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# THE ELUSIVE OBJECT OF PUNISHMENT

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**Abstract**
All observers of our legal system recognize that criminal statutes can be complex and obscure. But statutory obscurity often takes a particular form that most observers have overlooked: uncertainty about the identity of the wrong a statute aims to punish. It is not uncommon for parties to disagree about the identity of the underlying wrong even as they agree on the statute's elements. Hidden in plain sight, these unexamined disagreements underlie or exacerbate an assortment of familiar disputes—about venue, vagueness, and mens rea; about DUI and statutory rape; about hate crimes, child pornography, and counterterrorism laws; about proportionality in punishment; and about the proper ambit of the criminal law. Each of these disputes may hinge on deeper disagreements about the identity of the wrong a statute aims to punish, and these deeper disagreements can be surprisingly hard to resolve, fueled as they are by the complex inner structure of our penal laws and the discretionary mechanisms of their administration.

> When I am blamed, or condemned, or held liable, there is something *for which* I am blamed, condemned, or held liable: which is to say that blame, condemnation and holdings of liability require an . . . *object* on which they are focused and towards which they are directed.
> —R.A. Duff, "Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?"[1]

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1. R.A. Duff, *Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 Buff. Crim. L. Rev. 147, 155 (2003) (emphasis added).



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> Punishment, unlike torture, is by its nature exacted *for* something (viz. for some wrong or supposed wrong). So anyone who begins their evening out by saying "let's punish some people tonight" is making no sense until we get an answer to the question "Punish them for what? What are they supposed to have done?"
>
> —John Gardner, "What Is Tort Law For? Part 1. The Place of Corrective Justice"[2]

## INTRODUCTION

All observers of our legal system recognize that criminal statutes can be complex and obscure. But statutory obscurity often takes a particular form that most observers have overlooked: uncertainty about the identity of the wrong a statute aims to punish.

It is not uncommon for parties to disagree about the identity of the underlying wrong even as they agree on the statute's elements. Disagreement of this sort lay at the heart of Wisconsin v. Mitchell,[3] a case about the constitutionality of a Wisconsin hate crime law. The law imposed a penalty of up to seven years in prison on an assault offender who "'[i]ntentionally selects the [victim] . . . because of [his] race, religion, color, disability, sexual orientation, national origin or ancestry.'"[4] Wisconsin's high court struck down the law as contrary to the First Amendment, reasoning that it punished an offender not only for his assault but also for his "bigoted thought."[5] The U.S. Supreme Court disagreed. But it did not contest the Wisconsin court's construction of the law's *elements*. Rather, it took the law to punish a different *wrong*: a bigotry-driven assault.[6] Together, the two courts identified three candidates for the wrong being punished: an offender's bigotry, an offender's assault (conceived apart from the bigotry that motivates it), and an offender's bigotry-driven assault (conceived as a unitary wrong).

Why does it matter which of these wrongs was the actual object of punishment? It matters, first, to questions of penal *jurisdiction*: at least one of these wrongs (the offender's bigoted attitude) arguably lies outside the criminal law's proper ambit.[7] It matters, second, to questions of penal *justification*. If

2. John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice*, 30 LAW & PHIL. 1, 7 (2011).

3. 508 U.S. 476 (1993).

4. *Id.* at 480 (quoting WIS. STAT. §939.645(1)(b)).

5. State v. Mitchell, 169 Wis. 2d 153, 164 (1992), *rev'd*, 508 U.S. 476 (1993).

6. *Mitchell*, 508 U.S. at 484.

7. In what follows, I use the term "jurisdiction" in two related senses: one narrow, the other broad. In the narrow sense, jurisdiction concerns a given entity's authority to adjudicate a particular dispute. Questions of venue implicate jurisdiction in the narrow sense. In the broad sense, jurisdiction concerns the law's general authority to adjudicate disputes of a given type. Questions of the law's proper ambit (e.g., may the law punish people for their thoughts?) implicate jurisdiction in the broad sense.

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we do not know which of these wrongs the Wisconsin law punishes, we cannot judge whether the seven-year penalty is proportionate to its object. Nor can we determine whether it is fair to hold a given offender criminally accountable. People generally exercise less control over their attitudes than over their actions, so a particular offender might be justly held accountable for his assault but not for his bigotry.

This essay pursues two goals in tandem. The first is to show that a range of familiar debates about penal justification and jurisdiction actually reduce to disagreements about which wrong a law punishes. Examples include whether hate crime laws impermissibly punish "bigoted thought," whether loitering ordinances are unconstitutionally vague, where venue lies in a conspiracy prosecution, and whether statutory rape and drunk driving offenses should require mens rea. Part of what makes these questions challenging is that they hinge on deeper disagreements about the wrong a law punishes.

These deeper disagreements can be surprisingly hard to resolve, and the essay's second goal is to explain why. Does the offense of conspiracy criminalize (i.e., render punishable) the hyper-inchoate wrong of making a criminal agreement or the somewhat-less-inchoate wrong of beginning to carry that agreement out? Does Chicago's erstwhile "gang loitering" ordinance[8] criminalize the vaguely specified wrong of loitering with a suspected gang member or the clearly specified wrong of failing to obey a police officer's order to disperse? Does the offense of driving under the influence of alcohol criminalize the malum prohibitum wrong of driving with a blood alcohol level over 0.08% or the malum in se wrong of driving while unreasonably impaired? Does the offense of statutory rape criminalize the malum prohibitum wrong of having sex with someone under a given age or the malum in se wrong of having sex with someone of insufficient maturity? As we will see, we cannot answer any of these questions just by identifying the relevant law's elements. The wrong a law criminalizes turns out to be the product of diverse factors, including not only what the law says, but also how legal officials exercise their discretion to charge, convict, and sentence.

The essay is in four parts. Section I argues that every practice of condemnation and sanction requires that we identify the object of a given condemnatory sanction or else despair of resolving critical issues of jurisdiction and justification. The remaining sections explain why identifying the object of a condemnatory sanction is especially important and difficult in our system of criminal administration. Section II analyzes the central challenge of identifying penal wrongs: the surprisingly difficult task of determining whether a given element is *constitutive* or *conditional*. Constitutive elements help define the wrong a statute aims to punish; conditional elements establish

8. *See* City of Chicago v. Morales, 527 U.S. 41 (1999) (considering vagueness challenge to Chicago Municipal Code §8–4–015 (added June 17, 1992)).

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circumstances in which an offender may be punished for that wrong. Section III offers a typology of conditional elements, focusing on what I call *discretion-limiting elements*, which direct official attention to core instances of an amorphous or imperfectly specified wrong. As we will see, the wrong to which a discretion-limiting element directs official attention—and which the statute consequently criminalizes—is not always the action that the statute's constitutive elements describe. It is sometimes a wrong shaped less by the statute's text than by the discretionary mechanisms of its administration. Section IV vivifies this point by scrutinizing a British counterterrorism statute that employs a heretofore unexamined legislative technique. It prohibits an "act" that is less an act than a mere background circumstance, leaving behind a barely executed intention as the possible object of punishment. If the statute nevertheless criminalizes conduct rather than thought, it is only because of the manner in which the relevant officials exercise their discretion.

## I. BLAME AND CONDEMNATION: OBJECTS AND CONDITIONS

R.A. Duff draws attention to a critical if understated distinction between "the conditions of liability" and "the intentional objects of liability":[9]

> When I am blamed, or condemned, or held liable, there is something for which I am blamed, condemned, or held liable: which is to say that blame, condemnation and holdings of liability require an intentional object on which they are focused and towards which they are directed. Within any practice of blame, condemnation, or holding liable, there will also be conditions of liability—conditions which must be satisfied if the blame, condemnation, or holding liable is to be justified (or perhaps even intelligible) but which are not themselves part of the object of the blame, condemnation, or liability. It is, for instance, a condition of being justly blamed, or condemned, or held liable for a wrong I have committed that I am not mentally disordered in a way that undermines my responsibility for that action: but I am not blamed, or condemned, or held liable *for* not being mentally disordered.[10]

Duff's reason for distinguishing between conditions and objects of liability is largely theoretical: to clarify what is at stake in the debate over whether the ultimate basis of criminal responsibility lies in a person's choices or in her character. My aim in this section is to show that the distinction between conditions and objects of liability matters equally to substantive criminal law, and indeed to every practice or institution of condemnation.

