offense, meaning that they could avoid the death penalty. *See id.* at *98–*101.

¹⁰⁴ *See* Act of April 30, 1790, ch. 9, 1 Stat. 112, 112–19 (listing treason (§1), misprision of treason (§2), forgery (§ 14), and other crimes against the state, but making no mention of espionage).

¹⁰⁵ HURST, *supra* note 26, at 150–51.

¹⁰⁶ *See* ARCHER, *supra* note 101, at 1–2.

¹⁰⁷ *See* 4 BLACKSTONE, *supra* note 67, at *83.

¹⁰⁸ *See* U.S. CONST. art. III, § 3 (“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.”).

¹⁰⁹ Blackstone recognized a category of offenses called “misprisions,” defined as “all such high offences as are under the degree of capital, but nearly bordering thereon.” 4 BLACKSTONE, *supra* note 67, at *119. Among these offenses were a broad category of “misprisions against the king’s person and government” that encompassed “doing anything that may tend to . . . weaken [the king’s] government.” *Id.* at 123. The first Congress legislated “misprision of treason” as a misdemeanor offense. *See* Act of April 30, 1790, ch. 9, § 2, 1 Stat. 112, 112.

¹¹⁰ *See* *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

cuting rapists is unconstitutionally severe because murderers can escape the same penalty.¹¹¹

To what extent, if at all, is the *Coker* subjective comparison of rape with murder applicable to crimes against the security of the state such as espionage and treason? Commentators have reached different answers to this question. Some argue that crimes against the security of the state should be held to the same "murder standard" employed in *Coker*.¹¹² Under this standard, political crimes may be capital offenses if they rise to the level of murder; that is, if they caused a death.¹¹³ Others maintain that the *Coker* analysis applies only to crimes against the security of individuals, and that crimes such as treason and espionage need not be compared with murder under a subjective proportionality analysis.¹¹⁴

This Note does not adopt the viewpoint that subjective proportionality comparisons are wholly inapplicable to espionage. That approach ignores a central concern of the *Coker* decision: avoiding sentencing discrepancies between crimes of different severities.¹¹⁵ At the same time, however, this Note does not view murder as the only crime appropriate for subjective comparison under a *Coker* analysis. The crime of treason, like murder, has incurred the death penalty throughout the history of England and America.¹¹⁶ Just as murder is considered the most serious crime against the security of an individual,¹¹⁷ treason is considered the most serious crime against the security of the state.¹¹⁸ Although no person has faced execution for

¹¹¹ See *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion).

¹¹² See, e.g., Wilson, *supra* note 19, at 160–61, 173–79; Matura, *supra* note 49, at 260–62.

¹¹³ See Wilson, *supra* note 19, at 173–79 (proposing a compromise "aggravated treason" statute, which would punish traitors only when they intended, and actually caused, another's death); see also *Coker*, 433 U.S. at 621 (Burger, C.J., dissenting) (arguing that the plurality's decision "casts serious doubt upon the constitutional validity of statutes imposing the death penalty . . . [for crimes that] may not necessarily result in any immediate death," including treason).

¹¹⁴ See, e.g., Kamenar, *supra* note 38, at 888 (noting that "[t]he availability of the death penalty [for espionage] even in the absence of immediate death satisfies the criteria specified by the *Coker* Court"); Charles C. Boettcher, Note, *Testing the Federal Death Penalty Act of 1994*, 18 U.S.C. §§ 3591–98 (1994); United States v. Jones, 132 F.3d 232 (5th Cir. 1998), 29 TEX. TECH L. REV. 1043, 1061 (1998) ("Although the holding of *Coker* implied that any sentence of death for a non-homicide offense would be unconstitutional, treason and espionage are still viewed to be exceptions to this holding because of their historical precedent and significant impact on society.").

¹¹⁵ See *Coker*, 433 U.S. at 600 (plurality opinion) ("It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer . . .").

¹¹⁶ See *supra* notes 101–03 and accompanying text.

¹¹⁷ See *Coker*, 433 U.S. at 597 (plurality opinion).

¹¹⁸ See, e.g., Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943) ("Treason is the most serious offense that may be committed against the United States, and its gravity is emphasized by the fact that it is the only crime defined by the Constitution." (citations omitted)); 4 BLACKSTONE, *supra* note 67, at *75 (labeling treason "the highest civil crime").

treason in the United States since at least 1859,¹¹⁹ and despite recent criticisms of the constitutionality of the death penalty for treason,¹²⁰ an analysis of espionage must assume, absent any direct authority to the contrary, that treason is still a viable capital crime.

The subjective analysis in this Note, therefore, requires two perspectives: one comparing capital espionage crimes to murder, and the other comparing them to treason. The question in each is the same: is capital punishment for espionage *disproportionate* according to the logic that makes the penalty *proportionate* for murder and treason?

B. Espionage Compared to Murder

1. *Espionage Jeopardizing National Security*

Section 794(a) makes espionage punishable by death when “the offense . . . directly concern[s] nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.”¹²¹ Proponents of this statute have argued that an offender who reveals national security information could potentially cause harm to individuals far surpassing the harm caused by an individual murder, and that such a grave offense thus merits the death penalty under the *Coker* rationale.¹²²

One must question, however, whether those who commit crimes against the security of the state harbor the same culpability “in terms of moral depravity and of the injury to the person and to the public”¹²³ as do murderers. James Wilson notes that the law ordinarily does not punish non-homicide crimes on the basis of their danger to society as a whole.¹²⁴ Those who knowingly violate antitrust laws, for example, do not face the death penalty, despite the “widespread violations of the public’s rights, which cause more total injury than . . . a single murder.”¹²⁵ Moreover, the evil of crimes such as treason and espionage is often in the eye of the beholder. Wilson suggests that

119 Wilson, *supra* note 19, at 156. The 1859 execution was that of the abolitionist John Brown, whom the State of Virginia had also convicted on charges on conspiracy and first-degree murder. See ARCHER, *supra* note 101, at 51–53.

