



The Theory of Vulnerable Autonomy and the Legitimacy of the Civil Preventative Order

Peter Ramsay

LSE Law, Society and Economy Working Papers 1/2008

London School of Economics and Political Science

Law Department

This paper can be downloaded without charge from LSE Law, Society and Economy Working Papers at: www.lse.ac.uk/collections/law/wps/wps.htm and the Social Science Research Network electronic library at: <http://ssrn.com/abstract=1091782>.

© Peter Ramsay. Users may download and/or print one copy to facilitate their private study or for non-commercial research. Users may not engage in further distribution of this material or use it for any profit-making activities or any other form of commercial gain.

The Theory of Vulnerable Autonomy and the Legitimacy of the Civil Preventative Order

Peter Ramsay^{*}

Abstract: Criminologists and criminal law theorists have explained the ASBO and the terrorism Control Order as purely instrumental measures in the service of crime control. The political consent enjoyed by these new Civil Preventative Orders has for the most part been regarded in the expert literature as an example of penal populism which has thrown aside sound legal principles. This paper, by contrast, investigates a possible normative basis for these orders. It first analyses and reconstructs their substantive law, arguing that they impose a liability for manifesting a disposition which fails to reassure others. It then investigates the basis for this liability in official anti-social behaviour and counter-terrorism policy, both of which emphasise the vulnerability of normal citizens. The paper then proposes that the ‘vulnerable autonomy’ which these policies and legal instruments seek to protect is an axiomatic feature of the political theories of ‘advanced liberalism’. Finally, the claim made by normative criminal law theorists that Civil Preventative Orders are illegitimate is reconsidered in the light of the theory of vulnerable autonomy.

INTRODUCTION

Civil Preventative Orders (CPOs) encompass a wide range of binding legal orders.¹ The most prominent examples are the Anti-Social Behaviour Order (ASBO) and the Control Order, the legal flagships of the British government’s self-proclaimed tough stance on the twin threats of local disorder and global

^{*} Lecturer in Law, London School of Economics. My thanks to Nicola Lacey, Alan Norrie, Suke Wolton and Lucia Zedner for their comments on earlier drafts of this paper, and to the participants at the workshop *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, held at the Onati Institute in June 2007 for theirs. I am grateful to the Arts and Humanities Research Council for the financial support provided by a Doctoral Award during the writing of this paper.

¹ The term is Stephen Shute’s, see ‘The Sexual Offences Act 2003 (4): New Civil Preventative Orders’ (2004) *Crim LR* 417.

terrorism. While no two examples of the CPO are identical in form,² they all share several features:

- they are granted in civil proceedings, or administratively with some judicial supervision;
- they are granted on satisfaction of broad and vaguely defined conduct;
- their terms may be any prohibition (or mandatory term in some cases) deemed necessary to prevent future instances of the broad and vaguely defined conduct on which they are grounded;
- breach of any of their terms is a criminal offence of strict liability.

Although the Civil Preventative Order (CPO) is of recent origin, it does have precursors.³ What is novel in the new group is the breadth of the conduct which may give rise to an order, and which the order may prohibit, by comparison with the narrow grounds and scope of earlier orders. The CPOs have not been well received among criminal law theorists.

The normative critique of the CPO has been given its most systematic statement to date by Andrew Simester and Andrew von Hirsch.⁴ The particular importance of their work is that it integrates together a number of critical themes, covering the whole range of the substantive, procedural and political-constitutional aspects of the new legal instruments.⁵ Simester and von Hirsch detail these criticisms of the CPO through an analysis of the ASBO, and they are unsparing. I will consider their particular criticisms later on, but it is their conclusion that forms my starting point. They compare the ASBO unfavourably with the CPO's precursors, which they term Ancillary Civil Prohibitions (ACPs),⁶ and conclude that:

² I will explicitly deal here only with the ASBO, the Control Order and the Risk of Sexual Harm Order. Other CPOs include the Sexual Offences Prevention Order, Sex Offender Order, Foreign Travel Order, Football Banning Order, the Interim ASBO, Parenting Order, Individual Support Order and the proposed Serious Crime Prevention Order.

³ The most closely related legal instrument in form is the Statutory Nuisance Abatement Notice, provided by the Environmental Protection Act 1990, s79. An important functional precursor of the ASBO is the bind over to keep the peace or be of good behaviour. I have elsewhere compared the ASBO with the ancient bind over, see P. Ramsay, 'Vulnerability, Sovereignty and Police Power in the ASBO' in M. Dubber and M. Valverde (eds), *Police in the Liberal State* (Stanford University Press, forthcoming). See also A. von Hirsch and M. Wasik, 'Civil Disqualifications Attending Conviction' (1997) 56 *Cambridge Law Journal* 599.

⁴ A. Simester and A. von Hirsch, 'Regulating Offensive Conduct Through Two-Step Prohibitions' in A. von Hirsch and A. Simester (eds), *Incivilities* (Oxford: Hart, 2006).

⁵ Some of these themes have been pursued in detail by other writers. See in particular on fair trial, S. Macdonald, 'The Nature of the ASBO – R (*McCann & Others*) v *Crown Court at Manchester*' [2003] 66 *MLR* 630; on fair trial and proportionality, A. Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 *LQR* 263; on proportionality, S. Macdonald, 'The Principle of Composite Sentencing: Its Centrality to, and Implications for, the ASBO' (2006) *Crim LR* 791; on wrongfulness of conduct criminalised and on generality, P. Ramsay 'What Is Anti-Social Behaviour?' (2004) *Crim LR* 908.

⁶ n 4 above. They also use the term 'Two-Step Prohibition Order' rather than Civil Preventative Order. None of these terms has any legal status.

The ASBO is not sustainable as a legitimate ACP, because of the wide ambit of the kinds of conduct that may trigger issuance of an order, and because of the broad range of conduct that may be prohibited by the order itself.⁷

It is this conclusion that I want to scrutinise in this paper. For it is striking that the severe criticism of these measures, put forward by criminal law theorists of the stature of Simester and von Hirsch, cuts almost no political ice. The ‘appropriate’ use of the ASBO is supported by all the major political parties, and despite initial controversy surrounding the Control Order, when the power came up for renewal 12 months later a mere 13 MPs turned up to debate it, and it was renewed without a vote.⁸

Such controversy as surrounds the ASBO and the Control Order concerns the question of whether or not they ‘work’, which is to say have any impact on the experience of ‘anti-social behaviour’ or ‘terrorism’. But the existence of the power to impose ASBOs and Control Orders, and to punish individuals for breach of them, is not controversial among mainstream politicians,⁹ the judiciary,¹⁰ the police and local authorities¹¹ and it is supported by a large majority of the public.¹² The powers in CPOs are controversial among some campaigning groups,¹³ youth justice professionals, criminologists and criminal law theorists.

The gap between the normative conclusions of academic experts on criminal justice and the positive conditions of the political order is hardly unique to the CPO.¹⁴ But the gap does need explaining and normative theory cannot do this. The purely normative approach tells us what the CPO is not – it is not ‘good’ criminal law from the standpoint of the theory’s liberal norms. But in itself normative theory cannot tell us what the CPO is. Indeed there is a tendency to assume that, since the CPO is a violation of sound liberal norms, it must represent nothing more than unprincipled political opportunism. The flipside of normative theory’s condemnation is an explanation in terms of ‘penal populism’, in which

⁷ *ibid* 190.

⁸ HC Deb Col 1516 15 Feb 2006.

⁹ The first signs of a possible change of policy emerged in the summer of 2007, at least in respect of the ASBO. Ed Balls, the Minister for Children in the new government of Gordon Brown, has declared that while ASBOs remain ‘necessary’, their use against young people indicates a wider failure of policy, see *Daily Mirror*, 27 July 2007.

¹⁰ *R (McCann and Others) v Crown Court at Manchester and Another* [2003] 1 AC 787. The prohibitions included in particular Control Orders and the peculiar procedures for imposing them have been very closely scrutinised by the courts on human rights grounds, see in particular *Secretary of State for the Home Department v JJ and others* (FC) [2007] UKHL 45; *Secretary of State for the Home Department v MB* (FC) [2007] UKHL 46; *Secretary of State for the Home Department v E and another* [2007] UKHL 47. However, although particular orders have been quashed, they have been reimposed on different terms by the Secretary of State, and the basic power to impose them is unchallenged by the courts.

¹¹ Although use of the ASBO varies widely between local authority areas. For a breakdown see <http://www.crimereduction.gov.uk/asbos/asbos2.htm>.

¹² A MORI opinion poll in 2005 showed 82% support for the ASBO (although only 37% claimed to know more than a little about them, and only 39% thought them effective in stopping ASB), see <http://www.ipsos.mori.com/polls/2005/asbo-top.shtml>

¹³ See especially ASBO Concern, www.asboconcern.org.uk (accessed 1 Nov 2006); Liberty, www.liberty-human-rights.org.uk/7-asbos/index.shtml; and <http://www.statewatch.org/asbo/ASBOwatch.html>.

¹⁴ See A. Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) LQR 116.

government marginalises criminal justice expertise in favour of a punitive playing to the fears and insecurities of the electoral gallery.¹⁵ But, at the very least, this explanation fails to explain why some ‘populist’ policies are judicially endorsed (anti-social behaviour policy, for example), but others are not (the denial of welfare benefits to asylum-seekers, for example).¹⁶ And this is because this approach fails to investigate in any depth the content of the underlying beliefs that these ‘populist’ measures do in reality draw on.

