

Hold People Accountable for Actions, Not Thoughts

By: [Tom Flanagan](#) on March 1, 2010 |

The present challenge

The rise of radical Islam, combined with large-scale Islamic immigration to Canada, has resurrected a challenge that Canada has dealt with many times before – violent resistance to legitimate political authority.



That the danger is more than speculative was shown in 2006, when police in Toronto arrested a group of 18 Islamic conspirators who were allegedly planning acts of terrorism in Canada, including blowing up the Peace Tower and beheading Prime Minister Stephen Harper. Charges against seven were dropped, while several of the remaining 11 were convicted of offences under the *Anti-Terrorism Act*, and other trials are still proceeding. Should the Toronto 18 have been charged with treason, which might have led to much longer jail sentences? Should we in general resort more frequently to prosecutions for treason (the last prosecution of a Canadian for treason took place in 1947)? I think the answer is no to both questions.

The Law of Treason

The word “treason” is derived from the Latin verb *tradere*, meaning to give up or hand over. Its original meaning as a legal term is betrayal, i.e., to violate one’s trust or allegiance. In Medieval English common law, a great many offences could be construed as treason. Attempting to kill or levy war against the king was high treason, but there were also many forms of petty treason such as a wife killing her husband or a servant killing his master. Murder did not have to be part of the act; it was also petty treason under common law for a servant to counterfeit his master’s seal or commit adultery with his master’s wife or daughter. All treasons were felonies, and the punishments were particularly cruel, involving various combinations of hanging, beheading, drawing and quartering (for men) and burning at the stake (for women).

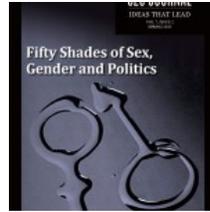
It is crucial to understand that treason as originally conceptualized was an offence of one person against another, of a social inferior violating his duty to a social superior. In that regard, it reflected a feudal understanding of social order that has largely been replaced by republican conceptions. We still have the trappings of monarchy in Canada and Great Britain, but citizens generally think of themselves as equal members of a legally structured community, bound by the law, not by the commands of hereditary superiors. The Constitution of the United States (1787) revised the definition of treason to fit modern republicanism: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” In this view, treason is not a betrayal of personal trust but an offence against the state.

Edward III brought some order to the law with his *Statute of Treasons*, 1351. This law limited the number of acts that could be regarded as treason, distinguished high treason from petty treason and standardized the gruesome punishments. The *Statute of Treasons* was still in force in Britain and Canada throughout the nineteenth century and was used in the Canadian prosecutions described below. The law, however, was gradually moderated, as nineteenth-century public opinion turned against sadistic physical punishments and wholesale executions. In 1814, the penalty was reduced to death by hanging. The complementary offence of treason-felony was introduced in 1848 in Great Britain and 1868 in Canada. Based on the wording of the various statutes, almost any act of political violence could be construed as either high treason or treason-felony; the real reason for introducing the new offence of treason-felony was to allow prosecutions without an automatic death penalty.

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Call for Submission

In modern Canada, treason is defined in section 46 of the Criminal Code, but that section goes back to the *Treason Act*, 1886, which itself was based on the *Statute of Treasons*, 1351. The term "treason-felony" has disappeared from Canadian law, to be replaced by a somewhat analogous distinction between high treason and treason:

[High treason](#)

46. (1) Every one commits high treason who, in Canada,

- (a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
- (b) levies war against Canada or does any act preparatory thereto; or
- (c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.

[Treason](#)

(2) Every one commits treason who, in Canada,

- (a) uses force or violence for the purpose of overthrowing the government of Canada or a province;
- (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;
- (c) conspires with any person to commit high treason or to do anything mentioned in paragraph (a);
- (d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; or
- (e) conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act.

Section 46(1)(a), which mentions offences against the person of Her Majesty, is an obvious link to the Medieval origins of the crime of treason. For the rest, the Canadian definition of "treason" is now similar in practice to that found in the Constitution of the United States – not an offence against the person of the monarch but an offence against the legal order of the state.

Treason in Canadian history

Canada has prosecuted offenders for treason several times, always when the security of the state appeared threatened. In 1797, an American, David McLane, was convicted in Quebec City of high treason, Chief Justice William Osgoode presiding. In an effort to intimidate the local population, Osgoode delivered the traditional gruesome sentence, but the executioner allowed McLane to die by hanging before mutilating his body. In the background of the trial was the ongoing war between Great Britain and Revolutionary France, which made the British authorities in Quebec fear that French agents might try to rouse the *canadiens* against them. Most historians think McLane was not guilty of anything except loose talk.

Treason charges appeared again in 1814, pursuant to the conflict between Canada and the United States in the War of 1812. In the Ancaster Assize (an assize is a special court), 15 Upper Canada settlers were charged with high treason for having co-operated with the U.S. invasion. Eight were hanged, three died of typhus in prison and the rest were banished. Others had escaped prosecution by fleeing the country.

In the wake of the rebellions in Upper and Lower Canada in 1837-38, there were several treason trials before assizes and courts-martial. The most famous executions were the hangings of Samuel Lount and Peter Matthews in Toronto and 12 *patriotes* in Montreal. In the latter case, 108 captives were put on trial, and those who were not hanged were exiled.

In 1885, Louis Riel was the only person charged with high treason for fomenting the North-West Rebellion. Charges of treason-felony were laid against Riel's white collaborator William Henry Jackson (allegedly his secretary but actually a hostage after the fighting broke out), dozens of Riel's Métis followers and the Indian Chiefs Poundmaker and Big Bear. Riel was convicted and hanged in Regina on November 16, 1885. Jackson was acquitted by reason of insanity, confined in a prison in Manitoba until he escaped to the United States. Riel's Métis followers and the two Indian chiefs

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were convicted of treason-felony but received relatively short sentences that ranged from one to seven years in prison. Overall, the government's strategy was to make an example of Riel by convicting him of high treason while treating the others involved in the Rebellion with relative leniency.

