SHOULD THERE BE A SEPARATE SCOTTISH LAW OF TREASON?

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Abstract:

Shortly after the Union, the Treason Act 1708 revoked Scotland's separate treason law in favour of England's treason law. Historically, English treason law was imposed on Scots criminal law and was not always sensitive to the differences in Scottish legal institutions and culture. A review of the law of treason is in contemplation, it being under general attention more than at any time since the end of World War II. If there were to be a revival of UK treason law, the creation of a separate Scottish treason law may be a logical development given Scotland's evolving devolution settlement. The thesis attempts to answer the question whether there should be a new, distinct, Scottish law of treason. If so, how might it be reformed for the modern era, refined for the Scottish context, and fit into the devolved system? An essentially 'black-letter' approach has been adopted – considering this issue in a strictly law-centred and legalistic manner – while making appropriate allowance for external factors such as policy and political considerations. Based on my normative evaluation of treason law, this thesis puts forward an argument that though current treason law is problematic, there is still justification for it. My original contribution to knowledge is to demonstrate how it can be rendered relevant for the modern Scottish context. Firstly, I argue that allegiance, traditionally at the heart of treason law, seems archaic and suggest the ways in which it can be modernised and reconstructed. The primary resources for doing so can be found in the Lauterpacht and Williams debate which followed *Joyce*. Treason's core duty of allegiance can be re-interpreted in terms of Williams' duty-based contractual model. Building on that modelling, a negative duty of allegiance (or duty of non-betrayal) emerges. Secondly, while thinking of treason to the UK as a general offence of breaking the bond of allegiance, there is room for a more Scottish inflexion in the way in which the offence might apply. This includes a Scottish political object of allegiance – incorporating Scottish political institutions as a complementary focus for potential allegiance – specifically, the Crown-in-Scotland. Its essential elements – *actus reus*, jurisdiction, *mens rea* and operable defences – can be recalibrated for any such revised allegiance model, with suitable Scottish inflexion. With this analysis, only a limited range of betraying acts emerges. Its *actus reus* can be reframed in terms of a construct grounded in 'Adherence Treason', referable to a national security harm principle and insisting that its commission involves providing material assistance to the enemy. The negative duty is underlined by removal of the commission of treason by only omission. Referencing the Draft Scottish Criminal Code, express statutory recognition might be made for the operation of the general common law defences of necessity, coercion and obeying superior orders. Its exceptional character commends provision for new specific statutory defences with contemporary resonance – including a 'Public Interest Defence', 'Government Whistleblowing Defence' and the Australian 'Humanitarian Defence'. Formulating a Scottish treason law might provide a suitable template for UK reform. But this is more than a pragmatic justification. Though not materially different in terms of its offence

elements, its defence elements should reflect a principled Scottish deviation in the availability of common law defences of necessity, coercion and obeying superior orders.

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Author's Declaration:

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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V. Making Scottish Treason Law Relevant

I. Context:

British treason law appears to be irrelevant. Treason is not addressed in the (Scottish) Jury Manual. Gordon's *Criminal Law* provides only the most cursory consideration and was not intended as a modern reappraisal. The editors of *Archbold* have omitted it from all editions after 2009, declaring: "it seems unlikely that there will be any such prosecutions in the foreseeable future".[1] The Law Commission's distant 1977 Working Paper on modernising the law of offences against the state was never implemented.[2] There is a paucity of contemporary sources and no recent precedent explaining how its core concepts might be defined in terms which are fit for purpose – though its continuing existence is expressly recognised by amending legislation and tentative allusions in case law.[3] The literature is scant and it has received relatively little academic attention in this country. It is no longer part of any Scottish undergraduate course syllabus on criminal law. The tendency to ignore it in theorising about criminal law and explaining the general elements of criminal liability evidences its atavistic character.[4] Although not formally abolished and remaining in the law, it plays a greatly restricted role.

Even if not technically obsolete, current treason law appears to be regarded as no longer relevant – problematic even. It has lost its normative appeal and practical efficacy.[5] Policy Exchange, a centre-right think tank, expressed concerns in their 2018 paper *Aiding the Enemy* that the existing law of treason is not a secure basis on which to bring prosecutions – that it is unfit for purpose, unworkable and should be updated.[6] Confident of long-standing external security and internal stability, we have managed successfully without treason prosecutions. There may have been a reluctance to prosecute what was until 1998 a

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[1] *Archbold: Criminal Practice and Pleading, Evidence and Practice 2020*, para. 25-1 – though this is less emphatic than the suggestion in previous editions that it was "unlikely in the extreme that there will … be any such prosecutions."

[2] Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences* (Law Com No 72, 1977)

[3] Niall O'Gallagher, "Ancient treason law to be used in Clara Ponsati extradition case" BBC (5 July 2018): https://www.bbc.co.uk/news/uk-scotland-scotland-politics-44726376

[4] George P. Fletcher, "The Case for Treason" (1982) 41 MdLRev 193; George P. Fletcher, "Ambivalence About Treason" (2004) 82 NCLRev 1611, 1619

[5] Shai Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel" (2010) 13(2) NewCrimLRev 404, 408

[6] Richard Ekins *et al.*, *Aiding the Enemy, How and why to restore the law of treason* Policy Exchange (2018), 48

mandatory capital offence. Americans may be generally less squeamish about the death penalty but, despite waging a so-called 'war on terror', common law countries have generally distanced themselves from the traditional notion of treason based on a breach of allegiance, even in circumstances where terrorist activity has undoubtedly fallen within the compass of treason.[7] Although the US obtained its first treason indictment since World War II in 2006 against American citizen Adam Yahiye Gadahn, this was no revival.[8] Post-war prosecution marking policy has expediently avoided charging offenders with treason – lest political justification be pled and secular martyrdom ensue – it being deemed preferable to characterise treasonable conduct in terms of ordinary criminality.[9] The Law Commission recognised:[10]

> " … from the practical point of view it is normally found more expedient to charge ordinary criminal offences than to imply that importance is being attached to the activities by treating them as treasonable, or that there could be any political justification for the conduct, even in the mind of the offenders".

Government Ambivalence:

The Government has been inconsistent in its approach toward revival. In 2001 it was suggested that British Muslims who take up arms against US or British forces in Afghanistan could face treason charges.[11] In 2005 it was reported that the Attorney-General's Office was considering the possibility of charging three prominent Islamic clerics for lauding acts of terrorism against civilians in the UK and attacks on British soldiers abroad, with solicitation to murder and incitement to treason.[12] None of this happened and although the Law Commission intended to review the law on treason in 2008 (alongside laws on kidnapping and public nuisance), the treason element of the project was ultimately jettisoned. It reasoned that it was an example of an area of the law shaped by political and social conditions which had "ceased to be of contemporary relevance" – and that new offences have been developed

[7] Lavi, "Revocation of Citizenship", 409

[8] *United States v. Gadahn*, SA CR 05-254(A) (CD. Cal. Oct. 11, 2006), First Superseding Indictment: http://www.usdoj.gov/opa/documents/adam_indictment.pdf

[9] Law Com WP 72, para. 58

[10] *Ibid.*; Clive Walker, *Terrorism and the Law* (2011), 5.172

[11] "British Muslims who fought with Taliban face prosecution" Guardian (20 November 2001): https://www.theguardian.com/uk/2001/nov/20/september11.world

[12] Vikram Dodd *et al.*, "Islamist clerics face treason charges" Guardian (8 August 2005): https://www.theguardian.com/uk/2005/aug/08/july7.terrorism

that were far better suited for tackling the problems afflicting society.[13] While the Law Commission has no plans to review the law of treason,[14] political conditions have since evolved in a way to suggest that treason law might again be best suited for tackling the problem of betrayal by significant numbers of home-grown Jihadists. In September 2014, Justice Minister Simon Hughes of the then coalition Government – when asked in Parliament whether the offence of treason was "available for use by prosecuting authorities against UK citizens participating in jihad in the Middle East" – responded that the offence of treason was outdated and that counter-terrorism powers were enough.[15] But in October 2014 the then Foreign Secretary Philip Hammond told Parliament that British citizens who had sworn personal allegiance to the so-called Islamic State and fought with insurgents in Iraq and Syria could have committed an offence under the Treason Act 1351.[16] Policy Exchange tabled a serious treason reform proposal – carefully crafting arguments favouring reform and rebuttals to counter-arguments, as well as a draft template offence. In May 2019, possibly inspired by their Paper, the then Home Secretary Sajid Javid, announced overhaul of treason law in a new Espionage Bill. Hostile state actors, such as spies, assassins or hackers, directed by the government of another country, were to be targeted by refreshed espionage laws – with officials also examining treason laws to see whether they could be updated to include British nationals, or those settled in the UK, operating on behalf of a hostile nation.[17] Javid said: "Our definition of terrorism is probably broad enough to cover those who betray our country by supporting terror abroad. But if updating the old offence of treason would help us counter hostile state activity, then there is merit in considering that too."[18] However,

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[13] Law Commission, *Tenth Programme of Law Reform HC 605* (Law Com No 311, 2008), para. 2.30

[14] Lizzie Dearden, "New 'treason law' which would jail jihadis is not being considered by government" Independent (25 July 2018): https://www.independent.co.uk/news/uk/home-news/treason-law-isis-jihadis-security-russia-government-plans-policy-exchange-a8463761.html

[15] *Hansard* HC Deb. vol. 585 col. 747, 9 September 2014

[16] *Hansard* HC Deb. vol. 586 col. 482, 16 October 2014

[17] Jamie Grierson, "Sajid Javid announces overhaul of espionage and treason laws" Guardian (20 May 2019): https://www.theguardian.com/politics/2019/may/20/sajid-javid-announces-overhaul-of-espionage-and-treason-laws

[18] Charles Hymas, "British citizens who help Isil could face life in prison under updated treason laws" Telegraph (20 May 2019): https://www.telegraph.co.uk/news/2019/05/20/british-citizens-help-isil-could-face-life-prison-updated-treason/?WT.mc_id=tmgliveapp_androidshare_AsgtnTNcSq3d

Jonathon Hall, current Independent Reviewer of Terrorism Legislation (IRTL), rejected any such renewal of treason laws in his inaugural speech of September 2019.[19] Then, in the most recent Queen's Speech of 19 December 2019, the Government announced that it was to consider the case for updating treason law as part of a new Espionage Bill to enable prosecution of anyone who participates in 'harmful activity' with a hostile foreign state.[20] Significantly, Australia remodelled its treason law in the aftermath of the 9/11 terrorist attacks.[21] It seems we continue to be unsure whether treason is the appropriate mechanism for criminalisation as opposed to other criminal offences. Nonetheless, the idea of treason law endures. It remains important and I will argue that there are even positive reasons for its renewal.

II. Value of Scottish Treason Law:

It may well be that 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 amending treason law from reserved matter status (also including the constitution, foreign affairs and defence) to devolved matter status. 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. Insofar 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.[22] I now explain why it might be worth thinking about a Scottish law.

"Home Secretary speech on keeping our country safe" (20 May 2019): https://www.gov.uk/government/speeches/home-secretary-speech-on-keeping-our-country-safe

[19] Jamie Grierson, "Terror legislation watchdog rejects call to change treason laws" Guardian (10 September 2019): https://www.theguardian.com/law/2019/sep/10/terror-legislation-watchdog-rejects-change-treason-law
Jonathon Hall, "Changing Times, Changing Treason" (9 September 2019): https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190909-Treason-Speech-to-RUSI.pdf

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf

[21] The Security Legislation Amendment (Terrorism) Act 2002 – now superseded by the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018

[22] Official secrets and terrorism are also reserved matters.

Devolution Plus:

The significance of treason law is that it has historically established the relationship between the state and citizenry and is wrapped up with the notion of how a state defines itself. But at what point does it become appropriate for a jurisdiction which is not an independent state to have its own law of treason?

Virtually all states continue to maintain a treason law (even if rarely applied). Treason laws frequently have concurrent application at provincial government level in federal common law systems such as Australia and the US – meaning there is scope for enforcement in terms of either federal or local law. The ever-expanding legislative competence of the Scottish Parliament and executive responsibility of the Scottish Government distinguishes the Scottish polity from mere local government. Though an asymmetrical settlement, Scotland's political and legal autonomy is comparable to that of a provincial or state government in a typical federal system. Having accreted more powers than most federal provinces or states, it may genuinely be "one of the most powerful devolved administrations in the world".[23] What is significant is that UK Sovereignty has become increasingly fragmented and Scotland might reasonably be expected to create its own treason law as the devolution settlement becomes more entrenched.

There is limited precedent for the existence and operation of a separate Scottish treason law within the Union. The old Scots law of treason had continued in force following the Union but was abolished after the failure of Scots juries to convict those involved in the Jacobite Expedition of 1708[24] – and the new Parliament of Great Britain's insistence that an identical law of treason in both countries was essential for public safety.[25] Parliament judged it

[23] "5 reasons why Scotland is more powerful as part of the United Kingdom", Office of the Secretary of State for Scotland:
https://www.gov.uk/government/news/5-reasons-why-scotland-is-more-powerful-as-part-of-the-united-kingdom
"Holyrood gains new powers under Scotland Act 2016" BBC (23 May 2016):
https://www.bbc.co.uk/news/uk-scotland-scotland-politics-36353498

[24] Insofar as the pre-Union Scots law of treason had been more complicated and extensive in its application and in many respects more severe than its English counterpart (Alison, *Principles*, I, 596) – to the extent that Hallam excoriated it as "one of the most odious engines of tyranny ever designed against public virtue" (*Constitutional History of England* (1827), 818) – its repeal was hardly a regressive measure.

[25] J. Irvine Smith and Ian MacDonald, "Criminal Law: The Sources of Criminal Law" in *An Introduction to Scottish Legal History* (1958) 280, 284

reasonable that the whole UK should be governed by the same law, as the obligations of loyalty were the same.[26] This resulted in the introduction into Scotland of the English law of treason and English procedure. On its passing, the Treason Act 1708 was considered a breach of that clause under the Treaty of Union providing for the continuation of Scotland's separate legal system (art. XIX).[27] It arguably violated the Treaty's spirit.[28] Its purpose was to create a uniform law of treason and affirm allegiance to the British monarchy – it having been described in its introductory test as "an Act for improving the Union of the Two Kingdoms … that the said Union may be more effectually improved". As the continuing validity of this justification would be a political decision, I might turn the question round. The prevailing context was of the continuing existence of a separate Scottish treason law possibly undermining a fledgling Union. Would a separate Scottish treason law do so three centuries hence – given that any current existential threat is far removed from the 'Dynastic Treason' problem of Jacobitism? A separate Scottish treason law could no longer be seriously rejected on the early post-Union pretext of public safety. If anything, this might be regarded as an exercise in restoring the Union settlement as originally envisaged by the Treaty's drafters, respecting the separate Scottish legal system, particularly in criminal law. 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.[29]

The experience of other common law nations commends that local treason laws are not exceptionable. Australian citizens owe allegiance to their sovereign and their country at both federal and state level. While at federal level it is treasonable conduct to levy war or do any act preparatory to levying war against the Commonwealth of Australia,[30] s. 12 of the Crimes Act 1900 (New South Wales) extends the offence of levying war (derived from s. 3 of the 1848 Act) to putting any force or constraint upon the Parliament of the State of NSW. Levying war also covers constraining of the Parliament of the State of South Australia.[31]

[26] Ersk. IV 20 (1181)

[27] Smith and MacDonald, "Criminal Law", 280, 284

[28] Steffen, *Defining a British State*, 74

[29] S. 289 of the Criminal Procedure (Scotland) Act 1995 restates the position (clarified by s. 39 of the Criminal Justice (Scotland) Act 1980) that the procedure and rules of evidence in proceedings for treason and misprision of treason shall be the same as in proceedings according to the law of Scotland for murder.

[30] Criminal Code Act 1995, s. 80.1

[31] Criminal Law Consolidation Act 1935 (SA), s. 7

Insofar as there are no state laws against treason in Western Australia, Northern Territory and Queensland, separate provincial provision seems optional.[32] The only Australian twentieth century treason prosecution – in 1946, of Australian Army Major Charles Cousens for broadcasting wartime propaganda on Japanese radio – was under NSW law since the Commonwealth law of treason was not then in place.[33] Most American states retain distinct treason provisions in their own constitutions or local statutes mirroring the US Constitution. Following the outbreak of the American Revolution, the Continental Congress passed a congressional resolution in June 1776 that each of the thirteen colonies enacted laws defining and punishing treason. The colonies responded by enacting state treason statutes which generally corresponded to the resolution and the definition in the Constitution.[34] Many state constitutions continue to incorporate similar definitions – invariably in terms of levying war against the state or of adhering to or aiding the enemies of the state. Constitutional provisions or criminal statutes defining treason against the state are retained by 43 states.[35] Local treason laws were created at a time when federal courts were not as strong.[36] Scholars have not seriously queried the validity of state treason laws in over a century[37] – the issue having largely vanished from legal discourse.[38] It is unlikely that local treason laws would be deployed and the breach of only a local allegiance invoked. The following *dicta* from the dissenting judgment of Justice Scalia in *Hamdi v. Rumsfeld* (where the Supreme Court considered the case of an American citizen captured while allegedly fighting for Taliban troops in Afghanistan and detained under military authority as an 'enemy combatant') is instructive in affirming the convention to prosecute treason at federal level: "Where the Government accuses a citizen of waging war against it, our constitutional tradition has been

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In 1977, a SA law reform committee considered a state law of treason unnecessary since it was adequately covered at Commonwealth level.

[32] The equivalent VIC legislation only speaks of levying war against the Commonwealth of Australia.

[33] *Ex Parte Cousens; Re Blackett* (1946) 47 SR (NSW) 145 – though the NSW Attorney-General discontinued the prosecution after committal proceedings

[34] US Constitution, art. III, s. 3

[35] Since 21 states have not paired their constitutional provisions with a criminal statute, it could be argued that their state treason laws are not self-executing, but non-justiciable and merely symbolic (J. Taylor McConkie, "State Treason: The History and Validity of Treason Against Individual States" (2013) 101(2) KYLawJ 281, 298-300).

[36] Oswald Garrison Villard, *John Brown: 1800-1859: A Biography Fifty Years After* (1910), 477

[37] McConkie, "State Treason", 281

[38] *Ibid.*, 282

to prosecute him in federal court for treason or some other crime."[39] The circumstances in which Hamdi was originally detained and held (firstly at Guantánamo Bay and finally at a US Naval Brig in South Carolina) suggest the federal court would be seised of jurisdiction by dint of its territorial jurisdiction. Discrete political and legal circumstances might allow for a treason prosecution to take place outwith federal court under only local treason law. Meanwhile, Canadian criminal law is entirely federal, being under the exclusive legislative jurisdiction of the Parliament of Canada. It has no provincial concurrence, though its treason law provides for protection of provincial political institutions in that it extends to attempting to use force or violence for the purpose of overthrowing any provincial government (or legislative body).[40]

Regardless of whether renewal of UK treason law is pursued, enacting a separate and distinct Scottish treason law could be regarded as a logical development given Scotland's evolving devolution settlement and the enhanced 'provincial' statehood of the Scottish political system. This would be a matter of political will and timing.

Would the creation of a separate Scottish treason law enhance or undermine the Union? Some nationalists might resent a perceptibly unionist and monarchist imposition. Conversely, unionists might view changing treason law from reserved to devolved status as pandering to nationalist sentiment – more Fabian strategizing in securing further trappings of Scottish nationhood. Unionists might fear a Scottish treason law being used against them in a future independent Scotland. Similar fault-lines might apply. I will argue in Chapters 2 and 3 that the Scottish political institutions are not a separate or competing sovereign power – but a complementary and subordinate development – and that the object of the duty of allegiance under a Scottish treason law remains the Crown-in-Scotland. A separate Scottish treason law need not bolster (or diminish) the Crown or British or Scottish identity.

[39] *Hamdi v. Rumsfeld*, 542 US 507 (2004), 554 (Scalia, J., dissenting)

[40] Criminal Code, s. 46(2)(a)

The old Law Reform Commission of Canada proposed a legislative scheme in which the aspect of treason involving using force or violence to overthrow the government would extend to the use of force or violence for the purpose of overthrowing the constitutional government of Canada or a province – or to extort or prevent a decision or measure of a federal or provincial legislative, executive or judicial organ of State (Law Reform Commission of Canada, *Crimes Against the State* (LRCC No 49, 1986)).

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 – assuming British treason law is not regarded as obsolete and otiose.

III. Relevance of Treason Law:

I now consider the positive reasons why British treason law might still be considered potentially relevant and will explain why treason law might matter.

(i) 'Fair Labelling' and Moral Wrong of Betrayal:

There is something arguably deeply unsatisfactory about Michael Adebolajo and Michael Adebowale, the admitted killers of Fusilier Lee Rigby, being prosecuted on a 'mere' murder charge for their 2013 attack on Rigby, an off-duty solider, who had been returning to Woolwich Barracks. They drove a car at him, knocking him to the ground. They then attacked him with knives and a cleaver and attempted to behead him, telling passers-by they had killed Rigby to avenge the killing of Muslims by British Armed Forces. They had intended to commit this barbaric murder for political and ideological purposes – their actions being aimed against the British state – to have the maximum effect to promote the misguided cause they espoused. They gloried in the murder and sought to use it to advance their cause by publicising it and making the statements they did. Their life sentences could not have been more severe in reflecting their savagery. Adebolajo was sentenced to a whole life term and Adebowale given a minimum term of 45 years.[41] These were Britons who were waging war against the British state and other Britons, targeting Rigby specifically because he was a British soldier. The libelling of the crime of treason might have conveyed the sense of this fundamental notion of betrayal of the British state and the British people by British citizens – of the moral wrong and peculiar offensiveness of betraying one's country.

This thesis is not about the specific issue of how to deal (legally) with Islamist Extremism (IE) – that radical Islamist ideology, where people effectively have an identity at variance with the nation-state, profess allegiance to something which is not their country and are actively willing to fight against this country. Countering IE may demand some legal innovation, but rebooting treason law could only ever be part of the appropriate (criminal

[41] *R. v. Adebolajo and Anor* [2014] EWCA Crim 2779

law) response to it. This thesis is about envisaging what an updated (Scottish) law of treason would look like – though I may incidentally address the issue of responding to new problems of this kind. I suggest that a treason charge evinces 'fair labelling' – fitting in with public sentiment about home-grown Jihadist treachery and that fighting for a foreign enemy is treason.

The word-choice still evokes betrayal and underlines the stigmatising nature of the crime. It makes clear to the public that this is about more than violations of person or property. A lay jury is likely to regard it as a more familiar concept than the statutory charges for treasonable acts brought under anti-terrorist legislation or the Official Secrets Acts. Though people might be bewildered by the statutory alternatives and not always appreciate the subtleties of the legal principles involved, they still intuitively grasp what treason means. Even if disused, public understanding persists since the idea of treason features prominently in the English literary canon. This idea of loyalty continues to be widespread, instinctive, and deep-rooted.[42] Lord Judge, former Lord Chief Justice, explained in his foreword to the Policy Exchange Paper:[43]

> "Treason is a heinous crime. It should be marked as such. If a citizen of this country chooses to fight with the Taliban in Afghanistan against British forces, his crime is more than terrorism. It is treason, and should be prosecuted accordingly."

Though a big and old-fashioned word, it is still the appropriate term for this issue. The bringing of treason charges is the most efficacious way of communicating the seriousness and emphasising the wrongdoing of betrayal. The *nomen juris* is consistent with 'fair labelling' – the (taxonomical) principle which has become common currency in criminal law scholarship over recent decades.[44] This is one of many normative principles governing criminal liability – one which is unobjectionable. Properly, the offence name should have a symbolic and declaratory function – evoking condemnation and signalling to both society and offender how the offender should be regarded. Even if unlikely to have a deterrent effect,[45] the use of this offence would benefit the general public in making clear the description of the offending and conveying the essential nature of the wrongdoing – and also

[42] Adrian Weale, *Patriot Traitors: Roger Casement, John Amery and the Real Meaning of Treason* (2001), xiii

[43] Policy Exchange, *Aiding the Enemy*, 9-10

[44] James Chalmers and Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71(2) MLR 217, 224 – the term was coined by Glanville Williams ("Convictions and Fair Labelling" (1983) 42 CLJ 8)

[45] Chalmers and Leverick, "Fair Labelling", 230

in differentiating it from modern statutory offences that fail adequately to capture and express the vital moral prohibition on betrayal.[46] Addressing the 'wrong' of treason in Chapter 2 will underline why revival is consistent with 'fair labelling' sensibilities.

(ii) Legal Certainty:

The principle of legal certainty – a central requirement of the rule of law – commends that something must be done with treason law to make it comprehensible and transparent to the public. That it is simply not being used would suggest that the law on treason might be regarded as obsolete and thus entirely predictable – ironically invalidating any argument about a lack of public understanding. However, the position is unclear. Some might be concerned that it is still available to be used, possibly in an arbitrary way. It could conceivably be dusted down for wartime exigencies. It is anomalous to continue to have this serious crime on the statute book (with the default punishment setting of life imprisonment) – neither completely ignoring it nor repealing it (*cf.* its recently-departed, sister crime sedition[47]). Further, it is difficult to discern the inward meanings of the terms used in the 'living instrument' which is the 1351 statute. There is the important legal fiction that prospective traitors should be able to regulate their conduct with certainty – that they do not break this law – and can protect themselves from the abuse of state power and over-criminalisation. Laws should be made so people can comply with them and it is wrong in principle that treason law should be quietly allowed to disappear through disuse, and not by repeal or amendment, nor by any formal process.[48] Having an offence on the statute book which cannot be used is unsatisfactory. If a law is not being enforced in practice, there can be no justification for its retention. It might as well be formally abolished altogether, rather than ignored – as Lord Judge suggested in his Policy Exchange foreword.[49]

So, what do we do with it? Properly, there needs to be a discussion about whether to update or completely abolish the law on treason, rather than allowing it to languish in limbo. Consistency is needed and if we cannot charge people with treason, we may as well remove

[46] Policy Exchange, *Aiding the Enemy*, 6, 11, 12, 22 and 33

[47] The allied common law offences of sedition and leasing-making have been abolished (Criminal Justice and Licensing (Scotland) Act 2010, s. 51) – as have been the common law offences of sedition and seditious libel in England, Wales and Northern Ireland (Coroners and Justice Act 2009, s. 73).

[48] Policy Exchange, *Aiding the Enemy*, 9

[49] *Ibid.*, 8-10

it, sweeping away this medieval clutter, rendering our criminal law more orderly. If, for political reasons, we cannot abolish it, we might as well use it – and if we plan to use it, we must modernise it – for if a law is to remain in place, it should be a good one. There is a principled case for doing so in Scotland without waiting on the rest of the UK.

(iii) Moral Duty to Prosecute Home-grown Traitors:

I am conscious of the dilemma posed by cases such as Jack Letts, a British-Canadian Islamist in Kurdish detention – and Shamina Begum, the British-born ISIS bride of Bangladeshi parentage from Bethnal Green – who seek vindication of their citizenship status and right of abode in the UK. Over 100 ISIL associates have had their British citizenship removed since 2016.[50] Public opinion is divided as to what to do with ISIS returnees and it is uncertain how pending litigation will unfold. I submit that, as a matter of principle, the British state has a legal and moral duty to ensure that our nationals are repatriated to face justice here and held accountable for their actions. For the Government unilaterally to revoke their citizenship and disavow them – not prosecuting and punishing them domestically – is deeply unsatisfactory. It smacks of the arbitrary, or of tyranny even. Removing people's nationality has deeply unpleasant connotations with practices of totalitarian regimes.[51] Repatriation for prosecution in the UK (rather than exile) is a correlating but distinct issue from arguing this policy should be pursued to prosecute specifically for treason. Positively seeking the return of home-grown traitors to prosecute them for treason underlines that they are not being disowned but being held accountable precisely because of their British citizenry and their allegiance owed by that – in a way that repatriating to indict statutory alternatives might not quite communicate. I will argue in Chapter 2 that allegiance might be better policed by treason law rather than citizenship deprivation laws – even if issuing treason indictments might expediently disincentivise some prospective returnees.

[50] "Don't revoke citizenship: update our treason laws" Telegraph (23 February 2019): https://www.telegraph.co.uk/opinion/2019/02/23/dont-revoke-citizenship-update-treason-laws/

[51] Invariably, the first act of Nazi invaders was to denationalise the occupied country's Jewish population, rendering them stateless – P. Weis and R. Graupner, "The Problem of Statelessness" (1944).

(iv) Improving Risk Management for IE Offenders:

Significant numbers of IE prisoners are now being released, without apparently being de-radicalised and rehabilitated.[52] Ex-IRTL Max Hill suggested some returning ISIS fighters were naive and could be rehabilitated.[53] Redemption and rehabilitation may be noble objectives in relation to normal criminality. IE is not normal crime. Its aim – indiscriminate massacre to instil terror and undermine Western civilisation – differs. Home-grown Jihadists present a real risk to national security and a continuing terrorist threat. They remain enemy combatants – albeit for an enemy which no longer has a territorial Caliphate. Rehabilitation of the radicalised may be fanciful[54] – paradigmatically an exercise in 'pathological altruism'; leading to irrational, counterproductive self-harm for the nation.[55] A low threshold of suspicion about the veracity of the professedly reformed – and the efficacy of clinical risk assessment – is reasonable. Overstretched security services do not have the resources to constantly surveil hundreds of returned ISIS fighters or that first wave of paroled prisoners.

Preventive detention of suspect terrorists as controlees under such controversial administrative measures as Terrorism Prevention and Investigation Measures (formerly Control Orders) is problematic.[56] Lord MacDonald queried this approach:[57]

> "The reality is that controlees become warehoused far beyond the harsh scrutiny of due process and, in consequence, some terrorist activity undoubtedly remains unpunished by the criminal law. This is a serious and continuing failure of public policy."

Pre-emptive detention represents a fundamental change in classical notions of justice – antithetical to the principles of common law systems of criminal justice.[58] Meanwhile,

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[52] Policy Exchange, *Aiding the Enemy*, 7

[53] Lizzie Dearden, "More than 400 British Isis jihadis have already returned to UK, report warns" Independent (24 October 2017): https://www.independent.co.uk/news/uk/home-news/isis-british-jihadis-return-uk-iraq-syria-report-islamic-state-fighters-europe-threat-debate-terror-a8017811.html

[54] Lord Faulks, *Hansard* HL Deb. vol. 801 cols. 279-280, 8 January 2020

[55] Barbara Oakley *et. al*., eds., *Pathological Altruism* (2012)

[56] Terrorism Prevention and Investigation Measures Act 2011

[57] *Review of Counter-Terrorism and Security Powers: A Report by Lord MacDonald of River Glaven QC* (Cm 8003) (2011), 10

[58] Alan M. Dershowitz, *Preemption: A knife that cuts both ways* (2006), 37

statutory alternatives do not consistently provide for the option of life imprisonment with ongoing post-release supervision.

Though possibly considered only a resourcing or sentencing issue (and for future offenders), treason law allows for prosecution of potential terrorists who have not yet escalated their actions to terrorist acts but still pose serious security risks. Since the sentencing entry point for treason is mandatory life imprisonment,[59] successful treason prosecutions could deal with this lacuna – ensuring more effective management of what would be paroled IE life prisoners, who can be more closely monitored on pain of immediate (arbitrary) recall. Invoking treason law is practically and philosophically preferable. It avoids legally dubious preventive detention. It recognises the impossibility of constant surveillance – but provides for proactive policing of released IE life prisoners, who are more likely to be circumspect in their conduct than those liberated on determinate sentences. Deprivation of liberty under treason law will at least follow due process and be 'human rights' compliant. Suspects will be informed of the charge against them; obtain effective legal assistance of their own choosing (not an appointed Special Advocate); have their case heard in public; before a competent court; determined by an independent jury, who must be satisfied of their guilt beyond reasonable doubt. The offenders are not punished without charge. Nor are they primarily sentenced to protect the public from possible future behaviour – rather under conventional sentencing principles, principally retribution and deterrence. An indeterminate sentence need not be excessive or disproportionate – because the sentencer retains discretion to limit the length of the punishment part – with provision for periodic reviews after completion.

(v) Vengeance and Retribution:

Invariably, those who have done harm to Britain's interests over the last century have not been prosecuted for treason. Instead, it has been an exceptional response – to deliver retribution to those who have taken a political stand against the British state during wartime – however pathetic their actions might have been.[60] It might be significant that William Joyce and John Amery (two of the four who were prosecuted for treason at the end of World War

[59] Treason Act 1814, s. 1 (as amended by Crime and Disorder Act 1998, s. 36(4))

[60] Weale, *Patriot Traitors*, 244-245

II) and Sir Roger Casement[61] were borderline establishment figures who were public propagandists.[62] Their offences involved more provocative behaviour than crimes of espionage and deception. Joyce ('Lord Haw-Haw'), the radio voice of 'Germany Calling', had, in his sneering affected upper-class accent, mocked, and taunted the British people during the War's darkest hours. Though you might think that the criminal justice system should rise above this unfashionably primal focus on vengeance and catharsis, retribution (their legal expression) remains a relevant and justifiable basis for prosecution and a sentencing imperative – especially where the ultimate complainers are the British state and people. The desire for retribution is unsurprising and human. Of course, this is not the only basis for justice, but it is an inescapable aspect of it. Properly, what should be avoided is misplaced vengeance. Again, I will consider the 'wrong' of treason in Chapter 2 as underpinning retribution as a relevant factor in reviving treason law.

IV. Problems with Reviving Treason Law:

It was recognised in the Policy Exchange Paper that any proposals to revive the law of treason are likely to encounter fierce criticism. A 2015 Guardian editorial criticised the Government flirting with revival of the existing treason law:[63]

> "Indeed, at a time when ministers insist they are intent on reassuring apprehensive Muslim communities, they could not have selected a more emotive law. It would also be counterproductive, given that the most famous offenders under the 18th-century treason laws are current-day heroes: the American revolutionaries who drew up the declaration of independence. The use of such laws now should be squashed as promptly as possible."

Lord MacDonald described discussion about using the archaic legislation against Britons fighting with Islamic State (ISIS) or pledging allegiance to the militant group as "a juvenile response to a grown-up problem".[64]

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[61] Though his knighthood was forfeited in 1916, the Cabinet record of the 1965 decision to repatriate his remains refers to Sir Roger Casement (National Archives, CAB/128/39).

[62] Weale, *Patriot Traitors*, xvii

[63] "Use existing Laws" Guardian (9 August 2015)

[64] Deborah Haynes, "Treason charge a 'badge of honour' for jihadists" Times (18 October 2014): https://www.thetimes.co.uk/article/treason-charge-a-badge-of-honour-for-jihadists-p05n7bn2qtz

I now address the problems associated with any attempted revival of treason law – whether principled, pragmatic, or technical – and the possible rebuttals to them.

(i) Treason, the Anachronism:

There is a serious credibility problem with treason law insofar as it is perceived as anachronistic – a medieval offence, a feudal concept, designed for a different society, where the king took most decisions of national importance. The feudal bases of treason are possibly considered inconsistent with the liberal version of contemporary criminal law that prefers "systematic and scientific control of violence" to the symbolism of ancient treason law.[65] This is an area of the law where you might have expected – with the emergence of liberal democracy in the nineteenth century – a liberal transformation and abandonment of feudal principles of obligation. But this never happened.[66] Treason law has been rightly lampooned for its more eccentric, obviously obsolete, provisions. While it might be plausible to retain certain ancient institutions and rituals for historical and nostalgic reasons, why bring more Medievalism into our law? It might signal state paranoia. A government that is perceived to need to reinforce its residents' allegiance in this way may unnecessarily reveal its insecurity about their loyalty and exaggerate the magnitude of the threat from within. Despite the intended deterrent effect of prosecution, the Government might signal weakness sufficient to trigger, rather than deter, additional treasons.[67]

Fletcher suggests that there is an ambivalence towards treason and that because of its feudal origins, it no longer conforms to our shared assumptions about the liberal nature and purpose of criminal law, such that it is difficult to convert it into an offence with liberal contours and reconcile it with a liberal legal culture.[68] It is a feudal crime surviving in a post-Enlightenment criminal law based on liberal principles of harm, privacy of the internal sphere and universality (in the sense of the substantive definition of offences, focusing on every individual as perpetrator and victim). He argues that one of its principal anti-liberal characteristics is that the crime is addressed to that bond of loyalty between a sovereign and

[65] J. Richard Broughton, "The Snowden Affair and the Limits of American Treason" (2015) 3 LMULawReview 5, 11; Fletcher, "Ambivalence", 1628

[66] *Ibid.*, 1622

[67] Kristen E. Eichensehr, "Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States" (2009) 42 VandJTransnatlL 1443

[68] Fletcher "Ambivalence", 1612-1613

subordinate subjects.[69] Certainly, we seem to be embarrassed to talk about such big ideas as allegiance, betrayal and treason.[70] But it is not immediately clear why the relational aspect of the crime should be regarded as anti-liberal – an issue I will explore in Chapter 2.[71] Further, treason laws are only anti-liberal if they have not been amended or re-interpreted to focus on the traitor's acts rather than their internal beliefs – a matter I will address in Chapter 4.

Antiquity need not be equated with obsolescence, for many crimes are old, timeless even. Trial by jury and common law are also medieval concepts. There are good reasons why the 1351 Act has survived for over 650 years. You may embrace modernity, though some things are universal and perpetual – and the core idea of acting with malice against your own country is one of them. The American founding fathers were anything but medieval or feudal, and still enshrined a treason law in their Constitution. The Australian Sheller Committee (the independent Security Legislation Review Committee) of 2005 rejected the proposition that the offence of treason is not appropriate in a modern democratic society.[72] Treason is regarded as a crime by most people today as it was in the past – though treason law has, of course, evolved as the idea of the nation has evolved, and needs to be updated for twenty-first century conditions.

Partly because of their archaic language, the Treason Acts have rarely been invoked in modern practice and alternative offences are available for prosecution. There are practical and presentational difficulties with the existing law. While founded in a concise medieval statute, written in a form of long-obsolete Norman French, its clear wording has allowed for liberal and broad judicial interpretation.[73] Disparate legislation created separate, overlapping offences – but the 1351 Act is still the living law of treason and the outmoded language persists.[74] Its terminology connotes a sense of deference by the subordinated subject – submission or subservience even – seeming hopelessly undemocratic in a less deferential age. Authoritative recommendations have previously been made for modernisation. The Law Commission concluded in 1977 – as did Lord Goldsmith, in his 2008 Citizenship Review –

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[69] *Ibid.*, 1619-1622

[70] Lord Bethell, *Hansard* HL Deb. vol. 793 col. 1379, 31 October 2018

[71] Eichensehr, "Treason in Terrorism", 1464

[72] Australian Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (4 December 2006), Ch. 4

[73] Alan Wharam, "Treason in Rhodesia" (1967) 25(2) CLJ 189, 192 and 194

[74] Law Com WP 72, para. 51; Lord Goldsmith, *Citizenship: Our Common Bond* (2008), 41

that there was a good case for retention, but that the existing statutes should be repealed and replaced with new legislation – in much the same way as other common law countries have done (notably Canada, Australia and New Zealand), drawing on our law and incorporating the offence of treason in similar though updated form in their Criminal Codes.[75]

The Law Commission's view was that because of the extent of the present offences of treason in peacetime and their difficult language, it was necessary to restate the offences in simple language, if they were, indeed, needed at all.[76] Lord Goldsmith found that there are difficulties in prosecuting "due to it being couched in archaic language of ambiguous ambit"[77] The scope of each of the offence elements was unclear. It would be difficult to determine how the statutory language might apply in a modern context, and present a treason case in easily explicable and intelligible terms.[78] Even in 1940, the then Home Secretary, Sir John Anderson, commended the Treachery Act to the Commons as necessary because the Treason Acts were antiquated, excessively cumbrous, and invested with a dignity and ceremonial that seemed wholly inappropriate.[79]

Many of the provisions have given rise to difficult questions of interpretation.[80] Notoriously, treason prosecutions have encountered difficulties arising from obscurities about the substance of treason offences; with archaic terminology affecting elements such as allegiance, residence, territoriality and even the impact of words alone.[81] It is often suggested that Casement was 'hanged on a comma' (because of the grammatical ambiguity of the original unpunctuated text) – and how unsatisfactory it was, even then, that this most serious of criminal offences should have turned on the construction of language some 600 (now over 700) years old,[82] which was both obscure and difficult.[83]

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[75] Goldsmith, *Citizenship*, 81

[76] Law Com WP 72, para. 57

[77] Goldsmith, *Citizenship*, 7, 41, 81; *Joyce v. DPP* [1946] AC 347

[78] Goldsmith, *Citizenship*, 79

[79] *Hansard* HC Deb. vol. 361 col. 191, 22 May 1940

[80] David M. Walker, *The Oxford Companion to Law* (1980), 1232

[81] *R. v. Mitchel* (1848) 3 Cox CC 509; *De Jager v. Attorney-General of Natal* (1907); *R. v. Casement* [1917] 1 KB 98; *Joyce*; Walker, *Terrorism*, 5.172

[82] Lord Reading CJ, 123

[83] Law Com WP 72, para. 21, referencing *Casement*; Goldsmith, *Citizenship*, 79; Alastair Brown, "Offences against the State" (2005), para. 540 in *The Laws of Scotland, Stair Memorial Encyclopaedia*, Reissue 5, Criminal Law, 19

Treason law also tends to apply to conventional war between nation-states – and not the modern phenomenon of 'war' or, more specifically, armed conflict being waged against nation-states by organisations. There is a difference between international armed conflict and non-international armed conflict – or other conflicts falling short of non-international conflict. But this form of warfare still represents an existential threat.

To conduct prosecutions under an Act which is that old and contains definitions so broad, would need to be tested and we do not know what would happen if it were so tested. If Scotland were to have a usable treason law, it must be re-drafted to reflect modern conditions and sensibilities.[84] This is precisely the problem with which I will engage.

(ii) 'Patriotic'/Nationalistic Treason – 'The (British) Empire Striking Back':

For many, the difficulty of a revived treason law is that it may evoke a patriotic treason which involves the 'wrong' kind of patriotism; that it would result in the targeting of minorities or cause them to be treated with undue suspicion; perhaps focusing on one sizeable community in particular, or will at least be perceived to do so. A Scottish law of treason is still likely to demand a British allegiance and some Scottish British citizens or residents may consider that they may be conflicted by a competing allegiance. In Chapter 2, I will consider the potential difficulties arising from treason law in a plural and multicultural state – and how this issue might be approached.

Some argue, with states fragmenting and the nation-state becoming ever more subordinate to and subsumed into supranational institutions – that we are now approaching a 'post-national' future. There is a cosmopolitan notion that nationality is morally irrelevant and national boundaries are morally insignificant, even entirely arbitrary.[85] Without endorsing full-blown cosmopolitanism, increasingly fragmented sovereignty seems indisputable. How much protection is genuinely attributable to our domestic political institutions as to warrant

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[84] "The Guardian view on fighting Isis: medieval treason laws are the wrong weapon" Guardian (19 October 2014): https://www.theguardian.com/commentisfree/2014/oct/19/guardian-view-on-fighting-isis-trason-laws-wrong-weapon

[85] Youngjae Lee, "Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries" (2012) 31 LawPhilos 299, 307-308; Martha C. Nussbaum, "Patriotism and Cosmopolitanism" Boston Review (1 October 1994): http://bostonreview.net/martha-nussbaum-patriotism-and-cosmopolitanism

a correlating duty of allegiance? Treason is premised on an extinct sense of loyalty to the state – and interconnectedness of the modern world scarcely lends itself to earlier notions of strict national allegiances and the attendant obligations.[86] If national boundaries do not carry moral weight, it is unclear whether there is a moral obligation to support your country, or even at least refrain from helping its enemies – unless it happens, somewhat implausibly, to be on the morally-correct side of every single conflict.[87] The nation or political community can hardly have a claim upon individuals in some essentialist fashion – and make exclusive demands upon their moral conscience. There may be other political, moral, or religious communities to which people can channel their allegiance and through which they can express their values or political aspirations. Who is to say that these are morally inferior or any less valid? Why should the citizen owe a special duty of loyalty to the state? Treason remains linked to the nation-state and to patriotism, which is perceived in certain influential quarters as chauvinistic, irrational, and dangerous. Some will think that there is something inherently 'creepy' about the state making demands about where one's heart belongs. This could easily be misconstrued as promoting a sense of tribal identity. Surely, we should now be transcending our arbitrary loyalties to these relics of the past. This is a meta-issue which denies nationality, patriotism and allegiance or loyalty. But the nation-state seems to be experiencing a striking renaissance. With the coronavirus outbreak, EU member states have peremptorily reclaimed sovereignty[88] – though Zielonka argues the prevailing trend had already been against globalisation and European integration,[89] having passed 'peak globalisation'.

The Policy Exchange Paper recognised this anxiety about how the public, especially British Muslims, would receive treason prosecutions. Rather than promoting community cohesion, a revived treason law might exacerbate an already fraught political situation. Absent consensus, the case for revival may be doomed because "ultimately the authority of the law depends on the support given to it by public opinion".[90]

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[86] Suzanne Kelly Babb, "Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh" (2003) 54 Hastings LJ 1721, 1732

[87] Peter Singer, *One World: The Ethics of Globalization* (2002), 152

[88] Jan Zielonka, "Has the coronavirus brought back the nation-state?" Social Europe (26 March 2020): https://www.socialeurope.eu/has-the-coronavirus-brought-back-the-nation-state

[89] Jan Zielonka, *Counter-Revolution: Liberal Europe in Retreat* (2018)

[90] Hersch Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens" (1947) 9 CLJ 330, 334

Is consensus achievable? If juries consistently refused to convict of treason, opting instead for statutory alternatives, that would suggest it is not. A pattern of jury nullification would indicate public opposition to a revived treason law, and should, pragmatically, prompt its discontinuance. But this might be regarded presently as a speculative concern which denies the validity of the 'fair labelling' argument. Meanwhile, it may well be that it is impossible to rebuild trust with alienated communities – and perhaps gloomily accepting that there is a division, managing it on the majority's terms, in defiance of political opposition. A fraught political calculus may be involved – but that is not to invalidate the legally-principled case for revival and reform.

(iii) Undue Deference to Monarchy and Political Institutions:

Perhaps by its original premise of personal allegiance to the sovereign, British treason law is associated with deference or subservience even to monarchy – perceptibly a *lèse-majesté* ('leasing-making') law, too heavily-wedded to the idea of monarchy and thus regarded as undemocratic. The Treason Felony Act 1848 still renders republican activists technically traitors. But the judgment in the Guardian's unsuccessful challenge to much of the 1848 Act in *Rusbridger* underlined that disseminating republican ideas does not fall within the ambit of treason law.[91] Nonetheless, not everyone is content to leave matters to prosecutorial discretion – or is comfortable with continuing over-criminalisation – and the potentiality for interference with Convention rights.[92]

I will argue in Chapter 2 that a revived treason law should instead focus on core concerns and dispense with such fripperies. I will submit that the central role of the Crown in any Scottish treason law should not be an exercise in promoting royal power – simply recognition of a long-standing constitutional settlement involving combined sovereignty, in circumstances in which there is presently little organised opposition to monarchy or desire for a rival theory of government. It may well be that attitudes about loyalty to monarch and country have changed; and will possibly crystallise once the second Elizabethan age ends. But you do not require to have a monarch for a separate Scottish treason law or a monarch with a central role in it. You need not reference the monarch (or Crown) at all. In Chapter 2

[91] *R. v. Her Majesty's Attorney General ex parte Rusbridger and another* [2003] UKHL 38 – comprehensively summarised in Gordon, *Criminal Law*, 3rd ed. Supplement (2005), para. 37.24

[92] Clare Dyer "Judges block treason challenge" Guardian (23 June 2001): http://www.theguardian.com/uk/2001/jun/23/monarchy.claredyer

I will consider whether there is scope for protectable interests or objects of allegiance in a Scottish treason law other than the monarchy.

Further, British treason law affirms a Protestant monarchy – and, impliedly, the Protestant faith – and thereby might be deemed non-inclusive by some, many even. Why should religion – and this branch of this religion in particular – be afforded such special privilege? But the Christian majority (59.6% in the 2011 Census[93]) – and the Protestant majority component of that – have rights too. It is not as if the UK has ever attempted to promote itself as a secular state. In any event you cannot simply view the contemporary British state in denominational and ideological terms. You should do so primarily in secular and functional terms – for the UK is essentially a secular or 'agnostic' nation. Rather than affirming the Protestant succession, the likelihood is that an ambivalent Coronation Oath of a future monarch could be sworn by the Defender of faith – not Defender of the Faith.[94]

I will consider in Chapter 3 whether separate provision could always be made outwith the law of treason for offences involving the sovereign, though this may have certain unintended consequences. To diminish the role of the monarch is to subvert its status relative to the Supreme Governor of the Church of England and Protector of the Faith – which might in turn precipitate the disestablishment of the Church of England and the Church of Scotland as the state religions – if these institutions no longer have the same specific legal standing and ceremonial relations with the monarchy. It might be appropriate to have that debate, or expediently avoid it, but for the purposes of this thesis, I will argue that the (Protestant) sovereign need not necessarily be critical to a new Scottish treason law.

