Inciting Military Disaffection in Interwar Britain and Fascist Italy:

Security, Crime and Authoritarian Law

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Abstract: During the interwar period two apparently different states, liberal democratic Britain and Fascist Italy, passed similar legislation establishing inchoate offences against military loyalty and obedience. These laws, the Incitement to Disaffection Act 1934 and Article 266 of the 1930 Italian Penal Code, were intended to protect state security and the monopoly of force against political threats. This article compares these laws' scope, rationales and purposes and traces their longer-term origins in the consolidation of the modern state. It argues that this comparative historical analysis evidences important intersections in these systems' uses of criminal law, and provides insights into the forms and extent of authoritarian tendencies and techniques in states' legal practices, specifically in the security context and more generally within criminal law as a vector of state power across the political spectrum.

Keywords: security, criminal law, authoritarianism, liberal democracy, Fascism, comparative legal history

1. *Introduction*

On 15-16 September 1931, large numbers of the 12,000 men of the British navy's Atlantic Fleet stationed at Invergordon in Scotland refused to obey orders. Although mainly triggered by pay cuts ordered by the Labour government in the aftermath of the 1929 Wall Street Crash, this incident fuelled fears of communist subversion of the military.[1] A few years later, a Conservative-led coalition passed the Incitement to Disaffection Act 1934. Subsequently described as the 'most notorious example' of anti-

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[1] Anthony Carew, 'The Invergordon Mutiny, 1931: Long-Term Causes, Organisation and Leadership,' (1979) 24(2) *Int'l Rev. Soc. Hist*. 157-188; Jeremy Black, *A Military History of Britain: From 1775 to the Present* (Praeger 2006) 107-108.

extremism legislation in Europe that represented an 'allegedly flagrant violation of established principles of English freedom,'[2] this Act has also been referred to as one of the main threats to civil liberties in the early 1930s.[3] What seems to have escaped critical attention though is the fact that the 1934 Act was remarkably similar to a provision passed a few years earlier in Fascist Italy, namely Article 266 of the 1930 Penal Code on inciting military disobedience.

The existence of these apparently similar laws establishing broad inchoate offences of inciting or encouraging military disloyalty or disobedience in these apparently distinct systems is noteworthy for two main reasons. One is that the laws provide insights into the wider legal tensions and intersections of the interwar period. During the 1920s-30s, liberal and democratic states across Europe sought to use legislative measures to protect themselves against the apparent menace of communism and fascism, but in so doing raised concerns about the preservation of their values.[4] As Karl Loewenstein famously showed, although democracies should be able to protect themselves within legal and liberal limits,[5] these systems' anti-extremist legislation could nevertheless endanger them.[6] During the same period,

[2] Karl Loewenstein, 'Legislative Control of Political Extremism in European Democracies, II', (1938) 38(5) *Colum. L. Rev.* 725-774, 757.
[3] KD Ewing and CA Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (OUP 2000) 214.
[4] Note especially Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) *Am. Pol. Sci. Rev.* 417-432 and 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) *Am. Pol. Sci. Rev.* 638-658.
[5] Loewenstein II, ibid 658.
[6] Karl Loewenstein, 'Legislative Control of Political Extremism in European Democracies, I', (1938) 38(4) *Colum. L. Rev.* 591-622, 594-596; see also Loewenstein (n 2).

Fascist Italy passed its 1930 Penal Code. While this has been shown not to be an entirely distinctive product of the Mussolini regime but closely related to criminal law in the pre-Fascist liberal order,[7] its similarities with liberal democratic law in other systems at that time require further study.[8]

The second reason for examining these two laws together is because they bring to light deeper issues in the relationship between security, criminal law and the politico-legal character of the state, historically and today. A notoriously elastic concept, security broadly encompasses the range of interests, institutions and activities that a state considers vital to its existence and operations, and as such has been said to constitute one of the state's most basic purposes.[9] Laws enacted in liberal democracies in the name of security, especially broad and pre-emptive offences targeting forms of politically motivated conduct that the state deems threatening,[10]

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[7] Mario Sbriccoli, 'Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990)' in Luciano Violante with Livia Minervini (eds), *Storia d'Italia, Annali 14, Legge Diritto Giustizia* (Einaudi 1998) 487-551; Paul Garfinkel, *Criminal Law in Liberal and Fascist Italy* (CUP 2016) 389-456.

[8] Laurence Lustgarten, '"A Distorted Image of Ourselves": Nazism, "Liberal" Societies and the Qualities of Difference' in Christian Joerges and Navraj Singh Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart 2003) ibid 113-132; Stephen Skinner, 'Crimes Against the State and the Intersection of Fascism and Democracy in the 1920s-30s: Vilification, Seditious Libel and the Limits of Legality', (2016) 36.3 *OJLS* 482-504.

[9] For Paul F Scott, *The National Security Constitution* (Hart 2018) 6, security is 'the irreducible minimum of the state's role, to which all other tasks are in theory and often in practice necessarily secondary or subordinate.' See also Stephen Skinner, 'Criminal Law and the Use of Force: Ideology and State Power in Fascist Italy and England in the Interwar Period', in Stephen Skinner (ed), *Ideology and Criminal Law: Fascist, National Socialist and Authoritarian Regimes* (Hart 2019) 299-320.

[10] Simon Hallsworth and John Lea, 'Reconstructing Leviathan: Emerging Contours of the Security State' (2011) 15(2) *Theo. Crim.* 141-157; Helen Duffy and Kate Pitcher, 'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2019) 343–386; Keith Syrett, 'The United Kingdom' in Kent Roach (ed), *Comparative Counter-Terrorism Law* (CUP 2015) 167-202; Kent Roach, 'Terrorism' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 812-836, 814; Jacqueline S. Hodgson & Victor Tadros, 'The Impossibility of Defining Terrorism' (2013) 16(3) *New Crim. L. Rev.* 494-526; Victor Tadros, 'Justice and Terrorism' (2007) 10(4) *New Crim. L. Rev.* 658-689.

have raised concerns about their negative impact on what they are ostensibly intended to protect, namely freedom, justice and the rule of law.[11] These concerns have included questioning whether the scope, techniques and effects of security measures have tipped such systems towards authoritarianism.[12] However, the concept of authoritarianism not only 'eludes precise definition,'[13] but also resists convenient dichotomies, in that it is not simply 'liberalism's other'[14] and there is no clear 'categorical gap'[15] between it and liberal democracies, indicating that 'authoritarian tendencies' are always already inherent within them.[16] Consequently, these two laws on military disobedience and their apparent similarities provide a critical lens for

[11] Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton UP 1961) 41. See also Tom Bingham, *The Rule of Law* (Allen Lane 2010) 158-159; Aharon Barak, *The Judge in a Democracy* (Princeton UP 2006) 283-287 and Dora Kostakopoulou, 'How to Do Things with Security Post-9/11' (2008) 28(2) *OJLS* 317-342, 320-324.

[12] Kostakopoulou, ibid 318; Christos Boukalas, 'U.K. Counterterrorism Law, Pre-emption, and Politics: Toward ''Authoritarian Legality''?' (2017) 20.3 *New Crim. L. Rev.* 355-390, 357-360, 378-379; Hallsworth and Lea (n 10).

[13] Günter Frankenberg, 'Authoritarian Constitutionalism: Coming to Terms with Modernity's Nightmares' in Helena Alviar García and Günter Frankenberg (eds), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Elgar 2019) 1-36, 3. See further Günter Frankenberg, *Authoritarianism: Constitutional Perspectives* (Elgar 2020) 33-40.

[14] Frankenberg, 'Authoritarian Constitutionalism', ibid 3.

[15] Kostakopoulou (n 11) 318; Ozan O Varol, 'Stealth Authoritarianism', (2015) 100 *Iowa L. Rev.* 1673-1742, 1681-1682.

[16] Norman W Spaulding, 'States of Authoritarianism in Liberal Democratic Regimes' in García and Frankenberg (eds) (n 13) 265-291, 266; Richard H Pildes, 'The Inherent Authoritarianism in Democratic Regimes' in A Sajó (ed), *Out of and Into Authoritarian Law* (Kluwer 2002), 125-149, 125; Alan Norrie, 'Citizenship, Authoritarianism and the Changing Shape of the Criminal Law' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart 2009) 13-34, 18, 28-34.

historicising[17] and questioning[18] the underlying connections between the state and security, and the attributes of authoritarian law.

This article examines these issues in two stages. In sections 2-3, it outlines the political rationales, interwar context and scope of the British Incitement to Disaffection Act 1934[19] and Article 266 of the 1930 Italian Penal Code.[20] Although these laws have been studied separately in the context of their respective systems, this article is the first to consider them together and to interpret their broader significance and implications.[21] In section 4, the article comparatively discusses the similarities and differences[22] between these laws and their longer-term origins in the consolidation of the modern state and the emergence of a particular understanding of security. On this basis, the article argues that intersections between the 1934 Act and Article 266, as well as similarities in their pre-conditions, provide significant additional evidence of

[17] Robert W Gordon, 'Critical Legal Histories', (1984) 36(1) *Stan. L. Rev.* 57-125, 98-99; Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues', (2009) 72(6) *MLR* 936-960, 941-942.

[18] George Fletcher 'Comparative Law as a Subversive Discipline' (1998) 46 *Am. J. Comp. L.* 683-700; Robert W Gordon, 'Foreword: The Arrival of Critical Historicism' (1997) 49(5) *Stan. L. Rev.* 1023-1029, 1024, 1028.

[19] As the 1934 Act applied to England and Wales and to Scotland it is referred to here as British. Its application to Northern Ireland is not addressed.

[20] Although the 1934 Act and Article 266 are still in force, a longevity that evidences direct continuities from the 1930s in both the British and Italian systems, the focus here is on their interwar history. On their post-war continuation note Thom Young with Martin Kettle, *Incitement to Disaffection* (Cobden Trust 1976); Luciano Violante, 'Istigazione di militari a disobbedire alle leggi' in Francesco Calasso (dir), *Enciclopedia del Diritto*, Vol XXII (Giuffrè 1972) 1009-1019, 1014-1015.

[21] Analysis of how these offences were interpreted and applied falls beyond the scope of this article. On the Incitement to Disaffection Act 1934 see Young (n 20) 76-94 and n 63-64. On Article 266 see n 100.

