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A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's

Definition of 'Anti-Social Behaviour'

*Stuart Macdonald**

INTRODUCTION

In June 1995 New Labour published the consultation paper *A Quiet Life*.¹ This document claimed that consultation with the police, local authorities, councillors and MPs had revealed 'intense dissatisfaction with the extent and speed of existing procedures'² used to tackle anti-social behaviour. This 'system failure'³ meant that 'new remedies [needed] to be developed.'⁴ The remedy which *A Quiet Life* proposed essentially amounted to a 'special form of injunction',⁵ breach of which was to be punished with criminal penalties. In this embryonic form the remedy was called the Community Safety Order. Just over three years later New Labour's first major criminal justice legislation – the Crime and Disorder Act 1998 – received Royal Assent, and the new remedy, which by now had been renamed the Anti-Social Behaviour Order (ASBO), found pride of place in section 1 of the Act. Further evolution occurred following the disappointing

* School of Law, University of Swansea. I would like to thank all those with whom I have discussed the ideas presented in this article, and in particular Andrew Halpin and the anonymous referees for their invaluable comments on earlier drafts.

¹ *A Quiet Life: Tough Action on Criminal Neighbours* (London: Labour Party, 1995).

² *ibid*, 6.

³ *ibid*, 6.

⁴ *ibid*, 8.

⁵ *ibid*, 8.

initial uptake of the ASBO,⁶ with steps being taken to enhance its effectiveness in the Police Reform Act 2002, the Anti-Social Behaviour Act 2003 and the Criminal Justice Act 2003. After these layers of reform we now have a complex regime governing ASBOs, contained in sections 1, 1A, 1AA, 1AB, 1B, 1C, 1D and 1E of the Crime and Disorder Act (to which will soon be added ss1F, 1G, 1H and 1I).⁷

Applications for ASBOs may be brought by local authorities, chief officers of local police, the British Transport Police, registered social landlords, Housing Action Trusts and County Councils.⁸ Applications may be made to the Magistrates' Court,⁹ County Court¹⁰ or Criminal Court,¹¹ although consultation requirements apply before an application can be made to either the Magistrates' Court or County Court.¹² There is also provision for interim ASBOs.¹³ The recipient of an Order must be at least 10 years of age, he must have acted in 'an anti-social

⁶ Of the 4649 ASBOs issued to the end of 2004, only 466 were issued between 1 April 1999 and 30 September 2001, with a further 871 imposed between 1 October 2001 and 30 June 2003 and 3312 between 1 July 2003 and 31 December 2004 (figures taken from the Home Office website).

⁷ These further changes will be made by sections 139-143 of the Serious Organised Crime and Police Act 2005 and section 20 of the Drugs Act 2005, and include greater powers for the Home Secretary to specify relevant authorities for the purposes of applying for an ASBO, provision for interim ASBOs pending imposition of an ASBO upon conviction under s1C, the relaxation of reporting restrictions in proceedings for breach against 10-17 year-olds, special measures for witnesses giving evidence at applications for ASBOs, and the introduction of Intervention Orders for those aged 18 and over receiving an ASBO.

⁸ s1(1A).

⁹ s1(3).

¹⁰ s1B.

¹¹ s1C.

¹² s1E.

¹³ s1D.

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,' and an ASBO must be considered necessary to protect other people from further anti-social acts by him.¹⁴ The prohibitions imposed by the Order must themselves be necessary to protect people from further anti-social acts by the defendant,¹⁵ may cover any defined area within, or indeed the whole of, England and Wales,¹⁶ and must last for a minimum of two years (and may be indefinite).¹⁷ During the initial two years of an Order it may only be discharged with the consent of both parties,¹⁸ thereafter either the applicant or the defendant may apply for the ASBO to be varied or discharged.¹⁹ Breach of the Order without reasonable excuse is a criminal offence punishable by up to five years' imprisonment and/or a fine.²⁰ Proceedings for breach may be brought by either the CPS or, in certain circumstances, by a local authority.²¹

Ever since the publication of *A Quiet Life* there has been strong opposition to the ASBO. As the new remedy made its journey onto the statute book six leading academics (Andrew Ashworth, John Gardner, Rod Morgan, ATH Smith, Andrew von Hirsch, and Martin Wasik – hereafter Ashworth *et al*) wrote a series of three articles in which they condemned the ASBO as

¹⁴ s1(1).

¹⁵ s1(6).

¹⁶ *ibid.*

¹⁷ s1(7).

¹⁸ s1(9).

¹⁹ s1(8).

²⁰ s1(10). Anyone convicted of breaching an ASBO may not be conditionally discharged (s1(11)).

²¹ s1(10A).

'Howardism with a vengeance' and called for it to be abandoned.²² More recently, the Commissioner for Human Rights of the Council for Europe has expressed a number of severe misgivings about the ASBO,²³ and NAPO concluded their analysis of the ASBO's first six years by stating that a fundamental review of the use and appropriateness of the Order is needed.²⁴ An organisation named ASBO Concern has also been set up to campaign for a full public government review of ASBOs and to highlight alternative ways of tackling anti-social behaviour, and has attracted support from organisations ranging from the Institute of Ideas and the Green Party to Mind and the National Autistic Society.²⁵

Notwithstanding this mounting dissatisfaction, the aim of this article is not to argue that we do not need ASBOs.²⁶ The Government regard the remedy as a 'key part'²⁷ of their campaign against anti-social behaviour. This has been endorsed by the Home Affairs Committee, who in their report on anti-social behaviour rejected many of the objections held by critics of the Order – stating that the inappropriate issuing of ASBOs is not a major problem in practice, that where Orders contain widely drafted terms it is relatively straightforward to apply for the Order to be varied, and that the ASBO's combination of civil and criminal law is not unique and is analogous

²² 'Overtaking on the Right' (1995) 145 NLJ 1501, 'Neighbouring on the Oppressive: The Government's "Anti-Social Behaviour Order" Proposals' (1998) 16(1) CJ 7 and 'Clause 1 – The Hybrid Law from Hell?' (1998) 31 CJM 25.

²³ Comm DH (2005) 6, paras 108-120.

²⁴ 'Anti-Social Behaviour Orders – Analysis of the First Six Years' (London: NAPO, 2005).

²⁵ See www.asboconcern.org.uk.

²⁶ Some of the deeper issues raised by the question of whether ASBOs are an appropriate mechanism for implementing criminal justice policy are covered in my article 'Lessons for Analysing Criminal Justice Policy: Learning from Packer's Mistakes' (forthcoming).

²⁷ Home Affairs Committee *Anti-Social Behaviour* HC 80 (2005) vol II, Ev 50.

to an injunction – and welcomed it as ‘an effective tool which gives relief to communities.’²⁸

Given the Home Affairs Committee’s support for the ASBO, coupled with the continued increase in the rate at which Orders are issued,²⁹ this article proceeds on the assumption that ASBOs will continue to feature prominently in the Government’s efforts to tackle anti-social behaviour. Its aim is to argue that, if the ASBO is to remain at the forefront of the campaign against anti-social behaviour, the definition of anti-social behaviour found in s1(1)(a) of the Crime and Disorder Act 1998 should be refined so as to focus the Order upon the sort of case for which it was originally designed.

One of the difficulties in pinning down an exact meaning for anti-social behaviour is that it is an expression which carries different weight according to its context.³⁰ It will be shown that, when New Labour first proposed the creation of the ASBO, they intended that the new remedy would be used against individuals who persistently commit criminal acts in a particular area. The Order was designed to provide a mechanism for imposing a composite sentence, reflecting the aggregate impact of the perpetrator’s behaviour, in circumstances where, if he was successfully prosecuted for any of his criminal acts, the likely penalty would not reflect the overall effect of his behaviour on those living there. However, the imprecision of the term anti-social behaviour allowed a gradual form of mission creep.³¹ Even before the ASBO came into force, the

²⁸ *Anti-Social Behaviour (ibid)* vol I, 72.

²⁹ See n 6 above.

³⁰ See E. Burney *Crime and Banishment: Nuisance and Exclusion in Social Housing* (Winchester; Waterside Press, 1999), particularly 83-94. For other discussion of the phrase anti-social behaviour see A. Millie, J. Jacobson, E. McDonald and M. Hough *Anti-Social Behaviour Strategies: Finding a Balance* (Bristol: The Policy Press, 2005), 1-2, and P. Ramsay ‘What is Anti-Social Behaviour?’ [2004] Crim LR 908.

³¹ The same expression has been used by Roger Smith in relation to the Control Order (‘Rights and Wrongs: A Hasty Measure’ (2005) 102(14) LSG 13).

Government extended the behaviour targeted by the Order to cover both criminal and ‘sub-criminal’ activity within residential neighbourhoods.³² By 2002 things such as begging, prostitution and graffiti had been added to the list of behaviours deemed anti-social, reflecting a wider ‘sanitising agenda.’ Anti-social behaviour was no longer being used simply to connote ‘aggressive or selfish individual behaviour affecting neighbours.’ Rather, it had been ‘adopted ... to describe a diverse mix of environmental and human incivilities that affect neighbourhoods in a more impersonal and generalised way.’³³

This rapid growth in the scope of the ASBO is further illustrated by the creation of the post conviction ASBO. Introduced by the Police Reform Act 2002, the CRASBO (as it has come to be known) raises a number of fundamental questions. Is it properly classified as a civil order, or is it in nature a criminal penalty?³⁴ Is it appropriate to use a CRASBO to increase the penalty for a particular crime, in order to increase the deterrent effect of the prohibition contained in the

³² Home Office *Anti-Social Behaviour Orders – Guidance* (London: Home Office, 1999). For a description of this period, see A. Rutherford ‘An Elephant on the Doorstep: Criminal Policy without Crime in New Labour’s Britain’ in P. Green and A. Rutherford (eds) *Criminal Policy in Transition* (Oxford: Hart Publishing, 2000). ‘Sub-criminal’ is of course a meaningless term – either behaviour violates the criminal law or it does not. It was coined by Alun Michael during the Commons Standing Committee debates on the Crime and Disorder Bill (see HC Standing Committee B col 66 30 April 1998), and was used by him as nothing more than a (confusing and unhelpful) label for the type of behaviour perpetrated by the Finnie brothers and Family X (see main text below). However, it has come to be used to refer to a range of behaviour which, although it does not amount to a criminal offence, is regarded as anti-social.