I want here to take a different approach to the question of legitimacy from that taken by Simester and von Hirsch. Instead of their broadly ‘philosophical’ approach to legitimacy, in which the CPO is evaluated against predetermined liberal norms, I seek to apply David Beetham’s ‘social-scientific conception of legitimacy’,¹⁷ which is a judgement of the measure’s ‘legitimacy in context, assessed against the relevant norms, principles and criteria of consent pertaining in the given society’.¹⁸ The ‘philosophical’ approach to the legitimacy of the CPOs begins with a set of normative criteria laid down in advance of the investigation of the measures themselves, and criticises the CPOs from that standpoint. By contrast, I will set out from the substantive law of the CPO. I will seek first to elucidate the character of the substantive demands on citizens made by the CPO – specifically I will argue that the CPO places a liability on those who consistently fail to reassure others. I will then show how these demands institutionalise the protection of a norm postulated in some very influential contemporary political theories – specifically I will argue that the CPO institutionalises the protection of ‘vulnerable autonomy’, a norm that is, in different ways, fundamental to the theories which Nikolas Rose has characterised as ‘advanced liberal’, that is, the Third Way, communitarianism and neoliberalism.

My argument is that there is a framework of belief behind the legal structure of the CPO, one that is sufficiently widely shared for these orders to resonate with the concerns of wider society, appear legitimate in political life and enjoy political immunity from the criticisms of liberal normative theory (at least for the present). None of this is intended as an argument that Simester’s and von Hirsch’s criticisms are without any substantive value. On the contrary, it is precisely the importance, even urgency, of at least some of their criticisms that leads me to reconstruct the ASBO’s claim to legitimacy. My reason for taking this approach is the belief that criticism which omits to place a governmental power in its actual legitimating context, but merely argues that the power fails to meet the requirements of predetermined normative criteria, will at best miss its target and

¹⁵ On ASBOs, for example, see E. Burney, *Making People Behave: Anti-Social Behaviour, Politics and Policy* (Cullompton: Willan, 2005) 17.

¹⁶ The higher courts have fought a running battle with the executive on this issue for more than a decade, see S. Wolton, ‘Immigration Policy and the Crisis of “British Values”’ (2006) 10(4) *Citizenship Studies* 453. For a recent engagement see *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396.

¹⁷ D. Beetham, *The Legitimation of Power* (Basingstoke: Macmillan 1991) 37.

¹⁸ *ibid* 38. This is not to be confused with Max Weber’s social-scientific concept of legitimacy, which precisely overlooks this objective judgement about prevailing norms, see *ibid* 8-15.

lack practical consequences.¹⁹ I will, therefore, return at the end of the paper to consider Simester and von Hirsch's detailed criticisms in the light of what we have discovered about the CPOs 'legitimacy in context', and specifically the extent to which their criticisms engage with the beliefs underlying the CPO or just talk past them.

In reconstructing the theory of vulnerable autonomy, I am therefore *not* trying to engage in the 'philosophical' style of normative theory familiar in the study of the substantive criminal law. I am not attempting to elaborate a watertight normative justification of these orders in the philosophical sense. My aim here is only to show that in the political world beyond academic criminal law theory, an influential normative argument for the CPO already exists, and serves to legitimise this form of penal obligation in practice. I will therefore try to elucidate that argument as clearly as possible, although I do so in the cause of identifying its structure rather than proposing its soundness. The theory of vulnerable autonomy which I investigate may turn out to have insecure foundations, and the justification of the CPO which arguably arises on the basis of that theory may have flaws.²⁰ But such strengths and weaknesses cannot be assessed unless the character of the argument is first identified. The purpose of this paper is only to take that first step by trying to draw a draft map of the territory that I think we are in.

The paper proceeds by first explaining the substantive content of three different CPOs: the ASBO, the terrorism Control Order and the Risk of Sexual Harm Order. My aim is to demonstrate that although these novel legal instruments are each applicable in different factual circumstances, they nevertheless share a common substantive content – a liability for a failure to reassure. I then look at how this liability and the policy arguments put forward in favour of it construct the ordinary citizen as intrinsically vulnerable and in need of reassurance.²¹ After that I turn to an important source of this construction by identifying the protection of 'vulnerable autonomy' as a norm at the heart of the three political theories with a preponderant influence in contemporary politics in the UK. Finally, having identified this normative structure institutionalised in the CPO, I return to the detail points of Simester and von Hirsch's criticisms to indicate the extent to which the theory of vulnerable autonomy has an 'answer' to them.

¹⁹ See also R. Barker, *Legitimizing Identities* (Cambridge: Cambridge University Press, 2001) 23.

²⁰ Among my own doubts about the coherence of the argument from vulnerable autonomy is the paradoxical implication for the state's authority that seems to result when the protection of intrinsic vulnerability is institutionalised by the penal law, see Ramsay n 3 above.

²¹ I will only consider policy in relation to the ASBO and the Control Order in this section. The little-used RSHO is included only for formal comparative purposes. I will not consider the wider context of vulnerability to sexual harm.

CONTROLLING THE FAILURE TO REASSURE

There are many differences between the CPOs, but I will here analyse in turn the substantive law of three of them - the ASBO, the terrorism Control Order and the Risk of Sexual Harm Order - to indicate the substantive content which they share.

ANTI-SOCIAL BEHAVIOUR ORDER (ASBO)

Section 1(1) Crime and Disorder Act 1998 gives the grounds for imposing an ASBO as follows:

- (a) that the person has acted...in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and
- (b) that such an order is necessary to protect relevant persons from further anti-social acts by him.²²

At its broadest, Section 1(1)(a) requires that the defendant has done something which a court is certain would, more likely than not, cause harassment, alarm or distress to someone present in the circumstances in which the conduct occurred.²³ The assessment of the necessity of an order in Section 1(1)(b) is a discretionary evaluation not subject to proof as such,²⁴ and more specifically a risk assessment of the clinical type.²⁵ An order is very likely to be necessary wherever the court finds a propensity or disposition to repeat the conduct; in the absence of such a disposition it is unlikely to be necessary.²⁶ What is therefore controlled by the ASBO is the manifest disposition to cause harassment, alarm or distress, which is to say a manifest disposition of indifference or hostility to others' feelings. What creates liability to an ASBO is anything which manifests a lack of respect for others' feelings. The huge scope of the Section 1(1) is qualified by Section 1(5) which allows the court to disregard any conduct which may cause or be likely to cause harassment, alarm or distress but which the defendant can show was 'reasonable in the circumstances'.

Where the court is satisfied that the s1(1) grounds are made out then the terms of an ASBO may include any 'prohibitions...necessary for the purpose of protecting persons...from further anti-social acts by the defendant'.²⁷ The terms of an order may therefore prohibit conduct which would not be a criminal offence when committed by anyone other than the specific defendant. These obligations - restrictions on the defendant's movements, association, possession and consumption of objects, use of language, and so on - by virtue of their specificity

²² Crime and Disorder Act 1998, s1(1) as amended by Police Reform Act 2002, s61(1)-(2).

²³ See *Chief Constable of Lancashire v Potter* [2003] 42 *Law Society Gazette* 31, (2003) All ER (D) 199 (Oct).

²⁴ *R(McCann)*, n 10 above, 812.

²⁵ See Ramsay, n 5 above, 915.

²⁶ *ibid.* See also *R v Jones and Others* [2006] All ER (D) 97 (Sep) CA.

²⁷ Section 1(6) as amended by Police Reform Act 2002, s 61(1) (7).

and individual tailoring, construct the person subject to them as representing a specific threat of further ‘harassment, alarm or distress’. But can we be any more precise about the character of these feelings experienced (or likely to be experienced) by the victim and, therefore, of the threat the defendant poses?

Harassment, alarm and distress are each unpleasant feelings, and there is no objective limitation on the sensitivity of those who might be caused any of these feelings by the defendant, apart from the authority’s discretion to bring an application.²⁸ One consequence of this breadth of definition is that there has been a tendency to assume that conduct which causes these feelings can be equated with behaviour which in fact offends people.²⁹ And in practice many ASBOs appear to prohibit the merely offensive.³⁰ But, while there is an overlap between the two categories, this identification of anti-social behaviour (ASB) with offensiveness is not satisfactory for two reasons.

First, the category ‘harassment, alarm or distress’ plainly includes conduct which causes another person to be afraid. But, as Douglas Husak observes, there must be some doubt as to the plausibility of claiming that a person is offended by that which causes them to experience fear.³¹ However, ‘harassment, alarm or distress’ can no more be equated with fear than it can with offence. There is no need to prove fear in order to prove harassment, alarm or distress since less grave feelings than fear will be sufficient.³² One plausible reaction to what appears to be a lumping together of fear and offence is to conclude that ‘harassment, alarm or distress’ is simply a vague, catch-all category. But the second reason for doubting the identification with offensiveness is supplied by the structure of Section 1 just outlined. This structure suggests that there may nevertheless be a common feature to the conduct Section 1(1)(a) describes.

We saw above that it is the manifesting of a disposition of indifference or hostility, a lack of respect for others’ feelings, that unifies the conduct which attracts liability to an ASBO. The behaviour which manifests this attitude may take the form of conduct which causes annoyance, offence, anxiety, shock, fear or any

²⁸ An ASBO application may be made by the police, a local authority or a registered social landlord. The ASBO is also available to a criminal court on conviction of an offender, sometimes referred to as a CrASBO (Crime and Disorder Act 1998, Section 1C). This does not alter the analysis here. The grounds for imposition are the same, and are usually provided at least in part by the facts of the criminal offence proved. The terms of a CrASBO will very likely specifically prohibit future criminal offending, but then so may any ASBO in so far as the prohibited conduct is also a criminal offence. The reason for its prohibition in an ASBO is not the wrong criminalised by the freestanding offence, but the harassment, alarm or distress the conduct is likely to cause (see *R v Braxton (No2)* [2005] 1 Cr App R (S) 36, [3]; *R v Lamb* [2005] All ER (D) 132 (Nov); *R v Stevens* [2006] 2 Cr App R (S) 453 CA).

