



Thought Crime and the Treason Act 1351

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Abstract

Has there ever been a law criminalizing mental states in themselves? We show that there has been, and still is: the Treason Act 1351. We argue for what we call ‘the Mental Interpretation’ of the Act, over against the interpretation that it criminalizes a complex of a mental state and an ‘overt act’. We also provide authority for the stronger thesis that the overt act functions purely as evidence for the mental state. We discuss other laws in various jurisdictions that have historically criminalized mental states in themselves. We conclude by considering the objection that the European Convention on Human Rights rules out our interpretation.

Keywords Treason · Treason Act 1351 · *Mens rea* · *Actus reus* · Criminal law · Thought crimes

But it is really too hard upon human nature that it should be held a criminal offence to imagine the death even of the king when he is turned eighty-three. It is not to be believed that any but the dullest Britons can be good subjects under that hard condition. (Eliot 1859) cited by (Baker 2012: 169)

The History of Thought Crime

It is an interesting question whether any law anywhere has ever attempted to criminalize a mental state in itself. The answer, we show here, is ‘yes’. And this is despite the fact that it has been asserted that this is simply impossible.¹ There are, of course, many ethical and political arguments arguing that it would be evil or counter-productive or impractical to try to introduce thought-crime legislation; these arguments

¹ See, e.g., ‘no law can legislate for mental attitudes or could be enforced in the courts’ (Rodd 2001: 94).

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include appeals to freedom of conscience or to the fact that mental states are involuntary; in this essay, however, we are concerned solely with the historical question whether such legislation has ever been in place.

There are many authoritative *dicta* in the history of the law of England and Wales that, taken at face value, could be interpreted as asserting that there has never been any legislation against any mental state or activity in itself. One example is the famous remark of Brian CJ's made in 1477:

The thought of man shall not be tried, for the devil himself knoweth not the thought of man.²

Montesquieu stated simply:

The laws do not take upon them to punish any other than overt acts. (Montesquieu 1899: 193)

Lord Mansfield's dictum, which was said in a later case 'to comprise all the principles of previous decisions upon this subject',³ is similar, but contains the significant qualification 'bare':

So long as an act rests in bare intention, it is not punishable by our laws.⁴

Lord Mansfield's dictum is quoted as legal fact by H L A Hart, who preserves the qualification 'bare' when he says 'as everyone knows, a bare intention to commit a crime is not punishable by English law' (Hart 2008: 127).

The quotations above, or the first two of them at any rate, could quite naturally be taken to express the view that the criminalization of thought in itself was foreign to the English legal tradition. We now turn to showing, however, that there is one law, of considerable long-standing but still on the UK statute book, that does purport to criminalize a mental state in itself.

Treason

We affirm that not only have there been laws criminalizing purely mental activity in history, there are in fact still two such laws in force today, one in the United Kingdom, the Treason Act 1351,⁵ and one derived from it, a Malaysian law.⁶ Until very recently the Singaporean Penal Code contained a similar provision, but this

² Brian CJ in *YB Pasch.* 17 Edw. IV, fo. 2, pl. 2, cited in *Scales v United States* (1961) 367 US 203, 266 (Douglas J, dissenting).

³ *R v Higgins* (1801) 2 East 5, 21, 102 ER 269, 275–276 (Lawrence J).

⁴ *R v Scofield* (1784) Cald Mag Cas 397.

⁵ 25 Edw 3 Stat 5 c 2.

⁶ See ss 121A and 121B of the Penal Code of Malaysia. Available online at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61339/117909/F1085941047/MYS61339%202015.pdf> Accessed 2 March 2022.

was changed in 2019.⁷ (There are other superficially similar laws, such as the Kenyan Penal Code,⁸ the Criminal Consolidation Act 1935 of South Australia,⁹ and the Crimes Act 1900 of New South Wales,¹⁰ in other parts of the Commonwealth that are based instead on the Treason Felony Act 1848 (11 & 12 Vict c 12). Other common-law jurisdictions have had similar laws in the past, e.g. Western Australia.¹¹) The Treason Act 1351 was the first Act in England to define the offence of treason,¹² which had been thitherto an offence at common law (in fact, the Act is frequently said to be declaratory of the common law¹³). The Act declared that treason was committed when

a man doth compass or imagine the death of our lord the King, or of our Lady his Queen, or of their eldest child and heir [...] and thereof be provably attainted of open deed by the people of their condition.¹⁴

⁷ The original version of the Penal Code of Singapore is available online at <https://sso.agc.gov.sg/Act/PC1871/Historical/20181219?DocDate=20190604&ValidDate=20181219&ProvIds=pr121A-#pr121A>. Accessed 2 March 2022. It is sections 121A and 121B that were similar. (We owe the reference to (Simester 2012: 64).) The revised code uses the word ‘plans’: <https://sso.agc.gov.sg/act/pc1871?ProvIds=pr121B-#pr1>. Accessed 2 March 2022. The repealing Act was the Criminal Law Reform Act 2019, on-line at <https://sso.agc.gov.sg/Acts-Supp/15-2019/#pr38>. Accessed 2 March 2022.

⁸ ‘Any person who, owing allegiance to the Republic, in Kenya or elsewhere—

a. Compasses, imagines, invents, devises or intends—

i. The death, maiming or wounding, or the imprisonment or restraint, of the President;

b. Expresses, utters or declares any such compassings, imaginations, inventions, devices or intentions by publishing any printing or writing or by any overt act or deed, is guilty of the offence of treason’.

Kenyan Penal Code cap 63 (1970), Ch. 7 s40(1), as amended.

⁹ <https://www.legislation.sa.gov.au/LZ/C/A/CRIMINAL%20LAW%20CONSOLIDATION%20ACT%201935.aspx>. Accessed 18 July 2020.

¹⁰ s12, online at <https://www.legislation.nsw.gov.au/#/view/act/1900/40/full>. Accessed 8 June 2019.

¹¹ Ordinance for the better security of the Crown and Government 1848 (32 Vict. c 10), on-line at http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/wa/num_act/elt32vn10266/elt32vn10266.html. Accessed 18 July 2020.