³³ E. Burney *Making People Behave: Anti-Social Behaviour, Politics and Policy* (Cullompton: Willan Publishing, 2005), 87-92 and 167-168.

³⁴ An issue left open by *C v Sunderland Youth Court* [2003] EWHC Admin 2385.

general law, on the ground that the general sanction has failed to deter the particular offender?³⁵

Is it appropriate to impose a CRASBO which takes effect upon an offender's release from custody?³⁶ And can the maximum sentence of five years' imprisonment for breach of a CRASBO be justified?³⁷ Notwithstanding these concerns, as well as the fact that the use of the ASBO as another sentencing option is 'a far cry from the original vision,'³⁸ the post conviction ASBO has become a popular way of controlling persistent offenders. This is attested by the fact that

³⁵ The prevailing view is that this is an improper use of the ASBO (see *R v Morrison* [2005] EWCA Crim 2237).

³⁶ See *R v P (Shane Tony)* [2004] EWCA Crim 287.

³⁷ According to the principle of double jeopardy – enshrined in Article 4 of Protocol Number 7 to the ECHR (not ratified by the UK) and in Article 14(7) of the ICCPR – an individual may not be punished twice for the same offence. This means that if, as this article argues, the role of the ASBO lies in providing a mechanism for the imposition of composite sentences, the concept of the post conviction ASBO is flawed. For if the sentence imposed for breach of an ASBO should reflect not only the act of breach, but also the course of conduct which gave rise to the Order, and that course of conduct consisted of criminal offences for which the individual has already been convicted and punished, then to impose a composite sentence which reflects the whole of the individual's course of conduct would infringe the principle of double jeopardy. So where an individual has persistently committed criminal offences in a particular area, the imposition of an ASBO and criminal prosecution should be seen as alternatives. Either an ASBO may be applied for or prosecutions may be brought in respect of each of the individual's offences. If an ASBO is imposed and subsequently breached a composite sentence may be imposed on the individual's course of conduct, since he has not already been punished for his earlier offences. If, on the other hand, the individual is convicted and punished, but continues to offend, he may be prosecuted again for his further offences, with the earlier offences operating as an aggravating factor (Criminal Justice Act 2003, s143(2)). Treating the earlier offences as an aggravating factor of the current offence may be distinguished from punishing the individual twice for those earlier offences.

³⁸ E. Burney *Making People Behave: Anti-Social Behaviour, Politics and Policy* (n 33 above), 94.

CRASBOs accounted for 71 per cent of all ASBOs issued between November 2002 and September 2004.

This article begins by outlining the debate over the definition of anti-social behaviour in s1(1)(a). It will be shown that, whilst the concerns of critics of the definition were rooted in a distrust of state power, at the heart of New Labour's approach lay a confidence that enforcement agencies could be entrusted with the wide-ranging discretion conferred by s1(1)(a). The article will then go on to argue that enforcement agencies' use of the ASBO has shown this confidence to have been ill-founded.

In their report on anti-social behaviour the Home Affairs Committee remarked:

It is telling that those who criticised the current definitions of anti-social behaviour did not themselves propose any alternative definitions, whether by reference of a suggested list of behaviours which could properly be considered anti-social or by any other means. This may well demonstrate the difficulty of adopting a different approach from that which forms the basis of the current legislation.³⁹

The final part of the article will accordingly suggest, first, three ways in which s1(1)(a) might helpfully be qualified and, second, that two further clauses should be added to s1(1). It will be argued that, by focussing the ASBO upon the sort of case for which it was designed, these amendments succeed in placing a bar on the use of the ASBO as a heavy-handed instrument of social control, thereby encouraging greater resort to other, more constructive, forms of intervention.

THE DEBATE OVER s1(1)(a)'s DEFINITION OF ANTI-SOCIAL BEHAVIOUR

³⁹ *Anti-Social Behaviour* (n 27 above) vol I, 20.

The claimed benefits of the definition

During the parliamentary passage of the Crime and Disorder Act 1998, New Labour resisted opposition amendments aimed at tightening s1(1)(a)'s definition of anti-social behaviour.⁴⁰ Home Office spokesman Alun Michael insisted that 'The essence of such orders is their flexibility to respond to local needs'⁴¹ and that 'Widely drawn legislation with clarity of purpose, and with clear expectations placed on those who use it, can be a flexible method.'⁴² In their report on anti-social behaviour the Home Affairs Committee agreed, concluding that the flexibility of the definition in s1(1)(a) has proved to have a number of advantages. Practitioners have found the definition simple to use as practical difficulties in applying the legislation have been avoided. The definition has generated a more strategic response to anti-social behaviour as, for instance, local authority anti-social behaviour units have begun to emerge. And s1(1)(a) has allowed the definition of anti-social behaviour to be worked out locally.⁴³

There is also a further justification for the definition in s1(1)(a). In support of their claim that a system failure had prevented anti-social behaviour being tackled effectively, New Labour explained that the criminal law focuses on single events, which means that it is ill-equipped to

⁴⁰ The amendments included inserting the word 'serious,' requiring that the behaviour would have caused harassment, alarm or distress to a person of reasonable firmness, requiring that the defendant intended to cause harassment, alarm or distress and requiring that the behaviour complained of would have amounted to either a crime or a civil wrong.

⁴¹ HC Standing Committee B col 46 30 April 1998.

⁴² *ibid*, col 70.

⁴³ *Anti-Social Behaviour* (n 27 above) vol I, 18-21. On the drawing up of localised definitions of anti-social behaviour, see Home Office Development and Practice Report 26 *Defining and Measuring Anti-Social Behaviour* (London: Home Office, 2004).

deal with a course of conduct where the overall impact of the behaviour is far greater than the sum of its parts:

[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.⁴⁴

The practical importance of this is that, if 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.'⁴⁵ The ASBO mechanism was designed to remedy this. New Labour insisted that breach of an ASBO should be seen as the continuation, in defiance of a court order, of a course of anti-social behaviour. The sentence imposed for breach should therefore reflect the impact of the entire course of conduct.⁴⁶ In order

⁴⁴ *A Quiet Life* (n 1 above), 6.

⁴⁵ Alun Michael (HC Standing Committee B col 48 30 April 1998).

⁴⁶ It was on this basis that New Labour sought to justify the severe maximum sentence for breach of an ASBO. When asked why the maximum penalty for breaching an ASBO was greater than the three year maximum penalty for the offence of affray (Public Order Act 1986, s3), 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' (HC Standing Committee B col 138 5 May 1998). Similarly, during the House of Lords debates on the Crime and Disorder Bill 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

for this mechanism to work, however, it is essential that the definition in s1(1)(a) covers the many diverse forms of anti-social behaviour, since 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. The definition of the behaviour which may give rise to an Order must therefore encompass all potential forms of anti-social behaviour. A flexible definition guarantees this.

Critics' objections to the definition

From when the ASBO was first proposed critics expressed concerns about the vagueness and breadth of the definition and about the degree of discretion which it would confer on enforcement agencies. Its vagueness, they argued, meant that it would infringe the rule of law by '[failing] to give fair warning to citizens of what kind of conduct may trigger these powers.'⁴⁷ Its

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' (HL Deb vol 585 cols 604-605 3 February 1998).

⁴⁷ Ashworth *et al* 'Overtaking on the Right' (n 22 above), 1501. They further argued that the wording of s1(1)(a) would breach Article 7 ECHR unless it was 'tightened up considerably' ('Clause 1 – The Hybrid Law from Hell?' (n 22 above), 26). However, this argument presupposes that proceedings for the imposition of an ASBO are criminal, not civil, in substance (see n 91 below). Plus, in practice a crime has to be very loosely defined indeed to breach Article 7 (see, eg, *R v Rimmington & Goldstein* [2005] UKHL 63, *Kokkinakis v Greece* (1994) 17 EHRR 397 and *Steel v United Kingdom* (1999) 28 EHRR 603; see

breadth, meanwhile, had an austerity which many found disquieting. Ashworth *et al* found the provision ‘unpleasantly reminiscent of powers granted in former East Germany to housing block committees – which also had unrestricted powers to regulate residents’ lives,’⁴⁸ adding that even the scope of the ‘sweeping and highly controversial’ offences created by sections 4A and 5 of the Public Order Act 1986 was not as broad as that of s1(1)(a),⁴⁹ whilst 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.’⁵⁰ The critics’ 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, which, they argued, meant that there were no safeguards within the legislation for those cases in which the victim is oversensitive or bigoted.

The critics were also concerned that the definition in s1(1)(a) amounted to an abdication of legislative responsibility, resulting in a ‘huge transfer to local officials of the power effectively to criminalise conduct.’⁵¹ They 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.’⁵² Others were less optimistic. Lord Dholakia, drawing a parallel with stop and search legislation, cautioned that ‘the clause could be misused ...

further R. White ‘Anti-Social Behaviour Orders Under Section 1 of the Crime and Disorder Act 1998’ (1999) 24 EL Rev HR 55).

⁴⁸ ‘Neighbouring on the Oppressive’ (n 22 above), 9.

⁴⁹ *ibid*, 8.

⁵⁰ HL Deb vol 584 cols 544-545 16 December 1997.

⁵¹ Ashworth *et al* ‘Neighbouring on the Oppressive’ (n 22 above), 9.

⁵² HL Deb vol 584 col 560 16 December 1997.

[T]he authorities could use it to target particular communities,⁵³ a view echoed 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.⁵⁴

New Labour’s response to the critics’ objections

New Labour’s response to these concerns about the definition of anti-social behaviour was threefold. First, they argued that it is unnecessary to define anti-social behaviour any more precisely since, ‘although it is difficult to define, one is certainly able to recognise such behaviour when one sees it.’⁵⁵ Alun Michael claimed that, like an elephant on the doorstep, anti-social behaviour is ‘easier to recognise than to define.’⁵⁶

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.⁵⁷

⁵³ HL Deb vol 585 cols 536-537 3 February 1998.

⁵⁴ ‘Neighbouring on the Oppressive’ (n 22 above), 9 (see also S. Cracknell ‘Anti-Social Behaviour Orders’ (2000) 22(1) JSWFL 108, 112).

⁵⁵ Lord Falconer (HL Deb vol 584 col 595 16 December 1997).