[22] Pierre Legrand, 'European Legal Systems are not Converging' (1996) 45 *ICLQ* 52-81, 55-63; Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *MJECL* 111-124, 116-124; Martin Löhnig, 'Comparative Law and Legal History: A Few Words about Comparative Legal History' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law* (Hart 2014) 113-120, 116-117; Christopher Tomlins, 'The Strait Gate: The Past, History, and Legal Scholarship' (2009) 5 *Law, Cult. Humanit.* 11-42, 30-31.

common ground between these two apparently contrasting interwar systems and their criminal law. It also argues that these connections indicate authoritarian traits in the two systems' uses of criminal legislation, which are interlinked with their underlying structures of state security and can usefully inform ongoing critical reflection on law's authoritarian fabric and potential.

This comparative engagement with criminal law in interwar Britain and Fascist Italy must though come with a caveat. It is essential to stress that the aim is not to undermine liberal democracy and condone authoritarianism or Fascism, nor to seek to reduce these political systems to the same level by relativising the latter's historical violence or minimising the former's normative strengths.[23] Nor is the comparison intended to ignore or conceal the wider historical context of these systems' institutional orders, and internal and external practices, through a blinkered focus on narrow examples. Instead, the aim is to analyse in depth these two specific laws on inciting military disloyalty, in order to show how their legal and political similarities and differences can be identified and interpreted, so as to enhance historical understanding of both systems individually and in relation to each other, as well as to demonstrate their relevance for critical engagement with wider and current questions of security and authoritarianism.

[23] Frankenberg, *Authoritarian Constitutionalism* (n 13) xvi: this approach is intended 'not to denounce liberalism or democracy, but rather to open the space for a robust analysis.'

2. The Incitement to Disaffection Act 1934

The Incitement to Disaffection Act 1934[24] included broadly drafted inchoate offences (anticipatory and substantively incomplete crimes of incitement and possession) intended to prohibit and deter efforts to undermine military loyalty. Although introduced in Great Britain, a predominantly liberal country with some deeply embedded principles of due process and the constraint of executive power, a generally stable parliamentary system and an increasingly wide democratic basis,[25] this Act was highly controversial. Understanding its background and scope requires a focus on three main issues: the government's justification for the Act in the context of the 1920s and early 30s; the Act's relationship with a pre-existing statute; and how its terms were represented and refined during its passage through Parliament. Together, these issues show the 1934 Act to reflect the will of a nervous government, seeking to draw on existing law to strengthen its hand, and importantly the effect (albeit limited) of parliamentary scrutiny. While the process of legislative debate and partial amendment underline the importance of the law's liberal democratic setting, the government's resort to a wide and flexible political offence to combat a perceived political danger, together with the repressive intention underpinning the Act, indicate its problematic dimensions.

[24] 24 & 25 Geo 5 c.56 Incitement to Disaffection Act 1934. Young (n 20) 52-53.

[25] The Representation of the People Act 1928 extended the franchise to men and women over 21. Jeremy Mitchell, 'United Kingdom: Stability and Compromise' in Dirk Berg-Schlosser and Jeremy Mitchell (eds), *Conditions of Democracy in Europe, 1919-39* (Macmillan 2000) 449-463.

The Incitement to Disaffection Act 1934 was ostensibly passed to extend the criminal law's reach and to facilitate prosecutions due to the British government's fear of communism. In the years following the First World War, industrial unrest and especially the General Strike of 1926 caused major social and economic disruption, leading the government to rely on the army and navy to support the police in maintaining public order and to keep essential services functioning.[26] In that context, during the 1920s and the beginning of the 1930s the activities of the Communist Party of Great Britain had seemed to represent a serious threat.[27] These activities included the 1924 publication of an article in the *British Worker*, in which the editor John Campbell called on soldiers 'never to shoot at strikers',[28] the distribution of political leaflets and other publications to troops,[29] and the apparent infiltration of the Royal Navy that led to the 1931 Invergordon mutiny noted at the start of this article.[30] That incident in particular fuelled the government's fear of communist interference with

[26] Ewing and Gearty (n 3) 155-161. Note also AV Sellwood, *Police Strike 1919* (Allen 1978) on the role of the Royal Navy during the Liverpool police strike.
[27] David Burke, *Russia and the British Left: From the 1848 Revolutions to the General Strike* (IB Tauris 2018) 217-233; Henry Pelling, *The British Communist Party: A Historical Profile* (Adam and Charles Black 1958) 28-34; James Eaden and Dave Renton, *The Communist Party of Great Britain since 1920* (Palgrave Macmillan 2002) 22-23; Skinner (n 8) 492-493.
[28] The incident caused Ramsay MacDonald's Labour government to fall after less than ten months: LJ MacFarlane, *The British Communist Party: Its Origin and Development until 1929* (MacGibbon & Kee 1966) 90, 106-107; James Klugmann, *History of the Communist Party of Great Britain, Volume Two: The General Strike, 1925-1927* (Lawrence & Wishart Ltd 1969) 55-56, 64-65; Young (n 20) 37-40.
[29] Young (n 20) 40-50; Ewing and Gearty (n 3) 235.
[30] Carew (n 1); Black (n 1); David Englander and James Osborne, 'Jack, Tommy and Henry Dubb: The Armed Forces and the Working Class' (1978) 21(3) *Hist. J.* 593-621, 621; Young, ibid 52-53; Ewing and Gearty, ibid 214-215, 237.

the 'willingness of the armed forces to defend the power structure at the apex of which the executive stood.'[31]

Some of those involved in distributing leaflets were tried for offences under the Incitement to Mutiny Act 1797.[32] That Act had been passed in response to threats to military discipline following the French Revolution with the aim of strengthening existing law, which in addition to treason and sedition only included a common law offence of persuading or enticing soldiers or sailors to desert.[33] The 1797 Act criminalised four forms of incitement in the military context:

> [A]ny person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces by sea or land from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such an offence be adjudged guilty of felony…[34]

These offences were made punishable by death. Initially enacted as a temporary provision, the 1797 Act was made permanent in 1817,[35] fell into disuse until the early 1900s, and was resurrected to tackle the perceived threats of trade union activity in the period before the First World War and communist agitation towards the armed forces in the 1920s.[36] By that time, capital punishment for the offences in the

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[31] Ewing and Gearty (n 3) 215.
[32] Ewing and Gearty, ibid 236.
[33] Young (n 20) 9-10; Barton L Ingraham, *Political Crime in Europe: A Comparative Study of France, Germany and England* (University of California Press 1979) 102.
[34] 37 Geo III c.70 Incitement to Mutiny Act 1797 s.1, cited in Young (n 20) 11.
[35] Young (n 20) 11.
[36] Young, ibid 13, 14-20. See also Standish Meacham, '"The Sense of an Impending Clash": English Working-Class Unrest before the First World War', (1972) 77(5) *Am. Hist. Rev.* 1343-1364; Ian Christopher Fletcher, '"Prosecutions… are Always Risky Business": Labor, Liberals and the 1912 "Don't Shoot" Prosecutions' (1996) 28(2) *Albion* 251-278 and James E Boasberg, 'Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson' (1990) 10 *OJLS* 106-121, 116-117.

1797 Act had been replaced by a term of imprisonment up to and including life, or by a fine, or both.[37] However, despite the existence of the 1797 Act and the decline of incidents of leafletting and other publications directed at soldiers and sailors after 1931, in 1934 the National Government coalition (dominated by the Conservative Party) pushed through the Incitement to Disaffection Act.[38]

The 1934 legislation partially mirrored the 1797 Act and other previous measures intended to tackle incitement to disaffection in the police and the military, passed during the First World War and immediately thereafter.[39] While the term 'disaffection' in the 1934 Act's short title was not used in any of its provisions at the draft or final stage, it appeared to echo those earlier inchoate measures, as well as contemporaneous understanding of the scope of sedition law.[40] More specifically, the Bill preceding the 1934 Act had been drafted following calls from the Army Council, the secret service and the Metropolitan Police for new and sweeping legislative powers to tackle communist propaganda.[41] It also appeared to be indirectly related to

[37] Young (n 20) 11-13; Joseph Baker, *The Law of Political Uniforms, Public Meetings and Private Armies* (HA Just & Co 1937) 71-72.
[38] Young (n 20) 56-67; Ewing and Gearty (n 3) 234-243.
[39] Primarily the Police Act 1919, s.53 and the Emergency Regulations 1921, passed under the Emergency Powers Act 1920: Michael Supperstone, *Brownlie's Law of Public Order and National Security* (2nd ed, Butterworths 1981) 244; Young (n 20) 20-32; Ewing and Gearty (n 3) 106-107 and ECS Wade and G Godfrey Phillips, *Constitutional Law* (Longmans, Green & Co. 1933) 298-299. See also Sellwood (n 26) and Brock Millman, 'HMG and the War Against Dissent, 1914-18' (2005) 40(3) *J. Contemp. Hist.* 413-440, 422.
[40] According to Boasberg (n 36) 108, citing 11 *Halsbury's Laws of England* (4th ed 1976) [828], the crime of sedition encompassed the intention 'to bring into hatred or contempt, or to excite disaffection against, the Sovereign or the government and constitution of the United Kingdom. . . or [inter alia] to raise discontent or disaffection amongst the Sovereign's subjects ...' This was mainly based on Sir J Fitzjames Stephen, *A History of the Criminal Law of England* (Burt Franklin 1883) Vol II, 374-375.
[41] Ewing and Gearty (n 3) 240-243, 273; Loewenstein (n 2) 756-757.

the Emergency Powers Act 1920, which had opened the way for the government to call on the armed forces to support essential activities in the event of internal (mainly industrial) disruption.[42] The 1934 Act therefore arguably seemed to be intended to form part of the legal framework ensuring the availability and reliability of the military to support the state. A long-running concern in English law, this included the common law understanding of soldiers as citizens in uniform, a concept originally devised to ensure that the military complied with a general duty to suppress disturbances.[43] During the 1934 Bill's second reading in Parliament, this concern with the role of the armed forces in supporting the state in relation to internal order and security, as well as external defence, was echoed by Oswald Lewis, Conservative MP for Colchester, who reminded his colleagues 'that His Majesty's Forces exist for the protection of the liberties of our people and for their protection against enemies from abroad or against violent uprisings from within.'[44]

The Bill was presented by the Attorney General as an unproblematic reproduction of the 1797 Act but with the advantages of allowing for summary prosecutions for minor incidents in addition to indictments for serious cases. This was intended to speed up the criminal justice process where necessary[45] in order to tackle an offence that was portrayed as being particularly morally repugnant. Described as