120 See, e.g., Wilson, *supra* note 19.

121 18 U.S.C. § 794(a) (1994).

122 See, e.g., 140 CONG. REC. H2225 (daily ed. Apr. 13, 1994) (statement of Rep. Stearns) (claiming that “acts of treachery” such as espionage have “long-term and damaging effects . . . on our country’s national security”); see also Bazan, *supra* note 15, at 617 (“It might therefore be argued that a person who commits the most serious forms of espionage, by putting the nation at risk, has engaged in conduct warranting the ultimate penalty.”).

123 *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion).

124 See Wilson, *supra* note 19, at 160.

125 *Id.*

“‘[t]reason’ . . . may be the act of a patriot.”¹²⁶ Similarly, a spy might share military secrets with a foreign country based on his or her own individual notions of justice.¹²⁷

This debate, however, sidesteps a fundamental precept of the *Coker* analysis. The concern under subjective proportionality is not the potential harm of a crime, but the actual harm inherent in the crime “by definition,” as provided by statute.¹²⁸ In *Coker*, for example, the plurality stated that “[rape] does not compare to murder” because although it might be accompanied by another crime, “rape by definition does not include the death of [the victim].”¹²⁹ The *Coker* plurality, thus, disavowed speculative inquiry into the possible—as distinct from the inherent—harm stemming from a given crime.

As defined in § 794(a), espionage does not require a showing of death, or any other actual harm to the national security.¹³⁰ In fact, espionage prosecutions often lack either evidence of significant attributable harm to the country or a specific individual.¹³¹ The imposition of a harm requirement, however, would not solve these deficiencies

¹²⁶ *Id.* at 161. According to James Wilson:

All traitors can claim that their actions would benefit the populace in the long run. If their defense is a belief in Marxism or fascism, does that ideological commitment make their defense a ‘moral justification’ which is ‘reasonable,’ and is that belief one that is an ‘ordinary standard of morality’? Or does the ‘ordinary standard’ test really justify execution of anyone who does not have the views of the average citizen? The meaning of this mish-mash of words is unknown.

Id. at 167.

¹²⁷ See, e.g., RADOSH & MILTON, *supra* note 14, at 450–52 (arguing that the Rosenbergs’ espionage was motivated by their sincere belief in the values and goals of the Communist Party); Peter Perl, *The Spy Who’s Been Left in the Cold*, WASH. POST MAG., July 5, 1998, at 9, 10 (discussing the political motives for Jonathan Pollard’s betrayal of American intelligence to Israel).

¹²⁸ See *Coker*, 433 U.S. at 598 (plurality opinion).

¹²⁹ *Id.* (plurality opinion). But compare *id.* (plurality opinion) with *id.* at 612 (Burger, C.J., dissenting):

Rape is not a mere physical attack—it is destructive of the human personality. The remainder of the victim’s life may be gravely affected, and this in turn may have a serious detrimental effect upon her husband and any children she may have. . . . [R]ecovery from such a gross assault on the human personality is not healed by medicine or surgery. To speak blandly, as the plurality does, of rape victims who are ‘unharm[ed],’ . . . takes too little account of the profound suffering the crime imposes upon the victims and their loved ones.

Id. at 612 (Burger, J., dissenting) (citations omitted); see also *id.* at 603 (Powell, J., concurring in part dissenting in part) (criticizing the plurality for ignoring the “wide variation in the effect on the victim” following rape).

¹³⁰ See 18 U.S.C. § 794(a) (1994).

¹³¹ See, e.g., *United States v. Squillacote*, 221 F.3d 542, 575–76 (4th Cir. 2000) (upholding a conviction for, inter alia, conspiracy to commit espionage despite evidence that the military information in question was already available to the general public), *cert. denied*, 121 S. Ct. 1601 (2001); RADOSH & MILTON, *supra* note 14, at 449 (quoting a high-ranking General working with the Atomic Energy Commission who believed that “the data that went out in the case of the Rosenbergs was of minor value”).

for two reasons: trials for political crimes may take place before the extent of any harm can be determined, and the actual causation of injury connected with crimes against the security of the state is often impossible to determine.¹³² Thus, by its own definition and nature, capital espionage jeopardizing national security cannot meet the murder standard used in *Coker*.

2. *Espionage Resulting in the Death of a Foreign Agent*

a. *The Enmund-Tison Standard*

Section 794(a) also makes espionage punishable by death when “the offense result[s] in the identification by a foreign power . . . of an individual acting as an agent of the United States and consequently in the death of that individual.”¹³³ This requirement that the capital espionage crime leads to a death conforms to language in *Coker* that limits the death penalty under the murder comparison to crimes “involving the taking of life.”¹³⁴ Thus, capital espionage resulting in the death of a foreign agent could be regarded as the subjective equivalent of murder because both involve “the ultimate violation of self”¹³⁵—the killing of a human being.

