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## Thoughts, Crimes, and Thought Crimes

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# THOUGHTS, CRIMES, AND THOUGHT CRIMES

Gabriel S. Mendlow\*

*Thought crimes are the stuff of dystopian fiction, not contemporary law. Or so we're told. Yet our criminal legal system may in a sense punish thought regularly, even as our existing criminal theory lacks the resources to recognize this state of affairs for what it is—or to explain what might be wrong with it. The beginning of wisdom lies in the seeming rhetorical excesses of those who complain that certain terrorism and hate crime laws punish offenders for their malevolent intentions while purporting to punish them for their conduct. Behind this too-easily-written-off complaint is a half-buried precept of criminal jurisprudence, one that this Essay aims to excavate, elaborate, and defend: that the proper target of an offender's punishment is always the criminal action itself, not the offender's associated mental state conceived as a separate wrong. Taken seriously, this precept would change how we punish an assortment of criminal offenses, from attempts to hate crimes to terrorism. It also would change how we conceive the criminal law's core axioms, especially the poorly understood but surprisingly important doctrine of concurrence.*

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\* Professor of Law and Professor of Philosophy, University of Michigan. I'm grateful to audiences everywhere I presented some version or part of this paper: the Analytical Legal Philosophy Conference, the Fordham Law School Criminal Law Theory Discussion Group, the London School of Economics Criminal Law and Criminal Justice Theory Forum, the University of Michigan Legal Theory Workshop, the New York City Criminal Law Colloquium (the "Markelloquium"), the University of Oxford Criminal Law Discussion Group, the University of Surrey School of Law Faculty Research Seminar, the UC-Irvine Philosophy Department, the UCLA Legal Theory Workshop, and the Yale Law School Legal Theory Workshop. Special thanks to Dennis Baker, Maureen Carroll, Rich Friedman, Margaret Gilbert, Tom Green, Sam Gross, Monica Hakimi, Daniel Halberstam, Jeff Helmreich, Scott Hershovitz, Don Herzog, Doug Husak, Vie Khanna, Adam Kolber, Adrienne Lapidos, Jae Lee, Kyle Logue, Daniel Markovits, Bill Miller, Michael Moore, Julian Mortenson, Federico Picinali, David Plunkett, J.J. Prescott, Eve Primus, Richard Primus, Don Regan, Jed Rubenfeld, Alex Sarch, Fred Schauer, Scott Shapiro, Seana Shiffrin, Ken Simons, Sonja Starr, Alec Walen, Peter Westen, Gideon Yaffe, Taisu Zhang, and the students at the UCLA Legal Theory Workshop, who each wrote a short response to an early draft of this Essay. I also would like to thank the editors of the *Michigan Law Review*, especially Bryce Freeman and Faraz Shahidpour. Research for this project was funded in part by the Cook Endowment.

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#### INTRODUCTION

Sophocles's *Ajax* is among other things a play about thought crime. It begins just after the Greek commanders have awarded the armor of Achilles to Odysseus, the worthiest and wisest Greek to survive the Trojan War, but not the strongest in battle. That honor belongs to the dimwitted Ajax, who is humiliated at having been passed over. In the play's opening scene, the goddess Athena describes how Ajax had sneaked up on the commanders' camp the night before, planning to torture and kill them. But Athena intervened at the last second, clouding Ajax's mind so that he would mistake the army's sheep for his human targets. When Ajax discovers later in the play that the men he thought he had tortured to death were actually livestock, he commits suicide in embarrassment. But his death does little to mollify his intended victims. Menelaus is especially unforgiving, demanding that the Greeks leave Ajax's body unburied, a punishment extremely severe in that it would prevent Ajax's soul from entering the afterlife. Menelaus doesn't care that Ajax's conduct ultimately posed no threat. He cares only about Ajax's murderous intention, which he equates with murder itself. Is it "just," asks Menelaus, "that my murderer have a peaceful end? . . . By his will, I am dead."<sup>1</sup>

If the punishment Menelaus demands is extreme, the rationale he offers for it is not. In branding Ajax's murderous intention a serious wrong, Menelaus gives voice to an idea familiar from ordinary morality and the criminal law. When you pursue a malevolent purpose through ineffective means, your evil mental state may attract stronger censure than your in-itself-innocuous conduct. If you point a gun at someone and pull the trigger, and the gun turns out to be a fake, we will blame you for your failed action, but we will blame you equally for your malevolent intention. In fact, we probably will blame you more for your intention than for your action—judging it more severely and condemning you for it more harshly. And if we prosecute you

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1. SOPHOCLES, AIAS (AJAX), *in SOPHOCLES: THE SEVEN PLAYS IN ENGLISH VERSE* 43, 74 (Lewis Campbell trans., rev. ed. 1933) (emphasis added).

for a criminal attempt, we may take a page from Menelaus and demand that you serve a long prison sentence.

If imposed, that prison sentence may in turn draw a pointed criticism: that you are being punished not for your in-itself-innocuous conduct but for the evil state of mind that motivated it. We are likeliest to hear this sort of criticism when your methods aren't just ineffective but are by their nature incapable of bringing your purpose to fruition—when you seek to kill someone by sticking pins in a doll, for example. In that case, the innocuousness of your conduct contrasts starkly with the malevolence of your state of mind. But whenever the badness of your state of mind exceeds by any appreciable degree the badness of your conduct, punishing you for a criminal attempt may draw the accusation that you are being punished for your thoughts (a word I'll use to denote the entire class of mental states).

So the venerable law of attempts has something in common with recently enacted terrorism and hate crime offenses: all have been accused of punishing people for their thoughts.<sup>2</sup> It is an accusation that can seem hyperbolic. No terrorism or hate crime offense, and certainly no attempt statute, actually punishes defendants who've failed to act. But critics don't mean that these laws neglect to prohibit conduct. They mean that the nominally prohibited conduct isn't what these laws truly aim to censure and sanction. When you commit an attempt or violate a terrorism or hate crime law, you act with a particular mental state: the intention to commit a crime, the intention to promote or facilitate terrorism, or the hatred of some group. And it is this mental state *taken in itself*, rather than your outward conduct, that critics see as the true object of punishment—the real transgression for which the law imposes censure and sanction.

This criticism raises two questions, which the present Essay seeks to answer. The first is whether the criticism is factually accurate: Does any criminal statute really punish offenders not for their outward conduct but for their inner states of mind, conceived as transgressions unto themselves? The second question is whether the criticism is truly a criticism: Is there anything amiss about a statute that treats an actor's mental state, taken in itself, as the ultimate object of punishment, as long as that mental state is executed through or realized in the actor's conduct?

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2. KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM 449 (2011) ("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."); Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992/1993 ANN. SURV. AM. L. 509, 514–15 ("The only substantive element of most hate crime statutes is that the defendant had a bias motive for committing the base offense. As motive consists solely of the defendant's thoughts, the additional penalty for motive amounts to a thought crime . . ." (emphasis and citation omitted)); Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 101 (2014) ("[S]ubjectivists [about criminal attempts] conclude that . . . attempts are properly punished thanks to their mens rea elements. From this point of view, attempts are thought crimes. The fundamental challenge for subjectivists, then, is to explain why it is not monstrous for a liberal society to punish attempts.").

The conventional answer to the second question is no. No recognized axiom of criminal jurisprudence forbids the law to punish you for a mental state that is executed through or realized in your conduct. As I'll explain in Part I of the Essay, punishment for an executed mental state doesn't flout the *voluntary act requirement*, which says (only) that the law mustn't punish you in the absence of voluntary conduct. Nor does punishment for an executed mental state flout Justinian's maxim *cogitationis poenam nemo patitur*,<sup>3</sup> which says (only) that the law mustn't punish you for a *mere* mental state—one on which you have not yet begun to act. No principle of conventional jurisprudence says what the critics of terrorism and hate crime laws presuppose: that the object of an offender's punishment, the transgression for which the offender's punishment is imposed, must always be an *action*. I use the term "action" to denote a broad and familiar category of doings, a category that encompasses both affirmative conduct and voluntary omissions but excludes activity that is entirely mental, such as believing, desiring, fantasizing, and intending. An action in this familiar sense may have a mental component that, taken separately, is a mental doing, such as resolutely intending to achieve a goal. Conventional criminal theory contains no principle rendering such mental doings off limits—no principle requiring that the law punish you only for your actions and never for the mental states that your actions partly comprise, conceived as separate transgressions. In short, conventional jurisprudence contains no *action-as-object requirement*.

The requirement's absence matters—both for the scope of the criminal law (which offenses the state may punish) and for the apportionment of punishment (how severely the state may punish them). Absent the action-as-object requirement, the state may punish you as soon as your conduct evinces a malevolent intention, and the state may punish you harshly for that intention even if the conduct that evinces it merits far less condemnation in itself. A criminal legal system that respected the action-as-object requirement would differ subtly but significantly. Offenders whose conduct was minimally wrongful would receive only a minimal punishment, despite the malevolence of their intentions. The law would apportion offenders' punishment to the gravity of their conduct, not to the gravity of any associated mental states. A judge could enhance offenders' sentences based on the malevolence of their mental states only if those mental states affected the badness or blameworthiness of their *actions*.

Critics of terrorism and hate crime laws seem to take the action-as-object requirement as given. But no learned treatise recounts the principle, no judicial opinion expressly endorses it, and many criminal theorists implicitly reject it. I refer particularly to those theorists partial to the "subjectiv-

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3. See 4 THE DIGEST OF JUSTINIAN § 48.19.18 (Alan Watson ed., rev. ed. 1998). For a discussion of the foundations of Justinian's maxim, see Gabriel S. Mendlow, *Why Is It Wrong to Punish Thought?*, 127 YALE L.J. 2342 (2018).

ist" version of the offense of attempts,<sup>4</sup> which Britain's preeminent twentieth-century scholar of criminal law, Glanville Williams, approvingly described as "punishing [the attempter] for his intention, the act [of attempting] being required [merely] as evidence of a *firm* intention."<sup>5</sup>

It is my contention that the action-as-object requirement is nevertheless a principle we should embrace. As I'll argue in Part II, the action-as-object requirement is compelling not only as a principle of political morality—one that precludes a kind of indirect mind control—but also, and even more so, as a principle of criminal theory. If we embraced the action-as-object requirement as a core legal axiom, we would discern a deep unity among the seemingly miscellaneous principles of criminal jurisprudence: the voluntary act requirement, Justinian's maxim, and the requirements of *actus reus*, *mens rea*, and concurrence. We would see these principles as *implementing doctrines* of the action-as-object requirement—not as disparate precepts with independent functions but as principles working in service of a common end: to help ensure that criminal statutes punish offenders only for their actions, conceived not as mere *aggregates* of (bad) acts and (culpable) mental states, but as psychological and moral *unities*.

In defending the action-as-object requirement, the Essay will accordingly uncover a second unsung principle of criminal law: the essential unity of criminal wrongs. This unity is something that conventional criminal doctrine obscures. The formal distinction between *actus reus* and *mens rea* invites us to misconceive the criminal wrong as a pair of wrongs—the bad act and the blameworthy mental state. To think of criminal wrongs this way is to take too literally Justice Robert Jackson's oft-quoted remark that "crime, as a compound concept . . . [is] constituted . . . from concurrence of an evil-meaning mind with an evil-doing hand."<sup>6</sup> As we will see, the true point of the largely overlooked and rarely understood requirement of concurrence is to forge from the offender's act and mental state a unitary action, an action that owes its moral and therefore criminal identity to the mental state with which it is performed. Although authors of criminal law casebooks tend to ignore the concurrence requirement, it is in fact fundamental to criminal ju-

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4. George P. Fletcher appears to have been the first person to distinguish "objectivist" and "subjectivist" theories of attempts. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 138 (1978). In Fletcher's usage, an "objectivist" theory of attempts employs "a legal standard for assessing conduct that does not presuppose a prior determination of the actor's intent," whereas, for the "subjectivist" theory, "[t]he act of execution is important so far as it verifies the firmness of the intent. No act of specific contours is necessary to constitute the attempt, for any act will suffice to demonstrate the actor's commitment to carry out his criminal plan." *Id.* In the spirit of Fletcher's distinction, I will use the term "subjectivist" to denote a particular version of the attempt offense, one where the attempter's intention, and not the act by which the attempter seeks to carry the intention out, serves as the transgression for which the law holds the attempter liable.

5. GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 631 (2d ed. 1983).

6. *Morissette v. United States*, 342 U.S. 246, 251 (1952).

risprudence, in part because it serves to promote compliance with the action-as-object requirement.

Part III of the Essay will show how the action-as-object requirement, although unacknowledged, figures covertly in judicial reasoning and critical commentary. As I noted a moment ago, critics of the war on terror implicitly draw on the action-as-object requirement when they protest that many of the counterterrorism laws in force throughout the Anglophone world come “dangerously close” to punishing thought. These laws nominally proscribe conduct, but what they really sanction and condemn, according to their critics, is an offender’s malevolent state of mind, the proscribed conduct being too incipient or insubstantial to be the true object of punishment.<sup>7</sup> This complaint evokes a classic objection to hate crime penalty-enhancement laws: that they impermissibly impose *extra* punishment for an offender’s hateful motives—punishment in addition to what is imposed for the offender’s violent conduct. Courts virtually always reject these complaints, but never on the ground that the law may treat a person’s mental states as objects of punishment provided they are realized in the person’s conduct. Like the litigants whose claims they reject, *courts adhere to the action-as-object requirement implicitly*. Courts consistently say more than they need to say in order to show that statutes accused of punishing people for their thoughts satisfy the voluntary act requirement and Justinian’s maxim. Courts say precisely what is necessary to show that these statutes comply with the action-as-object requirement.

But are courts right to imply that the challenged statutes *all* comply? Part IV will explain why this question is harder to resolve than the sometimes facile reasoning of courts might suggest. Resolving the question requires determining (among other things) whether the severity of offenders’ sentences is proportionate to the gravity of their actions, no “extra” punishment having been apportioned to their mental states conceived as transgressions unto themselves. To the extent that such questions of proportionality are difficult and contentious and potentially unresolvable, so too will be questions about whether terrorism and hate crime laws impermissibly punish people for their thoughts.

## I. THE ACTION-AS-OBJECT REQUIREMENT AND CONVENTIONAL CRIMINAL JURISPRUDENCE

There’s a gap in conventional criminal jurisprudence: a node in the web of axioms where a principle could be but isn’t. One conventional axiom, the voluntary act requirement, says that the state may not punish you in the absence of a voluntary act or omission. A related but distinct principle of criminal law is Justinian’s maxim *cogitationis poenam nemo patitur*. Often presented as an alternative formulation of the act requirement and sometimes offered as its rationale, Justinian’s maxim is actually neither of these

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7. See *infra* notes 75–84 and accompanying text.

things. It says simply that you may not be punished for a *mere* thought—a belief, desire, fantasy, or unexecuted intention. What no principle of conventional criminal jurisprudence says is that you may not be punished for a thought that is executed through or realized in your conduct. Conventional jurisprudence contains no action-as-object requirement.

If acknowledged and embraced, the action-as-object requirement would fill a gap in criminal theory, a gap left by the fact that Justinian's maxim and the voluntary act requirement speak in different registers. Justinian's maxim is *substantive*: it speaks to what may or may not be an *object* of penal liability—what sort of transgression (or supposed transgression) punishment may be imposed *for*. By contrast, the voluntary act requirement, as formulated in legal materials<sup>8</sup> and as understood by commentators,<sup>9</sup> isn't substantive but *conditional*.<sup>10</sup> Unlike Justinian's maxim, the voluntary act requirement doesn't speak to what may or may not be an object of liability. It speaks instead to what conditions must obtain before penal liability may be imposed. It says specifically (and only) that the state may not punish you unless it proves that you have performed some voluntary act or voluntary omission. It

8. See, e.g., MODEL PENAL CODE § 2.01(1) (AM. LAW INST. 1985) ("A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."); see also CAL. PENAL CODE § 26 (West 2014) ("All persons are capable of committing crimes except those belonging to the following classes: . . . Persons who committed the act charged without being conscious thereof."); N.Y. PENAL LAW § 15.10 (McKinney 2009) ("The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing."); TEX. PENAL CODE ANN. § 6.01(a) (West 2011) ("A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.").

9. See, e.g., Douglas Husak, *The Alleged Act Requirement in Criminal Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 107, 111 (John Deigh & David Dolinko eds., 2011) ("This much is common to any suitable [formulation of the act requirement]: *some* act is required for criminal liability. But whatever the act required by the act requirement is, it need not be that *for* which liability is imposed.").

10. In contrasting *conditional* and *substantive* principles, I draw on R.A. Duff's helpful distinction between "the conditions of liability" and "the intentional objects of liability." As Duff explains:

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 . . . 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.

R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147, 155 (2002).

doesn't say that the state may punish you only *for* an act or omission.<sup>11</sup> As typically formulated, the act requirement says nothing about the *substance* of what we criminalize.

Because the act requirement is conditional while Justinian's maxim is substantive, the two principles are logically independent. So a statute that satisfies one might violate the other. That a statute satisfies Justinian's maxim doesn't mean that it satisfies the act requirement: even if a statute avoids imposing punishment for an unexecuted thought, it might nevertheless impose punishment for a status or involuntary act. Conversely, that a statute satisfies the act requirement doesn't mean that it satisfies Justinian's maxim: even if a statute includes an act or omission among its elements, it might nevertheless impose punishment for an unexecuted thought. Consider Douglas Husak's example of the group of "legislators [who] become convinced that existing statutes [are] ineffective in punishing persons who [have] been disloyal to the monarch and propose a new statute that define[s] treason as 'compassing the death of the king.'"<sup>12</sup> When told that the proposed statute violates the act requirement, "the legislators agree to amend the statute to include an additional clause that allows liability to be imposed only on persons who had performed the act of eating at some time prior to the moment at which they compassed the death of the king."<sup>13</sup> So amended, the statute now satisfies the act requirement: it provides that penal liability may not be imposed on anyone who has compassed the death of the king unless the state proves that the person previously performed the act of eating. But there is still something wrong with the statute—something obviously wrong. What is wrong with the statute is a matter of what the statute imposes penal liability *for*—what it treats as the wrong or supposed wrong for which punishment is imposed. The statute obviously doesn't impose punishment for the physical act of eating. The statute instead imposes punishment for the mental act of compassing the death of the king. This feature of the statute seems objectionable not because of the act requirement, which the statute satisfies, but because of Justinian's maxim, which the statute (still) violates. Despite including an act element, the statute treats an offender's possibly unexecuted intention as the underlying object of punishment, exemplifying to an extreme degree the subjectivist style of criminal legislation.

As Husak's example shows, Justinian's maxim (because it's substantive) precludes certain styles of criminalization that the act requirement tolerates (because it's conditional). But Justinian's maxim is nonetheless highly permissive. Although it forbids the state to punish *mere* mental states—beliefs, desires, fantasies, and unexecuted intentions—Justinian's maxim doesn't

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11. For an in-depth examination of the difference between objects and conditions of penal liability, see Gabriel S. Mendlow, *The Elusive Object of Punishment*, 25 *LEGAL THEORY* 105 (2019).

12. DOUGLAS HUSAK, *Does Criminal Liability Require an Act?*, in *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS* 17, 26 (2010).

13. *Id.*

forbid the state to target a mental state that is realized in a person's conduct. So Justinian's maxim in no way precludes the subjectivist style of criminalization. Nor, for that matter, does the act requirement. "Under the criminal law's voluntary act requirement," writes Adam Kolber, "we do not punish people's culpable mental states *unless they take some implementing action.*"<sup>14</sup> Subjectivist offenses almost always require an implementing action and therefore almost never violate the act requirement.<sup>15</sup>

In our legal tradition, the clearest and probably oldest subjectivist crime is the offense on which Husak's example is obviously based: the English offense of treason. The Treason Act 1351 provides that "when a man doth compass or imagine the death of . . . the King . . . and thereof be provably attainted of open deed by the people of their condition . . . that ought to be adjudged treason."<sup>16</sup> Seizing on the breadth of this provision, contemporary commentators often say that a person once could be held for treason merely for intending the king's death. That is a pervasive misconception, and we should correct it. As Sir Matthew Hale recounts, only briefly was the law of treason governed by a statute that "ma[de] the bare purposing, or compassing, treason, without any overt-act."<sup>17</sup> At all other times, treason required an "open deed." What seems very likely, however, is that the overt act element was for several centuries nothing but a condition on which an offender could be punished for an underlying treasonous intention (a "compassing" or "imagining"). The classic commentators on the early English law of treason, Hale and Sir Edward Coke, both spoke of the overt act element as serving no purpose but to prove the existence of an underlying mental wrong.<sup>18</sup> In early centuries, courts sometimes held that a defendant could satisfy the overt act requirement just by making treasonous utterances and writings,<sup>19</sup> their sufficiency in a given case seemingly a function of whether they were reliable proof of the actor's treasonous intent.<sup>20</sup> Moreover, when the overt act alleged was a piece of nonverbal conduct, the conduct itself was often trifling—far less robust than that demanded by any modern attempt statute.<sup>21</sup> As administered, the Treason Act complied both with the act requirement (*some con-*

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14. Adam J. Kolber, *Two Views of First Amendment Thought Privacy*, 18 U. PA. J. CONST. L. 1381, 1398 (2016) (emphasis added).

15. The exception is when a statute prohibits "an 'act' that is less an act than a neutral background condition" in human life (e.g., possessing money), "leaving behind a barely executed intention as the underlying object of punishment." Mendlow, *supra* note 11, at 127.

16. Graham S McBain, *High Treason: Killing the Sovereign or Her Judges*, 20 KING'S L.J. 457, 460–61 (2009) (citations omitted).

17. 1 MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 111 (Sollom Emlyn ed., 1778).

18. *Id.* at 108; EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 5–6 (1644); see also 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 249 (1883).

19. See McBain, *supra* note 16, at 463 n.57 (discussing cases).

20. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*80.

21. See, e.g., HALE, *supra* note 17, at 115–17.

duct was required) and with Justinian's maxim (the intention for which liability was imposed had to be partially executed, even if only barely). But the Treason Act surely violated the action-as-object requirement: it aimed to punish offenders for their treacherous intentions.

