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Rethinking the Relationship Between Punishment and Policing

Kiel Brennan-Marquez*

Responding to Gabriel Mendlow, *Why Is it Wrong To Punish Thought?*, 127 YALE L. J. 2342 (2018).

I.

Gabriel Mendlow has published a rich and provocative essay on thought crimes.¹ In it, he argues that punishing thoughts is wrong, in essence, because mind control is wrong. According to Professor Mendlow, (1) we enjoy a right of “mental integrity” that forbids the state from controlling our thoughts, and (2) authority to control is a prerequisite of authority to punish; if the state may not directly control an activity on the basis of its wrongness (in this case, thinking), the state is likewise forbidden from imposing criminal sanctions on the same activity after the fact.²

The second proposition, which Professor Mendlow calls the “Enforceability Constraint,” forms the heart of his argument and represents an interesting conceptual innovation.³ But it is also, we will see, an implausible account of criminal law. Though the Enforceability Constraint gives voice to a common sensibility about police power—that authority to *enforce* a criminal prohibition follows automatically from the state’s authority to criminalize an activity in the first place—it is this sensibility itself, not our view of thought crimes, that needs reforming.

The problem runs deep. Despite the novelty of the Enforceability Constraint as a theoretical construct, Professor Mendlow’s substantive position is quite conventional. Our criminal-legal institutions (including courts) customarily assume a link, in keeping with Professor Mendlow’s theory, between prohibition and enforcement. In fact, it would hardly be an exaggeration to say that *all* of American criminal procedure begins from the premise that if activity *x* has been legitimately proscribed, enforcement officials who happen upon the occurrence of activity *x* in the world are authorized—by virtue of its proscription—to forcibly bring about the activity’s end.

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¹ Gabriel S. Mendlow, *Why Is It Wrong to Punish Thought?*, 127 YALE L. J. 2204 (2018).

² *Id.* at 2370.

³ *Id.* at 2342.

This, I will argue, is a philosophical mistake, and one with serious practical consequences. Part of why policing is so deplorable today—certainly not the only reason, but an important part of the story—is the political theory that underpins it. Professor Mendlow's Enforceability Constraint is an effort to name and flesh out that theory. To the extent it also endeavors to apologize for the theory on normative grounds, it must be rejected.

Ultimately, Professor Mendlow has the core point backwards. According to him, the state may not punish at t_2 an activity that officials do not even have authority to control at t_1 . The correct theory of criminal law, however, hews the other way: officials may not control at t_1 an activity the state does not even have authority to punish at t_2 . In other words, punishability sets an outer limit on control. The reason is simple. A legal order that authorized officials to exert direct, physical control over activities *beyond* those designatable for criminal punishment would be a police state, one in which individual law enforcement officers, rather than legislative bodies—and ultimately, the people—set the bounds of state power.

Professor Mendlow seeks to make the mirror-image claim: that direct controllability sets an outer limit on punishment. But there is nothing infirm about a legal order in which officials are *not* authorized to control every activity legitimately subject to criminal sanction. In fact, this is likely the mark of a healthy legal order. As much as the two forms of authority—punishment and policing—are bound to coincide in practice, we should insist on their separation in principle. And we should likewise insist that authority to control requires, but is not entailed by, authority to punish—not the other way around.

Before jumping in, I want to praise Professor Mendlow for making my job easy and enjoyable. His prose sings; his logic never obfuscates. The entire essay, in fact, sparkles with the kind of analytic delight promised by the Socratic tradition but too rarely borne out in the practice of professional philosophizing. No small feat, that.

II.

Let us begin with a point of—significant—agreement: the poverty of existing accounts of what makes thought crimes verboten. Those accounts, Professor Mendlow shows, come back to some combination of the following: (1) that thought crimes would be terribly hard to enforce;⁴ (2) that thoughts, even at their worst, are relatively harmless (by comparison to actions);⁵ or (3) that even if thoughts *are* harmful, they are not viable candidates for legal culpability.⁶

Yet on closer inspection, none of these rationales—alone or in tandem—can shoulder the burden required of them. The first, Professor Mendlow demonstrates,

⁴ See *id.* at 2346–47 (outlining the general form of this argument); *id.* at 2354–58 (exploring a specific version of the argument, focused on the difficulty of proving thought crimes beyond a reasonable doubt).

⁵ See *id.* at 2347–50.

