

**ANTI-SOCIAL BEHAVIOUR ORDERS: AN INFRINGEMENT OF THE
HUMAN RIGHTS ACT 1998?**

Roger Hopkins Burke and Ruth Morrill¹

INTRODUCTION

Anti-social behaviour orders ... will assist considerably in tackling disorder and anti-social behaviour. ... Much more can and will be achieved, thus producing a better quality of life for our communities.²

There have been growing concerns in recent years about anti-social behaviour, disorder and its damaging effects on communities: in the period 1995/6 to 1997/8, for example, calls to the police for offences such offences increased by 19%.³ It has become a commonplace problem with a devastating impact on the lives of a large number of ordinary, law-abiding people: a reality that was to become increasingly recognised by the 'New' Labour Party while in opposition and latterly in government. Their legislative response, The Crime and Disorder Act 1998 (hereinafter, CDA 1998) introduced a number of measures to protect the most vulnerable people from the intimidating behaviour of the few in their midst.⁴ Section 1 makes provision for Anti-social Behaviour Orders (hereinafter, ASBOs); a community based civil response to any individuals over the age of 10 who acts in any way that causes 'harassment, alarm or distress'. Prohibitions considered necessary to protect the community from further behaviour of the same kind are contained in the orders. Activities that can lead to the obtaining and enforcement of an ASBO may not necessarily amount to 'criminal' behaviour but significantly it is a criminal offence to breach the order and this can result in a maximum jail term of five years.

It is now widely acknowledged as part of the influential communitarian socio-political agenda that emerged in the 1980s in the USA that while individuals have rights in the traditional liberal sense they also have social responsibilities to the whole community for which they can be legitimately held accountable.⁵ ASBOs were introduced by a 'New' Labour government strongly influenced by the communitarian agenda⁶ and its dominant theme that autonomous selves do not live in isolation, but are shaped by the values and culture of communities. From this perspective it has become necessary to take measures to protect and enhance the community against the interests of normless, self-centred atomistic invariably actively anti-social individuals. The question this paper considers is whether that communitarian protectionism has been sought at the expense of individual rights. The paper has the following structure. First, there is an examination of the issue of anti-social behaviour and the case for a legitimate legislative response. Second, the nature of that legislative response is introduced and discussed. Third, a case study of how that legislation has been interpreted and implemented by one local authority is presented. Fourth, there is a discussion of the implementation of that legislative response in the context of debates about the protection of individual human rights.

ANTI-SOCIAL BEHAVIOUR

Disorderly, anti-social behaviour causes alarm and distress, heightens fear of crime and if unchecked can lead to escalating criminal behaviour.⁷

Anti-social behaviour is difficult to define. Behaviour that one person finds anti-social may to another appear commonplace and tolerable. Moreover, the types of behaviour that the public cite worthy of intervention range from the criminal (e.g.

prostitution or damage to property) to sub-criminal (e.g. verbal abuse or noise).⁸ Research has found that police forces do not have a formal definition of anti-social behaviour, but at a local level, it was described as, ‘whatever “minor” problems intrude on the daily life of the communities and leads to calls for police service’.⁹ The CDA 1998 (s.1 [1] a) defines anti-social behaviour as that acting ‘in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as [the defendant]’.

The Policy Action Team (hereinafter, PAT 8) of the Social Exclusion Unit at the Home Office conducted an extensive study of anti-social behaviour throughout the UK and reached the following conclusions. First, the problem is more prevalent in deprived neighbourhoods. Second, if left unchecked such activities can lead to neighbourhood decline. Third, increases in neighbourhood decline greatly heighten the fear of crime. Fourth, these problems are invariably exacerbated by issues of social exclusion and deprivation.¹⁰ There is a clear theoretical link here with the influential ‘broken windows theory’ developed by the US criminologists Wilson and Kelling who have influentially observed that ‘at the community level, disorder and crime are usually inextricably linked. ... If a window is broken and is left unrepaired, all of the rest of the windows will soon be broken’.¹¹ Such untended damage signals that no one cares; there is a breakdown of community controls, an increase in the level of disorder, this becomes perceived as a rise in crime, and there is a threat to ‘social order by creating fear of criminogenic conditions’.¹² In order to arrest and reverse such a ‘spiral of decline’ it is proposed that the police should pursue a ‘problem-oriented’ approach, identify local public problems, decide on an appropriate level of order and then provide informal rules to maintain what contentiously is considered to be an acceptable level in terms of the ‘community’s own moral order’.

The research evidence, which seeks to establish a causal link between disorder and serious crime, is ambiguous. The 1998 British Crime Survey (BCS) established a correlation between areas of high physical disorder and crime victimisation. For example, burglary victimisation was much higher in areas of high disorder than areas of low disorder.¹³ Evidence given to PAT8 suggests a link between anti-social behaviour, neighbourhood decline, disorder and the creation of an environment in which serious crime could thrive.¹⁴ In an extensive survey conducted in forty urban residential neighbourhoods in the USA, Skogan found that regardless of ethnicity, class or other variables, residents within the same neighbourhood were in general agreement as to what constitutes disorder and the extent of the problem in their locality. That disorder was moreover perceived as having played a central role in neighbourhood decline with there being a direct link between disorder and crime. Thus, the fear of disorder was considered rational because it did seem to precede or accompany serious crime and urban decay.¹⁵ Kelling and Coles found that when graffiti and the 'homeless' were challenged on the New York subway system there were dramatic reductions in murder in both the subway and the street.¹⁶ Other researchers have found strong links between anti-social behaviour in childhood and involvement in future criminal behaviour.¹⁷

Clear links have been found between disorder, anti-social behaviour and the fear of crime. The 1994 BCS indicated that respondent perceptions of disorder - for example, noisy neighbours, alcohol and drug misuse - were predictive of concerns about more serious crimes such as mugging and burglary and this fear was independent of the actual level of crime.¹⁸ The Audit Commission (1999) also ascertained that fear of crime is greatest in areas of high physical disorder.¹⁹ Kelling and Coles found that police foot patrols can have an effect on disorder and anti-social behaviour and that this can reduce the fear of crime.²⁰

