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AMBIVALENCE ABOUT TREASON

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INTRODUCTION

Betrayal and disloyalty are grievous moral wrongs, yet today when the disloyal commit treason we seem reluctant to punish them. John Walker Lindh fought for the Taliban with full knowledge that it was engaged in hostilities against the United States.¹ It should not have been so difficult to prove by two witnesses to the overt act, as the Constitution requires, that he adhered to the enemy giving them aid and comfort.² Admittedly, there were legal problems about whether the Taliban as an indirect enemy in an undeclared war could qualify as the enemy in the constitutional sense.³ But there was the alternative clause of “waging war against the United States,” which a soldier armed and fighting for the Taliban presumably did.⁴ The reasons for not prosecuting Lindh for treason had little to do with the technical requirements of the offense. Many in Washington regarded him as a confused kid following his religious commitments without

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1. Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. TIMES, July 16, 2002, at A1.

2. U.S. CONST. art. III, § 3, cl. 1. The literature on treason is scant. The subject is discussed in GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 41–60 (1993); JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES* (1971); REBECCA WEST, *THE MEANING OF TREASON* (1947).

3. See *infra* note 10 and accompanying text.

4. The classic application of this clause was in the rebellion of Aaron Burr, in which Burr was acquitted in a trial presided over by Chief Justice John Marshall. See GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* 122–25 (2002).

responsibility for the larger military conflict.⁵ They did not have the will to label him a traitor and punish him accordingly.

Treason still carries the death penalty,⁶ but that sanction is of dubious constitutionality. The Supreme Court has struck down the death penalty in cases where it was imposed for crimes less heinous than homicide.⁷ And though some might think that disloyalty is worse than homicide (and apparently it was in Renaissance Italy),⁸ that strong view of the crime is not likely to prevail today.

The mood now is better characterized as ambivalence. We supposedly hate treason, but we are unsure whether and how we should punish it. The last time the government prosecuted acts of adhering to the enemy was during World War II.⁹ Our contemporary ambivalence is expressed in opting for restrictive interpretations of key elements in the crime. According to a persuasive line of cases, the concept of the “enemy” applies only to enemies in a declared war.¹⁰ The armies of North Korea, North Vietnam, the Taliban, Afghanistan, Iraq—none of these met the technical standard of being enemies in a declared war. Indeed, with the entire congressional practice of declaring war in limbo, one wonders whether we will ever witness another American war formally declared in advance.¹¹

Why are we so ambivalent about treason? Why threaten the supreme penalty and then look for excuses not to apply the law? My thesis is that because of its feudal origins, treason no longer conforms to our shared assumptions about the liberal nature and purpose of criminal law. Our ambivalence about treason corresponds to legislative moves made in other countries to convert the offense into

5. The former President George Bush referred to him as a “misguided Marin County hot-tubber.” Marc Sandalow, *Why U.S. Was Forced into a Plea Deal; Trial Might Expose Anti-Terror Secrets*, S.F. CHRON., July 16, 2002, at A8.

6. 18 U.S.C. § 2381 (2000).

7. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (holding the death penalty unconstitutional as imposed for rape).

8. See Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 788 (2001).

9. See *Haupt v. United States*, 330 U.S. 631, 632–36 (1947). In an earlier stage of this case, the three male defendants received sentences of death; the females received terms of twenty-five years imprisonment. *United States v. Haupt*, 136 F.2d 661, 663 (7th Cir. 1943) (reversing on technical grounds); cf. *United States v. Cramer*, 325 U.S. 1 *passim* (1945) (reviewing another World War II era treason trial).

10. See *United States v. Fricke*, 259 F. 673, 675 (S.D.N.Y. 1919) (noting that German forces became enemies upon the outbreak of war between the United States and the German Empire); *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254) (holding rebels in Confederate states not enemies under the Treason Clause).

11. The last time Congress declared war was the day after Pearl Harbor, December 8, 1941. Joint Resolution of Dec. 8, 1941, Pub. L. No. 77-328, 55 Stat. 795, 795.

a crime with liberal contours. These are the claims I intend to establish in this paper. First we need to review the basics of treason in Anglo-American law and clarify the conceptual nature of liberal and feudal theories of law. Then we turn to the problem of reconciling treason with a liberal legal culture.

I. TREASON IN ENGLISH AND AMERICAN LAW

The original English treason statute of 25 Edward III (1351) expressed the spirit of the feudal system by grounding the crime in a personal relationship to King or Queen.¹² Treason was committed “when a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen.”¹³ Beyond this core duty, the crime extended to various acts that could threaten the continuity of the royal house. For example, it was also treason to compass the death of the King’s “eldest Son and heir” or to “violate the King’s Companion, or the King’s eldest Daughter unmarried, or the Wife of the King’s eldest Son and heir.”¹⁴

Beyond these attacks on the bloodline, the 1351 statute contained language familiar to us from the United States Constitution, for it was also treason “if a man do levy War against our Lord the King in his Realm, or be adherent to the King’s enemies in his Realm, giving to them aid and comfort in the Realm or elsewhere.”¹⁵ It is worth noting that the adaptation of this ancient formula in the Constitution dropped the distinction between levying war inside and outside the realm and refers generally to the enemies of the United States, not just enemies within the realm. The original treason statute seems to blur the line between internal and external threats to the state. All threats to the royal house were regarded under the same label. We shall see, however, that the distinction between sedition (overthrowing the government) and treason (as attachment to a foreign power) is fundamental to understanding the nature of the latter.