[42] 10 & 11 Geo. V c. 55 (1920); Ewing and Gearty, ibid 106.
[43] Lord Mansfield CJ, HL *Parliamentary History* (1780-81) 19 June 1780 vol 21 cc689-702, c698; *R v Kennett* (1781) 5 Car. & P. 294-295; *R v Pinney* (1832) 5 Car. & P. 258; Diplock L in *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)* [1977] A.C. 105, 136 E-G.
[44] Hansard HC Deb 16 April 1934 vol 288 cc739-855, c772.
[45] Ewing and Gearty (n 3) 243-244.

a 'loathsome and contemptible' sort of crime requiring sanction under this legislation, the main offence of inciting disloyalty or disobedience was said not to be one for which the perpetrator alone risked being punished, but was an 'offence of inducing someone else to do an act which may involve him in heavy punishment', namely the probable penalty under military law for a member of the armed forces who breached his oath or disobeyed orders.[46] The Bill was also intended to fill a gap in existing law regarding the possession of subversive literature, so as to 'deal with the activities of people who take very good steps to keep well in the background, while they push other persons forward who are going to distribute the leaflets and propaganda.'[47]

However, as a new law in this area with such broad terms seemed unnecessary despite the government's arguments, the Bill was controversial and met with strong opposition in Parliament, which was echoed in the press and academic publications.[48] A key problem was the absence of the minimal mens rea requirements stated in the 1797 Act from the Bill's principal offence of inciting disaffection.[49] Another problem was the Bill's inclusion of a widely drafted offence covering the mere possession or control of any material the distribution of which could support an act covered by the principal offence.[50] A third problem was the inclusion of an even wider proposed

[46] The Solicitor-General, Sir Donald Somervell, Hansard (n 44) c843.
[47] The Attorney-General Sir Thomas Inskip's opening address in Hansard (n 44) c741.
[48] Young (n 20) 62-76; Ewing and Gearty (n 3) 245-251; and Michael Head, *Crimes Against the State: From Treason to Terrorism* (Ashgate 2011) 108-116 who follows both those sources. See also Hansard (n 44) and 31 October 1934 vol 293 cc271-313; HC Deb 2 November 1934 vol 293 cc525-610; and HL Deb 6 November 1934 vol 94 cc96-162 and 8 November 1934 vol 94 cc201-374.
[49] Ewing and Gearty (n 3) 245. Note James E MacColl and WT Wells, 'The Incitement to Disaffection Bill, 1934' (1934) *Pol. Q.* 352-364.
[50] Ewing and Gearty (n 3) 245-246.

offence that would have punished any person who 'does or attempts to do, or causes to be done or attempted, any act preparatory to the commission' of the Bill's main offence.[51] There was also a broad provision for the granting of search warrants if any of the offences were suspected, which appeared to contravene long-standing common law restrictions on search powers.[52] The strength of opposition inside and outside Parliament led to several amendments being made to the Bill, restricting the terms of the incitement and possession offences by inserting mens rea requirements, dropping the preparatory conduct offence, and limiting the search warrant provision.[53]

The first two sections of the 1934 Act as passed established two offences:

> 1. If any person maliciously and advisedly endeavours to seduce any member of His Majesty's forces from his duty or allegiance to His Majesty, he shall be guilty of an offence under this Act.
> 2. (1) If any person, with intent to commit or to aid, abet, counsel or procure the commission of an offence under section one of this Act, has in his possession or under his control any document of such a nature that the dissemination of copies thereof among members of His Majesty's forces would constitute such an offence, he shall be guilty of an offence under this Act.[54]

The first offence in s.1 was almost the same as the offence in the 1797 Act, but with the wording of 'duty and allegiance' changed to 'duty or allegiance', which made it controversially broad.[55] Although the reason for this change was never explained

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[51] Ibid 246. Roland Burrows, 'Criminal Law and Procedure' (1935) 51 *L.Q.R.* 36-57, 41 stated that the 'section penalising acts of preparation has been the subject of much criticism, both academic and lay, on the ground that it is so vague that the subject cannot know what is or is not criminal conduct within the section and places too much power in the hands of the executive.' Burrows mentions the 1934 Act but his reference to preparation appears to be to the Bill.

[52] Ewing and Gearty (n 3) 247, referring to *Entick v Carrington* (1765) 19 St Tr 1030. See also ECS Wade, 'Police Search' (1934) 50 *L.Q.R.* 354-367, 358.

[53] Young (n 20) 74-75; Ewing and Gearty, ibid 248-250.

[54] S.2.(2) covered the search warrant provisions; s.3. covered penalties for the offences established by the Act, namely a maximum of two years' imprisonment or a fine on conviction on indictment, or four months' imprisonment or a much smaller fine on summary conviction.

[55] Young (n 20) 74; Ewing and Gearty (n 3) 245, 251; also Ingraham (n 33) 301-302 and Supperstone (n 39) 241-242.

and its effect was dismissed by the government as insignificant, it seemed to separate military duty, such as obedience to orders or other aspects of a soldier's, sailor's or airman's obligations, from allegiance, the loyalty sworn by the military to the sovereign as the material and symbolic figurehead of both state and nation.[56] This could have brought trivial matters within the offence's scope, in that a 'wife who persuades her soldier husband to overstay his leave by a day may well be guilty of endeavouring to seduce him from his duty, but cannot be said to have endeavoured to seduce him from his duty and allegiance.'[57] This 'use of the disjunctive rather than the conjunctive in the 1934 Act'[58] appeared to make it possible for a culpable form of incitement to be committed in relation to either concept, in contrast with the 1797 Act that required both together. Procedurally, the s.1 offence was made triable summarily, apparently because magistrates were more supportive of the government, especially if it was Conservative,[59] and the absence of a jury that could potentially side with the accused meant that a prosecution would not be jeopardised. As Jack Lawson MP said:

> Most people would rather have a jury. I rather think that we are having this Bill because people have been tried by jury and the right hon. Gentleman [i.e. the Attorney-General] has been disappointed with some of those cases.[60]

The offence in s.2 covered the possession or control of documents that could support or lead to the commission of the s.1 offence, provided the accused could be shown to have the requisite intention, either to commit the s.1 offence or 'aid, abet,

[56] CAW Manning (ed), *Salmond on Jurisprudence* (Sweet & Maxwell 1930) 150-151.
[57] Supperstone (n 39) 242.
[58] Ewing and Gearty (n 3) 251.
[59] Ewing and Gearty, ibid 194-195.
[60] Hansard (n 66) c757. See also Young (n 20) 74; Supperstone (n 39) 241-242.

counsel or procure' it. This offence extended the Act's inchoate coverage, albeit not with the full scope of criminalising preparatory conduct that the Bill had envisaged. Even so, it was a broad provision that was not limited to any specified types of literature and could cover any possession of any sort of text (including the Bible) in relation to which an intention to incite disaffection could be established to the satisfaction of magistrates or a jury on the basis of an inference or a presumption.[61] This was said to be partly justified on grounds of respecting the honour of most loyal military personnel, in that 'it is an insult to them that it should be possible for persons to let other people think they can be seduced from that allegiance' by subversive literature inciting disaffection.[62] As no specific conduct by an accused was required under this provision other than possession with intent, s.2 of the 1934 Act appeared to be tantamount to a thought crime.

Despite the government's apparently urgent arguments for passing the Incitement to Disaffection Act 1934, in practice it was ultimately rarely deployed.[63] Replaced by similar provisions in the Emergency Powers (Defence) Act 1939 for the duration of the Second World War, the 1934 Act was briefly resurrected during the Northern Ireland conflict in the mid-1970s before then fading into disuse.[64] Even so,

[61] Young (n 20) 74-75

[62] The Attorney-General, Hansard (n 44) cc749-750.

[63] The first prosecution under s.1 of the Act occurred in 1937 and resulted in a twelve-month sentence for an eighteen-year-old student who apparently encouraged a soldier to support communism and the Republican cause in Spain. Young (n 20) 77.

[64] Young (n 20) 76-94; Supperstone (n 39) 242-244; Head (n 48) 116-118. The 1934 Act existed alongside the 1797 Act until the latter was repealed in 1998.

the Act as it stood in 1934 raised questions about the law's scope in the name of security and its impact on liberal democratic values. When considered comparatively these concerns become even more pronounced as the Act's rationales, context and terms seem to echo an earlier provision in an apparently very different sort of state.

3. *Inciting the Military to Disobey the Law in Article 266 of the 1930 Italian Penal Code*

Four years before the controversial passage of the Incitement to Disaffection Act, Fascist Italy had included Article 266 in its 1930 Penal Code. This provision addressed similar concerns to the 1934 Act and appeared to use broadly similar legal means to do so. Even so, Article 266 was justified in terms that reflected the Fascist regime's distinct ideological preoccupations and aims. Before turning to the specifics of that Article though, it is important to note two preliminary points. First, the Fascist government of Benito Mussolini had come to power in 1922 and in 1927-29 effectively became a one-party dictatorship.[65] An extreme, ultra-nationalist regime,[66] Fascism had already demonstrated its authoritarian tendencies in its so-called 'ultra-Fascist laws' of 1926.[67] Second, while the 1930 Penal Code was drafted and introduced under Fascism, it was not entirely a 'Fascist law.' To some extent it reflected Italian criminal

[65] Robert O Paxton, *The Anatomy of Fascism* (Penguin 2004) 110; Roger Griffin, *The Nature of Fascism* (Routledge 1993) 71.
[66] Paxton ibid 5-7; Griffin ibid 26, 68-76.
[67] Lutz Klinkhammer, 'Was There a Fascist Revolution? The Function of Penal Law in Fascist Italy and Nazi Germany' (2010) 15(3) *J. Mod. Ital. Stud.* 390-409, 398, 400.

law's pre-Fascist repressive tendencies[68] and was not anomalous in the European legal context at that time.[69] However, in some respects it also signalled a new approach and substantive focus.[70] The 1930 Code made 'crimes against the personality of the State' the object of the first two sections of Book II on specific crimes (the Code's 'special part'). This structural and conceptual change, i.e. putting crimes against the state before crimes against the person, was declared by the Fascist regime to support its principal aim of protecting the main political interests of the 'strong state', treated as the paramount legal entity with its own personality.[71] The first two sections of Book II respectively covered political crimes against the international and internal personality of the state, and their drafting style reflected Fascism's objectives of making criminal law readily adaptable to its repressive goals by using vague and open-ended terms, inchoate offences, and harsher punishments.[72] These crimes could also come within the jurisdiction of the Special Tribunal for the Defence of the State, manned by military

[68] Guido Neppi Modona and Marco Pelissero, 'La politica criminale durante il fascismo' in Luciano Violante (ed), *Storia d'Italia, Annali 12, La criminalità* (Einaudi 1997) 759-847; Sbriccoli (n 7); Mario Sbriccoli, 'Le mani nella pasta e gli occhi al cielo – la penalistica italiana negli anni del fascismo', (1999) 28(1) *Quad. fiorent. stor. pensiero giurid.* 817-850; Klinkhammer (n 67) 391; Garfinkel (n 7) 389-456.

