

Why We Punish: Lessons in Indeterminacy

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Gabriel S. Mendlow, *The Elusive Object of Punishment* (Draft, March 11, 2018), available at [SSRN](#).

In the adjudication of criminal law, judges tend to agree upon the elements that make up a given crime, but are less certain about exactly which element the law seeks to punish. For example, in child pornography possession statutes, it is difficult to determine the underlying transgression that is targeted by the punishment. Is it the act of possessing the images that is blameworthy or is there something else? And if so, what? Does the law actually seek to punish certain thoughts that the images engender – particularly to steer people away from thinking about children in a certain way? The closer one looks, the more one might suspect that the law is punishing thoughts about certain images. From this perspective, the crime of possession takes the shape of a thought crime more than anything else. However, this very state of mind—which might be the true object of punishment—is not even an element of the offense.

Gabriel S. Mendlow's *The Elusive Object of Punishment* highlights such uncertainties in criminal law and how they might produce unfair punishment practices. As the author notes, these uncertainties “underlie an assortment of familiar disputes—over venue and vagueness and mens rea, over whether an offender’s sentence is proportionate to his offense, and over whether the offense itself is a legitimate object of punishment...Yet these disputes may hinge on deeper disagreements about the identity of the wrong a law punishes.” Through careful statutory analysis, Mendlow makes a powerful case that the object of punishment can be obscure and elusive, and that justice may suffer as a result.

Expounding on a distinction of Professor R.A. Duff, the work begins by establishing the importance of distinguishing the wrong an offender is being punished for from the conditions on which he is being punished for that wrong. In order to cast culpability on a defendant legitimately, the law must be certain about whether it is punishing the defendant for a transgression that the law may punish. But sometimes, courts are uncertain about the target of punishment – as demonstrated in hate-crime assault statutes. Wisconsin’s Supreme Court struck one statute because, in its view, the law imposed punishment for what the Court deemed the defendant’s “bigoted thought.” The U.S. Supreme Court saw the Wisconsin statute differently and focused on the assaultive nature of the offense. Furthermore, this Court reasoned that bias was simply a tack-on enhancement, not the point of blame. These, and other examples, demonstrate that failure to distinguish the wrong an offender is being punished for from the conditions on which he is being punished for that wrong leads to downstream problems, including when the criminal law oversteps its jurisdiction, punishes unfairly, and punishes when it should not.

Next, the work sets out to distinguish “conditional offence elements” from those elements considered material for purposes of casting culpability. Whereas the law may punish someone only if that person satisfies a statute’s set of elements, this notion hardly means that all elements are created equally. For example, if a sexual assault statute requires prosecution of a crime within a specified number of years, the time frame is a condition for ultimately imposing punishment. As such, the time component is immaterial when considering culpability. A clear understanding of this distinction sets the stage for examining genuine instances of punishment directed at conditional elements, or potentially more problematic, factors beyond the elements themselves.

Having outlined the moral and punitive import of material elements, the work moves on to employ the notion of “thought crime” to show how a statute can criminalize behavior outside the criminal law’s jurisdiction, in this case, by purporting to punish an act when it in fact punishes the accompanying mental state. Among other examples given is a British statute that makes it a crime to possess money with the intent to commit a terrorist act. This crime offers a vivid snapshot of how the law might target particular thinking. The object of punishment is arguably not so much the physical “possession” of money, but rather, possessing particular intentions about how to use the money. Thoughts are potentially the real transgression that the law is targeting, even though traditionally, mere thoughts could never be a basis for liability. For the reader, this example and others make clear that possessing such thoughts may not even be an essential element of the offense; however, one should not overlook the fact that thought is potentially the essential object of punishment.

Taken wholly, this work highlights a largely unexamined problem in criminal adjudication, one that invites the criminal law to overstep its boundaries and sometimes punish without justification. The work lends itself to imagining how punishment can be doled out more fairly, and most importantly, that only blameworthy behavior gets punished. In addition, this piece offers a critical reminder that policing human thought is an anathema to concepts of liberty, culpability, and ultimately, justice.

As shown throughout the work, individuals can face punishment seemingly for thinking certain thoughts, in full contravention to American political values. Yet in the world of courts, thought-deterrence can be a major impetus for punishment. While such rigid thought-patrol persists in some areas, in others, there is full license to possess. Practically anyone can possess the most debauched library of humans brutalizing other humans in unspeakable ways—from Faces of Death videos, prisoner mutilations, torture videos, police killings, to other ghoulish graphics—yet there is hardly legal prohibition. The work offers a compelling case for understanding how this situation is possible. The clear and careful analysis points out stark contradictions that offer a unique and critical contribution to legal scholarship. The practical implications for penal reform are especially noteworthy since they work to minimize needless human suffering.

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