THE UNITY OF ACTION AND THE ACTION AS OBJECT: UNSUNG AXIOMS OF CRIMINAL LAW

Gabriel S. Mendlow*

What do terrorism offenses, hate crime laws, and the law of attempt have in common?

All have been accused of punishing people for their thoughts.

The accusation might at first blush seem hyperbolic, because no terrorism or hate crime law, 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 prohibited conduct isn’t what these laws truly aim to punish. When a person commits an attempt or violates a terrorism or hate crime law, he acts 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’s this mental state taken in itself, rather than the offender’s prohibited conduct, that critics see as the true object of punishment.

This criticism invites two questions, which the Essay aims to answer. The first is whether the criticism is accurate: does any criminal statute truly punish offenders not for their conduct but for their accompanying mental state, conceived as a separate transgression? The second question is whether the criticism is really a criticism: is there really anything wrong with a statute that treats an actor’s mental state, taken in itself, as the ultimate object of punishment, provided the mental state is executed through or realized in the actor’s conduct?

Conventional jurisprudence says no. As Part I explains, no recognized axiom of criminal law forbids the state to punish an offender for a mental state that’s executed through or realized in his conduct. Punishment for an executed mental state doesn’t flout the voluntary act requirement, which says only that the state mustn’t punish you in the absence of voluntary conduct. Nor does punishment for an executed mental state flout what I’ll call the cogitationis principle,¹

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* Assistant Professor of Law and of Philosophy, University of Michigan. [Acknowledgments.]

¹ An ancient maxim is cogitationis poenam nemo patitur (“No one may be punished merely for thinking”).

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which says only that the state mustn’t punish you for a mere mental state—one on which you’ve not yet begun to act.² No principle of conventional jurisprudence says what the critics of terrorism and hate crime laws presuppose: that the object of an offender’s punishment must always be an action. Conventional criminal theory contains no action-as-object requirement, no principle requiring that the state punish you only for your actions,³ and never for the mental states that your actions accompany or incorporate, conceived as separate transgressions.

And that matters. It matters both for which offenses we may punish (the scope of the criminal law) and for how severely we may punish them (the apportionment of punishment). Absent the action-as-object requirement, the law may punish an offender as soon as soon as his conduct evinces a malevolent intention, and the law may punish him harshly for that intention even if the conduct that evinces it merits far less condemnation in itself. By contrast, if criminal law conformed to the action-as-object requirement:

(1) an offender whose conduct was minimally wrongful would receive only a minimal punishment, despite the malevolence of his intentions;

(2) the law would apportion an offender’s punishment to the gravity of his conduct, not to the gravity of any accompanying mental states, which might rule out certain hate crime penalty enhancements; and

(3) criminal liability would arise only once an offender’s conduct was grave enough to warrant sanction and censure, which might rule out certain counterterrorism crimes of mere preparation or of highly-attenuated facilitation.

² For a discussion of the foundations of the cogitationis principle, see Gabriel S. Mendlow, Why Is It Wrong to Punish Thought?, 127 YALE L.J. ___ (Forthcoming 2018).

³ I use the term “action” to denominate a broad and familiar category of doings, one that encompasses both affirmative conduct and voluntary omissions but excludes activity that is primarily mental, such as believing, desiring, fantasizing, and intending. The distinction between actions (i.e., non-mental doings) and mental doings is more conceptual than ontological. An action may have a mental component (e.g., an intention) that, taken separately, is a mental doing.
The Action-as-Object Requirement

All of these consequences would follow if the law conformed to the action-as-object requirement.

But should it conform? Although presupposed by critics of terrorism and hate crime laws, the action-as-object requirement appears in no learned treatise, is endorsed expressly by no judicial opinion, and is in fact implicitly rejected by the many theorists partial to a “subjectivist” law of attempts, which Glanville Williams said “punish[es] [the attempter] for his intention, the act being required [merely] as evidence of a firm intention.” Is the action-as-object requirement nevertheless something we should accept?

It is, for reasons I offer in Parts II and III.

In Part II, I argue that the state engages in impermissible mind control when it punishes an offender for his thoughts, whether those thoughts are wholly unexecuted or fully realized in the offender’s conduct. This conclusion follows from two principles: one familiar but poorly understood, the other unexamined and seemingly unnoticed. The familiar principle is that persons possess a right of mental integrity, a right to be free from the direct and forcible manipulation of their minds. The unexamined and seemingly unnoticed principle—the Enforcement Constraint—is that the state’s authority to punish transgressions of a given type extends no further than its authority to thwart or disrupt such transgressions using direct coercive force. Heretofore undefended, the Enforcement Constraint is in fact a signal feature of our system of criminal administration, governing the scope and limits of the criminal law. In our system, the state may ensure compliance with a given norm through criminal punishment only when the state may in principle ensure compliance with that norm through direct coercive force. When conjoined with the principle that persons possess a right of mental integrity, the Enforcement Constraint entails that punishment for any kind of thought is intrinsically unjust: if coercing compliance with a thought-proscribing norm would violate a potential norm-breaker’s right to mental integrity, then so too would exposing the norm-breaker to punishment. That, I suggest, is why it’s wrong to punish thought—not just unexecuted thought but all thought, including thought realized in an offender’s conduct, which is the sort of thought that the action-as-object requirement deems unpunishable.

In Part III, I show how embracing the action-as-object requirement not only would avoid the injustice of punishment for thought elucidated in Part II but also would promote a unified and coherent understanding of the criminal law’s core axioms. If we embraced the action-as-object requirement, we’d come to recognize seemingly miscellaneous principles of criminal jurisprudence (the voluntary act requirement, the *cognitionis* principle, and the requirements of *actus reus*, *mens rea*, and concurrence) as implementing doctrines of the action-as-object requirement—less as disparate precepts with independent functions than 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*. Thus, in defending the action-as-object requirement, I uncover a second unsung principle of criminal law: the essential unity of criminal actions.

Part IV shows how the action-as-object requirement, even though unacknowledged, actually figures covertly in legal reasoning and legal commentary. As mentioned above, critics of the War on Terror draw on the action-as-object requirement implicitly 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, are offenders’ malevolent states of mind, the proscribed conduct being too incipient or insubstantial to be the true object of punishment. This complaint evokes a familiar objection to hate crime penalty-enhancement laws: that they impermissibly impose *extra* punishment just for an offender’s hateful motives—punishment in excess of that which is imposed for the offender’s violent conduct. Courts virtually always reject such complaints when brought by litigants, but never on the ground that the state may treat a person’s mental states as objects of punishment as long as they’re realized in conduct. Like the litigants whose claims they reject, courts *adhere to the action-as-object requirement implicitly*, not doubting for a moment that the state may punish a person only for his actions, and never for the mental states that his actions execute, accompany, or incorporate. Courts don’t embrace the action-as-object requirement outright, but they 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 the *cogitationis* principle. In fact, courts say precisely what is necessary to show that these statutes satisfy the action-as-object requirement.

But are courts right? Do the challenged statutes really all comply with the action-as-object requirement? As I explain in Part V, this question is harder to resolve than courts have allowed. Resolving the question requires deciding whether the severity of an offender’s punishment is proportionate to the gravity of his action, with no “extra” punishment having been apportioned to his mental state conceived as an independent transgression. Insofar as such questions of proportionality are difficult and contentious and potentially irresolvable, so too will be questions about whether terrorism and hate crime laws comply with the action-as-object requirement.

I. THE MISSING AXIOM

There’s a gap in conventional criminal theory: 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, sometimes offered as a rationale for the act requirement and sometimes presented (wrongly) as an alternative formulation of the act requirement, is the maxim *cogitationis poenam nemo patitur*. This principle, the *cogitationis* principle, says that no one may be punished for a *mere* thought—a belief, desire, fantasy, or unexecuted intention. But no principle of conventional criminal theory says that you may not be punished for a thought that’s executed through or realized in your conduct. The law contains no action-as-object requirement.

How the action-as-object requirement differs from the voluntary act requirement and the *cogitationis* principle is easier to see if we first appreciate how the latter two differ from each other. Not only are these two principles distinct, but they speak in different registers. The *cogitationis* principle is *substantive*: it speaks to the question of 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\(^5\) and as standardly understood by commentators,\(^6\) isn’t substantive but *conditional.*\(^7\) The act requirement speaks to the

\(^5\) See, *e.g.*, MODEL PENAL CODE § 2.01(1) ("A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable."); CAL. PENAL CODE § 26 (West 1970 & Supp. 1987) ("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 1975) ("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 § 6.01(a) ("A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.").

\(^6\) See, *e.g.*, PAUL ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 35 (1997) ("[W]hat if a legislature gone wild sought to criminalize thinking or a status of some kind? . . . [I]t would take little for the legislature to add a conduct element of some kind to the offence definition. Instead of an offence of imagining the death of the king, the offence could be defined to punish communicating to another that one imagined the death of the king, a fact that would necessarily exist in every instance where we could know that such an offence had occurred. Instead of an offence of Being a Democrat, the offence could be defined to punish Joining the Democratic Party, which presumably would require an act of some sort. These offences might run afoul of other legal or constitutional provisions, but they do satisfy the statutory act requirement."); Douglas N. Husak, *The Alleged Act Requirement in Criminal Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 107, 111 (John Deigh and 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.").

