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The Dialogic Community at Dusk

Peter Ramsay*

Abstract

Alan Brudner's Hegelian theory of the "general part" of the criminal law offers a convincing explanation of the form taken by criminal law doctrine in liberal states. Brudner explains the general part's elements in terms of three paradigms of individual freedom that together form what he calls a "dialogic community." I argue here that the prevalence of harm-prevention offenses in the U.K.'s actual penal law demonstrates that there is a fundamental tension between these paradigms of freedom, one that has undermined the claims made for doctrine, the unity of the dialogic community, and the liberal state's commitment to individual freedom.

Introduction

Alan Brudner's *Punishment and Freedom*¹ seeks to explain every major doctrinal controversy in the penal law in terms of the realization of individual freedom in a liberal state. Brudner developed the book from ideas presented in one chapter of the first edition of his *The Unity of the Common Law*.² When read together with the new edition of *Unity of the Common Law*³ (UCL) and with *Constitutional Goods*⁴ (CG), Brudner's legal and philosophical scholarship constitutes a unified theory of the overall development of the twentieth century's liberal legal orders. By translating the theoretical content of Hegel's *Philosophy of Right* into a modern idiom, by applying Hegel's political theory to the detail of modern common law doctrine, and by using that theory to critique and relativize the leading schools of legal theory in each of the main branches of law, Brudner has made an unrivalled contribution to legal theory.

As a critique of the predominant moral philosophical theories of criminal law, *Punishment and Freedom* (PF) is compelling and profound. Brudner demonstrates that legal threats of state punishment have a political-constitutional significance that is independent of the relation between criminal wrongdoing and moral wrongdoing. Both *Unity of the Common Law* and *Punishment and Freedom* also argue against critical legal theorists' insistence that irreconcilable contradiction is the condition of law. For Brudner, their perspective represents a failure of dialectical imagination, a failure to grasp that the contradictions in

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¹ Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (2009).

² Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (1995).

³ Alan Brudner, *The Unity of the Common Law* (with Jennifer M. Nadler) (2d rev. ed. 2013).

⁴ Alan Brudner, *Constitutional Goods* (2004).

legal doctrines are only the form taken by a higher unity. Notwithstanding the subtlety of his Hegelian logic, I think this claim that the law is ultimately unified is misleading.

The dialectical antithesis and synthesis at the core of his account of freedom, the tension that makes his account so compelling when compared with that of moral philosophy, has not proved historically to provide the stable unity that he claims for its logical structure. On the contrary, if the evidence of recent developments in penal law is anything to go by, this tension has unraveled in a way that represents a mortal danger to a penal law that is consistent with individual freedom. Understanding the way that this process develops in our own time will provide the key to the law of the twenty-first century.

I. The Penal Law of the Dialogic Community

Penal laws are commands or threats made by a political sovereign with a monopoly on legitimate coercion. The sovereign coerces legitimately only when it coerces in the public interest. For Brudner, the public interest is those interests *necessarily* shared by all subjects, by virtue of some common nature, which he calls “public reason.” In a distinctively liberal political community that shared interest will be individual freedom. A liberal political theory of punishment must, therefore, show how the form and content of the public wrongs that comprise the substantive criminal law serve rather than undermine the liberal public reason of individual freedom.

To solve the problem of reconciling state coercion with individual freedom, Brudner elaborates an account of freedom as a unity of three different “paradigms,” each paradigm being logically related to and dependent on the existence of the others. These paradigms are “formal agency,” “real autonomy,” and “communal solidarity.” Brudner locates the various principles and ideas at work in legal doctrine as arising from one or another of these paradigms, and then argues that the whole can be understood as a unity of these different component paradigms.

This framework provides the basis of Brudner’s theory of the common law doctrines that are often referred to as the “general part” of the criminal law. I find Brudner’s detailed account of the general part convincing. I will briefly consider only those aspects that are immediately relevant for understanding the limitations of his theory in respect of the criminal law’s contemporary problems and the resources the theory nevertheless contains for solving those problems. The most persuasive feature of Brudner’s theory is that his paradigms of formal agency and real autonomy are able to explain features of the criminal law that moral theory is unable to explain. Moral theories of criminalization either rely on the harm principle and are unable to explain those criminal wrongs (such as battery) that can be committed without proof of any harm, or they rely on a moral retributivism that is unable to explain the entirely harm-oriented public welfare offenses, where there may be no moral wrongdoing. These two perspectives similarly struggle to explain why negligence is common in the public welfare offenses but traditionally absent from what judges sometimes refer to as “true crimes.”

Brudner's elaboration of the paradigms of formal agency and real autonomy resolves both these problems. As formal agents, human individuals are able to act independently of any particular end: they enjoy a "negative" freedom to choose ends. Free of any particular ends, we are ends in ourselves—*persons* possessed of a unique dignity by virtue of this independence of any particular ends. Protection and recognition of the rights of personhood (or end-status) is an interest that is necessarily shared by all subjects in a liberal political community. This theory has no difficulty in explaining the harmless wrong of battery as a coercion of this formal agency.

Formal agency also explains why some offenses require proof of intention, knowledge, or subjective recklessness even though, as H.L.A. Hart argued, negligence liability would ensure that more harm-causing behavior was deterred while punishment was nevertheless fairly distributed.⁵ The absence of negligence in these offenses is explained, Brudner argues, by their not being concerned to deter harm, but rather to impose a retributive response to the coercion of formal agency.

