Is there a duty of allegiance towards the State? The legitimacy of disloyalty as a rationale for treason law in the social contract paradigm

Vanessa Henri
Faculty of Law
McGill University, Montreal

August 2014

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of LL.M, with thesis

TABLE OF CONTENTS

ABSTRACTS

The crime of treason and its related offences are among the oldest in our criminal system and have always relied on the assumption that the citizen is subject to a duty of allegiance towards the State. This is commonly justified through the use of the social contract methodological device. Considering the historical background of political misuses associated with crimes against the State, this article challenges the assumption that the citizens ever consented to the obligation of loyalty in the original covenant.

Specifically, this thesis advocates that there is no moral basis to assume that we would have consented to a duty of loyalty. The obligation to prioritize the interests of nationals over foreigners erroneously assumes that boundaries are morally significant and hold the potential of resulting in violations of international law. It also demonstrates that the tacit consent theory does not offer a conclusive argument for the specific political obligation of loyalty. Ultimately, using the theory of the State as fiduciary, it argues that if the obligation of loyalty exists, it belongs to the State. The criminalization of treason must rely on a more objective rationale which could prevent the political abuses resulting from the emotionally and socially constructed notion of treason.

Le crime de trahison, ainsi que les multiples offenses qui y sont associés, sont parmi les plus anciens de notre système criminel et ont toujours reposés sur la présomption selon laquelle le citoyen est sujet à une obligation de loyauté vis-à-vis l'État. Ceci est communément justifié en ayant recours à l'outil méthodologique qu'est la théorie du contrat social. Considérant le contexte historique d'abus politiques associés avec les crimes contre l'État, cet article questionne l'affirmation selon laquelle les citoyens ont un jour consenti à l'obligation de loyauté dans ledit contrat social.

Plus spécifiquement, cette thèse argumente qu'il n'y a pas de justification morale pour affirmer que nous aurions voulu consentir à une obligation de loyauté. L'obligation

de prioriser les intérêts de nos confrères aux dépens de ceux des étrangers suppose à tort que les frontières ont une importance morale et peut potentiellement mener à des violations du droit international. Il est aussi démontré que la théorie du consentement implicite n'offre pas d'argument conclusif pour l'obligation politique spécifique qu'est l'obligation de loyauté. Ultimement, en ayant recours à la théorie de l'État comme fiduciaire, il est argumenté qu'admettant l'existence de l'obligation de loyauté, celle-ci repose sur les épaules de l'État. La criminalisation de la trahison doit reposer sur un raisonnement plus objectif qui permettrait de prévenir les abus politiques inhérents à la notion émotive et socialement construite qu'est la trahison.

ACKNOWLEDGEMENTS

I would like to express my gratitude to my supervisor, Frédéric Mégret, for his support, patience and encouragement through my Master's dissertation. Professor Mégret knew how to inspire me throughout our discussions, without ever directing or imposing any ideas. He asked perplexing questions to which the answers lie in between the lines of this thesis. Specifically, my supervisor was a catalyst in crafting the argument regarding the violation of international laws by drawing parallels with his own work.

I would also like to thank Dean Angela Campbell whose kindness and encouragements were truly a source of inspiration. Professor Campbell was present to listen and to comfort every student no matter what problem he or she was be facing. Last January, when I felt overwhelmed due to personal problems, she listened patiently then gently, but firmly, redirected me towards my goals. She has encouraged me to persist not only to complete this thesis, but also to pursue my studies at the doctorate level.

Last, but not least, I would like to thank my companion Adam, for his understanding and love during the past few years. His support and encouragement were, ultimately, what made this dissertation possible. He provided useful feedback throughout the redaction and listened endlessly to my arguments as I tried to organize my reasoning. I would also like to thank my mother-in-law, Eva, who was really helpful in reviewing this text, notwithstanding the constraint of time that I imposed on her.

Is there a duty of allegiance towards the State? The legitimacy of disloyalty as a rationale for treason law in the Social Contract Paradigm

Criminologia, as fashioned by Raffaele Garofalo, sparked life in 1885, kindled by the emergence of the positivist theory[1]. The nature of criminology is to psychoanalyze crimes, from their existence to their prevention, and to provide a framework for understanding criminal behavior. Its development could be held accountable for introducing the scientific method to the study of delinquency, and while this fostered the growth of prolific scholarly literature on the subject, it also had the effect of evicting the once popular philosophical approach, deeming it now overly subjective. Consequently, the ongoing dialogue between morality and law seems interrupted.

When we look back, we can admire a belief that philosophical insight within the realm of criminal behavior was introduced in different eras to accommodate its then current moral and societal consensus. Ancient Greece conceived criminal action as a lack of virtue; a defect in character. Born from within its walls was Plato, claiming that delinquency was a result of either ignorance, a psychological disorder or from a disease[2]. Reverting back a few years, into the Middle Ages, crimes were perceived as sins; a position which acutely reflected the religious zeal of the epoch. Within this theological perspective, criminals were immoral because they gave in to temptation – unless, of course, it was due to this person being possessed by Satan himself[3].

The debut of modernity was portrayed by the emergence of rationality within moral theory. Free will became emphasized, and criminality regarded as choice. Theories rang about, attempting to dictate the essence of this transformation. Leading the pact at the time stood utilitarianism and hedonism[4]. It was not long before positivism took stage,

[1] Bruce A Arrigo and Christopher R Williams, eds, *Philosophy, Crime, and Criminology* (Chicago: University of Illinois Press, 2006) at 11 [Arrigo & Williams].
[2] *Ibid* at 5.
[3] *Ibid* at 7-9.
[4] *Ibid* at 9-11.

drawing rationality upon criminology through the nature of science – a still popular to this day, prevailing throughout the current age of social structure theories.

Delving into the concepts of modern criminology, we notice that we have come a long way in solidifying our approach to the discipline, but does this mean that it is void of faulty judgment? Could it be that even today our standing theories lack critical components? It is of particular interest that modern criminology has been able to determine, through strict calculations, the statistical chance that a person of a specific demographic will commit a criminal act, yet it fails to question its own "[c]onceptual underpinnings"[5], particularly elucidated in the ideals of justice, the legitimacy of punishment and, more specifically, the very reason why a crime is a crime[6]. This fact brings to our attention that modern criminology has yet to be able to address the role of morality upon its foundation.

Criminology's narrow focus on the reality of crime has also neglected the very role it is supposed to play within societies by relegating the science to a governmental service concern with "[r]isk, efficient management, prevention and personal security"[7]. The science has become part of a disciplinary society of control. This raises more questions; "[w]hat do we mean by security? Which subjects have privileged access to the means of defining security in a given context? […] What moral frameworks do actuarial systems implicitly sustain? What responsibilities towards "otherness" are deflected by governmental practices of accusation?"[8]. These questions play a vital role in the analysis of crimes against the State that is proposed in this thesis. The present reflection hopes to help in filling the voids of criminology by targeting the inadequacy of a long-forgotten rationale implicit in such political crimes, the duty of allegiance or loyalty.

The duty of allegiance is a century old rationale and predominantly found in crimes

[5] *Ibid* at 15.
[6] *Ibid*, at 2.
[7] George Pavlich, "Forget Crime: Accusation, Governance and Criminology" (2000) 33 Australian & New Zealand J of Criminology 136 at 146 [Pavlich, "Forget Crime"].
[8] *Ibid* at 149.

of treason and other related offences. This political obligation requires that citizens within a State prioritize the interests of those living within the same territorial boundaries over those of foreigners. The failure to do so in circumstances which affect the core institution, with nationality considered a prime component to proceed to this determination, leads to criminal accusations[9]. The duty of allegiance underlies many offences related to treason, such as revolt, sabotage, mutiny, sedition, seditious libel and so on[10]. For the purposes of clarity and fluidity, this article will refer to treason law.

This being said, it is noteworthy that there is an ongoing debate as to whether espionage charges are also a manifestation of the criminalization of disloyalty to the State. One consideration in particular, being that non-nationals can commit it, determines it does not *invariably* involve the breach of a duty of allegiance. We can also affirm that espionage offences consist of a divergent rationale as opposed to treasonous behaviour, but that they can theoretically relate regarding confidentiality and ownership of information. Another consideration is that when committed by a national, espionage strikes an indubitably patriotic chord, from which it appears that the *mens rea* of such an offence appeals to the duty of allegiance[11]. By illustration, 18 U.S.C § 794 describes the *mens rea* as "[t]he intent or reason to believe that it is used to the injury of the United States or to the advantage of a foreign nation", an identifiable relation coinciding with the description of traitor. Hence forth, we will analyze espionage from a partial identity within treason law; on the grounds that it is committed by a national.

Returning to the duty of allegiance, the origins of this political obligation are disputed. Professor Youngjae Lee put forth a good case as to why the harm-based account cannot explain the origins of loyalty to the State by noting that it does not furnish explanations as to *why* one State must be preferred over another[12]. In North America and

[9]Youngjae Lee, "Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries" (2012) 31 Law and Philosophy 299 at 306 [Lee].
[10]Ben-Yehuda Nachman, *Betrayals and Treason: Violations of Trust and Loyalty* (Colorado:Westview Press, 2001) at 17 [Nachman].
[11]Lee, *supra* note 9 at 301.
[12]*Ibid* at 318. Harm-Based account of the relationship between the State and the citizens affirm that: "[i]t is morally blameworthy to injure institutions of the state because the state carries out valuable functions that

other democratic countries, a tendency to implement the duty of allegiance as part of the social contract theory is predominant. This paradigm, briefly stated, supposes that citizens have rationally accepted to surrender a portion of their rights in order for the government to ensure their well-being. The governing entity acquires power, providing protection to its citizens, but also to enhance its capacity for self-preservation. The creation of Treason Law has therefore appeared as a means to ensure this objective. It is presumed that citizens have agreed that living in an orderly society necessitates that members be loyal to this governing body.

Being an old and antiquated group of offences, treason law appears to have fallen in desuetude for those who have not been attentive. This is not surprising as it was even predicted, following World War II, that treason charges were in view of extinction, due notability to its appropriation in times of stability and security[13]. The fairly recent emergence of terrorism, cyber-attacks and cyber opportunities for whistleblowing have, however, perturbed the perceived equilibrium by using asymmetrical States. Pressured and unsure of the threat they are facing, States have reacted by recourse to treason law. An example can be found in 2006, when an American Grand Jury issued a treason indictment for providing aid and comfort to the enemy. The accused, Adam Gadahn, is a US citizen who appeared in several Al Qaeda propaganda videos[14]. Accusations of homogenous nature were discussed by Israel and the United Kingdom considering potential treason charges[15].

Most recently, in 2013, US Army Private First Class Chelsea Manning was charged with treason, following the leak of classified documents to acknowledged activist website

---

make it possible for individuals to live normal lives as we understand normalcy today, and injuring state institutions would cause harm to individuals' lives". Professor Lee refuted this argument by arguing that: "[t]he problem with 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".

[13]Kristen E Eichensehr, "Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States" (2009) 42 Vand J Transnat'l L 1443 at 1445 [Eichensehr]

[14]See First Superseding Indictment, *United States v Adam Gadahn aka Azzam Al-Amriki*, SA CR 05-254(A) (CD Cal Oct, 11 2006), online: <www.usdoj.gov>.

[15]Eisencher, *supra* note 13 at 1457.

WikiLeaks. The notorious footage referred to as the “Collateral Murder Video'” were amidst such leaks, in which US soldiers are displayed indifferently gunning down civilians, including two Reuters journalists[16].

This can be reason for concern, as history has demonstrated that crimes attributed to the duty of allegiance all too often involve antidemocratic utility to satisfy the interests of the government of the day. These offences were proven to be politically altered to ensure hegemonic political power and infringe on freedom of press, thought and speech. When we examine such historical misappropriations, we crucially challenge treason law by intent of obtaining a concise objective application. Systematically, this article proposes that the duty of allegiance rests upon antiquated foundations and offers no defendable, nor stable rationale supporting the felonies in question. It can additionally be observed to create the moral dilemma in which the individual is forced a loyalty upon his countrymen at the expense of all other human beings, regardless of the gravity of implication, and without any sustainable justification.

To further explore such concepts, we can take a look at the case of Mordechai Vanunu. A whistle-blower employed at the Israeli Nuclear Research Facility of Dimona, he appropriated knowledge to divulge that Israel was in possession of nuclear armaments including “[s]ufficient plutonium to arm 150 weapons”[17]. He affirmed to detain pictures from within the Dimona plant. Moments before the breaking news was intended for publication, the activist was “lured” from London to Rome by an alleged Mossad agent. Further actions consisted of Vanunu being drugged and transported to Israel. Upon issue of a secret trial, he was convicted of treason amongst other offences[18].

Vanunu's revelations reflected his humanitarian concerns for global well-being, and

[16]Andy Greenberg, *This Machine Kills Secrets: How WikiLeakers, Cypherpunks, and Hacktivists Aim to Free the World's Information* (London: Dutton, 2012) at 14, 167 (She also leaked “91 000 files from the war in Afghanistan, 392 000 from the Iraq War, 779 files of inmate in the Pentagon's Guantanamo prison, and a quarter of million memoranda from the US State Department, which also shared its data with troops via SIPRNet”).
[17]Eichensehr, *supra* note 13 at 1461.
[18]*Ibid*.

were consistent with the worries expressed by the international community in the *Treaty on the Non- Proliferation of Nuclear Weapon*, whose preamble highlights "[t]he devastation that would be visited upon all mankind by a nuclear war"[19]. This agreement limits the proliferation of nuclear weapons to the five recognized nuclear armed countries, and has been signed by all members of the United Nations with the exception of Israel, India, Pakistan and North Korea.

Israel refuses to sign the treaty and controversially practices a policy of nuclear ambiguity, unaroused by international pressure[20]. Vanunu's revelations attempted to remedy this uncertainty by providing the world with the information they were rightly entitled to, as humans living on the same planet. Still confined within Israel, without right to foreign contact, Mordechai Vanunu has been considered a "prisoner of conscience" by Amnesty International[21]. It was through a similar event that Nelson Mandela was imprisoned for 27 years. Shockingly, he was charged with sabotage for the same action against the apartheid regime that won him a Nobel Prize[22].

It is apparent that the duty of allegiance, as a criminal reasoning, randomly ensures that immoral acts, as opposed to moral acts, are punished. Most importantly, the emotional and subjective component of loyalty which makes it akin to patriotism favours political interpretation. The punishment of moral acts being an alien concept to criminal law, the political obligation of loyalty must then satisfy the requirement of legitimacy. As a consequence, this article challenges and ultimately concludes that the social contract theory fails to convince that the citizens have consented to a duty of loyalty toward the State as part of the covenant.

---

[19] *Treaty on the Non-Proliferation of Nuclear Weapons*, 729 UNTS 161 (Entered into force March 5, 1970), preamble.

[20] See for instance Associated Press, "UN tells Israel to let in nuclear inspectors - As nuclear peace talks are cancelled, overwhelming vote by general assembly calls for Israel to join non-proliferation treaty'" (4 December 2012), online: <www.theguardian.com>.

[21] Amnesty International, "Israel Nuclear Whistleblower Returned to Solitary Confinement" (18 June 2010), online: Amnesty International <www.amnesty.org>; BBC News, "Israeli Nuclear Whistleblower Mordechai Vanunu Arrested'" (29 December 2009), online: <http://news.bbc.uk>.

[22] Michael Head, *Crimes against the State: From Treason to Terrorism* (Surrey: Ashgate, 2012) at 182 [Head].

To demonstrate the absence of consent, this paper observes the absence of hypothetical consent. In other words, it argues that citizens *would not* consent to this obligation. In support of this affirmation, we demonstrate that loyalty to the State is neither reasonable, nor rational, nor morally grounded.

Precisely what it requires is a primary and exclusive allegiance. As a consequence, one must prioritize the interests of his resident country even if he has many citizenships, even if his family is located elsewhere and even if he does not see any reason to do so considering that we are all presumed to be of equal worth. It effectively prevents citizens of seeing themselves as part of a larger group, humanity, in favour of being part of a smaller national community. Doing so, it neglects humans' right to freedom of thought and association, values which are intrinsic to liberal societies. It literally forces a *duty to belong* on the inhabitants of a specific territory based on the assumption that its boundaries have the same moral worth for all of them.

This arbitrary imposition of moral choices is also likely to contradict with the international norms to which States have agreed. More precisely, it neglects the fundamental principle under which international law operates, that is the equal dignity and worth of each human. More specifically, however, loyalty to the State in wartime imposes the subject to the commitment of war crimes in violation of international treaties. The duty of allegiance does not include an exception of application should the State order the commission of crimes against humanity, such as genocide. The use of treason law during Nazi Germany most explicitly illustrates the potential of political misappropriation, indifferent to international standards.

Having argued that citizens *would* not consent to the duty of allegiance, we will examine whether there could be an *actual* consent. Acknowledging that some citizens have adhered to explicit oaths of allegiance, we note that it is dubious whether one can ever consent to human or civil rights violations. It also underlines that consent, given for life, hardly meets the conditions under which consent can be considered credible. Not

withstanding this, a general political obligation of loyalty must need a wider form of consent. Turning to the notion of implicit consent, we then argue that it has been discredited by many authors and that reformists consent are *propositions* which do not concern the actual state of affairs.

Concluding that there is no evidence of hypothetical or tacit consent to the duty of allegiance, this paper was nonetheless faced with the persistence of consent as a *myth* in democratic society. To further press that the citizens have no duty of allegiance, we turn to the alternative conception of the State as a fiduciary. By recourse to fiduciary obligations, we demonstrate that the citizens are in an intrinsic position of vulnerability while the State administers their practical interests. As this is a relationship based on a presumption of trust, the State has the fiduciary obligation of loyalty (expressed as the duties of reasonableness and fairness in the public setting). Therefore, we argue that if we were to admit that one of the parties should bear a duty of obligation, it must lay on the shoulders of the State who is definitely the stronger party. Otherwise, this would result in an excessive obligation.

Practical Considerations

While confronting the case, necessity will limit this analysis to the *logos* (the logic justifying the sanction) and the *archè* (the founding principle) of treason law, abstaining from the issue of punishment. Therefore, the judicial determination to condemn or acquit will not be of prime relevance in consideration of this study. Further limitation within this article will include the inability to encompass all variations of the social contract theory as proposed by an ever- increasing aggregation of philosophers, of the likes of Rawls and Harsanyi. The work of Thomas Hobbes will play a salient role in conceptualizing such theories, as his study pertains quite heavily on this perception of the social contract. Lastly, readers will observe that a majority of examples and laws are representative of the Commonwealth criminal tradition, and as such may seek the interest of metaphysical inquiry to auxiliary counties. Further research would be necessary in this field, particularly in non-democratic and/or religious states.

In order to best expose the argument, the first section of this thesis conceptualizes, with more precision, the social contract paradigm and its relation to patriotism as well as nationalism. The following aims to clarify the concept of treason law through a discussion on national security and a historical review of the evolution of relevant crimes against the State. A third section, which constitutes the core of the paper, provides thorough arguments as to the consent-based approach to the duty of loyalty. It explores, respectively, the explicit consent, the hypothetical consent and the tacit consent theories. The section on hypothetical consent is further divided in two sub-sections dealing with (1) the moral difficulties with the requirement of exclusive political loyalty and (2) the violations of international law and egalitarian principles. The final and fourth section discusses the theory of fiduciary relationships as applied to the State. It begins by discussing the characteristics of fiduciary relationships - the formation of the relationship, the indicia of presence and the duty of loyalty - and concludes with the subjects of fiduciary liability by exposing the effect of a breach on the duty to obey the law in general.

1. Metaphysics of the social contract

Considering that this article intends to prove that the social contract theory is not a justification for the duty of allegiance in criminal law, it becomes crucial that we explore the main aspects of the social contract philosophy. This is inherent due to the fact that summarizing the paradigm in one or two sentences does not do justice to the complexity and depth, which creates the beauty of the theory. The subtlety of our own argument, with its implication in terms of sovereignty, politics and power struggle between the governed and the governing will only reveal itself through a profound understanding of the implications behind the social contract hypothesis.

Before proceeding with further explanations, the reader must keep in mind that the theorists who adopted the social contract paradigm may be classified within two distinct traditions. A primary conception, notoriously adopted by Thomas Hobbes, John Harsanyi

and John Rawls, relies on rationality. According to this approach, the characteristics of the contract depend on what "[r]ational decision makers would agree to in a pre-existing 'state of nature'"[23]. The second point of view – the naturalistic approach – reflects on the evolution of this contract[24]. Since this article is concerned with the applicability of the theory itself to a criminal infraction, its primary focus is on the former, not latter, tradition.

The perception of Thomas Hobbes will be an intrinsic component of the nature of this research. This choice is technical, but also metaphysical. Primarily, as opposed to being solely a political theorist, Hobbes was also a jurist who understood the importance of law in a stable society. Secondly, as the authors David Dyzenhaus and Thomas Pool explicitly outlined in their introduction of *Hobbes and the Law*, this political thinker "[w]as deeply concerned with the relationship between politics and law", but also with "[t]he task of elaborating a legal theory that would explain the internal workings of the law - the legal nature of sovereignty as a product of human artifice, authority adjudication and the role of both criminal law and social contract in sustaining legal order"[25]. As a result, the work of Thomas Hobbes offers a unique perspective on how the social contract potentially sustains crime against the State, and most notoriously the crime of treason, which is a paradox of politics and law.

