Responsibility in a state of insecurity
a historical phenomenology of the preventive turn in English criminal law

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RESPONSIBILITY IN A STATE OF INSECURITY:
A Historical Phenomenology of the Preventive Turn in English Criminal Law

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Abstract

This thesis is a theoretical examination of criminal responsibility, inquiring into its conceptual foundations in order to analyse the concept's form and role in the preventive turn of criminal law and criminal justice experienced in the late twentieth and twenty-first centuries. It argues that there is an intrinsic socio-political dimension to responsibility, arising from the concept's essential connection to the idea of freedom. The specific idea of freedom upheld by liberal theory and society is one which claims to have universal validity, but which is nevertheless dependent upon and conditioned by particular socio-political conditions. This hiatus between responsibility's normative aspirations and its actual context renders its conceptualisation by liberal criminal legal theory and doctrine utterly abstract, and thus unable to account for the full scope and implications of its practices. This thesis suggests that only a dialectical and critical perspective is capable of bridging the theoretical gap in current legal scholarship, thus offering an adequate account of criminal responsibility.

The historical phenomenology endeavoured in this research contains three main methodological components. The first is a critical examination of contemporary legal theory, focusing on criminal responsibility and the changes and transformations occurring in the landscape of criminal law and criminal justice. This analysis reveals a tension in criminal responsibility that renders its conceptualisation intrinsically problematic, in that it appears to not only espouse notions of responsible subjectivity, but also preserve within its subject an essential aspect of dangerousness. The second component is an investigation into classical works of political philosophy, in which arguably lie the conceptual foundations for the dialectic and ambivalent character of criminal responsibility. The third and final moment in the thesis turns to an exploration of the theoretical and ethical challenges surrounding contemporary criminal law, in search of a way to rescue criminal responsibility from its state of insecurity.

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Introduction: Criminal Responsibility and Political Thought

The meaning of politics is freedom. (...) Does politics still have any meaning at all?[1]

As far as legal theory is concerned, the criminal law is in crisis. Recent changes to the criminal legal framework have brought significant challenges to the most basic elements of mainstream normative accounts of criminal law, particularly with regards to its justification as a modern, liberal institution. At the heart of these challenges lie a series of significant transformations to the way in which the criminal law was until recently believed to operate, ranging from the importance of the procedural guarantees embodied in the criminal process and the criminal trial to the form and deployment of some of its most fundamental doctrines, effected by an unprecedented expansion of the scope of criminalisation and the field of crime control.

The main rationale behind this expansion seems to be a growing concern with the provision of security through crime prevention. This concern presses for the reinforcement of criminal law's preventive function, prioritising it over the traditional focus on individual justice upheld by liberal legal theory[2]. This preventive or 'pre-emptive' turn[3] in criminal law and criminal justice has largely been seen to exert substantial pressure on criminal law's coherence and legitimation, since its transformations to criminal law's doctrinal structures draw them apart from elements and expectations linked to the liberal justificatory paradigm[4].

Among the many normative elements of the criminal law, undoubtedly the most important concept affected by the recent crisis has been that of criminal responsibility[5]. As a corollary to concern with individual autonomy and justice, responsibility is the primary symbol of criminal law's status as a modern and liberal institution[6]. In spite of such primacy, however, the transformations brought by the preventive turn have had deep implications upon the doctrinal structure and implementation of criminal responsibility, which by their turn have been interpreted as neglecting, distorting or even undermining the concept's

[1] H. Arendt, *The Promise of Politics* (2005), 108.
[2] Cf. A. Ashworth, L. Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' (2011) in R. A. Duff, S. P. Green (eds), *Philosophical Foundations of Criminal Law*, 279-303.
[3] L. Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' (2009) in B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance*, 35-58.
[4] Cf. D. Husak, *Overcriminalization* (2008); B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance* (2009); R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, V. Tadros (eds), *The Boundaries of the Criminal Law* (2010) and *The Structures of the Criminal Law* (2011).
[5] Cf. R. A. Duff, 'Perversions and Subversions of Criminal Law' (2010) in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, V. Tadros (eds), *The Boundaries of the Criminal Law*, 88-112; N. Lacey, 'The Resurgence of Character: Responsibility in the Context of Criminalization' (2011) in R.A. Duff, S. P. Green (eds), *Philosophical Foundations of Criminal Law*, 151-178.
[6] This status is too frequently taken at face value, in lieu of the criminal law's essentially coercive, authoritarian character and history.

normative centrality[7]. It should therefore come as no surprise that 'the question of individual responsibility' currently 'stands as *the* question of normative criminal law theory'[8].

This thesis engages with such a question, albeit from a different perspective than the one commonly employed within criminal law theory. Legal theory is replete with attempts to provide a general account of responsibility, through which a normative standard can tentatively be applied to the criminal law as a whole, thereby providing specific criminal laws with systematic coherence and validity[9]. From this perspective, it is possible to identify the appropriate scope and limits of the criminal law, so that instances of criminalisation which appear to contradict or overstep these limits – such as those consequent of the preventive turn – can be properly critiqued on the grounds of their normative validity. While this approach to criminal responsibility certainly has its merits – as criminal law theory greatly depends on conceptions of how criminal law *should be* justified and structured, it only offers a limited understanding of how criminal law *is* being justified and structured under actual conditions. Moreover, in distancing itself from criminal law's context, this form of ideal theory tends to neglect the conditional aspect of its own normative premises[10], which greatly reduces its theoretical – especially critical – breadth.

In order to bridge this gap, this project aims to understand criminal responsibility precisely through this relation between normative conceptions of responsibility and the way in which these conceptions are grounded on, shaped by and manifested through doctrinal arrangements and the scope of criminalisation. The main postulate explored by this thesis is that it is only through this relation that criminal responsibility can be adequately examined, not only in terms of the concept's normative structure but also in terms of its practical scope and application. The primary question under examination, then, is how to conceptualise criminal responsibility through a focus on the relation between normativity and context, and to what extent this dialectical perspective can elucidate our understanding of the preventive turn in criminal law and criminal justice. The proposed path to answer both strands of this question is by pursuing what I call a historical-phenomenological[11] account of criminal responsibility, centred on an analysis of responsibility's connection to arguably the most

[7] Cf. many of the essays in the collections referenced above, particularly in R. A. Duff, S. P. Green (eds), *Philosophical Foundations of Criminal Law* (2011).

[8] N. Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64(3) *The Modern Law Review*, 350-371, 350 (emphasis in original).

[9] Recent efforts to achieve such a theory include V. Tadros, *Criminal Responsibility* (2005); R. A. Duff, *Answering for Crime* (2007).

[10] A detailed critique of this kind of vice in criminal law theory can be found in A. Norrie, *Crime, Reason and History* (2001); L. Farmer, *Criminal Law, Tradition and Legal Order* (1997).

[11] The term 'phenomenology' is used throughout this thesis in Hegelian fashion, referring to the method of examining a concept through the relation between its idea and the socio-historical instances of its actualisation. Cf. G. W. F. Hegel, *Phenomenology of Spirit* (1977); G. W. F. Hegel, *Hegel's Philosophy of Right* (1967).

important socio-political phenomenon experienced by contemporary criminal law: insecurity.

THE ARGUMENT

The main argument in this thesis is that there is an undeniable, even if largely neglected and repressed, socio-political dimension to criminal responsibility. This dimension arises from responsibility's intrinsic connection to the idea of freedom, particularly in terms of autonomy and self-determination. To be a legal subject is to be a responsible subject, to be able to exercise one's freedom responsibly in a cooperative socio-political environment. Within the idea of the legal subject, then, there is also an idea of the kind of society in which this subject exercises their agency, as well as the form in which this kind of society is politically organised. These notions of political organisation within responsibility, however, are more normative than they are descriptive – they are more about how the law expects individuals to behave than about how they actually behave. The primacy of normativity within legal responsibility is clearest in the domain of criminal law, where responsible subjectivity occupies an intermediary space between the conception of the legal subject and its political community on one side and, on the other, the idea of a spectrum of human agency which is not only contrary to the model of society sustained by legal subjectivity, but also harmful to it. The political dimension of criminal responsibility is thus one of norms, boundaries, and also conflict.

This relation between the question of individual responsibility and issues of political association offers an interesting perspective through which to investigate the concept of criminal responsibility, for it highlights the contingent aspect of responsibility's aforementioned normative function. Immanuel Kant has classically postulated that a civil state, a state in which right can be universally preserved by coercive public laws, can only be one that is founded on the principles of freedom, equality and independence of each member of society – freedom to live according to one's own conception of happiness, equality of subjection to the civil law and independence in terms of political participation as a citizen[12]. The image of individuality which comes out of these principles of the civil state is deeply embedded in the legal subject, and it is both what justifies the legitimacy of modern punishment and what the penal system is supposed to protect. Legal subjectivity's dependence on this environment of citizenship and political freedom necessitates that this environment be appropriately managed, regulated and preserved – that it be secured.

[12] I. Kant, 'On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice' (1991) in *Political Writings*, 61-92, 77.

There is, therefore, a necessary dynamics between normative ideas of responsibility and the socio-political environment in which they have to be actualised. This dynamic aspect implies that notions of subjectivity embedded within criminal responsibility are not nearly as static or universal as normative criminal law theory seems to generally imply. On the contrary, they are largely conditioned by their context, on which their legitimacy ultimately depends. At the same time, notions of legal subjectivity are irreducible to their context, as they are also constituted by a normative ideological structure which is itself aimed at judging, shaping and conditioning its environment, re-interpreting social and political relations under a juridical perspective. The result of this entrenchment of juridical categories within a universalistic ideological framework is that a legal approach to issues of responsibility tends to obscure the fluidity and complexity inherent to socio-political conditions. As such, the encounter between legal categories of responsibility and the context which they are supposed to evaluate and regulate, particularly when this regulation is made by means of criminal laws, is inevitably permeated by violence.

Attention to the political dimension of criminal responsibility requires the development of a specific perspective which can be able to fully appreciate the concept's dynamicity and contingency. This thesis elaborates such a perspective by means of an examination of the intrinsic relation between criminal responsibility and law's abstract individualism[13]. According to this perspective, the idea of legal subjectivity which arises from notions of legal responsibility can be conceptualised as abstract, because it is unable to fully incorporate the breadth and complexity of the human condition, with the result that there is an inevitable rupture between legal subjectivity and concrete individuality. This fission renders notions of individual autonomy and liberty upheld by legal subjectivity vulnerable to the contingency of socio-political conditions, which severely compromises their claim to universal validity. The term 'insecurity' is deployed in this thesis both in order to conceptualise the phenomenological manifestation of this vulnerability in legal thinking and doctrine, and to understand its theoretical and practical effects and ramifications.

Since the legal subject is inherently abstract, and insecurity is a consequence of the concept's abstraction, there is an intrinsic relation between insecurity and legal subjectivity. This relation, however, is by no means one of harmony, but rather one full of tensions and contradictions. Insecurity is essentially contrary to the environment of order and peaceful coexistence predicated by the rule of law and required by juridical relations. The pervasiveness and normative predominance of legal subjectivity in modern societies, coupled with the legal subject's inherent insecurity, have thus given rise to socio-political settings which are endemically concerned with the issue of security. The liberal model of

[13] Cf. Chapter 1, subsection 1.3.2 below, and more generally A. Norrie, *Crime, Reason and History* (2001).

society behind the modern conception of criminal law, in particular, is a prime example of what Foucault has called 'a society of security'[14] – a socio-political paradigm which, due to the need to reduce human agency to acceptable (responsible) standards, is heavily reliant on mechanisms of security. These technologies are applied in order to guarantee the 'normalisation' of human behaviour[15], managing the insecurity of legal subjectivity by reassuring individuals of the prevalence of juridical relations.

One such mechanism of security is that of dangerousness[16]. Possessing a specifically exclusionary socio-political function, dangerousness defines forms and instances of human agency which cannot be allowed to be freely exercised, on the grounds that such agency is threatening to values and goods which are essential to the integrity of the political community. Understood in this way, dangerousness is not only a reflection of legal subjectivity's insecurity, but is also the most direct means for its management. By defining agency which oversteps the boundaries of legal responsibility as dangerous, dangerousness reinforces and normatively validates these boundaries. Put another way, dangerousness is the other side of legal subjectivity. The dynamics between responsibility and dangerousness thus constitutes the main analytical device for the examination of the conceptual framework of criminal responsibility in this thesis. It serves as an expression of the many contrasts and contradictions inherent to criminal responsibility's theoretical conceptualisation and socio-historical development, such as that between its normative and descriptive aspects, or that between its inclusionary aspirations and its exclusionary practices.

Criminal responsibility can thus best be conceptualised as a specific juridical manifestation of the socio-political normative framework engendered in the relation between legal subjectivity and insecurity. It is both a reflection of the idea that human agency can be understood and respected through conceptions of individual autonomy and responsibility upheld by the law, and the result of this idea's dependence on the management of insecurity in society through conceptions of crime and punishment. The acknowledgment of the existence of these two dimensions to criminal responsibility also highlights the concept's socio-historical contingency, by informing an analysis of how the relation between responsibility and dangerousness varies according to socio-historical conditions.

Such analysis is essential to an understanding of the contemporary framework of criminal law, where criminal law's 'reassurance function'[17] appears increasingly pervasive

[14] M. Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978* (2007), 11.
[15] Ibid, 7.
[16] Ibid.
[17] B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal*, 1029-1091, 1037.

and necessary[18]. By pointing at where the need for this function originates, and how it is deployed, the argument advanced in this thesis posits criminal responsibility as a fundamental theoretical concept in the study of the current state of insecurity in the law.

THE METHOD

The thesis endeavours a historical-phenomenological account of criminal responsibility, mapping the way in which this legal concept is expressed in the contemporary landscape of criminal law and tracing the conceptual foundations of the elements of this manifestation back into modern history. Both exercises are made from the specific perspective of legal theory, prioritising the way in which these phenomena are theorised over the details of their doctrinal and practical implementation. The focus on theory and philosophy is controversial[19], but here it is done with the explicit aim of contributing towards a more immanently critical approach to legal theory, by rescuing and emphasising the 'serious and fundamental relation between struggle and truth, the dimension in which philosophy has developed for centuries and centuries'[20], which seems to have been all but forgotten by the contemporary push towards analytical moral philosophy in criminal law theory.

For this reason, the theoretical perspective developed in this thesis is one which is deeply informed by a dialectical and critical tradition which sees philosophy as inextricably related with history and society, and the development of ideas as a fluid, dynamic and problematic field where concept and context continually interact with and condition each other. A significant measure of the thrust of the argument in this thesis lies in its dialectical method, in its attempt to understand criminal responsibility through a relational[21] approach which aims to escape the boundaries of analytical philosophy, and to understand legal theory not as an isolated, mainly normative field, but primarily as an intersection of social, political and ethical concerns expressed through juridical forms and institutions.

There is a manifest political purpose in employing such a method, of identifying and criticising the ideological bases of the common normative assumptions held by legal theory, and opening this theoretical field to questioning and critique. The present perspective is therefore an exercise in immanent critique, an attempt to re-vindicate the value and

[18] Cf. R. Ericson, *Crime in an Insecure World* (2007); I. Loader, N. Walker, *Civilizing Security* (2007).
[19] Too exclusive a focus on legal theory may lead to a dismissive attitude towards the fluid and controversial relation between criminal law and its social context. Cf. L. Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5 *Social and Legal Studies*, 57-73.
[20] Foucault, *Security, Territory, Population*, 3-4.
[21] Cf. A. Norrie, *Dialectic and Difference* (2009).

importance underscoring liberal law's ethical aspirations by questioning and re-examining its conceptual and normative foundations.

THESIS STRUCTURE

Chapter 1 explores the role of criminal responsibility in the normative framework espoused by liberal criminal law theory, in order to argue that this role engenders a problematic which not only compromises the normative structure of the liberal model of criminal law, but also underpins the premises and expectations grounding the preventive turn. This analysis culminates in a discussion of law's ideological character, the socio-political bases of the legal ideology, and the need to investigate these issues through a dialectical, historical-phenomenological perspective.

Chapter 2 turns to an examination of critical theoretical approaches that focus on criminal responsibility's ideological character and historical contingency. Through these approaches, I trace the development of forms and doctrines of criminal responsibility throughout modernity, bridging the gap between the concept's normative assumptions and its practical complexity and contradiction by means of the dialectical deployment of the concept of dangerousness. I argue that, throughout modern history, what we see is that criminal responsibility is essentially more expressive of dangerousness than it is of legal subjectivity, due to the specific socio-political function played by criminal law and punishment in the maintenance of social order.

The historical analysis developed in Chapter 2 suggests that, in order to grasp the full implications of the pervasiveness of dangerousness in criminal subjectivity, the conceptual foundations of criminal responsibility have to be re-examined, moving away from the placid domain of moral philosophy and into the conflictive sphere of political philosophy. Chapter 3 then traces the conceptual foundations of insecurity to the political theory of Thomas Hobbes, looking at how Hobbes's modern construction of political authority and freedom relied on a conception of human subjectivity which was deeply embedded within a specific model of society. It is the abstract character of this conception of subjectivity, upon which the modern liberal social order relies, that generates the insecurity of the legal subject and the need for punishment, so that criminal law's socio-political function conditions responsibility and punishment's normative justification.

Chapter 4 observes how the insecurity intrinsic to the legal subject is protected by and subsumed under an ideological structure of reassurance, by endeavouring a comparative analysis between Hobbes's socio-political framework and the political theory of John Locke. Locke's model of society provides the conceptual foundations for the notion of reassurance which grounds and explains the ideological basis of the conception of individual autonomy

espoused by the liberal model of criminal law. This theoretical analysis is used in order to propose not only that liberal law's conception of individual responsibility relies on specific socio-political conditions, but also that it rests on a foundation of insecurity, to which it is always liable to return whenever its structure of reassurance falters.

Chapter 5 then historicises and 'modernises' these conceptual foundations through an exploration of Hegel's political – and legal – theory. By means of Hegel's dialectical perspective, I identify the dynamic aspect of the relation between insecurity and reassurance in modern liberal society, and link it to the conceptual framework of criminal responsibility. With this theoretical examination of responsibility fully developed, I return to the historical-phenomenological investigation of criminal responsibility endeavoured in Chapter 2, but now add to it a broader socio-political perspective and a further dialectical element. This is achieved through an engagement with Zygmunt Bauman's concept of ambivalence, referring to the intrinsic conceptual tension and disorder which inevitably arises from efforts to classify and regulate identities[22]. The chapter concludes by identifying the radicalisation of ambivalence in criminal responsibility as the most prominent aspect of the preventive turn, expressed in liberal legal theory's failure to adequately engage with the discourse of security.

Finally, Chapter 6 links the present study in criminal responsibility to a broader reflection on the normative justification of punishment and the concrete socio-political meaning of responsibility, by endeavouring a critical examination of the communicative aspect of punishment from a dialectical perspective informed by the notion of recognition. Relying to a significant extent on Hegel's work previous to the elaboration of his fully-fledged political theory, this chapter aims to find in recognition not only a key to understanding the real problem behind law's abstract conception of responsibility, but also the groundwork for a possible solution.

The thesis concludes with an assessment of its implications, limitations and future directions, ending with a wishful remark that the crisis currently experienced by criminal law theory may also represent an unrivalled opportunity to rethink its foundations and enhance its critical, and perhaps also ethical, potential.

[22] Cf. Z. Bauman, *Modernity and Ambivalence* (1991).

Chapter 1: An Insecure Law for an Insecure World

We are witnessing the end of criminal law.[23]

INTRODUCTION

This chapter identifies a problematic within the framework of criminal responsibility, and then draws upon the issues it raises in order to examine the relation between responsibility and the changes to the framework of criminalisation occurring in contemporary criminal law.

It has long been acknowledged that individual responsibility is at the core of the modern liberal conception of criminal law, as an expression of respect to the freedom and rights of individuals in society. But as the changing landscape of criminal law illustrates complications in the (now) classic link between individual responsibility and state punishment, theorists strive to understand what this means for law's normative framework. The main liberal understanding of the current preventive turn is that the undermining of criminal responsibility suggests a crisis of legitimation which must be tackled, either by a reinforcement of liberal principles and guarantees[24], or by a reconstruction (sometimes more rational[25], sometimes more pragmatic[26]) of the criminal legal system in a way which can place individual responsibility once again in its privileged position.

Against this perspective, however, some theorists have argued that legal concepts and institutions are inherently contingent, and this contingency is reflected rather than resisted by notions of criminal responsibility[27]. In this view, the current state of criminal law is mainly a result of its circumstances, so that responsibility's normativity is shaped by its context rather than imposed over it. Recent developments should then be interpreted as evidence that it is the theoretical (liberal) conceptions of responsibility and criminal law, and not these categories and institutions *per se*, that are in crisis.

The main argument in this chapter is that an investigation of the contrasts and connections between these two approaches to criminal responsibility reveals that there is an essential ambiguity with regards to the notions of individual autonomy and subjectivity

[23] R. Ericson, *Crime in an Insecure World* (2007), 213.
[24] E.g. A. Ashworth, L. Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' (2011) in R. A. Duff, S. P. Green (eds), *Philosophical Foundations of Criminal Law*, 279-303.
[25] E.g. R. A. Duff, *Answering for Crime* (2007).
[26] E.g. J. Horder, *Excusing Crime* (2004).
[27] E.g. N. Lacey, 'The Resurgence of Character: Responsibility in the Context of Criminalization' (2011) in R.A. Duff, S. P. Green (eds), *Philosophical Foundations of Criminal Law*, 151-178.

which come out of the criminal law's treatment of its subject. Moreover, a proper understanding of the form and aspects of this ambiguity is significant for an adequate analysis of the preventive turn in criminal law and criminalisation. This is because the relation between criminal responsibility's normativity and its contingency carries important implications to its role in the legitimation of criminal laws. More specifically, criminal responsibility only seems able to sustain its normative primacy within the criminal legal system because it manages to adapt and conform to distinct socio-political contexts. This malleability, however, implies that the notion of individual autonomy contained within responsibility is not nearly as static or uniform as liberal legal theory maintains. This perspective thus aims to address both the shortcomings of the liberal approach to criminal responsibility, as well as this approach's complicity in the extravagances and insecurity engendered in the current state of criminal law and criminal justice.

Section 1.1 discusses the normative and contextual premises of criminal responsibility, moving from an examination of the main aspects and attributes given to the concept by liberal legal theory to an exploration of the different conceptions of responsibility which arise from the complexity within the doctrinal framework of criminal culpability. This discussion exposes the main problematic identified with regards to criminal responsibility. Namely, responsibility seems to be associated with a single normative framework, but it nevertheless espouses distinct and contradictory conceptions of individual autonomy and subjectivity.

Section 1.2 shows how this issue affects and influences liberal theoretical approaches to the preventive turn in criminal law. Not only is criminal responsibility's ambiguity exposed by these discussions, but it seems that it is precisely the lack of its acknowledgment which feeds the myopia and circularity of the arguments espoused in them. As a result, two quite contrary perspectives on the legitimacy and moral justification of preventive criminal laws can nevertheless both be grounded on the same basic normative framework.

The third and final section proposes a way to engage with this problem by examining the connections between liberal law's conception of individual autonomy and subjectivity and the current state of insecurity through an analysis of the ideological character of the law. Against the methodological division between law and insecurity embedded in the arguments discussed in the previous section, I propose that the juridical individualism inherent to modern criminal law, and particularly evident in its conception of responsibility, results in the law being a gateway to insecurity.

1.1 ENTER THE RESPONSIBLE SUBJECT

What is most distinctive about modern punishment, what is seen to set it apart from pre-modern exercises of the state's penal power, is its concern with individual justice, that is, with providing for a system of criminal justice which treats individuals with respect[28]. In contemporary criminal law theory, the most established theorisations of this liberal aspiration in punishment derive from a school of thought known as 'orthodox subjectivism', a position 'founded on the political values of individualism, liberty, and self-determination'[29]. At the heart of these conceptions of criminal law, there lies the idea that individuals are responsible subjects who are not only able but also entitled to live their lives according to their own plans and reasons, and that it is thus necessary for the law to treat individuals as such.

The subjectivist principle of responsibility which arises from this normative assumption carries two main implications to the criminal law. First, the demand to treat individuals as responsible means that the state should interfere with their liberty only when it is necessary and justified; subjective responsibility is in this sense largely taken to limit the scope and reach of the criminal law, upholding the retributive understanding that 'only those who have in some sense willed their own violation of the law should be punished, and (...) the punishment should be proportionate to the wrong'[30]. Second, however, the need to treat individuals as responsible is also expressed by criminal law as a demand on individuals to act responsibly; in this instance, it is the scope of human agency which is limited, while punishment's role in the enforcement of responsibility is vindicated. 'The criminal law therefore accords individuals the status of autonomous moral agents who, because they have axiomatic freedom of choice, can fairly be held accountable and punishable for the rational choices of wrongdoing that they make'[31].

This 'alignment of law and morality around the model of individual choice and responsibility'[32], reflected primarily through subjective categories of fault such as intention, recklessness and so on, is a cornerstone of modern criminal legal thinking, pervading not only orthodox subjectivist approaches but also most revisionist efforts within recent and contemporary criminal law theory[33]. Even as the traditional structure of subjective

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[28] Cf. D. Garland, *Punishment and Welfare: A History of Penal Strategies* (1985).
[29] I. Dennis, 'The Critical Condition of Criminal Law' (1997) 50 *Current Legal Problems*, 213-249, 237. Cf. also R. A. Duff, *Intention, Agency and Criminal Liability* (1990).
[30] P. Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69(1) *Modern Law Review*, 29-58, 31.
[31] Dennis, op cit, ibid.
[32] A. Norrie, *Punishment, Responsibility, and Justice* (2000), 2. Cf. also L. Farmer, *Criminal Law, Tradition and Legal Order* (1997), ch 1.
[33] E.g. A. Ashworth, *Principles of Criminal Law* (2009).

responsibility is increasingly challenged by the changing criminal legal landscape, a moral philosophical conception of individual autonomy and agency still constitutes the main basis for normative theorisations on penal law, especially with regards to efforts geared towards its rational reconstruction[34]. There is thus an essentially Kantian aspect in modern criminal law theory[35], in that criminal law's justification is significantly reliant on 'some assumption of the moral significance of the individual'[36], presented as aprioristic and largely independent of social context.

The idea of individuals as responsible subjects, predicated by a subjectivist conception of autonomous moral agency, is derived from individual autonomy's status as the unequivocal normative standpoint in liberal theory, 'the primary focus of concern in the moral assessment of any particular set of political arrangements'[37]. Subjective responsibility therefore implies a prominently liberal perspective on criminal law and punishment, due to its focus on guaranteeing that the state affords respect to individuals through the appropriate use of its coercive apparatus. This liberty-oriented, expressive aspect of the criminal law is largely reflective of modern punishment's theoretical background, originated in the work of 'the Enlightenment reformers of the late eighteenth and early nineteenth centuries'[38], who were particularly concerned with decrying the brutality, inefficiency and unfairness of pre-modern penal systems[39]. Modern criminal law and responsibility appear in history (and arguably still in the imagination of liberal theorists) as the imposition of justice and rationality over a coercive and thus potentially unjust institution: criminal law represents the civilisation of state punishment. Liberal legal thinking is thus permeated by the notion that criminal responsibility is mainly about limiting state power, keeping it within acceptable and justifiable boundaries. It is a rational, moral philosophical assessment which is laid upon and fit into the political framework of punishment.

This normative perspective on criminal responsibility is what allows liberal criminal law theorists to understand theories of responsibility as a mainly analytical philosophical process, whereupon a moral concept (responsibility) is applied into a particular socio-political environment (punishment) in order to civilise it. According to this viewpoint, what is required of criminal law theory with regards to responsibility is to determine 'what is

[34] Cf. R. A. Duff, *Answering for Crime* (2007); V. Tadros, *Criminal Responsibility* (2005).
[35] For Kant's conception of punishment, cf. *I. Kant, Metaphysics of Morals: Metaphysical Elements of Justice Pt.1* (1999). For a critique of its influence in English criminal law, cf. A. Norrie, *Punishment, Responsibility, and Justice* (2000).
[36] N. Lacey, *State Punishment* (1988), 144.
[37] Ibid.
[38] Ramsay, 'The Responsible Subject as Citizen', 31. Cf. also A. Norrie, *Law, Ideology and Punishment* (1990).
[39] Cf. K. J. M. Smith, L*awyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (1998).

necessary for the proper attribution of criminal responsibility'[40], nothing more and certainly nothing less. Theories produced under such assumptions are presented as moral assessments of criminal law institutions, in which the expectation is for the latter to adequate themselves to the former's normative demands. Criminal law is thus taken to possess a mainly normative function, that of upholding the tenets of individual responsibility within the structure of criminal justice. What is interesting to note is that the framework of criminal responsibility itself intrinsically presents the concept as a regulative idea, as an expression of individual justice, a 'moral demand' pressed at the service of 'the individual person' for their protection against other values and interests in society[41]. This is why criminal responsibility is conceptualised as belonging to the 'general part' of criminal law, the set of universalistic rules and principles which ought to be upheld by the contingent elements of the 'special part', the specific criminal laws and their sets of offences[42].

This methodological division of labour within criminal law helpfully expresses an important tendency in criminal law theory: the tendency to separate issues of responsibility and liberty from issues of crime and security. Within this separation, the first term is concerned with the theorisation of principles which can guarantee criminal law's legitimacy as a liberal institution, while the second is concerned with applying these principles to specific circumstances, through the enactment of laws and offences. For the most part, liberal criminal law theory has focused on the former, and only recently began to once again take some interest in the latter[43]. Even though criminalisation is back in the criminal law theory agenda, however, the theoretical implications of this methodological division persist, in that thinking about crime within criminal law mainly means applying a general normative framework against what is considered to be a contingent, and therefore unprincipled, environment. In essence, then, 'criminal law proper' remains about engendering an essentially normative structure which is capable of actualising a universalistic idea of individual justice within a contingent socio-political framework; the criminal law is predominantly conceptualised as a civilising institution, striving to protect individual agency against volatile and potentially dangerous forces in society.

[40] Tadros, *Criminal Responsibility*, 45.
[41] H. L. A. Hart, *Punishment and Responsibility* (2008), 21-22.
[42] Cf. N. Lacey, C. Wells, O. Quick, *Reconstructing Criminal Law: Texts and Materials* (2010), ch 1; J. Gardner, 'On the General Part of Criminal Law' (1998) in R. A. Duff (ed), *Philosophy and the Criminal Law: Principle and Critique*, 205-256.
[43] Cf. note 4 above.

1.1.1 Individual Autonomy and the Problem of Crime

At the core of the civilising purpose of criminal law lies the idea of individual autonomy, figuring as 'one of the fundamental concepts in the justification of criminal laws', by upholding a descriptive assumption (that individuals are autonomous) that imposes upon these laws a normative demand 'that each individual should be treated as responsible for his or her own behaviour'[44]. It is as a reflection of this demand that criminal responsibility is established in criminal law as a concept which is supposed to maintain order and protect the autonomy of individuals from threats which might otherwise arise from the complex socio-political environment where punishment operates. The greatest threat explored by liberal theoretical literature is that of arbitrary power, the unprincipled exercise of authority by the state which leads to unjust punishment. One of the main concerns regarding criminal law is thus that it should be informed by a principled approach which can secure individuals from undue interference from the state[45].

With that in mind, there is a problem in liberal theory's emancipatory project which appears to arise from criminal responsibility. At the same time as it is supposed to contain the state's penal power, in order for punishment to be justified, the idea of individual autonomy which supports responsible agency also has to acknowledge or at least to expect the possibility of crime. Embedded within the normative notion that individuals can be held responsible for crime is the idea that individuals can and do commit crimes[46]. Coupled with the idea that crime is in itself a threat to individual autonomy, criminal law's legitimacy as a modern institution depends not only on it being able to contain the threat of arbitrary power, but also and mainly on it being able to control and suppress the danger inherent to crime.

The appropriateness and necessity of punishment is intrinsic to the notion of criminal responsibility; indeed, Herbert Hart has even argued that answering for wrongs, which liability carried the potential for 'punishment or blame or other adverse treatment', was the original meaning and thus 'the primary sense of responsibility'[47]. This simple, commonsensical statement in reality reveals a tension within the traditional characterisation of criminal responsibility, for it makes it clear that responsibility is not simply deployed as a control on state punishment, but also as a vehicle for punishment itself: responsibility and punishment go together. Thus although the criminal law aims at maintaining state punishment within principled boundaries, it also has an intrinsic interest in preserving, strengthening and justifying the state's penal power.

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[44] Ashworth, *Principles of Criminal Law*, 23.
[45] Cf. L. Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) *Journal of Law and Society*, 507-533.
[46] Cf. D. Garland, *The Culture of Control* (2002), 15-16.
[47] Hart, *Punishment and Responsibility*, 265.

The co-relatedness of crime control and criminal responsibility also suggests that the separation between general and special part, between universal principles and particular laws, may not be nearly as neat or even feasible as theorists of responsibility suggest. Instead, the intrinsic relation between responsibility and punishment, coupled with the notion that punishment is an aspect of the political arrangements which the idea of responsibility is supposed to morally assess, implies entanglement rather than separation between these two poles. The idea of crime in particular is part of both the normative framework of responsibility and the contingent socio-political environment in which the criminal law operates.

Criminal law theorists have long tackled the complexity of the concept of crime, particularly with regards to what it represents to the framework of criminal responsibility, as it is the nature of crime that conditions the particular meaning which responsibility acquires in criminal law. Although criminal responsibility is largely conceptualised as a special kind of moral responsibility, and therefore belonging more to the realm of moral philosophy than to the more contextual sphere of social and political theory, the definition of crime in itself seems to complicate this assumption[48]. A common example of legal theory's attempt to deal with (and resolve) the complexity of crime can be found in crime's conceptualisation as a public wrong. The public nature of crime seems to defy a purely moral subjectivist interpretation of its wrongfulness; Antony Duff, for instance, stresses that '[w]e should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public, ie the polity as a whole'[49]. A proper understanding of crime therefore has to go beyond individualistic conceptions of victim and perpetrator, towards a more comprehensive examination of the socio-political environment in which the concept is produced and actualised, since it concerns the polity as a whole.

Furthermore, the political community which constitutes criminal law's contextual environment is not only concerned with issues of individual liberty; rather, it usually endorses diverse interests, many of which may sometimes come in conflict with the liberty of individuals. As an expression of public concern, the idea of crime is not limited or circumscribed solely by individual autonomy's moral quality or dimension. While Duff's conception only subtly refers to this contingency in crime, it is more apparent in Feinberg's reformulation of Mill's harm principle[50] in his liberal theory of law[51]. Addressing Mill's

[48] Cf. L. Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5 *Social and Legal Studies*, 57-73.
[49] Duff, *Answering for Crime*, 141.
[50] '(...) the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. (…) the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.' J. S. Mill, *On Liberty* (1989), 13.
[51] J. Feinberg, *Harm to Others, 1 The Moral Limits of the Criminal Law* (1984).

postulate that the notion of harm should represent the main grounds for restraint in criminalisation, Feinberg stresses that 'only setbacks to interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense'[52]. Feinberg thus suggests that there is interdependence between the notions of harm and wrong in crime, an intuition which should be transported to a discussion of responsibility. While the wrong in crime points to its moral aspect, the harm in crime points to its relatedness to the socio-political environment.

Crime is therefore not just a moral wrong, but a wrong which concerns the polity as a whole, and concerns it mainly because it is actually or at least potentially harmful to the values and interests upheld by it. There is an organic relation between the normative conception of crime and the socio-political context from where it springs. A purely moral philosophical conception of individual autonomy is insufficient to grasp this complexity in criminal law's normative framework, and this is the reason why Andrew Ashworth, one of the most prominent contemporary defenders of individual autonomy's primacy as a criminal legal principle, concedes that an 'autonomy-based theory' of criminal law 'cannot be sustained without wide-ranging qualifications', so that it 'should find a central place for certain collective goals, seen as creating the necessary conditions for maximum autonomy'[53]. It is interesting how Ashworth implies not only that a purely moral philosophic conception of individual autonomy is insufficient to understand or explain the full scope of the criminal law and its conception of responsibility, but also that this is because this conception is in itself related to and dependent upon other aspects of the socio-political environment which act as conditions for its full actualisation.

Perhaps unwittingly, Ashworth's qualification of autonomy suggests that the normative liberal conception of individual autonomy and responsibility is, in itself, affected by socio-political contingency. This relation between the normative and the operative frameworks of criminal law hints at a tension latent in the way in which criminal responsibility is commonly conceptualised and applied within criminal law doctrine. Despite its place of honour within law's justificatory framework, criminal responsibility's central importance is evenly matched by its elusiveness, clearly evidenced by the concept's problematic status in contemporary criminal law theory and doctrine. The main reason for this elusiveness lies in the very way in which responsibility is tentatively conceptualised, as a normative moral demand which, although being part of criminal law, is somehow detached from it, hovering above it untouched by its context. But in being distanced from the messiness of crime, criminal responsibility as a concept becomes sterile and abstract, unable

[52] Ibid, 36.
[53] Ashworth, *Principles of Criminal Law*, 25.

to properly reflect the very grounds upon which it operates. This hiatus becomes clear once the context of criminal responsibility attribution is more closely analysed.

1.1.2 The Context of Responsibility: Character, Capacity and Outcome

It is quite understandable that there is 'considerable allure'[54] in the idea of establishing a unitary theory of criminal responsibility, capable of accounting for the full scope of criminal liability and therefore securing responsibility's place as a guarantee of the fairness of the criminal law's punitive function. For this reason, great work has been put into seeking a single normative ground on which the idea of responsibility for crime can be solidly explained, circumscribed and justified[55]. In general, these theories start off from a common denominator, the already discussed moral philosophical conception of autonomous agency. The devil, however, is in the detail: when it comes to the point of discussing why and in what terms these autonomous individuals should be held responsible for crime, or even what it means to be criminally responsible, different theories start to contrast with each other, often significantly. The tension between these distinctions is further emphasised when it becomes apparent that no single theory is capable of fully accounting for the whole scope of criminal liability; instead, each perspective better accounts for some elements while neglecting or omitting others. Taken as a whole, the framework of criminal responsibility looks more like a 'patterned mixture'[56] of different conceptions of responsibility than the result of a single normative background.

While most theorists of criminal responsibility take the concept's theoretical and doctrinal fragmentation as a sign that there are elements of liability in criminal law which ought not to be there, and that there is still room for further rational reconstruction in its theoretical structure, some scholars have raised the possibility that the multifaceted aspect of criminal responsibility is inherent to it, so that no unitary theory is capable of grasping its full scope. The most traditional example of a proper examination of responsibility's 'hybridity'[57] can be found in George Fletcher's study of the changing patterns of liability[58], whose intuition has been more recently taken on by scholars such as Jeremy Horder[59] and

[54] J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12 *Law and Philosophy*, 193-215, 194.
[55] Notable contemporary examples are Duff, *Answering for Crime* and Tadros, *Criminal Responsibility*. Cf. Also M. Moore, *Placing Blame* (1997).
[56] Horder, 'Criminal Culpability', 214.
[57] A. Norrie, 'Historical Differentiation, Moral Judgment and the Modern Criminal Law' (2007) 1 *Criminal Law and Philosophy*, 251-257, 255.
[58] G. Fletcher, *Rethinking Criminal Law* (1978).
[59] Horder, 'Criminal Culpability'. Many other contemporary theorists also acknowledge the existence of competing theories of responsibility, but they tend to do so only in order to defend a specific conception which they believe is more appropriate or comprehensive. Cf. Tadros, *Criminal*

Nicola Lacey[60]. According to these authors, an adequate examination of the framework of criminal liability requires an analysis of at least three different conceptions of responsibility, each of which accounting for different aspects of practices and doctrines of responsibility within criminal law.

It is important to note, however, that although these theories may be seen as complementary, they are by no means easily coherent with each other. On the contrary, their complementarity appears to stem precisely from each conception's ability to confer a normative interpretation of what it means to be responsible for crime that differs from the other conceptions, but that is able to explain aspects of the criminal legal system which they have neglected or obscured. Nevertheless, a comparative analysis of these different notions of responsibility which inhabit the framework of criminal liability can be used to identify that although criminal responsibility may be contingent, such contingency appears to be influenced by and related to the subjectivist normative background of responsibility. The link between the normative and operative aspects of criminal responsibility is particularly apparent in the contrast between the two most popular contemporary conceptions of responsibility in criminal law theory, capacity and character.

Capacity responsibility is largely considered 'the dominant way of thinking about responsibility in contemporary British and American criminal law doctrine'[61]. This conception possesses a natural association with Kantian ethics, thus being intimately linked with orthodox subjectivism and its subjective categories of *mens rea*. Under this conception,

> the foundation of not only a person's status as a responsible agent answerable to the normative demands of the criminal law but also of an attribution of responsibility for specific actions lies in human capacities of cognition (knowledge of circumstances, assessment of consequences) and volition (powers of self-control).[62]

Capacity therefore operates at two different levels. First, it upholds the conceptualisation of individuals as responsible subjects by assigning to them specific capacities which ground their responsible agency, and which are only exceptionally negated by special circumstances (such as age, insanity, etc.). Second, it establishes that responsible agency is only properly engaged when such capacities are unhindered, so that responsibility is only attributable when an individual's capacity has been exercised, such as in circumstances of advertent conduct.

Responsibility; R. A. Duff, 'Choice, Character, and Criminal Liability' (1993) 12(4) *Law and Philosophy*, 345-383.

[60] A substantial part of Lacey's work is dedicated to a study of criminal responsibility. Cf. N. Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64(3) *The Modern Law Review*, 350-371; N. Lacey, 'Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice' (2007) 1 *Criminal Law and Philosophy*, 233-250; N. Lacey, 'Character, Capacity, Outcome: Toward a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law' (2007) in M. D. Dubber, L. Farmer (eds), *Modern Histories of Crime and Punishment*, 14-41.

[61] Lacey, 'Space, Time and Function', 236.

[62] Lacey, 'Character, Capacity, Outcome', 26-27.

Hart's work on responsibility[63], the most influential account of the capacity conception to this day, at first glance appears to ground criminal responsibility exclusively on such ideas of advertent conduct and free choice[64]. This choice-based version of the capacity conception, however, offers an extremely limited account of the instances of liability in criminal law, and has particular difficulty in explaining the widespread occurrence of objective liability, such as negligence[65]. For this reason, Hart is forced to shift the focus of capacity responsibility in order to incorporate negligence into his theory, by stressing that '[w]hat is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities'[66]. In this 'complex capacity theory'[67], although the idea of capacity as grounding the individual's status as a responsible subject remains the same, the focus on responsible agency changes from the requirement that the individual's capacities have been actively and properly engaged to a much wider judgment of whether one's capacities *could* (and therefore should) have been engaged.

Although this more complex conception of capacity responsibility 'offers an account more likely to be able to rationalize the actual shape of systems of criminal law'[68], it does so by broadening and hence obscuring the precise moment when criminal responsibility can be attributed, leaving it 'hidden behind the all-embracing notion of "fair" or "unfair" opportunity'[69]. In emphasising what constitutes responsible agency, Hart's discussion of negligence offers a sophisticated picture of the legal subject which his conception of responsibility has in mind: an individual who is expected to act according to the law, who has the capacity and opportunity to respond to the law's normative demands, and whose criminal conduct characterises a failure to take the opportunity to behave responsibly. What is curious is that the effort to elaborate on the aspects of responsible subjectivity ends up obscuring the details and elements of what it means to be responsible *for crime*. Capacity responsibility therefore focuses primarily on what it means to be a responsible subject who obeys the law, a *legal* subject, and only incidentally on what it means to be a responsible subject who breaks the law – a *criminal* subject.

[63] Hart, *Punishment and Responsibility*.
[64] Ibid, 22.
[65] For a detailed choice theory of responsibility, cf. Moore, *Placing Blame*. For a critique of the choice conception, cf. Horder, 'Criminal Culpability', 198-201; Tadros, *Criminal Responsibility*, 54-66.
[66] Hart, *Punishment and Responsibility*, 152.
[67] Horder, 'Criminal Culpability', 202.
[68] Lacey, 'Character, Capacity, Outcome', 28.
[69] Horder, 'Criminal Culpability', 203.

In contrast, the character conception is mainly concerned with emphasising the judgment which is implied in the ascription of criminal responsibility, examining the meaning of a specific conduct by looking at how it 'reflects' on the agent, and what this reflection says about their character[70]. Character responsibility has a long history, its conceptual origins being traced back to the work of philosophers such as Aristotle and Hume. More recently, it has received moderate support as a valid and fruitful theory of criminal responsibility[71]. Lacey argues that character possesses two main manifestations, either in the form of a more radical 'overall-character principle' which 'holds that the attribution of criminal responsibility is founded in a judgment that the defendant's conduct is evidence of a wrongful, bad, disapproved character trait'[72], or in the form of a more 'cautious' character principle, which 'restricts itself to an evaluation of the specific conduct that forms the basis for the present allegation'[73]. In both expressions of the theory, the main normative point is that the defendant's conduct displays a kind of attitude or disposition which is considered vicious, thereby emphasising that it is the wrongfulness of criminal behaviour, and not the defendant's status as a responsible subject, which is the specific focus of criminal responsibility.

The overall-character principle seems to go as far as rejecting the criminal's potential for legal subjectivity, as crime is interpreted as the manifestation of a bad character trait over which the individual has little or no control, thereby vitiating the very possibility of responsible agency on the part of that individual. The cautious principle offers a more nuanced interpretation, for although the defendant's conduct is still seen to display viciousness, this is taken to blemish the defendant's character rather than reflect it entirely. This version of the character conception 'preserves the specific allegation of criminal conduct as central to the rationale for conviction and punishment and is founded on a particular understanding of D's status as a moral agent: a reasoning being responsible for his or her beliefs, desires, emotions, and values'[74]. The cautious character principle is thus compatible with the moral conception of responsible subjectivity, while it also emphasises the specific quality of responsibility for crime. But at the same time that it can be made to maintain the criminal's status as an autonomous moral agent, character responsibility also demonstrates that the subject of criminal law is somehow different than a law-abiding individual, for they are a subject whose agency has fallen below the substantive moral standard upheld by the legal framework.

[70] Tadros, *Criminal Responsibility*, 47.
[71] Cf. M. Bayles, 'Character, Purpose, and Criminal Responsibility' (1982) 1 *Law and Philosophy*, 5-20; Lacey, *State Punishment*, Tadros, *Criminal Responsibility*.
[72] Lacey, 'Character, Capacity, Outcome', 29.
[73] Ibid.
[74] Ibid.

The character theory is able to explain the reasoning behind many elements of criminal liability, such as defences like duress and loss of control, and particularly the many standards of reasonableness abounding in contemporary criminal law, in which responsibility is linked to the notion that the defendant's conduct has proven unsatisfactory when compared to that 'of an idealised conception of an agent of good character'[75]. These examples evidence that, in many instances, what is important in the assessment of criminal responsibility is not exactly a confirmation of the individual's responsible agency, but a judgment regarding how and to what extent the defendant's agency has drifted away from what is expected of responsible legal subjects. Likewise, what is central for character is not for the individual to have been proven to possess the capacities of a responsible person, but to 'have shown himself, through his action, to be the sort of person who deserves the kind of criticism implied by the imposition of criminal responsibility'; that is, for the conduct to reflect on the agent 'in a way that makes the kind of criticism communicated by the imposition of criminal responsibility appropriate'[76]. The image of criminal subjectivity which comes out of the character conception, of 'the sort of person who deserves' punishment, is thus substantially distinct from the responsible subject deriving from capacity responsibility.

The rationale for this distinction can be related to the organisational separation within criminal law. Capacity responsibility is closer to the universalising impulse within law's normative framework, the idea that individual autonomy should uphold a uniform conception of subjectivity throughout the landscape of criminal responsibility. Such a focus, however, drifts too far away from the specific kind of moral judgment contained in the attribution of criminal responsibility. Character, on the other hand, constructs a conception of subjectivity directly informed by 'the *kind* of response that the imposition of criminal responsibility implies'[77]; it thereby addresses the need for punishment and thus maintains a much closer connection with 'the importantly practical orientation of the criminal law as a form of social control'[78]. The fact that this shift in focus gives rise to distinct and apparently irreconcilable conceptions of criminal responsibility suggests that there is a tension within the liberal conception of autonomy and responsible subjectivity in relation to crime which cannot be adequately grasped by a purely normative, unitary theory of criminal responsibility, and that leaves the framework of criminal law open to ambiguity.

This ambiguity ironically carries the potential of compromising criminal responsibility's intrinsic link with the notion of responsible subjectivity, by shifting the focus of criminal liability from the agent's status and conduct to an assessment of the outcomes

[75] Horder, 'Criminal Culpability', 207.
[76] Tadros, *Criminal Responsibility*, 49.
[77] Ibid, 48 (emphasis in original).
[78] Lacey, *State Punishment*, 67.

which are sought or produced by their agency. Agency, understood as the connection which an agent's purposes and outcomes has with their sense of identity, has become paradigmatic to the analytical structure of contemporary theories of responsibility[79]. While capacity and character theories deal with the tense relation between notions of responsibility and crime by focusing on either of these terms as the basis for their moral assessment, the agency conception of responsibility seems to highlight precisely the connection between them. But agency only manages to accomplish such compromise by assuming an instrumental aspect, discarding the more complex moral issues raised by the two previous conceptions in preference of a pragmatic focus on the relation between agent, conduct and outcome.

An example of this approach is given by Lacey in what she calls, paraphrasing Tony Honoré[80], 'outcome-responsibility', a conception 'based on the idea that we are truly responsible for the outcomes of our actions, even when they are accidental'[81]. This approach to responsibility, abundantly represented in contemporary criminal law by absolute and strict liability offences, is grounded on the understanding that 'even though we are related to unintended outcomes differently than to intended results, they nonetheless engage our agency in some morally relevant way'[82]. This relation between agency and outcome, which Honoré deems 'the basic form of responsibility in any society'[83], suggests that individuals can be held responsible even for accidents. But in focusing predominantly on how and to what extent a specific outcome, even if unintended, can engage an individual's agency in a morally relevant way, this conception says very little about the specific way in which the attribution of criminal responsibility is morally relevant. As a result of its preoccupation with establishing a link between the individual's agency and the harm produced by it, agency responsibility takes the wrongfulness implied in criminal responsibility's moral judgment for granted.

The multifaceted nature of the framework of criminal responsibility is thus indication not only that a moral philosophical approach to criminal law's normative framework is inadequate to grasp the complexities of criminal subjectivity, but also that the maintenance of a conceptual division between criminal law's normative grounds and its contextual environment is prone to fill the former with ambiguity. In order to bridge the gap

[79] A. Ripstein, 'Justice and Responsibility' (2004) 17 *Canadian Journal of Law & Jurisprudence*, 361-362. For examples of this phenomenon, cf. Tadros, *Criminal Responsibility*; Duff, *Answering for Crime*. Tadros stresses this point by saying that 'Agency is often thought, and I will argue rightly thought, to be at the heart of responsibility' (V. Tadros, 'The Scope and the Grounds of Responsibility' (2008) 11(1) *New Criminal Law Review*, 91-118, 91-92).
[80] T. Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 *Law Quarterly Review*, 530-553.
[81] Lacey, 'Character, Capacity, Outcome', 30.
[82] Lacey, 'Space, Time and Function', 239.
[83] Honoré, 'Responsibility and Luck', 552.

generated by this conceptual division, it is necessary to examine the nature of the tension generated by it in greater detail.

1.1.3 Responsibility's Ambiguity

There are thus strong reasons to conceptualise the framework of criminal responsibility in a way which can account for its complexity, so that a study of responsibility's hybridity should be seen as essential for an understanding of the conceptual foundations of contemporary criminal law. This does not mean, however, that we should lose sight of the moral and normative aspect of the concept, or neglect its relevance to responsibility's doctrinal application. Victor Tadros has highlighted that a multifaceted perspective on responsibility can lead to a serious epistemological mistake, a failure 'to distinguish between questions about how guilt is proven from the conception of criminal responsibility that is in play'[84]. In support of a unitary normative approach to responsibility, Tadros argues that even though conditions of culpability may be variable and contingent, 'the central idea of holding an individual responsible is itself historically stable'[85].

Although in many ways Tadros's critique is simply geared towards rescuing a moral conception of responsibility and therefore maintaining the purity of its legitimatory function, there is at least one reason why his objection should not be dismissed too hastily. This is because, to a large extent, there is one aspect of the notion of responsibility which has remained stable throughout the different conceptions analysed here: the idea of individual autonomy. Without the notion of autonomous agency, it is fair to assume the modern framework of responsibility as a whole would be irremediably compromised.

What Tadros fails to realise, however, is that this somewhat stable notion of individual autonomy is not what directly informs and constitutes the conception of criminal responsibility in any specific circumstance. Instead, this idea is substantively conditioned by the socio-political framework in which the criminal law operates, a framework which is indissociable from a specific conception of political community and, most importantly, from a specific conception of the meaning and relevance of crime. The moral ideal of responsible subjectivity *does* inform criminal law's conception of responsibility. However, this relation is not actualised through the normative imposition of moral responsibility over criminal law's socio-political environment, but precisely through the *interplay* between criminal law's structural conditions and its normative aspirations. Criminal responsibility is thus

[84] Tadros, *Criminal Responsibility*, 5.
[85] Ibid.

more than criminal law's adaptation of a universalistic moral conception of responsibility; it represents law's 'very conception of what it is to be a subject of criminal law'[86].

The relation between the idea of responsible legal subjectivity and the socio-political environment of punishment can be seen to be predicated on insecurity. Autonomy is conceptualised as constantly under threat, either from the arbitrary exercise of state power or from the dangerousness of crime, and criminal law's legitimation is taken to depend on its ability to effectively protect autonomy from both these threats. At the same time, however, the criminal law necessitates state power in order to quell the danger of crime, so that the interplay between these two sources of insecurity is unbalanced: state power is both threatening and necessary, while crime is just threatening. Therefore, as far as insecurity is concerned, the urge to control crime through punishment is stronger than the urge to protect autonomy from state power. It is only when the threat of crime is under control that the need for protection from the state can be properly engaged. This tense and unbalanced relation stands as the main force behind the fragmentation within the normative framework of criminal law.

Criminal responsibility thus possesses an essential ambiguity, as a result of autonomy's intrinsic insecurity in the environment of criminal law. On the one hand, criminal law is supposed to uphold the responsible subject as a trustworthy legal subject, thereby protecting individuals from unwanted and unnecessary interventions by the state's authority. This concern is more openly expressed by the capacity conception of responsibility. On the other hand, however, criminal law is also supposed to protect individuals from crime, which means not only preventing crime for the sake of the autonomy of victims and criminals themselves, but also for the sake of the political community, whose values and interests are conditions for the exercise of autonomy in society. It is this concern which is prevalent within the character and outcome conceptions of responsibility. Thus the same general idea of individual autonomy, when interacting with the complex socio-political environment of modern criminal law and punishment, gives rise to different notions of responsibility, which themselves espouse distinct conceptions of criminal subjectivity. These contradictory conceptions are able to coexist because both the moral philosophical idea of autonomy and the contextual complexity of socio-political conceptions of crime and community are constitutive of the concept of criminal responsibility.

The failure of liberal criminal law theory to grasp the ambiguity in criminal responsibility is reflected by its tendency to neglect the tension between legal and criminal subjectivity – between responsibility as a predicate for obedience to the law and as a judgment of criminal behaviour. This theoretical myopia leaves criminal law theory

[86] Lacey, 'In Search of the Responsible Subject', 351.

oblivious to the link which exists within liberal law between autonomy and insecurity. In order to explore this interplay in detail, it is helpful to look at the contemporary landscape of criminal law.

1.2 AN INSECURE WORLD

Recent changes to the criminal legal landscape are intimately associated with changes in society, and with how these changes influence the state's role in the maintenance of law and social order. It is largely uncontroversial that shifts in criminal law and punishment in the last few decades had tended towards an increase in punitiveness and regulation, as well as a growing focus on prevention, security and crime control, and that these changes have occurred to a significant extent as a reflection of and reaction to social, economic, political, technological and cultural changes in society[87]. This much is recognised by legal theory and doctrine; in this section, however, I aim to examine the way in which the interplay between law, politics and society is interpreted by liberal criminal law theory, in order to argue that acknowledgement of the influence of socio-political conditions upon the framework of criminal law is used only in order to reinforce and reinstate the normative primacy of an isolated and detached conception of law's role in society.

In other words, the interplay between law and its context is only acknowledged by liberal theorists to a very limited degree, and only in order to ultimately reject it as undesirable. As a result, traditional liberal legal thinking is unable to grasp the full extent to which law's normative grounds are related to the current state of insecurity. Furthermore, it is this theoretical and doctrinal myopia which leaves liberal law ultimately vulnerable to security-oriented, preventive transformations in the landscape of criminal law. Law's methodological isolation from insecurity paradoxically renders it insecure.

The section starts with a discussion of trends within the contemporary socio-political landscape, using a sociologically-oriented perspective in order to discuss a few general aspects of what I call the contemporary state of insecurity in the law. Then, the section turns to an analysis of some of the main developments resulting from 'the changing role of the criminal law in the modern state'[88]. For these purposes, I rely primarily on Andrew Ashworth and Lucia Zedner's joint paper, 'Defending the Criminal Law'[89], in order to set

[87] There is an extremely large and still growing variety of works that explore this phenomenon. Among others, cf. D. Garland, *The Culture of Control* (2002); B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance* (2009); R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, V. Tadros (eds), *The Structures of the Criminal Law* (2011); R. Sullivan, I. Dennis (eds), *Seeking Security* (2012); P. Ramsay, *The Insecurity State* (2012).

[88] A. Ashworth, L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy*, 21-51, 22.

[89] Ibid.

out an overview of criminal law's most recent developments, and then relate them to the prominent liberal argument that the criminal law is suffering from a growing process of corruption, caused by an unprincipled expansion of the scope of criminalisation which compromises the conceptual and doctrinal structures that guarantee individual justice and the justification of state punishment[90]. At the heart of the challenges made against the 'liberal model of criminal law'[91], there lies a growing concern with providing security through regulation and crime prevention[92], posited as a reaction to an increasingly insecure world.

1.2.1 The Condition of Late Modernity

David Garland has long submitted that changes in the field of crime control cannot be dissociated from their social and cultural context[93]. With regards to contemporary conditions, he points out that an analysis of 'shifts in the cultural underpinning' of criminal justice institutions raises important aspects of changes occurring in these institutions[94]. These, in their turn, 'suggest the possibility that, behind these new responses to crime, there lies a new pattern of mentalities, interests, and sensibilities', indicating an intrinsic connection between the current state of criminal law and 'the social, economic and cultural arrangements of late modernity'[95]. In order to establish the relation between changes in criminal law and changes in the contextual arrangements of late modernity, it is important to understand how this socio-historical moment is being interpreted, what conceptions of society and individuality arise from this interpretation, and how these in turn influence the socio-political conception and role of the law.

