



The Precognition of Crime: Treason in Medieval England and Terrorism in Twenty-first Century America

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"In our society, we have no major crimes," Anderton went on, "but we do have a detention camp full of would-be criminals."
Philip K. Dick, "The Minority Report"

"The Knight of the Two Swords" in Thomas Malory's *Morte Darthur* (1485) tells a story of an invisible knight who without provocation kills other knights. Rather than have the identity of this invisible knight become part of the plot of this tale, Malory names him immediately (1:79-80). This early identification of the invisible knight has led Eugene Vinaver to speculate that Malory "wants at all costs to avoid suspense, and so transfers the solution of the mystery from the end of the dialogue to the beginning. There are cases," Vinaver continues, "where such a method can relieve the story of an overdose of puzzles. [But i]n the present instance it has the opposite effect" (3:1315). I would like to use Malory's puzzle of immediate identification of someone who cannot be seen, in this case a murderer, as a means to consider the relation between the concept of invisibility and evidence of crime and criminal guilt. From our own experience of September 11, 2001, we know that the idea of invisible perpetrators does not occur only in Arthurian romance. The attacks on that day were carried out by people who drew no attention when they entered airports, when they went through security, nor when they boarded the aircraft they later used as weapons. Writing for *The Washington Post* in October 2001, Salmon Rushdie articulated this invisibility: "New York is the beating heart of the visible world, tough-talking, spirit-dazzling. [. . .] To this bright capital of the visible, the forces of invisibility have dealt a dreadful blow" (A25).

In the discussion that follows, I look specifically at several ways Malory represents the role of what cannot be seen—the invisible, the hidden, the suspected, and the imagined¹—in the relation between evidence of crime and criminal guilt; at certain fifteenth-century cases of treason against the king; and at certain strategies used by President Bush and his administration to address terrorism. In both medieval and modern approaches to the relation between what cannot be seen, on the one hand, and proof of crime and/or criminal guilt, on the other, law functions as a tactic that justifies and conceals its own suspension for the sake of the future, legitimating a form of sovereignty and power that stands outside of the law that ostensibly creates it.²

Malory offers several scenarios regarding what constitutes evidence of crime and guilt in his Arthurian romance. For instance, Tristram is caught naked in bed with Isolde, the wife of King Mark, but manages to escape (1:431-2). Guinevere's giving a piece of poisoned fruit to a knight who promptly dies when he eats it suggests to those who witness this event that Guinevere is guilty of murder (2:1048-50). But, here, Malory withholds from view the act of poisoning the fruit and, thus, withholds from view the identity of the person who actually causes the death of the knight. Later, Lancelot vindicates Guinevere in battle and the identity of the wrongdoer is revealed. And when

¹ While the terms *invisible*, *hidden*, *suspected*, and *imagined* hold different meanings, especially with regard to the issue of agency, I want to emphasize a general understanding that links them together, that is, that which is not open and/or not available to physical sight.

² My analysis of the Administration's tactics is indebted to Judith Butler's discussion of these tactics as a "reanimated anachronism" of sovereign rule. See *Precarious Life: The Powers of Mourning and Violence*, London: Verso: 2004, Chapter 3.

Mellyagaunce discovers blood on Guinevere's sheets in "The Knight of the Cart," he accuses her of treason, namely, that she has allowed one of the knights sleeping in her chamber into her bed (3:1132). To his credit, Mellyagaunce simply does not name someone. For him, the signs of blood constitute evidence of the Queen's guilt. Except for the example of Tristram being caught in Isolde's bed, the other episodes complicate the relation between evidence of crime and proof of guilt.

