

# How to Modernise the Law of Treason Around a New Version of Allegiance

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*British treason law is archaic and unworkable. Ideas of betrayal and allegiance seem outmoded. Contemplated reform of UK treason law renders a separate Scottish treason law politically possible. But how to re-think treason's core duty of allegiance and re-fashion it for modern conditions? Reconceptualisation is inspired by the Lauterpacht-Williams debate which followed *Joyce v DPP* (1946). Treason's core duty of allegiance is recast—adopting Williams' paradigm of a non-patriotic, contractual, duty-based model—promoting individual rights, evoking the social contract and common law. A negative duty of allegiance emerges—or duty of non-betrayal. Mercifully, this “patriotism-lite” version ignores citizenship modelling.*

## I. INTRODUCTION

Treason is an offence against allegiance, being historically based on the concept of allegiance of the British subject to the Crown. However, the existing British law of treason is archaic and unworkable—scarcely being in a form fit to be enforced or litigated. The 1351 Treason Act—still the chief basis for our treason law—is couched in language which is obscure, difficult, and anachronistic. There is a paucity of contemporary sources. No recent precedent explains how its core concepts might be defined. The literature is scant, it having received little domestic academic attention. Further, our treason law is based on English law. Though proposals previously made for its simplification and pruning were ignored,<sup>1</sup> its renewal is now genuinely in contemplation. In the Queen's Speech of 19 December 2019, the government announced it was to consider the case for updating treason law as part of a new Espionage Bill enabling prosecution of anyone participating in “harmful activity” with a hostile foreign state.<sup>2</sup> But the common law notion of allegiance is problematic in a twenty first century, multi-cultural constitutional monarchy. It may be perceived as unduly deferential to monarchy and over-emphasising British identity. It seems archaic and complicated. The principal

\* Advocate. I should like to express my sincere thanks to Lindsay Farmer and James Chalmers for their helpful comments and suggestions.

<sup>1</sup> Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences* (HMSO, 1977), Law Com. Working Paper No.72; Law Commission, *Tenth Programme of Law Reform* (TSO, 2008), HC 605, Law Com. No.311.

<sup>2</sup> The Queen's Speech 2019, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/853886/Queen\\_s\\_Speech\\_December\\_2019\\_-\\_background\\_briefing\\_notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf) [Accessed 6 September 2021]. This intention was reiterated in the Queen's Speech 2021, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/986770/Queen\\_s\\_Speech\\_2021\\_-\\_Background\\_Briefing\\_Notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986770/Queen_s_Speech_2021_-_Background_Briefing_Notes.pdf) [Accessed 6 September 2021]. Treason reform was specifically posited in the consultation paper, Home Office, *Legislation to Counter State Threats (Hostile State Activity): Government Consultation* (TSO, 2021), question 39, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/986013/Consultation\\_Document\\_-\\_Legislation\\_to\\_Counter\\_State\\_Threats.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986013/Consultation_Document_-_Legislation_to_Counter_State_Threats.pdf) [Accessed 20 November 2021].

question asked in this article is how to rethink treason's core duty of allegiance that it might be refashioned for modern conditions, placed in a viable theoretical context and restated in a form fit to be enforced? In short, how might we fix it?

If the revival of treason law were pursued at Westminster, this could also be done separately and concurrently by the Scottish Parliament—assuming prior adjustment of the Scottish constitutional settlement, and the amending of treason law from reserved to devolved matter status.<sup>3</sup> There is a principled case for fully repatriating Scottish treason law on the basis that it need never have been subsumed under English treason law in the early post-Union period in the first place. This would affirm the integrity of Scottish criminal law (as originally envisaged by the Treaty of Union).<sup>4</sup> It would be a further logical manifestation of Scotland's ever-evolving devolution settlement and the enhanced “provincial” statehood of the Scottish political system, particularly as the post-EU UK is increasingly perceived as a confederation. That viewpoint may not reflect constitutional reality, but prevailing “four nations” political rhetoric suggests people might be receptive to the notion of a devolved state having its own treason law. Instructively, “local” treason laws are unremarkable in the federal common law experience. As devolution has increasingly changed the relationship between Scotland and the rest of the UK, it might be thought that there is no longer a political impediment to a separate Scottish treason law. However, the case for a separate Scottish treason law is naturally predicated on the argument for reviving treason law generally—and, again, to modernise treason law you must first rethink treason's core idea of allegiance.

The primary resources for this re-conceptualisation exercise can be found in the Lauterpacht and Williams debate that followed *Joyce v DPP*.<sup>5</sup> Nazi propagandist William Joyce had voluntarily sided with Germany after an Anglo-Irish upbringing and education. As “Lord Haw-Haw”, the radio voice of “Germany calling”, Joyce had, in his sneering affected upper-class accent, mocked, and taunted the British people during the war's darkest hours. But many felt genuine discomfort with his treason prosecution, given that at the time of his ostensibly treasonable broadcasts, he was neither a British subject nor on British soil.<sup>6</sup> When convicted, he was a German citizen. It was moot whether Joyce had owed allegiance to the Crown, the nexus being his lapsed British passport, obtained by false pretences, and the resultant slender international diplomatic protection derived from it. The court relied upon his having applied for and received it as a basis for estoppel such that he was not entitled to deny his duty of allegiance. The trial judge directed the jury (as a matter of law) that when Joyce had applied for his British passport, he, “beyond a shadow of doubt”, owed allegiance to the Crown. On appeal, Joyce unsuccessfully submitted his possession of it did not entitle him to the Crown's protection and therefore did not perpetuate his duty of allegiance after he left the

<sup>3</sup> In practical terms this would involve repealing s.1 of the Treason Act 1708 and amending Sch.5 Pt 1 para.10 of the Scotland Act 1998. As there is precedent for amending the Scotland Act in this way, this is not an insurmountable legal impediment. Though unlikely, the Westminster Parliament could alternatively pass a specifically Scottish treason law.

<sup>4</sup> The Treason Act 1945 was a modest step in the direction of repatriating treason law, repealing the rule that treason trials in Scotland had to be conducted according to English criminal procedure and evidence.

<sup>5</sup> *Joyce v DPP* [1946] A.C. 347; [1946] 1 All E.R. 186.

<sup>6</sup> Glanville L. Williams, “The Correlation of Allegiance and Protection” (1948) 10 C.L.J. 54; Hersch Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens” (1947) 9 C.L.J. 330, 347; Alan Wharam, *Treason: Famous English Treason Trials* (Stroud, Gloucestershire: Sutton Publishing Ltd, 1995), p.236.

