

Victims Versus the State's Monopoly on Punishment?

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ABSTRACT. Gabriel Mendlow's insightful essay, *The Moral Ambiguity of Public Prosecution*, properly puts victims back at the center of criminal justice. He is right that victims deserve a much greater role. But he mistakenly goes even further and hints that, at least ideally, their standing to punish would be exclusive. Crimes wrong both victims and communities, giving both legitimate stakes in punishment. And the state plays an important role in ensuring equality and reducing arbitrariness. In dismantling one monopoly, we should not replace it with an opposing one. The problem is not that the state has a role in our criminal-justice system, but that the system is an impersonal punishment machine. To give some control to everyone who deserves it, criminal procedure should return to its roots as a communal morality play. Victims and wrongdoers are important players in that morality play, as Mendlow suggests—but so are the affected community and the state that governs that community.

INTRODUCTION

At least since Blackstone, Anglo-American lawyers have viewed crimes as public wrongs. As public policing and public prosecution have grown, the residual role for victims and private prosecution has shrunk almost out of sight. Most criminal theorists endorse the state's monopoly, understanding crimes as exclusively public wrongs. The dichotomy between crimes and torts—public versus private wrong—undergirds what we punish, why we blame, and how we prosecute.

Gabriel Mendlow's insightful essay, *The Moral Ambiguity of Public Prosecution*, forces us to rethink all that.¹ Crimes wrong victims, he reminds us. Criminal justice is not just a blaming or punishing machine, but a complex social institu-

1. Gabriel S. Mendlow, *The Moral Ambiguity of Public Prosecution*, 130 YALE L.J. 1146 (2021).

tion bound up with the morality of social relationships. That insight, I will argue, should force us to ask not only *who* punishes and *why* but also *how* we punish and which procedures we use to get there. His insight about whom crimes really harm should also make us grapple with political theory and ask whether we are atomized individuals or part of an organic community that suffers together.

Mendlow asks why the state has standing, or at least exclusive standing, to prosecute crimes on behalf of victims. He starts by observing that crimes are usually moral wrongs for which the state seeks to hold wrongdoers accountable.² But it is the direct victim, he argues, who has standing to hold to account the person who wronged *him*. Just as bystanders lack standing to meddle in social wrongs against other people, he suggests, so too does the state lack standing to usurp the role of the direct crime victim.³ Perhaps state prosecution is necessary in practice, a second-best compromise because victims are too poor or powerless to prosecute on their own.⁴ But unless we are prepared to sever the link to blame or serious punishment, he argues, public prosecutors should at least hand over much more control to crime victims.⁵

Mendlow is right that victims deserve a much greater role. But he mistakenly hints that, at least in an ideal world, victims' standing to punish would be exclusive.⁶ Crimes wrong both victims *and* communities, giving both legitimate stakes in punishment. In dismantling one monopoly, we should not fall into the opposite error by replacing it with a different monopoly. The state has an important role to play in ensuring equality and reducing arbitrariness. I have written elsewhere that criminal procedure should be a communal morality play, not just an impersonal punishment machine.⁷ Victims and wrongdoers are important players in that morality play, as Mendlow suggests—but so are the affected community and the state that governs that community.

Part I of this Response summarizes what Mendlow gets right. Section I.A highlights Mendlow's central point that crimes harm victims, not just the state. In Section I.B, I explain how our lawyer-run criminal-justice system excludes victims. And Section I.C then connects why we punish to who punishes and how. Part II goes on to address aspects that Mendlow does not explore. In Section II.A, I underscore the social role that criminal justice plays, which I argue does not figure prominently enough in Mendlow's account. Not only does crime

2. *Id.* at 1161.

3. *Id.* at 1168.

4. *See id.* at 1171.

5. *Id.* at 1183.

6. *See id.* at 1170.

7. *See* STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 130 (2012).

harm social relationships, but communities also help vindicate victims and denounce wrongs. Those social facts explain why the community has a big stake in and thus standing to punish even crimes against persons. And Section II.B argues that the state properly punishes crime to sustain the embodied ethical life of the community it represents. Finally, in Part III, I explain why the solution is not to avoid blaming, to stop punishing, or to cede all control to victims. Instead, the state should retain control while giving victims (and others) a far greater role.