Issues of jurisdiction and justification arise as often in ordinary life as in law. To resolve them, we must distinguish the transgression for which a

9. Duff, *supra* note 1, at 155.
10. *Id.*

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person is held to answer from the conditions on which the person is held to answer for it. Otherwise, we will be unable to determine whether the transgression lies within the jurisdiction of the relevant institution or practice, or whether the condemnatory response is justified—in particular, whether the response is proportionate to its object and the offender properly held accountable.[11]

These observations are banal, which could make them seem insignificant —as could the fact that we generally have little difficulty distinguishing the conditions on which blame, condemnation, and liability are imposed from the transgressions *for which* they are imposed. If you blame me for wronging you, you do not thereby blame me for any of the conditions that make your blame appropriate, such as my sanity and freedom from coercion, or the fact that you are not complicit in my wrong or guilty of a like wrong, or the fact that you have good reason to believe that I am the perpetrator. To blame me for a transgression is among other things to demand that I answer for it—by offering a justification, excuse, or other explanation, or by tendering an apology and striving to make amends. If I respond with an apology, you naturally will understand me to be apologizing for what I did, not for my sanity and freedom or for the evidence that justifies your belief that I am the perpetrator. Much the same is true in criminal law. A criminal offender is supposed to be held liable for an offense only if he was afforded a fair trial and proved guilty beyond a reasonable doubt. These things are conditions of the offender being held liable; they are not what he is being held liable for. To hold an offender liable for an offense is to subject him to censure and condemnation,[12] censure and condemnation whose object is the offense itself, not the fact that he was proved guilty of it.

To insist that criminal liability involves censure and condemnation is not to deny that a punishment's condemnatory function can serve further ends, such as deterrence and incapacitation. It is simply to describe a feature of punishment as a sociolegal practice. This feature is what generates the multifaceted demand captured by the principles of jurisdiction and justification: if an offender is to be held liable justly, he must be held liable for a transgression that the law has a right to subject to condemnation, the severity of that condemnation must be proportionate to the gravity of the transgression, and the transgression must be something for which the offender may fairly be held accountable under the circumstances.

Whether a given instance of punishment satisfies this multifaceted demand is often difficult to determine. Yet it might seem that the principal difficulty stems from the challenge of resolving hard questions of jurisdiction,

11. Proportionality and accountability are not the only considerations relevant to determining whether a given punishment is justified. But (as we will see) they are considerations especially sensitive to the identity of a given punishment's object.

12. *See* Joel Feinberg, *The Expressive Function of Punishment*, *in* Doing and Deserving: Essays in the Theory of Responsibility 95–118, 98 (1970).

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proportionality, and accountability: determining the proper bounds of the criminal law, gauging whether a given punishment fits its object, and identifying the true basis of criminal accountability. Distinguishing objects from conditions of liability might seem a comparatively straightforward task. The most salient conditions of liability are facts about the offender's capacities, about the history and authority of the person or entity holding the offender accountable, and about the procedures that govern the relevant practice or institution—each of these facts impossible to confuse with the transgression being condemned.

But it would be a mistake, and a serious one, to think that we can always isolate the object of liability simply by setting to one side all pertinent facts about an offender's capacities, about the procedures by which the relevant person or entity calls him to account, and about that person or entity's history and authority. In law and morality alike, the conditions of liability sometimes include an offender's very acts and mental states, as well as circumstances that closely accompany the transgression being condemned yet are nonetheless distinct from it. In some cases, the temporal span during which a transgression occurs contains multiple overlapping transgressions, only one of which is the object of a given instance of condemnation. If you throw a rock at me and miss, I may hold you to answer for your failed act, for the injurious intention that motivated it, or for the antisocial disposition that your intention manifests.

Although these transgressions coincide, they are distinct, and it matters which of them you are held to answer for. It matters in the first instance because the transgression for which you are held to answer must lie within the jurisdiction of the actor or institution that condemns you. Your disposition, your intention, and your act may all lie within the bounds of interpersonal morality, but only your act indisputably lies within the proper scope of the criminal law.

Whether a given transgression lies within the jurisdiction of a particular condemnatory institution is a question that exercises courts somewhat less often than it exercises theorists. One reason is that the U.S. Constitution imposes few limits on what the law may criminalize.[13] Another is that many of the cases examining whether a given statute transcends constitutional limits are primarily about where those limits lie, not about the identity of the underlying transgression that the statute under constitutional attack aims to punish. The parties to these cases typically agree on the identity of the underlying transgression. Their fundamental dispute is about whether that transgression lies within the law's proper bounds. This is true of disputes over the criminalization of abortion, for example.[14] It is also true of disputes over the criminalization of certain forms of sexual

13. *See* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 509–510 (2004).

14. Compare the majority and dissenting opinions in Roe v. Wade, 410 U.S. 113 (1973).

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contact between consenting adults.[15] In both contexts, the disputants agree about the identity of the conduct the law aims to punish. They disagree (only) about whether the state may punish it.

But in other contexts the reverse is true: the disputants agree in the abstract about the criminal law's proper bounds but disagree about whether a given statute transcends them—often because they disagree about which of several coinciding transgressions the statute aims to punish. This is true of disputes over the constitutionality of hate crime laws. At the outset, I mentioned Wisconsin v. Mitchell,[16] which involved a challenge to Wisconsin's hate crime penalty-enhancement law, a provision that increases the maximum penalty for assault from two years to seven "whenever the defendant '[i]ntentionally selects the [victim] . . . because of [his] race, religion, color, disability, sexual orientation, national origin or ancestry.'"[17] Although Wisconsin's high court and the Supreme Court differed over the provision's constitutionality, they agreed that the penal law must never punish thought—they agreed, in other words, about the law's proper bounds. But they disagreed about whether the hate crime provision exceeded them. The Wisconsin court held that the provision punished "bigoted thought,"[18] while the Supreme Court held that the provision punished assault, the enhancement feature serving merely to allow a sentencing judge to impose especially harsh punishment for an assault motivated by bias.[19]

These competing interpretations of the enhancement provision differ more than verbally. They represent substantive alternatives—rival conceptions of the wrong for which a bigoted offender is punished under Wisconsin law. According to the Supreme Court, the enhancement provision operates in tandem with the law criminalizing assault to punish an offender for a bias-motivated assault conceived as a unitary wrong.[20] According to the Wisconsin high court, by contrast, the offender is punished simultaneously for *two* wrongs: for his mere assault (which lies within the law's proper ambit) and for his bigotry (which arguably does not). All three of these wrongs—the mere assault, the bigotry, and the bias-motivated assault—occur at the same time. But they are distinct. And it matters which of them the state decides to punish, because at least one of them arguably lies outside the criminal law's jurisdiction.

15. *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that Georgia statute criminalizing consensual "homosexual sodomy" does not violate U.S. constitution), *with* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that Texas statute criminalizing consensual "homosexual sodomy" violates U.S. Constitution).

16. 508 U.S. 476 (1993).

17. *Id.* at 480 (quoting Wis. Stat. §939.645(1)(b)).

18. State v. Mitchell, 169 Wis. 2d 153, 164 (1992), *rev'd*, 508 U.S. 476 (1993).

19. *Mitchell*, 508 U.S. at 484 et seq.

20. The error of certain criticisms of hate crime laws is that they fail to appreciate how the underlying object of punishment might be a unitary wrong of this sort. *See* Gabriel S. Mendlow, *Thoughts, Crimes, and Thought Crimes*, 118 Mich. L. Rev. (forthcoming 2020).

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Even if these wrongs all lay inside the criminal law's jurisdiction, however, we still would need to know which of them served as the underlying object of liability, or else we could not determine whether the law's condemnatory response was proportionate to its object. If you throw a rock at me and miss, it matters whether the condemnatory response is for your failed act, for the injurious intention that motivated it, or for the antisocial disposition that your intention manifests. It matters because your antisocial disposition may warrant a harsher or milder punishment than your injurious intention, and your injurious intention may warrant a harsher or milder punishment than your failed act—perhaps a substantially harsher one if your act falls far short of its mark.