The 'broken windows' philosophy has been closely linked with 'zero tolerance' policing strategies first introduced in New York City in 1993 and various localities in the UK in subsequent years that have targeted 'quality of life' problems such as graffiti and low level disorder.²¹ These have been widely criticised however for being 'discriminatory initiatives, which target and criminalise economically excluded groups living on the streets'.²² However, in Leicester, in the UK, for example, the local constabulary eschewed zero tolerance-style strategies in the policing of begging and vagrancy in favour of a 'problem-oriented' approach that sought a balance between maintaining order and providing protection for beggars.²³

Some have argued that order-maintenance and zero tolerance policing strategies are compatible, that in order to establish the foundations of a successful problem oriented initiative it is first necessary to target anti-social elements.²⁴ Others consider the styles very different. Chief Constable of Thames Valley, Charles Pollard argues that order maintenance is essentially about 'identifying and describing a complex problem - with some broad ideas about how to solve that problem'. Zero tolerance is simply concerned with solutions, that is, to tackle low-level crime and disorder 'through aggressive, uncompromising law enforcement'.²⁵ Order maintenance policing suggests a wider range of tactics incorporating various local agencies, the community and solutions to the underlying causes of problems rather than merely the symptoms. Moreover, zero tolerance initiatives are invariably selective in 'targeting and criminalising the deprived and disadvantaged, the sad and mad, in order to protect business and commercial interests. It is simply *unfair*'.²⁶ ASBOs appear to focus on the same target with similar implications, a drift towards further intolerance of a marginal group with harsh crime control methods.

Anti-social behaviour and disorder may be a problem at a local level but in order for us to explain these issues adequately, it is necessary to situate them within the context of recent socio-economic change. The majority of the population now participates in unprecedented levels of *consumption*, the 'driving force of action' that has replaced industrial discipline as a motivational force.²⁷ At the other end of the scale, there is a substantial and growing rump - or underclass - that are permanently excluded, a whole class of people 'with quasi-criminal, anti-social, anti-work cultures of welfare dependency, who now threaten the happy security and ordered stability of wider society'.²⁸ For some the underclass is simply synonymous with a dangerous population of socially excluded young people invariably concentrated in particular local authority housing estates characterised by high crime rates and lawlessness.²⁹ This all came to be recognised by the Labour Party in political opposition and they subsequently published two documents proposing a new-style response to anti-social behaviour - the introduction of a 'Community Safety Order' (CSO) - with a strong emphasis on mediation between miscreant and community.³⁰ These documents received widespread support from the public, police and local authorities for such an initiative for it was now widely acknowledged that such behaviour: 'causes distress and misery to innocent, law-abiding people ... has reached unacceptable levels, and revealed a serious gap in the ability of the authorities to tackle this social menace'.³¹ The legislative response contained in the CDA 1998 indicated a much tougher stance with no mention of mediation.

THE ETHOS OF THE CRIME AND DISORDER ACT 1998

The Crime and Disorder Act provides the framework for a radical new empowerment of local people in the fight against crime and disorder. It

gives local authorities, the police and a variety of their key partners specific new responsibilities for the prevention of crime and disorder.³²

In response to a perceived public demand throughout the first half of the 1990s for tough action against crime, 'New' Labour felt they needed to steal the mantle of 'law and order' from the Conservatives. The run up to the General Election of 1997 witnessed the two parties outbidding each other in making commitments to crackdown on crime and social disorder. The Labour Manifesto criticised the Conservative Government for forgetting the 'order' in 'law and order' and promised to 'tackle the unacceptable level of anti-social behaviour and crime on our streets' by being 'tough on crime, tough on the causes of crime'.³³

Aims and Objectives of New Labour Criminal Justice Policy

New Labour criminal justice policy has been fundamentally influenced by left realist criminology. This claims to take crime seriously – particularly, predatory street crime – and prioritises crime committed by working class people against other working class people.³⁴ It is recognised that crime is a reality that makes the lives of many people a misery and that this is particularly true of local authority housing developments and the inner cities; the neighbourhoods that many of the solutions included in the CDA 1998 were expected to target.

Left realists also argue for reduced central state intervention and its replacement by localised multi-agency based forms of crime prevention and control. Thus, in this context the CDA 1998 gives local authorities and the police a statutory duty to work together in partnership to produce a 'community safety strategy'.³⁵ They were provided with tools to tackle behaviour previously not deemed criminal and not covered by

existing legislation but which posed a threat to the stability and order of communities. ASBOs were such a tool.

New Labour's criminal justice policy has been termed 'managerialist penology' whereby a 'permanently dangerous segment of the population (the underclass of permanently excluded, irredeemably dysfunctional deviants) are *managed*'.³⁶ It can be considered in terms of the concept of 'actuarial justice' that removes notions of individual need, diagnosis and rehabilitation from the analytical equation and replaces them with 'actuarial techniques' of classification, risk assessment and resource management.³⁷ The 'underclass' - and in particular the young underclass - are groups identified in this model as being high risk. The Audit Commission report on youth offending was framed in this language and ignored the traditional criminological agenda of locating the causes of offending by seeking to identify risk conditions, for example, lack of parental supervision or truancy.³⁸ These factors have all been incorporated into the provisions contained in the CDA 1998.

Provisions of the Crime and Disorder Act 1998

The CDA 1998 demonstrated New Labour commitment to tackle crime and disorder. Young people were identified as being central to the problem and the thrust of reform was earlier intervention in their lives. A host of non-criminal orders that proactively seek to prevent offending were introduced but which could be enforced by criminal sanction. It was proposed that 'taken together these measures will provide the victims of serious disorder with new, effective weapons to deter those who seem to take delight in making the lives of others a misery'.³⁹ They certainly seemed to uphold Labour's promise to put the 'order' back in 'law and order'.