UK. However, because Joyce had obtained (and renewed) it fraudulently—a material misrepresentation involving falsely claiming an Irish rather than American place of birth, such that it was “voidable”—the Crown owed no duty of protection. If there were no duty of protection, there was no correlating right to protection and no duty of allegiance could be competently owed. Lauterpacht’s case critique, affirming conviction, founded on the familiar doctrine of the mutuality of protection and allegiance.<sup>7</sup> Williams argued *Joyce* was wrongly decided. His deconstruction of the Lords’ reasoning involved redefining and refining the conceptual structure of allegiance in terms of a mutuality of a duty of protection and a duty of allegiance. This meant not protection juxtaposed against allegiance, rather a duty of protection correlating to a duty of allegiance. This makes for a duty-based contractual model as a working theory explaining the crime of treason. I will argue that treason’s core duty of allegiance can be reinterpreted in terms of Williams’ duty-based contractual model—promoting individual rights, evoking the “social contract” and the common law—and thus allowing for a “patriotism-lite” version of that duty.<sup>8</sup> Building on that modelling (of duty-based allegiance and negative protection), a negative duty of allegiance emerges; or a “duty of non-betrayal”, to use the phraseology of the 2018 Policy Exchange Paper *Aiding the Enemy*.<sup>9</sup>

## II. PROBLEMS WITH ALLEGIANCE IN “CURRENT” TREASON

I now consider the legal problems with the concept of allegiance as presently constituted in British treason law. The fictional judge in a treason-related episode of the 1970s courtroom drama *Crown Court* consoled the lay jury: “The concept of allegiance is perhaps a little difficult.”<sup>10</sup> Lord Goldsmith in his 2008 citizenship review referred to the complexities in the concept of allegiance and recommended reforming the law of treason to make the duty of allegiance relevant to modern conditions.<sup>11</sup> Certainly, it might be thought that insofar as its central notion is of allegiance of the British subject to the Crown and betrayal of the sovereign, it involves an antiquated and outmoded view of society.

### 1. Archaic language

There are presentational difficulties with the arcane language of allegiance and its comprehensibility not just for modern juries, but also modern lawyers. The word “allegiance” derives from the Anglo-Norman French “*alleggeance*”, defining the loyalty of the liegeman (or vassal) to his feudal lord or king.<sup>12</sup> The word itself bears the marks of this history.<sup>13</sup> It evokes a sense of deference, subservience even, to the monarchy and seems hopelessly undemocratic. We tend to associate allegiance

<sup>7</sup> Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens” (1947) 9 CLJ 330, 334

<sup>8</sup> Williams, “The Correlation of Allegiance and Protection” (1948) 10 C.L.J. 54.

<sup>9</sup> Richard Ekins et al, *Aiding the Enemy, How and why to restore the law of treason* (London: Policy Exchange, 2018), p.5.

<sup>10</sup> *Crown Court*, “Treason: *R. v. Clement*” (1973), episode 52, directed by Alan Bromly, where an Anglo-Belgian mercenary was found guilty of treason after leading an uprising in a fictional British dependency and sentenced to death (it still being formally punishable by execution at the time of broadcast), available at <https://www.youtube.com/watch?v=OvnWK-ullJw&t=10s> [Accessed 6 September 2021].

<sup>11</sup> Lord Goldsmith, *Citizenship: Our Common Bond* (Ministry of Justice, 2008), pp.7 and 81.

<sup>12</sup> See *Oxford English Dictionary Online* (2020), <https://www.oed.com/> [Accessed 6 September 2021].

<sup>13</sup> Shai Lavi, “Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel” (2010) 13(2) *New Crim. L. Rev.* 404, 406.

with a pledge of allegiance or swearing an oath of allegiance, but we no longer generally inhabit an oath-taking society. The idea of allegiance to our country may be considered unfashionable.<sup>14</sup> Lavi asserts that it is an anachronistic term, though previously adequate for the protection of the Crown, incapable of facing modern challenges of security and defensive democracy, which require preventive measures and efficient enforcement that allegiance cannot guarantee.<sup>15</sup> The breach of allegiance seems to have lost its normative appeal and practical efficacy.<sup>16</sup>

## 2. Centrality of monarchy

British treason law has never extinguished the centrality of the monarch.<sup>17</sup> This renders it too heavily wedded to the idea of monarchy; its unfortunate royalist or even feudal connotations evoking the undue deference associated with a bygone era, again undemocratic for modern sensibilities. It might be thought the notion of duty to the sovereign embodied in the concept of allegiance runs contrary to the kinds of social obligations necessary to make a free, democratic society work. This may be a problem for reluctant subjects who prefer to consider themselves citizens or hold different ideas about what their relationship with the sovereign should be. It could be considered appropriate to distance treason law from the idea of the subject being beholden to the sovereign and the hereditary principle.

Since the state was characteristically personified by a king—on whose person was focused the subject’s loyalty—allegiance was historically conceptualised in this way. But while notionally the allegiance owed to the sovereign appears to be a personal bond, the Crown can be conceived as the personification of the British state; the symbol of British authority. The Law Commission’s 1977 working paper spoke of a contemporary breach of the duty of allegiance in terms of either a breach of personal duty to the sovereign, or a breach of duty to the constitutional system of the realm, which has its embodiment in the sovereign.<sup>18</sup> This acknowledges that the courts have long-since transformed the feudal concept of treason as a breach of loyalty to the royal person into the modern one of a breach of loyalty to the institutions on which the social order rests.<sup>19</sup> Allegiance need not be regarded as a personal obligation of the subject (or citizen) to the sovereign, rather something institutional owed by the subject to the nation’s political and security institutions. Allegiance need not be projected upon the person of the sovereign—nor the Crown as an abstract—but on the British state and its institutions, even its sub-national institutions. While the focus was originally upon threats to the sovereign in person, now it concerns threats to the democratic order.<sup>20</sup> Though it might be anti-liberal

<sup>14</sup> *Hansard*, HL Vol.793, col.1377 (31 October 2018), Lord Faulks.

<sup>15</sup> Lavi, “Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel” (2010) 13(2) *New Crim. L. Rev.* 404, 407–408.

<sup>16</sup> Lavi, “Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel” (2010) 13(2) *New Crim. L. Rev.* 404, 406.

<sup>17</sup> Lisa Steffen, *Defining a British State: Treason and National Identity, 1608-1820* (Basingstoke, Hampshire: Palgrave Macmillan Distribution Ltd, 2001), p.8.

<sup>18</sup> Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences*, para.34.

<sup>19</sup> S.C. Biggs, “Treason and the Trial of William Joyce” (1947) 7 *U.T.L.J.* 162, 171.

<sup>20</sup> Alastair Brown, “Offences against the State” in *Stair Memorial Encyclopaedia*, “Criminal Law”, Reissue 5, 19, 531.

if treason were still based on loyalty to the person of the king, this is no longer the conception of the object to which allegiance is due in the UK.<sup>21</sup>

Indeed, a modern treason law need scarcely be about allegiance to monarchy. Modern allegiance is not predicated on personal or political allegiance, but institutional allegiance. This is not about defending what is only theoretical monarchical authority. We can democratically argue for other forms of government and about whether the goals of the nation state, at any point in time, are sensible or desirable. However, we have a modern constitutional monarchy (or perhaps more precisely a ritual or titular monarchy), operating within the parameters of a representative (parliamentary) democracy, and whose role is wholly symbolic, a ceremonial figurehead, with the loyalty asked of the subject merely being to the political and constitutional system of the realm, and not to any individual or the content of state decision-making. The allegiance is effectively owed not to the person of the monarch, but to the Crown or the monarch as the head of state, the symbol or personification of the British state, and on whose person are focused the allegiances and loyalties of the subject. The Crown encompasses the Queen, Parliament, and nation in its large embrace; more specifically, the Queen-in-Parliament (or a united Crown-in-Parliament), and according to law (the rule of law). The Crown is thus a concept implying the integrating of the Queen into the body of the community of the realm.<sup>22</sup>

It would always be possible in reviving treason law and if creating a new Scottish treason offence, to remove that head of treason of “Compassing and Imagining the Sovereign’s Death”, thus ending the notion of personal allegiance by subject or citizen to the monarch. This would be in much the same way that US treason law excludes all references to the executive or German treason law regards the abstract which is the current constitutional order, as the protectable interest or object of the duty of allegiance.<sup>23</sup> You could make separate provision outwith the law of treason for offences involving the sovereign. You do not require to have a monarch to have a new Scottish treason law, or assign the monarch a central role. A new Scottish treason law need not reference the monarch (or the Crown) at all; involving another definition of the sovereign power or object of the duty of allegiance. The form of the state (and system of government) may make little difference in the basic principle underlying the definition of the crime of treason, although it may account for the inclusion (or exclusion) of particular acti rei.<sup>24</sup> Given allegiance has latterly had more to do with the office rather than the person of the sovereign, there may be scope for projecting the subject’s duty of allegiance on to a different sovereign object or protectable interest, more specifically, the political institutions on which the social and democratic order rests.<sup>25</sup>

<sup>21</sup> Kristen E. Eichensehr, “Treason in the Age of Terrorism: An Explanation and Evaluation of Treason’s Return in Democratic States” (2009) 42 Vand. J. Transnat’l L. 1443.