The demand for proportionate punishment therefore supplies a practical reason to answer a classic theoretical question about attempt liability: Does the offense of attempt punish an act on the condition that it was performed with a criminal intention, or a criminal intention on the condition that it was evidenced through an act?[21] If attempt liability imposes punishment for an actor's intention, as the Model Penal Code's attempt provision supposedly does,[22] it would seem to follow (all else equal) that an offender's sentence should remain the same no matter how close she comes to completing the crime, that liability for an attempt should arise well before an offender completes her intended crime (as the Code provides[23]), and that punishment for an unsuccessful attempt should be as severe as punishment for a successful one (as the Code permits[24]). Considerations of proportionality warrant treating all of these cases alike.

In sum, issues of jurisdiction and justification often elude easy resolution. That is partly because the principles of jurisdiction and justification are contested. But it is also because, in applying these principles, we may be applying them to transgressions of uncertain identity. It is now time to consider what can obscure the identity of criminal transgressions in particular, and why that sort of obscurity can be so hard to dispel.

21. This question is the gist of the dispute between "objectivist" and "subjectivist" theories of criminal attempts, on which *see* R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007), at 96.

22. Model Penal Code §5.01 provides that "[a] person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Citing the Model Penal Code's attempt provision, *The Encyclopedia of Crime and Justice* says that "modern attempt law comes fairly close to the punishment of mere intentions. What little conduct on the part of the accused is required (and sometimes that is minimal indeed) is explicitly seen as serving an evidentiary role of corroborating the accused's criminal intent." Meier Dan-Cohen, *Actus Reus*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 15, 17 (Sanford H. Kadish ed., 1983). *See* AM. LAW INST., MODEL PENAL CODE & COMMENTARIES PART I, §5.01, 298 (1985).

23. AM. LAW INST., *supra* note 22, at 321.

24. *See* MODEL PENAL CODE §5.05(1).

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## II. CONDITIONAL AND CONSTITUTIVE OFFENSE ELEMENTS: ON THE OBSCURITY OF STATUTORY WRONGS

We may punish a person only if he violates a criminal statute, and he violates a criminal statute only if he satisfies its elements. But it does not follow that his satisfying the statute's elements is necessarily what we are punishing him *for*. In many statutes, not all of the elements are constitutive—not all help constitute the wrong being punished. Some are merely conditional, establishing *when* to punish rather than what to punish for. Paradigmatic examples are the elements that the Model Penal Code deems nonmaterial: those that "relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with . . . the harm or evil, incident to conduct, sought to be prevented by the law defining the offense."[25] Section 922(g) of Title 18 of the U.S. Code makes it a crime for a convicted felon to possess a gun if that gun or its components once "affect[ed]" interstate commerce.[26] The nexus with interstate commerce is purely conditional. It establishes that a felon may be punished for possessing a firearm (only) when the firearm traveled in interstate commerce. The wrong punished is the wrong of possessing a firearm, not the "wrong" of possessing a firearm that once traveled in interstate commerce. Offenders convicted under the statute are not being punished for the fact that their guns traveled in interstate commerce any more than they are being punished for the fact that they received a fair trial. That is presumably why they cannot claim in their defense that they were oblivious to the interstate nexus.[27]

While anyone can see that nonmaterial elements are purely conditional, few commentators seem to recognize that many conditional elements are quintessentially material: unquestionably connected with the harm or evil sought to be prevented by the law defining the offense. And no one seems to have noticed how difficult it can be to determine whether a given element is conditional or constitutive. Both of these points will emerge in the discussion that follows.

The truth is that we usually cannot classify a statute's elements as constitutive or conditional until we have identified the underlying transgression being punished. A given fact can play a conditional role in one statute and a constitutive role in another. A fact might even play dual roles within a single statute. In Section 1751 of Title 18 of the U.S. Code, which makes it a crime to kill the president, the victim's status as president obviously serves to grant the federal government jurisdiction to prosecute the killing. But it is hardly as though Congress enacted this statute in an effort to criminalize the general wrong of killing and failed for want of jurisdiction. Congress

25. *See id.* §1.13(10).
26. *See* 18 U.S.C. 922(g).
27. United States v. Blount, 111 F.3d 129, 129 (4th Cir. 1997).

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enacted Section 1751 (shortly after the Kennedy assassination) with a far narrower goal: to punish the distinctively political wrong of killing the leader of the United States.[28]

This wrong's identity is a matter of consensus. But sometimes the identity of the wrong being punished is a matter of tortuous, normatively inflected controversy. In the conspiracy case of Hyde v. United States,[29] the defendants formed a criminal agreement in California and one of them later performed an "overt act" in furtherance of the conspiracy in the District of Columbia. Prosecuted for conspiracy in D.C., the defendants complained of improper venue. They argued in effect that the act performed in D.C. was no part of the wrong punished by the federal conspiracy statute, a wrong properly conceived as the criminal agreement alone. Although the defendants lost their appeal, their argument persuaded Justice Oliver Wendell Holmes, who asserted in his dissenting opinion that "[t]he overt act is simply evidence that the conspiracy has passed beyond words and is on foot when the act is done. As a test of actuality it is made a *condition* to punishment, but it is no more a part of the crime . . . than is the fact that the statute of limitations has not run."[30] The Court's majority countered that "[the overt] act is something more . . . than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy, and all incur guilt by it, or rather complete their guilt by it. . . ."[31] The majority then rejected the proposed evidentiary conception of the overt act requirement in language that appeared to deny the very possibility of a purely conditional offense element: "It seems like a contradiction to say that a thing [i.e., an overt act] is necessary to complete another thing [i.e., the crime of conspiracy], and yet that other thing is complete without it. It seems like a paradox to say that anything . . . can be a crime of which no court can take cognizance."[32]

This possibly facetious argument is hard to accept as the true basis of the majority's holding. It is no more a paradox to say that a conspiracy-sans-overt-act is "a crime of which no court can take cognizance" than it is a paradox to describe as a burglar someone who cannot be prosecuted for burglary because the statute of limitations has run. The real basis of the judicial disagreement was deeper and fundamentally normative. Justice Holmes feared that construing the wrong of conspiracy broadly would engender prosecutorial oppression by allowing "the government to prosecute [a conspirator] in any one of twenty states in none of which the conspirators had been."[33] The majority feared that construing the wrong of conspiracy narrowly (as Justice Holmes favored) would "give

28. *See* H.R. REP. NO. 89–488, at 3 (1965).
29. 225 U.S. 347 (1912).
30. *Id.* at 388 (Holmes, J., dissenting) (emphasis added).
31. *Id.* at 359.
32. *Id.* (internal quotation marks omitted).
33. *Id.* at 387; *see also id.* at 386–387.

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[the conspirator] a kind of immunity from punishment because of the difficulty in convicting him—indeed, of even detecting him."[34]

This clash of views shows how a judge's normative commitments—here, a commitment to expanding the scope of prosecutorial power (as opposed to contracting it)—can lead the judge to adopt a broad (as opposed to narrow) construction of the underlying statutory wrong, which in turn may lead the judge to classify some element as constitutive (as opposed to conditional).