¹² There had been Acts of Attainder mentioning treason passed before 1351. For example, Roger de Mortimer, 4th Earl of March, was impeached for treason by Parliament on 13 March 1330 (1 Howell State Trials 51). This is described as an Attainder in (Cobbett 1806: 123).

¹³ Per Blackburne LCJ in *R v Smith O'Brien* (1849), 7 State Trials NS 349, Lord Jowitt LC in *Joyce v Director of Public Prosecutions* (1946) [HL] AC 347, 365, and Lord Reading CJ in *R v Casement* (1917) 1 KB 98, 124; cf. *Bellew and Norman's Case* (1673) 1 Vent 254, 86 ER 170. See also the words of Sir Orlando Bridgman, Lord Chief Baron in the trial of the regicides, ‘It was but declarative of the common law; it was no new law’ *Case of the Regicides* 5 Howell State Trials 947, 993. Note also the remark in the same volume in the trial of Miles Sindercombe, ‘the statutes of treason made 25 Ed. 3 as to this, did only declare what the common law was before the making of that statute and was not introductive of a new law’, 5 Howell State Trials 848. (Coke 1644: 1) calls it ‘for the most part declaratory’ in a note. (Hale 1800: 117) says ‘it was said by the king’s attorney upon the evidence, and not denied by the court, that the statute of 25 E. 3 as to compassing the king’s death was but an affirmance of the common law’.

¹⁴ Treason Act 1351 (25 Edw 3 Stat 5 c 2), pt 2. This is a translation of the original, which reads ‘Quant homme fait compasser ou imaginer la mort nostre seigneur le Roi ma dame sa compaignie ou de lour fitz primer & heir; [...] & de ceo provablement soit atteint de overt faite par gentz de lour condicion’ (Pickering 1762: 50–51).

In what follows, we intend to demonstrate that the Act does indeed criminalize mental activity in itself. Before embarking on an analysis of its two key verbs, ‘compass’ and ‘imagine’, however, it is worth providing more historical context. This will help indicate the significance the Act has taken in English legal history.

Treason Before the Statute

(Stephen 1883: 24) suggests that the Treason Act 1351 was derived from the early-13th-century definition of (Bracton 1968–1977):

where one rashly compasses the king’s death [...] even though what he has in mind is not carried into effect.¹⁵

Glanvill, over half a century earlier,¹⁶ also uses the Latin term ‘machinatus’, translated ‘compasses’ above, but here translated ‘plotted’:

[T]he accused had plotted or had done something against the king’s life [...], or had consented or given advice or lent his authority to this[.] (Hall 1965: 172)¹⁷

Glanvill does not go on, however, as Bracton does later, to say explicitly that it does not matter if the accused has not done anything in furtherance of the plot, though this is implied, we think in his ‘plotted *or* had done something’.

As far as works contemporaneous with, or written shortly after the Act, are concerned, they also use the term ‘compass’ or equivalent, even when not referring to the Act. The *Miroir des Justices* states:

The crime of majesty is an horrible offence done [...] by these [*sic*] who kill the king, or compass so to do. (Horne 1768: 16)¹⁸

Britton states:

Great or high treason is to compass our death or to disinherit us of our kingdom. (Nicholls 1865: 40)¹⁹

We mentioned above that there was a common-law offence of treason before the Treason Act 1351. This also is couched in terms of compassing; see, for example, the 1305 case of William Wallace, who was convicted in London of an offence ‘which the crown had no doubt about as being treason [...] compassing King Edward’s death’ (Bellamy 1970: 36).

¹⁵ The original reads ‘si quis ausu temerario machinatus est in mortem domini regis [...] licet id quod in voluntate habuerit non perduxerit ad effectum’ (Bracton 1922–1942: 334).

¹⁶ Probably between 1187 and 1189 (Hall 1965: xi).

¹⁷ The original reads ‘ipsum accusatū machinatum fuisse vel aliquid fecisse in mortem Regis [...], vel consensisse, vel consilium dedisse vel auctoritatem prestitasse’ (Glanville 1554: 110).

¹⁸ The original reads ‘Crime de Majesty est un peche horrible fait [...] per ceux qui occident le Roy ou compassent de faire’ (Horne 1642: 21).

¹⁹ The original reads ‘Graunt tresoun est a compasser notre mort, ou de nous desheriter de noster reaume’.

There were laws criminalizing mental states in themselves in other jurisdictions earlier than 1351. The 643 Edict of Rothari for the Lombards stated:

If anyone thinks or makes plans against the life of the king, let his own life be endangered.²⁰

The text here contains an expository note:

Concerning the fact that the law says ‘thought’, it may be complained, how the person’s thought is to be known, when only God discerns the thoughts of human beings? This can be resolved thus: it is recognized by signs.²¹

Lear comments on this:

One new conception of some interest is suggested in the verb *cogitaverit* which appears to make high treason out of mere ‘cogitating’, thinking about or planning the king’s death in the mind of the accused, yet accompanied by no overt act. This trend is symptomatic of a development which culminated in English law with the literal ‘imagining the king’s death’ as a form of high treason. (Lear 1965: 41–42)²²

Before that, the Roman statute *lex Quisquis* of 397²³ stated:

Whoever enters into a criminal conspiracy [...] to kill men of illustrious rank who participate in our consultations in the imperial counsel [...] shall be stricken with the sword as one guilty of treason [...], and we want to punish the intention of such crime equally with the effect thereof. (Blume 2008)²⁴

Floyd Lear translates from the comments in (Kübler 1928: 542–559) on this law:

Here we find something entirely new and unheard of, for the law of Honorius punishes as high treason not only the completed act, the attempt, and the preliminary acts but the mere intent itself. Neither before nor since has the sentence been laid down with such stark nakedness in any laws of the civilized world. (Lear 2011: 45)

²⁰ Our translation of ‘Si quis hominum contra animam regis cogitaverit aut consiliatus fuerit, animae suae incurrat periculum’ (Pertz 1868: 291, lines 24–26). Compare the translation in (Lear 1965: 41).