But does this type of capital espionage involve the same “moral depravity and . . . injury to [a] person and to the public”¹³⁶ as murder? Following *Coker*, the Supreme Court established that not all crimes resulting in the death of an individual are equal to murder in terms of eligibility for the death penalty. In *Enmund v. Florida*,¹³⁷ the Supreme Court held that despite his participation in a robbery in which two persons were killed, the defendant could not be sentenced to death if he “did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder.”¹³⁸

¹³² See Wilson, *supra* note 19, at 167 (noting that these same difficulties would exist in the context of treason prosecutions).

¹³³ 18 U.S.C. § 794(a). Moral outrage over the death of an individual similar to that involved with murder appears to have motivated the passage of the bill. See, e.g., 140 CONG. REC. H2225 (daily ed. Apr. 13, 1994) (remarks of Rep. Stearns) (“When [espionage] results in the death of an agent acting on behalf of the United States, such a betrayal becomes even more heinous [than other types of espionage].”). In fact, Congress passed this version of capital espionage in favor of another bill that would have capitally punished only espionage that created “a grave risk of death to another person.” See 140 CONG. REC. S1820 (daily ed. Feb. 24, 1994) (remarks of Senator Hatch) (referring to the other version of the bill).

¹³⁴ *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

¹³⁵ *Id.* (plurality opinion).

¹³⁶ *Id.* at 598 (plurality opinion).

¹³⁷ 458 U.S. 782 (1982).

¹³⁸ *Id.* at 795. The Court’s extensive discussion of the *Coker* proportionality analysis indicates that it did not intend to restrict its ruling to felony murder alone. Lynn D. Wittenbrink, Note, *Overstepping Precedent? Tison v. Arizona Imposes the Death Penalty on Felony Murder Accomplices*, 66 N.C. L. Rev. 817, 829 (1988).

Many commentators suggested that the Court had promulgated a bright-line “specific intent” rule for eligible death penalty murders.¹³⁹

Five years later, however, in *Tison v. Arizona*¹⁴⁰—another felony-murder case—the Court held that a defendant who does not specifically intend another’s death may nevertheless be executed if guilty of “major participation [in a crime involving a death], combined with reckless indifference to human life.”¹⁴¹ Although the Court’s standard for “major participation” was not entirely clear, the Court stressed the importance of the defendant’s presence at the scene of the murder.¹⁴²

b. *Application of the Standard to Espionage*

Section 794(a) imposes no requirement that the spy specifically intend the death of any American agent(s).¹⁴³ Nor would an individual case under the Espionage Act be likely to meet the *Enmund* standard. Aldrich Ames—the only example available for study—was apparently indifferent to the fates of the agents whose identities he revealed to the Russian government.¹⁴⁴ His motivations—\$2.7 million in payment from the KGB,¹⁴⁵ political disaffection,¹⁴⁶ and perhaps the thrill of being an important spy¹⁴⁷—were unrelated to a conscious desire to see American agents killed. He neither “committed homicide” nor participated in a deliberate “plot or scheme to murder.”¹⁴⁸

¹³⁹ See, e.g., Laura L. Kerton, Note, *Enmund v. Florida: The Constitutionality of Imposing the Death Penalty upon a Co-Felon in Felony Murder*, 32 DEPAUL L. REV. 713, 734 (1983); John C. Shawde, Note, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV. 357, 370 (1984). But see Deborah Sachs, Note, *Cabana v. Bullock: The Proper Tribunal—The Supreme Court Revisits Enmund v. Florida*, 40 U. MIAMI L. REV. 1023, 1031 (1986) (stating that the *Enmund* Court did not articulate an explicit standard for the requisite level of intent).

¹⁴⁰ 481 U.S. 137 (1987).

¹⁴¹ *Id.* at 158.

¹⁴² See *id.*; see also *Enmund*, 458 U.S. at 795 (explaining that most juries have not imposed the death penalty when, among other things, the defendant was not present at the scene of the murder).

¹⁴³ 18 U.S.C. § 794(a) (1994).

¹⁴⁴ See Interview by CNN with Aldrich Ames (Mar. 1998) [hereinafter Ames Interview] (claiming that he and his Russian contacts “never discussed the issue of what would be done with the names”), at <http://www.cnn.com/SPECIALS/cold.war/experience/spies/interviews/ames> (last visited Oct. 20, 2001); see also WISE, *supra* note 43, at 320–25 (providing other motives for Ames’s betrayals).

¹⁴⁵ WISE, *supra* note 43, at 325 (noting that Ames had been promised an additional \$1.9 million for his services).

¹⁴⁶ *Id.* at 324; Ames Interview, *supra* note 144.

¹⁴⁷ WISE, *supra* note 43, at 324–25 (“It seems clear that working for the Russians, quite aside from the money, was fulfilling some deep psychological need in Ames. They treated him like a hero.”); see also WEINER ET AL., *supra* note 44, at 289 (stating that Ames “loved the life of a spy”).

¹⁴⁸ *Enmund v. Florida*, 458 U.S. 782, 795 (1982).

Recklessness,¹⁴⁹ however, would not be hard to prove in a case involving a spy who betrayed American agents living in a country that routinely executed “moles.” The prosecution would only need to prove that which Aldrich Ames later admitted: that he “knew quite well, when [he] gave the names of our agents . . . that [he] was exposing them to the full machinery of counterespionage and the law, and then prosecution and capital punishment.”¹⁵⁰ Barring unusual circumstances, then, a case involving espionage which causes the death of a foreign agent would probably fail the *Enmund* standard of purposeful intent, but meet *Tison*’s recklessness standard.