[93] Office for National Statistics, "Religion in England and Wales 2011": https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religioninenglandandwales2011/2012-12-11

The progressively downward trend in Christian belief is evidenced by the 56.6% figure from a 2019 ONS survey: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/researchreportonpopulationestimatesbyethnicgroupandreligion/2019-12-04#population-estimates-by-religion

[94] https://www.princeofwales.gov.uk/promoting-and-protecting

(iv) Discredited by Historical Abuses:

Treason law has suffered much reputational damage by the long history of abuse of the treason charge.[95] The Policy Exchange Paper recognised these many injustices.[96] It has unfortunate baggage as an instrument of class oppression for crushing republican or radical dissent – *lois scélérates* ('villainous laws') – a manipulable political crime to defend the established order and repress social movements. Indeed, I will consider the historical abuse of treason law by 'constructive treasons' in Chapter 4. Treason law has also been discredited by totalitarian abuses elsewhere. To modern sensibilities only tyrants and the weakest of nations still need treason laws. Nations secure in their identity can comfortably survive without its invocation.[97] Unscrupulous governments will conflate society and state, homeland, and nation, to demand unquestioning loyalty – prosecuting political opponents and nonconformists as enemies of the state. Consider the excesses of the People's Court (the notorious *Volksgerichtshof*) which had jurisdiction over political offences including treason against the Third Reich[98] – and the Moscow Trials (1936-1938).[99] More recently, the post-Communist states of Eastern Europe have exploited treason laws to bolster their fledgling democracies – paranoid of betrayal and anxious to assert supremacy over threats from within.[100] Expanding the scope of treason law and exploiting it for sinister purposes is hardly a farfetched concern given the prevailing trend toward 'soft' authoritarianism.[101] UK and devolved Governments have just used emergency law-making powers to enact far-reaching measures, with little Parliamentary scrutiny. Can we have faith in the essential goodness of future governments not to abuse revitalised treason legislation and pursue an authoritarian path? Because treason is characteristically a political crime, it perceptibly risks

[95] *Cramer v. United States*, 325 US 1 (1945) – *Cramer* is an excellent resource for both British and American treason law in so far that leading American scholar James Willard Hurst produced a comprehensive historical survey for the US Government's brief.

[96] Policy Exchange, *Aiding the Enemy*, 50; Lisa Steffen, *Defining a British State: Treason and National Identity*, 1608-1820 (2001), 4-7

[97] Fletcher "Ambivalence", 1626-1627

[98] Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (2004), 398-399

[99] Robert Conquest, *The Great Terror: A Reassessment* (1990), 386

[100] Tom Humdley, "Old Crimes Still Haunt New Europe" Chi. Trib (29 June 2003); Vera Chelishcheva, "Spy mania 2.0: the rise in 'crimes against the state' in Russia" Guardian (24 February 2016): https://www.theguardian.com/world/2016/feb/24/spy-mania-rise-in-crimes-against-state-treason-russia-ukraine

[101] Christian Kreuder-Sonnen, "An Authoritarian Turn in Europe and European Studies?" (2018) 25(3) J Eur Public Policy 452

politically inspired abuses of process. Its status as a political crime does not invalidate it, but neither should it be overlooked. Could a revived treason law – and overreaching treason prosecutions – be used to curb freedom of expression and non-violent protest? The perceived threat might have further foundation in the rhetorical abuse of treason on the flimsiest pretexts although the precedents for suppressing political and religious speech are poor. Laws tend to leak into areas for which they were not originally designed – to succumb to 'mission creep' and evolve beyond their original purpose, if convenient for rulers. "Any Government which acts or asks Parliament to act against treason … has to meet the criticism that it is seeking not to protect government, but to protect the Government, and keep itself in power."[102]

However, the characterisation of treason as a political crime does not invalidate it as a relevant crime. Offences against the state are still a legitimate genre or legal classification in substantive criminal law. The British state (and the Scottish component of that) is entitled to protect its very existence, the nation's territorial integrity, and its people, to challenge acts of war committed against it and its people – including and especially external-sponsored terrorism committed by British subjects. Suppressing treason should be one of the first concerns of all governments.[103] Meanwhile, these historical and autocratic allusions are lazy. This is scarcely a recognisable risk in the modern British context. The Policy Exchange Paper argued that it does not follow that this troubled history somehow invalidates its key concepts of loyalty and betrayal.

I will argue that concerns about abuse can be alleviated by framing any new Scottish offence in suitably narrow terms. In Chapter 2 I will propose that allegiance be recast in terms of a narrow duty of loyalty or duty of non-betrayal – specifically, not to betray this country by aiding its enemies in their attacks against it – and only then as a corollary to the state's duty of protection such that it can be conceived in terms of the social contract. Allegiance under this model will not be an unduly burdensome impediment, as far as any restriction on personal freedom is concerned. In Chapter 3 I will suggest that an appropriate safeguard against any new Scottish treason law being used to criminalise political dissent will be the requirement for identification with a foreign enemy – and that it be narrowly defined in terms of helping an enemy in the perpetration of or preparation of attacks on the UK – adopting the argument advanced in the Policy Exchange Paper. In Chapter 4 I will focus on the

[102] *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1, 142

[103] Fletcher, "Case for Treason", 193

importance of intentional treasonous action.[104] The specific, limited wrong of betrayal will be aiding the UK's enemies in attacking this country; and narrowly defining Scottish treason law should equally make clear exactly what it is not.

(v) Ample Alternatives:

There are ample equivalent statutory crimes against the state which address precisely this kind of criminality – in a more nuanced way – without risking further politicising and needlessly complicating prosecutions with possibly limited benefit. It is difficult to conceive a treasonable act that would not fall within the definition of some other crime. Various statutory public order offences – as well as common law mobbing and rioting – adequately cope with serious civil unrest and a new (Scottish) treason offence would add little by way of criminalisation. As terrorism is a relatively modern phenomenon, the treason offences are arguably ill-equipped to deal with it.[105] Terrorism submits to a wide definition.[106] In particular, s. 17 of the Terrorism Act 2006 gives extra-territorial effect to s. 5 which reaffirms the criminalisation of the preparation of terrorist acts. Given the options for indeterminate sentencing – that terrorist offences generally produce the same resultant sentencing product – deterrence is scarcely compromised. It is a recognised aggravating factor in sentencing if the offence of preparation of terrorist acts is committed with a view to engaging in combat with UK armed forces – albeit this is a non-statutory aggravating factor and one of 14 factors listed in no particular order in the English Sentencing Guidelines.[107] The abuse of the position of trust when allegiance is owed has been confirmed as an aggravating factor in terrorist sentencing.[108] Acknowledging that treason law is obsolete would not leave the state powerless against violent subversion, although the dismal reality is that updating the treason laws may do little to stop IE terrorism. Should we be so hung up on the label which is used to charge home-grown Jihadists in what is, objectively, low intensity conflict?

But the equivalent statutory crimes are somewhat anodyne in that they do not reflect the distinct wrong of betrayal – and by that understate the gravity of such offending and may not reflect the public mood. They do not tap into the sense of betrayal of homeland, felt on

[104] Policy Exchange, *Aiding the Enemy*, 50

[105] Law Com WP 311, para. 2.29

[106] *R. v. Gul* [2013] UKSC 64

[107] Sentencing Council, *Terrorism Offences Definitive Guideline* (2018)

[108] *R. v. Farooqi and Ors* [2013] EWCA Crim 1649, *per* Lord Judge LCJ, 162

almost a primal level. In contrast, treason signals the gravity of the wrong where a citizen (or resident) helps an enemy engaged in attacking the UK.[109] Even though they involve criminal activity, terrorist acts are not simply crimes. By their character and intent, they are more akin to acts of war. They may not be so regarded by governments because that might confer legitimacy on their perpetrators and create a sense of entitlement to privileges ordinarily accorded enemy combatants, but escalating terrorist acts to treason charges recognises that these are indeed acts of war, while still retaining the criminal law context.

Prosecutions under current treason law would not be without their own difficulties of proof and legal complexities – principally, archaic, and obscure terminology; jurisdictional issues; and proof of 'protected person' status – but the statutory alternatives are not without their own complications either. Terrorism legislation is validly objected to for its lack of definition and clarity.[110] It can similarly be impugned for unjustly repressing minorities. However, unlike much anti-terrorism legislation, treason law does not necessarily endanger democracy by creating a relentless state of exception which allows the conditions for (soft) authoritarian government. Meanwhile, it has become increasingly apparent that the statutory alternatives do not provide for adequate punishment and post-release risk management – which treason convictions with their resultant life sentences undoubtedly would.[111]

(vi) Peacetime Irrelevance:

Modern treason is essentially a wartime phenomenon. Prosecutions are rare and only occur in wartime or its immediate aftermath, when emotions might be expected to be raw. The Law Commission considered it questionable whether treason offences are required in peacetime.[112] It might well be that wartime is apt for legislative activity, but we are not now engaged in a regular war (*de jure*). Certainly, the principal threat of twenty-first century terrorism is linked to IE. Ethnic or sectarian terrorism is scarcely a new phenomenon – and the current threat appears to be manageable. Indeed, it is at a significantly lower level of intensity than the Irish Troubles (1969-1998). To contextualise, more than 3,500 people were

[109] Policy Exchange, *Aiding the Enemy*, 5, 33, 41 and 51

[110] https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190909-Treason-Speech-to-RUSI.pdf

[111] "London Bridge: Attacker had been convicted of terror offence" BBC (30 November 2019): https://www.bbc.co.uk/news/uk-50610215

[112] Law Com WP 311, para. 2.30

killed in the Troubles.[113] The conflict was declared in 1971 by the then Home Secretary Reg Maudling as being at 'an acceptable level of violence' – a notorious gaffe which came to denote the security policy of successive UK Governments, prepared to tolerate paramilitary activity, so long as it remained at manageable proportions.[114] In contrast, since 2001 there have been 'only' 100 or so terrorist-related deaths in Great Britain, the majority of which are attributable to IE.[115] Our political institutions, police and military are not so fragile that they are unable to absorb these threats. Demographics militate against any serious insurrection aimed at the establishment of a British Caliphate. Given that there is no genuine existential danger posed by attacks from non-state actors to our society and its existence as a great power with economic, diplomatic and strategic influence – or of full-blown invasion of the UK, assuming we were embroiled in further conflict in the Middle East – perhaps there is little purpose in thinking about treason, as the threat is not an existential crisis and does not warrant panic.

Since treason is relevant in wartime or its immediate aftermath – or following an enormous, unprecedented terrorist spectacular – why not update it for precisely those eventualities which are hardly hypotheticals? Home-grown Jihadists are still perfectly capable of committing atrocities and of waging war against the British state and people – and causing serious injury to it and them. This is the nature of much modern warfare – often perpetrated by non-state actors, possibly funded to fight a proxy war against the UK and its Western allies. The issue is the fact of their betrayal and their intent. Treason law can and should deal with this in what might be peacetime. If treason law were viewed as being on 'stand-by' for the unwelcome day on which the UK again declares war, it should not be repealed – and if it should not be repealed, then it should be updated and rendered fit for purpose in that eventuality.

V. Making Scottish Treason Law Relevant:

Enacting a new Scottish treason law is an opportunity for the creation of a usable treason law, re-drafted to reflect modern conditions and sensibilities. It allows for the creation of a

[113] Malcolm Sutton, "Index of Deaths from the Conflict in Ireland", CAIN: https://cain.ulster.ac.uk/sutton/

[114] "Maudling Statement Arouses Ulster Parliament" NYT (16 December 1971)

[115] House of Commons Library, Briefing Paper Number CBP7613 *Terrorism in Great Britain: the statistics* (7 June 2018)

new lexicon to deal with the presentational difficulties of arcane terminology – especially treason's peculiar and convoluted *actus reus* and *mens rea* – that a treason case might be prosecuted in easily explicable and intelligible terms. It accords with 'fair labelling' expectations and promotes legal certainty. It could engage with the present existential threat on a more principled basis than anodyne statutory alternatives – reflecting the 'wrong' of treason. It would carry significant weight, theoretically and symbolically, and allow for more effective criminal sentencing, even providing the blueprint for modernising British treason law.

Assuming the case can thus be made for a separate Scottish treason law, the second principal research question with which I will engage is what would a separate Scottish treason law look like? How might it be modernised and made relevant – that it might serve a useful purpose and be successfully litigated?

To answer this and the first main research question, I must address the following sub-question: how can the duty of allegiance – pivotal to the theory of the crime of treason – be re-fashioned for modern conditions and placed in a viable theoretical context and restated in a form fit to be enforced? I will look in Chapter 2 at the contemporary dynamics of sovereignty, allegiance and national identity and consider whether treason's core idea of allegiance is survivable – and in what form. The prospect of a Scottish treason law raises fundamental questions at the most general level as to whether the obligations of loyalty would be the same. What would be the object of its (duty of) allegiance? Should it extend to Scottish political institutions? It might be appropriate to distance treason from patriotism and I will engage with the issue of how allegiance in a Scottish treason law (or revived British treason law) might be reconceptualised in terms of a narrow, negative duty (or duty of non-betrayal) not to betray this country to its foreign enemies and be operable under a non-patriotic contractual model – thus allowing for any fears of emotive patriotic distractions to be assuaged.

To answer the second main research question, I will consider how its essential elements might be expected to work under any revised allegiance model to determine the viability of the whole project. In Chapter 3 I will consider what type of conduct would breach this revised duty of allegiance and how the *actus reus* of a reformulated Scottish crime of treason might be expected to look. I will explore how the requirement for adhering to the UK's enemies in all surviving heads of treason – that the surviving treasons be essentially

'Adherence Treason'[116] or derivatives or sub-categories of it – might further address such concerns.

The particular thing about treason is its intent and in Chapter 4 I will consider what *mens rea* requirement may be appropriate to this contractual duty-based allegiance model. In Chapter 5 I will test the proper limits of that modelling and the conditions under which protected persons should not be criminally responsible for conduct falling within those limits – by investigating what defences should be available even where there has been a material and intentional breach of this duty of allegiance.

[116] This terminology applied in Broughton, "Snowden", 11. Giving 'aid and comfort to the enemy' has been described as 'Exterior Treason' (John N. Hazard and William B. Stern, "Exterior Treason: A Study in Comparative Criminal Law" (1938) 6(1) UChiLRev 77).

Chapter 2 – Towards a Modern Duty of Allegiance – The Allegiance Question

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VII. Allegiance in Scotland

- (i) Object of Scottish Allegiance
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- (i) Persisting Sense of Subservience
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IX. Conclusion

I. Introduction:

Treason is an offence against allegiance and is historically based on the concept of allegiance of the British subject to the Crown. Crucially, to commit treason you have to first owe allegiance to the Crown. Allegiance is traditionally at the heart of the law of treason, but the common law notion of allegiance is problematic in a twenty-first century, multi-cultural constitutional monarchy. It may be perceived as being unduly deferential to monarchy and emphasising British identity. It seems archaic and complicated. 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".[1] 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.[2] The principal question to be asked in this chapter is how to re-think the core duty of allegiance that it might be re-interpreted for modern conditions? In short, how might we fix it?

In the first (post-introduction) section I will consider the traditional meaning and view of allegiance, including demonstrating the extent to which it is a core concept in the crime of treason – to properly appreciate why it cannot be taken to fully work under contemporary conditions. In the second section I will address the problems with the concept of allegiance as presently constituted in treason law: *viz.*, its archaic language; its central notion of allegiance of the British subject to the Crown, its association with monarchy; its possibly nationalistic overtones; and the potentially confusing conflation of allegiance and citizenship. Insofar as there remains mileage in the concept of allegiance, it might be thought that modern ideas of citizenship could assume a greater importance in any new model. I will consider in the third section whether one way of modernising allegiance might be to invoke fashionable notions of citizenship – before rejecting this as something of a distraction. Further, while the protected person could otherwise be defined as a citizen rather than as subject (given the emotive invocations of monarchy and subservience associated with the traditional phraseology), I will consider whether this terminology should be dismissed as imprecise and unsuitable. I will focus in the fourth section on what might be meant by the

[1] *Crown Court, Treason: R. v. Clement*, ep. 52 (1973) Alan Bromly, dir. – 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): https://www.youtube.com/watch?v=OvnWK-ul1Jw&t=10s

[2] Lord Goldsmith, *Citizenship: Our Common Bond* (2008), 7 and 81

'wrong' of treason – to help us decide whether we should persist with allegiance or consider some other basis for grounding the law of treason. Insofar as it emerges that treason is still best understood in terms of allegiance and disloyalty – and that treason and betrayal can only ultimately be defined by reference to allegiance – I will argue that allegiance must continue to be the core concept in the offence of treason. Because allegiance is as an idea worth holding on to, I will try to develop a model by which it can be justifiably retained.

In the fifth section I will attempt to reconstruct allegiance by considering the competing analyses of allegiance arising from the thorny case of *Joyce v. DPP*.[3] Many felt genuine discomfort with the prosecution for treason of the Nazi propagandist William Joyce, who had voluntarily sided with Germany after an Anglo-Irish upbringing and education, given that at the time of his ostensibly treasonable broadcasts he was neither a British subject nor on British soil.[4] When he was 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 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 two outstanding legal heavyweights of their day re-fought the case, slugging it out through the medium of the Cambridge Law Journal – Sir Hersch Lauterpacht weighing in for the Law Lords and Glanville Williams counterpunching with devastating effect.[5] Lauterpacht's approach was based on the familiar concept of the mutuality of protection and allegiance.[6] In contrast, Williams' refinement of the conceptual structure was in terms of a mutuality of a duty of protection and a duty of allegiance, thus allowing for a 'patriotism-free' version of that duty.[7] This meant not protection juxtaposed against allegiance – but rather a duty of protection correlating to a duty of allegiance. I will adopt Williams' model of allegiance – a non-patriotic (or, at least, a not overtly patriotic) contractual, 'duty-based' model – and explain why his theoretical justification is to be preferred. As a matter of nomenclature, I will consider whether we should persist with a duty of allegiance – or substitute a more

[3] [1946] AC 347

[4] Glanville L. Williams, "The Correlation of Allegiance and Protection" (1948) 10 CLJ 54; Hersch Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens" (1947) 9 CLJ 330, 347; Alan Wharam, *Treason: Famous English Treason Trials* (1995), 236

[5] Brian Harris, *Injustice, State Trials from Socrates to Nuremberg* (2006), 51

[6] Lauterpacht, CLJ, 334

[7] Williams, CLJ

comprehensible duty of loyalty or fidelity (or duty of non-disloyalty even) that it might be otherwise expressed in more contemporary and familiar terminology. I will find other surrogates for personal allegiance to the Crown. Building on Williams' modelling, I will argue that the duty of allegiance be conceptualised as only a negative duty – and will attempt to define what a negative duty of allegiance means and involves. Indeed, I consider that there is much to commend the argument advanced in the Policy Exchange Paper *Aiding the Enemy* that a new law of treason could and should 'recognise and reinforce the duty of non-betrayal' incumbent on all citizens.[8]

Bringing Scottish government into being has been to arguably create a new form of allegiance for its inhabitants. In positing a new, separate, Scottish offence of treason, in issue will be how its duty of allegiance might be characterised in terms appropriate to Scotland. In the sixth section, I will thus consider to whom or what this duty of allegiance would be owed (its object); the class of people who would owe it (the subject of the duty of allegiance or 'protected person'); and define what it is exactly that they would owe by it (its content). Complexities arise in respect of who may be said to owe the duty of allegiance.[9] I will attempt to pre-empt problems with this reconstruction – identifying possible objections to it in the seventh section and suggesting how they might be met. In particular, I will assess whether competing allegiance and the cultural assimilation of protected persons should genuinely matter – because if not citizenship modelling, what to do with probationary citizens and other residents?

II. Treason and Allegiance – the Traditional View:

Treason, allegiance, and sovereignty can be treated as inseparable concepts. Sovereignty is the right to govern and includes the right to demand allegiance of the governed. If the sovereign power demands allegiance, it necessarily possesses the power to prohibit and punish the breach of allegiance. Allegiance is the price citizens pay for the state's corresponding obligation to provide protection.[10] Treason is essentially a breach of

[8] Richard Ekins *et al.*, *Aiding the Enemy, How and why to restore the law of treason* Policy Exchange (2018), 5

[9] Goldsmith, *Citizenship*, 41

[10] J. Taylor McConkie, "State Treason: The History and Validity of Treason against Individual States" (2013) 101 Kentucky LJ 281, 324

allegiance and can be committed only as between persons united by a bond of allegiance.[11] It is a 'relational crime' in the sense that there must be a pre-existing relationship between the betrayer and the betrayed.[12] The treason is based on a mutuality of protection and allegiance – and the breach of that protective relationship by the protected person.[13] By this mutual relationship between the state and the subject, the state provides the subject with protection and in return the subject owes allegiance to the state. This can be considered in terms of reciprocity of benefit and duty.[14]

In the UK, treason is a breach of allegiance to the Crown. Classically, the breach of the duty of allegiance involves a betrayal of the trust owed by the subject to the Crown. Only those who owe allegiance to the Crown can commit the crime of treason – consistent with the common understanding that to betray, there must be a pre-existing relationship between the betrayer and betrayed. "Treason … consists of a behaviour that is presumed to have betrayed trust and breached faith" – and "establishing an act of treason requires an *a priori* act of establishing a relationship of trust and loyalty."[15] Treason is paradigmatically a crime which is committed by a person in a special position of trust – a 'special capacity' offence.[16]

Allegiance has always been the pivotal concept in the crime of treason – something more than even an essential fact (*factum probandum*) or necessary element of the offence, but its very essence. The ancient notion of allegiance can be seen historically to be at its core. Allegiance was/is the mechanism by which the state secured or lost the attachment of its subjects.[17] High treason originally reflected the element of betraying a personal protector, namely the King, both as embodiment of divine authority and the supreme figure in the feudal system.[18] It was about breaching personal loyalty to the sovereign – being based on the feudal, personal duty of loyalty of all subjects to the monarch.[19] The subject turning against their king and waging war against him was a criminal wrong of great proportions.

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[11] Gordon, *Criminal Law*, 4th ed. Vol. II (2017), para 43.17

[12] Nachman Ben-Yehuda, *Betrayals and Treason: Violations of Trust and Loyalty* (2001), 107

[13] George P. Fletcher, "The Case for Treason" (1982) 41 MdLRev 193, 194

[14] Lauterpacht, CLJ, 330, 334

[15] Ben-Yehuda, *Betrayals and Treason*, 107

[16] Criminal Procedure (Scotland) Act 1995, s. 255

[17] Lisa Steffen, *Defining a British State: Treason and National Identity, 1608-1820* (2001), 1

[18] Fletcher, "Case for Treason", 193, 195

[19] Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences* (Law Com No 72, 1977), para. 12

The importance of the duty of allegiance to high treason is underlined in the following passage from Foster's *Crown Law*[20] – approved in *R. v. Casement*:[21]

> "High treason, being an offence committed against the duty of allegiance, it may be proper … to consider from whom and to whom allegiance is due. With regard to natural born subjects, there can be no doubt. They owe allegiance to the Crown at all times and in all places. This is what we call natural allegiance, in contradistinction to that which is local. …
>
> Natural allegiance is founded on the relation every man standeth in to the Crown considered as the head of that society whereof he is born a member: and on the peculiar privileges he deriveth from that relation which are with great propriety called his birthright; this birthright nothing but his own demerit can deprive him of; it is indefeasible and perpetual; and consequently the duty of allegiance which ariseth out of it and is inseparably connected with it, is in consideration of law likewise unalienable and perpetual."

It is also elucidated in this passage from *Casement*:[22]

> "The subjects of the King owe him allegiance and the allegiance follows the person of the subject. He is the King's liege wherever he may be and he may violate his allegiance in a foreign country just as well as he may violate it in this country."

But allegiance is not a one-sided relationship. The logic of the law is that if the state gives a citizen protection, it has a claim to his allegiance – and if he gives it his allegiance, it is bound to give him protection.[23] It might be thought that allegiance is given only in exchange for protection – though it is not a defence if the offender has not availed himself of that protection.

Lord Jowitt (the Lord Chancellor) illuminated this principle in *Joyce*:[24]

> "The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity: a duty of the sovereign lord to protect, a duty of the liege or subject to be faithful. Treason, 'trahison' is the betrayal of a trust: to be faithful to the trust is the counterpart of the duty to protect."

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[20] Fost. CL 183 (1762)

[21] [1917] 1 KB 98, 130

[22] *Ibid.*, 137

[23] Rebecca West, *The New Meaning of Treason* (1964), 361

[24] 368

This had previously been encapsulated by Coke, in the sixteenth century, in the following maxim: "Protection draws allegiance, and allegiance draws protection" (*protectio trahit subjectionem, et subjection protectionem*).[25] A more literal translation is – from allegiance to protection and from protection to allegiance – such that it is possible to argue both ways.[26] Hume narrated that treason "include(s) all such offences as are more immediately directed against the person and Government of the King; and amount to a violation of that fidelity and allegiance which is due to his Majesty from all his subjects in return for the protection of his laws and dominion."[27] Hale highlighted the significance of the breach of trust:[28]

> "Because as the subject hath his protection from the King and his laws, so on the other side the subject is bound by his allegiance to be true and faithful to the King …
> And hence it is, that if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust nor allegiance. …
> But if an alien, the subject of a foreign prince in amity with the King, live here, and enjoy the benefit of the King's protection, and commit a treason, he shall be judged and executed, as a traitor; for he owes a local allegiance."

West in *The New Meaning of Treason*, the definitive literary critique of the crime of treason, emphasised the mutuality of the relationship, dismissing any suggestion that the duty of allegiance need be unflinchingly owed to a capricious ruler:[29]

> "Allegiance is not exacted from a subject simply because the Crown is the Crown. The idea of the divine right of kings is a comparatively modern vulgarity. According to tradition and logic, the state gives protection to all men within its confines, and in return exacts their obedience to its law; and the process is reciprocal. When men within the confines of the state are obedient to its laws they have a right to claim its protection."

Historically, this personal bond of allegiance was unconditional. Allegiance was owed no matter what. The subject was supposed to trust in the sovereign and their representatives in government. This concept is hardly consistent with modern understandings of the state.

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[25] *Calvin's Case* (1608) 7 Co Rep 1

[26] Williams, CLJ, 56

[27] Hume, *Commentaries*, I, 512

[28] Matthew Hale, *History of the Pleas of the Crown*, Vol. I (1736), 59

[29] 12

Nonetheless, we can historically trace the transition of the monarch's role from a personal into an institutional or even symbolic object of allegiance or model of sovereignty. Foster argued that the relationship between king and subject was societal, not familial. Man's relationship to the greater society determined allegiance – a more abstract and remote relationship for creating allegiance than the intimacy and mystery of the paternal imagery of Hale and Coke.[30] Consistent with modern social contract theory, the sovereign's Coronation Oath underlines the contract or bargain made between the Queen and her people – recognising the rule of law – in a bond which is reciprocal.[31] Though there may be a dearth of direct authority, it seems to be incontrovertible that a breach of the Oath will absolve subjects from their allegiance.[32]

III. Problems with Allegiance in 'Current' Treason:

I now consider the legal problems with the concept of allegiance as presently constituted in British treason law. 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.

(i) 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.[33] The word itself bears the marks of this history.[34] It evokes a sense of deference – subservience even, to the monarchy and seems hopelessly undemocratic. We tend to associate allegiance 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.[35] Lavi asserts that it is an

[30] Steffen, Defining a British State, 86-87

[31] Geoffrey Robertson, *The Tyrannicide Brief* (2005), 185

[32] Alan Wharam, "Treason in Rhodesia" (1967) 25(2) CLJ 189, 190, n. 7

[33] OED Online, March 2020

[34] Shai Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel" (2010) 13(2) NewCrimLRev 404, 406

[35] Lord Faulks, *Hansard* HL Deb. vol. 793 col. 1377, 31 October 2018

anachronistic term – though previously adequate for the protection of the Crown – and is incapable of facing modern challenges of security and defensive democracy, which require preventive measures and efficient enforcement that allegiance cannot guarantee.[36] The breach of allegiance seems to have lost its normative appeal and practical efficacy.[37]

(ii) Centrality of Monarchy:

British treason law has never extinguished the centrality of the monarch.[38] This renders it too heavily wedded to the idea of monarchy. These unfortunate royalist or even feudal connotations – evoking the undue deference associated with a bygone era, seem hopelessly undemocratic for modern sensibilities. It might be thought that the notion of duty to the sovereign embodied in the concept of allegiance runs contrary to the kinds of social obligations which are necessary to make a free, democratic society work. This may be a problem for reluctant subjects who prefer to consider themselves citizens or who may have different ideas about what their relationship with the sovereign should be. Accordingly, 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 loyalty of the subject – 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 on modernising the law of offences against the state spoke of a contemporary breach of 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.[39] 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.[40] Allegiance need not be regarded as a personal obligation of the subject (or citizen) to the sovereign – rather as something institutional owed by the subject to the nation's political and

[36] Lavi, "Punishment and Revocation of Citizenship", 407-408

[37] *Ibid.*, 406

[38] Steffen, *Defining a British State*, 8

[39] Law Com WP 72, para. 34

[40] S.C. Biggs, "Treason and the Trial of William Joyce" (1947) 7 UTLJ 162, 171

security institutions. Allegiance does not have to be projected upon the person of the sovereign – or even the Crown as an abstract – but on the British state and its institutions, and (as I will consider in Chapter 3) even its sub-national institutions. While the focus was originally upon threats to the sovereign in person, now it is concerned with threats to the democratic order.[41] Though it might be anti-liberal 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.[42]

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.[43]

Of course, it would always be possible in reviving treason law and creating a new Scottish treason offence, to remove that head of treason which involves compassing the death of the sovereign and thus end 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 that German treason law regards the abstract which is the current constitutional

[41] Alastair Brown, "Offences against the State" (2005), para. 531 (in *Stair Memorial Encyclopaedia*)

[42] Kristen E. Eichensehr, "Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States" (2009) 42 VandJTransnatlL 1443

[43] Steffen, *Defining a British State*, 13-14

order, as the protectable interest or object of the duty of allegiance.[44] You could otherwise 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, if there is a monarch, to assign them a central role. You could conceivably have a new Scottish treason law which does not reference the monarch (or the Crown) at all – and involves another definition of the sovereign power or object of the duty of allegiance. The form of the state (and the system of government) may make little difference in the basic principle underlying the definition of the crime of treason – although the form may account for the inclusion (or exclusion) of particular *acti rei*.[45]

Insofar as 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 onto a different sovereign object or protectable interest – more specifically, the political institutions on which the social and democratic order rests.[46]

(iii) 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.[47]

But the concept of allegiance need not necessarily have nationalistic connotations. Patriotism should and 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

[44] S. 81 of 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.

[45] John N. Hazard and William B. Stern, "Exterior Treason: A Study in Comparative Criminal Law" (1938) 6(1) UChiLRev 77, 79

[46] Law Com WP 72, paras. 14 and 17 (citing the Irish case of *R. v. Sheanes* (1798) 27 St Tr 255, 387), 59 and 61; Goldsmith, *Citizenship*, 80; Biggs, "William Joyce", 171; Brown, "Offences against the State", para. 531

[47] Lavi, "Punishment and Revocation of Citizenship", 407

significance of the nation for its people's lives.[48] Nonetheless, I recognise that this approach would not be universally accepted. While patriotism may certainly be one approach or answer to this kind of question – and I concede that 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 to 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.

(iv) Conflating Allegiance and Citizenship:

It should be appreciated that 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 – insofar as 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. In issue with treason law is whether it applies to all those who live in the UK or otherwise 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".[49] 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 only 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 for some, as citizens.

Accordingly, I will consider whether some form of citizenship model of allegiance might work.

[48] Alasdair MacIntyre, "Is Patriotism a Virtue?" (1984) in *Patriotism*, Igor Primoratz, ed. (2002) 43, 48; Youngjae Lee, "Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries" (2012) 31 LawPhilos 299, 309

[49] Law Com WP 72, para. 34

IV. Citizenship and Allegiance Modelling:

(i) Citizenship:

I now explore whether the relevant *nexus* in a new version of this crime – and any reinvented allegiance model – could be citizenship. Of course, citizenship is not strictly necessary to owe a duty of allegiance. Treason can only be committed by persons owing 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 extends to aliens residing within the realm – and, more controversially, aliens who having settled within the realm and are temporarily removed, while continuing to have their family and effects within the realm. 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'[50] – and warrants consideration. The object of 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 and 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 means today – as something more than loyalty to a hereditary monarch. For example, the idea of a duty of allegiance which has 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 that means 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, rather than subject (though that redefinition could still

[50] Robert Reiner, "Citizenship, Crime, Criminalization: Marshalling a Social Democratic Perspective" (2010) 13(2) NewCrimLRev 241, 242

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 one's corresponding responsibilities.[51]

(ii) Limitations of Citizenship:

But citizenship has its limitations in understanding the normative aspects of the crime of treason. It should be remembered that treason is about a breach of allegiance and not a breach of citizenship as such.[52]

Dubber was not convinced by the potential of the concept of citizenship as an explanatory and analytical tool in criminal law generally. While it can play 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'.[53] He rejected the pernicious influence of the rhetoric of citizenship – and, if anything, expected that a normative theory of criminal law would seek to eliminate, rather than to centralise, the discourse of citizenship.[54]

Ryan was scathing about how citizenship and community could be cited in aid of positions at all points on the political spectrum:[55]

> "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?"[56]

On its face, allegiance bears little relevance to contemporary citizenship. Vasanthakumar suggests two illustrative competing conceptions of allegiance. In the liberal account, it is

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[51] Lucia Zedner, "Security, the State and the Citizen: The Changing Architecture of Crime Control" (2010) 13(2) NewCrimLRev 379

[52] Carlton F.W. Larson, "The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem" (2006) 154 UPaLRev 853, 874

[53] Markus D. Dubber, "Citizenship and Penal Law" (2010) 13(2) NewCrimLRev 190

[54] *Ibid.*, 215

[55] A. Ryan, "Citizens of All Persuasions" Times (25 October 1988)

[56] A. Ryan, "State and Citizen" Times (12 September 1990)

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.[57]

I argue for a thinner still approach (a 'lite' version), reducing the obligation to obeying only treason law, not the law generally – to deal with the imperative of national security and avoiding harm to it (as I will explore in Chapter 3). While there might be 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 crime is the subject's conduct being synonymous with a foreign enemy. It has nothing to do 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, though commendable, are superfluous. This is not about fulfilling responsibilities in society or having a shared national pride. The protected person's allegiance or loyalty is not contingent on 'responsiblized' crime-preventing active participation in the life of the community.[58] Protected persons who are lazy, indifferent or lacking in civic duty – characteristically 'non-loyal people' – should not be labelled as disloyal under treason law when they do nothing constituting betrayal.[59] 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 the enemy (as I will propose in Chapter 3) – 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

[57] Ashwini Vasanthakumar "Treason, Expatriation and 'So-Called' Americans: Recovering the Role of Allegiance in Citizenship" (2014) 12 GeoLJ 187

[58] Ely Aharonson and Peter Ramsay, "Citizenship and Criminalization in Contemporary Perspective: Introduction" (2010) NewCrimLawRev 13(2) 181, 182

[59] Lee, "Punishing Disloyalty", 322

(subject or citizen) to elide criminal responsibility for treason because no positive duty is posited, the crime being against conjoining with the state's enemies.

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.[60] 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.[61] There is a difference in emphasis.

Further, 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, therefore, needlessly confusing.

(iii) Whether Subjects or Citizens:

Standing what I suggest is the irrelevance of citizenship to any new allegiance modelling, I do not propose to define the protected person as a citizen, rather than as a subject. There is little principled objection to the use of the term 'citizen'. Logically, if you owe a duty of allegiance you are the subject correlating to the object which is the sovereign. In a constitutional monarchy, 'subject' is the technically correct term. 'Subject' is a frequent pejorative insult of citizens of monarchies by the citizens of republics – particularly American. The sneering implication is of serfdom – that only citizens in republics have rights – and that subjects are condemned to be ruled at the whim of an arbitrary and capricious ruler in a hereditary dictatorship, forever compelled to practise archery for allotted annual hours. It should also be appreciated that a subject is a person who has rights and privileges, possessing a certain dignity by virtue of that. Historically, the subject is a free man, living under the law, otherwise acting as he wishes, whereas citizens derive their freedoms from the state which requires certain duties from them.

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[60] Alejandro Chehtman, "Citizenship V. Territory: Explaining the Scope of the Criminal Law" (2010) 13(2) NewCrimLRev 427, 446

[61] Mariana Valverde, "Practices of Citizenship and Scales of Governance", (2010) 13(2) NewCrimLRev 216, 217

The use of the term 'citizen' in the definition of this crime would be problematic – even if a crime-specific definition were provided in any new legislation. Given that there are issues of definition already, I do not propose further avoidable complications. 'Citizen' has a restrictive meaning in immigration law. It would be a distracting conflation – because some non-citizen inhabitants will be relevant protected persons owing a duty of allegiance for the purposes of treason law – but it could justifiably be argued that one of the central elements of the offence will not have been proven if they are not citizens, and thus not protected persons.

Perhaps the focus on a 'protected person' would convey something of the meaning and significance of the state discharging a duty of protection and why the protected person owes a correlating duty of allegiance – underlining a symbiotic relationship.

V. 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 help us decide 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 enemy states or organisations dedicated to the destruction of the sovereign power, and even possibly the extermination of its people and civil society. The complicity with enemy states or organisations 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.[62] 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 otherwise be for conventional terrorist or espionage offences). It is the essence of the offence. Devoid of this, the crime of treason (if not the

[62] Fletcher, "Case for Treason", 193, 195

criminality involved) is meaningless. Betrayal is not some minor aggravating feature to be left to the sentencing judge as Baker suggests.[63] That would be to completely misconstrue the offence. As a generality, the wrongfulness of modern treason could thus 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 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,[64] the breach of allegiance has previously been approached in absolutist terms and means something more than a mere violation of trust.

The breach of allegiance has been historically considered to be fundamentally wrong. Consider the Oration famously 'attributed' to Cicero as he vainly pleaded to save the Roman Republic from tyranny:[65]

> "A nation can survive its fools, and even the ambitious. But it cannot survive treason [betrayal] from within. An enemy at the gates is less formidable, for he is known and carries his banner openly. But the traitor moves amongst those within the gate freely, his sly whispers rustling through all the alleys, heard in the very halls of government itself. For the traitor appears not a traitor; he speaks in accents familiar to his victims, and he wears their face and their arguments, he appeals to the baseness that lies deep in the hearts of all men. He rots the soul of a nation, he works secretly and unknown

[63] Dennis J. Baker, "Treason Versus Outraging Public Decency: Over-Criminalisation and Terrorism Panics" (2020) 84(1) JCrimLaw 19

[64] Hume, I, 512; *Joyce, per* Lord Jowitt (the Lord Chancellor), 368; *Pham v. Secretary of State for the Home Department* [2018] EWCA Civ 2064, [49]; *Hale's Pleas of the Crown*, Vol. I, 59; Policy Exchange, *Aiding the Enemy*, 5, 15-17, 19

[65] Quotation magnetism from Taylor Caldwell's faction, *A Pillar of Iron* (1965), 556 – albeit paraphrasing Cicero's Second Oration against Catiline in the Roman Senate (C.D. Yonge, trans., *The Orations of Marcus Tullius Cicero*, Vol. II (1917), 292-303).

> in the night to undermine the pillars of the city, he infects the body politic so that it can no longer resist. A murderer is less to fear."

Fletcher figuratively discusses treason in terms of "the sin of betrayal".[66] 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.[67] 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 (as I suggested in Chapter 1).

I argue that modern treason can and should be conceptualised, more precisely, as a crime of disloyalty. This is a 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,[68] loyalty itself is more closely connected to the idea of law.[69] But 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 necessarily 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 deal

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[66] George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (1993), 41

[67] Jonathon Hall, "Changing Times, Changing Treason" (9 September 2019): https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190909-Treason-Speech-to-RUSI.pdf

[68] MacIntyre, "Patriotism a Virtue?", 43, 48; Youngjae Lee, "Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries" (2012) 31 Law & Phil 299, 309

[69] George P. Fletcher, "Ambivalence About Treason" (2004) 82 NCLRev 1611, 1626, n. 62

with acts of terrorism, espionage or propagandising 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 amount to treason.

Because treason is thus 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 that disloyalty in this sense can be reconciled with the idea of allegiance if we consider how it might have dialectically evolved in terms of the Lauterpacht v. Williams debate.

VI. Reconstructing Allegiance:

I now address which model of allegiance, and by that what theoretical justification should be preferred. The purpose is to move towards a modern duty of allegiance. I will embark on this by discussing the fall-out from *Joyce* involving Lauterpacht and Williams.

Professor (and later judge) Sir Hersch Lauterpacht was a Polish-British lawyer, who had completed his doctorate at the LSE after he had been unable to graduate from law school in western Ukraine when the university excluded Jews. He was arguably the last century's most influential international lawyer, having played a prominent role in forging the modern system of international law.[70] Glanville Williams has been described as the leading British academic criminal lawyer of the twentieth century. From humble Welsh Congregationalist origins, he had a reputation of something of a 'radical outsider' and hugely effective law reformer. He was eulogised in his obituary as "a kind of legal Asterix, whose boundless energy and unquenchable optimism led him into endless battles against unjust laws, many of which he won despite the overwhelming odds against him".[71] It was rumoured he was denied a knighthood, having been a wartime conscientious objector, but in reality, declined it – thinking it incongruous that a man, who had refused to wield a bayonet, should

[70] Phillipe Sands, "My legal hero: Hersch Lauterpacht" Guardian (10 November 2010): https://www.theguardian.com/law/2010/nov/10/my-legal-hero-hersch-lauterpacht

[71] J.R. Spencer, "Glanville Williams Obituary" (1997) 56(3) CLJ 437

theoretically bear a sword.[72] Williams might have been expected to take the contrarian position.

(i) Duty of Allegiance arising from Duty of Protection – Fall-out from *Joyce v. DPP* – Lauterpacht v. Williams:

Following capture near the German-Danish border in May 1945, Joyce was tried at the Old Bailey on three counts of treason – including that between 18 September 1939 and 2 July 1940 (before his naturalisation as a German subject), being a person owing allegiance to the King, he did traitorously adhere to the King's enemies by broadcasting propaganda. With disclosure of his American nationality, it appeared there was no jurisdictional claim for treason based on personality. He could hardly betray a country that was not his own. He was acquitted of those charges libelled for the period after he assumed German citizenship. But Attorney General Sir Hartley Shawcross successfully argued that by his continuing possession of a British passport until July 1940, Joyce was still entitled to British diplomatic protection in Germany, and thus owed allegiance to the Crown when he started working for the Germans – notwithstanding that he had fraudulently misrepresented his nationality to obtain it. On this basis Joyce was convicted of the third treason charge and sentenced to death in September 1945. Joyce's story involves reconciling his multifaceted identity contradictions as an American, Irishman, Englishman, and then a German.[73]

Allegiance and Protection in *Joyce*:

The jury were directed that when Joyce had applied for his British passport, he had, beyond a shadow of doubt, owed allegiance to the Crown – and, on the evidence, nothing had subsequently happened to relinquish that allegiance. By possession of a live British passport, Joyce obtained the possibility of international protection – and, by that, continued to owe allegiance. Issuing the passport had created a legal duty of protection. The Law Lords were unanimous on this issue of substantive law – *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

[72] *Ibid.*, 439

[73] Joyce did not commit treason against the US because when Germany became an enemy of the US, he was already a German citizen and thus owed the US no allegiance.

the jurisdiction of the British Crown".[74] The defence sought to limit the application of protection on the particular facts and circumstances of the case and under reference to the nature of protection in general. They 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 the passport had been obtained (Joyce having falsely claimed an Irish rather than American place of birth), it could not afford effective protection abroad. Since Joyce had obtained his British passport by fraud, he could not owe allegiance in return for the protection he derived from it. The protection which attracted 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 has 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.[75] The likelihood is that Joyce would have still been granted a British passport in any event given his education and long-term residence in England; his pre-partition Irish antecedents; and through his Manchester-born second wife (who never sought to renounce her British Citizenship). Though the discovery of the fraud could have justified its withdrawal, that prospect would have been 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. Whether a state is entitled to issue a passport to a non-national is a matter for its own domestic law. 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 allegation of the passport which amounts to *prima facie* evidence of nationality. That protection could still be exercised by proxy. If interned in Germany, Joyce could have always requested the assistance of the Swiss Embassy – the protecting power appointed to safeguard the interests of British Citizens (and combatants) in occupied enemy territory – under the

[74] 375-376

[75] 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 (20 February 2019):
https://www.bbc.co.uk/news/uk-47299907

prevailing Geneva Convention 1929. 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.

(ii) 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 and obsolete relic of the past. This was of such a fundamental character that no serious effort had been made in *Joyce* to challenge it.[76] 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.[77] 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).[78] 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[79]) – because, historically, the protection enjoyed by the alien within the realm was also an 'administrative' protection, exercisable as part of the royal prerogative.[80] 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.[81] An alien

[76] Lauterpacht, CLJ, 336-337

[77] 335 – founding on *De Jager v. Attorney-General of Natal* [1907] AC 326

[78] 336

[79] 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 (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, CA, discussed in Goldsmith, *Citizenship*, 34.

[80] 336

[81] 338, n. 25 – citing Lord Porter's dissent in *Joyce*, 374-381

already subject to the duty of allegiance – because of his residence within the realm – continues to owe allegiance if, on leaving the realm, he applies for and obtains the continued protection of the Crown.[82] The Crown's exercise of protection 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.[83]

(iii) 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 is 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. As it was, 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 not affected 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 his 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.[84] 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',

[82] 341

[83] Biggs, "William Joyce", 189

[84] Williams, CLJ, 56-57

the decision slips away.[85] Though Williams' argumentation was admittedly pure technicality, so was the legal reasoning for the decision.[86] Lest we forget: "legal technicalities are the stuff of law".[87] Williams considered that the precedent set by the House of Lords was virtually beyond recall – though the substantial passage of time might now allow for its 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.[88] Williams had already refined this in terms of 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 – possibly except those in protectorates.[89] '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 he may be – and an alien (other than a member of an invading force) who is 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*).[90]

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 his 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

[85] *Ibid.*, 75

[86] *Ibid.*

[87] Alexander M. Bickel, *The Morality of Consent* (1975), 121

[88] Goldsmith, *Citizenship*, 35

[89] A British protectorate is not British soil – Williams, CLJ, 68-70

[90] An exception to the principle of local allegiance – *Joyce, per* Lord Jowitt (Lord Chancellor), *obiter* – without reference to precedent (Williams, CLJ, 62-63)

under God and the Law, for the Law makes the King (*Quod Rex non debet esse sub homine, sed sub Deo et Lege, quia lex facit regem*)" – invoked by Lord Chief Justice Coke when he politely rebuked King James VI (and I) that he had to abide by the common law.[91] The charge of tyranny which John Cooke proffered against Charles I, 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. The point is that 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.

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

(iv) What Emerges – A Version of Non-disloyalty Treason:

I answer this chapter'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.[92] Developing this idea, I propose that the

[91] Reproduced in Coke, Twelfth Report (ed. 1777) 64

[92] Williams, CLJ, 54-76

subject/citizen's duty be further 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 the subject/citizen 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/citizen. This is conceived in terms of a symmetrical relationship, no longer quite so heavily wedded to the notion of monarchy.

I argue for this model because it 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 need 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 it 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.

(v) Nomenclature:

Allegiance is not specifically used in Australian treason legislation.[93] Nor is it used in Ireland's treason legislation[94] or under the German model. Again, these are treason models where treason can be committed by every person within territorial jurisdiction of the state. I do not propose such a model – and argue that treason law should specifically target only those owing allegiance, to capture the gravity of betrayal by one of our fellow citizens. Insofar as allegiance continues to be used in US, Canadian and New Zealand treason legislation, it might be reasonably inferred that the language is not obscure.[95]

Any perceived language barrier is scarcely insurmountable – considering the complex legal concepts which lay juries are otherwise routinely expected to grasp. Indeed, the new British Citizen is required to take an oath (or affirmation) of allegiance – a loyalty oath which is the legal form of allegiance and British identity.[96] Parliamentarians (including MSPs) take an oath of allegiance.[97] By the Pledge of Allegiance, American school children understand the meaning and purpose in their expressing allegiance to the Flag and the Republic of the USA. If anything, the genuine difficulties of arcane language in treason law permeate its *actus reus* – a matter which I will address in Chapter 3.

A duty of fidelity would be consistent with the traditional approach in that it is consistent with the present idea of high treason as amounting to the violation of that fidelity and allegiance which is due to Her Majesty.[98] The original meaning of fidelity is associated with duty in a broader sense to the related, narrower, feudal concept of fealty, on which allegiance is based. In the legal context the duty of fidelity is classically associated with directors' duties under company law and employees' duties in employment law – referable to the notion of fiduciary trust. Certainly, fidelity connotes the sense of loyalty or faithfulness which is involved in this relationship of trust. But the idea of fidelity is perhaps too wide and does not quite capture the essence of the specific duty of non-betrayal of country, even if

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[93] Criminal Code Act 1995, s. 80

[94] Treason Act 1939, s. 1

[95] 18 USC § 2381 (1948); Criminal Code (Canada), s. 46(3); (New Zealand) Crimes Act 1961, s. 73

[96] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/258235/oathofallegiance.pdf

[97] https://www.parliament.uk/about/how/elections-and-voting/swearingin/

[98] Hume, I, 512

now expressed in narrower terms of the negative duty of allegiance. Meanwhile, the Canadian notion of an obligation of fidelity and obedience, though relating the idea of how strong the duty of loyalty should be, ironically suggests greater subservience still.