I will come back to this problem of distinguishing between overthrowing the government and treasonous disloyalty, but first we should note some other peculiar features of the 1351 statute that stamp it as a feudal document. The most intriguing is the definition

12. Statue of Treasons, 1351, 25 Edw. 3, c. 2.

13. *Id.* Similar language is found in the *Bible*. See *Ecclesiastes* 10:20 (New International Version 1984) (“Do not revile the King even in your thoughts . . .”).

14. Statue of Treasons, 1351, 25 Edw. 3, c. 2.

15. *Id.*

of petty treason, long since forgotten, that applies “when a servant slayeth his Master, or a Wife her husband, or when a man secular or religious slayeth his Prelate, to whom he oweth Faith and Obedience.”¹⁶ That these cases of homicide were regarded as a version of treason tells us something important about the original understanding of the crime. These are clearly hierarchical duties owed by the lower-standing members of society, servants, wives, and lay people, each relative to someone of higher-standing. The breach of the hierarchical duty expresses the feudal nature of the crime.

There was an element of reciprocity in the feudal structure, but not in the kinds of duties owed. The masters, husbands, and prelates bore duties to those below them, but they were presumably duties to provide protection, security, and care. They were not duties of submission and fealty. They were not ways of expressing subordination to the feudal structure. The homicidal acts that also constituted petty treason threatened the feudal order.¹⁷ If a subservient person could kill a superior, then anybody might kill the King.

The criteria of petty treason illuminate an important feature of “high” treason that is simply assumed. Only persons standing in a relationship of subordination could commit petty treason. The crime was not killing a prelate but killing him if you owed him a special duty of obedience.

The same must have been true about treason against the King. No one would have argued that a Frenchman who compassed the death of the English king would have been guilty of treason. Yet curiously the Statute is not addressed to subjects loyal to the English crown but to all persons. The personal relationship to the Crown was simply assumed.

The United States Constitution both built on and restricted the English conception of treason. Because the signers of the Declaration of Independence thought of themselves as having committed treason against the Crown, they sought to confine the offense to its core cases: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”¹⁸ The two witness requirement was added to provide procedural protection. Curiously, however, there is no reference in Article III to the shared common

16. *Id.*

17. The feudal order was expressed primarily in the system of land law.

18. U.S. CONST. art. III, § 3, cl. 1.

law assumption that only persons who owe a duty of loyalty to the United States can commit treason against “them” or, as we say in the postbellum period, treason against “it”—the United States as a singular entity. Correcting the omission in the Constitution, the United States Code adds the requirement of “owing allegiance to the United States” as a condition for committing treason.¹⁹

There has been some hesitation about defining the range of persons who owe a duty of loyalty to the United States or indeed to any republic. The assumption of the feudal system was that everyone in the realm, and therefore part of the feudal system, owed a duty of fealty to the king as person and as head of the house that would remain in power after the present king’s death. But it is not so easy, as a theoretical matter, to formulate the criteria on which the republican version of the crime should depend. Should the relevant nexus be citizenship, permanent residence, domicile, employment in the state, physical presence, or perhaps even owning property within the jurisdiction?

Citizenship is the default candidate, but it is fraught with problems. The entire institution of passports and citizenship is of rather recent vintage, and we are speaking here of an ancient crime. Also, whether someone is a citizen or not may often depend on accidents of birth and migration. The case of William Joyce (Lord Haw-Haw) illustrates the problem.²⁰ Joyce grew up in England, but because he was not born there, he was not a citizen. Joyce was born in Brooklyn and became an American citizen. His father was Irish, and Joyce grew up in Ireland and England. He used his perfect English accent to make radio broadcasts on behalf of the Germans during the Second World War. There was little doubt that when he was brought to trial at Old Bailey the Court would find a rationale for hanging him as a traitor. But the legal argument was not simple. Joyce was not a citizen, and therefore it was not clear why he owed allegiance to the United Kingdom. The Court relied upon his once having applied for and received a passport from the United Kingdom as a basis for estoppel: if he once had a passport and the protection of the Crown abroad, he could not be heard to deny his duty of loyalty.²¹

One reason why the criterion of duty is so difficult to fathom in the theory of treason is that we do not know to whom the duty is owed. Absent the personal relationship to “our lord the King,” who

19. 18 U.S.C. § 2381 (2000).

20. *Joyce v. Dir. Pub. Prosecutions*, 1946 A.C. 347 (H.L.).

