

Behaviour Orders: Preventive and/or Punitive Measures?

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Abstract

This thesis enquires into the nature of behaviour orders; specifically, it seeks to establish whether they are preventive and/or punitive. In 1998, Parliament introduced the anti-social behaviour order (ASBO), an order granted in a civil court that imposed ostensibly preventive conditions – such as curfews – on its recipient. Breach of a condition was an offence. This hybrid model was meant to overcome the supposedly unique difficulties of addressing anti-social behaviour through the criminal law. There has since been a proliferation of behaviour orders that take the form of or forms similar to the now repealed ASBO. At present, there are 33 such orders that target behaviours ranging from community nuisance to violent offending.

Behaviour orders are often described as preventive by courts and commentators. The central contention of this thesis is that though all behaviour orders are preventive, many are also punitive. The importance of this contention lies in the consequences of both classifications. Heightened safeguards, such as the presumption of innocence, must be employed when a trial may result in punishment. The current processes for the imposition of behaviour orders fall short of these standards. In addition, the thesis argues comparable safeguards should precede the imposition of preventive measures imposed by the state when these measures are coercive and based on a risk assessment. Again, such safeguards are not routinely employed before behaviour orders are imposed. In making out this argument, the thesis develops a new taxonomy of behaviour orders; offers new insight into both domestic judgments on behaviour orders and related decisions of the European Court of Human Rights; and critically engages with the concepts of punishment and prevention themselves.

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Table of Abbreviations

Abbreviation	Full text
ASB injunction	Anti-social behaviour injunction
ASBO	Anti-social behaviour order
CBO	Criminal behaviour order
CCTV	Closed circuit television
CPN	Community protection notice
CPS	Crown Prosecution Service
DVPO	Domestic violence protection order
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FGM	Female genital mutilation
HRA	Human Rights Act 1998
LCJ	Lord Chief Justice
PSPO	Public spaces protection order
SCPO	Serious crime prevention order
SHPO	Sexual harm prevention order
SRO	Sexual risk order
T	Time
TPIM	Terrorism prevention and investigation measure

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Chapter 1: Introduction

The terms of the [anti-social behaviour] injunction would...be preventative rather than punitive...¹ (Home Office, 2011)

[The anti-social-behaviour injunction] is effectively going to be a super-punitive ASBO...² (Liberty, 2013)

In 1998, Parliament, under Tony Blair's New Labour government, enacted the Crime and Disorder Act. The Act introduced the anti-social behaviour order (ASBO),³ an order granted in a civil court that imposed ostensibly preventive conditions – such as curfews and geographical restrictions – on its recipients.⁴ Breach of a condition was a criminal offence with a maximum sentence of five year's imprisonment.⁵ The ASBO was enacted in response to two issues that the then government argued limited the capacity of the criminal law to respond to anti-social behaviour.⁶ First, people were said not to want to give evidence against those who engaged in anti-social behaviour in their community. The more stringent rules on adducing hearsay evidence in criminal trials were thus seen as a bar to tackling anti-social behaviour. Secondly, though incidences of anti-social behaviour were only 'quasi-criminal',⁷ the cumulative effect of such incidences could be severe. The criminal law was said to be ill-equipped to tackle such cumulative problems. The ASBO

¹ Home Office, *More Effective Responses to Anti-social Behaviour* (2011) 18.

² Liberty, 'Liberty's Report Stage Briefing on the Anti-social Behaviour, Crime and Policing Bill in the House of Commons' (Liberty October 2013) 17.

³ Crime and Disorder Act 1998, s 1.

⁴ The ASBO was later made available on conviction by the Police Reform Act 2002, s 64.

⁵ Crime and Disorder Act 1998, s 1.

⁶ Labour Party, 'A Quiet Life: Tough Action on Criminal Neighbours' (Labour Party 1995); AP Simester and Andrew von Hirsch, 'Regulating Offensive Conduct through Two-Step Prohibitions' in Andrew von Hirsch and AP Simester (eds), *Incivilities* (Hart Publishing 2006) 175-177.

⁷ This phrase has been used in the House of Lords, but it is questionable whether behaviour can be quasi-criminal as opposed to being either criminal or not. *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [82] (Lord Hope). On what constitutes a crime, see Glanville Williams, 'The Definition of Crime' [1955] *Current Legal Problems* 107; Grant Lamond, 'What is a Crime?' (2007) 27(4) *Oxford Journal of Legal Studies* 609.

was presented as a solution because it could be granted under civil evidential rules and thus avoided the hearsay rules in criminal trials.⁸ This meant a local authority employee or a police officer could present statements on behalf of others that related to multiple incidents of alleged anti-social behaviour. At its inception, the ASBO was thus presented as a unique tool to respond to the unique difficulties of regulating anti-social behaviour.⁹

Bakalis later queried the merit of the government's move to allow officials to present evidence of anti-social behaviour on behalf of others, asking dryly 'would not *all* criminal offences be more effectively and easily prosecuted without the rule against hearsay evidence?'¹⁰ Repeated governments over the last twenty years appear to have agreed with Bakalis, but have perhaps not taken her contention as she intended. There has been a proliferation of behaviour orders that take the form of or forms similar to the now repealed ASBO.¹¹ In 2019, there are 33 such orders that target behaviours ranging from community nuisance¹² to violent offending;¹³ and from psychoactive substances abuse¹⁴ to terrorism.¹⁵

Why does it matter that there has been a proliferation of behaviour orders? The answer centres on the form of the orders and the safeguards which (should) precede their imposition. In essence, behaviour orders impose coercive conditions the breach of which can result in sanction, but their imposition is not necessarily preceded by the heightened

⁸ Note that the restrictions on hearsay evidence in criminal trials were softened, after the introduction of the ASBO, by the Criminal Justice Act 2003; See, Di Birch, 'Hearsay: Same Old Story, Same Old Song?' [2004] (7) *Criminal Law Review* 556.

⁹ This is not to say the ASBO was a wholly novel legal instrument: Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 75.

¹⁰ Chara Bakalis, 'Anti-social Behaviour Orders – Criminal Penalties or Civil Injunctions?' (2003) 62(3) *Cambridge Law Journal* 583, 585 (original emphasis).

¹¹ The ASBO was replaced by the anti-social behaviour injunction: Anti-social Behaviour, Crime and Policing Act 2014, s 1. A more frequently used term for these measures is 'preventive orders', I explain why the term 'behaviour orders' is preferred in chapter 2.

¹² Anti-social Behaviour, Crime and Policing Act 2014, s 43.

¹³ Criminal Justice and Immigration Act 2008, s 98.

¹⁴ Psychoactive Substances Act 2016, ss 18-19.

¹⁵ Terrorism Prevention and Investigation Measures Act 2011.

safeguards of the criminal trial. Safeguards such as the presumption of innocence and the right to cross-examine witnesses¹⁶ are fundamental to criminal trials because of the threat punishment poses to individual rights, the potential for its abuse by the state, and the power disparity between the state and the individual.¹⁷ If a behaviour order does constitute a punishment, its imposition without these heightened safeguards would run contrary to the right to a fair trial.¹⁸ If a behaviour order does not constitute a punishment, it could be seen as an innovative model to tackle a wide range of social problems. ‘Could’ is operative here. There is a growing literature on the dangers posed by coercive state measures justified by prevention, and how to guard against these dangers.¹⁹ In light of these issues, there is a need to establish whether behaviour orders are preventive and/or punitive, and to assess the consequences of these classifications if they apply. The central research question of this thesis is: are behaviour orders preventive and/or punitive measures? The primary argument of the thesis is that all behaviour orders are preventive measures and the majority are also punitive. As the quotations from the Home Office and Liberty at the start of the chapter illustrate, it is easy to claim that behaviour orders are preventive or punitive. The difficulty lies in explaining why.

Previous literature on behaviour orders can be divided largely into two groups: articles on particular behaviour orders,²⁰ and consideration of behaviour orders as part of a

¹⁶ These rights are protected under the European Convention on Human Rights, article 6(2)-(3); chapter 3 assess article 6 in detail.

¹⁷ See, for example, Lucia Zedner, ‘Penal Subversions: When is a Punishment Not Punishment, Who Decides and on What Grounds?’ (2016) 20(1) *Theoretical Criminology* 3, 14; Donald Dripps, ‘The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction’ (1996) 7 *Journal of Contemporary Legal Issues* 199, 202. For further discussion of the threat posed by state punishment, see chapter 5.

¹⁸ Contrary to article 6 of the European Convention on Human Rights.

¹⁹ See, for instance, Carol Steiker, ‘The Limits of the Preventive State’ (1998) 88 *Journal of Criminal Law and Criminology* 771; Ashworth and Zedner, *Preventive Justice* (n 9).

²⁰ Such as Chara Bakalis, ‘Asbos, “Preventative Orders” and the European Court of Human Rights’ [2007] (4) *European Human Rights Law Review* 427; Mohammad Mazher Idriss, ‘Forced Marriages - the Need for Criminalisation?’ [2015] (9) *Criminal Law Review* 687.

wider research project.²¹ Uniquely, this thesis will undertake a direct and sustained analysis of behaviour orders as a collective phenomenon. The thesis provides a new taxonomy of behaviour orders; engages with recent human rights developments; and, most importantly, provides a detailed conceptual examination of whether behaviour orders are preventive and/or punitive. Beyond behaviour orders, the thesis also offers new insight into the meaning of the terms ‘punishment’ and ‘preventive measures’. Together, the new taxonomy of behaviour orders, and conceptual work on prevention and punishment undertaken in the thesis will allow for a more sophisticated understanding of behaviour orders. Such understanding is now of increased importance because of the proliferation of the behaviour order as a model of state governance.

Possible reasons for and the extent of the proliferation of behaviour orders are outlined briefly in section I in order to provide context. Section II then sets out the structure of the thesis before the final section offers some brief remarks on the punishment-prevention ‘divide’ that runs through the thesis.

Section I. The proliferation of behaviour orders

The proliferation of behaviour orders provides the stimulus for this thesis, but the reasons for the proliferation are not the main subject of enquiry. Nonetheless, it would be remiss not to pass some comment on the potential reasons for it. A useful starting point is Ogg’s monograph on behaviour orders and policy transfer.²² Ogg seeks to explain the proliferation via doctrinal research and interviews that focus on a single order, the serious crime prevention order (SCPO).²³ An SCPO can be granted in the High Court or on

²¹ Such as Ashworth and Zedner, *Preventive Justice* (n 9); Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012).

²² James Ogg, *Preventive Justice and the Power of Policy Transfer* (Palgrave Macmillan 2015).

²³ The SCPO was introduced by the Serious Crime Act 2007, s 1.

conviction in the Crown Court, and breach is an offence.²⁴ Ogg argues domestic policy transfer is a ‘driving force’ of policy-making.²⁵ He maintains that policy-makers have been largely ‘unconscious’ of and have ‘sleepwalk[ed]’ toward the proliferation of behaviour orders.²⁶ At the same time, Ogg contends, there have been incremental developments that made the scope of the SCPO more ‘extensive’ than earlier behaviour orders.²⁷ These developments included expansions in who the order can be imposed on; the SCPO has a broader preventive purpose than previous orders; the conduct that must precede the SCPO is more broadly defined; the order could last longer than earlier orders; and sanctions on breach could be more severe.²⁸ Ogg draws a useful comparison to a colour spectrum running from red to blue: points close together are hard to distinguish, but across the spectrum there is a clear transition in colour.²⁹ As with the proliferation itself, Ogg sees this incremental change in the form of behaviour orders as a process ‘unwittingly’ undertaken by policy-makers that speaks to the broader idea of ‘incremental and unintentional policy change’.³⁰

Behaviour orders have continued to be enacted and expanded since Ogg’s research. So far in 2019, Parliament has enacted the stalking protection order,³¹ and a knife crime protection order;³² SCPOs on conviction and complaint have been expanded so that they can apply to terrorism offences;³³ and government plans to introduce a new domestic abuse

²⁴ Serious Crime Act 2007, ss 1, 19 and 25. More detail on the SCPO is provided in table 2 in the following chapter.

²⁵ Ogg (n 22) 3.

²⁶ Ogg (n 22) 198.

²⁷ Ogg (n 22) 199-200.

²⁸ Ogg (n 22) 199-200.

²⁹ Ogg (n 22) 200.

³⁰ Ogg (n 22) 200.

³¹ Stalking Protection Act 2019, s 1. (The statement is correct as of mid-June.)

³² Offensive Weapons Act 2019, ss 14-33.

³³ Counter-Terrorism and Border Security Act 2019, s 14.

protection order.³⁴ Ogg's work on policy transfer may be of continued value in explaining the proliferation of these orders. Yet it is questionable whether this narrative of unwitting development accurately conveys the process that led to the introduction of every behaviour order. The development of the rather precisely named injunction to prevent gang-related violence or 'gang injunction' can be taken as an example here.³⁵ The gang injunction was developed in response to the decision of the Court of Appeal in *Birmingham City Council v Shafi*.³⁶ In *Shafi*, the Court held that a local authority – except perhaps in an exceptional case – could not apply for an injunction under their general power to bring civil proceedings in circumstances where they could also apply for an ASBO.³⁷ The Court maintained that Parliament had enacted a statutory scheme to address anti-social behaviour and that it would be wrong in principle to circumvent it by using an injunction.³⁸

This was problematic from the Council's perspective because the imposition of an ASBO at the time required '(a) that the person has acted ... in an anti-social manner... and (b) that such an order is necessary to protect relevant persons from further anti-social acts by him.'³⁹ For the grant of an ASBO, the court had to be satisfied beyond reasonable doubt that condition (a) applied.⁴⁰ In comparison, when a claimant needs to establish facts in pursuit of an injunction the evidential standard is the balance of probabilities.⁴¹ This

³⁴ Domestic Abuse Bill 2019.

³⁵ The injunction was enacted by the Policing and Crime Act 2009, s 34. It has since been amended by the Serious Crime Act 2015, s 54. In consequence, the full name of the injunction is currently the, 'injunction to prevent gang-related violence and drug-dealing activity'.

³⁶ [2008] EWCA Civ 1186, [2009] 1 WLR 1961.

³⁷ *ibid* [44] (Clarke and Rix LJ). The general power is conferred by the Local Government Act 1972, s 222(1)(a).

³⁸ *ibid* [60] (Clarke and Rix LJ).

³⁹ Crime and Disorder Act 1998, s 1 as amended by Police Reform Act 2002, s 61.

⁴⁰ The raised evidential standard for the imposition of an ASBO was a result of the judgment of the House of Lords in *McCann* [2002] UKHL 39, [2003] 1 AC 787. The judgment is detailed and critiqued in chapter 3.

⁴¹ *Shafi* [2008] EWCA Civ 1186, [2009] 1 WLR 1961 [71].

difference in evidential standard was of practical importance. At first instance in *Shafi*, the judge commented,

Take 6 April 2007 as an example. On that date the defendant Tyrone Ellis was seen by police officers in Corporation Street following a disturbance in the nearby Bull Ring Shopping Centre. It may be that, on the balance of probabilities I might just conclude that he had participated in the disturbance. However, I certainly could not be sure, and thus the evidence in respect of that particular day is of no value at all.⁴²

The result of the Court of Appeal's decision was that the Council could not make use of an ASBO in some situations because of the beyond reasonable doubt evidential standard and it could not apply for an injunction because of the existence of the ASBO.

A year after *Shafi*, the gang injunction was enacted in section 34 of the Policing and Crime Act 2009. The gang injunction may be granted if two imposition requirements are met. At the time, these conditions were 'on the *balance of probabilities* that the respondent has engaged in, or has encouraged or assisted, gang-related violence' and the gang injunction was necessary for specified preventive purposes.⁴³ Breach is a contempt of court rather than an offence.

The introduction of the gang injunction was a clear response to the Court of Appeal's decision in *Shafi*. If not self-evident, this interpretation can be supported by reference to Parliamentary debate. When the clauses related to the gang injunction were introduced in Public Bill Committee, the then Minister for Security, Counter-Terrorism, Crime and Policing, Vernon Coaker, commented:

In looking at what to do [in response to gang violence], we saw the success of what happened in Birmingham and then determined—following the judgment in the courts—that we needed to correct and change the law.⁴⁴

⁴² This paragraph is cited in the judgment of the Court of Appeal: *Shafi* [2008] EWCA Civ 1186, [2009] 1 WLR 1961 [18].

⁴³ Policing and Crime Act 2009, s 34 (emphasis added). The Act has since been amended. The current law is engaged with in detail in chapter 6.

⁴⁴ Policing and Crime Bill Deb 26 February 2009, col 565.