²⁹ See, for example, R.A. Duff and S.E. Marshall, ‘How Offensive Can You Get?’ and E. Burney, ‘No Spitting: Regulation of Offensive Behaviour in England and Wales’ in von Hirsch and Simester (eds), above n 4, 94.

³⁰ ASBOs have prohibited people from singing in their houses, answering the front door dressed only in underwear, feeding pigeons, slamming doors too loudly, urinating in public, and so on, see <http://www.statewatch.org/asbo/ASBOWatch.html>.

³¹ See D. Husak, ‘Disgust: Metaphysical and Empirical Speculations’ in von Hirsch and Simester (eds), above n 4.

³² For the purposes of the Public Order Act 1986, s 4 and s 5, ‘harassment, alarm or distress’ has been explicitly held not to require the causing of fear (*Chambers and Edwards v DPP* [1995] Crim LR 896).

other feeling covered by the phrase ‘harassment, alarm or distress’. Liability to an ASBO turns not only on the likely or proven effects of conduct which caused harassment, alarm or distress, but also on an assessment of the threat that the disposition made manifest in the conduct represents to the quality of the defendant’s relationships with others in the future, a threat which the prohibitions in the ASBO are intended to regulate. These grounds of liability share a common element with Peter Birks’s account of the common law tort of harassment, an account which offers a more specific concept of the wrong of harassment.³³

In the course of his argument that the English common law recognises a tort of harassment, Birks describes the concept of harassment as it appears in both the common law and in its equivalent form in the Roman law of *iniuria*. Birks argues that such a tort protects ‘the right to one’s fair share of respect’ from the ‘hubris’, the insolent presumption, of the tortfeasor.³⁴ Moreover, for Birks at the heart of this tort lies a belittlement of the victim which

has two aspects, immediate and prospective, in that it infringes the protected interest and threatens the victim’s future entitlement. That belittlement is both an immediate wrong and, in that a person belittled is thereby in danger of being perceived as a person of less consequence, *an exposure to future wrongs*. Self-esteem and public esteem...are simultaneously in issue.³⁵

This gets to the heart of the concept of ASB too. Birks’s tort is narrower than ASB. It requires an intentional harassment, which manifests contempt.³⁶ Section 1(1) CDA by contrast has no requirement to prove intent. Rather, as we have seen, the ASBO defendant need only manifest indifference to the particular feelings of the other (although active contempt is certainly also included), and those feelings might be ‘alarm or distress’ rather than ‘harassment’.³⁷ But, whether the others are offended, anxious or afraid when they suffer ‘harassment, alarm or distress’, it is because the indifference or contempt of the defendant is likely to cause them to experience ‘an exposure to future wrongs’. The key to the ASB that renders a person liable to the imposition of an ASBO is that the disposition of contempt or indifference, made manifest by the defendant’s conduct, *fails to reassure* others with respect to their security in the future.

Although the explicit terms of Section 1(1) make liability depend on the commission of certain acts, those acts are defined in such a way as to impose a liability which encompasses an omission, the omission to maintain an awareness of other’s security needs and to act on the basis of that awareness. Any act, criminal,

³³ P. Birks, *Harassment and Hubris: The Right to an Equality of Respect* (Dublin: University College Dublin, 1996).

³⁴ *ibid* 13.

³⁵ *ibid*.

³⁶ *ibid* 17.

³⁷ The addition of the words alarm or distress seems to be required where unintentional conduct is to be included since the ordinary meaning of ‘harass’ seems to imply deliberate action at least in some degree.

tortious or neither, which manifests a disposition not to reassure others gives grounds for liability to an ASBO.³⁸

The breadth of the definition of this conduct, and the absence of any ‘objective’ standard of sensitivity of its ‘victim’, is such that the conduct which it will include in some cases may, to an external observer, appear to be merely offensive to its victim. But it is neither offensiveness as such, nor the causing of fear as such, that makes sense of the grounds for imposing an ASBO. It is the failure to reassure others about their future security that provides a more exact account of the particular disrespect for others’ feelings which establishes the liability – for it includes causing specific fears of particular threats but also feelings more inchoate than that, which are nevertheless not reducible to mere offence. Understood in this way, the substantive grounds for imposing an ASBO appear more as the criterion of a risk or threat assessment than as the definition of a wrong in the manner of Birks’s narrower tort, although, as we shall see later, the failure to reassure can be understood as a wrong. This emphasis on threat assessment is consistent with the House of Lords’ ruling in *R(McCann)* that the ASBO itself is not a penalty.³⁹ It is also consistent with dicta from the Court of Appeal in *Braxton (No2)* suggesting that the wrong which does attract a penalty when an ASBO is breached is the defendant’s failure to take the official assessment of threat seriously by continuing to manifest the threat in defiance of the terms of the order.⁴⁰

In summary, this interpretation of the ASB that is defined in the grounds of the ASBO power, as behaviour manifesting a disposition which fails to reassure others with regard to their future security, is consistent with the terms of Section 1(1) and has three particular merits over simple offensiveness. First, it identifies a category in which offensive and fear-causing conduct are not arbitrarily combined. Second, it can account for the interpretation of Section 1 offered by the higher courts. Third, it suggests that it is not the offensiveness of the conduct which causes ‘harassment, alarm or distress’ that is the problem, even where the conduct concerned is offensive, but rather it is the underlying threat to others’ sense of security. And, as we shall shortly see, it is these questions of exposure to future wrong and reassurance, rather than offensiveness as such, that are central to the policy rationale for the ASBO.

The ASBO can be summarised as a power to prohibit an individual’s conduct where it fails to reassure others because it manifests a disposition to disrespect others’ subjective security needs.

³⁸ Subject to the qualification that the defendant may prove that their conduct was nonetheless reasonable, see Section 1(5) CDA.

³⁹ See *R(McCann)*, n 10 above.

⁴⁰ See, *R v Braxton (No2)* [2005] 1 Cr App R (S) 36, [17]. This does not mean that severe punishment for breach of an ASBO is permissible for simple defiance of the order. Sentences for breach of ASBOs where no harassment, alarm or distress is caused by the breach must avoid custody where possible and if a custodial sentence is necessary, to uphold the court’s authority, it must be kept as short as possible (see *R v Lamb* [2005] All ER (D) 132, [19]). Rather the degree of harassment, alarm or distress caused by the breaching conduct can be seen as a measure of the extent of the defendant’s failure to respond to the requirements of the order, ‘to address...his behaviour in public’ (*Braxton (No2)* [17]).

CONTROL ORDER

The liability for a failure to reassure is more straightforward in the case of the Control Order, even though at first sight it seems to be focused on preventing conduct amounting to the most serious criminal wrongs rather than that which merely fails to reassure. There are two types of Control Order, one which involves a derogation from Article 5 ECHR and one which does not, and they have slightly different procedures.⁴¹ Derogating Control Orders are on their face emergency powers, and I will focus here on the non-derogating orders only.

The grounds for imposing a non-derogating Control Order are found in Section 2(1) Prevention of Terrorism Act 2005 which allows the Home Secretary to place individuals under specific criminal law obligations where she

(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

The grounds therefore constitute a risk assessment of the clinical type in which the Home Secretary evaluates the individual concerned to represent a ‘risk of terrorism’, with the result that that individual’s future behaviour may be controlled.⁴²

If a person is to avoid the reasonable suspicion of the Home Secretary then they will need to take care not to do that which might create reasonable suspicion, they will need to ensure that they do not fail to reassure the Home Secretary. The double negative indicates the subtlety of the liability created by the CPO. Liability to a Control Order does not impose a positive duty requiring citizens actively to reassure the Home Secretary; rather it gives citizens notice that if they wish to avoid liability, they need to think about what will not reassure the Home Secretary, and will therefore create suspicion, and act accordingly.

Failure to reassure the Home Secretary results in an order which may impose ‘any obligations that the Secretary of State or (as the case may be) the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity’.⁴³ Breach of this order is a criminal offence.⁴⁴ These obligations, particular to the defendant, may prohibit or mandate conduct and they will certainly include prohibiting and restricting the conduct that gave rise to suspicion, that failed to reassure in the first place. By imposing controls on their movements, activity, association, and susceptibility to official surveillance which are specific to the controlled individual, these

⁴¹ See Prevention of Terrorism Act 2005, s 1-s 4.

⁴² *Secretary of State for the Home Department v MB* (2006) EWCA Civ Div 1140, [57].

⁴³ Prevention of Terrorism Act 2005, s 1(3).

⁴⁴ Prevention of Terrorism Act 2005, s 9.

obligations construct the individual who has failed to reassure as a specific threat – a potential ‘terrorist’.⁴⁵ The purpose of the legislation may be to prevent serious criminal wrongs, it is aimed at the ‘threat’ of terrorism, but that threat is controlled by means of individualised penal obligations prohibiting activity which fails to reassure.

RISK OF SEXUAL HARM ORDER (RSHO)

An RSHO can be granted by a magistrates’ court where it is satisfied that the defendant has on at least two occasions engaged with a child in a very widely defined range of conduct which is related in some way to sexual activity or ‘sexual communication’ with a child,⁴⁶ so that, as a result, ‘there is reasonable cause to believe that it is necessary for such an order to be made’.⁴⁷ Again the procedure amounts to a risk assessment of the clinical type.

Like the ASBO, the conduct which lays the ground for the order⁴⁸ includes conduct that would be a criminal offence in any case and conduct which would not. What links these two different groups into a single set of grounds for imposition of the order is that they all lend sufficient credibility to the judgement that the defendant represents a risk of sexual harm to children so that a prohibitory order is necessary to protect against that risk.