In any event the duty of allegiance corresponds with the new citizen's oath of allegiance – also the familiar American Pledge of Allegiance. By their pledge of allegiance to ISIS – the *Bay'ah* (which in Islamic terminology is an oath of allegiance to a leader, as practised by the Islamic prophet Muhammad) – British Jihadists grasped the significance of allegiance and adherence.[99] The point is that the traitor will already be acquainted with the concept of allegiance by embarking on this course of action. Allegiance, betrayal, and treason remain big ideas – recognisable, comprehensible legal concepts in this and most jurisdictions for the actors involved. We readily speak of sporting or political allegiance. The idea retains ritualistic importance. For Williams, the meaning of the duty of allegiance was clear – it signifies you must not commit treason.[100] This is not a problematic concept. Insofar as the idea of allegiance to our country may be considered unfashionable, that approach verges on the decadent, showing a country lacking in self-confidence.[101]

I suggest that the (negative) duty of allegiance could be used interchangeably with the duty of non-betrayal – a concept promoted in the Policy Exchange Paper. There may be occasions where there are subtle distinctions between the two concepts – because discharging a duty of non-betrayal may exceptionally compel action, whereas the negative duty is invariably discharged simply by inaction. The negative duty might otherwise appear more cumbersome by dint of its more elaborate wording. But I do not propose this as an alternative. Both concepts are still consistent with 'fair labelling' sensibilities (a concept I identified in Chapter 1).

[99] Reem Makhoul, "Pledging Allegiance to ISIS: Real Oath or Empty Symbolism?" Wall Street Journal Video (13 November 2014): https://www.wsj.com/video/pledging-allegiance-to-isis-real-oath-or-empty-symbolism/7B2650B8-A534-4E97-B59F-0BF57BBB7AE9.html

[100] Williams, CLJ, 58

[101] Lord Faulks, *Hansard* HL Deb. vol. 793 col. 1377, 31 October 2018

VII. Allegiance in Scotland:

I now consider how the duty of allegiance might be rendered appropriate to Scotland – addressing what would be the object, subject and content of that (Scottish) duty of allegiance.

(i) Object of Scottish Allegiance:

In issue is whether the object of the duty of allegiance in any Scottish treason law should be owed to the UK or Scotland or both – and whether it should be extended to or confined to the Scottish political institutions.

At the core of sovereignty is the right to govern – and the sovereign has the right to demand allegiance of the governed. The Crown is the sovereign power in the UK – throughout the UK. It is the only sovereign power. The devolved settlement – involving as it does vertical and not horizontal devolution – does not countenance dual sovereignty and the potentiality for (legal) divergence by the Scottish institutions on foreign affairs. Logically, you cannot have treason against only a subordinate power such as the devolved institutions. Even if there were deemed to be a need for a specific law of treason protecting Scottish institutions, a specifically Scottish duty of allegiance would not be involved – allegiance to Scotland being only an idea or emotion, and not a relevant legal duty.[102]

Accordingly, I propose that the primary object of a Scottish treason law – the local sovereign power or authority – would remain the sovereign but refined to the local manifestation which is the Crown-in-Scotland. This is consistent with the approach in the Scotland Act 1988 which recognises 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 Her Majesty's Government in the UK and the Crown in right of the Scottish Administration.[103] The supreme authority in the land has long since been expressed in terms of a set of political institutions – the Lords, the Commons and the Queen – the sovereignty of the Crown in Parliament. In this respect the Queen and Parliament are almost indivisible institutions. The Crown need not be perceived as an exclusively royalist concept because it embraces all these institutions – though the default setting is that the Crown is the definitive political institution in the UK,

[102] Curiously, the Federal Republic of Germany treated support of East Germany as only espionage since this still involved loyalty to one part of Germany: Conrad Black "Treason From 16th-century England To 9-11" C2C Journal (1 March 2010): https://c2cjournal.ca/2010/03/treason-from-16thcentury-england-to-911/?_post_id=338

[103] Scotland Act 1998, s. 99

insofar as it symbolises the British state. We might visually associate the Crown with the iconic 'Keep Calm and Carry On' posters – where this motivational slogan is displayed under a representation of the Tudor Crown, as a symbol of the British state. The Crown continues to remain the definitive political institution in Scotland. That is axiomatic unless Scotland became independent without becoming a Commonwealth realm or the UK became a republic. The 'new' Scottish political institutions might ultimately receive special recognition – an issue I will address in Chapter 3. Meanwhile, they should not be perceived as a separate or competing sovereign power (as object of any duty of allegiance) – rather a complementary, subordinate, sub-national development. After all, this is about acknowledging those political institutions which represent the local sovereign power – so the projection of non-disloyalty toward the Scottish political institutions would not involve a different obligation of loyalty – just the local expression or manifestation of it – in accordance with provincial Commonwealth experience.

(ii) Subject of Scottish Allegiance:

I now consider whether allegiance – effectively the issue that grounds jurisdiction in terms of the nationality principle – should be predicated on Scottish domicile and/or residence. I argue that allegiance and thus jurisdiction could be reasonably based on Scottish domicile or residence – and that jurisdiction should extend to the Scottish-domiciled or Scottish-resident protected person, regardless of their nationality, and wherever they might be.

The jurisdictional claim for treason is based on personality – the allegiance (invariably nationality) of the offending protected person – and is not conceived in terms of territory or universality.[104] Allegiance, nationality and domicile are also not synonymous concepts.[105] Domicile is distinct from residence. Domicile of origin (acquired at birth) can be changed. There will be a presumption in favour of allegiance based on domicile absent evidence to the contrary. There may be anomalies in defining residence. If as an alternative to domicile that might imply it requires little territorial connection beyond brief presence. Proof of connection by residence would be an issue of fact – an essential fact. Domicile and/or residence could be established holistically by such factors as tax residence, suffrage, length of residence, property, employment, family residence and children's education.[106] The proof

[104] Gerald H. Gordon and Christopher H.W. Gane, *Renton and Brown Criminal Procedure*, 6th ed., para. 1-25

[105] Biggs, "William Joyce", 185

[106] Home Office, *Nationality policy: domicile Version 1.0* (14 July 2017)

required to establish that a domicile of origin has been displaced in favour of a domicile of choice is high.[107]

This approach is not without complications. Can you distinguish citizens of other parts of the UK without a concept of Scottish nationality? Why should rUK British subjects, who are not domiciled and/or resident in Scotland – but otherwise owing allegiance to the Crown – not be guilty of Scottish treason for acts committed in Scotland? Should their duty of allegiance to the British state not extend to respect for Scotland's constitutional settlement and its devolved institutions, wherever they might be? But domicile and residence are not unfamiliar concepts in litigation. The rationale might be that there is a supplementary Scottish social contract between the Scottish domiciled person (or resident) and the sub-national Scottish polity – with this further duty of allegiance correlating to the exercise of its duty of protection. The rUK non-Scottish-resident derives no such protection or benefit from that quite separate contractual relationship. They do not influence the Scottish political institutions by suffrage or tax residence – and are not so connected by domicile or residence.

(iii) Content of Scottish Duty:

All that is required by the duty of allegiance will be the duty of the protected person (or subject) not to be disloyal to the sovereign authority – and transferring that loyalty to the Queen's enemies. This negative duty could be understood as an aspect of or a manifestation of not adhering to the Queen's enemies. This will only ever be a passive and scarcely an active duty. Only inaction is compelled. This will be a basic and undemanding negative duty – a duty which is difficult to violate. This is hardly an objectionable or remarkable demand of the subject. It should not be misconstrued as compelling the submission of the unquestioning subject – it being perfectly consistent with a liberal conception of the state. While the ordinary criminal law addresses egregious examples of bad citizenship, the requirements of the law of treason are less onerous – 'Just do not be a traitor.' The duty not to be disloyal by avoiding aiding the sovereign's enemies is a duty which can be discharged by sitting on the couch and watching *X Factor* – not even *Last Night of the Proms*. It scarcely takes much to discharge this duty – and tacitly agreeing to do so, in consequence of 'protected person' status – is hardly unreasonable.[108]

[107] *Bell v. Kennedy* [1868] UKHL 566_1

[108] Lee, "Punishing Disloyalty", 326

VIII. Possible Objections:

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

(i) 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 – and that it fails to successfully address problems of competing allegiance. This is not to advocate for monarchism or royalism – 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 inevitably evolve. This is a contractual relationship with obligations on both sides. It should be remembered that 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 (which I will address in Chapter 3) renders this duty less exceptionable – negating any suggestion of prostrating the Scottish-domiciled British Citizen before the British state.

(ii) Recognising Moral Blameworthiness of Treason:

It might be considered that a contractual, non-patriotic model involves too clinical and anodyne an approach – as to detract from the notion that treason – the betrayal of the homeland or national trust – is so morally blameworthy, as to warrant special approbation and public denunciation. This might appear to ignore the moral wrong of treason which is, again, referable to 'fair labelling' – intended as one of the main purposes of the exercise. Without the concept of betrayal (the special breach of trust) the crime of treason (which is not a morally-empty crime) might appear to be stripped of meaning altogether – rendering the crime 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, 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 would be the critical 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 – going to the core issues of adherence and intent (or predisposition) (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 – confirming alienation or disaffection – in your digital footprint.

(iii) Competing Allegiance:

The possibility of competing allegiance on the part of British Citizen members of immigrant communities and new British residents is problematic. I now consider what this narrow, negative duty of allegiance might mean for them. What kind of duty might they be expected to have or show to their host (or origin) country – and 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 greater beneficiaries of state protection, or patronage even. Insofar 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 will trigger 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.[109] There are no half-measures in treachery.[110] 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.

Further, I contend that cultural assimilation is irrelevant to discharging the (negative) duty of allegiance (or duty of non-disloyalty). Cultural assimilation 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 and mores – as common citizenship under the rule of law is what civic society can only (or should) reasonably require. Again, this 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. Ghettoization 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 the overt act requirement (which I will consider in Chapter 4). This tolerant approach also precludes the operation of any 'Cultural Defence'.

[109] Lee, "Punishing Disloyalty", 332

[110] West, *New Meaning of Treason*, 105

IX. Conclusion:

Admittedly, the concept of allegiance in the modern state might be problematic, but it is still workable. I propose that the duty of allegiance be recast by the adoption of Williams' paradigm of a non-patriotic, contractual, 'duty-based' model.[111] I argue for only a negative duty of allegiance (or duty of non-betrayal) which will not be a positive or affirmative patriotic duty – 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. To reiterate, patriotism is a distraction to what the modern idea of allegiance might mean, for treason is in essence a crime of disloyalty.

What it Means for the Existing Law?

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 for fellow citizens) 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, the global community of Islam (*Ummah*) – though the person, who aids others in attacking this country, because they think it is their religious duty to do so, acts wrongly and should be punished. It will be precisely framed to allow for non-conformity, non-violent dissidence, and the expression of contempt for this country and its institutions. It will not require to be evidenced by overt acts of loyalty such as an oath of allegiance – or at least not any additional oath of allegiance. No one is being compelled or asked to fight a war in which they disbelieve. This offence will only curb individual freedom insofar as it denies that anyone should be free to betray their country to a foreign enemy with impunity.[112] This 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.

[111] Williams, CLJ, 54-76

[112] Policy Exchange, *Aiding the Enemy*, 16

The outlier might sympathise with the sentiment of Kim Philby's classic riposte: "To betray, you must first belong … I never belonged."[113] 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 discharge of its duties to us – and the duty of allegiance which flows from that. At a time of crisis, we look to the state for protection, particularly for protection and relief from external threats, be they military or viral. This is the vital corollary.

I propose that the (negative) duty of allegiance could be used interchangeably with the duty of non-betrayal. For ease of understanding, this negative duty of allegiance could be equally referred to as a duty of non-betrayal – to adopt the lexicon of the Policy Exchange Paper. This is also consistent with 'fair labelling' sensibilities. I propose that 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 the Queen and kingdom and is the personification of the British state. At the Scottish level, the sovereign power can be conceptualised as the Crown-in-Scotland.

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 that the relevant offence elements of treason with regard to allegiance, would be that the accused:

(1) had a duty of allegiance
(2) breached that duty of allegiance
(3) did so by the commission of treasonable conduct

The Crown would only be put to the test on this issue if the special capacity – the fact of the accused being a protected person owing a duty of allegiance at the relevant time – were

[113] "Murray Sayle, Obituary", Telegraph (21 September 2010): https://www.telegraph.co.uk/news/obituaries/culture-obituaries/books-obituaries/8016790/Murray-Sayle.html

challenged and such an evidential 'concession' were not forthcoming from the defence.[114] 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.

I will consider in Chapters 3 and 4 what steps might be taken to reframe the *actus reus* and the *mens rea* of any new Scottish treason law in consequence of this and compliance with this revised allegiance model. I will identify what relevant treasonable conduct might breach this duty of allegiance. I will propose this qualification or refinement of a requirement for conspiracy with a foreign enemy – the disloyal alignment with the nation's enemies – as a safeguard against political prosecution, an abuse of process. I will make clear that this duty (not to be disloyal) will not be breached by expressions of dissent – or through a lack of respect for Britain's individual political (or even security) institutions – or from a failure even to prioritise the UK's interests. I will underline the negative nature of this duty by proposing the removal of the commission of treason by only omission. This should underline the special character of disloyalty – as well as rendering treason a more coherent and tighter offence. I will recast all treasons in terms of 'Adherence Treason' – committed in concert with ('adhering to') the foreign enemy – to refine this idea of non-disloyalty.

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 – which regrettably is no longer a theoretical possibility in the British context. But its enforcement is a serious imposition on any citizenry. Accordingly, I will consider in Chapter 5 whether there is scope for bolstering or even creating new justification defences, as a mechanism of ensuring greater balance in the contractual relationship between the sovereign power and people (or protected persons).

[114] A special capacity is a capacity special to the accused and necessary to the commission of an offence. Treason is an offence only a restricted category of persons ('protected persons') can commit. The accused must deny the fact of holding that capacity by preliminary objection (CPSA s. 255) – otherwise it will be held as admitted and the Crown is under no obligation to prove it.

Chapter 3 – *Actus Reus* – Towards a Modern Scottish Formulation

I. Introduction

II. Problematic 'Current' *Actus Reus*

- (i) Compassing or Imagining the Death of the Sovereign
- (ii) Violating the King's Consort
- (iii) Levying War in the Realm
- (iv) Being Adherent to the Sovereign's Enemies in the Realm, Giving Them Aid and Comfort in the Realm, or Elsewhere
  - (a) General Definition
  - (b) Problems of Definition
  - (c) Whether Scotland's Enemies?
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  - (f) 'Aid and Comfort'
- (v) Disputing or Hindering the Succession
- (vi) Killing Judges
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- (viii) Misprision of Treason

III. 'National Security Harm' Principle

- (i) Definition
- (ii) Sub-national Institutions
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- (iv) Attacks on Sovereign

IV. Reconstructing Treason – Effect of Negative Duty of Allegiance, Contractual Model, and Enemy Assistance Requirement

- (i) Surviving Core Offences
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V. Look of New Treason

- (i) *Actus Reus*
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- (iii) Defining the Enemy
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VI. Redefining for Scottish Context

- (i) Enemy Attacks on Scotland
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VII. Conclusion

I. Introduction:

Having argued in Chapter 2 that allegiance should be conceptualised in terms of non-patriotic contractual modelling and a narrow, negative duty of allegiance (or duty of non-betrayal) not to betray this country to its foreign enemies, I now address the question of what type of conduct would breach this duty of allegiance and how, given this understanding of treason, the *actus reus* of a reformulated Scottish crime of treason might be expected to look.

In the first (post-introduction) section I will consider the problems with the existing *actus reus* of 'current' treason – the extent to which it is inadequate and incapable of fitting with this modelling. Predictably, there are issues of arcane language and definition. Jonathon Hall, current Independent Reviewer of Terrorism Legislation (IRTL), impugned the "frankly archaic sounding acts of compassing the death of the Sovereign or heir and 'being adherent to the Sovereign's enemies in her Realm giving them aid and comfort in Her realm, or elsewhere'",[1] cautioning that considerations about genuine utility would be acutely relevant to any proposed new treason offence. Definition and proof of the sovereign's enemies can be fraught with practical difficulties.[2] It will not always be clear whether the UK is engaged in armed conflict with a state or organisation, and whether aiding that state or organisation amounts to treason. I will consider the issues arising from identifying the sovereign's enemies given the complexities of modern conflict and whether breach of allegiance is engaged in non-international conflict and by adhering to non-state organisations.

In the second section I will consider the extent to which the new offence might define relevant harm. If treasonable conduct is constituted by aiding an enemy state or organisation in attacking the UK or engaging in combat with UK forces abroad, there may be scope for determining the relevancy of treasonable conduct in terms of a construct involving a 'national security harm' principle. I will review the relationship between the central elements of the *actus reus* which I propose be retained, and this 'national security harm' principle – and whether it should only be regarded as criminal if the 'national security harm' principle were satisfied – or whether that principle involves an alternative means of satisfying the

[1] Jonathon Hall QC, "Changing Times, Changing Treason" (9 September 2019): https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190909-Treason-Speech-to-RUSI.pdf

[2] Attorney-General Jeremy Wright, *Hansard* HC Deb. vol. 590 col. 154, 6 January 2015

actus reus. I will address whether this principle should extend to an attack on the sovereign or whether provision separate from the law of treason should apply.

In the third section I will then consider the implications of this modelling to explain how we might go about reconstructing the *actus reus* of the law of treason – allowing me to identify the core offences which should survive, and the duties involved with them. In the fourth section I will broadly propose how the *actus reus* of the core offences be recast. I will then address in the fifth section what exactly an enemy attack on Scotland might entail in terms of perpetration of relevant harm and how these reformulated core offences could be more specifically framed for the Scottish context and its devolved system, assuming the sub-national Scottish political institutions warrant such respect or protection.

II. Problematic 'Current' *Actus Reus*:

As currently framed, the *actus reus* of the crime of treason can be committed in the following seven ways:

- Compassing or Imagining the Death of the Sovereign
- Violating the King's Consort
- Levying War in the Realm
- Being Adherent to the Sovereign's Enemies in the Realm, Giving Them Aid and Comfort in the Realm, or Elsewhere
- Disputing or Hindering the Succession
- Killing Judges
- Counterfeiting Scots Seals

Again, there are obvious presentational difficulties insofar as the language used in the Treason Act 1351 does not clearly reflect the kinds of act that might be considered treasonous today or specify the *modus* by which they may be committed.[3] There is a paucity of contemporary sources. No recent precedent explains how treasonable acts might be defined in modern parlance. Anachronistic provisions and archaic language distract from

[3] Lord Goldsmith, *Citizenship: Our Common Bond* (2008), 80, para 41(ii)

what should be its core idea of non-disloyalty and betraying our country. I will critically evaluate each of these forms of *acti rei* with these shortcomings in mind.

(i) Compassing or Imagining the Death of the Sovereign:

(a) General Definition:

Compassing or imagining the death of the sovereign involves conspiring to assassinate the sovereign. Judicial interpretation extended this from not only plotting the sovereign's physical death, but their 'political death'. It was broadened to include deposing the sovereign, overthrowing the Government, usurping Parliament, and the Constitution by force. This reflected the notion of challenging the state as a political abstraction. The compassing of personal harm to the sovereign evolved to incorporate the concept of 'restraint' – by compelling the sovereign to change her measures. This changed the feudal notion of treason as a breach of a duty to a person (the person of the sovereign) into the more modern idea of "armed resistance, made on political grounds, to the public order of the realm".[4] The protected persons falling within the person of the sovereign do not include the Prime Minister, whose (attempted) assassination might otherwise fall under the head of levying war against the sovereign in their realm.

This head of treason appears to underline that treason law remains heavily wedded to the idea of monarchy and confuses the case for treason law with support for the monarchy. Separate provision could be made for offences committed against the sovereign. However, an act which harms the Queen is not just about threatening her personal safety, it being historically perceived as endangering the safety and security of the British state. Because of the way in which constitutional monarchy has evolved, with the sovereign's personal powers curbed by constitutional conventions and the emergence of a wider concept of the Crown, the physical security of the sovereign is no longer conflated with the stability of the British state and there is arguably no longer the imperative for the protection of the person of the

[4] Gordon, *Criminal Law*, 4th ed. Vol. II (2016), para. 43.04; Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences* (Law Com No 72, 1977), para. 14; Stephen, *A General View of the Criminal Law* (1863), 36; Law Reform Commission of Canada (LRCC) Working Paper 49, *Crimes Against the State* (1986), 6 and 26

sovereign to be the central focus of the crime of treason.[5] Insofar as we have a modern constitutional monarchy, operating within the parameters of a representative (Parliamentary) democracy, and whose role is wholly symbolic – with modern allegiance being predicated on institutional allegiance and not personal or political allegiance – that need not be a concern. While the Law Commission's 1977 Working Paper on modernising the law of offences against the state proposed that invasions of the personal security of the sovereign should be made a specific (peacetime) offence without being declared to be treason,[6] it seems impossible to ignore the historic and continuing symbolic significance of the monarchy to the British state – and to have Parliament countenance an effective downgrading, particularly so given the recognised duty of the sovereign to be seen among her people, with the constant exposure to the risk of injury.[7]

The 1351 Act might be thought to be defective in not expressly covering the situation where someone murders or kills the King or attempts to do so, only the inchoate act of conspiracy[8] – creating a *casus omissus* since it otherwise makes it treason to slay the Lord Chancellor and certain judges.[9] There is a problem with arcane terminology. 'Compassing' and 'imagining' no longer obviously mean 'intending'. The core idea of conspiracy to murder or kill Her Majesty is readily understood – though it might be more comprehensible if so defined, adopting the phraseology of the Australian and Canadian treason laws.

(ii) Violating the King's Consort:

The purpose of this head of treason of violating certain royal ladies (the King's wife or eldest unmarried daughter, or the wife of the sovereign's eldest son and heir) was to ensure the purity of the Royal bloodline.[10] It is moot whether this underlying rationale is satisfied if no child were born; if the royal lady were (recently) separated, widowed, or no longer capable

[5] Law Com WP 72, para. 62. A similar conclusion was reached in LRCC WP 49, 50, with the proposal that killing (or assaulting) the Queen be excluded from its proposed revised mini-code of crimes against the state – and instead treated as a form of aggravated homicide (or assault).

[6] Law Com WP 72, paras. 64-66

[7] *Ibid.* para. 63

[8] Graham S. McBain "High Treason: Killing the Sovereign or Her Judges" (2009) 20(3) KLJ 457, 462

[9] *Ibid.*, 465-466

[10] William Blackstone, *Commentaries on the Laws of England*, Vol. IV. 6th ed (1775), 81

of having children.[11] The language of violation is arcane and unclear. The word 'violate' (in a sexual sense) is no longer used in English legislation. It may equate to 'ravish' (still used in Scotland), if not ostensibly requiring force – and, on a constructive interpretation, covers adultery.[12] Consent was immaterial because this was, technically, unlawful (treasonable) sexual intercourse for either participant. It is scarcely considered in modern texts – dismissed as a 'colourful anachronism' in Harris's *Criminal Law*.[13] "It is a form of treason which may be supposed it is not in accordance with modern attitudes to enforce."[14] To punish consensual sex with life imprisonment is disproportionate, having major human rights implications.[15] The affair of James Hewitt with Diana, Princess of Wales, then wife of the heir apparent to the throne, might have technically fitted this definition, but was never prosecuted, despite the risible (or facetious) efforts of the *Daily Mirror* urging its readers to make a citizen's arrest of Hewitt. Authoritative recommendations have been made for formal repeal.[16] Notwithstanding Parliament's failure to rationalise, these provisions can be regarded as otiose and effectively obsolete – or, in Scottish terminology, as having fallen into desuetude.

Since the purpose of this oft-ridiculed head of treason (to prevent contamination of the Royal bloodline and ensure continuity of the royal house) does not remotely involve breaching the posited negative duty of allegiance (or duty of non-betrayal) by acting with a foreign enemy to perpetrate harm to national security, there is no principled case for its Scottish re-enactment under the new modelling.

(iii) Levying War in the Realm:

Under this head it is treason to levy war against the sovereign in her realm. There are two kinds: 'direct levying of war' against the person of the sovereign, and 'constructive levying of war' against the majesty of the sovereign, as in the case of insurrection to effect a change in the law or redress a national grievance. This has been widely interpreted to include revolution or riot – political violence with a national object, not declaring war in the

[11] Graham S. McBain "High treason – violating the sovereign's wife" (2009) 29(2) LegStud 264, 276

[12] *Ibid.*, 276; 278-279

[13] S.F. Harris *et al.*, *Criminal Law* (1973), 123; Law Com WP 72, para. 18

[14] Alastair Brown, "Offences against the State" (2005), para. 537 (in *Stair Memorial Encyclopaedia*)

[15] McBain "Violating", 279

[16] Law Com WP 72, para. 48

international law sense, but the use of armed force by a considerable number of people against the lawful Government to achieve some public or general purpose.

Again, there is an issue with the arcane terminology of 'levying war' evoking the iconography of warring feudal barons or Jacobite Rebellions. It lacks contemporary resonance. It is uncertain whether a formal declaration of war is required or whether 'levying' amounts to any act which might lead to war, such as domestic acts of terrorism.[17] This form of treason might be more comprehensible if re-classified in terms of 'political insurrection'; or as 'the sabotage of military or other critical infrastructure'; or even (less obscurely) 'engaging in war'. It might be made clearer that it is about engaging in political violence and that it is treasonable to use force or violence for the purpose of attempting to overthrow constitutional government or influence its (foreign) policy – 'levying civil war' even. Treason must be something more sinister than an aggravated public order offence. It is suggested in the 1986 Canadian Law Reform Commission's Working Paper on crimes against the state that a carefully-worded provision should – with the assistance of the inchoate offences of conspiracy and attempt – be able to deal with the problem of violent rebellion.[18]

Treason is a political crime and with political prosecutions, there are actual or perceived risks of oppression or abuse of process. In the modern era, it is unlikely that treason law would be deployed to criminalise political dissent even in circumstances involving agitation to overthrow the state by anti-democratic and illegitimate means. Given that non-violent insurrection is more obviously and historically associated with sedition (now expressly repealed), its prosecution as treason would almost certainly be regarded as an abuse of process and inconsistent with a reasonable and conscientious exercise of independent prosecutorial discretion – a legitimate expectation. It would negate 'fair labelling' principles. More pragmatically, juries would be unlikely to convict, causing avoidable reputational damage to those implicated in its prosecution. In any event, the current existential threat is not the prospect of internal rebellion resulting in the overthrow of stable and secure political institutions, the risk of Soviet-backed communist insurrection or industrial agitation having greatly diminished following the end of the Cold War. However, small terrorist cells can still inflict significant damage.

[17] Goldsmith, *Citizenship*, 80; LRCC WP 49, 35

[18] LRCC WP 49, 26 and 35

It is not clear that this head of treason is about protecting the British people from violent attack. I will argue that it should not just address levying war against the sovereign but levying war against, or, attacking the British people. It should focus on foreign-sponsored terrorist attacks by British actors on our political institutions, the military, our critical national infrastructure (CNI) or on the British people.

(iv) Being Adherent to the Sovereign's Enemies in the Realm, Giving Them Aid and Comfort in the Realm, or Elsewhere:

(a) General Definition:

This provision has been relied on to prosecute acts of assistance to the enemy in wartime – the most common form of treason in recent times – thus inferring that it might now be the most important.[19] It is treason to adhere to the Queen's enemies by giving them aid and comfort anywhere, which is how you adhere to the enemy.[20] A person may be guilty of this treason by giving aid and comfort in the realm to enemies in the realm – or by giving aid and comfort elsewhere to enemies elsewhere.[21] Any act which tends to strengthen the Queen's enemies or to weaken the Queen's power to resist or attack them constitutes giving aid and comfort.[22] That assistance might be practical, material or moral[23] – for example, disclosing information (intelligence)[24] or participation in enemy (wartime) propaganda broadcasts.[25] Hume speaks of treasonable adherence by: "Those … of his Majesty's subjects who adhere to such open enemies, and, contrary to their allegiance, give them aid and comfort" – and of the "hostility on the part of (those), who have broken the allegiance which they owe".[26] Adherence to the enemy requires something more than intent to render aid and comfort and

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[19] *R. v. Lynch* [1903] 1 KB 444; *R. v. Casement* [1917] 1 KB 98; and *Joyce v. DPP* [1946] AC 347

[20] J. Richard Broughton, "The Snowden Affair and the Limits of American Treason" (2015) 3 LMULawReview 5, 13

[21] Gordon, *Criminal Law*, para. 43.11; *Kenny's Outlines of Criminal Law* 18th ed. (J. Cecil Turner, ed., 2013), para. 407; *Casement*

[22] *Casement*, Reading CJ., 133

[23] Andrew Cubie, *Scots Criminal Law*, 4th ed. (2016), para. 19.3

[24] Macdonald, *A Practical Treatise on the Criminal Law in Scotland*, 5th ed. (1948), 174; Hume, *Commentaries*, I, 527; Alison, *Principles*, I, 612, 613

[25] *Joyce*; *R. v. Steane* [1947] KB 997; *Ex parte Cousens: Re Blackett* (1946) 47 SR (NSW) 145; Charles Warren, "What Is Giving Aid and Comfort to the Enemy?" (1918) 27(3) YaleLJ 331

[26] Hume, I, 527

the commission of an overt act – and in principle requires a deep emotional identification with the enemy – psychological adherence to the enemy.[27]

(b) Problems of Definition:

Again, there are problems of definition. Similarly, lack of definition and clarity is an objection often raised at anti-terrorism legislation.[28] Nonetheless, adherence remains a somewhat legalistic and 'clunky' concept. The significance of the duty of non-betrayal might be implicit, though it is not made expressly clear that it is involved. Properly, this head of treason should specifically recognise and reinforce the duty of non-betrayal involved – confirming this is the betrayal or the treason.

Lord Goldsmith referred to the difficulties of identifying the Queen's enemies.[29] Should we even speak in terms of the sovereign's enemies – insofar as this again underlines the centrality of the monarch? However, that is simply shorthand for the enemies of Her Majesty's Government. It may be preferable to avoid the pejorative, sinister, Stalinist language of 'enemies of the people'.[30] Complexities can arise as to the meaning of the Queen's enemies – particularly given that declarations of wars are now effectively obsolete[31] – and the likelihood that the UK will invariably be committed to different levels of military intervention, across the globe, at any given point in time.[32] How might you precisely define the foreign enemy in circumstances where there may not have been any formal declaration of war, or prior open hostilities? What of strategic adversaries with whom we are formally at peace? As the UK faces the threat of attacks from organisations other than states and where UK forces are often deployed in armed conflicts where an organisation is an adversary, the obvious dilemma is whether non-state enemy actors or organisations, or proto-states would be relevant enemies for the purposes of treason legislation. Does an indirect enemy in an

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[27] George P. Fletcher, "The Case for Treason" (1982) 41 MdLRev 193, 207-208

[28] Hall, "Changing Treason"

[29] Goldsmith, *Citizenship*, 41

[30] Clare Phipps, "British newspapers react to judges' Brexit ruling: 'Enemies of the people'" Guardian (4 November 2016): https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling

[31] *Waging War: Parliament's role and responsibility*, House of Lords (2006)

[32] Goldsmith, *Citizenship*, 80

undeclared war qualify? How does treason law deal with the clandestine terrorist group operating through a network of individuals rather than occupation of territory?

Further, the concept of giving the enemy 'aid and comfort' is couched in archaic language. A more modern definition is desirable. The jurisdiction terminology is arcane and occasionally ambiguous. Historically, there has been confusion as to extra-territorial jurisdiction, though the position was finally clarified in *Casement*.[33]

(c) Whether Scotland's Enemies?

I now consider whether Scotland could ever have separate enemies – or whether a Scottish Government could disassociate itself from the UK Government's targeting of the UK's enemies. A Scottish Parliament disapproving of a Government decision to send UK forces to war (in exercise of the royal prerogative and particularly after having secured Parliament approval, in accordance with the emerging constitutional convention) would be acting *ultra vires* on such an obviously reserved matter, having no legitimate constitutional role. Intriguing scenarios could be envisaged, e.g., in the eventuality of a future Scottish Government of anti-Zionist complexion making hostile declarations about the State of Israel, would this affect Scottish-domiciled dual British-Israeli citizens serving in the Israel Defence Forces (IDF)?

The UK is a unitary, sovereign country (not a federation) and, under the devolution settlement, there remains only one sovereign power in the UK. That sovereign power is effectively the UK Government (the agent of the Crown). Its duty is to protect all of the countries or nations of the UK. With a Scottish offence, the treason would not be committed against Scotland – but against the UK – by breaching the duty of allegiance owed to the sovereign whose object (I suggest) can be locally expressed as the Crown-in-Scotland. It

[33] Casement had tried to persuade Irish prisoners of war in Germany to fight for the Irish Brigade against the British. He unsuccessfully argued that on a narrow interpretation of the 1351 Act, only acts committed within the realm were relevant – and that the words 'or elsewhere' could not cover acts of giving aid and comfort to the enemy in Germany, but the effect of those acts. The Court, by reading commas into the unpunctuated text, construed 'in the realm or elsewhere' to refer to where the acts were done and not where the enemy might be, it being immaterial where the assistance was given. It is by no means clear that the House of Lords correctly interpreted the 1351 Act in declaring treason to be capable of extra-territorial jurisdiction in *Joyce* (Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003), 219).

could not be committed separately against Scotland – or jointly and severally against Scotland and the UK as parallel entities – but simply and exclusively against the UK. You cannot extricate a separate treason against Scotland from treason against the UK. If you commit treason against Scotland, you commit treason against the UK because Scotland is part of the UK. While treasonable acts could be directed against the Scottish political institutions – thus appearing to conflate treason against the UK with treason against Scotland – the treason is still against the UK. If you levy war against Scotland, you levy war against the UK. Levying war against one of the constituent countries of the UK is a crime against the whole – because it threatens the cohesion and sovereignty of the UK. It imperils the UK as well as the individual member. The sovereign's enemies are the UK's enemies. Insofar as Scotland lacks the power to wage war and conduct foreign affairs independently – the natural prerequisites to creating 'enemies' under treason case law[34] – with the conduct of the UK's foreign affairs remaining a reserved matter,[35] Scotland cannot have its own enemies. That could only occur under what is probably an untenable dual sovereignty model. In the prevailing devolved model, the Crown retains residuary and inviolable sovereignty.

American federal experience is instructive. Constitutionally, American citizens owe allegiance to two sovereigns – the United States (at federal level) and their own state – and can thus potentially commit treason against either or both.[36] Individual states cannot have external enemies. In *People v. Lynch* the State Court dismissed an indictment brought by the State of New York for treason by adhering to the State's enemies during the War of 1812 with the UK – because the acts charged did not amount to treason against the State on the basis that it was the United States, not the State, that had declared war against the UK. The accuseds' breach of allegiance to the United States was not actionable at state level.[37] It is moot whether treason against an individual state remains a valid or viable crime.[38] McConkie concludes that in light of the historical record from the Constitutional Convention (where a 1776 congressional resolution mandated each of the colonies to enact laws defining treason), the nature of dual sovereignty and federal criminal jurisdiction, states still have the power to

[34] J. Taylor McConkie, "State Treason: The History and Validity of Treason Against Individual States" (2013) 101(2) KYLawJ 281, 282-283

[35] Scotland Act 1998, sch. 5, pt. 1, para. 7

[36] John V. Orth and Paul M. Newby, *The North Carolina State Constitution* (2013) 2nd ed., 86.

[37] *People v. Lynch*, 11 Johns. 549 (NY Sup. Ct 1814)

[38] Carlton F.W. Larson, "The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem", (2006) 154 UPALRev 863, 886

protect against subversive activities through state treason laws. The crime would not extend to adhering to a state's enemies for the simple reason that states lack the power to wage war and engage in foreign diplomacy, the natural prerequisites to creating 'enemies' under treason case law.[39] Similarly, there would be no such natural prerequisites creating Scottish 'enemies' under any Scottish treason case law, even with a dual sovereignty model.

(d) Peacetime Enemies:

Normally, treason by aiding the enemy cannot be committed during peacetime. Properly, there must be an actual enemy for the traitor to aid. The Queen's enemies are those states (or their subjects) which are in a state of hostility to this country – even if war has not been declared[40] – and any foreigners who invade the country, whether or not their state is at war with the Queen (or British state).[41] It might be thought that the definition of 'enemies' is to be strictly construed in the way in which it is narrowly understood in terms of international law and depends upon the existence of an actual state of war.[42] But war is no longer generally commenced by formal declaration.[43] There is a difference between international armed conflict and non-international armed conflict – or conflicts falling short of non-international conflict. That war was never declared against the Soviet Union was a sufficiently compelling legal reason why the treachery of Klaus Fuchs and Alan Nunn May was never prosecuted as treason, despite their espionage activities allowing the USSR to catch up on critical nuclear research and redress the West's only (weaponry) advantage.[44] It is moot whether Jane Fonda, by her actions in posing in an NVA anti-aircraft battery in the infamous 'Hanoi Jane' photo shoot and making at least ten radio broadcasts from North Vietnam in 1972,[45] could have been competently indicted for treason because absent American declaration of war, North Vietnam was arguably not a legal enemy of the US. The prevailing American view appears

[39] McConkie, "State Treason", 282-283

[40] Gordon, *Criminal Law*, para. 43.13; Hume, I, 529; *Halsbury's Laws of England* (4th ed.), Vol. 11(1) (reissue 1990), para. 80

[41] Gordon, *Criminal Law*, para. 43.13; *Halsbury's Laws of England*, para. 80

[42] The view taken in *Kenny*, para. 339; Law Com WP 72, para. 24

[43] Goldsmith, *Citizenship*, 80

[44] Adrian Weale, *Patriot Traitors: Roger Casement, John Amery and the Real Meaning of Treason* (2001), xvii

[45] *The Vietnam War*, ep. 9 (2017) Ken Burns and Lyn Novick, dirs.: https://www.youtube.com/watch?v=JnFVFz9d6vU

to be that a formal declaration of war is not strictly necessary within the meaning of America's Treason Clause.[46] While the offence of 'Adhering to the Sovereign's Enemies' can only be committed during time of war, it does not necessarily follow that the war must be attired with all customary trimmings, such as a formal declaration.[47]

Enemy status is a question of fact for the jury to determine. It turns on the actual state and prevailing conditions between the UK and the 'enemy' state – and need not involve a state of open hostility.[48] Nor is the cessation of hostilities determinative of matters.[49] Whether and when a state of war exists with another state is a fact of state. The Courts take judicial notice of facts of state – and in the event of uncertainty would be expected to seek information from the Secretary of State.[50] The Secretary of State's certification would be deemed to be conclusive evidence that a state of war exists with a hostile state.[51]

(e) Non-state Actors:

While the concept of enemy might appear comprehensible, there is a problem of definition with non-state actors – a pertinent issue given the numbers of British Citizens who have served with or assisted IE groups which UK forces are fighting in non-international armed conflicts, and which have carried out terrorist attacks in the UK. The current definition fails to address the threat of foreign states or non-state actors attacking the UK in ways falling short of international armed conflict and with the agency of some British Citizens, who may provide support, financially or ideologically. This is about more than alignment with an irregular foreign army or paramilitary organisation – lest it be suggested that home-grown

[46] McConkie, "State Treason", 330; Tom W. Bell, "Treason, Technology and Freedom of Expression" (2005) 37 ArizStLJ 999, 1017-1019

[47] Paul Crane, "Did the Court Kill the Treason Charge? Reassessing Cramer v. United States and Its Significance" (2009) 36 FlaStULR 635; McConkie, "State Treason", 330

[48] Hume, I, 529; Macdonald, 175

[49] In *R. v. Bottrill, ex parte Kuechenmeister* [1947] KB 41, the Court of Appeal held that even in 1946, Britain and Germany would remain in a state of war pending the supervention of any peace treaty – notwithstanding the cessation of hostilities – such that no enemy alien had the legal right to apply to a British (civil) court for a writ of *habeas corpus*.

[50] Law Com WP 72, para. 24

[51] *Kuechenmeister*; *Halsbury's Laws of England*, para. 106; Cubie, *Scots Criminal Law*, para. 19.3, n. 1; Law Com WP 72, para. 24 – though this authority is only permissive and not mandatory, insofar as it indicates how the necessary evidence might be given and does not prevent it being given in a different way.

Jihadists are no different from those 2,500 to 4,000 British volunteers who joined the *Brigadas Internacionales* during the Spanish Civil War. Neither Franco's Spain nor the Republican faction were at war with the UK. Despite inconsistencies in British foreign policy and the Government's previous flirtation with Islamic State in Iraq and Syria, I will submit that there would be a metamorphosis to enemy status if, through its words and actions, that organisation becomes a self-proclaimed enemy of the British state – and I will address how that designation or proclamation might be competently made. I endorse Eichensehr's analysis that the risk of dignifying a terrorist group as an enemy is outweighed by benefits – including increased societal cohesion, deterrence of other treasons, and retribution – providing the threat posed by the terrorist group the traitor supports is akin to that posed by an enemy state. This would turn upon the magnitude of the threat posed by terrorist groups following an objective evaluation.[52]

(f) 'Aid and Comfort':

The notion of 'aid and comfort' is archaic and might be recast in more contemporary and comprehensible terms. A besotted British Jihadi bride or 'comfort woman' might be a literal contemporary example, but is this what might be intended? There are issues of impreciseness[53] and proportionality. Since 'moral' assistance suffices for this offence, it seems the assistance need not relate to the enemy war effort or be particularly substantial – a matter which should submit to some clarification. Giving aid and comfort to the sovereign's enemies may be problematic if this infraction were used to target non-violent protest (against official UK Government foreign policy) or dissidence – and deemed to stifle the free expression of opinion – potentially breaching the Convention right to freedom of expression under art. 10, ECHR.

(v) Disputing or Hindering the Succession:

S. 3 of the (English) Treason Act 1702 (extended to Scotland by the Treason Act 1708) makes it treason to attempt by overt acts to hinder the (Protestant) succession as limited by the Bill of Rights 1689 and the Act of Settlement 1701. This legislation was deemed fundamental to the emergence of a Protestant constitutional monarchy – to ensure that no

[52] Kristen E. Eichensehr, "Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States" (2009) 42 VandJTransnatlL 1443

[53] Douglas A. Kash, "The United States v. Adam Gadahn: A Case for Treason" (2008) 37 CapULRev 1, 22

Roman Catholic, or anyone married to a Roman Catholic, could hold the British Crown. Hindering the line of succession – to impede the rightful heir from becoming King or Queen – covers a wide range of activity, including anything from political assassination of the heir to simply attempting to declare them illegitimate – and even (technically) agitating for republicanism.

There is no modern instance of prosecution for this form of treason.[54] Alison described it as a subject of curiosity rather than use.[55] It represents something of an historical legacy – directed to the fears of an earlier age when the existential threat to the British state was Roman Catholicism (illustrated by the text of the English Bill of Rights 1689). If not exactly anachronistic or obsolete, it is possibly incompatible with the notion of the modern UK as something of a secular or 'agnostic' nation where political power has long since shifted to the Government and elected Parliament. Insofar as this head of treason affirms a Protestant monarchy and faith, it might be deemed non-inclusive and discriminatory by some, or by many even. This provision might be rendered redundant if the anodyne Coronation Oath of a future monarch were as Defender of Faith – and not Defender of the Faith. Since I argue for a streamlined model – focusing on the core idea of non-disloyalty through betraying our country by aiding its enemies and the perpetration of material harm to national security – this infraction is unlikely to involve any breach of the duty of non-disloyalty and thus is superfluous.

(vi) Killing Judges:

S. 11 of the 1708 Act which made it treason to kill any of the Lords of Session or Justiciary sitting in judgment in the exercise of their office is still technically in force. The 1351 Act deals with the killing of certain English judges in similar circumstances. The historical logic for this obscure head of treason is that the 'Fount of Justice' in the UK was the monarch – that the law courts are part of the Royal Court – with judges being the monarch's representatives, dispensing justice on the monarch's behalf. This head of treason evokes *crimen laesae majestatis*, one of the forms of Roman treason law – insofar as it was aimed at the protection of the authority of the sovereign and his principal officers.[56] This would be an act subverting the accepted order of society – attacking the public order of the realm.

[54] Law Com WP 72, para. 25

[55] Alison, I, 614-615

[56] LRCC WP 49, 5

Even if this reasoning had subsisted, it was further invalidated by the abolition of leasing-making (the Scots form of *lèse-majesté*, which had extended to the sovereign's court).[57]

McBain argued for its abolition given the absence of any precedent in the last 650 years.[58] He impugned its antiquity[59] and the uncertain wording of 'slaying' (featuring in the Scottish extension under the 1708 Act). It could include accidental killing and does not directly connote murder[60] (though Coke argued it could be regarded as wilful murder as the law implied malice[61]). Even if its meaning were obvious, because the wording is so archaic and obscure, a proper determination of the crime may not be possible on human rights grounds[62] – the law lacking the certainty as to be valid under art. 7, ECHR.[63] It would be better covered by murder (aggravated by the victim's absolute character) – as it would undoubtedly be charged.[64] It is anomalous that Supreme Court Justices, Ministers of the Crown, Privy Councillors or Parliamentarians (save the Lord Chancellor, who no longer sits as a judge) are denied similar protection.[65] Stephen dismissed the equivalent English provision in the 1351 Act as an 'antiquarian curiosity' deserving no notice.[66]

A spectacular attack on the Supreme Courts – such as the IRA's 1973 Old Bailey bombing[67] – involving sabotage of CNI (harming national security), might fall under the more conventional 'levying of war' head, meeting the treasonable threshold under my proposed new modelling (if enemy-sponsored).

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[57] Criminal Justice and Licensing (Scotland) Act 2010, s. 51

[58] McBain "Killing Judges", 483

[59] *Ibid.*, n. 209

[60] *Ibid.*, 481 and 484

[61] *Ibid.*, 481; Coke, *Institutes* Vol. III, 18

[62] McBain "Killing Judges", n. 209

[63] *R. v. Goldstein and Rimmington* [2005] UKHL 63

[64] Law Com WP 72, paras. 25 and 49; McBain "Killing Judges", 483-485

[65] *Ibid.*, 484

[66] Stephen, *General View*, 114

[67] IRA Commander Gerry Adams admonished volunteers this operation could be a hanging offence, as it was treason (Ed Moloney, *A Secret History of the IRA: The Big Lad* (2002), 125).

(vii) Counterfeiting Scots Seals:

S. 11 of the 1708 Act makes it treason to counterfeit the Great Seal of Scotland,[68] the mould used to create the wax seal attached to official documents to evidence Royal Assent.[69] The Keeper of the Registers of Scotland retains custody and maintains the Register of the Great Seal (governing royal appointments, warrants and authentication of deeds[70]). The equivalent provision in England and Wales has long since been repealed.[71]

It is difficult to envisage a contemporary practical incidence of how this might be successfully executed – particularly given the now extensive scope of (electronic) land registration of title. Since this uniquely Scottish head of treason does not involve perpetrating the kind of harm to national security under my proposed modelling, there is no principled case for the Scottish re-enactment of this provision.

(viii) Misprision of Treason:

Misprision of treason is a separate, allied offence – a rare common law offence – consisting of the 'concealment or keeping secret of treason'[72] or possibly a treasonable plot[73] from the authorities. It was made an offence in Scotland under s. 1 of the 1708 Act. Though Goddard CJ considered misprision obsolete or as having fallen into desuetude in *R. v. Aberg*,[74] it was specifically retained by the Criminal Law Act 1967.[75] It is committed by a person knowing or having reasonable cause to believe that another has committed treason, but failing to disclose this information (or any material part of it) to the proper authority within a reasonable time.[76] It includes failing to give information about projected treason.[77] In

[68] As appointed by the Treaty of Union, art. XXIV

[69] Provision for the current seal is made in the Scotland Act 1998, s. 2(6).

[70] https://www.ros.gov.uk/our-registers/register-of-great-seal

[71] The provisions in the 1351 Act relating to counterfeiting the Great Seal (or Privy Seal) of Great Britain ceased to be treason under the Forgery Act 1861.

[72] *Sykes v. DPP* [1962] AC 528; Cubie, *Scots Criminal Law*, para. 19.4

[73] *Ibid.*; *Kenny*, para. 421

[74] *R. v. Aberg* [1948] 2 KB 173, 176

[75] S. 12(6) – see *Hansard* HL Deb. vol. 355 cols. 65-66, 3 December 1974

[76] Macdonald, 176: "This crime consists in knowing of treason, and failing to reveal it with all convenient speed to a Judge or Justice of Peace."

