

The Ezra Pound Case: Freedom of Speech V. The Treason Clause*

Hsiu-ling Lin

ABSTRACT

The first part of this essay lays out the literary debates on Ezra Pound's politics. Literary critics regard Pound's fascism as the signatory act of collusion between modernist poetics and right-wing politics. Charles Bernstein, for instance, typifies the harsh criticism that justifying Pound's fascism is justifying fascism. I argue for historicizing Pound's ideas of fascism, a mixture of guild socialism and social credit theory, which does not fall into easy categories of either left or right. Furthermore, in the true libertarian spirit, defending Pound's right of anti-Semitic speech does not necessarily mean that one has to agree with his politics. We should exclude the issue of anti-Semitism from Pound's treason case.

Examining the legal aspect of the treason charge against Pound in light of the United States Constitution and relevant precedents reveals that because the treason charge requires both *an overt act* of either "levying war" against the government of "adhering" and "giving aid and comfort" to the enemies, *and the intent* of betraying one's country, Pound's radio speeches, do not show sufficient evidence that Pound intended to betray his country. The treason charge against Pound was insufficiently founded. Based on both the intent of the Constitution's framers and the judicial precedents, Pound should have been acquitted of treason.

KEY WORDS

Modernist poetics	Right-wing Politics of modernism
Treason	Freedom of Speech
War-time broadcasting	The Overt Act
The Intent	The U.S. Constitution
World War II	Fascism
Insanity	Constructive treason
National citizenship	Intellectual Allegiance

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

— John Stuart Mill, *On Liberty*¹

It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.

— Chief Justice John Marshall, *Ex parte Bollman*, 1807²

Thus we find, in the constitutionally defined crime, two elements, the intent and the act; neither is dominant. Intent minus act is not treason, any more than act minus intent is.

— James Willard Hurst, *The Law of Treason in the United States* (163)

Treason is a word of many meanings. In its broadest sense it refers to a betrayal of persons, ideas, principles, political ideology, or religious beliefs. More narrowly, treason is “the betrayal of allegiance owed a political sovereign either because of citizenship or because of acceptance of the

protection of laws" (Hurst 14-15). The United States Constitution adopts an even more limited prohibition against treason: "Treason against the United States shall consist only in Levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."³

In 1943, Ezra Pound was indicted for treason by the U.S. government for his war-time radio broadcast of Ente's "American Hour" at Rome.⁴ Between 1941 and 1943, Pound, a United States citizen, took part in more than 300 broadcasts.⁵ In these speeches, he claimed that the entrance of the U.S. into World War II was a mistake. He attacked Jews and Roosevelt. He criticized the international exploitation masterminded by Jews and the British Empire. He talked about Italy as the model patron state of art and culture. Sometimes, he read his *Cantos*. And at other times, he stated his opinions on governmenting, money reforms, international politics, literature, history, universities, etc.

At the end of the war, in May 1945, Pound was arrested and confined at the Detention Training Center, near Pisa, where he wrote "The Pisan Cantos." On November 17, 1945, he was flown to the United States and placed in the District of Columbia jail. He was accused of "counselling and aiding the Kingdom of Italy and its military allies."⁶ He was also accused of "creating racial prejudice" in the United States (Norman 78).

Julien Cornell, Pound's attorney, used the insanity defense strategically to avoid the treason charge—getting the psychiatrists retained to confirm that Pound was never likely to improve, and then securing his release on the ground that his insanity was incurable but in no need of hospitalization.⁷ A court hearing was held in 1946 to determine whether Pound was mentally and physically capable of standing trial and able to confer with his attorneys. Four court-appointed psycholo-

gists declared that Pound was insane and unable to stand trial.⁸ Pound's wife, Dorothy, acting as his guardian, had petitioned for a writ of habeas corpus on the ground that it was absurd to confine Pound for life because he could not be tried. However, her appeal was denied in the lower court in 1948. He was then held in St. Elizabeths Hospital, without trial, for another 12 years.

Pound's indefinite incarceration without trial posed a complicated problem for the American government. Thurman Arnold, the attorney who ultimately secured Pound's release in 1958, summarizes the situation as follows:

The fact that he was too mentally ill to be tried was not a reason for releasing him, because this had nothing to do with whether he was insane at the time of the offense. He could not be pardoned, because he was not convicted of any offense and there was nothing to pardon him for. He could not be tried and acquitted on the ground of insanity, because he refused to make that defense and, insane or not, the Supreme Court had held that he could not be forced to.⁹

Pound would not be released unless the prosecution dismissed the charges.

As Pound aged, the American political climate also changed. By the mid-1950s, the political climate in the United States had changed in Pound's favor. Fascism was no longer a threat; even the perceived threat of communism was declining. As Pound's indefinite incarceration without conviction became more and more embarrassing for the American government, the fear grew that he might die in St. Elizabeths. Even the somewhat conservative *Time* magazine began to voice sympathy for Pound's release.¹⁰ It was popularly felt unjust that Tokyo Rose¹¹ and other convicted traitors had been freed, while America's greatest poet, who had not only contributed

to modern poetry but had also helped young poets and writers, and who had never been convicted of any crime, was being held as a prisoner in a country that prided itself on political freedom, and would very likely be so held until his death (Meacham 33). After a campaign led by Robert Frost, T. S. Eliot, and Archibald MacLeish,¹² the U.S. Government dismissed the charge, and Pound was released as "incurable" in April 1958. He then returned to Italy at the age of 72, taking a vow of silence.

His treason charge is more a literary than a legal question, not only because it interests more literary than legal scholars, but also because when people talk about Pound's treason, the term "treason" is not used in its strict sense. Though critics have good reasons to condemn Pound's politics, moral indignation is one thing and legal conviction for treason quite another.

This paper examines the treason charge against Pound in light of the United States Constitution and relevant precedents. I do not think Pound had a First Amendment right to broadcast for America's enemies after America declared war on Italy: this is to say, I will not claim that Pound's being prosecuted for treason violated the First Amendment. Nonetheless, from the perspective of the common law, the treason charge against Pound was insufficiently founded. In this paper, I will demonstrate that the treason clause of the Constitution was intended to be restrictive and narrow, a departure from the broader constructive treason in British common law. I will then show that U.S. court opinions have interpreted the treason clause narrowly. Based on both the intent of the Constitution's framers and the precedent, I think Pound should have been acquitted of treason.

Perhaps the best way to examine the charges against Pound for treason as they relate to law and literature is to separate the moral condemnation of Pound's politics in today's literary discussion from the legal discussion; this will help us

decide whether law and literature, as quite distinct disciplines, can enrich each other, or, as Richard Posner claims, that they cannot be applied to each other.¹³

Section I: Literary Aspects:

Collusion between Modernist Poetics and Right-Wing Politics

Critics regard Pound's treason as the signatory act of collusion between modernist aesthetics and right-wing politics. The case raised serious issues: the proper role of psychiatric examination in the judicial system;¹⁴ the issue of freedom of expression, including radio speeches and censorship during war-time; and the definition of treason. As Pound was an extremely important figure in modern literature, his case not only raised controversial legal issues, but also had a great effect on the views of modernism generally. Modernism was no longer seen as a purely aesthetic or stylistic revolution.¹⁵

Ezra Pound's support of Mussolini and Italian Fascism during World War II is disturbing for literary scholars. Pound was emblematic of a number of early twentieth-century radical intellectuals who were seduced into authoritarianism. Pound's poetics is best understood in light of its politics, in line with the modernist legacy. Pound, W. B. Yeats, Wyndham Lewis, and T. S. Eliot to a degree, all contributed to the shaping of fiercely crafted, elitist, antihumanist and impersonal style that T. E. Hulme helped to outline as a dominant mode in high modernism. The high modernists were impatient with the masses, and firmly believed in strict hierarchy. Pound extended the aesthetics of authority into the politics of an equally severe and controlled order in the state. Pound's embrace of authoritarianism began as an earnest search for social and political justice and fell into deep racial hatred.

Equally disturbing as Pound's broadcasting for America's enemies during wartime is his support of fascism and his racist speech. Pound's "fascism" was more a mixing of Guild

Socialism and Social Credit theory.¹⁶ I do not intend to gloss over the fact that Italian fascism was highly repressive, particularly with regard to specific groups: the working class, black people in Ethiopia, and, after 1938, Jews. Nor do I intend to excuse Pound's racism and fascism, but Pound did not fit any easy definition of fascism. Our current understanding of fascism is heavily influenced by the Holocaust, and the post-Cold War ideological opposition between democracy and other regimes, but in the 1940s, fascism had wider political and intellectual appeal than it has currently and greater permutation than our current ideology may allow. Pound was attracted to Italian fascism by the ideas of a "totalitarian" state and the concept of hierarchical order. Pound saw the fascist national state as a solution to the problems of international exploitation, to which he linked Jews and Bolshevism. His attraction to Italian fascism should also be framed within the context of his lifelong concern with the issues of culture, patrons of art, the economic system, and justice. He saw the state of Italy as a great patron of culture and artists.