From the point of view of a liberal sovereignty, when one person coerces another's agency by an assault, a homicide, or a *deliberate* taking of or damage to the other's property without consent, she not only violates that particular other's rights, but also makes a claim to a liberty unlimited by the rights of the other person. In other words, when a person deliberately interferes with another's rights, she practically denies the existence of rights as such. The sovereign's purpose in punishing the offender is to realize the authority of rights by visiting the rights-denial on the offender who claimed it. The punishment is rendered consistent with the freedom of all because the offender has authorized it by her own denial of rights. This is not true, however, if force is applied or property interfered with negligently, for this is merely a violation of a right without any implied claim to an unlimited liberty that would require or authorize the sovereign to negate it with punishment.

Brudner calls this retributive account of crime and punishment "legal retributivism," to distinguish it from the moral retributivism that dominates Anglo-American penal theory. The offender is not punished for the reason that she morally deserves it. Punishment is legally "deserved" only insofar as a deprivation of the offender's rights will serve to realize the nullity that was the offender's own denial of rights.

This is a penal theory that also explains the shape taken by *actus reus* doctrines such as the limits on omissions liability and inchoate offenses. Where the paradigm of formal agency is concerned, punishment must be a response to a choice to deny rights, rather than to a mere failure to confer a benefit on another, as in many cases of omitting to help another. The choice must also be a choice that takes manifest external form in the world, so that it amounts to a practical denial of another's rights. Without this external public form, a merely private choice to deny rights, such as making intentional preparations to offend, never becomes a practical denial of rights that the sovereign is either required, or

⁵ H.L.A. Hart, *Punishment and Responsibility* (1968).

implicitly authorized by the offender, to negate by punishment. As a consequence, common law attempts doctrine has tended to restrict liability to acts that manifest externally the choice to deny rights.⁶

Formal agency is, however, a radically incomplete theory of individual freedom. Following Hegel, Brudner argues convincingly that the negative freedom from external determination of ends is incoherent without the positive freedom of actually authoring one's own ends. To be truly free, a person must not only be free from causal determination so as to enjoy the capacity to choose their own ends, but also pursue ends that they have determined for themselves. This second aspect of freedom, Brudner calls "real autonomy" and, from the logical unity of formal agency and real autonomy, Brudner is able to give an account of almost every aspect of the criminal law that would not make sense were the law based on formal agency alone.

Harm is at the center of the real autonomy paradigm because making self-determined choices depends on enjoying a right of access to certain agency goods, including life, limb, food, clothing, shelter, knowledge, skills, health, and so on. Without a right to these goods, formally free agents will always be "vulnerable to uncontrollable contingencies" resulting from poverty, disease, and disabling accident (PF, 136). The right to these agency goods implies the existence of an extensive welfare state that we will consider below, but it also has distinct implications for the criminal law.

The most important aspects of the criminal law that real autonomy explains are the gradation of offenses according to harm done, harm as a component of proportional sentencing, fraud and threat offenses, and the public welfare offenses. These latter offenses are concerned to deter behavior that carries an excessive risk of harm to agency goods. Since such excessively risky conduct may not necessarily involve a coercion of agency, there is no requirement to prove intention or recklessness. Negligence will be enough.⁷ At the same time, where violation of such law is not deliberate, there may be no externalization of a denial of rights, and the state has no authorization to deprive a person of liberty—only to fine them or impose some equivalent penalty.

From the same premises, Brudner has explained two types of offenses whose form and content are at odds with each other. Brudner shows that antithetical criminal law doctrines make sense if they are considered in their concrete legal specificity as the coercive threats of a liberal state, rather than in their generic character as instances of moral wrongdoing. Criminal punishment is only legitimate if citizens have *externalized a choice to deny rights*; that is, to repudiate the conditions that guarantee the freedom of themselves and others. A fine or relevant disqualification of some sort, falling short of

⁶ Brudner relies on the subsequently overruled New Zealand case of *R. v. Barker*, [1924] N.Z.L.R. 865. However, the English courts' interpretation of the "more than merely preparatory" test in the Criminal Attempts Act 1981 appears to confirm Brudner's point. See Christopher Clarkson, *Attempt: The Conduct Element*, 29 *Oxford J. Legal Stud.* 25 (2009).

⁷ Brudner rules out absolute liability, notwithstanding that this is common in regulatory offenses in the common law world.

imprisonment, may nevertheless be imposed for negligent creation of an excessive risk that violates publicly guaranteed rights to agency goods.

Brudner explains most of the criminal defenses as either exculpations in which a defendant has not chosen to deny rights, or justifications where despite appearances the defendant has chosen to affirm rights rather than deny them. Some defenses are excuses and these are explained by means of the third paradigm of “communal solidarity.” Free citizens are recognized by the state not only as abstract agents of agency and autonomy, but also as concrete embodied individuals with particular “loyalties,” “dispositions,” and “aims.” Sometimes for a person to have avoided the commission of a crime would have required them to show “an angelic selflessness” (PF, 256-57). The person who does wrong under duress, for example, may on that ground be excused because even though they deny rights, they nevertheless act “conformably to the public ethics of the life sufficient for dignity” (PF, 261).

Brudner concedes that communal *morality* is in this way allowed a peripheral role in the third paradigm of communal solidarity. Brudner is here trying to absorb the force of one critical school of criminal law theory. Alan Norrie argues that all attempts to produce a rational, principled account of the criminal law come unstuck because substantive moral judgments of a person’s motives or character always creep in to disrupt legal doctrines that claim to be concerned with formal rights. Duress is only one of the examples of this process that Norrie examines. He also identifies these tensions in the instability of doctrinal definitions of intention and recklessness, the limitations of legal concepts of voluntariness and automatism, the proliferation of different causation doctrines, and the extensive presence of evaluative standards of reasonableness in the defenses.⁸

Brudner does not explicitly respond in detail to Norrie’s arguments, although some of his discussion of doctrine offers implicit rejoinders. His general response is that morality is indeed let into legal doctrine “by the back door,” but that is precisely because at most it allows moral excuses to alleviate liability for a legal rights-denial (PF, 259). For Brudner, these moral considerations form only the periphery of criminal law and do not threaten the core of the law that consists of the rights-protecting laws arising from the formal agency and real autonomy paradigms.⁹ Crucially, Brudner argues that since the three paradigms of freedom are logically interdependent, they presuppose the others for their own coherence. There is, therefore, no “logical imperative” for the paradigms to impose themselves on the territory of the others. Indeed, “logic requires their [mutual] accommodation” (PF, 305).