In the twentieth century, the only Canadian prosecuted for treason was Kanao Inouye, the "Kamloops Kid." Born in Kamloops, Inouye went to Japan to complete his education and was drafted into the military. He became notorious for abusing Canadian prisoners in Hong Kong and later for serving as a torturer for the *Kempeitai*, Japan's dreaded military police. Arrested in Kowloon after the war, Inouye was tried and convicted for war crimes, but an appeal court overturned his conviction on jurisdictional grounds – as a British subject born in Canada, he could not be tried for war crimes committed as an enemy soldier. He was then retried for high treason before a civil court in Hong Kong, convicted, and hanged in 1947.

Inouye was a Canadian by birth, but at that time there was no legal category of Canadian citizenship. He was tried in Hong Kong by a British court under British law as a British subject. His case counts as a Canadian treason prosecution only in the sense that he and some of his victims had been born in Canada, but the treasonous acts took place in China and the prosecution was really a British affair.

The historical record makes it obvious that treason, while still on the law books in Canada, has gradually fallen into desuetude. In 1797, the traditional sentence of disembowelling and quartering could still be levied (though not actually carried out) on David McLane. Numerous people were charged with treason in 1812 and in 1838, and significant numbers were hanged. In 1885, only Louis Riel was charged with high treason and hanged, and those convicted of treason-felony were released fairly quickly. Only one Canadian was prosecuted for treason in the twentieth century and that was actually an application of British justice, because prosecution for war crimes had foundered on legal technicalities.

Bringing treason back into common usage?

Should we make use of treason prosecutions more often in the twenty-first century? My answer is no, even though in another context I vigorously defended the prosecution of Louis Riel for treason. I do not advocate taking the offence of treason out of the Criminal Code, for that would precipitate a national debate we do not need. However, I would not advocate more-frequent prosecutions for treason.

There is no shortage of offences with which to charge those who threaten Canada's national security. Depending on the facts of the case, such people can be charged with some combination of espionage, murder, terrorism, conspiracy, arson, destruction of property, breach of the peace, etc. The important thing is to put offenders in prison, not to pin ancient labels on them. Indeed, because prosecution for treason is so outmoded, attempting to revive it would probably only make it more difficult to secure convictions in our rights-conscious age.

Treason has become an outdated offence at least partly because it is based on the feudal conception of social order as a network of personal allegiance. The servant owed allegiance to his master, the serf to his lord, the nobleman to the king, and the king to God. Underpinning the social order was a patriarchal understanding of authority as a delegation from God, the Father of all; to the king; and from the king downwards through the ranks of society. But social contract theory changed everything, so that we now understand government as based on consent. In the British tradition, we have kept the symbolism of monarchy, but our constitutional version of monarchy is republican in substance. Adherence to the rule of law, not obedience to the will of the king, is the highest political value.

The citizen's duty is to obey laws made under agreed-upon procedures and to recognize constituted authority based on law. In form, political legitimacy comes from royal will, because the Crown appoints cabinet ministers, senators and other senior office holders and grants assent to legislation. But in political reality, legitimacy stems from success in democratic elections. Winning the requisite number of seats, based on securing popular support, is what makes government legitimate in a democracy, because it shows that authority rests upon the consent of the governed.

In this tableau, treason is somewhat like a hate crime, a legal category of which conservatives are rightly suspicious. Assaulting a disliked person is a crime, whether the basis of the dislike is a difference in skin colour, failure to pay a debt or flirting with your girl friend. Labelling certain assaults hate crimes amounts to punishing states of mind rather than actions. But in a liberal

society based on the rule of law and consent of the governed, people should be held accountable for actions, not thoughts. Similarly, killing people and blowing up buildings are crimes whether the motivation is to overthrow the government (treason) or to generate publicity for some cherished cause (political activism). The action should be punished rather than the motivation behind it.

Ask yourself who might be charged with treason in contemporary Canada. Muslim *jihadis*? But the Toronto 18 were apprehended by normal police work and charged under the *Anti-Terrorism Act*. Would we be any safer if they were convicted of treason? Would we levy treason charges against the Mohawks who have occupied Caledonia? The occupiers are certainly flouting all sorts of laws, but they are asserting a land claim, not levying war against Canada. The problem at Caledonia is a pusillanimous provincial government, not a shortage of charges that could be brought against the occupiers.

What about Quebec separatists? Those who kidnapped James Cross and murdered Pierre Laporte were punished under other laws or escaped to Cuba. Apart from these and a few other isolated cases of violence, Quebec separatism is a peaceful, democratic movement. Labelling separatists traitors, even rhetorically, would increase the political temperature and might even enhance the likelihood of violence. The crime of treason applies badly to the problems of multi-ethnic states where large identity groups would prefer a different political order. As Edmund Burke said in another context, "I do not know the method of drawing up an indictment against a whole people."

In a democratic polity, such large-scale problems of allegiance can only be solved by political conciliation, not by hunting down and punishing traitors. It is noteworthy that after the American Civil War, even with its devastating loss of life and property, the victorious Union government did not charge any Confederate rebels with treason. That wise and merciful policy allowed the national identity to rebuild itself, and today Southerners are famous for their American patriotism, even if they still cherish their Confederate tradition of "rebel pride."

Canada, like all liberal democracies, must defend itself against both internal and external enemies, but it has the tools to do so without ramping up treason prosecutions. Let us leave the crime of treason in the feudal past where it belongs, along with trial by ordeal, *lèse-majesté* and serfdom.



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