It is essential to note the absence of a unique and uncontroversial interpretation of Hobbes' doctrine. The orthodox understanding portrays the thinker as an early legal positivist but modern writers increasingly question this vision. As a consequence, different points of view on the interpretation to be given to Hobbes writings have emerged in scholarly literature. The orthodox view oversees the use of natural law in Hobbes's social contract as a mean to "[p]rovide secular legitimation of *de facto*

[23]Brian Skyrms, *Evolution of the Social Contract* (Cambridge, Cambridge University Press: 1996) at ix [Skyrms].
[24]See for instance the work of David Hume, *A treatise of human nature* (Oxford : Clarendon Press, 1888); Jean Jacques Rousseau, *Du contrat social ou principes du droit politique* (République Française : JP Bresson, 1795) and more recently of Skyrms, *ibid*.
[25]David Dyzenhaus & Thomas Poole, "Introduction" in *Hobbes and the Law,* David Dyzenhaus and Thomas Poole, eds, *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012) 1 at 2 [Dyzenhaus & Poole].

sovereign power"[26], meaning that it merely explains the legitimacy of the actual government in exercising its sovereign powers.

On the flipside, others have proposed that both the rule of law and natural law hold Hobbes's theory together, thus implying that it does more than simply explain the fact of sovereignty. Some theorists emphasize the role of natural law in Hobbes's paradigm and propose that it was intended to give "a moral shape" to civil society. While the extent to which natural law plays a role within the theory remains much debated, it does open the door to challenge whether *all* sovereign power and political obligations can or should be justified within the paradigm itself[27].

1.1 Hobbes's Perspective

Interest in Hobbes's theory stems from the recognition that it constitutes the first comprehensive attempts at explaining the ontology of the social contract[28]. Traces of the theory can be found hundreds of years before Hobbes, however no philosophers spent sufficient time as to explain the origins of the covenant.

For instance, a micro-argument of the social contract can be found within *Crito*, a play written in 360 BC by Plato. In this piece, Socrates explains to Crito that he must face the death sentence, rather than exile to another Greek city, due to an implicit contract between the citizens of Athens to abide the Laws[29]. However, in order to create a universal political theory, which could explain the foundation of society and the obligation to abide laws, Hobbes needed stronger philosophical presuppositions.

Precisely, Hobbes relied on a theory of human motivation called *psychological*

[26] *Ibid* at 2-3.

[27] *Ibid* at 2-3.

[28] Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986) at 1 [Hampton].

[29] Celeste Friend, "Social Contract Theory" (2013), online: Internet Encyclopaedia of Philosophy - A Peer-Reviewed Academic Resource <www.iep.utmedu> [Friend].

egoism, and exposed this in his work *Leviathan*. To summarize, the author was inspired by the scientific revolution to construct a theory of the living, which could be predictable[30]. This led him to conclude that humans respond mechanically to a variety of complex stimulus. From this perspective, emotions become reactions to stimuli that are liked or disliked. Ultimately, this serves as a foundation to affirm that individuals are naturally self-interested[31].

However, egoism isn't the sole characteristic of mankind. According to Hobbes, they are also rational. This explains why individuals were likely to agree to a civil society from which they would benefit. To further justify this proposition, Hobbes creates the methodological device of a "state of nature". That is, "neither a discrete historical moment nor a purely hypothetical construct", but an "always-possible situation in which the political is absent"[32]. According to Hobbes, existence in this world is "solitary, poor, nasty, brutish and short"[33] because "even the strongest man can be killed in his sleep"[34]. Self-interested, men were constantly in a "state of utter distrust" which prevented any cooperation[35].

Given the harshness of the state of nature, and given that humans are rational as well as self-interested, they agreed to a contract that created civil society. This covenant has two main propositions; (1) an "agreement to establish society by collectively and reciprocally renouncing the rights they had against one another in the State of Nature" and (2) an "agreement to imbue some person or assembly of persons with the authority and power to enforce the initial contract"[36]. It is important to understand that the State is

---

[30]Hampton, *supra* note 28 at 7 (specifically by the resolutive-compositive method of Harvey, Galileo and others).

[31]Friend, *supra* note 29 ("individuals first, and social creatures second"), Hampton, *ibid*.

[32]Alice Ristroph "Criminal laws for humans" in David Dyzenhaus & Thomas Poole, eds, *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012) 97 at 112-113 [Ristroph].

[33]Thomas Hobbes, *Leviathan with Selected Variants from the Latin Edition of 1668,* Edwin Curley, ed (Indianapolis: Hackett Publishing, 1994) at 76 [Curley].

[34]Friend, *supra* note 29.

[35]*Ibid*; this was criticized by many theorists. David Gauthier proposed that cooperation between purely self-interested agents is possible notably through his prisoner's dilemma; see *Morals by Agreement* (New York: Oxford University Press, 1986).

[36]Friend, *supra* note 29.

not part of this covenant, which is concluded between the subjects themselves[37].

This, however, raises the question of *how* the sovereign does obtain its power. According to Quentin Skinner, it is through a voluntary transfer of rights upon which the citizen abandons his freedom to ensure his own self-preservation[38]. This orthodox understanding is sturdily criticized by Professor Fox-Decent, who comments that a transfer cannot have the effect of enlarging a right. Notoriously, the State has more authority than just assuring the preservation of its citizens; it legislates their everyday life and administers their economic interests, in large part. Furthermore, Professor Fox-Decent emphasizes that the state of nature does not generate any "claim-rights" or legal obligations; it is simply a "liberty-right". As a consequence, it can doubtfully be transferred[39].

Along the same line, the scholar further argues that this transfer theory is contrary to Hobbes's justification for the sovereign's right to punish. Professor Ristroph, who also writes from a moralist perspective, corroborates this. Their interpretations emphasize the subject's inability to agree to punishment in Hobbes's social contract[40]. Most precisely, the theorist advocates for an absolute and inalienable right for self-preservation, which prevents consent to punishment. This is a right individuals *cannot* abandon[41]. Based on this, both authors agree that the sovereign's legitimacy in punishment is to be found *in his own right to self-preservation*[42]. There is no need for the citizen to transfer his own right to self-preservation, and the inherent inability to consent to punishment confirms that he has not done so.

Specifically, since the sovereign is not part of the social contract, he did not renounce to his right from the state of nature. Rather, when subjects gave up on their

[37]Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (New York: Oxford University Press, 2011) at 6 [Fox-Decent, *Sovereignty's Promise*].
[38]See Quentin Skinner, *Visions of Politics* (New York: Cambridge University Press, 2002) [Skinner].
[39]Fox-Decent, *Sovereignty's Promise*, *supra* note 37 at 9-10.
[40]Ristroph, *supra* note 32 at 109.
[41]Thomas Hobbes, *Leviathan*, Richard Tuck, ed, (Cambridge: Cambridge University Press, 1996) at 93 [Tuck]
[42]Fox-Decent, *Sovereignty's Promise*, *supra* note 37 at 11-13.

rights, they "strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him only"[43]. Thus, an individual, while not agreeing to his or her punishment, agreed to a world in which a sovereign has a right to punish[44].The idea of consent is therefore a structural component to the nature of criminal law in a social contract-derived society.

This might explain Hobbes's preference for written rules over common law, particularly in the field of criminal law. Curiously, however, in *Dialogue on the Common Laws of England*, the character referred to as the 'Philosopher' presumably defines treason as a *malum in se* offence. In other words, treason – as opposed to other criminal behavior- is a 'crime in itself', which can be discovered through reason without the need for a written law[45].

The interpretation of this *Dialogue* is disputable to say the least. Compellingly, the *Dialogue* is a conversation between a philosopher and a lawyer. It is uncertain whether Hobbes identifies himself as one or the other. Precisely, within the dialogue, the Philosopher adopts arguments cohesive with Hobbes's thinking, while in other parts he contradicts Hobbes. The same can be said of the lawyer. To further complicate the situation, the work was published posthumously and there seems to be confusion as to the speeches being assigned to the right speaker[46]. Theoretically, however, the question of *why* crimes against the state should be *malum in se* offences remains relevant to our studies of Hobbes's theory.

Ristroph's proposal is to understand Hobbes's notion of 'crimes in themselves' as 'minimum content' of any criminal code. Alternately, we capture the view that Hobbes considers treason to be against the very nature of the social contract. This is why he employs the philosopher and not the lawyer to make his statement. The *rationale* behind treason is not judicial, but rather theoretical or philosophical. As Ristroph emphasizes,

[43]Tuck, *supra* note 38 at 214; David Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (New York: Oxford University Press, 1969) at 148.
[44]Ristroph, *supra* note 32 at 101.
[45]*Ibid* at 100.
[46]*Ibid.*

criminal charges are "[a]n occasion for regret; it is evidence that the project of consensual government has failed in some way"[47]. We profess that crimes of betrayal question the very existence of society as constructed by the theorist; and the sustainability of the social contract theory requires that treason charges be *a malum in se* offence. This interpretation of *The Dialogue*, we argue, is more likely to explain Hobbes's input on crimes against the state as opposed to criminal law.

Conversely, a moralist account of the continuation of the relationship between the sovereign and its subjects casts doubt upon whether a sovereign has the legitimate power to punish disloyalty when it is executed to denounce a breach of trust from within the State. According to Professor Fox-Decent, even if the origin of power in the Hobbesian thought is based on consent, the continuation of the relationship between the State and the citizens is fiduciary[48]. As a consequence, "exercises of public power are constrained by moral and structural features intrinsic to legal order" - commonly referred to as the rule of law[49] and power can become authority only if it conforms to the rule of law. The distinction is explained as follows:

> For present purposes, exercises of mere power can be understood as the threat or use of force for which there is no moral justification, such the mugger's threat 'your money or your life'. Exercises of authority, on the other hand, may be backed by threats of force or coercion, but their prescriptions are justified on moral grounds, such as the role they play in securing a regime of secure and equal freedom. People subject to authority are thought to have moral reasons for acting in according with it reasons which are independent of the punishment they may face if they fail to do so[50].

From this standpoint, if offences against the duty of allegiance do not meet the Rule of law, they become mere exploitation of power. Take for instance the following scenario:

> Country ABC is facing political instability because a DEF, a virtual organization, is hacking confidential governmental data and revealing them to the country. Their targets are often corrupt politicians who misappropriate the resources of the State, or other bodies negligent of citizens' rights. Organization DEF has violated the law

[47] *Ibid* at 98.
[48] Fox-Decent, *Sovereignty's Promise, supra* note 37 at 4.
[49] *Ibid* at 1.
[50] *Ibid* at 3.

by hacking, thus stealing, governmental information and revealing them. Country ABC has condemned the leader of the organization to charges of espionage resulting in exemplary jail time.

Are country ABC's actions respectful of the moral and structural features intrinsic to legal order? It clearly appears that the act of the corrupt politicians or the decisions of the negligent governmental body cannot be conceptualized as the exercise of sovereign power as they clearly trespass the power allowed within the rule of law. In this situation, assuming that the subjects are bound by an obligation of loyalty, does the State misappropriation of power relieve them from their duty of allegiance in regards to this precise action? There are certainly arguments to assume so, since the citizen's authorization is not absolute and limitless. It is a specific consent which limits the actions of the sovereign to the rule of law. When the State trespasses those limits, it does not act within the covenant and the citizens should not be required to do so.

So, while it is true that organization DEF's actions were illegal, it is also potentially true that they were committed at a moment in which the group was not subject to either the duty of allegiance or even the duty to obey the law. The State, then, would be ill-informed to pursue the group on the basis that it has lacked loyalty or that it has not respected the law in vigour[51]. Section 4 further examines Professor Fox-Decent theory of fiduciary relationships and how it would limit the actions of the State if we were to adopt this paradigm.

In summary, the social contract theory relies on a contract concluded within the subjects in order to escape the state of nature. According to this binding agreement, the citizens have renounced their right of nature, at the exception of the right to self-preservation. Each society is believed to have a contract to which only the sovereign is not a party. This allows the entity to punish individuals to guarantee its self- preservation, and the well-being of its subjects. Offences for opposing the duty of allegiance appear as a powerful tool to achieve this goal and maintain the social contract, which gives

[51] *Ibid* at 5.

legitimate power to the governing body. However, tensions within the modern analysis of Hobbesian thought demonstrate that further reflection on the role of natural law might create inconsistencies within its very theory. The potential role of moral standards casts a doubt on whether the power of the sovereign goes so far as to allow the use of treason law to repress legitimate dissent.

1.2 Patriotism, Nationalism and the Social Contract

The implication of the contractual paradigm trespasses the boundary of abstract political theory; it also has decisive implications in terms of national identity. This might help contextualize the reasons for an antiquated notion of allegiance to still hold importance in modern democracies, notwithstanding the predominant scepticism of citizens regarding political parties and politicians. Understanding the psycho-sociological aspect of treason is crucial in deconstructing treason law and best exposes the link between social contract and loyalty. Lastly, it highlights obstacles to further philosophical intervention in the field of crimes against the state.

First and foremost, disloyalty is a type of betrayal, which itself is a socially constructed phenomenon[52]. As is illustrated by the Snowden and Manning cases, the same individual can be both a traitor and a hero depending on who is judging. *What* constitutes treason, therefore, changes according to societies. However, it is true that *how* treason is committed remains the same[53]. A common characteristic of disloyalty is that it depends upon membership; it is the moral baseline of treason. The issue becomes a little more complicated when a society, such as is the case in Canada, recognizes that it is composed of pluralistic cultures and nations. Author Ben-Yehuda noted that, as a consequence, "[i]t may be impractical, perhaps even futile, to discuss "betrayal" without being judgmental at the same time"[54].

According to the author Andrew Vincent, patriotism is "[l]inked to the virtues of

[52]Nachman, *supra* note 10 at 23.
[53]*Ibid* at 126.
[54]*Ibid* at 24.

membership", and "[o]ne important dimension of any membership relation is an expectation of some degree of loyalty". Patriotism, he argues, is a "[s]pecific loyalty consequent upon particular membership of a country"[55]. It should, however, be distinguished from nationalism, as it generally implies loyalty to the State, whereas nationalism is most likely to refer to the primary ethno-national group[56]. For example, loyalty to the French Quebecers refers to nationalism; the group is recognized as a nation, but within a larger country. Since most states are multi-ethnic, these sentiments only coincide for numerically, culturally, and politically preeminent groups[57]. In these circumstances, both notions reinforce each other. Psychological conclusions on nationalism can apply *mutatis mutandis* to patriotism.

Alasdair MacIntyre is amongst the most radical proponents of patriotism and went as far as to suggest that patriotism was *the* fundamental virtue holding one's morality together. He stated that notions of right and wrong were socially constructed and specific to the particular community in which the individual lives. The author notably proposed that without this framework, one cannot have "[g]enuine standards of judgment"; making loyalty a "[p]rerequisite of morality"[58]. Moderate patriotism theories, however, depart from this proposition that clearly denies the importance of international human rights and standards[59].

Multiple benefits have been attributed to patriotism, and have been summarized in three propositions by Professor Lee:

> First, national membership is essential for autonomous living because the very ability of an

[55] Andrew Vincent, "Patriotism and human rights: An argument for unpatriotic patriotism" (2009) 13:4 J of Ethics 347 at 348 [Vincent].

[56] Dusan Kecmanovic, *The Mass Psychology of Ethnonationalism* (np: Springer US, 1996) at 14 [Kecmanovic]; Charles Taylor also argued for a division between nationalism and patriotism in "Nationalism and modernity" in *The Morality of Nationalism*, Robert McKim and Jeff McMahan, eds, (Oxford: Oxford University Press, 1997).

[57] See Walker Connor, "Beyond reason: The nature of ethnonational bond" (1993) 16 Ethnic and Racial Studies 373.

[58] Alasdair MacIntyre, *Is patriotism a virtue?* (Kansas: University of Kansas Press, 1984) at 49-50.

[59] Carl Schmitt, *The concept of the political* (Chicago: University of Chicago Press, 1996); for an example of moderate patriotic theory see Jürgen Habernas, "Remarks on legitimation through human rights" in *The postnational constellation: Political essays*, Jürgen Habernas, ed, (Cambridge: Polity Press, 2001); Jan-Werner Müller, *Constitutional patriotism* (Princeton: Princeton University Press, 2007); Vincent, *supra* note 55.

> individual to make choices that are meaningful owes its existence to the cultural environment that he or she inhabits Second, national membership makes possible for individuals to transcend their everyday existence by imbuing a greater meaning - national significance - to the ordinary life. Third, national membership helps people belong to a community shared goal and mutual responsibilities[60]. [References omitted]

In *The Mass Psychology of Ethnonationalism*, author Dusan Kecmanovic, throughout analysis of nationalism, lays down the common ground between national feelings and the social contract. She establishes that nationalism "[e]ncompasses a politically more or less clearly articulated awareness of being a member of a nation, as well as the wish to protect and promote one's own national as an independent social entity"[61]. Furthermore, she adds, it "[i]mplies the existence of mutual expectations"[62].

Nationalism results from identification with other significant social and political entities. As we know, identification is a method of self-definition crucial to the human in his quest to establish a personal identity[63]. According to Kecmanovic, identity stability "[i]s a vital element of the feeling of personal security, of the feeling of 'internal peace'". On the other hand, facing identity threats, individuals tend to react with "[a]pprehension, discontent, and aggressiveness"[64]. Author Charles Taylor also observes that common identity is a crucial requirement for mobilization[65].

Actually, the individual's process of self-identification with the State accounts for much in the emotional tone of treason charges:

> It is worth stressing that in the course of identification with the nation, and especially once national identity has become an important part of the personal one, the nation (national group) is experienced on the part of the individual as a benefactor, as an entity helping conationals to fulfill their needs. Moreover, it is viewed as an entity through which mobilization of all national group members can be effected in order to secure their protection if they are attacked by people of another nationally or happen to be threatened in any other way. In addition, the national identity is also an entity that surveys, monitors, and controls the behavior of each conational. Thus, every deviation from the

---

[60] Lee, *supra* note 9 at 312-313.
[61] Kecmanovic, *supra* note 56 at 1.
[62] *Ibid*.
[63] *Ibid* at 10 referring to Sigmund Freud, *Group psychology and the analysis of the ego* (New York: Norton, 1959) at 37.
[64] *Ibid.*
[65] Charles Taylor, "Why Democracy Needs Patriotism" in *For Love of Country: Debating the Limits of Patriotism*, Joshua Cohen, ed, (Boston: Beacon Press, 1996) 119 at 120.

national standard can be punished by invoking the individual's *bad national conscience* and ostracizing him or her as a national traitor[66].

Nationalism appears as a reaction to the social contract in which there is an agreement that the nation's well-being is presumably achieved through the respect of the State's higher authority. In parallel, patriotism and nationalism being *feelings* or 'poetry of politics'[67], their main effect is to generate pride. As a consequence, "[t]he patriot is surely also the first to suffer his or her country's shame"[68]. Thus, treason law not only ensures the survival of the social contract, but also responds to the emotional stress caused by a threat to national identity.

It is also noteworthy that identification with the State needs not result from direct interaction or experience with the entity. According to the author, it is considerably shaped by symbolism and socio-political activities aimed at stimulating the 'feeling of belonging'[69]. As a result, national feelings are easily manipulated. Coincidentally, commitment to the national is believed to be directly linked with obedience to the authority of the state[70]. This makes patriotism both a suitable characteristic for self-development and a predisposition to blindfold adherence to State's political claims.

Still, feelings of national belonging provide crucial hints to explain the behaviour of traitors. Kecmanovic explains that the intensity of national feelings depends widely on the belief that the state adequately contributes to fulfilling the citizens' needs and providing sufficient protection. In the absence of such belief, nationalism can result from trusting that the State *would* provide such help and support when it will be the most needed[71]. Individuals who are convinced that the State *cannot* or is *not willing to* fulfill these roles are likely to engage in a process of dissent to signal their resentment.

---

[66]Kecmanovic, *supra* note 56 at 10.
[67]Edward W Blyden in *Negro Social and Political Thought,* Howard Brotz, ed, (New York: Basic Books, 1966) at 197.
[68]Kwame Anthony Appiah, "Cosmopolitan Patriots" in *For Love of Country: Debating the Limits of Patriotism,* Joshua Cohen, ed, (Boston: Beacon Press, 1996) 21 at 26 [Appiah].
[69]Kecmanovic, *supra* note 56 at 11-112.
[70]*Ibid* at 128.
[71]*Ibid* at 11.

Above all, this sub-section demonstrates that patriotism has strong implication on the criminalization of the duty of allegiance. For patriots, this appears logical and natural. For this very reason, few academics have looked into the theoretical validity of crimes against the State, most particularly into the value of disloyalty as a criminal *rationale.*

2. Treason Law: A Tool to Protect the Social Contract

Hobbes and other social contract theorists discussed the birth of civil society. This section addresses treason law as a means to enforce the viability and credibility of such a contract. It advocates that in their attempt to do so, governing entities have violated their citizens' freedom of speech and thought by using such charges as a powerful tool to repress legitimate dissent both in the political and societal spheres. In addition, it demonstrates that those criminal infractions traditionally resulted in illegitimate pressure on journalists, leading to occasional infringement on the liberty of the press. These critics are exacerbated in times of profound political turmoil during which States feel the need to reaffirm their authority. As the author Michael Head most explicitly outlined in his book *Crimes against the State:*

> Historically, these provisions have been exploited for purposes beyond, or even in defiance of, their stated functions. Measures purportedly directed against existential threats to society or the established order have been utilised to pursue a variety of agendas, notably to suppress dissent, intimidate political opponents, poison public opinion, prevent official embarrassment and divert attention from government or systemic failures. Prosecutions for these offences, even if ultimately unsuccessful, have had wider impacts in chilling dissent[72].