Pound's case also opens up a lively discussion of poetics, ethics and politics. Frank Kermode argues that "[t]here may even be a real relation between certain kinds of effectiveness in literature and totalitarianism in politics."¹⁷ Donald Davie claims of Pound: "The development from imagism in poetry to fascism in politics is clear and unbroken."¹⁸ Charles Bernstein harshly criticizes the justification of Pound's fascism:

But perhaps fascism has won the day, anyway. When Pound the great artist is excused for his politics, fascism has won. When Pound's politics are used to categorically discredit the compositional methods of his poetry, fascism has won. When Pound's poetry is exalted and his politics dismissed as largely irrelevant to his achievement, fascism has won. When Pound's politics are

condemned, his poetry acknowledged or ignored in passing, but sanitized forms of his ideas prevail—the virtue of authority, property, and the homestead (“family values”), the sanctity of the classics, the condemnation of the nonstandard in favor of “the plain sense of the word” and the divine right of the West (or East) to harness and bleed the rest of the world—fascism has won.¹⁹

From the speech act theory of J. L. Austin and Wittgenstein, Geoffrey Hill, arguing eloquently for moral liability in the use of language, holds that the integrity of Pound's struggle could not absolve him of responsibility for the vulgar cruelty of his anti-Semitism.²⁰ For Hill, the poet does not only preach morality, he also practices it in his writing. Hill thus argues that aesthetics and ethics are one,²¹ and that there is no private discourse. Private discourse is public and a writer is morally liable for his writing. In Hill's view, moral exactitude and technical precision are embodied in each other.²² He warns that a poet can be a dangerous legislator for society. Hill faults Pound for mistaking Shelly's metaphor for legislative act: “In *How To Do Things With Words* Austin writes that a verdictive is ‘a judicial act as distinct from legislative or executive acts, which are both executives.’ Pound's error was to confuse the two, to fancy that poets' ‘judicial sentences’ are, in mysterious actuality, legislative or executive acts. But poets are not legislators, unless they happen to be so employed, in government or law.”²³

Others see a conspiracy in Pound's release. Stanley Kutler, in his book *The American Inquisition: Justice and Injustice in the Cold War*, has more sympathy for the left-wing intellectual victims of McCarthyism. He accuses America's legal institutions of being wholly ineffectual in their defense of civil liberties during the McCarthy period. Yet, his treatment of Pound does not fit well into his scheme. He intimates that

Pound was perfectly sane, though hopelessly irascible, and that St. Elizabeths' administrator protected him by continually reporting that he was insane, despite clear evidence to the contrary. Pound's case exemplifies for him the law's occasional inability to reach the guilty.²⁴

Torrey, Pound's biographer, agrees that the insanity diagnosis protected the poet from trial, and that Dr. Overholser, the head psychiatrist at St. Elizabeths, protected Pound by locking out the press, the public and the Department of Justice (Torrey 248). At that time, many people thought that Pound's insanity was feigned and that he escaped conviction because he was a famous poet. One man wrote to President Truman that Pound was faking insanity and urged the President to "hang him promptly." A group of citizens from New York wrote to President Truman claiming that Pound "assisted the perpetrators of the slaughter chambers" and insisting that "he must suffer the same sentence meted out by the English people to traitors Amery and Lord Haw-Haw." Writer Albert Maltz said that Pound, as a poet, had committed double treasons—betraying his obligation as a citizen and betraying humanity: "If Ezra Pound were a lawyer, doctor, businessman or factory worker, no voice would be raised in his defense. Yet it is because he is a poet that he should be hanged, not once but twice—for treason as a citizen, and for his poet's betrayal of all that is decent in human civilization."²⁵ Another popular reaction was that "[s]uch a man should not escape penalty for his misdeeds."²⁶

Indeed, Pound's anti-Semitism should not affect the legal determination of whether Pound committed treason. Pound may be faulted morally, but we must defend his right of speech regardless of our disagreement with his politics. No one should be persecuted for his racism, even if we disagree with his racist ideas. Racist behavior is restricted, but no law limits racist speech, although legal theorists debate whether racist speech deserves First Amendment protection. Some think that

racial insults are undeserving of first amendment protection. Some argue that one should adopt "content neutrality" doctrine to political speech.²⁷

As the Skokie case (1977) shows, even anti-Semitic statements are protected by the First Amendment.²⁸ The National Socialist Party of America (NSPA), a small Chicago-based Nazi group led by a provocateur, Frank Collin, announced its intention to hold a pro-NSPA demonstration on the steps of Skokie's village hall. A majority of the Skokie residents were Holocaust survivors. The Board of Trustees of the Village of Skokie banned the NSPA from appearing in Skokie, yet Collin refused to acquiesce. With the legal assistance of the American Civil Liberties Union, he sued Skokie on the grounds that Skokie's actions violated his First Amendment free speech rights. After protracted legal struggles, the courts finally ruled in Collin's favor, declaring that speech may not be abridged because of its threatening content. The heart of this doctrine is the "content-neutrality rule" which holds that political speech shall not be abridged because of its content.²⁹

Moral indignation at the atrocity of what Hitler did to the Jews easily leads one to sentence Pound, even before giving him a fair trial. Shall we now render to law the things that are law's and to literature the things that are literature's?³⁰

Section II: Legal Aspects: Freedom of Speech v. the Treason Clause

Would Pound have been convicted of treason if he had been sent to trial? By examining the changing concept of treason in British and American legal history, I provide a possible answer to this question. Based on relevant legislative history and judicial opinions, had Pound come to trial, there was insufficient basis for conviction.

I am not arguing for Pound's freedom to broadcast for

America's enemies during wartime, but rather contending that his treason charge was without adequate basis. First, the treason clause requires an overt act of overthrowing or levying war against the country with an intent of betraying political allegiance to the United States. A treasonous overt act must advance beyond the stage of thought into that of execution. Pound's broadcasts were mere words, which is ironic, for Pound believed in action and was interested in Confucianism, which he believed was an action philosophy. Further, the content of Pound's broadcast did not endanger national security. The treason clause's purpose is to prevent the violent overthrow or subjugation of the government, either by domestic subversion or external aggression. Lastly, even though Pound did broadcast for Italy, he did not intend to betray his country. Pound, with his anti-American, pro-Nazism, more resembles such dissenting literary figures and intellectuals as Socrates and Dante.

Pound's main defense would have been the First Amendment guarantee of free speech. At the beginning of each broadcast, an announcer made the following statement:

The Italian radio, acting in accordance with the Fascist policy of intellectual freedom and free expression of opinion by those who are qualified to hold it, following the tradition of Italian hospitality, has offered Dr. Ezra Pound the use of the microphone twice a week. It is understood that he will not be asked to say anything whatsoever that goes against his conscience, or anything incompatible with his duties as a citizen of the United States of America. (Quoted in Cornell 1)

The announcement was self-serving, however, and was of arguably less weight legally during wartime when U.S. national security was at stake, because the treason clause overrides the First Amendment.³¹ Pound argued that "I do not

believe that the simple fact of speaking over the radio, wherever placed, can in itself constitute treason. I think that must depend on what is said, and on the motives for speaking."³² Pound, then, offered a narrow understanding of treason.

Pound in one of his radio speeches said: "My talks on the radio will eventually have to be judged by their content. Neither the medium of diffusion nor the merits or defects of my exposition can be the final basis of judgment. The contents will have to serve as that basis."³³ In his radio speeches, Pound lectured mostly against Western capitalism, Churchill, British Imperialism, international loans, international exploitation, the Jewish conspiracy he thought stood behind the international conflicts, and Roosevelt's foreign and economic policy, which for him was "Communism." The progressive tradition with its development of public power, civil-service reform, and social-welfare measures through the New Deal, designed to counter the Great Depression of the 1930s, were all considered by Pound a communist strategy. He did not ask the American army to surrender. He did not say that the American army should be bombed. He did say that America should not have been dragged into a war caused by international exploitation, mostly by the United Kingdom. Aside from his notorious racism, Pound at most made anti-war speeches and was critical of American policies and President Roosevelt.³⁴

To Pound, Roosevelt was a traitor, and Pound's radio speeches were meant to "save the United States Constitution." Pound's reading of Sir Edward Coke has significant influence as far as his intent of treason is concerned. For Coke, the concealment of treason is also treason. Pound found support in his reading of Coke's *Institutes* and the article on misprision of treason: "In legal understanding it signifieth, when one knoweth of any treason or felony, and concealeth it, this is misprision, so called, because the knowledge of it is an ill knowledge to him."³⁵ Pound thought President Roosevelt was a traitor, so for him to have kept quiet would have been

"misprision of treason" that is, "concealment of, or omission to notify the authorities of, treason" (Meacham 71). "I consider myself a 100 percent American and patriot," and "I am only against Roosevelt and the Jews who influence him" (Norman 9). Pound believed in Mencius's dictum: "Is there any difference between killing a man with a sword, and killing him with a system of government?"³⁶ Pound's support of Mussolini was merely verbal. Neither did he enlist in the Fascist army, nor did he join the Fascist Party. His "giving aid and comfort" and "adhering to the enemies" were a type of conduct quite distinct from activities like selling provisions and conveying intelligence to an enemy. His adherence was purely intellectual.

