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Command and Persuade

Crime, Law, and the State across History

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Chapter 4

The State as Victim: Treason

Most crimes eventually became understood as collective problems to be solved by the state acting on society's behalf. But one offense—treason—definitionally concerned the state from the very start. Early on, even murder was left to the implicated parties to sort. Yet from the very onset, the state penalized treachery against itself in the severest manner. Other than sacrilege and blasphemy, treason was the first example of a truly public crime and set the scene for the broader development outlined in the previous chapter. Yet as a crime it became ever less important. Democratically legitimated regimes feared it far less than their autocratic forebearers did. Why revolt against yourself? And as their powers grew, states found more effective ways of protecting themselves short of the ponderous legal machinery used to deal with treason.

Treason has always stood apart from other crimes. It is founded in scripture, where humans are warned against cursing their rulers.¹ Romulus himself, Romans believed, had protected their city against subversion, presiding over the trials in person.² It is the only crime explicitly defined in the US Constitution. Traitors have often been punished by special tribunals, outside normal courts.³ Dante consigned them to the lowest circle of hell, two notches below murderers. In ancient China, treason was the only crime exempt from the stricture that relatives not turn each other in. For all other crimes, family ties trumped obligations to the state: you were punished even for accurately reporting an errant family member to the

authorities. For treason, in contrast, the state wreaked its vengeance not only on offenders but also on all their family.⁴ Where faiths backed rulers, attacks on them threatened the divine, too. In medieval England, killing the king was compared to blasphemy against the Holy Ghost.⁵

Until recently, traitors died gruesome deaths. In ancient Egypt, treason was the only crime punishable by death. Traitors were thrown into pits in ancient Greece, banished or painfully killed in Rome, and even eaten in China.⁶ In sixteenth-century England, they were dragged along the ground to the gallows, hanged until close to death, cut down and castrated, disemboweled alive, had their heart cut out and burned along with the entrails, and finally were beheaded, then quartered, each part hung on towers and the head set upon London Bridge.⁷ As of 1814, traitors were allowed to die by hanging but were then still dismembered. If the king was in a good mood, they might merely suffer decapitation.⁸ Death remained the punishment for treason long after it had been banished for other crimes, up to 1998 in the United Kingdom.⁹ The traitor's family, too, was often punished. In fifth-century Athens, treason was a hereditary sentence, with descendants banished and despoiled. Roman law spared the children of traitors but confiscated their property and made their lives miserable.¹⁰ An Aztec traitor's household was enslaved for four generations.¹¹ The Prussian Code of 1794 also held a traitor's children liable in case the state decided to banish or lock them up. In nineteenth-century Bavaria, a traitor's family had to change its now infamous name.¹² Deep into the twentieth century, the Soviets punished traitors' families.¹³

For treason to be a crime, a state was needed to offend against. As its primary victim, the state defined treason and did so according to its own nature. It classified certain acts as treasonous—ones that others might see differently, even as virtuous. A vicious spiral of self-referential criminality ensued. Almost any action, however innocent it seemed, has at some time been deemed treasonous. But

one person's regicide was another's tyrannicide. Treason has always been an unstable concept. As the state consolidated its position, it abandoned its once-heavy reliance on the concept of treason for protection. Modern states invoke it rarely—not because they are weak, but because they are secure.

As long as the state and its ruler melded, treason was an offense against the person more than against the institution. Whatever the attendant pleasures of being a ruler, it was also very dangerous. In the first millennium CE, European monarchs were ten times as likely to be violently killed as the most endangered citizens of the developed world, young Black American men in blighted neighborhoods of the 1990s.¹⁴ In the early Middle Ages, with the sixth-century Salic code, for example, attacks on kings were punished especially severely. Ming regulations singled out acts that endangered the emperor: incorrectly mixing his medicines, violating dietary prescriptions, poorly training his carriage horses, building his ships shoddily, and so on.¹⁵ By the sixteenth century, regicide—the most obvious form of treason—had declined to largely modern levels.¹⁶

In sixteenth-century England, Henry VIII used treason shamelessly to hound his enemies—whether to attack his theological opponents as he broke with the papacy or against those who rejected his six marriages. Between 1532 and 1540, Henry's courts charged 883 people with treason. Of this total, 308 (38 percent) were executed, 287 of whom had openly rebelled, raising war against the king; 34 were victims of court politics, caught up in the destruction of the Boleyn, Pole, and Courtenay dynasties; and 394 were tried for treason in relation to the Reformation—Catholic martyrs and others denying the king's preeminence.¹⁷ With each new wife from Anne Boleyn forward, Henry made it treasonable to question the validity of his latest wedding or to accept his earlier marriages.¹⁸ In 1541, as he planned to divorce Katherine Howard, his fifth wife, he made it treasonous for a woman he intended to marry to conceal an unchaste sexual past, for his queen to cuckold him, and for

anyone who knew of such transgressions to not warn him.¹⁹ He also expanded treason beyond his person to include attacks on his policies as well. Opposition to Crown policy was criminalized; calling the king a heretic, schismatic, or tyrant was now treason.²⁰