It is this claim that is the lynchpin of Brudner’s theory because, as he recognizes, there are real antitheses between the paradigms, and the difference between his theory and analytical moral theories of criminal law is that Brudner does not pretend that these antitheses can or should be eliminated. Instead, he seeks to show that these antitheses are

⁸ See Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2d ed. 2001); Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* chs. 7-8 (2000).

⁹ See Alan Brudner, *A Reply to the Critics of Punishment and Freedom*, 14 *New Crim. L. Rev.* 498 (2011).

moments of a higher unity. The antithetical paradigms are each partial expressions of the complex human achievement that is individual freedom in political community—what Brudner refers to as a “dialogic community.” However, if the unity of the dialogic community should fail, if we should find that the forms of liability appropriate to one paradigm appear in the sphere Brudner has reserved for another, then his theory is not explaining the penal law. It is at best a normative aspiration for the penal law. If the mutual interference of paradigms is extensive and persistent, it might be that his normative theory is practically unsustainable for some reason.

II. The Conflict of the Paradigms in Penal Law

Even if Brudner could convincingly explain all of Norrie’s examples of invasions of morality into penal law as essentially marginal phenomena, his claim that the paradigms are unified would still have to account for another aspect of criminal law that seems to undermine that unity: the prevalence of harm-prevention offenses where they do not belong. Moreover, these offenses indicate that conflict between the paradigms is taking place not at what Brudner claims are the margins—between the core rights of freedom and the peripheral moral excuses—but within the core itself—between the paradigms of formal agency and real autonomy. In this conflict, the paradigm of real autonomy appears to have extended itself into territory that Brudner has reserved for formal agency.

Brudner himself briefly sketches what the criminal law would be like if the paradigm of real autonomy were imposed as the only paradigm of criminal law and all crimes were to become public welfare offenses. In such a regime, “[p]reventing harms rather than vindicating rights of formal agency becomes the aim of criminal law no less than of regulatory law” (PF, 301). The result, Brudner explains would be that:

the dangerous character rather than the criminal agent becomes the object of penal law and its sanctions, which become instruments honed to the aim of incapacitating him, preferably before he can strike. Thus, inchoate offences, once an apparent anomaly in a regime of punishment, become the norm in a regime of threat control, yet ... without the robust *actus* requirement imposed by a law of punishment (PF, 301).

Where dangerousness is the target of the criminal justice system, there is no need for the *actus reus* requirement to afford proof of an externalized choice to deny rights, and the *actus* requirement “atrophies” (PF, 302). The need for subjective fault also disappears. Within a regime of real autonomy it is enough to prove, as Hart had argued, that “the defendant negligently broke the law ... that he failed to comply though it was within his power to do so,” with the result that “[s]evere sentences required by a regime aimed at incapacitating human threats could be meted out on the basis of ordinary negligence” (PF, 302).

In recent decades, the criminal law in the U.K. has moved sharply *towards* limiting the influence of the paradigm of formal agency, using exactly the techniques of public welfare offenses that Brudner describes. There has been a steady expansion in the number and scope of “preinchoate” criminal offenses. In these offenses, the conduct element does not prove an externalization of a choice to deny rights but only that the offender has committed some preparatory or facilitating act with the ulterior intention of a subsequent criminal

denial of rights,¹⁰ or that he is willing to engage in conduct that *might* result in encouraging or facilitating such criminal wrongdoing by others.¹¹ To these, mostly recent, offenses can be added a long list of possession offenses of longer standing.¹² Most preinchoate offenses allow for imprisonment as a penalty.

In addition, a new form of penal liability has been innovated called the civil preventive order. This allows a civil court to impose specific individualized obligations on individuals assessed as representing a danger of committing terrorism offenses,¹³ or sexual offenses against children,¹⁴ or alcohol-related disorder,¹⁵ or domestic violence,¹⁶ or football hooliganism,¹⁷ or indeed any “serious crime.”¹⁸ These orders can contain any obligations that are thought necessary to prevent the materialization of the offending conduct, and typically they include curfews, movement restrictions, and restrictions on whom a defendant can associate with or what they may possess—and can sometimes include positive obligations to report changes of address, permit searches of premises, and so on. Breach of any of these obligations without reasonable excuse is a criminal offense carrying a maximum penalty of five years in prison. Here too the *actus* atrophies since the conduct necessary for a breach of a preventive order is not limited to conduct that *externalizes* a choice to deny rights. It will be enough to prove the commission of *any act* that was motivated by such a choice or that *could possibly* have been motivated by such a choice. Moreover, with the preventive orders, the fault requirement is negligence at best.¹⁹

These offenses cannot be regarded as ordinary public welfare offenses, properly protecting the agency good of security by deterring excessive risk creation while leaving the paradigm of formal agency intact. Their aim is to prevent the specifically *criminal wrongs*

¹⁰ Offenses of intentionally preparing another offense are to be found in respect of terrorism (Terrorism Act 2006, § 5), sex offenses (Sexual Offences Act 2003, §§ 14, 62), criminal damage (Criminal Damage Act 1971, § 3), burglary (Theft Act 1968, § 25), and fraud (Fraud Act 2006, § 2; Criminal Attempts Act 1981, § 1).