Individual justice is an essential component of what Charles Taylor has called modernity's 'moral order', a set of normative notions and expectations which underlie the modern social imaginaries and provide social practices and institutions with 'a widely shared sense of legitimacy'[96]. This sense of legitimacy is therefore predicated on a mainly instrumental idea of social order, which is deemed legitimate and justified to the extent that it can conform to and actualise the moral order's normative expectations. Taylor traces the

[90] Ibid. Cf. also D. Husak, *Overcriminalization* (2008); R. A. Duff, S. P. Green (eds), *Philosophical Foundations of Criminal Law* (2011).
[91] Ashworth, Zedner, 'Defending the Criminal Law', 22.
[92] Cf. V. Tadros, 'Crimes and Security' (2008) 71(6) *Modern Law Review*, 940-970; L. Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' (2009) in B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance*, 35-58. For a more general discussion on security in criminal law and criminal justice, cf. I. Loader, N. Walker, *Civilizing Security* (2007); L. Zedner *Security* (2009); Sullivan, Dennis, *Seeking Security*.
[93] Garland, *The Culture of Control*. Cf. also D. Garland, *Punishment and Welfare: a History of Penal Strategies* (1985).
[94] Garland, *The Culture of Control*, 6.
[95] Ibid, 6-7.
[96] C. Taylor, *Modern Social Imaginaries* (2004), 23.

conceptual origins of the main elements of this moral order to the work of seventeenth century political philosophers such as John Locke, establishing a basic structure which, albeit suffering many redactions and transformations, has retained a relatively stable normative core, constituted by what Taylor calls 'an ethic of freedom and mutual benefit'[97]. It is worth noting that, in this moral order, the idea of freedom is indissociable from the notion of mutual benefit, that is, the idea that individual liberty has to be actualised in a collective way, so that freedom has to be adequately organised and distributed within any particular set of political arrangements.

Since the advent of modernity, the state has been identified with the protection and organisation of freedom in society, a role which is seen as largely dependent upon the provision of 'certain common benefits [to the state's citizens], of which security is the most important'[98] – security both from outside threats and from one another[99]. Security is traditionally conceptualised as the main premise of mutual benefit and a necessary condition for individual autonomy, as it 'contributes to certainty: freedom from doubt, fear, and anxiety about danger'[100]. Freedom, however, is another premise of autonomy, and it both presupposes and generates a degree of uncertainty, necessary in order for individuals to have the opportunity to act of their own accord. Uncertainty, however, generates insecurity. The role of the state predicated by the moral order therefore implies a tense relationship between freedom and mutual benefit, and the need for constant balancing between these two values, as the state 'must curtail freedom through security measures in order to promote conditions in which freedom can flourish'[101]. The fact that the state exists to provide freedom through security but freedom itself tends to generate insecurity suggests that 'security is never an end-state but always a fragile process. It is more within us as a yearning than outside us as a fact'[102].

The liberal idea of society rests on an emphasis on the value and importance of freedom, and the need for the state to remain within strict limits, interfering with the liberty of individuals only as far as it is necessary. This premise is so pervasive in the liberal social imaginary that institutionalised practices of coercion like the criminal law are justified only on the grounds that they promote, protect and respect individual freedom[103]. The need for state security is counter-balanced in the liberal social imaginary by the idea that liberty itself generates mutual benefit, as the outcomes of individual projects in society, when allowed to flourish, tend to provide social outcomes. This idea of society, particularly strong under

[97] Ibid, 21.
[98] Ibid, 4.
[99] Loader, Walker, op cit, 42-43.
[100] Ericson, op cit, 216.
[101] Ibid, 217.
[102] Ibid.
[103] N. Rose, *Powers of Freedom* (1999), 10.

conditions of socio-economic integration, received its most comprehensive actualisation in recent times during the welfare state of the post-war period. In moments such as this, ideas of freedom tend to acquire 'an inescapably 'social form''[104], so that security appears as a secondary issue within the social order. It is on this particular set of socio-political arrangements that the liberal model of criminal law appears to be predicated.

Towards the end of the twentieth century, however, this social form of freedom becomes largely contested. Social integration gives way to a process of social unravelling[105], as society 'dissociates into a variety of ethical and cultural communities with incompatible allegiances and incommensurable obligations'[106]. With the erosion of the social basis for mutual benefit, the uncertainty generated by individual freedom finds no counter-balance in the structure of the social order; as a result, insecurity is emphasised by society's dissociation, and thus security is reinforced within the liberal agenda, dressed in 'a rhetoric of reassurance'[107]. This 'advanced liberalism'[108] is intrinsically connected with a form of 'active citizenship', where the political role of the individual 'is no longer primarily realized in a relation with the state, or in a single 'public sphere', but in a variety of private, corporate and quasi-public practices'[109]. This expansion and fragmentation of the duties of citizenship is directly related to the image and structure of the late modern state, as they suggest transformations in the state's role in the maintenance of social cohesion.

The legal system is one of the most powerful instruments which the state possesses in order to convey the experience of security to its citizens[110]. Roger Cotterrell examines this function of the legal system through the notion of 'legal security', a subjective sense of security 'based on the belief that power is being used in unseen ways to protect the citizen from unknown others (...) who might pose threats through unpredictable or irresponsible action, and from (...) authorities that might otherwise seem uncontrolled or unaccountable'[111]. This essential component of state authority is intimately related to the role of criminal law and its conception of responsibility. Within the liberal paradigm, legal security is tied to the notion that social relations are naturally conducive to mutual benefit, so that the law's role in providing security is seen as incidental, operating only in those

[104] Ibid, 83.
[105] Ericson, op cit, 213.
[106] Rose, op cit, 136.
[107] Ericson, op cit, 14.
[108] Rose, op cit, 166. I adopt Rose's categorisation of the liberal socio-political outlook of the late-twentieth and twenty-first centuries as 'advanced liberalism', labelling the general framework of criminal law and criminal justice in that period as 'advanced liberal'. Although I am aware that this term, just like other terminologies such as 'neoliberalism' or 'late modernity', is controversial and imprecise, I believe it provides a helpful characterisation of the current outlook as still intrinsically liberal, and not necessarily new – only further developed under specific conditions.
[109] Rose, ibid.
[110] Cf. Loader, Walker, op cit.
[111] R. Cotterrell, *Law's Community* (1995), 5.

exceptional circumstances where the harmony of society is threatened by some imbalance. With the social unravelling of late modernity, however, social relations become unstable and replete with risk and uncertainty[112], so that advanced liberal society appears rather as a source of legal insecurity. This perception that society is unable to provide individuals with proper bases for the preservation of mutual benefit prompts the state to seek to 'protect our subjective feelings of security more directly'[113]. The result is the deployment of a precautionary logic[114] which 'has significant and worrisome implications for the criminal law'[115].

This precautionary logic appears to be normatively grounded on a specific way of thinking about individual autonomy and its actualisation in social relations. Peter Ramsay refers to the conceptual grounds of this ideological perspective as the theory of vulnerable autonomy[116], whose main premise is the 'construction of normal, representative citizens as vulnerable in their mutual interdependence, and, therefore, required to be active in their attention to each others' need for reassurance'[117]. Promoting 'the idea that a commitment to social justice requires that society protect individuals with regard to their autonomy-related vulnerabilities'[118], this perspective encourages mutual cooperation and inter-dependence. At the same time, it also raises doubts as to individuals' ability to adhere to and advance these aspirations, thus inviting the state to regulate individual behaviour more actively through law. The attitude towards autonomy that arises from this perspective is substantially different from the strong defence of autonomous agency which comes out of orthodox subjectivism and its capacity conception of responsibility. Autonomy and responsibility are here presented as essentially problematic, the autonomy of one individual potentially representing a threat to the autonomy of others, if left unregulated.

Ramsay argues that the commitment to the protection of vulnerable autonomy is present in a number of political theories which have become prevalent in legal and political discourse in the United Kingdom in the last few decades[119]. A common ground among these theories can be found in their criticism of the unconditional distribution of rights which was advocated under the welfare state, replaced by a notion of active citizenship that conditions rights upon the due exercise of responsibilities. This perspective is presented by Ramsay as a

[112] Cf. A. Giddens, *Modernity and Self-Identity* (1991).
[113] Ramsay, *The Insecurity State*, 2.
[114] Ericson, *Crime in an Insecure World*, 21.
[115] Ibid, 35.
[116] Ramsay, *The Insecurity State*, Chapter 5. Cf. also P. Ramsay, 'The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventative Orders' (2009) in B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance*, 109-140.
[117] Ramsay, *The Insecurity State*, 84.
[118] J. Anderson, A. Honneth, 'Autonomy, Vulnerability, Recognition, and Justice' (2005) in J. Christman, J. Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays*, 127-149, 138.
[119] Cf. Ramsay, *The Insecurity State*, Chapter 5.

direct consequence of the social unravelling of late modernity, a technique implemented in the hope 'that the lack of social cohesion engendered by the atomistic neoliberal economic and social order might be ameliorated'[120]. This perspective on individual autonomy appears particularly problematic to liberal legal theory, for it directly compromises the idea of responsible subjectivity which lies at the core of the liberal model of criminal law.

What this short sociological analysis of the advanced liberal paradigm suggests, however, is that there is an intrinsic relation between the erosion and dissociation of the structural bases of the liberal model of society – on which the normative framework of liberal criminal law is based – and the rise of the precautionary logic of advanced liberalism. As Ramsay aptly demonstrates, the 'axiomatic proposition' contained within the theory of vulnerable autonomy '[has] enjoyed influence precisely because [it] offers a normative basis for the duties of citizenship in circumstances in which others have failed'[121]. The ideology of vulnerable autonomy is not a 'new' ideology *per se*, but an attempt to sustain the normative legitimation of the modern state in terms of respect for individual autonomy – in other words, the liberal normative framework – under socio-political conditions of insecurity. Advanced liberal law is simply the shape which liberal law takes in an insecure world.

1.2.2 The End of (Liberal) Criminal Law

It is precisely the connection between the liberal normative framework and the advanced liberal state of insecurity which liberal legal theory fails to acknowledge, choosing instead to focus on a conception of criminal law which effectiveness and normativity are upheld independently of changes in the socio-political context. The liberal model of criminal law is grounded on 'a liberal conception of criminal justice that emphasises both the purpose of the criminal law in providing for censure and punishment and the need to respect the autonomy and dignity of individuals in the criminal process'[122]. In order for autonomy and dignity to be respected in the criminal process, the liberal model relies on a series of procedural safeguards, many of which find their highest expression in the criminal trial. In the liberal perspective, challenges to the importance and centrality of these aspects of the criminal process threaten to undermine the justificatory basis on which the criminal law's status as a legitimate modern institution depends, drawing the criminal justice system away from the higher aspirations of modernity which distinguish the criminal law from pre-modern, more arbitrary instances of state punishment.

[120] Ibid, 111.
[121] Ibid, 112.
[122] Ashworth, Zedner, 'Defending the Criminal Law', 22.

Despite the influence which the liberal model holds over the contemporary normative idea of criminal law, many of the main transformations occurring within the criminal justice system were fuelled by challenges aimed directly at the centrality of the criminal trial within the criminal process. In their paper, Ashworth and Zedner note that there has been growing concern that the full rigour of the criminal trial should lose its primacy in the criminal legal system, on the grounds that it is not cost-effective, not preventive, not necessary, not appropriate and not effective in most circumstances[123]. It is interesting to note that this criticism is by no means aimed at the importance of the criminal law as a whole; quite the contrary. The reduction of the centrality of the criminal trial has been coupled with a prolific enactment of offences at every legislature, and with a steady growth both of criminal convictions and of the severity of sentences and other penal measures[124]. Likewise, the idea of responsibility for crime is not under dispute; instead, the framework of criminal justice is displaying 'an increasing emphasis on the retributive understanding of behaviour'[125]. What is under challenge seems rather to be the specific balance between respect for autonomy and the need for censure and punishment sustained by the liberal model.

Ashworth and Zedner identify seven trends behind the substantive changes which appear to be driving the contemporary framework of criminal law away from the liberal paradigm and towards an emphasis on regulation and prevention. These are: a greater use of diversion from prosecution, such as the conditional caution introduced for adults by the Criminal Justice Act 2003 and the youth conditional caution inaugurated by the Criminal Justice and Immigration Act 2008; a greater use of fixed penalties, such as fines for various traffic offences and the more general Penalty Notice for Disorder, issuable by a police officer on the spot, contestable only in court, and where failure to comply can incur in imprisonment; a greater use of summary trials, where many procedural guarantees are absent and where conviction can lead to prison sentences of up to 12 months; a greater use of hybrid civil-criminal processes, where a civil order restraining the subject's behaviour is imposed and where breaking the order constitutes a criminal offence[126]; a greater use of strict liability elements, not only in regulatory offences but also in serious offences, such as rape[127]; a greater use of incentives for defendants to avoid trial by pleading guilty, thus receiving a discount off custodial sentences which is greater the sooner the plea is made; and

[123] Ibid, 23.
[124] Ibid, 38.
[125] A. Norrie, 'Citizenship, Authoritarianism and the Changing Shape of the Criminal Law' (2009) in B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance*, 13-34, 15.
[126] The most famous and controversial example of such orders is the ASBO/CPI; cf. Ramsay, *The Insecurity State*.
[127] For instance, Rape of a child under 13 (Section 5 of the Sexual Offences Act 2003). See *R v G* [2008] UKHL 37.

a greater use of preventive orders, measures in the name of public protection which can be imposed in addition to or independently of a criminal conviction, including the ASBO/CPI, sexual offences prevention orders, football banning orders and terrorism control orders/TPIMs, among others[128].

It is thus not surprising that liberal theorists view these developments with great concern, as in their view these changes represent not a shift in paradigm *per se* but a tendency towards an 'unprincipled and chaotic construction of the criminal law' which expansion 'prompts the question whether [liberal criminal law] is a lost cause'[129]. Among undesirable consequences which may be brought about by this chaotic construction, diversion from prosecution and fixed penalties may produce a 'net-widening'[130] effect, extending the reach of criminal justice to offenders who would otherwise not have been prosecuted. Greater reliance on summary trials is likely to weaken the procedural safeguards of defendants; a similar effect can be expected from the use of hybrid orders, since they also avoid the need to rely on trial convictions. The greater use of strict liability and of incentives to plead guilty may indicate a growing distrust towards the criminal law's traditional modes of assigning blame, deeming them exaggerated, burdensome or unnecessary. Within these examples it is possible to identify that the criticisms directed at the criminal trial involve a rather obvious, if tacit, challenge to the conception of responsible (criminal) subjectivity embedded within the liberal model: the image of the subject of criminal law as an autonomous and responsible individual who can generally be trusted to follow the law, and should thus be presumed innocent until appropriately proven guilty.

Under the liberal perspective, there can be no appropriate moral ground for such challenges, since the normative legitimacy of the criminal law is tied to a universal moral idea of individual autonomy and, therefore, is not only self-evident, but logically necessary. As such, deviations from the liberal model must be explained as coming not from particular normative expectations, but from external pressures upon the legal system. This defensive logic is portrayed in Ashworth and Zedner's argument that the 'volatility in the English criminal law' is consequent of an 'over-development of particular state functions' which, in lieu of the delicate balance promoted by criminal law, condition the ways in which the state 'seeks to deploy (and in so doing deform) one of its most powerful tools of governance'[131]. These manifestations include a regulatory function, which affects the criminal law by supporting a normalisation of crime, turning many of its elements into a matter of economic

[128] Ashworth, Zedner, 'Defending the Criminal Law', 24-36.
[129] A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review*, 225-256, 225.
[130] Ashworth, Zedner, 'Defending the Criminal Law', 26. Cf. also S. Cohen, *Visions of Social Control* (1985).
[131] Ashworth, Zedner, ibid, 38.

analysis, so that 'censure and hard treatment become less appropriate than the manipulation of costs and disincentives'[132]. They also involve a preventive function, upholding a precautionary logic grounded on risk and harm prevention which 'privileges efficacy, economy, and outcome over justice'[133]. And finally, there is the manifestation of an increasingly authoritarian vein in the state, which espouses both 'a willingness to resort to the criminal law, and to deploy its powers with little restraint', and a desire for more pervasive and punitive forms of social control[134].

Essentially, then, the consequences of the current state of insecurity in the law are interpreted as an attack on the liberal model (indeed, on criminal law as a modern institution) made 'by the state as it pursues other agendas such as greater regulation, an emphasis on prevention, and an authoritarianism linked closely with penal populism and the demand for public protection'[135]. In other words, a deviation from the traditional model of individual responsibility and justice in the criminal law is presented as anomalous, so that any paradigm that comes out of it can only be unprincipled, illegitimate and unjustifiable. This is why Ashworth and Zedner's 'defence of the liberal model of the criminal law and the criminal trial rests on the proposition that, at the level of justification, there is a necessary link between the censure of conviction, liability to (significant) punishment, and the need to respect the dignity of the individual defendant'[136]. For Ashworth and Zedner, the status of the legal subject is so solidly established within the modern conception of criminal responsibility that to undermine or compromise it is to threaten the criminal law's normative justification as a whole.

1.2.3 The Normativity of the Preventive Turn

In spite of the strong defence of the liberal model made by theorists such as Ashworth and Zedner, it does not appear that the advanced liberal framework of criminal law is being generally affected by a crisis of legitimation. Rather,

> It seems increasingly likely that criminal law theorists must be prepared to face a new world. This is a world in which not only does minimalism seem increasingly irrelevant to modern legislators, but the availability of new and morally more ambiguous forms of censure – alternatives to and modifications of 'truly criminal' proceedings, punishment and accompanying record – also threatens the traditional basis for opposing the increasing expansion of punitive laws into the anticipatory domain.[137]

[132] Ibid, 39.
[133] Ibid, 40.
[134] Ibid, 42-43.
[135] Ibid, 44.
[136] Ibid, 49.
[137] J. Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' (2012) in R. Sullivan, I. Dennis (eds), *Seeking Security*, 79-102, 102.

The steady and uncompromised development of advanced liberal criminal laws can be interpreted (as liberal theorists do) as a superimposition of state interests over the criminal law, but the acknowledgment that these laws do not generally display a lack of justification might suggest that their development is not as unprincipled or chaotic as the mainstream liberal argument would have us believe. Instead, the continuing expansion of this framework indicates that there is indeed a certain logic behind it, which needs to be taken seriously if its consequences are to be properly criticised.

Arguably, one important factor behind the eagerness in liberal legal theory to display advanced liberal measures as unprincipled is that engaging with the normative structure of advanced liberal law inevitably involves dealing with liberal theory's own failings and limitations. The preventive turn's normative framework stands on the lack of sustainability of the socio-political conditions promoted and assumed by the liberal model, resulting from the process of social unravelling identified in late modern society. Tensions between the normative idea of individual autonomy, its importance to the legitimacy of the social order, and the difficulties for its actualisation in society, feed the perception that society is currently experiencing a 'crisis of security' which has to be tackled by the criminal law, thus justifying 'definitions and mechanisms which can reassure an anxious public that their concerns are being taken seriously – and that 'the criminal threat' can be contained'[138]. Moreover, the multifaceted nature of criminal responsibility is capable of incorporating the changing architecture of the criminal justice system, manifesting it primarily as a shift in the primary conception of responsibility, from capacity to character[139]. This shift does significantly influence the aspect of the subject of criminal law, but the roots of these different manifestations of criminal subjectivity all spring from the same conceptual foundations.

Thus, criminal law's own ambiguity with regards to its subject, between the rational agency implied by autonomy and responsibility and the wrongfulness and harmfulness intrinsic to crime, coupled with a change in socio-political conditions, is what grounds the shift from a liberal to an advanced liberal paradigm in criminal law. Liberal law is the author of its own insecurity.

1.3 AN INSECURE LAW

This section explores the justificatory basis for the preventive turn in criminal law, in order to highlight the connections between this basis, the modern liberal conception of individual autonomy and legal subjectivity, and the latter's shortcomings. It starts by

[138] Lacey, 'The Resurgence of Character', 173.
[139] Cf. ibid, 161-169.

analysing the main justificatory and normative elements in Jeremy Horder's critique of the liberal model of criminal law in support of the so-called 'anticipatory perspective' on criminalisation[140]. I use the contrast between this approach and the liberal argument in order to propose that both essentially possess the same conceptual and normative foundations, and that the anticipatory (advanced liberal) perspective relies on the ambiguity intrinsic to modern criminal law as the basis for its legitimacy, by engendering a shift in normative focus from liberty to security, from wrongdoing to harm doing, and from responsibility to crime. I argue that Horder's efforts to find a moral justification for preventive measures in criminal law end up exposing the interconnectedness between the moral basis for these measures and that for the liberal model, so that the problematic character of the former reveals even deeper structural problems in the latter.

If my argument is sound, then the problem with Ashworth and Zedner's defence of the criminal law lies precisely at the level of justification. It is at this level that the liberal and the anticipatory, advanced liberal model of criminal law connect and interact. Concealed within the liberal normative framework there seems to be an indissociable link between contradictory notions of human nature and society, as well as the role of punishment in the preservation of particular conceptions of autonomy and social order. It is this contradictory, ambiguous aspect of liberal law's normative framework which generates insecurity under certain socio-political conditions, and it is this insecurity which empowers and justifies the incorporation of regulatory, preventive and authoritarian measures within the framework of criminal law. As liberal law's normative grounds always potentially allow for the existence of these tendencies, the degree of their manifestation becomes a matter of structural balance and socio-historical contingency.

The final part of this section lays the groundwork for a critical examination of the current state of insecurity in the law which can account for the dialectic nature of criminal law and its conception of responsibility.

1.3.1 Crime, Harm and Security

Ironically, the most insightful element of Horder's defence of the anticipatory perspective on criminalisation is an aspect of his argument that he takes for granted. In the introduction to his paper, Horder makes a quick comment that both the anticipatory and the liberal perspective on criminalisation – which he dubs the 'harm-done' perspective – share a common moral background. Horder defines this moral background as the existence of a

[140] Horder, 'Harmless Wrongdoing', 79.

'shared interest in deterring people from engaging in wrongful harm-doing'[141]. He goes on to explain the basis for this shared interest:

> Only if (amongst other things) enough is done to deter such activity, can the conditions be secured in which people can reliably be expected to participate in important kinds of collective commitment, such as a commitment to live by the rule of law and participate in a culture respectful of human rights. (...) However, in using the criminal law to deter such activity, in the interests of shoring up important collective commitments, law creators should ensure that the criminal law respects values constitutive of those commitments (...).[142]

Horder's perspective on criminal law thus departs from almost exactly the same normative assumption contained within the liberal model of criminal law, that the criminal law needs to achieve an appropriate balance between the need to punish individuals and the need to protect values constitutive of the commitments which punishment aims to secure, such as the value of individual autonomy.

There are, however, subtle distinctions between each perspective's interpretations of this common moral background which are particularly significant. Horder's interpretation locates the main role of the criminal law in the performance of its preventive function, while the retributive tendencies of liberal theory lead to a focus on criminal law's declaratory function instead[143]. This shift in focus informs the whole of Horder's comparison between both perspectives, which he endeavours in terms of each perspective's attitude towards harm. Although Horder talks about wrongful harm-doing and harmless wrongdoing, maintaining the classic notion that crime is a form of conduct which is both harmful and wrongful, it is clear that throughout his discussion the idea of 'wrongdoing' is taken for granted, and his focus is instead on the notion of harm[144]. Arguably, this move is not only purposeful but necessary, for the whole normative basis of the anticipatory perspective relies on a shift in balance, from wrong to harm, so that it is crime's harmfulness – the danger it presents to the community's collective commitments – which grounds its wrongfulness and thereby the criminal's responsibility. The emphasis on harm can therefore condition and suppress, even if it cannot eliminate, the concerns about issues of autonomy and responsibility which are intrinsic to crime.

One of the main points of attempting to limit criminalisation generally to instances of harm done is that this way the criminal law leaves space for individuals to exercise their autonomy, allowing them the opportunity to act responsibly and only punishing them if they fail to do so. The emphasis on harm done is thus deeply linked to notions of legal subjectivity. To anticipate the harmful consequences of an individual's conduct too much

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[141] Ibid.
[142] Ibid.
[143] For a discussion of these functions, cf. A. Ashworth, 'Conceptions of Overcriminalization' (2008) 5 *Ohio State Journal of Criminal Law*, 407-425.
[144] Horder even makes that clear, when he states he is deliberately avoiding presenting the discussion in terms of wrongfulness. Cf. Horder, 'Harmless Wrongdoing', footnote 9 at page 81.

through criminalisation 'is to fail to treat the law's subjects as rational moral agents who are able to adjust their conduct to the law'[145]. This respect for individual autonomy is intrinsic to the liberal model, embedded in the presumption of innocence which is inherent to ideas of responsible legal subjectivity and 'the bedrock of the individual subject's, and more especially citizen's, independence of the state'[146]. It is precisely this series of concerns, expressive of an emphasis on the moral importance of the individual, which aligns the liberal model of criminal law with a perspective which 'purport[s] to take a restrictive, 'minimalist' view of the justifiability of criminalisation'[147].

Such a take is evident in Ashworth's – whose work Horder uses as the main representative of the harm-done perspective – postulate that 'the building blocks of criminalisation decisions are that the conduct in question must be harmful, wrongful, and of public concern'[148]. Against this, Horder argues that the constraints imposed on criminalisation by the liberal model are too constrictive and idealistic, to the point that even its greatest proponents are incapable of respecting. Horder spends a significant portion of his paper showing how Ashworth cannot avoid allowing space in his theory for offences which do not fit into his own approach to criminalisation, such as inchoate and possession offences. Possession offences, in particular, switch the main question in criminalisation from one based on harm done to one focused on 'how much 'preventable victimisation' ([Ashworth's] term) will in fact be prevented by having prohibitions on harmless but risky conduct'[149]. In light of such qualifications, Horder goes on to suggest that 'it becomes hard to see how there can be any 'building blocks' for criminalisation at all'[150]. In accepting and giving space to the importance of criminal law's preventive function, liberal theory's normative framework inevitably ends up validating, at least tacitly, the justificatory grounds for the anticipatory perspective.

The existence of a preventive element in modern criminal law, which expresses law's concern with security and with the importance of crime control for the preservation of the integrity of the political community and its collective commitments, thus indicates 'an implicit recognition of the fact that there are sound arguments for giving at least equal status to the anticipatory perspective in any theory of the justification for criminalisation'[151]. What

[145] P. Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (2011) in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, V. Tadros (eds), *The Structures of the Criminal Law*, 203-228, 217. For a criminological critique of preventive criminalisation, cf. M. Hildebrand, 'Proactive Forensic Profiling: Proactive Criminalization?' in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, V. Tadros (eds), *The Boundaries of the Criminal Law* (2010), 113-137.
[146] Ramsay, ibid.
[147] Horder, 'Harmless Wrongdoing', 79.
[148] Ashworth, *Principles of Criminal Law*, 39.
[149] Horder, 'Harmless Wrongdoing', 89.
[150] Ibid, 90.
[151] Ibid, 79.

distinguishes liberal law's concern for individual autonomy from the advanced liberal emphasis on security and crime prevention is not its moral background, but socio-political conditions which can guarantee and support the trust and respect for individual autonomy and liberty premised by the liberal model and its conception of the criminal subject. Without such support, the maintenance of individual autonomy and its conception of legal subjectivity appear vulnerable and insecure, and thus in need of reassurance. Within this framework, the condition of social relations in late modernity heightens a form of distrust towards individuals which has always been already implicit in the contextualisation of crime and the need for punishment. It is this embedded vulnerability which is emphasised under contemporary conditions, and which allows theorists such as Horder to argue that '[t]oo narrow a concern only with harm done might, ironically, undermine respect amongst the law-abiding for the very values (...) that motivate some theorists to work within a predominantly harm-done perspective'[152].

The moral justification for the anticipatory perspective does not eschew the value of individual autonomy; on the contrary, it depends on it. What it does, however, is to rely on an exaggerated notion of the importance of security for the actualisation of autonomy in society, fuelled by the perception that autonomy finds itself vulnerable, in a state of insecurity. It is this lack of confidence in the potential for responsible agency to be actualised without first being reassured against crime and social insecurity which allows Horder to consider that the anticipatory perspective represents a 'civilising move'[153] and 'a moral argument, sensitive to the idea that a focus only on harm done will lead, in terms of deterrence achieved, to nothing but Pyrrhic victories that may threaten people's trust and confidence in the rule of law'[154]. This moral argument depends to a great extent on the social unravelling which is associated with late modern societies, but it is only made possible because the capacity for crime, the dangerousness of its harmful outcomes and the perception that these outcomes undermine the bases for autonomous agency are already present in the liberal notion of individual responsibility, both together with and against the concept's association with individual justice.

1.3.2 Law's Ideology: a Gateway to Insecurity

The discussion so far has uncovered how both the liberal model of criminal law and an advanced liberal perspective focused on the importance of security and crime prevention rely on a common moral background, grounded on a set of political commitments which

[152] Ibid, 85.
[153] Ibid, 100.
[154] Ibid, 94.

uphold the primacy of individual autonomy and dignity, as well as on the importance of punishment for their actualisation. In light of this, any proper analysis of the challenges and problems surrounding the contemporary framework of criminal law and punishment requires a theoretical perspective able to account for the relationality between the conceptual foundations of modern liberal criminal law, the normative structure of the preventive turn and contemporary socio-political conditions. The first step towards an elaboration of such a perspective arguably lies in an examination of criminal law's ideological quality.

As discussed above, the dominant conception of criminal responsibility, whose doctrinal primacy has been increasingly challenged by the changing landscape of criminal law, focuses on the subjective, fault element of liability as a guarantee for individual justice. This perspective on responsibility, most prominently advanced by the orthodox subjectivist tradition and by the capacity conception of responsibility, originated from the work of the Enlightenment reformers, which above all promoted the corollary 'that at the heart of moral, political, social, economic – *and legal* – discourse there should be placed the idea of the free individual'[155]. Likewise, within the liberal legal paradigm, the importance of individual autonomy and freedom appears aprioristic and normatively necessary, being the starting point from which all the main elements of the legal system are developed, from rights and contracts to the existence of and justification for punishment. This regulative idea is supposed to inform the whole structure of the law, so that the latter is imbued with uniformity and universality. Respect for individual autonomy is a matter of justice because it treats all individuals in the same way, so that no one is either above or beyond the rule of law.

This idea can only be supported, however, if it is uniformly applicable in all possible contexts. As previously discussed, however, contrasts and contradictions arise from the way law's ideal of individual autonomy is manifested in distinct socio-political circumstances. This is true even with regards to law's conception of responsibility, which within criminal law is deeply influenced by the context and environment of crime and punishment. Within the same institutional framework, the same idea of responsibility leads the law to sometimes expect individuals to behave as responsible legal subjects, and at times to realise that the law – along with the community it represents – can nurture no such expectations. The imposition of a single normative perspective upon a diversity of conditions provokes distortions in law's attitudes towards human subjectivity that suggest that law's conception of the human condition is not nearly as universal as it is assumed to be. Although there is a clear emancipatory potential underlying the idea of the need to respect the capacity of individuals to govern their lives, there is a problematic tendency in individual responsibility towards

[155] A. Norrie, *Crime, Reason and History* (2001), 17 (emphasis in original).

subsuming the complexity of societal experience within a formal, abstract conception of autonomy – a problem which we saw affects the whole structure of the criminal law.

One way of approaching this problematic is through the understanding that individual responsibility, albeit a concept which aspires to universality, requires specific socio-political and historical conditions for its actual implementation. Instead of all-encompassing, the emancipatory potential in the law is tied to and dependent upon a particular socio-political framework, reflecting specific interests and aspirations; the fact that this contingency is masked under a universalistic discourse is what constitutes the ideological character of law's individualism. 'Juridical individualism', Alan Norrie argues, 'can be designated as ideology because it is inadequate to the reality of human life and obscures its true basis in fundamental social relations and individual characteristics of men and women'[156]. It universalises a model of society which is abstracted from a small proportion of actual social experience, and this detachment makes it nearly impossible to reconcile the legal forms with the concrete environment in which they are constituted, engendering a conflict that legal categories repress without being able to resolve. This conflict breeds tensions at the core of the legal system, with the result that legal categories both promote and hinder the idea of the free individual, rendering legal individualism unable to fully rationalise the law or implement its principles and promises[157]. Instead, these tensions are sustained by the legal framework, both expressed and repressed by law's normative role within the modern (and late modern) social order.

Due to the irreconcilable character of this conflict, the free, responsible individual contained within notions of individual responsibility has an abstract, monovalent[158] character. The responsible subject belongs more to the realm of legal theory and doctrine than to the social reality in which these have to be actualised; in its ideological guise, this concept is thus unable to properly comprehend the full breadth of socio-political relations, even after reinterpreting them as juridical relations. The autonomous individual thus has to be protected within limits in which it can properly operate, and the legal system is structured in order to provide for and manage these boundaries. One of the most direct expressions of this function is given by legal responsibility itself, as it delimits the exercise of agency that is considered to conform to legally-accepted standards, encapsulating it within the notion of legal subjectivity. Agency which lies outside of lawful boundaries is considered to be beyond and therefore against the law. The 'unlawfulness' attributed to this scope of agency is legitimated on the grounds that it is morally wrongful, and is motivated and necessitated by the perception that such conduct is potentially harmful to the autonomy of others and to

[156] Norrie, *Law, Ideology and Punishment*, 11.
[157] Cf. Norrie, *Crime, Reason and History*.
[158] Cf. A. Norrie, *Dialectic and Difference* (2009).

the structural legal environment which allows autonomy to be securely exercised – in other words, that such exercise of agency is dangerous.

The liberal conception of criminal responsibility holds that individuals ought to be respected as autonomous subjects throughout the criminal process, being liable to punishment and restraint only after it has been proven that they were responsible for their wrongful conduct, by voluntarily going beyond the boundaries of lawful agency. But it has become clear that criminal responsibility is broader and more complex than its subjectivist premises. The abstract nature of the liberal responsible subject is expressed through ambiguities and fissions in the criminal legal system, so that legal subjectivity exists within boundaries which are established not just through the law but within the law itself. The existence of these borders of legal subjectivity within the legal framework were already tacitly brought up by the previous discussion of criminal responsibility and criminalisation, and can now be highlighted with the help of Norrie's identification of two particular expressions of legal individualism's dialectical character, 'a 'psychological' and a 'political' dimension'[159].

Law's psychological individualism is defined as 'a political and ideological construction which operates to seal off the question of individual culpability from issues concerning the relationship between individual agency and social context'[160]. This is illustrated by the notion of legal subjectivity, which upholds the image of 'a 'responsible individual', or rather a universe of equally responsible individuals, regarded in isolation from the real world, the social and moral context in which crime occurs, of which they are a part'[161]. This separation, however, is artificial and therefore incomplete, so that issues of political and moral context keep creeping back into the framework of criminal law. Responsibility's hybridity is to a great extent a consequence of the legal framework's need to react against and manage the contradictions generated by the invasion of context into criminal culpability. By shifting among different conceptions of responsibility, criminal law can alter the perception of its subject whilst maintaining the normative status of legal subjectivity – it is the subject of criminal law who is malleable and sometimes dangerous, while the legal subject in themselves is always responsible and trustworthy. It is the contrast between the formal universality and substantive particularity of the juridical individual, along with the conflicts it generates within and outside the legal framework, which constitutes law's ideological character.

Law's political individualism represents precisely the manifestation of its conflictive nature, expressed as a 'tension in the law between its liberal individualism and the social

[159] Norrie, 'Citizenship, Authoritarianism', 16.
[160] Norrie, *Crime, Reason and History*, 223.
[161] Ibid, 29.

control needs of the state'[162] which engenders an opposition 'between individual freedom and political power'[163]. One significant difference between this political dimension and the psychological aspect of juridical individualism is that, while the subsumption of concrete individuality within an abstract conception of human subjectivity made by the law is largely ignored by liberal legal theory for obvious reasons, the political conflicts engendered by law's individualist ideology are more openly recognised[164]. One example of such acknowledgment can be found in the admission that autonomy's protection in criminal law has to be qualified by and balanced against the need to protect other collective interests. The ideological thrust of this dimension lies, however, in the way in which this political tension is interpreted by legal theorists, as originating outside the legal framework, from social and political considerations which the law must sometimes resist and sometimes respect, but over which it has little influence or control. This way, legal theorists can regret and criticise the consequences this political individualism has on the normative structure of the law without acknowledging the complicity law has in them.

Together, these two dimensions of law's individualism construct an ideological structure in which both the legal categories which promote individual freedom and the legal decisions and developments which contradict it are generated and sustained by the same normative framework. Since juridical individualism lies at the core of legal normativity, the law is unable either to deal with its abstract character or to escape its tensions and contradictions. Instead, as long as it uncritically reproduces this ideological individualism and the structural conditions which preserve and demand it, the legal system is bound to remain fractured and conflictive, and liable to eschew its emancipatory premises in the name of a pursuit of security which is deemed necessary to reassure its legal subjects against an insecure world. Behind the veil, however, the law is a gateway to its own insecurity.

CONCLUSION

> No matter how abstract the formulation of the law,
> it can never be completely disembedded from social space.[165]

This chapter has just barely scratched the surface of the current crisis experienced by criminal law, but this initial investigation has uncovered that what appeared to be the repercussions of a conflict between the legal system and an insecure world in fact conceals an internal conflict within the legal framework itself. This condition is intrinsically related to

[162] Ibid.
[163] Norrie, 'Citizenship, Authoritarianism', 18.
[164] Norrie, *Crime, Reason and History*, 29-30.
[165] Farmer, *Criminal Law, Tradition and Legal Order*, 165.

the conceptions of subjectivity upheld by the law, which are primarily manifest in law's conception of responsibility. Criminal responsibility represents a particularly fertile ground on which to investigate the dialectical nature of legal subjectivity, exposing its ideological character through the tense but necessary connection which criminal responsibility effects between the moral conception of responsible subjectivity and the socio-political embeddedness of the notion of crime. Within criminal law, legal subjectivity finds its clearest and most contentious limits. As the contingent nature of autonomous agency cannot be openly recognised by the legal framework, this tension is expressed as a political conflict between the law and its environment, be it in the form of struggles against an intervening state, or in the shape of criminal law's reaction against the pervasiveness and dangerousness of crime. The perennial need to guarantee the security of the legal subject trumps and subsumes the problem of the abstract and ideological character of freedom.

The tensions caused by the ideological nature of criminal responsibility are thus deeply implicated in the preventive turn affecting the contemporary landscape of criminal law. Realising that criminal subjectivity is essentially dialectical and thus embraces not only the legal subject, whom the liberal model aims to preserve, but also the dangerous subject increasingly prevalent in the advanced liberal legal framework, is an important step towards a richer, relational understanding of criminal responsibility; yet it is only the first step. The specific elements of the conceptual dynamics engendered through and expressed by criminal responsibility are most clearly revealed through the dialectical movement of history. The modern history of criminal responsibility is thus the focus of the next chapter.

Chapter 2: Historicising the Criminal Subject: Responsibility, Dangerousness and the Structure of Reassurance

> 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.[166]

INTRODUCTION

This chapter explores the historical dynamics of criminal responsibility, with regards to the intrinsic relationship between responsibility for crime, the liberal paradigm of subjectivity (the free, autonomous individual) and socio-political conditions. I argue that the prescribed universality of the legal subject is permanently compromised by its socio-political boundaries, especially the structural violence which a liberal legal system is bound to preserve. As a result, the scope of responsible agency is limited and contained, and notions of subjectivity which do not fit are deemed to be dangerous to the integrity of the political community, and excluded or regulated through punishment. A historical approach to criminal responsibility reveals its dialectical nature in the form of a dynamic relation between notions of responsibility and dangerousness, originated in the abstract character and intrinsic insecurity of legal subjectivity, and shaped and conditioned by the structure of reassurance prevalent within socio-political conditions at any given time.

I start by analysing a contemporary debate concerning how to pursue an appropriate historical account of criminal responsibility in modern criminal law, which discusses the philosophical bases of responsibility and its relationship with criminal law's role as an instrument of social control. The point of departure of this debate is Alan Norrie's conceptualisation of criminal law and responsibility as intrinsically ideological, related to a juridical individualism which pervades liberal philosophy and society, introduced at the end of the last chapter. This perspective is then contrasted with accounts of criminal responsibility that focus on its legitimatory and coordinatory functions and highlight criminal law's main role in the maintenance of social order, espoused by Nicola Lacey and Lindsay Farmer. The debate is then refreshed by Peter Ramsay, who attempts to synthesise both historical accounts within the framework of a political sociology of citizenship. I examine this theoretical interchange in Section 2.1, placing it as the background on which I

[166] N. Lacey, 'The Resurgence of Character: Responsibility in the Context of Criminalization' in R.A. Duff, S. P. Green (eds), *Philosophical Foundations of Criminal Law*, 151-178, 176 (emphasis in original).

aim to develop my own conclusions regarding the historical and socio-political dynamics of criminal responsibility.

I elaborate my perspective in Section 2.2, first by expounding the conceptual, philosophical connections between responsibility and dangerousness, insecurity and reassurance, and then by applying this methodological approach in order to recast the historical responsibility debate as concomitantly embracing, through the absences in the debate, the conceptual basis for an historical account of dangerousness. My main argument is that the dialectic relationship between responsibility and dangerousness – along with the socio-political function played by the repressive, 'civilising' role of criminal law – reveals that the paradigmatic subject of criminal law is not, as liberal law is keen to suggest, the responsible legal subject expressed through subjective categories of fault and elaborate procedural guarantees, but the dangerous subject predominant within conceptions of criminal responsibility of the eighteenth and nineteenth centuries, and resurgent in the preventive turn of the late twentieth and early twenty-first centuries.

Finally, in section 2.3, I apply this relational perspective to the contemporary, neo-liberal framework of criminal law, in order to examine the specific issues which arise from the resurgence of dangerousness as a paradigm of criminal responsibility after the insertion of subjective responsibility into criminal law doctrine in the post-war period. I conclude by stressing that the context of advanced liberal criminal law exposes and emphasises tensions and contradictions which are inherent to law's individualism, to the intrinsic insecurity of the legal subject, and which therefore reproduce a specific dynamics which has its conceptual foundations deeply embedded within the normative framework of liberal law.

2.1 HISTORIES OF RESPONSIBILITY

Due to liberal law's embeddedness within the specific socio-historical context of modernity, a proper understanding of criminal responsibility's ideological aspect has to rely on an account of the concept's historical development. Norrie's work represents the main source of such an account in contemporary criminal law theory[167]. It highlights how the notion of the free individual was intrinsic not only to Enlightenment ethics and philosophy, but also to the nascent capitalist society, enshrined in the activities of the rising middle class. The socio-political interests of the bourgeoisie generated a model of society which depended on the certainty of legal and economic relations and on the protection of individual rights, particularly that of private property. The free and autonomous individual not only reflected these interests and promoted the rational legal system necessitated by the nascent liberal

[167] Cf. A. Norrie, *Law, Ideology and Punishment* (1990); A. Norrie, *Punishment, Responsibility, and Justice* (2000); A. Norrie, *Crime, Reason and History* (2001).

society, but did so 'through a language that is universal and general, and cast in terms of respect for the individual before it'[168]. While this conception of human being emphasised individual agency and respect for autonomy, it obscured the fact that the society it legitimated also promoted material inequality and instances of 'structural violence'[169]. 'There was a fundamental disparity between the economic and social substance of the emerging relations of production and their juridical and economic expression'[170]. The reformers of the eighteenth and nineteenth centuries who postulated this model of society promised a reality that only existed in their treaties and theories, one of the main reasons why their initial efforts met with failure and their ideas took long to be actualised in legal doctrine.

Norrie's account of criminal responsibility as ideology thus relies on a link between the model of society first idealised by the Enlightenment reformers and the rise to prominence of subjective responsibility in the criminal law, deeming these philosophical grounds of criminal responsibility as relevant in order to explain not only its legitimatory power, but also the contradictions which abound in legal doctrine and practice. But such an account, as it is, leaves important questions unanswered. Ramsay notes that these questions arise from a difficulty in reconciling two different accounts of the history of criminal law and responsibility: one which emphasises the philosophical grounds on which criminal responsibility stands in recent criminal legal doctrine, and one which focuses on the instrumental function of the criminal law as a system of social control[171]. While Norrie's theory of criminal law does not ignore law's role in the maintenance of social order, it has been criticised for taking the philosophical grounds of individual responsibility too seriously, and thus neglecting the fact that the historical implementation of Enlightenment ideas into the criminal law was far from smooth or linear, and that these ideas did not constitute a predominant feature of the criminal law until recently.

An engagement with this debate can help us understand the extent to which the individualist ideology interacts with the socio-political function of the criminal law, as well as the precise form this dynamics takes.

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[168] Norrie, *Crime, Reason and History*, 23.
[169] J. Habermas in G. Borradori, *Philosophy in a Time of Terror* (2003), 35.
[170] Norrie, *Crime, Reason and History*, 23.
[171] P. Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69(1) *Modern Law Review*, 29-58. Cf. also L. Farmer, *Criminal Law, Tradition and Legal Order* (1997); N. Lacey, 'In Search of the Responsible Subject; History, Philosophy, and Social Science in Criminal Law Theory' (2001) 64 *Modern Law Review*, 350-371; N. Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9(3) *Journal of Political Philosophy*, 249-276; N. Lacey, 'Character, Capacity, Outcome: Toward a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law' (2007) in M. D. Dubber, L. Farmer (eds), *Modern Histories of Crime and Punishment*, 14-41.

2.1.1 Responsibility, Autonomy and Social Order

There are two main problems that have been raised with regards to Norrie's historical account of criminal law. The first is that it does not seem to properly address the fact that, over the course of the nineteenth and twentieth centuries, a significant part of the developments occurred in criminal law referred to 'the regulation of otherwise lawful everyday behaviour, such as productive and commercial activity or the use of public space, by means of statutory offences, prosecuted under summary procedure and often containing no fault element at all'[172]. The development of regulatory law seems to run contrary to an account of criminal law which emphasises the importance of individual autonomy, for it 'tends to socialise responsibility, rather than focusing on individual moral agency'[173]. Lindsay Farmer stresses that the main weakness in theories of individual responsibility is 'their failure to acknowledge their own history'[174], which for him cannot be disconnected from that of legal practices; such perspective aims 'to develop a reading of the modern criminal law as a system of criminal justice'[175], which entails 'a complex administrative system geared towards dealing with large numbers of people in a summary manner and controlling behaviour through small penalties for minor offences'[176].

This reading, Farmer argues, goes directly against a perspective focused on legal individualism, which for him 'does not attempt to understand the historical development of the law'[177]. Instead, attention to the rise of regulatory law and the consequent expansion of criminal liability from the nineteenth century onwards indicates that 'the focus of the law was increasingly on the regulation of conduct rather than the adjudication of right and wrong'[178]. Even when individual justice began its rise to prominence towards the end of the nineteenth century, it did not overcome criminal law's main preoccupation with social control, for it was aimed at minimising the impact of regulatory law and preserving the law's primary function. 'Individual justice remained important, but only within an overall concern with the management and production of social and legal order'[179].

Although Farmer does acknowledge that there is an important sense in which the prominence of individual responsibility in the law is ideological[180], he seems to imply that the real history of criminal law is not about the problematic of legal individualism, but about

[172] Ramsay, 'The Responsible Subject as Citizen', 32.
[173] Ibid.
[174] Farmer, *Criminal Law, Tradition and Legal Order*. 182.
[175] Ibid, 19.
[176] Ibid, 182.
[177] Ibid, 173.
[178] Ibid, 140.
[179] Ibid.
[180] Ibid, 173.

the criminal law's role as a manager and producer of public order. Against that, Ramsay argues that Farmer's historical critique runs the risk of being as one-sided as the theoretical perspective he criticises, for it chooses to emphasise one aspect of the legal system while neglecting the other; it thus begs the question, 'why does individual justice 'remain important' when the overall concern is 'with the management and production of social and legal order'?'[181] Instead, a full historical account of criminal law needs to be able to conciliate both aspects of individual justice and of social regulation, and 'to understand the interface between issues of moral agency and the socialisation of responsibility'[182].

Farmer's elaborate historical critique does offer an important contribution to this understanding, by highlighting the regulatory side of this interface, which is predominantly neglected in criminal legal theory. 'The narrow focus on individualism in legal theory is continually clashing with the function of the criminal law as an instrument of modern government'[183]. Farmer also stresses and depicts the contingent character of the relation between criminal law and moral philosophy, which reflects not some universal truth about the nature of punishment, but 'a certain characterisation of the modern state'; individual responsibility is thus allied with the legitimacy of political authority, as a reflection of 'the compact that was established between the criminal law and modernity'[184]. In downplaying the relevance of the ideological structures which legitimate the modern character of the legal system, portraying them mainly as obstacles to an understanding of the proper function of criminal law, however, Farmer neglects the fact that these structures 'could not have this legitimising effect without some grounding in real social practices'[185]. Nevertheless, his insights regarding regulatory laws reveal an essential characteristic of criminal law's historical and conceptual development, which needs to be adequately addressed.

The second problem plaguing a historical account of criminal law focused on legal individualism is that the subjectivist fault categories of responsibility 'which address the individual as a formally equal rational choosing subject'[186] did not get fully established in criminal law doctrine until the middle of the twentieth century, long after the reform proposals of the Enlightenment, after the development of the liberal socio-economic framework which Norrie places as the ground for these categories, and even after the aforementioned rise of law's regulatory function. There appears to be a significant time-lag between the theoretical and formal enunciation of ideas of individual freedom and justice, and their practical insertion into criminal law doctrine. Lacey's study of the history of

[181] Ramsay, 'The Responsible Subject as Citizen', 35.
[182] A. Norrie, 'Subjectivity, Morality and Criminal Law' (1999) 3 *Edinburgh Law Review*, 359-367, 365.
[183] Farmer, *Criminal Law, Tradition and Legal Order*, 173-174.
[184] Ibid, 6.
[185] Ramsay, 'The Responsible Subject as Citizen', 34.
[186] Ibid, 33.

criminal responsibility observes that 'only by the 1950s has the question of individual, let alone subjective, responsibility *as a question of agency and of individual fairness* become the primary focus for criminal law commentaries'[187]. Moreover, before the establishment of subjective responsibility, 'criminal law's conception of responsibility – its very conception of what it is to be a subject of criminal law'[188] did not seem to be concerned with the individual's capacity and opportunity to act according to the law, but rather with whether the individual displayed a 'bad' character – a dangerous disposition to act *against* the law[189]. Just like Farmer's concern with regulatory law, then, Lacey's exposition of criminal responsibility prior to the subjective turn as based on character evidences 'the importantly practical orientation of the criminal law as a form of social control'[190].

According to Lacey, the conception of criminal responsibility which predominated in the eighteenth and nineteenth centuries was one that posed the criminal trial as a mainly exculpatory process, where criminal intent was presumed in the criminal's conduct, and it was up to the defendant to attempt to prove their innocence. This provides a radically different picture to the common assumptions carried by the contemporary conception of individual responsibility, where the defendant is to be considered innocent until proven guilty and the criminal process is mainly inculpatory (where it is up to the prosecution to prove the defendant's guilt beyond reasonable doubt). This analysis seems to compromise the proposition that ideas of individual responsibility and justice had any significant ideological purchase in the criminal law before the 1950s, or that this individualist ideology was the main factor behind the rise to prominence of subjective categories of fault. Instead, Lacey's perspective is that 'the development of ideas of individual responsibility for crime is at root a response to problems of co-ordination and legitimation faced by systems of criminal law; the content and emphasis of these problems can be expected to change according to the environment in which the system operates'[191]. It is thus necessary for a theory of criminal law as ideology to be able to explain this time-lag, as well as the contrast between the theoretical prevalence and the practical ambivalence of individual responsibility.

In order to face up to these two challenges, Ramsay uses an aspect of Lacey's theorisation of the development of individual responsibility as the basis for reconciliation between these apparently disparate accounts of the history of criminal law. In her work, Lacey identifies a series of socio-political processes which she suggests might have geared

[187] Lacey, 'In Search of the Responsible Subject', 360 (emphasis in original).
[188] Ibid, 351.
[189] Cf. Lacey, 'Responsibility and Modernity in Criminal Law'. For a detailed analysis of the different conceptions of criminal responsibility, cf. Chapter 1 above.
[190] N. Lacey, *State Punishment* (1988), 67.
[191] Lacey, 'In Search of the Responsible Subject', 351.

the development of individual responsibility within the criminal law. In particular, she highlights 'the changing relations between individual citizens and the nation state and its institutions – indeed the emergence of a conception of increasingly egalitarian citizenship'; 'the growing influence of medical sciences and psychology on criminal law's understanding of human behaviour and the gradual emergence of the idea that the defendant's interior world might be an object of medical and legal knowledge'; and 'some interaction between the rapidly expanding scope of criminal liability during the nineteenth century (...) and the doctrinal arrangements for ascribing responsibility to those accused of crime'[192]. These three processes inform a trajectory from the eighteenth up until the twentieth century, in which criminal law's primary conception of responsibility shifts from a focus on character to one on capacity.

Ramsay picks up on these insights in order to propose that it is citizenship, the conceptualisation of membership in a specific political community, which provides the immediate 'environment in which the modern criminal law experiences its problems of coordination and legitimation'[193].

2.1.2 The Responsible Subject as Citizen

Ramsay's self-ascribed task is to try and analyse the context in which both moral agency and the socialisation of responsibility are taken to be 'necessary aspects of a legitimate criminal law'[194], and therefore reconcile the two aforementioned historical accounts. He conceptualises such context as that of 'the rights and duties of citizenship in the democratic welfare state'[195]. The welfare state coincides with the period which Lacey identifies as that of the insertion of subjective responsibility within criminal legal doctrine, evidenced by the work of criminal law scholars such as Glanville Williams. Even Williams's largely formal conception of criminal law, which ties the definition of a crime to its connection with 'criminal proceedings [which have] a criminal outcome'[196], according to Ramsay hints at to how the environment of citizenship defines the shape of criminal responsibility. After all, the criminal process, with its 'combination of penal sanction on conviction and procedural burden on the accuser' as well as 'the state's control of the initiative'[197], expresses both the state's role as representative of the political community and the individual's position as a member of the community – a citizen. Furthermore, the

[192] Ibid, 362.
[193] Ramsay, 'The Responsible Subject as Citizen', 39-40.
[194] Ibid, 36.
[195] Ibid.
[196] G. Williams, 'The Definition of Crime' (1955) *Current Legal Problems*, 107-130, 130.
[197] Ramsay, 'The Responsible Subject as Citizen', 38-39.

boundaries given by the criminal law to the autonomy and conduct of individuals represent 'the most direct expression of the relationship between a state and its citizens'[198].

Ramsay's strategy is thus to investigate the environment of citizenship of the 1950s and see whether this environment can both support the ideological conception of criminal responsibility and help it face its challenges. In order to do this, he relies on T. H. Marshall's tripartite conception of modern democratic citizenship enunciated in Marshall's 1949 lecture later published in the book *Citizenship and Social Class*[199]. Ramsay's choice of text is both pragmatic and historical: pragmatic because Marshall's political sociology of citizenship provides a framework in which the two historical accounts of criminal law can be tentatively reconciled; and historical because it was the dominant conception of citizenship during the 1950s, having significantly influenced socio-political perceptions of the time.

For Marshall, citizenship represented 'full membership of the community'[200] in which an individual participates, and was constituted of three essential elements or dimensions: civil ('composed of the rights necessary for individual freedom'[201], most importantly property rights), political ('the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body'[202]) and social ('the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society'[203]). These elements did not emerge all together in modern British society; citizenship developed gradually, first through the appearance of the civil element in the eighteenth century, followed by the political element partially in the nineteenth and then more broadly in the twentieth century, and then by the social element from the late nineteenth century onwards[204].

Ramsay uses Marshall's theorisation of the elements of citizenship and their historical evolution to explore the development of individual responsibility in the criminal law: looking at how and when the forms of citizenship emerged in history, he claims, can provide an explanation as to why individual responsibility, although originating as a theory in the eighteenth century, did not emerge in the criminal law until the mid-twentieth century. He starts by suggesting that the criminal law has an intrinsic relation with civil rights, since

[198] I. Dennis, 'The Critical Condition of Criminal Law' (1997) 50 *Current Legal Problems*, 213-249, 247.
[199] T. H. Marshall, *Citizenship and Social Class* (1992).
[200] Ibid, 18.
[201] Ibid, 8.
[202] Ibid.
[203] Ibid.
[204] Ibid, 10-13.

the latter posit the contours of every individual's liberty with regards to the enjoyment of their freedom and property:

> The criminal law plays a fundamental role in defining the civil rights of the individual by defining those duties breach of which will render the individual liable to punishment. In this way the criminal law defines an outer limit of civil rights, and violation of that outer limit gives the state a right to interfere with an individual's enjoyment of those rights.[205]

Under the subjectivist doctrine, this distribution of duties is presented as formally universal and substantively neutral – what Norrie calls a Kantian 'morality of form'[206]. 'Everybody is equal (...) because nobody is liable unless they have formally chosen to violate the law'[207]. However, the demand for this formal equality in the law is relative to the prevalence of claims and expectations of formal equality in other spheres of political life. In early nineteenth-century Britain, where there was a property qualification for voting, even though there were already discussions concerning the role of individual justice in the criminal law, 'the judiciary experienced no 'compelling practical grounds for change''[208]. The impulse to insert civil rights into criminal law was lacking in a politically unequal society.

The principles of formal equality embedded in civil citizenship only gain momentum in the criminal law after the further development of political rights, through the establishment of universal suffrage in Britain, when the state effectively makes a formal commitment to social neutrality and thus 'acquires authority on the grounds of its universality'[209]. Of course, this particular democratic environment exactly reflects the controversy between formal and substantive equality generated by legal individualism: by abolishing the property qualification for voting, the state declared that individuals were formally equal in spite of being substantively unequal. Individual responsibility thus comes forward not only to embrace this commitment, but to legitimise it, 'because it represents punishment as a vindication of the offender's own status as a citizen, of her formal equality with all other citizens'[210]. The consolidation of political citizenship effectively generated the need for normative categories which could support the new political status amidst social and economic disparity, as the development of political rights reinforced the claim for equality contained in civil rights. This, according to Ramsay, explains why orthodox subjectivism only rises to doctrinal prominence after the 1950s, with the rise of democratic values impelled by the defeat of fascism after the Second World War and the establishment of the

[205] Ramsay, 'The Responsible Subject as Citizen', 41.
[206] A. Norrie, *Punishment, Responsibility, and Justice* (2000), 8.
[207] Ibid.
[208] Ramsay, 'The Responsible Subject as Citizen', 43.
[209] Ibid, 44.
[210] Ibid, 44-45.

welfare state in the UK. 'Democracy necessitated the adoption of the responsible subject of criminal law as orthodoxy'[211].

