UNIVERSITY OF SOUTHAMPTON

FACULTY OF LAW, ARTS AND SOCIAL SCIENCES

School of Law

Analysing Criminal Justice Policy: The Anti-Social Behaviour Order and the Pervasive Effect of Packer's Two Models of the Criminal Justice Process

by

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ABSTRACT

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ANALYSING CRIMINAL JUSTICE POLICY: THE ANTI-SOCIAL BEHAVIOUR ORDER AND THE PERVASIVE EFFECT OF PACKER'S TWO MODELS OF THE CRIMINAL JUSTICE PROCESS

By Stuart Keith Macdonald

Herbert Packer claimed that his due process and crime control models of the criminal justice process provide a framework which may be used to analyse criminal justice policy. Although Packer's models have been subjected to widespread academic criticism, the basic approach at the heart of his analytical framework – to view criminal justice policy as a clash between two polarized value systems – is still influential today. An outstanding example of this is provided by the debates which preceded the coming into force of the Anti-Social Behaviour Order (ASBO). This dissertation argues that there are three fundamental lessons which any analysis of criminal justice policy must heed, and shows that the polarized approach which underlies Packer's framework fails to heed these lessons. This meant that during the debates surrounding the ASBO key issues of concern were reduced to unnecessarily restrictive choices between two courses of action. This dissertation offers a more thorough analysis of these issues, which enables proposals for the reform of ASBO to be advanced.

Chapter one explains the thinking that lay behind the creation of the ASBO. It outlines the reasons why New Labour regarded existing arrangements as unable to tackle anti-social behaviour effectively, and describes how the ASBO was designed to overcome the problems New Labour perceived in tackling anti-social behaviour through either the civil or criminal law. Chapter two details the concerns held by critics of the ASBO, and New Labour's response to these. In the course of this discussion two themes are introduced – New Labour and the critics' different perspectives of state power, and the notion that a central task in criminal justice policy is to balance the competing demands of defendants' rights and victims' interests. Chapter three critically discusses Packer's two models of the criminal justice process. To aid the analysis of Packer's work Nils Jareborg's exposition of a defensive model of, and offensive approach to, criminal justice policy are also discussed. In the course of this discussion the chapter draws out three lessons which any analysis of criminal justice policy must heed. Packer's failure to heed these lessons is detailed. Chapter four shows that, notwithstanding its deficiencies, the basic approach at the heart of Packer's analytical framework pervaded the debates surrounding the ASBO. This resulted in an impoverished analysis of key issues of concern. A more thorough discussion of these issues is offered, and proposals for reform of the ASBO are advanced.

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Introduction

Herbert Packer is best known for his exposition of the due process and crime control models of the criminal justice process. These models, he claimed, provide a framework which may be used to analyse criminal justice policy. Over the years Packer's models have been subjected to widespread academic criticism. Yet, paradoxically, the basic approach at the heart of his analytical framework – to view criminal justice policy as a clash between two polarized value systems – is still influential today. This dissertation argues that the important task of balancing the many different values which compete for priority in the criminal justice process will be hindered if three fundamental lessons are not heeded. The polarized approach which underlies Packer's framework fails to heed these lessons. An outstanding example of this is provided by the debates which preceded the coming into force of the Anti-Social Behaviour Order (ASBO). These debates were pervaded by the polarized approach to analysing criminal justice policy, with the result that key issues of concern were reduced to unnecessarily restrictive choices between two courses of action. An analysis of these issues which moves away from the polarized approach will be offered, which will enable proposals for the reform of ASBO to be advanced.

The dissertation begins by describing the debates surrounding the ASBO in detail in the first two chapters. Chapter one will explore the thinking that lay behind New Labour's decision to create the ASBO. It will be shown that, having become convinced that existing arrangements were inadequate to tackle anti-social behaviour effectively, New Labour chose to create a hybrid remedy which, they believed, would overcome the problems involved in tackling such behaviour through either the civil law or the criminal law. The focus of chapter two will be the concerns voiced by critics of the ASBO and New Labour's response to them. These concerns will be presented in two groups. The first group regard the definition of "anti-social behaviour." The second group relate to the terms of, and penalties for breaching, an ASBO. It will be shown that the cumulative effect of this second group of concerns led many commentators to argue that proceedings for the imposition of an Order had been incorrectly classified as civil in nature.

In chapter three attention will switch to Packer's two models of the criminal justice process. Nils Jareborg's exposition of a defensive model of, and offensive approach to, criminal justice policy will also be introduced; placing Jareborg's work alongside Packer's due process and crime control models will aid the explication and analysis of the latter. It will be shown that Packer's description of the crime control model is confused as a result of his failure to distinguish three different forms of efficiency. Properly understood, the desire to repress criminal conduct is not at the heart of the crime control model. It will also be shown that there is no necessary

connection between the values which Packer ascribed to his due process model. Since these values may conflict, the due process model is flawed. This critique of Packer's models will seek to draw out three lessons. First, three tools – ideal-types, strategies and ideals – which may be used to analyse criminal justice policy must be distinguished. The indiscriminate use of the word "model" to describe these different tools should be avoided. Second, the challenge in criminal justice policy is not to balance the competing demands of two value systems, but to balance the competing demands of many different values. The analytical framework employed must therefore be multi-dimensional. Third, a simple "yes/no" approach to the way in which values are held – either a value is a priority or it isn't – is inadequate. Any analysis of criminal justice policy must have regard to the different ways in which values are held. It will be shown that a failure to heed these three lessons infests Packer's exposition of the crime control and due process models.

Drawing on the material presented in chapters one and two, chapter four will show that, in spite of its failings, the basic approach at the heart of Packer's analytical framework was influential in the debates surrounding the ASBO. It will be shown that the parties involved in the debates thought in terms of two value systems; despite frequent references to the purported need to "balance" defendants' rights and victims' interests, the parties took up clearly polarized positions. This approach not only led both New Labour and the critics to level overly-simplistic accusations at one another, but also resulted in an impoverished approach to the two main areas of concern detailed in chapter two – the definition of "anti-social behaviour" and the problem of witness intimidation (which lay at the heart of the decision to classify proceedings for the imposition of an ASBO as civil in nature). A more thorough discussion of these two areas of concern will be offered. It will be shown that, as one moves away from a polarized approach to the issues involved, it is possible to advance proposals which would have addressed the concerns of both New Labour and the critics. In the light of these proposals a modified version of the ASBO will be presented which demonstrates the benefits of resisting a polarized approach to criminal justice policy – an approach which also prevails in other areas of growing concern such as terrorism and immigration.

Chapter One: The Creation of the ASBO

1. Introduction

Anti-Social Behaviour Orders (ASBOs) were created by section 1 of the Crime and Disorder Act 1998 – pride of place in the first major criminal justice legislation produced by the New Labour Government. But despite initial projections that 5000 ASBOs would be issued a year,[1] only 1337 were reported to the Home Office from the date section 1 entered into force (1st April 1999) to 30th June 2003.[2] This disappointing response to the Orders led to steps being taken to enhance their effectiveness in the Police Reform Act 2002 and the Anti-Social Behaviour Act 2003.[3] Following these reforms the Orders have continued to form a prominent part of New Labour's efforts to tackle anti-social behaviour. In a White Paper published in March 2003 Home Secretary David Blunkett set out the Government's intention to deal with anti-social behaviour by building upon "existing measures such as Anti-Social Behaviour Orders," adding:

> "For the first time, ASBOs gave the police and courts proper powers to address anti-social behaviour. ASBOs are an effective method of tackling low level nuisance like vandalism, stone-throwing and general abusive behaviour"[4]

Eight years earlier, in June 1995, New Labour had published the consultation paper *A Quiet Life*.[5] This document claimed that consultation with the police, local authorities, councillors and MPs had revealed "intense dissatisfaction with the extent

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[1] See, for example, Jack Straw, HC Written Answers vol 305 col 138 27 January 1998.

[2] Home Office website. This figure does conceal an increase in the use of the ASBO. Of the 1337 ASBOs issued during this period, 466 were issued between April 1st 1999 and September 30th 2001 – an average of 15.53 ASBOs per month (Siobhan Campbell, *A Review of Anti-Social Behaviour Orders* Home Office Research Study 236 (London: Home Office Research, Development and Statistics Directorate, 2002) at 7). The other 871 ASBOs were issued between 1st October 2001 and 30th June 2003 – an average of 41.48 per month. However, this remains far short of the anticipated 5000 ASBOs per year (416.67 per month).

[3] ss61-66 Police Reform Act 2002 and ss85-86 Anti-Social Behaviour Act 2003 made a number of amendments to s1 Crime and Disorder Act 1998, including, *inter alia*, the introduction of interim ASBOs, enabling the British Transport Police, registered social landlords, Housing Action Trusts and County Councils to apply for ASBOs, extending the geographical area over which an ASBO can be made to any defined area of England and Wales, and giving criminal courts the power to issues ASBOs on conviction of a criminal offence and County Courts the power to issues ASBOs alongside related proceedings (see further section 4.1 below).

[4] Home Office *Respect and Responsibility – Taking a Stand against Anti-Social Behaviour* Cm 5778 (2003) at 3 and para 1.18.

[5] *A Quiet Life: Tough Action on Criminal Neighbours* (London: Labour Party, 1995) (hereafter *A Quiet Life*).

and speed of existing procedures"[6] used to tackle anti-social behaviour. This "system failure"[7] meant that "new remedies [needed] to be developed."[8] The remedy which *A Quiet Life* proposed essentially amounted to a "special form of injunction,"[9] breach of which was punished with criminal penalties. In this embryonic form the remedy was called the Community Safety Order; within three years it had evolved to become the Anti-Social Behaviour Order. Alun Michael, a key player in the ASBO's journey onto the statute book, summed up New Labour's satisfaction with its new remedy when he declared:

> "We have thought about it long and hard and have teased out a way of dealing with anti-social behaviour which has been widely welcomed throughout the country"[10]

Notwithstanding such self-congratulatory remarks, the immediate response to the proposals contained in *A Quiet Life* had been disparaging. Home Secretary Michael Howard described them as "a bit of pretence of precisely the kind that we have come to expect from the Labour Party"[11] and Prime Minister John Major dismissed them as "merely window dressing on Labour's part."[12] Alun Michael's frustration at the Government's response was clear:

> "If he had the sense of the average Llanelli rugby player, the Home Secretary would have picked up the ball, accepted the constructive suggestion from the Opposition and gained credit for it himself by taking action on it"[13]

It was not long before the pressure exerted by the strong Opposition and local authorities anxious to tackle the growing problem of anti-social behaviour forced the politically weak Government into action. When the Housing Bill (to become the

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[6] ibid at 6.

[7] ibid at 6.

[8] ibid at 8.

[9] ibid at 8.

[10] HC Standing Committee B col 37 28 April 1998. Alun Michael was Home Office minister on the Commons Standing Committee on the Crime and Disorder Bill.

[11] HC Deb vol 262 col 469 22 June 1995.

[12] HC Deb vol 262 col 472 22 June 1995.

[13] HC Deb vol 268 col 627 8 December 1995.

Housing Act 1996) was presented to the Commons in January 1996, Part V of the Bill, entitled "Conduct of Tenants," contained three chapters aimed at confronting the problem of anti-social behaviour.[14] However, in New Labour's eyes these provisions did not go far enough. They proposed a number of amendments during the Bill's passage through Parliament designed to strengthen both its civil and criminal law provisions.[15] In addition to these Nick Raynsford (shadow Housing Minister) tabled an

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[14] The first chapter introduced an introductory tenancy scheme. Local authorities could set up introductory tenancies, lasting for 12 months, after which the tenancy would become a secure one (see ss124-125). This would make it easier for local authorities to evict nuisance tenants in the first twelve months of their occupation. Whilst the landlord must give reasons for its decision to seek an order for possession (s128(3)), and this decision may be subject to internal review (see s129), the statute contains no limitations on what those reasons may be. The only clues found in the statute itself as to the purpose of introductory tenancies are the heading of Part V – "conduct of tenants" – and the content of the other two chapters (see below). In chapter seven of the White Paper *Our Future Homes* (Department of the Environment *Our Future Homes: Opportunity, Choice, Responsibility: the Government's Housing Policies for England and Wales* Cm 2901 (1995)) the Government described the scheme as one for "tenancies on a probationary basis," to allow landlords at any time during the probationary period to be able to terminate the tenancies of "the minority of tenants who do not behave responsibly" (at 44). The second chapter strengthened the grounds on which social and private landlords could evict secure tenants for nuisance, in particular, by making it easier for professional witnesses to give evidence when tenants are too frightened to do so. In the Commons Standing Committee on the Bill David Curry introduced a Government amendment which substituted the expression "has been guilty of conduct *causing or likely to cause a nuisance or annoyance*" into clauses 108, 111, 115 and 116 (see now ss144, 148, 152, 153). The purpose of this expression was "to provide for third-party witnesses, such as a local authority officer or a professional witness, to give evidence ... [L]andlords should be able to obtain possession in some cases on evidence from third parties who are not victims. In the interests of fairness, the anti-social behaviour must be causing a nuisance to others or be likely to do so" (HC Standing Committee G col 383 27 February 1996). The other ways in which the Government strengthened the grounds for evicting secure tenants for nuisance were, first, by saying that the nuisance may be caused by a mere visitor to the property rather than someone residing there, second, the nuisance need not be to someone actually living in the relevant area, it may be to a person living, visiting or merely engaged in a lawful activity there, and third, the area of the nuisance is no longer confined to include only those who can be described as "neighbours," it is extended to cover the "locality." The third chapter provides that a power of arrest may be attached to an injunction obtained by a public landlord against one of its tenants (s153). And following pressure exerted by New Labour (see n15 below), the third chapter also expressly provides that injunctions can be taken out by local authorities to stop anti-social behaviour where violence had occurred or was threatened (s152). A practice that had been growing in popularity was for local authorities to combat nuisance on local authority estates using injunctions, sought under a variety of provisions including tenancy agreements, s222 Local Government Act 1972, nuisance, and actions for trespass as landowner. s152 of the Housing Act 1996 expressly provides for a power for local authorities to apply for injunctions against anti-social behaviour, thus obviating the need to rely on other powers. It also provides that a court may attach a power of arrest to an injunction granted under this provision (s152(6)).

[15] New Labour were keen to express their dissatisfaction at the scope of the civil law provisions, with Clive Betts, for example, stating, "[it] is not only tenants who create problems of neighbour nuisance. Some of the worst cases I have come across have involved owner-occupiers" (HC Deb vol 270 col 715 29 January 1996). Nick Raynsford accordingly introduced an amendment at the Standing Committee stage which was designed to enable local authorities to seek injunctions against anyone in residential accommodation who creates a nuisance, as opposed to merely its own tenants. The Government refused to grant such a power, expressing reluctance to enable local authorities to exclude people from the house they own. Undeterred by this, Baroness Hollis tabled an amendment on behalf of New Labour at the Lords Committee stage of the Bill, proposing that s222 Local Government Act 1972 be amended. She explained that where a person living on a council estate is the victim of abuse or harassment perpetrated by an owner-

amendment at the Standing Committee stage which would have had the effect of creating a Community Safety Order broadly similar to the one proposed in *A Quiet Life*.[16] Government Minister David Curry, however, dismissed the proposal as "hare-

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occupier, a visitor, a private sector tenant, or a housing association tenant, all the local authority can do is use public law remedies. She recited the tale of the Finnie brothers, explaining how witness intimidation had prevented Coventry City Council from gaining an injunction under s222 (see section 3.2 below), and further added that other local authorities had, in similar situations, been unable to rely on the section at all since judges had held that there was not a wide enough public interest at stake. Her amendment was therefore designed to make it clear that s222 may be used by a local authority "as the basis for an injunction to exclude anyone, not just its own tenants, from coming into a defined area of its estate if the judge agrees that serious anti-social behaviour has occurred or is likely to occur" (HL Deb vol 573 col 304 18 June 1996). Although Baroness Hollis' amendment was rejected, the pressure exerted by New Labour resulted in the Government moving an amendment at the Report stage of the Bill to introduce "a new clause which provides local authorities with a specific power to obtain an injunction to restrain the anti-social behaviour of non-tenants on council estates ... It is essential that local authorities also have an effective way of dealing with those who are not tenants and cause trouble on estates" (Lord Lucas, HL Deb vol 574 col 429 10 July 1996). (The clause is now s152 of the Act.) New Labour also made other, unsuccessful, attempts to bolster the civil law provisions in the Bill. These included, *inter alia*, an amendment to give local authorities mandatory grounds for possession against tenants guilty of serious anti-social behaviour, an amendment to introduce a fast-track procedure for local authorities seeking possession in serious cases of anti-social behaviour, an amendment to make it mandatory to attach the power of arrest to injunctions granted against anti-social behaviour, and various amendments designed to tackle the problem of witness intimidation, including one which proposed a new clause creating witness protection orders backed up with the power of arrest. To strengthen the Bill's criminal law provisions Keith Vaz unsuccessfully proposed the creation of a new offence of harassment of a residential occupier, which would penalise a *series* of crimes or tortious acts that forced someone to give up their home, reflecting New Labour's concern that the criminal law treats crime as an "acute" condition and is thus least effective where the offending behaviour is "chronic" (see section 3.2 below).

[16] The proposed clause 10 contained 20 sub-sections. This complex provision provided that the head of a local authority may apply for a Community Safety Order (cl 10(2)), after consulting with the superintendent of the local police force (cl 10(4)). Applications should be made in the county court (cl 10(1)). An Order could only be made if the respondent had either committed "not less than five unlawful acts within an area that in the opinion of the applicant forms a neighbourhood which have interfered with the peace or comfort of one or more residential occupiers in that neighbourhood or members of their households" (cl 10(9)(a)), or "on not less than five occasions been guilty of damaging property belonging to a qualifying person within an area that in the opinion of the applicant forms a neighbourhood" (cl 10(9)(b)), or "has been guilty on not less than five occasions of conduct which amounts to an offence under any provisions of the Public Order Act 1984 (as amended) (*sic*) and these offences have been committed within a qualifying area" (cl 10(9)(c)), or "has been guilty on not less than five occasions of a combination of the matters described in subparagraphs (a) to (c)" (cl 10(9)(d)). An act is considered unlawful if it is either a crime or a tort (cl 10(13)), and a person is deemed guilty of the act "if he has committed the act whether or not he has been convicted of that act by a criminal court and proof of that act shall be required on the balance of probabilities" (cl 10(14)). The Order may contain "such provisions as the court considers necessary to protect persons living in or visiting property owned or managed by a qualifying person from crime, harassment or intimidation or to protect property belonging to any person living in such property or property belonging to a qualifying person," and could include exclusion orders, curfew orders, or restraints from approaching particular people (cl 10(5)). A "qualifying area" is one which the local authority considers to be a neighbourhood and which includes dwellings belonging to a qualifying person (cl 10(11)). A "qualifying person" is either a local authority, a housing action trust, a registered social landlord, or a housing association (cl 10(12)), and a "residential occupier" is a person occupying premises as a residence where the premises belong to a qualifying person or are in the vicinity of premises belonging to a qualifying person (cl 10(10)). If the conditions for making an Order are met in relation to a child or young person, an Order may be made (a) against the child if they are over 10 years of age, and (b) in any case,

brained," accrediting it to Jack Straw, "who is lurching so far to the right that it is causing terrible difficulties for his own party."[17] He argued that the new remedy was unnecessary, bureaucratic and heavy-handed, and referred to a letter from the Penal Affairs Consortium which urged the Government to resist the introduction of a Community Safety Order. Significantly, Labour backbencher Andrew Bennett also considered his party's proposals for a Community Safety Order to be "ill-conceived," arguing that the real problem was a lack of resources for dealing with "tearaway kids" and for the provision of "effective witness protection systems" – "If we want to bring peace back into our communities, we have to spend money."[18]

This episode did nothing to dampen New Labour's enthusiasm for its idea of imposing court orders with criminal penalties for breach. Following a spate of high-profile cases of stalking, in March 1996 Labour Member Janet Anderson introduced to the Commons a Private Member's Bill aimed at addressing the problem. In terms reminiscent of *A Quiet Life* she claimed that "the law is inadequate to deal with the problem [of stalking]."[19] Also invocative of *A Quiet Life* was the remedy she advanced; clause 3 of the Bill proposed that magistrates should, on the application of someone who is being stalked, be able to make a prohibitory order, and that breach of such an order should constitute a criminal offence.[20] Although the Stalking Bill never received a Second Reading in the Commons,[21] the combination of the media pressure generated

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against the parent or guardian of the child (cl 10(7)). An Order against a parent or guardian may require them to take specified steps to ensure the child complies with the Order, rather than require the child to comply with the Order (cl 10(8)). A person who breaches an Order commits an offence, and is liable (a) on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or both; (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 5 years or to both (cl 10(19)). The penalty of five years' imprisonment for breach of an Order was in fact two years less than the maximum sentence first suggested in *A Quiet Life*.

[17] HC Standing Committee G cols 438, 439 29 February 1996.

[18] HC Standing Committee G cols 442-443 29 February 1996.

[19] HC Deb vol 273 col 370 6 March 1996. She referred in particular to the case of Anthony Burstow, who had instigated a hate campaign against Tracey Sant for three years, commenting that it "took five days of tortuous legal wrangling" (at col 370) before he was convicted for infliction of grievous bodily harm (s20 Offences Against the Person Act 1861) and jailed for three years. His later appeal against conviction was dismissed by the House of Lords (*R v Ireland*; *R v Burstow* [1998] AC 147). The creative approach towards the law of assault which the House of Lords were forced to take in this case merely added weight to Janet Anderson's contention. "Certainly, there should be legal protection from such conduct. But the law of assault is the wrong medium" (Simester & Sullivan *Criminal Law: Theory and Doctrine* (2nd edn.)(Oxford: Hart Publishing, 2003) at 383).

[20] Clause 2 of the Bill also provided for a separate criminal offence of stalking, carrying a maximum sentence of 5 years' imprisonment.

[21] The same proposals were introduced to the House of Lords by Lord McIntosh in the Stalking (No 2) Bill. This Bill was passed by the Lords and sent to the Commons, where it never received a Second Reading.

by the high-profile instances of stalking and the need to respond to an Opposition who had stolen a march over them led to the Government hastily publishing the consultation paper *Stalking – The Solutions*.[22] This document recommended a combination of civil and criminal measures to combat stalking, including the use of civil orders. On the question of how to deal with breaches of such orders, the Government said:

> "Though the civil courts should retain the power to deal with such breaches as contempt [of court], the Government considers that breach of an injunction in the case of stalking should also be capable of being a criminal offence, punishable by up to five years' imprisonment"[23]

The resulting Protection from Harassment Act 1997 created four criminal offences and a civil tort of harassment. Section 4 created the offence of "putting people in fear of violence" (punishable on conviction on indictment by five years' imprisonment (s4(4))) and section 2 created the offence of "harassment" (a summary offence punishable by six months' imprisonment (s2(2)). The other two criminal offences adopted the "quasi-criminal" formula first proposed in *A Quiet Life*. First, where a defendant is convicted of either of the s4 offence or the s2 offence, the criminal court is empowered by s5(1) to issue a civil restraining order, breach of which is a crime (s5(5)) punishable with a maximum of five years' imprisonment (s5(6)). Second, in civil proceedings brought by the victim of a course of conduct amounting to harassment[24] the court may grant an injunction in order to restrain the defendant, breach of which is also a crime (s3(6)) punishable with a maximum of five years' imprisonment (s3(9)).[25] These two offences led to one commentator describing the Act as a "cuckoo's egg neatly placed by Labour in the nest of the Conservative Government."[26]

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[22] London: Home Office, 1996.

[23] *Stalking – The Solutions* (n22 above) at para 5.12.

[24] Civil proceedings may also be brought by someone who apprehends being a victim of harassment (s3(1)).

[25] For more detail on the provisions of the Protection from Harassment Act 1997 see Emily Finch *The Criminalisation of Stalking* (London: Cavendish Publishing, 2001) chapter six.

[26] Andrew Rutherford 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain' in Penny Green and Andrew Rutherford (eds.) *Criminal Policy in Transition* (Oxford: Hart Publishing, 2000) at 48.

Furthermore, whilst the behaviour ostensibly targeted by the Act was stalking, Home Secretary Michael Howard was keen to stress that its scope included "not only stalkers, but disruptive neighbours and those who target people because of the colour of their skin"[27] as well. Whilst shadow Home Secretary Jack Straw welcomed the fact that the Government had "eventually [woken] up" to the "serious problem" of "criminal anti-social behaviour by bad neighbours," he criticised the Act, claiming it contained "serious defects" and was "too little, too late," pointing in particular to the fact that the "civil remedies provided by [the Act] are available only at the suit of the individual victim."[28] So just six months later – four months after their landslide General Election victory – New Labour repeated their proposals for a Community Safety Order in a Home Office Consultation Paper.[29] Three months later they introduced the Crime and Disorder Bill to the House of Lords, with the Government's proposed new remedy, which by now had been re-named the Anti-Social Behaviour Order, proudly showcased in clause 1 of the Bill. At the Bill's Second Reading in the Commons Straw, now Home Secretary, boasted:

> "There is also a long-overdue new remedy for communities that are ground down by the chronic bullying and harassment by a selfish minority ... The anti-social behaviour order adapts traditional civil and criminal procedures to tackle that serious persistent anti-social behaviour"[30]

During its passage through Parliament the ASBO faced little opposition. Indeed, at the Report stage of the Bill Conservative MPs angrily denied suggestions that they had not given the ASBO their full support, with Sir Norman Fowler proclaiming "[w]e are at one with the Government in the aims that lie behind the anti-social behaviour orders."[31] And in response to allegations that he had objected to the ASBO during the Standing Committee debates Edward Leigh stated bluntly, "the Opposition were not opposed to the anti-social behaviour orders in Committee."[32] In fact during the entire Parliamentary passage of the Bill only two amendments relating to the ASBO

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[27] HC Deb vol 287 col 781 17 December 1996.

[28] HC Deb vol 287 cols 792-793 17 December 1996. For more on this concern, see section 3.1 below.

[29] Home Office *Community Safety Order: A Consultation Paper* (London: Home Office, 1997) (hereafter *Community Safety Order*).

[30] HC Deb vol 310 col 373 8 April 1998.

[31] HC Deb vol 314 col 942 23 June 1998.

[32] HC Deb vol 314 col 727 22 June 1998.

were pressed to a division.[33] Both were tabled by Liberal Democrat peer Lord Goodhart, yet even he was keen to stress that "[w]e do not oppose it [the ASBO] in principle; we accept the need for a stronger, more effective remedy against the so-called neighbours from hell."[34] And so it was that the ASBO made the last step of its journey onto the statute book smoothly; the Bill received Royal Assent on 31st July 1998 and ASBOs became available on April 1st the following year.

This chapter and the one following it will examine the period which has just been outlined.[35] Chapter two will explore the various criticisms made of the proposal for an Anti-Social Behaviour Order, and consider New Labour's response to these criticisms. The present chapter will analyse the thinking that lay behind the creation of the ASBO. It will begin, in section 2, by showing that New Labour's motivation for tackling anti-social behaviour was not simply to protect victims; they were also driven by a concern to tackle the disorder and petty crime which, they believed, can lead to a downward spiral, resulting in further, and more serious, crime. The main purpose of this chapter, however, is to show that New Labour, having become convinced that a system failure meant that existing provisions were unable to deal effectively with anti-social behaviour, chose to create a hybrid remedy which, they believed, would overcome the problems involved in tackling such behaviour through either the civil law or the criminal law. To this end, section 3 will detail the reasons why New Labour perceived the civil and criminal laws as unable to respond effectively to anti-social behaviour. Section 4 will then describe s1 Crime and Disorder Act 1998 in greater detail than has been done hitherto, before going on to explain how the ASBO was intended to address the problems involved in relying on either civil or criminal law. Finally, an example will be employed to illustrate how New Labour expected the ASBO to operate more effectively than existing provisions.

2. The Aim of the ASBO

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[33] Both amendments were tabled at the Report stage. The effect of the first amendment would have been that an ASBO could not be imposed if the defendant did not act with an intention to harass or cause alarm or distress, nor if his actions were not likely to cause serious and justified alarm and distress. The second amendment would have ensured that the courts have sole discretion over whether an ASBO is discharged. Ir both instances the Labour and Conservative peers joined forces, with the first amendment being defeated 131-43 and the second 120-40.

[34] HL Deb vol 584 col 586 16 December 1997.

[35] For other commentaries on the ASBO see Alison Brown 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 Howard JCJ 203, Elizabeth Burney 'Talking Tough, Acting Coy: What Happened to the Anti-Social Behaviour Order?' (2002) 41 Howard JCJ 469, Sarah Cracknell 'Anti-Social Behaviour Orders' (2000) 22(1) JSWFL 108, Roger Hopkins-Burke and Ruth Morrill 'Anti-Social Behaviour Orders: An Infringement of the Human Rights Act 1998?' (2002) 11(2) Nott LJ 1 and Andrew Rutherford 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain' (n26 above).

2.1. To protect victims of anti-social behaviour

At the Second Reading of the Crime and Disorder Bill Jack Straw asserted that the Labour party had "lost its way" during the early 1980s, "not least by failing to listen to those whom we claimed to represent, and by failing to learn from them." Tony Blair, he maintained, had sought to correct this and ensure "that our policy making would be inspired above all by our constituents." Straw explained that during his constituency work in the early 1990s "[m]ore and more people came to me complaining of intolerable anti-social behaviour, of harassment and of intimidation." This led him to undertake "a serious examination of how to reverse the apparently inexorable rise in anti-social behaviour and teenage crime." The product of this, the ASBO, was thus "born out of the experience of our constituents," and was designed to "shift the balance of power in communities from the anti-social and the criminal to the law-abiding majority." It therefore represented "a triumph of community politics over detached metropolitan elites."[36]

The concern to protect victims of anti-social behaviour featured prominently throughout the ASBO's journey onto the statute book. The opening words of *A Quiet Life* declared:

> "Every citizen, every family, has the right to a quiet life – a right to go about their lawful business without harassment or criminal behaviour by their neighbours. But across Britain there are thousands of people whose lives are made a misery by the people next door, down the street or on the floor above or below. Their behaviour may not just be unneighbourly, but intolerable and outrageous"[37]

Although by the time the Crime and Disorder Bill was passing through Parliament New Labour had ceased to talk of a "right to a quiet life," they continued to couch their concern to protect victims of anti-social behaviour in terms of human rights. When presenting the Crime and Disorder Bill to the Commons Jack Straw said "[m]y wish is that everyone should enjoy that most basic of human rights: the right to live life free from fear and free from crime."[38] In the House of Lords, meanwhile, Lord Williams explained that the ASBO would "preserve the basic right of any citizen in our society to be protected; to have the opportunity which governments should provide to

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[36] HC Deb vol 310 cols 370-372 8 April 1998.

[37] *A Quiet Life* at 1.

[38] HC Deb vol 310 col 370 8 April 1998.

us all – namely, to have a calm life."[39] In spite of this nebulous rights-based reasoning,[40] New Labour's desire to protect those whose lives are made a misery by the anti-social behaviour of others is clear.[41]

2.2. A means of combating crime

In the Summer of 1995 Jack Straw visited New York to study the policing tactics employed by William Bratton, Commissoner of the city's police. Bratton's "zero tolerance" approach had been inspired in part[42] by his reading of the "Broken

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[39] HL Deb vol 585 col 508 3 February 1998. Lord Williams was Parliamentary Under-Secretary of State in the Home Office.

[40] In Hohfeldian terms, a right is a legal claim of one person (X) that another person (Y) acts or omits to act in a certain way. The correlative of a right is a duty; so Y is said to have a duty to act or omit to act in that way. A privilege (or liberty) describes the position of a person (X) who is free to do, or refrain from, some act without transgressing a legal obligation to another person. The correlative of a privilege is a no-right; so Y is said to have a no-right that X acts or omits to act in a certain way. In chapter two of his book *Rights & Law – Analysis & Theory* (Oxford: Hart Publishing, 1997) Andrew Halpin argues that Hohfeld is inconsistent in his definition of the concept of a privilege. Hohfeld defines the concept in two distinct ways; first as equivalent to a no-duty (X is under no obligation to Y to act or omit to act in a certain way), and second as a positive protection given by the law to do, or refrain from doing, a permitted act (X is protected from Y preventing him acting, or refraining from acting, in a certain way). Either way, Halpin argues that the Hohfeldian concept of a privilege is not a "fundamental" concept. If the first definition is accepted, a privilege may be reduced to the negation of a duty. If the second definition is accepted the concept is again reducible since the privilege may be broken down into a set of protective right-duty relations. Enjoyment of a quiet life cannot be described as a right. It may only be held to be a privilege in the second of the two senses identified by Halpin. A privilege of enjoying a quiet life would consist of a set of right-duty relations under which X is protected from Y preventing him enjoying a quiet life (X has a right that Y does not keep him awake at night with loud music, has a right that Y does not congregate outside his house with a large group of friends, and so on). What must not be overlooked, however, is that Y may also be said to enjoy certain privileges. For example, Y may be said to have a privilege of enjoying his music (Y has a right that X does not prevent him from playing his music whenever he wants to listen to it and at whatever volume he wants to listen to it at) and a privilege of associating with others (Y has a right that X does not prevent him from gathering with as many of his friends as he chooses, wherever he chooses). In the concluding chapter of his book Halpin writes, "[r]ights express the resolution within society of situations of conflict between the interests of different members of society" (at 264). He continues, "*any* approach may find expression in terms of rights, and we do not advance any debate by diverting attention from the issue of what right-duty relationships are appropriate, to a confused discussion over whether one side has, or should have, rights or not ... Where rights do have value when fully analysed is to provide us with an understanding of the way in which the interests of individuals need to be justified as entitlements as against the interests of other individuals" (at 265-266, emphasis original). This neatly encapsulates the flaw in New Labour's reasoning. Instead of justifying (a) the existence of X's privilege to enjoy a quiet life and the consequent duties imposed upon others such as Y, and (b) any restrictions which, as a result, are imposed upon privileges which Y may be said to enjoy, New Labour merely assert that restrictions upon the conduct of Y are justified by the existence of X's "right to a quiet life."

[41] For a more recent example, see the recent White Paper *Respect and Responsibility* (n4 above) where David Blunkett talks of our responsibility to "[respect] each other's property, [respect] the streets and public places we share and [respect] our neighbours' right to live free from harassment and distress" (at 3).

[42] Bratton also recalls a paper delivered by Kelling which "put into beautiful words what I had found from experience." The paper was entitled 'Police and Communities: The Quiet

Windows" article co-written by James Q. Wilson and George Kelling.[43] In this article Wilson and Kelling argue that, just as a broken window can signal that nobody cares about a building and so lead to further vandalism, so unchecked disorderly behaviour can signal that nobody cares about a community and so lead to more serious disorder and crime. It is thus in areas where disorderly behaviour goes unchecked that more serious street crime is likely to flourish. An ill-smelling drunk, a group of rowdy teenagers or an importuning panhandler may, in effect, become the first broken window.

On his return from New York Straw stated to the House of Commons that "[f]or too long, insufficient attention has been given to disorder on our streets and to the powerful connection between unchecked disorder and much more serious crime."[44] He continued, "[t]here are lessons to be learned from the policies being followed in New York in relation to disorder and tackling the petty disorder and petty crime that people all too often turn their faces away from, and which the police sometimes say they are too busy to deal with."[45] A concern to tackle such disorder was, he said, at the heart of the proposals contained in *A Quiet Life*; the Community Safety Order was designed "to give local police and local authorities much more effective powers for dealing with persistent disorder and criminal anti-social behaviour."[46] Similarly, in a speech delivered to the Howard League for Penal Reform Straw asserted – with reference to the work of Kelling – that "crime and disorder are intimately linked," explaining:

> "Disorder and insecurity creates a vicious circle of community decline in which those who are able to move out do so, whilst those who cannot have to modify

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Revolution' and was delivered to the Harvard Executive Session in 1988 (see William Bratton with Peter Knobler *Turnaround: How America's Top Cop Reversed the Crime Epidemic* (New York: Random House, 1998) at 138).

[43] 'Broken Windows: The Police and Neighborhood Safety' (1982) 249 *The Atlantic Monthly* 29.

[44] HC Deb vol 271 col 46 5 February 1996.

[45] HC Deb vol 271 col 49 5 February 1996. Neil Addison and Timothy Lawson-Cruttenden have argued that New Labour were also influenced by the approach taken to serious anti-social behaviour by the San Jose City Council ('Anti-Social Behaviour Orders' (1999) 92 Crim Law 5). A gang known as Varrio Sure o Town congregated regularly in the Rocksprings area of the city. They would drink, play loud music, fight, use profane language, urinate on residents' garages, smoke dope, and even snort cocaine laid out in neat lines on the boot of residents' cars. Murder, theft, vandalism, drive-by shootings and arson were commonplace. The City Attorney of San Jose sought a broad injunction against all the gang's activities in Rocksprings under California's public nuisance statutes. This was granted by the Superior Court of Santa Clara county, and although the Court of Appeal disagreed (limiting the scope of permissible injunctive relief to independently criminal conduct), the Supreme Court of California eventually upheld the City Council's approach (*The People ex rel. Joan Gallo v Carlos Acuna et al* 929 P.2d 596 (California) 1997).

[46] HC Deb vol 271 col 46 5 February 1996.

their behaviour and avoid the streets, squares and parks which they used to use. This leads to a breakdown in community ties, a reduction in natural social controls, and to the area tipping further into decline, economic dislocation and crime"

Having concluded that "[w]hat is needed ... are community based management strategies for tackling disorder and reducing fear," he then commended the *A Quiet Life* proposals as a "new and imaginative" way of tackling "the problem of anti-social criminal neighbours."[47]

The "broken windows" thesis continues to feature prominently in New Labour's criminal justice policy. In a description of his commitment to tackling anti-social behaviour Jack Straw's successor as Home Secretary, David Blunkett, has written:

> "We have seen the way communities spiral downwards once windows get broken and are not fixed, graffiti spreads and stays there, cars are left abandoned, streets get grimier and dirtier, youths hang around street corners intimidating the elderly. The result: crime increases, fear goes up and people feel trapped"[48]

So protecting victims of anti-social behaviour was not the sole purpose of the ASBO; New Labour were also concerned to tackle the types of disorder which, according to Wilson and Kelling, can lead to more serious disorder and crime.

3. A System Failure

Hand-in-hand with New Labour's determination to tackle anti-social behaviour went their insistence that a "system failure"[49] meant that such behaviour could not "be dealt with effectively by existing measures."[50] Jack Straw consistently maintained that

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[47] 13th Annual Conference of the Howard League for Penal Reform, New College Oxford, 12 September 1995. In an e-mail sent to me Andrew Rutherford recalls the end of Straw's speech: "I chaired the Howard League meeting and commented in my thanks to Straw that it was a little odd that he cited with such approval someone (Kelling) who worked closely with James Q. Wilson (a long-time adviser to the Reagan administration). While leaving the platform he turned to me and said in a testy voice: 'The problem with you people from the left ...' which was a little odd since we had not met before and the Howard League is a bi-partisan organisation." Straw has also asserted the link between disorder and crime more recently. For example: "[W]here there are high levels of incivility in an area, the chance of people suffering, for example, a violent crime is four times greater than in other similar areas. If we deal with disorder, we can cut a great deal of crime" (HC Deb vol 327 col 910 16 March 1999).

[48] *Respect and Responsibility* (n4 above) at 3.

[49] n7 above.

[50] Alun Michael (HC Standing Committee B col 47 30 April 1998).

"it is clear that the current system is not working."[51] On one occasion he described the situation on the Stoke Heath estate in Coventry following the lifting of an injunction which had restrained the by now notorious Finnie brothers from entering a defined area of the estate[52] and concluded, "many people took the only action that they could take within the system – they moved from the area in which they had spent their lives."[53] It was against this background that the ASBO was presented as a new and imaginative way of combating anti-social behaviour, the solution to this system failure:

> "The order addresses real situations which have caused misery for many people ... People are having their lives ruined by behaviour that is not prevented or dealt with by current legislation"[54]

This section will explain the problems New Labour perceived in tackling anti-social behaviour through either the civil law or the criminal law. It will be shown that New Labour identified five reasons why the civil law was unable to deal effectively with anti-social behaviour, and four reasons why the same was true of the criminal law. Section 4 will begin by describing the ASBO in greater detail, and then describe how New Labour expected their new remedy to overcome the problems involved in tackling anti-social behaviour through either the civil law or the criminal law.

3.1. The perceived deficiencies of the civil law

Jack Straw's main criticism of the Protection from Harassment Act 1997 – which, as noted above, the Conservative Government believed could be employed to tackle anti-social behaviour – was that the civil remedies provided by the Act are only available at the suit of the individual victim.[55] As a result of this the Act failed to address the first two reasons why, according to New Labour, the civil law is unable to respond effectively to anti-social behaviour. The Consultation Paper *Community Safety Order*, published six months after the Protection from Harassment Act received Royal Assent, explained that many victims are too frightened to take steps under civil law; "[c]ivil injunctions require the injured party to take action, which many are too

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[51] Speech to the Howard League (n47 above).

[52] See section 3.2 below.

[53] HC Deb vol 310 col 371 8 April 1998.

[54] Alun Michael (HC Standing Committee B col 37 28 April 1998).

[55] See n28 above.

frightened to do in the circumstances in question."[56] This concern was echoed by Lord Williams at the Lords Committee stage of the Crime and Disorder Bill:

> "At present [victims of anti-social behaviour] have no protection. They cannot afford to look for civil injunctions. I go further; in many well-documented cases, they are afraid to do that"[57]

As well as the fear of reprisals, this extract also highlights the second problem New Labour perceived in the civil law – expense. Many victims of anti-social behaviour cannot afford to take action under the civil law. This is particularly likely to be so where, as is often the case, the victim is elderly and/or poor.

The third reason identified was the problem of delay. New Labour were concerned that it could take some time for civil proceedings to get to court, during which time the anti-social behaviour could continue unchecked.[58] In particular they were concerned that, by failing to turn up at a hearing, a perpetrator of anti-social behaviour could cause proceedings to be adjourned, leading to unnecessary delay.[59]

It was stated in *A Quiet Life* that "when effective action has been taken to curb [anti-social] criminal behaviour, it is often the result of a combination of administrative action by the police, local authorities, housing associations, or other agencies relying on the use of the civil law."[60] This was illustrated by the two case studies found in *A Quiet Life*,[61] the second of which concerned Family X from Blackburn. In a letter sent to Jack Straw (MP for Blackburn) in May 1994, the superintendent of the local police wrote, "this family are causing great distress among their neighbours who feel that the situation is close to intolerable ... There is no doubt that this family is responsible for many problems and the quality of life of people living in the area has been adversely affected."[62] The five family members had been arrested a total of 54 times for offences including attempted robbery, burglary, theft, criminal damage and public disorder.

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[56] *Community Safety Order* at para 3.

[57] HL Deb vol 585 col 513 3 February 1998.

[58] See, for example, *A Quiet Life* at 1.

[59] Alun Michael, for example, described the risk that perpetrators of anti-social behaviour might not turn up, which "could lead to an intolerable delay and a continuation of the very behaviour we wish to prohibit" (HC Standing Committee B col 96 30 April 1998).

[60] *A Quiet Life* at 1.

[61] These two case studies are also found in the Guidance Notes published in March 1999 (Home Office *Anti-Social Behaviour Orders – Guidance* (London: Home Office, 1999) at 16-17).

[62] *A Quiet Life* at 4.

Twice their public landlord had evicted them in order to remove them from the area. However, the family reappeared in private rented accommodation, meaning "the local authority has no locus to evict them."[63] *A Quiet Life* thus lamented, "administrative action by public landlords is only available where the anti-social family happen to be their tenants."[64] It was this concern that lay behind New Labour's calls, during the Parliamentary passage of the Housing Bill, for a power to be granted to enable local authorities to seek injunctions against *anyone* in residential accommodation who creates a nuisance. This pressure culminated in the Conservative Government creating a new clause (now s152) which provided local authorities with a power to obtain an injunction to restrain the anti-social behaviour of non-tenants on council estates.[65] For New Labour, however, this power did not go far enough. In *Community Safety Order* they complained that the "Housing Act measures do not apply outside the locality of local authority housing,"[66] adding that "the range of conduct covered is less broad than that proposed for Community Safety Orders."[67] The enactment of the Protection from Harassment Act the following year also failed to appease them:

> "The Protection from Harassment Act may well in practice, provide an effective remedy for an individual who is the subject of individual harassment of a specific kind, but its provisions are not designed to deal with, and will be less effective in, situations where harassment is directed at a community rather than an individual or family, or where the behaviour is anti-social but not necessarily harassing"[68]

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[63] *A Quiet Life* at 5.

[64] *A Quiet Life* at 7.

[65] See n15 above.

[66] See ss152(1), (2).

[67] An injunction may not be granted under s152 Housing Act 1996 unless the respondent has used or threatened to use violence against a qualifying person (s152(3)(a)) and there is a significant risk of harm to that person, or a person of a similar description, if the injunction is not granted (s152(3)(b)). For the range of conduct covered by the ASBO, see section 4.1 below.

[68] *Community Safety Order* at para 3. What New Labour regarded as a "conceptual difference" between the Protection from Harassment Act and the ASBO was originally reflected in the Crime and Disorder Bill. Clause 1(1)(a) initially stated that the defendant's behaviour must have caused or been likely to cause harassment, alarm or distress to "two or more persons not of the same household" as the defendant. The reason for this requirement was that the ASBO "is not individualised in terms of a single individual complainant. It is designed to be a community measure ... We believe that where an individual is harassed that is covered by the Protection from Harassment Act 1997" (Lord Williams HL Deb vol 585 col 545 3 February 1998). At the Lords Report stage of the Bill, however, Conservative peer Lord Henley tabled an amendment, which the Government accepted, removing the requirement that at least two persons must have been/were likely to have been caused harassment, alarm or distress. The Government expressed agreement with Lord Henley's assertion that "there may be occasions when those

New Labour's fourth reason for believing that the civil law was unable to deal effectively with anti-social behaviour was thus the limited scope of existing provisions. Their final reason was more fundamental; they asserted that, even if broader provisions were enacted, it was "in principle less satisfactory"[69] to tackle anti-social behaviour through the civil law. At the heart of this lay an insistence that serious cases of anti-social behaviour should be dealt with by the criminal justice process so as to invoke the censure of the criminal law:

> "Anti-social behaviour is a menace on our streets; it is a threat to our communities. We aim to prevent it as far as we may. A civil order is part of the regime for doing that. But ultimately, we regard such behaviour as criminal"[70]

So even if the scope of the civil law were broadened, and the problems of fear, expense, and delay were adequately addressed, the lesser degree of censure which civil law remedies convey meant that they could play only a secondary role in New Labour's efforts to combat anti-social behaviour.

3.2. The perceived deficiencies of the criminal law

It was thus to the criminal law that New Labour turned in order to find an effective way of combating anti-social behaviour. What they found, however, was that "[t]he criminal justice system appeared to be incapable of enforcing decent standards of public behaviour on children and adults alike."[71] "Nowhere," claimed Jack Straw, "is the failure of the criminal justice system greater than in dealing with the problems of local disorder."[72] In fact, asserted *A Quiet Life*, it was the "deficiencies in the criminal justice process in dealing with chronic anti-social behaviour" that had led the police to rely on administrative action against Family X from Blackburn instead of seeking criminal sanctions.

New Labour highlighted four problems in the criminal law. The first of these problems was fear. Just as victims of anti-social behaviour are frequently too afraid to

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suffering from the mischief were solitary individuals, rather than two or more persons, and that those persons would not necessarily have the benefit of the protection provided by the Protection From Harassment Act 1997. Therefore, the protection which orders of this sort can provide may also be appropriate for them" (HL Deb vol 587 col 578 17 March 1998).

[69] *A Quiet Life* at 6.

[70] Lord Williams (HL Deb vol 585 col 603 3 February 1998).

[71] Jack Straw (HC Deb vol 310 col 370 8 April 1998).

[72] HC Deb vol 267 col 549 21 November 1995.

bring civil law proceedings, so they are often too scared to give evidence in criminal proceedings:

> "I have witnessed the fear of constituents – that they will not make a complaint, and are even less willing to become the principal prosecution witness in a criminal prosecution."[73]

Like the case study of Family X, the first case study contained in *A Quiet Life* was used to illustrate that when effective action had been taken against anti-social behaviour it was the result of relying on the civil law. The case study involved the Finnie brothers, John (aged 29) and David (aged 27), who lived on the Stoke Heath estate in Coventry. The brothers were allegedly responsible for a series of crimes on the estate, including burglary, harassment, intimidation and fire bombing. Coventry City Council had been faced with a very high level of requests for re-housing from tenants in the area, a disproportionate amount of staff time was spent dealing with complaints from tenants about burglary and intimidation, and a number of council properties had stood vacant for excessively long periods. In order to give the inhabitants of the estate some respite, the Council obtained an *ex parte* interlocutory injunction under s222 Local Government Act 1972 which prohibited the brothers from entering a one-mile exclusion zone on the estate. Their mother Janet welcomed the ban, saying, "[m]y boys have caused havoc around here and I feel extremely sorry for the other families. I am glad that all this has been sorted out for all the people who have been upset by what me lads have done."[74] The chair of the residents' association commented, "[l]ocal people have had to put up with the most horrific crime in the last few years. This injunction is a step in the right direction."[75] Jack Straw was also impressed by the success of the injunction:

> "After it [Coventry City Council] made legal history by winning injunctions to exclude the two men from the estate, the quality of life for residents was restored. When I visited the estate, I saw that measured by the reduction in the number of voids – dwellings that had been left empty – on it"[76]

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[73] Jack Straw (HC Deb vol 287 col 792 17 December 1996).

[74] 'Brothers banned from estate after crime spree' *The Guardian* 25 February 1995. However, it should be noted that if she had opposed the injunction she faced eviction from her home.

[75] *A Quiet Life* at 4.

[76] HC Deb vol 310 col 371 8 April 1998.

However, nine months after the publication of *A Quiet Life*, in March 1996, the Finnie brothers applied to have the injunction set aside.[77] The City Council reluctantly accepted Queen's Counsel Sir Louis Blom-Cooper's advice to withdraw from the action. At the *ex parte* hearing in February 1995 the Council's case had been based on a series of affidavits from Council and Police officers and a number of mainly ex-residents. Whilst this was sufficient at the *ex parte* hearing, the value of this evidence at a full trial would have been severely limited. At the *ex parte* hearing hearsay evidence was admissible, so it had not been necessary to identify witnesses in order to obtain the Order. A letter from Coventry's chief housing officer explained:

> "Counsel had hoped that, in the intervening period, it would have been possible to gain more evidence from police records, or from other victims being prepared to speak out. Without victims being identified our case is weak. Despite exhaustive efforts it has not been possible to persuade more victims to come forward. Hence, the harassment and intimidation which we were trying to tackle, is the very issue which prevents us from moving forward"[78]

So, having been originally used in *A Quiet Life* to demonstrate the potential for using injunctions to combat anti-social behaviour, the Finnie brothers case study came to be used to illustrate the difficulty of gaining criminal convictions for perpetrators of anti-social behaviour: "hard information within the rules of criminal evidence is required. But witnesses – other neighbours – are often intimidated into silence."[79] In New Labour's eyes, this difficulty was compounded by the second of the problems which they had identified with the criminal law – the criminal law standard of proof. All too often, they complained, it is impossible to prove the case against a perpetrator of anti-social behaviour beyond reasonable doubt, particularly when witnesses have been

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[77] In April 1995 the Council had brought contempt proceedings against John Finnie after he entered the exclusion zone. He was committed to prison for six months, with the penalty suspended on the condition that he did not breach the injunction again for the next two years. Similar action was taken against David Finnie in August 1995 after he breached the injunction on three occasions.