¹¹ The list is long but includes possession of weapons (Firearms Act 1968, § 1; Prevention of Crime Act 1953, § 1; Criminal Justice Act 1988, § 139), glorifying terrorism (Terrorism Act 2006, § 1(1)-(3)), handling stolen goods (Theft Act 1968, § 22), money laundering (Proceeds of Crime Act 2002, § 327), failure to report terrorism (Terrorism Act 2006, § 38B), and failure to report money laundering (Proceeds of Crime Act 2002, § 330).

¹² For a discussion of how poorly possession offenses fit in doctrinal categories, see Markus D. Dubber, *The Possession Paradigm*, in *Defining Crimes: Essays on the Criminal Law's Special Part 91* (R.A. Duff & Stephen P. Green eds., 2005).

¹³ Terrorism Prevention and Investigation Measures Act 2011, §§ 2-4.

¹⁴ Sexual Offences Act 2003, §§ 104-113; *id.* §§ 114-122; *id.* §§ 123-129.

¹⁵ Violent Crime Reduction Act 2006, §§ 1-14.

¹⁶ Domestic Violence, Crime and Victims Act 2004, § 1.

¹⁷ Football (Disorder) Act 2000, sched. 1.

¹⁸ Serious Crime Act 2007, §§ 1-37.

¹⁹ For a discussion, see Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* 187 (2012).

found in the paradigm of formal agency by anticipating the commission of an externalized choice to deny rights before it occurs. In other words, they permit the authorities to substitute incapacitation of the dangerous for retribution against rights denial, as far as is possible.²⁰ Their effect is to put a cordon of public welfare-type offenses oriented to harm prevention in front of the offenses belonging to formal agency, leaving the retributive law to come into play only where criminal harms have not been successfully prevented. In an effort entirely to surround the retributive law with harm-prevention measures, sentencing powers were reformed in 2003 to add an indefinite period of imprisonment for public protection, over and above the proportionate retributive sentences, to last as long as a convicted offender was thought to be dangerous.²¹ Being a dangerous person is the explicit reason for deprivation of liberty in these sentences.²²

Another category of offenses punishes the *manifestation of dangerousness* by criminalizing the causing of distress or anxiety to others whether by deliberate threats,²³ unreasonable conduct,²⁴ or even merely risking these feelings in others.²⁵ These offenses allow punishment for violating or risking the violation of others' *feelings of security*. It may be that subjective security can be understood as an agency good, but the interesting aspect of these offenses is that there is no requirement to prove that any perception of insecurity caused or risked was a reasonable one, suggesting that the interest in security that they protect need not be common to all subjects, and that these offenses are not therefore consistent with liberal public reason.²⁶

Equally striking are recent reforms to sexual offenses, such as rape, sexual assault, and assault by penetration. Under the *Sexual Offences Act 2003*, liability for these offenses no longer requires proof of subjective *mens rea* with respect to the circumstance that the complainant did not consent. It is enough to prove that the defendant's belief in consent was not one that the reasonable person would have formed in the circumstances, enough to prove that the defendant's belief in consent was a negligent one. In other words, under English law, the very serious imprisonable offenses of rape and sex-

²⁰ Unless, that is, subjects have acquired a right to security and dangerousness has itself become a wrong, in which case incapacitation and retribution have been merged. See Section IV below.

²¹ Criminal Justice Act 2003, § 225.

²² The practical strain imposed on the prisons by these sentences led to their subsequent reform, with indeterminate sentences retained only for the most serious offenders, and determinate periods for dangerousness made available for the less serious. Legal Aid Sentencing and Punishment of Offenders Act 2012, pt. 3, ch. 5.

²³ Public Order Act 1986, § 4A; Malicious Communications Act 1988, § 1; *R. v. Ireland*; *R. v. Burstow*, [1998] A.C. 147 (House of Lords confirming the Court of Appeal's judgment in *R. v. Constanza*, [1997] 2 Cr. App. R. 492, that assault includes causing another person to fear unlawful violence at some time "not excluding the immediate future").

²⁴ Protection from Harassment Act 1997, § 2.

²⁵ Public Order Act 1986, § 5.

²⁶ See Ramsay, *supra* note 19, at 206-08.

ual assault are now defined so as to include what for Brudner is at most the public welfare offense of negligent sexual assault.²⁷

In the U.K.'s penal law, as it currently stands, the relations of mutual dependence through which agency goods are secured, the relations that characterize the paradigm of real autonomy, have not overrun formal agency and entirely substituted themselves for legal retributivism. Rather, they are laying siege to the relations of independent formal agents, surrounding them with preventive coercion. This prevalence of preventive offenses is not a phenomenon limited to U.K. law.

Brudner briefly acknowledges Markus Dubber's account of the predominance of the "police power" model in the U.S. (PF, 301), in which criminal law serves to identify and incapacitate threats.²⁸ Günther Jakobs has demonstrated the longstanding "policification" of German criminal law.²⁹ These examples indicate that dialogic community is unable to explain the penal regimes of these two significant broadly liberal states. These examples could possibly be explained away. Arguably, the U.S. never got very far towards the dialogic community, so that it is unsurprising that its penal law remains inconsistent with it.³⁰ Germany, with its extensive postwar welfare state, presents a more challenging example, although both its civilian legal traditions and experience of fascism may go some way to explaining the differences between its legal regime and Brudner's dialogic liberalism.³¹ Nevertheless both these examples tend to suggest that Brudner's theory is essentially a normative theory with limitations as an explanatory theory.

The example of the U.K., however, presents a more severe challenge to Brudner's theory. The U.K. is the original common law system. It had not only developed a welfare state with an extensive legal paradigm of real autonomy, but in the postwar period had incorporated these institutions as a core aspect of its national identity. The contemporary expansion of penal harm-prevention in the U.K. has occurred long *after* its process of becoming a dialogic community.