The terms of the RSHO itself may prohibit *any* conduct, prohibition of which is necessary to protecting children under 16 generally or any particular child under 16 from harm from the defendant.⁴⁹ Many acts prohibited under the terms of the RSHO will in fact create a risk of sexual harm and might also be inchoate or complete sexual offences. But, since there need only be reasonable cause to believe that the order is necessary, there is no requirement that the prohibited acts in fact create any risk, only that they create reasonable cause to believe that there is a risk. Such acts are those which in the case of the particular defendant fail to reassure the public that he is not creating a risk of sexual harm even when he is not in fact doing so. By specifically prohibiting these acts, the terms of the RSHO construct the person subject to them as a specific threat of sexual harm to children.

The reassurance aspect of these grounds for the order is reinforced when the precise definition of sexual activity and sexual communication for the purposes s123 are taken into account. An activity or communication is sexual if a reasonable person would in all the circumstances, but regardless of any person’s purpose, consider it to be sexual.⁵⁰ This means that activity which is in fact sexually motivated but which a reasonable observer would not perceive to be does not

⁴⁵ ‘The PTA seeks to achieve this object by empowering the Secretary of State to impose control orders on those suspected of *being terrorists*.’ *Secretary of State v MB*, n 42 above, [6] (emphasis added).

⁴⁶ Sexual Offences Act 2003, s 123(1)(a).

⁴⁷ Sexual Offences Act 2003, s 123(1)(b).

⁴⁸ Set out in detail in Sexual Offences Act 2003, s 123(3).

⁴⁹ Sexual Offences Act 2003, s 123(6).

⁵⁰ Sexual Offences Act 2003, s 124(5) and (7).

create grounds for an order and vice versa.⁵¹ What is manifest to the reasonable observer, not actual sexual motive, is the substantive key to liability.⁵²

The rationale is preventative in that the inchoate criminal liability under the terms of the order may be much more extensive than in the ordinary criminal law. But again the conduct concerned is defined as that which represents a risk of harm in the minds of the magistrates. In other words, the magistrates harbour a reasonable suspicion that the defendant will cause sexual harm to children in the future. The defendant is liable to the order and the order is necessary because his conduct fails to reassure the magistrates that he represents no threat.

CONSTRUCTING THE ORDINARY CITIZEN AS VULNERABLE

Liability for a failure to reassure someone in authority about your future conduct is a legal burden akin to a presumption of guilt. It reverses the onus of proof in respect not of accusations about the past, but of fears about the future.⁵³ That criminal justice experts should find themselves politically isolated in their condemnation of such sweeping measures is testament to the political effectiveness of the government's justification of them. So what is this justification?

In a newspaper exchange with a critic of criminal justice policy, prime minister Tony Blair admitted that 'we have disturbed the normal legal process with the anti-social behaviour laws', and he went on to explain why this was necessary:

If the practical effect of the law is that people live in fear because the offender is unafraid of the legal process then, in the name of civil liberties, we are allowing the vulnerable, the decent, the people who show respect and expect it back, to have their essential liberties trampled on.⁵⁴

The Prime Minister's comment echoes the view of Lord Hutton in the House of Lords. The latter observed in *McCann*, the leading case on ASBOs, that in respect of ASB, the community is 'represented by weak and vulnerable people who claim they are victims of anti-social behaviour which violates their rights'.⁵⁵ For Blair the decent are vulnerable, for Hutton LJ the vulnerable represent the community.⁵⁶

When the Prime Minister and House of Lords refer to vulnerability, they mean vulnerability as it is subjectively experienced rather than vulnerability as an objective estimation of any threat. In *McCann* Lord Steyn clearly encompasses this

⁵¹ R. Card, *Sexual Offences: The New Law* (Bristol: Jordan, 2004) 239-40.

⁵² Although it should be noted that this is a longstanding feature of the offence of sexual assault in England and Wales, see *R v Court* [1989] AC 28.

⁵³ This is closely related to the idea of the 'preemptive' turn in criminal justice discussed in L. Zedner, 'Preventive Justice of Pre-Punishment? The Case of Control Orders' (2006) CLP.

⁵⁴ T. Blair, *Observer*, 23 April 2006.

⁵⁵ *R(McCann)*, n 10 above, 835.

subjective sense of vulnerability to other's potential criminal behaviour when, adopting the words of one of his earlier judgements, he observed that: 'The aim of the criminal law is not punishment for its own sake but to permit everyone to go about their daily lives without *fear* of harm to person or property.'⁵⁷ Similarly Home Office ASB policy is oriented to the subjective problem of fear of crime. The white paper *Respect and Responsibility* which preceded the Anti-Social Behaviour Act 2003 is explicit that although actual crime reported in victim surveys and recorded by the police has fallen in recent years:

[T]he fear of crime has not fallen to the same extent. And it is fear of crime – rather than actually being a victim – that can so often limit people's lives, making them feel afraid of going out or even afraid in their own homes....⁵⁸

Where the ordinary decent citizen is understood to be defined in some sense by their subjective vulnerability to others' potential for criminal aggression against them, the attempt to control fear of crime through measures which prohibit behaviour defined by its failure to reassure others starts to make normative sense. As the Home Office suggests in *Respect and Responsibility*, the intrinsically vulnerable citizen needs reassurance before they will be willing to go about their normal lives, and the 'right to be free from harassment, alarm or distress' which is asserted by the Home Secretary in the foreword to that document is the consequence.⁵⁹ It is this construction of the ordinary, decent citizen as vulnerable that is institutionalised in the substantive law of the ASBO.

The same construction can be found in the policy underlying the Control Order. It is perhaps unnecessary to point out that contemporary counter-terrorism policy is driven by the conviction that the UK and its citizens face a uniquely dangerous threat in the form of Islamist radicals. In recommending the Control Order to parliament the Home Secretary emphasised both the vulnerability of citizens to the subjects of Control Orders, in particular, and to Islamist violence in general. In relation to the former he observed that:

These orders are for those dangerous individuals whom we cannot prosecute or deport, but whom we cannot allow to go on their way unchecked because of the seriousness of the risk that they pose to *everybody else* in the country.⁶⁰

Alert to the question of why Control Orders were necessary in 2005 when they had not been in the quarter of a century of struggle against the IRA, Charles Clarke made the familiar claim that '9/11 changed things'. Specifically, he asserted that Islamist militants—in their philosophical nihilism, lack of restraint, willingness

⁵⁶ On the connection of respectability and vulnerability in the official policy see also P. Squires P and D. Stephen, *Rougher Justice: Anti-Social Behaviour and Young People* (Cullompton: Willan, 2005) 10.

⁵⁷ R(*McCann*), n 10 above, 805 (emphasis added).

⁵⁸ Home Office, *Respect and Responsibility* (London: HMSO, 2003) 13.

⁵⁹ See D. Blunkett, Ministerial Foreword, *ibid*.

⁶⁰ HC Deb Col 339 23 February 2005 (emphasis added).

to murder through suicide, ambition and sophistication, and global reach—represented a threat which is qualitatively more serious than that which was posed by the IRA. Whether or not this construction of a historically unprecedented threat is either accurate in some objective sense or strategically prudent is not the point here.⁶¹ For present purposes we should note that the political justification of the Control Order is the historically unprecedented threat from terrorism that government *believes* all its citizens are confronted by.

The ASBO and Control Order are premised on the subjective vulnerability of citizens in respect of everyday incivilities and of extraordinary political violence. This explains why those orders impose a liability for failure to reassure, since the subjectively vulnerable are in need of reassurance. The judicial endorsement of the vulnerability of the ordinary citizen suggests that this construction is no mere eccentricity of New Labour's notorious spin machine. In fact the vulnerability of the ordinary citizen's autonomy is a fundamental assumption of contemporary political life, found in the most influential of political theories to which we now turn.

THEORIES OF VULNERABLE AUTONOMY

The basic normative proposition of the theory of vulnerable autonomy has been set out by Joel Anderson and Axel Honneth.⁶² They argue that self-respect, self-esteem and self-trust are preconditions of autonomy. Possession of these qualities arises from an intersubjective process of mutual recognition of each other's worth. Anderson and Honneth describe these preconditions as 'more or less fragile achievements, and their vulnerability to various forms of injury, violation, and denigration makes it a central matter of justice that the social contexts within which they emerge be protected.'⁶³ Their detailed discussion is limited to the active denigration of other people, but in summing up their theory they observe that:

autonomy turns out to have as a condition of its possibility, a supportive recognitional infrastructure. Because agents are largely dependent on this recognitional infrastructure for their autonomy, they are subject to autonomy-related vulnerabilities: harms to and neglect of these relations of recognition jeopardise individuals' autonomy.⁶⁴

⁶¹ The UK government's claim in this respect was most controversially contested by Lord Hoffman in a trenchant dissenting judgement in the Belmarsh case which led to the Control Order legislation, see *A v SSHD* [2005] 2 WLR 87, 135.

⁶² J. Anderson and A. Honneth, 'Autonomy, Vulnerability, Recognition and Justice' in J. Christman and J. Anderson, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: Cambridge University Press, 2005).

⁶³ *ibid* 137.

⁶⁴ *ibid* 145.

This is useful as an explicit general statement of the theory of vulnerable autonomy. However I want to argue that the same basic construction can be found implicitly at the core of three theories which have long had the most powerful influence in British political life, and which have been tentatively characterised as ‘advanced liberalism’.⁶⁵ These are the ‘Third Way’, communitarianism and neoliberalism. The discussion of these theories that follows may seem to some readers to return to some already well-covered ground. My reason for doing so is to demonstrate that the vulnerability of autonomy is not a contingent feature of these theories but fundamental to them, and, therefore, that the concept of vulnerable autonomy is deeply rooted in theories with an influence right across the political mainstream. The focus is on these theories precisely because of their acknowledged political influence. Communitarian and republican political theories have been influential in normative theories of punishment in recent years.⁶⁶ The present analysis may well resonate with aspects of these normative penal theories. But the penal theories are not investigated here because our concern is with the question of legitimacy in a social-scientific perspective as opposed to a purely normative one.