This introductory statement and repeated reference to *Shafi* during the relevant Committee sessions⁴⁵ show that the government introduced the gang injunction in response to the Court of Appeal’s judgment. Later dicta of the Court of Appeal support this interpretation. In *Birmingham City Council v James*, Lord Justice Moore-Bick explicitly commented: ‘The provisions in Part 4 of the Policing and Crime Act 2009 were enacted in response to the court’s decision in *Birmingham City Council v Shafi*.’⁴⁶

The form of the gang injunction was not the result of an incremental and inadvertent widening of behaviour orders. The genesis of the gang injunction thus runs counter to Ogg’s account of policy-makers ‘sleepwalking’ toward the introduction of ever more and ever wider behaviour orders. This perhaps indicates that the proliferation of behaviour orders has been informed not only by the ease with which the orders can be ‘cut-and-paste’ into new contexts,⁴⁷ but also by their malleability of form: behaviour orders can be readily adapted to address new problems.

Regardless of what the drivers of the proliferation of behaviour orders are and what their relative weight is, the extent of their proliferation has been remarkable. One of Ogg’s interviewees suggested that it was inevitable that the model would spread once there was a behaviour order aimed at anti-social behaviour at one extreme and an order aimed at terrorism at the other.⁴⁸ The spectrum of behaviours targeted by behaviour orders has certainly filled in recent years. The behaviour orders included in this thesis are as follows.

- anti-social behaviour injunctions⁴⁹

⁴⁵ Policing and Crime Bill Deb 26 February 2009, cols 576, 581,588, 594, and 596.

⁴⁶ [2013] EWCA Civ 552, [2014] 1 WLR 23 [5] (Bick LJ). See also *Birmingham City Council v Jones (Secretary of State for the Home Department intervening)* [2018] EWCA Civ 1189, [2019] QB 521 [4] in which Sir Brian Leveson P maintains the introduction of the gang injunction was ‘clearly aimed at reversing the effect of *Shafi*’s case’.

⁴⁷ Ogg (n 22) 206.

⁴⁸ Ogg (n 22) 203.

⁴⁹ Anti-social Behaviour, Crime and Policing Act 2014, s 1.

- community protection notices⁵⁰
- criminal behaviour orders⁵¹
- domestic violence protection orders⁵²
- female genital mutilation protection orders (on complaint or other proceedings)⁵³
- female genital mutilation protection orders (on conviction)⁵⁴
- football banning orders (on complaint)⁵⁵
- football banning orders (on conviction)⁵⁶
- forced marriage protection orders⁵⁷
- gang injunctions⁵⁸
- harassment injunctions section 1(1)⁵⁹
- harassment injunctions section 1(1A)⁶⁰
- labour market enforcement orders (on complaint)⁶¹
- labour market enforcement orders (on conviction)⁶²
- letting banning orders⁶³
- non-molestation orders⁶⁴
- parenting orders⁶⁵
- psychoactive substances prohibition orders (on complaint)⁶⁶
- psychoactive substances prohibition orders (on conviction)⁶⁷
- public spaces protection orders⁶⁸
- restraining orders (on acquittal)⁶⁹
- restraining orders (on conviction)⁷⁰

⁵⁰ Anti-social Behaviour, Crime and Policing Act 2014, s 43.

⁵¹ Anti-social Behaviour, Crime and Policing Act 2014, s 22.

⁵² Crime and Security Act 2010, s 27.

⁵³ Female Genital Mutilation Act 2003, sch 2 para 2.

⁵⁴ Female Genital Mutilation Act 2003, sch 2 para 3.

⁵⁵ Football Spectators Act 1989, 14B.

⁵⁶ Football Spectators Act 1989, s 14A.

⁵⁷ Family Law Act 1996, s 63A.

⁵⁸ Policing and Crime Act 2009, s 34.

⁵⁹ Protection from Harassment Act 1997, s 3.

⁶⁰ Protection from Harassment Act 1997, s 3A.

⁶¹ Immigration Act 2016, s 18.

⁶² Immigration Act 2016, s 20.

⁶³ Housing and Planning Act 2016, s 14.

⁶⁴ Family Law Act 1996, s 42.

⁶⁵ Crime and Disorder Act 1998, s 8.

⁶⁶ Psychoactive Substances Act 2016, s 18.

⁶⁷ Psychoactive Substances Act 2016, s 19.

⁶⁸ Anti-social Behaviour, Crime and Policing Act 2014, s 59.

⁶⁹ Protection from Harassment Act 1997, s 5A.

⁷⁰ Protection from Harassment Act 1997, s 5.

- serious crime prevention orders (on complaint)⁷¹
- serious crime prevention orders (on conviction)⁷²
- sexual harm prevention orders (on complaint)⁷³
- sexual harm prevention orders (on conviction)⁷⁴
- sexual risk orders⁷⁵
- slavery and trafficking prevention orders (on complaint)⁷⁶
- slavery and trafficking prevention orders (on conviction)⁷⁷
- slavery and trafficking risk orders⁷⁸
- stalking protection orders⁷⁹
- terrorism prevention and investigation measures⁸⁰
- violent offender orders⁸¹

What is more, these orders have been introduced by every administration that followed Blair's New Labour government. This means they have been backed by Labour, the Conservatives, and the Liberal Democrats. As the above comment on behaviour orders introduced so far in 2019 shows, there is no sign that the proliferation will end. Behaviour orders did not disappear when the ASBO was repealed; to the contrary, now more than ever there is a need for an examination of them.

Section II. The thesis structure

The thesis has three substantive parts that work toward addressing the central research question: are behaviour orders preventive and/or punitive measures? The first part – chapters 2 and 3 – seeks to answer two initial questions:

⁷¹ Serious Crime Act 2007, s 19.

⁷² Serious Crime Act 2007, s 1.

⁷³ Sexual Offences Act 2003, s 103A(3).

⁷⁴ Sexual Offences Act 2003, s 103A(2).

⁷⁵ Sexual Offences Act 2003, s 122A.

⁷⁶ Modern Slavery Act 2015, s 15.

⁷⁷ Modern Slavery Act 2015, s 14.

⁷⁸ Modern Slavery Act 2015, s 23.

⁷⁹ Stalking Protection Act 2019, s 1.

⁸⁰ Terrorism Prevention and Investigation Measures Act 2011.

⁸¹ Criminal Justice and Immigration Act 2008, s 98.

- What is a behaviour order?
- To what extent does present case law establish whether behaviour orders are preventive and/or punitive?

Chapter 2 critically assesses what, if anything, distinguishes behaviour orders from similar measures such as civil injunctions and community sentences. Given the number and variety of behaviour orders that have been enacted, the chapter argues it is difficult to offer precise definitional criteria that include all behaviour orders, exclude different measures and encapsulate what it is to be a behaviour order. A broad three-part definition, that takes account of the purpose and structure of behaviour orders and the effects of breach is offered to emphasise their common characteristics. The chapter then splits behaviour orders into three new subcategories – hybrid behaviour orders, civil behaviour orders, and executive behaviour orders – to draw out important differences between the orders. Hybrid behaviour orders are granted under civil evidential rules and breach is an offence. This was the model of the ASBO and remains the most common type of behaviour order. Civil behaviour orders are granted under civil evidential rules and breach is a contempt of court. Executive behaviour orders are imposed by a state body with little or no judicial oversight and breach is an offence. This subcategorization will allow for a more sophisticated response to the central research question: are behaviour orders preventive and/or punitive measures? The chapter also offers a set of tables that provide an overview of current behaviour orders in order to make their features clear and to show where each one fits in the taxonomy.

Chapter 3 turns from legislation to assess two related bodies of case law: domestic judgments on behaviour orders, and decisions of the European Court of Human Rights (ECtHR) on article 5 (the right to liberty), article 6 (the right to a fair trial), and article 7 (the ban on retrospective punishment) of the European Convention on Human Rights. This case law is united by its engagement with the concepts of ‘prevention’, ‘punishment’ and related terms. The chapter argues neither the ECtHR nor domestic courts have provided a

clear and consistent approach to either prevention or punishment. Instead, the approach of the ECtHR varies both within and between its case law on each article. Domestic judgments present a different, but related, issue: they repeatedly rely on one strand of ECtHR decisions, with little rationalization as to why it is preferred to other judgments.

There would be little value in labelling behaviour orders as preventive or punitive without first establishing what is meant by these terms. In light of the limitations of the case law, the second part of the thesis seeks to establish what is meant by the terms ‘preventive measure’ and ‘punishment’. Two research questions are thus posed:

- What is a preventive measure?
- What is punishment?

The question of what it is to be a preventive measure is less frequently posed than that of what is meant by punishment. Chapter 4 seeks to remedy this through an assessment of how the term ‘preventive measure’ has been used in the ever-growing literature on ‘preventive justice’⁸² and the ‘preventive state’.⁸³ Examples in this literature vary significantly, from CCTV cameras on the one hand,⁸⁴ to the Iraq War on the other.⁸⁵ In light of this significant variation, I propose a two-part definition: to be preventive, a measure must be imposed before a possible harm with the purpose of avoiding the harm, reducing the likelihood of it occurring or reducing its severity if it does occur. The breadth of this definition means fitting within the preventive measure category alone would not offer much insight into behaviour orders or the safeguards that ought to precede their imposition. In light of these limitations, the chapter develops a more precise subcategory

⁸² Ashworth and Zedner, *Preventive Justice* (n 9) 200-203.

⁸³ Steiker (n 19).

⁸⁴ Tom Sorell, ‘Preventive Policing, Surveillance, and European Counter-Terrorism’ (2011) 30(1) *Criminal Justice Ethics* 1.

⁸⁵ David Cole, ‘The Difference Prevention Makes: Regulating Preventive Justice’ (2015) 9(3) *Criminal Law and Philosophy* 501.

of preventive measure: coercive risk measures. To fit within this subcategory a measure must satisfy the following criteria.

1. The measure is a preventive measure.
 - a) It is imposed before a possible harm.
 - b) With the purpose of avoiding the harm, reducing the likelihood of it occurring, or reducing its severity if it does occur.
2. An assessment of the risk posed by the individual must be undertaken and satisfied before the measure can be imposed.
3. The measure is coercive.

The critique of the preventive measures category in chapter 4 thus leads to an important refining of the overarching research question to ‘are behaviour orders coercive risk measures and/or punitive’?

Chapter 5 then examines what it is to be punitive. The chapter first appraises two well-known definitions of punishment.⁸⁶ It argues that neither is an appropriate means by which to distinguish between punitive and non-punitive measures. Both definitions displace the complexities of defining punishment to another term within their definition. The chapter goes on to argue that punishment is a fluid concept: both its purposes and forms have changed over time. In consequence, it is little wonder that precise definitions are of limited use in establishing whether measures at the boundaries of punitiveness constitute punishment or not. Yet a means by which to discern whether measures are punitive is needed to limit the capacity of the state to impose hard treatment that risks stigmatizing citizens without appropriate procedural safeguards. The proposed solution to this quandary is a three-part test of punitiveness that I label the behaviour-effect-purpose test.

1. Does the measure regulate behaviours that can be subject to the criminal law or that are wrongful?
2. Does the measure affect the recipient in a similar manner to accepted punishments?

⁸⁶ For an example of each, see Antony Flew, ‘The Justification of Punishment’ (1954) 29(3) *Philosophy* 291; Joel Feinberg, ‘The Expressive Function of Punishment’ in Antony Duff and David Garland, *A Reader on Punishment* (article first published in 1965, OUP 1994).

3. Does the measure have a punitive purpose?

If the response to each of these questions is positive, there is a compelling case that the measure is punitive.

If the response to one or more of these questions is negative, there is a compelling case that the measure is not punitive.

The three-part test is argued to be a theoretically informed and practicable means by which to assess whether measures are punitive.

The third part of the thesis takes the subcategories developed in chapter 2 and asks whether behaviour orders that fall within them are coercive risk measures and/or punitive in light of the conceptual work carried out in the second part of the thesis. Three research questions are posed.

- Are civil behaviour orders coercive risk measures and/or punitive measures?
- Are hybrid behaviour orders coercive risk measures and/or punitive measures?
- Are executive behaviour orders coercive risk measures and/or punitive measures?

Each of chapters 6-8 addresses one of these research questions in turn. A behaviour order that fits within each subcategory is used as an exemplar to focus the discussion and to allow the chapters to be less descriptive. Chapter 6 appraises civil behaviour orders and takes the aforementioned gang injunction as its exemplar order.⁸⁷ Chapter 7 turns to hybrid behaviour orders and takes the sexual harm prevention order as its exemplar.⁸⁸ Finally, chapter 8 examines executive behaviour orders and takes the public spaces protection order as its exemplar.⁸⁹ Although the focus in each chapter is on an exemplar order, they all draw comparisons with other behaviour orders within the subcategory they assess.

As will become apparent, the focus of the question ‘is this a punitive measure?’ and ‘is this a coercive risk measure?’ are quite different. When chapters 6–8 examine whether particular behaviour orders are punitive, the behaviour-effect-purpose test is applied to

⁸⁷ Policing and Crime Act 2009, s 34.

⁸⁸ Serious Crime Act 2007, ss 1 and 19.

⁸⁹ Anti-social Behaviour, Crime and Policing Act 2014, s 59.

them in some detail. From this it is evident whether existing safeguards such as the presumption of innocence should apply before the measure is imposed. By comparison, when the chapters assess whether the same behaviour orders are coercive risk measures, the case law and relevant commentary is used to identify what safeguards ought to precede their imposition. Punishment is a more contestable concept with clearer implications; coercive risk measure is a clearer concept with more contestable implications.

Finally, chapter 9 draws out the wider significance of the thesis, first by outlining six of its key contributions: a new taxonomy of behaviour orders; evidencing the limits of ECtHR case law and domestic case law; questioning the preventive measure category; developing the coercive risk measures category; rethinking punitive measures; and establishing that not every appropriate safeguard is contingent on classifying behaviour orders as punitive or as coercive risk measures. The chapter then turns to explain the wider significance of this research for criminal lawyers, penal theorists, and human rights lawyers.

Section III. The punishment-prevention ‘divide’

Little has been said so far about the relationship of punishment and prevention. This relationship will form an important theme of the thesis when discussing human rights case law, academic commentary on punishment, and in assessing behaviour orders themselves. The initial version of the overarching research question asks if behaviour orders are preventive *and/or* punitive. The relationship of prevention and punishment is complex; the terms are neither antonyms nor synonyms. This is why the thesis is structured to assess each concept independently. The thesis seeks to advance knowledge and debate not only on behaviour orders, but also on the concepts of prevention and punishment themselves.

As such, the complexities of the relationship between punishment and prevention are not to be shied away from, but embraced.

Chapter 2: A Taxonomy of Behaviour Orders

The anti-social behaviour order (ASBO) has been described as the ‘archetypal’¹ and ‘talisman[ic]’ behaviour order.² Behaviour orders enacted after it have varied in the behaviours they target; where and how they are imposed; the contents of the order; and the effects of breach. These orders target behaviours ranging from community nuisance³ to violent offending;⁴ and from psychoactive substance abuse⁵ to terrorism.⁶ Different orders can be sought by the person to be protected by them,⁷ the police,⁸ local authorities,⁹ the Gangmasters and Labour Abuse Authority¹⁰ and housing providers,¹¹ amongst other state bodies. Some behaviour orders can only be granted on conviction and can thus only be applied for by the Crown Prosecution Service.¹² The tests and evidential standards that must be met to impose behaviour orders vary. Some orders can be imposed on specified individuals, others on corporations, and others are imposed on any person in specified public spaces.¹³ As to contents, some behaviour orders are mandated to include certain types of restriction,¹⁴ other orders can

¹ Harry Annison, ‘Book Review: Preventive Justice’ (2016) 16(5) *Criminology & Criminal Justice* 622.

² Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 89.

³ Anti-social Behaviour, Crime and Policing Act 2014, s 43.

⁴ Criminal Justice and Immigration Act 2008, s 98.

⁵ Psychoactive Substances Act 2016, s 17.

⁶ Terrorism Prevention and Investigation Measures Act 2011.

⁷ By way of example, forced marriage protection orders: Family Law Act 1996, s 63C.

⁸ By way of example, football banning orders: Football Spectators Act 1989, s 14B.

⁹ By way of example, gang injunctions: Policing and Crime Act 2009, s 37.

¹⁰ By way of example, slavery and trafficking prevention orders: Modern Slavery Act 2015, s 15.

¹¹ By way of example, anti-social behaviour injunctions: Anti-social Behaviour, Crime and Policing Act 2014, s 1.

¹² By way of example, criminal behaviour orders: Anti-social Behaviour Crime and Policing Act 2014, s 22.

¹³ On individuals and corporations – Serious Crime Act 2007, s 5. On spaces – Anti-social Behaviour Crime and Policing Act 2014, s 59. Public spaces protection orders are discussed in detail in chapter 8.

¹⁴ By way of example, football banning orders: Football Spectators Act 1989, s 14E.

only contain restrictions,¹⁵ and still others can impose positive requirements.¹⁶ Breach of different orders can either constitute a criminal offence¹⁷ or a contempt of court.¹⁸ Where breach is a criminal offence, the maximum sentence ranges from a fine¹⁹ to five years' imprisonment.²⁰ In light of this variance, the chapter assesses what, if anything, unites these orders.