Perhaps Brudner could argue that these developments in U.K. law do not challenge the fundamentals of his theory since there is always likely to be a gap between the ideal and the actual, especially in the criminal law, where "anxieties about personal safety are at issue" (PF, 15). Moreover, he also hopes that his own theory, because it is grounded in the rights of a liberal constitution rather than in morality, could be taken up by the

²⁷ See Brudner, *supra* note 9, at 505-06.

²⁸ See Markus D. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (2002).

²⁹ See Günther Jakobs, *On the Theory of Enemy Criminal Law*, in *Foundational Texts in Modern Criminal Law* 415 (Markus D. Dubber ed., 2014).

³⁰ For Dubber, the police power is a survival of ancient pre-liberal ideas of sovereignty. See Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

³¹ Brudner hints that Europe experienced a "totalitarian" overextension of the paradigm of real autonomy in the first half of the twentieth century (Brudner, *supra* note 3, at 153-55) and, according to Jakobs, penal laws from that period have persisted in Germany.

judiciary to create the possibility of constitutional judicial review of substantive criminal law that might correct errors such as these (PF, 327-28).

The difficulty with such a response is that the siege of formal agency is too consistent and well-established a pattern to be dismissed as an aberration or failure to reach an ideal. If we investigate the reason for this development, we will find that it lies precisely in the tension between, on the one hand, the paradigm of real autonomy and, on the other, the interests of those persons who, on Brudner's account, are the perfection of formal agency. This tension, far from being overcome in a dialectical synthesis, has *already brought down the dialogic community* in the U.K. Moreover, this breakdown of the old order has been accompanied by the emergence of a new judicial doctrine that serves the judiciary's institutional needs in the new penal order, suggesting that judges may not have much interest in Brudner's theory of their past.

III. The Conflict of the Paradigms in Political Economy

Brudner's detailed arguments for the logical interdependence of the paradigms of freedom are impressive. However, even if he is right that there is no logical imperative for conflict between the paradigms, the siege of formal agency by real autonomy has nevertheless arisen, and this has occurred because the *philosophic logic of right* is not enough to account for the actual historical development of liberal societies and their paradigms of freedom.³² As Brudner recognizes, the relations of formal right imply the existence of certain specific *socio-logical circumstances*. It is the logic of these circumstances that gives rise to the conflict between the paradigms. To understand this, we need to consider the wider implications of the paradigm of real autonomy, going beyond the criminal law, because it is here that the tension between the paradigms has proven to be politically unmanageable, and this is the ultimate source of the siege of formal agency in the penal law.

The paradigm of real autonomy, it will be recalled, arises from the need to ensure that the individual person is not only free to choose ends but also actually able to pursue ends they have authored. One form this paradigm takes is the public welfare offenses. These amount to coercive interferences in the freedom of formal agents to make contracts with each other, and otherwise to use or dispose of their property, in order to deter excessive risk creation. However, such interferences with the rights of formal agency are not limited to the criminal law. Brudner explores the implications of real autonomy for the private law in *Unity of the Common Law*, and in *Constitutional Goods* he elaborates an extensive set of social and economic rights that real autonomy requires to be protected as constitutional rights.

For Brudner, as for Hegel, the most basic institutional form of freedom is property ownership, and the exchange of property for value. Exchange in particular establishes the independence of human beings from the world of objects, perfecting their personhood and formal agency. By exchanging with each other what they each have exclusive

³² Alan Norrie, *Law, Ideology and Punishment: Retrieval and Critique of the Liberal Ideal of Criminal Justice* 80-81 (1991).

rights to possess, the parties to a contract realize their independence of objects in their mutual recognition of each other's rights to possess or alienate an object at will. This independence is perfected for Brudner when proprietors enter into executory contracts, exchanging "promises to deliver equivalents in the future" (UCL, 127) rather than objects here and now. In the executory contract a person's end-status is not embodied in possession of a material object but in the "intellectual possession of ... exchange value" (UCL, 128). Exchange value itself takes physical form in the symbolic tokens of paper and metal currency, and these have in recent times further retreated from materiality into the electronic data held in banks' computer systems (UCL, 127). Exchange of private property is the acme of personhood in the paradigm of formal agency, and the more removed from the materiality of objects this exchange is, the more perfected the personhood achieved.

Brudner recognizes that one unavoidable implication of this centrality of property and its exchange to freedom is that some persons will come to own the objects required for the production of the necessities of life—the means of production—while others will lack them. The latter will own only their capacity to work and whatever they can get in exchange for offering up that capacity on the market for labor (CG, 260).³³ He further recognizes the force of Karl Marx's critique of the wage-labor contract as one that takes place between formally free agents but that nevertheless creates a heteronomous relation between the employer and the employee. This is because the employee is abstractly free as a formal agent not to sell his capacity to labor; but if the person who owns only their capacity to labor fails to sell it then (in the absence of some other access to resources) she will starve. Formal agency leaves the propertyless free to work for another or to die. As a consequence there is an element of real compulsion in the wage-labor relation: wage-earners must accept the employer's despotic organization of the working day; work to realize the employer's chosen ends rather than their own; be unable to pursue their own ends (assuming a competitive labor market with some level of unemployment holds wages to subsistence levels); and finally, having accumulated no wealth, pass on the same fate to their children (CG, 261). The perfection of personhood in the exchange of commodities leads to real heteronomy for many persons.

These labor market conditions compel the liberal state to various interventions in order to ensure the real autonomy of wage-earners. For Brudner, these include a degree of industrial democracy (UCL, 133) and numerous social and economic rights, such as very extensive rights to education, family and maternity support, and protection from uninsurable accident or illness (CG, 265-67). Two of these economic rights are worth spelling out in detail:

[A] guaranteed minimum income payable to everyone regardless of wealth at a level sufficient to liberate the mind from preoccupation with the necessities of life and from dependence on those who would otherwise control the means of life (CG, 264).