Although the modern attempt offense requires a far more substantial *actus reus* than treason once did, many theorists over the past two centuries have given the offense of attempt an equally subjectivist gloss. In his nineteenth-century *Lectures on Jurisprudence*, John Austin said, "Generally, attempts are perfectly innocuous, and the party is punished, not in respect of the attempt, but in respect of what he intended to do."<sup>22</sup> By the late twentieth century, the *Encyclopedia of Crime and Justice* spoke more broadly of a subjectivist trend permeating *all* of criminal law but reaching its zenith in "modern attempt law [which] 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."<sup>23</sup> The contemporary theorist R.A. Duff describes this approach to attempt liability as insisting that "the object of criminal responsibility is the firm intention to commit the crime . . . ; we are . . . criminally responsible for the intention, on condition that we undertook a suitable act towards fulfilling it."<sup>24</sup> The most influential exposition of this approach is the Commentary to the Model Penal Code's attempt provision, which declares that "the proper focus of attention is the actor's disposition."<sup>25</sup> Glossing the MPC attempt provision, Husak concludes that if the "[a]ctus reus is important . . . only insofar as it provides *evidence of criminal intent*[,] the requirement has no *independent* significance. Hence it appears inescapable that liability [under the MPC's attempt provision] is really *for . . . an intent*."<sup>26</sup>

If the offense of attempt truly imposes punishment for an actor's intention, then liability for an attempt should arise well before offenders complete their intended crimes—precisely as the MPC provides.<sup>27</sup> Furthermore, all else equal, punishment for an unsuccessful attempt should be as severe as punishment for a successful one (which the MPC generally allows<sup>28</sup>), and an attempter's sentence should hold constant no matter how close the attempter comes to completing the intended crime. If not all of these important implications have received all of the scrutiny they deserve, that is partly because

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22. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 507 (Robert Campbell ed., Lawbook Exch., Ltd. 5th ed. 2005) (1885).

23. Meir Dan Cohen, *Actus Reus*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 15, 17 (Sanford H. Kadish ed., 1983).

24. R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 96 (2007).

25. MODEL PENAL CODE § 5.01 cmt. 1 (AM. LAW INST. 1985).

26. DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 95 (1987) (footnote omitted).

27. MODEL PENAL CODE § 5.01 cmt. 5.

28. *Id.* § 5.05(1).

courts and commentators haven't openly embraced the action-as-object requirement.

## II. THE CASE FOR THE ACTION-AS-OBJECT REQUIREMENT

In this Part, I will argue that the action-as-object requirement is both a compelling principle of political morality and a powerful, unifying precept of criminal jurisprudence. As a principle of political morality, the action-as-object requirement precludes a kind of indirect mind control. As a precept of criminal jurisprudence, the action-as-object requirement grounds and unifies a seemingly disparate set of legal axioms: the voluntary act requirement, Justinian's maxim, the principles of mens rea and actus reus, and the poorly understood doctrine of concurrence, which, though ignored by casebook authors, turns out to be as important to criminal jurisprudence as the act requirement and Justinian's maxim.

### A. *The Action-as-Object Requirement as a Principle of Political Morality*

As a principle of political morality, the action-as-object requirement rests on the same justification as Justinian's maxim. I don't mean the *standard* justification, however. The standard justification for holding unexecuted intentions unpunishable is that unexecuted intentions are never harmful, harm-risking, culpably wrongful, or provable. None of this is true of intentions that an actor has taken at least a step or two to carry out. (None of it is true of *unexecuted* intentions either, but that is another story, and I have told it elsewhere.<sup>29</sup>) Our heavily subjectivist criminal law assumes (as I will) that executed and partly executed intentions *are* often harmful or harm-risking, often culpably wrongful, and often provable. If they are immune from punishment nevertheless, their immunity cannot derive from any of the principles that commentators typically (albeit mistakenly) take to underlie Justinian's maxim: the harm principle, the requirement that criminal transgressions be culpable wrongs, and the requirement that criminal transgressions be proved beyond a reasonable doubt.

I propose that the immunity of executed intentions derives instead from a pair of principles concerning the right to freedom of mind and the relationship between punishment and policing (principles I've argued elsewhere also underlie Justinian's maxim<sup>30</sup>). One of these principles is familiar; the other, basically unnoticed. The familiar principle is that people possess a right of mental integrity, a right to be free from the forcible manipulation of their minds. It is a right the state would violate directly and paradigmatically if it sought to alter your thoughts using involuntarily administered psychotropic drugs without a compelling and immediate justification, such as the need to prevent you from hurting yourself or someone else. The unnoticed

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29. See Mendlow, *supra* note 3.

30. *Id.*

principle, which I have previously called the *Enforceability Constraint*,<sup>31</sup> holds that the state may not impose punishment for a supposed transgression that, absent exigent circumstances, the state would not be permitted to thwart or disrupt using direct force: the state may impose punishment for a given transgression only if it may forcibly disrupt that transgression on the ground that it is criminally wrongful.

Like the right of mental integrity, the Enforceability Constraint rests on a moral foundation. Suppose the state would violate your rights if it disrupted a given transgression of yours for the reason that the transgression is criminally wrongful (rather than, say, for the more exigent reason that the transgression poses an imminent risk of harm). If it indeed is the case that the state would violate your rights if it disrupted your transgression on the ground that it is criminally wrongful, then it would seem to follow that the state also would violate your rights if it disrupted your transgression for the same reason but in a particular *indirect* fashion: by imposing terrible consequences on you for committing the transgression. Yet that is exactly what the state does when it punishes you.<sup>32</sup>

If these two principles are sound—the right to mental integrity and the Enforceability Constraint—they jointly render *all* mental states immune from punishment: not only the unexecuted intentions protected by Justinian's maxim but also the executed intentions protected by the action-as-object requirement. The basic idea is straightforward: when the state punishes you for a mental state—whether that mental state is wholly unexecuted or fully realized in your conduct—the state indirectly violates your right to mental integrity.

The contrast between direct and indirect rights violations mirrors the contrast between direct and indirect modes of enforcing the penal law. In our system of criminal administration, the state may ensure compliance with penal norms not only through the imposition of punishment *ex post* but also through the use of coercive force *ex ante*. The Enforceability Constraint maintains that these two enforcement authorities are normatively intertwined: it maintains that the state may punish someone for transgressions of a given type only when it may in principle use reasonable force to thwart such transgressions as they happen, merely on the ground that they are criminally wrongful. In other words, if transgressions of a given type are immune from *ex ante* interference on grounds of wrongfulness, then they are also immune from punishment. The reason, I've suggested, is this: if coercively enforcing a given norm *ex ante* would violate your rights, so would enforcing that norm *ex post* through the threat and imposition of the severest form of sanction and censure.<sup>33</sup> It follows that, if the state would violate your right to mental integrity if it used direct force to disrupt your criminal intentions simply because they were censurable transgressions, so too would the state

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31. *Id.*

32. See *id.* at 2371–73 (giving an informal proof of the Enforceability Constraint).

33. *See id.*

violate your right to mental integrity if it treated your criminal intentions as objects of punishment.

The question, then, is whether the state in fact violates your right to mental integrity when it uses direct force to disrupt your criminal intentions merely on the ground that they are censurable transgressions. I submit that the answer is yes, although I do not know how to justify that answer other than by thought experiments like the following one. Imagine you are on your way to the bank, intending to rob it. You are close to the bank and heavily armed, so we may suppose that you are already guilty of attempted bank robbery. Even so, your criminal intention doesn't yet pose an imminent threat. There is still time to arrest you or to try to talk you out of it. Yet agents of the state propose instead to disrupt your criminal intention using psychotropic gas, involuntary hypnosis, a mind-control beam, or some other kind of psychosurgical policing that would force you to change your mind or forget what you were doing. Does the mere fact that your intention violates a penal norm—the norm created by a subjectivist law of attempts—justify psychosurgical policing? My intuition is that it does not. Psychosurgical policing of this sort—disrupting your intention through direct and forcible mental intrusion on the mere ground that it is a criminal wrong—strikes me as violating your right to mental integrity under the circumstances.<sup>34</sup>

To posit a right to mental integrity with this degree of robustness is not to posit a right that is absolute. If the right were absolute, forcible manipulation of a person's mind would be forbidden absolutely—and it isn't. To borrow an example I've used before,<sup>35</sup> suppose the police have only two ways of stopping a would-be killer: running her over with a car or exposing her to hallucinogenic gas, a temporary psychical restraint. The threat is grave, while the psychical restraint is a mild invasion of the would-be killer's mental integrity—far milder an invasion of her rights than running her over. It seems clear that the police may deploy the hallucinogenic gas, forcibly disrupting the would-be killer's intention for the sake of public safety. But that is a far cry from forcibly disrupting her intention on the ground that it is a censurable transgression. Per the Enforceability Constraint, however, disrupting the intention on the ground that it is a censurable transgression is the sort of disruption that the state must in principle be permitted to undertake if the state is permitted to treat the intention as an object of punishment. So we can concede that the right to mental integrity is nonabsolute—as we should—while maintaining that mental states are nonetheless immune from punishment.

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34. A fuller analysis of the right to mental integrity would address the difficult question of what distinguishes direct and forcible mind control from softer modes of suggestion and suasion that leave a person's mental integrity tolerably intact. I will say nothing about this important question here. I will assume instead that the right to mental integrity protects against the psychic equivalent of a bodily assault, a paradigmatic example being the involuntary administration of psychotropic medication.

35. See Mendlow, *supra* note 3, at 2379.

**B. The Action-as-Object Requirement as a Precept of Criminal Jurisprudence**

In the previous Section, I sought to justify the action-as-object requirement by grounding it in a pair of principles concerning the right to freedom of mind and the relationship between punishment and policing. That argument lent support to the action-as-object requirement by undermining the subjectivist style of criminal administration that the requirement forbids.<sup>36</sup> One might wonder, however, whether the argument didn't also undermine the doctrine of mens rea, a core feature of the criminal law. I argued that if the state may not disrupt a partly executed mental state merely on the ground that it is a censurable transgression, then neither may the state treat such a mental state as an object of punishment. But ordinary crimes of mens rea might seem to do exactly that: they might seem to punish offenders for the combination of a bodily movement and an accompanying mental state, thereby treating offenders' executed or partly executed mental states as objects of punishment. This implication might seem to present a *reductio ad absurdum* of the action-as-object requirement. For if it really were impermissible for the state to punish an individual for a realized or executed mental state, wouldn't it also have to be impermissible for the state to punish someone for an offense that includes a realized or executed mental state among its elements, as most offenses do? Wouldn't that amount to punishing the person *for a mental state*? The action-as-object requirement would seem to entail—absurdly—that criminal offenses may not involve mens rea.

The action-as-object requirement doesn't actually entail any such thing. But to see why, we must reject the false yet influential conception of criminal wrongs that the foregoing line of argument presupposes: a conception according to which a criminal wrong is the mere conjunction of a (bad) act and a (culpable) mental state. This conception of a criminal wrong envisions it as an *aggregate* rather than a *unity*. In Bertrand Russell's terminology,<sup>37</sup> unities are entities defined in part by the specific relations between their parts. Aggregates are entities defined entirely by which parts they have, the parts themselves bearing no relation to one another other than comembership in the aggregate. If the typical penal statute punishes an *aggregative* wrong consisting of the conjunction of a (bad) act and a (culpable) mental state, then the typical penal statute punishes an offender in part *for her* mental state. And that is something that the action-as-object requirement indeed forbids—seemingly to its grave discredit. But, as I'll explain in a moment, criminal wrongs aren't aggregates—bad acts that happen to coincide with culpable mental states. Criminal wrongs are actions *made bad* by culpable

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36. Although the argument lent support to the action-as-object requirement, it didn't prove the requirement conclusively. Establishing that the state may not punish mental states doesn't suffice to establish that the state may punish only actions. That is because the universe of possible objects of punishment includes more than just mental states and actions. It also includes such things as statuses and involuntary acts—things that I will herein assume are immune from punishment.

37. 1 BERTRAND RUSSELL, THE PRINCIPLES OF MATHEMATICS 140–41 (1903).

mental states—or, if not made bad, then made worse, or made blameworthy. Criminal wrongs are *unitary* wrongs, wholes whose parts are integrally related. Punishing you for a criminal wrong therefore isn't a matter of punishing you at once for your action and for your culpable mental state. It is a matter of punishing you for your culpable action.

