WHEN FREEDOM ISN'T FREE

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Punishment, at least in its most familiar forms, is not freedom. Nearly all of the world's prisoners know this, as do most ordinary individuals. But philosophers are not ordinary individuals, and a strand of philosophy maintains that punishment is indeed a kind of freedom, if only we understand punishment, and freedom, properly. This is Alan Brudner's project in *Punishment and Freedom: A Liberal Theory of Penal Justice*.[1] The book seeks to demonstrate that acts we'd call assault, kidnapping, or murder if performed by a private individual are not even properly called violence when the state does them in the name of punishment; indeed, Brudner argues that as state punishment, these acts are consistent with the punished individual's freedom. Brudner claims to show that "the administration of punishment is itself self-willed by the recipient."[2] This argument places Brudner as the latest of a long line of retributive punishment theorists who would justify punishment by telling the criminal, "you asked for it." To be sure, Brudner acknowledges readily that real lawbreakers don't literally ask to be punished—in fact, they usually object vociferously—but on the account offered in this book, what real people say is largely irrelevant.[3] Punishment is consistent with freedom and distinguishable from violence if we can find a way to impute consent to be punished to the criminal.

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

2. Id. at 42.

3. See id. at 3; see also id. at 322–23 (arguing that "[j]ustice is metaphysical" rather than empirical, and leaving scrutiny of "flesh-and-blood criminals" to other professionals—criminologists, social workers, correctional officers, and sociologists).

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To accomplish this end, Brudner imagines a fictitious entity called the Thinking Agent[4] who can think but can do little else; it has no body to imprison, no physical needs, no interest in self-preservation, and no impulses or desires to wrong others (indeed, no desires at all).[5] Despite these discrepancies between the Thinking Agent and empirical persons, Brudner argues that the Thinking Agent is a good representative of the real criminal. And Brudner argues further that the Thinking Agent would consent to be punished if it did commit a crime (though this is an impossibility, since the Thinking Agent would never wrong anyone), and thus punishment of real people is consistent with their freedom.[6]

Brudner recognizes many of the limitations of the Thinking Agent, and of a political theory based on the Thinking Agent's imagined choices. Accordingly, he sometimes, but not consistently, supplements the "formal agency" that the Thinking Agent protects with a somewhat fuller account of freedom called real autonomy or a third conception called communal solidarity.[7] Nevertheless, Brudner retains the concept of the Thinking Agent, because, apparently, he can find no other way to reconcile punishment with freedom.[8] This raises a puzzling question of motivation: in a world with increasing incarceration rates and ugly racial and socioeconomic disparities linked to those rates, in a world in which criminal punishment (like crime itself) has devastating impacts on families and communities, in a world in which no one wants to be locked up, what strange impulse leads one to reverse-engineer liberal theory in pursuit of an argument that punishment is consistent with freedom?

In this short essay, I explore Brudner's claims about punishment, violence, and freedom in more detail. It's worth contrasting Brudner's theory,

4. Evoking the capitalization rules of Hegel's German, Brudner capitalizes only the noun ("the thinking Agent"). In English, this capitalization seems odd, for what is distinctive about this entity is not that it is an agent, but that it is an agent who does nothing other than think.

5. See, e.g., supra note 1, at 3–4; id. at 45 ("Though empirical agents may or may not need the threat of punishment to deter them from strategic wrongdoing, the thinking Agent most certainly does not: having no subjective ends, it forbears from wrong (wills the right) for the sake of its dignity alone.")

6. See id. at 4–5, 37–45.

7. See, e.g., id. at 136–38; 307–12.

8. "[T]hese limitations of the formalist paradigm are not a reason for jettisoning it. . . . [T]o dispense with it would be to lose its contributions to a practice of punishment consistent with freedom. . . ." Id. at 58.

which is inspired by German idealism and Hegel in particular, with an earlier and more straightforward liberalism: the relentlessly empirical, non-ideal theory of Thomas Hobbes. In what follows, I critique Brudner's claims that punishment is not violence and that it is justified coercion consistent with freedom, and I offer a very brief sketch of Hobbes's work as a more honest (and more liberal) account of punishment. Since Brudner claims the mantle of metaphysics and dismisses empiricist criticisms, I conclude by suggesting that crime and punishment are not subjects for which the philosopher may disregard real human experience.