While the coming together of civil and political citizenship explains the establishment of individual responsibility as doctrine, it is the rise of social citizenship that grounds the emergence and practical prevalence of summary and strict liability offences. If on the one hand political citizenship promoted the consolidation of the formal equality promised by civil rights, on the other it also emphasised the duties and conditions required for civil and political citizenship to have a practical impact on the lives of citizens. These minimum standards for the enjoyment of citizenship are expressed by social rights, which provide for 'a general reduction of risk and insecurity' and 'an equalisation between the more and the less fortunate at all levels'[212]; these provisions would be the main focus of regulatory criminal laws, concerned as they are with the socialisation of responsibility. For Ramsay, regulatory law 'puts pressure on those who stand to gain by market relations' by making them afford the risk of their economic activities; these criminal laws therefore contribute 'to the equalisation of the basic conditions on which people live, and to 'a general enrichment of the concrete substance of civilised life'', thereby ensuring the preservation of the 'single civilisation promoted by social citizenship'[213].

Social citizenship thus provides a distinct basis for responsibility to that of the civil element, concerned with the socialisation of responsibility while the latter focuses on its individualisation. Social citizenship's reflection on the criminal law is therefore also distinct from that of individual responsibility: it generates the need for laws which focus on the structural aspects of society, and therefore the conception of responsibility informed by it is rather objective, focused on outcomes[214]. Both the civil and the social elements are nevertheless part of the same framework of citizenship, thus allowing the different aspects of criminal law to coherently coexist. The rise of subjective responsibility is explained by the ideological importance of civil rights and the need to reinforce their promise of formal equality after the expansion of political rights; regulatory law and objective liability, by their turn, refer to the socialisation of responsibility required by the rise of social citizenship, seen as necessary in order to maintain the social differentiation inherent to liberal societies within limits that a democratic society can tolerate[215]. Within the broader environment of

[211] Ibid, 46.
[212] Marshall, op cit, 33.
[213] Ramsay, 'The Responsible Subject as Citizen', 49-50.
[214] A. Norrie, 'Historical differentiation, moral judgment and the modern criminal law' (2007) 3 *Criminal Law and Philosophy*, 253. Cf. also N. Lacey, 'Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice' (2007) 1 *Criminal Law and Philosophy*, 233-250.
[215] Ramsay, 'The Responsible Subject as Citizen', 52.

citizenship, seemingly contradictory historical accounts of criminal law, along with the distinct forms of liability which they espouse, can be tentatively reconciled.

Of course, this does not imply that the tensions and contradictions identified within criminal law and responsibility are resolved in any way. Democratic citizenship is presented both by Marshall and by Ramsay as a historical process in which 'the structure of modern citizenship is the achievement of a particular historical experience in which antithetical principles are only reconciled for a time, for as long as specific conditions hold'[216]. That is, even if some of the contradictions in the paradigm of criminal responsibility could be managed during the post-war welfare state, such condition should not be assumed to remain effective; as we will see, there are significant contrasts between the 1950s and the 2010s. Moreover, the main relevance of Ramsay's account of democratic citizenship as the environment in which the modern criminal law experiences its problems of coordination and legitimation is that this environment exposes criminal responsibility's socio-political boundaries, thus allowing us to properly analyse the interplay between responsibility's ideological character and its role as an instrument of social control.

Ramsay's historical perspective provides the structure for such an analysis, but his focus on reconciling the distinct histories of criminal liability kept him from delving deeper into the tensions and contradictions that arise from the dynamics between the different forms of citizenship and the different models of criminal law which they inform. This further move is necessary in order to understand the full implications of the relationship between responsibility and political community.

2.1.3 Citizenship and Insecurity

After Ramsay's deployment of the concept of citizenship as complement to an understanding of the ideological character of criminal law, Norrie took the opportunity to revisit his own historical account[217]. He found Ramsay's argument convincing, but decided to intervene on two points. First, he thought Ramsay's explanation of why individual responsibility did not become part of criminal law doctrine until the 1950s needed to be re-examined. And second, he used this revised contextualisation of the grounds for individual responsibility in order to see whether it could clarify the reasons behind the substantive changes occurring in the criminal law in the twenty-first century. He does that by looking at the interplay between all three forms of citizenship, and analysing how the changes in the balance between them affect the framework of criminal law.

[216] Ibid, 56.
[217] Cf. Norrie, 'Historical Differentiation'; A. Norrie, 'Citizenship, Authoritarianism and the Changing Shape of the Criminal Law' (2009) in B. McSherry, A. Norrie, S. Bronitt (eds). *Regulating Deviance*, 13-34.

With regards to the rise of orthodox subjectivism and its capacity conception of responsibility in criminal law, Norrie argues that Ramsay's explanation based on the rise of political citizenship does not fully account for why the insertion of individual responsibility into doctrine happened precisely in the period after the 1950s, for universal political citizenship was granted in the UK at the end of the nineteenth century; there seemed to be an element missing in Ramsay's theory. Norrie suggests that, although individual responsibility is in itself 'shaped by the civil commitment to personal freedom and the political commitment that this should be universalised', it further required 'the social commitment' to improve basic social conditions and thus 'give fresh impetus to the demand that civil and political freedoms should be actualised in reality'[218]. So even though the subjectivist conception of responsibility does not easily accommodate for the objective, collective nature of social citizenship, a commitment to social rights improves the structural basis and provides the opportunity for individual autonomy. Social citizenship, by promoting the conditions for social inclusion, strengthened the demand for civil and political rights; likewise, in the criminal law it enabled not only the proliferation of regulatory laws but also the establishment of individual responsibility as the legitimatory paradigm.

These considerations with regards to social citizenship thus complete the picture set out by Ramsay, explaining why it was only after the 1950s that individual responsibility came to be actualised in criminal law doctrine: 'this was the period in which the three ideas of citizenship – civil, political and social – came together, and that the historical fusion of a social conception of citizenship rights with an already existing civil/political conception gave real impetus to the civil/political conception'[219]. There was thus a harmonisation between a concern for the structural conditions of social life and the already established civil and political commitment to individual freedom, which generated the need for a morality of form to be inserted into the criminal law in order to legitimate its practices. At the same time, objective standards of liability were seen as limited to 'quasi-offences' of strict liability, carrying much less stigma in comparison to the 'serious' offences which possessed a fault element, but necessary in order to maintain social differentiation within limits which a democratic society could tolerate. It was therefore not just the rise of political citizenship which gave impetus to ideas of individual responsibility and justice, but the coming together of all forms of citizenship, as the welfare state in the post-war period provided an important structural basis for the doctrinal shifts in the criminal law.

Other than explaining the rise of individual responsibility, this understanding of the importance of the integration between civil, political and social citizenship for the protection of individual rights in the criminal law enables Norrie to examine the changes that happened

[218] Norrie, 'Historical Differentiation', 254.
[219] Norrie, 'Citizenship, Authoritarianism', 20.

to the criminal law in more recent times. The framework of democratic citizenship provided by the welfare state did not enjoy its prominent status for too long; by the end of the 1970s, it was already being heavily contested. While what we see in the 1950s is a coming together of the forms of citizenship, what occurs from the 1970s onwards is a process of dissociation of these elements[220]. As the fusion of civil, political and social citizenship erodes, it is replaced by a condition of friction and fission between the civil and social elements; civil citizenship, carrying the idea of the self-interested individual, is set against the socialisation of responsibility in an advanced liberal political environment. As trust in the structure provided by social citizenship diminishes, this structure starts to unravel and becomes vulnerable to the impulse to reinforce individual civil and economic guarantees at the cost of social equality. The political element of citizenship, by its turn, is 'caught in the middle'[221], upheld as necessary when it benefits civil liberty, and as cumbersome when it stands in the way of economic recovery. It turns out that social citizenship, the impetus to achieve substantial equality in society, is needed in order to guarantee the universal, inclusionary character of political citizenship[222]. 'Without the protective cover social citizenship gave to it, political citizenship operates both as a legitimating rhetoric for change and practice and, contradictorily, as a barrier to be overcome where necessary'[223].

This unbalance deeply affects the status of individual responsibility. Norrie points out that it is political citizenship which provides the basis for law's general framework of criminal responsibility: it is the political element of citizenship, participation in the political life of the community, which mediates between individual freedom and social order. With the loss of the support given by social citizenship to the framework of individual responsibility, the responsible legal subject who was inserted in the criminal law in the 1950s becomes insecure under contemporary conditions; the importance of individual responsibility in criminal law's legitimatory framework becomes itself unbalanced, at times being overemphasised[224], and at times dwindling under demands for greater security and social control. Norrie therefore establishes a link between the rise and fall of social citizenship and the erosion of the liberal model of criminal law and responsibility, as the unravelling of one leads to the erosion of the other.

We have so far seen that the historical account which identifies the ideological underpinning of criminal law and responsibility can be made to be coherent with the

[220] Ibid, 14. Cf. also Chapter 1, Section 1.2 above.
[221] Ibid, 21.
[222] Ibid, 21-22.
[223] Ibid, 22.
[224] This phenomenon can be seen in the exaggerated focus on culpability exhibited by inchoate offences such as theft (Theft Act 1968) and fraud (Fraud Act 2007), and taken to an extreme by pre-inchoate offences, such as preparatory offences like s. 25 of the Theft Act 1968 or s. 5 of the Terrorism Act 2006.

historical perspective which sees criminal law as mainly concerned with social control, and responsibility with providing a framework of legitimation and coordination to the law. A study of the political sociology of citizenship allows the account of law as ideology to face up to the two challenges made against it – that it did not properly account for criminal law's regulatory function, and that it overemphasised the importance of the philosophical grounds of responsibility – and retain its explanatory power. It is therefore still possible to maintain that individual responsibility is an expression of law's abstract individualism, and subject to historical development over time.

But the story so far leaves one important question unanswered. We saw that legal individualism advances the idea that the legal subject is the free, autonomous individual, who can make rational choices and have responsibility for them. We also saw that the main problem with this account is that this free individual is only actually inserted into criminal law doctrine in the 1950s, even though the individualist ideology exists since the dawn of modernity; we noticed how this time-lag can be explained, but this explanation only partially addresses the challenges raised by Farmer's and Lacey's historical observations. For if we restrain our identification of legal individualism in the criminal law to the appearance of individual responsibility and responsible legal subjectivity, we might be suggesting that criminal responsibility did not become ideological until the 1950s; furthermore, if we follow this connection closely, we might presume that law's individualist ideology is losing strength and falling into disrepute along with the liberal model in the current preventive turn. Too much focus on subjective responsibility as the sole or main expression of juridical individualism in criminal law might give the impression that only this particular conception of criminal responsibility is a product of the individualist ideology, while the other conceptions of responsibility previously identified are generated by other ideological concerns, or simply not ideological.

To reach such conclusions, however, would be once again to put the possibility of a coherent historical account of law based on ideology into question. If we are to claim that law's abstract conception of human subjectivity is behind the dialectical quality of criminal responsibility, we must understand how it would be possible for the law to sustain a conception of criminal responsibility which would be seemingly in conflict with its conception of legal subjectivity. Norrie's work already tacitly recognises this possibility, when he asserts that the tension between individual freedom and state authority is an intrinsic aspect of law's ideological framework:

> the image of the liberal state as one resting on 'right' as opposed to 'might' is from the beginning a false one. The liberal state – and its law – work *through* oppositions they embody, between law and force, freedom and sovereignty, *ratio* (the articulation of freedoms) and *voluntas* (the expression of

power) (...). Intrinsic opposition is reflected from the very beginning of liberalism in Locke's philosophy (...). Modern liberal law *combines* in its form individualist right and political necessity.[225]

This combination *within* modern liberal law of individualist right *and* political necessity is arguably the key for grasping the full scope of legal individualism within the criminal law; such scope, however, is only implicitly suggested by some elements within both sides of the responsibility debate. I intend to bring it forth by re-examining the historical analysis endeavoured in this section, but emphasising the presence and importance of legal individualism in the period *before* the rise of subjective categories of fault in the criminal law, in order to uncover the extent to which the individualist ideology in the criminal law stretches beyond these categories. The results of this examination carry potentially significant implications to an understanding both of criminal law's ideological character and of the justificatory framework of the liberal model of criminal law as a whole.

2.2 DANGEROUSNESS AND THE STRUCTURE OF REASSURANCE

Criminal law's conception of responsibility is shaped and conditioned by the socio-political framework in which it operates. 'Thus we cannot know *in general* the form and content of the behaviour which will undermine the integrity of the political community; this will depend on the ruling concept of citizenship at any one time and place'[226]. This concluding thought from Ramsay's work tells us that the form and content of behaviour considered criminal will depend on any particular socio-political setting; additionally, however, it defines criminal behaviour according to a specific quality, that of carrying the potential to undermine the integrity of the political community. The association between law's conception of autonomous agency and the socio-political environment of citizenship obviates the fact that there are limits to the expression of individual autonomy, which are mainly justified by the assumption that agency which stretches beyond them is dangerous to the life in common preserved by the legal system.

There is thus a conceptual, quasi-logical connection between criminal responsibility and dangerousness, and so also between legal and criminal subjectivity, in that the latter is conceptualised as the (necessary) limits and, to a great extent, contrary of the former. This connection indicates a dialectical relation between ideas of responsibility and dangerousness, which embeddedness within the modern structure of the criminal law has to be properly examined before we can return to our historical analysis.

The idea of the responsible subject is essentially linked to the criteria and attributes which ground legal personality: responsible subjects know the normative limits of their

[225] Norrie, 'Citizenship, Authoritarianism', 24-25 (emphasis in original).
[226] Ramsay, 'The Responsible Subject as Citizen', 40 (emphasis in original).

liberty, are able to foresee and understand when the outcome of their actions can interfere with the liberty of others, and likely to adjust their conduct accordingly. The very notion of responsible subjectivity implies a degree of harmony between the individual and the values, interests and norms of society. The image of the criminal, by its turn, is that of an individual who failed to act according to the tenets of legal personality; in this sense, it is essentially at odds with responsible subjectivity. Criminal responsibility arises precisely out of a judgment that the criminal acted *irresponsibly* – that they did something which a responsible subject ought not to have done.

Individual responsibility is aimed at treating and respecting every individual accused of a crime as a responsible citizen, someone who can be expected to act in league with the community's interests, until proven guilty. But this model finds a problem, in that the very notion of crime betrays the expectation of responsible subjectivity: responsible citizens do not generally commit crimes or pose a threat to security. The ontological assumption behind individual responsibility is betrayed by the dangerousness implicit in crime. Responsible legal subjects can be trusted and respected precisely because they have the capacity to respect the law and each other, and therefore they should not be expected to be dangerous; however, these individuals can sometimes commit crimes, and crimes are inherently dangerous to other individuals and to the community in general. So at the same time as criminal responsibility is dedicated to preserving the environment of legal subjectivity, it is primarily engaged in doing so through the identification of individuals whose agency is not in harmony with that expected of responsible citizens, and who have therefore overstepped the boundaries of their autonomy. Responsibility for crime seems to logically necessitate the notion of dangerousness.

This logical necessity is embedded within the normative framework of the modern liberal state. The modern conception of citizenship shares the same philosophical background of legal responsibility, finding its roots in the political thought within the Enlightenment tradition[227]; both notions are linked to the idea of limits on the liberty of subjects, which is both regulated and preserved by the law and its public authority[228]. The political authority of the liberal state is thus grounded on its capacity to maintain this balance, which includes adequate conditions for the proper, lawful exercise of the individual autonomy of its citizens.

It occurs, however, that the proper space of autonomy is not just enabled, but also conditioned by society's socio-political structure; and in liberal societies, cooperation must be achieved under conditions of structural inequality. The individualistic character of these societies prevents them from bringing socio-economic conditions in total conformity with

[227] Lacey, 'In Search of the Responsible Subject', 357.
[228] Farmer, *Criminal Law, Tradition and Legal Order*, 6.

their aspirations of mutual benefit, due to the structural violence which they are meant to preserve. As a result, there is always a degree of insecurity generated by the framework of legal subjectivity, which needs to be managed by the state.

2.2.1 The Balance of Insecurity and Reassurance

The abstract nature of legal individualism means that law's conception of autonomous agency is not necessarily coincident with actual individual behaviour, for the real scope of human agency is much wider than that which is formally recognised by the legal system. As a result, the ruling conception of citizenship in liberal society at any given moment can only give expression to part of the real scope of its citizens' agency. The most direct mechanism which the state can deploy to manage the insecurity generated by this discrepancy is that of dangerousness, an ideological conception aimed at outlawing extra-juridical expressions of autonomy and justifying their repression through authoritarian means. Since the liberal model of responsible legal subjectivity, due to its narrow conception of individual freedom, is incompatible with the reality of social behaviour, it is incapable of fully providing the trust and security it implies; consequentially dangerousness, systematic criminality, and insecurity have to accompany legal subjectivity in any system founded upon it.

Dangerousness supplements legal subjectivity as a means of management of the socio-political environment of liberal society, necessitated by the abstract character of juridical individualism. Through dangerousness, the insecurity generated by the disconnection between legal individualism and concrete individuality is re-interpreted as coming not from liberal society's conflictive and unequal social order, but from the deviant behaviour of particular groups and individuals. Through the normative notion of dangerousness, the expressive aspect of legal subjectivity is legitimately contained within the boundaries of legally-sanctioned behaviour – abridged by the political community and its ruling conception of citizenship –, boundaries which are then legitimately guarded by law's repressive apparatus. There is thus a conceptual division contained within criminal responsibility: responsible agency is defined through the notion of the legal subject, the autonomous, law-abiding individual, while responsibility for crime is conditioned by an evaluation of the dangerousness of the criminal's conduct, so that the criminal is always potentially a dangerous subject, whose agency escapes the boundaries of legal subjectivity.

Although obscured within contemporary moral and legal philosophy, the dialectics between responsibility and dangerousness generated by the abstract nature of the legal subject is deeply embedded within modern and liberal thought. Its conceptual foundations

can be traced back to as early as the political philosophy of the seventeenth century, in the political theory of Thomas Hobbes and John Locke.

Hobbes famously grounded the establishment of political society on the consent of its subjects, so that every member voluntarily restrained their natural liberty in favour of being governed by the sovereign; at the same time, the integrity of this social contract necessarily depended on the sovereign's threat of punishment, for 'covenants, without the sword, are but words, and of no strength to secure a man at all'[229]. For Hobbes, insecurity was an inherent aspect of human nature, which could only be contained by an irresistible political authority. Locke, by his turn, although openly rejecting the idea of absolute government on the grounds that human beings are naturally drawn to respect the boundaries of the law of nature, maintains that crime is defined by its dangerousness, by the fact that the criminal's conduct places them beyond the pale of legal subjectivity. 'In transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of reason and common Equity,' which is the standard 'set to the actions of Men, for their mutual security'[230]. According to Locke, whoever commits a crime thus 'becomes dangerous to Mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him'[231]. In both philosophical perspectives, there is an obvious political conflict between the standard of subjectivity upheld and expected by the social contract, and that which is implied in and which justifies the state's authority and punitive role.

It is this political conflict which is then given a moral subjectivist characterisation in the work of the Enlightenment reformers, especially in Kant's work. But while the problematic relation between the moral basis of responsibility and the socio-political, conflictive actualisation of punishment is substantially repressed under Kant's morality of form – even though traces of it are revealed in his more political essays[232], it is more evidently displayed in Hegel's *Philosophy of Right*. Directly influenced by Kant's philosophy, Hegel initially restates Kant's essentially retributive conceptualisation of punishment as a consequence and a symbol of respect for the individual's autonomous agency:

> Subjectively, [punishment] is the reconciliation of the criminal with himself, i.e. with the law known by him as his own and as valid for him and his protection; when this law is executed upon him, he himself finds in this process the satisfaction of justice and nothing save his own act.[233]

At the same time, however, Hegel also contrasts the abstract idea of punishment with its concrete actualisation in the form of the administration of justice. In this second moment,

[229] T. Hobbes, *Leviathan* (1996), 111.
[230] J. Locke, *Two Treatises of Government* (2010), 272.
[231] Ibid.
[232] Cf. many of the essays in I. Kant, *Political Writings* (1991), and more specifically the analysis of Kant's paradox of punishment in Chapter 3, at sub-section 3.1.2 below.
[233] G. W. F. Hegel, *Hegel's Philosophy of Right* (1967), 141.

punishment's retributive core is significantly conditioned by the stability and sense of security experienced by society, so that the penal law 'is primarily the child of its age and the state of civil society at the time'[234]. 'If society is still internally weak, then an example must be made by inflicting punishments (...). But in a society which is internally strong, the commission of crime is something so feeble that its annulment must be commensurable with its feebleness'[235].

Hegel's dialectical perspective enables him not only to reinstate punishment's conflictive socio-political dimension, but also to identify that this dimension exists within a specific historical dynamics, in which the need for social order limits and conditions the possibility for individual justice. Within this dynamics, dangerousness destabilises the model of legal subjectivity, at the same time as it is indissociable from it: the other side of responsibility is deterrence, insecurity and the need for reassurance.

There are important aspects of the historical development of criminal responsibility and punishment which can be identified and analysed through a theoretical investigation of these conceptual foundations, an endeavour which is properly pursued in subsequent chapters. For now, though, there are elements of this theoretical framework which should be highlighted, for they are indispensable for an understanding of the importance of dangerousness to criminal responsibility. One of them is already familiar to us: the insecurity that stems from the abstract nature of legal subjectivity, from its inability to account for the full scope of human agency. Dangerousness derives from law's need to manage insecurity and to legitimate its restrictive, exclusionary conception of autonomy, which is done through a negative normative evaluation of agency which does not conform to juridical expectations. Insecure agency which surpasses a certain threshold is thus conceptualised as dangerous and dealt with by the state through the exercise of its authority, by means of coercive laws and punishment. A state of insecurity thus prompts an increase in the instances of dangerousness which are identified and addressed by the legal system.

The deployment of measures against dangerousness fulfils a reassuring function. It tells the members of the community that, first, only legal subjectivity is conducive to peace and prosperity, and therefore only legally-sanctioned forms of behaviour are legitimate; and second, that dangerous conduct is being identified and dealt with by the state. Of course, dangerousness in itself is also a source of anxiety – its deployment tells the public that there are individuals in society who pose a threat to their autonomy. What dangerousness does, however, is to re-interpret an insecurity which is already endemic to liberal society's internal structure as something which originates from 'outside' of it, from individuals who have deviated from the standard of responsible conduct. This way, insecurity remains a threat to

[234] Ibid, 140.
[235] Ibid, 141. Hegel's political theory is discussed in detail in Chapter 5 below.

social cohesion, but one which the liberal state can manage and address, instead of one which it has itself generated and sustained. It is however a precarious solution, an ideological device aimed at patching the rips generated by liberal society's structural violence.

Dangerousness is inherent to criminal responsibility; it is the other side of the legal subject. Its prevalence and the form and degree of its manifestation, however, depend on the condition of society's *structure of reassurance* at any specific socio-historical moment. The structure of reassurance is essentially an ideological mechanism which contains and represses the intrinsic insecurity of liberal law, by maintaining a set of socio-political values and expectations which guarantee the prevalence and normality of legal subjectivity in society. This mechanism is called a 'structure' of reassurance because it relies on and ideologically reflects a set of structural conditions, in order to reassure individuals that legal subjectivity can be securely expressed. The modern state is arguably the main, essential component of this structure, seen as indispensable for the maintenance of the legal system and its framework of rights; but beyond that, the specific shape and density of the structure of reassurance varies in time and context, as changing socio-political conditions shape and condition legal discourse. The weaker the structure of reassurance at any specific context, the more the state will need to dispense its reassuring function through authoritarian means – such as the criminal law.

The historical dynamics of responsibility and dangerousness is thus deeply influenced by the dialectic interaction between insecurity and reassurance. We can theorise how this balancing influences the framework of criminal responsibility and punishment through the conceptual foundations to criminal law's political conflict which we previously identified in Hobbes's, Locke's and Hegel's works, by looking at how each theorist conceptualises the reassuring role of the state in contrast with specific conceptions of pre-political social relations. In Hobbes's work, we see that human relations without the state's authority – what he called the state of nature – are endemically insecure, so that each individual's liberty was vulnerable to the invasion of others. In his model of society, therefore, reassurance is almost completely dependent on political authority and its threat of punishment. For Locke, on the other hand, the state of nature is not nearly as insecure a condition as Hobbes suggested, as he sees social relations as naturally conducive to security and cooperation. Locke's model of society relies on the postulate that the system of property has a strong social function, in that individuals benefit from wealth accumulation even if they do not accumulate wealth themselves – because the industry which inevitably follows from accumulation benefits society as a whole. Locke therefore provides society with a much stronger structure of reassurance, which allows him to postulate that insecurity and the dangerousness that follows from it are exceptional, and that the state authority's reassuring

role is subsidiary to that of society's[236]. Hegel's discussion of the administration of justice, by its turn, evidences how these different theoretical stances can be put in historical perspective, and seen as contingent reflections of shifts in the structure of reassurance occurring within the same political society[237].

Legal subjectivity's vulnerability to insecurity is thus conditioned[238] by the structure of reassurance prevalent in society at any given time. Interestingly, a valuable guide for mapping the breadth and development of the structure of reassurance was already suggested by our previous discussions in this chapter, in the analysis of the framework of citizenship in English modernity. The rights and protections involved in the different forms and conceptions of citizenship ground and express the scope of autonomy which is secured by prevailing socio-political conditions, and by the same token they also give us an expectation of the pervasiveness of dangerousness in society. According to this dynamics, the more expansive and inclusive the ruling conception of citizenship, the stronger the structure of reassurance – and so the less pervasive insecurity – will be at any given moment in or model of society. It is thus possible to use Marshall's political sociology of citizenship as a basis of an examination of the modern development of English society's structure of reassurance.

Applying this dialectical perspective to the context of criminal responsibility, we can therefore expect to see two elements standing out from a historical analysis of the concept. First, we should expect to find an element of dangerousness intrinsic to criminal law's conception of responsibility: if the main socio-political function of the criminal law with regards to legal subjectivity is to reassure it through the repression of dangerousness, this should have a direct impact on criminal responsibility – so that criminal law's main subject should appear not as a legal subject, but as a dangerous one. Second, the pervasiveness of dangerousness in the framework of criminal responsibility should reflect the historical contingency of society's structure of reassurance, constituted by the ruling conception of citizenship and prevailing socio-political conditions. The weaker the structure of reassurance, the more dangerousness appears pervasive, and crime as a serious (social as well as legal) problem. On the other hand, the stronger the structure of reassurance, the more socio-political conditions appear to guarantee security and dangerousness is seen as an

[236] It is interesting to note how both Hobbes and Locke's theories were highly influenced by their distinct socio-historical contexts, even though they are only separated by a few decades: Hobbes's work was deeply influenced by a period of intense social and political conflict, while Locke's was conditioned by the promise of social stability and political reform. Cf. R. Harrison, *Hobbes, Locke, and Confusion's Masterpiece: An Examination of Seventeenth-Century Political Philosophy* (2003).

[237] These connections are fleshed out in much greater detail in following chapters.

[238] The emphasis is on conditionality, for such influence is by no means absolute; it is rather an indicative of tendencies and potentialities within politics and society which may facilitate certain developments and constrain others. 'Structure', as Lacey very appropriately reminds us, 'is not determination' (N. Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008), 205).

exceptional, individual phenomenon, reinforcing the responsibility model of individual justice.

It is time to revisit our historical analysis.

2.2.2 The (Dangerous) Subject of Criminal Law

We already saw how the specific shape of the political element of citizenship deeply influences the scope of formal equality within the legal framework, especially with regards to the affinity between this and the civil and social elements. Political rights can only fulfil their aspirations of universality when the scope of political participation it engenders is deemed to be in league with the maintenance of social order. Sometimes, political rights can be deemed cumbersome or even threatening to the political community, so that they may be limited or restricted. Legal subjectivity, by its turn, relies on the political community which comes as a result of citizenship, so that it is substantially conditioned by its scope and breadth. While the subjectivity of those individuals who are within society needs in all cases to be managed and reflected by the law, individuals whose agency is not in conformity with community standards have to be dealt with in a very distinct way: the law sees them as dangerous subjects, individuals whose autonomy needs or deserves to be regulated and repressed.

If, as we suggested, dangerousness is typical to the subject of criminal law, such embeddedness must be somehow apparent in criminal law's conception of responsibility. Indeed, it is just such an interplay that can be seen in what I call the 'pre-subjective' period of criminal law, before subjective responsibility made its way into criminal law doctrine, which mainly covered the eighteenth and nineteenth centuries.

Following Marshall's socio-political perspective, during this period the ruling conception of citizenship predominantly comprised the civil element, the protection of individual liberty and property rights. Before the rise of the other forms of citizenship, which only appear from the mid-nineteenth century onwards, liberal society was openly unequal. This formal inequality made it possible for the pursuit of justice in criminal law to be tied to the promotion of substantive values and interests, such as the protection of private property. Under the theoretical perspective just developed, in the eighteenth century the structure of reassurance was particularly weak, tied to the protection and enjoyment of property; only individuals who had access to such enjoyment were treated as full members of the community, and therefore only these privileged individuals could reasonably be expected to behave as legal subjects. The criminal law of the time not only reflected the substantive values of this ruling conception of citizenship, but it also upheld the expectation that most of

the population would not necessarily adhere to it. The result of the insecurity of social relations at the time was a conception of criminal responsibility pervaded by dangerousness.

As previously discussed, criminal responsibility at the time was tied to notions of character and disposition, exhibiting an 'explicitly moral evaluation of the defendant's conduct'[239]. Moreover, the main pattern of liability was one of 'manifest criminality'[240], where some forms of conduct were deemed to be explicitly criminal and it was assumed that the defendant intended the natural consequences of their actions[241]. The criminal trial was essentially an exculpatory process[242], where it was up to the defendant to attempt to prove their innocence with regards to what was otherwise considered obvious wrongful behaviour. Since criminal intent was manifest in the defendant's conduct and therefore the criminal trial operated under a practical 'presumption of guilt'[243], and since the wrongfulness of crime was taken to refer to the defendant's character or disposition, the subject of criminal law was by definition the kind of individual who could not be expected to abide by the boundaries of legal subjectivity. The defendant in a criminal trial was by definition a dangerous subject, unfit to freely exercise their autonomy, and it was up to them to prove otherwise.

The criminal law of the eighteenth century was not concerned with responsibility as a matter of individual fairness, but as a basis for social order. The lack of political and social guarantees reflected in the ruling conception of citizenship, allied with significant social inequality, provided no reassurance that most individuals within the political community would abide by the law – if anything, the weakness of the structure of reassurance at the time generated an expectation of socio-political instability, which was only reinforced by the steep rise in crime until the 1840s. As expected, then, the criminal legal system's reassuring function was widely deployed to secure the conditions of legal subjectivity; but this paradoxically meant that the criminal law was not expected to treat its subjects as responsible citizens. The criminal trial of the eighteenth century was short and expedient, not-guilty verdicts were relatively rare, and sentences were draconic, most crimes being punishable with death[244]. At the same time, this treatment was justified by the very conception of responsibility on which these trials were grounded – criminal intent was

[239] Ramsay, 'The Responsible Subject as Citizen', 44. For more on the concept of responsibility in the eighteenth and nineteenth centuries, cf. Lacey, 'Responsibility and Modernity in Criminal Law'.
[240] Lacey, 'Space, Time and Function', 233. Cf. also G. Fletcher, *Rethinking Criminal Law* (1978).
[241] K. J. M. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (1998), 166.
[242] Lacey, 'In Search of the Responsible Subject', 361.
[243] Farmer, *Criminal Law, Tradition and Legal Order*, 182; Lacey, 'Character, Capacity, Outcome', 21.
[244] For general characteristics of the criminal trial at the end of the eighteenth century, cf. Smith, op cit, 42-49.

conceptualised through notions such as 'malice', indicating a 'heart regardless of social duty and fatally bent upon mischief'[245].

The criminal law was thus not dealing with legal subjects; on the contrary, the reassurance it was required to provide depended on the idea that criminals were dangerous subjects whom the law was capable of identifying and keeping under control. The weak structure of reassurance generated by the thin and particularistic conception of citizenship of the pre-subject period generated the need for the criminal law to enforce a division between legal and dangerous subjectivity, addressing its subjects directly on the basis of the threat they were expected to represent. Criminal law's reassuring function was aimed at securing the community's (propertied) citizens against the insecurity of socio-political conditions, which was ideologically connected to the manifest criminality stemming mainly from the lower classes. As a result, it treated the members of these classes as potential threats to society. The criminal law of the eighteenth century was explicitly an ideological instrument of social control.

The nineteenth century saw the slow development of notions of political and social equality, which only gained real momentum towards the end of the century. The increase in depth and complexity of the social structure affected the framework of criminal law in many ways, particularly through the steady implementation of regulatory laws, which consequently implied a broadening of the scope of criminal liability. Regulatory law, due to its focus on commercial and industrial activity, effected a change in the social function of the criminal law: with the insertion of this kind of offence, the subject of criminal law was not just the 'true' criminal anymore, but also the factory owner and other stereotypes much closer to the then-dominant idea of citizenship. The expansion of criminal liability, itself geared by the expansion of political and social rights and by the increase in social complexity, necessitated a shift in criminal law's reassuring function. As the structure of reassurance became stronger, the conception of dangerousness in criminal responsibility became more nuanced, reflecting the slow enmeshment between criminal and legal subjectivity. Strict liability offences relating to the regulation of economic activity, for instance, were conceptualised in an intrinsically different way than 'real' offences, as 'quasi-crimes' which did not actually incur any substantive stigma on its perpetrators, nor threaten any serious deprivation of liberty[246].

These nuances in the framework of criminal responsibility became more widespread and significant as the strengthening of the structure of reassurance engendered by the development of the political and social forms of citizenship continued. As insecurity became weaker in the ideological framework of liberal law, the pervasiveness of dangerousness in

[245] Foster quoted in Smith, ibid, 131.
[246] Norrie, *Crime, Reason and History*, 83-92.

criminal responsibility became increasingly contested, as evidenced by the appearance of demands for individual fairness in criminal legal practice. Even though in the nineteenth century these demands were not many and largely met with little success[247], they showed how criminal law's repressive role was more and more at odds with the socio-political aspirations of the time. This conflict also influenced the work of many nineteenth century legal theorists, who attempted to conciliate the growing concern for individual fairness with the need to preserve punishment's role in the management of social order.

T. H. Green, for instance, defended individual justice but thought such justice could only be actualised through the active social intervention of the state, which included the use of punishment as a means of social reform[248]. Bernard Bosanquet, by his turn, attempted to uphold both individual responsibility and dangerousness by radicalising the distinction between legal and dangerous subjectivity: although for him the capacity for citizenship was inherent to individuals from any part of the social spectrum, such was not true of the 'definitely criminal classes'[249]. Bosanquet effectively characterised the dangerous subject as belonging to an exceptional part of society which did not partake of its potential for juridical autonomy – 'dangerous classes' who are 'virtually outlawed' by their own agency[250]. Thus although punishment was legitimated through the conceptualisation of the offender as a responsible subject, this in fact only obscured the reality that the criminal was essentially characterised as a rebellious member of the community, who exhibited 'a furious hostility against the whole recognised system of law' and therefore lacked 'the essentials of citizenship'[251].

The insecurity of social relations remained significant throughout the nineteenth century, so that although confidence in the pursuit of individual justice increased[252] and the widening of the scope of criminal liability compromised the pervasiveness of dangerousness, the inherent idea of the criminal as a dangerous subject still prevailed, emphasising how individual responsibility was at odds with criminal law's primary function.

2.2.3 Reassurance and the Welfare State

The paradoxical relation between legal and criminal subjectivity is evidenced by the fact that the treatment of defendants as responsible citizens is exceptional in the modern history of criminal responsibility. Albeit embedded in the notion of individual freedom

[247] Ibid, 25-26.
[248] T. H. Green, *Lectures on the Principles of Political Obligation* (1901).
[249] B. Bosanquet, *The Philosophical Theory of the State* (1965), ix.
[250] Ibid, 272.
[251] Ibid, 210.
[252] Cf. the optimism of the Victorian criminal law commissioners with regards to the insertion of subjective responsibility in criminal law doctrine (Smith, op cit, ch. 4).

supported by civil rights, ideas of subjective responsibility only manage to rise to doctrinal prominence in the criminal law in the post-war, or 'subjective', period. This is not so difficult to explain; after all, the criminal law has always been more closely associated with the *limits* of civil rights than with the rights themselves. In particular, the lack of political equality in the eighteenth and most of the nineteenth centuries allowed the legal framework to essentially limit the formal equality predicated by its conception of autonomy to economic relations – hence why ideas of autonomy and responsibility were much more quickly implemented in private law than they were in criminal law. It is only with the rise of political and social rights that this idea of subjectivity starts to permeate into other layers of social relations, and this in turn starts to affect and compromise other conceptions of subjectivity put in place to secure the legal subject. The strengthening of the structure of reassurance heightened the tension between the expressive and repressive aspects of legal individualism.

The coming together of the three forms of citizenship in the welfare state elevated the structure of reassurance to its most complete form so far. The end of the Second World War and the establishment of the welfare state in Britain made liberal ideals appear victorious, strengthened and realisable – a condition which not so much enabled as necessitated the pursuit of individual fairness within criminal law, as the urge for political equality compromised the pervasively exclusionary character of pre-subjective conceptions of criminal liability.

While in the pre-subjective period the lack of reassurance provided by its thin conception of citizenship left society inherently insecure against crime, requiring the state to provide for this reassurance through a largely repressive criminal law, in the welfare state reassurance was reinforced through political and social inclusion, a decline in crime from the mid-nineteenth century onwards, and an increased belief that the 'crime problem' was manageable through social reform, policies of rehabilitation, and an increasingly elaborate framework of 'quasi-offences' of strict liability. The insecurity of the citizenry was therefore subsumed under a strengthened structure of reassurance, and so the criminal law was forced to readapt its source of legitimation. The criminal subject thus had to be re-conceptualised as a responsible legal subject, whose capacity and opportunity to obey the law had to be ascertained before they could legitimately be held liable for failing to act within legal boundaries.

Insecurity, however, was only *subsumed* under the structure of reassurance; dangerousness did not disappear, it was only made exceptional. While the general idea of crime as a socio-political source of insecurity was weakened enough to compromise and transform the framework of criminal responsibility, the criminal law still reserved more repressive measures to a few classes of criminal whose dangerousness was linked to the

nature or seriousness of their crime. Since the emergence of the socialisation of responsibility in the nineteenth century, the idea of dangerousness in criminal law was increasingly 'pathologised', attributed not to the criminal's wickedness or bad character but to an incapacity to exercise 'the essentials of citizenship'[253], mirroring Bosanquet's radicalisation of the separation between legal and dangerous subjectivity in order to reinforce the normality of responsible agency. This distinction, however, only served to obscure the many fissures which remained in the framework of criminal law, through which its repressive character reappeared whenever it was required.

Legal individualism permanently espouses a political conflict between responsibility and dangerousness, between individual freedom and its dangerous exercise. In the pre-subjective period, this conflict was downplayed by the distance between the legal status of the full citizen and the dangerousness of the subject of criminal law. Once these opposite poles are brought closer together by an expanding structure of reassurance, the tension between them is heightened as both have to be preserved *within* the same legal discipline: both responsible and dangerous subjects come to inhabit the criminal law. Individual responsibility's morality of form, once inserted into criminal law doctrine, inevitably accentuates the tension between individual autonomy and state authority, between the need for the state to respect the (abstract) freedom of the individual and the need for it to protect the (unequal, structurally violent) conditions for its exercise. Thus at the same time as individual responsibility reinforced the guarantees for individual fairness within the criminal process, an increasingly developed framework of regulatory offences had to be put in place not only to socialise responsibility for social and economic conditions, but also to regulate behaviour in order to police socially dangerous conduct. The recognition of juridical autonomy within the criminal law was only possible coupled with the reassurance that individual agency would be restrained in order to fit within acceptable standards.

Even in the subjective period, therefore, individual responsibility remained abstract and formalistic, replete with tensions which compromise the presumed universal validity of the legal subject, for insecurity is intrinsic to the ideological nature of legal individualism. The structure of reassurance provided by democratic citizenship reinforced the ideal of equality propagated by liberal aspirations, bringing with it the promise of a less insecure world. The criminal law followed suit, changing its doctrinal framework from one adapted to pervasive dangerousness to one in which dangerousness was exceptional. But the maintenance of the unequal social and political elements of liberal society meant that this structure of reassurance was largely ideological, superimposed over conditions of structural violence. In sustaining these conflictive conditions, this structure allowed for the expansion

[253] Cf. L. Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' (2009) in B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance*, 35-58, 37-39.

of the ideal of individual freedom in legal subjectivity without doing away with the source of its insecurity; the result was a compromise which was incomplete and unstable. Proof of this is that, only a few decades later, the model of criminal law centred on individual responsibility came into increasing discredit and contestation. Once the structure of reassurance of the welfare state started to erode, the insecurity it subsumed began to resurface, and the criminal law slowly regained much of its repressive character.

One of Marshall's main objectives in *Citizenship and Social Class* was to understand the proper relation between the substantive equality propagated by citizenship and the material inequality inherent to liberal societies. Marshall saw this relation as a conflict, a war fought between capitalism and social justice. In the framework of citizenship, this conflict was reflected by the struggle between civil liberties and social duties, which 'springs from the very roots'[254] of the development of democratic citizenship in his time. This is why Marshall was aware that the ideal of democratic citizenship, while able to become a source of stability during the post-war period, generated a compromise between egalitarian principles and an 'inegalitarian' society which was 'not dictated by logic', and therefore unlikely to continue indefinitely[255]. Likewise, the compromise generated by the rise of subjective responsibility and the liberal model of criminal law is not, unlike what many criminal law scholars would like to believe, one dictated by logic, but rather one generated by the dynamic interaction between the ideological function of the criminal law and its socio-political framework of legitimation.

Individual responsibility cannot provide for the rational resolution of tensions which arise from an intrinsic contradiction within the liberal state. Instead, the subjective period provided an unstable balance which was largely dependent on the structure of reassurance provided by the welfare state. Once this structure starts to unravel, social reassurance gives way to insecurity, leading to the resurgence of dangerousness as a main feature of the paradigm of responsibility.

2.3 THE CRIMINAL WITHIN THE CITIZEN

Although citizenship may embrace contradictory elements, the idea in itself possesses a certain logic. In the modern political tradition, citizenship has been intrinsically linked with the notion of personhood – the capacity for autonomy and self-government[256]. But the citizen is not exactly the same as the autonomous individual; citizens are also members of a political community with specific values, interests and boundaries. As a

[254] Marshall, op cit, 49.
[255] Ibid.
[256] M. D. Dubber, 'Citizenship and Penal Law' (2010) 13(2) *New Criminal Law Review*, 190-215.

normative concept, then, citizenship is both inclusionary and exclusionary – it seeks to raise all members of the community to the same standard of autonomous and moral agency, but at the same time it limits this status to those who are considered full, trustworthy, members of that community. Citizenship shapes the contours of autonomy which can be exercised by citizens, and by implication also defines the scope of autonomy which is not adequate, or is harmful, to the integrity of the community. Full membership of the community is thus dependent on the capacity to exercise one's autonomy within the boundaries of citizenship, set by law.

In the pre-subjective period, full membership of the community only actually belonged to a few individuals; most people were not expected to behave fully as citizens, because they did not have access to the conditions necessary for the full enjoyment of citizenship. Character responsibility reflected this social insecurity, not only by presuming from the beginning that the defendant in a criminal trial was guilty of whatever crime of which they were being accused, but also by supposing that their crime reflected an internal, persistent disposition towards wrongful behaviour. The subject of criminal law was by definition a dangerous subject, and only exceptionally would be found to be in fact a responsible legal subject – just like the balance of citizenship in society seemed to imply. Democratic citizenship, by its turn, promoted the idea that most individuals should be expected to behave as legal subjects, and thus that the subject of criminal law ought to be respected as a citizen until proven guilty in a criminal trial which guaranteed such respect. This shift in criminal responsibility did not fundamentally disrupt the function of the criminal law of identifying and containing dangerous subjects, but it did potentially limit the scope of criminal law's coercive and repressive role under the right circumstances. This potential depended on a socio-political structure which could reassure citizens that a fair system of criminal law was sufficient to secure them against dangerousness.

The dangerous subject cannot be fully eliminated from the legal framework. Because legal subjectivity is tied to an abstract legal individualism, it is unable to account for the full scope of social individuality in a world marked by structural violence; as long as liberal society necessitates individuals to behave as legal subjects, the exercise of agency beyond these limits is potentially disruptive to the integrity of juridical relations. Therefore, as long as the legal system is intent on making legal subjects out of individuals, there will be individuals whose autonomy can be considered to be nothing but dangerous. The structure of reassurance promoted by democratic citizenship ideally promised an end to this rupture in human subjectivity, by assuming that a democratic political community could potentially include all members and classes of society. Marshall's conception of citizenship 'emphasized a process of inclusion of all people in a common status with civil, political, and

social rights (and concomitant responsibilities) by virtue of their humanity'[257]. Differences in social status could only exist to a very limited degree in Marshall's framework, and only 'provided they do not cut too deep, but occur within a population united in a single civilisation'[258]. These ideas of unity severely compromised the image of the criminal as a dangerous subject, excluded from full participation in society.

It is fair to say that the extent to which individual responsibility was successful in supplying the criminal law with individual justice was proportionate to the extent to which Marshall's promise of democratic citizenship was concretely actualised in British society. If even in the golden days of the welfare state these aspirations were of limited effectiveness, with the atmosphere of social unravelling which began to take shape in the 1970s and continued through to the twenty-first century, democratic citizenship increasingly assumed the image of either a failed project or a broken promise. The decline of the reassurance provided by the fusion of the forms of citizenship likewise affected the framework of criminal responsibility, along with the model of criminal law which it legitimated; as a result, dangerousness re-emerged as a main feature of penal law and policy. The substantive changes to the criminal law explored in the previous chapter point to an increasing lack of trust both in the necessity of the procedural guarantees of the liberal model to ascertain responsibility for crime, and in the effectiveness of this model as a guarantee to the security of citizens and the community.

But the paradigm of individual responsibility in itself – responsibility as a matter of individual autonomy and agency – was not directly challenged or deemed obsolete; what was put in doubt was its effectiveness in guaranteeing social order. With the waning of reassurance, insecurity shifts the focus of the main issue concerning criminal responsibility, from whether it was proven that the defendant had the capacity and the opportunity to avoid wrongdoing, to whether such capacity was and could be trusted to be appropriately exercised. The resurging dangerousness of the criminal subject shifts the discourse from one of capacity to one of incapacitation. The fission of citizenship[259] creates a situation in which the subjective aspect of criminal responsibility, effectively the political status of the defendant, is at times overemphasised when it benefits the preservation of civil society (reinforcing the guilt of the defendant and the need for harsh punishment), and at times downplayed or even ignored when it is deemed cumbersome for the promotion of security (such as with regards to preventive measures, strict liability offences, etc.).

Once it is inserted into the legitimatory framework of the criminal law, responsible subjectivity cannot simply be discarded; instead, its legitimatory framework is dissociated

[257] R. Reiner, 'Citizenship, Crime, Criminalization: Marshalling a Social Democratic Perspective' (2010) 13(2) *New Criminal Law Review*, 241-261, 244.
[258] Marshall, op cit, 44.
[259] Norrie, 'Citizenship, Authoritarianism', 21-22.

from most of its structural and procedural safeguards. In this 'post-subjective' period, what we see is a weakening and restriction of the relevance of legal subjectivity in the criminal process, coupled with a resurgence of dangerous subjectivity as the primary force behind criminal responsibility. In terms of doctrinal aspects, many elements of criminal liability in contemporary criminal law show more affinity with the character than with the capacity conception of responsibility. Examples include the widespread of objective standards of reasonableness not only in regulatory offences but also in serious offences such as rape and manslaughter; instances of constructive or aggravated liability; and, particularly, special laws which criminalise conduct related to a specific category of person and activity – categories such as 'the anti-social youth, the sex offender, the migrant, and, above all, the terrorist'[260].

'Amid a crisis of security (...), legislators today are reaching for definitions and mechanisms which can reassure an *anxious* public that their concerns are being taken seriously – and that 'the criminal threat' can be contained'[261]. It is important to realise that the post-subjective turn in criminal responsibility contributes directly to this public anxiety, even as the criminal law claims to be reacting against it. One of the main implications generated by the insertion of legal subjectivity within the criminal legal framework, and the subsequent erosion of the structure of reassurance which protected it, is an undermining of the traditional 'barrier' existent in pre-subjective responsibility between legal and criminal subjectivity. In the eighteenth and nineteenth centuries, there was a more or less clear socio-political and legal structure of inequality which indicated who the law saw as a trustworthy, responsible citizen, and who was a dangerous individual who ought to be restrained and controlled. The subjective turn in criminal responsibility relied on the exceptionality of dangerousness to reassure citizens that the guarantees of the criminal process would not compromise their security; without the structure of reassurance of the welfare state, insecurity once again permeates liberal society and necessitates criminal law's reassuring function, so that the established framework of individual responsibility has to coexist with a new framework of dangerousness. The result is socio-political anxiety.

Once a morality of form is inserted into the criminal law through individual responsibility, law's capacity of managing insecurity through categories of otherness is disrupted by responsibility's claim to universality. Post-subjective responsibility thus generates new paradoxes, in which legal categories are created for the purpose of distinguishing different kinds of subjectivity in the law, but still upholding the premise that

[260] Lacey, 'The Resurgence of Character', 161-165, 173.
[261] Ibid, 173 (emphasis added).

they potentially apply to all citizens[262]. Criminal law's reassuring function is compromised by the enmeshment of responsibility and dangerousness.

2.3.1 The State of Insecurity

The coexistence of legal and dangerous subjectivity in the framework of criminal responsibility is disruptive to the liberal legal project, because it thins down the barrier between these two subjectivities which is one of the bases of the ontological security[263] of the legal subject. Instead of reassuring legal subjectivity, its insertion into the framework of criminal responsibility left it more vulnerable to the insecurity generated by its own abstract nature. The neo-liberal state both sustains and reacts against this insecurity, through authoritarian measures which aim to compensate the lack of reassurance prevalent in socio-political conditions. But the anxiety generated by the mixed expectations of a post-subjective framework of criminal responsibility shows that the state cannot simply rescue its role as authoritarian reassurer which belonged to a pre-subjective criminal law, as responsible subjectivity became an intrinsic aspect of liberal society's ideological framework after the establishment of democratic citizenship. Neither should we aspire to find an answer to the current state of insecurity in a return to the reassurance of the subjective period, as we already saw that the so-called liberal model of criminal law does not offer any rational resolution to the problem of insecurity, just an ideological compromise contingent upon historical and socio-political conditions.

In a post-subjective framework of responsibility, the idea of the subject of criminal law as a responsible citizen, once protected by the structure of reassurance provided by democratic citizenship, now finds itself increasingly insecure. It is the need to preserve this ideal model of subjectivity alongside a resurgence of dangerousness in criminal responsibility which motivates and legitimates the changes occurring in contemporary criminal law. The paradox that the subjects of criminal law ought to be treated as responsible subjects but cannot be trusted to act responsibly generates an anxiety reflected in the specific shape and tendencies expressed by the advanced liberal landscape of criminal responsibility, as criminal and citizen are at times confused and at times set apart.

If we recall, in the first chapter we have seen that Ashworth and Zedner have argued that the recent 'volatility in the English criminal law' could be traced back to the 'over-development of particular state functions'; more specifically, they mentioned the over-development of a regulatory, a preventive and an authoritarian function in the late modern

[262] Some terrorist offences are particularly emblematic of this phenomenon. Cf. for instance s. 58 of the Terrorism Act 2000, discussed in detail in J. Hodgson, V. Tadros, 'How to make a terrorist out of nothing' (2009) 72 (6) *Modern Law Review*, 984 – 998.
[263] A. Giddens, *Modernity and Self-Identity* (1991), 36-42.

state[264]. These transformations in the landscape of criminal law are in reality intrinsically connected to the historical dynamics of criminal law and responsibility analysed above. This interrelation can be elucidated with the help of Norrie's identification of 'three broad developments in recent criminal law and justice'[265], linked to the reconfiguration of the forms of citizenship. This re-interpretation can highlight how the changing role of the criminal law is not so much related to the external interference of an over-developed state as it is to the workings of an advanced liberal criminal law, aimed at preserving the liberal normative framework in a state of insecurity.

The first development is 'an increasing emphasis on the retributive understanding of criminal behaviour, which is seen in the stress upon the responsibility of individuals for their actions', which he calls 'a tendency to increased *responsibilisation*'[266]. Linked to the authoritarian tendencies espoused by the late modern state, responsibilisation is the direct consequence of the unravelling of social citizenship and the consequent radicalisation of the civil form of citizenship as a basis for responsibility. The loss of trust in the social structure's capacity to inhibit and control criminal behaviour has been counteracted by a shift in the burden of responsibility, which was taken from society and placed in the hands of individuals. Individual responsibility, which was originally thought of as a guarantee for individual rights, is now being re-deployed as grounds for authoritarian legal intervention, as individuals are seen as increasingly responsible for the maintenance of social cohesion. 'Removing the contextualising manifold of principles of social citizenship, welfare and justice places renewed emphasis on individual responsibility as a primary legitimating and dominatory ideological device'[267].

Responsibilisation effectively re-conceptualises responsible subjectivity as a duty instead of a right, as it requires individuals to actively prove and preserve their character as that of a legal subject; implicit within this tendency is the assumption that the community's citizens, albeit legal subjects by definition, carry within themselves the potential to being or becoming dangerous. This shift clearly exposes the dialectic aspect of criminal responsibility, as the subjective notion of responsibility which at first represented an inclusionary and emancipatory development in the criminal law is turned into an instrument of repression and exclusion. The abstract nature of individual autonomy and agency allows these concepts to be turned around and used to reinforce the idea that individuals can and should be relied upon to bear the burden of social insecurity; it is this ideological aspect

[264] A. Ashworth, L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy*, 38-43. Cf. also the discussion in Chapter 1, subsection 1.2.2 above.
[265] Norrie, 'Citizenship, Authoritarianism', 14.
[266] Ibid, 15 (emphasis in original).
[267] Ibid, 30.

which allows the state to criminalise a citizen's failure to reassure others of their own status as a responsible legal subject, and to seek to control behaviour which threatens to compromise this fragile balance of individual responsibilities[268].

The second development is an increasing emphasis 'on notions of *dangerousness* for a minority of criminals, for whom exceptional forms of punishment or control are necessary'[269]. Different from ideas of dangerousness which were propagated in the end of the nineteenth century, the advanced liberal perspective on dangerousness is political instead of pathological. In this sense, this perspective is intrinsically linked to the post-subjective enmeshment between responsibility and dangerousness, as these categories of criminal are considered dangerous not due to their incapacity to act responsibly, but due to an abuse of capacity – a voluntary commitment towards wrongful and harmful behaviour. Here the anxiety behind responsibilisation is taken to its ultimate consequences, as legal subjects are taken to have the capacity to seriously endanger the integrity of the political community through their agency; this image fuels a tendency towards prevention, as any individual who is identified as *potentially* dangerous has to be contained (incapacitated) before they can put the community at risk.

Since under the post-subjective paradigm it is rather difficult for the law to legitimately openly distinguish between legal and dangerous subjects, the substantive developments which are put in place in order to deal with increased dangerousness have to be wide in scope and effective in reach – they have to be applicable at any time and place, even though in practice they will be employed through techniques which can identify groups and areas in which dangerousness is most likely to manifest, such as profiling. This way, preventive measures guided by dangerousness are both broadly conceptualised and narrowly employed[270]. These paradoxical regimes of prevention pragmatically abandon or suppress many of the principles and guarantees traditionally related to individual responsibility and its liberal model, at the same time as they are ideologically legitimated by subjectivist assumptions of capacity and agency, coupled with the notion of dangerousness.

Finally, the third is 'the development of new forms of criminal justice alongside traditional ideas of crime and punishment', which Norrie calls 'a tendency to increasing *regulation*'[271]. This tendency is related to the increase in regulatory law promoted by the

[268] The starkest example of this tendency is found in the rationale for preventive orders such as the ASBO/CPI, but it can also be linked to tendencies such as that towards increased punitiveness in the criminal justice system. Cf. A. Ashworth, L. Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' (2011) in R. A. Duff, S. P. Green (eds), *Philosophical Foundations of Criminal Law*, 279-303; P. Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (2011) in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, V. Tadros (eds), *The Structures of the Criminal Law*, 203-228.
[269] Norrie, 'Citizenship, Authoritarianism', 15 (emphasis added).
[270] Cf. Zedner, 'Fixing the Future?'.
[271] Norrie, 'Citizenship, Authoritarianism', 15 (emphasis in original).

development of social citizenship; but instead of pursuing the development of social conditions alongside other progressive socio-political developments, the contemporary trend represents an anxious attempt to compensate for the unravelling of social structures by means of an excessive regulation of social relations and activities. Regulatory law is also tied to the heightened tension between responsible and dangerous subjectivity: although effected through measures which escape the traditional attribution of liability, these regulatory devices can controversially be seen as 'a way of getting individuals to measure up to the responsibilities of being a member of [a liberal] polity, that is, as a way of renovating political citizenship for more legitimating work'[272]. Increased regulation completes the picture of the anxiety surrounding legal subjectivity, as responsible agency is simultaneously taken to be increasingly important and increasingly harder to trust and reassure.

It is thus necessary to understand the notion of the responsible legal subject within a broader socio-political framework in order to grasp the full scope of its ideological construction, beyond its apparent historical contradictions. The historical perspective developed in this chapter appropriately points to 'the *implication* of liberal law in the evolution of authoritarianism within criminal justice'[273]. Historical and normative analyses which consider the recent developments in criminal law as anomalies which do not fit into the liberal legal framework fail to consider how legal individualism possesses both an expressive and a repressive dimension, and how these two dimensions are intrinsically and inextricably connected.