In order to best expose these issues, the first sub-section deals with the role and place of national security in defining those wrongdoings while the second sub-section exposes the potential for political abuses.

2.1 The National Security Issue

National security is a fundamental issue in crimes against the state and ought to be

[72]Head, *supra* note 22 at 3-4.

addressed before any further inquiry into the duty of allegiance. Indeed, such criminal wrongdoings are often presumed valid merely because they are held to serve the objective of national security. In parallel, it serves as a criterion to distinguish between trivial acts of dissent and those worthy of criminal sanctions. Manifestly, States have a right to self-preservation and they also have a responsibility to guarantee national security as part of their relationship with the individuals living within their territory. This article makes no attempt to deny this, and argument based on the value of criminal sanctions in regards to national security fall short of understanding our purpose in criticizing the duty of allegiance. The question is not whether the act should be criminalized, but whether it should be criminalized due to a duty of loyalty, and if so, whether it can be explained through the social contract theory.

Upon that fact, the national security *rationale* is not exempt from criticism. Some of them are relevant to our position and need further consideration. Specifically, national security is foremost a political concept, subject to the interpretation of the legislative. It is purposefully left undefined by most legislation, notably the US *National Security Act* of 1947[73]. This leaves the executive with the discretion to fulfill national security within whichever content they deem appropriate for their political agenda. And since national security allows for differentiating trivial acts of dissent from those worthy of criminal pursuit, the executive branch obtains a means to alter the content of the duty of allegiance. As a result, the content of treason law tends to vary along with the political agenda. This makes such infractions notoriously at odds with the other criminal offences that are required to be written and non-ambiguous. Most worrisome, this discretionary power historically resulted in non-democratic misuses of treason law, and the recent enlargement of national security aggravates those concerns.

Both the White House, in its "2010 National Security Strategy"[74], and the British Government in a document titled "A Strong Britain in an Age Of Uncertainty: The

[73]61 Stat 495; 50 USC § 401.
[74]White House, "National Security Strategy 2010" (May 2010), online: National Security Strategy Archive <http://nssarchive.us>.

National Security Strategy"[75], indicate that national security encompasses economic interests. In Canada, as early as 2004-2005, the Annual Report of the Security Intelligence Review Committee[76] noted that for the same year, the Minister directed the Canadian Security Intelligence Service (CSIS) to pursue priorities that included "[p]roviding advice on Canada's economic security"[77]. The importation of economic interests within the scope of national security is unprecedented. Australian Federal Police Commissioner Mick Keelty explains the impact of this expansion:

> This is a major shift in thinking, especially after ten years in which it could be argued that the term 'National Security' was more often than not used as a synonym for 'counter-terrorism'...This approach means that 'national security' now encompasses a broad range of principles - which include economic stability and a peaceful international environment[78].

In addition, cyber security has also been added to the list of apprehensions affiliated with national security. This is evident in Obama's statement: "[c]yber threat is one of the most serious economic and national security challenges we face as a nation" and "[A]merica's economic prosperity in the 21st century will depend on cyber security"[79].

As a practical example of the effects of such enlargements on the scope of criminal offences, consider the legal definition of classified information:

> The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution[80].

The extension of national security to economic interests can imply that data regarding national economy could be considered classified information, whereas traditionally, this is most appropriately limited to military or politically sensible information.

---

[75]"A Strong Britain in an Age of Uncertainty: The National Security Strategy" (October 2010), online: <www.gov.uk>.

[76]This entity oversees the work of the CSIS and reports annually to Parliament; *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s. 34(1).

[77] Security Intelligence Review Committee, "Annual Reports" (2004-2005), Online: <www.sirc-csars.gc.ca>; (according to s. 6(2) of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, the Minister of Public Safety issues annual national requirements and general direction to the CSIS).

[78]Mick Keetley, "Law enforcement contribution to national security" (National Security Australia, 23 March 2009 Speech), online: <www.afp.gov.au>.

[79]White House, "Cyber Security" (2014), online: <www.whitehouse.gov>; Corey M Dennis & David A Goldman, "Data security laws and the cyberspace security debate" (2013) 17:2 J of Internet Law 1.

[80]*Disclosure of Classified Information,* 18 US § 798.

Notwithstanding the risk of political intrusion, courts have notoriously refused to intervene in national security litigation, and relied heavily on judicial deference to do so[81]. In cases such as *A v Secretary of State for the Home Department*, judges glorified the autonomy of the executive in this domain: "[a]ll courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice"[82]. It is perhaps this substantial latitude that explains why the US Supreme Court refused to hear an appeal brought by the American Civil Liberties Union and other groups in regards to the National Security Agency's warrantless domestic wiretapping program under the Bush Administration[83]. This latitude is also evident in the war on terrorism[84].

Having pointed out the issues with national security, we also acknowledge that it is a *necessary* concept to ensure the survival of States. Politicians need to have a certain flexibility to adapt to new threats, such as cyber security and, therefore, cannot offer a precise or definitive definition of national security. In addition, this concept is based upon the differentiation between trivial acts and criminal acts. Consequently, if we are to ensure that treason law becomes more impartial, this needs to be done through other means than criticizing the use of national security. This is why it is necessary to question ourselves on the rationale behind treason law, and initiate a debate on how we are to encompass norms of objectivity within these criminal charges. The duty of allegiance appears to be the starting point of such inquiry.

---

[81]See Ashley Deeks, "The Observer Effect: National Security Litigation, Executive Policy Changes and Judicial Deference" (2013) 82 Fordham L Rev 828; the author argues that notwithstanding judicial deference, courts have impact on national security issue because governments know they are being observe.
[82][2005] 2 AC 68 at 128.
[83]American Civil Liberties Union, "ACLU v. NSA: The challenge to illegal spying" (2008), online: ACLU <www.aclu.org>.
[84]For further information on counter-terrorism and political abuses, the reader is invited to refer to the vast amount of scholarly article already published which exposed the abuse of the government in this domain: Head, *supra* note 22 at c 7; Lee Ross Crain, "The legality of deliberate Miranda violations: how two-step national security interrogations undermine Miranda and destabilize Fifth Amendment protections" (2013) 112:3 Michigan L Rev 453; Robert M Chesney; "Beyond the battlefield, beyond Al Qaeda: the destabilizing legal architecture of counterterrorism" (2013) 112:2 Michigan L Rev 198; Natasa Mavronicola & Francesco Messineo, "Relatively absolute? The undermining of article 3 ECHR in Ahmad v UK" (2013) 76:3 Modern L Rev 589; Human Rights Watch, "Counter-Terrorism", online: <www.hrw.org>, etc.

2.2 Overview of Treason Law: An History of Political Abuses

The offence of treason initially appeared under the appellation *crimen laesa majestatis* during the autocratic Roman Empire of the third century BC, approximately when patriotism also appeared[85]. Even though the crime disappeared for many centuries, it returned during the medieval era to cover feudal notions of obligation. Both the King and the Lords were objects of allegiance. However, as the Monarchs consolidated their power, the initial doctrine of *crimen laesa majestatis* regained popularity[86], albeit its signification as "[a]n exalted prestige to which inferiors must submit"[87].

In 1351, Edward III enacted the most influential piece of legislation in the history of treason; *Treason Act 1351*, 25 Edward III[88]. Professor Carso notes that it marks the beginning of modern treason law as it (1) delimited the actions which were subject to treason and (2) defined the notion of sovereignty[89]. In fact, its importance is such that the disposition within the Constitution of the United States, which defines treason, uses a very similar verbatim to the one used in 1351[90].

Several categories of treason were created by this act: "(1) compassing the death of the monarch; (2) levying war against the king in his realm; and (3) adhering to the king's enemies in his realm or elsewhere" in addition to "[v]arious ancillary crimes, such as violating the king's companion, counterfeiting the king's seal and killing the chancellor or the king's justices"[91]. As a consequence, it established that the duty of allegiance was owed to the person of the king, rather than English society. Still, this was presumptively

---

[85]Head, *supra* note 22 at 24.
[86]*Ibid* at 24.
[87]Brian F Carso, *Whom can we Trust now? The Meaning of Treason in the United States from the Resolution through the Civil War* (New York: Lexington Books, 2006) at 11 [Carso].
[88]Edward Coke, *The Third Part of the Institutes of Laws of England, Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (London: E & R. Brooke, 1797 (first printed 1644)): "For except it be Magna Carta, no other act of parliament hath had more honour given to it by the king, lords spirituall and temporall, and the commons of the realme for the time being in full parliament, than this act concerning treason hath had".
[89]Carso, *supra* note 87 at 12.
[90]Carlton F W Larson, "The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem" (2006) 154:4 University of Pennsylvania L Rev 863 at 869. ("The phrases 'levying war' and 'adhering to their enemies, giving them aid and comfort' in the Treason Clause comes directly from the treason statute of 25 Edward III, enacted in 1351").
[91]Head, *supra* note 22 at 12.

an attempt to reaffirm the domination of the monarchy over the populace, rather than a conception of sovereignty that reflected the medieval mentality.

According to Gaines Post, during these decades, for at least "[s]ome legists and canonists, and in Thomas Aquinas[92], in varying degree, the word *status* bore the meaning both of the public welfare of the community and of the necessary government"[93]. For instance, in the case disputing the succession of the Kingdom of Scotland after the death of the young Queen Margaret in 1290, it was proposed in court that the "[r]ight of a realm is principally royal dignity and government of people"[94]. Similarly, in the 1570s, Hughenot, in *Vindiciae Contra Tyrannos*, affirmed that "[i]t was the people, not the king that formed a perpetual corporate body". He further suggested that even the King could be guilty of high treason, if he was to betray its citizens[95].

As likely as not, when Edward III enacted the *Treason Act 1351*, he attempted to strengthen the actual social contract in which the Monarchs were the governing body. The idea was to reinforce the monarchical system by providing with a tool against those who would challenge it. *Treason Act 1351* effectively confirmed the vision of sovereignty within the hands of the King.

Indeed, the act conferred immense arbitrary power to the Monarch to control his subjects. This is evident in the infraction of "[c]ompassing the death of the king", which consisted of merely: "[**w]ishing** and **desiring** that the life of the king should be taken, or that he should lose his liberty or his throne, or that he should be put in serious danger of losing his life, liberty or crown as the one or the other might naturally result"[96]. This infraction's formulation amounts to making the *mens rea* the 'core' of the crime, rather

[92]Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton, NJ: Princeton University Press, 1964) at 345 [Post] ("Thomas Aquinas is above all important. To understand his treatment of *status* it is well first to recall that his *raison d'état* was the 'reason' of the natural end of the city in the common good of the citizens and in its own welfare and safety; and it was the 'right reason' used by government for the attainment of the *ratio civitatis*").
[93]*Ibid* at 357-358.
[94]*Ibid* at 343 citing Barnaby C Keeney, "The Medieval Idea of the State: the Great Cause" (1949) 8:42 U of Toronto L J 62f, 63.
[95]Carso, *supra* note 87 at 4.
[96]Hayes McKinney, "Treason under the Constitution of the United States" (1918) 3:11 The Virginia Law Register 801, 803 [McKinney]

than the *actus reus*. In other words, the judge would first search for the intention and then potentially confirm it with an overt act[97]. Unfortunately, the range of acts which could serve as *actus reus* was quite arbitrary and resulted in severe injustice. To give a blunt example, a subject named Walter Walker was executed for treason after having told his child "[t]hat if he would be quiet, he would make him heir to the Crown"[98].

Another aspect of the *Treason Act 1351* worth mentioning is the "salvo" clause[99], which resulted in two controversial practices: "parliamentary attainder" and "common law treason"[100]. The former corresponds to the procedure by which the parliament passed an act declaring the accused guilty, in the absence of a trial. According to the author W.R. Stacy, this also enlarged the scope of treason by creating additional types of treasons - notably poisoning in the case of Richard Roose in 1531[101]. As for 'common-law treasons', it consists of custom-derived offences that existed before 1351. From its very beginning, treason was and remains a highly subjective and unpredictable crime at the service of political interests.

The Tudor and Stuart houses, for instance, were responsible for vastly expending treason law. Jurists from this era believed that States were "[s]imply affirmations of a body of pre-existing, unwritten, customary, fundamental law"[102], and therefore had no problem enlarging the *Treason Act 1351*. Both the authors Bellamy and Head explain this with the prevalent political instability and the presence of new threats to the monarchy[103].

More precisely, in 1534, Henri VIII enacted the *Treasonable Words Statute* which

---

[97]*Ibid* at 804.
[98]*Ibid* at 805 citing Matthew Hale, George Wilson & Thomas Dogherty, *Pleas of the Crown*, vol I, (Little Britain: Payne, 1800) at 115.
[99]Alan D Orr, *Treason and the State: Law, Politics, and Ideology in the English Civil War* (Cambridge: Cambridge University Press, 2002) at 13 [Orr] ("That if any other Case, supposed Treason, which is not above specified, doth happen before any Justices, the Justices shall Tarry without going to judgement of the Treason, till this Cause be shewed and declared before the King and his Parliament whether it ought to be judged Treason or other felony").
[100]*Ibid* at 13-16.
[101]W R Stacey, "Richard Roose and the Use of Parliamentary Attainder in the Reign of Henry VIII" (1986) 29 Historical J 1.
[102]Orr, *supra* note 99 at 15-16
[103]Head, *supra* note 22 at 25.

prohibited calling the King a "Heretic, Schismatic, Tyrant, Infidel or Usurper of the Crown"[104]. This unpopular law appeared as a consequence of Henry VIII's role in the separation of the Church of England from the Roman Catholic Church[105].

Similarly, 13 Elizabeth I, c.I defined treason as:

> Maliciously, advisedly and directly publish, declare, hold opinion, affirm or say by any speech express words or sayings, that our said sovereign Lady Queen Elizabeth during her life is not or ought not to be Queen of this realm of England and also the realms of France and Ireland; or that any other person or persons ought of right to be King or Queen of the said being under her Majesty's obeisance[106] […].

In the context of the papal bull of 1570, which claimed that the Queen was illegitimate and which released subjects from their allegiance, such enlargement of treason was to be expected. In addition, her reign was characterized by threats of invasion from Spain and France, as well as plots against her life by Roman Catholics[107]. For every Monarch, treason's content was altered to fill a different role.

On another note, those statutes also demonstrate that, until the early 1600s, seditious libel and seditious advocacy were subsumed by the offence of treason. It is not until the printing press brought new challenges for the monarchy that the Star Chamber, commissioned by the Sovereign to repress the rising parliamentarians, created this "terrible weapon"[108]. This was mostly accomplished through the infamous *De Libellis Famosis* case[109].

This decision concerned the publication of two poems mocking the Archbishops of Canterbury, seemingly because of their corrupted character. The judgment establishes that sedition against an individual, a magistrate or a public personality is criminal notwithstanding the fact that the subject is deceased or that the affirmation is truthful. In addition, it states that corruption must not be made public, considering the scandal that

[104]26 Henry VIII, c 13.
[105]Oxford Dictionary of National Biography, "Henry VIII", online <http://www.oxforddnb.com>.
[106]G R Elton, *The Tudor Constitution* (Cambridge: Cambridge University Press, 1982) at 74.
[107]The Royal Household, "Elizabeth I (R. 1558-1603)", online: Official Website of the British Monarchy <www.royal.gov.uk>.
[108]Head, *supra* note 22 at 25, 150.
[109]1606 Coke 254, 77 ER 250.

could result from it[110]. Such revelations were seen as a breach of the peace, disrupting the *status quo*.

Significantly, ordinary courts "[s]ympathetic to the parliamentary interests", initially refused to apply the reasoning developed by the Star Chamber in *De Libellis Famosis*[111]. Nonetheless, and quite ironically, in the late 1600s, following the Civil War and the Glorious Revolution, the same parliamentarians who were intended to be the victims of this decision, were now using it to their advantage: "[a]ny criticism of public men, laws or institutions was liable to be treated sedition"[112]. Seditious libel, just like treason, served to maintain the current social contract by preventing citizens from harming it verbally. This is evident in Lord Chief Justice Holt's later explanation for sedition in 1704:

> If people should not be called to account for possessing the people with an ill opinion of the government no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to produce animosities as to the management of it: this has always been looked upon as a crime, and no government can be sage without it punish[113].

This simplified overview of treason in Monarchical England highlights the origin of crimes against the state in the Commonwealth. It emphasizes that such treasonous behaviour were made criminal to maintain social order, rather than truly ensure the self-preservation of the State. There are certainly some cases of treason which affected the very existence of the governing body; for instances, many plots against the queen Elizabeth I were discovered through a network that is referred to as the ancestor of secret services. However, it was predominantly used as a tool to repress any thought of dissent, especially against corruption.

---

[110]Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke*, vol 1, Steve Sheppard, ed (Indianapolis: Liberty Fund, 2003), Part Five, online: <http://oll.libertyfund.org/title/911/106322> (initially published in Edward Coke's *Reports*, vol. 5, at 125A).

[111]Head, *supra* note 19 at 151. See the *Pine's Case*, (1629) 3 State Trials 359, in which fourteen judges acquitted the accused, evoking the absence of particular statute. Yet, the words pronounced were unequivocal disrespect of Charles I, who he called "as unwise a king as ever was" and argued that "before God he is no more fit to be king than Hickwright" (Mr. Pyne's shepherd); Courtney Stanhope Kenny, *A Selection of Cases Illustrative of English Criminal Law* (Cambridge University Press, 1901) at 377-378.

[112]Head, *supra* note 22 at 151.

[113]*R v Tutchin*, (1704) 14 State trials (OS) 1096 at 1128.

Although one would think that democratic systems have fared better than their antiquated *alter ego*, it has been surprisingly deceiving in times of instability, peculiarly in times of war. As an example, the Mayor of Montreal, Camillien Houde was arrested for sedition after urging the Quebeckers to ignore the *National Registraction Act* concerning conscription to the Second World War[114]. Even though his campaign was political and likely gave a voice to the numerous individuals who opposed circumscription, it threatened the fragile social order and divided people at a time when the federal government was hoping to rally them. Upon his release from prison four years later, a "crowd in jubilation" waited for him and he was subsequently re-elected[115]. The sentence was just convenient enough to ensure social order during the few years when it was needed.

A similar case in the United States led to the conviction of Matthew Lyon, a congressman whose crime was to have accused President Adam's administration of "[a] continual grasp for power […] an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice"[116]. In fact, following the enactment of the *Sedition Act 1798*, 25 well-known republicans were arrested by 1801[117]. The use of crimes against the State against politicians is astonishingly common throughout history, even in democracies where those individuals are elected to represent the voice of people.

Most notoriously, during the First World War, Eugene Debs, an "[i]nternationally-renowned" socialist who obtained more than a million votes through his candidature in the Socialist Party in 1912, was jailed for ten years under the *Espionage Act*[118] for supporting other imprisoned party members during a public speech. The politician received the same amount of suffrage after conducting his next political campaign from prison[119]. The fate of Victor Berger, also a candidate from the Socialist party, was similar. It took four years of judicial procedures before the politician was allowed to sit in

[114]The act was attached to the *National Resources Mobilization Act*, 1940 4 George VI c 13.
[115]Ville de Montréal, "Camillien Houde", online :<www2.ville.montreal.qc.ca>.
[116]Head, *supra* note 22 at 38.
[117]*Ibid.*
[118]18 USC §§ 793-98; 40 Stat 422.
[119]*Debs v United States*, (1919) 294 US 211; Head, *supra* note 22 at 44.

Congress[120]. These cases of political repression encroach on the democratic purpose and on the liberal values of freedom of speech, thought and political association.

In the same vein, crimes against the state were also used abundantly to enforce the economic interests of the political power in the capitalist system. The *British Mutiny Act 1797* was disgracefully enforced against socialists from the working class[121]. In 1912, trials for mutiny followed the publication in *The Syndicalist* of a letter urging soldiers not to shoot striking workers[122]. Similarly, it was applied against the Communist party, and precisely the editor of *Workers Weekly*, Campbell, for publishing another open letter to the soldiers, sailors and airmen suggesting that they refuse killing their fellow countryman[123]. Likewise, a group of American socialists and anarchists were jailed for 20 years due to a pamphlet criticizing capitalism and distributed during a protest against military actions in Russia[124].

The Star Chamber's reaction to the printing machine in *De Libellis Famosis* predicted quite accurately the attitude of governing bodies, in terms of freedom of press, regarding dissent in troubled times. Geoffrey Stone notes that between 1919 and 1927 alone, the American government dismissed First Amendment arguments "[i]n all nine cases in which they were mounted"[125]. In 1968, the US Supreme Court ruled that a law could override the first amendment if it furthered a "substantial government interest"[126]. The recent shift in attitude from this government following the appearance of asymmetric warfare is therefore troubling.

Of note, according to the World Press Freedom Index for 2014, published by Reporters Without Borders (RWB), the United Stated ranked in 46th place out of 180 countries, a 13-place drop from last year, due to the prosecution of Bradley Manning and

[120]See *Berger v United States*, (1921) 255 US 22; Head, *supra* note 22 at 26.
[121]*Head, supra note 22 at* 109.
[122]See *R v Bowman* (1912) 22 Cox CC 729; 76 JP 271.
[123]Head, *supra* note 22 at 112.
[124]*Abrams v United States*, (1919) 2660 US 616.
[125]Geoffrey Stone, *Perilous Time: Free Speech in Wartime* (New York: Norton, 2004) at 228.
[126]*United States v O'Brien*, 391 US 367 1968.