\(^7\) Commentators occasionally have observed that the voluntary act requirement could be construed substantively. See, *e.g.*, R.A. DUFF, ANSWERING FOR CRIME 96 (2007). Husak, in earlier work which he has since implicitly repudiated, see Husak, supra note 6, at 111, proposed a substantive gloss on the act requirement (Husak, *Does Criminal Liability Require an Act?*, supra note 9, at 26–27):

The act requirement must be interpreted to state that criminal liability requires not only that some act be performed but also that this act must bear some specific relation to criminal liability. The nature of this "specific relation" is not patently obvious. I propose that this connection is best expressed by the "for" relation. In other words, the act is not satisfied unless criminal liability is imposed *for* an act. I am unsure how to defend my proposal to understand the act requirement. But an act would seem unnecessary, superfluous, or extraneous to liability unless punishment were imposed *for* it.
question of what conditions must obtain before penal liability may be imposed. Unlike the cogitationis principle, the act requirement as standardly understood says nothing about what sort of (supposed) transgressions may or may not serve as objects of penal liability. The act requirement says only that the state may not punish someone unless it proves that he performed some voluntary act or voluntary omission, such act or omission being a necessary condition of penal liability. The act requirement doesn’t say that the state may punish someone only for an act or omission.8

Because the act requirement and cogitationis principles speak in different registers, they are logically independent. That a statute satisfies the cogitationis principle doesn’t entail that it satisfies the act requirement: even if some statute avoids imposing punishment for an unexecuted thought, the statute nevertheless might impose punishment for a status or for an involuntary act. Conversely, that a statute satisfies the act requirement doesn’t entail that it satisfies the cogitationis principle: even if some statute includes an act or omission among its elements, the statute nevertheless might impose punishment for an unexecuted thought. Consider this fanciful example of Douglas Husak’s:

Suppose that legislators in a given jurisdiction become convinced that existing statutes were ineffective in punishing persons who had been disloyal to the monarch and propose a new statute that defined treason as “compassing the death of the king”. One legislator, especially adept at criminal theory, objects to this new statute on the ground that it violates the act requirement. In order to mollify his concerns, the legislators agree to amend the statute to include an additional clause that allows liability to be imposed only on persons

Contrary to what Husak says here, an act might play any of a number of non-substantive roles. Consider, for example, the several possible non-substantive roles of the act element in attempt liability. See infra note 25 and accompanying text.

8 For an extended discussion of the difference between objects and conditions of penal liability, see Gabriel S. Mendlow, The Elusive Object of Punishment (unpublished manuscript); see also R.A. Duff, Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?, 6 BUFF. CRIM. L. REV. 147 (2003).
who had performed the act of eating at some time prior to the moment at which they compassed the death of the king.  

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’s still something wrong with the statute—something obviously wrong. What’s wrong with the statute is a matter of what the statute imposes penal liability for, what it treats as the object of liability, what it treats as the wrong or supposed wrong for which punishment is imposed. It’s evident that the statute doesn’t impose punishment for the physical act of eating. That act is innocuous, included in the offense definition only to ensure nominal compliance with the act requirement. The statute instead imposes punishment for the mental act of compassing the death of the king. That seems objectionable not because of the act requirement, which the statute satisfies, but because of the cogitationis principle, which forbids the state to treat a person’s unexecuted thoughts as objects of sanction and censure. The cogitationis principle (because it’s substantive) therefore precludes certain styles of criminalization that the act requirement tolerates (because it’s conditional). But the cogitationis principle is still highly permissive. Although it forbids the state to punish mere mental states—beliefs, desires, fantasies, and unexecuted intentions—the cogitationis principle doesn’t altogether forbid the state to make an offender’s mental state an object of liability. In particular, it principle doesn’t forbid the state to target a mental state that’s realized in conduct. The cogitationis principle, like the act requirement, does nothing to preclude the so-called subjectivist style of criminalization, in which a statute nominally prohibits an act but treats the motivating mental state as the underlying object of sanction and censure. Only the action-as-object requirement precludes the subjectivist style of criminalization.

Perhaps the clearest exemplar in Anglophone law of subjectivist legislation is the ancient English offense of treason. The Treason Act 1351 provided that “when a man doth compass or imagine the

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death of . . . the King . . . and thereof be provably attainted of open
deed by the people of their condition . . . that ought to be adjudged
treason. . . .”10 Seizing on the breadth of this provision, contemporary
commentators sometimes say that a person once could be held
for treason merely for intending the king’s death. That’s an exagger-
ation. 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.”11 At all other times
treason required an overt act (an “open deed”). What seems very
likely, however, is that the overt act element was for several centu-
ries nothing but a condition on which an offender could be punished
for his underlying treasonous intention (his “compassing” or “imag-
ining”). The classic commentators on the early English law of trea-
son, Hale and Sir Edward Coke, both spoke of the overt act element
as serving no purpose other than to prove the existence of an under-
lying mental wrong.12 In early centuries, courts sometimes held that
a defendant could satisfy the overt act requirement just by making
treasonous utterances and writings,13 their sufficiency in a given
case evidently a function of whether they were reliable proof of the
actor’s treasonous intent.14 Moreover, when the overt act alleged
was a piece of non-verbal conduct, that conduct often was trifling—
far less robust than that demanded by any modern attempt statute.15
As administered, the Treason Act nevertheless complied both with

10 Graham S. McBain, High Treason: Killing the Sovereign or Her Judges,
11 1 SIR MATTHEW HALE, HISTORY OF PLEAS OF THE CROWN 110 (1847).
12 Id. at 108; SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE
LAWS OF ENGLAND, 5–6 (1644). See also 2 JAMES FITZJAMES STEPHEN, A HIS-
TORY OF THE CRIMINAL LAW OF ENGLAND 249 (1883).
13 See McBain, supra note 10, at 463 n. 57 (discussing cases).
14 See 2 WILLIAM BLACKSTONE, COMMENTARIES *80 (“[N]owadays it
seems clearly to be agreed . . . that . . . words spoken amount to only a high mis-
demeanor, and no treason. For they may be spoken in heat, without any intention,
or be mistaken, perverted, or misremembered by the hearers. . . . If the words be
set down in writing, it argues more deliberate intention: and it has been held that
writing is an overt act of treason. . . . But even in this case the bare words are not
the treason, but the deliberate act of writing them. And such writing, though unpublish-
hed, has in some arbitrary reigns convicted its author of treason. . . .”).
15 See, e.g., HALE, supra note 11, at 115–17.
the act requirement (some conduct was required) and with the cogitationis principle (the intention for which liability was imposed had to be partially executed, even if only barely).

Although the modern offense of attempt requires a far more substantial actus reus than treason once did, many theorists over the past two centuries have given the former a similar subjectivist gloss. In his nineteenth century Lectures on Jurisprudence, John Austin said, “[g]enerally, attempts are perfectly innocuous, and the party is punished, not in respect of the attempt, but in respect of what he intended to do.”16 Echoing Austin a century later, Glanville Williams wrote that “in attempt the [guilty] party is really punished for his intention, the act being required as evidence of a firm intention. There is much to be said for this.”17 By the late twentieth century, the Encyclopedia of Crime and Justice spoke more broadly of a subjectivist trend permeating all of criminal law, a trend that treated actus reus in general as a condition on which offenders are held liable for “mere intentions”:

The subjectivist view of culpability increasingly taken by the criminal law leads to the conclusion that external factors, including the accused’s actual conduct, may be of great probative value as to what his intentions really were; but these factors no longer constitute the grounds for liability. Indeed, modern attempt law comes fairly close to the punishment of mere intentions. What little conduct on the part of the accused is required (and sometimes that is minimal indeed) is explicitly seen as serving an evidentiary role of corroborating the accused’s criminal intent (Model Penal Code § 5.01) [(requiring that the actus reus of attempt be an action “strongly corroborative of the actor’s criminal purpose”)].18

The Commentary to the Model Penal Code’s attempt provision insists that “the proper focus of attention is the actor’s disposition.”19

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16 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 523 (4th ed. 1873).
17 GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 631 (2d ed. 1983).
19 MODEL PENAL CODE § 5.01 cmt. at 298.
Husak suggests that subjectivism is irresistible on any attempt doctrine that permits liability to arise before the defendant’s conduct “exhibits criminal intent ‘on its face.’ . . . [I]f liability may arise though the actus is equivocal, it is difficult to resist the implication that punishment is for the intention rather than for the action.”  

Husak argues that this implication is clearest in the Model Penal Code, where 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 is really for such an intent.”

Like Husak, most subjectivists deem the actus reus of attempt evidentiary. “The reason for requiring an [act],” writes Austin, “is probably the danger of admitting a mere confession. When coupled with an overt act, the confession is illustrated and supported by the latter. When not, it may proceed from insanity, or may be invented by the witness to it.” On this view, the function of the actus reus of attempt is to verify that the object of liability—the intention—actually exists.

It might seem hard to square a purely evidentiary conception of the actus reus of attempt with the universal rejection of the so-called “first act” test, according to which liability for an attempt arises as soon as an offender evinces his criminal intention through an act. If the actus reus of attempt is purely evidentiary, shouldn’t liability for an attempt arise the moment the actor evinces his intention? And if so, doesn’t the widespread refusal to allow liability to arise so early entail that the actus reus of attempt mustn’t be purely evidentiary? Far from it. If later acts generally provide better evidence of intent, then the rejection of the “first act” test need not be seen as a rejection of the evidentiary construal of attempt’s actus reus.

Even if the rejection of the “first act” test did entail that the actus reus of attempt couldn’t be evidentiary, it still wouldn’t entail that the actus reus was the true object of liability. A late-stage act might

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20 DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 95 (1987).
21 Id. at 95.
22 1 AUSTIN, supra note 16, at 455.
serve any of a number of non-substantive functions.\textsuperscript{24} For example, the actus reus of attempt might serve to focus the justice system’s attention on those criminal intentions that threaten protected interests most seriously or most obviously. Arguably, the more an actor does to carry out his intention, the “firmer” his intention becomes (i.e., the less likely he is to abandon it), and the firmer his intention becomes, the more blameworthy and dangerous it may be. Alternatively, the actus reus of attempt might serve to direct prosecutorial attention in the first instance to dangerous actors, rather than to dangerous intentions. As the Commentary to the Model Penal Code’s attempt provision asserts, “conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others.”\textsuperscript{25} Neither the act requirement nor the cogitationis principle precludes assigning the actus reus of attempt one of these non-substantive roles.

Such an assignment carries substantial consequences for criminal administration. If attempt liability imposes punishment for an actor’s intention, then liability for an attempt should arise well before an offender completes his intended crime, precisely as the Model Code provides. The Commentary explains:

[The Code’s requirement] that [an] actor [charged with attempt] must have engaged in conduct that constitutes “a substantial step” in a course of conduct planned to culminate in his commission of the crime . . . shifts the emphasis from what remains to be done, the chief concern of the [common-law] proximity tests, to what the actor has already done. That further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial. \textit{It is expected, in the normal case,}

\textsuperscript{24} For a general discussion of the various non-substantive roles an offense element might play, see Gabriel S. Mendlow, The Elusive Object of Punishment (unpublished manuscript).