²¹ Our translation of ‘Ex hoc quod hec lex dicit ‘cogitaverit’, queritur, quomodo illius cogitatio cognoscatur, cum hominum cogitationes solus Deus discernit? Quod sic solvitur: cognoscitur per indicia’.

²² Another edition of Lear’s essays has the passage reading thus ‘The only new conception is contained in the verb *cogitaverit*; this makes mere “cogitating” high treason, merely thinking about or planning the king’s death in the mind of the accused, and suggests the development which culminated in mediaeval English law with the establishment of “imagining the king’s death” as high treason’ (Lear 2011: 237).

²³ Codex Justinianus 9, 8, 5 *Ad Legem Iuliam Maiestatis*.

²⁴ The original reads ‘Quisquis [...] scelestam inierit factionem [...] de nece etiam virorum illustrium qui consiliis et consistorio nostro intersunt [...] cogitarit (eadem enim severitate voluntatem sceleris qua effectum puniri iura voluerunt), ipse quidem utpote maiestatis reus gladio feriat’ (Krüger 1877: 820).

Kübler seems to be overstating his case here: as we have seen, criminalizing intent was attempted multiple times later in different jurisdictions.²⁵

Later Legislation

Subsequent statutes have preserved or amplified the wording of the Treason Act 1351. There have been many statutes dealing with treason in the UK or parts thereof over the years, and there are even now at least twelve different statutes to do with treason in effect in the UK or parts thereof.²⁶ Not only do some of the historic treason statutes reproduce the terms ‘compassed’ and ‘imagined’, but these same terms also occur in individual Acts of Attainder, for example, the attainder of John Cade in 1450²⁷:

1. FIRST, whereas the false traitor John Cade, naming himself John Mortimer [...] falsely and traitorously imagined the king’s death. (Pickering 1762: 551)

Various other Acts extended the provisions of the treason legislation to other persons. For example, the Act of Accord 1460²⁸ made it high treason to compass the death of Richard, Duke of York:

Yef any persone, or persones, ymagyne or compasse the dethe of the sayde duk, and therof prouably [proveably] be atteynt of open dede doone by folkes of other condicione. (Davies 1856: 104)

Most recently, under the Succession to the Crown Act 2013, the Treason Act 1351 now protects the monarch’s eldest child rather than the monarch’s eldest son.²⁹

British colonies adopted and adapted the Treason Act 1351. For example, in Jamaica it was illegal under the 1696 Act for the better order and government of slaves (Act 38) for a slave to compass or imagine the death of any white person.³⁰ This remained the law for well over a hundred years, being in substance reaffirmed in the 1817 Act for the subsistence, clothing, and the better regulation and government of slaves; for enlarging the powers of the council of protection; for preventing

²⁵ Kübler has added a word not found in the *lex Quisquis*, the word ‘mere’, into his comment here. If he means by ‘mere intent’ intent not manifested in any overt deed then his comment is more defensible.

²⁶ The Government’s statute Web site returns a list of 55 items of primary legislation for the search term ‘treason’ <http://www.legislation.gov.uk/primary/text=treason>. Accessed 2 March 2019. The most relevant of these are the Treason Act 1351, Treason Act 1495, Crown of Ireland Act 1542, Treason Act 1695, Treason Act 1702, Treason Act (Ireland) 1703, Treason Act 1708, Treason Act 1814, Treason (Ireland) Act 1821, Treason Act 1842, Treason Felony Act 1848, and Forfeiture Act 1870.

²⁷ 29 Henry 6 c 1.

²⁸ 39 Henry 6 c 1.

²⁹ Schedule to the Succession to the Crown Act 2013. <http://www.legislation.gov.uk/ukpga/2013/20/schedule/enacted>. Accessed 28 December 2017.

³⁰ s 24 states ‘if any slave or Slaves shall compass or imagine the Death of any white Person, and thereof be attainted, by open Deed, before Two Justices and Three Freeholders, such Slave or Slaves shall suffer Death’ (Anon 1769: 61).

the improper transfer of slaves.³¹ The situation was similar in British West Florida under the 1772 Act for the Order and Government of Slaves,³² in Tobago under the 1794 Act for the good order and government of Slaves,³³ and in the Bahamas under the 1796 Act to consolidate and bring into one Act, the several laws relating to Slaves.³⁴

One might assume that provisions like this were never enforced, but in the 1823 Jamaica case *R v Jacob and others* eight black slaves were hanged for, among other things, ‘compassing and imagining the death of the white people’ in St Mary’s, Jamaica.³⁵ The editor of (Anon 1833: 9, fn) adds ‘not one overt act of any kind was even alleged to have been committed’,³⁶ and (Madden 1835: 153) adds that no actual rebellion took place. In another conviction, a female slave called ‘Venus’ was transported from Jamaica for, among other things, ‘compassing and imagining the death of the white people’ of Jamaica (Anon 1826: 58). The same was true in other islands too; for example, a report in *The Spectator* states:

Three negroes at Barbadoes were lately convicted of ‘imagining the death of their master’. The Government pardoned them, because of the vagueness of the offence. The Assembly have passed resolutions condemning this act of grace. (Anon 1830: 8)

Interpretations of the Treason Act 1351

The Mental Interpretation and the Mixed Interpretation

Having established the significance of the phrase ‘compass or imagine’ in British legal history, it is now time to turn to the central issue for this paper—its correct

³¹ Section 46 of this law forbids a slave to ‘compass or imagine the death of any white person, and declare the same by an overt act’, and section 79 lays out punishments for slaves ‘compassing or imagining the death of any white person or persons’ (with no mention here of any ‘overt act’ or ‘open deed’) (Lunan 1819: 122, 134).

³² Section 5 ‘And if any Slave or Slaves shall Compass or Imagine the death of any white Person and thereof be attainted by open Deed before Two Justices and Three Freeholders such Slave or Slaves shall suffer death’: available online at <https://alex.state.al.us/uploads/33735/LawsPassedInFloridainthe1700s.pdf>. Accessed 9 December 2017. The Act was disallowed by His Majesty in Council, according to a marginal note to a transcript of the Act on-line at <http://digital.archives.alabama.gov/cdm/ref/collection/voices/id/2918>. Accessed 9 December 2017.