Perhaps the most complex rendering of this relation in the *Morte Darthur* occurs in "Slander and Strife" when Aggravayne reports that Lancelot "lyeth dayly and nyghtly by the quene" (3:1161); therefore, as he tells Arthur, Lancelot "is a traytoure to youre person" (3:1163). The King replies that he is reluctant to proceed against Lancelot unless he has proof. He advises Aggravayne, if it "be soothe as ye say, I wolde that he were takyn with the dede" (3:1163). To be taken in the deed or captured in the act constituted one of the strongest proofs of criminal wrongdoing in medieval England. In certain cases, it provided grounds for the wrongdoer to be executed immediately without benefit of trial (Harris 185-6). Knowing that Lancelot is in the Queen's chamber, Aggravayne and his companions set out to capture Lancelot in the deed. But rather moving quietly toward Guinevere's room as the knights do in Malory's primary source, the French *Mort Artu* (c. 1225), the knights in the *Morte Darthur* begin shouting that Lancelot is a traitor. As a result, the knights do not surprise Lancelot in the deed. Rather, he kills many of them and escapes. Guinevere, however, is captured and she is sentenced to death for treason (3:1165-9).

Malory departs from his sources again in two important ways. First, whereas Malory reports that the *Mort Artu* states that Lancelot and the Queen were together, he adds "whether they were abed other at other maner of disportis, me lyst nat thereof make no mencion, for love that tyme was nat as love ys nowadays" (3:1165). The crime, therefore, for which Guinevere is sentenced to death is not witnessed by either Lancelot's would-be capturers or by Malory's readers. Second, Malory inserts a law in his text that seemingly justifies Guinevere's sentence of death: "And the law was such in tho dayes that whatsomever they were, of what astate or degré, if they were founden gyilty of treson there shuld be none other remedy but deth [. . .]" (3:1174). Then he notes the types of evidence required: "and othir the menour other the takynge with the dede shulde be causer of their hasty jougement." Here Malory equates being taken with the deed to "menour." Evidence of *mainour* or to be taken with the mainour was a way that the law could address crimes that were not witnessed. To be taken *in* the mainour or *with* the mainour meant that a person was taken with the signs of crime in his possession, in his hand. For instance, if one were taken with stolen property in hand, then that evidence could compensate for the evidence of being taken with the deed and lead to summary or hasty judgment (Harris 188-9). The blood Mellyagaunce sees on Guinevere's sheets functions as a type of mainour. The construction was important since most persons intent on committing a crime usually take precautions against being caught—Lancelot and Guinevere, for example, lock the door to her chamber.

But, as I have mentioned, Guinevere is not caught in the deed nor is she caught in the mainour. This time there are no bloody sheets to suggest a crime. We could perhaps read Lancelot's presence in her chamber as a form of mainour, but as Gawain points out to Arthur, Lancelot could have been visiting with the Queen for other reasons than to commit a crime. Nevertheless, Malory reports, "And right so was hit ordained for queen Gwenyver: bycause sir Mordred was escaped sore wounded, and the dethe of thirteen knights of the Rounde Table, these previs and experyenses caused kynge Arthure to commaunde the queen to the fyre and there to be brente" (3:1174). Ostensibly, then, Arthur follows objective legal criteria. That is, compelled by the law and the evidence, he has no choice in the matter. As Ann Scales has remarked the effect of objectivity or neutrality is "the most difficult part of rule making [. . .] [that is] phrasing the rule so that people believe that the rule is detached [. . .] it [thus] appears to transcend the results of particular cases" (41). Here, Malory's law seems to have this objective force since it applies to everyone, that is, to "whatsomever they were, of what astate or degré" (3:1174). But the rule of evidence needed to inaugurate summary judgment and a

sentence of death is not applied in this case. In actuality, the law does not transcend this particular case; rather this case transcends the law and rules of evidence.

Not unlike Malory's rush to name the invisible knight in "The Knight of the Two Swords," the King judges Guinevere and Lancelot to be guilty of treason, although his stipulation that Lancelot be taken in the deed has not been met. His personal belief or suspicion that treason has occurred substitutes for the required physical evidence. Dismissing Gawain's attempt to dissuade him from sending the Queen to her death, Arthur replies, "she shall have the law. And if I may gete sir Launcelot, wyte you well he shall have as shamefull a dethe" (3:1175). At the moment, therefore, that Malory includes a law that governs treason and the conditions under which a person is sentenced, Arthur appeals to the law while suspending it. The King enacts a sovereign authority, determining when the rule of law will apply and when it will not. Viewed in this way, the law disappears as a principle to govern forms of evidence in the crime of treason to become an instrument of power, a tactic used to satisfy Arthur's sense of wrongdoing.