I. PRELUDE: IS IT VIOLENCE?

Brudner begins his book with the apt observation that much of what the state inflicts as criminal punishment would "in ordinary circumstances" be called assault, robbery, forcible confinement, or murder.[9] But immediately thereafter, Brudner claims (as he will throughout the book) that there are "obviously" intellectual distinctions between punishment and violence.[10] Though Brudner repeatedly asserts the distinction between punishment and violence, it is not clear whether defining or distinguishing violence is in fact a central concern of his work. Could a proudly metaphysical theory that disdains the study of empirical human persons have much to say about violence, which typically involves the flesh and blood of hopelessly embodied beings? Perhaps not, and this is one of the limitations of Brudner's larger argument. Given the physical force typically involved in modern punishment, and given liberalism's claim to base legitimate authority on something other than superior physical force, a liberal theory of punishment *should* address in detail the concept of violence. It is not enough simply to assert a distinction between violence and state punishment, as a few reflections will illustrate.

First, even if the Thinking Agent were an adequate representative of embodied human persons, and even if the Thinking Agent were to consent

9. Id. at 1.

10. Often, Brudner qualifies this claim with an adjective: punishment is distinct from *naked* violence (e.g., id. at 1, 321, 322), or *criminal* violence (e.g., id. at 166), or *external* violence (e.g., id. at 142, 303, 310). On at least a few occasions, however, Brudner abandons the adjectives and makes the simple claim that punishment is not violence (e.g., id. at 15, 167 n.64).

to punishment, it is not clear that consent would render otherwise violent action nonviolent. Of course, the definition of violence is contested, and it is conceptually possible to define violence to exclude consensual physical contact. But in ordinary usage, violence typically refers to exercises of physical force against vulnerable bodies, and it is the vulnerable body that is critical, not the consenting (or nonconsenting) mind. Thus the violent character of many activities has nothing to do with whether persons engaging in, or subject to, those activities have given consent. When we refer to prize fighting or boxing as violent sports, it is simply irrelevant that the participants choose freely to fight. Similarly, war is violent even if fought by all-volunteer armies, and even if the only people killed or injured are those volunteer soldiers.

There is, however, one familiar context in which consent *is* commonly thought to make the difference between violence and nonviolence: sexual contact. Consensual sex between adults is usually neither criminal nor violent, while nonconsensual sex is frequently classified as both criminal and violent. But notice that in the realm of sexual contact, *actual* consent matters. Few observers would exonerate an accused sexual offender on the grounds that that the victim should have consented, or would have consented if she'd only been more rational, or on the grounds that a Thinking Agent in the victim's shoes would have given its consent. Once upon a time, many courts and commentators denied the possibility of a rape within marriage, perhaps on the view that entering into marriage should be understood as a generalized consent to all future sexual contact. But nowadays that view is widely rejected, and understood to be as offensive as the claim that an assault victim who verbally refused sex nevertheless implicitly "asked for it" by her dress or behavior.

Brudner's discussion of sexual offenses suggests that he would never tell a victim of a sexual assault, you (implicitly) asked for it. Instead, he writes, "because a person's body is hers absolutely, consent to bodily contact is determined from the subjective perspective of the person whose body it is."[11] If she doesn't want to have sex, there is no consent as far as the law is concerned. Brudner objects to the view that legal consent is determined by circumstances rather than the individual's actual subjective will, and the related claim that the accused rapist may have a defense of reasonable mistake of fact regarding consent. Such a view implies "that my control

11. Id. at 91.

over my body is not absolute vis-à-vis other persons but is limited by their qualified liberty to use my body against my subjective will. This implication is surely at odds with the liberal premise of individual inviolability."[12] Brudner's position on permissible sexual contact seems reasonable (and liberal) enough. But what if the bodily contact in question involves handcuffs, a jail wagon, a strip search, and confinement to a small cell? Does "the subjective perspective of the person whose body it is" to be cuffed, searched, and confined still matter? We'll return to this question below, but it should already be clear that Brudner plays fast and loose with this so-called premise of individual inviolability, invoking it to preserve broad criminal liability for sexual offenders while readily abandoning it to justify state punishment as consensual.