I. THE NEGLECTED ROLE OF CRIME VICTIMS

A. *Crimes Hurt Victims*

Mendlow's first big insight is that *crimes hurt victims*. That sounds obvious, but lawyers sometimes seem to have forgotten that truth. Our adversarial system is bipolar (state v. defendant) and largely impersonal. We bring prosecutions in the name of the people of the state, not the victim. And for the most part, we prevent victims from starting their own prosecutions or from spurring on or discouraging the prosecutors who can do so on their behalf.⁸ In most states, victims have the right to notice at various stages, but not necessarily to influence those stages. For instance, in some states prosecutors must notify victims that the prosecution has reached a plea agreement with a defendant. But in many states, victims have no right to share input on proposed deals, and in no state do they have a right to veto deals.⁹ Even these rights to notice are often honored in the breach. Only at sentencing do victims get to speak, and by then plea bargains have made the input of victims little more than window dressing. Plus, if the state does not honor these rights, victims have few if any ways to enforce them.

What would it mean to take victims' rights seriously? That does not have to mean harsher punishment. Too often, we oversimplify criminal justice into a zero-sum game of left versus right or victims versus defendants. Prison-guard unions use victims as figureheads to pass three-strikes bills and mandatory minima.¹⁰ "Victims' rights" becomes a partisan slogan. But as Mendlow rightly

8. See Mendlow, *supra* note 1, at 1165 & n.47.

9. Office for Victims of Crimes, *Victim Input into Plea Agreements*, U.S. DEP'T JUST. 3 (Nov. 2002), https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/ncj189188.pdf [<https://perma.cc/STB2-BLYE>] (surveying state laws).

10. See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 148 (2d ed. 2004) (explaining that the Doris Tate Crime Victims Bureau, "the driving force behind California's three-strikes law," gets 78% of its funding from the state's prison guard's union).

notes, the issue here is not mainly the level of punishment, but agency.¹¹ Victims have a stake and deserve a voice.¹²

B. Lawyers Are in Charge, but They Miss the Moral and Personal Stakes

The main reason that victims have no say is that *lawyers and other professionals now run the show*. That brings many advantages. Professionals are experts versed in complex legal rules. They can husband scarce resources and handle many more cases. They know the going rates (the ordinary punishments for particular crimes) and are better positioned to ensure equality and consistency, not arbitrariness. If our goal were just to impose the greatest punishment on the greatest number, to deter and incapacitate quickly and cheaply, our system would make lots of sense.

But criminal justice is inherently morally freighted. It is not simply a punishment machine, but a social system designed to enforce community judgments about right and wrong. Mendlow toys with the idea of removing that censure, but he seems to understand how radical that would be.¹³ Blame lies at the root of criminal justice. As Michael Moore puts it in the title of his magnum opus, the reigning “theory of the criminal law” is “placing blame.”¹⁴ We cannot strip it of blame, nor would we want to.

Mendlow goes further. He sees that criminal justice is not only moral, but personal.¹⁵ We need to right wrongs and heal wounds. And those wounds belong first to victims. But in practice, day to day, that is not how most criminal-justice professionals see their jobs.¹⁶

C. Remember Why We Punish

Another of Mendlow’s important insights is that *why* we punish should influence *who* does the punishing. As I have long argued, criminal procedure has

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11. See Mendlow, *supra* note 1, at 1172–74 (focusing on agency and saying little about punishment).
 12. BIBAS, *supra* note 7, at 89–94, 150–53.
 13. See Mendlow, *supra* note 1, at 1184, 1187 (suggesting that if we are unwilling to depart from a thoroughgoing system of public prosecution, we should consider the “radical” solution of “cleaving censure from [punishment]”).
 14. MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).
 15. See, e.g., Mendlow, *supra* note 1, at 1185 (describing criminal law as punishing “interpersonal moral wrongs”); *id.* at 1171 (distinguishing whether a prosecution is morally justified from whether the prosecutor has personal standing).
 16. See, e.g., BIBAS, *supra* note 7, at 32–33; MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 110–14, 144–48 (1978).

largely been oblivious to the aims and moral goals of the substantive criminal law.¹⁷ Many of those goals are relational: venting anger, expressing condemnation, teaching lessons, reconciling, and healing relationships. And those relationships typically involve the victim, the wounded party.