[77] Gordon, *Criminal Law*, para. 43.23; *Kenny*, para. 421

contradistinction to the 'aiding and abetting' offence under s. 293 of the Criminal Procedure (Scotland) Act 1995, it addresses situations involving accession after the fact – an unrecognisable doctrine in Scots law,[78] perhaps incongruous if re-enacted in any Scottish treason law.

Exceptionally for the criminal law in a common law system, this is a crime which can be committed by omission. The duty of disclosure sits uncomfortably with common law sensibilities – where there is no general duty or criminal liability for the failure to act, even in serious crimes such as murder.[79] It might be regarded as excessive state interference with personal liberty – affirming the suspicion of political crimes engineered to protect the establishment.[80] The *actus reus* is the failing, by anyone who has any information that might lead to the arrest of a traitor, to give that information to the authorities. In an age of instantaneous communication, the permissible latitude would be minimal. It is characterised in terms of an exceptional or affirmative duty to seek out and inform the relevant authorities – not simply a disclosure requirement when questioned by the police. While it can be committed by persons who owe no duty of allegiance to the British Crown, it is difficult to envisage extra-territorial reach for a crime committed by omission outwith the UK by a person having only a tenuous British connection.

Compulsory disclosure of (contemplated) treasonable conduct (and the requirement of submission to questioning) might be regarded as a proportionate response to crimes striking at the core of the security and well-being of the nation and its citizenry – especially in time of war or national emergency. This is consistent with the principle of reciprocal obligations between state and citizen, including the duty of the British Citizen (and resident) not to be disloyal to the British state.[81] While, invariably, this duty would be conceived in terms of a negative duty, the serious (wartime) risk to the whole British state is an exceptional circumstance (in contrast to combatting conventional criminality) which arguably justifies extending the duties of the citizen (or resident) and countenancing a specific, positive duty of disclosure.[82] Wartime is precisely when the British state most needs the allegiance of its

[78] Macdonald, 8

[79] *Paterson v. Lees*, 1999 JC 159, *per* LJG (Rodger) at 161H

[80] LRCC WP 49, 38

[81] LRCC WP 49, 51

[82] *Ibid*., 38

people.[83] It may thus at least be ECHR-compliant with the right to remain silent and the privilege against self-incrimination, in terms of art. 6, ECHR, but does not seem to be consistent with the operation of only a negative duty.

It appears to be a strict liability offence (in contrast to the disclosure offences under ss. 19 and 38B of the Terrorism Act 2000 where there is a 'reasonable excuse' defence) – and thus potentially harsh and unjust. In the absence of direct modern authority, it may be unacceptably vague, offending the principles of legality and legal certainty.[84] But following the approach taken in *Sykes v. DPP* to the then subsisting offence of misprision of felony, it is 'probable' that the same general principles apply.[85] The meaning of 'misprision' is perplexing to the layman.[86] Its parameters are uncertain. Though not a legal duty of prevention, the duty to disclose all known material facts is not discharged by merely reporting the bare fact of commission.[87] Lord Denning suggested that non-disclosure might sometimes be justified or excused on the ground of privilege – *viz.*, legal professional privilege, medical confidentiality or clergy-penitent privilege[88] – but the Law Commission thought it 'very doubtful' whether any relationship would be held to justify non-disclosure of so serious an offence.[89]

III. 'National Security Harm' Principle:

I propose a 'national security harm' principle as the principle around which the surviving heads of treason can be formed – that express provision be made in any new Scottish legislation that treasonable conduct necessarily involves prejudicing the security and defence of the UK – and that the surviving heads of treason be justified by this principle. This will address what exactly relevant treasonable conduct might be in the modern age – a principled

[83] *Ibid.*, 56; *R. v. Lynch.* In *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948) the Circuit Court of Appeals said: "When war breaks out, a citizen's obligation of allegiance puts definite limits upon his freedom to act on his private judgment."

[84] The last reported case is *R. v. Thistlewood* (1820) 33 St Tr 681.

[85] Law Com WP 72, para. 41

[86] *Sykes*, 554-555

[87] Law Com WP 72, para. 41

[88] *Sykes*, 564

[89] Law Com WP 72, para. 42. Though it is suggested the intention to override rights such as LPP must be expressly stated in the statute or appear by necessary implication (*R. v. Special Commr. & Anor, ex parte Morgan Grenfell & Co Ltd.* [2002] UKHL 21).

way of establishing *modus* – the facts and circumstances which might conventionally be expected to be narrated in any treason charge. It is intended to clearly link the harm to the offence and reflect proportionality considerations – pre-empting juries objecting to treason charges being proffered (with the prospect of a mandatory life sentence) where, though there may be a betrayal, there is ostensibly little harm. It is consistent with the approach that only a limited range of betraying acts should be criminalised as treason.

The obvious starting point is to define what relevant harm might be for the purposes of a 'national security harm' principle. I suggest that relevant harm is harm which materially compromises national security. It will involve acts of sabotage perpetrated against political institutions, CNI and key military installations – against the general safety of the state. With enemy agency in particular, a national security risk is created or compounded. If national security is so imperilled, then the materiality test would be met. For an act to constitute treason, it must be directed against state institutions with sensitive national defence implications or the core institutional resources the British state requires to protect itself (and by extension the British nation) or even to otherwise advance its interests by force; and scrupulously distinguished from what can be the subjective and amorphous issue of harming the national interest (which can be conflated with the Government's interest). The perpetration of this kind of harm reaches the treasonable threshold because it involves conduct that is typically associated with the foreign enemy.[90]

I argue that perpetration of this degree of harm will be treasonable if it involves collusion with the enemy in an enemy attack on the UK – and, by that, the perpetration of harm to national security. The contemporary difficulty is whether assistance or aid to an enemy falling short of traditional military operations and international armed conflict – non-international armed conflict – might fall within its ambit. Such conduct may not strictly engage an attack on the UK. There are difficult issues of definition as to the micro-level at which this concept might be expected to operate. How much harm does an individual actor need to perpetrate (or attempt to achieve)? Must a specific attack be in contemplation? How much co-ordination with and direction by the enemy state or organisation must there be?

The enemy-sponsored sabotage of national institutions located within Scotland – British political institutions, military, and CNI – will involve an enemy attack on the UK and, by that, the perpetration of harm to national security. I will consider the extent to which war

[90] Fletcher, "Case for Treason", 195

might be levied against sub-national institutions – and what relevant harm in the specifically Scottish context might be in terms of Scottish political institutions and Scottish CNI.

(i) Definition:

Given the posited requirement for enemy agency, it is imperative to define what harm an enemy might be expected to perpetrate as to reach the treasonable threshold – and what exactly the modern enemy is. Insofar as relevant treasonable conduct may be constituted by aiding an enemy state or organisation in attacking the UK or engaging in combat with UK forces abroad, I submit that the relevancy of the treasonable conduct could be determined in terms of a 'national security harm' principle, loosely referable to the concept of self-defence in international law. This invocation of the criminal law could be regarded as a proportionate measure taken in exercise of the nation's right to self-defence. National security refers to the security of a nation-state, not simply concerning its external security, but material aspects of its internal security – its political institutions, citizenry and economy, the maintenance of which are a fundamental duty of any government. It can be conceived as a manifestation of the exercise of the state's duty of protection. Originally considered in terms of protection against military invasion or attack, national security can now be regarded as extending to the non-military sphere – including infrastructure security, economic, energy and cyber-security. In addition to the actions of other nation-states, national security risks include violent actions committed by non-state actors. Governments rely on a range of measures, including the projection of political and diplomatic power, and economic power, as well as military power, to enforce national security.

Sabotage or harm caused by enemy nation-states, non-state actors or organisations to the extent that national security, generically, is compromised, will amount to the perpetration of relevant harm. An enemy attack on the UK is an attack from which the UK state must defend itself and its people – and protect its national security. A relevant enemy (or treasonable) attack will be an operation which results in death or injury of persons, whether military, political office-holder or civilian; or destruction or damage to property comprising CNI, thereby compromising national security. Attacks must be on or against the UK. The 'harm' is important here because the offence of treason should focus on the 'wrong' of betraying one's country by participating in attacks on it. This is a short-hand way of encapsulating the essence of the crime – the principle which the traitor is betraying. Unremarkably, attacks on UK forces, military bases, embassies, or diplomatic personnel will be an attack on the UK.

There may well be an inevitable inference that wartime activity directed towards sabotaging core military or security institutions with sensitive defence implications is treasonable – and a *prima facie* case that peacetime activity directed towards such institutions is treasonable. The peacetime disclosure of classified military information to enemy agents would be treasonable in a way that the reckless disclosure of embarrassing intelligence to the public might not be. Included may be acts of assistance or aid to an enemy falling short of traditional military operations and international armed conflict – specifically, non-international armed conflict. This would include terrorism or criminal violence directed at civilians within the UK, or on British Citizens abroad, precisely because of their British nationality – on the basis that though these may involve violations of UK sovereignty which are short of attacks on the UK, they can be characterised as attacks on the UK, in respect that they have been targeted to attack the UK. To contextualise, the UK is not just the Government of the UK as a country is not merely its government. This would include non-armed conflict such as propagandising and cyber-warfare, being actions threatening the economic well-being of the UK. Propagandising for the enemy as an instrument of psychological warfare to cause disunity (including by disseminating 'fake news') is hardly new.[91] How international law and the law of war applies to cyber-warfare is unsettled and the definition of 'cyber-attack' is beyond the scope of this thesis, but it is the kind of hostility that fits within this definition as compromising CNI.[92] It is a characteristic of asymmetric warfare, capable of bringing down major infrastructure, causing direct economic harm and even indirectly killing people.

It would be a concern that an 'attack on the UK' could be easily widened to mean any group of actors who threaten the national interest as defined by the Government. A cautionary note should be struck that the national interest is not necessarily synonymous with the interest of the prevailing Government – or even a temporary majority view of what that might be. Though they may frequently converge, these are not identical concepts. To reiterate, the 'national security harm' principle (the treasonable threshold) should only be engaged by acts materially compromising national security. It is intended to exclude the potentiality for abuse of process by prosecuting dissidents, who might be 'irritants', but not traitors. This principle

[91] *Gillars v. United States*, 182 F 2d 962 (DC Cir 1950)

[92] J. Richard Broughton, "Constitutional Discourse and the Rhetoric of Treason" (2020) 47(2) HastingsConstLQ 303, 328-329

is posited as a fundamental means of satisfying the *actus reus* – and I propose to incorporate specific reference to it in any new Scottish offence.

Support for this principle can be found in the Australian Criminal Code insofar as it qualifies assistance in terms of the intent to provide material assistance – *viz*., if the person intends that their conduct will materially assist the enemy to engage in war with the Commonwealth of Australia.[93] It is the intent to provide material assistance – not the effectiveness or futility of its execution. It is unnecessary to show that the accused ultimately succeeded in delivering aid to the enemy – it suffices merely that they took overt action to attempt performance. This insistence on the (attempted) provision of tangible support has the advantage of excluding mere acts of dissidence and minor propagandising. It would be preferable it if could be clarified that 'assistance' relates to conduct such as funding, the provision of troops or armaments, intelligence, or other strategic support. The Australian Law Reform Commission proposed that an explanatory note be added to the provision to clarify the intended meaning of 'materially' to "make clear that mere rhetoric or expression of dissent are not sufficient."[94] Given the seriousness and penalties attached to the offence, it was considered crucial that the law achieved the highest degree of precision and thus certainty.[95]

The (repealed) Treachery Act 1940 had enabled, for the duration of the war emergency, the prosecution for treachery of enemy spies and saboteurs (who might not be covered by the doctrine of local allegiance) and those adhering to the enemy abroad. S. 1 made it an offence with intent to help the enemy to do any act which was designed or likely to give assistance to the naval, military or air operations of the enemy, (and/or) to impede such operations of His Majesty's forces, (and/or) to endanger life. The last words were inserted to make it quite clear that it extended to grievous cases of sabotage.[96] While not expressly providing that the help, assistance or impeding be material, this might be reasonably inferred given the stipulation that the enemy be assisted and UK armed forces be impeded, especially if read as *ejusdem generis* with endangerment to life and given that no mention was made of wilful omissions.[97] In *R. v . Malik*, a conviction under s. 58 of the Terrorism Act 2000 for

[93] Criminal Code Act 1995, s. 80.1AA

[94] ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, Report 104 (July 2006), para. 11.30

[95] The Australian Parliamentary Joint Committee on Intelligence and Security endorsed this view – Review of Security and Counter Terrorism Legislation (4 December 2006), Ch. 4.11

[96] *Hansard* HC Deb. vol. 361 col. 190, 22 May 1940

[97] D. Seaborne Davies, "The Treachery Act 1940" (1941) 4(3) MLR 217

glorification of terrorist activity was quashed because the trial judge failed to direct that material retrieved from the hard drive of the so-called 'lyrical terrorist' would only fall within that section if it was of a kind that was likely to provide practical assistance to a person committing or preparing an act of terrorism.[98] By analogy, a practical utility test could be adopted. It should be appreciated that motivated individuals are invaluable weapons of war: "One man willing to throw away his life is enough to terrorise thousands".[99] A very well-organised minority can have a pernicious effect.

New specific offences are not required to address the challenging manifestations of the crime of treason in the digital age (such as cyber-warfare and propagandising on the internet). The treasonable threshold will be met where there is relevant harm perpetrated (or attempted), in terms of breaching the 'national security harm' principle, where computer hacking or propagandising aids the military or intelligence operations of the enemy.

Ascertaining what 'material' harm would be is, again, ultimately a question of fact for the jury to determine. Proof could be potentially problematic – particularly in the case of 'Espionage Treason' – if establishing the relevant evidential matrix and the extent of harm inflicted might compromise an intelligence source (including signals intelligence) or cause reputational damage to the military or intelligence services. The fair trial risk posed by the prosecution's possibly over-zealous reliance on national security considerations as a basis for non-disclosure of classified evidence bearing on issues of national security, is beyond the scope of this thesis. Suffice to say, the Court would be expected to regulate disclosure and certain remedies could be invoked to limit wider dissemination (including a closed court and reporting restrictions).

(ii) Sub-national Institutions:

It might be thought that only attacks perpetrated against national institutions are treasonable. The distinction between national and sub-national institutions might be regarded as analogous to the competence demarcation in the devolution settlement between reserved and devolved matters. It is inconceivable that defence and foreign policy would be devolved so long as Scotland remains part of the UK – or that the Scottish Government would control

[98] *R. v. Malik* [2008] EWCA Crim 1450

[99] Gus Martin, *Understanding Terrorism*, 2nd ed. (2006), 12 – citing Chinese military philosopher Wu Ch'i.

core military or security infrastructure that would typically be the focus of treasonable attack. There might be a certain symmetry in treason law being referable to only those political institutions responsible for defence and foreign affairs – on the pretext of providing protection against external threats – thus precluding devolved institutions. It is axiomatic that only the British state can compel its citizens to take up arms and risk their lives, while the Scottish Government does not have that kind of authority or legitimacy.[100] But given that the executive responsibility of the Scottish Government involves the partial discharge of the duty of protection ordinarily (and still principally) discharged by national government – with substantial discharge of powers which have been delegated or devolved to it by central government and thus critical to the operations of government within the UK – the allegiance owed by the protected person could be conceivably projected on these sub-national institutions as an aspect of their duty of allegiance to the Crown-in-Scotland. This accords with the notion of institutional allegiance – with loyalty owed to the constitutional system of the realm and concerned with threats to the democratic order. Nonetheless, you cannot levy war as such against the sub-national institutions. You can only levy war against the sovereign power, the sabotage of sub-national institutions being a local manifestation of that. To reiterate, if you sabotage Scotland's sub-national institutions, you commit treason against the UK because Scotland is part of the UK.

You need not particularly respect or admire these sub-national political institutions or be complacent about the protections enjoyed by them – and in circumstances in which there is a democratic relationship with both national and sub-national institutions. In any event it is the fact of collaborating with a foreign enemy to commit acts of sabotage against these political institutions – whether national or sub-national – which engages the duty of non-betrayal. A modern Scottish Guy Fawkes could thus be implicated if he attempted to raze the Scottish Parliament to the ground while acting in concert with a foreign enemy. Localised harm can be as much a violation as that manifest at a national (UK) level. The point is that an attack on our sub-national institutions could materially harm our sense of national security in much the same way as an attack on our national institutions. Depending on the mechanism of attack, it could be even more traumatic.

[100] Marianna Valverde, *Practices of Citizenship and Scales of Government* (2010), 238

(iii) Sabotage of Critical National Infrastructure:

I argue that relevant sabotage should extend to the sabotage of CNI – consistent with the operation of the 'national security harm' principle. CNI comprises assets vital to the functioning of society or the economy. The UK Government's official definition of CNI is:[101] "those facilities, systems, sites and networks necessary for the functioning of the country and the delivery of the essential services upon which daily life in the UK depends".[102] In the Scottish context, the 2007 Glasgow Airport attack might be a paradigmatic example – aggravated by its perpetration on the busiest day of the year (the first day of the school summer holidays), showing that the attackers had aimed at committing murder on an indiscriminate and wholesale scale. Cyber-terrorism and the large-scale disruption of computer networks would be an obvious contemporary manifestation. Even if only a singular financial institution were targeted, there is a risk of cascading failure in the financial sector – given its interlinkages – such as to trigger a severe economic downturn – with consequences for the greater UK economy. It need not matter that a central government institution (such as the Bank of England) were not directly attacked. The consequences of undermining a UK clearing bank, with inevitable knock-on effects and the resultant shock to a dominant (financial) sector in the UK economy – to CNI – could still be sufficiently seismic in macro-economic terms as to amount to a contemporary form of levying war against the sovereign (in her realm). Admittedly, this would involve a wide re-definition and application of that concept – but it inevitably reflects London's status as financial powerhouse. The disproportionate significance of the financial sector for the UK economy – and the Scottish economy – is such that this form of sabotage would be more keenly felt – in contrast to other economies where the emphasis might instead be on manufacturing or its agricultural sector. The attempted sabotage of a key Scottish financial institution – while not

[101] A 'Criticality Scale' categorises different degrees of severity of impact. See the Centre for the Protection of National Infrastructure's website:
http://www.cpni.gov.uk/about/cni/#sthash.hc6FLSya.dpuf

[102] Arthur Thistlewood was unsuccessfully prosecuted for high treason in 1816, having organised a public meeting in pursuance of a plan to seize the Tower of London and the Bank of England (Alan Wharam, *Treason: Famous English Treason Trials* (2005), 166). As well as planning to assassinate the Cabinet, Thistlewood and those involved in the Cato Street Conspiracy of 1820 planned to attack and plunder the Bank of England (170). John Frost and his Chartist co-conspirators planned to spread political insurrection by stopping the Birmingham mail (*R. v. Frost* (1839); Wharam, *Treason Trials*, 194 and 209).

so significant a shock to the UK economy that it could not be effectively absorbed – would disproportionately damage the Scottish economy as to be regarded as a form of levying war against the sovereign in the Scottish territory of her realm. While the destabilisation of an identifiably (or even only notionally) Scottish financial institution might not be so significant as to be treasonable in a UK framework, it could be treasonable in the Scottish context – at least symbolically. This is perhaps a modern manifestation of how this form of treason might be committed – notwithstanding that there might be difficult issues of proof.

(iv) Attacks on Sovereign:

I now consider whether separate provision should otherwise be made in the law of treason for offences involving the sovereign. This new contractual model has implications for the core crime of compassing the (physical) death of the sovereign as a relevant head because it detracts from the notion of personal allegiance to the sovereign and of treason as an imperial or monarchical concept. Threats against the monarch no longer impact the security of the day-to-day operations of the state. This is scarcely a new development. The Treason Act 1842 marked a departure from equating the monarch's personal safety with the essential security of the state, rendering non-fatal attacks only high misdemeanours. As such, the safety of the Queen might be considered as not invoking a 'national security harm' principle, as to remain a relevant head. It might be thought that if no harm were perpetrated to national security (or were intended to be) the treasonable threshold would not be breached. But it might be considered inconceivable that there could still be a British and/or Scottish crime of treason which was not constituted by regicide, particularly with enemy complicity. Even if removal of this head were commended by the logic of the 'national security harm' principle, this might be considered too radical a departure.

Further, any removal of that aspect of that *actus reus* which involves compassing or imagining (intending) the death or bodily harm of the sovereign (and dispensing with that prong of treason concerned with 'disputing or hindering the (protestant) succession') may be to diminish the role of the monarch as the Supreme Governor of the Church of England and Protector of the Faith – though it might be melodramatic speculation to suggest that this could lead to the disestablishment of the Church of England and the Church of Scotland as the state religion. This may not matter in the Scottish context for though the Church of Scotland may be the national or established church, it is not headed by the sovereign (nor

could it be, since a hierarchical structure is inconsistent with Presbyterian governance or sensibilities). This may be an unintended consequence, but this offence has fallen into desuetude in any event – and I argue for a modelling where treason offences can survive if the breach of the duty of non-disloyalty and the 'national security harm' principle are engaged.

The object of the subject's duty of allegiance is characterised not in terms of the personal, but the institutional or abstract entity or short-hand for the British state which is the Crown. This is the inescapable logic of institutional allegiance to a symbolic sovereign in a constitutional monarchy. Political assassination is one of the oldest tools of statecraft, a favoured tactic of weaker states seeking leverage against stronger powers.[103] Given that the person of the monarch represents the British state, I argue that the act of regicide with the assistance of a foreign enemy should remain a treasonable offence – because, by its nature, this would be a destabilising act striking at the foundations of the British state and endangering national security, even if only temporarily and symbolically. This is still consistent with the new model and the 'national security harm' principle insofar as an enemy-sponsored attack on the person of the monarch is perceptibly an act that involves symbolically perpetrating harm to national security and the British people – and thus is an attack on the British state. This would be a shocking crime, a symbolic act warranting an equally symbolic response. Escalating the criminal law response to proffering treason charges recognises that this is, characteristically, an act of war.

IV. Reconstructing Treason – Effect of Negative Duty of Allegiance, Contractual Model, and Enemy Assistance Requirement:

I argue that insofar as the negative duty of allegiance (duty of non-betrayal) will be breached by allegiance to the sovereign's foreign enemies, enemy involvement will be pivotal. It is necessary to consider whether the various forms of conduct specified in the existing law of treason would still be consistent with that modelling. The surviving offences will necessarily involve giving aid and comfort – or, more contemporarily, 'assistance' – to the enemy.

[103] Sun Tzu, *Art of War* (Lionel Giles, trans. 1910), Ch. XIII, 20; *Niccolò Machiavelli*, *The Prince* (1532, N.H. Thomson, trans. 2005), Ch. XIX

The duty of non-betrayal will be breached when British Citizens help enemy states attack the UK, even if those attacks fall short of international armed conflict – and when British Citizens help enemy organisations aiming to carry out attacks on the UK – specifically, on its military, its (national and sub-national) political institutions and CNI. In each scenario the British Citizen betrays his compatriots by helping the sovereign's enemies attack them and the country they share. The core of the offence is betraying one's fellow citizens by helping an enemy state or organisation prepare for or carry out attacks on the UK – or helping an enemy state or organisation which the UK is fighting. Acting to help such an enemy state or organisation (materially) breaches the duty of loyalty (or non-betrayal).[104]

(i) Surviving Core Offences:

The logical conclusion of the preceding discussion is that the following three central elements of the *actus reus* of the crime of treason (or core offences) survive the adoption of this new contractual model, negative duty of allegiance and enemy assistance requirement, and are retained as relevant treasonable conduct:

> (1) Adhering to the sovereign's enemies (within or outwith the realm)
> (2) Compassing (Planning) the death of the sovereign (with the assistance of the sovereign's enemis
> (3) Levying war against the sovereign in the realm ('Internal rebellion') (with the assistance of the sovereign's enemies)

I argue that enemy involvement will be pivotal to all remaining heads of treason. The latter two surviving heads of treason should be recast as sub-categories of adhering to the sovereign's enemies. They are only treasonable in circumstances involving adherence to a foreign enemy and the perpetration of harm (or the risk of harm) against national security, the practical consequence of which is to give assistance to the foreign enemy. To constitute treason such internal subversion must derive from a foreign power and entail identification with a foreign enemy. These central elements should only be regarded as treasonable if the 'national security harm' principle were satisfied. But this does not mean that the 'national

[104] Richard Ekins *et al.*, *Aiding the Enemy, How and why to restore the law of treason* Policy Exchange (2018), 35

security harm' principle is an alternative means of satisfying the *actus reus* – because you might well perpetrate harm to national security without enemy adherence.

(ii) Duties with Surviving Core Offences:

On my account, the focus is on the commission of acts giving assistance to the sovereign's enemies – implicit in which is breaching the duty of non-betrayal. The legal duty of allegiance not to be disloyal to the sovereign power (by betraying it to an enemy state or organisation) would be breached by the commission, with enemy assistance, of acts endangering (or materially harming) national security.

V. Look of New Treason:

(i) *Actus Reus:*

The Treachery Act and the recently-revised Australian version of treason, as well as the New Zealand and Canadian Criminal Codes serve as useful templates for a new Scottish treason law.[105] The Treachery Act is instructive for the purposes of defining a relatively modern *actus reus*, the Commons having been told, on the bill's second reading, that acts containing its element of treachery, archetypically espionage and sabotage, were treason and nothing in s. 1 was not already an offence under the Treason Acts (allegiance aside).[106] It was intended to provide a clear description of the offence.

I suggest that the Scottish rather than the English (or English-derived) concepts of murder and assault be applied. This, after all, is to be a Scottish crime of treason.

I propose that the *actus reus* of the core offences be recast in the following general terms:

(1) Adhering to and materially assisting an enemy at war with the sovereign, whether or not the existence of a state of war has been declared

(2) A narrower and simpler category of compassing the physical death of the sovereign will be posited – *viz.*, murdering the sovereign, or attempting to murder the sovereign, or otherwise assaulting, imprisoning or restraining the sovereign

[105] *Ibid.*, 6, 11, s. VII

[106] *Hansard* HC Deb. vol. 361 cols. 185-186, 22 May 1940

– and thus materially assist an enemy at war with the sovereign, whether or not the existence of a state of war has been declared

(3) Levying war, or doing any act preparatory to levying war, against the sovereign – and thus materially assist an enemy at war with the sovereign, whether or not the existence of a state of war has been declared

Adherence to the enemy can be conceived as the obverse or flipside of allegiance – manifest by failing to discharge the duty of allegiance. This finds expression in the giving of assistance to the enemy – the concept of 'aid and comfort' couched in more contemporary and comprehensible terms.

It might be thought that armed resistance on political grounds to the public order of the realm, should continue as a stand-alone head of treason, without any qualification of enemy agency – and that revolution in a mature liberal democracy should be regarded as sufficiently serious as to be chargeable as treason, even in circumstances where no foreign intervention or jeopardising national security (from external threats) are involved. Recent events in Catalonia suggest that a *coup d'état* involving Scottish UDI is no longer an absurd hypothetical. Nonetheless, I propose that entirely domestic rebellion absent enemy adherence should be excluded – to allay concerns about abuse by political prosecutions. This is particularly so in cases of competing allegiance – archetypically Irish and now, for some, Scottish identity. Domestic insurrection (for which other remedies are available[107]) does not necessarily involve the specifically moral wrong of betrayal by aiding the UK's enemies – which is precisely what a revived treason law is intended to tackle. The contemporary existential threat is IE terrorism perpetrated by British Jihadists adhering to enemy states and organisations, not perceived mischief-making by devolved politicians.

[107] Effective (civil) remedies short of counterproductive criminal sanctions, include surcharging, sequestrating and debarring usurpative devolved politicians from holding public office – see Ian MacKinnon, "The Westminster Scandal: Labour rebels paid high price: The Surcharge" Independent (14 January 1994): https://www.independent.co.uk/news/uk/the-westminster-scandal-labour-rebels-paid-high-price-the-surcharges-1406773.html

(ii) 'Adherence Treason':

'Adhering to the Sovereign's Enemies' is the clearest candidate for survival. It encapsulates the core idea of betrayal of this country to its foreign enemies (more specifically, the Queen's enemies) – by breaching the duty of allegiance, including the negative duty (or duty of non-betrayal) – and by acting with a foreign enemy. The existence of an external enemy is pivotal insofar as only the concept of 'Adhering to the Sovereign's Enemies' survives, with the other heads of treason being derivatives or sub-categories of it. All might be conceived as 'Adherence Treason'.

(iii) Defining the Enemy:

I propose that the revised offence would apply when the UK is engaged in international armed conflict and non-international armed conflict. The 'enemy' would continue to be defined to include any state which is only potentially an enemy, in the sense that the UK might at to some future date be at war with it.[108] I commend Loane's conclusion that "aiding the enemy could well be committed in an escalated 'cold war' situation"[109] – as to preclude the possibility of an 'enemy' being a nation with whom foreign relations are only complicated at a moment in time. An enemy power should be distinguished from an unfriendly power. The two concepts are not synonymous. Of course, it might be politically inexpedient for the Crown to formally concede in open court that a *de facto* enemy state – or enemy non-state organisation, by dint of its connection to an unfriendly power – are *de jure* enemies.

The modern enemy in armed conflict extends to the waging of war against nation-states by non-state organisations. As a matter of principle, if the UK deploys its military overseas to fight an enemy force, it owes it to its military personnel to prohibit other British Citizens from doing anything to assist that enemy.[110] I suggest any new offence should expressly cover non-state enemy actors. This is consistent with the approach under Canadian treason law where the enemy is broadly defined as: "any armed force against whom the sovereign is

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[108] Gordon, *Criminal Law*, para. 43.43; *R. v. Parrott* (1913) 8 Cr App R 186, Phillimore J., 192

[109] Jabez W. Loane, "Treason and Aiding the Enemy" (1965) 30 MilLR 41, 62

[110] This logic was applied by the Australian Gibbs Committee (1991) in recommending the extension of Australian treason law – see the Australian PCJIS Review of Security and Counter Terrorism Legislation (2006), Ch. 4.15.

engaged in hostilities, even if no state of war exists." [111] It need not matter if ISIS or any legacy regime were not a fully formed state and had no formal international recognition, if it were thus deemed to be an enemy of the UK.

(iv) Proclamation:

The Home Office List of Proscribed International Terrorist Groups, as proscribed by the Home Secretary under the Terrorism Act 2000, is an obvious 'peacetime' starting point for defining an enemy organisation.[112] The authors of the Policy Exchange Paper go further and suggest proclamation – for the Secretary of State to simply proclaim that an organisation is engaged in attacking the UK[113] – adopting the procedure countenanced under the Australian Code. The Australian Governor-General can, by Proclamation, declare a 'party' to be an enemy engaged in armed conflict involving the Commonwealth or the Australian Defence Force.[114] This might be expected to be a higher tier of group than proscribed organisations under the Terrorism Act. Designation of enemies by this procedure (or statutory instrument) puts everyone legally on notice – consistent with requirements of legal certainty. Just as acting for the benefit of a proscribed group is deemed to be an act of terrorism, materially assisting a proclaimed group would be an act of treason. If the protected person aided a proclaimed group, then there would be a rebuttable presumption that they knew it was hostile to the UK.[115] That the enemy organisation involved were certified to be a proclaimed enemy (or even proscribed group) might ordinarily be expected to suffice – but in a marginal case, the act of proclamation could be impugned and corroborative parole evidence from senior officials might be appropriate. Proclamation (or proscription) need not be a prerequisite in

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[111] Criminal Code, s. 46(1)(c)

[112] Terrorism Act 2000, s. 3 and sch. 2 – the current list is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849493/20191101_Proscription__SG_.pdf

[113] Policy Exchange, *Aiding the Enemy*, 37

[114] The National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 amended the Criminal Code, creating a new offence of materially assisting a party to engage in armed conflict involving the Commonwealth or the ADF, provided that the enemy is declared by Proclamation to be an enemy engaged in armed conflict involving the Commonwealth or the ADF. It dispensed with the requirement that a country or organisation be engaged in armed hostilities *against* the Commonwealth, it being treason to assist a party that is engaged in armed conflict *involving* Australia.

[115] Hall, "Changing Treason"

fast-moving dynamic situations. Where a new enemy organisation has not been specifically proclaimed (or proscribed) – such that people are not technically on notice – the 'national security harm' principle might be invoked in that legislative vacuum.

The IRTL was concerned about the complications involved in the Policy Exchange's proposed proclamation of enemy groups. Insofar as the Law of Armed Conflict and International Humanitarian Law are based principally around conflict between states, there is a natural reluctance to accord members of armed groups the same status as soldiers or combatants of a foreign state – particularly if required to treat them as Prisoners of War, rather than criminals. A policy of proclamation risks conferring a special status or cachet. He cited Baroness Williams' admonition in a Lords' debate:[116]

> "prosecuting terrorists for treason would risk giving their actions a credibility … to seeing them as martyrs … glamour and political status that they do not deserve. It would indicate that we recognised terrorists as being in some formal sense at war with the state, rather than merely regarding them as dangerous criminals."

It might be preferable to avoid 'state trials' for treason by pitting the Government against an 'official' rebellion. The enemy organisation might savour the opportunity to say that true allegiance is owed to them, not the UK. It is an already an offence to be a member of proscribed terrorist groups such as ISIS[117] and there is a risk of dignifying them (or legitimising them as states, when they are not so recognised) – raising their morally-culpable adherents from criminals to heroes for their cause if you give them the political recognition and status they crave. By not treating them like any other criminal organisation and instead resorting to proclamation and the consequential *imprimatur* libel of treason, you confer 'a badge of honour' on those craving their misdeeds be treated as ideological rather than criminal. It would seal their secular martyrdom status – a recruiting tool for new followers. It would allow a volatile, but generally containable domestic problem, to exponentially grow. Standing the attraction of high-profile martyrdom, it is doubtful if proclamation would genuinely achieve any kind of deterrent effect. The IRTL considered these objections were insufficiently answered to justify a new treason offence.[118]

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[116] *Hansard* HL Deb. vol. 793 col. 1382, 31 October 2018

[117] Terrorism Act 2000, s. 11 and sch. 2:
https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2

[118] Hall, "Changing Treason"

I suspect, however, that rather than glorifying their actions, the likelihood is that members of proclaimed groups being prosecuted for treason would deny or minimalise their involvement at trial. Unremarkably, this is what people charged with serious criminal offences tend to do. Paradigmatically, though Adebolajo and Adebowale had told passers-by that they had killed Lee Rigby to avenge the killing of Muslims by British Armed Forces, they still pleaded not guilty and attempted to minimise their involvement at their 2013 trial.[119] The psychology of solemn criminal trial proceedings is that most accused accede to legal advice to be circumspect and not say things that needlessly alienate those sitting in judgment of them.

The IRTL cautioned that there is no duty on the Government to de-proscribe a group no longer involved if it has long ceased to be concerned in terrorism – and that while an application process exists, de-proscription is an imperfect mechanism.[120] Proclamation would be similarly fraught – and there should be a duty on the UK Government to conduct regular review. Then again, if a dormant organisation were again to be involved in attacking the UK, QED. Consistent with the principle that Scotland cannot have its own enemies, the power of proclamation could not be transferred to the Scottish Ministers, remaining a reserved matter.

(v) Material Assistance:

Giving aid and comfort to the sovereign's enemies will involve undermining our national security and thus perpetrating harm to national security and/or the British people.

I propose that the offence be more simply defined in terms of helping or assisting the enemy. The actor need not require in fact to help a hostile state or organisation – or be directly co-ordinated by them – but merely act with the intention of materially helping a hostile state or organisation to the detriment of the UK. Criminal liability for treason does not (and should not) turn on whether efforts to help the enemy are ultimately effective – or distant and speculative.[121] Steps would require to be taken in furtherance of an actual treasonable conspiracy – as opposed to conduct simply confirming a deep emotional identification with

[119] *R. v. Adebolajo and Anor* [2014] EWCA Crim 2779

[120] Hall, "Changing Treason"

[121] Policy Exchange, *Aiding the Enemy*, S. VII

the country's enemies. Helping to prepare an attack would involve being an active or contributory member of a group, as an accomplice of an enemy state or organisation, plotting to undermine or harm the integrity of national security. The compromising of national security can arise in myriad ways – pledging allegiance, intelligence-gathering, financial support, propagandising, cyber-attacks, recruitment and killing or maiming British Citizens. This might characteristically involve membership of a clandestine cell system – in contrast to lone wolf terrorism. Such a wide and extendable definition of treason could be problematic. The severity of sentence might reflect how advanced preparations have been for a specific attack – a factor in assessing culpability.

VI. Redefining for Scottish Context:

I now consider how these reformulated, surviving core offences might be more specifically formulated for the Scottish context.

(i) Enemy Attacks on Scotland:

This head of treason will involve the (attempted) perpetration of harm to UK and Scottish political institutions; UK military; UK and Scottish CNI physically located within Scotland; and attacks on civilians within Scotland.

(ii) Relevant Harm to Scotland:

The Scottish political institutions now seem entrenched. Their abolition is presently politically inconceivable – and might be regarded as the negation of Scotland's democratic will. I argue that the foreign-sponsored sabotage or destruction of the physical manifestations of these political institutions – specifically, the Scottish Parliament and Scottish Government buildings – would amount to treasonable conduct.

(iii) Levying War Against Scottish Political Institutions:

The Scottish political institutions are entities which are sufficiently national in scope – the local manifestation of UK sovereign authority, discharging the Crown's duty of protection. They represent public authority in Scotland. In many significant respects they are the leading

public authority in Scotland. They can be regarded as an integral part of the existing constitutional order (or greater British political community) as to warrant special recognition and protection in terms of the operation of any treason law. The appropriateness of protecting Scottish political institutions commends a new Scottish object in the crime of treason – that it be treasonable conduct to use political violence for the purpose of attempting to overthrow Scotland's political institutions.

The Canadian federal example is instructive – insofar as treason involving using force or violence to overthrow the government extends to the use of force or violence for the purpose of overthrowing the constitutional government of Canada or any provincial government (or legislative body).[122] Equally apposite to the evolving Anglo-Scottish dynamic is the Australian federal and state experience. Australian citizens owe allegiance to their sovereign at the federal and state level. While at federal level it is treasonable conduct to levy war or do any act preparatory to levying war against the Commonwealth of Australia,[123] s. 12 of the Crimes Act 1900 (New South Wales) extends the offence of levying war (derived from s. 3 of the Treason Felony Act 1848) to putting any force or constraint upon the Parliament of the State of New South Wales. Levying war covers the constraining of the Parliament of the State of South Australia.[124] Absent laws against treason in Western Australia, Northern Territory and Queensland, separate provincial provision seems to be optional for Australian states.[125] Most American states have treason provisions in their own constitutions or have statutes mirroring the US Constitution.

The (constructive) levying of war against the sovereign in her realm (under the extant law) – to the extent it involves "usurping the public authority of the land" and attacking the existing constitutional order or the political community – could be construed as covering the

[122] Criminal Code, s. 46(2)(a) – the Canadian Law Reform Commission proposed a legislative scheme in which the aspect of treason involving using force or violence to overthrow the government would extend to the use of force or violence for the purpose of overthrowing the constitutional government of Canada or a province – or to extort or prevent a decision or measure of a federal or provincial legislative, executive or judicial organ of State (LRCC WP 49, Ch. 6).

[123] Criminal Code Act, s. 80.1

[124] Criminal Law Consolidation Act 1935 (SA), s. 7. In 1977, a law reform committee in South Australia considered that a state law of treason was unnecessary – since it was adequately covered at Commonwealth level.

[125] The equivalent legislation for the State of Victoria only speaks of levying war against the Commonwealth of Australia – Crimes Act 1958, s. 9A.

use of political violence for the purpose of overthrowing constitutional government in Scotland – including the (devolved) Scottish Government or putting any force or constraint upon the Scottish Parliament – on the reasoning that the devolved Parliament (and Government) might no longer be characterised as merely local political institutions, but institutions which are sufficiently national in scope.

It might be construed as providing for the protection of the other devolved Governments – but since these are political institutions which do not have the same degree of executive and legislative competence, this might be a more marginal argument. Because these Scottish political institutions are not firmly enshrined – and could conceivably be dissolved by Act of the UK Parliament – then even violent political agitation for their removal would hardly have a treasonable aspect. Non-violent political agitation can hardly have a criminal aspect in a free society which respects our ancient liberties and Convention values.

Given that the political assassination of the Prime Minister and most Ministers of the Crown (the protection afforded the downgraded Lord Chancellor being an historical anomaly) would not be prosecutable under the current head of compassing the death of the sovereign, it would be anomalous if the First Minister for Scotland or their cabinet were afforded special protection. Nonetheless, such acts could be prosecutable, on an appropriate factual matrix, as an aspect of levying war against the sovereign in her realm.

VII. Conclusion:

This chapter has been about establishing how allegiance might be betrayed under this new modelling. I propose a narrowing-down exercise, by which the crime of treason is stripped down to its essential elements – specifically, breaching the duty of non-betrayal, by assisting the enemy, and doing so in material ways. I suggest that the following three heads of the *actus reus* of the crime survive with appropriate qualification – 'Adhering to the Sovereign's Enemies'; Compassing the death of the sovereign (with the assistance of the sovereign's enemies); and 'Levying War Treason' (again, with the assistance of the sovereign's enemies). The latter two heads will be recast as sub-categories of 'Adhering to the Sovereign's Enemies' – insofar as they can only be committed in circumstances involving adherence to a foreign enemy. All treasons will thus amount to what I describe in shorthand as 'Adherence Treason' or be derivatives of it. There will be no place for purely domestic insurrection (or 'Seditious Treason'). The focus on this form of treason is in recognition that

it is expected to occupy a significant share of the energy and resources of our security services in forthcoming years.[126] Meanwhile, I propose – without controversy – to otherwise prune the remainder of the 'motley lot' of offences (as the Law Commission described them in 2008).[127]

The negative duty of allegiance will be scarcely consistent with the continuing existence of the allied offence of misprision of treason (concealment) or the commission of treason by omission. Consistent with general narrowing-down – and the incongruity of accession after the fact in the Scottish context – I submit that misprision of treason (and compounding treason: the corruption in deciding not to prosecute treason) should not be retained as part of any new Scottish offence.

I propose a 'national security harm' principle as the guiding principle or model around which the reconstituted heads of treason are reconstructed. Analogous to the concept of self-defence in international law, invoking treason law might be regarded as a proportionate measure taken in exercise of the nation's right to self-defence. This principle will underlie each new provision. For any treasonable narrative to be relevant and internally consistent it should be consistent with this principle.

A working framework for a Scottish offence emerges. Relevant harm will involve (attempted) harm to the sovereign, Scottish political institutions, UK military installations and personnel in Scotland, and Scottish CNI. The crime of treason would be extended to include attacks on the British people in Scotland – definable by reference to anti-terrorist legislation. The 'materiality' qualification and the insistence that (attempted) damage to property involves CNI, alleviates the risk of over-breadth. For the narrative of any charge under the new Scottish treason law to be relevant, the alleged acts must be consistent with these principles.

The relevant offence elements of treason would now be that the accused:

(1) had a duty of allegiance
(2) breached that duty of allegiance

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[126] Dominic Kennedy "Security orders for ex-jihadists are 'so expensive that many roam free" Times (21 February 2019): https://www.thetimes.co.uk/article/security-orders-for-ex-jihadists-are-so-expensive-that-many-roam-free-vpq6mw9rr

[127] Law Commission, *Tenth Programme of Law Reform* (Law Com No 311, 2008), para. 2.27

(3) did so in a material way, by the commission of relevant treasonable conduct

In Chapter 4 I will address what might be the *mens rea* appropriate to the specific forms of conduct which should comprise these surviving three core offences in their recalibrated, Scottish form. I will consider in Chapter 5 the extent to which this 'national security harm' principle might test a 'Public Interest Defence' – as an overriding consideration in the conduct of any balancing exercise on the possible justification for espionage disclosures.

Chapter 4 – *Mens Rea* and Wrongfulness

I. Introduction:

I now consider treason's *mens rea* – intention, according to Hurst, being very much "at the heart" of treason.[1]

In Chapter 2 I set out the broad idea of 'Adherence Treason' – of enemy involvement being pivotal to all remaining heads of treason – and that the heads of treason involving 'Compassing and Imagining the Sovereign's Death' and 'Levying War Treason' be recast as sub-categories of 'Adherence Treason'. Then in Chapter 3 I argued that if adopted, this would require that we reframe the *actus reus* in terms of a 'national security harm' principle and coordination with a foreign enemy. The principal question to be asked in this chapter is what *mens rea* requirement would be appropriate to the contractual duty-based allegiance model that I have developed in previous chapters.

I have already discussed the wrongfulness of treason in Chapter 2 and have argued, as a generality, that its wrongfulness can be encapsulated in the fundamental idea that betraying your country to a foreign enemy is morally blameworthy. This chapter will not be about considering the wrongfulness of treason in that respect but will be about otherwise identifying that discrete wrongfulness – in the sense of the mental state – which would make for a relevant *mens rea*. I will thus be primarily engaging with the issue of legal guilt, while conscious that it tracks to some extent the subtly different concept of moral guilt.

In the first (post-introduction) section I will historically survey and attempt to outline the contours of what are believed to be the existing *mentes reae* of the posited surviving three core offences identified in Chapter 3. Predictably, there are definitional difficulties with 'current' treason's *mens rea* – though I will detail how its *mens rea* is at least ascertainable. In the second section I will engage with the criticisms that might be made of it: again, the lack of clarity and absence of precise definition; the issue of whether recklessness is or should be part of the existing *mens rea*; and the confusion arising in circumstances of mixed motives. Then I will confirm in the third section which parts of it might be retained – arguing that treasonous intent can be generally understood as requiring the intent to betray the UK. In the fourth section I will determine what might be the appropriate emergent *mens rea* for these surviving treasons and also the proposed new treason offence of attacking the British people, under a contractual based duty model. I will explain how a new Scottish offence

[1] James Willard Hurst, *The Law of Treason in the United States: Collected Essays* (1971), 15; Hurst, "Treason in the United States" (1945) 58 HarvLR 226, 395

might afford helpful clarification, providing in the fifth section for a precise reconstruction of the *mens rea* of treason – commending the subtle refinement of the concept of treasonous intention, from the intent to betray the UK, to the intent to betray the UK by aiding its enemies, or the intent to betray the UK to its enemies. The narrow duty not to aid our country's enemies in their attacks should be made clear. I will also consider the options for specifically Scottish refinement of the *mens rea* for what will be a Scottish crime of treason.

II. *Mens Rea* of Surviving Heads of 'Current' Treason:

I first address the way in which *mens rea* as a concept, has evolved substantially in treason law – proposing to trace historical interpretations of its intent and attempting to define what the requirement for *mens rea* has meant at different times.

Problematically, neither the Treason Act 1351 (still the chief basis for our treason law) nor subsequent legislation contain familiar common law *mens rea* terminology to explicitly confirm the nature of its *mens rea* element – classically, words such as 'intentionally', 'knowingly' or 'wilfully', or language referable to the concept of 'specific intent', such as 'with intent to …'.[2] But there was no doubt it was always a crime that had to be committed intentionally – in the sense of not being done by accident[3] – even if specific *mens rea* concepts were not specified in its definition. It is not that the medieval Parliament purposely left out a mental element as now understood. Nor was this somehow their subjective intention. It was just this concept had not yet been developed. Provision was made in the 1351 statute for the esoteric mental concepts of 'compassing' and 'imagining' under that head of treason of compassing and imagining the king's death. Debate had been about the meaning of intention both generally and specifically in relation to these concepts. It is important to consider how treason's *mens rea* can be considered as part of the broader history of *mens rea* in the criminal law, as it was not until the early seventeenth century that judges started defining crimes in terms of what is now conventional common law *mens rea*.[4]

[2] J. Richard Broughton, "The Snowden Affair and the Limits of American Treason" (2015) 3 LMULawReview 5, 15

[3] Graham S. McBain "High Treason: Killing the Sovereign or Her Judges" (2009) 20(3) KLJ 457, nn. 4 and 47

[4] Broughton, "Snowden", 15 – referencing Wayne R. LaFave, *Criminal Law* 5th ed. (2010), 253, where it is noted since about 1600 judges defined crimes as comprising some 'bad' or guilty state of mind, thus establishing conventional common law *mens rea*.

Nonetheless, it is virtually impossible to seriously conceive treason as a strict liability offence – it never having been understood as such in Anglo-American treason law.[5] Hume speaks of "treasonable purpose" or imagination against the life of the King in compassing and imagining the king's death.[6] Early American treason case law refers to 'treasonous intention' or even 'treasonable purpose'.[7] The 'modern' view of the general *mens rea* necessary for treason finds expression – under reference to the formulation of the charge in the indictment in *Joyce v. DPP* – in the concept of "traitorous contrivance (conspiracy) and intention".[8] But there is limited elucidation of the precise culpable mental state which the prosecution requires to prove to establish treason.