\textsuperscript{25} MODEL PENAL CODE § 5.01 cmt. at 329 (1985). See also United States v. Dworken, 855 F2d 12, 16 (1st Cir. 1988) (purpose of Model Penal Code’s attempt provision is to “make amenable to the corrective process those persons who have manifested a propensity to engage in dangerous criminal activity”).

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that this approach will broaden the scope of attempt liabil-
ity.

Furthermore, if the underlying object of liability in attempt is the offender’s intention, then punishment for an unsuccessful attempt should be as severe as punishment for a successful one, which the Model Code generally allows.27 “The theory of this grading system may be stated simply,” explains the Commentary. “To the extent that sentencing depends upon the antisocial disposition of the actor . . . there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan.”28 Finally, if attempt liability imposes punishment for an actor’s intention, then an offender’s sentence should remain the same no matter how close he comes to completing the crime, provided there’s no independent reason to think that, as the actor nears completion, his intention itself merits progressively harsher punishment. Each of these important implications has received little scrutiny because courts and commentators haven’t embraced the action-as-object requirement.

But they should. As I argue in Part II, the sort of subjectivist legislation prohibited by the action-as-object requirement actually violates an offender’s right to mental integrity. And as I argue in Part III, deeming the action-as-object requirement a fundamental principle of criminal jurisprudence would bring coherence and harmony to an otherwise seemingly disparate set of basic axioms.

II. THE ACTION-AS-OBJECT REQUIREMENT AS A GUARDIAN OF MENTAL INTEGRITY

As I’ll argue in this Part, the state engages in impermissible mind control when it treats as objects of punishment the mental states that accompany or lie behind an offender’s conduct. More specifically, when the state punishes you for your mental states—whether they’re

26 Id. at 321 (emphasis added).
27 Id. § 5.05(1) (“Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second degree.”).
28 Id. at 490.
wholly unexecuted or fully realized in your conduct—the state indirectly violates your right to mental integrity.

Your right to mental integrity is the right the state would invade directly if it exposed you to mind-altering drugs or hypnotized you involuntarily. I’ll say more about the contours and limits of this right in a moment. For now, an example will convey the basic idea. Suppose you’re an intending criminal. Without invading your right to mental integrity, the government may question you about your criminal intention, try to persuade you to abandon it, surveil you, tail you, and stand ready to thwart you if you attempt to carry your intention out. But the government will invade your right to mental integrity if it causes you to abandon your intention by forcing you to ingest mind-altering drugs, by exposing you to psychotropic gas, or by employing some other form of forcible mind control. These sorts of direct and forcible mind control plainly violate your right to be free from unwanted mental interference or manipulation.

To be sure, many of these intrusions also may invade your right to bodily integrity. Forcing you to ingest or inhale an unwanted substance is a classic battery. But if you possess a right to mental integrity, none of these actions is just a battery. Each is also an attempt at forcible mind control, which is a distinctive rights invasion. It’s this rights invasion that forms the gravamen of the wrong the state perpetrates when it forces you ingest or inhale something—


30 See, e.g., Bee v. Greaves, 744 F.2d 1387, 1394 (10th Cir. 1984) (“Antipsychotic drugs have the capacity to severely and even permanently affect an individual’s ability to think and communicate.”).
the physical battery being slight and potentially harmless. If the government could control your mind without battering you at all (say, by using light and sound to hypnotize you involuntarily), the intrusion still would wrong you, and it would wrong because it would violate your right to mental integrity.

The claim I’ll defend over the next two subsections is that punishing someone for his mental states (in the style of subjectivist criminal legislation) is a form of indirect mind control.31 The basic idea is easy to state: it’s because the state mustn’t control thoughts that the state mustn’t punish them. In what follows, I’ll show how this idea follows from two interlocking propositions presupposed by our legal order—propositions that I won’t be able to defend fully, but that I’ll do my best to render plausible. The first proposition—the Enforcement Constraint—is that it’s wrong for the state to punish offences of a given type if it’s always wrong in principle for the state to forcibly disrupt such offences merely on the ground that they’re censurable transgressions. The second proposition is that it’s always wrong in principle for the state to forcibly disrupt a given mental state merely on the ground that it’s a censurable transgression (although the state sometimes may disrupt a mental state on more exigent grounds).

I’ll defend these propositions in turn.

B. The Enforcement Constraint

In our system of criminal administration, the state may ensure compliance with penal norms not only through the ex post imposition of punishment but also through the ex ante use of coercive force. When you’re selling loose cigarettes, the police may take them from your hand. When you’re making a bomb, the police may escort you from your laboratory. When you’re absconding with stolen goods, the police may stop you and seize them.

An unexamined but signal feature of our system of criminal administration, which I’ll expound upon in a moment, is that the ex

31 Cf. Laurence Tribe, American Constitutional Law 899 (1st ed. 1978) (“In a society whose ‘whole constitutional heritage rebels at the thought of giving government the power to control men’s minds,’ the governing institutions, and especially the courts, must not only reject direct attempts to exercise forbidden domination over mental processes; they must strictly examine as well oblique intrusions likely to produce, or designed to produce, the same result.” (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)).
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ante and ex post enforcement authorities are linked in a particular way: in practice, and seemingly not by accident, the state may enforce a given penal norm ex post only when it also may enforce that norm ex ante. In other words, the state may punish someone for transgressions of a given type only when the state may in principle use reasonable force to thwart such transgressions (as they happen) merely on the ground that they’re criminally wrongful, that is, without supplying any additional justification. Inversely, if the state may not even in principle use force to thwart instances of a given transgression on the ground that they’re criminally wrongful, then the state also may not make that type of transgression an object of punishment.

Why the state ever has the authority to ensure compliance with penal norms ex ante through the use of coercive force is a deep and difficult question that I won’t pretend to answer here. It’s a question that strangely has received much less theoretical attention than the equally important question of why the state ever has the authority to punish. That the first of these authorities never exists without the second is a fascinating and striking aspect of our system of criminal administration—striking because, with respect to nonpenal norms, the two authorities frequently diverge. There are many nonpenal norms with which the state may ensure compliance only through the imposition of sanctions ex post. Why, then, may the state ensure compliance with penal norms through the imposition of contemporaneous coercive force? It could be the extraordinary importance of the interests that penal norms serve: if the violation of a legitimate penal norm is by its nature a breach of the social compact so grievous that the state may subject the violator to criminal punishment—the severest form of sanction and censure—then perhaps it stands to reason that the state may disrupt such breaches as they occur.

The question I wish to address here is different: it’s why the state may ensure compliance with a given legal norm through punishment only when the state may ensure contemporaneous compliance with that norm through direct coercive force.

32 See, e.g., Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972) (contrasting “property rules,” which the state may enforce ex ante through injunctions, with “liability rules,” which the state may enforce (only) ex post, typically through awards of monetary damages).
My answer, in brief, is this: if coercively enforcing a given norm ex ante would violate your rights, so too would enforcing that norm ex post through the threat and imposition of the severest form of sanction and censure. (My more particular aim will be to show that, if the state would violate your right to mental integrity if it used direct force to disrupt your criminal intentions on the ground that they’re censurable transgressions, so too would the state violate your right to mental integrity if it treated your criminal intentions as objects of punishment, which is what the subjectivist law of attempts supposedly does.) I’ll establish the general proposition by means of an informal conditional proof, starting with the supposition that some supposed transgression is off limits to forcible disruption on grounds of mere censurability, and reasoning from that supposition to the conclusion that the transgression is off limits to punishment.

Suppose, as our starting point, that the state would wrong you if it forcibly disrupted some supposed transgression of yours, T, merely on the ground that T is a censurable transgression. Suppose, further, that the wrong the state would perpetrate against you if it disrupted your T-ing is a wrong intrinsic to the disruption—a wrong that consists at least partly in the disruption of T itself, rather than consisting entirely in the fact (if it is one) that the means of disruption harms you in some other way.

Now, if it’s the case that the state would wrong you intrinsically if it disrupted your T-ing merely on the ground that T is a censurable transgression, then there must be some reason why this is so. And the reason can’t be that the means of disruption harms you in some other way, because I’ve supposed that the wrong is intrinsic—that it consists at least partly in the disruption of T itself. Why, then, does the state wrong you intrinsically when it disrupts your T-ing merely on the ground that T is a censurable transgression?

One possibility is that T is perfectly innocent and innocuous (like consensual sexual conduct between adults) or is at least less wrongful and less harmful than any censurable transgression that the state legitimately may criminalize. In either case, it follows straightforwardly that the state would wrong you if it punished for you for T-ing.

But some transgressions may be immune from disruption on grounds of censurability even though they’re wrongful and arguably dangerous. (Certain speech acts fall into this category, and so may certain thoughts, as I’ll argue in the next subsection. When the state
prevents you from performing these speech acts or from thinking these thoughts, the state wrongs you. And it wrongs you intrinsically—which is to say, it wrongs you even if it uses means of prevention so delicate and precise that they cause you no injury.

Suppose, then, that T is as wrongful and harmful as other censurable transgressions that the state may criminalize—as is an attempter’s criminal intention—yet the state nevertheless would wrong you intrinsically if it disrupted your T-ing merely on the ground that T is a censurable transgression.

If the state would wrong you intrinsically if it disrupted your T-ing on this ground alone, yet your T-ing is dangerous and wrongful, then it must be the case that you’ve got a right to perform T, a right that the state would violate if it forcibly disrupted your T-ing merely on the ground that T is a censurable transgression.

Now, if the state would violate your rights if it forcibly disrupted your T-ing merely on the ground that T is a censurable transgression, then I suggest that the state also would violate your rights if it disrupted your T-ing in a particular indirect fashion: by imposing-terrible-consequences-on-you-for-T-ing merely on the ground that T is a censurable transgression.

But when the state punishes you for T-ing, it thereby imposes terrible consequences on you for T-ing, and it does so on the ground that T is a censurable transgression. (Ordinarily, to justify punishing someone, the state need only show that the person the committed a criminal wrong.) So, when the state punishes you for T-ing, it violates your rights.