CONCLUSION

> Thus the formal, neutral appearing categories of criminal responsibility, an historically generated ideology permitting the legitimation of a particular kind of society, do real moral and political work of a particular as well as a general kind, but obliquely.[274]

In this chapter, I used a recent debate regarding how best to provide a historical account of criminal responsibility in order to argue that individual responsibility is a specific expression of a broader dialectics of responsibility generated by the legal individualism that lies at the core of liberal law. In this setting, criminal responsibility preserves a dynamic equilibrium between instances of responsibility and dangerousness, insecurity and reassurance, formed by the relation between legal individualism and the socio-political conditions in which it is actualised. As a result of this dialectic, and in order to fulfil its function of maintaining a specific, ideological social order, criminal responsibility promotes

[272] Ibid, 34.
[273] Norrie, 'Historical Differentiation', 257.
[274] Ibid.

manifestations of two different conceptions of subjectivity, a responsible legal subject and a dangerous subject, which it aims to respectively express and repress. While the legal subject is the primary model of subjectivity that is to be protected and preserved by the legal system, it is the dangerous subject who constitutes the paradigmatic subject of criminal law, upon whom it exercises its coercive, authoritarian function. These two dimensions are inevitably connected by the ideological structure of liberal law; a responsibility theory is necessarily also a dangerousness theory, for there is an inherent dangerousness to the legal subject.

The liberal framework of individual responsibility is incapable of fully protecting individual freedom against authoritarian power, for the abstract nature of legal subjectivity leaves it vulnerable to insecurity. Democratic citizenship and the structure of reassurance of the welfare state both enabled and required subjective responsibility to enter the framework of criminal law; this subjective turn, however, depended on the maintenance of this structure of reassurance in order to remain stable. With the unravelling of social citizenship from the end of the twentieth century onwards, the coexistence of legal and dangerous subjectivities in the framework of criminal law and responsibility proved disruptive, exposing the tensions and contradictions of legal individualism and placing the responsible subject, along with the liberal legal paradigm to which it relates, in a state of insecurity.

This intrinsic dialectic aspect in criminal responsibility has conceptual foundations which are found not in the midst of moral philosophy, but in the conflictive framework of political theory. This political aspect of criminal responsibility is further evidenced by the concept's connection with the framework of citizenship, which in itself can only be properly conceptualised in light of its socio-political elements, aims and conditions. It is therefore necessary to investigate these conceptual foundations, if responsibility is to be conceptualised in a way which can properly engage with its contemporary challenges and shortcomings.

Chapter 3: Securing the Responsible Subject: Hobbes and the Conceptual Foundations of Insecurity

To speak impartially, both sayings are very true:
that *man to man is a kind of God*;
and that *man to man is an arrant wolf*.[275]

INTRODUCTION

In the previous chapters, I argued that there is a notion of dangerousness which is intrinsic to, and indissociable from, responsible legal subjectivity. This notion is primarily expressed in modern law through criminal responsibility, in that the paradigmatic subject of criminal law is not the responsible citizen on whom liberal law grounds the moral justification for punishment, but an inherently dangerous subject whose agency is at odds with the purpose and interests of the political community. Furthermore, I argued that this dangerousness in criminal responsibility is a reflection of the ideological character of law's individualism, a reaction against the legal subject's essential insecurity.

In this chapter, we begin to explore the conceptual framework which I argue is at the core of liberal law's conception of individual, society and political authority. The idea of the free individual was established within modern (Western) legal and political thought out of the need to re-imagine society in a way which could break with the old traditions and hierarchies, and provide the necessary socio-political structure for the establishment of a new, liberal social and moral order. Such an investigation of the socio-political bases of the liberal normative framework intends to provide tools with which to expose what analytical philosophical approaches are keen to repress. The next step is an investigation into the conceptual foundations of the juridical individual's insecurity, foundations which were first and foremost established in the work of Thomas Hobbes, one of the greatest and still one of the most relevant and influential theorisations of the relation between individual autonomy and political authority in modern societies.

The main argument of this chapter is that the generation of insecurity by the individualist ideology in criminal law follows a Hobbesian logic. As such, a study of Hobbes's political theory is essential for understanding the current state of insecurity in criminal law. Hobbes's theoretical framework reveals and magnifies the basic assumptions behind the criminal law's role as an instrument of social order, as well as the influence that this role exerts over the need in liberal society to preserve and justify punishment. His conceptualisation of human nature as intrinsically insecure and in perennial need for

[275] T. Hobbes, *Man and Citizen* (1991), 89 (emphasis in original).

reassurance, of political society as the only solution to this insecurity, and of political power as an indispensable condition for the establishment and preservation of society, is deeply embedded within the role played by criminal law in the liberal social order. This identification, in turn, sheds some light upon the model of society which lies at the core of criminal law's normative justification. The way in which Hobbes connects all these elements with and through his account of punishment, highlighting punishment's central place within political society, provides a unique theoretical model with which to examine the relationship between criminal responsibility, dangerousness and insecurity.

The relevance of Hobbes's work to an understanding of the contemporary environment of criminal law is further evidenced by the increasing attention that it has received in the hands of legal scholars[276], particularly with regards to issues of punishment and security. Notably remarkable is the diversity of interpretations regarding Hobbes's work – Hobbes has been considered anything from one of the founders of the liberal tradition to a staunch defender of absolutism and arbitrary rule. To me, this suggests that Hobbes's theory, as an essential part of the history of modern political thought, evidences how the conceptualisation of the modern state is inextricably connected with both individual freedom and authoritarian government. This perspective, that individual autonomy and political authority are intrinsically related and co-dependent in modern political thought, inclines me to agree with Alice Ristroph that 'Hobbes's account of criminal law and punishment offers broader lessons about the promise, and limits, of liberalism'[277]. The present chapter is an investigation of these lessons.

Section 3.1 addresses the issue of insecurity in legal subjectivity, delineating and discussing the implications of the paradox contained in Hobbes's account of punishment. It looks at how this paradox is a reflection of an intrinsic logic within Hobbes's political theory, which engenders a conceptual separation between the subjectivity of those who follow and respect the law, and that of those whose agency reaches beyond its boundaries. This fissure in the law's relation with its subjects compromises the justification of punishment, but it paradoxically also constitutes the very reason why punishment is seen as necessary in the first place, representing the main ideological motivation behind the authority of the state in Hobbes's model of society.

This model, which involves the main elements in Hobbes's political theory, is the focus of section 3.2. This section explores Hobbes's conception of human nature and psychology, as well as the passage from the state of nature to political society. I argue that the endemic insecurity found within the natural condition of mankind implies that the state

[276] Cf. the references discussed throughout this chapter, and more generally D. Dyzenhaus, T. Poole (eds), *Hobbes and the Law* (2012).
[277] A. Ristroph, 'Criminal Law for Humans' (2012) in D. Dyzenhaus, T. Poole (eds), *Hobbes and the Law*, 97-117, 98.

of nature is never fully transcended, instead remaining at the core of Hobbes's political society and constituting the main basis for the dangerousness of crime.

Finally, section 3.3 discusses the implications of the influence which Hobbes's logic carries in the contemporary framework of criminal law, and why it has not been possible for liberal legal theory to escape its insecurity. The chapter concludes by stating that a critical assessment of Hobbes's influence in modern and contemporary legal thought is an indispensable step towards an understanding of the preventive turn in criminal law and responsibility.

3.1 HOBBES'S PARADOX OF PUNISHMENT

If Hobbes's political conclusions are taken as a starting point, it is difficult to think of him as anything other than a theorist of absolutism, let alone as one of the founders of liberalism[278] and 'originator of modernity'[279]. But Hobbes was more nuanced a theorist, and his postulates more thoughtful and influential, than his staunch defence of absolute authority would suggest. Indeed, Hobbes 'is often credited as inventing the very idea of the modern state'[280], understood as a political community concerned with upholding peace and security through law and grounded on the consent of its citizens. Furthermore, the notion that political authority is necessary for the maintenance of the principles and liberties of civil society is a corollary not only of modern societies in general, but also of liberal societies in particular[281]. The relation between Hobbes's political theory and the premises and institutions of the modern state is nowhere clearer than in his account of punishment and criminal law, an aspect of his work that has received surprisingly little attention over the years, in spite of its centrality to his political paradigm as a whole.

Hobbes thought very carefully about punishment and wrote extensively about the substantive content of the criminal law, even criticising jurisprudents of his time such as Coke in his *Dialogue on the Common Laws of England*[282]. His account of the substantive aspect of criminal law advanced many principles and rules that remain at the core of criminal legal theory to this day:

> Among other things, Hobbes advocated written statutes and impartial adjudicators; notice requirements and a prohibition of ex post facto laws; laws that punished action rather than intent

[278] Cf. J. Hampton, *Hobbes and the Social Contract Tradition* (1986); C. B. McPherson, *The Political Theory of Possessive Individualism* (2011).
[279] L. Strauss, *What is Political Philosophy?* (1959), 172.
[280] I. Loader, N. Walker, *Civilizing Security* (2007), 42.
[281] Ibid. Cf. also M. Oakeshott, 'Introduction to Leviathan' (1975) in *Hobbes on Civil Association*, 1-79, 67: 'Indeed, Hobbes, without being himself a liberal, had in him more of the philosophy of liberalism than most of its professed defenders.'
[282] T. Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (1972).

alone; a special condemnation of physically injurious activity; an individual right of self-defence; excuses based on incapacity and duress; and a graded scale of crime seriousness that generates correspondingly graded punishments.[283]

The similarities do not stop there. Hobbes's account of the form and theory of law upholds formal and structural tenets that sound surprisingly contemporary, from the principle of legality to the need for trial and conviction to precede punishment[284]. So many are the affinities between the framework Hobbes sets for his criminal law and the structures and values inherent to the contemporary legal system that 'the inattention to Hobbes's account of punishment is regrettable'[285].

Such inattention is regrettable, furthermore, not only because Hobbes's theory pre-empts many of the main aspects of modern criminal law, but also because it challenges elements which one might have thought would have appeared uncontroversial to a theorist of punishment – especially one arguing for the absolute authority of the state. Hobbes's framework is in this sense 'both familiar and strange'[286]. Among its strangest features is Hobbes's reluctance in providing a proper justification for punishment, as 'it is not clear in his writings what the justification of punishment is, or indeed whether there is one'[287]. This uncertainty with regards to punishment's normative justification is particularly odd in light of the fact that punishment is essential for the establishment and maintenance of the commonwealth. According to Hobbes, individuals only agree to subject themselves to the state and its law on

the foresight (...) of getting themselves out from that miserable condition of war, which is necessarily consequent (...) to the natural passions of men, when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants, and observation of [the] laws of nature.[288]

Punishment is therefore necessary for the commonwealth's preservation. It assures the members of the community that everyone will either respect the boundaries of the law, or be punished for breaching them. If Hobbes stopped here, he would be little more than an apologist for the sovereign's right to punish; but as it was just suggested, individuals in Hobbes's theory subject themselves to the state voluntarily. Like most liberal political theorists, Hobbes grounded the legitimacy of political authority on the consent of its subjects: individuals establish the commonwealth through a covenant in which they lay

[283] Ristroph, 'Criminal Law for Humans', 97.
[284] See Ristroph, ibid, 100; see also Hobbes, *Leviathan*, 193-194.
[285] A. Ristroph, 'Respect and Resistance in Punishment Theory' (2009) *97 California Law Review*, 601-632, 606.
[286] Ristroph, 'Criminal Law for Humans', 97.
[287] A. Norrie, 'Thomas Hobbes and the Philosophy of Punishment' (1984) *3 Law and Philosophy*, 299-320, 301-302.
[288] Hobbes, *Leviathan*, 111.

down their right to self-government, effectively transferring it to the sovereign. Hobbes, however, is clear that a human being only consents to such transference of right

> in consideration of some right reciprocally transferred to himself; or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man [*sic*], the object is some good to himself. And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force (...). The same may be said of wounds, and chains, and imprisonment (...). And lastly the motive, and end for which this renouncing, and transferring of right is introduced, is *nothing else but the security of a man's person*, in his life, and in the means of so preserving life, as not to be weary of it.[289]

This passage appears to suggest that, since security is the main reason why individuals join the commonwealth, they could not possibly authorise anyone, much less the sovereign, to do anything that could put their own life and security at risk. This implication is even clearer when Hobbes affirms that 'no man is supposed bound by covenant, not to resist violence; and consequently it cannot be intended, that he gave any right to another to lay violent hands upon his person'[290]. But if the right to punish inevitably involves the sovereign's right to 'lay violent hands' upon any individual who breaks the law, how could any of the subjects of the commonwealth possibly authorise it?

There is an obvious tension between Hobbes's first claim that individuals voluntarily constitute a sovereign with the power to punish transgressions of the law, a power to which they are all subjected, and the second claim that any particular human being could never voluntarily authorise anyone to punish them, instead always retaining the right to resist punishment. While punishment is necessary for the integrity of political society, it remains an act of violence upon the individual who is punished, and the violent nature of punishment contradicts the very reason why individuals authorise the sovereign in the first place. Remarkably, Hobbes himself was aware of this tension within his theory. He highlights its existence right after the definition of punishment in *Leviathan*, when he states that 'there is a question to be answered, of much importance; which is, by what door the right, or authority of punishing in any case, came in'[291]. His answer is as perplexing as it is illuminating:

> It is manifest therefore that the right which the commonwealth (...) hath to punish, is *not grounded on any concession, or gift of the subjects*. But I have also showed formerly, that before the institution of commonwealth, every man had a right to every thing, and to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of punishing, which is exercised in every commonwealth. For the subjects did not give the sovereign that right; but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him

[289] Ibid, 88-89 (emphasis added).
[290] Ibid, 205.
[291] Ibid.

only; and (excepting the limits set him by natural law) as entire, as in the condition of mere nature, and of war of every one against his neighbour.[292]

The most perplexing aspect of Hobbes's solution to the problem of punishment is the admission that the right to punish is not directly authorised by the subjects, but only indirectly grounded on the consent of the citizens, through their agreement to lay down their right to self-government. It appears that the power to punish in itself is not an ordinary part of the social contract – even though it is one of the necessary conditions for its possibility. The necessity of punishment is evident from the assumption that the social contract can only be sustained if individuals know that those who act against it will be punished. Punishment is 'an evil inflicted by public authority' in response to 'a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience'[293].

But Hobbes's reluctance to say that punishment is actually authorised by the subjects of the commonwealth, and his insistence that it is an *evil*, points to the impression that the right to punish is not in harmony with the principles of political society. It is rather reminiscent of the violence and conflict of the state of nature, from which individuals sought to escape in the first place. 'Thus while the Sovereign is supposed to protect men from the state of nature, the Sovereign's primary tool for achieving this is itself a weapon of war and a logical conduit back into the natural state'[294]. There is a self-contradiction contained within Hobbes's account of punishment, a paradox which threatens to undermine the legitimacy of the institution, and compromise the integrity of the commonwealth.

If individuals put themselves under the government of the sovereign precisely in order to guarantee their self-preservation; if the commonwealth depends on punishment in order to be effective; and if punishment threatens the self-preservation of every individual against whom it is directed – which potentially means every single member of the community, it would appear that 'the institution of the Commonwealth is a self-defeating proposition'[295]. After all, why would individuals accept the state to have a power that may be used against them if it, in being so used, would undermine the very reason why the state was instituted in the first place? Furthermore, if punishment goes against the self-interest of the individual who runs the risk of being subjected to it, how can the state reassure its citizens that this power is going to be used for their protection, rather than in its detriment? But most importantly, why would Hobbes identify this paradox in his theory, and yet preserve it? It might be tempting to consider this an imperfection in his theory, perhaps a consequence of the clash between his absolutist and individualist tendencies, which might suggest that

[292] Ibid, 205-206 (emphasis added).
[293] Ibid, 205.
[294] Norrie, 'Thomas Hobbes and the Philosophy of Punishment', 308.
[295] Ibid, 307.

'Hobbes's theory of punishment is surprising in its implication that punishment, while necessary, is at best imperfectly legitimate'[296].

But there is more to Hobbes's paradox of punishment than the crisis of legitimacy of the authority of the state to punish which it appears to denounce. The conflict between the respect for autonomy and the necessity of authority reflected in this paradox lies at the very heart of the socio-political landscape of modernity, as a direct consequence of the ideological paradigm which informs it and fills it with individual and social insecurity. The main problem generated by this paradigm is not the impossibility to reconcile autonomy and authority. What is most puzzling is that this impossibility, along with the conflict it engenders in society, appears to be exactly what legitimates and motivates the need for punishment. The first step to properly understand how this dynamics operates lies within Hobbes's solution to the question of punishment itself. More specifically, it lies within what his solution reveals about the relationship between the state and its subjects – especially those subjects who disobey the law.

3.1.1 The Nature of the Criminal

According to Hobbes's answer to the paradox of punishment, the sovereign's right to punish is akin to the right of nature, the right to self-government which every individual possesses before the establishment of the commonwealth, based on the essential right to self-preservation. The main reason why the state of nature is ripe with insecurity, which is examined in further detail below, is that the self-interest of individuals is constantly clashing with each other, and the absence of common judgment entitles every individual to pursue their own self-interest to the ultimate consequences, generating endemic potential conflict. In order to stop this cycle of violence, individuals relinquish their right to self-government for the sovereign to exercise it in the name of all: 'an individual's right to do violence as he judges necessary for his own security becomes, in political society, the sovereign's right to punish'[297]. Punishment is thus analogous to the natural liberty an individual possesses to use one's judgment according to the requirements of one's preservation, which necessarily includes 'the natural right to use violence pre-emptively, even against someone who does not pose an imminent threat'[298].

The need to care for one's own security thus implies the right to use violence for purposes other than direct self-defence, and the criminal law in a sense represents an exercise of this right in the name of the commonwealth. From this perspective, the right to

[296] Ristroph, 'Criminal Law for Humans', 98.
[297] Ibid, 110.
[298] Ibid.

punish is not something reciprocal, given to the sovereign by the individuals' subjection to its authority. On the contrary, the right to punish is precisely a consequence of the *dangerousness* inherent to crime. It is the threat of harm in crime, not the existence of law, which grounds the right to punish. Punishment is thus not a part of the social contract, as an exchange of rights and duties between sovereign and citizens. Instead, the right to punish is a condition for the establishment and maintenance of the political covenant, and 'a manifestation of the *sovereign's* [as representative of the commonwealth] right to self-preservation'[299].

The importance of punishment for the preservation of the state is significant to an understanding of the nature of the criminal in Hobbes's socio-political framework. As previously discussed, it is Hobbes's suggestion that individuals never abandon their right to resist punishment that generates the paradox of punishment in the first place. This right of resistance can be interpreted in many ways. Ristroph, for instance, argues that it actually constitutes an essentially liberal dimension of Hobbes's theory, emphasising a demand for the state to treat criminals with respect. She suggests that posing punishment as imperfectly legitimate highlights its violent character, and therefore encourages respect for the criminal. When – as it seems to be the case in contemporary criminal law – punishment is posited as perfectly legitimate, any resistance is 'viewed as a basis for further condemnation'[300]. Instead, Hobbes's depiction of resistance to punishment as a natural 'human' reaction ought to compel a more humane treatment of the criminal. But in overemphasising the emancipatory aspect of Hobbes's account of punishment, Ristroph seems to miss what is arguably the most important quality of Hobbes's characterisation of the criminal.

While Hobbes's account of punishment does submit that lawbreaking and resistance to authority are part of human nature, these issues are not raised in order to highlight the criminal's humanity, but mainly to emphasise two characteristics of crime: first, that it is not in league with the terms of the social contract, thus lying outside of the boundaries of the commonwealth; and second, that – precisely because of its extraneous nature – it constitutes a (potential or imminent) threat to the integrity of the political community. In the eyes of the sovereign, criminal behaviour is *dangerous*.

The natural dangerousness of crime in Hobbes's work can be elucidated through Ristroph's own discussion of the origins of the sovereign's right to punish. She highlights that the link between the right to punish and an individual's natural right might at first sound strange, for since the sovereign is an entity that only properly exists after the establishment of the commonwealth, it might be argued that the sovereign did not possess any right of nature to begin with. Ristroph attempts to 'alleviate this tension' by proposing that the state

[299] Ristroph, 'Respect and Resistance', 613.
[300] Ibid, 602.

of nature should not be understood as a reference to a possible pre-political historical moment, but rather as a 'term of art', referring to 'the always-possible situation in which political authority is absent'[301]. Perceived in these terms, the condition of the state of nature can always be recreated in particular circumstances.

Punishment thus occurs in what she calls 'a recurrent, specific state of nature, not an original or universal one'[302]. In this specific state of nature, the unity of political society is absent, and sovereign and criminal face each other as two natural subjects, each aiming towards their own self-preservation. Ristroph argues that this aspect of punishment undermines its legitimacy, for it is clear that, from the criminal's perspective, punishment is not the expression of an authorised political authority, but rather 'remains a violent threat to safety and freedom'[303], itself not very different from the crime against which it reacts. This perspective might lead to the conclusion that 'the criminal has as much right to resist punishment as the sovereign has to impose it'[304], and thus make it harder for us to 'pretend that we punish prisoners for *their* benefit rather than our own'[305].

But again Ristroph seems to be downplaying one very important aspect of the framework that her own work helps to elucidate. For according to this reasoning, although punishment occurs in a specific state of nature where everyone involved has equal claim to their self-preservation, it is clear that it was the crime, not the punishment, which led to it. Punishment is in this sense a reaction to a specific state of nature – a rupture in the peace and security of society – generated by crime. Even in Hobbes's peculiar characterisation of the right to punish as a manifestation of the right of self-preservation of the state, therefore, there is still a clear *retributive* aspect to punishment which seems to legitimate it, even if imperfectly. The fact that individuals do not authorise the sovereign to punish them does not eliminate the notion that individuals who commit crimes know that they are breaching the terms of the social contract and therefore endangering the political community tied to it, effectively threatening its preservation. The idea that crime occurs in political society, and that it threatens its existence, seems to provide punishment with all the legitimation it needs.

Hobbes's acknowledgement of the right of resistance does not appear to diminish punishment's motivation; after all, the right of nature from which the right to resist derives is nothing but a 'blameless liberty'[306] which does not incur any duty on the sovereign to respect it. When compared to the importance Hobbes attributes to punishment, without which 'there

[301] Ristroph, 'Criminal Law for Humans', 112.
[302] Ibid.
[303] Ristroph, 'Respect and Resistance', 619.
[304] Ristroph, 'Criminal Law for Humans', 112-113.
[305] Ristroph, 'Respect and Resistance', 621 (emphasis in original).
[306] Ibid, 602.

can be no security'[307], his acknowledgment of the right of resistance gives individuals little cause for consolation. Even if Ristroph's conclusions cannot be supported, however, there are other important implications which can be drawn from Hobbes's account of punishment as an expression of the state's right to self-preservation. The first is a reiteration of the relevance of the right to punish for the maintenance of the commonwealth. Through punishment, the sovereign claims to act in defence of the whole political community, against which crime poses a dangerous threat[308]. The transference of right made by individuals in the commonwealth 'for the preservation of them all' strengthens the sovereign's exercise of punishment.

The second is that the commission of a crime sets the criminal apart from the political community of the commonwealth, and effectively against it. Hobbes appears to indicate that a crime, up to the extent of its wrongfulness and harmfulness, distances an individual from political society and presents them as a dangerous other. This is arguably another reason why Hobbes does not expect individuals to lay down their right to resist punishment: he expects criminals to see their self-preservation out of league with that of the state, in conflict with it.

The third conclusion is that the possibility that crime can give birth to a specific state of nature implies that, for Hobbes, the reassurance provided by the commonwealth and its sovereign against the insecurity of the state of nature is neither permanent nor inviolable. Crime represents for Hobbes the always-present possibility that the conflict and insecurity of the state of nature will creep back into the midst of political society.

Finally, the fourth conclusion is that Hobbes seems to posit two qualitatively different forms of interaction between the individual and the state's authority: one comprising the peaceful relation between citizens and the laws of the community, and another representing the violent interaction enacted through crime and punishment. Hobbes's account of punishment thereby exposes 'a fissure between the law itself and the remedies for its violation'[309]. This rupture condenses and expresses all the other three conclusions taken from Hobbes's theoretical framework, and also reveals a problematic which is fundamental to an understanding of the workings of the criminal law and the dynamics of criminal responsibility.

[307] Hobbes, *Leviathan*, 87.
[308] This can be linked to the characterisation of crime as a public wrong. Cf. Chapter 1, subsection 1.1.1 above.
[309] Ristroph, 'Criminal Law for Humans', 115.

3.1.2 Liberties in Tension

Hobbes's state of nature is fraught with insecurity. Without a power to maintain the law and punish transgressions, it seems that individuals cannot be trusted to respect each other's liberty. A commonwealth is necessary to unite the will of its members around a common interest, which is maintained and preserved by the sovereign. In the commonwealth, individual liberty is promoted and protected by the state's law, so that individuals share an interest in upholding it. Under this perspective, relations between individuals are fundamentally different before and after the establishment of the commonwealth: individuals in the state of nature are a potential threat to each other, while individuals in political society are actually contributing towards a common interest, represented and upheld by the state.

Although this contrast is presented by Hobbes as a shift in socio-political conditions, the passage from the state of nature to political society, these different conditions are also a reflection of individuals' own attitudes towards each other. Individuals in the state of nature fully exercise their right to self-government regardless of the danger such exercise might pose to the liberty of others. Individuals in political society (legal subjects), by their turn, restrain their liberty to the limits established by the law of the community, so that their autonomy poses no danger to others. It is precisely the juridical boundaries of liberty that are forsaken by the criminal: criminals declare through their crimes to live according not to the law, but to their own rules. They behave – and are treated by the state – not as legal subjects who are part of the community, but as dangerous subjects who put themselves in a state of nature with (or rather against) the state.

The fissure between the law and the remedies for its violation, evidenced by punishment, is therefore a reflection of a fissure in the law's representation of its subject, caused by a radical conceptualisation of individuals' attitudes towards the law. While Hobbes's criminal is depicted as someone who has placed themselves outside of the social compact by their crimes, his citizen is conceptualised as dedicating an almost blind obedience to the sovereign's law, until the force of that law is turned against them. Hobbes's citizen not only acknowledges the necessity of the sovereign's right to punish, but also 'obligeth himself, to assist him that hath the sovereignty, in the punishing of another'[310]. It follows that, although Hobbes maintains that the citizen's acknowledgment of and assistance towards the sovereign's right to punish does not imply that individuals *give* the sovereign that right, the institution of punishment is to a large extent expressly authorised by the consent of the sovereign's (legal) subjects.

[310] Hobbes, *Leviathan*, 205.

Punishment's logic and motivation is therefore conditioned by the perspective which is applied to it, guided by two distinct models of subjectivity shaped by the individual's relation with the community and its law. This dialectic aspect of punishment, albeit first raised in modern thought by Hobbes's theory, is by no means unique to it. It has long been recognised as a problematic within the philosophy of punishment, present in retributive theory at least since the Enlightenment. The best known illustration of this contradiction was stated by Kant:

> When, therefore, I enact a penal law against myself as a criminal it is the pure juridical legislative reason (*homo noumenon*) in me that submits myself to the penal law as a person capable of committing a crime, that is, as another person (*homo phaenomenon*) along with all the others in the civil union who submit themselves to this law.[311]

According to Kant, there appears to be a tension within the individual with regards to the recognition of the criminal law, in that the personality which acknowledges and submits to the law (the rational, legal subject) is conceptually distinct from the subjectivity which is actually capable of being punished (the natural, dangerous subject). While Kant is presupposing that both aspects are abstractions within the same individual, this generates a problem for the attribution of responsibility, in that individuals can only authorise the criminal law if they can see themselves as legal subjects – as persons who by definition act in complete harmony with the law – *and* if they imagine that they will only be affected by the penal law if they actively behave as *another person* – 'as a person capable of committing a crime'. Only legal subjects authorise the criminal law, and only to the extent that they believe the criminal law only applies to dangerous subjects, those who are capable of committing crimes.

This paradox, according to Alan Norrie, is what causes the 'impasse'[312] found in the justification of punishment, clearly expressed in Hobbes's work. The ideal of individual justice in the liberal account of criminal responsibility legitimates punishment on the grounds that it treats individuals 'as rational and autonomous beings'[313], as capable of recognising the normative character of the law and acting accordingly. This cognitive connection between the acceptance of the norm and the breaking of the norm is deemed of essential importance in order to consider the individual responsible before the law. But the capacity to respect the law seems to be in stark contrast with the propensity for crime associated with the image of the criminal. Both in Hobbes and in Kant, it appears that individuals only accept to become legal subjects under the assumption (or hope) that the coercive power they are authorising will not be used against them. If, as Hobbes and Kant seem to consider, all individuals are both capable of behaving as rational and as natural

[311] I. Kant, *The Metaphysical Elements of Justice* (1965), p. 105.
[312] Norrie, 'Thomas Hobbes and the Philosophy of Punishment', 318.
[313] Ibid, 301.

subjects, then Norrie is right to infer that 'the conception of man as a free moral agent is only tenable so long as the naturalistic conception is 'forgotten''[314]. Hobbes thus 'cannot resolve the contradiction that exists between his juridical conception of man, which makes the contract a possibility and gives it its moral force, and his naturalistic conception of man which threatens to undermine the essential component of Sovereign power and right, punishment'[315].

But 'while Hobbes cannot solve this problem for the retributivist, he can at least help us understand why the problem exists'[316], and how it persists in contemporary criminal law. For Norrie, Hobbes's account of punishment shows that the modern justification for punishment attempts to repress its paradox, focusing solely on the rational characterisation of the legal subject. It shows, furthermore, that the natural subject, albeit repressed, cannot be completely eliminated, and keeps creeping back into the framework of punishment, causing fissures and tensions. While these observations seem to be accurate, there is one further point which needs to be made with regards to the paradox of punishment in Hobbes's theory, which is perhaps its most revealing aspect. Hobbes's account of punishment appears to sustain its paradox because punishment depends precisely on its existence in order to appear legitimate and necessary.

Although punishment is preserved in Hobbes's theory on the grounds that legal subjects require it and the integrity of the community depends on it, this necessity and dependence exist only because the state of nature is always a possibility, even in political society. This latent insecurity of socio-political relations is what legitimates punishment, for it generates the need for individuals to be reassured of their security by the authority of the state. Hobbes's theoretical framework may seem to propose that the establishment of the commonwealth puts an end to the state of nature, but it is precisely the persistent, recurring character of the conflict between nature and society – the struggle to make legal subjects out of individuals – which poses punishment as necessary.

'The juridical element at the heart of the Hobbesian theory of punishment is at war with what he understood to be the natural springs of human behaviour'[317]. This war, however, is not just a reflection of a philosophical paradox, but a necessary implication of the model of society in which this paradox is inevitably generated. What first appears as a moral problem is actually used to engender a socio-political condition in which individual autonomy needs to be permanently managed and disciplined.

[314] Ibid, 319.
[315] Ibid, 308.
[316] Ibid, 318.
[317] A. Norrie, *Law, Ideology and Punishment* (1991), 37.

3.2 THE NATURAL CONDITION OF INSECURITY

The paradox of punishment is inextricably linked to an individualistic account of human nature and society. Hobbes's theoretical framework represents the first proper example of such an account in modernity. Its novelty and sophistication allowed it to exert an 'immense influence'[318] over conceptions of individual autonomy and liberty which would constitute cornerstones of the liberal tradition, and therefore of the normative framework of many contemporary societies. Besides these qualities, Hobbes's theory is particularly relevant to an examination of liberal law because the way in which he conceptualises political society as both a *reflection* of human nature and as a *reaction* against it is arguably the key to understanding the legal subject's insecurity, as well as insecurity's role as the main motivation behind the authority of the state and the force of law.

At the heart of Hobbes's political theory lays an individual who is quite autonomous when it comes to the determination of their own goals, but in dire need of reassurance when it comes to social relations. Individual liberty, at the same time as it is the motor of society, is also ripe with insecurity. Hobbes's radical individualism is evident throughout his work – and nowhere clearer than in *Leviathan*, where the whole of political society is conceptualised in function of the individual, and described in individualistic terms: the commonwealth is an 'artificial man; though of greater stature and strength than the natural, for whose protection and defence it was intended'[319]. The state is for Hobbes an artificial construct, made with the specific purpose of protecting and securing its subjects, and created in their own image. Individuals are more than just members of political society; they are the parts from which society is built, in function of which it operates – its 'constitutive causes'[320].

Hobbes's 'resolutive-compositive'[321] method understands individuals as isolated entities with their own nature and purpose, and society as the direct result of their interaction. Aimed at understanding individuals as ends in themselves, this method 'regards individual human beings as conceptually prior not only to political society but also to *all* social interactions'[322]. Individuals are thus taken to autonomously generate their desires and interests, independently of social or historical causality. In Hobbes's framework, '[t]he fundamental characteristics of men are not products of their social existence. (...) Thus man

[318] C. Gearty, 'Escaping Hobbes: Liberty and Security for our Democratic (Not Anti-Terrorist) Age' (2012) in E. D. Reed, M. Dumper (eds), *Civil Liberties, National Security and Prospects for Consensus*, 35-61, 43.
[319] Hobbes, *Leviathan*, 7.
[320] Hampton, *Hobbes and the Social Contract Tradition*, 6.
[321] Ibid, 7-8.
[322] Ibid, 6.

is social because he is human, not human because he is social'[323]. Individuals are predominantly self-interested, as they act according to their own sense of pleasure or displeasure. This, however, does not mean that individuals are purely hedonistic beings. The content of their desires does not have to be exclusively self-regarding, but rather 'the cause for our having desires for certain objects' is 'exclusively self-interested'[324].

Human beings are also endowed with reason. However, reason for Hobbes does not act as a hindrance to desire; instead, rationality serves self-interest by allowing individuals to deliberate on the consequences of actions and circumstances. 'Rationality would therefore be regarded by [Hobbes] as having instrumental value; a rational man would be one whose reason would serve his desires well by determining correctly how those desires could be satisfied'[325]. There is a certain aspect of 'inertness'[326] in reason, in that it steers action but is not in itself the source of action. Hobbes's individual is therefore a complex being guided both by reason and by passions, with self-interest as their driving force. Paramount to every individual's self-interest is the desire for self-preservation, and thus the autonomy Hobbes attributes to human beings stems from this conjunction between the desire for self-preservation and the capacity to calculate through reason the best course of action in which to pursue that desire.

Individuals thus have the liberty to govern their own lives, and for Hobbes this liberty constitutes both a fact and a norm: human beings are naturally free, and their natural freedom entitles them to pursue their own interests in any way them deem best. Individual autonomy reaches its highest expression in the right of nature, which 'is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto'[327]. In a philosophically controversial move[328], Hobbes derives from a naturalistic conception of individual freedom the normative right of human beings to exercise their autonomy guided only by their own judgment. For the first time in modern history, individual autonomy and liberty acquire an important socio-political dimension. This dimension results not only from the inherent freedom of the human condition expressed by the right of nature, but also from its equality.

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[323] D. Gauthier, 'The Social Contract as Ideology' (1977), 6 *Philosophy and Public Affairs*, 130-164, 138.
[324] Hampton, op cit, 24. Cf. also D. Gauthier, 'Taming Leviathan' (1987) 16 (3) *Philosophy & Public Affairs*, 280-298, 285.
[325] Hampton, ibid, 35.
[326] Ibid, 16.
[327] Hobbes, *Leviathan*, 86. It should be stressed that the right of nature is not a right in the sense that it entails a corresponding duty on the part of others, but more in the sense of a 'blameless liberty' which cannot be removed or sanctioned by others. Cf. Ristroph, 'Respect and Resistance', 602-603.
[328] McPherson, op cit, 13.

Hobbes suggests an equality of ability amongst individuals[329], from which he infers an 'equality of hope in the attaining of our ends'[330]. There is a strong emancipatory aspect in Hobbes's postulate of natural equality, in that whatever differences there might be between individuals, for him they possess 'no *political* significance'[331]. The conjunction of natural liberty and equality constitutes the essence of Hobbes's state of nature, a state where every individual has the right and the capacity to determine their own fate.

It is in the 'natural condition of mankind'[332] where individual autonomy is most expressive; it is also, however, where it is most insecure. Human nature is the source of both autonomy and insecurity, and the right of nature is the greatest expression of one as well as the other. Since every individual has the right to do anything they deem necessary in order to guarantee their self-preservation and to pursue their self-interest, any disagreement or conflict of interests proves problematic, as all of those involved have an equal right to whatever claim they advance. As a result, 'if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end (...) endeavour to destroy, or subdue one another'[333]. Unhindered self-interest inevitably generates competition, and the awareness of this condition fosters diffidence, or distrust. Since individuals are unable to trust each other, 'there is no way for any man to secure himself, so reasonable, as anticipation; that is, by force, of wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him'[334]. The state of nature therefore inevitably leads to violence and war.

'Conflict is endemic in Hobbes's world'[335], and thus so is insecurity. This endemic insecurity is a consequence of the 'self-destructive character of judgment'[336] – namely, as a consequence of Hobbes's radical individualism, the freedom possessed by individuals leads to an incapacity for them to trust each other's judgment, and to respect each other's liberty. As a result, human beings 'have no pleasure, (but on the contrary a great deal of grief) in keeping company, where there is no power able to over-awe them all'[337] – that is, where there is no authority which can reassure them.

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[329] '[T]he difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he' (Hobbes, *Leviathan*, 82).
[330] Ibid, 83.
[331] Hampton, op cit, 25 (emphasis in original).
[332] Hobbes, *Leviathan*, 82.
[333] Ibid, 83.
[334] Ibid.
[335] T. Poole, 'Hobbes on Law and Prerogative' (2012) in D. Dyzenhaus, T. Poole (eds), *Hobbes and the Law*, 68-96, 69.
[336] R. Tuck quoted in Poole, ibid, 69-70.
[337] Hobbes, *Leviathan*, 83. For a detailed and fascinating discussion of the cause of conflict in Hobbes's state of nature, see Hampton, op cit, 58-96.

The natural liberty and equality of individuals imbues them with the right to govern their own lives, according to their own judgment; but 'where every man is his own judge, there properly is no judge at all'[338]. This trap contained in individual liberty is, ironically, a reflection of Hobbes's emancipatory project. His 'refusal to impose moral differences on men's wants' is the main reason behind the influence exerted by his work, the essence of 'his revolution in moral and political theory'[339]. The irony is that the same liberty which frees individuals from the constraints of tradition eventually shackles them to the power of the sovereign. While the state of nature may give every human being the liberty to make their own judgements, it affords them no assurance that their choices will be respected by others. Since every individual is free to decide what is best for them, no one can accuse another of doing wrong. And even if someone desires something that belongs to or interferes with someone else's liberty, these urges 'are in themselves no sin. No more are the actions, that proceed from those passions, till they know a law that forbids them'[340]. Political authority is necessary in order to establish a standard of common judgment, to which all individuals must adhere. 'Where there is no common power, there is no law: where no law, no injustice'[341].

Hobbes's account of the state of nature engenders a dialectical move where absolute liberty results in a complete lack of security, which by its turn compromises the very liberty that originates it. By the same token, the conceptual independence of human beings from socio-political constraints results in an absolute dependence from the state and its sovereign authority in the name of self-preservation. This dependence is inevitable, for 'during the time men live without a common power to keep them all in awe, they are in a condition which is called war; and such a war, as is of every man, against every man'[342]. The lack of reassurance endemic to Hobbes's conception of liberty turns the state of nature into a state of insecurity. As a consequence, individual autonomy – when unprotected by political authority – gives individuals no reassurance, only anxiety. 'In such condition', all there can be is 'continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short'[343].

[338] T. Hobbes, *Human Nature and De Corpore Politico* (1994), 95.
[339] McPherson, op cit, 78.
[340] Hobbes, *Leviathan*, 85.
[341] Ibid.
[342] Ibid, 84. It should be noted that for Hobbes this does not imply that individuals would be always fighting with each other: 'the nature of war, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary' (ibid).
[343] Ibid.

3.2.1 The Vulnerability of Security

The solution to the adversities of the state of nature is to find some way to establish a standard of judgment, and a means to uphold it. As Hobbes suggests over and over throughout his work, the institution of a common power is the way out of the state of insecurity of the natural condition of mankind. As it became clear, however, cooperation does not come naturally to individuals, and thus the establishment of political society must be a conscious effort, an artificial construction. The crafting of a commonwealth requires for Hobbes two conditions, one internal and one external to its prospective members. The internal condition is for individuals to restrain their own liberty so that they refrain from interfering with the liberty of others; the external is for the restraint of individual liberty to be kept in check by the threat of punishment.

Since the insecurity of human nature originates from the lack of boundaries in individual liberty, these boundaries must be artificially constructed; at the same time, as seen above, they cannot be imposed upon individuals without their consent. The only way in which autonomy can be respected while still being restricted is if each individual voluntarily restrains their own liberty. One very important point is that for Hobbes human beings are naturally inclined to try and avoid conflict. Since conflict is potentially harmful to self-preservation, reason endows individuals with the laws of nature, 'qualities that dispose men to peace, and obedience'[344].

The fundamental law of nature is 'to seek peace, and follow it'[345]. The problem of the state of nature is not that individuals do not seek peace; human beings are not necessarily brutes in the absence of authority. But without the reassurance of a standard of judgment which can set limits to natural liberty, peace becomes very difficult to achieve, as 'individuals seeking self-preservation will pose threats to one another'[346]. In the state of nature, insecurity tends to escalate, giving individuals increasingly greater reasons to use their right of nature pre-emptively and violently against each other[347]. Hobbes's general rule of reason thus qualifies the fundamental law of nature in light of this lack of reassurance, declaring 'that every man, ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war'[348]. The general rule is a true separator of waters, not only distinguishing two radically opposite forms of social behaviour – the safe pursuit of peace and the blameless pursuit of war – but also determining the ultimate frontier which divides nature from political society,

[344] Ibid, 177.
[345] Ibid, 87.
[346] Ristroph, 'Respect and Resistance', 608.
[347] Hobbes, *Leviathan*, 87.
[348] Ibid.

brutishness from civilisation: the hope for peace, which can only be obtained through security.

Since natural liberty is the source of insecurity, security can only be generated through the curbing of this blameless liberty. This is the second law of nature, which rules 'that a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself'[349]. Liberty ought to be restrained. And since human beings only transfer or renounce rights with the expectation of getting something in return, the curbing of liberty must be collective and reciprocal. In order to enter political society, individuals must voluntarily give up their right to self-government and restrain their liberty as much as peace requires it, keeping it 'within the limits of peaceful competition'[350] set by law.

It is law which must determine the boundaries of individual liberty, for they must be uniform and represent a standard of judgment, common to all. But then there is another problem: the natural condition of mankind does not allow individuals to trust each other to maintain these limits by themselves. For 'the laws of nature (...) of themselves, without the terror of some power, to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like'[351]. These laws, 'in the condition of mere nature (...) are not properly laws'[352], 'for they are but conclusions, or theorems concerning what conduceth to the conservation and defence of themselves; whereas law, properly is the word of him, that by right hath command over others'[353]. Law, properly, necessitates a quality that is absent in the state of nature: authority.

The establishment of a commonwealth requires the institution of a power which is able to uphold common judgment, and keep individual autonomy in check. A political authority, superior to every individual in the commonwealth, is for Hobbes the only thing that can reassure individuals of their security against each other's natural liberty. Without such reassurance, 'every man will, and may lawfully rely on his own strength and art, for caution against all other men'[354]. The restraint of individual liberty thus cannot hold without the establishment of a sovereign to serve as the guarantor for the authority of the law and the preservation of peace. This sovereign is empowered precisely by the liberty that is laid down by the subjects of the commonwealth, the right of nature. In exchange for the restraining of their liberty, the subjects of the state acquire security towards the enjoyment of whatever

[349] Ibid.
[350] McPherson, op cit, 95.
[351] Hobbes, *Leviathan*, 111.
[352] Ibid, 177.
[353] Ibid, 106.
[354] Ibid.

liberty is left to them (along with the right to defend themselves from an immediate threat, which they never give up).

Since in the state of nature it is the multitude of desires – and the lack of common judgment as to what desires are worth pursuing or protecting – that leads to insecurity, the aim of the commonwealth is to establish a political authority 'that may reduce all their wills, by plurality of voices, unto one will: which is as much to say (...) *to bear their person*'[355]. The sovereign *personifies* the members of the community, exercising the right of nature for the protection of all, and thus unifying the self-interest of all citizens into a single will or law – a *public interest*. Therefore, intrinsic to the social contract is the establishment not only of political society, but also of a standard of justice: after the restraint of individual liberty and the unification of every individual will into a common will, the social contract effectively *is* justice, and so 'to break it is *unjust*'[356], and deserving of punishment.

Once the commonwealth is established, there appears to be an effective transformation in the way individuals exercise their autonomy, in that it ceases to be unfettered and becomes limited and conditioned by the public interest expressed in the sovereign's law. Autonomy is *juridified* by the social contract, being both limited and protected by the law. Citizens of the state can only do what the law permits them to do but, as long as they act responsibly, lawfully, their autonomy is *secured* under the sovereign's aegis. Once political authority is established, therefore, individuals seem to be given all the conditions they need in order to escape the state of nature by becoming legal subjects. This incorporation of legal subjectivity seems to be deeper than a simple convenience, as it includes the assimilation of a politico-juridical form of morality, established by the common judgment manifested in the commonwealth's law. Under this perspective, the shift into political society appears to be rather definitive.

The juridification of individual autonomy is not, however, nearly as stable as Hobbes's theory would superficially indicate. Although individuals voluntarily forsake their natural liberty in favour of the normative framework of political society, guided by their own rationality, they still seem to be unable to fully escape the implications of the state of nature. The most obvious indication of this condition is that, after the establishment of the commonwealth, punishment does not exist solely as an abstract threat, but as a fully functional and rather pervasive aspect of the social order. This is because, for some reason, crime and its dangerousness are part and parcel of political society. Even though all the conditions for the juridification of autonomy are present, individuals keep invading each other's liberty.

[355] Ibid, 114 (emphasis added).
[356] Ibid, 95 (emphasis in original).

Hobbes provides some tips as to why the reassurance provided by the commonwealth still allows for the existence of crime. Political society seems to be aligned with individual autonomy through reason's laws of nature, but their prudential quality means that they are but 'convenient articles of reason, upon which men *may be* drawn to agreement'[357]. Besides, individuals do not forsake their natural liberty for the love of humanity or for some sense of justice; they do so out of self-interest, which is guided both by reason and by passions. At this point, Hobbes reveals that individual self-interest is more complex than the simple pursuit for self-preservation, when he discusses that there are specific 'passions that incline men to peace'[358]. These are 'fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them'[359]. It slowly begins to become clear that there is more to the social contract than the repudiation of the insecurity of the state of nature. The establishment of political society also involves a particular exchange, which appeals to and benefits some individuals more than others.

Although the security provided by the state has some common appeal to all individuals – as they all fear death, it is especially desirable to those who, beyond self-preservation, also desire a commodious living – and even more appealing to those who have actual hopes of obtaining it. Thus while the juridification of autonomy may be deemed necessary for peace and somewhat beneficial to all individuals, it can only fully satisfy some of them. There will likely be many individuals for whom the sovereign's law may appear excessively restraining, hindering their aims and ambitions, and for whom the protection they receive in exchange may feel like an ill-bargain. As Hobbes anticipated, human beings only pursue peace as far as they have hopes of obtaining it. If necessity, self-interest or the working of some passion leads someone beyond the sovereign's law and outside the boundaries of security, reason predicts that they will 'seek, and use, all helps, and advantages of war'[360]. Thus Hobbes himself implicitly indicated that the conflict and insecurity of the natural condition of mankind could not be completely dispelled, but instead merely managed, by the state. This is why the criminal law is not just a guarantee for the security of juridical autonomy. Rather, it is an instrument of social order, permanently required in order to keep the insecurity of natural liberty at bay.

[357] Ibid, 86 (emphasis added).
[358] Ibid, 109.
[359] Ibid.
[360] Ibid, 87.

3.2.2 The Ideological Quality of Common Judgment

The passage from natural to juridical liberty is thus by no means definitive in Hobbes's theoretical framework. Instead, the establishment of political society initiates a dynamic and complex relationship between individual autonomy and state authority. Individuals remain, at heart, natural individuals; the tendency to disagreement and conflict is always underlying security, capable of manifesting itself. Furthermore, the endemic insecurity of human nature means that crime is not only possible, but also expected. Due to the pervasiveness of insecurity, punishment is posited as necessary even if its justification is problematic. The juridical moment of consent is only formally required, for although no one actually gives the sovereign the right to punish them, and everyone would undoubtedly individually resist its exercise, juridical autonomy (legal subjectivity) cannot exist without the threat (and security) of punishment.

This perspective on human nature has seemed far-fetched to many, an opinion which Hobbes himself anticipated[361]. Hobbes's materialism, along with the lack of reassurance that accompanies it, is rigorous and unavoidable, so that insecurity is always present beneath the surface of the juridification of autonomy. But though the philosophical consistency of Hobbes's work can be (and has been) criticised, it is quite possible to accept such criticism and still maintain that his postulates enjoyed a significant and long-lasting influence on the liberal tradition of legal and political thought. This is because such influence did not arise from the impeccability of his logic, but from the ideological thrust of his individualistic conceptions.

Finding the origins of Hobbes's inspiration for the insecurity he saw in human relations is not very difficult. He lived in a period of extreme political turmoil, plagued by civil war and conflict both within and outside of England[362]. Hobbes realised from personal experience that weak states could easily fall prey to conflict, and saw 'the need for men to acknowledge the perfectly sovereign state instead of the imperfectly sovereign states they had'[363]. This rather brief historical recollection, in conjunction with Hobbes's self-admitted method, says much about the conceptual basis of his notion of human nature. Hobbes himself lived in a period of endemic insecurity, and concluded from it the need for a strong and undisputed political authority; he thus built his theory with the purpose of conveying

[361] In response to such possible claims, he argued that even 'civilised' social mores suggested a common distrust among individuals: 'when going to sleep, he locks his doors; when even in his house he locks his chests; and this when he knows there be laws, and public officers, armed, to revenge all injuries shall be done him (...) Does he not there as much accuse mankind by his actions, as I do by my words?' (Hobbes, *Leviathan*, 84-85).
[362] Hampton, op cit, 5. 'It would be difficult to find a time in history more tumultuous than the period (...) from approximately 1640 to 1660' (ibid, 1).
[363] McPherson, op cit, 22.

this need, and 'worked hard to make its architecture clear in order to persuade his readers of his political conclusions'[364]. Through his postulates, Hobbes hoped not just to find some universal truth about human nature, but mainly to produce a model of political society that would resonate with and influence his own socio-political context. For this purpose, Hobbes did not need to speculate about what happened with all societies constituted throughout history in order to construct his state of nature; he only needed to look 'just below the surface of [his] contemporary society'[365]. What he saw was a highly competitive environment, riddled with conflict and wars over property and dominance. There, just one step away from civilisation, Hobbes found his natural subject.

In his book *The Political Theory of Possessive Individualism*, C. B. McPherson argues that the key to properly grasp Hobbes's theory is to examine his postulates not as seeking some sort of universal truth, but as identifying and building towards a specific model of society. McPherson aptly described Hobbes's state of nature as 'a two-stage logical abstraction in which man's natural proclivities are first disengaged from their civil setting and then carried to their logical conclusion in the state of war'[366]. The essence of Hobbes's conception of human subjectivity comes from the first stage of this abstraction, which originates from 'the historically acquired nature of men in existing civil societies'[367]. This model of individuality is then disengaged from its socio-historical setting so that its essential qualities are naturalised; the result is a conception of individuals as naturally self-interested, guided by their own desires, and equally free to pursue those desires. This notion of human nature and psychology proved particularly attractive to the 'rising commercial classes'[368] of early modernity, which desired both to legitimate their claim to property and to reject the old hierarchies of medieval society. The individual freedom and equality which Hobbes theorised were to become hallmarks of the liberal tradition; this was in no small part because Hobbes's individual, albeit isolated from society, still possessed the 'socially acquired behaviour and desires of men'[369].

But beyond McPherson's observations, the political element of Hobbes's theory suggests an even higher degree of sophistication, for his conception of human nature proved attractive to his prospective audience not only because it supported their claims, but also because it did so at the same time as it also legitimated the state's authority, by postulating an inherent dangerousness within individual autonomy and liberty. The full thrust of Hobbes's argument is in how he conceptualised the socially acquired behaviour of

[364] Hampton, op cit, 1.
[365] McPherson, op cit, 26.
[366] Ibid.
[367] Ibid, 22.
[368] Ibid, 25-27.
[369] Ibid, 26.

individuals as part of their nature *at the same time* as he removed this behaviour from the socio-political environment which conditioned its existence. The result is a conception of human beings whose very nature leaves them incapable of living in peace without (a particular model of) society.

The second stage of Hobbes's state of nature – the state of war – establishes that individuals are not naturally equipped to live in peace with each other. The conceptual source of the state of war is also on the socially acquired behaviour of human beings. The natural subject was not supposed to represent a savage who never came into contact with civilisation; instead, Hobbes's argument is fully effective only if the dangerousness of natural subjects lies just below the surface of civilised society. 'Natural man is civilised man with only the restraint of law removed'[370], is the condition of every individual who finds themselves without or beyond the reassurance provided by the social contract. Hobbes's state of nature thus allows him to legitimate his model of political society on two grounds: first, that the flourishing of the conception of human being he envisages (the self-interested, autonomous individual) is dependent on the security provided by the state and its authority; and second, that whoever is found to be outside the boundaries of political society is effectively a natural subject, and therefore dangerous to the autonomy of others.

McPherson's political theory can be used to substantiate the claim that insecurity is at the heart of Hobbes's socio-political framework. By universalising the conditions of a specific model of society, Hobbes manages to normatively define human nature with reference to this model, legitimating both the expression and the repression of individual autonomy. Following his normative argument, the social contract appears as a consensual establishment of political bonds and social boundaries, maintained through the artificial generation and regulation of common judgment. In effect, however, these social boundaries privilege specific interests and only aspire to universality. This is why juridical autonomy, the liberty of individuals after the establishment of the commonwealth, is intrinsically insecure: it is only expected to be in league with the self-interest of some individuals, while it actually constitutes a significant imposition upon the liberty of many. Punishment is therefore necessary in order to deal with a conflict which is only natural to the model of society that the state is aimed at preserving.

McPherson ends his analysis of Hobbes's political framework by saying that Hobbes has one significant shortcoming in his theory: the equality Hobbes saw among human beings in his state of nature was too radical, and therefore 'he did not allow for the existence of politically significant unequal classes'[371]. This is what led Hobbes to postulate the necessity for an absolute sovereign, which proved unacceptable to the same rising commercial classes

[370] Ibid, 29.
[371] Ibid, 93.

that were so attracted by his depiction of human psychology, since they could never support an authority which could potentially compromise their interests. Hobbes's political model was therefore largely rejected in preference of models of representative government, such as the one proposed by Locke[372]. But here McPherson is arguably downplaying the extent to which essential aspects of Hobbes's political model survived its wholesale rejection. The independence of Hobbes's sovereign still reverberates in many aspects of modern liberal states, from emergency powers to the image of sovereignty which is commonly given to the rule of law[373]. Furthermore, it survives in the idea that the state is different from the particular party or the group of individuals which put it in power, representing not any group of particular interests but the public interest in general. The main aspect of the universality of Hobbes's state is not that it is too radical or absolute, but that it is abstract and ideological, derived from the need to legitimate a specific model of society in the name of freedom and equality, in lieu of the structural violence which it inevitably preserves. In this sense, Hobbes's political theory has been remarkably successful.

The influence of Hobbes's theoretical framework on the modern state has significant repercussions to an analysis of the pursuit of individual justice and responsibility within the criminal law.

3.3 RESPONSIBILITY, LIBERTY AND INSECURITY IN THE CRIMINAL LAW

I have previously argued that the insecurity which is inherent to legal subjectivity is the result of the abstract nature of law's individualism, as the legal conception of responsible subjectivity is intrinsically vulnerable to socio-political complexity. The conceptual foundations of this insecurity lie within the philosophical framework laid down by Hobbes, 'the theorist par excellence of human vulnerability'[374]. The vulnerability of the human condition depicted by Hobbes is the primary element of his political theory, as it is what justifies both the liberty of the individual and the authority of the state. The only way for individuals to be reassured that they can safely act responsibly is if they know that everyone else will do the same, so that their juridical liberty will be protected. 'Without the performance of covenant, we would be back in the state of nature'[375]. It is this same logic that legitimates the state's right to punish, as punishment reinforces the integrity of the community by reassuring citizens of the security of their liberty.

[372] This model, and the extent to which it is different from Hobbes's, is the subject of Chapter 4.
[373] Cf. D. Dyzenhaus, 'How Hobbes met the 'Hobbes Challenge'' (2009) 72(3) *Modern Law Review*, 488-506; G. Agamben, *State of Exception* (2005).
[374] Ristroph, 'Respect and Resistance', 607.
[375] R. Shiner, 'Hart and Hobbes' (1980) 22(2) *William and Mary Law Review*, 201-225, 208.

This artificial reassurance, however, can never be complete, because the insecurity of natural liberty does not go away with the establishment of the commonwealth. As a consequence, the vulnerability which Hobbes finds in human nature is reflected by the whole political community: not only individuals, but also the state is vulnerable to the natural insecurity of mankind. The social contract, as the necessary condition for the enjoyment of peace and prosperity, depends on the reassurance that the liberty of individuals will remain within its juridical limits. This reassurance, however, is compromised by the existence of crime, as crime is essentially an expression of natural liberty. Since crime is always a possibility, and since it threatens the integrity of the common judgment provided by the state, it follows that punishment is indispensable for the preservation of juridical autonomy: 'covenants, without the sword, are but words, and of no strength to secure a man at all'[376]. The insecurity engendered by the artificial and ideological quality of juridical liberty infiltrates (and motivates) the whole of Hobbes's political theory.

The responsible legal subject is always in need of being secured by the authority of the state, through measures which can guarantee that conduct is being regulated, crime is being prevented, and the conditions for responsible agency are being protected. Hobbes's theory thus displays a privileged concern towards security, on which the very conception of political and juridical liberty depends. Since the logical connection between individual autonomy, political authority and security is grounded on the individualism at the heart of Hobbes's political theory, it is fair to expect that socio-political frameworks which display similar individualist tendencies would present similar symptoms. It is the connection between the elements in Hobbes's political theory and the very conceptualisation of the modern state which conveys the importance of understanding these elements to a study of contemporary issues concerning law and society: 'the fullest significance of the kind of transformation about how we think of political community which reached its apogee in Hobbes concerns how it tracks and influences change in our very 'social imaginary''[377]. It is necessary to examine the extent to which the socio-political framework described above tracks and influences the problem of criminal responsibility discussed in previous chapters.