<sup>22</sup> Steffen, *Defining a British State: Treason and National Identity, 1608-1820* (2001), pp.13–14.

<sup>23</sup> The German Penal Code speaks of high treason against the Federation and criminalises the forcible change of the constitutional order based on the Basic Law of the Federal Republic (s.81).

<sup>24</sup> John N. Hazard and William B. Stern, “Exterior Treason: A Study in Comparative Criminal Law” (1938) 6(1) U. Chi. L. Rev. 77, 79.

<sup>25</sup> Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences*, paras 14 and 17 (citing the Irish case of *R. v Sheanes* (1798) 27 St. Tr. 255 at 387), 59 and 61; Goldsmith, *Citizenship: Our Common Bond*, p.80; Biggs, “Treason and the Trial of William Joyce” (1947) 7 U.T.L.J. 162, 171; Brown, “Offences against the State” in *Stair Memorial Encyclopaedia*, “Criminal Law”, Reissue 5, 19, 531.

### 3. Nationalistic allusions

Because treason is or can be conceptualised as a crime of disloyalty, it can be easily misconstrued as a crime compelling loyalty; thus having deeply unpleasant overtones for some, with connotations of nationalism, militarism even, and evoking an imperial past. Its opponents have rejected the notion of the duty of allegiance and sanctioning its breach because of its authoritarian origins.<sup>26</sup>

But the concept of allegiance need not have nationalistic connotations. Patriotism can be rightly distinguished from nationalism. Of course, the case could be made for a patriotic allegiance on the basis that patriotism is the central virtue, given the significance of the nation for its people's lives.<sup>27</sup> This approach is unlikely to be universally accepted. So, while patriotism may be one answer to this kind of question—and I concede there are problems with it—there is scope for considering models of sovereignty and allegiance, other than patriotic allegiance. However, what you can do is downplay the significance of patriotism—and I intend to do so by relying on Williams' contractual model—such that this emotion, while not entirely taken out of the equation, is not a factor alienating those not so politically-aligned.

### 4. Conflating allegiance and citizenship

Allegiance and citizenship are not synonymous concepts. Non-citizen residents appear to be bound by the same duty of allegiance—a local duty of allegiance—that while they stay here, they continue to enjoy the protection of the Crown and the legal system. Though residency is not citizenship, it might be regarded as a form of probationary or associate citizenship, coming with certain conditions. An issue with treason law is whether it applies to all those who live in the UK or remain connected to it. The Law Commission's 1977 working paper recognised that there are “somewhat complicated rules for deciding whether allegiance is owed or not”.<sup>28</sup> Therefore, should its ambit be limited to UK citizens, particularly because allegiance is no longer required to regulate citizenship? If not, there are still difficult distinctions to be made between settled and non-settled residents or sometime residents. Simplification and clarification might assist. Indeed, there may be some purpose in confining the duty of allegiance only to citizens. This might allow the subject of the duty of allegiance to be defined, less pejoratively, as a citizen. Accordingly, I will consider whether some form of citizenship model of allegiance might work.

## III. CITIZENSHIP AND ALLEGIANCE MODELLING

Could the relevant nexus in a new version of this crime—and any reinvented allegiance model—be citizenship? Of course, citizenship is not strictly necessary to owe a duty of allegiance. While treason can only be committed by persons owing

<sup>26</sup> Lavi, “Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel” (2010) 13(2) *New Crim. L. Rev.* 404, 407.

<sup>27</sup> Alasdair MacIntyre, “Is Patriotism a Virtue?” in Igor Primoratz (ed.), *Patriotism* (Amherst, New York: Humanity Books, 2002), pp.43, 48; Youngjae Lee, “Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries” (2012) 31 *Law Philos.* 299, 309.

<sup>28</sup> Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences*, para.34.

a duty of allegiance to the Crown—viz, British natural-born citizens, British subjects (wherever they may be) and British protected subjects, including naturalised subjects—this duty extends to resident aliens and, more controversially, aliens who, having settled, are temporarily removed, while continuing to have their family and effects here. Under the common law, not only British citizens, but all those protected by the law owe that duty of allegiance. However, since the late 1980s citizenship has become a focal point for political discourse—following on the vogue for the cognate idea of “community”<sup>29</sup>—and warrants consideration. The crime of treason might reflect a more conventional social contract model of citizenship in which the state or constitutional order replaces the Crown as the object of allegiance. The citizen’s duty might then be characterised as a duty owed to the whole (political) community, not just the sovereign. It could be defined in terms reflecting something of the political and moral expectations of what British citizenship and Scottish identity mean today, as something more than loyalty to a hereditary monarch. For example, the idea of a duty of allegiance having as its object the whole Scottish political community still connotes a national identity, involving a common connection to the nation-state, evoking social solidarity and the fabled Scottish democratic intellect. Citizenship entails a duty of allegiance meaning that citizens have a duty not to betray their country by aiding its enemies. It could be defined in terms of a model of citizenship participation—albeit not a particularly active one—involving (only) the negative duty of the citizens not to be disloyal and not to align themselves with the UK’s enemies. This would reflect the reciprocal relationship between citizens and the political community in which they live and its political institutions (as opposed to its political actors), with citizenship and community replacing the personal relationship of subject and sovereign. The subject of the duty of allegiance would be defined less pejoratively (depending on viewpoint) as a citizen (albeit redefinition could still occur under the present model). An allegiance model could be ascribable to the idea that a citizen’s rights are contingent on earning membership in a political community, with the duty of allegiance being a feature of their corresponding responsibilities.<sup>30</sup>

But citizenship has its limitations in understanding the normative aspects of the crime of treason. Dubber was not convinced by the potential of the concept of citizenship as an explanatory and analytical tool in criminal law generally. While playing a useful role in providing descriptive accounts of penal practice, it contributes nothing to a normative theory of criminal law, being either empty as a proxy for personhood, or pernicious, as a proxy for “insiderhood”.<sup>31</sup> He rejected the pernicious influence of citizenship rhetoric and, if anything, expected a normative theory of criminal law would seek to eliminate, rather than centralise, the discourse of citizenship.<sup>32</sup>

Ryan was scathing about how citizenship and community could be cited in aid of positions at all points on the political spectrum<sup>33</sup>:

<sup>29</sup> Robert Reiner, “Citizenship, Crime, Criminalization: Marshalling a Social Democratic Perspective” (2010) 13(2) *New Crim. L. Rev.* 241, 242.