³³ ‘Compassing the death of a white person shall suffer death, transportation or other punishment’ (Edwards 1819: 193). The Commissioner on Civil and Criminal Justice in the West Indies notes: ‘This it will be observed, is not confined to the case of the owner of the slave, and is enacted without requiring the proof of any overt act’ (Commissioner of Inquiry 1827: 128).

³⁴ House of Commons (1816: 24, para 55) talks about the ‘compassing or imagining the death of any white person or persons’.

³⁵ *R v Jacob and others* (1823, Jamaica); Available online at http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/jamaica/r_v_jacob_and_others/. Accessed 29 December 2017.

³⁶ It seems that the defendants were convicted on the evidence of friends and family, but it is not clear what the nature of that evidence was.

interpretation in the Treason Act 1351. This is the heart of our argument, since it is only if the use of ‘compass or imagine’ in the statute criminalizes mental activity in itself, apart from the overt act connected with it, that we have a case of thought-crime legislation.

The words of the Treason Act 1351 are capable, in themselves, of two different interpretations:

- i. The Mental Interpretation: that the offence consists in the compassing or imagining, which is a mental action, though the crime must be accompanied by an open deed;
- ii. The Mixed Interpretation: that the offence consists in the complex action composed of the mental act of the compassing or imagining and the physical act of the open deed.³⁷

It might at first seem as though there is no real difference between the Mental Interpretation and the Mixed Interpretation. We contend, however, that there is certainly a difference between, on the one hand, an offence’s consisting of both a mental element and a physical element, and, on the other hand, an offence’s consisting solely in something mental in itself, as long as this is accompanied by something not part of the offence. For example, in English law, no offence occurs if the agent is acting under duress,³⁸ but it seems wrong to say that the absence of duress is part of the action or an element of the offence.³⁹ Similar comments apply when the agent is acting out of necessity or in self-defence. These examples demonstrate our assertion that there is a difference between something’s being required for an offence to occur, and that thing’s being an element of the offence. In what follows, we shall argue, then, for the Mental Interpretation, that the only element of the offence is purely mental—and it is on the basis of this interpretation that we say that the Treason Act 1351 is a piece of thought-crime legislation still in force in the UK today.⁴⁰

Evidence for the Mental Interpretation

The first thing worthy of note is that the very words of the statute naturally suggest the Mental Interpretation, as the following two commentaries suggest:

³⁷ For an example of a third view, locating the crime solely in the physical, overt act, see the interpretation of Coke on treason in (Fletcher 1978: 208): ‘[t]he crime consisted in the overt act declaring the intention, not in the intention “evidenced” by the overt act’. As we show below, authority is definitively against this non-standard interpretation of Coke.

³⁸ Except with regard to murder (Smith and Hogan 1992: 235–6).

³⁹ This may not be the case in all jurisdictions, but it is the case in England and Wales. See (Christopher 2007), discussing (Fletcher 2007).

⁴⁰ There is another interpretation, that ‘open deed’ does not apply to ‘compass or imagine’, but only to some of the words not quoted (words dealing with adhering to the king’s enemies or giving them aid or comfort). This interpretation is defended by (Bellamy 1979: 31), and seems to us highly plausible with respect to the original meaning of the statute, but it has been definitively rejected by judicial pronouncement—since *Pasc. 35 Eliz*, according to (Coke 1644: 14).

Compassing and imagining the king's death, which are the words of the statute, in their plain obvious meaning, are confined to an intention or design of depriving the sovereign of his natural physical life. (Anon 1794: 2)⁴¹ The verbs 'compass or imagine' in 25 Edward III seem both to mean 'design', or 'intend', and since at least the second half of the seventeenth century indictments for this species of high treason had taken to including such words as 'contrive', 'devise', 'purpose', 'design', or 'intend', alongside 'compass or imagine'. (Barrell 2000: 30)

Hale is also very clear on this point:

The words *compass or imagine* are of a great latitude.

1. They refer to the purpose or design of the mind or will, tho the purpose or design take not effect.
2. Compassing or imagining singly of itself is an internal act, and without something to manifest it, could not possibly fall under any judicial cognizance, but of God alone; and therefore this statute requires such an overt-act, as may render the compassing or imagining capable of a trial and sentence by human judicatories.

[...]

Compassing the death of the king is high treason, tho it be not effected; but because the compassing is only an act of the mind, and cannot of itself be tried without some overt-act, to evidence it, such an overt-act is requisite to make such compassing or imagination high treason. (Hale 1800: 107)

Hale adds a footnote that further shows the implausibility of the Mixed Interpretation:

Insomuch that where the king is actually murdered, it is the compassing his death, which is the treason, and not the killing, which is only an overt-act. (Hale 1800: 108)

(It is also worthy of note that the word 'compassing' is still in legal use in some jurisdictions, e.g. the Appellate Division, now the Supreme Court of Appeal, in South Africa, which in a 1967 judgment stated: 'The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased'.⁴² This is also quoted approvingly by

⁴¹ The author is suggested to be Alexander Luders in (Barrell 2000: 309, n 66).