(i) Proof of Intention by Overt Act:

Invariably, criminal responsibility depends on the performance of overt acts. The point about treason is it must be demonstrated by some overt or open act – this being a term more particularly deployed in treason law. The 1351 Act provided that for the purposes of 'Adhering to the Sovereign's Enemies', the accused must "thereof be provably attainted of open deed" – the Courts applying this requirement to all forms of treason (save misprision of treason). The significance of the overt act is it allows the inference of treasonable intent. An overt act is "any act manifesting the criminal intention, and tending towards the accomplishment of the criminal object".[9] Properly, treasonous thoughts are not (should not be) enough to lead to a conviction. Alison confirmed that "hidden design, to come within the treason law, must be manifested by *overt acts*, which must be made out by proper evidence".[10] The purpose of the overt act element is to ensure "that mere mental attitudes or expressions should not be treason".[11]

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[5] Broughton, "Snowden", 25

[6] Hume, *Commentaries*, I, 514

[7] Broughton, "Snowden", 15 – citing *United States v. Hoxie*, 26 F Cas 397, 399 (CCD Vt 1808) (No. 15, 407); *United States v. Pryor*, 27 F Cas 628, 630 (CCD Pa 1814) (No. 16,096)

[8] [1946] AC 347

[9] *R. v. Thistlewood* (1820) 33 St Tr 681, 684 – quoted in *Kenny's Outlines of Criminal Law* 18th ed. (J. Cecil Turner, ed., 2013), para. 403; and Gordon, *Criminal Law*, 4th ed. Vol. II (2016), para. 43.05

[10] Alison, I, 597

[11] *Cramer v. United States*, 325 US 1 (1945), 28

Foster confirmed the importance of the overt act in evidencing treasonable intent:[12]

> "Overt acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence, but as the *means made use of to effectuate the purposes of the heart.* […] and though, in the case of the King, overt acts of less malignity, and having a more remote tendency to his destruction, are, with great propriety, deemed treasonable; yet still they are considered as *means to affectuate*, not barely *as evidence of* the treasonable purpose."

While Foster says treason is constituted by the overt act, Abbott CJ in *R. v. Thistlewood* reasoned that treason is constituted by the intention, evidenced by the overt act – an important difference in emphasis:[13]

> "The crime is made to consist in the compassing, imagination, or intention (which are all words of the same import) to perpetrate the acts, and not in the actual perpetration of them. But it is further required, by the ancient Statute, that the party accused of high Treason shall be thereof proveably attainted of open deed. […] The law has thus wisely provided […] that […] the intention shall constitute the crime; but the law has at the same time with equal wisdom provided (because the safety of individuals requires it), that the intention shall be manifested by some act tending towards the accomplishment of the criminal object."

The prosecution must demonstrate that the accused moved from the realm of thought, plan, or opinions into the world of action. The overt act is thus vital to proving intent. Lord Reading's charge to the jury in *R. v. Casement*[14] accords with this understanding: "Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled."[15] The acts might ordinarily be perfectly innocuous and lawful, but in certain circumstances allow for the inference or legal conclusion that a sinister, hostile (treasonable) intent exists. These may well be otherwise unlawful acts, but still devoid of treasonable intent. It can thus be seen that the importance of the overt (external) act requirement is to provide protection against persecution for thought or belief, or peaceful political activity.[16]

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[12] Michael Foster, *Crown Law*, 3rd ed., (1792), 203

[13] *Thistlewood*, 684

[14] *R. v. Casement* [1917] 1 KB 98

[15] Though not cited in the case report this passage was reproduced in *Cramer*, 6-7.

[16] James Willard Hurst, "English Sources of the American Law of Treason" (1945) WisLRev 315, 355

The disloyalty is not merely a matter of the heart. It needs to be incorporated in action threatening the security of the state – treason in conduct as well as treason in the heart. Disloyalty of attitude must ultimately become disloyalty in action – hence the overt act requirement. Disloyal intentions and feelings do not make a relevant case of treason.[17] Wrongful harm is necessarily more than feeling or expressing disloyalty.

Overt act and intent are separate and distinct elements of the crime and may involve different modes of proof.[18] This notion of the overt act as the manifestation and means to demonstrably effect (and prove) treasonable intent should be distinguished from Fletcher's use of the narrower, more specific concept of 'manifest intent (or criminality)' – whereby an act may be so obviously criminal that its intent can be assumed on the face of it, with any objective observer clearly recognising it so, irrespective of any knowledge of the actor's mental state.[19] It is to be contrasted with acts of 'subjective intent (or criminality)' – where acts are merely analysed as evidence of intent, consciously intended and experienced by the perpetrator in a highly individualised way. The overt act does not necessarily manifest intent and need not be openly manifest treason. It can be a composite thing, made up of several circumstances, passing through various stages.

(ii) Specific *Mens Rea*:

I now consider how *mens rea* has evolved in respect of each of the 'surviving' heads of treason. There does not seem to be a uniform standard of *mens rea* across the various heads of treason – albeit it is thought, unremarkably, most of the offending conduct would have to be committed intentionally.[20]

(a) Compassing or Imagining the Death of the Sovereign:

The essence of this form of treason is in the intention – the treason not being in the killing of the sovereign, but in compassing or imagining (endeavouring or plotting) their death.[21] The relevance of matters being at only the attempt or conspiracy stage is an historical

[17] George P. Fletcher, "The Case for Treason" (1982) 41 MdLRev 193, 197 and 201

[18] *Haupt v. United States*, 330 US 631 (1947), 645, Justice Douglas, concurring Opinion (after having dissented in *Cramer*)

[19] George P. Fletcher, *Rethinking Criminal Law* (1978), 115-116

[20] Law Reform Commission of Canada, Working Paper 49, *Crimes Against the State* (1986), 28

[21] Alastair Brown, "Offences against the State" (2005), para. 535 (in *Stair Memorial Encyclopaedia*)

consequence of the absence of any developed general law of attempt (or conspiracy) at the time of the early law of treason. To kill the King was regarded as a matter of such gravity that even the intent or attempt to do so was itself treason. While general principles of inchoate liability would subsequently emerge – applying to nearly all offences – the 1351 Act had already specifically acknowledged this inchoate form of the offence such that there was little purpose in discarding it. Nor would there be any compelling reason for a mere attempt to be treated any less seriously – given the ultimate penalty which until recently, would follow. The regicides of Charles I were indicted not on charges of murdering the King (as this would create difficulties for convicting those who had not sat as judges) but compassing the King's death – meaning no more than doing or saying something to conduce to it.[22] His actual killing (judicial execution) was one of the overt acts evidencing the compassing.[23] But in the Popish Plot trials of 1678-1680 and *Russell's Case* the only alleged crime was talk, perhaps idle chat. Lord William Russell had unsuccessfully argued that the conversations for which he was prosecuted amounted at their highest to only misprision, not treason – and that the prosecution were relying on notions of 'constructive treason' to overcome the requirement of the substantive law that there be two eyewitnesses to an overt act of treason.[24]

The notorious legal doctrine of 'constructive treason' was developed in the seventeenth and eighteenth centuries – allowing treason to be imputed to a person by a course of conduct even if none of their individual actions amounted to treason. A dubious constructive (creative) interpretation was applied to the 1351 Act to extrapolate the meaning of the original words, dictated more by political demands than recognised principles of judicial interpretation.[25] Facilitated by the vague language of 'compassing or imagining', judicial activism extended the statutory definition of treason – broadening its ambit by 'constructing' new treasons. 'Constructive treason' has been described as "anything whatever which, under any circumstances, may possibly have a tendency, however remote, to expose the King to personal danger or to forcible deprivation of part of the authority incidental to his office."[26]

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[22] *R. v. Twenty-nine Regicides* (1660) 5 St Tr 947; Geoffrey Robertson, *The Tyrannicide Brief* (2005), 291, Ch. 17 n. 6; McBain "Killing Judges", 466; Hume, I, 514 n. 1

[23] *Ibid*.; Alan Wharam, "Treason in Rhodesia" (1967) 25(2) CLJ 189, 195

[24] Lois G. Schwoerer, "William, Lord Russell: The Making of a Martyr, 1683-1983" (1985) 24(1) JBS 41, 53

[25] McBain "Killing Judges", 471-472

[26] Alfred H. Knight, *The Life of the Law: The People and Cases that Have Shaped Our Society, from King Alfred to Rodney King* (1998), 142

The accused did not have to participate in or even be present when the 'treasonous' action occurred. This loosely applied treason law was infamously exploited as a political instrument to persecute opponents. Blackstone emphasised the desirability of a restrictive interpretation of treason, condemning 'constructive treason' and 'new-fangled treasons' which imperilled the liberty of the people.[27] Knight analysed the doctrine thus:[28]

> "The word "constructive" is one of the law's most useful frauds. It implies substance where none exists. There can be constructive contracts, constructive trusts, constructive fraud, constructive intent, constructive possession, and constructive anything else the law chooses to baptize as such. "Constructive" in this sense means "treated as." ... Constructive treason wasn't "real" treason but a vaguely defined, less potent category of conduct that the court deciding the particular case felt should be "treated as" treason. It was the perfect instrument of oppression, being virtually whatever the authorities wanted it to be."

After a series of devastating miscarriages of justice occurring in treason trials across the decade from 1678 through to the Glorious Revolution of 1688-89, the Treason Trials Act 1696 introduced due process reforms immediately changing the complexion of treason trials – from conciliar hearings aimed at eliminating the government's enemies to actual trials seeking to establish guilt or innocence.[29] In 1689, when precursor legislation to the 1696 Act was being debated, Richard Hampden impugned the Russell conviction: "This thing of constructive Treason was set on foot in King Charles II's time. If there were not overt Acts, yet it was construed to be Treason".[30] Colonel Thomas Tipping admonished Parliament: "I have been always against making words Treason; for passion, or a man in drink, or a mistake of a word, may put our lives into our servants' hands".[31] The subordination and deference of the subject to the Crown had retreated during the seventeenth century. Nonetheless, the demarcation between loyal opposition and treason would continue to be problematic in the

[27] William Blackstone, *Commentaries on the Laws of England*, Vol. IV. 6th ed (1775), 75, 83, 85, 86 – cited in *Cramer*, 71

[28] Knight, *Life*, 142

[29] John H. Langbein, *The Origins of Adversary Criminal Trial* (2007), Ch. 2

[30] *Ibid.*, 85; Anchitell Grey, *Debates of the House of Commission from the Year 1667 to the Year 1694* (1769), Vol. 9, 207

[31] Langbein, *Trial*, 85; Grey, *Debates*, 206

legal characterisation of an accused's knowledge, conduct and intent – and hazardous when a hostile bench determined such a malleable legal standard.[32]

Barrell, in his seminal literary work, *Imagining the King's Death*, analysed the changing meaning of the concept of 'compassing' and particularly 'imagination' in the context of the controversial 1794 Treason Trials.[33] These trials were intended by the Pitt Government to suppress the British 'Radical' movement – in the belief they were intent on overthrowing the British constitution and establishing a French-style republic. The charges were brought under the head of compassing or imagining the king's death. The kinds of 'imagining' for which the accused were implicated were varied – from overt acts indicating the intention to assassinate the king's person to treasonous conspiracy to overthrow the constitution. The radicals' rhetoric had never materialised into armed rebellion, the reality being most were scarcely interested in killing the king. Barrell suggested the repertoire of the more artisanal elements of the republican movement amounted to only 'fantasies' of regicide – wish-fulfilment at its highest. Prosecutors were unable to prove either a conspiracy to raise a Jacobin army with French support – or to incite rebellion with the intent to kill the king's person – such that they could not establish the requisite overt act to conventionally convict under this head of treason.[34] The establishment appreciated that but still embarked on a modernisation narrative around effectively creating a new form of treason. The significance prosecutors attributed to the verb 'to imagine' came to be inflated. Barrell explains how the phrase 'to imagine the death of our Lord the King' was brought into hermeneutic equivalence with the prevailing idiomatic sense of 'imagine' – that is, the mere act of imagining.[35] It seems this provision was not satisfactorily adapted from its original Norman French – not having hitherto been closely scrutinised.[36] The difficulty was the flexibility of the term 'imagine'. At issue was whether it had its original narrow meaning of 'intend' or 'design' – or whether it could be construed more broadly, to even encapsulate merely thinking about the king's death. Indeed, if the Government wrongly believed that an individual was 'imagining the king's death' might it not be guilty of precisely the same crime? Barrell

[32] Langbein, *Trial*, 99

[33] John Barrell, *Imagining the King's Death: Figurative Treason, Fantasies of Regicide 1793-1796* (2000)

[34] Lisa Steffen, "Review: Barrell, Imagining" (2001) 116(466) EHR 495

[35] Danny Hayward, "Review: Barrell, Imagining" (2013) 21(1) HistMater 196

[36] The language of enactment, thus the governing language in the event of uncertainty (McBain "Killing Judges", 461)

observes that as 1794 progressed, the Government developed increasingly innovative legal arguments to address this problem of 'Modern Treason' – a treason not aimed at replacing the reigning king ('Dynastic Treason' or 'good old aristocratic, regicidal English treason'[37]) – but destroying monarchy itself ('Republican Treason' or French 'Democratic Treason').[38] They conflated the king's person and his authority – disguising it by the juridical extension of the word 'imagine', provoking much contemporary satirical derision.[39] The plotting of a convention was a clear act of imagining the king's death. The mere suggestion of any act – however spontaneous and involuntary – which 'might' lead to the king's death, was treason. In the Edinburgh trials of Robert Watt and David Downie it was argued that their forming a British Convention and raising arms to petition Parliament might lead to the destruction of the king's person. It was moot whether a tenuous plot to seize Edinburgh Castle truly endangered the royal person. The recurring issue in this and ensuing trials was who was imagining or intending the king's death, and who was simply fantasising about it. Much was predicated on the disingenuous and tendentious 'Coronation Oath' argument – that since the king had taken an oath to defend the constitution, he would necessarily expose himself to the risk of death in defending such radical attempts at constitutional reform. Any attempt to pressurise Parliament to change the constitution must necessarily provoke the king to resist in person and by force of arms. However modest a reform in contemplation, it would be as good as *a priori* true as entailing or imagining the king's death.[40] Barrell impugns these convoluted arguments in terms of prosecutors attempting to prove "figurative treason against a figurative king".[41] Lawyers quibbled about the distinction between the fantasy of merely imagining and the deadly intention of genuinely imagining the king's death.[42] The overt act would comprise the treason itself – without regard to the intention of the accused – on the ground that if the overt act were proved that would be conclusive evidence of the accused's intention that the king should die. This theory of 'constructive treason' may have been contrary to the literal or express terms of the 1351 Act but in the 1794 Treason trials of Thomas Hardy and John Horne Tooke, this modern treason – which the prosecution argued

[37] Barrell, *Imagining*, 283

[38] *Ibid.*, 129

[39] Hayward, "Review", 200

[40] Barrell, *Imagining*, 278-279; Carlton F.W. Larson, "Review: Barrell, Imagining" (2003) 21 LawHistRev 411; Hayward, "Review", 201

[41] Barrell, *Imagining*, 230

[42] Steffen, "Review"

to be found in the "force of clubs, committees and conventions" – was confirmed by the jury directions, albeit defence counsel Thomas Erskine criticised such constructive, fantastic treason and the defendants were ultimately acquitted.[43] It was unnecessary for matters to have reached an advanced stage – such as an actual attempt on the sovereign's life – proof of the existence of a plot to kill the sovereign (conspiracy) sufficing.[44] Fundamentally "the compassing is considered as the treason" – the so-called mental interpretation. By the Treasonable and Seditious Practices Act 1795 which extended the definition of treason – this figurative treason was 'literalized' – it being treason to "within the realm or without compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment of restrain, of the person of … the King". Any act of restraint on the person of the king became treasonable. What may have previously been merely overt acts of compassing or imagining the king's death – potential evidence of treasonous intentions – were transubstantiated into *per se* acts of treason.[45] There was no longer any distinction between levying war against the king's person and his authority. Conspiring against the government in general was now an overt act to prove treason – thus avoiding any debate about fantasising and imagining the king's death.[46] The democratic movement was forced underground. This provision in the 1795 Act was finally repealed by the Treason Felony Act 1848.

Lord Carlton's *dictum* in *R. v. Sheanes* confirmed how mere acts of subversion of the constitution could amount to compassing and imagining the king's death:[47]

> "Forming conspiracies to usurp by force and in defiance of the authority of Parliament, the government of the kingdom, to destroy the monarchy … holding consultations or entering into agreement, or advising, soliciting or persuading others for any such purposes, or assenting to such purposes … the moment the power of the government is usurped, the king is in effect deposed; he is bound by the duty of his situation to resist such attempts, even at the peril of his life, and several acts which I have mentioned whereby his life may be endangered, have been deemed under the sound construction of the statutes, and upon principles of substantial political justice overt acts of compassing his death."

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[43] Alan Wharam, *Treason: Famous English Treason Trials* (1995), xiv; Wharam, *The Treason Trials, 1794* (1992)

[44] *Thistlewood*; Brown, "Offences against State", para. 535

[45] Hayward, "Review", 202-203

[46] Steffen, "Review"

[47] (1798) 27 St Tr 255, 387

Halsbury's Laws of England describes compassing the sovereign's death:[48]

> "*wilfully and deliberately* to do or attempt anything whereby the sovereign's life may be endangered or to conspire, combine, confederate or agree to carry that purpose or to assent to any overtures for that purpose or to meet with others to kill the sovereign though no agreement is then come to. It is therefore an overt act of treason of compassing the death of the sovereign to enter into measures for deposing Her, or to agree with Foreigners to invade Her Dominions with force or to go into a foreign country to that end or to levy or conspire to levy war against Her."

The use of the words 'wilfully and deliberately' connotes a general *mens rea* requirement – and, in this context, the specific intent to 'compass' the King's death. Properly, some overt act is still required for commission.[49] The overt act might be found in the forming of a plot or it might even comprise the actual killing of the sovereign itself – because, strictly, the offence lies in the compassing or imagining the death and not necessarily in the killing of the sovereign itself – that 'merely' being a further overt act by which the compassing of his death would be consummated (though naturally a severe aggravation).[50]

It might be thought any person intent on assassinating the sovereign would automatically be an enemy of the British state – and that such a hostile act could only but be treasonous. Consider the intriguing hypothetical regicide involving mariticide or uxoricide – the archetypal *crime passionnel* committed by a jealous consort – assuming the errant spouse's motive were not usurpation of the throne (historically 'Dynastic Treason'). The overt act of killing the sovereign in that scenario would not technically involve a breach of allegiance – because the family dynamic precipitating such an act, exists independently of the conventional 'sovereign-subject' relationship governing the remaining population. Their attack on the sovereign would not have been committed because of the sovereign's status or connected to the performance of her public duties – the reason for the special protection afforded her. It would not be a political assassination. If the only overt act were their killing of the sovereign, there might well be an issue of evidential sufficiency so far as a compassing charge would be concerned because compassing does not strictly comprise the killing. This

[48] Halsbury's Laws of England, Vol. 11 (1), para. 81

[49] *R. v. Thistlewood* (1820) 33 St Tr 681 (the Cato Street Conspiracy); Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences* (Law Com No 72, 1977), para. 15

[50] Gordon, *Criminal Law*, para. 43.05; Law Com WP 72, para. 16

would otherwise amount to murder or culpable homicide, aggravated by the absolute character of the sovereign victim. If their killing were committed without the requisite treasonable intent, it would be plain murder (or culpable homicide).[51] The treason would not be consummated. Regardless of the dynamic in their own personal relationship, it is believed the junior royal protagonist must remain the subject of the sovereign – for the 'sovereign-subject' relationship cannot admit to exceptions. This discrete hypothetical scenario underlines regicide need not inevitably and automatically amount to treason – and that intent (or motive) is still pivotal.[52] Properly, there must be a political intent (or motive) – perhaps captured by the idea of 'compassing'.

(b) 'Levying War Treason':

With the 'Levying War' component of treason, what requires to be proved is the intent to forcibly overcome the general laws and the government of this country. It has similarly been the subject of wide judicial interpretation. Again, there is the historical transubstantiation of the king's corporeal body into the abstract. Hawkins encapsulated this notion of the king being provoked to resist in person and by force of arms:[53]

> "Those who make an insurrection in order to redress a public grievance … and of their own authority attempt with force to redress it, are said to levy war against the King, although they have no direct design against his person, in as much as they incidentally invade his prerogative."

Under older broad doctrines of 'constructive treason', intent by group force to prevent or overcome enforcement of a statute or order, to obtain a group benefit contrary to law, was treason. Hume stated: "That no ill is intended to the person of the King, is not material".[54] In the treason of constructive levying of war, the common purpose doctrine would impute criminal liability to even fringe participants in political insurrection – though in reality only prime movers would be prosecuted on the most serious charge. In the trial of Lord George Gordon, the Court held the prosecution was entitled to put in evidence anything to show the

[51] Law Com WP 72, para. 62

[52] The relevant intent under s. 2 of the Treason Act 1842 (which provided for non-lethal assaults on the sovereign) was the intent to break the public peace or to injure or alarm the sovereign.

[53] *Hawkins' Pleas of the Crown* (1716), Book 1, Ch. 17, s. 25

[54] Hume, I, 525

mob had a general intent, by terror and violence, to force a repeal of the law – though that did not affect the accused until he was shown to be privy to it.[55] Kenny spoke of the relevant intent in terms of a large body of men assembling and intending to debar the government from the free exercise of its lawful powers, being ready to resist with violence any opposition, with the 'general' (as opposed to private) character of their object distinguishing it from mere riot.[56]

The *mens rea* for this prong of treason might now be regarded as the hostile intent to endanger or threaten the safety and security of the British state by violent group resistance. Hostile intent will include intent to overthrow or coerce the Government by organised force (group force), even though there is no direct proof of an aim to wholly subvert the Government.

(c) 'Being Adherent to the Sovereign's Enemies in the Realm, Giving Them Aid and Comfort in the Realm, or Elsewhere':

The mental element requirement seems to weigh heavier in the treason of 'Adhering to the Sovereign's Enemies'. Applying the 'Plain Meaning Rule' (or 'Literal Rule') of Statutory Interpretation – and relying on the ordinary meaning of words[57] – the Court could readily discern that a disloyal state of mind accompanies this head of treason. Unsurprisingly, there is no definition section in the 1351 statute – and, absent contrary definition within the statute, words such as "adherent to" and "giving … Aid and Comfort" must be afforded their plain, ordinary, and literal meaning. "Adherence" is defined as: "Attachment *to* a person, party, or cause; steadfast support; loyalty, allegiance."[58] Insofar as "adherent to" (or "adherence") should be construed in accordance with their ordinary or natural meaning, this definition recognises there must be a connection between the adherent and the enemy to whom their adherence is given, whereby the adherent intends to give them 'Aid and Comfort'. "Giving … (them) Aid and Comfort" completes or evidences that relationship. Logically, you cannot adhere to the enemy by anything less than a conscious object to do so. This is also consistent with the 'Purposive Approach' to statutory interpretation – whereby words are interpreted

[55] *Lord George Gordon's case* (1781); Wharam, *Famous English Treason Trials*, 107

[56] *Kenny's Outlines*, para. 406

[57] *Commissioners of Inland Revenue v. Hinchy* [1960] AC 748

[58] OED Online

not only in their ordinary sense, but by reference to their content and purpose. The intent element might be defined as alliance with the enemy – while giving them 'Aid and Comfort' comprises the conduct requirement.[59]

There is specific provision for the *mens rea* of 'Adhering to the Sovereign's Enemies' in the Institutional Writings and criminal texts. Macdonald makes the relevance of intention clear, referencing *R. v. Ahlers*:[60] "The intention and purpose of the accused in doing the overt acts (of adherence) complained of are material."[61] There is further recognition of the operation of *mens rea* in Gordon's *Criminal Law*: "It appears that in some circumstances it is a defence to a charge of adherence that the accused did not act with the intention of giving aid to the Queen's enemies."[62] Cubie explains: "For a conviction under this heading, there must be proof of an 'evil' intention to give aid and comfort to the enemy".[63]

Indeed, the typical act of treason is adherence to and the provision of aid to a foreign enemy. It requires the intent to render the enemy 'Aid and Comfort' or tangible support. An act of aid and comfort absent intent to betray would not be treason – nor would be intent to betray without an overt act of aid and comfort.

The issue of intention in *Joyce*, as far as enemy adherence was concerned, was whether Joyce adhered to the King's enemies with intent to assist them. The charge was couched in the following terms:[64]

> "being then … a person owing allegiance to our Lord the King, and whilst on the said several days an open and public war was being prosecuted and carried on by the German Realm and its subjects against our Lord the King and his subjects, then and on the said several day *traitorously* contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects did traitorously adhere to and aid and comfort the said enemies … by broadcasting to the subjects of our Lord the King propaganda on behalf of the said enemies of our Lord the King".

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[59] Suzanne Kelly Babb, "Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh" (2003) 54 HastingsLJ 1721, 1731

[60] [1915] 1 KB 616

[61] Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th ed. (1948), 172

[62] Gordon, *Criminal Law*, para. 43.12

[63] Andrew Cubie, *Scots Criminal Law*, 4th ed. (2016), para. 19.3

[64] 348

It was for the jury to determine whether at the relevant dates Joyce adhered to the King's enemies with intent to assist them. We thus have the concept of "traitorous contrivance (conspiracy) and intention" – manifest by the intention to assist the enemy. Any intentional act which furthers the enemy's hostile designs or weakens the UK, gives aid and comfort to, and 'adheres to' the enemy.

In the Boer War case of *R. v. Lynch* the intent to assist the enemy was the recurring theme in the charges – the accused being charged with overt acts of treason committed with intent to join the enemy, inciting others to assist the enemy and commanding an armed body of men with intent to co-operate with the military forces of the enemy.[65] Giving aid to the enemy might be any act which is designed to assist the enemy positively, by giving them help of any kind – or negatively, by obstructing the UK's military forces arraigned against them.

The analysis of intent in the Law Commission's 1977 Working Paper on modernising the law of offences against the state, was that the head of treason of adhering to the sovereign's enemies required knowledge by the perpetrator of the fact that help was being given to the enemy – or that they had no substantial doubt that it would result from their conduct.[66] This is also consistent with the condition in Australian treason law that the person intends that their conduct will materially assist the enemy to engage in war with the Commonwealth.[67] It has been suggested that it is a relevant defence to a charge of 'adherence (to the Queen's enemies)' that the accused did not act with the intention of giving aid to them.[68] Properly, this should be conceptualised as an absence of the relevant *mens rea* by the absence of treasonous intent, rather than a substantive defence as such. There must be proof of intention to give 'Aid and Comfort' to the enemy[69] – and it is still incumbent on the Crown to discharge the (legal or persuasive) burden of proving this was the accused's intent.

[65] *R. v. Lynch* [1903] 1 KB 444

[66] Law Com WP 72, paras. 55 and 96

[67] Criminal Code Act 1995, s. 80.1AA – the Law Reform Commission of Canada posited a new offence (LRCC WP 49, 45).

[68] *Ahlers*; Gordon, *Criminal Law*, para. 43.12

[69] *Ibid.*

III. Problematic 'Current' *Mens Rea*:

I now consider the criticisms which might be made of the *mens rea* element in the proposed surviving heads of 'current' treason.

(i) Clarity:

Properly, all definitions of crimes should specify a mental element – and a person cannot be found criminally liable unless they meet the *mens rea* criteria for the crime concerned.[70] The main issue with the *mens rea* of treason is not so much that it is couched in archaic language (the recurring general complaint in treason law) – rather it is the apparent absence of definition. There is little clarity in domestic precedent that might meaningfully explain the precise culpable mental state which the prosecution requires to prove to establish treason. The Law Commission confirmed that the recognition in *Ahlers* of motive as a relevant factor in deciding criminal liability was unsatisfactory and confusing[71] – at variance with *Casement*[72] – and its recommendation that intention be proved on a subjective basis remains unresolved.[73] The mental element was not in issue in *Joyce*. The issue has received scant academic attention in this country – the immediate post-war focus following *Joyce* from Lauterpacht and Williams being elsewhere, then dissipating. Nonetheless, the *mens rea* of what might be regarded as Anglo-American treason has been substantively considered by the American Supreme Court and American academics.[74] But while the American Supreme Court has established the 'intent to betray' doctrine, its derivation remains unclear.[75] Treason's *mens rea*, like treason law generally, remains underdeveloped and incomplete. Because of the rarity of modern treason prosecutions, there has been little opportunity for issues such as the definition of *mens rea* to be rigorously tested. Predictably, the Scottish Jury Manual provides no model form of direction or guidance as to the *mens rea* requirement

[70] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016), 164

[71] Law Com WP 72, para. 27; C.S. Kenny, "Intention and Purpose" (1915) 31 LQR 299

[72] Para. 28

[73] Para 29

[74] Hurst, *Essays*, 15; Hurst, "Treason US", 226 and 395; Broughton, "Snowden", 5

[75] *Ibid.*, 25

for treason.[76] It is axiomatic that difficulties in definition of the mental element of the crime will result in difficulties of proof.

Nonetheless, we can derive from precedent the concept of treasonous intent. To reiterate, *Joyce* at least provides for the concept of 'traitorous contrivance and intention' – though this wording seems 'clunky'. Further, notwithstanding the lack of clarity in statute law, the *mens rea* of 'Adhering to the Sovereign's Enemies' could be reasonably inferred from the phraseology of the 1351 Act – for to 'be adherent' necessarily embraces the mental element of intentional betrayal.[77] But there remains an issue with archaic language that requires to be addressed.

(ii) Illiberalism of Imagining:

The vague, imprecise words of 'compassing' or 'imagining' the king's death have historically allowed for wide judicial discretion – with crude or expansive legal definitions having had unfortunate consequences. According to Fletcher, the "core of the crime" is not "external actions" – but rather "internal attitudes", specifically the "mental actions of compassing or lusting in one's heart."[78] Fletcher impugned the mental action of compassing as the core of the crime as violating Mill's harm principle[79] – and shifting the gravamen of the crime from external action to "internal attitudes" – as one of the principal anti-liberal features of treason law. The emphasis on "internal attitudes" as opposed to external conduct is associated with the criminal theory of authoritarian regimes. It evokes the Nazi concept of *Gesinnungsstrafrecht* ("criminal law based on attitudes") – another German word without English equivalent, meaning criminal law orientated towards punishing attitudes or belief systems, rather than the act itself.[80] It has sinister connotations of Orwellian thoughtcrime – criminalising the holding of politically unacceptable thoughts, not just actions or even speech. It defies Ulpian's maxim: "*Cogitationis poenam nemo patitur*" ("No one is punished for merely thinking of a crime").[81] The troubling notion persists that this offence – with its

[76] Judicial Institute for Scotland: Jury Manual (13 January 2020): http://www.scotland-judiciary.org.uk/Upload/Documents/Jury_Manual_20200113_1047.pdf

[77] Broughton, "Snowden", 26

[78] George P. Fletcher, "Ambivalence About Treason" (2004) 82 NCLRev 1611, 1619-1622

[79] John Stuart Mill, *On Liberty* (1859)

[80] Fletcher, "Ambivalence", 1621

[81] Justinian's *Digest* 48.19.18 (Ulpian 3, *ad edictum*)

wide *mens rea*, as established by unfortunate historical precedent – could still be exploited to squelch dissident ideas, even if it is now thought, as McBain asserts, that today compassing only covers murdering (or attempting or conspiring to murder) the sovereign, his wife or heir.[82] While *Archbold* previously stated "the doctrine of constructive treason is discouraged, if not exploded",[83] it would be preferable if it were clearer that it is not a criminal wrong to have strong ideological objections to the UK state and its policies. I naturally want to disavow this suggestion – and retain as a relevant head of treason the enemy-sponsored (attempted) political assassination of the sovereign – it being appropriate to continue to recognise it as an aggravated or special form of 'Adhering to the Sovereign's Enemies'. This would involve defining a *mens rea* element, specifically tailored to this particular aspect of this part of the crime.

(iii) Whether Recklessness:

The position is uncertain as to whether recklessness might suffice for the *mens rea* of 'Adhering to the Sovereign's Enemies' – particularly in 'whistleblowing' 'Espionage Treason'.[84] Little guidance can be derived from 'modern' domestic or Commonwealth case law.

It could be plausibly argued that given the 1351 statute stipulates simply that you 'be adherent to' the enemy when you give them 'Aid and Comfort', this might allow for something less than an intent to betray the UK. It need not matter whether you intend specifically to betray the UK or simply seek a firm connection to the enemy or their ideology. Nor would it matter whether you give 'Aid and Comfort' (or assistance) knowingly (in respect that you are fully conscious that you are aiding an enemy of the UK) – or recklessly (in the sense you would be subjectively at fault for deliberately embarking on a course of conduct involving a substantial risk of giving the enemy 'Aid and Comfort'). So long as you continue to be connected to the enemy, you are, by definition, adhering to the enemy and committing treason. This is not strict liability as such – in respect that there will still be a

[82] McBain "Killing Judges", 479

[83] *Archbold: Criminal Practice and Pleading, Evidence and Practice 2007*, para. 25-13

[84] Dylan Matthews, "No, Edward Snowden probably didn't commit treason" Washington Post (12 June 2013): https://www.washingtonpost.com/news/wonk/wp/2013/06/12/no-edward-snowden-probably-didnt-commit-treason/?utm_term=.93db089fca3d

substantial *mens rea* accompanying the relevant overt act – though it might be at variance with the notion of treason as a specific intent crime, requiring the specific intent to betray.[85]

It might be thought that because treason was seen as so serious, it had to be committed intentionally and not recklessly. To countenance recklessness as a possible *mens rea* for 'Adhering to the Sovereign's Enemies' would thus engage a broader definition than is conventionally understood but it can be seen how it might apply. There might be a subtle but not insignificant distinction between the intent to sabotage the UK's military and intelligence operations (where aiding the enemy's military or intelligence operations is intended to occur only as collateral damage) and the wilful intent to aid the military or intelligence operations of an enemy state or organisation. The latter may not be inevitably inferred from the intent to sabotage the UK's military or intelligence operations (particularly in peacetime) – but recklessness as to the consequences of one's actions could be. The following refinement of *mens rea* in 'Espionage Treason' could apply in that latter scenario – *viz.*, knowingly, or recklessly aiding the military or intelligence operations of an enemy state or organisation by knowingly sabotaging the UK's military and intelligence operations. This would involve alternatives for *mens rea* of knowledge and recklessness.

Standard *mens rea* requirements for most offences will include intention and recklessness. Invariably, *mens rea* may consist in intention, or knowledge, in recklessness or in negligence – forming a descending order. A requirement of negligence is satisfied by the presence of recklessness or knowledge – and recklessness by presence of intention or knowledge – but not *vice versa*.[86] While conscious that recklessness has also been a complicated issue in *mens rea* discourse – notably, the scope of so-called *Caldwell* recklessness (that the test of recklessness should be objective)[87] – and the appropriateness of honest unreasonable belief in consent in rape cases (subjective *mens rea*)[88] – I do not propose to extend the *mens rea* of any new treason law to recklessness or reckless disregard on the basis that in cases of mere negligence there is no relevant intent. For this most serious offence, only the highest form of *mens rea* is appropriate. A more expansive *mens rea* is scarcely desirable in prosecuting

[85] Broughton, "Snowden", 26-27

[86] Gordon, *Criminal Law*, 4th ed. Vol. I (2019), para. 7.11

[87] *R. v. Caldwell* [1982] AC 341 – overturned by *R. v. G and another* [2003] UKHL 50 which substituted a subjective test

[88] *Jamieson v. HM Advocate*, 1994 JC 88 – now precluded by the Sexual Offences (Scotland) Act 2009, s. 1(1)(b)

the ultimate crime (and at that an unavoidably political crime) which carries considerable sanctions and stigma. After all, recklessness and negligence typically do not suffice for higher categories of crime such as murder. Further, the likelihood is that ordinary recklessness or negligence may still be consistent with the operation of error defences.

Consistent with this guiding principle that only the highest form of *mens rea* is appropriate, I do not suggest the *mens rea* be extended to wicked recklessness, the highest form of recklessness, notwithstanding that it is still consistent with the most reprehensible forms of *mens rea* – meeting the Scottish *mens rea* threshold for the special crime that is murder. Murder is the only crime where the *mens rea* includes wicked recklessness (and there are other common law crimes which require intent) – and it is unlikely that the Courts would read in a requirement of it, given this is a statutory crime in which Parliament can specify the *mens rea* and standing its discrete and special technical meaning.

Properly, treason's *mens rea* should reflect the two correlating but subtly distinct aspects of the moral wrong of treason which are the intent to betray country and the intent to betray country to an enemy state or organisation. The intent to betray would appear to be a corollary of adherence to the enemy.[89] Reckless intelligence disclosures, in the context of 'Espionage Treason' might involve deliberate betrayal of country but not necessarily that second aspect of the moral wrong which is betrayal of country to the enemy. Treason would only arise if there were proven knowledge that the accused has been intent on aiding an enemy's military or intelligence operations. It might be prudent to proceed on the basis that whistleblowing is non-treasonable because it is typically unaccompanied by the intention to aid the enemy. I will consider whistleblowing as a relevant justification defence to 'Espionage Treason' in Chapter 5.

Proving a wilful *mens rea* might be problematic in whistleblowing 'Espionage Treason' – particularly absent proof of direct coordination with the enemy. Consider the court-martial of US Army Private Manning, who passed classified material to *WikiLeaks*, the notorious whistleblower website. In 2013 Manning was convicted of various espionage and military offences, the most serious of which was aiding the enemy (by knowingly giving out intelligence through indirect means). A defence preliminary motion to dismiss this charge – on the basis that the prosecution required to show Manning knew that the enemy would be able to access information on the *WikiLeaks* site – was repelled. The US Government argued

[89] Broughton, "Snowden", 26

WikiLeaks was not a legitimate journalistic enterprise. The military judge ultimately acquitted Manning of aiding the enemy[90] – the absence of enemy coordination being relevant in circumstances in which Manning seems to have acted impulsively with no intent to betray.[91]

Ponder the following hypothetical where someone seeks to spy for a foreign state, the 'enemy' spymaster instructing them: "Dispense with dead-drops and all the James Bond gimmicks – just post the information on your blog which we will read, and you will be a whistleblower, not a traitor."[92] The information is disclosed to the whole wide world – not a specific enemy as such (with which the UK is at war) – thus apparently precluding the operation of treason. But in this scenario, there would still have been treasonous intent – the deliberate intent to betray the UK to an enemy. This conduct might appear to be superficially reckless, but the true intent would be treasonous – though there might be difficult issues of proof because of resort to a disingenuous scheme in its execution. Faked innocence can craftily camouflage corruption and evil:

> "A Truth that's told with bad intent
> Beats all the Lies you can invent."[93]

In any event, the law is open and unsettled as to whether mere recklessness might suffice for the *mens rea* of 'Adhering to the Sovereign's Enemies'.

(iv) Mixed Motives Confusion:

Insofar as motive will be relevant in some way to proof of intent, there is a problem with how to deal with motive and the extent to which the intent requirement should be a subjective enquiry. The decision in *Ahlers* to introduce motive as a relevant factor in determining

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[90] *United States v. PFC Bradley E. Manning*, 30 July 2013:
https://fas.org/sgp/jud/manning/032912-dismiss-ch1.pdf
https://fas.org/sgp/jud/manning/appeal-053118.pdf

[91] This seems to have been the basis for the outgoing President Obama's commutation of Manning's sentence – Ed Pilkington *et al.*, "Chelsea Manning's prison sentence commuted by Barack Obama" Guardian (17 January 2017):
https://www.theguardian.com/us-news/2017/jan/17/chelsea-manning-sentence-commuted-barack-obama

[92] Paraphrasing Matthews (see above)

[93] William Blake, *Auguries of Innocence* (1803)

criminal liability in treason was the subject of some criticism.[94] The conviction of Nicolaus Ahlers, the German Consul in Sunderland, a naturalised British subject – for following the orders of the German Consul General in London and assisting German nationals of military age to return home immediately after the declaration of war (on 4 August 1914), with a view to enlisting – was quashed on appeal. This was on the basis that the trial judge had not directed the jury that they had to consider whether Ahlers' acts were done by him with the intention of assisting the King's enemies – or whether Ahlers had acted without any evil intention in the belief that it was his duty to assist German nationals to return to Germany. He had misdirected them in instructing them that it was no defence to show that Ahlers had acted as he believed he was lawfully entitled to do. Ahlers had believed that there was a rule of international law giving departing enemy subjects some margin of time to return home – an objectively reasonable belief in circumstances in which that there had been an Order in Council allowing German subjects to depart without permits from approved ports up until 11 August 1914. Somewhat incredibly, Ahlers had suggested he did not know that war had been declared. Properly, it should have been left to the jury to decide whether he had acted with the intention of assisting ("aiding and comforting") the King's enemies – or in the belief that he was only discharging his duties as Consul.[95] This case is understood to have introduced the concept of motive as a relevant factor in determining criminal liability in treason – alleviating the severity of what was thought to be the unassailable principle *ignorantia juris non excusat*.[96]

Per Lord Reading:[97]

> "It cannot be doubted that his intention and purpose in doing the acts were material to the issue before the jury. Unless the jury were satisfied that his intention and purpose in acting as he did were evil … and that he was intending to aid and comfort the King's enemies and did these acts with that object, they could not find him guilty of the act charged"

But in *Casement* the 'motive' argument was rejected by Reading CJ. The defence had claimed that Casement's motive in seeking to recruit Irish prisoners of war (other British subjects) to join a German-equipped Irish Brigade, was to assist the Irish cause – not

[94] Kenny, "Intention and Purpose"

[95] *R. v. Purdy* (1946) 10 JCL 182

[96] Law Com WP 72, para. 27

[97] 625

Germany. It was not Casement's professed intention to use this Brigade to wage Germany's war against England – and the defence argued that to convict, the jury needed to be satisfied that it was his intention to use it for the purpose of fighting Germany's war against England. An unimpressed Lord Reading directed the jury that a man's intentions were to be gathered from his deeds – and that he was presumed to intend the natural consequences of those deeds – though it was for the jury to ultimately determine whether Casement's intention had been to assist the enemy.[98] While this instruction notionally allowed for the rebuttal of the presumption that a person intends the natural consequences of their acts, it left little 'elbow-room' for the jury to give any weight to motive as a factor which could override the accused's intention, as decerned from their acts.[99]

The case of *Steane* – involving a prosecution under reg. 2A of the Defence General Regulations 1939 – correlated to the commission of treason, the accused having been charged with broadcasting for the German Broadcasting Service with intent to assist the enemy.[100] Ordinarily, merely the intent to broadcast would have sufficed for this offence – but the wording additionally required a specific intent to assist the enemy. Steane maintained that he had acted under pressure of severe personal violence and threats to his family – and with the purpose of saving his family from internment in a concentration camp. His conviction was quashed on appeal, it being held that in these circumstances an inevitable inference could not be drawn that he had intended the natural consequences of his acts – namely assistance of the enemy simply from the fact of his commission of them. As it was, there was scope for the possibility of more than one view as to his intent – and the prosecution required to discharge the burden of proving the specific intent implicit in this statutory offence. There could be no presumption that merely doing the action implied his intent to help the enemy. There was no intent to assist the enemy where Steane had been forced and threatened into doing so. Goddard CJ referred to duress as a possible defence but did not need to consider it, quashing conviction on the basis of misdirection – that the threats to which the accused had been subjected were not sufficiently put to the jury. Significantly, there had been no evidence that Steane's broadcasts had assisted the enemy or harmed the

[98] 129

[99] Law Com WP 72, para. 28; George H. Knott, *Trial of Roger Casement, Notable British Trials* (1917), 160, 184-185; Omer Elagab, "Fighting with the Enemy: The Case of Three British Muslims in Afghanistan" (2006) 10(4) IJHR 373, 376-377

[100] [1947] KB 997

UK. *Steane* does seem to have been wrongly decided.[101] Williams argued that subject to the defence of duress, Steane should have been convicted either on the basis that he acted voluntarily, knowing that what he was doing was assisting the enemy – or that he caused a result foreseen as certain.[102] Put simply, what the enemy asked him to do was to assist them. As that is what he did – deliberately so – his motive was irrelevant, his proper defence being duress. While his predominant intent was to save his family, in respect his act was described as "assisting the enemy by broadcasting", he acted intentionally and purposely.[103] This is a somewhat restrictive concept of the intention to assist the enemy – insisting that the accused must act to facilitate the enemy's purposes – rather than merely despite the realisation that their actions, though undertaken for a different purpose, will have the effect of objectively facilitating the enemy's aims. The decision does seem to be a restriction of liability for policy reasons.[104]

Further, by analogy, the House of Lords held in *Chandler v. DPP* that to find someone liable under the Official Secrets Act 1911, it was necessary in the first instance to determine what was the accused's immediate purpose – as distinct from their ultimate purpose or motive – and then determine whether that purpose was prejudicial to what the Crown, in its exercise of the Royal Prerogative, considered to be in the safety and interests of the state.[105] Modern sensibilities might commend that the Government should not be the final arbiter in determining the safety and interests of the state – the national interest not necessarily being synonymous with the interests of the prevailing Government.

This approach had been based on the Court accepting Ahlers' contention that he had believed his acts were lawful – and, in trying to mitigate the severity of the rule that ignorance of the law was no defence, introducing the concept of motive. But this has led to confusion emerging in this area of the law – and if treason law were to be reformed, some qualification might be required – to reconcile the apparently competing approaches of *Ahlers*, *Casement* and s. 8 of the (English) Criminal Justice Act 1967 (which provides that a jury shall not be bound to infer whether an accused intended or foresaw a result of actions by reason only of its being a natural and probable consequence, but shall decide by reference to all the

[101] Gordon, *Criminal Law*, para. 7.19; Cubie, *Scots Criminal Law*, para. 19.3 n. 6

[102] Glanville Williams, *The Mental Element in Crime* (1965), para. 21 *et seq.*

[103] Gordon, *Criminal Law*, para. 7.19

[104] Antje Pedain "Intention and the Terrorist Example" [2003] Crim LR 579, n. 19

[105] [1964] AC 763 – discussed in LRCC WP 49, 32

evidence). It might be thought that surely if there were the slightest intent to help the enemy, the element of intention would be satisfied, regardless of the perpetrator's motive.[106] That an accused might have acted with mixed purposes – such as seeking financial gain by trading in contraband with the enemy – would not negate the existence of the requisite treasonous intent, if one of their purposes (or an obvious consequence of their intended and deliberate actions) were to render performance useful to the enemy. Ordinarily, they would be deemed to be responsible for intending the foreseeable consequences of their conduct, even if they did not mean to bring about that outcome – following *Casement*.

Defining treasonous intent may be one thing, but how do you deal with it in circumstances in which, though the accused's actions are admitted, there is no direct evidence? With no admission and possibly a positive denial, it may be open to argue a notionally non-treasonous motive – that though what they did might look treasonous, their motive was otherwise pure and good. This is perhaps not strictly a problem of definition of intention as such – of substantive law – but a matter of the quantum of proof. It is an inevitable evidential difficulty, causing obvious problems in jury instruction, requiring to be pre-empted.[107]

The remedy might be found in World War II-era American propagandist cases which shifted the gravamen of the crime to the accused's actions rather than their "internal attitudes". In *Chandler v. United States*[108] and *Best v. United States*[109] the accused had contended that notwithstanding that they had intended to aid the German war effort and harm American morale, they otherwise had the special motive of rendering such aid because it would be better for Americans to stop world domination by Jewish Communism. They argued that they had acted out of patriotism and in the nation's best interests – that they had no intent to betray the United States – and that their propaganda urging the United States to stay out of the war and later to surrender was an attempt to aid the United States. The First Circuit rejected the argument that this motive somehow negated their intent to betray, because each accused had the purpose of aiding the enemy.[110] But despite the Court's reasoning, it was not that their motive was irrelevant. They did have a treasonous motive – they were motivated directly by the desire to see Germany prevail (and the USA defeated). It was just

[106] Elagab, "Fighting", 376

[107] Gordon, *Criminal Law*, para. 7.18

[108] 171 F 2d 921 (1st Cir 1948)

[109] 184 F 2d 131 (1st Cir 1950)

[110] *Chandler*, 942-945; *Best*, 137-138

that this motive was mixed with another attenuated or incidental motive.[111] The courts focused on the accused traitors' actions and from them presumed the intent element was satisfied. In doing so, they put the focus of the treason trial and appellate review on the actions themselves rather than on "internal attitudes".[112] Similarly, in *Haupt v. United States* the US Supreme Court affirmed a treason conviction where the accused had given his son shelter, transportation and employment in the United States – while knowing that he was on a sabotage mission. These acts were held as amounting to giving aid and comfort to the enemy.[113] Haupt possessed the requisite treasonous intent to betray – because he knew of his son's role and his aid to his son was thus not merely done as an exercise in paternal care, but with the purpose of assisting him in executing the German sabotage effort.[114] Accordingly, in cases involving multiple potential purposes, or a purpose mixed with motive, treason remains a relevant charge provided one of the purposes is the intent to betray.[115]

IV. Retaining 'Current' *Mens Rea*:

I now consider whether there are parts of the existing *mens rea* of treason which might be retained for these three surviving core offences insofar as they address the 'attitude' of treason – the mindset of a traitor.

