The State as Victim: Treason and the Paradox of American Criminal Law

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The American law on offenses against the state, most notably the definition of treason, has remained unchanged since the Founding Era of the New Republic. What’s more, and more interesting, that definition itself did not significantly revise the definition, and more important, the conception of treason reflected in the English Treason Act of 1351. That fourteenth century conception in turn merely made explicit, and rested on, a conception of the relationship between sovereign and subject familiar since the very beginnings of Western politics and economics, that between the householder and his household, the lord and his serf, the master and his slave, the abbot and his clerk, the paterfamilias and his familia, and in ancient Greece, the oikonomikos and his oikos. Treason always was, and in US law remains to this day, the breach of the duty of allegiance (or fealty or loyalty) that the subject owes the sovereign, any sovereign.

As it turns out, and as I shall argue, the offense of treason, and its history, is symptomatic of American criminal law as a whole, which survived the American Revolution largely unchanged, and unchallenged. Treason, in fact, is more symptomatic of American criminal law than is any other offense; it is positively paradigmatic not only of offenses against the state, but of American criminal law as a whole.

I.

The following discussion will focus almost exclusively on the crime of treason, rather than on some other offense that could be labeled an offense against the state, such as sedition, espionage, insurrection, rebellion, and so on. Treason is the oldest and most serious offense against the state. In fact, under the dominant conception of American criminal law, it is the most serious offense, period.¹

That conception is the police power model of criminal law, or rather of state penalty. Under the police power model, the state’s penal power is regarded as rooted in the concept of sovereignty. The sovereign, qua sovereign, has the power to police, the power, as Blackstone put it memorably in his Commentaries, of the “pater-familias of the nation” to govern “the individuals of the state, like members of a well-governed family”² and to maintain “the public police and oeconomy,” i.e., to attend to “the due regulation and domestic order of the kingdom,”³ or, in Rousseau’s roughly contemporaneous phrase, “that great family, the State,”⁴ the subject of political, or macro, economy. The police power is comprehensive, flexible, and

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¹ University of Toronto Faculty of Law. This paper was written for a conference on “Offenses Against the State” at the University of Haifa in December 2009.
² See Hanauer v. Doane, 79 U.S. 342 (1870) (“No crime is greater than treason.”)
⁴ Jean-Jacques Rousseau, Discourse on Political Economy (1755).
indefinable, except by its very indefinability; it is, according to the U.S. Supreme Court, “and must be from its very nature, incapable of any very exact definition or limitation.”

As a direct manifestation of sovereignty itself, the police power is also beyond meaningful scrutiny. A challenge to the sovereign’s exercise of the power to police is indistinguishable from a challenge to its very sovereignty. So close, and obvious, was the connection between police and state that the power to police was often treated as synonymous with sovereignty, so much so that the American debate about state sovereignty in a federalist scheme of government was framed as a debate about the states’ police power. The states had to retain the(ir) police power because, without it, they would no longer be sovereigns.

The police power, as “the most essential, the most insistent, and always one of the least limitable of the powers of government,” to cite the U.S. Supreme Court once again, extends to “the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property,” not no mention “the protection of the lives, limbs, health, comfort, and quiet of all persons.”

The police power, on this account, is the modern manifestation of the householder’s power to maintain the mund, or peace, of his household, which itself derived from the patriarchal power of the Roman paterfamilias (the manus, which included the potestas vitae necisque, the power of life and death over members of the familia), and of the Athenian oikonomikos before him. As Pollock and Maitland put it, “every householder has his peace.” This peace power of the micro householder eventually was asserted by the king who, as macro householder, claimed the power to maintain the peace of his household, or realm, and, eventually, the state, which incorporated the various micro households governed by lesser householders. This process of centralization meant a reconceptualization of local householders’ power over their respective households as now flowing from the king’s superior power as parens patriae, his sovereignty, rather than originating from the householder’s inherent power. In other words, the householder was degraded to object status within the royal macro household and retained subject status only within his micro household and only by the king’s grace. In the United States, the king’s peace was democratized and, literally, popularized along with the concept of sovereignty from which it derived and was merely reclassified as “‘peace of the commonwealth,’ ‘peace of the State,’ or ‘peace of the people,’” or, simply, “public peace.”