⁶ See *id.* at 2350–54.

is no argument at all; many crimes end up, in practice, being notoriously hard to enforce, but this has never been thought to preclude criminalization.⁷ To be sure, enforcement woes may count as a *pragmatic* reason not to criminalize thoughts (or any other class of activity), but they hardly mount an argument against criminalization in principle.⁸

The second rationale, meanwhile, rests on an implausible theory of the relationship between thoughts and actions. As Professor Mendlow rightly argues, at least *some* thoughts—namely, those involving an intention toward action—can be harmful in the same way as reckless conduct: by creating a danger of future injury.⁹ Imagine Mary thinks, “I intend to kill Dan.” Assuming Mary is a “competent person with the means to kill, the danger posed by [her] lethal intention”—the increased risk of injury it conduces—“could be at least as great as that posed by many risky activities we seldom think twice about punishing, such as driving recklessly and possessing volatile explosives.”¹⁰

Finally, the third rationale proves to be little more than *ipse dixit*. If, per the analysis just offered, thoughts can be harmful (at least to the same extent as criminally-reckless behavior), why would they be exempt, nonetheless, from legal culpability? The typical answer is that actions, unlike thoughts, “unleash” effects,¹¹ or, put otherwise, that they “touch[] and make[] an impress on the outside world.”¹² Yet—to quote Professor Mendlow’s sharp formulation—an “explanation” of this form actually “explains nothing.”¹³ It restates the “difference between actions and mere mental states,” almost in the manner of a dictionary, but it provides “no account of why the difference matters.”¹⁴

No disagreement so far: in fact, I find Professor Mendlow’s dissection of existing rationales for the prohibition on thought crimes elegant and persuasive. My concern relates to the essay’s second part, where Professor Mendlow aims to solve

⁷ See *id.* at 2356–57.

⁸ See *id.* at 2358 (“These risks [related to enforcement] surely give us some reason not to punish thought. Indeed, they give us some reason to treat punishment for thought as though it were morally forbidden. But they don’t establish that punishment for thought is morally forbidden in fact.”).

⁹ See *id.* at 2348–49 (“[Other commentators are] simply wrong to assume that unexecuted intentions risk only a ‘small degree of harm.’ Consider a person’s intention to kill, particularly when formed after extensive reflection and deliberation. Is such an intention really less likely to cause harm than driving recklessly or possessing volatile explosives—activities that we don’t hesitate to criminalize on account of their dangerousness? If no lethal intention were more than minimally dangerous, it would be irrational for me to fear you simply because you intended to kill me. But it’s difficult to accept that such fear is irrational. There would be little point to forming intentions if intentions didn’t generally increase the likelihood of actions.”) (internal citations omitted).

¹⁰ *Id.* at 2350.

¹¹ See *id.* at 2351 n.17 (compiling sources to this effect).

¹² *Id.* at 2353. For the canonical statement of this view, see Francis Wharton, *Comparative Criminal Jurisprudence*, 4 CRIM. L. MAG. 1 (1883).

¹³ Mendlow, *supra* note 1, at 2354.

¹⁴ *Id.*

his own puzzle by casting “the ban on thought crime as a categorical moral immunity.”¹⁵

Here, the idea is that we can appreciate the infirmity of thought crimes by exploring what makes its conceptual sibling, thought control, wrong. Professor Mendlow believes the two intolerable for the same reason: punishing thought and controlling thought both violate one’s right to “mental integrity.”¹⁶ More specifically, Professor Mendlow thinks the violation occasioned by punishing thought follows *a fortiori* from the violation occasioned by direct interference with thought, because—and herein lies the fulcrum of his argument—authority to control is a necessary condition of authority to punish.

Professor Mendlow deems this latter principle the Enforceability Constraint, and he articulates it numerous ways. For example: “the state may ensure compliance with a given norm through criminal punishment only when the state may in principle force compliance with that norm directly.”¹⁷ Or likewise: “[t]he state may punish someone for transgressions of a given type only when the state may in principle use reasonable force to thwart such transgressions merely on the ground that they’re criminally wrongful.”¹⁸ Whatever the exact language used, the conceptual upshot is that *if* the state is empowered to punish activity *x*, *then* the state is empowered to control activity *x*. With this syllogism in tow, Professor Mendlow’s strategy is to focus on the contrapositive: to disprove the “then” statement—to establish that the state may not control our thoughts—from which the falseness of the “if” statement would follow.

In short, Professor Mendlow believes we can rationalize the wrongness of thought crimes by (1) shoring up the intuition that state-sponsored thought control is wrong, and (2) establishing that if the state may not directly control an activity, neither, by logical implication, may it punish the same activity later on. It is the second of these premises—the Enforceability Constraint—where I take issue.