3.3.1 The Dangerousness of Liberty

There are two main lessons that can be taken from Hobbes's account of punishment, which can improve an understanding of the modern dynamics of responsibility. The first lesson relates to the artificial nature of juridical liberty and common judgment in Hobbes's theoretical framework. The conceptual distinction drawn by Hobbes between the liberty of

[376] Hobbes, *Leviathan*, 111.
[377] Loader, Walker, *Civilizing Security*, 44. See also C. Taylor, *Modern Social Imaginaries* (2007).

individuals in the state of nature and that of individuals in political society not only suggests that these two attitudes towards state authority are in conflict with each other, but also indicates, through Hobbes's own conceptual structure, that natural subjectivity is the presumptive position, while legal subjectivity is the normative position with regards to individual autonomy. In other words, while individuals in a commonwealth are supposed to behave as legal subjects, restraining their liberty to the limits of the law, they are all in fact, or at least potentially, natural subjects who may, out of self-interest, become dangerous to the project of political society.

Under this perspective, if an individual is accused or suspected of committing a crime, the state is more likely to expect this individual to be dangerous than to expect them to be a law-abiding citizen who would otherwise not have committed this offence against the community, or who was falsely accused. The artificial quality of legal subjectivity puts it in a vulnerable position with regards to the latent dangerousness of natural liberty. This is mainly because the sovereign's authority is the only thing that separates political society from the state of nature. When a structure of reassurance strong enough to manage the insecurity of individual autonomy is lacking, any suspicion of disharmony between individual autonomy and state authority is enough to undermine the expectation that such an individual can be expected to behave as a legal subject. Dangerous subjectivity is the presumptive position of criminal responsibility.

The second lesson to be taken from Hobbes's account of punishment is that the vulnerability of the state with regards to the insecurity of human relations does not compromise the state's authority; on the contrary, it reinforces it. Hobbes's theory may eventually compromise the very idea of security which it initially upheld as the main aim of the commonwealth, a fissure which is clearly reflected in his imperfect justification of punishment. But this paradox does not present political society as a failed project; instead, an absolute state is presented as the only hope of managing the endemic insecurity of human nature, a formidable power aimed at containing a formidable threat. In Hobbes's logic, the state may have to be authoritarian at times, and the liberty of many individuals is bound to suffer from this, but this unfortunate situation is not caused by the state – it is the consequence of the fickleness of human nature, which the state is precisely trying to contain however it can.

The state's primary aim is preserving the (juridical) liberty of individuals, but this is something which can only be secured through the repression and coercion of (natural, dangerous) autonomy. As seen above, the trap contained in Hobbes's theory lies in the fact that the authoritarian vein of his model of political society stems precisely from his emancipatory postulates. Likewise, following the same logic, the focus on individual justice given by individual responsibility is inevitably left vulnerable to the encroachment of

insecurity, because the very idea of autonomy that it aims to preserve depends on the security of the socio-political framework which defines crime as a serious threat to the community, and the criminal as a dangerous subject in need of repression. The Hobbesian logic of liberty transforms it into an abstract reflection of the juridical ideal of subjectivity in conformity with the interests of liberal society, therefore subsuming liberty under the security of these structural conditions.

The intimate relation between Hobbes's account of subjectivity and the free individual of liberal law is one of the most pervasive, but also least recognised, aspects of Hobbes's work. This significant omission is evidenced by the recent work of liberal theorists such as Conor Gearty who, although acknowledging and seeking to resist the influence of Hobbes's theory on the contemporary framework of state authority and criminal law, cannot escape the pervasiveness of its logic. An investigation of this shortcoming in Gearty's liberal theory can help illuminate the interrelation between the Hobbesian and the liberal frameworks.

Gearty's critique of Hobbes's political model argues that it promotes a conception of liberty which is 'too broad and mechanistic', and also 'too ready to allow the jettisoning of freedom in the name of security'[378]. This conception generates a 'defective symbiosis between liberty and security'[379], through which rather extensive security measures can be justified on the grounds that they are necessary in order to protect and preserve the liberty of individuals. Hobbes's account of individual liberty is thus 'both extensive (in this residual sense of being the presumptive position) and at the same time vulnerable to aggressive state action, capable of being smashed if Leviathan judges such repressive action to be essential to the safety of the state'[380].

Gearty also identifies (albeit not explicitly) the ideological quality of Hobbes's theory, in the sense that the repressive side of his conception of liberty, although universal in theory, is in practice unevenly distributed in society. Accordingly, although Hobbes's approach to liberty potentially leaves the freedom of all individuals vulnerable to the requirements of security, it in fact 'is only unsatisfactory if you experience it as precarious, if the contingent nature of the exercise of your freedom is before you all the time'[381]. If, on the other hand, your interests coincide with those of the state so that you generally benefit from its model of social order, then '[i]t is the freedom you experience, not the ease with which it is taken away'[382]. This ideological aspect of Hobbes's logic, Gearty argues, is one of the main reasons why it has exerted so much influence in modern politics, which is

[378] Gearty, op cit, 54-55.
[379] Ibid, 38.
[380] Ibid, 43.
[381] Ibid, 44.
[382] Ibid.

particularly evident in the war on terror of the twenty-first century. In its Hobbesian expression, the discourse on terrorism legitimates a 'plethora of laws (and extra-legal powers)' that carry dire consequences for 'those who step out of line', at the same time as they 'do not disturb the sense of personal freedom enjoyed by the majority'[383].

What Gearty misses, however, is that the success of the authoritarian measures in late modern states depends precisely on the fact that they *do* disturb the sense of personal freedom enjoyed by the majority, not necessarily by obstructing their liberty to any significant degree, but by highlighting their vulnerability to whatever threat these measures are aimed at containing. For instance, although counter-terrorism measures have a much more adverse effect on the liberty of members of 'suspect communities'[384] who are likely to be seen as terrorists, their legitimation depends to a significant extent on the perception that they are necessary in order to preserve the security (and therefore the liberty) of citizens in general. The state of insecurity on which these authoritarian measures depend potentially affects society as a whole, and it is precisely the function of these measures to manage the balance of insecurity, shifting it from the structural conditions of liberal society to the dangerousness arising from criminal and deviant behaviour.

Throughout his examination, Gearty seems to assume that the vulnerability in Hobbes's theory only effectively applies to the underprivileged portions of society. But insecurity is endemic in the Hobbesian framework, and the legitimacy of the authority of the state is reliant on the notion that the state itself, along with the liberty of those who corroborate with its model of society, is vulnerable to the dangerousness inherent in those who do not. Gearty's solution of a human rights model, based on a 'new synthesis of liberty and security'[385], fails to engage with this aspect of Hobbes's theory, and thus ends up repeating and perpetuating its logic. This becomes clear when Gearty displays his anxiety about being understood as advocating for a weak, unprotected state, emphasising that 'a human rights approach to freedom does not require a state to embrace pacifism, to surrender any capacity to act where its survival, or security, is at stake'[386]. In accepting the vulnerability of its model of society to deviance, liberal theory corroborates and sustains the paradox arising from the inherent insecurity of the juridical individual.

Gearty hopes his approach to security will be different by arguing for a 'requirement for justification: the state is required to justify both its general claims with regard to the asserted emergency the state is facing and also the need to act to the detriment of particular

[383] Ibid, 54.
[384] Cf. C. Pantazis, S. Pemberton, 'From the 'Old' to the 'New' Suspect Community: Examining the Impacts of Recent UK Counter-Terrorism Legislation' (2009), 49 *British Journal of Criminology*, 646-666.
[385] Gearty, op cit, 38.
[386] Ibid, 57.

individuals in specific situations'[387]. But it is exactly the insecurity surrounding Hobbes's conception of liberty which supports the justification of his political authority. Hobbes does not argue that the sovereign's coercive power is something to be celebrated; as Ristroph points out, Hobbes accepts the repression of natural liberty with reluctance, as something 'regrettable but necessary'[388]. An attempt to restrain the repressive power of the state through the requirement of necessity, while acknowledging that this necessity may be linked to instances of dangerousness such as terrorism, is no escape from Hobbes's logic; it is merely its confirmation.

Evidence of this is that the response given by Gearty's human rights model to 'the threat of terrorist violence'[389] is awfully similar to Hobbes's solution to the insecurity of the social contract: a robust and 'effective criminal law system, one which operates as a strong deterrent against violent wrongdoing and which endeavours to find and punish those who transgress its terms'[390]. Of course, Gearty continues, such a criminal law system would embrace 'a variety of inchoate offences (...) so as to equip the authorities to act to prevent anticipated crime as well as to punish wrongdoers after the event'; after all, 'no human rights defender wants a static criminal law incapable of responding to the threats posed by technological, social, or other change'[391].

Liberal theorists such as Gearty want to escape Hobbes's logic by altering the substance of security, from a concern towards stability to a concern towards human rights. But the core of Hobbes's logic is not to be found in his political conclusions, but in what he identifies as the source of the problem, the insecurity of human nature which makes his conclusions appear necessary. As long as respect for individual liberty is still connected with and dependent upon the need to protect liberty from its own vulnerabilities, the subjection of autonomy to authority remains. Nowhere is this clearer than in the framework of criminal law, where the Hobbesian logic finds its strongest expression in contemporary societies.

3.3.2 Hobbes and Contemporary Criminal Law

The politico-ideological conflict between the juridical and the natural (unrestrained, non-committed[392]) elements of individual autonomy is what both originates and sustains the need for punishment. By treating some individuals as dangerous subjects, the state effectively reassures citizens who are not punished of their secured status as legal subjects.

[387] Ibid.
[388] Ristroph, 'Respect and Resistance', 619.
[389] Gearty, op cit, 58.
[390] Ibid.
[391] Ibid.
[392] Cf. P. Pettit, 'Liberty and Leviathan' (2005) 4 *Politics, Philosophy & Economics*, 131-151.

Hobbes displays this dynamics through his account of political authority and its role in actively personifying the wills of the subjects of the state. First, the insecurity engendered in modern society's structural violence is conceptualised as intrinsic to the individual, coming from natural liberty's vulnerability to itself. Then, the moral paradox of punishment is politically transposed into a conflict between responsible citizens (and the political authority that represents them) and dangerous subjects whose autonomy is not exercised in harmony with the interests of the community, and is therefore in need of restraint by the state and its criminal law. Legal responsibility in this sense is as much a matter of liberty as a matter of security: it is the expression of one kind of liberty, and the provision of security against another. The legitimacy of punishment in modern societies seems to rely to a significant extent on the maintenance of this logic, as a manifestation of the ideological quality of legal individualism. This interrelation has become particularly evident after the preventive turn in criminal law and criminal justice.

In making this claim, I am both supporting and disagreeing with the perspective of recent theorists, such as Richard Ericson[393] and Peter Ramsay[394], who have critically analysed the current state of insecurity in the law. While, like them, I see that the substantive changes occurring to the criminal law in the past few decades are intimately connected to the liberal state's efforts to produce and maintain authority, my approach to the relationship between the current legitimatory framework of preventive and regulatory laws and the normative premises of the liberal legal and political tradition is slightly different. For both Ramsay and Ericson, it appears that the growing preventive apparatus of the criminal law places it in a crisis of legitimacy as the state, in employing this apparatus, appears to be openly and fundamentally questioning the force and the validity of its own authority. Both authors, furthermore, use Hobbes's theory in order to substantiate their claim that a preventive state acts as a state which does not recognise its own authority, drifting apart from Hobbes's ideal of the state as the ultimate reassurer of socio-political order.

Ramsay's perspective on the preventive turn is grounded on the acute perception that the legitimacy of preventive measures depends on the assumption that citizens have a right to security which must be actively guaranteed in virtue of the vulnerable character of their autonomy, 'an assumption (...) that is radically at odds with Hobbes's account of Leviathan's sovereignty'[395]. Although Hobbes conceptualises individuals as intrinsically vulnerable, it is precisely this vulnerability which the state, through its authority, is supposed to eliminate. Sovereignty seems to be justified in Hobbes's theory as the power necessary to remove individuals from the insecurity and vulnerability of the state of nature, 'to keep them

[393] R. Ericson, *Crime in an Insecure World* (2007).
[394] P. Ramsay, *The Insecurity State* (2012).
[395] Ibid, 215.

in awe, and tie them by fear of punishment to the performance of their covenants'[396]. Preventive measures, by their turn, strongly imply that the state is 'declaring the normal vulnerability of its subjects', a move which 'undermines its own authority in a way that would be intolerable to Leviathan, or indeed any sovereign worthy of the name'[397].

According to Ramsay, while Hobbes's state seeks to escape the state of nature through the force and authority of the sovereign's law, the insecure law of the preventive turn 'converts at least some of the conditions of the state of nature into the normal conditions of civil society'[398], thus amounting 'to *an authoritative statement of the law's lack of authority*'[399]. Ramsay's reasoning relies on Ericson's perception that, through the use of preventive measures, '[t]he Hobbesian Leviathan as a state that expresses the liberal imaginary of physical security and prosperity begins to break down'[400]. Furthermore, both Ramsay and Ericson highlight that the authority of the Hobbesian state, 'though it appears to be the 'negation' of the liberal idea of freedom under the rule of law, is in reality 'its very presupposition''[401]. From the assumption that preventive measures compromise the authority of the state, therefore, it would follow that '[t]he hollowing out of the state's sovereign authority' essentially constitutes 'an abandonment of liberal tradition'[402].

While I entirely agree that the state's authority is the very presupposition of the liberal idea of freedom – and Hobbes's theory especially emphasises that – and that the hollowing out of the state's sovereign authority potentially compromises the liberal tradition to a significant degree, I do not believe that the current state of insecurity in the law represents a breakdown of the Hobbesian political model. But this does not mean that I subscribe to accounts such as David Garland's, who suggests that the present 'culture of control' represents a 'Hobbesian solution'[403] to the problem of authority, or Simon Hallsworth and John Lea's argument that the 'security state' aims at 'reconstructing Leviathan'[404] as an *alternative* to the liberal welfare state.

Instead, my argument is that, while Hobbes's Leviathan is predicated on the promise of putting an end to the insecurity of the state of nature, the very conception of human nature on which Hobbes grounds his political model betrays the concrete feasibility of this promise. In other words, the core of Hobbes's normative framework lies not in the security of the sovereign state, but in the insecurity of the natural condition of mankind. Such insecurity is

[396] Hobbes, *Leviathan*, 111.
[397] Ramsay, *The Insecurity State*, 5.
[398] Ibid, 217.
[399] Ibid (emphasis in original).
[400] Ericson, op cit, 202.
[401] Ramsay, *The Insecurity State*, 218.
[402] Ibid.
[403] D. Garland, *The Culture of Control* (2001), 202.
[404] S. Hallsworth, J. Lea, 'Reconstructing Leviathan: Emerging Contours of the Security State' (2011) 15(2) *Theoretical Criminology*, 141-157, 141.

endemic in the contemporary socio-political framework, fuelling the perceived vulnerability of individual autonomy and grounding the need for the state to reassert its authority and preserve legal subjectivity at any cost. This logic – which links the insecurity of social relations to individual instances of deviant behaviour, and the role of the state and its law to the solution instead of the problem – is not only essentially Hobbesian, but also an intrinsic element of the normative structure of the liberal state.

There is a perennial, dynamic relationship between insecurity and reassurance within the liberal framework, which directly affects the conception of responsibility within criminal law. This relationship, just like that between the liberal idea of freedom and state authority alluded to by Ramsay and Ericson, has in Hobbes's work its main philosophical foundation. The most significant conclusion which can be taken from this analysis, and which diverges from Ramsay's and Ericson's interpretation of Hobbes's work, is that although the main function of the Hobbesian state is to eliminate the insecurity of the state of nature, this is a task that Hobbes was keenly aware that Leviathan could never fully achieve. Instead, Hobbes's radical (and abstract) individualism implies that insecurity is intrinsic to human nature, and it permeates his entire socio-political framework, so that some of the conditions of state of nature are also, by definition, normal conditions of civil society. This dialectical relation between nature and society is exposed, not generated, by a state of insecurity. The preventive turn is thus a reflection, not a subversion, of the authority of the liberal state.

CONCLUSION

> The sum of virtue is to be sociable with them that will be sociable, and formidable to them that will not.[405]

Hobbes's controversial perspective on the nature, function and justification of punishment reveals a 'philosophical problematic' which is not only 'fundamental to an understanding of the modern philosophy of punishment'[406], but also essential to a proper examination of the contemporary state of insecurity in criminal law and responsibility. This paradox reflects the dialectical relation between responsibility and dangerousness – between criminal law's normative justification and its pragmatic necessity – which perennially compromises the security of the legal subject. Hobbes's philosophical account of political society provides an analytical framework in which to understand the connection between individualism, insecurity and reassurance, and moreover constitutes one of the main

[405] Hobbes, *Human Nature and De Corpore Politico*, 99.
[406] Norrie, 'Thomas Hobbes and the Philosophy of Punishment', 299.

philosophical and ideological grounds for this connection, as a fundamental element of the modern social imaginary.

This chapter explored Hobbes's political theory and the influence it holds on contemporary issues of criminal responsibility and state authority, constituting the Hobbesian theoretical framework as the main conceptual foundation of the insecurity which is an intrinsic element of law's individualism. Hobbes's radical individualism effectively isolates the relationship between individual autonomy and state authority, evidencing how the coercive power of the state is conceptualised as necessary in order to deal with the dangerousness inherent to legal subjectivity.

The merit of Hobbes's theoretical framework, however, is also its weakness: in radically emphasising the individualistic nature of liberal subjectivity, his perspective neglects the potential that society's structure of reassurance has of conditioning and minimising the insecurity generated by abstract individualism. Thus, while Hobbes's theory can help us examine how the current state of insecurity in the law is implicated within the liberal legal tradition, it does not allow us to appreciate the full complexity of the relation between insecurity and reassurance, which is fundamental to the dynamic nature of criminal responsibility. In order to properly grasp this relational aspect of criminal responsibility, it is necessary to analyse the insecurity of legal individualism in light of another political theory, that of John Locke. Locke's model of society fares much better in managing the insecurity of the state of nature, by considering an important element that Hobbes seemingly ignored: the reassuring potential of civil society.

Chapter 4: Reassuring the Secured Subject: Locke and the Conceptual Foundations of Reassurance

> Men living together according to reason, without a common Superior on Earth, with Authority to judge between them, is *properly the State of Nature*. [...] And were it not for the corruption, and vitiousness of degenerate Men, there would be no need of any other; no necessity that Men should separate from this great and natural Community, and by positive agreements combine into smaller and divided associations. [407]

> In making one structural alteration in Hobbes's theoretical system that was required to bring it into conformity with the needs and possibilities of a possessive market society, Locke completed an edifice that rested on Hobbes's sure foundations.[408]

INTRODUCTION

The Hobbesian framework examined in the last chapter provides the foundations of the insecurity which I argue drives the dialectical relationship between responsibility and dangerousness. However, the intrinsic vulnerability of individual autonomy, laid bare in Hobbes's theory and being increasingly exposed under the contemporary state of insecurity, rarely appears in recent modern history and theory in such radical forms. Instead, it is rather found suppressed, alleviated and disguised under society's structure of reassurance, which is by its turn an ideological reflection of socio-political conditions. Perceptions of insecurity change over time and space, and these in turn condition the form and expression of criminal responsibility at any specific moment. In order to build a conceptual framework in which responsibility's character can be fully grasped, it is necessary to investigate the conceptual foundations of reassurance. These, I argue, can be found in the model of society provided by John Locke's political theory.

Locke is celebrated as the father of liberalism for being the first modern political theorist to conceptualise a model of society which, against the vulnerability and arbitrariness of human nature posited by authors such as Hobbes and Robert Filmer, was grounded on the belief that natural liberty and individual autonomy not only require but also generate security, thus being the main basis for a prosperous and peaceful society. For Locke, 'Truth and keeping of Faith belongs to Men, as Men, and not as Members of Society'[409]. The value and trustworthiness of individual liberty stand as the main corollaries in Locke's socio-political model, and have become the cornerstones not only of liberal theory, but also to a

[407] J. Locke, *Two Treatises of Government* (2010), 280, 352 (emphasis in original).
[408] C. B. McPherson, *The Political Theory of Possessive Individualism* (2011), 270.
[409] Locke, op cit, 277.

large extent of the normative idea of modern society as a whole[410]. The central elements of this model provide a structural framework for the universal validity of law and the justification for punishment which, I argue, is largely reflected on the normative structure of the liberal model of criminal law. An examination of Locke's political theory can thus provide analytical tools with which to investigate the socio-political conditions for the rise of the liberal model in the post-war period, along with its conception of criminal responsibility.

With this in mind, this chapter focuses on a detailed analysis of Locke's theoretical framework, in order to bring out these conceptual elements and connections which explain and elucidate liberal criminal law's dependence on a structure of reassurance, as well as the ideological basis of the latter. The bases for Locke's structure of reassurance, found in his unique account of the state of nature and grounded on the idea of the interdependence between law and liberty, are examined in section 4.1. Through a comparison between the main premises in Locke's and Hobbes's theories, this section investigates how Locke managed to preserve the emancipatory aspects of Hobbes's revolution in moral and political theory, at the same time as he tried to do away with its more chaotic and radical elements. In particular, Locke naturalises the juridical boundaries of individual liberty that, for Hobbes, could only exist after the establishment of political society, a move which has significant implications for punishment's justificatory framework.

In spite of his efforts, however, a deeper analysis of Locke's state of nature reveals an intrinsic, albeit repressed, instability that hints at the presence of a latent insecurity underlying his whole theoretical model. A critical analysis of Locke's work reveals that he needs this insecurity in order to motivate the need for the establishment of a political authority. Such analysis exposes that, as McPherson indicated in the prefatory quote, there are sure Hobbesian foundations underpinning Locke's socio-political structure. Section 4.2 explores the extent to which the Lockean framework can be seen as not so much rejecting Hobbes's model of society, but rather as completing it by reassuring its ideological setting. Finally, section 4.3 discusses how the theoretical outlook developed throughout this chapter can assist an understanding of criminal responsibility's conceptual structure, particularly with regards to the concept's role in maintaining the ideological primacy of legal subjectivity, and this role's dependence on a particular structure of reassurance.

I conclude by arguing that the insecurity of Hobbes's natural subject still lies underneath Locke's natural liberty, being preserved, even if repressed, in Locke's reassured model of society. Likewise, individual responsibility is unable to fully eliminate the repressive character of criminal law, due to the inherent dangerousness within criminal responsibility. The legal subject, even when reassured, remains ultimately insecure.

[410] Cf. C. Taylor, *Modern Social Imaginaries* (2004), 15.

4.1 LAW AND LIBERTY: LOCKE'S STRUCTURE OF REASSURANCE

Locke defines his *Second Treatise of Government* as an examination of political power. He understands political power to be composed of three rights: the right of making laws which incur punishment upon violation; the right of employing force in the execution of those laws; and the right of defending the community from external threats[411]. Both the origins of this power and the conceptual framework which gives it form and legitimacy are found in the 'State all Men [*sic*] are naturally in'[412]; just as in Hobbes's work, therefore, the state of nature constitutes 'the fundamental basis of Locke's political philosophy'[413]. Also similarly to Hobbes, Locke's nature is 'a State of perfect Freedom' and autonomy where individuals pursue their interests as they deem fit, 'without asking leave, or depending upon the Will of any other Man'[414]. It is also a state of perfect equality, where individuals co-exist 'without Subordination or Subjection'[415]. Locke's political theory thus begins with the same emancipatory impulse seen in Hobbes's conceptualisation of the natural condition of mankind, rejecting the idea that differences between human beings carry political significance.

However, Locke's characterisation of the natural freedom and equality of individuals carries a significantly distinct quality, in that it is not constituted by the absence of a standard of judgment; on the contrary, for Locke it is the 'equality of Men by Nature'[416] that constitutes the foundation of justice. Locke's state of nature may be a state of perfect liberty, 'yet it is not a State of License'[417], for it 'has a Law of Nature to govern it, which obliges every one'[418]. This law, even in the absence of political authority, is 'a real law, offering obligatory commands rather than prudential advice'[419]; it commands are universal and self-evident: 'Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions'[420].

While Hobbes derives an absolute right from the equality of individuals, Locke derives first of all an obligation. The reasoning behind this shift is that Locke realised that liberty, in order to be effective, requires certain conditions, a certain order. The natural

[411] Locke, op cit, 268. Cf. also J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (1993), 14.
[412] Locke, ibid, 269.
[413] R. Harrison, *Hobbes, Locke, and Confusion's Masterpiece: An Examination of Seventeenth-Century Political Philosophy* (2003), 175.
[414] Locke, op cit, 269.
[415] Ibid.
[416] Ibid, 270.
[417] Ibid.
[418] Ibid, 271.
[419] Harrison, op cit, 169.
[420] Locke, op cit, 271.

freedom and equality of individuals is not simply a given for Locke, but a careful, harmonious balance; in this orderly conception of nature, law and liberty are intrinsically connected. 'So that, however it may be mistaken, *the end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*'[421]. There is an obvious reluctance in Locke's work to accept any conception of liberty without boundaries, so that if the state of nature really is a state of perfect liberty, there has to be a law which can guarantee it. Liberty therefore cannot give individuals a license for 'every one to do what he lists, to live as he pleases, and not to be tyed by any Laws'[422], but only the right 'to be free from any Superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule'[423].

However, just like Hobbes, Locke also knows that law requires a power to enforce it. Locke's naturalisation of law is distinct not because it upholds that law can exist without political power, but rather because it claims that there is political power in the state of nature:

> For the Law of Nature would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature, had a Power to Execute that Law, and thereby preserve the innocent and restrain offenders, *and if any one in the State of Nature may punish another, for any evil he has done, every one may do so*.[424]

In one elegant twist, Locke's 'very strange Doctrine'[425] secures the juridical limits of natural liberty by giving every individual the reciprocal power to enforce them: 'people are naturally self-governing, because they are capable of exercising political power themselves'[426]. This seemingly simple modification to the state of nature provokes ripples which will influence the entirety of Locke's socio-political model, from its justification to its shortcomings.

At the heart of Locke's doctrine lies what appears to be a relation of interdependence between law and liberty, which by its turn engenders a similar relation between liberty and security. Like Hobbes, Locke also believes that natural liberty is about self-government: liberty is 'not to be subject to the arbitrary Will of another, but freely follow his own'[427]. But while for Hobbes this meant that there could be no law or authority in nature which could mediate between the self-interest of individuals, for Locke there *has* to be, for the absence of law would inevitably lead to the arbitrary imposition of an individual's will over another's, which would make liberty self-defeating. An essential condition of liberty is thus 'to be free

[421] Locke, op cit, 305-306 (emphasis in original).
[422] R. Filmer in Locke, ibid, 284.
[423] Locke, ibid, 283.
[424] Ibid, 271-272 (emphasis added).
[425] Locke, op cit, 272.
[426] Tully, op cit, 15.
[427] Locke, op cit, 306.

from restraint and violence from others which cannot be, where there is no Law (...) For who could be free, when every other Man's [*sic*] Humour might domineer over him?'[428]

Political power is Locke's answer to the problem of insecurity which abounded in Hobbes's state of nature, securing the liberty of individuals through the reciprocal exercise of judgment and, particularly, the reciprocal power to punish. But political power by itself is not enough; for while the law of nature may be enforceable by every individual, Hobbes has already stated that 'where every man is his own judge, there properly is no judge at all'[429]. Why would Locke have hopes that the naturalisation of political power through self-government would lead to cooperation and order, instead of conflict and war? Part of the answer is that he in fact did not have such hopes; as we will see, the problem of private judgment is one great reason why individuals choose to abandon the state of nature and establish political society.

But while Locke may have recognised that the lack of common judgment is an inconvenience in the state of nature, he still upheld that individuals could generally be trusted to uphold the law of nature, and to refrain from committing crimes. What allows him to support this proposition is the notion that natural liberty is not only protected by the law, but also defined, shaped by it: the interrelation between law and liberty sustains that individuals are only free when they act within juridical boundaries. The law of nature is not only rational; it is *reason*, so that the prudential aspect of individual self-interest is conceptualised as bound with that of other human beings, dependent upon peaceful coexistence. Whenever individuals exercise their natural liberty, they do it in accordance with the law, and 'the *fundamental Law of Nature*' is '*the preservation of Mankind*'[430]. The exercise of political power is also bound by this fundamental law, so that it cannot be used for selfish goals, but 'only for the Publick Good'[431].

So the natural exercise of liberty appears to be always in conformity with the juridical boundaries set by reason, and therefore in harmony with the peace and prosperity of mankind as a whole. The conjoining of law and liberty effects the most significant transformation in the state of nature, from Hobbes to Locke. By naturalising the juridical boundaries of liberty, Locke also naturalises the essence of legal subjectivity: Locke's natural individual is a responsible subject. All the basic elements of individual responsibility are present in Locke's natural conception of individuality: all individuals have the capacity to act according to the law, what the law requires of them, and they can foresee the consequences of their actions. Individuals can be held responsible, mainly because they can also be expected to act responsibly.

[428] Ibid.
[429] T. Hobbes, *Human Nature and De Corpore Politico* (1994), 95.
[430] Locke, op cit, 358 (emphasis in original).
[431] Ibid, 269.

This does not mean, however, that Locke's state of nature is not threatened by crime; quite the contrary. But if to act within the boundaries of natural liberty is necessarily to act according to the law, which is given by reason, then crime has to be conceptualised as an act that eschews rationality, and which by doing so offends against the trust which lies at the basis of human relations. 'In transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of *reason* and common Equity, which is that measure (...) set to the actions of Men, for their mutual security'[432]. Crime appears in Locke's work as an aberration, a voluntary act made against reason. In juridifying natural liberty, Locke conceptualises criminal behaviour as exceptional.

Since liberty is made indissociable from law and security, crime has to be pushed outside of its boundaries, turned against it. Locke's criminal is thus abnormal, an individual who chooses to act in a way that deviates from the common, acceptable norm, and in doing so 'becomes *dangerous* to Mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him'[433]. The criminal is still a dangerous subject, whose dangerousness arises from the fact that they cannot be trusted to act in accordance with the law, and whose actions are likely to harm the conditions on which the security of others depends. It is the existence and possibility of crime in the state of nature that requires the natural liberty of individuals to pay the cost of vigilance, by being subjected to the reciprocal use of political power.

But it seems that this cost is significantly minimised in Locke's state of nature, because most individuals are naturally eager to respect the law and to recognise criminal behaviour as dangerous and disruptive, being keen to punish wrongdoing in the name of the public good. This would be the main reason why law and punishment do not require a public authority in order to be effective: they are reciprocally promoted by a majority of responsible legal subjects, against an exceptional minority of dangerous offenders. This natural balance of legal subjectivity, grounded on the symbiosis between law and liberty, is what constitutes the normative core of Locke's reassurance. Although crime is a dangerous threat, it is not the endemic problem which permeated Hobbes's framework, because in Locke's state of nature individual liberty is *reassured*. That is why in Locke there appears to be no tension between punishment and individual liberty: since liberty is in full harmony with the law, punishment can do it no harm.

But there is a problem with this picture: if Locke's conception of the criminal is followed to the letter, it seems that punishment is aimed only at rare occasions in which individuals go to such lengths as to forsake reason and threaten society as a whole; punishment in itself appears to be quite exceptional. At the same time, Locke himself

[432] Ibid, 272.
[433] Ibid (emphasis added).

stressed that punishment is necessary so that '*all Men* may be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed'[434]. In this sense, punishment's function appears to be all-pervasive, aimed not only at the condemnation of a few deviants, but mainly at a much more general regulation of individual conduct. These two different perspectives suggest that there might be a tension in Locke's theory after all, caused by a latent insecurity which can be identified through an analysis of the structural conditions for Locke's natural liberty – his structure of reassurance.

Although the normative quality of Locke's reassurance lies in the idea that responsible subjectivity is natural – and crime exceptional – to human beings, this normative assumption requires specific material and ideological conditions. It is this structural quality of Locke's reassurance that permits him to posit that his juridical conception of natural liberty is capable of satisfying individual self-interest without the existence of a public authority. Locke's law of nature thus depends on the premise that not only liberty, but also self-interest, can be naturally exercised within the limits of the law.

4.1.1 The Security of Property

For Hobbes, the main reason for the inherent insecurity of the state of nature was not the lack of desire for peace, but the intense competition for self-preservation and self-interest, which grounded the need for a common authority to decide disputes between individuals. Whenever two people desired something which only one of them could possess, conflict would ensue. Competition would lead to distrust, and so individuals would aim to protect their possessions at any cost; because of that, any attempt to regulate property in the state of nature would be fruitless. Locke acknowledges that self-preservation is the primary interest of every individual, and that only 'when [an individual's] own Preservation *comes not in competition*, ought he, as much as he can, to preserve the rest of Mankind'[435]. Since the preservation of mankind is the fundamental law of nature, and it is from this law that the power to punish emerges[436], the only way in which Locke can conceptualise that lawbreaking is the exception, instead of the norm, is if his model of society can somehow guarantee that the self-interest of individuals will not come into conflict – or will at least remain 'within the limits of peaceful competition'[437].

The fusion between self-preservation and the preservation of all constitutes the basis of Locke's structure of reassurance. It presupposes the existence of a social structure which is not only able to provide individuals with what they need (without them having to sacrifice

[434] Ibid, 271 (emphasis added).
[435] Ibid (emphasis added).
[436] Tully, op cit, 27.
[437] McPherson, op cit, 95.

or fear for their personal liberty) but also natural – that is, which originates from the sociability of human beings, as a product of the law of nature, without the need for authority or coercion. It is this structure which, along with political power, guarantees that deviations from harmonious liberty are exceptional, and thus manageable. It follows that Locke's main challenge to the endemic insecurity posited by Hobbes is not so much the naturalisation of punishment and political power, but the natural existence of private property[438].

Locke's account of property begins with the idea that the world belongs to humanity's common use, but that in order for individuals to be able to enjoy the fruits of the earth, 'there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular Man'[439]. Appropriation is done through the use of labour power: since 'every Man has a Property in his own Person'[440], labour extends this property to whatever individuals transform or affect with their physical energy. This basic kind of appropriation is a natural right, for it is essential for survival; it is therefore independent from the consent of others. This right of appropriation is the basis for the 'original Law of Nature for the *beginning of Property*, in what was before common'[441], constituting labour power as 'the means of individuating the common into individual possessions to be used for preservation'[442].

Locke maintains that the privatisation of property does not harm the preservation of others, insofar as it follows two rules. First, an individual can only appropriate as much as can be enjoyed, so that nothing is spoiled or needlessly destroyed. The second proviso is that individual appropriation must remain 'within the bounds, set by reason of what might serve for his use'[443], so that there is always as good and enough for others. Just like natural liberty, then, the beginning of property constituted a right that was *regulated*[444], set within boundaries meant to avoid spoilage and scarcity. 'The measure of Property, Nature has well set, by the Extent of Mens Labour, and the Conveniency of Life'[445]. The regulation of appropriation, protected by political power, establishes private property as an essential element of the law of nature, in league with the perfect equality of individuals.

However, individuals do not seek property just for immediate survival; instead, they constantly look for ways in which to persistently guarantee and increase the 'Support and

[438] It should be highlighted that, although the chapter of the *Second Treatise* dedicated to property seems to focus on the possession and appropriation of material goods, the general connotation of property given by Locke refers to the 'Lives, Liberties and Estates' (Locke, op cit, 350) of individuals. This evidences the intrinsic connection which Locke establishes between property and individual liberty.
[439] Locke, ibid, 286-287.
[440] Ibid, 287.
[441] Ibid, 289 (emphasis in original).
[442] Tully, op cit, 27.
[443] Locke, op cit, 290.
[444] Tully, op cit, 28.
[445] Locke, op cit, 292.

Comfort of their being'[446]. The best way to achieve these goals, which Locke called 'the chief matter of Property', concerned the use and possession of land[447]. Land complicates the careful balance of private property enunciated by the two provisos set by Locke, since it not only permits the possession of a large quantity and quality of goods by association (whatever is produced on the land), but also limits the liberty of others more directly; it seems that the appropriation of land would be more likely to lead to conflict and competition among individuals.

But Locke suggests that the opposite is actually true. Indeed, he argues that the private possession of land is actually beneficial to the preservation of all, and more conducive to peace and cooperation than common property, since 'he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind'[448]. This argument relies on the notion that individuals appropriate land by cultivating it, which in turn makes the land more productive than when it was left uncultivated. By inextricably linking the fruits of labour to the desire for private property, Locke is able to propose 'that the *Property of labour* should be able to over-balance the Community of Land. For 'tis *Labour* indeed that *puts the difference of value* on every thing'[449].

There is an interesting double meaning contained in this last quote. At the same time as Locke is justifying the appropriation of land by arguing that it makes land more valuable (not just to the proprietor, but to humanity in general), he is doing so only because he expects individuals to appropriate land not in order to 'increase the common stock of mankind', but precisely because land is valuable. Locke is thus trying to legitimate the private possession of land by claiming that this possession is in conformity with the law of nature, because he is aware that the equality of possessions promoted by the beginning of property was only tenable 'before the desire of having more than Men needed, had altered the intrinsick value of things'[450]. It is thus clear that it is the desire for possession, not for increased productivity, which leads to the appropriation of land beyond one's immediate necessity. But since individuals desired land for its value, and were therefore unlikely to gratuitously share its products, the appropriation of land would likely be out of league with the law of nature, as it would likely lead to spoilage and scarcity. Locke admits that this would indeed be the case, 'had not the *Invention of Money*, and the tacit Agreement of Men to put a value on it, introduced (by Consent) larger Possessions, and a Right to them'[451].

[446] Ibid, 286.
[447] Ibid, 290.
[448] Ibid, 294.
[449] Ibid, 296 (emphasis in original).
[450] Ibid, 294.
[451] Ibid, 293 (emphasis in original).

Since money 'may be hoarded up without injury to any one, these metals not spoileing or decaying in the hands of the possessor'[452], its excessive accumulation did not harm the social function of property, 'the exceeding of the bounds of his just Property not lying in the largeness of his Possession, but the perishing of any thing uselessly in it'[453]. Locke uses money to counterbalance the competitiveness and inequality generated by private property: since appropriation actively enhances the value of things, and indirectly the common stock of mankind, private property is preferable to common property; and since money can be exchanged by goods and accumulated without spoiling, it allows for the distribution of products without hindering the desire for accumulation. Relying on these two premises, Locke manages to argue that individuals have tacitly 'agreed to disproportionate and unequal Possession of the Earth'[454]. Locke's explicit justification of the unequal distribution of property is essential to his structure of reassurance, for it maintains that the desire for accumulation is rational, and therefore it is not only compatible with natural liberty, but also conducive to a peaceful and secure social environment.

Socio-economic inequality is thus natural, in the sense that it emerges naturally from the rationality of the human condition, without conflict or imposition. 'This *partage* of things, in an inequality of private possessions, men have made practicable out of the bounds of Societie, and without compact'[455]. Although it generates inequality, private property is justified on the grounds that it provides security not only for the propertied, but for humanity as a whole. Locke's account of private property is the fundamental element of his structure of reassurance, as it guarantees that the exercise of natural liberty – legal subjectivity – does not lead to scarcity and conflict, but rather promotes the conditions for peace and security. This way, individuals are free to choose whether to compete and accumulate, for society can protect and satisfy them either way. If someone desires enlarged possessions, they can be competitive while still remaining within the boundaries of the law of nature; and if they do not desire or succeed in acquiring them, they can still work for money and buy the goods they need for their comfort and support.

Due to its social function, private property effectively becomes the main source of reassurance in Locke's socio-political framework, its protection becoming a corollary of his political society. 'We can see in Locke's formulation how much he sees mutual service in terms of profitable exchange. "Economic" (i.e., ordered, peaceful, productive) activity has become the model for human behaviour and the key to harmonious coexistence'[456]. The essential claim in Locke's state of nature is thus that a society structured around property

[452] Ibid, 302.
[453] Ibid, 300.
[454] Ibid, 302.
[455] Ibid (emphasis added).
[456] Taylor, op cit, 15.

and its protection can be reassured of its security against the disruptive potential of individual self-interest. Furthermore, the stability of Locke's conception of natural, 'normal' human relations reinforces the notion that individuals do not require the power of a common authority to convince them of the importance of restraining their agency to juridical limits, nor of the wrongfulness of transgressing those limits.

Grounded on private property, natural liberty provides both security and reassurance. But if this is true, we are then left with a puzzle: if liberty gives individuals everything they need in order to satisfy their self-interest, why does the law of nature need the threat of punishment in order to keep them all restrained? The pervasiveness of the role of punishment evidences that there is something more to Locke's natural society.

4.1.2 The Ideological Conditions for Reassurance

In order to understand the more pervasive function of punishment in Locke's society, it is necessary to examine the extent to which, as C. B. McPherson has highlighted, 'Locke's state of nature is a curious mixture of historical imagination and logical abstraction from civil society'[457]. This mixture includes two distinct elements: first, just like Hobbes, Locke found the image of the autonomous, self-interested individual just below the surface of his own society[458]; unlike Hobbes, however, Locke was unwilling to completely abandon traditional natural law conceptions of morality, such as the intrinsically orderly and peaceful nature of human beings. The result of this amalgamation was a theoretical perspective which, although more prone to fall into contradiction, provided the nascent liberal framework with a normative moral basis which Hobbes's radical individualism seemed to lack – with the result that Locke's model of society proved much more popular.

Locke's individuals were thus naturally social, 'in that they could live by the laws of nature without the imposition of rules by a sovereign state'[459]. But if this is so, why would some individuals choose to forsake the laws of nature and commit crimes? Furthermore, and more importantly, even if a few individuals for some reason became dangerous criminals, why is punishment aimed at restraining everyone, and not just a few irrational deviants? In other words, how can Locke's natural individuals be both rational and irrational, both naturally sociable and prone to crime and violence? McPherson's answer to this conundrum is that 'Locke was able to take both positions about human nature because he had in his mind at the same time two conceptions of society, which, although logically conflicting,

[457] McPherson, op cit, 209.
[458] Cf. Chapter 3, subsection 3.2.2 above.
[459] McPherson, op cit, 239.

were derived from the same source'[460]. This source can be identified as the same abstract and ideological conception of individual present in Hobbes's work. Through the contradictions found in Locke's account of the state of nature, the paradox of punishment makes a return within his theory, albeit in a differentiated, socialised form.

A seen in the previous chapter, Hobbes uses the establishment of the commonwealth as the grounds for the juridification of autonomy; however, this meant that juridical liberty was completely dependent on political authority, resulting in Hobbes's sovereign having absolute power. In order to avoid this conclusion, Locke naturalises legal subjectivity by providing it with a structure of reassurance, with socio-political conditions which could guarantee its natural prevalence. Locke's account of property is the primary element of this structure, constituting the main basis for legal subjectivity in Locke's theory. However, in the previous analysis of Hobbes's theory it became clear that the abstract nature of juridical individualism means that the establishment of legal subjectivity can be neither universal nor persistent, for there is always a significant scope of human agency which cannot be grasped by this ideological conception. Consequentially, this extant scope of agency has to be somehow managed or repressed in an individualistic society.

This ideological aspect of Locke's natural society lies, as McPherson aptly noticed, in Locke's treatment of property. The naturalisation of socio-economic relations, made possible by the normative validity given to the law of nature as a reflection of 'the postulated moral reasonableness of men by nature'[461], means that private accumulation is not only possible, but also morally justified. Furthermore, the social function of property, in that it actually increases the common stock of mankind, makes unhindered accumulation not just a natural, legitimate manifestation of human rationality, but its highest expression, since it is most conducive to the preservation of all. This relation between property and rationality can be related to that between law and rationality: reason and law are intertwined in Locke's framework, so that to act rationally is to act according to the law, and to commit crimes is to act against reason. Following these normative connections, if property is linked with reason, then the inequality of possessions in the state of nature also represents for Locke an unequal use of or access to reason. As McPherson argues, 'when (...) unlimited accumulation becomes rational, full rationality is possible only for those who can so accumulate'[462].

The idea that rationality is also unequally distributed in Locke's model of society may seem far-fetched, but it is in conformity with the intrinsic association which he established between the notions of law, liberty, property and reason. The identification between these terms allows Locke to produce an account of society which allows for the

[460] Ibid, 243.
[461] Ibid, 210.
[462] Ibid, 232.

values he respects to flourish without the need for repression or imposition; at the same time, however, this social order has severe implications for the liberty of those who do not adhere to these standards. Just as the equality of property had to be abandoned in face of the utility of unlimited accumulation, '[t]he initial equality of natural rights, which consisted in no man having jurisdiction over another cannot last after the differentiation of property'; as property becomes a measure of rationality, and rationality a condition for liberty, 'the man without property in things loses that full proprietorship of his own person which was the basis of his equal natural rights'[463], since those without possessions 'could not be accounted fully rational'[464].

The full thrust of Locke's structure of reassurance thus exposes its ideological conditions: the state of nature is a state of perfect freedom, but only in the sense that it is a state where each individual's freedom fits their capacity for rationality, measured by the alignment between their self-interest and the values upheld by the liberal model of society. Locke's socio-political framework promises the potential to preserve a society based on liberty without it falling into endless conflict, but this promise is contingent upon the condition that liberty follows a specific logic: the logic of property. The security implied in Locke's model of society stems from this unequal treatment of liberty – the propertied can provide jobs and goods to the non-propertied, and thus society may engender a form of cooperation, provided that those who are not 'fully rational' have their liberty restricted to the boundaries established not only by the law, but also by their means. It is because of this need for regulation, conditioned by the fact that Locke's perfect liberty presupposes an imperfect, limited and unequal distribution of autonomy, that Locke's state of nature, however peaceful, requires a pervasive framework of punishment.

The stratified condition of Locke's natural liberty can therefore shed light on the function of punishment in Locke's reassured model of society: although the structure of reassurance grounding natural liberty can maintain that most individuals will strive to behave as legal subjects, and only an exceptional few will behave dangerously in disregard for the juridical boundaries of autonomy, the rationality employed by those who do not accumulate property (most probably the majority of the population) cannot be expected to be perfectly employed. Such imperfect exercise of liberty has the potential to become dangerous, so that it has to be properly restrained and regulated through political power. Locke's interrelation between liberty and law, coupled with the unequal distribution of access to reason, results in that natural liberty has two distinct dimensions: for the fully rational, liberty is mainly negative, aimed at protecting the rights and property of these individuals; for the imperfectly rational, however, liberty acquires a positive dimension, in

[463] Ibid, 231.
[464] Ibid, 238.

which these individuals' autonomy must be both enabled (through the social function of property) and restrained (through the exercise of political power) in order to be harmonious with the law of nature[465].

Locke's structure of reassurance aims at preserving the conditions for the exercise of legal subjectivity without the need for complete subjection to a public authority; however, the abstract character of Locke's liberty is revealed by the links between his contradictory account of punishment and the structural inequality intrinsic to his model of society. Because it is ideological, Locke's reassurance cannot completely dispel the insecurity inherent to the legal subjectivity which it seeks to preserve. The pervasiveness of this concealed insecurity is such that it eventually puts Locke's natural paradise in jeopardy, paving the ground for that which Locke's theory seemingly strived to avoid: the absolute power of the sovereign.

4.2 THE INCONVENIENCES OF INSECURITY

Locke's conception of natural liberty, supported by the structure of reassurance built around his account of property, is what grounds his argument that peaceful coexistence – legal subjectivity – is possible in a state of nature, without the need for the security provided by a public authority. But the orderly image of Locke's natural society is betrayed by the necessity attributed to punishment and political power.

Punishment's importance is highlighted by Locke in two distinct ways. First, it is a reflection of the dangerousness inherent to crime, which 'consists in violating the Law, and varying from the right Rule of Reason, whereby a Man so far becomes degenerate, and declares himself to quit the Principles of Human Nature, and to be a noxious Creature'[466]. Crime is a particularly serious occurrence because it attempts against reason. This is not to say that crime is an irrational, involuntary action; quite the contrary, as Locke implies, crime appears to be mainly voluntary, an action through which the criminal 'renounce[s] Reason'[467]. Rather, crime attempts against reason because it threatens the bases on which the law of nature is grounded – namely, liberty, property and order. At the same time, the violence implied in crime appears in itself to be the result of a 'defect' of reason, as by committing a crime a criminal signals that they no longer adheres to the moral parameters set by their own rationality. This way, Locke appears to define crime as a threshold between two notions of subjectivity: a criminal is not naturally dangerous, but an otherwise responsible subject who *becomes* dangerous through their conduct.

[465] For more on positive and negative liberty, cf. I. Berlin, *Liberty* (2002), 179-186.
[466] Locke, op cit, 273.
[467] Ibid, 274.

The second way in which punishment's relevance to the maintenance of Locke's (natural) social order is emphasised is by the pervasiveness of its function: punishment is supposed to retrain all individuals to the limits of the law of nature. However, as pointed out above, there seems to be a tension between the exceptional nature of the criminal and the general, normal character of punishment. The former is a consequence of natural liberty: since Locke's individual is naturally law-abiding, crime cannot be a normal occurrence, but a ripple in the otherwise placid peace of the state of nature, occurring when individuals go *against* their nature, becoming vicious, degenerate, noxious, and dangerous; the latter, by its turn, results from Locke's uneven distribution of liberty and rationality: most individuals are not fully capable of exercising their liberty within juridical boundaries, and so they must be kept in check.

Although there seems to be a justification for each dimension of punishment in Locke's theoretical framework, they cannot be easily reconciled. Indeed, it seems that these two justifications are to a large extent incompatible, as they relate to different notions of subjectivity. But instead of attempting to reconcile them under a single conception of punishment's function, it is also possible to consider that Locke had a more complex conception of criminal behaviour than the one portrayed by his denouncement of the criminal's dangerousness, which in turn conditioned the role of punishment in his socio-political model.

This seems to be the case when we compare two different passages of the *Second Treatise*. In the first, Locke maintains that punishment can 'make [the criminal] repent the doing of [the crime], and thereby deter him, and by his Example others, from doing the like mischief'[468]; in the second, Locke is discussing the law's treatment of murderers, claiming they 'may be destroyed as a Lyon or a Tyger, one of those wild Savage Beasts, with whom Men can have no Society nor Security'[469]. The first example displays punishment fulfilling a purpose of deterrence, and portraying criminals as rational individuals who can be persuaded or influenced by punishment's expression; punishment is here primarily targeted at the regulation of behaviour. The second example, by its turn, presents punishment mainly as an means of prevention from further harm, and the criminal as someone who has fallen beyond the pale of (natural) human behaviour, and therefore beyond redemption. Although this contrast can be interpreted as a matter of proportionality, it also clearly expresses significantly distinct treatments of the criminal subject.

The complexity in Locke's account of punishment seems to complicate its normative justification: punishment appears to be justified both because it is a moral endeavour, grounded on the rationality of the human beings who are subjected to it, and

[468] Ibid, 272.
[469] Ibid, 274.

because it is an instrument of social order, grounded on the protection of society from dangerous individuals who cannot be trusted to act rationally. These inconsistencies approximate Locke's account of punishment to the paradox found in Hobbes's theory, between punishment's normative justification and its socio-political function. These similarities between Hobbes's and Locke's framework are arguably related to their common normative background, found in the individualist conception of the human condition. This common background comes most clearly to the fore the moment Locke needs to explain the passage from natural to political society, relying on his socio-political structure to reassure liberty at the same time as it legitimates the state's authority and power.

4.2.1 The Hobbesian Aspect of Locke's Nature

Towards the end of his account of the state of nature, Locke concedes that his state of perfect freedom is not without its inconveniences, born out of the 'Defects and Imperfections which are in us, as living singly and solely by our selves'[470]. The origins of these imperfections are particularly enlightening to the ideological aspect of Locke's liberty. As previously seen, Locke does not deny that self-preservation comes first in the state of nature, and the preservation of mankind (the law of nature) is to be pursued only when the individual is not under threat. This possible conflict between self-interest and solidarity was significantly ameliorated, almost eliminated by the reassurance provided by Locke's conception of liberty and property, which guaranteed that individuals can exercise their liberty without the need for violent competition. However, towards the end of his account of the state of nature, in order to justify how the natural social order he envisaged still necessitated the political authority of the state, Locke has to concede that there is still insecurity in his reassured natural relations.

The origins of this insecurity lie precisely in the same element of natural society which Locke deployed to secure his natural liberty: the reciprocity of political power. Although individuals have natural rights which afford them the free exercise of their natural liberty, 'yet the Enjoyment of it is very uncertain, and constantly exposed to the Invasion of others' – a risk which 'must certainly be Great, where Men may be Judges in their own Case'[471]. Without ceremony, Locke strips the state of nature of the security which it until now appeared to possess, placing the blame upon the same characteristic which constituted Hobbes's nature as a state of insecurity: the absence of common judgment. Even though every individual possesses the power to enforce the law of nature in defence of their liberty, Locke concedes that this power is no match against the volatility of private judgment. 'For

[470] Hooker cited in Locke, ibid, 278.
[471] Locke, ibid, 276.

all being Kings as much as he, every Man his Equal, and the greater part no strict Observers of Equity and Justice, the enjoyment of the property he has in this state is very unsafe, very insecure'[472].

For a moment, it seems that Locke's reassurance completely unravels beneath the weight of a very Hobbesian conception of natural relations, where any hope for cooperation upheld by its structure is undermined by self-interest and distrust. Although Locke's law of nature is plain and available to all who will but consult it, yet Men being biased by their Interest (...) are not apt to allow of it as a Law binding to them in the application of it to their particular Cases'[473]. Furthermore, even when individuals wish to apply the law of nature, such application is hindered by partiality: although everyone can act as judge and executioner of the law, 'Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases (...) as well as negligence, and unconcernedness, to make them too remiss, in other Mens'; and most importantly, 'there often wants *Power* to back and support the Sentence when right, and to *give* it due *Execution*'[474]. Against private judgment, political power is rendered ineffective and sterile.

But the importance of Locke's reassurance should not be so easily dismissed, as it imparts significant differences between his and Hobbes's treatment of insecurity. While for Hobbes the insecurity of the state of nature meant that the propensity for peace enabled by the law of nature was mainly prudential, and therefore unable to provide any answer to the inconveniences of human nature, for Locke the problem does not lie in any ineffectiveness on the part of the law of nature, but instead on individuals' incapacity to follow it correctly. The reason why Locke is capable of making this distinction is precisely due to the unequal and ideological character of his conception of natural liberty. Just as with his account of punishment, the general character of Locke's description of the insecurity of the state of nature should be read as if concealing a more complex distribution. In fact, Locke's differentiation between degrees of liberty and rationality is made even clearer here, when he stresses that the problem of private judgment is that 'the greater part' of natural individuals is 'no strict Observers of Equity and Justice'. It this portion of the population – those of imperfect rationality and hindered liberty – that Locke thinks can disrupt the security of natural society. By the same token, it is the property of the fully rational, of the propertied legal subjects, which in the state of nature finds itself 'very unsafe, very insecure'.

Thus even though Locke must acknowledge the existence of insecurity in his state of nature in order to justify the move to political society, his structure of reassurance enables him to unevenly distribute the form and weight of insecurity in social relations, thereby

[472] Ibid.
[473] Ibid, 351.
[474] Ibid (emphasis in original).

maintaining the normative primacy of legal subjectivity in his natural individual. This way, the possibility of social relations in the absence of a common power is not universally rejected; rather, the structural quality of natural liberty is capable of generating and preserving a careful balance within the social order which is capable of managing insecurity, a balance which is threatened by the equality of political power. It is interesting to note how the status of political power serves two contradictory functions in Locke's normative framework. Firstly, it supports the moral justification for punishment by reflecting the individual's general status as a responsible subject: Locke's natural individual is capable of understanding the law and of employing it to judge the moral quality of their and others' conduct, and can therefore be held responsible whenever they commit a crime.

Coupled with the complexity of Locke's structure of reassurance, the reciprocity of political power also grounds a more complex understanding of punishment's socio-political role, for it informs a broader spectrum of criminal behaviour. As seen above, the main manifestation of crime appears to be caused by a wanton disregard for the law and the security of others; here, punishment has a mainly preventive function. However, crime can also be the consequence of a defect in an individual's liberty; here, punishment acquires a primarily regulatory function. Finally, the idea that self-interest and partiality can lead to a misuse of political power also suggests that crime can be the consequence of a moral mistake, an unfair exercise of liberty; this time, punishment seems to possess a mainly declaratory, condemnatory aspect[475]. This complexity found in punishment has in itself an important socio-political role, as it reinforces the structure of reassurance by diffusing the insecurity generated by dangerousness: instead of crime being seen as primarily the consequence of the agency of dangerous subjects, these subjects become exceptional in Locke's model of society, and crime appears most of the time as a consequence of the 'unsocial sociability'[476] of human beings – a misuse of liberty on the part of otherwise responsible subjects, who can be trusted to learn from their punishment not to make the same mistake again.

On the other hand, at the same time as the natural equality of political power reinforces the normative primacy of legal subjectivity, without the protection of a public power it also becomes the main source of insecurity in the state of nature, precisely because most individuals are not fully rational and therefore cannot be trusted to make fair judgments. Locke imbues human nature with law in order to legitimate the latter; when he later de-couples law from the nature of some individuals, through the unequal distribution of liberty, it is law that appears as natural and stable, so that certain aspects of human nature

[475] For the different functions of punishment and criminal law, cf. A. Ashworth, 'Conceptions of Overcriminalization' (2008) 5 *Ohio State Journal of Criminal Law*, 407-425.
[476] I. Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' (1991) in *Political Writings* (Cambridge: Cambridge University Press), 41-53, 44.

become unnatural, and therefore wrongful. This happens because Locke's natural liberty – and the conception of subjectivity which arises from it – is not a function of human nature, but a function of the law and the model of society sustained by it.

However, because of this ideological aspect in law, even though insecurity is managed in Locke's framework, if unchecked by a public power, it still carries the potential of burying the state of nature under a state of war.

4.2.2 The War of Law against All

The structure of reassurance established in Locke's state of nature serves an important normative purpose in his political theory, of driving the source of insecurity away from the natural (juridical) boundaries of society, into the recesses of irrationality and of the fragmentation of political power in the state of nature. Under this perspective, as long as the law of nature is maintained and individual liberty sticks to its limits, peace and cooperation is guaranteed in society, and serious, dangerous crime becomes an exceptional occurrence. This ideological framework has significant normative implications for a model of criminal law based on it. At the same time as the exceptional nature of 'real' crime maintains that the repressive role of criminal law is expected to be limited to specific circumstances, punishment's broader function in the maintenance and regulation of social order preserves the criminal law's legitimacy and relevance. Although the criminal can be expected to be a responsible subject, they are nevertheless one who requires the guidance and control of the law to remain within the boundaries of legal subjectivity.