<sup>30</sup> Lucia Zedner, “Security, the State and the Citizen: The Changing Architecture of Crime Control” (2010) 13(2) *New Crim. L. Rev.* 379.

<sup>31</sup> Markus D. Dubber, “Citizenship and Penal Law” (2010) 13(2) *New Crim. L. Rev.* 190.

<sup>32</sup> Dubber, “Citizenship and Penal Law” (2010) 13(2) *New Crim. L. Rev.* 190, 215.

<sup>33</sup> A. Ryan, “Citizens of All Persuasions”, *The Times*, 25 October 1988.

“Goering reached for his revolver when he heard the word culture. Now it is tempting to do the same when people talk about citizenship, the great, but wholly indistinct, good thing that parties and voters agree we should have more of ... But is there anything concrete hidden in the clouds of rhetoric, or has the idea of citizenship reached a state of vacuity?”<sup>34</sup>

Significantly, treason is about a breach of allegiance and not a breach of citizenship.<sup>35</sup> On its face, allegiance bears little relevance to contemporary citizenship. Vasanthakumar suggests two illustrative, competing conceptions of allegiance. In the liberal account, it is reduced to a “thinner”, minimalist approach involving only a political obligation to obey the law generally, rendering citizens and residents indistinguishable, undemanding of affection. At the other end of the spectrum is a potentially “thicker” civic republican model, whereby allegiance informs a more robust conception of citizenship—cultivating civic virtue, communitarianism, patriotism, national identity and shared values—consensual not contractual, albeit accompanied by problematic, inchoate distinctions between “true” and “so-called” citizens.<sup>36</sup>

I argue for a thinner still approach (a “lite” version), reducing the obligation to obeying only treason law, not the law generally, to recognise the imperative of national security and avoiding harm to it. While there are other legal contexts where good citizenship genuinely matters, it is not a relevant or appropriate basis for grounding the law of treason or its major concept of allegiance. The gravamen of the new treason appears to be the subject’s conduct being synonymous with that of a hostile foreign state. It is unconcerned with civic virtue, properly fulfilling the role of a citizen, deviating from social norms, or lacking “team spirit”. There is no legal requirement (for the purposes of treason law) for the protected person to be a “good” citizen, to pay taxes or comply with the regular criminal law. Civic duty or activism are superfluous. This is not about fulfilling responsibilities in society or having a shared national pride. The protected person’s allegiance is not contingent on “responsibilised” crime-preventing active participation in the life of the community.<sup>37</sup> Lazy or indifferent protected persons, lacking in civic duty—characteristically “non-loyal people”—should not be labelled as disloyal under treason law when they do nothing constituting betrayal.<sup>38</sup> The lawbreaking citizen or recusant is not a traitor. The posited negative and non-patriotic nature of the new duty of allegiance—and the requirement for involvement with a hostile foreign state—renders poor citizenship irrelevant in committing this high-end offence. Though allegiance might be an essential element of citizenship, citizenship is not an essential element of allegiance. In short, you do not have to be a conscientious protected person to elide criminal responsibility for treason because no positive duty is posited, the crime being conjoining with the state’s enemies.

<sup>34</sup> A. Ryan, “State and Citizen”, *The Times*, 12 September 1990.

<sup>35</sup> Carlton F.W. Larson, “The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem” (2006) 154 U. Pa L. Rev. 853, 874.

<sup>36</sup> Ashwini Vasanthakumar, “Treason, Expatriation and ‘So-Called’ Americans: Recovering the Role of Allegiance in Citizenship” (2014) 12 Geo. L.J. 187.

<sup>37</sup> Ely Aharonson and Peter Ramsay, “Citizenship and Criminalization in Contemporary Perspective: Introduction” (2010) 13(2) New Crim. L. Rev. 181, 182.

<sup>38</sup> Lee, “Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries” (2012) 31 Law Philos. 299, 322.



Citizenship might explain how the sovereign power has the moral standing to hold the protected person accountable; and the fact that each citizen has an interest in the wrongdoer being punished is what is sufficiently important to justify conferring such a power upon it.<sup>39</sup> But criminalisation has no relationship with the processes of political and social inclusion (or exclusion) which go under the banner of citizenship in other legal areas.<sup>40</sup> There is a difference in emphasis.

There is no purpose in disapplying treason law to non-citizen residents. Concepts of exclusion (a perennial theme in immigration law) do not apply here. Why exclude new immigrants from treason law? If anything, the protected person is defined in terms of an overarching or looser form of citizenship than British citizenship in the legal sense. Conflation of citizenship with the owing of allegiance is needlessly confusing, to the extent that it even precludes defining the protected person as a citizen, rather than subject.

#### IV. THE WRONG OF TREASON

Given that the concept of allegiance has these problems (particularly in seeming archaic) and that the citizenship model does not appear to be the corrective it might have been thought to be, I now consider what exactly the “wrong” of treason might be, to determine whether we should continue to stick with allegiance or consider some other basis for grounding the law of treason.

Insofar as treason is a crime against allegiance, it involves a breach of the allegiance owed to the sovereign power. The allegiance is characteristically breached by betrayal. The specific wrong of the breach of allegiance is in the betrayal of the sovereign power (the protector). In the treason of “Adhering to the Sovereign’s Enemies”, the betrayal involves joining and acting with hostile foreign states (organisations even) dedicated to the destruction of the sovereign power, and even possibly the extermination of its people and civil society. Complicity with the foreign enemy might aggravate other heads of treason, though it is not a precondition of liability in “current” treason law. The wrong consists not only in conduct which equates to that of the foreign enemy, but in the element of personal betrayal of the sovereign power. That is what makes the treason.<sup>41</sup> Indeed, without the betrayal there can be no treason. Betrayal is not just an incidental or aggravating factor in the crime of treason (though it would be for conventional terrorist or espionage offences). It is the essence of the offence. Devoid of this, the crime of treason (if not the criminality involved) is meaningless. Betrayal is not some minor aggravating feature to be left to the sentencing judge as Baker suggests.<sup>42</sup> That is to misconstrue the offence. As a generality, the wrongfulness of modern treason could be encapsulated in the notion that the breach of allegiance by betrayal of country is morally blameworthy. The breach remains central. Unlike conventional crime, its focus is on wrongdoing which offends not simply against the collective interest or morality of the nation state but challenges its existence altogether and

<sup>39</sup> Alejandro Chehtman, “Citizenship v. Territory: Explaining the Scope of the Criminal Law” (2010) 13(2) *New Crim. L. Rev.* 427, 446.

<sup>40</sup> Mariana Valverde, “Practices of Citizenship and Scales of Governance” (2010) 13(2) *New Crim. L. Rev.* 216,

217.

<sup>41</sup> George P. Fletcher, “The Case for Treason” (1982) 41 *Md L. Rev.* 193, 195.

<sup>42</sup> Dennis J. Baker, “Treason Versus Outraging Public Decency: Over-Criminalisation and Terrorism Panics” (2020) 84(1) *J. Crim. Law* 19

involves an attack on its people. The modern idea of treason might be conceived in terms of betrayal of not just one's sovereign, but country, and by a co-citizen against a whole nation of people. In "Adhering to the Sovereign's Enemies", the moral wrong is, more narrowly, betraying one's sovereign, country, political community and neighbourhood to a foreign enemy. The betrayal is treason, a clear moral wrong. The protection the sovereign provides might be regarded as generating moral obligations of loyalty (or, more specifically, I will argue, of non-disloyalty) which render disloyal acts morally blameworthy, because they undermine or threaten the existence of the protector. While the betrayal has been conceptualised as a breach of trust,<sup>43</sup> the breach of allegiance has previously been approached in absolutist terms and means something more than mere violation of trust.