THE THIRD WAY

Anthony Giddens argues that ‘[f]reedom from the fear of crime is a major citizenship right’.⁶⁷ This right is necessary to protect the recognitional infrastructure which lies at the core of his Third Way theory where it serves as the solution to the problem of ‘social cohesion’.

The Third Way sets out from the proposition that contemporary society is characterised by a new individualism in which self-fulfilment is the central object of people’s lives.⁶⁸ In his earlier work, Giddens gives an account of the subjects of self-fulfilment who provide this starting point for The Third Way. He develops the idea that at root ‘The self is a reflexive project....We are not what we are, but what we make of ourselves’.⁶⁹ And the point of this reflexive project is self-actualisation: the discovery and positing of our authentic self through developing a reflexive self-knowledge of ‘the various phases of the lifespan’.⁷⁰ For Giddens this ‘moral thread of self-actualisation is one of *authenticity*...based on “being true to oneself”’.⁷¹ And he points out the problem of ‘social cohesion’ that is posed by this literally self-centred ethics in which ‘the only significant connecting thread is the life trajectory as such’.⁷² The authentic self is one who successfully creates ‘a

⁶⁵ N. Rose, *Powers of Freedom* (Cambridge: Cambridge University Press, 1999).

⁶⁶ See, for example, A. Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001); J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon, 1990).

⁶⁷ A. Giddens, *Where Now for New Labour?* (Cambridge: Polity, 2002) 17.

⁶⁸ A. Giddens, *The Third Way* (Cambridge: Polity, 1998) 37.

⁶⁹ A. Giddens, *Modernity and Self-Identity* (Cambridge: Polity, 1991) 75.

⁷⁰ *ibid* 75.

⁷¹ *ibid* 76-77.

⁷² *ibid* 80.

personal belief system by means of which the individual acknowledges that “his first loyalty is to himself”.⁷³ However the same self-actualisation concept that gives rise to this problem of self-centredness also supplies a potential solution in self-fulfilment.

The process of self-actualisation, of ‘finding oneself’, requires, as one of its moments, ‘achieving fulfilment’, and ‘fulfilment is in some part a moral phenomenon, because it means fostering a sense that one is “good”, a ‘worthy person’...’.⁷⁴ And to foster this sense of self-esteem requires the cooperation of others. For Giddens, a precondition of fostering self-esteem is the maintenance of what he calls ‘ontological security’, a ‘protective cocoon which all normal individuals carry around with them as the means whereby they are able to get on with the affairs of day-to-day life’.⁷⁵ This protective cocoon is made up of the everyday conventions of interaction between human beings which establish a ‘basic trust’ and thereby permit the ‘bracketing’ out of all the myriad dangers and threats to which the individual would otherwise perceive that they are constantly potentially exposed. Without this basic trust, individuals would be beset with an enervating ‘existential anxiety’ in which the elaboration of any ‘self-identity’, let alone actually achieving authentic self-knowledge, would be impossible.

Conventional civility is thus not merely one aspect of fostering the self-esteem of self and others, but a condition of being able to maintain a secure sense of self in the first place. In this way the theory of the reflexive self establishes the interdependence of the autonomy of the self and the behaviour of others.

Giddens’ ethics derive from the view that a precondition of a stable knowable sense of self is the ontological security supplied by the everyday rituals of civility. Ontological security implies ontological *vulnerability*. In this ‘therapeutic individualism’, self-realisation is always vulnerable to the hostility or indifference of others, the authentic self to be realised might be called a ‘vulnerable self’.⁷⁶ This assumption of the ontological vulnerability of individual autonomy is an essential component of Giddens’ therapeutic concept. The reflexive project of the autonomous self takes place in the shadow of its essential vulnerability.

Giddens draws out the political conclusions of this theory of the self by concluding that the autonomy of each individual is dependent on the lifestyle choices of others, entailing a new ‘life politics’ or politics of lifestyle.⁷⁷ In the Third Way this idea is developed into the political proposition that the welfare state should be reconceived as a ‘positive welfare society’, in which welfare is understood as a psychic rather than an economic concept.⁷⁸ A positive welfare

⁷³ *ibid* 80.

⁷⁴ *ibid* 79.

⁷⁵ *ibid* 40.

⁷⁶ The contemporary influence of the idea of the vulnerable self in therapeutic discourse is discussed in F. Furedi, *Therapy Culture: Cultivating Vulnerability in an Uncertain Age* (London: Routledge, 2003). Bryan Turner finds a philosophical source of the idea in Martin Heidegger’s work, see B. Turner, ‘Forgetfulness and Frailty: Otherness and Rights in Contemporary Social Theory’ in C. Rojek and B. Turner (eds), *The Politics of Jean-Francois Lyotard: Justice and Political Theory* (London: Routledge, 1998).

⁷⁷ n 69 above, 214.

⁷⁸ n 68 above, 117.

society is concerned to ensure social cohesion, which is to say cohesion between the different and diverse conditions of the psychic welfare of its self-fulfilling subjects.⁷⁹ If their own psychic welfare is to be guaranteed, individuals acquire a duty to consider others' psychic needs.⁸⁰ Indeed a whole new balance between rights and responsibilities is required, which is summed up by Giddens in the slogan 'No rights without responsibilities'.⁸¹ The responsibility not to cause each other to fear crime is a key example of these responsibilities, and for that reason freedom from fear of crime is a basic citizenship right for Giddens.

Giddens's account of 'therapeutic individualism' as such is not especially distinctive.⁸² But the way he poses the problems of social cohesion and 'ontological security' that 'therapeutic individualism' entails has been influential.⁸³ For Giddens this problem gives rise to a 'moral dilemma' which he summarises as the question of how 'to remoralise social life without falling prey to prejudice'.⁸⁴ Traditional moralities will no longer produce social cohesion for they will often conflict with the reflexive project of the self. His solution lies in duties of mutual regard for each other's self-esteem. This dilemma of remoralising social life without recourse to oppressively conservative traditions is the same problem that 'liberal communitarian' Amitai Etzioni has grappled with.

COMMUNITARIANISM

In responding to criticism that communitarianism is open to a highly conservative interpretation of moral order,⁸⁵ Etzioni has expounded a 'new golden rule' which he formulates as 'Respect and uphold society's moral order as you would have society respect and uphold your autonomy'.⁸⁶ The autonomy that, for Etzioni, can be well balanced with moral order is 'socially constructed' or 'socially secured' autonomy.⁸⁷ Etzioni is explicit that this 'socially secured' autonomy is a more upbeat formulation of Michael Sandel's conception of autonomy as the 'encumbered self'.⁸⁸

For communitarians, choices are autonomous if they reflect the identity of the chooser as a moral person, if they are truly choices which that self has commanded. For communitarians the identity of the self has no existence prior to the moral and relational context in which that self makes her choices. The individual is intersubjectively constituted in the prior moral bonds between

⁷⁹ *ibid* 44.

⁸⁰ *ibid* 37.

⁸¹ *ibid* 65.

⁸² See N. Rose, *Governing the Soul* (London: Routledge, 1990).

⁸³ And not only on New Labour policy-makers. See, for example, J. Young, *The Exclusive Society* (London: Sage, 1999); I Loader and N Walker, *Civilising Security* (Cambridge: Cambridge University Press, 2007) 166; Squires and Stephens also briefly consider ontological security in relation to ASB, n 56 above, 187.

⁸⁴ n 69 above, 231.

⁸⁵ See, for example, N. Lacey and E. Fraser, 'Communitarianism' (1994) *Politics* 14(2) 75, 79.

⁸⁶ A. Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (New York: Basic Books, 1996) xviii.

⁸⁷ *ibid* 257.

⁸⁸ *ibid* 23.

people.⁸⁹ As a consequence, individual choices are not autonomous, even where they appear to be unconstrained, unless they pay attention to the requirements of those moral bonds. In so far as the choices of market actors are merely utility-maximising they are grounded only in the particular desires which an individual feels, her immediate preferences; they represent 'purely preferential choice'. For Sandel, the satisfaction of these preferences is not itself an autonomous act. On the contrary: "Purely preferential choice" is thoroughly heteronomous.⁹⁰ Autonomous choices are not those which seek to satisfy 'an arbitrary collection of desires accidentally embodied in some particular human being'. Rather, autonomous choices are those which reach beyond spontaneous utility to satisfy 'a set of desires *ordered* in a certain way, arranged in a hierarchy of relative worth or essential connection with the identity of the agent'.⁹¹ Preferences which are not evaluated as being in accordance with the values inherent in the communal bonds which constitute the individual's identity are preferences which do not reflect the identity of the person who holds them, they are not therefore autonomous.

Since the causing of fear is corrosive of the communal bonds which constitute the individual's identity, the individual who manifests a settled disposition of practical indifference to other's fears and anxieties can be understood as refusing moral autonomy. From the standpoint of this 'socially secured' autonomy, there is nothing lost in restraining and preventing choices which arise from such a disposition. On the contrary, autonomy can only be socially constructed by maintaining an intersubjective field which inhibits such choices. Where such conditions are lacking, the duty to avoid causing the fear, or other lesser forms of offence which undermine those conditions, will need to be legally enforced.⁹² The 'heteronomy' of 'purely preferential choice' is nothing other than the inherent vulnerability of choice to external determination. Etzioni's account of 'socially secured autonomy' spells this out in less philosophical language:

People are socially constituted and continually penetrated by culture, by social and moral influences, and by one another....the choices made by individuals are not free from cultural and social factors. To remove, on libertarian grounds, limits set by the public, far from enhancing autonomy, merely leaves individuals subject to all the other influences, which reach them *not as information or environmental factors they can analyse and cope with*, but as invisible

⁸⁹ C. Taylor, 'Atomism', in S. Avineri and A. De-Shalit, *Communitarianism and Individualism*, (Oxford: Oxford University Press, 1993) 49.