21. *Id.* at 368–72.

or what is at the other end of relationship that is betrayed in an act of treason? The duty is surely not to the President or the government, and one would be hard pressed to find any other surrogate in modern liberal democracies for personal duties to the Crown.

A clue to the proper way of speaking about this duty is found in the old Communist name for treason: *izmena rodine*, or “betrayal of the motherland.”²² The notions of motherland and fatherland are critical to understanding the meaning of treason in a world without feudal duties of fealty to King or Queen. These terms represent a personification of the country or the nation and therefore enable us to speak of a personal relationship between the individual and the collective within which he or she lives.

The only problem is that Americans do not use the language of motherland or fatherland. I am not even sure, if we had to choose, whether we would prefer the feminine form, as do Russians, or the masculine, as do Germans. Even the current fashion of speaking of “homeland security” does not satisfy the need for an object of loyalty. No one is expected to be loyal to the homeland per se. The most we could possibly say is that the duty is owed to the American *nation*. In the name of the American nation, Lincoln insisted that the Confederacy could not secede and then delivered his famous eulogy over the dead in Gettysburg.²³

I am always puzzled by the apparent unwillingness of Americans to be clear about the distinction between nationhood and citizenship. The terms are used interchangeably in American discourse. True, the Constitution refers only to “foreign nations” and not to the American nation.²⁴ And there are many who are willing to recognize that Germans and Italians constitute nations, but insist that Americans do not. The idea seems to be that the Old World nations are extensions of tribal identities, but that immigration-based societies cannot have the same shared identity based on ancestral bloodlines. This is a shortsighted view.

By linguistic provenance, the idea of the nation must have something to do with being born (from the Latin *nasci*, to be born).

22. The 1960 Criminal Code of the former Russian Soviet Federated Socialist Republic refers to treason in article 64 as *izmena rodine* or “betrayal of the motherland.”

23. I have explored the relevance of nationhood in Lincoln’s thinking in GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 57–74 (2001).

24. U.S. CONST. art. I, § 8, cl. 3 (providing for congressional authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”). American Indians were commonly called nations—the Cherokee nation, etc.—suggesting an implicit assumption between attribution of nationhood and ethnic otherness.

My suggestion is that the nation consists of people who are born into the national experience, absorb the language and culture, and share a communal imagination.²⁵ Naturalized citizens are accepted on the basis of absorbing the language and the rudiments of the Constitution and their sworn commitment to uphold the basic ideals of the culture. This is certainly the way Lincoln thought of the American nation in the Gettysburg Address where he repeatedly referred to the North and the South as one nation “conceived in liberty and dedicated to the proposition that all men are created equal.”²⁶ Since the late nineteenth century schoolchildren have been pledging allegiance to “one nation indivisible, with liberty and justice for all,” and since 1954 they have used the phrase “one nation under God.” If the Americans were not a nation “four score and seven years” before Lincoln spoke at Gettysburg, their historical experience had made them into an organic entity comparable to the great nations of Europe.

American “nationhood” is an indispensable feature of the American self-understanding. No other concept could fit into the things that we say about ourselves, such as being a “nation under God” or constituting “an indivisible nation.”²⁷ It makes little sense to talk about “states under God” or “indivisible states.” But the idiom of the nation fits appropriately into these syntactical contexts. As the king claimed to derive his power from God, the nation claims to stand under God. This is surely the way Lincoln thought about Americans, a people he once described as “His almost chosen people.”²⁸ Admittedly, before the Civil War, it was common to invoke the notion of an indivisible Union, as Daniel Webster unforgettably orated in 1830: “Liberty and Union, now and forever, one and inseparable!”²⁹ Significantly, after the Gettysburg Address, American rhetoric focused on the nation instead of the Union. It would be odd, for example, to rewrite the Pledge of Allegiance so that it ended in a peroration to “one Union indivisible, under God.”

The nation is an idea that has come into its own precisely to explain what it means to be a republic (*res-publica*) instead of a

25. On nineteenth century theories of nationhood espoused by Orestes Brownson and Francis Lieber, see generally FLETCHER, *supra* note 23, at 64–74.

26. For a more extensive analysis of the Gettysburg Address, see FLETCHER, *supra* note 23, at 35–56.

27. These phrases, now part of the Pledge of Allegiance, originated in Lincoln’s Gettysburg Address, November 19, 1863. *See id.* at 45, 50–52.

28. *Id.* at 39–40, 49–53; WILLIAM WOLF, *THE ALMOST CHOSEN PEOPLE: A STUDY OF THE RELIGION OF ABRAHAM LINCOLN* 161–71 (1959).

29. Daniel Webster, Union Address (Jan. 26, 1830), <http://www.nv.cc.va.us/home/nvsageh/Hist121/Part3/Webster.htm> (on file with the North Carolina Law Review).

monarchy. Who is the *publica* to whom the *res* belongs? It is not very satisfying to say that the state belongs to its citizens for citizenship is conferred and subject to removal by the government acting for the state. (It would be like saying that the corporation belonged to its stockholders even if the corporate board could decide who held stock and for how long.)