The definitional starting point is the concept of 'traitorous contrivance and intention', as manifest by the intention to assist the enemy.[116] The US Supreme Court's decision in *Cramer* is of some assistance in providing a modern explication of the *mens rea* of treason – interpreting adherence to the enemy as an intent to betray the country – thus establishing the 'intent to betray' doctrine.[117] The Court (in a 5-4 majority judgment) recognised that the overt act need not manifest treasonous intent[118] – but that the overt act must specifically give

[111] Broughton, "Snowden", 22-23

[112] Kristen E. Eichensehr, "Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States" (2009) 42 VandJTransnatlL 1443

[113] 636

[114] 641-642

[115] Hurst, *Essays*, 245-246; J. Richard Broughton, "Constitutional Discourse and the Rhetoric of Treason" (2020) 47(2) HastingsConstLQ 303, 335

[116] *Joyce*, 348

[117] Broughton, "Snowden", 16-18

[118] *Cramer*, 45

aid and comfort to the enemy.[119] Cramer, a German-born naturalised American citizen, had wartime dealings with two German saboteurs, but argued that he did not have any treasonous intent and that his overt acts did not manifest treason. In consequence of that association, he was convicted of treason. The Court based treason's *mens rea* on the Constitutional textual requirement of 'adherence' to the enemy. Adherence to the enemy is the disloyal state of mind which the prosecution must prove.[120] Justice Jackson underlined the importance of such adherence:[121]

> " … the crime of treason consists of two elements: adherence to the enemy and rendering him aid and comfort. A citizen intellectually or emotionally may favour the enemy and harbour sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid or comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy – making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength – but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason."

The Court recognised that "… questions of intent in a treason case are even more complicated than in most criminal cases because of the peculiarity of the two different elements which together make the offense."[122] Treasonous intent cannot be shown through overt acts which are merely negligent or undesigned.[123] Properly, "to make treason the defendant must not only intend the act, but he must intend to betray his country by means of the act."[124] Treasonous intent could be inferred from conduct (including the relevant overt act itself), and one is deemed to intend the natural consequences of their actions.[125] In the circumstances of *Cramer*, the overt acts which the prosecution alleged, were relatively trivial and did not of themselves demonstrate treasonous intent.[126] Simply meeting with enemy spies did not amount to treason. Cramer had to actively help the German cause for it to

[119] *Ibid.*, 39-40

[120] *Ibid.*, 30

[121] *Ibid.*, 29

[122] *Ibid*., 31 – the two American elements being only 'Levying War Treason' and 'Adherence Treason', there being no equivalent for acts against monarchy or presidency.

[123] *Ibid*., 31

[124] *Ibid*., 31

[125] *Ibid*., 31-32

[126] *Ibid*., 39-40

constitute treason. The Court was not prepared to affirm a treason conviction merely from an alleged treasonous intent arising from meetings by the accused with the enemy saboteurs – holding that those acts did not have the effect of giving aid and comfort to the enemy. To conclude otherwise would "carry us back to constructive treasons."[127]

This doctrine was repeated in subsequent Supreme Court decisions. In *Kawakita v. United States* Justice Douglas (delivering the Opinion of the Court affirming the treason conviction) explained that treason requires both giving aid and comfort to the enemy (*actus reus*) and treasonable intent (*mens rea*). He defined treasonable (or traitorous) intent thus:[128]

> "One may think disloyal thoughts and have his heart on the side of the enemy. Yet if he commits no act giving aid and comfort to the enemy, he is not guilty of treason. He may on the other hand commit acts which do give aid and comfort to the enemy and yet not be guilty of treason, as for example when he acts impulsively with no intent to betray."

He explained how it might be inferred:[129]

> "Intent to betray must be inferred from conduct. It may be inferred from the overt acts themselves … from the defendant's own statements of his attitudes toward the war effort ... and from his own professions of loyalty to (the enemy nation)."

Properly, the prosecution must prove that the (overt) act of aid and comfort to the enemy was performed with the intention of betraying the country. This approach of interpreting adherence to the enemy as an intent to betray the country was adopted in the (2006) framing of the United States' first treason indictment since World War II. A federal grand jury indicted California-born Adam Yahiye Gadahn for treason for aiding an enemy of the United States – following his appearances in Al-Qaeda propaganda videos, in which he had celebrated the 9-11 Attacks and encouraged Al-Qaeda to use its capability to attack the USA again. Gadahn appeared to have acted in concert with and at the direction of Al-Qaeda leaders. The indictment alleged that Gadahn, an American citizen: "knowingly adhered to an enemy of the United States, namely, al-Qaeda, and gave al-Qaeda aid and comfort …

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[127] *Ibid.,* 40. It might have been thought (following the minority Opinion) that Cramer's established involvement in money laundering for enemy agents would have provided an evidential basis for the relevant treasonable intent – scarcely a carry-back to constructive treason.

[128] *Kawakita v. United States*, 343 US 717 (1952), 736

[129] *Ibid*., 742-743

with intent to betray the United States."[130] Gadahn was killed – in Pakistan, by a drone strike during a counter-terrorism operation in 2015 – before he could be captured and tried[131] – so the competency and relevancy of the treason charge were never properly tested in court. It is moot how much weight be afforded to this American preliminary procedure, given the apparent ease with which prosecutors can secure grand jury indictments.[132] Nonetheless, the formulation of the charge is demonstrative of the broad American approach to previously interpreting 'Aid and Comfort' in the wave of World War II propagandist cases – affirming that if an accused intentionally gives aid and comfort to the enemy, this satisfies the 'intent to betray' requirement.

Hurst suggested that "the natural consequences formula" can be reconciled with the 'specific intent' requirement when contextualised by what the accused knew.[133] He described the treasonous state of mind generally as an intent to "benefit the enemy's war effort and to harm that of that of the United States."[134] Significantly, the defendants in *Haupt* and *Kawakita* "were shown to have declared their animus against the United States war effort and their desire that the enemy prevail." [135] Broughton suggests *Cramer* leaves some ambiguity in treason's *mens rea*, jumping between what appears to be a requirement of a more demanding specific intent approach and of also inferring intent from the natural consequences of one's actions. A requirement of specific intent would be consistent not only with the meaning of 'adhere' in the Constitutional text, and with the desire to maintain a narrow definition of treason.[136] Its significance is confirming that treason requires, in addition to an overt act of aid and comfort to an enemy, proof of a distinctive *mens rea* element, *viz.*, intent to betray.[137] Vasanthakumar observes the Court did not specify whether treason requires specific or general intent, or whether motive is relevant to the question of intent. Repeated exhortations

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[130] *United States v. Gadahn*, SA CR 05-254(A) (CD. Cal. Oct. 11, 2006), First Superseding Indictment: http://www.usdoj.gov/opa/documents/adam_indictment.pdf

[131] "Adam Gadahn: Al-Qaeda's propagandist" BBC (23 April 2015): https://www.bbc.co.uk/news/world-asia-32441864

[132] Tom Wolfe immortalised New York State Chief Judge Solomon 'Sol' Wachtler's quip: "If a district attorney wanted, a grand jury would indict a ham sandwich." (*The Bonfire of the Vanities* (1987), 629).

[133] Hurst, *Essays*, 202-203

[134] *Ibid*., 244

[135] *Ibid*., 246

[136] Broughton, "Rhetoric", 330

[137] *Ibid.*, 330

that treason requires an intention to betray seem to suggest treason requires specific intent – that the accused must not only intend to provide aid and comfort to the enemy but must intend to provide aid and comfort to the enemy in order to betray.[138]

Israeli treason law is also instructive in underlining the essential idea of intent to assist the enemy against the homeland: "If a person with intent to assist an enemy in war against Israel commits an act calculated to do so, he is liable to the death penalty or to life imprisonment."[139]

I propose to subtly refine the concept of treasonous intention from the intent to betray the UK to the intent to betray the UK by aiding its enemies – or the intent to betray the UK to its enemies. Nothing less suffices. Again, this qualification reflects the central idea of 'Adherence Treason' and the imperative to maintain a narrow definition.

We could always approach treasonous intent on the basis of whether a reasonable person would, in all the circumstances of the case, consider it to be treasonous. But given the notorious historical difficulties of definition – and the current environment of promiscuous treason rhetoric ("treason talk")[140] creating the impression that treason is broader than the legal reality[141] – precise judicial instruction would be required – and that would necessarily be ascribable to a fuller definition in any new legislation.

Insofar as I have set out a conceptual framework of 'Adherence Treason' – enemy involvement being pivotal, reframing the *actus reus* in terms of a 'national security harm' principle and enemy coordination – I propose the relevant focus for the *mens rea* requirement would be on the actor's intent to breach their negative duty of allegiance (or duty of non-betrayal) in conjunction ('art and part') with the foreign enemy. The relevant treasonous intent is engaged by betrayal (breaching the negative duty of allegiance) to a foreign enemy. This might be encapsulated in the following notions: the intent to betray – predicated as it is on the intellectual or emotional attachment to the enemy, including the harbouring of sympathies or beliefs involving disloyalty to the UK – and the manifestation of that intent in an act which assists the enemy. This is to be a conjunctive and not a disjunctive test.

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[138] Ashwini Vasanthakumar, "Treason, Expatriation and 'So-Called' Americans: Recovering the Role of Allegiance in Citizenship" (2014) 12 GeoJIntlL 187, 209

[139] Criminal Code (1977), art. 99(a)

[140] Broughton, "Rhetoric"

[141] *Ibid.,* 315

The duty is to be conceptualised in narrow terms – not to betray one's country by aiding its enemies in their attacks – rather than any broad duty to love one's country (which would otherwise engage a positive duty). The emphasis will be on intentional treasonous action – to breach the (negative) duty of allegiance in this way – as evidenced by (more specifically, inferred from) a relevant overt act. This is not about the breach of a moral duty, but about the intentional breach of a more narrowly defined legal duty (that is itself a corollary of the British state discharging its duty of protection).

Suffice to say, the treasonous intent would have to be proved beyond reasonable doubt – though it might typically be expected that there would be a case for an accused to answer from evidence of proven overt acts alone and the inferences which could inevitably be drawn from them as to the existence of treasonous intent. The intent to betray could be proved in the same way as intent for any other crime – whereby *mens rea* is a state of mind, to be inferred or deduced from what has been proved to have been said or done.[142]

V. Relevant Intent with New Modelling:

I now address what would be the relevant intent under this duty-based contractual model – and what would be the *mens rea* appropriate to each of the specific forms of conduct identified in Chapter 3 which should comprise the surviving three core offences.

If we are proceeding on the basis of a contractual model – and thus envisaging the offence of treason in terms of the breach of a contractual duty (of allegiance) – then it might be thought that any breach of that duty involving the commission of threshold conduct would be pivotal – such that 'treasonable' intent could refer to or be inferred from the merely reckless or negligent actions of the protected person (in giving assistance, as I remodelled 'aid and comfort' in Chapter 3, to the sovereign's enemies). Logically, symmetrically, breach of the duty could be triggered through lesser forms of *mens rea* than intention – specifically, recklessness and negligence. But while the breach of the duty could arise through 'mere' recklessness or negligence, I propose that we should conceive it in terms of a material or even a fundamental breach of duty which requires an element of deliberateness. Given a material or fundamental breach of contractual duty of allegiance is posited, the threshold should be a deliberate and intentional breach of this duty (by giving assistance to

[142] See the Jury Manual model direction on assault, 39.2

the sovereign's enemies in these ways) – with the requisite intent being to provide the enemy with material assistance. Deliberate and fundamental breach can always be inferred from the overt character of the treasonable act.

Treason is the breach of the duty of allegiance and of the faithful support which the protected person owes to the sovereign (protecting) power. The 'wrong' of treason consists in the formation of a treasonous intent in violation of one's (negative) duty of allegiance to the sovereign power (or nation). The traitor is guilty of defying the law which legitimately prohibits the formation of such intention. Treason ultimately requires the action and intent to violate that obligation. The key consideration is whether the protected person undertook the apparently treasonable action with the intention of carrying out or furthering treason – with the overt act manifesting and demonstrably proving (inferring) the necessary criminal (treasonable) intent (as well as furthering the accomplishment of the crime). The essence of the recast Scottish crime of treason will be the hostile intent to endanger or threaten the safety and security of the British state.

This could be simply defined in terms of a specific intent to betray the UK. But this does not mean characterising it as a 'specific intent' crime – for that would be quite different. Further, 'specific intent' is not a concept recognised as such in Scots law.

In general terms, treasonous intent could be defined (for the purposes of the revised, surviving core offences) as intentionally breaching (or betraying) one's duty of allegiance to the sovereign power by assisting the sovereign's enemies, including doing so by compassing the death of the sovereign or by levying war against the sovereign in her realm. However, this will not be an exercise in simply defining a general treasonous intent to apply globally to these remaining heads of treason, given the statement from Gordon's *Criminal Law* that *mens rea* might be considered separately not merely with reference to each crime, but with reference to each element of them.[143] It involves defining the intent to do one of the specified *acti rei*.

Betrayal can be envisaged in terms of the breaking or violation of this presumptive contract or relationship of trust. The general *mens rea* of the crime of treason will be the hostile intent to endanger or threaten the safety and security of the British state by knowingly giving help to the enemy. There will be two aspects to this – intention to harm (in terms of the 'national

[143] Gordon, *Criminal Law*, para. 7.09

security harm' principle) – and knowledge that this would assist the enemy. This can be regarded as a conjunctive test – with both elements requiring to be proved for the relevant treasonable intent to be established. This is consistent with the approach adopted by the charge formulated in *Casement* that certain overt acts were committed: "with intent to solicit, incite, and persuade the … British subjects, being Irishmen, to forsake their duty and allegiance to the King and to aid and assist his enemies in the prosecution of the said war against the King and his subjects."[144]

I submit that the relevant *mens rea* for each of the three surviving limbs of treason be couched in the following terms:

- With 'Adhering to the Sovereign's Enemies', the relevant *mens rea* will be the hostile intent to betray the UK (the sovereign) and breach one's negative duty of allegiance (duty of non-betrayal), by knowingly adhering to an enemy of the UK to assist an enemy at war with the UK. In short, the relevant intent will be to betray the UK by helping its enemies – or the intent to betray the UK to its enemies.
- With compassing the death of the sovereign (attempted murder, assault or restraint of the sovereign), the relevant *mens rea* will be the hostile intent to betray the UK and breach one's negative duty of allegiance, by knowingly adhering to an enemy of the UK to assist an enemy at war with the UK, by killing or deliberately assaulting or restraining the sovereign. To summarise, the intent will be to betray the UK to its enemies by attacking the sovereign.
- With 'Levying War Treason' (insurrection), the relevant *mens rea* will be the hostile intent to betray the UK and breach one's negative duty of allegiance, by knowingly adhering to an enemy of the UK to assist an enemy at war with the UK, by levying war against the sovereign in her realm. In short, the intent will be to betray the UK to its enemies by levying war (or 'internal rebellion').

With the new posited offence of committing terrorism against the British people, the relevant *mens rea* will be the hostile intent to betray the UK and breach one's negative duty of

[144] 101

allegiance, by knowingly adhering to an enemy of the UK to assist an enemy at war with the UK, by attacking the general safety of the British state.

Properly, the offender's motive is irrelevant to their criminal responsibility – unless it is consistent with there being a relevant (justification or excuse) defence. I submit that motive as a factor establishing the crime of treason cannot override intention as inferred from conduct.[145] Treason will be established if the prosecution can prove that the accused had the specific intent to betray the UK by aiding its enemies (or the specific intent to betray the UK to its enemies) – regardless of whether there was a dual intent or ulterior motive. Having reviewed the somewhat inconsistent 'modern' treason case law on this thorny issue of mixed motives – as discussed in the twentieth century precedent of *Ahlers*, *Casement* and *Steane* – I suggest that "American Mid-century Modern" case law might offer the best solution – by underlining the irrelevance of mixing motive with another attenuated or incidental motive.

Firstly, if an accused has the specific intention to bring about this result – which this law seeks to prevent, their motive is irrelevant. Their reason or motivation might be religious or ideological conviction, hatred of the UK, or greed – but none of these motives will be relevant to the issue of whether they have intentionally and deliberately committed treason or not. It need not matter why one intends to aid a hostile state or organisation against the UK. A noble motive could provide scope, of course, for a justification defence – a matter which I will explore in Chapter 5 – but it will not negate *mens rea*. The betrayal could, of course, be aggravated because of certain motivations – in assessing culpability for sentencing purposes.

VI. *Mens Rea* in New Scottish Treason:

The absence of specific modern definition of the *mens rea* element of the crime of treason provides something of a blank canvas. I propose that the *mens rea* of the proposed Scottish crime of treason be couched in terms of "acting in breach of the duty of allegiance with *intent* to betray the sovereign and materially assist any enemy state or organisation at war with the United Kingdom."

Since it will be referred to as a crime of intent, in such phrase, the degree of *mens rea* will be that required for the central element of the crime.[146] I suggest the offence be formulated

[145] Elagab, "Fighting", 377

[146] Gordon, *Criminal Law*, para. 7.11

in terms of "acting with intent". To "act with intent" requires a more positive mental state than "acting intentionally" – since "intentionally" doing present actions may simply mean no more than those actions are done voluntarily.[147] It is not just about acting intentionally – but acting intentionally *with the intent to* bring out some further outcome. It connotes treachery and the moral wrong of betrayal. The use of the word 'intent' precludes the possibility of lessor forms of *mens rea* such as recklessness or negligence. It connotes the knowledge element. As an intent to betray the sovereign and material assistance are required, the additional incorporation of 'wilfully' in the definition would be quite superfluous.

A useful reference point for defining the relevant intent in any new treason offence is the (repealed) Treachery Act 1940. It will be appreciated that its treachery offence was not contingent on the existence of a duty of allegiance. Despite its title, its focus was on the prosecution of German saboteurs – it being doubtful whether they were captured by treason laws. Nonetheless, the Act was comparatively modern legislation which made the following familiar express provisions for intent: "with intent to help the enemy" – and the doing of any act: "which is designed or likely to give assistance to the naval, military or air operations of the enemy". The *mens rea* required under the Act was clear and simple – "with intent to help the enemy". No act done without that intent came within the offence of treachery.[148] The Policy Exchange Paper, in suggesting a framework for a new treason offence founded on this precedent and similarly defined intent in terms of "intent to aid" states or organisations with whom the UK is engaged in armed conflict.[149]

It is axiomatic that treasonous intent requires the element of betrayal. I suggest that the betrayal – by breach of the duty of the allegiance – is expressly stated. The stark reminder in the wording of the offence is that the offender is a protected person – that they enjoy the protection of the Crown – to the extent that they owe the Crown a duty (of allegiance) – which they have materially breached and betrayed – thus evoking something of the moral wrong of betrayal. In the dry world of statutory drafting, this is not anodyne language. It reiterates the focal meaning of the term in lay usage and understanding. This is a morally adequate solution to the argument that the *mens rea* of treason as it is currently understood,

[147] *Ibid.*, para. 7.13 n. 39; R. Buxton, "Some Simple Thoughts on Intention" [1988] Crim LR 484, 490

[148] D. Seaborne Davies, "The Treachery Act, 1940" (1941) 4 MLR 217, 219

[149] Richard Ekins *et al.*, *Aiding the Enemy, How and why to restore the law of treason* Policy Exchange (2018), 35

fails to capture the moral wrong of betrayal. It fulfils what should be the 'fair labelling' function of the criminal law – consistent with moral disapprobation.

I propose a conjunctive test – that there must be intent to both betray the country and to assist an enemy state or organisation at war with the UK. This makes it clear that the offender must intend to betray their country by means of the act of enemy assistance.[150]

The language of aid, assistance and adherence might be thought to be interchangeable. But the Australian Criminal Code is instructive in qualifying assistance in terms of the intent to provide material assistance. The Code only expressly provides for intent in relation to 'Adherence Treason' – if the person intends that their conduct will materially assist the enemy to engage in war with the Commonwealth of Australia.[151] The requirement that the intent be to provide material assistance might be considered an unnecessary impediment – because what might be regarded as significant is the fact of treasonous intent and not the effectiveness or futility of its execution. If 'new' treason were conceptualised in terms of 'accomplice liability' – involving coordination with an enemy principal, the content of the aid provided by the adherent accessory need not be significant – assuming it emboldens the enemy or amounts to mere psychological encouragement.[152] The requirement for the intent to provide material assistance is consistent with the 'national security harm' principle. It reflects that treason should be envisaged as the maximum legal response to conduct which is sufficiently serious as to harm our national security and political institutions.[153] It is unnecessary to show that the accused ultimately succeeded in delivering aid to the enemy. It suffices merely that they took overt action to attempt performance. This insistence on the (attempted) provision of tangible support has the advantage of excluding mere acts of dissidence and minor propagandising ('constructive treasons'). Treason is a special crime which should only be prosecuted exceptionally. Further, it need not matter whether material assistance is ultimately provided but that it is the actor's intent that their conduct will materially assist the enemy.

[150] *Cramer*, 31

[151] Criminal Code Act 1995, s. 80.1AA

[152] Broughton, "Rhetoric", 332; "Snowden", 28-31

[153] *Ibid.*, 35

Discrete *Mens Rea* Issues:

Knowledge of Enemy Status:

It would also have to be proven that the protected person had the requisite knowledge that the enemy state or organisation was at war with the UK. Proof of an accused's knowledge of an enemy's status might be fraught in circumstances of only undeclared war or shooting hostilities – a feature of modern warfare. I suggest provisions (in Chapter 3) by which the protected person will be deemed to be on *de jure* notice.

Knowledge of Protected Person Status:

The intent to betray includes the accused's awareness that they owe allegiance.[154] What of the *mens rea* of a home-grown Jihadist who is in the process of obtaining a 'declaration of renunciation' on the discrete issue of whether they genuinely know that they continue to be a protected person? This might be contingent on to what extent their renunciation application has a reasonable basis and is likely to succeed. I suggest that a person remains a British Citizen pending the determination of their renunciation application and the issuing of a 'declaration of renunciation' – and, if applicable, their new citizenship were acquired and not renounced (or revoked) within a subsequent 6-month period. The submission of a renunciation application can only be regarded as an incomplete act. Even then, the issuing of the 'declaration of renunciation' does not exhaust the process – for until the successful applicant has subsequently acquired their new citizenship, they remain a British Citizen – and criminally liable for the crime of treason.[155] They will not be left in a state of limbo. Perhaps those contemplating a 'Jihadi gap year' might be best advised to wait until their application to renounce British Citizenship has been determined – a 'declaration of renunciation' issued – their new citizenship application successfully determined – and a period of 6 months expire lest their new status be imperilled in any way during that time-frame (when the default setting is British Citizenship).

[154] Broughton, "Rhetoric", n. 171; Vasanthakumar, "Allegiance", 208; *Kawakita*, 722

[155] Obtaining enemy naturalisation after the commencement of war is itself an act of treason (*Lynch*).

VII. Conclusion:

The critical thing about treason is its intent. Treason is at the heart of treason, but treason is more than having treason in one's heart. Treasonous intention can generally be understood as not only the intent to commit the specific act – but requiring the additional intent to betray the UK by aiding its enemies.

I have provided a draft formulation for the *mens rea* element of any new Scottish crime of treason which underlines that the breach of the duty of the allegiance is morally blameworthy – by alluding to the violation of the contractual relationship between the protected person and the sovereign power. Treason requires proof of an essential and distinctive *mens rea* element – the intent to betray. I suggest the *mens rea* of any new Scottish crime of treason be defined in terms of the intent to betray the UK by aiding its enemies – or the intent to betray the UK to its enemies. I propose a conjunctive test – that there must be intent to both betray the country and assist an enemy state or organisation at war with the UK. Both aspects must apply to meet the threshold for treasonable *mens rea*. Treason's *mens rea* should reflect the two correlating but subtly distinct aspects of the moral wrong of treason which are the intent to betray country – and the intent to betray country to an enemy state or organisation.[156] These are plainly issues for a jury to decide. The accused's *mens rea* in respect of each aspect would naturally require to be corroborated under Scottish adjective law. Admittedly, this might render Scottish treason more difficult to prove – but that difficulty safeguards against the risk of politically vindictive prosecutions or the punishment of those who simply harbour disloyal grudges.[157] This does not render proof impossible. This is hardly a bar to conviction – because it will not excuse what might be otherwise egregious criminal conduct. It is simply to insist that if treason law were to be resuscitated, it requires confluence of a sufficiently guilty act and guilty mind devoted to betraying the UK to a foreign enemy.

On one view, a treasonous result should not be regarded as intended unless it were proven to be the actor's purpose, i.e., unless they acted to bring about that result. This is consistent with the ordinary meaning of the word. Meanwhile, simply defining *mens rea* will not make it clear that there might otherwise be scope for the operation of certain specific defences to 'new' treason.

[156] Broughton, "Snowden", 26

[157] *Ibid.,* 24

The relevant offence elements of treason, now including intentional elements, would be that the accused:

(1) had a duty of allegiance
(2) breached that duty of allegiance
(3) did so in a material way, by the commission of relevant treasonable conduct
(4) did so with the intent to betray the UK by aiding its enemies (or the intent to betray the UK to its enemies)

I am conscious this makes for a more convoluted offence – but, more importantly, for a deliberately narrow 'intent' offence. It should always be remembered that the charge of treason is a 'dangerous' charge – so it is important to curb the Government's power to bring it – preventing the possibility of it being extended to offences of minor importance. This need not unduly disadvantage the Crown in convicting saboteurs because treasonous conduct is invariably criminalised under alternative statutory offences which do not have the evidential safeguards and limitations that would (and should) accompany treason itself.[158]

Though the relationship of defences to *mens rea* may sometimes be close and direct – to the extent that general defences occasionally overlap with negating *mens rea* – I will approach matters in Chapter 5 on the basis of what separate defences might be available under this emerging model.

[158] *Cramer*, 45

Chapter 5 – Defences

I. Introduction

II. Defences to 'Current' Treason

- (i) Justification Defences
  - (a) Necessity
  - (b) Necessity and 'International Law Defence'
- (ii) Excuse Defences
  - (a) Coercion
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III. Problematic 'Current' Defences – Lack of Legal Certainty

- (i) Justification Defences
  - (a) Necessity
- (ii) Excuse Defences
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IV. Enhanced Defences

- (i) Justification Defences
  - (a) Necessity
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V. Contemplated New Specific Defences

- (i) Justification Defences
  - (a) 'Public Interest Defence'
  - (b) 'International Law Defence'
  - (c) 'Justified Government Whistleblowing'
  - (d) 'Humanitarian Defence'

VI. Objections

- (i) Justification Defences
  - (a) Necessity
  - (b) 'Public Interest Defence' (including 'Justified Government Whistleblowing')
  - (c) 'Humanitarian Defence'
- (ii) Excuse Defences
  - (a) Coercion
  - (b) 'Superior Orders Defence'

VII. Conclusion

I. Introduction:

Having addressed in Chapter 4 the *mens rea* that would be appropriate to the duty-based allegiance model, I now consider the proper limits of that model and the conditions under which protected persons should not be criminally responsible for conduct falling within those limits. The principal question to be asked in this chapter is what type of defences should be available where there has been a material and intentional breach of this duty of allegiance.

This chapter will be in five main parts. In the first (post-introduction) section, I will attempt to ascertain what are believed to be the existing general (non-procedural) defences to the posited surviving three core offences identified in Chapter 3 – *viz.*, 'Compassing Treason', 'Levying War Treason' and 'Adhering to the Enemy'.[1] In the second section, I will identify the issues arising with the otherwise standard defences operating in what is understood to be 'modern' treason law: in particular, the lack of certainty as to the availability of the general common law defences of necessity and coercion. I will engage with the criticisms which might be made of the ostensible defences to 'current' treason. Then in the third part I will make the general case for what should survive and be suitably bolstered. I will argue that there should be express statutory recognition for the partial operation of the general common law defences of necessity and coercion. In the fourth part I will consider whether the exceptional character of the crime of treason also commends provision for new specific statutory defences which have contemporary resonance. I will discuss what justification or (reasonable) excuse defences might or should be available under the suggested new Scottish framework. A potential justification defence will be a 'Public Interest Defence'. The experience of common law countries who have renewed their treason laws is instructive and I will also address the potentiality for an offence-specific 'Humanitarian Defence' as a justification defence for those found ensconced in enemy territory insofar as provision was made following a modern reappraisal of Australian treason law. Contemporary cases raise issues of 'Justified Government Whistleblowing' as a possible justification defence in 'Espionage Treason'. In the fifth part I will address the consequences of and any objections which there might be to these enhanced defences and new defences. I will consider the options for a specifically Scottish refinement of the defences.

[1] S. 5 of the Treason Act 1695 still sets a 3-year limitation period on prosecution for treasonable acts committed within the UK unless the treason consists of "designing, endeavouring or attempting any assassination on the body of the King" (s. 6).

II. Defences to 'Current' Treason:

(i) Justification Defences:

Many academics, in distinguishing between types of criminal defence, do so most readily between justifications and excuses. Justified actors deny wrongdoing – they may concede criminal wrongdoing but deny that it was the wrong thing to do. Excused actors do not deny the wrongfulness of their actions, arguing that there are grounds on which they should not be blamed for them. While justification defences are available to most crimes, there appears to be only limited scope for their application in treason. But there could be circumstances in which an accused maintains that they were not wrong and only committed treason because they were serving a higher good, defying a corrupt or unjustified regime. If someone genuinely wants to act against the UK because they believe that it is the right and necessary thing to do – and regards aiding its enemies as acceptable collateral damage – with any wavering objection already overcome by their firm belief in the acceptability of that action – that would not negate *mens rea*. It would still be consistent with what is posited in terms of treason's exacting *mens rea* – *viz.*, the specific intent to betray the UK by aiding its enemies or the specific intent to betray the UK to its enemies. But a justification defence might still be available, reflecting a difficult choice between two competing evils.

(a) Necessity:

Exceptionally, necessity makes it permissible to commit a crime to prevent a greater harm. The actor is confronted with a choice between two courses of action and is required to choose by reference to the relative values the law attaches to the two courses and their results. The essential feature is a conflict of values and the actor must, in making the choice, consider these relative values.[2] They do not have a duty to choose the course that will realise the greater value. They are (in the absence, exceptionally, of a special duty to act) entitled simply not to act and will not incur any liability for an omission.

While relative values may change from time to time, this appears to be no way to justify treason. An accused's reasonably held belief that they were 'driven' or compelled to perform certain kinds of treasonable acts – with the professed intent to avoid a greater harm still, in the national interest – in circumstances where they subjectively consider that their form of

[2] Gordon, *Criminal Law*, 4th ed. Vol. I (2019), para. 13.02

protest (included acts of sabotage) has been 'necessary' to prevail upon the Government to modify its allegedly harmful foreign policies could be creatively argued to amount to a defence of necessity (or, in England, 'duress of circumstances'). The accused's defence would be: "I did it because I had no alternative."[3]

This might also be loosely conceptualised in terms of self-defence (of others) or a 'Reasonable Excuse Defence'. This approach could apparently justify certain notionally treasonable activities which, have been motivated by the protected person's good or even noble intentions – involving a subjectively broader or longer-term view of the national interest. It is moot whether such a defence so expressed would survive contact with legal reality, as I will survey in the next section.

(b) Necessity and 'International Law Defence':

While there is no specific 'International Law Defence', the Government's breach of international law could conceivably be invoked as an aspect of a 'Reasonable Excuse Defence' or a necessity defence. In *R. v. Ahlers* the accused thought that there was a rule of international law which gave a margin of time to enemy subjects to return home.[4] That such a belief might have been reasonable was substantiated by an Order in Council which allowed German subjects to depart without permits from certain approved ports up to 11 August 1914. It was ultimately not left to the jury to decide whether he was actuated by the intention, and had the purpose, of aiding and comforting the King's enemies, and his appeal against conviction was allowed on that ground.

In an extraordinary sheriff court case Ellen Moxley, Angie Zelter and Ulla Roder were prosecuted on charges of maliciously damaging an unmanned barge involved in the carrying of Trident missiles at HMNB Clyde (Faslane). They maintained that causing the damage had been justified since the deployment of Trident was in breach of customary international law and therefore in breach of Scottish law. At the behest of the defence, Sheriff Gimblett instructed the jury that the accuseds' actions could be justified because they had been seeking to prevent the use of 'illegal' nuclear weapons – by their purporting to follow a 1996 advisory

[3] *Ibid.*, para. 13.01

[4] [1915] 1 KB 616

opinion of the International Court of Justice to the effect that they were illegal.[5] The jury acquitted. The Crown proceeded by way of a Lord Advocate's Reference – and the Appeal Court established that: (1) in a Scottish criminal trial, evidence could not be led as to the content of customary international law, but rather a direction should be given by the judge; (2) the conduct of the Government had not been illegal because the peacetime deployment of Trident as a deterrent was not a threat – and there was no rule of customary international law justifying the commission of a crime to prevent the commission of another crime even in circumstances of armed conflict and actual threat; (3) the accuseds' belief that the deployment of Trident was in breach of customary international law did not provide a defence of justification to the charge of malicious damage; and (4) save for the defence of necessity, it was not a defence to a criminal charge that the relevant actions had been taken to hinder the commission of an offence by another person.[6] Though the defence of necessity could be employed where the malicious damage was remote from the threat to people or property, it was only available where the perceived threat was immediate and there was no alternative to a criminal act to avert the threat.[7] It was not available where the actions of the Government had not been shown to be unlawful.

It might be thought that it is unlikely that the imminence requirement could be satisfied – or that the conduct could have had a reasonable (or even the remotest) prospect of removing the danger – as to substantiate a necessity defence. Nonetheless, a necessity defence was pled by Katherine Gun, a GCHQ translator and member of the security and intelligence services, who was charged in November 2003 with contravening s. 1 of the Official Secrets Act (OSA) 1989, for disclosing intelligence information to the media in February 2003 relating to illegal activities by the US Government in its agitating for the March 2003 invasion of Iraq. Her disclosure concerned illegal surveillance of UN Security Council delegates to obtain leverage to coerce their support. In issue was the then undisclosed and

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[5] *Legality of the Threat or Use of Nuclear Weapons – Advisory Opinion of 8 July 1996* [1996] ICJ 2 – though the judgment of the International Court of Justice was more ambiguous than the defence suggested, the ICJ observing:

"in view of the current state of international law and of the elements of fact at its disposal, [it] cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

[6] *Lord Advocate's Reference (No 1 of 2000)*, 2001 SCCR 296

[7] *Moss v. Howdle*, 1997 JC 123

what subsequently transpired to be the evolving advice of the Attorney General, Lord Goldsmith, on the war's legality. The prosecution was strategically discontinued in February 2004, the Crown offering no evidence. The case had become a *cause célèbre* with the defence expected to argue that Gun's actions in trying to stop an illegal act – specifically intending to prevent unnecessary loss of life in an illegal war of aggression – trumped her obligations under the OSA.[8] The asserted breach of international law was material – not speculative because it corresponded to the Attorney General's original advice – and arguably met the immediacy requirement in circumstances where the outbreak of war, leading to catastrophic loss of life, was imminent.[9] Gun's actions appear historically vindicated given that the Chilcot Report found that in the run up to the conflict, diplomatic options to avoid WMD proliferation had not been exhausted and military action was therefore not a last resort.[10] It was not within the inquiry's remit to assess the legality of military intervention, but it did impugn the legal advisory process: "The circumstances in which it was ultimately decided that there was a legal basis for UK participation were far from satisfactory."[11] Accordingly, it is submitted that while there is no specific 'International Law Defence', an accused could invoke a necessity defence to putatively treasonable conduct where the actions of the Government are arguably unlawful under international law and providing the imminence requirement is satisfied.

[8] Marcia and Thomas Mitchell, *The Spy Who Tried to Stop a War* (2008); *Official Secrets* (2019), Gavin Hood, dir.; "GCHQ translator cleared over leak" BBC (26 February 2004): http://news.bbc.co.uk/1/hi/uk/3485072.stm

[9] All estimates of Iraq War casualties are disputed. The tally of British military casualties from 2003-2009 was 179. Sir John Chilcot believed that at least 150,000 Iraqis were killed during the invasion and subsequent instability, but that the true figure was probably much higher – Ian Cobain, "UK must do more to assess civilian war casualties in future, says Chilcot" Guardian (8 July 2008): https://www.theguardian.com/uk-news/2016/jul/08/uk-must-do-more-assess-civilian-casualties-wars-chilcot

[10] *The Report of the Iraq Inquiry: Executive Summary* (2016), para. 20

[11] *Ibid.*, para. 432

(ii) Excuse Defences:

Excused actors deny either responsibility or culpability. They might concede that their conduct was wrongful (criminally and possibly morally) but seek to avoid attribution of responsibility for it. Classically, coercion is an excuse defence.[12]

(a) Coercion:

If the accused acts under coercion by the enemy, he will not have voluntarily adhered to the enemy cause.[13] It might be thought that someone who is forced to assist the enemy by reason of coercion (or duress) – even if they have done so quite deliberately and intentionally – should not be guilty of treason for this would scarcely be a free and voluntary act. Given 'Adherence Treason' involves the idea of psychological adherence to the enemy, it could hardly be a psychological finding that those acting under coercion adhered to the enemy.[14]

The defence of coercion (or duress in England) is not obviously available to a charge of treason – even in circumstances where there may be certainty that a person of reasonable firmness would have given way.[15] Someone who is forced to commit treasonous acts by coercion would still appear to be guilty of treason. It was suggested that the defence of duress did not extend to some forms of treason in the Law Commission's 1977 Working Paper on criminal defences.[16] They proposed in their 1977 Working Paper on modernising the law of offences against the state that it should apply.[17] In *R. v. Hasan* Lord Bingham, delivering the Opinion of the Court, confirmed that the defence of duress was unavailable to some forms of treason,[18] albeit countenancing its availability for other forms.

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[12] *R. v Hasan* [2005] UKHL 22, *per* Lord Bingham – the defence of duress "excuses what would otherwise be criminal conduct" rather than justifies it (para. 18).

[13] George P. Fletcher, "The Case for Treason" (1982) 41 MdLRev 193, 207-208

[14] *Ibid.*, 207

[15] *R. v. Steane* [1947] KB 997

[16] Law Commission, *Criminal Law Report on Defences of General Application* (Law Com No 83, 1977), para. 2.2

[17] Law Commission, *Codification of the Criminal Law, Treason, Sedition and Allied Offences* (Law Com No 72, 1977), para. 56

[18] Para. 21

In *R. v. Purdy* Oliver J directed the jury that on a charge of treason based on assisting the enemy with German propaganda while a prisoner of war, fear of death would be a relevant defence.[19] Though in *R. v. Steane* Goddard CJ was of the view that duress was not available on a treason charge (before otherwise quashing conviction), coercive circumstances were deemed sufficient to disprove a charge of doing acts likely to assist the enemy with intent to assist the enemy (in contravention of reg. 2A of the Defence (General) Regulations 1939). Macdonald confirms: "Compulsion is a good defence against a charge of adherence to the king's enemies, but not fear of injury to, or loss of property."[20] Further, Macdonald infers that there would be limited scope for a compulsion defence to a charge of treason in non-homicide or non-injury situations.[21] Though apparently contradicting *Steane*, Goddard CJ only referred to duress as a possible defence, holding it unnecessary to consider it because of the particular conditions prevailing where the accused was under enemy control. Meanwhile, *Steane* is cited in relation to the brief discussion confirming the availability of a compulsion defence in certain restricted circumstances in Gordon's *Criminal Law*.[22]

The House of Lords recognised the availability of duress on certain charges of treason in *DPP for Northern Ireland v. Lynch* but precluded its availability to treason involving the death of the sovereign.[23] Then again, the main ruling in *Lynch* was reversed in *R. v. Howe*.[24] The (2018) Crown Prosecution Service Legal Guidance states that duress is a defence at common law to all crimes except murder, attempted murder and treason involving the death of the sovereign,[25] citing *R. v. Gotts*.[26] *Archbold* confirms that coercion will not be available as a defence to a charge of treason involving the death of the sovereign but will be for other categories of treason.[27] The Policy Exchange Paper reiterates that it is unclear whether duress

[19] (1946) 10 JCL 182

[20] Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th ed. (1948), 174; Gordon, *Criminal Law*, para. 43.21 – citing *R. v. MacGrowther* (1746) 18 St Tr 391; *Cf. Purdy*; *Steane*

[21] Macdonald, 171 – citing Hume, *Commentaries*, I, 520: where there is historical acknowledgement that acts of outward warfare for a usurper against a deposed, true king should be held as done under compulsion of the usurper. This passage is significant in recognising compulsion as a relevant and operable defence in certain circumstances.

[22] Gordon, *Criminal Law*, para. 43.21

[23] [1975] AC 653, 681; *Abbot v. R.* [1976] 3 WLR 462, 470F

[24] [1987] AC 417

[25] https://www.cps.gov.uk/legal-guidance/defences-duress-and-necessity

[26] [1992] 2 AC 412

[27] *Archbold: Criminal Practice and Pleading, Evidence and Practice 2020*, para. 17-104

may or may not be a defence to treason – depending on whether the treason alleged would constitute murder or whether it was 'Levying War Treason' or 'Adhering to the Enemy'.[28]

As a general proposition, the Court will not countenance a defence of coercion where the harm done by the accused is greater than the Court's perception of the harm threatened to them – engaging a proportionality test. The holding in *Howe* was that the jury should consider whether the accused acted as they did because they honestly believed that their life was in immediate danger (a subjective test) – and whether a reasonable person of ordinary courage, sharing the accused's characteristics, would have responded in the same way to the threats (an objective test). Where the choice is between the threat of death or serious injury and betraying their country, should a reasonable man reflect that they are choosing the lesser of two evils? As a matter of public policy, in a case where lives are at stake, it would almost inevitably hold that the lives of innocent British Citizens (including British servicemen) are more valuable than the accused's own life. *Howe* affirmed the higher duty of protecting freedom and lives against the rising tide of violence and international terrorism.

The Court in *Thomson v. HM Advocate* accepted that Hume's account of coercion related to the situation of a well-regulated society where everyone was assumed to have ready access to protection from the forces of law and order, and where that assumption could be made to justify the strict conditions which limited the defence's ready exercise. Where that assumption could not be made, the Court considered that a case-by-case approach would have to be adopted where the usual strict criteria would have to be relaxed in accordance with realities.[29]

Coercion is thus not a global defence to a charge of treason – and a hierarchy seems to be involved. It is likely to be excluded where death or serious injury arises, particularly in the terrorist context.

Prisoners of War:

A recognised practical example of its operation would be Prisoners of War who have worked and given assistance to the enemy war effort. POWs can be compelled to work though they have the legal right (and military duty) not to undertake work which has a military character

[28] Richard Ekins *et al.*, *Aiding the Enemy, How and why to restore the law of treason* Policy Exchange (2018), 9

[29] *Thomson v. HM Advocate*, 1983 SCCR 368, *per* LJC Wheatley, 382

or purpose.[30] The coercion must be continuous – throughout the period of the treason – and the plea will not be available where there has been a failure to take the opportunity to escape.[31] Modern coercion case law suggests that disclosure to the authorities on regaining their freedom would only be relevant to the assessment of the credibility of the accused – and not an essential requirement.[32] There was some acknowledgement of the predicament of POWs assisting the enemy by the Law Commission – because they are compelled to work in terms of international convention. Properly, there should be a requirement not only of help to the enemy but that there should be no lawful excuse for giving the help. The Law Commission recommended that the defence should be available in such circumstances as a defence to treason.[33] This reflects allowance being made for the degree of physical and mental endurance which can be reasonably expected from POWs. It should be remembered that despite the perception created by cosy post-war cinematic depictions, POWs may be subjected to cruel, inhuman and degrading treatment, and suffering from starvation and malnutrition. These hardships would have been widespread toward the end of the Second World War as the Red Cross parcel system broke down with long-term POWs starting to die from malnutrition.[34] After a lengthy period of incarceration, they may become increasingly vulnerable to inducements and pressurisation. Depending on context and severity, these are factors which may be potentially exculpatory or at least reduce culpability. This defence could conceivably have traction with a repatriated POW, who has been 'turned', or more particularly 'brain-washed' by the enemy[35] – albeit that scenario might be technically more consistent with the more obscure defence of compulsion (rather than coercion), where the subject would have been deprived of the power to form the intention of doing the act which constituted or caused the crime.[36]

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[30] Convention (III) relative to the Treatment of Prisoners of War, Geneva (1949), arts. 49, 50 and 78

[31] *Steane*; Alastair Brown, "Offences against the State" (2005), para. 542 (in *Stair Memorial Encyclopaedia*)

[32] *Thomson*

[33] Law Com WP 72, para. 56

[34] Adrian Weale, *Patriot Traitors: Roger Casement, John Amery and the Real Meaning of Treason* (2001), 173; Rebecca West, *The New Meaning of Treason* (1964), 83

[35] See *Homeland*, Howard Gordon and Alex Gansa, Seasons 1-3 (2011-2013) – based on the Israeli production *Prisoners of War*, Gideon Raff, dir. (2010-2012); and, more fantastically, *The Manchurian Candidate* (1962) John Frankenheimer, dir. – based on Richard Condon's novel (1959)

[36] Gerald H. Gordon, "Criminal responsibility in Scots law" (1960) PHD thesis, University of Glasgow, 49: http://theses.gla.ac.uk/2753/1/1960gordonphd.pdf

Meanwhile, compulsion by threats (of immediate death or bodily harm) continues to be unavailable as a defence under the Canadian Criminal Code to the commission of the offence of (high) treason.[37] Notably the treason prosecution of Australian Major Charles Cousens was discontinued after he had pleaded at the committal proceedings that he had acted under duress, the captured radio broadcaster having been apparently compelled to broadcast propaganda for the Japanese or face execution.[38] Chapman encapsulated his dilemma thus: "Just how much could the nation expect from volunteer soldiers who had given up their careers to fight for the Empire and, having lived through the hazards of battle, had fallen into the hands of a cruel enemy?"[39]

Claims of duress were unsuccessfully pled in *D'Aquino v. United States*[40] and *Gillars v. United States*,[41] both World War II-era cases involving American nationals recruited as Axis propagandists. Iva Toguri D'Aquino, the daughter of Japanese immigrants, became synonymous with the name 'Tokyo Rose' (even though its usage predated her broadcasts). In 1940 she went to Japan to help care for to care for an elderly relative. As war loomed, she sought a passport from the US Counsel, but since this was not processed by the time of the Pearl Harbour attack, she was unable to leave. She claimed that the Japanese authorities forced her into the role and that she merely broadcast light musical entertainment while smuggling cigarettes and food to Allied POWs. She argued that however correct the jury instruction might be in an ordinary case involving a person accused of crime committed in their own country claiming to have been coerced by an individual, the trial court's instruction (almost identical to that approved in *Gillars*) was in error – particularly in its requirement of apprehension of immediate and impending death or bodily harm – where the accused person was in an enemy country, unable to obtain protection from their home country and where the compulsion is on the part of the enemy government itself. The Ninth Circuit held while that might apply to a person impressed into military service of the enemy, the circumstances did not commend departure from the ordinary rules. There was no rule which would permit

[37] Criminal Code, s. 17

[38] *Ex Parte Cousens; Re Blackett* (1946) 47 SR (NSW) 145. Though Cousens was committed for trial, the New South Wales Attorney-General discontinued the prosecution on 6 November 1946 – see Ivan Chapman "Cousens, Charles Hughes (1903-1964)" Australian Dictionary of Biography, Vol. 13 (MUP) (1993): http://adb.anu.edu.au/biography/cousens-charles-hughes-9842

[39] Ivan Chapman, *Tokyo Calling: The Charles Cousens Case* (1990)

[40] *D'Aquino v. United States*, 192 F.2d 338 (9th Cir 1951)

[41] *Gillars v. United States*, 182 F.2d 962 (DC Cir 1950)

a person under the protection of an enemy to claim immunity from prosecution for treason merely by setting up a claim of mental fear of possible future action on the part of the enemy. The citizen must manifest a determination to resist commands and orders until such time as they are faced with the alternative of immediate injury or death. Properly, the person claiming the defence of coercion and duress must be a person whose resistance has brought them to the last ditch.[42] But there was simply no evidence of any determined refusal on D'Aquino's part which might have provoked coercion – or induced immediate and actual danger to her.[43] This was a controversial case and she eventually received a full and unconditional Presidential Pardon from the retiring President Ford in 1977.[44]

Marital Coercion:

The now-abolished English defence of marital coercion was never an operable defence to a charge of treason.[45] It involved the rebuttable presumption that a wife who committed an offence in the presence of her husband did so under coercion. If it appeared that a wife had been acting as an equal partner, she might have expected to be excused capital punishment (women having been denied equal privileges with men on the benefit of clergy until 1691).[46] In Scotland, a wife's plea of subjection was relevant only as regards mitigation of punishment.[47] This defence had formerly existed in the US, though the presumption did not arise in a heinous offence such as treason (or murder). It was unsuccessfully deployed in the treason prosecution of Mildred Gillars ('Axis Sally').[48] The long-since risible historical

[42] 359

[43] 360

[44] David Bird, "Ford Pardons 'Tokyo Rose' in One of Last Official Acts as President" NYT (20 January 1977): https://www.nytimes.com/1977/01/20/archives/ford-pardons-tokyo-rose-in-one-of-last-official-acts-as-president.html

[45] Criminal Justice Act 1925, s. 47 (which had abolished the presumption and, in its place, incorporated the original common law defence) was repealed by the Anti-social Behaviour, Crime and Policing Act 2014, s. 177.