Yet we prosecute in the name of the state, not the victim. We keep victims largely in the dark and out of the process. Our criminal process is a bilateral contest between the individual defendant and the state, which also shuts out the many other stakeholders, like indirect victims and community members. Mendlow is perhaps the first scholar to put his finger on the disconnect between *what* we seek to do when we punish and *who* does it.

Indeed, I hope that Mendlow takes his insight further in future work. His present essay is a philosophical study of why victims have standing to punish. But the victim's moral standing bears not only on *who* should instigate punishing, but also on *how* we should punish.

Our default punishment today is imprisonment and only imprisonment. But if punishment is mainly for victims, why not orient punishment toward helping them directly? What about also prompting and encouraging (not requiring) defendants to admit guilt, express remorse, apologize, and ask forgiveness?¹⁸ That would vindicate victims and bring many some measure of healing and closure. What about giving victims their day in court? That would re-empower them, improving their psychological well-being (something Mendlow does not focus on).¹⁹ And what about doing more to promote restitution as well? That would counteract some of crime's material harms. Mendlow's essay is fertile in prompting us to reexamine our punishment practices.

II. CRIMINAL JUSTICE AS A SOCIAL AND POLITICAL INSTITUTION

A. Crimes Harm Communities

What Mendlow does not emphasize enough is that *criminal justice is a complex social institution*. When crime tears the fabric of interpersonal relationships,

17. See, e.g., Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 96 (2004).

18. See, e.g., Bibas & Bierschbach, *supra* note 17, at 87 (arguing that “[r]emorse and apology should also loom large in the criminal arena, where victims’ wounds are the greatest and need the most healing”).

19. Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 621-23 (2009); Malini Laxminarayan, *Enhancing Trust in the Legal System Through Victims’ Rights Mechanisms*, 21 INT’L REV. VICTIMOLOGY 273, 278 (2015).

criminal justice aims to stitch it back together.²⁰ Its healing ambitions are not just individual, but social. Victims undeniably have a stake, but so too do those around them. As John Donne memorably put it, “[n]o man is an island, entire of itself . . . any man’s death diminishes me, because I am involved in mankind.”²¹ That gives the state standing to speak on behalf of the community it represents.

Mendlow is right that victims have an important stake that we overlook. But so too do indirect victims and the rest of society. Their standing is not mutually exclusive, but shared. The state has standing both to vindicate victims and to repair social harms.

In places, Mendlow does seem to acknowledge the community’s stake.²² But he downplays its significance, especially for classic *mala in se* like murder and rape.²³ And there certainly are distinctions among crimes. It is easiest to see the state’s interest in treason, espionage, counterfeiting, tax fraud, and the like.

But what about crimes involving risk creation, like drunk driving? Any particular drunk or reckless driver may not hurt a person this time, but that driver threatens the safety of people in general. And what about so-called victimless crimes—are they simply legal paternalism run amok? Residents of neighborhoods plagued with drugs, littering, public urination, and prostitution would beg to disagree. These crimes are not just solitary vices; they harm neighbors and neighborhoods. They telegraph social disorder and decay. Reasonable people can disagree about whether and how much to punish them as crimes. But the idea of social harm is coherent, and (to residents of affected neighborhoods) often intuitive.

Perhaps Mendlow would respond that the state has standing in those cases because there is no one victim to bring suit, and it is impractical to expect community residents to bring class actions against diffuse harms. He suggests that classic *mala in se*, especially crimes against the person, are different. In those cases, we can identify a discrete victim. But victims are rarely powerful, savvy, and wealthy enough to bring prosecutions entirely on their own. That appears

20. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1457–58 (2017) (“Reconstructivism holds that criminal law and procedure have a distinctive role to play in the social world: where a wrong has been committed that is of such a nature as to attack the values on which social life is based, it is the office of the criminal law to reconstruct that violated normative order To use the clichéd but helpful metaphor, where crime tears the social fabric, criminal law’s distinctive function is to restitch it.”).