In order to legitimate the state, something or someone must precede it and give birth to it. In the American idiom, the precursor to the constitutional state was "We the people," and surely the people existed before the Constitution, otherwise it would make no sense for the people to enter into a more perfect union. The German Basic Law of 1949 speaks of the German *Volk* [nation, people] as the agent giving the Federal Republic its new Constitution.³⁰ We cannot account for the legitimacy of the state without invoking some ontologically antecedent notion of the nation or the people.

The conclusion to which we are led is that treason is a crime committed by members of a nation against the nation itself.³¹ So defined, treason is a relational crime, committed only by persons who stand in a specific relationship to others. Other crimes of the same form are adultery and child neglect. Only spouses can commit adultery, and only parents and guardians can engage in child neglect. Also in this category are some crimes committed by public officials under special duties to the public. We should call these relational crimes for they are not subject to being committed by anyone against anyone.

Among these relational crimes, we should note an important difference in the power and status of the offender. In the case of treason, the crime is committed by the subordinated subject against a superior. Adultery is more complicated. Under Jewish law, wives committed the crime against husbands but not vice versa,³² but in the book of Genesis, foreign potentates committed or risked committing the crime against Abraham and then Isaac.³³ In child abuse, the

30. The Preamble to the 1949 German Grundgesetz or "Basic Law," the constitution of post-war Germany, refers to the German *Volk* as both the agent and the recipient of the constitution.

31. The statutory definition of treason is ambiguous on this point. The commission of treason is limited to persons "owing allegiance to the United States," but it is unclear whether the United States is understood as a state or a nation. 18 U.S.C. § 2381 (2000). Citizenship is not necessary to "owe allegiance."

32. See *Deuteronomy* 22:22; THE PRINCIPLES OF JEWISH LAW 488 (Menachem Elon ed., 1974).

33. In the story pattern in *Genesis* 12:10-20, 20:1-17, 26:6-10, a Patriarch lies and claims that his wife is his sister. A foreign potentate takes or begins to take the alleged

power relationship is reversed: parents commit the crime by endangering their dependents. The same reversal is clear in cases of crimes by public officials against the public interest.³⁴ To affix the label “feudal” in discussing relational crimes, therefore, we should limit ourselves to the cases in which a subordinate is under special duties of respect and loyalty toward a superior. This was true in history of treason and partially true in the history of adultery.

In the literature of criminal law, treason was always considered something of an “outlier.” However central it might have been to the interests of the state, it was never taken to be the paradigmatic offense for understanding the general elements of criminal liability (harm, actus reus, mens rea). Casebooks ignore the offense. Treatise writers show little interest.³⁵ The tendency to ignore treason in theorizing about criminal law testifies to its atavistic character. It is a feudal crime surviving in a post-Enlightenment criminal law based on liberal principles of harm, privacy of the internal sphere, and universality. These features of the liberal theory of criminal law require further elaboration.

II. LIBERAL CRIMINAL LAW

We take it for granted that the basic criminal offenses—e.g., homicide, rape, burglary, robbery—are subject to commission by anyone and against anyone. They are universal on the side both of the perpetrator and the victim. The harm principle is an aspect of this universality. In John Stewart Mill’s memorable formula, the state should intervene to punish conduct only when it causes or threatens to cause imminent harm.³⁶ The premise underlying Mill’s claim is that the harm occurs not just to the insiders in a particular nation or group but to anyone. Offenses in a liberal legal culture begin on the assumption that there is a human victim and that this victim, in the words of Joel Feinberg, has suffered a setback to his or her interests.³⁷ Attempts and other prophylactic offenses are tolerated as modifications of this basic requirement of harm as a condition for

sister as his own wife and then by a variety of means discovers that she is already married. The mistaken adultery is considered a grave sin—on the part of the foreign male!

34. My favorite case is a crime of Public Disloyalty [*Untreue*]. § 266 STRAFGESETZBUCH [StGB]. The crime consists in abusing public trust.

35. I addressed these issues originally in George P. Fletcher, *The Case for Treason*, 41 MD. L. REV. 193 (1982).

36. JOHN STUART MILL, ON LIBERTY 10–11 (David Spitz ed., W.W. Norton & Co. 1975) (1859).

37. JOEL FEINBERG, HARM TO OTHERS 31–64 (1984).

liability.

