Preventive Justice, Autonomy and Rehabilitation: A Contribution Toward a Critical Theory of Law

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Thesis Summary

The thesis investigates the legitimacy of preventive justice, understood as those legal frameworks that seek to reduce the risk of crime. A critical theory approach is adopted which is based on the work of Axel Honneth. In particular, the thesis adopts Honneth's intersubjective account of autonomy, and his more recent notion of social freedom developed in *Freedom's Right,* as providing a normative basis for critique.

The thesis also draws on the critical theory of law as developed by Jürgen Habermas and which is largely adopted by Honneth. This approach involves evaluating the legitimacy of law both in terms of its effectiveness as a form of social co-ordination and from the perspective of its normative validity. Another element of this theoretical understanding of law is the recognition of a necessary, internal relationship between the legitimacy of law and autonomy: that law simultaneously provides for and depends on the exercise of autonomy.

Although the form of freedom provided for by law is a major achievement of modernity, it involves an abstraction from the social contexts and intersubjective relations that are necessary for autonomy and social freedom. For Honneth, both theory and social reality are damaged when the form of legal freedom is mistakenly understood to comprise the whole of freedom. This insight will be central to the contribution that a critical theory of law can make to the question of the legitimacy of preventive justice.

The thesis also adopts Honneth's model of critical theory that proceeds by way of a detailed, empirically informed examination of social institutions. Rather than attempting to constructively derive normative principles which are then applied to social reality, Honneth argues that theory must instead proceed by way of a social analysis: an examination of the norms and values that are already operative in social institutions.

Applying this method of normative reconstruction to the domain of preventive justice will involve a close analysis of existing laws in Australia and Germany that coercively restrict freedom on the basis of a person's risk of reoffending. This examination reveals that these laws are designed and implemented on the basis that 'liberty',

which largely corresponds to Honneth's concept of legal freedom, is the fundamental normative principle. The result of this one-dimensional interpretation of freedom, and it's correspondingly inadequate understanding of autonomy, is that these coercive preventive measures produce paradoxical effects that undermine both their normative validity and social effectiveness.

As an alternative, drawing on Honneth's accounts of autonomy and social freedom, it is argued that a reconstructed concept of rehabilitation, focussed on promoting the development of offenders' autonomy capacities and providing protection from institutionalised practices of misrecognition, can provide a basis for the legitimation of preventive justice.

Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

(Signed) Date: 19 March 2021

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This thesis is the culmination of a long period of engagement with the philosophy of the Frankfurt School of Critical Theory. I was first introduced to this way of thinking by Lisabeth During whilst an undergraduate at the UNSW over 30 years ago. Since then my interest in this area has been supported (and challenged) by various friends and colleagues, including Ross Poole, Kim Atkins, Desmond Manderson, and Nick Smith. I extend my thanks to them, and especially to Nick Smith who was a most understanding and helpful supervisor of this work.

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Chapter 1

Introduction

1.1 Context

Over the last 30 years, a number of major western liberal democracies have experienced a significant transformation within their systems of criminal justice involving modifications to the traditional model of the State prosecuting an offender who is alleged to have committed an offence.[1] For example, victims of crime are increasingly being given a formal role in the criminal justice process and there has been a renewed focus on the use of State power to prevent rather than simply punish crime. In this latter respect, there has been a rapid expansion and widespread proliferation of legal measures aimed at the relatively small number of individuals who commit serious crimes: in particular, a number of approaches have been developed that provide a legal mechanism for the State to interfere with the liberty of a person, not because of any criminal conduct having been committed, but based on an assessment of their risk of reoffending.

From a sociological perspective, these changes in the law can be understood in the context of the range of social co-ordination problems that are characteristic of the current phase of modernisation. These challenges include a heightened cultural, social and individual sensitivity to risk. Indeed, risk has become a dominant concept in a range of disciplines, from science to economics to law, and the management of risk has become a routinely considered factor in policies and decisions made by governments, corporations and individuals.[2] Where, however, this heightened awareness of the ubiquity of risk is accompanied by an increasing loss of confidence in institutions and experts, there is a growth in feelings of anxiety and insecurity.[3] In turn, this leads to a loss of trust, a necessary component of social integration, as well as to fundamental changes in the functioning of key social institutions. What appears to be a common feature of these changes is that they seem to simultaneously

[1] As will be seen, this is true for both the 'common law' (or Anglo-American) and 'civil' (European) systems of law.

[2] David Garland, "The Rise of Risk", in *Risk and Morality*, ed. Richard Ericson and Aaron Doyle (Toronto: University of Toronto Press, 2003), 48-86.

[3] Garland, "The Rise of Risk", 71-77.

emphasise the greater freedom of individuals and the precarious nature of their existence and capacity to engage in social life.[4]

This social dis-integration can be seen in a range of processes that have led to the exclusion or disengagement of large parts of the population from access to and participation in fundamental spheres of social life such as politics, the economy, the law and even family life. For example, there has been a rise in under and insecure employment; care of both children and the elderly has been largely outsourced to institutions; and the costs and complexity of professional legal advice and litigation exclude many from accessing the justice system.[5] It is in this setting, of the experience of a precarious and highly individuated relationship between members of modern society, and between citizens and the State, that increased pressure is brought to bear on government to address the fundamental demand for reassurance and protection. In the face of seemingly diminishing and ever more fragile resources for ensuring social cohesion, the State is increasingly reliant on the law as a mechanism for managing social conflict.

This 'legal turn' in response to the perceived crises in social coordination can take different forms: from expanding the range of everyday activities subject to regulation (for example, in education, sport and leisure, consumer protection and the family); an increase in the formalisation of practices to supplement a loss of confidence in democratic institutions (for example, an increase in regulatory and other oversight bodies); and even in the de-regulation (or 'legal privatisation') of certain spheres of activity (for example, legislation for individually rather than collectively bargained workplace agreements). In the area of the criminal law, all of these techniques are present: there has been a significant growth in 'regulatory' offences in an attempt to ensure behaviours that previously could be guaranteed by social norms alone (for example, allowing for criminal sanctions in respect of noisy behaviour or the breach of water use restrictions by private persons); the establishment of permanent authorities to monitor the conduct of the police and even the judiciary; and the outsourcing of State responsibility for managing antisocial behaviour (including the widespread use of surveillance and security technology in public places by local

[4] Ulrich Beck, Anthony Giddens and Scott Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Cambridge: Polity Press, 1994), 7-14. Garland, "The Rise of Risk", 77-78.
[5] See Axel Honneth, "Brutalization of the social conflict: struggles for recognition in the early 21st century", *Distinktion: Scandinavian Journal of Social Theory* 13, no. 1 (2012): 12-14.

authorities, corporations and private citizens, and in the use of privately owned and operated prisons).

Arguably, all these approaches can be seen as attempts, through changes in the meaning and extension of traditional principles of the criminal law, to address the anxiety generated by an experienced decline in socially produced solidarity. In particular, the criminal law now frequently exerts itself not only against those that cause specific harm, but also those who are seen to pose a risk of harm. That is, there has been an expansion in the focus of the criminal law to include those who fail to provide reassurance that they will abide by social norms.[6] Following Ashworth & Zedner[7], the term 'preventive justice' will be used here to describe a formal legal framework that is designed to reduce the risk of criminal harm as well as the specific values that may act as justifications and/or limits within such a framework. Similarly, the term 'coercive preventive measures' will be used to describe specific examples of mechanisms that allow the legally sanctioned use of State power to bring about a reduction in the risk of harm and which in some sense involve a restriction or deprivation of individual freedom.

Coercive preventive measures can and have taken many different forms and embody a range of different legal principles and techniques; for example, there are regimes for indeterminate sentencing of offenders, sex offender registration, civil orders imposing various restrictions or prohibitions on movement or behaviour (including on persons not convicted of any wrongdoing), and post-sentence supervision or detention of offenders. From a jurisprudential perspective, coercive preventive measures are usually considered controversial: at best, they are seen as representing exceptions to the traditional values of liberal criminal justice; at worst, a reversion behind fundamental principles of the rule of law. Nevertheless, through processes of judicial interpretation and legislative reform, the laws establishing these measures have generally come to be justified in accordance with traditional criteria, such as the institutionalised values found in constitutional doctrine or in principles set

[6] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford Scholarship Online, 2012), http://www.oxfordscholarship.com.simsrad.net.ocs.mq.edu.au/10.1093/acprof:oso/9780199581061.001.

[7] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014), 5-7.

out in human rights conventions. That is, most coercive preventive measures are generally considered to be lawful.

However, both within legal theory and the law itself, there persists a degree of dissatisfaction or disquiet about the apparent normalisation and ongoing use of such measures by the State.[8] That is, there is a sense shared by some legal theorists and practitioners that the mere lawfulness of such measures fails to provide a sufficient basis to justify them. Instead, there appears to be an awareness of, and sensitivity to, a normative deficit when it comes to legitimacy of laws that restrict freedom on the basis of a mere risk of criminal behaviour. This discontent is reflected in arguments put forward by both legal theorists and jurists that attempt to either reconcile these measures with fundamental principles of the law or to condemn them on the same basis.

Despite this general feeling of unease, these measures continue to be enacted and applied, even when they result in outcomes that could only be described as unjust or even counterproductive (for example, where the measures actually contribute to an increased feeling of insecurity or exacerbate the risk of criminal behaviours).[9] This uncertainty, and an apparent inability to convincingly articulate the principles and values that could justify such measures, only serves to intensify the problems that preventive justice is attempting to address.

Accordingly there is a pressing need for a new theoretical approach, one which can identify a plausible account of the normative basis of preventive justice in order that the future design and implementation of coercive preventive measures promotes rather than hinders the principles, values and practices that can justify such laws,

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[8] Larry Alexander and Steven D. Smith, "Introduction to the 2011 Editors' Symposium: The Morality of Preventive Restriction of Liberty," *San Diego Law Review* Vol 48, no. 4 (September 2011): 1075, said "Restricting the liberty of persons who can be held morally and legally responsible for their conduct on the ground that they might abuse that liberty and commit criminal acts is both suspect and ubiquitous." In Douglas Husak, "Lifting the Cloak: Preventive Detention as Punishment," *San Diego Law Review* Vol 48, no. 4, (September 2011): 1173, the author notes that "Most of the scholarly reaction to systems of preventive detention has been hostile". It is also common for submissions from the legal profession to challenge the legitimacy of such measures: see The Law Society of NSW, Letter from President of the Law Society of NSW to the Attorney General, (31 October 2012), https://www.lawsociety.com.au/about-us/law-Society-Initiatives/policy-submissions/archive/criminal-law.

[9] For example, 'Anti-Social Behaviour Orders (ASBOs)' and 'Imprisonment for Public Protection (IPP)' orders in the United Kingdom. See the discussion in Ramsay, *The Insecurity State*, 12-13, and Ashworth & Zedner, *Preventive Justice*, 75-91 & 158-160.

and which can also guide their design to avoid paradoxical consequences. The aim of this thesis is to provide such an account.

1.2 Approach

The central argument of the thesis is that preventive justice, being a framework of laws that impinge on the liberty of citizens based on the risk of future offending, is legitimate only to the extent that it promotes individual autonomy. Justifying this seemingly contradictory proposition requires a reconfiguration of key concepts, especially 'freedom' and 'autonomy', but also a clear understanding of the nature of the legitimacy of law itself, which in turn involves clarification of the relationship between law, liberty and freedom. By way of example, in the specific case of a coercive preventive measure that applies to high risk offenders after the completion of their sentence, the thesis will show how a reconceptualization of the concept of rehabilitation, understood as a process of simultaneously enabling the autonomy of an offender and providing for their social reintegration, can provide the means by which such laws can be legitimated.

My approach, as set out in Chapter 2, is based on the version of critical social theory developed by Axel Honneth and most clearly expressed in his work *Freedom's Right*.[10] In this work, Honneth argues that critical theory requires a detailed, empirically informed examination of the social practices which are embodied within those institutions that are fundamental to the reproduction of society. The purpose of such an analysis is to identify the extent to which those practices either promote or inhibit the fulfilment of the normative principles and values that govern these different spheres of social interaction: which, for Honneth, means identifying whether they contribute to or detract from the realisation of freedom. Honneth refers to this approach as 'normative reconstruction'.

In *Freedom's Right,* Honneth asserts that the dominant normative principle in modern society is freedom, understood as the autonomy of the individual.[11] Although in *Freedom's Right* Honneth expressly draws on Hegel's *Philosophy of Right* rather

[10] Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life*, trans. Joseph Ganahl (Cambridge: Polity Press, 2014).
[11] Honneth, *Freedom's Right,* 15.

than his own earlier writings in order to articulate this concept of social freedom, it is important to acknowledge the continuity between this recent work and the concept of autonomy developed in his earlier writings, including *The Struggle for Recognition.* In these previous writings, Honneth elaborates a concept of autonomy as involving three practical relations-to-self that are created and maintained by means of patterns of social recognition. This intersubjective understanding, that focusses on the need for inclusion in relationships of mutual recognition in order to develop certain practical abilities that constitute autonomy, finds its complement in the analysis of freedom in *Freedom's Right:* the latter work is directed to the manner and extent to which social institutions embody the principles that govern the relations of mutual recognition upon which the forms of self-relation that make up autonomy depend. That is, whilst *The Struggle for Recognition* focussed on the structure of autonomy, *Freedom's Right* is directed to an analysis of the social institutions that are necessary to develop and support autonomy.[12] In *Freedom's Right,* Honneth seeks to demonstrate that the dominant understandings or interpretations of freedom that conceptually prioritise an individual's abstraction or separation from others are flawed, and that these forms of freedom are dependent on an antecedent form of freedom that is intersubjective in nature which he calls 'social freedom'. Unlike the understandings of freedom that focus on the isolation of subjects, Honneth argues that social freedom requires relationships of mutual recognition within a framework of institutional practices.[13]

The aim of Chapter 2 is to show that the relationship between the structure of autonomy, the institutionalisation of patterns of recognition and the idea of social freedom provides the key to how normative reconstruction operates as a critical theory. Where the social practices that prevail in a social institution are inconsistent with the patterns of recognition necessary to develop and maintain the relations-to-self that constitute autonomy, this gives rise to experiences that provide for the cognitive and normative basis of critique. Where there is an unjustified exclusion from social practices, this experience of disrespect is felt as 'injustice'.[14] However, where there are blockages or distortions in the understanding of participants of the meaning of existing norms and principles governing social practices within an institution, this

[12] Honneth, *Freedom's Right,* 16-17.
[13] Honneth, *Freedom's Right*, 45.
[14] Honneth, *Freedom's Right,* 86.

gives rise to a 'social pathology'.[15] Social pathologies can occur when social practices are organised in a way that seeks to give effect to a normative principle but which actually creates conditions that undermine the realisation of that principle. These situations subvert autonomy and lead to a diminishment of social freedom: thus, the identification of the presence of injustice and social pathologies in the existing social infrastructure becomes the basis for critique.

Where Chapter 2 focusses on outlining Honneth's version of critical theory of society in terms of the process of normative reconstruction, and the concepts of autonomy, social freedom and social pathology, Chapter 3 provides an account of the key features of a Critical Theory understanding of law. In many respects, the thesis adopts the conceptualisation of law outlined by Honneth in *Freedom's Right*, which in turn draws heavily on the account developed by Habermas in *Between Facts and Norms*.[16] This approach involves an understanding that the legitimacy of modern law is to be evaluated both in terms of its effectiveness as a form of social co-ordination and from the perspective of its normative validity, and that ultimately the legitimation of law is dependent on the democratic process. In turn, this understanding points to a necessary, internal relationship between the legitimacy of law and individual autonomy (and so also freedom). This approach emphasises the need to regard the law not as a self-enclosed system of positive and coercive rules but rather as a social institution, a sphere of action governed by normative principles that also acts as a medium of social co-ordination.[17] As such, law is involved in, and in turn shaped by, the reproduction of society, with the consequence that the law is both responsive to and, at times, productive of social problems. The recognition that law is a social institution is why a social analysis of the law is required to understand a phenomenon like preventive justice; and why the mere lawfulness of preventive justice has proven to be an unconvincing justification. Instead, what is required is an account of the development of preventive justice that simultaneously addresses its legal, historical, sociological and normative features.

A normative reconstruction involves just such a social analysis: an examination of how the meaning and extension (or scope) of law has changed over time in order to

[15] Honneth, *Freedom's Right,* 86-87.
[16] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy,* trans. William Rehg (Cambridge, MA: The MIT Press, 1996).
[17] Habermas, *Between Facts and Norms,* 461.

both resolve social coordination problems as they arise and to better fulfil its own governing normative principles. Within legal and social theory, the concept of juridification is frequently used in this way to analyse changes in the law. Juridification is itself a complex concept and is often used in both a descriptive and a normative sense. For example, juridification has been used to describe the proliferation of legal measures, an increase in the formalisation of law, the monopolisation of the legal field by legal professionals, in understanding the role of the judiciary and more generally an increase in the social expectation of law-abiding behaviour. However, from a more normative perspective, it has been used to characterise the manner in which freedom is guaranteed by the rule of law, the drive towards the globalisation of human rights, and the manner in which, increasingly, matters of social conflict are understood from the perspective of legal relations.[18]

In *Freedom's Right,* Honneth references many of these different aspects of the concept of juridification, though he never clearly differentiates or delineates between them. Again, in broad agreement with Habermas' account of the historic development of the law, Honneth accepts that a number of identifiable stages have been crucial to the development of the rule of law as a guarantee of freedom. However, he also shares Habermas' concerns that the proliferation of law into areas of social life not previously regulated by law has had negative effects. In *Freedom's Right*, Honneth presents a largely negative picture of the effect of the latest phase of juridification on the realisation of freedom. He is highly critical of the tendency to analyse all social problems from a legal perspective, or to regard as only those issues that present as a task facing the legal system as deserving of theoretical attention.[19] Further, whilst acknowledging the significance of the form of freedom made possible by law ('legal freedom') to the possibility of social freedom, Honneth argues that contemporary processes of juridification result in a number of significant social pathologies. In particular, he argues that the level of abstraction involved in the sphere of law leads to the tendency for actors to approach *all* forms of interaction from the perspective of themselves as bearers of legal rights, and legal principles and attitudes come to dominate, to the exclusion of other modes of co-ordinating social interaction. In turn,

[18] Lars Chr. Blichner and Anders Molander, "Mapping Juridification," *European Law Journal* 14, no. 1 (January 2008): 36–54.
[19] Axel Honneth, "Beyond the Law: A Response to William Scheuerman," *Constellations* 24, no. 1 (2017): 127, https://doi-org.simsrad.net.ocs.mq.edu.au/10.1111/1467-8675.12272.

this detachment undermines the ability of other social institutions to supply the forms of mutual recognition necessary for the development of autonomy and the existence of social freedom.[20]

Without cavilling with his characterisation of the reality, nature, extent, and damaging effects of legal pathologies, it will be argued in Chapter 3 that, at least in part, Honneth's conceptualisation of juridification itself suffers from a peculiar blindness or one-sidedness. Although Honneth identifies law as a distinct sphere of knowledge and action, he does not consider law as itself involving a set of discrete social practices; that is, he has a tendency to consider law as a medium of social coordination (albeit ubiquitous) that can only operate on and through other social institutions such as the family, the market and the democratic public sphere. It is perhaps for this reason that Honneth, when considering the effect of juridification on the possibility of freedom, does not engage with the work of either legal theorists or jurists. Irrespective of why this is so, I will argue that the effect of the failure to engage empirically with the subject matter of the law means his analysis falls short of a normative reconstruction. By examining the limitations of his use of the film *Kramer v Kramer* in his account of legal pathologies in *Freedom's Right*, it can be seen how this omission results in Honneth failing to allow for the potential of a self-correcting critique being developed within the institution of the law; accordingly, he necessarily fails to see that the process of juridification may not be as thoroughly negative as his analysis otherwise suggests. In contrast, the concluding sections of Chapter 3 will demonstrate how an empirical engagement with the work of legal theorists, jurists and legislators allows for the identification of social practices within the institution of the law itself that have their own specific context and normative content, existing alongside those of the other major social institutions.

Following on from the theoretical framework set out in Chapters 2 and 3, the focus of Chapters 4 and 5 is to provide a contribution to a Critical Theory of law by demonstrating the potential of a normative reconstruction of preventive justice that includes an empirical engagement with the law. The first step of the analysis is by way of an outline of the legal and normative principles that have traditionally been held to govern any practice that involved the interference in the liberty of the subject

[20] Honneth, *Freedom's Right*, 86-94.

by the State, and how these principles were challenged in the late twentieth century during the advent of preventive justice. The second step in the process involves a study of two attempts by legal theorists to examine the normative basis for preventive justice. Alan Ashworth and Lucia Zedner, in their monograph *Preventive Justice*[21], constructively derive a number of guiding or restraining principles that they argue may be used to justify and delimit the development of coercive preventive measures. By contrast, Klaus Günther[22] undertakes a socio-historical analysis of law, arguing that the expansion of preventive justice involves a shift and extension in meaning of the law under the influence of a growing sensitivity to risk where the law is responding to social pressure to provide reassurance, protection and security.

The third step, undertaken in Chapter 5, involves an investigation of a specific form of coercive preventive measure, one which involves the ongoing detention or supervision of an offender after the expiration of their sentence because they pose a risk of future reoffending. This will be done by way of a detailed examination of how the legal systems in Australia and Germany have transformed their interpretation of the fundamental legal and normative principles governing the interference with the liberty of a subject in order to accommodate such a measure.

What this three step analysis discloses is that, in this current phase of juridification, legal theorists and the legal system itself are involved in an ongoing struggle to formulate principles and laws that can both satisfy the social and normative imperatives demanding reassurance and community protection and which can also continue to draw their legitimacy from the normative principle of freedom. There appears within the work of legal theorists, legislators and jurists a clear appreciation of the connection between the legitimacy of the law and individual freedom. However, what also becomes evident is that their attempts to identify the normative basis of preventive justice are repeatedly undermined because, within the law, the operative concept of freedom is one dimensional: freedom as 'liberty', an abstraction from social contexts and relations, is taken to constitute the entirety of freedom. The effects of this limited understanding of freedom can be seen in the way in which the coercive preventive measures examined in the Chapter have been implemented: the

[21] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014).
[22] Klaus Günther, "Responsibility to Protect and Preventive Justice," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 69-90.

result of this misconception are laws that have pathological effects, consequences which undermine both the validity and effectiveness of preventive justice. The identification of these social pathologies, where laws designed to promote freedom by ensuring the protection of the community are shown to undermine autonomy and social freedom, can explain both the normative deficit and the ongoing anxiety and uncertainty about the legitimacy of preventive justice.

Despite the existence of injustice and social pathology in the measures examined in Chapter 5, it will be argued in Chapter 6 that the potential exists to legitimise preventive justice on the basis it can promote social freedom. In particular, there are insights that can be identified within the current phase of juridification that point to a possible solution, albeit in a manner that needs further development and refinement. This involves the recognition that the legitimacy of preventive justice is tied to the normative potential of rehabilitation.[23] The specific contribution of this thesis to the debate is to demonstrate how a reconfiguration of the concept and practice of rehabilitation can provide the normative justification for preventive justice. Moving beyond an individualist understanding, rehabilitation is to be explained by reference to an intersubjective account of autonomy and the idea of social freedom. From this perspective, rehabilitation is the restoration of the offender in society by way of support structures necessary and appropriate for the promotion of an offender's autonomy and their protection from institutionalised practices of misrecognition. Instead of coercive preventive measures paradoxically creating 'autonomy gaps', by setting behavioural expectations on offenders that exceed their capacity to act autonomously, such measures could be designed to instead enhance or improve the capacities of such individuals.[24] It will be argued that this re-imagination[25] of the concept of rehabilitation, which integrates recent research on what is effective in preventing reoffending and promoting desistance with a recognition-theoretic concept of autonomy, is what provides a resolution to the apparent contradiction that a law

[23] This step could perhaps be characterised as an example of an engagement with 'middle range concepts' required to articulate the theoretical and empirical dimensions of recognition see Jean-Philippe Deranty, "Hegelian Recognition, Critical Theory, and the Social Sciences", in *Recognition Theory as Social Research: Investigating the Dynamics of Social Conflict*, ed. Shane O'Neill and Nicholas H. Smith (Palgrave Macmillan, 2012), 56.

[24] Joel Anderson, "Vulnerability, Autonomy Gaps and Social Exclusion," in *Vulnerability, Autonomy, and Applied Ethics*, ed. Christine Straehle (New York: Routledge, 2016), https://doi-org.simsrad.net.ocs.mq.edu.au/10.4324/9781315647418, 50.

[25] Lol Burke, Steve Collett and Fergus McNeill, *Reimagining Rehabilitation: Beyond the Individual* (New York: Routledge, 2019).

impinging on personal liberty may be justified in the name of autonomy and social freedom.

There is an obligation on any critical theory of law to extend beyond a mere diagnosis of the present to include the identification of how the law can and must develop so that it realises its fundamental values in a more comprehensive (albeit gradual) way.[26] Indeed one of the main aims of the argument being developed here is to show that there are possible modifications to the form in which coercive preventive measures are currently institutionalised which can advance the norms that they at present only imperfectly embody. That is, the same analysis that can be used to criticise coercive preventive measures in their current forms may also provide guidance for their reform. Accordingly, Chapter 6 will conclude with some tentative concrete proposals for the modification of existing coercive preventive measures.

1.3 Chapter summaries

Following this introduction, the body of the thesis will made up of six chapters.

Chapter 2 will detail the philosophical framework for the analysis to follow. It will outline the essential elements of Honneth's program for Critical Theory, understood as the form of social analysis he calls normative reconstruction, including the interdependence of such a theoretical approach with empirical research and engagement, as well as the concepts of autonomy, social freedom and social pathology which provide the normative basis of critique.

Chapter 3 will focus on the law as a social institution with its own underlying normative principles, and in particular on the relationship between law, autonomy and freedom. This will involve the adoption, and adaption, of Honneth's understanding of law, including his account of legal pathologies, but also seeks to develop his account by arguing for a more empirically focussed engagement with the law. In particular, the Chapter will set out the foundations for critical theory of law built around the concept of juridification.

[26] Honneth, *Freedom's Right*, 3-10.

Chapters 4 & 5 will apply the approach of normative reconstruction of law to examine the phenomenon of preventive justice. This involves an examination of the current transformation that is underway within the law as a result of social pressure to address a heightened awareness and sensitivity to the significance of risk, particularly in the context of the criminal law.

Chapter 4 will start by setting out the traditional approach of the law to manage the social coordination challenge posed by the problem of serious crime. It will then focus on two theoretical efforts to critically examine the legitimacy of preventive justice. The first approach (Ashworth & Zedner) attempts to rely on a traditional understanding of the normative principles of the law to justify coercive preventive measures. The second approach (Klaus Günther) undertakes social analysis to explain the change in meaning of key normative principles that are relied upon to justify preventive justice. While both approaches acknowledge the existence of legitimate social and normative demands underpinning the growth of preventive justice, the spread of coercive preventive measures is largely conceived of as a negative, yet at the same time almost unavoidable, development. The Chapter will conclude by setting out a different theoretical approach, one that involves utilising the concept of juridification to undertake a normative reconstruction of law.

In Chapter 5 the theoretical approach outlined in the final section of Chapter 4 will be applied to preventive justice, by means of a detailed exploration of the development of a specific coercive preventive measure, being the post sentence detention or supervision of high risk offenders. The Chapter will examine this measure in an Australian context but will then shift focus to the law in relation to post sentence measures in Germany. In both settings, the paradoxical effects of political, legislative and judicial responses which, under the compulsion of a ‘legal pathology’, approach the issue of legitimacy solely from the perspective of traditional legal norms, and in particular the idea of liberty (or legal freedom), become clear.

Chapter 6 will take up the possibilities that emerge from the empirical analyses in Chapters 4 and 5 and will attempt to articulate the basis for assessing the legitimacy of a post sentence coercive preventive measure by way of identifying the normative

potential of a concept of rehabilitation. Drawing on the work of McNeil[27], it will be argued that a reimagined framework for rehabilitation, expanded by reference to Honneth's recognition-theoretic concept of autonomy, and using Anderson's concepts of autonomy gaps[28], can provide the normative underpinnings required.

Chapter 7 will recap the main arguments of the thesis by way of conclusion.

[27] Fergus McNeill, "Four forms of 'offender' rehabilitation: Towards an interdisciplinary perspective", *Legal and Criminal Psychology* Vol 17, no. 1, (2012): 18-36; Lol Burke, Steve Collett and Fergus McNeill, *Reimagining Rehabilitation: Beyond the Individual* (New York: Routledge, 2019).
[28] Joel Anderson, "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 49-68.

Chapter 2

Philosophical frameworks: Axel Honneth's Critical Theory

2.1 Introduction and overview

> There is evidence that there is growing public support for more punitive approaches to those convicted of violent crimes and governments are keen to be viewed as tough on law and order. In this context, the creation of indefinite and preventive sentencing regimes is understandable…[29]

> One of the motivating thoughts behind our work is the contrast between the extensive research and writing on 'theories of punishment' and the virtual absence of equivalent normative debate about preventive measures.[30]

These two quotes frame the problem that this thesis seeks to address. On the one hand, as a social fact, there are powerful imperatives driving the growth of preventive justice. At the same time, there is a deficiency in the extent to which this growth is subject to theoretical scrutiny at the normative level. In Chapters 4 and 5 of the thesis there will be an examination of attempts by legal theorists, legislators and jurists to evaluate preventive justice in terms of its capacity to reconcile the social pressure for increased reassurance and protection of the community from the risk of crime with the already achieved and understood normative principles governing the law. This Chapter (and the next) provides an alternative philosophical framework in response to the problem identified above: one that allows for a critique of the other attempts considered in Chapters 4 and 5; and one that can move beyond the limitations of the current debate and identify a plausible account of the normative basis of preventive justice

This philosophical framework to be set out in this Chapter is based on Honneth's program for a Critical Theory of society, and in particular a form of social analysis he calls 'normative reconstruction'. According to Honneth, the key distinction between

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[29] Bernadette McSherry, "Indefinite and preventive detention legislation: from caution to an open door," *Criminal Law Journal* Vol 29, no. 2, (April 2005): 94.
[30] Ashworth and Zedner, *Preventive Justice*, 13.

Critical Theory and other theoretical approaches in contemporary moral or political philosophy is that the former takes seriously the norms, values and practices that have social reality. Unlike theoretical approaches that attempt to independently derive principles from ideal or fictive situations, and then apply them to social practices, Critical Theory provides a framework for investigating social conflicts by reference to the norms immanent to the conflicts themselves and which are embedded in historically instituted social infrastructure.[31] Such an approach commends itself to critical inquiry into the normative basis of preventive justice, where social transformations are giving rise to normative claims for reassurance and community protection that come into conflict with the existing norms and values governing the criminal law; indeed it will be argued here that only an approach which proceeds by way of social analysis can explain, evaluate and point beyond the current lacuna that exists between the manifestation of preventive justice and its normative justification.

Section 2.2 will set out the features of a critical social theory that proceeds by way of a 'normative reconstruction'. Section 2.3 explores in more detail the normative basis for critical theory by examining Honneth's concept of autonomy, the fundamental interdependence between autonomy and the institutionalisation of social practices, and the idea of social freedom. Section 2.4 will examine how this normative basis can operate as a foundation for critique. This will involve consideration of the concepts of 'injustice', where a member or members of society are wrongly excluded from participation in social practices, and 'social pathology' which occur when social practices prevent a person from acquiring an understanding of the meaning of the norms of the relevant social institution.[32] Section 2.5 will briefly outline how this approach will be used in the examination of preventive justice undertaken in Chapters 4 and 5.

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[31] Honneth, *Freedom's Right*, 1-11; Axel Honneth, "Reconstructive Social Criticism with a Genealogical Proviso: On the Idea of "Critique" in the Frankfurt School," in *Pathologies of Reason: On the Legacy of Critical Theory*, trans. James Ingram (New York: Columbia University Press, 2009), 47; Nicholas H. Smith, "Introduction: A Recognition-Theoretical Research Programme for the Social Sciences," in *Recognition Theory as Social Research: Investigating the Dynamics of Social Conflict*, ed. Shane O'Neill and Nicholas H. Smith (Palgrave Macmillan, 2012), 5.

[32] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press, 1995), 2; Honneth, *Freedom's Right,* 86, 128.

2.2 Normative reconstruction

> It [critique] is the simplest of all things...But it is also the utterly impossible thing, because it presupposes a standpoint removed, even though by a hair's breadth, from the scope of existence, whereas we all know that any possible knowledge must not only be first wrested from what is, if it shall hold good, but is also marked for this very reason by the same distortion and indigence from which it seeks to escape.[33]

According to Honneth, much contemporary social critique still seeks to simply avoid the challenge identified by Adorno above, if not by reference to a metaphysical ideal or to principles derived from the operation of pure reason, then more often by appealing to a proceduralist justification of norms. These approaches typically specify a number of principles that would necessarily be agreed to under ideal conditions, and then seek to apply them to critique social practices.[34] As will be demonstrated in Chapters 4 and 5, such an approach, which Honneth describes as 'constructivist', can suffer from the dual problems of unknowingly reinscribing existing social norms and values, or requiring such an abstraction or distancing from the lived experience of social actors that the principles thus derived are empty, rigid or even open to manipulation. These consequences are heightened as the meaning and institutionalisation of the relevant principles change over time and across social context; accordingly, the deficiencies of constructivist approaches appear more clearly in situations of social change. In particular, in Chapter 4 it will be shown how a constructivist approach to deriving normative principles in an attempt to justify preventive justice can, at best, generate a number of principles that lack content; in Chapter 5 it will be seen how such principles can lead to perverse outcomes.

By contrast, Critical Theory has always taken as its primary subject matter the existing conditions of the social world.[35] From the outset, Critical Theory has

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[33] Theodor Adorno, *Minima Moralia: Reflections from Damaged Life,* trans. E.F.N. Jephcott (London: Verso, 1987), 247.

[34] Axel Honneth, "Reconstructive Social Criticism with a Genealogical Proviso," 47.

[35] The history of the development of Critical Theory is well documented in a number of sources and will not be recounted here in any detail. A comprehensive history can be found in Rolf Wiggershaus, *The Frankfurt School: Its History, Theories, and Political Significance,* trans. Michael Robertson (Cambridge, MA: MIT Press, 1994). In relation to the first generation, see also Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research* (Berkeley: University of California Press, 1996).

attempted to identify a moment of transcendence from within social reality, a standard that constitutes a justified rational claim within the criticised relations themselves.[36] This is what it means for critique to be immanent.[37] Honneth has continued to refine this idea, more recently distinguishing two forms of 'immanent' critique as follows:

> ...immanent critique, which means you take up already existing normative beliefs; you believe these are not realized and… you criticize the existent society with reference to these somewhat already existing normative beliefs. I am defending a third model. It would be necessary to show that certain normative ideas and principles are already institutionalized, which means that they are not only accepted but that they are somewhat already informing our practices. But at the same time, we are not fully explaining the normative content of what we are doing. I would call this 'internal critique'. [38]

The latter, 'internal' version is a more practically engaged form of critique, in the sense that the social reality of norms is given greater weight than normative beliefs which may be, for example, constructively justified but which do not in fact play the role in social coordination that they may lay claim to. It is this more fundamental engagement with existing social practices that Honneth regards as characteristic of his approach of 'normative reconstruction'.

Central to the approach of normative reconstruction is that it involves a detailed analysis of the structure of society as it exists and is reproduced – this is what

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[36] Axel Honneth, "Labour and Recognition: A Redefinition," in *The I in We: Studies in the Theory of Recognition,* trans. Joseph Ganahl (Cambridge: Polity Press, 2012), 62-63.

[37] In many ways the history of Critical Theory is the attempt to formulate a form of critique that satisfies the requirement of 'immanence': each successive generation has spent considerable energy addressing the problem of locating the necessary 'standpoint' for critique within social reality. This can be seen for example in Horkheimer's seminal essay, "On Traditional and Critical Theory," in Max Horkheimer, *Critical Theory: Selected Essays*, trans. Matthew J. O'Connell (New York: Continuum, 1986), 188-243, through to the chapter on Adorno & Horkheimer in Jurgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures,* trans. Frederick Lawrence (Cambridge: Polity Press, 1990), 106-130, and subsequently the analyses by Honneth himself, first in Axel Honneth, *The Critique of Power: Reflective Stages in a Critical Social Theory*, trans. Kenneth Baynes (Cambridge, MA: The MIT Press, 1991) and later again in Honneth, *Pathologies of Reason*. For a useful overview relevant to the context of this thesis, see Joel Anderson "Situating Axel Honneth in the Frankfurt School Tradition," in *Axel Honneth: Critical Essays,* ed. Danielle Petherbridge (Leiden: Brill, 2011), 31-57.

[38] Axel Honneth, "Recognition and Critical Theory today: An interview with Axel Honneth," interview by Gonçalo Marcelo, *Philosophy and Social Criticism* Vol 39, no. 2 (January 2013): 216. See also Honneth, *Freedom's Right*, 3-11.

grounds the approach in social reality. However, the moment of transcendence is also found in this same process. For Honneth, the reproduction of society is a process that depends on shared values and ideals.[39] He claims that all social orders must be able to legitimate themselves – he refers to this as a 'transcendental necessity' – in order for society to function.[40] It is this *normative* basis of social integration that is the key to his method; a moment of validity that is built in to the institutionalisation of social practices.

The task (and challenge) of normative reconstruction is that it must engage in detailed social analysis in order to determine the values and ideals that are actually present in spheres of action. This involves an examination of both the empirical reality of social relations ('facticity') as well as the normative principles that are called up to legitimate these social practices ('validity').[41] For example, in his analysis of the sphere of personal relationships, Honneth considers the way in which 'friendship', 'intimate relationships' and 'families' have over time developed in ways that have allowed the stabilisation of social practices that provide for a particular type of freedom. For Honneth, developments in the sphere of personal relationships have gradually changed the meaning of friendship from a bond based on considerations of economic advantage or the need for social alliances, usually within narrowly prescribed social classes, to one based on affection and mutual consideration.[42] In his analysis, he traces the origin of modern friendship to changes that were identified in Scottish moral philosophy and through the Romantic period; however it was not until after World War Two that the possibility of a form of personal relationship based on mutual consideration, to the exclusion of 'selfish calculations', became widespread.[43]

Importantly, however, this process of reconstruction cannot rely simply on identifying historical changes. The potential (and need) for legitimisation that forms an unavoidable part of the process of social reproduction is what connects social integration and normativity. Normative reconstruction functions by detecting and

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[39] Honneth, *Freedom's* Right, 3; Christopher F. Zurn, *Axel Honneth: A Critical Theory of the Social* (Cambridge: Polity Press, 2015), 191.

[40] Honneth, *Freedom's Right*, 4.

[41] Honneth, *Freedom's Right*, 128.

[42] Honneth, *Freedom's Right,* 132.

[43] Honneth, *Freedom's Right,* 138.

articulating any disparity between the representation of shared values and ideals within each institutionalised sphere and the existing social practices which are understood to embody those values, including where there has been a shift in the meaning of these norms over time and across social contexts.[44] So, for Honneth, the form of modern friendship is one which allows the experience of self-articulation, an ability to share our feelings and experiences without reservation. Accordingly, social practices in the area of friendship can be evaluated by reference to the ideal of this complementary role obligation that supports this form of freedom. Here normative reconstruction can point out that the institution of personal friendship is under pressure from, for example, increasing demands to succeed in the workplace under conditions of increased individualisation; these developments see the return of the economic imperative and the requirement to form social alliances to ensure career progression, reintroducing an instrumentalised form of personal relationship that, from the perspective of the normative principles of friendship, is illegitimate.[45]

This last point reinforces that normative reconstruction is explicitly a *critical* theory. It does not take a neutral position (it is not merely descriptive) in relation to its subject matter, but rather seeks to evaluate social reality. The aim of Critical Theory is to show that the world can be other than it is - this is the essence of the moment of transcendence. However, this is an ongoing process of engagement rather than the production of an image of an ideal end state. The continual process of examining the practices and institutions that make up social reality introduces into normative reconstruction the idea of a learning process; new experiences and potentials will always emerge to challenge the current understandings of normative principles, and so expose existing mechanisms of social coordination to the requirement to transform to more completely fulfil the norms that justify them. Normative reconstruction can intervene in this process of social transformation to indicate how new modes of integration can enhance (or detract) from the normative potential of the values and ideals governing these social practices and the institutions that embody them.

[44] Honneth, *Freedom's Right,* 8-9; Honneth, "Reconstructive Social Criticism," 53.
[45] Honneth, *Freedom's Right,* 140-141.

2.3 The normative basis of critique: autonomy and social freedom

> Of all the ethical values prevailing and competing for dominance in modern society, only one has been capable of leaving a truly lasting impression on our institutional order: freedom, ie *the autonomy of the individual.*[46]

While the normative structure of social integration provides the basis for an analysis of social institutions in terms of the relationship between the social practices and the norms governing those practices (and which are called upon to justify them), this does not yet provide any normative criteria for an evaluation of those norms, beyond some form of logical consistency. For example, returning to the example of friendship, there is nothing inherent in the structural distinction that can be drawn between the social practices of friendship based on economic advantage and those based on complementary role obligations that means the latter should be preferred to the former. However, the purpose of critique is not simply to understand and describe the existing norms and principles governing social interaction, but to evaluate their validity. Critique requires a normative component.[47]

For Honneth, it is the concept of freedom that provides the criteria for the normative legitimacy of the social order.[48] Further, he argues that in the modern world freedom can only be understood by reference to the idea of autonomy; it is autonomy that provides the link between the individual subject and the social order, connecting the value of individual self-determination to the normative framework of society as a whole.[49] Accordingly, the normative basis of critique is encapsulated in the evaluation of the extent to which the social order ensures the conditions for autonomy.[50]

However, although autonomy is widely held to be of fundamental normative significance in modernity, it is itself a contested concept. Arguably, it remains the case that the predominant theoretical model of autonomy is one that involves some account of the subject as a free standing individual who is the bearer of abstract

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[46] Honneth, *Freedom's Right,* 15 (emphasis added).
[47] Honneth, "Recognition and Critical Theory Today,": 213. Here Honneth describes his approach as a "social theory with a certain moral-practical intention".
[48] Honneth, *Freedom's Right,* 16.
[49] Honneth, *Freedom's Right,* 15-18.
[50] Honneth, *Freedom's Right,* 16.

rights.[51] Even where such accounts take seriously the social, embodied, historical and relational aspects of an individual, the emphasis nevertheless remains on the normative significance of the subject taking up the attitude or perspective which can be labelled the 'moral point of view'. Typically, the moral point of view entails the following features: a commitment to universality, impartiality (even with respect to one's own feelings), that moral insight is epistemologically significant (cognitive), that moral validity transcends mere conventionality, that moral action involves compliance with principles provided to oneself without external constraint, and that morality (what is 'right') is compatible with a plurality of views about what is 'good'. Additionally, coupled to the development of this formalist (or principle based) concept of morality has been the trend to radically individualise the idea of subjectivity. The influence of various schools of thought, starting with Romanticism and Utilitarianism, led to the image of a subject apart, seeking to define his or her own identity in opposition to his or her social environment. In the 20th century, it was psychology in particular that further promoted the idea of individual self-realisation as a form of escape from limitations imposed both externally and those internalised by the subject in the process of socialisation. Accordingly, autonomy has come to be associated with the idea of an individual free to act in accordance without external constraint in the furtherance of their individual self-realisation (albeit with various concessions to needing to respect the similar freedom of others to do the same).

This common understanding of autonomy has however been the subject of extensive philosophical critique, starting with the contemporaries of Kant[52] through to the 'crisis' of subjectivity in the 20th century.[53] In particular, these philosophical critiques have shown that subjectivity cannot be explained or understood without acknowledging that it is fundamentally situated, both within a physical body and within a language. The consequence of this embeddedness is that every thought or action is influenced by both unconscious drives and forces as well as by pre-existing systems of meaning

[51] See John Christman and Joel Anderson, "Introduction," in *Autonomy and the Challenge to Liberalism: New Essays*, ed. John Christman and Joel Anderson (Cambridge: Cambridge University Press, 2005), 3, and related footnote to that text.

[52] Dieter Henrich, "The Origins of the Theory of the Subject," trans. William Rehg, in *Philosophical Interventions in the Unfinished Project of the Enlightenment*, ed. Axel Honneth, Thomas McCarthy, Claus Offe, and Albrecht Wellmer (Cambridge, MA: The MIT Press, 1992), 37.

[53] Albrecht Wellmer, "The Dialectics of Modernism and Postmodernism: The Critique of Reason Since Adorno" in *The Persistence of Modernity*, (Cambridge: Polity Press, 1991), 57.

that the subject can neither be fully aware of, nor can control. Arguably, from a theoretical perspective, this critique means that the individualistic understanding of autonomy has been effectively discredited even though, as will be seen in subsequent Chapters, this conceptual model of autonomy and freedom remains dominant in many disciplines, including the law. However, from a philosophical perspective, the question is how, in the face of this critique, it is possible to maintain a meaningful concept of autonomy at all, especially where this idea is meant to carry the entire burden of the normative legitimacy of the social order.

In his short essay 'Decentred Autonomy: The subject after the fall' Honneth answers this question. The essay highlights the need for precision when considering the implications of the critique of the traditional concept of autonomy. Although this critique has been seen as responsible for triggering a crisis in the concept of subjectivity and the understanding of the normative ideal of autonomy, Honneth points out that there is a pathway out of this predicament other than abandoning the concept of autonomy. In short, Honneth's proposal is to recognise the 'subject-transcending' powers of both inner psychic drives and language as being constitutive conditions for the formation of the subject, rather than as limitations.[54]

Honneth begins by describing three layers of meaning in the concept of autonomy, all which have their roots in Kant, which he says have not always been clearly articulated. The first aspect refers to classical moral autonomy - the idea of an individual who makes moral determinations in accordance with rational principles without reference to personal feelings or inclinations. The second refers to political autonomy - the right of self-determination of a moral or legal actor. (As will be discussed in Chapter 3 and subsequently, this aspect of autonomy is central to the modern self-understanding of moral and legal legitimacy - legal relations are regarded as legitimate if they respect the autonomy of the subject by enhancing the social space for individuals to act free from interference and if they are the expression of an actual or hypothetical act of democratic decision making.) The third element of the concept of autonomy however refers to the capacity of an individual to

[54] Axel Honneth, "Decentred Autonomy," in *Disrespect: The Normative Foundations of Critical Theory* (Cambridge: Polity Press, 2007), 183.

determine the course of their own lives, to construct an individual biography in light of their own needs and preferences: autonomy as a form of practical self-realisation.

Honneth argues that the critique of subjectivity need not disturb the first aspect, the idea of moral autonomy, provided that it is limited to the normative ideal of the justification of moral judgments. That is, if properly confined to the domain of moral judgments, and not conflated with an ideal of the subject's relation-to-self more generally, the critique of the subject does not disturb this normative ideal. Similarly, to the extent that the second aspect, political-legal autonomy, is understood as a claim for a social guarantee for the exercise of autonomy, as an assignment of rights rather than as being a property of the subject itself, this idea is also undisturbed. However, in the third aspect, the area of 'personal' autonomy, the critique of the subject calls for a response

> According to classical conceptions the individual subject must possess both a particular awareness of its personal needs and a specific knowledge about the meaning attributed to its actions if it is able to organize its own life freely and without constraint. Thus, two qualities of human action are presupposed: the transparency of our desires and the intentionality of meaning, whose attainability can no longer be readily claimed to be a consequence of the modern critique of the subject. That is why today, it is this third meaning of individual autonomy that requires theoretical correction or revision if it is still to be regarded as a normative ideal. The personal abilities indicated by the idea of personal autonomy in the sense of unconstrained self-determination have to be formulated theoretically in such a way as to not constitute excessive demands upon human beings in view of the modern decentring of the subject.[55]

Honneth begins the task of reconstructing this third dimension by recourse to a theory of intersubjectivity. He argues that it is only through the insight into the intersubjective constitution of the subject that a convincing account can be made of the concept of autonomy that both preserves a normative content and can satisfactorily account for the facts that some of the subject's internal drives and desires will always remain hidden from consciousness, and that the subject is formed

[55] Honneth, "Decentred Autonomy," 185.

within a pre-existing language and does not have full intentional control over the meaning ascribed to his or her actions.

Honneth derives from Mead and the early Hegel the idea that an individual can only ever achieve a conscious sense of its own identity from the perspective of an engaged other. That is, a subject must learn to identify itself as a participant in interaction. Honneth describes a process whereby the growing child first identifies itself from the perspective provided by the concrete other in the form of the primary caregiver. Gradually, the concrete other is generalised into the various perspectives that can be adopted with respect to the subject by other members of a shared language community. It is through this shared language that the subject learns to experience itself and its environment. What is significant is that it follows from this structure of self-consciousness that the subject's understanding of itself is derived from its participation in a broader community.

Honneth also, however, following Mead, asserts that there always remains within the subject a surplus – the impulsive and creative centre, the reserve of psychic drives and impulses that never reach the level of consciousness.[56] For Honneth, the tension that exists between these two elements, the unconscious yet present impulses which serve as an affective 'commentary'[57] on the subject's social actions, is in fact the key to a concept of autonomy that is both realisable and of normative value. It is this internal process that Honneth views as the engine of identity formation.

> It is from this interplay of unconscious surges and conscious, linguistically mediated experience that there develops in every subject a tension that drives it into a process of individualization; for in order to do justice to the affectively represented demands of its unconscious, the subject has to employ the forces of consciousness in order to attempt to expand its social latitude for action in such a way that it can present itself intersubjectively as a unique personality.[58]

The next stage in Honneth's argument is to engage with the consequences of this account of the structure of identity formation to identify how the concept of autonomy can be reconstructed in order to retain a normative content. This involves the

[56] Honneth, "Decentred Autonomy," 187.
[57] Honneth, "Decentred Autonomy," 187.
[58] Honneth, "Decentred Autonomy," 187.

identification of the abilities and properties which are required by the subject for the organisation of their drives, their life as a whole, and the moral demands of the social world. It will be these abilities and properties that form the basis of a decentred concept of autonomy.

Where the classical notion of autonomy called for the subject to become conscious of his or her needs, Honneth instead identifies the ability of the subject to bring his or her needs and desires into language as essential. While it can never be possible to fully articulate all the subject's needs and desires, as there always remains a reserve of unconscious and creative impulses which according to Honneth are structurally external to the conscious mind, the subject can learn to 'fearlessly articulate impulses to act'. In the concept of decentred autonomy, it is the goal of the subject to engage in an ongoing disclosure of these impulses that is to define an autonomous relation to the subject's inner self.[59]

> A person who is autonomous in this sense is not only free from psychical motives that unconsciously tie him or her to rigid, compulsive behavioural reactions, but is also in a position to discover new, still undisclosed impulses to act in him - or herself and to make reflective decisions about the matter.[60]

This account of the relation to inner self already points to the requirements of intersubjective support. The ability to fearlessly disclose internal impulses to act depends on a level of self-confidence that, as will be shown, arises in the subject only from the experience of a relationship of love or care from concrete others. Further, the process of unending disclosure also depends on the quality of the shared language in which the subject can attempt to creatively disclose his or her impulses. The openness of the prevailing language to innovative or poetic use is a limit on the capacity of the subject to express his or her inner nature.

The second element of the concept of decentred autonomy is a reconstruction of the idea found in the classical idea of the subject's relation or his or her life as a whole. The project of self-realisation in the classic idea of autonomy called for a subject to be able to identify or impose on his or her life's activities a single coherent biography.

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[59] Honneth, "Decentred Autonomy," 189.

[60] Honneth, "Decentred Autonomy," 189.

This idea of imposing 'a' meaning to one's life is undermined by the understanding of the ongoing process that is involved in the subject's relation to self. The fact that within the subject there arises a 'multitude of unused possibilities for identity'[61] instead leads to a reconstruction of this relation to one's life as a whole as an ability to present one's life coherently as one's own by reference to a set of ethical values.

> The subject is able to present its life as a coherent context, such that its disparate parts appear as an expression of the position reflectively taken by one and the same person. Such a level of reflection is tied to an ability to justify one's own decisions about life from the meta-perspective of evaluating wishes and impulses to act, for it is only when I am able to view and organize my primary needs in the light of ethical values that I can claim to be capable of autonomously - that is reflectively – taking a position on my own life.[62]

Although in this essay Honneth does not at this point highlight the intersubjective vulnerability of this form of self-relation, it is not difficult to see why it is necessarily dependent on the availability of a supportive community: a social group that both values the contribution of the subject's 'life projects', and in which the subject's own characterisation of his or her identity through time can be articulated in a shared language in terms that reflect a positive or meaningful perspective on such an identity.