In stark contrast, modern America has made little use of treason. Had the Founding Fathers' rebellion failed, they would have been hanged as traitors themselves.²¹ Unsurprisingly, they were as alert to tyrants' abuse of treason charges as to treason itself.²² They knew how rival aspirant families had misused treason to settle scores in England and were aghast at the hideous punishments inflicted there, so they defined treason as a limited and abstract offense on par with other felonies.²³ Even with the specter before them of Shays' Rebellion (a tax revolt in western Massachusetts in 1786) and other insurrections, even with England in Canada, with Spain in Florida and claiming the Mississippi Valley, with France only recently relieved of the Ohio Valley—despite enemies seemingly all around—the Constitution's drafters formulated treason precisely and narrowly. They dealt with it in the Constitution to prevent the legislature or judiciary from expanding it at will.²⁴ Though they followed the model of the English treason act of 1351, in their definition they eliminated compassing (or imagining) the king's death not only to acknowledge the absence of a monarch but also to ensure that constructive definitions of treachery, extending from actions to mere thoughts, could not be used to settle scores between political factions. Simply holding beliefs or harboring intent, as was actionable in England, was ruled out. Overt acts were required as evidence of guilt.²⁵

The fledgling nation did not define treason as harm to a non-existent monarch but restricted it to "consist only" of levying war against the United States or adhering to its enemies.²⁶ As in English law, a confession or two eyewitnesses was required as proof.²⁷ Treason was not to be used to punish political opponents or in domestic infighting, and the sovereign ruler's person no longer played a role. Only acts intended to harm the nation were treasonous.²⁸ With a

few exceptions, mere riots, without a demonstrable ambition to overthrow the government, were not actionable as treason.²⁹ Over the course of two and a half centuries of US history, only some two score traitors have ever been prosecuted.³⁰ No convictions were returned during World War I, and not a single person has ever been executed for this crime (admittedly with the intervention of a few presidential pardons).³¹ Even after the Civil War, the North did not pursue the Confederates for treason.³² Such insouciance in the face of what was once regarded as the worst possible crime spoke to the Americans' desire to leave behind the Europeans' frequent misuse of treason. It also showed Americans' confidence in their new republic. Its foundation was secure, and it faced few enemies. They were a people "singularly confident of external security and internal stability," in the words of the Supreme Court in 1945.³³

Between these extremes on treason's historical trajectory—sixteenth-century England and modern America—two points emerge. First, treason reflects the nature of the state it offends. Second, except in the totalitarian dictatorships, treason has faded in importance, not just in the United States but also in all democratic countries. Because democracies are not one person's rule, they are inherently less prone to treason in its classic form—political assassination. The primary parties in modern democracies are broadly similar, and the rules of succession clear, so killing a leader merely means that someone quite like him or her carries on. In autocracies, by contrast, whether absolutist monarchies or dictatorships, killing the ruler pays off. Protected by a private army of thousands, Adolf Hitler survived some forty attempts, Fidel Castro several hundred.³⁴ Oppressive, unrepresentative, and weak leaders have been most likely to die violently in office. Their rule generated opposition, and they tolerated no dissent, but they were insufficiently ruthless or effective to suppress their enemies fully.³⁵

The state eventually no longer needed treason laws to protect itself, instead amassing an arsenal of other weapons against attack.

Treason fell victim to the state's own success. More important, as the modern state became an element of an increasingly representative and eventually democratized political system, it served its citizens, not their rulers. Political change no longer came primarily through revolt, rebellion, or insurrection—acts threatening the entire system—but as piecemeal reform, broadly agreed. Seen in a Kantian or Hegelian perspective, treason thus became just another crime. It was self-rebellion, acting against oneself. Attacking a democratically legitimated system differed from transferring power among competing dynasties. Change in democracies came increasingly from within, as everyday “treason” or reform. The domestic aspects of treason—sedition—faded in importance. Treason in democracies instead focused increasingly on collaboration with enemies, or external treason.³⁶

Over millennia, treason reflected the nature of the government authority it attacked. It spanned a broad array of actions against the people and their community in the Greek city-state, where state and society largely overlapped (as they did again in the totalitarian regimes of the twentieth century). It focused on affronts to the person and later the office of the sovereign in imperial Rome and even more so in feudal Europe. In the early modern era, treason was abstracted to cover attacks on the nation, not on its ruler. And modern representative democracies pared treason back largely to aiding and abetting enemies. Most recently, as sovereignty has in part transferred to supranational institutions—the United Nations, the North Atlantic Treaty Organization, the Hague, and the European Union—treason's boundaries have grown even hazier.³⁷

Treason was once a much broader concept. A young and weak state was threatened by many acts.³⁸ When treason was the charge invoked between dynastic factions vying for preeminence, little hemmed it in. The ruler of the moment defined all enemies as traitors. Since traitors' lands escheated to them, medieval monarchs eagerly expanded the crime's remit.³⁹ In the fifteenth century, French

kings used treason charges to redistribute subordinate lords' lands to allies.⁴⁰ The greater the sovereigns' leeway to define treason, the more enemies quavered. Pointing to the Chinese emperor, Montesquieu put it aphoristically: the less precisely high treason was defined, the more despotic government could be.⁴¹ Few actions have not been thought treasonous: consulting soothsayers about the king's death, questioning the royal household expenditures, committing buggery, being a Jesuit priest, manufacturing bad shoes, and clipping coins—alongside, of course, aiding and abetting enemies and assassinating leaders.⁴² In contemporary Thailand, insulting the king—via internet postings or bathroom graffiti, say—or even just speaking ill of his dog merits prison. In Myanmar, so does tattooing an image of the president on your penis—or even just claiming to have done so.⁴³ Since treason was definitionally a threat to the state, whatever the state thus defined became ipso facto thus. Traitors have come in all shapes and sizes: Christians under Rome, peasants in the fourteenth century, Jesuits in the fifteenth, both republicans and aristocrats in the eighteenth, Chartists in the nineteenth, Nazis and Communists in the twentieth, Islamists in the twenty-first.⁴⁴