Fionda nonetheless argues that the legislation and the discussions preceding it reflect a mixture of conflicting aims and ideologies: punishment, welfare, restorative justice, managerialist issues and a ‘responsibilisation strategy’ (where central control is rigidly maintained while active responsibility is delegated to the local level). This she argues has resulted in legislation ‘that is ambiguous in terms of what it is try to achieve and which sends out no clear message about New Labour’s commitment to any political ideology on the subject’.⁴⁰ Brownlee criticises the ethos of the legislation for blaming the problem of ‘crime and disorder’ on a particular group in society and hoping to reduce that threat merely through management while ignoring the wider social origins of anti-social and criminal behaviour.⁴¹ Its critics thus propose that New Labour has selectively borrowed from left realism to justify a tough approach to crime without effective action to rectify the causes of that crime.

The Theoretical Context of Anti-Social Behaviour Orders

The ASBO was just one of a plethora of powers introduced by the CDA 1998 to help communities bighted by anti-social behaviour. Existing legislation had been seen to be inadequate to the task: the police were hampered by the rules of criminal evidence whilst the civil courts provided only lengthy and costly procedures for local authorities and housing associations to pursue. ASBOs would provide a solution. They are a civil action available to both police and local authorities requiring only the civil burden of proof ‘on a balance of probabilities’.⁴² Essentially, they are an attempt to control the threatening and disruptive anti-social behaviour that plagues many neighbourhoods and which puts them at risk of a decline into more serious criminal activity. The emphasis is therefore – in accordance with the concept of actuarialism - on the reduction of risk and hence the prevention of crime.

The primary rationale for the ASBO is the protection of the public. Thus, the duration of an order is not reflective of the offence committed (proportionality) but a period deemed necessary to protect the community (with a two year minimum period available). This is again consistent with the actuarial model where the length of sentence given is not dependent on the crime committed but on the extent of the risk posed by the offender and is therefore contrary to the 'just deserts' principle of proportionality.⁴³

ANTI-SOCIAL BEHAVIOUR ORDERS: A CASE STUDY

They've given [us] an extra weapon in [our] armoury and they've given [us] an effective tool for solving ongoing problems ... in conjunction with the local authorities. The police and the local authority are working well together.⁴⁴

In this section, we discuss how ASBOs are supposed to work in theory and then consider how these had been used in practice one urban location in the middle of England where the local authority had adopted a robust anti-social behaviour strategy and had actively promoted the use of ASBOs.

How Anti-Social Behaviour Orders Work: The Theory

ASBOs are applied for by way of complaint to the Magistrates Court, either by the local authority or the police but only after consultation with each other (s.1 [2] CDA 1998). They are available against any individual over the age of ten who has acted in a anti-social manner, that is, caused, or was likely to cause harassment, alarm or distress to one or more persons not of the household (s.1 [1] {a}). Magistrates act in their civil

capacity and civil rules of evidence apply: thus, the behaviour need only be proved on a balance of probabilities and hearsay evidence is admissible. Where witnesses feel too intimidated to give evidence in court Home Office guidance allows for the use of professional witnesses.⁴⁵ If the application is successful, the court can make an order prohibiting the defendant from behaving in way that had led to the application being sought.⁴⁶ Requirements in the order must be *negative* and must last for a minimum of two years.

Breach of the order is an arrestable offence.⁴⁷ The CPS will conduct the prosecution in a criminal court and evidence of the breach must be of the criminal standard, that is, beyond a reasonable doubt. Cases are triable either way. If heard on indictment in the Crown Court the maximum penalty available at the discretion of the judge is imprisonment for five years, or a fine, or both.⁴⁸ The defendant may use the defence of ‘reasonable excuse’, thus putting the burden of proof on the prosecution.

How Anti-Social Behaviour Orders Work: The Practice

At the time this research was conducted in September 2000, there were 140 ASBOs in force across the country. The Home Office database was aware of 19 breaches of those orders (between 1st April 1999 and 31st June 2000), though the length of sentences is not known.

While the Government had stressed that juveniles are not the main targets of the ASBO⁴⁹ it is readily acknowledged that ‘in the case of 12-17 year olds ... applications may be made more routinely’.⁵⁰ In practice, it would seem that the orders have been mainly used against this group. Three out of the orders granted to the Midlands ASBO Team were for juveniles and this appears to be the case nationally.⁵¹ ASBOs have,

therefore, been used essentially as a means of bringing misbehaving youngsters before the courts, where previously their conduct would have gone undeterred.⁵²

The Midlands ASBO Team suggested that orders were more usefully sought for juveniles not previously drawn into the criminal justice system because it was their intention was to sound a warning without criminalising the individual, to deter both future anti-social behaviour and prevent an escalation of current behaviour. It was readily acknowledged, however, that some young people are already well immersed in the criminal justice system before they reach 17 years of age. The Team cited one of their most high profile cases, Darren Roberts (not his real name) as an example. By the age of 14, he had been arrested in excess of 100 times and received over 60 convictions for offences such as burglary, robbery, harassment, assault and car theft. He was labelled a ‘one-boy crime wave’ in the local newspaper. The team considered the ASBO had come too late for Darren. Almost immediately, he breached the order and he was given a 9-month secure training unit order. They had learned a lesson from this initial interpretation of the ASBO:

We took somebody that was well into the criminal system, the criminal system wasn’t working, and the ASBO was not going to deter him. ... By the time Darren was 13 there had been 13 years of damage and a little court order isn’t going to help him.

ASBOs are useful when targeted at juveniles because they widen the powers of the police and the local authorities to deal with a category of person previously outside the parameters of available powers. Injunctions are only available for persons of 18 years of age and over. The Protection Against Harassment Act 1997 is designed to deal with situations where harassment is directed against an individual or family but not against a

community or where the behaviour is less than harassment but anti-social. This had been the case with Darren Roberts:

He was the only member of the family causing a nuisance, so it was unfair to go for possession [eviction from the local authority home]. He was under eighteen, so we couldn't go for an injunction.