The third dimension in which the classical idea of autonomy is decentred relates to the subject's relation to the social environment. Here, the traditional idea of the requirements of the 'moral point of view', the impartial and rational assessment of duty and the ability to act in accordance with norms that are evaluated as universalisable for that reason alone, requires extension. In particular, Honneth suggests that although the ability to consider the moral demands of the social environment in a reflective manner remains a key feature of this dimension of autonomy, this understanding must be supplemented by incorporating the consequences of the sense of autonomy developed in the other two dimensions. That is, the recognition by the subject of the intersubjective dependence of the ability to articulate its own inner drives, and to reflectively bring these together into a

[61] Honneth, "Decentred Autonomy," 190.
[62] Honneth, "Decentred Autonomy," 190.

meaningful ‘life as a whole’, allows for a deeper understanding of the similar experiences posed by other participants in interaction. Honneth sees the consequence of this moral insight as the need to supplement the ‘moral point of view’ with a ‘practically effective contextual sensitivity’.[63]

> A person is to be regarded as morally autonomous only if he or she knows how to apply these [universalist] principles responsibly and with affective sympathy for, and sensitivity to, the concrete circumstances of individual cases.[64]

Accordingly, the idea of decentred autonomy highlights that unconstrained and free self-determination requires specific abilities in relation to a subject’s own drives, the organisation of a life and the moral demands of the social environment.[65]

> The classical goal of making our needs transparent must be replaced by the notion that we are able to articulate our needs through language; the idea of biographical consistency should be replaced by the notion of a narrative coherence of life; and, finally, the idea of an orientation toward principles has to be supplemented by the criterion of moral sensitivity to context.[66]

This leads Honneth to the following definition of autonomy

> Only a person who is in a position to disclose needs creatively, to present his or her entire life in an ethically reflected way, and to apply universalist norms in a context sensitive manner can be regarded as an autonomous person…[67]

Having outlined the idea of decentred autonomy as a set of abilities, Honneth points out an inevitable consequence of such an understanding

> The different abilities are not necessarily founded on one another, rather they can be in a relation of tension…indeed it may well be typical of our epoch that in the individual interest of personal autonomy, only one of these abilities is

[63] Honneth, “Decentred Autonomy,“ 191.
[64] Honneth, “Decentred Autonomy,“ 191.
[65] Honneth, “Decentred Autonomy,“ 188.
[66] Honneth, “Decentred Autonomy,“ 188.
[67] Honneth, “Decentred Autonomy,“ 191.

> cultivated at the expense of the other two, a circumstance we could then designate one–sided autonomy. This leads to the theoretical conclusion that one can speak of the individual autonomy of a person in the complete sense of the term only if all three of these abilities are present.[68]

If autonomy is understood as the product of dynamic process in which distinctive capacities are developed in the course of constructing a practical self-relation in three dimensions, it must also be acknowledged that it is achievable only under socially supportive conditions. This understanding is more radical than an acceptance that autonomous agents value highly their key relationships or that they orient themselves in the social environment on the basis of dialogically or procedurally obtained agreement. Rather, the insight that is at the basis of Honneth's account of autonomy is that subjects are fundamentally socially vulnerable because the constitution of the autonomous subject is itself dependent on relations of mutual recognition. The competencies required of an autonomous subject involve being able to sustain a corresponding relation to self which in turn is dependent on being recognised by those whom one also recognises.

Honneth identifies three independent practical self-relations, by which is meant a bond between a distinctive type of ability and form of recognition:

- an individual whose needs and desires are of unique value, recognised in relationships of care and love
- an individual who is ascribed moral (and legal) accountability, recognised in relationships of mutual respect
- an individual whose capabilities are of constitutive value to the community, recognised in relationships of solidarity and loyalty.[69]

These three forms of mutual recognition are fundamental to the development of a subject that possesses the abilities and properties of an autonomous agent. Experience makes clear that these forms of mutual recognitions are themselves both

[68] Honneth, "Decentred Autonomy," 191-192.
[69] Axel Honneth, "Between Aristotle and Kant: Recognition and Moral Obligation," in *Disrespect*, 138-139. As will be seen later, Honneth in his more recent writings modifies his understanding of this third self-relation, however what remains central is that the contribution of the individual is regarded by the community as having worth.

fragile and demanding; understanding how such relations of mutual recognition can be created and maintained requires nothing less than an account of their role in social coordination and the reproduction of society. It is this structure which explains how autonomy provides the link between the individual subject and the social order.

The everyday demands of social coordination in a complex society, both in terms of the requirements for its material reproduction and for cultural socialisation of actors, pose significant challenges. The fact that modern societies involve large scale, highly sophisticated forms of social integration and action coordination in a heterogeneous population points to the existence of fundamental shared meanings, values and norms that make the stabilisation of social interaction possible in the first place.[70] Honneth (following from Habermas) employs the concept of the 'lifeworld' to name this store of unproblematic (in the sense of taken for granted, almost pre-conscious) background beliefs that provide the context for our interactions. It is only within a context of this shared 'massive pre-understanding'[71] of social actors that social interaction can in fact occur. Understanding what Honneth has to say about the way in which relationships of mutual recognition operate in society, as the mediating process between key normative principles and institutionalised social practices, depends on understanding how the lifeworld is structured and reproduced (though Honneth himself does not undertake an explanation of this in any real depth).

As the background for all social interaction, the lifeworld is experienced as a type of implicit, holistically structured knowledge which is intuitively accessible but in a sense unknowable. It informs the contextual understanding of participants in interaction, however it is only when addressed or problematised that an issue is raised out of the facticity of the lifeworld and can become subject to question or evaluation. Although the lifeworld is holistically structured, interaction always arises in concrete cases according to the interests or problems confronting social actors at that time and place, within a specific situation. For example, a family may be about to prepare the evening meal. This mundane task nevertheless can involve a significant amount of

[70] Honneth refers to this as the 'first premise' of a 'theory of justice as an analysis of society'; Honneth, *Freedom's Right,* 4. See also Jurgen Habermas, *The Theory of Communicative Action Vol 2: Lifeworld and System: A Critique of Functionalist Reason,* trans. Thomas McCarthy (Cambridge: Polity Press, 1987), 119-152.
[71] Jurgen Habermas, "A Reply," in *Communicative Action: Essays on Jurgen Habermas' The Theory of Communicative Action,* ed. Axel Honneth and Hans Joas, trans. Jeremy Gaines and Doris L. Jones (Cambridge: Polity Press, 1991), 244.

co-ordination, some of which may involve explicit and specific consideration of the norms governing the situation (for example, ‘should we eat together as a family tonight’), whereas other elements may simply draw unreflectively on habits and practices within the family, such as role expectations of the actors in respect of the division of labour in preparing the food and cleaning up.

Each action situation arises within a segment of the lifeworld that is always pre-interpreted. In all cases, situation definitions are necessary for prescribing issues of relevance to the interaction. These may be more or less explicit and are often only brought to attention when there are problems experienced in resolving the task successfully. In addition, generally, situation definitions remain open and fluid. In the above example, there will come a time in the life of the family that different expectations are held in respect of the involvement of growing children in the preparation of meals. This change in the definition of the situation requires social actors to respond to this new need for co-ordination. This can potentially lead to conflict, but in the majority of cases social actors can draw on other resources, such as personal attributes, norms and values, or shared cultural meanings to resolve the situation without violence. Continuing with the above example, it is not difficult to imagine that a family seeking to reflexively co-ordinate the task of involving a teenager in preparing a meal could appeal to values or norms such as ‘sharing the load’ or ‘you are part of this family’, or to the goal of developing specific personality traits such as ‘becoming self-sufficient’.

It is through social interaction that the symbolic dimensions of the lifeworld are raised up and put into question in specific contexts. Feelings, values and meanings that are used to interpret a situation can be challenged in respect of their relevance or validity to the coordination task at hand. The manner in which the task or problem is resolved can either reinforce or reinscribe the symbolic reserves of background beliefs, values and experiences in the lifeworld or, alternatively, undermine the legitimacy that was derived from their mere facticity, potentially leading to changes in the way in which social practices are understood and organised. In this way social interaction not only

draws on the resources of the lifeworld but is also the mechanism through which the lifeworld is reproduced.[72]

Forms of interaction that have been stabilised by widely shared social practices form the basis of an institution. Institutions, as part of the lifeworld, provide a ready, pre-interpreted resource for social actors (meanings, norms, motivations) necessary for social coordination. The associated expectations that arise as social actors participate in these forms of interaction, have a type of solidity. That is, in general, social actors are not able to capriciously dismiss or withdraw from these practices without causing damage or suffering as a result. At the same time, however, these institutions are not so rigid that they are not open to internal change or adaptation to new circumstances.[73]

Whilst mutual recognition occurs at the level of social interaction, it is necessary to remember that this interaction occurs within the lifeworld and draws on its pre-existing horizon of personality structures, normative valuations and shared meanings.[74] Through the affirmation (or contest) of meanings and norms in social interaction, individual action reproduces and (re)legitimates these practices and the associated norms, values and meanings. Accordingly, in order for the abilities and properties necessary for autonomy to be effectively stabilised, the corresponding relationships of mutual recognition must themselves be embedded as part of the lifeworld, such that they inform the definition of action situations as well as provide a basis for justifying the manner in which subjects orient themselves to their fellow participants in interaction: that is, they must govern social practices.

> Every human subject depends essentially on a context of forms of social interaction governed by normative principles of mutual recognition…this tight intermeshing of recognition and socialisation gives rise in the opposite

[72] It is important to acknowledge that this reproduction of the lifeworld occurs in both the symbolic and the material dimension. That is, at the same time as issues are resolved symbolically there is often a material result of social interaction.

[73] Axel Honneth, *The Pathologies of Individual Freedom: Hegel's Social Theory,* trans. Ladislaus Lob (Princeton, NJ: Princeton University Press, 2001), 73.

[74] While the lifeworld cannot be conceived in its totality, it can be formally analysed according to the structures of culture (understood as a store of knowledge, beliefs and meanings), society (legitimate social orders, norms and values) and personality (acquired competencies and experiences) that social actors bring to a situation of social interaction. Habermas, *Theory of Communicative Action Vol 2*, 119-152.

> direction to an appropriate concept of society, which allows us to see social integration as a process of inclusion through stable forms of recognition…To this extent, the normative integration of societies occurs only through the institutionalisation of recognition principles, which govern, in a comprehensible way, the forms of mutual recognition through which members are included in the context of social life.[75]

In this respect different orders or spheres of recognition[76] have developed historically in response to changing demands for and patterns of social integration and reproduction.[77]

> The practical self-relation of human beings – the capacity, made possible by recognition, to reflexively assure themselves of their own competencies and rights – is not something given once and for all…this ability expands with the number of spheres that are differentiated in the course of social development for socially recognising specific components of the personality.[78]

In *Freedom's Right*, Honneth shifts his attention from the patterns of mutual recognition necessary for individual autonomy to the institutional structures of recognition in which individuals participate.[79] Honneth is primarily interested in those institutions in which he sees a single normative principle governing a relation of mutual recognition mediating the socialisation of individuals and the normative integration of society.

In an echo of the distinction he draws in relation to three dimensions of the ideal of autonomy in the essay on decentred autonomy discussed above, in *Freedom's Right* Honneth identifies three forms of freedom. The first, which he describes as legal freedom, embodied in the sphere of legal relations, picks up on the second dimension of the ideal of autonomy which focuses on the assignment of legal rights

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[75] Axel Honneth, "Redistribution as Recognition: A Response to Nancy Fraser," in *Redistribution or Recognition?: A Political-Philosophical Exchange,* by Nancy Fraser and Axel Honneth, trans. Joel Golb, James Ingram, and Christiane Wilke (London: Verso, 2003), 173.

[76] Honneth, "Redistribution as Recognition", 138; Joel Anderson and Axel Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism,* 131.

[77] Honneth, "Redistribution as Recognition," 138; Axel Honneth, "Rejoinder," in Petherbridge, *Axel Honneth: Critical Essays,* 403.

[78] Honneth, "Recognition as Redistribution," 138.

[79] Honneth, *Freedom's Right,* 61.

to individuals. Honneth's account of legal freedom will be discussed at length in Chapter 3, but, in brief, involves a social space secured by the legal system for individuals to explore and pursue their own ends without interference, and without any obligation of social interaction.[80] The second type of freedom, which he refers to as moral freedom, refers back to the first aspect of the ideal autonomy referred to above: an individual who makes moral determinations in the face of demands to comply with social obligations, in accordance with rational principles and without reference to personal feelings or inclinations.[81]

For Honneth, what is common to both legal and moral freedom is that, although they involve institutionalised relations of mutual recognition, these are of limited form. In these cases, the relationships of recognition are necessary to allow the exercise of freedom – by acknowledging the status of the persons as a legal or moral actor – but that act of recognition does not help the person achieve or realise their goals.[82] That is, while these forms of freedom (and the forms of mutual recognition that support them) allow an individual to act freely as a moral or legal actor, they do not promote the development of practical self-relations necessary for autonomy. This is because these forms of freedom function through allowing a subject to suspend or withdraw from the lifeworld contexts. For Honneth, although these forms of freedom are indispensable to understanding freedom in the modern world, they are insufficient, as they are in some sense parasitic on the existence of forms of mutual recognition necessary for the exercise of the competencies involved for the type of freedom involved in each sphere (the ability to reflexively consider our obligations and ends).[83] Indeed, it could be said that the central thesis of *Freedom's Right* is that legal and moral freedom must be understood as derivative from another form of freedom, social freedom.

Social freedom engages with the third dimension of the ideal of autonomy discussed above. For Honneth, social freedom is experienced where relationships of mutual recognition allow for a 'free interplay with our intersubjective environment'.[84] This

[80] Honneth, *Freedom's Right,* 65, 71-94.
[81] Honneth, *Freedom's Right,* 65, 95-120.
[82] Honneth, *Freedom's Right*, 124.
[83] Honneth, *Freedom's Right,* 123; Axel Honneth, "Replies," *Krisis: Journal of Contemporary Philosophy,* Issue 1 (2013): 42.
[84] Honneth, *Freedom's Right*, 60.

involves participation in social practices which require a reflexively shared understanding and acceptance of complementary role obligations.[85] Honneth, drawing on classical sociology, identifies three institutions that he says meet the requirements for social freedom: the institutions of personal relationships (friendship, love and the family), those that promote the mutual satisfaction of needs (the market – for labour and for consumption) and those that support the political public sphere (the democratic public sphere and the rule of law).[86] For Honneth, it is within these institutions that individuals can

> …understand our own actions as a condition for the fulfilment of others' aims. Under this condition, we can experience the realization of our intentions as something that is entirely unforced and thus 'free, because it is desired or strived for by others within social reality'.[87]

The concept of social freedom complements the normative principle of autonomy as the basis for critique because it focuses attention on institutional structures, and the extent to which they are organised in accordance with the normative principle that allows the exercise of freedom in that particular sphere.

As will be shown in Chapters 4 and 5, it is these broader and more sophisticated concepts of autonomy and freedom that are missing from the attempts by legal theorists and the law more generally to justify preventive justice. In short, those

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[85] Honneth, *Freedom's Right,* 65.

[86] Honneth, *The Pathologies of Individual Freedom,* 76; Honneth, *Freedom's Right,* 125-129; Honneth, "Brutalization of the social conflict,": 148. Honneth is principally concerned with institutions that are the primary embodiments of certain forms of recognition and which have historically achieved universal features, rather than with other forms of social organisations which are commonly considered to be 'institutions' and which embody forms of recognition - such as schools, prisons or the military. Honneth distinguishes these 'secondary' forms of institution on the basis that they do not (according to Honneth) of themselves embody a specific principle or model of mutual recognition and do not take on central or society wide tasks – rather they are sites where one or more of the three modalities are implemented and contested, and which have specialised clients and functions. However, Honneth does acknowledge that, ''A comprehensive analysis of society should not be content merely to normatively reconstruct those forms of recognition inherent to the central media of social reproduction. In order to grasp the pattern according to which subjects are integrated into society, we also require an analysis of the forms of recognition practiced in other public or private organisations. It would be fatal to simply assume that we will only find forms of recognition that fall below the normative level of general forms of interaction. The question as to which patterns of interaction should be implemented in such organisations is always decided in conflictual processes of social negotiation. The results cannot be anticipated theoretically but can only be explored with the aid of empirical investigations"; Honneth, "Rejoinder," in Petherbridge, *Axel Honneth: Critical Essays*: 404-405.

[87] Honneth, *Freedom's Right,* 124.

attempts tend to limit their perspective to that of the 'legal' dimension of the normative ideal of autonomy (which is frequently described using the term 'liberty') and correspondingly understand the normative content of freedom as exhausted by the concept of legal freedom. However, this limited understanding means that these approaches typically fail to recognise that in the absence of appropriately institutionalised patterns of mutual recognition, individuals will be unable to develop and maintain the practical capacities needed to be autonomous. As a result, the law is increasingly, in the name of liberty, making demands on the autonomy of certain individuals that exceed their capacity to comply. This is particularly the case with the type of people who are often the focus of preventive justice and who are the object of coercive preventive measures: individuals where there is a significant gap between their legitimately ascribed status as a legal actor, and both their level of inclusion or participation in social practices supportive of social freedom and their level of development of the practical self-relations necessary for autonomy. The more comprehensive, intersubjective understanding of autonomy and freedom that has been outlined in this section will become significant in Chapter 6, where an attempt is made to articulate the normative content of a concept of rehabilitation which is designed to address this 'autonomy gap': it will be argued there, that when the governing principle of rehabilitation is understood as the obligation to promote the development of the capacities that constitute individual autonomy and to make modifications at an institutional level to allow for social freedom, it can provide the basis for legitimising preventive justice.

2.4 Critique: injustice and social pathology

Section 2.3 examined the relationship between the normative content of an intersubjective concept of autonomy and the institutionalisation of social practices that create and sustain the relationships of mutual recognition necessary for the development of the practical self-relations that make up autonomy and which provide for the experience of social freedom. As outlined in section 2.2, normative reconstruction is a form of social analysis that examines the way in which social practices are institutionalised to identify the values and ideals that govern social coordination in each sphere of action and which are called upon by participants to legitimate them. This form of analysis counts as critique when it is focussed on identifying situations in which there are gaps or distortions between the meaning of a

norm and its institutional operation. This involves the identification of those processes of social reproduction which, rather than promoting the ongoing development of the rational and normative potential of society, instead lead to distortions in the fabric of society. In this section we will examine how identifying and explaining circumstances where the form of social organisation distorts or damages the institutionalised relations of mutual recognition necessary for autonomy and social freedom provides the foundation for normative reconstruction as a form of critique. In particular, it will be seen how the experience of suffering can be understood as a symptom of deficits of both normativity and rationality in the prevailing social order.[88]

The experience of suffering is used by Honneth to identify two distinct forms of wrong that can be subject to social critique. The first is the phenomenon of 'injustice' where a person is wrongfully excluded from relations or practices of social recognition. For Honneth, the experience of injustice can motivate forms of social conflict that have a moral or emancipatory interest and which can lead to the normative development of society. A second, and arguably more complex, form of critique is concerned with the identification of those situations where processes at work in the reproduction of the institutionalised social order undermine the capacity of social actors to understand or apply the governing norms and principles of a social institution. That is, as part of the ongoing development of society, the values and principles that govern social integration in the various spheres can be systematically distorted by changes in social practices. This dynamic is called a social pathology.[89]

As noted above, for Honneth, the major social institutions all embody a normative principle based on a relation of mutual recognition. Similarly, it can be recalled that for Honneth these principles are never perfectly realised, meaning social practices never completely fulfil the normative expectations of participants in interaction. Social conflict can arise where people feel they have been mistreated or disadvantaged in relation to their rightful claims for recognition that arise in accordance with the normative principle that is operative in each of these spheres of action.

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[88] Oskar Negt and Alexander Kluge, *Public Sphere and Experience: Toward an Analysis of the Bourgeois and Proletarian Public Sphere* (Minneapolis: University of Minnesota Press, 1993), xiii, xlvi-ii, 4.

[89] Honneth, *Freedom's Right,* 86.

The dependence on relations of mutual recognition means that the autonomy of persons is vulnerable to injury at an existential level.

> The fact that human subjects are at all vulnerable in their conduct with one another follows from the fact that they can construct and maintain a positive self-relation only with the help of agreeing or affirmative reactions on the part of other subjects.[90]

The vulnerability is one that potentially exposes an individual to a catastrophic collapse in identity by means of being disrespected.[91] In contrast to the experience of an unintended or accidental injury, the experience of injury that arises through disrespect is accompanied by feelings that are most often expressed using the language of shame, humiliation, dishonour and so on. What is significant is that each form of disrespect gives rise to an experience that has a cognitive and normative dimension. In this way the experience of disrespect is a 'pre-theoretical' fact that can generate the insight – both epistemic and normative – to ground critique.[92]

> The experience of a moral injustice is necessarily accompanied by a mental shock, inasmuch as it disappoints an expectation on the part of the subject, one whose fulfilment constitutes one of the conditions of its own identity.[93]

Each distinct form of mutual recognition has a correlative form of injury arising from forms of disrespect or insult.[94] Intentional physical or psychological injury inflicted on a person, such as torture and rape, can unmake an individual's world, shattering their ability to develop trust in themselves or others. The injury that is inflicted does not just involve pain but the experience of defencelessness, and in the extreme case a feeling of being deprived of reality altogether. The accompanying social shame leads to loss of self-confidence, and damage to the underlying trust in oneself necessary for autonomy.[95]

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[90] Honneth, "Between Aristotle and Kant," 134.
[91] Honneth, *The Struggle for Recognition,* 132.
[92] Honneth, "Between Aristotle and Kant," 72.
[93] Honneth, "Between Aristotle and Kant," 134.
[94] Honneth, "Between Aristotle and Kant," 135.
[95] Honneth, *The Struggle for Recognition,* 132.

The second dimension of disrespect is characterised as a denial of rights. It is important here to recognise that this is not simply understood as the legal or moral wrong of limiting freedom or refusing to acknowledge a legitimate claim. The significance of the form of disrespect that accompanies the denial of rights is not just the disappointment of an unmet expectation but the feeling of not enjoying the status of a fully-fledged citizen.[96] The most obvious examples arise in areas of discrimination. It is not just the wrong of being deprived access to a sphere of society, such as work or education, which causes injury. This form of harm operates at a more fundamental level, undermining the ability of a member of that group to confidently assert their claim to recognition in the face of social disrespect. The experience of exclusion inhibits the development of the ability to both put forward claims for equal treatment, but also the confidence in the person's ability to actively participate in the evaluation of the claims of others (as it gives rise to the feeling that 'my perspective doesn't count').

The third dimension of disrespect is experienced through the degradation of patterns of self-realisation. This form of disrespect, which can take the form of personal insult or vilification, group humiliation or through a failure to attribute value to achievements, robs a person of the ability to relate to their own life as something of value. The experience that accompanies this is one of alienation from the shared form of life, the common ethical and semantic horizon in which an individual can develop a meaningful life.

Although Honneth initially presents these forms of disrespect through paradigmatic examples, such as rape or discrimination, it does not take much more phenomenological analysis of typical, everyday experiences of injustice to identify that the forms of disrespect involved are seldom just one dimensional. The prevalence of 'bullying', for example, illustrates the interpenetration of different modes of disrespect in a generalised form of mistreatment. The typical workplace bully often employs physical or psychological torment alongside acts of (not always) petty mistreatment (such as differential allocation of responsibilities or rewards, and denigration of a co-workers contribution to the workplace, either in terms of devaluing their output or by ridiculing their 'non-work' personae). What the example of bullying

[96] Honneth, *The Struggle for Recognition,* 133.

can show us is the power of Honneth's analysis in terms of the capacity of disrespect to disable the development or exercise of autonomy; the experience of those being bullied is often described in terms of powerlessness and worthlessness, and is accompanied by a sense of being responsible for being victimised. One of the challenges in attempting to eliminate or respond to bullying is that the response of the victim – which can be a quite dramatic or even catastrophic collapse in the relation to self – is often seen as disproportionate to the specific acts that constitute bullying. However, once the significance of the institutionalisation of bullying culture on the patterns of recognition that are fundamental to the development of an autonomous identity is understood, the threat that bullying conduct poses can be more easily understood.

In *The Struggle for Recognition*, Honneth set out the internal links between the features of the experience of disrespect and the patterns of recognition that are damaged by different forms of injustice. In that book, the experience of disrespect pointed to the necessary structure of a form of ethical life that could support undistorted patterns of mutual recognition. Where injustice was experienced, both motivational impetus and cognitive insight was said to be generated that could, in appropriate cases, lead to a struggle for recognition which was to be an engine for the normative development of society. Although this basic model remains at the heart of Honneth's approach, the emphasis shifts dramatically in *Freedom's Right* with its greater emphasis on the role of social institutions. With the introduction of an explicit account of the institutionalisation of patterns of recognition, the broader critical potential of the experience of disrespect becomes visible and is integrated into Honneth's approach to justice.[97] What Honneth later makes clear is that institutions or practices of recognition are dependent on an integrative principle that has a normative content – such as the principles of love, rights and solidarity. The institutionalisation of practices of recognition necessarily involves the ongoing reinterpretation of the normative implications that are inbuilt to that principle.[98]

[97] See for example the transition that can be seen taking place in Axel Honneth, "Recognition as Ideology: The Connection between Morality and Power," in *The I in We*, 84. Here Honneth acknowledges that in order to accommodate the effect of misdevelopments on patterns of recognition, there needs to be a shift in the approach of critical theory to include an analysis of institutionally guaranteed recognition.

[98] Honneth, "Recognition and Critical Theory Today,": 211.

This shift is important because, arguably, the link between acts of disrespect and a normatively driven response was perhaps too direct in *The Struggle for Recognition*. This can be seen in the fact that the examples of injustice given in that text all highlight the experience of disrespect that arises *immediately* from social practices that involve the misapplication of an already legitimated norm. That is, the examples are all rather conventional instances of injustice. What is missing from this account is the function of a normative principle that can make intelligible the experience of suffering where no misapplication occurs (for example where the norm is currently interpreted in what will prove to be a foreshortened way – such as the historical exclusion of women from various aspects of social and political life) or where no social practices have yet developed that could embody the relevant norm (for example where intimate relationships on the basis of sexual or emotional motives had not yet appeared as a system of behaviour, such that a person being required to marry for material or practical reasons could not yet appeal to the principle of 'love' as normatively relevant to justify the choice of a partner).[99] In the absence of such a principle through which the experience of disrespect is mediated, it is not clear how experiences of disrespect can be 'shared' in way that can give rise to a social struggle (as opposed to an individual reaction).

> We know that if the relations of recognition emerging before us are to fulfil their constitutive function, they must presuppose a moral principle. Subjects can only ascribe each other a normative worth, in the light of which they are capable of valuing themselves, if both sides agree on a moral principle that can serve as a source of their reciprocal ascriptions and statements. No relation of recognition, not even those past relations in which subjects respected each other as *un*equals, can do with a mutually agreed upon norm.[100]

For Honneth, what is fundamental is that the principles of recognition have a normative surplus, an inbuilt demand that will never be fully institutionalised.[101] In this

[99] See the discussion in Honneth, *Freedom's Right,* 142-143.

[100] Axel Honneth, "The Fabric of Justice: On the Limits of Contemporary Proceduralism," in *The I in We,* 46-7.

[101] Honneth, "Recognition and Critical Theory Today,": 217; see also Axel Honneth, "Paradoxes of Capitalist Modernization: A Research Programme (with Martin Hartmann)," in *The I in We,* 171, where he states, 'the idea that underlies them always contains more legitimizable claims and obligations than are realized in the facticity of social reality'.

schema, an experience of disrespect arises because of the gap or deficit between the (mis)recognition involved and the normative potential of the principle of recognition that underlies the interaction (or is embodied in the institutional context of action). Significantly, this deficit can, potentially, be identified as existing 'either side' of the norm of action that currently governs that action context. That is, the deficit could be on the side of a breach of an agreed understanding of an existing valid norm (a conventional injustice) or – and this is the significant shift – it could be on the side of the inadequacy of the existing norm to its normative potential (the normative surplus). This change in Honneth's emphasis is significant, because it unleashes the normative potential of the counterfactual promise of undistorted recognition – or autonomy – against the existing practices of recognition as they are institutionalised in the lifeworld.

This normative deficit in the existing institutionalisation of principles of recognition can - just like specific experiences of disrespect - lead to moral conflicts in the social lifeworld. This idea of a normative surplus is crucial to Honneth's project. Not only does it provide a critical basis for ongoing ethical struggles (that is, it provides the moment of transcendence from within an already existing normative framework), it reintroduces the element of rationality into the assessment of and response to the experience of injustice by referring to the validity of the reasons for the current interpretation – including the codification of this understanding into rules – of the governing principle of recognition. By connecting the rational and normative dimensions of the experience of injustice in this way, Honneth is able to promote the idea that struggles for recognition are at the heart of the normative learning process in modernity. Accordingly, within this more socially complex account of relations of recognition, social injustice moves from being an individual experience of injury to be instead the shared experience that arises when 'it can no longer be understood why an institutional rule should count as an agreement in accordance with generally accepted reasons'.[102]

Despite being able to identify the normative potential of modernity in the relations of mutual recognition that underpin autonomy, and demonstrating how the experience of disrespect points to the normative surplus of the existing rules governing the

[102] Honneth, "Recognition as Redistribution," 130.

practice of recognition as institutionalised in the lifeworld, Honneth recognises the limits of *theory* to directly unlock these potentials. He notes that the violation of institutionally expected justifications *can* lead to morally motivated protest and *can* lead to a cognitive insight into the fact that certain forms of recognition are being withheld;[103] and if semantic resources are available, it is *possible* for the articulation of a shared experience of disrespect to form the basis of a social movement.[104] These caveats are however, very significant and point to the fact that the enabling conditions for the transmission of the radical force of the experience of disrespect into co-ordinated action aimed at social change are not theoretical but practical. In fact, there are many ways in which the cognitive insight and motivational force of the experience of injustice are either stifled or channelled into counterproductive responses.

The first and most obvious difficulty is that specific struggles in the face of the experience of injustice are potentially normatively ambivalent; for example, in the face of unjustified exclusion, individuals can seek social esteem by participating in reactionary groups that promote violence. Although advances in understanding of norms and practices of recognition cannot be forgotten they can be repressed; accordingly, there needs to be a way to distinguish between progressive and reactionary forms of struggle. The problem that needs solving is how can a moral culture be constituted as to give those who are victimised, disrespected and ostracised the individual strength to articulate their experiences in the democratic public sphere rather than living out the counterculture of violence.[105]

Second, the evolution of the institutionalisation of principles of recognition is historically contingent. There is no necessary movement in the direction of undistorted relations of mutual recognition. The radical normative potential of the experience of injustice can be usurped or displaced by other social effects, leading to distortions in the institutionalisation of principles of recognition, that undermine actors' capacities to generate insight from the experience of suffering. It is this type of experience that leads us to a consideration of the second form of 'wrong', one where

[103] Honneth, "Recognition as Redistribution," 129; Honneth, *The Struggle for Recognition*, 138.
[104] Honneth, *The Struggle for Recognition,* 163-4.
[105] Honneth, "The Social Dynamics of Disrespect: On the Location of Critical Theory Today," in *Disrespect,* 78. This comment is particularly salient given the examination of the topic of preventive justice in later chapters of the thesis.

the problem lies not at the level of the mistreatment of an individual (or group) in accordance with agreed norms, but rather at the level of the institutionalisation of the norm itself.

Critical Theory seeks to examine the state of society in terms of its rational and normative potentials in order to identify failings or distortions in the current social order.

> Critical Theory must couple the critique of social injustice with *an explanation of the processes that obscure that injustice*.[106]

For Honneth, this involves examining the social order for inherent deficiencies in the institutionalisation of the norms of recognition and their corresponding supporting social practices. That is, although Critical Theory identifies normative principles operative in existing relations of recognition and the practices which support their institutionalisation[107], and so is sensitive to the experience of injustice when rightful claims go unredeemed, it also acknowledges that, at a deeper level, each institution and its governing principle is also open to impairment. This type developmental distortion is generically known as a 'social pathology'.[108] In many ways the task of diagnosing the existence, cause and treatment of social pathologies can be understood as the primary goal of Critical Theory. That is, whilst Critical Theory is interested in normative disputes amongst social actors it has no privileged position in resolving such arguments. Rather, the true challenge is to be able to identify both the existence and cause of social pathologies, which includes being able to articulate immanently (that is, from the participants' perspective) the experience that something is wrong. That is, theory has to be able to explain how a situation/experience can be identified as a wrong, how such a condemnation can be justified, and why in certain cases such experiences are unable to be articulated by a social actor where the experience (and their failure to articulate it) is contrary to their own emancipatory interest (freedom). Only in this way can Critical Theory participate in an ongoing

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[106] Honneth, "Reconstructive Social Criticism with a Genealogical Proviso," 29-30 (emphasis added). Deranty notes that although the analysis of such disorders is typically a concern of social rather than moral theory, it 'logically completes the model of a critical theory grounded in the feeling of injustice': Jean-Philippe Deranty, *Beyond Communication: a critical study of Axel Honneth's Social Philosophy* (Leiden: Brill, 2009), 319.

[107] Honneth, "The Fabric of Justice," 47.

[108] In *Freedom's Right*, Honneth draws a conceptual distinction between 'misdevelopments' and 'social pathologies'. This will be discussed further below.

learning process that seeks to overcome social pathologies and help social actors realise the normative potential that is held in surplus in every institutionalised social order.

Despite (or perhaps because of) his long standing interest in this form of critical analysis, across his works a number of different terms and concepts are used by Honneth to describe, explain and apply this idea such that clarifying the concept of a 'social pathology' would be itself a significant conceptual task. However, it is a task which has been greatly simplified because of the work of Christopher Zurn, who has collated and analysed a range of descriptors and frameworks used by Honneth when analysing various social pathologies.[109] These include 'ideology', 'maldistribution', 'invisibility', 'distorted rationality', 'reification' and 'institutionalised self-realisation'.[110] Zurn argues that there is something common to all these concepts used by Honneth to examine problems or defects in the social order leading to damaged patterns of recognition or forms of self-relation and this is the key to the definition of social pathology. Zurn argues that the universal element of all these concepts is that they describe a 'constitutive disconnect' between the first order contents of social practices and second order reflexive comprehension of those contents in circumstances where these disconnects are pervasive (that is, not individual or idiosyncratic) and are socially caused (that is, not an individual psychopathology).[111] Zurn suggests that the way to understand a social pathology is as a 'second order' disorder, which arises when, for reasons that can be attributed to the manner in which social practices are institutionalised, there is a blockage or misdirection of the capacity of participants to reflect rationally on their first order beliefs and norms.

To a large extent, Honneth himself adopts this explanation.[112]

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[109] Christopher Zurn, "Social Pathologies as Second-Order Disorders," in Petherbridge, *Axel Honneth: Critical Essays,* 345-370. On the distinction between misdevelopments and social pathology, see below. See also Rasmus Willig, "Grammatology of modern recognition orders: an interview with Axel Honneth," *Distinktion: Scandinavian Journal of Social Theory* 13, no. 1: 146. Zurn's characterisation has been adopted by Honneth, albeit apparently in a qualified way: see Honneth, "Rejoinder," in Petherbridge, *Axel Honneth: Critical Essays*, 417; Honneth, *Freedom's Right,* 86.

[110] Zurn, "Social Pathologies as Second-Order Disorders," 345. Note that in this last example Zurn surprisingly does not explicitly use the term 'paradox' which is used by Honneth in the article analysed by Zurn to develop the more conventional idea of 'contradiction' used in Critical Theory (and Marxism more generally).

[111] Zurn, "Social Pathologies as Second-Order Disorders," 345-6.

[112] Honneth, "Rejoinder," in Petherbridge, *Axel Honneth: Critical Essays*, 417-8; Honneth, *Freedom's Right,* 86.

> A social pathology indicates any social development that significantly impairs the ability to take part rationally in important forms of social co-operation.[113]

This definition also makes it easier to understand the interrelationship between social pathologies and injustices.

> Unlike social injustice, which consists in an unnecessary exclusion from or restriction on opportunities to participate in social processes of co-operation, social pathologies are found at a higher stage of social reproduction and impact the subject's reflexive access to primary systems of actions and norms. Whenever social developments prevent members of society from adequately grasping the significance of these practices and norms, we can speak of social pathologies.[114]

What may be distorted by the prevailing social order in these circumstances is the form of rationality embodied in practices of justification (a 'pathology of reason' – classically where the rational potential of society is misunderstood as being exhausted by instrumental or means-end reasoning) or in the self-understanding of participants about the meaning and application of existing norms and practices (as might arise in certain practices of 'individualisation' that in reality undermine the subject's individuality). A social pathology is in this sense better understood as a failure of social rationality rather than a moral type wrong or injustice. Indeed, social pathologies explain how deformations in social practices can operate to block or misdirect the transmission of the insight potentially generated by the experience of injustice, preventing the articulation of a shared experience of disrespect which is necessary to form the basis of a social movement.

Notwithstanding the utility of Zurn's analysis, especially given Honneth's general endorsement of it, there are at least two significant modifications that Honneth himself makes to it. The first modification is that, in *Freedom's Right,* Honneth stresses a distinction between what he calls 'misdevelopments' and 'social pathologies'. Although both involve socially induced deviations from underlying normative principles, Honneth wishes to reserve the term 'pathology' to those

[113] Honneth, *Freedom's Right,* 86.
[114] Honneth, *Freedom's Right,* 86.

systems of action whose underlying normative principles are 'incomplete' and require supplementation by other social practices. In particular he has in mind the way in which the guiding logic in the spheres of law and morality themselves induce a form of misunderstanding about the form of freedom they embody. By contrast, a misdevelopment is where social practices in one of the three spheres of action that involve a specific relation of mutual recognition is distorted (or does not conform with ideal patterns of action required by the underlying normative principle of those spheres).[115] For Honneth, the key difference is that any such misdevelopment, although socially caused and with similar effects, is not a result of the internal logic of the action system but rather are 'anomalies' the source of which must be sought elsewhere.

Although this distinction appears important to Honneth, and notwithstanding the differences between social pathology and misdevelopment, key commonalities remain. The emergence of these disorders are the result of complex social factors – they are not 'individual' defects of social actors – and, as such require detailed social analysis to attempt to identify the historical interplay of processes that give rise to them.[116] In any case, for reasons that shall become clear in Chapter 3, this distinction can be challenged somewhat because Honneth's rejection of the legal sphere as a social institution is not accepted in full. Indeed Honneth himself appears to blur this distinction, such as when he gives the example of the developments in which law, under the pressures of economic imperatives and misdevelopments in other social spheres, is transformed from a system of securing individual subjective rights to a mechanism for the exclusion of those members of society that have no longer any recourse to the system of law (the unemployed, the under educated and illegal aliens).[117]

The second modification made by Honneth to Zurn's approach is that he seeks to distinguish two of the frameworks described by Zurn by suggesting that they involve effects in relation to both first and second order issues.[118] For example, in his response to Zurn, Honneth notes that in his account of 'paradoxes' he shifts between

[115] Honneth, *Freedom's Right,* 86, 127-128.
[116] Honneth, "Rejoinder," in Petherbridge, *Axel Honneth: Critical Essays*, 419.
[117] Honneth, "Brutalization of the social conflict,": 16.
[118] Honneth, "Rejoinder," in Petherbridge, *Axel Honneth: Critical Essays*, 417-8.

descriptions of first and second order 'disorders'. For Honneth, a paradox is a situation where a social institution that appeals to a certain value to legitimise its social practices actually functions to reduce the likelihood of that value being realised; that is, the way in which social practices are organised in the name of a normative principle actually create conditions that run counter to that principle.[119] Honneth uses the concept in his exploration of the effects of capitalist modernisation. He shows how the neoliberal restructuring of capitalism utilises normative principles and self-understandings related to individual autonomy in a way that the social practices organised in accordance with neoliberal imperatives in fact have the effect of undermining those principles. For example, he identifies how the normative interpretation of the principle of 'romantically charged individualism' has been transformed such that employment is recast not as a social function but as a feature of an individual's experimental self-realisation. As a result, in the name of enhanced individualism, there is a tendency to weaken bonds between an employer and employee, and amongst colleagues. Individuals are experiencing increased pressure to be flexible, and to 'network', which means that economic imperatives begin to intrude into friendships and family life. Similarly, social welfare, once conceived of as a right, is transformed into a service, and entitlement becomes dependent on individual responsibility, impacting precisely those whose social circumstances mean they lack the necessary preconditions for taking on such responsibility. Thus the economic, social and cultural pressures that arise under, or constitute, neo-liberalism have a tendency to distort social relations in the name of the normative principles that those social relations are attempting to embody – more individualism undermines the social solidarity necessary for forming and maintaining individual self-realisation, thereby undermining the freedom it is supposed to enhance. The widely diagnosed symptoms of individual depression, normative insecurity and political disengagement that appear in neoliberal societies are but the most obvious effects of these paradoxes.

A paradox therefore represents a deficit of rationality; these are conditions under which subjects can no longer adequately acquire the first order knowledge, norms and meanings that can be implemented at a second order level – the same

[119] Honneth, "Paradoxes of Capitalist Modernization," 176.

'emancipatory vocabulary'[120] is used to legitimise the transformations that empty those terms of normative content. On the other hand, paradoxes also represent deformations in the first order practices that embody institutionalised patterns of recognition (and so also have a normative dimension). As a result, paradoxical developments mean individuals are denied access to established spheres of recognition and can no longer gain respect by participating in the life of society.[121]

The concept of a paradox becomes important in the analysis of preventive justice undertaken in Chapters 4 and 5. In those Chapters, the existing understanding and implementation of preventive justice will be shown to give rise, in different ways, to paradoxes that undermine the attempts to justify preventive justice. This will be shown at both the normative level, where the attempt to justify preventive justice itself on the basis of normative principles derived from the 'legal' dimension of the normative ideal of autonomy, and the idea of legal freedom, is at best tautological and at worst leads to an inversion or reversion of the meaning of those principles at the expense of autonomy and freedom; and at the practical level, where laws created within the preventive justice framework, in an attempt to preserve the principle of legal freedom, instead create injustices and operate on the basis of a certain irrationality, thereby impairing their effectiveness.

2.5 Conclusions

Honneth's version of Critical Theory, 'normative reconstruction', is a form of social analysis that investigates the principles and values that govern the functioning of social practices that make up key social institutions. In particular, it aims to identify the operative norms, those relied on by participants to justify their interactions, and evaluate them by reference to the normative ideals of autonomy and freedom. This is in contrast to theoretical approaches that seek to derive principles, usually based on some independent logic or procedure, then apply them to social situations.

In addition, the method of normative reconstruction can draw on Honneth's intersubjective concept of autonomy, that not only explains how autonomy is developed and maintained at a practical level, but how it can continue to operate as a

[120] Honneth, "Paradoxes of Capitalist Modernization," 177.
[121] Honneth, "Brutalization of the social conflict,": 17.

normative ideal. By demonstrating the link between the different practical self-relations that constitute autonomy, certain relations of mutual recognition and the requirement that these relationships be embodied in social institutions, Honneth demonstrates why the normative content of freedom is not exhausted by the ideas of moral or legal freedom, but must be understood by reference to social freedom: the capacity to participate in social practices that are governed by normative principles that provide mutual recognition.

Normative reconstruction requires a detailed, empirical interdisciplinary engagement with the subject matter under examination.[122] This approach allows the identification within social reality, and the experience of social actors, disturbances in the web of intersubjective relations that is needed for autonomy and social freedom. These disturbances are experienced in different ways: experiences of disrespect can cause suffering and give rise to social conflict; however, where the governing principles within social institutions are themselves distorted, this can give rise to social pathologies. As social pathologies are effectively a deficit of social rationality, they can undermine the capacity of social actors to reflect on the practices and norms in which they are participating and which they are using to justify their claims, causing both damage to the relationships of mutual recognition on which they depend for their freedom and an inability to articulate this from the level of a participant. This is why a Critical Theory is required, to highlight these deficits in rationality and to point to other ways in which society can be organised.

The Chapter opened with the problem posed by the relatively recent appearance of preventive justice: as a response to demands for community protection and reassurance, preventive justice has taken on social reality; at the same time its appearance calls for further close analysis in terms of its normative justification. Chapters 4 and 5 will undertake just such an analysis. In a situation where preventive justice has apparently taken root in social reality and seemingly challenges the meaning of fundamental norms and values within the law, normative reconstruction suggests itself as a powerful method for providing the required critique. In particular, normative reconstruction is an approach that takes seriously the normative and other social imperatives driving the development of preventive justice. It approaches the

[122] Honneth, "Social dynamics of disrespect," 63.

question of justification by reference to the fundamental principles of autonomy and social freedom, by examining the way in which the various norms, values and social practices that make up preventive justice have been institutionalised.

The fundamental question becomes whether preventive justice contributes to or detracts from social freedom. In addition to considering the experience of social actors, normative reconstruction is also directed to the identification of social pathologies within preventive justice: that is, deficits in social rationality that arise when the social practices that make up preventive justice undermine or distort the norms and values that are used in its justification.

However, before embarking on such an inquiry into preventive justice, Chapter 3 will outline the remaining key dimension of Honneth's Critical Theory that will be needed, his understanding of law.

Chapter 3

Honneth's Critical Theory of law: freedom, pathology and juridification

3.1 Introduction and overview

Chapter 2 outlined the version of Critical Theory that has been developed by Axel Honneth and which forms the basis for the approach being taken in this thesis: the process of normative reconstruction as a form of social analysis that examines and evaluates the organisation of society by reference to the normative content of an intersubjective account of the concepts of autonomy and social freedom. This Chapter will consider further Honneth's Critical Theory, specifically his conceptualisation of law.

The account of law to be developed in this Chapter is largely that adopted by Honneth in *Freedom's Right*, which in turn draws heavily on the analysis of law undertaken by Habermas in *Between Facts and Norms*. This account recognises that law is a social institution, a sphere of action governed by normative principles, that also acts as a medium of social co-ordination. This understanding both enables and calls for a social analysis of the law: an account of the development of modern law that simultaneously addresses it's historical, sociological and normative features and which includes an evaluation of the law's contribution to freedom. This understanding is fundamental to the primary goal of the thesis – to explore the phenomenon of preventive justice beyond a mere legal analysis or by reference to constructively derived norms or existing legal principles. Rather, what is required is an acknowledgement of and inquiry into the social and normative demands driving the growth of preventive justice and an evaluation of the extent to which the legal framework that has resulted either promotes or undermines autonomy and social freedom. Only such an approach can answer the question why, if preventive justice meets standards of lawfulness, does it still create a sense of unease or disquiet from a normative perspective.

Law has a complex role in Honneth's account of freedom. He recognises law as a distinct sphere of social action, and as an institution that is structured by a normative

principle of mutual recognition. For Honneth, the practical domain that is established by law which allows individuals to temporarily suspend and reflect on their interpersonal obligations is one of the forms of freedom that characterises modern society. Further, law acts as a resource that social actors can draw on to regulate the normative demands and practices of other social institutions. However, Honneth is wary of the risks that are created when law comes to be, both analytically and practically, the dominant perspective adopted by individuals in their understanding of their own freedom and in governing social action co-ordination. In particular, in his analysis of legal freedom in *Freedom's Right*, Honneth identifies a number of social pathologies that arise when this dominance of the legal perspective occurs, pathologies which he says are systemically induced by the logic of the law itself, as a consequence of the process he identifies as juridification.

Despite the force of his analysis of these pathological effects, it will be argued that Honneth himself suffers from a certain one-sidedness in his critique. As a result, he obscures from view a range of social practices that exist within and help define the institution of the law, and which can potentially provide a counterforce to the tendency towards social pathologies. Ultimately, this Chapter will seek to move beyond his one-sided account by laying the groundwork for an empirically based normative reconstruction of law, guided by a more multidimensional understanding of juridification.

Section 3.2 will examine the two most fundamental principles for the understanding of law as a social institution, articulated by Habermas and endorsed by Honneth. First, that the legitimacy of modern law depends on both its normative validity and its effectiveness as a form of social co-ordination. Second, that both of these dimensions of the legitimacy of law ultimately are derived from, and dependent on, the democratic process.

For both Habermas and Honneth, the law's dependence on the democratic process for legitimation reflects the internal relationship between law and autonomy.[123] Section 3.3 will examine how the form of modern law enables the development of private autonomy, a sphere in which individuals gain the freedom to act on the basis of their own interests and values, and in which they can undertake ethical self-

[123] Honneth, *Freedom's Right,* 71-94, 253-328; Honneth, "Beyond the Law,": 129.

reflection on their own lives without outside interference. However, at the same time, the validity of law is also tied to the exercise of public autonomy institutionalised in the procedures of modern democratic orders. This is why Habermas and Honneth regard private and public autonomy as 'equi-primordial' in the constitution of modern democratic legal systems.

Despite recognising that developments in the law have contributed to freedom in modern society, both Habermas and Honneth identify situations in which the institution of the law (by which they mean the form of law and the way it shapes social values and perspectives, rather than particular laws as such) can damage rather than promote freedom. Section 3.4 will examine Honneth's analysis of 'pathologies of legal freedom' in which, as a result of processes of juridification, actors come both to understand themselves (and others) as individuals constituted by the sum of their legal rights, and to interpret all social interaction (especially situations of conflict) from the perspective of legal relations, understood on the model of private autonomy. For Honneth, these tendencies, which he says are systematically induced by the form of law itself, have socially destructive effects (as well as negative impacts on the contemporary practice of social theory itself).

Section 3.5 will set out the foundations of a critical appropriation or development of Honneth's theory of law. This will involve examining some implications of his conceptual and methodological stance on law. Without cavilling with the main thrust of his analysis, a critical study of his use of the film *Kramer v Kramer* to demonstrate the nature of legal pathologies reveals how a one-sided perspective obscures the existence of social practices operating within the law as an institution that can act as a counterforce to the tendency towards legal pathology. Instead of focussing solely on the insights into pathologies said to be revealed through an analysis of the film alone, it will be shown how consideration of the insights of legal theorists and jurists (including judges and legislators engaged in the practice of law) that were expressed at the time reveals a more complex and nuanced dynamic at play within the law than is shown in the film. Accordingly, it will be suggested that in order to preserve the key insights of Honneth's understanding of law to undertake a critique of preventive justice, an empirical engagement with the corpus of the law itself is required.

Section 3.6 will continue the appropriation of Honneth's account by providing a positive response to the complex and at times ambiguous attitude of Honneth to law. Although legal freedom is for Honneth a fundamental aspect of freedom in the modern world, his anxiety about the tendency for social analysis to focus on legal problems and to use legal-juridical concepts is perhaps what leads him to argue that the law, although a distinct sphere of action, is not a social institution as such. The effect of this view can be seen in his use of the concept of 'juridification'. Both Habermas and Honneth use the concept to describe changes in the law that have promoted freedom; however, at the same time they use the concept to explain the existence of social pathologies. Indeed, juridification is a complex concept that has multiple meanings and can be used both descriptively and normatively. Understanding the relationship between the different meanings and processes that fall within the scope of the concept of 'juridification' becomes the key to a normative reconstruction of law.

If careful attention is given to the multiple dimensions of the meaning of juridification within the institution of law, an account can be given that highlights the way the law can promote freedom both within its own sphere of action, and in the interface between law and other social institutions. By focussing attention on how the law itself engages with these social and normative demands – or, more accurately, by focussing on the work of those engaged in reflecting on and transforming the moral grammar of the law – it is possible to uncover how the concept of juridification allows for a critique of specific legal measures by reference to the relationship between social practices and governing norms. This modification of Honneth's understanding of law provides the basis for the critique of preventive justice in Chapters 4 and 5: a normative reconstruction by way of a close analysis of the work of legal theorists, legislators and jurists who are in the process of driving the next phase of juridification, of which preventive justice is a major component.

3.2 The two dimensions of the legitimacy of law

> Modern law presents itself as Janus-faced to its addressees: it leaves it up to them which of two possible approaches they want to take to the law. Either they can consider legal norms as merely commands, in the sense of factual

> constraints on their personal scope for action…or they can…view norms as valid precepts and comply "out of respect for the law".[124]

Although in *Freedom's Right* Honneth provides a detailed analysis first of legal freedom and then of the democratic public sphere and constitutional state as a sphere in which social freedom can be realised, he himself provides no comprehensive account of law itself – instead he essentially adopts Habermas' reconstruction of law (and indeed does so by means of an endnote).[125]

For Habermas, law is a system of norms that are coercive, positive and (at least should be) freedom guaranteeing. In his seminal work on law, *Between Facts and Norms*, Habermas seeks to explain, by means of a reconstruction, how it is that law can be the seemingly arbitrary expression of a political will and yet make claim to being both a valid expression of, and at the same time limitation on, the freedom of individuals. Habermas answers this question by revealing the internal connection between the different components of the legitimacy of law and the democratic process.

For Habermas, a legal norm is valid whenever the State can guarantee two things. First, there must be at least average compliance with the law. This is the functional dimension of law, that as a system designed to stabilise behavioural expectations and coordinate interactions in a complex world, law must in fact be effective. The significance of this element should not be underestimated, as law carries within it the threat of force. That is, in the name of securing compliance, the power of the State can be drawn upon to compel action in conformity with the law. What would otherwise be violence becomes, in the name of the law, a legitimate use of force.

However, the fact that routine compliance with law is assured is of itself insufficient to justify the validity of law. The State must also be able to demonstrate that law is valid, worthy of being followed, merely on the basis that it is the law. This is law's normative dimension. At least in principle, laws must also satisfy the fundamental requirement that they can be justified according to the rules and principles that govern the validity of law. Only if citizens can regard a law as valid in this normative sense can it be

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[124] Jurgen Habermas, *Between Facts and Norms*, 448

[125] Honneth, *Freedom's Right*, 71-72 (endnote 1).

possible for them to also comply on the basis of 'respect for the law', as a law they have given to themselves.

The dual demand on law to be socially effective and normatively valid allows for the coercivity of law to nevertheless be directed towards guaranteeing the freedom of social actors: it explains how obedience to law is compatible with freedom. This binary nature however does not explain the positivity of law, that legal norms are expressed in the form of law as positive commands, whether as prohibitions or obligations. According to Habermas, in the post-metaphysical world, the only basis for the legitimate genesis of positive law is the democratic procedure.[126] For Habermas, norms that are backed by State power, and that arise from the decisions of lawmakers that are changeable, limited in space and time to a particular political community, and that are necessarily the result of complex arguments involving matters of principle, particular political and cultural self-understandings and evaluations, and a significant degree of pragmatic limitations and compromise, can only claim validity if they simultaneously guarantee the autonomy of all legal persons equally. The democratic process carries the entire burden of legitimation, and so must itself secure the autonomy of legal subjects upon which it too relies.[127]

> The establishment of this egalitarian legal order brought forth an independent sphere of action characterized by a set of norms that neither demand moral consent nor depend on ethical agreement but merely require an instrumental acceptance that, if necessary, can also be obtained by means of state force. However, the various functions required for creating, implementing and enforcing positive rights can only be fulfilled if the state manages to obtain a new source of legitimacy in the unified will of all the citizens affected by its actions. The emergence of a new system of subjective freedom was thus accompanied, in a unique historical parallel, by the rise of the democratic constitutional state, under whose rule the addressees of these positive rights could view themselves as their common authors.[128]

[126] Habermas, *Between Facts and Norms*, 448.
[127] Habermas, *Between Facts and Norms,* 450.
[128] Honneth, *Freedom's Right,* 71-72.