We’ve arrived at the following conditional claim: whether T is innocent and innocuous or wrongful and dangerous, if the state would wrong you if it forcibly disrupted your T-ing on the ground that T is a censurable transgression (the supposition with which we began), then the state would wrong you if it punished you for T-ing (the conclusion we just reached). This conditional claim is none other than the Enforcement Constraint.33

33 Although I’ve presented these considerations as an argument for the Enforcement Constraint, they may in fact justify both more and less than the Enforcement Constraint. Insofar as certain forms of what we regard as punishment might fall short of imposing terrible consequences on an offender, the argument in the text won’t establish that the state is always forbidden to punish what it may not disrupt ex ante merely on grounds of wrongfulness. Certain “lighter” forms of
C. The Right of Mental Integrity

Given the Enforcement Constraint, it’s wrong for the state punish you for your mental states if it’s wrong for the state to thwart your mental states merely on the ground that they’re censurable transgressions. But is it? Is it wrong for the state to thwart the attempter’s criminal intention through psycho-surgical policing not on the ground that he poses an immediate danger (he might not, after all) but merely on the ground that his criminal intention violates a penal norm—the norm created by a subjectivist law of attempts?

My contention is that such psycho-surgical policing would indeed be wrong, and that it would be wrong precisely because it would violate the right to mental integrity, the right to be free from unwanted mental interference or manipulation of a direct and forcible sort. I propose that the state would violate an intending criminal’s right to mental integrity if, acting merely on the ground that his criminal intention was a censurable transgression, it used direct coercive force (e.g., psychotropic gas, involuntary hypnosis, a mind-control beam) to disrupt, or otherwise cause him to abandon, his intention.

To posit a right to mental integrity is not to posit that the right is unqualified or absolute. If the right to mental integrity were absolute, forcible manipulation of a person’s mind would be absolutely forbidden. But forcible manipulation of a person’s mind doesn’t seem absolutely forbidden. I’ve implied that it could well be permissible for the state to transgress an intending criminal’s mental integrity on grounds of imminent danger. It also might be permissible for the state to force a mentally ill prisoner to ingest psychiatric medication, as the Supreme Court said in *Washington v. Harper*. If this sort of mental intrusion is permissible, that might seem to entail that punishment might still be permissible—just as *nonpenal* sanctions are often permissible even when ex ante enforcement of the relevant (nonpenal) norm is forbidden, the way it’s often permissible to award damages as a sanction for conduct that a court couldn’t enjoin and that a plaintiff couldn’t lawfully disrupt through self-defensive force. Furthermore, insofar as punishing someone for T-ing is but one way of indirectly violating his right to T, the argument in the text may in fact justify principles beyond the Enforcement Constraint, including a principle forbidding the state from preventively but nonpunitively detaining people for T-ing.

there’s no right to mental integrity after all—no right to be free from forcible mind control.

In fact, these justifiable invasions merely signify that the right to mental integrity, if it exists, is qualified or non-absolute. The permissibility of forced medication in a case like Harper actually seems to rest on an acknowledgment that people possess a qualified right to mental integrity rather than on a denial that any such right exists. In Harper, a mentally ill prisoner claimed that the state should be barred from forcing him to ingest antipsychotic drugs unless it could prove that he would consent to such treatment if competent. The Supreme Court denied the prisoner’s claim, holding that the state may force a seriously mentally ill prisoner to ingest antipsychotic medication against his will as long as the state first establishes that he’s “dangerous to himself or others” and that such treatment is in his “medical interest.” If this holding is correct—as a matter of political philosophy, whether or not as a matter of constitutional

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35 That rights can be invaded justifiably helps illuminate the otherwise perplexing moral structure of many ordinary transactions. If I moor my boat to your dock to save it from being destroyed by a storm, I unquestionably act permissibly, even if I act against your wishes. See Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910). A possible explanation of why my act is permissible is that necessity temporarily extinguishes your property right in the dock. But this explanation makes it mysterious why I owe you compensation for the damage your dock sustains after the storm throws my boat against it. (How could I be obliged to compensate you for the loss of something to which you had no right?) A better explanation is that your property right endures throughout my necessary trespass, the right making a persistent claim on me even as I justifiably infringe it. That would explain why I must take reasonable measures during the storm to minimize the damage, and why I must compensate you afterward for the damage I couldn’t avoid. Although I acted permissibly in mooring my boat to your dock, by leaving it there I infringed your persisting right. My analysis here borrows from Joel Feinberg's discussion of the “backpacker” case. See Joel Feinberg, Voluntary Euthanasia and the Inalienable Right to Life, 7 PHIL. & PUB. AFF. 93, 102 (1978); see also Judith Jarvis Thomson, Self-Defense and Rights, (Apr. 5, 1976), in THE LINDLEY LECTURE, THE UNIVERSITY OF KANSAS 10 (1977) (“[W]e violate [a person’s] right if and only if we do not merely infringe his right, but more, are acting wrongly, unjustly in doing so.”). But see John Oberdiek, Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights, 23 LAW & PHIL. 325, 327 (2004) (arguing “against incorporating the infringing/violating distinction into a theory of rights”).

36 Harper, 494 U.S. at 222.

37 Id. at 227.
law—then the government doesn’t violate (i.e., unjustifiably invade) an inmate’s right to mental integrity by interfering directly with his thoughts if doing so is practically necessary to ensure public safety and is in the person’s “medical interest.” It doesn’t follow, however, that the proposed right of mental integrity is illusory. Nor does it even follow that public necessity temporarily extinguishes the inmate’s right to mental integrity, such that the right exerts no moral force in the covered circumstance. Rather, the best explanation of the Court’s holding is that public necessity overrides the inmate’s right without extinguishing it. If the right persists even when justifiably overridden, then the right continues to exert moral force. That explains why the unwanted psychiatric intervention must end as soon as possible, why the intervention must be no more intrusive than necessary to serve its purpose, and why the very question of the intervention’s permissibility is so momentous in the first place.

As my analysis of Harper shows, we can allow that the state may manipulate your mental states on grounds of public necessity without denying the existence of a right to mental integrity. Just as important, we can allow that the state may manipulate your mental states on grounds of public necessity without thereby conceding that the state may infringe your right to mental integrity on grounds other than public necessity—such as the ground that the targeted mental state is a censurable transgression.

Public necessity may justify many kinds of rights invasion that would be impermissible if undertaken on other grounds. For example, the state may subject you to excruciating pain as a way of preventing you from killing someone, but not as a way of punishing you for a criminal offense. Your right not to be subjected to excruciating pain prohibits the state from performing certain actions for certain reasons without forbidding the state from performing those actions altogether. Thus, your right not to be subjected to excruciating pain forbids the state from causing you excruciating pain on the ground that doing so will serve as an unpleasant sanction that expresses the state’s disapproval of your past wrongdoing (ex post

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38 See Thomson, supra note 36.
39 See Sell v. United States, 539 U.S. 166, 179 (2003) (holding that the state must prove forced medication to be necessary after “taking account of less intrusive alternatives”).
punishment)—but the state violates no right of yours when it subjects you to the exact same measure of excruciating pain on the ground that doing so will make you drop the gun you’re threatening to fire at an innocent child (ex ante disruption).

Similarly, your right to mental integrity forbids the state from forcibly disrupting your mental states on the ground that they’re censurable transgressions—but, if the holding of *Harper* is sound, the state doesn’t violate your right to mental integrity when it forcibly disrupts your mental states on the ground that doing so is necessary to protect the public and is in your “medical interest” anyway. Indeed, such intrusion on grounds of public necessity seems permissible even when it’s not in your “medical interest.” Imagine that a terrorist intends to detonate a bomb and the police have only three ways of stopping him: they can incapacitate him (e.g., shoot him), restrain him physically (e.g., handcuff him), or restrain him psychically (e.g., deploy a stun grenade). If the police aren’t close enough to the terrorist to restrain him physically, they’re left with two options: incapacitation and psychical restraint. Because the threat to public safety is grave—and because temporary psychical restraint is a mild invasion of a person’s mental integrity, whereas permanent physical incapacitation is a grievous invasion of his bodily integrity—I presume that the government may forcibly disrupt the terrorist’s intention (e.g., with a stun grenade) on the ground that doing so is necessary to prevent the terrorist from detonating the bomb—which, I hasten to add, isn’t the same as disrupting the intention on the ground that it’s a censurable transgression: the sort of disruption that the state *must* be permitted to undertake if it’s permitted to make the intention an object of punishment (per the Enforcement Constraint).

In this Part, I’ve argued that the injustice of the sort of subjectivist legislation prohibited by the action-as-object requirement can be established in the following way:

1. It’s wrong for the state to punish you for your mental states if it’s always wrong in principle for the state to use force to thwart or disrupt your mental states merely on the ground that they’re censurable transgressions.
(2) It’s always wrong in principle for the state to use force to thwart or disrupt your mental states merely on the ground that they’re censurable transgressions.

(3) Therefore, it’s wrong for the state to punish you for your mental states.

The first of these propositions draws support from the Enforcement Constraint, and the second from the right to mental integrity—two ideas to which our legal order seems resolutely committed.

III. The Unity of Action

In the previous Part, I argued for the action-as-object requirement by arguing against the sort of subjectivist legislation that it forbids: legislation that treats as an object of punishment that mental state that accompanies or lies behind and offender’s conduct. One might wonder whether this line of argument doesn’t prove too much. If it’s impermissible for the state to thwart an executed or partly executed mental state simply on the ground that the mental state is a censurable transgression, then, by virtue of the Enforcement Constraint, it’s also impermissible to make someone’s executed or partly executed mental state an object of punishment. But ordinary crimes of mens rea might seem to do exactly that: they might seem to make an offender’s executed or partly executed mental state an object of punishment, punishing offenders for the combination of a bodily movement and an accompanying mental state. So if it really were impermissible for the state to punish an individual for his realized or executed mental states, wouldn’t it also be impermissible for the state to punish someone for an offense that includes a realized or executed mental state among its elements? Wouldn’t that amount to punishing the person for his mental state, in violation of the action-as-object requirement? Doesn’t the action-as-object requirement therefore imply—absurdly—that criminal offenses may not include mens rea elements?

It doesn’t. But to see why we first must reject the false but influential conception of criminal wrongs that this line of rhetorical questioning presupposes, according to which a criminal wrong is the mere conjunction of a (bad) act and a (culpable) mental state—a
conception that takes criminal wrongs to be aggregative wrongs rather than unitary wrongs. I adapt these terms from Bertrand Russell, who, in The Principles of Mathematics, distinguished between aggregates and unities. 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 co-membership in the aggregate.