A commitment to prosecutorial power does not always lead judges to construe statutory wrongs broadly, however, nor does an aversion to such power always lead judges to construe them narrowly. The opposite tendencies are at play when the issue in dispute is whether the breadth of a statute exceeds constitutional limits. In that context, a judge fearing prosecutorial oppression may construe the underlying wrong broadly, so as to bathe the statute's putative unconstitutionality in the brightest light. In City of Chicago v. Morales,[35] a plurality of the Court's members gave a broad construction to a "gang loitering" ordinance that they then held unconstitutionally vague. The ordinance imposed up to a six-month jail term on "criminal street gang members" (or their companions) who had refused a police order to disperse after being observed "loitering," which the ordinance defined as "remain[ing] in any one place with no apparent purpose."[36] The plurality held that the ordinance was unconstitutionally vague because it did not afford adequate notice of what sort of conduct was forbidden. The plurality found it "difficult to imagine how any Chicagoan standing in a public place with a group of people would know if he or she had an 'apparent purpose.'"[37] The plurality did not care that loiterers could be punished only if they had disregarded a police order to disperse. "Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order," wrote the plurality, "*the loitering is the conduct that the ordinance is designed to prohibit.*"[38] In dissent, Justice Clarence Thomas construed the underlying wrong (far) more narrowly. "At the outset," he wrote, "it is important to note that the ordinance does not criminalize loitering per se. Rather, *it penalizes loiterers' failure to obey a police officer's order to move along.*"[39]

Superficially, the dispute between Justice Thomas and the plurality hinged on their divergent conceptions of the wrong being punished. Justice Thomas deemed loitering with no apparent purpose a condition of liability for the narrow and clearly defined wrong of disobeying a police officer's order to move along. The plurality deemed disobeying a police

34. *Id.* at 363.
35. 527 U.S. 41 (1999).
36. *Id.* at 47 (plurality opinion) (quoting Chicago Municipal Code §8–4–015 (added June 17, 1992)).
37. *Id.* at 42.
38. *Id.* at 58 (emphasis added).
39. *Id.* at 106 (Thomas, J., dissenting) (emphasis added).

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officer's order to move along a condition of liability for the broad and poorly defined wrong of loitering with no apparent purpose. But (as in *Hyde*) the real basis of the judicial disagreement was deeper. The plurality reasoned that the ordinance "afford[ed] too much discretion to the police and too little notice to citizens who wish to use the public streets"[40] in the exercise of their right to "freedom of movement,"[41] a right whose exercise the plurality deemed the underlying object of liability. Justice Thomas responded by denigrating the supposed "fundamental right to loiter"[42] and asserting that "the law assumes that the police will exercise [their] discretion [to act as peace officers] responsibly and with sound judgment."[43] As in *Hyde*, the way the justices (implicitly) classified the elements of the "gang loitering" ordinance was an epiphenomenon of how they construed the wrong being punished, their respective constructions of that wrong flowing from deeper normative considerations about the rights of citizens and the proper role of law enforcement officers.

Because the considerations that undergird a court's construction of statutory wrongs are contestable and various, I doubt that we can say anything systematic about how such considerations generally ought to inform the process of ascertaining the wrong a statute criminalizes. I do not deny the possibility of a theory of statutory wrongs, but I doubt the feasibility of a *comprehensive* theory. Thanks to the diversity and complexity of the normative disputes that a comprehensive theory of statutory wrongs would be called upon to resolve, the theory could end up nearly as complex and variegated as its subject matter.

The infeasibility of a comprehensive theory of statutory wrongs probably will not disappoint anyone who thinks most criminal statutes are fundamentally like Chicago's "gang loitering" ordinance: a forward-looking measure designed to disable threats to public safety, rather than a backward-looking measure designed to punish wrongs. Another example of a statute with a blatantly forward-looking design is the Armed Career Criminal Act,[44] which mandates a prison sentence of at least fifteen years for anyone caught possessing a gun after sustaining three convictions for a violent felony or a serious drug offense.[45] Congress did not even pretend that it had fashioned the fifteen-year sentence to fit the wrong of possessing a firearm. Congress's avowed and overriding purpose was to incapacitate repeat offenders,[46] the Act being an example of what A.P. Simester calls a "prophylactic

40. *Id.* at 64 (plurality opinion).
41. *Id.* at 54.
42. *Id.* at 113.
43. *Id.* at 109.
44. Codified at 18 U.S.C. §924(e).
45. *Id.*
46. *See* H.R. REP. No. 98–1073, at 1.

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crime,"[47] a crime that prohibits a given act for the purpose of preventing some remote harm that the prohibited act causes or correlates with.

Contrary to appearances, the rise of prophylactic crimes does not render this essay's subject academic. Even when a penal statute's overriding aims are to incapacitate and deter, it necessarily achieves these aims by condemning and sanctioning offenders for supposed wrongs. That is what makes it a *penal* statute. But if a statute condemns and sanctions offenders for supposed wrongs, then it subjects itself to the principle of proportionality—a principle that should matter not just to retributivists but to anyone who thinks the state should not condemn someone falsely, either for an offense he did not commit or for an offense graver than the one he did commit. As Andrew von Hirsch and Andrew Ashworth explain, "[o]nce one has created an institution with the condemnatory implications that punishment has, then it is a requirement of justice, not merely of efficient crime prevention, to punish offenders according to the degree of reprehensibleness of their conduct."[48] Condemnation disproportionate to fault is presumptively unjust, no matter how weighty a statute's preventive justification. Although a compelling preventive justification conceivably might outweigh the injustice of disproportionate punishment, that injustice is something that must be overcome rather than ignored. To know whether it has been overcome, we must know its severity: how much the harshness of the sanction exceeds the seriousness of the wrong. But to know how much the harshness of the sanction exceeds the seriousness of the wrong, we first must know the wrong's identity.

## III. A TYPOLOGY OF CONDITIONAL ELEMENTS: OR, HOW STATUTES MAY PUNISH WRONGS DIFFERENT FROM THE ACTIONS THEIR ELEMENTS DESCRIBE

Although we probably cannot produce a comprehensive theory of statutory wrongs, we can give a systematic account of conditional elements—an account that shows how given statutes may criminalize wrongs different from the actions their elements describe.

Conditional elements are mostly of two basic types. *Authority-determining* elements serve to ensure that the relevant tribunal possesses the authority to hold an offender liable for the wrong being punished. This authority is lacking if the wrong occurred too far away (venue) or too far in the past (statute of limitations), or if the wrong did not touch on a matter within the tribunal's jurisdiction.

47. A.P. Simester, *Prophylactic Crimes*, *in* Seeking Security: Pre-empting the Commission of Criminal Harms (G.R. Sullivan & Ian Dennis eds., 2012).

48. Andrew von Hirsch & Andrew Ashworth, Proportionate Sentencing: Exploring the Principles (2005), at 134.

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The other basic type of conditional element is *discretion limiting*, and it is this type with which the present section is principally concerned. Discretion-limiting elements direct the criminal legal system to condemn and sanction offenders only for certain instances of a wrong. These elements come in several varieties. *Evidentiary* elements direct the legal system to punish the most provable instances of the underlying wrong. *Severity-screening* elements direct the legal system to punish the most serious instances of the wrong. *Clarity-screening* elements direct the legal system to punish those instances of the wrong that violate the underlying moral norm most unequivocally.[49] As we will see, when courts decide not to require mens rea regarding an offense element, the reason is often that they see the element as channeling legal actors' discretion in at least one of these three ways, rather than as helping constitute the underlying wrong. Thus, disagreements about whether to require mens rea—a type of disagreement about the circumstances in which we are justified in holding an offender accountable for some wrong—often implicate disagreements about the wrong's very identity.

We have encountered one purportedly discretion-limiting element already: the overt act requirement in conspiracy. Years after *Hyde*, the Supreme Court in Yates v. United States came around to something like Justice Holmes's view that the overt act element is but a condition on which offenders may be punished for the wrong of forming a criminal agreement. The Court in *Yates* said that "[t]he function of the overt act . . . is simply to manifest 'that the conspiracy is at work' . . . and is [not] a project still resting solely in the minds of the conspirators."[50] The Court's remark could mean that the overt act element serves a kind of evidentiary function, confining punishment to criminal agreements provable on the basis of publicly observable facts (those evidenced by a verifiable act). Or it could mean that the overt act element serves a kind of severity-screening function, confining punishment to criminal agreements firm enough to have been "manifest[ed]" in outward conduct. Or it could mean both of these things at once.