The Team admitted that it is much quicker and easier to get an injunction or use other legislation once a young person reaches the age of eighteen. There are however significant limitations to such a strategy. First, breach of an injunction is not a criminal offence and therefore there is no power of enforcement. Second, they are only available for the actual tenant of local authority accommodation who breaches their contract. ASBOs overcome these problems but take longer to implement because of the need to gather evidence from witnesses and information from other agencies. Third, the police have powers under the Criminal Justice and Public Order Act 1994 and the Protection Against Harassment Act 1997. Nevertheless, this criminal legislation invariably offers only short-term solutions and requires a higher standard of proof. ASBOs were seen to offer a long-term solution to problems that fell outside the remit of the criminal law:

If one 14/15 year old was there, every time it happened that is no evidence of crime whatsoever. But in terms of nuisance and disorderly behaviour, if you can say, this person was making a lot of noise and obviously revelling in it ... they're part of a mob ... a part of the anti-social behaviour.

ASBOs had also been found to provide a potential long-term solution to on-street prostitution in residential areas. The Team were currently considering applying for orders in respect of ten persistent offenders soliciting on the street in the local vice area. Hitherto, prostitution had been an issue solely appropriate to the criminal courts. However, while the police are able to gather sufficient evidence to arrest the women, the criminal penalty is problematically just a fine:

Every week the women go down to the court and dutifully pay their fines, they regard it as a tax on their activities, it does not keep them off the streets.

If the Team were successful in getting an ASBO granted against a prostitute she could be prohibited from working in the whole local authority area and receive a prison sentence if she breached the order. The Criminal Justice Act 1982 s.71 had of course removed the power of the courts to hand down a custodial sentence for prostitution.

The ASBO is just one of a number of measures available to the police in the case of prostitution. It is possible to pursue a criminal line of enquiry and to liaise with the CPS while an order is being sought, and even after it has been imposed. The CPS would be made aware that an ASBO had been made and if breached there would be the possibility of a custodial sentence:

So, the CPS is probably going to say it is not in the public's interest to prosecute. It is not worth the public money because they are going to be dealt with more firmly by the ASBO route. ... It depends on how serious the criminal offence is as to whether they do it solely as criminal, solely as a

breach [as in the case of prostitution], or they might think ... it's worth going down both routes.

The Midland Team were aware of human rights legislation issues but did not foresee any substantial difficulties arising:

The alternative is to make them criminal in the first place, ... either we tolerate anti-social behaviour to some degree or we make that behaviour a crime, which ratchets it up a notch and virtually says that any young person in high spirits is committing a crime.

A necessary balancing act between individual and community rights was readily acknowledged when considering an application but the team considered themselves successful in achieving this:

The Human Rights Act is not a problem because the terms of the order have to relate to previous behaviour that's going to be proportional. We always push the point that ASBOs are community-based orders and members of the community have human rights as well.

But in particular, with regard to concerns about the infringement of the rights of the particular individual:

I don't think they've got anything to worry about. If they don't persist with that behaviour then they don't need to worry do they?

The orders were not considered a punishment simply an attempt to improve the situation in a given geographical area, while seeking to constrain the behaviour of an individual. ASBOs had been introduced with the intention of protecting the rights of communities and the Team asserted that this is exactly what they seek to do, irrespective of the rights of the individual. In fact, this issue of this balance of rights is one of the most intensely debated criticisms of ASBOs.

A BALANCE OF HUMAN RIGHTS?

The excess in severity may be useful for society, but that alone should not justify the added intrusion into the rights of the person punished.⁵³

Getting the balance right

ASBOs were introduced by a government with a strong commitment to communitarian values and the intention of protecting the rights of communities susceptible to unacceptable behaviour of individuals or groups in their midst. Nonetheless, the interests of the community should reasonably be balanced with those of the individual: 'people have a right to be protected against aggression, intimidation and incivilities. At the same time, it is necessary to heed the rights and liberties of disadvantaged citizens'.⁵⁴

Seeking a balance between the rights of the individual and those of the community was a challenge faced in many US cities during the 1980s and 1990s, as communitarianism became an increasingly influential doctrine to the detriment of the more traditional individualism.⁵⁵ Seattle, for example, had long tolerated a population of

street people. During the 1980s, however, they came increasingly to be associated by commercial enterprise with falling revenues; citizens refused to shop in areas in which they felt intimidated and compelled to walk in the road to avoid people begging, insulting them and openly urinating. City Attorney Sidran responded by issuing a set of acceptable behaviour guidelines to the street people. For example, sitting or lying on public sidewalks between the hours of 7am and 9pm was prohibited. Opposition came from libertarians who categorised the legislation ‘anti-homeless’. Sidran explained:

What you get into is some sort of balancing in the hearts and minds of the court about whose sidewalk this is. ... If street people congregate on sidewalks what about those trying to cross the street? Deliver products? Furthermore, if citizens ... withdrew from the streets the homeless would then become victims of predators in their midst.⁵⁶

The Seattle courts decided that this example of order maintenance *did* strike a balance between the rights of the individual (the homeless) and the community (the citizens of Seattle). Had they retained the liberal status quo this would have entailed a violation of the rights of the community, and *vice versa* had the police chosen to take a ‘zero tolerance’ approach and excluded the homeless altogether.

Whether such a balance has been achieved in the British context with the introduction of ASBOs has been a matter for extensive discussion, in particular, since the incorporation of the European Convention on Human Rights (hereinafter, ECHR) into UK domestic law under the Human Rights Act (hereinafter, HRA) 1998. All domestic law would now have to be compatible with the convention. Critics say that the CDA 1998 is not.

The ECHR provides private individuals with no obligation to protect the human rights of another individual but ‘the European Court and Commission have chosen to impose the obligation on state authorities to protect individuals from the actions of other individuals’.⁵⁷ Under Article 8 of the Convention – the right to respect for private and family life – individuals are guaranteed a right to peaceful enjoyment of their homes. Primarily this implies a negative obligation on the state to refrain from arbitrary interference of this right. The European Court has, however, extrapolated from this a *positive obligation* to take action to ensure that Article 8 rights are effectively protected when the threat is from private individuals. This suggests compatibility with ASBOs, which give local authorities the capacity to protect the rights of communities from the activities of specific individuals. Interpreted in this way, orders positively protect human rights.