I do not intend to argue, in Pound's case, for the absolute freedom of speech, nor that the right of speech should be protected during war time. Certain types of expression, such as obscenity, defamation, hard-core pornography, and coercive speech, are limited even during peace time. Certain people, such as former government employees taking a National Security oath, are understandably restricted in what they can say. The right to free speech does not protect these actions. Commenting on the *Rosenbergs* case, Henry Mark Holzer observes:

In the first place, there cannot be a right to speech or press that allows affirmative steps to disclose information, which in the hands of America's enemies, could violate the legitimate rights of Americans to survive. In other words, there is no right to violate a right. Second, the Supreme Court never has held that the first amendment is entitled to a privileged position in either the Bill of Rights, or in the entire constitutional constellation of which the first amendment and the Bill of Rights are but a part. And third, federal courts have held, at least in the case of the *Rosenbergs*, that there is

no first amendment right to pass atomic secrets to the Soviets.³⁷

(a) Constructive Treason in English Common Law

"Treason" was a term familiar in common law even before it was codified as the Statute of 25 Edward III,³⁸ which in 1351, defined seven types of behavior as treason: (1) levying war against the King; (2) adhering to the king's enemies, giving them aid and comfort; (3) compassing or imaging the death of the king; (4) violation of the king's wife, eldest unmarried daughter, or wife of the heir apparent; (5) counterfeiting; (6) knowingly bringing counterfeit into the country, with fraudulent intent; and (7) slaying the Chancellor, Treasurer, or one of the King's justices.³⁹ Before the modern era, the King was considered head of the body-politik and his life could not be taken away by treasonable practices without involving the whole nation in blood and confusion (Hurst 43).

In British common law prior to the eighteenth century, treason had been extended to cover a great variety of treasonable act and intents, which could be "constructed" and found by adequate inference. Men were convicted on the basis of the expression or advocacy of ideas whose "natural" consequences, as deduced or "interpreted" by the crown or the speaker's political opponents might do harm to the crown or the state. Especially during the Tudor period, people were convicted of treason for reasons including religious conflict, opposition to royal supremacy, political factions in the court, conflict between the crown and parliament, and even adultery with the Queen.⁴⁰

Treason was also a familiar charge in English literature. Sir Thomas Wyatt and Henry Howard, Earl of Surrey, (who both introduced the sonnet form to English verse), were charged with treason. Sir Wyatt had been a lover of Anne Boleyn before her marriage to Henry VIII. He was twice

imprisoned on suspicion of treason. The Earl of Surrey, as a member of Howard family, was also executed on a trumped-up charge. During the Reformation, Sir Thomas More was executed for his adherence to the Roman Catholic faith. In 1527, he refused to endorse King Henry VIII's plan to divorce Catherine of Aragon.⁴¹ In 1535, More was found guilty of treason and was beheaded for refusing to acknowledge Henry as supreme head of the Church of England. Sir Walter Raleigh was accused of complicity in a plot in favor of Lady Arabella Stuart when James I succeeded to the throne in 1603. He was charged with treason, condemned to death, reprieved and imprisoned for 12 years in the Tower of London.⁴² Anglo-American revolutionary writer Thomas Paine was also charged with treason. He published pamphlets, *Common Sense* and *The Crisis*, calling for American independence. After returning to England in 1787, he published *The Rights of Man* (1791-92), a defense of the French Revolution which responded to Edmund Burke's *Reflections on the Revolution in France* (1790). He was then declared an outlaw for treason and fled to France.

These writers might not have been convicted of constructive treason solely on the basis of their writing, yet, as Thomas Paine's case makes clear, constructive treason posed a serious threat to freedom of expression, especially during the latter part of the seventeenth century when printing became more widespread and the ideas of the divine rule of the monarchy and the colonial rule of the crown were challenged. Under the doctrine of constructive treason, English judges ruled that mere written or printed matter against the crown and the government could constitute a treasonable offense. John Twyn was the first printer to be convicted on the basis of a constructive interpretation of treason. In 1664, after the Restoration, he was hanged, drawn and quartered after government officers had seized the proofs of a book suggesting that the king was accountable to the people and that the people were entitled to self-governance.⁴³

The doctrine of constructive treason was abandoned after 1720, because juries were often reluctant to convict. The death penalty was in many cases considered too drastic.⁴⁴ Since then, treason charges have been based on direct evidence, not constructive conclusions. This is a natural consequence of a period of relative political stability.

(b) The U.S. Treason Clause

The natural starting point for the discussion of America's law of treason is the American Revolution, which captures the irony of treason. The war for American Independence was a treasonous act in the eyes of the British. Resistance to the Stamp Act first raised the issue of treason in America. London demanded repression and punishment, but the local city councils such as those in New York and Boston, were unwilling to charge people with treason. By midsummer of 1768, aware that local juries might be sympathetic to an accused traitor, British officials searched for a means to bring persons suspected of treason to England. The ministry discovered an old statute passed in the reign of Henry VIII, an "act for the trial of treasons committed out of the King's dominions" which made it feasible to transport the American traitors. The act provided that any treason committed out of the realm of England might be tried at Westminster before King's Bench or in any English county by special commissioners appointed by the king. After the Boston Tea Party in December, 1773, law officers, applying rules of constructive treason, decided that the Bostonians had levied a war against the king. In August 1775, a royal Proclamation of Rebellion declared that the North American colonies had "proceeded to open and avowed rebellion, by arraying themselves in a hostile manner, to withstand the execution of the law, and [are] traitorously preparing, ordering and levying war against us,"⁴⁵ Efforts to bring Americans to trial under English law had

proved futile. Trying Americans in England for treason aroused hostility, because it violated local judicial right. Indeed, these coercive measures helped drive the Colonies to armed struggle for independence (Chapin 10-28).

Although Haupt's assistance to his son was consistent with the normal responses of a loving father, Haupt knew that his son was working for Germany and thus knowingly helped the German cause. The *Cramer* Court held that ordinary commercial transactions, such as purchasing goods, holding money on deposit, provisioning a ship, and borrowing from a bank were held sufficient to constitute overt acts when linked with an intention to thereby give aid and comfort to the enemy. Haupt's assistance was to be sufficient proof of aiding and abetting. Moreover, the jury could reasonably infer treasonous intent from Haupt's aid. In the retrial, Haupt received life imprisonment and a \$10,000 fine.

The Court held: "To make treason, the defendant not only must intend the act, but he must intend to betray his country by means of the act." The Court emphasized that a defendant must have a defined criminal purpose to betray the country, one step beyond the immediate intention to do the overt act. Thus, "treason" is a crime of specific intent. The court declared: "The crime of treason consists of two elements, both of which must be present in order to sustain a conviction: (1) adherence to enemy, and (2) rendering him aid and comfort. The acts must be intentional. *The intent sufficient to sustain conviction must be an intent, not merely to commit the overt acts complained of but to betray the country by means of such acts.*"

Justice Jackson followed a narrow interpretation of the treason clause. Now, one should ask why should we opt for the narrow interpretation? Jackson noted: "The basic law of treason in this country was framed by men... taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself."³³ According to Justice Jackson:

A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, stirring in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.⁵¹

When Pound was indicted on July 26, 1943, a District of Columbia Grand Jury also indicted seven other Americans who were broadcasting from Europe on treason charges. Only two of the eight were convicted.⁵⁵ Two of the indicted died before trial. Three indictments were dismissed for lack of sufficient evidence required under *Cramer v. United States*. As Professor Hurst says, the treason clause is the product not of theory, but of history. Cases like *Cramer* show that the treason clause has been ever more narrowly defined and more cautiously applied.

Treason is a charge tied tightly with the political and social circumstances and contexts within which it arises. When Pound was charged, the Supreme Court was led by Chief Justice Harlan F. Stone, the Chief justice from 1941-45. During that period the Justices devoted much of their attention to the troublesome issues brought up by the Second World War. According to David Currie, in this period the Justices focused increasingly on the new agenda of civil rights and liberties that Stone laid out for them in *United States v. Carolene Products Co.* in 1938 (Currie 277). Robert H. Jackson, who wrote the decision in the *Cramer* Case, was still on the bench.

Other liberals on the Court included Justice Hugo L. Black, Justice Frank Murphy, Justice Black and Justice Douglas. Had Pound's case ever reached the Supreme Court, the trial court, properly applying the Court's decision in *Cramer*, would have found Pound innocent of treason.

Conclusion

Broadcasting for the enemies should not be held alone as an overt treasonous act of "giving aid and comfort" to the enemy. Conviction on treason depends on the content of the broadcasts and the motivation for broadcasting. In Ezra Pound's case, nothing in his speeches was treasonous. Furthermore, his speeches were "mere" words. I do not deny that his radio-broadcasting was an act, but rather that there was a distance between his words and the possible damage that his words could make. His "propaganda" was difficult to follow and hard to understand; it would not evoke a war against or endanger the security of the United States.

His "propaganda" was not in our sense "propaganda"; rather, according to its ancient meaning, he was "propagating" his faith. James A. Fishback and Leonard W. Doob have listed the contents of Pound's broadcasts, and they were not effective "propaganda:" the aims, causes, effects, future and enemy of World War II, economics, culture, communication, race, government, social structure, organizations including Universities, etc.⁵⁶ Julien Cornell, Pound's attorney for his insanity trial, defended Pound's broadcasts:

There was no criticism of the allied war effort in the broadcasts; nothing was said to discourage or disturb American soldiers or their families. Pound's main concern was with usury and other economic sins which he conceived were being committed by an international conspiracy of Jewish bankers who were the powers

behind the throne of England and had succeeded in duping the government of the United States. The broadcasts were in essence lectures in history and political and economic theory, highly critical of the course of American government beginning with Alexander Hamilton... The American people were told that they did not understand what was going on in Europe and if they did, the war would not have been necessary (Cornell 1-2).

