

ANTI-SOCIAL BEHAVIOUR ORDERS IN THE UNITED KINGDOM



A. W. Brian Simpson

For centuries the common law, in Great Britain and America and elsewhere in the world, has elaborated bit by bit a complex procedure for the trial of criminal cases, including certain features thought essential to elementary fairness: clear notice of the rule one is supposed to have violated, notice of charges, opportunity to be heard and to confront witnesses, assistance of counsel, proof beyond a reasonable doubt, the right of appeal, and so on. The process of the investigation of offenses has likewise been subject to regulation, perhaps most dramatically as a matter of constitutional law under the Fourth, Fifth, and Sixth Amendments.

As A. W. Brian Simpson explains in this essay, in recent years the United Kingdom has established quite a different system for dealing with disturbing, offensive, or generally anti-social behavior, especially by young people, called the Anti-Social Behaviour Order. Under this program, a person can be subjected to what amounts to an injunction to refrain from certain conduct specified in the order, with virtually none of the protections of traditional common law. This system converts courts into administrators of a program of social control. In this essay Simpson describes this development, which he sees as presenting the question: Is this the end of criminal law?

In this essay, I shall talk about what are known as ASBOs, Anti-Social Behaviour Orders, a legal innovation brought into UK law by the Blair government in 1998. For many years, there has been a recognition that law enforcement agencies have not been very successful in dealing with groups of badly behaved young people, sometimes called feral youths, who create disorder and a sense of insecurity, mainly in relatively deprived urban residential areas, but also in city centers late at night and on public transport. The sort of behavior involved varies but may include shouting and swearing,

personal abuse directed at bystanders, public drinking, vomiting and urinating, various forms of damage to property (including paint spraying, smashing bottles, and throwing beer cans around), and so on. Everyone agrees there is a problem. Just before writing up this discussion, I was on a train to London from my home when a group of such youths, mainly male, but including some young women, boarded the train. None had bought tickets, and the ticket collector was so intimidated by their noisy and aggressive behavior that he let this pass. One seized my newspaper, not to read it, but simply to annoy me. Various passengers moved to other parts of the train. Mercifully, the youths all left at an intermediate station, and peace descended again. They provided a very mild example of the problem.

In 1995, the Labour Party issued a consultation paper entitled *A Quiet Life: Tough Action on Criminal Neighbours*¹ that discussed the problem and its possible solution, and in the Crime and Disorder Act of 1998, the Blair government introduced the ASBO as one remedy. The rules governing ASBOs have been modified since then by legislation in 2002 and 2003,² and my account has to somewhat simplify a complex body of law. So I will not mention all the safeguards built into the system. In essence, an ASBO is a court order, in effect an injunction, usually made by a magistrate's court,³ requiring a person to abstain from specified anti-social behavior, prohibiting him or her from certain specified conduct, or both. Applications must be made by local government authorities, by the police, or by registered social landlords and housing trusts and county councils; members of the public cannot directly make applications. Orders cannot be made against children under the age of ten, but otherwise anyone can be made subject to one, and there is no upper age limit. People of my age are not immune, but most orders are made against young persons. Originally they only had local force within a local government area, but today ASBOs made anywhere in England and Wales can apply throughout that area.⁴ Violation of such an order is a criminal offense, which therefore incurs a liability to suffer criminal penalties. These may include imprisonment for up to five years for those over seventeen. Those between twelve and seventeen can be made subject to a detention and training order—that is to say, they can be locked up—but those aged ten and eleven cannot be, though they may be ordered to perform some community service. Violation of an order is also an arrestable offense—that is, arrestable by a police officer without warrant.

Acting in an anti-social manner, which has to be proved before an order can be made, is not defined in the legislation except as acting in “a man-

ner that has caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as [the subject or the order].⁵ The responsible government department, the Home Office, has issued *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* and various other documents explaining ASBOs and the related Acceptable Behaviour Contracts (ABCs).⁶ The latter are agreements that can be entered into between local governmental agencies and troublesome people, mainly young people; the procedure is inevitably somewhat coercive. Violation of such a contract can lead to the imposition of an ASBO or to a possession order related to residential accommodation.⁷ Official guidance on what is to count as anti-social behavior lists harassment of residents or passersby, verbal abuse, criminal damage, vandalism, noise nuisance, writing graffiti, engaging in threatening behavior in large groups, racial abuse, smoking or drinking in public while under age, substance abuse, joyriding, begging, prostitution, curbside crawling, throwing missiles, assault, and vehicle crime. Another official guidance document includes rowdy and nuisance behavior, yobbish behavior and intimidating groups taking over public spaces, fly-posting, dealing and buying drugs on the streets, dumping rubbish and abandoning cars, anti-social drinking, and the misuse of fireworks. The English yob, or lout,⁸ shades into the English hooligan and, like elephants, is hard to define but supposedly easy to recognize. What needs to be noticed is that the concept is not limited to cover only conduct that is criminal, though, in fact, most of these examples involve conduct that could, depending on the circumstances, be criminal. Furthermore, conduct that may be forbidden under an ASBO is in no way confined to criminal conduct. For example, a person might be forbidden to be in a town center at night.

The United Kingdom has long since signed up to the European Convention on Human Rights, and under the Human Rights Act of 1998, the convention is partly assimilated into UK domestic law. Article 6 of the convention specifies certain requirements that must be satisfied in criminal proceedings.⁹ In English law, proceedings in applications for ASBOs count as civil proceedings, not criminal proceedings.¹⁰ The policy of characterizing the proceedings as civil has all sorts of consequences. For example, the criminal burden of proof does not apply to the requirement, specified in the legislation, that the order must be thought necessary, though it does apply to the proof of the alleged previous anti-social acts. There are important consequences in the law of evidence, in that hearsay