Eventually, with the rationalizing and scientizing impulse of the early enlightenment and the transformation of governance from royal or princely rule to an abstract, depersonalized, and amorphous concept of the state, the notion of the peace of the macro household, and of the governance of the macro household to

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5 Slaughter-House Cases, 83 U.S. 36, 49 (1873).
7 Slaughter-House Cases, 83 U.S. 36, 49-50 (1873).
maintain its peace, were suitably reclassified—as police and political (rather than domestic) economy, which were two labels for the same ambitious project of governing the state as a *familia*.

When police is used as synonymous with “public welfare” (as, for instance, in the concept of “public welfare” offenses), “the commonweal” or “commonwealth” (i.e., the police or oeconomy of the community), or “good order,” it is important to recall the historical and conceptual foundation of the power to police in the householder’s power to govern the household, for which these terms are best used as shorthand references. To say that penal power in the United States derives from the police power, then, is to say that it is one, and the most awesome, manifestation of the sovereign’s power to maintain the peace of the macro household.

Now, not only does every householder have his peace, as Pollock and Maitland remarked. But every householder also has his treason. In a police power model of criminal law, treason is the *Ur*-offense, the most radical and direct offense against the sovereign-householder, by breaking the bond of allegiance that the householder is owed by each member of the household. Treason is the purest offense against the sovereign *qua* sovereign, and the householder *qua* householder. High treason, after all, is not the only form of treason. The Treason Act 1351 not only defined treason, but also recognized two types of treason, high, or grand, treason and petit treason. The lords wanted Edward III to clarify the distinction between treason and felony, presumably in the hope that some, any, definition of treason was better than no definition at all. This was not a civil liberties issue, incidentally, whatever that would mean in the fourteenth century, but a matter of the disposition of the offender’s property, which fell to the king if it amounted to treason, and to the local lord if it amounted to felony. Edward obliged by defining treason so broadly and vaguely that at least some lords might have wished they had not gotten what they had wished for.

In the Treason Act, Edward codified his superior status vis-à-vis the lords by distinguishing between grand treason, which offended his sovereignty, and not-so-grand, or merely petit, treason, which was committed against a lord. He went further and defined petit treason far more narrowly than he had grand treason; for instance, the famous, or infamous, offense of “compass[ing] or imagin[ing] the Death of our Lord the King” applied only to, well, our Lord the King, along with “our Lady his [Queen] or ... their eldest Son and Heir,” but not to the lords; grand treason also included “violat[ing] the King’s [Companion,] or the King’s eldest Daughter unmarried, or the Wife [of] the King’s eldest Son and Heir,” as well as killing all manner of royal officials, including judges, not to mention the better known offenses of “levy[ing] War against our Lord the King in his Realm, or be[ing] adherent to the King’s Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere.” By contrast, petit treason was limited to actual, rather than merely compassed or imagined, slayings, by “a Servant [of] his Master, or a Wife [of] her Husband, or when a Man secular or Religious slayeth his Prelate, to whom he oweth Faith and Obedience.”

In fact, one might suspect that the lords, when issuing the request that triggered the Treason Act, may well have had in mind a definition of treason *simpliciter* that rather more resembled Edward’s definition of *petit* treason than his
definition of *grand* treason.

Still, despite these distinctions between grand and petit treason, it is important not to lose sight of the point that even petit treason was a form of treason. Treason, then, is at bottom not an offense against the state. It is an offense against the householder and his inherent sovereignty; an act of disobedience. Treason is not the breach of allegiance to the state; it is the breach of allegiance to the state *qua* sovereign. As such, it is rooted in a fundamental, and fundamentally patriarchal, distinction between sovereign and subject, between householder and household, and even between king and lords, as the latter found out to their chagrin that one day in the 25th year of the reign of Edward III.

II.

An inquiry into the Treason Act 1351 is not of merely historical interest. It has considerable contemporary significance for the simple reason that its conception of sovereignty continues to undergird the American law of treason to this day. Treason was the ultimate breach of allegiance then, and it is the ultimate breach of allegiance today. The sovereign has changed, but the nature of the offense against sovereignty has not. The object of disobedience has changed, but the offense of disobedience has not. Treason was the pure police offense then (if *avant la lettre*), and treason is the pure police offense now.