The content of his speeches demonstrated that he had no intent to betray his country. Pound believed that his broadcasts were to save the Constitution. He saw the entrance of the U.S. into war, led by Roosevelt, as a mistake in fact. When he was extradited to the U. S., he still believed that he was brought back to his country to help the Government in understanding the Italian situation and the rehabilitation of the world. His eccentric personality and remarkable grandiosity, the reason that the court-appointed psychiatrists diagnosed his insanity, could justify that he did not have intent to betray his country.

A contemporary legal scholar, Professor James G. Wilson, proposes a model statute that might reduce the likelihood of unjust treason executions.⁵⁷ Although he is more concerned with capital punishment of those charged with treason, he narrows the constitutional definition of treason and proposes a better-defined charge. The definition of "aggravated levying of war" limits the death penalty to armed insurrections by groups intending to overthrow the government. The charge of "aggravated adherence to the enemy" is limited to the act or acts of giving life-endangering military secrets to the enemy, or of participating in armed attacks. Wilson's model treason clause allows mitigation, which includes: (A) insanity; (B) age; (C) moral or political belief in the propriety of said acts; and/or (D) degree of injury actually inflicted upon the country. Under

Wilson's proposed statute, Pound did neither give life-endangering military secrets, nor participate in armed combat or violent acts, and his broadcasts were motivated by his political belief in the propriety of such acts and did not manifest treacherous and treasonous intent. Pound obviously was not be guilty of treason.

Furthermore, Pound never gained political power or became a ruler in an attache government as did Marshall Henri Philippe Petain, Pierre Laval and Vidkun Quisling, who were denounced as traitors to their countries after the Allied victory. Marshall Petain (1856-1951), who was a World War I French military hero, headed the Vichy Government⁶⁸ in France during World War II. Although he was nominally independent, he found it increasingly difficult to resist German demands. After the Allied victory, the French brought Petain to trial. He was sentenced to death, but the provisional president Charles de Gaulle commuted the sentence to life imprisonment. Petain died in prison in 1951. Pierre Laval, vice-premier of the collaborative Vichy Government, was tried for treason in a hostile court in 1945, and executed. Vidkun Quisling (1887-1945) was a Norwegian fascist in World War II. Norwegian minister of defense from 1931, he founded the National Unity party, modeled on the German Nazi party. In 1940 he aided the Germans in their conquest of Norway and was their puppet ruler throughout the war. After the war the Norwegians tried him, convicted him of high treason, and executed him.⁶⁹

For Pound, Socrates⁶⁰ and Dante⁶¹ are probably closer models. They all followed universalism, what they thought of as truth and the call for transcending local political allegiance. In an interview with Damaso Riccioni in 1955, Pound answered the journalist's question about the duties of a citizen when his country is at war: "Socrates was accused of impiety and the subversion of the laws of his country; still he was not impious nor subversive, and subsequent history has

shown this. I am accused of betraying my country, which I love as much as you love yours. But one, who like me, acts in the light of a truth interiorly felt, and foreseen, anticipates in the present a most certain future reality" (Meacham 26). Hemingway pleaded for Pound's release: "Dante, by these standards, could well have spent his life in St. Elizabeths Hospital for errors in judgment and of pride." Hemingway's comment on Dante is interesting in this context, for that great poet was condemned to death as a traitor to Florence and spent the last years of his life in exile (Meacham 56).

Was Pound's embrace of metropolitanism a reaction against the narrow sense of citizenship? Pound's case shows the split of universalism and patriotism in quite a Modernist mode: A cosmopolitan writer yearns for an enlightened strongman to solve the problem of patriotic nationalism. The question of American citizenship vs. Modernist world citizen-

Although Haupt's assistance to his son was consistent with the normal responses of a loving father, Haupt knew that his son was working for Germany and thus knowingly helped the German cause. The *Cramer* Court held that ordinary commercial transactions, such as purchasing goods, holding money on deposit, provisioning a ship, and borrowing from a bank were held sufficient to constitute overt acts when linked with an intention to thereby give aid and comfort to the enemy. Haupt's assistance was to be sufficient proof of aiding and abetting. Moreover, the jury could reasonably infer treasonous intent from Haupt's aid. In the retrial, Haupt received life imprisonment and a \$10,000 fine.

The Court held: "To make treason, the defendant not only must intend the act, but he must intend to betray his country by means of the act." The Court emphasized that a defendant must have a defined criminal purpose to betray the country, one step beyond the immediate intention to do the overt act. Thus, "treason" is a crime of specific intent. The court

declared: "The crime of treason consists of two elements, both of which must be present in order to sustain a conviction: (1) adherence to enemy, and (2) rendering him aid and comfort. The acts must be intentional. *The intent sufficient to sustain conviction must be an intent, not merely to commit the overt acts complained of but to betray the country by means of such acts.*"

Justice Jackson followed a narrow interpretation of the treason clause. Now, one should ask why should we opt for the narrow interpretation? Jackson noted: "The basic law of treason in this country was framed by men... taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself."³³ According to Justice Jackson:

A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, stirring in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.³⁴

When Pound was indicted on July 26, 1943, a District of Columbia Grand Jury also indicted seven other Americans who were broadcasting from Europe on treason charges. Only two of the eight were convicted.³⁵ Two of the indicted died before trial. Three indictments were dismissed for lack of sufficient evidence required under *Cramer v. United States*. As Professor Hurst says, the treason clause is the product not of theory, but of history. Cases like *Cramer* show that the treason

clause has been ever more narrowly defined and more cautiously applied.

Treason is a charge tied tightly with the political and social circumstances and contexts within which it arises. When Pound was charged, the Supreme Court was led by Chief Justice Harlan F. Stone, the Chief justice from 1941-45. During that period the Justices devoted much of their attention to the troublesome issues brought up by the Second World War. According to David Currie, in this period the Justices focused increasingly on the new agenda of civil rights and liberties that Stone laid out for them in *United States v. Carolene Products Co.* in 1938 (Currie 277). Robert H. Jackson, who wrote the decision in the *Cramer* Case, was still on the bench. Other liberals on the Court included Justice Hugo L. Black, Justice Frank Murphy, Justice Black and Justice Douglas. Had Pound's case ever reached the Supreme Court, the trial court, properly applying the Court's decision in *Cramer*, would have found Pound innocent of treason.

Conclusion

Broadcasting for the enemies should not be held alone as an overt treasonous act of "giving aid and comfort" to the enemy. Conviction on treason depends on the content of the broadcasts and the motivation for broadcasting. In Ezra Pound's case, nothing in his speeches was treasonous. Furthermore, his speeches were "mere" words. I do not deny that his radio-broadcasting was an act, but rather that there was a distance between his words and the possible damage that his words could make. His "propaganda" was difficult to follow and hard to understand; it would not evoke a war against or endanger the security of the United States.

His "propaganda" was not in our sense "propaganda"; rather, according to its ancient meaning, he was "propagating" his faith. James A. Fishback and Leonard W. Doob have listed

the contents of Pound's broadcasts, and they were not effective "propaganda:" the aims, causes, effects, future and enemy of World War II, economics, culture, communication, race, government, social structure, organizations including Universities, etc.⁵⁶ Julien Cornell, Pound's attorney for his insanity trial, defended Pound's broadcasts:

There was no criticism of the allied war effort in the broadcasts; nothing was said to discourage or disturb American soldiers or their families. Pound's main concern was with usury and other economic sins which he conceived were being committed by an international conspiracy of Jewish bankers who were the powers behind the throne of England and had succeeded in duping the government of the United States. The broadcasts were in essence lectures in history and political and economic theory, highly critical of the course of American government beginning with Alexander Hamilton... The American people were told that they did not understand what was going on in Europe and if they did, the war would not have been necessary (Cornell 1-2).

The content of his speeches demonstrated that he had no intent to betray his country. Pound believed that his broadcasts were to save the Constitution. He saw the entrance of the U.S. into war, led by Roosevelt, as a mistake in fact. When he was extradited to the U. S., he still believed that he was brought back to his country to help the Government in understanding the Italian situation and the rehabilitation of the world. His eccentric personality and remarkable grandiosity, the reason that the court-appointed psychiatrists diagnosed his insanity, could justify that he did not have intent to betray his country.

A contemporary legal scholar, Professor James G. Wilson,

proposes a model statute that might reduce the likelihood of unjust treason executions.⁵⁷ Although he is more concerned with capital punishment of those charged with treason, he narrows the constitutional definition of treason and proposes a better-defined charge. The definition of "aggravated levying of war" limits the death penalty to armed insurrections by groups intending to overthrow the government. The charge of "aggravated adherence to the enemy" is limited to the act or acts of giving life-endangering military secrets to the enemy, or of participating in armed attacks. Wilson's model treason clause allows mitigation, which includes: (A) insanity; (B) age; (C) moral or political belief in the propriety of said acts; and/or (D) degree of injury actually inflicted upon the country. Under Wilson's proposed statute, Pound did neither give life-endangering military secrets, nor participate in armed combat or violent acts, and his broadcasts were motivated by his political belief in the propriety of such acts and did not manifest treacherous and treasonous intent. Pound obviously was not be guilty of treason.

