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**Punishing Disloyalty?:  
Treason, Espionage, and the Transgression of Political Boundaries**

Youngjae Lee\*\*

ABSTRACT

This Article examines the idea of betraying or being disloyal to one's own country as a matter of criminal law. First, the Article defines crimes of disloyalty as involving failures to prioritize one's own country's interests through participating in efforts to directly undermine core institutional resources the country requires to protect itself or otherwise advance its interests by force. Second, this Article canvasses various potential arguments for the existence of a duty not to be disloyal to one's own country and argues that they fail. Finally, this Article argues that we should interpret the wrong of disloyalty crimes as involving not betrayal or infidelity, but transgression of political boundaries. That is, the relevant wrong here is rooted in the ideas of separation of powers and assignments of roles between citizens and the state, and we should thus conceive crimes of disloyalty as crimes of usurpation and evaluate the moral rights and wrongs of such crimes accordingly.

INTRODUCTION

When two people, an American citizen and a Russian citizen, commit the crime of delivering United States military secrets to a foreign government, is there a difference between the two cases? A common reaction to this scenario is that the American is a traitor to his country and should be condemned for his betrayal and that such a characterization is inappropriate for the Russian. This Article asks whether we can justify this intuition.

A natural starting point in considering crimes of betrayal of the country<sup>1</sup> is the crime of treason. The word treason has its roots in the word “to betray,”<sup>2</sup> and “intent to

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<sup>1</sup> This Article focuses on the idea of disloyalty *to one's country*, and unless otherwise specified this Article uses “disloyalty” and “disloyalty to the state” interchangeably. The concept of disloyalty, of course, has a scope that is much broader than that. One can be disloyal not just to the country, but also to persons, groups, organizations, and perhaps even ideals. See, e.g., STUART P. GREEN, LYING, CHEATING AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 98-99 (2006); John Kleinig, *Patriotic Loyalty*, in PATRIOTISM: PHILOSOPHICAL AND POLITICAL PERSPECTIVES 37, 39 (Igor Primoratz & Aleksandar Pavković eds., 2007) (observing that “loyalty can be developed in relation to almost any associational object”). And not all “crimes of disloyalty” have to do with disloyalty to the country. For instance, disloyalty is a

betray” the United States is an element of the crime of treason.<sup>3</sup> Also, only those who “owe allegiance to the United States”<sup>4</sup> can commit the crime of treason,<sup>5</sup> which is consistent with the common understanding that in order for one to betray there has to be a preexisting relationship between the betrayer and the betrayed.<sup>6</sup> Hence, when Sarah Palin accused Wikileaks of committing a “treasonous act,”<sup>7</sup> it was quickly and rightly pointed out that Julian Assange, not being an American, was “incapable of committing ‘treason’” against the United States.<sup>8</sup>

Prosecutions for treason are rare.<sup>9</sup> More common are espionage cases.<sup>10</sup> Robert Hanssen, Aldrich Ames, Julius and Ethel Rosenberg are some of the more well-known of those convicted of espionage-related charges in the United States. Technically speaking, the crimes they were convicted of were not crimes of betrayal or disloyalty. Passing state secrets to foreign governments or other enemies of the United States is a federal crime no matter who commits them and is not a crime limited to those who “owe allegiance” to the United States.<sup>11</sup>

At the same time, it is difficult to avoid at least a whiff of disloyalty when an American commits the crime of delivering military secrets to a foreign government “with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation,” which is the mens rea requirement of one of the espionage crimes.<sup>12</sup> No such inference of disloyalty would be appropriate if the same crime were committed by a Russian or an Australian. It is thus no surprise that when American

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significant concept in the area of white-collar crimes. See GREEN, *supra*, at 98-106; see also *id.* at 193-211 (discussing bribery). While some of the ideas considered in this Article may have broader applicability or bear resemblance to the idea of disloyalty in different contexts, the argument this Article develops is specific to the idea of disloyalty to the country only.

<sup>2</sup> OXFORD ENGLISH DICTIONARY ONLINE (2011).

<sup>3</sup> *Cramer v. United States*, 325 U.S. 1, 29 (1945).

<sup>4</sup> 18 U.S.C. § 2381 (2006).

<sup>5</sup> The crime of treason is defined also in the Constitution, but its formulation does not include the requirement of allegiance. See U.S. CONST. art. III, § 3 (“Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.”). While the requirement of allegiance thus appears to be a requirement in addition to the definition given in the Constitution, Chief Justice Marshall wrote in an opinion that “[t]reason is a breach of allegiance, and can be committed by him only who owes allegiance” and concluded that “[t]he words, therefore, ‘owing allegiance to the United States,’ . . . are entirely surplus words.” *United States v. Wiltberger*, 18 U.S. 76, 97 (1820).

<sup>6</sup> See, e.g., NACHMAN BEN-YEHUDA, *BETRAYALS AND TREASON: VIOLATIONS OF TRUST AND LOYALTY* 107 (2001) (“Treason . . . consists of a behavior 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.”).

<sup>7</sup> <http://twitter.com/SarahPalinUSA/status/9251635779866625>.

<sup>8</sup> James Fallows, *On “Treason” and Julian Assange*, THE ATLANTIC, Oct. 29, 2010, at <http://www.theatlantic.com/politics/archive/2010/10/on-treason-and-julian-assange/65437>.

<sup>9</sup> The last wave of prosecutions for treason occurred after World War II. For a summary, see Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1003-04 (2005). Most recently, Adam Gadahn was indicted for treason for appearing in al-Qaeda propaganda videos. Dan Eggen & Karen de Young, *U.S. Supporter of Al-Qaeda Is Indicted on Treason Charge*, WASH. POST, Oct. 12, 2006, at A3.

<sup>10</sup> See, e.g., 18 U.S.C. §§ 793-798.

<sup>11</sup> See, e.g., *Id.* § 794; see also *United States v. Zehe*, 601 F. Supp. 196, 197 (D.C. Mass. 1985) (discussing the case of Alfred Zehe, an East German citizen who was facing prosecution for “alleged acts of espionage against the United States committed in Mexico and the German Federal Republic”).

<sup>12</sup> 18 U.S.C. § 794.

citizens are accused of espionage, there is talk of treason and disloyalty, whereas if Russian citizens are accused of espionage, there is instead talk of a “prisoner swap” with the Russian government,<sup>13</sup> as if crossing the border cancels out whatever criminality might have existed on the other side.<sup>14</sup> Hanssen, Ames, and the Rosenbergs are commonly characterized as “traitors,”<sup>15</sup> and it is a common misunderstanding that they were convicted of treason, not espionage.<sup>16</sup> Therefore, even though espionage laws on their face do not distinguish between Americans and foreigners, the implication is clear; there is an act of betrayal and disloyalty when the crime is committed by Americans against the United States, and the legal system – not to mention the general public – reacts accordingly.<sup>17</sup>

Treason and espionage are only the two most obvious crimes of betrayal and disloyalty to the country. Some of the other federal crimes that likely implicate disloyalty to the United States when committed by Americans are: helping a prisoner of war or “enemy alien” held by the United States escape,<sup>18</sup> sabotaging United States war or defense activities,<sup>19</sup> interfering with activities of the United States armed forces during a time of war,<sup>20</sup> recruiting soldiers to serve in armed hostility against the United States,<sup>21</sup> and enlisting to serve in armed hostility against the United States.<sup>22</sup>

This Article examines the idea of betraying or being disloyal to one’s country as a matter of criminal law by addressing two broad questions: “What does it mean to be disloyal to one’s own country?” and “Is disloyalty to one’s own country morally blameworthy?”

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<sup>13</sup> Peter Baker, et al., *Swap Idea Emerged Early in Case of Russia Agents*, N.Y. TIMES, Jul. 9, 2010.

<sup>14</sup> In fact, Russian agents who were deported recently from the United States received awards from the Russian government. Associated Press, *Russian Spies Receive Top Honours: Anna Chapman Among the Sleeper Agents Deported from the US Given Awards by President Dmitry Medvedev*, GUARDIAN, Oct. 19, 2010.

<sup>15</sup> See, e.g., RICHARD SALE, *TRAITORS: THE WORST ACTS OF TREASON IN AMERICAN HISTORY FROM BENEDICT ARNOLD TO ROBERT HANSSSEN* (2003); DAVID WISE, *SPY: THE INSIDE STORY OF HOW THE FBI’S ROBERT HANSSSEN BETRAYED AMERICA* (2003).

<sup>16</sup> Cf. Thomas Vinciguerra, *Satisfying the Constitution on Treason*, N.Y. TIMES, Oct. 15, 2006 (“Many of the most infamous betrayals of national trust were not considered treasonous in a legal sense. Julius and Ethel Rosenberg, for example, were convicted of espionage, not treason, for giving atomic secrets to the Soviet Union.”).

<sup>17</sup> See, e.g., GEORGE FLETCHER, *LOYALTY* 43 (1993) (“There is every likelihood that Weinberger’s branding of Pollard a traitor contributed to Judge Robinson’s decision to impose a life sentence.”). This elision of the distinction between treason and espionage was starkly displayed in the Rosenbergs’ case. When the Rosenbergs challenged their conviction on the grounds that the “intent to betray” was not properly proven, the court rejected the argument on the ground that the “intent to betray” was not an element of the crime they were charged with. *United States v. Rosenberg*, 108 F. Supp. 798, 807 (S.D.N.Y. 1952) (“The specific intent required by the Statute to be proved as an element of the crime requires not a purpose to ‘betray’ the United States . . .”). But when they then challenged the sentence of the death penalty, the court rejected *that* challenge on the ground that “their traitorous acts were of the highest degree,” stressing that “[t]hroughout history the crimes of traitors stand as those most abhorred by people.” *United States v. Rosenberg*, 109 F. Supp. 108, 109 (SDNY 1953).

<sup>18</sup> 18 U.S.C. § 757.

<sup>19</sup> *Id.* §§ 2153-2156.

<sup>20</sup> *Id.* § 2388.

<sup>21</sup> *Id.* § 2389.

<sup>22</sup> *Id.* § 2390.

In understanding the inquiry of this Article, it is important to distinguish among the following three questions:

- 1) Is the state justified in punishing crimes of disloyalty to one's own country?
- 2) Is the state justified in punishing disloyalty to one's own country?
- 3) Is disloyalty to one's own country blameworthy?

The first proposition differs from the second and the third in that it only asks whether we can justify punishing those who commit crimes commonly understood to be crimes of disloyalty to their country, which is different from punishing disloyalty to their country. For example, if an American citizen levies war against the United States by bombing a federal building, he or she should be punished, but one may still ask whether the punishment is for causing harm or for betraying the United States. It is uncontroversial that he is a criminal and should be punished, but the question this Article asks is whether we can justifiably *condemn* the criminal, or *morally blame* the criminal, for betraying his country.

The second proposition differs from the third in that it asks whether the state is justified in punishing disloyalty to one's own country. The answer to this question may well be yes on consequentialist grounds according to an account like the following: In order for a state to provide for, for example, national defense, it is important to prevent people from acting disloyally. Punishment of disloyalty to one's own country can serve not only as a threat to those who may be tempted to be disloyal but also as an educative device to instill in people the sense that it is wrong to be disloyal to their country. Instances of disloyalty then should be punished in order to deter future acts of disloyalty to one's own country. This line of argumentation may persuade many, but it is, again, separate from the question whether disloyalty to one's own country is in fact blameworthy.

The question of blameworthiness of disloyalty to one's own country matters not because there is any question as to whether treason or espionage should be criminalized. It matters, rather, because it is clear that we do not just punish crimes of disloyalty; we punish people for being disloyal to their country. Charges of disloyalty to one's own country can stir up deep emotional responses, and we should ask whether those who commit crimes of disloyalty to their country and are disloyal *deserve* to be condemned for being disloyal.