Further, if we look at Malory's law and its application once again, we see that when we move from the criteria for hasty or summary judgment—being taken with the deed or with the mainour—to the cited proof—Mordred's wounds and the death of thirteen—the Queen disappears from the legal discourse that judges her. For it is Lancelot, not Guinevere, who has inflicted such harm on Arthur's knights. Nor does Malory make it clear if she is even present to hear Arthur's sentence. The entire legal process—the law that governs treason, the rules of evidence, and the accused—disappear at the moment when the law is supposedly operating. Malory leaves us with Arthur's judgment and, hence, with the implication that Arthur has translated Aggravain's accusation against Lancelot and his own declaration of Guinevere and Lancelot's guilt into substantive forms of evidence required by the law.

Elsewhere I have argued that Malory's representation of the law in this scene resonates with a particular form of treason prosecuted in fifteenth-century England: treason by imagination (Harris 191-207). In 1441, Sir Richard Neuton, CJCP, (Chief Justice, Common Pleas) was asked if a man could be put to death for a thing which he had never done, and he replied:

Yes, because a person will die, be drawn and hanged and known for a thing which he never in fact agreed to or aided in. This is the same as when a man or his wife imagines the death of the King and do nothing more; by this act of imagination he will die as already said. (qtd. in Bellamy, 123, n.2)³

Imagining the death of the king as an instance of treason was not new to the fifteenth century. The thirteenth-century compiler of English laws and customs, Henri Bracton includes this form of treason in his compilation, but he adds that it must lead to an overt act, one that can be seen and heard (2:366). In 1352, parliament enacted a statute on treason that listed the deeds that would count as treason against the king. In it, the statute provides for imagining the death of the king, but fails to qualify it in any way (III Edward 25, Stat., c.5). The statute thus opened the door for new forms of treason and new forms of evidence.

Speaking ill of the king was one way for the crown to establish that an act of imagined treason had taken place. Henry IV was the first king to exploit this provision of the 1352 statute. He and his judges reasoned that unkind words spoken against him could lead his subjects to withdraw their love from him. In turn, the people's disaffection for their king could cause him to suffer life-threatening grief and sorrow. Subsequent fifteenth-century monarchs followed Henry's lead. During the reign of Henry VI, the duchess of Gloucester, Roger Bolingbroke, and Thomas Southwell had

³ *Donc il fuit demand si on sera mort pur chose q'il ne jamais fist. Neuton dit ouy, qe on sera mort, trait et pend et diselos pur chose q'il ne fist jamais, en fait, ny consentat ny aidat. Come si on ou sa femme imagine le mort le Roy et ne ad fait plus, pur ce imaginacion il sera mort come devant.* (Year Books, 19 Henry VI Mich. Pl. 103, quoted in Bellamy, *Law of Treason*, 123n2. The translation is mine.)

imagined the king's death, intending to "withdraw the cordial love [of the people] from the king himself [. . .] [and] this same king would take such a sadness in his heart through the knowledge of their [predictions], which have been detected and manifested, that he would quickly die from the sadness and grief of them."⁴ Similarly during the reign of Edward IV, a charge against John Stacey, Thomas Burdet, and Thomas Black stated that on May 26, 1475, they had "in hope of destroying the cordial love the people had for the king and thereby shortening his life by sadness [. . .] declared to others that the prince of Wales was to die very shortly" (Bellamy 127-8). This projected series of events was used often enough to become formulaic.

