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.

I. 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\(^1\) is the crime of treason. The word treason has its roots in the word ‘to betray’,\(^2\) and ‘intent to betray’ the United States is an element of the crime of treason.\(^3\) Also, only those who ‘owe allegiance to the United States’\(^4\) can commit the crime of treason,\(^5\) 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.\(^6\) Hence, when Sarah Palin accused Wikileaks of committing a ‘treasonous act’,\(^7\) it was quickly and rightly pointed out that Julian Assange, not being an American, was ‘incapable of committing ‘treason’’ against the United States.\(^8\)

Prosecutions for treason are rare.\(^9\) More common are espionage cases.\(^10\) Robert Hanssen, Aldrich Ames, Julius and Ethel Rosenberg

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\(^1\) 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 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.

\(^2\) OXFORD ENGLISH DICTIONARY ONLINE (2011).

\(^3\) Cramer v. United States, 325 U.S. 1, 29 (1945).


\(^5\) 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).

\(^6\) 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 ‘estab[lish]ing an act of treason requires an a priori act of establishing a relationship of trust and loyalty.’).

\(^7\) http://twitter.com/SarahPalinUSA/status/92516357798666262.