This complex account of Locke's theory of punishment seemingly reinforces the reassurance provided by his model of natural liberty; but such model is less stable than it appears, for as it turns out, law still necessitates the power of the state. Law's dependence on a public authority was already hinted at by Locke's discussion of the problems of private judgment, but the full implications of this relation appear in his analysis of the state of war. Locke stresses that 'the State of Nature, and the State of War, which however some Men have confounded, are as far distant, as a State of Peace, Good Will, Mutual Assistance, and Preservation, and a State of Enmity, Malice, Violence, and Mutual Destruction are one from another'[477]. There is a clear purpose in this statement to avoid the conclusion seen in Hobbes's theory that a state of nature inevitably leads to war; the extent to which Locke manages to escape Hobbes's natural insecurity deserves further enquiry.

[477] Locke, op cit, 280.

War, for Locke, begins when someone forsakes the boundaries of their liberty and declares, 'by Word or Action'[478], the intent to 'take away the Freedom' of another[479] by use of force. 'To be free from such force is the only security of my Preservation: and reason bids me look on him, as an Enemy to my Preservation, who would take away that Freedom, which is the Fence to it'[480]. The wrongfulness and danger contained in such aggression confers upon the victim the right of war, which entitles an individual to abandon the boundaries of their own liberty and kill an aggressor 'for the same Reason, that he may kill a *Wolf* or a *Lyon*; because such Men are not under the ties of the Common Law of Reason, have no other Rule, but that of Force and Violence, and so may be treated as Beasts of Prey, those dangerous and noxious Creatures'[481].

From this description, it seems that Locke approximates crime and aggression in many aspects, as both the criminal and the aggressor are characterised as dangerous subjects who renounce the laws of reason and thereby threaten the preservation of all; in other words, aggression is also a crime. What distinguishes aggression from crime in general is the imminence of the threat of aggression to the victim's self-preservation, a quality which calls for a different response. Thus while punishment is an expression of political power, a measured judgment which main aim is the preservation of all, the right of war is mainly a reflection of the victim's right to self-preservation, a defensive response to an immediate danger. 'Thus a *Thief*, whom I cannot harm but by appeal to the Law, for having stolen all that I am worth, I may kill, when he sets on me to rob me, but of my Horse or Coat'[482]. War therefore happens precisely when punishment is not available, when the threat is either too imminent or too great to allow for calculated judgment.

It thus appears that the main difference between the state of nature and the state of war is that, in nature, individuals have recourse to political power and are therefore bound to respect the limits set by the law of nature – even when they punish, they must overstep the criminal's liberty only to the extent dictated by the crime – while, in war, the juridical boundaries of the law of liberty have no hold. 'Want of a common Judge with Authority, puts all Men in a State of Nature: Force without Right, upon a Man's Person, makes a State of War'[483]. But although Locke's state of war disturbs the order and platitude of the state of nature, it is still far from being the amoral fight for self-preservation presented by Hobbes. War is clearly moralised and juridified in Locke's theory: it begins with an act of force *without right*, which *entitles* the victim and any supporters to *rightfully* fight any aggressors

[478] Ibid, 278.
[479] Ibid, 279.
[480] Ibid.
[481] Ibid.
[482] Ibid, 280.
[483] Ibid, 281.

up to the point of taking their life. War for Locke is thus not about two sides with equal rights to self-preservation, but about one side exercising their right of self-preservation against another, who apparently lost that right due to their unlawful violence; it is therefore not a lawless state, but rather 'a juridical decision by arms: the right to judge and proceed against a recalcitrant transgressor by force of arms'[484].

Instead of eschewing or nullifying the law of nature, the right of war constitute its ultimate means of enforcement, available when the only option is 'to appeal to Heaven'[485], to seek justice through force. The juridification and moralisation of war makes it explicit not only how pervasive Locke's conception of law truly is, but also how, due to law's normative importance to Locke's structure of reassurance, it is the primary value and concern within Locke's conception of liberty, superior even to individual self-preservation – while it is motivated by self-preservation, war has to be legitimated on the basis of law and justice. For this reason, even though war interrupts the natural social order, it doesn't completely disrupt it, instead being constituted as a means towards its restoration. War therefore still has its place even after the establishment of political society, manifested in many occasions as a right to self-defence. For instance, it is the right of war which underpins and legitimates resistance against the arbitrary power of a tyrant government, entitling the people to revolt[486].

The caveat to this right, however, is that it is only *wrongful* force which entitles individuals to legitimately resist, while rightful force overcomes even the other party's right to self-preservation. The juridification of war thus exposes the primacy of legal authority over individual autonomy in Locke's thinking, indicating that the public good is superior to individual self-interest; this is why the use of force is authorised against a recalcitrant criminal, why there is no right to resist punishment in the Lockean framework, and why sometimes the state is entitled to go even against its own law, by means of the prerogative, whenever the public good requires it[487].

So while Locke puts great emphasis on the reassurance provided by his conception of liberty, this reassurance's dependence on a specific model of society, with a particular set of social and legal rules demonstrates that it is this society, and not the individual *per se*, which is Locke's core concern to preserve. Locke's conception of liberty is reassured only insofar as it serves the social order; it is to this order which Locke alludes when he says that the state of nature is a state of 'perfect freedom': his freedom is fit for a specific purpose. Even war is unable to completely upset the normative prevalence of his law of nature, for

[484] Tully, op cit, 25.
[485] Locke, op cit, 282.
[486] Tully, op cit, 31.
[487] Cf. subsection 4.3.2 below.

there is always one side who is in the right, and one who is in the wrong – and who therefore has no right.

Due to the juridified justification of war, even though war temporarily eschews the juridical boundaries of liberty, it still depends on political power in order to be effective; after all, war's only purpose is to restore the social order which was threatened by the aggressor's crime, an order which relies on the peaceful enforcement of the law. It is here, however, that the state of nature finds its greatest insecurity. For if war necessitates political power to fulfil its function of restoring the social order, it can be effective only 'between those who are in Society, and are equally on both sides Subjected to the fair determination of the Law;' however, 'where no such appeal is, as in the State of Nature, for want of positive Laws, and Judges with Authority to appeal to, the State of War once begun, continues'[488] indefinitely. Because, in the state of nature, political power is fragmented and thus at the mercy of the defective rationality of most individuals, war ceases from being a juridical decision by arms to become a dangerous threat. Under such conditions, 'it is hard to imagine any thing but a State of War'[489].

'To avoid this State of War (wherein there is no appeal but to Heaven, and wherein every the least difference is apt to end, where there is no Authority to decide between the Contenders) is one great reason of Mens putting themselves into Society, and quitting the State of Nature'[490]. This sentence reveals how close insecurity is to the peaceful surface of Locke's model of society, and how important it is for its normative justification. Instead of eliminating the insecurity of juridical relations, Locke's reassurance only represses it under a specific ideological structure which is deeply reliant on socio-political conditions, while still deploying this same insecurity in order to legitimate the political and juridical authority of the state.

Although it would seem that, by making dangerousness exceptional, Locke would also minimise the hold of violence and coercion in his political society, by moralising both punishment and war Locke also reinforces the legitimation of these coercive measures, so that although they are appear to be less pervasive than in Hobbes's socio-political framework, they are every bit as necessary, and even more normatively justified. Just as it happened with Locke's state of nature, the peaceful surface of his political society conceals an ocean of turbulent waters.

[488] Locke, op cit, 281.
[489] Ibid.
[490] Ibid, 282. Peter Laslett calls this sentence 'Locke's closest formal approach to [Hobbes] in his political theory' (ibid).

4.3 THE ENDS OF POLITICAL SOCIETY

> The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*. To which in the state of Nature there are many things wanting.[491]

The juridification of natural liberty in Locke's political theory provides an interesting framework in which to analyse the logic of reassurance in individual responsibility. As previously discussed, in Hobbes's theory, natural liberty was essentially at odds with any juridical conception of autonomy, as individuals in the state of nature were entitled and expected to behave in any way they saw fit for their self-preservation. The juridification of autonomy occurs through the artificial restraining of liberty established by the commonwealth, and this implies that although individuals choose to limit their liberty and empower the sovereign to protect these limits, they remain at heart natural individuals, which means they are always at least potentially dangerous, highlighting the intrinsic insecurity of legal subjectivity.

Locke's conception of human nature, on the other hand, constructs an image of individual autonomy which is rather compatible with the premises behind legal subjectivity. For Locke, all individuals are rational in principle, and thus capable of obeying the law and understanding the consequences of their actions. His conception of natural liberty highlights, above all, the lawfulness of individual autonomy: law and liberty are harmonious, and so individuals can usually be expected to act according to the law. Likewise, both the social structure and the authority of the state are not at odds with human nature, but on the contrary exist to promote the conditions for its flourishing. Individuals are not forced or restrained in order to cooperate, they naturally do so; it is the unreasonableness of exceptional individuals and the fragile political conditions of the state of nature, not the fickleness and arbitrariness of self-interest, which generates conflict and violence. As long as it remains at the service of the public good, the political authority of the state can only improve the expression of liberty; in this setting, there is no reason for the state to expect its citizens to generally behave as dangerous subjects, but rather as legal subjects who exceptionally commit crimes.

The inherent connection between liberty and law, and law and security, means that the security provided by political society does not limit, but enhance natural liberty – political society perfects the state of nature, instead of overcoming it. On the other hand, such perfecting is made necessary by the vulnerability of political power to the partiality and defectiveness of private judgment. Without the protection of the state, Locke's liberty is perfect only in the abstract; it necessitates political authority for its complete actualisation.

[491] Ibid, 350-351 (emphasis in original).

'Civil Government is the proper Remedy for the Inconveniences of the State of Nature'[492]. But although the abstract character of natural liberty originates from its uneven distribution, it is not inequality which is the problem for Locke. Locke's model of society requires inequality, for the full rationality of property can only arise when individuals are allowed to accumulate without limits – legal subjectivity is about competition, even if peaceful.

The main problem of the state of nature is that, although liberty is unequal, political power is equally shared. As mentioned earlier, the same *political equality* which legitimates the existence of law and punishment in the state of nature also grounds the need for these institutions to be perfected with the help of a public authority. Locke gives political power to his individuals just so he can justifiably take it away: 'there, and there only is Political Society, where every one of the Members hath quitted this natural Power'[493]. Through the establishment of political society, the normative standard of the responsible legal subject is reinforced for every member of society. Individuals have to be capable of self-government in order to be responsible, but in order for this standard of responsibility to be universalised, they need to agree to restrain their right to self-government in favour of universal rules made by society. Every member of political society therefore 'gives up [their right to self-government] to be *regulated* by Laws made by the Society (...) which (...) in many things confine the liberty he had by the Law of Nature'[494].

Although it appears to remain the same, individual liberty in essence takes a whole different form under political society, when the government of its boundaries is taken from the individual, and given to civil government[495]. Autonomy has always been restricted by the law, but in the state of nature it was individuals themselves who were the judges and enforcers of these limits; after the social contract, individuals subject their self-government to the laws dictated by society – a society which is itself modelled around a specific conception of liberty, that which is in league with the self-interested of the legal subjectivity defined by the rationality of property. It is this specific rationality which is the chief end of Locke's society.

Locke uses the pervasiveness of this rationality in order to highlight the emancipatory aspect of his socio-political model. So while Locke's political society represents the unification of individual wills under 'one Body, with a Power to Act as one Body'[496], this society is not personified by a sovereign; instead, these two entities remain somewhat conceptually distinct. His framework suggests a 'double contractual operation' in which people 'contract with each other in order to have 'society', and then this 'society' (the

[492] Ibid, 276.
[493] Ibid, 324.
[494] Ibid, 352-353 (emphasis added).
[495] Ibid, 283.
[496] Ibid, 331.

people as a whole) decides to have a government, a government it constructs on conditions'[497]. Under this perspective, the government is not the author of its powers or decisions; these ultimately remain in the hands of society, which represents the real public authority in Locke's framework.

However, although individuals enter society in order to protect their rights and property, it should be clear that society is not supposed to represent the interests of its members, but rather the *public interest*. In other words, society preserves only those interests which are in harmony with the law of nature, those which correspond with the dictates of natural liberty. 'In Lockean liberalism the durability of natural law in civil society, combined with the pre-existence of the individual person as *proprietor*, means that natural law has precedence over civil laws and over the rights of individuals, even in their most particularised aspects'[498]. It is the socio-political framework postulated by the law of nature, grounded on its structure of reassurance, which is at the heart of Locke's sovereign, his conception of society. Although individual freedom is placed at the centre of the law of nature, it is freedom according to and as a function of the law – legal subjectivity – which is protected and promoted; the juridical individual is just an abstract representation of this social order, an idea in service of the public good.

If we draw a parallel between Locke's framework of individual liberty and the liberal model of criminal responsibility, we can see how the idea of individual responsibility in the criminal law draws a similar socio-political structure: responsible agency (legal subjectivity) becomes the primary concept to be observed by the criminal law, limiting both the power of the state (by linking punishment to the ascription of responsibility and guilt) and the autonomy of individuals (by linking individual autonomy to responsible agency, and therefore human subjectivity to legal subjectivity). Legal subjectivity, however, is mainly a normative ideal in connection to a specific notion of moral and social order, so that it is this ideal, and not the actual agency of individuals, which is respected by the subjective conception of legal responsibility.

Likewise, Locke's juridification of liberty allows him to justify the establishment of political authority on the grounds not only of its necessity, but mainly of its justice, its service to the law and the liberty of individuals. In his account of property, Locke universalises liberty in order to justify its privatisation; and in his account of political power and punishment, he privatises judgement in order to justify its universalisation. This way, the property of all becomes the legitimate property of some, while the judgment of some serves as the legitimate judgment of all. 'And thus all private judgment of every particular

[497] Harrison, op cit, 212.
[498] L. Jaume, 'Hobbes and the Philosophical Sources of Liberalism' (2007) in P. Springbord (ed), *The Cambridge Companion to Hobbes's Leviathan*, 199-216, 202.

Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties'[499].

4.3.1 Reassurance and Liberal Society

The relationship between individual freedom, law and juridical liberty at the heart of Locke's framework of punishment can guide an understanding of how the structure of reassurance embedded in the liberal model of society can shape and condition, while still preserving, the essential insecurity of legal individualism. The first major aspect is that, since punishment is naturalised, it appears moral and legitimate in Locke's political society. Crime is not a consequence of individual liberty, but rather originates in imperfections of human nature arising either from the anti-social, almost pathological behaviour of some, or from the misguided judgment of those who do not have full access to the rationality of property. It is individual self-interest, when unrestrained by reason or improperly regulated by political power, which generates dangerousness and insecurity. Political power and authority are therefore harmonious with individual liberty, a condition for its preservation, and it is only the imperfect rationality of some which threatens to harm this balance.

The second major aspect of Locke's framework is related to his account of liberty, and the shift which occurs to this conception after the establishment of political society. As previously mentioned, the juridical boundaries of individual liberty remain the same before and after political society, except for the right to self-government, which is transferred from the individuals to society. Since the main expression of self-government is political power, and punishment is a manifestation of this power, it can be said that punishment's role is also transformed by this shift in individual liberty, a phenomenon which is related to the complexity of Locke's account of punishment discussed above. When Locke defines punishment in the state of nature, his main concern is to highlight the dangerousness of crime, and the justification of punishment which arises from it. When Locke has to argue for the necessity of political authority, however, the main legal problem of natural society stops being crime, and becomes the partiality of private judgment, driven by self-interest. It is thus mainly this more nuanced, more rational kind of crime which the establishment of political society aims to address.

So while the dangerousness of serious criminal behaviour is preserved in political society, it is subsumed under a much more orderly and stable orientation of punishment, which is the regulation of individual behaviour and the preservation of the moral standard of legal subjectivity in society. In contrast with Hobbes's account of punishment, in which it

[499] Locke, op cit, 324.

remains essentially an act of violence, itself more part of a chaotic state of nature than an element of political society, in Locke's theory punishment itself is juridified, mainly addressing legal subjects. However, punishment in this model still preserves its repressive potential, which in political society is doubly justified: justified first by its moral validity, grounded on notion of responsibility derived from individual liberty, and second by its dangerousness – 'real', serious crime in political society becomes even more exceptional, so that in these few cases prevention and repression become even more necessary.

Locke's socio-political framework is therefore able to inform a criminal legal system which, because grounded on a structure of reassurance, is able to exercise condemnatory, preventive and regulatory functions, and to accordingly treat criminals normally as legal subjects, and only exceptionally as dangerous subjects. This is tied to an intrinsically thick conception of citizenship implicit in Locke's socio-political framework: he envisages a model of society which can provide for the formal equality of all its members, even if it sustains material inequality.

The third major aspect of Locke's framework of punishment, however, is the abstract and contingent character of the reassurance grounding responsible agency. If the idea that initially comes out of Locke's conception of political society is that the liberty (and self-preservation) of all individuals can be made to harmoniously coexist in the security generated by his socio-political model, Locke cannot help but concede that, when liberty and security do come into conflict, it is security – the preservation of the structural conditions of his society – which comes out victorious. This is mainly because Locke's account of individual liberty is ideological, based not on a concrete account of the human condition but on a specific conception of individual autonomy and subjectivity, embedded within a specific socio-economic logic.

The supremacy of security in Locke's framework[500] is further reinforced by the shifting role of self-preservation in his dual conception of liberty. In the state of nature, when political power rested in the hands of individuals, the rationality of the law of nature had to adequate itself to individual self-interest, so that individuals were bound, only 'when [their] own Preservation *comes not in competition*, (...) to preserve the rest of Mankind'[501]. The primacy of self-preservation was mainly a reflection of the private judgment maintained by the reciprocal exercise of political power. But when civil government is established, the political power necessary to guarantee the security of property is transferred to society, to be employed by its government. Once political power is freed from the inconveniences of private judgment, the fundamental law of civil government becomes '*the preservation of the*

[500] Cf. M. Neocleous, *Critique of Security* (2008), ch. 1.
[501] Locke, op cit, 271 (emphasis added).

Society, and (as far as will consist with the public good) of every person in it'[502]. As the public good is the ultimate goal of liberty, once the political power to protect the public good is concentrated in society, society becomes the primary value to be protected and individual self-preservation becomes secondary. This abstract character of the liberal individual can be most clearly exemplified through Locke's account of prerogative.

4.3.2 Prerogative, Responsibility and Dangerousness

The primary ideal promoted by subjective, individual responsibility is that of individual justice and fairness. This ideal can be seen reflected in the equalising aspect of political society in Locke's political theory: the social contract is conceptualised as an attempt to quell the partiality caused by the fragmentation of political power, '[b]y which means every single person became subject, equally with other the meanest Men, to those Laws, which he himself, as part of the Legislative had established: nor could any one, by his own Authority, avoid the force of the Law, when once made'[503]. Locke's political society is thus grounded on the image of formal equality, which influences not only relations among individuals, but also those between individuals and the state, as the state is equally subjected to the dictates of the law. 'The relation of governance between governors and free citizens is conceptualized, not as sovereign and subjects, as in the absolutist traditions, but rather as a game of conditional and mutual subjection in which each governs the other by subjecting the other to the rule of law'[504]. According to James Tully, 'this agonistic picture of government is [Locke's] most distinctive and enduring contribution to modern political thought'[505].

In Locke's political society, therefore, the government is not posited as absolute, but as subjected to the public good expressed by the law of nature:

> though Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society (...) yet it being only with an intention in every one the better to preserve himself his Liberty and Property (...) the power of the Society, or *Legislative* constituted by them, *can never be suppos'd to extend farther than the common good*; but is obliged to secure every ones Property by providing against those (...) defects (...) that made the State of Nature so unsafe and uneasie[506].

Locke's 'rule of law' appears to subject the state to the protection and promotion of liberty, which might suggest that 'there is no sovereign in Locke's theory of government'[507]. But that would prove to be a rushed conclusion. Locke's sovereign is not inexistent, but it is in some sense 'de-personalised': above all, it is the notion of public good in his political

[502] Ibid, 356 (emphasis in original).
[503] Ibid, 329-330.
[504] Tully, op cit, 3.
[505] Ibid.
[506] Locke, op cit, 353.
[507] Tully, op cit, 37.

theory which holds sovereign authority: not only is the public good which directs, justifies and authorises political power, but it is also the public good which rules over individual self-interest, through the juridified conception of liberty. However, the public good is largely dependent on political power; and in political society, it is the state which secures and exercises political power through government. Furthermore, even though civil government in Locke's theory is restrained to act according to the public good, this ultimately means acting according to the public interest, that which guarantees the structural conditions of society, and not according to the interest of individuals. Granted, the public interest is likely to be aligned with the interest of particular individuals: those who are fully rational, and who have their self-interest expressed through the law of property. It is this idea of liberty, and not the general well-being of individuals, which lies behind the notion of the public good; and, except in the event of a revolution, it is the state which is its ultimate arbiter.

The greatest example of how the public authority's grounding on the public good effectively makes it sovereign is seen in Locke's account of prerogative. The need for the state to respect the formal boundaries of civil laws is the main guarantee which individuals have against the arbitrary imposition of power. However, the abstract and universalistic character of civil laws is in tension with the structural inequality and violence which is sustained by a liberal model of society, so that their reassuring function is necessarily socio-politically contingent. Insecurity is bound to emerge from the inadequacy between the abstract framework of the law and the concrete conditions for its application. In these circumstances, where Locke's structure of reassurance falters and finds itself vulnerable, Locke has no choice but to bring back the absolute power of the sovereign, and place it in the hands of the public authority. In cases of emergency, 'wherein a strict and rigid observation of the Laws may do harm', the power to decide 'must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the publick good and advantage shall require'[508].

Just like the right of war, this sovereign decision potentially upsets the juridical boundaries of individual liberty; also just like war, however, prerogative is ultimately an instrument of justice, used for the purpose of protecting the integrity and conditions of society. Prerogative therefore 'is nothing but the Power of doing publick good without a Rule'[509]. The need for Locke to allow for this manifestation of sovereign power is arguably the most significant sign that the structure of reassurance in his model of society is largely contingent, a socio-political compromise used to manage and conceal the fact that political society is grounded on conditions of social conflict and insecurity. Since reassurance is abstract and largely ideological, it is incapable of permanently and efficiently suppressing

[508] Locke, op cit, 375.
[509] Ibid, 378.

the insecurity coming from its very bases, so that even a particularly strong and developed socio-political model needs to rely on authoritarian measures in order to deal with the circumstances in which it finds itself deprived of its structural basis.

The vulnerability of liberty to the structural conditions of reassurance in society reveals the limitations of the pursuit of individual fairness grounded upon an abstract conception of individual autonomy and responsible agency. Responsibility for crime, even in conditions of social stability, remains essentially a function of the maintenance of the ideological framework of liberal society, for the liberal conception of legal subjectivity is more directly aligned with these specific socio-political conditions than it is with the actual expressions of human subjectivity found in the midst of society. For that reason, even when the socio-political environment is such that liberal law can guarantee or expect a high degree of compliance with the law, ultimately this reassurance rests on insecure foundations. This is why liberal society requires the repressive role exercised by political authority through the criminal law, and why the framework of individual responsibility is intrinsically vulnerable to the threat of dangerousness. Whenever reassurance is threatened or finds itself eroded, the expectation of social compliance disappears, and the need for punishment's reassuring function re-emerges.

CONCLUSION

> Locke was indeed at the fountain-head of English liberalism. The greatness of seventeenth-century liberalism was its assertion of the free rational individual as the criterion of the good society; its tragedy was that this very assertion was necessarily a denial of individualism to half the nation.[510]

The conceptual elements of the relation between responsibility and dangerousness can thus be identified through a critical examination of Locke's socio-political framework. In the end, Locke's naturalisation of law and juridification of liberty served the purpose of legitimising a particular conception of subjectivity based upon a specific model of society, which was grounded on the idea that the structural elements of this model (law, property and political power) were capable of securing it against the insecurity generated by its abstract universalisation and its concrete inequality. But Locke's distrust of individual autonomy revealed that the insecurity of human behaviour which he de-naturalised and marginalised in his political theory was still latent within the ideological conditions for his model of society. This is why his civil government ultimately puts society above individuals, and executive power above civil laws: the peace and cooperation upheld by Locke's conception of natural

[510] McPherson, op cit, 262.

liberty remained utterly abstract, maintained only by contingent socio-political conditions, and thus unable to assimilate the full scope of human autonomy – except through the correlate notion of dangerousness.

The particular dynamics generated by the state of insecurity in the contemporary framework of criminal law can now be properly analysed in light of the conceptual framework constructed throughout this thesis. Now that the conceptual foundations for both insecurity and reassurance have been examined, they have to be set in motion through a renewed dialectical account of their historical development, which is the focus of the next chapter. Once fully inserted into the framework of criminal responsibility, legal subjectivity ultimately heightens the tension between responsibility and dangerousness, for it undermines the barrier between legal and dangerous subjectivity which was upheld by a pre-subjective, primarily repressive criminal law. At the moment the structure of reassurance erodes and insecurity forces dangerousness back to its primary role in criminal subjectivity, law's conception of individual autonomy is left particularly vulnerable against a criminal law aimed both at containing the resurgent pervasiveness of dangerousness and at respecting the criminal as a responsible legal subject.

Chapter 5: Disciplining the Dangerous Subject: Punishment, Ambivalence and Civil Society

> The greatest problem for the human species, the solution of which nature compels him to seek, is that of attaining a civil society which can administer justice universally.[511]

INTRODUCTION

After discussing the conceptual foundations of both insecurity and reassurance, this chapter turns to reinsert these developed concepts back into the framework of criminal responsibility. This thesis started with an analysis of criminal responsibility in order to uncover its other side, the dangerousness which is inherent to the legal subject; now, on its way back, the enquiry inverts its initial order, starting with dangerousness in order to pursue a critical understanding of responsibility. At this moment, there is an important aspect of this phenomenon which still remains relatively unexplored: how the idea of dangerousness influences and affects the normative framework of criminal responsibility, or the legitimacy of the criminal law as a liberal institution. In grasping the normative grounds of the dynamics between responsibility and dangerousness in modern criminal law and punishment, I aim to reveal the essential importance of a dialectic perspective for a proper critical understanding of criminal responsibility.

The first part of this study starts with the political philosophy of G. W. F. Hegel. Section 5.1 examines the links between the concepts explored through Hobbes's and Locke's theories and Hegel's political theoretical framework developed in the *Philosophy of Right*[512], relying on Hegel's more sophisticated account of subjectivity and dangerousness to establish a dynamic relation between insecurity and reassurance through the conception of civil society. Then, with the help of the theory of punishment Hegel developed in his political work, I draw the connections between the political framework of punishment developed by these theorists and the morality-based perspective on criminal responsibility prevalent in contemporary criminal law theory. In so doing, I highlight that the source of criminal responsibility's dialectic nature lies in liberal law's incapacity to accept and engage with its own insecurity, at the same time as it is unable to eliminate it. As a result, liberal law has a paradoxical relationship with its own socio-political grounds, so that its treatment of society and its citizens is hopelessly ambivalent.

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[511] I. Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' (1991) in *Political Writings*, 41-53, 45.
[512] G. W. F. Hegel, *Hegel's Philosophy of Right* (1967).

With this analytical framework in hand, in section 5.2 I rescue my historical exploration of criminal responsibility initiated in Chapter 2, but this time stressing how the dynamics of responsibility and dangerousness is a direct reflection of the ambivalence inherent to the liberal conception of society. I develop and discuss the notion of ambivalence with regards to autonomy and punishment through a discussion of Barry Vaughan's interpretation of the genealogy of modern punishment in Britain[513], linking criminal responsibility's conceptual foundations with its historical expression and ideological repression. The result is a conception of liberal criminal law which aspires to be expressive, but cannot help being repressive, of individual autonomy and freedom.

Section 5.3 discusses how liberal theory's incapacity to deal with autonomy's ambivalence is heightened and managed in the contemporary landscape of criminal law through an abstract dichotomy between liberty and security. The polarisation of society's interests is here investigated mainly as an expression of the intrinsic conflict between legal and dangerous subjectivities. This conflict, contained within the eroded structure of reassurance of advanced liberal society, leaves criminal responsibility in a condition of what I call *radical* ambivalence. The failure to acknowledge the exclusionary element in the liberal conception of liberty – originated in liberal society's incapacity to provide the full reassurance that it promises its citizens – results in liberal theory being utterly vulnerable to a discourse of security.

5.1 DANGEROUSNESS AND CIVIL SOCIETY

Although Hobbes and Locke's accounts of punishment carry many differences, previous chapters illustrated that they also possess significant similarities, which derive from the fact that they espouse elements of a common background, a specific model of society. This model is grounded upon the idea of human beings as autonomous individuals, and of political society as these individuals coming together under the rule of a public authority. This conceptualisation leads to a tendency, common throughout most of modern political thought, to consider the state, or political society, as

> the supreme and definitive moment of the common and collective life of man considered as a rational being, as the most perfect or less imperfect result of that process of rationalisation of the instincts or passions or interests for which the rule of disorderly strength is transformed into one of controlled liberty.[514]

[513] B. Vaughan, 'Punishment and Conditional Citizenship' (2000) 2(1) *Punishment and Society*, 23-39.
[514] N. Bobbio, 'Gramsci and the Conception of Civil Society' (1979) in C. Mouffe (ed), *Gramsci and Marxist Theory*, 21-47, at 21.

It is with Hobbes and Locke that this tradition of political thought is initiated and established as the roots of liberal political theory, and it is with Hegel that 'the rationalisation of the state reaches its climax', as it is 'represented not simply as a proposal for an ideal model, but as an understanding of the real historical movement: the rationality of the state is no longer just a necessity but a reality, not just an ideal but an event of history'[515]. In order to grasp the full scope of the liberal normative framework of punishment, it is important to examine the role this framework plays in the process of actualisation of the rational state.

This rationalising process is theorised 'through the constant use of a dichotomic model, where the state is conceived as a positive moment opposed to a pre-state or anti-state society, which is degraded to a negative moment'[516]. With Hobbes and Locke, we see this dichotomic model expressed as the contrast between the state of nature, or natural (pre-political) society, and the state or political society formed after the social contract which establishes a public authority. For Hobbes, the state of nature is a state of endemic insecurity, which almost inevitably leads to a war of all against all, so that political society comes as the only solution for individuals to escape the state of nature, to eliminate its insecurity. For Locke, on the other hand, natural society is an environment of relative social harmony, which is only disturbed by inconveniences arising from the defective rationality of some and from the wickedness of few. Political society then comes in Locke's framework not to eliminate the state of nature, but to perfect it through civil law and common judgment.

As previously suggested, the contrasts between the Hobbesian and the Lockean perspectives on the relation between pre-political and political society revealed interesting aspects surrounding their accounts of punishment. Since for Hobbes the lack of reassurance in the state of nature means that there could be no valid law or effective moral judgment, individual rights and respect for the law were only possible after the establishment of a public authority capable of guaranteeing these limits to individual autonomy through law and punishment. This meant that individuals were naturally dangerous to each other, and could only behave as legal subjects within the environment of a political society. A crime, then, signified a rejection of the social contract and a return to the individual's natural, pre-political status.

For Locke, on the other hand, the state of nature was furnished with a structure of reassurance which was in principle able to provide the necessary conditions for legal subjectivity, so that law and punishment had validity even before political society. The need for a public authority arises in Locke not due to human nature, but due to a defect in human nature which requires correction by the state[517]; dangerousness was not the rule, but the

[515] Ibid.
[516] Ibid, 22.
[517] Cf. M. Oakeshott, *Hobbes on Civil Association* (1975), 62-63.

exception in Locke's state of nature. Even so, political society was still necessary to guarantee the actualisation of legal subjectivity, as dangerousness, albeit exceptional, remained a threat to the peaceful coexistence of individuals. While legal subjectivity was considered the outcome of human nature, it was still only reassured in political society, and dangerous subjectivity remained an aspect reminiscent of the state of nature, and of the possibility of the human condition, without authority, dissolving into a state of war.

The analytical framework provided by these two authors is particularly illuminating about the specific mechanics surrounding the justification of public authority, and the political function of punishment with regards to the maintenance of the conditions for autonomy in liberal societies. However, since these perspectives aspire to universal rational validity, they neglect the historical specificity of their conceptions, which leaves them utterly sterile and abstract. The categorical separation between state of nature and political society fails to account for how the insecurity of nature – along with the dangerous subjectivity it engenders – gets reproduced in political society, even as this reproduction is inevitably implied by the postulated necessity of punishment and public authority. The result is a conflict between these two frameworks of human sociability, most eminently expressed through the paradox found in punishment[518].

The idea that many of the problems and limitations of these political theories are generated by the categorical distinction between state of nature and political society hints at the necessity to conceptualise this relation in a more fluid, dynamic way. An attempt at such an endeavour can be found in Hegel's political philosophy. In historicising the dichotomy between pre-political and political society, Hegel does away with the polar opposition between nature and civilisation implied by the natural law tradition, placing the pre-political status of individuals as a moment within the modern socio-political framework. The key to this significant transformation lies in Hegel's re-conceptualisation of civil society.

5.1.1 Civilising Nature

Up until and including the writings of Kant, the terms 'civil society' and 'political society' were essentially synonymous. Kant, who as previously seen was significantly influenced by Locke's work, postulated in his *Metaphysics of Morals* that 'the condition of the state of nature is not opposed and contrasted with the social condition but with the civil condition. For within a state of nature there can indeed be society, but not a civil society'[519]. Kant here was proposing that it is only when civil society is a political society, that is, when it is regulated by civil laws and guaranteed by a public authority, that individuals can be

[518] Cf. Chapter 3, section 3.1 above.
[519] I. Kant, *Metaphysics of Morals: Metaphysical Elements of Justice Pt.1* (1999), 41.

considered citizens and treated as legal persons[520]. Civil society for Kant requires the civil state, because it is only the latter which guarantees the boundaries of legal subjectivity and which therefore confines the insecurity of social relations to the pre-political moment. Having said this, since Kant preserved this categorical distinction, he also inevitably preserved the essential paradox in punishment[521], as well as the abstract character of political society's reassurance.

Perhaps one of Hegel's greatest insights in his political philosophy was to implicitly realise that, given the juridical individualism prevalent in modern and liberal conceptions of society, the insecurity of pre-political social relations could never be completely dispelled by the public authority. So Hobbes's general postulate that political society could overcome and eliminate the conditions of the state of nature had to be discarded. Hegel's conception of the pre-political moment was thus closer to Locke's (and Kant's) idea of the state of nature as a natural society, than to Hobbes's radical individualism. At the same time, however, Hegel maintained that pre-political society and political society should not be confused, so that even though political society could not simply do away with pre-political relations, it still had to be a new and distinct moment within his socio-political framework. Therefore, Locke's idea that political society merely perfects and secures natural society could not be maintained either. Instead, in Hegel's theory the political moment – which he called the state – contains and preserves the pre-political moment (since it is an essential aspect of social relations, which cannot be eliminated), but at the same time it also transcends it, transforming its conflictive nature into part of a universality, into a political community[522].

This innovation carries significant transformations to the dichotomic model first espoused by Hobbes and Locke. First, Hegel's conception of the pre-political moment resists the tendency of calling it a 'natural' or 'non-civilised' state. Instead, Hegel calls it 'civil society', making clear that the pre-political moment is part and parcel of modernity, an aspect of society as we know it, at the same time as he distinguishes it from his political moment, crystallised in the idea of the state. Second, Hegel eliminates the dominance of juridical form which was maintained by the natural law dichotomies. What separates civil society from the state is not the absence of civil laws or the ineffectiveness of punishment. Rather, the main distinction between the pre-political and political moments is the quality of the relations between individuals: civil society is dominated by economic relations between self-interested individuals and institutions, and their association is a matter of convenience or necessity. The state, by its turn, is an environment of political relations, where individuals recognise each other as equals and have their autonomy and freedom fully recognised and

[520] Cf. Bobbio, op cit, 27.
[521] Cf. Chapter 3, subsection 3.1.2 above.
[522] Bobbio, op cit, 22.

actualised by the state. This way, the competitive, economic nature of human relations – individual self-interest – is also civilised, presented not as a matter of natural impulse but as an intrinsic characteristic of modern society.

This leads to the third aspect of the pre-political moment's civilisation: while for Hobbes and Locke (and Kant) the main defining aspect of the state of nature was the lack of a public authority, for Hegel the public authority is already part of the environment of civil society. Instead of being located at some mythical or distant moment in time, Hegel's pre-political moment is contained within the modern state, and thereby it needs to presuppose the existence of laws and of a public authority which maintains them. Hegel then deals another blow to the old distinction between pre-political and political society, by highlighting that the existence of a public authority is not enough to guarantee an end to the conflict of human relations. The reason for this is that, while civil society is 'an association of members', this 'association is brought about by their needs'[523], and not by some common purpose, or some desire to live together. Thus although civil society possesses a 'legal system – the means to security of person and property – and (...) an external organization for attaining their particular and common interests'[524] (which Hegel calls 'the external state, the state based on need'[525]), these institutions appear in civil society as an external necessity, a state that may not only protect freedom, but also restrain it.

The rule of civil society is therefore individual self-interest. Even though there is a public authority which is supposed to preserve the conditions for right and property, this authority and its law – due to the lack of political unity – appear only as a means to individuals' personal ends[526]. Such a perspective breeds as much conflict as it does cooperation, since both are just means towards the satisfaction of individual self-interest. Here the only purpose of the external state is security – the provision of the necessary conditions and constraints for individuals to exercise their subjective freedom. If individuals see the state only as a matter of support for their personal interests, this means that although relations between individuals may be regulated by the public authority, self-interest in itself remains unrestrained. Due to a lack of public interest, 'civil society affords a spectacle of extravagance and want as well as of the physical and ethical degeneration common to them both'[527], which will only 'be regulated, dominated and annulled in the superior order of the state'[528].

[523] Hegel, *Philosophy of Right*, 110.
[524] Ibid.
[525] Ibid, 123.
[526] Ibid, 124.
[527] Ibid, 123.
[528] Bobbio, op cit, 28.

It is thus not the absence of public authority, but the externality and instrumentality of the state in civil society which makes it a conflictive environment. Individuals may recognise the necessity and utility of the state, but they do not identify with it. The problem with the pre-political moment of civil society is therefore not that there is no social relationality between individuals, no bonds of interdependence, but that this relationality is fragile because it is subjected to self-interest, and therefore vulnerable. As we can see, legal subjectivity is fully actualisable in civil society: there is a system of needs, there are laws to guarantee individual rights and property, and there is a public authority to secure the laws through punishment. But what we find is that, without the unity of political society, legal subjectivity is more a matter of convenience than the essence or even the norm of individual autonomy. Subjective freedom, until it is put in league with the polity through the political moment of the state – until it is 'internalised', is not necessarily conducive to legal subjectivity. The legal subject, if we recall, is the citizen, the full member of the community. But, as Hegel puts it,

> If the state is confused with civil society, and if its specific end is laid down as the security and protection of property and personal freedom, then the interest of the individuals as such becomes the ultimate end of their association, and it follows that membership of the state is something optional.[529]

In other words, since individual self-interest is the ultimate end of individuals' association with each other, if at any moment the state appears as an obstacle rather than a facilitator to the attainment of their interests, individuals may find it better to dissociate themselves from the rules and institutions of civil society. The external state therefore cannot guarantee the loyalty of all its members, as some individuals may realise that the state's constraints may pose a threat to their own interests. In forsaking the association provided by the state, however, individuals may themselves come to threaten the interests of other individuals, and even the system maintained by the public authority itself. It occurs that, in civilising the pre-political moment of political philosophy, Hegel also civilised dangerousness.

5.1.2 Abstract versus Concrete Punishment[530]

In order to understand how dangerousness is actualised in civil society, it is necessary to analyse Hegel's interesting and complex account of crime and punishment. The main purpose of Hegel's *Philosophy of Right* is to examine how right gets realised in history and society – how it comes from being an inner principle of the subjective will to acquire an

[529] Hegel, *Philosophy of Right*, 156.
[530] The distinction between abstract and concrete punishment is taken from Brooks' systematic reading of Hegel's *Philosophy of Right*. Cf. T. Brooks, *Hegel's Political Philosophy* (2009).

objective reality. This journey starts in the sphere of Abstract Right; here, right is materialised through the individual's subjective will, through which the individual sees themselves as a person with rights. This subjective will is actualised through the notion of property, and confirmed through contracts with other individuals, in which each recognises the other's personality and rights. These expressions of subjective will can be compromised and put under compulsion by crime, and for this reason Hegel's conception of abstract right includes not only a right to property but also 'a right to coerce, because the wrong which transgresses it is an exercise of force against the existence of my freedom in an external thing'[531]. In its most basic expression, then, right involves something similar to a right to self-preservation.

Hegel's right to coerce is however very different from Hobbes's amoral right of nature, for it only arises as a response to a previous, wrongful, coercion. Hegel is much closer to Locke and Kant than he is to Hobbes at this moment; his abstract right to coerce is in effect a right to punish. This is because the initial act of force is determined as wrongful, because it 'infringes the existence of freedom in its concrete sense, infringes the right as right'[532]. That is, by attacking someone's freedom and property, a crime attacks the foundations of personality; it is therefore 'a negatively infinite judgement (...) whereby not only the particular (i.e. the subsumption under my will of a single thing (...)) is negated, but also the universality and infinity in the predicate 'mine' (i.e. my capacity for rights)'[533]. Thus, the right to coerce predicated by Hegel is not to be exercised in lieu of the others' rights, but only in conformity with them, in order to preserve the notions of property and personality which are the expression of the individual's capacity to have rights. 'This', Hegel claims, 'is the sphere of criminal law'[534].

It is interesting to realise, however, that abstract right as such, the 'implicit will' within individuals (including the criminal), 'is rather that which has no external existence and which for that reason cannot be injured'[535]. That is, although crime appears to be an infringement of right or law as such, this right is still internalised in the sphere of abstract right, and it is only its external appearance that is injured. This way, right as such is not vulnerable to crime; crime's positive existence exists only as a manifestation of 'the particular will of the criminal. Hence to injure this particular will as a will determinately existent is to annul the crime, which otherwise would have been held valid, and to restore the [external appearance of] right'[536]. The main point of crime, then, is that its manifestation

[531] Hegel, *Philosophy of Right*, 67.
[532] Ibid.
[533] Ibid.
[534] Ibid, 68.
[535] Ibid, 69.
[536] Ibid.

as an aspect of the individual's subjective will is anomalous – the individual cannot really claim a right to whatever is the purpose or outcome of their crime, because the crime as such injures or rejects the very condition of personality. In this sense, the criminal's own subjective will requires the annulment of their crime. Hegel summarises this point in the following addition to the *Philosophy of Right*'s main text:

> A crime alters something in some way, and the thing has its existence in this alteration. Yet this existence is a self-contradiction and to that extent is inherently a nullity. The nullity is that the crime has set aside right as such. That is to say, right as something absolute cannot be set aside, and so committing a crime is in principle a nullity: and this nullity is the essence of what a crime effects. A nullity, however, must reveal itself to be such, i.e. manifest itself as vulnerable. A crime, as an act, is not something positive, not a first thing, on which punishment would supervene as negation. It is something negative, so that its punishment is only a negation of the negation. Right in its actuality, then, annuls what infringes it and therein displays its validity and proves itself to be a necessary, mediated, reality.[537]

In the sphere of abstract right, then, crime and punishment are mainly matters of appearance. That is, crime does not injure right as such, only its immediate manifestation in the capacity for rights either of the criminal – who loses their capacity for rights in the measure required by punishment – or of the victim – if the crime goes unpunished, it is the criminal's right which is held valid and the victim's which is annulled. This last point shows an interesting and controversial aspect of Hegel's account of punishment in abstract right, or abstract punishment: even though abstract right is an expression of right as such, here the latter finds itself internalised, so that there is no external, universal regulation of which right-claim is the valid one, and which one is the negation. Without some common notion of the good, the difference between right and crime is mainly a personal perspective, so that 'acts of punishment in the level of abstract right are acts of revenge', and punishment deteriorates into vengeance[538]. In order for individuals' subjective will to acquire an objective reality, it needs to be linked with some idea of the good. This leads us from Abstract Right into the sphere of Morality.

Hegel's discussion of morality involves the definition of a moral standpoint from which individuals can judge the validity and rightness of their actions. It is here that Hegel develops notions such as intention, purpose and responsibility. From this discussion, Hegel concludes that morality has to include some element of individual right – the individual's right to actualise their intentions and their responsibility for the consequences of their actions – and some notion of welfare – the interdependence between an individual's purpose and the purpose of others. In the sphere of morality, the notion of the good (the union of right and welfare) is externalised through the individual's conscience, which generates in them the notion of duty. For Kant, and for natural law theorists such as Locke, this is where

[537] Ibid, 246.
[538] Brooks, op cit, 44.

the story of responsibility reaches its end: with the realisation of one's duties towards oneself and others, the individual is already capable of measuring the consequences of their actions and therefore to answer for them. Their duty is just a matter of actualising in society what their inner morality (reason) tells them. Hegel, however, is more dialectical than this. For him, although individuals develop a notion of the good and externalise it through their subjective will by means of their conscience, the good in itself requires an objective reality; without it, both good and subjective will remain abstract. 'Morality needs to be transcended. Its insights should be preserved, but its inadequacies need to be corrected by the study of Ethical Life'[539].

It is in ethical life where both abstract right and morality acquire an objective reality, because they are brought together and actualised through social and political institutions. In civil society, the rights and property of individuals are guaranteed by civil laws and by the administration of justice, and welfare and the common good are overseen and protected by the public authority (which Hegel calls 'the police'[540]). Punishment is elevated from its abstract status as vengeance, taken from the hands of the victim to be delivered by the administration of justice, thereby assuming a concrete, public character. By the same token, crime is also elevated from its status as abstract injury to a more concrete state as a wrong which concerns society at large – a public wrong. This shift, Hegel suggests, incurs a radical transformation in the relation between crime and right:

> Since property and personality have legal recognition and validity in civil society, wrongdoing now becomes an infringement, not merely of what is subjectively infinite, but of the universal thing which is existent with inherent stability and strength. Hence a new attitude arises: the action is seen as *a danger to society* and thereby the magnitude of the wrongdoing is increased.[541]

Thus while in abstract right the injury of crime was directed solely at the external, subjective manifestation of right in the person's property, when right as such becomes concretised in the common association of civil society, the wrongfulness of crime becomes much more serious, it becomes *dangerous*. What does this shift tell us about the nature of the criminal's subjectivity? At first, Hegel says that the public nature of crime in civil society 'does not alter the conception of wrongdoing', that is, it does not affect the way in which the criminal must be seen in relation to the crime, their responsibility. However, he then says that this public nature 'does alter [the conception of wrongdoing] in respect of its outward existence as an injury done (...) which now affects the mind and consciousness of civil society as a whole, not merely the external embodiment of the person directly

[539] D. Knowles, *Hegel and the Philosophy of Right* (2002), 220. Cf. also Hegel, *Philosophy of Right*, 103.
[540] Hegel, ibid, 145.
[541] Ibid, 140 (emphasis added).

injured'[542]. Therefore crime under concrete punishment *is* altered in its externality – and as we saw, it is crime in its externality which is the sphere of criminal law; because of that, 'its danger to civil society is a determinant of the magnitude of a crime, or even one of its qualitative characteristics'[543]. When punishment acquires concreteness in civil society, the criminal becomes, at least potentially, a dangerous subject.

The criminal only potentially becomes a dangerous subject because, although there is an inherent dangerousness to the notion of crime in civil society, which determines the quality or magnitude of any particular crime, 'this quality or magnitude varies with the state of civil society; and this is the justification for sometimes attaching the penalty of death to a theft of a few pence or a turnip, and at other times a light penalty to a theft of a hundred or more times that amount'[544]. Thus, although crime is inherently dangerous in civil society, the externality of this dangerousness in itself depends on the present state of civil society – on its structure of reassurance. Likewise, although the idea of responsibility for crime remains stable as an aspect of both morality and the administration of justice, the real meaning of the criminal's responsibility – what their crime represents to both the public conception of the good and to their own conscience and subjective will – is contingent upon the relative strength of society at any given time – in other words, the criminal law's interpretation of the criminal's subjectivity is contingent upon society's structure of reassurance. Or, in Hegel's own words, when 'society is sure of itself', when it is *reassured*,

> a crime must always be something idiosyncratic in comparison, something unstable and exceptional. *The very stability of society gives a crime the status of something purely subjective which seems to be the product rather of natural impulse than of a prudential will*. In this light, crime acquires a milder status, and for this reason its punishment too becomes milder. If society is still internally weak, then an example must be made by inflicting punishments, since punishment is itself an example over against the example of crime. But in a society which is internally strong, the commission of crime is something so feeble that its annulment must be commensurable with its feebleness. Harsh punishments, therefore, are not unjust in and by themselves; they are related to contemporary conditions.[545]

The emphasised part of this quote clearly shows that Hegel is here talking of responsibility as much as of punishment. When society is reassured, crime appears as mainly subjective, a failure of reason, a moral mistake. The liberal, Kantian conception of subjective responsibility can be applied here, because crime is considered something exceptional. When society is insecure, however, crime cannot be interpreted by the criminal law only as a moral mistake; if society is vulnerable, crime is a dangerous threat, not only to be corrected but also to be prevented. When crime does occur in its concrete sense, against civil society, it is 'contingency as subjective willing of evil, and this is what the universal authority must

[542] Ibid.
[543] Ibid.
[544] Ibid. T. M. Knox, the translator of this particular version of Hegel's *Philosophy of Right*, notes that this almost exact same phrase was used by Blackstone in his *Commentaries*. Cf. ibid, 359.
[545] Ibid, 274 (emphasis added).

prevent or bring to justice'[546]. In Hegel's account of concrete punishment, then, criminal responsibility fully displays its dynamic character, its subject shifting from a legal to a dangerous subject in accordance with the strength of society's structure of reassurance. 'A penal code, then, is primarily the child of its age and the state of civil society at the time'[547].

But even when society is reassured, there is always the possibility of crime; and, since crime is always potentially dangerous, there is always the possibility that crime might injure civil society's stability, and therefore constitute a danger to it. 'The point is that the actions of individuals may always be wrongful, and this is the ultimate reason for police control and penal justice'[548]. In other words, in civil society it is always possible that the public authority might consider an individual's actions as dangerous, and thereby treat them as a dangerous subject. Since crime is inherently dangerous, the contingency of punishment in civil society seems to generate contingency in legal subjectivity as well. Although all the conditions for legal subjectivity are present in civil society, its situation appears to be significantly insecure; if the state is to guarantee legal subjectivity, there must be a way in which this insecurity can be transcended. It is time to turn to an investigation of the political moment in Hegel's theory.

5.1.3 The Insecure State of Civil Society

We have seen that, in civil society, the association of its members appears as brought about by relations of interdependence, which are only managed and regulated by an external state. In the political moment, however, this external organisation 'is brought back to and welded into unity in the Constitution of the State which is the end and actuality of both the substantial universal order and the public life devoted thereto'[549]. Hegel states that this union is 'brought back' because, as he later reveals, in his political dialectics 'the state as such is not so much the result as the beginning'[550]. In this significant move, Hegel radically transforms the logic of the dichotomic model, by presenting the pre-political moment not as the condition or cause for the political moment, but as one of its necessary aspects or implications. There is no chronological sequence from civil society to the state; rather, these are two moments contained within the development of civil association. For Hegel, then, the solution for the insecurity of social relations does not lie in civil society's assimilation by the state, but precisely in a proper *differentiation* between these two moments. Hegel knows that he cannot eliminate the conflicts and inequalities of civil

[546] Ibid, 146.
[547] Ibid, 140.
[548] Ibid, 146.
[549] Ibid, 110.
[550] Ibid, 155.

society, so his state has to somehow overcome these problems by accepting them as part of political life.

Hegel's main argument supporting this transcendence is that the political unity of the state is the purpose of the individual's participation in society, and as such it is already implicit in civil society. After all, the system of needs has some form of socio-political organisation as one of its necessary conditions, especially with regards to individual rights and property. While in civil society this form of organisation may appear as one in which each individual's self-interest has to be negotiated and to compete with others in order to be actualised, the ultimate aim of each individual is to have their self-interest fully recognised and reflected in society[551]. And, since the state is the objectification of right and good in society, 'it is only as one of its members that the individual himself has objectivity, genuine individuality, and an ethical life'[552]. That is, it is only as a full member of the community, a citizen, that the individual's self-interest, their freedom and autonomy, are being fully actualised. As the state is the representation and actualisation of the individual's recognition as a full member of society, then, the individual's autonomy has to have the state 'as [its] starting point and [its] result'[553].

There are therefore two ways in which the state can appear in the realm of ethical life:

> In contrast with the spheres of private rights and private welfare (...), the state is from one point of view an external necessity and their higher authority; its nature is such that their laws and interests are subordinate to it and dependent on it. On the other hand, however, it is the end immanent within them, and its strength lies in the unity of its own universal end and aim with the particular interest of individuals, in the fact that individuals have duties to the state in proportion as they have rights against it.[554]

The state may appear to be in conflict with the right and welfare of individuals, but this is just a consequence of the self-centred, particular perspective of civil society. In essence, the state represents the collective realisation of every individual's subjective will. The political moment is in this sense an expression and manifestation of a unity that is already latent in civil society, within the very purpose why individuals pursue their interests in society. 'The state is the actuality of concrete freedom'[555]. This expressive aspect of the state is the basis of legal subjectivity: to be a legal subject is to realise this unity between one's autonomy and the authority of the state, to understand one's rights and to respect one's duties. What we call legal subjectivity is then for Hegel the aim of concrete individuality, the conception of an individual as a particular, reflecting upon and being reflected by the universality of the state

[551] The notion of recognition implied in this claim is discussed in detail in Chapter 6 below.
[552] Hegel, *Philosophy of Right*, 156.
[553] Ibid.
[554] Ibid, 161.
[555] Ibid, 160.

– a citizen. Political society is thus attained from the moment individuals realise that the state, instead of being a cumbersome necessity, is actually the expression of their subjective freedom in objective form.

At this stage, it is not necessary to question the universalising and inclusionary aspect of the liberal state – this is the aim of the next chapter. What should be stressed now is that the universality of the state does not eliminate the particularity of civil society; on the contrary, civil society continues to represent the sphere of socio-economic relations, where individual self-interest and public good exist apart from each other, although 'both are still reciprocally bound together and conditioned'[556]. The idea that these two spheres are reciprocally conditioned is particularly relevant; indeed, Hegel is clear that, although the unity of the state belongs to the political moment and to some extent contains civil society, it also needs to be actualised in and through civil society. After all, the individual may have rights and duties as a member of the state, but it is *in* civil society that these rights and duties operate. It is by embracing the reality of civil society that legal subjectivity is expressed:

> The isolated individual, so far as his duties are concerned, is in subjection; but as member of civil society he finds in fulfilling his duties to it protection of his person and property, regard for his private welfare, the satisfaction of the depths of his being, the consciousness and feeling of himself as a member of the whole; and, *in so far as he completely fulfils his duties* (...), he is upheld and preserved.[557]

Hence, civil society is not only contained within the state, but it also contains it within its institutions; the trained eye can already see that the system of needs, the legal system and the public authority are already expressions of the unity and security of the constitutional state. 'Civil society in Hegel is the sphere of economic relations together with their external regulations according to the principles of the liberal state, and is at the same time bourgeois society and bourgeois state'[558]. So the liberty of the liberal state is already a reality in the conflictive state of civil society. However, there is a caveat: in civil society, the liberal state, as well as the legal subjectivity which it upholds, is *conditional*. The state may be an objective reality in political society, but this reality still has to be negotiated in the field of civil society; there is no escape from this necessity. Likewise, individuals can in civil society overcome the subjection to the authority of the state and attain 'the satisfaction of the depths of [their] being', but only in so far as they completely fulfil their duties; otherwise, the state cannot guarantee that they will be 'upheld and preserved'.

There is thus a conditional and an unconditional aspect to the liberal state in Hegel's political theory. The state in the political moment appears as a complete universality, bringing all the members of society together within its constitution, guaranteeing their rights

[556] Ibid, 267.
[557] Ibid, 162 (emphasis added).
[558] Bobbio, op cit, 28-29.

and placing their duties in complete harmony with their welfare. In civil society, however, the state appears as an external entity, conditioned by the attitudes of individuals and by the current state of society's reassurance. Because of the distinctions between these two moments, the way in which the state relates with the members of society is radically different in each of them: in the political moment, the state does not differentiate between individuals, because its universality is expressed through all of them, within its constitution. In civil society, however, the state has an external existence, which must be negotiated, protected and preserved. It is the maintenance of the elements of the state in civil society which allows individuals to transcend their subjective needs and see themselves as part of a political whole.

It is particularly meaningful that Hegel locates the administration of justice and the public authority as parts of civil society, and not of the constitutional state. This has two main consequences for the nature of criminal law. First, in locating the administration of justice in civil society, Hegel finds a way to maintain punishment's coercive nature without however compromising its justification. Under this perspective, the administration of justice is a reflection not of the state in its objective reality as concrete freedom, but a reflection of the state in its particularity, as an actualised aspect of the public good which is nevertheless vulnerable to the state of society and to conditions of insecurity. Crime is thus dangerous to society, and in conditions of insecurity the public authority may respond to it in harsh and disproportionate ways. This contingency of punishment is nevertheless an appearance; it is civil society, not the state, which is vulnerable, and punishment is merely a way to protect society – and individuals – from themselves. The 'real' state is the state of public right and welfare, of peace and cooperation. The individual who makes this realisation – who behaves as a good citizen – has nothing to fear from the state, and lots to be grateful for it. Hegel's political theory thus demonstrates how liberal law can assume regulatory, preventive and authoritarian forms, and yet it can still appear justified as a liberal institution.

However, criminal law's position in the sphere of civil society suggests that the notion of the liberal state which the criminal law expresses is the *external* state, which is more a regulative idea than a concrete reality, a vulnerable state which needs punishment in order to be actualised. Criminal law does not make the transition up to the liberal state, but remains in the clutches of the problematic state of civil society. Moreover, the focus of punishment is neither the subjective will of abstract right nor the fully rational citizen of the state. It is the conflictive, contradictory inhabitant of civil society. In other words, the subject of criminal law is an ambivalent subject, a subject of two worlds.

In the next session, I am going to explore this condition further, through a study of the development of criminal responsibility's ambivalence in modernity.