These examples reveal that the prosecution of an imagined act of treason ascribes to the law access to an invisible arena: the mind or imagination of the king's subjects. It attributes an omniscience or precognition to the law that enables those who enforce it to reveal what is hidden and to predict, like the pre-crime unit in Philip Dick's "The Minority Report," the consequences—the future crimes—that could follow from such thoughts if they go undetected. For these judgments establish a cause and effect sequence that imagines the future death of the king and then inserts that future event into the present as proof that a crime has been committed.⁵ Although J. G. Bellamy notes that accusations of treason in the form of the conditional were a Tudor innovation (*Tudor Law of Treason* 21), these fifteenth-century cases of imagined treason are premised on the condition that if words spoken against the king find an audience, then they could lead to his death.

This judicial precognition of treason had several effects. For instance, it placed an insurmountable burden on the accused. For how does one prove that one has not thought a certain thought or how does one prove that one will or will not do or intend to do a certain deed in the future. Unable to challenge such predictions, the accused in an important sense becomes invisible, disappearing as he stands before the law. Further, once it becomes legal to imprison and/or convict a person for something the person has said, has been reported to have said, has imagined, or has been reported to have imagined, accusations of treason cannot be held in check. No substantiated facts are needed to justify either a charge or a conviction. The accusation, then, becomes a substitute for a lack of evidence. The precognition of future treasons as a form of evidence, therefore, can easily be seen to be as fanciful and as inexplicable as Malory's identifying an invisible knight or as lawless as Arthur's sentencing Guinevere to death without evidence. Effectively dispensing with any rules of evidence, this pseudo-legal process provided a means for a king and his jurists to address in an arbitrary and personal manner any perceived threat to the king's power that could be imagined.

The amendment that defines treason in the US Constitution addresses the legacy of the crime of imagining the king's death, stipulating that: "No person shall be convicted of treason unless on the testimony of two witnesses to the same *overt* act, or confession in open court" (Article III, Section 3, my emphasis). It is not enough, then, to impute that a crime may take place at some point in the future or that someone has imagined a crime. Indeed, the framers of the Constitution included several safeguards to protect an individual's liberty from such abuses of power. These constitutional safeguards recall early documents of English law in which freedom from arbitrary power was of central concern. The Magna Carta, for instance, states that "[n]o freeman" should be punished for a crime "except by the lawful judgment of his peers or by the law of the land" (Provision 39). Similarly, the US Constitution echoes this provision and adds to it: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for

⁴ *Ab ipso Rege cordialemn amorem retraherent et idem Rex per notitiam illarum detectionis et manifestationis caperet talem tristiam in corde suo iiden per ilarum tristia ac dolerem cicius moreret.* (P.R.O., K.G. 9/72/14, quoted in Bellamy, *Law of Treason*, Appendix III, 237. The translation is mine).

⁵ I make this point in an earlier essay and link it to the "don't tell, don't ask don't tell policy" that is currently enforce in the U.S. military. See "Censoring Disobedient Subjects."

his defense” (Amendment VI). According to the Constitution, therefore, mere accusations of wrongdoing or predictions of future crimes do not justify the suspension of the law and rules of evidence.

The writ of habeas corpus is central to these constitutional protections. And its history, too, goes back to the medieval period. Early in the thirteenth century, a writ of habeas corpus operated as summons for the accused to be “physically brought before a court”; the defendant’s presence was necessary before a court would decide the case (Sharpe 1-2). In the fifteenth and sixteenth centuries a change occurred. In the effort to centralize their power over local courts, royal courts used habeas corpus to invalidate findings of a local court. That is, a royal court investigating why a person who had been held on the order of a local court could find insufficient cause for the arrest and release the prisoner. Habeas corpus, then, became associated with the legality or illegality of detention (4-5), and the need for a prosecuting authority to have sufficient grounds, a factual basis, for an arrest became increasingly important—although as we have seen medieval kings found ways to evade this developing custom through the crime of imagining the death of the king.