⁹⁰ M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) 165.

⁹¹ *ibid* 167.

⁹² W. Galston, 'Social Mores Are Not Enough', A. Etzioni *et al* (eds), *The Communitarian Reader* (Lanham Maryland: Rowman & Littlefield, 2004) 92. Moreover, the prior duty to avoid causing these anxieties can be very wide ranging and failure to reassure may justify very intrusive official coercion (see, for example, A. Etzioni, 'Rights and Responsibilities 2001' in Etzioni *et al* (eds), *ibid* 196).

messages of which they are unaware and that sway them in nonrational ways.⁹³

For Etzioni, freedom of choice unlimited by some public regulation can only diminish autonomy, because without consciously and politically constructed limits, the individual is subject to the spontaneous operation of factors they can neither understand nor control. Left to their own devices and without the moral order of community people cannot ‘cope’, and are forced by social and market pressures to act in ‘nonrational ways’, in other words, to make ‘purely preferential choices’. They will therefore never be able to enjoy the self-command enjoyed by autonomous people who understand themselves for the people that they are, as members of their community.

To resolve Giddens’s dilemma, and ensure that the local community does not impose a particular and oppressive moral tradition on its members, Etzioni proposes a ‘pluralism with unity’ in which the law would adopt a ‘two-layered approach’.⁹⁴ The values affirmed by any particular community, which the individual would presumptively have to respect, would themselves be ‘additionally accountable’ to ‘society-wide values’ which are typically regarded as constitutional in some form or other.⁹⁵ It is interesting that, as we shall see, Etzioni’s solution is directly reflected in the legal structure of the ASBO.⁹⁶ The philosophical success or coherence of this solution is not the issue here. The key point is that for communitarianism, individual autonomy is vulnerable to heteronomous determination in the form of the purely preferential choices of both self and others. The protection of autonomy requires respect for the moral order of communal obligation that maintains the intersubjective field in which self-command may be achieved. Where discussion of the Third Way focused our attention on the denial of autonomy to the victim of such choices, our discussion of communitarianism allows us also to see the lack of autonomy of the perpetrator, the person who causes fear and anxiety. Etzioni’s formulation of the self as vulnerable in the face of market relations which are beyond comprehension is particularly intriguing because the same assumption is fundamental to the social theory of FA Hayek, the inspiration of neoliberalism.

NEOLIBERALISM

Hayek is especially significant because his thinking was a direct influence on Britain’s Conservative governments of the 1980s and 1990s, and the broader ‘neoliberalism’ which he inspired, with its preference for the provision of all kinds of public services by means of market mechanisms rather than those of state bureaucracy, has become a more or less consensus position of mainstream politics.

⁹³ n 86 above, 21 (emphasis added).

⁹⁴ *ibid* 226.

⁹⁵ *ibid* 224–25.

⁹⁶ See text at n 116 below.

The claim that Hayek's theory lends any sort of support to the kind of discretionary and reactive coercive decision-making characteristic of the CPO may seem perverse, given his avowed commitment to the rule of generally formulated laws.⁹⁷ But, as we shall see, a concept of vulnerable autonomy is nevertheless axiomatic in his social theory. Its axiomatic position has been buried by Hayek's own theoretical efforts to compensate for its effects. This element of Hayek's theory comes to the surface when it is understood that the triumph of Hayekian policy has been only partial. Unearthing it fully requires us, against the grain of discussions of neoliberalism, to remember that although Hayek was a champion of free market individualism, his case for it was nevertheless a relative one, and that this entails a particular vision of the subject of market relations.

Hayek was careful not to make the claim advanced by many neoclassical economists that free markets necessarily make the optimum use of society's resources. He only claimed that they are less imperfect than the alternatives, and particularly the socialist alternative.⁹⁸ For Hayek, socialism was an irrational revolt against the 'impersonal forces' of the market because it 'fails to comprehend that the coordination of the multifarious individual efforts in a complex society must take account of facts that no individual can completely survey.'⁹⁹ The true position, Hayek thought, was that:

A complex civilisation like ours is necessarily based on the individual adjusting himself to changes whose cause and nature he cannot understand: why he should have more or less, why he should have to move to another occupation, why some things he wants should become more difficult to get than others, will always be connected with such a multitude of circumstances that no single mind will be able to grasp them....¹⁰⁰

For Hayek, the consequences of socialism's hubristic revolt against the necessarily decentralised decision-making process of the market would not be more freedom but less because:

the only alternative to submission to the impersonal and seemingly irrational forces of the market is submission to the equally uncontrollable and therefore arbitrary power of other men.¹⁰¹

In this respect, Hayek's theory is strikingly paradoxical. The free market had generated a 'Great Society' of unparalleled wealth, and of freedom from the arbitrary despotism of other people. But it had done so only through submission to the impersonal forces of the market. Any attempt to gain control of those

⁹⁷ See F. Hayek, *Law, Liberty, Legislation* (Routledge & Kegan Paul, 1979).

⁹⁸ A. Gamble, *Hayek: The Iron Cage of Liberty* (Cambridge: Polity, 1996) 69.

⁹⁹ F. Hayek, *The Road to Serfdom* (London: Routledge, 1944) 152.

¹⁰⁰ *ibid* 151.

¹⁰¹ *ibid* 152.

impersonal forces could undermine independence from other people's arbitrary power. Hayek was conscious of the tension intrinsic to the experience of a freedom founded on submission. And he was explicit that it was only through religious faith and tradition that these tensions could be managed:

It does not matter whether men in the past did submit [to market forces] from beliefs which some now regard as superstitious: from a religious spirit of humility, or an exaggerated respect for the crude teachings of the early economists. The crucial point is that it is infinitely more difficult rationally to comprehend the necessity of submitting to forces whose operation we cannot follow in detail, than to do so out of the humble awe which religion, or even the respect for the doctrines of economics, did inspire.¹⁰²

Writing in the 1940s, Hayek's reference to 'exaggerated respect' for the doctrines of the early economists tacitly recognises the crisis of neoclassical economics in the wake of the Depression of the 1930s and the rise of Keynesianism with its promotion of the macroeconomic role of the state. In the face of the decline of neoclassical economics as a rationale for the free market, the authority of tradition was critical. As Hayek would later write: 'all progress must be based on tradition.'¹⁰³

Hayek argues that social cohesion under the market relies on traditional institutions and beliefs,¹⁰⁴ but he offers little in the way of a systematic connection between the market and traditional beliefs. Hayek recognised that the free market could not be made to be 'good in the sense that it will behave morally'.¹⁰⁵ He regarded it as neither innate nor designed, but a system which 'we have tumbled into'.¹⁰⁶ In his last work, he notes the historical connection between monotheistic religions and the values of capitalism but adds that this 'does not of course mean that there is any intrinsic connection between religion as such and such values'.¹⁰⁷ In Hayek's theory, the necessity of tradition and religion is external to the market's knowledge-coordinating function. Given the contingency of this relation, the notion that the secure enjoyment of the individual freedoms of the Great Society depends on traditional religious faith carries with it a necessary implication, one which is given more explicit treatment by The Third Way and communitarianism. The experience of an individual who is *not* securely embedded in traditional values

¹⁰² *ibid.* Hayek omits to mention one circumstance in which an individual, even in the absence of religious belief, might find it relatively easy 'rationally to comprehend the necessity of submitting to forces whose operation we cannot follow in detail'. That circumstance is the knowledge that the individual concerned possesses sufficient property to protect herself against the unfathomable changes wrought by the market. This ideological omission is significant, for it assumes that vulnerability to other's choices is a universal characteristic of the subjects of market society.

¹⁰³ F. Hayek, *Law, Legislation and Liberty*, Vol 3 (London: Routledge & Kegan Paul, 1979) 167.

¹⁰⁴ See also P. O'Malley, 'Volatile and Contradictory Punishment' (1999) 3(2) *Theoretical Criminology* 175, 188.

¹⁰⁵ F. Hayek, *Law, Legislation and Liberty*, Vol 1 (London: Routledge & Kegan Paul, 1979) 33.

¹⁰⁶ *ibid* 164.

¹⁰⁷ F. Hayek, *The Fatal Conceit: The Errors of Socialism*, (London: Routledge, 1988) 137.

or religious faith (or, presumably, is not ‘irrationally’ rebelling against market forces) will be an experience of vulnerability ‘to changes whose cause and nature he cannot understand’.

Once the theoretically contingent presence of tradition or religion in the individual’s life is eliminated, the individual subject conceived of by Hayek’s theory turns out to be intrinsically vulnerable to the depredations of the market’s impersonal forces. Neoliberalism, once denuded of its contingent ethical moorings in traditional religion, loses any distinctive moral grounds for the duties of citizenship,¹⁰⁸ and is left with only the unmediated experience of vulnerability to the unknowable, uncontrollable and insecure marketplace. ‘Neoliberalism without the traditional values’ is an apt description of the mainstream political experience in Britain in the 1990s. Neoliberal economic policies triumphed in the 1980s and 1990s. But, for all Margaret Thatcher’s talk of ‘Victorian values’ or John Major’s abortive ‘Back to basics’ campaign, that triumph was not accompanied by any public revival of traditional morality or of social policies based on it.¹⁰⁹ It is this experience to which the ethics of Giddens’s ‘life politics’, or of Etzioni’s New Golden Rule respond, generating what Rose terms an ‘ethico-politics’, a politics of behaviour.¹¹⁰ These are the politics that underpin the right of the community to live free from ‘harassment’ or ‘distress’ or from ‘terror’, and the power of the magistrates court or the Home Secretary to control behaviour that does not reassure. Although there is every reason to doubt that Hayek himself would have approved of the legal form of the CPO, the ground for its legitimacy has been laid by the combination of the political success of his ideas in respect of economic policy and the simultaneous political failure of the social and moral prescriptions’ that were the counterpart of the economic aspects of his thought.