After introducing some preliminary distinctions as a way of defining the subject matter of this Article in Part I, Part II addresses the question whether disloyalty to one's own country is morally blameworthy. Part II first raises some reasons to doubt that disloyalty to the country is blameworthy by discussing the cosmopolitan notion that national boundaries are morally insignificant. Part II then presents and evaluates several potential explanations as to why disloyalty to one's own country is blameworthy and concludes that they are all deficient.

Part III argues that, given the difficulties in justifying punishing disloyalty to one's own country on retributivist grounds, we should reject the idea that disloyalty to one's own country is wrong. Rather, we should reinterpret the wrong of these crimes of disloyalty to one's own country as involving not betrayal or disloyalty but transgression of political boundaries. In other words, the relevant wrong here is rooted in the idea of

separation of powers between citizens and the state. If we reconceive of crimes of disloyalty instead as crimes of “usurpation” or “foreign relations vigilantism,” we can evaluate the moral rights and wrongs of these behaviors without the distraction of the heated, yet morally unsupportable, accusations of betrayal.

A couple caveats are in order. First, crimes of disloyalty to the country, especially treason and espionage, raise First Amendment problems in many instances. A treason case may involve a propaganda video and an espionage case may involve leaking classified documents to the press. Such First Amendment issues are controversial and important,<sup>23</sup> but I do not address them in this Article. Second, while much of this Article is written in abstract theoretical terms, the focus of this Article is on the idea of disloyalty to the country as a criminal matter in the United States. Many of the arguments I discuss here could apply to other national contexts, but the general theoretical style of argumentation should not be understood to be an ambition to provide an account that applies universally. This Article is about Americans and the United States.

## I. What’s Wrong with Disloyalty?: Some Preliminary Issues

We first need to be clear about the object of disloyalty. What does it mean to betray *the United States*? That is, *who* or *what* is the United States that we are trying to protect from betrayal through criminal law? We may think of the United States as a *nation*, defined as a community of people bound by common ancestry, history, or tradition who seek to govern themselves with a set of political institutions.<sup>24</sup> We may alternatively think of the United States as a *state*, defined as a set of political institutions that is organized to govern a particular territory and that, as Weber famously put it, successfully lays claim to the monopoly of legitimate violence within a particular territory.<sup>25</sup> Finally, “nation” should be distinguished from “ethnic group,” which we might say is a group of people sharing common ancestry and culture.<sup>26</sup>

So when we are talking about disloyalty as a criminal matter, who is exactly being betrayed? One thing that is clear is that the contemplated victim of disloyalty cannot be an ethnicity, as the United States is a multiethnic nation-state. Other than that, it is difficult to say who exactly the victim of crimes of disloyalty is because real world indictments, legal or otherwise, do not distinguish among potentially different objects of betrayals when one is disloyal to the United States. I will argue below that we should think of the duty not to be disloyal to the United States as being limited to the duty not to be disloyal to the state, not the nation.

Second, what does it mean to be disloyal to one’s own country? We should start with the idea of *partiality*, which is generally considered to be a crucial aspect of “loyalty” and “disloyalty.” When a person is called “disloyal” to her own country, the implication is that, contrary to expectations, she has failed to place the interests of her

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<sup>23</sup> For the latest, see Geoffrey R. Stone, *An Overreaction to Wikileaks*, INT’L HERALD TRIB., Jan. 5, 2011. For further discussion, see, for example, GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

<sup>24</sup> See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 5-7 (1991); E.J. HOBBSBAM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* 5-8 (1990).

<sup>25</sup> Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (1919).

<sup>26</sup> See, e.g., MAX WEBER, *ECONOMY AND SOCIETY* 387-93 (Guenther Roth & Claus Wittich eds., 1968).

own country over that of other countries. Alasdair MacIntyre, for instance, argues that patriotism, which he views as a kind of loyalty, entails that “I strive to further the interests of my community and you strive to further those of yours.”<sup>27</sup> Samuel Scheffler, similarly, notes that loyalty requires “the assignment of priority to the interests of one’s associates.”<sup>28</sup> The relevant law reflects this idea of partiality. As noted above, the mens rea requirement for an espionage crime is “with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation,”<sup>29</sup> and one can be guilty of treason against the United States for “adhering to their enemies, giving them aid and comfort.”<sup>30</sup>

A person may be said to be disloyal, then, when he fails to prioritize the interests of his own community in an appropriate way. This by itself is too broad for our purposes, however, as a mere preference for other countries’ interests can include something as trivial as cheering for foreign athletes when they are competing against one’s own country.<sup>31</sup> Similarly, it seems clear that being “disloyal” to compatriots by buying only foreign-made products (German cars, French wines, Finnish cellphones, and so on), donating only to charities that serve the needy overseas, vacationing only in foreign countries, living abroad for months at a time, and so on should not be within the scope of disloyalty, especially not the kind that is morally wrongful or criminal.

In order for an act to rise to the level of criminal disloyalty against the United States, it seems that it has to be directed against state instruments with sensitive national defense implications. Other than treason, federal crimes listed earlier as implicating disloyalty, such as espionage, helping prisoners of war escape, and sabotaging United States military activities, all require support for, or at least non-interference of, core institutional resources the state requires to protect itself (and by extension, the nation) or to otherwise advance its interests by force.

From these considerations, we may arrive at the following generalization as the first attempt at a definition of disloyalty: *an “American” is disloyal to the United States (as in the state or the nation) when he or she knowingly participates in efforts, either directly or by helping others engaged in such efforts, to directly undermine core institutional resources that the United States requires to protect itself or otherwise advance its interests by force, and, in doing so, fails to prioritize the interests of the United States in an appropriate manner.*

Some caveats about the breadth of some of the terms used. First, there is a question of what institutional resources the United States requires to protect itself or advance its interests by force, and something like the Internal Revenue Service may be considered to be such an institution, which is why the word “core” is included in the

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<sup>27</sup> Alasdair MacIntyre, *Is Patriotism a Virtue?*, in PATRIOTISM 43, 46 (Igor Primoratz ed., 2002).

<sup>28</sup> Samuel Scheffler, *Liberalism, Nationalism and Egalitarianism*, in BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT 66, 79 (2001).

<sup>29</sup> 18 U.S.C. § 794.

<sup>30</sup> See U.S. CONST. art. III, § 3.

<sup>31</sup> One potential distraction here with the example of “cheering” is that it seems to implicate the First Amendment. In order to avoid such distractions, one might think instead about volunteering to carry water bottles and towels for German soccer players about to play the American team or providing the French swim team a free use of your private gym so they can gain a critical edge against the American team. The point of these examples is to see that, even without the First Amendment problems, condemning such acts as disloyal would be mistaken.

formulation. Second, it may be possible to “undermine” institutional resources by, say, refusing to pay taxes; the phrase “directly undermine” is used to distinguish such instances. Third, the phrase “protect itself” can also be construed broadly to include safeguarding American jobs and producers of American culture, such as General Motors and Hollywood respectively, but what concerns us most here is “protect” as in preserving “national security,” as the phrase is commonly understood.<sup>32</sup>

This formulation does not answer all the questions, and it will go through some modifications below, but I hope the gist of it is clear enough for it to be useful as a starting point. The goal here is not to answer all line-drawing questions but to capture the moment at which accusations of criminal disloyalty tend to legitimately arise.

## II. What’s Wrong with Disloyalty?: Some Possible Accounts

### A. Cosmopolitan Challenge

In Woody Allen’s movie “Love and Death,” there is a scene in which a Russian army sergeant explains to his soldiers about to go into battle against Napoleon’s army that “if they kill more Russians, they win, if we kill more Frenchmen, we win.” Boris, the character played by Woody Allen, is a Russian soldier, and he raises his hand at that point and asks, in all earnestness, “What do we win?”

The moment is hilarious both because the question seems so out of place and obviously inappropriate -- something only someone as clueless as Woody Allen’s character would ask -- *and* because it is in fact a very good question. To Boris, the fact that he is on one side as opposed to the other does not give him an independent reason to want his side to win; he wants to know whether more can be said in terms of reasons why he should support his side. Boris’ question makes sense because it is deeply mysterious why one’s nationality should be thought to be morally significant. If we start with the presumption that all people are of equal value and dignity, then why is it better for “our side” to win and for the “other side” to lose such that we have a moral obligation to take “our side”? If, in a situation of a conflict between two countries, we have a moral duty to support the country we have a membership in and refrain from helping our country’s enemy, such boundaries between countries must be capable of creating morally significant distinctions. And it is not obvious whether that is the case.

In fact, a number of political philosophers -- under the banner of “cosmopolitanism” -- have questioned the view that national boundaries are morally significant.<sup>33</sup> Martha Nussbaum, for example, writes in an oft-cited article that “[h]uman

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<sup>32</sup> The term “national security,” of course, is a difficult phrase to unpack. See, e.g., BARRY BUZAN, PEOPLE, STATES & FEAR: AN AGENDA FOR INTERNATIONAL SECURITY STUDIES IN THE POST-COLD WAR ERA 16-23 (1991). For the purposes of this article, “national security” means “military security” and “political security,” where military security involves armed forces and political security has to do with the stability of political institutions. See BUZAN, *supra*, at 19.

<sup>33</sup> There are many different kinds of cosmopolitanism, and different schemas abound. When I refer to cosmopolitanism in this article, I am referring to a way of deliberating about morality, as opposed to a view about how international institutions for global governance ought to be designed or a view about the significance of culture for formation of individual identities. In other words, I am interested in “moral cosmopolitanism,” not “cosmopolitanism about institutions” or “cosmopolitanism about culture.” See CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 199 (2d ed., 1999); Samuel

personhood . . . is the source of our moral worth, and this worth is equal.”<sup>34</sup> This means that we should “recognize humanity wherever it occurs, and give its fundamental ingredients, reason and moral capacity, our first allegiance and respect.”<sup>35</sup> Giving national boundaries a significant role to play in one’s moral deliberation would be indefensible, she argues, because the “accident of where one is born is just that, an accident; any human being might have been born in any nation.”<sup>36</sup> In other words, one’s nationality is “morally irrelevant”<sup>37</sup> and national boundaries, similarly, “morally arbitrary,”<sup>38</sup> and we cannot justify our differential treatment of individuals on such arbitrary grounds.<sup>39</sup>

Peter Singer also points out that “most of us unquestioningly support declarations proclaiming that all humans have certain rights, and that all human life is of equal worth” and that we “condemn those who say the life of a person of a different race or nationality is of less account than the life of a person of our own race or nation.”<sup>40</sup> But if such a set of ideas is taken seriously, as Singer argues, it seems that we cannot coherently maintain also that “national boundaries carry moral weight.”<sup>41</sup> And, if national boundaries do not carry moral weight, it is unclear whether there is a moral obligation to support your country or at least refrain from helping your country’s enemy unless your country is on the morally correct side of every conflict.

In short, despite the prevalent view that disloyalty to the country is blameworthy, it is not at all clear theoretically why that is the case. This and the following Parts consider several potential solutions to this puzzle.

## B. Potential Answers to the Challenge

### 1. Moral Self and Relational Self

We should start by setting aside two well-known arguments. First, almost every philosophical discussion of the moral status of patriotism begins with Alasdair MacIntyre’s “Is Patriotism a Virtue?”<sup>42</sup> MacIntyre argues that patriotism is not only a virtue but the “central” virtue that holds together morality because we learn and understand morality “in and through the way of life of some particular community” and thus understand rules of morality “in some socially specific and particular form,” in reference to “goods that are socially specific and particular.”<sup>43</sup> He concludes that

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Scheffler, *Conceptions of Cosmopolitanism*, in *BOUNDARIES AND ALLEGIANCES*, *supra* note 28, at 111, 111-12.

<sup>34</sup> Martha C. Nussbaum, *Reply*, in *FOR LOVE OF COUNTRY?* 131, 133 (Joshua Cohen ed., 1996).

<sup>35</sup> Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY?*, *supra* note 34, at 3, 7.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 5.

<sup>38</sup> *Id.* at 14.