⁵⁶ HC Standing Committee B col 47 30 April 1998.

⁵⁷ HC Standing Committee B col 37 28 April 1998.

Second, New Labour pointed to a filtering process within the legislation which, they believed, would ‘ensure that such orders are not used for trivial behaviour.’⁵⁸ Individuals seeking the imposition of an ASBO must go to one of the enforcement agencies and ask them to apply. New Labour argued that if the person’s complaint is frivolous or vexatious, they are likely to ‘receive a very short answer.’⁵⁹ This is buttressed, first, by the requirement that there be consultation before an application is brought,⁶⁰ and, second, by the guidance published by the Home Office. And 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. New Labour’s confidence in courts hearing applications for ASBOs was reinforced, first, by the requirement that they disregard any act of the defendant which he shows was ‘reasonable in the circumstances,’⁶¹ and, second, by the stipulation that an Order may only be imposed if it is ‘necessary to protect [others] from further anti-social acts by [the defendant].’⁶² And finally, the requirement that an ASBO be imposed for at least two years was designed to indicate, both to the authority applying for an ASBO and to the

⁵⁸ Alun Michael (HC Standing Committee B col 46 30 April 1998).

⁵⁹ Lord Williams (HL Deb vol 585 col 566 3 February 1998).

⁶⁰ Although an application may still be brought if there is no agreement on consultation, the application is likely to be weakened as a result (see Home Office *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (London: Home Office Communication Directorate, 2002), 25-26).

⁶¹ s1(5). Although s1(5)’s effectiveness in filtering out undeserving cases is hampered by the placing of the burden of proof on the defendant.

⁶² s1(1)(b).

court hearing the application, that only conduct serious enough to warrant an Order of that duration should result in an ASBO being imposed.⁶³

The third reason which New Labour gave for rejecting the concerns of the critics was that enforcement agencies and courts can be trusted to exercise the discretion vested in them responsibly, a view captured neatly by the following remark:

My constituents know what anti-social behaviour is ... 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?⁶⁴

The different views of state power

What emerges from this examination of the critics' objections to the definition in s1(1)(a), and New Labour's response to these objections, is that the difference of opinion flows fundamentally from different perspectives on how state power should be viewed. The critics approached the task of defining anti-social behaviour on the footing that state power should be viewed with suspicion. A clear, tightly-drawn definition is essential, they argued, so that individuals can plan their affairs safe in the knowledge that if their actions fall outside the range of clearly proscribed behaviour the State will have no recourse against them. Similarly, 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. In

⁶³ See HC Standing Committee B col 46 30 April 1998 and HL Deb vol 585 col 571 3 February 1998. Whether this is how the two-year minimum duration has operated in practice is open to question – anecdotal evidence suggests that at least some magistrates impose two-year ASBOs in cases where they do not feel an Order of that length is justified, on the basis that they have no power to impose a shorter Order.

⁶⁴ Former Labour MP Helen Clark (née Brinton) (HC Standing Committee B col 69 30 April 1998).

short, clarity and tightness of definition is needed to *protect* those undeserving of an Order from having one imposed on them. At the heart of New Labour's approach, by contrast, is a more benevolent view of state power. Whilst the definition of anti-social behaviour is admittedly broad, any risk of uncertainty is offset by the fact that everyone knows what behaviour is anti-social and so knows how (not) to behave. Plus, in practice ASBOs will only be imposed in deserving cases since those vested with discretion can be relied upon to exercise it responsibly and to operate the filtering process effectively. A clear, tightly-drawn definition to protect the eccentric, the unpopular, and anyone else not engaging in serious anti-social behaviour is thus unnecessary. The state can be *trusted* to exercise their widely-drawn powers against only those individuals who are guilty of serious anti-social behaviour. Moreover, a widely-drawn definition offers a flexible tool which courts and enforcement agencies can be trusted to utilise to ensure the legislation is effective in tackling all forms of anti-social behaviour that require a response.

This benevolent view of state power stands in marked contrast to the rhetoric which surrounded the introduction of the Human Rights Act 1998. At the second reading of the Human Rights Bill in the House of Lords, Lord Williams exclaimed that 'The traditional freedom of the individual under an unwritten constitution to do himself that which is not prohibited by law gives no protection from misuse of power by the state.'⁶⁵ When he introduced the Bill to the Commons, Jack Straw also stressed the importance of human rights legislation and the potential for the state to misuse the power vested in it. Ironically, these comments came at the same time that the Crime and Disorder Bill was passing through the Lords, and less than two months before Straw himself introduced the Crime and Disorder Bill, including the ASBO provisions, to the Commons:

⁶⁵ HL Deb vol 582 col 1228 3 November 1997.

[This Bill will enable] citizens to challenge more easily actions of the state if they fail to match the standards set by the European convention ... Nothing in the Bill will take away the freedoms that our citizens already enjoy. However, those freedoms ... need to be complemented by positive rights that individuals can assert when they believe that they have been treated unfairly by the state, or that the state and its institutions have failed properly to protect them.⁶⁶

Although this discrepancy was pointed out by several commentators,⁶⁷ Home Office policy has continued to be characterised by a benevolent view of state power. Former Home Secretary David Blunkett delivered a number of speeches in which he urged ‘the vital role of good, trusted government in ensuring freedom and security,’⁶⁸ 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.⁶⁹

⁶⁶ HC Deb vol 306 col 767 16 February 1998.

⁶⁷ See, for example, A. Rutherford ‘An Elephant on the Doorstep: Criminal Policy without Crime in New Labour’s Britain’ (n 32 above) and A. Ashworth ‘Social Control and “Anti-Social Behaviour”: The Subversion of Human Rights?’ (2004) 120 LQR 263.

⁶⁸ ‘Security and Justice, Mutuality and Individual Rights,’ Lecture at John Jay College New York, 3 April 2003.

⁶⁹ ‘Renewing Democracy: Why Government Must Invest in Civil Renewal,’ Speech at Ash Institute Boston USA, 8 March 2004.

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 argued. ‘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.’⁷⁰ 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.’⁷¹ As far as civil liberties are concerned, ‘You do not erode the rights of the honest, of the innocent, by increasing the rights of victims and the protection of witnesses.’⁷² After all, he argued, civil liberties are 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.’⁷³

Blunkett’s successor as Home Secretary, Charles Clarke, has demonstrated a similar willingness to entrust the executive with wide-ranging powers. For example, he responded to concerns that the Racial and Religious Hatred Bill (passed by the Commons in July 2005) could be used to prosecute those who vigorously debate matters of religion or who proselytise by pointing to the fact that the police will be issued with guidance notes and that prosecutions may only be brought with the consent of the Attorney-General.⁷⁴ In a similar vein, when the Home Office initially proposed the introduction of a new control order, both derogating and non-

⁷⁰ Speech to Labour Party conference, Blackpool, 7 October 2002.

⁷¹ ‘Security and Justice, Mutuality and Individual Rights’ (n 68 above).

⁷² Speech to Labour Party conference (n 70 above).

⁷³ ‘Defending the Democratic State and Maintaining Liberty – Two Sides of the Same Coin?’ Speech at Harvard Law School Boston USA, 8 March 2004.

⁷⁴ HC Deb vol 435 cols 671, 679 and 683 21 June 2005.

derogating control orders were to be made by the Home Secretary. Conceding that the use of such powers, which could include the house arrest without trial of British citizens, would be ‘a very grave step,’ Clarke stated that ‘a lot of the discussion around this revolves around the extent to which I as Home Secretary, or the Prime Minister, or the Head of the Security Services or the Commissioner of the Metropolitan Police can be trusted with the assessments that we make.’⁷⁵ Although the pressure exerted by Opposition parties ultimately meant that the legislation took a different shape to that originally proposed,⁷⁶ Clarke’s willingness to vest such ‘grave’ powers in the executive was clear. This continued willingness to legislate on the basis that the state can be trusted with wide-ranging powers raises fundamental questions about how the relationship between state and citizen should be conceived, and casts doubt upon the importance which New Labour professedly attach to human rights.

The extravagant version of the rule of law

It is of course possible to take a more cynical view of New Labour’s insistence that enforcement agencies can be trusted to exercise responsibly the discretion which the definition of anti-social behaviour in s1(1)(a) vests in them. On this view such pronouncements are merely a 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 does not rule out the possibility of a benevolent view of state power, which at least one of New Labour’s critics – Baroness Helena Kennedy – seems to consider can be sincerely held. In the third of her series of Hamlyn Lectures Kennedy explained that:

⁷⁵ Interview on BBC Radio 4’s *Today Programme* 27 January 2005.

⁷⁶ See further M. Zander ‘The Prevention of Terrorism Act 2005’ (2005) 155 NLJ 438.

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.⁷⁷

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 extravagant version of the rule of law.’⁷⁸ 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.’⁷⁹ 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.’⁸⁰ As Bradley and Ewing have observed, ‘If it is contrary to the rule of law that discretionary authority should be given to

⁷⁷ *Legal Conundrums in our Brave New World* (London: Sweet & Maxwell, 2004), 41-42.

⁷⁸ *Discretionary Justice: A Preliminary Inquiry* (Urbana: University of Illinois Press, 1971), 28-33.

⁷⁹ This expression derives from Locke’s *Second Treatise of Government* (see M. Loughlin *Sword & Scales: An Examination of the Relationship Between Law & Politics* (Oxford: Hart Publishing, 2000) chapter one at n 29).

⁸⁰ K. Culp Davis (*Discretionary Justice: A Preliminary Inquiry* (n 78 above), 33).

government departments or public officers, then the rule of law applies to no modern constitution.’⁸¹

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. 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.’⁸² However, this approach proceeds on the mistaken assumption that there is a neat dichotomy between rules and discretion. Rules are erroneously contrasted with discretion ‘as if each were the antithesis of the other.’⁸³ 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.⁸⁴

Proponents of the extravagant version of the rule of law also fail to recognise that the exercise of discretion may be beneficial. In areas which are especially complex, discretionary

⁸¹ *Constitutional and Administrative Law* (Harlow: Longman, 13th ed, 2003), 94.

⁸² N. Lacey ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’ in K. Hawkins (ed) *The Uses of Discretion* (Oxford: Clarendon Press, 1992), 372.

⁸³ D. Galligan (*Discretionary Powers* (Oxford: Clarendon Press, 1986), 169).