It is through the democratic process that the apparent contradiction between obedience to the law and freedom is finally fully resolved: following a law that I have made for myself is not just compatible with, but is indeed an expression of, my freedom.

This understanding of the dual nature of the legitimacy of law is critical to an analysis of preventive justice. It explains why the legal framework must not only be effective to gain acceptance as legitimate, but it must be able to justify itself as valid. As will be seen in Chapters 4 and 5, although there are some debates about the effectiveness of laws directed to reducing the risk of harm, the fundamental debates over the legitimacy of preventive justice ranges from claims that such laws are not properly to be considered as laws at all, through to arguments that preventive justice ultimately functions to undermine democratic principles.

3.3 Law and autonomy: an internal relationship between law and both 'private' and 'public' autonomy

If the legitimacy of law is explained by recognising the internal relation between the functional and normative moments of legal validity and the democratic procedure for the production of law,[129] then it becomes clear how the modern form of law and its normative foundations are internally connected to the concept of autonomy. The validity of law is derived from the Enlightenment idea of self-legislation: that a law is valid if a free and rational author of the law would consent to be bound as the subject of the law. What this means first is that valid law secures symmetrical relationships between individual bearers of abstract rights. At the same time the law must institutionalise the meanings, values and norms that regulate the process for the production of law; as an institution, the law is explicitly directed to the question of its own legitimacy. In modern societies this involves something like securing the democratic procedure in which all citizens can participate equally.

The similarities between the validity of modern law and universalist understandings of morality are apparent. Both law and morality regulate social conflicts and promote autonomy. However, legal autonomy is not the same as moral autonomy. It does not have the same unitary form in which the subject simply obeys norms that it finds

[129] Habermas, *Between Facts and Norms,* 447-448, 450.

binding. The structure of law is more complex than that of morality, and the form of autonomy that is bound up with it cannot be understood in a unitary manner. The positivity and coercivity of modern law forces autonomy to split into two dimensions: what can be referred to as private and as public autonomy.

The first aspect of legal autonomy can be understood as the sphere in which persons are released from moral norms and dispositions. This institutionalised sphere of 'private autonomy' is central to the idea of legal freedom. This is a dimension which, within legally circumscribed bounds, agents are free to act on the basis of their own interests and values. This enables action which is directed strategically with respect to one's own interests, and interactions which are regulated by mutual expectations that are based not on any assumption of other parties' willingness to suspend their own values and interests, but only on an acknowledgement that they are governed by law.[130] This understanding of legal freedom – as a form of negative freedom, or liberty – is a significant development in two aspects. Here law functions as a supplement to morality in post conventional society, it disburdens subjects from the intensive cognitive, motivational and organisational demands of action coordination on the basis of morality alone.[131] Law is an abstraction from the capacity of addressees to bind their own will, from the complexities of action plans in lifeworld contexts, and from the kind of motivation otherwise required for compliance. In brief, it does not matter when in engaging in interaction why the other party wishes to interact or why they will obey the law. This greatly simplifies the otherwise impossibly complex task of continually negotiating situation definitions (and agreeing on the specification and application of governing norms) in a complex, diverse, post conventional society.

In addition, however, the dimension of private autonomy provides a space for the ethical self-reflection of individuals. The freedoms guaranteed by law allow persons to explore and critically examine existential self-understandings, to question and reconstruct values and meanings by which they will evaluate both their own life

[130] Habermas, *Between Facts and Norms,* 118-131*,* 450-453; Honneth, *Freedom's Right,* 71-74. This is how social effectiveness, based on a presumption of general compliance, is a dimension of the legitimacy of law.
[131] Habermas, *Between Facts and Norms,* 112 -114, 452.

history as well as the collective values and dominant interpretations of the social and political culture they find themselves in.

Although law involves a range of motivations, action orientations and forms of reason that distinguish it from morality, law is not morally neutral. However, the moral dimension of legal autonomy only appears in the exercise of public autonomy. Moral reasons enter into the law by way of the democratic process where citizens (as co-legislators) come together to generate the laws that protect the individual liberties of all. This is the 'paradoxical achievement'[132] of law in social reproduction - as a guarantor of individual liberties, the law gives rise to situations of social conflict as social actors make claims in the name of their 'unleashed individual liberties' and competing visions of the good life; yet at the same time it constrains this conflict through the coercive application of norms that are recognised as legitimate only on the basis of the legally institutionalised process of democratic will formation.

In the tradition of liberal theory, human rights (modelled to a greater or lesser extent on the catalogue of individual or private rights, though on occasion supplemented by certain other substantive rights required to enjoy the exercise of these primary freedoms) are given priority. In the civil republican tradition, popular sovereignty has primacy, and accordingly there is an emphasis on procedural or participatory rights. These two traditions however both underplay the significance of the internal relation between private and public autonomy. The liberal tradition fails to recognise the constitutive role of an intersubjectively exercised civil autonomy, the fact that individual liberties are first reciprocally granted and are then protected by a legal code.[133] On the other hand, although human rights may be justifiable as moral rights , for the reasons set out above, this does not mean that these rights can be imposed on a political lawmaker. Human rights are not a ‘pregiven moral fact’[134]; yet at the same time the internal link between rights and private autonomy means that human rights should not be able to be violated even in the exercise of public autonomy. The civil republican tradition needs to acknowledge that classic liberty rights that secure

[132] Habermas, *Between Facts and Norms,* 461.
[133] Habermas, *Between Facts and Norms*, 457.
[134] Habermas, *Between Facts and Norms,* 454.

private autonomy are essential for the institutionalisation of the conditions in which public autonomy can be exercised – through the medium of the law.

The key insight here, shared by Habermas and Honneth, in terms of the internal relation between law and democracy, is the recognition that the individual liberties of the subjects in the dimension of private autonomy and the public autonomy of the enfranchised citizen make each other possible.[135] The form of law itself is an unavoidable medium which requires the exercise of both private and public autonomy; conceived properly, the system of law need not be subject to some 'natural law' governing its validity from outside, nor must it merely accept the consequences of legal positivism. The process by which citizens must test what rights they should accord each other must be anchored in the law itself which must therefore legally institutionalise the presuppositions and procedures of democratic will formation.

For Habermas, the central question facing a democratic legal order is therefore

> What rights must citizens mutually grant one another if they decide to constitute themselves as a voluntary association of legal consociates and legitimately regulate living together by means of positive law?[136]

In *Freedom's Right,* Honneth, takes up this essential understanding, defining law as

> a system that grants collective autonomy to socialised citizens who deliberate on the rights they grant each other and how they are to be implemented.[137]

Although it is strikingly similar to what is said by Habermas, in Honneth's definition there is a significant difference. Unlike the predominantly proceduralist rendition by Habermas, for Honneth the question facing the legal order is one confronted by citizens who are already 'socialised'. This important difference of emphasis reinforces the claim that although the dimension of private and public autonomy can be distinguished analytically, their connection cannot be severed

[135] Habermas, *Between Facts and Norms,* 126-127.
[136] Habermas, *Between Facts and Norms,* 453.
[137] Honneth, *Freedom's Right,* 72.

> the institution of modern law demands more than purposive rational rule following; it also relies on democratic attitudes, practices and convictions.[138]

It is at this point that the theoretical analysis of law as its own sphere of action, and the normative principles that structure the operation of law, must remember that the form of freedom created by law, and the principle of mutual recognition that is embodied in the institutions of law and the functioning of the democratic process, are characteristic of but one dimension of freedom and autonomy. It is this need to decentre the law that becomes a key component of Honneth's critical theory of law itself.

3.4 Pathologies of legal freedom

Honneth acknowledges the positive value of the moment of freedom that accompanies the negative freedom of private autonomy. In *Freedom's Right* he emphasises the significance of classic liberty rights in the process of securing reciprocal recognition of the exercise of an individual free will – leading to the form of recognition analysed as 'self-respect'.[139] He also appreciates the significance of the legal protection provided by private autonomy that allows a 'retreat from roles' to facilitate an exploration of the individual's own value orientations and the development of a sense of self-worth. Thus, law is a significant contributor to the ability of individuals to develop the reflexive capacities necessary for autonomy.

As noted above, Honneth also endorses Habermas' view on the internal relation between private autonomy and public autonomy. That is, the exercise of civic autonomy is fundamental to the legitimacy of the law. However, significantly, Honneth argues that, although these two forms of autonomy arise at the same time, the relationship between them is not symmetrical. For Honneth, the two complementary moments - of a space of individual freedom (subjective rights

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[138] Honneth, *Freedom's Right,* 72. Habermas of course was not insensitive to this, in that he acknowledges that law requires a "liberal culture that meets it halfway"; Habermas, *Between Facts and Norms,* 461. However, as we will see, Honneth's advance is to highlight the pathologies that in fact arise where there is a mismatch between the conceptual demands of valid law and the lifeworld resources available to ensure its legitimacy, both in terms of actual compliance but also in terms of a social actors understanding of the grounds of the law's claim to normative validity.

[139] Honneth, *Freedom's Right,* 75-79.

guaranteed by law) and the participatory rights of the democratic sphere - cannot be understood as operating within the same register in terms of the concept of autonomy that is engaged.

> The negative freedom guaranteed by the state is thus based on the right of individuals to a purely private disclosure of their own will. This mode of freedom, however, runs up against the fact that in order to successfully determine our own aims, we require a form of social interaction that legal freedom cannot provide. In order to realize legal freedom, it must be accompanied by the very kind of communication from which legal freedom threatens to exclude individuals due to its purely private structure.[140]

Honneth characterises the sphere of negatively protected rights as a 'retreat from communicative obligations'. That is, for Honneth, the form of freedom that is provided by law via private autonomy involves a subject isolating or abstracting itself from the intersubjective relations of recognition that are required to support the multi-dimensional form of autonomy that is needed for the exercise of public autonomy. The cognitive and normative demands of public autonomy, the capacity to participate as a co-author of law, requires competencies beyond those that are provided for by the concept of private autonomy. For Honneth, the freedom provided by negative liberty to abstract from social obligations does not provide for the individual attitudes and requirements of participation in co-operative social practices necessary for the exercise of public autonomy.

Accordingly, for Honneth, the process of abstraction that is the defining structural component of private autonomy carries with it not just a contingent but a systemically induced risk of the development of social pathologies. Although accepting that one of the positive achievements of law is this suspension of the exacting requirements for social coordination, Honneth is concerned to highlight the limitations of this form of freedom, and the potential pathological consequences where this form of freedom is mistaken for the whole of freedom.[141]

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[140] Honneth, *Freedom's Right,* 73.

[141] Honneth, *Freedom's Right,* 73.

To understand this concern, it is important to recall Honneth's characterisation of what constitutes a 'sphere of action'. First, there must be a socially differentiated, institutionalised system of practices in which subjects participate through relations of recognition governed by a commonly shared norm of action. Second, that participation in the system of action is on the basis of mutual recognition, allowing a shared expectation of behaviour. Third, that a specific relation to self is thereby created and sustained that allows for subjects to acquire the skills, attitudes and shared interpretations necessary to participate in these constitutive practices.[142]

In Honneth's account, in interactions governed by law, subjects encounter each other in abstraction from their personal motives and values. Instead, all that is required is confidence that a partner in action will comply with existing legal norms (and perhaps also in accordance with prevailing interpretations of those norms). Any action that is compatible with the governing system of rights can be undertaken without further justification. This neutrality with respect to motives and values creates for each individual a 'legal personality', something abstracted from the person's own beliefs, in which the person has the capacity to suspend - temporarily at least – their own values (and judgments on the values of others).[143]

There is however a structural weakness in this form of freedom. The protective sphere of private autonomy prevents access to the intersubjective base of personal attachments and the ethical evaluations of others – taking cover behind one's rights in effect isolates the moment of 'self-respect' from the intersubjective conditions necessary to create and sustain the other dimensions of the practical relations to self that must exist together to constitute autonomy.[144] Although one of the liberating moments of modern law is to free subjects from substantive value orientations in order to facilitate ethical self-reflection, the stance that is embodied in legal freedom, the perspective of the legal personality, in fact disables this form of rational reflection. Ethical self-reflection requires viewing our relations with others in other than a strategic, monological mode. It requires that subjects engage in the communicative

[142] Honneth, *Freedom's Right,* 81.
[143] Honneth, *Freedom's Right,* 82-83.
[144] Honneth, *Freedom's Right,* 83-84.

practice of raising and justifying claims about what he or she consider to be of meaning and value.

> The legal *stance* prevents any access to the world of intersubjective attachments and responsibilities…Even the act of mentally examining former attachments or anticipating new obligations would demand that we abandon the stance of legal freedom.[145]

Honneth argues that the weakness of legal freedom is that it secures a form of freedom that can only be enjoyed beyond the law itself.[146]

> …the law produces a form of individual freedom whose conditions of existence it can neither create nor maintain.[147]

The atomizing effect of the form of law does not negate, but can obscure, its intersubjective bases.[148] Honneth is concerned to highlight the risks that this form of freedom can have on the skills and attitudes required of subjects to participate in the constitutive practices necessary for the exercise of both private and public autonomy. In *Freedom's Right*, Honneth identifies two forms of social pathology that he describes as 'pathologies of legal freedom', both of which arise when the level of abstraction required by participation in the sphere of law lead to a fundamental misinterpretation by social actors, specifically one where subjects 'instead of grasping the negative meaning of legal freedom…make it the exclusive point of reference for their own relation-to-self.'[149]

The first pathology is said to arise directly as a consequence of 'juridification', understood in this context as both the expansion of law into areas of everyday life and the attitude where subjects approach or understand all forms of social conflict from the perspective of their legal rights. A consequence of this approach to social interaction is that, in order to maximise the opportunity to successfully resolve conflict through the medium of law, subjects increasingly 'hollow out' or objectify their

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[145] Honneth, *Freedom's Right,* 84 (emphasis added).
[146] Honneth, *Freedom's Right,* 83.
[147] Honneth, *Freedom's Right,* 86.
[148] Habermas, *Between Facts and Norms,* 112.
[149] Honneth, *Freedom's Right,* 87.

intersubjective relations. This privileging of the dimension of legal accountability leads to its diremption from the other forms of recognition based on relationships of care and love or of loyalty and solidarity, relationships of recognition which are necessary for autonomy. This in turn leads to an ever-increasing abstraction of the self from the lifeworld, and the identification of the self with the sum of subjective rights that can be asserted – which, by their very form, are increasingly universal. This de-contextualisation further intensifies the tendency to block the subject's access to the symbolic resources of the lifeworld to interpret situations, coordinate interactions and employ a broader social grammar as a participant in shared social practices. Honneth suggests that this pathology is caused by, and represented in, the increasing tendency for social actors to revert to law as the most appropriate instrument for resolving all social conflicts: the growth of the 'legal personality' as a form of life also reinforces a juridical model of society, where the interpretation of social coordination problems, as well as the natural response to social conflict, involves the recourse to law. Law, or the form of recognition provided by law, the sphere of negative freedom, is in this manner substituted as an end of social processes, rather than a means.

The second pathology examined by Honneth in *Freedom's Right* is a form of indeterminacy. Whereas the juridification of the social leads to a pathological relation to self in which the self is reduced to the sum of his or her 'rights', Honneth also highlights a tendency for the 'legal personality' to transform the temporary suspension of communicative obligations into an ideal. In this sense, freedom becomes understood as a permanent break from obligations; indecisiveness, a lack of will and an apparent ability to live without any 'profound value attachments and beliefs' is not only no longer not experienced as a crisis of personality, but in fact becomes a positive model for individual subjectivity.

In addition to the deformations in the individual's self-relation that result, it is evident that a further feature of these two pathologies is the hypostatisation of the moment of detachment from the lifeworld provided by negative freedom and private autonomy as being the essence of freedom itself. This further feature necessarily undermines the possibility of the exercise of public autonomy.[150] Not only will the form of

[150] Indeed, this stance comes close to the forgetfulness of the 'elementary recognition' that subjects generally grant to one another that Honneth uses in his re-conceptualisation of 'reification', notwithstanding his view

participation called for by the exercise of public autonomy be misunderstood if it is conceived of on the model of private or subjective rights, but more fundamentally the conditions necessary for subjects to develop the necessary skills and attitudes to exercise this form of freedom will be undermined.

While legal freedom is an important achievement of modern society, the process of the 'de-socialisation' of interaction that it entails has the capacity to undermine the patterns of mutual recognition necessary for autonomy, in turn increasing the need for reliance on other non-communicative mechanisms for negotiating social interactions - such as law itself. In this way, legal pathology reinforces the dominance of law as a medium for everyday social co-ordination in a one-sided manner; law no longer supports the development of principles that support mutual recognition in other social institutions such as the family and the market, rather it replaces them. For Honneth, these effects arise as a consequence of the conceptual compulsion to abstraction that the law requires for the exercise of legal freedom, rather than any specific social cause. That is, the dangers of fundamental misinterpretations of the nature of freedom and autonomy that can be seen in modern society are, for Honneth, at least in part a result of what he sees as the structure of modern law itself.

3.5 Towards a critical appropriation of Honneth's theory of law

In *Freedom's Right,* Honneth identifies the two forms of 'legal pathology' by an exploration of their symptoms as they appear in works of fiction. Although in this choice he is also faithful to a long tradition in Critical Theory, Honneth goes beyond merely making use of works as fiction as a resource: he goes so far as to assert that the 'analytical tools used by sociological researchers are generally too blunt to capture such diffuse moods or collective sentiments' that are indicative of the 'certain rigidity' in behaviour and relations to self that typically arise as a result of a social pathology. He expressly states that

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that legal personality or status provides a measure of 'antecedent recognition'. See Axel Honneth, *Reification: A New Look at an Old Idea* (Oxford: Oxford University Press, 2008), 80-83. Note also "subjects can forget or learn later to deny the elementary recognition that they generally grant to every other human being, if they continuously contribute to a highly one-sided form of praxis that necessitates abstraction from the "qualitative" characteristics of human beings": Honneth, *Reification,* 154-155.

> The best approach for diagnosing such pathologies remains…the analysis of indirect displays of these symptoms in the aesthetic sphere; novels, films or works of art are still the best source of initial insights into contemporary tendencies towards higher-order, reflexive deformations of social behaviour.[151]

Without having to challenge the value of the aesthetic sphere as a source of insights, it will be shown that an empirical inquiry into a controversial area of the law like preventive justice - one which involves a struggle over the meaning and extension of some central tenets of modern legal systems - based on an examination of the work of lawyers, legal policy makers, the judiciary and the legislature, provides at least an equally convincing diagnosis of the existence and effect of these pathologies. Indeed, a diagnosis of pathology from within the practices of the law itself provides an even more compelling account of the disturbances and harm caused by these pathologies - at the conceptual as well as practical level – than might be expected. What this section aims to show is that a critical examination of Honneth's methodological choice in his exploration of legal pathologies reveals, contrary to Honneth's characterisation, a domain of social practices that adds a further dimension to the bare bones of legal principles and fleshes out the institution of the law.

To explain the dynamic of the first form of social pathology that arises because of the subordination of the lifeworld to the medium of law as a result of juridification, the compulsion to identify one's freedom or identity with the sum of their legal rights or claims (the pathology of 'legal personality'), Honneth references the film *Kramer v Kramer*. Although the analysis provides an excellent heuristic vehicle to explain this particular pathology, the film itself (and so too Honneth's analysis) in fact obscures a number of important, countervailing imperatives to the form of juridification manifesting the legal personality that existed at the time within the law itself.

The film, released in 1979 and based on a 1977 novel of the same name, explores the complex relationships and conflicts that arise during divorce and custody proceedings. Honneth, with a few caveats (to be discussed in a little more detail below) notes that the film 'occasionally manages to give a good impression of how the protagonists constantly calculate the legal consequences of their actions, as well

[151] Honneth, *Freedom's Right*, 87.

as the effects this has on their intentions and their personality'.[152] In particular, Honneth relies on the effect on the audience that the film creates, one in which they come to realise, through the ambiguity that arises in the interpretation of the male character's own motivations – is he acting out of a genuine love and a consideration of the best interests of the child or is he merely acting strategically – of what is lost in ourselves if we view our relationships and actions solely, or even predominantly, from the perspective of the law.

For Honneth, the film reveals the general course of the first pathology of legal freedom as follows

> Throughout the divorce proceedings, the parents, who are compelled by the law they themselves invoke to calculate the effect of their actions on the future judgment of the court, lose sight of the fact that behind their reciprocally apparent strategic interactions, communicative needs and dependencies remain. The more they block out this lifeworld background…the greater the tendency to regard this kind of strategic interaction recognized by the law as a legitimate form of breaking off communication as the only possible form of strategic interaction.[153]

Honneth makes clear that the adoption of the pathological approach is not the responsibility of the individual actors, but something that arises for social reasons. He argues that the cinematic truth of the film is in its representation of the widespread willingness to adopt this attitude, which lies in the 'social tendency to immediately, and almost automatically, regard the system of law as the appropriate means for solving social disputes and conflicts'.[154]

There are a few aspects of this analysis that warrant comment. The first relates to the caveats that Honneth himself puts on the value of the film as a source of insight. He notes at the outset of his discussion that the film has a 'number of narrative flaws', in particular that it fails to explain the wife's motives for the divorce and thus reinforces

[152] Honneth, *Freedom's Right,* 90.
[153] Honneth, *Freedom's Right,* 91.
[154] Honneth, *Freedom's Right,* 91.

prejudices against women's liberation.[155] Although given his limited use of the film is to demonstrate a form of legal pathology such an aside may be unobjectionable, a certain disquiet is warranted given some of Honneth's own concerns that are expressed later in *Freedom's Right:* in his discussion of the democratic public sphere, Honneth cautions about the potential misdevelopment that arises when the mass media produces virtual descriptions of social reality, to the extent that 'the communication processes in the public sphere have been so dramatized by media reporting that it is quite difficult to separate reality from fiction and get a sober look at real social developments'.[156] This insight is significant in terms of whether the film that is being used to show the reality of a legal pathology in fact reflects the 'deformation of social behaviour' symptomatic of that pathology, or something else entirely. For example, one of the few key plot developments of the film noted by Honneth in his brief commentary, is that the father loses his job and is required to accept a 'much lower-paid job' (to use Honneth's words) in order to demonstrate to the Court his financial stability. However, in the film the father obtains new employment with 24 hours, and his salary only drops from $33,000 to $28,200.[157] By contrast, the average family income in a household headed by a woman in the United States in 1977 was $7,742. Further, despite the father's stated salary, the lifestyle that he is depicted as enjoying would require an even higher level of earning. This means that any parallel between the father and a woman in a similar situation is simply false – and it is this false parallel which is a central element of the film's dramatic impact. Accordingly, whilst there is no reason to reject the aesthetic sphere as a source of insights into 'diffuse moods' and 'collective sentiments' that are indicative of social pathology, there must be an awareness that the portrayals of characters in works of fiction – and the social pathologies they 'represent' - may also themselves be distorted (leading to what Honneth describes as a 'feedback effect' where media produces reality self-referentially).[158] As a result, it could be suggested

[155] Honneth, *Freedom's Right,* 90. Indeed the film has on occasion been referred to as Hollywood's backlash to the 'second wave of feminism' – see Rebecca Baum, "Kramer vs Kramer vs Mother-right," *Jump Cut: A Review of Contemporary Media*, no. 23 (October 1980): 4-5.

[156] Honneth, *Freedom's Right,* 296-297.

[157] Eileen Malloy, "Kramer vs Kramer – A fraudulent view," *Jump Cut: A Review of Contemporary Media,* no 26, (December 1981): 5-7, for the basis of what follows.

[158] Honneth, *Freedom's Right,* 297.

that the aesthetic sphere – especially under the influence of the mass media - can also obscure or blunt the insights needed for effective normative reconstruction.

The second aspect of his analysis, and one which for the purposes of the argument here is far more significant, involves another bracketing out by Honneth in the course of drawing out the features of the pathology of legal personality. Honneth acknowledges that the film 'displays a number of special characteristics and emphases associated with the particularly emotional case of a custody battle', but nevertheless asserts that it reveals the general course of the pathology. This is no doubt true – indeed Honneth could have made the perhaps glib point that the name of the film itself, *Kramer v Kramer*, in adopting the legal nomenclature of court proceedings to characterise the entirety of the drama being played out by the protagonists, could be seen to symbolise the total subsumption of the complex interplay of communicative relationships and interpersonal conflict involved in a family breakdown and custody dispute under the aegis of the law. However, perhaps ironically given Honneth's critique of legal freedom centres on the compulsion to abstraction, the bracketing out of these 'special characteristics' itself obscures a range of social practices particular to the co-ordination challenges raised by the specific conflict involved in family separations that can and have been identified empirically, including from within the legal sphere itself. Indeed, an analysis of the developments within family law over time both support his diagnosis of a social pathology but, critically, also provides access to the potential resource for overcoming or at least mitigating its effects, something that neither the film nor Honneth's analysis of it, seems capable of doing.[159]

Remaining with the example of *Kramer v Kramer*, it is noteworthy that the work (which as noted previously was published as a novel in 1977 and a film in 1979) was made during a period where rates of divorce were on the rise, and there was

[159] In line with one of the key elements of a Critical Theory, there is a requirement that having been diagnosed, the theory provides some at least *theoretical* hope for overcoming social pathologies. In some ways, there is a hint of regression in method here. In an earlier essay, Honneth argued that it was possible to search for the socio-structural conditions which provided a level of protection for the moral orientations of members of the social underclasses from institutional demands by means of an empirical investigation. His argument was that normative potentials of struggles for recognition were, although difficult to measure, *empirically* verifiable. Axel Honneth, "Moral Consciousness and Class Domination: Some Problems in the Analysis of Hidden Morality", republished in *The Fragmented World of the Social: Essays in Social and Political Philosophy,* ed. Charles W. Wright (Albany, NY: State University of New York Press, 1995).

significant debate about the future stability of the 'nuclear' family. In the period leading up to the film, the concept of 'no fault divorce' was receiving significant attention in the jurisprudence of the courts and in legislatures in the United States. One of the key drivers of this concept was the concern that the requirement of 'fault' before divorce would be granted had led to a significant amount of collusion between the parties. An example of this recognition amongst the judiciary is found in the case of *In re Marriage of McKim.*[160] In this case, heard in the California Supreme Court in 1972 (notably some five years before the novel was written and seven years before the film was released), Mosk J (albeit in dissent) said

> The California Legislature took a giant leap forward in the field of domestic relations with adoption of the Family Law Act, operative as of January 1, 1970…Traditionally, divorce could be granted to an aggrieved marital partner only upon a showing of the exclusive fault of the other partner…
>
> However, the concept of fault as the essential element in divorce actions lingered on, even in cases involving no issue of child custody and cases in which the defendant defaulted and thus impliedly admitted the allegations of the complaint. *Every day, in every superior court in the state, the same melancholy charade was played*: the "innocent" spouse, generally the wife, would take the stand and, to the accompanying cacophony of sobbing and nose-blowing, *testify under the deft guidance of an attorney* to the spousal conduct that she deemed "cruel".
>
> *Universal disenchantment with the demeaning nature of this command performance*, and with the rule that demonstrable fault is necessary to terminate the marriage relationship, led to extensive legislative studies and ultimately to adoption of the Family Law Act.

Although New York - where *Kramer vs Kramer* was set - was one of the last states of the United States to introduce no fault divorce, it is abundantly clear from this extract that the law – including both legislatures and judiciary - was painfully aware of the tendency of parties to adopt a strategic approach in the litigation, converting the conflict giving rise to the breakdown in the relationship into a form that was legally

[160] *In re Marriage of McKim*, 6 C.3d 673 (1972) (emphases added).

recognisable. Further, it is also clear that legislatures had responded to these signs of legal pathology by refocussing attention onto the substantive issue – that divorce was sought by parties in circumstances where the marriage had broken down. The change in the Californian law referred to by Mosk J in the quote above was the elimination of fault or guilt as grounds for granting or denying divorce. The Court in *McKim* also noted that

> Instead of grounds for divorce based on fault the Legislature sought to provide a basis for dissolution which is *descriptive of the actual reasons underlying marital breakdown*. The grounds of dissolution which the act substitutes for the traditional concept of fault are irreconcilable differences, which have caused the irremediable breakdown of the marriage. By eliminating faults and wrongs as substantive grounds for dissolution and by *requiring the consideration of the marriage as a whole* and *making the possibility of reconciliation the important issue*, the *intent is to induce a conciliatory and uncharged atmosphere which will facilitate resolution of the other issues* and perhaps effect a reconciliation.[161]

There is in this judgment a clear demonstration that the law itself was cognisant of the counterproductive nature of a complete abstraction from communicative relations, and seems in stark contrast to Honneth's assertion noted above that parties exercising the right of divorce have 'destroyed any possibility of commonly discussing their separate life paths in the future in light of their shared experiences'.[162]

What is critical is that recognition of the symptoms of the legal pathology described by Honneth, as dramatised in *Kramer v Kramer,* can be found in the texts of judgments of the Court and by implication from the reports and debates in the legislature giving rise to the changes to the law that came into effect in 1970. Not only does this suggest the law itself is sensitive to symptoms of legal pathology even as they are occurring, more importantly, it appears that the law itself was reflexively able to identify the abstraction from legal relationships in the context of divorce proceedings as a problem that meant the law could not fulfil its function – and further, that the law sought to remedy this failure by attempting to 'undo' this pathology, by

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[161] *In re Marriage of McKim, 6 C.3d 673 (1972)* (emphasis added).

[162] Honneth, *Freedom's Right,* 85.

reaffirming the importance of underlying relations, including those in other spheres of action.[163]

Indeed, the way in which the film depicts the custody battle significantly misrepresented how a custody case would have been handled by a New York court in 1979. Shortly after the film was released, the New York Times published an article entitled 'Child Custody: Jurists Weigh Film vs Life'.[164] In that article, several members of the New York bench and bar were asked to comment on the manner in which the film dealt with the custody issue. All of those interviewed agreed that the film grossly misrepresented the legal process involved. Philip Solomon, then immediate past president of the American Academy of Matrimonial Lawyers said that the decision of the court to grant custody to the mother 'could not have been the correct decision' and 'the public would be deceived in thinking so'. In the words of Justice Felice Shea of the New York Supreme Court, 'the court process was portrayed as unfeeling, unrealistic and incomplete. Even within the confines of a movie, Hollywood could have done better'. In particular, Justice Shea noted that the movie did not depict the judge interviewing the child in an effort to ascertain his relationship with his parents (also noting that the failure to do so amounted to an error of law), nor did it show the appointment of a neutral expert such as a psychiatrist or guardian ad litem who would seek to ascertain and represent the child's best interests. Justice Shea described a real trial process as involving a much greater focus on ascertaining what is happening in the child's life, rather than relying only on testimony in court. The expert commentators in the article also noted that the doctrine appealed to by the mother's lawyer (that a child is better off with the mother unless the mother is proved unfit) had by then been rejected by statute or court decision in most states including

[163] The methodological bias revealed here exposes Honneth to other forms of criticism. For example, he has been directly criticised for downplaying relations of domination within the family. Daniel Loick, "Juridification and politics: From the dilemma of juridification to the paradoxes of rights," *Philosophy and Social Criticism* Vol 40, no. 8 (2014): 757-778. Loick suggests Honneth has a propensity to view the family as a "pre-legal idyll, whose integrity must be defended from the sprawling imperialist invasion by a cold bureaucracy": 768. Although Loick acknowledges that Honneth does grant consideration to the role of juridification in securing improvements in security and freedom of women and children (see for example Honneth, *Freedom's Right,* 144, where in his reconstruction of the sphere of personal relationships post World War 2, women and other minorities could obtain legal protection in intimate relations), he argues that Honneth is inclined to give a higher normative value to the sphere of the family than to the law. Loick's criticism is that Honneth's critique of juridification thereby misses the *political* character of corresponding struggles: 769.

[164] George Dullea, "Child Custody: Jurists Weigh Film vs. Life," *New York Times,* December 21, 1979.

New York. Finally, they noted that exploration of the possibility of joint custody arrangements was completely absent from the film, which even in 1979 was seen as 'a viable alternative' to the traditional model. Given the hypothetical possibility of the parents returning to Court with an agreed custody plan, Justice Shea said she would probably make such an order because 'I would be very happy if they managed to work things out on a consensual basis, because it's my feeling that parents usually know better than the courts can possibly know'.

The purpose of this exegesis on Honneth's use of *Kramer v Kramer* is not to suggest that his use of the film to identify the relevant legal pathology is illegitimate, but that it is problematic when coupled to his outright dismissal of the possibility that similar insights are available from within the discourse of the law itself, and his resultant failure to see social practices within the law that potentially provide the resources to counteract the development of pathologies of legal freedom. Indeed, the exegesis just undertaken supports the counterclaim that jurists are ideally placed to diagnose and engage with the complexity of action orientations – which will include both the strategic and the communicative - of parties to litigation. After all much of the role of lawyer or judge is to 'translate' the everyday social practices, issues, conflicts and experiences of the parties involved in conflict into the language of the law. Although the dangers involved in this process must include the risk of promoting the adoption of the legal point of view as an exclusive attitude towards ones obligations and the corresponding furtherance of the legal pathologies identified by Honneth, the corpus of work created by jurists must also be given due regard as a source of insight into the 'diffuse mood' and 'collective sentiments' of those who engage with the law. It is evident from the article in the New York Times that lawyers, including those on the bench and in the legislature, had already been exposed to the more complex experiences underlying the struggles for recognition within the family; and further, that the law developed in response to these coordination challenges in a way that produced new intersubjective contexts of interaction. That is, this example is evidence of a reflexive refocussing of the law in a direct response to the pathological identification with legal rights in an effort to re-engage all the parties to the conflict with the communicative relationships that underpin the institutions of marriage and family.

Although the above proceeds by way of a demonstration of the limitations of Honneth's analysis of legal pathology, at the same time the analysis shows the overall value of his critical theory of law. His method of normative reconstruction when applied to law, when modified to also engage with the work of legal theorists, legislators and jurists, not only provided insights into the dynamic that leads to the social pathology of the legal personality, but also provides for an accurate and nuanced understanding of the relevant social phenomenon. This engagement makes visible the recognition within the law of the tendency towards the adoption of the legal personality in divorce proceedings and its pathologizing effects on the relationships of mutual recognition operative within the institution of the family. The significance of this diagnostic power of such an approach will be explored in the next section.

3.6 Juridification and the normative reconstruction of law

In order to understand why Honneth can see only part of the significance of *Kramer v Kramer* in understanding the pathology of the legal personality, a closer examination of his attitude – both methodological and conceptual – to law is required.

Law plays a complex role in Honneth's critical theory. He acknowledges that the dimension of legal recognition and the system of formal rights secured by law form part of the meaning of autonomy in the modern world. Indeed, in *Freedom's Right,* Honneth expressly identifies law as one of five 'spheres of recognition', distinct from morality as well as the from interpersonal relationships, the economy and democratic politics. Law is therefore understood as a 'constitutive sphere of action' in that it provides for an institutionalised form of mutual recognition.[165] For Honneth, law is fundamental in securing a specific form of freedom that is a necessary component of individual freedom in modern society, which involves establishing and protecting social space for individuals to act free from interference.

Law has both a specific and ubiquitous place in the complex structures that secure freedom in modern democracy. Specifically, the sphere of law allows for the retreat from and reflection on existing obligations. Law however is also a 'permanent

[165] Honneth, "Beyond the Law,": 129.

resource' that can be called upon by social actors to regulate the other spheres of action, as a

> shared medium for rejecting unreasonable demands, justifying social reforms or giving general institutional force to newly achieved social changes.[166]

Indeed, whilst maintaining the fundamental dependence of the sphere of freedom that allows for democratic will formation (the political-public sphere) on other forms of social freedom (and the ontological precedence of the social relations in these other spheres), Honneth accepts that only through the law (or at least the institutionalised practices of the political-democratic sphere) are achievements in other spheres able to be reflexively deliberated on and secured.[167]

One the other hand, Honneth argues strongly that legal categories and norms are insufficient for comprehending freedom and autonomy.

> Many of the load-bearing structures, particularly in the spheres of social freedom, do not consist in juridical relations, but in practices, customs and social roles…I am explicitly opposed to the tendency to develop the foundations of a theory of justice solely on the basis of juridical concepts. Nothing has been more fatal to the formulation of a concept of social justice than the recent tendency to dissolve all social relations into legal relationships...[168]

That is, Honneth has an empirically driven concern that critical social theory should not confine itself to the examination of social co-ordination problems that confront the law or the democratic process only. Without doubt, there are many significant areas of study deserving of attention outside the sphere of law; however, even Honneth acknowledges that it remains possible to hold this view and yet maintain that a critical interest in the law is still a valid field of inquiry.[169]

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[166] Honneth, "Beyond the Law,": 128.
[167] Honneth, *Freedom's Right,* 330-331.
[168] Honneth, *Freedom's Right,* 66-67.
[169] Honneth, "Beyond the Law,": 126-8.

There is however also a more fundamental theoretical concern held by Honneth that the ubiquity of law in the various spheres of social action gives rise to the tendency at the theoretical level – almost as a complement to the pathological tendency at the social or practical level - to subsume all social norms and interpersonal interactions under the model of legal principles and legal relations.[170] For Honneth, the dominance of this one-sided approach to social analysis, coupled with the use of a one dimensional concept of autonomy in law and legal theory, conceptually reinforces a fundamental misunderstanding of the concept of freedom: 'liberty' is taken to represent the whole of freedom.[171]

Indeed, at times in the chapter on legal freedom in *Freedom's Right* it appears that Honneth thinks that the pathologies of legal freedom are a *necessary* result of the 'compulsion to abstraction' required by the law – for example when he says the institutionalised system of legal freedom represents a gateway to such pathologies for the 'mere reason that it demands a great deal of abstraction from its participants'.[172] Honneth appears to suggest this conceptual demand is, at least in part, instrumental in the social process whereby the law as a medium for coordinating action increasingly displaces communicative forms of social interaction, and especially dispute or conflict resolution. In his analysis Honneth ultimately links both legal pathologies he identifies in the chapter to the process of increasing legal codification which leads to strategic attitudes replacing communicative orientations, along with the 'ideological' effect of the growing legalism of political discourse.[173]

However, in taking up this critique, it appears that Honneth focusses only on Habermas' account of law as a medium of social co-ordination to the diminishment, if not the exclusion, of the idea of law as a social institution, itself a domain of social practices. Accordingly, Habermas' account of the idea of legally structured relations also contributing to the reproduction of 'shared legal traditions and individual

[170] Honneth, "Beyond the Law,": 128.

[171] Honneth, *Freedom's Right,* 123-125.

[172] Honneth, *Freedom's Right,* 87.

[173] Honneth, *Freedom's Right,* 89, 94. It is not just the logic of legal freedom at work in the development of the law however; elsewhere Honneth expresses a particularly bleak view of developments in the law which, under the pressures of economic imperatives and misdevelopments in other social spheres is transformed from a system of securing individual subjective rights to a mechanism for the exclusion of those members of society that have no longer any recourse to the system of law (the unemployed, the under educated and illegal aliens). See Honneth, "Brutalization of the social conflict,": 16.

competencies for interpreting and observing legal rules'[174] as part of the social world tends to be occluded in Honneth's work. That is, despite Honneth's critique of Habermas' idea of 'normatively neutral' steering mechanisms as a form of social co-ordination – and here we need remember that the claim that all social orders are necessarily normatively integrated is said to be the 'first premise' of Honneth's approach[175] - it sometimes seems to be an overly formalistic understanding of the law that appears in *Freedom's Right.* Indeed, Honneth goes so far as to claim that although law is important in regulating social practices in all the various spheres, it does not itself generate any new substantial contexts of action. That is, despite Honneth identifying law as both a distinct sphere of knowledge and action, and as a permanent resource to be drawn on by social actors generally, he does not consider law as itself involving a set of discrete social practices; that is, he has a tendency to consider law only as a medium of social coordination that operates on and through other social institutions such as the family, the market and the democratic public sphere. For Honneth, legal relations necessarily involve social practices that depend on non-legal relations – the sphere of law, although a constitutive sphere of action, is merely regulative and not constitutive of an intersubjectively shared social reality.[176] For example, as noted above, Honneth says that 'whoever exercises the individual right to divorce as a means of separating from one's spouse has 'destroyed any possibility of commonly discussing their separate life paths in the future in light of their shared experiences'.[177] As was hinted at in the previous section, this however seems to both dramatically overstate and also oversimplify the interaction between the legal framework that regulates the institution of marriage and the relationship between the participants in that institution.[178] Indeed, the ongoing relationship between ex-spouses is not simply what it was before marriage; the recognition of the relationship between them by law has created an irrevocable social context in which the relationship is constituted both during marriage and after divorce. It is not just that developments in family law have allowed for a proliferation of family forms which are

[174] Habermas, *Between Facts and Norms,* 80-81.

[175] Honneth, *Freedom's Right,* 3-4.

[176] Honneth, *Freedom's Right,* 123.

[177] Honneth, *Freedom's Right,* 85 (emphasis added).

[178] Habermas, *The Theory of Communicative Action Vol 2,* 370-371. Noticeably Habermas similarly critiques the effect of juridification on the family in discussing divorce, however because of the attention he gives to empirical research he, unlike Honneth, is able to identify the counter-pressures from within the law: he notes, for example, the attempts within the law to "dejudicialize juridified family conflict".

governed by the principles relevant to family life, but that there is another range of social contexts that are created by these new, plural forms of family life and in particular different principles that govern how social actors in these contexts relate to one another. Although Honneth is very careful not to compartmentalise the law within his social theory, but to acknowledge it operates in and through the other spheres of action[179], when it comes to the social practices that make up the law as an institution he tends to understand them in purely abstract, almost binary terms: as either purely strategic or, even if communicatively based, as more properly 'belonging' to another sphere of action.

Methodologically, this view leads Honneth to separate the analysis in *Freedom's Right* of the development of modern law as the means by which 'private' autonomy, or subjective rights, are developed and secured from the processes leading to the creation and institutionalisation of the democratic public sphere.[180] Although he recognises that there is a fundamental internal relationship between private autonomy secured by law and the act of public autonomy that creates law, Honneth wants to ensure that both moments are given separate consideration. However, it appears that this analytic decision may have resulted in a certain one-sidedness in Honneth's analysis of law, one which obscures the way in which law is made up of social practices that constitute an intersubjective reality; that is, this bifurcation leads Honneth to fail to see that the law is a 'social institution' proper.

This same perspective perhaps explains why Honneth does not in fact engage with the work of either legal theorists, lawyers or jurists when examining the law in the same way as he does with subject-specific theorists and practitioners in other spheres of freedom.[181] By stark contrast, Habermas had argued that

> The doctrinal work of legal scholars is at the heart of systematizing and rationalizing a corpus of legal norms - of making its construction transparent. This might be the reason why all great social theorists since Durkheim were fascinated by law...But again, one can hardly give an appropriate account of

[179] Honneth, "Beyond the Law,": 128.

[180] Honneth, "Beyond the Law,": 129.

[181] Contrast the chapter on legal freedom which has very limited references with the parts of the book dedicated to the study of the family, the economy and the democratic public sphere in *Freedom's Right*, where these latter sections engage much more extensively with the work of a range of psychologists, economists and political theorists.

> those achievements from either a sociological or a philosophical point of view alone. Sociologists and philosophers have to pay due respect to the doctrinal work of lawyers, which first lays bare the bones of a legal corpus.[182]

Although in this quote Habermas is drawing attention to the need to engage with the work of legal scholars in order to properly reconstruct the normative basis of the legal sphere, as shown in the previous section, this same 'doctrinal work' is at least as sensitive or open to displaying the signs of a social pathology.[183] Perhaps in response to what he sees as the overemphasis in a number of theorists, including Habermas, on law as the institution that actualises freedom in modern societies, while Honneth regards law as a fundamental institution of modern society, he has not engaged empirically with the law in the same way as he has with either psychology or economics.[184] Even taking seriously Honneth's concern about the risk of a possible one-sided view of law as detrimental to institutionalising freedom in modernity (or perhaps, because of this risk), there are good reasons to argue that empirical research in law – meaning an analysis of the decisions of courts and the law making of legislatures - should be considered as fundamental to any attempt at a normative reconstruction.

Contrary to Honneth's view, the institution of law embodies distinctive shared social practices such that developments in the law do generate new intersubjectively shared contexts of action; changes in the sphere of law are not just a conceptual

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[182] Habermas, Jurgen. "Discourse theory & international law". Interview by Armin von Bogandy. *European Society of International Law,* Second Master Class on International Law, Max Planck Institute for Comparative Public Law and International Law, 2013, 4. https://esil-sedi.eu/wp-content/uploads/2018/04/2013InterviewHabermas.pdf

[183] A recent example of a similar exercise can be found in the work of Chad Kautzer who uses Honneth's theory to diagnose a social pathology in the rise of what he describes as 'self-defensive subjectivity' in the particular context of the "subject-constituting 'passionate attachment' to the Second Amendment right to bear arms." See Chad Kautzer, "Self-defensive subjectivity: The diagnosis of a social pathology," *Philosophy and Social Criticism* Vol 40, no. 8 (2014): 743-756. Kautzer provides a compelling account of how recent jurisprudence and legislative activity in relation to the interpretation of the right to bear arms in the Constitution of the United States of America can be best understood as a social pathology. Importantly for the point being made here, Kautzer undertakes this analysis by examining decisions of the US Courts and the statements of policy makers and lobby groups involved in the development of legislative change. See Chad Kautzer, "Good Guys with Guns: From Popular Sovereignty to Self-Defensive Subjectivity," *Law Critique* Vol 26, (2015): 173-187.

[184] Honneth, "Grammatology of modern recognition orders,": 147. Even in *Freedom's Right* Honneth's empirical engagement with law as a social institution (rather than as a form of freedom) is limited to high level discussion about the constitutional state.

evolution that affects the meaning and extension of law as a form of negative freedom but rather also something that directly produces new domains within an intersubjectively shared social reality. Accordingly, although there is critical value in Honneth's analysis of the pathologies of legal freedom, which arise when negative freedom is taken to represent the whole of freedom, his approach needs to be adapted by recognising the law as embodying social practices that directly contribute to developments in social freedom as well. Significantly, this modified approach draws attention to the way in which the meaning of freedom - and the interplay between negative freedom and social freedom - is a source of conflict internal to the law, and so as central to its development as a social institution. That is, it is part of the reflexivity of law to recognise the interdependence of legal freedom and social freedom, of private and public autonomy. This in turn opens up a valuable field for empirical research that remains largely obscured in Honneth's analysis; in particular the work of legal theorists, legislators and the judiciary, something that is almost completely overlooked in Honneth's account.

Only when the law is understood as a social institution and not just a system of abstract principles guaranteeing subjective rights can there be a nuanced critique of developments in the law – one that identifies the emancipatory potentials of recent developments, not just the dangers of the process unfolding in a way that takes on paradoxical features. This is fundamental to the project of seeking to steer the ongoing interpretation of freedom in the law in a manner that promotes rather than hinders social freedom. In undertaking this type of critique, attention is given not only to theoretical forms and arguments but to practical dimensions – in this instance to a detailed analysis of the law not as an abstract set of norms, rules and principles but as it appears in the social institution of law itself, as actually articulated in legislation and judgments and put into practice.

The effect of the combination of Honneth's somewhat ambivalent attitude to law and his methodological choice to analytically separate the sphere of law from social spheres that he considers to be constitutive of intersubjective relations can be seen in his use of the concept of juridification. In Section 3, it was noted that the development of legal pathology was attributed by Honneth to the process of juridification. However, the concept of juridification is an ambiguous one, and can be

used both descriptively and normatively to discuss changes in the law over time.[185] In their study of juridification, Blichner & Molander identify five different dimensions or meanings of the concept as it commonly appears in the relevant literature

1. The establishment of a legal order
2. The expansion and differentiation of law
3. An increase in problem solving by reference to law
4. Increased judicial power
5. The tendency to understand oneself and the relationship between self and others in legal terms

Indeed, a close reading of the analysis provided by Honneth of the nature and source of legal pathologies, reveals at least three of these different aspects or meanings of the concept of juridification being used.

First, there is an empirical claim by Honneth that increasingly law regulates a broader range of social practices and action contexts (item 2 in the list). In Honneth's account, this idea of juridification as an expansion of law draws not on Habermas' normative account of the development of law found in *Between Facts and Norms* but on his earlier seminal work, *The Theory of Communicative Action*, which provides a brief historical-sociological account of the development of modern law.[186] In this earlier work, 'juridification' is part of Habermas's analysis of the 'colonisation' of the lifeworld, the process by which more and more areas of social co-ordination are progressively drawn into the functional systems of the economy and the State. When he discusses the growth in the legal regulation of areas of social coordination, Habermas specifically refers to this as a process of juridification.[187]

The second aspect of juridification that features in Honneth's account of legal pathologies is the tendency to view law as the 'natural' means to resolve conflict (item 3 in Blichner & Molander's list). In circumstances where law is increasingly expanding to regulate more action contexts, there is an obvious correlation with an

[185] Blichner and Molander, "Mapping Juridification,": 38-39.
[186] Honneth, "Beyond the law,": 127. Honneth argues that there is nothing in *Between Facts and Norms* to suggest that it displaces Habermas' earlier account of law, one which pays greater attention to a social analysis of the effect of law on the reproduction of society.
[187] Habermas, *The Theory of Communicative Action Vol 2*, 356-373.

increase in recourse to the formal law to solve problems. However, this aspect of juridification goes further in that it refers to the tendency to perceive social conflict through the frame of legal concepts (and again here Honneth is talking not only about the orientation of actors in specific problem situations but about theory as well).

The third aspect is the one Honneth most explicitly describes in terms of a legal pathology which is the tendency for social actors to understand themselves, others and the relations between them in terms of legal rights, and the expectation of conformity to law is one based on an assumption of an actor's strategic motivations rather than communicative obligations and understandings (item 5).

Despite these three apparent different emphases in his use of the term 'juridification' in explaining the causes of legal pathologies, Honneth does little to explain what he means by these terms, or whether or how he sees them to be related processes, other than by reference to their common feature of a 'compulsion' to abstraction.

Returning to Honneth's argument more generally however, a fourth dimension of juridification – understood as the establishment of a legal order itself (item 1) – also has a prominent place in *Freedom's Right*. It appears earlier in the chapter on legal freedom when Honneth traces the development of what he refers to as 'liberal' and 'social' rights (which he says are not only empirically but conceptually linked) and the further development of what he calls 'political' rights (which he says differ from the first two categories of rights not just empirically but conceptually).[188] This fourth meaning of the concept of juridification, the establishment of a legal order as such, which interestingly is not described in this context by Honneth as 'juridification', is a familiar one for readers of Habermas: it appears in both the *Theory of Communicative Action* and *Between Facts and Norms.* In both texts, Habermas' account of the development of the modern legal system – or the establishment of the modern legal order - are described as 'four waves' of juridification. The first wave led to the bourgeois state; the second led to the constitutional state; the third led to the democratic constitutional state; and the fourth led to the democratic welfare state.[189]

[188] Honneth, *Freedom's Right,* 78- 79.

[189] Honneth, *Freedom's Right,* 357.

For Habermas, the first wave formed a political-legal order that was epitomised in the social contract theory of Thomas Hobbes – a social order based on the formal equality of all legal subjects with a sovereign power that holds a monopoly on coercive power. The second wave is characterised by the creation of civil rights that can be exercised by subjects as against the sovereign. It is at this stage that the concept of the 'rule of law' begins to emerge, where rights to life, liberty and private property no longer arise as 'side effects' of the social contract but are themselves justified norms that become central to the institutional order. The third wave arises when subjects become citizens: political rights provide for legal subjects to actively influence the will of the sovereign. At this point, the process by which law is generated and legitimated becomes itself subject to law (and it is at this stage that the 'separation of powers' becomes an issue and a hallmark of the legitimacy of the modern legal system). These three stages of juridification are, in general terms, characterised by Habermas as stages in a linear process of 'freedom guaranteeing juridification'.[190] Habermas goes so far as to state that where the institutionalisation of law 'underwrites the demands of the lifeworld against bureaucratic domination' the results are '*unambiguously* freedom guaranteeing'.[191]

However, with the fourth wave of juridification, Habermas identifies that, for the first time, there are a number of *ambivalent* effects of juridification. The institutionalisation of legal norms in the form of the social welfare state reveals the potential for juridification to both promote and undermine freedom. Habermas distinguishes social welfare reforms that engage with areas of life that are already structured by law – for example in the labour market where social welfare reforms provided protections to workers from excessive hours of work, unfair dismissal, and supported the freedom to organise – and those reforms which depend on legal-bureaucratic interventions in the communicative lifeworld of welfare recipients. While reforms that fall within the first category are said to promote freedom, Habermas argues that reforms that are in

[190] Habermas, *The Theory of Communicative Action Vol 2,* 361.