Furthermore, Pound never gained political power or became a ruler in an attache government as did Marshall Henri Philippe Petain, Pierre Laval and Vidkun Quisling, who were denounced as traitors to their countries after the Allied victory. Marshall Petain (1856-1951), who was a World War I French military hero, headed the Vichy Government⁵⁸ in France during World War II. Although he was nominally independent, he found it increasingly difficult to resist German demands. After the Allied victory, the French brought Petain to trial. He was sentenced to death, but the provisional president Charles de Gaulle commuted the sentence to life imprisonment. Petain died in prison in 1951. Pierre Laval, vice-premier of the collaborative Vichy Government, was tried for treason in a hostile court in 1945, and executed. Vidkun Quisling (1887-1945) was a Norwegian fascist in World War II. Norwegian minister of defense from 1931, he founded the

National Unity party, modeled on the German Nazi party. In 1940 he aided the Germans in their conquest of Norway and was their puppet ruler throughout the war. After the war the Norwegians tried him, convicted him of high treason, and executed him.⁶⁰

For Pound, Socrates⁶⁰ and Dante⁶¹ are probably closer models. They all followed universalism, what they thought of as truth and the call for transcending local political allegiance. In an interview with Damaso Riccioni in 1955, Pound answered the journalist's question about the duties of a citizen when his country is at war: "Socrates was accused of impiety and the subversion of the laws of his country; still he was not impious nor subversive, and subsequent history has shown this. I am accused of betraying my country, which I love as much as you love yours. But one, who like me, acts in the light of a truth interiorly felt, and foreseen, anticipates in the present a most certain future reality" (Meacham 26). Hemingway pleaded for Pound's release: "Dante, by these standards, could well have spent his life in St. Elizabeths Hospital for errors in judgment and of pride." Hemingway's comment on Dante is interesting in this context, for that great poet was condemned to death as a traitor to Florence and spent the last years of his life in exile (Meacham 56).

Was Pound's embrace of metropolitanism a reaction against the narrow sense of citizenship? Pound's case shows the split of universalism and patriotism in quite a Modernist mode: A cosmopolitan writer yearns for an enlightened strongman to solve the problem of patriotic nationalism. The question of American citizenship vs. Modernist world citizenship was obviously central to the issue of treason.⁶² Treason presupposes the ideas of nationalism and patriotism. Pound did broadcast, but not to betray his country, for he allegedly spoke as an American citizen and for the Constitution. Harry M. Meacham, who headed the letter campaign to release Pound, felt that had Pound renounced his citizenship he would not

have been arrested, and had he broadcast in his own country and spoken out against the war and the administration, he might have remained a free man (Meacham 21). Pound defended himself: "As a citizen I do not speak nor stand against my country; as a thoughtful man I stand for points of view which I consider closest to the aspirations of my free spirit, under the spell of a vision of a sacred union of all the peoples called by destiny to lead humanity by virtue of their advanced evolutionary state, intellectual and social" (Meacham 27). "I did not betray my country. I never renounced my citizenship" (Meacham 66). Pound wanted to emphasize that unlike Henry James and T. S. Eliot, he never renounced American citizenship nor did he tell American soldiers to desert, and he continued: "I've behaved in accordance with the United States Constitution, where it is said that one shall oppose the government when it works for interests which are not those of the country. Before and during the war Roosevelt was the real enemy of the U. S. The treason was carried out in the White House, in the head organizations of American finance, not in Rapallo" (Meacham 90-91).

Conrad Aiken said that Pound should be judged "less a traitor than a fool." Wyndham Lewis called Pound "a revolutionary simpleton." Anyone with political sense should feel that Pound's fall had some pathetic and farcical elements. Pound should have stopped broadcasting for Italy when the United States declared war on Italy. Unfortunately, he lacked that kind of political acumen. When Socrates was brought to trial for "impiety and corrupting the youth of Athens," he spoke to the jury in defense of his ideas:

Some one will say: Yes, Socrates, but cannot you hold your tongue, and then you may go into a foreign city, and no one will interfere with you? Now, I have great difficulty in making you understand my answer to this. For if I tell you that to do as you say would be a

disobedience to the God, and therefore that I cannot hold my tongue, you will not believe that I am serious.⁶⁸

To be indicted for a crime is one thing; to be convicted of a crime is often quite another. I have tried to defend Pound against the charge of treason by narrow construction and to argue for strict judicial scrutiny in the context of a treason charge. I believe that if Pound had been tried for treason, he would have been acquitted, not because he was a famous poet, but because there was insufficient evidence to show that he had intended to betray his country. His radio speeches were mere words, insufficient to levy war against his country or to aid and give comfort to his country's enemies. One might declare a moral verdict against Pound, but as far as law is concerned, there is insufficient grounds to convict Pound for treason. Had his case come to trial, Pound would have been entitled to a fair and impartial process and a presumption of innocence. Let me end with a quote from John Stuart Mill's *On Liberty*: "We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."

Works Cited

- Arnold, Thurman. *Fair Fights and Foul: A Dissenting Lawyer's Life*. 1951; New York: Harcourt, Brace & World, Inc, 1965.
- Bellamy, John. *The Tudor Law of Treason*. London: Routledge & Kegan Paul; Toronto and Buffalo: University of Toronto Press, 1979.
- Bernstein, Charles. "Pounding Fascism: Appropriating Ideologies - Mystification, Aestheticization, and Authority in Pound's Poetic Practice." *A Poetics*. Cambridge: Harvard University Press, 1992. 121-127.
- Boveri, Margret. *Treason in the Twentieth Century*. Trans. by Jonathan Steinberg. New York: G.P. Putnam's Sons, 1961

Originally published in Germany under the title *Der Verrat in XX Jahrhundert*.

- Chapin, Bradley. *The American Law of Treason: Revolutionary and Early National Origins*. Seattle: University of Washington Press, 1964.
- Chane, William. "Ezra Pound: 'Insanity,' 'Treason,' and Care." *Critical Inquiry* 14:1 (Autumn 1987): 134-141.
- . *The Political Identities of Ezra Pound and T. S. Eliot*. Stanford: Stanford University Press, 1937.
- Chaitkin, Anton. *Treason in America: From Aaron Burr to Averell Harriman*. New York: New Benjamin Franklin House, 1985.
- Cornell, Julien. *The Trial of Ezra Pound: A Documented Account of the Treason Case by the Defendant's Lawyer*. New York: The John Day Company, 1966.
- Currie, David P. *The Constitution in the Supreme Court: The Second Century, 1888-1986*. Chicago and London: The University of Chicago Press, 1990.
- Davie, Donald. *Purity of Diction in English Verse*. New York: Schocken Books, 1967.
- Downs, Donald Alexander. *Nazi in Skokie: Freedom, Community, and the First Amendment*. Notre Dame, IN: University of Notre Dame Press, 1985.
- Federal Bureau Investigation of Ezra Pound. Photocopy of Partial file, made available to William Chase, bequeathed by Chase to The Bancroft Library, University of California, Berkeley.
- Finley, John L. *Social Credit: The English Origins*. Montreal: McGill-Queens University Press, 1972.
- Garvey, John H. and Frederick Schauer, eds. *The First Amendment: A Reader*. St. Paul, MN: West Publishing CO, 1992.
- Gunther, Gerald. *Cases and Materials on Constitutional Law*. 11th ed. Mincola, N. Y: Foundation Press, 1985
- Hamlin, David. *The Nazi/Skokie Conflict: A Civil Liberties Battle*. Boston: Beacon Press, 1980.
- Harrisom, John R. *The Reactionaries: A Study of the Anti-Democratic Intelligentsia*. New York: Schocken Books, 1967.

- Hart, Henry. *The Poetry of Geoffrey Hill*. Illinois: Southern Illinois University Press, 1986.
- Heymann, Clemens David. *Ezra Pound*. New York: Viking Press, 1976.
- Hill, Geoffrey. "The Dream of Reason." *Essays in Criticism* 1 (1964): 91-101.
- . *The Lords of Limit: Essays on Literature and Ideas*. New York: Oxford University Press, 1984.
- Holzer, Henry Mark, et al. "The First Amendment and National Security: Symposium—Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts." *University of Miami Law Review* 43:1 (Sept. 1988): 61-90.
- Howell, T. B. comp. *A Complete Collection of State Trials and Proceedings for High treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*. 34 vols. London: T. C. Hansard, 1816.
- Hurst, James Willard. *The Law of Treason in the United States: Collected Essays*. Westport, CT: Greenwood Publishing Corporation, 1971.
- Jameson, Fredric. *Fables of Aggression: Wyndham Lewis, the Modernist as Fascist*. Berkeley, CA: University of California Press, 1979.
- Kermode, Frank. *The Sense of an Ending: Studies in the Theory of Fiction*. 1966; London: Oxford University Press, 1967.
- Kutler, Stanley I. *The American Inquisition: Justice and Injustice in the Cold War*. New York: Hill & Wang, 1982.
- Lunn, Kenneth and Richard C. Thurlow. *British Fascism: Essays on the Radical Right in Inter-War Britain*. London: Croom Helm, 1980.
- Meacham, Harry M. *The Caged Panther: Ezra Pound at Saint Elizabeths*. New York: Twayne Publishers, Inc, 1967.
- Mill, John Stuart. *On Liberty: Annotated Text, Sources and Background, Criticism*. Ed. by David Spitz. 1859; New York: W. W. Norton & Company, Inc, 1975.
- Norman, Charles. *The Case of Ezra Pound*. New York: Funk and