Edward Snowden. In RWB's opinion, "[f]reedom of information is too often sacrificed to an overly broad and abusive interpretation of national security need". The seizure of phone record to identify the journalistic source of a CIA leak, without warning, by the American Department of Justice is definitely one of these suspect practices. Likewise, James Risen of the *New York Times* was subject to a court order summoning him to testify against his source. Journalist Barret Brown is currently facing 105 years in prison "in connection with the posting of information that hackers obtained from Statfor, a private intelligence company with close ties to the federal government". RWB also notes similar pressure in the United Kingdom, particularly regarding the newspaper *The Guardian*[127].

In the same line of concerns toward freedom of press, the Electronic Frontier Foundations notes that the *Espionage Act* is not only a threat to website diffusing confidential information like Wikileaks, but also to journalism in general[128]. Attorney General Alberto Gonzales indicated in an interview on ABC that some statutes would allow the possibility of criminal charges for some journalist implicated in the breaking news of the National Security Agency warrantless wiretapping scandal[129]. On July 11th 2012, legal experts, on the demand on the House Judiciary subcommittee specifically explained that such criminal pursuit were not out of reach:

> "Under certain circumstances, you can see that if someone acting with impunity and knowledge of the consequences goes ahead and publishes it, that is something that I think would be worthy of prosecution and punishment," said Kenneth Wainstein, a partner at Cadwalader, Wickersham & Taft who specializes in national security[130].

Given the severity of crimes against the State, especially of treason (which may lead to the death sentence in some jurisdictions), actual conviction rates are far lower than accusation rates. In some cases, accusations are even dropped when the social tension and

---

[127] Reporters Without Border, "World Press Freedom Index 2014" (2014), online: <www.rsf.org>.

[128] Trevor Timm, "Why the WikiLeaks Grand Jury is So Dangerous: Members of Congress Now Want to Prosecute New York Times Journalists Too" (23 July 2012), online: Electronic Frontier Foundation <www.eff.org> [Timm].

[129] Walter Pincus, "Prosecution of Journalist is possible in NSA leak" (May 22, 2006), online: Washington Post <www.washingtonpost.com>.

[130] Jame Goldberg, "House Republicans Consider Prosecuting Reporters over Leaks" (11 July 2012) online: Los Angeles Times <www.articles.latimes.com>; Timm, *supra* note 128.

political animosity disappear. Nonetheless, such serious accusations guarantee that the accused will spend time in jail while awaiting trial. This manoeuvre amounts to political manipulation of criminal law to muzzle dissent.

It is also known that accusation is also a political technique which allows differentiating and excluding different types of people that are deemed 'outsiders'[131]. This process allows the government to draw the lines which indicate who is the enemy by reinforcing the identity of the community. A notorious example of this technique, which can sometimes amount to crowd manipulation, can be seen in terrorism. Initially, it was quite difficult for the population to identify the threat. Identifying individuals as samples of these groups, through the accusation process, enhances the population's capacity to conceptualize it: "[t]he collective, the many, is almost indiscernibly constructed by isolating disruptive ones. This quarantining generates a clean slate upon which to write the accused's identity as other, in excess of order"[132]

An accusation consists of a *warning* or *alarm* that something is disturbing the legal order imagined through the social contract theory.

> The accusatorial bell tolls to signal that a presumed order is disrupted and to initiate a confessionals sequence of self-accounting and validation quite different from the ordinary, where ordered self-identities are usually negotiated. What emerges from this Lore are ritualized ethico-political assertions of limit formation, displacements that forge boundaries by calling subjects to account on suspicion of disrupting and imagined order[133].

Through the accusation process, "images of the accused other are created from within, but made to appear as threats from without"[134]. Accusations of disloyalty, then, could be alarming when dealing with crimes against the State because they (1) serve to repress dissent, (2)contribute to create a political climate of exclusion based on a political agenda and (3) reinforces the current social contract also as seen by the government of the day. While most of this is the normal role of criminal law, the combination of this social discretion with the emotional component of betrayal makes such accusations

[131]Pavlich, "Forget Crime", *supra* note 7 at 145.
[132]George Pavlich, "The Lore of Accusation" (2007) 1:1 Criminal Law and Philosophy 79 at 91 [Pavlich, "The Lore of Accusation"].
[133]*Ibid* at 85.
[134]*Ibid* at 93.

profound.

The issue of determining whether there is a legal justification for the duty of loyalty then becomes an important matter. Pointing out that this judicial *rationale* cannot logically justify the prosecution of crimes against the State could potentially encourage jurists and politicians into thinking of a more objective explanation that would reduce the risk of political manipulation. The next section, then, will demonstrate that the social contract theory is inapplicable as a justification for the duty of allegiance.

3. Challenging a Consent-Based Approach to Loyalty

This article attempts to challenge whether the parties to the social contract agreed to the duty of allegiance towards the State in the original covenant. It does not question whether the parties agreed to *obey* the State. Of course, the duty to obey and the duty of allegiance overlap in significant ways. It is true that disloyalty can lead to criminal acts. In fact, it is the case with treason law, but one person could very well be disloyal without ever committing a crime and vice versa. An accusation of murder, for instance, does not lead to the qualitative of traitor.

Obeisance to the law means that the citizens will be obliged to the substantive content of laws because they have a political or reciprocal obligation to do so. The duty of allegiance in treason law differs from this concept because it requires more than just obedience to the content of the laws. It necessitates a deeper moral engagement by requiring that the individual trust the State; it is a *commitment* towards the governing entity. The duty of allegiance limits dissent in a moral way, while the duty of obeisance limits dissent in a material way through laws.

As we have seen, it also involves the demand that the citizens prioritize the interests of the other beneficiaries within the State over those of non-nationals. As Harry Beran paraphrased, "[o]ne must distinguish between the statements 'A *agrees with* the constitution' and 'A *agrees to obey* the constitution'"[135]. Only the second statement refers

[135]Harry Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987) at 65 [Beran, *Consent Theory*].

to the duty to obey the law. The duty of loyalty, strictly interpreted such as it is in times of conflict, corresponds to the first statement. This distinction is crucial because some arguments might very well explain why the citizens agreed to follow the laws, without justifying the further moral implication of the duty of allegiance.

This article, therefore, attempts to distinguish between the consent to loyalty and consent to obedience. At times, it might attempt to draw analogy between the two obligations, but its first concern is to confirm or infirm the possibility that the parties agreed to the duty of allegiance. In order to fulfill this goal, it examines the possibility of explicit, hypothetical and tacit consent.

3.1 Explicit Consent

In order to validate the duty of loyalty, it is necessary to obtain a widespread consent. Since they are no actual mechanisms that ensure this, it is essential to use either the theoretical device of tacit consent or the argument of hypothetical consent. This does not mean that explicit consent does not exist; it just means that it is only present within a minority of people. There are at least two types of individuals that explicitly consent to loyalty.

A first group includes naturalized citizens who consent to the duty of loyalty for a life-long period. The Canadian *Oaths of Allegiance Act* requires that the naturalized citizens to take the following oath:

> I, ..., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors. So help me God[136].

The oath is the same in Australia, where a monarchical constitution prevails as well. The American oath of citizenship is longer and needs to follow the requirements of the *Immigration and Nationality Act* § 337(a). Its actual formulation can be found in the *Code of Federal Regulations*, § 337.1:

> 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 and 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

[136] *Oaths of Allegiance Act*, RSV, 1985, c O-1, s 2.

> 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.

According to author Peter Spiro, the part which requires to "[r]enounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, sovereignty […]" is considered obsolete and is not currently enforced[137]. Its presence, however, serves as a reminder that loyalty to a State risks being interpreted as *exclusive* loyalty (see section 3.2.1). It is also worrying that the oath has not been modified. One must also note that in this oath, allegiance is not only a mental state; it requires that citizens "[b]ear arms on behalf of the United States", "[p]erform noncombatant service in the Armed Forces" and "[p]erform work of national importance". As author Youngjae Lee notes, the oath has serious implications and the validity of the consent is uncertain since the oath remains in effect for the life span of the naturalized citizen.

Promises of allegiance have been required from every form of sovereignty for hundreds, if not thousands, of years. They often adjust to the political situation, reflecting the flexibility of loyalty itself. For instance, James I crafted an oath which prevented allegiance to the Pope, using vague and emotional terms. It required that subjects recognize James I as the lawful king and deny the Pope's authority to depose the king: "And I do further swear, that I do from my heart abhor, detest and abjure, as impious and heretical, this damnable doctrine and position, that princes which be excommunicated or deprived by the Pope, may be deposed or murdered by their subjects, or any whatsoever"[138]. The nature of allegiance often depends of the political situation, and the oath may or may not reflect this. However, this demonstrates that while the consent seems straightforward, the word loyalty is stretchable and one may not know the content and extent of his new obligation as a naturalized citizen. This also, can cast doubt as to the validity of the explicit consent.

---

[137] Peter Spiro, *Beyond Citizenship: American Identity After Globalization*, (Oxford: Oxford University Press, 2008) at 72-73.

[138] *An Act for the better discovering and repressing of Popish recusants*; 3 & 4 James I c 4, 1606.

The second group which can be said to consent explicitly to be under an obligation of allegiance towards the State includes public office holders. In Canada, every elected Member of the House of Commons takes the oath codified in the Fifth Schedule of the *Constitution Act 1867* : "I, (Member's name), do swear that I will be faithful and bear true Allegiance to Her Majesty Queen Elizabeth the Second". This must be done verbally, but also by signing the "Test Roll", a book whose pages are headed by the text of the oath. According to the Parliament, allegiance to the Queen must be interpreted as "[a]llegiance to the institutions the Queen represents, including the concept of democracy", and therefore means that the Member must "[c]onduct him-or herself – in the best interests of the country"[139]. In the United States, however, allegiance is usually pledge to the Constitution[140]. It is important to note that members of armed force are also subject to similar oaths of allegiance. Still, these consents to the duty of loyalty are most likely to be considered valid, as they are limited to the length of the office; it is always possible to resign. Nonetheless, section 3.4 proposes that consent will be *ultra vires* if contrary to international treaties and human rights. This is especially crucial for those who are enrolled in armed force.

3.2 Hypothetical Consent

In an attempt to provide a widespread legitimacy to the social contract, theorists have proposed two options; the hypothetical consent and the tacit consent. Both

[139]Parliament of Canada, "The House of Commons and Its Members", online: <www.parl.gc.ca>; "Breaking the oath of allegiance is a serious offence and any Member whose conduct has been determined by the House to have violated the oath could be liable to punishment by the House. Although there have been no cases of a Member having been found guilty of breaching the oath of allegiance, the Speaker was asked in 1990 to rule on the sincerity of a Member's solemn affirmation. Speaker Fraser ruled that the Chair was "not empowered to make a judgement on the circumstances or the sincerity with which a duly elected Member takes the oath of allegiance. The significance of the oath to each Member is a matter of conscience and so it must remain." Since the Member stated very clearly in the House that he had "never mocked the Canadian Parliament nor the Queen", the Speaker concluded that, in keeping with convention that the House accepts as true the word of the Member, there was no breach of privilege. He did note, however, that "only the House can examine the conduct of its Members and only the House can take action if it decides action is required". No further action was taken" [References omitted]. We interpret this paragraph as suggesting that, except in cases which can command criminal actions such as Treason, the member's disloyalty can also be subject to political reprimand directly by the House of Commons. In this case, the House may attribute itself competences over penal matters, which demonstrates the political component inherent with the punishment of disloyalty.

[140]See for instance the Oath for the Office of US President in *US Constitution*, art 11, s 11 which requires an oath to "preserve, protect and defend the Constitution of the United States".

approaches have met their fair share of objections and are regarded as very controversial, notwithstanding some honourable efforts for their defense. The tacit consent, however, persists as the most common explanation to the obeisance to the rule of law, mostly because of its apparent appeal to reason.

That being said, the arguments in favour of hypothetical consent are sometimes overlooked and authors frequently think it sufficient to cite Ronald Dworkin's conclusion that an "[h]ypothetical contract is… no contract at all"[141]. There is, however, more to the hypothetical theory than just the absence of contract, as it appeals to the same type of moral values which can justify the respect of a promise. To clarify, a hypothetical consent happens when it is assumed that one person *would* have consented.

The assumption of scholars who endorse this version of 'consent' is not to assimilate it to a real promise but rather to use it as a methodological tool to demonstrate the legitimacy of the governing body. From this point of view, the social contract is not a theory which serves to explain political obligations, but rather one concerned with the legitimacy of the State. From this theory's standpoint, if the arrangement between citizens is both reasonable and rational, it is sufficient to create some legitimacy, and therefore an actual consent is not necessary. The hypothetical consent is a means to detect which policies are *justified*:

> Hypothetical consent theories, then, serve to justify political arrangements only if we are prepared to accept these precepts. If we agree that people should be subject only to policies that they have reason to accept, then hypothetical consent theories, insofar as they establish which policies people have reason to accept, are capable of determining which policies are just[142].

On that account, simply stating that hypothetical consent amounts to hypothetical contract misses the point. Proposing to someone that it would be reasonable to follow a rule or be bind by an obligation does not replace consent however, it is not meaningless.

---

[141] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977) at 151.

[142] Cynthia Stark, "Hypothetical Consent and Political Legitimacy", online: University of Utah <https://www.bu.edu/wcp/Papers/Poli/PoliStar.htm>.

There is an argument of substance in demonstrating the legitimacy of a rule[143]. Hypothetical consent, then, is not just basis for consent[144].

Still, this article needs to prove consent to a specific political obligation, i.e. loyalty. The hypothetical consent cannot justify that, but it is a convenient tool to demonstrate whether we *would* have accepted such an obligation because it is reasonable and rational. *Would citizens accept to consent to a duty of loyalty being aware of its content?* In this sub-section, we attempt to demonstrate that the answer is 'no' and as a result, there is no moral basis or legitimacy to such an obligation. This does not directly answer our interrogation in regard to actual consent, but it helps us reflect on the implicit requirement of State's loyalty.

We, firstly, advocate that loyalty raises moral difficulties because it amounts to *exclusive* and *primary* political allegiance. This leads us to question whether patriotism and nationalism are morally significant for the vast majority of subjects. Secondly, we further suggest that the duty of allegiance has the potential of being at odds with international treaties. This is particularly true of international human rights. As a result, it is unlikely that this arrangement could be considered reasonable and rational.

3.2.1 Moral Difficulties with the Requirement of Exclusive Loyalty

> *"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 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"*[145].

It has been exposed that the duty of allegiance requires that the subjects prioritize the interest of those within their nation over those of foreigners. This assumption stems from

[143]*Ibid.*
[144]Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31 Queen's L J 259 at 288 [Fox-Decent, "Fiduciary Nature"].
[145]Lee, *supra* note 9 at 308.

the codification of treason law and of explicit oaths of allegiance, as well as from the presumption that different societies have different social contracts leading to the establishment of a government. Since we do not share a universal government, there has to be multiple social contracts for each sovereign.

The requirement of prioritizing national interests is tantamount to requiring an exclusive or fundamental allegiance that effectively denies the possibility of having more than one preference, or none at all[146]. This means that the law does not only require *A* to be loyal to country *X*, it also requires *A* to choose *X* over any other countries. Then, if *A* knows that country *X* plans to invade country *Y* in violation of its international obligations, *A's* duty of allegiance requires him to keep that information confidential even if *A*'s family lives in country *Y*.

More generally, the duty of allegiance presupposes that the interests of foreigners are less worthy than those of nationals. While this has been explained by reference to nationalism and patriotism, it still remains at odds with the presumption that humans are born equal. The requirement of exclusive loyalty also deprives individuals of the option to envision themselves as primarily citizens of the world. It denies the fact that the boundaries of a given country might not be morally significant for all of the citizens. Some of us might simply not attach much importance to boundaries, especially given that people can now hold multiple nationalities and travel easily between countries.

Of all time, scholars, philosophers and political thinkers have adopted cosmopolitan views on different issues. While all cosmopolitans share the view that allegiance to humanity is of at least equal value than allegiance to a nation, some authors go so far as to challenge the value of patriotism and nationalism. Overall, however, they agree that a requirement of *exclusive* allegiance to a State does not meet the necessary standard of morality required by the common existence on earth.

[146]On the need to accept more than one loyalty see Amartya Sen, "Humanity and Citizenship" in *For Love of Country: Debating the Limits of Patriotism*, Joshua Cohen, ed (Boston: Beacon Press, 1996) at 113-114.

The ideology, as defended by Martha C. Nussbaum, originated with the Stoic's recognition that "[t]he accident of where one is born is just that, an accident; any human being might have been born in any nation"[147]. They denied the importance of nationality, class or ethnic memberships, and refused such barriers, instead praising that "[w]e should recognize humanity wherever it occurs and give its fundamental ingredients, reason and moral capacity, our first allegiance and respect"[148]. In other words, governing bodies are not worthy of our exclusive allegiance. Both Hobbes and Stoic recognized reason as a fundamental human characteristic, but only the Stoic's celebrates humans' moral capacity.

Cosmopolitanism does recognize the importance of local communities and bounds, but further affirms that each human is also part of a larger community, whose boundaries, Seneca argued, are only delimited by the sun[149]. This paradigm, Nussbaum adds, does not offer the same emotional comfort as patriotism and nationalism. The patriot is comforted by symbols, songs, arts, popular opinions and culture. Membership to a state offers psychological stability and cosiness; patriotism celebrates the norm, the known and the familiar. It does not appeal to *reason*, but to *emotion*. On the flip side, being a citizen of the world requires mental efforts to appreciate and imagine the diversity of humanity. It demands an open mind, which is willing and capable of situating itself within the world. Have we not all heard that the greatest happiness happens when one is willing to leave his zone of comfort?

> Becoming a citizen of the world is often a lonely business. It is, as Diogenes said, a kind of exile – from the comfort of local truths, from the warm, nestling feeling of patriotism, from the absorbing drama of pride in oneself and one's own… Cosmopolitanism offers no such refuge; it offers only reason and the love of humanity, which may seem at times less colourful than other sources of belonging[150].

Understanding the comfort associated with patriotism helps to conceptualize how it can prevent citizens from being aware of political misuses of crimes against the State. More precisely, patriotism is likely to render people susceptible to crowd manipulation

---

[147]Martha C Nussbaum, "Patriotism and Cosmopolitanism" in *For Love of Country: Debating the Limits of Patriotism*, Joshua Cohen, ed (Boston: Beacon Press, 1996) at 7 [Nussbaum].
[148]*Ibid.*
[149]*Ibid* citing Seneca, *De Otio.*
[150]*Ibid* at 15.

through symbolism, political claims and propaganda. In times of instability, it is easier for the State to appeal to the anger of the population to delimit an enemy group. As Nussbaum claims, patriotism "[s]ubstitutes a colourful idol for the substantive universal values of justice and right"[151].

In the same line of thought, the author contends that "[t]his emphasis on patriotic pride is both morally dangerous and, ultimately, subversive of some of the worthy goals patriotism sets out to serve – for example, the goal of national unity in devotion to worthy ideals of justice and equality"[152]. Of course, the idea is not to *generalize*; it is evident that individuals can have patriotic feelings from time to time without falling into the trap of blindfold adherence to dubious political claims.

Notwithstanding this, examples of local pride during sport competition can serve to roughly illustrate how feelings of adherence to a group can ultimately lead to discrimination. In the NHL 2014 playoffs, following defenceman P.K. Subban's winning goal in a double-overtime match between the Canadians and the Bruins, the athlete was the object of racial slurs generating thousands of tweets online[153]. In 2011, following the loss of the Vancouver Canucks in the Stanley Cup final, angry rioters caused substantial damages forcing police officers to use gas, batons, flash bombs and peppers spray[154]. While these are banal example of extremist fans, it underlines that feelings of adherence to a group can and do create extreme circumstances, even in ordinary situations. In wartime, examples such as Nazi Germany suffice to prove the point that patriotism can be a dangerous slip.

Patriotism, Nussbaum further claims, might very well affect the quality of our political deliberations and is in direct relationship with ethnocentric political claims:

[151] *Ibid* at 5.
[152] *Ibid* at 4.
[153] See for instance CBC News, "P.K. Subban targeted by racist tweets after Habs win" (May 2nd 2014), online: CBC News <www.cbc.ca>.
[154] See for instance CBC News, "Riots erupt in Vancouver after Canucks loss" (June 15, 2011), online: CBC News <www.cbc.ca>.

"[o]ne of the greatest barriers to rational deliberation in politics is the unexamined feeling that one's own preferences and ways are neutral"[155]. To abandon patriotism, she explains, does not result in the abandon of the traditional western values. In fact, cosmopolitanism corresponds to these values as it "[r]ecognizes in people what is especially fundamental about them, most worthy of respect and acknowledgement: their aspirations to justice and goodness and their capacities for reasoning in this connection"[156]. Even more efficiently than patriotism, it enhances the pursuit of happiness and the glorification of human dignity[157]. That being said, many argued quite rightly that patriotism is *not* incompatible with cosmopolitanism; that the two can cohabit:

> We cosmopolitans *can* be patriots, loving our homelands (not only the states where we were born but the states where we grew up and where we live). Our loyalty to humankind – so vast, so abstract, a unity – does not deprive us of the capacity to care for people closer by; the notion of a global citizenship can have a real and practical meaning[158].