[191] Habermas, *The Theory of Communicative Action Vol 2,* 361 (emphasis added). This is not to say that Habermas did not think that the first 3 waves of juridification did not have effects that were negative – however these are understood as arising from the not yet institutionalised normative potential of legal freedom: that is, using Honneth's terms, the normative surplus of the codification of social norms in law themselves highlighted the injustice of the exclusion of women, the working classes and other socially repressive elements of the political legal order. However, the process of juridification itself was not seen to be intervening in a way that distorted the social relations the process was aiming to liberate.

the second category – for example where monetary compensation is provided to those who are ill, old, unemployed or poor – lead to ambivalent and potentially negative effects. This is because although such reforms no doubt amount to an improvement in the historical conditions in which many such persons lived, the nature of the legal intervention also led to a restructuring of the relationships and life situations of these people. In his analysis, Habermas notes the 'individualising effect' of a system of welfare based on legal entitlements, and the detrimental impacts on the readiness of communities organised on the basis of a sense of solidarity rather than legal relations – including the family – to provide support or assistance. As a result, individuals are isolated from the bonds of solidarity provided by family and the broader community. This restructuring of social relations in the welfare state as a result of the legal institutionalisation of welfare reforms negatively impacts on the self-image of the welfare recipient – the necessary relations of reciprocal recognition are distorted, and the autonomy (and so freedom) of the individual is undermined.[192]

In *Freedom's Right,* Honneth's description of the development of the modern legal order follows the Habermasian account quite closely, but there is a difference of normative significance. Honneth notes the inevitability, from a normative point of view, of the struggle for and implementation of social rights that provide for the material basis for civil and political participation of subjects in the democratic state.[193] However, as noted above, Honneth argues that although necessarily connected, there is a fundamental conceptual difference between liberal and social rights, and political rights: the former can be exercised in a purely private fashion whereas the latter requires active co-operation with others. That is, Honneth analytically detaches the 'third' wave of juridification from developments in the law as such[194] and situates it in sphere of democratic will formation. For Honneth, this analytical distinction appears to lead him to suggest that the fourth wave of juridification has ambivalent effects depending on whether 'social' rights are conceived on the basis of 'civil' or 'liberal' rights, that is, by reference to public or private autonomy: where the latter conception prevails the result is the development of legal pathology.

[192] Habermas, *The Theory of Communicative Action Vol 2,* 362.
[193] Honneth, *Freedom's Right,* 78.
[194] Honneth, *Freedom's Right,* 73.

However, using the framework provided by Blichner & Molander, it can be seen that Honneth oversimplifies the process of juridification. When coupled with his methodological distinction between the sphere of law and the sphere of democratic will formation, and his view that law does not constitute any substantive intersubjective relations but merely regulates existing ones, this oversimplification leads to an inability to see the law as a social institution, as one which also can contribute to social freedom (or the reality of freedom). Critically, this means that Honneth is unable to find within the practice of the law any normative counterpressure to the tendency towards pathology. Crucial to Blichner & Molander's analysis of the different meanings and uses of the term juridification is that it is a complex and multidimensional process, in that it is something that takes place over time, and it is not necessarily linear. Indeed, it's different effects can be seen to increase or decrease (an effect they call 'de-juridification') as part of the ongoing development of the law. What is highlighted is that these five dimensions have a complex inter-relationship: on occasion, an increase in one dimension of juridification can lead to a decrease (de-juridification) in another. Ultimately, what is made clear is that it is necessary to examine empirically all the different processes at work, and their relationships, before it is possible to normatively evaluate the effect of juridification in a specific legal order and broader social context (or lifeworld).

Reconsidering the example of *Kramer v Kramer* – based on the corrective to the narrative of the film provided by legal scholars and practitioners outlined above – can demonstrate this limitation on Honneth's analysis, but also the potential of a normative reconstruction of law based on Blichner & Molander's multidimensional concept of juridification. The example of the narrative in *Kramer v Kramer,* and the context in which it is set, provides very clear signs of the three aspects of juridification that Honneth sees at work in the development of legal pathology. The changes in the law in the United States between the 1950s and late 1970s reflects first of all an expansion of legal regulation of family life, an increase in the resort to law to resolve family conflict and a subsequent tendency for parties to approach their interactions strategically. Interestingly, generally speaking, Honneth limits his analysis of the film to the latter two aspects: in his use of the film to identify legal pathology, there is no argument along the lines that the expansion of the law into the regulation of familial conflict is itself productive of pathology. Indeed, elsewhere Honneth acknowledges the positive contribution of legal regulation of conflict of family life to the development

(both in terms of protections from violence but also in terms of promoting a certain 'democratisation' of familial relations) of social freedom in the intimate sphere of family life.[195]

As was seen above, Honneth accepts the characterisation in the film that in the face of familial conflict, there is a tendency to resort to 'the law'. However, as was also seen above, whilst this may have been a feature of the early period of modern divorce law, by the time of the film this had changed significantly. A more nuanced approach to the concept of juridification enables this more complex interplay between legal and communicative responses to a social problem to appear. First, it is unsurprising that when new rights are introduced that the judicial process is charged with determining the scope and enabling the enforcement of those rights. (This statement in no way conflicts with Honneth's view that the law does not lead but follows the normative struggle leading to the recognition of such rights; indeed it is relatively clear that the change in the legal order to create laws to allow divorce followed from various normative demands which became prominent in the 1950s to secularise the regulation of the institution of marriage.) However, the law relatively quickly recognised the need to de-juridify certain aspects of the process of resolving familial conflict, especially where the custody of children was involved, a feature of juridification not picked up by Honneth at all in his analysis. As noted by the legal commentators discussing *Kramer v Kramer,* the traditional adversarial judicial process has become secondary to other forms of conflict resolution, in particular to those modes directed to re-establishing (or at least emphasising) the communicative relationships between family members, and in redirecting the focus of the parties to the interests of the child involved in any such disputes. This shift in the law had a number of consequences also (at least potentially) for the tendency of participants to act 'strategically' in the sense of interpreting their interactions through the lens of their legal rights. Instead of a win/lose principle structuring the participants' perspective, 'strategically' the interest of the parties is best served by their engagement in ethical self-reflection in order to achieve an agreed outcome.

[195] Although 'divorce law' has a long provenance, the major shift that took place in the 20th century was a shift from the law *prohibiting* recourse to general law (at least in the sense of modern secular law) in the area of marriage to a willingness on the part of the law to actively regulate those relationships (in the sense of establishing normative criteria for such relationships as well as the rules for establishing/recognising such relationships).

Interestingly, in this respect, the jurists interviewed by the New York Times agreed that the film accurately depicted what had become two increasingly common features of custody cases – that women were no longer satisfied to allow an unfeeling husband to take command of a family's life, and also that a father could parent as well as a mother: both phenomenon that appear as a counterforce to the pathology of legal personality. It is this dimension of the sphere of action constituted by law that demonstrates that law in fact does create an intersubjective reality. The law not only allows ethical self-reflection by providing an environment free from social obligations; when structured in the right way, it can promote, or even 'require' such deliberation. Indeed, what can be seen here is a potential that will be explored in detail in Chapter 6: that the law creates an intersubjective context for supporting, restoring or even producing the capacities of individuals to engage in social practices and develop the self-relations necessary for autonomy.

Already this brief analysis is suggestive that Honneth's account of juridification fails to appreciate the complexity of the process of the development of, and within, the law. Juridification is a multi-faceted process, an ongoing negotiation within the law, and particularly between the coordination of action/resolution of conflict by law, involving the process of abstraction, and the broader relationships, values, principles and abilities at stake in the social conflict. This significance of this insight, that juridification is a process by which the law first develops in response to social problems, and then adjusts this response in the face of symptoms of social pathology, is that it provides a theoretical framework for undertaking a normative reconstruction of law. The different meanings and aspects of the concept of juridification highlight features of the social practices that comprise the institution of modern law. These social practices, and the normative principles that govern them, are part of the resources that are drawn upon when the law is called upon to deal with social conflict. Normative reconstruction of law involves an empirical analysis of the process of juridification in terms of these social practices and their governing norms; the extent to which the law can be seen to promote social practices that embody these normative principles, or instead gives rise to pathologies, provides the basis to legitimate (or critique) any particular legal response to social problems.

3.7 Conclusions

The foundations for Honneth's Critical Theory of law are found in the work of Habermas. Both share the view that law has a fundamental role in social co-ordination and integration in complex societies. They also agree that, as a result, the legitimacy of law must be evaluated in two dimensions: the extent to which it is effective as a means of social coordination by ensuring general compliance; and the extent to which it is regarded as normatively valid, allowing compliance on the basis of respect for the law. They further also share the view that in modern societies, it is the democratic process that carries the burden of ensuring the validity of the law.

What follows from these positions is the recognition that there is a necessary internal relationship between law and autonomy. For law to function as a means of social coordination its must effectively disburden social actors; it does so by means of creating a space for action based on subjective values and reasons alone. This idea of a form of social space abstracted from intersubjective relations gives rise to the idea of 'private' autonomy, and the freedom enjoyed in such a space is known as 'legal freedom'. However, this is not enough to guarantee the validity of law; actors must also be able to participate freely in the democratic process in order that law can also meet the ideal of self-determination, that a person can obey a law on the basis that they have imposed it upon themselves. This is the requirement of 'public' autonomy. This form of autonomy depends on the existence of intersubjective relationships: as outlined in Chapter 2, this is the form of autonomy that requires a network of intersubjective relationships of mutual recognition, and the corresponding form of freedom known as 'social freedom'. Accordingly, it can be said that law requires, but does not guarantee, social freedom.

This last insight explains how, while agreeing that modern law has been, and remains, fundamental to the meaning and reality of freedom in modern society, both Habermas and Honneth argue that developments in the law are not *necessarily* freedom guaranteeing. Some changes in the law have had ambivalent effects: in particular, where law has replaced forms of social coordination based on relationships of mutual recognition, there has been an experience of a diminishment of social freedom. Sometimes this has been through the exclusion of social actors from participation in key social institutions; however, more significantly, there is also

evidence of social pathologies being caused by the systemically induced misunderstanding of the meaning of key norms and principles. Honneth in particular details what he describes as legal pathologies, situations where the process of abstracting from lifeworld contexts that allows for private autonomy and legal freedom is misunderstood as comprising the whole of freedom. A consequence of this type of pathology is that the institution of the law, and social actors within it, interact in ways that damage and disrupt the relations of mutual recognition needed for 'public' autonomy and social freedom.

This conceptual framework is a powerful complement to the process of normative reconstruction that will enable our critique of preventive justice. A key to the analysis will be to identify whether the law's attempt to address social coordination challenges through preventive justice, on the basis of certain normative principles, enhances or diminishes freedom. A major part of the task will be to identify whether there are any pathologies that can be seen to be operative in the way preventive justice has developed.

However, within the approach outlined by Honneth in *Freedom's Right*, there is itself a certain one-sidedness. Honneth's own account of legal pathologies draws on works of literature and film; he gives no consideration to the work of legal theorists or lawmakers. Taking a cue from Habermas who recognises the importance of the work of jurists, it can be seen that Honneth's account of legal pathologies does not do justice to the recognition within the law itself of the danger of such pathologies, and efforts to address them by reference to normative principles beyond that of legal freedom. In the case of divorce law, his reliance solely on the film *Kramer v Kramer*, led him to overlook the debate and structural changes occurring within the law itself aimed at eliminating the pathology he identifies.

This insight, that empirical engagement with the law itself is necessary, points towards the concept of juridification. Whereas Honneth's use of the concept is largely negative – that is, he sees the development of legal pathology as a direct result of the process of juridification – in fact the concept is more complex. Indeed, within his own account in *Freedom's Right* of the development of law there is evident a more nuanced and positive appreciation of the process of juridification. Using the concept of juridification as a framework for analysing developments in the law allows

consideration of the processes by which the law seeks to continually adjust in response to social coordination challenges, in ways that seek to be socially effective as well as by reference to normative principles that extend beyond those that make up private autonomy and legal freedom. Indeed, recognising the complexity of the concept, in appreciating the different descriptive and normative aspects of juridification, helps bring into focus different sites within the development of the law at which private and public autonomy and the principles of legal and social freedom intersect.

The benefits of this adjustment to Honneth's conceptualisation of law is that, without having to modify the understanding of the legitimacy of law he shares with Habermas or ignore his undoubted sensitivity to the dangers of legal pathology, a more nuanced critique of preventive justice becomes possible. This analysis, while still critically interrogating the various principles and values that are being used to justify preventive justice (and which also shape the social practices that both give rise to it and make it up), provides an opportunity for finding within the law itself a countervailing normative potential. That is, as was seen in the example of divorce law, rather than seeing the current phase of juridification as almost inevitably resulting in legal pathology, it may be possible to locate in the work of theorists, legislators and jurists alternative principles and forms of social organisation which, if implemented, could mean that preventive justice would promote autonomy and social freedom.

Chapter 4

Preventive Justice: the contemporary debate

4.1 Introduction

Having outlined the philosophical framework for a normative reconstruction of law in Chapters 2 and 3, the following three Chapters will engage directly in just such a reconstruction of the phenomenon of preventive justice.

In recent times, a large number of liberal legal systems[196] have introduced laws that allow for significant incursions on the liberty of subjects – to the point of ongoing detention – without any crime having been committed. The general underlying principle for such measures is that they are preventive, where the intrusion of liberty is justified in the name of community protection in the face of an apprehended risk that a crime will be committed. From a jurisprudential perspective, these laws are generally considered to be controversial: at best, representing a significant break from the tradition of liberal criminal justice; at worst, a reversion behind fundamental principles of the rule of law. In the analysis to follow, the principles and values underlying this new and developing framework in the law will be referred to as 'preventive justice'; the specific examples of laws that are being made that seek to prevent crime by providing for ongoing monitoring, supervision or detention of potential offenders will be referred to as coercive preventive measures.

This Chapter will begin the process of a normative reconstruction by critically examining attempts by legal theorists to understand the normative basis of preventive justice. The first step (Section 4.2) will be to outline the paradigm case in which the use of State power to interfere in the liberty of the subject is considered to be justified: the detention of a person after conviction of a criminal offence. This analysis is necessary in order to identify how preventive justice challenges the normative principles that are used to justify that traditional understanding.

[196] The focus here will be on Australia, though direct comparison will be made with Germany; but such shifts are much more widespread, including the USA, UK, Canada and other parts of Europe.

Section 4.3 will examine a sophisticated contemporary program directly aimed at examining the legitimacy of preventive justice. The analysis undertaken by Allan Ashworth & Lucia Zedner serves to emphasise that notwithstanding coercive preventive measures may satisfy the form of valid law, there is a strong sentiment that they traverse traditional legal principles. However, for Ashworth & Zedner, the challenge posed in justifying coercive preventive measures is ultimately not that such laws invoke a different normative basis to the traditional justification of punishment in the criminal law, but rather that they appeal to the same principles using a different logic. In response, Ashworth & Zedner attempt to derive from the various principles that are used to justify punishment a number of guiding or 'restraining' principles that should be used to justify and delimit the development of coercive preventive measures.

Section 4.4 will examine an alternative theoretical approach. In contrast to Ashworth & Zedner, Klaus Günther undertakes a socio-historical analysis of preventive justice. Günther argues that that the expansion of preventive justice involves a shift and extension in meaning of the law under the influence of a growing sensitivity to risk where the law is responding to social pressure to provide reassurance, protection and security. He traces the normative principles underlying the shift to preventive justice back to principles inherent in the concept of the legitimacy of law itself – the obligation of the State to protect its citizens. However, unlike Ashworth & Zedner who seek to construct principles that could to legitimise coercive measures, Günther argues that preventive justice involves a peculiar inversion of the relationship between State and subject which ultimately threatens the democratic process and the rule of law itself.

Section 4.5 will provide some concluding observations that aim to reframe the contemporary debate. In particular, the focus will be on how a normative reconstruction that uses a multidimensional concept of juridification can point beyond analyses that limit their normative criteria for critique to the perspective of legal freedom.

Chapter 5 will then focus on a close analysis of developments within the law, from the perspective of legislators and jurists. This will be done by way of a case study of

a specific coercive preventive measure, being legislation that allows for the ongoing supervision or detention of serious offenders after the expiration of their sentence.

Chapter 6 will take up the possibilities that emerge from the normative reconstruction carried out in Chapters 4 and 5 and will attempt to articulate the basis for assessing the legitimacy of a post sentence coercive preventive measure by way of identifying the normative potential of a reimagined concept of rehabilitation.

4.2 Restriction of liberty: the traditional paradigm and its normative bases

There is nothing novel about efforts by legal communities to impose restrictions on the liberty of individuals based on a concern for the protection of the community. Indeed, at this level of abstraction, the tradition of social contract theory justifies the validity of law itself on the recognised need of individuals to mutually accept the curtailment of their liberty in the name of self and/or social preservation. However, as set out in Chapter 3, the relationship between the legitimacy of law and individual freedom is far more complex than that suggested by social contract theory.

Although there is an internal relationship between law and autonomy, and although the legitimacy of law ultimately depends on the exercise of public autonomy by citizens through the democratic process, one of the key achievements of modern law is the creation of a sphere of freedom in which individuals can retreat from their social obligations under the protection of law. Given the fundamental significance of this sphere of legal freedom, and the role of private autonomy to the form of the modern legal order, it is unsurprising that one of the central principles in the law's development, in response to both social pressures and normative demands, is the paramount value placed on the principle of individual liberty. It is perhaps no exaggeration to state that the integrity of the sphere of legal freedom from intrusion by the State, and specifically the right not to be detained or otherwise coerced by the State, is the defining characteristic of a modern democratic legal order.

Within the Anglo-Saxon or common law legal system, as early as the *Magna Carta* of 1215 the right to liberty was asserted against even the power of the sovereign to detain persons at will. That is, already at this early, pre-modern stage within this legal tradition, the requirement that the deprivation of liberty must always be justified was

enshrined.[197] In the 17th century, this doctrine was developed further with the *Petition of Right* of 1627 and the Acts preserving the writs of habeas corpus (1640 & 1679), which all placed limits on the power of the monarch to imprison a subject without the authorisation of law. Since that time, any inherent capacity of the sovereign or executive to lawfully imprison a subject has been denied (at least in times of peace).[198] Likewise, the authority of even the legislature to directly interfere in the liberty of subjects, through Bills of Attainder or Bills of Pains (where a legislative Act can inflict punishment on an individual or group of individuals without trial), fell into disrepute and in certain jurisdictions such Acts were prohibited, in some cases by the founding documents of the legal system itself (see for example Article 1 of the Constitution of the United States). In these jurisdictions, the development of the doctrine (and practice) of the separation of powers fundamental to the democratic constitutional state went hand in hand with the delimitation of the circumstances in which state coercive power could be brought to bear on subjects. The doctrine of the separation of powers and the allocation of the power to lawfully detain to the judiciary is a key achievement of the early phases of juridification to the elaboration and expansion of the concept of freedom.

Common to the juridification process in modern liberal legal systems has been the establishment of the paradigm case of the legitimate restriction of liberty: the punishment by the State of those convicted of crimes by a court of law. That this idea has become entrenched as a fundamental feature of the rule of law generally can be seen from such foundational documents as the Constitution of the United States of America (Article 1 prohibiting suspension of habeas corpus except in emergencies and outlawing bills of attainder, and the 5th and 6th amendments providing due process protections), the International Covenant on Civil and Political Rights (Article 9, the right to liberty and freedom from arbitrary arrest or detention and Article 14, against double jeopardy) and the European Convention on Human Rights (Article 5, against deprivation of liberty other than in accordance with a procedure prescribed by law). Even in Australia, which has no constitutionally enshrined bill of rights or even

[197] Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Sydney: The Federation Press, 2009), 42-43.

[198] See discussion of this development in the judgment of Justice Gageler in *Plaintiff M68/2016 v Minister for Immigration & Border Protection* [2016] HCA 1.

prohibitions on attainder (for example), the Courts have expressed this principle as being a necessary consequence of the doctrine of the separation of powers.[199]

> Putting to one side the exceptional cases…the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[200]

The use of coercive powers by the State against the liberty of the subject is therefore subject to limitations that are inherent to the system of law in a democratic constitutional state: coercive measures are only ever justified where a subject is convicted of a crime by operation of the judicial process.

This doctrine derives strong normative justification from a concept of autonomy derived from the principles of legal freedom. Subjects are free and equal before the law. The State, through the decisions of democratically elected representatives, define a range of conduct that is prohibited as incompatible with the freedom of others. These laws demand respect, both as a functionally necessary condition of (minimum) requirements for social co-ordination, as well as an act of self-legislation. The legitimacy of the interference in the liberty of the subject appears to depend entirely on the perspective of the subject itself; as an expression of private autonomy. A subject that breaks such a law threatens the effectiveness and legitimacy of the law itself and this act of disrespect justifies their punishment in accordance with procedures that simultaneously grants them respect through legally guaranteed rights (for example, to due process). At this stage, apart from the minimal recognition that the acts of a criminal can be condemned as such because the conduct performed has been deemed to be incompatible with the right to freedom of other subjects, the concept of community protection as a basis for punishment for a crime has almost no independent normative content. The focus is entirely on the moral culpability of the offender.

Even so, as noted in the statement by the High Court of Australia cited above, ‘exceptional’ cases to this fundamental rule have always existed. These cases

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[199] See McHugh J in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 37.

[200] Per the High Court in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

include the involuntary detention of those with mental illness or the confinement of those with an infectious disease. In these instances, the protection of the community appears to provide some normative justification for the detention of a person who lacks any moral culpability for the threat they pose (or are perceived to pose) to the community more generally. Notably too, in these cases there appear to be other normative factors in play that justify detention that do not play any part in the paradigm case of punishment for criminal guilt. In particular, in both these examples, a common element that seems to be significant to the legitimacy of the detention of the person is the obligation or expectation that care or treatment will be provided to them, with a view to the restoration of the person to society. Both examples can be characterised as occasions where detention involves the temporary removal of the person from society as a form of control rather than a removal of the person as a form of retribution for a wrong for which the person is morally responsible.[201]

From the paradigm of legal freedom, these 'exceptional' cases of coercive measures that are applied other than in the case of punishment following conviction draw on normative resources that cannot be readily expressed in the language of rights. Accordingly, such cases have given rise to complex questions about the legitimacy of such measures. A diverse range of legal and social responses have resulted, especially during and beyond the '4th wave' of juridification (the development of social rights, understood as a response to provide for the materialisation of civil and political rights), with the various ambivalent effects that have been diagnosed as resulting from this phase. For example, with respect to the case of persons with a mental illness, the growth of institutionalised care and treatment (as opposed to mere incapacitation) was, at first, a means for materialising the civil rights of the mentally

[201] There are also other cases that fall between the two ends of the spectrum, where moral culpability and the focus on rehabilitation are blended. These include historical instances such as the vagrant, but in contemporary contexts usually apply to those with a serious addiction, such as to narcotics. Finally, there are other exceptions to the general rule such as the detention of non-citizens for the purpose of deportation or expulsion, or of prisoners of war. These cases however can be distinguished on the basis that although the right to liberty is universal in its extension, its application can be limited to members of specific legal community (where membership includes those who are temporarily authorised by the specific legal community to reside or participate within it, subject to its laws – for example, migrants, visitors and other lawful non-citizens). In these cases, the idea of community protection has both a more immediate and more abstract sense – it encapsulates the internal link between law as the expression of private autonomy and as the expression of public autonomy – the 'community' is the actual embodiment of ongoing acts of self-determination of a particular legal community that delimits the scope of its law by reference to specific temporal, geographic and demographic parameters (a 'jurisdiction'). Quite literally, in these cases the community is protecting itself as a polity rather than seeking to protect its individual citizens.

ill: however, the unintended impacts of this form of 'care', which came to be recognised as an undermining of the relation to self of those with a mental illness, has led in many jurisdictions to a process of de-institutionalisation.[202]

However, in addition to these typical 'exceptional cases', political communities have on occasion – including in modern times - adopted other measures which, from the perspective of the paradigm case are 'extraordinary', to deal with a small number of individuals regarded as posing a serious or ongoing threat. Various legislative regimes that target 'habitual criminals' represent an example of such a response. These regimes involve a judicial determination, most often at the time of sentencing of a repeat offender, that the person had the characteristics of a habitual offender, or an offender that was unwilling or incapable of controlling their behaviour. Typically such a decision was to be based on medical evidence, and resulted either in an additional sentence being imposed, or an order made that the person should be detained in an institution (which may include a prison) until further order (in other words, an indeterminate sentence).[203] In many cases, although these responses remained legally available options, in most jurisdictions during the mid-20th century they fell out of favour.[204] Although the social reasons for this are obscure, from a theoretical perspective it is plausible that their 'hybrid' status, involving on the one hand a sentence based on moral culpability and simultaneously an order for control based on a lack of moral capability, did not resonate well within the binary understanding of responsibility that is operative in the criminal justice system. That is, in order to eliminate the conceptual contradiction, it either had to be accepted that

[202] See for example the 'Richmond Report': *Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled,* NSW Department of Health, (March 1983) which recommended a process of decentralisation and deinstitutionalisation based on the principle that persons with a mental illness had a 'right' to the opportunity to 'social and physical contact in the normal human environment irrespective of their level of functioning': 21.

[203] For example, the *Habitual Criminals Act 1957* (NSW), section 23 of the *Criminal Law (Sentencing) Act 1988* (SA), the *Sentencing Act 1991* (Vic).

[204] Arie Freiberg, Hugh Donnelly and Karen Gelb, "Sentencing for Child Sexual Abuse in Institutional Contexts", *Report for the Royal Commission into Institutional Responses to Child Sexual Abuse* (Sydney: Commonwealth of Australia, 2015): 170-174. Sentencing Council NSW, *Penalties Relating to Sexual Assault Offences* Vol 3 (Sydney, May 2009), 57-64. Even in Germany, where there has been a continuity of 'preventive detention' measures available, and where a conceptual distinction exists that allows for a separation of a sentence into a component for punishment and a component as a measure for protection, as will be discussed in Chapter 5, there was a decline in use of preventive detention measures during the mid-20th century: Kirstin Drenkhahn, Christine Morgenstern, Dirk van Zyl Smit, "What is in a name? Preventive detention in Germany in the shadow of European human rights law," *Criminal Law Review* Vol 3 (2012): 167.

these regimes operated as a form of disproportionate sentencing – something generally regarded as illegitimate – or that it was justified to punish a person both for something they had already been punished for (their prior offending) and for something they had not yet done, and for which they had at least a diminished level of moral responsibility; all being matters which infringed fundamental justifications for the punishment of offenders.[205] Notwithstanding the failure of these regimes to take hold within the criminal law, at least as a form of sentencing practice, these statutes maintained the internal link between punishment as an affirmation of the moral culpability of the offender with the ongoing detention of the offender. In this respect, although this type of legislation abrogates various fundamental principles, including the principle of proportionality in sentencing, they remain firmly within the paradigm case of detention as a consequence of the punishment of a specific crime.[206] As will be seen, the desire to maintain this principle has an enduring presence.

Accordingly, towards the end of the 20th century, while there appears to have been an increasing sense of the need for the law to respond to the threat of repeated serious offending (whether real or imaginary), the normative principles that constituted the paradigm case for the deprivation of liberty could not seemingly accommodate a justification for the ongoing detention or control of a person who was morally culpable for their crimes but ostensibly unwilling or unable to live a crime free

[205] In *Veen v The Queen (No 2)* (1988) 164 CLR 465, the High Court held that while protection of the community is a consideration in the sentencing of offenders, a sentence should not be increased beyond what is proportionate to the crime merely to protect the community from the risk of further offending by the offender: at 472, per Mason CJ, Brennan, Dawson and Toohey JJ. The court added (at 473), "It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."

[206] In *R v Moffat* (1998) 2 VR 229, Hayne JA noted the long history of this type of regime. He noted that, "it may be accepted that the common law does not sanction preventive detention and that the imposition of an indefinite sentence cuts across well-recognized and established principles of proportionality… But the existence of these common law principles does not mean that the legislature may not provide that the courts may impose indefinite sentences in certain circumstances on persons found guilty of offences or even go so far as to require the courts to impose such sentences on such persons…Habitual offender and preventive detention provisions have long been known to the law, in this country and in other countries which derived their legal systems from England. The history of the indeterminate sentence in penal systems was examined in the United Nations publication in 1953 "The Indeterminate Sentence". It is suggested there that its origins are ecclesiastical, but it is also said that the originator of the whole movement leading to the indeterminate sentence was the well-known penal reformer, Alexander Maconochie." (at [87]-[92]).

life. It is this tension between social imperatives seeking reassurance that the community will be protected from reoffending and the need for any legal measures in response to be legitimate that is central to understanding the debates that accompany the phenomenon of preventive justice.

4.3 Preventive justice: a new logic within the traditional paradigm?

Ashworth & Zedner note that although the legitimation of the new coercive measures that are a prominent feature of preventive justice is expressly said to rely on their focus on the prevention of future harm, one of the central principles of the criminal law, and explicitly a part of the sentencing process, has always been the prevention of crime. These two commentators point out that the protective function of law is in fact foundational to the existence of State authority and is what motivated the development of the criminal law itself.[207] This notwithstanding, Ashworth & Zedner acknowledge that there has been a shift in the prevailing social-political climate such that there has been an increased focus on the use of the law to more actively prevent the commission of crime, in contrast to the traditional emphasis on punishment of an offender after the event. In their monograph *Preventive Justice,* Ashworth & Zedner draw attention to the need for a more rigorous critique of the normative bases of this transition to preventive justice.[208]

Ashworth & Zedner acknowledge that the classic liberal conception of the relation of State and citizen focusses on the reciprocal obligations between them, with the obligation to obey the law justified on various grounds including consent, fairness and a desire to avoid the Hobbesian state of nature. The nature of the obligation of State to citizen is said to be less well defined, but 'seems always to include a duty to provide protection from the hazards and threats they would otherwise face'.[209] Indeed, Ashworth & Zedner go on to characterise the obligation to protect its citizens as the State's primary task and reason for being. Three consequences are drawn by them from this characterisation: that the protective function is 'written into the very fabric of state authority'; that citizens have an obligation to accept coercive measures as the 'necessary price of peace and good order'; and that the State retains the

[207] Ashworth and Zedner, *Preventive Justice,* 11.
[208] Ashworth and Zedner, *Preventive Justice,* 13.
[209] Ashworth and Zedner, *Preventive Justice,* 7.

prerogative of exercising executive powers in conditions of emergency outside the normal legal and constitutional limits placed upon it.[210]

For the purpose of their analysis of preventive justice, Ashworth & Zedner put aside the third point, the exercise of the prerogative power in emergency conditions, as they are concerned with the rapid expansion of coercive preventive measures in everyday situations. That is, even where the nature or magnitude of risk is great – such as with potential acts of terrorism – the measures under consideration are no longer being regarded as a response to an 'emergency' but rather are designed to be part of the general law.

In contrast to commentators that suggest the recent development of preventive justice represents an essential discontinuity with the past, Ashworth & Zedner explicitly distance themselves from any historical or sociological inquiry: they claim that their concern is simply to pay close attention to the State's use of preventive powers in a context where most academic attention has previously focussed on the question of the legitimacy of the State's use of punitive power.[211] Ashworth & Zedner seek to remedy a situation where they perceive the growth in preventive justice, and especially in coercive preventive measures, is not being matched by any systematic exploration of the rationales, scope and principled limits of preventive coercion.[212] Their primary concern is not whether preventive justice represents a break with the fundamentals of the rule of law in a democratic constitutional state, but more in examining the consequences of the fact that the legitimation (and limitations to legitimacy) of coercive preventive measures requires the invocation of a different logic. That is, different principles are at work in the definition and justification of laws that allow the use of coercive measures against subjects who have not yet committed a crime than are available to justify punishment in the paradigm case. This new logic which is now at work within the law therefore requires investigation, and the articulation of the appropriate principles which can justifiably restrain the use of coercive preventive measures.[213]

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[210] Ashworth and Zedner, *Preventive Justice,* 8.

[211] Ashworth and Zedner, *Preventive Justice,* 11.

[212] Ashworth and Zedner, *Preventive Justice,* 11.

[213] Ashworth and Zedner, *Preventive Justice,* 18-19.

In order that they might clearly identify the new logic at work in preventive justice, Ashworth & Zedner first re-examine the various existing rationales for the legitimate imposition of punitive measures by the State. These are set out as being that some wrongs are so serious that they should be condemned as wrong and should result in punishment (retributivism); the use of the fear of punishment as a deterrent; incapacitation; and, the use of punishment as a means of rehabilitation. They note that the last three rationales are in fact preventive in nature, with a focus on avoiding further offences being committed both generally (in respect of the second) and specifically (in respect of the last three). However, what is said to be common to the legitimacy of the four rationales above is that each must, in its application, maintain proportionality to the seriousness of the crime committed.[214] Ashworth & Zedner argue that punishment (whether primarily as retribution or involving any combination of the rationales outlined above – that is, deterrence, incapacitation or rehabilitation) for an offence must not be disproportionate to the crime, and that this principle imposes an internal constraint on the legitimacy of any measure imposed.

Of critical significance is that the principle of proportionality is said to operate on the basis of the recognition of, and respect for, the subject offender as a responsible agent. That is, ultimately, the justification for punitive measures is said to depend on the censuring of the subject that is involved in the process of punishment occurring in such a way, and to the necessary extent, that it respects the responsible agency of the subject. The argument is that a responsible agent can modify his or her behaviour in the face of or in response to the threat of punishment. A proportionate sentence is legitimate because it appeals to the freedom of a (potential) offender to choose to act otherwise.

This understanding, unsurprisingly, accords with the analysis in the previous section of the paradigm case of the deprivation of liberty. The normative force of the principle of proportionality is drawn from the autonomy of subjects who on the one hand exercise public autonomy through the commitment to a State that promulgates law and on the other exercise their private autonomy through their freely chosen obedience to these laws. A disproportionate sentence has the effect of sundering the internal connection between the dual exercise of autonomy, representing on the one

[214] Ashworth and Zedner, *Preventive Justice,* 18.

hand an unauthorised act of State power and on the other a denial of the freedom of the subject to, at least potentially, obey out of respect for the law.

The concern that Ashworth & Zedner hold with respect to coercive preventive measures – at least those that are not responsive to any act but focus solely on the avoidance of future wrongdoing - is that the fundamental underlying rationale of such measures is merely the optimal prevention of future harm. In these cases, the internal constraint imposed on coercive measures by the principle of proportionality in punitive contexts is said not to be readily applicable.

> …where prevention is the rationale its logic applies without respect for whether the subject is a responsible agent or not, since the purpose is to obtain the optimal preventive outcome.[215]

This is because a preventive measure acts without reference to whether the subject, the prospective offender, can or will change their mind about (re) offending. That is, there is no exercise of individual autonomy relevant to the application of the preventive measure: it is applied as a form of external control based on an assessment that the offender lacks any form of internal control.

Having established that the State's duty to protect is foundational, and so prima facie legitimate, and that the use of a coercive preventive measure is outside the paradigm case of the punishment of a crime (including the standard exceptional cases that form part of that paradigm) and as such cannot rely on the same justificatory logic as applies to punishment, Ashworth & Zedner spend considerable time deriving a catalogue of rights and values that can legitimately operate as 'limiting principles'.[216] Ultimately, nine such principles are specified which they argue are relevant to the evaluation of mechanisms that provide for the deprivation of liberty for predominantly preventive purposes:

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[215] Ashworth and Zedner, *Preventive Justice,* 19.

[216] See Ashworth and Zedner, *Preventive Justice,* 250-267. Here the authors derive 25 such principles ranging from restating the right to liberty, the presumption of innocence and the presumption of harmlessness, through various procedural safeguards (such as requirements for intention or knowledge, fair warning and least restrictive alternative) to the principles that would justify indeterminate detention, such as where a person presents a very serious danger to others and has a conviction for a previous offence.

1. A presumption of 'harmlessness' that can be rebutted only in exceptional circumstances
2. The State has a duty to protect people from serious harm which may justify depriving the liberty of a person who has lost the presumption of harmlessness by reason of having committed a serious crime
3. Deprivation of liberty must be the least restrictive option
4. A judgment of 'dangerousness' must be approached cautiously. The burden of proof must lie with the State and the level of risk required to be proven should vary in accordance with the seriousness of the predicted harm
5. Any additional period of time added to a sentence must be the shortest possible to address the risk
6. In exceptional circumstances a court could order an indeterminate sentence
7. There should be regular review of the need for continuing detention, and legal assistance should be provided to the offender
8. Adequately resourced rehabilitative treatment or training courses should be made available to the offender
9. Preventive detention should be served in non-punitive conditions with no greater restraints than that required by the imperatives of security, and in a separate facility.[217]

In developing this schema, Ashworth & Zedner position coercive preventive measures completely within the existing paradigm of the criminal justice system.[218] However, the authors themselves acknowledge that the situation facing a liberal justification of coercive preventive measures is paradoxical

> …a major justification for taking preventive powers is to secure or enhance the liberty of individuals, but that one possible effect of such powers is to deprive some individuals of their liberty. The paradox cannot be resolved by saying it is all a question of balance, and that the loss of liberty for some has to be balanced against the overall gain in liberty generally. That is an unsatisfactory

[217] Ashworth and Zedner, *Preventive Justice,* 168-169. This list is in fact similar to the 'safeguards' that were identified as necessary if legislation allowing for post sentence supervision or detention of sex offenders was to be introduced: NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (Volume 3): paras [2.28] – [2.29].

[218] The authors explicitly disclaim any interest in examining whether 'any discontinuities now outstrip the continuities': Ashworth and Zedner, *Preventive Justice,* 11.

> argument because it fails to respect liberty as a fundamental right…if liberty is to be duly respected, the state's powers – justified as the minimum necessary powers to achieve an acceptable degree of prevention – should be adjusted so as to ensure that the liberty of all persons involved is preserved as far as possible…this kind of adjustment differs from balancing, but it does not rule out the possibility that in certain circumstances there may be sufficient justification for depriving an individual of the right to liberty entirely.[219]

Without needing to challenge or criticise the various limiting principles Ashworth & Zedner articulate themselves, it should be clear from the above quote that the fundamental right to liberty – and it's concomitant concept of the responsible or autonomous agent understood on the model of legal freedom– fails to provide a proper basis either to justify coercive preventive measures or to provide for a meaningful critique of such measures: this is, after all, the basis of the 'paradox' that they themselves identify. That is, the principles derived by Ashworth & Zedner on their own simply extend the normative meaning of liberty in such a way that it can justify the deprivation of liberty on the basis of prevention.

In approaching the question in this way, Ashworth & Zedner demonstrate the limitations of a constructivist approach to critique. As noted in Chapter 2, constructivist approaches typically specify a number of principles that would necessarily be agreed to under ideal conditions, and then seek to apply them to critique social practices.[220] It was also noted in Chapter 2 that such an approach can suffer from the dual problems of unknowingly reinscribing existing social norms and values, and simultaneously so abstracting or distancing itself from the lived experience of social actors that the principles it derives become empty, rigid or even open to manipulation. That this is the case here can be seen most clearly in the fact that the nine principles all rely on evaluative terms that require additional content in order to be meaningful, and which the formal principle of liberty is incapable of providing: 'exceptional', 'serious', 'least restrictive', 'cautious' and so on.

Fundamentally, the question that Ashworth & Zedner do not (and cannot from within their own theoretical framework) answer is what is it that governs or determines the

[219] Ashworth and Zedner, *Preventive Justice,* 257.
[220] Honneth, "Reconstructive social criticism," 47.

legitimacy of the 'adjustment' of State power which is central to the schema outlined in the quote above. Given the thorough analysis undertaken by Ashworth & Zedner leading to the derivation of the nine principles, it is reasonable to conclude that the legitimacy of preventive justice measures can only be assessed within the liberal paradigm by the extent to which any such measure complies with the form of law, result from the decisions of democratically elected bodies and include various procedural safeguards characteristic of the rule of law. This conclusion simply reflects the argument by Honneth that 'legal freedom' or liberty involves an abstraction from everyday obligations, and that in order for these other evaluative principles to have any normative content, and to be subject to the rigours of intersubjective testing of their validity, that this legal stance must be abandoned.[221] That is, without a concept of autonomy that gives more content both to the idea of liberty and to the democratic limits of State power, the danger of resolving the paradox by reference to an adjustment of State power is nothing less than the subsumption of any normative basis of critique into a purely formal one. Not only does this situation not resolve the problem posed by preventive justice- how notwithstanding it complies with the requirements of lawfulness there nevertheless persists a sense of a normative deficit at its core – but the dangers involved in this position are made clear in the analysis of Klaus Günther, which will be examined in the next section.

4.4 Preventive justice: a new paradigm?

The lack of normative content available to Ashworth & Zedner from within the traditional legal paradigm is in part a result of limitations within the concept of autonomy as routinely used by liberal jurisprudence - as explored in Chapter 3 – and in part a result of their failure to recognise that, notwithstanding certain continuities between the traditional criminal law and preventive justice, there are features of the latter that represent a fundamental shift in the law itself. By contrast, some other commentators are more convinced that preventive justice and the growth of coercive preventive measures reflects a paradigm change in the law. These commentators argue that a critique that does not appreciate that preventive justice reflects a fundamental shift in the relationship between the law, the State and the subject will be unable to properly articulate the significance of the threat to the legitimacy of law

[221] Honneth, *Freedom's Right,* 84.

posed by such measures. These critics note that the predominant critique of preventive justice involves liberal reservations about the use of coercive measures outside the traditional terms of criminal law, and these approaches are not well equipped to cope with these changes: a view seemingly confirmed by the analysis of Ashworth & Zedner set out above.[222]

One such commentator is Klaus Günther, who draws to some degree on the sociological diagnosis of contemporary, neoliberal society undertaken by Ulrich Beck and David Garland, in order to examine the social causes of what he regards as a paradigm shift in the meaning of both the law (and especially the criminal law) and autonomy. Günther argues that there has been a transition within modern legal systems from what he (in common with Habermas and Honneth) calls the welfare paradigm to a new paradigm which reflects neoliberalism's attempt to confront or control the demands of the 'risk society'.[223]

Along with Ashworth & Zedner, Günther too regards the preventive role of the State, and the use of the criminal law to this end, as a fundamental part of its legitimacy. However, Günther argues that the current trend towards preventive justice represents a fundamental shift in the extension and meaning of the law. Günther particularly wants to explain the phenomenon whereby the negative meaning of rights – specifically, the understanding of rights as a system of prohibitions or limitations on the arbitrary use of the power of the State to punish – has been transformed to a positive justification for the State to punish more.

> Citizens claim that their rights should be protected by an efficient criminal law and by stronger law enforcement…the protective meaning of the constitution

[222] Matt Matravers, "On Preventive Justice," in *Prevention and the Limits of the Criminal Law,* ed. Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (Oxford: Oxford University Press, 2013), 235.
[223] Klaus Günther, "Responsibility to Protect and Preventive Justice," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 69-90. David Garland, "The Rise of Risk", 71, sets out five features of the 'risk society' thesis – '(1) risk and our attempts to control it are corollaries of purposeful action and are thus ubiquitous elements of human experience; (2) modern societies have become more successful in assessing and managing risk thanks to the development of probability theory, statistics, and systematic techniques of measurement and control; (3) techniques of systematic risk management have become a pervasive element of modern organisations and institutions; (4) questions that bear upon risk management have increasingly become a source of anxiety in contemporary culture because of raised expectations, decreased levels of trust [including in experts and governments], and new social sources of insecurity; and (5) we are not a 'risk society' in the sense of being exposed to more, or more serious, dangers. If we are a risk society it is because we have become more conscious of the risks that we run and more intensely engaged in attempts to identify, measure and manage them.'

> has changed, from being a shield for the suspect and the convicted perpetrator against the state punishing for preventive purposes to being a shield for the citizen as potential or actual victim of the citizen as criminal. The state comes in as the bearer of a constitutional duty to protect the citizen-victim against the citizen-criminal.[224]

Günther argues that the conceptual framework that underpins the justification of crime prevention relied upon by States today can be characterised as a 'responsibility to protect'. Although in the form of an express doctrine the 'responsibility to protect' is generally known only at the level of international law, Günther argues that the same form of justificatory reasoning that is applied at the international level also explains the view that the State should act to prevent crime against its citizens, and that it has a duty to do so. It is this shift, the positive empowerment and declared duty on the part of the State to take protective measures against crime as a fundamental or basic right of the citizen, that Günther regards as indicating that preventive justice involves a 'paradigm change'.

To explain the nature and cause of this transition, Günther traces the philosophical-historical origins of the 'responsibility to protect'. Without any explicit reference to the concept of juridification, Günther explores the development of the responsibility to protect through the (now familiar) four distinct phases in the evolution of the law. In the first phase, political society is born when the 'right to punish' that is said to be possessed by every individual in the state of nature – as a corollary of each individual's absolute right and duty to do whatever is necessary in order to ensure their own self-preservation - is abandoned in favour of a sovereign who preserves his right to punish. Significantly, the right to punish is not transferred to the sovereign by the people; rather the sovereign is the only person to retain the right to punish, and the power of the sovereign to punish is entrenched by reason of all others renouncing their own such right.

[224] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 71.

> The *primary act* of political autonomy is the mutual agreement on a public authority to punish.[225]

In this context the sovereign has permission to punish. It is not a question of a responsibility in the strict sense, because the punishment of those who break the law is an act of sovereign self-preservation. The protection of the citizens through the criminal law is a mere side effect of this otherwise self-interested behaviour. There is no normative dimension to the State's assumption on the monopoly of power, rather it is an act of obedience on the part of the people, motivated by fear, and with a view to relieving themselves of a complete preoccupation with their own protection.[226]

> The natural duty to protect oneself is just a heavy burden that constrains human flourishing, the exercise of autonomy, and finally the natural right of liberty itself.[227]

This arrangement had a fundamental role in fashioning the traditional meaning of the criminal law. The focus of the criminal law was not on the actual victim but on the perpetrator who, through crime, demonstrated a disloyalty to the State. It was because of this that the focus of the criminal law fell on the offender rather than the victim. Indeed, Günther argues that, more than simply being sidelined incidentally as part of the development of and refinement the criminal justice process, it was necessary for the victim to actively be disempowered.

> The victim was individualised and neutralised because the emotions of humiliation and vengeance and the demand for satisfaction could be dangerous for the state as well…Therefore the prevention of crime was part of a political strategy to suppress self-help because of its dangerous effects on the state.[228]

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[225] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 81 (emphasis added).
[226] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 76-77.
[227] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 80.
[228] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 74-75.

The second phase of juridification involved the development of civil rights that could be claimed against the sovereign. For Günther, this second stage involved the first introduction of a normative dimension to the sovereign's right to punish. This normative dimension arises from the recognition that protection from the uncertainty and indeterminacy of the state of nature, upon which the legitimacy of the political compromise entered into by the subjects and the sovereign depends, requires the sovereign to exercise the power to punish in a non-arbitrary fashion. The need to provide equal protection gives rise to the need to ensure protection by and according to law. In this phase, the primary ground of protection becomes the general law itself. That is, the rule of law with its features of generality, calculability, and precision is recognised as necessary for solving the problem of the state of nature. There is a change in emphasis from the simple end of self-preservation to the kind and quality of protection that is provided by the sovereign.

> It is the law that protects in the first place, and it shall protect equally, calculably, and effectively in a threefold manner. It shall protect all those citizens who demand protection of the law against others who attempt to violate the law…But it shall also protect those citizens who are uncertain whether their intentions and actions…are legally permissible…And finally it should protect citizens with a system in which only responsible subjects can be punished.

The sovereign is at this stage bound by law: the power to punish is limited to the positive law in place before a crime is committed and which applies generally and is enforced equally.[229] Here for the first time is seen the feature common to constitutional and human rights documents: the prohibition on the State from punishing other than in accordance with the law. Here can be seen also the increase in the dimension of legal freedom, the negative or obligation free space in which a subject can develop and exercise their freedom, as well as the idea of the moral responsibility of the criminal agent as a condition of the appropriateness of their punishment under the law.

[229] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law*, 77.

The third phase of juridification involves the realisation that the form of law, including the feature of equality, is not incompatible with a degree of arbitrariness, provided it allows for a minimal level of protection for all. For example, a monarch is capable of expressing his particular interests in the form of a general law. At this point, the legitimacy of law itself becomes subject to the requirements of democratic procedure. In addition to civil rights, citizens acquire political rights. The responsibility to protect is transferred to the sovereign people as citizens, and the validity of any manifestation of this principle in and through the law becomes subject to procedural requirements. At this stage, the meaning of the criminal law is also transformed: crime, which was always an act of defiance against the sovereign, is conceptualised as a violation of the civic rights of the victim. The criminal act is a denial of the equal status of the victim as a citizen, and so as a co-legislator of the law which has been broken.[230] This also means that crime undermines the citizen's justified belief in the validity of the law as the expression of the general will, because the offender imposes his or her will on others in violating the general law.[231] (Note also, although Günther does not make this point, that the act of crime also denies, through the principle of reciprocity, the offender's own status as an equal member and co-legislator: in committing a crime, the offender violates the law that they have made themselves.)

For Günther, the standard of legitimacy of all constitutionally established powers of punishment are laws that provide general, equal and determinate levels of protection generated by means of democratic procedure.[232] In addition to the fact that this standard remains an ideal which has not yet been reached, Günther identifies the further developments that arise when it becomes clear that civil citizenship conceived formally is compatible with social inequality and the unequal distribution of wealth and power. As discussed previously, the fourth wave of juridification results from the recognition that practical conditions of life limit the equal enjoyment of fundamental rights. In this phase the State is called on not only to protect rights *from* state intervention (the limitations and protections provided by the criminal law in the democratic constitutional state) but to protect rights *through* intervention. In the face

[230] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 83.
[231] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 84.
[232] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 85.

of growing social, technological and environmental risks, public interest and public safety become central elements to the 'responsibility to protect'.[233]

Günther argues that the materialisation of rights through the creation of the welfare state also had implications for the criminal law. Protection in this context now also requires the prevention of future harm. The criminal law increasingly becomes a field of tension between traditional substantive protections of fundamental rights and a whole field of sanctions which focus on the general interest: individual responsibility (that is, the requirement of a specifically criminal intention) makes way to concepts of negligence and strict liability.[234]

> The extension of civil and political citizenship to social citizenship also changes the meaning of protection by criminal law. To obtain protection from dangers requires prevention of future harms as early as possible.[235]

It is at this point that Günther sees the paradigm shift to preventive justice occurring, or at least the conditions of possibility for the shift arising. However, rather than identifying any normative potential in this next phase of juridification, Günther goes on to argue that preventive justice involves a peculiar inversion of the relationship between State and subject which ultimately threatens the democratic process and the rule of law itself.

Günther notes that the various human rights doctrines established since 1945 focussed on the responsibility of the State not to infringe on human rights, being the civil, political and social rights that had been developed during the processes of juridification outlined above. The formal doctrine of the 'responsibility to protect' arose in the context of the need for intervention by the international community where a State acted in violation of the human rights of its citizens. He characterises classical human rights instruments as fundamentally directed at providing for the protection of minorities against government supported majorities. However, the developments

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[233] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 85-86.
[234] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 86. For example, regulatory offences appear that criminalise behaviours that are risky, both for oneself and for others. This can be seen in laws relating to consumer protection, road safety, workplace health and safety and so on.
[235] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 86.

brought about by the welfare paradigm has meant that, increasingly, public interest and majoritarian values have come to serve as a justification for a criminal law policy that emphasises the responsibility of the state to protect the majority of its law-abiding citizens from an offending minority. For Günther, it is this fusion of the normative ideal of the protection of individual rights with the claim by the majority for protection that allows for the use of the language of human rights for the promotion of criminal law reforms that expand the scale and scope of preventive justice measures.[236]

Referencing David Garland, Günther sees this shift as characteristic of a paradigm change from the 'welfare paradigm' to the 'culture of control'. This transition is a response to a growing sensitivity of political society to the range of risks that are posed from a variety of sources, particularly technological, environmental and socio-economic. The popular appreciation of these risks, as well as a growing scepticism about the ability of experts to adequately manage them, has seen an escalation in fear and a corresponding rise in expectation that the State will intervene to protect its citizens. In the sphere of criminal law, there is an increase in the public expression of a fear of crime and a demand that the State do more to protect its citizens.

> Victims of crime have become the 'representative character' of middle classes in modern societies who express their emotional solidarity with them and ask the state to be more oppressive against the perpetrator.[237]

According to Günther, this new phase fundamentally threatens the historically achieved balancing of individual rights with the public good of crime prevention that is at the core of the democratic constitutional state. The traditional focus of human rights on prohibitions on the excessive and arbitrary use of State power has been inverted, where the moral grammar of rights is used as a sanction or justification for any form of measure that is designed to result in the prevention of crime. Without specific reference to examples of preventive justice measures, though with some reference to Western anti-terrorism policy in this context, Günther takes features of preventive justice as (at least potentially) involving the suspension of fundamental

[236] In Honneth's terms, this is an example of a paradox – the normative intent is subverted by the manner in which the relevant principle is implemented.
[237] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 70.

rights in favour of 'rights' to public safety. In this he no doubt has in mind various justifications that have been put forward for the suspension of fundamental procedural and substantive rights in various jurisdictions in order to confront the risk of terrorism, including in extreme cases the suspension of habeas corpus and the use of torture. This has led to 'a regulatory capture of democratic criminal law legislation that suspends the procedural requirements of generality and reciprocity in such legislation…[which] turns out to be nothing other than a tacit nullification of the social contract'.[238]

For Günther too, the attempt to legitimate preventive justice therefore involves a paradox. However, unlike for Ashworth & Zedner where the paradox involved the justification of the deprivation of liberty in the name of liberty, for Günther the popular demand for protection that results in the proliferation of coercive preventive measures has led to the undermining of democracy itself. Indeed, he goes as far as to suggest it involves a return to the state of nature where subjects are in a perpetual state of concern for their own self-preservation, a condition which makes political society impossible. Accordingly, for Günther, this next stage of juridification actually undermines the normative legitimacy of law itself.

Günther provides a compelling account of the development of the preventive justice paradigm out of the expansion of law that took place in the 'welfare' stage of juridification, and in particular the consequences for the criminal law and the expectations of State action that resulted from the 'socialisation' of risk. In so doing he reinforces the fact that the liberal paradigm fails to provide any principled limitation on the development of preventive justice. He also provides a powerful warning in respect of the effect of an unchecked expansion of preventive justice where paradoxically the attempt to address the popular demand for 'protection' contributes both to an atmosphere where fear of crime is intensified and to an undermining of the rule of law, involving a regression behind the earlier phases of juridification to a stage in which subjects once more hand to the State the power to punish without limit.