Of course, as noted above, one can define the term "violence" in many ways, and it is possible to argue that punishment, though violent, is a distinctively legitimate form of violence.[13] But one needs to make the argument. Ultimately, Brudner gives us no good reason to accept his claim that physically restrictive or injurious punishments—again, acts we would otherwise call assault, forcible confinement, or murder—are any less violent for being performed by authorized state officials. Brudner does not explain how he understands the word "violence," and as noted above, whether punishment is violent or not may not be his central concern. He gives more sustained attention to the claim that punishment is justified within liberal theory and consistent with liberal freedom. Now, when we shift our attention from the word "violence"—a term used both in and out of the context of politics—to questions of justifying state power, the expectations concerning sexual intimacy identified above are not necessarily the appropriate place to begin. There's no reason to expect that the conditions under which the exercise of state power is permissible are parallel to the conditions under which private sexual intimacy is permissible, even if both state power and sexual contact are potentially violent. So let's start afresh: what are the conditions under which the state may permissibly exercise power over its citizens?

12. Id.

13. Recall Max Weber's famous description of the modern state as the entity with a monopoly of legitimate violence within a given territory. Max Weber, Politics as a Vocation, in From Max Weber: Essays in Sociology 78 (H. H. Gerth & C. Wright Mills eds., 1976).

II. JUSTIFICATION AND FREEDOM

In very general terms, liberal theories tend to find state power justifiable when it is based on the consent of the governed. But in real societies, the governed are often uncooperative in granting consent, and so liberal theories often look to substitute sources for consent. According to Brudner, state punishment is justified if it is acceptable to the Thinking Agent. The Thinking Agent, again, is an imagined being "with the epistemic powers of a finite, thinking being," but without any bodily existence, subjective ends, or interests of its own.[14] With these characteristics, Brudner argues, the Thinking Agent is an ideal representative for a real human person. Like the hypothetical individual who sits behind Rawls's veil of ignorance, the Thinking Agent has no knowledge of the subjective ends of the empirical person whom the Agent represents.[15] But like a live person, the Thinking Agent is aware of its circumstances and can understand cause-effect relationships; it has "a limited power to know the circumstances and foresee the consequences of its principal's actions."[16]

On Brudner's account, these epistemic capacities—and limitations—are sufficient to capture "the human condition" and to render the Thinking Agent an adequate representative of an embodied human.[17] Though Brudner does not make the point explicit, notice that hunger, pain, other physical sensations, physical mobility or disability, vulnerability to injury, and mortality all are absent from "the human condition," on this account. (And they will stay absent until we consider what kind of conduct should be criminal, at which point a principle of bodily autonomy and integrity will become important. But it is only potential crime victims, not the targets of punishment, who will enjoy the protection of this principle.) Given that the Thinking Agent is human only in this minimalist way,

14. Brudner, supra note 1, at 4.

15. Id. at 3–4.

16. Id. at 4.

17. Brudner explains that the Thinking Agent has the capacity to know circumstances and foresee consequences "to a relative perfection, without the idiosyncratic frailties of its principal." Id. "Relative perfection" means as much knowledge and foresight as is available to a finite being situated in a specific place and time. "The representative would not be an intercessor if it replicated its principal's particular failings, but the intercessor would not be representative if it did not share its principal's human condition. Thus, the representative's knowledge of circumstances and foresight of consequences are limited by its principal's location here and now." Id.

one wonders whether it is really coherent to say that the Thinking Agent consents to punishment. In what sense can a being with no experience of a corporeal existence "consent" to be physically confined? One might ask also whether a being definitionally incapable of committing a crime[18] is an adequate representative of real criminals.

These concerns raise the question why we should evaluate the legitimacy of punishment with reference to the consent of an imaginary Thinking Agent rather than the consent of the empirical person. In the vast majority of cases, the empirical person doesn't actually consent to be punished, as Brudner notes. But is that a reason to imagine a Thinking Agent, or is it a reason to conclude that punishment cannot be justified within a liberal theory that insists state power must be based on the consent of the governed? If we have started with the premise that punishment can and, by Jove, *will* be justified within liberal theory, then perhaps we will have no alternative but to conjure a being to give consent. To the skeptical—and perhaps, uncharitable—reader, the Thinking Agent looks suspiciously like an ad hoc creation designed to ensure that the theory reaches its predetermined destination.