American criminal law as a whole, and not merely the law of treason, did not undergo a radical critique and reconceptualization during the Founding Era. The question of the legitimacy of state punishment attracted little, if any, attention in the New Republic. Instead, the conception of crime as an offense against the sovereign survived the Revolution unchallenged, though of course sovereignty ostensibly passed from the king to “the people.” The state’s power to punish, instead, was taken for granted and the revolutionaries(and traitors)-turned-rulers simply proceeded to use the criminal law as an unquestioned and integral aspect of their comprehensive and indefinable power to police. Thomas Jefferson came closest to framing the legitimacy question of punishment in a republican democracy in the preface to the criminal law bill he drafted as part of the general overhaul of Virginia state law in light of republican principles. But he, too, did not advance beyond assembling a haphazard, incomplete, and unsystematic collection of provisions drawn primarily from Coke and Anglo-Saxon dooms that attracted his attention primarily as an exercise in penmanship, rather than in draftsmanship, and received praise as an “extraordinarily beautiful document,” rather than as a serious attempt to address the challenge of criminal law in the New Republic.10

The treason provision in Jefferson’s bill illustrates the point. Like the U.S. Constitution, and the federal treason statute, it closely follows the language of the Treason Act 1351. Treason is defined, again and still, as “levy[ing] war against the

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Commonwealth or be[ing] adherent to the enemies of the commonwealth giving to them aid or comfort in the commonwealth, or elsewhere,” simply replacing one sovereign (the king) with another (the commonwealth). Analogous substitutions appear in the treason provisions in the U.S. Constitution and the federal treason statute (where the king is replaced by “the United States”). Moreover, Jefferson even retains the offense of “petty treason,” without defining it, though grouping it with the acts of “a husband murder[ing] his wife, a parent his child, or a child his parent.”

The only difference between the 1351 English statute and the definition of treason since the American Founding Era, other than the simple exchange of one sovereign with another, is the omission of one of its three clauses; treason includes “levying war” against the sovereign du jour and “giving ... aid or comfort” to said sovereign’s enemies, but no longer “compass[ing] or imagin[ing] the Death of our Lord the King” or of “our Lady his [Queen] or ... their eldest Son and Heir,” nor for that matter of “violat[ing] the King’s [Companion,] or the King’s eldest Daughter unmarried, or the Wife [of] the King’s eldest Son and Heir.”

The omission of this clause is hardly surprising since, after replacing the personal sovereign of the king with the abstract sovereign of the “United States,” it is difficult to imagine just what compassing or imagining that sovereign’s death would mean, not to mention compassing or imaging the death of its wife, son, or heir, never mind “violating” its companion, oldest unmarried daughter, or daughter-in-law.

The omission also has been said to reflect the Founding Fathers’ distaste for so-called “constructive” treason, which they apparently attributed to interpretations of the “compassing or imagining” clause (even though the other two clauses would seem to be no less susceptible to expansive interpretation). This distaste reflected their very personal concern about being prosecuted for treason for what they considered legitimate civil disobedience and political agitation even before they openly levied war against the royal sovereign (or rather his colonial officials, a distinction the revolutionaries often emphasized). It does not reflect a rejection of, or even an adjustment to, the conception of treason as breach of allegiance to the sovereign (who- or whatever that may be) that undergirds the Treason Act 1351 in general, and the remaining two clauses (levying war, and giving aid or comfort to the sovereign’s enemies) in particular. Whatever substantive objection there was to the compassing or imagining clause, it was an objection to constructive treason, not to treason itself.

In fact, the omission of the compassing or imagining clause does not even imply a rejection of the breadth or vagueness of the English definition of treason from 1351, nor a rejection of its essential inchoacy and vicarity. The remaining clauses, levying war and giving aid or comfort to the sovereign’s enemies are no less broad and vague, and in some sense are still broader and vaguer, than the clause proscribing compassing or imagining the king’s death. As the failed federal criminal

code commission pointed out in the 1970s, the American definition of treason contained, and still contains, no requirement of \textit{mens rea} whatsoever, whereas the very act of compassing and imagining implies intentionality.\textsuperscript{12} The anachronistic element of "levying war" specifies neither the activity (levying) nor its object (war). The no less archaic element of "giving aid or comfort" does not differentiate between levels of aid—or comfort—and makes no attempt to relate itself to general modes of vicarious criminal liability, with their doctrinal constraints, instead creating the impression of a malleable \textit{sui generis} offense.