Fletcher figuratively discusses treason in terms of "the sin of betrayal".<sup>44</sup> Jonathon Hall, current Independent Reviewer of Terrorism Legislation, concurred with the authors of the Policy Exchange paper that there is such a thing as disloyalty and such a thing as betrayal.<sup>45</sup> This is the "wrong" of treason which explains why vengeance and, more specifically, retribution (the legal expression of vengeance) are relevant factors, if not overriding considerations, in making the case for reviving treason law.

I argue modern treason can and should be conceptualised, more precisely, as a crime of disloyalty. This is subtly, but significantly, different from the idea of it being a crime against loyalty. It is not (or should not be) predicated on failing to discharge some special duty of loyalty. Indeed, we should purposely avoid confusing talk of loyalty, patriotism, and fidelity, for patriotism is not necessarily the same thing as loyalty and an absence of patriotism (or indifference towards it) need not be synonymous with disloyalty. Patriotism is only an emotion and not a legally relevant concept. It is a romantic passion which can even provoke people into breaking the law. Though patriotism might loosely be described as a kind of loyalty,<sup>46</sup> loyalty itself is more closely connected to the idea of law.<sup>47</sup> Modern treason should be suitably distanced from authoritarian notions of sanctioning any perceived failures to exhibit demonstrable loyalty or deference. This means that in general terms treason would not typically be committed by omission, including by the absence of loyalty or of basic gratitude for our society's benevolence. There would require to be positive acts of disloyalty involving a breach of allegiance. Acts of disloyalty would not suffice on their own. Properly, to be treasonable, the disloyalty must find expression in the violation of allegiance. That is how the distinction is made from mere disloyalty, and from the notion of treason being a crime against loyalty. Without the requirement for allegiance, you cannot have betrayal, and without betrayal, you cannot have treason. You may well otherwise

<sup>43</sup> Hume, I, 512; *Joyce* [1946] A.C. 347, per Lord Jowitt (the Lord Chancellor) at 368; *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064; [2019] 1 W.L.R. 2070 at [49]; Matthew Hale, *History of the Pleas of the Crown* (Clark, New Jersey: Law Book Exchange Ltd, 1736), Vol.1, p.59; Ekins et al, *Aiding the Enemy* (2018), pp.5, 15–17, 19.

<sup>44</sup> George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (New York: Oxford University Press, 1993), p.41.

<sup>45</sup> Jonathon Hall, "Changing Times, Changing Treason" (9 September 2019), available at <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190909-Treason-Speech-to-RUSI.pdf> [Accessed 6 September 2021].

<sup>46</sup> MacIntyre, "Is Patriotism a Virtue?" in *Patriotism* (2002), pp.43, 48; Lee, "Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries" (2012) 31 Law Philos. 299, 309.

<sup>47</sup> George P. Fletcher, "Ambivalence About Treason" (2004) 82 N.C. L. Rev. 1611, 1626, fn.62.

deal with acts of terrorism, espionage or propagandising for the enemy on their own terms—approaching them in the same way as conventional criminality—but if you try to approach these crimes against the state in terms devoid of disloyalty and the resultant betrayal by that, they cannot constitute treason.

Because treason is still demonstrably best understood in terms of allegiance and disloyalty—and, indeed, standing that treason and betrayal can only ultimately be defined by reference to allegiance (because it is allegiance that creates the obligation of non-disloyalty)—I submit that allegiance should continue to be the core concept in the offence of treason. So, how might we proceed to reconstruct allegiance? I will argue disloyalty in this sense can be reconciled with the idea of allegiance if we consider how it might have dialectically evolved through the *Lauterpacht v Williams* debate.

## V. ALLEGIANCE AND PROTECTION IN *JOYCE*

The ratio of *Joyce* was that by his possession of a British passport, Joyce obtained the possibility of international protection, and, by that, continued to owe allegiance. Issuing it had created a legal duty of protection. The Law Lords were unanimous: per Lord Porter “if an alien is under British protection he occupies the same position when abroad as he would occupy if he were a British subject”; and that “each of them owes allegiance, and in so doing each is subject to the jurisdiction of the British Crown”.<sup>48</sup> The defence argued there was no basis in law for establishing the relation of protection—and the corresponding duty of allegiance—because the state was not entitled to issue a passport to a non-national. Given the fraudulent misrepresentation by which it was obtained, it could not afford effective protection abroad. Since Joyce obtained it by fraud, he could not owe allegiance in return for the protection he derived from it. The protection attracting the allegiance could not be mere protection *de facto* but had to be protection *de jure*; not actual protection, only the legal right to it. As a man who had obtained his passport by fraud was not receiving its protection lawfully, there was no reciprocal legal duty of allegiance. A tainted passport might be regarded as only voidable—and not void *ab initio*—and incapable of unilateral reduction by the holder or the issuing authority until the administrative process had run its course. Otherwise, a person who fraudulently obtained a British passport would be in a stronger position than someone obtaining it legally: because he would still receive protection without having to give allegiance.<sup>49</sup> The likelihood is Joyce would have still been granted a British passport, given his education and long-term residence in England; his pre-partition Irish antecedents; and his Manchester-born second wife (who never sought to renounce her British citizenship). Though discovery of the fraud could have justified its withdrawal, that prospect was remote. His continuing possession of the passport—implied by its non-return to a British consul—perpetuated his duty of allegiance after he left England. A person holding a passport and describing themselves as a national is entitled to be treated as a protected person—though that might be challengeable—contrary to the certification in the passport which

<sup>48</sup> *Joyce* [1946] A.C. 347 at 375–376.

<sup>49</sup> The circumstances of Shamina Begum may be analogous in so far as she stole her older sister’s British passport to exit the UK fraudulently: “Shamina Begum: IS teenager to lose UK citizenship” (*BBC News*, 20 February 2019), <https://www.bbc.co.uk/news/uk-47299907> [Accessed 6 September 2021].

amounts to prima facie evidence of nationality. That protection could still be exercised by proxy. If interned in Germany, Joyce could have always requested assistance from the Swiss Embassy, the protecting power appointed to safeguard the interests of British citizens in enemy territory. Lord Porter dissented on the narrow ground that the issue of whether Joyce's duty of allegiance had ended was a question of fact (an essential fact) for the jury to determine rather than a purely legal question for the trial judge.