If we have trouble seeing a difference between these two modes of punishment, it is because we're accustomed to thinking and theorizing about *real* penal statutes, and real penal statutes never punish aggregative wrongs. We can appreciate the difference if we reflect for a moment on a fictional statute that does punish an aggregative wrong: a statute that makes it an offense to litter while intending to murder someone. The object of punishment under this fictional statute is a gerrymandered disjunction, the hybrid of a thought (an intention to commit murder) and an unrelated action (an act of littering). The only required connection between the two elements is contemporaneity. The offender need not litter *in order to* execute his intention to murder: although a rare offender may litter as part of a murder plot, such an offender is no guiltier of violating our imaginary statute than is a hitman who thoughtlessly flicks a cigarette butt onto the sidewalk while mentally planning his next hit. Because the required intention is disconnected from the required action—potentially disconnected from *any* action—it seems natural to say that the statute imposes punishment for an intention, even as it also imposes punishment for an action. If our hitman were convicted of two separate offenses—the offense of littering and the offense of intending to murder—we wouldn't hesitate to describe the second of these offenses as punishing the hitman for his intention, in violation of the action-as-object requirement. Joining these two offenses in a single statute would make no difference.

Compare the fictional statute to a real one, a Florida statute that criminalizes perpetrating an assault “[w]ith [the] intent to commit a felony.”<sup>38</sup> The Florida statute bears a superficial resemblance to the fictional one: both criminalize the combination of an action (littering/assaulting) and an intention (to kill/to commit a felony). Does the Florida statute therefore violate the action-as-object requirement? If an offender were convicted of two separate offenses—the offense of “simple” assault and the (fictional) offense of intending to commit a felony—we wouldn't hesitate to describe the second of these offenses as punishing the offender for an intention. Should we say the same of the compound offense of assault with the intent to commit a felony? Should we say that, even though the compound offense punishes an action, it also imposes separate punishment for an intention?

We shouldn't, because it doesn't. Unlike the fictional offense of littering with the intent to kill, the Florida offense of aggravated assault doesn't punish the hybrid of two separate but simultaneous wrongs: an act of assault and a contemporaneous intention to commit a felony. Far from being a gerrymandered pair, the assault and the intention are inseparably united. The as-

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38. FLA. STAT. ANN. § 784.021(1)(b) (West 2017).

sault is the action that it is—morally as well as psychologically—*because* of the intention with which it is performed. If the assault occurred without the mental state, it would still be an action, but it would be an action of a morally different sort. In the fictional statute, by contrast, littering and intending to kill are fully distinct and fully separable, separable not just analytically but also psychologically and morally. The action and mental state simply coincide. They could exist at different times, even in different people, without losing their moral or psychological characters.

As these examples show, normal offense elements aren't constituent parts of aggregative wrongs; they are ingredients of unitary wrongs.<sup>39</sup> This is perhaps easiest to see when an offense's *actus reus* is not wrongful in itself. “A person may give an official a gift that in fact influences his judgment,” writes Husak, “but he has not committed bribery unless his intention in giving the gift was to influence the official’s judgment.”<sup>40</sup> Likewise, “[t]he act of altering a writing is innocuous, but a person commits forgery when he alters the writing with the purpose to defraud or injure another.”<sup>41</sup> Similarly, “[t]he destruction of evidence of a crime is an everyday occurrence, but a person commits an offense when he conceals or destroys evidence with the purpose of hindering a prosecution.”<sup>42</sup> In none of these instances is the object of liability a mere aggregate of an action and an illicit intention, punishment being imposed separately for each. Minus the illicit intentions, these actions aren't wrongful and therefore aren't plausible objects of punishment. In each case, punishment is imposed for one thing only: the unitary wrong that the offense elements create when jointly satisfied, an action made wrongful—indeed, made the action that it is—by the illicit intention with which it is performed. “Intention rarely operates as a mere ‘fault element’ in the criminal law,” explains Jeremy Horder.<sup>43</sup> “Its main role is in changing the normative significance of conduct. If, in appropriating your property, I intend permanently to deprive you of it, that intention . . . turn[s] my conduct from something neutral (like putting goods in a shopping basket) into a substantive criminal offence.”<sup>44</sup> Horder concludes: “Without the intention to commit the crime, there is not only no fault; there is simply no wrong.”<sup>45</sup>

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39. Cf. Yaffe, *supra* note 2, at 119 (rejecting “the thought that the *actus reus* and *mens rea* components of crimes make independent contributions to the criminality of the conduct”).

40. DOUGLAS N. HUSAK, *The Costs to Criminal Theory of Supposing that Intentions Are Irrelevant to Permissibility*, in THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS, *supra* note 12, at 69, 77.

41. *Id.*

42. *Id.* at 77–78.

43. Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, 1995 CRIM. L.R. 759, 762 [hereinafter Horder, *A Critique of the Correspondence Principle in Criminal Law*]; see also Jeremy Horder, *Intention in the Criminal Law—A Rejoinder*, 58 MOD. L. REV. 678, 681–83 (1995) (describing the role of intentions in “constituting wrongs”).

44. Horder, *A Critique of the Correspondence Principle in Criminal Law*, *supra* note 43, at 762 (footnote omitted).

45. *Id.*

Horder's point holds true not just of intentions but of mental states generally: mental states don't merely undergird offenders' culpability; they help constitute offenders' actions as particular criminal wrongs. Even actions that are utterly harmless can be made wrongful, and thus punishable, by an accompanying mental state. Driving 100 miles per hour on a desolate road, putting sugar in someone's tea believing it to be poison—each of these actions is harmless in itself. Yet both are rightly punishable, the first as reckless driving and the second as attempted murder. Each action owes its identity to the mental state with which it is performed. That is why we may regard an offender's punishment as imposed for the action taken as a whole, rather than imposed for each of the action's constituents taken separately. Indeed, even when an offense's *actus reus* is not just harmless but entirely lawful taken in itself, it doesn't follow that the object of punishment is the offense's *mens rea* element. There are nearly as many counterexamples to this supposed inference as there are crimes of *mens rea*. Shredding your old bank statement is entirely lawful in itself, but when done for the purpose of hindering an investigation, it is obstruction of justice. It doesn't follow that the object of punishment under the obstruction statute is the intention to hinder an investigation. The object of punishment is *the action of obstructing justice*, an action that takes its identity, and accordingly its criminal character, from the intention with which it is performed.

It is a property of actions generally, not just criminal ones, that they owe their identities to the mental states with which they are performed. If you flip a switch that activates a strobe light, what action do you perform? The answer depends on the intention with which you flip the switch. If you flip it with the intention of illuminating the room, you perform the action of turning on the lights. If you flip it with the intention of inducing an epileptic seizure in someone climbing a ladder, you perform the action of trying to kill someone. Your bodily movement (your "*actus reus*," so to speak) is the same in both cases. But your action is different, and it is different because of your intention. An action is never just a bodily movement. It is a bodily movement done with a particular intention.<sup>46</sup> The intention is part of what constitutes the action as an action, and it is also part of what constitutes the action as the particular action that it is.

A person's intention can of course make the difference between manslaughter and murder, and thus make the difference between a brief prison stint and the death penalty. But that is because the intention makes the difference between two different actions: an accidental killing and a murder. There is usually no particular reason to posit that, in punishing you for your attempted murder, we are "really" punishing you for your intention. What we are really punishing you for is your wrongful *action*. Although the wrongful action has two ingredients—the bodily movement and the accompanying intention—it is a single wrong nonetheless. What you'll be resented,

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46. Cf. DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 61 (2d ed. 2001) (arguing that an action is an event that is intentional "under some description[]").

criticized, and punished for is your action of attempted murder—not for your mere bodily movement, not (ordinarily) for your intention taken in itself, and (certainly) not for the two of these taken as a brute aggregate.

Much the same is true of inchoate crimes generally, including even the crime of attempt under the MPC—notwithstanding the views expressed by its own commentators.<sup>47</sup> The MPC's attempt provision requires that the actor perform “an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime,”<sup>48</sup> where an act or omission is deemed not to be a substantial step “unless it is strongly corroborative of the actor's criminal purpose.”<sup>49</sup> Now a jurisdiction certainly could administer the “substantial step” test so as to punish offenders solely for their partially executed intentions: it could relentlessly apportion attempters' punishments to the gravity of their mental states rather than the gravity of their failed attempts, and it could punish so-called “impossible” attempts, where the offender's purpose is malevolent in the extreme (e.g., to kill) while the offender's method is utterly innocuous (e.g., sticking pins in a doll). But a jurisdiction equally could administer the “substantial step” test so as to punish offenders *for their substantial steps*, and many jurisdictions may do just that. Whether they actually do is partly a function of how they apportion an attempter's punishment and whether they punish impossible attempts. But it is also a function of how the relevant decisionmakers understand and describe the jurisdiction's legal practices.<sup>50</sup> So it is surely significant that no jurisdiction describes its attempt statute as punishing offenders for their intentions.

### C. *The True Meaning of Concurrence*

To this point I've said nothing about a looming question: If criminal wrongs aren't aggregates but unities—entities defined not just by the identity of their parts but by the way their parts are related—what is the nature of that relation? What relation must obtain between the *actus reus* and *mens rea* of an offense in order for these elements to function as ingredients of a unitary wrong rather than as constituent parts of an aggregative wrong? One obvious answer to this question is that the elements must “concur”—that they must satisfy the concurrence requirement. But what exactly does the concurrence requirement require?

“[T]here is concurrence,” says a leading treatise, “when the defendant's mental state actuates [her] physical conduct.”<sup>51</sup> Says another: “The defendant's conduct . . . must have been set into motion or impelled by the thought

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47. MODEL PENAL CODE § 5.01 cmt. 1 (AM. LAW INST. 1985).

48. *Id.* § 5.01(1)(c).

49. *Id.* § 5.01(2).

50. See Mendlow, *supra* note 11 (arguing that the wrong a statute punishes depends in part on how the statute is administered and understood).

51. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.3(a) (3d ed. 2018).

process that constituted the *mens rea* of the offense.”<sup>52</sup> These authorities cannot mean simply that the defendant’s conduct must have been *caused by* the defendant’s mental state. That minimal sort of connection wouldn’t be enough to rule out cases of so-called deviant causation, where a person’s intention leads to conduct accidentally.<sup>53</sup> These authorities presumably mean that there is concurrence when the defendant’s physical conduct *executes* her mental state. A defendant’s conduct executes her mental state when the defendant’s mental state guides her conduct nonaccidentally. The paradigmatic example is when the defendant performs an action in order to carry her intention out.

Does this mean that *execution* is the relation that must obtain between the act and mental state elements of an offense in order for these elements to function as ingredients of a unitary wrong? Although not addressed to this question, some remarks of the criminal theorist Michael Moore imply an affirmative answer. Moore asks us to imagine a statute that makes it a crime “to intend to bribe an official while at the same time whistling Dixie, combing one’s hair, or washing one’s cat.”<sup>54</sup> Moore contrasts this imaginary statute, which he says treats the voluntary act requirement as an “empty formality,”<sup>55</sup> with the Interstate Travel Act,<sup>56</sup> which criminalizes interstate travel undertaken with the intent to bribe officials or perform other corrupt acts.<sup>57</sup> Moore implies that the Interstate Travel Act avoids punishing mere intent because it “require[s] by way of an act . . . some act that executes, however slightly, the culpable intention. Travelling interstate in order to bribe an official satisfies such an act requirement; washing one’s cat while intending to bribe an official does not.”<sup>58</sup> These remarks seem basically sound, but they raise a further question: How is it that execution unites the *actus reus* and *mens rea* elements of an offense to form a single wrong?