Yet *Tison* also requires that the actor be a “inajor participant” in the crime leading to the death.¹⁵¹ The application of this rule in an espionage case is uncertain. A spy like Ames who essentially works alone rather than within a larger spy ring is clearly a major—indeed, the only—participant in the crime.¹⁵² But unlike murder, no one can commit espionage alone. Ames, for example, could not have provided the names of American agents and subsequently caused their deaths without the help of his “handlers” in the United States, the KGB, or the executioners in Russia.¹⁵³ Thus, if inajor participation is interpreted relatively, the independent actions of others involved in the espionage might mitigate the major participant’s individual moral responsibility.¹⁵⁴

Even if *Tison*’s major participation standard does not involve relative comparisons,¹⁵⁵ it does appear at least to require the defendant’s physical presence at the scene of the killing.¹⁵⁶ The *Tison* Court stressed this factor when distinguishing the holding in *Enmund*, where the defendant was waiting in a getaway car away from the scene of the killing.¹⁵⁷

¹⁴⁹ See MODEL PENAL CODE § 2.02(c) (1962) (“A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”).

¹⁵⁰ Ames Interview, *supra* note 144.

¹⁵¹ *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

¹⁵² Ames’s wife, Rosario, was also implicated in Ames’s espionage crimes. She received a sixty-three month jail sentence. WEINER ET AL., *supra* note 44, at 288.

¹⁵³ See WISE, *supra* note 43, 107–26, 254–71 (describing the roles of Ames’s handlers in the United States and of the KGB in Russia).

¹⁵⁴ See David McCord, *State Death Sentencing for Felony Murder Accomplices Under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843, 875–76 (2000) (outlining the standard for relative comparisons under the “major participation” inquiry).

¹⁵⁵ *Id.* (arguing that the *Tison* “major participation” standard must at least partially incorporate an “absolute sense of whether the defendant’s actions were significant to the completion of the [crime]”).

¹⁵⁶ See *id.* at 876 (“[T]he court likely meant ‘major participation’ to mean significant participation plus presence at the murder scene, unless the defendant’s role is dwarfed by that of the other accomplice(s).”).

¹⁵⁷ *Tison v. Arizona*, 481 U.S. 137, 149–50 (1987); *Enmund v. Florida* 458 U.S. 782, 783–85 (1982). But see Andrew H. Friedman, Note, *Tison v. Arizona: The Death Penalty and*

On remand in *Tison*, the prosecution eventually decided to drop the death penalty for the same reason: it “had no conclusive proof that [the defendants] were even present at the scene of the murders.”¹⁵⁸ David McCord notes that this distinction carries substantial weight, for “the defendant’s presence gives him an opportunity to act as a restraining influence on murderous cohorts. If the defendant fails to act as a restraining influence, then the defendant is arguably more at fault for the resulting murders.”¹⁵⁹

Even more so than an accomplice absent from the scene of a robbery or murder, a spy like Aldrich Ames lacks control over executions that take place thousands of miles away under the orders of a foreign government. Although responsible for identifying the foreign agents in the first place, Ames had no further ability to influence the decisions of the KGB or to stop the executions of the agents.¹⁶⁰ In this sense, espionage under § 794(a) lacks the continuing moral depravity inherent in *Tison*’s major participant standard.

Finally, evaluating the moral depravity of a spy against the moral depravity of a murderer requires the consideration of one factor not addressed in *Enmund* or *Tison*. Whereas felony-murder victims are usually innocent victims of violent crime, the agents implicated under § 794(a) are, in all likelihood, spies who are betraying their own country.¹⁶¹ The Aldrich Ames case illustrates the irony that this situation creates: the same people who condemn Ames’s crime praise the efforts of the spies he condemned.¹⁶² In other words, the depravity of betraying agents, unlike murder but like treason and other espionage crimes, is relative to the observer.¹⁶³ This fact does not excuse the spy who sells out his fellow agents. Rather, it demonstrates that the capital espionage crimes under § 794(a), if constitutional under a moral depravity standard, must be justified not by a proportionality review in relation to crimes against individuals, but in relation to crimes against the security of the state itself.

the Non-Triggerman: The Scales of Justice Are Broken, 75 CORNELL L. REV. 123, 132–37 (1989) (arguing that *Tison*’s elimination of the intent standard essentially overrules *Enmund*).

¹⁵⁸ McCord, *supra* note 154, at 874.

¹⁵⁹ *Id.* at 873.

¹⁶⁰ See WISE, *supra* note 43, at 265 (disputing Ames’s contention that he was able to protect some of the agents he revealed to the KGB, stating that “[i]t was a novel claim, that one could turn over the name of a Russian CIA agent to the KGB on condition that they be left alone”); see also WEINER ET AL., *supra* note 44, at 280 (noting the “KGB’s lack of cool-headedness in killing the men” Ames had betrayed).

¹⁶¹ See WISE, *supra* note 43, at 327–28. For examples of information provided by the victims in the Ames case, see *id.* at 254–71.

¹⁶² See *id.*

¹⁶³ See *supra* notes 112–14 and accompanying text.

