

May the State Punish What it May Not Prevent?

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In *Why Is It Wrong To Punish Thought?* I defended an overlooked principle of criminalization that I called the Enforceability Constraint.¹ The Enforceability Constraint holds that the state may punish transgressions of a given type only if the state in principle may forcibly disrupt such transgressions on the ground that they are criminal wrongs.² As I argued in the essay, the reason why the state is forbidden from punishing thought is that the state is forbidden from forcibly disrupting a person's mental states on the ground that they are criminally wrongful (as opposed to, say, on the ground that they pose a risk of imminent harm).³ My argument for the Enforceability Constraint was essentially moral. Suppose that the state would violate your rights if it disrupted a particular transgression of yours on the ground that it is a criminal wrong. It would seem to follow, or so I argued, that the state likewise would violate your rights if, acting for the reason that your transgression was a criminal wrong, the state imposed terrible consequences on you for committing it. But that is precisely what the state does when it punishes you.⁴

Kiel Brennan-Marquez does not address this moral argument in his essay attacking the Enforceability Constraint.⁵ The gravamen of his attack is instead a supposed counterexample—the offense of being “under the influence” of intoxicating drugs.⁶ It is an offense that Brennan-Marquez claims the state may punish but may never forcibly disrupt on grounds of criminal wrongfulness.⁷ Relying on this example, Brennan-Marquez concludes that the Enforceability Constraint is not a legitimate restriction on state power.⁸ He then asserts somewhat paradoxically that if the Enforceability Constraint did restrict the state's power to punish, it would unduly expand the state's power to police.⁹

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¹ Gabriel S. Mendlow, *Why Is It Wrong To Punish Thought?*, 127 *YALE L. J.* 2342 (2018).

² *See id.* at 2370–76.

³ *See id.* at 2376–84.

⁴ *See id.* at 2371–73 (giving an informal proof of the Enforceability Constraint).

⁵ *See* Kiel Brennan-Marquez, *Rethinking the Relationship Between Punishment and Policing: A Response to Gabriel Mendlow*, 17 *OHIO ST. J. CRIM. L.* 399 (2020).

⁶ *Id.* at 402–404.

⁷ *Id.* at 403–404.

⁸ *Id.* at 404–407.

⁹ *Id.* at 407.

I believe that Brennan-Marquez is mistaken on both counts. His counterexample is dubious, and the unjustified police violence he decries is not licensed or encouraged by the Enforceability Constraint.

Whether the offense of being “under the influence” of intoxicating drugs is a counterexample to the Enforceability Constraint turns on the answers to two questions: may the state punish a person merely for being in a physiological condition of intoxication, and, if so, is the state nevertheless forbidden from disrupting or undoing that condition on the ground that it is criminally wrongful? Neither question strikes Brennan-Marquez as difficult. “[T]here is no reason, in principle, that a state would be forbidden from criminalizing intoxication across the board, in private as well as in public,” he asserts.¹⁰ Doing so “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,”¹¹ because “undoing the influence of drugs in [a person’s] system . . . is a direct violation of his bodily integrity.”¹²

Brennan-Marquez’s confidence in these assertions puzzles me. I am especially puzzled by his conviction that the state “would not disrespect any fundamental limits on [its] authority to punish”¹³ if it punished a person for a mere physiological condition. Of the real-life intoxication offenses that he cites, the most pertinent displays ambivalence about this very issue. While virtually all intoxication offenses require some additional element, such as being in public,¹⁴ Brennan-Marquez has found a single intoxication offense that at first glance seems to criminalize mere intoxication itself. The offense is a California misdemeanor statute that makes it a crime to “use . . . or be under the influence of [a] controlled substance” not dispensed by a licensed professional.¹⁵ Nominally, the statute purports to proscribe mere intoxication, which is why Brennan-Marquez offers it as a counterexample to the Enforceability Constraint. Yet California’s standard jury instructions suggest that the statute in practice criminalizes the *use* of an intoxicant rather than the state of being intoxicated. The instructions define being “under the influence of a controlled substance” not as a physiological condition but as an *activity* that causes a physiological condition.¹⁶ A person is “under the influence” of a controlled

¹⁰ *Id.* at 402 (citing CAL. HEALTH & SAFETY CODE § 11550 (West 2019)).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *See, e.g.*, IOWA CODE § 123.46(2) (2019) (“A person shall not be intoxicated in a public place”); *see* Brennan-Marquez, *supra* note 5, at 404 n.24.

¹⁵ CAL. HEALTH & SAFETY CODE § 11550 (West 2019); *see* Brennan-Marquez, *supra* note 5, at 404 n.26.

