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Introduction

One reason to have criminal laws is that they make us feel more secure. For Thomas Hobbes this was the key reason for having them.[1] Hobbes thought that without obligations to the sovereign to desist from violating others' interests we would all feel vulnerable to the predation of others. Fearing the possibility that force will be used against us, we would take measures to anticipate others' coercion. Since attack is often the best method of defence, the result would be relentless conflict, 'the war of all against all', and no civil society would be possible. By contrast, the existence of the obligations contained in the criminal law allows us to believe that our interests are to some extent secure. We do not normally need to pre-empt the danger represented by others with coercion of our own, and a commonwealth is made possible.

We do not have to accept all of Hobbes's political theory to grasp the truth that it contains on this point. To the extent that we believe in the criminal law's effectiveness in lowering what we might call the *objective* risk of victimization—the risk that we will in fact be victimized—that risk is reduced in our *subjective* perceptions.[2] As a consequence we are less likely to plan for—and still less to take—our own coercive action. With the law of murder in place, for example, we can go about our lives *secure in the knowledge* that the ultimate coercive authority does condemn the deliberate taking of our lives (without some special justification or excuse), and that it can and will try to punish anyone who kills us in this way. The risk is not entirely removed, but the consequence is that 'in a given social situation, we know what behaviour to expect from others because we know that if they behave differently they will be punished'.[3] The communication of the law's norms in the form of the state's penal threats serves a general reassurance function in so far as subjects know that violations of their protected interests will be taken seriously by the state. And this background reassurance is part of what makes the normal life of society possible.

Of course the mere existence of the law may not provide much in the way of subjective security—it may fail to reassure us—unless a number of other conditions are also fulfilled, including: widespread public knowledge of the law's existence and

[1] T Hobbes, *Leviathan* (Penguin, 1968).

[2] On the difference between objective and subjective senses of security see L Zedner, *Security* (Routledge, 2009) 14–19 and I Loader and N Walker, *Civilizing Security* (Cambridge University Press, 2007) 155–61 and further discussion in Chapter 3.

[3] R Dahrendorf, *Law and Order* (Steven & Sons, 1985) 25.

the consequences of violating it; rigorous enforcement with adequately high clear-up rates; belief that the courts and the criminal process generally do justice and that the penalties for violation of the law are adequate; all in all a sufficient degree of public confidence in the law's justice and effectiveness. It is no secret that such confidence is neither universal nor evenly distributed across society. Nor is it the case that the sovereign's threats are the only, or necessarily the most effective, source of order. Nevertheless, with these important caveats, the existence and enforcement of criminal offences that prohibit conduct that we tend to fear will serve to protect our subjective feeling of security. If our penal obligations to a central coercive authority simply disappeared or ceased to be enforced, and all other things remained the same, most people would feel very insecure.[4]

This protection of our feelings of security by the criminal law is then of fundamental political significance, even if the law's practical contribution to security can be argued about. The threat of punishment for criminal wrongs, in symbolically and practically excluding those wrongs from the normal life of the community, is one of the ways in which the very existence of a political community is constituted by the sovereign state.[5] But historically this protection of subjective security has been, for the most part, *indirect*. It has largely been a secondary effect of laws that threaten punishment for an invasion of some other primary wrong. The most familiar criminal wrongs—killing, battering, raping, thieving, vandalizing and so on—are not defined in terms of causing insecurity. The feeling of security is not the interest they explicitly invoke. The primary wrongs and harms that are directly committed by these acts provide the justification for the coercive force of the laws that prohibit them, and for the state's punishment when those laws are defied.

The content of the argument

In recent decades, the criminal law in the UK has sought to protect our subjective feelings of security more directly than in the past. It has done so by prohibiting a much larger range of conduct than the criminal law covered in the preceding period. Offences have been enacted that prohibit not only conduct that undermines our feelings of security but also conduct that *might* undermine them, conduct that manifests an indifference to others' feelings of security. Some of these offences explicitly define a substantive wrong of causing subjective insecurity. Others can only be understood as punishing a wrong in so far as that wrong is understood to be the causing of insecurity. The new offences that protect this interest in subjective security include: public order offences; breach of civil preventive orders; preparation, possession and failure to report offences; new developments in fraud, theft and assault law. While protection of interests in subjective

[4] When law enforcement is suddenly removed, as it was, for example, in Egyptian cities in January 2011, locally organized vigilantism develops very quickly.

[5] See also I Loader and N Walker, *Civilizing Security,* 164.

security by the substantive law is far from unprecedented, the scope, speed and explicit character of the recent development represents a qualitative shift that can be understood as the institutionalization of a 'right to security' in UK law. At least that will be one of my arguments in this book.