<sup>39</sup> See also Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 *PHIL. & PUB. AFF.* 195, 198-99 (1994); Debra Satz, *Equality of What Among Whom?: Thoughts on Cosmopolitanism, Statism, and Nationalism*, in *GLOBAL JUSTICE* 67, 67 (Ian Shapiro & Lea Brilmayer eds., 1999).

<sup>40</sup> PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* 152 (2002).

<sup>41</sup> *Id.*

<sup>42</sup> MacIntyre, *supra* note 27, at 48.

<sup>43</sup> *Id.* at 49.

“detached from my community, I will be apt to lose my hold upon all genuine standards of judgment” and loyalty to the community is thus a “prerequisite for morality.”<sup>44</sup> In other words, the claim appears to be that, applied to the context of crimes of disloyalty, those who commit such crimes are lost, morally speaking, because those who have lost their allegiance to their communities have also lost their ability to be guided by morality.

The vision presented here is unpersuasive. MacIntyre is no doubt articulating an important truth about how people develop as moral agents; however, he overstates his case. He is suggesting that a person who is disloyal to his community would lose his capacity for moral deliberation, and that is simply false. Even though we may receive our moral educations from communities that we are born into and grow up in, the moral capacities that we obtain can certainly be exercised to generate the conclusion that sometimes the morally correct thing to do is to betray one’s country. That is, just because one learns to be moral from being a member of one’s community does not mean that one then may not criticize the source of one’s moral knowledge.<sup>45</sup>

Another common argument against cosmopolitanism accuses cosmopolitanism of threatening the idea of partiality by questioning not only patriotism but also family ties and friendships. For instance, if cosmopolitans are correct in thinking that all people are of equal worth, it seems illegitimate for a father to give special priority to the interests of his children over those of someone else’s children just because his children are his.<sup>46</sup>

This argument is fine as far as it goes, but only as far as it goes. Even if we grant that relationships matter to people, are valuable, and are important ingredients of moral lives, that does not show which relationships matter, which relationships are valuable, and which relationships are so valuable that we should treat the breach of responsibilities stemming from such relationships as morally blameworthy. And in fact, there is a serious disanalogy between intimate relationships like family and friends and relationships among compatriots. Significant components of relationships among family members and (at least good) friends are the number, type, and scope of direct interpersonal interactions extending over significant periods of time. Obviously, we cannot say the same for relationships between an individual and the state or among compatriots. The state consists of large, impersonal organizations, and most people live their lives having never met or otherwise interacted with most of their compatriots. Therefore, there is something *prima facie* dubious about arguments that justify loyalty to one’s country by drawing attention to the importance of family relationships in one’s life.

Another difference between intimate relationships and the citizen-state relationship is as follows. When we talk about various actions we perform as spouses, parents, children, friends, and colleagues, a simple statement to the effect of “That’s what a husband is supposed to do,” “That’s what friends do,” and so on is sufficient, and a demand for a further specification beyond that is often thought to be odd and misguided,

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<sup>44</sup> *Id.* at 50.

<sup>45</sup> MacIntyre does not deny, by the way, that a person can criticize his country and still have his moral faculties intact. A patriot can criticize “the status quo of power and government and the policies pursued by those exercising power and government” yet still be loyal to his country. MacIntyre, *supra* note 27, at 52. Loyal to what exactly? The answer is loyal to “the nation conceived *as a project*.” *Id.* But of course this nuance does not rescue the core argument from its implausibility, given that what MacIntyre *does* deny is that a person can criticize “the nation conceived as a project” and still retain his moral faculties.

<sup>46</sup> Scheffler, *supra* note 33, at 118.

typically leading one to think “one thought too many,” in Bernard Williams’ well-known formulation.<sup>47</sup>

This move, however, is unavailable to those who seek to justify the existence of an analogous obligation to the state. What makes “one thought too many” an argument, as opposed to just a slogan, is the thought that it is incoherent for a person to attempt to justify some of his or her most fundamental commitments because it is precisely those commitments that constitute who that person is. Meeting the demand for an external justification for the person’s commitment would require the person to step outside of himself, and that is where the mistake is, according to the communitarian view.<sup>48</sup> What this means is that for this type of argument to ground an obligation to the state, one’s political identity has to be one of those identities that are impossible to separate from one’s conception of the self, and this is implausible -- for reasons related to the aforementioned reasons to question the analogy between family and the state.

In short, philosophers like Andrew Oldenquist have attempted to argue from examples involving fathers and drowning children to justify the idea of loyalty to one’s country by pointing out that the “contempt we feel toward traitors is not unlike what we feel toward the father who lets his daughter drown,”<sup>49</sup> but that is much too quick. We cannot argue in favor of a moral duty of loyalty to one’s country by making general arguments about the importance of special relationships and special obligations for human flourishing or for moral deliberations.<sup>50</sup> The force of the cosmopolitan challenge that national boundaries are not and, morally speaking, should not be significant does not diminish because we do not know whether our relationships to our compatriots fall into those kinds of relationships that are independent sources of moral obligation. Therefore, we need to examine the nature of one’s relationship to one’s country on its own terms in order to evaluate the moral blameworthiness of one’s disloyalty to the country.

## 2. Value of Nations

As discussed above, the object of disloyalty in cases of disloyalty to one’s country is ambiguous: disloyalty to the nation or disloyalty to the state? We have stated above that the United States is a state of one nation of multiple ethnicities. One may be then disloyal against the nation or the state, and we need to treat each object of disloyalty separately. This section examines the idea that betraying one’s nation is wrong.

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<sup>47</sup> Bernard Williams, *Persons, Character, and Morality*, in *MORAL LUCK* 1, 18 (1981).

<sup>48</sup> See, e.g., CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 25-32 (1989); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179-83 (1982).

<sup>49</sup> Andrew Oldenquist, *Loyalties*, 79 *J. PHIL.* 173, 187 (1982); see also Thomas Hurka, *The Justification of National Partiality*, in *THE MORALITY OF NATIONALISM* 139, 149 (Robert McKim & Jeff McMahan eds., 1997) (“Because the arena in which partiality seems most clearly justified is the family, defenders of nationalism often try to assimilate the relations among conations to those among family members.”); Jeff McMahan, *The Limits of National Partiality*, in *THE MORALITY OF NATIONALISM*, *supra*, at 107, 111 (“A common defense of nationalism consists in comparing nations to families, thereby assimilating national partiality to the paradigm of partiality within the family.”).

<sup>50</sup> On this point, see McMahan, *supra* note 49, at 112 (“Indeed, all the various special relations have been thought to justify departures from impartiality -- love, friendship, parenthood, conationality, citizenship, and so on -- seem *sui generis*; none is relevantly quite like any other. Each has to be understood on its own terms . . .”).

In order to establish something like an allegiance to one's nation, one might start from the significance of nations for people's lives. There is much written on the value of national membership, and some breathtaking claims have been made.<sup>51</sup> According to various defenders of nationalism, national membership is valuable for at least three reasons. First, national membership is essential for autonomous living because the very ability of an individual to make choices that are meaningful owes its existence to the cultural environment that he or she inhabits.<sup>52</sup> Second, national membership makes it possible for individuals to transcend their everyday existence by imbuing a greater meaning – national significance – to the ordinary life.<sup>53</sup> Third, national membership helps people belong to a community with shared goals and mutual responsibilities.<sup>54</sup>

Assuming these various assertions about the value of belonging to a nation are correct, can such benefits of national community generate moral obligations of loyalty, which would in turn support the proposition that disloyal acts are morally blameworthy because they would undermine the health of, and threaten the existence of, one's own nation?

One possible answer is that if national membership is important to individuals in these various ways, then we have an obligation to foster them. If nations help people pursue autonomous lives by providing a context for their choices, help people give meaning to their lives by helping them draw connections to the grand narrative of their nation, and provide people with a sense of belonging to a community, then we should support the perpetuation and flourishing of these cultures. One might argue, then, that an obligation to support your nation and refrain from helping your nation's enemies naturally follows from this insight as to the importance of national membership.<sup>55</sup>

The problem with this argument is that the autonomy, transcendence, and community arguments give one a reason to support *any* nation, not just one's own. If

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<sup>51</sup> Some of the authors I am about to discuss use the term "nation." Others use the term "people" or "culture" or "encompassing group." Instead of getting bogged down on what term each author uses, I am going to treat these terms as interchangeable, not because I believe they all mean the same thing, but in order to identify a common strand of thought that has emerged in writings of various contemporary political philosophers.

<sup>52</sup> Will Kymlicka is a prominent proponent of this view. *See, e.g.,* WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 80-82, 87-90 (1995). Similar arguments have been made by others. *See, e.g.,* YAEL TAMIR, *LIBERAL NATIONALISM* 84 (1993); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 *J. PHIL.* 439 (1990).

<sup>53</sup> *See, e.g.,* TAMIR, *supra* note 52, at 85; *see also* Neil MacCormick, *Nations and Nationalism*, in *THEORIZING NATIONALISM* 189, 193 (Ronald Beiner ed., 1999).

<sup>54</sup> *See, e.g.,* TAMIR, *supra* note 52, at 85-86; Margalit & Raz, *supra* note 52, at 452.

<sup>55</sup> Charles Taylor has made an argument of this sort, when he said: "If we . . . affirm[] the worth of certain human capacities, . . . , then any proof that these capacities can only develop in society or in a society of a certain kind is a proof that we ought to belong to or sustain society or this kind of society." Charles Taylor, *Atomism*, in *PHILOSOPHY & THE HUMAN SCIENCES: 2 PHILOSOPHICAL PAPERS* 187, 197 (1985). That is, if culture can create certain goods that contribute to individual well-being, then those who value such goods should also "want to preserve and strengthen this culture." *Id.*; *see also* Charles Taylor, *Irreducibly Social Goods*, in *PHILOSOPHICAL ARGUMENTS*, at 136-37 (1995) ("As individuals we value certain things; we find certain fulfillments good, certain experiences satisfying, certain outcomes positive. But these things can only be good in that certain way, or satisfying or positive after their particular fashion, because of the background understanding developed in our culture. . . . If these things are goods, then other things being equal so is the culture that makes them possible. If I want to maximize these goods, then I must want to preserve and strengthen this culture.").

national cultures should be protected because of their importance to individual well-being, then one might argue that every person has an obligation to support protection and flourishing of national cultures, but these arguments do not specify which nations should be supported by individuals.<sup>56</sup> The topic we are addressing is disloyalty, and arguments based on general virtues of national cultures for individuals do not urge individuals to be loyal to their own cultures. Rather, the implication of the arguments seems to be that perhaps *every* existing nation should be protected and supported by *everyone*;<sup>57</sup> it says nothing about why people ought to support *their own* nations. In short, from the premise, “Nations are great for individual well-being and should therefore be supported,” the conclusion, “Therefore, you should support your own nation,” does not follow.

Some would disagree with this conclusion. Some have argued that we can derive an argument in favor of prioritizing those close to us over others from arguments that apply universally. Robert Goodin argues, for instance, “hospital patients are better cared for by being assigned to particular doctors rather than having all of the hospital’s doctors devote one *n*th of their time to each of the hospital’s *n* patients.”<sup>58</sup> Similarly, we may think, the universalist argument in favor of nationalism can generate an argument in favor of loyalty to one’s own nation because cultivation and fostering of nations as a general matter would be done most effectively if people focused on supporting their *own* nations and fighting enemies of their nation. If this is the case, then injuring state institutions may be blameworthy for undermining the health of your own nation because everyone has a duty to support his or her own nation.