[78] The letter was read out by Nick Raynsford in the Commons Standing Committee on the Housing Bill (HC Standing Committee G cols 432-433 29 February 1996). In subsequent discussions of the episode involving the Finnie brothers, New Labour frequently stated incorrectly that the injunction obtained by Coventry City Council had been quashed by a higher court. For example, "[t]here is evidence – for instance from Coventry before an injunction was overturned on appeal – that the new power is likely to cut offending by those named in the Order, and by others" (*Community Safety Order* at para 5) and "it [the Council] made legal history by winning injunctions to exclude the two men from the estate ... But the injunction was then quashed by a higher court, and the brothers were allowed to return. They caused mayhem yet again" (Jack Straw (HC Deb vol 310 col 371 8 April 1998)).

[79] *A Quiet Life* at 1.

intimidated into silence. As Alun Michael lamented, "the behaviour may well be criminal ... but it may not be possible to prove it to the standard required for a criminal conviction."[80]

The third problem with the criminal law is described in *A Quiet Life* using medical terms:

> "[T]he criminal justice system tends to treat the commission of crime as an acute, rather than a chronic condition. The system is therefore at its least effective where the offending behaviour is chronic and persistent, where the separation of incidents may lack forensic worth, where it is the aggregate impact of criminal behaviour which makes it intolerable and where the whole is much worse than the sum of its parts. Serious anti-social behaviour by neighbours is perhaps the best example of chronic crime."[81]

Jack Straw levelled the same complaint using photographic imagery – "When the criminal justice system has tried to deal with stalking or neighbour harassment, on the whole it has failed. That is because it has tended to chop up continuous film of persistent misbehaviour into individual, discrete snapshots."[82] *A Quiet Life* argues that anti-social behaviour typically involves a pattern of criminal damage, insulting words, threats of intimidation, minor assaults and noise. A single episode of such behaviour "may be classified as being relatively minor, and therefore tolerable." But while "being woken up by an unexpectedly loud noise once in a blue moon is simply a hazard of life ... being woken up night after night can make life unbearable." The separation of anti-social behaviour into a series of acute events thus means that "courts rarely treat such behaviour as it takes place – as a serious pattern which is wholly destructive of the quiet life of a community."[83] As Alun Michael explained, "the cumulative effect on the victims of anti-social behaviour will often be more important than each individual act ... A series of events such as I have described should be dealt with as a package."[84]

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[80] HC Standing Committee B col 49 30 April 1998.

[81] *A Quiet Life* at 6.

[82] HC Deb vol 287 col 788 17 December 1996. The metaphor was borrowed directly from James Q. Wilson – see Andrew Rutherford 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain' (n26 above) at 39.

[83] *A Quiet Life* at 6.

[84] HC Standing Committee B cols 47, 48 30 April 1998.

A Quiet Life explains that the fourth difficulty with relying on the criminal law is a consequence of treating the commission of crime as an acute, as opposed to a chronic, condition:

> "[T]he normal criminal process did not prove effective in dealing with the scale of the disruption caused by family X. Because each incident of criminal behaviour was dealt with in isolation – and the family appeared to know how to pitch their behaviour so as to avoid long prison sentences – their frequent court appearances rarely ended in much more than a fine, conditional discharge or other non-custodial sentences"[85]

The moral of this story is that, when a course of anti-social behaviour is broken up into a number of discrete offences, the penalties imposed for each individual offence do not "reflect the impact on neighbours of all that was being done."[86] In other words, perpetrators of anti-social behaviour rarely receive a punishment that fits their crime.

4. The Solution: To Mix the Best of Civil and Criminal Law

4.1. The Anti-Social Behaviour Order

Convinced of the current system's inability to deal effectively with anti-social behaviour, New Labour resolved to "mix the best of civil and of criminal law."[87] The product was "a new form of injunction to deal with the problem ... It would be a civil remedy, in the form of an injunction, which would be enforced by the criminal law if it were breached."[88] The Anti-Social Behaviour Order, which "adapts traditional civil and criminal procedures to tackle that serious, persistent anti-social behaviour,"[89] was born.

Originally only a local authority or the chief officer of the local police could apply for an ASBO. To this list have since been added the British Transport Police, registered social landlords, Housing Action Trusts and County Councils (s1(1A) Crime and Disorder Act 1998).[90] Where the applicant is a local authority, it must consult with the chief officer of the local police before applying for an ASBO (s1E(2)), and vice-versa

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[85] *A Quiet Life* at 5.

[86] Alun Michael (HC Standing Committee B col 48 30 April 1998).

[87] Jack Straw (HC Deb vol 287 col 791 17 December 1996).

[88] HC Deb vol 287 cols 791, 792 17 December 1996.

[89] Jack Straw (HC Deb vol 310 col 373 8 April 1998).

[90] The first two were added by s61(4) Police Reform Act 2002, and the latter two by s85(2) Anti-Social Behaviour Act 2003.

(s1E(3)). The other four bodies must first consult both the local authority and the chief officer of the local police before applying (s1E(4)).[91] Applications for ASBOs could originally only be made to the magistrates' court (s1(3)). Now county courts[92] and criminal courts[93] may impose ASBOs too, and there is also provision for interim ASBOs.[94] The subject of an Order must be at least 10 years of age (s1(1)), and must fulfil two conditions. First, he must have acted in "an anti-social manner, that is to say, 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 himself" (s1(1)(a)). In deciding this, the court must disregard any act of the defendant which he shows was reasonable in the circumstances (s1(5)). Second, the Order must be necessary to protect other people from further anti-social acts by the defendant (s1(1)(b)).[95] If these conditions are

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[91] s61(5) Police Reform Act 2002 repealed s1(2) Crime and Disorder Act 1998 and replaced it with the new s1E. s1E was then further modified by s85(7) Anti-Social Behaviour Act 2003. The consultation requirements imposed by s1E apply both to applications made to the magistrates' court and to those made to the county court (s1E(1)).

[92] s63 Police Reform Act 2002 inserted a new s1B into the Crime and Disorder Act 1998, enabling county courts to issue ASBOs where the conditions in s1(1) are satisfied (s1B(4)). According to s1B, if any one of the authorities who may apply for an ASBO (a) is a party to proceedings in a county court, and (b) considers that it would be reasonable to apply for an ASBO in relation to another party in those proceedings, it may do so (s1B(2)). Even if the authority is not a party to the proceedings, if it considers it would be reasonable to apply for an ASBO in relation to a party in the proceedings it may apply to be joined to those proceedings to enable it to apply for an ASBO (s1B(3)). These provisions have been further broadened by the introduction of s1B(3A)-(3C) by s85(5) Anti-Social Behaviour Act 2003. The effect of ss1B(3A)-(3C) is that where (a) a person has acted anti-socially and (b) although not a party to the proceedings, his behaviour is material in relation to the principal proceedings, the authority may apply for that person to be joined to the principal proceedings so that an ASBO may be made against him.

[93] s64 Police Reform Act 2002 inserted a new s1C into the Crime and Disorder Act 1998, enabling criminal courts to issue ASBOs where the defendant is convicted of a criminal offence (s1C(1)). According to s1C, the court may impose an ASBO if (a) the offender has acted in an anti-social manner (as defined in s1(1)(a)) and (b) that an order is necessary to protect persons in any place in England and Wales from further anti-social acts by him (s1C(2)). The court may make such an order if the prosecutor asks it to do so (s1C(3)(a)) or if the court thinks it is appropriate (s1C(3)(b)). For the purpose of deciding whether to make an Order the court may consider evidence led by the prosecution and the defence (s1C(3A)), and this can include evidence which is inadmissible in the criminal proceedings themselves (1C(3B)). An Order may only be made in addition to a sentence imposed for the relevant offence or to an order discharging him conditionally (s1C(4)).

[94] s65 Police Reform Act 2002 inserted a new s1D, which provides for the imposition of interim ASBOs. According to s1D, where an ASBO has been applied for under either s1 or s1B, the court may make an interim order pending the determination of the main application if it considers that doing so is "just" (s1D(2)).

[95] This subsection originally read, "necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him." The wording was changed to "necessary to protect relevant persons from further anti-social acts by him" by s61(2) Police Reform Act 2002. A new subsection (1B), inserted into s1 Crime and Disorder Act 1998 by s61(4) Police Reform Act 2002, states that the meaning of "relevant persons" depends upon who the "relevant authority" is. Where it is a local authority, it means persons within that local government area (s1(1B)(a)). Where it is a county

satisfied, the court may impose an Order "which prohibits the defendant from doing anything described in the order" (s1(4)). Any prohibitions imposed must be necessary for the purpose of protecting people from further anti-social acts by the defendant (s1(6)).[96] The minimum duration of an Order is two years, and it may be indefinite (s1(7)). During the initial two years of an Order it may only be discharged with the consent of both parties (s1(9)), thereafter either the applicant or the defendant may apply for the ASBO to be varied or discharged (s1(8)). It is a criminal offence for a defendant to do "anything which he is prohibited from doing" by the ASBO "without reasonable excuse," and if convicted he is liable (a) on summary conviction, to six months' imprisonment and/or a fine not exceeding the statutory maximum, (b) on conviction on indictment, to five years' imprisonment and/or a fine (s1(10)). While breaches of ASBOs could originally only be prosecuted by the CPS, proceedings for breach of an ASBO may now be brought by local authorities, where they were the applicant agency (s1(10A)(a)) or where the defendant resides or appears to reside in their local government area (s1(10A)(b)).[97] Anyone convicted of breaching an ASBO may not, however, be given a conditional discharge (s1(11)).

4.2. How the ASBO addresses the problems in the civil law

As noted above, Jack Straw's main criticism of the Protection from Harassment Act was that it "[did] not take proper account of the huge pressures that victims experience."[98] The ASBO aimed to ease these pressures in two ways. First, it was designed to ease the financial pressure on victims. By placing the responsibility for

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council, it means persons within the county of the county council. Where it is the chief officer of the local police, it means persons within that police area (s1(1B)(b)). Where it is the British Transport Police, it means persons who are on or likely to be on policed premises in a local government area or persons in the vicinity of or likely to be in the vicinity of such premises (s1(1B)(c)). And where it is a registered social landlord or Housing Action Trust, it means persons who are residing in or who are otherwise on or likely to be on premises provided or managed by that authority, or persons who are in the vicinity of or likely to be in the vicinity of such premises (s1(1B)(d)).

[96] Under the original wording of s1(6), the prohibitions imposed had to be necessary for the purpose of protecting from further anti-social acts by the defendant (a) persons in the local government area and (b) persons in any adjoining local government area specified in the application for the order. s1(6) went on to say that the police/local authority "shall not specify an adjoining local government area in the application without consulting the council for that area and each chief officer of police any part of whose police area lies within that area." This was replaced by s61(7) Police Reform Act 2002 with the following: "The prohibitions that may be imposed by an anti-social behaviour order are those necessary for the purpose of protecting persons (whether relevant persons or persons elsewhere in England and Wales) from further anti-social acts by the defendant." This extended the geographical area over which an ASBO can be made to any defined area within, or indeed the whole of, England and Wales.

[97] s1(10A) was inserted by s85(4) Anti-Social Behaviour Act 2003.

[98] HC Deb vol 287 col 792 17 December 1996.

applying for an Order on the police/local authority, the victim is spared the expense of seeking a civil injunction himself. Second, it was designed to ease the fear of reprisals. Unlike a civil injunction, which a victim of anti-social behaviour would be forced to seek in his own name, an application for an ASBO would be brought in the name of the police/local authority. The ASBO was thus intended to confer on victims what Lord Williams described as "the shield of the Government."[99] Furthermore, not only would a victim of such behaviour not have to bring proceedings in his own name, but where there was a risk of intimidation he would not have to appear as a witness either. Professional witnesses could be employed by virtue of the expression "caused or was *likely to cause* harassment, alarm or distress" in s1(1)(a),[100] and, under the civil rules of evidence, police officers and local authority officials could testify to the complaints they had received.[101]

The third of the problems New Labour said was involved in relying on the civil law was delay. As a result they stressed that the procedure for applying for an ASBO should be as swift as possible. The Home Office Guidance published the month before ASBOs came into force stated (in bold text): "It is essential that there should be no unnecessary delay in hearing these cases and adjournments should only be allowed in exceptional circumstances."[102] New Labour were particularly concerned to ensure that defendants could not deliberately force an adjournment by failing to turn up at court:

> "Of course, it is preferable for an individual concerned to be present and able to respond as he considers appropriate to the evidence that is put to the court in justification of the request for an order, but I am sure that if the Honourable Gentleman has had any experience of the sort of incidents that we are seeking to tackle, he will have come across individuals who would choose not to come to court if that would frustrate the intentions of the application for an order. That should not be possible, because it would frustrate the intention of protecting

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[99] HL Deb vol 585 col 513 3 February 1998.

[100] This expression was first employed in the Housing Act 1996 for just this reason. See n14 above.

[101] The House of Lords confirmed in *R (McCann & others) v Crown Court at Manchester* [2002] UKHL 39 that hearsay evidence may be admitted at the application for an ASBO. This case is discussed further in section 3.6 of chapter two.

[102] *Anti-Social Behaviour Orders – Guidance* (n61 above) at para 6.5. The latest Home Office Guidance also reflects this concern, but does not state the matter as strongly. After saying that a complaint must be made within six months from when the matter of the complaint arose (s127 Magistrates' Court Act 1980), the Guidance adds that "[a]s long as the complaint is made within the six-month timeframe, a summons may be served outside this time period; although delay is not encouraged" (Home Office *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (London: Home Office Communication Directorate, 2002) at 28).

people against serious anti-social behaviour, which the order is designed to target"[103]

The Guidance published in March 1999 thus stated:

"Although courts should think carefully before proceeding in a defendant's absence there will undoubtedly be some cases where this is necessary. Where prohibitions are being imposed, the breach of which is a criminal offence, it is preferable for the defendant to be present to know what the order is about *but a defendant must not be allowed to use his absence to delay an outcome*"[104]

The next problem which New Labour identified was the limited scope of existing civil law provisions. Once Family X moved into private rented accommodation, the local authority was left powerless to evict them from the area. Under s1 Crime and Disorder Act 1998, however, the role of a local authority in seeking an ASBO arises not from its role as landlord, but rather from its general responsibility to all citizens in its area for such things as noise abatement, environmental health and crime prevention.[105] They can therefore apply for an Order to be made against anyone engaging in anti-social behaviour, be they public sector tenants, private tenants or even owner-occupiers. This power is broader than the one conferred by s152 Housing Act 1996 in two respects. First, it applies to anti-social behaviour carried on anywhere, not just in the locality of local authority housing. Second, the preconditions for obtaining an injunction under s152 are tighter than the preconditions for obtaining an ASBO.[106]

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[103] Alun Michael (HC Standing Committee B col 67 30 April 1998).

[104] *Anti-Social Behaviour Orders – Guidance* (n61 above) at para 6.5 (emphasis original). This too is reiterated in the most recent Home Office Guidance: "Whether or not the subject of the application is present the court should be asked to make the order. Adjournments should be avoided unless absolutely necessary" (*A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (n102 above) at 37). The Guidance goes on to say that, if an ASBO is ordered in the absence of the defendant, the court "should be asked to arrange for personal service as soon as possible thereafter. Proof of service of an ASBO is important, since any criminal proceedings for breach may fail if service is challenged by the defence, and cannot be proved by the prosecution" (at 44).

[105] See *A Quiet Life* at 8.

[106] Both s1(1) Crime and Disorder Act 1998 and s152(3) Housing Act 1996 lay down two preconditions. First, s152(3)(a) requires that the defendant used or threatened to use violence against a relevant person (a person who was "residing in, visiting or otherwise engaging in a lawful activity" in either (a) a dwelling house held under a secure or introductory tenancy from the local authority, or (b) accommodation provided by the local authority under Part VII Housing Act 1996 or Part III Housing Act 1985 (homelessness) (ss152(1),(2))). s1(1)(a), on the other hand, says an ASBO may only be imposed if the defendant has acted in an anti-social manner, i.e., a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household. Conduct that caused (or was likely to cause) harassment/alarm/distress may fall far short of conduct that amounted to (a threat of) violence.

There are also two ways in which New Labour believed that the power to obtain an ASBO is broader than the powers conferred by the Protection from Harassment Act 1997. First, the Protection from Harassment Act applies only to courses of conduct which amount to "*harassment* of another" (s1(1)(a)). Although s7(2) of the 1997 Act states that references to harassing a person include alarming that person or causing them distress, an ASBO may be obtained not only when a person has behaved in a manner that caused harassment, alarm or distress, but also when their behaviour was likely to cause harassment, alarm or distress. This reflects New Labour's belief that some behaviour may be anti-social but not harassing.[107] Second, the Protection from Harassment Act applies only to courses of conduct which amount to "harassment *of another*" (s1(1)(a)). New Labour pointed out, however, that frequently anti-social behaviour will affect a community as a whole without being directed at anyone in particular.[108] s1 of the Crime and Disorder Act 1998 was thus designed to broaden the scope of these existing civil law powers.

When asked why New Labour had opted for the name "anti-social behaviour order," Alun Michael explained that it was intended to give an indication of the nature of the conduct that had led to the Order being imposed:

> "I was asked whether the terms 'anti-social behaviour order' added anything to the Bill. Legally, it does not, but it is an essential label that sets out clearly and succinctly what the provision is about: preventing anti-social behaviour"[109]

Second, s152(3)(b) requires that there must be a significant risk of harm to the person against whom violence was used/threatened or to a person of a similar description. "Harm" is defined in s158 to mean ill-treatment or impairment of physical or mental health (and in relation to those under the age of 18, harm also encompasses impairment of the child's development and ill-treatment includes sexual abuse and forms of non-physical ill-treatment). s1(1)(b), on the other hand, says that an ASBO may only be imposed if it is necessary to protect persons from further anti-social acts (i.e., ones that cause or are likely to cause harassment/alarm/distress) by the defendant. The requirement of a significant risk of harm, as defined in s158, is more stringent than the requirement of being necessary to protect persons from further anti-social acts.

[107] See n68 above. A further difference is that s1(1)(b) Protection from Harassment Act 1997 requires that the defendant must have known, or ought to have known, that his course of conduct amounted to harassment (the "ought to have known" requirement is then further elucidated in s1(2)). By contrast, s1(1) Crime and Disorder Act 1998 contains no fault element. When Conservative Humfrey Malins tabled an amendment in the Commons Standing Committee which would have had the effect of requiring the defendant to have intended to cause harassment, alarm or distress, Alun Michael rejected it, saying it was "unacceptable" because "it would place an obstacle in the way of an application for an order. There is an objective test: whether the behaviour that leads to the complaint causes harassment, alarm or distress. The amendment would impose a test of intention, but it is the behaviour and the distress that is relevant when making an order" (HC Standing Committee B col 101 30 April 1998).

[108] See n68 above.

[109] HC Standing Committee B col 53 30 April 1998.

New Labour's desire to express disapproval of such behaviour thus explains the change in the remedy's name. Imposing an Anti-Social Behaviour Order implies a greater degree of censure than imposing a Community Safety Order. Simply renaming the Order was inadequate, however, to quell the concern that serious cases of anti-social behaviour should be dealt with by the criminal justice process. As seen above, the most fundamental problem with dealing with cases of serious anti-social behaviour through the civil law, according to New Labour, was that the censure of the criminal law is not invoked. It is for this reason that breach of an ASBO is a crime, as opposed to just a civil wrong:

> "[W]e want to ensure that the breach of an anti-social behaviour order is seen as being a criminal offence, as well as a contempt of court, because it is a criminal act against the individuals who are protected as a result of the order being made"[110]

So while the ASBO was not designed to be a criminal sanction, its name was intended to convey strong disapproval of the individual's conduct, with the further possibility of a severe criminal penalty, and the accompanying degree of censure, being imposed if the Order is breached.

4.3. How the ASBO addresses the problems in the criminal law

The first of the problems New Labour identified in the criminal law was witness intimidation. To an extent the way in which the ASBO was designed to resolve this problem has already been discussed; applications are brought in the name of the police/local authority, and professional witnesses and hearsay evidence can be used so that intimidated victims need not be identified. However, one further issue remains. Suppose that an ASBO is issued, but the anti-social behaviour continues unchecked. Although the perpetrator may then be prosecuted for breach of the order, won't the victim(s) have to give evidence at his trial for breach of the order? After all, at his trial the criminal rules of evidence will apply, meaning that hearsay evidence will be inadmissible. New Labour gave two reasons for believing this concern is unfounded. First, all that need be proved at the criminal trial is that the defendant breached the order. The conduct that preceded the imposition of the ASBO need not be re-examined.[111] This may well mean that it is not necessary for the victim(s) of the conduct

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[110] Alun Michael (HC Standing Committee B col 136 5 May 1998).

[111] See, for example, *Community Safety Order* at para 21.

which led to the imposition of the order to testify.[112] Second, since breach of an ASBO is an arrestable offence, anyone who breaches an order is subject to the power of arrest.[113] This was designed to "reassure members of the community that, when the matter went before the court, they had protection and that might encourage them to come forward as witnesses."[114]

Closely linked to the problem of witness intimidation was the difficulty of proving cases against perpetrators of anti-social behaviour to the criminal law standard of proof. Key to addressing this problem was the classification of the ASBO as a civil order. The intended consequence of this classification[115] was that the relevant standard of proof at proceedings for the imposition of an ASBO would be the balance of probabilities. This lower standard of proof would, said Alun Michael, provide "a protection in circumstances where it is not possible to get a conviction on the basis of the criminal standard of proof."[116] And whilst the criminal standard of proof would apply at any trial for breach of an Order, the mechanisms which exist to reduce the threat of witness intimidation at the criminal trial[117] will, in so doing, ease the task of proving breach of an ASBO beyond reasonable doubt.

The third and fourth problems which New Labour identified in the criminal law were closely related. The criminal justice system tends to treat the commission of crime as an acute event – inappropriate when dealing with a chronic condition such as anti-social behaviour – with the result that perpetrators of such behaviour rarely receive a punishment that fits their crime. In response to these concerns New Labour insisted that a breach of an ASBO should be seen as the continuation, in defiance of a court order, of a course of anti-social behaviour. When viewed in this way a more severe penalty may be imposed than if the act of breaching the Order were taken in isolation. It was on this basis that New Labour sought to justify the severe maximum sentence (5 years' imprisonment) for breach of an ASBO. When asked why the

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[112] "It may, for instance, be possible for the police to gather direct evidence of a breach or further breach without needing to use a member of the community as the chief prosecution witness" (Home Office *Anti-Social Behaviour Orders – Guidance on Drawing up Local ASBO Protocols* (London: Home Office, 2000) at para 18.2).

[113] s24 Police and Criminal Evidence Act 1984.

[114] Nick Raynsford (HC Standing Committee G col 437 29 February 1996).

[115] This must now be seen in the light of the House of Lords' decision in *R (McCann & others) v Crown Court at Manchester* (n101 above), in which the Lords held that, although the proceedings are civil in nature, given the potential severity of an ASBO the criminal law standard of proof should always apply.

[116] HC Standing Committee B cols 49-50 30 April 1998.

[117] See previous paragraph of main text.

maximum penalty for breaching an ASBO was greater than the maximum penalty for the offence of affray,[118] Alun Michael replied that affray "involves one incident – maybe one moment of madness involving a group of people. Here we are discussing a pattern of behaviour that is damaging people's lives over a considerable period of time."[119] Similarly, when asked whether a sentence of five years' imprisonment would ever be imposed for breach of an ASBO, Lord Williams asked the House of Lords to imagine a situation where a course of serious anti-social behaviour had been continuing for some time, then continued:

> "We reach the situation where the only redress for the individual citizen ... is to try to establish through the relevant authority (a local authority or the police) that the order is required. If behaviour of that kind continues time and again even after the offender has been brought to court, even after the proceedings have been introduced, there may well be extreme circumstances where a five-year sentence would be justified. I can easily conceive of those circumstances"[120]

So while most criminal offences consist of one acute event, breach of an ASBO is fundamentally different. It is the continuation, in defiance of a court order, of a chronic course of anti-social behaviour. The sentence imposed should, therefore, reflect the impact not just of the single act that constituted breach of the Order, but of the whole course of behaviour which culminated in that breach.

5. Conclusion: Larry the lout

Larry the lout lived in a leafy suburban cul-de-sac. His parents, both partners in a leading law firm, worked long hours and were rarely around to keep an eye on Larry. Every evening after school Larry and his gang of friends would hang out on the street outside Larry's house. Some of them would skateboard whilst the others would listen to heavy metal music on a ghetto blaster at full volume. All of them would drink cider, shout obscenities and abuse at the neighbours, and refuse to get out of the road when cars wanted to pass. As well as dropping fast food containers and soft drink cans in the neighbours' gardens, they would also urinate on their flower beds. The younger children who lived in the cul-de-sac used to ride their bikes in the street when they got home from school, but were now too frightened to do so. A neighbour had once confronted Larry, but woke up the next morning to find all the windows on her brand

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[118] s3 Public Order Act 1986. The maximum sentence for affray is 3 years' imprisonment (s3(7)).

[119] HC Standing Committee B col 138 5 May 1998.

[120] HL Deb vol 585 cols 604-605 3 February 1998.

new BMW estate smashed. Larry's parents had sternly rebuked him on more than one occasion, but he responded by becoming increasingly defiant and behaved even more badly.

After enduring the appalling behaviour of Larry and his gang for over a month, the neighbours decided they could take no more and so contacted a local authority official. Since the cul-de-sac where Larry lived was not in the vicinity of any local authority housing, the local authority decided to apply for an ASBO against Larry. The neighbours refused to testify against Larry in court, fearing that acts of criminal damage might otherwise ensue as retribution, and so the local authority arranged for a professional witness to stay with Larry's next-door-neighbour for two nights to witness the behaviour for himself. On the day of the court hearing Larry's father, who had promised to accompany Larry to the magistrates' court, was called away on urgent business. Knowing that he wasn't expected at school that day, Larry took the opportunity to spend the day at the snooker club playing pool and didn't turn up at court. Nevertheless, the magistrates' court, mindful that applications for ASBOs should only exceptionally be adjourned, proceeded in Larry's absence. Acting on the basis of both the local authority official's evidence of the complaints he had received and the testimony of the professional witness, the magistrates' court imposed an ASBO on Larry. The terms of the ASBO were that (a) he must stay inside his parents' house between the hours of 8 p.m. and 7 a.m. and (b) he must not act in a manner that causes or is likely to cause harassment, alarm or distress to the other residents of the cul-de-sac in which he resides. That evening an officer of the court served the Order on Larry in the presence of his parents at their home. After a severe warning from his parents about the legal consequences of breaching the ASBO, Larry resolved to mend his ways.

The next day an official from the local authority visited each of Larry's neighbours and explained the terms of the ASBO. That evening Larry's parents were both working late when, at half past eight, one of Larry's friends arrived at his front door. The friend invited Larry for a curry at a nearby curry house. Although he refused at first, the friend insisted it was harmless and managed to talk Larry into joining him. Two neighbours, keen to police the terms of the ASBO effectively, watched him leave and contacted the police. Later that evening the police arrested Larry as he walked home from the curry house. He was charged with breach of the Order. At his trial the only prosecution witnesses were the two policemen who arrested Larry. Larry was convicted. The court, in deciding an appropriate sentence, took into account not just the single act of breaching the curfew, but had regard for all the upset and disruption Larry's neighbours had suffered throughout the previous month.

The tale of Larry the lout illustrates how the ASBO operates so as to overcome the problems New Labour perceived in both the civil and criminal laws. The power

contained in s152 Housing Act 1996 to obtain injunctions against non-tenants was inapplicable in Larry's case since he did not live in the vicinity of local authority housing. Furthermore, whilst there might have been doubt over whether or not his conduct fell within the scope of the Protection from Harassment Act 1997,[121] it is clear that his behaviour did fall within s1(1)(a) of the Crime and Disorder Act 1998. Although Larry's neighbours seemed to be reasonably wealthy, and so could probably have afforded to seek a civil injunction, the fact that the local authority applied for the ASBO demonstrates that where victims of anti-social behaviour are poor they are spared the expense of seeking an Order. The proceedings for the imposition of the ASBO were not delayed by Larry's absence, and none of the victims of Larry's behaviour were required to give evidence, thereby easing the problem of witness intimidation. Neither were they required to give evidence at his prosecution for breach of the ASBO, since the direct evidence of the two police officers was sufficient. And finally, the court, when sentencing, took into account the whole course of conduct which culminated in Larry breaching the ASBO, thus enabling them to impose a sentence that would more adequately reflect all that the neighbours had endured.

The ASBO is the result of New Labour's determination to tackle anti-social behaviour. This determination stemmed from a desire to protect victims of such behaviour and a concern to prevent the downward spiral that could result from unchecked disorder and petty crime. New Labour were convinced that anti-social behaviour could not be tackled effectively through either the civil law or the criminal law. It was this conviction that led to the policy choice to create a hybrid remedy which, they believed, would not be hindered by the problems which rendered both the civil and criminal laws ineffectual. The ASBO is thus a carefully tailored response to what New Labour regarded as a "real social evil."[122]

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[121] The issue would be whether or not his behaviour amounted to harassment of another, i.e., was it harassment of the community as opposed to harassment of an individual or family? See sections 3.1 and 4.2 above.

[122] Lord Williams (HL Deb vol 585 col 518 3 February 1998).

Chapter Two: The Criticisms of the ASBO

1. Introduction

Chapter one described the ASBO's smooth journey onto the statute book. During its passage through Parliament only two amendments relating to the ASBO were pressed to a division, and Opposition Members stressed their support for a stronger remedy against perpetrators of anti-social behaviour. But it should not be concluded that Opposition Members had no misgivings about the ASBO. There was much argument over the details of the new remedy; the Commons Standing Committee, for example, spent eight hours debating the ASBO provisions. And although not pressed to divisions, numerous amendments were proposed both in the Lords and in the Commons. Doubts about the ASBO were also voiced outside of Parliament. Groups such as Liberty, NACRO and The Howard League for Penal Reform expressed serious reservations about the Order. The strongest criticism, however, came in a series of three articles written by a group of six leading academics – Andrew Ashworth, John Gardner, Rod Morgan, ATH Smith, Andrew von Hirsch, and Martin Wasik (hereafter "Ashworth et al").[1] The group described the ASBO as "Howardism with a vengeance"[2] and called for it to be abandoned, commenting that "[b]lunderbuss solutions do not help, and serve only to politicise what are very real problems for those who live in poorer neighbourhoods."[3]

This chapter will describe these concerns about the ASBO[4] and outline New Labour's response to them. For the purposes of this chapter those expressing doubts

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[1] 'Overtaking on the Right' (1995) 145 NLJ 1501 (hereafter 'Overtaking on the Right'), 'Neighbouring on the Oppressive: The Government's "Anti-Social Behaviour Order" Proposals' (1998) 16(1) CJ 7 (hereafter 'Neighbouring on the Oppressive'), 'Clause 1 – The Hybrid Law from Hell?' (1998) 31 CJM 25 (hereafter 'The Hybrid Law from Hell?').

[2] 'Overtaking on the Right' at 1501.

[3] 'Neighbouring on the Oppressive' at 14.

[4] The chapter does not purport to examine all the criticisms levelled at the ASBO. In particular, issues relating to the availability of the Order against juveniles will not be considered. In England and Wales ASBOs are available against anyone aged ten years or over (s1(1) Crime and Disorder Act 1998). When an amendment was proposed which would have had the effect of limiting the availability of ASBOs to only those aged 16 and over, Alun Michael said that this would create a gap in the law. He gave as an example the "family from hell." In this family the adults not only behave in an anti-social manner, but also use their children as the "deliverers of some of the harassment, damage or even injury to those in the neighbourhood." Where such children were under 10 the intention was that they would be dealt with using a Child Safety Order (created by s11 Crime and Disorder Act 1998). If they were aged 10 or over they would be dealt with using an ASBO. To raise the minimum age at which an ASBO could be imposed would accordingly "leave a gap between those who can be dealt with [using a Child Safety Order], as they are under the age of 10, and those over the age of 16." When challenged by Richard Allan as to whether ASBOs would be used not only against 10-16 year-old members of "families from hell," but also, for example, against "a group of ... 13 year-olds who hang around causing minor criminal damage or writing graffiti" Alun Michael replied that using an ASBO in

about the ASBO will simply be referred to as "critics." It should not be inferred from this that all the criticisms of the ASBO detailed in this chapter were shared by all of the critics. Those voicing concerns about the ASBO form an extremely heterogeneous group. Whilst some critics were at pains to point out that they agreed with the ASBO in principle, for example, others called for the Order to be abandoned. The various criticisms have been arranged in two sections: those relating to the definition of "anti-social behaviour" and those relating to the terms of, and penalties for breaching, an ASBO. The discussion of the definition of "anti-social behaviour" in section 2 will show that the different opinions held by New Labour and the critics stem from different perspectives of state power. The discussion in section 3 will outline the various concerns relating to the terms of, and penalties for breaching, an ASBO and then explain that the cumulative effect of these concerns led many commentators to argue that the proceedings for imposition of an ASBO should be regarded as criminal in substance. The argument that the proceedings are properly classified as civil will accordingly be examined. It will be shown that at the heart of the debate surrounding the proper classification of proceedings for the imposition of an ASBO lay the notion that a central task of criminal justice policy is to balance the competing demands of

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such a situation would be "unlikely" – "It might be possible to construct an extreme case in which it might be appropriate, but the Honourable Gentleman is right – it would be unlikely that anti-social behaviour orders would be used in such circumstances" (HC Deb vol 314 cols 867-871 23 June 1998). This was reflected in the draft Home Office Guidance produced in 1998. But, following strong representations from local authorities, the final Home Office Guidance, produced in March 1999, stated that, whilst "[i]t is unlikely that there will be many cases where it would be appropriate to apply for an order against a 10-11 year-old ... [a]pplications may routinely be made for the middle and older age groups of juveniles and young people (e.g., 12-17 year-olds) as experience has shown that such individuals may commit serious acts of anti-social behaviour without adult encouragement or involvement" (Home Office *Anti-Social Behaviour Orders – Guidance* (London: Home Office, 1999) at para 2.1) (see further Elizabeth Burney 'Talking Tough, Acting Coy: What Happened to the Anti-Social Behaviour Order?' (2002) 41 Howard JCJ 469 at 473-474). So it was unsurprising that, in her study of ASBOs issued between April 1st 1999 and September 30th 2001, Siobhan Campbell found that 36% of individuals given ASBOs were aged 16 or under (with the figure rising to 58% for those aged 18 or under) (*A Review of Anti-Social Behaviour Orders* Home Office Research Study 236 (London: Home Office Research, Development and Statistics Directorate, 2002) at 8). This may be contrasted with the equivalent provisions in Scotland. According to s19 Crime and Disorder Act 1998, ASBOs were originally only available against those aged 16 or over. Scottish Office Minister Henry McLeish explained that the reason for the difference was that "in Scotland, there are already measures to deal with that age group – we felt that, after 27 years of progress, it was vital to keep the children's hearings system intact" (HC Deb vol 314 col 878 23 June 1998). Nevertheless, under the Anti-Social Behaviour (Scotland) Act 2004 ASBOs will now be made available against 12-15 year-olds in Scotland too (s4). It is also worthy of note that ss1AA, 1AB Crime and Disorder Act 1998 create Individual Support Orders (applicable only to England and Wales). If the individual support conditions are fulfilled, a court making an ASBO against a child or young person must also make an Individual Support Order (s1AA(2)). The Order will last for up to six months (s1AA(2)(a)), and require the defendant to comply with requirements which the court considers desirable in the interests of preventing any repetition of the behaviour which led to the making of the ASBO (s1AA(5)), such as participation in specified activities (s1AA(6)(a)) or meeting with a specified person (s1AA(6)(b)). Breach of an Individual Support Order without reasonable excuse is a criminal offence punishable (a) if the defendant is aged 14 or over by a £1000 fine; (b) if the defendant is aged under 14 by a £250 fine (s1A3(3)).

victims' interests and defendants' rights. So as well as detailing the various arguments surrounding the ASBO, this chapter will also demonstrate the influential role played both by the parties' different perspectives of state power and by their different views of how victims' interests and defendants' rights should be balanced.

2. The Definition of "Anti-Social Behaviour"

An ASBO may only be imposed if the defendant has acted in an "anti-social manner." s1(1)(a) defines this as "a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself." Three criticisms were levelled at this definition. First, it was argued that the definition is so vague as to infringe the Rule of Law. Second, it was argued that it is so broad as to be authoritarian, encompassing much behaviour that is merely trivial, unconventional or eccentric. And third, it was argued that the definition confers too much discretion, which risks the legislation being applied in a discriminatory manner. This section will detail these arguments and New Labour's response to them. It will be shown that the different opinions on these issues are, at root, the result of the parties' different perspectives of state power.

2.1. The vagueness of the definition

The basic intuition behind the Rule of Law, writes Joseph Raz, is that "the law must be capable of guiding the behaviour of its subjects." From this general precept flow a number of attributes that laws must have if they are to be said to be in compliance with the Rule of Law. These include the requirement that laws are prospective, open and clear – "An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it."[5] Critics of

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[5] Joseph Raz 'The Rule of Law and its Virtue' (1977) 93 LQR 195 at 198, 199. Raz's conception of the Rule of Law is a formal one (see further Paul Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467). Interestingly, Finbarr McAuley and J. Paul McCutcheon have argued that the evolution of the legality principle was not rooted in a concern for defendants' rights. They explain that, in its modern guise, the principle of legality stems from those seventeenth and eighteenth century writers who were "responsible for moving the issue of legality to the forefront of criminal law theory" (*Criminal Liability* (Dublin: Round Hall Sweet & Maxwell, 2000) at 52). Montesquieu and Beccaria "were quick to see that respect for the principal [*sic*] was an essential prerequisite to the efficient realisation of the fundamental objectives of the criminal law in a civilised society" (at 53). Their rationale was that, as the numbers who can understand the law increase, so the frequency of crimes will decrease. McAuley and McCutcheon continue, "there is no doubt that Beccaria's central claim that the criminal law should be recast as a set of clear and effective threats aimed at securing the minimum conditions of social life – his version of the legality thesis – struck a deep chord in the eighteenth century mind" (at 54). This shift of emphasis was "given added impetus by the codification movement of the nineteenth century such that its enduring legacy has been that all civilized legal systems now recognise that the idea of legality entails three fundamental postulates: that prohibitory norms should be prospective, should aspire to maximum certainty, and should be strictly construed" (at 45).

the ASBO argued that the definition of "anti-social behaviour" is so vague that it fails to give individuals clear indication of what behaviour falls within the scope of s1(1)(a). It therefore contravenes the Rule of Law; individuals wishing to plan their affairs will not receive clear guidance on how (not) to behave. Ashworth et al commented that the provision "fails to give fair warning to citizens of what kind of conduct may trigger these powers,"[6] a view echoed by Conservative peer Lord Henley:

> "It is important to make sure that the definitions within clause 1 are tightly drawn so that the individual knows to what he is subject and everybody knows exactly how the clause can be interpreted"[7]

New Labour responded to these criticisms by claiming that it was unnecessary to define anti-social behaviour any more precisely. Lord Falconer explained that

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[6] 'Overtaking on the Right' at 1501. Ashworth et al further argued that the wording of s1(1)(a) would breach Article 7 ECHR unless it was "tightened up considerably" ('The Hybrid Law from Hell?' at 26). Since Article 7 only applies when a defendant has been found guilty of a "criminal offence," the argument that s1(1)(a) breaches Article 7 presupposes that proceedings for the imposition of an ASBO are criminal, not civil, in substance (the proper classification of the proceedings is discussed below in section 3.6). The European Court of Human Rights explained in the case of *Kokkinakis v Greece* (1994) 17 EHRR 397 that, according to Article 7, "an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable" (at para 52). In spite of this declaration, in practice "a crime has to be very loosely defined indeed before the Court will find a violation of this provision" (Clare Ovey & Robin White *Jacobs & White: European Convention on Human Rights* (3rd edn.)(Oxford: OUP, 2002) at 191). The Strasbourg Court said in *SW and CR v United Kingdom* (1996) 21 EHRR 363 that "the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen" (at para 34). So, for example, the definition of breach of the peace was upheld by the European Court of Human Rights in *Steel v United Kingdom* (1999) 28 EHRR 603 (see paras 54-55). (For another example of the Strasbourg Court holding that a broadly defined offence did not breach Article 7 see *Kokkinakis*.) On this basis Robin White has commented that, even if the proceedings for imposition of an ASBO *are* criminal in substance, it is probably an overstatement to say that s1(1)(a) is so vague as to breach Article 7 ('Anti-Social Behaviour Orders under Section 1 of the Crime and Disorder Act 1998' (1999) 24 EL Rev HR 55). In this connection, it is interesting to consider the Law Commission's recommendation that there should not be a general offence of dishonesty (Law Commission Report 276 *Fraud* Cm 5560 (2002) at paras 5.20-5.57). Whilst the Commission took the view that "general dishonesty offences ... could perhaps be found to be compatible with the requirements of Article 7" (at para 5.33), it nevertheless argued that such an offence was "objectionable in principle" (at para 5.20). In particular, such an offence would infringe the principle of maximum certainty and thus "fail to provide any meaningful guidance on the scope of the criminal law and the conduct which may be lawfully pursued" (at para 5.28).

[7] HL Deb vol 585 col 517 3 February 1998. The amendment which Lord Henley proposed would have removed the words "in an anti-social manner, that is to say." He did not challenge the "well understood public order law phraseology" (at col 510) of "in a manner that caused or as likely to cause harassment, alarm or distress."

"although it is difficult to define, one is certainly able to recognise [anti-social] behaviour when one sees it,"[8] and expressed his agreement with the comment of Labour peer Lord Watson that "those who suffer anti-social behaviour do not need to have it defined; they know what it is and experience it daily."[9] Alun Michael repeated this argument in the Commons Standing Committee on the Bill, adding that, like an elephant on the doorstep, anti-social behaviour is "easier to recognise than to define."[10] In fact, he argued, a tight definition is positively undesirable. In response to amendments designed to tighten the definition of anti-social behaviour[11] he said, "it would not be right to limit the definition in the ways that have been suggested. The essence of such orders is their flexibility to respond to local needs"[12] The same concern lay behind his earlier comment that "it is wise to recognise an elephant on the doorstep. That is why we are not trying in the order to define the elephant on the doorstep too narrowly."[13]

So the logic behind New Labour's refusal to make any concession to the critics' Rule of Law concerns is clear. It is difficult, if not impossible, to define anti-social behaviour tightly. Any attempt at a tight definition will more than likely prove to be too narrow and thus under-inclusive, meaning that perpetrators of some forms of anti-social behaviour will fall outside the ambit of the legislation. A vague definition, on the other hand, provides enforcement agencies with a flexible tool that is capable of applying to all forms of anti-social behaviour. Whilst such a definition is admittedly over-inclusive, the risk of uncertainty is offset by the fact that everyone knows what amounts to anti-social behaviour. In the critics' eyes such a departure from the demands of the principle of maximum certainty constitutes a dangerous inroad on the Rule of Law. In New Labour's eyes, however, it is harmless – everyone knows what amounts to anti-social behaviour and so knows what conduct they must refrain from – and, furthermore, it is vital in order for the legislation to be as effective in combating anti-social behaviour as possible. This illustrates starkly the difference in the way the critics and New Labour view state power. The critics view it with suspicion. Adherence to the Rule of Law is essential so that individuals can plan their affairs, safe in the

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[8] HL Deb vol 584 col 595 16 December 1997. At the time Lord Falconer was the Solicitor-General.

[9] HL Deb vol 584 col 550 16 December 1997.

[10] HC Standing Committee B col 47 30 April 1998.

[11] Various amendments aimed at tightening the definition were tabled in the Commons Standing Committee. These are discussed further in section 3.1 of chapter four.

[12] HC Standing Committee B col 46 30 April 1998.

[13] HC Standing Committee B col 37 28 April 1998.

knowledge that if their actions fall outside the range of clearly proscribed behaviour the State will have no recourse against them. Clarity of definition *protects* them from the State exercising its power to tackle anti-social behaviour against them. New Labour, on the other hand, view state power benevolently. Even if anti-social behaviour is defined so vaguely as to encompass much behaviour that ought not to be regarded as anti-social, people can still plan their affairs because they know what amounts to anti-social behaviour. The State can be *trusted* to exercise their widely-drawn powers against only those individuals who do act anti-socially.

2.2. The wide-reach of the definition

The words "harassment, alarm or distress" were used in the definitions of the offences created by sections 4A and 5 of the Public Order Act 1986. Yet, as Ashworth et al were keen to point out, even the scope of these "sweeping and highly controversial"[14] offences was not as broad as s1(1)(a). For the Public Order Act offences the defendant must have either used threatening, abusive or insulting words, displayed some writing, sign or other visible representation which was threatening, abusive or insulting, or acted in a disorderly manner. There are no such preconditions laid down in s1(1)(a) regarding the behaviour which caused/was likely to have caused harassment, alarm or distress. Moreover, the Public Order Act offences have *mens rea* requirements, whereas s1(1)(a) does not, and ss4A and 5 contain a broader range of defences than s1 of the 1998 Act.[15]

The breadth of s1(1)(a) caused unease both in Parliament and outside of it. In the Commons Standing Committee James Clappison expressed concern that behaviour could fall within the definition in s1(1)(a) even though it would not otherwise have

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[14] Ashworth et al 'Neighbouring on the Oppressive' at 8.

[15] For the s4A offence the defendant must have intended to cause harassment, alarm or distress. For the s5 offence the defendant must have either (a) intended his words/behaviour, or the writing/sign/visible representation, to be threatening, abusive or insulting or intended his behaviour to be disorderly, or (b) been aware that his words/behaviour, or the writing/sign/visible representation, may have been threatening, abusive or insulting or been aware that his behaviour may have been disorderly. In terms of defences, s1(5) of the Crime and Disorder Act does provide that "the court shall disregard any act of the defendant which he shows was reasonable in the circumstances." However, s4A(3)(b) and s5(3)(c) also provide that it is a defence for the defendant to prove "that his conduct was reasonable," and ss4A and 5 also create further defences alongside this one. s4A(2) and s5(2) say that it is a defence if the words/behaviour were used, or the writing/sign/visible representation was displayed, by a person inside a dwelling and the other person was also inside that or another dwelling. s4A(3)(a) and s5(3)(b) say that it is a defence for the defendant to prove that he was inside a dwelling and had no reason to believe that the words/behaviour used, or writing/sign/visible representation displayed, would be seen/heard by a person outside that dwelling. There is a further defence applicable only to the s5 offence, where the defendant proves he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress (s5(3)(a)).

amounted to a crime or a civil wrong.[16] In the Lords Lord Goodhart said that the definition of anti-social behaviour was "dangerously wide," adding that "an order as powerful as the anti-social behaviour order ... needs a correspondingly serious level of misbehaviour to trigger it."[17] Outside of Parliament Philip Plowden questioned "the alarmingly wide remit of these new orders,"[18] while Ashworth et al commented:

> "Unhappily, the Labour proposal is neither sensible nor carefully targeted. It takes sweepingly defined conduct into its ambit ... Playing a CD player too loud, failing to control noisy children, uttering supposedly defamatory utterances, are only a few examples of behaviour that might qualify. Essentially, any conduct that displeases neighbours could be deemed 'anti-social conduct'"[19]

Critics found the austerity of s1(1)(a) particularly disquieting. Liberal Democrat peer Lord Rodgers questioned whether the "disturbingly authoritarian overtones of 'anti-social behaviour'" are consistent "with the spirit and language of a free society,"[20] whilst Ashworth et al found the provision "unpleasantly reminiscent of powers granted in former East Germany to housing block committees – which also had unrestrcited powers to regulate residents' lives."[21] This anxiety was exacerbated by the fact that the definition of anti-social behaviour in s1(1)(a) looks only to the effect the defendant's behaviour had/would have been likely to have on the victim. There are therefore no safeguards within the legislation for those cases in which the victim is oversensitive or bigoted – "there is no protection for the defendant against the squeamishness, oversensitivity or intolerance of her neighbours"[22] lamented Ashworth et al. This led

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[16] "Instead of relating the provision to acts that would be criminal offences or breaches of civil law, there has been a shift to a far wider type of provision. On the face of it, any type of action leading to 'harassment, alarm or distress' could give rise to an order ... Is [anti-social] behaviour no longer defined as acts that are criminal offences or in breach of civil law? Could such acts include those that are presently wholly legal if they generate harassment, alarm or distress?" (HC Standing Committee B col 21 28 April 1998). As Clappison pointed out, under the clause which New Labour had proposed inserting into the Housing Bill (which would have created a Community Safety Order) it had to be shown that the defendant had committed five unlawful acts (see chapter one n16).

[17] HL Deb vol 587 col 580 17 March 1998.

[18] 'Love Thy Neighbour' (1999) 149 NLJ 479 & 520 at 479.

[19] 'Overtaking on the Right' at 1501.

[20] HL Deb vol 584 cols 544-545 16 December 1997.

[21] 'Neighbouring on the Oppressive' at 9.

[22] 'The Hybrid Law from Hell?' at 26. Similarly James Clappison remarked, "the person complaining could be a sensitive soul. The behaviour being complained about might not cause harassment, alarm or distress to people of everyday firmness ... but it might to a sensitive soul ... How does the Bill stop such applications and the granting of orders in response to them?" (HC

the critics to insist that ASBOs should not "be used simply to penalise the eccentric and should be limited to very real anti-social behaviour."[23] Conservative Edward Garnier warned the House of Commons:

> "We must be careful ... not to create a system of law that discriminates against eccentric people. I mean people who are loosely described as 'a nuisance:' people who raise eyebrows. We should be tolerant ... of people whose lives are somewhat different from the lives that we would like to lead"[24]

New Labour responded by reassuring the sceptics that ASBOs would not be imposed for trivial misbehaviour. Alun Michael explained that "in practice, a threshold must be observed," adding, "the orders are intended to tackle persistent behaviour ... [and] are intended to be used for criminal or sub-criminal activity, not for run-of-the-mill civil disputes between neighbours."[25] Despite the opaqueness of the expression "sub-criminal activity,"[26] this illustrates New Labour's confidence that ASBOs would

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Standing Committee B col 24 28 April 1998). Clappison therefore (unsuccessfully) tabled an amendment which would have imposed a requirement that the person of reasonable firmness would have been caused/been likely to have been caused harassment, alarm or distress.