Before religious and secular power began separating in the early modern period, treason and sacrilege or heresy were much the same offense, attacking the highest authority.⁴⁵ The Greeks closely associated impiety (*asebeia*) with treason (*prodosia*), and temple robbers were targeted by the same law as traitors. The Romans regarded serious violations of divine law (*fas*) as a kind of treason against the gods. Criticism of the emperors, regarded as quasi-divine, was considered both impiety and treason.⁴⁶ In the Old Testament, the rebellions of Adam, Cain, and Saul were disobedience against God. The Bible instructed Christians to obey the authorities, who held their power from God.⁴⁷ In 1199, Pope Innocent III turned imperial laws on treason against heretics, now seen as traitors to God.⁴⁸ Henry VIII, both king and head of the English Church, distinguished only vaguely between treason and heresy. French kings in the sixteenth

century equated heretics and traitors, confiscating the property of both.⁴⁹ In the seventeenth century, James I of England considered resistance to kings blasphemous. The Prussian legal codes of the seventeenth and early eighteenth centuries still defined treason as an attack on divine as well as worldly powers.⁵⁰ And French old-regime law recognized *lèse-majesté divine*, thought and speech crimes against God. It was from this that *lèse-majesté humaine* was derived by analogy once the prince and the state were conceived of as being separate.⁵¹

As long as rule by one lineage remained the norm, state and governing family overlapped, and treason was committed against the person of the ruler, not against the state in any abstract sense. Killing the leader was the essence of treason. Today, assassination is legally seen as but another murder. Because fathers, like hereditary leaders, were once invested with a quasi-supernatural authority, parricide too was once a worse crime than the simple homicide it is today. The Romans drowned parricides in a leather sack together with a dog, a cock, a viper, and an ape. So did eighteenth-century Germans, who added infanticide to the list of such crimes.⁵² In ancient China, a broad array of kin elders were protected against parricide, and offenders were punished by the severest affliction, death by slicing.⁵³ Neither English nor US law singled out parricide⁵⁴ But in France parent killing was still a separate crime in the Napoleonic penal code of 1810. The convicted were executed with special humiliations: barefoot, wearing only a shirt, head covered with black cloth, the right hand amputated.⁵⁵ In Japan, parricide did not become a murder like any other until 1973.⁵⁶

Similarly, seducing a leader's wife or adult daughter is today at most a private moral transgression with no legal implications. In the past, however, subverting the royal lineage's purity and claim to power by adultery, seduction, or rape was treasonous.⁵⁷ Philippe IV of France executed two minor nobles in 1314 for adultery with his daughters-in-law.⁵⁸ In 1536, Henry VIII prosecuted Lord Thomas

Howard for marrying the daughter of the queen of Scots, Henry's eldest sister. Had Henry died heirless, he feared Howard could bid for the crown. The new act made it treason to defile or deflower the king's sister, niece, or aunt or to marry them without royal permission.⁵⁹ This still holds. Adultery with the monarch's consort, eldest unmarried daughter, or the wife of the heir to the throne remains treasonous. Princess Diana's affair with James Hewitt, her riding instructor, posed the issue most recently. With treason still a capital crime at the time, both could theoretically have been executed.⁶⁰

When state and society broadly overlapped, as in the Greek polis, more actions were potentially treasonable than later when the state crystallized into more specialized functions and was threatened only by specific acts.⁶¹ Among the Romans, too, almost any offense seemingly of peril to the state was treasonous, although the emperor eventually became the focus of concern.⁶² The Romans distinguished two concepts. *Perduellio* (wicked warfare) covered any action harmful to the people, as though from an armed enemy.⁶³ As Rome enlarged, former external enemies became internal subjects, and so the concept of treachery expanded as well.⁶⁴ About 100 BCE, it included also the *crimen maiestatis* (combined by Sulla into a single law in 81 BCE)—behaviors tarnishing the sovereignty or dignity of the Roman state or the emperor. *Maiestatis* encompassed *perduellio*, and together they included even negligent or merely reckless behavior. Under Augustus, the definition expanded to cover personal damages to the leader, such as slander of the *princeps*, his family, and other prominent citizens, alive or dead.⁶⁵ Counterfeiting, too, was treason because it desecrated the emperor's image on coins.⁶⁶ Wearing clothing in the imperial purple was a treasonous offense.⁶⁷ Already under the Romans, the concept of majesty thus shifted focus from the community to the person of the ruler, which was to dominate the Middle Ages and absolutism. The *Lex Quisquis* (397 CE) expanded treason to include almost any political utterance the ruler, his ministers, and favorites objected to.⁶⁸

Treason in Roman law was action against ruler and people. Germanic ideas, as they merged with the Roman inheritance in the barbarian legal codes of the seventh century, instead emphasized the contractual relationship between ruler and follower. Loyalty was pledged, and breaking that pledge (*Treubruch*) was treason.⁶⁹ *Verrat* was equally evocative: bad counsel. The vassal owed his lord good advice and aid.⁷⁰ As feudalism spread, kings, solidifying their power as the primary lord, distinguished betrayals against themselves from those against lesser lords. English common law thus separated high from petty treason, reserving special sanctions for crimes against the king.⁷¹ The German term for treason in general, *Hochverrat*, still retains a memory of high treason.⁷²