The chapter has four sections. Section I explains why the term 'behaviour order' is preferred to two alternatives: 'preventive order' and 'two-step prohibition order'. Section II engages with existing definitions of behaviour order and offers an alternative definition to better reflect more recent legal developments. Section III introduces and justifies three subcategories of behaviour orders: civil behaviour orders, hybrid behaviour orders, and executive behaviour orders. These subcategories are argued to be essential to draw out important differences between current behaviour orders, and to help make the task of assessing whether behaviour orders are preventive and/or punitive more manageable in later chapters. Section IV elaborates a taxonomy of the current law in light of the definition and subcategories developed in prior sections. Section V concludes the chapter with brief commentary on the wider value of the taxonomy developed here.

Section I. The term 'behaviour order'

Behaviour orders is not a universally adopted term for the measures at issue. Other authors have used different terms that include 'preventive orders', 'civil preventive orders', and 'two-

¹⁵ By way of example, sexual harm prevention orders: Sexual Offences Act 2003, s 103C.

¹⁶ By way of example, serious crime prevention orders: Serious Crime Act 2007, s 1.

¹⁷ By way of example, terrorism prevention and investigation measures: Terrorism Prevention and Investigation Measures Act 2011.

¹⁸ By way of example, domestic violence protection orders: Crime and Security Act 2010, s 24.

¹⁹ By way of example, parenting orders: Crime and Disorder Act 1998, s 9.

²⁰ By way of example, non-molestation orders: Family Law Act 1996, s 42A.

step prohibition orders'. Though there has been variation in the name given to this collection of orders, the terms have not been contested. In this section, I examine the above terms and argue that 'behaviour orders' is the most appropriate, at least for the purposes of this thesis.

Perhaps the most widely adopted term for the measures at issue in academic writing is 'preventive orders' or 'civil preventive orders'.²¹ The next section engages with the question of whether these orders are civil. For now, I focus on the employment of the term 'preventive' in these two names. The overarching research question in this thesis is whether the orders at issue are preventive and/or punitive. If the term 'preventive orders' was used throughout, it may suggest a stance had been taken on whether the orders are preventive and/or punitive before an examination of this issue had taken place. It would also make for hard reading to ask if preventive orders are preventive. Given alternatives to the term 'preventive order' exist, it will not be employed hereinafter. Though the need to examine whether these orders are preventive – and what it is to be preventive – is, if anything, heightened by how frequently they are labelled 'preventive' orders.

Simester and von Hirsch use the term 'two-step prohibition order' in their 2005 edited collection on *Incivilities*.²² The following section engages with the substance of their work. As a matter of nomenclature, their term has an immediate advantage over 'preventive order' in that it does not presume an answer to the overarching research question of the thesis. Yet more recent legal developments call into question whether the term remains appropriate. By way of

²¹ See for instance, Stephen Shute, 'The Sexual Offences Act 2003: (4) New Civil Preventative Orders - Sexual Offences Prevention Orders; Foreign Travel Orders; Risk of Sexual Harm Orders' [2004] (6) *Criminal Law Review* 417; Ashworth and Zedner, *Preventive Justice* (n 2) ch 4; Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017) 6-8; Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012); Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (OUP 2016) 158-161; Ian Dennis, 'Security, Risk and Preventive Orders' in GR Sullivan and Ian Dennis, *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Bloomsbury 2012); Rory Kelly, 'The Right to a Fair Trial and the Problem of Pre-Inchoate Offences' (2017) *European Human Rights Law Review* 596. Shute appears to have coined the term 'preventative order' in 2004.

²² AP Simester and Andrew von Hirsch, 'Regulating Offensive Conduct through Two-Step Prohibitions' in Andrew von Hirsch and AP Simester (eds), *Incivilities* (Hart Publishing 2006). The term has also been used by Dennis (n 21) 170; and Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2019) 35-37.

example, the essence of the statutory requirements to impose a public spaces protection order are that activities in a local area have had a determinantal effect on the quality of life and the effects are persistent, unreasonable and justify the relevant restrictions.²³ Breach of a restriction imposed under the order is an offence.²⁴ There is an order prohibiting aiding another to climb a public bridge in Salford.²⁵ An order in East Hertfordshire prohibits, ‘failing to produce a receptacle for picking up dog faeces’ if asked to do so by an authorized officer.²⁶ If either a person in Salford helps another climb a bridge or a person in Hertfordshire does not produce a faeces receptacle, there is no need for prior or further ‘deviance’; they have committed an offence. Thus, from the perspective of the person who commits the offence, this may be a ‘one-step prohibition’.

By way of further example, the psychoactive substances prohibition order can form the middle step in what would be a ‘three-step prohibition order’. A psychoactive substances prohibition notice can be imposed where a senior police officer or local authority reasonably believes both that the person is carrying out a prohibited activity and that the prohibition is necessary for the purpose of preventing the activity.²⁷ Breach of the notice can lead to a psychoactive substance order being imposed.²⁸ In turn, breach of the order, absent reasonable excuse, is an offence.²⁹ Perhaps one response to this criticism of the term ‘two-step prohibition order’ would be that these newer orders do not fit within the definition and should be thought

²³ Anti-social Behaviour, Crime and Policing Act 2014, s 59.

²⁴ Anti-social Behaviour, Crime and Policing Act 2014, s 67.

²⁵ Salford City Council, ‘Salford Quays Public Spaces Protection Order’ <<http://www.salford.gov.uk/crime-reduction-and-emergencies/anti-social-behaviour/public-spaces-protection-orders/salford-quays-pspo/>> accessed 4 May 2019.

²⁶ East Herts Council, ‘Public Spaces Protection Order’ <<http://www.eastherts.gov.uk/pspo>> accessed 4 May 2019.

²⁷ Psychoactive Substances Act 2016, s 13.

²⁸ Psychoactive Substance Act 2016, s 18.

²⁹ Psychoactive Substance Act 2016, s 26.

of as separate phenomena. As will be seen, such a response would miss the shared history and legal similarities of the orders. As such, Simester and von Hirsch's term will not be employed.

The term 'behaviour order' avoids presuming an answer to the overarching research question and has not been dated by more recent developments. The term has also been used in the Criminal Procedure Rules,³⁰ the Court of Appeal³¹ and *Blackstone's Criminal Practice*.³² The term behaviour order is used in this thesis. We can now assess what it is to be a behaviour order.

Section II. What are behaviour orders?

Behaviour orders have been presented as a category of legal measure by the Law Commission³³ and government,³⁴ in appellate judgments,³⁵ academic writing,³⁶ and practitioner's texts.³⁷ But what unites these orders? Given the proliferation of behaviour orders and their malleable form, it is perhaps more important now than previously to have a definition or conception of what a behaviour order is. In this section, I first detail four previous approaches to defining 'behaviour order' and then examine whether they need to be amended in light of more recent legal developments.³⁸ Two of the definitions are produced by Ashworth and Zedner, the others are

³⁰ Criminal Procedure Rules 2015/1490, pt 31.

³¹ *Cornish* [2016] EWCA Crim 1450 [14]-[18].

³² David Ormerod and David Perry use 'Civil Behaviour Orders': *Blackstone's Criminal Practice 2018* (OUP 2017) ch D25.

³³ Law Commission, *Sentencing Code, Volume 1: Report* (Law Com No 382, HC 1724, 2018) 161-167. Of course, the point is not to say that all of these sources refer to precisely the same measures when they use the term 'behaviour order'. Each source has its own purposes. It would for instance be odd if the Law Commission's report on sentencing discussed behaviour orders that did not require a conviction in detail.

³⁴ See Ogg on how the development of the serious crime prevention order was influenced by other behaviour orders: James Ogg, *Preventive Justice and the Power of Policy Transfer* (Palgrave Macmillan UK 2015).

³⁵ *Chief Constable of Lancashire v Wilson* [2015] EWHC 2763 (QB) [26]-[28]; *Birmingham City Council v James* [2013] EWCA Civ 552, [2014] 1 WLR 23 [20]-[23].

³⁶ See the sources listed in footnotes 21 and 22.

³⁷ Ormerod and Perry (n 32) ch D25.

³⁸ I use the term 'behaviour order' even where the authors have used a different term for simplicity.

provided by Simester and von Hirsch, and Ogg respectively.³⁹ I will also examine the extent to which a definition of behaviour orders can be given which distinguishes them from injunctions (a civil remedy) and community orders (a criminal sentence).

The first definition of behaviour order examined is that provided by Ashworth and Zedner as part of an early attempt at mapping the terrain of preventive measures in 2010.⁴⁰ They define preventive measures as involving three elements: '(i) restrictions on individual liberty, (ii) in order to prevent harm or a risk of harm and (iii) are backed by threats of coercive measures.'⁴¹ To be clear, this is a definition of preventive measure, not of behaviour orders. This is an important distinction because the authors envision preventive measures as a broader category. For instance, they offer multiple categories of criminal offences as preventive measures.⁴² In consequence, the three criteria are best understood as necessary, but likely not sufficient definitional elements of behaviour orders.

It is also important to note that behaviour orders are not offered as one distinct category by Ashworth and Zedner, but as three: 'civil preventive hybrid orders aimed at preventing risk only'; 'civil preventive hybrid orders aimed at preventing harm and/or risk of harm'; and 'civil orders aimed at preventing harm/and or risk of harm'.⁴³ It is instructive to extract traits that these subcategories share because they may add to the above necessary conditions. This approach is not intended to force a non-existent behaviour order category into Ashworth and Zedner's taxonomy of preventive measures. Their chapter centres on behaviour orders and is,

³⁹ In a more recent work, Shute engages with a particular subset of behaviour orders: Stephen Shute, 'Rationalising Civil Preventive Orders: Opportunities for Reform' in JJ Child and RA Duff (eds) *Criminal Law Reform Now: Proposals and Critique* (Hart Publishing 2019).

⁴⁰ Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization?' in RA Duff and others, *The Boundaries of the Criminal Law* (OUP 2010).

⁴¹ Ashworth and Zedner, 'Undercriminalization' (n 40) 61.

⁴² Ashworth and Zedner, 'Undercriminalization' (n 40) 63-65.

⁴³ Ashworth and Zedner, 'Undercriminalization' (n 40) 63-64.

in fact, entitled, ‘Preventive Orders: A Problem of Undercriminalization?’⁴⁴ Preventive orders is Ashworth and Zedner’s equivalent term for behaviour orders.

Orders in all three of Ashworth and Zedner’s subcategories share the capacity to contain broad restrictions for preventive purposes. All three types of order achieve this by allowing for restrictions that target activities which increase the risk of a harm occurring as well as the harm per se. An example will be instructive. In *Lamb*, the appellant had committed common assault in a metro station and received an anti-social behaviour order (ASBO) which prohibited him from entering the metro station.⁴⁵ This restriction was directed at preventing the risk of a future assault. If the restriction had, instead, been that the appellant could not commit common assault in the station, it would have been directed at preventing the harm itself.

In sum, Ashworth and Zedner’s chapter suggests the term ‘behaviour order’ has four definitional elements: restrictions on individual liberty that may target a harmful behaviour and related acts, that are purposed with preventing harm or the risk thereof, and which are backed by the threat of sanctions. A further point that this early taxonomy emphasises is the need to consider the similarities and differences of behaviour orders and sentences which have a preventive purpose such as a community order with a curfew condition attached.⁴⁶ To do so, the authors comment, ‘[behaviour] orders differ because their primary aim is to restrict individual liberty in order to prevent future harm and not to punish wrongdoing’.⁴⁷

A second definition of behaviour orders can be extracted from later work by Ashworth and Zedner in their 2013 monograph *Preventive Justice*. Again, no explicit definition of the term is given. In the chapter on behaviour orders, the authors discuss ‘civil’ and ‘criminal’

⁴⁴ The title is a nod to Husak’s monograph: Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2007).

⁴⁵ *Lamb* [2005] EWCA Crim 3000, [2006] 2 Cr App R (S) 11 [2].

⁴⁶ Available under Criminal Justice Act 2003, s 177.

⁴⁷ Ashworth and Zedner, ‘Undercriminalization’ (n 40) 62.

behaviour orders. Their commonalities appear to be as follows: 1. the order can include ‘cordon sanitaire’ conditions;⁴⁸ and 2. breach of the order is an offence.⁴⁹ What distinguishes civil and criminal behaviour orders is examined in the next section.

Ashworth and Zedner appear to drop consideration of what they had described previously as purely civil orders backed by contempt of court. This is an odd absence in light of their engagement with the anti-social behaviour injunction.⁵⁰ The injunction was not enacted until after the monograph was published, but even when it was being consulted on by the Coalition government it was intended to be backed by contempt.⁵¹ Thus *Preventive Justice* offers a narrower implicit definition of behaviour order: restrictions on individual liberty, in the form of broad conditions, purposed with preventing harm or the risk thereof, the breach of which is an offence.

Simester and von Hirsch also do not define ‘behaviour orders’ explicitly in their 2005 edited collection.⁵² A definition can, again, be discerned from the text.

1. A person has engaged in or is expected engaged in ‘undesired conduct’;
2. a formally civil order is issued in consequence;
3. the contents of the order can vary considerably: either prohibiting the trigger behaviour or activities before it;⁵³ and
4. breach of the order is an offence.⁵⁴

⁴⁸ Ashworth and Zedner, *Preventive Justice* (n 2) 91. See also, Dennis (n 21) 180.

⁴⁹ Ashworth and Zedner, *Preventive Justice* (n 2) 77.

⁵⁰ Ashworth and Zedner, *Preventive Justice* (n 2) 89-90. The injunction was then called the injunction to prevent nuisance and annoyance.

⁵¹ Home Office, *More Effective Responses to Anti-social Behaviour* (2011) 18. The injunction was enacted in the Anti-social Behaviour, Crime and Policing Act 2014, s 1.

⁵² Simester and von Hirsch (n 22).

⁵³ I have interpreted Simester and von Hirsch as suggesting that behaviour orders all have the capacity to contain a variety of restrictions, though they could be read as stating that some of the orders, but not all, have this capacity: (n 22) 174.

⁵⁴ Simester and von Hirsch (n 22) 174-175.

As with Ashworth and Zedner, Simester and von Hirsch emphasise the breadth of the restrictions that can be included in behaviour orders and limit what may constitute a behaviour order by suggesting breach must be an offence.

The fourth definition of behaviour order to be considered is in Ogg's 2015 monograph *Preventive Justice and the Power of Policy Transfer*.⁵⁵ This definition is of particular interest due to its more recent publication. Ogg sets three criteria for a measure to be a behaviour order:

First, the order places prohibitions and/or restrictions on an individual or other entity...Second, the order is designed to prevent harm or risk of harm in relation to a *specific offence category*...Third, breach of the terms of an order constitutes a *new criminal offence*.⁵⁶

The second criterion is purposed with distinguishing behaviour orders from injunctions.⁵⁷ The third criterion is purposed with distinguishing behaviour orders from community orders.⁵⁸ Such purposes are to be commended. An ideal definition of behaviour orders would make clear how they are similar to and different from other legal measures. The extent to which behaviour orders can be divided from both injunctions and community orders is open to question in light of more recent legislative development. This point is picked up below. Having detailed existing approaches to defining behaviour orders, I will now appraise potential elements to be used in defining the term. These potential elements are as follows: the hybridity of the orders, the wide restrictions/requirements they can impose, and their targeting of particular behaviours.

Three of the above definitions share a conception of behaviour orders as hybrid: they can be granted in civil proceedings, but breach is a criminal offence. To adopt such a definitional element would now be limiting because there has been a turn toward introducing behaviour orders which are backed by contempt of court. By way of example, the anti-social behaviour

⁵⁵ Ogg (n 34).

⁵⁶ Ogg (n 34) 130-131 (original emphasis).

⁵⁷ Ogg (n 34) 130-131.

⁵⁸ Ogg (n 34) 131.

injunction replaced the ASBO in 2015.⁵⁹ Two further examples are the domestic violence protection order which was introduced in 2010 and the gang injunction that was introduced in 2009 and amended significantly in 2015.⁶⁰

Being found to be in contempt of court can result in up to two years' imprisonment.⁶¹ Though it is not an offence, findings of contempt can have a punitive purpose and constitute a criminal charge and a conviction under the European Convention on Human Rights.⁶² Thus, being found to be in contempt can have similar effects for the person in breach as being found guilty of a breach offence. This similarity has been recognised in statutes that create behaviour orders. The Female Genital Mutilation Act 2003, for example, states that a person cannot be both held in contempt for breach of a female genital mutilation protection order and found guilty of the standalone breach offence.⁶³

Beyond this legal similarity, there is a reason of policy for including orders backed by contempt within the definition of behaviour orders. Government has amended orders backed by a standalone offence so that they are backed by contempt only and vice versa. It would thus limit the practical relevance of the thesis if orders backed by contempt only were excluded. What is more, orders very similar to, and derived from, those considered by the authors above are not always granted in civil proceedings. There are also a growing number of orders that are imposed initially by a state body with minimal judicial oversight. Both of these points will be developed in the following section. For now, it is sufficient to note legal developments and reasons of policy mean it would be inappropriate to describe behaviour orders as hybrid orders,

⁵⁹ The Anti-social Behaviour, Crime and Policing Act 2014, s 1.