The right to security has been prominent in British political rhetoric especially since the terror attacks on 11 September 2001. In his response in parliament to those atrocities, the then prime minister, Tony Blair, declared that 'the most basic liberty of all is the right of the ordinary citizen to go about their business free from fear or terror'.[6] Blair's belief was one reiterated by the home secretaries who served in his government.[7] But the political commitment to the right to security pre-dated 9/11 and that commitment had by then already gone beyond the level of rhetoric to become institutionalized in substantive penal liabilities. Moreover this was a commitment shared across the political mainstream. Indeed, by the time the first home secretary in the Conservative–Liberal Democrat Coalition that replaced New Labour declared, 'I believe everyone has the right to feel safe in their home and in their neighbourhood', the phrase was political boilerplate.[8] Although the institutionalization of the right to security was most marked under New Labour, more than a year after the Coalition government took power, only two of the more extreme powers covered in this book have been made the subject of repeal legislation.

As well as demonstrating that a right to security unites a great deal of recent criminal legislation, this book is addressed to two groups of related questions about the development of a right to security. First, why has it come about and, more particularly, why do these very broad laws enjoy a significant degree of political legitimacy? Why do both officials and the majority of the population consent to the duties imposed by protecting a right to security? Why is there relatively little political controversy about the substantive demands they make? Why have these sweeping security laws arisen in an apparently liberal society rather than in an avowedly authoritarian regime? Second, what do these laws and the normative expectations they institutionalize tell us about the state that created them? What implications does this have for the future of criminal law and of our theories of it?

To readers familiar with the criminal justice literature, there will be nothing novel in the claim that the penal law has been expanded and deployed in the name of security. Indeed the criminal legislation that is the focus of this book occurred during a period in which the political preoccupation with crime and punishment, and more especially with victims of crime and the security of potential victims, has led numerous commentators to invoke the name of Hobbes. For many like David Garland, 'Hobbes is the thinker whose vision seems most relevant in situations

[6] HC Deb, 14 September 2001 vol 372 col 606.

[7] 'I claim that the ID cards Bill that I am introducing today is a profoundly civil libertarian measure because it promotes the most fundamental civil liberty in our society which is the right to live free from crime and fear': Charles Clarke, *The Times*, 20 December 2004.

[8] T May, *More Effective Responses to Anti-Social Behaviour* (Home Office, 2011) Ministerial Foreword.

where "law and order" is perceived to be breaking down'.[9] This is because Hobbes's Leviathan, the sovereign he thought was established by rational subjects to avoid the war of all against all, is generally thought to have been authorized to do anything necessary to protect security. Garland describes the expansive and hard-line penal measures pursued by politicians as a 'Hobbesian solution'.[10] For Loïc Wacquant, too, the new tendency to 'punish the poor' in the name of security 'is part of the building of a neoliberal Leviathan',[11] while Simon Hallsworth and John Lea regard the emerging 'security state' as 'reconstructing' and 'tooling up' Leviathan.[12]

The conclusion drawn here will, however, be very different. This is because our focus will not be on the instrumental categories of criminal justice policy. It will not be on *security* as such (security as a good or insecurity as a bad, that criminal justice policy might increase or decrease). Rather the focus will be on the normative categories of legal theory, on the *right to* security (security as a legally protected interest that is the ground of penal obligations to the state not to set it back). The normative assumptions that are needed in order to justify punishing people for breaking these laws turn out to be ones that no Leviathan could maintain because they amount to a confession of the state's lack of authority. The state is clearly preoccupied with security but the right to security turns out to be an ironic paradox. The contemporary British state turns out to be less 'security state' and more 'insecurity state'.

Of course it can be argued that contemporary criminal justice policy and the contemporary criminal law are simply not justified and not justifiable. This has been the approach taken by much of the expert literature, and it is the view that leads experts to perceive the hand of an absolutist Leviathan, or at least of a Hobbesian political outlook, in current developments. It has been argued that criminal justice policy has been either purely instrumental, seeking to achieve the good of security whatever the cost to the rights of the law's subjects,[13] or a narrowly political reaction to popular anxiety about crime, one that 'acts out' those popular emotions by singling out for harsh treatment a wide range of undesirable elements—not least criminal offenders, but potentially anyone who causes fear. The aim of the political response is to assuage those fears and so to avoid the electoral consequences of seeming to lack authority over crime.

The problem with these views is not that that they are entirely false. The expressive acting out in contemporary policy would be particularly hard to deny. The problem is that they either fail to notice or, at least, to take seriously the claims

[9] D Garland in N McCormick and D Garland, 'Sovereign States and Vengeful Victims' in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press, 1998) 19.

[10] D Garland, *The Culture of Control* (Oxford University Press, 2000) 202.

[11] L Wacquant, 'Bringing the Penal State Back In', Lecture at London School of Economics, 6 October 2009 (available at <www2.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLectures AndEvents/player.aspx?id=426>).

[12] S Hallsworth and J Lea, 'Reconstructing Leviathan: Emerging Contours of the Security State' (2011) 15(2) *Theoretical Criminology* 141.