[23] Lord Henley (a Conservative peer) (HL Deb vol 584 col 539 16 December 1997). Richard Allan's comments to the Commons Standing Committee were very similar: "[W]e are worried that there may be attempts to secure anti-social behaviour orders for behaviour that might simply be naughty or a little extraordinary ... [O]nly behaviour that can be deemed genuinely disruptive should be covered by such an order" (HC Standing Committee B cols 19, 20 28 April 1998).

[24] HC Deb vol 310 col 436 8 April 1998.

[25] HC Standing Committee B cols 46, 47 30 April 1998. Although Alun Michael insisted that ASBOs were designed to target persistent anti-social behaviour, the word "persistent" does not appear in s1(1)(a). See further chapter four section 3.4.

[26] Edward Leigh questioned the coining of the phrase "sub-criminal activity," saying, "behaviour is either criminal, in that it infringes an Act of Parliament and a provision clearly laid down, or it is not. There is no such thing as sub-criminal behaviour; there is behaviour and criminal behaviour" (HC Standing Committee B col 66 30 April 1998). Alun Michael responded, "sub-criminal behaviour is behaviour of a level that may be criminal, but to be actually described as such it would have to be proved to be so before a court. The question of proof may be a problem, but it makes perfect sense as part of a general pattern of activity, in which evidence is given to a court as part of the civil burden of proof about the need for an anti-social behaviour order to be made to prevent the repetition of certain behaviour" (at col 66). Philip Plowden has since reiterated the sentiments of Edward Leigh: "the term 'sub-criminal' is ... meaningless in law; behaviour is either criminal or it is not" ('Love Thy Neighbour' (n18 above) at 479). The quoted passage from Alun Michael suggests that in using the term he had in mind behaviour which (a) does infringe the criminal law, but for which no criminal conviction can be obtained due to the stringent criminal law rules of evidence; (b) can be proved to the civil standard of proof and forms part of a general pattern of behaviour; and (c) warrants the imposition of an ASBO to prevent further repetition of the behaviour. Yet this definition of sub-criminal behaviour is merely a description of the behaviour which New Labour were targeting when creating the ASBO! The term "sub-criminal activity" may therefore be seen as an unhelpful and confusing label for the type of behaviour which the ASBO was designed to tackle.

only be imposed following serious, persistent misbehaviour. This confidence derived from a filtering process which, they believed, would "ensure that such orders are not used for trivial behaviour."[27]

Individuals may not apply for an ASBO. If they believe an Order should be imposed they must go to one of the relevant authorities and ask them to apply. In the Lords Committee on the Crime and Disorder Bill Lord Goodhart expressed concern that someone cooking in their flat might produce smells "which cause genuine distress, but not serious distress, to the neighbours," and so would *prima facie* appear to fall within the scope of s1(1)(a). Lord Williams responded:

> "As far as concerns domestic smells – for example, if someone does not like the smell of fishcake batter wafting over the garden, or the barbeque irritates the next-door neighbour – I stress that this law is not for those eventualities. I believe that someone going to the local authority or the chief police officer in those circumstances would receive a very short answer"[28]

In other words, if the misbehaviour is trivial (or if there is no misbehaviour at all) the relevant authority will be unlikely to apply for an ASBO. Undeserving cases will be filtered out. The operation of this filter is buttressed, first, by the requirement that the relevant authorities consult with one another before applying for an Order[29] and, second, by the Guidance published by the Home Office. "[T]he guidance," Alun Michael affirmed, "will set out firm advice on the threshold to be applied. That will help the police, local authorities and the courts to act in accordance with Parliament's intentions." In particular, the Guidance would make it clear that Orders should not be imposed "for trivial matters or to penalise people who are merely eccentric."[30]

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[27] Alun Michael (HC Standing Committee B col 46 30 April 1998).

[28] HL Deb vol 585 cols 564, 566 3 February 1998. Similarly, Viscount Bledisloe (a Cross-Bench peer) remarked, "[t]hose proposing the amendments have spoken as though the over-fussy old lady has only to prove some harassment in order to get an order automatically. Surely that is wrong. First, she has to persuade the relevant authority that it ought to apply" (HL Deb vol 585 col 541 3 February 1998).

[29] This requirement was originally laid down by s1(2) and is now contained in s1E (see chapter one section 4.1). Admittedly the relevant authority may still apply for an ASBO even if the authorities it consults with do not agree with the application. However, if this were to happen the application would be weakened by the lack of agreement (see *Anti-Social Behaviour Orders – Guidance* (n4 above) at para 4.1).

[30] HC Standing Committee B cols 45, 46 30 April 1998. The Home Office Guidance issued in March 1999 accordingly stated – "In broad terms an anti-social behaviour order is likely to be relevant where there is behaviour of a criminal nature which causes or is likely to cause harassment, alarm or distress to other people ... [This] should not include run of the mill disputes between neighbours, petty intolerances, or minor or one-off disorderly acts. Nor should orders be used to penalise those who are merely different" (*Anti-Social Behaviour*

Even if the relevant authority were to apply for an Order in an undeserving case, it would still have to convince a court – who, according to s1(4), has complete discretion whether or not to make an Order – to impose an ASBO. "We trust the courts," declared Lord Williams, "[w]e do not expect them to impose these orders on a trivial basis."[31] This confidence in the courts' exercise of their discretion was reinforced by two safeguards contained in the legislation. First, s1(5) requires a court considering an application for an ASBO to disregard any act of the defendant which he shows was "reasonable in the circumstances." Complaints from bigoted or oversensitive neighbours, such as in Lord Goodhart's domestic smells example, will be filtered out by this defence. Second, s1(1)(b) states that an Order may only be imposed if it is "necessary to protect [others] from further anti-social acts by [the defendant]." This requirement prevents the imposition of an ASBO where the defendant's misbehaviour was trivial or was a one-off. These tests were therefore expected to "[ensure] that the order is applied only to the behaviour that it is intended to address."[32]

Finally, an ASBO must be imposed for a period of at least two years (s1(7)). This minimum period was designed to indicate, both to the authority applying for an ASBO and to the court hearing the application, that only conduct serious enough to warrant an Order of that duration should result in an ASBO being imposed. Alun Michael explained:

> "[T]here will be a minimum duration of the orders of two years. Behaviour not meriting that should not be the subject of an order, and if such an application is made, the court should reject it"[33]

Orders – Guidance (n4 above) at para 3.9). The wording of subsequent Guidance was less restrictive, however, emphasising the "wide range of anti-social behaviour that can be tackled by ASBOs," and commenting that "the most common behaviour tackled by ASBOs is general loutish and unruly conduct." But it does warn agencies considering applying for an ASBO that they should "satisfy themselves that complaints are well founded. In particular, they should consider the possibility that complaints may have been motivated by discrimination, perhaps on racist grounds, or to further a pre-existing grudge" (*A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (London: Home Office Communication Directorate, 2002) at 11, 14).

[31] HL Deb vol 585 col 539 3 February 1998.

[32] Alun Michael (HC Standing Committee B col 40 28 April 1998). There is also a right of appeal against the making of an ASBO (s4(1) Crime and Disorder Act 1998). A defendant may appeal against the making of the order and/or the terms of the order (see *R v Manchester Crown Court ex parte Manchester City Council* [2001] ACD 53).

[33] HC Standing Committee B col 46 30 April 1998. Similarly, Lord Williams said that the minimum duration "will indicate to the appropriate authorities – the local authority and the police – how they are to deal with these matters. In other words, this tells them not to seek orders lightly or for trivial incidents but where there is a real problem in a particular locality" (HL Deb vol 585 col 571 3 February 1998).

Once again, the difference in the way the critics and New Labour view state power is stark. In the eyes of the critics, the wide-reaching definition of "anti-social behaviour" is authoritarian. Whether or not a person is subjected to an ASBO should not depend on the exercise of discretion. Tightly-drawn definitions are needed so that individuals not engaging in serious anti-social behaviour are safely outside the reach of the legislation. New Labour, on the other hand, were happy to define "anti-social behaviour" more loosely. Whilst this gave the legislation a very broad scope, they were confident that in practice ASBOs would only be imposed in deserving cases. Those vested with discretion can be trusted to exercise it responsibly and the filtering process can be relied upon to work effectively.

2.3. The discretion conferred

For the critics, the definition of anti-social behaviour contained in s1(1)(a) amounted to an abdication of legislative responsibility. Ashworth et al questioned the "huge transfer to local officials of the power effectively to criminalise conduct,"[34] whilst Edward Garnier warned that we ought to be "careful about legislating by means of Home Office guidance," adding, "I am instinctively opposed to criminal legislation by Home Office guidance notes."[35] At the heart of these concerns lay the conviction that individuals not engaging in serious anti-social behaviour should not have to rely on how discretion is exercised for the non-imposition of an ASBO against them. Having given the example of a person who performed a lawful act which, quite unintentionally, caused distress to another, Conservative Humfrey Malins commented, "[i]t is worrying that a policy decision would be needed whether to proceed with an anti-social behaviour order."[36] In a similar vein Lord Goodhart complained:

> "[I]f the conduct does not deserve a penalty, then the law should not make it potentially subject to such a penalty. One should not be penalised by law and unpenalised by the exercise of discretion ... [P]eople should not be in danger of having antisocial behaviour orders made against them under the law and then having to rely on the discretion of the local authorities, the police or the courts to avoid having the order made against them"[37]

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[34] 'Neighbouring on the Oppressive' at 9.

[35] HC Deb vol 310 col 437 8 April 1998.

[36] HC Standing Committee B col 57 30 April 1998.

[37] HL Deb vol 587 cols 580, 585 17 March 1998.

The critics were quick to point out the magnitude of the task being imposed on both enforcement agencies and the courts. Lord Bingham, who welcomed the provisions of the Act as "imaginative and well designed," nevertheless urged that "the fair operation of these procedures will, I think, call for very great judgment and restraint on the part of those seeking, making and enforcing some of these orders."[38] Others were less optimistic. Conservative Eleanor Laing warned that the application of the law might vary from area to area,[39] whilst Lord Dholakia, drawing a parallel with stop and search legislation, cautioned that "the clause could be misused ... [T]he authorities could use it to target particular communities."[40] The potential for the law to be used in a discriminatory manner was also emphasised by Ashworth et al:

> "Even if the police and local authorities can be trusted to be scrupulous in avoiding discrimination [on grounds of race, religion, sex, sexual orientation or disability] – and we are not sure that they can – this is no obstacle to these orders being used as weapons against other unpopular types, such as ex-offenders, 'loners,' 'losers,' 'weirdos,' prostitutes, travellers, addicts, those subject to rumour and gossip, those regarded by the police or neighbours as having 'got away' with crime, etc ... Even though the courts may resist the grossest abuses, when these come to their attention, this will not necessarily prevent the police and local authorities from trying, perhaps zealously, to obtain orders against unpopular residents, in an effort to persuade local complainers that they are doing something"[41]

In New Labour's eyes, by contrast, the discretion conferred by the definition of "anti-social behaviour" posed no threat. The filtering process is "safeguard enough to ensure that the orders are not made in inappropriate circumstances ... [T]here are more than sufficient safeguards in the [legislation]"[42] insisted Lord Falconer. And, most

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[38] HL Deb vol 584 col 560 16 December 1997.

[39] "It is wrong to enact a law that applies throughout the country, but which can be interpreted in vastly different ways by different courts under different circumstances" (HC Standing Committee B col 135 5 May 1998).

[40] HL Deb vol 585 cols 536-537 3 February 1998. On the issue of stop and search powers, he remarked, "Twenty-five per cent of stop and search in this country relates to black people. In London, 40 per cent of stop and search relates to black people."

[41] 'Neighbouring on the Oppressive' at 9. Sarah Cracknell also warned of the danger of widening the net so that "new 'inappropriate' populations become subject to regulation, criminalization and exclusion ... [A] large proportion of perpetrators of nuisance are the elderly, families with children, and those who had mental health problems or other medical and welfare needs" ('Anti-Social Behaviour Orders' (2000) 22(1) JSWFL 108 at 112).

[42] HL Deb vol 587 col 583 17 March 1998.

importantly, the enforcement agencies and the courts can be trusted to exercise their discretion appropriately:

> "My constituents know what anti-social behaviour is. So too, I suspect, do those of Opposition Members. Anti-social behaviour orders will be granted by Magistrates' courts on the application of local authorities and high-ranking police officers. Do Opposition Members distrust the judgment of the police and the courts so much that they believe that they cannot judge anti-social behaviour when they see it?"[43]

New Labour were also keen to stress the benefits of the approach they had taken in s1(1)(a). Alun Michael argued that "[w]idely drawn legislation with clarity of purpose, and with clear expectations placed on those who use it, can be a flexible method."[44] A tightly-drawn definition might prove too rigid and thus exclude some forms of serious anti-social behaviour. A broad definition, on the other hand, is flexible and can be adapted to meet all potential forms of serious anti-social behaviour.

Appreciating these different perspectives on the discretion conferred by s1(1)(a) is fundamental to a proper understanding of the dispute over the clarity and breadth of the definition of anti-social behaviour. The critics' disquiet with the vagueness and breadth of the definition stems from their view that state power is not necessarily benevolent. A clear, tightly-drawn definition is needed so that individuals who do not engage in serious anti-social behaviour are plainly outside the scope of the legislation with the State having no recourse against them. This fear that undeserving individuals might nonetheless have an ASBO imposed on them goes hand-in-hand with the concern that those exercising the discretion conferred by s1(1)(a) might do so in a discriminatory manner. The eccentric, the unconventional and the unpopular should be protected against the discriminatory use of the legislation by a tightly-drawn definition which clearly excludes them from its scope. This contrasts with New Labour's view of state power as benevolent. Assisted by the relevant features of the filtering process, those entrusted with discretion can be relied upon to only invoke the ASBO against those guilty of serious anti-social behaviour. For this reason a clear, tightly-drawn definition of "anti-social behaviour" to protect the eccentric, the unpopular, and anyone else not engaging in serious anti-social behaviour is

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[43] Labour MP Helen Brinton (now Mrs Helen Clark) (HC Standing Committee B col 69 30 April 1998). Ironically the police had once been called to Ms Brinton's home at 3a.m. after neighbours complained about noise ('Police called to MP's home' *The Guardian* 21 May 2001).

[44] HC Standing Committee B col 70 30 April 1998.

unnecessary. Neither is it desirable. A widely-drawn definition offers a flexible tool which courts and enforcement agencies can utilise to ensure the legislation is effective in tackling all forms of anti-social behaviour. In short, the arguments surrounding s1(1)(a) are at root concerned with fundamental questions about how state power should be viewed.

3. The Terms of, and Penalties for Breaching, an ASBO: Should Proceedings for the Imposition of an ASBO be Regarded as Civil or Criminal in Substance?

Besides the definition of "anti-social behaviour" in s1(1)(a), a number of other concerns regarding the ASBO provisions were also voiced. These may be divided into two categories; first, those concerning the possible terms of an Order, and second, those concerning the penalties for breaching an Order. In relation to the possible terms of an Order, criticisms were levelled at the potential severity and minimum duration of an ASBO. In relation to the penalties for breaching an Order, criticisms were levelled at the fact that breach of an ASBO is a criminal offence, not a contempt of court, at the gravity of the sentences that can be imposed for breach, and at the non-availability of conditional discharge as a sentencing option. These concerns, and New Labour's response to them, will be detailed in sections 3.1 to 3.5. Pointing to these different issues surrounding the ASBO, many commentators argued that the proceedings for imposition of an Order should be regarded as criminal in substance. The proper classification of these proceedings will accordingly be discussed in section 3.6. Finally, it will be shown that underlying the debate surrounding the proper classification of proceedings for the imposition of an ASBO lay the notion that a central task of criminal justice policy is to balance the competing demands of victims' interests and defendants' rights.

3.1. The potential severity of an ASBO

Five-and-a-half months after ASBOs had become available, a total of just five Orders had been imposed.[45] In a speech delivered to the annual conference of the Police Superintendents' Association, a disappointed Jack Straw attacked those "well-heeled and hypocritical" civil liberties lawyers who had opposed the introduction of the Orders. "These people," he lamented, "will represent the perpetrators of crime and then get back into their BMWs and drive to their homes in quiet and prosperous areas where they are immune from much of the crime."[46] In a letter written to *The Times*

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[45] 'Straw attacks hypocrisy of "BMW lawyers"' *The Guardian* September 15 1999.

[46] ibid. See also "Straw says affluent civil rights lawyers are hypocrites" *The Times* September 15 1999.

John Wadham, the Director of Liberty, responded by saying that he "was saddened and surprised to see Jack replacing reasoned argument with such attacks," adding that until the "real problems" with the legislation were removed his opposition to the ASBO would continue. He illustrated one of these problems using the case of two boys from Liverpool who had had an Order imposed on them.[47] The Order stated, *inter alia*, that the boys were not to enter two roads in the Edge Hill area of the city. Referring to the European Convention on Human Rights, Wadham commented that the imposition of such a prohibition, breach of which is punishable by up to five years' imprisonment, "is likely to violate the right of freedom of assembly (Article 11) and the right to private life (Article 8)."[48] Robin White also argued that the terms of an ASBO could potentially infringe Articles 8, 10 and/or 11 of the ECHR. Although the rights enshrined in these Articles are qualified rights, White explained that derogations from them are only permissible if it is shown that "there is a pressing social need for regulation and that the interference with the right is the minimum necessary to secure a legitimate general interest."[49] At the heart of these concerns lay the broadly-couched s1(6), which permits

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[47] See 'Tearaways banned from streets' *The Guardian* 2 September 1999 and 'Yobs named and shamed' *Liverpool Echo* 25 September 2003.

[48] *The Times* 17 September 1999 at 25.

[49] 'Anti-Social Behaviour Orders under Section 1 of the Crime and Disorder Act 1998' (n6 above) at 61. Ashworth et al also argued that the terms of an ASBO could amount to a breach of Article 5(1) of the ECHR: "any curfew or house arrest provisions included in an ASBO would be in clear breach of Article 5(1) of the European Convention if an ASBO does not formally amount to a criminal conviction. Article 5(1) provides a closed list of circumstances in which the liberty of the subject may be curtailed, a list which does not include the mere prevention of anti-social behaviour" ('The Hybrid Law from Hell?' at 26). For an ASBO to breach Article 5(1) two things would have to be established. First, it would have to be shown that the terms of the Order amounted to a deprivation of liberty and not merely a restriction of it (restrictions of liberty are governed by Article 2 of Protocol Number 4 – see, for example, *Engel* (see below) at para 58 and *Guzzardi* (see below) at para 92 – which has not been ratified by the U.K.). In the case of *Guzzardi v Italy* (1980) 3 EHRR 333 the European Court of Human Rights explained that the difference between a deprivation of liberty and a restriction of it is "one of degree or intensity, and not one of nature or substance" (at para 93), adding that in applying this distinction regard must be had to "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question" (at para 92). Guzzardi, who was suspected of belonging to a band of mafiosi, was placed under special supervision with an obligation to reside within an area of 2.5 square kilometres on the small island of Asinara. He was also required, *inter alia*, to report to the supervisory authorities twice a day, to return to his residence by 10 p.m. and not leave earlier than 7 a.m., and, whenever he wished to make/receive a long-distance telephone call, to inform the supervisory authorities in advance of the telephone number and name of the recipient/maker of the call. Although Guzzardi was not kept under lock and key, this was held to amount to a deprivation of liberty. However, the facts of the case are extreme. It may be contrasted with the case of *Raimondo v Italy* (1994) 18 EHRR 237. Raimondo was also placed under special supervision. He was prohibited from leaving his home between the hours of 9 p.m. and 7 a.m. and without first informing the police. This was held not to amount to a deprivation of liberty (see para 39). Also instructive is the case of *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 in which the Court held that servicemen under light arrest (confined during off-duty hours to their dwellings or to military buildings or premises) and under aggravated arrest (confined during off-duty hours to a specially designated but unlocked place) were not deprived of their liberty, whereas servicemen under strict arrest (locked in a cell day

the imposition of any prohibition deemed "necessary" to protect persons from further anti-social acts by the defendant. Commenting on the powers afforded by this provision, Ashworth et al complained:

> "One might expect that a community safety order would simply be an order that the offender desist from the offending conduct. The proposal, however, goes far beyond this. The order could include a curfew, exclusion from a particular area, restraints from approaching specified persons, and so forth ... Nothing in the proposal would prevent the order from being very burdensome indeed: to involve requiring the offending family to move its residence (without funds being made available for the purpose), or to curtail its movements drastically"[50]

These sentiments were echoed by Opposition members during the passage of the Crime and Disorder Bill. "Those of us who are concerned about civil liberties do not want to live in a state where conduct that falls short of what is required by the criminal law could result in oppressive action being taken against those who do not intend their actions to cause offence"[51] declared Humfrey Malins. Various amendments aimed at preventing the imposition of oppressive Orders were accordingly proposed. Warning of the "real danger that we could give the courts powers to make sweeping orders,"[52] Malins proposed amending s1(4) so that an ASBO could only prohibit repetition of the behaviour that triggered the Order (as opposed to prohibiting "anything described in the order"). If two young men are causing a lot of trouble on housing estate X, he mused, why can't the court simply impose an ASBO prohibiting them "from acting in a manner likely to cause harassment, alarm or distress to persons present on the X housing estate? ... It must be possible to draw up wording that is sufficiently wide to prohibit the mischief complained of but not so cumbersome as to represent a blanket exclusion from a whole area."[53] A similar amendment was suggested by Liberal

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and night) were deprived of their liberty. (It should be noted, however, that the Court said that "[t]he bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman" (at para 59)). The second thing which must be shown in order to establish a breach of Article 5(1) is that none of the derogations listed in Articles 5(1)(a)-(f) apply. It might be argued that the terms of the ASBO are imposed in order to secure the fulfilment of an obligation prescribed by law, i.e., the obligation found in s1(1)(a) Crime and Disorder Act 1998 not to behave in an "anti-social manner," so that Article 5(1)(b) applies.

[50] 'Overtaking on the Right' at 1502.

[51] HC Standing Committee B col 30 28 April 1998.

[52] HC Standing Committee B col 107 30 April 1998.

[53] HC Standing Committee B col 115 30 April 1998.

Democrat Richard Allan, who likewise urged that it "is critical to keep the orders' scope proportional to the behaviour that brings them about."[54] Amendments were also proposed which would have prevented an ASBO from ever prohibiting a defendant from occupying his own home[55] and from interfering with a defendant's schooling, employment, or religious observance.[56]

These amendments were all resisted by New Labour. In the House of Lords Lord Williams insisted that ASBOs would not be oppressive. It "is a prohibitory order and it requires that the person who is subject to it should do no more than have a decent regard for the susceptibilities of others."[57] Therefore, "[i]f [the defendant] ceases his wrong activity, there is no sanction at all. There is no interference with his personal liberty."[58] Lord Falconer agreed:

> "Antisocial behaviour orders should only prohibit antisocial behaviour, not interfere in the defendant's everyday lawful and socially acceptable activities ... The defendant should be well aware that the kind of activity prohibited is unacceptable to society; he should cease that activity; and the order can run its length without adverse effect"[59]

The suggestion that an ASBO will not be burdensome to a defendant who does not act anti-socially is irreconcilable, however, with other comments made by New Labour, most notably those accepting the possibility that a defendant might be banned from his own home.[60] Lord Falconer accepted that a defendant might be banned from a house he owns or rents, "if it is established before the court that that is necessary for the protection of the public,"[61] as did Alun Michael, who commented that "[i]t would be

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[54] HC Standing Committee B col 106 30 April 1998. Lord Goodhart also moved an amendment to this effect at the Lords Committee stage of the Bill (amendment number 12).

[55] Amendment number 33, tabled by James Clappison at the Commons Standing Committee.

[56] Amendment number 93, tabled by Humfrey Malins at the Commons Standing Committee. See also amendment number 11, tabled by James Clappison, which provided that ASBOs should, *as far as possible*, avoid conflict with a defendant's school attendance and religious observance.

[57] HL Deb vol 588 col 173 31 March 1998.

[58] HL Deb vol 585 col 575 3 February 1998.

[59] HL Deb vol 587 col 592 17 March 1998.

[60] A point made by Lord Mackay when s19 (Anti-Social Behaviour Orders in Scotland) was debated at the Lords Committee stage (HL Deb vol 585 col 630 3 February 1998). Curfew and exclusion requirements are other examples of conditions which are inconsistent with the assertion that ASBOs impose no greater burden than the requirement to act lawfully.

[61] HL Deb vol 584 col 595 16 December 1997.

unusual to ban someone from his home entirely ... [It] is not impossible, but unlikely."[62] When asked to amend the Bill, so that such severe prohibitions could never be imposed, Michael responded by saying that such amendments were unnecessary:

> "No court needs to be told that a prohibition that a defendant can show will cause exceptional hardship should not be imposed unless there is a real need to do so ... Restricting the prohibitions in the order to those necessary to protect the community from further anti-social acts by the defendant is the essential safeguard. It is the only one required"[63]

Michael also rejected the proposal to limit ASBOs to prohibiting repetition of the behaviour that triggered the Order, saying that it "would permit the defendant to circumvent the order by subtly changing the anti-social activity in question."[64] Lord Williams similarly dismissed the proposal, describing it as "too limiting ... One does not want to be too restrictive in what is intended to be ... a flexible remedy."[65] As for the amendments aimed at preventing any conflict with the defendant's schooling, employment or religious observance, Michael said it would not be "appropriate" to address such matters in the legislation. "No list of what should or should not be included [in an ASBO] could ever be complete," he claimed, adding that the Home Office Guidance would "[make] it clear that the requirements of any order should avoid conflict with such matters as schooling, work, or religious activities."[66]

As with the definition of "anti-social behaviour," the different perspectives on state power are again stark. The critics argued that the legislation should be worded tightly, so that defendants would be protected against the risk that courts might impose unduly severe prohibitions. New Labour, on the other hand, were keen to give courts imposing ASBOs plenty of room for manoeuvre, to ensure the prohibitions would be effective in combating the defendant's anti-social behaviour. To this end, they were happy to vest considerable discretion in the courts, trusting them to only impose onerous prohibitions when absolutely necessary.

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[62] HC Standing Committee B col 113 30 April 1998.

[63] HC Standing Committee B cols 112, 113 30 April 1998.

[64] HC Standing Committee B col 112 30 April 1998.

[65] HL Deb vol 585 col 563 3 February 1998.

[66] HC Standing Committee B cols 112, 113 30 April 1998. However, the Guidance published in November 2002 contains nothing to this effect (*A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (n30 above) at 34-35).

3.2. Minimum duration of an ASBO

The fear that onerous Orders could be imposed was exacerbated by the stipulation in s1(7) that Orders must apply for at least two years. Opposition Members accordingly tabled amendments which would have reduced the minimum duration of an ASBO.[67] Concern was also expressed about s1(9), which provides that an ASBO may not be discharged within two years of its imposition unless both the applicant and the defendant give their consent. The decision to impose an ASBO is a "judicial" one, argued Lord Dholakia. It is "therefore right and proper" that the court should be able to discharge the Order without anyone else having "the right to interfere in that decision other than to be consulted about the appropriateness of what is required."[68] Lord Goodhart agreed, commenting that to effectively give the applicant for an Order the right of veto over its discharge "is contrary to the principle that the prosecution does not involve itself with sentencing."[69] After all, a local authority, and the chief officer of police, are "likely to be influenced by political considerations of the popularity or unpopularity of the individual concerned."[70]

As explained above,[71] the two-year minimum duration of an ASBO was designed to indicate, both to the authority making an application and to the court considering it, how serious the defendant's anti-social behaviour must be if an ASBO is to be imposed. Emphasising its importance to the filtering process, New Labour accordingly resisted the amendments aimed at reducing this minimum duration. The role of the consent requirement laid down by s1(9) was to underline this expectation that ASBOs would only be imposed on behaviour deserving of a two-year Order. Lord Williams explained that "[i]t is not intended that any court should be able to impose an order thinking, 'By the way, this can be reduced without the agreement of the applicant authority.'"[72] In response to suggestions that the consent requirement could operate inequitably, he replied summarily that where there are "truly exceptional circumstances" which "justify

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[67] At the Commons Standing Committee, Richard Allan proposed that Orders should have no minimum duration and a maximum duration of two years (amendment number 40 – identical to amendment number 17 tabled by Lord Goodhart at the Lords Committee stage). In a similar vein, James Clappison tabled an amendment (number 13) which would have reduced the minimum duration of an ASBO to one year and introduced a maximum period of three years, and Lord Henley moved an amendment (number 16) at the Lords Committee stage which would have given the courts complete discretion as to the length of an ASBO.

[68] HL Deb vol 585 cols 576-577 3 February 1998.

[69] HL Deb vol 585 col 574 3 February 1998.

[70] HL Deb vol 587 col 590 17 March 1998. Although Lord Goodhart did not explicitly mention chief officers of police his point may equally be applied to them.

[71] See section 2.2.

[72] HL Deb vol 585 col 577 3 February 1998.

the discharge of the order, there will be no reason for the police and the local authority not to consent to it."[73]

3.3. Criminal penalties for breach

According to s14(1) Contempt of Court Act 1981, a person who breaches a court order may be committed to prison for contempt of court for a fixed term of up to two years.[74] In the eyes of New Labour, however, to punish breach of an ASBO as a contempt of court would be insufficient. As explained in chapter one, they were adamant that breach of an ASBO should be a crime so that the censure of the criminal law is invoked. A curious consequence of this procedure is that "an order can be placed on someone because of a non-criminal act, and breached without that person engaging in a criminal act." In other words, without ever having broken the criminal law, "[s]uch a person can be turned into a criminal."[75] One commentary on the Crime and Disorder Act 1998 thus described the novel concept of imposing criminal penalties for breach of a court order as creating "a form of personalised criminal law."[76] The notion of effectively imposing particularised criminal laws on perpetrators of anti-social behaviour was condemned by Ashworth et al:

> "Until now, British law as remained broadly faithful to the principle that the criminal law should not have its scope determined on a discretionary basis by officials of the executive. Parliament and the courts announce what conduct is to be criminal, and we are all given the chance, thanks to such announcements, to avoid getting entangled with the criminal law. The ASBO proposals threaten to criminalise people's activities by stealth, through the decisions of local officials"[77]

Opposition Members also pointed out the differences between imprisonment for contemnors and imprisonment for convicted criminals.[78] Committal for contempt

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[73] HL Deb vol 585 col 576 3 February 1998.

[74] In the case of committal by a superior court. The maximum term in the case of committal by an inferior court is one month.

[75] Sir Robert Smith (HC Standing Committee B col 70 30 April 1998).

[76] Roger Leng, Richard Taylor and Martin Wasik *Blackstone's Guide to the Crime and Disorder Act 1998* (London: Blackstone, 1998) at 13.

[77] 'Neighbouring on the Oppressive' at 9.

[78] In particular, Lord Thomas (see HL Deb vol 585 cols 597-600 3 February 1998). See also Humfrey Malins (HC Standing Committee B col 104 30 April 1998).

of court does not show up on a person's criminal record;[79] contemnors are a separate class of prisoner and only mix with convicted criminals if they wish to do so;[80] and, unlike convicted criminals, contemnors may be visited and treated by their own registered medical practitioner or dentist,[81] may wear their own clothing and arrange for the supply of clean clothing from outside prison,[82] and may send and receive as many letters and receive as many visits as they wish.[83] Emphasising the importance of these differences, Liberal Democrat peer Lord Thomas challenged New Labour to punish breach of an ASBO as a contempt of court, adding that such an approach would also have the benefit of greater flexibility. Since a court may release a contemnor before the end of his term of imprisonment if he apologises and promises to obey the Order,[84] the offender has the opportunity "to come to his senses and, instead of serving a term of up to two years' imprisonment, to come to the court and apologise and give assurances of good behaviour in the future."[85]

For New Labour, however, the chief concern was to invoke the censure of the criminal law. Lord Williams stressed that "[anti-social behaviour] must be recognised and dealt with for what it is. That is why we made the deliberate decision to invoke the criminal law at the breach of the order stage."[86] And, whilst imposing criminal penalties for breach of a court order was novel, it was not unprecedented. New Labour pointed, somewhat ironically, to the Protection from Harassment Act 1997:

> "It was interesting to note that in introducing the Protection from Harassment Act 1997, the previous Government accepted the underlying approach of combining the civil procedure in respect of prevention with the criminal procedure in relation to punishment, which is the essence of the anti-social behaviour order"[87]

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[79] See ss112-127 Police Act 1997.

[80] Prison Rules 1999 (SI 1999/728) r7(3)(b).

[81] ibid r7(3)(c), r20(5).

[82] ibid r7(3)(c), r23(1).

[83] ibid r7(3)(c), r35(1).

[84] The power of the court to order the contemnor's early release is expressly preserved by s14(1) Contempt of Court Act 1981.

[85] HL Deb vol 585 col 598 3 February 1998.

[86] HL Deb vol 585 col 603 3 February 1998.

[87] Alun Michael (HC Standing Committee B col 94 30 April 1998). The irony lies in the fact that, as explained in section 1 of chapter one, the Protection from Harassment Act 1997 was a "cuckoo's egg neatly placed by Labour in the nest of the Conservative Government" (Andrew

As for the differences between imprisonment for contemnors and imprisonment for convicted criminals, Alun Michael retorted glibly that "imprisonment feels like imprisonment, whatever the source from which it arises."[88]

3.4. Disproportionate penalties for breach

There was also much opposition to the length of time for which a defendant might be imprisoned for breach of an Order – up to five years. "[T]he ferocity of the sentencing power in this Bill is extraordinary" remarked Lord Thomas. "It can only be window-dressing."[89] The maximum possible term of imprisonment – the same as for offences such as violent disorder[90] and malicious wounding or infliction of grievous bodily harm[91] – made breach of an ASBO a very serious offence. Recalling a sentencing conference he had attended, at which the penalty for breach of an ASBO had been discussed, Lord Thomas said, "the idea that breach an order of this kind should be placed above various other serious offences was one which the professional judges simply could not accept."[92] He accordingly challenged Lord Williams to give examples of when, if ever, the maximum five year prison sentence would be imposed:

> "[W]hat circumstances does the noble Lord envisage would have to have occurred for a five-year sentence of imprisonment to be passed for a breach of

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Rutherford 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain' in Penny Green and Andrew Rutherford (eds.) *Criminal Policy in Transition* (Oxford: Hart Publishing, 2000) at 48). Lord Thomas' call for breach of an ASBO to be punished as a contempt of court was also undermined by the fact that, during the passage of the Protection from Harassment Bill, he had proposed replacing the "unprecedented mismash of civil and criminal procedure" (HL Deb vol 577 col 924 24 January 1997) with a "simple, two-stage procedure" which also treated breach of a court order as a crime. First, "a victim, or the police on her behalf, will bring a complaint before the magistrate setting out in simple language the problems she is encountering." Acting on the balance of probabilities, the magistrates' court could then impose an order "to prohibit the the particular conduct about which the complaint is made." Second, "breach of the prohibitions would be a criminal offence. The actus reus would be the breach itself; the intention to breach the order would be the mens rea" (cols 926-927). Lord Thomas tabled amendments to this effect at the Lords Committee stage of the Bill, but did not press them to a division (HL Deb vol 578 cols 511-524 17 February 1997).

[88] HC Standing Committee B col 98 30 April 1998.

[89] HL Deb vol 585 col 600 3 February 1998.

[90] s2 Public Order Act 1986.

[91] s20 Offences Against the Person Act 1861.

[92] HL Deb vol 587 col 601 17 March 1998.

one of his antisocial behaviour orders and where a more serious offence has not been committed?"[93]

These sentiments were echoed by other Opposition Members. Lord Goodhart asserted that the five-year maximum sentence was unnecessary. If the act that constituted breach of an ASBO was in itself a crime the defendant could be prosecuted for that offence, he argued, whereas if it did not constitute a crime it was "inconceivable that it would be possible to justify a five-year sentence for that breach."[94] Similarly, Edward Garnier warned against "sending someone to prison for five years when the act that constitutes the basis of the breach of that order, if subject to prosecution under the normal criminal law, would not lead to anything like a five-year prison sentence."[95] Ashworth et al concurred:

> "It strains credibility to assert that up to five years' custody could be a proportionate sanction in any case in which the defendant could not instead have been tried under the existing law for an ordinary criminal offence, such as one of the graver forms of aggravated assault"[96]

According to s1(10), to establish liability for breach of an ASBO the prosecution need only prove that the defendant, without reasonable excuse, did something which the Order prohibited him from doing. There is thus no need to establish *mens rea* in relation to the breach, and there is nothing to prevent the act that constitutes a breach from being extremely trivial.[97] James Clappison surmised that "[s]omeone might, for example, merely set foot inside an exclusion zone and thus render himself liable to five years' imprisonment – the same penalty as for the serious criminal offences [mentioned above]."[98] Andrew Ashworth thus concluded, "what we have here is a strict

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[93] HL Deb vol 585 col 604 3 February 1998.

[94] HL Deb vol 587 col 599 17 March 1998.

[95] HC Deb vol 310 col 437 8 April 1998.

[96] 'Neighbouring on the Oppressive' at 11.

[97] For example, if a defendant unthinkingly enters an exclusion zone he will have breached the Order, and it is debatable whether absent-mindedness constitutes a "reasonable excuse" for having done so.

[98] HC Standing Committee B col 129 5 May 1998.

liability offence (no proof of fault required) with a disproportionately high maximum penalty."[99]

As explained in chapter one, New Labour believed that the punishment meted out by the criminal justice system for anti-social behaviour was seldom sufficient. A chronic condition was broken up by the criminal law into a series of acute events, with the result that the punishment imposed failed to reflect the aggregate impact of the behaviour. In order to address this, New Labour stressed that breach of an ASBO should be seen as the continuation, in defiance of a court order, of a course of anti-social behaviour. "[A] breach is not just a repetition of the anti-social behaviour; it is also a flouting of a court order"[100] declared Alun Michael. Viewed in this way, they argued that the maximum sentence of five years' imprisonment was appropriate. Alun Michael distinguished breach of an ASBO from the offence of affray, for which the maximum sentence is three years' imprisonment, on the basis that affray "involves one incident" whereas breach of an ASBO involves "a pattern of behaviour that is damaging people's lives over a considerable period of time."[101] And Lord Williams claimed that he could "easily conceive" of circumstances where a five year prison sentence would be justified, pointing as an example to a situation where serious anti-social behaviour had been continuing for some time, even after the imposition of an ASBO.[102] New Labour were also keen to stress the symbolic importance of the severe maximum penalty. "[I]ts existence is necessary," argued Lord Williams, "to show how seriously the community regards this kind of behaviour."[103] Furthermore, a clear message would be sent to perpetrators of such behaviour, deterring them from breaching the Order. "Breaching an order may result in a sentence of up to five years, which may well cause some criminals in our communities to think twice about doing so" declared Hazel Blears.[104]

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[99] 'The Magistrate Debate' (1999) 55(8) Mag 237. In this short piece Ashworth also states that the burden of proof of the defence of reasonable excuse lies on the defendant. But whilst s1(5) makes clear that, at the application for an ASBO, only behaviour which the defendant shows was reasonable may be disregarded, s1(10) does not clearly place the burden of proof for establishing a reasonable excuse for breaching the Order on the defendant. The defendant's burden may therefore be construed as merely evidential – a view in fact adopted by Ashworth in his later article 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 LQR 263 at 277.

[100] HC Standing Committee B col 53 30 April 1998.

[101] HC Standing Committee B col 138 5 May 1998. The offence of affray is found in s3 Public Order Act 1986.

[102] HL Deb vol 585 cols 604-605 3 February 1998.

[103] HL Deb vol 587 col 601 17 March 1998.

[104] HC Deb vol 310 col 414 8 April 1998. Although "the people subject to the orders will soon become familiar with the actual sentences being handed down," and so if word got around that the courts never granted sentences of five years the deterrent effect would be lost anyway (Richard Allan (HC Standing Committee B col 141 5 May 1998)). It is therefore interesting to

New Labour responded to concerns that trivial breaches of ASBOs might result in disproportionate penalties in a by-now familiar manner. "If a specific breach is not regarded as serious, the Crown Prosecution Service is not likely to proceed,"[105] Alun Michael reassured the Commons Standing Committee. Moreover, even if such a defendant were prosecuted, the court sentencing for breach can be trusted to impose only a nominal fine[106] or discharge him absolutely.[107]

3.5. Unavailability of conditional discharge

By virtue of s1(11) of the 1998 Act, however, the sentencing court could not discharge the defendant conditionally. The critics challenged this "unprecendented fetter upon the sentencing discretion of an English criminal court."[108] Lord Goodhart questioned:

> "Why should small fines be allowed but, at the same time, the court be refused the power to order a conditional discharge which may well, in those circumstances, have a stronger deterrent effect?"[109]

The willingness of New Labour to vest discretion in enforcement agencies and the courts has been highlighted on several occasions. To withdraw from the courts the option of discharging a defendant conditionally might therefore appear surprising. Commenting on this apparent paradox, Lord Goodhart remarked, "while the Government are conferring wide powers on the courts, they do not seem to trust the courts to use those powers properly."[110]

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note that Siobhan Campbell found that, during the year 2000, just 27 of the 51 individuals who breached an ASBO and were taken to court received a custodial sentence (53%). Campbell goes on to note that a large proportion of partnerships expressed dissatisfaction about the way the courts handled breaches, questioning whether they took ASBOs seriously. Some magistrates, on the other hand, expressed unease with the focus on custody, explaining that you try everything before resorting to a prison sentence (*A Review of Anti-Social Behaviour Orders* (n4 above) at 76-80).

[105] HC Standing Committee B col 111 30 April 1998.

[106] See, e.g., HL Deb vol 585 col 606 3 February 1998.

[107] See, e.g., HC Standing Committee B col 111 30 April 1998.

[108] Ashworth et al ('The Hybrid Law from Hell?' at 26).

[109] HL Deb vol 585 col 602 3 February 1998.

[110] HL Deb vol 585 col 533 3 February 1998. Lord Goodhart further illustrated his contention by pointing to the two-year minimum duration of an ASBO and the consent requirement laid down by s1(9) (see section 3.2 above).

New Labour responded by asserting that an ASBO effectively gives a defendant a final warning – either he stops his anti-social behaviour or he is punished. To discharge a defendant conditionally following breach of the Order would merely be to serve "a further order, a further final warning and a further last resort."[111] Lord Falconer explained:

> "The order is saying, 'Continue in this behaviour and you will be in serious trouble. If you breach the order, there will be consequences under the criminal law.' But to make a conditional discharge following a breach appears to ignore all that"[112]

Permitting conditional discharge would thus be an "obstacle to enforcing the order effectively."[113] It would land us "back in a situation which most people have regarded as foolish in the extreme; namely, caution, caution and caution" argued Lord Williams, adding "[w]e do not believe that a conditional discharge, which so often, as they say in the trade, is just a slap on wrist with a wet lettuce, is appropriate."[114]

3.6. The classification of the proceedings for the imposition of an ASBO

In English law the rule against hearsay evidence and the requirement that a defendant's guilt be established "beyond reasonable doubt" are fundamental features of the criminal trial. These safeguards are also enshrined in the European Convention on Human Rights. According to Article 6 of the Convention a defendant "charged with a criminal offence" has certain basic rights which include the right "to examine or have examined witnesses against him" (Article 6(3)(d)), whilst Article 6(2) provides that he "shall be presumed innocent until proved guilty according to law," from which may be inferred the requirement to prove guilt "beyond reasonable doubt."[115] The proper classification of the proceedings for the imposition of an ASBO was thus crucial, since, as outlined in chapter one, New Labour had purposed that hearsay evidence would be

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[111] Lord Williams (HL Deb vol 585 col 605 3 February 1998).

[112] HL Deb vol 587 col 593 17 March 1998.

[113] Alun Michael HC Standing Committee B col 137 5 May 1998.

[114] HL Deb vol 585 cols 605-606 3 February 1998.

[115] In *Barberà, Messegué & Jabardo v Spain* (1989) 11 EHRR 360 the European Court of Human Rights stated that "the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused" (at para 77). Similarly, in *Austria v Italy* (1963) YB VI 740 the European Commission of Human Rights said that "the onus to prove guilt falls on the prosecution and any doubt is to the benefit of the accused" (at 784). Cf. Richard Clayton & Hugh Tomlinson *The Law of Human Rights* (Oxford: OUP, 2000) at para 11.238.

admissible at the application for an Order and the civil law standard of proof would apply. To this end they provided that applications for an ASBO shall be made "by complaint,"[116] thereby triggering the civil procedure of the Magistrates' Courts Act 1980.

This formal classification notwithstanding, many commentators[117] argued that proceedings for the imposition of an ASBO should be classified as criminal in substance, and that therefore the rule against hearsay evidence and the requirement that guilt be established "beyond reasonable doubt" should apply.[118] They drew attention to the various aspects of the ASBO outlined hitherto in this section, emphasising that an ASBO can impose severe restrictions on a defendant's liberty, that an Order's potential severity is compounded by the fact that it must last for at least two years (during which time it can only be discharged with the applicant's consent) and could last indefinitely, and that breach of an Order is a serious criminal offence punishable by up to five years' imprisonment, with conditional discharge not available as a sentencing option.[119] To further support the assertion that the proceedings for imposition of an ASBO ought to be regarded as criminal in substance, critics also stressed that the behaviour giving rise to an Order will normally constitute or include a criminal offence, that the proceedings are launched by either the police or by the local authority acting in its public capacity, and that the ASBO was being presented as part of a campaign to tackle crime. James Clappison wryly commented:

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[116] s1(3) Crime and Disorder Act 1998.

[117] In addition to the three articles by Ashworth et al, see Philip Plowden 'Love Thy Neighbour' (n18 above), Adrian Turner 'Reluctance to Seek Anti-Social Behaviour Orders' (1999) 163 JP 761 & 'Anti-Social Behaviour Orders and the HRA' (1999) 163 JP 861, Robin White 'Anti-Social Behaviour Orders under Section 1 of the Crime and Disorder Act 1998' (n6 above) and Andrew Rutherford 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain' (n87 above). Cf. Addison & Lawson-Cruttenden 'Anti-Social Behaviour Orders' (1999) 92 Crim Law 5 and John Smith [2003] Crim LR 269.

[118] Concern was also expressed about the availability of legal aid for those subject to an application for an ASBO. In response to these concerns New Labour provided that legal aid would be available (see *LSC Guidance on Anti-Social Behaviour Orders* – available on the website of the Legal Services Commission (www.legalservices.gov.uk)).

[119] Ashworth et al explained the relevance of the non-availability of conditional discharge to the conclusion that proceedings for the imposition of an ASBO ought to be regarded as criminal in substance: "The underlying thought is that, in a sense, the defendant has already *had* a conditional discharge. The ASBO itself sent her home with some conditions to abide by, and now here she is back before the court. Surely the time is now ripe for some serious sentencing?" ('The Hybrid Law from Hell?' at 26 (emphasis original)). James Clappison put forward the same argument: "The Government argue, and the Minister argued this morning, that the order is civil, not criminal. If it can be inferred that a person subject to an order has had a conditional discharge in the shape of the order, that argument is undermined" (HC Standing Committee B col 130 5 May 1998).

> "The Government are here trying to have it both ways. With respect to the absence of legal safeguards, the Government are saying that anti-social behaviour orders will lead only to civil injunctions that will prevent people from doing certain things ... The Government have presented those orders as part and parcel of a crack down on crime, especially youth crime. That was referred to this morning. The Government cannot have it both ways"[120]

Furthermore, the critics urged, even if the proceedings were classified as civil domestically this would not be decisive for the purposes of Article 6. The European Court of Human Rights gives the phrase "criminal charge" a meaning autonomous from that used in domestic jurisdictions. The three *Engel*[121] criteria are used to assess whether proceedings are in substance criminal for the purposes of Article 6. Whilst the first of these is admittedly the domestic classification of the proceedings, this is a starting point only. The key factors are thus the nature of the offence and the degree of severity of the penalty that the defendant risks incurring.

New Labour responded by insisting that the proceedings for imposition of an ASBO are properly classified as civil under domestic law and do not involve the determination of a criminal charge for the purposes of Article 6 ECHR. They therefore maintained that the civil standard of proof should apply and hearsay evidence should be admissible. In *R (McCann & others) v Crown Court at Manchester*[122] the House of Lords agreed that the proceedings are civil and do not involve the determination of a criminal charge, and so confirmed that hearsay evidence is admissible.[123] However, given the seriousness of the matter involved, their Lordships concluded that the criminal standard of proof should always apply.[124]

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[120] HC Standing Committee B col 83 30 April 1998.

[121] *Engel v Netherlands (No 1)* (n49 above) at para 82.

[122] [2002] UKHL 39. For detailed comment on the House of Lords' reasoning in this case, see my piece 'The Nature of the Anti-Social Behaviour Order – *R (McCann & others) v Crown Court at Manchester*' (2003) 66(4) MLR 630.

[123] The House of Lords made clear that, although proceedings for the imposition of an ASBO do not involve a criminal charge, and so do not attract the protections afforded by Article 6(2)-(3) ECHR, the proceedings do involve a determination of the defendant's civil rights and obligations and so the fair trial guarantees contained in Article 6(1) apply. By contrast, it was held in *R (on the application of Kenny) v Leeds Magistrates' Court* [2003] EWHC 2963 (Admin) that Article 6(1) does not apply to proceedings under s1D Crime and Disorder Act 1998 for the imposition of an interim ASBO without notice. See also *C v Sunderland Youth Court* [2003] EWHC 2385 (Admin), in which the Court left open the question whether ASBOs imposed following a criminal conviction (under s1C) are civil or criminal in nature.

[124] Although New Labour had insisted that the civil standard of proof should apply, they accepted that it should, in appropriate cases, be heightened, sometimes to "beyond reasonable doubt." Lord Williams, for example, said: "It is also necessary to bear in mind that the civil standard of proof, although described as a balance of probabilities, is not itself set in stone ... It

As well as the fact that proceedings for the imposition of an ASBO are initiated by the civil process of a complaint, both New Labour and the House of Lords pointed to several features of applications for an ASBO in support of the conclusion that they are civil proceedings. The Crown Prosecution Service is not involved in the application for an ASBO, there is no formal accusation of a breach of criminal law and it is unnecessary for the obtaining of an ASBO to establish criminal liability, the ASBO is not entered on a defendant's record as a conviction, and it is not a recordable offence for the purpose of taking fingerprints. Proceedings for breach of the peace, which had been held to be criminal in nature by the European Court of Human Rights,[125] were distinguished on the basis that if a defendant refuses to be bound over he can be immediately imprisoned for up to six months.[126] Proceedings for breach of the peace thus carry a risk of imprisonment which proceedings for the imposition of an ASBO do not.[127] Significantly, New Labour also emphasised that an ASBO is a prohibitory order and not a penalty. Lord Williams stressed that "the order is not a penalty. There is no prosecutor. The order prohibits antisocial behaviour only."[128] And although breach of the Order might lead to a penalty of up to five years' imprisonment, Lord Williams explained that this did not give the application for an ASBO a penal element:

> "An antisocial behaviour order is a serious matter but it is a civil matter. The criminal question does not arise until a breach is alleged ... [O]ne needs to look at these issues quite distinctly"[129]

Similar reasoning was adopted by the House of Lords in the *McCann* case. The House drew a distinction between proceedings which are preventative in character and those which are punitive. Lord Hope stated:

> "[T]he purpose of the procedure is to impose a prohibition, not a penalty ... Furthermore the decision whether or not to make the order does not depend solely on proof of the defendant's conduct. The application may only be made if

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is a flexible instrument. If the court has particular concerns, one would expect it to apply a higher test. I believe that it is a matter best left to the courts" (HL Deb vol 585 col 560 3 February 1998).