The traditional separation of actus reus from mens rea encourages us to regard penal statutes as punishing aggregative wrongs, wrongs consisting of the mere conjunction of a bad act and a culpable mental state. To think of criminal wrongs this way is to take too literally Justice 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.” If conceived as punishing wrongs consisting of the mere conjunction of a (bad) act and a (culpable) mental state, penal statutes punish offenders in part for their mental states, something that the action-as-object requirement indeed forbids.

Criminal wrongs aren’t “compounds” in this brute, aggregative sense. Criminal wrongs aren’t mere conjunctions—bad acts that happen to coincide with culpable mental states. Criminal wrongs are actions made bad—or, if not made bad, then made worse, or made blameworthy—by culpable mental states. Criminal wrongs are unities, wholes whose parts are integrally related. (How they’re related I’ll say in a moment.) Punishing someone for a criminal wrong therefore isn’t a matter of punishing him conjointly for his action and for his culpable mental state. It’s a matter of punishing him for his culpable action.

We can see the difference clearly if we contrast the structure of ordinary criminal statutes to that of a fictional statute that actually does punish an aggregative wrong. Imagine a statute that makes it an offense to litter while intending to murder someone. The object of punishment under this imaginary statute is a gerrymandered disjunction, the gangly hybrid of a thought (an intention to commit

42 Cf. Gideon Yaffe, Criminal Attempts, 124 Yale L.J. 92, 119 (2014) (criticizing “the thought that the actus reus and mens rea components of crimes make independent contributions to the criminality of the conduct”).
murder) and an unrelated action (an act of littering). The only connection required between the two 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 the hitman who thoughtlessly flicks a cigarette butt onto the sidewalk while mentally planning his next hit. Because the 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 (potentially, a wholly unexecuted one), even as it also imposes punishment for an action. If our hitman were indicted for 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 (possibly unexecuted) intention, a violation of the action-as-object requirement (and possibly also a violation of the cogitationis principle, although not of the voluntary act requirement).

Compare my fictional statute to the Florida offense of aggravated assault, of which a person is guilty when he perpetrates an assault “[w]ith [the] intent to commit a felony.”43 The Florida offense bears a superficial resemblance to the fictional statute: both criminalize the combination of an action (littering/assaulting) and an intention (the intention to kill/the intention to commit a felony). So let’s ask a stupid question: Does the Florida offense violate the action-as-object requirement? If an offender were indicted for 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 therefore say the same of the compound offense of assault with the intent to commit a felony? Even though the compound offense unquestionably punishes an action, does the compound offense also impose separate punishment for an intention?

It doesn’t, of course. 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 fel-

43 FLA. STAT. ANN. § 784.021.
ony. Far from being a gerrymandered pair, the assault and the intention are inseparably united. The assault is the action that it is—morally as well as psychologically—because of the intention with which it’s performed. Although we can abstract the assault from the accompanying intention, the result of the abstraction (the assault without the intention that motivates it) is something that exists on its own only analytically. By contrast, littering and intending to kill are fully distinct and fully separable, separable not just analytically but also psychologically and morally. In the fictional offense, the action and mental state simply coincide. They could exist at different times, even in different people, without losing their moral or psychological characters. In the Florida offense of aggravated assault, by contrast, the action derives its moral and psychological character from the mental state with which it’s performed. If the assault occurred without the mental state, it would still be an action, but it would be an action of a relevantly different sort.

As these examples show, normal offense elements aren’t constituent parts of aggregative wrongs; they’re ingredients from which unitary wrongs are made. This is perhaps even easier 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.”44 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. The 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.”45 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. In themselves, the actions aren’t wrongful and therefore aren’t plausible objects of punishment. In each case, punishment is imposed for 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’s performed. Even

45 Id. at 77–78.
actions that are utterly harmless can be made wrongful, and thus punishable, by an accompanying mental state. Driving 100 mph 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, if done intentionally, are punishable actions, actions of reckless driving and of attempted murder.\textsuperscript{46} The error of (a too-literal interpretation of) Justice Jackson’s quip is thus its failure to grasp this fundamental truth: a criminal wrong is something other than the brute sum of its parts. Embracing the action-as-object requirement forces us to make this fundamental truth explicit.

But embracing the action-as-object requirement also invites a 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 \textit{actus reus} and \textit{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 possible answer to this question is suggested by the criminal law requirement of \textit{concurrence}; indeed, I believe it is the very purpose of the concurrence requirement to help answer this question. “[T]here is concurrence,” a leading treatise says, “when the defendant’s mental state actuates [his] physical conduct,”\textsuperscript{47} which is equivalent to saying that there is concurrence when the defendant’s physical conduct executes his mental state. \textit{Is execution} then 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? Some remarks of Moore’s, although not addressed to this question, suggest that he thinks the answer is yes. 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.”\textsuperscript{48} Moore contrasts this imaginary statute,

\textsuperscript{46} That an act harmless in itself becomes punishable when conjoined with a culpable mental state doesn’t entail that the culpable mental state, taken separately, is the true object of punishment. We don’t violate the action-as-object requirement when we punish someone for driving 100 mph on a desolate road or for putting sugar in someone’s tea in the belief that it’s poison.

\textsuperscript{47} 1 WAYNE LAFAVE, \textsc{Substantive Criminal Law} § 6.3 (2d ed. 2014).

\textsuperscript{48} \textit{Id.}
which he says treats the voluntary act requirement as an “empty formality,”49 with the Interstate Travel Act,50 which criminalizes interstate travel undertaken with the intent to bribe officials or perform other corrupt acts.51 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. Traveling interstate in order to bribe an official satisfies such an act requirement; washing one’s cat while intending to bribe an official does not.”52

These remarks seem basically sound, but they raise a question Moore doesn’t answer: 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 a type of moral relation—a relation that can obtain even in the absence of execution, contrary to what Moore implies and what the textbook definition of the concurrence requirement asserts. If we accept the action-as-object requirement, then we must view criminal wrongs not as bad acts conjoined with culpable mental states but as actions made bad—or made worse, or made blameworthy—by culpable mental states. Indeed, part of what makes an action the action it is—an action of bribery, or forgery, or obstructing justice—is the mental state by which it’s accompanied or motivated, or of which it’s partly composed. Now, one way in which a mental state, such as an intention, can make an action bad, worse, or blameworthy, is if the action executes the intention. But that’s not the only way. An action of carjacking certainly is made worse by the accompanying conditional intention to kill if necessary to accomplish the carjacking, even if the action does nothing to execute that intention.53 Carjacking while

51 MOORE, supra note 49, at 19.
52 Id. at 19 n.5.
53 Section 2119 of Title 18 of the United States Code makes it a crime to engage in carjacking “with the intent to cause death.” 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).
willing to kill is a worse action than carjacking while unwilling to do so.

Moreover, in other offenses—many other offenses—actions are 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 (tenuous) 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’s why punishment for reckless driving is punishment for driving recklessly, rather than the conjunction of punishment for driving and punishment for recklessness. Concurrence is therefore a moral relation, not (in the first instance) a psychological one: the \textit{actus reus} and \textit{mens rea} elements of an offense concur when the mental state transforms the act’s moral character—by making it bad, worse, or blameworthy.

Understanding the doctrine of concurrence in this way reveals its true importance to criminal jurisprudence. The concurrence requirement often is treated as an obscure curiosity, significant mainly to the resolution of improbable niceties, like the issue at the heart of the Idaho case of \textit{State v. Hopple}\textsuperscript{54}: whether A is guilty of larceny if he corrals B’s sheep to stop them from tromping on 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.”\textsuperscript{55}) Given how infrequently such questions arise and how esoteric they seem, it’s 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 him but missing, can be held liable for intentional murder nonetheless if the bullet strikes and kills B.\textsuperscript{56} But if criminal jurisprudence properly

\textsuperscript{54} 357 P.2d 656 (Ida. 1960).
\textsuperscript{55} \textit{Id.} at 659.
\textsuperscript{56} \textit{Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes} 618–19 (10th ed. 2017)
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 utterly vital. Conceived as a moral relation, which is how the action-as-object requirement invites us to conceive concurrence, the concurrence requirement ensures 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, making the former an implementing doctrine of the latter.

The action-as-object requirement doesn’t demand that the object of punishment be an offense’s actus reus taken in itself. The requirement demands only that the object of punishment be an action. Consistent with the action-as-object requirement, the object of punishment action might be—and indeed almost always is—the action that an offense’s actus reus and mens rea jointly constitute, not the actus reus taken in itself. This action owes its identity to the mental state (mens rea) with which it’s performed.

Indeed, it’s a feature of actions generally, not just criminal actions, that they tend to owe their identities to the mental states with which they’re done. 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 the switch with the intention of illuminating the room, you perform the action of turning on the lights. If you flip the switch 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’s different because of your intention.

I adapt these examples from the philosopher Donald Davidson, who along with G.E.M. Anscombe is the progenitor of contemporary action theory. Davidson famously observed that an action is something a person does that is “intentional under some description.” If Davidson was right, and most philosophers think he was,

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57 DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 61 (1980).
then an action is never just a bodily movement. It’s a bodily movement done with a particular intention. The intention is part of what constitutes the action as an action, and 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’s because the intention makes the difference between two different actions: an accidental killing and a murder. There’s no reasons to posit that, in punishing someone for her attempted murder, we’re “really” punishing her for her intention. We’re punishing her for her action of trying to kill someone. Intent and other mental states do indeed play a vital role in grading offenses—not by serving as the object of punishment but by determining the identity of an offender’s action. The action-as-object requirement permits an offender’s intention to determine the severity of his punishment as long as the intention does this by determining the identity of offender’s action.

Even when an offense’s actus reus is 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’s 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’s performed.