In important respects the three theories considered here are quite different in their concerns, emphases and priorities. These differences nuance the way each theory conceives of the vulnerability of the individual subject. Nevertheless each of these influential theories contains the assumption that the individual’s autonomy is intrinsically vulnerable to the spontaneous self-interested preferences of others. And it is this vulnerability which lays the normative basis for liability to the CPOs, the liability to have behaviour which fails to reassure controlled by a preventative order.

¹⁰⁸ See also R. Sullivan, ‘The Schizophrenic State: Neoliberal Criminal Justice’ in K. Stenson and R. Sullivan, *Crime, Risk and Justice* (Cullompton: Willan, 2001) 44.

¹⁰⁹ Margaret Thatcher’s much-vaunted promotion of Victorian Values did not reverse any of the major moral reforms of the 1960s. Nor did welfare policy return to the Poor Law or the workhouse, see R Samuel, ‘Mrs Thatcher’s Return to Victorian Values’ in T Smout (ed), *Victorian Values* (Oxford: Oxford University Press, 1992) 22.

¹¹⁰ n 65 above, 170.

NORMATIVE CRIMINAL THEORY vs THE THEORY OF VULNERABLE AUTONOMY

The central position of vulnerable autonomy in contemporary political and social theory suggests that the political invocation of vulnerability and its protection as a norm represents something more than merely cynical fear-mongering or a manipulative governmental technique deploying the contingently fashionable discourse of therapy.¹¹¹ In so far as these theories articulate shared social beliefs they provide a legitimating context for the substantive law of the CPO which institutionalises the protection of this norm.¹¹²

We can now look at Simester and von Hirsch's claim that the CPO is not legitimate in this new light. The claim made here is that the CPO institutionalises in penal obligations the normative structure of the 'advanced liberal' theories of 'vulnerable autonomy'; from the perspective of the theory of vulnerable autonomy some at least of the features of the CPO which Simester and von Hirsch regard as weaknesses reappear as its strengths. We will look in turn at each of the seven objections they pursue in detail below and at how the theory of vulnerable autonomy responds to them. To reiterate a point made earlier, the object is not to make a normative argument for either the theory or the CPO, it is only to argue that there appears to be a connection between the two. It may be that proponents of the theory of vulnerable autonomy who disapprove of CPOs will wish to find ways to break the connection between the two. But the purpose here is simply to show that there appears to be a connection to break, that the theory of vulnerable autonomy appears to provide a rationale for the elements of the CPO to which normative criminal law theory objects.

THE CPO CRIMINALISES CONDUCT THAT IS NOT A WRONG

Simester and von Hirsch object that the broad and vague definitions of the conduct that can be controlled by CPOs may criminalise conduct that is not wrong in the sense of 'satisfying a properly defined Harm Principle or Offence Principle'.¹¹³ But from the standpoint of vulnerable autonomy, it is wrong to fail to reassure each other and/or the relevant authorities that we do not represent a threat. Without reassurance ordinary vulnerable citizens will be inhibited from going about their lawful business. Not to reassure in this view is wrong because it

¹¹¹ For a sociological critique of the 'construction of the vulnerable citizen' which discounts the significance of contemporary political ideas in general, and the Third Way in particular, see F. Furedi, *Culture of Fear* (London: Continuum, 2005).

¹¹² How far these theories do articulate shared social beliefs is of course debateable. My argument here is only that since these theories inform much of mainstream politics, they tend to explain the relative lack of political controversy over the substantive terms of the CPOs. However in so far as the theories are also sociologically sound we could expect their invocation of vulnerability to articulate feelings experienced in the wider population.

¹¹³ Simester and von Hirsch, n 4 above, 173-174.

does harm to the ‘relations of recognition’, to the intersubjective field in which citizens’ vulnerable autonomy is constituted.¹¹⁴

Simester and von Hirsch use the example of the potential distress caused to racists by interracial couples to note that in relation to the ASBO this may mean that we all have to be aware of every objectionable prejudice of our neighbours lest we offend them.¹¹⁵ But this is why so much official discretion is built into these legal measures. Since some subjective anxieties will not be reasonably founded, the authorities and the courts are empowered to make political judgements over what behaviour is reasonable, what is reasonably suspicious, when orders are necessary and so on.¹¹⁶ Conduct that causes harassment, alarm or distress but is nevertheless adjudged to be consistent with public policy will avoid liability,¹¹⁷ but the presumption has shifted towards controlling behaviour which creates anxiety, and that is a consequence of the perceived need to protect the ‘recognitional infrastructure’ of ‘vulnerable autonomy’.

The lack of attention to the theories of ‘advanced liberalism’ creates a particular difficulty for Simester and von Hirsch’s critique on this point. They argue that the ASBO, which typically limits access to public space to those subject to one, ‘raises problems of identity and self-definition’. This is because ‘for most of us, our lives involve, and are in part defined by, the interaction and relationships we have with other members of our society’ and denying access to public space will tend to ‘undermine [the defendant’s] participation in the society itself; and, ultimately, to undermine D’s identity as a human being’.¹¹⁸ But this is to invoke precisely the ‘recognitional infrastructure’, as it exists in public space, which provides the normative basis of the requirement that citizens not fail to reassure each other. Simester and von Hirsch object that the ASBO criminalises conduct in a way that goes further than any Harm or Offence Principle can justify. But it is not clear why they claim this, given that they appear to accept the intersubjective constitution of identity, which, in the theories of vulnerable autonomy implies the possibility of harm to the intersubjective field. They may have reasons as to why the Harm Principle does not recognise damage to the intersubjective field as a wrong (despite their agreement that it is in this field that individual’s identities are constituted), but they don’t state them.

THE ABSENCE OF A CULPABILITY REQUIREMENT

Simester and von Hirsch object that the CPO lacks a culpability requirement both in the grounds of liability to an order and the offence of breach of an order.

¹¹⁴ Although, as we have seen, the ASBO does not treat the conduct on the footing of a wrong to be punished but as a threat to be controlled, see text at n 39 above.

¹¹⁵ *ibid* 185.

¹¹⁶ Note that this structure replicates Etzioni’s ‘pluralism with unity’ solution to the dilemma of ‘remoralising society without prejudice’, in which a person’s indifference to local mores and sensibilities will only be legally controlled if it is also violates ‘society-wide’ values. See text at n 96 above.

¹¹⁷ See Ramsay, n 5 above, 918.

¹¹⁸ Simester and von Hirsch, n 4 above, 183.

However the absence of cognitive *mens rea* (ie, intention or recklessness) at both stages does not mean that the CPO contains no element of culpability. The key to this is to grasp the element of positive obligation in the CPO. If the wrong is the failure to reassure, where a reasonable person would or so as to create a reasonable suspicion in the mind of an official, then the failure amounts to a form of negligence. Furthermore, where a person has committed the wrong of failing to reassure, the authority imposing the order is nevertheless required to consider the necessity of the order. An order will not be necessary unless there is sufficient evidence to suggest that the failure to reassure is the consequence of some settled disposition to ignore or to prey upon the vulnerability of others. A person who exhibits such a disposition, and consistently fails to do what the reasonable person would do, such that the order is necessary, is a person who (in the communitarian idiom) fails to assess her actions in the light of the intersubjective constitution of her own autonomy, or (in Giddens's idiom) fails to fulfil the responsibilities which are the constitutive basis of her rights. In other words, a preventative order will be *necessary* only against a person who fails this test of moral autonomy.

It is because of this prior failure that no *mens rea* is required in the criminal offence of breach of a CPO. An order is only imposed where this failure has occurred, and the order will consist of highly specific and individualised prohibitions. These specific prohibitions are communicated to the defendant, who is put on notice of the consequences of failure to provide that continued reassurance. These terms construct the person subject to them as a specific threat, *as opposed to* a formally autonomous subject presumed capable of freely adjusting her conduct to the general criminal law.¹¹⁹ This construction of the subject of a CPO as a mere threat is given in the very existence of the *actus reus* of the offence of breach of a CPO. A *mens rea* requirement in the offence of breach would be morally nugatory, whatever its practical benefits to defendants.

PUNISHMENT IS NOT PROPORTIONAL TO THE SERIOUSNESS OF THE CONDUCT

Simester and von Hirsch object that an order might impose a 10-year long ASBO on conduct which if prosecuted as a criminal offence would carry at most a few months in prison or a fine. But understood as a means to protect vulnerable autonomy the order is not a punishment for the wrong of a harmful or offensive interference with another individual's protected interests, as a conventional criminal punishment might be. By specifically prohibiting the failure to reassure, the order is intended to prevent wrongs to the intersubjective field in which the vulnerable autonomy, and the security, of citizens are constituted.¹²⁰ What is

¹¹⁹ On this distinctive characteristic of criminal law, see H.L.A. Hart, *The Concept of Law* (Clarendon: Oxford, 1997) 39.

¹²⁰ Anderson and Honneth argue that the autonomy-protecting rights (and the violations of them) are properties of this field and not of the individuals within it, see n 62 above, 138-139; see also Barbara Hudson on the community as moral being in contemporary criminal justice policy, B. Hudson, *Justice in the Risk Society* (London: Sage, 2003) 82.

necessary in an order is what is proportional to those preventative and incapacitatory demands.¹²¹ This does not dispose of the argument that the effect of a CPO is penal whatever its intention, but from the standpoint of vulnerable autonomy this coercion is imposed on a person who has been differentiated from other citizens on the grounds of a dispositional lack of moral autonomy. In such a context proportionality will become of a question of their dangerousness and the requirements of incapacitation.¹²²

A further objection is that punishing a defendant for breach of an order may involve punishment for conduct that is not in itself wrong but merely in defiance of the order: 'The scheme becomes, in Hegel's terms, a stick raised to a dog.'¹²³ But we have seen above how the imposition of a CPO is precisely premised on the defendant's lack of moral autonomy and her reconstruction as a threat to the recognitional infrastructure of autonomy.¹²⁴

THE GROUNDS FOR LIABILITY FOR A CPO DO NOT GIVE CITIZENS FAIR WARNING

The objection is that the vagueness and imprecision of the grounds for imposing an order make it difficult to know in advance what behaviour will render a citizen liable to one. This matters because, as Simester and von Hirsch put it, 'knowing where we stand augments the ability of citizens to live autonomous lives'.¹²⁵ But if by 'autonomy' is meant 'vulnerable autonomy', then knowing where we stand so as to augment our ability to live autonomous lives requires reassurance by others, and enforcing that reassurance is the purpose of the CPO.