[238] Günther, "Responsibility to Protect," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 90. Honneth says something very similar in "Brutalization of the social conflict,": 16. Here Honneth gives the example of the developments in the area of law which, under the pressures of economic imperatives and misdevelopments in other social spheres is transformed from a system of securing individual subjective rights to a mechanism for the exclusion of those members of society that have no longer any recourse to the system of law (the unemployed, the under educated and illegal aliens).

However, what is missing in Günther's account is any consideration of the countervailing pressure that can be provided by the principles of freedom, including those that have been institutionalised during the course of the previous four phases of juridification. That is, it appears that Günther too readily accepts the possibility of regression to the 'state of nature' without acknowledging the significant cognitive and normative effort that this repression of gains in autonomy and freedom would entail. As was discussed in Chapter 2, there are consequences when the principles that underpin spheres of recognition develop inconsistently: indeed, that Günther recognises the situation where coercive preventive measures generate an increase in fear of crime and an abrogation of fundamental legal principles is an example of this phenomenon.

In his essay Günther has a tendency towards a one-dimensional account of the development of the law. Whereas, as was discussed previously, the process of juridification can have ambivalent effects, there is no examination by Günther of whether there is any moment in the transition to preventive justice that could promote freedom. Arguably, at least in part, this may be because in his analysis he focuses solely on the subject/citizen as a bearer of rights, and his account is developed primarily from the perspective of the law as the principle institution of freedom. From this perspective, his account of the transformation of law built on the sociological approach of the risk society has the effect of completely obscuring the countervailing potential of the normativity inherent in a broader concept of autonomy and freedom. Accordingly, the only evaluation open to him is completely negative, where preventive justice represents nothing less than a return to the state of nature. This however, would seem to almost involve stepping outside the social-historical process by denying any normative potential to the transformation in social practices that underpin the transition to incorporating the challenges and opportunities of the risk society.

4.5 Preventive justice and juridification: moving beyond legal freedom

The theorists examined in this Chapter identify within preventive justice what they regard as the legitimate normative principle that the State has an obligation to protect the safety of citizens in a context where sensitivity to risk is heightened. The theoretical positions analysed above share the view that preventive justice is

compatible with liberalism. Both suggest that there needs to be principled, in the sense of normatively grounded, limits to the nature and extent of these measures in order for them to be legitimate. However, neither can provide a satisfactory account of how the principle of community protection is to be reconciled with the existing norms that represent an historically achieved expansion of freedom in the law.

Ashworth & Zedner, although not primarily interested in a sociological or even historical analysis of preventive justice (in terms of whether it is continuous or discontinuous with respect to the traditional criminal law) acknowledge that the traditional principles of the traditional criminal law, primarily that of 'proportionality', need supplementation in order for the normative limits of coercive justice measures to be articulated. However, despite cataloguing a number of substantive, procedural and material standards they say can provide the basis of a principled approach to the deprivation of liberty for preventive reasons, the authors note a fundamental paradox at the heart of the exercise: that the logic at work in the derivation of these principles is that the protection of the liberty of some can justify the deprivation of the liberty of others. However, if liberty is a (or even the) fundamental value, the obvious question arises: what is it that provides the normative basis for these intermediate principles that can justify the abrogation of the principle of liberty? The authors acknowledge that the standards they set out incorporate and depend on a number of important yet indeterminate concepts, such as 'reasonable suspicion', 'appropriate' and 'least restrictive' that require interpretation and context sensitive application. It is this acknowledgment that demonstrates the limitations of the approach of deriving principles then seeking to apply them (which is what characterises the constructivist method); these principles simply lack the substance to make them effective in articulating the necessary normative content to achieve their objectives.[239]

Günther by contrast holds the view that preventive justice represents a paradigm shift within the criminal law in response to the imperatives, both functional and normative, of the 'risk society'. While he acknowledges the reality of the social imperatives and coordination challenges giving rise to these laws, and seems to accept the normative validity of the principle that the State has a responsibility to protect, he ultimately

[239] Alternatively, such principles are superfluous as they will necessarily be conditioned by the normative content of the situations of their application; see Rutger Claasen, "Justice: Constructive or Reconstructive?," *Krisis*, Issue 1, (2013): 28-31.

takes the view that these changes involve an 'ideologically' driven reversion behind previous positive (freedom enhancing) stages in the evolution of the law. He appears incapable of identifying any normative justification for coercive preventive measures; however, in order to sustain his critique, he is ultimately required to draw on the very norms and principles that are being contested by the transition to preventive justice. Accordingly, it is unsurprising that he ultimately argues that such measures are fundamentally incompatible with the rule of law, democracy and freedom, on the basis that they involve paradoxical changes in the law. For Günther, his conclusions would seem to be a result of the fact that he only has recourse to legal principles or juridical concepts to explain the process of juridification that is producing preventive justice, and so therefore cannot identify or articulate any countervailing normative pressure that may be located in other social practices or institutions.

Accordingly, despite acknowledging (either implicitly or explicitly) the existence of legitimate social and normative demands underpinning the growth of preventive justice, as a result of the methodological and conceptual limitations of each approach, the spread of coercive preventive measures can only be conceived of as an entirely negative, yet at the same time almost unavoidable, development. Despite their differences, both theoretical perspectives share a concern that preventive justice is paradoxical, either in the manner in which it relies on the principle of liberty for its justification or because it is ultimately incompatible with the social structures that are necessary for a democratic state. Although both of the theoretical approaches provide an explanation of the rise of preventive justice by reference to the legitimate object of the State to protect the safety of citizens in a context where sensitivity to risk is heightened, neither is able to identify any normative potential in the modified social practices that arise in the institutionalisation of preventive justice.

Both of the critiques analysed above, in different ways, suggest that preventive justice can be best understood as a '5th wave' of juridification. Each highlight the expansion of the criminal law into spheres that were previously regarded as not falling within its jurisdiction, areas that include a wide range of behaviour and conduct, and which are temporally and spatially remote from actual harms, with a corresponding expansion of the need for and legitimation of formal systems of

control, including mass surveillance.[240] They emphasise the shift in focus from punishment to prevention as reflecting a preoccupation with risk and the desire for the law to provide some response to a perceived increase in insecurity (or, an increase in the perception of insecurity).[241]

While Ashworth & Zedner do not attempt to analyse the source of this shift (and are in truth simply less concerned with the question of the underlying social causes), Günther clearly articulates the growth in preventive justice as a direct result of developments that took place during the evolution of the 'welfare' paradigm. Although Günther does not use the term 'juridification', his analyses can readily be understood as consistent with that concept. He sees the current phase of juridification as the manifestation of the transition to a post-welfare paradigm, in which a new source of legitimacy is being sought, and he argues that the existing justifications for preventive justice, whilst broadly compatible with liberalism, derive from and promote fundamental distortions that threaten the legitimacy of the political and social order itself. He identifies the effects of the spread of the law in this phase on other forms of social integration, and its impact on the possibility for autonomy. In turn, he highlights the impact on democracy, drawing our attention to the internal connection between autonomy and the legitimacy of law itself. Ultimately, he sees such measures and the assumptions upon which they are based, and which they in turn reinforce, as contrary to a democratic society.

Normative reconstruction as explained in Chapter 2 is focussed neither on a description of preventive justice nor deriving ideal principles, but rather an examination of social practices that may support autonomy and freedom.[242] As was also outlined in Chapter 2, distortions in the reproduction of society may give rise to social pathologies resulting in the exclusion of subjects from the practices and attitudes necessary for the formation and maintenance of the relations to self that constitute 'autonomy'. In Chapter 3, an analysis was provided of modern law as an institution of social integration that was required to satisfy both functional and normative criteria for its legitimacy. In particular, the internal relation between law and

[240] See also Peter Ramsay, "Democratic Limits to Preventive Criminal Law," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 218.
[241] Ramsay, "Democratic Limits," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 222.
[242] Honneth, *Freedom's Right,* 128.

autonomy was identified: a relationship made even more complex by the fact the form of freedom guaranteed by law allows for, but at the same time is dependent on, the broader social freedom that only exists where the appropriate social institutions that can support the necessary relations of mutual recognition are able to reproduce themselves in a sufficiently undistorted manner. In the sphere of the law itself, pathologies arise when developmental processes cause subjects to identify the space of legal freedom with the entirety of freedom, leading to experiences of isolation and depression, loss of meaning and a tendency to disengage from communicative practices in circumstances of conflict.

In this Chapter we have seen that changes in the organisation of modern liberal societies have called forth a new phase of juridification in which the demand for social cohesion in the face of an increased insecurity and sensitivity to risk has seen the development of a range of novel legal interventions. For these interventions to be legitimate, they need to be effective in stabilising social expectations and behaviours as well as being able to claim normative validity. However, in this Chapter we have seen the challenges that arise where theoretical attempts to explain the normative basis of preventive justice do so solely from within the framework, or from the perspective, of legal freedom. By contrast, the approach of normative reconstruction requires that the standard by which preventive justice is to be evaluated is whether the social practices that make it up, and the norms which govern them, promote autonomy and social freedom; or, from a more negative perspective, whether they result in social pathology. In order to answer this, the process of normative reconstruction requires us to make sure that 'we have already sufficiently analysed social reality'[243]. This leads us away from purely theoretical arguments into a critical inquiry into the law itself.

That there is an ongoing debate over preventive justice is unsurprising: the issue at stake is one of the fundamental rights that underpin modern liberal legal systems, the liberty of the subject. What will be critical to moving the debate forward is to identify whether the perspective provided by understanding the growth of preventive justice as a moment within the next phase of juridification allows for theoretical access to the normative potential that is in contest in this change: that is, does understanding the

[243] Honneth, *Freedom's Right,* 7.

changes within the law that are characteristic of preventive justice as an attempt to further develop freedom in accordance with its own principles allow the identification of where such changes are counterproductive but amenable to correction; or is it simply the case that such changes necessarily represent a reduction in freedom?

Chapter 5

Preventive justice reconstructed: an empirical analysis of the operation and justification of 'end of sentence' coercive preventive measures

5.1 Introduction and overview

In this Chapter, the normative reconstruction of preventive justice will shift to an analysis of the law itself, by means of a detailed exploration of the development of a specific coercive preventive measure, being the post sentence detention or supervision of high risk offenders.[244] The idea that the growth in preventive justice is a sign of a fifth wave of juridification, one that must be evaluated by reference to its effects on autonomy and social freedom, requires an analysis of the law itself. Based on the study of the contemporary debate in Chapter 4, it is anticipated that such an analysis will identify changes in the law responsive to the normative demands, functional imperatives and social co-ordination challenges typical of the 'risk society'; in particular, the need for community protection and reassurance. Further, consistent with the critical theory understanding of society and of law in particular (as a social institution) it is also expected that the process of juridification productive of preventive justice involves a conflict or contest over the meaning of key norms and principles currently institutionalised in the law. These changes and conflicts might appear in a number of different ways and contexts, commensurate with the different modes of juridification itself: for example in a general expansion of the scope and reach of the law; debate over the role of law in managing newly perceived risks; and in structural changes, including adjustments to the distribution of labour between the arms of

[244] Although this will be discussed at some length below, three points need to be made about the use of the term 'coercive preventive measures'. The first is that in the literature, the topic is often described as 'preventive detention'. However, this term conflates some old and well-established measures of detention of persons for preventive purposes – such as the system of remand for trial - with the newer regimes that are the subject of debate. Second, the legislative regimes that are the focus of the analysis here usually provide for either detention or supervision of offenders in the community. Third, although in a number of jurisdictions, an order for 'preventive detention' is made as part of the sentencing process, there remains a clear conceptual distinction between the 'sentence' as a punishment for an offence and a preventive component. The measures to be considered here primarily are those than involve imposition of some form of control *after* the sentencing process.

government and specifically the role of the judiciary. Of significance will be whether our analysis of the law can identify any pathological effects of these developments.

In this Chapter, the analysis will focus on a specific type of coercive preventive measure, one which provides for the ongoing detention or supervision of a convicted offender, after the expiration of their sentence, due to their risk of reoffending. This type of coercive preventive measure represents the most extreme example of the transition from a traditional rights/welfare stage of juridification to the next, in terms of moving away from the paradigm case for the deprivation of liberty, and so arguably carries within it both the greatest potential for pathological developments and for an improved understanding of the relationship between legal and social freedom within the institution of the law.

The Chapter will first examine in detail the development of this type of measure in Australia but will then shift the focus to Germany. The Chapter will begin by analysing certain landmark judgments of the High Court of Australia (Section 5.2) to demonstrate the law's commitment to the paradigm case of the traditional limitations on State power to interfere with the liberty of the subject, being the punishment of an offender following conviction of a crime. Two cases in particular from the late 1980s/early 1990s set the stage for the High Court's overwhelming rejection in 1996 of a legislative scheme for the post sentence detention of a high risk offender. However, in 2005, less than ten years later, the High Court would uphold the constitutional validity of a similar legislative scheme. A close analysis of these cases is illustrative of how the Court managed, to the extent necessary, to reconcile previous jurisprudence upholding the pre-eminence of the principle of liberty with a recognition of the normative claims and social imperatives that exist within preventive justice. In doing so, the Court not only endorsed the lawfulness of such measures but identified how the process of juridification had opened up a space for a new normative framework to develop within the law.

The High Court's decision in 2005 provided licence for a proliferation of similar coercive preventive measures throughout Australia, however the focus here will be on the scheme established in New South Wales by the *Crimes (High Risk Offenders) Act 2006* (Section 5.3). An examination of some key features of the design and operation of the NSW legislation will show that an inability to articulate the normative

basis for such laws has resulted in a number of paradoxes. The effects created by these paradoxes have the capacity to undermine both the effectiveness and validity of the law, and so jeopardise its very legitimacy. Further, of concern is that the current trajectory of developments in the law suggest a potential intensification of these pathological effects.

Section 5.4 will explore the developments in relation to post sentence detention in Germany during the same period. This analysis shows similar challenges arising in that jurisdiction as appear in the Australian context. However, while recent developments in Germany also raise the possibility of the law leading to a paradox, there also appears within the process of juridification underway in Germany a possible pathway that could instead result in preventive justice contributing to an increase in freedom.

Section 5.5 will provide a brief conclusion.

It will be the aim of Chapter 6 to develop (at least conceptually) the normative potential of the pathway that is to be identified in section 5.4, which the reconstruction here suggests already exists, albeit somewhat precariously, in the law.

5.2 The High Court of Australia and preventive justice

This section will involve a normative reconstruction of the development of preventive justice in the Australian context through a study of the interpretation of the law by the High Court, not as a form of legal analysis but rather from the perspective of the process of juridification.

As was discussed in Chapter 4, a fundamental issue raised by preventive justice is how the law can incorporate normative principles of community protection that underpin coercive preventive measures whilst maintaining its commitment to liberty as a fundamental feature, indeed the central normative principle, of the legal system. While Ashworth & Zedner argue that the law can in effect incorporate coercive preventive measures within a liberal framework by adapting existing legal principles, especially ‘proportionality’, Günther, whilst also recognising that coercive preventive measures are ultimately compatible with legal liberalism, argues that they depend on an inversion in the normative content of the law that is ultimately paradoxical. What

this section will explore is how the law and lawmakers have articulated the relationship between the liberal legal tradition and preventive justice, and how the law has attempted to reconcile or resolve any normative conflict that may arise. This involves examining the jurisprudence of the High Court not just from a purely legal perspective, but as a form of social analysis. That is, an attempt will be made to explain developments in the law as pronounced by the High Court by reference to the social coordination challenges that specific laws were designed to address, as well as how these developments have resulted in modifications of key normative principles. The starting point for this analysis involves consideration of two key cases that set out the commitment of the High Court to the traditional paradigm while also recognising the presence of new social imperatives: where the community seeks reassurance that the law is managing, rather than simply responding to risks posed by serious criminal offending.

In 1975, Robert Veen stabbed a man to death. He was charged with murder but convicted of manslaughter on the basis of diminished responsibility. He was originally sentenced to life imprisonment, but in 1979 the High Court quashed the sentence and imposed a fixed sentence of 12 years, holding that a sentence must be proportionate to the gravity of the offence committed. It was the unanimous view of the Court that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.

Veen was released from custody in 1983. Later that year he stabbed another man to death. He was again charged with murder but convicted of manslaughter on the basis of diminished responsibility and again sentenced to life imprisonment. His appeal against that sentence reached the High Court in 1988. This time, however, the Court dismissed the appeal and upheld the sentence. In a joint judgment, the majority of the Court (Mason CJ, Brennan, Dawson & Toohey JJ) noted

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. *The distinction in principle is clear between an extension merely by way of preventive detention,*

> *which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.*[245]

Although the decision is consistent with, and indeed is a clear restatement of, the traditional paradigm, particularly in the emphasis on the principle of proportionality, it does represent a recognition of the growing importance of the principle of the protection of society in the sentencing process.

It is however the judgment of one of the judges in dissent that is of greatest interest. Deane J considered the judgment of the majority invalidly extended the scope of the sentencing process to create a system of preventive detention

> The common law of this country makes no provision for any system of imprisonment by way of preventive detention. While the sentencing process must take account of many factors other than punishment, the basis and justification of the imposition of a sentence of imprisonment upon a convicted person lies in punishment in the sense that the outer limit of the appropriate sentence for a particular offence…is that which is proportionate to the gravity of the actual crime when viewed in the context of relevant social standards and circumstances. Put differently, the power of a person in the exercise of judicial office to order the imprisonment of another person who has been convicted of a crime is limited to what is justified as punishment for the crime itself: it does not extend to imprisoning that other person beyond that proportionate punishment for the reason that the judge thinks that it is to the benefit either of the other person himself or of the community generally that he be further incarcerated.[246]

Despite this strong restatement of the traditional view, the decision of Deane J also contains a further comment that shows his sensitivity to the social imperatives that were appearing in the commentary at the time and were encapsulated in the original judgment of the sentencing court. It is worth quoting these comments at length because in them are almost all the key features of what will become the model for

[245] *Veen v R (No 2)* [1988] HCA 14; (1988) 164 CLR 465 (29 March 1988) at [9] (emphasis added).
[246] *Veen,* per Deane J, para [2].

post sentence coercive preventive measures (and also largely predicts the principles that will later be enunciated by Ashworth & Zedner)

> There is one further matter which I would briefly mention. That is that *the protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality* if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on *periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts*. The courts will impede rather than assist the introduction of such an acceptable system if, by disregarding the limits of conventional notions of punishment, they assume a power to impose preventive indeterminate gaol sentences in a context which lacks the proper safeguards which an adequate statutory system must provide and in which, where no non-parole period is fixed, the remaining hope of future release ultimately lies not in the judgment of experts but in the exercise of a Ministerial discretion to which political considerations would seem to be relevant. I say "by disregarding the limits of conventional notions of punishment" for the reason that *to increase a sentence of imprisonment by reason of a propensity, flowing from abnormality of mind, to commit further offences is to punish a person for that abnormality of mind and not for what he has done*.[247]

Another fascinating aspect about the statements of Deane J is his identification of the risks involved in a process of juridification that sought to introduce new principles that could disturb the existing relationship between the arms of Government; for him, a statutory system of preventive detention based on expert opinion would be a bulwark against a tendency to undermine the judicial process in which some indeterminate normative principle of ‘community protection’ was smuggled into the sentencing process.

[247] *Veen,* per Deane J, para [12].

The second case that is crucial to understanding the state of the law in terms of how key normative principles were institutionalised at the beginning of the transition to preventive justice is *Lim v Minister for Immigration*[248]. In this case the High Court was required to engage directly with the issue of the extent (and justification) of the State's powers of detention other than in the context of a sentence following criminal conviction. The decision took place in the broader social political context of a shift in Australia's attitude to certain arrivals by foreigners seeking asylum or simply to immigrate to Australia in which a relatively liberal attitude in the preceding decade or so had changed quickly. In the late 1980s and early 1990s, the political rhetoric in relation to the need to detain persons arriving in Australia unlawfully reflected the growth of various perceptions of insecurity common to the 'risk society'; for example, a loss of control over borders, economic insecurity and issues around race and cultural identity. The case itself involved a challenge by 36 Cambodian nationals against a decision of the relevant Minister to refuse their applications for refugee status. The Federal Court had made orders setting aside the decision of the Minister and had listed for hearing an application that the plaintiffs be released from detention. Before that matter was heard, the Commonwealth Parliament passed an amendment to the *Migration Act 1958* that provided for the compulsory detention in custody of certain 'non-citizens' which included the plaintiffs. Proceedings were brought by the affected asylum seekers in the High Court to argue the amending legislation was invalid.

The case put squarely into focus the fundamental normative principles institutionalised in the paradigm case of the deprivation of liberty.[249] In the joint judgment of Justices Brennan, Deane and Dawson, the Court provides a clear statement of the traditional, fundamental respect for liberty that defines a liberal legal system. The judges noted that at common law, an alien who was in Australia,

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[248] *Chu Keng Lim v Minister for Immigration, Local Government & Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1.

[249] The case also brought to the fore issues relating to the Constitutional arrangements as between the Executive and the Judiciary. This latter issue takes on some significance in the Australian context as the Court grapples with the trend towards preventive justice over the next 20 years as will be seen in the discussion below, but perhaps more particularly in the context of immigration law where the executive has increasingly acted to remove issues relating to immigration from the jurisdiction of the Courts. However, analysing this particular process of *de-juridification* within the 5th wave in an immigration context is beyond the scope of this thesis, but see note 248 below.

whether lawfully or unlawfully, was not an outlaw. Accordingly, there was no power to detain such a person unless some other positive authority of law existed. For this reason, in order for the detention of the plaintiffs to be lawful, there had to be a valid statutory provision that allowed for it (at [8]).

The joint judgment also considered the Constitutional arrangements that underlie the State's powers of detention.

> There are some functions which by reason of their nature or because of historical considerations have become established as *essentially* and *exclusively* judicial in character. The most important of them is the adjudgment and punishment of criminal guilt…That function appertains exclusively to and "could not be excluded from" the judicial power.[250]

As the Constitution of Australia incorporates a separation of powers, the Court held that Chapter III (which relates to judicial power) would cause any law that purported to vest any part of that exclusively judicial function to the Executive to be invalid.

> It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.[251]

Notwithstanding this very clear expression of the limits on the power to detain, the validity of the law was upheld.[252] The Court here noted the existence of exceptions to

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[250] *Lim,* at [22] of the joint judgment, emphasis added, and internal citations omitted.

[251] *Lim,* at [23]. The statement quoted above in Chapter 4 follows immediately from this statement.

[252] The joint judgment did not however leave the legislation undisturbed. One of the legislative amendments under challenge was section 54R, which read 'A court is not to order the release from custody of a designated person'. Although it was willing to read down the protections of Chapter III in respect of the power to pass a law detaining aliens, the joint judgment struck down the attempt to exclude judicial oversight.

> 'A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power [in Chapter III] and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid…In terms, s54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament…to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction…The latter constitutes an impermissible intrusion into judicial power.' *Lim,* [38].

the general rule that the power to detain a citizen is essentially judicial in nature, including: the power of the State to arrest and detain a person in custody who is accused of a crime to ensure that he or she is available to be dealt with by the courts (where even then this is subject to the supervision of the courts); involuntary detention in cases of mental illness or infectious disease; and, various extraordinary measures in times of war. None of those exceptions applied in this case. However, for the joint judgment, the determining factor in this case was that the law which provided for the detention of the plaintiffs was a law directed to 'non-citizens': if the law had purported to authorise the detention of citizens it would have been held invalid. The joint judgment went on to find that the vulnerability of non-citizens to exclusion and deportation from Australia diminished the protection that the Constitutional separation of powers would have otherwise provided. Ultimately the judges accepted that the Constitutionally vested power to pass laws in respect of aliens authorised the Executive to detain non-citizens to the extent necessary to make deportation effective. This power that was being exercised was described as being neither punitive nor judicial in character, but as an incident of the executive power to exclude, admit or deport aliens.[253]

The remaining judges, who all gave sole judgments, although reaching different conclusions on some points, all expressed similar opinions on key issues. Justice Toohey approached the questions in accordance with the paradigm case; for him the issues raised were answered by the observation that the legislation allowed for the detention of the designated class of persons not for punitive purposes but solely to ensure that they would leave Australia if they were not given an entry permit. This was not a question of punishment, but of supervision and control. Justice Gaudron noted that detention in custody in circumstances not involving some breach of the criminal law and not coming within the 'well accepted categories' set out in the joint judgment 'is offensive to ordinary notions of what is involved in a just society', but was not persuaded that legislation that authorised detention in such circumstances would necessarily and inevitably be contrary to Chapter III.[254] Justice McHugh noted that the legislation could not be characterised as a Bill of Attainder or a Bill of Pains

As will be seen, a key feature of this current phase of juridification in Australia involves a re-settling of the relationship between the different arms of Government, and in particular the judiciary and the executive.

[253] *Lim,* at [29-30].

[254] *Lim,* per Gaudron J at [9].

and Penalties. He noted that although there was no express prohibition of such Acts in the Constitution, they would be invalid as being contrary to the separation of powers confirmed by Chapter III. He too went on to characterise the law in this case as non-punitive but did note that if detention went beyond what was reasonably necessary to achieve the non-punitive ends of the legislation it would be regarded as punitive. He emphasised (as did the other members of the Court) that the approach to these questions of characterisation must always be a matter of substance over form.

The judgments in *Veen No 2* and *Lim* stand at the threshold of the paradigm shift to preventive justice in Australia. The judgments contain certain key features of the legal framework in which preventive justice will come to be evaluated by the Court:

- The need for a valid legislative authority for coercive preventive measures
- That detention other than as a consequence of conviction must be for a legitimate non-punitive purpose
- Those subject to supervision and control must belong to a class of persons with a reduced or limited claim to the rights otherwise enjoyed by a person who is a fully legally responsible person
- The characterisation of a measure as punitive or non-punitive is a matter of substance not form
- Even if a measure is non-punitive, there is a requirement of proportionality between the deprivation of liberty and the non-punitive purpose
- A prohibition on any ouster of judicial review of decisions by the State or of any attempt by the Executive to direct the Courts in the exercise of judicial power.

Both judgments (*Veen No2* and *Lim*) affirm the pre-eminence of the principle of liberty and the restricted circumstances in which infringement of liberty by the State will be lawful. A person who is a full member of the legal community, one who is recognised as possessing private autonomy, can only be deprived of their liberty by the court as punishment for a crime, and such deprivation must be proportionate to the gravity of the offence committed; and even in cases where the person has diminished autonomy, any measures that interfere with their liberty must be proportionate to the non-punitive purpose.

If the 1988 and 1992 judgments in *Veen No 2* and *Lim* mark the threshold of the era of preventive justice in Australia, it is the case of *Kable v Director of Public Prosecutions (NSW)*[255] a few years later that represents the first major challenge to the normative principles of the traditional paradigm. In this case the High Court struck down the *Community Protection Act 1994* (NSW), a piece of legislation specifically designed to enable the ongoing detention of an offender after the expiration of his sentence.

Gregory Wayne Kable was convicted in 1990 of manslaughter and sentenced to five years and four months in custody. He had killed his wife in the context of a marriage breakdown and a dispute over custody of and access to children. During his time in custody Kable expressed thoughts of violence and wrote several threatening letters to the family of his deceased wife. As a consequence, the NSW Government introduced legislation into the Parliament in an attempt to provide a mechanism to allow for the ongoing detention of any person considered more likely than not to commit an act of serious violence.

It is worth quoting at some length the Second Reading Speech of the NSW Attorney General who introduced the Bill in order to appreciate the force of the functional and normative imperatives that resulted in the new law.

> This Government has always placed the highest priority on the need to provide adequate measures for the protection of the community from violence. For example, it has done so by strengthening a number of provisions aimed at providing that protection from domestic violence, and by strengthening the sentencing laws of this State...However, the law does not presently provide a mechanism whereby the community can be protected from a potentially violent individual, who is not mentally ill for the purposes of the mental health legislation, and who has not committed a serious offence of violence…
>
> This bill addresses that inadequacy by providing for a mechanism whereby persons who are more likely than not to commit serious acts of violence may be detained when it is appropriate to do so for the protection of the

[255] *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; 189 CLR 51 (12 September 1996).

community. *It is the need to protect the community which is the paramount consideration* for the introduction of this bill.

This is not a measure which this Government proposes lightly, without due regard to one of the principles underlying the criminal law, namely that *deprivation of liberty should only be justified as punishment for a criminal offence actually committed*. It is however a necessary measure. *The community must be protected from those persons who present a real danger yet are unable to be otherwise lawfully detained.*'[256]

The Bill was opposed in the Parliament. The shadow Attorney General said

The bill is a radical departure from the traditions and standards of our criminal justice system. In particular, it provides for preventive detention orders…being made against a person who could not otherwise be held in lawful custody…

The defendant will be incarcerated by the judge without any facts being demonstrated as to criminal conduct and on the say-so of a psychiatrist, psychologist or social worker. *The tradition of our law is that people are punished for crimes they have committed*. In addition, if they have a mental illness or a mental disorder, under the Mental Health Act they can be placed in custody in the mental health system. In special circumstances a case may exist for indeterminate sentences, or even protective detention, but only when charges have been laid.

…It is true that in wartime, nations whose very survival is under threat have resorted to extreme measures of this character. It is true that other countries facing threats of terrorism or insurgency have resorted to measures of this kind. But I assert confidently that *in peacetime no democratic country not facing extreme threats of this character has set the precedent of resorting to legislation of this kind*.[257] (emphasis added)

[256] The Hon J Hannaford MLC, Attorney General, Hansard, NSW Parliament, 27 October 1994, (emphasis added).

[257] The Hon J Shaw MLC, Hansard, NSW Parliament, 27 October 1994.

In reply, the Attorney General said

> Where there is evidence that is capable of satisfying a Supreme Court judge on the balance of probabilities that a person is more likely than not to commit a serious act of violence, should we be powerless to act until that person actually kills or injures another?[258]

The debate in the Parliament demonstrates the conflict between the normative principles of the old and new paradigms. The concrete example of Gregory Kable, a man convicted of a serious violent crime nearing the end of his sentence, neither mentally ill nor an alien, and explicitly threatening future violence, is both a threat to the community that must be controlled and a man whose right to liberty following the expiration of his sentence must be respected. The risk represented by Kable is a challenge to the legitimacy of the Government which has an obligation to protect the community and to uphold the rule of law.

The Act which was ultimately passed by the Parliament allowed for the making of a preventive detention order by the Supreme Court if satisfied on reasonable grounds that a person is more likely than not to commit a serious act of violence and that it is appropriate for the protection of a particular person or the community generally that the person be held in custody. Proceedings under the Act were deemed to be civil proceedings. Although the rules of evidence were to apply, the Court was empowered to order the production of various reports, including medical and psychiatric reports and could order the defendant in the proceedings to be examined by a psychiatrist or psychologist. The burden of proof was the civil standard of a balance of probabilities. A detention order could be made for a period of up to six months but could be renewed and could be made subject to conditions, including specifying the particular prison in which the defendant was to be detained. During the period of detention, assessors appointed by the Court were required to observe and report on the detainee. A detainee was deemed to be a prisoner for the purposes of relevant laws relating to the control of prisoners.[259] Although the Act was passed in

[258] The Hon J Hannaford MLC, Hansard, NSW Parliament, 16 November 1994.

[259] Accordingly, the legislation would be largely compliant with the principles enunciated by Ashworth and Zedner, *Preventive Justice*, 168-169.

general terms, because of amendments that were made to secure its passage, it could only apply to one person: Gregory Kable.

Kable was the subject of a successful application under the Act, which was upheld on appeal. A subsequent application by the DPP for an order failed. However, Kable was still exposed to a future application under the Act, and proceedings were commenced by him in the High Court challenging the validity of the Act on a multiplicity of grounds, ranging from an argument that it was not a law at all, that it was beyond the power of the NSW legislature to enact, that it infringed fundamental rights that could not be overturned by any legislature, that it infringed a constitutional requirement of equality under the law, and that it was inconsistent with the requirements of Chapter III of the Constitution. It was ultimately only the last point upon which he was successful.

Given the significance of this decision, it is worth examining the various judgments of the High Court in some detail. Brennan J and Dawson J would have dismissed the appeal, the latter pointing out the apparent consistency between this statutory regime and what Deane J had described in *Veen (No 2)*. Indeed Dawson suggested that the Act was a result of the NSW legislature's perception of a 'gap in the law' arising from the fact that there were people in the community with personality disorders that disposed them to violence but who were not mentally ill.[260] Dawson J accepted that detention under the Act was preventive, not punitive, though it was noted that the place of detention was to be the same as when he was serving his sentence (that is, a gaol), rather than some other institution (in contrast to what Deane J had suggested in *Veen*).

Toohey J held the Act invalid because it called on the Supreme Court to make an order requiring the detention of a person in circumstances other than a finding of guilt following a breach of the criminal law.[261] In reaching this conclusion he distinguished the circumstances from those in *Lim*, noting that in addition to not involving an adjudication of criminal guilt it did not fall into any of the 'exceptional cases' described there, 'directly or by analogy', because detention under the Act was an end in itself rather than, for example, a means to secure the expulsion of a non-citizen. For this

[260] *Kable,* per Dawson J at [45].
[261] *Kable,* per Toohey J at [30].

reason, he held that the Act required the Court to exercise judicial power in a manner that was inconsistent with traditional judicial process.[262]

Gaudron J also struck down the law, and she was also particularly strenuous in her condemnation of the Act. She expressed the view that the proceedings which the Act envisaged were not proceedings otherwise known to law.

> Except to the extent that the Act attempts to dress them up as legal proceedings…they do not in any way partake of the nature of legal proceedings. …the applicant is not to be put on trial of any offence against the criminal law. Instead, the proceedings are directed to the making of a guess – perhaps an educated guess, but a guess nonetheless – whether, on the balance of probabilities, the appellant will commit an offence…[263]

She too noted that the place of detention was an ordinary prison, and that Kable was to be held subject to the same regime as any other prisoner.[264] For Gaudron J, the Act required the Court to undertake a task that was the 'antithesis of the judicial process', one of the central features of which was to protect the individual from arbitrary punishment and the arbitrary abrogation of rights.[265]

McHugh J was also explicit in his distaste for the legislation.

> In my opinion, those who initiated and passed the Act plainly expected and intended that the imprisonment of the appellant would continue…It is true that the Act places the necessity for a Supreme Court order between the obvious intention of the executive government and the imprisonment of the appellant…But when the Act was passed it must have seemed to many that the risk of that intention being defeated was minimal.[266]

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[262] *Kable,* per Toohey J at [28].

[263] *Kable,* per Gaudron J at [22].

[264] *Kable,* per Gaudron J at [21].

[265] *Kable,* per Gaudron J at [24]. In many ways she pre-empts Günther's analysis that these laws can involve a paradoxical inversion in the meaning of 'rights' and so the relationship between State and individual, and are for that reason illegitimate.

[266] *Kable,* per McHugh J at [30].

Significantly, for McHugh J, it was not the principle of preventive detention itself that was held to be objectionable, but rather the method in which it was to be achieved in this case. McHugh J opined that the Parliament of NSW had the power to pass legislation providing for the imprisonment of a particular individual, and to make general laws for preventive detention, provided that they operated in accordance with the ordinary judicial processes for State courts. His objection in this case was that the Act made the Supreme Court 'an instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person'.[267]

Gummow J too accepted the argument that the powers conferred by the Act on the Court were of such an 'extreme nature and quality' that they were incompatible with the exercise of judicial power.[268] He considered that the nature of detention under the Act was punitive, and as it did not follow from an adjudication of guilt, the proceedings involved were 'repugnant to the judicial process'.[269]

A common thread in the majority judgments was a concern about the future focussed nature of the matters to be determined, that detention was to be a consequence of what the defendant might do in the future, not for what he had done in the past. Gaudron J, McHugh J and Gummow J also shared a concern about the nature of the evidence that would support an order, being the reports of experts that opined on the likelihood of future offending. In addition to the necessarily difficult task of predicting 'dangerousness', these judges distinguished the use of that type of evidence in criminal proceedings (in which it would likely be inadmissible) and in proceedings under the legislative regimes for dealing with the mentally ill.

> The primary significance of the provisions of the Act to which I have referred above [providing for the expert medical reports] is their service to emphasise the placement of the applicant *outside* the general legislative regimes with

[267] *Kable,* per McHugh J at [32]. In fact, McHugh characterised the power being exercised as similar to that exercised by a Minister during times of war: at [34].
[268] *Kable,* per Gummow J at [11] – [16].
[269] *Kable,* per Gummow J at [30], [35].

> respect to the care, control and treatment of mentally ill and mentally disordered persons.[270]

Accordingly, by majority judgment, the legislation was struck down.

Although this outcome could be said to be simply consistent with the principles of the traditional paradigm, the analysis above shows that it is not so straightforward. The dissenting judges seemed perfectly willing to accept that interference with liberty could be justified on the basis of a normative principle of community protection. However, for the majority, in addition to the confirmation of the traditional limitations on the legitimate interference with liberty, the judgment also stands for the requirement that legislation cannot impair the institutional integrity of a State Supreme Court; indeed the fatal flaw of the legislation in this case was less about the primacy of liberty (or any invalidity of the normative imperative of protecting the community) than the perception of the majority of judges that the Act was an attempt by the State to enlist the Supreme Court to bring about the ongoing detention of an offender in a way that was removed from the usual judicial process. Although the principle of liberty provided the normative starting point for the decision of the majority, in many ways the case is better understood as an evaluation of the process of juridification towards preventive justice that was taking place: that is, the relevant norms that governed the outcome were more related to the integrity of the judicial process rather than the liberty of the offender. As will be seen, the subsequent jurisprudence in relation to this form of coercive preventive measure is to an extent governed by the ongoing process of juridification in which the principles and techniques involved in measures of this kind (such as the assessment of future risk) become normalised within the judicial process.

Notwithstanding that the *Kable* decision in 1996 emphatically rejected the first[271] attempt at a legislative scheme for post sentence detention of a high risk offender it was not long before the High Court was called on again to consider the validity of such a scheme. In 2003, the impending release of a notorious child sex offender caused significant media attention and 'community concern' in Queensland. Dennis

[270] *Kable,* per Gummow J at [41] (emphasis added).

[271] In fact, a similar law had been passed earlier in Victoria, but the offender to which it was directed died before any application for ongoing detention was made, and so the Act was never put to use and subsequently repealed.

Ferguson had completed his full sentence of 14 years following his conviction for abducting and sexually assaulting three children. He had consistently maintained his innocence and had refused to undertake sex offender programs in custody and to submit to psychiatric evaluation. At the time of his release, the Queensland Government said

> There is nothing at all I [Minister for Corrections] or indeed the Attorney could do to stop this person.

The Opposition party said

> We're not satisfied…We would like to see 24-hour surveillance on this fellow.

Victims of crime groups said

> Some studies have shown that up to 98 per cent of people who have a history of sexual assaults against children will reoffend. And that's because they don't believe they're doing anything wrong. They believe the law is wrong and what they're doing is correct.[272]

On 2 June 2003, the Queensland Attorney General introduced into Parliament the Dangerous Prisoners (Sexual Offenders) Bill, stating

> There has been growing concern in our community about the release from prison of convicted violent sex offenders and paedophiles who are not rehabilitated. Although these offenders may have completed the fixed term sentence imposed by the court, the real possibility of them reoffending poses a risk to the community that cannot be ignored. It is a risk that concerns not only their victims and their families, but other innocent families and children. It is a risk this government views as unacceptable.[273]

He went on to say

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[272] All quotes taken from ABC 7.30 Report, 9 January 2003, transcript accessed at http://www.abc.net.au/7.30/stories/s760658.htm on 12 March 2016. While there must be considerable scepticism about the accuracy of some statements in the debate, they do represent a clear articulation of the demand for community protection and incorporate a number of features of the risk society.

[273] Hansard, Queensland Parliament, 3 June 2003, 2484.

> This bill introduces a more contemporary and effective scheme for protection of the community. The detention of individuals in custody, depriving them of their liberty to that extent, must never be authorised lightly, without reasonable cause based on legitimate grounds. *However, the law has never regarded detention as legitimately authorised only for the purpose of punishment for proven criminal offending.* Even the sentencing process contemplates the factors of rehabilitation and protection of the public be considered in deciding whether to impose a custodial sentence.[274]

And, further

> The scheme of this bill is however not part of the sentencing process but a separate process for detaining persons who are seriously dangerous, convicted, violent sex offenders and whose risk of reoffending demands that the community be protected. *It is akin to the detention authorised under mental health laws, except that the protection provided to the public by this new law is founded not on the mental illness of a person but on a different though equally sound principle of public policy. That principle is the priority that must be given to protecting the public*, our families and children from the serious danger that a person, having already been convicted and imprisoned for committing offences of a violent sexual nature, poses to the community because of their propensity for committing such an offence again.[275]

The debate on the bill focussed heavily on its application to a small number of offenders who either refused rehabilitation or were said to be unable to control their offending behaviour.[276]

The Parliamentary debate emphasised the claim that the legislation was a normatively justified 'gap filler' between the traditional criminal justice system and the mental health system. What is clear from the language of the debate is that the Parliament was struggling with how to respond in a principled manner to the apparent paradox of the person who is free from mental illness but apparently not free to

[274] Hansard, Queensland Parliament, 3 June 2003, 2484 (emphasis added).
[275] Hansard, Queensland Parliament, 3 June 2003, 2485. Note the collapsing of the functional and normative dimension of the social imperatives being referenced in the concept of 'public policy'.
[276] Hansard, Queensland Parliament, 4 June 2003, 2581.

control their behaviour in a manner compatible with the freedom of others not to be harmed.

> There are people in the community who are driven to commit terrible sexual offences, including sexual offences against children, and who, while they may not be considered by mental health professionals to be insane, seem unable or unwilling to stop themselves from doing it again. These people, though there are very few of them, are a real risk to the community. *In committing such awful crime they have lost many of their rights and the community must be protected from them…*
>
> [The Bill] targets a small group of people but a very seriously deficient group of people—that is, violent sex offenders and paedophiles who are not rehabilitated…The reason they are not rehabilitated is that, in truth, we do not have the ability, the knowledge and the expertise to rehabilitate them…it is a matter of regretful fact that we have been unsuccessful at finding what may be regarded as a cure for such people…*What is also not understood is why they are not classified as mentally ill*—as people who are insane—and therefore kept at an appropriate mental institution, if necessary for the rest of their lives. It is a matter for the classification of mental illness, and that is a matter for experts...We wish we had a cure for such individuals; that they could be rehabilitated. [277]

The framing of the issue in this way is significant. The inability to conceive of the 'serious deficiency' in question (behavioural control) in normative terms is not seen as a failure in conceptualisation of the relevant normative category (autonomy) but rather of the ability of the psychiatric expert to either diagnose or treat such a deficiency. This lacuna in the law between the system for detention and punishment of those criminally responsible and the detention and treatment of those not criminally responsible by reason of mental illness, a void whose origin is to be found in the binary understanding of autonomy characteristic of the theoretical emphasis on negative freedom, creates a structural weakness in the efforts to legitimate coercive preventive measures (in the context of preventing future serious crimes by those

[277] Hansard, Queensland Parliament, 4 June 2003, 2570-2571 (emphasis added). Again, the inversion of rights in this speech echoes Günther's concerns discussed in Chapter 4.

previously convicted of such crimes). As will become clear, this weakness leaves such measures prone to paradoxical formulations.

The Act was passed with bipartisan support in three days. The first application was made shortly after in respect of Robert John Fardon. A continuing detention order was made by the Supreme Court on application from the Queensland Attorney General. This order was upheld on appeal, and perhaps not unexpectedly[278], the case found its way to the High Court.[279]

Despite the obvious parallels with the legislation that was struck down in *Kable*, the passage of a mere seven years saw a dramatic turnaround: the High Court upheld the Queensland legislation by a majority of 6-1.[280] The fundamental change in the attitude of the Court from the decision in *Kable* is evident from the judgment of the Chief Justice. For Gleeson CJ, the starting point was the observation that no one would doubt the validity of a law that empowered the ongoing detention of a sexual offender shown to constitute a serious danger if *they were mentally ill*. In stark contrast to the approach taken by the majority judges in *Kable*, who all accepted as a starting point the paradigm case that emphasises the restrictions on the power to detain other than as an incident of an adjudication of guilt under the criminal law, Gleeson CJ chose to highlight the long history of laws in the United Kingdom that to a greater or lesser degree transgressed that principle.[281] He noted that the validity of such laws was, necessarily, to be considered in the light of the particular constitutional context, and that in the Australian context, in the absence of any general Constitutional statement of rights and freedoms, the question of validity was to be determined on a narrow basis. Gleeson CJ pointed out that the appellant's argument in this case highlighted (in the context of Australian Constitutional law) that the objection to the validity of the legislation was that it required a court to consider whether ongoing detention should be ordered, and that this was incompatible with

[278] It seems a little surprising that during the entire debate on the Bill, despite patent similarities between this legislation and the *Community Protection Act*, only at one point in the entire debate was there raised a possible Constitutional challenge on the basis of the *Kable* decision (misspelt in Hansard as *Cable*).

[279] *Fardon v Attorney General (Qld)* [2004] HCA 46; (2004) 223 CLR 575.

[280] Although the Court was differently constituted, the only 2 judges that sat in both cases – McHugh & Gummow JJ – both found in favour of Kable – holding the legislation there *invalid* – and against Fardon – holding the *Dangerous Prisoners (Sexual Offenders) Act 2003* to be *valid*.

[281] *Fardon*, Gleeson CJ, at [13].

the institutional integrity of the court itself (the 'Kable' principle). There was no challenge directly on the basis that the law infringed the appellant's human rights or that it was the legislation's effect on the personal liberty of the subject that was said to infringe the Constitution; the Chief Justice noting that, of course, there could not be such a challenge as the Constitution has no express guarantee of such liberty.[282]

The Chief Justice also regarded the scheme of the Act as appropriately judicial in character: the Act specified certain criteria by which the judge was to evaluate the ultimate issue, the rules of evidence applied, the onus of proof was appropriate, and the law was general in character (that is, it did not apply to one individual).[283] In moving beyond the concern of the Court in *Kable* about the form of the legislation and its impact on the judicial process, Gleeson CJ was able to return to fundamental normative question raised by this type of measure

> The devising of an appropriate community response to the problem referred to by Deane J in…*Veen [No 2]…*raises difficult questions involving the *reconciliation of rights to liberty and concerns for the protection of the community*.[284]

This statement confirms the judicial acceptance that preventive justice is a legitimate response to the burgeoning social imperatives of the risk society, and that the true question is one of reconciling liberty and protection. Arguably, it is in this judgment that for the first time these two principles are collocated in the same register of freedom and given the same level of importance.

McHugh J, one of the majority that rejected the law considered in *Kable*, here dismissed the appeal and so upheld the validity of this legislation. He argued that the differences between the *Community Protection Act* and the *Dangerous Prisoners (Sexual Offenders) Act* were 'substantial'. In *Kable,* McHugh J had said that the legislation was invalid because it imprisoned the appellant by a 'process that is far

[282] *Fardon,* Gleeson CJ at [2]. Here the Chief Justice is pointing out that juridification in the sense of expanding the scope of judicial power to manage social conflict is more likely to be protective of freedom than expanding the scope of non-judicial power.
[283] *Fardon,* Gleeson CJ at [19].
[284] *Fardon,* per Gleeson CJ at [20].

removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person'. However, here he said

> State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion…that the State court might not be an impartial tribunal.[285]

McHugh J, like the Chief Justice, emphasised that under the Queensland Act, the Court was called on to exercise a real discretion, that the rules of evidence applied and that the onus of proof was a 'high degree of probability'. He also chose to emphasise that 'the Act is not designed to punish the prisoner. It is designed to protect the community…'[286]. This judgment is remarkable in terms of the ease with which McHugh J was able to uphold the legislation because in this instance he was satisfied that there was no undermining of the judicial process. Perhaps, as with the Chief Justice, he simply recognised the risks involved if decisions such as these were to be made by persons other than the judiciary or in a non-judicial manner; however, the emphasis on the non-punitive nature of any detention under the Act suggests he probably considered there was additionally a need for a normative justification.

Although Hayne J took a mere four paragraphs to uphold the Act, it is perhaps this brief judgment that most elegantly expresses the challenges to the traditional paradigm posed by preventive justice

> Once it is accepted…that protection of the community…is a legitimate purpose of sentencing, the line between preventative detention of those who have committed crimes in the past (for fear of what they may do in the future) and punishment of those persons for what they have done becomes increasingly difficult to discern. So too, when the propensity to commit crimes (past or future) is explained by reference to constructs like 'anti-social personality disorder' and it is suggested that the disorder, or the offender's behaviour, can be treated, the line between commitment for psychiatric illness and preventative detention is difficult to discern.[287]

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[285] *Fardon,* per McHugh J at [42].
[286] *Fardon,* per McHugh J at [34].
[287] *Fardon,* per Hayne J at [196].

Hayne J here seems to acknowledge that traditional normative categories cannot provide a basis for either legitimising or delimiting the new protective justice paradigm. At the same time, in this paragraph, the liberty of the subject has almost completely disappeared, subsumed into the need for the control of the risk of harm, whether past or future.

In some respects, the joint judgment of Callinan and Heydon JJ almost suggests the transition from the old paradigm case to preventive justice has been completed. Any sense of a conflict between the traditional limitation on involuntary detention and the principles that may justify preventative detention is completely absent from their judgment. They have no difficulty in holding that the Act is protective rather than punitive[288], and that it validly authorises involuntary detention in the 'interests of public safety'. Indeed, they appear to include the Act as part of the category of 'exceptional cases' described in *Lim* noting that it

> is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment'.[289]

By contrast to the scathing remarks of the Court (and particularly of Gaudron J) in *Kable*, this joint judgment in a few short paragraphs characterise the proceedings under the Act as 'bear[ing] the hallmarks of traditional judicial forms'.[290] They dismiss any concern about the Court having to undertake a predictive task in determining whether to make an order noting that the Family Court undertakes a similar process 'on a daily basis' in the context of an evaluation of a risk to a child.[291] Ultimately they conclude

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[288] *Fardon,* per Callinan and Heydon JJ at [216]. By stark contrast to the statement of McHugh J in *Lim* that the proper characterisation of the nature of detention is a matter of substance not form, here Callinan & Heydon JJ draw comfort from the fact that the stated objects of the Act includes ensuring the protection of the community.

[289] *Fardon,* per Callinan & Heydon JJ at [217]. No attempt is given to articulate any principle that would bring detention under the Act into this category, and certainly no reference is given to the rejection of such an idea by Toohey J in *Kable* in circumstances where he distinguished the case of *Lim* because detention under the *Community Protection Act* was an 'end in itself'.

[290] *Fardon,* per Callinan and Heydon JJ at [220].

[291] *Fardon,* per Callinan and Heydon JJ at [225].

> The Act…is designed to achieve a legitimate, preventative, non-punitive purpose in the public interest, and to achieve it with due regard to a full and conventional judicial process…[292]

The one dissenting judgment in the case also provides an insight into the process of juridification taking place. Kirby J could see no principled difference between the *Dangerous Offenders Act* and the legislation that was struck down in *Kable*. He regarded the legislation as involving the deprivation of a fundamental human right, liberty, on the basis of a prediction of dangerousness by psychiatrists that could at best be an educated guess. He went further, arguing that this type of legislation will target people who will be unpopular in the community and the media. For Kirby J, this type of legislation is an example of a species of law that punishes people for their unconventional beliefs and as such is a potential threat to the protection that must be afforded to minorities in a democratic society.[293]

> Protection of the legal and constitutional rights of minorities in a representative democracy such as the Australian Commonwealth is sometimes unpopular. This is so whether it involves religious minorities, communists, illegal drug importers, applicants for refugee status, or persons accused of offences against anti-terrorist laws. Least of all is it popular in the case of prisoners convicted of violent sexual offences or offences against children. Yet it is in cases of such a kind that the rule of law is tested. As Latham CJ pointed out long ago, in claims for legal protection, normally, "the majority of the people can look after itself": constitutional protections only really become important in the case of "minorities, and, in particular, of unpopular minorities". It is in such cases that the adherence of this Court to established constitutional principle is truly tested, as it is in this case.[294]

In maintaining the emphasis of substance over form, Kirby J noted that the 'preventive detention' under the Act is nothing less than a continuation of the offender's sentence in the same location and under the same conditions.

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[292] *Fardon,* per Callinan and Heydon JJ at [234].

[293] *Fardon,* per Kirby J at [135].

[294] *Fardon,* per Kirby J at [143] (internal references omitted).

> In Australia, we formerly boasted that even an hour of liberty was precious to the common law. Have we debased liberty so far that deprivation of liberty, for yearly intervals, confined in a prison cell, is now regarded as immaterial or insignificant? Under the Act, just as in the law invalidated in *Kable*, the prisoner could theoretically be detained for the rest of the prisoner's life.[295]

Thus far Kirby J's judgment appears to represent a staunch defence of the traditional paradigm and the fundamental importance of liberty as a normative principle that cannot be compromised by any other claim. However, Kirby J recognises that the law under challenge, one that purports to justify detention on the basis of a risk of future acts, is a new development in the law.

> The focus of the exercise of judicial power upon past events is not accidental. It is an aspect of the essential character of the judicial function. Of its nature, judicial power involves the application of the law to *past* events or conduct. Although, in discharging their functions, judges are often called upon to predict future happenings, an order imprisoning a person because of an estimate of some future offence is *something new and different*.[296]

Perhaps surprisingly, given the strength of his opposition to the law, Kirby J does not rule out entirely the possibility of some acceptable regime of preventive detention. On a number of occasions in his judgment, Kirby J contrasts the regime established by the legislation under challenge with that in place in various parts of the United States of America.