A king who detained a person on the basis that the individual represented a “threat to the safety of the realm” was also another way to circumvent a court’s scrutiny into the legality or illegality of an arrest (Sharpe 10). Over a period of time, however, imprisonment by order of the king alone was not enough to satisfy a writ of habeas corpus or suspend due process. The 1640 Habeas Corpus Act “specifically provided that anyone imprisoned by order of the King or Council should have his habeas corpus and be brought before the court without delay with the cause of his imprisonment shown” (15). The Judiciary Act enacted by our Congress in 1789 follows this reasoning, providing “that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment” (Chapter XX, Section 14). Habeas corpus has evolved into the primary legal means to deprive the executive branch of “detain[ing persons] solely for reasons of state” when the legislative branch has not first conferred power in time of national emergency (Sharpe 13).

While the US Constitution and the Judiciary Act of 1789 remember these important moments in English legal history, the Executive Order issued by President Bush in November 2001 to address terrorism does not do so. After describing the attacks that occurred on September 11, 2001, the President observes: “Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks [. . .] [and] if not detected [. . .] will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government” (“Military Order” 1665). At the conclusion of this section, he makes a similar statement: “having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism [. . .] and the probability that such acts will occur, I have determined that an extraordinary emergency exists [. . .]” (1665).

The President’s purpose, to prevent acts of violence, is certainly one that is easily understood. It is nevertheless the case that what individuals intend to do and what the effects may be of those intentions cannot be substantiated in the present, rather the intentions and their future effects can be asserted only. But these declarations have been used to identify enemy combatants in the present and detain them until they no longer pose a threat to the United States. The President’s reasoning echoes, if it does not replicate, the reasoning of medieval monarchs and their jurists who used predictions of future crimes as evidence to convict people of treason. Moreover, the substitution of an accusation or a declaration of criminal status for overt evidence of a criminal act and, therefore, criminal guilt leads to the temptation to imagine and detain almost anyone as an enemy combatant.

The President tacitly confirms this temptation when he further explains that in the military commissions established by this order “it is not practicable to apply [. . .] the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district

courts” (1666). Indeed, once the focus shifts from actual deeds to potential ones, the principles of law and the rules of evidence do not apply. To assert that the law and rules of evidence are “not practicable” in crimes of terrorism suggests that a national emergency—not the President—demands the suspension of established legal processes.

Yet despite the fact that the Order describes how trials will proceed, it does not guarantee that trials will in fact take place. For instance, the President states, “It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained [. . .] and, *if* the individual is to be tried, that such individual is tried only in accordance” with this order (1666). The conditional “*if*” in this sentence reveals that not all detainees will have a trial. Contrary to the Constitution, individuals subject to this order are not guaranteed a speedy trial, and, hence, the opportunity to challenge their imprisonment. If, however, a detainee is fortunate enough to have a trial before a military tribunal, then no other court can review the tribunal’s decision since

military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal. (1668)

Like the disappearance of Guinevere from the legal discourse that determines that she is a traitor to the king and like the disappearance of those accused of imagining the death since they had no meaningful way to challenge such a charge, persons declared to be enemy combatants also disappear as if they had suffered judgment by a medieval English monarch.⁶

To give you an example of how the Executive Order has worked, I will consider one case, and in this instance the person detained is a US citizen. In May 2002, Jose Padilla was taken into custody by the FBI at O’Hare International Airport in fulfillment of a material witness warrant relating to the September 11 attacks. He was taken to New York City and held in a maximum security cell at the Metropolitan Correctional Center. On June 9, the President issued a statement that designated Padilla an enemy combatant and instructed the Secretary of Defense to detain him. Padilla was transferred to a naval brig in South Carolina and was held eighteen months without access to counsel, to family, or non-military personnel. Nor was he charged with a specific crime (*Padilla v. Rumsfeld*, U.S. Court of Appeals, Second District 5).