⁶⁰ The Serious Crime Act 2015, s 51 amending the Policing and Crime Act 2009, s 34.

⁶¹ Contempt of Court Act 1981, s 14.

⁶² *Re K (Children) (Committal Proceedings)* [2002] EWCA Civ 1559, [2003] 1 FLR 277. Cited recently in *Hammerton v United Kingdom* (2016) 63 EHRR 23 [42].

⁶³ Female Genital Mutilation Act 2003, sch 2 para 4.

granted in civil proceedings backed by criminal offences.⁶⁴ An alternative, more current, definition would be ‘orders which impose coercive restrictions the breach of which may result in sanction’. Yet expanding the definition of behaviour orders in this manner risks a more blurred divide between behaviour orders and injunctions. With this risk in mind, I will consider further potential definitional elements.

Another possible definitional element may distinguish behaviour orders from injunctions: the type of restrictions/requirements that can be imposed under each measure. The four definitions of behaviour order above were united in claiming that a feature of behaviour orders is that they can contain restrictions which target a harmful behaviour or activities prior to it. An example of the latter type of restriction is the aforementioned prohibition on Lamb entering the metro station.⁶⁵ Wider commentary also emphasises this feature of behaviour orders. Gardner and his co-authors critiqued the breadth of the restrictions that could be imposed under the ASBO as early as 1998.⁶⁶ They described the ASBO as ‘quite extraordinary’ because it deviated from the normal model of injunction which only banned the wrong which triggered its imposition.⁶⁷ Bakalis has, likewise, critiqued the effect of such broad restrictions: ‘the terms of an ASBO can be (and often are) extremely far-reaching, and so the effect of an ASBO being imposed on an individual can be extremely drastic’.⁶⁸

Orders introduced since the above definitions were offered have continued to be able to prohibit both harmful behaviours and related activities.⁶⁹ However, newer orders, such as the

⁶⁴ Ogg, (n 34) 133, suggests gang injunctions, which are backed by contempt only, may constitute behaviour orders despite the second criterion of his definition.

⁶⁵ *Lamb* [2005] EWCA Crim 3000, [2006] 2 Cr App R (S) 11 [2].

⁶⁶ John Gardner and others, ‘Clause 1 - The Hybrid Law from Hell’ (1998) 31(1) Criminal Justice Matters 25.

⁶⁷ Gardner and others (n 66) 26.

⁶⁸ Chara Bakalis. ‘Asbos, “Preventative Orders” and the European Court of Human Rights’ [2007] (4) European Human Rights Law Review 427, 437. See also, Geoff Pearson, ‘Hybrid Law and Human Rights – Banning and Behaviour Orders in the Appeal Courts’ (2006) 27 Liverpool Law Review 125, 128-129.

⁶⁹ By way of example, slavery and trafficking prevention orders: Modern Slavery Act 2015, s 17.

criminal behaviour order, may impose requirements as well as restrictions.⁷⁰ Explanatory notes to the legislation that introduced that order state: ‘The requirements in an order could include attendance at a course to educate offenders on alcohol and its effects.’⁷¹ The capacity to include positive obligations dates Ashworth and Zedner’s first definition of behaviour order,⁷² and von Hirsch and Simester’s definition because both only acknowledge restrictions.⁷³ Ogg too only refers to ‘prohibitions and/or restrictions’ as the form of conditions that may be imposed under behaviour orders, but he does discuss financial reporting orders which can only impose positive requirements.⁷⁴ The following definitional element updates the type of condition that can be imposed in a behaviour order: behaviour orders must have the capacity to contain restrictions and/or requirements targeting a specified behaviour and related acts or omissions.

The type of condition that can be imposed in a behaviour order is an important definitional element. Yet it may not clearly distinguish behaviour orders from civil injunctions as implied by Gardner and his co-authors. Injunctions often restrain a particular action that is the infringement of a right. For example, restraining hunters from allowing their hounds to trespass.⁷⁵ However, some injunctions contain both restrictions aimed at prohibiting an infringement of a right and behaviour antecedent to it. In *Burris v Azadani* the Court of Appeal approved an injunction that restricted the defendant from molesting the claimant and excluded

⁷⁰ Anti-social Behaviour, Crime and Policing Act 2014, s 22. Some older behaviour orders could impose positive requirements such as parenting orders (Crime and Disorder Act 1998, s 8) and football banning orders (Football Spectators Act 1989, ss14E and 14G).

⁷¹ Explanatory Notes to the Anti-social, Crime and Policing Act 2014, para 127.

⁷² Positive requirements could be included within Ashworth and Zedner’s ‘restrictions on individual liberty’ conceivably, but for the avoidance of doubt I rework this definitional element. Ashworth and Zedner, ‘Undercriminalization’ (n 40) 61.

⁷³ Simester and von Hirsch (n 22) 174.

⁷⁴ Ogg (n 34) 140.

⁷⁵ *League against Cruel Sports Ltd v Scott and Others* [1986] QB 240, 256. A list of behaviours which can result in an injunction being imposed can be found in David Bean, Isabel Perry and Andrew Burns, *Injunctions* (12th edn, Sweet & Maxwell 2015) paras 1.14-1.28.

him from coming within 250 yards of her address.⁷⁶ Perhaps all that can be said is that as a norm, behaviour orders may impose more inchoate restrictions and requirements than injunctions.⁷⁷

The third potential definitional element to be considered relates to the behaviours regulated by behaviour orders. The range of behaviours that can trigger the imposition of a behaviour order is wide: from terrorism offences to anti-social behaviour. Perhaps what the terrorism prevention investigation measure (TPIM) and the anti-social behaviour injunction have in common is that they can be imposed in response to ‘undesired conduct’ as per von Hirsch and Simester’s definition.⁷⁸ However, such a formulation of the behavioural element would not distinguish behaviour orders from either community orders or injunctions.⁷⁹ As outlined above, injunctions have been used to regulate molestation and other conduct that infringes a person’s rights. Community orders are granted on conviction and thus can also regulate undesired conduct that has been criminalised.⁸⁰

Ogg also moves toward a behavioural requirement in his second criterion which refers to ‘a specific offence category’.⁸¹ Yet not all of the behaviours that can underlie an application for a behaviour order are offences. The paradigm example of this is anti-social behaviour which can include both offences, such as criminal damage, and non-criminalised behaviour, such as young people gathering.⁸² Furthermore, to describe anti-social behaviour as ‘specific’ is also

⁷⁶ *Burris v Azadani* [1995] 1 WLR 1372, 1373-1376 (CA).

⁷⁷ It is perhaps unsurprising a sharp divide cannot be drawn between the conditions that can be imposed under injunctions and behaviour orders. As Dyson has claimed, even the broader civil-criminal divide can be unobvious: Matthew Dyson, ‘The State’s Obligation to Provide a Coherent System of Remedies Across Crime and Tort’ in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds) *Criminal Law and the Authority of the State* (2017 Hart Publishing) 173.

⁷⁸ Terrorism Prevention and Investigation Measures Act 2011. Simester and von Hirsch (n 22) 174-175.

⁷⁹ It is not claimed that Simester and von Hirsch intended to make such a distinction.

⁸⁰ Criminal Justice Act 2003, s 147.

⁸¹ Ogg (n 34) 130-131.

⁸² Andrew Ashworth, ‘Social Control and “Anti-Social Behaviour”: The Subversion of Human Rights?’ (2004) 120(Apr) *Law Quarterly Review* 263, 286-288.

questionable given the widespan of incivilities and offences that it includes. An alternative version of the behavioural element is thus needed: behaviour orders are imposed to prevent a specified type of behaviour. This alternative version of the element is sufficiently broad to encompass behaviours such as anti-social behaviour, sexual offences, violent offences, and terrorism. It may also draw out a difference between behaviour orders, and injunctions and community orders.

Forced marriage protection orders and female genital mutilation protection orders are behaviour orders. Forced marriage protection orders respond to forced marriage or the risk thereof.⁸³ Female genital mutilation protection orders respond to female genital mutilation or the risk thereof.⁸⁴ The injunction, by comparison, is an equitable remedy. As per *Snell's Equity*: 'The jurisdiction to grant an injunction is dependent upon the existence of a right, coupled with circumstances which make it equitable to make the order.'⁸⁵ Thus the specified behaviour element appears to draw a plausible conceptual divide between behaviour orders and injunctions. The imposition of an injunction is predicated on the need to protect a right of the claimant not to prevent a behaviour of the defendant.

For a community order to be imposed, three conditions related to the seriousness of the offence, suitability of the requirements to be imposed, and proportionality of the sentence have to be met.⁸⁶ Barring exceptional circumstances, a community order must contain at least one requirement imposed for 'the purpose of punishment', a fine or both, and can contain other preventive conditions.⁸⁷ Possible conditions include a curfew or attendance at a drug

⁸³ Family Law Act 1996, s 63A.

⁸⁴ Female Genital Mutilation Act 2003, s 5A.

⁸⁵ John McGhee, *Snell's Equity* (33rd edn, Sweet & Maxwell 2016) para 18-008. See also Bean, Perry and Burns (n 75) para 1-03.

⁸⁶ Criminal Justice Act 2003, s 148. For analysis see Lyndon Harris and Nicola Padfield, *Thomas' Sentencing Referencer* (Sweet & Maxwell 2017) para D13-1.

⁸⁷ Criminal Justice Act 2003, s 177(2A). My use of 'punishment' here follows the Criminal Justice 2003. Chapter 5 undertakes a detailed examination of the term.

rehabilitation centre.⁸⁸ As with injunctions, community orders are not predicated on the recipient having undertaken a specified type behaviour. They are a more general power available on conviction.

The point here is not that the behaviours which behaviour orders target are either narrow or easily discernible. Numerous authors having criticised the breadth of behaviours which could result in the imposition of an ASBO.⁸⁹ The sexual risk order is a more contemporary example of how broad the behaviours that may be regulated by a behaviour order can be: ‘the defendant has...done an act of a sexual nature as a result of which there is reasonable cause to believe that it is necessary for a sexual risk order to be made’.⁹⁰ The point is, instead, that the requirement that a specified type of behaviour is done or risked is a commonality of behaviour orders that may help to distinguish them from community orders and injunctions.

In light of the arguments made in this section, I use the following conception of a behaviour order:

Behaviour orders are imposed to prevent a specified type of behaviour; must have the capacity to contain restrictions and/or requirements targeting that behaviour and related acts or omissions; and breach can result in sanction.

This conception is intended to capture what behaviour orders have in common in light of their recent proliferation and variation. It is important, however, to note that the effects of some behaviour orders have become more similar to the effects of injunctions. The differences in the form of behaviour orders are now as important as their similarities. To acknowledge this, the next section develops three sub-categories of behaviour order.

Section III. Subcategorising behaviour orders

⁸⁸ Criminal Justice Act 2003, s 177(1).

⁸⁹ Stuart Macdonald, ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO’s Definition of Anti-Social Behaviour’ (2006) 69 *Modern Law Review* 183; Elizabeth Burney, *Making People Behave: Anti-social Behaviour Law and Politics* (2nd edn, Routledge 2009) 167-169.

⁹⁰ Sexual Offences Act 2003, s 122A.

The subcategories of behaviour order developed here stem from Ashworth and Zedner's subcategorization, so it is first important to detail their work.⁹¹ The authors draw a divide between 'civil' and 'criminal' behaviour orders. Under their approach, criminal behaviour orders can only be imposed on conviction for an offence, and civil behaviour orders can be granted in a civil court under civil evidential rules, or on conviction. This subsection rethinks this civil-criminal divide and develops a new subcategory of behaviour orders.

What Ashworth and Zedner label 'civil' behaviour orders are, as the authors recognise, hybrid.⁹² Yes, the proceedings to impose the orders may be civil, but they may regulate criminal behaviour, may be granted on conviction, and breach is an offence. Likewise, the behaviour orders the authors label 'criminal' may only be granted on conviction, but proceedings for the grant of such orders do not necessarily follow criminal evidential rules. By way of example, the criminal behaviour order introduced in section 22 of the Anti-social Behaviour, Crime and Policing Act 2014 can only be imposed on conviction.⁹³ Yet section 23 of the Act sets out the following with regard to the proceedings for imposing the order.

(1) For the purpose of deciding whether to make a criminal behaviour order the court may consider evidence led by the prosecution and evidence led by the offender.

(2) It does not matter whether the evidence would have been admissible in the proceedings in which the offender was convicted.

What is so challenging about behaviour orders is how they test conventional legal divides, be it between civil and criminal law; or, and as will be seen, between prevention and punishment; and between judicial and executive functions. We should subcategorise behaviour orders in a manner that reflects, or at least does not hide, these challenges.

⁹¹ Ashworth and Zedner, *Preventive Justice* (n 2) 75-77.

⁹² Ashworth and Zedner, *Preventive Justice* (n 2) 77.

⁹³ There is a frustrating overlap of language here. The order introduced is called the 'criminal behaviour order'. Ashworth and Zedner's category was called the 'criminal preventive order category', but is referred to in this thesis as the 'criminal behaviour order subcategory' for reasons given in the previous section.

The first two subcategories of behaviour order I propose are civil behaviour orders and hybrid behaviour orders. The label ‘civil behaviour order’ is repurposed for the rest of this thesis. Civil behaviour orders are granted under civil evidential rules and breach is a contempt of court, not an offence. By comparison, hybrid behaviour orders are granted under civil evidential rules,⁹⁴ but breach is an offence. There are two reasons to have separate subcategories for civil and hybrid behaviour orders: first, the legal differences between a finding of contempt and an offence; and, secondly, the policy practice of hybrid orders being replaced with civil orders and vice versa. Both reasons will now be outlined.

There are important similarities between the process before a person can be found guilty of an offence and before they can be held in contempt. Like being found guilty of an offence, being held to be in contempt constitutes a criminal charge under the European Convention on Human Rights.⁹⁵ This means the process preceding their imposition must have more rigorous fair trial safeguards than a civil trial.⁹⁶ Though this was recently reaffirmed by the European Court of Human Rights,⁹⁷ it is to be noted that civil contempt proceedings already employed the criminal evidential standard,⁹⁸ and hearsay rules comparable to the criminal courts.⁹⁹

As above, being found to be in contempt can result in up to two years’ imprisonment.¹⁰⁰ In addition, holding an individual in contempt can have a partially penal and partially coercive purpose,¹⁰¹ and ‘[i]n some cases the court when dealing with the breach of an order is simply

⁹⁴ With the possible exception of the employment of the criminal evidential standard. The case law on the employment of this standard will be discussed in detail in the following chapter.

⁹⁵ *Re K (Children) (Committal Proceedings)* [2002] EWCA Civ 1559, [2003] 1 FLR 277.

⁹⁶ The factors listed in article 6(2)-(3) of the European Convention on Human Rights are only possible features of a fair trial and are not each either necessary or sufficient; see *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1.

⁹⁷ *Hammerton v United Kingdom* (2016) 63 EHRR 23 [42].

⁹⁸ Patricia Londono, ATH Smith and David Eady, *Arlidge, Eady & Smith on Contempt* (4th edn, 2nd Supplement, Sweet & Maxwell 2015) paras 12.45-12.50.

⁹⁹ Londono, Smith and Eady (n 98) paras 3.41-3.42.

¹⁰⁰ Contempt of Court Act 1981, s 14.

¹⁰¹ Londono, Smith and Eady (n 98) paras 3.7-3.11A. *JSC BTA Bank v Solodchenko* [2011] EWCA Civ 1241, [2012] 1 WLR 350 [45].

punishing the contemnor, and there is no element of coercion at all.’¹⁰² In sum, a finding of contempt must follow a process with heightened fair trial safeguards, has an explicit punitive purpose and can result in imprisonment.

Such similarities may lead some to the reasonable assumption that being found in contempt is practically indistinguishable from being convicted for an offence. Yet this is not the case. As an example of the differences in substantive law, duress may not function as a complete defence to contempt, but as mitigation only.¹⁰³ As to procedure, there is no right to a trial by jury in proceedings for contempt.¹⁰⁴ The effects of being found in contempt are also different than those of being found guilty of an offence. Contemnors retain the right to vote whilst imprisoned,¹⁰⁵ do not receive a criminal record,¹⁰⁶ and can purge their contempt. A contemnor will not be released on a mere ‘belated expression of contrition’.¹⁰⁷ Instead, *CJ v Flintshire Borough Council* set out eight overlapping questions which should be considered when a contemnor applies to purge their contempt.¹⁰⁸ It is also the duty of the Secretary of

¹⁰² Londono, Smith and Eady (n 98) paras 3.12-3.14.

¹⁰³ Londono, Smith and Eady (n 98) para 12.98.

¹⁰⁴ Londono, Smith and Eady (n 98) para 3.59.

¹⁰⁵ Representation of the People Act 1983, s 7A.