### 1. Lauterpacht's defence of *Joyce*—Mutuality of protection and allegiance

Lauterpacht affirmed the correlation between allegiance and protection as expressing a compelling principle of political ethics and the security of the state as not just an artificial, obsolete relic of the past. This was of such a fundamental character that no serious effort had been made in *Joyce* to challenge it.<sup>50</sup> Though alien residents abroad continue to owe allegiance to their own sovereign state, they will become subject to another allegiance, concomitant with the protection of the law which has been sheltering them. It is legally irrelevant whether there is at any given point an equivalence of duty and benefit—of allegiance and protection—or of an actual disposition to fidelity and capacity to afford protection. The duty of allegiance is not affected by the temporary and involuntary absence of protection.<sup>51</sup> Lauterpacht emphasised the significance of protection manifesting itself in the overarching scope for diplomatic intercession—which extends to its citizens in enemy territory—by the threat of reprisals against enemy nationals and the prospect of exacting post-conflict compensation (or retribution).<sup>52</sup> The Lords rejected Joyce's argument that the kind of protection which had previously been the basis for the duty of allegiance was only protection by the law (the right to go to law)—in distinction to the administrative protection provided by the state abroad (diplomatic protection and consular assistance)<sup>53</sup>—because, historically, the protection enjoyed by the alien within the realm was also an “administrative” protection, exercisable as part of the royal prerogative.<sup>54</sup> In Joyce's situation nothing short of a formal act of renunciation of protection—involving revelation of his true nationality—would have been sufficient to end that mutuality of protection and allegiance.<sup>55</sup> An alien already subject to the duty of allegiance—because of their residence within the realm—continues to owe allegiance if, on leaving the realm, they apply for and obtain the continued protection of the Crown.<sup>56</sup> The Crown's exercise of protection

<sup>50</sup> Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens” (1947) 9 C.L.J. 330, 336–337.

<sup>51</sup> Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens” (1947) 9 C.L.J. 330, 335, founding on *De Jager v Attorney General of Natal* [1907] A.C. 326.

<sup>52</sup> Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens” (1947) 9 C.L.J. 330, 336.

<sup>53</sup> Diplomatic protection and consular assistance are not absolute rights afforded to all nationals, exercisable as a matter of “very wide” executive discretion, not legal obligation, albeit that discretion is judicially reviewable: *R. (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] U.K.H.R.R. 76, discussed in Goldsmith, *Citizenship: Our Common Bond*, p.34.

<sup>54</sup> Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens” (1947) 9 C.L.J. 330, 336.

<sup>55</sup> Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens” (1947) 9 C.L.J. 330, 338, fn.25, citing Lord Porter's dissent in *Joyce* [1946] A.C. 347 at 374–381.

<sup>56</sup> Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens” (1947) 9 C.L.J. 330, 341.

can be seen in terms which Thucydides (by his Melian Dialogue) and Machiavelli might have approved, by its projection of raw power, even unprincipled realpolitik, regardless of legality under international law. This reflected the prevailing sensibility that not all nations could be adjudged to be civilised or the basing of jurisdiction on the idea of reciprocity between equal nations. But this notion of vicarious protection continuing a duty of allegiance which would have otherwise ceased seems rather tenuous.<sup>57</sup>

## 2. Williams' critique—Mutuality of duty of protection and duty of allegiance

Williams suggested that the duty of allegiance should be deduced only from a duty of protection. It was a fallacy to mistake the meaning of protection for the purpose of the legal rule. When it was suggested that protection was correlative to allegiance, what seemed to be meant was that the duty of protection was correlative to the duty of allegiance. The Crown did not owe Joyce a duty of protection while he was in Germany; or attempt to exercise it in any way. Joyce's passport only conferred a possibility of de facto protection, and it was legally unsound to argue that this raised a correlative duty of allegiance. Properly, it was the duty of protection which raised the duty of allegiance, not just protection in fact. The correlation should be understood generally in terms between duty and duty, not fact and duty. The duty of allegiance persists even if protection were not in fact being given (because of enemy occupation) and is unaffected by the temporary and involuntary absence of protection. The duty of allegiance is not so much supported by the fact of protection, but by the duty of protection. The duty of allegiance is brought into being only by a duty of protection, yet *Joyce* denied this. Meanwhile, the duty of allegiance persists even if the subject were not acting in the spirit of their duty of allegiance. The mere fact that an alien may feel a spirit of allegiance and acts in accordance with it—by, for example, aiding British agents abroad—does not create in the Crown a duty of protection.<sup>58</sup> Joyce could not have been convicted of treason except as a result of a legal argument based on the correlation between allegiance and protection; and given the misapprehended meaning of “protection”, the decision slips away.<sup>59</sup> Though Williams' argumentation was admittedly pure technicality, so was the legal reasoning for the decision.<sup>60</sup> Lest we forget, “legal technicalities are the stuff of law”.<sup>61</sup> While Williams considered the precedent set by the Lords was virtually beyond recall, the substantial passage of time now allows for revaluation.

Williams provides some elucidation as to what that duty of protection entails. Protection might be thought to manifest itself in the provision of a police force, defence by armed forces, protection by diplomatic representations or simply the law-abidingness of the executive in relation to the individual. Lord Goldsmith similarly put protection in these terms, espousing domestic protection in terms of the operation of the rule of law.<sup>62</sup> Williams had already refined this in terms of

<sup>57</sup> Biggs, “Treason and the Trial of William Joyce” (1947) 7 U.T.L.J. 162, 189.

<sup>58</sup> Williams, “The Correlation of Allegiance and Protection” (1948) 10 C.L.J. 54, 56–57.

<sup>59</sup> Williams, “The Correlation of Allegiance and Protection” (1948) 10 C.L.J. 54, 75.

<sup>60</sup> Williams, “The Correlation of Allegiance and Protection” (1948) 10 C.L.J. 54, 75.

<sup>61</sup> Alexander M. Bickel, *The Morality of Consent* (New Haven, Connecticut: Yale University Press, 1975), p.121.

<sup>62</sup> Goldsmith, *Citizenship: Our Common Bond*, p.35

either a Crown duty of “positive (or active) protection”, where the sovereign (or British state) exerts itself actively on behalf of the individual, or “negative protection”, where there need only be an absence of illegal interference with the individual. The Crown owes a duty of positive protection to all within Crown dominions, whether British or alien (except for members of an invading force). It does not owe such a duty to anyone outwith them, possibly except those in protectorates.<sup>63</sup> “Negative protection” is a concept, signifying the exclusion of the defence of act of state. It is enjoyed by a British citizen (or subject) wherever they may be, and an alien (other than a member of an invading force) within the Crown dominions, or the departed alien, who retains a British passport, has left family and effects behind, or has left only temporarily (*animo revertendi*).<sup>64</sup>

It was not strictly correct for Williams to have argued that any Crown breach of that duty of protection is not an offence punishable by law. Rulers who oppress their own people can be brought to justice. The crime of tyranny was formulated to punish a leader who destroys law and liberty or who bears command responsibility for the killing of their own people or orders the plunder of innocent individuals. Consider Henri de Bracton’s statement which has reverberated down the centuries, “The King shall be under no man’s authority, yet he is under God and the Law, for the Law makes the King”; invoked by Lord Chief Justice Coke when he politely rebuked King James VI (and I) that he must abide by the common law.<sup>65</sup> The charge of tyranny, proffered against Charles I by Solicitor General John Cooke, began with the fundamental proposition that the King of England was not a person, but an office, whose occupants were entrusted with a limited power to govern “by and according to the laws of the land and not otherwise”. It had been with the criminal intent of securing unlimited and tyrannical power that Charles had levied war against Parliament, and had set out to destroy the people whose life and liberty he was obliged to preserve. Significantly, the monarch (and her ministers) have responsibilities too, militating against any concept of sovereign immunity and the impunity of tyrants. A certain symmetry is involved.