Some discretion-limiting elements may look evidentiary or severity screening when their true function is subtly different. Rather than sorting well-evidenced instances of a wrong from poorly evidenced ones, or grave instances of a wrong from mild ones, some discretion-limiting elements may sort unequivocal instances of a wrong from uncertain ones. These clarity-screening elements provide a vital check on the discretion of judges and prosecutors tasked with administering statutes that embody moral

49. What I am calling a "discretion-limiting element" relates closely to what Meir Dan-Cohen calls a "decision rule," a rule directed to the legal officials who administer rules of primary conduct. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

50. Yates v. United States, 354 U.S. 298, 334 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

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norms of indeterminate contours.[51] A classic example is the nineteenth-century English statute at issue in Regina v. Prince.[52] The statute made it a crime to "unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any person having the lawful care or charge of her."[53] The presiding judge in *Prince* interpreted the statute as embodying a Victorian moral norm against absconding with a "girl" contrary to the wishes of her guardian—a norm substantially broader than the *criminal* norm that the statute created. "[W]hat the statute contemplates, and what I say is wrong," explained the judge, "is the taking of a female of such tender years that she is properly called a *girl*, can be said to be in another's *possession*, and in that other's *care or charge*. . . . The legislature has enacted that if anyone does this wrong act [taking a 'girl' without her guardian's permission], he does it at the risk of her turning out to be under sixteen."[54] The "wrong" that the judge described is broader than a violation of the statutory prohibition because a female over the age of sixteen still might be "of such tender years that she is properly called a girl" by the standards of Victorian England. Thus, many "girls" who fall within the ambit of the underlying moral norm nevertheless fall outside the scope of the statutory proscription. Thanks to the age element, the statute criminalizes only certain instances of the underlying wrong: those in which the "girl" taken is under the age of sixteen. As for the requisite mens rea, an awareness that the victim is a "girl" (whether or not under the age of sixteen) is all that is required for a culpable commission of the wrong. Hence the rule for which *Prince* is famous: the prosecutor need not prove that the defendant knew the victim's chronological age.

The age element in *Prince* is clarity screening, not severity screening. By the lights of a Victorian observer, the covered instances of the underlying wrong might not be the most grievous ones. A Victorian observer probably would judge the gravity of a "taking" less by the girl's age than by her social station and the vehemence of her guardian's opposition. Such an observer might well condemn the "taking" of a "girl" in her mid-twenties if done over her guardian's objection, yet approve the guardian-sanctioned "taking" of a girl of only eleven or twelve. The age element's function therefore is not (primarily) to sort instances of the underlying wrong in terms of their comparative gravity. As Meir Dan-Cohen suggests, the age element serves instead to "define, as clearly and precisely as possible, a range of punishable conduct that is unquestionably within the bounds of the [underlying] moral norm"[55]—there being no doubt that a female under the age of

51. *Cf.* Dan-Cohen, *supra* note 49, at 650.
52. 2 L.R.-Cr. Cas. Res. 154 (1875).
53. Offences Against the Person Act 1861, 24 & 25 Vict., c. 100, §55 (Eng.).
54. *Prince*, 2 L.R.-Cr. Cas. Res. at 175 (Bramwell, B.).
55. Dan-Cohen, *supra* note 49, at 650.

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sixteen is "of such tender years that she is properly called a *girl*."[56] On this reading of the statute, the legislature deployed the age element to ensure that judges and prosecutors would focus their attention on exceedingly clear-cut violations of the underlying moral norm. Although other violations of the norm might be just as heinous, such violations will tend to be less identifiable as violations when the females involved are older than sixteen. The statute accommodates this indeterminacy by depriving judges and prosecutors of the discretion to police the moral norm's uncertain boundaries.

One way of understanding the age element in the contemporary offense of statutory rape is to regard it as serving a clarity-screening function similar to that of the age element in *Prince*. Underlying the typical statutory rape offense is a moral norm that most commentators conceive as a proscription on sexual contact with people either too immature to consent to sex or too immature to have sex without risking serious physical or psychological injury.[57] This norm is broader than the statutory rape offense it underlies, because some people above the age of consent also may be too immature for sex. The age element evidently aspires to limit prosecutorial and judicial attention to people who are *presumptively* too immature for sex, singling out the (supposedly) most clear-cut instances of the moral wrong of having sex with an immature person (although perhaps also sweeping in some innocent conduct as well, a complication I will address presently). The age element therefore serves to deprive prosecutors and judges of the discretion to make contestable judgments about the maturity of particular young people.[58]

Arguably serving a similar discretion-limiting function is the blood alcohol threshold in the typical per se DUI offense. This offense penalizes anyone who drives with a blood alcohol level over a given threshold (usually 0.08%). Commentators often analyze the per se DUI offense alongside statutory rape because both offenses use bright-line criteria to track what looks to be a far less determinate moral wrong. Underlying the typical per se DUI offense is a moral norm against driving while unreasonably impaired by alcohol. The moral norm is broader than the statutory prohibition because some people under the limit are still unreasonably impaired. In isolation, this feature of the offense seems to indicate that the blood alcohol threshold completely deprives prosecutors and judges of the discretion to make

56. *Prince*, 2 L.R.-Cr. Cas. Res. at 175 (Bramwell, B.).

57. Perhaps a more accurate rendition of the norm would be a proscription on sexual conduct with people either too immature to consent to sex *with an older person* or too immature to have sex *with an older person* without risking serious physical or psychological injury.

58. In addition to screening for clarity, the age element in statutory rape offenses also may screen for severity, insofar as immature people under a given age are on the whole (even) less capable of consent and (even) more vulnerable to harm than are immature people over that age. It's safe to say that the lower the critical age in a statutory rape offense, the more the age element screens for severity and the less it screens for clarity. Where the critical age is very low, e.g., ten, the age element probably screens only for severity, as sexual contact with people a year or two over that age is assuredly an equally clear-cut violation of the underlying moral norm.

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contestable judgments about a given driver's impairment. But the blood alcohol threshold usually does not deprive these actors of all discretion, because jurisdictions typically employ dual drunk driving statutes: one that creates a rule-like per se prohibition on driving with a blood alcohol level over 0.08%, and another that creates a standard-like prohibition on driving while unreasonably impaired by alcohol.[59] The standard-like prohibition enables the legal system to punish drivers whose driving is actually impaired but whose blood alcohol content is under the limit or not provably over it. The blood alcohol element in per se DUI statutes therefore is not discretion *stripping*. But it is still discretion limiting: like the age element in statutory rape, the blood alcohol threshold aspires to focus prosecutorial and judicial attention on exceedingly clear-cut instances of the underlying moral wrong.

I say that the blood alcohol threshold *aspires* to focus attention on exceedingly clear-cut cases of the underlying wrong because the statute is theoretically overinclusive: some people over the limit might in theory be able to drive safely, just as some people under the legal age of consent might in theory be mature enough for sexual contact with older people. Given these apparent problems of fit, commentators tend to regard per se DUI offenses and statutory rape offenses as "hybrids," offenses that are "similar to but different from wholly *mala in se* or *mala prohibita* offenses in the following respect. Persons can . . . commit these offenses without doing anything wrongful prior to or independent of law. . . . But some instances of these offenses are wrongful prior to or independent of law."[60]

Construed as a "hybrid" offense, the typical per se DUI statute might seem unfair, as it punishes equally the offender whose conduct is malum in se—whose driving is unreasonably dangerous because of his drinking—and the offender whose conduct is merely malum prohibitum—whose driving is reasonably safe *despite* his drinking.[61] Why do courts tolerate this apparent unfairness?

Let me venture a hypothesis, one that not only answers the question I just posed but also substantiates a central claim of this essay: that the wrong a statute criminalizes may be an action its elements do not describe. My hypothesis is that courts do not regard the typical per se DUI offense as a "hybrid"; instead, they regard it as punishing the malum in se offense of driving while unreasonably impaired by alcohol, but only on the condition that the defendant was over the limit. On its face, the typical DUI statute

59. A typical approach to drunk driving is California's. *See* People v. McNeal, 46 Cal. 4th 1183, 1193 (2009) (discussing California's "two parallel statutes making it a crime to drive while intoxicated," one "requiring proof that the defendant was actually impaired by his drinking," the other "simply requir[ing] proof that the defendant had been driving with a blood alcohol level over the legal limit").

60. Douglas N. Husak, Overcriminalization: The Limits of the Criminal Law (2008), at 107.

61. *See, e.g.*, *id.* at 103–119; R.A. Duff, *Crime, Prohibition, and Punishment*, 19 J. Applied Phil. 97 (2002); Duff, Answering for Crime, *supra* note 21, at 166–172.