⁸⁴ ‘The Use of Legal Discretion: Perspectives from Law and Social Science’ in K. Hawkins (ed) *The Uses of Discretion* (n 82 above), 13.

decision-making enables difficult issues to be addressed on a case-by-case basis.⁸⁵ 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.⁸⁶ 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’ in order to determine whether or not any of these concerns apply in a particular context.⁸⁷ This raises the question whether the critics’ concerns about the definition of anti-social behaviour in s1(1)(a) were in fact ill-founded, or whether the use made of the ASBO has shown these concerns to have been justified. To answer this, it is necessary to examine the use of the ASBO to date.

THE USE OF ASBOs TO DATE

The opening words of *A Quiet Life* indicated the intended target of the ASBO:

⁸⁵ See K. Culp Davis *Discretionary Justice: A Preliminary Inquiry* (n 78 above), 106-111, and C.E. Schneider ‘Discretion and Rules: A Lawyer’s View’ in K. Hawkins (ed) *The Uses of Discretion* (n 82 above), 64-65.

⁸⁶ See also L. Gelsthorpe and N. Padfield (eds) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Cullompton: Willan Publishing, 2003), 5-6.

⁸⁷ ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’ (n 82 above), 371.

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*.⁸⁸

Two case studies were employed to illustrate the sort of behaviour contemplated.⁸⁹ The first of these concerned John and David Finnie, aged 29 and 27 respectively, who lived on the Stoke Heath estate in Coventry. They 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 rehousing from tenants in the area, a disproportionate amount of staff time had been spent dealing with complaints from tenants about burglary and intimidation, and a number of council properties had stood vacant for excessively long periods. At the time *A Quiet Life* was published, the Council had obtained an *ex parte* interlocutory injunction under section 222 of the Local Government Act 1972 which prohibited the brothers from entering a one-mile exclusion zone on the estate. This succeeded in giving the inhabitants of the estate some respite. However, at the *ex parte* hearing hearsay evidence had been admissible, so it had not been necessary to identify witnesses in order to obtain the injunction. When the brothers subsequently applied to have the injunction set aside, the Council were forced to withdraw from the action because they had been unable to persuade more victims to come forward.⁹⁰ Coventry's chief housing officer thus concluded, 'The harassment and

⁸⁸ *A Quiet Life* (n 1 above), 1 (emphasis added).

⁸⁹ The two case studies also appear in Home Office *Anti-Social Behaviour Orders – Guidance* (n 32 above), 16-17.

⁹⁰ In subsequent discussions of the episode involving the Finnie brothers, New Labour stated incorrectly that the injunction obtained by Coventry City Council had been quashed by a higher court (eg, Jack Straw

intimidation which we were trying to tackle, is the very issue which prevents us from moving forward.’⁹¹

The second case study concerned Family X from Blackburn. The five members of this family been arrested a total of 54 times for offences including attempted robbery, burglary, theft, criminal damage and public disorder. 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.’⁹² According to *A Quiet Life*, however, ‘each incident of criminal behaviour was dealt with in isolation,’ which meant that the family’s ‘frequent court appearances rarely ended in

(HC Deb vol 310 col 371 8 April 1998) and *Community Safety Order: A Consultation Paper* (London: Home Office, 1997), para 5).

⁹¹ HC Standing Committee G cols 432-433 29 February 1996. In addition to treating chronic courses of conduct as series of acute events, the other major reason which New Labour gave for the perceived ‘system failure’ was witness intimidation. The Finnie brothers case study came to be used to illustrate this. The ASBO mechanism was designed to address the problem of witness intimidation in a number of ways. As well as allowing professional witnesses to give evidence at applications for ASBOs and making breach of an Order an arrestable offence, New Labour purposed that applications for ASBOs be classified as civil in nature so that hearsay evidence could be admitted. This classification was upheld by the House of Lords in *R (McCann & others) v Crown Court at Manchester* [2002] UKHL 39; [2003] 1 AC 787. One of the reasons given by their Lordships was that, if applications for ASBOs were deemed to be criminal in nature so that the hearsay rule applied, ‘it would inevitably follow that the procedure for obtaining anti-social behaviour orders is completely or virtually unworkable and useless’ (*per* Lord Steyn at [18]). For comment on the reasoning in *McCann* see S. Macdonald ‘The Nature of the Anti-Social Behaviour Order – *R (McCann & others) v Crown Court at Manchester*’ (2003) 66(4) MLR 630, C. Bakalis ‘Anti-Social Behaviour Orders – Criminal Penalties or Civil Injunctions?’ [2003] CLJ 583 and A. Ashworth ‘Social Control and “Anti-Social Behaviour”: The Subversion of Human Rights?’ (n 67 above).

⁹² *A Quiet Life* (n 1 above), 4.

much more than a fine, conditional discharge or other non-custodial sentences.⁹³ As explained previously, the ASBO mechanism was designed to remedy this.

Proponents of the definition of anti-social behaviour in s1(1)(a) have argued that its principal benefit is its flexibility. A distinction must be drawn, however, between having the flexibility to invoke the legislation against the variety of forms of anti-social behaviour that might cause a serious level of harassment, alarm or distress and which are so ‘intolerable and outrageous’ as to be properly made the subject of a criminal sanction, and having the licence to invoke the legislation in contexts which are quite different to that for which it was designed. This is important because a person can be caused harassment, alarm or distress in lesser situations which only amount to inconvenience, embarrassment or ‘unneighbourly’ conduct. A wife might be caused harassment, alarm or distress if, keen to impress her new boss, she invites him and his wife for dinner, only for her husband to get drunk, make lewd remarks and belch at the dinner table. At the other extreme to the husband’s behaviour is that of the offender who commits a serious assault, thereby causing harassment, alarm and distress to his victim, to the victim’s friends and family, and to others living in the vicinity of the attack. The ASBO was designed to be a means of tackling nuisance neighbours like the Finnie brothers and Family X, who have made others’ lives a misery by persistently committing criminal acts and have intimidated witnesses into silence. But the breadth of the definition in s1(1)(a) has allowed enforcement agencies the freedom to invoke the ASBO in quite different contexts.

Anecdotal examples of draconian uses of ASBOs are becoming increasingly popular. Many of these examples concern Orders with unnecessarily wide-ranging prohibitions. For example, in addition to the well-publicised ASBO which, *inter alia*, prohibited 87 year-old great-

⁹³ *ibid*, 5.

grandfather Alexander Muat from making sarcastic remarks to his neighbours,⁹⁴ an ASBO has been imposed on a pirate DJ who ran an illegal radio station from the top of a tower block banning him from entering any building more than four storeys tall,⁹⁵ and on a prolific car thief which banned him from entering any car park in England or Wales.⁹⁶ Such Orders are possible because section 1(6) of the Crime and Disorder Act 1998 does not limit a court to prohibiting repetition of the defendant's anti-social behaviour. Rather it permits the imposition of any prohibitions deemed 'necessary for the purpose of protecting persons ... from further anti-social acts by the defendant.' Thus, no distinction is made between the anti-social behaviour perpetrated by the defendant and behaviour which is necessarily prior to his anti-social behaviour. Hence the pirate DJ was banned not just from making illegal broadcasts on the roof of tower blocks, but from entering any building more than four storeys tall – even if his purpose was merely to visit someone who lived there. And the car thief was banned not just from persisting in car crime, but from entering any car park anywhere in the country – even if he was parking in a supermarket car park to go shopping. Orders with widely-drafted prohibitions such as these may be open to challenge under Articles 8, 10 and/or 11 ECHR. For whilst the infringement of the defendant's rights may have the legitimate aims of preventing disorder or crime and protecting the rights and freedoms of others, it is arguable that an ASBO is disproportionate where it goes

⁹⁴ 'Anti-social OAP faces jail' BBC website 22 July 2003,

http://news.bbc.co.uk/2/hi/uk_news/england/merseyside/3087007.stm (last visited 10 October 2005).

⁹⁵ 'Tower blocked: the "anti-social" pirate' *The London Line* 21 April 2005.

⁹⁶ 'Thou shalt not ...' *Teesside Evening Gazette* 4 September 2004. Cf *R v McGrath (Jamie Paul)* [2005] EWCA Crim 353, in which a man who persistently stole from cars parked in railway station car parks challenged the ASBO imposed on him. The Court of Appeal upheld the prohibition on entering railway station car parks in Hertfordshire, Bedfordshire or Buckinghamshire, but quashed the ban on entering any other car park in Hertfordshire, Bedfordshire or Buckinghamshire, describing it as 'unjustifiably draconian.'

beyond merely prohibiting the defendant's anti-social behaviour and imposes restrictions on prior forms of behaviour which are not themselves anti-social.⁹⁷

However, other draconian uses of ASBOs stem not from the wide-ranging discretion which s1(6) vests in magistrates drafting the terms of Orders, but from the freedom which s1(1)(a) confers on enforcement agencies to invoke the legislation in a wide range of different contexts. For example, Mitch Hawkin was threatened with an ASBO for publishing on a website a spoof advert for the job of Pope following the death of John Paul II.⁹⁸ Taxi drivers in North Wales have been told that if they beep their horn as they pick up customers they may face an ASBO.⁹⁹ A report prepared for the Scottish Executive has proposed the use of ASBOs against people caught feeding gulls in Scottish towns and cities.¹⁰⁰ Farmer Brian Hagan was issued with

⁹⁷ Where an ASBO contains vaguely worded prohibitions it might also be argued that the infringement of the defendant's Article 8 right is not in accordance with the law (or prescribed by law in the case of Articles 10 and 11). However, the Strasbourg Court has been generous in its interpretation of this requirement. See *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49, and *Steel v United Kingdom* (1999) 28 EHRR 603, paras 54-55. Cf *Hashman & Harrup v United Kingdom* (2000) 30 EHRR 241, paras 29-41.

⁹⁸ 'Asbo call over jokes about the Pope' *The Guardian* 9 April 2005. Similarly, an ASBO was imposed on pub landlord Leroy Trought after he named the pub's car park 'The Porking Yard,' a pun designed to commemorate the area's long-history of pork butchers. Avon and Somerset Police applied for the Order on the basis that the sign was offensive to the large Somali Muslim population who attended the learning centre opposite the pub ('Car park sign Asbo "a joke" says pub landlord' *The Scotsman* 22 March 2005, 'A law for the vindictive' *The Guardian* 27 March 2005).