Loyalty to humankind in general has also raised practical objections. Nathan Glazer, in his article "Limits of Loyalty", emphasizes that there might be a limit up to where "[b]onds of obligation and loyalty can stretch"[159]. Through history, the duty of allegiance evolved as to target subsequently the person of the monarch, the realm and the nation, but is it elastic enough to include all of humanity? He further argues, among the same line, that boundaries, if not morally significant, are at least practical both in personal and political life. From this point of view, they could likely correspond to the limits of a political duty of allegiance. In fact, he rightly remarks that "[m]ost people around the world seem to want their governments to be smaller and less distant than they are now, rather than give power to large, more cosmopolitan centers"[160].

Cosmopolitanism, however, does not need to correspond to the political arrangements of States. In its basic form, it is mostly a *state of mind* that individuals should be sensible to, rather than a political agenda. The argument, for the purpose of this article, does not need to go as far as to propose that an individual's first loyalty *must* be dedicated to

---

[155]Nussbaum, *supra* note 147 at 11.
[156]*Ibid* at 8.
[157]*Ibid* at 12.
[158]Appiah, *supra* note 68 at 26-27.
[159]Nathan Glazer, "Limits of Loyalty" in *For Love of Country: Debating the Limits of Patriotism*, Joshua Cohen, ed (Boston: Beacon Press, 1996) at 63.
[160]*Ibid* at 63.

humankind. It needs only to convince that world citizenship *could* be a primary allegiance, for at least a considerable group of people.

Most importantly, even if we were to agreed that patriotism has an intrinsic value which is necessary for the community, this recognition does not *ipso facto* lead to the conclusion that territorial boundaries are morally significant. It might be true that nationalism and patriotism are virtues which bring about the feelings of belonging necessary for the construction of social identity. However, if this is true of Canadian patriotism, it must also be true for every nation. Professor Youngjae Lee correctly emphasizes that arguments in favour of patriotism do not answer the question of why we must prioritize the interests of our own nation:

> The question is, given the choice between supporting one's own and supporting someone else's nation, why should one choose one's as oppose 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[161].

It is difficult to provide a more persuasive simplification than the one of Professor Appiah: "[y]ou don't value your wife because you value wives generally, and this one happens to be yours"[162]. The comparison is strangely adequate, as both marriage and the duty of allegiance require a lifelong commitment of faithfulness.

Professor Lee's article on disloyalty highlights at least one more relevant moral dilemma associated with loyalty to the State. As it has been exposed, the criminalization of disloyalty to the State has the effect of *imposing* a primary allegiance to the nation on every citizen, notwithstanding their moral positions. This has the consequence of creating an 'obligation to belong'[163]. In this scenario, the positive effects of national feelings on identity building are irrelevant if the citizen cannot develop its own affinity with its community.

[161]Lee, *supra* note 9 at 315.
[162]Kwame Anthony Appiah, *Ethics of Identity* (Princeton: Princeton University Press, 2006) at 226.
[163]Lee, *supra* note 9 at 316.

Lastly, it is noteworthy that this view is inconsistent with the Western values of freedom of thought and affiliation: "[a]t least in the context of the United States, yet not all citizens are expected to be 'American' in the cultural sense […] 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"[164]. In other words, the source of loyalty cannot lie in the virtue of nation (defined as "[a] community of people bound by common ancestry, history or tradition who seeks to govern themselves with a set of political institutions"), but within the political institutions which form the State. This means that the duty of allegiance must be justified as a *political obligation*, rather than a moral one. From this point of view, consent is then a *sine qua non* condition of its legitimacy. The absence of moral basis, however, infringes on the proposition that it could be reasonable.

3.2.2 Violations of International Laws and Egalitarian Principles Based on Loyalty

Another moral issue with the duty of allegiance lays in the fact that it appears at odds with the international contracts concluded between the States. This point is even more important for those who choose a contractual approach to civil society; if the social contract ought to be credible; then it ought to be that other arrangements on sovereignty must also be binding, assuming that the consent is valid.

And, as a matter of fact, strict conditions are applied to the validity of consent in international law. These are found within the *Vienna Convention on the Law of Treaties*, 11 UNTS 331, entered into force on January 27, 1980. Its article 7 establishes who can represent of the State for the purpose of consent whereas article 11 discusses the means by which it can be expressed. Different types of consent – ascension, ratification or acceptance – are precisely defined along with the way that they are held valid. Part IV provides with the means by which one can terminate or suspend the operation of a treaty, thus meaning that a treaty does not need to bind a party indeterminately like it is the case with the social contract. It is also worth mentioning that articles 50 and following

[164] *Ibid.*

mention the conditions in which consent is not freely given such as corruption and coercion.

If there are reasons to think of the social contract as valid, then it is even more so for international contracts. As a result, the duty of allegiance either cannot be interpreted such as to contradict with international obligations, or cannot be conceived as part of the social contract. Alternatively, this could mean that the citizens *might* have consented to be loyal, but the State, by adhering to certain international arrangements, has limited its power to enforce the duty of loyalty.

Indeed, there are many ways in which loyalty is at odds with international law. On a more technical level, many treaties manage the way warfare must be conducted, which weapons may be used, the duties of neutral parties and even the way that prisoners must be treated[165]. The following examples illustrate this point:

Country ABC was present at the 1997 Oslo Diplomatic Conference on a Total Global Ban on Anti-Personnel Mines and was one of the 89 States who adopted the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*[166]. One of the obligations resulting from the treaty obliges the State to "[d]estroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party"[167].

A few days before the deadline, a civil war involving insurrection groups explodes within the city. The authorities in power pretend to fulfil their international obligation by destroying part of its anti-personnel mines, but trust some of the private firms' employees

[165]See for instance the *Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare,* 26 UST 571; 94 LNTS 65 (Entered into force February 8, 1928); *Geneva Convention relative to the Treatment of Prisoners of War,* 75 UNTS 135 (Entered into force October 21, 1950); *Convention on Prohibitions or Restrictions on the Use of Certain Convention Weapon which may be deemed to be Excessively Injurious and to have Indiscriminate Effects,* 1342 UNTS 137 (Entered into force December 2nd 1983).
[166]2056 UNTS 211 (Entered into force March 1st 1999).
[167]*Ibid*, art 4.

who fabricated them to hide part of the mines for future use against the rebel who are seeking secession. *X* is one of the person trusted with the state confidential decision on the anti-personnel mines and was told that these armaments were necessary to protect his nation against the bloodthirsty rebels. Any attempt to divulge that the State was in possession of the anti-personnel mines, worse that it intended to use it, would be considered treasonous behaviour or espionage. Any attempt to destroy it, would be considered sabotage. Since *X* is under a duty of loyalty toward country ABC, he becomes an enabler of the State's violation. Morally speaking, he is also required to live with the fact that his decision might affect the lives of others.

Even without the legal violation implicit in this example, it is dubious that we would have agreed to a duty which could result in such an absurd moral dilemma. However, assuming that we did, it could not or should not be interpreted to be absolute in a sense that it violates international obligation. The State's consent to the treaty means that it restricted its right to punish in accordance with its new obligations.

More generally, the duty of loyalty is also in conflict with the spirit on the *Universal Declaration of Human Rights* whose preamble affirms that:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[168].

And whose first article contrasts sharply with the obligation to privilege the interests of people living within our country:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Many other articles quite explicitly reinforce this position:

> Article 3
> • Everyone has the right to life, liberty, and security of person.
> Article 6.
> • Everyone has the right to recognition everywhere as a person before the law.
> Article 7
> • All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination.

[168] *Universal Declaration of Human Rights*, GA Res (III), UNGAOR, 3d Sess, Sup No 13, UN Doc A/810 (1948) 71.

Such dispositions tend to invalidate the argument that a duty of loyalty within the social contract is credible. However, it is noteworthy that some 'traitors' could also rely on these to justify their acts, Mordechai Vanunu for instance. More than twenty years ago, Thomas Franck had already noted how "[o]bedience to national authority is currently most often challenged in connection with the dissenting citizen's sense of an international or supranational obligation and in connection with some sense of an 'ought' which has its roots in a perceived international order"[169]. While it is beyond the scope of this article to discuss the role of international law in coping with criminality resulting from such claims[170], it appears evident that there is a growing interconnection between the two that underlines the archaic character of the duty of allegiance.

Indeed, crimes against the State tend to dissipate the importance of egalitarianism within humans by emphasizing national security and immediate threat. The fact that it is difficult for most people to imagine life elsewhere, and feel emotionally related to it, encourages those people into making choices that are advantageous to their security. To put it bluntly, if we could avoid risks by causing harm somewhere else and never see the results, why not? Adam Smith has already framed this issue;

> If he was to lose his little finger tomorrow, he will not sleep tonight; but, provided he never saw them, he will snore with the most profound security over the ruin of a hundred millions of his brethren, and the destruction of that immense multitude seems plainly an object less interesting to him, than this paltry misfortune of his own. To prevent, therefore, this paltry misfortune to himself, would a man of humanity be willing to sacrifice the lives of a hundred millions of his brethren, provided he had never seen them?[171]

One might be tempted to answer that, since the parties to the social contract were considered self-interested, it is then most likely that they *would* consent to this. Still, they were also rational; if every social contract allows for these kinds of actions in the name of loyalty, then what is the difference between the state of nature and the international world?

---

[169]TM Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990) at 12.
[170]See however Frédéric Mégret, "Civil disobedience and international law: Sketch for a theoretical argument" (2008) 46 Can Y B Int'l Law 143.
[171]Adam Smith, *Theory of Moral Sentiments* (London: George Bell and Sons, 1875) at 136-137.

It is also unlikely that the social contract was designated by Hobbes as to contain a disposition which would lead to such an absurd result. The philosopher dedicated chapters fourteen and fifteen of his work to 'theorems' of natural law ("[a] set of truths deducible by reason"[172]). These can be summarized through the Golden Rule which states that one shall not do to the other what he would not want the other to do to him, or most specifically in Hobbes' words: "do not that to another which thou thinkest unreasonable to be done by another to thyself"[173]. Hobbes considered that natural law had a definite content that included at a minimum, equity, justice, gratitude and other related moral virtues. Why spend energy to define natural law to then defend a covenant which allows for the violations of these very principles?

To summarize, it does not appear that we *would* have consented to this arbitrary duty in sound knowledge of the consequences. Some of us might disagree with international law; it does not bind citizens, but States. Some people might even think that not all humans are created equal and that their nation is more worthy of protection. Still, it remains contentious that a vast majority of us would think that way. The very fact that individuals like Mordechai Vanunu, Bradley Manning or Edward Snowden were recently willing to sacrifice their liberties in the name of these higher principles demonstrates that dignity and equality are crucial values within western democracies. And if we did consent, then the State could not enforce loyalty in cases that could lead to violations of international standards because of its own obligations toward the international community.

3.3 Tacit Consent

So far, it was demonstrated that both hypothetical and explicit consent are inadequate to prove *actual* and *shared* consent by citizens. The social contract must therefore rely on some type of implicit consent theory in order to find application in the modern context. The consent of the original parties cannot, according to our legal tradition, tie the actual

[172]Ross Harrison, "The equal extent of natural and civil law" in David Dyzenhaus and Thomas Poole, eds, *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012) 22 at 23.
[173]Curley, *supra* note 33 at 140 (c 26, para 13).

citizens of a given State. It might explain the origin of society, but it could not justify the imposition of political obligations such as the duty of loyalty.

This has pushed some thinkers to affirm that the act of living within specific borders, in itself, could be thought of as a tacit consent to the rules which apply in this territory. This was refuted since Hume, who noted that migration was not available to everyone:

> Can we seriously say, that a poor peasant … 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 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[174].

Many added that the emotional, financial and identity cost of moving from one country to another is underestimated by the tacit consent theory. The choice of staying should not be interpreted as consent to political obligations, but merely as the fact that, having weighed the pros and cons, one chose to stay[175]. Further extrapolation is purely guesswork.

So then why do we still discuss social contract and consent? Why did scholars such as Beran and Rawls dedicate long hours of work on this issue, hundreds of years after Hume? The consent approach in western democracies, and particularly in the United States where the literature on the subject is prolific, has become a socially constructed myth. This is especially true of settler's nations whose creation is recent enough that citizens can identify how sovereignty emerged. In these new nations, everyone is an immigrant. Especially in the United States, the inhabitants were first united by their legal and political order, one that they had the occasion of choosing and creating according to their own standards. Khan rightly notices that:

> Americans believe they created themselves first through a violent, revolutionary break with an inherited, unjust, monarchic order and then through a positive act of popular lawmaking. Without a common ethnic, racial, or religious heritage, American identity is peculiarly dependent on the idea of law. The American citizen, if not himself an immigrant, maintains a family memory of immigration. In a nation of immigrants, to be a citizen is to believe in a legal order and choose to be part of it.
>
> […]

[174]David Hume, "Of the Original Contract" in *Hume's Ethical Writings,* Alasdair MacIntyre, ed (New York: Collier Books, 1965) at 263.
[175]George Klosko, "Reformist Consent and Political Obligation" (1991) 39 Political Studies 676 at 679 [Klosko].

> Commitment to a common legal order links the diverse members of this community to each other; it also links us to our predecessors and successors. Our predecessors are those who bequeathed to us this rule of law; our successors are those who will sustain the rule of law that we leave to them. The role of the present general is to perfect the legal order we inherit and to pass on this reformed rule of law to our children[176].

The importance accorded to the construction of a democratic government emphasizes the idea of consent to the creation of a society. As opposed to European countries whose governments emerged from monarchy, new settlers' countries were the first to have both the power to create a legal order and the knowledge to do so in a scientific way. By the time of the American Revolution, the study of political science was a recognized discipline. The recourse to social sciences demonstrated that a Constitution could be based on reason; on true principles that could be binding to the next general because they were *reasonable*. The founders themselves were well versed in philosophy, law and even physics; they personified reason and credibility. In Kahn's words:

> Belief that government can be constructed on the basis of political science made plausible the project of writing and enacting the Constitution, of creating a rule of law for the present community that was also to be the permanent rule for all future entrants into the community. This was an Enlightenment dream of reason: government as "state of the art" political science. Because politics was the subject of a science, a permanent constitution founded on the true principles could endure. Like other sciences, political science was thought to discover laws. The rule of law, accordingly, was to have the same compelling character to the reasonable man as any other form of science[177].

The creation of a democratic state, to escape the tyranny of a monarchy, corresponds to an expression of will akin to consent. This leads to an idiosyncratic situation in which the rule of law is seen as a product of will and consent rather than the unilateral act of the sovereign. This had led Kahn to affirm that there are multiple points of consent in democracies that can explain the persistence of the tacit consent approach to political obligations:

> The rule of law in a democratic order appears as the subordination of will to reason: we consent to law because it is reasonable. This conception of an ongoing consent to a reasonable legal order replicates the act of consent of the new immigrant who wilfully joins the community by affirming his or her support to the legal order. There are multiple points of consent in our imagining of the legal order: consent as immigration, consent as ratification of the Constitution, consent as voter participation and jury duty, consent as tacit acknowledgment of legal authority. All of these moments share this structure of subordinating will to reason, i.e. of affirming through an act of will the product of reason's deliberations[178].

---

[176]Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: The University of Chicago Press, 1999) at 9.
[177]*Ibid* at 10.
[178]*Ibid.*

The idea of consent, therefore, is *socially constructed*. This, however, does not make the tacit consent theory any more legitimate; it just makes it harder to deconstruct for those under the impression that it is part of their identity. In reality, the American Revolution did not result from a referendum in which all future citizens were asked to expressed consent, and certainly not all of them gave said consent. Even in such a culture, consent is not *actual*; even though we have the impression that it is:

> Thus, whatever the flaws that reason can identify in the legal order, we seem already to have accepted law through a collective act of will. Limits freely imposed upon the self are not constraints; they are manifestation of the self. Looking at the law, we believe we are looking at the externalization of our own will. For us, the rule of law expresses popular sovereignty, and the popular sovereign is only ourselves viewed in our collective identity. Law's rule appears, therefore, as an expression and systematization of our own freedom[179].

To deconstruct the myth illustrated by Kahn, then, it is necessary to further discuss the propositions of tacit consent and reassert why they can't justify the imposition of the duty of loyalty as a specific political obligation.

To begin with, the consent theory "[c]laims that consent is a necessary condition for there being an authority relationship between a state and its members". According to Beran, however, "[i]t does not claim that consent is either a necessary or a sufficient condition for there being a conclusive reasons for obeying the state"[180]. In other words, consent allows the political institutions to exercise their sovereign power, but does not provide an explanation of *why* citizens *should* obey, i.e. it just states that they *must* obey. The social contract theory, which explains why the arrangement is reasonable, provides some of the possible explanations to fill the void left by consent.

Harry Beran claimed that consent could be inferred from the fact that one 'chooses' to live in a specific country without refuting the application of the sovereign power. He suggests three ways by which one can deny the State's sovereignty: migration, secession and public declaration[181]. These propositions correspond to George Klosko's

[179] *Ibid* at 14.
[180] Harry Beran, "In Defense of the Consent Theory of Political Obligation and Authority" (1977) 87:3 Ethics 260 at 261 [Beran, "Defense of the Consent Theory"].
[181] Beran, *Consent Theory*, *supra* note 135 at 266.

definition of reformist consent, i.e. the recent tendency to propose theory of implicit consent which, he argues, require political reforms[182].

As for the concept of consent, it has been associated with agreement and acceptance of membership[183]. More solemnly, however, it has been understood as a promise. This conception, as oppose to others, implies a measure of moral justification in addition to an act of agreement[184]. Because of the official character of promises, they must meet certain conditions of validity: they must be (1) made voluntarily and (2) in circumstances which demonstrate that the promisor is "[a]ware of the implications of its actions"[185]. In addition, Hart considered the presence of 'mental incapacity', 'undue influence' or 'unfair bargaining position' to be defeating as to the validity of the consent as well[186].

For this reason, it is difficult to affirm that one's consent, even explicit, to a duty of loyalty can force a citizen to passively witness breach of civil or human rights from its government. Could Mordechai Vanunu know that his duty of loyalty went as far as protecting his State from the international community while it developed nuclear armament? How should one expect that the limit of his duty of allegiance would not correspond to the limit of what is legal for a government to do, such as when the United States spies on its own citizens?

As it is the case with naturalized citizens, one can question whether there is *really* a voluntarily consent. Beran's controversial approach to coercion attempts to refute such arguments by affirming that there is still a measure of choice when individuals are asked to consent or to leave. The author illustrates his claim with two examples, among which the case of Green, summarized by Klosko as followed:

---

[182]Klosko, *supra* note 165 at 676.
[183]Beran, "Defense of the Consent Theory", *supra* note 180 at 262.
[184]Klosko, *supra* note 165 at 676-77.
[185]*Ibid* at 677.
[186]HLA Hart, "The Ascription of Responsibility and Rights, 1948-49" in *Logic and Language*, AGN Flew, ed (First Series, Oxford: Blackwell, 1951) 145-66.

> Green has an illness which will be fatal unless he receives treatment in a hospital. Hospitals have rules requiring certain behaviour of their patients, with which patients must promise to abide as a condition of admission. According to Beran, though Green dislikes being in an hospital and objects to following rules that he has had no say in making, his decision to seek treatment commits him to obey the rules, although the alternative to the decision is certain death[187].

In other words, because such choices are valid in the health systems they should be held valid with political obligations. On one hand, it might be noteworthy that most democracies have opted for public health systems because this situation struck them as immoral. The fact that one person has to choice between dying and living the rest of his life with debts has been considered as a violation of human dignity in many countries. It can hardly be defended as an example of non-coercion.

On another hand, the example proposed by Beran does not represent the actual situation between the State and the citizen. A more accurate example could result from the situation in which a government requires that X join the armed force for a certain mission considered crucial for the national defense. However, X has family that is likely to be affected by this mission carried out on a foreign territory. This situation differs from Green's case-study because there was already a pre-existing relationship between this citizen and the State. The latter created the problem for which he will ask *X* to consent or leave. If we were to adapt the Green scenario to this reality, it would be more accurately stated as followed:

> An agent of Hospital X infects Green with a deadly virus, which can be cured only if he seeks expensive treatment at Hospital X, the only hospital able to help him. Green agrees to this even though he is required to sign over half his income for life[188].

In this case, argues Kolsko, the promise is not voluntarily because the Hospital is no stranger to the problem requiring Green to seek treatment. The situation of the State vis-à-vis its citizens corresponds to the same reality.

Beran's proposition that migration constitutes a valid means of dissent is also quite thought-provoking as he attempts to address Hume's objection. According to him, the peasant is prevented from leaving the state by 'ignorance' and 'poverty'; "[h]e accepts membership in the state not because of the state's threat of harm should he do otherwise,

[187]Beran, "Defense of the Consent Theory", *supra* note 180 at 679-80.
[188]Klosko, *supra* note 165 at 680.

but because of his poverty and ignorance"[189]. Since neither of these conditions are recognized as defeating a valid consent, the fact that the peasant is *unable* to leave the country does not result in the fact that he is *coerced* to stay. Just like it is the case with the hospital case scenario, there is enough voluntarism, he argues, for the political obligation to be valid.