⁴² *S v Sigwahla* [1967] 4 SA 566 (A) at 570B–E. This was recently approved by the Supreme Court of Appeal in South Africa, *Francis and Others v S* (866/2018) [2019] ZASCA 177 (2 December 2019) at [8], on-line at <http://www.saflii.org/za/cases/ZASCA/2019/177.html>. Accessed 18 July 2020.

the Supreme Court of Zimbabwe,⁴³ the High Court of Kenya,⁴⁴ the High Court of Namibia,⁴⁵ the Supreme Court of Swaziland,⁴⁶ and the High Court of Lesotho.⁴⁷)

Chief Justice Osgoode in Quebec in 1797 actually makes the same point as Bryan CJ earlier about our ignorance of the state of the mind:

Some of the treasons [...] respect the intentions of the mind, such as compassing the king's death. But as, to discover the secret purposes of the heart is the attribute of Omniscience alone, as it would be highly presumptuous and dangerous in human tribunals, to take cognizance of the compassing of men's minds, without some substantial evidence of the intention. The law therefore requires that such compassing be proved by some open act.⁴⁸

An early judicial pronouncement supporting the Mental Interpretation was made in 19 Henry 6 by Neuton J, who offered as his opinion, without being contradicted, 'If a man imagines the death of the King and does no more he will be drawn and hanged and quartered'. Bellamy comments 'Nothing could be clearer than that' (Bellamy 1970: 123).⁴⁹ Bellamy adds a further quotation in a footnote from the Year Book for Michaelmas 1440:

So, it will be asked whether one can be put to death for something that one never did. Neuton said yes, that one would be put to death, drawn, hanged and quartered for something that one never did, in fact, or helped or aided. For example, if one or one's wife imagined the death of the King and did nothing more, for this imagination one would be put to death as before. (Bellamy 1970: 123)⁵⁰

Coke also follows the Mental Interpretation:

⁴³ *S v Mudzana* (23/03) ((23/03)) [2004] ZWSC 76 (22 September 2004), on-line at <https://zimlil.org/zw/judgment/supreme-court-zimbabwe/2004/76>, Accessed 18 July 2020.

⁴⁴ *Republic v Kahindi Mwasambu Kai* [2020] eKLR, Criminal Case 14 of 2016, on-line at <http://kenya.law.org/caselaw/cases/view/197694/>. Accessed 18 July 2020.

⁴⁵ *S v Soroseb* (CC 08/2010) (CC 08/2010) [2010] NAHC 36 (04 June 2010) at [38], on-line at <https://namiblii.org/na/judgment/high-court/2010/36>, accessed 18 July 2020.

⁴⁶ *Mxolisi Sicelo Dlamini vs the King* (37/2014) 2017 [SZSC] 40 09th October, 2017 at [2], on-line at <https://swazilii.org/sz/judgment/supreme-court/2017/40/2017-szsc-40.pdf>, accessed 18 July 2020.

⁴⁷ *Rex v Khoaele Thinyane* (CRI/T/150/2005) [2009] LSHC 55 (16 January 2009), on-line at <https://lesotholii.org/node/7742>, accessed 18 July 2020.

⁴⁸ *R v Maclane* 26 State Trials 721, 726, punctuation original.

⁴⁹ The original reads 'si home ymagyn le mort de Roy et ne fait pluy il serra traye et pend et disclos'—the translation above is ours.

⁵⁰ This is quoting YB Mich 19 Hen VI, pl 103: our translation of '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 disclos pur chose q'il ne fist jamais, en fait, ny constentat ny aidat. Come si on ou sa femme imagine le mort le Roy et ne ad fait plus, pur ce imaginacion il sera mort comme devant'. Rezneck (1928: 33) finds that this approach predated the 1351 Act: 'Before 1352 as after, the essence of treason is to be found in the intent to compass the death of the king; everything else, words included, was to be regarded as the outward manifestation and as the proof of that intent', quoted in Strohm, (1998: 220 n 60).

This compassing, intent, or imagination, though secret, is to be tried by the peers, and to be discovered by circumstances precedent, concomitant, and subsequent. (Coke 1644: 6)

Blackstone adds his authority to the Mental Interpretation:

Let us next see, what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect. [...] But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt*, act. And yet the tyrant Dionysius is recorded to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore [...] it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon[.] (Blackstone 1769: 78–79)⁵¹

The above authorities seem to us decisively to show the appropriateness of interpreting the Treason Act 1351 according to the Mental Interpretation. The statute has clearly been interpreted as criminalizing something mental in itself (as long as this is accompanied by a physical action—but the action is not itself part of what is criminalized). What is more, there have, in fact, been subsequent English statutes that have dropped mention of the ‘overt act’ entirely. One of these was the Treason Act 1397,⁵² repealed two years after being enacted,⁵³ which stated, in translation:

it is ordained and stablished, That every Man, which compasseth or purposeth the Death of the King [...] shall be judged as a Traitor of High Treason against the Crown.⁵⁴

The omission of reference to an overt act can surely be explained only by the fact that the statute was intended to criminalize a mental state in itself without its being expressed in any physical act, or, at least, in any physical act done in furtherance of it.

The Evidentiary Thesis

In fact, not only is there a constant stream of authority favouring the Mental Interpretation, that the offence consists in the imagining or compassing in itself, most

⁵¹ The story of Dionysius’s execution of a man (Marsyas) for dreaming that he had killed him (Dionysius), is told in (Plutarch 1918). Plutarch notes of Dionysius’s reasoning concerning Marsyas: ‘without some previous waking thought and purpose of the kind, he could not, he supposed, have had that fancy in his sleep’.

⁵² 21 Ric 2 c 3.

⁵³ The Treason Act 1399, 1 Hen 4 c 10.

⁵⁴ The original states ‘ordeine est & establiz que chescun que compasse & p’pose la Mort du Roy [...] soit adjugez come traitour de haute traison encontre la Corone’ (Raithby 1963: 98).

authorities go further and add that the open deed is necessary *purely as evidence* for the imagining or compassing. Stephen, for example, says:

the actual murder of the sovereign is treason only because it is evidence of an intent to murder[.] (Stephen 1883: 284–5)

It should be noted that the Mental Interpretation does not imply that the overt acts are purely evidentiary (what we might call ‘the Evidentiary Thesis’—a sub-view of the Mental Interpretation); all that the Mental Interpretation says is that the overt act is not part of what is criminalized (and, clearly, the evidence for a crime need not itself be part of the crime). There are adherents of the Mental Interpretation that do not also hold the Evidentiary Thesis. For example, Sir Michael Foster asserts that the overt acts are not mere pieces of evidence, but ‘the means employed by the defendant for executing his traitorous purposes’. He continues:

For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions and imaginations of the heart. [...]