[69] Stephen Skinner, 'Fascist by Name, Fascist by Nature? The 1930 Italian Penal Code in Academic Commentary, 1928-1946', in Stephen Skinner (ed), *Fascism and Criminal Law: History, Theory, Continuity* (Hart 2015) 59-84.

[70] Claudio Schwarzenberg, *Diritto e giustizia nell'italia fascista* (Mursia 1977).

[71] On the personality of the strong state see Alfredo Rocco, 'The Political Doctrine of Fascism', (1926-27) 11 *Int'l Conciliation* 393-415. On the influence of that ideology on criminal law see Carlo Fiore, *I Reati di Opinione* (CEDAM 1972) 13-14; Salvatore Panagia, *Il Delitto Politico nel Sistema Penale Italiano* (CEDAM 1980) 73-76; Guglielmo Marconi, *I Delitti contro La Personalità dello Stato: Profili Storico-Sistematici* (Giuffrè 1984) 172-173, 184-185; Neppi Modona and Pelissero (n 68) 759-847.

[72] Marconi, ibid 6-7; Patrick Anthony Cavaliere, *Il diritto penale politico in Italia dallo Stato liberale allo Stato totalitario* (Aracne 2008) 564; Guido Neppi Modona, 'Principio di legalità e giustizia penale nel periodo fascista' (2007) 36 *Quad. fiorent. stor. pensiero giurid.* 983-1005 at 992-993 and 'Diritto e giustizia penale nel periodo fascista' in Luigi Lacchè, Paolo Marchetti and Massimo Meccarelli (eds) *Penale Giustizia Potere. Metodi, Ricerche, Storiografiche. Per ricordare Mario Sbriccoli* (EUM 2007) 341-378, 354-355.

officers and Fascist party officials, and created by the Fascist regime in 1926 to deal with high-profile political offences.[73]

Article 266 of the 1930 Penal Code covered the incitement of members of the armed forces to disobey the law or military discipline and was enacted to reinforce the Fascist state and its military capabilities. Understanding the scope of Article 266 requires a focus on three main issues: its specific categorisation in the Italian schema of political crimes; its ideological rationales and aims; and its interpretive scope. Together, these elements show Article 266 to be a markedly ideological provision, introduced by a regime which in its blatantly dictatorial conduct differed from the British government, but which shared with it a desire to suppress political interference with the armed forces and a decision to use a flexible, codified offence to do so.

In the section on crimes against the international personality of the state (1930 Penal Code, Book II, Title 1, Chapter 1) several provisions covering what are generally referred to as offences of defeatism were designed to support and protect Italy's military strength. These offences encompassed Article 265 on political defeatism,[74] Article 266 on military defeatism and Article 267 on economic defeatism. Articles 265 and 267 were considered to be true offences of defeatism, in that they could only be

[73] Klinkhammer (n 67) 393-399; Luigi Lacchè, 'The Shadow of the Law: The Special Tribunal for the Defence of the State between Justice and Politics in the Italian Fascist Period,' in Skinner (n 69) 15-33.
[74] The political defeatism offence had roots in First World War legislation prohibiting false news and subsequent laws from 1923-25: Francesco Cigolini, 'I Reati di Disfattismo in Tempo di Guerra e di Pace', (1935) 2 *Riv. Pen.* 1292-1319, 1293-1295, 1305; Marconi (n 71) 164; Alessandra Fusco, 'Le Radici del Disfattismo Politico: Profili Teorici ed Applicativi (1915-1918)' in Floriana Colao, Luigi Lacchè and Claudia Storti (eds), *Giustizia Penale e Politica in Italia tra Otto e Novecento* (Giuffrè 2015) 459-481.

committed in wartime. In contrast, Article 266 could also be committed in peacetime, although the penalty would be increased in wartime.[75] While classified in this particular way, Article 266, like the Incitement to Disaffection Act 1934, covered efforts to undermine the armed forces' adherence to their duties or allegiance, and went further to include their obedience to the law in general:

> Whosoever incites military personnel to disobey the laws or to breach their sworn oath or the requirements of military discipline or other duties inherent in their status or justifies to military personnel[76] acts that are against the law, their sworn oath, discipline or other military duties, shall be punished, for that fact alone and if it does not constitute a more serious offence,[77] with a term of imprisonment of one to three years.
> The punishment is a term of imprisonment of two to five years if the act is committed in public.
> The punishment shall be increased if the act is committed in time of war.
> In accordance with criminal law, the crime shall be considered to have been committed in public if it is carried out:
> 1. By means of the press or other means of propaganda
> 2. In a public place or one open to the public and in the presence of others
> 3. In a meeting, which due to the location in which it is held, or the number of participants, or its aim or objective, can be considered not to be private.[78]

The defeatism dimension was considered to be a key justification for Article 266. Alfredo Rocco, the first Minister of Justice under the Fascist regime and the chief architect of the Penal Code, declared that this offence covered one of the worst forms of defeatism, which threatened Italy's 'external and internal *sicurezza'*, i.e. safety or security.[79] This was deemed to include the ability to defend against a military attack,

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[75] Vincenzo Manzini, *Trattato di Diritto Penale Italiano secondo il Codice del 1930*, Vol 4 *Delitti contro la Personalità dello Stato* (UTET 1934) 262, 264.

[76] This is called '*apologia*' and covers the illegal defence, glorification, or justification of an illegal act.

[77] Article 266 applies only where a more serious offence does not, such as Article 265 on political defeatism, Article 272 on subversive or antinational propaganda or apologia, or Article 302 on incitement to commit any of the crimes against the personality of the state in Book II, Title 1, Chapter 1-2: see Manzini (n 75) 264 and Pietro di Vico, 'Per l'Interpretazione dell'Art. 266 del Codice Penale' (1933) 2 *Ann. Dir. Proc. Pen.* 113-140, 139.

[78] Author's translation of the original 1930 text.

[79] Manzini (n 75) 263, citing Rocco's report on the preliminary draft of the new Penal Code.

to wage war and to maintain public order.[80] Partly a response to the activities of anti-Fascist and communist agitators during the 1920s, who had tried to weaken military loyalty to the regime, the defeatism offences also reflected Italy's experience of the First World War.[81] Rocco noted that victory in war depended on the 'moral resistance of the whole country' and defeatism, which tends to 'cut the sinews of such resistance', should be considered as 'the worst of enemies' to be criminally repressed 'with every severity.'[82] This view was echoed in the Report of the Ministerial Commission, presided over by Giovanni Appiani, which reported on the preliminary draft of the Code. Appiani stated that war had become 'a struggle not only between armies, but also peoples' and so the outcome of war depended on a country's internal political and economic conditions. If these were undermined by defeatist propaganda, he went on, then military resistance to an enemy could collapse, and so the anti-defeatism offences were vitally important for the state's security.[83]

Article 266 was not only to do with Italy's external and internal security, but also reflected core elements of the regime's ideology. The Fascists had come to power in 1922 with a mixed agenda, and their 'doctrine' gradually coalesced around the concept

[80] Ibid; Di Vico (n 77) 115; Violante, (n 24) 1014.
[81] Aldo Berselli, 'L'antifascismo all'interno e all'esterno' in Emilio Agazzi et al (eds), *La Dittatura Fascista* (Teti Editore 1983) 341-381; Richard Bessel, 'The First World War as Totality' in RJB Bosworth (ed), *The Oxford Handbook of Fascism* (OUP 2009) 52-69, 52, 59, 65.
[82] Ministero della Giustizia e degli Affari di Culto, *Lavori Preparatori del Codice Penale e Del Codice di Procedura Penale*, Vol V Part II (Tipografia delle Mantellate 1929) 41 para 267, on the penultimate draft of the defeatism provisions, numbered as Article 272 to 276 (draft Article 273 became Article 266).
[83] Ministero della Giustizia e degli Affari di Culto, *Lavori Preparatori del Codice Penale e Del Codice di Procedura Penale*, Vol IV Part Ia (Tipografia delle Mantellate 1929) 221-222, para 222.

of the strong state and a rhetoric of 'totalitarianism'.[84] Although the regime never quite became a fully totalitarian system, it endeavoured to shape a new Fascist order.[85] As part of that aim, in 1925 Mussolini had sought to implement a system of 'organisation of the nation for war', to align national life with the state's efforts to build military strength in readiness for conflict.[86] Moreover, even though the regime's relationship with the army was difficult due to its commanding officers' primary loyalty to the King rather than the Fascist party,[87] military strength and symbolism were an important part of the Fascist regime's ideological identity, its efforts to consolidate its control, and its pursuit of prestige.[88] It was not by chance that in his Report to the King on the final text of the 1930 Penal Code Rocco had connected the state's power in criminal law with its power in war.[89]

These security and ideological concerns were apparent in the ways Article 266 was linked with the importance of law and obedience. Rocco underlined that 'the

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[84] Stanley G Payne, *A History of Fascism, 1914-1945* (University of Wisconsin Press 1995) 121; Griffin (n 65) 56-60; Rocco (n 71); Benito Mussolini, 'La dottrina del fascismo' entry in the *Enciclopedia Italiana* (Treccani 1932) 847-51, in Stanislao Pugliese (ed), *Italian Fascism and Antifascism: A Critical Anthology* (Manchester UP 2001) 82-87, 85.

[85] Emilio Gentile, 'Fascism in Power: The Totalitarian Experiment' in Adrian Lyttelton (ed), *Liberal and Fascist Italy* (OUP 2002) 139-174, 140-141.

[86] John Gooch, *Armies in Europe* (Routledge 1980) 200; MacGregor Knox, 'Fascism: Ideology, Foreign Policy and War' in Lyttelton (n 85) 105-138, 118.

[87] Adrian Lyttelton, 'La Dittatura Fascista' in Giovanni Sabbatucci and Vittorio Vidotto (eds), *Storia d'Italia Vol. 4 Guerre e Fascismo* (Laterza 1997) 169-243, 220-221.