The answer, I believe, is that execution instantiates the type of *moral* relation demanded by the action-as-object requirement: the mental state makes the corresponding act bad, worse, or blameworthy. But this is a relation that can occur even in the absence of execution—contrary to what

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52. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 189 (8th ed. 2018).

53. See Gideon Yaffe, *The Voluntary Act Requirement*, in THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW 174, 185 (Andrei Marmor ed., 2012) (“[S]ay that . . . D is at the firing range and notices that V is passing between him and the target at which he is pointing. Recalling that he earlier formed an intention to kill V, D becomes very nervous—‘My God,’ he thinks, ‘I might actually go through with this!’—and his nervousness causes his hands to shake violently, resulting in the bodily movement of his finger pulling the trigger. In such a case, the bodily movement is not the manifestation of the intention of the sort that is required for [concurrence], or, as we say, for it to be the case that D is ‘acting on the intention.’”).

54. MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 19 n.5 (1993).

55. *Id.*

56. 18 U.S.C. § 1952 (2018).

57. MOORE, *supra* note 54, at 19.

58. *Id.* at 19 n.5.

Moore's remarks imply what the textbook definition of concurrence asserts. One way in which a mental state, such as an intention, can make an action bad, worse, or blameworthy is when the action executes the intention. But that is not the only way. An action of carjacking is made worse by a conditional intention *to kill if necessary to accomplish the carjacking* even when the action does nothing to execute the intention.<sup>59</sup> Carjacking while willing to kill is a worse action than carjacking while unwilling to do so. More fundamentally, criminal actions are often made bad, worse, or blameworthy by mental states that the actions in question simply couldn't be said to execute. When the mental state is reckless indifference to a risked outcome, the mental state can be said to actuate the action only in the attenuated counterfactual sense of failing to prevent it. But reckless indifference certainly can transform the action's moral character, making the action a distinctive kind of wrong punishable as such. That is why punishment for reckless driving is punishment for driving recklessly, rather than the conjunction of punishment for driving and punishment for recklessness.

Another type of mental state that can affect an action's moral quality even when it does not cause or motivate the action is an actor's associated emotional attitude. Compare Kenneth Simons's two sadistic murderers, one who "kill[s] the victim in a particularly brutal manner for the very purpose of obtaining pleasure in the victim's suffering," and another who "kills his victim in a brutal manner and discovers, to his surprise, that this brings him great pleasure."<sup>60</sup> Simons doubts that the second killer's sadistic joy should "count in favor of imposing a much heavier punishment,"<sup>61</sup> because neither that joy nor its prospect plays any kind of causal or motivational role in the killing. Simons's assumption is that an offender's accompanying emotion should increase his punishment only if it motivates his crime. But what motivates this assumption? The killer's sadistic joy plainly makes his action worse, so why shouldn't it increase his punishment? Insisting on a motivational link strikes me as dogmatic.

Simons's answer is that increasing the killer's punishment on account of an emotion that plays no motivational role would amount to punishing the killer for bad character. As Simons asserts in a related context, "The question for criminal law should be whether the actor's attitude influenced the fact or the manner of the killing, not whether it demonstrates his good or bad character in responding to the killing."<sup>62</sup> But this question presupposes a false di-

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59. Section 2119 of title 18 of the United States Code makes it a crime to engage in carjacking "with the intent to cause death." 18 U.S.C. § 2119. As the Supreme Court interprets § 2119, a carjacker's lethal intention will satisfy the statute's mens rea requirement even if the intention is conditional—that is, even if what the carjacker intends is *to kill the car's owner only on the condition that doing so is necessary to accomplish the carjacking*. See *Holloway v. United States*, 526 U.S. 1, 12 (1999).

60. Kenneth W. Simons, *Punishment and Blame for Culpable Indifference*, 58 INQUIRY 143, 155 (2015).

61. *Id.* at 155–56.

62. *Id.* at 153.

chotomy: that an actor's attitude either bears a causal influence on "the fact or the manner" of his crime or *merely* "demonstrates his . . . bad character."<sup>63</sup> The dichotomy is false because even if an actor's attitude isn't what motivates the actor's conduct, it can do more than merely demonstrate the actor's bad character: it can affect the nature and moral quality of the actor's *action*. We can see this moral consequence not only in Simons's second example (where the sadistic pleasure plays no motivational role) but in his first example (where the desire for sadistic pleasure motivates the killing). That desire makes the killing cruel and therefore morally worse. But other things can have these moral consequences as well, and one of them is the pleasure desired and attained. Unlike its prospect, the pleasure contemporaneous with the action isn't part of what *motivates* it. But that contemporaneous pleasure affects the action's moral quality all the same.

A killer's sadistic pleasure, a carjacker's conditional intention, a driver's recklessness—all of these things help show us that concurrence is a moral relation, not in the first instance a merely psychological one. The *actus reus* and *mens rea* elements of an offense concur when the mental state transforms the act's moral character—by making it bad, worse, or blameworthy. This moral relation can obtain between an act and a mental state even when they do not stand in a relation of causation, motivation, or execution.<sup>64</sup>

Understanding the doctrine of concurrence in moral terms reveals its perhaps surprising centrality to criminal jurisprudence. Commentators often treat the concurrence requirement as an obscure curiosity, important only to the resolution of improbable niceties like the issue at the heart of the Idaho case *State v. Hopple*<sup>65</sup>: whether A is guilty of larceny (taking another's property with the intent to steal it) if he corrals B's sheep to stop them from trampling A's cattle feed, and only *later* decides to steal them. (The court's answer: No. "[I]f the jury believed from the evidence that the defendant had no felonious intent to steal the sheep at the time they came into his possession he would not be guilty of larceny even if he subsequently conceived the intent to appropriate them."<sup>66</sup>) Given how rarely this sort of esoteric question arises, it is no surprise that a leading criminal law casebook doesn't mention the concurrence requirement at all, even as it spends two pages on an analytical exposition of the decidedly marginal doctrine of transferred intent (by which an offender who fires a gun at A, intending to kill A but missing, can be held liable for intentional murder nonetheless if the bullet strikes

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63. *Id.*

64. Recent sophisticated analyses of the concurrence requirement plainly recognize that concurrence is in some respect a moral relation. But they go astray in supposing that the moral relation requires a causal or motivational link. See Alexander F. Sarch, *Knowledge, Recklessness and the Connection Requirement Between Actus Reus and Mens Rea*, 120 PENN ST. L. REV. 1 (2015); Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"? Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219 (2002); Yaffe, *supra* note 53, at 174.

65. 357 P.2d 656 (Idaho 1960).

66. *Hopple*, 357 P.2d at 659.

and kills B).<sup>67</sup> But if criminal jurisprudence properly contains an action-as-object requirement, then the doctrine of concurrence isn't like the doctrine of transferred intent, an exotic ratchet to be pulled from the satchel on the rare occasion when no other tool will fit the bolt. Instead, the concurrence requirement is like the voluntary act requirement, a principle rarely breached, and thus rarely invoked, but still critical. Conceived in moral terms, which is how the action-as-object requirement invites us to conceive the concurrence requirement, it serves to ensure that the *actus reus* and *mens rea* components of an offense are parts of a unity rather than a mere aggregate. Compliance with the concurrence requirement thereby promotes compliance with the action-as-object requirement, the former serving as an implementing doctrine of the latter.<sup>68</sup>

### III. THE ACTION-AS-OBJECT REQUIREMENT IN CRITICAL COMMENTARY AND JUDICIAL REASONING

Although courts and commentators don't denominate the action-as-object requirement an official axiom of criminal jurisprudence, I suggest that they nevertheless feel the principle's attraction. Implicit appeals to the action-as-object requirement figure not only in legal commentary but also in judicial reasoning, particularly regarding offenses crafted in the subjectivist style and accordingly susceptible to the charge of criminalizing thought. Although versions of the offense of attempt occasionally draw this charge,<sup>69</sup> critics more often train their sights on what may appear to them more extreme instances of subjectivist legislation, such as hate crimes and the highly inchoate offenses prototypical of the legal fight against terrorism. In this Part, I'll show how critics complaining about such legislation invoke the ac-

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67. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 618–19 (10th ed. 2017).

68. It would perhaps be more accurate to call the concurrence requirement a *partial* implementing doctrine of the action-as-object requirement, because satisfaction of the concurrence requirement enables *but does not guarantee* compliance with the action-as-object requirement. For example, attempters punished under a subjectivist attempt statute will be punished for their intentions (in violation of the action-as-object requirement) even as their intentions may concur with actions constituting the offense's *actus reus*.

69. See, e.g., Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 30–32 (1968) (implying that punishing offenders for “impossible” attempts would amount to punishing them for their mere thoughts); Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1026 (1967) (“Professor [Glanville] Williams [a subjectivist] is inviting us to say that attempted murder can be *doing anything* while thinking (mistakenly) that you are going to cause X. This is a dangerous invitation which should be rejected, since it provides no criterion whatsoever for characterizing an act as an attempt other than the mistaken view under which it is being done, and is thus . . . tantamount to punishment for intention alone.”); Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 273 (2014) (“Criminalizing attempted murder by means of implausible causal theories [e.g., voodoo] seems dangerously close to criminalizing the sincere hope that somebody dies accompanied by the slightest act in this direction . . . ”).

tion-as-object requirement implicitly. I'll also show how courts and other legal officials adhere to the action-as-object requirement when answering these complaints, even as they reject them.

Currently in force in the leading Anglophone jurisdictions are a set of statutes that criminalize conduct broadly related to terrorism but too incipient or insubstantial to be punishable under traditional principles of attempt or complicity. Such statutes in Canada and the United States serve primarily to expand the scope of accomplice liability,<sup>70</sup> while the highly inchoate counterterrorism statutes in Australia and the United Kingdom serve primarily to expand the scope of attempt liability. In particular, section 101.6(1) of the Australian Criminal Code provides that “[a] person commits an offence if the person does any act in preparation for, or planning, a terrorist act,”<sup>71</sup> and section 5(1) of the United Kingdom’s Terrorism Act 2006 similarly provides that “[a] person commits an offence if, with the intention of . . . committing acts of terrorism . . . he engages in any conduct in preparation for giving effect to his intention.”<sup>72</sup> Other highly inchoate counterterrorism statutes in the United Kingdom push even further beyond the conventional bounds of attempt and accomplice liability by creating unusually broad offenses of possession. For example, section 58(1) of the United Kingdom’s Terrorism Act 2000 creates an offense of “collect[ing] . . . information of a kind likely to be useful to a person committing or preparing an act of terrorism . . . [or] possess[ing] a document or record containing information of that kind.”<sup>73</sup> Section 58 grants a defense to anyone who can “prove that he had a reasonable excuse for his action or possession.”<sup>74</sup>

These and similar statutes are sometimes said to criminalize thought, or to come “dangerously close” to doing so.<sup>75</sup> It isn’t hard to see why. For one thing, the acts these statutes nominally proscribe can be utterly trivial. Section 5(1) of the United Kingdom’s Terrorism Act 2006 criminalizes “engaging in any conduct in preparation for giving effect to [a terroristic] intention.” As A.P. Simester observes, section 5(1) seems “to proscribe acts of cereal eating . . . when done as part of a fitness programme in preparation for committing a terrorist act.”<sup>76</sup> Creating an offense of comparable breadth is section 58(1) of the 2000 Act, which criminalizes collecting information

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70. Section 83.19 of the Canadian Criminal Code imposes liability on anyone “who knowingly facilitates a terrorist activity.” Canada Criminal Code, R.S.C. 1985, c C-46, 83.19(1). Sections 2339A and 2339B of title 18 of the United States Code criminalize the provision of “material support” to terrorists and terrorist organizations, including “seemingly benign support,” such as instruction in how to conduct peaceful negotiations. Holder v. Humanitarian Law Project, 561 U.S. 1, 36 (2010).