Nevertheless, to satisfy the conditions of consent in the social contract paradigm, the State would be required to put the citizens in a condition similar to the 'state of nature' should the citizen refuse the contract. Otherwise, it might be said that the consent is coerced because the citizen does not have a real choice of living with or without the covenant. The practical problem with this is that our political reality does not have a 'no-legal-order-land' in which the citizens who opted-out can live, and the possibility of living tax free might interest a surprising amount of people. Then, the issue of whether one consents freely to political obligations because he lives within a specific State is worthless unless the citizen has a choice of reconquering the rights he had before the contract[190].

This has led some thinkers to question whether there could be a form of consent that could allow the dissenters to remain within the national territory, without being part of that State. One of the solutions proposed, the alienage mechanism, is inspired by the Ancient Greek cities in which some privileges were only accessible to those who consented to be citizens. Without going further in this path, we just need to note that this would equal to hypothetical consent in the sense that there is nothing *actual* about this system, at least in Western democracies. The same may be said of benefit deprivation schemes.

The proposition that one may dissent to the State through sedition or a declaration of dissent amounts to the same and even worse, as it is likely to lead to criminal prosecutions. In fact, this position pinpoints the problem inherent with crimes against the

[189]Beran, "Defense of the Consent Theory" *supra* note 180 at 267.
[190]Klosko, *supra* note 165 at 682.

State; they are often merely acts of dissent towards the authority of the government. Even according to Beran, these should be respected as declaration that one refuses to engage in the social contract theory:

> It is true, these days, that a repressed or disenchanted minority cannot found a new state of their own liking or an anarchist community by migrating to hitherto unoccupied territory. But they can, and I am inclined to think they have a moral right to, found a new state or an anarchist community by secession. The number of new independent communities which can be founded by secession is, for all practical purposes, not. Politically speaking, new Americas can always be found *within* America[191].

Sadly, Beran's beliefs are quite naïve. Not only is there no such right, but sedition and declaration of infidelity are at risk of being punished through the duty of loyalty. This paradox demonstrates that there is just *no way out* of this social contract, even though, at the outset of this analysis, there happens to be no actual consent to it. As author Hannah Pitkin remarks, "why go through the whole social contract argument if it turns out in the end that everyone is automatically obligated?"[192].

Consent can offer a moral basis to the everyday act of politicians, particularly in democratic state. True enough, by voting, citizens accord some legitimacy to the state's "political authority", that is "[t]he authority to determine the substantive character of ordinary law within the constitutional framework supplied by the state's legal authority"[193]. However, as Professor Fox-Decent rightly argues, such consent does not extend to 'legal authority' (defined as "[t]he authority to make, interpret, administer and enforce law"[194]). The consent-based approach to the social contract theory, which confounds legal and political authority[195], is a poor justification of state's authority in general and, even more so, of the duty of allegiance.

To outline, there is barely any air of reality to the proposition that we *would* have consented to such a large and arbitrary condition as the duty of allegiance, especially knowing the implications of it. Even in cases of explicit consent, it should not be morally or legally enforceable when it implies the violation of international law or violation of

---

[191]Beran, "Defense of the Consent Theory" *supra* note 180 at 266.
[192]Hannah Pitkin, "Obligation and Consent I" 59:4 American Political Science Rev 990 at 995.
[193]Fox Decent, "Fiduciary Nature", *supra* note 144 at 262.
[194]*Ibid.*
[195]*Ibid* at 292.

recognized human and civil rights. Above all, there is no evidence of actual consent to the social contract, and proposed means of dissent to the covenant are likely to be criminalized. As a result, it is unclear how consent would not be coerced. Taking this into consideration, it is alleged that the duty of allegiance cannot have reasonable ground within the social contract theory.

To further demonstrate this point, the next section examines the proposition that the state's legal authority rests on a presumption of trust rather than consent. This assumption allows appointing the State in the position of fiduciary, while the citizens become beneficiaries. The objective of this last section is to demonstrate that if there should be a duty of loyalty, it should lay on the State's shoulders.

4. The State as Fiduciary

The suggestion that the relationship between the subject and the State can be qualified as fiduciary is still a controversial one, notwithstanding the fact that it relies essentially on orthodox understandings of fiduciary relationships. The origin of the theory is attributed to Professor Fox-Decent, who first discussed the idea in a 2005 article titled "The Fiduciary Nature of Legal Authority"[196]. Through his ground-breaking book, *Sovereignty's Promise: The State as Fiduciary*, this postulate obtained an international window. Gaining popularity among scholars, the emerging concept of fiduciary duties in the public realm offer a crucial insight for the role of loyalty in the relationship between the State and the subject[197].

The argument can be summarized as follows: The relationship between the State and the citizens lays on a presumption of trust, which is enforced by the law: "[t]he law, via this principle, entrusts B to do C on behalf of A"[198]. The fiduciary obligation is not

[196] *Ibid*.
[197] See Andrew S Gold, "Reflections on the State as Fiduciary" (2013) 63:4 U of T L J 655; Malcom Thorburn, "Justification, Powers and Authority" (2007-2008) 117 Yale L J 1070, at 1123; Erika Chamberlain, "The Crown's Fiduciary Duties to Aboriginal Peoples as an Aspect of Climate Justice" (2012) 30 Windsor YB Access Just 289 at 307; GR Wray, "The State of rights. Fiduciary Duties and Constitutional Rights: Constitutionalizing a Minimum Level of Well-Being under section 7 of the Charter" (2007) University of Toronto, ProQuest Dissertation and Thesis.
[198] Fox-Decent, "Fiduciary Nature", *supra* note 144 at 263.

triggered by consent, but rather by the knowledge "[t]hat one is in a position to which a fiduciary obligation may attach"[199]. The fiduciary framework also serves to determine the legality of the State's action:

> Regardless of how *de facto* sovereignty arises, if exercises of power that flow from it are to be made legitimate, I claim, they must respect the demands of legality made by the rule of law. Exercises of mere power based on *de facto* sovereignty are legitimate and imbued with authority if, and only if, they subscribe to the fiduciary requirements of legality which inhere in what we can think of as *de jure* sovereignty[200].

It is also worth noting that this theory is not incompatible with the social contract paradigm *per se*. Justice LaForest stressed that both types of obligations were compatible and that "[t]he legal incidents of many contractual agreements are such as to give rise to a fiduciary duty"[201]. Professor Fox-Decent, however, expressed a slightly different opinion about the compatibility of the theory with the contractual approach:

> While contractual relations do not necessarily preclude fiduciary relations, the presence of a contract will usually weigh against the recognition of fiduciary duties, especially with respect to contracts negotiated by arms-length parties. The point to a contract is to let the parties pursue their own interests on mutually agreeable terms. There is never a presumption that one party owes the other a duty of loyalty. All that is presumed is a duty of performance[202] [Notes omitted]

While this might be true of a regular contract, this comment cannot be applied *ipso facto* to the social contract theory, due to its inherent peculiarities. It differs from regular contractual agreements because it lasts indefinitely, the parties are not designated in a firm manner, the obligations are unusually vague and the dispositions give extremely discretionary power to one of the parties without specifying explicit limitations. Even if "arms-length parties" might have concluded it, it is not *conducted* in such manner anymore. Assuming that one believed a consent-based approach, then, it is not unreasonable to think of fiduciary duties as an external safeguard against the abuse of the stronger party. Both, contracts that are not concluded by "arms-length parties" and those

---

[199] *Ibid* at 297.

[200] *Ibid* at 284.

[201] *Hodgkinson v Simms*, [1994] 3 SCR 377 at 407 [*Hodkinson*] ("The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see *Johnson v Birkett* (1910), 21 OLR 319 (HC); *McLeod v Sweezey*, [1944] SCR 111; PD Finn, "Contract and Fiduciary Principle" (1989) 12 UNSWLJ 76").

[202] Fox-Decent, "Fiduciary Nature", *supra* note 144 at 304.

who are conducted in an unequal manner, should profit from the advantage of fiduciary liability.

This overview leaves a crucial question open; how do we recognize relationships set upon a presumption of trust? The jurisprudence has established various indicia, which, on a fact-based approach, allow for the identification of such situations. Section 4.1 examines the formation of fiduciary relationships and the interpretation of those indicia. This is followed by a discussion of fiduciary duties and more precisely, of the duty of loyalty. Section 4.2 is concerning fiduciary liability and the duty to obey the law.

4.1 Characteristics of a Fiduciary Relationship

A conceptualization of the theory of fiduciary relationships faces numerous challenges. Firstly, the courts have not yet managed to establish a thorough principled approach to the concept, even though recent developments suggest that this would be a plausible outcome in the next few years. Rather, "[d]eterminations of fiduciary liability", in Canada, the United States and the Commonwealth countries, remain "[e]xercices of approximation"[203].

Secondly, even though academics have proposed a variety of theories related to the notion, courts have preferred assertion to explanation[204]. Judge LaForest correctly brought forth in 1989 that "[t]here are few legal concepts more frequently invoked but less conceptually certain that that of the fiduciary relationship"[205]. Even in jurisdiction that have specific disposition, such as the American *Restatement (Second) of Torts* § 874 (1965), the explanations remain vague. "Comment A" of this disposition simply mentions that "[a] fiduciary relation exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation"[206].

[203]Paul B Miller, "A Theory of Fiduciary Liability" (2011) 56:2 McGill LJ 235 at 239 [Miller].
[204]*Ibid* at 237.
[205]*Lac Minerals Ltd v International Corona Ressources Ltd,* [1989] 2 SCR 574 at 643-644.
[206]Deborah A Demott, "Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences" (2006) 48 Ariz L Rev 925 at 933 [Demott].

Fortunately, in the recent decision *Galambos v Perez momentous*[207], the Supreme Court of Canada revisited the concept to provide further clarifications. This article relies heavily on this precedent as well as on the articles published by both Professor Miller and Fox-Decent to offer a brief but thorough overview of fiduciary relationships[208].

4.1.1 Formation of Fiduciary Relationship

As opposed to the social contract, which requires consent from both parties, the formation of fiduciary relationships is more credible in explaining the relation between the State and the citizens since it can result from (a) "[a] statute, a court order or an agreement", or (b) they can also be the consequence of a unilateral act. In this later case, "[o]ne party unilaterally assumes **discretionary power of an administrative nature over the important interests of another**, interests that are especially **vulnerable** to the fiduciary's discretion"[209]. The next sub-section is further concerned with the interpretation of those terms.

Following this logic, the vulnerable party (the subject) does not need to declare explicitly that he trusts the other party (the State)[210]. The presence of a trust-based relationship, as mentioned above, is sufficient. An agreement remains an advantage for a judicial process, but in theory, fiduciary relationships appear as soon as there is "[*d*]*e facto* control" over the beneficiary's interests[211].

As a consequence, it might be appropriate to say that an implicit agreement is necessary:

> While a mutual understanding may not always be necessary […] it is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party. In other words, while it

[207]2009 SCC 48 [*Galambos*].
[208]Even though he discussed the basis of this argument in his 2005 article, the publication of his book provided a more complete and throughout analysis, leading to reviews and debates among scholars and jurists.
[209]Fox Decent. "Fiduciary Nature", *supra* note 144 at 275.
[210]*Ibid* at 296.
[211]*Ibid* at 297.

> may not be necessary for the beneficiary in all cases to consent to this undertaking, it is clearly settled that the undertaking itself is fundamental to the existence of an *ad hoc* fiduciary relationship[212].

An *ad hoc* fiduciary relationship refers to a fact-based approach, as opposed to a status-based method in which one may try to associate a relationship with one of those that are already recognized as fiduciary[213]. This can include, amongst others, the relationships of physician/patient, parent/child, solicitor/client or director/corporation.

The undertaking of which Justice Cromwell speaks in *Galambos* "[m]ay be implicit in the nature of the relationship freely entered into"[214]. While the interpretation of the qualities required in a fiduciary relationships is still open for debate, the decision does state that "[t]he normatively salient qualities of the fiduciary relationship are inherent, essential features of *the relationship*, not extrinsic, accidental features of *particular relationships*" [215] [italics in original]. More specifically, "[f]iduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship"[216] [italics in original]. The implication here is that the relationship implies mutual trust within the parties. This is not only the foundation of the beneficiary's right to fiduciary obligation, but it is also the moral basis behind the very existence of fiduciary duties.

The presence of trust in fiduciary relationships reflects a crucial feature of those legal situations; the presence of the beneficiary's personality and right. Professor Fox-Decent, based on a Kantian analysis, affirmed that the legal relationship exists "[d]ue to the right-bearing nature of the legal person", as we all carry innate rights[217] (defined by Kant as "[t]hat which belongs to everyone by nature, independently of any act that would

[212]*Galambos*, *supra* note 207 at para 66.
[213]*Ibid* at para 48.
[214]Miller, *supra* note 203 at 266.
[215]*Ibid* at 267.
[216]*Galambos*, *supra* note 207 at para 68.
[217]Fox-Decent, "Fiduciary Nature" *supra* note 144 at 262.

establish a right"[218]). The presence of trust means that "[t]he fiduciary principle can be understood to authorize the use of fiduciary power only to the extent that such power may be exercised in a manner consistent with each person's equal dignity"[219]; this is the *equal dignity constraint*.

This concept of trust, as an expression of equal dignity, also explains that the main fiduciary duty remains the obligation to be loyal[220]. The interconnection between trust and loyalty can be found within betrayal, a concept which is at the heart of crimes against the State. In his sociological work *Betrayal and Treason: Violations of Trust and Loyalty,* author Nachman Ben-Yehuda argues that betrayal is in fact a violation of both trust and loyalty.

Most importantly, he sees trust and loyalty as central features of our societies, and violations of these as a source of chaos[221]. His analysis points out that betrayal is not only dangerous for human interactions, but also "[f]or state integrity (especially during periods of conflict)"[222]. Violations of trust and loyalty, he explains, underlay treason law:

> Betrayal as a socially constructed phenomenon constituted a complicated subject… A structure composed of two major violations needs to materialize if we are to invoke the label of betrayal. One violation is of trust, and the other of loyalty. When a member of a group is engaged in a process of violating both trust and loyalty, the invocation of the term "traitor" to characterize the behaviour of that individual is not far behind[223].

Theoretically, then, the fiduciary theory appears to perfectly explain the *rationale* behind crimes against the State. Indictments for treason law are punishment for violations of trust and loyalty, except that, as will be further explained, the beneficiary is the subject and the fiduciary is the State. As a consequence, the *rationale* does not lie on a valid legal argument. The criminalization only makes sense if it applies on the fiduciary, on which lays the duty of loyalty. Ben-Yehuda's explanations might make sense from a sociological perspective, but they fail to explain treason law from a judicial and rational perspective.

---

[218]Immanuel Kant, *The Metaphysics of Morals,* Mary Gregor, ed, (New York: Cambridge University Press, 1991) at 63, first published 1797.
[219]Fox-Decent, "Fiduciary Nature" *supra* note 144 at 265.
[220]*Ibid* at 302.
[221]Nachman, *supra* note 10 at 17.
[222]*Ibid* at 9.
[223]*Ibid* at 23.

A sociological account of trust and loyalty, however, is necessary to better understand the meaning behind these obscure concepts. As specialists pointed out, trust serves to ensure the integrity of societies[224]. Trust is also conceived by sociologists as "[r]isk-taking behaviour"[225] characterized by the "[w]illingness to become vulnerable to the action of another person or group"[226]. To clarify, it is also necessary to distinguish trust from loyalty and confidence:

> Trust involves a particular type of relationship, where the participants perceive that a genuine, authentic, and truthful interaction exists. Violating that trust and subverting that truth typically involves lying, cheating, concealment, and deception. Loyalty, first and foremost, involves fidelity. Violating these moral codes invokes strong emotional responses because feelings of trusts and loyalty are typically constructed as deep and profound[227].
>
> Confidence refers to a situation where roles are clear and one knows what to expect; that is, confidence is based on clear expectations. Trust is what one needs when one does not have confidence[228].
>
> […]

This analysis provides a convincing base to affirm that fiduciary duties are necessary when a relationship lays on a presumption of trust since it highlights the idea that trusting someone involves a measure of blindness. Trust is needed because the beneficiary hardly knows what result to expect considering that he has no control on how his interests will be handled. The situation is aggravated when the fiduciary possesses knowledge that is not available to the beneficiary, such as with solicitor and physician.

Following these explanations, the relationship between the State and the citizens presents many characteristics which explain the need for trust:

---

[224]Barbara A Misztal, *Trust in Modern* Societies (Cambridge: polity Press, 1996); Adam Seligman, *The Problem of Trust* (Princeton : Princeton University Press, 1997) [Seligman].

[225]Nachman, *supra* note 10 at 9, see also Niklas Luhmann, "Family, Confidence, Trust: Problems and Alternatives" in *Trust: Making and Breaking Cooperative Relations*, D Gambetta, eds (New York: Basil Blackwell, 1988) at 94-107; C Johnson-George & W Swap, "Measurement of Specific Interpersonal Trust: Construction and Validation of a Scale to Assess Trust in a Specific Other" (1982) 43 J of Personality and Social Psychology 1306.

[226]Nachman, *supra* note 10 at 9, see also DG Gambetta "Can We Trust Now?" in *Trust: Making and Breaking Cooperative Relations*, D Gambetta, ed (New York: Basil Blackwell, 1988) at 213-237; HW Kee & RE Knox, "Conceptual and Methodological Considerations in the Study of Trust" 14 J of Conflict Resolution 357.

[227]Nachman, *supra* note 10 at 6.

[228]James S Coleman, *Foundation of Social Control* (Cambridge: Polity Press, 1985); Summary by Nachman, *supra* note 10 at 10.

> [W]e must entrust the specification, administration, adjudication and vindication of our legal rights to the state. We ourselves have no authority to make the judgments or to exercise the powers necessary to determine such matters; private parties do not get to make laws that apply to others, nor decide legal disputes. Legal subjects, in other words, are in a position of de facto and de jure dependence on the state for the provision of legal order[229].

The specific content of the obligation generated by trust, in this context, corresponds to the rule of law. In administrative law, this is expressed by the duty of fairness and reasonableness.

4.1.2 Indicia of the Presence of a Fiduciary Relationship

Justice Wilson best exposed the framework of fiduciary relationships in *Frame v Smith:*

> Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests,
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power[230].

Obviously, this excerpt remains very vague, and is now considered a rough draft[231]. Nevertheless, it already stressed the core concepts of fiduciary relationships, among which is vulnerability. This feature plays an essential explicative role by indicating "[t]hat the content of the duty of loyalty is explicable in terms of the beneficiary's structural vulnerability to exploitative misuse of power by the fiduciary"[232].

This characteristic is intrinsically related to power; the right type of vulnerability must result from the fiduciary situation rather than from external circumstances, such as

---

[229]Fox-Decent, "Fiduciary Nature", *supra* note 144 at 308.
[230]*Frame v Smith*, [1987] 2 SCR 99 at 136, 42 DLR (4th) 81 [*Frame*].
[231]Miller, *supra* note 203 at 253.
[232]*Ibid* at 269 ("Power is exercised exploitatively where it is instead used to advance the interest of the fiduciary or a third party").

personal attributes[233]. It might be more accurate to see vulnerability as a *consequence* of fiduciary relationships, rather than a criterion to the *formation* of these situations. This potentially explains why Justice Laforest, in *Hodgkinson*, specified that "[v]ulnerability is not the hallmark of [the] fiduciary relationship though it is an important *indicium* of its existence"[234].

Another way to understand vulnerability is to see it as power imbalance. In fact, Justice McLachlin stated in *Norberg* that this characteristic distinguished the fiduciary approach from torts or contracts[235]. In *Hodgkinson*, vulnerability has been associated with dependence because the beneficiary's interests depend upon the discretion of the fiduciary[236]. Alternatively, Professor Fox-Decent maintained that vulnerability should be interpreted as incapacity.

Precisely, he distinguished between contextual incapacity and judicial incapacity. In the former case, "[t]he beneficiary can in principle exercise the kind of power entrusted to the fiduciary, but the beneficiary is de facto or de jure unable to control or exercise the fiduciary's power"[237], such as in a client and solicitor relationship. In the latter situation, "[t]he beneficiary cannot in principle exercise the kind of power entrusted to the fiduciary, either because the beneficiary lacks legal capacity, is an artificial person, or is a private party in a multi-beneficiary or public context"[238].

The citizens, in the subject/State relationship, are in a position of judicial incapacity because "[l]egislation, adjudication, administration [and] law enforcement" are the exclusive competence of the governing body. Taking this into consideration caused Professor Fox-Decent to affirm that citizens were in a similar position toward the State as recognized beneficiaries such "[c]hildren, artificial persons, pension fund beneficiaries,

---

[233]Fox-Decent, "Fiduciary Nature", *supra* note 144 at 275, 299.
[234]*Hodgkinson*, *supra* note 201 at 405.
[235]*Norberg v Wynrib*, [1992] 2 SCR 226 at 289, 92 DLR (4th) 449 [*Norberg*].
[236]Miller, *supra* note 203 at 254, 268; Ernest J Weinrib, "The Fiduciary Obligation" (1975) 25:1 UTLJ 1 at 4; *Hodgkinson*, *supra* note 201 at 461.
[237]Evan Fox-Decent, *Sovereignty's promise*, *supra* note 37 at 102.
[238]*Ibid* at 102,103.

and competing First Nations"[239]. This conclusion, however, does not suffice to affirm the fiduciary character of the subject/State situation. Justice Cromwell made it clear that the conclusion that one relationship is characterized by power-dependency does not lead ineluctably to the presence of fiduciary circumstances[240]. In the same direction, "[t]o assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly"[241].