⁹⁹ 'Asbo threat over cabbies' horns' BBC website 25 March 2005, http://news.bbc.co.uk/2/hi/uk_news/wales/4382739.stm (last visited 10 October 2005).

¹⁰⁰ 'Feeding gulls may earn you an ASBO' *The Scotsman* 30 March 2005. Fife council applied for an ASBO against Jean Smith, aged 60, to prohibit her from feeding birds in her garden after her next-door neighbours complained that the crumbs attracted noisy seagulls and crows which dirtied the cars in the

an ASBO which prohibited him from letting his pigs and geese escape.¹⁰¹ And a 13 year-old autistic boy was served with an ASBO after neighbours complained about the noise the boy was making when jumping on his trampoline – notwithstanding the fact that the local authority were aware he had autism and that trampolining has been found to be therapeutic for people with autism.¹⁰² All of these situations are far removed from the Finnie brothers and Family X type scenarios for which the Order was designed. So too is the ASBO which banned Kim Sutton, a 23 year-old woman from Odd Down, from jumping into rivers, canals or onto railway lines after she had attempted suicide on four occasions.¹⁰³ At her appeal against the Order, Sutton’s counsel not

street (‘Crumbs! Jean hit with an ASBO for feeding the birds’ *Sunday Mail* 24 April 2005). The Council dropped the application after Smith agreed not to feed birds in her garden and only to feed birds at other places during specified hours (‘Bird woman agrees deal to avoid ASBO action’ *Evening Telegraph and Post* 2 June 2005).

¹⁰¹ ‘Pigs that fly the coop land owner with Asbo’ *The Guardian* 14 December 2004. The pigs escaped again within hours of the interim ASBO being imposed, after which Hagan was charged with breaching the Order. The CPS subsequently discontinued proceedings for breach, after which the police chose not to continue with the application for a full ASBO (‘Pig farmer’s Asbo request dropped’ BBC website 31 January 2005, <http://news.bbc.co.uk/1/hi/england/norfolk/4218823.stm> (last visited 10 October 2005)). The use of ASBOs has also been threatened against shepherds who fail to control their sheep (‘Unruly sheep face nuisance bans’ BBC website 13 July 2004, <http://news.bbc.co.uk/1/hi/uk/3889009.stm> (last visited 10 October 2005)), and against the owner of a pet sheep which was (wrongly) accused of eating flowers from a grave (‘Asbowatch V: War on a G-string’ BBC website 15 March 2005, <http://news.bbc.co.uk/1/hi/magazine/4319653.stm> (last visited 10 October 2005)).

¹⁰² Supplementary written evidence from National Autistic Society Scotland to Scottish Parliament Communities Committee *Stage 1 Report on Antisocial Behaviour etc (Scotland) Bill* (1st Report 2004) volume 2.

¹⁰³ ‘Suicide woman banned from rivers’ BBC website 25 February 2005, <http://news.bbc.co.uk/1/hi/england/somerset/4297695.stm> (last visited 10 October 2005) and ‘ASBO on

only argued that her personality disorder meant that she needed help and that legal sanctions could in fact be counter-productive, but also that the effect of the ASBO was to criminalise suicide and attempted suicide, which are not criminal offences.¹⁰⁴ The effect of the Order was thus to create what one commentary on the Crime and Disorder Act described as ‘a form of personalised criminal law.’¹⁰⁵ Proponents of the ASBO have responded to such uses of the Order by arguing that examples such as these are exceptional.¹⁰⁶ Even if this is true – and the list of outlandish uses of ASBOs does appear to be growing ever longer – the fact remains that the effect of the definition of anti-social behaviour in s1(1)(a) is to confer on enforcement agencies the power to apply for, and obtain, ASBOs in these sorts of situations.¹⁰⁷ As we have seen, when the critics expressed concern that this would happen, New Labour responded by reassuring them that in practice ASBOs would be used appropriately. Experience has shown that this is not always the case.

The use of ASBOs in three other contexts – against young people, prostitutes and beggars – has also given cause for concern.¹⁰⁸ From June 2000 (when age breakdowns first became

“suicide” woman upheld’ BBC website 29 April 2005,

<http://news.bbc.co.uk/1/hi/england/somerset/4499797.stm> (last visited 10 October 2005). See also ‘Suicide bid woman’s ban upheld’ *Bath Chronicle* 30 April 2005.

¹⁰⁴ Suicide Act 1961, s1.

¹⁰⁵ R. Leng, R. Taylor and M. Wasik *Blackstone’s Guide to the Crime and Disorder Act 1998* (London: Blackstone, 1998), 13.

¹⁰⁶ Home Affairs Committee *Anti-Social Behaviour* (n 27 above) vol I, 73.

¹⁰⁷ Tellingly, 3826 ASBOs were imposed nationwide to the end of September 2004, whilst only 43 applications for Orders were refused (Home Office website).

¹⁰⁸ There has also been a tendency to use ASBOs to restrict public protest. However, this trend may now be curbed by district judge Roy Anderson’s refusal to impose an Order on peaceful protestor Lindis Percy. He commented, ‘I am firmly of the view courts ought not to allow anti-social behaviour orders to be used as a

available) to the end of 2003, 991 of the 1892 ASBOs issued (52 per cent) were imposed on 10-17 year-olds,¹⁰⁹ even though it was originally intended that ASBOs would not be routinely used against those aged under 18.¹¹⁰ The constraints of space mean that the use of ASBOs against this age group cannot be explored in detail here.¹¹¹ Suffice it to say that it is not merely the fact that the Government performed a U-turn, revising its guidance after the Crime and Disorder Bill received Royal Assent,¹¹² which is of concern. The civil classification of applications for ASBOs means, *inter alia*, that applications are heard in the adults' magistrates' court instead of the youth court and that the presumption in favour of anonymity is reversed.¹¹³ The Youth Justice Board have also expressed concern that the ASBO process is seen by some 'as a way of "fast-tracking" problem young people into custody.'¹¹⁴ The routine invocation of the ASBO against those aged under 18 thus threatens to undermine fundamental principles of juvenile justice.

club to beat down the expression of legitimate comment and the dissemination of views of matters of public concern' ('No Asbo for protest grandmother' BBC website 17 May 2005, <http://news.bbc.co.uk/1/hi/england/humber/4555131.stm> (last visited 10 October 2005)).

¹⁰⁹ Home Office website.

¹¹⁰ See, eg, Home Office *Draft Guidance Document: Anti-Social Behaviour Orders* (London: Home Office, 1998), para 3.5.

¹¹¹ Work is already underway on an article which examines this topic in detail.

¹¹² Compare the draft guidance (n 110 above) with the guidance published the month before ASBOs became available (*Anti-Social Behaviour Orders – Guidance* (n 32 above), para 2.1).

¹¹³ See *R (on the application of T) v St Albans Crown Court* [2002] EWHC Admin 1129 and *R (on the application of Stanley, Marshall and Kelly) v Metropolitan Police Commissioner* [2004] EWHC Admin 2229.

¹¹⁴ Supplementary memorandum submitted by the Youth Justice Board to the Homes Affairs Committee inquiry (*Anti-Social Behaviour* (n 27 above) vol III, Ev 217).

Following Campbell's Home Office Research Study – which found that, out of a sample of ninety-five cases, in five per cent the behaviour which led to an ASBO was prostitution¹¹⁵ – the Home Office added prostitution to the list of behaviours which might give rise to an Order in its guidance published in November 2002.¹¹⁶ ASBOs which prohibit prostitutes from soliciting, or which exclude them from a specified area altogether, are designed to act as a powerful deterrent. But while an ASBO may provide some temporary respite for locals, Jones and Sager note that 'what research there is indicates that exclusion will not deter street prostitution but simply relocate or bury the problem.' They go on to say that 'Crucially, both displacement and concealment may pre-empt any possibility of "rehabilitation" by placing the women out of reach of assistance from health and welfare agencies that the Crime and Disorder Act ostensibly seeks to facilitate.'¹¹⁷ Furthermore, it is likely that many prostitutes will breach any ASBO imposed on them, for reasons such as drug dependency, poverty and pressure from pimps.¹¹⁸ And where an Order is breached, custody is likely to follow. Indeed, there are already numerous examples of

¹¹⁵ S. Campbell *A Review of Anti-Social Behaviour Orders* Home Office Research Study 236 (London: Home Office Research, Development and Statistics Directorate, 2002), 13.

¹¹⁶ *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (n 60 above), 8. Significantly, in *Chief Constable of Lancashire v Potter* [2003] EWHC Admin 2272 it was held that, even if a prostitute's behaviour was not itself sufficient to cause harassment alarm or distress to those living in the vicinity, she could nonetheless be issued with an ASBO if her behaviour contributed to the red light character of the neighbourhood, which did have this effect.

¹¹⁷ 'Crime and Disorder Act 1998: Prostitution and the Anti-Social Behaviour Order' [2001] Crim LR 873, 881.

¹¹⁸ Interestingly, in M. Hester and N. Westmarland *Tackling Street Prostitution: Towards an Holistic Approach* Home Office Research Study 279 (London: Home Office Research, Development and Statistics Directorate, 2004), 34, only three out of the ten prostitutes interviewed felt that an ASBO would stop them working or make them work elsewhere.

prostitutes who have been sentenced to periods of imprisonment for breaching an ASBO.¹¹⁹ Resorting to the use of custodial sentences against prostitutes undermines section 71 of the Criminal Justice Act 1982, which abolished the use of imprisonment for ‘common prostitutes’ found guilty of loitering or soliciting in a street or public place for the purpose of prostitution (section 1(1) of the Street Offences Act 1959). Jones and Sager thus warn that ‘we may find the Crime and Disorder Act returns the street prostitute to an era of crime control castigated in parliament as iniquitous and causing unacceptable hardship.’¹²⁰ What is more, the decision to return to this era was not made by Parliament acting in its legislative capacity, but by enforcement agencies exercising their discretion to use the ASBO in a context for which the Order was not intended.