[13] See, for example, A Rutherford, 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain' in P Green and A Rutherford, *Criminal Policy in Transition* (Hart, 2000).

of an influential body of contemporary political thought that does offer a normative justification for punishing harms to other people's interests in feeling safe. Moreover this political thinking has been a predominant influence on governments from the 1990s onwards. At least that will be another of the arguments of this book. The normative justification for the right to security is found in the idea of vulnerable autonomy, a concept that is axiomatic not only in the Third Way and communitarianism, but also implicitly (and more significantly perhaps) in the theory of Friedrich Hayek that has been a chief source of so-called neoliberalism. The vulnerability of the law's subjects assumed by these theories is the normative basis of the subject's right to be free from fear, their right to security. For this reason, it is a mistake to see in the policy and legislative development only an unprincipled reaction to popular anxiety. The political reaction may often be reactive and emotive, but the reactions and the emotions reflect normative principles that are shared across mainstream political life, however much criminal justice experts may dislike the consequences.

Moreover, the norm of vulnerable autonomy has not only influenced policy. It can be and is used to explain the jurisdiction of the ultimate normative resource for contemporary lawyers—human rights. There are, of course, many possible sources for human rights, but the ECHR offers few obstacles to the protection of the right to security by substantive law and this tends to confirm the view that the vulnerability of autonomy is the normative source of fundamental rights as they are protected by the Convention.

This degree of consistency with human rights is significant because the right to security in the sense of freedom from fear is seen by many to be a threat to human rights (especially the rights of those suspected of wrongdoing by the authorities),[14] and to liberty more generally.[15] That it might be consistent with (or even foundational to) human rights suggests, by contrast, that there is a large degree of convergence between liberal norms and the right to security. When the right to security is examined for its consistency with various liberal theories of criminal law, the relationship between it and liberal order can be more precisely specified. The institutionalization of the right to security extends the liberal commitment to protect vulnerable individuals from harm to a point where it comes into contradiction with the underlying preconditions of liberal order. In declaring the normal vulnerability of its subjects, the state undermines its own authority in a way that would be intolerable to Leviathan, or indeed any sovereign worthy of the name.

Criminal laws that lack sovereign authority present us with the paradox of a self-defeating insecurity state—a state that upholds the right to security through laws that have as their substantive premise the law's own lack of authority. The historical conditions for the appearance and the survival of this self-contradiction lie in the exhaustion of both the imperial tradition and the representative politics that

[14] L Lazarus, 'Mapping the Right to Security' in B Goold and L Lazarus (eds), *Security and Human Rights* (Hart, 2007).

[15] For a philosophical discussion of the right to security see J Waldron, *Torture, Terror and Trade Offs: Philosophy for the White House* (Oxford University Press, 2010) chs 2 and 6.

formerly supplied the lifeblood of the UK's sovereignty. The result has been the decay of liberal norms into a political culture characterized by permanent emergency. Once the problem of our security laws is understood not to be one of authoritarianism, but of a deficit of authority, a new set of questions for criminal law theory are posed.

That in brief is the argument that I will make. For readers well versed in criminal law theory or the criminal justice literature the argument may seem unconventional in a couple of respects. I am trying to identify and explain recent changes in social norms and their influence on substantive criminal law. Although I will be exploring the law's justification, I am not trying to justify it. Moreover this 'political sociology' of the law's norms employs a method that is a relatively unfamiliar one in criminal law theory. Before explaining the structure of the book, I should give an account of the method of inquiry in order to clarify what the book is trying to achieve and what it is not.

Method of inquiry

The book offers a historical theory of a specific trend in recent criminal legislation. My investigation of that trend proceeded in the following way. I first examined in detail the substantive law of one of the most politically prominent of recent penal laws—the anti-social behaviour order. By analysis of its case law I found that it defined a particular wrong (manifesting a disposition to cause others to feel insecure) and protected a particular interest (subjective security). I sought out the normative argument for the legal protection of that interest in policy documents and then in the social theories that were influential on policy makers at the time. Having identified the normative argument, I found that it could also explain a great deal of other recent legislation. I then considered how the law had protected interests in subjective security in the past so as to identify qualitative differences with the present legal order. Finally I examined the new legal order from the standpoint of a variety of theoretical understandings of the state's penal powers. The purpose was to identify the elements of contradiction and tension within the new order and to understand the political conditions in which such a contradictory structure of law is sustainable.

Hopefully the merits of this method will be self-evident to readers, but since it is an unfamiliar one in theoretical writing about criminal law it may need to be situated with respect to more familiar methods.