Much the same is true of inchoate crimes like attempt liability—arguably even under the Model Penal Code. The Code’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.”\textsuperscript{58} An act or omission is not a substantial step, the Code further provides, “unless it is strongly corroborative of the actor’s criminal purpose.”\textsuperscript{59} A jurisdiction certainly could administer the “substantial step” test so as to punish offender’s

\begin{footnotes}
\item[58] Model Penal Code § 5.01(1)(c).
\item[59] Id. § 5.01(2).
\end{footnotes}
solely for their partially-executed intentions, in violation of the action-as-object requirement. 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 (do they apportion it to the gravity of his conduct or to the gravity of his criminal intention?), and partly a function of how the relevant decision makers understand and describe the jurisdiction’s legal practices. It counts for something that no jurisdiction describes its attempt statute as punishing offenders for their intentions.

If you flip a switch with the intention of inducing a seizure, you commit the wrong of trying to kill someone, known also as attempted murder. That wrong may have two ingredients—the bodily movement and the accompanying intention—but it’s a single wrong nonetheless. What you’ll be resented, criticized, and punished for is your action of attempted murder—not for your mere bodily movement, not for your intention taken in itself, and not for the two of these taken as a brute aggregate.

IV. THE ACTION-AS-OBJECT REQUIREMENT IN CRITICAL COMMENTARY AND LEGAL REASONING

Courts and commentators haven’t denominated the action-as-object requirement an official axiom of criminal jurisprudence. But that doesn’t mean that they’ve failed to feel the principle’s attraction. On the contrary, implicit appeals to the action-as-object requirement figure in legal commentary, as well as in legal reasoning itself, particularly in regard to offenses crafted in the subjectivist style and accordingly susceptible to the charge of criminalizing thought. Although versions of attempt liability occasionally draw this charge, critics tend to train their sights on what may appear to

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60 See, e.g., 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—for example, a diary entry. And this kind of infringement on a person’s thoughts is not only unjust; it is unconstitutional.”); Jerome B. Elkind, Impossibility in Criminal Attempts: A Theorist’s Headache, 54
them more extreme instances of subjectivist legislation, such as the highly inchoate offenses prototypical of the legal fight against terrorism. In this Part, I’ll show how critics complaining about this legislation implicitly invoke the action-as-object requirement, and I’ll also show how courts and other legal officials implicitly 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. Section 83.19 of the Canadian Criminal Code imposes liability on anyone “who knowingly facilitates a terrorist activity,” while §§ 2239A and 2239B of Title 18 of the United States Code criminalize the provision of “material support” to terrorists and terrorist organizations, including support “seemingly [for] benign purposes,” such as instruction in how to conduct peaceful negotiations.61

The highly inchoate counterterrorism statutes in Australia and the United Kingdom serve primarily to expand the scope of attempt liability. 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.” 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

V.A. L. REV. 20, 30–31 (1968) (implying that punishing someone for an “impossible” attempt would amount to punishing him for his 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, in spite of Williams’ denials, tantamount to punishment for intention alone. To escape this danger we shall have to insist that an attempt must be understood as including a reference to trying to achieve the actus reus of the complete crime in some way which is apparent on the face of the actus reus of the attempt.”).

giving effect to his intention.” 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 “collecting . . . information of a kind likely to be useful to a person committing or preparing an act of terrorism, or . . . possessing a document or record containing information of that kind.” Section 58 grants a defense to anyone who can “prove that he had a reasonable excuse for his action or possession.”\(^{62}\)

These and similar statutes are often said to criminalize thought, or to come “dangerously close” to doing so.\(^{63}\) It isn’t hard to see why. For one thing, the acts these statutes nominally proscribe can be utterly trivial. Consider Section 5(1) of the United Kingdom’s Terrorism Act 2006, which criminalizes “engaging in any conduct in preparation for giving effect to [a terrorist] intention.” As A.P.

\(^{62}\) Terrorism Act, 2000, pt. 6, § 58(3) (U.K.).

\(^{63}\) Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism 114–15 (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.”); see Kent Roach, Terrorism, in The Oxford Handbook of Criminal Law 812, 814 (Markus D. Dubber & Tatjana Hörnle eds., 2014) (same); Jacqueline Hodgson & Victor Tadros, How to Make a Terrorist Out of Nothing, 72 Mod. L. Rev. 984, 989 (noting that Section 58(1) (collection of records) of the Terrorism Act 2000 brings us “perilously close to the chilling idea of a thought crime,” proposing that “the intention of parliament in creating the offence is to warrant convictions of those who have terrorist intentions at a very early stage,” and suggesting that “the offence is really designed . . . to capture people who are suspected to have a terrorist intent”); Andrew Ashworth, Criminal Law, Human Rights and Preventative Justice, in The Redirection of Criminalisation and the Futures of Criminal Law 88–89 (B. McSherry, A. Norrie, & S. Bronitt eds., 2009); Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 Cal. L. Rev. 301, 351 (2009) (claiming that the “Lackawanna Six,” a group of Yemeni-Americans convicted of rendering material support to Al Qaeda, were “sentence[ed] . . . to long prison sentences for what was basically a thought crime”); A Nation at War: The Buffalo Case, N.Y. Times, Apr. 9, 2003 (describing the case of the “Lackawanna Six”); A. Jones et al., Blackstone’s Guide to the Terrorism Act 2006 34 (2006) (“If no other criminal offence is available to try a terrorist suspect, the use of this offence [namely, Section 5 (Preparation of Terrorist Acts) of the Terrorism Act 2006] 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.”).
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.” Section 58(1) of the 2000 Act, which criminalizes collecting information “useful” to terrorists, creates an offense of comparable breadth. “Almost 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. “Terrorists might need clean clothes, so washing machine instructions are useful to terrorists. Terrorists might need to meet each other, so instructions about public transport 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.”

The severe penalties associated with these counterterrorism statutes give critics an additional reason to suspect that the underlying wrongs being condemned and sanctioned are not the potentially trifling acts that the statutes nominally proscribe but are instead the malign intentions with which those acts are performed. Under Section 5(1) of the 2006 Act, for example, a person can go to prison for life “if, with the intention of . . . committing acts of terrorism . . . he

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65 Hodgson & Tadros, supra note 63, at 985.
66 Id.
67 Terrorism Act, 2006, pt. 1, § 5(3) (U.K.) (person guilty of preparing for terrorist act liable to imprisonment for life); CRIMINAL CODE, § 101.6(1) (Austl.) (same); 18 U.S.C. § 2239A (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. § 2239B (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”); CRIMINAL CODE, R.S.C., c. C–46, § 83.19(1) (1985) (Can.) (“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, pt. 6, § 57(4) (U.K.) (violation of Section 57(1) (possession for terrorist purposes) punishable by up to fifteen years in prison); Terrorism Act, 2000, pt. 6, § 58(4) (U.K.) (violation of Section 58(1) (collection of information useful to terrorists) punishable by up to ten years in prison).
engages in *any* conduct in preparation for giving effect to his intention.” What is the underlying wrong that 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? Many commentators evidently find it impossible to shake the suspicion that the wrong that Section 5(1) punishes is really the offender’s terroristic intention. Alun Jones and co-authors 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.”68 Hodgson and Tadros express a similar concern about the information-collection offense created by Section 58(1) of the 2000 Act. They regard “the offence [as] really [being] designed . . . to capture people who are suspected to have a terrorist intent.”69 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 ‘exact plans are unknown’ but that the offence approximates to ‘having criminal thoughts’.”70 As Andrew Asworth puts it, “the essence of the offense is the intention, coupled with a preparatory act of some kind.”71

These claims don’t allege a violation of either the act requirement or the cogitationis principle. Each of the statutes just described includes an act as a condition of liability, an act that somehow or other 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 simply because they’re mental states rather than actions.

To be sure, no prosecutor has charged a terrorism defendant with eating cereal in furtherance of a terror plot or possessing a joke book

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68 A. JONES ET AL., supra note 63, at 34.
69 Hodgson & Tadros, supra note 63, at 989.
71 Andrew Ashworth, Attempts, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 127 (John Deigh et al. eds., 2011).
with the intent to commit a terrorist act. But prosecutors’ reluctance to pursue these cases may itself evince fidelity to the action-as-object requirement. Given the robust intelligence-gathering capabilities of western governments, it’s doubtful that the only reason for such prosecutorial restraint is evidentiary uncertainty. Just as likely, prosecutors intuit, or expect judges and juries to intuit, that a trivial 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. Implicit in this intuition is an adherence to the spirit of the action-as-object requirement, the notion that punishment must be apportioned to the gravity of an offender’s action, rather than to the gravity of the mental state that the action accompanies or incorporates.

This intuition evidently is shared by courts. Because prosecutors don’t charge cereal eaters and joke book possessors with counterterrorism offenses, we don’t know how courts would respond to such charges. But we do know how courts have responded to defendants’ arguments that some statute criminalizes thought despite nominally proscribing an act. Courts virtually always deflect that sort of challenge by construing the statute in question in such a way that it complies not only with the act requirement and the cogitationis principle but also with the action-as-object requirement.

A perennial target of such challenges is an inchoate offense similar in structure to the foregoing counterterrorism offenses, namely, § 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.” This so-called “traveler” statute is a stock-in-trade of the federal government’s effort to combat child sex abuse. Section 2423(b) enables the government to prosecute pedophiles intercepted on their way to clandestine rendezvous with children in other states (or police officers posing as children). Defendants convicted under § 2423(b) have
argued that the statute “criminalizes ‘mere thought’”;\(^{72}\) that it “lacks a ‘meaningful actus reus’ and punishes the mere act of thinking while traveling”;\(^ {73}\) and that it “requires merely the crossing of state lines with illegal thoughts [solely in order] to effectuate federal jurisdiction.”\(^ {74}\) Every court faced with these arguments 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 and accordingly to deem the 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 uniformly have interpreted the traveler statute as punishing wrongful travel, not wrongful intent. As the United States Court of Appeals for the Third Circuit held,

> the 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.\(^ {75}\)

If, as the Third Circuit says, a defendant violates § 2423(b) only when his act of interstate travel is “a necessary step in the commission of a crime,” then it’s plausible to suppose (even if it doesn’t follow logically) that the statute imposes punishment for a wrongful action, not for a bad intention.

\(^{72}\) United States v. Gamache, 156 F.3d 1, 7 (1st Cir. 1998) (quoting defendant’s brief).

\(^{73}\) United States v. Tyarsky, 446 F.3d 458, 471 (3d Cir. 2006) (quoting defendant’s brief)

\(^{74}\) United States v. Han, 230 F.3d 560, 562 (2d Cir. 2000) (quoting defendant’s brief) (internal quotation marks omitted).