21. JOHN DONNE, *Meditation XVII*, in DEVOTIONS UPON EMERGENT OCCASIONS AND DEATH’S DUEL 103 (Vintage 1999).

22. See, e.g., Mendlow, *supra* note 1, at 1158 (suggesting that “rape and murder” are partially “wrongs against the polity”).

23. See Mendlow, *supra* note 1, at 1158–60.

to be why Mendlow acknowledges that the state may have to stand in for victims at least by default, but laments that solution as “second best.”²⁴

The state's standing, I argue, is not second-best. It rests not just on these practical problems, but also on the broader harms that communities suffer even from classic *mala in se*. Crimes demean victims, flout social norms, and rend social relationships. In the face of crime, society must not only vindicate the victim, but also heal the social wound, condemn the wrong, and vindicate the norm violated by the crime.

Take the most infamous homicides. Think of the Holocaust, the Third Reich's aggressive war-making in World War II, or the attacks of September 11, 2001. The victims and their families no doubt had moral standing to prosecute. But these were also attacks upon the Jews as a people, the United States and other Allies as countries, and humanity. Surely the Allies at Nuremberg had standing to prosecute the Nazi leaders on behalf of humanity. Surely Israel had standing to prosecute Adolf Eichmann on behalf of Jews both living and murdered. And surely our nation had standing to prosecute the terrorist attacks upon our country. The same is true of ordinary homicides. Even a single murder sows fear and rends the social contract; the state has standing to restitch that torn fabric before it unravels.

The same is true of rape and sexual assault. When a young Indian woman was gang-raped and murdered by a group of drunken men several years ago, Indian citizens began protesting the plague of sexual violence and harassment of women that the government of India had done little to combat.²⁵ Surely those citizens had standing to complain about this troubling example of a broader phenomenon. If a pacifist rape victim survived and chose to forgive her rapist and not press charges, would that mean that the community lacked a substantial interest in righting the wrong? Mendlow's argument in places suggests that it would,²⁶ but I suspect that readers may see things differently.

One can extend Mendlow's argument to favor greater localism in criminal justice. Think of the interested parties as concentric circles, like rings on a target. At the bull's-eye is the victim, with the most direct stake. Next are the victim's and defendant's family members, neighbors, and community members. As we zoom out, the neighborhood, city, county, state, and nation have less and less direct interests. Mendlow's insight supports concentrating power over street

24. *Id.* at 1172, 1179.

25. Jim Yardley, *Leaders' Response Magnifies Outrage in India Rape Case*, N.Y. TIMES (Dec. 29, 2012), <https://www.nytimes.com/2012/12/30/world/asia/weak-response-of-india-government-in-rape-case-stokes-rage.html> [<https://perma.cc/GKK8-7BWK>].

26. See Mendlow, *supra* note 1, at 1158–59, 1168.

crimes toward the center of the target, in the hands of those most affected. But it does not support excluding the outer rings entirely.

B. Communities Deserve Justice Too

These questions should prompt us to *consider political theory*, which rarely talks with criminal jurisprudence. Mendlow says nothing explicit about his understanding of what the state is. But his view of victim standing suggests a kind of liberal individualism. On this view, each person exists prior to society and apart from it. If one person's well-being is not bound up with that of others, then only direct victims suffer from crimes. From this perspective, the state is simply a congeries of individuals who band together in a social contract to protect each one's natural rights. Victims should retain their natural right to exact justice from those who wrong them, and the state should at most facilitate or supplement victims' primary role. That Lockean understanding profoundly influenced the Founders of our nation, and it is intuitive to many readers.

But criminal law is probably the least liberal area of law. It may reflect a conservative understanding of the state as the government of an organic community, of a people or nation as an entity.²⁷ We the People of the United States share a history, a language, a founding mythos, a national civil religion, and a commitment to a set of ideals grounded in liberty, virtuous citizenship, and responsible self-government. When wrongdoers prey on victims, they harm not only those victims, but also the community trust and peaceful coexistence that allow our communal lives to flourish.