¹⁰⁶ *O’Brien* [2014] UKSC 23, [2014] AC 1246 [38]; *Hammerton v United Kingdom* (2016) 63 EHRR 23 [38].

¹⁰⁷ *Johnson v Grant* (1923) 1923 SC 789, 1923 SLT 501, 503 (Court of Session).

¹⁰⁸ *CJ v Flintshire BC* [2010] EWCA Civ 393, [2010] CP Rep 36 [21].

- I. Can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to his contempt?
- II. Would the interest of the State in upholding the rule of law be significantly prejudiced by early discharge?
- III. How genuine is the contemnor’s expression of contrition?
- IV. Has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early?
- V. In particular has he done all that he reasonably can (bearing in mind the difficulties of his so doing while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach?
- VI. Does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect?

State to release unconditionally contemnors who have served half of their sentence.¹⁰⁹ In summation, the substantive law relating to contempt, the process of being found in contempt and its effects are distinct from being found guilty of an offence. As the then Mr Justice Wall remarked, '[T]he analogy with criminal proceedings can be taken too far'.¹¹⁰

Beyond the legal differences between being held in contempt and found guilty of an offence, there is a policy reason for distinguishing between civil and hybrid behaviour orders. When faced with a problem with a behaviour order, government has been willing to shift between these two forms of order to solve it. The replacement of the ASBO with the anti-social behaviour injunction appears to have been informed by the decision of the House of Lords in *McCann*.¹¹¹ *McCann* will be examined in detail in the following chapter, for now, it is sufficient to note that the evidential standard for granting an ASBO was held to be equivalent to the criminal standard of proof due to what Lord Steyn described as 'the seriousness of matters involved'.¹¹² This was a setback for the government because an attraction of the ASBO had been the relative ease with which it could be obtained.

VII. What is the length of time which he has served in prison, including its relation to (a) the full term imposed upon him and (b) the term which he will otherwise be required to serve prior to release pursuant to s.258(2) of the Criminal Justice Act 2003?

VIII. Are there any special factors which impinge upon the exercise of the discretion in one way or the other?

Strictly, the application is not for contempt to be purged, but an application for the court to use its discretionary power to release a contemnor earlier than their given sentence. This power is set out in Civil Procedure Rules 1998/3132, part 81.31. The application of these questions is not meant as a box ticking exercise: *CJ* [36] (Sedley LJ); *Swindon BC v Webb* [2016] EWCA Civ 152, [2016] 1 WLR 3301 [36]. By way of example, *Solicitor General v Stephen Dodd* [2014] EWHC 1285 in which the contemnor appears to have been released early largely because his prison experience was harder than was expected during sentencing.

¹⁰⁹ Criminal Justice Act 2003, s 258(2).

¹¹⁰ *In re B (A Minor) (Contempt of Court: Affidavit Evidence)* [1996] 1 WLR 627, 639 (Family Division).

¹¹¹ *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787. This has been alluded to by Edwards: Phil Edwards, 'New ASBOs for Old?' (2015) 79(4) *Journal of Criminal Law* 257, 269. The introduction of the gang injunction also appears to be, in part, due to the decision; see further chapter 6.

¹¹² *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [37].

By contrast, the evidential standard for granting an anti-social behaviour injunction was set as the balance of probabilities.¹¹³ The injunction was introduced after a consultation paper by the Home Office.¹¹⁴ The section of the consultation that concerns the anti-social behaviour injunction – then called the crime prevention injunction – states:

Although much of what is currently termed “anti-social behaviour” is crime, it can be very difficult to prove that a particular criminal offence has been committed – perhaps to due a lack of witnesses, or witnesses’ fear of giving evidence against people who live nearby. ... As a result, we believe the police and other local agencies still need the ability to use a civil order (i.e. imposed “on the balance of probabilities”, rather than “beyond reasonable doubt”) to act quickly to protect victims and communities from ongoing anti-social behaviour.¹¹⁵ [sic]

The anti-social behaviour injunction was likely enacted not only because the evidential standard for a civil order was lower, there would also appear to be party politics at play. Labour did not replace the ASBO, a flagship of their law and order agenda, for nearly a decade after *McCann*. The Coalition Government then introduced plans to amend the order within 10 months of coming into power in 2012. Nonetheless, there is a clear policy advantage in moving from a hybrid to a civil behaviour order: it can be presented as doing more to tackle deleterious behaviour more effectively.

In the other direction, breach of a forced marriage protection order could initially only be dealt with as a contempt of court, but was criminalised in 2014.¹¹⁶ Announcing the change, the then Prime Minister, David Cameron, claimed that,

Forced marriage is little more than slavery. To force someone into marriage is completely wrong and I strongly believe this is a problem we should not shy away from addressing because of some cultural concerns.¹¹⁷

The Prime Minister went on to announce:

¹¹³ Anti-social Behaviour Crime and Policing Act, s 1.

¹¹⁴ Home Office, *More Effective Responses to Anti-social Behaviour* (2011).

¹¹⁵ *ibid* 16.

¹¹⁶ The Family Law Act 1996, 63CA as amended by Anti-social Behaviour, Crime, Policing Act 2014, s 120.

¹¹⁷ David Cameron, ‘Prime Minister’s Speech on Immigration’ (*gov.uk*, 10 October 2011) <<https://www.gov.uk/government/speeches/prime-ministers-speech-on-immigration>> accessed 5 May 2019.

[W]e will criminalise the breach of forced marriage prevention orders. It is ridiculous that an order made to stop a forced marriage isn't enforced with the full rigour of the criminal law.¹¹⁸

Whereas moving from a hybrid to a civil behaviour order has been used to lower the evidential standard for granting an order, moving from a civil to a hybrid order can be used to appear tough on crime. Behaviour orders backed by standalone offences and by contempt continue to be seen as viable alternatives in policymaking. Part two of the Offensive Weapons Act 2019 enacted a knife crime prevention order. Before enactment, Parliament had debated whether the order should be backed by contempt proceedings or by a criminal offence.¹¹⁹ In consequence, it is appropriate to distinguish between orders backed by contempt and standalone offences when critically assessing behaviour orders in later chapters. Examining civil behaviour orders and hybrid behaviour orders as separate subcategories will allow for such comparison. In addition, the use of these two categories also identifies that civil behaviour orders are more similar in effect to civil injunctions than hybrid behaviour orders.

Still other behaviour orders cannot fairly be described as either civil or hybrid civil-criminal orders. The third, and final, subcategory of behaviour orders is executive behaviour orders. Executive behaviour orders are imposed by a state body with little or no judicial oversight and breach is an offence. Executive behaviour orders could also be described as hybrid orders (granted by a state body, breach is a criminal offence). However, the orders are hybrid in a different manner than the more common civil-criminal model in that the executive can impose them and they are named to reflect this.

To understand the value of having a distinct subcategory for executive behaviour orders, it is important to outline an early critique of behaviour orders: they side-step the heightened

¹¹⁸ *ibid.*

¹¹⁹ HL Deb 6 February 2019, vol 795 cols 377-378GC, 393GC.

criminal fair trial safeguards such as the right to cross-examine witnesses.¹²⁰ As Pearson commented,

The central civil libertarian criticism of hybrid orders has been that by imposing quasi-criminal sanctions on the basis of civil procedures, ECHR [European Convention on Human Rights] protections granted to citizens under the HRA [Human Rights Act 1998] are being infringed.¹²¹

If an important critique of behaviour orders is that they avoid the heightened fair trial safeguards of the criminal trial, then the development of executive behaviour orders is worthy of particular attention. Executive behaviour orders may undermine those safeguards in a different way and arguably to a greater degree. When comparing the ASBO and the control order – the antecedent of the TPIM – Macdonald argued that there is a recurring theme of trust in the executive to ‘employ wide-ranging powers responsibly’.¹²² To support this argument, Macdonald first listed the types of behaviour – such as feeding pigeons – and types of people – such as young people – that local authorities and the police could seek to regulate via ASBOs.¹²³ Macdonald then criticised the minimal court oversight of granting control orders.¹²⁴ The court proceedings for granting a control order were more analogous to a judicial review of the Secretary of State’s decision to impose the order than a substantive hearing on the merits of imposition.¹²⁵

Although both approaches speak to trust in the executive, they do so in distinct ways. The ASBO through the broad discretion to regulate a wide range of behaviours on application to a court. The control order through the lack of oversight when the order was granted. The type of danger presented by the control order was perhaps greater because it was not only an

¹²⁰ European Convention on Human Rights, art 6(3).

¹²¹ Pearson (n 68) 133. Pearson builds on earlier work by Ashworth (n 82).

¹²² Stuart Macdonald, ‘ASBOs and Control Orders: Two Recurring Themes, Two Apparent Contradictions’ (2007) 60(4) Parliamentary Affairs 601, 602.

¹²³ Macdonald (n 122) 608-610.

¹²⁴ Macdonald (n 122) 610-612.

¹²⁵ Prevention of Terrorism Act 2005, s 3.

expansion of the regulatory power of the executive per se, but an expansion without significant corresponding judicial oversight. This heightened danger risks going unseen if behaviour orders granted with minimal judicial oversight are incorporated into another subcategory of behaviour orders.¹²⁶

So, what are the existing executive behaviour orders? The most well-known example is the TPIM. As the TPIM has already received considerable academic attention,¹²⁷ another example will be analysed here: the community protection notice. A constable, local authority or designated person may grant a community protection notice,

if satisfied on reasonable grounds that—

- (a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and
- (b) the conduct is unreasonable.¹²⁸

The notice can include requirements to do specified acts or take reasonable steps to achieve specified results. The example given by the Coalition government in their explanatory notes is as follows:

For instance, where a dog was repeatedly escaping from its owner's back garden due to a broken fence, the owner could be issued with a notice requiring that they fix the fence to avoid further escapes and also, if appropriate, ensure that the owner and dog attended training sessions to improve behaviour (if this was also an issue).¹²⁹

¹²⁶ Christos Boukalas, 'U.K. Counterterrorism Law, Pre-Emption, and Politics Toward "Authoritarian Legality"?' (2017) 20(3) *New Criminal Law Review* 355, 367: 'TPIMs combine civil standards of proof with sanctions the severity of which approaches criminal punishment.' Jennifer Hendry and Colin King, 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2017) 11(4) *Criminal Law and Philosophy* 733, 734: 'Many examples can be cited of the use of civil processes to target criminal behaviour, for example...Terrorism Prevention and Investigation Measures'.

¹²⁷ By way of example, Ben Middleton, 'Terrorism Prevention and Investigation Measures: Constitutional Evolution, not Revolution?' (2013) 77(6) *Journal of Criminal Law* 562; Alexander Horne and Clive Walker, 'Lessons Learned from Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament [2014] (2) *Public Law* 267; Stuart Macdonald, 'The Role of the Courts in Imposing Terrorism Prevention and Investigation Measures: Normative Duality and Legal Realism' (2015) 9(2) *Criminal Law and Philosophy* 265; Helen Fenwick, 'Redefining the Role of TPIMs in Combatting "Home-Grown" Terrorism within the Widening Counter-Terror Framework' [2015] (1) *European Human Rights Law Review* 41; David Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' [2013] (3) *European Human Rights Law Review* 233.

¹²⁸ The recipient must also have received a written warning. *Anti-social Behaviour, Crime and Policing Act 2014*, ss 43 and 53.

¹²⁹ Explanatory notes to the *Anti-social Behaviour, Crime and Policing Act 2014*, para 149.

Breach of a community protection notice, without reasonable excuse, is an offence with a maximum sentence of a fine.¹³⁰

The only potential role of the courts is as a forum of appeal after the order has been imposed.¹³¹ Grounds of appeal include that the trigger behaviour did not take place, someone else did the behaviour, the behaviour is not having a detrimental effect and the conditions are unreasonable.¹³² These are narrow grounds for judicial oversight. It is ex post facto and the burden is placed on the recipient to appeal. The recipient of a community protection notice may thus be left to prove their innocence. ASBOs arguably undermined the criminal fair trial safeguards. Community protection notices have almost dispensed with the trial altogether.

There are not many different types of executive behaviour order, but those which do exist regulate anti-social behaviour and terrorism. It was the regulation of these two categories which lead one senior policy official, interviewed by Ogg, to suggest that the proliferation of behaviour orders was somewhat inevitable.¹³³ Perhaps the same will become true of executive behaviour orders specifically. Regardless, executive behaviour orders are so structurally different from civil and hybrid behaviour orders that they merit separate consideration in later chapters, which appraise whether behaviour orders are preventive and/or punitive.

Section IV. A taxonomy of behaviour orders

Section IV sets out the current law on behaviour orders over three tables, one for each subcategory. In each table, the following factors are set out: the behaviour order, the legislation which the order is contained in, the behaviour it targets, the body that can apply for it, the body

¹³⁰ Anti-social Behaviour, Crime and Policing Act 2014, s 48.

¹³¹ Anti-social Behaviour, Crime and Policing Act 2014, s 46.

¹³² Anti-social Behaviour, Crime and Policing Act 2014, s 46.

¹³³ Ogg (n 34) 203.

that can impose it, the requirements to impose the order, the type of restrictions/requirements the order may contain, and the effect of breaching the order.

Table 1: Civil behaviour orders [granted under civil evidential rules and breach is a contempt of court]

Behaviour order	Legislation	Behaviour targeted	Body that can apply	Body that can impose	Imposition requirements	Type of restrictions/ requirements	Effect of breach
Anti-social behaviour injunction	Anti-social Behaviour, Crime and Policing Act 2014, ss 1-21.	Anti-social behaviour	A local authority, a chief officer of the police for an area, or other listed authorities.	High Court or county court.	1. On the balance of probabilities, the respondent has engaged in or threatens to engage in anti-social behaviour. 2. The court considers it just and convenient to grant the injunction to prevent the respondent from engaging in anti-social behaviour.	Restrictions and requirements	Contempt of court
Domestic violence protection order	Crime and Security Act 2010, ss 24-33.	Domestic violence	A constable.	Magistrates' court.	1. P has been violent towards, or has threatened violence towards, an associated person. 2. An order is necessary to protect the associated person from violence or a threat thereof.	Must prohibit molesting the associated person. May include listed restrictions.	Contempt of court
Gang injunction	Policing and Crime Act 2009, ss 34-50.	Gang-related violence and drug-dealing	A chief officer of police for an area, the chief constable of the British Transport	High Court or county court.	1. On the balance of probabilities, the respondent has engaged in, encouraged or assisted gang-related violence or drug-	Restrictions and requirements	Contempt of court

			Police Force, or a local authority.		dealing. 2. An injunction is necessary to prevent gang-related violence or drug-dealing.		
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Table 2: Hybrid behaviour orders [granted under civil evidential rules, but breach is an offence]

Behaviour order	Legislation	Behaviour targeted	Body that can apply	Body that can impose	Imposition requirements	Type of restrictions/ requirements	Effect of breach
Criminal behaviour order	Anti-social Behaviour, Crime and Policing Act 2014, ss 22-33.	Anti-social behaviour	Crown Prosecution Service (CPS) or the court of its own volition.	Crown Court or magistrates' Court.	1. The court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress. 2. The order will help in preventing the offender from engaging in	Restrictions or requirements	Offence (max - five years)

					such behaviour.		
Female genital mutilation protection order (on complaint or other proceedings)	Female Genital Mutilation Act 2003, sch 2 para 2.	Female genital mutilation (FGM)	The girl to be protected, a relevant third party, any other person with leave of the court, or without an application in specified circumstances.	High Court or family court.	1. The court may make an order to protect a girl from an FGM offence or to protect a girl against whom the offence has been committed. 2. When making decision, the court must have regard to all the circumstances.	Restrictions or requirements.	Offence (max - 5 years)
Female genital mutilation protection order (on conviction)	Female Genital Mutilation Act 2003, sch 2 para 3.	FGM	CPS or the court of its own volition.	Crown Court or magistrates' court.	1. The court considers an order should be made to protect a girl. 2. A person who would be the respondent to proceedings for an order is a defendant.	Restrictions or requirements.	Offence (max - 5 years)

<p>Football banning order (on complaint)</p>	<p>Football Spectators Act 1989, s 14B.</p>	<p>Football-related violence or disorder</p>	<p>A chief officer of police for an area, the chief constable of the British Transport Police Force, or the Director of Public Prosecutions.</p>	<p>Magistrates' court.</p>	<p>The court must impose an order if 1. The 'respondent has at any time caused or contributed to any violence or disorder'. 2. There are reasonable grounds to believe that imposing an FBO would help prevent violence or disorder at regulated football matches.</p>	<p>Must contain specified reporting requirements. May contain additional requirements.</p>	<p>Offence (max - 6 months)</p>
<p>Football banning order (on conviction)</p>	<p>Football Spectators Act 1989, s 14A.</p>	<p>Football-related violence or disorder</p>	<p>CPS or the court of its own volition.</p>	<p>Crown Court or magistrates' court.</p>	<p>1. Conviction for a relevant offence. 2. The court must make the order if there are reasonable grounds to believe it would help</p>	<p>Must contain specified reporting requirements. May contain additional requirements.</p>	<p>Offence (max - 6 months)</p>

					prevent violence at or connected to football matches.		
Forced marriage protection order	Family Law Act 1996, ss 63A-63S.	Forced marriage	The person to be protected, a relevant third party, any other person with leave, or of the court's own volition.	High Court or a family court.	1. An order may be made to protect a person who has been forced into a marriage, or to protect them from any attempt to be so forced. 2. The court must have regard to all the circumstances.	Restrictions and requirements	Offence (max – 5 years)
Harassment injunction section 1(1)	Protection from Harassment Act 1997, s 3.	Harassment	The person who is or may be the victim.	High Court or county court.	1. Actual or apprehended harassment. 2. The injunction is for the purpose of restraining the defendant from harassing.	Restrictions	Offence (max - 5 years)