Others argue, however, that this protection has been achieved at the expense of the protections afforded the ‘offender’. Lord Goodhart summarises this argument thus:

Human rights are not just the right to behave well. ... People have a right to be bloody-minded; they have a right within reason to make a bit of a nuisance of themselves. ... We want to live in a law-abiding society with a low level of crime ... and a low level of vandalism and disorder of all kinds ... but, at the same time, we do not want to live in an authoritarian state.⁵⁸

Von Hirsch et al argue that ASBOs abandon basic legal protections for defendants and thus breach their civil rights.⁵⁹ This human rights critique is founded on three fundamental issues. First, ASBOs require only a civil standard of proof to potentially enforce criminal measures. Indeed, Home Office guidance states that the orders are

intended to deal with criminal or sub-criminal activity, which, for one reason or another, cannot be proven, to the criminal standard, or where criminal proceedings are not appropriate'.⁶⁰ Cracknell argues that this clearly indicates the use of civil law for crime control. The order may have a civil rhetoric but the outcome of the procedure, if violated, can be severe criminal penalties.⁶¹ Von Hirsch et al thus observe that the crime control nature of civil procedures contradict fundamental due-process protections.⁶² Packer had argued that a legitimate criminal justice system should incorporate elements of both 'due-process' and 'crime control' models, a notion of 'balancing' conflicting aims and interests that Ashworth develops observing that they, 'should not be driven by consequentialist calculations of which set of arrangements would produce the most overall benefits to society. Rather, individual rights must be assigned some special weight in the balancing process'.⁶³

It is arguable whether the rights of the individual receive sufficient consideration by those applying for an ASBO. While opponents argue that the threshold for proof is too low, in practice, this might not be the case. The Crown Court has suggested that the civil standard of proof is flexible.⁶⁴ Moreover, the rules of evidence state that, 'if an issue in a civil case involves an allegation that a criminal ... act has been committed, the standard of proof on that issue must be commensurate with the occasion and proportionate to the subject matter'.⁶⁵ In practice, the acceptable lower standard of proof available was not taken literally by the Midlands ASBO Team:

It's hard to say how much [evidence] to need but we tend to go over the top because the cases we take to court we like to be strong.

Moreover, on the issue of the use of witnesses and hearsay evidence (civil procedure):

If we haven't witnessed [the behaviour] we can serve ... a hearsay notice on the defendant but the defence can challenge that and if the witness is not there to be cross-examined the judge won't give that evidence as much weight.

There is a potential argument that the civil rhetoric of ASBOs violates Article 6 of the ECHR– the right to a fair trial – by not affording suspects the criminal safeguards to which they are entitled. Thus, any proceedings established as 'criminal' under Article 6(1) would require further safeguards afforded them by articles 6(2) and 6(3). The case of *Engels vs. Netherlands* (A22, 1976) established the meaning of 'criminal' and this is dependent on three criteria. The first is whether an offence is classified as a criminal offence under domestic law. If this is not the case then the other two criteria become applicable. The second is the nature of the offence and the third, the degree of severity of the penalty.

Once established as criminal under Article 6(1), it is then it is then necessary to turn to Article 6(2) and 6(3). The former concerns the standard of proof, and the ECHR insists that guilt should be proved beyond reasonable doubt (this is not the case with the ASBO).⁶⁶ In respect of the latter, those subject to applications for ASBOs are never formally arrested or advised of their rights, they are not required to be in court for the hearing and they are only entitled to legal aid and witness examination on a civil standard.

However, the Court of Appeal Judges (Civil) have held that ASBOs cannot be deduced as 'criminal' under Article 6(1) because the application procedure is separate from the subsequent criminal proceedings that result from a breach and whose criminal safeguards are provided.⁶⁷ Plowden contests the legitimacy of this finding observing the original order

to be merely a ‘preliminary warning stage in a single process’ in which ‘further warnings are inappropriate, illustrated by the lack of conditional discharges as a penalty upon breach’.⁶⁸

The second fundamental issue raised by human rights critics of ASBOs is the nature of restrictions on behaviour that can be included in an order. A wide variety of conduct - for example playing music or walking in a city centre – behaviour that is neither a criminal violation, nor a civil wrong in itself can be proscribed. This is done to protect the public from future risk of harassment. However, these actuarialist principles are in direct confrontation to the values of commensurate deserts principles: thus, an order *must* last a minimum of two years, in the hope of reducing risk, regardless of the offence. In Manchester, a 15-year-old schoolboy who ‘terrorised a community with threats of murder and fire-bombings’ was banned from entering a designated square mile of the city for a period of ten years.⁶⁹ His behaviour as leader of a gang is certainly worthy of concern and a punitive response would seem in order to protect the community. Nonetheless, a ten-year-long ban on a fifteen year old entering a particular area does appear disproportionate.

Thus, the third fundamental issue raised by human rights critics of ASBOs is the excessive and disproportionate penalties available on breach. The maximum penalty for *intentional* harassment under the Criminal Justice and Public Order Act 1994 is just six months imprisonment and that requires criminal proof. In the Committee stage of discussion of the CDA 1998, Lord Thomas observed that ‘prison will not make the offender truly and earnestly repent and be in love and charity with his neighbour’.⁷⁰ If the ‘offender’ behaves in the proscribed way, not only do they potentially face severe penalties but also they carry the stigma ‘even if he is a person who has otherwise been of completely good character’.⁷¹

These issues principally contradict the ‘balance of proportionality’ inherent in human rights legislation. Any restriction on the rights of an individual should, by characterisation of the ECHR, be proportionate to the legitimate aim they pursue.⁷² It seems that the combination of civil and criminal law available is confusing and inconsistent and defendants are potentially at risk of losing liberties disproportionate to the aim of defending the rights of the community.