The Hobbesian argument that we began with emphasizes the aspect of the criminal justice system that is concerned with the reproduction of social order. However, as Nicola Lacey argues, it is a concern with order 'not exclusively or even primarily in an instrumental, straightforwardly empirical sense, but rather with social order in a symbolic sense: with a society's sense of itself as a cohesive, viable and ethical entity'.[16] Most theorizing about criminal law, however, tends in one

[16] N Lacey (ed), 'Introduction' *A Reader on Criminal Justice* (Oxford University Press, 1994) 28.

way or another to separate the normative concerns of philosophy from the questions of order pursued by social theory, implicitly or explicitly subordinating one set of concerns to the other. The present study resists that separation.

The predominant style of criminal law theory sets out from a philosophical account of freedom or of morality and then reconstructs or criticizes law on the model of that theory. Laws are assessed on the basis of norms announced in advance of any investigation of the actual law and the law itself is welcomed or criticized accordingly. The question that is asked is whether or not the law is legitimate according to the philosophical principles of the theory. But the initial question that we are concerned with here is a different one. It is not whether the legal powers that subjects consent to are normatively right according to an abstract principle, but what makes these powers legitimate in the context of a particular society at a particular time. Though this question is concerned with the normative dimension of law, it invokes a 'social–scientific' concept of legitimacy as opposed to a strictly normative one. Power will be legitimate in this social–scientific sense where subjects consent to it because the power can be justified in terms of beliefs that are shared by governors and governed alike.[17] The philosophical method is necessarily of limited help when we are seeking to answer the historical question of why particular laws enjoy 'legitimacy in context', as we will be here.[18]

In general, the task of explaining legal developments has fallen to criminal justice theory and this has been, by contrast, highly sensitive to social and historical change. Criminal justice policy and the laws it produces have been subjected to minute analysis of the shifting pressures on policy. But theories of criminal justice have been reluctant to take the law's normative content or its justificatory claims too seriously.[19] This is not merely scepticism about the philosophers' normative question—what the law ought to be—but also about the historical question that is central to the current work: the question of why human subjects at a particular time will consent to be ruled by one law or another.

One of the reasons for the indifference to this question seems to be that it is thought to contradict the insight of social theory that the subjects whose consent to power is to be normatively investigated are themselves produced by power. From this perspective, the law's normative claims tend to be understood in the Foucauldian terminology as aspects of the 'rationalities' or 'technologies' of government

[17] D Beetham, *The Legitimation of Power* (Macmillan, 1991) 14–16. Note that this concept of legitimacy is different from, and more demanding than, the more familiar sociological concept of Max Weber, that power is legitimate when the subjects believe it to be (see ibid, 11).

[18] Moreover, the dogmatic pursuit of philosophical method without regard to historical change is potentially misleading for reasons suggested by Lacey: 'Developments in the criminal process, in the penal system, and in the political and economic world, in short affect the *meaning* as well as the *normative significance* of criminal responsibility; and that meaning, produced within an influential system of social signalling, should be a core concern of criminal law theory.' N Lacey, 'The Resurgence of Character', in RA Duff and SP Green, *Philosophical Foundations of the Criminal Law* (Oxford University Press, 2011). To imagine that we can understand the normative significance of legally relevant concepts independently of their changing meaning to living subjects is to leave theory either sequestered in the ivory tower or drifting with events.

[19] L Zedner, 'Dangers of Dystopia' (2002) 22 *Oxford Journal of Legal Studies* 341, 365–6.

through which power constructs its subjects. To ask why subjects consent to a particular power would seem to ignore this insight by assuming that the human subject exists independently of, and prior to, the exercise of power, consenting or dissenting according to some rational calculation of interests or moral evaluation that is mysteriously power-free.[20] It is worth taking a moment to clarify the approach taken to this issue in the present work because here we will be asking about the recent history of social order, but in a way that runs counter to the normatively sceptical approach that is more familiar in theorizing about criminal justice policy.

The sceptical social theory alights on an important aspect of the historical question. It would be a mistake to assume that subjects are merely natural entities given independently of human history and unchanging throughout its vicissitudes. At any particular time, the character and limits of human subjectivity is at least in part a product of how it is imagined to exist, and particularly how it is imagined to exist by authoritative disciplines and institutions, not least the law. But constructions of the subject change over time. And we can ask meaningful questions about why existing subjects consent to transformations of subjectivity achieved through new structures of power without assuming that the individual subject is a naturally free entity who exists independently of power and is only repressed by power. Moreover, there is much to be learned if we do ask these questions.

The fact of a *subject's* agreement to a form of subjugation, the *subject's* reasons for that agreement and the extent to which a *subject* believes in, plays along or resists power's demands, all tell you something important about how that *subject* perceives her- or him-*self* and how she or he is perceived, which in turn tells you something important about who that *subject* is. Without consideration of these reasons and self-perceptions, the theory concerns the construction of subjects only in a very one-sided sense: in the sense of human beings as *subjected to power* and not in the sense of humans as the *subjects of power;* only as beings upon whom power is exercised and not as beings who exercise power.[21] Not only does this theory give an impoverished account of the subjects of law (and implicitly relieves us of responsibility for the law), but also, and more to the point in the present context, it can give only a thin account of the *power* of law. There are significant differences between a

[20] As Michel Foucault put it: 'We should not . . . be asking subjects how, why, and by what right they can agree to being subjugated, but showing how actual relations of subjugation manufacture subjects.' M Foucault, *Society Must Be Defended* (Penguin, 2004) 45.