[88] Violante (n 20) 1014; Giorgio Rochat, 'Mussolini e le Forze Armate' in Alberto Aquarone and Maurizio Vernassa, *Il Regime Fascista* (Il Mulino 1974) 113-132, 116; more generally see Payne (n 84) 12.

[89] Alfredo Rocco, 'Relazione a sua Maestà il Re del Ministro Guardasigilli (Rocco) Presentata nell'udienza del 19 Ottobre 1930-VIII per l'approvazione del testo definitivo del Codice Penale', in Ministero della Giustizia e degli Affari di Culto, *Lavori Preparatori del Codice Penale e Del Codice di Procedura Penale*, Vol. VII, Testo del Nuovo Codice Penale con la Relazione a Sua Maestà il Re del Guardasigilli (Tipografia delle Mantellate 1930) 7-28, 25.

army is the inflexible custodian of the authority of all laws,' indicating that the army was a foundation of the state and the ultimate guarantor of the legal system (and therefore of the regime[90]) that required protection through criminal law.[91] Also, Ministerial Commission President Appiani emphasised in his Report on the preliminary draft of the offence that its importance and breadth related to the fact that 'a member of the military owes obedience, due to his very nature, and more than any other citizen, to all laws of the State'.[92] This implied that while soldiers were also citizens, they were subject to a stronger duty to obey the law. Linking obedience to law and the state's military capacity, this offence demonstrated the Fascist regime's particular approach to legality as an emanation of state power and its emphasis on all citizens' and public officials' duties to the state.[93]

The offence covered by Article 266 was a new element of the 1930 Code, as an equivalent crime had not appeared in the preceding penal code of Liberal Italy, the so-called Zanardelli Code of 1889. There was though a related precedent in Italy in Law 315 of 19 July 1894 (echoing earlier French laws on military discipline[94]) which had been passed to combat the threat of anarchism. Law 315 had prohibited inciting members of the armed forces to disobey the law or breach military discipline, but only

[90] Marconi (n 71) 210-211.
[91] *Lavori Preparatori del Codice Penale e Del Codice di Procedura Penale*, Vol V Part II (n 82) 44 para 269.
[92] *Lavori Preparatori del Codice Penale e Del Codice di Procedura Penale*, Vol IV Part Ia (n 83) 224, para 225.
[93] Floriana Colao, *Il Delitto Politico tra Ottocento e Novecento: Da «Delitto Fittizio» a «Nemico dello Stato»* (Giuffrè 1986) 289, 360; Franco Bricola, 'Teoria generale del reato' in Antonio Azara and Ernesto Eula (eds), *Novissimo Digesto Italiano* vol XIX (UTET 1979) 7-38, 32-33.
[94] The French Laws of 27 July 1849 and 29 July 1881 prohibited acts intended to provoke members of the armed forces to breach their duties or disobey their commanding officers. A further French law on this issue was passed on 28 July 1894.

if the accused addressed them collectively and did so by means of the press.[95] The new provision in Article 266 was much more extensive and covered incitement of members of the armed forces, individually and collectively, in the service of Italy, its colonies or allies,[96] to disobey the law, their oath or (disjunctively) any other aspect of military discipline.[97] Unlike s.2 of the British 1934 Act, Article 266 did not include a possession offence and was also different in that it covered inciting disobedience to the law in general as well as an indirect form of incitement called '*apologia*', the justification or glorification of unlawful acts.[98] Like the Bill preceding the 1934 Act in Britain, Article 266 did not explicitly state a mens rea, but as its offences of incitement and *apologia* had to be committed consciously and voluntarily they were by implication deemed to require an intention.[99] The Article also covered all inchoate political activity committed in public or private, thus maximising the regime's ability to suppress what it considered to be the harmful excesses of political opinion 'let loose' by the French Revolution.[100] As such, the Article 266 offence, albeit with particular ideological

[95] Cigolini, (n 74) 1309-1310; Marconi (n 71) 163-164; Fiore (n 71) 35; and Mariano d'Amelio with Antonio Azara, *Nuovo Digesto Italiano* (UTET 1939) 1090-1091.
[96] Manzini (n 75) 267-269; Di Vico (n 77) 118-130; Colao (n 93) 389.
[97] Manzini, ibid 272, notes that the fourth aspect of breaching any 'other duties inherent in their status' appears to be redundant as the other three heads appear to cover all eventualities.
[98] Manzini, ibid 272-74; Pietro di Vico, 'Il Delitto di Apologia' (1936) *Ann. Dir. Proc. Pen.* 785-795, 793.
[99] Manzini, ibid 274; Di Vico (n 77) 130.
[100] Manzini, ibid 266; Marconi (n 71) 212. In practice the offence's application was more mundane. E.g. Special Tribunal for the Defence of the State ruling no. 65 (9 December 1935) involved a peasant called Giovanni Ungerank who was convicted under Article 266 and sentenced to three years in prison for having tried to persuade two soldiers in a hostelry near Bolzano that life was better in Austria and that they should go there. Ministero della Difesa, *Tribunale Speciale per la Difesa dello Stato: Decisioni emesse nel 1935* (Ufficio storico SME 1990) 229-230.

rationales, was designed to tackle political threats to security[101] in ways that the 1934 Act would subsequently echo in Britain's different political context. It is to the nature and significance of these differences and similarities that this article now turns.

4. Making Sense of the Incitement to Disaffection Act 1934 and Article 266: Comparisons, Origins and Implications

Having outlined the context, political rationales and formulation of the 1934 Act and Article 266 separately, this section considers them comparatively, in terms of their substance and purposes (subsection A), and their longer-term origins (subsection B). Whilst noting the importance of the differences between these laws, these two stages of comparison highlight the main similarities between them in terms of legal techniques and deeper structural dimensions of the state-security relationship.[102] The article then argues that these common features demonstrate similar approaches to political crime and the legal construction of ideological enemies, which highlight criminal law's authoritarian traits and potential in the security context (subsection C).

[101] Despite its associations with Fascism, Article 266 was retained post-1945 due to its perceived usefulness: Violante (n 20) 1014-1015; Alberto Cadoppi et al (eds), *Trattato di Diritto Penale*, Parte speciale Vol I, *I Delitti Contro la Personalità dello Stato* (UTET 2008) 229.

[102] Ian Loader and Neil Walker, *Civilizing Security* (CUP 2009) 26-27; Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (OUP 2016) 43-44; Boukalas (n 12) 359-360; Frankenberg, *Authoritarian Constitutionalism* (n 13) 84, 96.

A. Comparing the Two Laws

As the previous two sections have shown, the two laws were not identical and differed in their scope, formulation of military obligations, as well as in their underlying ideologies and supposed rationales. The aim of this subsection is not to minimise those differences but to highlight some key similarities between them. These similarities are in the laws' subject matter, their means and methods, and their purposes and effects, or in other words what Lindsay Farmer has referred to as matters of content, form and function.[103] As the following analysis shows, each of these three areas of similarity can be seen to be binary in character, which brings to light the laws' internal tensions and dual levels of operation.

First, the offences' subject matter involved a combination of the tangible and the intangible. In terms of the former, both laws evidently focused on the armed forces, one of the most distinctive institutions of the state providing the organised and disciplined delivery of physical force in its service. Both laws were concerned with control over the armed forces in their external and internal roles in protecting state security. Although the 1930 Italian Penal Code was structured in terms of the international and internal personality of the state, it was clear that Article 266 was understood to relate to both of them. Similarly, while British law and the 1934 Act

[103] Farmer, ibid 19-21. Farmer refers to function as defined by Émile Durkheim (Steven Lukes, ed), *The Rules of Sociological Method* (e-book; Palgrave Macmillan 2013) 81. This article refers to the laws' purposes and wider effects to try to capture the sense of what the laws were intended to achieve as well as what they entailed in a less explicitly engineered sense, which seems closer to the Durkheimian meaning of function.

were not based on such a dual classification, it was also clear from the rationales stated for the legislation in Parliament that it was intended to tackle internal and external security threats. What is notable therefore is that both laws shared a cohesive conceptualisation of state security and envisaged the armed forces as its keystone.[104] At the same time, in seeking to preserve the armed forces' security role the laws' focus was primarily on the abstract domain of thoughts, opinions and feelings. In that regard, both offences were based on an understanding that control over the armed forces depended on the sentiment of loyalty and the psychological condition of obedience. Although the provisions were based on slightly different conceptualisations of what loyalty and obedience encompassed, in terms of allegiance to the Crown or to the Fascist state and its law, both laws sought to draw those factors widely and were intended to prohibit and deter essentially intangible forms of conduct and result, namely politically motivated efforts to influence military hearts and minds and thereby weaken the state's control.

Second, the means and methods of both laws similarly indicated a combination of the concrete and the insubstantial. In Britain, the 1934 incitement to disaffection offences were introduced in an Act of Parliament, just as the original offences they were intended to improve had been passed in the 1797 Act, which gave incitement to mutiny legislative status above their prior common law form. In Italy, Article 266

[104] On the conceptual merging of the nineteenth-century distinction between the state's external and internal interests see Kirchheimer (n 11) 36-39; Mark Neocleous, 'From Martial Law to the War on Terror' (2007) 10(4) *New Crim. L. Rev.* 489-513; Skinner (n 8) 500.

replaced the earlier, less comprehensive statute law of 1894 and was introduced in the new 1930 Penal Code, which was intended to ground a new legal order.[105] Both of these laws also made incitement of conduct that would on its own be a matter of internal military discipline into offences covered by general criminal law, as distinct from military law, emergency powers or special wartime regulations. Although they were nevertheless political offences in terms of their rationales and culpable aims, as compared with ordinary crimes that did not have a political dimension, they reflected governmental determination of a need to make these offences applicable to all potential perpetrators and triable in particular ways, so maximising their reach without resorting to exceptional measures or prerogatives.[106]

However, the laws' intangible focus was mirrored in their similar reliance on inchoate liability, encompassing direct and indirect forms of incitement, persuasion and encouragement. S.2 of the 1934 Act went further with its offence of possessing literature that could support an offence of incitement, while Article 266 extended to the crime of *apologia*. These inchoate provisions focused on 'bad tendencies'[107] or the apparent manifestation of potential danger to the state rather than concrete harms. Both laws were thus intended to be pre-emptive and to tackle the potential for harm

[105] Garfinkel (n 7) 389; on the symbolic resonance of codes see John Henry Merryman, *The Civil Law Tradition* (Stanford UP 1985) 26-29.
[106] Head (n 48) 108.
[107] Robert W Gordon, 'Law and Disorder' (1988-1989) 64.4 *Ind. L. J.* 803-830, 814: 'In British law, political offenses such as sedition and incitement to disaffection are defined in terms of bad tendency, rather than likelihood of imminent serious harms.' See also Ingraham (n 33) 26-29 and compare Frankenberg (n 104) 95.

perceived in or presumed from the expression of words or possession of texts. The highest forms of criminal law in each system were used in this way to define and prohibit intangible and subjective forms of behaviour.