As Joshua Kleinfeld argues, the criminal law reflects and sustains a particular society's "embodied ethical life."²⁸ It makes possible human flourishing and teaches essential social lessons. Crimes have ripple effects; so do punishments. That need for punishment is visceral, perhaps even hard-wired in us to make cooperation possible.²⁹ Enforcing the law promotes reciprocity and punishes social cheaters. Humans, as sociable creatures, may need criminal law to restrain

27. See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1555 (2016) ("Thus reconstructivism comes with a distinct conception of the role of the state with respect to criminal law. The state's role is not to be the night watchman of libertarians, nor the moral scold of the Right, nor the moral crusader of the Left. The state in the criminal context should be the embodiment and protector of society's lived moral culture — its way of life. Edmund Burke would approve.").

28. *Id.* at 1486 ("Criminal law is thus an enterprise in normative reconstruction, the protector of the shared normative ideas on which a society's way of life is based — the society's embodied ethical life.").

29. Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1649 (2007) ("[T]he evolutionary history of social exchange has likely

our base temptations to cheat, defect, and exploit one another. That is why the state may and indeed must punish on behalf of the community it protects.

Our social need to see justice done is why our Bill of Rights guarantees a series of criminal procedures. Those rights, as Akhil Amar argues, are “fundamentally populist and majoritarian.”³⁰ Take the rights to grand and petit juries. Jury service not only ensures that We the People check government prosecution, but also educates jurors themselves in democratic citizenship.³¹ Or take the right to a public trial, which both protects defendants and gives the American press and public the right to *see* justice done. Even the due process right to proof beyond a reasonable doubt is grounded, in part, in the need to give the community confidence that innocent men and women are not being convicted.³² Public confidence in the criminal-justice system, and as well as its legitimacy, is essential for all citizens, not just crime victims.

As I have explained elsewhere, criminal justice began as a communal morality play. Over the last two centuries, it has morphed into a punishment machine, so focused on crime control that its moral rhetoric sometimes rings hollow.³³ But we should reclaim our heritage and seek to return the system toward its moral, social, and educational roots.³⁴

III. FIXING THE BROKEN MACHINE

Finally, there are Mendlow’s three *proposals for reform*: bracing, stark, and radical. One of them is to strip away punishment’s expressive power. Fining wrongdoers, for instance, would express much less condemnation than imprisoning them. The state could even lock wrongdoers up without condemning them, he suggests. Mendlow envisions making sentencing more like a civil-commitment hearing focused on the danger of future crimes, not blameworthiness.³⁵

led to a reliably developing psychological system that is able to compute when someone has injured or cheated and to motivate punishment.”).

30. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1185 (1991).

31. *Id.* at 1185 (“The institution of the jury . . . places the real direction of society in the hands of the governed . . .” (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 293-94 (Vintage ed. 1945))); *id.* at 1186-87 (“The jury, and more especially the civil jury, serves to communicate . . . the soundest preparation for free institutions.” (quoting TOCQUEVILLE, *supra*, at 295-96)).

32. *In re Winship*, 397 U.S. 358, 364 (1970) (“[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.”).

33. Bibas, *supra* note 7, at 1-32.

34. *Id.* at 130-33.

35. Mendlow, *supra* note 1, at 1184-85.

That proposal is problematic, both theoretically and practically. Theoretically, if punishment were just about deterrence or incapacitation, it would indeed be directed toward purely public rather than private ends. But criminal punishment is inherently drenched in blame. It is the most powerful way that we as a society condemn wrongs, and criminal justice without blame would not feel like criminal justice at all. It would lose its lifeblood.

Practically, as I have already suggested, and Mendlow seems to recognize, that proposal is both radical and infeasible. Mendlow says that to downplay blame, we would have to “change the social meaning of incarceration.”³⁶ But one can no more mold social meaning like wet clay than King Canute could insist that the tides halt. Stigma is a stubborn social fact.