71. *Criminal Code Act 1995* (Cth) s 101.6(1) (Austl.).

72. Terrorism Act 2006, c. 11, § 5(1) (UK).

73. Terrorism Act 2000, c. 11, § 58(1) (UK).

74. *Id.* § 58(3).

75. ROACH, *supra* note 2, at 449.

76. AP Simester, *Prophylactic Crimes*, in SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMs 59, 71 (G.R. Sullivan & Ian Dennis eds., 2012).

"useful" to terrorists. "[A]lmost anything that is of general use in carrying out our day-to-day activities is also useful to terrorists," note Jacqueline Hodgson and Victor Tadros.<sup>77</sup> "Terrorists might need clean clothes, so washing machine instructions are useful to terrorists.... It might be advantageous to terrorists in distracting the authorities to appear to have a sense of humour, so joke books might be useful to terrorists."<sup>78</sup>

The severe penalties associated with these counterterrorism statutes<sup>79</sup> give critics a further reason to suspect that the underlying wrongs being condemned and sanctioned are not the potentially trifling acts that the statutes nominally proscribe but the malign intentions that motivate them. Under section 5(1) of the 2006 Act, a person can go to prison for life "if, with the intention of... committing acts of terrorism... he engages in *any* conduct in preparation for giving effect to his intention."<sup>80</sup> What is the underlying wrong section 5(1) condemns and sanctions so severely? Is it the potentially trifling act of preparation? Or is it instead the terroristic intention to which that act gives effect? Alun Jones and coauthors comment that, "[i]f no other criminal offence is available to try a terrorist suspect, the use of [section 5] would surely imply that the person was being tried principally for having criminal thoughts, the *actus reus* of any offence being non-specific and very easy to prove."<sup>81</sup> Hodgson and Tadros voice a similar concern about the information-collection offense created by section 58(1) of the 2000 Act. They see "the offence [as] *really* [being] designed... to capture people who are suspected to have a terrorist intent."<sup>82</sup> Clive Walker adds that section 5(2) makes it "expressly irrelevant whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description, or acts of terrorism generally. It is not just that the

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77. Jacqueline Hodgson & Victor Tadros, *How to Make a Terrorist Out of Nothing*, 72 MOD. L. REV. 984, 985 (2009).

78. *Id.*

79. Terrorism Act 2006, c. 11, § 5(1) (UK) (providing that a person guilty of preparing for a terrorist act is liable to imprisonment for life); *Criminal Code Act 1995* (Cth) s 101.6(1) (Austl.) (same); 18 U.S.C. § 2339A (2018) (providing that a person guilty of providing material support to terrorists "shall be fined..., imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life"); 18 U.S.C. § 2339B (providing that a person guilty of providing material support to foreign terrorist organization "shall be fined... or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life"); Canada Criminal Code, R.S.C. 1985, c C-46, 83.19(1) ("Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."); Terrorism Act 2000, c. 11, § 57(4) (UK) (providing that a violation of section 57(1) (possession for terrorist purposes) is punishable by up to fifteen years in prison); *id.* § 58(4) (providing that a violation of section 58(1) (collection of information useful to terrorists) is punishable by up to fifteen years in prison).

80. Terrorism Act 2006, § 5(1) (emphasis added).

81. ALUN JONES ET AL., BLACKSTONE'S GUIDE TO THE TERRORISM ACT 2006 § 3.05 (2006) (emphasis added).

82. Hodgson & Tadros, *supra* note 77, at 989.

'exact plans are unknown' but that the offence approximates to 'having criminal thoughts.'"<sup>83</sup> As Andrew Ashworth puts it, "[t]he essence of the offense is the intention, coupled with a preparatory act of some kind."<sup>84</sup>

These complaints don't allege a violation of the act requirement, which says (only) that the conditions of liability must include an act. Nor do these complaints allege a violation of Justinian's maxim, which says (only) that if an intention serves as an object of liability, it mustn't be wholly unexecuted. Each of the statutes just described includes an act as a condition of liability, an act that somehow manifests the accompanying mental state. If we take critics' complaints literally, what they find objectionable about these statutes is that the statutes treat mental states as objects of sanction and censure. They find this objectionable not because the mental states targeted are *mere* mental states—they aren't—but because they are mental states rather than actions. To find this objectionable is to presuppose the action-as-object requirement.

No prosecutor has charged a terrorism defendant with eating cereal in furtherance of a terror plot or possessing a joke book with the intent to commit a terrorist act. But prosecutors' very reluctance to bring such charges evinces fidelity to the action-as-object requirement. Given the robust intelligence-gathering capabilities of western governments, I doubt that the only reason for prosecutorial restraint is evidentiary uncertainty. Just as likely, prosecutors intuit, or expect judges and juries to intuit, that a minor act of possession or preparation, even if done in furtherance of a terrorist plot, is a trivial wrong, perhaps too trivial to merit punishment, or if not too trivial to merit punishment, then unworthy of more than a slap on the wrist—even though the intention that motivates the action might itself be a serious moral breach worthy of substantial censure. This intuition channels the action-as-object requirement, which demands that punishment be apportioned to the gravity of an offender's action, rather than to the gravity of any associated state of mind.

The intuition is one that courts seem to share. Because prosecutors don't charge cereal eaters and joke-book possessors with counterterrorism offenses, we don't know how courts would deal with such a charge. But we do know how courts have responded to a defendant's argument that a statute criminalizes thought despite nominally proscribing an act. What we know is that courts have virtually always deflected this sort of challenge by construing the statute in question in such a way that complies not only with the act requirement and Justinian's maxim but also with the action-as-object requirement.

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83. Clive Walker, *The Impact of Contemporary Security Agendas Against Terrorism on the Substantive Criminal Law*, in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY 121, 130 (Aniceto Masferrer ed., 2012) (quoting 438 Parl Deb HC (6th ser.) (2005) col. 999 (UK) (statement of Paul Goggins), and JONES ET AL., *supra* note 81, § 3.05).

84. Andrew Ashworth, *Attempts*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW, *supra* note 9, at 125, 127.

A perennial target of such challenges is an older inchoate offense similar in structure to the counterterrorism crimes that I just discussed. The offense is section 2423(b) of title 18 of the United States Code, which provides that “[a] person who travels in interstate commerce . . . for the purpose of engaging in any illicit sexual conduct with another person shall be fined . . . or imprisoned not more than 30 years, or both.”<sup>85</sup> This “traveler” statute is a stock-in-trade of the federal government’s effort to combat child sex abuse. It enables the government to prosecute pedophiles intercepted on their way to clandestine rendezvous with children (or with police officers posing as children). Defendants convicted under § 2423(b) have argued that the statute “criminalizes ‘mere thought’”;<sup>86</sup> that it “lacks a ‘meaningful actus reus’ and punishes the mere act of thinking while traveling”;<sup>87</sup> and that it “requires merely the crossing of state lines with illegal thoughts to effectuate federal jurisdiction.”<sup>88</sup>

Every court confronted with such an argument has acknowledged that the interstate-travel element in § 2423(b) serves to ensure federal jurisdiction. But none has accepted a challenger’s invitation to interpret the interstate-travel element as exclusively jurisdictional. In particular, none has deemed an offender’s malevolent intention the underlying object of sanction and censure. To save § 2423(b) from imposing punishment for a defendant’s intention to “engag[e] in . . . illicit sexual conduct,” courts have uniformly interpreted the traveler statute as punishing wrongful travel, not wrongful intent. Representative of this approach is the opinion of the United States Court of Appeals for the Third Circuit in *United States v. Tykarsky*:

[T]he relationship between the mens rea and the actus reus required by § 2423(b) is neither incidental nor tangential. Section 2423(b) does not simply prohibit traveling with an immoral thought, or even with an amorphous intent to engage in sexual activity with a minor in another state. The travel must be *for the purpose* of engaging in the unlawful sexual act. By requiring that the interstate travel be “for the purpose of” engaging in illicit sexual activity, Congress has narrowed the scope of the law to exclude mere preparation, thought or fantasy; the statute only applies when the travel is a necessary step in the commission of a crime.<sup>89</sup>

The implication is plain: if a defendant violates § 2423(b) only when his act of interstate travel is “a necessary step in the commission of a crime,” then we plausibly might suppose (even if it doesn’t follow necessarily) that the statute imposes punishment for a wrongful action, not for a bad intention.

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85. 18 U.S.C. § 2423(b) (2018).

86. *United States v. Gamache*, 156 F.3d 1, 7 (1st Cir. 1998) (quoting Brief of Defendant-Appellant at 15–16, *Gamache*, 156 F.3d 1 (No. 97-2418)).

87. *United States v. Tykarsky*, 446 F.3d 458, 471 (3d Cir. 2006) (quoting Brief of Appellant Todd Tykarsky at 61, *Tykarsky*, 446 F.3d 458 (No. 06-3663)).

88. *United States v. Han*, 230 F.3d 560, 562 (2d Cir. 2000) (quoting Brief of Defendant-Appellant Pierce S. Han at 5, *Han*, 230 F.3d 560 (No. 99-1759)).

89. *Tykarsky*, 446 F.3d at 471 (citation omitted).

Some observers will be inclined to dismiss the Third Circuit's interpretation of § 2423(b) as little more than a disingenuous piece of judicial apologetics for a brazen piece of legislative subterfuge. It is just obvious, they'll insist, that Congress's true aim in enacting § 2423(b) was to punish pedophiles for intending to "engag[e] in . . . illicit sexual conduct," not for stepping across imaginary lines. My purpose at this juncture is not to adjudicate any such dispute—I'll attempt that in the next Part—but to emphasize what the dispute's very occurrence implies. The Third Circuit could have agreed with the defendant that his state of mind was the true object of punishment, his act of interstate travel being but a jurisdictional hook, or a proxy for the seriousness of his intent, or both. Interpreting the statute in one of these ways wouldn't have contravened the act requirement or Justinian's maxim. *But it would have contravened the action-as-object requirement.* It is therefore significant that the Third Circuit chose to assign the *actus reus* of § 2423(b) a robust *substantive* role. The court held that "the statute only applies when the [offender's] travel is a *necessary step* in the commission of a crime,"<sup>90</sup> and the court twice contrasted such acts of interstate travel with "mere preparation."<sup>91</sup>

The Third Circuit is no anomaly. In virtually every case where a defendant challenged § 2423(b) on the ground that it criminalizes mere thought despite nominally proscribing an act, the court responded by interpreting the statute in such a way as to render it consistent with the action-as-object requirement.<sup>92</sup> In most of these cases, moreover, the court explicitly required that defendants have performed actions beyond "mere preparation." This further requirement is significant because actions that bring an intending criminal close to completion tend to be considerably more dangerous, and to that extent more wrongful, than actions of mere preparation. If courts understand § 2423(b) to apply to a set of actions that are especially wrongful—acts beyond "mere preparation"—then it is all the likelier that these actions, rather than the intentions with which they are performed, are being treated as the objects of punishment under the statute. It is no point to the contrary that some courts also emphasize that the act of interstate travel provides evidence of the requisite intent. If courts regarded the act of interstate travel as serving no purpose but an evidentiary one, they presumably would require prosecutors to prove that a defendant's act evinced or corroborated his criminal intent. But you'll find no such requirement in the model jury instructions of any federal circuit.

In short, courts almost always reject a defendant's claim that a statute criminalizes thought despite proscribing an act. An instructive exception is

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90. *Id.* (emphasis added).