There are two problems with this argument. First, it sets up a false dichotomy. One’s choices are not in fact limited to supporting either one’s own nation or supporting all nations at once. Framed in this way, it is obviously the case that it would make more sense to support one’s own nation than attempt to support all nations. However, that is not the correct way to frame the issue. The question is, given the choice between supporting one’s own and supporting someone else’s nation, why should one choose

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<sup>56</sup> In the movie *Love and Death* mentioned above, when Boris asks the question, “What do we win?” the answer he receives is as follows: “Imagine your loved ones conquered by Napoleon and forced to live under French rule. Do you want them to eat that rich food and those heavy sauces? Do you want them to have soufflé every meal and croissant?” The answer of course does not appear to satisfy Boris. The deep point here is that if a highly developed culture *A* is replaced by a highly developed culture *B*, the loss to particular individuals living in it is unclear -- at least past the initial transitional period, which could concededly be painful for members of culture *A* -- if one of the important benefits of nationhood is a sense of self importantly fueled by one’s cuisine.

<sup>57</sup> In fact, the value of nations implies even less than that. First, there is the possibility of individuals converting from one nationality to another. As long as individuals belong to *some* cultures, individuals can take the benefits of belonging to a culture, which in turn means that not all existing nations even need to continue to exist in order for individuals to draw benefits of national membership. Of course, how far this argument can go depends on the ability of individuals to truly belong to different nations. Second, if nation *A* deems the existence of nation *B* to threaten its own well-being, then the arguments in favor of national membership would be pointing in two conflicting directions – towards eliminating *B* for the health of *A* and towards protecting *B* to protect its nationhood even if it means hurting *A*.

<sup>58</sup> Robert Goodin, *What Is So Special About Our Countrymen?*, 98 ETHICS 663, 681 (1988). For a similar argument, see Nussbaum, *supra* note 35, at 13 (“Politics, like child care, will be poorly done if each thinks herself equally responsible for all, rather than giving the immediate surroundings special attention and care.”); see also 136 (“If I tried to help all the world’s children a little bit, rather than to devote an immense amount of love and care to Rachel Nussbaum, I would be no good at all as a parent.”). Cf. Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 PHIL. & PUB. AFF. 134 (1984).

one's own as opposed to the other's? That is, when choosing between supporting one and supporting *every* other nation, the choice seems clear, but when choosing between your nation and someone else's, the universalist perspective offers no guidance as to why you should support your own as opposed to the other.

Perhaps we can get around this problem by making an efficiency-based argument in favor of everyone being assigned to his or her own nation. It is easier and less costly for people as a general matter to help those that are close to them for various reasons having to do with our cognitive and emotive limitations. The transaction costs of assigning benefactors to beneficiaries, coordinating services, and making sure everyone is getting what they are supposed to be getting may be too high to justify the expense of doing it any other way. Therefore, one may argue that each national should support his or her own nation because doing it any other way would be a waste of resources and most likely less effective.

This brings us to the second problem with this way of deriving an argument in favor of loyalty to your nation from the benefits of robust national cultures. Although it may justify condemning disloyalty, it would do so for reasons that seem oddly detached from the way people in fact think about what is wrong with disloyalty and why they should not engage in acts of disloyalty. People think that they should support their own countries *because* these are their own countries, not because they believe that countries should be supported as a general matter and their own happens to be the one it is most efficient for them to support. As Anthony Appiah has put it, "You don't value your wife because you value wives generally, and this one happens to be yours."<sup>59</sup> Similarly, there is something odd about defending the state's demand of allegiance on the basis of the argument that because nations are wonderful generally everyone has a duty to support the nation that is his or her own. What is needed is a reason for one to value one's own nation in particular.

I do not mean to deny that many Americans do in fact value their nation in particular. And those who do indeed feel this way would feel guilt and would feel that they have betrayed the nation if they commit acts of disloyalty, and they will resent other Americans who commit such acts. There is no reason to disrespect or discount the validity of such sentiments, but acknowledging so need not involve the belief that that is how everyone who is "American" should in fact feel. Judging people on the basis of the fact that they do not feel that they "belong" to their own nation to which they owe corresponding obligations essentially imposes on people an obligation to belong.

Is there such an obligation? As a general matter, no, and the state cannot legitimately fault individuals for not identifying with the nation associated with it.<sup>60</sup> Of course, to what extent the state demands that people belong to the nation may differ depending on each state's citizenship laws, and even then there will be troubling questions as to whether states can legitimately hold people criminally culpable for not identifying with the nation. But at least in the context of the United States, we can safely state that all citizens have a duty not to be disloyal against the United States, yet not all citizens are expected to be "American" in the cultural sense.

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<sup>59</sup> KWAME ANTHONY APPIAH, *ETHICS OF IDENTITY* 226 (2005).

<sup>60</sup> Cf. Joseph Raz, *The Obligation to Obey: Revision and Tradition*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE PUBLIC DOMAIN*, 341, 354 (1995).

In short, there is no demand that individuals identify themselves as “American” as a matter of personal and cultural identity. If we are going to find the source of the moral obligation not to betray the United States, we should look at America the state, not the nation. One implication of this conclusion is that the definition of disloyalty given above should be refined. The new definition, which focuses on the state, is as follows: *An “American” is disloyal to the United States (as in the state) when he or she knowingly participates in efforts, either directly or by helping others engaged in such efforts, to directly undermine core institutional resources that the United States requires to protect itself or otherwise advance its interests by force, and, in doing so, fails to prioritize the interests of the United States in an appropriate manner.*

### 3. Value of States

So, if being loyal to one’s nation is one way of living a meaningful life among many that the state may not require people to adopt as their own, can we draw a duty to be loyal to one’s country by thinking about it in terms of a duty to one’s state? I defined “nation” above as a community of people bound by common ancestry, history, or tradition who seek to govern themselves with a set of political institutions. “State,” on the other hand, may be thought to be those political institutions. Therefore, whatever obligations one may have to his nation have to do with his personal identity as a bearer of culture, history, and tradition, whereas obligations one has to his state have to do with the relationship he has to his state as a member of the polity. In other words, one’s acts of disloyalty to the state may be morally blameworthy because they violate their *political* obligations, or obligations individuals owe to their state by virtue of their relationship to the state.<sup>61</sup>

We can start by discussing what makes states valuable. The typical definition of a state as a set of political institutions organized to govern a particular territory that successfully lays claim to the monopoly of legitimate violence within the territory<sup>62</sup> tells us how to tell whether something is a state but does not tell us what a state is good for, and why supporting a state may be morally required. The state does a number of things, including protecting the physical safety of those within its territory from attacks from one another and from people outside the territory, operating a system of dispute resolution spanning from police force to administrative agencies to the judicial branch, solving coordination problems by establishing and enforcing conventions, such as rules of the

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<sup>61</sup> There is a large literature on the “problem of political obligation,” and the related topic of the duty to obey the law. *See, e.g.*, A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); CAROLE PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION* (2d ed. 1979); LESLIE GREEN, *THE AUTHORITY OF THE STATE* (1988); JOHN HORTON, *POLITICAL OBLIGATION* (1992); GEORGE KLOSKO, *POLITICAL OBLIGATIONS* (2005); MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION* (2006). Unlike this literature, the discussion that follows focuses on the question of disloyalty as opposed to the question of disobedience.

<sup>62</sup> For other discussions of the concept of the state, see, for example GREEN, *supra* note 61, at 63-88; KLOSKO, *supra* note 61, at 21-42; DAVID MILLER, *ANARCHISM* 5 (1984). For illuminating discussions of the requirement of monopoly of legitimate violence, see GREEN, *supra* note 61, at 78-83; ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 23-24 (1974).

road, and so on.<sup>63</sup> There are debates about whether the state is *necessary* to provide these goods,<sup>64</sup> but that is not our concern here. All that we are interested in here is, given that the state exists, and given that it does these things, what can we say about the moral rights and wrongs of injuring the state?

The answer to this question seems obvious. It is morally blameworthy to injure institutions of the state because the state carries out valuable functions that make it possible for individuals to live normal lives as we understand normalcy today, and injuring state institutions would cause harm to individuals' lives.<sup>65</sup> But the question we are trying to answer is not whether offenses against the state should be outlawed; it is obvious that they should be. The question, rather, is whether one of the reasons crimes of injuring the state are blameworthy is because they are acts of disloyalty.

The problem is that harm-based accounts are, by their form, universalistic. If helping an enemy attack the United States is wrong simply because it participates in harm production, then it must be the case that helping the United States attack an enemy is wrong, too, and that does not correspond to the idea of disloyalty as a wrong. If passing military secrets from the United States to Russia is wrong only because it can potentially cause harm, then passing military secrets from Russia to the United States is wrong, too, and, again, that is not how we understand the meaning of disloyalty. That is, what is wrong with crimes of disloyalty is not a question that can be answered through a straight harm-based account because such an account does not distinguish between harm to one's own country and harm to other countries.<sup>66</sup> In order to give a disloyalty-based account of these crimes, we must have an explanation as to why harming one's own state is a distinct wrong, apart from and beyond the fact that it is wrong to produce harm.

#### 4. Fairness

One way of thinking about what kinds of relationship citizens have to their state is in terms that John Rawls lays out in his discussion of the duty of fairness, or fair play. He explains as follows:

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<sup>63</sup> While it is difficult to come up with a list of functions as uniquely state functions, see GREEN, *supra* note 61, at 68-69, we can still make some general statements about what states do. A good discussion can be found in KLOSKO, *supra* note 61, at 21-42.

<sup>64</sup> For a defense of the state on such grounds, see KLOSKO, *supra* note 61, at 17-59.

<sup>65</sup> We should note, however, that this conclusion *could* be questioned. First, one might argue that replacing one set of political institutions with another set of institutions can be morally justified if it can be done with minimum disruption to people's lives, with little or no violence, and with reasonable compensations for those whose reasonable expectations would be frustrated by the regime change. Of course, costs of such a transition would have to be justified by its benefits, which brings us to the second point. Even if the cost of transition from one polity to another is high, blood or no blood, one might also argue that such a transition can be justified in the same way that wars can be justified -- as a way of securing long-term benefits even if there are short-term costs. See Matthew Noah Smith, *Rethinking Sovereignty, Rethinking Revolution*, 36 PHIL. & PUB. AFF. 405, 411-13 (2008). One might develop this line of thinking to support the idea that injuring state institutions need not necessarily be morally blameworthy, but I will not pursue this avenue further because avoiding the conclusion that injuring states is morally blameworthy requires piling on too many assumptions that verge on wishful thinking.

<sup>66</sup> In the literature on political obligations, this problem has been called the "particularity" or "special allegiance" objection. See Christopher H. Wellman, *Political Obligation and the Particularity Requirement*, 10 LEGAL THEORY 97 (2004); Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFF. 3 (1993).

The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share.<sup>67</sup>

Whether the duty of fair play embodies a correct moral principle and whether it can ground political obligations have been vigorously debated.<sup>68</sup> The main intuition here is that of wrongness of free-riding. People who cut in line benefit from others' following the rules without doing their fair share. People who litter after enjoying a nice picnic at a neighborhood garden kept clean by people cleaning up after themselves benefit from others' cooperation without doing their share of cleaning.

Can we think of the duty not to be disloyal against one's own state to follow from the duty of fair play? It appears that way at first. The state can be plausibly described as a "mutually advantageous cooperative venture," which "restrict[s] liberties in ways necessary to yield advantages for all." One such restriction may take the form of the rule prohibiting acts of betrayal, such as treason or espionage, and "those who have submitted to these restrictions" by avoiding such activities, one might say, "have a right to similar acquiescence on the part of those who have benefited from their submission."

But there are problems. First of all, there is a distinction to be made between those who are passive recipients of benefits from others' labors and those who seek to benefit from others' cooperation without doing their fair share. The latter group is whom we think of when we think about free-riding. In Robert Nozick's well-known criticism of the duty of fair play, he may not have succeeded in undermining the principle completely, but his discussion of situations when benefits are essentially given to people without prior agreement are valuable at least for highlighting this distinction.<sup>69</sup> Nozick asks us to imagine a public entertainment system that provides entertainment on a daily basis in one's neighborhood or a man who gets his best exercise by throwing books into people's homes, and argues that "[o]ne cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment."<sup>70</sup>

Some have argued that benefits provided by governments are similar to Nozick's examples in that they have the feature of providing benefits to individuals without their having actively taken such benefits, in which case basing political obligations on the idea

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<sup>67</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 342-43 (1971). For another canonical formulation, see H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185 (1955).