Much of this applies equally to the use of ASBOs against beggars. There are now many examples of Orders banning individuals not just from aggressive begging, but also non-aggressive begging.¹²¹ Crisis have doubted the effectiveness of using enforcement measures such as ASBOs and fines to tackle begging, stating that ‘Bans from public spaces often simply displace the problem of begging, moving it from one area of the city to another and homeless people are ill placed to pay fines. In both instances there is a danger that the problems facing vulnerable homeless people are exacerbated.’¹²² More fundamentally, they argue that ‘Although the act of begging may be deemed anti-social, it is a problem that is best understood and dealt with as a

¹¹⁹ Even in 2001 Jones and Sager were able to write that they knew of fourteen prostitutes who had been imprisoned for breach of an ASBO (‘Crime and Disorder Act 1998: Prostitution and the Anti-Social Behaviour Order’ (n 117 above), 873-874).

¹²⁰ *ibid*, 882.

¹²¹ For examples see <http://www.statewatch.org/asbo/ASBOwatch.html>.

¹²² Memorandum submitted to the Home Affairs Committee inquiry (*Anti-Social Behaviour* (n 27 above) vol II, Ev 38).

manifestation of social exclusion.’¹²³ Indeed, the use of ASBOs against prostitutes and beggars led NAPO to state that ‘the original purpose of the ASBO has been abused in some areas. In many incidents, individuals are receiving a custodial sentence where the original offence was not itself imprisonable ... The ASBO is clearly, therefore, moving offenders up tariff and resulting in the inappropriate use of custody.’¹²⁴

Although the discussion hitherto has focussed on the use of the ASBO in contexts for which it was not designed, critics of s1(1)(a) were equally concerned at the discretion vested in enforcement agencies dealing with cases involving neighbours. It is important to recognise that, although in many such cases the attribution of blame may be straightforward, this is not always the case. 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 ‘So 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.’¹²⁵ The ASBO imposed on 87 year-old Alexander Muat,¹²⁶ for example, followed an eight year dispute with his neighbours. In fact, part of the behaviour which gave rise to the Order was Muat’s use of CCTV cameras to

¹²³ *ibid*, Ev 37.

¹²⁴ ‘Anti-Social Behaviour Orders – Analysis of the First Six Years’ (n 24 above).

¹²⁵ ‘When Home’s A Prison’ *The Guardian Weekend* 24 July 2004.

¹²⁶ n 94 above. See also the interim ASBO which, *inter alia*, forbade 27 year-old Caroline Shepherd from being seen in her garden, at her window or at her front door ‘wearing only her undergarments.’ Shepherd claimed that she was the victim of a witch hunt (her neighbours had compiled a dossier to substantiate their claims that she had deliberately set out to provoke them by dressing provocatively), stating that, although she had done gardening in a bikini, it was because of the hot weather, and saying that the claim that she answered her front door to a paperboy wearing only her underwear ‘just isn’t true’ (‘Woman to fight underwear Asbo’ *The Sunday Times – Scotland* 6 March 2005).

film his neighbours, notwithstanding the fact that he had installed the cameras to prove his claims that his neighbours had vandalised his property and that Muat had showed the court a video of his flowerbeds being trampled by his neighbour. Significantly, the Restorative Justice Consortium have reported that 'It is the common experience of community mediation services ... that the party who reports a dispute has sometimes contributed to it, whether by anti-social behaviour of their own or by the manner in which they approached the other party.' They accordingly recommend greater use of mediation, saying that it 'can often defuse the tension and promote better understanding between the parties and an appreciation of underlying personal difficulties ... Impressively, an agreement can be reached in eight or nine cases out of ten when the parties agree to meet.'¹²⁷ More constructive interventions of this kind may be precluded by resorting to the ASBO too readily.

The danger that ASBOs may be resorted to too readily is exacerbated by the fact that decisions to apply for an ASBO are made against the background of Home Office pressure to utilise the Order¹²⁸ as well as substantial pressure from victims, the wider community and the media to deal with notorious perpetrators of anti-social behaviour. In the case of the Morris triplets – nicknamed the 'terror triplets' by the tabloids – one source close to the case described the 13 year-olds as 'victims of politics.' The triplets all suffered from Attention Deficit Hyperactivity Disorder (ADHD), whilst two of them were epileptic and the third suffered from a speech impediment. Tellingly, the YOT report on the triplets stated that 'Until recently support has been episodic rather than consistent ... [There is] no evidence that there has ever been a

¹²⁷ Memorandum submitted to the Home Affairs Committee inquiry *Anti-Social Behaviour* (n 27 above) vol II, Ev 122.

¹²⁸ The rate at which ASBOs are imposed is still far short of the initial forecast of 5000 per year (Jack Straw HC Written Answers vol 305 col 138 27 January 1998).

multi-agency plan for this family.’¹²⁹ Similar to this case is the one of Aneeze Williamson. An illiterate 11 year-old, who was excluded from school at the age of seven, Aneeze’s father left when he was six weeks old. After the ASBO was imposed Aneeze’s mother, who herself suffered from alcohol problems, urged ‘he needs help, the right sort of help ... and I need help with him.’ Journalist Bob Graham, who spent three days with the family, agreed, concluding, ‘It was obvious that there was a compelling need for help.’¹³⁰ A similar case involving an adult is that of 44 year-old Jennifer Ford, who received an interim ASBO after being accused of intimidating behaviour towards elderly neighbours in her council accommodation. Ford, an alcoholic with mental health problems, subsequently breached the terms of the interim ASBO by consuming alcohol in the city centre and was imprisoned for four weeks. Liberty spokesman Doug Jewell lamented, ‘In this case, an ASBO was simply not an appropriate way to deal with what is a serious issue. Whether Ms Ford has mental problems or not, she is clearly an alcoholic, whose problems need to be dealt with constructively to prevent the whole scenario occurring again.’¹³¹

¹²⁹ ‘They’re called the terror triplets, but behind the headlines is another story’ *The Guardian* 27 March 2002.

¹³⁰ ‘Confined and hated: 72 hours with Britain’s youngest social outcast’ *The Times* 13 October 2004. See also the cases of Kyle Major (‘Teenager brought terror to families’ *The Star (Sheffield)* 15 January 2005), Benny Griffiths (‘Mother slams anti-social orders’ BBC website 25 June 2002, <http://news.bbc.co.uk/1/hi/wales/2065013.stm> (last visited 10 October 2005)) and Ben Norris (‘Teenager jailed for ASBO breach’ *Reading Evening Post* 16 November 2004).

¹³¹ ‘Alcoholic jailed for ASBO breach’ Cherwell online 25 February 2005, http://www.cherwell.org/show_article.php?id=2756 (last visited 10 October 2005). Once the new s1G comes into force it is possible that a defendant like Ms Ford will be issued with an Intervention Order, to tackle the factors underlying her behaviour, alongside an ASBO (much will depend on how the Secretary of

This examination of the use made of ASBOs reveals that New Labour's confidence that enforcement agencies could be entrusted with the wide-ranging discretion conferred by s1(1)(a) was ill-founded. As well as employing the ASBO as a heavy-handed instrument for social control in contexts where the use of a potentially onerous Order, backed up by the threat of five years' imprisonment, is not appropriate, enforcement agencies have displayed an inclination to apply for ASBOs in neighbour disputes when other forms of intervention would have been more constructive. The question which arises is whether there is a way of amending the definition in s1(1)(a) which would limit the discretion conferred on enforcement agencies, thereby safeguarding against the inappropriate use of ASBOs, whilst at the same time preserving the flexibility to invoke the Order against all the potential forms of anti-social behaviour which might occur in the Finnie brothers and Family X type scenarios. Contrary to the suggestion of the Home Affairs Committee, the final section of this article will argue that this is possible.

REFINING THE s1(1)(a) DEFINITION OF 'ANTI-SOCIAL BEHAVIOUR'

When approaching the task of defining anti-social behaviour a fundamental distinction must be drawn between tightness and clarity of definition. A vaguely worded definition can be tightly-drawn, just as a clearly worded definition can be extremely broad. Suppose, for example, that after an unusually dry Winter a state legislature is considering how to preserve the nation's sparse water supply. One proposal, a ban on the use of hosepipes, is extremely clearly worded and is also narrowly drawn, focusing as it does on just one form of water usage which might lead to waste. By contrast, a proposal to limit citizens to just fifteen litres of water per day, although equally clear, is far broader, restricting all forms of water usage. Indeed it is probably over-

State exercises his discretion under s1G(1)(b)). There is a danger, however, that this will merely result in the ASBO being resorted to more readily.

inclusive, encompassing not just culpable individuals who wastefully use too much water, but also many blameless people who exceed their quota for reasons of genuine need. An offence of ‘the deliberate use of an excessive amount of water’ would be much narrower than a blanket 15 litre quota, but is much less precise (what is an excessive amount of water?). Indeed, since much water wastage is careless, not deliberate, it is probably too tightly drawn. A strict liability offence of ‘water wastage’ would be much broader. But it too is vague (what amounts to water wastage?).

This section will show that, when rejecting various amendments which would have narrowed the scope of s1(1)(a),¹³² New Labour erroneously conflated tightness and clarity of definition. It will be argued that the ASBO was designed to apply to serious, persistent, culpable misconduct, and so the definition of anti-social behaviour in s1(1)(a) should be qualified accordingly in order to tighten its scope. It will then be argued that greater certainty could be engendered by adding a further two clauses to s1(1) aimed at communicating the original spirit and purpose of the ASBO. These changes, it will be argued, will not result in inflexibility.

Tightening the definition of anti-social behaviour

The boundaries of s1(1)(a) stretch far beyond the range of behaviour that the ASBO was designed to combat. First, the ASBO was targeted at perpetrators of behaviour who were culpable. The remedy was designed ‘for communities that are ground down by the chronic bullying and harassment by a *selfish* minority.’¹³³ The Home Office guidance published in 2002, for example, states that anti-social behaviour covers ‘a whole complex of thoughtless,

¹³² See n 40 above.

¹³³ Jack Straw (HC Deb vol 310 col 373 8 April 1998 emphasis added).

inconsiderate or malicious activity.¹³⁴ 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 therefore seem apposite. Second, the Order was aimed at individuals who persistently engage in anti-social behaviour:

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.¹³⁵

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 seriousness of ‘a pattern of behaviour that is damaging people’s lives over a considerable period of time.’¹³⁶ Yet, as Andrew Ashworth remarked, ‘Does [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.’¹³⁷ And third, the ASBO targets serious misconduct. New Labour hoped that the remedy would ‘make it clear to offenders that persistent, serious anti-social behaviour will not be tolerated.’¹³⁸ This is underlined by the two case studies found in *A Quiet Life*. Both the members of Family X and the Finnie brothers were responsible ‘for serious anti-social behaviour.’¹³⁹ Yet despite being targeted

¹³⁴ *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (n 60 above), 3.