It considereth the wicked imaginations of the heart in the same degree of guilt as if carried into actual execution, from the moment *measures appear to have been taken to render them effectual*. (Foster 1792: 194–5, italics original)

A little later Foster concludes:

Overt acts undoubtedly do discover the man’s intentions; but, I conceive, they are not to be considered merely as evidence, but as the *means made use of to effectuate the purposes of the heart*. [...] and though, in the case of the King, overt acts of less malignity, and having a more remote tendency to his destruction, are, with great propriety, deemed treasonable; yet still they are considered as *means to effectuate*, not *barely as evidence of* the treasonable purpose. (Foster 1792: 203–4, italics original)

What we wish to point out here is that, although Foster rejects the Evidentiary Thesis, he does not reject the Mental Interpretation (‘the compassing is considered as the treason’, as he says at the beginning).

The US Supreme Court has also entered the fray of the interpretation of the Treason Act 1351:

Hale (History of the Pleas of the Crown, Emlyn ed. London, 1736) frequently uses terminology, found in Coke and earlier writers, which might mean that the function of an overt act is to prove intent, saying that the overt act is to ‘manifest’ or ‘declare’ the compassing of the king’s death, and so forth. *Id.*, 109. But, as in the other writers, the statements are usually open as well to the interpretation that the act must show translation of thought into action. In the latter sense, the act ‘declares’ intent in that it shows, in the light of other evidence, that the defendant’s thoughts were not mere idle desires. This is a different

thing from saying that the overt act must of itself display an unambiguously traitorous character.⁵⁵

Here the Supreme Court, while it distances itself from one version of the Evidentiary Thesis, at any rate seems to favour the Mental Interpretation more generally.

The Evidentiary Thesis is supported, however, by the overwhelming majority of treason judgments rendered since 1352. One of the best sources concerning the status of the overt act in the Treason Act 1351 is the collection of remarks from the speeches made during the trial of the regicides in October 1660. This is Sir Orlando Bridgeman, Chief Baron, opening the trial on 9 October 1660:

By the statute of the 25th of Edward the 3d (a Statute or Declaration of Treason), it is made High-Treason to compass and imagine the death of the king. It was the ancient law of the nation. In no case else imagination, or compassing, without an actual effect of it, was punishable by our law, ‘Nihil illicit conatus nisi sequatur effectus;’ that was the old rule of law: But in the case of the king, his life was so precious, that the intent was treason by the common law; and declared treason by this statute. [...] This compassing and imagining the cutting off the head of the king is known by some Overt-Act. Treason it is in the wicked imagination, though not treason apparent [...]

Then what is an Overt-Act of an imagination or compassing of the king’s death? Truly, it is anything which shews what the imagination is. Words, in many cases, are evidence of this imagination; they are evidences of the heart.⁵⁶

It is to be noted that Sir Orlando allowed anything that evidenced the imagining to fall under the term ‘overt act’. This is, we submit, the dominant interpretation historically.

It is not just Sir Orlando Bridgeman that takes this view; Sir Heneage Finch, Solicitor-General, stated in the same trial:

the very thought of such an attempt hath ever been presented by all laws, in all ages, in all nations of the world, as a most unpardonable Treason. My lord, this is that that brought the two eunuchs in the Persian court to their just destruction: *Voluerunt insurgere*, says the text,^[57] and yet that was enough to attain them. And so, my lords, it was by the Roman laws too, as Tacitus observes; *Qui deliberant, desciverunt*.^[58] To doubt or hesitate in a point of allegiance, is direct treason and apostacy. And upon this ground it is, that the statute upon which your lordships are now to proceed hath these express words: ‘If a man doth compass or imagine the death of the king,’ &c. kings who are ‘God’s

⁵⁵ *Cramer v United States* (US Supreme Court, 1945) 325 US 1, 18, n. 25.

⁵⁶ *Case of the Regicides* (1660) 5 Howell State Trials 947, 988–9.

⁵⁷ ‘They wanted to rebel’ (our translation). The reference is to Esther 2:21. This was the text taken by Bishop Lancelot Andrewes when he preached before King James I on 5 August 1616 (Andrewes 1632: 845). Cf. also the sermon preached before King James I on 5 August 1607 (Andrewes 1632: 777). Perhaps Sir Heneage Finch had one or other of these sermons in mind when he was speaking, since they treat the text as he treats it.

⁵⁸ ‘Those who deliberate on revolt have revolted already’ (Tacitus 1873: 2.77).

vice-gerents upon earth,' have thus far a kind of resemblance of the Divine Majesty, that their subjects stand accountable to them for the very thoughts of their hearts. Not that any man can know the heart, save God alone; but because when the wicked heart breaks out into any open expressions, by which it may be judged, it is the thoughts of the heart which makes the Treason; the Overt-act is but the evidence of it. [...] The scope of this Indictment is for the compassing the death of the king; The rest of the Indictment, as the usurping authority over the king's person, the assembling, sitting, judging, and killing of the king, are but so many several overt-acts to prove the intention of the heart.⁵⁹

Finally, to show that the Evidentiary Thesis was not unique to the 17th-century, or to England, we quote from the words of James Wedderburn, Solicitor-General, at the trial of William Edgar at the High Court of Justiciary in Scotland on 9 April 1817:

Your lordships are all aware, that by declaring and defining the first species of treason, the legislature bestowed upon a mental act—upon the imagining, or compassing in the mind, the death of the king—the character of a completed crime, punishable by a high sanction; and it provided, that in the case of this highest offence against the state, mere intention (which in other cases is not cognizable by the criminal tribunals to that effect) should hold the same rank in the scale of guilt and of punishment with a completed act. It rendered the compassing or imagining, the mere conception or design of destroying the king, punishable with the pains of treason. There is a remarkable distinction, therefore, between this class of crimes and all others. It may be said generally, almost without exception, that the mere compassing of any other act, the mere compassing of murder, for instance, the criminally imagining such a deed is not a cognizable crime, at least is not cognizable as the crime of murder. But in this department of the law the case is different. The imagination of the king's death is the statutory crime, and nothing more is required than an overt act, by which this imagining is inferred or proved.⁶⁰

The above quotations form just a small sample of the cases that treat the overt acts as mere evidence.⁶¹ Thus, to conclude, it is not only the case that the Mental Interpretation of the Treason Act 1351 is correct, but also, the overwhelming weight of the case law is for the Evidentiary Thesis as well.