Third, building on the above aspects of subject matter and form, the laws' purposes and effects also indicate notable and twofold similarities. As forms of criminal law, both the 1934 Act and Article 266 made provision for the prohibition, prevention and deterrence of forms of conduct by authorising their punishment. These laws were therefore intended to be repressive rather than regulatory,[108] in that they were intended to stop and stamp out inchoate forms of political threat to security rather than restrict or reconfigure it. Beyond that (perhaps self-evident) repressive purpose though the two provisions also arguably had three additional effects, or functions, at a more intangible level. While prohibiting politically threatening activity, the reliance on ordinary criminal law served to normalise and legitimate the exercise of state power in the public perception, by channelling a political objective through a supposedly autonomous instrument of general application with its own formal and procedural majesty.[109] At the same time, the declaratory power of the statute and code could make these intangible pre-emptive crimes against abstract interests seem more real by means of a legal definition that could justify efforts to suppress them in the absence of manifestly dangerous conduct or tangible harm. The laws' declaratory aspect also served a symbolic purpose, in the sense of representing and projecting

[108] Ingraham (n 33) 9-13.
[109] Kirchheimer (n 11) 36-41.

these states' interests and power.[110] In that sense both laws expressed these states' intention to stop endeavours to interfere with their armed forces, and to use their punitive powers to do so[111] through new law (Article 266) or renewed legislation (the 1934 Act). Just as the state's armed forces could use physical force and represent its potential use as a symbol of state power,[112] so these laws could both lead to punishment and symbolise the state's ability to impose it. Overall, these similarities between the two laws point to the conjunction of the armed forces, security and law's layers of significance as an instrument of state power. To understand and interpret these more fully though, it is necessary to look further back at the development of the state and armed forces as conditions of existence for a concept of security and its protection by criminal law.

B. The Laws' Longer-term Origins

Article 266 and the 1934 Act can be understood to have two interlinked temporal and explanatory frames of reference, one more immediate, and another encompassing longer processes of state-formation and development. The short-term origins of both laws in the 1920s-30s were outlined in Sections 2 and 3 above. Looking slightly further back, the First World War was also a major influence on both systems, engendering a

[110] On law's symbolic dimension regarding contested moral wrongs see Javier Wilenmann, 'Framing Meaning through Criminalization: A Test for the Theory of Criminalization' (2019) 22(1) *New Crim. L. Rev.* 3-33, 9.
[111] Head (n 48) 11-12.
[112] Loader and Walker (n 102) 26-27.

new awareness of the impact of mechanised warfare on the relationship between state, armed forces and nation (as explicitly emphasised in Fascist Italy), and of the state's new role and legal powers that war had necessitated.[113] However, as important as these short-term explanations for the introduction of both laws were, they also need to be understood as the result of longer-term conditions of existence[114] involving the emergence of the modern state and its need to consolidate its monopoly of force. This is not intended to imply what Robert Paxton has called the misleading 'Darwinian convention that if we study the origins of something we grasp its inner blueprint',[115] but to recall that these two laws became possible and necessary because of longer-term military developments that predated the First World War.

The conceptual link between the modern state and the idea of a monopoly of force stems from Weber's influential description, according to which the state as the source and locus of power and authority within a territory has exclusive control over the principal means to enforce and preserve itself against threats.[116] That aspect of exclusive control means that a state must have no rivals within its territory making

[113] Payne (n 84) 78; Jerzy Holzer, 'The Heritage of the First World War' in Dirk Berg-Schlosser and Jeremy Mitchell (eds), *Authoritarianism and Democracy in Europe, 1919-39* (Macmillan 2002) 7-19; Marc Ancel, 'Le Crime Politique et le Droit Pénal au XX^{e} Siècle' (1938) 2 *Rev. d'histoire pol. et const.* 87-104, 93.
[114] Lacey (n 17) 941. On historical 'conditions of possibility' compare Michel Foucault, *L'Ordre du Discours* (Gallimard 1971) 55-56.
[115] Paxton (n 65) 53. A Darwinian approach has though been considered in the field of national security: David Sloan Wilson, 'Rethinking the National Security State from an Evolutionary Perspective: A Reconnaissance' in Karen J. Greenberg (ed), *Reimagining the National Security State: Liberalism on the Brink* (CUP 2019) 169-184.
[116] Max Weber, 'Politics as a Vocation' in HH Gerth and C Wright Mills, *From Max Weber: Essays in Sociology* (Routledge 1991) 77-128, 78.

competing claims to legitimate authority (such as the nobility, church or families[117]) or to organise or wield legitimate force.[118] It also means that in practical terms the state must be able to exert effective rather than merely nominal control over the deployment of force.[119] In other words, the monopoly of force is key to the state's security, which is only as good as the security of the state's monopoly.

Although the state is a complex historical phenomenon and a much-debated concept, perhaps especially in the British context, with (at least) political, social and legal dimensions at central and local levels beyond Weber's narrow view,[120] his description can to some extent be evidenced historically. It is apparent that the gradual development of permanent, professionalised armed forces on land and sea was an integral part of the consolidation of modern state systems from the seventeenth century onwards.[121] Permanent armed forces were dependent on the formation of centralised fiscal, financial and administrative structures that characterised the advent of modern states and supported those states' ability to assert power and control against external rivals or enemies and threats within their territories. The adoption of standing professional forces entailed the need to house them in barracks and bases for

[117] James Q Whitman, 'The Transition to Modernity' in Dubber and Hörnle (n 10) 84-110, 94-102.
[118] Loader and Walker (n 102) 26-27. In the British context note also the Unlawful Drilling Act 1819 prohibiting unauthorised private training in the use of arms; and the Public Order Act 1936 prohibiting quasi-military organisations and uniforms: see Baker (n 37) 114-115, 21-23.
[119] On military acceptance of civil political control see Hannah Arendt, *On Violence* (Harcourt Brace Jovanovich 1969) 48 and Samuel P Huntingdon, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Harvard UP 1957).
[120] Kenneth HF Dyson, *The State Tradition in Western Europe* (Martin Robertson 1980) 205-214; Skinner (n 9) 312-315.
[121] Samuel E Finer, 'State- and Nation-Building in Europe: The Role of the Military' in Charles Tilly (ed), *The Formation of National States in Western Europe* (Princeton UP 1975) 84-163.

purposes of containment and discipline,[122] as well as provisioning, training and easy deployment. At the same time, these logistical factors were accompanied by public order rationales, as military establishments near urban areas had the additional advantages of demonstrating the state's potential to use armed force, thereby impressing or intimidating the local populace, and making troops available to suppress any outbreaks of civil disorder. Yet the development of these forces generated concerns about their reliability. Their numbers and the efficiency in the use of weapons that professionalisation produced could be turned against the monarch or government that commanded them, and concentrating forces in barracks and bases could make them vulnerable to the infiltration and dissemination of political ideas that could undermine their loyalty. A detailed study of these issues and the specifics of state-building in each system falls beyond the scope of this article, but these matters and the centrality of the monopoly of force can be illustrated by reference to key elements of British and Italian military history.

In Britain, the first professional army was formed during the Commonwealth of 1649-60, and the retention of standing forces thereafter was made subject to parliamentary approval and financial control by the Glorious Revolution settlements of 1689.[123] Armed land forces trained in new types of weaponry and tactics only

[122] For Michel Foucault (trans. Alan Sheridan), *Discipline and Punish: The Birth of the Prison* (Penguin 1991) 141-142, 168, barracks formed a key part of the development of disciplinary power in the eighteenth to nineteenth centuries.
[123] Lois G Schwoerer, *The Declaration of Rights, 1689* (Johns Hopkins UP 1981) 3, 291.

became a permanent feature of the state in the early 1700s under King William III,[124] due to the demands of overseas campaigns and colonial expansion, as well as the internal maintenance of order in support of the local militia.[125] The increasing size of the army, its need for accommodation, as well as its usefulness in deterring and suppressing disorder, led to the construction of barracks in strategic positions around the country. Similarly, although the size and organisation of the Royal Navy had varied since its founding in 1660, by the late eighteenth century it too had become firmly established and was the main branch of military power for purposes of national defence and imperial expansion.

The need for land and sea forces to face internal and external threats became particularly important following the French Revolution and during the Napoleonic wars.[126] The Revolution's ideological impact caused social and political disturbances, in response to which the government called on troops to maintain public order, and at the same time demonstrated the military's susceptibility to subversion.[127] It was these threats to military and naval loyalty that led to the 1797 Mutiny Act.[128]

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[124] This development was facilitated by new financial arrangements following the founding of the Bank of England in 1694: John Brewer, *The Sinews of Power: War, Money and the English State, 1688-1783* (Unwin Hyman 1989) and DW Jones, *War and Economy in the Age of William III and Marlborough* (Blackwell 1988).
[125] Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Vol 4 (Stevens & Sons 1956) 118-120; Stanley H Palmer, 'Calling Out the Troops: The Military, the Law and Public Order in England, 1650-1850' (1978) *JSAHR* 198-214. In the late eighteenth century the militia was supplemented by the yeomanry.
[126] Radzinowicz, ibid 120-124; TA Critchley, *The Conquest of Violence: Order and Liberty in Britain* (Schocken Books 1970) 68.
[127] Nick Mansfield, *Soldiers as Citizens: Popular Politics and the Nineteenth-Century British Military* (University of Liverpool Press 2019) 57-92.
[128] Young (n 20) 9-11.

Subsequently, standing forces, barracks and bases became even more firmly established during the continuing modernisation of the military during the nineteenth century and into the early twentieth.[129] Although the military's role in maintaining domestic public order was increasingly taken over by the civil police from the late nineteenth century, concentrations of forces were nevertheless maintained around the country to face both external and internal dangers.[130] In that broader military context, the First World War and Russian Revolution led to the fear of communist subversion in the context of mass conscription and thence the 1934 Incitement to Disaffection Act.