Simester and von Hirsch continue that 'the possibility of being guided by the state's rules is foundational to our capacity as individuals to make decisions'.¹²⁶ There may be an argument that it is possible to be guided by the CPO's requirements: citizens can make any decisions they like, as long as they make sure that their neighbours' sense of security is not threatened by any conduct that might be adjudged unreasonable, that they have not given the Home Secretary grounds for reasonable suspicion of involvement in 'terrorism-related activity' and that they haven't engaged in conduct with children that a reasonable observer would regard as sexual. Public policy will give them a guide as to what is reasonable. Citizens now have to make their decisions in this precautionary context. If they fail to be aware of precaution's requirements, or make the wrong

¹²¹ For discussions of the issues involved, see A. Ashworth, 'Criminal Law. Human Rights and Preventive Justice' and L. Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' in B. McSherry, A. Norrie and S. Bronnitt, eds., *Regulating Deviance* (Oxford: Hart, forthcoming).

¹²² Such a position seems to be emerging in the sentencing law for breach of ASBO, see *R v Anthony* [2006] 1 Cr App R (S) 74.

¹²³ Simester and von Hirsch, n 4 above, 189.

¹²⁴ Where breach of an ASBO itself causes no ASB, the Court of Appeal has ruled that custodial sentences should be avoided or, where they cannot be avoided, they should be kept to the minimum necessary to uphold the authority of the court (see *R v Lamb* [2005] All ER (D) 132 (Nov)).

¹²⁵ Simester and von Hirsch, n 4 above, 187.

¹²⁶ *ibid.*

decisions, then the highly specific terms of the order to which they become liable will offer them some stern guidance as to what to avoid in future.

On the other hand it may be that it is ultimately impossible to be sure that you have acted cautiously enough in the face of the uncertainties involved and that the problem of insecurity is therefore created by the law rather than solved by it. But normative criticism of the CPO needs to recognise that it is the operation of the ‘precautionary principle’ in criminal justice that is its target.¹²⁷

THE CIVIL APPLICATION PROCEDURE FOR AN ORDER PREVENTS A FAIR TRIAL

The central objection in relation to the ASBO is to the admissibility of hearsay, the evidence of professional witnesses, and the absence of any necessity for a confrontation between the complainant and the defendant (or the defendant’s representative), given the serious consequences that an order may have on the life of the defendant.¹²⁸ However since substantively the liability is based on protection of vulnerable autonomy, it would be self-defeating to demand of the ordinary vulnerable citizen that they give evidence against the person who fails to reassure them.¹²⁹ Their subjective vulnerability to the defendant’s failure to reassure will in many cases prevent them from giving evidence in open court in practice, they will be too afraid. This treatment of the rights of defendant and of victims as a zero-sum game is the necessary counterpart of the precautionary logic of the substantive law of vulnerable autonomy, under which all citizens have a legal responsibility in respect of each other’s (in)security, fulfilment of which is prior to their rights, procedural and substantive.¹³⁰

CPO PROHIBITIONS ARE NOT GENERALLY FORMULATED

Simester and von Hirsch object that generally formulated criminal laws treat people as equal before the law, while the CPO ‘abandons reciprocity in favour of burdening individual targets’.¹³¹ But, once again, in the normative structure of vulnerable autonomy ‘there are no rights without responsibilities’, and what this means (if it means anything beyond a tautology) is that failure to fulfil responsibilities justifies a reduction in rights. The protection of vulnerable autonomy requires that citizens do not fail in their responsibility to reassure, and where there is a failure to reassure, a risk assessment may be necessary, and where a dispositional failure of moral autonomy is found, a preventative order may be imposed.

¹²⁷ This point that has been recognised by criminal justice writers, see Zedner, n 121 above; Squires and Stephens, n 56 above, 202-07.

¹²⁸ The procedural objections to the Control Order are much more far reaching and require separate treatment, see Zedner, n 53 above.

¹²⁹ See *R(McCann)*, n 10 above, 814.

¹³⁰ For an expanded exposition of the point see Ramsay, n 5 above, 924.

¹³¹ Simester and von Hirsch, n 4 above, 181.

The purpose of the CPO is not the liberal criminal law's purpose of punishing the invasion of the protected interests of autonomous individual subjects, a purpose which takes form in the equal protection of general laws. The purpose of the CPO is to protect 'advanced' liberalism's intersubjective 'recognition infrastructure' of vulnerable autonomy. It therefore takes the form of risk assessment, and the deliberately discriminatory distribution of penal obligations and civil rights.

CRIMINAL PROHIBITIONS SHOULD ONLY BE LAID DOWN BY REPRESENTATIVE AUTHORITY

This is Simester and von Hirsch's most fundamental objection. CPOs contain criminal prohibitions laid down by magistrates courts or executive functionaries rather than 'a legislative body such as parliament'.¹³² As Simester and von Hirsch observe 'this raises a separation of powers issue'.¹³³ The ASBO in particular collapses the legislative, adjudicative and executive functions into the person of the magistrate.¹³⁴ Under the CPO powers, citizens can no longer even in theory be said to be both author and addressee, subject and object, of the penal obligations, since the scope of their liability to penal coercion can be decided at the discretion of an official rather than by their elected representatives. For parliament to abandon the monopoly on the distribution of the civil rights of citizens to executive functionaries, or judicial functionaries exercising an executive function, is incompatible with representative government.¹³⁵

In so far as the protection of vulnerable autonomy requires a risk assessment and the individualised distribution of civil rights (on the grounds of failure to fulfil prior responsibilities), then it does appear to require this violation of the conditions of representative authority. The deliberation upon and adoption of individualised criminal prohibitions is in its nature not a legislative or adjudicative function. Since it must be based on a risk-assessment, it is an executive function, whoever carries it out.¹³⁶

The broader position of the theories of vulnerable autonomy on representative government cannot be pursued here. For the purposes of this paper it is enough to note that contemporary government appears to be staking its claims to legitimacy in the security context on something other than *representative* democracy. This suggests a new direction for criminal law theory which has

¹³² *ibid* 180.

¹³³ *ibid* 180.

¹³⁴ See Ramsay, n 5 above, 920.

¹³⁵ Of course officials in the criminal justice system have long enjoyed discretionary powers in practice which may in some circumstances result in a deliberately discriminatory distribution of civil rights. But this is different from being granted a discretion which explicitly requires such a formally unequal distribution. This latter discretion is not entirely unprecedented, as Simester and von Hirsch note, regulatory powers are frequently delegated to specialised agencies. What is new is the scope of the CPOs, and their impact on civil rights beyond the right to property and beyond the regulation of circumscribed areas of social activity.

¹³⁶ See Ramsay, n 5 above.

tended to proceed either as a branch of liberal moral philosophy or as a critical perspective on this liberal philosophy. An explicit understanding of criminal justice in the terms of political theory and the norms of democracy is comparatively underdeveloped.¹³⁷ This is to reassert Nicola Lacey's point that 'the democratic legitimisation...of the whole range of practices involved in criminalisation, is the most pressing normative and practical question facing the contemporary criminal process'.¹³⁸

CONCLUSION

One reason that the Civil Preventative Order enjoys its practical political legitimacy in the present may be that it institutionalises the protection of vulnerable autonomy, a concept which is axiomatic to political outlooks which have enjoyed a widespread influence in recent years.

The analysis of the normative claim to protect vulnerable autonomy might make a useful contribution to the broader perspective of theorising criminalisation. By virtue of the conceptual connection between vulnerable autonomy and ontological security, vulnerability may have some potential to integrate the explanatory and instrumental concerns which have dominated criminological and policy-oriented discussions of the 'security society',¹³⁹ with the normative concerns of criminal law theory.¹⁴⁰

The 'social-scientific' analysis of the CPO's legitimacy in itself does nothing to answer the purely normative criticisms of liberal criminal law theory. It rather sets out the normative claim made on behalf of the CPO, in its most systematic form. By understanding the character of that claim we can gain a better understanding what is at stake, and clear the ground for contesting the claim's validity in its own terms. The analysis presented here suggests that the theory of vulnerable autonomy has little interest in the value or purpose of fair warning, formal equality before the criminal law and the legal prerequisites of representative government generally. It is on this ground that the CPO may itself prove particularly vulnerable to critique since, to put the point mildly, it is questionable whether the endeavour to eliminate insecurity by eroding these aspects of democratic citizenship can be described as coherent.

¹³⁷ N. Lacey, 'Criminal Justice and Democracies: Inclusionary and Exclusionary Dynamics in the Institutional Structure of Late Modern Societies' draft paper for Workshop on Democratic Criminal Justice, Warsaw (October 2006).

¹³⁸ N. Lacey 'Contingency and Criminalisation' in I. Loveland (ed), *Frontiers of Criminality* (London: Sweet & Maxwell, 1995).

¹³⁹ See, for example, L. Zedner, *Criminal Justice* (Oxford: Oxford University Press, 2004).

¹⁴⁰ See L. Zedner, 'Policing Before and After the Police' (2006) 46 BJ Crim 78, 92.