\(^{75}\) Tyarsky, 446 F.3d at 471.
Some may 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’s 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 isn’t to adjudicate this dispute 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 this way wouldn’t have contravened either the act requirement or the cogitationis principle. But the Third Circuit chose instead to assign the actus reus of § 2423(b) a robust substantive role, describing the act of crossing state lines not as a condition of liability but as the object of liability: the underlying wrong for which the statute imposes punishment.

The court in Tykarsky could have held simply that the statute applies only when an offender’s travel is done for the purpose of committing a crime. That would have been enough to show that § 2423(b) satisfies the cogitationis principle. But the court interpreted the statute more narrowly, holding that it “only applies when the [offender’s] travel is a necessary step in the commission of a crime.” Moreover, the court twice contrasted acts of interstate travel with “mere preparation,” a contrast that the court didn’t need to draw in order to show that the statute satisfies the cogitationis principle, because an intention that flowers in an act of “mere preparation” isn’t unexecuted. In resolving the case thus, the Third Circuit adhered to a principle beyond the act requirement and the cogitationis principle, namely, the action-as-object requirement, which demands that punishment be imposed only for an action—never for a mental state, no matter how wrongful in itself.

The Third Circuit is no anomaly. In virtually every American case in which a defendant challenged a statute on the ground that it criminalizes thought alone despite nominally proscribing an act, the court responded by saying more than it needed to say in order to show that § 2423(b) satisfies the cogitationis principle. In fact, it

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76 United States v. Tykarsky, 446 F.3d 458, 471 (3d Cir. 2006) (emphasis added).
77 Id.
said precisely what is necessary to show that the statute satisfies the action-as-object requirement.  

Indeed, in most of these cases, courts have required that defendants perform acts beyond “mere preparation.” It’s true of course that acts beyond “mere preparation” aren’t wrongful in themselves—wrongful in isolation from the intention with which they’re performed. What’s wrongful in itself is the action of attempting, an action that owes both its identity and its wrongfulness to the intention with which it’s done. And, importantly, not all actions of attempting are wrongful to the same degree. Actions that bring an intending criminal close to completion tend to be considerably more dangerous (and therefore more wrongful) than actions of mere preparation. If courts understand § 2423(b) to apply to a set of actions that are especially dangerous, then it’s all the likelier that these actions, rather than the intentions with which they’re performed, are being treated as the objects of punishment under the statute.

It’s no point to the contrary that some courts treat the act of interstate travel as providing evidence of the requisite intent. That doesn’t entail that these courts regard the act of interstate travel as serving no purpose but to provide evidence of the requisite intent. If courts actually regarded the act of interstate travel as (purely) evidentiary, courts presumably would require prosecutors to prove that a defendant’s act evinced his criminal intent. But you’ll find no such requirement in the model jury instructions of any federal circuit.

A rare but instructive exception to the general trend of courts deflecting defendants’ claims that a statute criminalizes thought despite proscribing an act is the case of Doe v. City of Lafayette. 79 The plaintiff, Doe, was a pedophile who argued that he’d been punished for his thoughts alone. He wasn’t prosecuted for stepping across

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78 See, e.g., Tyarsky, 446 F.3d at 471 (holding that 18 U.S.C. § 2423(b) “does not punish thought alone”); Han, 230 F.3d at 563 (same); Gamache, 156 F.3d at 8 (same); United States v. Bredimus, 352 F.3d 200, 208 (5th Cir. 2003) (same); United States v. Stephen, No. 00–1775, 19 Fed. Appx. 196, 198 (6th Cir. Aug. 20, 2001) (same); United States v. Kaechele, 466 F. Supp. 2d 868, 896 (E.D. Mich. 2006) (same); Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004) (en banc) (holding that city did not punish pedophile for his thoughts when it banned him indefinitely from public parks after learning that he had watched children playing in park while thinking about sexually assaulting them).

79 Doe v. City of Lafayette, 334 F.3d 606 (7th Cir. 2003), rev’d on reh’g en banc, 377 F.3d 757 (7th Cir. 2004).
state lines, however. In fact, he wasn’t prosecuted at all. Instead, he was subjected to an ad hoc administrative order banning him indefinitely from all city parks in Lafayette, Indiana. City officials issued the order after receiving an anonymous tip that Doe had stood around in a park watching children play and thinking about molesting them. The city imposed the ban without formal process and made no claim that the order was a sanction for an alleged legal violation. 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 thoughts alone:

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.

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81 Id. at 139 (suggesting that the anonymous tip came from a fellow member of Doe’s sex-addict support group).
82 Doe, 334 F.3d at 612.
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,” wrote the panel majority, “that Doe’s own revelation of his thoughts, not any outward indication of his thinking, was the basis for its actions. . . . [T]he circumstances make clear that the ban order issued by the city resulted from its concern about Doe’s fantasies about children.”

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 actions, branding his deeds and not his accompanying thoughts the true object of punishment. Rejecting what it saw as Doe’s unduly narrow description of the action that had precipitated his punishment, the en banc court focused 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.

The en banc court responded to the banning order in *Doe* the same way all courts have deflected similar challenges to § 2423(b): by identifying some action 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 three-fold rejoinder to the charge that a statute punishes a criminal intention. First, the response emphasizes that the statute

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83 Id. at 608–11.
84 377 F.3d at 766–67. For good measure, the en banc court added 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 767 n.8.
includes an act among the conditions of liability, which means that the statute satisfies the act requirement. Second, the response establishes that the required act executes the required mental state, which means that the statute satisfies the cogitationis principle. Third, and most important for our purposes, the response establishes that the true wrong punished by the statute is the offender’s conduct, conduct that the court typically deems wrongful insofar as it executes the offender’s illicit intention. 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 betrayed the action-as-object requirement.85

Fidelity to the action-as-object requirement also unites both sides in the classic dispute over the permissibility of hate crime penalty-enhancement provisions like the one at issue in the United States Supreme Court case of Wisconsin v. Mitchell.86 The Wisconsin provision increased the maximum penalty for assault from two years to seven “whenever the defendant ‘[i]ntentionally select[ed] the [victim] . . . because of [his] race, religion, color, disability, sexual orientation, national origin or ancestry.’”87 The Wisconsin high court held that the enhancement provision impermissibly punished offenders for their thoughts or character,88 siding with a view broadly endorsed by critics of hate crime laws.89 Heidi Hurd and Michael Moore state the view succinctly:

85 The criminal process nevertheless may betray the action-as-object requirement in spirit. See Gabriel S. Mendlow, Divine Justice and the Library of Babel, ___ OHIO ST. J. CRIM. L. ___ (Forthcoming 2018) (considering whether certain exercises of official discretion result in defendants being punished for their thoughts even though the statutes under which they’re convicted criminalize conduct).


87 WIS. STAT. § 939.645(1)(b).

88 Mitchell, 169 Wis. 2d at 164–66.

89 Id. at 166 (relying on the “insightful analysis” of 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) (“[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.”); see also Larry Alexander, The ADL Hate Crime Statute and the First Amendment, 11 CRIM. JUST. ETHICS 49, 49 (1992) (“If one
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 not for the underlying act, nor is it for the intentionality with which it is committed; it is for the hatred or prejudice that motivated the defendant to form and act on that intent.90

Hurd and Moore’s complaint about hate crime penalty enhancement provisions is not that they empower the state to impose punishment in the absence of an act, which would be a violation of the voluntary act requirement. Their complaint is rather that 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 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.“); Martin Redish, Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory, 11 CRIM. JUST. ETHICS 29, 37–38 (1992) (“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.”); Susan Gellman, Hate Crime Laws Are Thought Crime Laws, 1992/1993 ANN. SURV. AM. L. 509, 514–15 (1993) (“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. . . . “); JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND 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?”); Heidi M. Hurd & Michael S. Moore, Punishing Hatred and Prejudice, 56 STAN. L. REV. 1081, 1128–29 (2004). A distinct objection to hate crime laws, which the Wisconsin court also endorsed but which it conflated with the present one, is that such laws are impermissible not (merely) because they target thought but because they target thought based on its “ideological content.” Mitchell, 169 Wis. 2d at 172.

90 Hurd & Moore, supra note 89, at 1128–29.
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.

The U.S. Supreme Court fully adhered to the action-as-object requirement when it gave its approval to the Wisconsin law in *Mitchell*, reversing the Wisconsin high court. The Supreme Court concluded that the hate crime law punished conduct, not thought, upholding the enhancement provision on the ground that “bias-inspired conduct . . . inflict[s] greater individual and societal harm.” Whether the Supreme Court or the Wisconsin high court had the better of this dispute is a question I’ll address below. 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 state must never treat a person’s mental states as separate objects of punishment.

I point this out mindful of the ever-present danger of reading too much into what courts say or don’t say. My view of the significance of judicial language is basically J.L. Austin’s view of the significance of “ordinary” language. Austin writes:

> [O]rdinary language has no claim to be the last word.... [A]lthough it embodies ... something better than the metaphysics of the Stone Age, namely ... the inherited experience and acumen of many generations of men ... that acumen ... has not been fed from the resources of the microscope and its successors.... [S]uperstition and error and fantasy of all kinds do become incorporated in ordinary language.... Certainly, then, ordinary language is *not* the last word.... Only remember, it is the *first* word.93

We could say much the same thing about the language of courts. What courts *say* they’re doing is not the last word on what they’re *actually* doing. But it is the first word, and we should take it seriously. Of course we also should look beyond what courts say. We

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91 Mitchell, 508 U.S. at 484 et seq.
92 *Id.* at 487–88.
may find courts doing things very different from what they say they’re doing. But that discovery should lead us to give judicial language more scrutiny, not less. Why do courts claim fidelity to the values they betray, and why do they betray these values only in secret? If no court has ever acknowledged rejecting the action-as-object requirement—and, as far as I know, none has—that’s a striking fact worthy of serious attention.