In the Italian context the development of armed forces extended over a similar time frame and involved comparable concerns with external and internal threats but related to a different sort of state-building process. Pre-unification, the separate states around the Italian peninsula had maintained their own sea and land forces, with the first permanent body of soldiers apparently founded by Duke Charles Emmanuel II of Savoy in 1659.[131] During the 1700s and into the first half of the nineteenth century, military garrisons in urban centres became an important part of the separate states' efforts to control public order, which during the Napoleonic period included improving strategically important roads and urban street plans to facilitate military intervention.[132] In 1859-60 during the Risorgimento, the various states' armed forces

[129] Edward M Spiers, *The Army and Society, 1815-1914* (Longman 1980).
[130] Charles Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (OUP 1993) 80-111.
[131] www.esercito.difesa.it/storia/Anniversario-EI/Pagine/Anniversario.aspx (29 April 2020).
[132] John A Davis, 'The Army and Public Order in Italian Cities' in Ministero per i Beni Culturali e Ambientali, *Esercito e Città dall'Unita agli Anni Trenta*, Atti del Convegno di Studi, Spoleto 11-14 maggio

were merged to serve the new unified Kingdom of Italy (declared in 1861). This integration of forces, especially the army, was both a necessary practical step in the struggle for independence and a socio-political means for seeking to forge united Italy into a single state through the enculturation processes of conscription and military service.[133] While the navy played a relatively minor role in Italian social and military affairs,[134] the army continued to be used to tackle threats to public order during the nineteenth and early twentieth centuries. This included the army's involvement (together with the militarised police, the *carabinieri*) in suppressing brigandage[135] and maintaining order in the face of industrial unrest, particularly in the 1890s,[136] after which the *carabinieri* and civil police became the predominant forces of social control.

As in Britain, the army's reliability was at times in doubt however, especially during the turbulent final years of the nineteenth century. The 1894 criminal law noted above was passed to address the political threat of anarchism to military obedience, and around the same time efforts were made to turn barracks into centres of social separation and education for the armed forces, especially conscripted men, to try to minimise the danger of ideological contamination.[137] As John Davis argues, the

1988, Vol I (Pubblicazioni degli Archivi di Stato 1989) 483-498, 483-487; John Whittam, *The Politics of the Italian Army, 1861-1918* (Croom Helm 1977) 45.

[133] Gooch (n 86) 86-87, 118-119; Whittam, ibid 60, 109.

[134] RJB Bosworth, *Italy and the Wider World 1860-1960* (Routledge 1996) 65.

[135] Whittam (n 133) 74-82, 100; Clive Emsley, *Gendarmes and the State in Nineteenth-Century Europe* (OUP 1999) 198-202. On earlier forms of brigandage and usage of the term to mask the post-unification civil war in the south of Italy see John A Davis, *Conflict and Control: Law and Order in Nineteenth Century Italy* (Macmillan 1988) 71-90, 159-179.

[136] Gooch (n 86) 135-136; Davis, ibid 91-105, 235-236 and (n 133) 486-488, 491-498.

[137] Davis (n 133) 486-487 on earlier problems of sedition in the armed forces in the 1820s and 496-497 on the fear of army disobedience in the early 1900s; Whittam (n 133) 119, 131-140.

disturbances of the 1890s led to a shift in focus in Italy from 'ordinary' crime to subversion and political threats to the state.[138] These issues of control over the military and the management of threats to its reliability continued after the First World War and the rise to power of Fascism in 1922,[139] as reflected in the rationales for Article 266.

Taking these points together, a focus on the specific early twentieth-century background to the British Act of 1934 and the Italian provision of 1930 is an important step in addressing why those measures were passed in that period but is insufficient to develop a fuller understanding of their 'conditions of existence.' This requires noting how the two laws became necessary because of the ways in which the military and its roles had developed. In other words, these broad historical processes indicate how the state, the armed forces and state security were interdependent, for their existence and their protection, and how both laws discussed here reflected this deeper underlying framework. This is not to suggest a Marxist sense of material determinism, but a self-preserving connection between the state's monopoly of force in its military and criminal law aspects. When considering the nature of today's security discourse and the introduction of elastic offences to protect state interests, it is necessary to recall that these are not new problems for democracies or merely indicative of recent categorical slippage on the democratic scale, but that they also point to deeper and

[138] Davis (n 136) 356-358.
[139] Whittam (n 133) 191-205.

longer-term underlying patterns in the emergence of the state, the consolidation of its core activities, its reliance on law and its ways of doing so.

C. Intersections and the Question of Authoritarian Law

It is apparent from the preceding comparative and historical analysis that the 1934 Act and Article 266, while not identical, had some notable political, formal and functional similarities, as well as broadly analogous origins, despite their apparent contextual and ideological differences. It is argued here that these similarities indicate two main intersections between these laws and their respective systems, namely the flexible character of political crime and the laws' exclusionary and classificatory role in the construction of political conduct as criminal conduct. It is then argued that taken together, these common features point to the relationships between security, criminal law and force, which demonstrate criminal law's immanent authoritarian potential, irrespective of apparent systemic distinctions.

Although enacted in the form of ordinary and general criminal law, both the 1934 Act and Article 266 covered political crimes, that is, offences involving and dependent on political interpretations of conduct, motive and aims, and which served the political interests of the state. As other studies of political crime have shown, liberal and democratic states have often been as willing as dictatorships to use broad and flexible criminal laws to justify and legitimate repressive measures to protect their security and so such crimes can provide critical insights into the politico-legal

characteristics of state practices.[140] This categorisation in terms of political crime is particularly useful here for situating the two laws within their respective systems and in relation to each other.

In Italy, political offences have been shown to evidence significant continuities from the pre-Fascist liberal era to the Mussolini regime and into the subsequent democratic republic. These continuities have included criminal law's authoritarian tendencies in structuring power and obedience in the name of stability,[141] repressing political opposition,[142] and fostering indeterminacy to maximise the scope of the law's potential application.[143] While to some extent the quantity and focus of political offences in the 1930 Penal Code can be attributed to the will of the Fascist regime, those continuities in Italian criminal law show that the 1930 Code's authoritarian dimensions go beyond a list of provisions that might be labelled as Fascist.[144] Article 266 was therefore not only a political offence codified for the first time by the Fascist regime, reflecting core aspects of its ideological aims, but also in its approach part of a longer repressive tendency in Italian criminal law.

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[140] Head (n 48) 2; Kirchheimer (n 11) 6-7; Tiago Pires Marques, *Crime and the Fascist State, 1850-1940* (Routledge 2013) 171; Austin T Turk, *Political Criminality: The Defiance and Defense of Authority* (Sage 1982) 54-67; Ingraham (n 33) 19-36.

[141] Mario Sbriccoli, *Crimen laese maiestatis: Il problema del reato politico alle soglie della scienza penalistica moderna* (Giuffrè 1974) 4.

[142] Fiore (n 71) 14-18; Panagia (n 71) 73.

[143] Giuseppe Sotgiu, *Il Delitto Politico* (Croce 1950) 7-13; Panagia (n 71) 13; Colao (n 93) 379; Neppi Modona, 'Principio di legalità' (n 72) 992-993.

[144] Garfinkel (n 7) 390-393; Cavaliere (n 72) 475-565. Post-war anti-reform analysis sought to minimise the 1930 Penal Code's Fascist content by focusing on a few evidently political offences: Tullio Delogu, 'L'elemento politico nel codice penale', (1945) 1 *Arch. pen.* 161-195. Compare e.g. Paolo Piasenza, 'Tecnicismo giuridico e continuità dello Stato: il dibattito sulla riforma del codice penale e della legge di pubblica sicurezza', (1979) *Pol. dir.* 261-317.

In interwar Britain, political crime was similarly indeterminate and flexible, with a long historical pedigree.[145] Although the 1934 Act in some respects signalled a shift from previous political crimes, perhaps most notably the common law offence of seditious libel,[146] to a relatively more specific type of statutory offence, it was still intended to enable the government to protect its interests through elastic provisions legitimated in a statutory form. While it is important to recall that the government's original plan for this Act was even more flexible but was curtailed through Parliamentary scrutiny and the critical attention of civil society, the final version of the law still evidenced the goal of prioritising security. Like Article 266 therefore, the 1934 Act formed part of a longer pattern of repressive law on political crime.

The two laws also reflected the restricted sense of legality in both systems in the interwar period. The limited meaning of legality under Fascism has been well documented, pointing to its meaning as the expression of the strong state's will, rather than a form of guarantee or protection.[147] Moreover, legality in the common law sense of the rule of law in contemporaneous Britain was similarly malleable, with open-ended legal provisions an accepted technique for upholding and protecting state authority and interests.[148] As a result, despite the differences between them, the 1934

[145] Kirchheimer (n 11) 6-7; Ingraham (n 33) 19-36.
[146] Skinner (n 8) 489-494.
[147] Mario A Cattaneo, 'Il Codice Rocco e l'Eredità Illuministico-Liberale', (1981) 7.1 *Quest. crim.* 99-110; Modona, 'Diritto e giustizia penale' (n 72) 354-355; Bricola (n 93) 32-33.
[148] ECS Wade, 'Constitutional Law' (1935) *L.Q.R.* 235-248, 238 argued that the use of broad security laws was limited in Britain, observing that 'not even the Incitement to Disaffection Act 1934 has caused the most vociferous of daily or weekly periodicals to cease publication.' However, while arguing that 'the law serves the people by creating the machinery for administrative services and setting the proper boundaries for its operation,' he asserted that any government infringement of private rights or

Act was arguably sufficiently similar to Article 266 to provide further evidence of proximity between the two systems' uses of criminal law for political purposes. This highlights the need to interpret 'liberal democratic' law in Britain in this period in a temporally specific and contingent way, and to note that 'Fascist law' was not entirely distinct from the law of its self-declared democratic enemies.[149]

This overlap in the treatment of political crime points to a second intersection between these two laws and systems, which flows from the first and involves the laws' connection of the political and the criminal in relation to security. Both laws on inciting military disloyalty stemmed from governmental fears about the apparent threat of political subversion,[150] especially from international communism and its revolutionary potential. In Britain, the 1934 Act was motivated by a lingering perception of political danger to the state from communist agitation while in Italy Article 266 formed part of the Fascist regime's efforts to secure its hold on power by prohibiting its political opponents and repressing their activities. Although the 1934 Act's provisions were partly explained in Parliament in terms of individual moral blameworthiness, the emphasis was on protecting against internal and external security threats, whereas Article 266 was explicitly connected with the strong state and its war powers, echoing

property 'must be justified by the authority of law, even though that very authority leaves a wide discretion to the Administration.' See also Skinner (n 8) 495-499.