III.

Suppose, in a given jurisdiction, it is a crime to voluntarily come under the influence of substance *x*; if a person is found to be or have been so influenced, they may be criminally punished. And suppose, further, that police come across Jones (in a public park, say), whom they have very good reason to believe has recently ingested a large amount of substance *x*. May the police forcibly pump Jones’s stomach, or strap Jones down and inject a counteractive drug, to “force compliance

¹⁵ *Id.* at 2359.

¹⁶ *Id.* at 2342.

¹⁷ *Id.* at 2346.

¹⁸ *Id.* at 2371.

with [the law] directly”¹⁹ Of course not—doctrinally, because of *Rochin v. California*,²⁰ though more importantly, because doing so would be abominable.²¹

By itself, of course, this does not necessarily show that forced compliance with the substance *x* law is wrong in principle; it may simply show that stomach pumping and compulsory injection are impermissible *means* of forcing compliance. That is surely what Professor Mendlow would say. In fact, his analysis leans heavily on the distinction between wrongness in principle and wrongness in practice—even going so far as to suggest that where, practically speaking, there are *no* permissible means of forcing compliance with a given law, it can still be permissible to do so in principle. In his words:

[C]ircumstances sometimes arise where the amount of force necessary and sufficient to stop a given transgression is unreasonably great. Suppose a narcochemist is manufacturing methamphetamine in a treehouse and the only way the police can stop him is by cutting the tree down, paralyzing him in the process. May the police cut down the tree? Clearly not, and the Enforceability Constraint agrees. What the state may punish, the state in principle may impede—but only with reasonable force. Unreasonable force wrongs the narcochemist. . . . [Even] [i]n a world where no single instance of a given offense is disruptable through reasonable force—a world where every narcochemist operates from a fortified treehouse—the Enforceability Constraint still permits offenders to be punished. The Enforceability Constraint says that an offense is unpunishable if it’s always wrong *in principle* to disrupt instances of that offense merely on grounds of wrongfulness. In a world of fortified treehouse meth labs, it’s always wrong to disrupt meth-making in practice, but it isn’t always (or perhaps ever) wrong to do so in principle.²²

I grant Professor Mendlow the treebound-narcochemist case. The question is whether the same logic applies to Jones the drug user. And the answer depends on whether we can imagine means of interfering with Jones’s activity—reversing his metabolism of the drug, or forcibly ejecting it from his system—that would be consistent with basic principles of individual dignity and bodily autonomy. After all, it is easy to see why shutting down a treehouse meth lab is permissible in principle; one need only imagine a technological innovation (e.g., a means of aerial intervention, or a mechanism for causing trees to fall much more slowly to the ground) that would solve the collateral damage problem. The issue in the

¹⁹ *Id.* at 2346.

²⁰ *Rochin v. California*, 342 U.S. 165 (1952).

²¹ The *Rochin* Court—confronting a situation in which law enforcement officials forcibly pumped a suspect’s stomach to recover evidence—rightly invoked the idea of a “shock to [the] conscience.” *Id.* at 172.

²² Mendlow, *supra* note 1, at 2374.

narcochemist case, in other words, is that stopping this particular *instance* of meth-making is likely, given its location, to cause severe incidental harm—but there is nothing infirm, in the abstract, about thwarting meth production. That is Professor Mendlow’s point.

Is the same true of Jones’s case? I think not. There, the issue is not that thwarting the criminal act—undoing the influence of drugs in Jones’s system—runs too great a risk of incidental harm. Rather, undoing the influence of drugs in Jones’s system *is* the harm, for it is a direct violation of his bodily integrity. This is not to say, of course, that Jones may not be arrested (or punished) for ingesting substance *x*. He may be. Likewise, if there are reasons *apart from* criminal wrongness to interfere with Jones’s bodily integrity—quarantining him, say, or possibly even pumping his stomach, if the ingestion of substance *x* poses overwhelming public safety concerns—that, in theory, could be justified. What matters for Professor Mendlow’s account, however, is whether “the state may in principle use reasonable force to thwart [a] transgression[] *merely [because it is] criminally wrongful.*”²³ Which is just what seems forbidden here.

The “substance *x*” case is no mere hypothetical. Many jurisdictions have public intoxication laws, some of which criminalize the act of being under the influence of alcohol or other drugs unto itself (by contrast to intoxication laws that include an additional element along the lines of disorderliness).²⁴ What is more, public intoxication laws have been explicitly upheld against constitutional challenge,²⁵ and there is no reason, in principle, that a state would be forbidden from criminalizing intoxication across the board, in private as well as in public.²⁶ (I am not saying this would be sound policy, obviously; only that it would not disrespect any fundamental limits on the state’s authority to punish.) But even so, state officials would still lack authority, even in principle, to force compliance with the law directly.