[125] *Steel v United Kingdom* (n6 above).

[126] s115(3) Magistrates' Courts Act 1980.

[127] See *McCann*, *per* Lord Steyn at [32], Lord Hope at [74], and Lord Hutton at [104]-[106].

[128] HL Deb vol 585 col 575 3 February 1998.

[129] HL Deb vol 585 col 559 3 February 1998.

it appears to the local council or the chief constable that an order is necessary to protect persons in the area, and consultation between them is required before the application is made. Thus the proceedings are identified from the outset as preventative in character rather than punitive or disciplinary"[130]

Their Lordships also agreed that the fact that breach of the Order constitutes a criminal offence does not give the application for an ASBO a punitive element. Lord Steyn said, "These are separate and independent procedures. The making of the order will presumably sometimes serve its purpose and there will be no proceedings for breach. It is *in principle* necessary to consider the two stages separately."[131] In relation to the second and third *Engel* factors the House accordingly held that the ASBO is not a penalty at all, and that proceedings for the imposition of an ASBO are preventative, not punitive, in nature and so do not involve the bringing of a charge.

The technique advocated by the House of Lords for distinguishing civil proceedings from criminal proceedings – identifying whether the proceedings are preventative or punitive in nature – is similar to that of the U.S. Supreme Court.[132] Like

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[130] At [68], [72].

[131] At [23] (emphasis added).

[132] See *Hendricks v Kansas* 521 US 346 (1997). In 1994 the Kansas legislature passed the Sexually Violent Predator Act. This legislation allowed for the civil confinement of persons who (a) suffered from a mental abnormality or personality disorder, (b) had been convicted or charged with a violent sexual offence, and (c) were likely to engage in "predatory acts of sexual violence." Hendricks, a paedophile with a long history of sexual offences against children, had been convicted of taking "indecent liberties" with two 13 year-old boys in 1984. Shortly before his conditional release date in 1994, the State filed a petition seeking his civil confinement as a sexually violent predator. At his trial the jury unanimously found that Hendricks was a sexually violent predator and the trial court determined that paedophilia qualified as a mental abnormality, so he was transferred to the custody of the Secretary of Social and Rehabilitation Services. Hendricks appealed claiming, *inter alia*, that the proceedings under the Act were criminal in nature and so his confinement violated the Federal Constitution's clauses on double jeopardy (his confinement amounted to a second prosecution and a second punishment for the same offence) and *ex post facto* (new punitive measures – confinement under the Act – may not be applied to crimes already committed). The Supreme Court began by saying that the categorisation of proceedings as civil or criminal is first of all a question of statutory construction. That the Kansas legislature intended to create civil proceedings was self-evident. However, the legislature's manifest intent will be rejected if the party challenging it provides clear proof that the proceedings are so punitive, either in purpose or effect, as to negate the State's intention to deem them civil. The Supreme Court held that in this case commitment under the Act did not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act was not retributive because it did not "affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness" (*per* Justice Thomas at 362). Furthermore, a criminal conviction was not a necessary prerequisite (the Act's procedures also pertained to those incompetent to stand trial/found "not guilty by reason of insanity"/found "not guilty" because of a mental disease), and no finding of scienter was required to commit an individual. Neither was the Act intended to function as a deterrent, since persons suffering from a mental abnormality or personality disorder are "unlikely to be deterred by the threat of confinement" (at 362-363). And whilst incapacitation clearly was one of the aims of the Act, this "may be a legitimate end of the civil law" (at 366).

the Supreme Court's approach, the approach adopted by the House of Lords is unconvincing.[133] Their Lordships sought to support the distinction between civil (preventative) and criminal (punitive) proceedings by contrasting *Guzzardi v Italy*[134] and *Raimondo v Italy*,[135] where the preventative measures taken against suspected Mafiosi were held not to involve the determination of a criminal charge,[136] with *Öztürk v Germany*[137] and *Lauko v Slovakia*,[138] stating that in deciding that the proceedings in these latter cases were criminal for the purposes of Article 6 the European Court of Human Rights had relied on the punitive and deterrent elements of the fines imposed. However, as Chara Bakalis has observed, the House of Lords were rather selective in the parts of the *Öztürk* and *Lauko* judgments they chose to apply.[139] In both cases the Strasbourg court also placed reliance on the fact that the legal provision at issue applied to all citizens (as opposed to a "disciplinary" law which applies only to a given group possessing a special status) and disregarded the fact that breach of the provision did

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And so since the proceedings were not criminal in nature, the Federal Constitution's clauses on double jeopardy and *ex post facto* did not apply.

[133] The line which the U.S. Supreme Court drew between civil and criminal proceedings in *Hendricks v Kansas* (ibid) is a feeble one. Sex offenders are frequently sentenced to long prison terms, based not only on retribution but also on predictions of their future dangerousness. Incapacitative concerns thus frequently enter the criminal sentencing process. As Nora V. Demleitner has commented, this undermines the distinction drawn in *Hendricks v Kansas*: "[i]f courts were to acknowledge incapacitation as a traditional punishment goal, this would undermine the carefully crafted, albeit flimsy, distinction between civil and criminal sanctions" ('Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungverwahrung' (2003) 30 Fordham Urb LJ 1621 at 1637). The fragility of the distinction is further underlined by Justice Breyer's dissenting opinion in *Hendricks*. Justice Breyer argued that the importance attached to treating the individual should be an important factor in determining whether the proceedings were civil or punitive: "one would expect a nonpunitively motivated legislature that confines *because of* a dangerous mental abnormality to seek to help the individual himself overcome that abnormality" (at 382, emphasis original). He agreed with the Kansas Supreme Court that treatment was not a significant objective of the Act. This conclusion was supported by the fact that "[t]he Act explicitly defers diagnosis, evaluation, and commitment proceedings until a few weeks prior to the 'anticipated release' of a previously convicted offender from prison" (at 385).

[134] n49 above.

[135] n49 above.

[136] The House of Lords failed to acknowledge that both *Guzzardi* and *Raimondo* were not primarily Article 6 cases. Furthermore, *Guzzardi* supports the need to consider Article 5 alongside Article 6, and the House of Lords failed to consider Article 5 at all. See further my piece 'The Nature of the Anti-Social Behaviour Order' (n122 above).

[137] (1984) 6 EHRR 409.

[138] (2001) 33 EHRR 994.

[139] 'Anti-Social Behaviour Orders – Criminal Penalties or Civil Injunctions?' [2003] CLJ 583.

not give rise to imprisonment nor to a criminal record.[140] Moreover, the Court in *Lauko* did not regard as relevant the fact that the provision was "designed to keep the peace between neighbours."[141] Furthermore, the distinction which the House of Lords sought to draw proceeds on the assumption that proceedings for the imposition of an ASBO are *either* preventative *or* punitive. Yet, when they first proposed the Community Safety Order New Labour themselves stated that "the principal aim of the new order is punitive *and* preventative."[142] And, when appropriate, the European Court of Human Rights has asked a different question – is punishment *a* purpose of the proceedings?[143] – implicitly recognising that proceedings may have elements of both prevention and punishment. Finally, as Andrew Ashworth has argued, even if the purpose of the proceedings could be construed as being purely preventative, "if the effects of an order are far-reaching (e.g. liability to imprisonment for up to five years), there must surely come a point at which they may fairly be held to override the purpose."[144]

The conclusion that proceedings for the imposition of an ASBO are preventative in nature was – as noted above – also founded on the assertion that they are separate and distinct from proceedings for breach of an Order. Yet this assertion is unsustainable. Chapter one explained that, in order to ensure appropriate penalties for chronic anti-social behaviour, New Labour resolved that breach of an ASBO should be viewed as the continuation, in defiance of a court order, of a course of anti-social behaviour. The criminal penalty imposed for breach should reflect the impact of the entire course of anti-social behaviour. Findings of fact from the proceedings for the making of an Order may therefore form the basis of the sentence that is later imposed in the criminal proceedings for breach. So while an ASBO may not amount to a penalty by virtue of just the prohibitions imposed,[145] to look narrowly at just these prohibitions

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[140] At para 58 of *Lauko* and at paras 52-53 of *Öztürk*. In fact, Lord Hope dismissed the distinction between provisions which apply to all citizens and those which only apply to a given group possessing a special status as one which did not "[fall] to be drawn in this case" (at [70]). And, as noted previously, in deciding that the proceedings for imposition of an ASBO are civil the House of Lords relied on the fact that an ASBO does not give rise to imprisonment and that it does not appear on a defendant's criminal record.

[141] At para 58.

[142] *A Quiet Life: Tough Action on Criminal Neighbours* (London: Labour Party, 1995) at 8 (emphasis added).

[143] See, for example, *Malige v France* (1999) 28 EHRR 578 at para 39.

[144] 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (n99 above) at 281. Ashworth cites *Welch v United Kingdom* (1995) 20 EHRR 247 in support of this assertion.

[145] It has already been suggested that the prohibitions imposed by an ASBO, whilst amounting to a restriction of liberty, would be unlikely to amount to a deprivation of liberty (see n49 above).

is to overlook the intricacies of the Order. An ASBO carries the implied threat that the behaviour giving rise to the Order could subsequently be taken into account if and when a sentence for breach is passed. This wider perspective has been adopted by the European Court of Human Rights in cases such as *Weber v Switzerland*[146] and *Bendenoun v France*,[147] where, in holding that the sanctions involved amounted to penalties, the Court relied, *inter alia*, on the fact that in the case of default they could be converted into a term of imprisonment.[148] The proceedings for the making of an ASBO cannot, therefore, be regarded as distinct from the proceedings for breach of an Order. Contrary to the assertion of Lord Steyn, there is no principle within the legislation which requires the two stages to be considered separately.

3.7. Defendants' rights and victims' interests

The possibility that the criminal penalty imposed on a defendant who has breached an ASBO could be based almost entirely on behaviour proven only in civil proceedings led Lord Dholakia to comment:

> "I do not dispute that, from time to time, there may be cases where imprisonment for a period over two years may be justified – not for the breach alone, but due to persistent criminal behaviour. What worries me is that none of that behaviour has to be proved to the criminal standard"[149]

This concern was also expressed by Andrew Ashworth who, writing in his capacity as editor of *The Criminal Law Review*, asked: "Is the civil law (with its lower proof requirements) not being used as a Trojan horse, in the sense that it provides the basis for severe sentencing later?"[150] Given that the House of Lords held in *McCann*

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[146] (1990) 12 EHRR 508.

[147] (1994) 18 EHRR 54.

[148] These two cases should be contrasted with *Ravnsborg v Sweden* (1994) 18 EHRR 38. In *Ravnsborg* the Court held that the fines imposed for improper statements made in court proceedings were disciplinary sanctions, not criminal ones. This was based, however, on (a) the fact that the relevant provision applied only to persons attending or taking part in the court proceedings, which gave it the nature of a disciplinary law, and (b) the fact that unpaid fines were only converted into imprisonment if the defendant intentionally failed to pay them (or if there were other special public interest reasons for so converting them). In contrast to the ASBO, therefore, any resultant imprisonment was for the single act of failing to pay the fine.

[149] HL Deb vol 585 col 602 3 February 1998.

[150] [1997] Crim LR 769 at 770. The expression "Trojan horse" might equally be applied to the fact that, by virtue of the ASBO, a defendant might be convicted as a criminal without ever having contravened the criminal law (see section 3.3 above).

that the criminal standard of proof should always apply in proceedings for the imposition of an ASBO, these comments should now be taken to apply primarily to the admissibility of hearsay evidence in the application for an ASBO. A criminal penalty may be imposed on a course of conduct, most of which might have been proven on the basis of hearsay evidence. This would appear to be a breach of Article 5(1) ECHR; to the extent that a custodial sentence imposed for breach of an ASBO is based on findings of fact made on the basis of hearsay evidence in the application for the Order, the deprivation of liberty imposed is not justified by any of the derogations contained in Article 5(1).[151]

In response to suggestions that the ASBO provisions could be found to breach the ECHR, the Government introduced s1(5)(which says that the court hearing the application for an ASBO shall "disregard any act of the defendant which he shows was reasonable in the circumstances") at the Lords Committee Stage of the Bill.[152] But this defence of "reasonable behaviour" does not affect the admissibility of hearsay evidence at proceedings for the imposition of an ASBO at all.[153] This of course is unsurprising, given New Labour's resolution that hearsay evidence should be admissible in order to ease the problem of witness intimidation. Indeed, at the outset of his judgment in *McCann* Lord Steyn observed that, if the rule against hearsay evidence were to apply at the application for an ASBO, "it would inevitably follow that the procedure for obtaining anti-social behaviour orders is completely or virtually unworkable and useless." He therefore declared "an initial scepticism of an outcome which would deprive communities of *their* fundamental rights."[154] In a similar vein, Lord Hutton

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[151] Most importantly, the derogation contained in Article 5(1)(a) ("the lawful detention of a person after conviction by a competent court") would not apply since the deprivation of liberty is based on findings of fact made by a civil court acting on the basis of hearsay evidence. See further my piece 'The Nature of the Anti-Social Behaviour Order' (n122 above).

[152] Amendment 13 (HL Deb vol 585 col 564 3 February 1998). In the subsequent Commons Standing Committee debates Alun Michael explained that s1(5) was designed to meet the concerns expressed by Ashworth et al: "Reference has been made to distinguished academic commentators. The commentators have misunderstood the nature of the order, and they made their comments before amendments were made in another place [the introduction of the reasonable behaviour defence] to deal with some of the issues about which they expressed concern. The Government have examined the matter, and we are confident that the European Convention on Human Rights has not been breached. Subsection 5 of [section 1] was the critical addition made in another place. It refers to reasonable behaviour 'in the circumstances'" (HC Standing Committee B col 39 28 April 1998).

[153] The effectiveness of s1(5) in meeting the human rights concerns of the critics was also undermined by the fact that the burden of proof for the defence is placed on the defendant. Philip Plowden commented: "[I]n response to concerns about human rights, the Government introduced a provision ... requiring the courts to disregard any act of the defendant which he shows was reasonable in the circumstances ... Whether this achieves anything seems unlikely, not least since the burden of proof is laid on the defence" ('Love Thy Neighbour' (n18 above) at 520).

[154] At [18] (emphasis original).

invoked the interests of victims in support of his conclusion that admitting hearsay evidence at proceedings for the imposition of an Order does not breach the rights of the defendant:

> "I consider that the striking of a fair balance between the demands of the general interest of the community (the community in this case being represented by weak and vulnerable people who claim that they are the victims of anti-social behaviour which violates their rights) and the requirements of the protection of the defendants' rights requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence in applications for anti-social behaviour orders"[155]

Chapter one explained that the ASBO was created in response to a perceived "system failure." The civil and criminal laws were deemed incapable of giving effective protection to victims of anti-social behaviour, and the ASBO represented a new and imaginative way of tackling the problem. Frightened victims would not have to give evidence at the application for an Order (and often would not need to give evidence at proceedings for breach either) and, in the case of breach, a sentence could be imposed that reflected the impact of the whole course of anti-social behaviour. In other words, the ASBO was intended to make it possible for courts to impose a *criminal* penalty for an entire course of conduct without that course of conduct (with the exception of the act that constitutes breach) having to be established within the criminal rules of evidence. To hold that the hearsay rule should apply at proceedings for the imposition of an ASBO would therefore frustrate the purpose of the Order. In this light, the comments of Lords Steyn and Hutton are significant. In English law, the rule against hearsay evidence is a fundamental feature of the criminal trial. The ASBO circumvents this safeguard in the name of protecting victims of anti-social behaviour. According to Lords Steyn and Hutton this is justified because the interests of the victims outweigh the rights of the defendant. In fact Lord Hutton, citing the European Court of Human Rights' decision in *Sporrong & Lönnroth v Sweden*,[156] claimed that this approach of "striking a fair balance 'between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights' is

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[155] At [113]. Significantly, this paragraph was explicitly endorsed by both Lords Hobhouse and Scott.

[156] (1982) 5 EHRR 35.

inherent in the whole of the Convention."[157] At the heart of this reasoning lies the notion that a central feature of criminal justice policy is the task of "balancing" the competing demands of defendants' rights and victims' interests. Indeed this was a popular theme in the debates surrounding the ASBO. New Labour consistently asserted that the law was too generous to defendants and needed to be redressed in favour of victims. When presenting the Crime and Disorder Bill to the Commons Jack Straw proclaimed that this was one of the themes of the Bill:

> "[This Bill] will shift the balance of power in communities from the anti-social and the criminal to the law-abiding majority. It will put the victim first, and it will ensure that offenders understand that even so-called petty crime has a victim"[158]

This theme will be returned to in chapter four, where the notion that a central task of criminal justice policy is to balance the competing demands of two value systems, represented by defendants' rights and victims' interests, will be considered in detail.

4. Conclusion: Larry the Lout Revisited

The tale of Larry the Lout illustrated how the ASBO overcomes the problems New Labour perceived in both the civil and criminal laws. It also illustrates many of the concerns voiced by critics of the ASBO. The ASBO imposed on Larry not only prohibited him from acting in a manner that caused or was likely to cause harassment, alarm or distress to the other residents of his cul-de-sac, but also required that he not leave his parents' house between the hours of 8p.m. and 7a.m.. Yet the former prohibition would appear to be sufficient to protect other residents of the cul-de-sac; the curfew requirement goes beyond the minimum necessary. Furthermore, the ASBO imposed on Larry must apply for a minimum of two years. Two years is a long time in the life of an adolescent, during which much change and development takes place. An Order lasting for two years, with its associated stigma, is arguably inappropriate in such circumstances. Larry breached the ASBO by going to a curry house with a friend. This was not anti-social behaviour. It did not constitute a continuation of the previous course of anti-social conduct. Larry had no intention to harass, alarm or distress any of the other residents of the cul-de-sac. Yet the trip to a curry house amounts to a serious

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[157] At [113]. On Lord Hutton's approach the rights of a defendant may be "balanced" away. See further chapter four section 4.1.

[158] HC Deb vol 310 col 372 8 April 1998.

criminal offence. Furthermore, when sentencing Larry the court is to consider not just his trip to the curry house, but also all the conduct which led to the ASBO being imposed – the loud music, the under-age drinking, the verbal abuse, the obstruction of the road, the littering of the neighbours' gardens, the urinating on their flower beds, and the intimidation of the younger children. Yet the findings of fact made by the magistrates' court at the application for the ASBO had in part been based on the local authority official's evidence of the complaints he had received. This means that the sentence imposed on Larry is based on a course of conduct, the vast majority of which was proven on the basis of hearsay evidence in civil proceedings.

This chapter has described the various concerns surrounding the ASBO, including those illustrated by the tale of Larry the Lout, and has also outlined New Labour's response to them. In the course of the discussion of the definition of "anti-social behaviour" it was shown that the different opinions held by New Labour and the critics stem from different perspectives on how state power should be viewed. The discussion of the possible terms of, and penalties for breaching, an ASBO led to consideration of the proper classification of the proceedings for imposition of an Order. In defending the classification of the proceedings as civil New Labour and the House of Lords urged that victims' interests outweighed the rights of defendants. These two themes – the different perspectives of state power and the purported need to balance defendants' rights against victims' interests – will be returned to in chapter four.

Chapter Three: Packer's Models of the Criminal Justice Process

1. Introduction

In August 1967 Professor Herbert Packer of Stanford University put aside his administrative duties as vice provost, and went away to Santa Cruz to concentrate his efforts on the book he was writing. The result was the acclaimed *The Limits of the Criminal Sanction*,[1] winner in 1970 of the prestigious triennial Order of the Coif book award, the highest honour that could be bestowed on an American legal scholar. Whilst its primary concern was to question the "far too indiscriminate"[2] way in which the criminal sanction was being resorted to, it is Packer's two models of the criminal justice process – the "crime control" and "due process" models – for which the book is best known.[3] These two models were not, he insisted, "labeled Is and Ought;" rather they represented "an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process," and as such were intended to provide "a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems."[4]

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[1] Stanford: Stanford University Press, 1968 (hereafter '*Limits*').

[2] ibid at 364. The central argument of the book is outlined at n102 below.

[3] Part II of the book, in which the crime control and due process models are outlined and then applied to various stages of the criminal justice process, is almost identical to Packer's earlier article 'Two Models of the Criminal Process' ((1964) 113 U. PA. L. Rev. 1). This article was written by Packer during a year's sabbatical at the University of Pennsylvania. He states at the beginning of the article that it was part of a broader work in progress designed to question the use of the criminal sanction.

[4] *Limits* at 153. Although the models were not to be taken in the sense of "Is and Ought," it seems clear to which value system Packer subscribed. Herbert's son, George Packer, recalls in *Blood of the Liberals* (New York: Farrar, Straus and Giroux, 2000) how his father's hero was John Stuart Mill. Born in 1925, Herbert, who was Jewish and whose lineage ran back to the Jewish ghetto of Zhitomir near the Polish-Ukraine border, gained entry into Yale College in spite of their anti-semitic policies. After serving in the U.S. Navy he entered Yale Law School, was admitted to the New York bar, clerked for a year in the 2nd circuit, and then joined "Lloyd Cutler's liberal firm in Washington" (at 144). In 1956 he moved to Stanford Law School, to direct a study of the testimony of ex-Communists, for which the Fund for the Republic had given the law school a grant of $25,000. He married Nancy on March 15th 1958. George, their second child, recalls that, "[w]hen I was a boy, the name Adlai Stevenson was spoken around my house with an admiration bordering on reverence" (at 151). By contrast, Richard Nixon Herbert "hated all his life" (at 3). Herbert, he writes, was a modern liberal – "my father's liberty was procedural, taking the individual in isolation. A modern liberal looked to the courts for liberty, just as he looked to the federal government for equality" (at 151). For Herbert, "ideas were the ultimate reality;" he had "faith in rational human progress" (at 135) and in "the rational mind's ability to analyze fact and establish probability" (at 193). When asked to serve on the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, he contributed by calling for federally funded lawyers to represent poor criminal defendants. On issues such as heroin, pornography, abortion, and homosexuality, he "put the burden of justification on the state for taking away the liberty of individuals" (at 207). George describes a

The crime control model sees "the repression of criminal conduct [as] the most important function to be performed by the criminal process," because by repressing crime the criminal process acts as a guarantor of social freedom. Given the primacy of repressing criminal conduct, it follows "that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime." As well as emphasising efficiency, there must also be a premium on speed and finality; "the process must not be cluttered up with ceremonious rituals that do not advance the progress of a case." The model is thus an "administrative, almost a managerial, model":[5]

> "The image that comes to mind is an assembly-line conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file"[6]

According to the crime control model, a successful conclusion is one "that throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest, with a minimum of occasions for challenge, let alone post-audit." Key to achieving this goal is what Packer calls the "presumption of guilt."[7] The premise

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heated argument between Herbert and his brother-in-law, a Congressman, in which "[m]y father was making a case for the civil rights legislation that Kennedy hadn't lived to get through Congress" (at 212). In 1966 Herbert became Stanford's vice provost. This was a turbulent, stressful time, and Herbert was on the front line dealing with the student radicals. George recalls, "my father was pushing himself hard on several fronts, as if the problems of the university and society had all come to depend on the exercise of his analytical powers" (at 237). It was around this time that he finished writing *The Limits of the Criminal Sanction*. Soon after, in mid-March 1969, Herbert suffered a stroke. A cripple, paralysed in his right side and unable to speak whole sentences, he continued his career, publishing in *The New Republic* and *The New York Review of Books*, criticising Nixon's harsh crime policy and advocating the decriminalisation of heroin. In a book he began writing after his stroke he blamed the stresses of his administrative position for his condition. George describes his father's growing frustration and increasingly short-temper. After a failed suicide attempt in 1971, Herbert's body was found in December 1972 in a San Francisco hotel room, with empty bottles of sleeping pills in the wastebasket.

[5] *Limits* at 158-159.

[6] ibid at 159.

[7] Packer adds that the presumption of guilt is not the opposite of the presumption of innocence. Whereas the presumption of innocence "is a direction to officials about how they are to proceed," the presumption of guilt "is purely and simply a prediction of outcome." Packer gives the example of someone who commits murder in front of many witnesses, and who confesses to the crime. It would be absurd in such circumstances (which Packer says "characterize with rough accuracy the evidentiary situation in a large proportion of criminal cases") to maintain that more probably than not the suspect did not commit the killing. The presumption of

of the presumption is that "the screening processes operated by police and prosecutors are reliable indicators of probable guilt." So "once a determination has been made that there is enough evidence of guilt to permit holding [the suspect] for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty ... [therefore] the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency."[8] And while there must be devices for dealing with the suspect after the preliminary screening process, adjudicative fact-finding can be reduced to a minimum through fostering pleas of guilty. The centre of gravity in the crime control model thus lies in the early, administrative fact-finding stages.

> "In the presumption of guilt this model finds a factual predicate for the position that the dominant goal of repressing crime can be achieved through highly summary processes without any great loss of efficiency ... because of the probability that, in the run of cases, the preliminary screening processes operated by the police and the prosecuting officials contain adequate guarantees of reliable fact-finding"[9]

Packer explains that the due process model is not the converse of the crime control model – it does not hold that it is not socially desirable to repress crime – but

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innocence, however, means something different. It means that "until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question" (ibid at 161). The presumption of guilt in the sense used by Packer must be distinguished from another sense in which the expression might be used. Two examples will illustrate this other use of the expression. In his book recounting the trial of Dr. John Bodkin Adams, Patrick Devlin (the trial judge) says of the two investigating officers from New Scotland Yard, "Hannam and Hewitt were among those who could see no explanation except that of murder for legacies followed by deaths. It was as if upon enrolment in the investigating team they had taken an oath of loyalty to that idea. Their job was not to question it but to find in as many cases as possible the sort of proof that would satisfy the law" (*Easing the Passing* (London: Faber and Faber, 1986) at 20). Similarly, in *Report of an Inquiry by the Honourable Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6* HC 90 (1977)(London: HMSO) Fisher concludes, "the police do not at present see it as their duty to initiate enquiries which might point to the fact that they had got the wrong man, or that for some other reason the prosecution should fail ... [Those concerned with the investigation and prosecution] were concerned to establish a case which rested wholly or mainly on confessions which could not be entirely true unless the time of death was outside the brackets given by Dr Bain, the police surgeon, and Dr Cameron, the pathologist" (at paras 2.30, 2.31). Whereas Packer uses the expression presumption of guilt to refer to the situation once there is sufficient admissible evidence for the outcome of the case to be almost certain (as demonstrated by his example), in these examples the presumption of guilt refers to a working ethos, whereby the police assume that the defendant is guilty and embark on a quest to find admissible evidence to establish the defendant's guilt.

[8] *Limits* at 160-161.

[9] ibid at 162.

unlike the crime control model it views reliability as of at least as much importance as efficiency (if not more); "if efficiency demands short-cuts around reliability, then absolute efficiency must be rejected." According to the due process model, the aim of the process "is at least as much to protect the factually innocent as it is to convict the factually guilty."[10] Informal, non-adjudicative, fact-finding is viewed as prone to error, and hence formal, adjudicative, adversary fact-finding processes are insisted upon:

> "If the crime control model resembles an assembly line, the due process model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along the process"[11]

Packer explains that this is "only the beginning of the ideological difference between the two models." The due process model stresses the primacy of the individual, and that "power is always subject to abuse." Since the loss of liberty and the attachment of stigma that the criminal process culminates in is "the heaviest deprivation that Government can inflict on the individual," proponents of the due process model "would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual."[12]

The doctrine of legal guilt is the mechanism by which the model "implements these anti-authoritarian values." This doctrine holds that a person is not to be held guilty of a crime just because, in all probability, he in fact did what he is said to have done. Rather, "he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them."[13] It is here that the presumption of innocence comes into operation:

> "[B]y forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the

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[10] ibid at 165.

[11] ibid at 163.

[12] ibid at 165-166.

[13] ibid at 166.

individual ... [I]t vindicates the proposition that the factually guilty may nonetheless be legally innocent"[14]

Packer identifies two other strands "in the complex of attitudes underlying the due process model." The first is the notion of equality. Based on the fact that "there are gross inequalities in the financial means of criminal defendants as a class," and that "an effective defence is largely a function of the resources that can be mustered on behalf of the accused," the principle of equality requires that "the criminal process, initiated as it is by government and containing as it does the likelihood of severe deprivation at the hands of government, imposes some kind of public obligation to ensure that financial inability does not destroy the capacity of an accused to assert what may be meritorious challenges to the processes being invoked against him." The second strand of thought is a "mood of skepticism about the morality and utility of the criminal sanction." These "doubts about the ends for which power is being exercised create pressure to limit the discretion with which that power is exercised."[15]

Packer's models have been subjected to considerable criticism.[16] Doreen McBarnet has described as "false" Packer's suggestion that two separate value systems compete for priority in the criminal justice process, arguing that "[j]udges and politicians may deal in the rhetoric of civil rights and due process, but the actual rules they create for law enforcement and the policies they adopt on sanctioning police malpractices are less about civil rights than about smoothing the path to conviction, less about due process than *post-hoc* acceptance of police activities as justifying themselves ... The operation of the law is not a subversion of the substance of the law but exactly what one would expect it to produce; the law in action is only too close a parallel to the law in the books; due process is for crime control."[17] Other writers,

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[14] ibid at 167.

[15] ibid at 168-171. For a description of this "mood of skepticism" see n102 below.

[16] See, for example, John Griffiths 'Ideology in Criminal Procedure or A Third "Model" of the Criminal Process' (1970) 79 Yale LJ 359, A.E Bottoms and J.D. McClean *Defendants in the Criminal Process* (London: Routledge, 1976), Kent Roach 'Four Models of the Criminal Process' (1999) 89 J Crim L & Criminology 671, Andrew Ashworth *The Criminal Process: An Evaluative Study* (2nd edn.)(Oxford: OUP, 1998) chapter two, Neil Walker and Mark Telford *Designing Criminal Justice: The Northern Ireland System in Comparative Perspective* (Criminal Justice Review Group Research Report 18)(London: The Stationary Office, 2000) chapter one.

[17] 'False Dichotomies in Criminal Justice Research' in John Baldwin and A. Keith Bottomley (eds.) *Criminal Justice: Selected Readings* (Oxford: Martin Robertson, 1978) at 30, 31. Andrew Rutherford challenges McBarnet's argument in his book *Criminal Justice and the Pursuit of Decency* (Winchester: Waterside Press, 1994), pointing out that "[w]hile there is much in statutory and case law that can be used to support her argument, there is also a great deal that works against it" (at 5). Having interviewed 28 practitioners holding senior positions across the criminal justice process, Rutherford identifies three working credos: credo one was characterised by a strong dislike of offenders, the belief that as few fetters as possible should be

meanwhile, have criticised Packer's models for being unduly selective, neglecting other possible considerations such as resource management and victims' rights. Consequently, there have been several attempts to identify further models. Michael King, for example, has outlined six models of criminal justice – the medical, bureaucratic, status passage, and power models, in addition to the crime control and due process models.[18]

This chapter begins in section 2 by arguing that Packer's aim was to construct something like ideal-type models in the sense described by Max Weber. Section 3 focuses on the crime control model, explaining that Packer's outline of this model is confused as a result of his failure to distinguish three different forms of efficiency. After constructing an ideal-type operational efficiency model, this section will show that Packer's presentation of the crime control model failed to accentuate the features of the model to their purest form. Attention will then shift to the values underlying the due process model; it will be argued that the due process model is constructed upon values which may conflict and so is flawed. The values underlying the model are accordingly considered separately, starting, in section 4, with reliability. This section will use the value of reliability to construct an ideal-type adversarial reliability model, and demonstrate that Packer also failed to accentuate the features of the due process model to their purest form. In section 5 an example will be used to demonstrate how the ideal-type operational efficiency and adversarial reliability models can be used to analyse whether a policy decision detrimentally affects the reliability of the criminal justice process, and how – if this is the case – the models invite us to evaluate the policy decision by considering the reasons behind it.

The work of Swedish scholar Nils Jareborg will be introduced in section 6. The features of Jareborg's defensive model of criminal law policy, which is based on the concepts of prevention of abuse of state power and the primacy of the individual, bear certain similarities to the due process model's application of the value of prevention of abuse of state power. Placing Jareborg's defensive model alongside the due process

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placed on efforts to apprehend offenders, and the belief that offenders should be dealt with in ways which are punitive; credo two was characterised by a concern for smooth management; and credo three was characterised by empathy with suspects, offenders and victims, optimism that constructive work can be done with offenders, adherence to the rule of law so as to restrict state powers, and an insistence on open and accountable procedures.

[18] Three of these models are based on the perspective of the typical participants, and the other three are based on the work of social theorists (*The Framework of Criminal Justice* (London: Croom Helm, 1981), chapter two). For other attempts to identify further models, see John Griffiths 'Ideology in Criminal Procedure or A Third "Model" of the Criminal Process' (n16 above), Bottoms and McClean *Defendants in the Criminal Process* (n16 above), Kent Roach 'Four Models of the Criminal Process' (n16 above) and Sir Leon Radzinowicz 'Penal Regressions' [1991] CLJ 422. (For an alternative theoretical approach to criminal justice see Ashworth *The Criminal Process: An Evaluative Study* (2nd edn.)(n16 above) chapter two and 'Concepts of Criminal Justice' [1979] Crim LR 412).

model will aid the explication and analysis of the latter. It will be argued that, while Weber was careful to distinguish ideal-types from ideals, the defensive model and the due process model (insofar as it is based on the prevention of abuse of state power) may be employed as either ideal-types or ideals, provided that the distinct activities of empirical work (analysis, research and exposition) and evaluative work are not confused. However, before the features of the defensive model and due process model (to the extent that it is based on the prevention of abuse of state power) may be employed as evaluative standards, their use in this way must first of all be justified. This involves justifying, first, one's interpretation of what constitutes an abuse of state power, second, one's opinion over what safeguards are necessary to prevent abuses from occurring, and third, where enacting safeguards against the abuse of state power involves placing restrictions on our efforts to apprehend and convict offenders, one's view that such safeguards should nevertheless be introduced. Failure to do so will result in an impoverished evaluation. Whilst some would argue that preventing abuses of state power is of such primary importance that we should enact safeguards even when these do qualify our pursuit of the apprehension and conviction of offenders, the final part of section 6 will turn to a competing view – that the importance of repressing criminal conduct demands that we do not qualify our pursuit of this goal. It will be argued that, contrary to Packer's suggestion, the concern to repress criminal conduct is not at the heart of the crime control model; someone might in fact endorse the features of the crime control model even if their primary concern is not the repression of crime. By contrast, Jareborg outlines an offensive approach to criminal law policy which is grounded in crime prevention. It will be stressed, however, that the offensive approach focuses on just one possible strategy for preventing crime.

In section 7 attention will focus on the due process model's application of the value of equality. It will again be argued that, to the extent to which it is based on the value of equality, the due process model may be employed as either an ideal-type, for the purposes of empirical study, or as an ideal, which again requires that its usage in this way is first of all justified.

The focus of sections 3 to 7 will be the post-screening part of the criminal justice process.[19] In section 8 attention will turn to the screening process itself. Ideal-type investigative efficiency and administrative reliability models will be constructed. The ideal-type administrative reliability model will then be compared to both the ideal-type adversarial reliability and operational efficiency models. This comparison will demonstrate that, although Packer attributes the value of reliability to his due process model, in the police/prosecutorial screening process the model attaches greater

[19] For what constitutes the screening process, see section 3.3 below.

significance to competing concerns. In fact, it will be shown that, in the police/prosecutorial screening process, it is the crime control model which attaches great significance to the value of reliability.

The chapter concludes by drawing out three lessons from the critical discussion of Packer's work. First, it will be argued that three separate tools may be used to analyse criminal justice policy: ideal-types, strategies and ideals. These three tools must be distinguished, and to this end an indiscriminate use of the word "model" to refer to each of these tools should be avoided. Second, it will be argued that the challenge in criminal justice policy is not to balance the competing demands of two value systems; it is to balance the competing demands of many different values. A one-dimensional analytical framework, such as Packer's, is therefore inadequate. The analytical framework which is employed must be multi-dimensional. Third, it will be argued that a simple "yes/no" approach to the different ways in which values are held is inadequate. Any analysis of criminal justice policy must recognise that the substantive content of many values is contentious, and that opinions might differ over how best to meet the demands of a value. Furthermore, a simple "yes/no" approach obscures the fact that a person might identify as priorities a number of values which, on occasion, conflict. It will be argued in conclusion that any analysis which does not heed these three lessons cannot hope to achieve a satisfactory understanding of criminal justice policy.

2. Ideal-Type Models

Packer's use of the term "model" has been queried by John Griffiths.[20] The word "model" can be used in a variety of ways, none of which, he argues, fits Packer's usage. First, the crime control and due process models are not "alternative ideals toward which one might strive,"[21] since, as Packer himself pointed out, anyone who subscribed wholeheartedly to the values of one model to the exclusion of those of the other would rightly be regarded as a "fanatic."[22] Neither, second, are they "entities which have an analogical or metaphoric relationship to an actual system of criminal procedure".[23] Packer fails, Griffiths says, to explain the internal logic of his models, and

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[20] 'Ideology in Criminal Procedure or A Third "Model" of the Criminal Process' (n16 above) at n14.

[21] ibid.

[22] *Limits* at 154.

[23] 'Ideology in Criminal Procedure or A Third "Model" of the Criminal Process' (n16 above) at n14.

thus we are left with no way to determine whether a particular value belongs more with one model than with the other.[24]

Given the doubts expressed by Griffiths, it is useful to consider whether Packer's models might be regarded as "ideal-type" models, in the sense outlined by Max Weber:

> "[The ideal-type] is a conceptual construct which is neither historical reality nor even the 'true reality'. It is even less fitted to serve as a schema under which a real situation or action is to be subsumed as one *instance*. It has the significance of a purely ideal *limiting* concept with which the real situation or action is *compared* and surveyed for the explication of certain of its significant components. Such concepts are constructs in terms of which we formulate relationships by the application of the category of objective possibility. By means of this category, the adequacy of our imagination, oriented and disciplined by reality, is *judged*"[25]

Weber explained that an ideal-type is formed "... by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct."[26] An ideal-type may be compared to reality, to determine the extent to which it approximates to or diverges from reality. So, explained Weber, it is useful in both research and exposition.

> "Historical research faces the task of determining in each individual case, the extent to which this ideal-construct approximates to or diverges from reality, to what extent for example, the economic structure of a certain city is to be classified as a 'city-economy.' When carefully applied, these concepts are particularly useful in research and exposition"[27]

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[24] Griffiths says that Packer gives us no way to determine whether the value of efficiency belongs more with the crime control model than the due process model, except that he happens to assign it to the former. Similarly, Ashworth discusses the value of speed. As Ashworth says, Packer ascribes this to the crime control model, but since delays are a source of anxiety, inconvenience, and potentially prolonged loss of liberty, surely an emphasis on speed also belongs to the due process model (*The Criminal Process: An Evaluative Study* (2nd edn.)(n16 above) at 28).

[25] '"Objectivity" in Social Science and Social Policy' from *The Methodology of the Social Sciences* (New York: The Free Press, 1949) at 93 (emphasis original) (hereafter 'Objectivity').

[26] ibid at 90 (emphasis original).

[27] ibid at 90.

That Packer's purpose was to construct something like ideal-types, that would be useful in both research and exposition, is clear:

> "The two models merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions of the tensions between competing claims ... The weighty questions of public policy that inhere in any attempt to discern where on the spectrum of normative choice the 'right' answer lies are beyond the scope of the present inquiry. The attempt here is primarily to clarify the terms of discussion by isolating the assumptions that underlie competing policy claims and examining the conclusions that those claims, if fully accepted, would lead to ... The values are presented here as an aid to analysis, not as a program for action"[28]

Packer's models represented "an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process".[29] As we have seen, Packer began by identifying the values that formed the essence of each of these competing value systems, and he then constructed each model by imagining a system that insisted wholeheartedly on one of these sets of values, to the exclusion (to the extent possible[30]) of the values of the competing system. Each model accordingly represents an attempt to accentuate one point of view in order to develop an analytical construct.

Weber was also careful to distinguish ideal-types from ideals. An ideal is something against which one evaluates reality, which is to be distinguished from an ideal-type:

> "[T]hey are *model types* which – in our illustration – contain what, from the point of view of the expositor, *should* be and what *to him* is 'essential' in Christianity *because it is enduringly valuable*. If this is consciously or – as it is more frequently – unconsciously the case, they contain ideals *to* which the expositor *evaluatively* relates Christianity ... In this sense, however, the 'ideas' are naturally no longer purely *logical* auxiliary devices, no longer concepts with

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[28] *Limits* at 153-154.

[29] ibid at 153.

[30] Packer himself conceded that there was common ground between his two models (ibid at 154-158).

> which reality is compared, but ideals by which it is evaluatively *judged* ... An 'ideal type' in our sense, to repeat once more, has no connection at all with *value-judgments*, and it has nothing to do with any type of perfection other than a purely *logical* one"[31]

As noted earlier, Packer wrote that, "[a] person who subscribed to all of the values underlying one model to the exclusion of all of the values underlying the other would be rightly viewed as a fanatic."[32] As this shows, far from being intended to be ideals against which one evaluatively compares the criminal justice process, Packer's models were designed to be logical possibilities against which we may measure the reality of the criminal justice process, for the purposes of research and exposition. Ironically, Griffiths himself hinted at this possibility:

> "What [Packer] is really telling us is that among American lawyers there are two main perspectives on the criminal process. He has caricatured them a bit and exaggerated their differences so we can clearly see the terms of the debate between those who hold more to one than to the other"[33]

This is echoed by Andrew Ashworth:

> "These models are, of course, artificial constructs which list the features of a 'pure' or extreme form of a particular approach. They are designed as interpretative tools, to enable us to tell (for example) how far in a particular direction a given criminal justice system tends, and they do not of themselves suggest that one approach is preferable to the other"[34]

Packer's models were, then, intended to be ideal-type constructs, designed to clarify discussion, and aid analysis, of the criminal justice process.

3. An Ideal-Type Version of the Crime Control Model

3.1. Clarifying the crime control model

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[31] 'Objectivity' at 97-98 (emphasis original).

[32] *Limits* at 154.

[33] 'Ideology in Criminal Procedure or A Third "Model" of the Criminal Process' (n16 above) at n14.

[34] *The Criminal Process: An Evaluative Study* (2nd edn.)(n16 above) at 27.

David Smith has argued that "the Crime Control Model is concerned with the fundamental goal of the criminal justice system, whereas the Due Process Model is concerned with setting limits to the pursuit of that goal. Due process is not a goal in itself. It would make no sense to say that the criminal justice system has the function of delivering due process. Due process only acquires a meaning in the context of the pursuit of other goals, such as crime control."[35] Smith accordingly argues that it would be mistaken "to evaluate a system of criminal justice purely by how closely it approximates to the Due Process Model."[36]

Packer's decision to label one of his models the crime control model is unhelpful, for it tends to confuse two distinct ideas. The first idea is the raison d'être of the criminal justice process, which is to apprehend, convict and sentence those who engage in conduct which has been defined as criminal. The second idea is the set of values identified by Packer – efficiency, speed, finality – which concern one possible way in which the apprehension and conviction of offenders might be pursued.[37] Smith mistakenly assumes that the crime control model is concerned with the first of these ideas, the raison d'être of the criminal justice process, when in fact it is concerned with the second idea, the way in which the apprehension and conviction of offenders should be pursued.

That this is the case is confirmed by considering the imagery Packer uses to describe his two models – the conveyor belt and the obstacle course.[38] What these

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[35] 'Case Construction and the Goals of Criminal Process' [1997] 37 BJ Crim 319 at 335.

[36] ibid at 336. Ashworth also points out that Packer's two models "might be reconstructed so as to suggest that Crime Control is the underlying purpose of the system, but that pursuit of this purpose should be qualified out of respect to Due Process" (*The Criminal Process: An Evaluative Study* (2nd edn.)(n16 above) at 27).

[37] This distinction is recognised by other writers. In his article 'Concepts of Criminal Justice' (n18 above) Ashworth distinguishes the "general justifying aim" of criminal justice from principles and policies which qualify the pursuit of that aim (what he calls "qualifiers"). He takes the general justifying aim of criminal justice to be "crime control," i.e. "that the guilty should be detected, convicted and duly sentenced" (at 412), with "three main sources of restriction upon pursuit of the general justifying aim" – "considerations of systems," "certain hallowed principles of fairness" and restrictions aimed at "the control of abuse" (at 413-414). Similarly, in her book *Texts and Materials on the Criminal Justice Process* (3rd edn.)(London: Butterworths, 2003) Nicola Padfield writes, "Before evaluating the criminal justice system, one should identify what the system is seeking to achieve. At one level the answer is easy: it seeks to reduce the incidence of crime in society. But it is not obvious that the criminal justice system itself is (or is even capable of) actually doing that. Perhaps it seeks merely to convict the guilty and to acquit the innocent ... *This book seeks merely to assess the process used to convict the guilty and to acquit the innocent*" (at 7, emphasis added). See also Walker and Telford's two-tiered "meta-model" of the criminal justice process (*Designing Criminal Justice: The Northern Ireland System in Comparative Perspective* (n16 above) chapter one).

[38] *Limits* at 159, 163. That Packer was concerned with the second of these ideas is further illustrated by the fact that he defines as "common ground" between the models the assumption that certain conduct will be defined as criminal, and that perpetrators of criminal conduct will be apprehended and convicted – see *Limits* at 155.

illustrations are designed to draw attention to is not the overall aim of the conveyor belt or the obstacle course. Rather, they are meant to illustrate two different ways of reaching the desired result (be it the completed good or the finish line). The assembly line is characterised by the speed and efficiency with which the product reaches completion; the obstacle course is characterised by impediments which test the calibre of whoever is attempting to reach the end. Similarly, Packer's two models were designed to illustrate the contrasting ways in which a case might be dealt with. Quickly and efficiently to ensure the swift progress of a case, or with obstacles to ensure the reliability of the eventual conviction/acquittal. Given the unhelpfulness of the title "crime control," Peter Duff has proposed renaming it the "efficiency model."[39]

3.2. Efficiency

Yet the term "efficiency" is at least as troublesome as the term "crime control." Examination of Packer's work reveals that he is not consistent in the way in which he uses the word efficiency.

First, consider Packer's description of the crime control perspective on the police's power of arrest:

> "The police have no reason to abuse this power by arresting and holding law-abiding people. The innocent have nothing to fear. It is enough of a check on police discretion to let the dictates of police efficiency determine under what circumstances and for how long a person may be stopped and held for investigation"[40]

Efficiency in this extract cannot simply mean the expeditious handling of cases. The fact that cases are dealt with quickly does not, in itself, afford any guarantee to the innocent. It would be possible for someone wrongly accused to have his case dealt with swiftly. Packer's logic is based on the idea that efficiency involves accuracy; the

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[39] 'Crime Control, Due Process and "The Case for the Prosecution"' [1998] 38 BJ Crim 611. Notably, Smith later wrote, "Packer saw crime control as the goal of the system as a whole, but saw due process and crime control as competing sets of values within the system" ('Reform or Moral Outrage – The Choice is Yours' [1998] 38 BJ Crim 616 at 616). This statement too has been challenged, with Andrew Rutherford arguing that crime control should not be seen as the goal of the criminal justice process: "It is suggested here that the *raison d'être* of the criminal justice process must reside with its fundamental values. It is a process for criminal justice and not for criminal control. In other words, criminal justice is about the expression of fundamental values in terms of how victims, witnesses, suspects, defendants and offenders are dealt with" (*Criminal Justice Choices: What Is Criminal Justice For?* (London: Institute of Public Policy Research, 2001) at 12).

[40] *Limits* at 177.

innocent have nothing to fear because the police are efficient, i.e., they will be effective in their attempts to only arrest those who are guilty. This form of efficiency, which we may call investigative efficiency (or investigative effectiveness), is closely related to the presumption of guilt, which, as explained previously, is a key feature of the crime control model:

> "The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt"[41]

But as this extract shows, and as we saw above, Packer also uses the word efficiency to describe the speedy and expeditious handling of cases in which the suspect has been shown, by the police and prosecutorial screening process, to be probably guilty. We may call this second form of efficiency operational efficiency. This form of efficiency has no connection with accuracy. Cases may be dealt with quickly by the criminal justice process regardless of whether the suspect is in fact guilty of the alleged offence or not. A further point to be gleaned from this extract is that the crime control model's demand for operational efficiency is premised upon the reliability (or investigative efficiency) of the police/prosecutorial screening processes.

Another example of Packer using efficiency to mean operational efficiency may be found when he discusses the potential for state power to be abused:

> "[T]he proponents of the Due Process Model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual"[42]

In other words, proponents of the due process model would happily place some obstacles on the conveyor belt, even though this would hamper the speedy, expeditious handling of cases, in order to ensure suspects are given sufficient protection from state power. This extract also only makes sense if efficiency is taken to have no connection whatsoever with accuracy.

In his outline of the due process model and its associated values, Packer's failure to recognise that he attributes different meanings to the word efficiency

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[41] ibid at 160.

[42] ibid at 166.

becomes particularly glaring. This important section of the book[43] begins with an explanation for the due process model's rejection of administrative fact-finding and its insistence on adjudicative fact-finding. In order to illustrate the divergence between the crime control and due process models, Packer then poses the question, "how much reliability is compatible with efficiency?" The answer given by each model lies, he says, in the "weight [that] is to be given to the competing demands of reliability ... and efficiency." Here he defines reliability as "a high degree of probability in each case that factual guilt has been accurately determined" and efficiency as the "expeditious handling of the large numbers of cases that the process ingests," i.e., operational efficiency.[44] Having posed the question and provided these definitions, Packer states:

> "The Due Process Model insists on the prevention and elimination of mistakes to the extent possible; the Crime Control Model accepts the probability of mistakes up to the level at which they interfere with the goal of repressing

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[43] ibid at 163-173.