C. Espionage Compared to Treason

1. *Treason as Betrayal*

Treason, by its broadest definition, is a betrayal of one's country and fellow citizens.¹⁶⁴ While a treasonous betrayal may well cause great harm to both the country and to individual citizens, treason historically has not required a showing of harm analogous to that of murder.¹⁶⁵ Rather, the act of betrayal is considered *per se* invidious. Whether or not it causes great harm, an act of treason undermines the "sacred agreements of society," and for this reason could deserve the ultimate penalty.¹⁶⁶

Mindful of the potential for abuse under a broad definition of treason,¹⁶⁷ the Founders carefully limited the types of betrayals that could constitute this crime.¹⁶⁸ The Constitution provides: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."¹⁶⁹ Aside from setting limits on the scope of the crime, the very act of defining treason within the Constitution itself confirmed that the Founders—like their contemporaries—viewed betrayal as the most dangerous and severe crime against the security of the state.¹⁷⁰

¹⁶⁴ See ARCHER, *supra* note 101, at 1; see also Carney, *supra* note 102, at 19 ("Treason is betrayal on a large scale.").

¹⁶⁵ See, e.g., U.S. CONST. art. III, § 3; 4 BLACKSTONE, *supra* note 67, at *81–*97.

¹⁶⁶ Carney, *supra* note 102, at 19; see also *id.* at 20–21 ("[T]reason affronts the public trust. Betrayal threatens the conditions for trust, diminishes the strength of the social contract, and ultimately threatens the survival of the group. The impact of treason on the social order is considered so severe that societies impose the strongest punishment for the crime of treason."); see also Wilson, *supra* note 19, at 159 (suggesting that treason can be defined as "the ultimate violation of community security").

¹⁶⁷ See THE FEDERALIST No. 43, at 273 (James Madison) (Clinton Rossiter ed., 1961) ("[A]s new-fangled and artificial treasons have been the great engines by which violent factions . . . 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 . . ."); Carney, *supra* note 102, at 24–31 (detailing abuses in treason prosecutions throughout the history of England).

¹⁶⁸ See THE FEDERALIST No. 43, *supra* note 167, at 273. In fact, all of the substantive and procedural elements of the Treason Clause stem from English law, as "[t]he framers did not choose to contrive their own definition of [treason]." HURST, *supra* note 26, at 3–4.

¹⁶⁹ U.S. CONST. art. III, § 3.

¹⁷⁰ See *Stephan v. United States*, 133 F.2d 87, 90 (6th Cir. 1943) ("Treason is the most serious offense that may be committed against the United States . . . and its gravity is emphasized by the fact that it is the only crime defined by the Constitution.") (citations omitted); see also 4 BLACKSTONE, *supra* note 67, at *82 (labeling treason the highest civil crime); Carney, *supra* note 102, at 21 (defining treason as "an unparalleled high crime").

Some of the Framers apparently believed that this constitutional definition of treason itself foreclosed the death penalty for other crimes against the state. During a debate over the treason clause, Rufus King warned that "the controversy relating to Treason might be of less magnitude than was supposed; as the legislature might punish capitally under other names than Treason." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 347 (Max Farrand ed., 1966); see also HURST, *supra* note 26, at 150 n.62 (articulating Rufus King's belief that the central motive for restricting the definition of treason was "to limit the

If treason is the most serious betrayal against the United States, the espionage crimes listed in § 794(a)—sharing military secrets with an enemy or providing the names and causing the deaths of foreign agents¹⁷¹—must therefore be lesser betrayals. One might argue that this fact alone makes capital espionage subjectively disproportionate under the Eighth Amendment because offenders of the lesser crime of espionage could face execution while offenders of the greater crime of treason may live.¹⁷² The *Tison* decision, however, indicates that the *Coker* test should not be applied this rigidly.¹⁷³ Instead, the inquiry is whether the betrayal required for capital espionage involves the same “moral depravity and . . . injury . . . to the public”¹⁷⁴ as that required for treason.

2. *Espionage as Treason?*

Although the capital espionage crimes in § 794(a) resemble the second type of treason defined in the Constitution, “adhering to . . . enemies,” an analysis reveals two major differences.¹⁷⁵ First, unlike espionage, the offense of treason requires that an “enemy” be the beneficiary of the offender’s crime.¹⁷⁶ Following English law, American courts have limited the definition of enemy in the Treason Clause to “subject[s] of a foreign power in a state of open hostility with us,” requiring the presence of a formal, declared war as an attendant cir-

application of the death penalty for subversive crimes”). Although the record does not indicate whether the other Framers acted upon this concern, many of their subsequent defenses of the Constitution would seem disingenuous if the Treason Clause did not guarantee substantive protection against capital punishment for other subversive crimes. See, e.g., 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 469, 489 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1859) (remarks of James Wilson); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 360 (Paul Leicester Ford ed., 1888) (remarks of James Iredell); see also HURST, *supra* note 26, at 150 n.62 (discussing remarks of Rufus King). The prevalence of the view may explain why Congress limited subversive crimes other than treason to non-capital punishments until the twentieth century. See *id.* at 151 & nn.69–71.

¹⁷¹ 18 U.S.C. § 794(a) (1994).

¹⁷² Cf. *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion) (“It is difficult to accept the notion . . . that the rapist . . . should be punished more heavily than the deliberate killer . . .”).

¹⁷³ The Court agrees that society has usually held the murderer who acts with a specific intent to kill more blameworthy than one who acts recklessly. See *Tison v. Arizona*, 481 U.S. 137, 156 (1987); *id.* at 170–72 (Brennan, J. dissenting). Yet by condoning the death penalty for the latter in *Tison*, the Court created the risk of an anomaly whereby a killer who acts recklessly may face death, but one who kills intentionally may receive a lesser sentence.