V. CONCLUDING REMARKS: DO TERRORISM AND HATE CRIME LAWS VIOLATE THE ACTION-AS-OBJECT REQUIREMENT?

As I argued earlier, compliance with the concurrence requirement promotes compliance with the action-as-object requirement. But it doesn’t guarantee compliance. The subjectivist version of attempt liability systematically violates the action-as-object requirement even though the subjectivist attempt offense is so defined that an offender’s conduct and criminal intention necessarily concur, the conduct being made wrongful by the fact that it executes the intention. Furthermore, we can’t allay questions about whether hate crime laws satisfy the action-as-object requirement just by observing (correctly) that they satisfy the concurrence requirement, in that crimes of violence are made worse—more blameworthy, more harmful, more frightening—when done from hateful motivations. It therefore isn’t obvious that critics of hate crime penalty enhancement statutes are speaking figuratively—or else falsely—when they say that such statutes punish offenders for their thoughts. Critics like James Jacobs and Kimberly Potter certainly seem to be speaking literally when they argue that “[g]eneric 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.”

I suggest that, while the conclusion of Jacobs and Potter’s argument could be true, the argument itself is unsound. 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 necessarily amounts to separate punishment for the offender’s hatred or prejudice. If Jacobs and Potter are drawing this inference,

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94 JACOBS & POTTER, supra note 89, at 121.
then they are guilty of a kind of subtractive fallacy. When the law provides that some aggravating fact 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 existence of the aggravating fact. In Michigan, a person who commits a robbery can be punished by up to fifteen years in prison, unless she “represents orally . . . that . . . she is in possession of a dangerous weapon,” in which case she can be punished by up to life in prison. Suppose a robber is sentenced to twenty five years after committing a robbery in the course of which she said she had a gun. Wouldn’t it be odd, even absurd, to say that her prison sentence represents punishment for two separate wrongs? Fifteen years for the robbery and ten for the statement about the gun? The statement itself 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. Clearly, punishment for the armed robbery can’t be disaggregated into multiple punishments for the offense’s multiple constituents.

Can punishment for a bias-motivated 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. Consider that the Wisconsin statute which drew their objection increases the maximum penalty for assault from two years to seven when an assault is motivated by bias. It isn’t the fact of the increase, as Jacobs and Potter seem to think, but rather the increase’s magnitude which gives us reason to suspect that the biased offender receives “extra [i.e., separate] punishment for [his] values, beliefs, and opinions.” If a bias-motivated assault doesn’t merit a sentence three-and-a-half times longer than that which a bias-free assault merits, we have reason to suspect that the

95 Other commentators appear to trade on the same faulty inference. See Alexander, supra note 89, at 49; Hurd & Moore, supra note 89, at 101–2; Gellman, Sticks and Stones, supra note 89, at 363.
97 Id. § 750.529.
98 Nor can punishment for an offense with an ordinary mens rea element be disaggregated into (separate) punishment for the mens rea and for the actus reus, even if the actus reus is innocuous in itself. See supra notes 44–46 and accompanying text.
99 Jacobs & Potter, supra note 89, at 121.
enhancement provision may treat the offender’s bias as a separate wrong, rather than treating it as a separate wrong-making feature of the offender’s wrongful action. To confirm this suspicion, we’d of course have to be able to exclude the possibility that the defendant’s overall sentence represents disproportionate punishment for his actions, rather than the conjunction of punishment for his actions and punishment for his bigoted thoughts.

How much additional punishment an offense merits when motivated by bias is a tremendously difficult question.\(^{100}\) The difficulty of the question might help explain why so much controversy surrounds the issue of whether hate crime laws impermissibly punish people for their mental states. Hate crime laws may be a genuinely hard case—perhaps an unresolvable one. But disproportionate punishment isn’t always so difficult to detect. If you possess a subway map in order to find your way to a meeting of potential terrorists, does that act of possession really merit ten years in prison?\(^{101}\) If you do push-ups in order to make yourself strong enough to hijack a bus, does that act of preparation really merit life?\(^{102}\) If these are silly questions—silly because the answer to each of them is obviously no—then such punishments don’t befit the actions for which they’re nominally imposed, the better part of each punishment possibly being imposed for your malevolent intentions.

No court would impose such 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 the law’s conformity to the action-as-object requirement. Actual sentencing practice raises these questions as well, even if not as poignantly. The United Kingdom Court of Appeal recently issued guidance to lower courts on how to sentence offenders under Section 5(1) of the Terrorism Act 2006, which criminalizes “engaging in any

\(^{100}\) See, e.g., Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 45–63 (2009) (exploring different respects (e.g., culpability, harmfulness) in which considerations of proportionality warrant imposing harsher punishment on bias offenders).

\(^{101}\) Terrorism Act, 2000, pt. 6, § 58(4) (U.K.) (violation of Section 58(1) (collection of information useful to terrorists) punishable by up to ten years in prison).

\(^{102}\) Terrorism Act, 2006, pt. 1, § 5(3) (U.K.) (person guilty of preparing for terrorist act liable to imprisonment for life); Criminal Code, § 101.6(1) (Austl.) (same).
conduct in preparation for giving effect to [a terrorist] intention.”\textsuperscript{103} 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 multi-year 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 intended acts at the lowest end of seriousness.”\textsuperscript{104}

Would imposing a five-year sentence for such conduct conform to the action-as-object requirement? Perhaps (1) a five-year sentence really does befit minor preparatory conduct, because of the sheer malevolence of a 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.\textsuperscript{105} There’s accordingly no absurdity in interpreting Section 5(1) and other highly inchoate statutes as imposing punishment for conduct rather than mere intent. Even when trifling, the acts these statutes proscribe aren’t completely innocent. Eating cereal as part of a terrorist training program might not do much to further one’s terrorist intentions, but it still does something. Alternatively, perhaps (2) a five-year sentence is too harsh a penalty for such (relatively) minor preparatory conduct, and some portion of the sentence represents punishment for the offender’s terrorist intention. Or perhaps (3) a five-year sentence is too harsh a penalty for such minor conduct but the whole sentence represents

\textsuperscript{104} Id. at 308.
\textsuperscript{105} See 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, 132 (Ancieto Masferrer ed., 2012) (“[T]he criminal law maintains in normal times a distinction between attempts and preparatory acts, but this distinction becomes blurred in the terrorism arena because of the extreme danger of the potential harm and the importance of the interests protected (the lives of others). As a result, it may be simplistic to say that preparatory acts . . . are not worthy of moral criticism or legal reaction.”).
disproportionate punishment for the terrorist’s actions, none of it representing punishment for his terroristic intention.

These are the sort of possibilities we’d routinely be forced to grapple with if the criminal law contained an action-as-object requirement. Distinguishing (2) from (3) is a difficult task that may require us to divine what’s in the hearts of prosecutors and judges. Distinguishing either (2) or (3) from (1) is also a difficult task, because of how hard it is in general to assess a punishment’s proportionality. The best attempts to delineate a rigorous notion of proportionality still leave us ill-equipped to evaluate 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 minimal amount of pain or loss necessary to preserve social order.” Deigh’s measure of proportionality admirably exceeds the rigor of any retributive metaphor, but it’s still so abstract that we can only speculate as to whether a twenty-one month sentence or a five year sentence or . . . is the minimal amount of pain or loss necessary to preserve social order.

What’s more, it’s not just counterterrorism offenses and hate crime laws that might require us to grapple with these difficult questions if criminal law contained an action-as-object requirement. Any conventional offense graded in terms of an offender’s culpability could in theory invite the question whether an offender convicted of a higher grade of the offense was being punished for his action only or was instead (or in addition) being punished for his aggravating mental state conceived as a separate wrong. First-degree murder is

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106 See Mendlow, Divine Justice, supra note 85 (arguing that the object of an offender’s punishment may depend on the motivations of various legal officials).

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

108 To be fair, although Deigh’s proposed measure of proportionality is too abstract to give concrete guidance to a sentencing judge in an individual case, it isn’t too abstract to give concrete guidance to policymakers. See id. at 198 (“If policymakers, in their devising of sentencing policies, could be brought to see the function of punishment as preserving the social order rather than optimally preventing crime, then they would be better able to understand the injustice of imposing . . . harsh sentences on people whose crimes do not greatly threaten the social order [i.e., drug crimes] and better prepared as well to resist the pressures to sacrifice those people that arise with popular movements for highly punitive laws whose aim is to stamp out these [i.e., drug] crimes.”).
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 discrete transgression?

That we don’t find ourselves asking such questions with any frequency might be seen as evidence that criminal law doesn’t (and shouldn’t) contain an action-as-object requirement after all. It could be that the criminal law 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. A preference for a partial action-as-object requirement would explain the general absence of controversy about whether offenders are being punished in part for their thoughts. In most cases, it’s plain that at least part of an offender’s sentence represents punishment for his actions. Only when the offender’s conduct is insubstantial or highly incipient (or perhaps when the offender is subjected to a certain kind of pretextual prosecution) does it seem possible that his punishment is imposed entirely for his mental state—which would explain why counterterrorism laws arouse the fiercest criticism. A general preference for a partial action-as-object requirement also would explain why the subjectivist version of attempt liability is relatively uncontroversial. Given that subjectivist doctrines like the Model Code’s “substantial step” test require robust conduct, it’s easy and reasonable for onlookers to convince themselves that, in practice, at least some portion of any attempter’s sentence represents punishment for his actions.

As I said a moment ago, that we don’t find ourselves asking whether conventional offenses punish offenders for their thoughts might be seen as evidence that the criminal law doesn’t (and shouldn’t) contain an action-as-object requirement. But the absence of such questions just as plausibly might be seen as evidence that we implicitly accept an action-as-object requirement and rarely suspect that it’s being violated. In itself, the fact that an offender’s sentence is disproportionate to the gravity of his conduct gives us no reason to suspect that some portion of the offender’s punishment is imposed for his mental state, conceived as a separate wrong. To be justified

\footnote{See Mendlow, Divine Justice, supra note 85 (raising the question whether a defendant prosecuted because, and only because, of the state’s antipathy to his thoughts is punished for his thoughts).}
in suspecting this, we’d need reason to believe that the incremental punishment isn’t just disproportionate punishment for the offender’s conduct, a common enough occurrence. If the state administers some statute so as to impose harsh punishment on people whose conduct is insubstantial or incipient but whose attitudes and other mental states generate intense social antipathy, then maybe we have reason to suspect that these mental states are objects of punishment in their own right. Absent such factors—and such factors are usually absent—disproportionate punishment is probably just disproportionate punishment.