91. *Id.*

92. See, e.g., *id.* (holding that 18 U.S.C. § 2423(b) "does not punish thought alone"); United States v. Bredimus, 352 F.3d 200, 208 (5th Cir. 2003) (same); United States v. Stephen, 19 F. App'x 196, 198 (6th Cir. 2001) (same); *Han*, 230 F.3d at 563 (same); *Gamache*, 156 F.3d at 8 (same); United States v. Kaechele, 466 F. Supp. 2d 868, 896 (E.D. Mich. 2006) (same).

*Doe v. City of Lafayette.*<sup>93</sup> The plaintiff, Doe, was a pedophile who argued that he had been punished for his sexual thoughts about children.<sup>94</sup> He hadn't been prosecuted for stepping across state lines, however. In fact, he hadn't been prosecuted at all. Instead, he had been subjected to an ad hoc administrative order banning him indefinitely from all city parks in Lafayette, Indiana.<sup>95</sup> City officials issued the order after receiving an anonymous tip that Doe had stood around in a park watching children play while thinking about molesting them.<sup>96</sup> The city imposed the ban without a formal process and made no claim that the order was a sanction for an alleged legal violation.<sup>97</sup> A divided panel of the United States Court of Appeals for the Seventh Circuit nevertheless treated the order as a punishment, holding that the city had impermissibly punished Doe for his mere thoughts:

Doe's behavior [did] not rise to the level of an action of sufficient gravity to justify punishment. The error in punishing actions similar to Doe's is more easily seen by way of analogies removed from the sensitive context of child molestation. By way of comparison, we would not sanction criminal punishment of an individual with a criminal history of bank robbery . . . simply because she or he stood in the parking lot of a bank and thought about robbing it. It goes without saying that in this hypothetical the individual would not have taken an action that could support punishment. Or, as a different example, punishment of a drug addict who stands outside a dealer's house craving a hit but successfully resists the urge to enter and purchase drugs would be offensive to our understanding of the bounds of the criminal law. . . . [B]oth of these situations, analogous to the actions taken by Doe here, present clear examples of actions that do not reach a level of criminal culpability necessary to justify punishment.<sup>98</sup>

As the panel's opinion implies, if standing around in a park does "not rise to the level of an action of sufficient gravity to justify punishment," then standing around in a park can't have been the true object of Doe's punishment. The true object must have been Doe's thoughts. "[T]he City acknowledges that Doe's own revelation of his thoughts, not any outward indication of his thinking, [was] the basis for its actions," wrote the panel majority.<sup>99</sup> "[T]he circumstances make clear that the ban order issued by the City resulted from its concern about Doe's fantasies about children."<sup>100</sup>

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93. 334 F.3d 606 (7th Cir. 2003), *rev'd en banc*, 377 F.3d 757 (7th Cir. 2004).

94. *Doe*, 334 F.3d at 607.

95. Clay Calvert, *Freedom of Thought, Offensive Fantasies and the Fundamental Human Right to Hold Deviant Ideas: Why the Seventh Circuit Got It Wrong in Doe v. City of Lafayette*, 3 PIERCE L. REV. 125, 140 (2005).

96. *Id.* at 139 (suggesting that the anonymous tip came from a fellow member of Doe's sex-addict support group).

97. *See id.* at 140.

98. *Doe*, 334 F.3d at 612.

99. *Id.* at 608.

100. *Id.* at 611.

Doe's victory was short-lived. The Seventh Circuit reheard the case en banc and rejected the panel's conclusion. The en banc court emphasized the gravity of Doe's *conduct*, deeming his action and not his accompanying thought the true object of punishment. The en banc court rejected what it saw as Doe's unduly narrow description of the action that had precipitated his punishment, focusing instead on the entire course of conduct leading to Doe's moment in the park:

The City . . . did not ban [Doe] from the public parks because he admitted to having sexual fantasies about children in his home or even in a coffee shop. The inescapable reality is that Mr. Doe did not simply entertain thoughts; he brought himself to the brink of committing child molestation. He had sexual urges directed toward children, and he took dangerous steps toward gratifying his urges by going to a place where he was likely to find children in a vulnerable situation.

To characterize the ban as directed at "pure thought" would require us to close our eyes to Mr. Doe's actions.<sup>101</sup>

The en banc court thus disposed of Doe's claim in the same way that other courts have deflected challenges to § 2423(b): by identifying an action that the defendant performed in furtherance of his illicit intention and by labeling that action, not his illicit intention, the true object of punishment. This sort of judicial response serves as a threefold rejoinder to the charge that a statute punishes thought. First, the response emphasizes that the statute includes an act among the conditions of liability, which shows that the statute satisfies the voluntary act requirement. Second, the response establishes that the required act executes the required mental state, which shows that the statute satisfies Justinian's maxim. Third, and most important for our purposes, the response establishes (or purports to establish) that the true wrong punished by the statute is the offender's conduct, which shows that the statute satisfies the action-as-object requirement. No court has responded to one of these challenges by saying, "Yes, the statute in question punishes thought, but the thought it punishes is executed in conduct, so the defendant is without a claim." No court has openly said anything inconsistent with the action-as-object requirement.

What courts say they're doing is of course far from the last word on what they're actually doing. But it is the first word, and we should take it seriously.<sup>102</sup> No doubt we also should look beyond what courts say. We may find courts doing things very different from what they say they're doing.

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101. Doe v. City of Lafayette, 377 F.3d 757, 766–67 (7th Cir. 2004). The en banc court added for good measure that the order banning Doe from the parks "was not [punishment] at all. Rather, the ban was a civil (i.e., nonpunitive) measure designed for the protection of the public." *Id.* at 766 n.8.

102. Cf. J.L. AUSTIN, PHILOSOPHICAL PAPERS 185 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979) ("[O]rdinary language is *not* the last word [on philosophical questions]: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it *is* the *first* word.").

That discovery should lead us to give judicial language more attention, not less. If no court has ever embraced subjectivism outright—and, as far as I know, none has—that is a striking fact worthy of serious attention.

A reluctance to contradict the action-as-object requirement also seems to unite both sides in the classic dispute over the permissibility of hate crime penalty-enhancement provisions like the one before the Supreme Court in *Wisconsin v. Mitchell*.<sup>103</sup> The case concerned a Wisconsin provision that increases the maximum penalty for assault from two years to seven “whenever [a] defendant ‘[i]ntentionally selects the [victim] . . . because of [his] race, religion, color, disability, sexual orientation, national origin or ancestry.’”<sup>104</sup> Before the case reached the Supreme Court, the Wisconsin high court held that the enhancement provision impermissibly punished offenders for their thoughts,<sup>105</sup> siding with a view broadly endorsed by critics of hate crime laws.<sup>106</sup> Heidi Hurd and Michael Moore state the view succinctly:

The underlying criminal act, together with the mens rea to commit that act (for example, the intentionality of the act), is already punished by existing criminal law. The enhanced penalty attached by hate/bias crime legislation is [therefore] not for the underlying act, nor is it for the intentionality with

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103. 508 U.S. 476 (1993).

104. *Mitchell*, 508 U.S. at 480 (quoting WIS. STAT. § 939.645(1)(b) (1989–1990)).

105. *Wisconsin v. Mitchell*, 485 N.W.2d 807, 811–13 (Wis. 1992), *rev'd*, 508 U.S. 476 (1993).

106. *Id.* at 812–13 (“[A] charge of ethnic intimidation must always be predicated on certain offenses proscribed elsewhere in a state's criminal code. As those offenses are already punishable, all that remains is an additional penalty for the actor's *reasons* for his or her actions.” (footnote omitted) (quoting Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 363 (1991) [hereinafter Gellman, *Sticks and Stones*])); see also JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 121 (1998) (“Generic criminal laws already punish injurious conduct; so recriminalization or sentence enhancement for the same injurious conduct when it is motivated by prejudice amounts to extra punishment for values, beliefs, and opinions . . . . If the purpose of hate crime laws is to punish more severely offenders who are motivated by prejudices, is that not equivalent to punishing . . . hate thought?”); Larry Alexander, *The ADL Hate Crime Statute and the First Amendment*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 49, 49 (“If one is punished an extra amount for acting with a bigoted motive, where the justification is the pure retributive one that the bigoted motive reflects a morally depraved bigoted character, then one is being punished the extra amount for being a bigot. And if one is being punished for being a bigot, one is being punished for believing what bigots believe.”); Gellman, *supra* note 2, at 514–15 (“The only substantive element of most hate crime statutes is that the defendant had a bias *motive* for committing the base offense. As motive consists solely of the defendant's thoughts, the additional penalty for motive amounts to a thought crime . . . .” (footnote omitted)); Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1128–29 (2004); Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 29, 37–38 (“Because [sentencing enhancement] laws are adopted for the very purpose of penalizing thought processes and political motivations found to be offensive by those in power, they constitute classic abridgements of the constitutionally protected freedom of thought . . . . Hate crime sentencing laws punish *nothing more* than internal motivation . . . .”).

which it is committed; it is for the hatred or prejudice that motivated the defendant to form and act on that intent.<sup>107</sup>

The complaint asserted here is not that hate crime penalty-enhancement provisions empower the state to impose punishment in the absence of an act, which would be a violation of the voluntary act requirement. The complaint is rather that these enhancement provisions empower the state to condemn and sanction an offender for something *in addition* to an act—namely, a hateful state of mind. To voice this complaint is to invoke the action-as-object requirement, which demands that punishment be imposed only for actions and omissions, separate punishment for thoughts or character being impermissible.

Although the Supreme Court ultimately adjudged the complaint meritless, reversing the Wisconsin high court and upholding the hate crime penalty-enhancement law, its decision in *Mitchell* said nothing inconsistent with the action-as-object requirement. The Supreme Court concluded that the Wisconsin law punished conduct, not thought,<sup>108</sup> reasoning that “bias-inspired conduct . . . inflict[s] greater individual and societal harm.”<sup>109</sup> Whether the Supreme Court or the Wisconsin high court had the better of this dispute is a question I’ll address in the next Part. My present purpose has been to emphasize that neither side in the dispute took a position inconsistent with the action-as-object requirement. Although the Supreme Court didn’t grant the relief that the challengers sought, it didn’t question their assumption that the law must never treat a person’s mental states as separate objects of punishment. To my knowledge, no American court has ever avowedly tolerated a violation of the action-as-object requirement.

#### IV. ARE HATE CRIME LAWS AND TERRORISM OFFENSES THOUGHT CRIMES?

What remains to be determined is whether the law adheres as rigorously to the action-as-object requirement as judicial discourse apparently assumes. I believe it does not. But the matter is trickier than critics allow, and in this Part I’ll try to explain why, starting with the subject of hate crime laws.

Like Hurd and Moore, James Jacobs and Kimberly Potter present the problem with hate crime laws as a matter of basic arithmetic: “Generic criminal laws already punish injurious conduct; so recriminalization or sentence enhancement for the same injurious conduct when it is motivated by prejudice amounts to *extra* punishment for values, beliefs, and opinions . . .”<sup>110</sup> Jacobs and Potter appear to be drawing the following inference: if a crime motivated by hatred or prejudice is punished more harshly than an otherwise identical crime not so motivated, then the difference in punishment

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107. Hurd & Moore, *supra* note 106, at 1128–29.

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

109. *Id.* at 487–88.

110. JACOBS & POTTER, *supra* note 106, at 121.

*necessarily* amounts to separate punishment for the offender's hatred or prejudice.