¹⁷⁴ See *Coker*, 433 U.S. at 598 (plurality opinion).

¹⁷⁵ U.S. CONST. art. III, § 3. The notion of “levying war” is subject to a strict construction that would defeat any attempt to associate this type of treason with espionage jeopardizing national security. See *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 110–12 (1807) (rejecting the notion of “constructive” levying of war).

¹⁷⁶ See U.S. CONST. art. III, § 3.

cumstance.¹⁷⁷ Treason, thus, is not any ordinary breach of allegiance to the United States. Instead, it only involves betrayals in the most egregious and severe circumstances: those occurring at wartime, and those involving the enemy.¹⁷⁸ Capital espionage under § 794(a), however, allows the death penalty without regard to the relationship between the United States and the recipient of the information.¹⁷⁹ While capital espionage certainly could encompass acts outside the scope of treason that may endanger national security, peacetime espionage, by definition, does not involve the sort of betrayal that is necessary to rise to the level of treason.¹⁸⁰

Second, unlike espionage, treason requires at least some showing of harm to the national security. Article III, Section 3 of the Constitution requires two separate elements for treason: adherence to the enemy and the rendering of aid and comfort.¹⁸¹ A treason prosecution may fail for want of either element. Therefore, a defendant who adheres to the enemy intending to give them aid and comfort is still not guilty of treason unless the government can further conclusively prove that his actions materially aided the enemy and thus harmed the United States.¹⁸²

¹⁷⁷ *Stephan v. United States*, 133 F.2d 87, 94 (6th Cir. 1943) (using December 11, 1941, the date on which the United States declared war on Germany, as the benchmark for determining when German subjects became enemies under the Treason Clause). Compare *United States v. Fricke*, 259 F. 673, 675 (S.D.N.Y. 1919) (“On the breaking out of the war between the United States and the Imperial German Government, the subjects of the Emperor of Germany were enemies of the United States . . .”), with *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254) (holding that rebels in Confederate states waging war against the United States during the Civil War were not enemies under the Treason Clause).

¹⁷⁸ See U.S. CONST. art. III, § 3.

¹⁷⁹ See *United States v. Rosenberg*, 109 F. Supp. 108, 112 (S.D.N.Y.) (“Congress wisely did not distinguish between a friendly or an enemy country in prescribing punishments for acts of espionage. The law was intended to protect and to keep inviolate our military secrets from all foreign powers.”), *aff’d*, 204 F.2d 688 (2d Cir. 1953).

¹⁸⁰ The omission of the “enemy” requirement allows the death sentence under 18 U.S.C. § 794(a) for supplying even *allies* of the United States with classified military information. The case of Jonathan Pollard illustrates this anomaly. Pollard, a United States naval intelligence analyst, supplied the Israeli government with classified U.S. military intelligence relating to Israel’s enemies in the Middle East. See Perl, *supra* note 127, at 9. He pleaded guilty to espionage in 1986, before the restoration of the federal death penalty, and was sentenced to life in prison. *Id.* at 9–10. Although Pollard accepted over \$50,000 from the Mossad, Israel’s secret service, he claimed that concern regarding Israel’s security was his major motivation. *Id.* at 10–11.

Notably, the capital crimes for which the government has enforced death sentences during this century—sabotage and wartime espionage, see Wilson, *supra* note 19, at 156—can be distinguished from peacetime espionage using the enemy criterion. Both crimes require, at a minimum, that the defendant’s betrayal take place in wartime. See 18 U.S.C. § 794(b) (1994); *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942).

¹⁸¹ U.S. CONST. art. III, § 3; *Cramer v. United States*, 325 U.S. 1, 29 (1945).

¹⁸² See *Cramer*, 325 U.S. at 36–37, 48. In *Cramer*, the government proved that the defendant was sympathetic to the German government during World War II, and that he had

Capital espionage, by contrast, concerns only a possibility of harm. Section 794(a) embraces the “adherence” prong of treason by requiring that the actor commit espionage “with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation,” but imposes no requirement that the specific act of espionage actually aid the enemy.¹⁸³ Espionage prosecutions, in fact, often succeed in cases where the defendants could not have significantly aided another country, or where evidence of such aid is wholly speculative.¹⁸⁴ Because the betrayal in capital espionage involves only a possibility rather than the actuality of harm to the security of the country, it is inherently less egregious and less severe than that of treason, and thus involves an inherently inferior moral depravity and injury to society. As such, the *Coker* decision renders § 794(a) unconstitutional under the Eighth Amendment.

One could contend that the second type of espionage under § 794(a), concerning offenses that compromise foreign agents, is akin

met and conversed with known German spies in the summer of 1942. *Id.* at 36–37. In a 5–4 ruling, the Court held that this evidence was insufficient to sustain a treason conviction:

The Government contends that . . . it has shown a treasonable intent on Cramer’s part in meeting and talking with [the spies]. But if it showed him disposed to betray, and showed that he had opportunity to do so, it still has not proved in the manner required that he did any acts . . . which had the effect of betraying by giving aid and comfort. To take the intent for the deed would carry us back to constructive treasons.

Id. at 39–40 (emphasis added).

¹⁸³ See 18 U.S.C. § 794(a); *Gorin v. United States*, 312 U.S. 19, 27–28 (1941).