[44] Note that elsewhere Packer defines "efficiency" differently, for example, he writes, "By 'efficiency' we mean the system's capacity to apprehend, try, convict and dispose of a high proportion of criminal offenders whose offenses become known" (ibid at 158). Unlike the other definition, this definition includes some notion of reliability, since Packer associates efficiency not just with expeditious handling of cases, but also convicting the correct people. It may therefore be taken as a definition of investigative efficiency. Notice also that the definition of reliability refers to "a high degree of probability *in each case* that factual guilt has been accurately determined," whereas this definition of investigative efficiency refers to convicting "*a high proportion* of criminal offenders whose offences become known." So while reliability is defined as a high degree of probability that guilt has been accurately determined in an individual case, investigative efficiency is achieved when a high proportion of those crimes that are known to have been committed culminate in reliable determinations of guilt. A lack of investigative efficiency will result in a "justice gap." The notion of a "justice gap" was influential in the movement from liberal humanitarianism to managerialism that occurred in Dutch criminal justice policy in the 1980's. In his article *The working of criminal justice: a small step backward and a huge leap forwards* (*Delikt en Delinkwent* 14 (1984) 395 & 497) Dato Steenhuis pointed out that in The Netherlands in 1982 there were 900,000 offences recorded by the police, of which 200,000 were then referred to the prosecutor, with 45% of these being put before a court. In 9% of the cases dealt with by the courts the judge did not reach a verdict. Steenhuis concluded, "any real-life production firm that dealt with its production means in such a way would have become bankrupt a long time ago." The white paper *Samenleving en Criminaliteit* (Society and Criminality, A Policy Plan for the Years to Come (The Hague: Ministry of Justice, 1985)), published the following year, stated, "The gap between the number of infringements of standards embodied in the criminal law and the number of real responses to them by the criminal justice authorities has become unacceptably wide" (at 20). The white paper thus stated, "The first step which needs to be taken in restoring the credibility of the administration of criminal justice is to eliminate the innumerable stoppages in the criminal justice system, so as to ensure that cases are dealt with and concluded systematically and within a reasonable timescale. In order to gain an understanding of the problems which arise in these processes, it is appropriate to present the totality of activities of the criminal justice system, in the form of a conceptual model, as a factory with a continuous production point" (at 40). For an account of Dutch criminal justice in the 1980's, see the chapter 'Managerialism and Credibility' in Andrew Rutherford's book *Transforming Criminal Policy* (Winchester: Waterside Press, 1996) (the translated excerpts from Steenhuis's article and the white paper are taken from this book).

> crime, either because too many guilty people are escaping or, more subtly, because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law. In this way, reliability and efficiency are not polar opposites but rather complementary characteristics. The system is reliable *because* efficient; reliability becomes a matter of independent concern only when it becomes so attenuated as to impair efficiency"[45]

This quote begins with a re-affirmation of the due process model's concern to ensure that the criminal justice process operates reliably. Mistakes, at whatever stage of the process, must, so far as is possible, be eliminated. Packer contrasts this with the crime control model, which, he says, is willing to accept the possibility of mistakes. Only if too many guilty people are escaping, or if awareness of the unreliability of the criminal justice process is affecting the deterrent efficacy of the criminal law, does the probability of mistakes need to be addressed. So whilst the due process model insists on achieving the highest degree of reliability possible, the crime control model also insists on reliability, but to a lesser extent. The difference is one of degree.

Packer then states that, according to the crime control model, reliability and efficiency are "complementary characteristics." The preceding expression "In this way ..." reveals that what Packer means is that if the criminal justice process is reliable it will be *efficient at deterring* people from crime. If there is awareness that the process is unreliable the efficiency with which the criminal law deters people from crime will be detrimentally affected. Packer then purports to restate this idea, saying, "the system is reliable *because* efficient." This sentence goes beyond the idea that the two concepts are complementary by attempting to state their causal relationship. Reliability, he says, is the consequence of efficiency. But the fact that a system is efficient at deterring people from committing crime does not mean the system is reliable. Efficiency in this sense provides no guarantee of reliable fact-finding.[46] Indeed only two sentences previously Packer stated the causal relationship the other way round – "because general awareness of the unreliability of the process *leads* to a decrease in the deterrent efficacy of the criminal law" (emphasis added).

Reliability is, however, the consequence of *investigative efficiency*. If the criminal justice process is effective at discovering the truth reliable verdicts will inevitably ensue. The process will be reliable because it has investigative efficiency. So

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[45] *Limits* at 164-165 (emphasis original).

[46] For example, individuals might be deterred from committing crimes by an onerous penalty scale, even where the criminal justice process is unreliable.

in order to make sense of the statement "the system is reliable *because* efficient" we must conclude that Packer is using the word efficient in the sense of investigative efficiency.

Packer then completes this sentence by stating that "reliability becomes a matter of independent concern only when it becomes so attenuated as to impair efficiency." This does not make sense if efficiency is understood in the sense of investigative efficiency. Accuracy in investigation (and therefore reliability of outcome) is always of concern to the investigatively efficient fact-finder. Instead, Packer here appears to revert to the idea expressed two sentences previously. For the crime control model, reliability only becomes a matter of "independent concern" when it is so attenuated as to impair the deterrent efficacy of the criminal law.

So although immediately before this passage Packer defined efficiency in the sense of *operational efficiency*, at no point in the passage does he use the word efficiency to refer to the expeditious handling of cases. Instead he uses the word primarily to refer to the way in which the unreliability of the criminal justice process will affect the efficiency with which individuals are deterred from committing crimes, whilst also lapsing into using the word in the sense of investigative efficiency without offering any indication that he is doing so.

Having described the perspective of the crime control model, Packer immediately goes on to say:

> "All of this the Due Process Model rejects. If efficiency demands short-cuts around reliability, then absolute efficiency must be rejected. The aim of this process is at least as much to protect the factually innocent as it is to convict the factually guilty"[47]

What exactly does the due process model reject? Efficiently deterring individuals from committing crime does not demand short-cuts around reliability; on the contrary, as Packer has already pointed out, this form of efficiency depends upon reliability. Neither does the due process model reject investigative efficiency. The due process model, with its emphasis on reliability, welcomes accurate investigation that discovers the truth. Packer must, of course, mean operational efficiency, i.e., the due process model challenges the primacy the crime control model attaches to operational efficiency. If the expeditious handling of cases is incompatible with having reliable fact-finding processes, then it is the expeditious handling of cases that must be sacrificed. The sentence "All of this the Due Process Model rejects" is thus misleading,

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[47] *Limits* at 164-165.

for it suggests that the due process model is rejecting efficiency in the sense used immediately before by the crime control model, when in fact it is rejecting operational efficiency.

Packer finishes this section by likening the due process model to a factory that cuts down on quantitative output in order to improve its quality control. The implication is that, whilst the due process model chooses to sacrifice the expeditious handling of cases in order to improve reliability, the crime control model prefers to insist on the expeditious handling of cases at the expense of reliability. What Packer fails to recognise, however, is that the crime control model's concern for operational efficiency is premised on its assumption of investigative efficiency. According to the due process model, if operational efficiency demands short-cuts around reliability, then absolute operational efficiency must be rejected. But the crime control model does not demand short-cuts around reliability; on the contrary, it is premised on the reliability of the police/prosecutorial screening process. Operational efficiency is only a sustainable ideal if the administrative fact-finding processes are reliable enough to produce investigative efficiency. Packer's dialogue between the two models merely reveals two voices speaking at cross-purposes. A crime control voice that fails to articulate clearly its model, and a due process voice that has failed to understand the model of its opponent.

It is clear then that Packer's analysis is confused as a result of his failure to distinguish these three different forms of efficiency: investigative efficiency, operational efficiency, and deterrent efficacy. So, whilst the label "crime control model" is problematic, relabelling the model the "efficiency model" proves equally troublesome. Efficiency is a term that may be used in diverse ways, and to label a model the efficiency model merely invites confusion.

3.3. The screening process

Before we construct an ideal-type version of the crime control model, a preliminary question must be addressed: when does the screening process referred to by Packer end? The importance of this question is illustrated by the following extract:

> "By the application of administrative expertness, primarily that of the police and prosecutors, an early determination of probable innocence or guilt emerges. Those who are probably innocent are screened out. Those who are probably guilty are passed quickly through the remaining stages of the process"[48]

[48] ibid at 160.

Once the screening process is complete, those who remain are probably guilty of the offence of which they are suspected. Those who are probably innocent have been screened out. It is at this point that the crime control model's concern for operational efficiency kicks in:

> "If there is confidence in the reliability of informal administrative fact-finding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency"[49]

The point at which the screening process is complete is thus crucial. It is from this point onwards that, according to the crime control model, cases can be dealt with quickly and expeditiously.[50] As we saw above, this insistence on operational efficiency is premised on the reliability of the screening process. The question remains, however, when does the screening process end? Packer states:

> "[W]e will assume that the police have satisfied themselves that the original decision to arrest was sound and that the suspect is factually guilty ... It is clear that now the initiative must pass from the police to the prosecutor, from the expert in factual guilt to the expert in legal guilt. The decision to be made at this stage is a screening decision: should the suspect be held for further stages of the process?"[51]

As this passage shows, Packer saw the prosecutor's decision whether or not to prosecute as the final stage of the screening process. Interestingly, this also shows that the group of people that emerge from the screening process will be smaller than the group of people that the police determine are factually guilty. The prosecutor will be concerned with legal guilt, not merely factual guilt, and so will be swayed by additional considerations, in particular, the question whether there is sufficient admissible evidence to secure a verdict of guilty. In other words, all those who emerge from the screening process (and who are then passed on to the remaining stages of the criminal

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[49] ibid at 160-161. Packer again uses the word efficiency in a confusing manner. It would not make sense for the word efficiency to be referring simply to the expeditious handling of cases, since Packer's logic here is based on efficiency involving some degree of reliability.

[50] We will return below to the stage before the screening process is complete.

[51] *Limits* at 205-206.

justice process[52]) will have been found, by the police and the prosecutor, to be both factually and legally guilty.

3.4. An ideal-type operational efficiency model

The discussion so far has identified two key features of the crime control model. First, there will be investigative efficiency. The police will be effective in their endeavours to only arrest those who are guilty of crime. Closely related to this is the reliability of the screening process operated by police and prosecutors. This reliability means that the screening process will act as an effective indicator of probable guilt. Second, there will be operational efficiency. Cases that pass the police and prosecutorial screening process should be dealt with speedily and expeditiously.

In order to construct an ideal-type model, let us accentuate each of these features to their purest form. So, first, let us assume that the police are perfectly efficient (in the investigative sense), and that the screening process operated by the police and prosecutors is perfectly reliable. On this view, we can say with the utmost confidence that everyone who emerges from this screening process, and who is passed on to the remainder of the criminal justice process, is legally guilty.[53] Packer's presumption of guilt falls short of this:

> "Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty"[54]

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[52] It is assumed here that the screening process is part of the criminal justice process. An alternative approach would be to hold that the criminal justice process begins once the screening process is complete, and that therefore only those who emerge from the screening process enter the criminal justice process. The problem with this reasoning, however, is that it would place the entire police investigative process, and the prosecutor's decision whether to prosecute, outside the scope of the criminal justice process. Cf. Ashworth, who writes, "while decisions to take no further action or to give a formal caution have the effect of diverting the offender from the criminal process, the decision to prosecute is the first step on what may become a long road" (*The Criminal Process: An Evaluative Study* (2nd edn.)(n16 above) at 149).

[53] What this does not mean, however, is that everyone who is factually and legally guilty of a crime will emerge from the screening process. The reason is that not everyone who is factually guilty will be entered into the screening process in the first place. The total number of the factually and legally guilty entering the screening process is likely to be but a small part of the total number of factually and legally guilty in the population because, e.g., many crimes are not reported to the police in the first place (for discussion of the process of attrition see Ashworth *The Criminal Process: An Evaluative Study* (2nd edn.)(n16 above) at 140-142).

[54] *Limits* at 160.

According to the ideal-type model, however, those who emerge from the screening process are not *probably* guilty; we can say with the fullest possible confidence that they *are* guilty.

Given that everyone who emerges from the screening process is legally guilty, it follows that the remainder of the criminal justice process ought to have no bearing on whether the defendant should be convicted. Again Packer came close to this conclusion, but ultimately failed to present the ideal-type model in its pure form:

> "In this model [the crime control model], as I have suggested, the center of gravity for the process lies in the early, administrative fact-finding stages. The complementary proposition is that the subsequent stages are relatively unimportant and should be truncated as much as possible"[55]

Having determined that, on the ideal-type model, everyone who emerges from the screening process is legally guilty, the second feature of the crime control model flows naturally. There should be perfect operational efficiency. Cases should be dealt with as quickly and expeditiously as possible. Once a defendant emerges from the screening process there is little sense in delaying the remaining stages of the criminal justice process. That he will be convicted is not in doubt. All that remains to be determined is the sentence he will serve.

The image of the conveyor belt resonates with the ideal-type operational efficiency model.[56] Once a defendant is placed on the conveyor belt (i.e., been through the screening process and found to be legally guilty), his case should be processed and disposed of as quickly as possible. What use would any obstacles on the conveyor belt be? His guilt is not, after all, in doubt.

4. An Ideal-Type Adversarial Reliability Model

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[55] ibid at 163.

[56] In her book *Public Prosecutors and Discretion: A Comparative Study* (Oxford: OUP, 1995) Julia Fionda examines the role of the public prosecutor in four European jurisdictions. She argues that the justifications advanced for the adoption of prosecutorial sentencing in these jurisdictions fall into three categories; she then expounds three models based upon these categories – the operational efficiency, restorative and credibility models. The first of these, the operational efficiency model, is "governed by principles of administrative efficiency and resource saving" (at 176). This bears some similarity to our ideal-type operational efficiency model. However, whilst our ideal-type operational efficiency model's demand for the expeditious handling of cases is premised upon the reliability of the police/prosecutorial screening process, Fionda's operational efficiency model bases its demand for administrative efficiency on the pragmatic concern to "control and manage an increasing workload within the constraints of a limited workforce and budget" (at 176).

Two questions immediately emerge from this presentation of an ideal-type operational efficiency model. First, what would the alternative look like? Is it possible to construct an ideal-type where the police and prosecutorial screening process is perfectly unreliable? Second, the ideal-type presented above operates only in the part of the criminal justice process from the end of the screening process onwards. Can an ideal-type of the screening process itself be constructed? The first of these questions will be considered here, and the second question will be returned to in section 8.

4.1. The values underlying the due process model

As we saw earlier, Packer argued that several different concerns underlie the due process model – reliability, prevention of abuse of state power, equality, and concern about the way in which the criminal sanction is used.[57]

Concern about the ends for which power is being used may of course lead to concerns about the process through which such power is exercised.[58] This concern about the means (the criminal justice process) is derived from concern about the ends for which the power is being exercised (the use of the criminal sanction). Unease about how the criminal sanction is used is thus a background factor, a "mood,"[59] which acts as a catalyst to create concern about the criminal justice process. And whilst concern about the use of the criminal sanction may create concern about the criminal justice process, it does not tell us anything about what the substantive content of the criminal justice process should be.[60] It simply raises the issue as one to be considered.

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[57] See section 1 above.

[58] See n15 above.

[59] Packer's use of the word "mood" is evocative of words spoken by Winston Churchill: "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man – these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it" (HC Deb vol 191 cols 1353-1354 20 July 1910).

[60] There are a diverse range of possible concerns regarding the use of the criminal sanction that could generate consideration of the criminal justice process. For example, there might be concern that the criminal sanction is not being used sufficiently, in which case features of the criminal justice process that hinder the use of the sanction might be removed; on the other hand, there might be concern that the criminal sanction is extremely draconian, in which case safeguards in the criminal justice process might be tightened. This illustrates that although concern about the use of the criminal sanction may provoke consideration of the criminal justice process, this concern does not lead to particular substantive views on the criminal justice process.

The values of reliability, prevention of abuse of state power and equality are different. These values are not founded upon concern about the ends for which the criminal justice process is being used. In this sense these values are independent; they are relevant regardless of the ends for which the criminal sanction is used. Furthermore, each of these values has a substantive content. They each have something to say on the issue of what form the criminal justice process should take.

Since it has nothing to say on the substantive issue of what form the criminal justice process should take, it is not possible to construct an ideal-type model using concern about the use of the criminal sanction as our starting-point. Attention in this chapter will therefore be focussed on the other three values mentioned by Packer. This is not to say, however, that concern about the use of the criminal sanction is irrelevant. Not only might it provoke consideration of the criminal justice process, it might also be highly relevant in making the value judgements that the ideal-types open up.

It is also immediately apparent that the three values of reliability, prevention of abuse of state power and equality do not always pull in the same direction. Take, for example, a confession, obtained through torture of the suspect, but verified as true by evidence subsequently discovered as a result of the confession.[61] If we are only concerned with reliability, the confession ought to be relevant evidence. It has, after all, been verified as true.[62] But if we are concerned purely with prevention of abuse of state power, the confession ought not to be considered as evidence. Refusing to consider such evidence is an expression of our conviction that obtaining evidence in such a manner is unacceptable. It sends a strong message to the police (or other

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[61] Of course, a confession obtained by torture would normally be extremely unreliable.

[62] In a trial, we must decide whether or not the defendant transgressed law X. The demands of reliability require that, when making this determination, we look at every piece of probative evidence. An improperly obtained confession that has been verified as true is helpful in determining whether, as a matter of fact, the defendant did transgress law X, and thus the dictates of reliability demand that we consider it. If we refuse to consider such evidence we accept that the likelihood of correctly determining whether or not the defendant transgressed law X will be reduced. It is implicit in the distinction between factual guilt and legal guilt that sometimes, even though there is ample evidence that the defendant transgressed law X (i.e., he is factually guilty), the appropriate verdict is not guilty. In other words, we accept the possibility that the verdict is factually inaccurate (we say the defendant is not guilty of transgressing law X when there is ample evidence that he did so), in order to, e.g., deter abuses of state power. Reliability may thus be said to have been sacrificed. This is the sense in which Packer used the word "reliability." He defined reliability as "a high degree of probability in each case that *factual* guilt has been accurately determined" (*Limits* at 164 (emphasis added)), and, when explaining the doctrine of legal guilt he wrote, "a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect" (*Limits* at 166).

relevant organ of the state) that they should not abuse their power to interview suspects.[63]

A due process model that is constructed upon values that may conflict is flawed.[64] As this example demonstrates, the model will be in a state of internal conflict.[65] So the analysis here will focus upon each of the three values underlying Packer's due process model in turn. The value of prevention of abuse of state power will be considered in section 6, and then equality will be considered in section 7. We will focus first of all on reliability, and construct an ideal-type adversarial reliability model.

4.2. A perfectly unreliable screening process

Packer explains that the due process model's perspective on the reliability of the police/prosecutorial screening process is the converse of that of the crime control model:

> "The Due Process Model encounters its rival on the Crime Control Model's own ground in respect to the reliability of fact-finding processes. The Crime Control Model, as we have suggested, places heavy reliance on the ability of investigative and prosecutorial officers ... to elicit and reconstruct a tolerably accurate

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[63] In *Schenk v Switzerland* (1991) 13 EHRR 242 the European Court of Human Rights said that whilst Article 6 guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, and so this is primarily a matter for regulation under national law. The Court will, however look at the proceedings as a whole and ask whether they were fair (at para 46). s76(2)(a) Police and Criminal Evidence Act 1984 states that any confession that "was or may have been" obtained by "oppression" of the defendant may not be given in evidence against him. "Oppression" is defined in s76(8) in terms very similar to Article 3 ECHR, and in practice admission of any evidence obtained in breach of Article 3 would inevitably breach Article 6. However, s76(4)(a) provides that the inadmissibility of a confession does not affect the admissibility of "any facts discovered as a result of the confession." This shows that the message to police that they should not abuse their powers in order to obtain evidence is somewhat equivocal.

[64] Admittedly this example involves only two of the three values listed by Packer. But the same point applies if we take an example involving the principle of equality. Imagine a defendant is convicted on the basis of incontrovertible evidence of his guilt, but that he did not have legal representation because he could not afford it. According to the principle of reliability there is no point in spending public money on providing legal representation for a defendant whose guilt is not in doubt. But according to the principle of equality, the criminal justice process should not allow financial ability to affect a defendant's access to legal representation. Public money should be used to ensure that all defendants have access to legal representation, regardless of the cogency of the case against the defendant.

[65] Packer acknowledged this potential for conflict, writing; "the Due Process Model, although it may in the first instance be addressed to the maintenance of reliable fact-finding techniques, comes eventually to incorporate prophylactic and deterrent rules that result in the release of the factually guilty even in cases in which blotting out the illegality would still leave an adjudicative fact-finder convinced of the accused person's guilt. Only be penalizing errant police and prosecutors within the criminal process itself can adequate pressure be maintained, so the argument runs, to induce conformity with the Due Process Model" (*Limits* at 168).

account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, nonadjudicative fact-finding that stresses the possibility of error"[66]

The due process model thus rejects "informal fact-finding processes as definitive of factual guilt."[67]

As we attempt to accentuate this point of view to its purest form we find a problem which Packer overlooked. The word reliable may be understood either in the sense of accuracy, or in the sense of trustworthiness. The question arises, in which sense should we use the word here?

Let us first of all take reliability in the sense of accuracy. A perfectly reliable screening process results in only those who are factually and legally guilty being passed on to the remainder of the criminal justice process, i.e., it is perfectly accurate. If we take the converse of this, and accentuate it to its purest form, we have a screening process that is perfectly inaccurate. Everyone who is innocent will be found by the screening process to be guilty, and vice versa. There are two possible consequences of this. Either everyone who is passed on to the remainder of the criminal justice process, having been found by the screening process to be guilty, would have to be acquitted, or, alternatively, only those found by the screening process to be innocent should be passed on to the remainder of the screening process. Neither of these possibilities are worthy of further consideration; the first would result in no crime ever resulting in a conviction, whilst the second would result in a farcical criminal justice process.

But since a perfectly reliable screening process results in only those who are factually and legally guilty being passed on to the remainder of the criminal justice process, we may also take reliable in the sense of trustworthy. If we take the converse of this, and accentuate it to its purest form, we have a screening process that is entirely untrustworthy. On this view, the screening process is no indicator whatsoever of factual (or legal) guilt. No determination that is made by the screening process can be trusted. The group of people who emerge from the screening process are seen as nothing more than a randomly selected group of people. They are as likely to be guilty of the crime charged as any other member of society. The fact they have been selected by the screening process means nothing, since the process, completely untrustworthy as it is, offers no indication of guilt.

Indeed, when Packer describes the due process model's perspective on the police/prosecutorial screening process he seems to use the word reliability primarily in

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[66] *Limits* at 163.

[67] ibid at 163.

the sense of trustworthiness. Whether or not a determination is accurate is not a relevant consideration, he writes. The proponent of the due process model stresses the *possibility* of error. Any determination made by administrative fact-finders must be examined and reconsidered. We cannot place our *trust* in what they have determined.

So in order to describe the due process model's rejection of the informal fact-finding processes that form the screening process, it is important to take reliability in the sense of trustworthiness. This is consistent with Packer's depiction of the due process model. However, Packer obscures this because, as we have seen, he defines reliability in the sense of accuracy.[68]

4.3. An ideal-type adversarial reliability model

If we start from the premise that the police/prosecutorial screening process is completely untrustworthy, it follows naturally that the remainder of the criminal justice process must be given to determining the legal guilt of the suspect. Giving primacy to the expeditious handling of cases is no longer appropriate.[69] We have no idea whatsoever whether or not those who have emerged from the screening process are factually and legally guilty of the crime charged. The remainder of the process must therefore be devoted to scrutinising and testing the case against the suspect, so that the final outcome of the criminal justice process is reliable.[70] Packer, as already noted, wrote, "[t]he Due Process Model resembles a factory that has to devote a substantial part of its input to quality control."[71] Again, he does not present this point of view in its purest form. The ideal-type adversarial reliability model is premised on a completely untrustworthy police/prosecutorial screening process, and so is completely (not substantially) devoted to ensuring the remainder of the process is reliable.

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[68] See n44 above. Occasionally Packer does use the word reliable in the sense of trustworthiness, but without giving any indication that he is using the word in a different sense, or offering any explanation for doing so. For example, he writes of "the distrust of fact-finding processes that animates the Due Process Model" (at 164), and, when describing the due process perspective on improperly obtained confession evidence, he writes, "the rationale of exclusion is not that the confession is untrustworthy ..." (at 191).

[69] Of course, this is not to give a licence for delay. The process should still operate as swiftly as possible. But this is very different from the ideal-type operational efficiency model's emphasis on passing the case through the remainder of the criminal justice process as quickly as possible: Cf. n24 above.

[70] Here it is not necessary to distinguish between reliability in the sense of accuracy and reliability in the sense of trustworthiness. For, according to our ideal-type model, the remainder of the process must be devoted to a procedure that arrives at the correct outcome, i.e., a procedure that accurately determines guilt and which, as a result, is trustworthy. The concepts of accuracy and trustworthiness thus coincide.

[71] *Limits* at 165.

5. Using the Ideal-Type Operational Efficiency and Adversarial Reliability Models

Having constructed two ideal-type models, it seems appropriate to offer an example of how they might be used.

Packer ascribed a uniform threshold of probability to the word reliability,[72] but in reality different parties at different stages of the criminal justice process are asked to make quite different assessments of a case.[73] The "evidential test" employed by the Crown Prosecution Service, for example, is whether there is a "realistic prospect of conviction,"[74] whereas finders of fact in criminal trials, when determining guilt, employ the standard of "beyond reasonable doubt." Obviously, the two are not synonymous.[75] Given that the test employed by Crown Prosecutors is an easier one to satisfy, it follows that many suspects will emerge from the screening process and be passed on to the remainder of the criminal justice process, when in fact the case against them does not fulfil the criminal standard of proof.

Three further considerations may be added. First, there is the difficulty a Crown Prosecutor faces in attempting to judge the sufficiency of evidence, without having heard the witnesses in court, without knowing the credibility or reliability of the witnesses, and without knowing what form the defence will take. Second, in his research on the CPS, John Baldwin found a tendency among some Crown Prosecutors to proceed with a case despite a probable or manifest weakness.[76] He attributed this to inexperience, lack of self-confidence, and, importantly, the fact that "some prosecutors

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[72] He defines it as "a high degree of probability in each case that factual guilt has been accurately determined" (see n44 above).

[73] Although Packer explicitly ascribes a uniform threshold of probability to reliability, he does implicitly recognise that prosecutors apply a threshold lower than the criminal standard of proof (see, for example, n48 and n54 above), but without considering the implications this has for his models.

[74] *Code for Crown Prosecutors* (4th edn.)(London: Stevens, 2000) at para 5.1. The second test is the "public interest" test. According to para 6.2, prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.

[75] Of course it is not only the CPS and finders of fact in criminal trials that have to make assessments of a case. Before the case even gets to the CPS, for example, the police must make an assessment of a case when deciding whether or not to exercise their power of arrest. The threshold laid down by section 24(6) of the Police and Criminal Evidence Act 1984 ("Where a constable has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds for suspecting to be guilty of the offence") is easier to satisfy than the evidential and public interest tests applied by the CPS.

[76] 'Understanding Judge Ordered and Directed Acquittals in the Crown Court' [1997] Crim LR 536

share a common value system with the police."[77] Third, there is the under-resourcing of the CPS, which places great pressure on Crown Prosecutors to make decisions about cases quickly, and also hampers the efforts of the CPS to recruit and retain staff of the right quality. These three factors make it likely that a significant number of suspects pass through the screening process when in fact there is *no* "realistic prospect of conviction." This brief examination of the CPS suggests the police/prosecutorial screening process in England and Wales is not a very trustworthy indicator of legal guilt.[78] Many suspects will pass through the screening process when they are not, in fact, legally guilty. Suppose that, against this background, the New Labour Government directed the courts to speed up the rate at which cases are heard in order to ensure a swifter turnover of cases (with the resourcing of the courts remaining the same).

We saw earlier that Packer used the image of a factory to suggest that the due process model sacrifices the expeditious handling of cases in order to improve reliability, whereas the crime control model insists on the expeditious handling of cases at the expense of reliability.[79] As explained previously, this contrast between Packer's two models is flawed. Both ideal-type models recognise the expeditious handling of cases only to the extent that this is compatible with the dictates of reliability. However, in reality there will often be instances where the demands of efficiency and reliability are in competition and must be balanced. Comparing such situations to each of our ideal-type models aids our analysis of these situations and helps clarify discussion.

In our example, for instance, the New Labour Government has shown a concern to promote the expeditious handling of cases. This is akin to the emphasis placed on operational efficiency by the ideal-type operational efficiency model. Unlike the ideal-type operational efficiency model, however, the background to the Government's decision in our example is a screening process that is not an effective indicator of factual and legal guilt. Furthermore, if the resources available to the courts remains the same, then in order to ensure a swifter turnover of cases the scrutiny with which cases are examined must be reduced. Unlike the ideal-type adversarial reliability model, in our example the Government has decided to reduce the thoroughness of the adversarial fact-finding processes. This is so even though the background to our example is similar to the premise upon which the ideal-type adversarial reliability model is built (police/prosecutorial screening process not a trustworthy indicator of factual and legal

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[77] ibid at 551.

[78] My purpose here is not to provide a comprehensive evaluation of the screening process operated by the police and Crown Prosecution Service. Such a study is beyond the scope of this chapter. My purpose is merely to illustrate how the ideal-type models may be used.

[79] See the last two paragraphs of section 3.2.

guilt). So comparison of the situation in our example to the ideal-type models demonstrates that the Government has decided to reduce the thorough scrutiny of cases in favour of increasing the expeditiousness with which cases are handled, without adhering to the premise adopted by either ideal-type model. Of course, one would have to take into account the factors behind the Government's decision. Perhaps it was motivated by a concern to reduce the length of time individuals are remanded in custody pending trial, or perhaps it wanted to send out a message that they are cracking down on crime. In order to evaluate the decision these background factors would have to be considered. The key point, however, is to note how the ideal-type operational efficiency and adversarial reliability models open up this further evaluative discourse.

So when the ideal-type models are used together they help us to analyse whether or not the reliability of the criminal justice process is being sacrificed. If this is found to be the case, as in our example, the ideal-type models invite us to evaluate the decision to reduce the reliability of the criminal justice process by considering the reasons behind the decision. The reason may simply be to increase the volume of the criminal justice process, but this need not necessarily be the case. The decision might, for example, be based on a concern to prevent the abuse of state power.[80] If we compare this methodological approach to the one advocated by Packer, the shortcomings of his two models are further exposed. As we saw previously, his two models are based on two value systems,[81] which Packer claims represent two ends of a spectrum. On this approach, our example should be seen as a classic case of the crime control model's concern for the expeditious handling of cases being given pre-eminence over the values underlying the due process model. The first difficulty with this, however, is that it fails to question whether the reliability of the criminal justice process has in fact been diminished. It does not examine the reliability of the police/prosecutorial screening process; instead it simply assumes that the post-screening part of the process ought to be devoted to reliability. Second, by reducing all decisions to a simple conflict between the values of the crime control and due process models, it assumes that the only explanation there could be for reducing the reliability of the post-screening part of the process is to increase the expeditiousness with which cases are handled. It ignores the possibility that other values might have been the basis for the decision; in particular, by attributing other values, such as the prevention of abuse of state power, to the due process model Packer implicitly rejects the notion that

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[80] Examples are the exclusion of an improperly obtained confession that has been verified as true and evidence found in an illegal search. See n62 above.

[81] See n4 above.

these values could have been influential in making the decision. Packer's framework is thus inadequate for proper consideration of the issues involved.

6. Models Based on Prevention of Abuse of State Power and Crime Prevention

Having considered the value of reliability, it is time to turn to the second of the values underlying Packer's due process model, prevention of abuse of state power.

6.1. The value of prevention of abuse of state power in the due process model

The due process model states that "power is always subject to abuse – sometimes subtle, other times, as in the criminal process, open and ugly."[82] Its concern to prevent abuse of state power is compounded by the fact that "[t]he combination of stigma and loss of liberty that is embodied in the end result of the criminal process is viewed as being the heaviest deprivation that government can inflict on the individual," and that "the processes that culminate in these highly afflictive sanctions are seen as in themselves coercive, restricting, and demeaning."[83] Closely related to the concept of prevention of abuse of state power is the concept of the primacy of the individual.[84] According to this concept, the state should act in a manner that respects the autonomy, liberty and rights of every individual. When the state abuses its power it violates these demands.

Prevention of abuse of state power is central to much of Packer's application of the due process model. He invokes the principle throughout his application of the due process model to the post-screening part of the criminal justice process. For example,[85] when examining the issue of pre-trial detention, he writes, "A person accused of crime is not a criminal ... [He] is entitled to remain free until judged guilty so long as his freedom does not threaten to subvert the orderly processes of criminal justice."[86] The implication is clear. For the state to detain an accused person when the orderly processes of criminal justice are not under threat is to abuse its power. On the issue of

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[82] *Limits* at 166.

[83] ibid at 165-166.

[84] ibid at 165.

[85] A further example concerns collateral attack. Packer writes that, according to the due process model, a *habeas corpus* petitioner should, first, be allowed to litigate a Fourteenth Amendment claim at the Federal level even if the claim has already been rejected by a state court, and second, be allowed to raise a Fourteenth Amendment issue in the Federal criminal process even if he failed to take his opportunity to raise it in the state criminal process and is now barred by state procedural rules (ibid at 234-235).

[86] ibid at 215.

guilty pleas the due process model insists that "the prosecutor, in order to avoid any possibility of coercive pressure, should never take the lead in proposing or suggesting a compromise plea. It is manifestly improper for a judge to use his sentencing discretion to coerce a guilty plea, either by threatening severe punishment in a particular case or by reserving lenient treatment, such as probation, for defendants who plead guilty ... [I]t can only defeat the ends of the system to penalize a defendant for insisting on a trial or to intimidate him by threatening him with unpleasant consequences if he does insist." The criminal trial should be seen "not as an undesirable burden but rather as the logical and proper culmination of the process."[87] And on the issue of appeals, Packer writes that "it is important that the discretion to allow bail pending appeal not be manipulated coercively to discourage the pursuit of any appeal that has a semblance of merit." Furthermore, an appeal should result in the reversal of a conviction whenever there has been an "error abridging the basic rights of the defendant" in the screening part of the process, or when an abuse has occurred at trial – "The reversal of a criminal conviction is a small price to pay for an affirmation of proper values and a deterrent example of what will happen when those values are slighted. When an appellate court finds it necessary to castigate the conduct of the police, the prosecutor, or the trial court, but fails to reverse a conviction, it simply breeds disrespect for the very standards it is trying to affirm."[88]

6.2. Jareborg's defensive model

Nils Jareborg has also developed a model of criminal law policy which, in contrast to Packer's due process model, is based purely on the concepts of prevention of abuse of state power and the primacy of the individual.[89] He calls it the "defensive model":

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[87] ibid at 224.

[88] ibid at 231-232. The importance which the due process model attaches to reversing criminal convictions where there has been an abuse of state power is illustrated by the fact that doing so involves a departure from the dictates of reliability – see n62 and n65 above.

[89] Nils Jareborg has written extensively on the question of criminal responsibility and on sentencing principles. He is Professor Emeritus of Criminal Law at Uppsala University, Sweden. It has been argued by Maciej Zaremba ('Byalagets diskreta charm eller Folkhemmets demokratiuppfattning' [the people's sense of democracy] in *Du sköna gamla värld* [Brave old world] (FRN, 1987)) that Swedish society has never really accepted the culture of individual rights. The Yeoman farmer class was historically strong, and the nobility weak. Claims for individual rights were seen by the Yeoman farmer class as illegitimate attempts by the nobility to assert privileges. Similarly, in a paper entitled 'The Historical Roots of the Swedish Socialist Experiment' Mauricio Rojas argues that "the absence of strong political traditions stressing the individual rights of the citizens" is linked to Sweden's "feeble urban development" (the Swedish urban population did not break the 10% barrier until the 1850s) which meant that in Sweden there was no "independent bourgeois or petty-bourgeois cultural or political tradition comparable to what has been normal in many other parts of Europe." In his article 'Protection of Constitutional Rights in Sweden' [1997] PL 488 Iain Cameron writes that since Sweden was

"All criminal law aims at protecting the interests of individuals, collective or public interests, or state interests, by using threats of punishment and by using execution of punishment to make the threat credible. But the defensive model ... also aims at *protecting individuals against power abuse*, against abuse of state power, excessive repression in legal or illegal forms, as well as against abuse of private, informal power, of which 'lynch justice' is the most obvious form ... [T]he defensive model does not deny that the criminal law has a social task or function, but its criminal law policy implies that criminal law is meant to be an obstacle, not only for offenders, but also for authorities and politicians."[90]

The features of the defensive model of criminal law policy may be broken down into three parts: first, principles for criminalisation,[91] respect for which means the

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not occupied during World War II, "the resurgence of interest in constitutional (and international) rights after the Second World War largely passed Sweden by." He adds, "the period since 1945 has been one of economic plenty in Sweden. There has been no genuinely perceived need for the courts to intervene to protect the individual from the administration" (at 507). Although Sweden ratified the European Convention on Human Rights in February 1952, it was not until 1966 that Sweden recognised the competence of the Strasbourg Court to decide cases. In another account Cameron writes, "[a]part from its indirect influence on the 1976 drafting reforms of Chapter 2 of the Instrument of Government, little attention was initially paid to the Convention by the Swedish Parliament, administrative agencies, or courts" ('Sweden' in Blackburn and Polakiewicz (eds.) *Fundamental Rights in Europe* (Oxford: OUP, 2001) at 837). In fact, Chapter 2 of the Instrument of Government (which sets out human rights not contained in the Freedom of the Press Act and the Freedom of Expression Act) was a late addition to the original drafts of the Instrument of Government; the Social Democratic Government of the day saw little need for constitutional protection of human rights because, in its eyes, "the sole meaningful protection of fundamental freedoms lay in the democratic process" ('Sweden' at 834). Sweden's reasons for incorporating the Convention into domestic law in 1994 were mainly pragmatic; *inter alia* all the other Nordic states had incorporated/were likely to incorporate the Convention, and Sweden was planning EU membership. Interestingly, in 'Protection of Constitutional Rights in Sweden' Cameron argues that "the emphasis in the Swedish system is placed on preventive, legislative safeguards on abuse of rights" (at 502), later attributing this in part to the fact that the "courts in Sweden ... unreservedly accept the primacy of the principle of parliamentary democracy" (at 504). There are relatively few cases, he says, in which the superior courts in Sweden have considered the rights set out in the Instrument of Government. It might be argued that Jareborg's defensive model is informed by this emphasis on preventive, legislative safeguards; the model asserts, for example, that "the point of having a criminal justice system as a response to unwanted behaviour is ... to protect the offending individual from power abuse" ('What Kind of Criminal Law Do We Want?' in Annika Snare (ed.) *Beware of Punishment: On the Utility and Futility of Criminal Law* (Oslo: Pax Forlag, 1995) at 24 (hereafter 'Jareborg')).

[90] Jareborg at 21, 24 (emphasis original).

[91] He outlines ten principles for criminalisation: a crime presupposes that a legitimate interest or value, capable of concrete specification, is violated or threatened; a crime presupposes that the offender is morally responsible for his deed; a crime consists in a separate event of wrongdoing (an evil or bad deed), i.e., the criminal law is concerned with an act or omission, and only indirectly concerned with the offender; criminalisation must be general, concerning types of deeds, not particular cases or individuals; the crime types must be defined by statutory law, i.e., in general norms easily accessible to the public; the crime type descriptions must be understandable and determinate; retroactive criminalisation to the detriment of the accused is

criminal code lists a set of "socially sanctioned basic moral demands" and so acquires a "value-expressive function;"[92] second, procedural safeguards;[93] and third, principles for sentencing,[94] which recognise that "the courts cannot have an independent function in 'combatting' crime."[95]

We shall see shortly that both the defensive model and the due process model's use of the value of prevention of abuse of state power have roots in liberal concerns. There is, however, a difference between the concerns of each model. Packer's due process model focuses on the potential for individuals within the criminal justice process to abuse their powers.[96] On this view, it is not the fact of state power *per se* that presents a threat – the threat emanates instead from "bad apples," i.e., from individuals within the system misusing the power vested in them. Given this, it is no surprise that the focus of the due process model is narrower than that of the defensive model. The due process model focuses on the stages of the criminal justice process from initial arrest through to appeals and collateral attack, since it is in this part of the criminal justice process that the executive employs the powers vested in it by the state. Jareborg's defensive model, on the other hand, "does not regard state power as necessarily benevolent."[97] It sees the state itself as a "potential enemy,"[98] and its chief

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not allowed; the degree of reprehensibility of the crime type should be reflected in the attached penalty scale; punishment is society's most intrusive and degrading sanction, and so criminalisation should be used only as a last resort or for the most reprehensible types of wrongdoing; and, the general threat of punishment as reflected in actual sentencing should not be severer than what is proved necessary for keeping criminality at a tolerable level (ibid at 22).

[92] ibid at 22.

[93] He outlines eight procedural safeguards: the existence of independent courts; the prohibition of retroactive application of the law to the detriment of the accused; the prohibition of analogical application of the law to the detriment of the accused; the placing of the burden of proof on the prosecutor; requiring proof beyond a reasonable doubt; providing for access to independent legal counsel; allowing appeal of both conviction and sentence; and, providing for judicial review of pre-trial detention (ibid at 23).

[94] Sentencing is guided by the principles of proportionality and parity, and punishment is used parsimoniously (ibid at 23).

[95] ibid at 23.

[96] For example, the due process model stresses the scope for police officers to abuse their power of arrest (*Limits* at 179) and to apply the power of arrest in a discriminatory manner (at 180); it stresses the possibility of suspects being detained and interrogated improperly, e.g., by failing to warn them of their rights or by detaining them for longer than permitted (at 191); it worries that "an unscrupulous policeman or prosecutor" could use electronic surveillance "to pry into the private lives of people almost at will" (at 196-197); it stresses that police officers might resort to illegal searches in order to obtain evidence (at 200); and it states that a prosecutor "with nobody looking over his shoulder" might charge a suspect even when there is insufficient evidence (at 207).

[97] Jareborg at 22.

[98] ibid at 25.

concern is to impose obstacles "for authorities and politicians."[99] As a result, the focus of the defensive model is broader, calling for restrictions on the legislature's use of the criminal sanction (principles for criminalisation), non-negotiable standards for criminal procedure (procedural safeguards), and regulation of the severity of criminal penalties (principles for sentencing).[100] These features of the defensive model are not primarily aimed at stamping out "bad apples," but at placing constraints on state power *per se*.

6.3. The distinction between ideals and ideal-types

We have seen that the ideal-type operational efficiency and adversarial reliability models may be used as concepts against which to compare reality for the purposes of analysis and exposition. The same is also true of the work done by Packer and Jareborg on the prevention of abuse of state power. Comparing reality to the features of Jareborg's defensive model helps us to analyse the dominant trends in the criminal justice process, and provides a convenient way of expounding such trends. Indeed, Jareborg claims that his model "is an 'ideal type' model in a Weberian sense."[101] And the features of the due process model which Packer derives by applying the value of prevention of abuse of state power may also be compared to reality for the purposes of analysis and exposition. In fact, with each issue he considers (pre-trial detention, guilty pleas, appeals, etc), Packer outlines the perspective of the crime control and due process models and then goes on to compare these perspectives with the contemporaneous situation in the United States. He thus uses each model as an ideal-type with which to analyse the trends within the criminal justice process in the United States. Indeed, his conclusion that the criminal justice process was moving increasingly towards the due process model is an important stepping stone in the argument of his book.[102]

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[99] ibid at 24.

[100] A further consequence of this difference in breadth is that Jareborg's outline of the defensive model remains at a high level of generality, simply expounding principles and procedural safeguards, whereas Packer applies the principle of prevention of abuse of state power to a number of specific situations within the criminal justice process. The due process model consequently addresses issues such as the appropriate scope of the police's power of arrest, the circumstances in which the police should be permitted to interrogate suspects, and when electronic surveillance should be used – issues which Jareborg, in his outline of the defensive model, does not touch upon.

[101] Jareborg at 20.

[102] Packer concludes that "the officially determined norms of the process are rapidly providing a standard that looks more and more like what has been described in these pages as the Due Process Model ... In theory at least ... the process is being turned from an assembly line into an obstacle course. This is by far the dominant normative trend" (*Limits* at 239). This conclusion, at the end of part two, paves the way for the ultimate argument of the book. Having argued that

Yet there is also a significant difference between the ideal-type operational efficiency and adversarial reliability models and the work of Jareborg and Packer based on the value of prevention of abuse of state power. The features of Jareborg's defensive model, and the features of the due process model that are derived from the principle of prevention of abuse of state power, may be used as standards against which to *evaluate* reality. The due process model, for example, states that a prosecutor should never take the lead in proposing or suggesting a compromise plea, for this could place coercive pressure on an accused person. In the eyes of the due process model failure to live up to this standard is clearly lamentable. A similar example from Jareborg's defensive model is the provision of access to independent legal counsel. According to the defensive model, a system of criminal justice should strive to ensure that this procedural safeguard is realised for all persons accused of crime.[103] So while the defensive model, and the features of the due process model derived from the principle of prevention of abuse of state power, may be used as concepts against which to

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the criminal sanction is indispensable, Packer goes on in part three to argue that the criminal sanction is resorted to too indiscriminately. This leads to the situation where "its processes are being forced to conform to values that reduce its efficiency [yet] we place heavier and heavier demands on those processes" (at 365). Packer thus concludes, "The process cannot function effectively unless the subject matter with which it deals is appropriately shaped to take advantage of its strengths and to minimize its weaknesses. The prospect of spending billions of dollars, as the federal government now seems prepared to do, on improving the capacity of the nation's system of criminal justice to deal with gamblers, narcotics addicts, prostitutes, homosexuals, abortionists, and other producers and consumers of illegal goods and services would be seen for the absurdity that it is if we were not so inured to similar spectacles. Our national talent runs much more to how-to-do-it than to what-to-do. We sorely need to redress the balance, to ask 'what' and 'why' before we ask 'how'" (at 366). George Packer, commenting on *The Limits of the Criminal Sanction*, writes of his father: "His area of specialization was becoming the criminal law, and he wrote about it in the spirit of the philosophers whom he'd read as a young man, John Stuart Mill and the Utilitarians. On every issue that was to become controversial during the 1960s, and remains controversial today – heroin, pornography, abortion, homosexuality, gambling, preventive detention, wiretapping – he put the burden of justification on the state for taking away the liberty of individuals ... Between 1963 and 1968 crime rates in America increased by as much as 50 percent, and the illegal drug profits, the burden on the courts, the corruption of police tactics, the public's distrust of the criminal justice system, the crime surge itself were all partly due to the fact that America had made more things illegal than it could enforce. My father called it the 'crime tariff' and compared it to Prohibition. In the experimental and hopeful atmosphere of the early 1960s, with the Warren Court handing down sympathetic decisions, this argument could be calmly made and seriously discussed. But 'law and order' soon became one of the hottest political slogans of the decade ... My Father's utilitarian approach to criminal law, though widely praised in the legal field, became more and more a minority position, as it remains to this day, when the 'drug war' has deprived over 300,000 [*sic*] Americans of their liberty, so that we can hardly build enough jails to house them" (*Blood of the Liberals* (n4 above) at 207, 208, 209).

[103] This is equally true for each of the other examples of the due process model's application of the principle of prevention of abuse of state power (see section 6.1 above), and for each of the defensive model's procedural safeguards and principles for criminalisation and sentencing (see n91, n93 and n94 above).

compare reality for the purposes of analysis and exposition, they may also serve as evaluative standards, against which to appraise the criminal justice process.[104]

As noted earlier, Weber was careful to distinguish ideal-types from ideals. Whereas an ideal-type is a purely analytical device, against which we may compare reality for the purposes of analysis, research and exposition, an ideal is something against which we evaluate reality:

> "[W]e should emphasise that the idea of an ethical *imperative*, of a 'model' of what 'ought' to exist is to be carefully distinguished from the analytical construct, which is 'ideal' in the strictly logical sense of the term"[105]

Jareborg's defensive model, and the features of the due process model which are derived from the principle of abuse of state power, appear at first to blur this distinction. Indeed, Weber comments that writers do often blur the distinction between the two.[106] Closer examination reveals, however, that the distinction Weber draws between ideal-types and ideals is rooted in the activity engaged in by the researcher, and not the substantive content of the model itself. In the section of '"Objectivity" in Social Science and Social Policy' where this distinction is discussed, Weber focuses on the example of Christianity.[107] He explains that ideal-types, in the purely logical sense, "regularly seek to be, or are unconsciously, ideal-types not only in the *logical* sense but also in the *practical* sense, i.e., they are *model types* which – in our illustration – contain what, from the point of view of the expositor, *should* be and what *to him* is 'essential' in Christianity *because it is enduringly valuable.*" Such model types "contain ideals *to* which the expositor *evaluatively* relates Christianity ... In this sense, however, the 'ideas' are no longer concepts with which reality is compared, but ideals by which it is evaluatively *judged.*"[108] Weber concludes:

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[104] The title of Jareborg's essay – 'What Kind of Criminal Law Do We Want?' – suggests in itself that Jareborg's defensive model is not simply an ideal-type. In fact, immediately after stating that the defensive model is an ideal-type, Jareborg adds that, "In many respects, it is also meant to be 'ideal'" (Jareborg at 20).

[105] 'Objectivity' at 91-92 (emphasis original).

[106] "As fundamental as this distinction is in principle, the confusion of these two basically different meanings of the term 'idea' appears with extraordinary frequency in historical writings" (ibid at 98).

[107] ibid at 97-99.

[108] ibid at 97-98 (emphasis original).

> "[T]he *elementary duty of scientific self-control* and the only way to avoid serious and foolish blunders requires a sharp, precise distinction between the logically *comparative* analysis of reality by ideal-*types* in the logical sense and the *value-judgment* of reality *on the basis of ideals*. An 'ideal-type' in our sense, to repeat once more, has no connection at all with *value-judgments*, and it has nothing to do with any type of perfection other than a purely *logical* one"[109]

The crucial point that emerges is that the researcher should not confuse the two distinct activities of empirical work and evaluation. When engaged in the task of analysing reality the researcher should employ an ideal-type and not, as Weber emphasises, an ideal. The ideal is only employed when evaluating reality and presenting a goal to strive towards. On this reasoning, however, it remains possible that a model of Christianity may, *if appropriate*, be used both as an ideal-type when engaged in empirical study, and as an ideal when engaged in evaluative work (as Weber explicitly recognised in the passage quoted by stating that ideal-types regularly seek to be, or are unconsciously, ideal-types "not only" in the logical sense "but also" in the practical sense) – provided, of course, that the two distinct activities are not confused.[110] It follows, then, that a model such as Jareborg's defensive model may legitimately be used as either an ideal-type or as an ideal.[111]

The ideal-type operational efficiency and adversarial reliability models, on the other hand, are not apt to be used as ideals. Although they may be used to analyse the criminal justice process, and thereby open up an evaluative discourse, neither model could plausibly be regarded as a desirable end towards which to strive. They are logical possibilities – ideal-types – but are not suitable for use as ideals.

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[109] ibid at 98-99 (emphasis original).