As royal power solidified, treason focused on the monarch's person. In the late thirteenth century, the English king Edward II sought to define opposition from his barons, who wished to hold him to his feudal obligations, as treason. The kings slowly succeeded. If the monarch was society's linchpin, his demise was necessarily worse than others. A royal death involved the "whole nation in blood and confusion," in the words of an eighteenth-century English jurist. Every stroke against him is "levelled at the public tranquility."⁷³ In the seventh century, Visigoths defined treason as actions against the people and the land as well as against the king. But at the close of the ninth century, King Alfred declared a man's treachery to his lord the one crime that compensation could not expiate.⁷⁴ The English treason act of 1351 (still in effect today and the model for the US Constitution's treatment of the subject) targeted violations of the king's person. It began with instructions to punish physical attacks against or plans (i.e., compassing) to kill the king, queen, and eldest son as well as rape of the king's wife, daughter, or daughter-in-law, thus compromising the lineage. Only then did it proceed to war against the king and his realm, adherence to the enemy, and the killing of high ministers.⁷⁵ The feudal king pushed aside lesser lords, concentrating treason law's protection

on himself. His absolutist successors took this approach to its apogee. Even the subjects of a king who had become a tyrant, James I lectured them, had no right to resist him. No rebellion was ever justified.⁷⁶

From Ruler to Nation

Yet this fixation on the sovereign's person could not last.⁷⁷ Whom or what did the concept of treason seek to protect? Was treason an attack on the person of the sovereign or on sovereignty itself, independent of its current holder? If treason law protected the sovereign person, then if he were deposed, allegiance remained with him. His usurper was a pretender. Tell that to the triumphant successor! But if allegiance was to the ruler on the throne—in other words, to the system not to the person—then the expelled sovereign was a has-been, and the current occupant the true king. Any attempt to reverse a once-treasonous shift in power would now itself be treason. Success cleansed treason. Being enthroned justified all earlier treason. Politics became a succession of treacheries. Each successful treason immediately flipped from crime to status quo. Treason was thus an inherently unstable concept. If allegiance was to the person, it could not survive his or her departure; if to the system, then the new regime automatically trumped it. Impotence or irrelevance were the possible outcomes.

As long as treason focused on the ruler, regime change became a parade of treacheries. When the current leader lost, he was definitionally succeeded by traitors turned kings, whose own rule was equally illegitimate and faced the same predicament with the next challenger. In ancient China, a ruler who had driven out his predecessor was considered to have polluted himself. To be cleansed, he had to sacrifice a victim—that person was dismembered, his limbs thrown out the city's four gates.⁷⁸ As long as competing would-be

rulers battled, as in the European Middle Ages and early modern period, accusations of treason rarely rose above being tit for tat. "Treason does never succeed; and what's the reason?" the famous epigram asks. "When it succeeds, no man dare call it treason."⁷⁹

Put another way, all political action short of slavish support of the powers in charge could be treason. As a judge, Richard Tresilian, a member of the court party during Richard II's reign, had advanced the king's cause in 1386. With the peers ascendant again the following year, he was impeached and executed. Having pronounced treason on others, the judge was now himself killed as a traitor. In Tudor England, treason charges flew fast and furious as lordly lineages sought to prevail. Competing accusations of treason inevitably arose, with the last word going to the victor of the moment. Most so-called traitors of this period merely had the misfortune of ending on the losing side of a civil war.⁸⁰ Much the same held true during the French religious wars of the sixteenth century, when *lèse-majesté* could be turned at times against the Huguenots and at others against the Catholics, depending on what prince appeared to be next in line for the throne.⁸¹

Besides the inherent anarchy of a personified definition of the offense, in time other forces also helped move treason's focus away from the individual ruler. Whom did the king serve? Himself, the people, something higher? Germanic and feudal law approached relations between ruler and subject contractually and reciprocally. "Thou shalt be king if thou dost right," as the Visigoths put it, "but if thou dost not right, then shalt thou not be king."⁸² In post-Conquest England and France, the feudal relationship was reciprocal. If the king violated his end of the bargain, vassals could formally withdraw fealty (*diffidatio*) and then wage war against him, all without committing treason.⁸³ A king who became a tyrant lost legitimacy. To rebel against him was not treason. This was clearly spelled out in the various thirteenth-century compacts regulating relations between kings and their barons, most notably the Magna

Carta (1215).⁸⁴ That tradition had been overshadowed in late feudalism as one lord gained preeminence and enlisted the crime of treason for his own protection, but its fundamental logic reemerged in the contractarian political theories of the eighteenth century.

Even the absolutist monarchs' pretensions, spurning any criticism, were undermined in the sixteenth and seventeenth centuries as the religious persecution sparked by the Reformation prompted contractualist theories of government, and the natural-law tradition reemerged. Natural law insisted that transgression was not just what authority said it was but that the state itself could be considered a criminal if it violated those higher laws by which it should abide. Only those kings who governed according to higher principle could justify their authority. Tyrants could justly be deposed. John Ponet's *A Shorte Treatise of Politike Power* (1556) openly advocated tyrannicide against Mary Tudor because her rule contravened divine and natural law. Obedience was not to a personal monarch but to a constitutional sovereignty compliant with divine and natural law. In 1579, Phillippe du Plessis-Mornay, the likely Huguenot author of *Vindiciae contra tyrannos*, argued that it was treasonous for a king to commit crimes against his subjects.⁸⁵ Regicide might be reprehensible, but tyrannicide was justified. Oliver Cromwell's republic in mid-seventeenth-century England rested on similar constitutional assumptions. Kings derived power from the people. If they did not pursue their subjects' good, resistance was justified.⁸⁶ Even Thomas Hobbes allowed subjects to resist kings who harmed them directly.⁸⁷