Most notably, the American drafters did not object to the feature that today is most often associated with the compassing or imagining clause—an inchoacy so extreme that it flies in the face of the other bedrock principle of Anglo-American criminal law, \textit{actus reus}. Inchoacy remained a central feature of the American law of treason, and indeed American criminal law in general, as the 1351 statute's reference to "compassing or imagining" appears almost quaint in comparison to the broad concepts of attempt, conspiracy, facilitation, and solicitation that populate American criminal law to this day, including prominently in the influential Model Penal Code of 1962, which explicitly revolves around the project of assessing criminal dangerousness.

In other words, the omitted "compassing or imagining" clause was simply superfluous, given the inchoacy of American criminal law in general. And its consummation, in the form of the death of the king, was no longer possible, given the substitution of a new, non-personal, sovereign.

This invention, or discovery, of a new, abstract, sovereign, of course, lay at the very heart of the American revolutionary project. In the law of treason, however, it can be seen as replacing one form of constructivity with another, or even more radically, of transforming all treason into constructive treason. Insofar as the victim of treason, the new sovereign of "the United States," was an entirely artificial, constructed concept, an offense or treason against it, must itself be constructive.\textsuperscript{13} The death of the person of the king, by contrast, is as actual as the person of the king itself. By contrast, any breach of allegiance to the United States, or "the people," or "the commonwealth," or "the state," is as constructive as its victim is constructed, and designedly so.

III.


The substitution of one, personal, sovereign with another, abstract, one, illustrates a yet more basic feature of the American law of treason, and of American criminal law in general. I mean the denial of the existence of the state. The American revolution not only rejected the personal sovereignty of the English king and replaced it with another, a personal one. It also went further and denied the very existence of sovereignty and its new holder, the state. Not only the royal sovereign had been removed, but sovereignty itself. Sovereignty, without a personal holder, appeared to dissipate and even to disappear altogether, as though the New Republic magically governed itself, without state intervention of any kind. Laissez-faire became the dominant ideology, as the newly sovereignless citizens of the United States went about their pursuit of happiness.

This myth, of course, has been debunked many times over, most recently in Bill Novak’s revelation of the myriad exercises of the police power at all levels of government throughout the nineteenth century. But it is a powerful myth and one that blocks open and honest analysis, never mind critique, of any exercise of state power, and notably of the state’s power to police, which—as we’ve seen—is bound up particularly closely with the very notion of sovereignty.

The denial of sovereignty, and of a state that holds and wields it, obviously complicates not only the project of an American law of treason, but the project of American criminal law as a whole, given that it is conceptualized as an instance of the power to police. Without a state, there can be no offense of disobedience, or of a breach of allegiance, against the state. And insofar as the abstract state is the holder of non-personal sovereignty, there can be no offense of any kind. Not only treason, but criminal law as a whole, becomes impossible.

Yet, at the same time, American law insists that the offense of treason, and in fact any offense, is an offense against sovereignty, rather than against an individual person. What makes an offense criminal, it is said again and again, is its offensiveness to the sovereign, rather than against a particular victim. Private law, and tort in particular, is said to deal with violations of individual right, or interference with individual interests. So, for instance, consent is no defense because the sovereign will be offended, through the very disobedience of its commands, even if the individual remains inviolate, and an act that kills one person can be prosecuted and punished twice, insofar as it offends the criminal law, and therefore the sovereignty, of two sovereigns.

Treason, then, is paradigmatic of American criminal law as a whole because it is both the ultimate victimless and the ultimate victimful crime, at the same time.

Treason is victimful because it is the offense most directly aimed at the authority of the state, and the state, as the abstract holder of amorphous sovereignty, is the ultimate victim of crime conceptualized as an offense against the sovereign.

At the same time, treason is the ultimate victimless offense because it is explicitly not aimed at a particular person (say, the English king) and, more

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fundamentally, because the very existence of the state, and of the sovereignty it
wields, is denied.

In other words, as both victimless and victimful, treason highlights, and
personifies, the central paradox at the heart of American criminal law. The state,
and its sovereignty, are both nowhere and everywhere, and so is treason, as the
ultimate offense against the state as sovereign.

IV.

This paradox of American criminal law, which relies on the very notion of
sovereignty it denies, has remained unresolved. Treason most pointedly manifests
that paradox by positing the nonexistent state as victim, and in this sense is at once
the most serious offense and the most impossible offense.

Small surprise, then, that the American law of treason has not been reformed,
and that, as a result, a paper on the reform of US law on offenses against the state
would have been very short. For a reconceptualization of the American law of
treason would require nothing less than a reconceptualization of American criminal
law as a whole.