[110] Since Weber states clearly that an ideal-type is a "mental construct [that] cannot be found empirically anywhere in reality" (ibid at 90) the recognition that a model may be used as either an ideal or an ideal-type raises a further question – may ideals be realised? There are two possibilities. First, it is possible that a non-realisable ideal-type may be used in order to describe an ideal. A free market, for example, is an illustration Weber gives of an ideal-type (at 90). A perfectly free market is non-realisable (because, *inter alia*, perfect freedom of entry and exit and perfect information within the market are non-realisable). But it might be argued that for a market to become more and more like a free market is an ideal. Of course, the ideal-type cannot be emulated, but it is nevertheless useful in describing the ideal. Second, suppose that an ideal-type is realisable. If it is regarded as an ideal, and the ideal is realised, then the concept must cease to be an ideal-type. It may now be found in reality, and so is no longer a "mental construct." The ideal becomes a historical occurrence which we strive to emulate, rather than a logical possibility.

[111] The word "ideal" will here be used to refer to the relevant model in its entirety. Whilst individual features of the models, such as providing for access to independent legal counsel, could be described as "ideals," this usage will be avoided for the sake of clarity. Different terminology, such as "evaluative standards," will be used to refer to these.

6.4. Justification of evaluative standards

It is obvious that constructing a model of the criminal justice process based upon prevention of abuse of state power will be a contentious exercise. Not only will opinions differ on what safeguards are necessary to prevent abuses of state power, but there will also be disagreement over the prior question of what constitutes an abuse of state power. For example, when presenting the due process model's perspective on the decision to arrest, Packer writes:

> "[T]he police should not arrest unless information in their hands at that time seems likely, subject to the vicissitudes of the litigation process, to provide a case that will result in a conviction"[112]

There are likely to be many who regard this safeguard as being too stringent. Packer himself envisages that a proponent of the crime control model would have a very different outlook on the police's power of arrest. This is not to say that the proponent of the crime control model accepts the possibility of abuse of state power. In contrast to the proponent of the due process model, who regards it an abuse of state power to arrest a suspect unless sufficient information has already been obtained to make a conviction likely, the proponent of the crime control model accepts the need to arrest suspects in order to investigate offences.[113] This difference of opinion over what constitutes an abuse of state power inevitably leads to different opinions over what safeguards are necessary to prevent abuses from occurring.

The same point is evident in Jareborg's work. One procedural safeguard laid down by Jareborg is the prohibition of retroactive application of law to the detriment of the accused. Whilst many would agree that such a prohibition is an important restraint on state action, there are others who would argue that the state should have the power to apply law retroactively if and when the necessity arises. In *R v R*[114] the House of Lords held that the pronouncement of Sir Matthew Hale in 1736[115] that a husband could

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[112] *Limits* at 190.

[113] The proponent of the crime control model would, says Packer, argue that, since "the best source of information is usually the suspect himself," the police should not "be expected to solve crimes by independent investigation alone." They should therefore be able to "interrogate the suspect in private before he has a chance to fabricate a story or to decide that he will not cooperate." The length of time for which the suspect may be held is "the length of time, given all the circumstances, during which it is reasonable to suppose that legitimate techniques of interrogation may be expected to produce useful information or that extrinsic investigation may be expected to produce convincing proof either of the suspect's innocence or of his guilt" (ibid at 187-188).

[114] [1992] 1 AC 599 HL.

[115] See *History of the Pleas of the Crown* volume 1 (1st edn., 1736) at 629.

not be guilty of raping his wife had ceased to apply, and so upheld the conviction of the defendant for the attempted rape of his wife. Whether or not this decision in fact constituted the retroactive application of the law to the detriment of the accused,[116] some would argue that the state should be able to reform the law and apply it retrospectively in cases such as this one. In the eyes of others, however, to permit retroactive application of the law, whatever the circumstances, would be a grave misuse of state power.

Another of the procedural safeguards in Jareborg's defensive model is the placing of the burden of proof on the prosecutor. Lord Sankey LC described the presumption of innocence as the "golden thread" of English criminal law.[117] Many would agree, urging that it should always be for the state to prove the guilt of a person suspected of having committed an offence. The power and resources of the state are immense in comparison to individuals, and to presume that those prosecuted for an offence are guilty would place an oppressive burden on defendants and considerable power in the hands of those who decide on prosecution. However, others would say that to prohibit the state from placing the burden of proof on defendants is too inflexible, and argue that the state should have the ability to place the burden of proof on defendants. Some matters may be far easier for one party to prove than the other (e.g., possession of a licence), or it may simply be more expedient to require the defendant to disprove an element of the offence than to require the prosecution to prove it. The prevalence of offences that place a burden of proof on the defendant demonstrates that, in contrast to Jareborg's defensive model, policy-makers and legislators do not consider the presumption of innocence to be an essential restriction on state power.[118]

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[116] The House of Lords did not consider themselves to be applying the law retrospectively, with Lord Keith (with the unanimous support of the House) declaring that "in modern times the supposed marital exemption in rape forms no part of the law of England" (n114 above at 623). As Sir John Smith has written, "the [House of Lords] did not hold that Hale had misstated the law ... but that (this must have been on some unspecified day before R had forcible intercourse with his wife in October 1989) the law had changed as no longer compatible with modern conditions" (*Smith & Hogan Criminal Law: Cases & Materials* (8th edn.)(London: Butterworths, 2002) at 560). The European Court of Human Rights declined to find that this decision violated Article 7 ECHR (*SW and CR v United Kingdom* (1996) 21 EHRR 363). Nevertheless, a strong argument may be made that the House of Lords were applying the law retrospectively; see, for example, Ashworth *Principles of Criminal Law* (4th edn.)(Oxford: OUP, 2003) at 70-75 (Cf. Finbarr McAuley and J. Paul McCutcheon *Criminal Liability* (Dublin: Round Hall Sweet & Maxwell, 2000) at 48-49).

[117] *Woolmington v DPP* [1935] AC 462 HL.

[118] A study by Andrew Ashworth and Meredith Blake found that 40 per cent of offences triable in the Crown Court place a burden of proof on the defendant ('The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306). Furthermore, although Article 6(2) ECHR states that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law," the European Court of Human Rights has accepted that this does not prohibit

Given that there may be debate over what amounts to an abuse of state power, it is helpful to examine the background to Packer and Jareborg's work on the value of prevention of abuse of state power. Jareborg's defensive model is inspired by classical criminal law, and its ideological base is the philosophies of the Enlightenment and its views on human nature.[119] Packer, meanwhile, explains that the due process model bases its call for controlling the exercise of state power on the Constitution.[120] He observes that "the criminal process has been and will probably continue to be an important forum in the struggle over civil rights. Coercive uses of the criminal process – police brutality, arrests on inadequate grounds, excessively high bail, or the denial of bail, denial of access to counsel, prejudiced tribunals – have focused and will continue to focus attention on the problem of adequate challenge in the process, that mainspring of the Due Process Model."[121] And, having concluded that the dominant trend at that time was towards the norms of the due process model, Packer adds that "the trend as it has so far developed is based almost exclusively on judicial decisions. Indeed, it has been derived from the lead taken by one judicial institution, the Supreme Court of the United States." The "Warren Court" of the day was renowned for its "activist commitment to social justice" and its "belief that the Constitution embodied certain natural rights that the Court had the power to articulate and that in doing so it was always under the obligation to protect individual liberties and to ensure justice."[122] So both Jareborg's defensive model and Packer's use of the value of prevention of abuse of state power are founded on liberal concerns.

This is significant since it demonstrates that someone may approach criminal justice from a different perspective. Jareborg recognises this when outlining what he describes as the offensive approach to criminal law policy:

> "[F]or the defensive model the state is a potential enemy. For the offensive approach, the state is an ally. The possibility of power abuse is not completely

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the reversal of the burden of proof, provided that reverse onus provisions are "[confined] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence" (*Salabiaku v France* (1988) 13 EHRR 379 at para 28).

[119] Jareborg at 20. By classical criminal law, Jareborg explains that he means the "kind of criminal law that began to dominate in the beginning of the 19th century, especially in what could roughly be described as German- and French-dominated parts of Europe" (Jareborg at 20).

[120] *Limits* at 173.

[121] ibid at 243-244.

[122] Kermit L. Hall (ed.) *The Oxford Companion to the Supreme Court of the United States* (New York: OUP, 1992) at 914, 916.

forgotten: a *Rechtsstaat* ideology is still the background. But the important thing is to show results"[123]

Two points emerge from this extract. First, when criminal justice is approached from this perspective instead of the liberal perspective of the defensive and due process models, results are given primary importance, and so a more intrusive use of state power will be condoned. But this is not to permit the abuse of state power. On the contrary, because of the primacy attached to results the question of what constitutes an abuse of state power is viewed differently. Second, it is inherent in Jareborg's defensive model and Packer's use of the value of prevention of abuse of state power that state power is viewed with suspicion, mindful of the potential for abuse. It is for this reason that strict safeguards are insisted upon. From this alternative perspective, however, state power is viewed benevolently. Whilst the possibility of abuse of state power is not neglected, faith is placed in the state and so, instead of imposing strict safeguards, the state is accorded greater leeway.

One reason Weber gave for insisting on the distinction between ideal-types and ideals was to avoid serious and foolish blunders in empirical work.[124] A further reason was that the failure to distinguish between "the 'idea' in the sense of the *ideal* [and] the 'idea' in the sense of the 'ideal-type' ... on the one hand hampers the value-judgment and on the other, strives to free itself from the responsibility for its own judgment."[125] These concerns are of especial relevance here. If the features of the defensive model, or those of the due process model which are based on the prevention of abuse of state power, are to be used to evaluate how well individuals are protected from potential abuses of state power, it is important that this use be justified. It must be explained why they ought to be regarded as evaluative standards, in particular, why the model's liberal notions of what amounts to an abuse of state power and what is necessary to prevent abuse from occurring should be accepted over competing views. Failure to do this will, as Weber said, lead to an impoverished evaluation.

So both Jareborg's defensive model and the due process model (to the extent that it is based upon the principle of prevention of abuse of state power) may be used as either ideal-types or as ideals. The defensive model is inspired by classical criminal law, while the due process model is inspired by the United States Constitution and the civil rights movement and "Warren Court" of the 1960s. As ideal-types they may therefore be used for empirical work, to analyse and expound the extent to which the

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[123] Jareborg at 25.

[124] 'Objectivity' at 98.

[125] ibid at 98.

contemporaneous criminal justice process reflects the liberal concern to place restraints on state action. As ideals, on the other hand, they may be used to evaluate the criminal justice process, assessing how well individuals are protected from potential abuses of state power, and pointing out ways in which it should be reformed to move it closer towards the ideal. Prior to this evaluation, however, the researcher must justify his use of the features of the model as evaluative standards. To fail to do this would be to replace reasoned argument with mere assertion.

Andrew Ashworth has commented that Packer's two models are "unsatisfactory in their failure to propose any normative or evaluative criteria." He goes on to propose a theoretical framework which "[locates] a set or number of principles which have the authority or the persuasiveness to serve as goals for the criminal process or criteria by which to judge it."[126] As we have seen, however, Packer's purpose in this part of his book was to demonstrate that (in theory at least) the criminal justice process in the United States was increasingly resembling the due process model.[127] In other words, he was engaged in empirical work and so intended to use his models as ideal-types, not as ideals. Furthermore, the features of the due process model based on the principle of prevention of abuse of state power may be employed as evaluative criteria, although their use in this way would first of all have to be justified. Packer does not embark on this task because he was engaged in an empirical study, but if it were to be undertaken the result would be a set of evaluative standards.[128] The distance between Packer's models[129] and Ashworth's proposed normative framework is thus not as great as it at first appears.

Finally, we saw previously that there may be internal conflict within Packer's due process model since the values of reliability, prevention of abuse of state power and equality will sometimes pull in different directions. A further problem with Packer's decision to base this model on these different values is now evident. To the extent that the due process model is based upon the principle of prevention of abuse of state power, the model may be employed as an ideal-type or as an ideal. The ideal-type

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[126] *The Criminal Process: An Evaluative Study* (2nd edn.)(n16 above) at 29. Ashworth also expresses these sentiments in his earlier article 'Criminal Justice and the Criminal Process' (1988) 28 BJ Crim 111 at 117.

[127] When Packer arrives at this conclusion, he qualifies it by saying "[i]n theory at least" (see n102 above). This presumably alludes to the possible disparity between the "law in the books" and the "law in action." Like the due process/crime control dichotomy, the dichotomy between the "law in the books" and the "law in action" has been challenged by Doreen McBarnet (see n17 above).

[128] Admittedly the evaluative standards would relate to specific issues, such as pre-trial detention and bail, and so would not be couched as broad principles.

[129] The same process could also be applied to the crime control model.

adversarial reliability model, on the other hand, is not suitable for use as an ideal. The due process model is thus an admixture; on the one hand it consists of norms towards which many would argue we should strive and may be used as an ideal-type to analyse the extent to which the criminal justice reflects liberal concerns, while on the other hand it involves a logical possibility towards which no-one would seek to strive, but which may be used to analyse reality, to aid exposition, and to open up an evaluative discourse.

6.5. Should we qualify our pursuit of the apprehension and conviction of offenders?

So evaluating how well the criminal justice process prevents the abuse of state power will prove contentious because opinions will differ both over what constitutes an abuse of state power and over what safeguards are necessary to prevent abuses from occurring. But there is a further bone of contention – should safeguards against the abuse of state power be enacted where this involves placing a restriction on our pursuit of the apprehension and conviction of offenders? The answer to this question will obviously affect how one evaluates the criminal justice process. According to Packer's due process model (insofar as it is based on prevention of abuse of state power) and Jareborg's defensive model, it is of primary importance that all steps are taken to protect against possible abuses of state power, even where this does place restrictions on our pursuit of the apprehension and conviction of offenders. The evaluative standards associated with these models are accordingly constructed on this basis. But this must be justified in just the same way that each model's liberal notions of what constitutes an abuse of state power and what safeguards are necessary to prevent abuses from occurring must be explicated and defended. To fail to do this when evaluating the criminal justice process, and so to simply assume that our pursuit of the apprehension and conviction of offenders should be qualified by the introduction of safeguards which protect against possible abuses of state power, will lead to an impoverished evaluation.

This is all the more important given that there will be many who feel that other concerns should be given greater weight. Of course, this is not to say that they regard abuses of state power as unimportant – but if they view state power benevolently the possibility of abuse will be regarded as less serious and so other concerns will be given priority. Jareborg, for example, outlines an "offensive approach" to criminal law policy, which has as its primary concern crime prevention:

> "The offensive approach regards the criminal justice system as an at least potential repertoire of methods for solution of social or societal problems. From

> its point of view, the most serious criticism is not that the system is, in some respects, unjust or lacking in legal certainty but that it is too inefficient, not 'rational' enough (in the sense of 'goal rational'). *Prevention* of harm or wrong-doing is the dominating perspective ... From its own point of view, the offensive approach is legitimate only if it is efficient in preventing crime"[130]

Jareborg goes on to explain that, while the defensive model consisted of principles and safeguards, "[t]he offensive approach is best described in terms of its methods and consequences."[131] It would, however, be misleading to suggest that goal-fulfilment is the sole domain of the offensive approach. For whilst a proponent of the offensive approach may prioritise crime prevention, and so might criticise the criminal justice process if it is not "efficient in preventing crime," proponents of the defensive model believe that the criminal justice process should strive to prevent the state from abusing its power, and so might criticise the criminal justice process if it is ineffective in achieving this goal – if, for example, certain procedural safeguards which are regarded as necessary to protect the right to a fair trial are not enacted. It is equally incorrect to say that it is only the proponent of the offensive approach who is concerned with "methods," for while the defensive model may be described as consisting of principles and procedural safeguards, the virtue of these principles and procedural safeguards is

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[130] Jareborg at 24-25, 27-28.

[131] ibid at 26. The methods Jareborg describes are: a threat against or a violation of a legitimate interest or value is regarded as a sufficient (as opposed to necessary) reason for criminalisation; culpability tends to be regarded as a sufficient reason for criminalisation; emphasis shifts from offences against individuals to offences against the state machinery, its institutions, policies, transactions and undertakings, or against an anonymous public; criminalisations increasingly concern potentially dangerous deeds or deeds that are otherwise peripheral in relation to caused harm, meaning that a violation of or a manifest threat to a legitimate interest or value is not required; many new crime definitions are to a remarkable extent linguistically indeterminate; it is very difficult to accomplish decriminalisations, but easy to accomplish new ones and to raise maximum and minimum sentences; repression is increased on all levels of the criminal justice process; criminal procedure is "rationalised" in order to reduce the costs of each processed case; and some groups of offenders are regarded more as enemies than as fellow human beings, and are treated as such. The consequences Jareborg lists are: the threat of penal sanctions is used, not as a last resort or for the most reprehensible deeds, but often in the first place and for minor transgressions of peripheral regulations; overcriminalisation, leading to an unacceptable workload for criminal justice authorities; increased criminalisation of negligence, inchoate crimes and different forms of complicity; it is often difficult to detect criminality, to perceive that a crime has been committed at all; legal certainty is reduced; decision-making competence moves from courts to prosecutors and from prosecutors to police; after a long period of gradually reduced repression, severer punishments are used both on the level of criminalisation and the level of sentencing; more people go to prison and more people receive longer prison terms; those who have committed serious crimes are more and more regarded as enemies, not worthy of citizenship, and crime control is referred to in martial language; procedural safeguards are weakened; there is more discretionary decision-making power; there is an increased sensitivity to the real or imagined demands of the public and the media as regards efficient crime control; there is a tendency to obstruct a parsimonious use of punishment and to obstruct efforts to make punishment more humane; and, the execution of punishment tends to become more control-minded and thus involve increased violation of personal integrity.

deemed to lie in the fact that their imposition is the method by which abuses of state power are prevented from occurring. The fundamental difference between, on the one hand, the due process model (insofar as it is based on the prevention of abuse of state power) and the defensive model, and, on the other hand, the offensive approach is that they disagree over whether we should enact measures which restrict our pursuit of the apprehension and conviction of offenders but which protect against possible abuses of state power. It is essential, then, that before engaging in evaluation the researcher states whether he believes that our pursuit of the apprehension and conviction of offenders should be qualified, and seeks to justify this.

6.6. Crime prevention and the crime control model

According to Packer, the crime control model, like the offensive approach, believes that the repression of criminal conduct is so important that we should not place any restrictions on our pursuit of the apprehension and conviction of offenders. Closer examination, however, reveals that the concern to repress crime is not as central to the crime control model as Packer suggests. Rather, the model is characterised by its faith in administrative fact-finders.

First, in the police/prosecutorial screening process[132] the model insists that administrative fact-finding be given "special weight;" whilst there are many who would argue that certain limits should be placed on their work – perhaps to protect the privacy of the individual or to prevent abuses of state power – the crime control model urges that "as few restrictions as possible" be put on the "expert" administrative fact-finding processes.[133] But this might not be primarily based on a concern to repress crime. Someone with this degree of confidence in administrative fact-finding will not only regard the potential for abuse of power and the intrusion for the individual as slight,[134] but will also view the police/prosecutorial screening process as the best

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[132] We will accentuate the crime control model's perspective of the screening process into an ideal-type model in section 8.1.

[133] *Limits* at 162. For example, the crime control model insists that the police should have extremely broad powers of arrest, since "[i]t is enough of a check on police discretion to let the dictates of police efficiency determine under what circumstances and for how long a person may be stopped and held for investigation" (at 177), and access to a lawyer should be refused because "it is absolutely necessary for the police to question the suspect at this point without undue interference ... Because the police do not arrest without probable cause, there is a high degree of probability that useful information can be learned from the suspect" (at 202).

[134] The crime control model asserts, for example, that "the innocent have nothing to fear" from broad police powers of arrest, since the dictates of efficiency are sufficient regulation (ibid at 177), and that "[l]aw-abiding citizens have nothing to fear" from electronic surveillance since "law enforcement has neither the time nor the inclination to build up files of information about activity that is not criminal" (at 196).

available opportunity to obtain probative evidence which will help secure a reliable outcome.

Second, as we have already seen, the crime control model's insistence on operational efficiency in the post-screening part of the process is based on its faith in the police/prosecutorial screening process. For example, the model takes a restrictive view of pre-trial liberty because "[t]he vast majority of persons charged with crime are factually guilty ... Just because the assembly line cannot move fast enough for him to be immediately disposed of is no reason for him to go free,"[135] and it encourages guilty pleas because, "[i]f the earlier stages of the process have functioned as they should" there should be only a very small number of cases in which there is "genuine doubt about the factual guilt of the defendant."[136] But whilst the result might be that more offenders are convicted, it does not follow that the primary reason for increasing the operational efficiency of the post-screening part of the process must be the repression of crime. Managerialist concerns would also suggest that, if the police/prosecutorial screening process is reliable, the operational efficiency of the post-screening process should be increased so as to avoid an unnecessary duplication of resources. Indeed, our example in section 5 illustrated that the ideal-type operational efficiency model (when used in conjunction with the ideal-type adversarial reliability model) helps us to analyse the effect that a policy decision has on the reliability of the criminal justice process and invites us to evaluate the reasons behind it, but does not purport to tell us what those reasons are.

So the features of the crime control model are all contingent upon having great faith in administrative fact-finding. Someone who does not share this confidence would not seek to repress crime by affording wide powers to administrative fact-finders and increasing the operational efficiency of the post-screening process. Furthermore, someone with this degree of confidence in administrative fact-finding might agree with the features of the crime control model even if their primary concern is not the repression of crime – their primary concern might, for example, be the managerialist one of avoiding the unnecessary duplication of resources. To suggest, as Packer does, that whoever endorses the features of the crime control model must have as their primary concern the repression of criminal conduct is unfounded.

6.7. Crime prevention and the offensive approach

When outlining his defensive model of criminal law policy, Jareborg explains that it is a conceptual construct which "does not necessarily have a counterpart in

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[135] ibid at 211.

[136] ibid at 222.

reality."[137] It is, as we have seen, an ideal-type. Jareborg's description of the offensive approach, however, is an attempt to describe a "strong ideological counter-current" which, he says, "is undermining [the] dominance" of the ideology of the defensive model.[138] It is not a conceptual construct. It is a description of a historical phenomenon – a description of an emerging strategy for criminal justice policy. The outline of the offensive approach cannot, therefore, be regarded as an ideal-type.[139] Nevertheless, one may still compare the methods and consequences which Jareborg identifies to the reality of the criminal justice process in order to analyse the extent to which contemporaneous criminal law policy resembles the offensive approach.

If one were to carry out such research, it would be important to recognise that the offensive approach focuses on one particular strategy for achieving crime prevention. Six of the nine methods listed by Jareborg concern criminalisation, concentrating on an increased willingness to use the criminal sanction, in ways that are broader and more severe.[140] The focus is thus on the work of legislators,[141] with the threat of penal sanctions forming their chief weapon. So the fact that current criminal law policy does not resemble the offensive approach does not mean that crime prevention is not a priority. It might be the case that a different strategy is being employed.

This also has implications for the use of the offensive approach as an ideal.[142] A researcher might seek to evaluate legislation by assessing the extent to which it employs

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[137] Jareborg at 20.

[138] ibid at 23.

[139] In his essay, Jareborg also insists that the offensive approach ought not to be regarded as a model, since "important parts of the defensive model are kept or only slightly modified – there is no general rejection of the anchorage in a *Rechtstaat* ideology ... [I]t is not (yet) possible to formulate an offensive model, i.e., to describe the offensive approach in isolation from the defensive model" (ibid at 24).

[140] See n131 above.

[141] Legislators may also employ the other 3 methods – repression on each level of the criminal justice process may be increased through severer legislation, criminal procedure may be "rationalised" through new statutory procedures, and the perception of offenders as enemies may be encouraged through the legislative process and the resultant legislation.

[142] Jareborg himself makes it clear that he opposes the offensive approach, stating, "[t]he ambitions of the offensive approach are largely misguided, partly for reasons of principle but also because it is indefensible to try to reach important social goals with inadequate and costly means" (Jareborg at 32-33). This affects the way he describes the methods and consequences of the offensive approach, and, as a result, much of the description is, at least impliedly, critical. Were a proponent of the offensive approach to argue that it should be regarded as an ideal, he would be likely to describe the same methods and consequences in a much more positive manner.

the methods of the offensive approach.[143] However, such evaluation will be impoverished if the researcher does not first of all do three things. First, grounds must be given for believing that crime will be prevented if the methods of the offensive approach are employed. Second, attempting to tackle crime in the manner envisaged by the offensive approach, rather than in some other way, must be justified. And third, for the reasons explained previously, where employing the offensive approach involves resisting suggestions that restrictions should be imposed on our attempts to apprehend and convict offenders (e.g., to prevent possible abuses of state power), the primacy attached to repressing criminal conduct must be justified.

7. Equality

There is some overlap between the principles of prevention of abuse of state power and equality, in that if a state discriminates against certain people, treating them less favourably than everyone else, this constitutes an abuse of state power. But a state may abuse its power in a way that affects everyone without discrimination. And abuse of state power is not the only reason that people may not be treated equally. Packer, for example, applied the principle of equality to the differing financial abilities of those who enter the criminal justice process, arguing that "there is some kind of public obligation to ensure that financial inability does not destroy the capacity of an accused to assert what may be meritorious challenges to the processes being invoked against him."[144] Whilst the state might be under some "obligation" to address this inequality, the inequality itself is not the result of abuse of state power. The two principles should, therefore, be dealt with separately.

7.1. The principle of equality in the due process model

George Fletcher has commented, "[e]quality is at once the simplest and the most complex idea that shapes the evolution of the law."[145] As this indicates, just like the principle of prevention of abuse of state power, how the principle of equality should be applied is contentious. What is clear, however, is that equality of treatment in the criminal justice process cannot mean uniformity of treatment; suspects cannot all be

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[143] A proponent of the offensive approach might also carry out evaluation by studying the effect a piece of legislation actually has on the crime level. However, the fact that crime levels are unaffected does not necessarily mean that the legislation in some way fails to employ the methods of the offensive approach – it might be that inadequate resourcing has hampered the enforcement of the legislation, or that there has been a lack of enthusiasm amongst enforcement agencies for the legislation. This underlines the fact that, if the offensive approach is to be used as an ideal, the researcher must justify his belief that crime will be prevented if the methods of the offensive approach are employed (see main text).

[144] *Limits* at 169.

[145] *Basic Concepts of Legal Thought* (New York: OUP, 1996) at 121.

investigated by the same officers, tried by the same judge and jury, and represented by the same counsel.

In *Griffin v. Illinois* the U.S. Supreme Court stated that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[146] Based on this, Packer concentrates the due process model's application of the principle of equality on the financial (in)ability of those entering the criminal justice process. So, for example, the due process model points out that there are a large class of persons who cannot afford any bail payment, and thus argues that "[i]t is unfair to deny the poor the same right [to be free pending a formal adjudication of guilt] simply because for them the marginal utility of the bail money is higher than it is for the rich ... And if that is so, it seems to follow that a system that makes pre-trial freedom conditional on financial ability is discriminatory."[147] Another area of concern is the right of appeal. The due process model asserts that, "[i]f the appellant cannot afford to pay a filing fee, it must be waived; if he cannot afford to buy a transcript, it must be given to him; if he cannot afford to hire a lawyer, he must be assigned one."[148] The right of appeal must not be restricted by financial inability.

These propositions are clearly contentious. The proponent of the crime control model, for example, views financial ability as a fundamental aspect of the bail system. Being able to set bail at a level that the defendant cannot afford enables the magistrate to "select those people who – for whatever reason – ought not to be at liberty pending trial, and to see to it that they are not."[149] On this view, the principle of equality should not be applied in the way contended for by the due process model. On the contrary, it regards it as positively desirable that defendants are not all given an equal opportunity to be released on bail.[150] On the right of appeal, the crime control model states that the costs of filing an appeal, buying a transcript and having legal representation should only be waived/defrayed if "the appeal is screened and determined to be probably meritorious."[151] Whilst this places a limit on the exercise of the right of appeal by the

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[146] 351 U.S. 12 (1956) at 19.

[147] *Limits* at 217.

[148] ibid at 231.

[149] ibid at 213.

[150] The difference of opinion fundamentally flows from the fact that the due process model holds that there should be a right to pre-trial liberty pending a formal adjudication of guilt (ibid at 215), whereas the crime control model argues that, since a formal charge "has behind it a double assurance of reliability" (the judgement of the police officer and the prosecutor), then "[f]or all practical purposes, the defendant is a criminal," and so there "is no reason for him to go free" (at 211).

[151] ibid at 229.

financially unable, it is deemed to be sufficient to satisfy the demands of equality. It might even be argued that to waive/defray these costs for the financially unable, but to impose them on the financially able, is in itself discriminatory, for it attaches a cost to the exercise of the right for some but not for others.

It is noteworthy also that Packer only applies the principle of equality to the issue of financial ability. It would have seemed appropriate to have applied it to other issues, particularly – given that the book was written against the backdrop of the struggle over civil rights[152] – non-discrimination on the basis of race. In fact, the due process model insists that a stringent standard must be satisfied in order for the power of arrest to be exercised, since otherwise it "will be applied in a discriminatory fashion to precisely those elements in the population – the poor, the ignorant, the illiterate, the unpopular – who are least able to draw attention to their plight and to whose sufferings the vast majority of the population are the least responsive. Respect for law, never high among minority groups, would plunge to a new low if what the police are now thought to do sub rosa became an officially sanctioned practice."[153] In spite of this recognition of the problem of discrimination on the basis of race, it forms no part of Packer's outline of the principle of equality.[154]

7.2. An ideal and an ideal-type

The due process model (to the extent that it is based on the principle of equality) may be used as an ideal-type. It can be compared to reality in order to analyse the extent to which the criminal justice process reflects its liberal approach to the concern that justice is not dependent upon financial ability. And as with the value of prevention of abuse of state power, it may also be used as an ideal. But before the features of the due process model that are based on the principle of equality can be employed as evaluative standards, their usage in this way must be justified. The researcher must not only justify invoking the principle of equality, but also explain why the features of the due process model which are based on the principle of equality are

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[152] See n121 above.

[153] *Limits* at 180. Packer also alludes to the issue of discrimination on the basis of race when he writes, "the fact that the numbers of Negro criminal defendants are out of all proportion to their numbers in the population has already produced legislative and extra-governmental interest in the workings of the criminal process" (at 244).

[154] Discrimination on the basis of race was, nevertheless, an issue about which Herbert Packer felt strongly. In *Blood of the Liberals* (n4 above) George Packer recalls, "I was fairly alert to the plight of Negroes; the subject was much discussed in our house, in strong moral tones. I gathered that Negroes had been treated unfairly and we owed them something." He also recalls finding his parents sitting at the kitchen table with tears in their eyes, something that was "unusual, maybe unprecedented," the night Martin Luther King was killed (at 238). The year of Martin Luther King's death, 1968, was also the year *The Limits of the Criminal Sanction* was published.

suitable norms for evaluating whether suspects are treated equally, particularly since there will almost always be debate over what the principle of equality requires in a given situation. Furthermore, the scope of the inquiry must be delineated. For example, Packer's due process model only applies the principle of equality to financial ability, and so may only be used to evaluate the extent to which equal justice depends on money. Equality may also be a concern in other areas, such as race or gender, and an inquiry along these lines would require another set of evaluative standards.

8. Modelling the Screening Process: Investigative Efficiency and Administrative Reliability

Having examined the post-screening part of the criminal justice process, it is now time to turn our attention to the screening process itself.

The principles of prevention of abuse of state power and equality may be applied to the screening process in the same way that they were applied to the post-screening process. Indeed, we saw previously that the principle of equality may be used to support the requirement that a stringent test be satisfied before the power of arrest is exercised, and we shall see shortly that Packer applies the principle of prevention of abuse of state power to several issues in the screening process. Given, then, that the screening process/post-screening process divide has little bearing on how these principles are applied, it is not necessary to consider them further in this section. We shall focus instead on the value of reliability, and, first, the values underlying the crime control model.

8.1. An ideal-type investigative efficiency model

According to Packer, the end of the screening process is the prosecutor's decision to prosecute.[155] Whilst the crime control model expounded by Packer insists on operational efficiency in the remainder of the criminal justice process, it is also insistent on what should be the central features of the screening process itself:

> "... subsequent processes, particularly those of a formal adjudicatory nature, are unlikely to produce as reliable fact-finding as the expert administrative process that precedes them ... It becomes important, then, to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions to such as enhance reliability, excluding those designed for other purposes"[156]

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[155] See n51 above.

[156] *Limits* at 162.

Two features of this perspective emerge, which we can accentuate to form an ideal-type investigative efficiency model. The first feature is that administrative fact-finders will have perfect investigative efficiency.[157] They will be completely reliable fact-finders, and so the innocent can take refuge in the fact that their innocence will emerge. As the crime control model insists, "[l]aw-abiding citizens have nothing to fear."[158] Furthermore, since they have perfect investigative efficiency administrative fact-finders will not waste time and effort employing their powers in a manner that is not constructive. For example, they will not extract confessions by torture, since such evidence is inherently unreliable. Neither will they waste time pursuing personal agendas, for example, arresting and questioning someone simply because they have a personal vendetta against them.

The perfect investigative efficiency of the police is the basis for the second feature of this ideal-type model – that no restrictions be imposed upon the administrative fact-finding process. Since the police (and prosecutors) have perfect investigative efficiency, no restrictions should be placed on their work. Packer referred to placing "as few restrictions as possible" on administrative fact-finders, and to limiting restrictions "to such as enhance reliability," but even this does not reach the pure form of this perspective. No restrictions should be imposed. Restrictions designed to enhance reliability are unnecessary, since the police (and prosecutors) have perfect investigative efficiency and so will, through self-regulation, impose such restrictions on themselves. And those that restrict reliability will hinder the work of administrative fact-finders. As Packer writes when describing the crime control models' perspective on police interrogation, "Criminal investigation is a search for truth, and anything that aids the search should be encouraged"[159]

8.2. An ideal-type administrative reliability model

As we have seen, reliability is one of the values at the heart of Packer's due process model. We have used this value to construct an ideal-type adversarial reliability model for the post-screening part of the criminal justice process. We will now use it to construct an ideal-type administrative reliability model for the police/prosecutorial screening process.

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[157] See sections 3.2 and 3.4 above.

[158] *Limits* at 196. This quotation is taken from Packer's description of the crime control model's perspective on electronic surveillance. For a similar statement with regard to the power of arrest, see n40 above.

[159] ibid at 189.

According to the ideal-type administrative reliability model, the police/prosecutorial screening process must attach primacy to the value of reliability. The screening process should wholeheartedly pursue outcomes that are reliable. Where the value of reliability conflicts with other values, the conflict must be resolved by meeting the demands of reliability. The police should therefore only engage in activities that will result in probative evidence being uncovered. Prohibitions should be imposed to prevent them from engaging in activities that will not contribute to reliable determinations of guilt. So, for example, since a confession extracted by torture is of little or no probative force, the police should not be permitted to extract confessions by torture. It would be fruitless labour, since it will not produce probative evidence (although if it were to happen, and the confession were later verified as true, it would not be appropriate to refuse to consider the confession. Refusing to consider probative evidence merely decreases the chance of arriving at the correct outcome).

The flip-side of this, however, is that no restrictions should be imposed upon activities that will result in probative evidence being uncovered. If, for example, bugging a suspect's telephone line is likely to result in cogent evidence being uncovered, there should be no restrictions placed on the police's power to do so. The primary goal is for the screening process to reach the correct outcome, and fetters should not be imposed on the pursuit of this goal.

8.3. Comparing the ideal-type administrative and adversarial reliability models

This leads us onto a further difficulty with Packer's exposition of the due process model. We have seen that Packer likens the due process model to a "factory that has to devote a substantial part of its input to quality control,"[160] the implication being that reliability is central to the due process model. Having insisted that the due process model attaches primary importance to the value of reliability,[161] he then goes on to consider the police/prosecutorial screening process through the eyes of this model, describing its perspectives on arrests for investigation,[162] detention and interrogation

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[160] ibid at 165.

[161] Packer also writes that "[t]he Due Process Model insists on the prevention and elimination of mistakes to the extent possible," and that "if efficiency demands short-cuts around reliability, then absolute efficiency must be rejected" (ibid at 164, 165). He also explains that the demand for finality is very low in the due process model, because "as long as there is an allegation of factual error that has not received an adjudicative hearing in a fact-finding context" further scrutiny of findings of fact must be available "in case facts have been overlooked or suppressed in the heat of battle" (at 164).

[162] ibid at 179-181.

after a "lawful" arrest,[163] electronic surveillance,[164] illegally secured evidence,[165] access to counsel,[166] and the decision to charge.[167] Yet closer examination of Packer's account reveals that the value of reliability has little role to play in his description of the due process model's perspective on the police/prosecutorial screening process. Rather than reliability, the account is instead dominated by a desire to protect privacy and the dignity and inviolability of the individual, and a concern to prevent the state from abusing its power. For example,[168] when describing the due process model's perspective on arrests for investigation, Packer states that a stringent test must be satisfied before any arrest is made. This is based on a concern not to "[open] the door to the possibility of grave abuse," and to protect "personal privacy" and "the dignity and inviolability of the individual."[169] Similarly, on the issue of electronic surveillance Packer states, "the right of privacy ... cannot be forced to give way to the asserted

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[163] ibid at 190-192.

[164] ibid at 196-197.

[165] ibid at 200.

[166] ibid at 203.

[167] ibid at 207-209.

[168] The examples mentioned in the main text are not the only occasions where Packer's description of the due process model's perspective on the police/prosecutorial screening process is dominated by a desire to prevent abuses of state power and protect the primacy of the individual. When considering detention and interrogation after a lawful arrest, Packer states that a suspect should only be arrested so that he may answer the case against him, not so that a case against him that does not exist at the time of his arrest can be developed. Further, the suspect should be told that he is under no obligation to answer questions, that he will not suffer detriment by refusing to answer questions, that he may answer questions in his own interest to clear himself of suspicion (but that anything he says may be used in evidence), and that he is entitled to see a lawyer. An improperly obtained confession should be excluded, not because it is "untrustworthy," but because "it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against a defendant without forcing him to co-operate in the process, and without capitalizing on his ignorance of his legal rights" (ibid at 191). On illegally secured evidence Packer writes, "The ordinary remedies for trespass upon one's property are totally deficient as a means for securing police compliance with rules regarding illegal searches and seizures ... The only practical way to control illegal searches is to take the profit out of them" (at 200). And finally, on the decision to charge, he says, "it would be ridiculous to expect every arrest to produce a case sufficiently strong to warrant criminal prosecution. Some screening must take place. The appropriate forum for that screening process is a preliminary hearing before a magistrate, if the arrested person is not released before that stage is reached. The prosecutor cannot be trusted to do this screening job any more than the police can ... Why should we expect the prosecutor, with nobody looking over his shoulder, to decide that there is insufficient evidence to hold the suspect for criminal charges? Why, in particular, should we do so in the large number of cases in which the evidence in the hands of the police is inadmissible but may lead to the discovery of other, possibly admissible evidence if the process is not terminated? ... [A] screening operation by an impartial judicial official is necessary if suspects are to be given an adequate opportunity to challenge the processes being invoked against them" (at 207-208).

[169] ibid at 179.

exigencies of law enforcement."[170] And third, when considering access to counsel, he says that the suspect must be immediately apprised of his right to remain silent and to have a lawyer, he must promptly be given access to a lawyer, and failing the presence of a lawyer he must not be subjected to police interrogation, for "there is no moment in the criminal process when the disparity in resources between the state and the accused is greater than at the moment of arrest. There is every opportunity for overreaching and abuse on the part of the police."[171]

Indeed, where these concerns conflict with the value of reliability, it is they that are to be given priority, so, for example, according to the due process model improperly obtained confessions and illegally secured evidence should be inadmissible regardless of their probativeness.[172] So although Packer attributes the value of reliability to his due process model, it is clear that, in the police/prosecutorial screening process, the model attaches greater significance to competing concerns. Packer thus obscures the role that reliability has to play, by, on the one hand, attributing it to the due process model, and then, on the other hand, by subordinating reliability to other concerns in his application of the model, without offering any explanation of his reasons for doing so.

In fact, as we have seen, the due process model rejects the possibility of administrative fact-finders arriving at reliable determinations of guilt:

> "People are notoriously poor observers of disturbing events – the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not)"[173]

It is incoherent to attribute the value of reliability to the due process model and then to apply the model to administrative fact-finding, if the model's insistence on reliability is premised upon the impossibility of administrative fact-finders arriving at reliable determinations of guilt. Applying the model, with its insistence on reliability,

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[170] ibid at 196.

[171] ibid at 203.

[172] See n65 above.

[173] *Limits* at 163.

to administrative fact-finding must either be futile, for the model itself asserts that reliable administrative fact-finding is impossible, or, if it is not futile, the very premise on which the model bases its demand for reliability in the post-screening part of the criminal justice process is challenged.

Understanding this weakness in Packer's exposition explains why our ideal-type administrative and adversarial reliability models make uneasy bedfellows. One would expect them to be complementary, since they both attach primacy to the value of reliability. But while the ideal-type administrative reliability model endorses the wholehearted pursuit by administrative fact-finders of reliable outcomes, the ideal-type adversarial reliability model premises its insistence on securing reliable outcomes in the post-screening part of the criminal justice process on the untrustworthiness of the police/prosecutorial screening process. The ideal-type adversarial reliability model rejects the possibility of reliable administrative fact-finding, while the ideal-type administrative reliability model embraces it.

Packer failed to make clear the role of the value of reliability. Although the due process model attaches great significance to reliability in the post-screening part of the criminal justice process, in the screening process itself greater significance is attributed to other concerns. The ideal-type adversarial reliability model, formed by accentuating this aspect of the due process model, is consequently quite different from the ideal-type administrative reliability model, which – unlike the due process model – is optimistic about the reliability of administrative fact-finding.

8.4. Comparing the ideal-type administrative reliability and investigative efficiency models

There are certain differences between these two ideal-type models. Since the ideal-type investigative efficiency model is formed by accentuating an aspect of the crime control model, it is premised upon administrative fact-finders having perfect investigative efficiency. The ideal-type administrative reliability model, on the other hand, is formed using one of the values at the heart of the due process model, and so is not premised upon administrative fact-finders having perfect investigative efficiency. The model simply attaches primacy to the value of reliability. The ideal-type administrative reliability model consequently insists that the work of administrative fact-finders be regulated, so that they are prohibited from engaging in activities that will not enhance reliability, and are directed into activities that do. According to the ideal-type investigative efficiency model, on the other hand, it is unnecessary to regulate the work of administrative fact-finders; the police (and prosecutors) are self-regulating. The dictates of perfect investigative efficiency ensure that they engage in activities that will enhance reliability, and avoid activities that will not.

In spite of these differences, however, the two ideal-type models share the same underlying assumption. Both regard reliability as of primary importance, and subjugate competing concerns to the demands of reliability. For example, any electronic surveillance that produces probative evidence, and so helps secure reliable determinations of guilt, would be endorsed by these models, regardless of issues of personal privacy. At all times reliability is the guiding principle. As a result of this shared underlying assumption the scope of the powers of administrative fact-finders is the same in each ideal-type model. Although the bounds of these powers are determined by external regulation in one, and by self-regulation in the other, the boundaries are the same.

It might seem surprising that there is such a high degree of similarity between these two ideal-type models, given that one was formed by accentuating the crime control model's perspective on the police/prosecutorial screening process, and the other was formed using one of the values at the heart of the due process model. In particular, Packer's assertion that his two models are "polarities"[174] is called into question. The explanation again lies in Packer's failure to clearly explain the role of the value of reliability in his two models. Using the factory illustration he implied that the due process model sacrifices the expeditious handling of cases for the sake of reliability, whilst the crime control model insists on the expeditious handling of cases at the expense of reliability. But whilst reliability is of prime concern to the due process model in the post-screening part of the criminal justice process, in the screening process itself the model attaches greater significance to competing concerns. Indeed, it is the crime control model, with its insistence that administrative fact-finders should be allowed to employ their expertise unhindered, that attaches great significance to the value of reliability in the screening process. This is confused by Packer's simple ascription of the value of reliability to the due process model.

9. Conclusion: Three Lessons for Any Analysis of Criminal Justice Policy

This chapter has shown that any analysis of criminal justice policy will be flawed without a detailed appreciation of the way that competing policies are constructed and assessed. Three key lessons may be drawn out from this discussion.

First, the indiscriminate use of the word "model" to describe the different tools which may be employed to analyse criminal justice policies should be avoided. This chapter has distinguished three separate tools: ideal-types, strategies and ideals. Ideal-types are distinct from strategies. An ideal-type is a purely conceptual construct,

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[174] ibid at 154.

whereas a strategy (such as the offensive approach to criminal law policy) is a description of a historical occurrence. Both ideal-types and strategies may, if appropriate, be employed as ideals. This chapter has shown that frequently these three tools are not distinguished. In particular, it has been argued that employing an ideal-type model or a strategy as an ideal must be justified. This involves the researcher, first, explicating and defending his interpretation of contentious concepts, second, demonstrating that the provisions for which he contends are not only capable of achieving their goal but are also to be preferred to other possible methods of doing so, and, third, where enacting the provision involves imposing restrictions on our efforts to apprehend and convict offenders, justifying these restrictions. If the use of an ideal-type model or a strategy as an ideal is not justified in this way, the result will be an impoverished approach to the consideration of policy which fails to take responsibility for its own judgement.

Second, this chapter has demonstrated that criminal justice policy cannot be satisfactorily understood if the analytical framework used is a spectrum. A spectrum such as Packer's is a one-dimensional device. It states that there are two sets of values which are polar opposites, and that as adherence to one set of values increases so adherence to the other set necessarily diminishes. It has been shown, however, that the challenge in criminal justice policy is not to balance the competing demands of two value systems; it is to balance the competing demands of many different *values*. The analytical framework employed must therefore be multi-dimensional.

Third, the analytical framework employed must have regard for the different ways in which values are held. A simple "yes/no" approach – either a value is a priority or it isn't – is inadequate. Such an approach fails to recognise that many values are contentious. One person's interpretation of the substantive content of a value might not be the same as that of other people. Moreover, there might be differences over how best to meet the demands of a value. The "yes/no" approach also obscures the fact that a person might identify as priorities a number of values which, on occasion, conflict. In particular, a value may still be a priority even if its demands are not always met.

Packer's exposition of the crime control and due process models fails to heed these three lessons, and so is infested by a failure to appreciate the way that competing policies are constructed and assessed. He fails to distinguish between ideal-type models and ideals, the analytical framework which he employs is a spectrum, and he uses a simple "yes/no" approach to describe the packages of values held by different parties within the criminal justice process. We will look at these failings in reverse order.

First, the framework which Packer constructs is based upon the assumption that the values he discusses can be neatly dichotomised into two value systems. The simple "yes/no" approach which he employs to arrange the values in this way is inadequate.

Packer ascribes the value of reliability to the due process model. Yet it has little part to play in his application of the due process model to the police/prosecutorial screening process; other values are not only given greater prominence than, but are also given priority over, the demands of reliability. He also suggests that it is of only secondary importance to the crime control model, even though this model attaches great significance to the value of reliability in the police/prosecutorial screening process, insisting that administrative fact-finders should be allowed to work unhindered. And although Packer states that the crime control model demands short-cuts around reliability in order to increase operational efficiency, we have seen that it is in fact the case that the crime control model premises its demand for operational efficiency upon the police/prosecutorial screening process operating reliably.

The second value which Packer ascribes to the due process model is prevention of abuse of state power. According to this model, "the criminal process must ... be subjected to controls that prevent it from operating maximal [operational] efficiency;" the model would happily accept "a substantial diminution in the [operational] efficiency with which the criminal process operates in the interest of preventing official oppression of the individual."[175] The implication is that the crime control model, with its insistence that "primary attention be paid to the efficiency with which the criminal process operates,"[176] refuses to impose any such controls upon the criminal justice process. It is, however, too simplistic to say that the crime control model subjugates the concern to prevent abuses of state power to the dictates of efficiency in this way. Proponents of the crime control model view state power with greater benevolence than the due process model, and so do not share the latter's liberal concerns. This not only means that they are happy to afford greater leeway to the state, but also that they have different ideas of what constitutes an abuse of state power. For Packer to assert that the crime control model subordinates the need to prevent abuses of state power to the dictates of efficiency is to mistakenly assume that there is uniform understanding on both sides of both what safeguards are necessary to prevent abuses of state power from occurring and what constitutes an abuse of state power.

The value of equality, the final value Packer attributes to the due process model, may also be understood in diverse ways. The due process model only applies the

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[175] ibid at 166.

[176] In this sentence Packer's use of the word efficiency has a sense of both operational efficiency and investigative efficiency (the sentences continues "... to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime" (ibid at 158)).

principle to the issue of financial (in)ability, neglecting other possible bases for discrimination, such as race. What is required to ensure that financial ability does not affect the "kind of trial a man gets"[177] is also contentious; the level of intervention that the due process model considers necessary is greater than that deemed necessary by the crime control model. This is not to say, however, that the due process model attaches greater significance to the value of equality than the crime control model. Rather the two models have different views on what is sufficient to prevent discrimination on the basis of financial ability.

Packer attributes the value of efficiency to the crime control model, and says that the due process model rejects "absolute efficiency" if it "demands short-cuts around reliability."[178] This statement on the role of efficiency is misleading, however, due to Packer's failure to distinguish, and clarify the roles of, three different forms of efficiency. The first of these, investigative efficiency, is welcomed not only by the crime control model, but also – with its emphasis on reliability – by the due process model. The second form of efficiency is the deterrent efficacy of the criminal law. This form of efficiency is not in competition with the demands of reliability – on the contrary, it is dependent upon it. General awareness that the criminal justice process is unreliable will lead to a decrease in the deterrent efficacy of the criminal law. It is the third form of efficiency, operational efficiency, which, when it demands short-cuts around reliability, the due process model rejects. The crime control model, however, does not insist on the expeditious handling of cases at the expense of reliability. Its demand for operational efficiency in the post-screening part of the process is premised upon its faith in the police/prosecutorial screening process; according to the crime control model operational efficiency is only a sustainable ideal if the administrative fact-finding processes have investigative efficiency.

Packer states that the goal of the crime control model is the repression of crime. We have seen, however, that the features of the model are in fact shaped by its great confidence in administrative fact-finding, and that someone who shares this confidence might agree with the features of the model even if their primary concern is not the repression of crime.

This simple "yes/no" approach proves to be a defective foundation for the analytical framework which Packer builds upon it. It obscures the fact that Packer's due process model identifies as priorities values which, on occasion, conflict. It also means that there is no scope within Packer's framework for examining whether different opinions over a policy decision emanate from different views of what a

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[177] From *Griffin v. Illinois* (see n146 above).