Widening the net and stigmatisation

A more general criticism of the CDA 1998 has been the potential for drawing into the criminal justice system a group of people who previously would have ‘avoided’ it. This has been noted as particularly true in respect of juveniles:

[The legislation extends] the concept of ‘delinquency’ to behaviour that falls short of actual criminal offending. Criminal justice authorities are empowered to intervene in these cases of ‘delinquency’, thus widening the youth justice net.⁷³

Moreover, because of the flexible interpretation of ‘anti-social behaviour’ in the legislation, ‘eventually any conduct that displeases neighbours could be deemed “anti-social conduct”. ... The result is to embrace not merely repetitively criminal actors, but also those with unconventional lifestyles.⁷⁴

The crucial significance is that an ASBO can be obtained without a criminal offence having been committed; the behaviour has to be subjectively deemed disruptive and the offender considered *at risk* of their activities developing into something more serious. The outcome is that the range of actions over which local authorities can claim authority

is widening and individual freedom – particularly in the case of juveniles – is being reduced.

These observations are resonant with Stanley Cohen's 'discipline thesis' regarding the development of the decarceration movement during the 1980s and the transition to community sanctions where he argues that an apparently liberal process actually leads to 'net extension and strengthening. ... Intervention comes earlier, it sweeps in more deviants, is extended to those not yet formally adjudicated and becomes more intensive'.⁷⁵ ASBOs can certainly be considered in this way.

Cohen considers the role of labelling and stigmatisation in the net-widening process and this is again an important issue with ASBOs. Subject to an order, the individual may well be labelled: drug addict, prostitute or juvenile delinquent, the formation of a label that predominates when describing the individual or the group. It is a process of 'disintegrative shaming'⁷⁶ with the outcome being a community divided into the law-abiding and a group of outcasts stimulated by their alienation into the formation of deviant subcultures. ASBOs can exacerbate the problem because they offer no potential to de-label and reintegrate the individual but, on the contrary, the stigmatising process will push him or her further and further into a criminal self-concept. In short, targeting these groups in an adversarial way will result in certain section of the community becoming resentful for being blamed for the 'ills of society', interpret this as dismissal from the mainstream and withdraw from the law completely.⁷⁷ Thus, while ASBOs are merely a civil mechanism their potential to 'brand' people as anti-social is a major flaw.⁷⁸

CONCLUSION

The ‘post-modern condition’ is a term used to describe the increasingly fragmented and diverse social world in advanced industrial societies in recent years.⁷⁹ In modern societies there are different and competing viewpoints or grand explanatory theories that explain the world – for example, conservatism, liberalism and socialism – but the proponents of each perspective had the moral confidence in their particular doctrine to solve all problems in society. In the post-modern condition, politics becomes more complex as it becomes necessary to square the diametrically opposite perspectives of multiple interest groups with a range of different and legitimate discourses. Moreover, ‘a post-modern politician who aspires to electoral success needs to identify crucial political issues that concern the widest possible range of interest groups in order to build successful electoral conditions’.⁸⁰

‘New’ Labour is a political party clearly aware of the need to steer a middle path – or ‘third way’ – between competing interest groups in contemporary societies. The guru of this British version of communitarianism - but with substantial international influence - is the Director of the London School of Economics, Anthony Giddens.⁸¹ The intention is to balance the undoubted energy of capitalism with the need to foster social solidarity and civic values: ‘the third way suggests that it is possible to combine social solidarity with a dynamic economy, and this is a goal contemporary social democrats should strive for’.⁸² A crucial identified concern that unites many varied and competing interest groups in communal social solidarity is that of crime and disorder. Thus, it was in this context that the CDA 1998 was introduced to tackle the ‘root cause of crime’ and disorder within local communities. ASBOs are intended to protect the rights of citizens whose lives are blighted by others who behave in a way previously beyond the reach of the criminal law but which nonetheless intrude on the daily life of communities.

Kelling and Coles describe how authorities in various constituencies in the USA have introduced strategies to deal with 'quality of life' issues while invariably being challenged in the courts, usually by the American Civil Liberties Union (ACLU) and other libertarian groups.⁸³ Debates surrounding the introduction and implementation of ASBOs can be seen as a British example of this conflict between civil rights/human rights pressure groups and the 'back to justice lobby' on the one hand and communitarians on the other hand. There have emerged two sets of discourse, each worthy of consideration as both individuals and communities have undoubtedly legitimate rights.

The CDA 1998 communitarian discourse recognises a problem of anti-social behaviour in our communities. Indeed, people have a right to be protected against harassment, alarm, distress and incivilities and it is fair that the police and local authorities should target this behaviour to ensure protection. From that perspective, the ASBO is a reasonable measure that has filled a prominent gap in the law. They are not a punishment but a deterrent and act to stem behaviour before it reaches a criminal level. ASBOs are, however, fraught with problems regarding the civil liberties of individuals. Both the procedures and orders themselves have been attacked because they infringe the fundamental rights of the perpetrator. Local authorities are able to inflict prohibitory conditions without recourse to a criminal court of law and are consequently in conflict with fundamental due process protections.

This paper has suggested that the balance may have shifted too much in favour of 'communities' at the expense of individual liberty. Moreover, due-process values have been sacrificed in the increased pursuit of crime control outcomes with a worrying potential to absorb further into a widening net a whole group of relatively non

problematic young people who left pretty much alone would grow out of their anti-social activities and become respectable members of society.

So, what does the future hold for ASBOs? One possibility is to hear applications in a criminal court so that orders continue in their present form but individuals are afforded better safeguards. There are, however, two potential problems with this proposal. First, this would amplify the problem of 'net-widening' by 'criminalising' an excluded group who might not be involved in criminal behaviour. Second, there would be considerable resource implications. ASBOs were introduced in their present civil form so that the police do not have to spend considerable time gathering criminal evidence, a 'quick fix' was seen to be needed to quell anti-social behaviour before it develops into something more serious. If the evidence requirements were increased to the criminal standard then local authorities might just as well wait for the behaviour to escalate and use the criminal law against the offender. Nothing would be really gained.