Let's try to be more charitable; let's stipulate for the moment that the Thinking Agent is an adequate representative, and examine why this representative would consent to punishment. Recall Brudner's initial characterization of liberal freedom as "formal agency," defined as "the bare capacity to have chosen otherwise than one did."[19] Note that freedom is first defined with reference to the past—in terms of a choice already made, rather than the present or future capacity to make choices.[20] Even if we are trying to be charitable rather than skeptical, it's notable that Brudner defines freedom in a way that will not allow us to evaluate punishment by asking whether, at the moment punishment is imposed, the prisoner has the bare capacity to choose not to be punished. Instead, Brudner wishes to focus attention

18. See id. at 45.

19. Id. at 5.

20. Later in the book, Brudner shifts his account of formal agency to focus on the ongoing capacity to make choices. He argues that the use of force in self-defense is not a matter of biological self-preservation, but a logical effort to protect formal agency. We are permitted use of force against an attacker not because it is necessary to preserve our lives, but because it is necessary to preserve our capacity to make choices, or more precisely, the dignity associated with that capacity. According to Brudner, justified forcible restraint or killing does not violate the target's dignity, and so there is no right of self-defense against lawful restraint or execution. Id. at 208.

on an earlier choice: the choice to commit a crime. As long as the individual could have acted otherwise—could have refrained from committing the crime—then his subsequent punishment is consistent with his freedom defined as formal agency. This is so, Brudner claims, because punishment is "the necessary implication" of the choice to commit a crime.[21] As a broken glass is consistent with freedom if I could have chosen not to drop the glass, so incarceration is consistent with freedom if I could have chosen not to break the law.

Or is that the right analogy? Brudner says relatively little about the nature of the "necessity" of punishment, but it seems clear he would acknowledge that it is not an *empirical* necessity. Brudner invokes Kant's idea that "culpability consists in an action whose universalized principle rebounds against the actor."[22] But punishment rebounding is not like a ball bouncing or light reflecting. Brudner also quotes Kant's famous claim that "whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself."[23] Nifty rhetoric, but human experience has demonstrated again and again that it is possible to strike or kill another without striking or killing yourself. Of course, Brudner's argument is not one that takes place in the realm of human experience; justice, he tells us, is metaphysical.[24] So perhaps the claim is that punishment is metaphysically necessary. I am not sure how to evaluate this claim, because I am not sure what metaphysical necessity entails. In any event, note that Brudner's claim of (imputed) consent to punishment depends on this mysterious notion that punishment is the "necessary implication" of a voluntary criminal act. If it is sometimes possible to choose to commit a crime and yet to avoid punishment—as everyone knows it is in the realm of actual human experience—then the criminal no more consents to punishment than the woman who chooses to walk alone down a dark street at night consents to be assaulted. Each may have known the risks, but neither of them "asked for it."

Perhaps punishment is necessary in a different sense: a necessary means to a desired end. Retributivists often resist this instrumentalist

21. Id. at 5.
22. Id. at 34.
23. Id. (quoting Kant, Metaphysics of Morals, 142–43).
24. Id. at 323.

characterization of punishment, but some of Brudner's claims do seem to imply that punishment is a means to an end. According to Brudner, even the criminal's (imputed) consent to punishment is not itself enough to justify punishment. The criminal's consent gives the state a permission to punish, but not an absolute duty, and to distinguish punishment from arbitrary "external violence," it is necessary to establish "a public reason to punish crimes as a general rule—one that the thinking Agent will endorse for the sake of its freedom and whose endorsement by the thinking Agent can be imputed to the empirical one."[25] The public reason to punish may identify the "necessity" of punishment.

To identify that public reason, Brudner invokes Hegel's claim that crime has "positive existence in the external world, though inherently it is nothing at all," and that this positive existence must be "annihilat[ed]" by punishment.[26] "This is the right actualized, the necessity of the right mediating itself with itself by annulling what has infringed it."[27] Under Brudner's exposition, the claim is that because the existence of rights requires that rights bearers recognize one another's mutual claims, a crime (which infringes another's rights) is tantamount to "a denial of the possibility of rights." The criminal claims "unlimited permission to act as he pleases," but this is "self-contradictory, for its corollary when generalized is that no one . . . may complain if someone pre-empts his liberty by physical force."[28] Now, it's not clear what is self-contradictory about this claim.[29] It is logically coherent to endorse an every-man-for-himself view, in which the individual uses whatever means he can to achieve his self-interest, and understands that others will be doing the same. And of course, if the criminal's claim really were "self-contradictory" or "self-destructive,"[30] as Brudner claims, it doesn't seem that the state would need to respond to it all.