5.2 PUNISHMENT, RESPONSIBILITY AND AMBIVALENCE

The notion of ambivalence is useful for understanding the importance of Hegel's work to a study of criminal law and its conception of responsibility. 'Ambivalence', according to Zygmunt Bauman, is 'the possibility of assigning an object or an event to more than one category'[559]. It is, moreover, a 'disorder', a failure which upsets the effort of classification in language[560]. 'To classify', in turn, 'means to set apart, to segregate'; it is done in order 'to give the world a *structure*', 'to sustain the order and to deny or suppress (...) contingency'[561]. However, the suppression of contingency is limited and utterly artificial, so that the more one tries to classify an object, to give it an identity distinct from everything else, the more this object is likely to become ambivalent. 'Ambivalence is a side-product of the labour of classification; and it calls for yet more classifying effort', for it 'can be fought only with a naming that is yet more exact', and that thus 'give[s] yet more occasion for ambiguity'[562].

> The struggle against ambivalence is, therefore, both self-destructive and self-propelling. It goes on with unabating strength because it creates its own problems in the course of resolving them. Its intensity, however, varies over time, depending on the availability of force adequate to the task of controlling the extant volume of ambivalence, and also on the presence or absence of awareness that the reduction of ambivalence is a problem of the discovery and application of proper technology: a managerial problem. Both factors combined to make modern times an era of particularly bitter and relentless war against ambivalence.[563]

We can see, for instance, how Hegel's conception of civil society is ambivalent. It is both insecure and reassuring: there, individuals are both immersed in endless competition, caught either in extravagance or want, at the same time as they are a part of something bigger, a political society which aims at their flourishing and satisfaction. Likewise, individuals in civil society are also ambivalent, particularly in their relation with the state: they can see the state as an obstacle, as a coercive force applied upon them, and they can see it as the realisation of their own freedom. Likewise, the liberal, juridical individual can act according to the law and be seen as a legal subject, or attempt against it and thus pose a danger to society. The attempt to turn individuals into citizens, into members of political society, is in itself a further classifying effort to suppress the ambivalence of civil society, to cope with the management of the social order. 'Classifying', however, 'consists in the acts of inclusion and exclusion'. Whenever classification occurs, some entities can only be made into a class 'as far as other entities are *excluded*, left outside. Invariably, such operation of inclusion/exclusion is an act of violence perpetrated upon the world, and requires the support

[559] Z. Bauman, *Modernity and Ambivalence* (1991), 1 (emphasis in original).
[560] Ibid.
[561] Ibid.
[562] Ibid, 3.
[563] Ibid.

of a certain amount of coercion'[564]. It is thus inevitable that the act of making individuals into citizens will include a fair amount of coercion, in order to make sure that the boundaries of citizenship will remain stable and well-defined, and that individuals who deviate too far from the norm of citizenship are excluded.

In Hegel's system of civil society, the pervasiveness of political community – itself representing the idea and environment of citizenship – can be conceptualised as the structure of reassurance in Hegel's model of society; that is, the framework which is able to ground the management of insecurity in society. As Hegel made clear, the structure of reassurance varies with the state of civil society – so that society's cohesion may sometimes be strong, and sometimes weak. When society is weak, the conception of individuals as citizens and legal subjects runs the risk of becoming more ambivalent – ambiguous, confusing, uncertain – and thus giving space to insecurity. The management of this insecurity ultimately depends on the generation of reassurance through coercion, through the use of 'force adequate to the task of controlling the extant volume of ambivalence'. This reassuring function is arguably the main socio-political purpose of the criminal law.

The criminal law manages the ambivalence of legal subjectivity mainly through its conception of criminal responsibility. It is therefore able to further classify legal subjects into those who obey the law and those who commit crimes. But then the idea of responsible subjectivity, which allows the criminal law to divide individuals into law-abiding citizens and criminals, is itself ambivalent, and the result of this ambivalence is the notion of dangerousness. It is the insecurity of social relations in civil society which generates the notion of crime and criminal responsibility, and it is the notion of crime as a public wrong which generates the notion of dangerousness. As we recall, there is an intrinsic dangerousness in the very idea of legal subjectivity, so that the capacity for responsible agency also implies the capacity for crime. In order to deal with the anxiety which comes out of this paradox, the criminal law embarks in a further work of classification: it divides individuals into citizens and deviants – those who can (and therefore can be expected to) obey the law, and those who cannot (or, for some reason, will not). Deviance and criminality go hand in hand in the modern imaginary, but criminal responsibility is not all about dangerousness and deviance; it is an ambivalent concept, and as such the responsible subject upholds a tension between legal and dangerous subjectivity. The form, polarity and intensity of this tension vary according to historical and socio-political conditions: the state of civil society and its ruling conception of citizenship – its structure of reassurance.

After uncovering the conceptual foundations of ideas of insecurity and reassurance and contextualising these concepts within a dialectical, historically-oriented narrative

[564] Ibid, 2.

through Hegel's work and the notion of ambivalence, the chapter now turns to relate this developed theoretical framework with the historical development of criminal responsibility.

5.2.1 Punishment and the Inclusionary Impulse of Modernity

In our historical examination of criminal responsibility, we have seen that an account of criminal law as ideology, historically contextualised with the help of a political sociology of citizenship, revealed an inherent dangerousness within the conception of the legal subject, its intensity and manifestation in criminal responsibility being conditioned by a historical dialectic between insecurity and reassurance. Furthermore, it was illustrated that, as a result of this conceptual dynamics, the subject of criminal law in modernity is conceptualised (in doctrine and practice, if not in theory) predominantly as a dangerous subject – a deviant, and only exceptionally as a legal subject – a citizen. Liberal theory's insistence that the subject of criminal law is traditionally and normatively conceptualised as a responsible legal subject is more a result of ideology than of history[565]. Now, however, we should revisit our analysis in order to add some further nuance – indeed, ambivalence – to it. The main purpose of this further theorisation is to avoid essentialising the relation between legal and dangerous subjectivity, a relation that should remain fluid.

This re-enactment of the historical account of criminal responsibility is guided through a dialogue with an article by Barry Vaughan, called 'Punishment and Conditional Citizenship'[566]. In this article, Vaughan goes through a historical examination of the ways in which 'modern practices of penal punishment are being fundamentally transformed'[567], relying on a periodisation of the development of penal punishment also inspired on the political sociology of citizenship put forward by T. H. Marshall[568]. The reason Vaughan chooses this framework in which to explore his historical analysis is, he argues, that the distinctive trait of modern punishment is that it 'has always partly been an inclusionary project'[569]. This 'attempt to incorporate offenders rather than exclude them'[570] is, according to Vaughan, a distinctly modern characteristic, and it was incorporated into punishment as a consequence of the rise of ideas of citizenship, ideas which are grounded on a shared sense of community. There is thus an intrinsic link between developments and transformations in modern practices of punishment and developments and transformations in the idea and environment of citizenship.

[565] Cf. Chapter 2.
[566] Vaughan, op cit.
[567] Ibid, 23.
[568] T. H. Marshall, *Citizenship and Social Class* (1992). For a more detailed analysis of this work, cf. Chapter 2.
[569] Vaughan, op cit, 23.
[570] Ibid.

Vaughan points to how Garland had already made this connection with regards to punishment practices in Britain, linking the rise of political citizenship in the end of the nineteenth century with developments in the penal system geared at 'identify[ing] those prospective citizens who seemed to be unable to fulfil the demands of citizenship'[571]. These deviants, according to Garland, were given a choice:

> Either they become responsible, conforming subjects, whose regularity, political stability and industrious performance deems them capable of entering into institutions of representative democracy; or they are supervised and segregated from the normal social realm in a manner that minimises (and individualises) any 'damage' they can do.[572]

Thus punishment, according to Garland, would tend towards reform the more the ruling conception of citizenship became extended and comprehensive. Vaughan's problem with Garland's use of the relation between punishment and citizenship is that his conception of citizenship is too static; 'there is insufficient recognition in Garland's account that citizenship can be partial'[573]. For Vaughan, on the other hand, '[c]itizenship is (...) a dynamic, contingent affair that may be granted or rescinded, depending on the public estimation of one's behaviour'; citizenship is thus 'neither a fixed nor an all-or-nothing state'[574]. From this cultural, dynamic idea of citizenship, Vaughan defines the criminal as some sort of partial citizen – criminals are still within society, but because of their shown inadequacies with regards to the full requirements of citizenship, they have only a limited, restrained access to it. Vaughan then characterises modern punishment as ambivalent because, on the one hand, it expresses 'the desire to convert people into proper citizens rather than excluding them', but on the other, 'for punishment to be meaningful, it must entail that some rights or privileges are forgone; the process of inclusion cannot be total'[575]. As a result, punishment entails a process of conditional citizenship:

> The relationship between punishment and citizenship is then conditional in two senses: the first is that one's claim to citizenship is granted only if one abides by an accepted standard of behaviour and punishment may be imposed if one does not live up to this standard; second, while undergoing this punishment, one is no longer a full citizen yet neither is one completely rejected. Instead, one occupies the purgatory of being a 'conditional citizen'.[576]

Vaughan's analysis is particularly helpful in illuminating what he calls the 'reciprocal relationship between citizenship and punishment: the cultural conditions of citizenship direct how people will be punished and punishment reinforces notions about who is thought worthy of citizenship'[577]. This reciprocal relationship is vividly portrayed in his

[571] Ibid, 24.
[572] D. Garland, *Punishment and Welfare: A History of Penal Strategies* (1985), 249.
[573] Vaughan, op cit, 26.
[574] Ibid, 25.
[575] Ibid, 26.
[576] Ibid.
[577] Ibid, 28.

discussion of the transformations experienced by punishment in relation to the development of the forms of citizenship, to which I will refer in a moment. In focusing too much on modern punishment's characterisation as an inclusionary process, however, Vaughan may have significantly downplayed its ambivalence. Citizenship is in itself an attempt to manage society's ambivalence, to suppress its contradictions through a supervening idea of political community. Modern punishment is thus conditioned both by citizenship's inclusionary aspect and by punishment's own original, traditional exclusionary nature. The essentially ambivalent nature of the criminal is thus not that they are a conditional citizen, neither in nor out; the criminal's ambivalence consists in that they are *both* in and out, as a citizen turned into a deviant, or a deviant forced to be a citizen – an insider pushed outside, or an outsider trapped inside.

Its relation to citizenship shows that punishment is inherently contradictory: the concept of the criminal does not fit well into the framework of citizenship. Because of that, its conception fluctuates between citizenship and deviance, according to the structure of reassurance at any moment in time. If the structure of reassurance is strong, the criminal's dangerousness is weakened and so the criminal is not really a deviant (unless they are exceptionally dangerous; then, they are *really* deviant). If, however, the structure of reassurance is weak, then citizenship is insecure, and thus it is up to the criminal law to keep the criminal away from the citizen. It is the ambivalence of both concepts which marks the reciprocity between citizenship and punishment: the fact that citizenship is an inclusionary environment with exclusionary needs, and that modern punishment is an exclusionary institution legitimated by an inclusionary ideology. This more dialectical dynamic becomes more evident when we link Vaughan's analysis of punishment with the historical development of criminal responsibility.

5.2.2 The Inclusion of Exclusion in Modern Punishment

The first stage in Vaughan's periodisation is located in the eighteenth century, when the civil component of citizenship is taken to have emerged. If this is correct, Vaughan says, we should be able to identify the cultural element of this form of citizenship in society – an element which would influence that period's perspective on punishment. He then notes that the structural changes of this period in Britain, particularly in relation to the industrial revolution, were followed by an increasing concern from the part of the commercial classes with the encouragement of etiquette and politeness in society[578] – particularly in the lower classes, who were increasingly being included in market relations due to the rising demands

[578] Cf. N. Elias, *The Civilising Process* (1994).

for industrial labour. It was also in the late eighteenth century that modern punishment is taken to have been established, through the 'birth of the prison'[579]. In Vaughan's analysis, then, '[t]he development of the prison, as an alternative to capital punishment, is the story of how the burgeoning middle class tried to impose their own standards of behaviour upon those who were thought to be worthy of inclusion within society but not yet able to take their place voluntarily'[580]. The significant shift in punishment in modernity, under Vaughan's perspective, was that it became 'less and less about making an example of an offender to reassert an already existing consensus and more about including subjects upon whom society's grip has never taken hold', so that 'the individuals to be punished were increasingly thought to be the primary recipients of the message of punishment and were being increasingly valued'[581].

Vaughan's account of how Britain's industrialisation required a different treatment of criminals is persuasive, but arguably the notion that the criminal's individuality was being increasingly valued was more an artefact of ideology than of concrete practice. The Enlightenment reformers indeed conceptualised the subject of criminal law as a rational, responsible subject, and this most likely informed the growth of an underlying idea of responsibility in what I called the 'pre-subjective' period[582]. However, the conception of the criminal's subjectivity which came out of practices of responsibility during this period was not that of a rational, responsible individual, but that of an inherently dangerous subject, whose criminality was ascertained through a finding of malice in their conduct. The rise of a civil form of citizenship did enunciate the rise of an inclusionary, liberal ideology, but during the pre-subjective period the grasp of this ideological structure of reassurance was limited, in need more of protection from than inclusion of the lower classes. Although the prison may be considered more rational or humane than older practices of public executions and transportation, it was still an essentially exclusionary process[583].

Vaughan's second strand of argumentation with regards to the birth of modern punishment in fact helps highlight how the notion that the criminal was the primary recipient of punishment's message might have been more ideal than actual. He argues that an additional impulse behind the modernisation of punishment was a growing feeling of repugnance from the part of the middle and aristocratic classes with regards to public displays of violence. Most importantly, capital punishment was seen to be increasingly at odds with the sense of identity propagated by the rising bourgeoisie, as it was seen to be 'incapable of producing in its audience the kind of self-regulating agents that the commercial

[579] Vaughan, op cit, 24. Cf. also M. Foucault, *Discipline and Punish* (1979).
[580] Vaughan, ibid, 28.
[581] Ibid, 29.
[582] Cf. Chapter 2, subsection 2.2.2.
[583] Cf. Foucault, *Discipline and Punish*, 266.

middle class was becoming'[584]. In other words, capital punishment was contrary to legal subjectivity – but the legal subjectivity with which the criminal law was concerned was that of punishment's *audience*, those abridged by the narrow, civil conception of citizenship, and not the dangerous masses. The legal subjectivity which modern punishment was born to protect was that of the law-abiding, capitalist citizen, not that of the criminal. The criminal was essentially still a deviant, a dangerous subject who was unable to be allowed in society without the strictest of restraints. This is why, as Vaughan notes, in spite of the ideological notion of punishment as a reform-oriented activity, it still 'operates with a severity that is incompatible with reform'[585].

Thus the rise of a modern civil society required that attitudes towards criminal responsibility and punishment be transformed; but this transformation was aimed at the protection of society's narrow scope of citizenship, which above all necessitated the regulation and containment of the growing lower classes. The criminal's inclusion within the environment of citizenship, even within Vaughan's conditional conception, was almost entirely ideological. 'Hence, civilisation did not necessarily mean the suppression of violence but its transfer away from a public space into institutional confines'[586]. The ambivalence of modern punishment and its conception of the criminal subject heightened after the mid-nineteenth century, as the development of the cultural basis for the political and social elements of citizenship strengthened the structure of reassurance in civil society and thus also the ideological basis for inclusion and reform of the criminal, at the same time as the tension between the enlarging conception of citizenship and the social conditions of the lower classes emphasised the criminal's dangerousness. Thus the impetus for reform within modern punishment met with the idea that reform could mainly be achieved through instilling a sense of dread within members of the 'dangerous classes'[587]. The larger the idea of civilisation within the citizens of civil society grew, the more it needed to be distinguished from the uncivilised masses – even as this distinction was claimed by many to have a civilising effect upon those masses[588].

The rise of political citizenship in the late-nineteenth century occasioned a strengthening of punishment's regulatory function, identified by Vaughan as an increasing concern with policing the behaviour of the working class, an effort which was coupled with the regulation of dangerousness throughout the nineteenth century, and with the surge of regulatory offences from the mid-nineteenth century onwards[589]. As legal and dangerous

[584] Vaughan, op cit, 30.
[585] Ibid.
[586] Ibid.
[587] B. Bosanquet, *The Philosophical Theory of the State* (1965), 272.
[588] Vaughan, op cit, 31-32.
[589] Cf. Chapter 2, Section 2.1 above.

subjectivity clashed within the conception of the subject of criminal law, efforts to regulate behaviour in order to contain or repress dangerousness before its most outward, harmful manifestations became more intense. In particular, the political form of citizenship intensified the cultural basis for a demand for higher inclusion of the criminal within the scope of citizenship, so that policing and regulation were established as bases for a stronger structure of reassurance, one which could accommodate for the growing social element of citizenship.

We already observed that the idea of a criminal as a legal subject – predicated on the expansion of the political form of citizenship – is especially contrary to punishment's exclusionary, protective function, so that it required a particularly strong structure of reassurance in order to be actualised. This contingent condition, however, was not long-lasting.

5.2.3 Legal Subjectivity and the Liberal State

According to Vaughan, the 'next great wave of change within the penal system' occurs precisely in the post-war period, with the rise of the welfare state. The pressure provoked by a strong structure of reassurance grounded on the coming together of the three forms of citizenship 'entailed a redoubling of efforts to reintegrate the criminal within society'[590]. It is in this moment that we see a full flourishing of what Foucault called the process of normalization which lies at the heart of modern punishment, and which entails an effort of 'encouraging offenders to abide by a certain type of behaviour', thus allowing them to be disciplined and perform specific roles in society[591]. Thus, Vaughan's analysis of modern punishment places the actualisation of the ideal of modern punishment within the same period as a study of the historical development of criminal responsibility places the actualisation of doctrines of subjective individual responsibility. Both strands of the analysis consider the welfare state as a period in which the structure of reassurance of civil society allowed/required the implementation of the idea of legal subjectivity within criminal law and criminal justice, thus evidencing the link between the juridical individualism in the law and the general ideological framework of liberal society.

The ideological aspect of these transformations in the landscape of criminal responsibility and punishment is also crystallised by an analysis of the practices of punishment, which show that the inherent dangerousness within the notion of the criminal was never fully eliminated, but merely displaced within the subjective period, made exceptional. The ambivalence of the criminal subject remained evident within the penal

[590] Vaughan, op cit, 33-34.
[591] Cf. Foucault, *Discipline and Punish*; Garland, *Punishment and Welfare*.

system, particularly expressed through 'the incompatibility between proportionate punishment and the indeterminate sentencing implied by the welfare model of punishment', targeted at groups such as juveniles[592]. However, the exceptional status of dangerousness and deviance significantly undermined the reassuring function of criminal responsibility, as the subject of criminal law became increasingly ambivalent. Criminal law's reassuring function against criminal behaviour relied heavily on the structure of reassurance provided by the optimism of the post-war period coupled with the conditions, aspirations and promises of the welfare state. This structure ultimately proved to be fragile and unstable, a contingency which became obvious more quickly in the sphere of criminal justice, as evidenced by Martinson's famous article in the mid-1970s[593], when criminal lawyers were still engaged in establishing the normative truth of subjective responsibility.

We can now hopefully see more clearly how Hegel's bifurcation of the modern liberal state helps inform an understanding of the ambivalence surrounding legal subjectivity, criminal responsibility and punishment. Hegel's conceptual distinction between liberal society and liberal state, along with their conflictive and contradictory relationship within the sphere of civil society, provides a particularly helpful framework through which to examine and theorise the ambivalent nature of the aforementioned terms, as well as the dynamic historical and socio-political movement among conceptions of citizenship, deviance and criminality, and between legal and dangerous subjectivities. This perspective shows how it is the criminal law's role to manage the insecurity generated by the boundaries and limitations of citizenship, through the regulation of criminal behaviour and suppression of deviance. It also shows how the criminal law's location in the contingent sphere of civil society elucidates a vulnerable, reactive conception of state (an external state) which must in turn be protected from dangerousness through the coercive, exclusionary apparatus of punishment – despite punishment's inclusionary aspirations. Finally, within this perspective we can also see how, due to citizenship's contingent, conditional state in civil society, the expression of criminal responsibility and punishment is shaped and influenced by the state of civil society – its structure of reassurance.

However, Hegel's dialectical political theory also illustrates how punishment can maintain its apparent legitimacy within the liberal framework in spite of its actual ambiguity. This is because, out of the two moments of the liberal state, the concrete, realised state appears as the supervening, enveloping moment, while the conflictive aspect of civil society appears in the liberal normative framework as illusory, as a consequence of contingent social conditions rather than a real expression of the liberal state. Since, from the ideological

[592] Vaughan, op cit, 34.
[593] R. Martinson, 'What Works? – Questions and Answers about Prison Reform' (1974) 35 *The Public Interest*, 22-54.

perspective of the law, the liberal state appears fully realised, the coercive, exclusionary function of criminal law is taken to be a reaction against the imperfectability of individual self-interest, rather than a reflection of some intrinsic aspect of modern punishment. If the objective reality of the liberal state is taken for granted, punishment inevitably appears as a mainly inclusionary process, and the criminal law as primarily concerned with matters of subjective morality, dealing with an abstract conception of right which, since it is taken to be fully realised, is essentially unproblematic.

This takes us to the greatest theoretical shortcoming of the subjective period within criminal law theory. Such is the ideological predominance of the idea of legal subjectivity and its correlation with notions of subjective responsibility within juridical individualism that, when these conceptions become actualised in legal doctrine and penal practices, supported by the structure of reassurance of the post-war environment of the welfare state, liberal legal theory essentially sees the coming together of these elements in the liberal model of criminal law as the normative equivalent of the transformation of the liberal state into objective reality in Hegel's work. In other words, normatively speaking, the structuring of criminal law and criminal justice around the principle of individual responsibility was thought to be fully realisable through the liberal model, so that this model was believed to bring any possible ambivalence in the history of punishment and responsibility to an end.

It is interesting how the conceptual framework of criminal responsibility appears to be so firmly founded upon a Hegelian notion of political theory, and at the same time to blatantly neglect the significant shift in Hegel's conception of the pre-political moment: the importance he gives to its socio- and politico-economic elements. By being oblivious to the socio-historical contingency of the liberal model, liberal theory keeps its normative structure tied to a juridified, Lockean-Kantian conception of socio-political relations. But instead of eliminating the ambivalence of legal subjectivity, liberal law's neglect of the importance of structural conditions to the maintenance of its normative framework actually preserves this ambivalence, allowing it to be radicalised under conditions of insecurity.

5.3 RADICAL AMBIVALENCE, SECURITY AND CRIMINAL LAW

According to the socio-historical perspective endeavoured in Chapter 2, the shift from the subjective to the post-subjective period in criminal responsibility can be contextualised in relation to transformations in the environment of citizenship, particularly with regards to the demise of the welfare state and the consequences this brings to the image and promises of liberal society. Among the main consequences identified with this process of social unravelling, the advanced liberal paradigm of criminal law and criminal justice is intimately connected with the perception of a 'more general [feeling of] insecurity – deriving

from tenuous employment and fragile social relations'[594], which the state is supposed to address and combat. The interplay between the socio-political environment of the late modern period and the preventive turn is what leads Vaughan to conclude that 'the state's current punitive stance is a peculiarly modern phenomenon in that it is a response, despite its archaic vestiges, to its failings to make good the promise of social rights'[595]. With this remark in mind, we can identify two characteristics of the post-subjective, advanced liberal period in criminal responsibility and punishment.

First, its particular shape and tendencies can partly be explained in terms of the dynamics between insecurity and reassurance which we previously identified. The rise of subjective responsibility, along with its corresponding ideas of inclusionary punishment and rehabilitation, is associated with the rise of and transformations in a specific structure of reassurance, an ideological structure which can ground ideas of legal subjectivity at the same time as it suppresses the dangerousness inherent to them. The breakdown of the structural conditions for the liberal model thus inevitably leads to a collapse of the normative hold which these ideas possess in criminal justice practices, as they cannot properly discharge their reassuring function without the structural support which they previously enjoyed. Furthermore, the rise of insecurity in social relations engenders the need for the state to manage such insecurity through its penal power, which leads to the resurgence of dangerousness in the framework of criminal responsibility. In this sense, the ruling conception of criminal subjectivity shifts from a mainly liberal/Lockean perspective of prevalent legal subjectivity and exceptional dangerousness to a primarily Hobbesian outlook, in which dangerousness appears to be increasingly normalised within criminal law.

Second, however, the specifically historical character of this dynamics suggests that it is embedded within a particular historical trajectory, so that the present moment should not be understood only as a return to pre-subjective insecurity. Instead, the post-subjective period consists of a new configuration of the interaction between these two tendencies; and although the subjective hold on criminal responsibility is in decline, it still maintains a significant role in criminal law's normative framework, which both preserves the hold and importance of individual responsibility and conditions the form which dangerousness takes in the post-subjective paradigm. Essentially, then, while the image of the pre-political moment is deteriorated from the reassured liberal (Lockean/Hegelian) model of society to a Hobbesian state of insecurity, the normative idea of the political moment remained idealised as that of the concrete liberal state. This configuration radically enhanced the distance and contrasts between the two moments in the post-subjective socio-political framework.

[594] D. Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36(4) *British Journal of Criminology*, 445-471, 460.
[595] Vaughan, op cit, 35.

As previously discussed, the rise of liberal law and punishment is deeply connected with the rise of an ideological structure of reassurance, grounded on a rich and inclusionary idea of citizenship. When this idea reaches its contemporary apex with the welfare state, liberal models of responsibility and punishment partake of this hegemonic moment and appear fully actualisable – indeed, for some they might have appeared fully actualised. Especially in criminal law, a very strong conviction was generated that the liberal model was capable of sustaining a legal system that could appropriately treat the subject of criminal law as a responsible legal subject; within this system, dangerousness would be either extremely exceptional or something of the past. Using Hegel's jargon, the rise of the liberal model to doctrine and orthodoxy was taken by liberal theorists to represent the actualisation of the concrete liberal state, so that freedom acquired within this system an objective reality. The liberal model's structural conditions, by their turn, were largely neglected, overshadowed by the model's rational appeal – so that instead of socio-political conditions giving rise to a subjective idea of criminal responsibility, it was subjective responsibility which was taken to allow the criminal law to respect individuals as citizens and legal subjects. The contingent nature of this subjectivity was ignored.

What is thus significant and particularly modern about the post-subjective period in criminal law and criminal justice is that the collapse of the structure of reassurance occurs just after the erection of an ideological structure which was deemed to be capable of fully eliminating, or at least aptly managing, the insecurity and ambivalence contained within ideas of punishment and responsibility. The result of the current historical moment is a crisis: the backlash of dangerousness within criminal law and criminal justice coexists and conflicts with an ideal model of punishment and responsibility which cannot be reconciled with its own contingency. On the one hand, the current state of insecurity is a direct consequence of 'the failure of the nation-state to secure participation within society for all those who reside within its boundaries'[596] – that is, the failure of the nation-state to preserve the conditions for the maintenance of its structure of reassurance, which is itself a consequence of the abstract and artificial nature of the liberal ideology. On the other hand, however, this failure is precisely what the liberal state – and its criminal legal system – cannot recognise. For to recognise it would be to compromise the very normative assumptions on which the liberal model of criminal law is grounded – the inclusionary nature of liberal society.

At the heart of the advanced liberal paradigm is a condition which can be termed *radical* ambivalence. Essentially, the liberal state cannot possibly provide the reassurance which is required of it with regards to the expectations generated by a liberal democratic

[596] Ibid, 36.

model of society; but neither can it embrace its failures and posit the need for comprehensive social reform. Instead, it is required to sustain and protect its normative ideological basis within a state of insecurity. Under such conditions, the state portrays a rather contradictory character, as it is forced to heavily intervene in civil society in order to 'discharge the reassurance function'[597] at the same time as it must somehow maintain that such intervention is necessitated by problems which are not internal to liberal society, but instead due to external circumstances. In order words, the advanced liberal state is required to both embrace and deny its own insecurity.

This generates a particular challenge for the criminal law's much needed reassuring function, because liberal society's ideological structure has now grown to include legal subjectivity within the framework of criminal responsibility. The liberal model's assimilation of legal subjectivity was established as a manifestation of the climax of the inclusionary impulse of liberal society's structure of reassurance; as this structure is in decline, criminal law's inclusionary impulse starts to recede as the boundaries of legal subjectivity have to be reinforced. Social insecurity brings out the exclusionary aspect of liberal society's ideological framework, primarily expressed within criminal responsibility through the deployment of dangerousness. But since legal subjectivity cannot be taken out of criminal responsibility without compromising the liberal normative framework, criminal subjectivity finds itself radically ambivalent, as the subject of criminal law is concomitantly and contradictorily seen as both a citizen and a deviant. The desire to preserve the normative ideal of liberal society's assimilation into the liberal state, amidst the erosion of the structural conditions which made this hegemonic moment possible, heightens and radicalises the paradox within punishment.

Here is where security as the main premise of state intervention comes in: the discourse on security is the predominant ideological device used in order for the state to manage and suppress the insecurity of its current socio-political conditions. In Bauman's terms, security is liberal law's reaction to the problem of ambivalence, in the form of the deployment of further classification. Through this discourse, liberal society's problems are reinterpreted as problems of security – the social unravelling of late modernity is perceived under this prism as an erosion of the barriers and protections which kept liberal society in place, and which are now in dire need of protection from the state.

The preventive turn can therefore be conceptualised as the state's attempt to manage liberal law's (and society's) ambivalence by preserving the normative premises of liberal society – all the assumptions, conditions and promises of the democratic liberal state – by constituting these premises as vulnerable, in need of protection from external (that is,

[597] B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal*, 1029-1091, 1037.

external to the liberal model of society) threats. The pervasiveness of this ideological shift, however, goes beyond the deployment of the discourse of security by the state. Security has become a predominant feature in legal thought, particularly in criminal law and criminal justice. This can be seen as a reflection of the pragmatic field with which legal theory in these areas has to engage, but there are reasons to believe that this predominance might also be related to the need which legal theory has also felt to defend and preserve its own normative grounds.

In this sense, security is also very useful for the liberal legal theorist, for it can be employed in a very similar way to that of the state. Focus on security helps liberal theorists to conceptualise the changes and transformations occurring to the criminal law as extraneous to the core concerns of liberal legal theory, traditionally associated with the notion of liberty. Focusing on security as a new concern – or the new manifestation of an old concern – bringing distortions to the legal landscape helps them preserve the issue of liberty as unproblematic. This way, legal theory is able to refer to the preventive turn in itself as a threat to the liberal model of criminal law, from which this model has to be protected. Again, we can see the same interrelation between security and vulnerability: the issue of security is used as an ideological device to preserve the normative premises of liberal law, by conceptualising it as normatively valid but vulnerable.

Liberal theory's criticisms of the preventive turn ironically mirror its very logic. This dialectic relation between liberal and advanced liberal criminal law further echoes the radical ambivalence displayed by the present period, the source of which can still be traced back to law's individualism.

5.3.1 The Radical Insecurity of Liberal Law

The ambivalence in Hegel's account of punishment lies in that he grounds punishment's justification on an ideal which he knows the criminal law cannot actualise. Because of this, his account of punishment maintains a rift between an abstract conception of wrongdoing and a criminal law which is more concerned with social order than with individual justice. The only notion which appears to bridge this gap, where Hegel places his hopes for reconciliation, is the assumption that the mutual recognition implied in the political community of the liberal state can have an objective reality which is only dependent on its realisation on the part of individuals. As long as we believe that the model of society envisaged and mirrored by the liberal state can make justice to human beings as autonomous individuals, the conflictive nature of civil society is attributed either to its imperfect implementation or to its overzealous protection, but never to its normative and structural bases. Likewise, the emancipatory impulse of liberal law remains trapped under the shadow

of Hegel's promise of totality and transcendence in the political moment of the state, a promise which betrays the insightful and dialectical nature of his own political theory.

Hegel's model of society is therefore applicable to the current moment in criminal law and responsibility, as a tool to understand the normative framework in which criminal law operates. This framework happens to be shared both by those who advocate the preventive turn in the advanced liberal state and by those who attempt to criticise it through a defence of the liberal model of criminal law. The conception of security which predominates in contemporary legal discourse and theory is often conceptualised as a value in itself, but the idea of security is rarely entirely dissociated from the idea of liberty; instead, both notions work together in the liberal social imaginary, as interdependent poles which both attract and repel each other. The problem of balance between liberty and security is one of the most essential issues arising from liberal thinking, and one which has been particularly emphasised in the current state of insecurity in law[598]. There are interesting parallels which can be drawn between the relation between liberty and security in the liberal social imaginary and the relation between state and civil society in Hegel's political theory.

In the liberal imagination, liberty represents the ultimate purpose of political organisation, the achievement of that condition which Locke characterised as 'a State of perfect Freedom'[599]. It is within this notion of liberty that we find the image of individuals as autonomous and responsible subjects, as well as the image of law and morality which arises from this conception of human ontology. Liberty has a natural, self-evident quality to it, as a value that does not need to be questioned, only properly actualised in society. Security, in turn, also has significant value in the liberal imagination, but this value is contingent upon social and political conditions: security is important, but only because it is necessary for the actualisation and protection of liberty. Comparing this relation to Hegel's dichotomic model, it may be suggested that liberty represents the essence of the liberal state, the spirit of the constitution, while security represents the state within the conflictive realm of civil society, the state as externality guaranteeing the conditions for the actualisation of liberty. In civil society, therefore, the state appears as promoting both liberty and security, maintaining a fragile balance which may sometimes upset individuals or seemingly treat them disproportionately. This is however only an appearance, a result of the fragmented perspective of society. In reality, the liberal state is only the concrete realisation of liberty.

Both liberal and advanced liberal discourses seem to rely on this dichotomic normative structure in order to ground their claims. According to both perspectives, there is an ideal of liberal society that is fully actualisable – the notion of individual autonomy

[598] Cf. I. Loader, C. Walker, *Civilizing Security* (2007), 51-71; M. Neocleous, *Critique of Security* (2008), ch 1; L. Zedner, *Security* (2009), ch 2.
[599] J. Locke, *Two Treatises of Government* (2010), 269.

behind legal subjectivity is a reality, and liberal society is the most appropriate socio-political expression of this reality. According to both perspectives, however, this ideal becomes vulnerable in civil society, and can be compromised by external interferences related to security. The main assumption grounding the preventive turn in criminal law appears to be the idea that individual autonomy finds itself vulnerable with regards to the anti-social and dangerous behaviour of others[600], so that the state is forced to pursue authoritarian measures in order to guarantee the liberty at the heart of the liberal state under insecure conditions. Under the liberal perspective, on the other hand, it is mainly the actions of an overzealous state which are interfering with the law's actualisation of liberty, so that it is primarily against the state that the autonomy of individuals (and indeed, the law's integrity) is vulnerable.

Thus, although these two perspectives host distinct and largely antagonistic views on the proper solution for the current state of insecurity, both appear to be grounded on the same normative order. At the core of this order lies a universalistic conception of human subjectivity, the free and autonomous individual, which the law and the state attempt to actualise in conditions of structural inequality, thereby engendering violence and ambivalence. The violence of the imposition of the liberal paradigm upon civil society has only been heightened in late modernity; it is an intrinsic aspect of liberal society. The need to restrict autonomy to boundaries which are compatible with the exercise of legal subjectivity implies that liberal law and society have strict limits in their potential to recognise difference. In the paradigm of abstract individualism, difference can only be accepted as an expression of the need to treat everyone equally – which means essentialising difference as a quirk of the same conception of juridical individual[601]. When difference cannot fit into this model, it can only be understood as radical difference – as otherness, deviance.

This takes us to why, among the two perspectives we have been investigating, the liberal discourse finds itself particularly vulnerable and ineffective under late modern conditions. This is because the liberal paradigm implicitly recognises and legitimates the advanced liberal model. The discourse on (in)security is a reflection of liberal law and society, rather than a threat to it. This is reflected on the work of contemporary theorists who try to deal with the 'threat' of prevention to criminal law and criminal justice, in that they aim to preserve the liberal model at the same time as they have to recognise instances of radical deviance as a threat.

[600] Cf. P. Ramsay, *The Insecurity State* (2012).
[601] For detailed discussions on identity essentialism, cf. S. L. Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (1990); K. Woodward, *Identity and Difference* (1997).

Lucia Zedner, for instance, when investigating the discourse on balance between liberty and security with regards to terrorism, argues that 'a central problem of our times' is to find out '[h]ow to enhance security against terrorism without diminishing security against the state'[602]. Although she is, in this article, mainly concerned with how the discourse of security has used the 'metaphor of balance' between liberty and security in ways which ignore the real interests and considerations which lie in this balance[603], she cannot help but preserve the main normative claim behind this discourse, the necessity to enhance security against terrorism. Embedded within this claim is a series of images about who the terrorist is, what this subject represents to the security of the community, and what this in turn represents to the aspirations of liberal society. It is arguably on the dangerousness of the terrorist as other (who is also potentially a citizen) which the discourse of security is fuelled.

Zedner's solution to this problem of how to balance security against terrorism with security against the state is the same reproduced in her joint article with Andrew Ashworth, previously analysed in the present thesis[604]: to preserve the procedural guarantees advocated by the liberal model. However, it has already been submitted that, in focusing in the redemptive potential of due process rights, the liberal model largely neglects that the criminal law depends on categories of dangerousness in order to fulfil its reassuring function, so that procedural guarantees will always have the tendency of being trumped by substantive concerns with necessity and security. Tadros subscribes to a similar perspective when he argues that '[w]hile there are those who argue that due process rights can play an important role in protecting the right to liberty of citizens against an overzealous pursuit of security, without substantial paring back of the criminal law, due process rights remain toothless'[605].

Tadros's own solution, however, still proves similarly problematic, for different reasons. His approach relies on the idea that the current preventive turn can by criticised on the grounds that it does not take the value of security seriously, even though its measures can probably only be normative justified on the grounds of security[606]. Furthermore, disregard for the value of security is also shared by the legal practitioners and theorists, whose 'discussion of criminalisation has not subjected the value of security to careful analysis. (...) Without engaging with the value of security, scholarship which decries the expanding criminal law is at even greater risk than normal of being dismissed as irrelevant'[607].

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[602] L. Zedner, 'Securing Liberty in the Face of Terror: Lessons from Criminal Justice' (2005) 32(4) *Journal of Law and Society*, 507-533, 532.
[603] Ibid, 507. Cf. also J. Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *Journal of Political Philosophy*, 191-210.
[604] Cf. Chapter 1, Section 1.2.
[605] V. Tadros, 'Justice and Terrorism' (2007) 10(4) *New Criminal Law Review*, 658-689, 676.
[606] V. Tadros, 'Crimes and Security' (2008) 71(6) *Modern Law Review*, 940-970, 941.
[607] Ibid, 969-970.

Although there are many reasons to sympathise with Tadros's argument, his own remedy to the lack he identifies is not to actually engage with the value which security is representing in current practices and debates, but to devise 'a normative theory of security', with the specific purpose of integrating security with the values and aspirations maintained by the general, retributive normativity sustained by liberal criminal law[608].

The focus of Tadros's analysis on security is therefore to make security adhere to the standards upheld by the liberal notion of individual justice, particularly in the sense that, in order to be justified, security has to be evenly distributed among the state's citizens, treating them all as equals[609]. Tadros's aim in this move is, arguably, to try and achieve a kind of compromise between the mainstream liberal perspective which argues for a return to the liberal model, and an advanced liberal perspective aimed primarily at maintaining the moral validity of the preventive turn in criminal law[610]. He does so by attempting to reconcile the current concern with security and regulation with the pursuit of individual justice.

> There is no realistic possibility of rolling back the regulatory state even if this were in principle desirable. But once the state claims this responsibility to manage the lives of its citizens, it must be subject to appropriate normative scrutiny that will help to ensure that the responsibility is discharged in a way that can be justified to those citizens.[611]

The problem with this perspective, however, is that the aspiration to treat all individuals as equals under unequal structural conditions is precisely what leads to liberal law's preservation of an abstract conception of responsible subjectivity, and thus to its incapacity to deal with difference except through suppression and exclusion. In other words, treating all individuals as equals is precisely what the criminal law cannot do, and it is the coexistence of this normative aspiration together with its actual impossibility, under circumstances in which the former cannot be ideologically reassured, which generates the radical ambivalence present in post-subjective criminal responsibility. In relying on a normative framework which can find no place for the political conflict which is inherent to liberal society, criminal law finds itself supporting two abstract and irreconcilable conceptions of its subject, either as another manifestation of the free, autonomous individual who populates its ideal world of juridical relations, or as a deviant other whose unfitness to express legal subjectivity can only be interpreted as dangerousness.

[608] Tadros, 'Justice and Terrorism', 658.
[609] Ibid, 664. Cf. also Tadros, 'Crimes and Security', 962-963.
[610] For a detailed discussion of these two perspectives, cf. Chapter 1, Section 1.2 above.
[611] Tadros, 'Justice and Terrorism', 663.

CONCLUSION

> It is just as absurd to fancy that a philosophy can transcend its contemporary world as it is to fancy that an individual can overleap his own age, jump over Rhodes.[612]

This chapter argued that the dynamic relationship between insecurity and reassurance can be linked through Hegel's political theory to an intrinsic ambivalence in the conceptualisation of the relation between individual autonomy and political authority, between civil society and state, in liberal theory and law. The liberal state is presented in society as both an expression of individual freedom and as a barrier to it, as the state reflectively sees autonomy both as one of its essential conditions and as a threat to its existence and purpose. This ambivalence is reflected in the historical development of modern punishment and criminal responsibility, generating a historical dynamic in which the inclusionary impulse of modernity and liberal society is always contrasted with and conditioned by the exclusionary nature of the socio-political structure which these institutions aim to uphold and preserve. Criminal law's ambivalence is then radicalised under contemporary conditions, in which the idea of the objective reality of the universal liberal state is held side by side with an idea of society as endemically permeated with insecurity. As a result, the contemporary framework of criminal responsibility is in a condition of radical ambivalence, as the criminal law's normative structure has to sustain two radically opposite but equally universalistic conceptions of subjectivity.

The current crisis in criminal law is thus a consequence of the contingent exposure of the intrinsic insecurity of its normative bases, a problem with which liberal law cannot engage without putting its own justificatory premises into question. But such engagement is necessary if a concrete notion of individual justice is to be actualised by the criminal legal system. If the aspirations of liberal society are to be rescued from its ideological foundations, liberal law has to be pushed to its limits.

[612] Hegel, *Philosophy of Right*, 11.

Chapter 6: Retrieving Subjectivity: The Limits of Responsibility and the Struggle for Recognition[613]

> Man is necessarily recognized and necessarily gives recognition. This necessity is his own, not that of our thinking in contrast to the content. As recognizing, man is himself the movement [of recognition], and this movement itself is what negates [*hebt auf*] his natural state: he is recognition.[614]

INTRODUCTION

There seems to be a paradox between the pragmatic framework of the institution of punishment and any theory that attempts to justify it. Liberal criminal law theory's inability to properly engage with the conflictive and contradictory nature of criminal responsibility arguably owes a lot to its desire to justify punishment on the grounds of its capacity to deliver justice to individuals. Punishment is such a common and pervasive feature of modern societies that its justifiability and legitimacy might easily be considered self-evident, their investigation fruitless at the least, and self-indulgent at the most. But throughout this research, punishment's existence as a modern institution has appeared to be increasingly problematic, its contradictory normative framework being intimately related both to the main issues surrounding the conceptualisation of criminal responsibility and to the current crisis involving the landscape of criminal law and criminal justice. In light of these findings, there are good reasons to conduct an examination of punishment's normative premises.

This chapter is an effort to undertake such an examination, by intervening in a current debate regarding the proper role of punishment in a liberal democratic community. Through this question, I hope to address the main issues which lie at the heart of the problems arising from law's abstract individualism in criminal law, as well as uncover a theoretical perspective which can point to a possible way to re-conceptualise legal notions of responsibility and subjectivity in a more dialectical, less monovalent[615], manner. The first section of this chapter explores Antony Duff's account of a normative theory of punishment based on liberal assumptions, but with a particular emphasis on its communicative aspect. By stressing the possibility to 'reconcile punishment with a proper recognition of our fellow

[613] Much of this chapter has been previously published in H. Carvalho, 'Terrorism, Punishment, and Recognition' (2012) 15(3) *New Criminal Law Review*, 345-374.
[614] G. W. F. Hegel, *Hegel and the Human Spirit: A translation of the Jena Lectures on the Philosophy of Spirit (1805–6) with commentary* (1983), 111.
[615] Cf. A. Norrie, *Dialectic and Difference* (2009).

citizenship with those whom we punish'[616], this liberal communitarian theory poses punishment as an instrument of recognition.

An analysis of Duff's work suggests that the communicative aspect of his theory is a reflection of the most basic assumptions underlying the liberal justification for punishment and grounding the conception of individual justice sustained by criminal law's morality of form. However, such analysis also suggests that these assumptions are in tension with the actual relation which is established through punishment between the individual and the punishing community. Once identified, section 6.2 links the core of this tension to the notion of recognition, on which Duff himself relies without however properly theorising. The rest of this section is dedicated to sketching a detailed theory of recognition in order to address punishment's limitations, based on a discussion of Hegelian dialectics[617].

The theory of recognition developed in this chapter is then applied as a critical perspective on punishment and criminal responsibility in section 6.3, with the aim of elucidating the problems and limitations of the emancipatory promise found in liberal legal theory. It pursues this aim by engaging with Duff's claim that '[t]errorism poses a significant challenge to a liberal account of punishment that emphasizes its communicative character'[618]. The figure of the terrorist not only stands as something of a conceptually open term to legal and social theory, but also represents the most radical example of deviance and dangerousness found in the advanced liberal paradigm of criminal law. The terrorist is the dangerous subject *par excellence*. When the liberal legal system tries to fit a real person into such a complex category, it finds it particularly hard to develop a theoretical justification that still upholds principles of individual responsibility and justice. For this reason, Duff's discussion of terrorism proves a particularly fertile ground on which to test the limits of liberal law's inclusionary impulse in punishment.

The chapter concludes with the proposition that the greatest challenge to criminal law's communicative aspiration is not posed by radical instances of deviance such as terrorism, but the abstract and unreflective character of the liberal promise of freedom and respect for the individual. A serious examination of the concepts of punishment and responsibility, informed by a critical theory of recognition, can expose their problems and, perhaps, point to a pathway to their solution.

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[616] R.A. Duff, 'Notes on Punishment and Terrorism' (2005) 6 American Behavioral Scientist, 758-763, 758.

[617] Although this chapter focuses on specific aspects of Hegel's work, there are different emphases on Hegelian scholarship, some more rationalizing, some more critical. Cf. e.g. A. Brudner, *Punishment and Freedom* (2009).

[618] Duff, 'Notes on Punishment', 758.

6.1 PUNISHMENT, COMMUNICATION, AND RECOGNITION

This section will consider Duff's account of punishment as a communicative endeavour, and relate questions in his notion of communication to the underlying issue of recognition. In his article 'Penance, Punishment and the Limits of Community'[619], Duff advances an interesting argument regarding how to theorise about punishment; in a nutshell, he argued that 'we should understand criminal punishment as, ideally, a kind of secular penance'[620]. Although this might be a curious claim to pursue in a field which tries to keep away from areas of substantive morality such as religion, and which categories of fault strive to separate wrongful conduct from inner motives, Duff is in this particular paper addressing a recent surge of theories that aim to produce a thicker account of punishment around 'the idea that punishment should involve such elements as repentance and atonement'[621]. Furthermore, the claims Duff raises regarding the nature of punishment are of great importance for our subsequent discussion.

The notion of penance constitutes 'something necessarily painful or burdensome that is required of or undertaken by the sinner because of a sin', or in other words, 'a punishment for that sin'[622]. It has many purposes, among which is the induction of a repentant understanding of the sin and the communication of that repentance to the wronged party, not particularly as a way of evidencing it but more as an essential element of such repentance, that is, 'a way of taking the matter seriously'[623]. 'Penance', says Duff, 'thus looks both backward, to the sin for which it is undertaken, and forward, to the restoration of the sinner's relationships with those whom she wronged'[624]; this goes hand in hand with liberal criminal theory's common tendency to look for a middle-ground between retributivist (backward-looking) and consequentialist (forward-looking) perspectives on punishment[625]. In both instances, Duff claims penance shows itself as intrinsically inclusionary, as it portrays the sinner as a member of a community who violated its values but who, through the act of penance, can repair the relationship with the community that their wrongful acts have damaged[626].

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[619] R.A. Duff, 'Penance, Punishment and the Limits of Community' (2003) 5 *Punishment and Society*, 295–312.
[620] Ibid, 300.
[621] Ibid, 298.
[622] Ibid, 299.
[623] Ibid.
[624] Ibid.
[625] For more on this cf. R.A. Duff, *Punishment, Communication, and Community* (2001); R.A. Duff, D. Garland (eds), *A Reader on Punishment* (1994); H. L. A. Hart, *Punishment and Responsibility* (2008).
[626] Duff, 'Penance, Punishment', 299.

The idea of punishment as secular penance, then, characterizes it as 'a communicative process between the offender and the polity', a way in which 'to make moral reparation for the wrong that was done'[627]. It pursues multiple aims: communicating the deserved censure to the offender; making them recognize the wrong for which they need to make moral reparation; bringing them to make such reparation, which also constitutes a form of forceful apology; and finally, through this process, reconciling them with the community. It is even a reformative enterprise, as in the offender's recognition of their wrong, he would also 'recognize the need to reform his future conduct'[628].

Although Duff does not go into detail about the communicative character of his theory or about his precise notion of community in the article presently under analysis (such details can mainly be found in his book *Punishment, Communication, and Community*[629], scrutinized below), he engages with a series of criticisms he expects to be directed by liberals against penance playing a proper role in a system of state punishment. This engagement is very illuminating in regard to the particular way in which he envisages that a system of punishment should address its subjects. He anticipates it might be argued that, as previously suggested, penance not only addresses the offender's conduct, but their moral attitudes in a deeper sense. Such invasion of the individual sphere can be accepted within a religious community, but not as a general social exigency, for the following reasons: First, members of a religious community are free to leave it if they so choose, whereas citizens cannot separate themselves from the State. Second, because the sinner is a voluntary member of the community, they have chosen to submit themselves to its values, whereas a citizen does not have to accept all the values of their political community. Third, the confession involved in penance itself is voluntary, whereas punishment cannot be conditional on voluntary confession. And fourth, the sinner is still able to refuse to undertake the penance – at risk of excommunication or other kind of exclusion from community – whereas punishment is not and could not be optional[630].

Duff addresses these potential objections in an explanation divided into three parts. First he claims that, whereas punishment 'seeks to engage [the offenders'] moral attitudes and feelings, it does not (it should not) seek to coerce those attitudes and feelings'; instead, 'it aims to persuade, rather than to coerce, their moral understanding'[631] – it is, as he puts it, 'an exercise in forceful moral communication'[632]. Second, 'criminal punishment need not

[627] Ibid, 300.
[628] Ibid, 300–301.
[629] Duff, *Punishment, Communication, and Community*.
[630] Duff, 'Penance, Punishment', 301–2.
[631] Ibid, 302.
[632] Ibid.

and should not be as ambitious as religious punishment'[633]; the criminal law focuses instead 'on the wrongfulness of the criminal deed, on the wrongful attitudes or concerns directly manifested in that deed'[634], and does not need to reach as deep as religious punishment, aimed to affect the soul of the offender and thus going over the border set by liberal conceptions of privacy. Third, finally, Duff argues that the expectation that the state 'show its citizens the respect due to them as responsible moral agents' leads to the conclusion that the state 'must address them in the kind of moral language that is central to this account of punishment'[635]. Thus, the criminal law should be ready to expose the wrongfulness involved in crime, and to censure such wrongfulness in a way that allows citizens to recognize it and repent. More than a practical suggestion, communicative punishment would be a requirement: a 'communicative system of punishment', Duff argues, 'is what we are owed'[636].

Duff's tripartite defence of his theory of punishment raises three essential elements of punishment's justification in a modern liberal paradigm, but these elements are not as harmonious as he would have us believe. To try and understand the tension concealed in Duff's account, we should examine his three claims in the inverse order in which they were presented. To begin, then, within the claim that a communicative system of punishment is owed to citizens lies the assumption that the state ought to respect its citizens as responsible moral agents. Particular conceptions of responsibility and autonomy come thus to the fore, embedded within liberal philosophy in principles which have been previously discussed in this thesis[637]. Duff has long struggled with the attempt to find a compromise between individualist requirements for agency and rationality in the criminal law, and communitarian notions of moral contingency in responsibility, suggesting such compromise can be found in the idea of the citizen as a moral agent bound by the community of the state[638]. Since Duff's conception of citizenship sees the citizen necessarily as a moral agent, Duff sees individual autonomy and freedom not only as rational requirements, but also as values shared and sustained by a liberal community[639].

So, if punishment seeks to recognize the citizen as a moral agent in order to be consistent with the values of what Duff calls a 'liberal political community'[640], it has to be

[633] Ibid, 303.
[634] Ibid.
[635] Ibid.
[636] Ibid.
[637] Cf. Chapter 1 above.
[638] Cf. Duff, *Punishment, Communication, and Community*, ch. 2; R.A. Duff, *Answering for Crime* (2007), ch. 2; Alan Norrie, *Punishment, Responsibility, and Justice* (2000), ch. 5. The idea that the framework of citizenship can help bridge the gap between responsibility's moral universalism and contextual particularity has also been explored in Chapter 2 above.
[639] Duff, *Punishment, Communication, and Community*, 35.
[640] Ibid, 79.

communicative. In *Punishment, Communication, and Community*, Duff argues against the idea of an 'expressive' purpose in punishment, and for 'its communicative purpose: for communication involves, as expression need not, a reciprocal and rational engagement'[641]. Communication 'aims to engage that person as an active participant in the process who will receive and respond to the communication, and it appeals to the other's reason and understanding'[642]. From what this short description of communication indicates, it seems that Duff's normative conception of punishment would indeed be very different from actual penal practices, and one could even go further and wonder whether the two would be at all compatible.

Second, the critical edge enunciated by the first claim does not stand alone; it is followed by the claim that the criminal law should focus on the 'wrongfulness' of the offender's deed[643]. To think in terms of wrongfulness without deeply qualifying it is, before anything, to imply a specific and previous moral judgment concerning the attitude of the offender, dependent on the shared values implied by a particular conception of community. The way in which the wrongful nature of the conduct is defined carries the weight of Duff's communitarian perspective on punishment, for the criminal law is interested in 'public' wrongs, understood as 'wrongs in which 'the public,' the community as a whole, is properly interested'[644]. Such public interest would be assessed and reflected by the state, through its democratic structures, and fed into the system of punishment.

Third, finally, upon determining such wrongfulness and identifying it in the offender's conduct, the system would then engage in forceful moral communication. Duff's connotation of this idea is that, although punishment is to be imposed on offenders against their will, it should be aimed at persuading, rather than coercing, their moral understanding. It must provide a clear moral message to the offender, but in Duff's words, '[w]e can try to force them to hear the message that their punishment aims to convey: but we must not try to force them to accept it—or even to listen to it or to take it seriously'[645].

Despite the image of non-authoritarian communication presented in Duff's work, however, there is no doubt that the two poles of the communicative relation are not symmetrical. Furthermore, in *Punishment, Communication, and Community*, Duff claims that one aspect of communication is that it also seeks 'to affect future conduct' by declaring some kinds of conduct as wrong in order 'to persuade citizens (those who need persuading) to refrain from such conduct'[646]. Suddenly, the earlier reciprocal aspect of communication

[641] Ibid.
[642] Ibid.
[643] Duff, 'Penance, Punishment', 303.
[644] Duff, *Punishment, Communication, and Community*, 61.
[645] Duff, 'Penance, Punishment', 302.
[646] Duff, *Punishment, Communication, and Community*, 80.

seems to lose focus in favour of a more pragmatic notion of persuasion. Although the idea of persuasion can be nuanced in ethical, practical, and strategic ways, Duff is clear that the law aims at persuading the citizen to refrain from some conduct. The main idea here is thus not to engage with the criminal in reciprocal dialogue, but to convince them of the wrongfulness of their actions. Dialogue has a limited, one-way quality, and the 'communicative' aspect is merely a means to achieve persuasion; it aims 'to bring citizens to recognize and to accept'[647] the wrongfulness of their conduct, but says nothing of recognizing any of the citizen's claims in return. If the law identifies any 'direct manifestation' of 'attitudes or concerns' that fit pre-established moral considerations, the citizen's position is taken to be 'wrongful'[648].

The actual outcome of this framework is that the offender is forcefully exposed to a moral message that they are deemed to be able to understand and to accept – and even though they are not forced to do either, the legal system ignores any argument to the contrary of its predetermined moral judgment. The justification for that is that the wrongfulness is public – that is, it represents the community's (including here the offender's) interests – and even if the law is basically saying to the offender 'you are wrong, whether you accept it or not', the process is deemed reciprocal. But such a formal recognition of the autonomy of the offender does not seem to fit into Duff's previously bold and rather substantial enunciation of what communication entails – 'a reciprocal and rational engagement' of the agent 'as an active participant in the process who will receive and respond to the communication'[649]; it would be better understood as the previously eschewed notion of expressive punishment or, even worse (because it aims to persuade), as forced acceptance or imposition, which is not far short of indoctrination. The offender's options are reduced either to consent with the discourse contained within the criminal law or to remain silent, to submit; the pre-judgment contained in the wrongfulness of their actions already predetermines what they may be allowed to say, should they choose to 'communicate'. Such an authoritative notion of communication can hardly be said to be reciprocal.

If Duff is right that we – as members of the political community – are owed a communicative engagement on the part of the legal system – an assumption that seems to lie not only within Duff's liberal communitarian perspective, but also within general liberal notions of individual autonomy and justice – the core of the matter, then, becomes the question, can such a normative theory of punishment be up to the task of doing justice to the assumptions within its own conception of the liberal legal principles? Moreover, if this claim is to be taken seriously, can any system of punishment achieve this level of communication

[647] Ibid, 81.
[648] Duff, 'Penance, Punishment', 303.
[649] Duff, *Punishment, Communication, and Community*, 79.

with the offender? That is, can the state recognize those it aims to punish as responsible moral agents and engage with them in reciprocal dialogue, instead of merely forcing them to unidirectionally accept the system's rules?

Punishment seems to derive its justification from its backward-looking relation to the crime and its forward-looking relation to the preservation of community bonds; both relations seem to be dependent on some notion of communication, which is in itself dependent on a conception of political community. The communicative engagement, by its turn, aims at recognizing the subject as a responsible moral agent. If Duff is right that a normative theory of punishment has 'to reconcile punishment with a proper recognition of our fellow citizenship with those whom we punish'[650], such recognition seems to represent the main ground for responsible moral agency, so that it deserves special attention from a critical examination of the normative framework in which punishment operates. Recognition is arguably the key to understanding the problematic relationship between punishment and responsibility.