Harassment injunction section 1(1A)	Protection from Harassment Act 1997, s 3A.	Harassment to persuade	The person who is or may be the victim, or a person the harassment is intended to persuade.	High Court or county court.	1. Actual or apprehended harassment to persuade. 2. The injunction is for the purpose of restraining the defendant from harassing.	Restrictions	Offence (max - 5 years)
Labour market enforcement order (on complaint)	Immigration Act 2016, s 18.	Labour market exploitation	The Secretary of State, Gangmasters and Labour Abuse Authority, or other listed authorities.	Magistrates' court.	1. On the balance of probabilities, the person has committed a trigger offence. 2. It is just and reasonable to impose the order.	Restrictions or requirements	Offence (max - 2 years)
Labour market enforcement order (on conviction)	Immigration Act 2016, s 20.	Labour market exploitation	CPS or the court of its own volition.	Crown Court or magistrates' court	1. A conviction for a trigger offence. 2. It is just and reasonable to impose the order.	Restrictions or requirements	Offence (max - 2 years)

<p>Letting banning order</p>	<p>Housing and Planning Act 2016, ss 14-27.</p>	<p>Rogue letting</p>	<p>Local housing authority.</p>	<p>First-tier Tribunal.</p>	<p>1. Conviction for a banning order offence. 2. The person was a residential landlord or agent at the time of the offence (unless a body corporate). 3. The Tribunal must consider the seriousness of the offence, previous convictions, whether they are a listed rogue landlord or agent, and the likely effect of the order.</p>	<p>Restrictions on letting houses, and related activities.</p>	<p>Offence (max - 51 weeks)</p>
<p>Non-molestation order</p>	<p>Family Law Act 1996, ss 42-49.</p>	<p>Molestation</p>	<p>A person associated to the respondent or the court itself in other proceedings if the</p>	<p>High Court or family court.</p>	<p>The court will have regard to all the circumstances when deciding if and how to</p>	<p>Restrictions</p>	<p>Offence (max - 5 years)</p>

			respondent is a party.		exercise this power.		
Parenting order	Crime and Disorder Act 1998, ss 8-10.	Incivility/crime of a child	The court of its own volition.	The order can be sought in a range of proceedings listed in the Act.	1. The order would be desirable to prevent listed behaviours, or a further offence by the child.	Requirements	Offence (max - fine)
Psychoactive substances prohibition order (on complaint)	Psychoactive Substances Act 2016, s 18.	Producing supplying offering etc. of a psychoactive substance	A Chief officer of police, the chief constable of the British Transport Police Force, the Director General of the National Crime Agency, the relevant Secretary of State, or a local authority.	Youth court or a magistrates' court.	1(a). On the balance of probabilities, the person has not complied with a prohibition notice, or 1(b). on the balance of probabilities, the person has or is likely to carry out a prohibited activity, and would likely fail to comply with a prohibition notice; and	Restrictions or requirements	Offence (max - 2 years)

					2. an order is necessary and proportionate to prevent the person carrying out a prohibited activity.		
Psychoactive substances prohibition order (on conviction)	Psychoactive Substances Act 2016, s 19.	Producing supplying offering etc. of a psychoactive substance	CPS or the court of its own volition.	Crown Court or magistrates' court.	1. Conviction for a relevant offence. 2. The order is necessary and proportionate to prevent the offender from carrying out a prohibited activity.	Restrictions or requirements	Offence (max - 2 years)
Restraining order (on acquittal)	Protection from Harassment Act 1997, 5A.	Harassment	CPS or the court of its own volition.	Crown Court or magistrates' court.	1. Acquittal for an offence. 2. The order is necessary to protect a person from harassment by the defendant.	Restrictions	Offence (max 5 - years)
Restraining order (on conviction)	Protection from Harassment Act 1997, s 5.	Harassment	CPS or the court of its own volition.	Crown Court or magistrates' court.	1. Conviction for an offence. 2. The order must be for the purpose of	Restrictions	Offence (max - 5 years)

					protecting a person from harassment or the fear of violence.		
Serious crime prevention order (on complaint)	Serious Crime Act 2007, s 1.	Serious crime	The Director of Public Prosecutions or the Serious Fraud Office.	High Court.	1. The court is satisfied that a person has been involved in serious crime. 2. There are reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.	Restrictions or requirements	Offence (max - 5 years)
Serious crime prevention	Serious Crime Act 2007, s 19.	Serious crime	CPS or the court of its own volition.	Crown Court.	1. Conviction for a serious offence.	Restrictions or requirements	Offence (max - 5 years)

order (on conviction)					2. There are reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.		
Sexual harm prevention order (on complaint)	Sexual Offences Act 2003, ss 103A-103K.	Sexual harm	A chief officer of the police, or the Director General of the National Crime Agency.	Magistrates' court.	1. The defendant is a qualifying offender. 2. The defendant's behaviour makes an SHPO necessary to protect the public or persons listed in the section.	Restrictions	Offence (max - 5 years)

<p>Sexual harm prevention order (on conviction)</p>	<p>Sexual Offences Act 2003, ss 103A-103K.</p>	<p>Sexual harm</p>	<p>CPS or the court of its own volition.</p>	<p>Crown Court or magistrates' court.</p>	<p>1. The defendant has committed a relevant sexual or violent offence. 2. An order is necessary to protect the public or persons listed in the section.</p>	<p>Restrictions</p>	<p>Offence (max - 5 years)</p>
<p>Sexual risk order</p>	<p>Sexual Offences Act 2003, ss 122A-122K.</p>	<p>Sexual harm</p>	<p>A chief officer of the police or the Director General of the National Crime Agency.</p>	<p>Magistrates' court.</p>	<p>1. The defendant has done an act of a sexual nature. 2. As a result of which there is reasonable cause to believe that it is necessary for a sexual risk order to be made for the purpose of protecting people etc...</p>	<p>Restrictions</p>	<p>Offence (max - 5 years)</p>

<p>Slavery and trafficking prevention order (on complaint)</p>	<p>Modern Slavery Act 2015, s 15.</p>	<p>Slavery and trafficking</p>	<p>A chief officer of police, an immigration officer, the Director General of the National Crime Agency, or the Gangmasters and Labour Abuse Authority.</p>	<p>Magistrates' court.</p>	<p>1. The defendant is a relevant offender. 2. There is a risk the defendant may commit a slavery or human trafficking offence. 3. The order is necessary to protect a person from physical or psychological harm likely to occur if the offence was committed.</p>	<p>Restrictions</p>	<p>Offence (max - 5 years)</p>
<p>Slavery and trafficking prevention order (on conviction)</p>	<p>Modern Slavery Act 2015, s 14.</p>	<p>Slavery and trafficking</p>	<p>CPS or the court of its own volition.</p>	<p>Crown Court or magistrates' court.</p>	<p>1. Conviction for a slavery or trafficking offence. 2. There is a risk the defendant will commit a slavery or human</p>	<p>Restrictions</p>	<p>Offence (max - 5 years)</p>

					trafficking offence. 3. An order is necessary to protect people from the harms likely to occur if they committed such an offence.		
Slavery and trafficking risk order	Modern Slavery Act 2015, s 23.	Slavery and trafficking	A chief officer of police, an immigration officer, the Director General of the National Crime Agency, and the Gangmasters and Labour Abuse Authority.	Magistrates' court.	The defendant has acted in a manner which means: 1. there is a risk they will commit a slavery or trafficking offence; and 2. the order is necessary to protect a person from physical or psychological harm likely to occur if the offence was committed.	Restrictions	Offence (max - 5 years)

<p>Stalking protection order</p>	<p>Stalking Protection Act 2019, s 2.</p>	<p>Stalking</p>	<p>A chief officer of police.</p>	<p>Magistrates' court.</p>	<p>1. The defendant has carried out acts associated with stalking. 2. The defendant poses a risk associated with stalking. 3. The order is necessary to protect a person from such a risk.</p>	<p>Restrictions or requirements</p>	<p>Offence (max - 5 years)</p>
<p>Violent offender order</p>	<p>Criminal Justice and Immigration Act 2008, ss 98-107.</p>	<p>Violent offending</p>	<p>A chief officer of police.</p>	<p>Magistrates' court.</p>	<p>1. The person is a qualifying offender. 2. The person has acted in such a way as to make it necessary to make a violent offender order for the purpose of protecting the public from the risk of serious violent</p>	<p>Listed restrictions</p>	<p>Offence (max - 5 years)</p>

					harm caused by the person.		
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Table 3: Executive behaviour orders [imposed by a state body with little or no judicial oversight and breach is an offence]

Behaviour order	Legislation	Behaviour targeted	Body that can apply	Body that can impose	Imposition requirements	Type of restrictions/ requirements	Effect of breach
Community protection notice	Anti-social Behaviour, Crime and Policing Act 2014, ss 43-48.	Behaviour that is having a persistent detrimental effect on quality of life.	N/A	Constable, local authority, or a person designated by the local authority.	An authorised person is satisfied on reasonable grounds that: 1. ‘the conduct of individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality’; and 2. ‘the conduct is unreasonable’.	Restrictions or requirements	Offence (max - fine)
Public spaces protection order	Anti-social Behaviour, Crime and Policing Act 2014, ss 59-75.	Behaviour that has ‘a detrimental effect on the quality of life of those in the locality’.	N/A	Local authority.	The authority is satisfied, on reasonable grounds, that: 1. activities in a public place are having a detrimental effect, or it is likely that activities with	Restrictions or requirements	Offence (max - fine)

					<p>this effect will be carried out; and</p> <p>2. the effect is, or is likely to be persistent, unreasonable, and justifies the order.</p>		
<p>Terrorism prevention and investigation measure</p>	<p>Terrorism Prevention and Investigation Measures Act 2011.</p>	<p>Terrorism</p>	<p>Secretary of State</p>	<p>High Court.</p>	<p>The court must review the decision of the Secretary of State against listed conditions under judicial review principles.</p>	<p>Listed restrictions and requirements</p>	<p>Offence (max - 5 years)</p>

Section V. Conclusion

While other definitions and categorisations are possible, the taxonomy developed here has the advantage that it details important differences in the structure of behaviour orders that will allow for more nuance in answering the overarching research question of whether these orders are preventive and/or punitive. There are simply too many behaviour orders of too great a variety to make a single all-encompassing attempt to answer the overarching question plausible. Later chapters will thus assess orders within each subcategory in turn.

The taxonomy developed here also allows for advancement on earlier accounts of behaviour orders. By way of example, Edwards has claimed

The Labour government's insistence on backing civil behaviour regulation with criminal penalties, the better to "send [a] clear message" of society's condemnation of anti-social behaviour, has disappeared.¹³⁴

Edward's claim was made in the context of the hybrid ASBO being replaced by the civil anti-social behaviour injunction. However, the tables above show that the hybrid model is still, by far, the most popular form of behaviour order. The framework also allows for some nuance to be added to Burney's conclusion in 2009 that the 'political heyday' of the ASBO was over.¹³⁵ The ASBO can be understood as having two legacies. First, the continued willingness to regulate anti-social behaviour through means other than the criminal law. Secondly, as a model for the hybrid regulation of a wide range of other behaviours. With a clearer conception of what behaviour orders are and how they have developed, we can now turn to the case law on prevention and punishment.

¹³⁴ Edwards (n 111) 268.

¹³⁵ Burney (n 89) 114.

Chapter 3: Prevention and Punishment in the Case Law

Our attention can now turn from behaviour orders to the concepts against which they will be assessed in later chapters: punishment and prevention. Both the European Court of Human Rights (ECtHR) and domestic courts have had to establish whether legal measures are preventive and/or punitive. A critical examination of the case law is thus an important step toward answering the central research question of this thesis: are behaviour orders preventive and/or punitive measures? This chapter engages with two related bodies of case law. First, it examines decisions of the ECtHR on article 5 (the right to liberty), article 6 (the right to a fair trial), and article 7 (the ban on retrospective punishment) of the European Convention on Human Rights (ECHR). Secondly, it considers judgments of domestic courts that concern behaviour orders. The purpose of the chapter is not to reach a conclusion on whether behaviour orders or any subcategory thereof – civil, hybrid, or executive – are preventive and/or punitive. The chapter is also not a complete review of the case law on either articles 5-7,¹ or behaviour orders.² Instead, it extracts and analyses elements of this case law to establish if the current law can provide clear conceptions of punishment and prevention against which to assess behaviour orders in later chapters.

The case law of the ECtHR is considered first because a number of the important Strasbourg decisions on the relevant articles precede domestic judgments on behaviour orders and are cited in those judgments. The ECtHR case law thus needs to be understood before we can examine the domestic judgments. The primary argument I make in section I is that the ECtHR has neither a consistent nor a clear approach by which it assesses whether

¹ For such a review of article 6, see Ryan Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Hart Publishing 2014).

² For instance, cases that concern sentencing for breach of behaviour orders are not engaged with. For earlier consideration of sentencing for breach of an ASBO see Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012) ch 2; Stuart Macdonald, 'The Principle of Composite Sentencing: Its Centrality to, and Implications for, the ASBO' [2006] (9) *Criminal Law Review* 791.

measures are preventive and/or punitive. Instead the approach of the Court varies dependent on which article of the Convention is at issue and even within case law on the same article. The first section also offers some insights into why the ECtHR has not developed a more consistent approach to prevention and punishment. Section II then examines domestic case law on behaviour orders. In it, I argue that domestic case law has not developed significantly since the 2002 judgment of the House of Lords in *R (McCann) v Manchester Crown Court*.³ The section is critical of *McCann* because it relied on one strand of ECtHR case law without recognition of the wider inconsistencies in how the Strasbourg Court handles the concepts of punishment and prevention. Section III emphasises the limitations of the case law examined in this chapter and it reflects on the need for more fully developed accounts of prevention and punishment for this thesis and more generally.

Section I. The ECtHR case law

In this section, I assess the case law of the ECtHR over seven subsections, the first three set out and examine the Court's approach to punishment under articles 6, 7 and 5 respectively. The next trio of subsections tackle more overarching topics: the inconsistent approaches to punishment across ECtHR case law; the ways in which prevention has played second fiddle to punishment; and the inconsistency in the relationship between prevention and punishment. In the final subsection, I discuss a factor which may have contributed to the Court's difficulties with the concepts of prevention and punishment, namely, its need to maintain working relationships with contracting states.

³ [2002] UKHL 39, [2003] 1 AC 787.

Punishment and article 6

Article 6 of the ECHR sets out fair trial safeguards for those who face either a determination of their civil rights and obligations, or a criminal charge. Article 6(1) provides the safeguards that apply to both types of proceedings; the heightened safeguards for those charged with a criminal offence are set out in article 6(2)-(3). Article 6(2) provides for the presumption of innocence and article 6(3) lists further safeguards that include the right to examine witnesses. Ashworth and Redmayne have commented,

The purpose of these additional safeguards is to provide fundamental guarantees against arbitrary State conduct and potential misuse of its authority, an authority that is considerable when the public censure of conviction and State punishment are at stake.⁴

The ECtHR, to this end, gives autonomous meaning to the term ‘criminal charge’. In essence, this means that the Court, not the contracting state, has the power to determine what is and what is not a criminal charge for the purposes of the Convention. Autonomous meaning is a tool to prevent contracting states subverting the heightened criminal fair trial rights by labelling proceedings as, for example, disciplinary or administrative.⁵

The leading case of *Engel v the Netherlands* sets out the test to establish what constitutes a criminal charge.⁶ The test is three-part: under the first part, which is of less importance, the court considers whether there has been a criminal charge under the relevant domestic law. The court assesses the nature of the offence under the second part of the test and the severity of the penalty imposed under the third. Where neither the second nor third

⁴ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 403-404. See also, Lucia Zedner, ‘Penal Subversions: When is a Punishment Not Punishment, Who Decides and on What Grounds?’ (2016) 20(1) *Theoretical Criminology* 3, 14; Michael L Rich, ‘Limits on the Perfect Preventive State’ (2013-14) 46 *Connecticut Law Review* 883, 908. The safeguards could be argued to relate only to the trial as a process and not to be as safeguards against punishment itself. But this would be to conflate the effect of a safeguard and its purpose. The effect of a seatbelt is to stop a person from moving in a crash; its purpose is to stop serious injury and death. The concept of censure will be addressed in chapter 5.