> In the United States, where post-sentence detention legislation has been enacted, such continuing detention is ordinarily carried out in different facilities, controlled by a different governmental agency, with different features to mark the conclusion of the punitive element of the judicial sentence and the commencement of a new detention with a different quality and purpose.[297]

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[295] *Fardon,* per Kirby J at [160]. Similarly foreshadowing the arguments of Günther discussed in Chapter 4.

[296] *Fardon,* per Kirby J at [164] (emphasis added).

[297] *Fardon,* per Kirby J at [161], referring to the decision of *Hendricks* [1997] USSC 63; 521 US 346 at 368-369 (1997). This crucial judgment of the United States Supreme Court will be discussed separately – albeit very briefly – in Chapter 6.

He goes on to note the comments of Deane J in *Veen.* However, whereas Deane J expressly referred to the normative force of a claim of community protection as a possible justification for preventive justice, Kirby J focuses almost exclusively on those comments that suggest any statutory scheme for preventive detention must be closer to that which allows for the detention of the mentally ill: for him, incapacitation is only justified if it is for therapeutic purposes.

> In *Veen v The Queen [No 2]*, Deane J pointed out that cases may exceptionally arise where a prisoner, who has completed the punishment, judicially imposed upon proof of a criminal offence, may continue to represent a danger to the community. Where such a danger arises from an established mental illness, abnormality or infirmity which requires and justifies civil commitment, the law already provides solutions. If it is desired to extend powers to deprive of their liberty persons who do *not* exhibit an established mental illness, abnormality or infirmity, it is possible that another form of detention might be created. It is also possible that judges might play a part in giving effect to it in ways compatible with the traditional judicial process and observing the conventional nature of legal proceedings. However, at a minimum, *any such detention would have to be conducted in a medical or like institution, with full facilities for rehabilitation and therapy, divorced from the punishment for which prisons and custodial services are designed*.[298]

As will be discussed below, this formulation simultaneously points to a normative potential within preventive justice and to the possibility that developments in the law will instead lead to social pathology. At this point in our reconstruction, it is enough to note that Kirby J's medicalisation of the problem of reoffending would seem to reinscribe the traditional paradigm (an interpretation of the judgment supported by the emphasis given by Kirby J to 'traditional' process and 'conventional' forms): offenders who pose a risk of reoffending can be subject to control without further justification.

Arguably, the most significant judgment is that of Gummow J, the only other judge that presided in both *Kable* and *Fardon.* Gummow J took a distinctively new approach in this case in what appears to be an express effort to reconcile the

[298] *Fardon,* per Kirby J at [191] (emphasis added).

principles of liberty and protection. For Gummow J, this was not a case to be decided on the basis of whether detention under the Act was in accordance with the distinctions set out in *Lim* and followed in *Kable,* either as an 'exceptional case' or as 'punishment' following an adjudication of criminal guilt. He attempts to avoid the characterisation of detention as either punitive or non-punitive: instead, the focus should be on whether detention could be characterised as a 'consequential step in the adjudication of criminal guilt'.

In *Kable*, Gummow J had said

> The [Community Protection] Act requires the Supreme Court to inflict punishment without any anterior finding of criminal guilt by application of the law to past events…Such an activity is…repugnant to judicial process.[299]

Here, Gummow J accepted that under the *Dangerous Prisoners (Sexual Offenders) Act* detention was ordered not on the basis of a finding that the person has engaged in criminal conduct in the past, but on the basis that there is a risk he will do so in the future. The way out of this contradiction for Gummow J was to characterise the Act as *sui generis* in nature. It was important for him that the Act could apply only to a person who had been previously found guilty of a criminal act and who was presently detained as a result, and that the ongoing detention of that person could be ordered only by reference to the risk of future conduct of the same kind. For Gummow J, the Act

> operated by reference to the appellant's status deriving from that conviction, but then *set up its own normative structure*.[300]

In this judgment it is recognised, in express terms, that preventive justice involves a modification of traditional principles, that it is a development taking place within the law that has a normative content.

The decision of the High Court in *Fardon* is significant not just because it provides confirmation of the lawfulness of post sentence coercive justice measures. The decision recognises the need for the law to respond to social coordination challenges

[299] *Kable*, per Gummow J at [35].

[300] *Fardon,* per Gummow J at [74] (emphasis added).

arising from a community expectation that it will be protected from 'dangerous offenders'. It also shows how the judges of the Court struggled to identify the normative basis for their decision to uphold the validity of the Act: some appeared to subsume the principle of community protection into the traditional paradigm (Hayne, Callinan & Heydon JJ) (though in doing so opening themselves to a Günther style criticism that they invert the relationship between subject and State in a way that is incompatible with the principle of liberty); others seemed to focus on the form of juridification itself in preventive justice by either arguing for the expansion of judicial power to apply coercive preventive measures (Gleeson CJ), or limiting the scope of the judiciary to interfere in the exercise of power by the legislature (a form of de-juridification) (McHugh J); and Kirby J in seeking to preserve the pre-eminence of the principle of liberty potentially allocates the dangerous offender to the domain of those who lack autonomy altogether. However, arguably it is the decision of Gummow J that is of most interest in terms of his attempt to articulate the governing principles for the validity of any post sentence coercive preventive measure. It is against this background, and in particular the invitation by Gummow J for such legislative schemes to develop their own normative framework, that our reconstruction will turn to consider in detail a specific example of just such a measure.

5.3 The *Crimes (High Risk Offenders) Act 2006* (NSW)[301]

Shortly after the High Court decision in *Fardon*, the NSW Parliament passed the *Crimes (Serious Sex Offenders) Act 2006.* The Act provided a mechanism for the State to apply to the Supreme Court of NSW for orders that allowed for the ongoing control of convicted serious sex offenders. The period of control was to occur after the completion of the offender's existing sentence for a relevant offence. In 2013, the Act was expanded to also apply to serious violent offenders and was renamed as the *Crimes (High Risk Offenders) Act 2006* ('the Act').

Under the Act, the State may apply to the Supreme Court for either a Continuing Detention Order (CDO), which will mean the offender is kept in custody for the duration of the order, or an Extended Supervision Order (ESO) which means the offender will be supervised in the community subject to conditions imposed by the

[301] In what follows, references are to the legislation as in force on 21 January 2021 unless otherwise indicated.

Court (a breach of which is a criminal offence). Orders may be for up to 5 years duration and applications for further orders can be made in respect of the offender. After hearing an application, the Court may, if satisfied to a high degree of probability that an offender poses an unacceptable risk of committing a serious offence of the relevant kind if not kept under supervision, make an ESO for the supervision in the community of the offender.[302] The Court may only make a CDO if it is satisfied that the risk is unacceptable if the person is not kept in detention.[303]

For a long time, given the similarities of the legislation with that upheld in *Fardon*, it appeared generally accepted that the legislative regime in NSW was legally (constitutionally) valid and it was not until 2017 that there was an attempt to challenge it on such grounds, which was unsuccessful.[304] Accordingly, there is little doubt that the Act is lawful. However, the more interesting and controversial question is whether the Act is legitimate. As discussed in Chapter 3, the question of legitimacy involves consideration of both the effectiveness of the legislation (as a form of social co-ordination) as well as whether it is valid, in the sense of normatively justified. In what follows, the focus of our reconstruction will be on how the Act attempts to address the social imperatives that are driving preventive justice while also developing its own normative framework. The extent to which the Act is successful in doing so will be evaluated by reference to whether any paradoxes or other pathological effects can be identified in the way the Act is designed and operationalised.

In Chapter 4, the attempt by Ashworth & Zedner to constructively derive a normative basis for a post sentence coercive justice measure by modifications of the principle of proportionality led to them identifying nine sub-principles. For convenience they are set out again in full here:

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[302] *Crimes (High Risk Offenders) Act 2006,* Section 5B.

[303] *Crimes (High Risk Offenders) Act 2006,* Section 5C. The test for a CDO was amended to this version in 2017; previously the Court had to be satisfied that 'adequate supervision' would not be provided under a supervision order.

[304] A potential challenge to aspects of the legislation said to be not covered by the *Fardon* decision was raised in the matter of *State of NSW v Hill* [2009] NSWSC 1137 but was not ultimately pursued. In the matter of *Kamm v State of NSW (No 4)* [2017] NSWCA 189 the applicability of the High Court's decision in *Fardon* to the NSW scheme was affirmed by the NSW Court of Appeal.

1. A presumption of 'harmlessness' that can be rebutted only in exceptional circumstances

2. The State has a duty to protect people from serious harm which may justify depriving the liberty of a person who has lost the presumption of harmlessness by reason of having committed a serious crime

3. Deprivation of liberty must be the least restrictive option

4. A judgment of 'dangerousness' must be approached cautiously. The burden of proof must lie with the State and the level of risk required to be proven should vary in accordance with the seriousness of the predicted harm

5. Any additional period of time added to a sentence must be the shortest possible to address the risk

6. In exceptional circumstances a court could order an indeterminate sentence

7. There should be regular review of the need for continuing detention, and legal assistance should be provided to the offender

8. Adequately resourced rehabilitative treatment or training courses should be made available to the offender

9. Preventive detention should be served in non-punitive conditions with no greater restraints than that required by the imperatives of security, and in a separate facility.[305]

As was seen in the previous section, a number of these principles, or at least issues addressed by these principles, have also been referred to by various justices of the High Court during the development of preventive justice. It also appears that the NSW legislation meets the majority of these principles, at least in formal terms. Proceedings can only be brought against offenders currently serving a sentence of imprisonment for a serious offence (or in the case of sex offenders, serving a sentence for an offence of a sexual nature having previously been convicted and

[305] Ashworth and Zedner, *Preventive Justice,* 168-169.

sentenced to imprisonment for a serious sex offence). That is, the Act only applies to a small group in the population that through prior conduct have raised a doubt about their 'harmlessness' (principles 1 & 2). The Act provides for two forms of ongoing control, detention or supervision however continuing detention can only be ordered if detention is the only means of addressing risk; accordingly, a least restrictive principle informs the hierarchy of orders available under the Act (principle 3). The State has to prove 'to a high degree of probability' that the offender poses an 'unacceptable risk' of future serious offending, a burden above the usual civil standard (albeit less than the criminal standard) (principle 4). Orders are limited to a maximum of five years, although further orders can be sought, and are subject to executive review every 12 months, with a capacity for either party to apply for a variation or revocation of the order at any time (principles 5 & 7 – note principle 6 does not apply in this context).

Whether the NSW scheme satisfies principle 8 is less certain. As a matter of form, the Act has as an object the rehabilitation of an offender. Indeed, one of the justifications for the Act was that there were a small number of offenders who refused to undertake treatment or otherwise address their offending behaviour and who would otherwise be released to the community at the end of their sentence without any indicators of, or requirement for, rehabilitation. Further, a mandatory factor the Court has to consider in any application under the Act is 'any treatment or rehabilitation programs in which the offender has had an opportunity to participate, the willingness of the offender to participate in any such programs, and the level of the offender's participation in any such programs'.[306] The Court is also required to consider 'options (if any) available if the offender is kept in custody or is in the community (whether or not under supervision) that might reduce the likelihood of the offender re-offending over time'.[307] A review of applications made under the Act also reveals that the issue of whether an offender has completed a high intensity treatment program in custody is a significant factor in the decision to commence the proceedings; however the cases also suggest that at times any such failure is not always the fault of the offender. In some circumstances access to a suitable treatment program, or one that the offender would be able to participate in, was not

[306] *Crimes (High Risk Offenders) Act 2006,* Sections 9(3)(e), 17(4)(e).
[307] *Crimes (High Risk Offenders) Act 2006,* Sections 9(3)(e1), 17(4)(e1).

available or only became available with insufficient time left on the offender's sentence for it to be completed. Additionally, the evidence of the State in these proceedings has consistently been that there are no programs of sufficient intensity for high risk offenders available in the community. Accordingly, whilst at the formal level principle 8 is not offended by the legislative scheme, some concerns exist at the practical or operational level about the resourcing of programs for these high risk offenders.[308]

The one principle which is unambiguously not met under the NSW scheme is principle 9. Offenders subject to a Continuing Detention Order are housed in correctional centres alongside convicted inmates. Indeed the regime that applies to offenders on such orders is effectively identical to that of a sentenced inmate.[309] Interestingly, despite this being an issue that is broadly recognised as significant (without however there often being any considered critique of the basis for this principle), it has generally not featured as a determining factor in cases in which a Continuing Detention Order has been sought but not granted.[310]

Accordingly, an application of the Ashworth & Zedner principles to the NSW scheme would result in a high normative scoring. However, as was noted in Chapter 4, these principles themselves appear to appeal to a normative content that they cannot

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[308] See for example the comments of McCallum J in *State of NSW v Manna (preliminary hearing*) [2016] NSWSC 1841 at [79] – "…the systemic response to his need for treatment has been both languid and chaotic. One is left with the impression that the treatment of violent offenders in custody is significantly under-resourced."

[309] By reason of the Crimes (Administration of Sentences) Regulation 2014, offenders subject to a CDO are 'civil inmates' (clause 3) which has some minimal effect on their conditions of custody, including that they cannot be required to undertake work and they have increased visitor privileges. However, they are housed in the same physical environment, remain subject to the usual processes for classification and placement, and are subject to the same processes for discipline as convicted offenders.

[310] However, it should be noted that both Fardon and Kenneth Tillman – the latter being the first person subject to a Continuing Detention Order under the NSW legislation - lodged communications with the United Nations Human Rights Committee (Communications 1629/2007 and 1635/2007) about their detention under the respective legislative schemes. Both complaints were upheld by a majority of the Committee that concluded the preventive detention under the legislation was 'arbitrary' and in violation of Article 9 of the International Covenant on Civil and Political Rights. See *Fardon v. Australia*, Un Doc CCPR/C/98/D/1629/2007, (10 May 2010); *Tillman v Australia,* UN Doc CCPR/C/98/D/1635/2007, (18 March 2010). The key reasons for the decision were that the ongoing detention was in a prison and that 'imprisonment' was necessarily penal in nature; and that the orders were made 'in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence' and so was both retroactive in application and failed to meet due process. The decision of the majority of the Committee turned essentially on the characterisation of the detention by reference to the *location* of the detention.

themselves account for. Despite, as a matter of form, the legislation having strong claims to validity from a constructivist or liberal perspective, a close study of the legislation and its interpretation by the Supreme Court provides a number of clear signs, in the form of paradoxes, that its normative basis is somewhat fragile, a result of unreflectively seeking to draw on both traditional liberal principles and uncertainty about the meaning of the principles found in the new preventive justice paradigm. In particular, an examination of the values and principles that are used in the context of the Act to determine the content of pivotal concepts within the Ashworth & Zedner principles, such as how an offender is determined to have lost the presumption of harmlessness, the assessment of 'dangerousness', and in what circumstances deprivation of liberty is the 'least restrictive option', reveals that in the absence of a concept of freedom or autonomy with a broader normative content than that provided by liberty, the legislation is prone to developments that are productive of pathologies, including paradoxical effects.

Perhaps the most striking example of the inadequacy of the concept of liberty to provide any meaningful content to guide the formulation of this type of coercive preventive measure can be found in the formulation of the test the Court is required to apply when determining an application. Currently, the Court has to be satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a further serious offence if not kept under supervision. There are two elements of the test. The first involves the burden of proof. Although the proceedings are civil, the State must prove its case to 'a high degree of probability'. This constitutes a standard of proof which is higher than the civil standard but lower than the criminal standard.[311] This appears to be responsive to the normative demand, as articulated in Ashworth & Zedner's list of principles, that these types of judgments should be made conservatively because they result in a significant restriction of a subject's liberty, to the point of ongoing detention in a custodial setting, for reasons other than the commission of a crime. This ongoing concern with 'liberty' was a significant factor in the approach taken in an early case by the Court of Appeal in interpreting or characterising the burden of proof element of the test

[311] *State of New South Wales v Thomas (preliminary)* [2011] NSWSC 118 at [17], citing *Attorney General for the State of New South Wales v Tillman* [2007] NSWSC 605 at [27] and *Cornwall v Attorney General for New South Wales* [2007] NSWCA 374 at [21].

> It is a fundamental principle of criminal law that a person convicted of a crime must be given punishment appropriate to that crime and no more…Thus, if in addition to appropriate punishment for crimes they have committed, persons are to have their liberty further restricted because of what they might do in the future, this requires justification outside the ordinary principles of criminal law, and outside the ordinary principle that interference with liberty is generally restricted to interference that is deserved by reason of actual criminal conduct…[312]

In line with (though predating) the suggestion of Ashworth & Zedner, the Court approached the question by reference to the principle of 'proportionality'. Accordingly, although accepting that the burden of proof was less than the criminal standard, the Court was willing to infer that the legislature, in recognition of the infringement of personal liberty that was involved in an order under the Act, required something 'beyond more probably than not'. This element of the test has continued unchanged and the interpretation set out in the *Cornwall* decision quoted above remains an authoritative statement of the existing law.

By contrast however, the second aspect of the test, what might be considered the substantive element, has been amended significantly since 2006. In the original formulation, the criterion was whether there was 'a likelihood' that the offender would commit a further serious offence. What was meant by 'likelihood' was the matter of some judicial debate and the issue was considered by the New South Wales Court of Appeal in *Tillman* (on appeal from the first case decided under the Act). Again, the principle of liberty provided the normative framework for considering the meaning of the test. Mason P (albeit in dissent) noted that

> The *common law's presumption in favour of the liberty of the subject underpins the predictive inquiry to be undertaken* and further explains why this opaque legislation should be interpreted strictly in the sense that the available, tighter meaning of "more probable than not" should be chosen for "likely".[313]

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[312] *Cornwall v Attorney General for New South Wales* [2007] NSWCA 374 at [18] – [19]

[313] *Tillman v Attorney General for the State of New South Wales* [2007] NSWCA 327 at [13] (emphasis added). Although the Court upheld a less stringent test, this was because it felt bound to follow a decision of the Court of Appeal in Victoria in relation to a similar provision.

Shortly after the *Tillman* decision was handed down the Act was amended. The nature of the amendments that were made is instructive, in that they reflect a decision to introduce an expressly normative criterion as a counterpoint to the principle of liberty that had been relied on to interpret the provision. The arguably neutral term 'likelihood' was replaced with the normatively loaded term '*unacceptable* risk'.[314] It is noteworthy that although this provision is the fundamental principle of the Act and the central test to be applied by the Court in determining the outcome of these proceedings, it is not defined in the legislation. Perhaps unsurprisingly, two divergent approaches to the meaning of the term appeared. The first, which came to be known as the 'ordinary meaning' approach, considered the test required the Court to be satisfied the risk that the person will commit a serious offence is present to a sufficient degree so that the safety and protection of the community cannot be ensured unless an order is made.[315] The second approach suggested the test required the Court to undertake a balancing exercise

> …"unacceptable risk" involves a balancing exercise between the commission of a serious sexual offence and the likelihood of that risk coming to fruition on the one hand, and the serious consequences for the Defendant either because he will be detained beyond the period of his sentence although he has not committed any further offence or he will be subject to an onerous supervision order, on the other hand.[316]

In this second approach the central test of the legislation is seen to involve a need to reconcile two apparently competing principles, being community protection and liberty. The Court regarded its role as involving a balance between risk, understood in a conventional manner as a combination of the likelihood and gravity of a further serious offence, and the consequences of an order on the liberty of the offender.

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[314] When making the change which introduced the new terminology in similar legislation in Victoria, the Minister for Corrections described it as a "new, *qualitative*, 'unacceptable risk test'". Bob Cameron, Minister for Corrections, *Second Reading Speech,* Hansard Victorian Legislative Assembly, 12 November 2009, 4036 (emphasis added).

[315] First enunciated as a distinct interpretive approach in *State of New South Wales v Thomas (Preliminary)* [2011] NSWSC 118 and confirmed in *State of New South Wales v Thomas (Final)* [2011] NSWSC 307.

[316] *State of NSW v Richardson (No 2)* (2011) 210 A Crim R 220 at [24]-[27].

This 'balancing' approach was subsequently often, but not universally, followed by judges of the Court[317], notwithstanding the arguments by the State that the impact of an order on the offender should not be a factor in the relevant evaluative exercise. The State's position was that the Court should focus solely on the assessment of factors relevant to risk itself (such as the degree of risk and the likely consequences if an offence is committed).[318]

It was not until the 2016 decision of the Court of Appeal in *Lynn*[319], some five years after the unacceptable risk test was introduced, that this question was finally determined. In this appeal, the offender argued that the Court was required to take into account that the prior custodial sentence imposed on him in respect of his serious violence offence had been served in full, and that but for an order under the Act he was entitled to his personal liberty. As such he argued that the right of the person to personal liberty was an inherent aspect of the 'unacceptable risk' test. That argument was rejected by every member of the Court. Beazley P noted (at [45]), that the passing of the Act in itself demonstrated that the presumption of liberty had been displaced *in favour* of the protection of the community. The President accepted that the test required the Court to undertake an evaluation, which in turn required a context that could provide a 'standard or norm against which that determination is to be made' (at [51]). This context was said to be found in the purpose of the legislation, which is the protection of the community.

Basten JA also held that a finding of 'unacceptable risk' involved no consideration of the consequences of the finding on the offender. He did however suggest that the interests of the offender in liberty formed 'part of a set of underlying assumptions in considering what may be unacceptable' but did not articulate what was meant by this observation. Even so, he did explicitly accept that consideration of the impact of an order on the liberty of an offender was relevant at the stage at which a Court, having found the offender posed an unacceptable risk, was considering what conditions of supervision may be appropriate to diminish that risk to an acceptable level or in

[317] For example, see *Attorney General for the State of NSW v Steadman* [2013] NSWSC 170 at [66]; *State of NSW v Fisk* [2013] NSWSC 364 at [20]; *State of NSW v Green* [2013] NSWSC 1003 at [4]; *State of NSW v Wilde* [2014] NSWSC 305 at [106]; *State of NSW v Atkins* [2014] NSWSC 292 at [14]; *State of NSW v King (No. 2)* [2014] NSWSC 128 at [9].

[318] See the discussion of this in *State of NSW v Reed* [2011] NSWSC 625.

[319] *Lynn v State of NSW* [2016] NSWCA 57.

considering whether, notwithstanding the finding of unacceptable risk, it would exercise its discretion not to make an order at all.[320]

However, the acceptance by the Court that community protection is a legitimate goal of the State such that it can displace the 'fundamental' right to liberty, and that it is no longer even a question of balancing the two, is most clearly expressed by the Chief Justice

> It can be readily accepted that orders for supervision or detention of a 'high risk violent offender' involve a significant restriction on the personal liberty of the subject outside the ordinary principles of the common law. The basis for that interference with liberty in specific cases is to be found in Parliament's determination that such orders may be made for the protection of the public…It would subvert the language of the statute if the interests of the offender in liberty and privacy were to be taken into account in the assessment of…'unacceptable risk'…there is no 'balancing' exercise involved in the court's assessment…[321]

In this judgment, the Court accepts that the legislation both evokes and is justified by reference to the normative principle of community protection. Again, this position would seem to confirm Günther's concerns that preventive justice will lead to an inversion of the relationship between State and offender that previous developments in the law regarded as a significant accomplishment, and as fundamental to freedom. Arguably, albeit noting the concessions made by Basten JA to the principle of liberty in respect of other questions arising in applications under the Act, this formulation clearly reinforces the primacy of the principle of community protection. However, the normative content of this principle itself remains unarticulated, except obliquely through the assessment of dangerousness which refers only to the likelihood and gravity of a future act. Accordingly, the key concept of the legislation, albeit incorporating the cautionary approach promoted by Ashworth & Zedner, operates without any reference to the freedom or autonomy of the offender.

[320] *Lynn,* per Basten JA at [127] – [131]. Gleeson JA agreed with Basten JA on this point as well.
[321] *Lynn,* per Gleeson CJ at [148].

While the discussion above has highlighted the efforts by the legislature and the Court to grapple with the implications of the current phase of juridification in order to normatively justify this coercive preventive measure, it is also clear that the Court has, by means of traditional processes of statutory interpretation combined with the principle of parliamentary sovereignty, and unencumbered by Constitutional guarantees of civil rights, approved the institutionalisation of some of the principles of preventive justice in the Act. However, while embodying the principle of community protection, the Act (and those creating and applying it) have not yet been able to clearly articulate the normative content of such a principle. This result is consistent with the theoretical expectations of Ashworth & Zedner as well as Günther; that these type of coercive preventive justice measures are compatible with 'liberalism'. However, it is also clear that even when complying with Ashworth & Zedner's modified principles of proportionality, the legislation has a tendency to displace the principle of liberty in favour of a concept of dangerousness that has no reference to individual freedom or autonomy (a consequence that Ashworth & Zedner themselves identified) and even potentially to invert the relationship between the State and the individual (as Günther feared). Accordingly, it could be said that the Act is prone to development in a manner productive of pathologies. Our reconstruction will now turn to two further examples that appear to support this preliminary conclusion.

5.3.1 The paradox of the loss of the presumption of harmlessness: the 'Gummow principle'

The first example relates to the manner in which the Act embodies the principles enunciated by Ashworth & Zedner in relation to 'losing the presumption of harmlessness'. It will be recalled that Ashworth & Zedner's modification of the principle of proportionality in this context, arguably one also informed by the social imperatives that motivate preventive justice, is that post sentence coercive preventive measures should only apply to those who have 'lost the presumption of harmlessness'. For them, the presumption of harmlessness is consistent with the principle of liberty; however, just as the commission of a crime can warrant interference with liberty, for a certain class of offenders interference with liberty could potentially be justified because their prior behaviour means they cannot provide the necessary assurance they will act consistently with the principle of liberty in respect

of others.[322] Importantly for Ashworth & Zedner, this principle is said to demonstrate respect for the agency of the offender, because while the principle of community protection makes no necessary reference to the normative dimensions of an offender's previous conduct, being concerned only with the minimisation of harm, this limitation is based on the prior actions of the offender.[323]

In the NSW legislation, the main mechanism to limit the scope of the Act is to restrict its application to offenders who have committed a 'serious offence' and, with some exceptions, are serving a sentence of imprisonment for that offence. This understanding of what is required to 'lose the presumption of harmlessness' will be referred to here as the 'Gummow principle', because its operative logic draws on (or at least reflects or defers to) the comments of Gummow J in *Fardon.* It will be recalled that Gummow J approached the legislation under challenge in that case on the basis that it had its own normative structure. For him, the question of validity was to be answered by whether detention under the legislation could be characterised as a 'consequential step in the adjudication of criminal guilt'. In *Fardon's* case, what ultimately satisfied Gummow J that the legislation was valid was that it could only apply to a person who had been previously found guilty of a criminal act, who was presently detained as a result, and that the ongoing detention of that person could be ordered only by reference to the risk of future conduct of the same kind.[324] Despite the logic that underpins this approach, shared by Ashworth & Zedner and Gummow J, this attempt to bridge the normative divide between liberty and community protection in fact results in a paradox.

The first sign that this approach leads to a paradox is that the Gummow principle says nothing about what sort of offending is appropriately targeted by this type of measure. For example, originally the NSW Act applied only to sex offenders. This choice of offender type is not unusual for such schemes but is in fact symptomatic of a normative sensitivity that cannot be explained within the liberal paradigm, and certainly not on the basis of the principle of liberty itself. Sex offenders, particularly those that offend against children, appear to cause a response from within the

[322] See also Ramsay, "Democratic Limits," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 216-217.
[323] Ashworth and Zedner, *Preventive Justice*, 162.
[324] *Fardon,* per Gummow J at [74].

community that is, from a certain point of view, disproportionate to the risk posed.[325] It is undeniable that victims of sex offences suffer considerably from these crimes. However, even taking into account significant underreporting, the incidence of sexual crime is generally thought to be lower than that of other serious crimes.[326] Further, and what is more relevant for the issue under analysis here, the rate of recidivism (however measured) for sexual offenders also appears to be significantly lower than that of other serious crimes.[327] However, in jurisdictions where post sentence control regimes have been implemented, a significant (and in some cases only) category of offender targeted has been the sex offender (either by way of actual limitations in the relevant legislation or in the way the measure has been applied).[328] This suggests that, at least in part, the factum of a prior conviction of a sexual offence is normatively loaded in a way that cannot be explained by reference to either the traditional paradigm or even the principle of community protection (at least understood in terms of the likelihood of re-offending).[329] Accordingly, a regime designed to protect the community from serious reoffending that targets only sex offending will not provide the necessary reassurance that the public is being kept safe from serious offending: in particular, the rate of serious violent reoffending is far higher than recidivist sex offending.

It is perhaps not surprising then that in 2013 the Act was amended to extend its reach to persons who were serving a sentence following a conviction for a serious

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[325] Arie Freiberg, Hugh Donnelly and Karen Gelb, "Sentencing for Child Sexual Abuse in Institutional Contexts,": 132-163.

[326] See Sentencing Council NSW, *Penalties Relating to Sexual Assault Offences* Vol 3, 30-36.

[327] Complex Adult Victim Sex Offender Management Review Panel, *Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic),* (Melbourne, Victoria: Department of Justice & Regulation - Corrections Victoria, 2016): 25-30.

[328] See Sentencing Council NSW, *Penalties Relating to Sexual Assault Offences* Vol 3, 256 – 296.

[329] Arie Freiberg, Hugh Donnelly and Karen Gelb, "Sentencing for Child Sexual Abuse in Institutional Contexts,": 132-163. It is beyond the scope of this thesis to explain why sex offending creates such a strong response in the community. Certainly, there is a degree of community misperception about the prevalence and risks of sexual offending, which can perhaps explain this response. However, arguably, there also exists an often unarticulated sense of the depth of injury that is caused by sexual offending, which is a function of the specific vulnerability at the physical and psychic level of the relation to self to these types of violations, that at least in part, motivates this response: as mentioned in Chapter 2, the physical violation that is involved in a sexual offence can 'undo' the psychological world of the victim, damaging that fundamental relation to self of self-confidence, whether the victim is an adult or child. Additionally, as was noted above in the debates around the introduction of legislation in Queensland, there is a perception that the sex offender is the archetype of offenders who, while not mentally ill, 'seem unable or unwilling to stop themselves from doing it again.' That is, repeat sex offenders seem to confound the traditional legal understanding of autonomy based on the principle of liberty, and are a challenge to the binary logic of the paradigm case: sex offenders who reoffend are simultaneously both free and unfree.

violence offence.[330] Interestingly, the way this was done legislatively might be described as being strict compliance with the Gummow principle: after the amendments, an application for an order against an offender on the basis of a risk of future sex offending could only be brought against a person serving a sentence for a sex offence; whereas an application on the basis of a risk of future violent offending could only be made against a person serving a sentence for a serious violence offence. This development, however, only served to highlight the paradoxical effect of this principle, especially when applied in such strict terms. The most obvious problem was that the high level of symmetry required between the current offending and future risk potentially excluded offenders who posed a significant risk of reoffending but who were not currently serving a sentence of the relevant type: the recidivist sex offender serving a sentence for violence or the violent offender serving a sentence for a sex offence were both excluded. In this regard, it must be noted that research in the area of recidivism shows that most serious offenders are in fact 'generalists'; that is, their offending behaviour does not fall neatly into categories such as 'sex' or 'violence'.[331] Accordingly, the legislative requirement of prior offending of a specific type, rather than providing an appropriate limitation on this type of measure, instead misdirects attention from those most deserving of losing the presumption of harmlessness to those whose offending pattern is one less likely to represent a risk of recidivism.

The second effect arises because although the Gummow principle aimed to move beyond a punitive-protective dichotomy, it in fact applies a limit to the operation of the legislation based on prior criminal conduct instead of by reference to the assessment of future risk. The Act simply does not apply at all to an offender who may be at extreme risk of reoffending in a seriously sexual or violent way, including where there is a demonstrable escalation in his or her offending conduct, but who has not

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[330] *Crimes (Serious Sex Offenders) Amendment Act 2013.*

[331] Complex Adult Victim Sex Offender Management Review Panel, *Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*: 58-61. Of note, in 2017, the Act was again amended in part to address this problem. Specifically, the *parallel* categories of 'sex' and 'violent' offender were dissolved to a large degree, in that the direct link between the subtypes of future serious offending and previous offending were dissolved into the concept of a 'serious offence'. That is, an offender serving a sentence of imprisonment for a 'serious offence', defined as either a serious sex or violence offence, who poses an unacceptable risk or committing a 'serious offence' may be the subject of an order – so the scenario of a convicted 'violent offender' who poses a risk of future sex offending is now covered by the scheme.

committed a prior serious offence of the relevant kind.[332] Neither does the Act apply in circumstances where an offender had committed a series of non-serious sex or violence offences and was highly likely to continue committing such offences, even to the extent of declaring an intention to commit such further offences. That is, there may be offenders who are assessed at a higher risk of reoffending or are at a high risk of serious offending who fall outside of the scope of the regime; yet conversely offenders with a history of serious offending who remain assessed at a high risk of reoffending but whose offending may be de-escalating do fall within the scheme.[333] Accordingly, the *sui generis* normative principle articulated by Gummow J in an effort to both maintain the traditional principle that detention is only justified as a 'consequence' (even if indirect) of a conviction of an offence, and acknowledge the normative force of community protection, in fact intensifies the focus of the Act on the past acts of the offender rather than their future conduct. When applied in this way, the principle of the loss of the presumption of harmlessness, contrary to their expectations, actually brings about the situation Ashworth & Zedner seek to avoid: where the logic of the coercive preventive measure is not directed to the agency of the offender, but to a maximised (albeit potentially empirically misconceived) outcome. The Act equates the loss of harmlessness with the fact of prior conviction rather than the current presentation of the offender: their status as having lost the presumption of harmlessness involves the identification of the autonomy of the offender with their legal status as a convicted offender, irrespective of whether the effect of their punishment (noting Ashworth & Zedner identify three preventive aspects of the sentencing process itself) means they no longer should be presumed to have such a status; and simultaneously excludes from the category of those who have lost the presumption of harmlessness a significant number of offenders who may actually pose the greatest risk.

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[332] Complex Adult Victim Sex Offender Management Review Panel, *Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*: 58-61. A significant example involves choking offences – especially in a domestic violence context there is a strong relationship between prior choking offences or even non-criminal behaviour such as coercive control and subsequent domestic homicide. Yet because choking (or coercive control) is not a 'serious violence offence' under the Act, irrespective of the assessment of risk, an offender would not be eligible for an application under the Act.

[333] Again the Act has a structural feature that reinforces this – a sex offender who previously committed a serious sex offence but is currently serving a sentence for a less serious 'offence of a sexual nature' is eligible (where this is a de-escalation), but the converse does not apply; there is also no equivalent when it comes to violent offences.

One sign that the problems inherent in the Gummow principle has been recognised can perhaps be seen in more recent legislation introduced in NSW.[334] Since 2014 there has been a growing concern about the commission of terrorist acts by former offenders, including those said to have been 'radicalised' in prison. In Australia, since 2016, a number of legislative schemes have been established specifically to address this issue. In particular, in late 2017 the NSW Government introduced legislation further extending its post sentence scheme to enable Extended Supervision Orders or Continuing Detention Orders to be made in relation to 'terrorist offenders'. However, it did so not by way of amendment to the Act but by creating a completely separate piece of legislation, the *Terrorism (High Risk Offenders) Act 2017.* Although essentially modelled on the Act, the new legislation represented a significant shift in respect of its legal and normative underpinnings. While on one level the legislation maintains a commitment to the *Gummow* principle, in that it only applies to offenders currently serving a sentence of imprisonment, on another it moves beyond the principle in that it essentially severs the link between the future risk and a prior conviction for conduct of a similar kind.

While the first subset of the cohort eligible under *Terrorism (High Risk Offenders) Act 2017* are those who are serving or have ever served a sentence of imprisonment for an offence under section 310J of the *Crimes Act 1900* which is the only NSW terrorism offence (most terrorism offences being under the Commonwealth Criminal Code), there are in fact no such offenders in NSW. Of greater interest are the remaining two categories of offenders who are eligible: the 'underlying terrorist offender' and the 'terrorism activity offender'. The first of these categories covers an

[334] It is also worth noting that the *Gummow* principle does not seem to be adopted universally, or even at all, in the assessment of the validity of coercive preventive measures other than post sentence regimes involving detention. For example, a range of powers have been introduced at both a State and Commonwealth level that allow coercive orders to be made on the basis of suspicions that a person is involved in serious criminal activity which have been upheld by the High Court as valid. One example is the scheme for control orders under the *Criminal Code* (Cth) that allow law enforcement agencies to apply for an order that places restrictions on the defendant's liberty if the court is satisfied that on the balance of probabilities the order would 'substantially assist in preventing a terrorist act'. There is no requirement that the person be previously convicted of *any* offence: *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33. Similarly, the *Crimes (Serious Crime Prevention Orders) Act (NSW)* allows the Court to make a 'serious crime prevention order' against a specified person if satisfied that the person 'has been involved in serious crime related activity for which the person has not been convicted', and that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities. The High Court upheld this legislation also: *Vella v Commissioner of Police (NSW)* [2019] HCA 38; (2019) 93 ALJR 1236. It is perhaps significant that under neither scheme was the *detention* of the person a possibility - only orders restricting liberty (though these could be quite extensive intrusions on freedoms of movement, association and communication).

offender currently serving a sentence of imprisonment for a serious offence of a specified type (for example firearms or prohibited weapons offences), that is not the NSW terrorism offence, but where the conduct giving rise to the offence had an underlying connection with a terrorist act or offence and where the conduct was undertaken with a 'terrorist intention'. Although the nexus with a previous criminal conviction remains, in this case for the first time there can be identified the beginning of an inversion in the priority of risk of future offending over the qualifying offence. That is, the legislature has for the first time allowed the future risk to 'colour' the characterisation of prior offending: for example, the significance of a person's conviction of say a firearms offence is determined by a subsequent characterisation of features of the offence by reference to a future risk, where none of those features were elements (in the technical legal sense) of the offence they stand convicted of. The second category goes even further in distancing itself from the Gummow principle. Despite the short description of the category, there is no requirement for the offender to have undertaken any terrorism activity at all. A terrorism activity offender is someone serving a sentence for any indictable offence who has made statements advocating support for terrorism or violent extremism or has associations or affiliations with those advocating support for terrorism or violent extremism. In this scenario the *Gummow* principle is stretched to the limit: there remains the factum of a prior conviction and sentence of imprisonment for an indictable offence, however there is no other required nexus at all, at least in principle, between that conviction and the risk of committing a future serious terrorism offence. Here for the first time the risk of future offending almost completely determines the necessary characteristics of the offender for eligibility under the legislation: the loss of the presumption of harmlessness is more a function of the offender demonstrating indicators of future risk than their past offending.

What is challenging is discerning whether this transition represents a corrective to the paradox or rather an intensification of it. In the first matter determined under the new Act, the Court paid attention to the offender's susceptibility to influence (particularly from those who held extremist views), the use of a hand gesture associated with support for extremist jihadist views, and alleged threats of violence made whilst in custody, to conclude the risk of a serious terrorism offence was unacceptable.[335] Of

[335] *State of New South Wales v Ceissman* (No 2) [2018] NSWSC 1237.

interest, in the final judgment there is virtually no discussion of the offender's criminal antecedents although there is extensive discussion of expert evidence characterising some of the offender's conduct as indicating support for extremist views as well as how his criminal history discloses certain vulnerabilities that have been associated with an increased risk of extremist violence. In this respect, the judgment is singularly 'forward looking' (in the sense that the High Court has used the term in the cases relating to coercive preventive measures).

By contrast, in a subsequent case, the Court spent considerable time analysing the criminal antecedents of the offender. The Court assessed the offender as having expressed hostility to Australia on frequent occasions and by his conduct had shown a 'comprehensive lack of respect for Australian laws, for Australian police and other authorities, for the courts and for the rights of his fellow citizens'. His adherence to Islam for many years was noted, and his religious conviction was described by the judge as being of an 'Islamic bigot, expressing contempt and hatred for anyone who does not accept the Quran'. Despite this, the Court went on to compare the ideological commitment of the offender to that of offenders who had been convicted of serious terrorism offences in recent years. On this comparison, the offender failed to possess what the judge regarded as the key ideological commitment – the desire to impose Sharia law in Australia. On this basis, the Court dismissed the State's application, concluding that although the defendant was significantly likely to commit an act of violence in the future, it would not be in the furtherance of his religion and so would not meet the necessary elements of a serious terrorism offence. Despite the asymmetry between past and future offending allowed by this Act, the Court still approached the task of assessing future risk primarily by reference to past offending. There was little or no willingness on the part of the Court to draw inferences from the evidence to suggest that in a future risk scenario the offender may be capable of acting violently in the name of his religion.[336]

This latter decision highlights the paradoxical effect of the Gummow principle quite effectively. The two features of the offender that led to the dismissal of the State's application were that he had not expressed the same ideological commitment as those convicted of terrorism nor carried out acts of violence in the name of his

[336] *State of New South Wales v Naaman* (Final) [2018] NSWSC 1635.

religion: that is, he had not previously committed a terrorist act. This traditional, backward-looking approach, meant that the various factors identified by the experts, and in fact by the judge himself, all of which have been empirically associated with the risk of violent extremism, could be put to one side. Again, this approach (and the conclusion it leads to) rather peculiarly denies the autonomy of offender; according to the Court he is both bound to reoffend, but only in the way he has in the past. Further, while accepting that these cases require an evaluation of the evidence about which reasonable minds can differ, what is significant about this approach – in effect requiring the offender to have *de facto* committed a terrorism offence in the past - is that it subverts the very purpose of the legislative scheme.

In mid-2020, the NSW Court of Appeal dismissed a challenge to the validity of the *Terrorism (High Risk Offenders) Act* on Constitutional grounds. The main challenge was described as going to

> the degree of connection between an offence for which there has been a conviction and a sentence of imprisonment imposed, and the relief sought by the respondent in relation to continuing detention after sentence.[337]

In other words, the challenge was brought squarely on the basis of the non-compliance of the legislation with the *Gummow* principle. In a unanimous verdict the challenge was dismissed. However, in a joint judgment, after considering the jurisprudence of the High Court, and in particular the various formulations of the principles set out in *Lim* and *Fardon* found in the line of cases dealing with coercive preventive measures, the Court concluded that

> …dicta by a number of justices of the High Court provide powerful support for the proposition that the conferral of a function on a court to impose preventative detention on a person for reasons unrelated to the offence which that person has committed is incompatible with the institutional integrity of the Court…Notwithstanding the force of these comments, I do not think the authorities as they presently stand lead to the conclusion that the conferral by a State Parliament on a State court of the function of making preventative detention orders under an Act is constitutionally invalid, even in circumstances

[337] *Lawrence v State of New South Wales* [2020] NSWCA 248, per Bathurst CJ at [13].

> where the order could not be described as a consequential step in the adjudication of past guilt…[338]

The Court of Appeal held that despite there being some level of support to be found for the Gummow principle, it did not reflect the law as expressed by the majority of the High Court in subsequent cases. Instead, the Court considered that the critical issue to the determination of validity was 'the preventative nature of the order and the fact the power to make the order was conferred on the Court in a way that did not impact on its institutional integrity.'[339]

While this judgment in some senses suggests that the law has moved beyond the Gummow principle, arguably it does so by seemingly avoiding the very issue the Gummow principle was designed to address - in what circumstances would the enlistment of the judiciary in a coercive preventive justice measure impact on the institutional integrity of the court? – without reference to any alternative normative principle. Perhaps the Court itself understood this as a problem: in referring to various dicta (as referred to in the above quote) that might suggest the regime was invalid, the Court of Appeal quoted at length the judgment of Gageler J of the High Court in the matter of *Vella*[340]

> The judiciary can, of course, be expected to perform any function that might be legislatively imposed on it, as best it can, in a judicial manner. The judiciary can therefore be expected to fashion for itself workable and consistent decision-making criteria to guide the individualised assessment that it is obliged to make in each case in which it is asked by the executive… Appellate processes can be expected to be invoked and, over time, a body of principle can be expected to develop. So the process…will be judicialised; and so with the judicialisation of the process the distinctive character of the judiciary as the constitutional arbiter of disputes about rights between the citizen and the State will become increasingly less distinct. Incrementally but inexorably the judiciary will be drawn ever more deeply into a process in which institutional

[338] *Lawrence,* per Bathurst CJ at [66]- [67].
[339] *Lawrence,* per Bathurst CJ at [68].
[340] *Vella v Commissioner of Police (NSW)* [2019] HCA 38; (2019) 93 ALJR 1236. This case was a challenge to the NSW legislation allowing for Serious Crime Prevention Orders (see note 334 above).

> boundaries are blurred and by which its institutional independence is diminished.[341]

This quote appears to express a concern held by the NSW Court of Appeal, sharing that expressed clearly by Justice Gageler, that the current process of juridification involved in preventive justice will, in the absence of a guiding normative principle, undermine the achievements of previous stages, and in particular the separation of powers which is a fundamental element of modern democratic legal systems.

The latest stage in the process of juridification in respect of the Gummow principle, and what perhaps signals its ultimate demise (at least in terms of the view of the High Court), is the decision of the High Court in the case of *Benbrika*.[342] This case involved a challenge to the validity of the Commonwealth post sentence detention scheme in relation to convicted terrorist offenders. Whilst the legislative scheme itself accords with the Gummow principle, in that for an offender to be eligible for a post sentence order they must be serving a sentence for a terrorism offence, the majority of the High Court expressly rejected this as being a principle relevant to the validity of the legislation.

The majority of the Court stated that the issue in the case was the meaning of the principle set out in *Lim,* as to whether involuntary detention in the custody of the State existed only as an incident of the adjudgment and punishment of criminal guilt.[343] The majority then went on to explicitly reject Gummow J's reformulation of the principle (that detention must be 'a consequential step in the adjudication of criminal guilt'). Instead they held that

> The power…is an extraordinary power to detain a terrorist offender in prison notwithstanding that the purposes of punishment have been vindicated and the sentence served. The power is conditioned on the status of the offender as a prisoner serving a sentence for a terrorist offence…but its making is divorced from sentencing the offender for the terrorist offence. The object of Div 105A, …is plainly directed to the protection of the community from harm. The fact that the Parliament has chosen not to pursue this object by a more

[341] *Lawrence,* per Bathurst CJ at [66], quoting *Vella,* per Gageler J at [180].
[342] *Minister for Home Affairs v Benbrika* [2021] HCA 4.
[343] *Benbrika,* per Kiefel CJ, Bell, Keane and Steward JJ at [28].

> extreme measure that is not conditioned on the subject being a "terrorist offender" does not gainsay that the object of the continuing detention order is community protection and not punishment.[344]

In this judgment, the majority rejected any normative principle based on a link between the original conviction and the subsequent preventive detention. Having done so, the majority was forced to return to the question, which Gummow J had tried to put to one side, whether the scheme was punitive or protective. In determining this question in respect of this particular legislative scheme, the majority noted that although any continuing detention was to be in a prison, the offender was required to be treated in a way that 'appropriate to his or her status as a person who is not serving a sentence of imprisonment'. It was also noted by the majority that any Court considering an application under the scheme was required to consider expert opinions about risk and to take into account the extent to which the offender could be managed in the community; that the legislation set a suitably high standard of proof; that there was a requirement for annual reviews; and, that an order could only be made if it was the least restrictive measure that would address the risk. These are of course familiar concepts from both the principles set out by Ashworth & Zedner and also the NSW schemes. What is significant here is that rather than considering these provisions as necessary or appropriate limiting principles, the majority construed these as demonstrating the non-punitive nature of the scheme.[345]

Ultimately, the majority reached the following conclusion

> There is no principled reason for distinguishing the power…to order that a mentally ill person be detained in custody for the protection of the community from harm and the power to order that a terrorist offender be detained in custody for the same purpose. *It is the protective purpose that qualifies a power as an exception to a principle that is recognised under our system of government as a safeguard on liberty*...As a matter of substance, the power must have as its object the protection of the community from harm. [346]

[344] *Benbrika,* per Kiefel CJ, Bell, Keane and Steward JJ at [38]- [39].
[345] *Benbrika,* per Kiefel CJ, Bell, Keane and Steward JJ at [39] – [40].
[346] *Benbrika,* per Kiefel CJ, Bell, Keane and Steward JJ at [36] (emphasis added).

Arguably, in this decision the High Court has finally, and perhaps completely, accepted that the normative force of 'community protection' is sufficient to displace the principle of liberty.[347] However, if this is indeed the case, then it appears that the paradox proposed by Günther may have come to fruition: where preventive justice involves the suspension of fundamental rights in favour of 'rights' to public safety; 'legal freedom' is displaced by the principle of community protection, potentially disrupting the relationship between private and public autonomy necessary for securing the legitimacy of law itself.

5.3.2 The paradox of the least restrictive measure: continuing detention v breach of supervision

The second example of a social pathology created by the Act is a paradox that arises in implementing the principle of the 'least restrictive measure'. The logic of the Act is that if an offender poses an unacceptable risk of committing a serious offence unless an order is made under the Act, the Court may make such an order. However, the Court can only order continuing detention if satisfied the risk remains unacceptable unless the offender is detained. In this manner, the Act embodies the Ashworth & Zedner principle that the least restrictive measure should apply. Unsurprisingly, given this principle, the Court has made many more Extended Supervision Orders than it has Continuing Detention Orders.[348]

However, when an Extended Supervision Order is made, the Court imposes a range of conditions with which an offender must comply. The breach of a condition of supervision by an offender is a criminal offence punishable by imprisonment of up to five years. The Court can impose such conditions as it considers to be appropriate. These usually include conditions relating to place restrictions, non-associations, prohibitions on using or possessing alcohol, drugs or pornography, electronic

[347] At least in cases where the harm to be avoided is sufficiently serious. The majority noted that "terrorism poses a singular threat to civil society" (at [36]), and further discussed the serious harm involved in terrorism offences (at [43] – [46]), perhaps suggesting that if the future harm was merely another criminal offence that would not justify such a measure. Notably, Gageler J held that the legislation was invalid because at least some of the future offences that were to be considered were merely 'prophylactic' (at [91]); in his view the future harm had to be 'grave and specific' (at [79]).

[348] NSW Department of Communities and Justice, *High Risk Offender Management Reforms*, https://www.justice.nsw.gov.au/Pages/Reforms/high-risk-offender-management.aspx, (downloaded 11February 2021). As at October 2017, there were 87 high risk offenders subject to an ESO and two subject to a CDO.

monitoring, obeying reasonable directions of a supervising officer, disclosure of information and requiring offenders to consent to searches of their person, accommodation and electronic devices. As noted previously, at the stage of imposing conditions the Court may consider the impact of conditions on the liberty of the offender. The Court of Appeal has made it clear that conditions must relate to the risk of future re-offending of a kind that forms the basis of making the order; but it is acceptable that conditions are made which are directed towards conduct that formed no part of the offender's previous offences.[349]

In practice, when commencing proceedings under the Act, the State files a schedule of proposed conditions directed to what it says are the specific risk factors associated with the offender. The aim of these conditions is, essentially, to give effect to a plan developed to manage the risk of the offender when released into the community. However, these conditions, developed from the perspective of managing risk, have the effect of converting what is often otherwise lawful behaviour into a serious criminal offence. In this way, in addition to a large part of an offender's everyday life – indeed significant parts of their broader lifeworld – now being legally regulated and monitored, non-compliance with this external structuring of their everyday life is actually criminalised. For example, where the consumption of alcohol is identified as a significant risk factor it appears routine for a prohibition on drinking to be a condition of supervision. If an offender breaches this condition by consuming any amount of alcohol – even if no other misconduct occurs, nor any 'normal' criminal behaviour, nor even a *specific* escalation of the risk of serious reoffending – the offender will have committed an offence which will can lead to his arrest and prosecution. As a breach of an ESO is an offence for which there is a presumption against bail, an offender in this situation is highly likely to be returned to custody, at least until the matter is determined by the Court. Further, in recent years, official sentencing statistics suggest a custodial sentence is the most likely outcome of a conviction for a breach of ESO.[350]

The criminalisation of such a wide spectrum of behaviour has paradoxical results, with direct consequences for both the offender and the overall legitimacy of the

[349] *Wilde v State of New South Wales* [2015] NSWCA 28 at [53] – [54].

[350] According to the Judicial Information Research System (JIRS), over 93% of convictions for breach of an Extended Supervision Order between from 24 Sep 2018 to Dec 2019 resulted in a sentence of imprisonment.

legislation. The first effect is the lowering of the threshold of criminality. This occurs because the conditions of an ESO demand a high level of self-regulation and a capacity to plan and organise; however, in general, high risk offenders are those least likely to be able to modify their behaviour in order to adapt to, and comply with, those requirements. Second, the almost inevitable return of the offender to custody, even for behaviour which for the general population is not only legal but often both normal and prosocial, has negative effects on rehabilitation on both a practical and psychological level. At a practical level, any significant period in custody is likely to result in the loss of employment, possibly a loss of accommodation and can also damage or disrupt any pro-social relationships that had been established by the offender in the community. Psychologically, it can be readily understood that offenders feel that being returned to custody for such conduct is discriminatory (or 'unjust' in the sense that it involves exclusion from certain social practices), and that this reaction may well function to reinforce their existing anti-sociality.[351] It is also the case that although a sentence of imprisonment is imposed for a breach of ESO, usually the sentence is not of an adequate length for the offender to undertake any meaningful treatment programs in custody which may help address the various risks of reoffending. As a result, it is not uncommon for high risk offenders to cycle in and out of custody solely on the basis of breaches rather than any substantive offending, without any measures being applied to bring about a reduction in risk. As an ESO is suspended whilst an offender is in lawful custody, this has the effect of extending the duration of an order, often well beyond the period originally set by the Court. Finally, a pattern of instability brought about by repeated breaches and returns to custody not unexpectedly provides a foundation for further applications for orders under the Act.[352]

This phenomenon has been identified by the Court in a number of recent cases. In the matter of *McQuilton*[353] the offender had been returned to custody for breaching his ESO on a number of occasions. In an application for a further order in early 2019,

[351] See the discussion in Chapter 2 where it was noted that specific struggles in the face of the experience of injustice are potentially normatively ambivalent; for example, in the face of unjustified exclusion, individuals can seek social esteem by participating in reactionary groups that promote violence. Here, the suggestion is that the response to the experience of injustice in someone with already entrenched anti-sociality is likely to be an exacerbation of that characteristic rather than a positive claim for recognition.