6.2 THE PROCESS OF RECOGNITION

If we are going to take the idea of recognition seriously, there is no better way to start than with Hegel, whose work in the topic has retained its significance in contemporary social theory. The quote at the start of this chapter refers to Hegel's *Jena Lectures on the Philosophy of Spirit*[651], the most comprehensive of his texts on recognition, developed right before his work on the *Phenomenology of Spirit*[652]. Hegel's account of recognition is one of the greatest modern influences on the idea of mutual interdependence in society and on communitarian challenges to atomistic notions of individuality[653]. From the prefatory quote it is possible to highlight the idea of solidarity, as '[m]an is necessarily recognized and necessarily gives recognition'[654], and the idea that recognition – as a constituent of human agency – is intrinsic to human being: 'This necessity is his own (...) man (...) is recognition'[655]. Taking these two initial thoughts into account, this section will first look into a discussion of recognition from Duff's perspective, then move on to consider how recognition is linked with punishment in Hegel's political philosophy, before delving into a deeper reflection on the concept through Axel Honneth's comment on Hegel's early critique

[650] Duff, 'Notes on Punishment'.
[651] Hegel, *Hegel and the Human Spirit*.
[652] G. W. F. Hegel, *Phenomenology of Spirit* (1977).
[653] Cf. C. Taylor, *Sources of the Self* (1992).
[654] Hegel, *Hegel and the Human Spirit*.
[655] Ibid.

of the social contract[656] and Hegel's account of 'Independence and Dependence of Self-Consciousness: Lordship and Bondage'[657] in the *Phenomenology of Spirit*, along with Alexandre Kojève's own interpretation of it[658].

In *Punishment, Communication, and Community*, Duff talks about 'the 'recognition' of fellowship (...) in a political community'[659], contrasting this idea with the liberal individualist conception of choice, which emphasizes the volitional character of choosing what to believe, what values and principles to accept. Duff sees recognition as 'basic to moral life and thought', as '[w]e must attend to the world and to other people as sources of moral demands on us (...) and we must recognize others as our fellows'[660]. The emphasis in this perspective is precisely that such bonds, such recognition of fellowship, is 'given in moral experience'[661], something that can be rationally questioned but cannot be denied or set aside: 'I might not be required by either psychology or logic to accept these bonds (...) but I am, morally, stuck with them'[662]. This goes hand in hand with Duff's idea of wrongfulness as a moral demand from the community upon the individual, although the idea that these demands are given in moral experience is arguably something for which Duff does not properly account.

Hegel, however, provides in his *Philosophy of Right*[663], his main work in political philosophy, why the notion of recognition is so important to the constitution of crime and punishment. Recognition is in the core of the idea of right, reflected mainly on the notion of property, where '[t]he embodiment which my willing thereby attains involves its recognisability by others'[664]. Such recognition is guaranteed by the realization of a contract that represents the common will of the parties. The idea of wrong appears in Hegel as a negation of the common, universal will made by a particular party to the contract[665]. The nature of the wrong, then, is to go against the common will established in the contract. What is important to realize here – something with which Duff would probably agree – is that '[w]rong thus presupposes the establishment and existence of some mutually recognized common will that finds expression in contract'[666]: without a contract, without some previous agreement, there is no wrong.

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[656] A. Honneth, *The Struggle for Recognition* (1995).
[657] Hegel, *Phenomenology of Spirit*, 111–19.
[658] A. Kojève, *Introduction to the Reading of Hegel* (1980), 3–30.
[659] Duff, *Punishment, Communication, and Community*, 53.
[660] Ibid.
[661] Ibid.
[662] Ibid.
[663] G.W.F. Hegel, *Hegel's Philosophy of Right* (1967).
[664] Ibid, 45.
[665] Ibid, 64.
[666] R. R. Williams, *Hegel's Ethics of Recognition* (1997), 152.

The worst kind of wrong to Hegel is the wrong of transgression, or crime; as we saw, it is 'characterised by a criminal's rejection of another will's capacity for rights'[667]; that is, it is an open negation of someone else's rights. Punishment comes thus to the fore as a way of asserting the nullity of crime's negation of rights, as right 'reasserts itself by negating this negation of itself'[668]. Basically, when the criminal betrays the common will, they create a law that can only be good for themselves, and then punishment returns the criminal's own law back to them, thus evidencing the wrongfulness of their actions and reaffirming the right manifested in the common will. The most relevant point here to a discussion of recognition is precisely to understand that punishment presupposes a common will, a social contract that is grounded on mutual recognition.

This social contract, by its turn, is an essential part of an established political community. Hegel criticized views of the social contract such as Hobbes's, saying that the contract breaks with the state of nature as if introducing an all-new social order that completely contradicts the old one; Axel Honneth identifies especially in Hegel's early work a deeper focus on inter-subjectivity. When Hegel criticizes the idea of a social contract constituting the basis for the legal person, 'Hegel wishes to show that the emergence of the social contract – and, thereby, of legal relations – represents a practical event that necessarily follows from the initial social situation of the state of nature itself'[669]. In other words, in the very presupposition of a common agreement organizing individual conduct, 'theoretical attention must be shifted to the intersubjective social relations that always already guarantee a minimal normative consensus in advance'[670]. Hegel asserts the necessity 'to integrate the obligation of mutual recognition into the state of nature [the pre-political moment] as a social fact'[671].

Instead of individuals receiving a moral demand of fellowship from a community, Hegel's critique of the social contract inserts a dialectical movement in this relation – as fellowship is also what generates individuality. Hegel does not deny that conflict is intrinsic in basic human relations, quite the contrary; what he challenges is the nature of this conflict. Whereas a classic interpretation of the state of nature would suggest a conflict of claims based on 'struggles for self-assertion', the Hegelian reading points rather to a process in which 'individuals learn to see themselves as being fitted out with intersubjectively accepted rights', inscribed in a 'struggle for recognition'[672]. It happens that the struggle is not merely defined by the opposing subjects; it also defines them in return. What Honneth points out is

[667] T. Brooks, *Hegel's Political Philosophy* (2009), 43.
[668] Hegel, *Philosophy of Right*, 64. For a detailed discussion of Hegel's account of crime and punishment, cf. Chapter 5, Section 5.1 above.
[669] Honneth, *The Struggle for Recognition*, 41.
[670] Ibid, 42.
[671] Ibid, 43.
[672] Ibid.

that it is incorrect to see the antagonists in the state of nature as isolated, self-contained beings, for 'the social meaning of the conflict can only be adequately understood by ascribing to both parties knowledge of their dependence on the other'[673].

It is precisely this interdependence, evident in Hegel's work, which would justify the need to address wrongs in order to preserve the mutual recognition guaranteed by right. The problem that this chapter aims to highlight, though, is that the justification of punishment comes from the nature of wrong as a breach of the common will; wrong is taken to be a 'wilful disregard for mutual recognition'[674] made by a rational being voluntarily breaking a previous contract in which they were fully recognized. It is imperative to ask, then, whether this account is coherent with the way in which individuals are actually recognized in social conditions.

The key to answer this question arguably lies not in Hegel's work in political philosophy, but in his account of the development of self-consciousness in the *Phenomenology of Spirit*. Though systematic accounts of Hegel's work tend to consider the *Phenomenology* as a preliminary work before his encyclopaedic systematization of themes and concepts[675], it not only provides the most elaborate account of recognition as part of the movement of freedom in society, but it also examines the aim of the process of recognition and, of particular interest to the present study, instances in which the process can deviate from its aim.

6.2.1 Recognition and Self-Consciousness

Alexandre Kojève probably makes the most sophisticated account of Hegel's development of history as a process of recognition, as he brings elements of Hegel's earlier work on recognition together with the account in the *Phenomenology* through the Marxist elements in his interpretation. Kojève's account starts with the idea that 'Man [*sic*] is Self-Consciousness'[676]; what constitutes humanity, human subjectivity, is the fact that man is (or rather has the potential to be) 'conscious of himself, of his human reality and dignity'[677]. This essential subjectivism is implied in the essence of contemporary liberal philosophical

[673] Ibid, 45.
[674] Brooks, op cit, 44.
[675] Cf. e.g. Brooks, Ibid. Dudley Knowles (D. Knowles, *Hegel and the Philosophy of Right*, 2002), on the other hand, acknowledges the importance that the development of recognition in the *Phenomenology* has for Hegel's political philosophy, even though he claims that in the end Hegel falls short of his own demands for mutual recognition in the *Philosophy of Right* (Ibid, 106). I agree with Knowles on this point, and aim precisely to develop how punishment in particular falls short of such demands.
[676] Kojève, op cit, 3.
[677] Ibid.

conceptions of responsibility and autonomy; what is unique in Hegel, however, is his argument that recognition underlies self-consciousness.

The development of self-consciousness is for Hegel part of a long process of awareness, with alternating moments of integration and differentiation between subject and object. Understanding this genealogy of self-consciousness, the 'origin'[678] of subjectivity and the philosophical conditions for its flourishing, then, provides an intrinsic tool to understanding human being in itself. The dialectics of self-consciousness, which informs this understanding, is essentially the movement between knowing and being or, in Kojève's account, between knowledge and desire. Desire always presents itself as a lack: man desires what he lacks, what he is not, and thus by desiring, man acknowledges his own limits; and through these limits he sets up the boundaries of his own being, he defines himself. Whereas knowledge seems to bring forth synthesis and integration, desire initially highlights monadic antagonism and separation.

But '[i]n contrast to the knowledge that keeps man in a passive quietude, desire disquiets him and moves him to action'[679]; so man is moved to act upon the world and satisfy his desire, to negate his lack. 'Thus, all action is 'negating''[680], is transforming the world in pursuit of the satisfaction of a desire. This mechanics can be seen in simple examples like feeding, in which the lack of sustenance leads to the destruction (transformation, 'real negation'[681]) of food for the satisfaction of hunger. Hegel refers to the developing subject in this particular moment as 'life', and this desire for survival distinguishes the subject from their surroundings through this process of active negation, in which 'Life in the universal fluid medium, a passive separating-out of the shapes becomes, just by so doing, a movement of those shapes or becomes Life as a *process*'[682]. This process is, for Hegel, the 'genus'[683] of consciousness and individuality.

Just as life as a process turns a passive knowledge of one's surroundings into an active participation in the world (moved by the feeling of lack, desire), consciousness reflects upon the contrast between the world and itself. It is only through this comparison, through this process, that consciousness is able to know anything about itself – that it is able to become self-consciousness. It is desire – the feeling of absence, of difference – that puts this shifting of knowledge in motion, and it is precisely the action to satisfy a desire that transforms the subject's relations with the world. This whole process of interaction shapes not only the subject's knowledge of the world, but also their knowledge of themselves.

[678] Ibid.
[679] Ibid, 4.
[680] Ibid.
[681] Cf. Norrie, *Dialectic and Difference*, 25.
[682] Hegel, *Phenomenology of Spirit*, 107 (emphasis added).
[683] Ibid, 109.

Thus it is, for example, the desire of self-preservation and proliferation, and the specific ways in which their satisfaction is possible, that teach the subject about their animal nature. The main point about recognition, however, is that to become conscious of their human nature, subjects need something in the world to reflect such humanity back to them; they need other human beings. Therein lies the limit of desire and the secret of the process of self-consciousness: to know itself, it must have itself as an object. In other words, a subject can only be aware of their own individuality if they can compare themselves to another subject. Kojève will say that '[h]uman Desire must be directed towards another Desire'[684], toward another desiring subject, following Hegel's claim that '[s]elf-consciousness achieves its satisfaction only in another self-consciousness'[685].

Thus '[s]elf-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged'[686]. This statement gives the full thrust of Hegel's critique of the state of nature; for the subject is only a proper individual through the acknowledgement of kinship with another individual – true individuality exists only within a social reality. Self-consciousness needs to 'come out of itself'[687] and see its own subjectivity reflected in another being; that is what constitutes and initiates what Hegel calls the 'process of Recognition'[688]. There is a necessary reciprocity in this movement, as it only works if one subject can recognize themselves in the other. 'Action by one side only would be useless because what is to happen can only be brought about by both'[689]; the process of self-consciousness must appear as a middle term through which subjects 'recognize themselves as mutually recognizing one another'[690].

The dialectic of subjectivity, according to this particular narrative, leads to the conclusion that the essence of human desire is to place man as the end of desire itself. This qualitatively distinct human desire for individuality (self-consciousness) can only be properly satisfied through recognition. 'All human Desire is a function of the desire for 'recognition'.'[691] Since such recognition is necessarily intersubjective, it has to be reciprocal. There is an intrinsic solidarity in this process, for in order to be an individual – to be acknowledged and valued as a subject – one needs to belong to a society of individuals. The mutual recognition implied in the social contract is not merely engendered by individuals; it shapes individuality as well.

[684] Kojève, op cit, 5.
[685] Hegel, *Phenomenology of Spirit*, 110.
[686] Ibid, 111.
[687] Ibid.
[688] Ibid.
[689] Ibid, 112.
[690] Ibid.
[691] Kojève, op cit, 7.

6.2.2 The Life-and-Death Struggle

There is, however, a problem with recognition. There has to be mutual recognition for subjectivity to be realized; while an individual may be aware of their own subjectivity, this certainty is not yet concrete, because 'for an idea to be a truth, it must reveal an objective reality'[692]. And the only situation in which this objective reality can be achieved is when the subject is equally recognized by another. Moreover, although human individuality can only exist through recognition of the other's equally human desires, there is still the matter of the satisfaction of such desires. The acknowledgment of another desiring subject, as Hobbes implied in his work[693], may simply mean that there are two people in the world desiring something that may not be enough for both; the anxiety behind this threat looms ever present in the process of recognition, which takes the shape of a struggle. So whereas the desire for recognition generates self-consciousness and individuality, the pursuit of this desire leads to conflict.

The ideal situation is likely one in which human values sustain a mutual understanding of reality, which can thus be truly understood as a social reality – or, in Duff's terms, a community in which all of its members are properly and equally recognized. But this community, which in the abstract is a presupposition of every social interaction, can only be concretely (objectively) realized in the end of a process of awareness and solidarity, and what is seen throughout history, instead, is a variety of incomplete, partial, one-sided forms of recognition. The acknowledgment of a mutual desire does not necessarily lead to cooperation toward mutual satisfaction; History usually tells a story in which the opposite is the rule.

So what starts as a 'pure' conception of recognition results in a process in which recognition goes wrong, since it is not (yet) properly grounded in reciprocity. Hegel's account of the mythical first encounter between two subjectivities takes the form of a life-and-death struggle resulting from the competitive quality inherent to opposing claims of subjectivity. But the satisfaction of recognition necessitates an objective reality, as said before, and not before long 'self-consciousness learns that life is (...) essential to it'[694]. When this happens, the struggle becomes one of domination as one subject (the lord, the Master) imposes their recognition over another (the bondsman, the Slave) – 'one being only recognized, the other only recognizing'[695]. The lord's essential nature is 'to be for itself', to

[692] Ibid, 11.
[693] T. Hobbes, *Leviathan* (1996), 83. Cf. the detailed the discussion of Hobbes's work in Chapter 3 above.
[694] Hegel, *Phenomenology of Spirit*, 115.
[695] Ibid, 112.

be independent, whereas the bondsman's nature 'is simply to live or to be for another'[696], to live in submission.

It may seem at first that this unequal recognition is unsatisfactory because it is unfair that only one side is recognized. Although this may be true, the full thrust of Hegel's critique is that, in fact, *neither* of the parties to the conflict is fully recognized, not even the lord, as 'for recognition proper the moment is lacking, that what the lord does to the other he also does to himself, and what the bondsman does to himself he should also do to the other'[697]. When the lord is recognized by the bondsman, he is recognized by someone whose autonomy he does not fully recognize, and so the bondsman's recognition of the lord is also imperfect – 'For he can be satisfied only by recognition from one whom he recognizes as worthy of recognizing him'[698]. To be properly recognized, one needs to properly recognize: that is the essence of concrete reciprocity.

The mutuality inherent in Hegel's account of recognition points directly to a substantially communicative, relational framework. As Honneth pointed out in his argument, a recognitive social theory should undoubtedly be communicative. But what Hegel's and mainly Kojève's[699] dialectics of recognition indicate is that the recognition that underlies communication does not guarantee solidarity, and the process can go wrong. As we saw earlier, punishment requires the pre-existence of a common will, of a community. It is not clear, however, how the process of recognition evolves from the Master-Slave dialectic to a situation of concrete mutual recognition. Hegel does not resolve this problem in the *Phenomenology*, showing instead that this dialectic repeats itself at higher levels of self-consciousness[700], and in his post-phenomenological work he does not address this problem directly. But this illustration of the process of recognition can arguably be the key to understand the challenges and paradoxes that punishment presents in liberal society.

As seen in the previous chapter, in the *Philosophy of Right*, Hegel examines punishment primarily from a perspective of abstract right; his theory is therefore still limited to an abstract, relatively subjective level, and Hegel himself points to the fact that 'acts of punishment at the level of abstract right are acts of revenge, as there is no designated penal power'[701]. He states that punishment in the abstract is in fact essentially equated to crime as, without a common will to legitimate it, the right that punishment strives to preserve is as contingent as the right the criminal evokes in their actions. In the abstract, both crime and

[696] Ibid, 115.
[697] Ibid, 116.
[698] Kojève, op cit, 19.
[699] As briefly discussed above, Kojève's account of the dialectics of recognition radicalizes Hegel's account with a focus on a material dialectic through the use of a Marxist perspective. Cf. Kojève, op cit, at 3–30.
[700] Williams, op cit, 68.
[701] Brooks, op cit, 44.

punishment display the same disregard for the other party's claim to right. That is why Hegel stresses that although there are many considerations to be taken in a theory of punishment, the essential point is to keep in mind that 'all these considerations presuppose as their foundation the fact that punishment is inherently and actually just'[702].

There is a gap between this abstract account of punishment and what systematic readers of the *Philosophy of Right*[703] will consider Hegel's concrete account of punishment when he considers the administration of justice. There the focus of punishment changes from a direct relation with the wrongfulness of the criminal's deed to a relation between the state and the condition of civil society. As previously discussed, Hegel points to the fact that the stability or sense of security of a society can directly influence how punishments are envisaged,[704] and this represents a significant shift in what is considered to be a mainly retributive theory of punishment[705]. Although it seems that the administration of justice retains a retributive core, it is certain that the 'penal code, then, is primarily the child of its age and the state of civil society at the time'[706].

But what if the state of civil society in particular circumstances or in a particular context is not in a condition of mutual recognition? If it is acknowledged that structural problems hinder the presumption of a common will, the justification of punishment as a communicative endeavour is not very far from the Master's illusion that the submission of the Slave will grant him the recognition he desires; it is a situation of false consciousness. Concrete recognition would require the conditions for a mutual satisfaction of human desires: structural problems of injustice and inequality would need to be resolved for it to occur. This structural disharmony generates dissonance in ethical and normative expectations. Recognition, taken seriously as the core of genuinely reciprocal communication, raises important questions for thinking about an account of punishment as a liberal institution.

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[702] Hegel, *Philosophy of Right*, 70.
[703] Cf. e.g. Brooks, op cit.
[704] Hegel, *Philosophy of Right*, 140.
[705] Other commentators such as Dudley Knowles (op cit) argue that it is precisely this instance of administration of justice that will give coherence and substance to Hegel's theory of punishment, since it brings together the universal restoration of right and the particular right of the criminal. But the focus in the subjective part still is on the fact 'that the criminal must recognize that his punishment is legitimate *in so far as it procures the restoration of right*' (Ibid, 156, emphasis in original). Such restoration is not only dependent on social mechanisms that 'demonstrate to all, honest and criminal citizens alike, the nature of their rights' (Ibid, 157), but also on the previously mentioned common will.
[706] Hegel, *Philosophy of Right*, 140.

6.3 THE LIMITS OF COMMUNITY

This chapter has so far considered Duff's account of punishment as communication, noting his underlying commitment to recognition, and examined in some depth a critical perspective on recognition provided by an analysis of Hegel's work. The possibility that recognition can go wrong appeared as problems in the recognition process that are related to questions of social structure and justice, and that hinder the justification of punishment. This third section now returns to Duff's normative theory of punishment in light of this discussion of recognition.

Responsibility, autonomy, and communication can all be tied together and examined through a perspective of recognition. Duff's claim that we are owed a communicative engagement on the part of the legal system refers to the image of the abstract individual that the legal framework strives to uphold, an image which aims to reflect the actualisation of the ideal of mutual recognition. What Duff fails to recognize, however, is that these theoretical aspirations are not in harmony with the practices and categories of punishment. Punishment, even if conceptualized as forceful moral communication, carries within itself a certain exclusionary logic of violence and domination; the punisher is only concerned with communication as a way to make the deviant conform to pre-established rules, and as thus cannot fully recognize their agency. There is a paradox within the system, between the paradigm it uses to justify its practices and the socio-political function and consequences of the practices themselves. The process of recognition seems to indicate that force goes against reciprocal communication, and there is no punishment without force[707].

A recognitive perspective, on the other hand, shows that socialization occurs in different levels or dimensions. First, a critical theory of recognition reformulates the nature of the social contract, by placing individuality as dependent on sociability; individuals do not gather to form a society, rather individuality is generated through social coexistence. Second, although sociability is inherent to human beings, the acknowledgement of a multitude of desires leads to a struggle for recognition where there is a clash of competing claims and expectations. And, third, although the struggle for recognition generates situations of violence and domination, the inherent solidarity in human sociability implies that the desire for recognition can only be fully satisfied in a condition of mutual and reciprocal recognition, where one subject is fully recognized by someone they fully recognize. It is quite understandable and desirable that a liberal legal order would seek to realize mutual recognition, but the very existence of the categories of crime and punishment

[707] Andrew von Hirsch has a similar critique of Duff's theory in relation to this point, although not from a perspective of recognition. Cf. A. von Hirsch, 'Proportionate Sentences: A Desert Perspective' (2009) in A. Von Hirsch, A. Ashworth, J. Roberts (eds), *Principled Sentencing: Readings on Theory and Policy*, 115-125.

suggests that the struggle for recognition still persists, since the recognition that such categories provide can at best be partial and unequal.

Duff's communicative logic seems to begin from the end; that is, it seems to start with the assumption that a liberal political community is in a situation of mutual recognition, and that deviance drags the individual back to the struggle. Likewise, this same assumption can be identified at the core of liberal theory, as its model of criminal law professes that autonomy can be fully realised through legal personality, so that it is through this idea of equal respect that punishment is justified. Instead, what seems to be the case is that the legal framework embodies values and expectations that are in many cases still struggling to be fully recognized, and it finds in the deviant's values a competing claim. But as the parable of the Master and the Slave shows us, forceful communication not only fails to recognize the criminal, but it also does the system (and liberal society) itself a disservice. Although there is certainly some logic behind the activity of punishment – and it seems to use the language of freedom and recognition, which can be a positive thing – such logic necessitates rather than assures solidarity and mutual respect.

The idea that individuality is socially generated – and precisely because of that, it is not generated equally in different circumstances – elucidates that the struggle for recognition occurs between differentiated subjectivities, which due to their distinct social contexts do not share a common social, political, or legal understanding. The legal framework and its abstract individual, along with its image of an abstract (concretized) political community, fail to account for this social complexity. The legal framework assumes that every individual is an integral member of this political community – that is, that the struggle for recognition as a social reality is basically over – and, by assuming that every individual shares the values it represents, punishment does seem to be a legitimate endeavour[708]. The only ripple in this otherwise placid lake of normative theory, however, is that if every individual is fully recognized within a set of values that they fully understand and accept, then they would not desire anything outside of the system, and then punishment would not be necessary – or would be reserved to a select group of unenlightened (deviant) few. The very fact that punishment exists and that society (even if reluctantly) accepts its categories and practices suggests that the community to which the legal system aspires is not yet fully realized.

Instead, what transpires is that the offender has a desire that the legal system is presently unable or unwilling to recognize. Although it is very likely that the offender's

[708] This seems also to be the case in Hegel's conception of the state, although interpretations of Hegelian scholarship would also suggest that this is Hegel's description of how the state sees itself rather than a normative description of what would happen in an ideal society (cf. R. Fine, *Political Investigations* (2001)). Even so, Hegel's conception of the state clashes with many problems he recognises in modern society, such as the situation of endemic poverty which 'immediately takes the form of a wrong done to one class by another' (Hegel, *Philosophy of Right*, 277–78) and 'there is a consequent loss of the sense of right and wrong' (Ibid, 150).

desire is being expressed in an inappropriate way (it is in itself at best an example of forceful moral communication), the punisher's answer seems to suffer from the same vice. The system and the community it represents act as if threatened or harmed, threatening (or retaliating) in return. One way to break out of this vicious circle would be to concretely communicate the recognition of the offender's humanity, of their value, and this can arguably only be done through a real dialogue that properly addresses the social context in which the offender's actions are situated[709]. But this seems highly incompatible with the way in which punishment operates. The normative assumption of the deviant's expectations as wrongful (the fairness of which must be examined, but such examination is beyond the scope of this work) is unable to provide a reciprocal engagement; it represses the existence of the struggle for recognition. This is indeed an issue for how contemporary criminal justice systems are envisioned and theorized: by pre-establishing the wrongfulness of some course of action and only then pursuing the relationality between individual and community, theories of punishment seem to invert the logic of recognition, thus rendering the proposed communication inexistent at worst, insufficient – because it is one-sided – at best.

This is of course not to say that replacing the categories of punishment is something simple or even presently possible; neither it is to say that the fact that categories of punishment contradictorily reflect aspirations for mutual recognition is something only to be regretted. The main point is to address the fact that, if a theory of punishment is to be grounded upon notions of responsibility that strive to respect concrete individuality, that theory needs to be aware that communication is a project and a process, and proper recognition still an aspiration. Otherwise, its categories start to challenge and contradict themselves, and the system finds itself working against the same principles it allegedly preserves.

Duff's discussion about the terrorist provides a particularly vivid and relevant example of this paradox.

6.3.1 The Terrorist Threat

Before we proceed, however, it is helpful to briefly examine the legal framework of terrorism and its importance to English criminal law. Arguably the most exemplary manifestation of the contemporary insecurity surrounding the liberal model of criminal law

[709] Although there are many similarities between what is being proposed and the postulated aims of restorative justice, this is not necessarily what is being advocated here. There are problems and difficulties in how restorative justice is actualised which may severely compromise its validity, but which however are beyond the scope of the present study. For a short discussion of the matter, cf. A. Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 *British Journal of Criminology*, 578-595.

and criminal responsibility is the framework of anti-terrorism legislation. It is safe to say that in no other area of the criminal law, the challenge to individual rights brought by the felt need to promote collective security and to condemn dangerous and wrongful behaviour has been so strong and pervasive. In this sense, it is fair to agree with Manuel Cancio Meliá that '[t]he evolution of criminal law in the twenty-first century is closely intertwined with the way in which it is used to react to terrorism'[710].

There are two reasons why the criminalization and regulation of terrorism can be considered a primary example of the current state of insecurity in the law, the first of which being the interplay between terrorism and the changes and transformations to the landscape of criminal law suggested by Meliá. The second reason, however, is that terrorism represents not only an expression of the new, advanced liberal paradigm of criminal law, but also its most radical expression. The terrorist is portrayed in the modern social imaginary as the radical deviant, the most dangerous and unrelenting criminal, whose very status is positioned beyond the boundaries of the political community which the criminal law is supposed to promote and uphold. Terrorism therefore poses significant challenges to a liberal model of criminal law which aims to treat criminals as citizens, so that it offers a very interesting context in which to discuss the limits and aspects of the criminal law in the 21st century.

One of the most interesting elements of terrorism as an example of deviance is the essential link between terrorism and state authority. Although every crime is deemed to threaten or harm the community, terrorism is distinguished from 'normal' crimes for the fact that it has a clear political motive: it directly target the community, either in its entirety, in part or through its government. There are thus very interesting insights which can come out of theorising about the link between terrorism and criminal law, regarding the political nature of crime. Soon after the attacks of 11 September 2001, and particularly after the United States' excessive and extensive war on terror, most liberal scholars have acclaimed the criminal law as the best environment in which to deal with the terrorist threat, due to its capacity to both condemn and prevent wrongdoing and to treat individuals – even terrorists – fairly, thus containing the possible excesses of an overzealous state[711].

The UK provides the paradigmatic criminal justice model of anti-terrorism legislation, due to the long history of counter-terrorism in former colonies and especially to the relationship between criminal justice and terrorism with regards to Northern Ireland, going back to the Northern Ireland (Emergency Provisions) Acts 1973-98[712]. But though the

[710] M. C. Meliá, 'Terrorism and Criminal Law: The Dream of Prevention, the Nightmare of the Rule of Law' (2011) 14(1) *New Criminal Law Review*, 108-122, 110.
[711] J. Waldron, *Torture, Terror and Trade-Offs* (2010); L. Zedner, 'Terrorizing Criminal Law' (2012) 6 *Criminal Law and Philosophy*.
[712] Cf. C. Walker, 'Terrorism and Criminal Justice: Past, Present and Future' (2004) *Criminal Law* Review, 311-327, 312.

criminal law was considered the ideal place in which to deal with international terrorists, its ordinary framework was also deemed insufficient in order to deal with this special kind of criminal; this led to a significant expansion of criminal offences and criminal justice measures which has been widely deemed as 'grossly disproportionate'[713]. This expansion of the criminal law was grounded on three levels of justification, according to Clive Walker: firstly, the terrorist threat calls upon the duty and the power of the state to protect itself and its political community, a prerogative which is recognised by the European Convention of Human Rights[714], even at the cost of the derogation of individual rights; secondly, repressive measures are justified by 'the illegitimacy of terrorism as a mode of political expression', incurring the impossibility of amelioration, reinforced by the fact that terrorism usually involves the commission of serious and dangerous crimes; and thirdly, the pervasive and invasive nature of anti-terrorism laws is based on the notion 'that terrorism is a specialised form of criminality that presents peculiar difficulties in terms of policing and criminal process'[715].

The result of this justificatory framework based on dangerousness and insecurity is a system of specialised norms which nevertheless have a high degree of pervasiveness, affecting the whole structure of criminal law and criminal justice – from new offences and an expanded scope of criminal responsibility to expanded police powers and preventive measures, covering virtually all of the categories and trends of substantive changes previously explored[716]. Just as with these broader changes, however, the specific challenge that terrorism poses to the criminal law is not one of justification; it is rather one of exposure. Terrorism, more than other substantive changes to the criminal law, exposes ideological aspects of punishment and responsibility which, while not irremediably harming their justificatory framework, does point to the incapacity of liberal law to properly deliver some of its most fundamental promises.

6.3.2 Terrorism and Recognition

Duff concludes his article about punishment as secular penance with a question concerning what he calls 'the limits of community'. He starts by saying that punishment, as an essentially inclusionary activity, 'is supposed to constitute a mode of moral reparation through which [the offender] is to be reconciled with those he has wronged – through which the bonds of political community are to be repaired and strengthened'[717]. This leads to a

[713] Meliá, 'Terrorism and Criminal Law', 110.
[714] European Convention of Human Rights, articles 2, 15 and 17.
[715] Walker, 'Terrorism and Criminal Justice', 316.
[716] Cf. Chapter 1, Section 1.2 above.
[717] Duff, 'Penance, Punishment', 305.

question of 'whether there are any crimes whose character is such that we need not, or should not, or cannot maintain such community with the offender'[718] – that is, crimes that negate this inclusionary character of punishment but do so in a 'legitimate, appropriate or even necessary'[719] way, since the very nature of the crime denies the possibility of community. Duff presses the issue by suggesting that many kinds of punishment reflect precisely that assumption, such as capital punishment or life imprisonment under a whole life order, since they do not leave open any real possibility of reintegration of the offender with the community. He rejects a general application of such categories of punishment under the limits of his theory, for '[w]ith at least the vast majority of crimes and criminals, we should continue to see and to treat them as fellow members of the normative community who must be punished, but whose moral standing as members is not to be denied or qualified'[720]. But then he presents the possibility of exceptions to the rule, in which some extreme forms of wrongful conduct might be enough to give rise to an un-repairable breach of community with the offender.

Duff argues that three particular scenarios exemplify the reasoning behind this compromise. The first inquires about some crimes being so terrible in themselves that they preclude any possibility of the restoration or continuation of community between criminal and society; the second corresponds to criminal careers, that is, the 'persistent commission of dangerous and violent crimes, which display in the end such an incorrigible rejection of the community's central values' as to lead to the aforementioned breach; and the third case finally refers to terrorist attacks 'such as, most terribly, those committed on New York and Washington in September 2001'[721].

Considering whether or not any of these examples would admit the impossibility of communicative punishment, Duff claims he is fairly confident that the first case should be answered with a negative, as 'no single deed, however terrible, should put a person beyond civic redemption'[722]. Duff is slightly more hesitant when it comes to the second case, as the insistence on wrongful behaviour could be significantly damaging to the bond between offender and community, and to deny the possibility of measures such as permanent detention in these cases would be 'to believe that the bonds of community, and the status of citizenship, are unconditional and absolute – that nothing, not even a person's own persistent demonstration that he utterly rejects the demands of citizenship and community, can destroy them'[723]. Duff seems to be reluctant to accept this possibility, which he approximates to a

[718] Ibid, 305–6.
[719] Ibid, 306.
[720] Ibid.
[721] Ibid.
[722] Ibid.
[723] Ibid, 307.

religious ideal unsuitable for the modern state. A recognitive perspective, however, would question first of all whether the aforementioned rejection of community is a consequence of the criminal's actions, or whether it is inherent in the social context and consequently born in the law's interpretation of them.

As regards the matter of the terrorist attack, Duff complicates the problem by introducing a further discussion on law and punishment. He considers the hypothesis of a terrorist attack in which there is a good idea of who the perpetrators are, then asks whether, assuming those probable suspects are actually under pursuit, we should 'treat this as an attempt to arrest suspected criminals (...) or as a defensive war to prosecute against an alien enemy'[724]. He reflects that, although moral constraints have to be acknowledged in regard to the treatment of these suspects, 'the aims even of a just war and the moral constraints on its conduct clearly differ from the aims and constraints of a system of communicative punishments. War aims not at reconciliation with the enemy (...) but at victory'[725]. He further claims that the terrorists themselves probably see their own activities under the same light, as a war against an enemy regime or a state. But then he asks, 'should we take this view?'[726]

In the article presently under discussion, Duff says he doesn't have a clear answer to this problem; instead, he says that 'any normatively plausible account of the situation would need to be much more complex and nuanced than such a simple 'either/or' allows'[727]. He further argues that 'we should surely be very reluctant to abandon the moral constraints that belong with the enterprise of criminal justice, in favour of the rather weaker constraints that apply to the conduct of war', and that 'we should also be very reluctant to exclude the perpetrator from any prospect of community with us'[728]. Two years later, however, in his article 'Notes on Punishment and Terrorism'[729], Duff addresses the same problem again and offers a rather different answer. The main theme of this article is the question of whether we should see the terrorist as a criminal (subject to the criminal law of the state), as an enemy combatant (protected by international humanitarian law), or as an 'unlawful combatant'[730] (that is, as someone with 'no such moral claims on our respect or concern and whom we may treat in any way that seems necessary to ensure our own safety and to 'defeat terrorism''[731]). Duff says, first of all, that to see terrorists as criminals 'is to see them as

[724] Ibid.
[725] Ibid.
[726] Ibid.
[727] Ibid, 308.
[728] Ibid.
[729] Duff, 'Notes on Punishment'.
[730] Ibid, 758.
[731] Ibid, 760. Duff is here clearly referring to the approach purported by the U.S. government for many years, reflected in regimes of detention without trial such as Guantanamo Bay. The United Kingdom had a similar approach in Belmarsh prison with the Anti-terrorism, Crime and Security Act 2001 until the Prevention of Terrorism Act 2005 repealed the provisions for detention without trial.

moral agents with whom we must still seek to communicate', and under such view they would be 'entitled to the same protections as any citizen'[732]. 'However', he continues, 'we might plausibly feel that especially with the more serious kinds of international (as distinct from domestic) terrorism, we are faced by something that is more like war than crime'[733].

The main argument Duff uses in support of his view[734] is that, given the extreme nature of the 'wrongfulness' involved in certain terrorist activities, the interaction between a community and its perpetrators would be better interpreted as a situation of war than one of punishment; and he believes such is an important distinction because '[i]t is true that warfare does not aim – as punishment should aim – at moral communication with the enemy'[735]. What seems to be confusing in this situation is what conception of communication Duff is referring to. If communication would be simply some attempt to reach out to the other in order to convince or persuade them (that is, forceful moral communication), then certainly the terrorist is trying to communicate something – even if it is an extreme and fundamentalist message. Looking at legislation in the United Kingdom, the definition of terrorism in the Terrorist Act 2000 states that it includes an intent 'to influence the government or an international governmental organization or to intimidate the public or a section of the public', and must have 'the purpose of advancing a political, religious, racial or ideological cause'[736], which necessarily implies that there is some message being transmitted through an act of terrorism.

Within a normative framework that takes recognition (and communication) seriously, the possibility that the specific attitudes of the terrorist may place them outside of any notion of community go against the very principles of responsibility and autonomy upheld by the tenets of liberal law that Duff is trying to espouse. This is so not because a sense of community would be taken as absolute, but because the actions of the terrorist should not be interpreted as directed completely against the community, but rather as an expression of the same desire for recognition that is taken as a presupposition of it. To say that war does not aim at moral communication with the enemy, from the perspective of a liberal normative framework, would be an argument against the legitimacy of war, rather than against the possibility of punishment[737]. Duff's discussion on the limits of community

[732] Duff, 'Notes on Punishment', 759.
[733] Ibid.
[734] It should be noted that Duff does not assert that he supports the view that the terrorist should be treated as an enemy combatant; instead, his claim is 'that the rules of war mark the minimal constraints that we must respect in our dealings with other human beings, whatever they have done' (Ibid, 761). But it can be argued that, by saying this, Duff is accepting the possibility of denying a terrorist access to the system of punishment.
[735] Duff, 'Notes on Punishment', 759.
[736] Terrorism Act 2000, Section 1(1).
[737] This is particularly relevant if we consider that war is politics by other means, and that politics can also be seen as the continuation of war by other means. Cf. M. Foucault, *Society Must Be Defended:*

rather hints at the situations in which the justificatory logic of punishment exposes its own limitations.

6.3.3 The Politics of Responsibility and Community

Terrorism challenges liberal conceptions of punishment precisely because its radical political nature exposes contradictions which are inherent to the justification of punishment. The book *Philosophy in a Time of Terror*[738] presents interviews with Jürgen Habermas and Jacques Derrida about the attacks of September 11, 2001, shortly after they occurred. Habermas provides a clear explanation of how terrorism in the twenty-first century, inflamed by fundamentalism, can be better understood as the result of frustrated claims of communities that are not adapted to the modern secular framework of Western society[739]. Furthermore, Western society in itself contains 'a structural violence that, to a certain degree, we have gotten used to, that is, unconscionable social inequality, degrading discrimination, pauperization, and marginalization'[740]. This structural violence is deeply related to a distortion in communication that arises from conflicting expectations, and if left unchecked, one feeds into the other until communication is no longer possible[741].

This particular view arguably 'explains why attempts at understanding have a chance only under symmetrical conditions of mutual perspective-taking'[742] where communication would be free from distortion. And although Habermas admits that 'communication is always ambiguous, suspect of latent violence'[743], he advises that seeing communication embedded purely in violence and letting force respond to force misses the point, 'that the critical power to put a stop to violence, without reproducing it in circles of new violence, can only dwell in the telos of mutual understanding'[744]. This is a call to continued recognition and communication in structural conditions where all parties share some responsibility for what occurs; legal categories of guilt and wrongfulness go against this logic of mutual understanding, which is something that liberal theories of punishment seem to ignore.

Lectures at the Collège de France 1975-1976 (2004). Also, for more on the dichotomy between crime and war, cf. L. Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *Journal of Law and Society*, 507-533; N. Feldman, 'Choices of Law, Choices of War' (2002) 25 *Harvard Journal of Law and Public Policy*, 457-485.

[738] G. Borradori, *Philosophy in a Time of Terror* (2003).

[739] J. Habermas in Borradori, ibid, 30–33.

[740] Ibid, 35.

[741] Ibid.

[742] Ibid, 37.

[743] Ibid, 38.

[744] Ibid.

Activities that are taken as emblematic of terrorism are never to be endorsed or ignored; on the contrary, it is necessary that they be engaged and dealt with. But to properly confront the threat of extreme violence in a way that seriously considers the values of human dignity and individual autonomy, the legal system must either do better than to ignore the social context in which such violence occurs or abandon its pretentions to be communicative and find its justification somewhere else. Thus Derrida says, 'One can thus condemn unconditionally (...) the attack of September 11 without having to ignore the real or alleged conditions that made it possible'[745]. A critical account of September 11 is an example of how it is possible to try and understand terrorism from beyond this 'lexicon of violence' that is 'legitimated by the prevailing system'[746]. International terrorism[747] seems to act rather within the same framework as the law, as 'all terrorism presents itself as a response in a situation that continues to escalate'[748] – and in this globalized situation of violence, 'dialogue (at once verbal and peaceful) is not taking place. Recourse to the worst violence is thus often presented as the only 'response' to a 'deaf ear''[749]. This seems to be the expressed justification given by terrorists for their actions; surely a normative system committed to communication and recognition should do better.

Even if the terrorist is subjectively claiming to act against the political community, they are objectively acting in community, against (aspects of) a community that frustrates recognition. The means they choose to reclaim recognition are surely mistaken and lead to terrible consequences, and something indeed ought to be done about it; but the same mistake could be attributed to any overzealous imposition of a normative judgment (any forceful moral communication or, even worse, a refusal to communicate) in response to their activities. The same observations could be directed at less radical forms of deviance which are the bread and butter of criminal law. An engagement with the context of criminal conduct points to the fact that all crime is essentially political, in that it is a reflection of the struggle for recognition intrinsic to life in society. This basic element of the nature of crime and social conflict is neglected and repressed by liberal law's attempt to preserve a monovalent assumption of equal respect and recognition in society. This repression, in its turn, is probably the most significant obstacle for liberal society to actualise the recognition which its normative framework ideologically assumes.

The way out of such an orientation can only be grasped within a much larger perspective than would be permitted by any contemporary legal system. But if heed is to be

[745] Jacques Derrida in Borradori, ibid, 107.
[746] Ibid, 93.
[747] Although a similar critique could be elaborated in regard to all actions associated with terrorism, this specific critique focuses on the notion of international terrorism endemic to the twenty-first century. For more on that, cf. B. Hoffman, *Inside Terrorism* (2006).
[748] Derrida, op cit, 107.
[749] Ibid, 122–23.

paid to a serious account of the values behind the respect for the individual, it should at the very least be required that the law acknowledge its limitations.

CONCLUSION

> [Penality] communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters. Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organise our moral and political understanding and to educate our sentiments and sensibilities. (...) [I]f we are to understand the social effects of punishment then we are obliged to trace this positive capacity to produce meaning and create 'normality' as well as its more negative capacity to suppress and silence deviance.[750]

This chapter has interacted with Duff's communicative theory of punishment and its implications to the treatment of terrorism by the criminal law, in an attempt to illustrate the difficulties in finding a liberal justification for punishment that can account for the theoretical and pragmatic problems generated by liberal society's structural inequality and social injustice. Although it may be true that punishment has a place and a function in society, this function should not be mistaken with a normative justification that implies that violence and coercion can preserve or develop a framework of communication and recognition. Duff's contribution, of engaging with difficult challenges and pushing forward the need to think normatively about punishment, is welcome and necessary, but perhaps there is a need to acknowledge how this normative perception depends upon a larger framework that includes many other elements, which punishment is not only unable to address, but also liable to harm.

Criminalization is one of the most important debates occurring in current criminal legal theory[751], and such debate relies heavily on an examination of what the criminal law and its subject should be, in order to determine what should or should not be criminalized. This chapter embraces an examination of the law's normative limits, hopefully suggesting a reflection on what it means to punish, and why there seems to be a social need for the institution. Such reflection invites the view that a shift in perspective – from punishment to recognition – is necessary if any of the wrongs identified in society are to be concretely dealt with. Then, maybe a properly communicative conception of responsibility can begin to unfurl, and problems such as terrorism and other categories of deviance will be better understood by the criminal law.

The theory of recognition sketched in this chapter aims to suggest that the community ideally expressed by legal principles relies on the existence and development of

[750] D. Garland, *Punishment and Modern Society: a Study in Social Theory* (1990), 252-253.
[751] Cf. Chapter 1 above and more generally R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, V. Tadros (eds), *The Boundaries of the Criminal Law* (2010).

mutual understanding, and curtailing or neglecting such understanding constitutes an affront to the very concepts that ground and justify the legal order in the first place. This tension between mutual recognition and one-sided communication poses a paradox for the legal system, and any normative theory of punishment aimed at advocating a need for recognition and respect for the individual has in the very least to acknowledge it. Only then can the possibility of dealing with the real problems found in seeking justice through punishment come to the fore.

Conclusion: Towards a State of Security in Criminal Law

> But where danger threatens
> That which saves from it also grows.[752]

> There are two good reasons why philosophy has never found a place where politics can take shape. The first is the assumption that there is something political *in* man that belongs to his essence. This is simply not so; *man* is apolitical. Politics arises *between men*, and so quite *outside* of *man*. There is therefore no real political substance. Politics arises in what lies *between men* and is established as relationships. [...] Freedom exists only in the unique intermediary space of politics.[753]

OVERVIEW

This thesis comprised a theoretical exercise reflecting on what lies behind the tensions and contradictions found within criminal responsibility, and the relation between responsibility's conflictive framework and the current state of insecurity surrounding criminal law in particular, and liberal society in general. It was impelled by a predominant intuition that the conflict between the emancipatory idea of individual freedom and autonomy and the repressive and coercive nature of state punishment, encapsulated within notions of criminal responsibility, reflected something deeper and more primordial about the way the liberal state is organised, how it deploys its punitive role, and how it relates to those individuals whom it is supposed to both respect and govern. This intuition was given substance by the contemporary crisis which criminal law and criminal justice are experiencing with regards to their liberal bases and aspirations. Although in itself extremely problematic, under the perspective of this study, this crisis constituted a manifest and undeniable symptom of a more pervasive and essential problem: the abstract nature of individual justice in liberal law.

The thesis was roughly organised into three different components. The first was an investigation into the specific dynamics of the state of insecurity in contemporary criminal law. It identified and analysed the relationship between criminal responsibility and the crisis surrounding the contemporary legal landscape, tracing it back to the issue of legal subjectivity and its ideological structure. It then contextualised this analysis, first in terms of the surrounding socio-political framework of late modernity, and second in terms of its socio-historical development. During the progress of this moment, an essential link was established between notions of criminal responsibility and legal subjectivity on the one hand,

[752] F. Hölderlin, *Selected Poems and Fragments* (1994), 231.
[753] H. Arendt, *The Promise of Politics* (2005), 95.

and notions of citizenship and political community on the other, demonstrating the intrinsically political aspect of the former.

The second component of this study delved into a conceptual examination of notions which the first moment established as being the main forces behind the dynamics of criminal responsibility and the inevitable manifestation of dangerousness within it, the conceptions of insecurity and reassurance. This was done through a critical analysis of two of the most influential and foundational works in modern political philosophical thought, those of Thomas Hobbes and John Locke. Hobbes's socio-political model provided the theoretical foundations for the notion of insecurity, while Locke's liberal theory grounded the conceptual development of reassurance. Both were analysed through a particular focus on their accounts of subjectivity, society and political authority, particularly with regards to the relation between these notions and each theorist's framework of punishment. The primary finding of this part of the thesis was that the normative assumptions and implications of these theoretical treatises exerted great influence upon the liberal social imaginary, so that the way in which liberal society is imagined today is significantly conditioned by them, as they are preserved within its moral order.

The third and final part of this research dealt with the normative, pragmatic and ethical implications of the problem with which this study strived to engage. It did so by means of a critical engagement with a third foundational work in modern philosophy, that of G. W. F. Hegel. This part of the argument was developed first by examining how the abstract character of legal subjectivity embedded within liberal law is mainly responsible for the insecurity experienced by liberal society and its legal system, and second by discussing what this crisis means for the pursuit of individual freedom and justice which lies at the core of liberal ethics. This moment expressed the main conclusion which has been implicit throughout the whole study, the importance of re-conceptualising responsibility as dialectical and inter-subjective, in an effort to escape the boundaries and shortcomings of juridical individualism without however abandoning or neglecting its higher aspirations.

IMPLICATIONS AND REFLECTIONS

The whole conceptual trajectory of criminal responsibility, from its modern pre-subjective, primarily exclusionary beginnings over to its radically ambivalent and contested status in the contemporary state of insecurity, can essentially be understood as originating from the repression and ideological legitimation of a broken process of recognition at the core of liberal ethics, which left the legal subject born out of it intrinsically insecure. Such a perspective carries significant theoretical implications which should be properly addressed.

An End to Criminal Law

The intention of this work was not necessarily to advocate for the abolition of punishment, nor to denigrate the importance of its current moral constraints. It was rather to deal with the many tensions and contradictions that exist within the criminal legal framework by critically analyzing its limitations and questioning its justification. Liberal theory's calls for individual autonomy and justice are to be welcomed, but if they are to be ever concretely realised in society, these concepts cannot have punishment as an end – on the contrary, they ought to aspire to an end to punishment.

If the image of society which lies within liberal aspirations for mutual respect is somehow realized, punishment is not vindicated – it begins to lose its purpose. If the institution of punishment still has a function in society, it should be made clear that this function is in conflict with the higher liberal aspirations, and that criminal law's main role in a liberal society, striving for autonomy and recognition, should ultimately be to eradicate its own presuppositions: to make itself unnecessary. A liberal system of punishment should ideally hope for its own demise. Although these reflections remain essentially theoretical and normative, after further development they could hopefully point to more practical suggestions in regard to the criminal law, both in its formal elements and in relation to a larger framework of the administration of justice.

If one seriously considers the claims grounding individual autonomy, the contemporary legal notions of crime and punishment are problematic. The problem may be mainly identified as coming from the tensions that exist in the interaction between a concrete, dialectical subject and an abstract, un-dialectical normative framework, represented in this particular case by the system of criminal law. If recognition is to be taken as expressive of the tenets behind the principles sustained by legal discourse, then the individual is formed precisely by this interaction of conflicting expectations in society, which are a consequence of their (human) desire to be recognized as a subject. Although the law acknowledges such desires in principle, the way in which it attempts to manage social expectations ends up repressing the complexity and diversity found in concrete social conditions, by delimiting what comes to be standard and acceptable behaviour. All that falls outside of this framework is taken to be deviant and wrongful, and – most problematically – seen to deny the possibility of community that the law at its core strives to uphold. But instead of recognizing and engaging with this paradox, normative legal theory represses it in its attempts to fully overcome it without shifting criminal law's paradigm. As a result, liberal law compromises the very conditions for the possibility of it ever realising its ethical

aspirations. As Hegel has indicated[754], the lord's partial recognition of the bondsman is reflected back into himself; thus crime and punishment, radically different though they may seem from a legal perspective, are both heir to and perpetuators of this vicious circle of structural violence and distorted communication.

Normativity and the Human Condition

One of the main targets of analysis and criticism in this thesis was the common tendency in criminal law theory to ground notions of responsibility and punishment in primarily normative conceptions of individual autonomy and subjectivity, as well as of society. Although it is important to keep in mind and properly develop an ideal which can inform the legal system's ethical and moral aspirations, the perspective developed in this research suggests that such ideal can by no means be conceptualised without a proper engagement with the context and conditions in which it has to be actualised. Without this contextual grounding, the normative ideal loses sight of its own premises and purposes, becomes abstract and sterile. In order to achieve an adequate understanding of what law's engagement with individuals, with the political community and with the authority which is meant to represent it should be, it is necessary to never lose sight of what this engagement actually is, the premises on which it is grounded and the extent to which law's normative aspirations are dialectically connected to its structural and socio-historical conditions.

The essence of ideology is to uphold a normative idea which is abstracted and disconnected from the conditions for its actualisation, so that what is actualised by an ideological structure is something substantially different than what is premised by the idea that legitimates it. The result is a distortion which can only lead to violence and alienation. The main ideal of liberal law is to find a purpose for society and government in the respect for and flourishing of human freedom. But as long as this ideal is upheld in lieu of the structural violence which is preserved and fostered by liberal society's social order, it will remain not only unrealised, but an ideological tool for interests which can only further undermine and obstruct its concrete realisation.

The Dialectics and the Politics of Subjectivity

The most significant implication of the theoretical perspective developed throughout this thesis is the need to re-conceptualise legal responsibility in ways which can avoid essentialising the notions of human subjectivity which come out of it, so that it can allow for

[754] Cf. Chapter 6, Section 6.2 above.

a richer and more substantive conception of individual freedom in the law. The present study suggested that the most appropriate pathway to such a re-conceptualisation is through a dialectic perspective on responsibility and subjectivity, one which can highlight and uphold the intrinsic reciprocity and interdependence of the human condition. When applied directly to the framework of punishment and criminal law, such a perspective most prominently portrayed the political nature of juridical relations, political in the sense that they are a reflection of human relations in an inherently conflictive social environment, in which individual demands are not just claimed and addressed, but negotiated in a much more fluid and complex way than that recognised by legal categories.

The criminal law's efforts to manage, protect and (to a limited extent) respect social relations is to some degree an acknowledgement of this political aspect of responsibility, but to a great extent it is also a denial of it, in that the criminal law attempts to coercively reduce the complexity of social relations through its categories and relations of crime and punishment. This ambivalent relation between criminal law and its subject is one of its most significant, remarkable and essential aspects, one which this thesis suggested has to be a primary and indispensable object of legal theoretical enquiry, and which can be more comprehensively pursued through an engagement between legal, political and social theory.

LIMITATIONS AND FUTURE DIRECTIONS

Although this thesis addressed issues of criminal law doctrine and practice, its content and methodology are largely theoretical, focused primarily on aspects of legal thinking which influence and are in turn conditioned by more pragmatic concerns of criminal and penal practice. As such, it could not (nor had the intention to) make specific suggestions on how to reform criminal law doctrine or criminal justice policy. Although the present study aimed at supporting more direct research targeted at effectively bringing pragmatic changes to the criminal legal system, it can only do so with the eventual development of particular aspects of its methodology and findings.

Furthermore, the specific critical perspective developed throughout this project, although it aspired to produce deep and far-reaching implications, was fairly limited in the scope of the elements and perspectives contained within the rich debates to which it sought to contribute. This had a specific methodological purpose of magnifying particular aspects and arguments which the study found to be of particular importance, but nevertheless it led to inevitable generalisations regarding the themes investigated. Against that, one of the advantages of pursuing a dialectical approach to theory is that such a perspective is more likely to better recognise the rich meaning which can be ascribed to what is absent, including what is absent from the present text.

In hindsight, I realise that what was presented in this thesis was a tentative investigation into what I hope will eventually become a comprehensive dialectic and critical approach to criminal law and punishment. I am aware that the reality of crime and punishment is immensely complex, and does not render itself to straightforward explanations. In fact, if anything I hope to have contributed to the idea that such analytical categorisations are to be avoided in legal thinking, so that the theoretical examination endeavoured in this thesis was primarily an attempt to open up these concepts to the contradiction and uncertainty which underlie the reality which they attempt to describe and, in doing so, constrict and regulate.

On the bright side, the aforementioned limitations inevitably pave the way for possible expansions and further explorations into the topic, among which I selected the following few as particularly relevant candidates.

First, there is the call for a more comprehensive inclusion of critical political theory into the theoretical study of criminal law. The analysis of the conceptual interaction between legal and political philosophy undertaken in the present study should be expanded into a new field of criminal law theory, delving deeper into the relation between ideas and notions of punishment, politics and society. Methodologically, this would require not only a grasp of philosophical concepts which are still considered extraneous or at least marginal to criminal law thinking, but also the development of analytical tools indispensable to grasping the inevitable shift in perspective which would result from such exercise. More specifically, such a shift in perspective would most probably have to bring dialectical movement to the usually static relation existing in criminal law between notions of state and society, moving the primary ground of an inquiry into the function and justification for punishment from the former to the latter.

Second, it is necessary to apply the concepts developed in the thesis, particularly the concept of dangerousness and the dialectical aspect of criminal responsibility which it informs, onto specific aspects and fields of criminal law doctrine. The dynamic relation between responsibility and dangerousness provides a rich conceptual basis for doctrinal analysis, especially with regards to legal categories and frameworks which are intimately related to the preventive turn in criminal law. A detailed exploration of the doctrinal framework of terrorism legislation and other cases of what this thesis has conceptualised as instances of radical deviance are probably the most obvious candidates for such an application.

Finally, there is the possibility of taking many of the wider ethical and philosophical conclusions made by the present study further into an investigation of the impact that the theoretical perspective developed here can have on specific elements of the philosophy of punishment in particular and political and social theory in general. The more direct pathway

to this proposed expansion would be to enquire into the ramifications of the problems in coherently sustaining a normative justification for punishment. If punishment cannot be normatively justified in liberal society, what does this mean for its status as a liberal institution? More importantly, what does this mean for the ethical and normative bases of liberal society? If punishment cannot be rationally justified, can its socio-political function be explained in some other way which makes the pursuit or the preservation of punishment in society still ethically valid, or at least acceptable? The dialectical/recognitive perspective developed in this thesis can arguably provide a useful basis on which to pursue these future projects.

CONCLUDING REMARKS

The practical and philosophical question of how to make justice to individuals in society is not only one of the fundamental enquiries of moral and legal philosophy, but also the basis for many of the greatest problems in contemporary criminal law and criminal justice. I have argued that this question is one which criminal law theory not only has to address, but which it can only properly address by putting its own conceptual and normative foundations into question.

While political theory predominantly strives to find an ethical and efficient solution to the problem of conflict in society, its conceptual foundations cannot help being fundamentally constituted by the very conflict which its proposed solutions aim to manage and eliminate. This thesis aimed to tap into this conflictive essence of political society in order to engage with the dialectical nature of criminal responsibility, so as to denounce and examine the abstract and ideological aspects of liberal society and legal subjectivity. Arguably, such engagement is in particular demand due to the crisis of normativity and legitimacy which is apparent to the contemporary framework of criminal law and criminal justice. As liberal law battles with the insecurity born of its own normative foundations, the climate of authoritarianism and individual and social injustice prevalent in criminal law in the twenty-first century, terrible though it is, provides legal theory with an unrivalled opportunity to rethink its premises and perhaps re-vindicate its promises. As a theoretical conjecture into these issues and possibilities, this thesis provides at least some grounds upon which a new dialogue can be construed.

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