⁵⁹ *Regicides* 1012–3.

⁶⁰ *R v Edgar* (1817) 33 Howell State Trials 145, 176. Although Edgar was not tried under the Treason Act 1351, the Act and its interpretation were explicitly discussed during the trial.

⁶¹ For a discussion of the phrase 'overt act' from an American point of view, with an eye to its inclusion in Article 3 of the US Constitution, see (Fletcher 1978: 207ff). It seems to us that Fletcher's attack on the Mental Interpretation misses the mark.

Confession and the Mental Interpretation

The question arises: if we are just in search of evidence for a mental state then will it suffice as evidence to have a mere confession of a *past*, and perhaps regretted, mental state?⁶² While there has been, as far as we know, no English case⁶³ in which someone has been convicted solely on the basis of confession of a past mental state of compassing and imagining, there have indeed been convictions under the Treason Act 1351 of spoken words only—(Hale 1800: 115) cites from (Baker 1670) the 15th-century cases of Walter Walker⁶⁴ and Thomas Burdett.⁶⁵ A more trustworthy example, from the 17th-century, is *Crohagan's Case*, in which it is stated:

Arthur Crohagan, an Irishman, was arraigned [...] of treason, for that he being the King's subject, upon the ninth of July, 7 Car. 1 *regis nunc*, at Lisbon, in Spain, used these words: 'I will kill the King' [...].

And for that his traitorous intent and the imagination of his heart is declared by these words, it was held high-treason by the course of the common law, and within the express words of the statute of 25 Edw. 3. c. 2.⁶⁶

It should be clarified that not just any old spoken words will serve as the 'overt act': Holt CJ in *Charnock's Case* (1695) distinguishes words of different sorts:

Loose words spoken without relation to any act or project, are not treason: but words of persuasion to kill the King are overt acts of high treason; so is a consulting how to kill the King; so if two men agree together to kill the King; for the bare imagination and compassing makes the treason, and any external act that is a sufficient manifestation of that compassing and imagining, is an overt act: it was never yet doubted, but to meet and consult how to kill the King, was an overt act of high treason.⁶⁷

In fact, it seems that written words may constitute treason even when they are not in prosecution of a particular act or project. In *Peacham's Case*⁶⁸ Peacham was 'indicted of treason for divers treasonable passages in a sermon which was never

⁶² It is interesting to note that the US Constitution allows for conviction of treason on the basis of confession, but does not count it as an overt act: 'No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court' Article III, section 3, Clause 1.

⁶³ We have found reports of two French examples: (Cayet 1606: 307) and (Bodin 1583: II, 303).

⁶⁴ Walker is said to have told his child that he would make him 'Heir of the Crown' (Baker 1670: 215). But Walker was proprietor of the inn The Crown, and so was making a joke, if the story be believed. Bromley CJ had a slightly different account of the story, involving Markham CJ as the judge, according to 1 Howell State Trials 894.

⁶⁵ Burdett is said to have expressed a hope that a dead stag would be 'horns and all in his belly that had counselled the King to kill it: and because none counselled the King to kill it but himself, it was thought those words were not spoken without a malignant reflecting upon the King' (Baker 1670: 215). The *Baga de Secretis* gives a totally different account, however (Anon 1842: Appendix II, 213).

⁶⁶ *Crohagan's Case* (1633) Croke Car. 332, 79 ER 891.

⁶⁷ *Charnock's Case* (1695) 2 Salkeld 631, 91 ER 533.

⁶⁸ *Peacham's Case* (1628) Croke Car. 125, 79 ER 711, 2 Cobbett State Trials 869.

preached, or intended to be preached, but only set down in writings, and found in his study'.⁶⁹ It also seems to be evident in the case of James Sheppard, convicted in 1718 of 'compassing and imagining the death of the King' in virtue of his writing a letter that declared his 'design to assassinate the King' and his determination 'to put it in execution when opportunity offered' (Anon 1768: 284, 285, 287); the Court also made the general comment that 'a letter under the party's hand is a sufficient Overt-act to prove such imagination'.⁷⁰

The Absoluteness of the *Forum Internum*

The content of the preceding argument was historical: by attending to past authorities on, or judgments implementing, the Treason Act 1351, we argued that legislation did exist in British law that criminalized a mental state in itself. There is, however, one modern objection that we should address: that, while it might be true that thought-crime legislation has functioned coherently in Britain in the past, there is no chance of any successful prosecution under the Treason Act 1351 or any similar legislation today, owing to jurisprudence surrounding the European Convention on Human Rights [ECHR]. And this would be true for any thought-crime legislation a government in the Council of Europe might attempt to bring into force.

The root of this incompatibility between the ECHR and thought-crime legislation is to be located in Article 9 of the ECHR, which provides for freedom of thought: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief' (Council of Europe 1950). Article 10 also makes explicit reference to the 'freedom to hold opinions' (Council of Europe 1950). The freedom of thought and conscience falls under the '*forum internum*', while the freedom to express or manifest opinions, beliefs, and thoughts falls under the '*forum externum*'. While many of the freedoms of the Convention are substantially restricted by concerns over health and morals or public-order interests, case law on Article 9 in particular has been very clear that such qualifications pertain to the *forum externum* alone, whereas the freedom of the *forum internum* is *absolute*. The Venice Commission brings out this distinction most clearly:

In contrast to manifestations of religion, the right to freedom of thought, conscience and religion within the *forum internum* is absolute and may not be subjected to limitations of any kind. Thus, for example, legal requirements mandating involuntary disclosure of religious beliefs are impermissible. (European Commission for Democracy through Law 2004: II.B.1, 5)

⁶⁹ *Peacham's Case* 125.