[352] See *State of New South Wales v Carr* [2020] NSWSC 643, discussed further below.

[353] *State of New South Wales v McQuilton (Final)* [2019] NSWSC 265.

the State submitted that the strict conditions that had been imposed by the Court in the previous order had allowed the State to intervene and manage the risks posed by the offender by breaching him and returning him to custody. The judge presiding over the fresh application rejected any argument that the efficacy of the previous orders may be evaluated (and a further order justified) by viewing orders as instruments for achieving preventative detention. His Honour expressed the view that the offence of breaching an order is intended only to provide a means of enforcement of the conditions of the order, and that a central purpose of punishment for an offence for a breach is to deter the offender from further breaching the order. His Honour expressed concerns that repeated prosecutions for breaches amounted to an 'unacceptably blunt measure for reducing the risk of reoffending', where imprisonment was adverse to McQuilton's rehabilitation and disruptive of any effort to reintegrate him, noting the frequency with which he had been in and out of custody.[354]

This concern about the paradoxical effect of an ESO being the 'least restrictive means' but where enforcement of a breach of conditions occurs by way of the criminal law was taken up and amplified in the matter of *Grooms.*[355] In that matter the State had originally sought a Continuing Detention Order, which was not ultimately pressed at the final hearing. However, after the final hearing but before judgment was delivered, the offender was charged with breach of an Interim Supervision Order. Grooms was a violent offender with a history of aggression and abusive behaviour towards others. A direction had been given to him by a supervising officer to 'not to behave in an aggressive or abusive manner'. Following an incident at his approved accommodation, he was arrested for a breach of this direction. In her final judgment, the presiding judge was highly critical of this sequence of events

> …the defendant being arrested the day before he was scheduled to seek treatment (it would seem of his own initiative) to deal with a tendency to react angrily to the understandable stressors confronting him in the early stages of supervision (including whilst resident at a shared facility against his wishes) has effectively derailed what I am satisfied are his considerable efforts to exercise self-control and to seek treatment to assist him to maintain it. The fact

[354] *McQuilton,* per Fagan J at [91]-[100].
[355] *State of New South Wales v Grooms (Final)* [2019] NSWSC 353.

> of being charged at this critical stage of his return to the community…is counterproductive to the statutory objects of protecting the community through the defendant's progress towards rehabilitation, and devoid of demonstrated means of his arrest enhancing community protection…In this case, what I consider to be a flawed approach to the defendant's supervision under interim orders has directly impacted upon my formulation of conditions to which the defendant will be subject under the extended supervision order. Amongst those matters, of greatest weight, is the decision made to arrest and charge the defendant for an act not otherwise criminal and not involving, in my view, any increase in the risk of him reoffending by the commission of a serious offence of violence and, in fact, not involving any threat of physical violence at all…The decision to prosecute him…has all the hallmarks of prosecuting the defendant as a form of detention in circumstances where, at the hearing, the State's application for a continuing detention order was not pressed.[356]

Arguably the matter of *Carr*[357], provides the clearest demonstration of this paradox. In August 2009, the Court made an ESO against Carr for a period of 5 years. Some 11 years later, the original order was still in force, because Carr had been imprisoned on about 10 occasions involving more than 20 breaches of the conditions attached to the order. None of these offences involved conduct that came anything close to a serious offence, with most breaches relating to drug use or absconding. In 2020, the State itself applied for a revocation of the order, noting that despite the ongoing presence of risk factors, it could no longer be said that Carr posed a high risk of committing a serious offence. In revoking the order, the Court lamented the history of the matter, noting there were

> many administrative decisions that have meant that there appears to have been sparse focus on the rehabilitation of this man, while the State's actions have consistently resulted in him being punished by incarceration for relatively minor, if repeated, misconduct.[358]

The Court noted that Carr had been

[356] *Grooms*, per Fullerton J at [69].
[357] *State of New South Wales v Carr* [2020] NSWSC 643.
[358] *Carr,* per Hamill J at [18].

> locked up for smoking cannabis, not because anybody charged him with such an offence; such offences are almost never prosecuted, but because his use of drugs, disclosed by compulsory testing, constituted a breach of one of the scores of conditions of his ESO.[359]

It was also noted that it was during a period of incarceration for a breach that Carr became addicted to 'hard' drugs, which then became the foundation for a number of breaches. Ultimately, the Court characterised the effect of the order as punitive, rather than either protective or rehabilitative.

> It is now clear that the impact of the order resulting in Mr Carr's repeated incarceration for relatively minor infractions and his consequent institutionalisation is adversely impacting on his prospects of rehabilitation. Neither the primary [community protection] nor the secondary [rehabilitation] objectives of the legislation are being served by this order remaining in place.[360]

Although the cases noted above suggest that the Court has, at least on some occasions, identified the paradoxical effect of the breach process, this has not led to any change in approach to the view that an ESO is necessarily a 'less restrictive measure'. The Court has consistently approached the question of whether an ESO is to be preferred to a CDO primarily from the perspective that an ESO is necessarily less restrictive even if there are greater prospects of the offender successfully reintegrating following a period of further detention. For example, even where the State's evidence has established that an offender has not undertaken treatment in custody and that no such treatment is available in the community, the Court will not order ongoing detention solely for the purpose of the offender undertaking that treatment. In the matter of *Weribone*, Wilson J said

> Whilst I accept that the defendant would benefit from participation in the program, I do not regard that as an adequate basis upon which to order his interim detention...the possible benefit of participation in a custody based

[359] *Carr,* per Hamill J at [2].
[360] *Carr,* per Hamill J at [32].

program is, in any event, not a matter that enlivens the power to make an interim detention order.[361]

The Court's entrenched preference for imposing an ESO rather than a CDO, even where evidence exists that the offender will almost certainly be non-compliant with an order, was highlighted in the matter of *Donovan.*[362] In that case, the Court accepted the evidence that alcohol consumption was a significant risk factor and that it was highly unlikely the offender would remain abstinent in the community. The Court refused to order his ongoing detention, despite the possibility of a rehabilitation program being made available in custody to address his risk factors, in deference to the principle of a 'less restrictive measure' in circumstances where his breach of an order and return to custody was considered almost inevitable. It seems that the Court in these circumstances took comfort in the fact that any return to custody would be as a result of a criminal trial conducted in the usual manner (albeit in respect of conduct which for the general population would not be criminal) and not as a result of an assessment of future risk.[363]

The principle of the 'less restrictive measure' is proposed by Ashworth & Zedner as an important limitation on preventive justice to limit the extent to which it abrogates from the fundamental principle of liberty. However, as has been seen, at least in the form in which it is embodied in the Act, this leads to pathological consequences. An ESO with stringent conditions in preference to a CDO involves a paradox, as offenders not capable of complying with conditions of supervision are released in the knowledge that such non-compliance will be identified and sanctioned, and where the threshold of criminality is lowered; resulting in a lengthening criminal history as well as their periodic removal from the community. The consequence of this paradox is that the effectiveness of the legislation is undermined both in terms of community protection and the rehabilitation of offenders. Arguably, a further consequence is that the confidence of those responsible for undertaking supervision that offenders on orders are able to adapt to community life is diminished; as a result, it seems

[361] *State of New South Wales v Weribone* [2016] NSWSC 1046.
[362] *State of New South Wales v Donovan* [2015] NSWSC 1254.
[363] Following this decision (which was upheld on appeal - *State of New South Wales v Donovan* [2015] NSWCA 280), the legislation was again amended, to mandate that the Court could not take into account the possibility of criminal proceedings for a breach of an ESO when determining whether to impose a Continuing Detention Order.

inevitable that the balance between the functions of monitoring and enforcement, and providing support to an offender on an order will be tipped in favour of enforcement, and where breaches of an order potentially become a measure of its 'success'.

Rather than focussing the operation of the Act on potentially expanding the concept of freedom in the direction of reducing the risk of reoffending, the effect of the 'least restrictive measure' paradox is to expand the punitive approach of the traditional criminal law in respect of these offenders. The normative force of the commitment to liberty in the traditional paradigm leads to ever increasing impingement on the freedom of these offenders; and not just in the sense of their liberty to be at large in society, but also in the escalation of their social isolation and exclusion from participation in other social institutions, such as the family and the workplace. The attempt to protect their liberty destroys the conditions required for autonomy.

5.4 The German experience

The previous sections of this Chapter have focussed on how the law in Australia has engaged with the fifth wave of juridification. It has shown how the functional imperatives of the risk society have been able to be incorporated into the traditional liberal judicial and legislative framework such that coercive preventive measures based on risk principles have been held to be legally valid. However, the analysis has also shown that a lack of certainty about the normative basis of these new laws, coupled with the tendency to legal pathology (in which legal freedom, or liberty, is taken to be the whole of freedom) has led to developments within the law with paradoxical effects. Accordingly, although the law in Australia has shown some sensitivity to the normative imperatives that are driving this next phase of juridification, there remains an inability to translate the content of those demands into an expanded concept of freedom.

Arguably, this inability may in part be a result of the peculiarities of the Australian legal system: based on the common law with, at the State level at least, an almost unchecked sovereign power to pass laws. That is, the relatively limited restrictions imposed by the Commonwealth Constitution, and the lack of any fundamental protections of traditional rights for example in a bill of rights, has meant that there have been no significant limits on the ability of State legislatures to introduce

coercive preventive measures. The reconstruction undertaken above demonstrates that the influence of the traditional liberal legal paradigm remains strong. However, a consequence of this structural deficit (in terms of the formal supports for a liberal legal paradigm within the legal order) is that the effort to reconcile the new normative imperatives with the liberal paradigm is taking place indirectly, through arguments about statutory interpretation and the proper relationship between the Executive and Judicial functions.[364] The effect of this is a somewhat artificial abstraction, in that the debate around the legitimacy of coercive preventive measures – and the attempts to develop the law in relation to them in a principled fashion – appears to be increasingly detached from any analysis of the struggle occurring at the normative level. That is, the debate over these laws is less about how they affect our conception of freedom and more about compliance with the pre-existing understanding of the principle of liberty and how that is to be incorporated into the legal corpus.

At this point a comparison with developments in the German context has several benefits. The first is that, notwithstanding both legal systems are based on democratic principles and the rule of law, the actual form of the legal system, including the criminal justice system is quite different. Accordingly, although there are in common a number of fundamental concepts and principles, the way in which they are embodied in the law and the legal system of each jurisdiction demonstrates that there is a degree of flexibility in how 'law' can operate and yet still be legitimate. The second is that, in terms of the specific issue under examination, in recent years Germany, as in Australia, has seen a resurgence of attention to coercive measures that can be taken at the end of an offender's sentence to address a risk of further serious offending.[365]

Further, like in Australia, the growth in preventive justice in Germany has not been without its challenges: there have been a series of legislative changes made that

[364] See for example the comments of the Chief Justice in *Kable,* but also the concerns expressed on this by Gageler J in *Vella.*

[365] For reasons that will be set out below, it is somewhat imprecise to say that these measures are at the 'end' of the sentence, as in Germany 'preventive detention' forms part of the sentence; however even in this system there is a strong conceptual (and legal) distinction between the part of the sentence that aims at addressing the offenders guilt for the offence and the part that addresses the future risk of reoffending once that retributive part of the sentence is complete; accordingly, for convenience the German system of preventive detention will be referred to here as 'post sentence'.

seek to respond to the pressure being brought to bear on the traditional criminal justice system by the unfolding of the fifth wave of juridification. A reconstruction of the developments in Germany will show that, as in Australia, the tension between the traditional paradigm and the imperatives of the risk society have led to certain paradoxical effects. Significantly however, there are other indicators that at times the law has attempted to move beyond the idea of liberty as a justification for these changes, and instead attempts to draw on a broader concept of freedom, one tied to the autonomy of offenders.

Ultimately, the case of Germany provides an insight into two possible pathways out of the existing crisis of legitimacy: one that has the effect of severing the ties between coercive preventive measures and their underlying normative basis, by converting responsible but dangerous offenders into subjects of control; another that provides an avenue for the normative potential of a concept of rehabilitation to influence the form and operation of these laws. Although the former pathway is one that has been mentioned in the Australian context (for example by Justice Kirby in *Fardon*), the latter, although present in the early justifications for post sentence schemes in Australia, has been increasingly obscured.

To begin the comparison a very brief discussion of the difference in the law of Australia and Germany in respect of sentencing is required, as this is fundamental to understanding the evolution of the post sentence preventive scheme in Germany. In Australia, the process of sentencing is regarded as a single yet complex task. The sentencing court takes on the responsibility of evaluating the relevant subjective and objective features of both the crime and the offender, and by application of a range of sentencing principles, comes by way of an 'instinctive synthesis' to a result that represents an appropriate punishment.[366]

In *Veen v The Queen (No 2)* the majority of the High Court said

> … sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal

[366] For a discussion of the origins of the idea of sentencing as an 'instinctive synthesis', and a critique thereof, see Mirko Bargaric, "Sentencing: From vagueness to arbitrariness: the need to abolish the stain that is the instinctive synthesis," *UNSW Law Journal* Vol 38, No 1, (2015): 76-113.

> punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions. [367]

As was discussed earlier, *Veen* also affirmed that whilst protection of the community is a relevant factor in determining a sentence, a sentence should not be increased beyond what is proportionate to the crime merely to protect the community from the risk of further offending by the offender. Accordingly, a sentence imposed on an offender is an amalgam of facts, principles and purposes, including future protection of the community, designed to provide individual justice through the process of punishment.

By contrast, the sentencing process in Germany is described as a 'twin track system'. In this model, there are two distinct dimensions of sentencing – punishment, said to fulfil the retributive function of sentencing, and prevention, which is said to address the likelihood of future reoffending. The first track involves the imposition of criminal sanctions, such as imprisonment or fines. This is called the system of penalties. By contrast, the second track involves measures that address rehabilitation and security. The first track directly addresses the criminal responsibility of the offender: the sentence is directly related to the *guilt* of the accused, understood as a measure of his or her culpability. The second track however is directed to the potential of future reoffending.[368]

The different systems may of course lead to quite similar outcomes. For example, in both Germany and Australia, a person convicted of driving under the influence of alcohol will receive a fine or worse and be disqualified from driving. In the Australian context, both elements are generally considered a punishment whereas in Germany the fine is the penalty and the disqualification is regarded as a preventive

[367] *Veen,* at 476.

[368] Bernd-Dieter Meier, "Legal Constraints on the Indeterminate Control of "Dangerous' Sex Offenders in the Community: The German Perspective," *9 Erasmus Law Review 83,* (2016): 94.

measure.[369] Despite this similarity of outcome, this express conceptual distinction in the German model has meant that the legal system there has, for a much longer period, been operating with the idea of coercive preventive measures as a legitimate response to the perceived ongoing dangerousness of an offender. Indeed, preventive detention as an option after the end of a sentence of punishment has been provided for in German law since the 1930s.[370]

For various reasons, the utilisation of preventive detention in Germany, as a component of sentencing, diminished during the mid-twentieth century. However, in what is a familiar story across many jurisdictions, there was a renewed interest in such measures in the late twentieth century, following a high profile case of a child sex offender (the case of Marc Dutroux, who was arrested in 1996 and ultimately convicted of having kidnapped, tortured and sexually assaulted six young girls, four of whom died; Dutroux having previously been convicted of a number of sexual assaults against young girls, all in Belgium). At this time, preventive detention in Germany was limited in its application to offenders who had two prior convictions with sentences of imprisonment. It also had to be shown that the offender had a tendency to commit serious offences which would severely damage the victim or were dangerous to the general public. Where an order for preventive detention was made simultaneously with a sentence of imprisonment, a Court was required to review the matter prior to the end of the sentence to consider whether preventive detention remained necessary. There was also a ten year maximum limit on the period of preventive detention that could be imposed subsequent to a prison sentence.

In 1998, following the Dutroux case, the German government enacted a number of laws, including abolishing the ten year limit on preventive detention and changing the criteria for the making of orders, for example by enabling a court to order preventive detention for an offender receiving a prescribed term of imprisonment for the first time.[371] Further changes were made in 2002, allowing the 'subsequent' imposition of preventive detention (that is, not at the time of the original sentence) provided the sentencing court had preserved that option at the time of the original sentencing.

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[369] Though periods of disqualification in Australia can also be imposed administratively as a consequence of a conviction even where a Court does not impose such a 'penalty'.

[370] Drenkhahn, Morgenstern, van Zyl Smit, "What is in a name?,": 167-187.

[371] Drenkhahn, Morgenstern, van Zyl Smit, "'What's in a name?,": 168.

Some States went further still, making amendments that could allow some preventive detention to be imposed towards the end of a sentence even if that option had not been preserved.[372]

The case of *M v Germany*[373] however provided a significant challenge to this trajectory of enhancing provisions allowing for preventive detention. 'M' was convicted in 1986 of attempted murder and robbery. At that time he had a significant number of previous convictions and had spent the majority of his adult life in prison. He had also previously spent time in psychiatric institutions. Indeed, the index offence was committed by M whilst on day leave from a psychiatric hospital. Although he suffered from a serious mental disorder, the Court found that at the time of the offence his condition was not pathological and so he had acted with full criminal responsibility. He was sentenced to five years imprisonment and an order was also made for his preventive detention. He served his full prison sentence and commenced his period of preventive detention in August 1991. His case was reviewed on a number of occasions, and each time the reviewing Court refused to suspend his preventive detention.

At the time M was originally convicted, the ten year limitation on any period of preventive detention was in force. In April 2001, M again sought the suspension of his preventive detention. The Court again refused to suspend his preventive detention, noting that the effect of the decision was to authorise his ongoing detention beyond the ten year period that applied at the time the order was imposed. The Court did so on the basis that the amendments made in 1998 (post-Dutroux) were said to have applied to existing orders of preventive detention.

M challenged the decision in both the regional Court of Appeal and the Federal Constitutional Court. One ground he advanced was that the amendments in 1998 violated the prohibition of retrospective punishment under the German Basic Law. Another ground was that the ongoing detention infringed his right to liberty because it violated the principle of proportionality. A third ground was that the preventive detention provision did not allow for any relaxation in his conditions of detention which would enable him to demonstrate he was no longer dangerous, and as such

[372] Drenkhahn, Morgenstern, van Zyl Smit, "'What's in a name?,": 168.
[373] *M v Germany,* (19359/04) (2010) 51 E.H.S.R. 41 (ECHR), December 2009.

was effectively a sentence of life imprisonment. His appeals were dismissed on all grounds. The Constitutional Court held that the prohibition on retrospectivity did not apply to 'measures of correction and prevention' but was limited to punishments. The Court also read down the preventive detention provisions by stressing that the longer a person was deprived of their liberty, the stricter the requirements became in order to justify their ongoing detention; for example, a higher standard in terms of the proof of the offender's dangerousness was necessary. The Court also noted that due to the significance that a relaxation of conditions of detention had for the assessment of dangerousness, a Court reviewing the ongoing detention would expect a significant justification for any refusal by the prison authorities to provide a relaxation of conditions as a pathway to possible release.[374]

M then filed a complaint with the European Court of Human Rights. In a decision of 17 December 2009, the Court held that the relevant provisions of the German criminal code were in breach of the European Convention. The Court noted that Article 5 of the Convention was an exhaustive list of permissible grounds for the deprivation of liberty [para 86]. As noted in Chapter 3, Article 5 of the Convention is a classic embodiment of the paradigm case for the justified deprivation of liberty: accordingly, the first basis is the imposition of a penalty after conviction (Art 5.1(a)). Here the Court emphasised that the detention must not just follow the conviction, it must also result from and depend on the conviction [87-88]. The Court also considered that the exception that allowed detention where it is reasonably considered necessary to prevent an offence (Art 5.1(c)) does not justify a measure directed towards general prevention in respect of an individual, but only operated where it was used to prevent a 'concrete and specific offence' [89].

In applying these principles to the case of M, the Court noted it had previously upheld preventive detention measures under Art 5.1(a) where the order for preventive detention was made by the sentencing court in addition to or instead of a sentence. Accordingly, the Court held that the original order for preventive detention imposed in 1986 was valid [96]. However, the Court held that without the change in the law made in 1998, the reviewing Court would have had no jurisdiction to extend the period of preventive detention beyond ten years. As such, there was no longer a

[374] This summary of the decision of the Constitutional court is drawn from the decision of the ECHR at [26]-[40].

sufficient causal connection between the original conviction and sentence and the ongoing deprivation of liberty beyond ten years. The Court also held that there was no other provision under Article 5 which would authorise ongoing detention. Of significance is the Court's comment in relation to Art 5.1(e) which allows detention on the basis a person is of 'unsound mind'. The Court rejected the application of this provision in relation to M because the Courts in Germany had found that although M had previously suffered a serious mental disorder, this was not the basis on which his ongoing detention was either sought or ordered.

Another basis of M's challenge was that the indefinite period of preventive detention that he now faced was contrary to Article 7 of the Convention that prohibited the retrospective imposition of a heavier penalty. M noted that the fact that the measure was ordered by a criminal court in connection with a finding in respect of his guilt for an offence demonstrated it was in truth a penalty. In addition, in his submissions to the Court on this ground, M emphasised that there were no special facilities in Germany for persons held in preventive detention. Although persons serving preventive detention had some privileges not afforded other prisoners, the conditions of detention did not differ significantly from those serving a sentence. In particular he argued that there were no requirement for any special measures to be taken in addition to those available to other prisoners to prepare the offender for release.

In determining the complaint in relation to Article 7, the Court stressed it 'must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty'' [120]. Although the Court acknowledged the 'twin track' system in Germany, 'having regard to the realities of the situation of persons in preventive detention' in Germany, and in particular 'that there appears to be no special measures, instruments or institutions in place…directed at persons subject to preventive detention aimed at reducing the danger they represent and thus at limiting the duration of their detention to what is strictly necessary' [128], and observing that the procedures for making and implementing orders for preventive detention involved the criminal courts [131], the Court concluded that the order for preventive detention was a 'penalty' for the purpose of Art 7.[375] Accordingly, the

[375] Compare the reasoning an outcome on this point to the decision of the Australian High Court in *Benbrika* examined above which expressly rejected the argument that the lack of any special provisions for treatment or rehabilitation rendered his continuing detention punitive.

prolongation of M's preventive detention beyond the ten year limit in place at the time the order was made constituted an 'additional penalty' imposed retrospectively in violation of Article 7 [135 & 137].

The European Court of Human Rights adopted similar reasoning in the case of *Haidn*[376] to hold that a Bavarian law that purported to allow a subsequent order of preventive detention – that is, an order made when the possibility of such an order was not preserved at the time of original sentence – was contrary to Article 5. Haidn had been convicted in 1999 of two historical counts of rape (committed in 1986) and was sentenced to three years and six months imprisonment. Due to the time when the offences were committed, he was not eligible for an order of preventive detention under the Criminal Code. However, during the term of his sentence, the Bayreuth Regional Court ordered his indefinite detention under the Bavarian (Dangerous Offenders') Placement Act. The order was based on the seriousness of his index offence and the evidence of a psychologist and psychiatrist that, since the time of his conviction, the offender had failed to participate in any therapeutic measure to address his sexual offending, and due to an organic personality disorder which led to a continuous decline in his personality, he was no longer able to reflect on his deviant sexual behaviour. The European Court, consistent with its decision in *M,* held that only the judgment of the Court in 1999 convicting him of rape could satisfy the requirement in Article 5.1(a), that authorised detention following a 'conviction'. The decision of the Bavarian Court ordering his indefinite detention did not involve a finding of guilt in relation to new offences and so was not a 'conviction'. As such there was no sufficient causal connection between his conviction and the order of the Bavarian court to justify his detention under Art 5.1(a) [84-88]. The Court also held that although the experts considered Haidn posed a threat in part based on an organic personality disorder, he had not in fact been placed in a psychiatric hospital and so was not convinced he had a 'true mental disorder' as required by Art 5.1(c) [93].

Thus far, the trajectory in Germany has close parallels with what had happened in Australia pre-*Fardon*. Here, it was the European Court that effectively undermined some of the key developments in German preventive detention post 1998 by

[376] *Haidn v Germany,* App No 6587/04, Eur. Ct. H.R. NJW 3426 (2011), 13 January 2011.

requiring what might be termed strict compliance with the traditional paradigm of the protection of liberty: either a direct causal relationship between any ongoing detention and a conviction or evidence that the offender lacked capacity to the extent that they were not to be held responsible for their criminal behaviour but ought be subject to control on the basis of the risk posed.

In January 2011, the German government enacted a number of legislative reforms in an attempt to address these decisions of the European Court. These included introducing some limitations to the range of offences to which preventive detention applied. However, another response, described by one commentator as a further 'innovation'[377], was the Therapy Placement Act. This legislation attempted to address the problem facing the Government of those who could no longer be held in preventive detention because of the decision in *M.* In effect, the legislation took up the option provided by the European Court to deal with such offenders in a manner that was consistent with Art 5.1(c) – by facilitating the classification of these offenders as suffering from a 'mental disorder' which made it likely they would commit a serious crime. This new legislation provided that an order could be made by a civil court for the ongoing detention of relevant offenders in a closed and secure institution which would no longer be characterizable as an infringement of the offender's liberty.[378]

However, it was a series of decisions of the German Federal Constitutional Court in 2011[379] that fundamentally conditioned the German response to the decisions of the European Court and which ultimately has created the opportunity for an alternative form of legitimation for this type of coercive preventive justice measure, and which distinguishes the developments in Germany from those occurring in Australia. The Constitutional Court considered a number of distinct issues relating to the preventive detention legislation then in force in Germany, and while it did not find that preventive detention was in principle unconstitutional, it held the existing provisions were so. Although guided by the decisions of the European Court, the Constitutional Court proceeded in a different manner. In response to the European Court decisions that found preventive detention was a punishment, the Constitutional Court decided that

[377] Drenkhahn, Morgenstern, van Zyl Smit, "'What's in a name?,": 172.

[378] Kirstin Drenkhahn, "Secure Preventive Detention in Germany: Incapacitation or Treatment Intervention?," *Behavioural Sciences and the Law*, Vol 31 (May 2013): 319.

[379] Judgment of 4 May 2011 – 2BvR 2365/09, 740/10, 2333/08, 1152/10 & 571/10.

the question of validity rested on a more stringent application of the distinction between punishment and prevention: in order to prevent any future measure, no matter how described, from being characterised as a punishment, it was necessary to be able to clearly distinguish the two, by reference to the legitimation and objectives of the law. In determining the existing provisions as unconstitutional, the central principle relied upon by the Court was that the relevant provisions did not provide for the necessary 'distance' between preventive detention and prison sentences.[380]

The Constitutional Court held that the serious interference with liberty that preventive detention represents could only be justified if it was subject to strict requirements of proportionality and on the basis of a close scrutiny of the conditions of its execution. In respect of this latter criterion, the Court held that preventive detention could only be justified in circumstances where there was a clear orientation by the authorities towards the offender regaining their freedom. This included a requirement for early and intensive therapeutic interventions, as well as specifying that the place of detention was to be separate from where those serving a sentence were held, and was to be designed to facilitate family and social contact; further, there must be ongoing judicial review of the circumstances of preventive detention, including the measures that had been developed to reduce the offender's dangerousness and to prepare them for release.[381]

It is here that an opportunity arose for the law to expand the concept of freedom used to justify these measures beyond the traditional concern for liberty. These decisions point directly to features of the offender's autonomy that go well beyond a concept of negative freedom but focus attention on the reintegration of the offender into society as a responsible agent capable of forming and maintaining relationships of mutual recognition. Indeed, the requirements set out by the Constitutional Court's decisions have been described as effecting a radical step in the process of juridification of preventive justice.

> The BVerfG [Federal Constitutional Court] redefined secure preventive detention as a treatment measure in a secure environment and, once and for

[380] Drenkhahn, Morgenstern, van Zyl Smit, "'What's in a name?,": 175.
[381] Federal Constitutional Court Press Release 31/2011 of 4 May 2011.

all, dismissed the idea of prevention solely as secure exclusion from the free society.[382]

However, when in 2012 the German government passed legislation that sought to give effect to the requirements set out by the Constitutional Court, by establishing a fundamental difference between provisions relating to sentences and preventive detention, this opportunity was at least partially obscured. It is true that the legislation meant that considerable operational changes were made, including the construction of special 'preventive detention facilities' within the grounds of certain prisons, and a renewed focus was placed on the preparation of these offenders for release. However, one of the legislative changes that was introduced was designed to address the effect of the various court decisions on those offenders in preventive detention where orders were imposed prior to 1998 (those whose ongoing detention was held to be invalid as a result of the decision in 'M'). The Constitutional Court in its judgment of 2011 had held that in these cases, placement in preventive detention or its ongoing execution could only be valid if the offender posed a high risk of committing the most serious crimes and where the detainee suffered from a mental disorder within the meaning of the Therapy Placement Act. The new 2012 legislative provision was intended to implement this decision and so provide a basis for deprivation of liberty of these offenders in accordance with the principles set out in Article 5.1(e). The validity of this provision however depended on whether the concept of 'unsound mind' in 5.1(e) could accommodate the position where an offender was suffering a serious mental disorder but not one which was so serious that it excluded criminal responsibility. That is, the legislation, in order to bring those offenders previously subject to preventive detention but whose ongoing detention was held invalid because of the decision in *M,* simply extended the meaning of 'unsound mind' to include a wide range of disorders and behaviours; potentially to the extent of considering criminality itself to be pathological.[383]

These new provisions were, unsurprisingly, the subject of proceedings in the European Court. In the matter of *Bergmann v Germany*[384]*,* the Court considered whether the ongoing detention of an offender who had no diagnosis of mental illness

[382] Drenkhahn, "Secure Preventive Detention,": 320.
[383] Drenkhahn, "Secure Preventive Detention,": 323.
[384] *Bergmann v Germany,* Application No 23279/14, (7 January 2016).

but had a diagnosis of a paraphilia (sexual sadism) and an alcohol dependence disorder fell within the provisions of Art 5.1(e). In sharp contrast to the approach taken in *M* to the question of whether a measure was preventive or punitive, where the Court felt compelled to go behind the characterisation given in domestic law to the relevant measure, in this case the Court approached the matter on the basis that 'the national authorities are to be recognised as having a certain discretion' in deciding whether an individual should be detained on the basis of 'unsound mind' [98]. The Court noted that at the time Bergmann's ongoing detention was confirmed, the Court accepted the diagnosis of sexual sadism and that this condition has remained essentially unchanged since the date of his conviction (which was in 1986). The Court went on to find that the mental disorder found by the domestic court was sufficiently serious to qualify as a true mental disorder for the purpose of Art 5.1(e) [106-117]. The Court also gave consideration to the new facilities that had been constructed by the German authorities for those serving preventive detention and held that, in this particular case, the facilities that were available in the centre in which Bergmann was being detained offered an appropriate therapeutic environment for a person detained as a mental health patient. Accordingly, the Court held there had been no violation of Article 5. This approach was confirmed in the decision of *Ilnseher* which also held that ongoing preventive detention of a sexual sadist on the basis that he was of unsound mind in a special facility for preventive detainees was not a penalty [83].[385]

5.5 Conclusions

The process of juridification that has taken place in both Australia and Germany highlight the challenge the law faces in attempting to address the normative imperatives and associated social coordination challenges of the risk society, where there are increasing demands for reassurance and community protection against serious crime. Unsurprisingly, the response to these pressures first appeared in the actions of legislators, those directly accountable to the public. Over time. the initial resistance to these legislative responses by the judiciary shifted, and the normative force of the demand for community protection became institutionalised in the law.

[385] This decision was upheld on appeal to the Grand Chamber: ECHR 419 (2018), 4 December 2018.

However, there still remains a certain normative uncertainty about the meaning of community protection and how it can be reconciled with the pre-existing principles that are deeply institutionalised in the law, particularly that of liberty. This uncertainty is found in both the products of the legislature and the judiciary; accordingly, the form of the law and its interpretation, under the pressure of the principle of legal freedom and its one-dimensional understanding of autonomy, remains susceptible to developing social pathology. Although even the most ardent proponent of preventive justice would accept the need for limiting principles,[386] the experience in NSW shows that where these principles are derived constructively and then applied, they in fact lead to paradoxical outcomes. At the current stage of this process of juridification, there is a real possibility that the law in NSW will soon stand as proof of the paradoxes identified by Ashworth & Zedner and Günther discussed in Chapter 4: where the adjustment of State power to interfere with the liberty of the subject leads to an inversion in the relationship, and where the exercise of power is justified without any reference to the principle of liberty at all.

Similarly, the German system appears to stand delicately poised at the junction of two possible lines of juridification. The first takes the path from the decision in *M* through the various interventions by the Constitutional Court (and Government responses) to focus the question of legitimacy of the laws establishing a post sentence coercive preventive measure on their theoretical and practical commitment to the reintegration of the offender into society; a concept of rehabilitation becomes the key normative interpretation of the principle of freedom. The other path however leads from *M* in the direction of *Bergmann* and *Ilnseher* where the criminal conduct of the offender is conceived as itself pathological, justifying the coercive control by the State of an offender who is incapable of controlling themselves. In this scenario the normative content of freedom is understood only from the perspective of the traditional paradigm where liberty is understood as the whole of freedom; the autonomy of the offender is subsumed into their legal persona which, in turn, is constructed in such a way that the possibility of their freedom is denied both conceptually and practically. Rather than expanding the concept of freedom, this line

[386] This point is made effectively by Frederick Schauer, "The Ubiquity of Prevention," in Ashworth, Zedner and Tomlin, *Prevention and the Limits of the Criminal Law,* 10: "There can be little doubt that the universal incarceration of all males between the ages of fifteen and twenty-none would bring about a dramatic reduction in crime and especially violent crime…Plainly such a course of action would be…unacceptable".

of juridification would appear to instead lead to a loss of freedom, potentially representing a reversion to earlier stages in the development of both law and social freedom.

While the second scenario would appear to almost represent the perfection of the paradoxes that have been revealed in this Chapter to arise within the framework of preventive justice, in the next Chapter the first pathway will be reconstructed in a way that promises a resolution to these pathologies, one which has the potential to see an expansion in the concept of freedom as a result of this phase of juridification.

Chapter 6

Legitimating preventive justice: rehabilitation, autonomy & social freedom

6.1 Introduction and overview

This Chapter will take up the challenges and possibilities that emerge from the empirical analyses undertaken in Chapter 5 and will attempt to articulate the basis for the legitimacy of preventive justice by way of the normative potential of 'rehabilitation'.

In Chapter 2, the normative basis of critique was set out by reference to Honneth's concepts of autonomy (consisting of a number of practical self-relations supported by intersubjective practices of mutual recognition) and social freedom (the idea that freedom involves participation in social institutions organised in accordance with a normative principle). Chapter 3 explained how the legitimacy of the law is measured in two dimensions, recognising that law must be both socially effective and normatively valid. In turn, the validity of law depends on its capacity to support both private and public autonomy, and that ultimately its validity depends on the democratic process. The Chapter also highlighted the risk that the institution of the law can lead to a social pathology, where legal freedom (the form of freedom associated with private autonomy) is wrongly understood as constituting the entirety of freedom, and autonomy is modelled solely on the basis of the isolated individual asserting their rights, free from interference.

The reconstruction undertaken in Chapters 4 and 5 demonstrated that, in the current phase of juridification, the law (and legal theory) is struggling to respond to the normative and functional demands of the risk society in a way that avoids reinscribing or even exaggerating the pathologies of legal freedom. For example, in the Australian context, the attempt to legitimise post sentence coercive preventive measures by reference to the principle of liberty has resulted in paradoxes that threaten to undermine both the effectiveness and validity of such laws. In the German context too, the law has, at least to some degree, seemingly reinscribed the traditional concept of liberty in a way that actually diminishes the understanding of freedom.

Section 6.2 will take up the current threads emerging from the normative reconstruction of post sentence coercive preventive measures. It will be argued that despite a risk that certain trajectories present in the current developments in preventive justice will undermine the possibility that it will lead to an increase in freedom, it is possible to redeem an emancipatory moment in the fifth wave of juridification. This however requires locating a dimension of social freedom within preventive justice; and such a space is indicated in the law by the idea of rehabilitation.

However, in order for rehabilitation to provide a normative basis for preventive justice, it will itself need to move beyond an individualist model built around the idea of legal freedom. Section 6.3 will outline just such an understanding of rehabilitation. This account is based on the research of Burke, Collett & McNeil in *Reimagining Rehabilitation* in which the authors identify four strands of rehabilitation – the personal, legal/judicial, moral and social – all of which are required for an effective *and* just response to the risk of reoffending.

Section 6.4 explores how this model of rehabilitation, approached from the perspective of Honneth's concept of autonomy, reflected in Joel Anderson's idea of 'autonomy gaps', can create a space in which an offender can experience social freedom.

Section 6.5 looks beyond the existing state of the law to suggest how this reimagined concept of rehabilitation might shape the ongoing phase of juridification that is preventive justice.

6.2 Preventive justice: two pathways – pathology or autonomy

In Chapter 5, the normative reconstruction of the current process of juridification of preventive justice highlighted two possible paths forward: the first, where the law regards high risk offenders as another 'special' category within the existing traditional paradigm, suitable for control because they lack the capacity to control themselves; the second, that focuses on the need to fully restore the offender to society. In terms of demonstrating this juncture, the developments in Germany in 2011 and 2013 are

illuminating. The existing 'conventional' preventive detentions law in Germany were directly challenged by a traditional approach to interpreting rights protections in a criminal law context. The European Court however created two discrete opportunities to respond: in emphasising the viability of ongoing detention on the basis of a diagnosis of 'unsound mind', it encouraged a pathway along which an offender would surrender their claim of autonomy altogether; however, by examining the substantive position of an offender placed in preventive detention it also opened up the possibility of an alternative normative foundation for such a measure.

This first option is one which, broadly speaking, is best known by reason of its adoption in various jurisdictions in the United States of America following the decision of the Supreme Court in *Kansas v Hendricks*.[387] In that case the US Supreme Court approved of legislation that allowed for post sentence preventive detention of sex offenders that were regarded as 'dangerous' based on a diagnosis of some 'mental abnormality'. Significantly, the diagnosis did not need to be of the kind that would normally constitute a mental illness: it simply needed to be one that allowed the inference to be drawn that the person lacked the capacity to control their behaviour. The Supreme Court found that ongoing detention was not punishment but civil incapacitation; further, it was implied that although treatment should be attempted, the legitimacy of the preventive measure did not depend on treatment being provided or indeed being possible.[388]

There are also elements of this 'medical' model in the schemes operating in Australia, including in the weight given to the evidence of psychiatrists and psychologists around the causes of offending. Indeed, this pathway was seemingly the option preferred by Justice Kirby in the *Fardon* decision, when he noted that

> In the United States, where post-sentence detention legislation has been enacted, such continuing detention is ordinarily carried out in different facilities, controlled by a different governmental agency, with different features to mark the conclusion of the punitive element of the judicial sentence and the commencement of a new detention with a different quality and purpose.[389]

[387] *Kansas v Hendricks,* 521 U.S. 346 (1997).
[388] McSherry and Keyzer, *Sex Offenders and Preventive Detention*, 59-60.
[389] *Fardon,* per Kirby J at [161].

Later in the same judgment, he stated

> If it is desired to extend powers to deprive of their liberty persons who do *not* exhibit an established mental illness, abnormality or infirmity, it is possible that another form of detention might be created. It is also possible that judges might play a part in giving effect to it in ways compatible with the traditional judicial process and observing the conventional nature of legal proceedings. However, at a minimum, any such detention would have to be conducted in a medical or like institution, with full facilities for rehabilitation and therapy, divorced from the punishment for which prisons and custodial services are designed.[390]

There is however a fundamental problem with this approach. There is an inescapable circularity at the heart of the determination that an offender could fall within the category of offenders of 'unsound mind' such that they are dangerous and may be detained on an ongoing basis. This is because the diagnosis of certain conditions – particularly paraphilias and personality disorders – are not based on the identification of any specific organic or other biological or psychological condition, but rather are derived from features of the person's behaviour exhibited during their lifetime. For example, paraphilic disorders are described in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) as involving 'atypical sexual interests' where the person feels personal distress about their interest resulting from society's disapproval, or they have a sexual desire or behaviour that involves another person's psychological distress, injury or death, or a desire for sexual behaviours involving unwilling persons or persons unable to give legal consent.[391] By way of specific example, the diagnostic criteria for paedophilic disorder (as set out in the DSM-5) are

- Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviours involving sexual activity with a prepubescent child or children (generally age 13 years or younger)

[390] *Fardon,* per Kirby J at [191].

[391] American Psychiatric Association, *DSM-5 Factsheet on Paraphilic Disorders*, 2013, https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets/Paraphilic-Disorders.pdf.

- The individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty
- The individual is at least age 16 years and at least 5 years older than the child or children in the first criteria.

As noted by some commentators, these diagnostic criteria appear to have a more forensic than therapeutic focus.[392]

Similarly, Antisocial Personality Disorder is commonly defined as 'a pervasive and persistent disregard for morals, social norms, and the rights and feelings of others'. Diagnostically, a person must be 18 years of age and there must be evidence of 'conduct disorder' with an onset before the age of 15 and three or more occurrences since the age of 15 of criminal behaviour, deceitfulness for personal profit or pleasure, impulsivity, aggressiveness indicated by fights or assaults, reckless disregard for the safety of others, consistent irresponsibility or lack of remorse indicated by being indifferent to or rationalising having hurt, mistreated or stolen from another. Additionally, the occurrence of antisocial behaviour must not take place exclusively during periods of mental illness (such as a schizophrenic episode).[393]

The medicalisation of criminal conduct by means of psychiatric diagnosis that is built around forensic rather than therapeutic criteria dissolves the autonomy of offenders into a range of behaviours that require intervention by the State to incapacitate and control. Indeed, conceptually, this comes close to identifying criminality itself as a type of pathology.[394]

The first approach taken by Germany to manage the offenders who, following the decision of the European Court in *M,* were being detained unlawfully was, by way of legislative fiat, to simply deny the autonomy of those offenders, rendering them suitable subjects of control. This approach is the ultimate paradoxical outcome that can arise from the inability of the law to incorporate the normativity that is driving the

[392] For example, Agustin Malon, "Pedophilia: a diagnosis in search of a disorder," *Archives of Sexual Behaviour* Vol 41, No. 5, (October 2012): 1083-97.

[393] American Psychiatric Association, *DSM-IV and DSM-5 Criteria for the Personality Disorders*, 2012, https://www.psi.uba.ar/academica/carrerasdegrado/psicologia/sitios_catedras/practicas_profesionales/820_clinica_tr_personalidad_psicosis/material/dsm.pdf.

[394] Drenkhahn, "Secure Preventive Detention in Germany,": 323.

current phase of juridification: here is displayed the ultimate ‘vulnerable’ subjectivity, being the offender whose autonomy is completely denied in the face of criminal behaviours that are characterised as proof of an ‘unsound mind’; and where, in the name of protecting their liberty against otherwise unjustified detention, the offender is simply removed from the category of persons capable of asserting their rights within the criminal justice system at all. On this model the pathology of legal freedom triumphs completely: offenders are denied their autonomy on the basis of their complete identification with their legal personality (in this case their criminal history); they are denied the possibility of freedom in the name of their own freedom.

By contrast, the second approach discernible in the developments in Germany, in examining preventive detention substantively, arguably shows a sensitivity and openness to the normative potential of the fifth wave of juridification. By preserving the option of a form of preventive detention that has certain substantive features rather than simply superimposing a formal concept of liberty, the opportunity was created for the law to develop in a way that could draw on a normativity making itself felt in this transition: the offender as a subjectivity that has deficits of autonomy that requires support rather than ongoing criminalisation; rehabilitation as the return of the offender to society through a restoration of their autonomy, and the possibility of social freedom. Here the decisions of the European Court and, more explicitly those of the Federal Constitutional Court, can be reconstructed by reference to the two dimensions of legitimacy of law: both Courts at times, though perhaps only partially, seem to recognise that preventive measures require, in terms of both normative validity and effectiveness, to reflect a form of social freedom that goes beyond the individualistic conception that still makes itself felt in the traditional rights based approach.

For example, the decisions of the Constitutional Court identified several features of a preventive detention regime that it considered necessary for its validity

- It must be a measure of last resort
- Where therapeutic treatment is necessary it must begin so early during the execution of the sentence and must be carried out so intensively that it will be terminated wherever possible before the end of the sentence

- At the beginning of the period of preventive detention, at the latest, an examination with a view to treatment must be conducted
- On the basis of the review, a plan is to be developed and intensive therapeutic care conducted which opens up a realistic prospect of release
- The cooperation of the person is to be encouraged by targeted motivational work
- Life in preventive detention must be adapted to general living conditions to the extent possible, provided there are no conflicting security concerns (this does not require the complete spatial detachment of preventive detention from the execution of sentences – however accommodation must be separate from the prison regime in special buildings and wards which comply with therapeutic requirements and in which family and social contacts with the outside world are possible)
- There must be legal standards for the relaxation of rules and for the preparation for release
- A detainee must be granted an effectively enforceable legal claim to measures reducing their dangerousness being implemented
- The continuation of preventive detention is to be judicially reviewed at least once per year.[395]

While there is a noticeable overlap between these requirements and Ashworth & Zedner's 'nine principles', the maxims set down by the Federal Constitutional Court are far more concrete and, more specifically, are directly focussed on the preparation of the offender for release. Significantly also these requirements do not just contain a list of measures which the State can take to control the offender, they also create an expectation that the offender will participate in their own transition and provides them with enforceable rights against (and so obligations on) the State.[396] What is being institutionalised in the law here is a relationship of mutual recognition[397]: the

[395] Drenkhahn, "Secure Preventive Detention,": 320.
[396] By contrast, in *Benbrika*, the majority of the High Court of Australia expressly stated that "the absence of special provision for treatment and rehabilitation of detainees under Div 105A does not deprive the scheme of its character as protective"; per Kiefel CJ, Bell, Keane and Steward JJ at [39].
[397] Although at least initially the relationship is not symmetrical, this does not mean it is not one of mutual recognition; whilst wanting to avoid the overtones of paternalism, the relationship at the beginning is not dissimilar to that between parent and child, and significantly the key dimension of autonomy that must first be (re)established between the state and offender, and between the offender and themselves, is one of trust.

autonomy, rather than the liberty, of the offender takes central place in the justification of the scheme.

The decisions of the European and German Constitutional Courts – and the subsequent response of the German federal government – at least in part suggests an aspect of the current phase of juridification that seeks to derive legitimacy from the normative content of a concept of rehabilitation which extends beyond the mere liberty of the subject, but points towards a range of capacities and dependencies that bring to mind the forms of relations that are the elements of an intersubjective concept of autonomy and institutional requirements characteristic of the idea of social freedom. As such, this may be a pathway that provides for the possibility that the law relating to preventive detention can develop in a manner that avoids paradox and instead promotes social freedom. The approach of regarding preventive detention as a form of 'treatment measure in a secure environment' points towards the possibility that preventive justice could be justified on the basis that it expands social freedom by *promoting* the autonomy of offenders.

6.3 Reimagining rehabilitation

In Chapter 3, objection was taken to the position maintained by Honneth that the law is not properly a social institution as it does not create intersubjective reality because it merely regulates contexts of interaction. The concept of rehabilitation demonstrates the error in Honneth's view. Rehabilitation is a set of norms, values and practices that create and circumscribe the lived experience of offenders (and indeed not just offenders, but practitioners and the broader community). Although rehabilitation involves an interplay with the other social institutions of the family, the economy and the democratic public sphere, it is also necessary to understand the unique and specific set of social practices that constitute rehabilitation in order to appreciate how the law mediates the offender's relationship with those other spheres. Without understanding rehabilitation as a part of the social institution of law it will not be possible to reconstruct or retrieve its normative potential.

As with other dimensions of the institution of the law examined in previous Chapters, the concept and practice of rehabilitation has been transformed as part of the previous four phases of juridification, and so the meaning and form of rehabilitation

has changed significantly over time. A number of distinct approaches to the idea of what was involved in the process of rehabilitation can be identified that are shaped by the understanding of freedom that was embodied in the law at the time. The early forms of rehabilitation focused on the moral character of the offender. The penitentiary was a place where it was hoped that, in conditions of solitary confinement, an offender would reflect on their sins and reform themselves. Although in many places prisons that were built during this period are still in use, this quasi-religious model was transcended and transformed in the twentieth century by developments in psychiatry and psychology. As the liberal paradigm developed, rehabilitation was increasingly understood as a form of treatment directed towards individual pathologies (however caused). Arguably, it is at this stage that a shift from a focus on moral character (a feature of the earlier models of rehabilitation) to correction or control of behaviour becomes a dominant feature. This medical or therapeutic model[398] perhaps remains as the most familiar meaning (and practice) of rehabilitation and continues to exert a strong influence in the law, underpinning the division within the traditional paradigm: to a large degree the ability to medically treat a personal pathology is used to define whether an offender is medically unfit – and so not responsible – and therefore suitable to 'control', or merely deviant and, while deserving of punishment, is amenable to 'correction' through punishment.

There has been however a further transition in the understanding of rehabilitation, including how it has been practised. This occurred alongside the growing recognition of the significance of social and structural causes of criminality. As part of the 'welfare' phase of juridification, rehabilitation came to resemble a form of social re-education. The emphasis in the practice of rehabilitation shifted in the direction of an attempt to understand the social contexts in which the offender grew up and lived with a view to identifying problematic behaviours and attempting to modify those behaviours: rehabilitation became a form of 'resocialisation'.[399] Indeed, in many contemporary systems, rehabilitation now includes a combination of psychological and psychiatric treatments as well as other interventions designed to address an offenders criminogenic behaviours (including providing education and vocational

[398] Fergus McNeill, "Four forms of 'offender' rehabilitation: Towards an interdisciplinary perspective", *Legal and Criminal Psychology* Vol 17, no. 1, (2012): 22.

[399] McNeill, "Four forms of 'offender' rehabilitation,": 22.

training, assistance in securing stable accommodation and attempts to develop or support pro-social family/peer associations).

Unsurprisingly, the contemporary history of 'rehabilitation' also reflects the tensions and distorting effects of the law's responses to the risk society.[400] In particular, under the influence of the risk paradigm, the law has assigned rehabilitation to the domain of various experts, particularly psychologists and psychiatrists, where decisions about the release and treatment of offenders are influenced by expert opinion directed to an assessment of their risk of reoffending. As a result, a 'correctional' model of rehabilitation has developed which is constituted by an increase, in both theoretical and practical terms, in ever more sophisticated forms of social control.[401] In this model, the offender becomes an object of knowledge rather than an active agent in their transformation.

> Within this paradigm, [rehabilitative] practice was rooted in professional assessment of risk and need governed by structured assessment instruments; the offender was less and less an active participant and more and more an object to be assessed through technologies applied by professionals and compulsorily engaged in structured programmes and offender management processes as required elements of legal orders imposed…irrespective of consent.[402]

This form of rehabilitation can be characterised as nothing other than the flipside of the pathologisation of criminality: whether the causes of crime are considered to be individual (either sinfulness or psychological deficits) or social (poverty, lack of education or employment), the assessment and management of that risk is regarded as something fundamentally removed from the issue of the offender's agency (autonomy). The offender is constituted as a bundle of risk attributes and their treatment involves working to reduce the overall presentation of risk. From this perspective, the effectiveness of rehabilitation is measured by whether the offender reoffends: no distinction is drawn between an offender who, although not committed to not reoffending, does not reoffend for whatever reason (including by being

[400] McNeill, "Four forms of 'offender' rehabilitation,": 22.
[401] Michel Foucault, *Discipline and Punish: The Birth of the Prison,* trans. Alan Sheridan, (London: Penguin,1977), 306.
[402] McNeill, "Four forms of 'offender' rehabilitation,": 25.

incapacitated) and one who strives to do so and who seeks to actively engage in society.

The types of therapeutic interventions and pre-release preparations that are typically used in the situation of high risk offenders in NSW are illustrative of this perspective. There is a significant body of research on the factors that are associated with an increased risk of re-offending and, accordingly, therapeutic measures are designed to ameliorate these risk factors and allow for the development of risk management strategies to assist offenders in either avoiding high risk situations or appropriately navigating their way out of such situations (that is, without reoffending). For example, in the case of sex offenders, a range of assessment tools have been developed and empirically tested which allow for an estimate of the risk that an offender having the relevant characteristics may represent (or perhaps more accurately the tools allow an estimation of the rate of reoffending within a group of offenders that have similar characteristics). These tools typically assess either or both static (historical) or dynamic (changeable) factors. In all cases, the general and specific criminal history of an offender, including specific details of that offending are considered a significant indicator of future risk. The Static 99-R for example examines factors such as the frequency of sexual and general offending, the relationship of the offender to their victim(s), the gender of the victim(s), and the age of the offender. The Stable 2007 considers a number of dynamic risk factors that have been consistently found to relate to sexual reoffending, such as intimacy deficits, social influences, distorted attitudes, and both general and sexual self-regulation. Critically, the level of assessed risk usually determines the nature and availability of therapeutic programs made available to offenders.[403]

Although individualised in the approach to the assessment of risk and the development of a treatment and risk mitigation plan, from a normative perspective the approach is essentially utilitarian; what matters is the outcome in terms of reducing reoffending, not the means by which it is achieved. As with other aspects of the welfare phase of juridification, the offender 'subject' to this form of rehabilitation is transformed from an agent into a client. The reason why an offender does not reoffend is largely irrelevant. It does not matter if the lack of reoffending is an

[403] See Corrective Services NSW, *Compendium of Offender Behaviour Change Programs,* 2020, 9-11, https://correctiveservices.dcj.nsw.gov.au.

expression of the offender's autonomy: on return to the community, they are not reintegrated through bonds of solidarity, rather they are managed through a combination of administrative, technological and legal power.