- Wagnalls, 1968.
- Nowak, John and Donald D. Rotunda. *Constitutional Law*. St. Paul, MN: West Publishing Co., 1991.
- O'Connor, William Van, and Edward Stone, eds. *The Casebook on Ezra Pound*. New York: Thomas Y. Crowell Company, 1959.
- Plato. "Socrates' Address to the Jurors after being found Guilty of Impiety and Corrupting the Youth." *The Law as Literature: An Anthology of Great Writing in and About the Law*. Ed. by Louis Blom-Cooper. London: The Bodley Head, 1961, 89-94.
- Perl, Jeffrey M. *The Tradition of Return: The Implicit History of Modern Literature*. Princeton: Princeton University Press, 1984.
- Posner, Richard. *Law and Literature: A Misunderstood Relation*. Cambridge, MA: Harvard University Press, 1988.
- Pound, Ezra. *Certain Radio Speeches of Ezra Pound*. Ed. by William Levy. Rotterdam, Netherlands: Cold Turkey Press, 1975.
- . "Ezra Pound speaking": *Radio speeches of World War II*. Ed. by Leonard W. Doob. Westport, CT: Greenwood Press, 1987.
- Shiffrin, Steven H. and Jesse H. Choper, eds. *The First Amendment: Cases—Comments—Questions*. St. Paul, MN: West Publishing Co., 1991.
- Sherry, Vincent. *Ezra Pound, Wyndham Lewis, and Radical Modernism*. Oxford: Oxford University Press, 1993.
- . *The Uncommon Tongue: The Poetry and Criticism of Geoffrey Hill*. Ann Arbor: The University of Michigan Press, 1987.
- Simon, Walter G. "The Evolution of Treason." *Tulane Law Review* 35: 4 (June 1961): 669-704.
- Soltman, Nelson A. *The Treason Clause: an Examination*. A paper submitted for a seminar at the University of Chicago, 1969.
- Stone, Geoffrey R., Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, eds. *Constitutional Law*. 2nd ed. Boston, Toronto and London: Little, Brown and Company, 1991.
- Torrey, E. Fuller. *The Roots of Treason: Ezra Pound and the Secret of St. Elizabeths*. New York: McGraw-Hill Book Company, 1984.
- Twyn, John. *An Exact Narrative of the Tryal and Condemnation of John Twyn for Printing and Dispensing of a Treasonable Book*:

with the Tryals of Thomas Brewster, bookseller, Simon Dover, printer, Nathan Brooks, bookbinder, for Printing, Publishing and Uttering of Seditious, Scandalous, and Malitious Pamphlets: at Justice-Hall in the Old-Bayly, London, the 20th, and 22th of February, 166314, published by the authority London: Printed by Thomas Mabb for Henry Brome et al., 1664.

Von Hallberg, Robert. "Libertarian Imagism." *Modernism/Modernity* 2:2 (April 1995): 63-79.

West, Rebecca. *The Meaning of Treason*. New York: Viking Press, 1964.

Wilson, James G. "Changing the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason." *University of Pittsburgh Law Review* 99 (Fall 1983): 99-179.

Notes

* I want to record my appreciation for the help of the excellent research librarians at both The Bancroft Library, University of California at Berkeley and The D'Angelo Law Library, The University of Chicago. I am deeply obliged to Jim Ryer, Judith Wise, Rob Mahnke, Kelley Ritter and Keith Sharfman, for their reading of earlier drafts and giving me valuable comments. I am grateful for Jaw-Perng Wang, Yung-Sheng Wu and Ching-Yi Liu for their answering many legal questions whenever I had in doubt and for their assistance to in accessing Westlaw. All of them except Kelley are The University of Chicago Law School students. I also would like to thank Alan Ying-Nan Lin, my husband, for his assistance, suggestions and encouragement throughout the research project. I lone, however, take full responsibility for the ideas expressed here.

¹ John Stuart Mill, Chapter 2: "Of the Liberty of Thought and Discussion," *On Liberty: Annotated Text, Sources and Background, Criticism*, ed. by David Spitz (1859; New York: W.W. Norton & Company, Inc., 1975), 18.

² Quoted in James Willard Hurst, *The Law of Treason in the United States: Collected Essays* (Westport, CT: Greenwood Publishing

Corporation, 1971), 152. Cited hereafter in the text. Hurst's study was commissioned by the Department of Justice, when the Supreme Court invited argument on treason in the *Cramer* Case (1943). See later discussion on *Cramer*.

³ The remainder of the treason clause is as follows: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the life of the Person attainted." United States constitution, Section III, article 3. One attainted of treason is civilly dead. Personal and real property of the attainted is forfeited to the Government. "Corruption of the Blood" means that the attainted person cannot inherit land or other hereditaments, nor bequeath them, nor can his posterity inherit his property.

⁴ *Ente, Italiano per le Audizioni Radiofoniche*, translated as "Italian Broadcasting Authority," was a public radio system administered by a corporate public body. No person was permitted to broadcast without the approval of proper agencies of the Fascist government. Photocopy of FBI file of Ezra Pound, The Bancroft Library, University of California, Berkeley.

⁵ Pound made more than 300 broadcasts. An earlier anthology, *Certain Radio Speeches of Ezra Pound: From the Recordings and Transcriptions of his Wartime Broadcasts, Rome, 1941-1943*, ed. by William Levy (Rotterdam, Netherlands: Cold Turkey Press, 1975), collected only thirteen transcripts from the recording monitored by the Federal Communications Commission (FCC). These recordings became the holdings of the National Archives. The known holdings of Pound broadcast transcripts at the National Archives total 117 transcripts, covering the period October 2, 1941-July 25, 1943. Later on, *"Ezra Pound Speaking": Radio Speeches of World War II*, ed. by Leonard W. Doob (Westport, CT: Greenwood Press, 1978), collected 110 National Archives transcripts and 10 miscellaneous scripts confiscated by the U.S. Army from Pound's home in Rapallo. These recordings were used as main evidence by the prosecutors, the Department of Justice; see FBI file.

⁶ Pound was charged with "counselling and aiding the Kingdom

of Italy and its military allies and proposing and advocating to the officials of the Government of the Kingdom of Italy ideas and thoughts, as well as methods by which such ideas and thoughts could be disseminated, which the said defendant, Ezra Pound, believed suitable and useful to the Kingdom of Italy for Propaganda purposes in the prosecution of said war.

"That the aforesaid activities of the said defendant, Ezra Pound, were intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of the said war, to weaken or destroy confidence in the Government of the United States and in the integrity and loyalty of the Allies of the United States, and to further bind together and increase the morale of the subjects of the Kingdom of Italy in support of the prosecution of the said war by the Kingdom of Italy and its military allies... that the purport of said messages, speeches and talks was to create racial prejudice in the United States." Quoted in Charles Norman, *The Case of Ezra Pound* (New York: Funk and Wagnalls, 1967), 77-78. Cited hereafter in the text.

⁷ E. Fuller Torrey, *The Rotis of Treason: Ezra Pound and the Secret of St. Elizabeths* (New York: McGraw-Hill Book Company, 1984), 231. Cited hereafter in the text. James Laughlin, Pound's American publisher, and T. S. Eliot also agreed on the strategy.

⁸ The medical report reads: "At the present time he exhibits extremely poor judgment as to his situation, its seriousness and the manner in which the charges are to be met. He insists that his broadcasts were not treasonable, but that all of his radio activities have stemmed from his self-appointed mission to 'save the Constitution.' He is abnormally grandiose, is expansive and exuberant in manner, exhibiting pressure of speech, discursiveness, and distractibility. In our opinion, with advancing years his personality, for many years abnormal, has undergone further distortion to the extent that he is now suffering from a paranoid state which renders him mentally unfit to advise properly with counsel or to participate intelligently and reasonably in his own defense. He is, in other words, insane and mentally unfit for trial, and is in need of care in a

mental hospital." Quoted in Julien Cornell, *The Trial of Ezra Pound: A Documented Account of the Treason Case by the Defendant's Lawyer* (New York: The John Day Company, 1966), 37.

⁹ Thurman Arnold, *Fair Trials and Foul: A Dissenting Lawyer's Life* (1951: repr., New York: Harcourt, Brace & World, Inc., 1965): 237.

¹⁰ In the December 13, 1954 issue of *Time*, Hemingway is quoted as saying: "Ezra Pound is a great poet, and whatever he did he has been punished greatly and I believe he should be freed to go and write poems in Italy where he is loved and understood." Quoted in Harry M. Meacham, *The Caged Panther: Ezra Pound at Saint Elizabeths* (New York: Twayne Publishers, Inc., 1967), 56. Cited hereafter in the text.