⁵ Ashworth describes this interpretative methodology as the anti-subversion doctrine. The doctrine applies to other terms in the Convention too: Andrew Ashworth, ‘Social Control and “Anti-social Behaviour”: The Subversion of Human Rights?’ (2004) 120(Apr) *Law Quarterly Review* 263.

⁶ *Engel v The Netherlands (No 1)* (1979-80) 1 EHRR 647 [82].

part of the test alone lead to the conclusion that a measure constitutes a criminal charge, the court can take a cumulative approach to them.⁷

The Court thus engages with the punitiveness of measures under the third Engel criterion: ‘the degree of severity of the *penalty* that the person concerned risks incurring.’⁸ There is an immediate issue in the approach to punishment taken in the third criterion, however; as the italicised text shows, the criterion is predicated on the assumption that the measure under consideration is penal, all that is left to be assessed – at least on a literal reading – is how severe a penalty the measure at issue is. This point was not acknowledged in *Engel* itself where the Court only went so far as to hold that the disciplinary measure, light arrest, imposed on Mr Engel was not burdensome enough to satisfy the third criterion, but the maximum of three to four months’ imprisonment in a disciplinary unit faced by other applicants was.⁹

The approach taken to the third criterion in *Engel* was narrow because it only considered the effects and potential effects of the measures when it assessed if they were severe penalties. The Court again applied a narrow interpretation in *Benham v United Kingdom*, which concerned imprisonment for non-payment of a community charge; in respect of the third criterion it only went as far as to state:

Finally, it is to be recalled that the applicant faced a relatively severe maximum penalty of three months’ imprisonment, and was in fact ordered to be detained for 30 days.¹⁰

⁷ *Jussila v Finland* (2007) 45 EHRR 39 [31].

⁸ *Engel* (n 6) [82] (emphasis added). I understand the ECtHR’s use of the terms ‘penalty’ and ‘punishment’ to be interchangeable. This can be seen in the extracts from the Court engaged with in the chapter. What is more, it follows the use of the terms in the ECHR: art. 7 is entitled ‘No punishment without law’, the first paragraph limits the imposition of increasing ‘penalties’ retrospectively and the second returns to ‘trial and punishment’. In this section, I critique the clarity of the ECtHR’s jurisprudence. The case for clarity is stronger if penal and punitive are assumed to be interchangeable. If the terms were understood to be distinct, complex issues of how exactly the terms were different from each other, and what exactly their relationship would arise; better to take the case for clarity in its stronger form.

⁹ *Engel* (n 6) [85].

¹⁰ *Benham v United Kingdom* (1996) EHRR 293 [56].

The Court would risk questionable outcomes in certain circumstances if it interpreted the third criterion narrowly. The imposition of income tax, for instance, could be taken to constitute a criminal charge because to be charged thousands of pounds undoubtedly has a serious effect even if the penal quality of the charge is doubtful. The fundamental issue with the narrow interpretation is that the ECtHR does not engage with the logically prior question of whether the relevant measure is penal at all.

In his partly dissenting opinion to the decision of the European Commission of Human Rights in *Benham*, Schermers commented: ‘In the present case, however, there is no question of any such punitive element. The detention of the applicant was intended solely as an enforcement measure.’¹¹ Regardless of whether Schermers’ view was correct, the narrow interpretation of the third criterion means the status of the detention as penal was not engaged with in the later judgment of the Court. In other words, the status of the measure was contested, but this could not be brought out because the narrow reading of the third Engel criterion presumes that the measure being assessed is penal. The narrow interpretation, thus, risks both over-inclusiveness and stifling legitimate contestation of the status of measures as penal. This limits the insights that can be drawn from article 6 case law for present purposes.

On other occasions, the ECtHR has taken a broad interpretation of the third criterion. In *Matyjek v Poland*, the applicant was held by domestic courts to have lied in lustration proceedings,¹² and as a result lost his parliamentary mandate and was banned from office for 10 years.¹³ Matyjek argued that the domestic proceedings violated his right to a fair trial and the ECtHR thus had to determine whether there had been a criminal charge. In its

¹¹ *Benham* (n 10) 315 (Mr Schermers).

¹² Lustration proceedings are used in central and eastern European countries to remove those associated with the Communist regime from governments or at least to make it clear who in government had such affiliations.

¹³ (2011) 53 EHRR 10 [26].

decision on admissibility, the Court applied the third Engel criterion, and, in so doing, linked its assessment of the severity of the consequences for Matyjek to a wider assessment of the character of the measures: the ECtHR held that the measure was so severe that it had ‘at least partly punitive and deterrent character.’¹⁴ The Court then placed weight on the purpose of the proceedings:

[T]he purpose of lustration proceeding is not to prevent former employees of the communist-era secret services from taking up employment in public institutions...but to punish those who have failed to comply with the obligation to disclose.¹⁵

The ECtHR decided that, ‘given its nature and duration, the sanction provided by the Lustration Act must be considered as detrimental to and as having serious consequences for the applicant.’¹⁶ The Court’s understanding of the severity of the measure in *Matyjek* was thus affected not only by the impact of the measure on the applicant, but also by the character and purpose of the measure.

The broad interpretation of the third criterion allows for factors beyond the effect and possible effect of the measure to be considered when the Court assesses severity. An assessment of the character and purpose of a measure may well be salient to an assessment of whether it is penal, but the Court’s methodology is jarring. The broad interpretation requires character and purpose to be considered under a strained reading of the term ‘severity’ and not as part of an inquiry into whether the measure is punitive in the first place. What is more, the broad interpretation, though possibly an advance on the narrow interpretation, again does not constitute a clear definition of ‘punishment’ or a clear means by which to assess punitiveness for the purpose of article 6.

¹⁴ *Matyjek v Poland* App no 38184/03 (ECtHR, 30 May 2006) [55].

¹⁵ *ibid* [56].

¹⁶ *ibid* [57].

There are not only issues with the broad and narrow interpretation when they are assessed independently, it is also troubling, that the Court does not interpret the third criterion consistently. As the wider interpretation of the criterion allows for more factors, including character and purpose, to influence the Court's decision as to whether there has been a criminal charge, the choice of interpretative approach could affect whether a contracting state will be found to have violated article 6. There is also no easy means by which to determine when the Court will apply each interpretative approach. This is no doubt a serious issue for all parties, and reflects a problem raised by Goss in his detailed examination of the ECtHR's fair trial case law: namely, that there is inconsistency both within and between the approaches taken by the ECtHR in article 6 cases.¹⁷ Despite the importance of the classification of a measure as punitive or non-punitive for the right to a fair trial, the relevant case law of the ECtHR does not provide a clear conception of what makes a measure punitive.

Punishment and article 7

Article 7 of the ECHR restricts contracting states from applying criminal law or enhanced penalties retrospectively. As with article 6, article 7 relies on the principle of autonomous meaning to give effect to the protections it enshrines.¹⁸ Here, the autonomous term is 'penalty'. The current approach of the ECtHR to assess whether a measure constitutes a penalty for the purposes of article 7 was first elaborated in *Welch v United Kingdom*.¹⁹ *Welch* concerned the retrospective application of a confiscation order on conviction; the contracting state accepted that the measure had been applied retrospectively, what was at issue was whether it constituted a penalty.²⁰ In its decision on the admissibility of the claim,

¹⁷ Goss (n 1) 206.

¹⁸ *Welch v United Kingdom* (1995) EHRR 247 [27].

¹⁹ *ibid.*

²⁰ *ibid* [27].

the Commission noted there was ‘no established definition of the term “penalty”’ in Convention case law.²¹ The Commission found the claim admissible.²² The ECtHR then assessed the confiscation order against five factors to establish if it was a penalty: whether it was imposed after a conviction for a criminal offence; the nature and purpose of the measure; its characterization in domestic law; the procedures for making and implementing the measure; and its severity.²³ The Court concluded that the confiscation order constituted a penalty.²⁴

The ECtHR’s approach to punishment under article 7 is clearer than under the broad interpretation of the third Engel criterion. The factor-based approach can draw attention to what is considered important in particular ECtHR cases in a manner that is particularly useful in contentious cases. *Welch* is such a case; the Commission had held that the confiscation order was not penal only by the narrowest of margins, seven votes to seven with the vote of the then Acting President decisive.²⁵ Yet the five factors relied on by the Court are relatively clear. For instance, on the first factor the ECtHR stated:

As regards the connection with a criminal offence, it is to be observed that before an order can be made under the 1986 Act the accused must have been convicted of one or more drug trafficking offences. This link is in no way diminished by the fact that, due to the operation of the statutory presumptions concerning the extent to which the applicant has benefited from trafficking, the court order may affect proceeds or property which are not directly related to the facts underlying the criminal conviction.²⁶

I will argue the use of a factor-based approach to assessing punitiveness has a strong theoretical basis in chapter 5. Yet the particular factor-based approach used in respect of

²¹ The relevant part of the Commission’s decision is set out in the later judgment of the ECtHR: *ibid* 255.

²² *ibid* [19].

²³ *ibid* [28].

²⁴ *ibid* [35].

²⁵ *ibid* 258.

²⁶ *ibid* [29].

article 7 does raise some points of concern. First, the factors themselves remain underdeveloped. When the Court engaged with the purpose of ostensibly preventive detention in the later case of *M v Germany*, it argued that the measure had a punitive quality given that ‘the realities of the situation’ for the applicant were so similar to those who were imprisoned for an offence: M was in fact detained within the walls of a conventional prison.²⁷ The same phrase – ‘the realities of the situation’ – was again used in the related case of *Glien v Germany* to reach the conclusion that preventive detention had a punitive purpose.²⁸ The Court relied on a loose phrase – ‘the realities of the situation’ – to reach its conclusion; it engaged neither with whether the purpose of a measure can be determined from an applicant’s material circumstance nor offered detailed appraisal of the relationship between a preventive and a punitive purpose.

Secondly, unlike the Engel criteria, the consequence of the Court finding that a measure meets a Welch factor is unclear. The Court has repeatedly remarked that the severity of the measure alone will not be sufficient for it to be found to be penal,²⁹ but it has made little positive comment on what combination or combinations of factors will lead to such a conclusion. Thus, the Welch factors do not provide a clear conception of what is and what is not a penalty, they are more like a scaffold with which such a concept could be built. Absent such building, there will remain uncertainty over when a measure will be held to be penal for the purposes of article 7. As with article 6, this is problematic for both contracting states and applicants, and it limits the utility of article 7 for the present purpose

²⁷ *M v Germany* (2010) 51 EHRR 41 [128]. For commentary on the case, see Kirstin Drenkhahn, Christine Morgenstern, and Dirk van Zyl Smit, ‘What is in a Name? Preventive Detention in Germany in the Shadow of European Human Rights Law’ [2012] (3) Criminal Law Review 167.

²⁸ App no 7345/12 (ECtHR, 28 February 2014) [126]. The phrase was also used in *Welch* (n 18) [34].

²⁹ For instance, *Welch* (n 18) [32]; *M v Germany* (n 27) [120]; *Gardel v France* App no 16428/05 (ECtHR, 17 March 2010) [45].

of finding a clear conception of punishment. That said, it is a positive that factors of relevance to punitiveness are set out more clearly.

Punishment and article 5

Article 5 of the Convention provides for both the right to liberty and security of the person, and exceptions to it. These exceptions include ‘the lawful detention of a person after conviction by a competent court’.³⁰ The ECtHR has repeatedly held that there are two constituent elements of a conviction: first, the finding of an offence, and secondly the imposition of a penalty as a result.³¹ If the Court holds that a measure is a penalty in the context of article 5, it has a different effect than under article 6 or 7. When a measure is found to be punitive in an article 5 case, this makes it more likely that an *exception* to the right to liberty will apply, but the protections of articles 6(2)-3 and 7 are triggered when the Court finds a measure is penal.

The decision-making process of the ECtHR can be elusive when it assesses whether a measure is penal for the purposes of article 5. In *Guzzardi v Italy*, the applicant, a suspected Mafioso, had been detained on an island, and had other conditions imposed on him.³² The detention was imposed in light of the applicant’s dangerousness, and the question arose as to whether this constituted a violation of his right to liberty.³³ The ECtHR found that the detention constituted a deprivation of liberty and then examined the exceptions in article 5. The Court held the deprivation did not follow a conviction:

³⁰ Art 5(1)(a). As with the other exceptions to art 5, the conviction must be ‘in accordance with a procedure prescribed by law’.

³¹ See, for instance, *Guzzardi v Italy* (1981) 3 EHRR 333 [100]. Compare to the wider drafting of the second requirement in *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 [35]: ‘...and the imposition of a penalty or other measure involving deprivation of liberty.’ (emphasis added)

³² *Guzzardi* (n 31) [12].

³³ *Guzzardi* (n 31) [12], [90]-[95].

On a true analysis, the order for Mr. Guzzardi's compulsory residence was not a punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to crime.³⁴

What appears to have been important here is the preventive, or perhaps solely preventive, purpose of the measure.

By comparison, in *Van Droogenbroeck v Belgium*, the Court found the detention of the applicant as a recidivist to be a penalty.³⁵ The decision may have turned on the fact that measure was considered punitive in Belgian law.³⁶ This, however, is unclear. The Court commented that the measure was considered to be punitive in Belgium in the paragraph before it declared the detention to be a penalty. But the comment was made as the Court assessed whether there had been a deprivation of liberty:

In this connection, it should be recalled that according to Belgian case law the placing of recidivists and habitual offenders at the Government's disposal is to be classified as a penalty involving deprivation of liberty...³⁷

Regardless of whether the decision turned on the domestic classification of the deprivation as penal, the *Van Droogenbroeck* judgment does not appear to take the same purposive approach as *Guzzardi*.

As with articles 6 and 7, the inconsistency and ambiguity in how the ECtHR conceives of punishment for the purposes of article 5 is problematic for contracting states and possible applicants: it leaves unclear when a measure will be considered to be imposed on conviction and how this will be established. Furthermore, the inconsistency again limits the value of ECtHR case law for the present purpose of establishing what it is that makes a measure punitive.

³⁴ *Guzzardi* (n 31) [100].

³⁵ *Van Droogenbroeck* (n 31) [35], [38], [53].

³⁶ *Van Droogenbroeck* (n 31) [34].

³⁷ *Van Droogenbroeck* (n 31) [34].

Inconsistent approaches to punishment

A declarative approach that can turn on purpose or possibly on domestic conceptions in respect of article 5; a presumption of punitiveness in article 6; and an under-developed factor-based approach in article 7. The approaches to punishment in articles 5, 6, and 7 are not only internally problematic, but are inconsistent with each other. In other words, there is no consistent Convention-wide approach to assess if a measure is penal. The lack of a universal approach is problematic given the ECtHR's self-proclaimed desire for consistency. As the Court stated in *Austin v United Kingdom*, 'the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.'³⁸

What is more, the Court has repeatedly maintained that its approach to the relevant articles is and ought to be consistent.³⁹ There are clear risks posed by such presumed consistency, whether a measure is taken to be penal could turn on which article was alleged to be violated or which the Court engaged with.⁴⁰ A measure could also, conceivably,⁴¹ be found to be punitive for the purposes of one article, but not another. Such an outcome did not materialise in *Guzzardi*, but may have done if the Court had engaged more substantively with the applicant's island detention under article 6. Though the Court cited *Engel*, it did not apply the Engel criteria, instead the judgment states 'In the Court's opinion, those proceedings did not involve the "determination ... of a criminal charge",

³⁸ *Austin v United Kingdom* (2012) 55 EHRR 14 [54].

³⁹ See, for instance, *Zolotukhin v Russia* (2012) 54 EHRR 16 [52]; *Varvera v Italy* App no 17475/09 (ECtHR, 24 March 2014) [66], [69]; *Guzzardi* (n 31) [100].

⁴⁰ For instance, in *Chraidi v Germany* (2008) 47 EHRR 2 the Court heard the case under article 5, and said no further issue arose under article 6(2) at para [51].

⁴¹ Compare, for example, the approach to domestic classification in *Engel* (n 6) and *Van Droogenbroeck* (n 31). The Court may well refrain from classifying a measure as penal for one article and not for another in a single case because this would show the lack of a universal meaning of the term 'penalty'.

even when these words are construed within the meaning of the Convention.⁴² Had the Court engaged more fully with the Engel criteria, problems would have arisen because it had declared the detention not to be a penalty under article 5. The Court, on a fuller examination, would have had to assess this non-penal detention against the third Engel criterion, ‘the degree of severity of the *penalty*’.⁴³

Absent a consistent approach, the decision as to whether a measure is punitive could also be affected by which contracting state is alleged to have violated the Convention. In *Raimondo v Italy*, the applicant alleged violations of articles 5 and 6 based on the imposition of ostensibly preventive measures – confiscation and special police supervision – under the same legislation as was at issue in *Guzzardi*.⁴⁴ The question of whether the measures were penal did not arise under article 5 in *Raimondo*: the Court did not find that there had been a deprivation of liberty and so did not need to consider the exceptions to article 5. When the Court turned to article 6, it did not fully apply the Engel criteria to the special supervision, but instead quoted *Guzzardi* to support the conclusion that the measure was not penal.⁴⁵ *Raimondo* does not reference *Engel*, and, as will be recalled, *Guzzardi* did not engage with *Engel* substantively; the decision that Raimondo did not face a criminal charge was light touch to say the least. It would have been more difficult for the ECtHR to apply such a light-touch approach if similar special supervision in a different contracting state, say the Netherlands, was alleged to have violated the Convention. The special supervision prohibited Raimondo from leaving his house without informing the police, imposed reporting requirements and set a curfew between 9pm and 7am without valid reasons to leave and informing the relevant authorities, and required the payment of a

⁴² *Guzzardi* (n 31) [108].