Whether the standard by which rulers were judged was a supra-political principle or an implicit contract with their subjects, they were held accountable to something other than their own wishes. This principle was institutionalized further with representative rule in the seventeenth century and then with democracy beginning with the eighteenth-century revolutions. Not every criticism or action against leaders was treason. Indeed, they themselves could

be guilty of treason. Once rule was justified by a higher standard by which it could fail, traitors were distinguished from common criminals not just because they violated laws—both did that—but because they did not recognize the legitimacy of the law in the first place. Modern traitors rejected the entire system, claiming it had no purchase over them. Unlike common criminals, traitors also often claimed to be spurred on by a higher purpose, not by mere lucre.⁸⁸

In Europe after the late Middle Ages, the object protected by treason laws thus shifted from the person of the sovereign to something more abstract, whether the Crown, the office of the monarch, the existing governmental system, or eventually the nation. As political systems increasingly justified themselves as pursuing the good of the ruled, the crime of treason declined. Why undermine a system that ostensibly helped you? Treason necessarily faded when political change could be effected by means other than resistance, rebellion, and overthrow of authority in that regular change was incorporated into the very functioning of government. As subjects became citizens and thus the ultimate sovereign, treason meant revolting against themselves.

Treason's focus continued to move from sovereign to sovereignty, from ruler to state. In the early thirteenth century, the Magna Carta codified how the English king shared power with his barons and was not a divine ruler, which helped bring forth the idea of the Crown as the bond between the kingdom (the barons who had to be consulted) and the king. The Crown, not the king, was sovereign.⁸⁹ Treason now meant action against the realm more than against the king. By the mid-thirteenth century, treason was seen in France as a crime not just against the ruler's person but also against the province as a larger entity independent of him. The ruler now represented the state; he no longer was the state.⁹⁰ By the early sixteenth century in England, kingship was no longer understood as a network of personal allegiance but, rather, as an office or a public capacity. The king assumed it, but it existed independently of him.⁹¹ Under

Edward II in 1320, forging of coin was declared to be an affront not just—as the Romans had it—to the ruler but also to the people of his realm. Similarly, counterfeiting in sixteenth-century Florence was no longer a crime because, as with the Romans, it desecrated the emperor's image on the coin but because it impugned the credibility of the state's finances.⁹²

A century later in Elizabethan England, the state grew fully recognized as a permanent and public entity, existing independently of the monarch. Only thus did the trial of Charles I in 1649 for treason make sense. He had warred against something independent of the monarch, namely "Parliament and Kingdom." The English civil wars of the 1640s crystallized out an impersonal concept of the state, where the kings' sovereignty was derogated to them by the people.⁹³ By the time of England's strife with its North American colonies in the 1770s, this idea was firmly in place. Colonist rebels levied war against the king, "though they have no direct design against his person."⁹⁴

Protecting the Person of the Ruler

Despite this shift in the definition of treason, attacks on the sovereign's person long remained the primary concern. In 1813, the Bavarian penal code's first and worst example of treason was attacks on the "sacred person" of the king.⁹⁵ The Napoleonic penal code punished attempts on the emperor as parricide.⁹⁶ England took longer than most to shift attention from ruler to state.⁹⁷ In 1695, an English statute, passed in reaction to the bloody excesses of recent treason prosecutions, sought to hem in their scope by imposing due-process requirements. Even it, however, exempted attempts on the king's life.⁹⁸ A century later, after stones were thrown at George III, treason was specifically defined to include harming, maiming, or wounding the monarch.⁹⁹ Five years on, after another attack, attempts to

assassinate the king were now to count as and be tried in the same less-restrictive manner as murder.¹⁰⁰ Two witnesses were no longer needed, making it easier to prosecute. In 1840 and 1842, several would-be assassins attacked Queen Victoria.¹⁰¹ The treason act of 1842 therefore allowed prosecution of violence against the monarch without wheeling out treason's heavy legal machinery, treating such crimes by the laxer standards of conventional murder. The monarch's person could be better protected by making it a crime short of treason merely to bring into her presence firearms or other weapons or even just to alarm her. Easier to prosecute, these offenses also triggered more moderate punishments (transportation, hard labor, flogging, imprisonment) than the death prescribed for treason.¹⁰² The 1998 treason act retained compassing the monarch's death (inherited from the statute of 1351) as the only treasonable action directed against his or her person. Attacking the queen would thus be treason only if it was evidence of wanting to kill her.¹⁰³

Although special protection was sometimes still reserved for the head of state, treason's focus was clearly shifting from ruler to state. Nowhere did this transition occur more abruptly than Israel. Importing the English treason act of 1351 largely verbatim in 1943, Palestine under the British Mandate defined treason as "levying war against His Majesty." When it became a nation in its own right, the Supreme Court redefined the object of solicitude in 1959 to be the State of Israel.¹⁰⁴ Elsewhere the change was more gradual. The example of the French revolutionaries' shift from king to state as the protected object shows that ruler and system were being clearly distinguished. In the penal code of 1791, *lèse-majesté*, offense against the monarch, shifted to the newly minted category of crime against the nation, *lèse-nation*. In July 1790, the king—like all his subjects—was made to swear an oath to the nation. His flight to Varennes on 20 June 1791, as he sought to leave his subjects behind, revealed the king as no longer treason's victim but its primary culprit.¹⁰⁵ Like Charles I, Louis XVI died on the scaffold, a convicted traitor.