[178] *Limits* at 165.

particular value requires. Suppose, for example, a decision is made to repeal a provision which the due process model regards as essential to prevent the abuse of state power. According to Packer's framework the reason for the decision against the values of the due process model must be a concern for efficiency and crime prevention. But this is too simplistic. It could be the case that those in favour of the decision have different views either on what constitutes an abuse of state power or on what is necessary to prevent such an abuse from occurring. In their eyes the provision might be an unnecessary restriction upon the power of the state, one which could potentially hinder efforts to achieve other goals.[179] Any analysis that ignores this, and explains the decision simply as an example of the values of efficiency and crime prevention being given priority over preventing abuses of state power, will be impoverished.

Second, the analytical framework constructed by Packer is a spectrum which, as we have seen, is inadequate as an analytical tool. The challenge in criminal justice policy is to balance the competing demands of many different values, and so the analytical framework employed must be multi-dimensional. Packer's spectrum, however, is one-dimensional and reduces all policy decisions to a conflict between two value systems – those of the crime control and due process models. Packer's one-dimensional approach leads to the mistaken assumption that any policy decision which is based upon the values of one of his models must necessarily have a detrimental affect upon the values of the other model. But this is not the case. Suppose, for example, that a decision is made which increases the operational efficiency of the post-screening part of the criminal justice process. Packer's framework tells us that the reliability of the process as a whole must have been diminished. But to say this is to simply assume that the post-screening part of the process ought to be devoted to reliability without examining first the police/prosecutorial screening process. It might be the case that the reliability of the whole process has not been adversely affected at all. The one-dimensional approach also leads to the mistaken assumption that any decision which detrimentally affects one of the values Packer associates with the due process model must be motivated by a concern for the values he attributes to the crime control model. But such a decision might not be based on the values he associates with the crime control model. For example, a decision which reduces the reliability of the criminal

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[179] It is true that those making the decision to repeal the provision might be primarily concerned to prevent crime. One might therefore ask whether this criticism of Packer's spectrum is unfounded. This objection is mistaken for two reasons. First, since they do not regard the provision as essential to prevent abuses of state power, those making the decision would not, in their eyes, be prioritising crime prevention over preventing abuses of state power as Packer's spectrum suggests. Second, whilst the provision might be repealed to help crime prevention, the provision might equally be repealed in order to help efforts to pursue other values, e.g., efforts to obtain probative evidence which leads to reliable determinations of guilt.

justice process in order to prevent abuses of state power, or to achieve greater equality, would not be concern with the values associated with the crime control model at all.

Finally, Packer's work fails to clearly distinguish between ideal-type models and ideals. Although Packer's aim was to construct something like ideal-type models, he failed in this task by not accentuating the viewpoints of either of his models to their purest form. It was by further accentuating the crime control and due process models' perspectives on the trustworthiness of the police/prosecutorial screening process that we formed the ideal-type operational efficiency and adversarial reliability models. The factual premises upon which these ideal-type models are based mean that they cannot plausibly be regarded as goals to strive towards and so cannot be regarded as ideals. However, to the extent that the due process model is based upon the principle of prevention of abuse of state power or the principle of equality, it may be employed as either an ideal-type or an ideal. Packer's confusion here not only means that he does not draw attention to the necessity of justifying the use of an ideal-type model as an ideal, but also that he obscures this need, by labelling anyone who subscribes to the values of one model to the exclusion of the values of the other as a "fanatic."[180]

This chapter has focussed upon Herbert Packer's attempt to devise a theoretical framework for analysing criminal justice policies. Through exploring the various failings in Packer's work we have identified three fundamental lessons for any analysis of criminal justice policy. First, the three tools (ideal-types, ideals and strategies) which may be used to understand criminal justice policies must be distinguished. Second, since the challenge in criminal justice policy is to balance the demands of many competing values, a multi-dimensional analytical framework must be used. Third, the simple "yes/no" approach to describing the ways in which different values are held must be abandoned. Without paying attention to these lessons no satisfactory understanding of criminal justice policy can be achieved.

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[180] *Limits* at 154.

Chapter Four: The Pervasive Effect of Packer's Approach to Analysing Criminal Justice Policy

1. Introduction

In response to the failure of Packer's models to afford a role to the rights of victims, Kent Roach has outlined a punitive model of victims' rights (the "roller coaster" model).[1] This model is "quite similar to the old crime control model. It replicates Packer's assumption that the criminal law controls crime and his battle between due process and crime control (the latter now reconceived and strengthened as victims' rights)."[2] The principal difference between the two models is that the roller coaster model strengthens its call for crime control by appealing to the rights of victims. The roller coaster model may thus be seen as an evolved version of Packer's crime control model:

> "Concern about crime victims and disadvantaged groups of potential victims has provided a new symbolic and legitimating language for the same old crime control routine of enacting criminal laws, arresting, convicting, and imprisoning a minority of the people who break those laws, and opposing due process claims. Victims' rights have become the new rights-bearing face of crime control. Because they employ the concepts of risks and rights, victims' rights are much more powerful than crime control"[3]

These comments echo New Labour's determination to quash anti-social behaviour. As explained in chapter one, New Labour not only insisted that there was a need for a new remedy which would overcome the problems they perceived in both the civil and criminal laws and so be effective in tackling anti-social behaviour, they also couched this appeal for a new remedy in terms of the rights of victims.

Whilst behind New Labour's rights-based rhetoric lay a desire to repress anti-social behaviour reflective of the crime control model, the criticisms levelled at the ASBO by the critics reflected the concerns of the due process model. These criticisms

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[1] Roach also outlines a non-punitive model of victims' rights ('Four Models of the Criminal Process' (1999) 89 J Crim L & Criminology 671). That Roach's punitive model is in fact a description of a historical phenomenon is confirmed by his reason for calling it the roller coaster model: "The recent politics of criminal justice has been a bumpy roller coaster ride. A punitive victims' rights model has continued to rely on the criminal sanction; it has found itself in conflict with due process claims and has failed, despite zero tolerance strategies, to reduce the risk of crime victimization to zero" (at 706). In accordance with the typology introduced in chapter three, it should therefore be referred to as a strategy.

[2] ibid at 714.

[3] ibid at 706.

were detailed in chapter two. It was shown that critics of the definition of anti-social behaviour were concerned to limit the scope of the legislation so that individuals not engaging in serious anti-social behaviour – in particular minority groups and unconventional types – were protected against the improper use of the legislation. The classification of proceedings for the imposition of an ASBO as civil in substance was also challenged; critics urged that, given the potential severity of the terms of, and penalties for breaching, an Order, the proceedings should be classified as criminal in substance so that the criminal law standard of proof and the rule against hearsay evidence, procedural safeguards which help ensure reliable determinations of guilt, would apply. The concerns of the critics were thus centred around two of the values which Packer ascribed to his due process model – reliability and the prevention of abuse of state power.

In the light of this, it might be suggested that Packer was correct to assert that two value systems compete for priority in the criminal justice process. This is further supported by the fact that the parties involved in the debates surrounding the ASBO thought in terms of two value systems. As noted in chapter two, there were frequent references to the purported need to strike a fair balance between, on the one hand, respecting the fundamental rights of defendants and, on the other hand, protecting the interests of the community at large (and victims in particular). For New Labour, existing arrangements were too generous in their protection of defendants' rights and needed to be realigned in favour of victims, i.e., due process values needed to be sacrificed in favour of increased crime control. Jack Straw accordingly proclaimed that "[the Crime and Disorder Act] will shift the balance of power in communities from the anti-social and the criminal to the law-abiding majority."[4] He also famously commented that the Act represented "a triumph of community politics over detached metropolitan elites."[5] Concerns that insufficient regard was being had for the values associated with the due process model were summarily dismissed on the basis that there was a greater need for effective measures against anti-social behaviour. For example, a Conservative MP who supported the ASBO commented, "I have complaints from lobby groups about [the Act's] impact on individual liberty, but this is a time when we should give greater consideration to expediency than to liberty."[6] Similarly, Alun

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[4] HC Deb vol 310 col 372 8 April 1998.

[5] HC Deb vol 310 col 370 3 April 1998. On the same day Straw wrote in an article in *The Times*: "For many years, the concerns of those who lived in areas undermined by crime and disorder were ignored or overlooked by people whose comfortable notions of human behaviour were matched only by their comfortable distances from its worst excesses" ('Crime and Old Labour's Punishment' *The Times* 8 April 1998).

[6] Desmond Swayne (HC Deb vol 310 col 440 8 April 1998).

Michael argued that the principled protection of defendants' rights had to be subordinated to the practical need to protect victims of anti-social behaviour:

> "Most of the people who argued that it [mixing the civil and criminal laws] is a problem have advanced that argument as a matter of principle rather than of practicality ... [W]e should consider what happens on the streets as well as in the courts. The problem on the streets is that the present system has not been able to deal with the sort of anti-social behaviour that has so damaged people's lives"[7]

On the face of it then, it would appear apposite to analyse the debates surrounding the ASBO using Packer's two models of the criminal justice process. Indeed, an example of such analysis can be found in an article written by Roger Hopkins Burke and Ruth Morrill, where they conclude that "due-process values have been sacrificed in the increased pursuit of crime control outcomes."[8] However, the temptation to employ Packer's analytical framework must be resisted. Chapter three has shown it to be inadequate. This chapter will show that the basic approach at the heart of Packer's framework nevertheless pervaded the debates surrounding the ASBO, and demonstrate that this resulted in an impoverished analysis of the issues involved. The chapter will begin, in section 2, by showing that the accusations which New Labour and the critics levelled at each other were akin to the conclusions derived by applying Packer's models to the debates surrounding the ASBO, and were accordingly too simplistic. It will be argued that this is the result of Packer's failure to appreciate the different ways in which values are held. The following two sections will argue that the approach adopted by New Labour and the critics to the task of defining "anti-social behaviour," and the approach adopted by New Labour and the House of Lords to the problem of witness intimidation, were analogous to an application of Packer's analytical framework. It will be shown that this resulted in an impoverished analysis; a more thorough discussion will accordingly be offered. Section 3 will argue, first, that, although "anti-social behaviour" is an umbrella term and so defies precise definition, the adoption of two proposals designed to reveal the spirit and purpose of the legislation would nevertheless engender certainty. Second, it will argue that the core definition of "anti-social behaviour" should have been qualified in three ways, and that the failure to do so creates a risk that ASBOs could be imposed on individuals who are

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[7] HC Standing Committee B col 94 30 April 1998.

[8] 'Anti-Social Behaviour Orders: An Infringement of the Human Rights Act 1998?' (2002) 11(2) Nott LJ 1 at 15.

not within the intended scope of the Order. Section 4 will argue that the problem of witness intimidation could be addressed even if the proceedings for imposition of an ASBO were classified as criminal. Pointing to the jurisprudence of the European Court of Human Rights, it will be contended that the problems presented by frightened and intimidated witnesses could be dealt with within a framework incorporating a principled application of the hearsay rule. It will then be argued that, even if hearsay evidence were not admissible, a number of other methods exist for tackling the problem of witness intimidation. The chapter will conclude by showing that, even if these proposals, which address the concerns of both New Labour and the critics, were adopted, a number of other issues regarding the ASBO would remain.

2. The over-simplicity of the conclusions derived by applying Packer's framework to the ASBO

As explained in chapter one, New Labour were convinced that in order to tackle anti-social behaviour effectively it was essential to create the ASBO. They accordingly accused the ASBO's critics of being prepared to allow anti-social behaviour to continue unchecked. When, for example, Opposition Members presented the reasons for the Howard League for Penal Reform's unease about the ASBO to the Commons Standing Committee, Alun Michael dismissed the Organisation's concerns, saying, "I do not believe that it [the Howard League] wants to see such behaviour go unaddressed."[9] And in a later sitting of the Committee Alun Michael ridiculed Edward Leigh for having presented the parliamentary briefings prepared by both the Howard League and Liberty, labelling him "an old softy who wants to protect individuals involved in serious and persistent anti-social behaviour."[10] In a similar vein, the House of Lords in the *McCann*[11] case held that hearsay evidence should be admissible at applications for Orders on the basis that to refuse to admit such evidence would frustrate the purpose of the legislation and thus "deprive communities of *their* fundamental rights."[12]

The critics, on the other hand, accused New Labour of showing disregard for civil liberties. "In providing protection for people who are genuinely and seriously suffering from the current state of disorder, we should not create a monster that overreacts and creates other problems,"[13] warned Sir Robert Smith. This was echoed by

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[9] HC Standing Committee B col 37 28 April 1998.

[10] HC Standing Committee B col 94 30 April 1998.

[11] *R (McCann & others) v Crown Court at Manchester* [2002] UKHL 39.

[12] *per* Lord Steyn at [18] (emphasis original).

[13] HC Standing Committee B col 70 30 April 1998.

Edward Leigh, who claimed that New Labour were "uprooting 100 years of Labour tradition in defence of civil liberties."[14] Lord Thomas conceded that anti-social behaviour was a serious problem which needed to be addressed, but stressed that it "has to be addressed with regard to the liberties of the people of this country."[15]

It has already been shown that the parties involved in the debates surrounding the ASBO thought in terms of two conflicting value systems in a manner evocative of Packer. The accusations just expounded should therefore come as no surprise. After all, if Packer's analytical framework is applied to the debates surrounding the ASBO it tells us, first, that the campaign against anti-social behaviour will be hindered by adherence to due process values, and, conversely, that due process values must be sacrificed if anti-social behaviour is to be tackled effectively. However, like the accusations made by both the critics and New Labour, the conclusions derived from applying Packer's models are too simplistic.

2.1. The critics and the campaign against anti-social behaviour

It is naïve to suggest that the critics of the ASBO were willing to allow anti-social behaviour to go unaddressed. Two premises underlay New Labour's belief that anti-social behaviour could only be tackled effectively if the ASBO was created. Many of the critics disagreed with these premises, and thus did not share New Labour's conviction that the ASBO was essential for the repression of anti-social behaviour.

The first premise, as seen in chapter one, was that existing measures were incapable of tackling anti-social behaviour. Many of the critics doubted whether this was in fact the case. "We wonder," pondered James Clappison, "whether, in practice, the existing law is so inadequate." Having pointed to the public order provisions, offences against the person, Noise Act 1996 and housing legislation, he continued, "[t]he Government create the impression ... that when someone commits an offence against the Public Order Act 1986, which contains a fairly wide definition of disorderly behaviour or of threatening the use of violence and so on, nothing happens. That is not the case."[16] Similarly, in a book published shortly after ASBOs became available, Elizabeth Burney wrote, "criminal prosecution on the one hand and straightforward civil injunctions on the other, if effectively pursued, should cover any conduct foreseeably relevant, especially in view of the wide application of section 222 Local

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[14] HC Deb vol 314 col 949 23 June 1998.

[15] HL Deb vol 585 col 607 3 February 1998.

[16] HC Standing Committee B col 62 30 April 1998.

Government Act 1972."[17] Although it was undeniable that anti-social behaviour posed a serious problem in many areas, the critics questioned whether it followed that existing measures were inadequate. Many suggested that the real reason for existing measures proving ineffectual was a lack of resources for their enforcement. Sir Robert Smith, for example, questioned whether the "failure of current legislation" was due to "the lack of resources necessary to provide the protection and police presence that enable people to be confident enough to use the current law."[18] Edward Leigh likewise argued that "the shortcomings lie not in the nature of our existing criminal law, but in the resources available to the police to deal with the problem."[19]

Even if they accepted the need for new measures, many critics nevertheless challenged New Labour's second premise – that the ASBO would prove an effective tool for tackling anti-social behaviour. Elizabeth Burney argued that exclusionary rule enforcement strategies would not provide a permanent answer to anti-social behaviour; what was needed, she urged, were inclusionary re-integrative strategies which "strengthen the boundaries of reasonable behaviour and provide a way back for those who exceed them."[20] For Ashworth et al the way forward was to develop existing civil law measures. In their eyes, the ASBO was not only likely to be ineffective, but also counter-productive:

> "Dealing with nuisance neighbours requires a careful targeting of particular kinds of problematic behaviour, and development of enforcement routines. A variety of approaches, relying chiefly on the civil law, should be experimented with. These should build upon the measures already authorised, especially through the Housing Act 1996 and the Noise Act 1996 ... Without carefully worked-out, well-targeted responses, however, even a minimum of success is unlikely. The ASBO proposal – precisely because of its sweeping character – is likely to impede the development of such responses"[21]

Others argued that further legal regulation would not address the root causes of anti-social behaviour. "[Y]ear after year Parliament introduces new remedies to try to

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[17] *Crime and Banishment: Nuisance and Exclusion in Social Housing* (Winchester: Waterside Press, 1999) at 108.

[18] HC Standing Committee B col 70 30 April 1998.

[19] HC Standing Committee B cols 31-32 28 April 1998.

[20] *Crime and Banishment* (n17 above) at 141.

[21] Andrew Ashworth, John Gardner, Rod Morgan, ATH Smith, Andrew von Hirsch, Martin Wasik 'Neighbouring on the Oppressive: The Government's "Anti-Social Behaviour Order" Proposals' (1998) 16(1) CJ 7 at 13 (hereafter 'Neighbouring on the Oppressive').

deal with these problems," lamented Edward Leigh. "There is a danger that we will fool ourselves into thinking that passing these remedies, which every year become more draconian, will deal with the problem. However, most of the problems arise from the fundamental social, moral and ethical structures of society."[22] Similarly, the Lord Bishop of Hereford, speaking at the Crime and Disorder Bill's Second Reading in the Lords, remarked that the ASBO only "contained" the problem of anti-social behaviour, and did not "solve it or prevent it." What was needed more than anything else, he asserted, was "community building."[23]

Applying Packer's models tells us that the campaign against anti-social behaviour will be hindered by adherence to due process values. In accordance with this, New Labour accused the critics of being prepared to allow anti-social behaviour to continue unchecked. It has been shown, however, that this conclusion is unduly simplistic. In their eyes the critics were not choosing between, on the one hand, taking effective steps against anti-social behaviour and, on the other hand, respecting due process values. For them, the choice was whether or not to support a measure which would offend due process values without furthering the campaign against anti-social behaviour. This illustrates the third of the lessons expounded in chapter three – that Packer's "yes/no" approach to the way in which values are held is inadequate. Packer's analytical framework unjustifiably assumes (as did New Labour) that if a policy-maker is concerned to repress anti-social behaviour they will support the ASBO. Therefore, when Packer's framework is applied to the debates surrounding the ASBO it tells us that repressing anti-social behaviour was a priority for New Labour but not for the critics. This clearly was not the case. All the parties involved in the debates were concerned to tackle anti-social behaviour. The important point is that there may be different opinions on how this should be achieved, and any analysis of the debates must recognise this.

2.2. New Labour and due process values – (1) prevention of abuse of state power

Whilst New Labour accused the critics of being unconcerned about anti-social behaviour, the critics responded by claiming New Labour were showing disregard for civil liberties. As explained previously, the critics' concerns centred on the values of reliability and the prevention of abuse of state power. However, just as it was mistaken to suggest that the critics were willing to allow anti-social behaviour to continue

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[22] HC Standing Committee B col 31 28 April 1998.

[23] HL Deb vol 584 col 559 16 December 1997.

unabated, so too is it overly simplistic to say that New Labour showed disregard for the values of reliability and prevention of abuse of state power.

It was shown in chapter two that New Labour and the critics viewed state power differently. According to the critics, we should view it with suspicion, mindful of the potential for abuse. For this reason, state power should be kept within tight bounds and safeguards should be established to protect citizens. As a result of this perspective, the critics objected to the vagueness and breadth of the definition of "anti-social behaviour" contained in section 1(1)(a) of the Crime and Disorder Act 1998. Such definitions should be both clear, so that individuals can plan their affairs knowing that if their actions fall outside the range of clearly proscribed behaviour the State will have no recourse against them, and tightly-drawn, so that only those targeted by the legislation fall within its scope. Broad, ill-defined legislation confers considerable discretion on enforcement agencies which means that it may be applied in a discriminatory manner.

New Labour, by contrast, viewed state power benevolently. Whilst it is very difficult to define "anti-social behaviour" tightly, New Labour argued that everyone knows such behaviour when they see it. So, even if the definition of "anti-social behaviour" is vague and broad, the State can be trusted to exercise their widely-drawn powers against only those individuals who do act anti-socially. This confidence was reinforced by the operation of a filtering process (outlined in chapter two) to ensure that ASBOs were not imposed inappropriately. New Labour thus regarded the critics' insistence on a clear, tightly-drawn definition of "anti-social behaviour" as unnecessary. Moreover, they claimed that it would hamper the effectiveness of the legislation. Any attempt at a tight definition is likely to prove under-inclusive, meaning that perpetrators of some forms of anti-social behaviour fall outside the ambit of the legislation. A widely-drafted definition, by contrast, offers a degree of flexibility, enabling enforcement agencies to invoke the legislation against all potential forms of anti-social behaviour.

Applying Packer's analytical framework tells us that New Labour chose to take steps to repress anti-social behaviour at the expense of the due process value of prevention of abuse of state power. This again shows a failure to appreciate the different ways in which values are held. For while the critics considered the definition of "anti-social behaviour" contained in s1(1)(a) to be too vague and broad, creating a danger that the legislation would be used inappropriately and applied in a discriminatory manner, New Labour were confident that the definition posed no threat. Assisted by the filtering process, enforcement agencies could be relied upon to only invoke the legislation in deserving cases. In other words, as far as New Labour were

concerned they were not sacrificing the value of prevention of abuse of state power at all.

Of course, it is possible to take a more cynical view of New Labour's insistence that enforcement agencies could be trusted to exercise their discretion responsibly. On this view such pronouncements are merely a purported stance employed as rhetoric to conceal a blunt and unprincipled decision to sacrifice safeguards which protect against the abuse of state power in order to pursue the politically motivated goal of reducing anti-social behaviour. However, this still raises the possibility of a benevolent view of state power, which, as we shall see below, at least one of New Labour's critics – Baroness Helena Kennedy – seems to consider can be sincerely held. By assuming that New Labour were showing disregard for the value of prevention of abuse of state power, Packer's framework precludes discussion of whether their insistence that we can trust enforcement agencies was genuine or mere rhetoric, and, in general, avoids the more subtle but fundamental issue – which will be addressed in section 3 – of to what extent government should be trusted.

2.3. New Labour and due process values – (2) reliability

Chapter one outlined the reasons why New Labour believed the criminal law was unable to deal effectively with anti-social behaviour. The rule against hearsay evidence meant that it was difficult to gain convictions in cases where witnesses had been intimidated into silence – a problem compounded by the criminal law standard of proof. So New Labour devised the ASBO. ASBOs were to be imposed in civil proceedings so that the criminal rules of evidence would not apply. And the formula of civil order with criminal penalty for breach meant that if the behaviour continued after the imposition of the Order, a criminal sentence could be imposed which reflected the impact of the entire course of conduct. For the critics, the creation of this hybrid remedy amounted to an abrogation of the value of reliability. It meant, first, that a potentially oppressive Order could be imposed on a defendant for acting anti-socially even though "it may be far from clear that the [anti-social] conduct in fact occurred."[24] The critics argued that the difficulty of obtaining criminal convictions for anti-social behaviour could not justify circumventing two fundamental procedural protections of English criminal law. "Serious crimes such as robbery, burglary, or assault are also endemic in some poorer urban areas," argued Ashworth et al. "This has not, however, been deemed reason for convicting burglars or robbers on hearsay evidence under a reduced standard of proof."[25] And, second, the new hybrid remedy meant that a

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[24] Ashworth et al 'Neighbouring on the Oppressive' at 10.

[25] ibid.

criminal penalty could be imposed on a course of conduct even though the course of conduct (excluding the act of breach) may not have been established within the criminal rules of evidence. "The civil law Trojan horse is a dangerous creature," commented Andrew Ashworth. "It is wrong to use civil law processes as the basis for a strict liability crime carrying up to five years imprisonment."[26] Edward Leigh agreed:

> "Magistrates will want to do their job properly. They will impose a conviction only if there is no doubt in the matter, but they will be unable to go behind the original order. The Minister might reply that the prosecution have to prove, beyond reasonable doubt, that the family or persons have broken the order. However, the prosecution does not have to prove beyond reasonable doubt what was in the original order"[27]

As far as New Labour were concerned, however, no sacrifice of reliability was involved. They believed that it is possible to be sure that someone has acted anti-socially and yet, at the same time, to be unable to prove this within the criminal rules of evidence. As Alun Michael remarked, "the behaviour may well be criminal ... but it may not be possible to prove it to the standard required for a criminal conviction."[28] It was this notion that lay behind the coining of the phrase "sub-criminal behaviour":

> "[S]ub-criminal behaviour is behaviour of a level that may be criminal, but to be actually described as such it would have to be proved to be so before a court. The question of proof may be a problem, but it makes sense as part of a general pattern of activity, in which evidence is given to a court as part of the civil burden of proof about the need for an anti-social behaviour order to be made to prevent the repetition of certain behaviour"[29]

For example, after the Finnie brothers[30] applied to have the injunction against them set aside Coventry City Council reluctantly decided to withdraw from the action because they had been unable to persuade more victims to testify. Notwithstanding the weakness of their case, however, no-one could reasonably have doubted the fact that

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[26] 'The Magistrate Debate' (1999) 55(8) Mag 237.

[27] HC Standing Committee B cols 92-93 30 April 1998.

[28] HC Standing Committee B col 49 30 April 1998.

[29] Alun Michael (HC Standing Committee B col 66 30 April 1998). See further chapter two n26.

[30] See chapter one section 3.2.

the Finnies had acted anti-socially. It was with this type of situation in mind that New Labour created the ASBO. They wanted to devise a mechanism for imposing appropriate sanctions on defendants like the Finnies – defendants who have undeniably acted in an anti-social manner but, owing to witness intimidation, whose guilt cannot be established within the criminal rules of evidence. In the light of this it is possible to see how New Labour believed that creating the ASBO involved no sacrifice of reliability. Although two fundamental procedural protections were being circumvented ASBOs would, in practice, only be imposed on those whose guilt could not reasonably be doubted. Of course, it might be objected that there is nothing within the legislative framework to prevent an ASBO being successfully applied for in a case where there are significant doubts about whether the defendant has in fact acted anti-socially. However, New Labour's view of state power must be borne in mind. New Labour were happy to place considerable trust in enforcement agencies. They were willing, therefore, to rely on enforcement agencies to only apply for ASBOs in cases like the Finnie brothers, where it is clear that the defendants have been acting anti-socially.

Once again, then, Packer's "yes/no" approach to values is found wanting. For whilst Packer's analytical framework tell us that New Labour were prepared to sacrifice the value of reliability in order to repress anti-social behaviour, closer examination suggests that, as far as New Labour were concerned, no such sacrifice was involved.

3. Defining "anti-social behaviour"

Chapter two outlined the debates surrounding the definition of "anti-social behaviour" in s1(1)(a). It was shown that at root the debates stemmed from different views of state power; the critics, wary of state power, urged a clear, precise definition whereas New Labour, trusting of state power, preferred a wider, more flexible definition. There thus emerged an "either/or" approach to the task of defining "anti-social behaviour" – one either showed respect for civil liberties and so urged that the definition was clarified and tightened, or one showed a concern to tackle "anti-social behaviour" and so left the definition intact. Section 2 has already demonstrated that this one-dimensional "either/or" approach, which is akin to applying Packer's spectrum, is impoverished. In this section a more thorough analysis will accordingly be offered, in the course of which some proposals for reform will be offered.

The section begins by showing that, contrary to the implication of Packer's framework, there is no necessary connection between tightness of definition and clarity of definition. Whilst the critics proposed changes to s1(1)(a) which would have had the effect of narrowing its scope, no suggestions were made as to how it should be clarified. It will be argued in section 3.2 that the reason for this is that "anti-social behaviour" is an umbrella term which covers a wide range of misconduct and so must inevitably be

framed at a high level of abstraction. This presents us with a dilemma. If the ASBO is to succeed in its goal of ensuring that perpetrators of anti-social behaviour receive sanctions which reflect the aggregate impact of their misconduct, the definition of the behaviour which may result in an Order must encompass the many different forms of anti-social behaviour. However, since this necessitates the use of an umbrella term, the definition will necessarily be vague. This dilemma will be addressed in sections 3.3 and 3.4. Section 3.3 will argue that in some situations certainty may be engendered by principles as well as by precise definitions and carefully crafted rules. Since the umbrella term "anti-social behaviour" defies precise definition, two proposals will be advanced which clarify the scope of s1(1)(a) by revealing the spirit and purpose of the legislation. In section 3.4 it will be argued that New Labour should have added three qualifications to the core definition of "anti-social behaviour" as behaviour which "caused or was likely to cause harassment, alarm or distress." Their failure to do so means that s1(1)(a) is unnecessarily broad, which, it will be argued, creates a risk that ASBOs could be imposed on individuals who are not within the intended scope of the Order.

This section will also explore the broader context of the debate about how "anti-social behaviour" should be defined. Starting from the notion that state power should be viewed with suspicion, some jurists have expounded a version of the Rule of Law that seeks to eliminate as much discretion as possible from the legal sphere and to regulate such discretion as is necessary by means of rules. It will be argued that the distinction which this version of the Rule of Law draws between rules and discretion is flawed, and that the critics' concerns about the definition of "anti-social behaviour" were unduly informed by the rules/discretion dichotomy. At the other extreme to this version of the Rule of Law is the view that, since state power can be trusted, discretionary decision-making by state officials can readily be accepted. The problem with this outlook is that the risks associated with discretionary decision-making may be overlooked. It will be argued that New Labour's refusal to qualify the core definition of "anti-social behaviour" reveals a disturbing complacency towards these risks.

3.1. Distinguishing clarity of definition from tightness of definition

Packer did not apply his due process model to the drafting of criminal offences.[31] But since the due process model is based on the liberal concerns of the U.S.

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[31] It was argued in section 6.2 of chapter three that, although prevention of abuse of state power is one of the key values in Packer's due process model, the model does not see the threat of abuse as emanating from state power *per se*. Instead it focuses on the potential for individuals within the criminal justice process to abuse their powers. This explains why Packer concentrated his application of the model on the stages of the criminal justice process from initial arrest through to appeals and collateral attack.

Constitution, and in the U.S. criminal offences which infringe the void for vagueness principle are deemed unconstitutional,[32] it is reasonable to import to the model a concern that penal legislation be drafted as clearly and as tightly as possible.[33] Tight, clearly drawn definitions reflect the liberal concern that the discretion which a statute confers upon enforcement agencies should be minimised, thus reducing the likelihood that the legislation is used in an arbitrary or discriminatory manner. By contrast, the crime control model, with its emphasis on the repression of criminal conduct and its benevolent view of state power, favours broader, more flexible definitions which entrust enforcement agencies with considerable discretion, thus enabling them to invoke the legislation against all potential forms of the targeted behaviour.[34] The resultant spectrum, which places tight, clearly drawn definitions at one end and broader, more flexible definitions at the other, is, however, flawed, as the following example illustrates.

Following meteorologists' predictions of a dry Summer, state legislators in the Thames Valley decide to try and preserve the nation's sparse water supply by passing a new criminal law which penalises those who use more water than they need to. The Government propose a hosepipe ban. The pressure group Equity oppose this suggestion, arguing that it only addresses one of the many different ways in which water can be wasted, thus unfairly taxing hosepipe users for the excesses of others. To promote equality, they recommend that each citizen should be permitted to use up to a maximum of fifteen litres of water per day. The leading opposition party prefer the creation of a new criminal offence – "the deliberate use of excessive amounts of water" – while another party, the Cleans, argue that this offence will prove ineffectual, since much water wastage is merely careless, not deliberate. They accordingly suggest a strict liability offence of "water wastage," whereby anyone who (in the eyes of the Water Board) wastes waters is criminally liable.

By placing clear, tight definitions at one end of the spectrum and broader, more indeterminate definitions at the other, Packer's analytical framework incorrectly assumes that there is a connection between clarity of definition and tightness of definition. If, for example, a definition were amended in order to tighten its scope,

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[32] According to the void for vagueness doctrine penal statutes must define criminal offences with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. See, e.g., *Kolender v Lawson* 461 US 352 (1983), where a Californian statute which required persons loitering or wandering on the streets to provide "credible and reliable" identification and to account for their presence when requested by a police officer was held to be unconstitutionally vague.

[33] Likewise, one of the principles for criminalisation advocated by Jareborg's defensive model is that descriptions of crimes must be understandable and determinate.

[34] Similarly, a feature of Jareborg's offensive approach to criminal law policy is that many new crime definitions are linguistically indeterminate.

Packer's one-dimensional device would tell us that this represents a move towards the due process model. It might be the case, however, that the amended definition is even vaguer than the original one – which suggests a move in the opposite direction (towards the crime control model). This conflict within Packer's analytical framework is the result of his mistaken contention that the challenge in criminal justice policy is to balance the competing demands of two value systems. The challenge is in fact to balance the demands of many different values. A multi-dimensional framework is therefore needed.

The Thames Valley example illustrates that there is no necessary connection between clarity of definition and tightness of definition. The Government's proposal to ban the use of hosepipes is extremely clear. It is also very tight. Indeed, the pressure group Equity regarded the proposal as too narrowly drawn, concentrating as it does on just one form of excessive water use. Their alternative suggestion, to limit every citizen to fifteen litres of water per day, is thus far broader, embracing all forms of water usage. Although this proposal is similarly clear, it is also over-inclusive. Whilst many citizens might be able to cope with just fifteen litres of water a day, there are others who genuinely need to use more than this amount. The proposal would therefore cover not just culpable individuals who wastefully use too much water, but also many blameless people who exceed their quota for reasons of genuine need. According to Packer's spectrum, therefore, replacing the hosepipe ban with the far broader suggestion tabled by Equity would represent a move towards the crime control model. This is the case even though Equity's suggestion involves no sacrifice of clarity. The Clean party's proposed strict liability offence of "water wastage" is both extremely broad (no *mens rea* requirement) and also vague (what amounts to water wastage?). The Opposition party's offence of "the deliberate use of excessive amounts of water" is much tighter since it requires proof that the excessive use was deliberate. But it too is vague – what is an excessive amount of water? Yet Packer's spectrum tells us that since the Opposition party's proposed new offence is narrower, enacting it instead of the Clean party's suggestion would represent a move towards the due process model, even though the "deliberate use of excessive amounts of water" offence is no clearer than the offence of "water wastage."

Moreover, it should also be pointed out that Packer's one-dimensional framework incorrectly assumes that there is a connection between clarity and tightness of definition and prevention of abuse of state power. This need not be the case – clarifying a definition and reducing its scope may do little or nothing to address the possibility of abuse of state power. In 1942, for example, 15 top Nazi civil servants, SS and Party officials met on the shores of Lake Wannsee to discuss the "final solution of the Jewish question." Five years later, the Wannsee Protocol was discovered. *Inter*

alia, it contained detailed provisions regarding "the question of mixed marriages and persons of mixed blood."[35] Applying Packer's spectrum would suggest that, since the careful construction of such a framework entails a movement towards the due process model, the risk of prevention of abuse of state power must have been reduced. Yet this was clearly not the case in this example. The Wannsee Protocol thus illustrates starkly Alexander Bickel's comment (quoted by Andrew Rutherford) that "enjoying the benefits of due process does not rule out ending up in Hell."[36]

Critics criticised the definition of "anti-social behaviour" in s1(1)(a) for being too vague and too broad. Various amendments to the definition were accordingly proposed during the Crime and Disorder Bill's passage through Parliament. These amendments included inserting the word "serious,"[37] requiring that the behaviour would have caused harassment, alarm or distress to a person of reasonable firmness,[38] and requiring that the defendant intended to cause harassment, alarm or distress.[39] Each of these suggestions would have had the effect of narrowing the scope of the definition contained in s1(1)(a). Applying Packer's framework tells us that by adding qualifiers which narrow the scope of the definition we move it towards the values associated with the due process model. This movement towards the due process model implies that there is an associated increase in the clarity of the definition. Yet it is hard to see how any of these amendments clarify what amounts to anti-social behaviour – the basic definition of anti-social behaviour as behaviour "which caused or was likely to cause harassment, alarm or distress" is just as vague as before.[40] In fact, it is arguable that the addition of a requirement that the harassment/alarm/distress must have been

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[35] See Mark Roseman *The Villa, the Lake, the Meeting: Wannsee and the Final Solution* (London: Allen Lane/Penguin, 2002). The quotes are taken from the translated text of the Wannsee Protocol found in Appendix A of this book.

[36] *Prisons and the Process of Justice: The Reductionist Challenge* (London: Heinemann, 1984) at 25.

[37] Amendment number 3 at the Lords Committee stage and amendment number 39 in the Commons Standing Committee.

[38] Amendment number 3 at the Lords Committee stage and amendment number 3 in the Commons Standing Committee.

[39] Amendment number 84 in the Commons Standing Committee. Note that the wording of the proposed amendment would have put the burden of proof on the defendant to establish that he had not intended to cause harassment, alarm or distress.

[40] A further amendment (number 35), which would have added a requirement that the behaviour complained of would have amounted to either a crime or a civil wrong, was also proposed in the Commons Standing Committee. Whilst this amendment might appear to add clarity, this is merely illusory. For if this requirement had been added, the vagaries of the language used in relevant areas of civil law (such as public and private nuisance) and in other criminal offences (such as s5 Public Order Act 1986 and s137 Highways Act 1980) would have been introduced into s1(1)(a) of the Crime and Disorder Act 1998, thus compounding the vagueness of the existing wording.

serious, or that a person of reasonable firmness would have been caused harassment/alarm/distress, would make the definition in s1(1)(a) even less certain. Applying Packer's spectrum thus falsely implies that qualifiers which narrow a definition's scope also increase its clarity. A multi-dimensional analytical framework, which recognises that there is no necessary connection between clarity of definition and tightness of definition, is therefore needed.

3.2. The dilemma at the heart of the definition

Given that the definition of "anti-social behaviour" in s1(1)(a) was strongly criticised for it vagueness, it might seem surprising that no clearer formulations were put forward as alternatives during the Bill's passage through Parliament.[41] The reason for this, it is suggested, stems from the nature of the behaviour being defined.

Subsequent Home Office Guidance explained that the behaviour which might be tackled by an ASBO *includes* harassment of residents or passers-by, verbal abuse, criminal damage, vandalism, noise nuisance, graffiti, threatening behaviour in large groups, racial abuse, under-age smoking/drinking, substance misuse, joyriding, begging, prostitution, kerb-crawling, throwing missiles, assault, and vehicle crime.[42] Any definition of a term which purports to include within its scope such a long list of different forms of misconduct must inevitably be framed at a high level of abstraction. The impossibility of framing a definition which is clear, lucid and discernible, and which also encompasses such a diverse range of behaviour whilst excluding from its scope both the actions of the eccentric and unconventional and more trivial forms of misbehaviour, is obvious. In short, vagueness is unavoidable when seeking to define an umbrella term like "anti-social behaviour."

If vagueness is unavoidable when defining a term like "anti-social behaviour," it might be asked why a provision aimed at such a diverse range of misconduct was devised. The reason is that, if an ASBO is placed on a defendant who has engaged in a variety of forms of anti-social behaviour, then, should the Order be breached, the

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[41] In addition to the amendments already mentioned, it was also suggested that the words "in an anti-social manner" should be dropped from s1(1)(a) (amendment number 2 at the Lords Committee stage, amendment number 1 at the Lords Report stage and amendment number 149 at the Commons Standing Committee stage). But since this expression is superfluous (see chapter one section 4.2), its deletion would not have clarified the definition of the offending behaviour.

[42] Home Office *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (London: Home Office Communication Directorate, 2002) at 8. Peter Ramsay has argued that at the heart of the determination that an individual has acted anti-socially lies the value judgment that that individual has manifested an attitude of indifference towards his relationship with his community. Since such an attitude may be manifested in a multiplicity of ways – as the list from the Home Office Guidance illustrates – he also argues that vagueness in defining "anti-social behaviour" is inescapable ('What is Anti-Social Behaviour' Crim LR (forthcoming)).

sentencing court is enabled to impose a penalty which reflects the impact of the entire course of conduct. So while the criminal law would ordinarily break a chronic course of anti-social behaviour down into a number of discrete events – the effect of which would be that any sentence(s) imposed would fail to reflect the aggregate impact of the defendant's actions – the ASBO provides a mechanism for dealing with the whole series of events as one package.[43] Rod Hansen, Larry Bill and Ken Pease emphasise the importance of this:

> "The central issue in dealing with chronic predators is how the individual elements of the predation accumulate their impact to diminish the quality of life in the hard-pressed communities in which they live, and how this accumulation is translated into commensurate sanctions"[44]

The problem is, if the ASBO method of securing commensurate sanctions is to work, s1(1)(a)'s definition of the proscribed behaviour has to cover the many diverse forms of anti-social behaviour. Otherwise relevant behaviour could be excluded from the consideration of a court hearing an application for an Order, which would mean that, should the ASBO later be breached, the sentencing court would not be able to take that behaviour into account when passing sentence. This presents us with a dilemma. For the ASBO to achieve its purpose of ensuring that the sanctions imposed on perpetrators of anti-social behaviour reflect the aggregate impact of their misconduct, the definition of the behaviour which may give rise to an Order must encompass all the various forms of anti-social behaviour. But since this necessitates the use of an umbrella term, this definition will necessarily be vague.

If Packer's analytical framework is applied to this dilemma we are left with a choice between, on the one hand, defining "anti-social behaviour" vaguely in order to ensure the effectiveness of the legislation in tackling anti-social behaviour, and, on the other hand, respecting civil liberties by opposing the vague definition of "anti-social behaviour." As we have seen, both New Labour and the critics approached the dilemma in this way. New Labour resisted the critics' attempts to alter the definition, claiming that to do so would impede the effectiveness of the legislation in tackling anti-social behaviour. The critics, by contrast, claimed that defining "anti-social behaviour" vaguely showed a disregard for civil liberties, expressing concern, first, that the vagaries of s1(1)(a) would fail to give citizens fair warning of what conduct is proscribed – which

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[43] See chapter one section 4.3.

[44] 'Nuisance Offenders: Scoping the Public Policy Problems' in Michael Tonry (ed.) *Confronting Crime: Crime Control Policy under New Labour* (Uffculme Cullompton: Willan Publishing, 2003) at 92.

is of especial importance given the potential onerousness of an ASBO and the fact that breach of an Order is a criminal offence – and, second, that the unclear definition would have the effect of vesting considerable discretion in enforcement agencies, who might use these powers in an inappropriate or discriminatory manner. The aim of the rest of this section is to develop an analysis of the task of defining "anti-social behaviour" which gets away from this "either/or" approach. In the course of this discussion I will suggest some alterations to the ASBO regime as it stands today.

3.3. The critics and the extravagant version of the Rule of Law

The value of prevention of abuse of state power has deep historical roots. In the seventeenth century John Locke warned that "he that thinks absolute power purifies men's blood and corrects the baseness of human nature need read but the history of this or any other age to be convinced of the contrary."[45] He accordingly promoted a theory of limited government; political power is delegated by individuals and so government is limited by the ends for which political society is established. After him, Montesquieu wrote, "[i]t has been eternally observed that any man who has power is led to abuse it; he continues until he finds limits." Therefore, in order to protect citizens from the oppressive instincts of their rulers, "power must check power by the arrangement of things"[46] – a clear statement of the principle of the separation of powers. The view that state power is not necessarily benevolent also lay behind Immanuel Kant's famous statement that "politics must bend the knee before right."[47] More recently, the European Convention on Human Rights was established in order to prevent a repeat of the atrocities which occurred before and during the Second World War. And the concern that limits should be imposed on state power is still prevalent today. Martin Loughlin, for example, has commented that, "[a]ccording to modern sensibilities, the exercise of State power, even when placed in the hands of the wisest, contains an arbitrary element which must be checked and controlled."[48]

Taking as their starting point the view that state power should be seen with suspicion, some jurists have expounded what Kenneth Culp Davis labelled "the

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[45] *Second Treatise of Government* in his *Two Treatises of Government* (1680) Peter Laslett (ed.)(Cambridge: Cambridge University Press, 1988) at §92.

[46] *The Spirit of the Laws* book 11 chapter four (1748) Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (eds. and trans.)(Cambridge: Cambridge University Press, 1989) at 155.

[47] 'Perpetual Peace: A Philosophical Sketch' in his *Political Writings* (1795) Hans Reiss (ed.) and H.B. Nisbet (trans.)(Cambridge: Cambridge University Press, 1991) at 125.

[48] *Sword & Scales: An Examination of the Relationship Between Law & Politics* (Oxford: Hart Publishing, 2000) at 183.

extravagant version of the rule of law."[49] The foundation of this version of the Rule of Law is the belief that discretionary power has no place in any system of law or government; government, in all its actions, should be bound by rules fixed and announced beforehand – a sentiment well captured by the slogan "where law ends, there tyranny begins."[50] However, such accounts of the Rule of Law ignore the stark reality that no legal system can operate without significant discretionary power. They "express an emotion, an aspiration, an ideal, but none is based upon a down-to-earth analysis of the practical problems with which modern governments are confronted."[51] As Wade and Forsyth have observed, "[i]ntensive government of the modern kind cannot be carried on without a great deal of discretionary power."[52] Bradley and Ewing similarly state that "[i]f it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then the rule of law applies to no modern constitution ... Discretionary authority in most spheres of government is inevitable."[53]

Given the inevitability of discretion in every legal system, proponents of the extravagant version of the Rule of Law seek to eliminate as much discretion as possible from the legal sphere.[54] Beyond this they urge the need to "bring such discretion as is reluctantly determined to be necessary within the 'legal umbrella' by regulating it by means of general rules and standards and by subjecting its exercise to legal scrutiny."[55] However, this approach proceeds on the mistaken assumption that there is a neat dichotomy between rules and discretion. Rules are erroneously contrasted with

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[49] *Discretionary Justice: A Preliminary Inquiry* (Urbana: University of Illinois Press, 1971) at 28-33.

[50] Davis attributes this expression to William Pitt (ibid at 3), but Loughlin points out (*Sword & Scales: An Examination of the Relationship Between Law & Politics* (n48 above) chapter one n29) that it in fact derives from Locke's *Second Treatise of Government* (n45 above at §202).

[51] Kenneth Culp Davis (*Discretionary Justice: A Preliminary Inquiry* (n49 above) at 33).

[52] *Administrative Law* (8th edn.)(Oxford: OUP, 2000) at 21.

[53] *Constitutional and Administrative Law* (13th edn.)(Harlow: Longman, 2003) at 94.

[54] It should be pointed out that the extravagant version of the Rule of Law could be construed as a non-realisable ideal-type; it would then be possible to describe moving towards this logical construct as an ideal (see chapter three n110). It will be argued in section 3.4 below, however, that discretionary decision-making can be beneficial, and so therefore the elimination of all discretion ought not to be regarded as an ideal.

[55] Nicola Lacey 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in Keith Hawkins (ed.) *The Uses of Discretion* (Oxford: Clarendon Press, 1992) at 372. Although critical of the extravagant version of the Rule of Law, the approach which Kenneth Culp Davis proposed to tackle injustices caused by the exercise of discretionary power (eliminate unnecessary discretionary power and confine, structure and check necessary discretionary power – see *Discretionary Justice: A Preliminary Inquiry* (n49 above) at 50-51) reflects the "legal paradigm" described by Lacey.

discretion "as if each were the antithesis of the other."[56] As Keith Hawkins argues, the distinction between the two is far more uncertain:

> "Discretion is heavily implicated in the use of rules: interpretative behaviour is involved in making sense of rules, and in making choices about the relevance and use of rules. At the same time, it is clear that rules enter the use of discretion: much of what is often thought to be the free and flexible application of discretion by legal actors is in fact guided and constrained by rules to a considerable extent. These rules, however, tend not to be legal, but social and organizational in character"[57]

Although it is problematic, the rules/discretion dichotomy nonetheless informs the critics' two concerns about the vagueness of the definition of "anti-social behaviour." A clear, precise definition of "anti-social behaviour" is assumed to be necessary if citizens are to be given fair warning of what behaviour is proscribed by s1(1)(a) and if discriminatory use of the legislation to be avoided. However, just as carefully crafted rules may not drive out discretion, so conversely may principles engender just as much certainty as rules (if not more).[58] Two vehicles for communicating the purpose of the ASBO – a non-exhaustive list detailing some of the forms that the proscribed behaviour could take and a provision which states that ASBOs should only be imposed in cases analogous to those of the Finnie brothers and Family X – are accordingly proposed here. These suggestions are particularly important given that the critics' calls for clarity of definition are beset by the hopelessness of trying to define an umbrella term like "anti-social behaviour" precisely.

That any definition of an umbrella term like "anti-social behaviour" will be vague has already been shown to be inescapable. Rather than advancing a more precise definition Ashworth et al argued that "reasonable effort could be made to specify the generic types of misconduct being addressed."[59] The Home Office Guidance illustrates

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[56] Denis Galligan (*Discretionary Powers* (Oxford: Clarendon Press, 1986) at 169).

[57] 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed.) *The Uses of Discretion* (n55 above) at 13.

[58] See John Braithwaite's article 'Rules and Principles: A Theory of Legal Certainty' (discussed below in the main text) ((2002) 27 AJLP 47). An example of a rule which fails to engender certainty is the hearsay rule. Arguing in favour of a more discretionary approach to out-of-court statements, Andrew Choo describes how courts will, on occasion, resort to "hearsay fiddles" to avoid the application of the hearsay rule, whilst on other occasions applying the rule with full vigour. He concludes that "this is one area in which the introduction of a more discretionary approach might well increase, rather than decrease, certainty and predictability" (*Hearsay and Confrontation in Criminal Trials* (Oxford: Clarendon Press, 1996) at 198).

[59] 'Neighbouring on the Oppressive' at 13.

that such a list is possible.[60] Since "anti-social behaviour" is an umbrella term this suggestion would seem sensible, provided that the list is construed as indicative, not exhaustive. An exhaustive list of the generic types of misconduct covered by the definition could be counter-productive, as the following extract from John Braithwaite demonstrates:

> "Broad prescriptions against a phenomenon like insider trading can engender more certainty than a patchwork of specific rules that define A, B, C, D, E and F all as forms of insider trading. The rulish form of such an insider trading statute nurtures the plausibility of a legal argument that another form of insider trading – G – must be legal because the clear intent of the legislature was only to proscribe A to F, when in fact the legislature had never thought of G. Legal uncertainty arises from the fact that a thicket of rules engenders an argument of a form that some judges will buy and others will not"[61]

As this extract suggests, if a list of the generic types of misconduct covered by s1(1)(a) failed to mention a particular form of anti-social behaviour, there would be uncertainty as to whether a Magistrate hearing an application for an ASBO would be prepared to read that form of misconduct into the list or not. An expressly non-exhaustive list, on the other hand, would allow unforeseen forms of anti-social behaviour to still fall within the scope of s1(1)(a). Furthermore, citizens would be given a clear indication of some of the forms that the proscribed behaviour could take, and, by revealing something of the spirit of the provision, a non-exhaustive list would also help citizens decide whether other forms of misconduct fall within the scope of s1(1)(a).