³³ In *The Insecurity State*, I erroneously implied that Brudner did not take any account of the implications of the wage-labor contract for the paradigm of real autonomy. See Ramsay, *supra* note 19, at 237. He does recognize it, and not only in *Constitutional Goods* but also in *Punishment and Freedom*. See Brudner, *supra* note 1, at 225-26.

[A] legal framework facilitating the equalization through collective action by workers of their bargaining power with that of managers of capital and prescribing minimum standards for wages, hours, and safety for workers who bargain individually. The pillars of this framework are, of course, the right of workers to bargain collectively and thus to require all workers in a bargaining unit to join the union, the right to strike ... and the right to picket peacefully to back negotiating positions (CG, 265).

These are indeed conditions of real autonomy for wage-earners, and they create a real difficulty for their employers, the profit-dependent owners of the means of production. Not only are the resources to fund these guarantees found by taxing the share of social product that would otherwise go to profits, but such a guarantee of real autonomy, precisely because it eliminates the wage-earners' vulnerability to heteronomy in the labor-market, eliminates their "dependence on those who would otherwise control the means of life," which is to say that it eliminates the employers' most important asset in their contractual negotiations with wage-earners.

If the state were to guarantee an income with the quality that Brudner argues is the condition of wage-earners' real autonomy, then the threat of unemployment would lose its disciplining effect on organized labor. This problem is compounded by the fact that the resources necessary for the wage earners to enjoy "moral independence" of the employers (CG, 265) are not a naturally given fixed quantity but a historically relative level of consumption (which drugs and treatments should be made available without charge in public healthcare? how much and what sort of education? how high a level of state pension? and so on). They are a matter of political argument. Once constitutional guarantees of real autonomy are in place, wage-earners' expectations are going to rise and the market economy is going to have to maintain high rates of growth if it is to cope with the political demands of wage-earners for better living standards while returning a sufficient rate of profit to ensure continued private investment. If those rates of growth should falter then there is likely to be a "crisis of rising expectations." Wage earners will be able to resist attempts to force them to endure austerity conditions, this will threaten profits and, as a result, the confidence of private investors in an adequate return on their capital will fall, threatening the very investment that is needed to ensure sufficiently high growth.

This is not a hypothetical possibility. Something like this happened in the late 1960s and 1970s when the political deal that underpinned the postwar welfare state broke down in the U.K. and the U.S. When economic growth rates faltered, even the limited political guarantees enjoyed by the wage earners of that period proved to be too much for the profit-dependent owners. They were faced with effective strike waves by wage-earners who, in defending their share of the social product, enjoyed a high degree of confidence gained over two decades of politically guaranteed full employment, unemployment benefits, trade union power, and relative prosperity.³⁴ In the U.K. and the U.S., business and its political representatives turned to the solutions advocated by the followers of classical liberal F.A. Hayek. In the late 1970s and 1980s they withdrew from the postwar social

³⁴ Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* 20-26 (2014).

contract and attacked the institutions of the dialogic community, abandoning full employment, ending cooperation with organized labor, and breaking the market power of the unions in a series of set-piece confrontations. This “neoliberal counter-revolution” has since spread across most of the globe.

In other words, the liberal legal and political order that Brudner is describing is the order that postwar welfare states aspired to attain: one which sought to reconcile the claims of negative civil and property rights, on the one hand, with positive social and economic rights, on the other.³⁵ Brudner is correct to argue that such a political order is the most complete realization of the liberal idea of freedom. However, actual dialogic communities did not fall from the heavens of rational thought but needed concrete political forces to deliver them. The necessary political basis of this order has *already broken down*. In recent decades, liberal democracies have not been moving towards such a political order but *away* from it.³⁶ State welfare is increasingly made available not as a right but on a conditional basis as “workfare.” Statutory minimum wages and state pensions are at levels that are too low to come close to “liberating the mind from ... dependence on those who would otherwise control the means of life.” Real wages for most are stagnating, and the collective bargaining power of wage-earners has declined dramatically, along with the membership and activity of trade unions, with some Western states very actively attacking the privileges that trade unions once enjoyed. Industrial democracy is a very marginal concern.

This process is not an even one. It has been much more advanced in the U.K. and the U.S., a more recent development in continental Europe, but nowhere has the postwar settlement between capital and labor persisted unscathed. Many institutional features of welfare states—transfer payments, pensions, public healthcare and education, and so on—persist. Nevertheless, the politics of the dialogical community that underpinned the “golden age” of the welfare state have broken down as a consequence of a fundamental sociological tension between the liberal conditions of formal agency (private property in the means of production), on the one hand, and the real autonomy of the majority of the population (“moral independence” of wage-earners from the ends of the owners of the means of production), on the other. As that tension unravels we have witnessed the retreat of the paradigm of real autonomy in the sphere of social and economic rights from the positions that Brudner would have it occupy, while at the same time in the penal sphere, real autonomy has advanced into the territory reserved for formal agency by Brudner.

Brudner’s painstaking elaboration of the dialogic community’s inner liberal rationale allows us to specify the tension that brought it down with some precision. Left to itself, a competitive labor market ensures that wages are reduced to a level at which all of a wage-earner’s life will be spent heteronomously serving the employer’s ends (either directly by producing the “surplus” exchange value that is the source of the employers’ profits or indirectly by producing the exchange value that pays for what is necessary to

³⁵ T.H. Marshall, *Citizenship and Social Class* (1992).