[149] Skinner (n 69).

[150] Justifications expressed in terms of fear and the role of loyalty and identity were to become major themes in post-1945 national security discourse: compare Mark Neocleous, *Critique of Security* (Edinburgh UP 2008) 4-5, 81, 92, 106-141, 123 and Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception* (Elgar 2014), 147-160, 156. See also Kostakopoulou (n 11) 322-326 and Barry Wright, 'Quiescent Leviathan? Citizenship and National Security Measures in Late Modernity' (1998) 25(2) *J. L. & Soc'y* 213-236, 224-229.

Rocco's overarching ideological connection between criminal law and sovereignty. Through their prohibition and punishment of inchoate manifestations of an ideological challenge to the state's control over the military, both the 1934 Act and Article 266 made a political activity into an offence against security, thereby turning a political opponent into a criminal and an enemy of the state.[151] Both laws can thus be seen to intersect in a way that is often associated with historical authoritarianism,[152] but that has also received renewed focus in the more contemporary area of political crimes against security, especially terrorism.[153]

Taking these two intersections together, the main point of interest here is not merely that they can be seen to have existed, illustrating similar practices across different types of system, but that they came about through similar processes and involved similar techniques. That is, these laws and their approaches to pre-empting and prohibiting the expression of threatening ideas became possible and necessary because of the institutional and structural development of security and its military means in the consolidation of the state itself. In addition, both governments sought to use criminal law in particular ways to manage the problems raised by that

[151] Lustgarten (n 8) 116; note also Boukalas (n 12) 364-365.

[152] Perhaps the most (in)famous formulation is in the German context by Carl Schmitt, *The Concept of the Political* (University of Chicago Press 2007) 26 et seq, but Fascist Minister of Justice Alfredo Rocco also emphasised the criminal-enemy conjunction, see Rocco (n 89).

[153] Norrie (n 16) 32; Boukalas (n 12) 376. For a useful overview of the more recent debate see Daniel Ohana, 'Günther Jakobs's *Feindstrafrecht*: A Dispassionate Account' in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (OUP 2014) 353-371. See also Alessandro Gamberini and Renzo Orlandi (eds), *Delitto Politico e Diritto Penale del Nemico* (Monduzzi 2007); Ferrando Mantovani, 'Il diritto penale del nemico, il diritto penale dell'amico, il nemico del diritto penale e l'amico del diritto penale', (2007) *Riv. it. dir. proc. pen.* 470-492.

development. This underlines the importance of the interconnections among the state, law and security, and the ways in which they support each other, or in other words are self-preserving.

These interconnections point to a core of authoritarian potential within the construction and application of power in the modern state, which is explicitly acknowledged and valued in self-declared authoritarian systems (such as Fascism) and has been said to be implicit, or immanent, in liberal systems.[154] This can be seen in the work of Günter Frankenberg, who from the perspective of constitutional law has developed a critical analysis of 'political technology', or the range of practices and strategies that state actors use in the exercise of power.[155] As Frankenberg argues, there is an essential connection to be made between the state 'as a sphere of activity and intervention for intersecting goals and operative activities', law as an important 'form of intervention and basis of authority in the exercise of power,' and the concept of security 'as the main rationale for and objective of political technology.'[156] More specifically, Frankenberg has argued that the connection between 'rule and law' — that is between the activity of ruling a territory, population and politico-legal system by a state and the nature and operation of law — make an authoritarian potential a widespread feature of modernity.[157] In other words, the ways in which states have

[154] Spaulding (n 16) 266, 270, 290; Pildes (n 16) 125; Boukalas (n 12) 359.
[155] Frankenberg (n 104) 1.
[156] Frankenberg (n 104) 1, 3-4.
[157] Frankenberg, 'Authoritarian Constitutionalism' (n 13) 13; Frankenberg, *Authoritarian Constitutionalism* (n 13) xvi, 82-83, 100.

been formed in the modern era and have given authority to power through law so as to effect their rule, and in particular uphold their security, builds into their processes of government the potential for (constrained and legitimate) authority to become authoritarian. That authoritarian potential can also be even more acutely identified within criminal law. As Lindsay Farmer has argued, criminal law has been a common 'modality of rule in the modern state'[158] and as such can be understood as a key aspect of states' 'political technology.' However, as Alan Norrie has explored, criminal law has its own inherent authoritarian potential due to its focus on control through prohibition, culpability and retribution, and the provision for and imposition of punishment.[159] Consequently state practices, 'rule and law', and especially criminal law bring into focus the fine line between authoritative and authoritarian exercises of power, and law's negative potential.

The essence of this interpretive connection is arguably the element of force. This is apparent conceptually in Weber's defining component of the state, which is traceable historically in the state's monopolised means for ensuring its security as part

[158] Farmer (n 102) 43-44.

[159] Norrie (n 16) 18, 26, 29, 32. Norrie constructs his discussion of criminal law's authoritarian tendencies on Franz Neumann's identification of liberal law's combination of legitimating and controlling functions in his 1937 essay, 'The Change in the Function of Law in Modern Society'. Neumann's discussion of authoritarian law focused on 'fascism' in the German sense, or National Socialism. As that regime's approach to law differed from Fascist Italy's, this aspect of Neumann's discussion is not addressed here. However, it is important to recall that Neumann's outline of the modern liberal state emphasised its link with force: 'The liberal state ... has conducted warfare and crushed strikes; with the help of strong navies it has protected its investments, with the help of strong armies it has defended and extended its boundaries, with the help of the police it has restored "peace and order". It has been a strong state precisely in those spheres in which it had to be strong and in which it wanted to be strong. This state, in which laws but not men were to rule... has rested upon force and law...' See Neumann, (Herbert Marcuse, ed), *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (Macmillan 1957) 22.

of its consolidation in a modern form. It is also apparent implicitly and explicitly in the essential characteristics of law itself, in the sense of law's normative authority (the 'force of law'[160]), its enforceability and criminal law's punitive consequences.[161] Where force as the foundation and privilege of power comes to the fore, with the state prioritising its authority through law at the expense of law's restrictive capacity,[162] then authority fulfils its inherent potential and becomes authoritarian. Under Fascism the relationship between force and violence (especially the powers of war and punishment), the state and its law was ideologically and practically pre-eminent,[163] with law envisaged as an extension of the state's will and an institutionalised replacement for physical violence.[164] Article 266 and its ideological aims reflected this perspective. In Britain, such an explicit ideological focus on the relationship between state, law and force was not so apparent, but the 1934 Act makes visible that underlying connection and how the erosion of legal constraints in the Act's terms brought this authoritarian potential closer to the surface.

These two interwar examples of political offences against state security did not therefore reflect a clear distinction between liberal democratic law and authoritarian law under Fascism and rather pointed to a degree of proximity between them in some

[160] This was famously addressed by Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo L. Rev.* 919-1045.
[161] Norrie (n 16) 29.
[162] Turk (n 141) 67-68. See also Paddy Hillyard and Janie Percy-Smith, *The Coercive State: The Decline of Democracy in Britain* (Pinter 1988) 143.
[163] Rocco (n 89).
[164] Klinkhammer (n 67) 398.

respects. While it is essential to recall that they differed in their ideological bases and objectives, and so cannot be said to be entirely the same, their intersections show that both laws and systems tackled this sort of political conduct, and sought to address similar security concerns, based on similar pre-conditions and in similar ways. These connections also highlight some ongoing features of security law, its forms and foundations. By highlighting elements of continuity and commonality within and across prima facie distinct systems in the interwar period, this study shows that the authoritarian potential of political offences does not necessarily entail a temporal and normative distinction or shift away from one value system to another but might already be present within a state's uses of criminal law. Historicizing and comparing the approach to state security indicated by two laws from the 1930s cannot of course provide the key to evaluating all aspects of security law today. However, this study does show how critical engagement with criminal law's authoritarian potential and tendencies in the area of state security,[165] as well as wider concerns with authoritarianism's covert resurgence,[166] can be complemented by analysis of longer-term historical developments and overlaps in law and the interconnected emergence of state and security across ostensibly distinct politico-legal categories.

[165] Frankenberg, *Authoritarian Constitutionalism* (n 13) 84.

[166] Varol (n 15) 1679-1680; see also Sanford Levinson and Jack M Balkin, 'Constitutional Dictatorship: Its Dangers and Its Design', (2010) 94 *Minn. L. Rev.* 1789-1866, 1821-1836 and Kim Lane Scheppele, 'Autocratic Legalism', (2018) 85 *U. Chi. L. Rev.* 545-83.

5. Conclusion

This article has offered the first comparative analysis of offences of inciting military disloyalty and disobedience introduced in Great Britain and Fascist Italy in the 1930s. The study has demonstrated that although these offences were not identical, there were significant overlaps between them, indicating that both states were willing to tackle perceived political threats to their control over their armed forces in similar ways, and that both used criminal law as a repressive and expressive mode of government. This article has also shown that comparing and evaluating political crimes against security needs to encompass their underlying conditions of existence, namely the interconnected development of the modern state and its armed forces, and thereby the consolidation of the state's monopoly of force.

In so doing, the article has contributed further evidence to ongoing discussion about criminal law under Fascism and the extent of its comparability with other contemporaneous systems, specifically here interwar Britain. This has not been intended to suggest that these systems were the same, or that their differences are unimportant because of these legal and historical similarities. It does though underline the need to consider criminal law under Fascism not only in relation to the preceding legal order in Italy, but also in a wider European perspective. At the same time, this historical comparison has also demonstrated its critical potential in questioning the foundations and attributes of liberal democratic law.

Ultimately, this analysis has shown that these historical uses of criminal legislation to protect state security cannot be neatly classified in terms of a liberal democratic/authoritarian distinction, and that these past intersections can generate insights into authoritarian law and the authoritarian potential of liberal democratic law. This suggests that normative evaluation of crimes against security cannot meaningfully occur in systemic or temporal isolation and needs to take account of the ways in which such offences have emerged, converged or diverged in different systems and over time. Although the interwar years were in many ways a unique phase of twentieth-century history, and Italian Fascism is unlikely to shape the resurgence of legal authoritarianism today,[167] reflecting on the legal history of the 1920s-30s can still provide valuable insights into criminal law, state security, and the fragile normative boundaries between liberal democracy and its supposed others.[168]

[167] Hallsworth and Lea (n 10) 142, 153; Scheppele (n 165) 572-573, 582. Compare Griffin (n 65) 26, 146-147.

[168] David Fraser, *The Fragility of Law* (Routledge 2009) 228-230.