¹¹ Tokyo Rose was the nickname given by U.S. troops in the Pacific to at least a dozen women who broadcast enemy propaganda and music to them from Japan during World War II. One of these women, Iva Ikuki Toguri D'A Aquino, a U.S. citizen, was convicted of treason in 1949. Imprisoned until 1956, she steadfastly claimed to have worked under duress. On January 19, 1977, President Gerald R. Ford granted her a pardon.

¹² Robert Frost, Archibald Macleish, and T. S. Eliot were some of the major figures who worked hard to get Pound released. Meacham identifies three major forces working for Pound's release: "(1) a group of scholars led by Dr. Giovannini, whose influence reached into academic circles in the United States as well as in England, Australia, and Italy; (2) Congressman Burdick of North Dakota, who on August 21, 1957 introduced House Resolution No. 403 calling for an investigation of the Pound case, and a Senator (unidentified) who asked the Legislative Reference Service of the Library of Congress to make a study of the case (oddly enough, the Senator and the Congressman acted independently); and (3) the most powerful force, exerting pressure almost from the moment of Pound's incarceration, Archibald MacLeish." Meacham, 59.

¹³ "Do we read law and literature the same way?" is the central question in Judge Richard Posner's "The Interpretation of Statutes and the Constitution," in *Law and Literature: A Misunderstood*

Relation (Cambridge, MA: Harvard University Press, 1988), 209-268. His answer is no. Posner still holds a New Critical view towards literary works. He asserts that literary works are not to be read with the intentions of the author in mind, while statutes should be read with the intentions of their framers in mind. He shows the inapplicability of literary criticism to law, yet, he holds that knowing literature may give us insights into legal institutions, but will not help us know them. I do not quite agree that literary works should be read alone, nor do I think that law and literature are completely incompatible.

¹⁴ Many asked whether Pound feigned insanity and thereby escaped trial. Paradoxically, the appeal for his final release claimed that he was not sane enough to stand trial, yet not dangerous enough to be committed. During the hearing on Pound's fitness for trial, insanity was the focus of attention and contention between the attorney for the defendant and his prosecutors. One question put forward epitomizes the relation between Modernist poetics and psychoanalysis. The witness was asked whether he thought Pound's poems were understandable. The obscurity of Modernist poetics therefore became a sign of insanity. There was even a suggestion that Pound's belief in Fascism implied he was insane. For the transcripts of the trial, see Cornell, 154-215.

¹⁵ For good discussions of the politics of literary Modernism, see John R. Harrison, *The Reactionaries: A Study of the anti-Democratic Intelligentsia* (New York: Schocken Books 1967); Jeffrey M. Perl, "the Politics of Return: An Admonitory Postlogue," in his *The Tradition of Return: The Implicit History of Modern Literature* (Princeton: Princeton University Press, 1984), 256-82; William Chace, *The Political Identities of Ezra Pound and T. S. Eliot* (Stanford: Stanford University Press, 1973); Michael Levenson, *A Genealogy of Modernism: A Study of English Literary Doctrine, 1908-1922* (Cambridge: Cambridge University Press, 1984); Paul Peppis, *The Fictions of National Character: Wyndham Lewis, Nationalism and the English Avant-garde* (University of Chicago Ph.D. Dissertation, 1993; forthcoming by the Northwestern University Press); Michael North,

Political Aesthetic of Yeats, Eliot, and Pound (Cambridge: Cambridge University Press, 1991); Cairns Craig, *Yeats, Eliot, Pound, and the Politics of Poetry: Richest to the Richest* (Pittsburgh, PA: University of Pittsburgh Press, 1981); Raymond Williams, *The Politics of Modernism: Against the New Conformists*, ed. by Tony Pinkney (London & New York: Verso, 1989); Vincent Sherry, *Ezra Pound, Wyndham Lewis, and Radical Modernism* (New York & Oxford: Oxford University Press, 1993); Fredric Jameson, *Fables of Aggression: Wyndham Lewis, the Modernist as Fascist* (Berkeley: University of California Press, 1979); Tim Redman, *Ezra Pound and Italian Fascism* (Cambridge: University of Cambridge Press, 1991).

¹⁶ Pound met C. H. Douglass (1878-1952) in London in 1918 and had grown preoccupied with the latter's Social Credit theory. See John L. Finley, *Social Credit: The English Origins* (Montreal: McGill-Queens University Press, 1972). See also the distinction between Pound and American Social Credit Movement made by Mr. Munson in Norman, 39-40. Some studies have attempted to historicize Pound's fascism; see Tim Redman, *ibid.*; Robert von Hallberg, "Libertarian Imagism," *Modernism/Modernity* 2:2 (April, 1995) 63-79.

¹⁷ Frank Kermode, *The Sense of an Ending: Studies in the Theory of Fiction* (1966; repr., London, Oxford and New York: Oxford University Press, 1967), 39.

¹⁸ Donald Davie, *Purity of Diction in English Verse* (New York: Schocken Books, 1967), 99. Robert von Hallberg does not agree that the connection between imagism and fascism is so "clear and unbroken." He reconstructs an individualist, anti-statist liberatarian tradition that Pound was influenced when he launched Imagism in London. Hence, von Hallberg argues how an anti-statist politics would lead to the politics of totalitarianism is "anything but 'clear and unbroken.'" See von Hallberg, 23.

¹⁹ Charles Bernstein, "Pounding Fascism: Appropriating Ideologies - Mystification, Aestheticization, and Authority in Pound's Poetic Practice," *A Poetics* (Cambridge, MA. and London: Harvard University Press, 1992), 126.

²⁰ Geoffrey Hill, "Our Word Is Our Bond," *The Lords of Limit:*

Essays on Literature and Ideas (Oxford & New York; Oxford University Press, 1984), 154.

²¹ Hill cites Wittgenstein's adage: "Ethics and aesthetics are one." Geoffrey Hill, "The Dream of Reason," *Essays in Criticism* 1 (1964), 96, and also Vincent Sherry, *The Uncommon Tongue; The Poetry and Criticism of Geoffrey Hill* (Ann Arbor: The University of Michigan Press, 1987), 23.

²² Ibid.

²³ Hill, "Our Word Is Our Bond," 158-159.

²⁴ Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill & Wang, 1982).

²⁵ Lion Feuchtwanger, Arthur Miller, Norman Rosten and Albert Maltz, "Should Ezra Pound Be Shot?" *New Masses* (December 25, 1945). Quoted in Torrey, 200.

²⁶ "Ezra Pound," *Saturday Review of Literature* (December 15, 1945), 10; quoted in Torrey, 199.

²⁷ John H. Garvey and Frederick Schauer, eds, "Racist Speech" in *The First Amendment: A Reader*, (St. Paul, MN: West Publishing Co. 1992), 351-365; Steven H. Shiffrin and Jesse H. Choper, eds, "Racist Speech," *The First Amendment; Cases - Comments - Questions* (St. Paul, MN; West Publishing Co, 1991), 204-208; John Nowak and Donald D. Rotunda, "Freedom of Speech," *Constitutional Law* (St. Paul, MN; West Publishing Co; 1991), 934-1156.

²⁸ *Collin V. Smith*, 578 F. 2d 1197 (7th Cir. 1978) cert. denied, 439 U.S. 916, 99 S. Ct. 291. 58 L.Ed. 2d 264 (1978).

²⁹ See Donald Alexander Downs, *Nazi in Skokie: Freedom, Community, and the First Amendment* (Notre Dame, IN: University of Notre Dame Press, 1985); David Hamlin, *The Nazi/Skokie Conflict: A Civil Liberties Battle* (Boston: Beacon Press, 1980).

³⁰ Here, I borrow the words of Jesus Christ, "Render to Caesar the things that are Caesar's, and to God the things that are God's" (Mark 12:17), which indicate early Christianity's clear distinction between the secular and the spiritual.

³¹ United States Constitution, The First Amendment: "Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances." (1791).

³² This was in a letter that he left for Mr. Biddle on August 4 at the Swiss legation in Rome, which forwarded it to the Secretary of State. Norman, 64.

³³ "To Recapitulate," (March 25, 1943) in *"Ezra Pound Speaking,"* 261.

³⁴ Pound's anti-war speech, unlike Chandler's or Lord Haw-Haw's, did not tell the American army that they would be killed or defeated by the enemy, but rather: "Will you folks back in America NEVER realize that you are fighting this war IN ORDER to get into debt? I mean just that, you have been dumped into the war IN ORDER to get into debt. To get in further, to get in up to the chin, the throat. To get into the morass up to your eyebrows and no man living can see WHEN you will get out of it." "Debt," (June 5, 1943) in *"Ezra Pound Speaking,"* 322. "United States Treaties are valid when ratified by the Senate and not before. The President has no legal power to enter into condominiums with foreign governments, for the misconduct of scandalous islands off the China coast or in proximity to distant oriental, or any other damn harbors." "Audacia/Audacity," (July 17, 1943) *Ibid*, 368.

³⁵ Sir Edward Coke (1552-1634) was Chief Justice of England and became the foremost English lawyer of his time. In 1593 he served as Speaker of the House of Commons and was appointed Attorney General of the realm by Elizabeth I. His most famous prosecution, early in the reign of James I, was that of Walter Raleigh. Catherine Bowen's *The Lion and the Throne; The Life and Times of Sir Edward Coke* contains the following passage from Coke: "When one knoweth of any treason or felony and concealith it,' ... 'this is misprision of treason, the offender to be imprisoned for life, to forfeit all his goods, debts, and duties forever, and the profits of his lands during his life. ... 'by the common law, concealment of high treason was treason.'" Quoted in Meacham, 21-22.