The communication of the spirit and purpose of the legislation would be bolstered by a second provision. Kenneth Culp Davis has pointed out that "a rule need not be in the form of an abstract generalization; a rule can be limited to resolving one or more hypothetical cases, without generalizing."[62] To illustrate, he refers to the expressions "the public interest" and "due process of law," commenting that these "extremely broad generalizations need not be given meaning by narrower

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[60] See n42 above.

[61] 'Rules and Principles: A Theory of Legal Certainty' (n58 above) at 56-57. For example, s1 of the Wild Mammals (Protection) Act 1996 states that a person who "mutilates, kicks, beats, nails or otherwise impales, stabs, burns, stones, crushes, drowns, drags or asphyxiates any wild mammal with intent to inflict unnecessary suffering ... shall be guilty of an offence" (subject to the defences contained in s2). Would a person who shot or poisoned a wild mammal have committed an offence under this section?

[62] *Discretionary Justice: A Preliminary Inquiry* (n49 above) at 60.

generalizations; they may also be given meaning, or partial meaning, by rules in the form of hypothetical cases."[63] Davis' observation is of particular relevance to the ASBO, given that the Order was designed with cases like the Finnie brothers and Family X in mind. A provision could accordingly be added to s1 of the Crime and Disorder Act 1998 which explains that ASBOs should only be imposed in cases analogous to those of the Finnie brothers and Family X.[64] Whilst this would not elucidate the definition of "anti-social behaviour" any further, Braithwaite's study of nursing homes in Australia and the U.S. suggests that it might nevertheless engender certainty. For even though regulation of nursing homes in the U.S. was by way of a multiplicity of specific "standards" – more than a thousand in most U.S. states – the Australian regulatory scheme, which consisted of 31 broadly-phrased outcome-oriented standards, delivered a greater degree of consistency. This was in part attributable to the fact that the smaller number of broad standards meant that, in contrast to the legal realist approach of U.S. inspectors (who, since they could not plausibly be expected to employ every one of the hundreds of different standards, tended to intuitively decide whether a standard had been breached and then search for an appropriate regulation), Australian inspectors engaged in the task of deliberating over whether a standard had been met.[65] Similarly, a provision which focussed attention on whether the case under consideration was analogous to the Finnie brothers and Family X case studies would harbour consideration of whether the case was the type of one for which the ASBO was designed. The proposed provision would thus avoid the impossibility of concocting a more precise definition for the umbrella term "anti-social behaviour" whilst at the same time focussing the scope of the Orders on the sort of case for which they were devised.

3.4. New Labour and their readiness to accept discretion

It has been argued that New Labour believed that enforcement agencies could be trusted to exercise the discretion conferred by s1(1)(a) responsibly. This benevolent view of state power is by no means limited to the ASBO; on the contrary, it is characteristic of Home Office policy under New Labour. David Blunkett has urged "the

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[63] ibid at 63 n10.

[64] A provision along these lines would outline the facts of each case study and highlight the common features which justify the imposition of an ASBO. Furthermore, since s4(1) states that there is a right of appeal against the making of an ASBO (see chapter two n32), a stipulation that ASBOs should only be imposed in cases analogous to those of the Finnie brothers and Family X could be developed incrementally by case law.

[65] 'Rules and Principles: A Theory of Legal Certainty' (n58 above) at 60-65.

vital role of good, trusted government in ensuring freedom and security,"[66] arguing that a close partnership between State and citizen is essential:

> "We need to move towards a new compact between government and governed. This means responsibilities and duties resting with the individual and community as well as with the Government, the politics of something-for-something, with rights and responsibilities going hand in hand. This is an extension of the family, where mutual help has to be balanced by willingness to self-help"[67]

The freedom and security which this compact is designed to protect are threatened not by the State, but by law-breakers. "Parliament must be able to act on behalf of the people," Blunkett argues. "Democracy and legitimacy of politics itself depends not on protecting people from the will of Parliament, but protecting people from the actions of dangerous criminals on our streets."[68] Indeed, those who warn of the danger of unchecked state power threaten to hamper the compact between government and governed, and in so doing jeopardise the attainment of freedom and democracy – "those extremists who see the State itself as inherently bad would leave us open to a collapse in order and, in turn, the end of democracy and freedom."[69] As far as civil liberties are concerned, "[y]ou do not erode the rights of the honest, of the innocent, by increasing the rights of victims and the protection of witnesses."[70] Civil liberties are, after all, as much about the protection of the innocent as about protecting the rights of defendants. In reality, then, protecting civil liberties and defending the democratic state are "two sides of the same coin."[71] The following comment on the possibility of barring trial by jury where jury members have been intimidated captures this sentiment well:

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[66] 'Security and Justice, Mutuality and Individual Rights,' Lecture at John Jay College New York, 3 April 2003.

[67] 'Renewing Democracy: Why Government Must Invest in Civil Renewal,' Speech at Ash Institute Boston U.S.A., 8 March 2004.

[68] Speech to Labour Party conference, Blackpool, 7 October 2002.

[69] 'Security and Justice, Mutuality and Individual Rights' (n66 above).

[70] Speech to Labour Party conference (n68 above).

[71] 'Defending the Democratic State and Maintaining Liberty – Two Sides of the Same Coin?' Speech at Harvard Law School Boston U.S.A., 8 March 2004.

> "[I]f those intimidated juries have to be replaced by a judge sitting alone it will not be an act of sabotage on civil liberties, it will be providing liberty and freedom for all of the rest of us who have to put up with the actions of those gangs day in and day out"[72]

This perspective was challenged by Baroness Helena Kennedy in the third of her series of Hamlyn Lectures. "Part of the problem," she says, "is that our governors see themselves as the good guys ... [K]nowing them as I do, I think they are good guys but I also know that there must always be in place serious restraints on power." She continues:

> "Once people 'are the state' or have their hands on the levers of the state they have amnesia about the meaning of power and its potential to corrupt. They forget the basic lessons that safeguards and legal protections are there for the possible bad times which could confront us, when a government may be less hospitable, or when social pressures make law our only lifeline. They forget that good intentions are not enough, that scepticism about untrammelled power is essential. No state should be assumed benign, even the one you are governing"[73]

The issue of how state power should be conceived is a very important one. New Labour have challenged the notion that state power should be viewed with suspicion, urging that the government and the governed must work together to protect the civil liberties of the law-abiding. The implications of this for traditional legal protections are far-reaching, as the ASBO itself demonstrates. It was argued in section 2.2 above that Packer's failure to appreciate the different ways in which values are held means that, when his models are applied to the debates surrounding the ASBO, there is a failure to recognise the fact that New Labour (at least purport to) view state power differently from the critics. By obscuring New Labour's perspective on state power in this way, Packer's analytical framework hinders the important task of locating the ASBO in its broader context and engaging in the discourse concerning how state power should be conceived.[74]

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[72] Speech to Labour Party conference, Bournemouth, 2 October 2003.

[73] *Legal Conundrums in our Brave New World* (London: Sweet & Maxwell, 2004) at 41-42.

[74] By contrast, Jareborg explicitly states that his defensive model views state power with suspicion and that the offensive approach sees the state as an ally (see chapter three n123).

As seen above, the error made by the extravagant version of the Rule of Law is to claim that, since state power should be viewed with suspicion, as much discretion as possible should be eliminated from the legal sphere. This assertion not only ignores the fact that the proliferation of rules is no guarantee against the exercise of discretion,[75] it also fails to recognise that the exercise of discretion may be beneficial. In areas which are especially complex, discretionary decision-making enables difficult issues to be addressed on a case-by-case basis.[76] Discretion also avoids undue rigidity. As the evolution of the Court of Chancery illustrates, discretion may be necessary to enable a decision-maker to do justice.[77] In fact, even the due process model, with its emphasis on the prevention of abuse of state power, recognises the advantages of discretionary judgment.[78] And, whilst there are a number of dangers associated with discretionary decision-making – such as the possible use of illegitimate criteria, the risk of inconsistencies of outcome, and the potential for arrogant, careless decision-making – these dangers can only be expressed in general terms and so, as Nicola Lacey warns, their application in a particular context should not be accepted as "unproblematic truth." Rather, one must engage in the "social science project of detailed examination of discretion in particular contexts informed by an appreciation of the agents' own understandings and the experiences of clients and other participants"[79] in order to determine whether or not any of these concerns apply in a particular context.

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[75] See n57 above.

[76] Kenneth Culp Davis explains that approaching an issue in this way will allow principles to be developed over time, which may then be formulated as rules (see *Discretionary Justice: A Preliminary Inquiry* (n49 above) at 106-111). Denis Galligan argues that the two main difficulties with this incremental approach are "the practical ones of encouraging officials to link decisions together and to extract general standards from them" (*Discretionary Powers* (n56 above) at 168 n7). For further discussion of this form of discretionary authority, see Carl E. Schneider (who labels it "rule-building discretion") 'Discretion and Rules: A Lawyer's View' in Keith Hawkins (ed.) *The Uses of Discretion* (n55 above) at 64-65).

[77] Loraine Gelsthorpe and Nicola Padfield write that, although "the exercise of discretion can work in a negative way where it leads to unwarranted disparity and discrimination ... [d]ecision-makers may discriminate in a positive way too." Elaborating, they explain that discretion "provides a mechanism to show mercy [that is, compassion or forbearance] which ... many would recognise as being necessary to the conception and delivery of justice" (Loraine Gelsthorpe and Nicola Padfield (eds.) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Uffculme Cullompton: Willan Publishing, 2003) at 5-6). Mercy, they stress, is to be distinguished from justified mitigation.

[78] When examining the issue of pre-trial detention, for example, the model insists that until a suspect's guilt has been determined at trial he should be entitled to remain free. This is then qualified by the caveat that a suspect may, exceptionally, be detained, if his freedom threatens to subvert the orderly process of criminal justice (*The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 215). A rule which, if applied rigidly, would result in some suspects being inappropriately released on bail, is thus qualified by an exception which self-evidently calls for the exercise of discretionary judgment.

[79] 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' (n55 above) at 371.

If the extravagant version of the Rule of Law fails to recognise the benefits which discretionary decision-making may offer, then the opposite extreme is to accept discretion too readily. The danger inherent in trusting state power is that the risks associated with discretionary decision-making will be overlooked. Indeed, this charge may be levelled at New Labour. Even though they devised a filtering process to help ensure that ASBOs would only be imposed in deserving cases, their ready acceptance of the discretion vested in enforcement agencies reveals a disturbing complacency.

Criticising the view that a part of a legal system without rules is one of "absolute discretion," Keith Hawkins has written that it "does not make sense from a social scientific point of view to speak of 'absolute' or 'unfettered' discretion, since to do so is to imply that discretion in the real world may be constrained only by legal rules, and to overlook the fact that it is also shaped by political, economic, social and organizational forces outside the legal structure."[80] In order to understand how these forces influence decision-making outcomes, Hawkins argues that we must "[get] away from the central place accorded to legal rules" and instead seek to understand decisions by reference to their surround (broad setting in which decision-making activity takes places), decision field (defined setting in which decisions are made) and frame (the interpretative behaviour involved in decision-making about a specific matter).[81] If this framework is applied to enforcement agencies deciding whether to apply for an ASBO, New Labour's complacency is revealed.

Decisions to apply for an ASBO are made against the surround of Home Office pressure to utilise the Order[82] as well as substantial pressure from victims, the wider community and the media to deal with notorious perpetrators of anti-social behaviour.[83] Given this surround, there is a danger that an official considering whether to apply for an ASBO will, when framing the features of a particular case, be influenced by the pressures which enforcement agencies face to apply for and obtain ASBOs.[84]

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[80] 'The Use of Legal Discretion: Perspectives from Law and Social Science' (n57 above) at 38.

[81] 'Order, Rationality and Silence: Some Reflections on Criminal Justice Decision-Making' in Loraine Gelsthorpe and Nicola Padfield (eds.) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (n77 above) at 188-194.

[82] The disappointing uptake of ASBOs was detailed at the start of chapter one.

[83] Also forming part of the surround are budgetary constraints; Siobhan Campbell found that the average cost associated with an ASBO to either the local authority or the police was £5350. Although interestingly, while 10 of the 12 police and local authority respondents thought costs were a significant factor in the decision to apply for an ASBO, only one said that costs had deterred him from taking an application forward (*A Review of Anti-Social Behaviour Orders* Home Office Research Study 236 (London: Home Office Research, Development and Statistics Directorate, 2002) at 90).

[84] In the light of this, it is perhaps surprising that Siobhan Campbell found that "few partnerships had received any formal training in relation to ASBOs" (*A Review of Anti-Social Behaviour Orders* (ibid) at 25). After all, as Denis Galligan has stressed, the "the risk of

Even on a benevolent view, the risk of ASBOs being applied for too readily in such a charged environment, where there is a strong desire to be seen to be doing something, is undeniable. It is disturbing, therefore, to find that New Labour did not qualify their core definition of "anti-social behaviour," thereby failing to ensure that s1(1)(a) proscribed only the sort of behaviour which the Order was meant to tackle – serious, persistent, culpable anti-social behaviour. The effect of this failure was to stretch the boundaries of the decision field far beyond the range of behaviour which the Order was designed to combat, thus creating a risk that an enforcement agency might apply for an ASBO against an individual who either was not culpable, whose anti-social behaviour was not serious, or who had not persistently acted in an anti-social manner

First, the ASBO was targeted at perpetrators of behaviour who were culpable. The Home Office Guidance published in 2002, for example, states that anti-social behaviour covers "a whole complex of thoughtless, inconsiderate or malicious activity."[85] Indeed, this is what distinguishes those targeted by the legislation from the eccentric or unconventional. The Home Office Guidance published shortly before ASBOs came into force urged that the Orders should not "be used to penalise those who are merely different."[86] By contrast, the remedy was designed "for communities that are ground down by the chronic bullying and harassment by a *selfish* minority."[87] Lord Falconer recognised this when stating that "anti-social behaviour orders should only prohibit anti-social behaviour ... The defendant should be well aware that the kind of activity prohibited is unacceptable to society; he should cease that activity; and the order can run its length without adverse effect."[88] Yet there is nothing in the definition in s1(1)(a) which reflects this requirement of culpability – a *mens rea* element along the lines of "knowing or believing that others would be, or were likely to be, caused harassment, alarm or distress" would have seemed apposite.

Second, the Order was aimed at individuals who persistently engage in the forms of behaviour detailed above, as the following extract from the Home Office Guidance published in March 1999 indicates:

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arbitrariness is high ... where powers are exercised by officials whose expertise and training are limited" (*Discretionary Powers* (n56 above) at 178). Campbell also found that "very few magistrates or clerks had received any formal training on ASBOs" (at 58).

[85] *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (n42 above) at 3.

[86] Home Office *Anti-Social Behaviour Orders – Guidance* (London: Home Office, 1999) at para 3.9.

[87] Jack Straw (HC Deb vol 310 col 373 8 April 1998). Emphasis has been added to the word "selfish" because this, of course, implies culpability.

[88] HL Deb vol 587 col 592 17 March 1998.

> "The main test [when considering whether the use an ASBO would be appropriate] is that there is a *pattern* of behaviour which continues over a period of time but cannot be dealt with easily or adequately through the prosecution of those concerned for a single 'snapshot' or criminal event."[89]

Indeed, New Labour justified the severe maximum penalty for breach of an Order by pointing to the fact that it was designed to reflect the severity of "a pattern of behaviour that is damaging people's lives over a considerable period of time."[90] Yet, as Andrew Ashworth remarked, "[d]oes [the word persistent] appear in section 1 of the Crime and Disorder Act as something to be proved by the local authority seeking an order? No, it does not."[91]

Third, the ASBO targets serious misconduct; New Labour hoped that it would "make it clear to offenders that persistent, serious anti-social behaviour will not be tolerated."[92] This is underlined by the case studies[93] used in *A Quiet Life*.[94] The members of Family X had been arrested over 50 times in less than 12 months for offences ranging from attempted robbery and burglary to criminal damage and public disorder, and had been evicted from public housing twice "for serious anti-social behaviour"[95] only to then reappear in private rented accommodation. The Finnie brothers were prohibited from entering a one mile exclusion zone on the Stoke Heath estate in Coventry by an *ex parte* interlocutory injunction (which was later set aside) after allegedly committing a series of crimes including burglary, harassment, intimidation and fire bombing. But despite being targeted at perpetrators of this kind of behaviour – behaviour which "ruin[s] the lives of individuals, families or communities"[96] – s1(1)(a) does not state that the conduct giving rise to the Order must have been of a serious nature.

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[89] Home Office *Anti-Social Behaviour Orders – Guidance* (n86 above) at para 3.10 (emphasis original).

[90] Alun Michael (HC Standing Committee B col 138 5 May 1998).

[91] 'The Magistrate Debate' (n26 above).

[92] Jack Straw *Anti-Social Behaviour Orders – Guidance* (n86 above) at 2.

[93] These case studies were recounted in detail in chapter one.

[94] They were also used in the Home Office Guidance published in March 1999 (*Anti-Social Behaviour Orders – Guidance* (n86 above) at 16-17).

[95] Home Office *Anti-Social Behaviour Orders – Guidance* (n86 above) at 16.

[96] Alun Michael (HC Standing Committee B col 47 30 April 1998).

New Labour justified their refusal to alter the definition in s1(1)(a) by saying that flexibility was needed in order to ensure that the legislation could be invoked against all potential forms of anti-social behaviour. However, even if these three qualifications were added to s1(1)(a) so as to require that the behaviour was persistent, serious and culpable, the core definition of the umbrella term "anti-social behaviour" would still be left intact. The addition of these three qualifiers would thus not prevent the invocation of the Order against all potential forms of anti-social behaviour. So, notwithstanding their construction of a filtering process, by stretching the boundaries of the decision field far beyond the intended target of the ASBO New Labour failed to have sufficient regard for the risk that Orders would, in such a politically charged environment, be applied for too readily.

This section has shown that a thorough analysis of the task of defining "anti-social behaviour" is only possible once one moves away from the "either/or" approach. New Labour approached the task concerned to ensure that s1(1)(a) was sufficiently flexible to cover all possible forms of anti-social misconduct, whilst the critics emphasised the need to give citizens fair warning of the proscribed conduct and the importance of safeguarding against the legislation being applied in a discriminatory manner. Whilst the "either/or" approach implies that these aims cannot all be addressed, it has been argued that this is what the proposals advanced in this section accomplish. A non-exhaustive list and a provision limiting the availability of ASBOs to cases analogous to those of the Finnie brothers and Family X would engender certainty by communicating the spirit and purpose of the legislation, and these proposals, in tandem with the three qualifications to s1(1)(a) advanced above, would help ensure that ASBOs are only imposed in those sorts of cases for which they were designed. And since these proposals do not alter the core definition found in s1(1)(a), the Order could still be invoked against all potential forms of anti-social behaviour.

4. The hearsay rule and witness intimidation

Chapter two explained that both New Labour and the House of Lords in the *McCann*[97] case believed that, in order for the ASBO to be effective in tackling anti-social behaviour, it was vital that the rule against hearsay evidence did not apply at applications for ASBOs. Like Packer's analytical framework, at the heart of their reasoning lay the notion that two value systems compete for priority in the criminal justice process. For the reasons detailed in chapter two, Packer's due process model, with its insistence on reliability and prevention of abuse of state power, requires that the rule against hearsay evidence applies at applications for ASBOs. The crime control

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[97] n11 above.

model, by contrast, prioritises the efficacy of measures implemented to combat anti-social behaviour, and so insists that the hearsay rule should not apply at proceedings for the imposition of an ASBO. New Labour and the House of Lords approached this conflict in a similar "all or nothing" manner, arguing that the rights of defendants and the interests of victims should be "balanced," with the scales either coming down in favour of victims, in which case hearsay evidence may be used in applications for ASBOs, or in favour of defendants, in which case the use of hearsay evidence should be precluded. As we have already seen, their conclusion was that "the striking of a fair balance ... requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence in applications for anti-social behaviour orders."[98]

This "all or nothing" approach to the problem of witness intimidation results in a failure to question whether the problems presented by frightened and intimidated witnesses could be dealt with within a framework incorporating a principled application of the hearsay rule. It will be argued in section 4.1, with reference to the jurisprudence of the European Court of Human Rights, that such an approach is both possible and preferable. The "all or nothing" approach also falsely assumes that circumventing the hearsay rule is the only method by which the problem of witness intimidation can be tackled. By pointing to a number of other ways of tackling the problem of witness intimidation, section 4.2 will demonstrate that this is not the case.

4.1. A principled application of the hearsay rule

In their Report *Evidence in Criminal Proceedings: Hearsay and Related Topics*, the Law Commission concluded that "the main, if not the sole, reason why hearsay is inferior to non-hearsay is that it is not tested by cross-examination."[99] This view is based on the assumption that cross-examination is an important tool for testing reliability and truthfulness; the Law Commission, for example, refer to Sir Matthew Hale's claim that cross-examination "beats and boults out the Truth."[100] The importance attached to cross-examination is such that Article 6(3)(d) of the European Convention on Human Rights enshrines the right of a defendant in a criminal trial "to examine or have examined witnesses against him."

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[98] *per* Lord Hutton in *McCann* at [113]. It is not possible to say that the critics also adopted an "all or nothing" approach, since, even if proceedings for the imposition of an ASBO had been held to be criminal in nature so that the hearsay rule applied, exceptions to the rule existed which could be relied upon to excuse intimidated witnesses from having to give evidence (see s23 Criminal Justice Act 1988).

[99] Law Commission Report 245 Cm 3670 (1997) at para 3.37.

[100] *The History of the Common Law of England* (3rd edn., 1739) quoted at para 3.16 of the Law Commission Report (ibid).

It was argued in chapter two that, since proceedings for the imposition of an ASBO ought to be regarded as criminal in substance for the purposes of the ECHR, Article 6(3)(d) should apply at applications for Orders. Contrary to Lord Steyn's assertion in *McCann*, however, this would not render the procedure for obtaining Orders "completely or virtually unworkable and useless"[101] since, although on the face of it Article 6(3)(d) permits of no exceptions, the Strasbourg Court has shown a willingness to allow derogations where the facts of the case demand it and the proceedings, considered as a whole, were fair.

Steven Greer has observed that "the Convention formally assigns priority to Convention rights, which means that the process by which the Court reconciles Convention rights with each other is subtly different from that by which it reconciles Convention rights with the 'common good.'"[102] The Strasbourg Court's decisions on Article 6(3)(d) reflect this distinction, for while the Court has insisted that fair trial rights "cannot be sacrificed to expediency,"[103] it has also recognised that in cases of witness intimidation a witness' "life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."[104] In *Doorson v Netherlands*,[105] for example, the Court said that, since it had been established that drug dealers frequently resort to threats or actual violence against persons who give evidence against them, "there was sufficient reason for maintaining the anonymity"[106] of two witnesses who had identified the defendant from a photograph which he had acknowledged to be of himself. Whilst this would present "the defence with difficulties which criminal proceedings should not normally involve," it would not breach Article 6, the Court held, "if it is established that the handicaps

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[101] At [18].

[102] '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' [2004] CLJ 412 at 433.

[103] *Kostovski v Netherlands* (1990) 12 EHRR 434 at para 44.

[104] *Doorson v Netherlands* (1996) 22 EHRR 330 at para 70.

[105] ibid. Similarly, although a breach of Article 6 was found in *Kostovski* (n103 above), the Court implicitly recognised that some restrictions may be placed on Article 6(3)(d), explaining that, on the facts of the case, "it cannot be said that the handicaps under which the defence laboured were counterbalanced by the procedures followed by the judicial authorities" (at para 43).

[106] *Doorson* (n104 above) at para 71.

under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities," if the evidence was treated with "extreme care," and if any conviction was not "based either solely or to a decisive extent on anonymous statements."[107] In *Doorson* these conditions were satisfied since, first, the anonymous witnesses were questioned at the appeal stage in the presence of defence counsel by an investigating judge, with defence counsel given the opportunity to "ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity," second, the evidence was treated with "the necessary caution and circumspection," and, third, "the national court did not base its finding of guilt solely or to a decisive extent on the evidence" of the two witnesses.[108]

Discussing the relationship between rules and principles, John Braithwaite has written:

> "[W]ith complex, ever-changing phenomena where the integrity of the rules are constantly under challenge from legal game playing by wealthy manipulators of the rules, there is not a lot of choice but to opt for wisdom in choosing which rules should be regarded as stickier than others. That said, we must call people to account for these judgments. This means enforceable principles that give reasons for why we should resist breaching the rules that should have the greatest stickiness and why even those sticky rules should be breached when doing so is imperative to safeguarding the principle that justifies them"[109]

These comments may be applied to proceedings for the imposition of an ASBO. As noted above, the principal justification for the hearsay rule is that it allows defendants the opportunity to cross-examine witnesses; the importance of cross-examination is said to lie in fact that, by providing the opportunity it to test the truthfulness of witnesses, it helps ensure reliable determinations of guilt. Yet it has long been accepted that in practice the hearsay rule frequently operates so as to exclude cogent evidence.[110] This, it is suggested, would be the effect of applying the hearsay rule with full vigour to applications for ASBOs. The testimony of witnesses who are too frightened to give evidence would be excluded, meaning that defendants like the Finnie

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[107] ibid at paras 72, 76.

[108] ibid at paras 73, 76.

[109] 'Rules and Principles: A Theory of Legal Certainty' (n58 above) at 70.

[110] The classic example is *Myers v DPP* [1965] AC 1001. See further Andrew Choo's book *Hearsay and Confrontation in Criminal Trials* (n58 above).

brothers avoid the imposition of an Order even though it is undeniable that they have persistently been guilty of serious anti-social behaviour. The strict application of the hearsay rule would, in effect, allow such defendants to profit from their own wrong.[111] In these circumstances, principle demands that the hearsay rule is not applied with full vigour. It is thus submitted that when an ASBO is applied for in a situation like the Finnie brothers case – i.e., where the defendant has undeniably acted in an anti-social manner and no witnesses will testify because they have either suffered threats or intimidation or reasonably fear retaliation should they testify – the Strasbourg Court's approach to Article 6(3)(d) should be followed. In order to encourage witnesses to come forward, their anonymity should be guaranteed. Any resultant handicap suffered by the defendant could be counter-balanced by allowing defence counsel to question the witness in the presence of the Magistrates hearing the application, or by requiring the witness to give evidence behind a screen, perhaps with the use of a voice distorter.[112] It would also be necessary to ensure that the imposition of an Order is not based solely or decisively on the testimony of the anonymous witness(es). To this end professional witnesses could also be employed to witness and testify to the misconduct perpetrated by the defendant.

Were such an approach adopted, it would be important to ensure that witnesses are only guaranteed anonymity if they really are too frightened to give evidence. In its Report on hearsay evidence the Law Commission warned that "fear is a state of mind, and it can be difficult to tell whether a witness is genuinely frightened or merely reluctant." On consultation the Law Commissioners were repeatedly told that "there is a very genuine risk that, if the statements of frightened witnesses were automatically admissible, prospective witnesses could give statements to the police in the knowledge that they could at a later stage falsely claim to be frightened, with the result that they could avoid having to go to court and be cross-examined."[113] Such concerns are underlined by Nicholas Fyfe's findings in his interviews with members of criminal justice agencies in Strathclyde.[114] They opined that, whilst some witnesses are too

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[111] An analogy may be drawn with the celebrated American case *Riggs v Palmer* (115 NY 506 (1889)). A grandson murdered his grandfather so that he could obtain his inheritance. The majority of the Court held that the principle that no man should profit from his own wrong should take priority over the rules of succession, literally construed.

[112] According to s17 Youth Justice and Criminal Evidence Act 1999, where the quality of evidence which a witness will give "is likely to be diminished by reason of fear or distress on the part of the witness" a special measures direction may be given. One special measure is the use of a screen which prevents the witness from seeing the defendant while giving testimony (s23). See further section 4.2 below.

[113] Law Commission Report 245 (n99 above) at para 8.58.

[114] *Protecting Intimidated Witnesses* (Aldershot: Ashgate, 2001).

frightened to give evidence because of actual intimidation or harassment (sometimes even life-threatening intimidation), there are certain areas, usually containing large local authority housing schemes, where "the stigma of being labelled a 'grass' ... is often sufficiently strong to dissuade witnesses or victims from ever coming forward to assist the police with the investigation of crime."[115] In such an environment it would be important not to grant guarantees of anonymity lightly, since otherwise potential witnesses would be sent the message that they can avoid the stigma of being labelled a "grass" simply by claiming that they are too frightened to give evidence. Furthermore, where "grassing" is a contravention of locally accepted norms and values, simply protecting the anonymity of reluctant witnesses will propagate the existing culture. The subsisting culture should instead be confronted through the development of social, community-focused measures which strengthen links between residents and the police and which provide offers of support for potential witnesses.[116]

It should also be stressed that, even where a witness has been guaranteed anonymity, their evidence should not be accepted unquestioningly. A witness who has suffered at the hands of a defendant who has persistently engaged in serious anti-social behaviour may embellish or exaggerate his account of events, perhaps deliberately – in order to ensure that the defendant receives a stiff penalty or simply out of spite – or maybe because, over time, the strain imposed by the defendant's conduct has distorted his recollection. Furthermore, some complainants may be exceptionally sensitive or impatient, and so their version of events could differ markedly from the defendant's. For example, after meeting three juveniles who were subject to ASBOs, their families, and the victims of their anti-social behaviour, the journalist Decca Aitkenhead concluded that "[s]o much of these families' narrative is unknowable – the chaos of local feuds, the self-delusion and counter-allegation ('You look in her rubbish bins, you'll not find food, it's all empty cider bottles') – that very few observations can be made with confidence."[117] In this light, it is noteworthy that the decisions of the Strasbourg Court under Article 6(3)(d) "emphasise that the essence of the right must be preserved, even where limited restrictions are allowed."[118] The Strasbourg Court's approach thus gives defendants the opportunity to challenge the evidence of witnesses

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[115] ibid at 37.

[116] See section 4.2 below.

[117] 'When Home's A Prison' *The Guardian Weekend* 24 July 2004.

[118] Andrew Ashworth *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet & Maxwell, 2002) at 57.

against them, which, it is submitted, is essential in proceedings for the imposition of an ASBO.[119]

The Strasbourg Court's refined approach to balancing defendants' rights and victims' interests stands in stark contrast to the "all or nothing" approach adopted by New Labour and the House of Lords in *McCann*. Having concluded that the interests of victims outweighed the rights of defendants, they classified proceedings for the imposition of an ASBO as civil in nature so as to avoid the application of the hearsay rule. This not only results in an unnecessarily broad acceptance of the admissibility of hearsay evidence – since the hearsay rule does not apply the evidence of the witness who has not suffered any threats nor been intimidated and who harbours no fears about testifying may be admitted as well as the evidence of the terrified witness who has been beaten up, whose house has been petrol-bombed and who has been warned of more to come if s/he testifies – but also allows the defendant's right "to examine or have examined witnesses against him" to be balanced away.[120] So not only should proceedings for the imposition of an ASBO be classified as criminal in nature, as was argued in chapter two, but the problem of intimidated witnesses would be better dealt with in a framework incorporating a principled application of the hearsay rule.

4.2. Other methods for tackling witness intimidation

Section 2.1 explained that, as a result of his "yes/no" approach to values, Packer's analytical framework unjustifiably assumes that if a policy-maker is concerned to repress anti-social behaviour they will support the ASBO. One aspect of this is the false assumption that, if you are concerned to tackle the problem of witness intimidation, you will support the non-applicability of the hearsay rule to proceedings for the imposition of Orders. It is possible, however, to both be concerned to tackle witness intimidation and to oppose the non-applicability of the hearsay rule to proceedings under s1(1) of the Crime and Disorder Act 1998. Ashworth et al, for example, argued that "[w]itness intimidation is a growing problem, but there are

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[119] Under s116 of the Criminal Justice Act 2003 (which is expected to come into force in April 2005), a statement made by a witness who has been identified to the court's satisfaction and who through fear does not give evidence in the proceedings may be admitted in evidence. s116(4) provides that leave to admit such a statement should only be given if it is in the "interests of justice." Where such a statement is admitted, however, there is a danger that, if the defendant is not given an effective opportunity to challenge the evidence against him, Article 6(3)(d) will be breached.

[120] Such an approach is inconsistent with the Convention's objective to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" (*Airey v Ireland* (1979-80) 2 EHRR 305 at para 24).

better-targeted ways of tackling it."[121] This section will outline some of these other methods by which witness intimidation may be tackled.

First, measures can be employed to minimise the opportunities for intimidation before the application for an ASBO is heard. For example, the likelihood that a witness will be identified by the fact that the police visited their home can be reduced by using plain clothes officers or by conducting house-to-house calls on neighbouring properties. Alternatively, a witness could be invited by telephone to make a statement at the police station. And enforcement agencies could keep the identity of the witness a secret during their investigation. Such measures are compatible with the ECHR; the Convention "does not preclude reliance, at the investigation stage, on sources such as anonymous informants."[122] In addition, cases should be brought before the courts as swiftly as possible. Where there are unnecessary delays in hearing a case witness' fears about testifying are likely to be exacerbated.

It must be recognised, however, that sometimes a guarantee of anonymity will be of little use; the perpetrator of the anti-social behaviour will be able to work out who has made a complaint about their conduct. In these circumstances the witness might choose to move away from the area, particularly apt in cases like the Finnie brothers where the defendant's misconduct occurs within a particular territory. Or, with police assistance, they might install a house alarm or a panic button; they could also carry a personal attack alarm or a mobile phone with a direct link to the local police station. Police patrols in the witness' neighbourhood could be increased. The witness could even be escorted to and from work, school and shops, and a round-the-clock police presence could be provided. And if and when intimidation does occur, it is vital that this is taken seriously. Action should be taken against the perpetrators, e.g., by bringing a prosecution under s51 Criminal Justice and Public Order Act 1994.[123]

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[121] 'Neighbouring on the Oppressive' at 10.

[122] *Doorson v Netherlands* (n104 above) at para 69.

[123] According to s51(1), a person commits an offence if (a) he does an act which intimidates, and is intended to intimidate, another person; (b) he does the act knowing or believing that that person is assisting in the investigation of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, and (c) he does it intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with. And according to s51(2) a person commits an offence if (a) he does an act which harms, and is intended to harm, another person or, intending to cause another person to fear harm, he threatens to do an act which would harm that other person; (b) he does or threatens to do the act knowing or believing that the person harmed or threatened to be harmed, or some other person, has assisted in an investigation into an offence or has given evidence or particular evidence in proceedings for an offence, or has acted as a juror or concurred in a particular verdict in proceedings for an offence, and (c) he does or threatens to do it because of that knowledge or belief. A person guilty of an offence under this section is liable, on conviction on indictment, to five years' imprisonment and/or a fine or, on summary conviction, to six months' imprisonment and/or a fine not exceeding the statutory maximum.

Worryingly, in his interviews with intimidated witnesses Nicholas Fyfe found that, in some cases, there was "a failure among a few officers to take reports of intimidation seriously or to make determined efforts to pursue those responsible."[124] Responses like these merely serve to discourage and disenchant intimidated witnesses and reassure intimidators.

In cases where the defendant knows the identity of the witness, special measures may be used to help prevent intimidation in the courtroom. These include the use of screens and giving evidence by live television link. For many witnesses entering the witness box is an intimidating experience. The witness must not only face the defendant, but possibly also many of the defendant's family and friends in the public gallery. It is significant, therefore, that a Home Office Research Study[125] found that, following the implementation of the special measures contained in the Youth Justice and Criminal Evidence Act 1999,[126] the percentage of vulnerable and intimidated witnesses (VIWs) who gave evidence either with the use of a screen or by live link, and so did not have to see the defendant, almost trebled (from 17% to 47%). Tellingly, it was also found that 33% of witnesses who used a special measure said they would not have been willing and able to give evidence without it. The Study concludes that, whilst witnesses using special measures were less likely to experience anxiety than those not using them (63% opposed to 73%), there is still some way to go; satisfaction levels amongst VIWs are still lower than amongst witnesses in general. Continued improvement will help ease the problem of witness intimidation further.

Finally, as Nicholas Fyfe concludes, "[i]f progress is to be made in terms of tackling the causes of witness intimidation, then it is vital that more emphasis is given to social strategies."[127] He gives as examples the Community and Police Enforcement (CAPE) scheme in Newcastle and an inter-agency scheme in Salford. Members of the CAPE scheme make a commitment to report crime and, if necessary, give evidence in court. In return the police provide information and offer support such as accompanying the witness to court during the trial, and providing personal alarms and mobile telephones with a direct link to the local police station. The scheme in Salford involves several agencies which have agreed a set of actions to help tackle the fear of

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[124] *Protecting Intimidated Witnesses* (n114 above) at 111-112.

[125] *Are Special Measures Working? Evidence From Surveys of Vulnerable and Intimidated Witnesses* Home Office Research Study 283 (London: Home Office Research, Development and Statistics Directorate, 2004).

[126] s17 sets out the test for whether a witness is eligible for special measures on the basis of fear or distress about testifying. The special measures contained in ss23-28 apply to intimidated witnesses (s18(1)(b)).

[127] *Protecting Intimidated Witnesses* (n114 above) at 135.

intimidation. For example, the Housing Department prioritise repairs to homes which have been damaged due to intimidation and arrange for the installation of alarms in the homes of vulnerable witnesses, and the courts promise to ensure a safe, secure environment for witnesses attending court.[128] Schemes of this nature, which strengthen social solidarity against intimidators, are needed if witness intimidation is to be tackled effectively.

As noted above, in *McCann* Lord Steyn asserted that, if proceedings for the imposition of ASBOs were classified as criminal, this would render the procedure for obtaining Orders "completely or virtually unworkable and useless."[129] In this section it has been shown that this is not the case. Based on the jurisprudence of the European Court of Human Rights section 4.1 argued that, even if the hearsay rule did apply at applications for ASBOs, frightened witnesses could be encouraged to give evidence by being given guarantees of anonymity. And section 4.2 has showed that a range of other measures exist for tackling the problem of witness intimidation.

5. Conclusion: The Modified Version of the ASBO

A straightforward application of Packer's analytical framework tells us that, in creating the ASBO, New Labour sacrificed due-process values in the increased pursuit of crime control outcomes. On this approach the choice is clear – one either opposes the ASBO out of respect for civil liberties, or one supports it out of a desire to see anti-social behaviour tackled effectively. This chapter has shown that, although such an approach results in an impoverished understanding of the issues surrounding the ASBO, both the task of defining "anti-social behaviour" and the problem of witness intimidation were approached in a similarly polarized manner. This meant that the debates of these issues were reduced to over-simplistic "either/or" or "all or nothing" choices.

In the course of discussing these issues more thoroughly a number of proposals have been advanced which, it has been argued, address the concerns of both New Labour and the critics. In terms of witness intimidation, it was argued in chapter two that proceedings for the imposition of an ASBO ought to be classified as criminal in nature. As a result the hearsay rule would apply at proceedings under s1(1) Crime and Disorder Act 1998. Nevertheless, a range of other measures exist for tackling witness intimidation. Plus, in cases where witnesses have been intimidated and are too frightened to give evidence, their anonymity should be guaranteed. Following the Strasbourg case law, any resultant handicap suffered by the defence should be counter-

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[128] ibid at 47-48.

[129] At [18].

balanced by, for example, allowing defence counsel to question the witness in the presence of the Magistrates hearing the application or by requiring the witness to give evidence behind a screen, perhaps with the use of a voice distorter, and by ensuring that Orders are not be imposed solely on the basis of the testimony of anonymous witness(es). Moreover, it is vital that applications for Orders are brought before the courts swiftly; unnecessary delays merely exacerbate witness' fears about testifying.

For an Order to be imposed it must be shown that the defendant has behaved in an "anti-social manner." The definition of "anti-social behaviour" in s1(1)(a) should be qualified so as to require that the misconduct was serious, persistent and culpable. The core definition of "anti-social behaviour" could also be clarified by means of a non-exhaustive list and a provision stating that ASBOs can only be imposed in cases analogous to those of the Finnie brothers and Family X. These proposals would maintain sufficient flexibility for the Order to be invoked against all potential forms of "anti-social behaviour," and, by focussing the ASBO on the sort of case for which it was designed, would also prevent enforcement agencies from effectively creating new criminal offences by using the Order in unforeseen ways, e.g., to force shepherds to control their sheep.[130]

Even in this modified form, a number of issues regarding the ASBO remain. Once the decision to impose an ASBO has been made, the terms of the Order must be determined. Since, as has been explained, the Order would amount to a criminal penalty, general sentencing principles would apply at this stage. This would help ensure that the terms of an Order are well-reasoned; ASBOs that contain such terms as a prohibition on saying the word "grass" anywhere in England and Wales until the year 2010 merely serve to undermine the legislative scheme.[131] It is also important that, when framing the terms of an Order, magistrates take care not to infringe Articles 8, 10 and 11 of the ECHR. Any interference with the rights protected by these Articles must be the minimum necessary to secure a legitimate general interest; an ASBO which does not merely prohibit a continuation of the conduct that gave rise to the Order, but which imposes a curfew or excludes a defendant from a specified area, could be deemed to be disproportionate.

Should an Order be breached, the sentencing court would, as intended, be empowered to impose a sentence that reflects the impact of the entire course of anti-social behaviour. Of course, this assumes that it is appropriate to deal with the course

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[130] 'Unruly sheep face nuisance bans' (http://news.bbc.co.uk/1/hi/uk/3889009.stm). ASBOs have also been used, *inter alia*, to prohibit the making of hoax 999 calls and to ban youngsters from wearing balaclavas and hooded tops (see further http://news.bbc.co.uk/1/hi/magazine/3674430.stm)

[131] 'When Home's A Prison' (n117 above).

of conduct as one package – this assumption received little discussion during the ASBO's journey onto the statute book. Another question which received little discussion is, if the conduct is to be dealt with cumulatively, what constitutes an appropriate maximum sentence for breach of an ASBO. What is clear is that the maximum five year prison term for breach of an ASBO – the same as for offences such as malicious wounding or infliction of GBH and violent disorder – seems to be out of sync with the sentencing practices of courts dealing with cases where Orders have been breached. Of the 85 incidents of breach of an ASBO brought before the courts in 2000 (involving 51 individuals and 75 breach hearings), 64 (75%) were sentenced in the magistrates' court and only five (6%) were committed to the Crown Court (four for sentence and one for trial). Magistrates thus seem to regard few of the cases of breach of an ASBO which come before them as serious enough to be committed to the Crown Court for sentencing. And of those incidents of breach which were sentenced in the magistrates' court, 62% resulted in a custodial sentence.[132] This led Rod Hansen, Larry Bill and Ken Pease to express "amazement" at the fact that "an offender escapes custody in almost half the cases where the [ASBO] is breached, presumably because the focus of the court reverts to evidence on a single event which may of itself not be serious and the principle of limiting retribution resumes its place."[133]

It must also be recognised that the terms of an ASBO will not address many of the factors that can underlie anti-social behaviour. As the creation of Individual Support Orders[134] testifies, simply imposing negative prohibitions cannot be expected to resolve many of the problems that may contribute to anti-social behaviour. For example, in some well-documented cases ASBOs have been imposed on children suffering from Attention Deficit Hyperactivity Disorder (ADHD) whose parents are struggling to cope with them.[135] Indeed, in her study of cases where individuals had had an ASBO imposed, Siobhan Campbell found that "there was a high proportion [of cases] where some mitigating factor appeared to have contributed to their behaviour."[136] These factors included drug abuse (18% of the individuals), alcohol abuse (17%) and learning disabilities (9%). The "other" category (16%) also included individuals whose mother admitted being unable to cope anymore, individuals with

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[132] Siobhan Campbell *A Review of Anti-Social Behaviour Orders* (n83 above) at 76-77.

[133] 'Nuisance Offenders: Scoping the Public Policy Problems' (n44 above) at 93.

[134] See further chapter two n4.

[135] For example, Benny Griffiths ('Mother Slams Anti-Social Orders' (http://news.bbc.co.uk/1/hi/wales/2065013.stm)) and the Morris triplets ('They're Called the Terror Triplets but behind the Headlines is Another Story' (*The Guardian* 27 March 2002)).

[136] *A Review of Anti-Social Behaviour Orders* (n83 above) at 17.

psychological problems such as personality and behavioural disorders, and even one individual who was deaf and dumb. And as well as these types of individualised factors, there are also broader social factors which may influence anti-social behaviour. In their "Bus Stop Kids" illustration, for example, Ashworth et al argue that banning a group of teenagers from congregating at a local bus shelter "does nothing to alleviate the problem: the absence of a facility at the estate for teenagers to meet."[137]

In conclusion, this chapter has shown that, by forcing the many disparate issues raised by the ASBO into a simple choice between due process values and crime control outcomes, Packer's models leave us in an analytical straitjacket. But while the application of his models to the ASBO should be rejected, his primary objective in writing *The Limits of the Criminal Sanction*[138] should not be forgotten. For the main purpose of the book was not to expound an analytical framework for the criminal justice process, but to question the "far too indiscriminate"[139] way in which the criminal sanction was being resorted to. It is this aspect of Packer's legacy, and not the crime control and due process models, which we should bring to a discussion of the ASBO.

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[137] 'Neighbouring on the Oppressive' at 12.

[138] Stanford: Stanford University Press, 1968.

[139] ibid at 364.

Concluding Reflections

Herbert Packer's primary objective in *The Limits of the Criminal Sanction* was to argue that the criminal sanction is resorted to too indiscriminately. The discussion of ASBOs in this study has shown that this theme of Packer's work is still relevant today. In order to tackle anti-social behaviour effectively New Labour invoked the criminal law in an indiscriminate manner. Proceedings for the imposition of an ASBO were classified as civil in nature, so that findings of fact could be made on the basis of hearsay evidence. Breach of an ASBO, however, was made a criminal offence, meaning that findings of fact from the application for an Order might later form the basis of the criminal sentence that is imposed in proceedings for breach. Even if this problem of classification were remedied – by classifying applications for Orders as criminal – questions would still remain about the efficacy of tackling anti-social behaviour using the ASBO.

Packer's doubts about the use of the criminal sanction were founded on his analysis of contemporaneous trends in the criminal justice process. This analysis was conducted using a spectrum, with the due process model at one end and the crime control model at the other. This study has shown that this analytical framework is flawed. Not only does it falsely assume that the various values relevant to criminal justice policy can be neatly dichotomised into two value systems, it also adopts a simplistic "yes/no" approach to values which has no regard for the different ways in which values are held. Furthermore, the use of a spectrum – a one-dimensional device – is obstructive. Packer's framework wrongly supposes, first, that a decision based on the values associated with one model must necessarily have a detrimental effect on the values associated with the other model, and, second, that a decision to detrimentally affect the values associated with one model must be motivated by a concern for the values of the other model. So while Packer's concern to question the expanding use of the criminal sanction is of continuing relevance, the method he used to draw attention to this issue must be rejected.

Although Packer's analytical framework has been subjected to widespread academic criticism, the basic approach at the heart of his framework is, paradoxically, still influential today. Those participating in the debates surrounding the ASBO thought in terms of two polarized value systems. References to the purported need to balance the rights of defendants with (i.e., set them off against) the interests of victims were frequent. New Labour stressed that effective action had to be taken against anti-social behaviour, accusing the critics of being prepared to allow such behaviour to continue unchecked. The critics, by contrast, urged respect for the values of reliability and prevention of abuse of state power, claiming that New Labour were showing disregard for civil liberties. This polarized approach resulted in an impoverished

analysis of the issues surrounding the ASBO. The task of defining "anti-social behaviour" was approached in an "either/or" manner, according to which one either showed respect for civil liberties, and so urged that the definition was clarified and tightened, or one showed a concern to tackle anti-social behaviour, and so urged that the wider, more flexible definition was left intact. And New Labour and the House of Lords adopted an "all or nothing" approach to the hearsay rule, concluding that, given the problem of witness intimidation, the rule should not apply at applications for Orders.

One of the main conclusions of this study was that ideals must be carefully distinguished from ideal-types and strategies. Packer's failure to heed this lesson is mirrored by the inclination of policy-makers, when drafting new legislation, instead of addressing the conflict between different ideals, to dress up an ill-thought out, politically motivated strategy as an inherently attractive ideal. This means that, in a political climate where great importance is attached to being seen to be tough on crime, policy-makers frequently present severe provisions in an ideal light, and political opponents commonly seek to outflank one another by proposing the sternest, most biting, measures, often stretching – even transgressing – what human rights treaties such as the ECHR will permit. The rhetoric surrounding the ASBO, for example, reveals that New Labour were determined to be seen as the party who were prepared to take the most strong-handed action against perpetrators of anti-social behaviour. And whilst austere provisions may generate protests from human rights organisations, such protests underline the strength of the action being taken and so, ironically, may be seen as desirable. Against this background, it is easy to see how debates become polarized, with defendants' rights on the one hand and victims' (or the wider community's) interests on the other. However, this tendency must be resisted. A polarized approach to policy-making hinders the important task of balancing the many different values which compete for priority in the criminal justice process. In relation to the ASBO, it resulted in the issues surrounding the definition of "anti-social behaviour" and the hearsay rule being reduced to an unnecessarily restrictive choice between two courses of action. The proposals which the current study has advanced for reforming the ASBO demonstrate that, had the polarized approach not been so influential, provisions could have been introduced which would have addressed the concerns of both New Labour and the critics.

Unfortunately, resisting the tendency towards the polarized approach may prove counter-intuitive to many policy-makers. Introducing a remedy like the ASBO, while also voicing grand declarations about the interests of victims and resisting protests about defendants' rights, has great symbolic force. It is important to recognise, therefore, that this political strategy may ultimately prove counter-

productive. One of the primary objectives of the ASBO was to ensure that, if a perpetrator of anti-social behaviour breached an Order, he would receive a sentence that reflected the impact of his entire course of conduct. However, the controversy surrounding the definition of "anti-social behaviour" and the admissibility of hearsay evidence and the standard of proof at proceedings for the imposition of an Order distracted attention from this objective. This is arguably the reason why, to date, sentencers imposing penalties for breach of an ASBO seem to have regard only for the act of breach and not the conduct which gave rise to the Order. Such sentences will merely disappoint victims of the anti-social behaviour and, given the time and resources required to apply for an ASBO, discourage enforcement agencies from utilising the Order. If, on the other hand, the modified version of the ASBO presented in this study had been enacted, attention could have focussed on the intention to treat as one a cumulative course of anti-social behaviour, and the implications of this for sentencing practice could have been more carefully addressed.

The significance of the current study extends beyond its principal concern with the Anti-Social Behaviour Order. Other complex areas of growing concern such as terrorism, immigration – even football hooliganism – are often approached in terms of two polarized value systems. This approach results in an impoverished analysis of the issues involved and a failure to effectively balance, or even compromise, the various values which compete for priority. But although the modified version of the ASBO presented in this study demonstrates the benefits of resisting the polarized approach, it too has its limitations. It does nothing to address many of the problems which can influence an individual to behave anti-socially, such as drug/alcohol abuse, psychological problems, or broader social factors. If effective steps are to be taken to address these underlying factors we must look beyond criminal justice policy. It is important, therefore, that we recognise the limits of, as well as question the indiscriminate resort to, the criminal sanction.

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