[21] It is, therefore, the first clause in Foucault's dictum (ibid) that is one-sided from the point of view adopted here. The second clause is unproblematic. The 'manufacture', or indeed the 'construction', of subjects certainly has an ironic connotation, since 'manufacture' or 'construct' are words describing how humans produce complicated artificial *objects.* But from the broadly social–scientific perspective adopted by the present work, the 'manufactured subject' is that peculiar object of power that is capable of imagining itself and becoming a *subject* of power. For Foucault, by contrast, because subjectification is an effect of power it is a trap to be avoided. For him the power of subjectification can and should be *resisted*, perhaps with an 'aesthetics of the self' or a 'politics of the body' or the creation of something entirely different from a subject, but not by indulging in the power-laden discussion of 'legitimacy' or the political consent of subjects. But in so far as the Foucauldian theory itself becomes power/knowledge, it is self-fulfilling: subjects are constructed accordingly as beings subjected to power. See, generally, J Heartfield, *The Death of the Subject Explained* (Sheffield Hallam Press, 2002) 68–75.

power that is exercised through terrorizing those subjected to it, a power that is exercised through their routine and unthinking habits, and a power that is exercised through their wholehearted embrace of its demands—and this is to give only the crudest of normative differentiations. These differences in the normative legitimacy of power go to the core of its quality as power, its capacity to produce or to repress, its potency, its *powerfulness*. As David Beetham puts it:

> legitimacy is not the icing on the cake of power, which is applied after baking is complete and leaves the cake itself essentially unchanged. It is more like the yeast that permeates the dough, and makes the bread what it is.[22]

Without a nuanced understanding of the legitimacy claims of our present criminal law, we will see only the exercise of power and fail to grasp precisely what sort of power it represents, and how powerful a power that is.

In the present work I will, therefore, take the normative content of the law seriously while not making any assumption that the law's subjects are naturally given and merely repressed by law. On the contrary, I will be concerned with the construction of a new subject—the vulnerable subject—and the giving of institutional form and legitimacy to that construction through the normative order contained in new legal powers. In so doing I aim to gain a better understanding of both the contemporary subject of law and of the changing quality of the state power that is being exercised. None of this should be read as a simple dismissal of the work of theorists who do follow a normatively sceptical approach. Their attention to the production of subjects and to the 'technologies' of government is highly attuned to changes in the structure of relations between government and the governed. On these points I will rely on writers drawing on the Foucauldian perspective frequently and some of my conclusions will be familiar to those writers. But this study will take the normative dimension as its primary object of study with the aim of shedding some light on the legitimacy and the authority of the state's penal power.

The method that I rely on here is then neither that of normative philosophical theories of criminal law nor of normatively sceptical sociology. The method of this work is rather that of immanent critique pursued in contemporary criminal law theory by Alan Norrie.[23] By immanent critique I mean setting out from an analysis of the posited legal form, an analysis that seeks to lay bare its conceptual and normative structure, and to uncover the tensions, oppositions, conflicts and contradictions that inhere in this structure. This is the basis of what Norrie describes as a second stage of 'explanatory critique', which explores the 'fault lines' in the historical social context that can account for the contradictory conceptual structure:[24]

[22] D Beetham, *The Legitimation of Power* (Macmillan, 1991) 39. The problem with Foucault's theory is that the concept of power it contains is too unspecific to do the amount of work that the theory requires of it. See also N Fraser, 'Foucault on Modern Power: Empirical Insights and Normative Confusions' (1981) 1 *Praxis International* 272.

[23] A Norrie, *Crime, Reason and History* (Butterworths, 2001); A Norrie, *Punishment, Responsibility, Justice* (Oxford University Press, 2000) 45.

[24] Norrie, *Punishment, Responsibility, Justice,* 45.

Such an approach reflects law's own claims, but at the same time critically explores and decentres them. It involves a respect for the 'internal' presentation of legal concepts (their treatment as if they were formally rational), coupled with a historical and deconstructive exposure of the limits of such an approach. Such a deconstruction takes us into the 'external' social and historical conditions of possibility of the internal presentation. It asks: what claims does law make and how does it sustain them; what is wrong with the claims that law makes and the means of sustaining them; and in what social conditions and contexts does it become possible to seek to make and sustain them.[25]