### *i. Williams’ better modelling*

What was significant is that Williams—a moderniser of social democratic sensibilities—was attempting to use the common law in a creative way to update the law of treason and promote individual rights. The recruitment of the common law evoked British exceptionalism—allowing Williams to champion a more modern, credible idea of the crime of treason—in which the duty of allegiance turned instead on the exercise of the British state’s duty of protection. In doing so, he shifted the emphasis from the idea of purely natural allegiance and birth-right—or personal bond—to a duty of protection, which reflected more contemporary complications of dual nationality. Williams’ skill was to make sense of the crime of treason in the context of contemporary institutions in a constitutional

<sup>63</sup> Save British protectorates: Williams, “The Correlation of Allegiance and Protection” (1948) 10 C.L.J. 54, 68–70.

<sup>64</sup> An exception to the principle of local allegiance; *Joyce* [1946] A.C. 347, per Lord Jowitt (Lord Chancellor), obiter, without reference to precedent (Williams, “The Correlation of Allegiance and Protection” (1948) 10 C.L.J. 54, 62–63).

<sup>65</sup> Reproduced in *Part Twelve of the Reports of Sir Edward Coke, Selected Writings of Sir Edward Coke*, edited by Steve Sheppard (Indianapolis, Indiana: Liberty Fund, 2003), Vol.1, p.65.

monarchy, but relying imaginatively on the common law to do so, by invoking the law of contract.

### 3. What emerges?—A version of non-disloyalty treason

I answer this article's principal question by arguing for the adoption of a non-patriotic (or, at least, a not overtly patriotic) contractual, "duty-based" model by which the subject's duty of allegiance correlates to the duty of protection discharged by the sovereign power; inspired by Williams' deconstruction of the Lords' decision-making in *Joyce* and his analysis of the conceptual framework of treason.<sup>66</sup> Developing this idea, I propose the subject's duty be refined by the adoption of a narrower still negative duty of allegiance (or duty of non-betrayal). The British subject's duty of allegiance is re-conceptualised in terms of a non-patriotic, negative duty of allegiance, falling on them not to be disloyal by aligning themselves with Britain's enemies: in short, to do no enemy-backed harm to their homeland. The subject's duty only compels inaction. This is not a positive duty to be loyal, but a negative duty not to be disloyal. The subject is not being asked to love their country—or even admonished not to hate it—merely not to loathe it by enlisting with the enemy and committing acts of sabotage against it. This "do no harm" principle is a corollary of the British state discharging its duty of protection to the subject. This is conceived in terms of a symmetrical relationship, no longer so beholden to the notion of monarchy.

This model affords balance to the relationship between the subject of the duty of allegiance and the sovereign power. This will not be a submissive relationship in which the subject is a mere supplicant, even to a beneficent lord or king. It emphasises that this is not a one-sided relationship. It need not be contingent on British (or Scottish) exceptionalism or even referable to British (or Scottish) values, and should be about transcending divisive identity politics. Such values might provide a colourable explanation as to how the British state and its devolved institutions exercise their duty of protection in a certain way and are the essence of what this country stands for and which needs to be defended. But they are not the only reason why the duty of allegiance is owed. This will be a modern democratic approach to treason law which affirms the social contract and avoids the distraction of emotionally-charged issues such as patriotism or monarchism. This shift in conceptualisation will explain how any new law should be understood and applied.

The reconceived offence should make clear that the offence is committed by a protected person who, while owing a duty of allegiance to the Crown, equally enjoys the protection of the Crown. This could be more properly stated in terms of enjoying the protection of the Crown as the Crown discharges its duty of protection; though such wording in the offence might be regarded as somewhat convoluted. It would be better left to the explanatory notes and to be more fully contextualised in judicial instructions, as provided for in the *Jury Manual*.

<sup>66</sup> Williams, "The Correlation of Allegiance and Protection" (1948) 10 C.L.J. 54, 54–76.

## VI. POSSIBLE OBJECTIONS

I now consider what would be the problems with this reconstruction—the possible objections to it—and how they might be met.

### 1. Persisting sense of subservience

It might be thought that retaining the Crown as the object of the duty of allegiance is still too subservient a concept for those of a Scottish/republican sensibility, failing to successfully address problems of competing allegiance. This is not to advocate for monarchism, simply a reflection that we continue to operate as a constitutional monarchy, and that the sovereign power is a series of political institutions including a constitutional monarch. If those constitutional arrangements change, the projected object (or protected interest) would evolve. This is a contractual relationship with obligations on both sides. The flip side of this transaction is that members of the executive, in failing to discharge their duty of protection, can be liable *in extremis* to the charge of treachery. I submit that the qualification of a requirement for foreign agency in treasonable conduct renders this duty less exceptionable, negating any suggestion of prostrating the Scottish-domiciled British citizen before the British state.

### 2. Recognising the moral blameworthiness of treason

It might be considered that a contractual, non-patriotic model involves too clinical and anodyne an approach, detracting from the notion that treason, the betrayal of the homeland or of national trust, is so morally blameworthy as to warrant special approbation and public denunciation. This might appear to ignore the moral wrong of treason; and affirming “fair labelling”, the taxonomical principle which has become common currency in criminal law scholarship over recent decades.<sup>67</sup> Without the concept of betrayal, the crime of treason (scarcely a morally-empty crime) seems stripped of meaning altogether, rendered hopelessly vague. Should we reduce all our obligations—especially our most serious—to mere obligations of contract? Is this not a legitimate form of non-contractual obligation which is or should be a “given” obligation? Can you truly still have the crime of treason without patriotism or at least without ignoring it?

Then again, the breaching or breaking of allegiance will be characterised in terms of a fundamental breach of the contractual duty—as opposed to a non-material breach—and is referable in the definition of the offence to the fact of enjoyment of Crown protection as to underline its gravity and egregiousness. Most significantly, the evocative headline offence remains in place. These are simply its new building blocks.

Nonetheless, while the overt act, critical to evidencing treasonable intent, would be the pivotal evidence in any treason trial, circumstantial evidence of the accused’s loyalty and patriotism—or lack of it—might still be expected to feature prominently. Though not inherently criminal, such colourable adminicles of evidence would be relevant, determining core issues of adherence and intent (or predisposition;

<sup>67</sup> James Chalmers and Fiona Leverick, “Fair Labelling in Criminal Law” (2008) 71(2) M.L.R. 217, 224; the term was coined by Glanville Williams (“Convictions and Fair Labelling” (1983) 42 C.L.J. 8).



assuming they were not excluded as collateral matters). It is axiomatic that people will say things online that they would never dream of doing in real life, so there must be some recognition of the difficulties in policing social media and criminalising (in this way) the writings of keyboard warriors who are only non-violent blowhards. Those expressing disloyalty may well be culpable of only bluster. But while you are entitled to freedom of expression, if you are intent on committing treasonable acts, it might be imprudent to create a body of self-incriminating evidence of alienation in your digital footprint.

### 3. Competing allegiances

The possibility of competing allegiances on the part of British citizen members of immigrant communities and new British residents is problematic.<sup>68</sup> What might this narrow, negative duty of allegiance mean for them? What kind of duty might they be expected to have to their host (or origin) country? What responsibilities to, and expectations of such people, might the host nation reasonably have? Should a lack of cultural assimilation negate or mitigate any failure to discharge this duty?