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says nothing about the moral wrong of driving while impaired. It speaks only of a per se rule. But suppose courts assume that when someone violates the per se rule he almost certainly commits the moral wrong. This assumption would make sense of the nontrivial carceral penalties that courts impose on drunk drivers.[62] And it would lead us to see the blood alcohol element not as constitutive but as discretion limiting: as serving to confine punishment to the clearest-cut instances of the *moral* wrong of driving while impaired. My hypothesis, then, is not that courts regard the statute as punishing a "legal" wrong (driving while over the limit) that coincides with a moral wrong (driving while too impaired by alcohol to drive safely). My hypothesis is that courts regard the statute as criminalizing the moral wrong itself. On this approach, the legal wrong *is* the moral wrong—even though the elements do not literally describe it.

One reason to believe this is how courts understand per se DUI statutes is that courts are not remotely inclined to require proof of a drunk driver's mens rea. If the blood alcohol element were constitutive rather than discretion limiting, courts would feel pressure to require culpability as to blood alcohol level. Considerations of fairness and moral blame usually lead courts to require than an offender be aware (or culpably unaware) of what makes his conduct wrongful. But courts are not at all inclined to interpolate mens rea in per se DUI statutes—even though none of the usual exceptions to the presumption in favor of mens rea seems to apply. One exception applies when "penalties . . . are relatively small, and conviction does not [do] grave damage to an offender's reputation."[63] But the penalties for DUI are nontrivial, and a conviction may do substantial damage to an offender's reputation.[64] Another exception to the presumption in favor of mens rea applies when separate proof of a culpable mental state is unnecessary because the offense is so defined that anyone who commits the underlying wrong is almost certainly aware (or culpably unaware) of the fact that he is committing that wrong.[65] But an impaired driver surely could be reasonably unaware of his blood alcohol percentage.

A better explanation of why courts never require proof of such awareness is that they simply do not regard driving with a blood alcohol level over 0.08% as the wrong being punished. If courts assume that anyone who

62. A drunk driver in Arizona, for example, faces the following mandatory penalties: if his blood alcohol concentration exceeds 0.08%, a minimum of 10 days in jail on a first offense and 90 on a second offense; if his blood alcohol concentration exceeds 0.15%, a minimum of 30 days in jail on a first offense and 120 on a second offense; if one of several aggravating circumstances obtains (e.g., driving with a suspended license, driving with a person under fifteen in the vehicle), a minimum of two years in prison. *See* ARIZ. REV. STAT. ANN. §§12-1381–12-1383 (2017).

63. Morissette v. United States, 342 U.S. 246, 256 (1952).

64. *See supra* note 62.

65. In United States v. Freed, 401 U.S. 601 (1971), for example, the Supreme Court did not require the government to prove that a defendant charged with possessing unregistered hand grenades knew of the registration requirement, because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609.

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drives while over the limit knows or ought to know he is committing the moral wrong of driving while impaired, it is unsurprising that courts do not require separate proof that the defendant was aware he was committing that moral wrong. It is equally unsurprising that courts do not require proof that the defendant was aware he was driving while over the limit. On the present interpretation, driving while over the limit is not the wrong for which an offender is punished. The blood alcohol element on this interpretation is not constitutive but conditional. It confines punishment to impaired drivers who know or ought to know they are committing the moral wrong of driving while impaired, whether or not they know their blood alcohol level. So construed, the typical per se DUI statute is not a (partial) malum prohibitum offense. It is a malum in se offense employing a presumption of culpable wrongdoing for people driving while over the limit—culpable wrongdoing that itself is the very object of punishment, even though the statute's elements do not literally describe it.

It is natural to construe the offense of statutory rape as employing a similar presumption, one to the effect that anyone who has sex with a person below the age of consent knows or ought to know that his sexual partner is too immature for sex. This presumption is somewhat controversial—more so than the presumption that a driver operating over the limit knows or ought to know that he is unreasonably impaired. This difference explains another difference: whereas no jurisdiction requires proof that a driver was aware or culpably unaware of his blood alcohol content, a great many jurisdictions now permit an accused statutory rapist to present evidence that he was blamelessly mistaken about his sexual partner's age, "typically when the relevant age of consent is greater than [fourteen] or when the two parties are close in age."[66] It is revealing, however, that no one is troubled by the general unavailability of a mens rea defense when the statutory rape offense specifies a very low critical age (e.g., ten). An offender is no less likely to be blamelessly mistaken about whether a nine-year-old is under the age of ten than he is to be blamelessly mistaken about whether a fifteen-year-old is under the age of sixteen. Yet when the critical age is very low, most commentators drop the demand for proof of culpability as to age —including even the drafters of the Model Penal Code,[67] who otherwise insist on subjective culpability in almost all circumstances.[68] This about-face makes perfect sense if the wrong being punished is not the breach of a per se rule ("don't have sex with someone under the age of ten") but rather a moral wrong that the statute's elements do not literally describe: the wrong of having sex with someone whose extreme youth means that they are not only too immature to consent but also vulnerable to grievous physical

66. *See* Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes (10th ed. 2017), at 301.

67. Model Penal Code §213.6(1).

68. *See id.* §§2.02(1), 2.05(1).

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and psychological injury. There is no reason to require the state to prove an offender's culpable awareness of *this* wrong, because it is one we can presume a person knows or ought to know he is committing when he has sexual contact with a child who is in fact nine, whether or not he knows her chronological age.

If statutory rape law punishes the moral wrong of sex with an immature person, then the nominal statutory proscription is both overinclusive and underinclusive: in theory, some who violate the proscription do not commit the underlying wrong (because their partners are mature), and some who commit the underlying wrong do not violate the statutory proscription (because their immature partners are over the age of consent). Do these problems of fit mean that we cannot reasonably construe a strict liability statutory rape offense (i.e., one that denies a mens rea defense) as punishing the malum in se wrong of sex with an immature person? Must we conclude that any strict liability statutory rape offense punishes the malum prohibitum wrong of sex with someone below the age of consent? I have given several (nondecisive) reasons for thinking the answer to these questions is no—reasons that make good sense of why courts punish statutory rape offenders harshly without requiring evidence that they knew their victims' chronological ages. Similar reasons apply to DUI, notwithstanding comparable problems of fit.

Even when a statutory proscription fits tightly with the underlying moral wrong that the proscription aims to track, we still would do well to observe a conceptual distinction between a commission of the wrong and a violation of the proscription. Duff notes "how odd it would be for a person to refrain from murder, not because she saw it to be wrongful independently of the criminal law, but from respect for the law that criminalises it."[69] It would be just as odd for us to regard the state as punishing murderers for transgressing a statutory proscription, rather than as punishing them for committing the prelegal wrong of malicious killing—a prelegal wrong that the statutory proscription renders punishable but does not create. The purpose of having a law against murder is not to generate a new norm. It is to give legal effect to a preexisting one. In respect of such preexisting norms, Duff explains, "the criminal law has a declaratory rather than prohibitory meaning."[70] The law's role is "to declare that [certain] pre-legal wrongs are public wrongs: to declare, that is, not merely that they are wrongs . . . but that they are wrongs that properly concern the whole polity, which should call their perpetrators to public account through the criminal courts."[71]

Part of what makes it plausible to regard the offense of murder as criminalizing the prelegal wrong of malicious killing is that the statutory proscription tracks the prelegal wrong very closely. The fit is not perfect,

69. DUFF, *supra* note 21, at 87.
70. *Id.*
71. *Id.* at 86.

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however. For one thing, the statutory proscription is probably overinclusive: an anguished and compassionate mercy killing done with the consent of the victim is unquestionably a violation of the statutory norm, but it is not a paradigmatic instance of malicious killing. The statutory proscription is probably also underinclusive: certain inadvertent killings may display a degree of maliciousness equivalent to or even greater than that which is typically present when one kills purposely, knowingly, or recklessly. But these problems of fit do not compel us to abandon the view that the offense of murder typically punishes the prelegal wrong of malicious killing (on the condition that the offender satisfies any additional requirements mentioned in the statute, e.g., mens rea). Nor do similar problems of fit compel us to abandon the view that the offense of statutory rape typically punishes the prelegal wrong of sex with an immature person (on the condition that the victim was under the age of consent), or that the offense of DUI typically punishes the prelegal wrong of driving while unreasonably impaired by alcohol (on the condition that the driver's blood alcohol level exceeded the relevant threshold). In each of these cases, the statute may criminalize a wrong different from the exact action its elements describe.