This passage summarizes the aspirations of the present work. It offers a historically specific explanation of the criminal law's changing normative structure, elucidating the relation of these legal powers to the social and political environment in which they exist. Where Norrie has undertaken a critique that has mostly been directed at the so-called 'general part' (that is the general principles that are claimed by criminal law doctrine), here the critique is directed towards a contemporary development in the so-called 'special part' (the form and content of the many particular offences that comprise the criminal law). This method of immanent critique has an advantage, which will hopefully become clear in its results. As Norrie puts it: 'The strength of such a critique is that it starts from within the field of investigation and works through and beyond it, without imposing, seemingly from without, an alien frame of reference.'[26]

This strength of the method means, however, that the normative stance is secondary to the explanation. It appears at the end of the explanatory analysis and is not set out at the beginning. It is also important to keep in mind that the investigation concerns a specific trend in contemporary penal laws and that trend is the unifying theme of the work. In explaining the law, connections will arise to subjects such as anti-social behaviour policy and criminal justice policy generally, recent political history, contemporary political theory, human rights and normative criminal law theory. But none of these is discussed for its own sake and all only in so far as they arise from or are connected to the trend in penal law that we are trying to understand.

The presentation of the argument

The argument is presented in a way that directly reflects the method. It begins with the law of the anti-social behaviour order (ASBO), moves on to policy and then to social theory. A new normative order is identified in this way and this is then applied to other recent laws. Finally the argument examines the contradiction that this legal structure contains and the historical conditions in which it is sustained.

[25] A Norrie, 'From Law to Popular Justice' in A Norrie, *Law and the Beautiful Soul* (Glasshouse Press, 2005) 41. The term 'deconstruction' is used loosely in this passage and not in the specific sense of the term developed by Jacques Derrida. For Norrie's account of the relation of his critical realist method to that of Derrida see ibid, 6–16.

[26] Ibid, 21.

This order of presentation is intended to emphasize the method that has been relied upon and the necessarily exploratory character of an investigation into a historical moment in which an old political order has passed away and a new dispensation is emerging in its wake. If there is anything to the theory presented here there will be much more to be said, in particular about its application outside the substantive law, its relevance to other jurisdictions, the historical context of the insecurity state and the decay of liberal norms.

In the first three chapters I present a detailed analysis of the law of the ASBO. There are several reasons for this initial focus. The ASBO was the first major contribution to the criminal justice system made by New Labour in government, and it was to become a flagship of their policy. The reason for this flagship status was that by imposing a liability for failing to reassure it provided the most explicit and elaborate protection of security interests of any of the powers I will discuss here. And it was not only the flagship for the government, but for its critics among criminal justice experts too. No measure achieved such notoriety, and the response to it has been overwhelmingly hostile among academic experts.[27] But the ASBO's legal critics have misunderstood it in important respects. The ASBO itself has been consistently misread as a punishment for morally offensive behaviour when it is apparent that its intent was preventive rather than penal (whatever its effect), and that is was aimed at behaviour that causes or risks causing insecurity rather than offence as such. The criminal offence of breach of an ASBO has been taken to be an offence of mere defiance or a course of conduct offence when it was neither. By clarifying these points through a detailed analysis of the measure I hope to show that the proposition that the law protects interests in subjective security, defined in the broadest way, is not an abstract theoretical impression but can be read in the law's black letter. This is the foundation of the claim that will be made later that the wider law has shifted towards protection of a right to security.

Another reason for the focus on the ASBO is that it was the most used of a whole new class of powers dubbed the civil preventive orders, and it has the most extensive case law of any of them. By elaborating the argument with respect to the ASBO we shall be able to see subsequently, in Chapter 7, that the very form of the civil preventive order lends itself to the protection of interests in subjective security whatever the exact conduct that liability to an order covers. The ASBO is, therefore,

[27] The key texts include A Ashworth, J Gardner, R Morgan, ATH Smith, A Von Hirsch, and M Wasik, 'Neighbouring on the oppressive: the government's "Anti-Social Behaviour Order" proposals' (1998) 16(1) *Criminal Justice* 7; A Ashworth, 'Is the criminal law a lost cause?' [2000] LQR 116; E Burney, *Making People Behave: Anti-Social Behaviour Politics and Policy* (Willan, 2005); S Macdonald, 'The Nature of the ASBO—*R (McCann & Others) v Crown Court at Manchester*' (2003) 66(4) *Modern Law Review* 630; RA Duff and SE Marshall, 'How Offensive Can You Get?' in A von Hirsch and A Simester (eds), *Incivilities* (Hart, 2006); AP Simester and A von Hirsch, 'Regulating Offensive Conduct Through Two-Step Prohibitions' in von Hirsch and Simester, ibid; S Macdonald, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of Anti-Social Behaviour' (2006) 69(2) *Modern Law Review* 183. For a more sympathetic view see R Burke and R Morrill, 'Anti-social Behaviour Orders: An Infringement of the Human Rights Act 1998?' (2002) 11 (2) *Nottingham Law Journal* 16; J Donoghue, *Anti-Social Behaviour Orders: A Culture of Control?* (Palgrave Macmillan, 2010).

the most prominent example of a legal form innovated to address the problem of subjective insecurity.