I do not consider that there is scope for a sliding scale of criminal responsibility to recognise different categories of protected persons, who will be afforded different levels of protection: such as “probationary” British citizens or foreign residents, who may only owe some possibly partial and temporary duty of allegiance, having voluntarily placed themselves under British protection; or, at the other end of the scale, public officials, who might be expected to owe a special or greater duty of allegiance still, as beneficiaries of particular state protection or patronage. As there will be a relationship involving, symmetrically, protection entitlements on some level, a correlating duty of allegiance will be owed, the simple breach of which triggers criminal liability. This is a binary concept. The duty of non-betrayal does not operate on a sliding scale which might be adjustable according to background and emotional identifications.<sup>69</sup> There are no half-measures in treachery.<sup>70</sup> It may be a question of degree and not of its existence. The character of the protected person will impact only on any assessment of their culpability and not upon their criminal liability as such; albeit this remains a potentially mitigating factor in sentencing. Instead, it is about criminalising conduct involving sabotage of those institutions which safeguard national security in a way that acknowledges the absolute character—the allegiance—of the actor. Their national identity or residence (which evidences their allegiance) will be determined as an objective fact and not contingent on any subjective assessment on their part. This approach is also consistent with the not unimportant principle of equality before the law. The case for taking this trenchant approach is warranted because of the basic, undemanding, and minimalist nature of the negative duty.

I contend that cultural assimilation is irrelevant to discharging the (negative) duty of allegiance (or duty of non-disloyalty). It might be regarded as an aspect of good citizenship, though it is debatable whether citizens in a free society, indigenous or immigrant, should be pressurised into a community of shared values

<sup>68</sup> Goldsmith, *Citizenship: Our Common Bond*, p.41.

<sup>69</sup> Lee, “Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries” (2012) 31 *Law Philos.* 299, 332.

<sup>70</sup> Rebecca West, *The New Meaning of Treason* (London: Penguin Books Ltd, 1964), p.105.

and mores. Common citizenship under the rule of law is what civic society can only reasonably require. Again, citizenship is rejected as an irrelevant concept here. It is immaterial whether newer British citizens integrate with the host community or even attempt to become truly British in the cultural sense—at least for the purposes of treason criminalisation—because this remains only a negative duty. A demonstrable duty is not postulated. Ghettoisation and “poor British citizenship” are irrelevant. The extent of this legal duty is simply not to be disloyal to the British state and its manifestation at a devolved level. It need not conflict with the citizen’s religion or their moral or philosophical beliefs. Even if a British citizen’s primary loyalty were to a religious cause which they perceive as superseding their national identity, deviation from a conceptual (British) national identity would not be treasonable unless an overt act of betrayal were involved, standing treason’s overt act requirement. This tolerant approach also precludes the operation of any “cultural defence”.

## VII. CONCLUSION

Admittedly, the concept of allegiance in the modern state is problematic. But it is still workable. I propose the duty of allegiance be recast by adopting Williams’ paradigm of a non-patriotic, contractual, “duty-based” model.<sup>71</sup> I argue for only a negative duty of allegiance (or duty of non-betrayal) which will not be a positive or affirmative patriotic duty, but rather a narrow duty reaffirming the duty of the British citizen not to betray their country by conjoining with its enemies and waging war against the British state and its people, their fellow citizens. Patriotic affection or its expression is not a sine qua non for discharging that duty. Patriotism is a distraction to what the modern idea of allegiance might mean, for treason is in essence a crime of disloyalty.

This duty will not and should not demand total loyalty. Though treason is a crime of disloyalty, I propose instead a “non-loyalty” version. It will not be about good citizenship or promoting love, respect, or affection for this country, or endorsing British (or Scottish) values on pain of criminal sanction. It will not be breached by the citizen’s primary loyalty being to their religion or some political ideal or sense of belonging to some supranational community, such as the global community of Islam (*Ummah*). But the person who aids the enemy in attacking this country, because they believe it is their religious duty to do so, acts wrongly and should be punished. Under this modelling, it can be precisely framed to allow for non-conformity, non-violent dissidence, or even expressing contempt for this country and its institutions. It need not be evidenced by overt acts of loyalty such as an oath of allegiance, or at least not any additional oath of allegiance. It would only curb individual freedom to the extent it denies that anyone should be free to betray their country to a foreign enemy with impunity.<sup>72</sup> It will comprise only a negative duty of allegiance to do no (enemy-backed) harm (to the homeland): the “do no harm” principle. This will be the extent of the obligation.

<sup>71</sup> Williams, “The Correlation of Allegiance and Protection” (1948) 10 C.L.J. 54, 54–76.

<sup>72</sup> Ekins et al, *Aiding the Enemy* (2018), p.16.

The outlier might sympathise with Kim Philby’s sentiment: “To betray, you must first belong ... I never belonged.”<sup>73</sup> But disaffection and not feeling allegiance or warmth toward the British state is one thing, breaching a duty of non-betrayal, by positively betraying it and aligning with and aiding its enemies, attacking the British state and its people, is quite another, and is the essence of the violation. Cynicism about political institutions, whether at a British or Scottish level, should not blind us to the protections the British state provides in discharging its duties to us and the duty of allegiance flowing from that. At a time of crisis, we should hope to look to the state for protection, particularly for protection and relief from external threats, be they military or viral. This is the vital corollary.

The (negative) duty of allegiance could be used interchangeably with the duty of non-betrayal. For ease of understanding, it might be so defined, consistent with “fair labelling” sensibilities. I propose the subject of the duty of allegiance be the Crown, a term implying the integration of the Queen into the body of an older notion. The Queen is not the state or the exclusive sovereign power. This notion of the Crown recognises an abstract concept of the bond between monarch and kingdom, personifying the British state. At the Scottish level, the sovereign power could be conceptualised as the Crown-in-Scotland, consistent with the approach in the Scotland Act recognising the rights and liabilities of the Crown in its different capacities, viz the rights and liabilities that may arise between the Crown in right of HM Government in the UK and the Crown in right of the Scottish Administration.<sup>74</sup>

An essential element of the crime of treason is that the accused must be proven to owe allegiance to the UK. Treason is an offence which revolves around the concept of the mutuality of allegiance and protection and the breach of that protective relationship. More specifically, I have posited Williams’ refined conceptual structure, in terms of a mutuality of a duty of protection and a duty of allegiance. On the basis of this model, I suggest the relevant offence elements of treason with regard to allegiance, would be that the accused:

- had a duty of allegiance;
- breached that duty of allegiance; and
- did so by the commission of treasonable conduct.

Whether allegiance continues to exist or has been cast off is strictly an element of the actus reus and not a substantive defence as such, though it might be strategically in issue as the first line of defence at trial. This duty is never one of blind allegiance. One corrective is the liability to the crime of tyranny by state actors who abuse their power—regrettably no longer a theoretical possibility—albeit its enforcement is a serious imposition on any citizenry. Lest this be mischaracterised as a reciprocal relationship, it is duty-based and open-ended. Everything flows from that in re-evaluating the “essential elements” of the crime, including its actus reus and mens rea, and establishing operable defences. The law of treason is thus narrowed.

<sup>73</sup> “Murray Sayle, Obituary”, *The Telegraph*, 21 September 2010, available at <https://www.telegraph.co.uk/news/obituaries/culture-obituaries/books-obituaries/8016790/Murray-Sayle.html> [Accessed 6 September 2021].

<sup>74</sup> Scotland Act 1998 s.99.

Is this approach especially Scottish? Perhaps not. But there would be scope for a Scottish political object of allegiance, insofar as Scottish political institutions, falling under the ambit of the “Crown-in-Scotland”, would be a complementary (not separate) focus for allegiance. So, a Scottish treason law need not operate to the exclusion of a revived British treason law.