[46] Matthew Hale, *History of the Pleas of the Crown*, Vol. I (1736), 44-45; William Blackstone, *Commentaries on the Laws of England*, Vol. IV. 6th ed (1775), 28-29; Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016), 174

[47] J.L.J. Edwards, "Coercion, Compulsion and Criminal Responsibility" (1951) 14 MLR 297, 312

[48] S. 2.09(3) of the American Law Institute's influential template Model Penal Code (1962) (republished with revised Commentary in 1984) recommended abolition, albeit it is not legally binding.

justification was that wives were seen as obedient to their husbands, compliant, control being exercised through physical chastisement, not being economically independent, not having legal personality or autonomy[49] – the so-called 'melancholy doctrine'.[50] But treason, like murder, was so heinous, it was supposed a married woman would revolt against even her husband's authority, than be guilty of them[51] – "the husband, having broken through the most sacred tie of social community by rebellion against the State, has no right to that obedience from his wife, which he himself, as a subject, has forgotten to pay."[52] This exclusion precludes so-called Jihadi Brides arguing that they have been subject to this form of coercion in anything but modern Western conditions – to do otherwise would be to deny them agency[53] – but the prevailing religious and ideological culture might instead be the overriding factors in establishing a legally relevant defence of coercion. Domestic pressurisation remains a potentially mitigating factor.[54]

Terrorism Grooming and Online Radicalisation:

In circumstances where a minor has been groomed and become entangled in a terrorist organisation, their systematic corruption could be inventively argued as an aspect of a coercion defence. Where children shy of the age of majority have been inculcated with radical ideas – whether through parental influence, the agency of the parents' choice of spiritual mentors or social media – then it might be thought that such groomed and coerced children should be able to avail themselves of a coercion defence for 'underage' offending.

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[49] Gerald McCoy, "Uxorial Privileges in Substantive Criminal Law: A Comparative Law Enquiry" (2007) PHD thesis, University of Canterbury, 23: https://ir.canterbury.ac.nz/bitstream/handle/10092/3674/thesis_fulltext.pdf?sequence=1

[50] *R. v. Peel*, The Times 8, 15 March 1922

[51] McCoy, "Uxorial Privileges", 78, 229 n. 311, 408 n. 33

[52] Blackstone, IV, 29

[53] Ester E.J. Strømmen, "Jihadi Brides or Female Foreign Fighters? Women in Da'esh – from Recruitment to Sentencing" (2017) GPS Policy Brief 1

[54] This kind of pressure was claimed by 21-year-old Hana Khan, convicted of funding terrorism, and sentenced to 21 months' imprisonment (suspended for 2 years), following trial at the Central Criminal Court in 2015. She had not been radicalised but had given £1,000 to her British Jihadist boyfriend in Syria on the misguided notion they would marry. He instead used it to fund terrorism – see "Hana Khan sentenced for helping to fund terrorism" BBC (27 March 2015): https://www.bbc.co.uk/news/uk-england-london-32090088

It could be argued that this is a form of 'grooming' which excuses criminal responsibility. Though the role of online grooming is recognised in the commission of sexual offences,[55] the law in other areas falls woefully behind this new kind of grooming. Edwards suggests the English duress defence might now have to be developed for adolescents and vulnerable adults in recognition of these exceptional new offences and circumstances of terrorism grooming – in much the same way as family law recognises psychological duress and coercion for the purposes of marriage. This is particularly important given the abolition of the once wider defence of marital coercion which had recognised a broad range of women's experience, including cultural pressures.[56] If she were ever prosecuted, this formulation of coercion defence might be conceivably available to Shamina Begum for the pre-adulthood phase (time latitude) of her offending, when she left the UK aged 15 to join the Islamic State in Syria.[57] An accused's account of such alleged indoctrination might be expected to be suitably corroborated by psychological evidence. This, inevitably, would be a factually complex defence and may only be regarded as mitigation.[58] There would be scope for slavery or trafficking victims invoking the statutory defence available under s. 45 of the Modern Slavery Act 2015 (extending to England and Wales only), treason not being an excluded offence.[59]

(b) 'Superior Orders Defence':

Scots law does not conclusively rule out the defence of obeying superior orders.[60] It is recognised as a valid defence, provided the order is not obviously unlawful or (less certainly)

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[55] Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, s. 1

[56] Susan Edwards, "Protecting Schoolgirls from Terrorism Grooming" (2015) IntFamLaw 3.236

[57] Hanna Yusuf and Steve Swann, "Shamima Begum: Lawyer says teen was 'groomed'" BBC (31 May 2019): https://www.bbc.co.uk/news/uk-48444604

[58] In *R. v. Boular* [2019] EWCA Crim 798, the Court of Appeal partially allowed the appeal of teenager SB in relation to a life sentence imposed following conviction for offences of preparing acts of terrorism under s. 5 of the Terrorism Act 2006. Sentence was reduced on the basis that the sentencer had given insufficient weight to the particularly potent cumulative effect of the two factors of youth (SB being 15 to 17 years old during the indictment period); and grooming (radicalisation through the malign influence of her mother and mother's friends).

[59] Sch. 4

[60] James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para. 6.01

is known to be unlawful.[61] In contrast, the common law of England does not recognise a general defence of superior orders (or of Crown or executive *fiat*).[62] Given that substantive treason law is governed by the law of England,[63] it appears to be impliedly precluded in any Scottish prosecution, in defiance of Scottish common law.

Since treason is necessarily a crime at only a national level – and the impugned order would be emanating from a superior at the level of national law – in circumstances in which refusal could result in punishment at the national level – compliance with that order would appear to be excusable at the national level, even if there may be no relief from punishment at the international level for an order which is manifestly illegal.[64] Gordon suggested that the basis for the defence was 'probably' public policy and that would explain why an order may be lawful according to the municipal law of a particular country, and yet be unlawful according to international law[65] – and that it may also extend to actings in pursuance of an illegal order, for it is necessary for the proper functioning of the armed forces that its members be disciplined and obedient – theirs not to reason why. Considered from the perspective of the individual soldier, it is unfair to train them in automatic obedience, and then penalise them for acting in the way the state itself has trained them to act.[66] Obedience to the orders of a superior officer is a fundamental aspect of military discipline, without which the functioning of military operations would be impaired.[67] Further, the actor is arguably not acting independently. What is involved is not coercion or compulsion, but the right or duty of a soldier to carry out their orders without incurring liability under the criminal law.[68] This might apply to enlisted men ordered to collaborate with the enemy, a fictional example being those under the command of Alec Guinness' misguided or demented Colonel Nicholson.[69]

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[61] *Ibid.*, para. 6.11; Hume, I, 54; *HM Advocate v. Hamilton and Parker* (1861) 4 Irv 58, 72; *William Ingles* (1810) Burnett 79, 80

[62] *Archbold*, para. 17-123; *Lewis v. Dickson* [1976] RTR 431, DC; *Howe, per* Lord Hailsham, 427; *Yip Chiu-Cheung v. R.* [1995] 1 AC 111, PC

[63] Treason Act 1708

[64] Nuremberg Principle IV; Rome Statute of the International Criminal Court (1998), art. 33

[65] Gordon, *Criminal Law*, para. 13.30

[66] *Ibid.*, para. 13.31

[67] Chalmers and Leverick, *Defences*, para. 6.03; Hilaire McCoubrey, "From Nuremberg to Rome: Restoring the Defence of Superior Orders" (2001) 50 ICLQ 386, 391

[68] Gordon, *Criminal Law*, para. 13.30

[69] *The Bridge on the River Kwai* (1957) David Lean, dir.; Pierre Boulle, *The Bridge over the River Kwai* (1952)

Reported Scottish cases on 'superior orders' are few and far between and the two cases invariably cited – *HM Advocate v Sheppard*[70] and *HM Advocate v Macpherson*[71] – do not deal directly with the defence.[72] Obeying superior non-military, wartime, diplomatic orders was not specifically pled as a defence in *Ahlers* though the conviction was otherwise quashed on appeal. Absence of recent domestic case law means the Courts would probably take account of case law from other jurisdictions and in the international context.[73] In other common law jurisdictions, this defence has been ruled out entirely or the 'manifest illegality' test has been adopted.[74] A superior orders defence was pled in the South African treason case of *S v. Banda and Others* – held after an abortive military coup in Bophuthatswana – and the Court drew a distinction between unlawful orders and 'manifestly and palpably illegal' orders.[75] No reasonable soldier would know a 'manifestly and palpably illegal' order to be otherwise – nullifying the duty to obey.

III. Problematic 'Current' Defences – Lack of Legal Certainty:

I now identify the problems in the operation of these general defences to the crime of treason and the extent to which they are only potentially available to certain forms of treason. As treason law has not developed to keep pace with the new forms of treason which feature more prominently from the second half of the twentieth century – principally, 'Espionage Treason' or propagandising for the enemy – equally, neither have the defences that might be potentially available to them. As treason law must evolve to reflect advancements in technology and communications, so must the defences to it.

[70] 1941 JC 67

[71] Edinburgh High Court, 18 Sep. 1940, unrepd.

[72] Chalmers and Leverick, *Defences*, para. 6.10

[73] *Ibid.*, para. 6.11 – the High Court of Australia did not recognise it as a general defence at common law (*A v. Hayden (No. 2)* (1984) 156 CLR 532), though it features in the Western Australia Criminal Code, s. 31 (having been modelled into a defence of 'lawful authority') – and as a limited defence in Queensland.

[74] *R. v. Finta* [1994] 1 SCR 701

[75] 1990 (3) SA 466, *per* Friedman J., 496

(i) Justification Defences:

(a) Necessity:

The availability of a necessity defence is uncertain. While the Law Commission engaged with and recommended that duress should be available in certain circumstances as a defence to treason in its 1977 Working Papers on Treason and Defences, it did not engage with the defence of necessity. Nor did the Policy Exchange Paper do so. While there is cursory consideration of a compulsion defence in the Treason section in Gordon's *Criminal Law*, there is no such engagement with necessity. If it does apply, it may do so only creatively. If a reasonable or lawful excuse defence could be derived from the holding in *Ahlers* acknowledging the reasonableness of the accused's belief, a necessity defence could possibly be countenanced, conceptualised in terms of there being a reasonable excuse for its operation.

Necessity defences also involve a high evidential threshold. With modern communication tools it will be difficult to justify any failure to disclose, even while ensconced in enemy territory – though again, that may not be fatal.

(ii) Excuse Defences:

(a) Coercion:

The Law Commission underlined the lack of legal certainty – specifically consistency – as to the availability of duress as a defence to a charge of treason:[76]

> "It has long been accepted that duress is a defence to at least some conduct which amounts to treason. It is, however, difficult to differentiate between treasonable conduct which should have the defence and that which should not. Hale suggested that duress should be a defence to treason only in time of war or public insurrection but not in peacetime, on the basis that a person who falls into enemy or rebel hands cannot resort to the law for protection. This does not seem to us to be a valid basis of distinction, and indeed treasonable conduct covers such a wide range that it would be unsatisfactory to break it down into categories to determine in which cases duress should be a defence and in which it should not. Nor do we think that this is necessary. The test of duress which we recommend requires the nature of the conduct, and, of course, its consequences, to be weighed against the degree of pressure brought to bear. This means that so long as duress is not excluded as a defence there will be sufficient flexibility to allow the jury to accept duress as a defence in appropriate cases, and

[76] Law Com WP 83, para. 2.45

> reject it in those which are not appropriate. Accordingly we recommend that duress should be a defence available on a charge of treason."

These recommendations, of course, were never enacted and gained no subsequent traction. The fact that recommendations were made highlights the ambiguity of the position. The Policy Exchange Paper endorsed New Zealand legislation which does not permit duress to be a defence to treason.[77]

A difficulty in the operation of any coercion defence involving the grooming of minors is that 16-year-olds are now deemed to have almost as much autonomy as other adults. The United Nations Convention on the Rights of the Child (UNCRC) (to which the UK is a state party and signatory) defines a child as any human being under the age of 18 (unless the age of majority is attained earlier under national legislation). Age may be a mitigating factor, but never a complete defence. Raising the age of criminal responsibility specifically for the crime of treason is not a solution though as childhood corruption might still lead to a continuing offence being committed past any new threshold age. However, a general defence of coercion could still have traction in young adulthood if there has been continuing abuse or its effects subsisted well into adulthood.

(b) 'Superior Orders Defence':

The position as to the availability of a 'Superior Orders Defence' in the military or law enforcement context to a charge of treason in Scotland is also uncertain. Further, the limits of the defence are by no means clear.[78] Assuming its availability, it is uncertain whether the determination of the order's manifest illegality is a question of law or if there is scope for subjectivity on the part of the actor. The defence is not mentioned in the (unofficial) Draft Criminal Code for Scotland.[79] The defence does seem to have been completely ruled out in English law by the House of Lords[80] and the Privy Council[81] – albeit by *obiter* comments. The general post-war assumption had been that the plea of superior orders was no longer a

[77] Policy Exchange, *Aiding the Enemy*, 36

[78] Gordon, *Criminal Law*, para. 13.31

[79] Chalmers and Leverick, *Defences*, para. 6.08, n. 50

[80] *R. v. Clegg* [1995] 1 AC 482, 498

[81] *Yi Chiu-Cheung v. The Queen* [1995] AC 111, *per* Lord Griffiths, 118

relevant defence to charges involving war crimes, crimes against humanity or crimes against peace. A plea of superior orders in response to charges founded upon violations of the international laws of armed conflict has since 1945 been treated as a plea in mitigation of sentence rather than as a substantive defence,[82] having been tainted by its connotations with the so-called 'Nuremberg' defence.[83] But art. 33 of the Rome Statute of the International Criminal Court has controversially 'restored' superior orders as a defence where a crime has been committed pursuant to the order of a Government or of a superior, whether military or civilian. A person who is bound to obey a superior is under a legal duty to refuse to carry out an order received from that superior to do some act or make some omission – though only if the order were manifestly illegal. McCoubrey argues that this plea could still be a part of a defence of duress or mistake of fact or law – or be considered as a circumstance for mitigation of punishment.[84] Rather than establishing a new and stricter doctrine, the Charter of the IMT at Nuremberg had correctly applied pre-existing doctrine in extreme and unusual circumstances, but was mistakenly taken to have developed a new approach which was then applied with a potentially distorting effect for the generality of circumstances. The Rome Statute has merely recognised the essential doctrine of superior orders as it had existed prior to 1945 and which, properly understood, should not have been thought essentially to have been changed even in 1945.[85]

There is little support for the proposition that superior orders should always act as a complete defence. Most commentators support an intermediary position whereby superior orders could provide a defence in certain limited circumstances,[86] but the law would require to be clarified, not only in its application to treason.

Its availability in the non-military context – including even law enforcement – is also uncertain. It has tended to arise in the context only of the master-servant relationship.[87]

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[82] Charter of the International Military Tribunal at Nuremberg (1945), art. 8

[83] *The Handbook of Comparative Criminal Law* 1st ed. (2010) (Kevin Jon Heller and Markus Dubber, eds.), 75

[84] McCoubrey, "Rome", 386

[85] *Ibid.*

[86] Chalmers and Leverick, *Defences*, para. 6.05; J.L. Bakker, "The Defense of Obedience to Superior Orders: the Mens Rea Requirement" (1989) 17 AmJCrimL 55; I.D. Brownlee, "Superior Orders: Time for a New Realism" (1989) Crim LR 396, 410; Geoffrey Creighton, "Superior Orders and Command Responsibility in Canadian Criminal Law" (1980) 38 UTorontoFacLRev 1, 16-17; P. Eden "Criminal Liability and the Defence of Superior Orders" (1991) 108 SALJ 640, 646

[87] *Calder v Robertson* (1878) 4 Couper 131; Gordon, *Criminal Law*, para. 13.35

Gordon's *Criminal Law* suggests that the only category of importance at the present day is that of soldier.[88]

IV. Enhanced Defences:

In accordance with the prevailing trend, I submit that there should finally be express statutory recognition for the partial operation of the general common law defences of necessity and coercion.

(i) Justification Defences:

(a) Necessity:

I argued in Chapter 2 that the duty of allegiance is not a one-sided, servile relationship. There is or should be a certain symmetry involved. The protected person is entitled to resist a usurpative state which is acting *ultra vires*; to curb its excesses, even when or especially when it is purportedly acting in national self-defence in discharging its correlating duty of protection. If the state were waging war illegally, then even violent resistance to such a military campaign might not have a treasonable aspect to it. Resisting tyranny may not amount to betrayal and can even be justified. It may even be a moral duty. I concluded that the duty of allegiance is not one of blind allegiance and that there might be suitable scope for bolstering existing justification defences or even creating new justification defences, ensuring greater balance in the contractual relationship between the sovereign power and the people (or protected persons). Given the availability of the defence of necessity or a less exacting defence of reasonable excuse are uncertain under existing treason law, I recommend formal recognition of a necessity defence – also new variants of it – as a way of policing this relationship and providing some semblance of equilibrium.

This is consistent with the Draft Scottish Criminal Code[89] which would apply necessity (as broadly defined) to all crimes – though this defence would be applicable to the taking of human life "only if that is done to save human life".[90] Treason was not included in the Code for reasons of legislative competence and its drafters are unlikely to have had treason in

[88] *Ibid.*, para. 13.30; Chalmers and Leverick, *Defences*, para. 6.16

[89] While based on existing Scots law, the Draft Code was never intended as an exact restatement.

[90] Clauses 24(3); Gordon, *Criminal Law*, 3rd ed. Suppl. (2005), para. 13.22

contemplation when they proposed the extension of the defence of coercion (although that would not stop general defences applying). Nonetheless, it is an obvious reference point and inspiration. This is a significant area in which Scottish treason might be differentiated from the 'current' British treason law and any revised British model. It is not suggested as an exercise in Scottish exceptionalism – but as an aspect of the modelling of this offence in which Scottish treason would be expected to be different, thus justifying separate creation.

(ii) Excuse Defences:

(a) Coercion:

It is axiomatic that if the protected person were unable to discharge their (negative) duty of allegiance because their capacity has been overridden by coercion (or duress), they should be able to avail themselves of this defence. Having constructed a new treason offence where the treasons will be 'Adherence Treason' or derivatives of it – with contemporary treason involving the likelihood of its commission in enemy territory where there can be no resort to a relevant (UK) authority – this potentially invokes coercion as a relevant defence or excuse.[91] Again, the Draft Scottish Criminal Code would apply coercion (as broadly defined) to all crimes – save this defence would be applicable to the taking of human life "only if that is done to save human life".[92] This approach is also consistent with the logic of the Law Commission that if the defence were to be allowed at all, it should apply to all offences.[93] On this model coercion would surely continue to be excluded as a defence to a charge of 'Adherence Treason' or 'Levying War Treason' in circumstances in which the offender has been implicated directly in the killing of British Citizens. This limitation is understandable given that the procedure and the rules of evidence in proceedings for treason (and misprision of treason) equate to murder proceedings – and standing that coercion is, notoriously, one of the hardest defences to make out with duress invariably not being a relevant defence to a charge of murder (or even attempted murder).[94]

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[91] *Steane*

[92] Clauses 24(3) and 29(3); Gordon, *Criminal Law*, 3rd ed. Suppl., para. 13.22

[93] Law Com WP 83, paras. 2.44-2.46

[94] *Howe*; *Collins v. HM Advocate*, 1991 SCCR 898

(b) 'Superior Orders Defence':

Though it might be controversial, there could be discrete circumstances where a 'Superior Orders Defence' might have validity – and given it remains a relevant defence in Scots common law and the public policy grounds underpinning it – I suggest provision be made on grounds of legal certainty.

I propose its operation be extended from the military to the diplomatic context as civil servants are also acting as instruments of the British state – it being inequitable for the state to punish them for acting in accordance with the commands of their bureaucratic or elected chiefs. It might be appropriate they be afforded this 'protection' given the treasonous rhetoric surrounding the conduct of Brexit negotiations.[95] This could be regarded as the complement to the posited 'Justified Government Whistleblowing' defence.

There would be the unsurprising and unimpeachable qualification of the 'manifest illegality' test – or its refinement in this context, to 'manifest treasonableness'. Accused persons would be excused for obeying any order which were in fact treasonable, provided it were not blatantly so. I suggest that the determination of the order's manifest treasonableness would be a question of law. The issue may also be blurred with employees of so-called independent state-financed bodies carrying out the functions of government away from direct Ministerial supervision.

Again, this is a significant aspect of the modelling of this offence in which Scottish treason might be expected to be different – thus justifying a separate Scottish law. There may be no principled reason why the two jurisdictions should take a different approach. The reform process at UK level might lead to a similar conclusion – particularly given that the defence (with its 'manifest illegality' qualification) is now reaffirmed under international criminal law. But the English lacuna remains.

[95] "We're not 'traitors' or 'remoaners' – but this is a dark time to be a civil servant" Guardian (1 October 2019): https://www.theguardian.com/commentisfree/2019/oct/01/traitors-remoaners-civil-servant-brexit-language
See also J. Richard Broughton, "Constitutional Discourse and the Rhetoric of Treason" (2020) 47(2) HastingsConstLQ 303, 335

V. Contemplated New Specific Defences:

I now consider what provision might be made for new specific defences which would be consistent with and permissible under this duty-based contractual model.

(i) Justification Defences:

(a) 'Public Interest Defence':

I propose the operation of a 'Public Interest Defence' – particularly in relation to non-violent categories of treason, such as 'Espionage Treason' or propagandising for the enemy. As this might countenance subjectively 'necessary' political violence, acts of sabotage or humanitarian activity in enemy territory, it might be considered as an aspect of or sub-category of the necessity defence. This is a development of the notion of a legitimate motive to defend the nation's interests (possibly longer-term interests rather than its immediate military situation) in a different way.

This kind of defence also reflects the compelling logic of the posited allegiance contractual model – whereby the contract could be unilaterally revoked by the protected person on grounds of a repudiatory or fundamental breach of contract – if, on a reasonable view, the British state has behaved in such a way that they consider themselves discharged from wholly honouring the contract on this discrete issue – equating to intervening illegality or frustration. Rather than 'my Country, right or wrong', this might be conceived as 'my Country, right only'. This connotes the idea that you can be a 'patriotic traitor' – that in your own mind, you did the right thing.[96] This resonates with the concept of the 'conscientious traitor' which was mooted in left-wing Weimar Republic circles but never enacted – that the German law of 'Exterior Treason' should not apply to the whistleblower justifiably disclosing rearmament violations of the Treaty of Versailles – on the ground that they owed a higher sense of duty to the world than to any individual state (including their own).[97] Colonel Claus von Stauffenberg and the other conspirators behind the abortive '20 July' plot (Operation Valkyrie) agonised about whether they were committing treason. They were,

[96] J. Richard Broughton, "The Snowden Affair and the Limits of American Treason" (2015) 3 LMULawReview 5, 22; Newt Gingrich, "Meet the Press Transcript", NBC (1 June 2014): https://www.nbcnews.com/meet-the-press/meet-press-transcript-june-1-2014-n121571

[97] John N. Hazard and William B. Stern, "Exterior Treason: A Study in Comparative Criminal Law" (1938) 6(1) UChiLRev 77, 90

particularly after having sworn an oath of loyalty to Hitler, Germany's legal ruler. But as they could be held to have acted against tyranny, to wrest political control of Germany and its armed forces from the Nazi Party, to ensure continuity of government and make peace with the Western Allies, their conduct was morally defensible – and, following any regime change and restoration of the rule of law, would have been legally-defensible on this basis.

Jane Fonda's *prima facie* treasonable actions in 1972 of posing in an NVA anti-aircraft battery in the infamous 'Hanoi Jane' photo-shoot[98], making at least ten radio broadcasts from North Vietnam,[99] excoriating American servicemen as war criminals[100] – could be defensible under this proposition. Simply invoking Constitutional freedom of speech protections would not have sufficed because propagandising for the enemy may not have First Amendment protections.[101] She was still arguably acting in the broader American public interest – on an ostensibly reasonable and not unpopular view of it – by protesting "against the (war) crimes committed in our name".[102] Even if this defence had been removed from a jury's consideration, it is doubtful whether a unanimous verdict could have been secured at such a politically charged time.[103]

US Army Private Manning was court-martialled for passing classified material to *WikiLeaks*. In 2013 Manning was convicted of various espionage and military offences though the military judge ultimately acquitted Manning of the most serious charge of aiding the enemy

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[98] AP footage (22 July 1972):
https://www.youtube.com/watch?v=eBViVboG0Mk

[99] *The Vietnam War*, ep. 9 (2017) Ken Burns and Lyn Novick, dirs.:
https://www.youtube.com/watch?v=JnFVFz9d6vU

[100] AP footage (27 July 1972):
https://www.youtube.com/watch?v=Zn7g2MMzBmM

[101] *Schenck v. United States*, 249 US 47 (1919); *Chandler v. United States*, 171 F.2d 921 (1st Cir 1948), 939; *United States v. Burgman*, 87F Supp 568 (DDC 1949), 571; Douglas A. Kash, "The United States v. Adam Gadahn: A Case for Treason" 37 CapULRev 1, 23

[102] https://www.youtube.com/watch?v=MSfWDQzmpr8

[103] There was evidently no political will to prosecute. The administration was perhaps rightly afraid "she would make a monkey out of (them)" in what would have been a disastrous show trial, circus even – as conceded in Henry and Erika Holzer's polemical case for her prosecution, *Aid and Comfort: Jane Fonda in North Vietnam* (2006):
https://www.c-span.org/video/?171009-1/aid-comfort

(by knowingly giving out intelligence through indirect means).[104] The prosecution argued that Manning was not a whistleblower, but a traitor, who understood the value of compromised information in the hands of the enemy and took deliberate steps to ensure that they, along with the world, received it. It was argued that Manning's "wholesale and indiscriminate compromise of hundreds of thousands of classified documents" for release by *WikiLeaks* staff – "essentially information anarchists" – was not an ordinary journalistic disclosure, but a bid for "notoriety, although in a clandestine form."[105] The judge did not permit Manning to raise a defence of motive for his guilt and sentenced Manning to 35 years' confinement. Though some of the documents Manning disclosed were of little or no public interest, many were – thus, an *amicus* brief argued, justifying mitigation of sentence.[106] The departing President Obama commuted Manning's sentence to 7 years' confinement.[107] Fugitive ex-CIA employee Edward Snowden professes that he did not indiscriminately disclose classified surveillance activities of the National Security Agency (NSA) and the Five Eyes Intelligence Alliance (FVEY) to journalists, evaluating every document to ensure that each was legitimately in the public interest[108] – though his consistency is suspect and it is alleged that the improper redaction by the New York Times exposed intelligence activity

[104] *United States v. PFC Bradley E. Manning* (30 July 2013):
https://fas.org/sgp/jud/manning/032912-dismiss-ch1.pdf
https://fas.org/sgp/jud/manning/appeal-053118.pdf

[105] Charlie Savage, "In Closing Argument, Prosecutor Casts Soldier as 'Anarchist' for Leaking Archives" NYT (July 25, 2013):
https://www.nytimes.com/2013/07/26/us/politics/closing-arguments-due-in-manning-leaks-case.html?hp&_r=0

[106] "United States v. Private First Class Chelsea Manning" Open Society Justice Initiative (17 May 2017):
https://www.justiceinitiative.org/litigation/united-states-v-private-first-class-chelsea-manning

[107] Charlie Savage, "Chelsea Manning to be Released Early as Obama Commutes Sentence" NYT (17 January 2017):
https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html

[108] Glenn Greenwald, "Edward Snowden: the whistleblower behind the NSA surveillance revelations" Guardian (9 June 2013):
https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance

against Al-Qaida.[109] Snowden self-identifies as a whistleblower, distinguishable from a 'leaker' who "only distributes information for personal gain."[110]

Perhaps unsurprisingly, a 'Public Interest Defence' is not countenanced under Britain's secrecy laws, even in circumstances where the threat engaged does not involve espionage by foreign powers and terrorist groups. In 1985 Civil Servant Clive Ponting was prosecuted under s. 2 of the OSA 1911 for disclosing documents concerning the sinking of *ARA General Belgrano* to Labour MP Tam Dalyell. His defence was that disclosure to a Member of Parliament was in the public interest and was protected by Parliamentary Privilege. The trial judge excluded his 'Public Interest Defence' – with a notoriously narrow direction which scarcely survives history's judgment: "the public interest is whatever the Government of the day says it is". Though there was no defence left for them to consider, the jury still acquitted – in defiance of judicial instruction – the jury's prerogative.[111] This act of jury nullification does seem to be regarded as *de facto* precedent for a 'Public Interest Defence'.[112] There has been a broader recognition of whistleblowing as legitimate since the 1980s.[113] But while the inclusion of a 'Public Interest Defence' was the subject of Parliamentary debate, it was not ultimately incorporated in the final version of the OSA 1989 which repealed the public interest defence in s. 2 of the OSA 1911. This defence is also omitted from secrecy laws in

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[109] Alan Yuhas, "John Oliver presses Edward Snowden on whether he read all leaked NSA material" Guardian (6 April 2015):
https://www.theguardian.com/us-news/2015/apr/06/edward-snowden-john-oliver-last-week-tonight-nsa-leaked-documents

[110] "Edward Snowden Condemns Trump's Mistreatment of Whistleblower Who Exposed Ukraine Scandal" Democracy Now! (26 September 2019):
https://www.democracynow.org/2019/9/26/edward_snowden_on_writing_his_memoir

[111] "1985: Falklands' row civil servant resigns" BBC:
http://news.bbc.co.uk/onthisday/hi/dates/stories/february/16/newsid_2545000/2545907.stm
Martin Rosenbaum, "Clive Ponting case: Where is the investigators' report?" BBC (18 May 2011):
http://www.bbc.co.uk/news/uk-politics-13430012

[112] Andrew Pierce, "Editors defend Telegraph decision to pay" Telegraph (26 September 2009):
https://www.telegraph.co.uk/news/newstopics/mps-expenses/mps-expenses-rebuilding-politic/6231381/MPs-expenses-whistleblower-prosecution-acquitted-Clive-Ponting-The-Observer.html

[113] Gehan Gunasekara, "Whistle-blowing: New Zealand and UK Solutions to a Common Problem" (2003) 24(1) StatuteLawRev 39. The Public Interest Disclosure Act 1998 formalised protections from workplace victimisation for employees making public interest disclosures (albeit employees could previously invoke a public interest defence to being litigated against for breach of confidence) – though they will not be qualifying disclosures if offences are committed by making them.

other countries which used the OSA 1911 as a blueprint – except Canada which has added this defence to its Security of Information Act 1985. Nonetheless, its operation is limited to situations in which the accused has complied with certain preliminaries before making disclosure and their purpose in doing so is to reveal an offence committed by another in their official duties.[114] In *R. v. Shayler* the House of Lords held that a defendant charged under ss. 1(1) and 4(1) of the OSA 1989 could not mount a 'public or national interest defence' in respect of unauthorised, whistleblowing disclosures which he, a former member of the security services, had admittedly made.[115] It also held that the OSA – which afforded no 'Public Interest Defence' to disclosure of classified information – did not breach art. 10, ECHR. While the aims and the legal basis of the OSA can comply with art. 10(2), the appellant had argued that the matters which he had wished to disclose, were not being kept secret in the interests of national security – it being the right of the public to be informed about the abuse of the powers given to the security services – leading to pressure for reform – and that the lack of any 'Public Interest Defence' was incompatible with art. 10(2). Lord Hope did feel that the non-availability of such a defence rendered the OSA vulnerable to criticism on the ground that it lacked the necessary 'sensitivity'.[116] But there was a competing public interest in play – specifically, the public interest in national security. Striking that balance required the Court to speculate as to the consequences in national security terms if the prosecution had to prove beyond reasonable doubt any potential damage to the security system if a particular disclosure were made. Lord Hope stated: "Damage already done may well be irreparable, and the gathering together and disclosure of evidence to prove the nature and extent of the damage may compound its effects to the further detriment of national security."[117] The strict controls requiring official authorisation could not be considered disproportionate. Ultimately, the interference was justified by the legitimate objectives secured by the legislation. Sufficient and adequate safeguards to satisfy art. 10(2) had been provided. Limited whistleblowing was permitted, that the accused might bring their concerns over security issues to the authorities' notice without disclosing restricted matters to the media. Judicial Review was a further remedy if any potential whistleblower took issue with the refusal of authorisation for disclosure – it being for the

[114] S. 15

[115] [2002] UKHL 11

[116] Para. 70

[117] Para. 85

Court to ultimately determine whether refusal is justified and within the range of reasonable responses.[118]

The Australian Criminal Code provides a defence to the offence of materially assisting the enemy for acts done in good faith. The defence is established where the person 'tries in good faith' to show that the Sovereign, Governor-General, or Prime Minister is 'mistaken in any of his or her counsels, policies or actions'. The Court may consider whether the acts were done for purposes 'intended to be prejudicial to the safety or defence of the Commonwealth' – or 'with the intention of causing violence or creating public disorder or a public disturbance'.[119] But the defence is not available for treason.

(b) 'International Law Defence':

Inspiration for an 'International Law Defence' might be found in the above-mentioned Weimar-era concept of the 'conscientious traitor'. This also reflects the notion of the 'contract' with the protected person being repudiated in circumstances in which the sovereign power has breached it on grounds of illegality.

It is difficult to go behind the decision in *Lord Advocate's Reference (No 1 of 2000)* which makes it clear that an individual cannot rely on customary international law as a defence to a domestic criminal charge. There was no adjudication in the Gun prosecution, and, in any event, the contemplated defence was necessity. While informed by an asserted material breach of international law, it was not conceptualised as an 'International Law Defence'.

Further, there can be a lack of legal certainty as to what international law (customary or otherwise) is. Ascertaining what it might be – and proving what it might be – presumably by conflicting expert opinion – is fraught with subjectivity. Even then, it may not always be just, rational, binding, or enforceable. It may conflict with the sovereignty and authority of the British state. The legitimacy of international law – its legal validity, particularly in the domestic context – is outwith the parameters of this thesis. Nonetheless, it is doubtful if any UK Government would allow its wartime foreign policy to be challenged or undermined, by

[118] Shayler also unsuccessfully attempted to argue a defence of necessity – on the basis that he committed the crime "to avoid imminent peril of danger to life or serious injury to himself or towards individuals for whom he reasonably regarded himself as responsible."

[119] Criminal Code Act, s. 80.3

proxy, in a criminal court by maverick accused persons running a legally dubious defence predicated on nebulous ideas of what international law should be – and thus publicly subvert the national interest (or at least the prevailing Government's view of it). A Scottish Government of a difficult political complexion from the UK Government might not be so troubled.

I do not propose to expressly provide for such a free-standing 'International Law Defence'. Only a necessity defence could meet the immediacy requirement. There may be cases in which the defence could argue that there is an absence of treasonous *mens rea* in circumstances in which the UK is in (continuing) breach of customary international law – but I submit that the essential fact of enemy agency (as commended in Chapter 3) cannot justify or excuse treasonable conduct on this pretext only.

(c) 'Justified Government Whistleblowing':

I propose that there should be express provision for a specific 'Justified Government Whistleblowing Defence'[120] – a 'Public Interest Defence'. The essence of 'Espionage Treason' is betraying state secrets and this justification defence could apply in circumstances where the accused has made unauthorised disclosures of state secrets – even if designed to harm the Government and otherwise culpable under the OSA – but has done so in the public interest where the disclosure could have reasonably been believed to reveal grave government wrongdoing.

Whistleblower protection laws and political philosophers commonly state that a breach of state secrecy by disclosing classified documents is justified if it serves the public interest.[121] We should want to protect whistleblowers because, as a starting proposition, government whistleblowing can be regarded as ethical in circumstances in which the aim is to protect the public from government wrongdoing. A government acting unethically or illegally, is not acting in its own and its people's best interests – and a citizen (or subject) is not acting disloyally in blowing the whistle. Properly, we should recognise the public value of government whistleblowing. Responsible people – including and even especially those who

[120] The term coined by Candice Delmas, "The Ethics of Government Whistleblowing" (2015) 41(1) SocTheoryPract 77 – see also Eric R. Boot, "The Feasibility of a Public Interest Defense for Whistleblowing" (2020) 39(1) LawPhilos 1, who conceives this as 'Classified Public Whistleblowing'.

[121] *Ibid.*

have signed the OSA – should reasonably do so when they believe more harm than good will occur if they should otherwise stay silent. It can be reasonable to act against the state in the true interests of society. Virtuous whistleblowers are to be commended if they genuinely and reasonably believe that they have acted in protecting the greater public interest. They are not disloyal in reality – and, if anything, could show greater loyalty (to country). A whistleblower would be entitled to act according to Kantian deontological (or duty-based) ethics, where moral obligations will have nothing to do with consequences – or possibly on utilitarian grounds, contingent on a cost-benefit analysis. This might be conceived as a form of political vigilantism which can be justified if exposing information that the public should know and deliberate about – and as approximating to civil disobedience as a collective cognition and legitimacy enhancing device.[122]

(d) 'Humanitarian Defence':

Problematically, providing humanitarian aid could be deemed consistent with aiding the military operations of the enemy – and to do so by providing even material assistance.[123] Humanitarian activity which has assisted the enemy (and thus provided them with aid and comfort) – feeding an enemy army, even by recklessness or negligence – could expose the protected person to the risk of treason prosecution. Under 'current' treason law, a 'Humanitarian Defence' could not even be creatively argued in terms of an absence of *mens rea* – or as a form of necessity or 'Reasonable Excuse Defence' (given their uncertain availability) – or, where inadvertent aid and comfort is given, as a defence of error as to fact (albeit 'accident' is a denial of *mens rea*, rather than a defence as such). More desperately, it would be a matter for jury nullification.[124] This is unsatisfactory, and I draw on the 'new' Australian statutory humanitarian defence in making provision for such a statutory

[122] *Ibid.*

[123] We would reasonably expect our military to provide such 'material assistance' to captured enemy combatants – to feed, shelter and medicate them. The Joint Service Manual of the Law of Armed Conflict (2004) provides that in international armed conflicts, wounded and sick POWs must be given necessary medical treatment without discrimination on non-medical grounds: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf

[124] See the discussion of the Clive Ponting prosecution in 1985

defence.[125] I propose that the evidential burden for establishing this defence falls on the accused – in accordance with the specific provision made in the Australian Criminal Code.[126]

To alleviate the harsher consequences of a strict application, this defence is justifiable on normative grounds and might also be conceived as an aspect of 'Good Samaritan' laws where, though there is no legal duty to assist, there may be an ethical obligation to do so. However, I would not insist on the American qualification whereby 'Good Samaritan' protections apply to aiding and assisting people only in imminent peril or danger – because people in a conflict zone are self-evidently in imminent peril or danger – any such additional condition being superfluous. As a matter of principle, the Courts should be reluctant to penalise people who are attempting to bring aid to the victims of war, even in enemy territory, or where they might be found in what has recently been enemy territory. To disincentivise relief work – or to introduce an avoidable impediment to it – when people may be dying – is immoral and unethical. Even if sceptical of the notion of an ethical foreign policy, it could be at variance with the pursuit of a foreign policy with an ethical dimension.[127]

When Australian treason law was modernised by the Security Legislation Amendment (Terrorism) Act 2002, provision was made, at the Labor Party's insistence, for the availability of such a defence to the treason offence of assisting the enemy (to engage in military conflict). It had not hitherto existed.[128] Concerns had been raised during the precursor 2002 Senate inquiry that the definition of 'assist' was sufficiently broad as to encompass the provision of humanitarian relief.[129] This was rectified by providing express exemption where assistance constitutes humanitarian relief. The Australian Criminal Code expressly provides for a 'Humanitarian Defence' to a charge of treason if the accused has engaged in conduct solely for the provision of aid or assistance of a humanitarian nature, the

[125] Criminal Code Act, s. 80.3

[126] S. 80.1AA (6)

[127] "Robin Cook's speech on the government's ethical foreign policy" Guardian (12 May 1997): https://www.theguardian.com/world/1997/may/12/indonesia.ethicalforeignpolicy

[128] The pre-amendment law was found in the Crimes Act 1914, s. 24

[129] Australian Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (4 December 2006), Ch. 4.8

accused bearing the evidential burden.[130] This might be considered a sub-category of necessity.

Suffice to say, there is no interpretative case law on the Australian 'Humanitarian Defence' – there continuing to be an absence of Australian treason prosecutions. But it might be expected that the obviousness of this factor would arise at the investigative stage as to preclude prosecution. It would be hoped that express provision should put investigators and prosecutors on notice as to its possible application and remedy the risk of confirmation bias in disregarding inconvenient evidence to their favoured hypothesis in what is an emotionally charged offence.[131]

VI. Objections:

I now consider what problems or issues might potentially arise with these affirmed defences and new defences.

(i) Justification Defences:

(a) Necessity:

The plea of necessity is scarcely tolerated as a general defence elsewhere in the criminal law, the possibilities for abuse being considerable.[132] It would be difficult to argue that the competing value in any value-conflict is greater than the invariably overriding or absolute values associated with treason law, such as national security. The great negative value of the crime of treason must surely always tip the balance.[133] In any assessment of the hierarchy of values, could the state ever concede that there might be greater values than its own integrity and survival? Then again, there is no generally accepted hierarchy of values and relative values change from time to time.[134]

The greater and entrenched availability of defences of necessity (and coercion) would not necessarily make for legal certainty. Assuming adoption of the strict limitation in the Draft

[130] Criminal Code Act, s. 80.1AA

[131] Barbara O'Brien and Phoebe Ellsworth, "Confirmation Bias in Criminal Investigations" (2006) SSRN

[132] Gordon, *Criminal Law*, para. 13.09

[133] *Ibid.*, para. 13.11

[134] *Ibid.*, para. 13.04

Scottish Criminal Code – "only if that is done to save human life"[135] – this could allow an accused to present as arbiter of what human lives have lesser value. It is scarcely desirable if an accused should be able to legitimately argue that their life was somehow more important than others' – especially their co-citizens, in wartime. But these are defences which would be carefully regulated by the Court – on a 'case-by-case' basis – removable from the jury's consideration if exacting relevant criteria were unfulfilled. It is one thing to make these defences available, another to prove them. This is not unique to the crime of treason. How the decision of a private citizen, in 'Homicidal Treason', to unilaterally take another's life might be justified or excused poses complex legal, ethical, and philosophical dilemmas.

It might be considered incongruous that this defence be extended to treason involving assassination of the monarch. In Chapter 3 I argued that compassing and imagining the death of the sovereign should survive in the narrow form of impeaching a foreign state-sponsored attack on the monarch – because such acts involve symbolically perpetrating harm to national security and/or the British people – and that its retention recognises that an attack on the person of the monarch will be an attack on the British state (and people). It may well be that this head of treason is so egregious as to defy the prevailing trend for the greater availability of these defences and the momentum created by the Draft Scottish Criminal Code. If not excluded, would there be less justification or excuse for attacking the person of the monarch than that of other co-citizens – and thus placing a higher onus on the accused to discharge the evidential burden?

(b) 'Public Interest Defence' (including 'Justified Government Whistleblowing'):

It might be thought that propagandising for the enemy could be justified on free speech grounds – under reference to art. 10, ECHR. But that approach would be based on only a cursory and incomplete understanding of art. 10 and without regard to its obvious restrictions.[136]

While I have suggested that as a starting proposition, whistleblowing can be regarded as ethical – and thus normatively justifiable – a compelling counter-argument can be readily made that it is neither ethical nor moral. Though transparency informs public debate and ensures public accountability, it is still necessary and legitimate for governments to keep

[135] Clauses 24(3) and 29(3); Gordon, *Criminal Law*, 3rd ed. Suppl., para. 13.22, n. 94

[136] See n. 101

certain information, particularly that pertaining to national security, secret. Governments are entitled to have their secrets protected – and the proposition that anyone can justify disclosing secrets for a good cause is problematic.[137] Whistleblowing causes harm – in the sense that public trust is damaged and national security threatened. To insist upon complete transparency and reject legitimate secrets is anarchic.

The choice which the whistleblower makes is not a matter of objective duty. Given it values the few over the many, it appears to be incompatible with basic assumptions of morality. The state or sovereign power is or should properly be the overriding object of their duty of loyalty or allegiance for the reasons I have set out in Chapter 2. External whistleblowing is wrong because the subject has the contractual duty of allegiance to the sovereign power. It is not merely a *prima facie* duty of allegiance which can be whimsically breached.

Then again competing interests are involved – a principle of lesser evils – a matter ultimately for adjudication. A complicated balancing exercise could be involved in circumstances where though the enemy has been materially assisted, and their interests seemingly put above the nation's short-term interests, the assistance may not have been to the detriment of the nation's longer-term interests.

In issue with any defence of 'Justified Government Whistleblowing' is that the operative concept – the public interest – is invariably left unclarified, creating legal uncertainty. This leaves potential whistleblowers without sufficient certainty that their disclosures will be protected by this defence – leading many to err on the side of circumspection and thus depriving the public of much-needed information (the 'chilling effect').[138] Invariably, defining the public interest is challenging and complex. It may be a familiar part of the legal lexicon – but it is an amorphous political concept as much as a legal concept – and notoriously difficult to pin down exactly what it means. There is no overarching definition – and it must be contextually determined on a case-by-case basis. It must be interpreted in light of present-day conditions and changing perceptions. How egregious does government wrongdoing have to be to warrant external whistleblowing? How reasonable does the whistleblower's belief in that wrongdoing have to be? How damaging must their disclosures be in terms of meeting the posited *actus reus* of materially assisting the enemy – as to engage proportionality considerations? Disclosures containing nuclear launch codes or

[137] George P. Fletcher, "Ambivalence About Treason" (2004) 82 NCLRev 1611, 1625

[138] Boot, "Whistleblowing"

compromising intelligence agents will be less excusable than those which simply embarrass. Failing an agreed upon definition of the public interest or a process to determine it, judges' applications of the public interest in whistleblowing cases have been criticised for demonstrating 'judicial idiosyncrasy'.[139] Admittedly, this defence is not without its difficulties, but it can be rendered workable and feasible. I commend Boot's approach of the civic account of the public interest – a common-interest approach that public interests are those interests that we all share in our role as members of the public, including the shared interest in the rule of law, fundamental human rights, legal certainty and political accountability. Determining where the public interest lies – and the weight to be assigned competing interests – requires careful judicial consideration of the gravity of the harm to national security likely to ensue from the disclosure and the significance of its benefit. It should be appreciated that given that in a treason case the 'national security harm' principle (identified in Chapter 3) will (or should) already be engaged, it may be difficult for the whistleblower to argue that they have minimised that harm. In any event, Boot's approach should provide sufficient guidance for judges to undertake the necessary proportionality style balancing exercise and thus curb the excesses of judicial discretion that lead to legal uncertainty.

There is the familiar dilemma of whether the posited 'reasonable belief' test would be subjective or objective. Whistleblowers may not always act from the purest motives in exposing government wrongdoing. They may not always act in a responsible manner – but capriciously, even malevolently – far-removed from the dutiful Kantian agent. While there may be personal sacrifice involved, there should be no presumption that their activities are a courageous act of conscience. Characteristically, they can be saboteurs, not heroes. Assessment of their conduct and motivation in determining whether they have acted reasonably is a value judgment. Is that assessment to be based on subjective or only objective criteria? Paradoxically, they may do the right thing for the wrong reasons. I argue that the 'reasonable belief' test be not only subjective, but also objective – in respect that not only must the whistleblower themselves believe their disclosure would be in the public interest, their subjective belief must also be objectively reasonable.[140]

[139] *Ibid.*

[140] *Ibid.*

A strategic trial concern for the prosecution might be that a jury would be needlessly confused by the availability in 'Espionage Treason' cases of such a statutory 'Public Interest Defence' when juxtaposed against its non-availability as a statutory defence to alternative charges under the OSA – and conflate the two and thus erroneously apply this defence to the OSA aspect of the case despite its non-application. It might be preferable to stick with an absolute rule about protecting state secrets.[141] But the jury would surely be presumed and expected to follow careful judicial directions – to the effect that the OSA framework is conceptually different, because by signing the OSA, the Crown Servant is committing to a further allegiance – a lifelong commitment to HMG (and not the British people as Keira Knightley's Gun asserts in *Official Secrets*).

It might be thought that if a 'Public Interest' Defence were not permitted under the present OSA, then why should it be countenanced under a revised treason law – particularly since treason is a more serious category of offence still? Its recognition in treason law may detract from coherency and consistency in the body of offences against the State – sending mixed signals by that. The OSA provides for offences of strict liability in connection with some kinds of disclosure. It is not intended to deal exclusively with threats to national security. While the fact of public interest disclosure is not an operable defence to an offence under the OSA, I submit that a 'Public Interest' Defence to treason should still be available in such circumstances. Causing ostensible harm to the Government's interests – to the apparent, present, narrow national interest – in this way could be criminal but would not necessarily be treasonous if done to secure the broader, future public interest. The availability of this defence to the charge of treason does not mean that you should be allowed to commit secrecy offences with impunity. The OSA is not invalidated (though whether a 'Public Interest' Defence should be countenanced under the OSA is another argument). It should be remembered that the point of civil disobedience or dissidence is that the cause should be sufficiently important that you are willing to suffer the consequences of your conduct and you may still fall foul of the OSA. But treason is in a different category – a more serious offence with the sentencing entry point of life imprisonment – that should be hard to prove.