It seems that the criminal's insult to the law is not really self-contradictory or self-destructive; it needs to be contradicted or destroyed by some

25. Id. at 42.

26. Id. at 45 (quoting Hegel, Philosophy of Right, para. 97).

27. Id. (quoting Hegel, Philosophy of Right).

28. Id. at 46.

29. It's also highly implausible that the criminal is actually claiming an unlimited permission to act as he pleases, or that others understand the crime in that way. I have critiqued similar expressivist claims elsewhere. See Alice Ristroph, Actions of Mercy, in Merciful Judgments (Austin Sarat ed., forthcoming).

30. Brudner, supra note 1, at 46.

countervailing message. This, then, is the public reason to punish, the one embraced by the Thinking Agent on behalf of empirical persons: "the vindication of mutual recognition (Law)."[31] If we define law to include punishment, then I suppose the imposition of punishment is (necessarily) the "vindication" of law. But is there any nontautological sense in which punishment vindicates law? In Brudner's public reason for punishment we have another abstract and clearly nonempirical claim, like the assertion that punishment is the necessary implication of crime, that needs exposition and defense. Instead of providing either, Brudner equivocates. Does a crime really threaten the authority of law in any way? Maybe, maybe not.

> One might . . . object that the authority of Law is inherently invincible and cannot be negated by logically absurd claims making pretenses to existential validity. This is true. However, the invincibility of Law is a reason only for denying that the state must punish in all cases of intentional wrongdoing; it is not a reason for denying that the state ought to punish as a general rule. For if it did not, Law's authority would remain pervasively unrealized and hence no authority at all.[32]

Brudner makes two competing and seemingly mutually exclusive claims in the space of a few sentences, and it's not clear where the argument ends up. Is Law's authority invincible, impervious to the silly claims of criminals? Or is Law's authority dependent on the use of coercive force to restrain or injure those who disobey? (Much later in the book, in his discussion of self-defense as a permissible preemption of rights violations, Brudner will simply deny outright that after-the-fact punishment vindicates or "actualizes" the right of the individual victim.[33] It's not clear how to reconcile this claim with the earlier claim that punishment vindicates Law.)

I argued earlier that formal agency is not a satisfying account of freedom, and that the Thinking Agent is a poor representative of actual humans. It should now be clear that even if we set aside those concerns and accept formal agency as the appropriate understanding of freedom and the Thinking Agent as an adequate representative, Brudner's argument is unpersuasive. It fails to defend its claim that punishment is a necessary implication of crime, and it fails to offer a coherent statement of a public reason to punish.

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31. Id.
32. Id. at 47.
33. Id. at 209.

Notably, Brudner does not claim that the formal agency paradigm is an independently adequate account of liberal freedom. Formal agency recognizes only one interest to be protected by the criminal law—the capacity for undetermined choice—and so cannot account for the criminal law's concern with kind or degree of harm caused by a rights-infringing act.[34] To explain the gradation of more or less serious crimes, and corresponding penalties of varying degrees of severity, Brudner turns from formal agency to a second account of freedom that he calls "real autonomy."[35] Real autonomy requires more than the capacity for choice; it entails "realized potential for acting from self-authored ends."[36] There is considerably more flesh—literally—on the notion of real autonomy than there is on the notion of formal agency. Real autonomy recognizes that certain "agency goods," such as life itself, physical health and bodily integrity, and property "are essential to realizing the agent's potential for acting from self-authored ends."[37] Thus, the criminal law identifies and punishes as wrong those actions that cause harm to these goods, and it punishes more or less depending on the degree of harm.

After introducing the idea of freedom as real autonomy, Brudner does not immediately reexamine in any detail his claims that punishment is justified, based on consent, and consistent with freedom. At first, he seems to assume these claims survive the introduction of the real autonomy paradigm; that is, he suggests that punishment is consistent not only with the prisoner's formal agency but also with his real autonomy.[38] But it is difficult to see how this could be the case. The prisoner loses his agency goods—his property, his bodily autonomy, and in some cases, his life itself.[39] And indeed, Brudner eventually concludes that when freedom is defined as real autonomy, punishment is not consistent with freedom after all.

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34. Id. at 55–56.

35. Id. at 136.

36. Id. at 137.

37. Id. at 138. Thus real autonomy, rather than formal agency, is necessary to explain the law of sexual offenses discussed above.

38. See, e.g., id. at 137.

39. At one point, Brudner seems to suggest that the criminal loses these goods only because of his own choice to break the law, and so is still "authoring [his] own fate." Id. But that is simply a claim that the criminal forfeits his real autonomy, not a demonstration that punishment preserves it. Brudner's later discussion of voluntary servitude makes clear that the right to real autonomy is inalienable.