Finally as the flagship New Labour policy, the Coalition government that replaced New Labour has been keen to dispense with the ASBO. The new government's criticisms of the ASBO are, however, wholly focused on its effectiveness.[28] The Coalition's reform proposals make no criticism of the normative content of the substantive liabilities that the ASBO imposed. On the contrary, these liabilities are retained in the new orders proposed as replacements for the ASBO. That is not to say that there are no differences. In one sense the new proposals offer a more limited protection of security interests but in another they are more insidious. The key point is that, for all the noise about the ASBO's ineffectiveness, the Coalition is happy to retain its basic formal structure and the substantive liability that it imposed. The ASBO case law is likely to remain directly relevant to at least one of the orders that the Coalition has proposed to replace it with. But much more important is that the survival of this liability in form and content is the clearest example of the breadth of consensus around the protection of the right to security.

The ASBO, like one of its proposed replacements, takes the form of a court order made up of prohibitions breach of which is a criminal offence. Punishment for breach of an ASBO is, therefore, the result of two separate sets of proceedings, the civil proceedings in which the ASBO is imposed and the criminal proceedings for the breach. The first two chapters analyse the law at each stage of these proceedings. In Chapter 1, I analyse the law governing the imposition of an ASBO. The purpose is to show first that the grounds for imposing an order are defined as any conduct that manifests a disposition that fails to reassure others about their security and second that a finding of liability to an order is best understood as the exercise of a power in administrative law to make a risk assessment and preventive order rather than to impose a punishment. In Chapter 2, I analyse the case law on the criminal offence of breach of an ASBO to show, first, that the offence converts conduct manifesting the same unreassuring disposition from a threat to be controlled by a court order into a public wrong to be punished, and, second, that the penal wrong that the offence defines is a wrong of dangerousness.

In Chapter 3, I consider what is distinctive about the ASBO. I compare it with criminal offences that appear to target the same kind of conduct, specifically section 5 of the Public Order Act 1986, in order to show that the ASBO penalizes not specific or individual acts that fail to reassure others but any manifestation of a disposition that fails to reassure others. I argue that the ASBO imposes a subtle positive obligation of active citizenship: anyone who, by manifesting the unreassuring disposition, fails to fulfil this positive obligation, is formally marked as a second-class citizen by the reduction of their civil rights imposed by the court's order. I review the legal controversy over the ASBO's procedure in the light of its substantive law in order to demonstrate that the ASBO protected a right to freedom

[28] See Home Office, *More Effective Responses to Anti-Social Behaviour* (Home Office, 2011).

from fear. I show that the Coalition's proposed reforms to the ASBO impose the same substantive liability as an ASBO, and represent a more subtle manipulation of procedural distinctions than that found in the ASBO. Finally, I explain why I describe the ASBO's freedom from fear as a right to security.

Chapter 4 turns from law to policy, reviewing the development of New Labour's anti-social behaviour policy in the context of its wider criminal justice and social policies. I seek to show first that the ASBO's imposition of conditional citizenship, in which rights are made contingent on the performance of duties, was central to policy discussion and, secondly, that these duties extended to security questions because the representative citizen was constructed as weak and vulnerable, and in need of reassurance.

Chapter 5 identifies and explains the normative basis of New Labour's policy claim that citizens owe duties of reassurance. I argue that this idea arises from an axiomatic proposition of three theories that had a major influence on New Labour—The Third Way, communitarianism, neoliberalism—and that this proposition remains significant in the civic conservatism underlying the Big Society thinking of the Coalition government. All in different ways assume that the autonomy of citizens is vulnerable to insecurity caused by others' hostility and indifference. To explain the influence of this theory, I offer an account of the partial political victory of Hayekian neoliberalism over welfare liberalism during the 1980s. It is the aspect in which Hayekian ideas failed, I argue, that explains the rise to influence of the other theories, and the emergence with this of the idea of a duty towards others' feelings of security—a right to security.

Chapter 6 considers the compliance of the ASBO's protection of subjective security interests with the European Convention on Human Rights and the wider question of the relationship between vulnerability and human rights. I show that the protection of the interest in subjective security by the substantive law of the ASBO and by section 5 POA 1986 is for the most part consistent with the ECHR and capable of justifying significant interferences with the right to free speech. I argue that while it is not formally a human right, the right to security is recognized as fundamental in the scheme of the ECHR, and that this tends to confirm New Labour's communitarian interpretation of the Human Rights Act. I then explore the theoretical problem presented by the human rights of those individuals made subject to ASBOs. These individuals are often described as vulnerable and with good reason. That their subjection to the degraded citizenship status of the ASBO is compatible with the ECHR notwithstanding their vulnerability raises interesting questions about the relationship of human rights and vulnerability. I distinguish two different senses of vulnerability—universal and particular—and account for the apparent denial of human rights to the particularly vulnerable through a critique of Bryan Turner's vulnerability theory of human rights. I argue that this theory gives no definitive answer to the imposition of liabilities for failure to reassure such as those found in the ASBO, and offers no theoretical resources to resist them.