¹⁸⁴ In *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1601 (2001), for example, the defendants were convicted under § 794(a) for conspiring to provide East Germany with “information relating to the national defense.” *Id.* at 575. The court upheld the conviction despite the defendants’ claim that the transmitted information was already available to the general public. *Id.* at 575–76. The possibility that East Germany could have obtained, or might have already obtained, the same information from another source (thus obviating most of the harm the defendants could have caused) did not concern the court. Rather, the Sixth Circuit interpreted *Gorin v. United States* to hold that the “intent” clause in the Espionage Act “provided a sufficient limitation on the reach of the Act.” *Id.* at 577.

The Rosenberg case also reveals the importance of the omission of a harm requirement for espionage. The government charged that the Rosenbergs provided the Soviet Union with classified sketches and information that could have been used to construct an atomic bomb. At the sentencing hearing, Judge Irving Kaufman accused the Rosenbergs of “putting into the hands of the Russians the A-bomb,” and thus causing “the Communist aggression in Korea, with the resultant casualties exceeding 50,000” Judge Kaufman added, “Indeed, by your betrayal, you undoubtedly have altered the course of history to the disadvantage of our country.” RADOSH & MILTON, *supra* note 14, at 284. In retrospect, the evidence supporting these allegations of harm is far from convincing. The record, for example, contained no evidence at all connecting the Rosenberg’s espionage to the Korean War. *Id.* Prominent nuclear scientists such as Albert Einstein, Harold Urey, and Philip Morrison further charged that the information the government accused the Rosenbergs of transmitting could not have conveyed anything of “real value” to the Russian nuclear program. *Id.* at 432–43. At best, the sketches and diagrams may have helped to confirm the genuineness of information the Russians received from another spy, Klaus Fuchs. See *id.* at 444–49.

to treason in that it retains a harm requirement—"the death of that individual."¹⁸⁵ This analogy is faulty for two reasons. First, whereas the harm caused by treason must implicate national security,¹⁸⁶ the harm accompanying espionage under § 794(a) need only affect a single human being. This is not to say that harm done to individuals is necessarily inferior to harm inflicted against the state.¹⁸⁷ Rather, this difference underscores that the subjective proportionality of espionage revealing foreign agents should be evaluated by reference to murder, a crime against an individual, instead of treason, a crime against the state.¹⁸⁸

Second, § 794(a) on its face does not require that the perpetrator be proximately responsible for the harm. The statute makes espionage capital when the crime "result[s] in the identification by a foreign power . . . of an individual acting as an agent of the United States and consequently in the death of that individual."¹⁸⁹ The absence of the word "cause" from either clause of the statute is conspicuous, and probably not accidental. Both of the major recent incidents involving alleged unmasking of foreign agents—the cases of Aldrich Ames and Robert Hanssen—have generated considerable doubt regarding the proximate cause of the betrayals due to the presence of multiple sources.¹⁹⁰ In fact, the only party that could definitively explain causation in most § 794(a) cases would be the foreign government responsible for the executions, a fact that presents serious problems regarding cooperation and reliability.¹⁹¹ The broad wording of the statute avoids this evidentiary quandary, but at the expense of encompassing a great number of espionage crimes that obviated the essential "enemy" and "harm" requirements of treason.

¹⁸⁵ 18 U.S.C. § 794(a).

¹⁸⁶ See *Cramer*, 325 U.S. at 38 (holding treason indictment invalid because the government failed to demonstrate the defendant's act "strengthened [the enemy] or weakened the United States").

¹⁸⁷ See *Wilson*, *supra* note 19, at 159–161 (discussing the difficulty of evaluating harms inflicted against the state in relation to those inflicted against individuals).

¹⁸⁸ See *supra* Part IV.B.2 (applying the *Enmund-Tison* standard for capital murder to espionage resulting in the death of a foreign agent).

¹⁸⁹ 18 U.S.C. § 794(a) (emphasis added).

¹⁹⁰ The Russian government already knew that many of the spies "revealed" by Ames were working for the United States, thanks to a former CIA agent named Edward Lee Howard, who defected to the Soviet Union in 1985. WEINER ET AL., *supra* note 44, at 52–53; WISE, *supra* note 43, at 141–42, 258–60. Ames, in turn, had apparently already informed the Soviets of the moles later "revealed" by Robert Hanssen. See Dan Eggen & Brooke A. Masters, *U.S. Drops Demand for Hanssen's Execution*, WASH. POST, June 15, 2001, at A1.

¹⁹¹ Revealing the original source of a tip and the decisionmaking process would jeopardize the security of the "sources and methods" essential to a major intelligence operation. See, e.g., Perl, *supra* note 127, at 26 (quoting a former Director of Naval Intelligence who warns that revealing such information, even to an ally, could have devastating impact on future operations).

D. Aggravating Circumstances

The *Coker* plurality held that appropriate aggravating circumstances could justify the imposition of the death penalty for a crime that would not otherwise merit such punishment under a subjective proportionality analysis.¹⁹² Following a conviction for peacetime espionage, the Federal Death Penalty Act requires that the judge or jury find at least one aggravating circumstance beyond a reasonable doubt before returning a sentence of death.¹⁹³ The Act provides three aggravating circumstances for treason and espionage: a "prior espionage or treason offense," the creation of a "grave risk to national security," and the creation of "a grave risk of death to another person."¹⁹⁴ The presence of one or all of these circumstances, however, is insufficient to redeem the appropriateness of the death penalty for peacetime espionage.