<sup>68</sup> See, e.g., SIMMONS, *supra* note 61, at 101-42; A. John Simmons, *Fair Play and Political Obligation: Twenty Years Later*, in *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 27 (2001); KLOSKO, *supra* note 61, at 102-104; NOZICK, *supra* note 62, at 90-95; Richard Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 *ETHICS* 616 (1982).

<sup>69</sup> For a discussion that brings this out nicely, see SIMMONS, *supra* note 61, at 118-36.

<sup>70</sup> NOZICK, *ANARCHY, STATE & UTOPIA*, *supra* note 62, at 95. More current examples of situations where one should not be accused of free-riding or shirking one's own obligation to cooperate just because one has benefited without paying for the benefits may be Wikipedia and Craigslist.

of fair play becomes problematic.<sup>71</sup> Such observations gave rise to an endless debate over the validity of Nozick's arguments in terms of the differences between: receiving benefits and accepting benefits, taking benefits and not avoiding benefits thrown in one's way,<sup>72</sup> valuable goods which give rise to obligations and trivial goods which do not, and so on.

Instead of attempting to resolve this debate here by adding my voice to an already crowded conversation, I note two things. First, there is a reason to at least hesitate about the idea of the state providing mandatory or practically mandatory benefits to its citizens and giving them the following three choices: refrain from disloyal acts in return, be condemned as free riders, or leave the country to avoid receiving the benefits. Second, this problem, if it is a problem at all, is not as serious for naturalized citizens as it is for others who were born into their citizenship because we may presume that naturalized citizens have voluntarily applied to partake in benefits of this particular citizenship. Even in the case of naturalized citizens, however, there is a concern that once they accept the benefits, it is not easy for them to extricate themselves from the benefits. It would be like signing up for a lifetime subscription for a magazine without ever being able to terminate it and with payments being demanded for as long as one lives.

Another problem with the strategy of grounding the duty not to be disloyal on the duty of fair play is that it is unclear whether disloyalty is properly characterized as a problem of free riding at all. I see (literal) free riders often when I take the subway; free riders are those who take certain benefits (in this case of public transportation) without assuming the associated burdens (paying for tickets). A free rider may want the benefits to continue and simply does not want to contribute knowing that others will contribute a sufficient amount to continue to provide the benefits.<sup>73</sup> Such people are rightly looked down upon as a general matter, but that moral disapproval has as its target a different wrong from the wrong of disloyalty. Free riders want the cooperative venture that provides benefits to continue -- they just do not want to pay for it -- whereas the core wrong of disloyalty seems to involve committing acts that damage, weaken, or undermine the cooperative venture. Imagine a Vietnam War veteran who pays all his taxes turning to espionage as a side source of income.<sup>74</sup> Such a person would certainly be considered a traitor, while he may or may not be a free rider given that he has paid more than his share for national defense.

There may be two responses to this observation. First, as noted above, it is not difficult to frame disloyalty as a problem of fairness. If the state is a "mutually advantageous cooperative venture," then it is not difficult to imagine it prohibiting acts of

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<sup>71</sup> A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* 252-53 (1995). Cf. RAWLS, *supra* note 67, at 113-14 (arguing that in the case of "the average citizen," "it is not clear what is the requisite binding action or who has performed it" given that the average citizen need not perform any voluntary acts to receive benefits from the government).

<sup>72</sup> SIMMONS, *supra* note 71, at 256-60; RICHARD DAGGER, *CIVIC VIRTUES: RIGHTS, CITIZENSHIP, AND REPUBLICAN LIBERALISM* 73-77 (1997); CHAIM GANS, *PHILOSOPHICAL ANARCHISM AND POLITICAL DISOBEDIENCE* 57-66 (1992); GREGORY S. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* 410-14 (1986).

<sup>73</sup> A free rider also may not value certain benefits enough to care for their continued provision even though he would take the benefits without contributing his share if they were available.

<sup>74</sup> Maybe he does not pay "all" his taxes, since he presumably does not report income from espionage activities unless he dutifully pays taxes on them by characterizing them as prize winning or some such alternative income.

disloyalty as a way of “restrict[ing] liberties in ways necessary to yield advantages for all.” Therefore, even if disloyalty and free riding are different in important ways, that does not threaten the fair play account of disloyalty, the argument might go. What this response highlights is that, once we distance ourselves from the intuition of the wrongness of free-riding, the principle of fairness appears to be too capacious to be of much use in explaining what is wrong with various crimes. It turns out that restrictions of liberties in ways necessary to yield advantages to all in a society can cover the entire criminal code and more; laws against murder, rape, physical assault and so on are all restrictions “necessary to yield advantages to all” in the “mutually advantageous cooperative venture” called society.<sup>75</sup> If we are interested in finding out what is distinctively wrong about disloyalty, the principle of fairness, interpreted broadly, is thus a poor guide.

The second response brings us back to the idea of free riding. Disloyalty, the argument would go, *is* like free riding after all. There may be a couple ways to describe disloyalty as a form of free riding. First, in order to have a state function as an effective entity, it needs not only cooperation from its members in terms of following the law, but also loyal members who are committed to the long-term health and existence of the polity. People who are not loyal are then free riders in the sense that they are deriving benefits from those who contribute more to the advancement of the common good. Even though this may be correct as a description of what goes on in various group settings, it does not work as an explanation of crimes of disloyalty because it cuts too broadly. There are those who are lazy, indifferent, or lack any sense of civic duty, and we may call such people nonloyal. Nonloyal people may benefit from the work of those who devote more of their time and efforts to being engaged citizens (at the very least, by voting). Even if we may think of such people as not “loyal,” it seems excessively harsh to label such people “disloyal” when they do not do anything that amounts to a betrayal and all they do is simply put in less effort than others.

Second, one may think that disloyalty is problematic because it is a way of “keeping one’s options open.” That is, during a war between two countries, a member of one state may conceal his activities as a spy for the other country, with the result being that, no matter which side wins, he will be protected. The wrong here, then, is the wrong of “hedging,” which free rides on the efforts of those who have committed to one side or the other in advance and have risked being on the losing side. This does not quite work, either, however. There are two kinds of traitors – those who betray openly and those who betray in secret. The “hedgers” – the free riding traitors – betray in secret because being open about one’s betrayal defeats the purpose of hedging. This means that the wrongness of betraying and the wrongness of hedging are separate from each other, and disloyalty cannot be reduced to a form of hedging.

In short, if we interpret the duty of fairness narrowly as essentially a duty not to free-ride, then it seems to point at a wrong distinct from disloyalty, but if we interpret it

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<sup>75</sup> In fact, Herbert Morris’ famous essay “Persons and Punishment” took precisely this path in arguing that punishment is justified because criminals have benefited without shouldering the burdens of obeying the law. Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968). While influential, the argument has the bizarre implication that we should think of murder and rape as “unfair benefits” taken by murderers and rapists. For similar criticisms see R.A. DUFF, *TRIALS AND PUNISHMENTS* 211-14 (1991).

broadly as a duty to play by the rules, then it can capture so many different types of wrongs that it ceases to be useful as a way of understanding disloyalty.

## 5. Consent

Another familiar possibility is consent. A consent-based theory, for our purposes, would impose a duty on members of a state not to betray the state on the basis of their agreement not to do so. Consent arguments are thought to have some obvious defects, but I would argue that there are important insights to derive from consent theories even if they ultimately fail to explain why disloyalty is blameworthy.

The problem with an express-consent theory of political obligations is now familiar. It cannot be the ground to establish political obligations that bind every member of the state simply because very few people have made such explicit commitments, and there would be numerous problems with asking people to go through a process where they can give express consent.<sup>76</sup> This problem has led some consent theorists, including, most (in)famously, John Locke, to appeal to the idea of tacit consent.<sup>77</sup> The idea of tacit consent has been severely criticized for various reasons, mainly having to do with the conceit that mere residence or receipt of benefits can amount to an act of consent to be ruled.<sup>78</sup> The problem with the consent theory, however, lies elsewhere for the purposes of this Article because it turns out that even if we limit the scope of our inquiry to just those who have expressly promised allegiance to the state, we will still have trouble understanding what is wrong with disloyalty and have to look for other ways of thinking about the obligation not to betray.

There are two groups of people who have taken explicit oaths of allegiance: public officers, including members of the military, and naturalized citizens. The wording of various oaths taken by federal office holders is different, but they all include languages of allegiance such as “preserve, protect and defend the Constitution of the United States,”<sup>79</sup> “support and defend the Constitution of the United States against all enemies, foreign and domestic,”<sup>80</sup> or “bear true faith and allegiance to [the United States].”<sup>81</sup> The citizenship oath taken by naturalized citizens is similar:

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<sup>76</sup> See KLOSKO, *supra* note 61, at 122-40; FLETCHER, *supra* note 17, at 53-55.

<sup>77</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. MacPherson ed., Hackett 1980) (1690). For a discussion, see Hanna Pitkin, *Obligation and Consent -- I*, 59 AM. POL. SCI. REV. 990, 994-97 (1965); SIMMONS, *supra* note 61, at 83-95.

<sup>78</sup> David Hume, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL AND LITERARY* 465, 475 (Eugene F. Miller eds., 1985) (1777) (“Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.”); SIMMONS, *supra* note 61, at 83-100; Leslie Green, *Law and Obligations*, in *OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 514, 528 (Jules Coleman & Scott Shapiro eds., 2002).

<sup>79</sup> U.S. CONST. art. II, § 1 (specifying the oath for the Office of President of the United States).

<sup>80</sup> 5 U.S.C. § 3331 (specifying the general oath of office for individuals “elected or appointed to an office of honor or profit in the civil service or uniformed services”).

<sup>81</sup> *Id.*

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.<sup>82</sup>

Such promises to defend the United States Constitution against all enemies are easy to interpret to include a commitment not to betray the United States through acts of treason or espionage.

To be sure, there is an important difference between oaths taken by holders of public offices and oaths taken by naturalized citizens. The duration the oaths remain in effect varies in the two situations. Although no particular term limit is spelled out in oaths taken by holders of public office, they do not last indefinitely. Rather, they are tied to the office that the oath-takers are about to enter. The presumption then should be that the duty not to be disloyal lasts only as long as the term of the office. There could be residual obligations even after someone leaves the office, especially if the particular way in which someone commits acts of disloyalty can be traced to his tenure in the office, but the outer parameters of the oath would be determined by the term of the office. For naturalized citizens, by contrast, the oath is in effect for as long as they live. It is true that naturalized citizens can always renounce their citizenship, the same way that public officers can quit and free themselves from the obligations, but giving up a citizenship is far more costly than changing jobs. This difference matters for the validity of the consent given because there are reasons to question promises of indefinite durations without easy exit options when there is much uncertainty as to what the future holds.

None of this is to argue that the oath taken by naturalized citizens is invalid as a matter of consent. We may debate over whether people are always free to leave their own country and question whether one's decision to stay amounts to consent to be governed by the state, but entering a new country and actively seeking a citizenship in it should be considered to be, generally speaking, voluntary.<sup>83</sup> And neither is it the case that, as far as the duty not to betray is concerned, the terms of the promise are so vague and uncertain that the existence of a valid promise is in doubt. The only point being made here is that, all other things being equal, there are features of the citizenship oath

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<sup>82</sup> The part of the oath that requires renunciation of "all allegiance to fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen" has never been enforced and is looking outdated. See PETER SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 72-73 (2008). The existence of this discrepancy probably hurts the credibility of the oath somewhat, but it does not seem to me that it damages the core substance involving loyalty, allegiance, and protection of the United States against all enemies.