Having established that the ASBO's right to security is grounded in influential theories and is for the most part ECHR compatible, in Chapter 7 I review the wider

scope of its protection under the criminal legislation enacted by New Labour governments. First I will show that the other civil preventive orders, by virtue of their form, serve to protect the right to security across a wide range of behaviour. After that I investigate the Vetting and Barring Scheme—a very extensive administrative licensing scheme enacted by New Labour but significantly scaled back by the Coalition. Then I look at a range of preparation, possession and ancillary offences that I categorize as preinchoate offences and contrast with properly inchoate offences on the ground that the scope of conduct for which they impose liability to punishment can only be explained in terms of targeting the dangerousness of the offender rather than of her acts. I apply the same analysis to three classic complete criminal offences that have acquired or moved towards a preinchoate form in recent years: fraud, theft and assault. Finally I consider imprisonment for public protection, a controversial sentencing power that reflects the underlying logic of the substantive offences considered here. The chapter is not intended to be comprehensive. The analysis could probably be extended to other offences. The chapter is intended simply to demonstrate that the ASBO was indeed the flagship of a fleet of measures sent out to do battle on behalf of the public's feeling of security.

Chapter 8 reviews the protection of subjective security interests in the criminal law of an earlier period before the ASBO. Again the review of the law is not meant to cover every relevant power but rather to argue that while subjective security interests were protected in different ways, this protection remained piecemeal, implicit or justified in a traditional moralized language quite different from the later more explicit and systematic development of a liability for failure to reassure.

In the next two chapters I investigate the relationship between liberalism and the right to security. Chapter 9 assesses the penal protection of the right to security in the terms of thee recently published broadly liberal theories of criminal law: Douglas Husak's theory of the limits of criminalization; Markus Dubber's critique of the police power; and Alan Brudner's theory of dialogic community. The enemy criminal law theory of Günther Jakobs is also considered briefly in passing. Since these are normative theories, readers should keep in mind that the purpose of this assessment is to understand the relationship of the right to security to liberalism, and not to offer a normative assessment as such. Specifically I seek to argue two points. The first is that moral philosophy in itself gives us no clear answer to the question of how far the law should go in protecting subjective security, and that from one ethical standpoint at least the right to security seems consistent with liberal order. The second is that, from the point of view of liberal political theories of the criminal law, protection of the right to security is inconsistent with the state's authority understood either as a traditional (and essentially illiberal) patriarchal order or as a modern liberal state.

The inconsistency of the right to security with the authority of the state is the starting point for Chapter 10. I show that the substantive law that protects the right to security has the character of emergency power that takes a normalized form, and I offer a critique of the recent theory of the normalization of the state of exception. In particular, I argue that this experience offers compelling evidence that the sovereignty of the state has decayed significantly in the UK, so that the criminal

law's threats are premised on their own inadequacy. I identify the historical precondition of this paradoxical state of affairs in the decay of representative politics, a decay that is an aspect of the political experience already discussed in Chapter 5. I contrast this theory with Garland's apparently similar 'myth of the sovereign state' thesis arguing that the problem of the expansion of penal control is the result of the actual decline of sovereign authority rather than of the political pursuit of its myth, as proposed by Garland.

The book ends with a brief afterword on how criminal law theorists might contribute to solving the problem of the insecurity state. I argue that liberalism is exhausted as a source of political authority and that democratic sources of authority will need to be better understood.

This book is a political sociology of the substantive criminal law, and more particularly of a recent development in what theorists refer to as 'the special part' of the substantive law. Beyond the substantive criminal law, it considers only one sentencing power and does not cover the law of procedure and evidence except in so far as that sheds light on the substantive law of the hybrid civil preventive orders. If there is anything to the argument pursued here it is of undoubted significance to criminal procedure and evidence but that is for another day.

Strictly speaking this is a political sociology of the substantive law of England and Wales, although most of the law it covers applies in some form to the whole of the UK. The claims it makes about the insecurity state are, therefore, restricted to the UK. Having said that, it would be very surprising if the connections drawn here between the legal protection of a right to security, the ideology of vulnerable autonomy and the decline of sovereignty had no relevance to other jurisdictions. But the specific legal and political articulations are likely to be quite different in other countries.

Finally this is a political sociology of contemporary legal developments and its argument is necessarily held hostage to events after it went to press, which was in late 2011. In particular, the writing was completed after the Coalition government published its consultation on the reform of anti-social behaviour powers but before it published a bill. The assumption made in what follows is that the essentials of the proposals in the consultation will be enacted by parliament. However, at the time of writing, the ASBO is still in force and it is, therefore, referred to in the present tense.