The harm principle implies the same harm should be the basis of punishment regardless of the identify of the victim. Thus the harm principle, as an expression of a liberal and universal system of criminal justice, excludes parochial crimes directed toward specifically marked groups, such as crimes directed only against women or blacks. The crimes of genocide at the international level³⁸ and hate crimes in the United States³⁹ arguably do not run afoul of this principle, for although they are directed toward racial, national, religious, or ethnic groups, they are designed to protect all such groups defined by the same characteristics.⁴⁰

A crime that arguably does offend the liberal principle of universality is the current definition of war crimes in the United States. Under 18 U.S.C. § 2441, there is a punishment for war crimes as defined in the Geneva Conventions but only if “the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.”⁴¹ It looks as though this statute is designed to criminalize only crimes committed by and against Americans, but a more careful reading suggests another interpretation. The limitation to American nationals is not substantive but jurisdictional. Although some countries claim universal jurisdiction over war crimes wherever and by whomever committed,⁴² the United States does not. The reference to national identity of perpetrators and victims in § 2441 is a jurisdictional limitation on the prosecution of war crimes. The premises are the active and passive nationality principles, which authorize criminal punishment under international law only if a country’s nationals either commit the offense or suffer the offense as victims.⁴³

It is important, then, to distinguish universality in the substantive

38. See Rome Statute of the International Criminal Court, July 17, 1998, art. 6, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, 1004 (1998).

39. Penalty enhancement for hate crimes was upheld in *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993).

40. The text says “arguably” because the crimes are subject to criticism that they protect some groups and not others, i.e. they protect religious but not political minorities. For an analysis of these offenses as examples of collective criminality, see George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1522–26 (2002).

41. 18 U.S.C. § 2441(b) (2000). “[N]ational of the United States” is defined in 8 U.S.C. § 1101(a)(22) (2000).

42. See VÖLKERSTRAFGESETZBUCH [VstGB].

43. The locus classicus of these restrictions on jurisdiction is *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4 (Sept. 7).

definition of the offense from universality of jurisdiction. The former focuses on every individual as perpetrator and victim, the latter defines the range of cases on which the court will claim the competence to adjudicate liability for the crime. If you look at the definition of homicide in any state of the United States, the definition purports to cover all persons in the world, both as perpetrators and as victims. It is only elsewhere in the statutes and cases that you learn that the states insist on the territorial principle, namely that the crime occurs or its effects be felt in the state itself.⁴⁴

Against this background of the principles guiding the development of criminal law, we can recognize easily that treason displays two anti-liberal characteristics. First, the crime is addressed to the bond of loyalty between a particular sovereign and subordinate subjects. Second, the mental actions of compassing or lusting in one's heart⁴⁵ as the core of the crime violate the harm principle.⁴⁶ The gravamen of the crime shifts from external action to internal attitudes.

Both of these anti-liberal features of treason were commonplace in Fascist criminal theory as it became influential under National Socialism. A leading scholar of the period wrote that treason was the paradigm for all crime: betrayal of the *Volk* was the essential wrong.⁴⁷ Also, the emphasis on internal attitudes as opposed to external conduct is associated with National Socialist criminal theory, where it was called *Gesinnungsstrafrecht*, translated as "criminal law based on attitudes."⁴⁸

National Socialist scholars had rediscovered something about crime and wrongdoing that was taken for granted in feudal culture. The issues of loyalty and attitude were central to the limited world

44. See e.g., *People v. Tyler*, 7 Mich. 160, 290 (1859) (reversing a murder conviction because the shooting occurred outside the United States); *State v. Payne*, 892 P.2d 1032, 1032 (Utah 1995) (discussing whether decedent died on Utah state land, thus giving the state courts jurisdiction over the homicide prosecution).

45. Compare Jesus's redefinition of the crime of adultery in *Matthew 5:28* (New International Version 1984) ("But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in his heart.").

46. See THOMAS HOBBS, *DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* 107 (Joseph Cropsey ed., Univ. of Chi. Press 1971) (1681) (noting that the crime of compassing "lyeth hidden in the Breast of him that is Accused").

47. Georg Dahm, *Verrat und Verbrechen* [Treason and Felony], 95 *ZEITSCHRIFT FÜR DIE GESAMTE STAATSRICHTSWISSENSCHAFT* 283 (1935); Roland Freisler, *Der Volksverrat*, 40 *DEUTSCHE JURISTENZEITUNG* 905, 907 (1935).

48. See KLAUS MARXEN, *DER KAMPF GEGEN DAS LIBERALE STRAFRECHT* 188 (1975).

defined by lord and subject. The question we should ask about treason today is: How did this feudal crime, based on ideas at odds with liberal thinking, survive into the modern world?

III. FROM FEUDAL TO LIBERAL CRIMINAL LAW

In the historical transition from feudalism to liberalism, as Henry Maine famously wrote, status gives way to contract as the primary source of obligation.⁴⁹ In broader terms, this transition means that duties acquired at birth yield to duties freely chosen by citizens. In the feudal law of property, the holder of an interest in land was a vassal beholden to another. The nature of feudalism was that these duties of fealty were imposed at birth. To know what your duties were, you had to know your station in life.