That argument takes place in a discussion of voluntary servitude, which Brudner uses to show the inadequacy of the formal agency paradigm:

> [I]f someone pointing a gun at me says, "your labour or your life," and I give him my labour for an indefinite period, then it looks as though I have expressed my capacity for undetermined choice (for I could have chosen otherwise). . . . [I]f what we mean by respect for freedom is respect for undetermined rather than self-determined choice, then enslaving someone with threats is consistent with their freedom.[40]

Even an individual who choose slavery to avoid starvation acts freely under the formal agency paradigm, since the formal agency paradigm does not recognize any instinctual compulsion toward bodily self-preservation.[41] Indeed, formal agency doesn't recognize the physical body as relevant to freedom at all: "The root problem with formal agency as a conception of freedom is that it treats the agent's particularity—the particular body in which the agent is alive as well as the subjective ends of its motion—as necessarily belonging to the animality of the agent, forming no part of its freedom."[42] Because, according to Brudner, "no conception of human dignity can be adequate that treats slavery as consistent with it," the formal agency paradigm must be rejected in favor of real autonomy. Slavery, even voluntary servitude, is "normatively impossible" under the real autonomy paradigm, because "there are some ends the agent cannot validly choose to renounce." The agent cannot renounce "the power to choose the ends of its life," nor can the agent choose "that someone kill or maim it."[43]

The obvious question here is whether, consistent with real autonomy, an agent could choose that someone else forcibly confine him and control his daily existence in the manner typical of modern incarceration. Brudner seems to concede that the answer is no. If we adopt real autonomy as our exclusive understanding of freedom, punishment becomes an instrument by which "the convict is deprived of his liberty in order to secure the agency goods of others. In other words, he is used violently as a means."[44] Again, under the real autonomy paradigm, punishment is no longer self-willed but is instead

40. Id. at 297–98.
41. Id. at 298; see also id. at 208–9.
42. Id. at 299.
43. Id.
44. Id. at 303.

"externally imposed violence."[45] Remarkably, from this Brudner concludes not that punishment is violence after all, but instead that penal theory needs both formal agency and real autonomy. Though real autonomy is "the only coherent conception of freedom,"[46] we must retain a role for formal agency, because otherwise punishment wouldn't be justified or consistent with freedom. Penal theory must accommodate both formal agency and real autonomy: the first to evaluate the criminal's freedom, and the second to explain what should be criminalized and how it should be punished.[47] This dualistic account is not "intellectually shabby" or "incoherent compromise," Brudner insists, but is instead a necessary whole devised of "constituent and mutually complementary parts."[48]

Freedom, in short, means one thing for criminals and another for everybody else. For the criminal, freedom is formal agency and is unimpaired by incarceration or even execution. For the potential victim, freedom is real autonomy, with a right to bodily security, the opportunity for actualized choice, and certain material goods.[49] The kind of freedom that is consistent with punishment is the same kind of freedom that is consistent with slavery, which is, again, good enough for criminals but not for the rest of us. Put differently, perhaps the best we can say of Brudner's argument is that it shows punishment to be as justifiable as slavery.

III. A MORE HONEST LIBERALISM

As I have suggested, it is difficult to understand some of Brudner's philosophical moves (the reliance on the Thinking Agent rather than empirical

45. Id. Specifically, Brudner argues that real autonomy standing alone is "self-contradictory" because it leaves us no way to avoid the conclusion that punishment is violence. Id. at 304. But if we are not precommitted to the view that punishment is *not* violence, it's difficult to see where the contradiction is.

46. Id. at 300.

47. Id. at 304. Brudner also incorporates a third account of freedom—communal solidarity—into his theory, but that account is not relevant to the arguments explored here.

48. Id. at 304–5.

49. Consider Brudner's paradigm crime: a surgeon is operating to remove a patient's cancerous prostate, and decides, without the patient's consent, to take out the patient's healthy appendix. See id. at 39–40. The surgeon, as model criminal, acts out of pure spite or willfulness, without any apparent needs or desires that will be fulfilled by the crime. The model victim, in contrast, is a vulnerable and helpless body, a patient etherized upon the table.

persons, or the adherence to the formal agency paradigm notwithstanding its endorsement of slavery) except as efforts to reverse-engineer liberal consent theory in a way that will yield a justification of punishment. Brudner is hardly alone among modern liberals in his effort to reconcile punishment with liberal premises of individual choice and self-determination, though most other liberals rely on desert or some other device instead of attempting to characterize punishment as consensual. I share Brudner's skepticism about traditional desert-based defenses of punishment, but not his steadfast commitment to finding an alternative justification.[50] There is a third possible approach: once we've adopted the basic tenets of liberalism, just see where they take us with regard to punishment. If they lead to the conclusion that punishment is violence, just say so. If they lead us to doubt the justification of punishment, let us doubt. The world won't end if theorists cease to devise new apologies for punishment; in fact, a little candor might serve us well.