⁷⁰ *R v Sheppard* (1718) 5 Howell State Trials 1022.

This passage has been repeated in judgments under Article 9 such as *Işik v Turkey*.⁷¹ In *Kosteski v The Former Yugoslav Republic of Macedonia*⁷² the European Court of Human Rights [ECtHR] used this line of reasoning to conclude very firmly that ‘the notion of the state sitting in judgment on the state of a citizen’s inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions.’⁷³ Such comments make clear that there would be no chance of the successful prosecution of offences under the Treason Act 1351 (or any other law criminalizing mental activity in itself) without an overt act’s being done in furtherance of the treasonous compassing or imagining⁷⁴—but, as we have seen, the Act itself also does not allow such a prosecution.

The Guardian newspaper in 2000 launched a campaign along these lines, seeking, among other things, a declaration of the incompatibility of the Treason Felony Act 1848 and the Human Rights Act 1998 (which encodes as part of UK law the ECHR). The legal aspect to that campaign was defeated in the House of Lords in 2003, which refused to make any such declaration. Lord Steyn stated:

The part of section 3 of the 1848 Act which appears to criminalise the advocacy of republicanism is a relic of a bygone age and does not fit into the fabric of our modern legal system. The idea that section 3 could survive scrutiny under the Human Rights Act 1998 is unreal.⁷⁵

Lord Scott of Foscote agreed:

It is plain as a pikestaff to the respondents and everyone else that no one who advocates the peaceful abolition of the monarchy and its replacement by a republican form of government is at any risk of prosecution. [...] it is clear beyond any peradventure [...] that the section would now be ‘read down’ as

⁷¹ *Sinan Işik v Turkey* [2010] ECHR 2265, (2015) 61 EHRR 6, App. No. 21924/05, 2 February 2010, [20] 177.

⁷² *Kosteski v Former Yugoslav Republic of Macedonia* [2006] ECHR 403, (2007) 45 EHRR 31, App. No. 55170/00, 23 April 2006.

⁷³ *Kosteski* [39] 720. It is true that the word ‘beliefs’ is used here, but the wording of Article 9 is broader.

⁷⁴ Similar opinions can be found in a comment from the United Nations’ Human-Rights Committee concerning the International Covenant on Civil and Political Rights: ‘Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in Article 19.1. In accordance with Articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief’ (United Nations Human Rights Committee 1954). The EU Charter of Fundamental Rights also has two relevant articles, the first of which is Article 10: ‘1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance’ (European Union 2000) The second is Article 11: ‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected’ (European Union 2000).

⁷⁵ *R (Rusbridger) v Attorney General* [2003] UKHL 38, [2004] 1 AC 357, 369C [28] (Lord Steyn).

required by section 3 of the Human Rights Act 1998 so that the advocacy contemplated by the respondents could not constitute a criminal offence.⁷⁶

While their Lordships are here discussing a different Act (the Treason Felony Act 1848⁷⁷) from the one that we have been discussing (the Treason Act 1351), we accept that the Courts would in similar fashion refuse to uphold a conviction for compassing or imagining on the basis of mere confession or where the open deed did not further the compassing or imagining (say, because it was a mere note in one's diary). But this does not show that in a case where there *was* an open deed that furthered the compassing or imagining, the domestic courts or the ECtHR would refuse to uphold a conviction under the Treason Act 1351.

We have three reasons for supposing that the Courts, domestic or in Strasbourg, would decline to condemn a conviction under the Treason Act 1351 on the grounds that it criminalized a mental activity in itself. First, there is a legal school of thought, the 'subjectivist' school that holds, particularly for the law of attempts, that when *mens rea* is at issue, the mental activity is what is criminalized.⁷⁸ Although we do not accept this view,⁷⁹ it is surely unlikely that the domestic courts or the ECtHR would want effectively to take a position on its truth or falsehood by formulating a principle that declared the criminalization of mental activity to be incompatible with the HRA 1998 or to be a violation of the ECHR. Secondly, the domestic courts and the ECtHR are unlikely to want to make a violation of the ECHR depend on a distinction as fine as that between the criminalization of a mental activity evidenced by an outward action, on the one hand (the Mental Interpretation), and the criminalization of a compound of mental activity and *actus reus* on the other (the Mixed Interpretation). The courts are in general of a practical mind (as the judgment in the case brought by *The Guardian* shows), and would surely hold the view that if people were penalized only if they had done something in furtherance of a criminal intention, then it would not really matter exactly *why* they were penalized, as long as what they had done was taken into account somewhere in the state's reasoning process.

The third point is also a feature of the pragmatic attitude taken by the Courts: the Treason Act 1351 is still the obvious statute under which an attempt to kill the monarch, or actual regicide, would be prosecuted,⁸⁰ and the Courts would, we think, decline to remove or undermine the only or main UK law against regicide, even if it is the main one only *faute de mieux*.

⁷⁶ *Rusbridger* 372B–D [40] (Lord Scott of Foscote).

⁷⁷ 11 & 12 Vict c 12.

⁷⁸ For a brief explanation of subjectivism, see, for example, (Garvey 2011: 178–179).

⁷⁹ In fact, we hold that treason forms the *only* example of current thought-crime legislation, though there is no space to argue the point here.

⁸⁰ Of course, the offence would still be murder, or attempted murder, but it might well be publicly unacceptable to prosecute the assassination of the head of the state as just one more murder.

Conclusion

The point of this paper has been to show that thought-crime legislation can, and does, exist, whether or not it is desirable. We have discussed the antecedents and progeny of the Treason Act 1351, and shown that it criminalizes mental activity in itself, not a compound of mental activity and physical activity. We have also suggested that, despite some instances to the contrary, the overwhelming preponderance of authority is for a particular variety of the Mental Interpretation, viz. the Evidentiary Thesis that the role of the overt act is purely to serve as evidence for the internal mental activity of the compassing and imagining the monarch's death. Those that blithely dismiss thought-crime legislation as impossible (Rodd 2001: 94) need to be more careful with their rhetoric.⁸¹

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