¹³⁵ Home Office *Anti-Social Behaviour Orders – Guidance* (n 32 above), para 3.10 (emphasis original).

¹³⁶ Alun Michael (HC Standing Committee B col 138 5 May 1998).

¹³⁷ (1999) 55(8) Mag 237.

¹³⁸ Jack Straw *Anti-Social Behaviour Orders – Guidance* (n 32 above), 2.

¹³⁹ *ibid*, 16.

at perpetrators of this kind of behaviour – behaviour which ‘ruin[s] the lives of individuals, families or communities’¹⁴⁰ – s1(1)(a) does not state that the conduct giving rise to the Order must have been of a serious nature.

When amendments that would have added a *mens rea* requirement and a requirement that the anti-social behaviour was serious were suggested during the parliamentary debates on the Crime and Disorder Bill,¹⁴¹ New Labour rejected them on the basis that a tighter definition could prove too rigid and inflexible. This reasoning is flawed, because it fails to distinguish between tightness of definition and clarity of definition. The flexibility of s1(1)(a) stems from the elasticity of the definition of anti-social behaviour as behaviour which caused/was likely to cause harassment, alarm or distress. But even if s1(1)(a) were amended, so as to require that the anti-social behaviour was serious and persistent and that the perpetrator was culpable, the core definition of anti-social behaviour as behaviour which caused/was likely to cause harassment, alarm or distress would remain intact. Qualifying the definition in the way suggested¹⁴² would thus not prevent the invocation of the ASBO against all potential forms of anti-social behaviour in the Finnie brothers and Family X type scenarios.

Clarifying the definition of anti-social behaviour

¹⁴⁰ Alun Michael (HC Standing Committee B col 47 30 April 1998).

¹⁴¹ No amendment to insert the word ‘persistent’ was suggested. Note too that the addition of a requirement that the reasonable person would have been caused harassment/alarm/distress is not being suggested here since the other amendments being proposed render it unnecessary.

¹⁴² A further respect in which s1(1)(a) should be tightened is to restrict the availability of the ASBO to those aged 18 and over. This is not to reject the use of an ASBO-like provision against under-18s outright. Rather it is to force careful consideration of how a remedy designed specifically for adults should be tailored for use against young people. See main text at 000.

Whilst the addition of requirements that the anti-social behaviour was persistent and serious and that the perpetrator was culpable would narrow the scope of s1(1)(a), the basic definition of anti-social behaviour as behaviour which caused/was likely to cause harassment, alarm or distress would remain just as imprecise as before. It might even be argued that adding nebulous concepts such as seriousness and persistence to s1(1)(a) would render it even less certain. Given that critics have expressed severe misgivings about the vagueness of the definition of anti-social behaviour in s1(1)(a), it might therefore seem surprising that no clearer formulations have been put forward as alternatives.¹⁴³ The reason, it is suggested, is the nature of the behaviour being defined. As the case studies from *A Quiet Life* illustrate, the behaviour giving rise to an Order might include burglary, robbery, theft, criminal damage, harassment, intimidation, public disorder, threatening behaviour, noise nuisance, racial abuse, vehicle crime, and assault. The reasons for wanting to ensure that these many forms of behaviour may form part of the course of conduct that can give rise to an ASBO have already been outlined. However, 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 and lucid, 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.¹⁴⁴ In short, some degree of vagueness is unavoidable when seeking to define an umbrella term like anti-social behaviour.

¹⁴³ In addition to the various amendments already mentioned, Roger Smith, Director of JUSTICE, has proposed removing the words 'or was likely to cause' from s1(1)(a) (Home Affairs Committee *Anti-Social Behaviour* (n 27 above) vol III, Qu 298). Whilst this would remove one nebulous concept, the imprecision of the core definition would still remain.

¹⁴⁴ For general discussion of the idea that, armed with the 'correct' definition, membership of a category can straightforwardly be determined see A. Halpin *Definition in the Criminal Law* (Oxford: Hart Publishing, 2004).

Although it is problematic, the rules/discretion dichotomy underlies the critics' 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 is 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).¹⁴⁵ The addition of two new clauses to s1(1), aimed at expounding and explicating the principles underlying the ASBO, is accordingly proposed here. This suggestion is 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.

The first of these clauses would set out three conditions which must be satisfied for an ASBO to be imposed. These conditions identify the key features of the Finnie brothers and Family X case studies – namely, that the persistent anti-social acts took place in the same area so that the same people were repeatedly affected, that the anti-social acts amounted to criminal offences of a certain level of seriousness, and that a composite sentence was deemed to be necessary to adequately reflect the aggregate impact of the behaviour. Whilst such a provision may not elucidate the legal definition of anti-social behaviour any further, Braithwaite's study of

¹⁴⁵ See J. Braithwaite 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 AJLP 47. The hearsay rule is a good example, not only of a rule which has failed to engender certainty (whilst some courts have applied the rule with full vigour others have resorted to 'hearsay fiddles'), but also of an area where a more discretionary approach might promote greater certainty (see A. Choo *Hearsay and Confrontation in Criminal Trials* (Oxford: Clarendon Press, 1996). Cf Law Commission Report 245 *Evidence in Criminal Proceedings: Hearsay and Related Topics* Cm 3670 (1997), particularly 69-80). For comment on the new hearsay regime under the Criminal Justice Act 2003, including the likely importance of the safety valve provision, see D. Birch 'Criminal Justice Act 2003: (4) Hearsay - Same Old Story, Same Old Song?' [2004] Crim LR 556.

nursing homes in Australia and the US suggests that it might nevertheless engender certainty. For even though regulation of nursing homes in the US was by way of a multiplicity of specific ‘standards’ – more than a thousand in most US 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 US 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.¹⁴⁶ Similarly, a provision which expounds the key features of the type of situation for which the ASBO was designed, and identifies these as necessary prerequisites for the imposition of an Order, would harbour consideration of whether a given case is the sort of one for which the ASBO was intended.¹⁴⁷

The conditions laid down by this clause would then be further explicated by the use of a series of illustrative examples. As Kenneth Culp Davis has pointed out, ‘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.’¹⁴⁸ 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. Taking these case studies, and some of the uses which have been made of the ASBO to date, it is possible

¹⁴⁶ ‘Rules and Principles: A Theory of Legal Certainty’ (*ibid*), 60-65.

¹⁴⁷ It might be argued that such a provision would implicitly communicate the fact that the misconduct must have been serious and persistent, and so qualifying s1(1)(a) by adding requirements that the anti-social behaviour was serious and persistent would be rendered unnecessary. It is suggested, however, that qualifying s1(1)(a) in the way proposed would nonetheless be helpful for it would aid the interpretation and application of the proposed new clauses.

¹⁴⁸ *Discretionary Justice: A Preliminary Inquiry* (n 78 above), 60.

to compile a number of examples which indicate, for example, which crimes are/are not of a sufficient degree of seriousness for the imposition of an ASBO and when a composite sentence may/may not be regarded as necessary. In so doing they illustrate how the preconditions set out in the previous paragraph should be applied.¹⁴⁹

The explication of the thinking behind the ASBO would be reinforced by the second proposed new clause. Rather than attempting to advance a more precise definition of anti-social behaviour Ashworth *et al* argued that ‘reasonable effort could be made to specify the generic types of misconduct being addressed.’¹⁵⁰ Since anti-social behaviour is an umbrella term this suggestion would seem sensible, provided that the list is construed as indicative, not exhaustive. Any attempt to devise an exhaustive list would risk excluding unforeseen types of anti-social behaviour, which would then create 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.¹⁵¹ 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). It would also give citizens a clear indication of some of the forms that the proscribed behaviour could take, and, by revealing something of the thinking behind the provision, would help citizens decide whether other forms of misconduct fall within the scope of s1(1)(a). Furthermore, although the Home Affairs Committee rejected the

¹⁴⁹ For another example of such an approach being employed, see appendix B of Law Commission Report 177 *A Criminal Code for England and Wales* HC 299 (1989).

¹⁵⁰ ‘Neighbouring on the Oppressive’ (n 22 above), 13.

¹⁵¹ A good example is section 1 of the Wild Mammals (Protection) Act 1996, which 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? See also J. Braithwaite ‘Rules and Principles: A Theory of Legal Certainty’ (n 145 above), 56-57.

notion that a list of behaviours which are anti-social could be drawn up as ‘unworkable and anomalous,’ this conclusion was based on the assumption that the list would be exhaustive.¹⁵² Their concern that ‘different organisations and individuals would doubtless disagree about what behaviours should be included’ would thus not apply, since the non-inclusion of a particular form of behaviour would not necessarily place it outside the range of behaviour that could give rise to an ASBO. And the concern that ‘a list-based approach would be unable to take account of the context, or the frequency, of the behaviour’ would also not apply; a court deciding whether a course of anti-social behaviour was persistent and serious, in line with the suggested qualifications to s1(1)(a) advanced above, would have to consider both the context and the frequency of the behaviour.

The cumulative effect of the amendments proposed in this article would be to focus the ASBO on the sort of case for which it was designed. Many of the outlandish uses of the ASBO detailed previously would have been precluded had s1(1)(a) been qualified to require that the behaviour was persistent, that it caused a serious level of harassment, alarm or distress, and that the perpetrator was culpable. This would be bolstered by the addition of the clauses expounding and explicating the principles underlying the ASBO. While, for example, Kim Sutton’s repeated suicide attempts may have caused serious harassment to the emergency services, since attempted suicide is not a criminal offence she cannot be said to have repeatedly committed criminal offences. Similarly, a prostitute who has, on numerous occasions, loitered and solicited in a particular area for the purpose of prostitution cannot be said to have repeatedly committed crimes of a sufficient degree of seriousness for the imposition of an ASBO since the offence she has repeatedly committed is non-imprisonable.¹⁵³ And if a herd of pigs escape from their enclosure

¹⁵² Home Affairs Committee *Anti-Social Behaviour* (n 27 above) vol I, 20.