There is nonetheless a case for revision. Speaking to the Midlands ASBO Team, two issues became apparent. First, ASBOs are most useful used against those at an early stage in their anti-social/criminal career; and second they are best targeted at those who already have behaved in some way that has been proved to a criminal standard, for example, in the case of convicted prostitutes. In most of these cases the individuals have received criminal penalties but with little deterrent effect. The ASBO reinforces the element of deterrence and prohibits the individual only from breaking the law. It is not drawing people into the net who are 'otherwise law-abiding' for they are proven lawbreakers. Perhaps, therefore, specific conditions should apply before an order can be sought. For example, a perpetrator should have a significant but not substantial criminal record - because ASBOs have been shown not to work for people with a long history of

offending - and they thus should be imposed at an early stage. The standard of proof required should be of a 'higher civil standard'.

ASBOs have a legitimate and appropriate future in a communitarian criminal justice policy. It would be a mistake to abandon or seriously curtail their use because measures are needed to tackle a grievous social threat to many communities. It is however appropriate to consider and reconsider the issue of civil liberties and human rights in terms of their long-term implementation.

¹ Roger Hopkins Burke is Director of The Nottingham Crime Research Unit and The Nottingham Trent University. Ruth Morrill is a graduate of the BA Criminology programme at the Nottingham Trent University and is to commence doctoral studies at the Institute of Criminology at Cambridge University.

² HMIC, *Keeping the Peace: Policing Disorder* (HMSO, 1999).

³ Home Office, *Report of Policy Action Team 8: Anti-Social Behaviour* (Social Exclusion Unit: National Strategy For Neighbourhood Renewal, 2000a), para 1.23.

⁴ Crime Prevention News, *Flagship Bill Unveiled*, (Jan-Mar, 1998)

⁵ See A. Etzioni, *The Spirit of Community: The Reinvention of American Society*, Touchstone, 1993); A Etzioni (ed.) *The New Communitarian Thinking: Persons, Virtues, Institutions and Communities*, University of Virginia Press, 1995; R. Hopkins Burke, 'Begging, Vagrancy and Disorder', in R. Hopkins Burke, *Zero Tolerance Policing* (Perpetuity Press, 1998).

⁶ See: A. Giddens, *The Third Way: The Renewal of Social Democracy*, (Polity Press, 1998); A Giddens, *The Third Way and Its Critics*, (Polity Press 2001).

⁷ Home Office, *Anti-Social Behaviour and Disorder* (Annual Report, 1998C).

⁸ Home Office, *Anti-Social Behaviour* (Crime Prevention Toolkits, 2000a).

⁹ N. Bland and T. Read, 'Policing Anti-social Behaviour', *Policing and Reducing Crime Unit Paper 123* (Home Office, 2000) p.5.

¹⁰ Home Office op. cit. (2000b).

¹¹ J.Q. Wilson and G.L. Kelling, 'Broken Windows' (*Atlantic Monthly*, March, 1982), p.31.

¹² G.L. Kelling and C. M. Coles, *Fixing Broken Windows* (Free Press, 1996), p.17.

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- ¹³ C. Mirlees-Black, P. Mayhew and A. Percy, A. (*The 1998 British Crime Survey*, (Research and Statistics Directorate, 1998).
- ¹⁴ Home Office, (op cit, 2000a).
- ¹⁵ W. Skogan, *Disorder and Decline: Crime and the Spiral Decay in American Neighbourhoods*, (The Free Press, 1990).
- ¹⁶ Kelling and Coles, (op cit), p. 20.
- ¹⁷ D.P. Farrington, *Human Development and Criminal Careers*, in M. Maguire, R. Morgan and R. Reiner (eds) *Oxford Handbook of Criminology* (2nd edn), (Clarendon Press, 1997) pp. 361-408. J. Elander, M. Rutter, E. Sminoff, and A. Pickles 'Explanations for Apparent Late Onset Criminality in a High-Risk sample of Children Followed Up in Adult Life', (*British Journal of Criminology*, Vol. 40(3), 2000) pp. 497-509.
- ¹⁸ M. Hough, *Anxiety About Crime: Findings from the 1994 British Crime Survey*, Home Office Research Study No 147, (HMSO, 1995).
- ¹⁹ Audit Commission, *Life's Work, A: Local Authorities, Economic Development and Regeneration*, (Audit Commission, 1999).
- ²⁰ Kelling and Coles (op cit).
- ²¹ See R.D. Hopkins Burke, 'The Contextualisation of Zero Tolerance Policing Strategies', in Hopkins Burke (op cit, 1998), pp. 11-38.
- ²² R.D. Hopkins Burke, 'The Regulation of Begging and Vagrancy: A Critical Discussion', *Crime Prevention and Community Safety: An International Journal*, (Vol. 2[2], 2000).
- ²³ R.D. Hopkins Burke, 'Begging, Vagrancy and Disorder', in R.D. Hopkins Burke (op cit, 1998).
- ²⁴ N. Dennis and R. Mallon, 'Confident Policing in Hartlepool' in N. Dennis (ed.) *Zero Tolerance: Policing a Free Society*, (Institute for Economic Affairs; 1997). T. Romeanes, 'A Question of Confidence: Zero Tolerance and Problem Oriented Policing' in R. Hopkins Burke (op cit, 1998).
- ²⁵ Pollard, C. (1998) 'Zero-Tolerance: Short-term Fix, Long-term Liability?' in N. Dennis (ed.) (op cit).
- ²⁶ Hopkins Burke (op cit, 2000), p.50.
- ²⁷ R. Reiner, 'Policing and the Police', in M. Maguire et al, (op cit, 1997) pp. 1051-1093.
- ²⁸ R. MacDonald, *Youth, the 'Underclass' and Social Exclusion*, (Routledge, 1997), p.2.