<sup>83</sup> Of course there will be exceptions in individual circumstances. Also, there exists a group of naturalized citizens who were brought to the United States as children and then became naturalized after they turned 18; by that point, it is unclear whether they can be said to be free to leave.

that make it more suspect as a promise than the oath that public officers take upon entering their offices.

Now, if it *also* turns out that the demands of the oath are stringent, *then* we may take the further step of considering the promise of naturalized citizens to be invalid. Fortunately, for the duties that this Article is focusing on, it does not seem that particularly stringent demands are being made. The duty not to be disloyal by avoiding aiding the country's enemy and avoiding revealing military secrets to foreign entities is a duty that can be performed while sitting on a couch and watching *Mad Men*. It does not take much to satisfy such duties, and agreeing to satisfy such duties as a condition of obtaining the citizenship is not an unreasonable demand.<sup>84</sup>

Therefore, it seems that we can safely conclude that at least those who take oaths of allegiance – holders of public positions and naturalized citizens – are under a duty not to be disloyal. Does this mean that, at least for these two groups of people, we have answered our question whether the state may legitimately blame people for being disloyal?

Not quite. Perhaps the existence of some kind of obligation not to be disloyal is secured through the oaths of allegiance; however, we have to ask the further question of what exactly is the nature of wrongdoing when obligations of allegiance established through an oath are breached. When someone breaks a promise by performing an act, there are potentially two wrongs, the wrongness of promise breaking and the wrongness of the act itself. This is because when someone makes a promise to do *x*, it is understood that the promise creates a new obligation to do *x* over and above the pre-existing reasons to do *x*, and breaking the promise entails a violation of the promissory obligation as well as going against the reasons to do *x* that existed before the promise was made.<sup>85</sup> Why breaking a promise is wrong is a topic that has been much debated, but it is unnecessary here to commit to any particular account of the nature of its wrongness.<sup>86</sup> The only point being made is that there is an independent wrong that is associated with breaking a promise that is separate from the wrong of committing the conduct underlying the breach.

This means that when public officers or naturalized citizens commit acts of disloyalty, we may blame them for violating their oaths or for being disloyal, and the argument that those who have taken the oaths of allegiance have an obligation not to be disloyal is sufficient to establish the duty not to be disloyal but cannot establish further that the state may blame them for the wrongness of betraying. In other words, the consent theory cannot justify the practice of taking people's acts of disloyalty to be blameworthy. At most, what we have established here is that public officers and naturalized citizens have duties not to be disloyal on the grounds that they have given

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<sup>84</sup> If one believed in the existence of a fundamental right to support whatever state, regardless of one's own national membership, then the duty not to be disloyal starts to look like a serious violation. I am not aware of any attempts to recognize such a right unless it implicates other rights such as the freedom of speech. And even if some of these crimes of disloyalty turn out to be unconstitutional for infringing on the First Amendment, a large category of conduct considered to constitute crimes of betrayal would still remain.

<sup>85</sup> Cf. H.L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82, 102 (A.I. Melden, ed., 1958) ("Promises have pre-eminently the feature I have called independence of content: the obligation springs not from the nature of the promised action but from the use of the procedure by the appropriate person in the appropriate circumstances.").

<sup>86</sup> See, e.g., RAWLS, *supra* note 67, at 344-50; T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 295-327 (1998).

their express consent to be under a duty not to be disloyal. *Thus*, when a naturalized citizen commits an act of disloyalty we may blame him not only for being disloyal but also for breaking a promise. It is the blame for being disloyal part, however, that still remains to be explained.

Furthermore, I would argue that even when we condemn public officers and naturalized citizens for being disloyal, the part of our condemnation having to do with breaking of the promise is rather insignificant. This is because, properly understood, the significance of the oath lies not in the fact that one is making a promise to undertake certain specific obligations; rather, what the oath does is express one's undertaking of a certain position or a role, which comes *with* certain obligations. The oath is thus not like signing a contract and promising to perform various terms of the contract; the oath rather is an expression of intent to enter a role and assume a set of responsibilities that come with the role.

In this way, the oath of allegiance to the state is analogous to marriage vows. When vows are spoken during a marriage ceremony, the bride and groom are expressing their assumption of a role that comes with certain duties, one of which is the duty of loyalty. And if a husband is unfaithful to his wife, the core wrongness of his acts lies in the fact that he betrayed his wife, and the fact that he also happened to have broken his promise by itself is too feeble to account for our understanding of the wrong that was committed. Breaking one's oath of public office or citizenship oath through performing acts of disloyalty should be understood in the same way – as acceptances of roles that come with certain obligations – a public official or a citizen.<sup>87</sup>

For all of these reasons, we need not go into the various problems of theories of “tacit consent” to expose the deficiencies of the consent theory as a way of explaining why disloyalty is blameworthy. It turns out that even in instances in which we find express consent to a duty of allegiance, consent is not sufficient to do the job of explaining what is wrong with disloyalty.

## 6. Trust

Can we appeal to the idea of violation of trust to understand punishing disloyalty? Violation of trust may be thought of as a wrong, and it is closely related to betrayal – so closely related, in fact, that some would define disloyalty as violation of trust. The idea of violation of trust, however, is illuminating only for some phenomena and not for others. Here, we again need to distinguish between naturalized citizens and public officers on one hand and other members of society on the other hand. As we saw above in our discussion of consent, naturalized citizens and public officers appear different from other citizens because it may be argued that through a voluntary application and assumption of citizenship or public offices, these people have induced others' trust, and if they behave disloyally, then there is nothing wrong with describing them as having violated others' or the state's trust. Therefore, it seems that we have fairly clear instances of betrayal as a violation of trust in these cases, and we can analyze espionage cases involving those whose positions give them access to classified materials as violation of trust cases. Cases of Aldrich Ames, a C.I.A. agent, and Robert Hanssen, an F.B.I. agent,

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<sup>87</sup> The use of the word “citizen” is not meant to exclude others who may have a sufficiently thick relationship with a state to be considered a member of the state, which may include permanent residents.

fall into this category, and we might also argue that naturalized citizens who transmit classified materials to other governments violate our trust from two sources, one stemming from the naturalization process and the other from his or her position of trust and access to classified information.

But what about the rest? Isn't there a case of misplaced trust if other members of society have not done anything affirmative to encourage others to trust them? And wouldn't there also be a case of misplaced trust if we trust a harsh and persistent critic of the United States and its government's deeds? In what sense has there been a violation of trust if a United States citizen, say, makes propaganda videos for Al Qaeda?<sup>88</sup> Who trusted him and why? We expect the government to punish those who commit crimes because the government uses its coercive power to reassure the rest of us that we can play by the rules without fear of being taken advantage of or having our efforts be wasted. But I am not sure how we can say that we trust people to not commit acts of disloyalty. In fact, as a general matter, we do not trust one another, and that is why the state uses a variety of tools, some coercive others less so, to induce desirable behavior from people.

Trust is also an inappropriate concept here because normally people can avoid being trusted to act in a certain way through the practice of full disclosure, but that is not an option in this context. For instance, imagine Claire, a U.S. citizen who gets up every morning and recites the following anti-oath in public before going to work:

I hereby declare that I am a U.S. citizen, *but* that I will *not* support and defend the Constitution and laws of the United States of America against all enemies, foreign or domestic; that I will *not* bear true faith and allegiance to the same; that I will *not* bear arms on behalf of the United States when required by the law; that I will *not* perform noncombatant service in the Armed Forces of the United States when required by the law; and that I will *not* perform work of national importance under civilian direction when required by the law.

If "trust" is what is at issue, and if betrayals consist in violations of trust, then it seems that we would have no right to complain about Claire's betrayal if she does commit acts of disloyalty because she is clearly begging not be trusted here. The duty not to be disloyal against the government is not something that one can free oneself of simply by denouncing the government or taking an oath like the one above.<sup>89</sup> Therefore, if we are interested in giving an account that applies to naturalized citizens, public officers, and other members of society alike, trust is of limited use as an explanatory concept.

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<sup>88</sup> See Eric Lichtblau, *American in Qaeda Tapes Accused of Treason*, N.Y. TIMES, Oct. 16, 2006 (describing the case of Adam Yahye Gadahn, an American accused of making al Qaeda videos denouncing the United States and indicted for treason).

<sup>89</sup> In fact, it is not easy to lose one's citizenship. For basic requirements, see 8 U.S.C. § 1481. See also *Gillars v. United States*, 182 F.2d 962 (1950) (finding that a statement of allegiance to Germany typed on a piece of paper and signed by an American citizen and submitted to her work supervisor in Germany during World War II was insufficient to cause a loss of citizenship).

## 7. Gratitude

In the discussion of the natural duty accounts above, we listed a number of valuable functions the state carries out, such as national defense, dispute resolution, social coordination, and so on. Even though it was argued above that the fact that the state provides these services does not justify an obligation to be loyal to one's own state as opposed to an obligation to support reasonably just states generally, it is sometimes argued that citizens owe a duty to support their own state because they have received benefits from it in numerous ways.<sup>90</sup> Those who commit acts of disloyalty should be condemned, on this account, because they are ingrates who take benefits from the state and return the favor by hurting it.

The gratitude argument as a way of grounding political obligations has been criticized. It has been argued, for instance, that while the duty of gratitude may be sufficient to generate a duty to express one's gratitude in some adequate fashion, it is too vague to generate political obligations,<sup>91</sup> and that gratitude is to feel in a certain way and it is inappropriate for the government to require that people have certain feelings.<sup>92</sup> It has also been argued that gratitude is appropriate only when special effort has been expended by the benefactor to provide benefits and when the benefactor provides such benefits with right motives. The government does not seem to satisfy either condition, simply because thinking of the state as a being capable of expending efforts and acting with right motives quickly brings us to a land of metaphysical obscurity.<sup>93</sup> These objections are successful in defeating the gratitude argument to various degrees.<sup>94</sup> For our purposes, though, it seems that the vagueness objection is not a worry given that no matter how vague the requirements of the duty of gratitude to the government may be, it seems that we can safely say that being disloyal to the government is in violation of them. Also, the requirement of gratitude need not be construed as a requirement to have certain feelings; it is perfectly coherent to think of it as a duty to make appropriate expressions of gratitude or a duty to avoid acts expressing ingratitude.<sup>95</sup>

For the purposes of this Article, which is to examine potential grounds for persons not to betray the state, the biggest weakness of the gratitude argument is exposed once we think of states and institutions as beings capable of bestowing benefits and expecting gratitude in return. *If* it is coherent to talk of institutions in this way, the list of benefactors to whom individuals owe duties to express gratitude in some way starts to grow very quickly.

First, we cannot ignore globalization as a phenomenon when we start looking for things to thank for giving our lives their current shape. International cooperation and

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<sup>90</sup> See, e.g., A.D.M. Walker, *Political Obligation and the Argument from Gratitude*, 17 PHIL. & PUB. AFF. 191 (1988).

<sup>91</sup> SIMMONS, *supra* note 61, at 167-68, 185-86.

<sup>92</sup> *Id.* at 166-67.

<sup>93</sup> *Id.* at 187-89.

<sup>94</sup> For a good discussion, see William A. Edmundson, *State of the Art: the Duty to Obey the Law*, 10 LEGAL THEORY 215, 243-45 (2004).

<sup>95</sup> This means that your expression of gratitude may be insincere, but this only means that the obligation to express gratitude may be satisfied perfectly or imperfectly. A person may have trouble having genuine feelings of gratitude yet may still go through the motions because, objectively speaking, he feels that he owes an expression of gratitude nevertheless.

international institutions are needed to address various issues that can affect individuals' day to day lives – such as finance, trade, terrorism, climate, diseases, and nuclear proliferation.<sup>96</sup> People benefit from not just their own state but from other states and international bodies, and the logic of the gratitude theory sets us on a path of calculating who is providing benefits to whom.