Napoleon backtracked slightly. The penal code of 1810 especially protected the emperor (his murder punished with the extra measures reserved for parricide) and his family (their killing punished as a capital crime), much like the Roman and medieval sovereigns.¹⁰⁶ In the late nineteenth century, the Japanese penal code cast its net even wider. It protected not only the divine emperor and his heirs but also his mother and grandmother, whose role in assuring the regime's continuity had, after all, been fulfilled long ago.¹⁰⁷ In Germany, as in Italy and Sweden, insulting the sovereign was still considered an affront to the nation, thus graver than disparaging private citizens.¹⁰⁸ Attempts on his life was the penal code's first example of treason.¹⁰⁹ The Belgian penal code of 1867 distinguished internal from external security. Recognizing that the king was not the state itself, though one of its officers, it added another category on crimes against the king and his family.¹¹⁰ In the French Third Republic of the 1870s and then in Germany's Weimar Republic from 1918 to 1933, such feudal echoes dissipated altogether. In matters of personal safety, the president was treated like any other private citizen. Killing him, after all, did not lead to a change in government, merely a new election.¹¹¹ Fearing unrest, the Social Democratic leaders of the Weimar Republic bucked their party's commitment to abolish capital punishment, mandating it for conspirators who plotted to kill government members.¹¹² By the postwar era, however, the transition was complete. In the German Basic Law (1949), treason laws protected not the ruler and not even the nation but the fundamental political system, the constitutional order.¹¹³ The current French penal code makes it treasonous to attack—among other aspects of the very broadly defined “fundamental interests of the nation”—the “republican form of its institutions.”¹¹⁴

Born a republic, the United States was reluctant to offer its head of state special protections. Assassinating the president was defined as nothing more than murder unless the killing was part of a plot to aid and abet the nation's enemies.¹¹⁵ A wartime statute in 1917

sought to change direction by outlawing threats against the president.¹¹⁶ After John F. Kennedy's assassination in 1963, it was discovered that although federal law penalized threats against the president and the murder of other national officials, it had overlooked the killing of the president.¹¹⁷ That omission was rectified in 1965, when investigating and prosecuting assassination were centralized in federal hands, though with punishments for it remaining the same as for conventional murder or manslaughter.¹¹⁸

Protecting the System

With political change, treason also changed. Battling barons, fighting for the crown, used treason to solidify power once they attained it. Endless bloodletting resulted. Hence, the 1495 treason act, passed after ten years of Tudor rule under Henry VII, in effect recognized *de facto* (not just *de jure*) governments. To avoid the killing of court officials as regimes devoured their predecessors, the act assured government personnel that they would not be prosecuted for treason as new monarchs ascended the throne or for past adherence to the king's enemies.¹¹⁹

At issue here was not the nature of the system but the identity of the ruling clan. When political change was threatened between different systems, not just by substituting royal lineages, however, the stakes increased. Treason was gradually whittled down from a welter of actions to focus on the primordial sin of fundamental regime change. Treason had once been vaguely defined as almost any conceivable action that hurt the body politic and community, especially its ruler. Gradually it came to focus on overthrowing government, aiming to change the system fundamentally, whether in collusion with foreign enemies or not.

Such fundamental change had earlier been almost inconceivable. Dynasties, not regimes, came and went. Early modern governments

sought to protect themselves by passing inherently self-contradictory laws outlawing their own end. Anyone in a position to violate these laws could not, of course, care less. In the late fourteenth century, Richard II promulgated a statute making it treasonous to attempt to repeal his new law on treason. His successor, Henry IV, having won the throne in war, repealed it shortly thereafter.¹²⁰ Treason laws' inherent contradictions were accentuated once they were deployed to protect not just the ruler but also the system. The German peasants revolting in the sixteenth century fought not for a new king but for a new political system altogether. The same had been true of the English peasants rebelling in 1381 and then charged with treason against the realm.¹²¹ The Holy Roman emperor thought the same as he expanded treason in the sixteenth century to include rebellion—threatening revolting peasants with decapitation or flogging.¹²² He rightly worried that peasants wanted to end imperial rule *tout court*. After the peasant rebellion of 1525, the *Landesordnung* (territorial law) of South Tirol threatened all insurrectionaries with death.¹²³ The treason trial of Charles I in England in 1649, part of the establishment of Cromwell's republic, brought fundamental regime change. No longer did rival claimants to the throne succeed one another; hereditary monarchy ended altogether.¹²⁴ Treason was already cruelly punished, but under Charles II Cromwell's now defeated followers were subjected to even more spectacular suffering, probably in response to how they had overturned the entire order. The corpses of the mercifully already dead Cromwellians were disinterred, hanged, and beheaded.

Representative government and then democracy exacerbated the problem of treason's logical self-contradiction. How could treason be squared with the right of citizens to hold their leaders accountable? In democracies, allegedly based on natural law, actions that "would earlier have kept the hangman busy" were now understood as citizens' right to determine the regime that ruled them.¹²⁵ Far from being treason, criticism and change were baked into

representative government. With freedom of speech a fundamental right, seditious opinions and even libel against the ruler could not be treason. And yet even democracies faced treason's fundamental incoherence: you cannot legislate across basic ruptures in legitimation. Only unsuccessful treason can be prosecuted. Successful treasons by their nature are not pursued.

