

Pre-crime and precautionary criminalisation

Peter Squires and Dawn Stephen look at antisocial behaviour legislation and its role in precautionary criminalisation.

Amongst the last government's hyperactive law making, the ASBO (Anti-Social Behaviour Order), and ASB management more generally, have stood out for a number of reasons. Many of these issues relate directly to a future-oriented, actuarial, or 'risk-preventive' perspective on crime and disorder management, and all have a central concern with what we might call 'precautionary criminalisation'. Perhaps, it might be suggested, that this is what you get when 'governing through crime', but as we argue below, 'net-widening' has been but a part of the story.

In the first place there was the hybrid nature of the law itself; the ASBO was based upon a civil injunction and yet it dealt with ostensibly criminal (or even pre-criminal) matters. Furthermore, breach of an ASBO was a criminal offence. This foundation in civil law permitted the side-stepping of a certain amount of troubling 'due-process' associated with the criminal law, providing what has sometimes been referred to as a 'quick and dirty' route to enforcement action (Squires, 2006). Perhaps this was especially so in relation to the interim ASBOs, available 'on application' to the magistrates court, and which could be imposed without the accused person being present to defend him or herself. Even earlier and more 'informal' measures were the 'acceptable behaviour contracts' (ABCs) imposed (although premised on a 'contract' model, one hesitates to say 'negotiated') in the homes of supposed perpetrators themselves (Squires and Stephen, 2005).

Then there was the very elastic definition of 'anti-social behaviour' itself: behaviour 'likely to cause harassment, alarm and distress to third parties' implying both the perceptions of those subjected to the behaviour and some future impact. This was so even though the future impact was predicated upon an accumulated pattern of 'harmful' behaviour, some aspects of which, might not, in themselves, have even been illegal. Young people 'hanging about', which became almost the definitive (*sine qua non*) instance of ASB, might be a case in point here. In this sense the politics of anti-social behaviour firmly aligned our discourses of the 'anti-social' and of 'youth' with potentially far-reaching consequences.

For legal commentators (Simester and Von Hirsch, 2006), it was the 'bespoke' character of the 'two step' ASBO provisions which was particularly troubling. Here, the prior designation of specific groups or individuals, by an order and the attachment of a range of particular conditions (perhaps not unlike bail conditions), including curfew requirements, geographic prohibitions, or persons to be avoided, establishes a *de facto* sub-class of 'restricted persons', in a kind of legal apartheid, and against whom further, relatively swift and difficult to defend, enforcement action might be taken. These have become the new 'status' offences of late modernity, offence categories from an earlier time, such as 'alien', 'vagrant', or 'common prostitute', whose simple designation, rooted in primarily ideological constructions of contamination, danger, and suspect

'otherness', seemed to justify a wholesale suspension of rights to due process. And we have created a fair few of these in recent years under the ASBO itself: the Dispersal Order, Control Orders, Civil Gang Injunctions (gang-asbos), and sexual and violent offender registration, all of which establish an enforcement potential for conditional forms of citizenship, supplemented by more coercive sanctions and streamlined due process.

In some senses it is the sheer utility of these provisions that would seem to endear them to politicians with a law and order mandate, or performance-driven criminal justice agencies. They have been used to demonstrate a governmental commitment to tackling crime and disorder issues, and facilitate some notional closure of the so-called 'Justice Gap' – the difference between the number of victims (offences recorded) and the number of prosecutions (or 'sanction detections' in police performance terms). At the same time these developments clearly reflect the 'rebalancing criminal justice' agenda articulated by Tony Blair in a series of speeches from 2004 onwards. Progress on these matters has not been confined to the new orders, it has also been associated with a certain blurring of the lines between police 'intelligence' and 'evidence' and the uses to which each is put (for example in the use of civil gang injunctions or 'Gangbos', as discussed below).