Also, for individual Americans, how the gratitude calculus works out is likely to vary greatly. Some Americans were born in other countries and raised there before they came to the United States. Some college students study abroad and are changed profoundly forever. Some build their careers on importing overseas cultural products and selling them to the American public. In short, if we can identify what benefits come to individuals from where, then the direction of gratitude is likely to be not only diffuse but also would map out differently for different individuals. Therefore, gratitude to benefactors is a highly unreliable and messy way of arriving at duties of individuals to their states.<sup>97</sup> This is not just an objection based on pragmatic considerations; the argument is that the gratitude account does not track the way we generally think about who has the duty not to be disloyal towards whom.

Gratitude-based accounts of disloyalty also have trouble with the real phenomenon of people around the world having feelings of gratitude towards the United States for various reasons. Such sentiments were recently on display in Normandy for instance, during its sixty-fifth year commemoration of the Normandy landings during the Second World War. Countries around the world continue to depend on the United States military to preserve their own security. Drove of foreigners come to the United States each year to enroll in graduate schools. Some of them stay, but many go back to their home countries. Should we start demanding a duty of loyalty to the United States from all of these people? Would it ever make sense to accuse them of treason if they decide to steal American secrets and pass them around since they received benefits from the United States? The point is that the duty not to be disloyal against the state does not operate on a sliding scale that adjusts according to people's backgrounds and particular emotional identifications, but gratitude accounts do not have internal constraints to avoid such implications.

### III. Usurpation, not Disloyalty

The central puzzle this Article has sought to resolve is the following: when two people, an American citizen and a Russian citizen, commit the crime of delivering United States military secrets to a foreign government, is there a difference between the two cases? We started this Article with the idea that there is a difference between the two cases in that we can blame the American for disloyalty whereas such a conclusion would be inappropriate for the Russian, even though both broke the same law. The various theoretical attempts outlined in Part II all fail to explain and justify this intuition, and one

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<sup>96</sup> For a good snapshot of the current state of global governance, see JOSHUA COHEN AND CHARLES SABEL, *Extra Republican Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147, 164-65 (2006). See also MARTIN WOLF, WHY GLOBALIZATION WORKS 61-73 (2004). For a recent example, see Sewell Chan, *G-20 Vows to Avoid Currency War*, N.Y. TIMES, Oct. 23, 2010.

<sup>97</sup> This is not to deny the possibility of people having multiple allegiances. The point is that we need a way of telling who has allegiances to whom (which is something we can do for those who hold multiple passports), and the concept of gratitude is too vague to give rise to such categories.

possible conclusion to draw from all this is that there is no such thing as a duty not to be disloyal to one's own country and that we should thus dismiss the Russian-American difference as illusory.

Another possibility is to ask if the intuition has some basis other than disloyalty. To make some headway here, let's think about what it would mean for people to undertake the acts that we have been assuming to be "disloyal." First, take the case of treason. If the United States is at war against another country, say Iraq, it would be treasonous for an American to help Iraqi war efforts by going to Iraq and working as a volunteer for the Iraqi military. One may of course go to Iraq during a time of war for humanitarian reasons, to help Iraqi civilians whose lives have been adversely affected by war, to monitor potential human rights abuses and violations of laws of war, and so on. We can put such acts aside as not treasonous, even if they would incidentally have the effect of boosting the morale of the Iraqi army. But what if a person believes that the right thing for him to do is to help the Iraqis with the goal of defeating America in the war?

There may be several reasons for such an act, depending on the situation. It may be thought that the United States is a hegemon with imperial ambitions that should be curbed in order to prevent further damage to international affairs,<sup>98</sup> with the long-term net result of an American defeat being better for the world as a whole than its victory. Or it may be thought that the quickest way to end the war with the lowest number of military and civilian casualties on both sides is for the United States to be defeated soundly. For example, the Vietnam War may not have dragged on for as long as it did if it had become obvious early on to the United States government that its efforts were futile.<sup>99</sup> Or it may be thought that the United States is on the wrong side of this particular conflict, morally speaking, and that it is morally permissible to participate in the war on the side opposing the United States. If the United States is engaging in an act of aggression, the Iraqis may simply be innocent actors defending themselves, in which case helping the Iraqis defend against the U.S. attack is a simple case of defense of others.<sup>100</sup>

What about espionage? Is there an argument for engaging in acts of espionage? Again, there may be many reasons why one might think that passing along, say, United States military secrets is a good idea. For instance, one might think that national security is a good – it contributes to a sense of safety that enables people to pursue normal lives,<sup>101</sup> and a country's military power can enhance its ability to defend itself against potential aggressors, and one might accordingly believe that the United States military secrets can be useful to some other country's national security, which in turn would

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<sup>98</sup> Cf. G. John Ikenberry, *America's Imperial Ambition*, in *THE USE OF FORCE* 321 (Robert J. Art & Kenneth N. Waltz eds., 6th ed., 2004).

<sup>99</sup> Cf., ROBERT MCNAMARA, IN *RETROSPECT: TRAGEDY AND LESSONS OF VIETNAM* 262-64 (1996).

<sup>100</sup> Cf. MODEL PENAL CODE § 3.05 ("[T]he use of force upon or toward the person of another is justifiable to protect a third person when . . . the actor would be justified . . . in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and . . . under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and the actor believes that his intervention is necessary for the protection of such other person.").

<sup>101</sup> See, e.g., IAN LOADER & NEIL WALKER, *CIVILIZING SECURITY* (2007).

benefit that country's inhabitants.<sup>102</sup> It might also be believed that if countries that worry about American military interventions learn more about the American military, these countries will benefit from obtaining American military secrets and better prepare themselves for a potential attack from the United States. If American interventions in general or in particular instances are thought to be potentially an awful idea then one might think that there is nothing wrong with preventing such interventions by weakening the United States military or strengthening the potential targets of the United States military intervention.<sup>103</sup> In addition, military power enhances a country's bargaining position in the world,<sup>104</sup> and to the extent that the United States has an unfair advantage in this arena, one might think that revealing U.S. military secrets to others is a way of leveling the playing field. Moreover, to the extent that citizens in wealthy countries benefit from the current system of inequalities, one might say that they in fact have a moral duty to work towards undoing the system of inequality, perhaps by distributing military intelligence to other countries that may lack such resources and are thus in positions of vulnerability. Some might even argue that sending military secrets to some countries would mean those countries would be able to spend less on military and more on, say, social welfare, which would be a tremendous gain for the individuals living in those states.

What is wrong with positions like these? One obvious response is that basing one's behavior on these sorts of arguments is unwise. Most of these behaviors carry the risk of doing more harm than good, and morally responsible individuals would probably refrain from engaging in them. But this way of thinking about what is wrong with such acts speaks in terms of what kinds of harms such acts would bring about and is thus limited. First, it cannot well explain why we do not engage in case-by-case determinations to see whether individual "disloyal" acts undertaken are in fact harmful all things considered. Second, being a harm-based argument, it has the same defect as other

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<sup>102</sup> For instance, a cosmopolitan philosopher Kok-Chor Tan supports the "right of nation states to self-determination and noninterference," KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* 114 (2004), which would presumably be a right that is more easily and freely exercised with a strong military force. Tan further argues that "differences in power relations between nations . . . obstruct the right to self-determination of the least advantaged" because "material inequalities will allow some nations to more easily exploit others, thereby compromising their right to self-determination," *id.* at 116, and it seems that this problem, too, can be alleviated if military knowledge from more powerful states can be redistributed to weaker states. Finally, he states that "the relative vulnerability of some nations with respect to others makes them susceptible to coercion and deception, which is clearly anathema to self-determination." *Id.* at 118. The argument is not that Tan himself would endorse acts of espionage; the only point here is that one way of addressing the kinds of relative vulnerabilities Tan points out may be through espionage.

<sup>103</sup> *Cf.* BUZAN, *supra* note 32, at 158 (1991) ("Would international security be better served by a more even distribution of power than by the huge inequalities, such as those between the United States and Burundi, that dominate the present system? It can be argued that more equal units might well provide a more manageable anarchy, because each would have difficulty mobilizing sufficient resources to threaten others seriously . . .").

<sup>104</sup> Robert J. Art, *The Fungibility of Force*, in *THE USE OF FORCE*, *supra* note 98, at 3, 7 (arguing that military power is "fungible" in the sense that it helps the state achieve various objectives, both military and non-military); Robert J. Art, *To What Ends Military Power?*, in *AMERICA'S GRAND STRATEGY AND WORLD POLITICS* 111 (2009); Alexander L. George, *Coercive Diplomacy*, in *THE USE OF FORCE*, *supra* note 98, at 70; John Garnett, *The Role of Military Power*, in *PERSPECTIVES ON WORLD POLITICS* 69, 74-82 (Richard Little & Michael Smith, 2d ed. 1991).

harm-based arguments considered above. Namely, it cannot explain the difference between the Russian spy and the American spy.

To resolve this puzzle, I suggest that we view the wrongfulness of these acts of “disloyalty” as consisting not of harm or even disloyalty, but what one might call “usurpation” or “foreign relations vigilantism.” The problem with these “disloyal” acts is that they cross the boundaries that are set up to protect the state monopoly of violence. The state, as mentioned above, fulfills various valuable functions. The state goes about its business in the name of its people, and physical security is not only one of the main functions of the state but is a precondition of the cooperative activity of governing and being governed together as members of a polity. This cooperative venture, in turn, cannot exist and continue unless it has physical security, and the state achieves this through a particular configuration of power between the state and its citizens, and one core feature of this configuration is the state monopoly on violence.<sup>105</sup>

Members of the state are, then, required to refrain from engaging in activities that threaten the core institutional resources the state requires to protect itself. When a citizen participates in efforts to undermine the core institutional resources the state requires to protect itself, the citizen disturbs the way in which power is distributed within the polity and enters a domain of exclusive governmental power. In short, the relevant wrong here should be thought of as usurpation of state power.<sup>106</sup>

Can this account explain the difference between the Russian spy and the American spy? It may appear that the answer to this question is no because it seems that both the Russian and the American have interfered with the monopoly of violence held

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<sup>105</sup> There is obviously much more to be said about the nature of this cooperative activity and the importance of violence and coercion in understanding it. One important inspiration here is Kant’s political philosophy. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 89-90 (Mary Gregor trans. & ed., Cambridge Univ. Press 1996) (1797) (“[B]efore a public lawful condition is established individual human beings, peoples, and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another’s opinion about this. So, unless it wants to renounce any conceptions of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter a civil condition.”). For an excellent discussion, see ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 145-266, 238 (2009) (“[T]he fundamental rationale for the exercise of the police power is to create a regime of equal private freedom. In order to do so, the state must create and sustain the systematic preconditions both of the exercise of private freedom and of the conditions of its ability to provide them. It can compel citizens to do their part in creating and sustaining a rightful condition.”); see also ANNA STILZ, *LIBERAL LOYALTY* 27-56 (2009); Jeremy Waldron, *Kant’s Legal Positivism*, 109 *HARV. L. REV.* 1535, 1545-66 (1996). For another account of the nature of the state that renders support to the picture sketched here, see Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 128 (2005) (“[W]e are both putative joint authors of the coercively imposed system, and subject to its norms . . .”).

<sup>106</sup> Disloyalty offenses are not the only usurpation offenses in criminal law, and indeed one implication of accepting the account proposed here is that crimes of disloyalty become a member of a family of wrongdoing that is characterized by a disturbance of a system of a division of labor between citizens and the state. For a discussion, see Youngjae Lee, *The Defense of Necessity and Powers of the Government*, 3 *CRIM. L. & PHIL.* 133, 138-43 (2009); see also George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 *U. PITT. L. REV.* 553, 567-71 (1996); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 *U. PENN. L. REV.* 1691, 1703-20 (2003); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 *YALE L.J.* 1070 (2008).

by the United States within the United States. The appearance is not entirely correct, however, because there is a crucial difference between the Russian and the American; the American is related to the United States government in a way that the Russian is not. The state monopoly of violence is a political idea in the sense that it effects a separation of powers between the state and its citizens and assigns different roles to each. When an American steals state secrets from his own government, he is breaking the terms that control the way in which power is shared between him, his government, and among all members of the society, but when a Russian steals from the American government, there is no equivalent wrong because he is not involved in a power-sharing arrangement with the American government or its people.