Thomas Hobbes (arguably, the first liberal) was a steadfast defender of both individual rights and a strong sovereign. He insisted on individual consent as a condition of government legitimacy, and held fast to that principle even when it seemed to threaten the scope of sovereign power. Hobbes's theory offers a stark, and refreshing, alternative to the later liberal theories that have inspired Brudner. I have discussed Hobbes's account of punishment at greater length elsewhere, so here I will summarize briefly.[51]

Hobbes understood political theory to be an account of human relationships, and he premised his own theory on a description of humans as they actually are. Humans, according to Hobbes, are "thinking bodies"—animate, corporeal beings with the capacity for rational (as well as irrational) thought.[52] As thinking bodies, we perceive our own vulnerability to injury and death, and we nearly always wish to avoid such a fate. Already, it is worth noting the contrast between Hobbes's thinking body and Brudner's Thinking Agent. Though Brudner attributes the formal agency account of freedom to Hobbes,[53] it is clear that Hobbes would never endorse a philosophical

50. See Alice Ristroph, Desert, Democracy, and Sentencing Reform, 96 J. Crim. L. & Criminology 1293 (2006).

51. The discussion below is based on Alice Ristroph, Respect and Resistance in Punishment Theory, 97 Cal. L. Rev. 601, 607–22.

52. Thomas Hobbes, De Corpore, in The English Works of Thomas Hobbes 34 (W. Molesworth ed., 1839).

53. See, e.g., Brudner, supra note 1, at 298.

account centered on the choices of a hypothetical, noncorporeal Thinking Agent. Indeed, Hobbes introduced the phrase "thinking body" in the context of a critique of Cartesian dualism, which committed the "gross error" of "conceiv[ing] of thought without the consideration of body."[54] For Hobbes, the fact that humans are embodied and physically vulnerable beings was of great significance to politics and political theory. Of course, humans are not *merely* body—Hobbes did not equate humans to animals with lesser cognitive functions. Instead, they are thinking bodies, and neither the body nor the thinking can be ignored.

As a committed individualist, Hobbes believed each thinking body possessed an inalienable right to self-preservation.[55] Unfortunately, the efforts of individuals to preserve themselves would lead to conflicts that left everyone at risk. In this state of nature / state of war, individuals should realize that their long-term preservation was best achieved by the selection of a ruling sovereign who would legislate rules of conduct and adjudicate disputes. The authority of this sovereign is based on the subjects' consent, which is to be expressed in a social contract in which each individual gives up her right to govern herself and agrees to be governed by the sovereign, on the condition that others similarly give up their rights of self-governance.[56]

In sharp contrast to Brudner, Hobbes explicitly rejected the suggestion that the social contract, or some other moment of consent, could give the sovereign the authority to punish. "[N]o man is supposed bound by covenant, not to resist violence; and consequently it cannot be intended that he gave any right to another to lay violent hands upon his person."[57] (Obviously, there is no equivocation about the violence of punishment here.) The sovereign's right to punish "is not grounded on any concession . . . of the subjects," but is instead a manifestation of the sovereign's own natural right to self-preservation.[58] One can understand Hobbes's argument as a claim that when a subject breaks the law, he and the sovereign stand in a kind of state of nature to one another, and the sovereign may use his natural right of self-preservation to disable the present (and possible future) threat. But if this is the case, then the criminal too has a right of

54. Hobbes, English Works, supra note 52.
55. Thomas Hobbes, Leviathan 86–88 (R. Tuck ed., 1996).
56. Id. at 120.
57. Id. at 214.
58. Id.

self-preservation, which entails a right to avoid making one's body vulnerable to another, and this in turn implies a right to resist the sovereign's efforts to punish him. Accordingly, Hobbes insisted that the guilty (as well as the wrongfully convicted innocent) had a right to resist "wounds, chains, and imprisonment."[59]

Two points are worth emphasizing. First, the "right" to resist is not a Hohfeldian right; the sovereign has no correlative duty not to punish.[60] Instead the right to resist punishment is what Hobbes called a natural right, or a "blameless liberty."[61] Second, I do not want to suggest that Hobbes was indifferent to the outcome of the contest between the punishing sovereign and the resisting criminal. Hobbes's defense of a powerful sovereign made clear that the sovereign would usually win this contest, and society would be the better off.