IV.

Of course, even if the Enforceability Constraint falls short as a logical truism—in light of laws prohibiting things like intoxication, which qualify (in principle) for punishment but not direct control—it could still be a valid sociological observation. Professor Mendlow may be right, in other words, that our criminal-legal institutions *tend* to abide by the Enforceability Constraint, even if they do not do so in 100% of

²³ *Id.* at 2371 (emphasis added).

²⁴ *See, e.g.*, Code of Iowa § 123.46(2) (“A person shall not be intoxicated in a public place”); Texas Penal Code § 49.02(a) (“A person commits an offense [under this section] if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another.”).

²⁵ *See Powell v. Texas*, 392 U.S. 514 (1968).

²⁶ *See, e.g.*, Cal. Health & Safety Code § 11550 (making it a crime to be under the influence of a controlled substance, unless administered by a doctor—carrying a penalty of up to one year in county jail).

cases. In fact, I think he is right; the Enforceability Constraint offers a crisp, philosophically-honed description of existing practice.

The crux of the matter, then, is normative. Professor Mendlow's goal—and mine, too—is to craft a political theory of criminal law that explains and legitimates the state's often-violent, more-than-occasionally deadly, exercise of enforcement power; if not in all times and places, at least in contemporary liberal-democratic legal regimes. “In our system of criminal administration,” Professor Mendlow writes,

the state may ensure compliance with penal norms not only indirectly through punishment, but also through direct compulsive 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.²⁷

The “may” language here is telling; there is more at stake than pattern-recognition. The goal is to theorize the *legitimate* exercise of state power—not just to observe how, rightly or wrongly, it tends to get exercised in practice.

What is more, the normative claim has a rich pedigree. Although Professor Mendlow may be the first scholar to have endowed it with a name, the idea that authority to punish entails authority to control has long been a feature of our criminal justice system. The Enforceability Constraint is the contrapositive statement of this idea. But either way—formulated as $P \rightarrow Q$ or $\neg Q \rightarrow \neg P$, where P denotes authority to punish, and Q , authority to control—the upshot is the same. So long as an activity has been (legitimately) subject to criminal punishment, the police enjoy corresponding enforcement authority. If they happen on the activity in the world, they may, in principle, thwart it; and they may also, in principle, place the relevant actor under arrest, kicking into gear the full machinery of criminal punishment.

Put slightly differently, the mere *existence* of a criminal statute—assuming the statute was duly enacted, that it does not run afoul of any substantive limits on state power (e.g., the prohibition on *ex post facto* lawmaking), and that its enforcement adheres to the demands of due process and equal protection—is typically understood to confer the police authority to enforce the statute's terms. And what is more, it is understood to confer police authority to use significant force to enforce the statute's terms. This does not make all enforcement measures fair game, of course. Limits remain; officials must be reasonable when deciding how much, and what kind of, force to use. But the threshold grant of authority flows seamlessly—almost inexorably—from the fact of the underlying law.²⁸

²⁷ Mendlow, *supra* note 1, at 2370.

²⁸ See, e.g., BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 16 (Noting that “typical enabling statute[s] of a policing agency simply authorize[] it to enforce the criminal law,” but

To appreciate the point more concretely, consider an example of Professor Mendlow's own: the unlawful selling of loose cigarettes. A person who does so may be punished.²⁹ And if police happen to catch the wayward vendor in the act, he may be arrested and have his contraband seized—including, if need be, by physical force. In practice, however, it turns out the vendor could also be subject to greater intrusion. He could be harassed and humiliated. He could be put in a chokehold. He could be strangled to death.

The Enforceability Constraint, to be clear, is not to blame for cases like Eric Garner's, which plainly flout the "reasonable means" constraint that Professor Mendlow takes care to layer into his account. I hardly mean to lay all manner of police misconduct at Professor Mendlow's door. The conceptual question, however, is why reasonableness as to the *type* of force permitted in the course of law enforcement—as opposed to the more primary question of whether *any* direct force is warranted—should be asked to do so much work. Why shouldn't the reality of how police wield power today cause us to reconsider the viability of the Enforceability Constraint as a first principle of criminal law?