Regimes with representative and especially democratic legitimacy allowed, indeed welcomed, criticism and reform. Yet they, too, drew the line at fundamental system change. Just as sovereign individuals cannot sell themselves into slavery without violating their freedom, so democratic regimes could not allow the undermining of popular sovereignty. That principle, in turn, rested on the assumption that popular sovereignty would never willingly surrender itself into the hands of some other system. Deciding whether one dynasty or another was to sit on the throne involved no basic principles, but to tamper with a regime constituted by its subjects' free choice was serious. Insofar as democratic regimes represented the general will, to question them was to thwart that will. A traitor to democracy was an enemy of the people. Starting already with the French Revolution, such reasoning was taken to its extremes in the populist pseudodemocracies of totalitarianism. Any criticism, however mild, was taken as tantamount to treason. Any transgression, however inconsequential or technical, was heresy.¹²⁶ Some liberal democracies, having surveyed the ravages of authoritarianism, therefore drew robust conclusions on protecting democracy against its own worst instincts. Militant democracy was the outcome—the doctrine that lesser civil rights, such as free speech or assembly, must occasionally be sacrificed since a democracy cannot tolerate political parties that aim to overthrow popular rule. In the postwar era, more than half of Europe's nations have banned a political party for such intentions, mainly but not only parties on the far Right.¹²⁷

This logic existed already with the first quasi-democratic republic in ancient Rome. When the monarchy was overthrown and

the republic installed, each citizen had to swear never to support a king or similar leader, making it treasonous not to back the existing system.¹²⁸ Similarly, in 1671 the New England colonists of New Plymouth defined treason as any attempt to alter or subvert the “Fundamental Frame and Constitutions of this Government.”¹²⁹ The US Constitution of 1787 followed suit, guaranteeing the individual states a republican form of government and promising to protect them against invasion.¹³⁰ The French revolutionaries repeated this reasoning. They messianically regarded their regime as history’s culmination. To question this conclusion was self-evidently treason. The French penal code of 1791 listed seventy-nine different crimes against the state.¹³¹ In 1792, the revolutionaries decreed death for anyone proposing a return to monarchy or any other regime hostile to the people’s sovereignty.¹³² In the Napoleonic penal code, treason was defined as any “attempt to change the form of the government.”¹³³

But, of course, events overtake even the most ambitious intentions. The Roman emperors were not deterred by the republic’s oaths. Revolutionary France was only the first of—so far—eight French regimes: five republics, two empires, and whatever Vichy should be called. Overturning a popularly legitimated system may be a primal political sin, but no regime is stronger than its ability to defend itself. Treason laws are only as robust as the regime that enforces them.

Treason Narrows

Once democratic governance became the norm, treason changed profoundly. Democracies had weaker reason to fear treason than less-legitimated regimes, except as outside attack or a wholesale upheaval from within. Democratically legitimated regimes’ authority rested on doing their citizens’ biddings. Why would anyone overthrow themselves? The short answer was that almost no one did. Treason moved from being a crime of the elite—nobles battling each

other for power—to one of outsiders, cranks, and fabulists—the Lord Haw Haws and Tokyo Roses of the world. The longer answer must also take account of the circumstances of World War II and the Cold War. As nations became carriers of competing ideologies (as during the earlier wars of religion), working for a foreign power meant more than helping enemies fight one's homeland for pay. Traitors took sides in an ideological battle. The fifth columnists in the West—Julius and Ethel Rosenberg, Guy Burgess, Harold Philby, and others from that quaint era when art historians had access to state secrets—were anticapitalist true believers. The dissidents of the totalitarian regimes were their mirror image.

But in the longer *durée* of modern history, treason fell into disuse. By the eighteenth century, interest in it was so slight that standard legal texts ceased discussing it in any detail. No other major crime, German observers calculated early in the twentieth century, was committed so infrequently.¹³⁴ Prosecutions occurred mainly in wartime and other crises. The world wars and interwar era saw clashing ideologies demanding ever firmer allegiance and a precarious geopolitical balance, with nations fearing attack and invasion. Legislation protecting nation and state unsurprisingly tightened.¹³⁵ In the United States, sedition laws suppressed radical unions during the 1920s. An uptick in treason prosecutions followed the Kennedy assassination in 1963. The Cold War rekindled treason charges, as did the Algerian conflict for France.¹³⁶ But even then treason law remained little used, compared to the early modern era, although Islamic terrorism in the West from the late twentieth century on has put it back in the limelight.

Once a blunderbuss in the early modern period, modern treason narrowed to a few crimes, mostly involving enemy powers and local collaborators. Modern law commonly distinguished between foreign and domestic treason, or what Germans call *Landesverrat* (treason) and *Hochverrat* (sedition).¹³⁷ In liberal democracies, treason was restricted to a few actions: attacks on public authorities,

insubordination in the military, sabotage, and more generally the aiding and abetting of the enemy. The external aspects of treason included obvious instances of assisting foreign enemies: committing espionage, serving in their military, admitting them illegally into the national territory. The presumption was that in democracies both government and citizens opposed the enemy.

In contrast, modern democracies deal with sedition, the domestic aspects of treason, in two ways. Much of what would earlier have counted as seditious is now accepted criticism and dissent and thus something the modern state must tolerate. But not all. Democratic systems that otherwise regard freedom of speech as foundational have also been quick to punish when matters stray onto treason's turf. Regarding words as treasonable acts in their own right stands in a long tradition. Following Roman law, with its emphasis on sedition and disloyal thoughts, the English treason act of 1351 expanded treason to include compassing or imagining the death of the king—a purely internal event perceptible only to traitors themselves and perhaps to God. How then to know whether someone was guilty? Two centuries later, under Henry VIII in the treason act of 1534 the offense was broadened to include attempts to imperil the king's person, accomplished by writing or a similar manifest act. Calling the king a heretic, schismatic, tyrant, or the like was now treasonable.¹³⁸