One might say, then, that the wrong here consists in a breach of a role obligation.<sup>107</sup> While the term “role obligations” by itself is not terribly informative since it does not spell out what the relevant obligation is, it is useful in highlighting the difference between the American and the Russian. The United States assigns the American in the example one role – that of a citizen, whereas the Russian is assigned a different role – that of a guest, and the difference between the two is explained by the fact that their otherwise identical acts of espionage breach different role obligations. The Russian fails to fulfill his obligation to be a polite guest who is expected to be well-behaved in ways that matter to the United States; the American fails to fulfill his obligation to be a citizen who respects and abides by a particular allocation of power between him and the state.

An important difference between usurpation and disloyalty is that usurpation, unlike disloyalty, is not about prioritizing the interests of one’s own community or associates. Rather, it is about respecting boundaries and the way in which power is allocated. Under this account, one may be a citizen of country *A*, believe that country *B*’s interests are more valuable overall, and work in ways to promote country *B*’s interests over those of country *A* every time but still avoid being “disloyal” as long as he respects these political boundaries. Conversely, one may be a citizen of country *A* and promote country *A*’s interests over those of other countries at all times but can still be “disloyal” if he transgresses the relevant boundaries. Therefore, under the proposed account, the idea of partiality in the sense of prioritizing interests drops out, while the *special* and *particularistic* aspect of the obligation a citizen owes to the state is preserved.

As a consequence, we need to rework the working definition of disloyalty so that it reads as follows: *An “American” is guilty of “disloyalty” to the United States (as in the state) when he or she knowingly participates in efforts, either directly or by helping others engaged in such efforts, to directly undermine core institutional resources that the United States requires to protect itself or otherwise advance its interests by force.* There are two revisions here. First, there are scare quotes around the word “disloyalty” because the very idea here is to reject our reliance on the term. Second, the clause, “*in doing so, fails to prioritize the interests of the United States in an appropriate manner,*” is omitted for the reasons explained above.

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<sup>107</sup> See generally Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333 (1994). Cf. A. John Simmons, *Associative Political Obligations*, 106 ETHICS 247, 247-52 (1996).

Now, one might object, is it not possible to make a role-obligations-based argument to establish the duty not to be disloyal? That is, why not simply say that members of the state are prohibited from prioritizing the interests of other countries or competing entities in certain ways, and that is an obligation that comes with the role of citizenship? The problem with this idea is that the role obligations argument for the disloyalty account remains vulnerable to the cosmopolitan challenge because the idea of prioritizing the state's interest is of crucial importance for the disloyalty account. Because the usurpation account is not similarly related to the idea of prioritizing interests one way or the other, it is less vulnerable to the charge that it violates the principle that people are of equal worth.

Putting things in terms of a role obligation not to usurp the government's exclusive power has a number of further advantages over the disloyalty account. First, let's reexamine the original definition of disloyalty: *An "American" is disloyal to the United States (as in the state) when he or she knowingly participates in efforts, either directly or by helping others engaged in such efforts, to directly undermine core institutional resources that the United States requires to protect itself or otherwise advance its interests by force, and, in doing so, fails to prioritize the interests of the United States in an appropriate manner.* This definition may work tolerably well to describe crimes that we normally consider to be crimes of disloyalty; nevertheless, the term disloyalty can be inapposite. For instance, is an American who sells American state secrets to China disloyal to the country even though he himself has no interest in how the competition between the two countries for global dominance shakes out? Here is someone whose heart does not belong to China or the United States but only to himself. It is debatable whether this is a genuine case of betrayal, but it is easy to assimilate the scenario as a case of usurpation.

Second, a usurpation account does a better job explaining why we do not see the distinction between betraying state secrets to enemy and ally nations in this area of the law, except in the case of treason. The Jonathan Pollard case,<sup>108</sup> for instance, is controversial because some believe that there is a difference between spying for an enemy and spying for an ally.<sup>109</sup> If the real issue here had to do with the idea of betrayal, then some distinction between friends and enemies seems plausible, the way a person may reveal a friend's secret to their mutual friend with the belief that the mutual friend would not use the information against the friend. However, the law's treatment of Pollard's conduct -- he is serving a life sentence in prison<sup>110</sup> -- has not differed much due to his status as a spy for an ally. Part of the explanation for this has to do with the belief that some of the information he passed on to Israel was given to the former Soviet Union,<sup>111</sup> and part of the explanation has to do with the fact that he indeed betrayed the United States by abusing the trust placed in him as an intelligence analyst. It seems to me, however, that a deeper explanation of his conviction and punishment is that he committed the wrong of interfering with the United States intelligence systems and

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<sup>108</sup> See generally Seymour M. Hersh, *The Traitor: The Case Against Jonathan Pollard*, NEW YORKER, Jan. 18, 1999.

<sup>109</sup> See, e.g., Alan M. Dershowitz, *The Pollards and Rosenbergs*, N.Y. TIMES, Mar. 18, 1987.

<sup>110</sup> Isabel Kershner, *Israel: An Appeal for a Spy's Release*, N.Y. TIMES, Jan. 4, 2011.

<sup>111</sup> Hersh, *supra* note 108, at 27.

thereby stepped into the government's exclusive territory, and the concept of usurpation makes no distinction between spying for friends and spying for enemies.

Finally, a person may "directly undermine core institutional resources that the United States requires to protect itself" but in order to protect the United States from a greater harm. Arguably, Daniel Ellsberg's leaking of the Pentagon Papers to the *New York Times* satisfies the definition of disloyalty given here, yet, again arguably, it would be wrong to characterize his actions as disloyal because his acts were ultimately acts of patriotism. That is, sometimes one's concern for the well-being of one's object of loyalty may lead one to commit criminal acts, such as stealing and revealing state secrets, but it would be inaccurate to characterize such acts as disloyal. If stealing state secrets were truly a crime of disloyalty, then Ellsberg's lawbreaking would be an awkward fit, and we could imagine some pressure to invent something like a patriotism defense, but no such thing exists. By contrast, if we imagine his crime as an instance of usurpation, no such difficulty arises.

Now, one objection here may be that the usurpation account is insufficiently full-blooded to capture what is actually wrong with crimes of disloyalty. The crime of treason, after all, is defined as "adher[ing]" to "enemies" and "giving them aid and comfort," which sounds like it is a crime of infidelity. Furthermore, "intent to betray" is an element of the crime of treason, and the idea of usurpation does not sit well with the idea of giving "intent to betray" an important role to play. However, I would argue that the shift from the language of infidelity and betrayal to usurpation does not entail as big an interpretive loss as it might look at first. George Fletcher has observed, albeit with some exaggeration, that "[g]overnments seem no longer to care about actual sentiments of loyalty" and those accused of espionage "are prosecuted for their acts of conveying information, and not for their emotional disloyalty and identification with a foreign power."<sup>112</sup> Similarly, in a recent article, Kristen Eichensehr argues that the courts have "refocused [the] law of treason via court interpretations away from internal attitudes and toward external actions."<sup>113</sup> Given the small number of cases, it seems to me difficult to draw firm conclusions about the law of treason, but if Fletcher and Eichensehr's reading of the law is correct, the account I am proposing here would be less revisionist than it would at first appear.

Plus, I would argue that even though the account proposed here seems quite distant from the idea of betrayal, this aspect of the account is a strength and not a weakness. For one thing, there is something, to use a technical term, *creepy* about the state making demands about where one's heart belongs. Consider Douglas Husak's example:

Suppose that two persons, Jane and Jill, each attend the same anti-war demonstration. Jane attends in order to aid the enemy. She knows that her boyfriend will be at the rally and wants to impress him with her interest in politics, but does not attend for this reason. She would have participated in the rally even if she had been certain that her boyfriend would not be there. By contrast, Jill knows that her attendance will aid the enemy, but

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<sup>112</sup> FLETCHER, *supra* note 17, at 59-60.

<sup>113</sup> See Kristen E. Eichensehr, *Treason in the Age of Terrorism*, 42 VAND. J. TRANSNAT'L L. 1443, 1470 (2009).

does not participate in order to further this objective. She attends because she wants to impress her boyfriend, and would not demonstrate if she knew he would not be there. The criminal law makes Jane but not Jill guilty of treason. . . . The wrong committed by Jane . . . is incredibly serious, qualifying for a severe punishment.<sup>114</sup>

As Husak notes, the caselaw is actually not very clear, and it is unclear whether Jane's activities would count as a legitimate case of treason.<sup>115</sup> The more important point here, though, is whether it would be desirable to place so much legal significance on the difference in states of minds of Jane and Jill in this case. The more importance we place on "intent to betray," the more plausible the differential treatment of Jane and Jill becomes, but at the same time the more it starts to look like an instance of punishment for thoughts, emotions, or attitudes. Given that the relationship at issue is that between state and citizen and not person to person, it seems to me appropriate to drain out some of the more emotional elements from the concept of punishing disloyalty.

## CONCLUSION

Charges of treason, betrayal, and disloyalty tend to invite heated rhetoric. George Fletcher states in his book *Loyalty* that "[t]he worst epithets are reserved for the sin of betrayal" and that "betrayal of country," being "[w]orse than murder [and] worse than incest, . . . invites universal scorn."<sup>116</sup> He adds that "[t]he language of treason and treachery incites passions"<sup>117</sup> and describes treason as "stress[ing] internal commitment" and "emotional attachment."<sup>118</sup>

This Article has addressed the question whether such passions are appropriate in this context by examining the idea that disloyalty to one's country is morally blameworthy. This Article has argued that various arguments commonly raised -- such as those based on harm, consent, fairness and gratitude, just to name a few -- to explain why disloyalty to the country is blameworthy fail. Given the difficulties in justifying the idea that disloyalty is morally blameworthy, the Article then argued, we should look for a retributivist account of crimes of disloyalty elsewhere.

More specifically, this article has argued that we should reinterpret the wrong of disloyalty crimes as involving not betrayal or disloyalty, but usurpation. In other words,

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<sup>114</sup> Douglas Husak, *The Costs to Criminal Theory of Supposing That Intentions Are Irrelevant to Permissibility*, 3 CRIM. L. & PHIL. 51, 59 (2009).

<sup>115</sup> See, e.g., *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948) ("Thus, a citizen in the exercise of his ordinary political rights may -- intemperately as he pleases -- criticize the President for getting the country into war . . . . The speech may tend to weaken our country in its war effort by inducing divided counsels and a spirit of defeatism, and in that sense may be of aid and comfort to the enemy. *Such, indeed, might be the speaker's purpose.* But if it be assumed that the utterance in the case supported would not be treason, *whatever the speaker's purpose*, the immunity would be afforded, not to encourage treasonable efforts to aid in the enemy's triumph, but in order that, in the course of the normal activities of political opposition, the expression of honest criticism and sincere conviction as to what is best for the country may not be fettered by fear of a jury's finding of traitorous purpose in the passion and tumult of a subsequent prosecution for treason.") (emphases added).

<sup>116</sup> FLETCHER, *supra* note 17, at 41.

<sup>117</sup> *Id.* at 42.

<sup>118</sup> *Id.* at 53.

the relevant wrong here is rooted in the idea of separation of powers between citizens and the state, and we should reconceive crimes of disloyalty as crimes of usurpation or “foreign relations vigilantism” and evaluate the moral rights and wrongs of these behaviors accordingly.

Thinking of these crimes in this way has the virtue of helping us avoid the confusing and emotional talk of loyalty, patriotism, and fidelity. The focus of our attention should instead be on whether government officials are doing their job and earning their keep as exclusive holders and exercisers of state power. The idea of usurpation would encourage a more rational and levelheaded discourse about what is truly at stake in this area of law, which is not loyalty, but *power* -- who has it, what one can do with it, and how its particular allocation and uses are justified.