The first of the circumstances, a prior espionage or treason offense, is not only unlikely, but irrelevant under a proportionality analysis. In *Coker*, the plurality held that a prior record of even "capital felonies" did not justify the imposition of the death penalty as long as the "instant crime" did not merit capital punishment.¹⁹⁵ The federal statute is less expansive than that in *Coker*, requiring only that the prior offense involve the possibility of life imprisonment.¹⁹⁶

The presence of the second circumstance, the requirement that the defendant "knowingly created a grave risk of substantial danger to the national security," may enhance the culpability of a defendant who provides information regarding the national defense to foreign powers.¹⁹⁷ Yet this factor still requires neither the actuality of harm inherent in treason or murder, nor the dealings with wartime enemies required for a finding of treason. Under subjective proportionality review, the circumstance thus does not alter the basic, non-capital nature of the underlying crime of espionage.¹⁹⁸ The presence of the third factor, "knowingly creat[ing] a grave risk of death to another person"¹⁹⁹ also fails for this reason, because it merely restates the recklessness requirement deemed necessary under *Tison*.²⁰⁰

¹⁹² *Coker v. Georgia*, 433 U.S. 584, 599 (1977) (plurality opinion).

¹⁹³ 18 U.S.C. § 3593(d) (1994).

¹⁹⁴ *Id.* § 3592(b).

¹⁹⁵ *Coker*, 433 U.S. at 599 (plurality opinion).

¹⁹⁶ *See* 18 U.S.C. § 3592(b)(1).

¹⁹⁷ *See id.* § 3592(b)(2).

¹⁹⁸ *Cf. Coker*, 433 U.S. at 599 (plurality opinion) (noting that the aggravating circumstances are insufficient because they "do not change the fact that the instant crime being punished is a rape not involving the taking of life").

¹⁹⁹ 18 U.S.C. § 3592(b)(3).

²⁰⁰ *See Tison v. Arizona*, 481 U.S. 137, 157 (1987) (describing recklessness as "knowingly engaging in criminal activities known to carry a grave risk of death").

Finally, the presence of multiple aggravating circumstances—such as where a spy causes both the death of a foreign agent and endangers the national security—does not justify the death penalty under *Coker*. Just as *Coker* could not be executed for committing two non-capital crimes,²⁰¹ a spy should not face death for a crime falling short of both murder and treason. Under subjective proportionality review, multiple close calls do not justify a death sentence.

CONCLUSION: THE DEATH PENALTY FOR PEACETIME ESPIONAGE IS OBJECTIVELY AND SUBJECTIVELY DISPROPORTIONATE

Espionage is a terrible crime, offensive to our basic notions of honor, security, and patriotism. When espionage leads to the death of another person, innocent or not, the crime becomes even more heinous. This visceral reaction shared by most Americans doubtless played a role in Congress's imposition of the federal death penalty for peacetime espionage in 1994.²⁰²

The Supreme Court, however, has held that even the most morally reprehensible crimes do not always merit society's ultimate sanction. Thus, the crime of rape—the "ultimate violation of self" next to murder²⁰³—does not merit the death penalty. Applying the same rationale, peacetime espionage should not be a capital crime.

From an objective standpoint, execution for peacetime espionage has fallen out of favor even among those countries that retain the death penalty for other crimes. Contemporary public support for capital espionage executions appears to be lukewarm, at best. Moreover, the idea of capital peacetime espionage finds no precedent in the history of the United States dating back to the framing of the Constitution.

Subjectively, espionage fails to measure up to the standards of inherent moral depravity and injury involved with the capital crimes of murder and treason. Espionage, even when leading to the death of a foreign agent, fails to meet murder's minimum requirements of participation and presence. Likewise, espionage, even when jeopardizing the national security, does not involve a betrayal as dangerous or as harmful as that required by treason.

The death penalty for espionage thus creates an anomaly in sentencing whereby spies could face death while purposeful murderers

²⁰¹ See *Coker*, 433 U.S. at 599 (plurality opinion).

²⁰² See, e.g., H.R. 4060, 103d Cong. (1994); 140 CONG. REC. H2225 (daily ed. Apr. 13, 1994) (statement of Rep. Stearns); 140 CONG. REC. S1820 (daily ed. Feb. 24, 1994) (statement of Sen. Hatch).

²⁰³ *Coker*, 433 U.S. at 597 (plurality opinion).

and dangerous traitors might live.²⁰⁴ Such a “wanton and freakish” result violates the Eighth Amendment’s prohibition against cruel and unusual punishments.²⁰⁵ Spilling the blood of a guilty spy like Robert Hanssen—or threatening the same against a wrongly accused one such as Wen Ho Lee—may satisfy the honor of an offended patriot, but only at the expense of the principles which adhere him or her to this country in the first place.

²⁰⁴ The death penalty for treason is not mandatory, nor has it been throughout much of American history. See 18 U.S.C. § 2381 (1994) (providing, as an alternative to death, that the offender “shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States”); ARCHER, *supra* note 101, at 23–24 (noting that Congress in 1789 originally allowed imprisonment and fine as an alternative punishment for traitors, “at the discretion of the court”); HURST, *supra* note 26, at 146 n.49 (explaining that Congress has provided “an alternative of fine and imprisonment” for treason since the Civil War).

²⁰⁵ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 224 (1976) (plurality opinion).