Courts came to accept spoken or written words alone as overt acts proving treason. In one extreme example from 1460, a tavern owner was convicted for promising to make his son, should he behave, heir to the throne.¹³⁹ During the French Revolution, about a third of the many thousands executed died merely because of what they had said or written.¹⁴⁰ The American Founding Fathers avoided making mere expression treasonable, but state statutes considered allegiance uttered to the English king treasonous.¹⁴¹ A US statute of 1917 protecting the president from threats criminalized verbal attacks on his person, thereby sanctioning speech,

and criticism of conscription was punished during World War I. In cases during World War II, propaganda was accepted as action and thus potentially treasonous.¹⁴² To prevent overreach, courts sought to distinguish between true threats and mere hyperbole. Yet even those who made conditional threats in private were indicted.¹⁴³ On the whole, however, free-speech protections encouraged the state to accept that criticisms, even ones like those once considered treasonous, were the price of democracy. The authorities worried less about the content of utterances and more about whether they sought to undermine public order. Criticism was fine, riot not.¹⁴⁴

Prosecutions of overt treason were reined in. But the modern democratic state also redirected its powers into other channels, retaining its defensive capacities in new guises. Treason laws were no longer the only or even the main bulwark against the state's enemies. It now deployed new potential charges. Since these charges were not subject to treason's procedural restrictions, through them the authorities in fact had greater leeway. Following the US Civil War, no one was prosecuted for treason, but laws regarding other, newly defined crimes now punished much the same acts. Rebellion and insurrection were criminalized in 1862, seditious conspiracy in 1861.¹⁴⁵ Such attempts to make an end run around treason proper survived challenges in court, which portrayed them as treason in all but name.¹⁴⁶ In the 1940s, similar treason substitutes were passed that outlawed advocating the government's overthrow.¹⁴⁷ In the United States, treason was seldom prosecuted during the Cold War, in part because the Supreme Court tightened up requirements in 1954. The authorities instead pursued threats via other means: rebellion, insurrection, trading with the enemy, seditious conspiracy, advocating overthrow of the government, piracy, and espionage were among the crimes now rolled out against treasonlike activities.¹⁴⁸ Alger Hiss was convicted of perjury in 1950, the Rosenbergs of conspiring to spy in 1951.¹⁴⁹

Britain invented the crime of treason-felony in 1848 to prosecute those whose actions earlier would have required accusations of

sedition.¹⁵⁰ During World War II, the new felony offense of treachery allowed pursuit of espionage and disloyalty without treason's cumbersome rules of evidence and procedure.¹⁵¹ The French penal code of 1994 devoted an entire book to the grandiosely named crimes and misdemeanors against the nation, the state, and the public peace. The book defines treason in 10 articles and then proceeds to another 227 distinct articles, many covering several different acts.¹⁵²

Modern states also turned to practical techniques to protect themselves. No-go zones from which civilians were excluded or forbidden to photograph became common.¹⁵³ Although modern leaders may no longer be protected by as many laws, they have become far more insulated from their constituents, making them physically harder to harm. They are assassinated most often at stopping points during travel, including parades.¹⁵⁴ Modern weaponry has in effect banished leaders from the open air. Their workplaces and homes have been sealed off like fortresses, and they travel in armor-plated vehicles. Such protective technologies would have been the envy of the Borgias and, until recently, would have been used only by the most despised dictators, such as Hitler and Stalin.¹⁵⁵

The rough and tumble that leaders were once expected to endure astonishes the modern mind. The same day in 1800 that James Hadfield tried to assassinate George III in the Drury Lane Theater, the king had earlier been the object of a near-miss shooting during a Grenadier Battalion field exercise in Hyde Park. That same evening, on the way back from the theater, George was pursued by an angry mob, which dispersed only when the Bow Street officers made arrests.¹⁵⁶ Security precautions were laughable by modern standards. In 1840, a drunk wandered into the White House to spend the night unnoticed. John Wilkes Booth shot President Abraham Lincoln while the police officer assigned to his theater box was drinking in a nearby bar.¹⁵⁷ After an unsuccessful attempt on President Andrew Jackson's life in 1835, the would-be assassin was released on (an increased amount of) bail since there had been

no actual battery.¹⁵⁸ The French king Louis-Philippe was the object of seven assassination attempts between the autumn of 1834 and the following summer.¹⁵⁹ When Queen Victoria was shot at in her carriage in 1842 and the assailant escaped, she and Albert were sent down the same route the next day (at a slightly faster pace) to flush out the would-be assassin.¹⁶⁰ Though he was indeed arrested on the second attempt, it seems highly unlikely that modern leaders would thus be treated like tethered goats—nor does a body double seem to have occurred to the Victorian imagination. Victoria's reign was long, but the eight attempts on her life put to shame what modern leaders are expected to endure. In the spring of 1878, Kaiser Wilhelm I survived two assassination attempts within three weeks, both on the same boulevard, Unter den Linden. Napoleon III, however, was widely suspected of having fabricated assassination plots to suppress his enemies.¹⁶¹ And Felice Orsini's attempt on Napoleon's life in 1858 certainly prompted a widespread crackdown and massive deportations.

A logically unstable concept, treason has undergone two divergent developments. As the state increasingly came to serve the people as the ultimate sovereign, treason largely dissipated. Regime change no longer involved switches among ruling dynasties, who sought to bolster their own legitimacy by wielding treason laws against their enemies, only to have the same eventually done to them. In a popularly legitimated system, treason was almost self-contradictory. As an offense, it continued as a pale vestige of its former self, largely reduced to collaboration with external enemies. What had once been the worst possible crime, one the state expended its main efforts suppressing, had largely vanished by the nineteenth century. But the state's repressive machinery against those who would threaten its stability or harm its leaders took new forms. The modern state relinquished treason law as an arrow in its quiver not because it was weak but because it was too strong and all-controlling to need it any longer.