Yet much of this enforcement innovation in criminal justice centres around a very particular series of developments, prefaced in the Youth Justice White paper of 1997 (Home Office, 1997), and the ensuing Crime and Disorder Act, as a form of 'pre-criminal' early intervention or, more colloquially, as 'nipping crime in the bud'. However, anti-social behaviour management has entailed both a *net-widening* and a *deviancy amplification* aspect, so when the white paper spoke of 'breaking the links' between juvenile anti-social behaviour and criminal recidivism later in life, it has rather served to more effectively connect these two phenomena both ideologically, as

part of a new common-sense of crime control, and practically for thousands of disadvantaged young people now subject to more intensive surveillance and scrutiny in their schools, communities, and families.

In our book, *Rougher Justice* (2005), we described these new interventions, predicated largely upon enforcement, as entailing a form of *precautionary injustice*. They entailed a form of pre-emptive criminalisation, not in the terms established by the old Blair mantra 'tough on crime, tough on the causes of crime' because causes, contexts, and conditions became rather secondary. The populist common sense of ASB was that it was something inevitably to do with youth. The related fact that it was primarily deprived and disadvantaged areas which consistently reported the highest rates of ASB went overlooked at the point of intervention. Although youth offending research has consistently drawn attention to the social, peer-group influenced, nature of most youth offending (see for example Zimring, 1998) criminal justice interventions generally overlook this (side-stepping older 'left realist' leanings) and individualise the phenomenon, effectively producing the delinquent career they were ostensibly set to avoid. This is not about rival perspectives on crime prevention: enforcement responses versus social crime prevention (the velvet glove of the social 'therapeutic' state versus the 'iron fist' of the law and order state) in the classic formulation and as so effectively articulated by Cohen in *Visions of Control* (1985). Rather, this is a debate *within* the enforcement side of the equation itself.

Thus, perhaps the most enduring legacy of the ASBO is that it has established a wide range of hybrid, and semi-criminal enforcement powers. Here loosely defined 'offences', streamlined due process, peremptory evidential scrutiny, pre-emptive criminalisation, and inclusive net-widening describe the outlines of a new approach to crime control and security

management. Furthermore, the very features which led critics to question anti-social behaviour as a crime and disorder strategy, the imprecise definitions, its relativity, and flexibility, are precisely the keys to its greatest utility. Even more paradoxically, the social aspects of 'delinquency' (referred to above), which are overlooked in our contemporary misunderstandings of youth offending, are themselves reintroduced to justify the control regimes imposed by the new orders. Thus, young people on ASBOs can be prevented from frequenting certain areas or associating with other named people. Like their name suggests, Dispersal Orders are intended to move on, disperse, and displace larger groups of congregating young people – but to where? Such restrictions are simple social controls upon youth lifestyles supplemented by criminal sanctions.

The paradox here is most complete in relation to the new gang-asbos; for while many sociologists of 'deviance' still debate whether Britain has an appreciable 'gang problem', the media and the authorities appear to have largely made up their minds. Many social scientists have questioned both the purpose and consequences of using a discourse of gangs to describe street socialising and sometimes disorderly young people (Sharp et al., 2006; Hallsworth and Young, 2008; Alexander, 2008). However, it has precisely been the social relations of friendship, socialisation, and association, captured and reproduced in police databases, surveillance, and intelligence logs, which have spread a demonology of 'gangsterisation' across kinship and friendship networks, and community relations alike, and which now serves as the basis for the gang injunctions. It is not only supposed 'gang members' who fall within the purview of these measures but also a loose series of others: associates, acquaintances, family members: in Pitts' (2008) terms, from the 'wannabes' to the 'reluctants' and victims.

In establishing entire new classes of suspect persons, the new ranks of (diminished) status suspects and

offenders – the new 'police property' – we have achieved, in just over 25 years, an almost complete reconstruction of the discriminatory regime of the 'sus' laws. Yet, where Section 4 of the 1824 Vagrancy Act operated through the discretion of the police officer in the street, precautionary and pre-emptive criminalisation is now rooted throughout the legislation, policies, institutions, and professional practices of our criminal justice system. In this way the criminal justice system has come to internalise and further facilitate some of the least palatable and dangerously populist features of our law and order preoccupied culture. ■

Peter Squires is Professor of Criminology and Public Policy at the University of Brighton and **Dawn Stephen** is Principal Lecturer in Criminology at the University of Brighton.

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