Though there may be a tendency for the mainstream media to demonise leakers, then again, any such prejudice and alleged oppression will always be curable by direction. Further, they tend to be competent in utilising social media to create a rebuttal narrative.

[141] Fletcher, "Ambivalence", 1625

It might be thought that the prospective whistleblower should surely avail themselves of the more obvious legal avenues available in terms of reporting their grievances to internal authority ('Internal Whistleblowing'). Even allowing for trust issues, why should it be acceptable for them to be allowed to circumvent the internal mechanisms and escalate disclosure to external authority or the public ('External Whistleblowing')? That requires compliance with a convoluted disclosure regime – of first resort to recognised authority figures (unless the communication were necessary to avoid death or severe injury). In the *Wikileaker* scenario, the purpose is to make very public disclosures – not directly prompt internal government investigation of abuses. Prior resort to relevant authority figures should not be a *sine qua non* for availability of this defence to treason. As was recognised in *Shayler*, no such other avenues may be open. That the accused may not have exhausted these possibilities would not necessarily mean that they intended to betray the UK – though attempted prior disclosure to suitable authority figures could corroborate this defence and bolster credibility.

Express protection of whistleblowing may also be considered a superfluous provision – because if the actor lacked treasonous *mens rea*, then a defence would not be strictly necessary. But its formal recognition simply reflects the likelihood of this issue already being in play, particularly in cases of 'Espionage Treason'. Though the relationship to *mens rea* may sometimes be close and direct – to the extent that general defences could occasionally overlap with the negation of *mens rea* – approaching matters on the basis of the separation of defences is more conducive to fairness in the administration of justice.[142]

Necessity defences involve a high threshold – and the availability of these new derivative defences might afford an accused too much latitude, allowing them to turn their trial into a political circus. While contingent on an objectively reasonable construction of the actor's subjective motivation, this, of course, is still a subjective exercise, removed from the norms of legal certainty. The prosecution might be expected to attempt to argue that a bogus justification is an abuse of the defence, rendering it irrelevant – but the accused is surely entitled to testify in detail about the political views motivating their action as an aspect of *mens rea* in any event. If an accused is inevitably asked the big, open question of why they

[142] Claire McDiarmid, "How Do They Do That? Automatism, Coercion, Necessity, and *Mens Rea* in Scots Criminal Law" in *General Defences in Criminal Law: Domestic and Comparative Perspectives (Substantive Issues in Criminal Law)* (Alan Reed *et al.*, eds., 2014), Ch. 11

did something, the prosecution cannot legitimately object to their answer. It should be remembered that a lay jury will be the ultimate arbiters – making the definitive assessment of whether the accused's belief or motivation are objectively reasonable. Their determining a political defence is appropriate in the prosecution of a political crime, where there may be the perception and/or narrative of a politically motivated prosecution. This is a vital check and balance against a politically-inspired abuse of process – or neutralising the perception of such. A criminal prosecution of a political crime must be expected to allow for the ventilation, scrutiny, and rebuttal of political defences.

(c) 'Humanitarian Defence':

Humanitarian assistance is not without its complications. While civilian humanitarian relief in an enemy war zone is commendable, it is moot whether it should legitimately extend to working on critical infrastructure – lest it be militarily deployed. Building a well or the provision of medical treatment might be an understandable, defensible human impulse. Constructing a road or a helicopter landing pad (which might be used by military traffic) is fraught with difficulty. In essence, humanitarian aid should be about providing material and logistical assistance to people desperately needing help – particularly in conflict zones. Its primary objective is saving lives, alleviating suffering, and maintaining human dignity.[143] But its efficacy – particularly food aid – in conflict-affected situations has been heavily criticised – with reported accounts, ironically and counterintuitively, of aid aggravating conflicts in recipient countries. Malnourished armed groups can seize aid – money, goods, food – diverting it from its intended recipients.[144] Of course, its providers should be accountable, but their coming into direct or indirect contact with proscribed groups is an occupational hazard. There may be unavoidably difficult issues of proof – and providing effective rebuttal – in circumstances in which an accused has been found ensconced in enemy territory. Again, there is obvious potentiality for the abuse of this defence. The family of Jack Letts claim that he was carrying out humanitarian work in ISIS-controlled territory.[145] Ruhal Ahmed of the so-called 'Tipton Three' originally claimed to be doing

[143] Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship* (2003), para. 1: https://www.ghdinitiative.org/ghd/gns/principles-good-practice-of-ghd/principles-good-practice-ghd.html

[144] Nathan Nunn and Nancy Qian, "US Food Aid and Civil Conflict" (2014) 104(6) AmEconRev 1630

[145] Darshna Sonni "'Jihadi Jack' has mental health condition, say parents" Channel 4 (4 February 2006): https://www.channel4.com/news/jihadi-jack-has-mental-health-condition-say-parents

charity work when found in criminative circumstances in Afghanistan.[146] It is doubtful whether Ahmed genuinely was the literal innocent abroad given his Islamist antecedents. You might well have a low threshold of suspicion about the veracity of such claims – particularly unilateral missions without involvement of recognised aid agencies. But it is precisely in a warzone that humanitarian work will be required – such that it should be recognised. In any event, it is not as if an accused would be required to discharge the evidential burden by corroborated evidence – though they may have presentational difficulties absent it. There will be inevitable grey areas – it being for the factfinder to determine the accused's true motive and intent when providing aid in enemy territory.

(ii) Excuse Defences:

(a) Coercion:

Just as the general policy of the law in relation to coercion is to discourage association with criminals and promote wariness in excusing the criminal conduct of those who do so,[147] the policy of the law in relation to coercion in treason should be discouraging association with the enemy and only scrupulously excusing the treasonable conduct of those keeping such company. *Per* Lord Bingham in *Hasan*: "the defence of duress is excluded when as a result of the accused's voluntary association with others engaged in criminal activity he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence".[148] There are also policy problems in relying on duress as a mitigating factor in respect that the general approach should be to maintain that the stronger the temptation or pressure to commit a crime, the stronger the law's threat should be to counter-balance it.[149]

Coercion defences are open to abuse. Smith observed unremarkably: "… duress is a unique defence in that it is so much more likely than any other to depend on assertions which are peculiarly difficult for the prosecution to investigate or subsequently to disprove".[150] There is a low threshold of suspicion where such a defence is engaged – and this would be particularly so in extraterritorial cases where the investigative difficulties will be even

[146] *The Road to Guantánamo* (2006) Michael Winterbottom, dir.

[147] *Hasan*, para. 38

[148] *Ibid.*, para. 39

[149] *Ibid.*, para. 71

[150] J.C. Smith's commentary on *R. v. Cole* [1994] Crim LR 582, 584

greater. The Law Commission's 1993 Working Paper on offences against the person recommended that the persuasive burden of proof shift to the accused to establish duress on balance of probabilities – though this has never been acted upon.[151] But placing the persuasive burden on the accused is unlikely to be consistent with the Human Rights Act and would violate the presumption of innocence articulated in art. 6(2), ECHR. Any such reverse onus clause is only acceptable if proportionate. Properly, this should be characterised as an evidential burden, with the accused only being required to raise the issue which the Crown then must disprove to the normal criminal standard.[152]

The form of direction for a general defence of coercion in the (Scottish) Jury Manual combines objective and subjective elements which is recognised as leading to difficulties in formulating jury directions and great care would be required in selecting the appropriate form of words to use in any particular case.[153] This is one of the hardest defences to prove. It should be, because the accused is effectively putting themselves forward as the arbiter of what was lawful conduct. Even if available to a charge of treason, the practical difficulty in proof – before a lay jury – would be of an accused, possibly having been found in criminative ('treasonous') circumstances, claiming that their life is more important than their co-citizens. Should a jury be afforded this 'moral elbow-room'? Then again, the issue must be couched in terms of the strict limitation in the Draft Code – "only if that is done to save human life".[154]

(b) 'Superior Orders Defence':

Enshrining a 'Superior Orders Defence' in such a significant statute – even if only to preserve the intermediary position – would not be consistent with House of Lords precedent – and with perceived international norms, if not current international law as such. Then again, the Lords' *obiter* rejections preceded its 'restoration' by the Rome Statute. Continuing recognition in Scots law would be acknowledgement of the legally correct and consistent position. Of course, if it already exists as a general defence in Scots law, why the requirement to restate it? In rebuttal, it is precisely because of the lack of legal certainty arising from the

[151] Law Commission, *Offences Against the Person and General Principles* (Law Com No 218, 1993), paras. 28.6; 31.1-31.8; and 33.1-33.12b

[152] *R. v. Lambert* [2001] UKHL 37

[153] 10.2/117

[154] Clause 29(3)

Lords' decisions, particularly given their *obiter* status, that the defence should be enacted anew in any Scottish treason law – this being a crime where it could have practical application. That this would be a specifically Scottish refinement underlines the case for a separate Scottish treason law.

A complication might be with the significance of an order which though manifestly illegal, is not manifestly treasonable. Gordon suggests that in the general application of this defence, resolving the 'manifest illegality' test might be a matter of degree, depending on the circumstances, and particularly the rank of the officer giving the illegal order. The question becomes one whether an accused could reasonably consider themselves bound to obey the order last given by an officer on the spot and whether they could be reasonably expected to risk the consequences of disobedience. Such a situation approaches one of true coercion, since the serviceman would be placed in a dilemma in which it would be unreasonable to saddle them with responsibility for their superior's illegal (treasonable) orders, and in which they might be said to have been 'coerced' by their superior orders.[155] I suggest a treasonable order would be perceptibly more manifestly illegal still – and less excusable in the conduct of any such balancing exercise. But it should be appreciated this defence has been used to excuse homicides in pursuit of illegal orders in circumstances in which the accused have acted honestly and with the intention of carrying out what they have believed to be their duty.[156]

VII. Conclusion:

This re-conceptualisation in terms of a duty-based contractual model allows for the greater application of necessity and coercion defences, their hitherto application to the crime of treason being somewhat moot, given the existence of competing authorities. The confirmed availability of a necessity defence – suitably contextualised by the 'national security harm' principle – allows for the emergence of specific defences – such as a 'Public Interest Defence' and a 'Humanitarian Defence'. Despite its non-availability otherwise under parallel legislation such as the OSA, I submit that ironically, with the more serious offence of treason, there should be scope for a 'Public Interest Defence'. I make no provision for a specific 'International Law Defence'. This expansion of available defences hopefully

[155] Gordon PHD, 482

[156] *Shepherd*; *Macpherson*

provides for greater balance in the relationship between the sovereign power and the protected person. It provides a salutary reminder of how we might wish to behave if living under tyrannical or usurpative government – and whether we could (and rightly should) contemplate disloyalty.[157] Given that the offence elements comprise concert with the enemy, they may only apply in very discrete circumstances. Meanwhile, the jury can be entrusted as gatekeepers against any perceived politically-motivated abuse of process – and equally against abuse of any legal political defences.

[157] Fletcher, "Case for Treason", 207-208

Chapter 6 – Conclusion and Recommendations:

The purpose of this thesis has been to see how we might go about updating Britain's dormant treason law for a Scottish context. Although historically, few have been indicted for treason that does not mean that the commission of the crime of treason is rare. Much modern conflict involves conflict falling short of international conflict and non-international conflict – asymmetric warfare, characterised by mass-casualty domestic terrorism, directed by states and non-state organisations (themselves often proxies). Criminal justice insider Black recognised: "if the nature of conflict is to be internal terror directed by phantom foreign enemies and smuggled in and associated with domestic malcontents, a revival is possible. … public outrage could revive the concept of this most odious and stigmatizing offence".[1] The demonstrable eagerness of some of our co-citizens to join with enemy terrorist organisations, when combined with the capabilities of modern digital technology for detection and investigation, renders the prospect of treason prosecutions perfectly plausible.

I began by asking whether there should be a separate Scottish treason law and now answer my primary research question in the affirmative. 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 (albeit it should have perhaps been 'modernised'). This is about affirming the integrity of Scottish criminal law (as originally envisaged by the Treaty of Union). This 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 the constitutional reality, but the prevailing 'four nations' political rhetoric suggests that people might be receptive to the notion of one of the nations (a devolved state) also having its own treason law. A 'local' treason law is unremarkable in the federal common law experience. Creating a separate Scottish treason law would not involve, in practical terms, a significant transfer of reserved powers – effectively facilitating the prosecution of what is otherwise generally prosecutable in Scotland already, but under a different *nomen juris*. I maintain that there are also proper and substantive legal reasons for creating a separate Scottish treason law – particularly to reflect what would be a Scottish deviation from British treason law in the

[1] Conrad Black, "Treason From 16th-century England To 9-11" C2C Journal (1 March 2010): https://c2cjournal.ca/2010/03/treason-from-16thcentury-england-to-911/?_post_id=338

availability and operation of common law general defences of necessity, coercion and obeying superior orders; and the removal of the allied offence of misprision of treason.

Meanwhile, the case for a separate Scottish treason law is naturally predicated on the argument for reviving treason law generally – and I have argued in Chapter 1 that it is worth modernising the law of treason because it continues to capture the essence of the still pertinent moral wrong of betrayal – of disloyalty to and betrayal of the modern nation-state, of community, and of neighbour – and that in so doing, fits with fair labelling sensibilities, achieving retribution in a way that the anodyne statutory alternatives do not. Given that life imprisonment is mandatory, successful treason prosecutions could allow for more effective management of what would ultimately be paroled IE life prisoners, who can be more closely monitored on pain of immediate recall – in a more efficacious way than preventive detention measures or determinate sentencing, and in a manner more consistent with due process and fair hearing requirements. That lacuna could of course be otherwise addressed by reform of the anti-terrorist sentencing framework, but this has hitherto been lacking.

Summary of Findings:

Unremarkably, any such Scottish treason law would have to be made consistent with modern sensibilities and progressive notions of human rights to meet the obvious criticism that it is anachronistic. While there is still much merit in the basic substance of many of the offences of treason, the form and detail are desperately in need of re-definition.

Allegiance:

In Chapter 2 I have argued that modernising treason law can be done by rethinking its core idea of allegiance. Allegiance can still be made to work – reinvented by the adoption of Williams' paradigm of a non-patriotic, contractual, 'duty-based' model – by his theory of the crime of treason, predicated as it is on the British Citizen's (or resident's) duty of allegiance as a corollary of the British state's duty of protection. This provides a viable contemporary working model for the modern social democratic state, reflecting the notion of the object of allegiance being institutional and consistent with the social contract.

Rediscovering and championing a distant article of the prodigious Williams is scarcely a core intellectual contribution. My contribution to human knowledge is to take from Williams

and then add to it by seeing how his model might be expected to play out in the modern Scottish context and inform a new Scottish treason offence. I then argue that the duty of allegiance should comprise only a negative duty of allegiance – to do no (enemy-backed) harm (to the homeland), adopting the shorthand of the 'Do-No-Harm' principle. This further refines the characterisation by the Policy Exchange Paper of a narrow duty of non-betrayal. The concept of allegiance is thus reducible to a legal duty of the British subject not to be disloyal. Being disloyal in a cultural sense – not doing certain overtly patriotic acts such as snubbing the national anthem or the wartime conscripted refusing to fight on conscientious grounds – would not engage a breach of the duty of allegiance as to ever amount to treason.[2]

Nonetheless, this minimalist legal duty is an obligation which can still be said to be influenced or infused with British and/or Scottish values – because these values explain something of why the duty of allegiance exists in the first place. They illustrate the theory or justification behind the crime – if not contributing to any definition of its essential elements as such. If a purposive interpretation were to be applied to any new treason legislation, these values are what it might also reasonably be intended to protect. Inevitably, ideas of sovereignty and allegiance must be about British and Scottish identity – for the subject cannot be completely isolated or alienated from the state and the society they inhabit.

This is about not losing one's loyalty altogether. It is about recognising a residual duty of loyalty of the subject to the British state – and criminalising actions which fall *far* below that minimum. Save for the most exceptional scenarios, this should only ever be a passive and scarcely an active duty. This is a negative duty discharged by simply not taking positive steps to reject your allegiance and transfer it to the Queen's enemies.

***Actus Reus*:**

I argued in Chapter 3 that treason can be further modernised by taking this allegiance modelling and defining the breach of the duty of allegiance in terms of relevant harm being referable to a 'national security harm' principle – such that the central elements should only be regarded as criminal (treasonable) if the 'national security harm' principle were satisfied. The compelling logic of the negative duty is that treason can no longer be committed by omission. Proof of the requisite overt act is more readily achievable given modern evidence-

[2] S.C. Biggs, *Treason and the Trial of William Joyce* (1947), 162

gathering capabilities. Consistent with the operation of only a negative duty of allegiance and a general narrowing-down exercise, I do not propose to re-enact the allied common law offences of misprision of treason and compounding treason. This is an analytical framework which allows for a shift away from any misconceived notions of patriotic treason and a patriotic allegiance. Reappraisal through the prism of this new theory of the crime allows for the more anachronistic aspects of the offence to be culled – for no harm to national security is truly involved in violating the King's consort, disputing or hindering the succession, killing judges or counterfeiting Scots seals. A streamlined, tighter, more credible offence emerges, stripped down to its three main heads: adhering to the sovereign's enemies; compassing the death of the sovereign; levying war against the sovereign in the realm ('Levying War Treason') – though the latter two only as sub-categories of adhering to the sovereign's enemies, necessarily committed in circumstances involving the assistance of a foreign enemy. The idea of political dissent or subversion – republican agitation – being remotely regarded as a treasonable (or seditious) act has long since been discredited but this conceptual model militates against that possibility. There should be no scope for purely domestic 'Seditious Treason' or 'Republican Treason'. The new Scottish treason offence will be crafted in a way to prevent such abuse. The core of this idea should be captured by the concept of what might be generically labelled 'Adherence Treason'. This represents something of a departure from the historical focus in English or British treason law where the dominant treason offence would seem to have been compassing the sovereign's death, a consequence inevitably of the centrality of the monarchy. 'Adherence Treason' should now emerge as the core form of treason, being at the heart of this new law. Adherence (to the enemy) can be conceived in terms of being the opposite (or 'flip side') of allegiance – the abandonment (or non-performance) of the duty of allegiance – and which finds expression in the giving of assistance to the enemy.

The surviving core offences should be re-defined in the following terms:

- A narrower and simpler category of compassing the death of the sovereign will be posited – *viz*., killing the Sovereign, or attempting to kill the Sovereign, or otherwise assaulting, imprisoning or restraining the Sovereign – with intent to assist an enemy at war with the Sovereign, whether or not the existence of a state of war has been declared

- Levying war, or doing any act preparatory to levying war, against the Sovereign – with intent to assist an enemy at war with the Sovereign, whether or not the existence of a state of war has been declared
- Assisting by any means whatever, with intent to assist, an enemy at war with the Sovereign, whether or not the existence of a state of war has been declared

Relevant harm under the 'levying of war' head should be harm that materially compromises national security. This should involve acts of sabotage perpetrated against political institutions, critical infrastructure, and key military installations, against the general safety of the state – and with enemy agency. The creation of a national security risk – invoking a 'national security harm' principle – corresponds to the criteria for self-defence in international law.

This rare and special criminality arises from these core treasonable acts being committed in a special capacity – and the fact that the accused possesses the qualification necessary to the commission of the offence – being a 'protected person' – is what triggers the breach of the 'contractual' duty of allegiance.

The burden of proof resting upon the prosecutor should be a high one.[3] Certainly, it might be hoped that its prosecution is confined to only the kinds of conduct which are capable of reasonably sure proof.[4] I do not propose to say anything about the evidentiary safeguards operable in other jurisdictions – such as the former two-witness rule (albeit repealed in England by the Treason Act 1945) – because the corroboration requirement still (just) remains a defining feature of Scottish criminal evidence.[5] This does not require to be put on a statutory footing – as it had historically been in England – or as it continues to be under the US Constitution.[6]

[3] Alan Wharam, "Treason in Rhodesia" (1967) 25(2) CLJ 189

[4] *Cramer v. United States*, 325 US 1 (1945), 39

[5] Ironically, while the 1945 Act repealed the historic statutory requirement for corroboration (provided for under the Treason Act 1695), it also abolished the rule that treason trials in Scotland had to be conducted according to the rules of English criminal law – thus ensuring the Scottish corroboration requirement persisted for treason trials in Scotland.

[6] US Constitution, art. III, s. 3

Not all terrorist activity will be treasonable – possibly not quite reaching the relevant threshold of targeting critical infrastructure and threatening the security of the state. Many terrorist spectaculars will fall short. But where jeopardy is threatened, this should be a significant symbolic and popular response.

Enemy-sponsored sabotage of critical infrastructure – including Scottish political institutions, even though these are sub-national institutions – and also of what might be only critical infrastructure in the Scottish if not the national UK context – should fall within the ambit of this crime.

***Mens Rea*:**

To reiterate, the critical thing about treason is its intent. The intent to betray is an essential element of treason. I suggested in Chapter 4 that the *mens rea* of the new Scottish crime of treason be defined in terms of the intent to betray the UK by aiding its enemies – or the intent to betray the UK to its enemies. I have proposed a conjunctive test – whereby there must be intent to both betray the country and assist an enemy state or organisation at war with the UK. Both aspects must be engaged to fulfil the relevant threshold for treasonable *mens rea*. Treason's *mens rea* should reflect the two correlating but subtly distinct aspects of the moral wrong of treason which are the intent to betray country – and the intent to betray country to an enemy state or organisation, specifically made manifest by overt act. This will necessarily involve a deliberate and intentional act – only the highest form of *mens rea* being appropriate to what is the ultimate offence.

General and New Specific Defences:

Given prevailing uncertainty, I proposed in Chapter 5 that any Scottish statute should expressly confirm that defences of coercion, necessity and obeying superior orders are available – under certain obvious parameters consistent with treason case law. What is proposed is consistent with the Draft Scottish Criminal Code which goes considerably further than previously, countenancing the operation of coercion and necessity defences to all crimes even where human life has been taken. As an appropriate counter-balance, the recognised necessity defence – particularly when considered in the context of the 'national security harm' principle – allows for the emergence of more specific defences such as a 'Public Interest Defence' for certain kinds of treason, particularly 'Espionage Treason'; and a 'Humanitarian Defence'. The 'public interest' will invariably be negated by the

perpetration of harm to national security and in this respect the 'Public Interest Defence' will have to engage with the 'national security harm' principle – which might be expected to be the overriding consideration in determining the 'public interest'.

I thus answer the second principal research question as to what a separate Scottish treason law would (or should) look like. A streamlined version of the offence emerges, more readily comprehensible in contemporary lexicon. While the offences elements of the suggested new offence do not have a distinctively Scottish dimension to them (save for issues of definition of Scottish critical infrastructure), the defence elements do, thus providing a principled justification for a separate Scottish offence. I have explained how it might be modernised and made relevant – including with 'generous' general and specific defences – that it might be successfully litigated from both prosecution and defence perspectives. This underlines the break from past historical abuses.

Recommendations for Further Research:

Subsidiary Definitional and Construction Issues:

This is not a policy paper or mini-codification exercise. Predictably, there are further definitional problems and issues of construction in framing a working conduct definition for a Scottish crime of treason, which I have been unable to address because of constraints of space. For example, jurisdiction requires careful consideration. Who would be and not be subject to a Scottish treason law? Should it be predicated on Scottish domicile or residence of the protected person? Should citizens of other parts of the UK be able to undermine Scottish political institutions with impunity, and how would any such distinctions be drawn without a concept of Scottish nationality? Is extra-territorial reach for treasonable acts committed furth of Scotland, including elsewhere in the UK, appropriate? Should a Scottish treason law have concurrent jurisdiction with any new UK treason law? At issue would be how the duty of allegiance, if conceived in terms of a voluntary contractual obligation and a departure from perpetual allegiance, be extinguished. Might you set a higher age of criminal responsibility for treason – consistent with the concept that affirming or shedding of allegiance is (or should be) an adult decision – and with the age of majority in Scots law still being 18? The so-called 'Cultural Defence' as an excuse defence in treason law is also a potentially interesting area for further research because it engages with the recurring issue of dual nationality and competing allegiance. Consideration might be given to the

appropriateness of various ancillary sentencing and administrative orders (such as disqualification from public office and public employment, loss of state or public pension, disenfranchisement, deprivation, and nullity of British Citizenship). Since the abolition of automatic forfeiture of goods and land under Forfeiture Act 1870 did not apply to Scotland, might the confiscation recovery machinery (under the Proceeds of Crime Act 2002) form part of the criminal sentencing exercise? These issues all involve future work within this hypothesis.

Implications of Study for Theory:

Citizenship, Nationality, and Immigration Law:

I argued in Chapter 2 that citizenship has its limitations in understanding the normative aspects of the crime of treason – treason being about a breach of allegiance and not a breach of citizenship as such – and that while allegiance might be an essential element of citizenship, citizenship is not an essential element of allegiance. So, while citizenship might not be a relevant or appropriate basis for grounding the law of treason or its major concept of allegiance, could this new allegiance modelling inform notions of citizenship? Vasanthakumar suggests that a renewed interest in allegiance may provide a basis on which to articulate and ground the duties of citizenship – possibly distinguished from the prevailing liberal model which casts citizenship as an entitlement – and of citizenship instead being a political status requiring a particular political orientation on the part of citizens.[7] I argued for a 'thinner', minimalist approach towards allegiance, involving obeying only treason law, for the purposes of treason law. But further research might be done on whether allegiance can inform a more robust conception of British Citizenship – generating a more nuanced appreciation of it, including cultivating civic virtue, communitarianism, patriotism, national identity, and shared values – providing an analytical framework for understanding multiple citizenship – with implications for renunciation, naturalisation, denaturalisation and dual nationality, subjecting these practices to normative scrutiny.[8] Notwithstanding the passing of the Scottish Elections (Franchise and Representation) Act 2020, allegiance could inform

[7] Ashwini Vasanthakumar "Treason, Expatriation and 'So-Called' Americans: Recovering the Role of Allegiance in Citizenship" (2014) 12 GeoLJ 187, 223

[8] *Ibid.*, 224

debate about extending enfranchisement of foreign nationals to future referenda, particularly in the Scottish context.

Theoretical/Jurisprudential Implications:

Treason could again become one of those prominent, influential crimes that might influence particularly how we think about criminal justice policy, criminal law, and the law of evidence and procedure in Scotland. A theory of criminal law tends to abstract (or deduce) general principles from the details of certain crimes. History, venerable statutes, and prominent cases testify to the significance of treason in the structure of our criminal law – yet our casebooks and textbooks now totally ignore these materials. As long as we ignore treason in formulating our general criminal principles, we risk distorting the criminal law by overemphasising violent and sexual crimes against the person.[9] Perhaps we should take this ancient crime more seriously in thinking about the general theory of criminal law and the mainsprings of criminal conduct. For example, could a government plausibly propose (or leverage) even in, or especially in times of crisis, the suspension of jury trials or the abolition of the corroboration requirement, if that also meant extending such policies to treason cases (assuming their prosecution had become a genuine possibility)? The prospect of justifying doing so with treason prosecutions would surely underline how sinister a constitutional threat would be engaged.

Cultural Implications:

"We laugh at honour, and are shocked to find traitors in our midst":[10]

Looking at the issue more creatively, it might be thought that the affirmation of the traitor is a way by which our society can renew its own heroic values. This is not the Greatest Generation. We live in a 'post-heroic' society which is characterised by law and the pursuit of prosperity. We are not necessarily decadent but have become passive and soft, readily intimidated by the state. The traitor is the enemy, who thwarts our technological superiority and seeks to overcome the pampered, peaceful societies of the West – the super-villain, who is the manifestation of the dangers we face. We know that we are the target of their attacks,

[9] George P. Fletcher, "The Case for Treason" (1982) 41 MdLRev 193, 194

[10] C.S. Lewis, *The Abolition of Man* (1943), 12

if rarely physically, always psychologically. 'Post-heroic' societies can survive colliding with such 'heroic' groups – though we require a foundation of heroic values if we are to challenge them. Such attacks lose their impact if the citizenry reacts coolly and calmly, our politicians decidedly, if the economy cannot be intimidated, and the media remains measured. There must be a willingness to sacrifice. We need composure and determination. We may even create our own makeshift heroes. As acquiring this 'heroic' composure might be considered a positive societal development – virtuous even – there might be times when a nation needs its villains, as well as its heroes – with the miscreants being properly labelled (as traitors) if this narrative were to have proper traction.[11] There may be a need for a modern-day Guy Fawkes to foster public virtue.

The existence of traitors in these depressing numbers also feels like a mark of failure – a failure of our society to engender loyalty, respect, or affection – which might be expected to provoke some serious national soul-searching. Should we even care about their motivation in having a deep emotional identification with our country's enemies to the extent that they would betray us – or try to understand malcontents, seeking to avenge their personal humiliations and feelings of injustice, by projecting them into a political cause? Do we have to agonise over their myriad motives – as this may be a problem which probably cannot be fixed – and just accept that there is and will continue to be this significant constituency in our midst and deal with the bald fact of betrayal?

Fletcher creatively reasoned that the decline of treason expressed a general cultural shift away from symbolic struggles towards the systematic and scientific control of violence. Treason belonged to an era in which crimes were understood as personal moral dramas and was emblematic of a moral struggle between community and deviant, where the criminal betrayed those they hurt. In the West, we no longer perceive great symbolic messages in criminal action, including terrorist attacks. We think impersonally about crime and danger. The criminal or terrorist may threaten us with physical harm but does not betray us.[12] If anything, the less emotive or inflammatory statutory alternatives are more appropriate in this culture. Though an intriguing critique, Fletcher conceded this was conjecture and maybe we should carefully think about whether we still need symbolic messages in our criminal law.

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[11] Hans Bachofner (2006), The vulnerability of post-heroic societies: https://www.offiziere.ch/?p=17738

[12] George P. Fletcher, "Ambivalence About Treason" (2004) 82 NCLRev 1611, 1627-1628

Whether Patriotism:

Re-affirming and re-booting the duty of allegiance is not about making the case for a misty-eyed, emotional patriotism. I have deliberately deployed a modelling to distance treason from patriotism – having argued that patriotism is not a relevant legal concept to its operation. But it might be supposed that patriotic sentiment goes some way towards explaining why the duty of allegiance exists. Insofar as the duty of allegiance might still be tangentially informed or instructed by patriotism, arguing for treason's revival – even if presented in terms of only tacitly making the case for not being against patriotism – reviving treason law will inevitably precipitate a debate about patriotism.

Treason has become an unfashionable allegation because it implies national moral superiority.[13] There will be the unfortunate perception that treason law is nationalistic and that it is somehow a patriotic or even a political allegiance which is owed under it. For many, the problem with any revived treason law – whether British or 'notionally' Scottish – is that it may evoke a 'patriotic' treason which for them will involve patriotic connotations, or the 'wrong' kind of patriotism, or a patriotism which is compulsive and not compelling. It is likely to provoke complaints that it would result in the targeting of minorities, or one sizeable community – or will be perceived to be so. It would risk enhancing, not diminishing social divisions – precipitating a descent into tribalism. There may be the perception that a new treason law would be nationalistic, 'white identitarian' and anti-minority – and championed for the wrong reasons. For some it will have unfortunate jingoistic connotations with populist nationalism, 'blood and soil' nationalism or British ethno-nationalism and nativism. This could repel and even antagonise minorities in an increasingly diversified population. It would be needlessly inflammatory – creating feelings of 'otherness' – fostering a sense of a divided, threatened group identity of a British 'us', distinct from the immigrant 'them' – provoking anger and hostility towards outsiders – and creating a culture of fear. 'Symbolic' threats, arising from perceived differences in values or beliefs will arouse greater enmity – with people being more likely to be antagonistic to immigrants if they perceive them as threatening the country's values than if they simply view them as direct competition for jobs or other resources.[14] Perceptibly, treason will be regarded as a right-wing crime, doing little

[13] Black, "Treason To 9-11"

[14] Amanda Taub, "A Small French Town Infused with Us-vs.Them Politics" NYT (21 April 2017): https://www.nytimes.com/2017/04/20/world/europe/a-small-french-town-infused-with-us-vs-them-politics.html

to restore trust with alienated communities[15] – inconsistent with the cultural sensitivity that might win the proverbial 'hearts and minds' in any propaganda war against guerrilla insurgency.[16] It will calcify divisions and make for toxic, culturally divided politics. You can only build trust on trust. If anything, a succession of treason indictments could needlessly ferment division and prove counterproductive.

But consider the virtues of patriotism in making us behave unselfishly. It makes us recognise our obligation to the people around us. It is why we obey laws and pay taxes with which we disagree. Absent patriotism, a breakdown of responsible government and responsible citizenship ensues. This is not a political ideal to be diminished or neglected. MacIntyre argued that patriotism is not just a virtue, but the central virtue which holds together morality – that we learn and understand morality "in and through the way of life of some particular community".[17] When Samuel Johnson notoriously quipped: "Patriotism is the last refuge of the scoundrel", he was not indicting patriotism in general, but excoriating false patriotism.[18] Abuse of patriotism and its occasional exploitation by the manipulative does not invalidate it as a meaningful civic virtue. The less cynical might prefer Byron's sentiment: "He who loves not his country, can love nothing" – or Shakespeare's Brutus: "Who is here so vile that will not love his country?"[19] Medieval Islamic scholar Ibn Khaldun defined the all-important factor in human history as *Asabiyyah* or 'group feeling'. The strength of any state lies in its ability to inspire *Asabiyyah*, without which it crumbles: "Strength is obtained only through group feeling which means affection and willingness to fight and die for each other."[20] Without *Asabiyyah*, he wrote, there could be no sovereignty or legitimacy – and people could only otherwise be ruled by force or fear.

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[15] Kenan Malik, "If we want to build trust in society, a new treason law is no way to do it" Guardian (29 July 2018): https://www.theguardian.com/commentisfree/2018/jul/29/if-we-want-to-rebuild-trust-in-society-a-new-treason-law-is-no-way-to-do-it#comments

[16] Robert Thompson, *Defeating Communist Insurgency: Experiences from Malaya and Vietnam* (1966)

[17] Alasdair MacIntyre, "Is Patriotism a Virtue?" (1984) in *Patriotism*, Igor Primoratz ed. (2002), 43, 48; Youngjae Lee, "Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries" (2012) 31 LawPhilos 299, 309

[18] James Boswell, *The Life of Samuel Johnson*, (Christopher Hibbert ed., 1979), 182

[19] *Julius Caesar*, Act 3, Scene 2

[20] Ibn Khaldun, *The Muqaddimah: An Introduction to History* (1967, 2015), trans. Franz Rosenthal, N. J. Dawood ed., 123

Patriotism can and should be rightly distinguished from nationalism – to assuage concerns of any such project being about 'Nationalistic Treason'. George Orwell classically differentiated patriotism from the excesses typically associated with chauvinistic nationalist sentiment.[21] "Nowadays, though, patriotism is a complicated matter."[22] But without a shared sense of identity – and a loyalty to common political institutions – there is a real risk that devoid of a sense of purpose of national loyalty, other loyalties begin to take over. Race, ethnicity, religion, and/or political ideology fill that vacuum. People will group themselves instead by political allegiance, religion, or ethnicity – perceiving their opponents as enemies and not as co-citizens. It should be remembered that the proposed Scottish object of the duty of allegiance is not the Scottish or British people, but the abstract entity or shorthand for the local manifestation of the British state which is the Crown. It is not intended to be based on ethnicity.

The case for the revival of the crime of treason is (or can be) an overriding normative value position which transcends identity politics. Fundamentally this need not be about stirring deep feelings of patriotism – though treason law could also help to generate and confirm a sense of national identity and pride – values which all of us can and should share, without being mandated. If they were, we would not be living in a free society – which would negate the case for being patriotic about it. That said, in a more relativist and globalist age, is the revival of a strong sense of national identity a legitimate objective of government or public virtue to be fostered? But, as I suggested in Chapter 1, the nation-state may be undergoing a reinvigoration.

I reiterate that the duty of non-betrayal should not be conflated with a duty to be patriotic. In the final (legal) analysis, patriotism is only an emotion, hence my focus on a 'patriotism-free' version of the duty of allegiance. Of course, patriotism – and the reasons to be patriotic – might substantially explain why the duty of allegiance exists. If you are patriotic then you will enthusiastically discharge this duty of allegiance. If you are unpatriotic or not particularly patriotic, there is still no good reason for you not to comply with this very discrete duty – specifically, because you owe this duty in return for the protection afforded to you by the sovereign power. You might discharge the duty patriotically – with patriotic

[21] George Orwell, *Notes on Nationalism* (1945), para. 2

[22] "Remembering Vietnam" NYT Editorial (18 May 1981): https://www.nytimes.com/1981/05/18/opinion/remembering-vietnam.html

fervour or grace – though there should be little to be excited about in discharging only a negative duty. This is only an adverb to describe a way in which a negative duty might be discharged. The duty implicitly involves or should involve some level of respect for the sovereign power – if not necessarily affection – while patriotic sentiment is the optional gloss to the duty. You will not fail to discharge this duty by showing 'insufficient patriotism'.

This is not about saying our country is in some way superior to others. Not unreasonably, we owe it a duty of allegiance – more specifically, a duty not to be disloyal to it – in much the same way that others may owe their own homeland a duty – and that these are some of the positive reasons behind that duty. Nor is that about invoking British exceptionalism, for: "No organised State can continue to exist without a law directed against treason."[23]

If anything, by not prosecuting members of a significant minority group for treason, then we are, ironically, holding to a lesser standard and not quite treating them as being fully British. This, if anything, negates social integration and cultural assimilation in a multi-cultural society. It also suggests a lack of respect for the communities concerned. Consider the following quote attributed to Johann Wolfgang von Goethe: "The way you see people is the way you treat them, and the way you treat them is what they become." You also create the perception that the authorities are not seriously grappling with this primary problem of IE – and cause a consequential secondary problem with the empowerment of radical far right protest movements. You do not want actual racists and Nazis to have legitimate grievance claims, exploiting that advanced demoralisation of the authorities, and disguising themselves as something they are not. Populist politicians may take advantage because the mainstream is seen to be soft-peddling. A fraught political calculus may be involved.

Suggestions for Policy:

***Cui Bono* – Who Cares or Should Care?**

Who might benefit from or be interested in this thesis? Not implausibly, the concept of a separate and distinct Scottish treason law could pique the interest of those involved in policy formulation for the current or future Scottish devolved administrations. As updating of UK treason law is now in contemplation, its timing is opportune. It is not remotely remarkable

[23] *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1, 150, *per* Latham CJ – see also *Adelaide Company of Jehovah's Witnesses Inc v. The Commonwealth* (1943) 67 CLR 116, 132

to state that members of the current administration are motivated to do things differently in Scotland, wherever they can – and that their appetite for further transfer of reserved powers is insatiable. This idea has traction for those whose agenda is to federalise the UK. It may even be covertly envisaged as a model treason offence for a newly-independent state. Admittedly, these would be contentious political or policy imperatives – though that would not invalidate the requirement for prudent legal modelling. However, this need not be about divergence for its own sake, given that there is already a principled (and not necessarily anti-unionist) case for fully repatriating Scottish treason law on the basis that it need not (or should not) have been subsumed under English treason law. As the practical outcome will be the prosecution of precisely the same offenders on a Scottish indictment containing different charges from what are otherwise generally prosecutable in Scotland already under UK (anti-terrorist or espionage) legislation, this would, as a policy option, be a harmless, cost-neutral 'concession' for Scottish unionist politicians to make.

This thesis could also inform those involved in the legislative process of updating British treason law – or those wishing to critique it. The arguments are broadly similar to those for creating a separate Scottish treason law. Indeed, the posited template offence may be generally indistinguishable from what might be envisaged as a modern UK offence – to the extent that I am conscious that this relatively marginal difference as to form might suggest that if there were a need for a specific law of treason protecting Scottish institutions, need it even be specifically Scottish? But I suggest that there remains a case for a separate Scottish treason law for policy and genuine legal reasons.

Meanwhile, if legislators are seriously committed to creating a modern treason offence, I provide reassurance that treason law can still work and explain how it might be expected to work. Alternatively, if they were not inclined to presently proceed – or even proposed to repeal treason law altogether – they might at least first dialectically engage with the arguments advanced in this thesis, such that it still serves a meaningful and useful purpose by that. Then, if the view were ultimately taken that it is impossible or too difficult to modernise treason law – if allegiance were no longer deemed an explicable, relevant concept – the crime of treason might as well, for reasons of legal certainty, be formally abolished, rather than ignored.

Policy Limitations:

I am conscious that a policy of reviving treason law has its limitations. It might be too controversial to develop any kind of political momentum, with legislators shying away from engaging with such a needlessly sensitive issue. Nonetheless, I argue that we should not shirk from discussing difficult subjects like treason and refrain from calling it out for what it is. It should also be appreciated that while the existential threat posed by IE may be a reason to consider reviving treason law, it is not the only reason. There are other valid reasons to do so – as I discussed in Chapter 1 – including fair labelling; capturing the moral wrong of betrayal; and promoting legal certainty. Indeed, the insensitive handling of this issue might be an unhelpful distraction from what I hope has been the intellectual case for doing so.[24]

Presently, treason law is likely to suffer much reputational damage with the national security legislation the People's Republic of China has directly imposed on the Hong Kong SAR, with the National People's Congress bypassing the semi-autonomous territory's elected Legislative Council. I suggest that the problem with what was foisted on Hong Kong is not with treason law *per se* – but with legality, process, overreach, and its opportunistic timing. There are myriad concerns: its putative breaching of the (1984) Sino-British Joint Declaration and the Hong Kong Basic Law[25]; lack of consent; the seemingly insurmountable problem of mass competing allegiance, with popular antipathy towards its intended object of allegiance (the Central People's Government). The conflation of treason, secessionism, sedition, and subversion (a familiar concept in the PRC, but not in the common law) creates a broad, generalist framework – and the resultant ambiguity can only but facilitate 'constructive treasons. It is reasonably apprehended that it will be abused to quell pro-democracy protest movements – creating a potentially chilling effect by that. Its ouster clause, excluding jurisdiction of Hong Kong's foreign judges, is flagrant forum shopping. The prospect of disproportionate or even draconian punishments is exacerbated by the possibility of extradition.[26] This thesis might prevent our legislators being dissuaded from

[24] Douglas A. Kash, "The United States v. Adam Gadahn: A Case for Treason" 37 CapULRev 1, 25

[25] Art. 23

[26] Helen Davidson and Lily Kuo, "Hong Kong's security laws: what are they and why are they so controversial?" Guardian (21 May 2020): https://www.theguardian.com/world/2020/may/21/hong-kongs-security-laws-what-are-they-and-why-are-they-so-controversial

the case for treason's revival (at UK and devolved level) because of it being politically weaponised in another common law jurisdiction by the PRC and pro-Beijing legislators, and by the prospect of it being implemented without precisely the 'safe' modelling I recommend.

These, of course, are only policy suggestions rather than imperatives or recommendations – the purpose of academic research merely being to inform, explain and investigate, never instruct. This thesis provides a viable theoretical framework and working template for any such project – and engages with the issues that might be expected to arise in it being pursued and debated. I simply make discrete, topical policy suggestions underpinned by academic research.

Would it work?

If treason law were deemed incapable of modernisation – or, assuming that could be accomplished, and prosecutors were prepared to enforce it, then any dismal policy view of modern juries' reluctance to convict would soon be tested. If juries were unable to grasp the difficult concepts that would still necessarily be inherent in the law of treason, they would surely gravitate towards the statutory equivalent alternative charges featuring on the same indictment. The efficacy and viability of the exercise would soon be confirmed. Significantly, the lay jury would be the final brake on executive and judicial overreach, by the rounding and balancing effect of decision-makers comprising fifteen random members of the public. They can be trusted as gate-keepers against any perceived politically-motivated abuse of process (in a way that they might not be permitted to be in prosecutions under the OSA) – and, equally, against the abuse of any legal political defences. If it transpires that I am wrong about what juries might do, then just repeal the crime of treason!

Appendix:

Resultant New Scottish Treason Offence:

I propose that the new Scottish crime of treason be couched in the following terms:

Treason – Aiding an Enemy State or Organisation:

A person, who being a Scottish-domiciled or a Scottish-resident British subject, enjoying the protection of the Crown (in the protection that the Crown owes under Her Majesty's Government in the United Kingdom and the Crown under the Scottish Administration) and thus owing a duty of allegiance to the Crown, commits the offence of treason if, in breach of that duty of allegiance, and acting with intent to betray the Sovereign and materially assist any enemy state or organisation at war with the United Kingdom (whether or not the existence of a state of war has been declared), he engages in the following conduct, in Scotland or elsewhere, including outside the United Kingdom:

- murders the Sovereign, or attempts to murder the Sovereign, or otherwise assaults, imprisons or restrains the Sovereign;
- impedes the operations of Her Majesty's forces;
- aids the military or intelligence operations of an enemy state or organisation;
- prejudices the security and defence of the UK – by causing (or attempting to cause) harm which materially compromises national security – and including committing acts of sabotage against British military installations located in Scotland, Scottish political institutions including the Scottish Government and the Scottish Parliament, and critical infrastructure located in Scotland – all against the general safety of the British state and the Scottish political settlement;
- does anything as an act of terrorism against the British people or for the purposes of terrorism against the British people; and his action would constitute an offence listed in section 63B of the Terrorism Act 2000

Indictable-only Offence:

This offence shall be tried only on indictment in the High Court of Justiciary.

Time Limit:

An accused shall not be tried for any offence of treason committed only within the United Kingdom unless an indictment has been served on the accused within three years after the offence occurred and in the case of a continuous offence, within three years after the last date of such contravention.

It shall be competent in a prosecution of a continuous contravention to include the entire period during which the contravention occurred.

This time limit will not be available in circumstances in which an accused has murdered the Sovereign or attempted to murder the Sovereign, wherever that act has been committed.

Defences:

Availability of Special Defences of Coercion and Necessity and General Defence of Obeying Superior Orders:

It shall be competent for an accused to plead a special defence of coercion or necessity. The defence of coercion will be available in circumstances in which an accused has acted under coercion by the enemy and has not voluntarily adhered to the enemy cause.

It shall be competent for an accused, who is a member of the armed forces of the Crown and engaged in the course of hostilities, to plead a defence of obeying a superior military order in the execution of their duty if he did not know that the order was unlawful and treasonable; and that the order were not manifestly unlawful and treasonable.

It shall be competent for an accused, who is a servant of the Crown ('Crown employee'), to plead a defence of obeying a superior official order if he did not know that the order was unlawful and treasonable; and that the order were not manifestly unlawful and treasonable.

Whether an order is or is not manifestly unlawful and treasonable is a question of law.

Defence for slavery or trafficking victims who commit treason:

Section 45 of the Modern Slavery Act 2015 will extend to Scotland for the purposes of the offence of treason.

These defences will not be available in circumstances in which an accused has murdered the Sovereign or attempted to murder the Sovereign – or in circumstances in which the taking of human life has not been done to save human life.

Public Interest Defence (including Whistleblowing):

The offence of impeding the operations of Her Majesty's forces, by disclosing classified or protected information, will not apply to disclosure solely by way of, or for the purposes of establishing the public interest – if disclosure were done in good faith – if disclosure has not resulted in material harm to national security – and if, in the reasonable belief of an accused making the disclosure, the public interest in disclosure outweighs the public interest in non-disclosure.

Humanitarian Defence:

The offence of impeding the operations of Her Majesty's forces will not apply to engagement in conduct solely by way of, or for the purposes of, the provision of aid of a humanitarian nature – and for acts done in good faith.
The accused bears an evidential burden in relation to establishing a humanitarian defence.

Punishment for Treason:

Subject to the subsections below, a person convicted of treason shall be sentenced to imprisonment for life unless given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.

Where a person convicted of treason is under the age of 18 years he shall not be sentenced to imprisonment for life but to be detained without limit of time and shall be liable to be detained in such place, and under such conditions, as the Secretary of State may direct.

Where a person convicted of treason has attained the age of 18 years but is under the age of 21 years, he shall not be sentenced to imprisonment for life but to be detained in a young offenders institution and shall be liable to be detained for life.

Explanatory Note:

'British subject' will be defined in terms of constitutional law and 'current' treason law – and not its discrete, restrictive meaning under immigration law.[1] Constitutionally, we all continue to remain the Queen's subjects, there having been no formal or legal transition from British subject to British Citizen in the constitutional and devolved context.[2]

Section 63B of the Terrorism Act 2000 lists such offences as *inter alia* murder, culpable homicide, rape, assault causing injury, assault to injury, abduction or false imprisonment, malicious mischief, wilful fire-raising, and various statutory counterfeiting offences.

This includes what might be described as the more conventional form of treason which is 'Military Treason' – and also 'Diplomatic Treason' or 'Espionage Treason' which targets those citizens who interfere with the external safety of the British state by obstructing its foreign policy or relations other than militarily.[3]

[1] British Nationality Act 1981, s. 51

[2] Scotland Act 1998, s. 99

[3] The terminology invoked by John N. Hazard and William B. Stern, "Exterior Treason: A Study in Comparative Criminal Law" (1938) 6(1) UChiLRev 77, 82-83

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