As the liberal revolution occurred in France, the distinctive feature of the Napoleonic legal order was the abolition of the feudal system of estates and servitudes. The advocates of “liberty, equality, and fraternity” recognized that the place to begin their legal reform was in the law of real property. The French *Code civil* of 1804 gave birth to a single indivisible concept of ownership in land.⁵⁰ The American Revolution took a different path. A republic took the place of a monarchy, and therefore the system of land law dispersed with duties to higher-ranking nobles holding reversionary interests in the feudal chain. The freeholder in land became sovereign over his piece of the earth’s surface. This transformation in the status of landowners had revolutionary significance. In the early stages of American democracy, holding real property was a condition of the right to vote.⁵¹

The law of treason was a second area where one might have expected a liberal transformation and abandonment of feudal principles of obligation. But it did not happen. The offense of treason adapted to republican forms of government. The crime of disloyalty lives on as though it were an indispensable feature of the landscape of criminal law. Yet we have to ask the question whether treason survives primarily in name or whether we remain committed to punishing disloyalty to the nation.

49. HENRY MAINE, *ANCIENT LAW* 165 (1864).

50. *CODE CIVIL* [C. CIV.] art. 544 (defining property as the right to dispose of a thing in the most complete manner possible, provided that there is no violation of statutes or regulations).

51. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 328–36 tbls. A.1–3 (2000).

IV. ADAPTATIONS OF TREASON TO LIBERAL PRINCIPLES

The illiberal elements in the feudal crime of treason have led to a number of efforts to reform the offense. The most common move is to redefine the crime as a variation on espionage. This is the French approach. The essence of the crime is betraying state secrets. It is applicable to everyone, but the term “treason” is reserved for French citizens who commit espionage.⁵²

The blurred distinction between espionage and treason became a critical factor in the Rosenberg case, when Julius and Ethel Rosenberg were charged by only one witness of delivering military secrets to the Soviets. They argued in the Supreme Court that they could not be convicted on the testimony of a single witness because the charge was in the *nature* of treason, and the Constitution requires two witness to the overt act to establish treason.⁵³ Having earlier rejected this argument, the Court approved the pending execution.⁵⁴ The case testifies to the willingness of American prosecutors to rely on charges of espionage in lieu of the procedurally more demanding charge of treason.

The German experience goes further toward universalization of treason than the French have done by linking the crime with espionage. The provision of the criminal code now in force strikes one immediately as a claim to make the crime of treason applicable to all offenders. Anyone, foreigners as well as Germans, can commit *Hochverrat* [high treason] by using force or the threat of force to undermine the Basic Law, the German constitution.⁵⁵ It does not matter whether the crime is committed in Frankfurt or New York.

The temptation is to think that postwar Germans, sickened by the nationalism of the Nazi period, eliminated the duty of national allegiance. But things are more complicated than that. Hitler changed the law in 1934 in the megalomaniacal belief that the whole

52. CODE PÉNAL [C. PÉN.] §§ 411-1 to 411-3 (defining certain acts as espionage if committed by foreigners and treason if committed by French citizens or members of the French military).

53. See *Rosenberg v. United States*, 346 U.S. 273, 300 (1953) (Black, J., dissenting).

54. *Id.* at 277–85 (summarizing the *Rosenberg* case’s history before the Supreme Court).

55. § 81 StGB (providing that high treason against the Federal Republic is committed by anyone, anywhere, who “undertakes” with force or the threat of force to undermine the constitutional order of Germany); § 82 StGB (providing that treason against a state is committed by anyone, anyplace, who undertakes with force or the threat of force to undermine the constitutional order of a state [*Bundesland*] or to seize part of its territory). *But cf.* § 100 StGB (limiting the offense to Germans living in Germany who take up contacts with foreign powers for the purpose of waging war against the Federal Republic).

world owed him a duty of loyalty.⁵⁶ Still, by substituting the Basic Law for the *Führer* in the postwar amendment of the crime, contemporary Germans have in effect nullified the crime of treason. Even though the label of treason is used, the offense now resembles the American concept of sedition⁵⁷ and seeks to prevent a violent overthrow of the government.

The two techniques, then, for liberalizing the crime are first, to equate treason with espionage, and second, to collapse the betrayal of the nation into disloyalty or sedition toward the established government. Both of these techniques retain the idea that the state is entitled to protect its secrets and its existence by threatening and applying criminal sanctions. Though the power of states to do so is rarely questioned, I am not sure whether the assertion rests on neutral moral principles. States have no inherent moral justification for their continued existence. They might be dictatorial, oppressive regimes. Why then should they be able to claim their own criminal law and their power to punish as legitimate instruments of self-preservation?

A good case at the borderline of state authority to punish the disclosure of state secrets arose in Hungary during the transition from Communism to democracy. While the “round table” negotiations between the Communist Party and the democratic forces were going in the late 1980s, the Hungarian security police, the local version of the KGB, taped the negotiations. A member of the secret police named Miklós Végyári had a crisis of conscience about this duplicity. He decided to switch to the other side and invited a television crew into the inner sanctum of the ministry to photograph secret files.

Later, after the transition to democracy, the chief prosecutor confronted the question whether he should prosecute Végyári for disclosing state secrets. In the end he decided that the rule of law mandated prosecution and the trial proceeded. The military court reached a compromise verdict.⁵⁸

56. The relevant changes occurred in the Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens [Statute for the Amendment of Provisions of Criminal Law and Procedure], v. 2.5.1934 (RGBl. I S.341), reprinted in DIE STRAFGESETZGEBUNG DER JAHRE 1931 BIS 1935 [Legislation for the Years 1931–1935] (Ernst Schäfer & Hans V. Dohanyi eds., 1936).