If Jacobs and Potter are drawing this inference, then they are guilty of a kind of subtractive fallacy.<sup>111</sup> When the law provides that some aggravating factor increases the punishment for a given crime, one need not (and generally ought not) construe the additional quantum of punishment as separate punishment for the aggravating factor. In Michigan, offenders who commit a robbery can ordinarily be punished by up to fifteen years in prison,<sup>112</sup> but if they "represent[] orally . . . that . . . [they are] in possession of a dangerous weapon," they can be punished by up to life in prison.<sup>113</sup> Suppose you are sentenced to twenty-five years after committing a robbery in the course of which you claimed to have a gun. I submit that it would be exceedingly odd, even absurd, to say that your prison sentence represents punishment for two separate wrongs—fifteen years for the robbery and ten for the statement about the gun. Your statement surely doesn't warrant ten years in prison; in itself it might not warrant any punishment at all. But the "armed" robbery, a unitary wrong, could well warrant twenty-five years. Your statement increases the overall punishment by making the robbery a worse robbery, not by serving as a separate wrong that receives a separate punishment. We would commit a kind of subtractive fallacy if we subtracted the fifteen-year maximum sentence for unarmed robbery from your twenty-five-year sentence for armed robbery and concluded that the law was imposing a ten-year punishment for your having claimed to be armed. Punishment for armed robbery can't be disaggregated into multiple punishments for the offense's multiple constituents.

But can punishment for a bias-motived assault be disaggregated into punishment for the assault and punishment for the bias? Here, by contrast, the answer might be yes—but not by virtue of Jacobs and Potter's fallacious inference. Recall that the Wisconsin statute at issue increases the maximum penalty for assault from two years to *seven* when an assault is motivated by bias. I suggest that it isn't the mere fact of the increase but rather the *magnitude* of the increase that gives us reason to consider whether biased offenders receive "extra [i.e., separate] punishment for [their] values, beliefs, and opinions."<sup>114</sup> If a bias-motivated assault doesn't merit a sentence three-and-a-half times longer than that which a bias-free assault merits, then the enhancement provision might treat an offender's bias as a separate wrong, rather than treating it as a separate wrong-making feature of the offender's wrongful action.

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111. Other commentators appear to trade on the same inference. See Alexander, *supra* note 106, at 49; Gellman, *Sticks and Stones*, *supra* note 106, at 363; Hurd & Moore, *supra* note 106, at 1128–29.

112. MICH. COMP. LAWS ANN. § 750.530 (West 2014).

113. *Id.* § 750.529.

114. JACOBS & POTTER, *supra* note 106, at 121.

To resolve the matter decisively, we would need to determine whether an offender's overall sentence represents disproportionate punishment for his actions, rather than the conjunction of appropriate punishment for his actions and improper punishment for his bigoted thoughts. To distinguish between these two scenarios, we would need to answer a more fundamental question: Just how much additional punishment does an offense merit when motivated by bias? This is a tremendously difficult question.<sup>115</sup> Its difficulty might be part of the reason why so much controversy surrounds the issue of whether hate crime laws impermissibly punish people for their thoughts. Hate crime laws might be a genuinely hard case—perhaps an unresolvable one.<sup>116</sup>

But disproportionate punishment isn't always so difficult to spot. If you possess a subway map in order to find your way to a meeting of potential terrorists, could that act of possession truly merit fifteen years in prison?<sup>117</sup> If you do push-ups in order to make yourself strong enough to hijack a bus, could that act of preparation truly merit life?<sup>118</sup> If these are silly questions—silly because the answer to each of them is obviously no—then the listed punishments don't befit the actions for which they are nominally imposed, and the better part of each punishment might well represent punishment for the associated intention taken as a separate wrong.

No court would impose such harsh sentences, of course, nor would any prosecutor seek them. But these hypothetical scenarios are only the most extreme and therefore the most obvious examples of how the state's treatment of a terrorism defendant might raise questions about whether the law is violating the action-as-object requirement. Actual sentencing practice raises these questions as well, even if not as dramatically. The Court of Appeal of England and Wales recently issued guidance to lower courts on how to sentence offenders under section 5(1) of the Terrorism Act 2006,<sup>119</sup> which criminalizes “engaging in any conduct in preparation for giving effect to [a

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115. See, e.g., FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 45–63 (1999) (exploring different respects (e.g., culpability, harmfulness) in which considerations of proportionality warrant imposing harsher punishment on bias offenders).

116. My response to Jacobs and Potter complements Carol Steiker's, which rejects the idea that hate crime laws stand apart from traditional penal laws in scrutinizing the quality of an offender's motives. See Carol S. Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857, 1871 (1999) (book review) (“[N]ormative evaluation of reasons for action—of belief and attitude—are hardly foreign to the criminal law as it now exists and as it has long existed.”).

117. Terrorism Act 2000, c. 11, § 58(4) (UK) (providing that a violation of section 58(1) (collection of information useful to terrorists) is punishable by up to fifteen years in prison).

118. *Criminal Code Act 1995* (Cth) s 101.6(1) (Austl.) (providing that a person guilty of preparing for terrorist act is liable to imprisonment for life); Terrorism Act 2006, c. 11, § 5(3) (UK) (same).

119. R v. Kahar [2016] EWCA (Crim) 568 [24]–[36], [2016] 2 Cr. App. R(S) 32 [H12] (Eng.).

terroristic] intention.”<sup>120</sup> Although the court recommended increasing an offender’s sentence in proportion to the gravity of his preparatory conduct—thus honoring the action-as-object requirement in theory—the court nevertheless suggested multiyear prison terms for offenders whose preparatory conduct was relatively insubstantial. For example, the court suggested a prison term of between twenty-one months and five years for “[a]n offender who had never set out [to join a terrorist organisation] or who set out but the circumstances were such that it was unlikely that he would go very far, or returned without going far, or who had a minor role in relation to [relatively insignificant] intended acts.”<sup>121</sup> Would imposing a five-year sentence for such minor preparatory conduct violate the action-as-object requirement?

There are at least three ways to answer this question. Maybe (1) a five-year sentence really does befit minor preparatory conduct because of the sheer malignancy of a would-be terrorist’s ultimate objective. However trivial in itself, an act done for the purpose of executing a malign intention is to that extent wrongful and therefore potentially an appropriate object of punishment—all the more so if the actor’s ultimate end is something truly horrible. So there is no absurdity in interpreting statutes like section 5(1) of the Terrorism Act 2006 as imposing punishment for conduct rather than mere intent. Even when trifling, the acts such statutes proscribe aren’t completely innocent. Eating cereal as part of a terrorist training program might not do much to further one’s terroristic intentions, but it still does something. Alternatively, maybe (2) a five-year sentence is too harsh a penalty for such (relatively) minor preparatory conduct, so a portion of the sentence represents punishment for the offender’s terroristic intention. Or maybe (3) a five-year sentence is too harsh a penalty for such minor preparatory conduct but the whole sentence represents disproportionate punishment for the terrorist’s actions, none of it representing punishment for his terroristic intention.

These are the sorts of possibilities we would routinely be forced to evaluate and decide between if the criminal law contained an action-as-object requirement. Distinguishing (2) from (3) is a difficult task that could require us to divine what is in the hearts of prosecutors and judges.<sup>122</sup> Distinguishing either (2) or (3) from (1) is also a difficult task, because of how hard it is to assess a punishment’s proportionality. The best attempts to delineate a rigorous notion of proportionality still leave us ill-equipped to evaluate the proportionality of particular sentences. John Deigh proposes that “the [appropriate] measure by which the severity of punishment is determined to be proportional to the seriousness of the crime for which it is inflicted is the

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120. Terrorism Act 2006, § 5(1).

121. *Kahar*, [2016] 2 Cr. App. R(S) 32 [H12].

122. See Gabriel S. Mendlow, Commentary, *Divine Justice and the Library of Babel: Or, Was Al Capone Really Punished for Tax Evasion?*, 16 OHIO ST. J. CRIM. L. 181 (2018) (arguing that the wrong for which an offender is punished may depend on the motivations of various legal officials).

minimal amount of pain or loss necessary to preserve social order.”<sup>123</sup> Deigh’s measure of proportionality admirably exceeds the rigor of any retributive metaphor. But it is still so abstract that we can only speculate as to whether a twenty-one-month sentence or a five-year sentence—or something in between or above or below these extremes—is the minimal amount of pain or loss necessary to preserve social order when we are sentencing a defendant who set out to join a terrorist organization and failed.

If criminal law contained an action-as-object requirement, it isn’t just counterterrorism offenses and hate crime laws that could require us to grapple with these difficult questions. In theory, *any* conventional offense graded in terms of an offender’s culpability could invite the question of whether an offender convicted of a higher grade of the offense was being punished primarily for the aggravating mental state conceived as a separate wrong. First-degree murder is penalized more harshly than second-degree murder. Does the incremental penalty associated with first-degree murder therefore represent separate punishment for the first-degree murderer’s aggravating state of mind, conceived as a transgression unto itself?

That we don’t find ourselves asking such questions with any frequency might be seen as evidence that the criminal law doesn’t contain an action-as-object requirement after all. Maybe it contains only a *partial* action-as-object requirement, a principle demanding that an offender’s punishment be imposed at least in part, but not necessarily exclusively, for an action. Preference for a partial action-as-object requirement would explain the general absence of controversy about whether first-degree murderers and other offenders are being punished in part for their thoughts. In most cases, it is plain that at least part of an offender’s sentence represents punishment for the offender’s actions. Only when an offender’s conduct is insubstantial or highly incipient (or perhaps when the offender is subjected to a certain kind of pretextual prosecution<sup>124</sup>) does it seem possible that the offender’s punishment is imposed entirely for the offender’s state of mind. That would explain why counterterrorism laws of preparation and facilitation arouse the fiercest criticism. In these cases, the gravity of an offender’s conduct is at its lowest ebb. A general preference for a *partial* action-as-object requirement also would explain why the subjectivist version of attempt liability is relatively uncontroversial. Subjectivist doctrines like the MPC’s “substantial step” test require robust conduct. That makes it easy for reasonable onlookers to convince themselves that, in practice, at least some portion of any attempted犯’s sentence represents punishment for the attempter’s actions.

As I said a moment ago, the fact that we don’t find ourselves asking whether conventional offenses punish offenders for their thoughts might be

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123. John Deigh, *Punishment and Proportionality*, 33 CRIM. JUST. ETHICS 185, 185 (2014).

124. See Mendlow, *supra* note 122 (raising the question whether defendants prosecuted because of, and only because of, the state’s antipathy to their thoughts are punished *for* their thoughts).

seen as evidence that the criminal law contains only a *partial* action-as-object requirement. But it just as plausibly might be seen as evidence that the criminal law contains a *full* action-as-object requirement *that we rarely suspect the state is violating*. When the state punishes harshly someone whose conduct is insubstantial or incipient but whose attitudes and other mental states generate intense social antipathy, then these mental states could well be objects of punishment in their own right. Absent such factors—and such factors are often absent—disproportionate punishment is probably just disproportionate punishment.

#### CONCLUSION

If our criminal legal system conformed to the action-as-object requirement, an offender's conduct would serve always as the underlying object of punishment and never merely as a proxy for the offender's illicit state of mind. Liability would arise only once the offender's conduct was serious enough to warrant sanction and censure, and the law would apportion the offender's punishment to the gravity of the offender's conduct, not to the gravity of any accompanying states of mind. Offenders whose conduct was minimally wrongful would receive only a minimal punishment no matter how malevolent their intentions.

Textbook criminal theory doesn't include the action-as-object requirement among its axioms. Yet plausible principles of political morality strongly support the requirement, critical commentary frequently presupposes it, and judicial reasoning never flouts it. The action-as-object requirement is a moral aspiration of our law. If we made this aspiration explicit, we would conceive the seemingly miscellaneous axioms of criminal jurisprudence as a cohesive set of principles that serve as a collective bulwark against thought crime.