President Bush’s statement declaring Padilla an enemy combatant relates “[b]ased on information available to [him] from all sources,” he has determined that Padilla is an enemy combatant, that he is associated with al Qaeda, that he “engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury or adverse effects on the United States,” and that he “represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda [. . .]” (“Statement Determining Enemy Combatant Status”). The rhetoric echoes that of the Executive Order and is formulaic: all enemy combatants may in the future commit the crimes against the United States and thus pose potential threats to the security of the United States.⁷ As the Court of Appeals pointed out in its ruling, Padilla was being held in a maximum security cell when the President decided he was an enemy combatant. Whatever

⁶ Not until 2006 did the Administration release the names of those held at Guantanamo and not until 2004 were detainees granted access to counsel. See Jonathan Hafetz, “Secret Evidence and the Courts in the Age of National Security.”

⁷ The statements I have seen are worded exactly the same except for the name of the person being designated an enemy combatant.

threat he had posed had been “neutralized” (6). Nevertheless, without revealing any specific evidence to support its claims, the President’s statement was used to detain this citizen for several years. Finally, through many challenges to administration’s policy, the writ of habeas corpus and due process has been reinstated, and Padilla, in November 2005, won the right to go before a grand jury and be indicted.

Since it was issued, the President’s executive order has encountered problems. In 2003, the U.S. Court of Appeals, 2nd Circuit decided “the President’s inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat” (*Padilla vs. Rumsfeld* 48). Then, in June 2004, the Supreme Court ruled “the United States cannot order indefinite detention without due process” (Center for Constitutional Rights, Synopsis of *Rasul v. Bush*). The courts specified that the power ascribed to the President by his Executive Order had not been authorized by Congress. But in October 2006, the Military Commissions Act was passed by both houses, and it, in effect, inscribes the President’s November 2001 Order into law.

If I were to read the President’s handling of enemy combatants in a positive light, then I would say that he wants to take us back to pre-9/11, to a time perhaps when we felt safer. When incomprehensible acts of violence occur, we are at a loss to understand, to know what to do. Malory’s story of the invisible knight speaks to this inability: how do we address an enemy who seems invisible yet appears and strikes without warning. For this immediate naming of a person who cannot be seen invites us to pause and ask an important question: how do we move from the state of not being able to see a person to a state of being able to declare who the person is with unquestioning certainty—or rather, how do those two states occur almost simultaneously. The naming of so many people as enemy combatants on the basis of what they may have done or what they may do should—on “evidence” that has not been seen or cannot be seen yet and, hence, must be imagined—replicates this movement. Rather than taking us back to a safe place or safe time, the detainee policy has taken us back to a past that the framers of the Constitution were eager to leave behind. For similar to medieval English kings and their jurists who could predict future acts of treason, the Administration’s policy, now supported by law through the Military Commission Act, tacitly claims a similar precognitive capacity to identify future terrorists now. In both medieval England and modern America, officials who were or are to stand for the law or who were or are to abide by law have imagined a future fraught with treason and/or terrorism as a way to return to a fantasized past and to project an idealized future where such crimes did not exist or will no longer exist. And in both eras, these acts of imagined pasts and futures have led to a consolidation of power that once enhanced the majesty of the medieval king and now supports and extends the reach of what President Bush calls “the unitary executive.” What is lost in this return to a past and in this projection of a future is our present. Nothing so graphically illustrates this loss as people who spend hour after hour and day after day in prison without the recourse to the safeguards that the Constitution has set in place. Such a scene comprehends as well the loss of those safeguards for far too many people.

At the end of Malory’s “Knight of the Two Swords,” two brothers, Balin and Balan, kill each other because they are unable to recognize each other. So the tale moves from a capacity to identify an invisible knight who commits murder to an inability to recognize those who are not enemies. What processes lead us to lose what is most dear to us in the effort to protect ourselves from suffering that very loss? Christopher Rigby’s comment on the relation between Arthur Miller’s *The Crucible*, the Salem witch trials, and the McCarthy era suggests an answer: “The question is not the reality of witches but the power of authority to define the nature of the real, and the desire, on the part of individuals and the state, to identify those whose purging will relieve a sense of anxiety and guilt” (xi).

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