-
- ²⁹ Home Office, *Community Safety Order: A Consultation Paper*, (HMSO, 1997); A. Bottoms and P. Wiles 'Environmental Criminology', in M. Maguire et al, (op cit), pp. 305-59); Bland and Read, (op cit); Home Office, (op cit, 2000b).
- ³⁰ Labour Party, *A Quiet Life: Tough Action on Criminal Neighbours*, (Labour Party, 1995); Home Office, (op cit, 1997).
- ³¹ Home Office, (op cit, 2000b), para.1.26.
- ³² HMIC (op cit), p.8.
- ³³ Labour Party, *Labour Party Manifesto*, (Labour Party, 1997).
- ³⁴ R. D. Hopkins Burke, *An Introduction to Criminological Theory*, (Willan, 2001), pp. 217-30.
- ³⁵ A. Crawford, *Crime Prevention and Community Safety: Politics, Policies and Practices*, (Longmans, 1998), p. 62.
- ³⁶ L. Brownlee, 'New Labour - New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy' (*Journal of Law and Society*, 1998), Vol. 25 No. 3 p. 324.
- ³⁷ M. Feeley and J. Simon, 'Actuarial Justice: The Emerging New Criminal Law', in D. Nelken (ed.) *The Futures of Criminology* (Sage, 1994).
- ³⁸ Audit Commission, *Misspent Youth: Young People and Crime*, (Audit Commission, 1996).
- ³⁹ Home Office, *Crime and Disorder Act 1998*, (Home Office, 1998b).
- ⁴⁰ J. Fionda, 'New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998', (*Criminal Law Review*, 1999), p. 37.
- ⁴¹ Brownlee, (op cit), p.328.
- ⁴² Home Office, *The Crime and Disorder Act 1998*, (Home Office, 1998d), para. 48.
- ⁴³ A. von Hirsch, *Doing Justice: The Choice of Punishments*. Report of the Committee for the Study of Incarceration, (Hill and Wang, 1976)
- ⁴⁴ Police officer attached to Midlands ASBO Team
- ⁴⁵ Home Office, (op cit, 1998d), para 4.9
- ⁴⁶ Ibid, para 6.10
- ⁴⁷ Home Office, (op cit, 1998b), s.1 [10]
- ⁴⁸ Ibid, s.1 [10][b]
- ⁴⁹ N, Padfield, *A Guide to the Crime and Disorder Act 1998*, (Butterworth, 1998), p.15
- ⁵⁰ Home Office, (op cit, 1998d), para. 5.9

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- ⁵¹ Between April 1999 and September 2001 466 ASBOs were granted nationally, 74% were in respect of those 21 years of age and under. Source: S. Campbell, 'A Review of Anti-social Behaviour Orders', *Home Office Research Study 236*, (Home Office, 2002).
- ⁵² M. Rowan, 'Anti-social Behaviour Orders – Further Comment', *Justice of the Peace*, (Vol. 163, No. 40, 1999), p. 794.
- ⁵³ A. Von Hirsch, *Doing Justice: The Choice of Punishments*, (Hill and Wang, 1976), p. 70.
- ⁵⁴ Hopkins Burke, (op cit, 2000), p. 43
- ⁵⁵ See Kelling and Coles, (op cit).
- ⁵⁶ Cited in ibid, p. 218.
- ⁵⁷ K. Starmer, *European Human Rights Law*, (Legal Action Group, 2000), p. 194.
- ⁵⁸ HL Report, (HMSO, 03 Feb. 1998), Col. 534
- ⁵⁹ A. Von Hirsch, A. Ashworth, M. Wasik, A.T.H. Smith, R. Morgan and J. Gardner, 'Overtaking on the Right', (*New Law Journal*, 1999), p. 1501
- ⁶⁰ Home Office, (op cit, 1998d), para. 2.6.
- ⁶¹ S. Cracknell, 'Anti-Social Behaviour Orders', (*Journal of Social Welfare and Family Law*, 2000), Vol. 22 No. 1, pp. 108-15.
- ⁶² Von Hirsch et al, (op cit).
- ⁶³ A. Ashworth, *Sentencing and Criminal Justice*, (Weidenfeld and Nicolson, 1992).
- ⁶⁴ P. Tain, 'Anti-social Behaviour Orders', (*Solicitors Journal*, 2001), Vol. 145 No. 2, p. 36.
- ⁶⁵ R. Bagshaw, (ed.), *Cross & Wilkins Outline of the Law of Evidence* (7th edn), (Butterworth, 1996).
- ⁶⁶ Barbera, Messegue & Jabardo vs. Spain [1989] 11 EHRR 360.
- ⁶⁷ *McCann & Others vs. Manchester Crown Court*, [2001] ENCA CIV 218).
- ⁶⁸ P. Plowden, 'Love Thy Neighbour', (*New Law Journal*, 1999), p. 520.
- ⁶⁹ The Times, 'Boy, 15 is Exiled After Reign of Terror', (*Times*, 24th April 2001), p. 5.
- ⁷⁰ HL Debate, (HMSO, 03 Feb 1998), Col 600
- ⁷¹ Ibid, Col 599
- ⁷² Starmer, (op cit), p.170.
- ⁷³ Fionda, (op cit), p. 45.
- ⁷⁴ Von Hirsch et al, (op cit), p. 1501.
- ⁷⁵ S. Cohen, *Visions of Social Control*, (Polity Press, 1985), pp. 126-7.

⁷⁶ J. Braithwaite, *Crime, Shame and Reintegration*, (Cambridge University Press, 1989).

⁷⁷ J. Muncie, 'Institutionalised Intolerance: Youth Justice and the 1998 Crime and Disorder Act', (*Critical Social Policy*, 1998), Vol. 19 No. 2, p. 60.

⁷⁸ Tain, (op cit).

⁷⁹ Hopkins Burke, (op cit, 2001), pp. 231-45.

⁸⁰ Hopkins Burke, (op cit, 2000), p. 46.

⁸¹ Giddens, (op cit, 1998), (Op Cit, 2001).

⁸² Giddens, (op cit, 2001), p.5.

⁸³ Kelling and Coles, (op cit).