To the contrary, the actual state of the jurisprudence affirms that discretionary power, not vulnerability, is the "[h]allmark of any fiduciary relationships"[242]. Justice Cromwell, in *Galambos*, is explicit when, citing Justice Wilson in *Smith v Frame. H*e asserts that "[i]n the absence of [a] discretion or power and the possibility of abuse of power which it entails, 'there is no need for a superadded obligation to restrict the damaging use of the discretion or power'"[243]. This was also made clear by Justice McLachlin, in *Norberg*: "[t]he essence of a fiduciary relationship [i]s that one party exercises power on behalf of another"[244].

Likewise, Justice Sopinka, in *Hodgkinson* agreed that "[t]he ceding by one party of effective power to the other" is the spirit which explains the imposition of fiduciary duties[245]. We also know, from precedents such as *Roncarelli* that "[t]here is no such thing as absolute and untrammelled 'discretion'", to the contrary, it "[i]mplies good faith in discharging public duty"[246]. Fiduciary duties reinforce this principle, peculiarly as applied to the State. In spite of this broad consensus on discretion, the jurisprudence neglects to account for the specific nature of the fiduciary discretionary power that was ultimately sought[247].

---

[239]*Ibid* at 103.
[240]*Galambos, supra* note 207, para 73-74.
[241]*Galambos, supra* note 207, para 67.
[242]*Guerin v The Queen*, [1984] 2 SCR 335, J Dickson [Guerin] cited in *Galambos, supra* note 207, at para 83-84.
[243]*Ibid* at 275-76, citing *Frame, supra* note 230 at 136.
[244]*Norberg, supra* note 235 at 272.
[245]*Hodgkinson, supra* note 201 at 466.
[246]*Roncarelli v Duplessis*, [1959] SCR 121 at 140.
[247]Fox-Decent, *Sovereignty's Promise, supra* note 37 at 96.

It is true that *Galambos* provided with supplementary clues by indicating that the necessary discretion to trigger fiduciary duties should to be directed towards "[t]he legal or vital practical interests of the other"[248]. However, this leaves open for debate both the notions of *discretion* and *practical interests*[249].

According to this scholar, the discretionary power that is implied in fiduciary liability has been interpreted in three different ways. It has been understood as the capacity to *access*[250] or to *influence*[251] the practical interests of the beneficiary, and more restrictedly, it has been comprehended as *authority*. Professor Evan Fox-Decent notably endorsed this later proposition in an article, which preceded his book, "The Fiduciary Nature of State Legal Authority"[252]. This is also the position supported by Miller, who noted that "[t]he difficulty with other interpretations lies in the overbreadth, generating inconsistency between the concept of power and key elements of the conceptual structure of fiduciary liability"[253]. He further affirms that "[t]he idea of power as authority is alone consistent with the stipulation that fiduciary powers are discretionary"[254].

In the relationship under study, authority refers to the state's legal authority (as opposed to political authority). Thus, the State has the necessary discretionary power because it has the authority "[t]o make, interpret, administer and enforce law"[255]; as it refers to governance. In other words, in the context of the State/citizens relationship, sovereignty leads to authority, which in turns generates discretionary power, which is exacerbated by the absence of consent. This was most eloquently evoked by Professor Fox-Decent in *Sovereignty's Promise*:

> This overarching fiduciary relationship arises from what we may think of as the fact of sovereignty. The fact of sovereignty consists in the sovereign powers the state claims and exercises, most notably, powers of legislation, administration, and adjudication. Through legislation, the state determines the form and content of each person's rights and obligations. Through administration,

[248]*Galambos*, *supra* note 207 at para 70, 83.
[249]*Miller*, *supra* note 203 at 272.
[250]Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83:1 Can Bar Rev 35.
[251]Robert C Muir, "Duties Arising Outside of the Fiduciary Relationship" (1964) 3:3 Alta L Rev 359 at 360.
[252]Evan Fox-Decent, "Fiduciary Nature", *supra* note 144 at 294-98.
[253]Miller, *supra* note 203 at 273.
[254]*Ibid* at 273.
[255]Evan Fox-Decent, "Fiduciary Nature", *supra* note 144 at 292.

> officials implement public law regimes to give effect to legislation. Through adjudication, the judiciary interprets legislation and settles disputes over rights and duties. To ensure that legal order prevails, the state assumes a monopoly on the use of coercive force. These general attributes of the state point to a non-consensual relationship of proclaimed authority between state and subject, notwithstanding democratic channels (in democratic states) through which the people's voice may be heard[256].

More precisely, however, authority over the interests of the beneficiary should be interpreted as administrative power. This term best exposes that it necessitates more than mere possession or disposition control over one's interest: "[a]dministration implies administration of some thing, for some purpose, and for the benefit of some person or group other than the person conducting the administration"[257]. The term best corresponds to fiduciary circumstances because it is also "[p]urposeful rather than accidental in the sense that the reason for which administrative power is exercised must be consistent with the other-regarding purpose for which it is held". Lastly, it was pointed out that the notion of administration is "[i]nstitutional in character" because it "[t]akes place within a particular structure or organization that is animated by its own substantive values and internal practices"[258]. A national governing body, then, is perhaps the best illustrative of administrative power.

This leads us to further discuss the meaning of practical interests. The Australian jurisprudence adopted a restricted view of fiduciary relationships, which is inconsistent with the Canadian approach. In *Paramasivam*, the Court defined practical interests as economic interest[259]. This tendency is reflected elsewhere in the Commonwealth and the United States, where "[f]iduciary liability requires engagement of some proprietary or economic interest of the beneficiary"[260]. Professor Gordon Smith, for instance, thought that discretion was to be held over "[c]ritical resource belonging to the beneficiary"[261].

---

[256]Evan Fox-Decent, *Sovereignty's Promise*, *supra* note 37 at 29.
[257]Evan Fox-Decent, "Fiduciary Nature", *supra* note 144 at 301.
[258]*Ibid*.
[259]*Paramasivam v Flynn*, [1998] FCA 1711, [1998] 90 FCR 489, see Miller, *supra* note 203 at 276.
[260]Miller, *supra* note 203 at 275.
[261]D Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, (2002) 55 Vand L Rev 1399 at 1402.

In fact, McGill Scholar Paul B. Miller correctly points out that Canadian fiduciary jurisprudence interprets the interests required by a fiduciary relation in a generous manner in comparison to other jurisdiction[262]. In effect, any interest which "[c]onnotes a real, ascertainable matter of personality, welfare, or right in relation to which one person may be uniquely and materially susceptible to the exercise of authority by another" qualifies for a fiduciary interest[263]. In *Frame*, Justice Wilson recognized that an interest had to be substantial as well as practical in the sense that the beneficiary must not have pre-existing legal claims towards these interests[264].

For instance, the citizens have substantial and non-legal interests in the way the government exercises its discretion over a wide variety of topics. By non-legal, it is implied that these interests cannot give rise to torts or contracts based litigation. The legal use of coercive power and the decision to prosecute an individual or a group of persons are relevant examples of situation in which the governing body has discretion over the interests of citizens, but it can be as large as to include decisions regarding the environment or the economy in general.

The strict interpretation that is privileged elsewhere limits unduly the scope of the beneficiary's protection while vulnerable to the discretion of another party. It is commonly assumed that courts should privileged large and generous interpretation when it can affect the rights and protection accorded to weaker parties. For instance, the Canadian *Interpretation Act* specifies that:

> 11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects[265].

In *Frame*, Justice Wilson purposely rejected the strict interpretation of fiduciary duties: "[t]o deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be

[262]Miller, *supra* note 203 at 275.
[263]*Ibid* 276.
[264]Evan Fox-Decent, "Fiduciary Nature", *supra* note 144 at 306 citing *Frame, supra* note 230 at 136.
[265]*Interpretation Act*, RSA 1970, c 189.

arbitrary in the extreme[266]. Professor Fox-Decent rightly remarked that the strict interpretation of *practical interests* "[f]ocus on the nature and content of the fiduciary's obligation rather than the beneficiary's right", while the larger approach extolled in this article "[p]ays equal attention to the beneficiary's right and fiduciary's duty, and conceives them as correlative to each other"[267].

According to the scholar, there are at least three reasons to give equal importance to (a) the beneficiary's rights and (b) the fiduciary's duties when interpreting the nature of the interests that are administered[268]. First, the beneficiary's right is the chief reason why a fiduciary duty is imposed. Next, the duty of loyalty itself can only be conceptualized by reference to the beneficiary's fundamental rights. And last, but crucially, the reference to the beneficiary's worth and dignity furnishes a moral basis on which fiduciary liability can derive[269]. As a result, it makes more sense to adopt a broad interpretation of the interests that can give rise to fiduciary duties as opposed to the one privileged outside Canada. As a matter of fact, a conception which gives equal importance to rights and duties is natural within legal order[270].

Following this line of argument, there is no substantive reason to reject the application of the State as fiduciary even in a country where stricter interpretation of practical interests have been adopted by the Courts. On the one hand, jurisprudence is often reactive to academics' critics, and the debate is still ongoing. On the other hand, the theory could at least apply partially in cases where the State has discretion over the economic interests of the subjects.

To summarize, a fiduciary relationship arises when the relation lays on a presumption of trust. This is evident when the fiduciary has administrative authority over

---

[266] *Frame*, *supra* note 230 at 142; Author Deborah A. Demott also argued for a large definition, *supra* note 206 at 936.
[267] Evan Fox-Decent, "Fiduciary Nature", *supra* note 144 at 275.
[268] Evan Fox-Decent, *Sovereignty's promise*, *supra* note 37 at 46.
[269] Evan Fox-Decent, "Fiduciary Nature", *supra* note 144 at 276/
[270] *Ibid* at 278.

the practical interests of the beneficiary. As a consequence of the fiduciary relationship, the beneficiary becomes vulnerable because he is placed in a situation of contextual or judicial incapacity. Fiduciaries are expected "to hold power to *serve*, to *protect*, or to *promote* or *advance* the practical interests of beneficiaries, or to exercise them *for* or *on behalf of* beneficiaries"[271]. To ensure that they act accordingly, the fiduciary theory imposes on them a duty of loyalty (and elsewhere, a duty of care as well).

4.1.3 The Fiduciary Duty of Loyalty

This article's chief goal is to examine whether there is a theoretical and legal justification for the criminalization of disloyalty through treason law. It is particularly concerned with the social contract reasoning and ultimately concludes that this theory is ineffective as a justification for the duty of allegiance. The fourth section aims at demonstrating that this conclusion is reinforced by the fiduciary theory. According to Professor Fox-Decent, a duty of loyalty lies on the State, who is the fiduciary and stronger party. The previous sub-section demonstrated the reason for the imposition of such a duty on the State and confirmed the view that it was an excessive obligation on the citizens. This part explores the content of the fiduciary duty of loyalty and demonstrates how it is also compatible with the role of the governing body in public law.

In Canadian jurisprudence, the preferred view affirms more or less consistently that the duty of loyalty is the only fiduciary obligation[272]. Once again, this view is controversial[273]. Other nations, such as the United States, refer to the duties of loyalty and care[274]. The privileged position in Canada is that care is included in loyalty. Professor Fox-Decent explains this opinion and the difference between the duty of care and loyalty as followed:

---

[271] *Ibid* at 276.
[272] Miller, *supra* note 203 at 28.
[273] *Ibid* at 256.
[274] *Ibid* at 281.

> The warrant that trust provides also explains why the primary fiduciary duty at private law is a duty of loyalty rather than a duty of care. Loyalty sets the parameters within which a fiduciary's care may be exercised. A duty of care may be sufficient to mediate the relations of parties who are strangers to one another and who pursue their interests separately, but more than simple care is required in circumstances where one party is entrusted to act on behalf of another. A duty of care may generally be satisfied by refraining from causing damage or injury that violates another person's rights. The duty of loyalty is more onerous, for it seeks to ensure that the substantive purpose of the relationship between the parties is not frustrated. In sum, the duty of loyalty supplies a promise of legal order to relations in which one party acts on behalf of another, a promise which affirms the autonomy and dignity of the principal by placing the fiduciary under a duty to treat an otherwise unprotected interest as one subject to the weighty obligations that arise from trust.

Nonetheless, it is safe to assume that there is a general consensus on the fiduciary importance of faithfulness.

The content of this obligation is generally understood as the exercise of power for the benefit of the fiduciary[275]: [i]t responds to and reflects a *kind of vulnerability* peculiar to the fiduciary relationship; namely, the inherent susceptibility of the beneficiary to exploitative exercises of discretionary power by the fiduciary"[276]. This requirement has two aspects: the conflict of interest and the conflict of duty. Respectively, the fiduciary must abstain himself from privileging his own interests over those of the beneficiary and the interests of others over those of the beneficiary[277].

Author Deborah A. Demott notes that these constraints do go as far as requiring "[t]horoughgoing devotion" or "[a]ll-encompassing subordination of the actor's interests to those of the beneficiary". In the same vein, she argues that they should not "[d]isregard the autonomy of an actor subject to fiduciary duties"[278]. Nonetheless, the duty of loyalty clearly imposes "[a] high standard of conduct upon fiduciaries"[279].

The proposition that the duty of loyalty could be applied to public law remains, however, provocative[280].This is so because it requires a flexible interpretation due to the dual demand of public offices "[t]o consider both the interests of the public at large and

[275]*Ibid* at 280.
[276]*Ibid* at 289.
[277]*Ibid* at 257.
[278]Demott, *supra* note 206 at 926.
[279]Miller, *supra* note 203 at 259.
[280]See e.g. *Harris v Canada,* [2002] 2 FC 484 at para 178 (TD), Dawson J.

the interests of individuals directly affected by their determinations"[281]. This has led Professor Fox-Decent to affirm that, in the public context, the fiduciary duties of fairness and reasonableness represent more adequately the notion of loyalty[282]. Besides, these standards are well-known to administrative law since the Canadian leading case *Baker v Canada*, [1999] 2 SCR 817.

The duty of fairness can be defined simply as "[t]he duty to let the individual subject to an administrative body's authority reply to the case against her"[283]. This obligation is compatible with fiduciary relationships because fiduciary powers have been recognized in cases implying multiple beneficiaries, such as with pension funds. It is also well-suited because "[t]he law is *incapable* of authorizing any kind of fiduciary power that can be exercised arbitrarily between legal persons"[284]. In fact, both the duty of fairness and of reasonableness meet the moral standard imposed by the *constraint of equal dignity*: "However, whereas fairness sets a limit on how the fiduciary may exercise power as between distinct classes of beneficiaries, reasonableness establishes a floor"[285]. These duties are necessary to allow for the universalization of the duty of loyalty[286].

Fox-Decent's argument might be controversial, but relies on some precedent. The jurisprudence on First Nations provides with a counter-argument to those advocating that the fiduciary doctrine is inapplicable in the public sphere. The Supreme Court of Canada has recognized a fiduciary duty from the Crown towards the First Nations. This was necessary to legitimize the government's authority over the natives, since they never consented to the authority of settlers. There is evidence that even today, many natives still refuse to acknowledge such authority. Facing "[u]nilateral assertion of sovereignty", it seems like "[o]nly the presumption of a fiduciary relationship has the potential to save the

[281]Evan Fox-Decent, "Fiduciary Nature", *supra* note 144 at 261/
[282]*Ibid.*
[283]*Ibid* at 264.
[284]*Ibid* at 266.
[285]*Ibid* at 266.
[286]*Ibid.*

Crown's authority over First Nations from suffering a wholesale failure in legality"[287]. In *Wewaykum Indian Band v Canada*, the Court specified the content of the fiduciary duty in the public setting where interests conflict. It requires that the fiduciary act "[w]ith loyalty, good faith, full disclose appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regards as the best interests of the beneficiaries"[288]. Such conduct corresponds to the duty of fairness and reasonableness.

In brief, the principal duty of fiduciaries is faithfulness. In the public sector, because the fiduciary must deal with conflicting interests within the beneficiaries, this requires him to be fair and reasonable when administrating those interests. The duty of loyalty's content is altered, but the principle of faithfulness remains because of the advantageous position of the fiduciary. There is then a plausible theory explaining why the State has a duty of loyalty, but none so far to explain why the citizens should have one.

4.2 Fiduciary Liability and the Duty to Obey the Law

Professor Fox-Decent's analogy between the State's authority and fiduciary duties is also of crucial importance for this work as it provides with a framework to explain the conditions of authority over citizens. Essentially, the duties of fairness and reasonableness correspond to the rule of law in the public sphere. If Country X respects both obligations, it simultaneously conforms to the rule of law. These circumstances, in turn, encourage the citizen to fulfill their own legal obligations[289].

The governing body, then, has an obvious advantage in following the rule of law because it legitimizes their actions and encourages citizens into obeying the law, but what happens when the State *doesn't* fulfil its fiduciary obligations? Inversely, it discourages the citizens from obeying the laws. Both obligations – the State's fiduciary duty and the

[287] *Ibid* at 264, see also Fox-Decent, *Sovereignty's Promise*, *supra* note 37 at 55; *Guerin, supra* note 242; *R. v Sparrow*, [1990] 1 SCR 1075.
[288] *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at para 97.
[289] Fox-Decent, "Fiduciary Nature", *supra* note 144 at 261.

citizens' duty to obey the laws – are correlative and intrinsically related. This is morally grounded by also rational; we expect the State to protect our rights, and if it fails to do so by violating its own duties than it cannot legitimately expect the citizens to obey the laws[290].

Now, can we apply the same logic to a fictive duty of allegiance? Consider the following scenario. Country *ABC* engages in illegal spying over its own citizens, therefore violating its obligation of fairness and reasonableness.

It is not *fair* because the State is privileging the interests of the collective before those of its citizens while it has to consider both. It is certainly not *reasonable* because it is contrary to its own democratic laws. It also does not meet the moral standard imposed by the *constraint of equal dignity*. In other words, it is not respectful of the rule of law. The State is clearly in violation of its fiduciary obligations and is liable toward the beneficiary.

Does it make sense then to expect the citizen to respect its own duty of loyalty? If the landlord does not meet his obligation to provide quiet enjoyment of his apartment, do we expect the tenants to pay the rent? If the carpenter does not finish a table that a customer requested, do we expect the customer to pay? The point here is not to say that the citizen should necessarily reveal the confidential data exposing the government and be free of criminal consequences – though it is arguable -, but to point out that if the State punishes such reaction, than it should have a better justification than disloyalty. Overall, we argue that if a violation of the duties of fairness and reasonableness affects the State's legitimacy in enforcing the duty to obey the law, the same must be said of the duty of loyalty, assuming that it exists. In other words, if the State wants to engage in criminal pursuit based on disloyalty, it must foremost meet its own obligations.

To summarize, this brief overview of fiduciary theory adequately proves that the citizens are not likely to be under a duty of loyalty towards the State. We argued that being the vulnerable party; it should be the one favoured by the additional protection of

[290]Fox-Decent, *Sovereignty's Promise, supra* note 37 at 39.

fiduciary duties. This is not inconsistent with Hobbes's concerns over exploitative use of power. The author's focus, on civic liberty and the necessity that all political rules conform with the rule-of-law, betrays his intentions of protecting citizens against arbitrary exercise of power risking to affect the remaining freedoms of citizens[291]. Above all, this fiduciary reasoning amounts to a critique of the rational foundation of treason law. If the State is under a duty of loyalty, but not the citizens, than there are no grounds on which to punish disloyalty. In fact, the fiduciary theory goes as far as to affirm that the citizen can reject the state's authority and still be protected by the fiduciary duty because it is that law which entrusts the State to administer on behalf of the citizens. Thus, the State does not acquire a right to criminal pursuit from the citizens' dissent[292].

[291] Lars Vinx, "Hobbes on civil liberty and the rule of law" in *Hobbes and the Law*, David Dyzenhaus & Thomas Poole, eds (Cambridge: Cambridge University Press, 2012) 145 at 146.
[292] *Ibid* at 105, 106.

To summarize, the actual criminalization of disloyalty has led to many injustices through political misuses in times of instability. Due to their emotional component and because of the role of patriotism in national identity, crimes against the state are particularly sensible to crowd manipulation and social construction. In like manner, the national security criteria used to sort trivial dissent from more serious acts of treason is a source of arbitrariness. Courts prefer judicial deference and have left the definition of national security to the executive branch, such as to create a situation in which the governing body has unparalleled and undemocratic access to the content of criminal law.

Indeed, the executive branch acquired the capacity to define and determine the content of disloyalty toward the State. In times of war, this historically led to the infringement of fundamental rights and freedoms. Beliefs that such situations could happen again are not irrational. Since the apparition of asymmetric threats such as terrorism, hackers and online-leaking, we have witnessed a resurgence of accusations based on the duty of allegiance. As a result, the inquiry presented in this thesis is meant to trigger a crucial debate in order to avoid future abuses that will certainly happen as the States feel more and more pressure from these groups.

From this necessity, developed the need to explore whether there were any grounds for the State to punish based on disloyalty or whether it should consider another reasoning to explain why treason law should be illegal. Specifically, this thesis focused on the social contract justification as opposed to other accounts of State authority. The consent-based approach developed by Hobbes offers interesting views on the nature of criminal law and on the discretionary power of the State. It is also most appealing to those living in democracies due to the persistence of the myth of consent to the legal order. For these reasons, the social contract appeared as a good starting point to challenge the duty of allegiance.