57. 18 U.S.C. § 2384 (2000) (defining seditious conspiracy as two or more persons who conspire “to overthrow the government of the United States”); see *Dennis v. United States*, 341 U.S. 494, 516–17 (1951) (upholding convictions of members of the Communist Party for “conspiracy . . . to teach and advocate the overthrow of the Government of the United States by force”).

58. For additional details about the case, see GEORGE P. FLETCHER, BASIC

We can justify this prosecution only by assuming that every government, even a dying Communist government, is entitled to have its secrets protected. It can justify prosecution, as it were, from the grave. This seems a bit arbitrary, but the alternative proposition is also problematic, the claim that anyone can justify disclosing secrets for a good cause.

The case that comes closest to testing this claim in the American experience is the prosecution and conviction of Jonathan Pollard, an intelligence officer who sold secrets to our military ally Israel.⁵⁹ If the principle of lesser evils could justify Végvári, it could apply with equal force on behalf of Pollard. That outcome is hardly attractive. It might be better to stick with an absolute rule about protecting state secrets, even if the result is that some unappealing states—such as Communist Hungary—are thereby protected.

V. THE FUTURE OF TREASON

The United States now finds itself in an ambivalent position with regard to the duties of its citizens and nationals toward the nation. It expects people to be loyal to the country, even if that requires suppression of dissent. The Attorney General has played the “loyalty” card to criticize those who disagree with governmental policies that impinge on civil liberties.⁶⁰ American civil society has endorsed this general demand for loyalty, as evidenced by the

CONCEPTS OF LEGAL THOUGHT 18–19 (1996).

59. Pollard was arrested on November 21, 1985, on charges of espionage; he was accused of selling U.S. intelligence to Israel. See Philip Shenon, *Navy Employee Arrested as Spy*, N.Y. TIMES, Nov. 22, 1985, at A1. In discussing the issues raised by this case of an ally spying on another ally, Bernard Weintraub pointed out:

Both nations are, of course, sovereign. Their respective interests, while rarely colliding, sometimes diverge. The Israelis, for example, have been frustrated by the refusal of the United States to provide certain information on troop deployments by moderate Arab countries, including Jordan and Egypt. Moreover, some Israelis have said that the United States declined to turn over all the intelligence data that would be helpful in protecting Israel.

Bernard Weintraub, *The Darker Side of U.S.-Israeli Ties Revealed*, N.Y. TIMES, June 5, 1986, at B9.

60. During a December 6, 2001, Senate Judiciary Committee hearing on Ashcroft’s proposed antiterrorism measures, the Attorney General remarked:

[T]o those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies and pause to America’s friends. They encourage people of good will to remain silent in the face of evil.

DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, 107th Cong. 313 (2001) (Sup. Doc. No. Y 4.J 89/2:S.HRG. 107-704) (statement of John Ashcroft, Attorney General, U.S. Dep’t of Justice).

difficulty that television satirist Bill Maher encountered after he made a “politically incorrect” comment about the attacks of 9/11.⁶¹

The surge of patriotism in the United States has expressed itself in the apparent decline of multiculturalism.⁶² It was not too long ago that Muhammed Ali could gain the sympathy at least of liberals for resisting the draft and grounding in his decision in discrimination against African Americans.⁶³ I don’t think the same argument would appeal to so many today. Hyphenated identity now seems to mean less than it did before 9/11. The overriding principle is loyalty to the nation and a passionate renewal of the belief that we are all Americans.

At the same time that patriotism is ascendant, the law of treason is on the wane. The decision not to prosecute John Walker Lindh for treason is symptomatic. Of significance, also, is the absence of significant appellate decisions in the entire sixty-year period since the World War II cases.⁶⁴ It is worth noting this correlation, though it is unlikely that the relationship is causal.

It may be as well that nations secure in their identity tend to abandon the use of the feudal crime of treason. The new post-Communist states of Eastern Europe readily invoke treason charges

61. Maher’s comment was made on September 17, 2001, during an on-air conversation with conservative commentator Dinesh D’Souza on Maher’s political talk show, *Politically Incorrect*. Celestine Bohlen, *In New War on Terrorism, Words Are Weapons, Too*, N.Y. TIMES, Sept. 29, 2001, at A11. Regarding President Bush’s then-recent characterization of the 9/11 hijackers as cowards, Maher said, “We have been cowards, lobbing cruise missiles from 2,000 miles away. That’s cowardly.” *Id.* (quoting *Politically Incorrect* (ABC television broadcast, Sept. 17, 2001)). Two days later, Sears and Federal Express withdrew their advertising from the show, and despite Maher’s subsequent public apologies, several ABC affiliates refused to continue airing *Politically Incorrect* (although some later relented). *Id.* Then, in a September 26 press briefing, Ari Fleischer, the White House press secretary, “denounced Mr. Maher, saying of news organizations, and all Americans, that in times like these ‘people have to watch what they say and watch what they do.’” Bill Carter & Felicity Barringer, *In Patriotic Time, Dissent Is Muted*, N.Y. TIMES, Sept. 28, 2001, at A1. *Politically Incorrect*, which had run on ABC since 1997, was bumped from its time-slot in 2002, and Maher’s ABC contract was quietly allowed to expire, as he had predicted it would. Don Kaplan, *Maher Expects To Be Axed*, N.Y. POST, Nov. 8, 2001, at 82; Lisa de Moraes, *The TV Column*, WASH. POST, June 29, 2002, at C1.