## IV. THOUGHT CRIME: A CASE STUDY

If a statute can criminalize a wrong different from the action its elements describe, then a statute might in theory criminalize a wrong outside the law's ambit even as it appears not to. The likelihood of this scenario is probably greatest in the case of a prophylactic offense,[72] one that proscribes an act for the purpose of preventing a remote harm that the proscribed act causes or correlates with. The remote harm is usually a physical injury. (The offense of gun possession, for example, prevents people from getting shot.) But some prophylactic offenses may prevent evils less tangible and thus less plainly within the law's proper scope. This is the point of Amy Adler's description of the prohibition on child pornography as a "thought crime,"[73] and of Andrew Koppelman's suggestion that the ultimate evil targeted by the law of obscenity is a person's immoral sexual state of mind.[74] If

72. *See* Simester, *supra* note 47.

73. Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 995 (2001) (quoting Brief of National Law Center for Children and Families et al. as Amici Curiae in Support of the Respondent at Part IV.C., Knox v. United States, 510 U.S. 939 (1993) (No. 92–1183)). Adler's charge that child pornography prohibitions "police thoughts and fantasy, not actions," *id.*, was directed at the federal Child Pornography Prevention Act of 1996, which banned sexual images of youthful-looking adults and computer-generated images appearing to depict children engaged in sexual conduct. *See* 18 U.S.C. §2256(8)(B). Although this ban on "virtual" child pornography subsequently was struck down by the Supreme Court, *see* Ashcroft v. Free Speech Coal., 535 U.S. 234, 234 (2002), Adler's charge still applies to nonvirtual pornography insofar as Congress's reason for banning it is at least in part that "[Congress does] not like the way people think about certain pictures of children." Adler, *supra*, at 995.

74. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1637 (2005).

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these laws seek to prevent certain mental states, and to prevent them for the reason that they are morally condemnable—for the reason that "we do not like the way people think about certain pictures of children,"[75] as Adler says—are these mental states what the laws in question actually aim to punish?[76]

We should resist the temptation to deflect this question by insisting on Herbert Morris's distinction "between *what* it is we are punishing *for* and *why* it is that we are punishing."[77] Although there of course is a difference between a punishment's object and a punishment's purpose, it would be obtuse of us not to consider how a punishment's purpose might shape its object. Imagine a jurisdiction in which prosecutors bring statutory rape charges only when convinced that a defendant was (or ought to have been) aware that his victim was too immature for sex. Suppose prosecutors always introduce evidence of the victim's immaturity, even though such evidence is not probative of a defendant's guilt of the nominal offense (i.e., having sex with someone under the age of consent). Suppose judges always base the severity of a defendant's sentence on the extent of his victim's immaturity and on the degree of the defendant's awareness of that immaturity. Suppose everyone in the jurisdiction understands the statutory rape law as protecting sexually immature people and condemning those who culpably harm them. Given these things, it would be dogmatic of us to insist that the object of liability under the statutory rape law is the violation of a bright-line rule—"don't have sex with anyone under the age of consent"—rather than the commission of a moral wrong, the wrong of sex with an immature person. But if the object of punishment is the moral wrong, then the object of punishment takes its identity less from the statute's constitutive elements than from the manner in which the statute is administered and understood.[78]

Whether child pornography laws punish thought is another matter. In this case, there is a wider gap between the nominal object of punishment (possessing a commodity whose very existence does enduring harm to the depicted children) and the supposed "real" object of punishment (the thoughts that possessing the commodity tends to engender in certain people). Closing this gap would require weighty evidence about how child pornography laws are implemented and publicly understood[79]—evidence

75. *Id.*

76. In what follows, I assume for the sake of discussion that punishment for (mere) thought is unjust, although I do not think anyone has provided an adequate account of why that is. *See* Gabriel S. Mendlow, *Why Is It Wrong To Punish Thought?*, 127 YALE L.J. 2342 (2018).

77. *See* Herbert Morris, *Punishment for Thoughts*, 49 MONIST 342, 351 (1965).

78. I accordingly resist drawing too rigid a version of Nicola Lacey's distinction between what the law criminalizes formally (in "legislation, judicial decisions, international treaties") and what the law criminalizes substantively (through the "actual implementation of formal norms"). Nicola Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, 72 MODERN L. REV. 936, 943 (2009).

79. For some evidence of the relevant sort, *see* Andrew Gilden, *Punishing Sexual Fantasy*, 48 WM. & MARY L. REV. 419, 419 (2016) ("reveal[ing] a widespread and overlooked pattern of harshly punishing individuals for exploring their sexual fantasies on the Internet").

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weightier than that sufficient to bridge the narrower gap between the nominal and real objects of liability under the hypothetical statutory rape offense I described a moment ago. But while we may lack sufficient evidence to conclude that child pornography laws criminalize thought, my point is that we cannot rule out the possibility on textual grounds alone. Criminal administration can determine the object of punishment.

Now, if the law prohibiting child pornography criminalizes thought, that is because of how it is implemented and understood, not (simply) because of what it says, implies, or presumes. When commentators call a law a thought crime, however, they sometimes seem to mean that the law punishes thought by its very terms. That is what critics of the War on Terror seem to mean when they say that certain counterterrorism offenses come "dangerously close" to criminalizing mere thoughts.[80] We might be tempted to write off these claims as unserious or merely figurative, but that would be a mistake. As we will see, certain counterterrorism offenses come terribly close to criminalizing mere thoughts. If they nevertheless criminalize conduct, it is only because of the way the relevant officials exercise their discretion.

My primary purpose in exploring these matters is to underscore and exemplify a central claim of this essay: that the complex inner structure of our penal statutes and the discretionary mechanisms of their administration can obscure the object of punishment. A related aim is to bring attention to an unexamined legislative technique, whereby a statute criminalizes an "act" that is less an act than a neutral background condition, leaving behind a barely executed intention as the underlying object of punishment. It is a technique employed by the statute on which I will focus: Section 16(2) of the United Kingdom's Terrorism Act 2000, which makes it an offense, punishable by fifteen years in prison,[81] for a person to "possess money or other property" where the person "intends that it [the money or other property] should be used . . . for the purposes of terrorism."[82]

At first glance, the statute seems to criminalize an act of wrongful possession: possessing money or some other object with the intent to use it for terrorism. But that is misdirection. The statute does not criminalize an act of wrongful possession as much as it criminalizes the possession of a wrongful intention: intending to use your money or other property for terrorism. Money is as pervasive among human beings as clothing. Virtually everyone possesses some amount of both. Because the possession of money is a

80. Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism (2011), at 114–115 ("Many new terrorism offenses enacted after 9/11 pushed the envelope of inchoate liability and came dangerously close to creating status offenses, thought crimes, and guilt by association."); *see* Kent Roach, *Terrorism*, *in* The Oxford Handbook of Criminal Law 812, 814 (Markus D. Dubber & Tatjana Hörnle eds., 2014); Andrew Ashworth, *Criminal Law, Human Rights and Preventative Justice*, *in* The Redirection of Criminalisation and the Futures of Criminal Law 88–89 (B. McSherry, A. Norrie & S. Bronitt eds., 2009).

81. Terrorism Act, 2006, pt. 1, §13 (U.K.).

82. Terrorism Act, 2000, pt. 3, §16 (U.K.).

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normal background condition in human life, a person becomes guilty of an offense under Section 16(2) the very moment he forms the intention to use his money for purposes of terrorism. This striking fact suggests that the wrong being punished is the mere intention to use money for terrorism, not the normal background condition of money possession.

Imagine a statute that makes it an offense for a person to intend to kill someone with his bare hands. No one would deny that this statute creates a thought crime: the wrong it criminalizes is unquestionably a pure intention. Would things be otherwise if the statute made it an offense for a person *with hands* to intend to kill someone with his bare hands? Would anyone now insist that the wrong being punished is not the wrongful possession of an intention but the wrongful possession of hands?