The main goal of this thesis, then, was to prove that the social contract theory could not afford a plausible justification for the duty of allegiance in criminal law. To meet this

objective, the third section of this study demonstrated that there was no *actual* and *shared* consent to the specific duty of loyalty. Of course, there are people who gave explicit consent to be under a duty of allegiance, amongst whom are naturalized citizens, public office holders and members of the armed forces.

While they constitute an increasing amount of people, it certainly does not correspond to a national consent. In addition, it is dubious that a life-long commitment to loyalty can be held valid. On the same note, we argued that consent to human or civil rights violations should be held *ultra vires*. In fact, in discussing hypothetical consent, we established that it is unlikely, knowing the extent of the obligation, that we *would* consent to faithfulness toward a State. As a consequence, there is no moral basis to defend the imposition of the duty of loyalty.

Also under study was the proposition that consent could be implicit, based on the fact that some individuals lived within a specific border for instance. These arguments were rejected because they either involved a measure of coercion that affected their validity or because they did not amount to actual consent but to suggestion towards reform to obtain approval of the State authority. Having concluded to the absence of real and general consent, the social contract theory might be useful to explain the creation of civil society but certainly does not provide a tangible justification for the duty of allegiance.

To corroborate this conclusion, this article further examined the emerging theory whereby the State and the citizen are in a fiduciary relationship. While the social contract could explain the creation of civil society, the fiduciary paradigm serves to delimit the way the relation is conducted, hence why it appeared as a natural supplement to our analysis. To summarize, the fiduciary approach proposes that the State has a duty of loyalty toward the citizens because it has discretion over the administration of their practical interests. So, not only do the citizens not have a duty of loyalty, but being the weaker to have the duty of loyalty. This outcome enforces the conclusion that the duty of allegiance appears to have no rational grounds in criminal law.

Regrettably, it is beyond the scope of this paper to explore which options other than disloyalty are available to punish the actions actually targeted by loyalty, though it is worth mentioning that Professor Lee has already exposed a first option; that of 'political usurpation' or 'foreign relations vigilantism'. In other words, we should punish individuals who commit acts of treason because they violate the State's exclusive competence in terms of legal violence[293].

The arguments presented in this thesis attempt to establish how century-old crimes can still rely on antiquated reasoning and escape the attention of jurists. Since the beginning of its existence, political philosophy has revolved about the necessity to justify authority and correlative obligation. Its quest is often idealistic and always theoretical. The platonic reality involves a bit of corruption, greed as well as a touch of class-based self-interests, garnished with a pinch of hope and dreams. Above all, it is unlikely that a theory of political authority may find cosmopolitan applications. Theories of consent tend to be ethnocentric and revolve mostly around the myth of democracy, while the fiduciary approach still remains within the realm of the '*should be'* rather than within reality.

Even at a micro level, one individual may find one approach more convincing than the others; it is possible that a person may be motivated to fulfill its political obligation by gratitude alone. It is also conceivable to see State's authority as justifiable through harm-based accounts if you moved from a volatile and dangerous area of the world to a safer place. As a result, there is no singular answer for the question of State authority or political obligation.

Legal order, however, cannot be satisfied with shaky reasoning. The Founders were right in their assumption that the laws should be *discoverable* through reasons and logic. In terms of criminal law, this often means that punishment should correspond with immoral acts; we would naturally repulse at punishment of moral behaviour. Of course, this is not the actual state of the law, but that does not mean that we should not try and

[293]Lee, *supra* note 10 at 335.

improve it to create a system that is flexible yet firm enough to correspond to our standards of morality. This, we argue, is the role of criminal jurists who must undertake the task to fill the voids left by modern criminology.

SOURCES

LEGISLATION: DOMESTIC SOURCES

An Act for the better discovering and repressing of Popish recusants; 3 & 4 James I c 4, 1606.
Code of Federal Regulations Act
Canadian Security Intelligence Service Act, RSC 1985, c C-23.
Constitution Law 1867.
Disclosure of Classified Information, 18 US § 798.
Espionage Act, 18 USC §§ 793-98; 40 Stat 422.
Immigration and Nationality Act.
Interpretation Act, RSA 1970, c 189.
National Resources Mobilization Act, 1940 4 George VI c 13.
National Security Act, 61 Stat 495, 50 USC § 401.
Oaths of Allegiance Act, RSV, 1985, c O-1.
Restatement (Second) of Torts § 874 (1965)
Treasonable Words Statute, 26 Henry VIII, c 13.

LEGISLATION: INTERNATIONAL SOURCES

Convention on Prohibitions or Restrictions on the Use of Certain Convention Weapon which may be deemed to be Excessively Injurious and to have Indiscriminate Effects, 1342 UNTS 137 (Entered into force December 2nd 1983).
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 211(Entered into force March 1st 1999).
Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 (Entered into force October 21, 1950).
Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, 26 UST 571; 94 LNTS 65 (Entered into force February 8, 1928).
Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161 (Entered into force March 5, 1970)
Universal Declaration of Human Rights, GA Res (III), UNGAOR, 3d Sess, Sup No 13, UN Doc A/810 (1948) 71.
Vienna Convention on the Law of Treaties, 1155 UNTS 331 (Entered into force January 27th 1999).

JURISPRUDENCE

Abrams v United States, (1919) 2660 US 616.
A v Secretary of State for the Home Department, [2005] 2 AC 68.
Berger v United States, (1921) 255 US 22

Debs v United States, (1919) 294 US 211.
De Libellis Famosis, 1606 Coke 254, 77 ER 250.
Frame v Smith, [1987] 2 SCR 99, 42 DLR (4th) 81.
Galambos v Perez momentous, 2009 SCC 48.
Guerin v The Queen, [1984] 2 SCR 335.
Harris v Canada, [2002] 2 FC 484
Hodgkinson v Simms, [1994] 3 SCR 377.
Johnson v Birkett (1910), 21 OLR 319 (HC).
Lac Minerals Ltd v International Corona Ressources Ltd, [1989] 2 SCR 574.
McLeod v Sweezey, [1944] SCR 111.
Norberg v Wynrib, [1992] 2 SCR 226 at 289, 92 DLR (4th) 449.
Paramasivam v Flynn, [1998] FCA 1711, [1998] 90 FCR 489.
Roncarelli v Duplessis, [1959] SCR 121.
R v Bowman (1912) 22 Cox CC 729; 76 JP 271.
R v Tutchin, (1704) 14 State trials (OS) 1096.
United States v Adam Gadahn aka Azzam Al-Amriki, SA CR 05-254(A) (CD Cal Oct, 11 2006), online: <www.usdoj.gov>.
United States v O'Brien, 391 US 367 1968.
Wewaykum Indian Band v Canada, [2002] 4 SCR 245

SECONDARY MATERIAL: MONOGRAPHS

Appiah, Kwame Anthony. "Cosmopolitan Patriots" in *For Love of Country: Debating the Limits of Patriotism*, Joshua Cohen, ed, (Boston: Beacon Press, 1996) 21.
Appiah, Kwame Anthony. *Ethics of Identity* (Princeton: Princeton University Press, 2006).
Arrigo, Bruce A and Christopher R Williams, eds, *Philosophy, Crime, and Criminology* (Chicago: University of Illinois Press, 2006).
Beran, Harry. *The Consent Theory of Political Obligation* (London: Croom Helm, 1987).
Blyden, Edward W, in *Negro Social and Political Thought*, Howard Brotz, ed, (New York: Basic Books, 1966).
Carso, Brian F. *Whom can we Trust now? The Meaning of Treason in the United States from the Resolution through the Civil War* (New York: Lexington Books, 2006).
Coke, Edward. *The Third Part of the Institutes of Laws of England, Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (London: E & R. Brooke, 1797).
Coke, Edward. *The Selected Writings and Speeches of Sir Edward Coke*, vol 1, Steve Sheppard, ed (Indianapolis: Liberty Fund, 2003), Part Five, online: <http://oll.libertyfund.org/title/911/106322>.
Coleman, James S. *Foundation of Social Control* (Cambridge: Polity Press, 1985).
Dyzenhaus, David & Thomas Poole, "Introduction" in *Hobbes and the Law*, David Dyzenhaus and Thomas Poole, eds, Hobbes and the Law (Cambridge: Cambridge University Press, 2012) 1.
Dworkin, Ronald. *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977).
Elton, GR. *The Tudor Constitution* (Cambridge: Cambridge University Press, 1982).

Fox-Decent, Evan. *Sovereignty's Promise: The State as Fiduciary* (New York: Oxford University Press, 2011).

Franck, TM. *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990)

Freud, Sigmund. *Group psychology and the analysis of the ego* (New York: Norton, 1959).

Gambetta, DG. "Can We Trust Now?" in *Trust: Making and Breaking Cooperative Relations*, D Gambetta, ed (New York: Basil Blackwell, 1988)

Gauthier, David. *Morals by Agreement* (New York: Oxford University Press, 1986).

Gauthier, David. *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (New York: Oxford University Press, 1969).

Glazer, Nathan. "Limits of Loyalty" in *For Love of Country: Debating the Limits of Patriotism*, Joshua Cohen, ed (Boston: Beacon Press, 1996).

Greenberg, Andy. *This Machine Kills Secrets: How WikiLeakers, Cypherpunks, and Hacktivists Aim to Free the World's Information* (London: Dutton, 2012).

Hampton, Jean. *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986).

Head, Michael. *Crimes against the State: From Treason to Terrorism* (Surrey: Ashgate, 2012).

Hobbes, Thomas. *Leviathan*, Richard Tuck, ed, (Cambridge: Cambridge University Press, 1996).

Hobbes, Thomas. *Leviathan with Selected Variants from the Latin Edition of 1668*, Edwin Curley, ed (Indianapolis: Hackett Publishing, 1994)

Hume, David. A treatise of human nature (Oxford: Clarendon Press, 1888).

Hume, David. "Of the Original Contract" in *Hume's Ethical Writings*, Alasdair MacIntyre, ed (New York: Collier Books, 1965).

Habernas, Jürgen. "Remarks on legitimation through human rights" in *The postnational constellation: Political essays*, Jürgen Habernas, ed, (Cambridge: Polity Press, 2001).

Hale, Matthew, George Wilson & Thomas Dogherty, *Pleas of the Crown*, vol I, (Little Britain: Payne, 1800).

Harrison, Ross. "The equal extent of natural and civil law" in David Dyzenhaus and Thomas Poole, eds, *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012.

Johnson-George, C & W Swap, "Measurement of Specific Interpersonal Trust: Construction and Validation of a Scale to Assess Trust in a Specific Other" (1982) 43 J of Personality and Social Psychology 1306.

Kant, Immanuel. *The Metaphysics of Morals*, Mary Gregor, ed, (New York: Cambridge University Press, 1991).

Kecmanovic, Dusan. *The Mass Psychology of Ethnonationalism* (np: Springer US, 1996).

Keeney, Barnaby C. "The Medieval Idea of the State: the Great Cause" (1949) 8:42 U of Toronto L J 62f, 63.

Kenny, Courtney Stanhope. *A Selection of Cases Illustrative of English Criminal Law* (Cambridge University Press, 1901).

Luhmann, Niklas. "Family, Confidence, Trust: Problems and Alternatives" in *Trust: Making and Breaking Cooperative Relations*, D Gambetta, eds (New York: Basil Blackwell, 1988).

MacIntyre, Alasdair. *Is patriotism a virtue?* (Kansas: University of Kansas Press, 1984.
Misztal, Barbara A. *Trust in Modern* Societies (Cambridge: polity Press, 1996).
Müller, Jan-Werner. *Constitutional patriotism* (Princeton: Princeton University Press, 2007).
Nachman, Ben-Yehuda. *Betrayals and Treason: Violations of Trust and Loyalty* (Colorado: Westview Press, 2001).
Nussbaum, Martha C. "Patriotism and Cosmopolitanism" in *For Love of Country: Debating the Limits of Patriotism*, Joshua Cohen, ed (Boston: Beacon Press, 1996).
Orr, Alan D. *Treason and the State: Law, Politics, and Ideology in the English Civil War* (Cambridge: Cambridge University Press, 2002).
Post, Gaines. *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton, NJ: Princeton University Press, 1964).
Ristroph, Alice. "Criminal laws for humans" in *Hobbes and the Law,* David Dyzenhaus & Thomas Poole, eds, (Cambridge: Cambridge University Press, 2012) 97.
Rousseau, Jean Jacques. *Du contrat social ou principes du droit politique* (République Française : JP Bresson, 1795).
Schmitt, Carl. *The concept of the political* (Chicago: University of Chicago Press, 1996).
Seligman, Adam. *The Problem of Trust* (Princeton : Princeton University Press, 1997).
Sen, Amartya. "Humanity and Citizenship" in *For Love of Country: Debating the Limits of Patriotism*, Joshua Cohen, ed (Boston: Beacon Press, 1996)
Skinner, Quentin. *Visions of Politics* (New York: Cambridge University Press, 2002).
Skyrms, Brian. *Evolution of the Social Contract* (Cambridge, Cambridge University Press: 1996).
Smith, Adam. *Theory of Moral Sentiments* (London: George Bell and Sons, 1875
Spiro, Peter. *Beyond Citizenship: American Identity After Globalization,* (Oxford: Oxford University Press, 2008).
Stone, Geoffrey. *Perilous Time: Free Speech in Wartime* (New York: Norton, 2004).
Taylor, Charles. "Nationalism and modernity" in *The Morality of Nationalism*, Robert McKim and Jeff McMahan, eds, (Oxford: Oxford University Press, 1997).
Taylor, Charles. "Why Democracy Needs Patriotism" in *For Love of Country: Debating the Limits of Patriotism,* Joshua Cohen, ed, (Boston: Beacon Press, 1996) 119.
Vinx, Lars. "Hobbes on civil liberty and the rule of law" in *Hobbes and the Law*, David Dyzenhaus & Thomas Poole, eds (Cambridge: Cambridge University Press, 2012) 145.

SECONDARY MATERIAL: SCHOLARLY ARTICLES

Beran, Harry. "In Defense of the Consent Theory of Political Obligation and Authority" (1977) 87:3 Ethics 260.
Chamberlain, Erika. "The Crown's Fiduciary Duties to Aboriginal Peoples as an Aspect of Climate Justice" (2012) 30 Windsor YB Access Just 289.
Chesney, Robert M. "Beyond the battlefield, beyond Al Qaeda: the destabilizing legal architecture of counterterrorism" (2013) 112:2 Michigan L Rev 198.
Connor, Walker. "Beyond reason: The nature of ethnonational bond" (1993) 16 Ethnic and Racial Studies 373.

Crain, Lee Ross. “The legality of deliberate Miranda violations: how two-step national security interrogations undermine Miranda and destabilize Fifth Amendment protections” (2013) 112:3 Michigan L Rev 453.
Deeks, Ashley. “The Observer Effect: National Security Litigation, Executive Policy Changes and Judicial Deference” (2013) 82 Fordham L Rev 828.
Demott, Deborah A. “Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences” (2006) 48 Ariz L Rev 925
Dennis, Corey M & David A Goldman, “Data security laws and the cyberspace security debate” (2013) 17:2 J of Internet Law 1.
Eichensehr, Kristen E. “Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States” (2009) 42 Vand J Transnat'l L 1443.
Flannigan, Robert. “The Boundaries of Fiduciary Accountability” (2004) 83:1 Can Bar Rev 35.
Fox-Decent, Evan. “The Fiduciary Nature of State Legal Authority” (2005) 31 Queen’s L J 259.
Gold, Andrew S. “Reflections on the State as Fiduciary” (2013) 63:4 U of T L J 655.
Hart, HLA. “The Ascription of Responsibility and Rights, 1948-49” in *Logic and Language*, AGN Flew, ed (First Series, Oxford: Blackwell, 1951) 145.
Kahn, Paul W. *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: The University of Chicago Press, 1999)
Kee, HW & RE Knox, “Conceptual and Methodological Considerations in the Study of Trust” 14 J of Conflict Resolution 357.
Klosko, George. “Reformist Consent and Political Obligation” (1991) 39 Political Studies.
Larson, Carlton FW. “The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem” (2006) 154:4 University of Pennsylvania L Rev 863.
Lee, Youngjae. “Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries” (2012) 31 Law and Philosophy 299.
Mavronicola, Natasa. & Francesco Messineo, “Relatively absolute? The undermining of article 3 ECHR in Ahmad v UK” (2013) 76:3 Modern L Rev 589.
McKinney, Hayes. “Treason under the Constitution of the United States” (1918) 3:11 The Virginia Law Register 801.
Mégret, Frédéric. “Civil disobedience and international law: Sketch for a theoretical argument” (2008) 46 Can Y B Int’l Law 143.
Miller, Paul B. “A Theory of Fiduciary Liability” (2011) 56:2 McGill LJ.
Robert C Muir, “Duties Arising Outside of the Fiduciary Relationship” (1964) 3:3 Alta L Rev 359.
Pavlich, George. “Forget Crime: Accusation, Governance and Criminology” (2000) 33 Australian & New Zealand J of Criminology 136.
Finn, PD. “Contract and Fiduciary Principle” (1989) 12 UNSWLJ 76.
Pavlich, George. “The Lore of Accusation” (2007) 1:1 Criminal Law and Philosophy 79.
Pitkin, Hannah. “Obligation and Consent I” 59:4 American Political Science Rev 990
Smith, Gordon D. *The Critical Resource Theory of Fiduciary Duty*, (2002) 55 Vand L Rev 1399
Stacey, WR “Richard Roose and the Use of Parliamentary Attainder in the Reign of Henry VIII” (1986) 29 Historical J 1.

Thorburn, Malcom. “Justification, Powers and Authority” (2007-2008) 117 Yale L J 1070

Vincent, Andrew. “Patriotism and human rights: An argument for unpatriotic patriotism” (2009) 13:4 J of Ethics 347.

Weinrib, Ernest J. “The Fiduciary Obligation” (1975) 25:1 UTLJ 1.

SECONDARY MATERIALS: ARTICLES FROM NEWSPAPERS

Amnesty International, “Israel Nuclear Whistleblower Returned to Solitary Confinement” (18 June 2010), online: Amnesty International <www.amnesty.org>

Associated Press, “UN tells Israel to let in nuclear inspectors - As nuclear peace talks are cancelled, overwhelming vote by general assembly calls for Israel to join non-proliferation treaty'” (4 December 2012), online: <www.theguardian.com>.

BBC News, “Israeli Nuclear Whistleblower Mordechai Vanunu Arrested'” (29 December 2009), online: <http://news.bbc.uk>.

CBC News, “P.K. Subban targeted by racist tweets after Habs win” (May 2nd 2014), online: CBC News <www.cbc.ca>.

CBC News, “Riots erupt in Vancouver after Canucks loss” (June 15, 2011), online: CBC News <www.cbc.ca>.

Goldberg, Jame. “House Republicans Consider Prosecuting Reporters over Leaks” (11 July 2012) online: Los Angeles Times <www.articles.latimes.com>.

Pincus, Walter. “Prosecution of Journalist is possible in NSA leak” (May 22, 2006), online: Washington Post <www.washingtonpost.com>.

SECONDARY MATERIALS: POLITICAL DOCUMENTS

“A Strong Britain in an Age of Uncertainty: The National Security Strategy” (October 2010), online: <www.gov.uk>.

Keetley, Mike. “Law enforcement contribution to national security” (National Security Australia, 23 March 2009 Speech), online: <www.afp.gov.au>.

Security Intelligence Review Committee, “Annual Reports” (2004-2005), Online: <www.sirc-csars.gc.ca>.

White House, “Cyber Security” (2014), online: <www.whitehouse.gov>.

White House, “National Security Strategy 2010” (May 2010), online: National Security Strategy Archive <http://nssarchive.us>.

OTHER MATERIALS

American Civil Liberties Union, “ACLU v. NSA: The challenge to illegal spying” (2008), online: ACLU <www.aclu.org>.

Human Rights Watch, “Counter-Terrorism”, online: <www.hrw.org>.

Friend, Celeste. “Social Contract Theory” (2013), online: Internet Encyclopaedia of Philosophy - A Peer-Reviewed Academic Resource <www.iep.utmedu>.

Oxford Dictionary of National Biography, “Henry VIII”, online <http://www.oxforddnb.com>.

Parliament of Canada, “The House of Commons and Its Members”, online: <www.parl.gc.ca>;

Reporters Without Border, “World Press Freedom Index 2014” (2014), online: <www.rsf.org>.

Stark, Cynthia. “Hypothetical Consent and Political Legitimacy”, online: University of Utah <https://www.bu.edu/wcp/Papers/Poli/PoliStar.htm>.

Timm, Trevor. “Why the WikiLeaks Grand Jury is So Dangerous: Members of Congress Now Want to Prosecute New York Times Journalists Too” (23 July 2012), online: Electronic Frontier Foundation <www.eff.org>.

The Royal Household, “Elizabeth I (R. 1558-1603)”, online: Official Website of the British Monarchy <www.royal.gov.uk>.

Ville de Montréal, “Camillien Houde”, online :<www2.ville.montreal.qc.ca>.

Wray, GR. “The State of rights. Fiduciary Duties and Constitutional Rights: Constitutionalizing a Minimum Level of Well-Being under section 7 of the Charter” (2007) University of Toronto, ProQuest Dissertation and Thesis.