³⁶ For a summary of the challenges faced by welfare states since the 1970s, see F.G. Castles et al., Introduction, in *The Oxford Handbook of the Welfare State 1* (F.G. Castles et al. eds., 2010).

reproduce the wage-earners' capacity to labor to produce profit for the employer).³⁷ The legal rights of real autonomy can give back some of the wage-earner's time of life to ends that she sets for herself by, one way or another, transferring some of the surplus value (that would otherwise become profit) to the wage earner, although always subject to the condition that some of the wage-earner's life must be given up to the ends of her employer. But this dialogic community can be purchased only at the price of radically constraining the power of the employers to dictate the terms of employment, and inciting a general willingness to question the authority of the profit-dependent owners over the lives of wage earners.³⁸ The dialogic synthesis was unstable because it could only persist for as long as productivity and profit growth were strong and profit expectations restrained, and these conditions did not hold for long in the uneven and cyclical conditions of the market system.

These logical relations explain the history of the dialogic community's fall. When the necessary economic conditions ceased to hold, the fundamental problem asserted itself: that those who, according to Brudner, most perfectly personify formal agency—the owners of money capital who exchange it for ownership of profit-producing assets or promises to repay with interest—lacked sufficient interest in the real autonomy of wage-earners. Instead they resorted to the methods of class conflict. By contrast, unlike the owners of the means of production, the movement of organized labor entirely identified with the welfare state's dialogic community, becoming one of its core institutions (as Brudner's analysis in *Constitutional Goods* explains). The downfall of the dialogic community destroyed the institutional basis of the workers' movement and left wage-earners without any distinctive political alternative of their own. Wage-labor subsequently lost any distinctive political presence as a social class.

I have labored these points a little because it is important to grasp how decisively the social basis of the dialogic community's philosophic logic has broken down in Western democracies. Without recognizing this, the development of our current penal state is hard to understand because the particular elements of the old dialogic order, the surface features of the welfare state, have not simply disappeared. Following the political resolution of the conflicts of the 1970s and 1980s, there has been a long process of decay as the tension between the social interests lying behind each paradigm has unraveled. It is this process of decay that explains the specific form taken by the breakdown of dialogic community, a retreat of the paradigm of real autonomy in economic and industrial policy accompanied by its *advance* in the penal sphere. I will describe this decay briefly because it explains why Brudner's hopes for the judiciary as defenders of the dialogic community's penal law may be misplaced and misleading.³⁹

³⁷ 1 Karl Marx, *Capital: A Critique of Political Economy* ch. 7, § 2 (Samuel Moore & Edward Aveling trans., 1967) (1867) (<http://www.marxists.org/archive/marx/works/1867-c1/index.htm>).

³⁸ Claus Offe, *Contradictions of the Welfare State* 143-44, 149-52 (1984).

³⁹ For more detailed accounts, see Ramsay, *supra* note 19 (esp. chs. 5, 6 & 10); Peter Ramsay, *Pashukanis and Public Protection*, in *Foundational Texts in Modern Criminal Law* 199 (Markus D. Dubber ed., 2014).

IV. Decay and Simulacrum

The neoliberal overthrow of the welfare state's compromise destroyed the dialogic legitimacy for coercive state power. In so doing, it *necessitated a new politics of legitimation*. However, neoliberals found that they could not reinvigorate a classical liberal account of freedom—one shorn of any concern for self-determination or autonomy—as a practical source of political legitimacy. The underlying reason for this failure is demonstrated by Brudner's own work, especially in *Unity of the Common Law*: once the Hegelian account has been institutionalized, the libertarian account of freedom is plainly inferior. A revival of libertarianism would have been possible only with support from older non-rational and traditional sources of legitimacy, as Hayek persistently argued.⁴⁰ However, since the 1980s, these sources have shown themselves to be insufficiently influential to do the legitimating work required of them.⁴¹ A different solution to the legitimation problem nevertheless became available because, as noted above, the neoliberal counter-revolution, in destroying the old structure of political legitimation, also destroyed the political basis of the working class movement. The elimination of wage-labor as a political movement made possible *the recycling of the idea of real autonomy* in a form less immediately threatening to the interests of the owners of the means of production.

The new order has redefined citizens in neoliberal form as consumers.⁴² For these consumer-citizens, autonomy lies in being able to realize their identities from the plurality of available lifestyles in the consumer society. In this process of self-realization, their autonomy is intrinsically vulnerable to the undermining of their self-esteem by others' failure to respect their broadly defined security needs.⁴³ Moreover, as consumers of public services, citizens are constructed as consumers of the state's criminal justice services, and, in the process, redefined as potential victims of crime. As Jonathan Simon points out, the vulnerability of the representative citizen to crime comes to "define the appropriate conditions for government intervention."⁴⁴ This is a neoliberal imitation of "public reason." The interest that is necessarily shared by those defined by their potential victimhood is protection from harm. Indeed, where citizens are defined by their vulnerability to crime, *their perception of their security* will be understood as an agency good, grounding a right to be free from fear, a right to security. This in turn implies a public wrong of causing insecurity

⁴⁰ See F.A. Hayek, *The Road to Serfdom* 152 (1994); 3 F.A. Hayek, *Law, Legislation and Liberty* 167 (1979); F.A. Hayek, *The Fatal Conceit* 135-37 (1988).

⁴¹ Losing your enemies is a danger for any political tradition. But to have any understanding of contemporary developments, it is essential to face up to an obvious fact that liberal and leftist commentators seem reluctant to admit: the very limited political appeal of conservative traditionalism in the West (outside some parts of the U.S., perhaps). See Ramsay, *supra* note 19, ch. 5.

⁴² Colin Crouch, *Post-Democracy* ch. 5 (2004); Wolfgang Streeck, *Citizens as Customers: Considerations on the New Politics of Consumption*, 76 *New Left Rev.* 27 (2012); Keith Faulks, *Citizenship in Modern Britain* 134 (1998); Ramsay, *supra* note 19, at 102-05.