If the sovereign usually will and should subdue the resisting criminal, one may ask whether there is any significance to Hobbes's discussion of the right to resist, or his denial that subjects consent to punishment. Some readers of Hobbes have treated his discussion of punishment as an odd misstep or an inconsequential curiosity. Such characterizations are mistaken, in my view; we have much to learn from Hobbes's discussion of punishment. Importantly, Hobbes shows us what liberalism looks like when it doesn't cheat—when it takes in view actual humans, embodied thinking agents capable of speaking for themselves, and bases the legitimacy of government on the actual consent of those real people. It's not always a pretty picture. When liberalism doesn't cheat, we must admit that some government actions cannot be justified on the basis of consent. We see inevitable gaps in government legitimacy, and we see the very real dilemmas that human coexistence produces. The social contract turns out to be quite fragile, and it is violated or renounced with some regularity. In many instances of violation, the state may face a dilemma: ignore the crime and betray its victims, or punish the crime and rule by superior force rather than consent. Hobbes urged the latter option, but he didn't pretend that it was costless. Hobbes's argument strikes most liberals as strange today, for almost every major liberal thinker since Hobbes has succumbed to temptation and adopted some

59. Id. at 93 (spelling modernized).

60. See, e.g., Deborah Baumgold, Hobbes's Political Theory 29 (1988) (characterizing the right to resist punishment as "politically irrelevant").

61. Ristroph, supra note 51, at 622.

substitute form of consent to eliminate the problem of clearly nonconsenting subjects. Hobbes, staunch defender of a powerful sovereign though he was, wouldn't take this route.

In short, Hobbes shows us a more principled and honest liberalism; and he shows us that principled and honest liberalism must recognize its own limitations. As noted above, Hobbes hardly called for the abolition of punishment; instead, he chose to be candid about the violence of punishment. He expected the sovereign to punish the disobedient, but he imposed no obligation on the criminal to submit quietly. Nor would he pretend that those persons violently subdued by state officials asked to be dominated in that way. Punishment is at best "imperfectly legitimate," and never fully representative, under Hobbes's theory; it is a practice that leaves the hands of the punisher at least a bit dirty.

IV. CODA: ON GETTING METAPHYSICAL, AND GETTING REAL

Brudner might view Hobbes, and this essay, as plagued by the "excessive empiricism" that he proudly avoids.[62] His is an ideal theory, operating in the metaphysical realm rather than "the real world."[63] But to claim the mantle of ideal theory only raises further questions. What sort of ideal system makes a place for crime (and for physically brutal responses)? If we're doing ideal theory, if we're positing ideals, why are we imagining criminals at all? The ideal theorist can say to misguided officials, or disengaged citizens, "change your practice to correspond to my ideal." But will he complain to the criminal, "you're not living up to what a criminal should be"? What other sorts of violence take place in Brudner's ideal world? Do we need an ideal theory of terrorism, or an ideal theory of torture?

As far as I know, contemporary invocations of "ideal theory" are inspired by John Rawls's use of that phrase in *A Theory of Justice*.[64] But Rawls was very explicit that his was a theory of distributive justice under conditions of full compliance—that is, a theory of what happens when everyone agrees on certain basic ground rules and complies with them. Once we start talking about

62. Brudner, supra note 1, at 59.

63. Id. at 322.

64. John Rawls, A Theory of Justice 7–8 (rev. ed. 1999).

crime—or terrorism, or human rights abuses, or international conflict—we've left full compliance behind. And a theory of partial compliance or noncompliance is not ideal theory.

At some level, Brudner must know this, for as we have seen he turns to empirical reality on occasion. His representative crime victim is not an abstract Thinking Agent, but an embodied being subject to the same biological needs and vulnerabilities as are empirical humans. It is only the criminal who must be imagined without "excessive"—or any—empiricism. This selective attention to reality undermines the philosopher's relevance. Unless the philosopher is willing to be honest about all the parties involved, philosophy can contribute little to our understanding of crime and punishment in the real world.