A statute that criminalized possessing hands with the intent to kill might be called unfair, because it would direct someone who intends to kill with his bare hands to either change his mind or cut off his hands. But this sort of unfairness does not fully explain what inclines us against interpreting the statute as criminalizing the possession of hands. What inclines us against this interpretation is less a desire to avoid unfairness than the fact that possessing hands is a normal background condition in human life. Possessing hands is only in the weakest sense something that anyone *does*.

A hand is not a gun. Gun possession is not (or is not yet) a normal background condition in human life. It is optional and eminently avoidable. Possessing a gun is something you *do*, and something you might sensibly be called upon to stop doing. If a gun owner forms the intention to shoot someone, it becomes incumbent on him to abandon either the intention or the gun. If he abandons neither, his persistent gun possession becomes a continuing wrong, something for which he will rightly be condemned. Not so for the would-be strangler's persistent hand possession. Although we will condemn the would-be strangler for his intention to strangle, we will not condemn him for his possession of hands, even though he theoretically could rid himself of them. That is because hand possession is a normal background condition in human life. As such, possessing hands is not something we tend to think of as an act the would-be strangler performs in order to carry out his intention to strangle. Nor is hand possession something we tend to think of as augmenting his lethal intention's dangerousness or blameworthiness. To be sure, the would-be strangler is more dangerous with hands than without them. But the condition of no-handedness is not the relevant baseline. The relevant baseline is a condition of background normalcy, not one that involves unusual disabilities.

Now, if a statute made it an offense for you to intend to use *another's* money (not in your possession) for terrorism, no one would deny that the statute created a thought crime. The wrong the statute criminalized would clearly be a pure intention. What, then, of Section 16(2), which makes it an offense for you to intend to use *your own* money for terrorism? Must we say that the wrong the statute criminalizes is not the wrongful

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possession of an intention but rather the wrongful possession of money? Having money, like having hands, is a normal background condition in human life. Possessing money is only in the weakest sense something you *do*. It is a condition in which you virtually always find yourself. That condition does not suddenly cry out for condemnation the moment you form the intention to use your money for terrorism, any more than hand possession suddenly cries out for condemnation the moment you form the intention to strangle someone. The natural response to someone who intends to use his money for terrorism is not: "How dare you possess money (for that purpose)?! You'd better get rid of it." That is almost as awkward as saying: "How dare you possess hands for the purpose of strangling someone?! You'd better cut them off." The natural response to someone who intends to use his money for terrorism is rather: "How dare you *intend* to use your money for that purpose?!" It is the intention we condemn, not the act of possession. Being a pervasive background condition of normal life, possessing money is not something we tend to think of as an act a person performs in furtherance of his various financial intentions. To be sure, the would-be terrorist is more dangerous with money than without it. But, like no-handedness, the condition of abject penury is not the relevant baseline. The relevant baseline is a condition of background normalcy, not one that involves unusual disabilities. Literal pennilessness is as unusual a condition as no-handedness.

I doubt it is possible to furnish an analysis of what makes some status a neutral background condition akin to money possession. I have suggested that a condition's pervasiveness matters more than its innocuousness. But innocuousness is not irrelevant, nor is pervasiveness sufficient. I suspect that pervasiveness in the statistical sense is not even necessary: in a land of wretched poverty, money possession still might be a neutral background condition for those who possess money. As is often the case, it may be easier to identify clear instances of the phenomenon than to articulate necessary and sufficient conditions for its occurrence. If possessing money is a neutral background condition, what about possessing kitchen knives or screwdrivers? When done with a criminal intention, possessing these and other ubiquitous household items can satisfy the actus reus of the offense of possession of burglar's tools with intent to use them,[83] an offense that exists in some form in nearly every American state.[84] Potentially, these offenses punish larcenous intentions the same way Section 16(2) punishes terroristic ones.

83. Commonwealth v. Jones, 355 Mass. 170, 176 (1969).

84. Among the items that courts have considered burglar's tools are soap, a kitchen knife, a sponge, rubber gloves, a wrench, batteries, a candle, charcoal, a clock, cotton, an extension cord, adhesive tape, a flashlight, a funnel, a hammer, a needle, pliers, a razor blade, scissors, a screwdriver, toothpicks, tweezers, and Vaseline. *See Validity, Construction, and Application of Statutes Relating to Burglars' Tools*, 33 A.L.R.3d 798 (1970).

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Potentially. Whether these offenses actually punish intentions is not solely a function of their text—and that is the crucial point. Suppose that, as a matter of policy, prosecutors never brought charges under Section 16(2) unless the offender has actively raised or segregated funds for terroristic purposes. In that case, I would find it hard to accept that Section 16(2) really criminalized the mere possession of a wrongful intention. The wrong a statute criminalizes must be a wrong that it condemns. Thanks to the exercise of official discretion, a statute can condemn a wrong different from that which its terms describe.

I believe this point is widely accepted by courts, even if they rarely embrace it openly. Rarely, but not never. In the 1930s, a Tennessee railway filed a lawsuit complaining about the state taxation authority's longstanding practice of assessing public service corporations less generously than other forms of property. Because this differential treatment was not authorized by the text of any statute, the railway claimed that the taxation authority was breaking the law. Justice Frankfurter disagreed:

> [A]ll the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. *Settled state practice . . . can establish what is state law.* Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.[85]

The idea that what the law is can be determined by "[s]ettled . . . practice" is a cousin to the doctrine of desuetude, the somewhat controversial proposition that a settled practice of declining to enforce a statute can render it a nullity.[86] The idea I have been pressing is less sweeping and less controversial. It is that a settled practice of using a statute to punish one sort of transgression and not another can make it the case that the statute criminalizes only the first sort of transgression and not the second.

## CONCLUSION

Disagreement about a statute's elements might seem like the beginning and the end of uncertainty about which wrong the statute punishes. But it is only the beginning. Thanks to the complex inner structure of the penal law and the discretionary mechanisms of its administration, parties may disagree about which wrong a statute criminalizes even as they agree on the statute's elements. Hidden in plain sight, these largely unexamined

85. Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1940) (emphasis added).

86. *See* Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962), 143–156.

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disagreements underlie and exacerbate a range of familiar disputes, all of them related in some fashion to questions of jurisdiction, proportionality, and accountability. What makes these questions hard to answer is not just that the concepts they involve are contested. It is also that the wrong a statute punishes may be elusive and obscure.

The identity of the underlying wrong is often only partly a function of the statute's text and the legislature's intent. Often, what matters more is how the statute is interpreted by courts. Even when a court's interpretation is in some sense deficient—because it contravenes a statute's text, the legislature's intent, or some other authoritative source of statutory meaning—judicial construction plays a paramount role in determining the wrong a statute criminalizes. But not always a definitive role. The manner of administration may matter most of all. The object of punishment under a statute is therefore what courts say it is unless courts and other legal actors administer the statute in a way that belies the judicial gloss.[87]

A skeptic might say that the object of punishment is not elusive but indeterminate. To this charge, I concede it is possible that a statute's text, together with other conventional determinants of statutory meaning (e.g., legislative history, canons of construction), might *underdetermine* the correct judicial interpretation or the correct manner of prosecutorial administration. If there is no uniquely correct way of understanding the statute or of deciding whom to prosecute under it, then there is a sense in which the statutory wrong is indeterminate. A statutory wrong takes determinate shape from what courts say and what prosecutors do, but in these circumstances there is more than one thing it is permissible for a court to say or for a prosecutor to do. Whether this kind of indeterminacy arises often, rarely, or never, is an instance of the question whether hard cases have right answers—an issue on which there is no theoretical consensus. Whatever the truth, I see little reason to believe that the relevant principles of administration are likelier to underdetermine the object of punishment than to leave unanswerable any other hard question of law.

87. A further point, not explored here, is that the object of punishment can be elusive not only at the level of statutes but also at the level of individual prosecutions. Thanks to charging and sentencing discretion, an offender can be punished for a wrong different from the wrong criminalized by the statute under which he is prosecuted. *See* Gabriel S. Mendlow, *Divine Justice and the Library of Babel: Or, Was Al Capone Really Punished for Tax Evasion?*, 16 Ohio St. J. Crim. L. __ (forthcoming 2019).

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