62. On the distinction between loyalty and patriotism, see FLETCHER, *supra* note 2, at 62–65. Loyalty is closely connected to the idea of law (*lex, loi*) while patriotism is a romantic passion that inclines people to break the law.

63. *Muhammad Ali—The Measure of a Man*, 7 FREEDOMWAYS 101, 101–02 (1967) (praising Muhammad Ali’s refusal to be inducted and quoting Ali on the issue’s cover as saying, “No, I am not going 10,000 miles to help murder and kill and burn other people simply to help continue the domination of white slavemasters over dark people the world over. This is the day and age when such evil injustice must come to an end.”); see Gene Marine, *Nobody Knows My Name*, RAMPARTS, June 1967, at 11.

64. See *supra* note 9 and accompanying text.

to support their fledgling democracies.⁶⁵ The Russians even prosecute people for treason if they share too much information with foreign journalists that is disparaging to national pride.⁶⁶ Insecure states are more likely to sense betrayal and to invoke criminal sanctions as a way of demonstrating their supremacy over threats from within. More secure states, such as the United States, might find that they can live quite well without the crime of treason.

For various reasons the government will probably not bring another treason prosecution for many years to come, if ever. For one, the notion of the enemy seems to presuppose a declared war, and Congress now delegates military authority to the President without declaring war.⁶⁷ Further, as the Lindh case illustrated, the government has a whole array of other offenses at its disposal, all of which are easier to prove in court than is treason.⁶⁸ The fight against terrorism now looms larger than the problem of American allegiance to “enemy” powers.

CONCLUSION

But these are all technical or pragmatic concerns. I believe that there is a deeper reason for the decline of treason in the way lawyers and judges think about mastering the problems of crime and terrorism in the twenty-first century.

Treason belongs to an era in which crimes were understood primarily as personal moral dramas.⁶⁹ The criminal betrayed those

65. Milos Jakes and Josef Lenart, former Communist officials, were acquitted. For a general survey of similar prosecutions in former Communist states, see Tom Humdley, *Old Crimes Still Haunt New Europe*, CHI. TRIB., June 29, 2003, § 1, at 1.

66. For example, Grigory Pasko was prosecuted and convicted in Vladivostock for collaborating with Japanese journalists about Russian environmental abuses. David Holley, *Judge Paroles Russian Journalist*, L.A. TIMES, Jan. 24, 2003, at A6.

67. See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C.A. § 1541 note (West 2003)) (authorizing the president to wage war in Afghanistan).

68. On July 15, 2002, Lindh pled guilty to one count of providing service to a terrorist organization (a felony, as the Taliban had been thus designated) and one count of carrying explosives while doing so (a second felony). Lewis, *supra* note 1. He summarized his actions in court thus: “I provided my services as a soldier to the Taliban last year and in the course of doing so, I carried a rifle and two grenades.” *Id.* (quoting John Walker Lindh (July 15, 2002)). The U.S. government agreed to the bargain, dropping the remaining nine counts in the indictment, *id.*, while adding a proviso that “for the rest of his life the government may immediately and unilaterally capture and detain Mr. Lindh as an ‘enemy combatant’ should it determine that he has engaged in any of a score of crimes of terrorism.” Adam Liptak, *Accord Suggests U.S. Prefers To Avoid Courts*, N.Y. TIMES, July 16, 2002, at A14.

69. Recall the place of loyalty in the Renaissance. See Chevigny, *supra* note 8, at 788–

whom he hurt. As some National Socialist theories argued, all crime was a form of treason against the collective.⁷⁰ Thus, crime and treason were emblematic of moral struggles between the community and the deviant. This larger-than-the-incident conception of crime was played out dramatically in court and in the rituals of punishment. Those who perpetrated the attacks of 9/11 saw them as symbolic victories against the despised values of the West. We saw them as the malicious homicide of roughly three thousand people and the meaningless destruction of the twin towers.

Though this way of addressing the problem is admittedly speculative, my sense is that treason has declined because in the pragmatic thinking of the West, we no longer perceive great symbolic messages in criminal action. We now think impersonally about crime and danger. The criminal does not betray us. He or she threatens us with physical harm. The decline of treason expresses a general shift in our culture away from symbolic struggles toward the systematic and scientific control of violence.

96.

70. *See supra* note 47.