¹⁵³ The fact that an individual has repeatedly committed the same offence does not make the offence itself more serious. See A. von Hirsch ‘Desert and Previous Convictions in Sentencing’ (1981) 65 *Minn L Rev*

on several occasions, causing hundreds of pounds worth of damage to the property of neighbouring landowners, it is hard to see why the farmer who failed to properly fence them in is worthy of a composite criminal sentence as opposed to a straightforward prosecution for reckless criminal damage. A new clause which lays down preconditions for the use of the ASBO, based on the thinking behind the Order, and which then uses examples such as these to clearly illustrate how the preconditions should be applied, would thus help limit the availability of the ASBO to the sort of case for which it was originally designed whilst simultaneously preserving the flexibility of the core definition of anti-social behaviour as behaviour that caused/was likely to cause harassment, alarm or distress. Moreover, by rendering the ASBO unavailable in many situations where it has hitherto been resorted to, the amendments proposed in this article would encourage greater use of other, more constructive, forms of intervention in cases such as those involving long-running neighbour disputes and individuals suffering from mental health (or other underlying) problems.

CONCLUSION

This article has argued that the use of the ASBO to date has shown that New Labour's willingness to entrust enforcement agencies with the wide-ranging discretion conferred by s1(1)(a) was mistaken. Furthermore, their refusal to accept amendments which would have narrowed s1(1)(a)'s scope, on the basis that this would result in inflexibility, erroneously conflated tightness and clarity of definition. As well as proposing that the definition in s1(1)(a) be tightened, this article has argued that, although anti-social behaviour is an umbrella term which defies precise definition, greater certainty could nonetheless be engendered (and sufficient

591 and 'Desert and Previous Convictions' in A. von Hirsch and A. Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (Oxford: Hart, 2nd ed, 1998).

flexibility maintained) by the adoption of two new clauses geared at communicating the spirit of the ASBO. It is accordingly submitted that subsection (1) of section 1 of the Crime and Disorder Act 1998 be amended as follows:

(a) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 18 or over,¹⁵⁴ namely—

- (i) that, since the commencement date, the person has persistently engaged in serious forms of anti-social behaviour, that is to say, behaviour that caused or was likely to cause serious harassment, alarm or distress to one or more persons not of the same household as himself;
- (ii) that the person knew or believed that others would be, or were likely to be, caused serious harassment, alarm or distress;
- (iii) that the conditions detailed in paragraph (b) are satisfied; and
- (iv) that such an order is necessary to protect relevant persons from further serious anti-social acts by him.

(b) An order should only be imposed under this section if:

- (i) The person's persistent anti-social acts took place in the same area, so that those living in that area were repeatedly affected by his behaviour;
- (ii) The person's anti-social acts amounted to criminal offences of a sufficient level of seriousness; and
- (iii) A composite criminal sentence is regarded as necessary because, if the person were successfully prosecuted for any of his anti-social acts, the penalty likely to result would be insufficient to reflect the aggregate impact of his course of behaviour.

¹⁵⁴ See n 142 above.

When considering whether these conditions are satisfied, regard should be had to the following examples:

Example	Paragraph	Facts	Response
A	(b)(i), (ii) and (iii)	D commits a series of crimes on the estate on which he lives, including burglary, robbery, theft, criminal damage, assault and public disorder. D's behaviour causes people living on the estate serious distress, evidenced by the high level of requests for rehousing from council tenants and by the number of council properties which stand vacant for excessively long periods. If D were prosecuted for one or more of his criminal acts in isolation, the likely penalty/ies would be insufficient to reflect the aggregate impact of his behaviour.	A court hearing an application under this section should impose an Order.

B	(b)(ii)	D, a prostitute, loiters and/or solicits in a public place for the purpose of prostitution on several occasions.	Any application made for an Order under this section should be refused. Although D is guilty, on several occasions, of a criminal offence (Street Offences Act 1959, s1(1)), this crime is not imprisonable and so is not of a sufficient level of seriousness for the imposition of an Order.
C	(b)(ii) and (iii)	D, who suffers from a personality disorder, attempts suicide on several occasions, jumping off of bridges into rivers.	Any application made for an Order under this section should be refused. Attempted suicide is not a criminal offence. And since D suffers from a personality disorder other forms of intervention are more appropriate, and so a composite sentence cannot be regarded as necessary.

D	(b)(iii)	D is a pig farmer. One day, his pigs escape and damage the property of D's neighbour, E. D recaptures his pigs and places them back in their enclosure, but does not take any steps to prevent them escaping again. The next day the pigs escape again, and once more damage E's property. The same then happens again, and E's property is damaged a third time.	Any application made for an Order under this section should be refused. D may be prosecuted for recklessly causing criminal damage to E's property. A composite sentence cannot be regarded as necessary to reflect the aggregate impact of D's behaviour.
E	(b)(iii)	D is an alcoholic with mental health problems. As well as verbally abusing and threatening his neighbours, these illnesses cause D to commit acts of noise nuisance, public disorder, and criminal damage.	Any application for an Order under this section should be refused. Since there are other possible forms of intervention, aimed at addressing the underlying causes of D's behaviour, a composite sentence cannot be regarded as necessary.

(c) Those forms of behaviour which may be considered for the purposes of paragraph (a) include burglary, robbery, theft, criminal damage, harassment, intimidation, public disorder, threatening behaviour, noise nuisance, racial abuse, vehicle crime, and assault.

The effect of this proposal would be to limit the ASBO to its original purpose – a means of imposing composite sentences on individuals who persistently commit criminal acts of a certain level of seriousness in a particular area, making the lives of those living there unbearable.

Two further issues remain. The first is the appropriate bounds of a composite sentence. Even if one shares the view that a composite sentence should be imposed on courses of conduct like the Finnie brothers' and Family X's, this aspect of the ASBO needs greater discussion than it has received hitherto. There are further points to consider concerning how the increase in sentence severity should be quantified (it might be argued that, even employing composite sentencing, the five year maximum sentence for breach of an ASBO is too severe). And fuller discussion of the principles of composite sentencing might lead to consideration of other contexts in which composite sentencing should be applied.

The second remaining issue is that, although the ASBO was designed to provide a mechanism for imposing composite sentences, this has not happened in practice. Campbell's Home Office Research Study found that, of the 85 incidents of breach of an ASBO brought before the courts in 2000 (involving 51 individuals and 75 breach hearings), 64 (75 per cent) were sentenced in the magistrates' court and only five (6 per cent) were committed to the Crown Court (four for sentence and one for trial). The magistrates dealing with these incidents of breach thus regarded few of them as serious enough to be committed to the Crown Court for sentencing. Moreover, of those incidents of breach which were sentenced in the magistrates' court, only 62 per cent resulted in a custodial sentence.¹⁵⁵ This trend has continued since. Of the 793 people who breached an ASBO between 1 June 2000 and the end of 2003, 356 (45 per cent) escaped a custodial sentence.¹⁵⁶ This has 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

¹⁵⁵ S. Campbell *A Review of Anti-Social Behaviour Orders* (n 115 above), 76-77.

¹⁵⁶ Home Office website.

[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.¹⁵⁷ There are, it is suggested, at least two reasons for this shift in focus. First, where an Order contains unnecessarily wide-ranging prohibitions, a sentencing court may be reluctant to impose a severe sentence following a trivial act of breach, eg, visiting one's friend in a fifth floor flat or parking in a supermarket car park to buy one's groceries. This problem could be straightforwardly addressed by approaching the task of drafting the terms of ASBOs in a more measured way, taking due account of a defendant's rights under the ECHR. After all, imposing wide-ranging prohibitions in order to be seen to be tough on anti-social behaviour is self-defeating if it merely results in sentencing courts imposing lesser sentences in the event of breach.¹⁵⁸ Second, in order to justify classifying the ASBO as civil in nature the courts have stressed that proceedings for the imposition of an Order are distinct from proceedings for breach.¹⁵⁹ But emphasising the separateness of the two sets of proceedings in this way sends out the signal that the conduct which was taken into account at the application for the Order should not be considered again at the proceedings for breach. Far from insisting on the separateness of the two sets of proceedings, the connection between the two should be emphasised, so that findings of fact from the application for an ASBO can be taken into account at any subsequent

¹⁵⁷ 'Nuisance Offenders: Scoping the Public Policy Problems' in M. Tonry (ed) *Confronting Crime: Crime Control Policy under New Labour* (Cullompton: Willan Publishing, 2003), 93.

¹⁵⁸ For example, Karl Roberts was imprisoned for 24 hours after going to his girlfriend's house to visit her and their 23 month-old child in breach of his ASBO. The Parish Council vice-chairman labelled the sentence 'derisory,' saying it sent out the wrong message ('Asbo breach sentence "derisory"' BBC website 24 April 2005, <http://news.bbc.co.uk/1/hi/england/suffolk/4478557.stm> (last visited 10 October 2005)).

¹⁵⁹ See, eg, Lord Steyn in *R (McCann & others) v Crown Court at Manchester* (n 91 above) at [23].

proceedings for breach. This would entail reclassifying the ASBO as criminal in nature,¹⁶⁰ something which the House of Lords in *McCann* were loath to do on the basis that, given the problem of witness intimidation in cases of neighbour nuisance, the non-admissibility of hearsay evidence would render the ASBO ineffectual.¹⁶¹ Following the implementation of the new hearsay provisions in the Criminal Justice Act 2003, however, it must be doubted whether the classification of the ASBO as criminal in nature would have this effect.

Notwithstanding the fact that the ASBO was a carefully crafted response to a ‘real social evil,’¹⁶² there is growing opposition to the remedy. One of the major reasons for this dissent is the use of ASBOs in contexts for which they were neither designed nor suited and in situations where other more constructive forms of intervention are possible. Such uses of the Order are possible because of the permissive wording of s1(1)(a). The implementation of the proposals advanced in this article would help concentrate the use of ASBOs on the type of situation for which they were purportedly intended and perhaps go some way to restoring their credibility.

¹⁶⁰ See S. Macdonald ‘The Nature of the Anti-Social Behaviour Order – *R (McCann & others) v Crown Court at Manchester*’ (n 91 above).

¹⁶¹ See n 91 above.

¹⁶² Lord Williams (HL Deb vol 585 col 518 3 February 1998).