⁴³ Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (1991).

⁴⁴ Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 76 (2007).

to others by being dangerous, and explains the practical political legitimacy of the extensive regime of preinchoate and harassment offenses outlined above. Formal agency remains a necessary aspect of this order, but now it appears inverted as an ever-present *threat of harm* to vulnerable consumer-citizens. For this reason, “vulnerable autonomy” might be an appropriate name for this recycled real autonomy.

Vulnerability has become the dominant motif in U.K. criminal justice policy, and not only in criminal justice policy. All sorts of welfare interventions and claims on public resources are now framed in terms of the vulnerability of the claimant to some harm or other.⁴⁵ The abandonment of dialogic community as the rationale for state power has eliminated the old limitations on the harm principle, allowing it to run riot as an expansive principle of government action. In this way, the new order presents a *simulacrum of dialogical politics*, in which the autonomy of “vulnerable groups” is promoted by supporters of state welfare and regulation. In many cases, these groups will receive some protection in the form of penal law or other welfare rights. However, such protection is always on terms dictated by the underlying acceptance of the neoliberal precondition that investor confidence in future revenue streams should not be undermined by the real autonomy of wage-earners.

The new order, therefore, retains a formal commitment to rights and the rule of law. Its legal ideology is provided by human rights, which substitute themselves for the citizens’ rights of the dialogic community. These human rights are the rights of persons to have their formal agency upheld within the limit of the rights of vulnerable others to have harms prevented.⁴⁶ It is in the balancing of these conflicting claims that the judiciary has found itself a new doctrine of proportionality. This doctrine provides the key element of most contemporary thinking about constitutional review.⁴⁷ It permits the judiciary to continue in its role as the adjudicators of rights claims, but in a manner wholly compliant with the new order, since proportionality doctrine is designed to give constitutional sanction to “limitations” on the civil liberties of formal agency where those limitations are “necessary” for the purposes of harm prevention.

The new order is itself far from coherent and may not be especially long lasting. It is only what has arisen from the decay of the old order. Brudner would be right to say that such an order can neither serve the independence of individual citizens nor the common good. As I have argued elsewhere, the reliance of this structure of state power on casting formal agency in the role of a threat can only undermine the coherence of civil society; while the relentless promotion of the citizens’ vulnerability can only undermine the sovereignty of the state.⁴⁸

⁴⁵ Kate Brown, “Vulnerability”: Handle with Care, 5 J. Ethics & Soc. Welfare 313 (2011).

⁴⁶ See Ramsay, *supra* note 19, ch. 6. All these contemporary conditions distinguish the present period from the “totalitarian” assertion of real autonomy, which Brudner implies afflicted societies based on the exchange of private property in the mid-twentieth century; see Brudner, *supra* note 3. The contemporary order is by contrast pluralistic, although its effects on freedom may in their own way prove as profound as the old authoritarianism.

⁴⁷ For an account of how the doctrine of proportionality can be applied to enable judicial influence over the extensive harm prevention regime, see Andrew Ashworth & Lucia Zedner, *Preventive Justice* (2014).

⁴⁸ Ramsay, *supra* note 19, ch. 10.

Despite its weak rationale, it has nevertheless served to legitimate state power in the period of the decay of the old order by recycling its elements.⁴⁹ By simulating the dialogic community in a negative form, this order has drawn the critics of neoliberal order onto the safe ground of vulnerability claims, endlessly urging a politically enfeebled state to solve social problems.

We are living in the long twilight of the liberal dialogic community. Its political basis has been destroyed, but familiar aspects of the old order persist in a caricatured form: a rhetorical commitment to freedom combined with a deepened dependence on a weak state. Brudner's depiction of the complex and subtle shapes of the old order is poignant. He often paints his philosophy's grey in grey in beautiful shades that honor the humanizing achievements of the liberal form of human life. All the same, the light is failing badly.

V. Legal Retributivism After Dark

Brudner's theory is a theory of a form of social life that is passing away. Liberalism's decay has inverted the idea of formal agency into a permanent perception of threat; in the process, the free subjects of liberal order have been redefined as either vulnerable potential victims or dangerous risks. Even though the immediate prospects are not promising, the decay of the liberal order does not require us to give up on individual freedom. We need rather to put it on a new *democratic* conceptual basis.⁵⁰

Brudner's legal retributivism has a great deal to offer to democratic theory because formal agency is a shared interest of all in a democratic sovereignty.⁵¹ Legal retributivism provides a basis for challenging the ideological grip of the harm principle, and the threat that this is posing to civil liberty in the present. Furthermore, a truly democratic sovereignty, while it has an interest in negating rights denials, has none in morally blaming offenders. A democracy that takes collective self-rule seriously will rather be mindful of its claim to take collective responsibility for social conditions, and will end the political moralizing about crime. Finally, legal retributivism points towards the elimination of punishment. The purpose of punishment under legal retributivism is to realize the authority of rights. The stronger is the state, the less of a challenge any particular offense will represent to the authority of those rights and the more the overall scale of proportional punishments will diminish.⁵² A state that was nothing other than the representative of its citizens in collective control of their own circumstances would be stronger than any state ever seen. Hegel's logic suggests that it would have little need of any punishment at all.

⁴⁹ Just as vast expansions of public and private credit have, until recently, served to prevent major reverses in living standards and public spending. See Streeck, *supra* note 34.

⁵⁰ For the foundation of such an account, see Franz L. Neumann, *The Concept of Political Freedom*, in *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* 195 (William Scheuerman ed., 1996).

⁵¹ See Neumann on juridical liberty. *Id.*

⁵² See Alan Brudner, *The Contraction of Crime in Hegel's Rechtsphilosophie*, in *Foundational Texts in Modern Criminal Law* 141 (Markus D. Dubber ed., 2014).