In the wake of Eric Garner's murder, Stephen Carter authored an impassioned defense of taking criminal law quite seriously—far more than we commonly do—given the enforcement authority it is usually taken to imply:

It's not just cigarette tax laws that can lead to the death of those the police seek to arrest. It's every law. Libertarians argue that we have far too many laws, and the Garner case offers evidence that they're right. I often tell my students that there will never be a perfect technology of law enforcement, and therefore it is unavoidable that there will be situations where police err on the side of too much violence rather than too little. Better training won't lead to perfection. But fewer laws would mean fewer opportunities for official violence to get out of hand.³⁰

I share Professor Carter's dismay. And I endorse his admonition that law, and criminal law especially, is not a plaything to be casually bandied about. Once again, however, the fundamental question is why *should* the existence of a criminal law—as an expression of the state's authority to punish a given activity—entail authority to control the activity as well. That is certainly the operative assumption of criminal law today. But what drives it?

they "say[] little or nothing about *how* to do so"—a concrete manifestation of the Enforceability Constraint).

²⁹ Whether one agrees with the criminalization of selling cigarettes on policy grounds, it seems beyond doubt—or at any rate, I am assuming *arguendo*—that such criminalization violates no fundamental rights.

³⁰ Stephen L. Carter, *Law Puts Us All in the Same Danger as Eric Garner*, THE VIRGINIAN-PILOT (Dec. 5, 2014), https://www.pilotonline.com/opinion/columns/article_26a42d3a-b51b-5bb7-9d58-a10eada5297c.html.

Professor Mendlow's answer is the Enforceability Constraint. Echoing other philosophers of criminal law,³¹ he believes authority to punish and authority to control travel together—that it would be, in Professor Mendlow's phrase, “an anomaly” for there to exist a “crime that the state may punish but never forcibly disrupt on grounds of criminality alone.”³²

Putting aside that intoxication laws already exemplify this “anomaly,” the normative point is that designations of anomalousness—even if true—are no foundation for political theory. Professor Mendlow could be right that we, in the “We the people” sense, are not in the habit of authorizing punishment for activities over which we are not *also* willing to authorize more direct forms of control. This hardly means, however, that the same justification underwrites both. Perhaps it is anomalous—and perhaps it would even be anomalous under ideal political conditions—for an activity to be legitimately punishable but not subject to more direct forms of control. Still, the possibility matters. Using force to directly control an activity (on the basis of its wrongness) is simply a different mode of exercising power than punishing the same activity after the fact. To observe this difference is not to suggest that control is always graver, or more injurious, than punishment; the latter, too, can produce agony, humiliation, and death. It often does so by design. The point is that control and punishment require different *kinds* of justifications—and that even in settings (which may be many) where both forms of authority turn out to be justified simultaneously, one does not stem from the other as a matter of course.

This does not mean Professor Mendlow is wrong to discern a formal relationship between authority to punish and authority to control. On the contrary, he is right to. But the relationship is not one of license; it is one of constraint. For an activity to be susceptible, in principle, to direct control by state officials in virtue of its wrongness, it must *at least* be the sort of activity that can be legitimately subject to criminal punishment. The reason is simple: it would confer officials too much power—a sort of power inconsistent with the ideal of self-rule—if they could control activities, on the basis of claimed wrongness, that could not even be legitimately designated as crimes.

This is the sense, ultimately, in which authority to control on the basis of wrongness presupposes authority to punish. Control in the absence of punishability subverts the rule of law. A legal order that allowed direct control of activities *beyond* those legitimately subjectable to punishment would no longer be a democracy. It would be a police state. For it would give individual officials the power—in at least some margin of cases—to substitute their own judgments of wrongness for those made, however imperfectly, by the people.

³¹ See, e.g., Malcolm Thorburn, *Punishment and Public Authority*, in *CRIMINAL LAW AND THE AUTHORITY OF THE STATE* 7–32 (Antje du Bois-Pedain, Magnus Ulväng, and Petter Asp eds., 2017) (arguing, via an extended analogy to parenting, that the state's authority to punish, control, and dissuade are all coextensive).

³² Mendlow, *supra* note 1, at 2373.

V.

When all is said and done, Professor Mendlow has confused a necessary condition for a necessary and sufficient one. Authority to control requires, but is not entailed by, authority to punish. Although both, under the right conditions, can be justified, both also have the capacity to produce serious harms. Yet the harms diverge; the threat of overzealous policing is simply different from the threat of overzealous prosecution and incarceration, much as they blend together in practice. At the level of advocacy, the two might be safely treated as monolithic. At the level of political theory, however, we should insist on the distinction; and only the more so if lasting reform—especially around policing—is what we seek.