³⁶ Pound, "Power," (Feb. 19.1942), "*Ezra Pound Speaking*," 41.

³⁷ See Henry Mark Holzer, "The First Amendment and National Security in Symposium—Foreign Affairs and the Constitution; The Roles of Congress, the President, and the Courts," *University of Miami Law Review* 43:1 (Sept. 1988), 65. I do not agree with Holzer's conclusion that Pound did not have the right to broadcast anti-Semitic statements during the war. First, anti-Semitic expression was not like passing atomic secrets to enemies, which endangers the country. Second, even the ideas of anti-Semitism are properly protected by the First Amendment.

³⁸ Before the Edward III treason statute, drawing and quartering was a punishment for treason in early England. In one form the condemned man was dragged to the gallows, hanged briefly by the neck, and while still alive, was disemboweled. Then his entrails were burned and his body divided into four parts. The first person so punished was the Welsh prince David in 1283. Another was the Scotsman Sir William Wallace (1272-1305), who led a failed revolt against Edward I of England to oppose his rule in Scotland.

³⁹ The Treason Act, 1351, 25 Edw. III, st. 5, c.2 (1350).

⁴⁰ For studies on British history of treason law and cases, see John Bellamy, *The Tudor Law of Treason* (London: Routledge & Kegan Paul; Toronto & Buffalo: University of Toronto Press 1979); Walter G. Simon, "Evolution of Treason," *Tulane Law Review* 35:4 (June 1961): 669-704 and Hurst, Chapter 2: "English Sources of the Law of Treason."

⁴¹ Nevertheless, More became lord chancellor after the fall of Thomas Wolsey.

⁴² In 1616 Raleigh persuaded James to allow him to undertake another expedition to search for gold, but he was warned against attacking the Spaniards. He returned without gold and was then executed under his old sentence, partly because Spain demanded his punishment for sacking a Spanish settlement in Guiana.

⁴³ Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, eds, *Constitutional Law*, 2nd ed. (Boston, Toronto and London: Little, Brown and Company, 1991), 1012. For the

complete trial, see *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, compiled by T. B. Howell, vol. 6 (London: T.C. Hansard, 1816), 513-564; See also *An Exact Narrative of the Tryal and Condemnation of John Twyn for Printing and Dispensing of a Treasonable Book: with the Tryals of Thomas Brewster, bookseller, Simon Dover, printer, Nathan Brooks, book-binder, for Printing, Publishing and Uttering of Seditious, Scandalous, and Malitious Pamphlets: at Justice-Hall in the Old-Bayly, London, the 20th, and 22th of February, 1663/4*, published by the authority (London: Printed by Thomas Mabb for Henry Brome, Etc, 1664.

⁴⁴ Stone, et. al. eds, *ibid.*

⁴⁵ Quoted in Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press, 1964), 25. This book has an interesting and detailed discussion of treason charges during the period before Independence. See Chapter 2, "The American Revolution as Lese Majesty." Cited hereafter in the text.

⁴⁶ Hurst, 82-83. As a matter of fact, before independence was declared, George Washington, the Commander of the Continental Army, faced a difficult situation between June 1775 and June 1776. Men who joined the American army were violating English law. They dissolved their bonds of allegiance to Britain and announced boldly a new allegiance. They became the first American citizens, even before independence was declared. A breach of this new allegiance thus constituted treason against America. See also Chapin, 29.

⁴⁷ The original draft reads: "Treason against the United States shall consist only in levying war against the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood nor forfeiture, except during the life of the person attainted." Quoted in Hurst, 129-130.

⁴⁸ *Ibid.*, 136. This lecture was delivered in 1790 and 1791.

⁴⁹ *Cramer v. United States*, 325 U.S. 1, 24 (1945).

⁵⁰ *United States v. Burr*, 25 Fed. Cas. 2, 55, Nos. 14,692a, 14,693 (C. C.D. Va. 1807) and *Ex parte Bollman*, 4 Cranch 75 (U.S. 1807).

⁵¹ *New York v. Hanway*, 26 Fed. Cas. 628, No. 16,096 (C.C.D.Pa. 1851).

⁵² See *United States v. Cramer*, 137 F.2d 888 (2d Cir 1943), reversed, 325 U.S. 1 (1945).

⁵³ *Cramer*, 325 U.S. at 21.

⁵⁴ *Cramer*, 325 U.S. at 29.

⁵⁵ These two were Douglas Chandler, alias Paul Revere, and Robert Best, who had broadcast from Berlin. Chandler incited his fellow Americans to throw out "Roosevelt and his Jews." Best spoke of Adolf Hitler as the "crusader for civilization," and Roosevelt as "a tool of the Jews." In his mouth the New Deal became the "Jew Deal." and America was turned into a "slave plantation run by talmudic Christian-lovers." Defending himself in Federal Court in Boston in 1948, Best asserted that he had never intended to betray America but had only tried to warn his countrymen against the Bolshevik peril and Roosevelt's warmongering. See Torrey, 168. Their radio speeches are not available, so there is no way we can compare Pound's broadcasts with theirs.

⁵⁶ See the appendices to "*Ezra Pound Speaking*." Fishbank and Doob also make an interesting comparison of the percentage of the contents cited by various critics of Pound.

⁵⁷ Wilson proposes "Aggravated Treason Clause": "Treason may be punishable by death only if the defendant has been convicted of 'aggravated treason' under at least one of the following two definitions:

I. The defendant, who is a citizen of the United States, was guilty of 'aggravated levying of war' The judge or jury must make all of the following findings fact prior to convicting the defendant:

A. The defendant engaged in armed combat or directed others to engage in armed combat within the immediate future;

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

Furthermore, said act or acts must unequivocally manifest treacherous intent to levy war.

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

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

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

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

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

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

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

A. Two witnesses simultaneously observed the act or acts set forth in Part IA through D and/or under Part II B, C and D. B. The defendant has a waivable right to a jury to determine if he is guilty of 'aggravated treason.' The defendant also has a waivable right to a jury to decide if death should be imposed. If the jury recommends mercy, that opinion shall be accepted by the trial judge. The trial judge has the discretion to set aside a jury recommendation that defendant die." James Wilson, "Changing the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason," *University of Pittsburgh Law Review* 99 (Fall 1983): 174-176.

⁸⁸ The Vichy Government (1940-1944), a right-wing authoritarian regime, succeeded the Third Republic in unoccupied French territory

after Germany defeated France (June 1940) early in World War II.

⁵⁹ Margret Boveri questions the ideas of "collaboration" and the "traitor." She argues that the accused "collaborators" often intended to save more lives and protect the citizens. I agree with her views that the ideas of betrayal are often relative and arbitrary. See Margret Boveri, *Treason in the Twentieth Century*, trans. by Jonathan Steinberg (New York: G. P. Putnam's Sons, 1961). Originally published in Germany under the title *Der Verrat in XX Jahrhundert*. I cite Petain, Laval and Quisling only to show the contrast between Pound, a poet-intellectual stating his political opinions for an enemy station, and the collaborators, who had ruling power. Pound had less chance of endangering the U. S.

⁶⁰ In the period after the Athenian defeat in the Peloponnesian War, however, the political leaders did not want to be awakened; uncritical patriotism seemed to them what they and Athens needed. In an attempt to frighten Socrates away, they threatened to bring him to trial for "impiety and corrupting the youth of Athens." He was convicted and executed in 399 B. C.

⁶¹ In the political wars between Guephs and Ghibellines (the pro-Papal and Imperial parties respectively), Dante was originally a Guelph. When the Guelphs later split into Black and White factions, Dante favored the Whites, who, suspicious of Pope Boniface VIII's designs on Florence, gradually took on the political coloration of the Ghibellines, whose ideal was a unified, peaceful Italy under the temporal authority of the Holy Roman emperor. Dante's public career ended in 1301 when the Black Guelphs and their French allies seized control of the city. In 1302 they confiscated Dante's possessions, sentenced the poet to permanent banishment from Florence and to the death penalty should he ever return. Thereafter Dante lived in various centers sympathetic to the Ghibelline cause.

⁶² Lord Haw-Haw's case presented the greatest controversy: whether his British passport subjected him to the protection of the King and thus pledged his allegiance to Britain. He was deported back to England to be tried for treason. The prosecution was under the impression that he was a British subject. The defense succeed in

proving beyond question that Joyce, an American, had never been a British subject and obviously such a man was not obliged to be loyal to the king and could not be tried under the law of 1351. The prosecution turned to a precedent in 1608, according to which anyone, regardless of nationality, if standing under the king's protection, is obliged to be loyal to the crown. The court ruled that the holder of an ordinary British passport is under such protection. However, there was no precedent for the assertion that the simple possession of a British passport constituted an act of allegiance. See Boveri, 155 and Rebecca West, *The Meaning of Treason* (New York: Viking Press, 1964).

⁶⁸ Plato reconstructed Socrates's speech to the jury in "Apology," collected in *The Law as Literature: An Anthology of Great Writing in and About the Law*, ed. by Louis Blom-Cooper (London: The Bodley Head, 1961), 90-91.