¹⁶ CALCIM No. 2400, Using or Being Under the Influence of Controlled Substance (HEALTH & SAF. CODE § 11550 (West 2019)) (emphasis added); *see also* *People v. Culberson*, 295 P.2d 598, 599 (Cal. App. Dep’t Super. Ct. 1956) (asserting that the “object” of the statute that criminalizes being

substance, according to the jury instructions, “if that person *has taken or used* a controlled substance that has appreciably affected the person’s nervous system, brain, or muscles or has created in the person a detectable abnormal mental or physical condition.”¹⁷ Implemented according to these instructions, the statute treats intoxication as a proxy for use, in effect punishing use-that-causes-intoxication instead of punishing intoxication itself.¹⁸ Use is an activity that the state arguably may forcibly disrupt on grounds of mere criminality, provided the force deployed is not excessive. So the statute is not a clear counterexample to the Enforceability Constraint.

The statute actually would not be a clear counterexample to the Enforceability Constraint even if it did punish mere intoxication. As Brennan-Marquez notes, the critical question is “whether we can imagine means of interfering with [an offender’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.”¹⁹ Brennan-Marquez concludes almost immediately that no such means are imaginable, dismissing out of hand two methods he calls “abominable”:²⁰ “forcibly pump[ing] [an offender’s] stomach”²¹ and “strap[ping] [him] down and inject[ing] a counteractive drug.”²² These methods are no doubt impermissible. But we can easily imagine methods that are less offensive. One would be to detain an offender in a holding cell (the proverbial “drunk tank”), which would force the offender’s body to metabolize and expel the intoxicant. Another method—as yet fanciful but certainly imaginable—would be to apply a patch to the offender’s skin that painlessly leaches the intoxicant from the offender’s blood. I do not find it obvious that either of these methods “is a direct [and impermissible] violation of [the offender’s] bodily integrity.”²³ Ultimately, I am unsure of the permissibility of forcibly undoing an offender’s physiological condition of intoxication, just as I am unsure of the permissibility of treating that condition as an object of punishment. The offense of mere intoxication raises hard questions about the limits of the right to bodily integrity and the scope of the criminal law. It is a dubious basis on which to reject the Enforceability Constraint.

“under the influence” of a controlled substance “is to control the *taking* of a narcotic” (emphasis added)).

¹⁷ *Id.* (emphasis added).

¹⁸ See Gabriel S. Mendlow, *The Elusive Object of Punishment*, 25 LEGAL THEORY 105 (2019) (arguing that the wrong a statute criminalizes is a function not only of the statute’s text but also of the way the statute is enforced, administered, and understood).

¹⁹ Brennan-Marquez, *supra* note 5, at 403.

²⁰ *Id.*

²¹ *Id.* at 402-403 n.21 (citing *Rochin v. California*, 342 U.S. 165 (1952)).

²² *Id.* at 402.

²³ *Id.* at 404.

A sounder basis would be a philosophical edifice of the sort that Brennan-Marquez says is his eventual goal to build, namely, an account of criminal law, grounded in a “political theory . . . 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.”²⁴ Brennan-Marquez very reasonably does not attempt to build the entire edifice in his short essay. He instead lays a foundation stone, arguing that “the reality of how police wield power today [should] cause us to reconsider the viability of the Enforceability Constraint as a first principle of criminal law.”²⁵ Thanks to the Enforceability Constraint, claims Brennan-Marquez, “the mere *existence* of a criminal statute . . . is typically understood to confer [on] the police authority to enforce the statute’s terms.”²⁶ All criminal statutes therefore seem to license a measure of police violence—violence that too easily can become excessive. As Brennan-Marquez observes, a person who unlawfully sells loose cigarettes “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.”²⁷ Brennan-Marquez acknowledges that these abuses aren’t licensed by the Enforceability Constraint. The principle forbids force that is unreasonable and forbids all force whatsoever when any amount would prove excessive in practice.²⁸ But these restrictions do not go far enough, in Brennan-Marquez’s view. “The conceptual question,” he says, “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.”²⁹

If this is an argument against the Enforceability Constraint, it is unsound. Brennan-Marquez is surely right that the police are sometimes too violent. He may also be right that one reason why the police are sometimes too violent is the way our legal order conceives the relationship between policing and the penal law. Echoing me, he notes that in our system of criminal administration “the mere *existence* of a criminal statute . . . is typically understood to confer [on] the police authority to enforce the statute’s terms.”³⁰ The law therefore governs “the *type* of force permitted,” not “whether *any* direct force is warranted.”³¹ But Brennan-Marquez is wrong to think that these features of our legal order flow from the Enforceability

²⁴ *Id.* at 405.

²⁵ *Id.* at 406.

²⁶ *Id.* at 405.

²⁷ *Id.* at 406.

²⁸ See Mendlow, *supra* note 1, at 2373–74.

²⁹ Brennan-Marquez, *supra* note 5, at 406.

³⁰ See Mendlow, *supra* note 1, at 2370.

³¹ *Id.*

Constraint. The Enforceability Constraint holds that the state may punish actions of a given type only if thwarting such actions directly is not wrong in itself. Thus, the Enforceability Constraint entails that *in principle* the state may thwart any properly criminalized action on the ground that it is criminally wrongful. But the Enforceability Constraint does not entail that if actions of a given type are properly criminalized, then the state may grant enforcement officials the legal power to thwart such actions routinely. What the state may do in principle is one thing. What its officials may be empowered to do in practice is another. The Enforceability Constraint does not license regular police violence. Much less does it encourage police brutality. Blaming the Enforceability Constraint for police brutality is like blaming Charles Darwin for Social Darwinism.