What would sentencing look like? It is hard to imagine anything remotely like criminal sentencing that would drain punishment of blame – even if one re-labeled it a system of tort or civil commitment. Pursuing that fantasy might even stoke vigilantes, private vengeance, even lynching, bringing back sordid forms of blame. Only in the realm of thought experiments can we imagine away the social reality of blame or the state’s role in it.

A second possibility Mendlow offers is to punish little if at all. Wrongdoers who harm others could suffer a public tongue-lashing.³⁷ By contrast, wrongs prosecuted by victims themselves and purely public wrongs could still be punished as they currently are.

But this proposal is hardly more feasible. Sentences may or may not be too high. But some kind of serious punishment must attach to serious wrongs, especially the *mala in se* crimes on which Mendlow focuses. We cannot disentangle the punishment due for harm to a victim from the punishment due for the community’s harm, let alone quantify those harms. Even if we could, it would be perverse to suggest that the state could punish violations of public order or risk creation fully, but far less when the risk harmed someone.

When victims find it difficult to sue, private harms would go unpunished. And keep in mind that many victims are poor, powerless, disabled, non-English-speaking, or otherwise poorly placed to prosecute their wrongdoers. Take an immigrant woman who was raped and forcibly pimped out by a gang. She might be unable or unwilling to prosecute gang members because she is here illegally, has no money, and speaks little English. Many women and men would rightly be outraged if the state settled for denouncing the gang members for rape and sex trafficking without further penalty.

36. *Id.* at 1185.

37. *See id.* at 1184 & n.78 (reasoning that “we all seem able to express [condemnation] just as easily (and, indeed, more articulately) through mere speech”).

That leaves Mendlow's third alternative, which he seems to prefer: giving victims far more power in criminal procedure than they currently have. Indeed, I have made just that suggestion, arguing for giving victims a voice and a say throughout criminal procedures. If I were a legislator rather than a judge (and thus free to innovate), I would even give victims the power to insist on or forgive some fraction of punishment within a range of permissible punishment for a given crime.

But Mendlow suggests that he would go further. He seems to favor returning to private prosecutions, or at least giving victims the power to insist on or veto criminal proceedings.³⁸ That proposal, however, is a bridge too far. Some victims might be pacifist, unwilling to punish at all. Others might be bloodthirsty, unwilling to relent at all. Still others might be bigots, too forgiving of whites or females and too harsh on black men. The community has an interest in ensuring that the state uses its coercive power to punish both proportionately and evenhandedly, so that citizens of all races, ethnicities, faiths, and the like have confidence in equal justice under law. Even though victims deserve an important role, the state must retain the upper hand.

Another reason for the state to keep the upper hand is to vindicate harms suffered by the community itself. In the example above, the immigrant woman is the direct victim of sex trafficking. But women in general suffer from the scourges of sex trafficking and sexual violence. Sending a strong message supporting victims, and making a public example of sex traffickers and pimps, are public goods, not just personal ones.

Mendlow's lesser attention to these other values highlights the limits of his theoretical approach. Like many theorists, he is in this essay (in Isaiah Berlin's wonderful phrase) a hedgehog. He grasps one big insight about victims and shows that we have been blind to it. But I am a judge, and judges must be foxes. We see up close the many values and functions that criminal justice must serve. Some of these are substantive justifications for punishment, like retribution, specific and general deterrence, incapacitation, and reform. Others are procedural values like equal treatment, transparency, and participation. And then there are practical constraints tied to limited time and money. How we pursue these values within these constraints depends in part upon our history and the social meaning of practices like public prosecution. We cannot start anew on a clean slate, even if we want to. Mendlow's thought experiment is a powerful one. But by treating one value as a threshold requirement, it obscures many others served by our social practice of punishment.

38. See *id.* at 1171.

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These criticisms are hardly fatal. They speak to how fresh, unexpected, and fertile Mendlow's argument is. I commend him for innovating a jurisprudence of criminal procedure, for breaking out of our statist assumptions, and for raising foundational questions that have lain dormant for far too long: who should punish, how, why, and in whose name.

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