At the same time, the history of the concept of rehabilitation also has a deontological dimension, where the purpose of rehabilitation was not the maximisation of social utility or even the minimisation of risk, but the restoration of an offender to their full status as citizen.[404] However, this understanding of rehabilitation has been somewhat obscured, both theoretically and practically. In part this is because of the emphasis on psychological rehabilitation which has in turn meant that rehabilitation theory has not fully engaged with broader debates, particularly in philosophy and sociology, but also because of the capacity of this approach to be co-opted by increasingly punitive justice systems.[405] It is however this deontological dimension of rehabilitation, with its emphasis on the restoration of an offender to society, which provides the normative underpinning to the second pathway open to preventive justice in this phase of juridification.

McNeill argues that central to the understanding (and implementation) of this normative concept of rehabilitation is the recognition that it involves more dimensions than the psychological alone. He identifies four strands of rehabilitation: psychological; judicial; moral; and social.[406] The first of these is familiar, focussing on cognitive distortions and the problematic behaviours that arise from them, however the emphasis is on changing the offender through the development of new skills and abilities and to address any deficits or problems: it is a personal form of rehabilitation rather than a specific disciplinary perspective that is meant by this aspect. In this domain, in addition to traditional 'treatment' aimed at addressing cognitive distortions that may be used to justify sexual violence against women, for example, attention needs to be directed towards enabling offenders to form strong bonds with others in which relationships of recognition can develop that allow the experience of trust,

[404] McNeill, "Four forms of 'offender' rehabilitation,": 22.
[405] McNeill, "Four forms of 'offender' rehabilitation,": 24-25.
[406] Fergus McNeill, "Punishment as Rehabilitation", in *Encyclopedia of Criminology and Criminal Justice,* ed. Gerben Bruinsma and David Weisburd (New York: Springer Science and Business Media, 2018), 4202-5.

loyalty, support and solidarity which creates a safe environment for self-development.[407]

Judicial rehabilitation is the dimension that addresses the legal consequences of the process of moving beyond offending; the point is made that irrespective of the extent to which the offender 'achieves' personal rehabilitation, unless measures are in place to relieve the legal burden or barrier arising from the conviction, the ability to be 'fully restored' as a citizen is dramatically impeded. The most obvious example here involves the active exclusion of offenders from social practices due to their criminal history. The inability to secure employment or housing because of a criminal history not only creates significant material challenges for an offender re-entering society, but the misrecognition that is involved imposes an ongoing form of symbolic punishment. However, judicial rehabilitation also involves much more than the often discriminatory legal effects of a criminal conviction; it includes for example the judicial process leading to the imposition of a sentence which can either reinforce a sense of the exclusion of the offender on the basis of their deviance or emphasise the belongingness of the offender through the sentence operating as a means of censure.[408]

The third dimension of *moral* rehabilitation is directed towards the community in the sense that it allows or supports the offender to 'make good' the harm done through their offending. That is, even where personal rehabilitation has taken place at the private or individual level, it does not bring with it any form of redemption in the eyes of the community. The increased attention to the active role of 'victims' in the criminal justice system involves a limited acknowledgement of the importance of this dimension; and although a number of measures that are broadly referred to as 'restorative' justice (such as victim-offender conferencing) exist, and research suggests that there are positive effects of such programs[409], these programs remain significantly underdeveloped and often exclude high risk serious offenders.[410]

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[407] Beth Weaver and Fergus McNeill, "Lifelines: Desistance, Social Relations and Reciprocity," *Criminal Justice and Behaviour* Vol 42, no. 1, (2015): 99.

[408] Burke, Collett and McNeill, *Reimagining Rehabilitation,* 92.

[409] Australian Institute of Criminology, "Restorative Justice in the Australian Criminal Justice System", *Research and Public Policy Series* (Canberra, 2014), vii.

[410] For example, sexual and serious violent offenders are often excluded from programs such as youth conferencing (*Young Offenders Act 1997,* sections 8 & 35), circle sentencing (see *Criminal Procedure Act 1986,*

Finally, *social* rehabilitation involves the restoration not just of the abstract legal status of the offender as citizen but the deeper, substantive re-acceptance of the offender back into society (implying both the material and symbolic reintegration of the offender into the community).

The focus on this broader concept of rehabilitation corresponds with a shift in emphasis from the techniques of correcting the offender to consideration of the offender as a moral subject.[411]

This multi-dimensional, or even intersubjective, perspective on rehabilitation does not dispute that empirical research has identified factors which are strongly linked to an increased risk of reoffending, but it does highlight that in many of these areas risk factors are often articulated solely from within the psychological or personal perspective, as features of the offender's personality or behaviour. A careful analysis however demonstrates that markers of risk in many of these domains also have a broader moral and social dimension.[412] So, for example, while 'sexual preoccupation' is a significant risk factor for a sex offender that can perhaps be quite well understood primarily from within the personal or psychological dimension, a factor like 'negative social influences' or 'lack of emotionally intimate relationships with adults' are indicators of risk that most obviously require attention to the social environment of the offender. Other factors, such as 'lifestyle impulsiveness' or 'resistance to rules and supervision' possibly point toward the complex interrelationships between the offender and their broader social environment.

This intersubjective understanding of rehabilitation gains empirical support form research in the area of 'desistance theory'. Desistance theory focusses on the process of change that occurs within the offender as moral subject; as a movement by the subject away from offending into a willing compliance with law and social norms.[413] Desistance describes a state where an offender refrains from reoffending

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section 348*)*, and victim conferences (unless initiated by the victim) – see AIC, "Restorative Justice in the Australian Criminal Justice System", 18.

[411] McNeill, "Punishment as Rehabilitation", 4204.

[412] Michiel de Vries Robbe, Ruth E. Mann, Shadd Maruna, and David Thornton, "An Exploration of Protective Factors Supporting Desistance from Sexual Offending," *Sexual Abuse: A Journal of Research and Treatment* Vol 27, No. 1 (2015): 18.

[413] Fergus McNeill, "The Collateral Consequences of Risk", in *Beyond the Risk Paradigm in Criminal Justice,* ed. Chris Trotter, Gill McIvor and Fergus McNeill (London: Palgrave, 2016), 148.

of their own volition, not because of external factors or a threat of sanction. Importantly, this is not to be understood primarily as a psychological condition or a set of beliefs, but rather it involves a complex set of competencies that enable an offender to respond to challenging, risk-laden situations in a socially acceptable manner. This perspective emphasises that desistance is not only about a change in behaviour, but fundamentally involves a change in identity. A growing area of research, guided by the desistance approach, has identified a range of protective factors that contribute to the ability of an offender to undergo the transition to a life that is free (or largely so) from re-offending. A protective factor is something that lowers the risk of re-offending but again is something more than a psychological attribute of an offender: just as assessment of risk needs to look more broadly, protective factors can be identified in the social and interpersonal environment the offender inhabits (or will be released to).[414]

De Vries Robbe argues that protective factors, properly understood, must be considered not just as the absence of a risk factor but as a positive propensity or manifestation in their own right.[415] The most obvious example is that while negative peer influences are a well-known risk factor, positive or prosocial peers provide the offender with resources that can be drawn on to assist in the desistance process. What this understanding of protective factors enables is the identification of a positive dimension of the offender's behaviours and social environment that can be the focus of rehabilitation: where an offender displays lifestyle impulsiveness, efforts can be directed to developing the offender's self-control; resistance to rules requires efforts to reorient the offender to enable connection with people in authority; where there is shown a lack of empathy, intervention should target care and concern for others; overcoming dysfunctional coping involves learning socially acceptable strategies for dealing with negative emotions.[416] The shift to a concern with protective factors involves a reorientation in therapeutic interventions: efforts must be made not only to address risk factors but to 'strengthen an individual's protective factors, or provide

[414] de Vries Robbe, Mann, Maruna, and Thornton, "An Exploration of Protective Factors,": 18.
[415] de Vries Robbe, Mann, Maruna, and Thornton, "An Exploration of Protective Factors,": 19.
[416] de Vries Robbe, Mann, Maruna, and Thornton, "An Exploration of Protective Factors,": 22-23.

him or her with prosthetics to compensate for under-developed or 'missing' protective factors'.[417]

In addition to these developments which focus on (re)building positive dimensions of an offender's identity, in recent years there has also been important empirical research into the experience of offenders who re-enter society after a period in custody. This transitional experience is significant if the aim of rehabilitation is understood as the reintegration of an offender into society, rather than simply the production of a compliant individual. Factors that contribute to a negative experience of integration have been identified that point to matters that go beyond the individual psychological makeup of offenders: the challenges that face offenders often include their active exclusion from the job market, difficulties in obtaining appropriate health care, an inability to source and maintain suitable accommodation and damaged interpersonal relationships (or alternatively, recourse to a subculture of antisocial or criminal peers in order to compensate for various forms of misrecognition).[418] By contrast, offenders who experienced a positive transition from custody to the community were those that could rely on social support, had a job at the time, and showed various protective psychological features (including realistic expectations).[419] Accordingly, planning for the effective reintegration of an offender requires a thorough analysis of the social environment into which the offender is to be released, as well as efforts directed to preparation for release through the development of skills and stabilisation of relationships, as well as the modification of any dysfunctional beliefs or cognitions.[420] In addition, this requires providing the offender the opportunity to test these new competencies in a real world setting before being released, and the provision of ongoing support during the transition.[421]

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[417] de Vries Robbe, Mann, Maruna, and Thornton, "An Exploration of Protective Factors,": 20 (emphasis in the original).

[418] Gunda Wössner, Elke Wienhuasen-Knezevic, and Kira-Sophie Gauder, "*I was thrown in at the deep end…": Prisoner re-entry: Patterns of transition from prison to community among sexual and violent offenders* (Freiburg: Max- Planck Institut Fur Auslandisches und Internationales Strafrecht, 2016), 28-29.

[419] Wössner, Wienhuasen-Knezevic, and Gauder, "*I was thrown in at the deep end…",* 29.

[420] Cf the recommendations by Wössner, Wienhuasen-Knezevic, and Gauder, "*I was thrown in at the deep end…",* 30.

[421] Wössner, Wienhuasen-Knezevic, and Gauder, "*I was thrown in at the deep end…",* 29-30, 32.

6.4 Rehabilitation, autonomy and social freedom

At this stage it is worth recalling and elaborating further some features of the intersubjective account of autonomy developed by Honneth and others such as Joel Anderson, in order to develop the hypothesis that desistance is a specific form of boosted or restored autonomy, and an experience or expression of social freedom.

For Honneth and Anderson, autonomy involves three practical self-relations developed and maintained through practices of mutual recognition.

> Self-trust, self-respect and self-esteem are thus neither purely beliefs about oneself nor emotional states, but are *emergent properties of a dynamic process in which individuals come to experience themselves as having a certain status*, be it an object of concern, a responsible agent, a valued contributor to shared projects…[422]

The first practical relation to self is one that is regarded as fundamental (in the sense of foundational) to the development of an autonomous self. The relation of self-trust allows the subject to avoid psychological rigidity and develop an ability to creatively disclose his or her needs and desires as they arise over time. The capacity for self-trust is basic for the development of the self's other capacities to engage in the social world. In *Struggles for Recognition*, Honneth provides a developmental account of this self-relation by reference to a child developing a capacity to be alone with itself. This capacity is based on the child being able to 'generate enough trust in the continuity of her care that he or she is able, under the protection of a felt intersubjectivity, to be alone in a carefree manner.'[423] Honneth generalises from this account as follows

> It is only because the assurance of care gives the person who is loved the strength to open up to himself or herself in a relaxed relation-to-self that he or she can become an independent subject…[424]

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[422] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism,* 131 (emphasis added).
[423] Honneth, *The Struggle for Recognition,* 103.
[424] Honneth, *The Struggle for Recognition,* 105.

Anderson and Honneth argue that such genuine openness is risky and relies on assurance of the love of others in order that sufficient self-confidence can allow the articulation of the inner needs and drives.[425] Honneth goes so far as to say that the 'human faculty of imagination in general' is dependent on a sense of self confidence that exists in a loving relationship.[426] Although this self-relation first emerges in the child's primary relation, Anderson and Honneth note that it remains dependent on the forms of recognition that are only achieved in intimate relations.[427] These relationships are essential for developing and maintaining self-trust which allows for the ability of the subject to engage with his or her inner dimensions.[428]

The second and third forms of self-relation are more historically continent. In modernity there has been a historically achieved separation of concepts of moral worth and concrete social roles. Moral worth becomes a function of the recognition of each individual as a bearer of rights separate from the value that is attributed to them by virtue of their contribution to society. In particular, it is in the growth of post conventional legal orders that recognition is attracted to and called on by the acknowledgement of every human being as worthy of respect. It is through the experience of recognition afforded by a post conventional legal and moral order that subjects come to see their actions as universally respected expressions of their own autonomy.[429] In this context, rights are best understood as 'depersonalised symbols of social respect'.[430] The existence of the post conventional legal order which ascribes rights to an individual embodies, in a socially effective way, a relationship of mutual recognition between subjects. However, this type of recognition is also fundamental to the formation of a form of self-relation that is understood as self-respect. Self-respect is a form of self-relation that involves viewing oneself as a legitimate source of reasons for acting

[425] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism,* 135.
[426] Honneth, *The Struggle for Recognition,* 103.
[427] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism,* 135.
[428] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism,* 135.
[429] Honneth, *The Struggle for Recognition,* 118.
[430] Honneth, *The Struggle for Recognition,* 118.

as a competent deliberator and legitimate co-author of decisions.[431]

Legal recognition simultaneously confirms the social acknowledgement of the capacities of the person to autonomously form judgments as well as supporting the person's view of his or herself as a person possessing those qualities. Self-respect is required in order that an agent can raise or defend a claim with respect to his or her status in the social environment as a person with equal standing. Significantly, as Anderson and Honneth point out, this understanding of the concept of self-respect points to a limitation in the 'rights based' approach that is characteristic of liberalism: rights do not directly support autonomy by blocking interference in the subjects actions; rather rights can support autonomy by facilitating a relation of self-respect.[432]

The corollary of the uncoupling of legal and moral recognition from concrete social roles was the development of a distinctive form of recognition directed towards the worth attributed to the specific contributions of a person to society.[433] In contrast to the formalistic character of legal recognition which is directed to those features of a person capable of adopting the moral point of view – which is formal and universal – the form of recognition that develops in relation to the worth of a person is directed to particular qualities and contributions. The criterion for evaluation of an individual's worth is tied to the broader ethical framework of society; a person's contribution generally is valued in relation to the achievement of social goals. In the modern context, where pluralist value orientations are a given in complex societies, these goals take on a multitude of historically derived (and changeable forms). Alongside the development of individual rights as the symbolically charged articulation of social respect, the individualisation of personal achievement gives rise to a form of social recognition directed towards the individual's personal self-realisation in pursuit of a

[431] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism,* 132.

[432] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism,* 133.

[433] Honneth, *The Struggle for Recognition,* 121; although there has been a shift in focus by Honneth between *The Struggle for Recognition* and *Freedom's Right* in terms of the way in which this third self-relation is understood in terms of its connection to the social institution of the market and the relationships of mutual recognition created and sustained by the social practices that make up the economy, it still fundamentally involves a sense of self-esteem based on recognition of worth or value of the individual accomplishments of the person.

generally recognised societal goal.[434] The experience of being socially esteemed in a post conventional society can no longer be referred back to the value system of society as a whole: the sense that the contribution to society is valuable in accordance with an agreed overarching consensus on the 'good'. Instead, the experience is tied to the sense that one's own achievements can be valued by other members of society. This sense of self-esteem is what allows for the development of a shared sense of value amongst social actors – or what Honneth refers to as solidarity.[435] Solidarity entails not just a tolerance of the individual characteristics of an acting subject (as sometimes implied by the liberal ideal of the priority of the right over the good) but an active and positive recognition of the individual and particular dimensions of another person.

> …only to the degree to which I actively care about the development of the other's characteristics (which seem foreign to me) can our shared goals be realized.[436]

Fundamental to the development of self-esteem are the semantic resources which have an evaluative character, that enable a subject to describe what he or she does as a meaningful or worthwhile purpose. As Anderson and Honneth suggest, these semantic resources are developed within a set of shared values and practices that are not universal but in which bonds of solidarity exist.[437]

In previous Chapters, there was a focus on the effect of misrecognition in terms of an experience of injury, such as a feeling of injustice as a source of normative insight. However, there are also practical consequences of misrecognition. Distortions in the development of the fundamental self-relations necessary for autonomy leads to capacity deficits. As explained in Chapter 2, autonomy is not just a status; it is, in addition, both an achievement and a set of competencies. While the formal and universal features of personhood that attract recognition from a moral and legal perspective are sufficient to ascribe autonomy to a person, it is the ongoing process of creating and maintaining the practical relations to self that allow a person to act

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[434] Honneth, *The Struggle for Recognition,* 125-126.
[435] Honneth, *The Struggle for Recognition,* 128-9.
[436] Honneth, *The Struggle for Recognition,* 129.
[437] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism,* 136-7.

autonomously. Where a person is excluded from relations of mutual recognition and can no longer participate in social practices that make up a social institution, the resulting pathology operates to diminish their capacity to act autonomously. That is, it is possible to simultaneously have the normative status of a free person while having an impaired ability to participate in the activities that constitute freedom: a situation demonstrated in the study of the paradox of the 'least restrictive measure' in Chapter 5.

Anderson develops the idea of an 'autonomy gap' to describe a circumstance where complex situations or problems create demands that outstrip our capacities for acting autonomously.[438] Although Anderson articulates this idea in the context of policies that introduce complex problems or choice situations that require levels of decision making that are beyond the level of non-experts or an individual's ability to handle temptations[439], the idea itself can be applied to any circumstance where there are generalised expectations of competency, in the sense of a capacity to act autonomously, that although are met by most, exceed those of particular individuals.

Anderson examines a number of examples where public policy makes certain assumptions about the capacities of individuals that leads to their exclusion from participation in certain practices.[440] The first is the example of persons requiring wheelchair access to public buildings; he notes that for a long time public buildings were constructed on the basis of assumptions about individuals' capacities to climb stairs or navigate narrow areas. The gap between what capacities were assumed and the actual physical abilities of certain individuals had an exclusionary effect. He notes similar effects in welfare to work schemes (that assume a degree of mobility that many potential workers did not have) and electoral ballots (that assume a degree of literacy that may not exist). Anderson then generalises from these examples of a gap in capacity to consider situations where individuals are excluded because they lack one or more of the capacities that are required for autonomy.[441] For example, he

[438] Joel Anderson, "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 50-51.
[439] Anderson. "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 50.
[440] Anderson. "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 50.
[441] Anderson. "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 50. He discusses these capacities as involving a range of skills existing in a number of clusters he

points to the situations where knowledge-workers are expected to work remotely without access to the supporting infrastructure of an organised office environment; where voters in the United States are asked to cast votes in respect of highly complex issues including judicial appointments with limited information or knowledge of the relevant considerations; and where large payments were distributed to young adults on native reserves in Canada (based on royalties from oil and gas extraction) with no restrictions on financial decisions made by these young adults on how such money could be spent. In each of these cases, Anderson notes that

> a social arrangement comes to be established for coordinating activity, with the concomitant presumption that this way of doing things makes sense given the presence of certain capacities on the part of individuals. If everyone could keep up, everyone would reap the benefits of these arrangements, each of which involves a significantly greater degree of autonomy and skill than more centralized or paternalistic arrangements. However, in each case these policies are based on people being more self-disciplined, better informed and better at appreciating the needs of their future selves than many foreseeably turn out to be.[442]

Where a social policy is implemented that requires participants in a social practice to grasp meanings or follow rules that are beyond their competence, an autonomy gap is created. Anderson argues that these 'autonomy gaps' are harmful at both the level of the individual and at the level of social coordination. Not only will such policies give rise to feelings of humiliation and frustration (or, to use Honneth's generic term, disrespect), but they are also unlikely to be successful in addressing the social coordination challenge they are responding to; further, they could well contribute to an increase in inequality, a decline of trust in government, and ultimately an undermining of the legitimacy of such interventions.[443]

Accordingly, the presence of 'autonomy gaps' provides a normative ground for critique of a social policy: not only would it be ineffective but it would be unjust;

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describes as 'deliberative', 'executive', 'self-interpretive' and 'critical'. For our purposes here, these describe the same types of practical skills and dispositions that Honneth sees as being critical to autonomy.

[442] Anderson. "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 54-55.

[443] Anderson. "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 56-7.

further, the adoption and maintenance of such policies is a sign of a social pathology, one which operates to generate feelings of disrespect that undermine autonomy and which are incompatible with social freedom.[444] The concept of an autonomy gap helps explain the situation where a high risk offender is released into society 'unrehabilitated'. The dual expectation that such an individual will reoffend (based on an assessment of risk) but will not reoffend (because this would be contrary to their interests, especially their 'liberty') is an example of an irrational social policy, one that has all of the features identified by Anderson as outlined above. In contrast, a coercive preventive measure that is designed to promote desistance as an outcome will not only avoid the problematic consequences noted above but would potentially work to reverse autonomy gaps.

The idea of an autonomy gap allows for the articulation of the normative content of a reimagined concept of rehabilitation. Rehabilitation involves the (re)building of damaged or underdeveloped self-relations required for autonomy. Desistance from this perspective is nothing less than the re-engagement of an offender with the full range of social practices that support relations of mutual recognition necessary to form the practical self-relations that constitute autonomy, and the re-engagement with the social institutions necessary to experience social freedom. This normative content explains the process of desistance as the supported overcoming of an autonomy gap. This approach allows a reimagined concept of rehabilitation to avoid the risks that techniques and interventions of rehabilitation are either necessarily moments of 'social control' or simply paternalistic.[445]

The empirically identified developments leading to the reimagination of rehabilitation examined above along its four dimensions, the focus on the promotion of protective factors and the appreciation of the significance of the experience of the offender in the transition from custody to society gain theoretical support from Honneth's intersubjective concept of autonomy and his idea of social freedom. The four dimensions of rehabilitation not only articulate the practical requirements for effective reintegration into the social institutions that provide for social freedom, they highlight the significance of patterns of mutual recognition in the personal, legal, social and

[444] Anderson. "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 62-65.
[445] See discussion of these problems in Burke, Collett and McNeill, *Reimagining Rehabilitation*, 28-52.

cultural domains for the development of a stable and autonomous identity. The experience of misrecognition in any of these domains will cause damage to the subject that experiences such disrespect. In the context of the legal consequences of conviction, an offender who has 'done his or her time', but nevertheless is excluded from the employment market, not only suffers from the material consequences of unemployment but from the disrespect that is involved in their unequal treatment, as well as the disrespect that follows from not being able to have a contribution to the economy recognised as valuable. In the context of an individual that is likely to have diminished material circumstances (which also means that, unlike others who are not fully recognised in the labour market, participating as a consumer in the market cannot be relied on to compensate for feelings of disrespect) the experience of misrecognition is not something conducive to the undistorted development of the different relations to self that have been identified as necessary for the formation and maintenance of autonomy. That is, misrecognition not only undermines the material but the symbolic resources available to the offender to participate in the social practices that allow for social freedom.

Similarly, the intersubjective understanding of autonomy and the concept of social freedom explains how protective factors are not just functionally effective but in fact embody normative principles that govern the relations-to-self required for autonomy. The capacity for emotionally intimate relationships, self-control, the capacity to comply with rules and obey legal conditions, a trusting and forgiving orientation, being embedded in a pro-social network, demonstrating honest and respectful attitudes and an ability to deal with negative emotions[446] are all features that are a result of positive relations to self and others in the personal, social, legal and cultural domains.

Finally, attention to the experience of transition, both from a psychological and a social perspective, involving the examination of not just how the offender understands or responds to the change from custody to the community but the environmental factors surrounding the offender on release, points to the importance of (re)establishing the offender into institutionalised patterns of recognition. That is, this sensitivity to the offender's autonomy suggest that effective rehabilitation

[446] These are all features identified as 'protective factors' in de Vries Robbe, Mann, Maruna, and Thornton, "An Exploration of Protective Factors,": 22-23.

involves interventions that provide the maximal opportunity for an offender to develop their necessary self-relations through minimising experiences of misrecognition and enhanced or supported engagement in (rather than restriction or exclusion from) key institutionalised social practices. Significantly also, this approach enables the conceptualisation and implementation of rehabilitation as a tool to promote desistance, understood as a slow process of identity transformation. Unlike the traditional predominant utilitarian model of rehabilitation, this approach allows for a normative distinction to be made between offenders who fail to reoffend merely as a result of contingent reasons (for example because of a lack of opportunity for reoffending, or because they 'burn out') from those that are on a pathway to reintegration but may relapse from time to time.[447] Similarly, it allows for a more nuanced assessment of the success of rehabilitation from the perspective of the offender themselves. The lived experience of those who desist from offending is varied, and demonstrates that a number of techniques can be used by offenders that result in an absence of reoffending.[448] However, not all of these could be described as an enhancement of social freedom; for example, in a number of cases 'desistance' was achieved through intensive self-isolation.[449] Desistance understood from an intersubjective perspective means nothing less that the integration of the ex-offender into the full range of social practices that make up the various social institutions of the community: in essence, desistance *is* the experience of social freedom.

6.5 Preventive justice legitimated: closing autonomy gaps

Returning to the pathway opened up by the German/European human rights jurisprudence, it can be seen that within the law and the current phase of juridification there exists a possibility of the expansion of social freedom through preventive justice. For example, a post sentence coercive preventive measure that directs itself to the rehabilitation of the offender, understood as promoting desistance by an individualised identification of the offender's autonomy gaps (through a joint program of developing and enhancing protective factors to enable a transition into the

[447] de Vries Robbe, Mann, Maruna, and Thornton, "An Exploration of Protective Factors,": 23.

[448] Briege Nugent and Marguerite Schinkel, "The Pains of Desistance", *Criminology and Criminal Justice* Vol 16, no.5, (2016): 568-584.

[449] Nugent and Schinkel, "The Pains of Desistance,": 568-584.

community and the (re)building of relations of mutual recognition) can lay claim to both normative validity and (based on the empirical evidence that forms the basis of desistance theory) practical effectiveness.

Not all high risk offenders released without appropriate rehabilitation will re-offend. However, all such offenders are prone to suffer from misrecognition.

> It is, of course, psychologically *possible* to sustain a sense of self worth in the face of denigrating and humiliating attitudes, but it is harder to do so, and there are significant costs associated with having to shield oneself from these negative attitudes and having to find subcultures for support. And so even if one's effort to maintain self-esteem in the face of denigrating treatment is successful, the question of justice is whether the burden is fair.[450]

The normative insight that can be found in the developments in Germany, is that a coercive preventive measure can be said to be valid to the extent that it promotes freedom of offenders by providing an entitlement to rehabilitation understood as a support for the development of autonomy capacities. This requires a highly complex, and contestable, balancing of the requirements of different freedoms: in particular the sphere of negative freedom and the entitlement to liberty and the more demanding sphere of social freedom. However, the key lesson from our reconstruction is that the experience of misrecognition that can arise when, despite being 'at liberty', an offender is excluded from a range of social practices necessary for the enjoyment of social freedom (whether intimate relationships, formal legal equality or in the production or pursuit of culturally 'valued' goals such as gainful employment or a generally prosocial lifestyle), can be not only painful but debilitating.[451]

One important consequence of Anderson's analysis is the recognition that there are more than one way to address an autonomy gap: attempts can be made to raise the abilities and capacities of individuals or social structures can be modified.[452] In other

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[450] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism*, 131.
[451] Joel Anderson, "Autonomy and Vulnerability Entwined", in *Vulnerability: New Essays in Ethics and Feminist Philosophy* ed. Catriona Mackenzie, Wendy Rogers and Susan Dodds (Oxford: Oxford University Press, 2013), 141. From the empirical perspective, see Nugent & Schinkel, "The Pains of Desistance,": 568-584.
[452] Anderson. "Vulnerability, Autonomy Gaps and Social Exclusion," in Straehle, *Vulnerability, Autonomy, and Applied Ethics*, 64-5.

words, interventions can be aimed at both promoting the autonomy competencies of individuals as well as avoiding implementation of social policy that overtaxes the autonomy competencies of those affected. Applying this analysis to the context of rehabilitation policy, it is possible to develop a critique of preventive justice based on the normative content revealed in the internal connection between risk factors for high risk offenders and the four domains of rehabilitation examined above. An offender that presents with a number of risk indicators and/or lack of protective factors is someone with identifiable autonomy gaps in the context of the social environment in which they are to be released. In these circumstances, the failure to intervene to address this gap in the name of the liberty of the offender is irrational and contradictory: such a policy in fact will overtax the capacity of the offender to act autonomously. In these circumstances, the 'negative freedom' that is entailed by the right to liberty is potentially destructive of the offender's autonomy, as without appropriate support structures, the offender is exposed to experiences of inequality and humiliation if they are unable to meet the autonomy capacities expected of them; even if he or she fails to reoffend, mere compliance with external control (including internalised behaviour modifications) does not equate with the development of autonomous self-regulation.

Accordingly, where preventive justice aims to close autonomy gaps, it is legitimate; where it operates in such a way to intensify them, it is illegitimate. It is acknowledged that it is deeply counterintuitive to suggest that the State's interference with the liberty of a person through a coercive preventive measure can be legitimated in the name of an offender's own autonomy. This is because the core idea that the reduction of restrictions is both necessary and sufficient for the increase in an individual's autonomy is equally deeply rooted in the origin of the modern concept of autonomy itself.[453] An intersubjective account of autonomy however demonstrates that the 'focus on eliminating interference…misconstrues the demands of social justice by failing to adequately conceptualize the neediness, vulnerability, and interdependence of individuals'.[454] This view of autonomy requires that any commitment to social

[453] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism*, 128.
[454] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism*, 129.

justice entails a commitment to guaranteeing the material and institutional basis for autonomy-constitutive relations of recognition.[455]

In the context of a high risk offender, a commitment to autonomy involves a commitment to the four forms of rehabilitation that can be said to underpin desistance: the psychological, judicial, moral and social. The positive restoration of the offender to society by supporting a minimum level of autonomy capabilities and providing a degree of protection from an excess of vulnerability addresses the risk of reoffending and the promotion of social freedom: the resituating of the offender within a network of social bonds is both an effective and morally valid goal of preventive justice. Importantly this can also be contrasted with the paternalism of the medical or correctional approach which operate on the basis of social control; instead this approach focuses on supporting relational connections and the development of individual reflexivity.[456] A coercive preventive measure is therefore legitimate to the extent it imposes an obligation on the State (and its citizens) to enable an offender to achieve rehabilitation in the four dimensions, to actively engage in social practices which allow for mutual recognition, and so enables the experience of legal and social freedom.

It is beyond the scope of this thesis to articulate in any detail what this would look like in practice. However, a number of areas for potential reform on the basis of an intersubjective concept of rehabilitation can be indicated as appropriate for further consideration. As a start, in NSW the first step would be to reverse an amendment made in 2007 that prioritised the object 'to provide for the extended supervision and continuing detention of high risk offenders so as to ensure the safety and protection of the community'[457] over the object to encourage serious offenders to undertake rehabilitation.[458] Indeed, renaming the legislation to focus on the renewed objects

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[455] Anderson and Honneth, "Autonomy, Vulnerability, Recognition and Justice," in Christman and Anderson, *Autonomy and the Challenges to Liberalism*, 129.

[456] Beth Weaver, "The Relational Context of Desistance: Some Implications and Opportunities for Social Policy", *Social Policy and Administration* Vol 46, no. 4, (August 2012): 407.

[457] *Crimes (High Risk Offenders) Act 2006,* section 3(1).

[458] *Crimes (High Risk Offenders) Act 2006,* section 3(2). Originally, the Act did not differentiate between these two objects in terms of priority; that is, each object was of equal weight. The Act was amended on 21 December 2007, less than 2 years after it was passed, to make it clear that the primary object of the Act is to ensure the safety and protection of the community and that rehabilitation was 'another' object. This amendment was in response to one of the first decisions of the Supreme Court under the Act, where the Court declined to make an Interim Detention Order even though the evidence suggested the offender had failed to undertake offence specific programs in custody designed to promote his rehabilitation. In that case, the Court

rather than by reference to the maligned subjectivity of its target group ('high risk offenders') would also be a simple but symbolically significant step: for example, as the 'Community Protection and Rehabilitation Act'.[459] There would also need to be a clear break with the Gummow principle; although a serious offence may be an appropriate marker for consideration under any scheme, the focus of the measures in the legislation is the need to reintegrate the offender, something which is normatively independent from their punishment for their crime. The criteria for the Court to consider when determining to make an order, and whether supervision or detention is required, should make clear that the Court is to give primacy to factors that address the individual autonomy gaps (which includes the absence or need to rebuild protective factors) of the offender at the time of their potential release, such that even ongoing detention for the purpose of rehabilitation may, in appropriate cases, be preferable to a painful and unsustainable 'liberty'. In such a case, the offender's ongoing detention can be justified in the name of their own freedom.[460]

In order to ensure that rehabilitation is a real possibility, the legislation should mandate that the State design and implement measures that support a range of social practices necessary for the reintegration of offenders into society. These should involve providing both material and symbolic 'prostheses' to support the autonomy of the offender and ensure reengagement with the fundamental social institutions needed for the experience of social freedom. A number of these are already indicated in the decision of the German federal Constitutional Court: an obligation for intensive therapeutic treatment, designed to be completed before the end of the offender's original sentence; a requirement for a specific, tailored plan that 'opens up a realistic prospect of release' subject to ongoing judicial oversight or review; a formal process to involve and motivate the offender in the planning and treatment process; an obligation to provide accommodation that approximates life in the community as far as possible (consistent with security requirements); legally

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held that it should not assist in a process which forces a person to unwillingly undergo 'medical' treatment as a condition of obtaining that person's liberty. *Attorney General for NSW v Tillman* [2007] NSWSC 356 at [59].

[459] Ironically perhaps, this comes close to the name of the legislation that was struck down in *Kable* – the *Community Protection Act.*

[460] Indeed, the underlying principle of offender programs in custody in NSW is to enable offenders to "acquire the skills that enable them to independently manage their risk of reoffending… This moves beyond individual or internal factors that may impede change to also incorporate the context or environment as an important variable in determining the success of any change process. This is critically important in custodial settings and obstacles to successful behaviour change can reside in the person, the context or the therapeutic environment." Corrective Services NSW, *Compendium of Offender Behaviour Change Programs,* 9-12.

enforceable requirements for the relaxation of rules of detention or supervision and for the preparation for release.

In addition, the legislation should look more broadly to the social environment into which the offender is to be released and address obstacles to reintegration: for example, by providing for or at least eliminating obstacles to employment for offenders such as education, training and supported placements; promoting judicial rehabilitation by making discrimination in employment based on criminal history unlawful and allowing early discharge from other schemes that are based on status, such as from offender registers or ongoing disqualification from attaining certain licences; promoting moral rehabilitation through introducing processes for victim conferencing irrespective of offence type; involving the offender, their family and/or other pro social supports in their case management process (including potentially other offenders who are also working on desisting); providing supported accommodation for offenders in transition; and psychiatric and/or psychological support in the community. The criminalisation of the offender's vulnerability through the breach process would also need to be radically reviewed: in order to avoid either intensifying social isolation and misrecognition, or repeated failures, a more nuanced approach to addressing missteps by offenders in the post release process needs to be introduced.

Although these reforms in one respect represent a radical departure from the current operation of the law, they are consistent with the normative and social imperatives of preventive justice, and would go far in ensuring that the juridification process produces laws that are not only effective in protecting the community but which meet the exacting requirements of legitimacy in a modern, liberal democratic society.

Chapter 7

Conclusions

The thesis began with identifying the field of inquiry, the trend in the last 30 years in many liberal democracies to develop systems of preventive justice. It was noted that from a sociological perspective, the development of legal frameworks designed to address risk, including those targeting the potential of serious criminal offending, was consistent with other trends in the current phase of modernisation sometimes described as the risk society. However, it was also noted that despite the fact that preventive justice has become well established in a number of legal systems, there remained some disquiet at the normative level about whether such measures are legitimate. This sense of unease or uncertainty can be seen at both the level of theory, where much of the literature is sceptical at best concerning the legitimacy of many preventive justice measures, and in the way in which legislators and jurists have approached the design and implementation of such measures. The overarching aim of the thesis was to undertake a critical inquiry into the legitimacy of preventive justice in an attempt to identify whether these concerns could be addressed.

The first stage was to outline the philosophical framework for the inquiry to be undertaken. Chapter 2 set out the version of Critical Theory that has been developed by Axel Honneth. In the tradition of Critical Theory, Honneth argues that critique must proceed by way of a social analysis. His method of normative reconstruction is a theoretically guided empirical investigation that attempts to identify the somewhat already institutionalised norms and principles that structure social practices. This approach was contrasted with other forms of critique that constructively derive normative principles then seek to apply them to social situations. Along with Honneth, it was argued that constructivist approaches can lead to principles that are either abstract and meaningless, or that inadvertently reinscribe existing norms, meaning they are open to misuse. In Chapters 4 and 5, the limits of a constructivist approach were demonstrated in the analysis of the efforts of Ashworth & Zedner to derive principles that could be used to limit the scope and spread of preventive justice;

ultimately it was revealed that the principles they had derived suffered both these flaws. This failure was shown in the inability of these principles, even when implemented to a significant degree, to address the normative deficits found in the post sentence coercive preventive measures operating in Australia.

The method of normative reconstruction outlined in Chapter 2 was supplemented by an account of the normative basis of critique. For Honneth, the fundamental normative principle in modernity is that of freedom, understood as individual autonomy. However, Honneth's work has, for many years, involved demonstrating that the prevailing understandings of both these concepts are often inadequate. He argues that both autonomy and freedom are misunderstood if they are conceived from the perspective of the abstract individual. Honneth instead argues that autonomy is fundamentally intersubjective: a series of practical self-relations developed and maintained in the context of relationships of mutual recognition. This understanding of autonomy also involves a broader social dimension: relationships of mutual recognition occur in the context of social practices that are institutionalised, for example in the family, the market and the democratic public sphere. For Honneth, the normative content of the principle of freedom requires an appreciation that freedom means the ability to participate in these social practices. Accordingly, the process of normative reconstruction not only involves an analysis of the principles and values that govern social practices within social institutions, it requires an evaluation of existing forms of social organisation: that is, normative reconstruction is directed to whether the current social order promotes or inhibits freedom. In particular, normative reconstruction is interested in identifying situations where there are problems in the social order that interfere with or undermine the capacity of individuals to participate in the social practices that allow for the development of autonomy and the experience of social freedom. These situations were examined theoretically in Chapter 2 by reference to the concepts of injustice, understood in terms of an unjustified exclusion of an individual from social practices, and social pathology, in which there is a blockage or distortion in the understanding of participants of the meaning of existing norms and principles of a social institution.

The philosophical framework outlined in Chapter 2 is what enables a critique of preventive justice that moves beyond the existing debate. Importantly, the process of normative reconstruction takes seriously the facticity of preventive justice, that the

norms and values that are appealed to within this 'new' legal framework, such as the need for reassurance and community protection, are already partially realised and are already structuring social practices (both inside and outside the law). However, at the same time, normative reconstruction enables an evaluation of the validity of these principles and values: not by reference either to some independent standard or even simply in contrast to the pre-existing norms of the law, but in terms of whether the manner in which these principles and values contribute to the social order either promotes or detracts from autonomy and freedom. The focus of Chapters 4 and 5 was to draw out of the existing debates, both at the theoretical level and at the practical level (the law as it exists and is applied), the meaning of the norms and values actually being used to define and justify preventive justice, and to evaluate them in terms of their contribution to autonomy and freedom; and, in particular, to identify whether there were any signs within the framework of preventive justice as it has developed that indicates the presence of social pathologies.

Before the thesis moved to a normative reconstruction of preventive justice, Chapter 3 outlined the understanding of law as it appears within Honneth's Critical Theory. Drawing on the work of Habermas, Honneth argues that law plays an important, although not privileged, role in the structuring and reproduction of society. Law has a vital role in ensuring the social integration of complex societies; it is both a social system that enables the stabilisation of behavioural expectations that allow for the otherwise risky endeavour of peaceful social interaction, and a normatively based network of principles and values. Law must meet both its functional imperatives of ensuring general compliance and be redeemable in terms of its normative validity to be experienced as legitimate. This dual aspect of the legitimacy of law becomes critical in the assessment of preventive justice: not only is preventive justice susceptible to critique on the basis that it suffers a normative deficit, it must also be functionally effective. As was shown in Chapter 5, the legal frameworks governing specific coercive preventive measures are prone to certain paradoxes that simultaneously undermine the effectiveness and validity of such laws. The understanding of law developed in Chapter 3 explains how the presence and experience of these pathologies – even if not clearly understood or articulated – gives rise to the ongoing unease about the legitimacy of preventive justice.

In his most recent major work, *Freedom's Right,* Honneth shows how law is simultaneously dependent on, and a condition of possibility of, autonomy. In this text, Honneth methodologically distinguishes the moments of private and public autonomy. For Honneth, private autonomy is enabled by law when a space is created in which an individual can, independently of their other social obligations, consider and pursue their own interests. This idea of autonomy, and its corresponding form of freedom which Honneth calls 'legal freedom', is a major accomplishment of modernity. However, Honneth emphasises that this form of autonomy and freedom is derivative of the broader understanding of autonomy and freedom that was outlined in Chapter 2; for Honneth the capacity to exercise this type of autonomy and enjoy this form of freedom is dependent on pre-existing social relationships. One of Honneth's major concerns in *Freedom' Right* is to demonstrate the problems that arise, again both theoretically and practically, when this form of freedom is mistakenly assumed to comprise the whole of freedom. The significance of this insight is again demonstrated in Chapters 4 and 5 where it is shown how the law's assumption that legal freedom – or 'liberty' - is the paramount normative concept can lead to paradoxical situations. Indeed, it could be said that the debate over the legitimacy of preventive justice becomes both self-defeating and intransigent when it operates with this one-dimensional understanding of the normative basis of society.

Although both Honneth and Habermas acknowledge that law is fundamental to the achievement of freedom in modernity, they both also argue that it can have negative effects. In particular, both raise concerns about the effects law has when it intrudes into areas of life not previously structured in accordance with legal principles. For both, this aspect of the process of juridification leads to the replacement of intersubjective forms of social co-ordination by law and juridical principles. In turn, this results in damage to the web of intersubjective relations necessary for both private and public autonomy and undermines social cohesion and solidarity. Indeed, in *Freedom's Right,* Honneth argues that the abstraction from social relations and contexts that is required by law means that law systematically tends to the production of social pathologies.

Despite the explanatory force of the concept of legal pathologies, in Chapter 3 it was shown that Honneth's analysis suffers from a lack of empirical engagement with the law itself. The problem with this methodological choice is that it means Honneth

cannot see within the sphere of law any normative force working against the developmental processes that leads to legal pathologies. For example, his use of the film *Kramer v Kramer* to outline the pathology of the legal personality, although illuminating, actually obscures the existence within the legal debate about divorce law the presence of countervailing imperatives: how the law itself had recognised the pathological effects of the traditional model for resolving family disputes and had put in place measures that focus less on the rights of parties and more on preserving (to the extent possible) the underlying intersubjective relationships within the family. It is here that the thesis seeks to modify or adapt Honneth's Critical Theory of law (though in a way that is arguably simply more consistent with the methodology of normative reconstruction than Honneth's own approach to law), by insisting on investigating the institution of the law itself through a detailed engagement with the work of legal theorists, legislators and jurists.

One of the aims of Chapter 3 was to introduce and elucidate the concept of juridification. The concept itself is complex and has usages that are both descriptive and normative, though these differences are sometimes not clearly distinguished. For example, both Habermas and Honneth outline the history of the development of modern law as first involving three phases of juridification, which led to the institutionalisation of fundamental civil and political rights, which are generally regarded as unambiguously freedom enhancing (though the distribution of this freedom was by no means universal); and then a fourth phase, which was an attempt to secure the material foundation for the universal enjoyment of civil and political rights. This fourth phase is considered to have had ambivalent effects in respect of freedom, and it is in the analysis of the fourth phase that some of the different meanings of juridification appear: on the one hand it still refers to the development of a legal framework that by considering the social conditions necessary for enjoying freedom lead to changes that enhanced freedom for a greater number; at the same time, it is used to describe the intrusion of law into the lifeworld where social coordination based on communicative relationships was replaced by legal/bureaucratic techniques, which was experienced as a loss of freedom. By coupling the recognition that juridification has multiple dimensions with the insight that an empirical engagement with law is necessary to identify conflicting principles and values, the concept of juridification becomes a basis for a critique of specific legal measures. It does so because it refers to the relationship between social

practices and governing norms within the institution of the law: that is, as a concept with descriptive and normative dimensions, juridification can be understood as a form of normative reconstruction.

Having established the philosophical framework in Chapters 2 and 3, the following two Chapters engage in a normative reconstruction of preventive justice. Chapter 4 first examines the normative framework that existed at the time preventive justice began to emerge, and then undertakes an analysis of two theoretical responses to the issue of the justification of preventive justice. Although preventive justice is frequently criticised from the traditional perspective as reflecting an unjustified expression of State power and involving a regression behind rights and freedoms acquired in earlier phases of juridification, as Ashworth & Zedner have shown, on a careful analysis these measures are ultimately compatible with the liberal paradigm: a position ultimately reflected in the acceptance within the law that such measures are legally (and constitutionally) valid. However, efforts to articulate the legitimate scope of these measures from within the traditional paradigm are forced to appeal to normative principles and meanings that extend beyond those available within the liberal framework. The result is theoretical explanations that are either unhelpful or, worse still, that have paradoxical consequences. At the same time, approaches that consider the current transition as a break from the traditional liberal paradigm, and which acknowledge the significance of the shift to the risk society, also seem to lead to similar outcomes. For example, for Günther, the modification of existing legal norms to accommodate the demand for community protection is seen as regressive. However, this conclusion is only plausible because, from the perspective of legal freedom, the principles that are said to explain the transformation taking place in the law (the functional imperatives of the risk society) have no normative content. Accordingly, Günther can only find within this new paradigm a paradoxical inversion in the meaning of rights, where preventive justice involves the subjugation of individual liberty in the face of the demand for community protection.

The analysis of the theoretical approaches undertaken in Chapter 4 supports the conclusion that preventive justice is best understood as a new or fifth phase of juridification: the law is in the process of institutionalising new principles, or at least new understandings of existing principles, that go the core of the purpose of law itself – the guarantee of liberty and the protection of the community. However, the

analysis undertaken in Chapter 4 suggested that the shift from a liberal/traditional model to the new paradigm of preventive justice remains characterised by an ongoing struggle to identify any normative principles that can reconcile the traditional understanding of freedom institutionalised in the law with the social coordination challenges of the risk society that are driving the transition.

The focus of Chapter 5 was an engagement with the law more directly, by considering specific examples where preventive justice has been put into practice. In particular, the focus was on the use of State power in a coercive manner to restrict the liberty of persons who, having committed a crime previously and having since 'served their time', are nevertheless considered to pose a risk of future serious offending that justifies further intervention. As outlined in Chapter 4, strict limits on the State's legitimate power to restrict the liberty of the subject have been regarded as a benchmark of the freedom guaranteed by the rule of law. However, preventive justice involves a challenge to the paradigm case, which states that the restriction of liberty is only justified as a punishment after a crime has been committed; this challenge draws on both the social imperatives of the risk society and the normative content of the principle of community protection.

Perhaps unsurprisingly, the force of the demands for reassurance and community protection that came with the rise of the risk society were first acknowledged by the Executive arm of the State; however early attempts to address these social imperatives by way of coercive preventive measures were rejected by the judiciary as being incompatible with the system of law. Despite this initial response, relatively quickly the judiciary found a way to affirm the legal legitimacy of such measures. Even so, the analysis in Chapter 5 confirms what was shown in Chapter 4 at the theoretical level: while being sensitive to the expectations generated by the challenges of social integration that arise in the risk society, the law – both in terms of the legislature and the judiciary – has seemingly struggled to articulate in any meaningful way the normative content of a principle of community protection that could define and justify preventive justice. This is because even when the principles of risk and community protection are incorporated into preventive justice as appropriate concepts to express the new demands for social integration, the law has continued to understand the meaning of such terms from the perspective of legal freedom, or 'liberty'. As a result, the development of preventive justice has seen the

implementation of coercive preventive measures – with corresponding practices of interpretation, assessment and enforcement of risk – that have paradoxical effects.

However, the reconstruction undertaken in Chapter 5 also highlighted that the existence of these paradoxes appears to be felt – if not completely understood – within the law. As a result, there is an ongoing process of amendment and refinement in both legislation and in judicial interpretation during this phase of juridification. In both Australia and Germany, for example, the ongoing process of reflection and debate over the normative content of preventive justice is leading (or has led) the law towards two pathways: one which could ultimately destroy the normative basis for preventive justice; the other which poses a potential pathway to legitimacy.

The first pathway involves the reinterpretation of the traditional paradigm, under the influence of the imperatives of the risk society, but without recourse to any meaningful normative principle *at all*. This is seen in two different developments. The first is where liberty and autonomy are completely obscured by an actuarial (as opposed to normative) concept of risk. This leads to the position where, as can be seen in some decisions of the Court of Appeal in NSW and the High Court of Australia, the principle of community protection can justify the restriction of liberty, even to the point of ongoing detention, on the basis of risk alone. As noted above, this approach justifies coercive preventive measures on the basis that they are consistent with the traditional paradigm; however it does so without any reference to the liberty of the offender, by simply inverting the traditional priority given to the relationship between individual and the State that the principle of liberty entails. It is difficult to see how this approach is anything other than, as suggested by Günther, regressive in terms of the previous accomplishments of the process of juridification. The second development, as seen in some judgments of the High Court of Australia but most clearly in certain judicial and legislative responses in Germany, appears to be a redefinition and expansion of the other side of the traditional paradigm; where the State's power to control and contain the danger posed by a citizen who lacks capacity – usually as a result of mental illness – is extended to include all those who represent a danger. On this model, not just criminality, but the risk posed by an offender is itself taken as evidence of their lack of capacity and justifies the State's intervention to control their behaviour. Here any reference to the offender's responsibility, and so their autonomy, is simply negated. This first pathway, in both

directions, appears consistent with Honneth's anxiety about the laws tendency towards legal pathology, and from that perspective is seemingly an inevitable consequence of this current phase of juridification: where the sphere of freedom is dissolved, and in the place of autonomous subjects there are merely pathological personality structures whose every interaction is mediated by law.

Despite the reality of this concerning tendency, there can also be seen within the law an alternative pathway in which the social imperatives giving rise to preventive justice can be reconciled with the normative principles of community protection and liberty in a manner that promotes autonomy and social freedom. This is most evident in certain developments in Germany, made under pressure arising from decisions of the European Court. The focus of Chapter 6 was to draw out this alternative by examining the potential of the concept of rehabilitation. Although already a feature in preventive justice (even if only to define those offenders who are appropriately subject to coercive measures, as those who 'cannot be rehabilitated'), the concept of rehabilitation itself requires reconstruction (or reimagining to use McNeil's term). That is, while in traditional contexts, rehabilitation is understood individualistically as treatment, or only involving changes at the personal level, a reimagined understanding of rehabilitation focusses on its broader legal, moral and social dimensions. This broader, intersubjective approach aligns with research in desistance theory that highlights the role of protective factors in enabling an offender to refrain from reoffending on the basis of their own volition, not because of external factors or a threat of sanction. When this broader understanding of rehabilitation is mapped onto Honneth's account of autonomy and social freedom – where fundamental relations to self are developed and maintained through institutionalised practices of mutual recognition - it can be seen how rehabilitation has a normative as well as a practical content. Rehabilitation, across the four domains identified by McNeil, is essentially directed to enabling desistance by simultaneously assisting an offender to (re)build and maintain the practical relations to self that make up autonomy as well as reintegrating offenders into the social institutions that enable the exercise of social freedom.

Chapter 6 also introduced the idea, developed by Anderson, of 'autonomy gaps' to explain the complex social co-ordination challenge posed by high risk offenders. Autonomy gaps arise where social policies set behavioural expectations on an

individual that exceed their capacity to act autonomously. In Chapter 5 the paradox of the criminalisation of breaches of supervision orders was examined in detail, where conditions of supervision are imposed on offenders across a broad domain of their social life that presume capacities of self-discipline and self-awareness that these offenders typically do not have, and where non-compliance is criminalised: this is a classic example of a policy that produces an autonomy gap and which is both unjust and irrational. By contrast, Anderson notes that social policies can be designed in such a way as to either improve the capacities of individuals to act autonomously or at least reduce the requirements for compliance. Accordingly, a coercive preventive measure that is directed towards rehabilitation can be understood as one that closes an autonomy gap: it can simultaneously manage the risk posed by an offender while providing the necessary legal, moral and social supports for the offender to reintegrate with society. On this model, it is the interest in promoting the autonomy of the offender and expanding their range and experience of social freedom by reconnecting them to social practices from which they have been excluded, that provides the normative foundation for preventive justice.

Preventive justice represents the next phase of juridification in the law. The social coordination challenges of a society highly attuned to risk gives rise to normative demands for reassurance and community protection that cannot simply be ignored; at the same time, in order to be legitimate, preventive justice must provide a response that is both effective and normatively justified. It can do so where measures are designed to close autonomy gaps confronting high risk offenders rather than perpetuate or even intensify them. Only an ongoing critique that engages with the law, and which is attuned to the possibility that fundamental normative principles may be misunderstood or misapplied, leading to pathological outcomes and irrational policies, can hope to guide this ongoing process of juridification in a manner that is consistent with the requirements of freedom.

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