Confusion over the scope of the Enforceability Constraint may stem in part from my occasional use of the term “authority” when expressing the principle informally. In *Why Is It Wrong To Punish Thought?* I said that “the state’s authority to punish transgressions of a given type extends no further than its authority to disrupt transgressions of that type using direct compulsive force.”³² Perhaps because of this formulation, Brennan-Marquez attributes to me the view that “the state may not punish at t_2 an activity that officials do not even have authority to control at t_1 .”³³ The attribution is roughly correct if he means “authority” in a *moral* sense, such that the clause “officials do not even have authority to control [the activity]” is equivalent to “it would be *morally impermissible in all circumstances* for officials to control the activity.”³⁴ It is precisely my view that the state may not punish an activity if it would be morally impermissible in all circumstances for officials to control it. But Brennan-Marquez’s attribution is mistaken if he means “authority” in a positive legal sense, such that the clause “officials do not even have authority to control [the activity]” is equivalent to “officials have not been granted the *legal power* to control the activity.” It is not my view that the state may punish an activity only if legal officials have been granted the legal power to control it. The Enforceability Constraint speaks to what the state may do in principle. It doesn’t speak to what the state should do in practice or should empower its enforcement officers to do routinely. So I agree with Brennan-Marquez when he says that “there is nothing infirm about a legal order in which officials are not authorized [i.e., granted the legal power] to control every activity legitimately subject to criminal sanction.”³⁵ I disagree only with his assertion that such a legal order conflicts with the Enforceability Constraint. Consistent with the Enforceability Constraint, a state may

³² Mendlow, *supra* note 1, at 2383.

³³ Brennan-Marquez, *supra* note 5, at 400.

³⁴ Brennan-Marquez himself seems to use “authority” in a moral sense sometimes, as when he first formulates the Enforceability Constraint. He writes, for example, “[A]uthority to control is a prerequisite of authority to punish; if the state may not directly control an activity . . . [it] is likewise forbidden from imposing criminal sanctions on the same activity after the fact.” *Id.* at 399 (citing Mendlow, *supra* note 1, at 2370).

³⁵ Brennan-Marquez, *supra* note 5, at 400.

enact a criminal statute while affirmatively denying itself the power to enforce the statute through any means but retrospective penalty, provided that the conduct criminalized is conduct that the state may in principle prevent on grounds of wrongfulness alone.

For better or worse, the resulting policy would be anomalous. In American law, seemingly all criminal offenses and even many non-criminal ones (e.g., parking violations) may be thwarted by the state directly (e.g., by towing your car). That the penal law is presumptively enforceable in practice is a basic aspect of our legal order, an aspect that philosophers of criminal law have not thoroughly examined, let alone sought to justify.³⁶ The potential for state violence that results from this aspect of our legal order is impossible to deny. As Stephen Carter warns (in an essay cited by Brennan-Marquez), “making an offense criminal . . . means that the police will go armed to enforce it.”³⁷

I drew attention to the presumptive enforceability of the penal law in *Why Is It Wrong To Punish Thought?*, where I distinguished the question of what might justify this aspect of our legal order³⁸ (a question I did not answer³⁹) from the question of what might justify the Enforceability Constraint.⁴⁰ Brennan-Marquez evidently sees a connection between these two questions, and he is right to see one. But the true connection is not the one he sees. The Enforceability Constraint does not entail or presuppose that the penal law is presumptively enforceable in practice. Rather, the presumptive enforceability of the penal law presupposes the soundness of the Enforceability Constraint. This is true for a simple reason: the state may not empower its officials to do something routinely that it would be wrong of them to do even in theory.⁴¹

³⁶ See Mendlow, *supra* note 1, at 2370–71.

³⁷ Stephen L. Carter, *Law Puts Us All in Same Danger as Eric Garner*, BLOOMBERG (Dec. 4, 2014).

³⁸ See Mendlow, *supra* note 1, at 2371 (“Why . . . may the state ensure compliance with penal norms through the imposition of contemporaneous compulsive force?”).

³⁹ I did venture speculatively that “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.” *Id.*

⁴⁰ See *id.* (“[W]hy [may] the state . . . ensure compliance with a given legal norm through punishment only when the state may ensure contemporaneous compliance with that norm through direct compulsive force[?]”).

⁴¹ Brennan-Marquez ends his essay by proposing a principle that is roughly the converse of the Enforceability Constraint. He suggests that, “[f]or 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.” Brennan-Marquez, *supra* note 5, at 407. I am happy to endorse this principle. But I would formulate it so as to make explicit that the activity in question *must actually be criminal*. I assume that the state may not disrupt an activity on grounds of (criminal) wrongfulness unless the activity is actually (criminally) wrongful.