⁴³ *Engel* (n 6) [82] (emphasis added).

⁴⁴ *Raimondo v Italy* (1994) 18 EHRR 237.

⁴⁵ *ibid* [43].

significant security that he would obey the order.⁴⁶ These conditions are burdensome, and may well have satisfied a narrow reading of the third Engel criterion.⁴⁷

The term ‘penalty’ is certainly autonomous, but this subsection and those which preceded it have shown that the Strasbourg Court has struggled to give it autonomous *meaning*. In fact, the ECtHR does not even apply a consistent approach to establish if a measure is penal across the Convention.⁴⁸ This will likely not come as a surprise to the reader given the lack of consistency with the Court’s approach to punishment within each article. Our attention can now turn from punishment to how and when the Court has engaged with prevention.

Prevention as second fiddle

Preventive, or ostensibly preventive, measures are frequently considered by the ECtHR.⁴⁹ The notion of prevention is also embedded in the exceptions to the right to liberty; these include to prevent an offence or fleeing arrest, to prevent the spread of infectious diseases, and to prevent unauthorised entry into the country. The Court has also recognised the risk presented by preventive measures; in *Lawless v Ireland (No 3)* – a case that will be returned to below – it stated:

[T]he purpose of the Convention...is to protect the freedom and security of the individual against arbitrary detention or arrest. It must be pointed out in this connexion that, if the construction placed by the Court on the aforementioned provisions [article 5] were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention. Such

⁴⁶ *ibid* [13].

⁴⁷ De Londras and Dzehtsiarou have detailed the effect of non-legal factors on the decision-making of ECtHR: Fiona de Londras and Kanstantsin Dzehtsiarou, ‘Managing Judicial Innovation in the European Court of Human Rights’ (2015) 15(3) Human Rights Law Review 523. Their work is discussed further below.

⁴⁸ For this reason, James and Pearson’s claim that football banning orders now constitute penalties when assessed against *Welch* and *Engel* is open to question. Mark James and Geoff Pearson, ‘30 Years of Hurt: The Evolution of Civil Preventive Orders, Hybrid Law, and the Emergence of the Super-Football Banning Order’ [2018] (Jan) Public Law 44.

⁴⁹ Relevant case law is set out below.

an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention ...⁵⁰

Yet the Court has not made the applicability of the exceptions to article 5 contingent on the status of a measure as preventive. So, by way of example, for the prevention of diseases exception to bite, two requirements have to be met: first, the spread of the disease must be dangerous to public health or safety; and, secondly, the detention must be the measure of last resort to prevent the spread.⁵¹ The exception does not require the Court to establish an autonomous meaning for ‘preventive measure’ and assess whether a measure is ‘preventive’ or ‘non-preventive’ based on that meaning. By comparison, and as above, the classification of a measure as penal has direct implications for Convention rights: an exception to the right to liberty is more likely to apply, heightened fair trial safeguards are required, and the measure cannot be applied retrospectively. Despite the Court’s early grasp of the risks posed to individuals and Convention values by preventive measures, it has paid little attention to the exact meaning of the term ‘prevention’.

Prevention can be considered secondary to punishment under the Convention in another sense: the occasions on which the Court has queried whether measures are preventive are often when it has sought to establish if they are punitive. The next subsection examines this engagement, but for now we can note that such a limited approach cannot offer a full conception of preventive measures because it only considers those measures with at least some proximity to punishment.

Punishment and prevention, an unclear relationship

This subsection examines two categories of ECtHR decisions: those which take punishment and prevention to be alternatives, and those which present a more complicated

⁵⁰ (1979-80) 1 EHRR 15 [14]. The interpretive issue was quite technical; it is well explained at [13]-[14].

⁵¹ *Enhorn v Sweden* (2005) 41 EHRR 30 [44].

relationship. It does so to better understand the respective dominions, and contested territories, of punishment and prevention in the ECtHR. A string of case law on coercive measures that target Mafioso have set punishment and prevention as alternatives. In *Guzzardi*, the Court maintained that the applicant's island confinement was a 'preventive measure' and thus 'not a punishment'.⁵² In the later case of *Raimondo*, the Court again drew a sharp divide between punishment and prevention, but in the context of article 6:

special supervision is not comparable to a criminal sanction because it is designed to prevent the commission of offences. It follows that proceedings concerning it did not involve "the determination ... of a criminal charge".⁵³

Finally, in *M v Italy* the Commission assessed whether a confiscation order constituted a penalty under articles 6 and 7 and held that:

Preventive measures must, in principle, be regarded as distinct not only from criminal penalties but also from disciplinary penalties, administrative penalties and other forms of penalty, since they are not designed to punish a specific offence.⁵⁴

Instead the Commission implied that preventive measures are defined by their prospective orientation when it found the confiscation order at issue to be preventive and not punitive:

the impugned confiscation measure concerns property considered to be of unlawful origin. It aims to strike a blow against mafia-type organisations and the very considerable resources they have at their disposal to finance unlawful activities.⁵⁵

It is not only the Italian Peninsula that produces ECtHR case law that envisages punishment and prevention as alternatives.⁵⁶ In *Maaouia v France*, the applicant claimed a violation of article 6 based on the length of time it took to commence proceedings for

⁵² *Guzzardi* (n 31) [100].

⁵³ *Raimondo* (n 44) [43].

⁵⁴ App no 12386/86 (Commission, 15 April 1991) 97.

⁵⁵ *ibid* 98.

⁵⁶ See also, *Gardel* (n 29) [43] 'The obligation arising out of a placement on the register therefore has a preventive and deterrent purpose and cannot be considered to be punitive in nature or as constituting a sanction'.

recession of his exclusion order.⁵⁷ The parties contested whether or not there had been a criminal charge. In this context, the Court assessed whether the measure was a penalty and concluded:

[T]he Court notes that, in general, exclusion orders are not characterised as criminal within the Member States of the Council of Europe. Such orders, which in most States may also be made by the administrative authorities, constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6(1). The fact that they are imposed in the context of criminal proceedings cannot alter their essentially preventive nature.⁵⁸

In a concurring opinion, Judge Costa, joined by Judges Hedigan and Pantîru, was critical of this rationale. He instead classified exclusion orders that could be imposed by the criminal courts as an ‘ancillary penalty’ and queried the binary divide between prevention and punishment in the judgment:

Admittedly, they are both preventive and punitive in character, but do not criminal penalties always have that dual purpose: to punish the offender and to deter him from reoffending?⁵⁹

The Court itself has rejected the prevention-punishment binary elsewhere. In *Welch*, the ECtHR likewise maintained that prevention of future offending was a central aim of punishment:

The preventive purpose of confiscating property that might be available for use in future drug trafficking operations as well as the purpose of ensuring that crime does not pay are evident from the ministerial statements that were made to Parliament at the time of the introduction of the legislation. However, it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed, the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.⁶⁰

⁵⁷ *Maaouia v France* (2001) 33 EHRR 42.

⁵⁸ *ibid* [39].

⁵⁹ *ibid* [O-II3]-[O-II4].

⁶⁰ *Welch* (n 18) [30].

What is more, *Welch* is by no means an anomaly, *M v Germany* again portrayed punishment and prevention as overlapping concepts:

Even though it could be said that penalties mainly serve punitive purposes whereas measures of correction and prevention are mainly aimed at prevention, it is nonetheless clear that the aims of these sanctions partly overlap... In any event, as the Court has previously found, the aim of prevention can also be consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment.⁶¹

There are thus two conceptions of the relationship between prevention and punishment in the ECtHR's case law. At times, the Court presents preventive and punitive measures as alternatives, but at other times it recognises that the aim of prevention is central to punishment. This divide in approach spans different Convention articles. In the light of this divergent case law, two points can be made. First, and more positively, the case law indicates a likely definitional element of 'preventive measure': that the orientation of the measure is, possibly exclusively, toward the reduction of future harm. This does not constitute a complete conceptualisation of a preventive measure. Nonetheless, it is an important point that will receive further attention in chapter 4. Secondly, and less positively, the Court's divergent approaches to the relationship between punishment and prevention add further uncertainty to what it understands punishment to be. Not only is the Court's approach to the test of punitiveness inconsistent, but it also does not appear to have a clear view on the purpose of punishment. ECtHR case law, which draws a strict divide between preventive and punitive measures, suggests it sees punishment as only backward-looking, whilst other case law, such as *Welch*, explicitly acknowledges that punishment has a forward-looking preventive purpose. Chapter 5 will explore further the issue of uncertainty over the purpose(s) of punishment.

⁶¹ *M v Germany* (n 27) [130].

This analysis of the divergent approaches to the relationship between punishment and prevention in the case law of the ECtHR emphasises the need for clearer concepts of prevention and punishment. Otherwise, it will remain an arduous task to determine when applicants will receive the safeguards reserved for those who face the possibility of punishment. Equally, the analysis shows that ECtHR case law cannot provide sufficiently clear concepts of prevention and punishment against which behaviour orders could be examined in later chapters.

Conceptual issues in a relational context

Until this point, I have critiqued the capacity of ECtHR case law to articulate concepts of punishment and prevention. In this subsection, our attention will shift to consider a factor that may have limited the capacity of the Court to do so: the need to maintain working relationships with contracting states. The aim is not to justify the conceptual incoherence in the ECtHR's approach to punishment and prevention, but instead to offer insights into why this incoherence may exist.

In *Lawless*, noted above, the applicant – an Irish citizen and member of the Irish Republican Army – was detained without trial under the Offences Against the State Act 1939, he alleged violations of articles 5, 6, and 7.⁶² As above, the Court in *Lawless* envisaged the purpose of the Convention as to protect citizens from arbitrary exercises of power by contracting states.⁶³ This interpretation informed the ECtHR's rejection of the government's claim that the detention could be justified under the lawful arrest exception in article 5(1)(c) and thus led it to find a violation of article 5.⁶⁴

⁶² *Lawless* (n 50). The Irish Republican Army is a para-military organization, not the military of the Republic of Ireland.

⁶³ *Lawless* (n 50) [14].

⁶⁴ The technicalities of the argument are not central to this enquiry, see *Lawless* (n 50) [10]-[15].

Despite the ECtHR's construction of the purpose of the Convention, to protect citizens from arbitrary state power, it did not find a violation of article 7. Faced with deciding whether Lawless' imprisonment constituted a penalty, the Court went no further than to state:

The proceedings show that the Irish Government detained G. R. Lawless under the Offences against the State (Amendment) Act 1940 for the sole purpose of restraining him from engaging in activities prejudicial to the preservation of public peace and order or the security of the State. His detention, being a preventive measure, cannot be deemed to be due to his having been held guilty of a criminal offence within the meaning of Article 7 of the Convention. It follows that Article 7 has no bearing on the case of G. R. Lawless. Therefore, the Irish Government, in detaining G. R. Lawless under the 1940 Act, did not violate their obligation under Article 7 of the Convention.⁶⁵

The Court reached this conclusion even though Lawless had appealed for it to consider the substance and not the form of the detention imposed on him.⁶⁶ The ECtHR's failure to engage with the substance of the detention does not align with its later approach to establishing what constitutes a penalty for the purposes of article 7.

The ECtHR's decision, that the detention was not a penalty, and its non-engagement with the substance of the measure can perhaps be explained if it is contextualised, but it is first important to set out the outcome in *Lawless*. Though the Court held that there had been a violation of article 5, it found that Ireland had derogated from article 5 as per the requirements in article 15 and thus that the Irish government had not breached its obligations under the Convention.⁶⁷

Had the Court engaged with the substance of Lawless' detention, it may well have come to the conclusion that there had been a violation of article 7. But such a conclusion would have presented the ECtHR with a problem because contracting states cannot rely on

⁶⁵ *Lawless* (n 50) [19].

⁶⁶ *Lawless* (n 50) [16].

⁶⁷ *Lawless* (n 50) [30].

article 15 to derogate from article 7 in times of emergency, it would thus have been bound to find that Ireland had violated article 7.⁶⁸ There would have been implications for the relationship of the Court to the Republic of Ireland and other contracting states if it had found a violation. As O'Higgins acknowledged at the time, this was the Court's first decision and contracting states were concerned with the degree of influence it was going to have over domestic legal systems.⁶⁹ It is thus plausible that the Court's non-engagement with whether or not the measure was a penalty was caused by its desire to establish its legitimacy in the face of concern amongst contracting states.⁷⁰ For the ECtHR to have found a violation would have amounted not only to a finding against a contracting state, but a finding against a contracting state as it sought to deal with what the Court accepted was an emergency.⁷¹ Such a finding would have been brave, to say the least, for a court that was seeking to establish a working relationship with contracting states. *Lawless* thus indicates that relational factors may affect how the Court engages, or even if it will engage at all, with the concepts of punishment and prevention.

This analysis of the ECtHR's approach to punishment and prevention aligns closely to de Londras and Dzehtsiarou's broader argument that the Court takes non-legal factors into account when it passes judgment so as to keep contracting states 'on board'.⁷² They maintain that the ECtHR, in part, assuages the tensions caused by its 'evolutive' approach

⁶⁸ Article 6 was also at issue in *Lawless* (n 50) [12]. On the extent of and workings of the emergency clause in the context of article 6, see Stephanos Stavros, 'The Right to a Fair Trial in Emergency Situations' (1992) 41 *International & Comparative Law Quarterly* 343.

⁶⁹ P O'Higgins, 'The *Lawless* Case' (1962) 20(2) *Cambridge Law Journal* 234.

⁷⁰ On the willingness of the Court to appease contracting states, see Helen Fenwick, 'An Appeasement Approach in the European Court of Human Rights?' (*UK Constitutional Law Blog*, 5 April 2012) <<https://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/>> accessed 16 June 2019.

⁷¹ Though for critical comment on whether there was an emergency, see O'Higgins (n 69) 250.

⁷² De Londras and Dzehtsiarou (n 47) 526.

to the Convention by taking account of non-legal factors in more contentious cases.⁷³ The Court, in *de Londras and Dzehtsiarou*, does so because of the important roles contracting states play in law reform, funding the Court, and enforcing the Court's judgments.⁷⁴

Perhaps some of the tension between contracting states and the ECtHR could be relieved by clearer definitions of key Convention concepts or at least clear approaches to them.⁷⁵ Regardless, the Court has neither a clear conception of prevention and punishment, nor a settled approach to either term. The ECtHR's approach to both terms is instead affected by which article is at issue, and possibly also which contracting state has brought the case and whether there are important relational factors in play. The Court's case law does not provide adequate concepts of punishment and prevention against which later chapters could assess behaviour orders. Greer has claimed that the principle of autonomous meaning can be used by the Court to define terms that do not have common-meaning across contracting states.⁷⁶ This appraisal of the ECtHR's case law has shown that autonomous meaning can be a vehicle for inconsistency as much as for consistency.

Section II. Domestic case law

The chapter now examines the approach domestic courts have taken to these concepts in cases that concern behaviour orders. As in section I, my central aim in this section is to appraise whether clear concepts of prevention and punishment can be derived from the case law with which to appraise behaviour orders in later chapters. Domestic courts, I will argue,

⁷³ *De Londras and Dzehtsiarou* (n 47) 524.

⁷⁴ *De Londras and Dzehtsiarou* (n 47) 527.

⁷⁵ For recent discussion of the strained relationship between the Strasbourg Court and some contracting states from the perspective of a sitting Judge of the ECtHR, see Paulo Pinto de Albuquerque, 'Plaidoyer for the European Court of Human Rights' [2018] (2) *European Human Rights Law Review* 119.

⁷⁶ Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 213.

have failed to develop such concepts in part because they have relied on the case law of the ECtHR. The first subsection will outline the leading judgment of the House of Lords in *McCann* before the second argues that, problematically, case law of the ECtHR could have been relied on by the Law Lords to reach an alternative judgment. The final subsection then examines more recent case law on behaviour orders to assess what advances, if any, have been made since *McCann*.

The decision in McCann

The principal issues for the House of Lords in *McCann* were should ASBOs be classed as criminal for the purpose of domestic law or as a criminal charge under article 6 of the Convention?⁷⁷ Two related questions underlay these issues: whether hearsay evidence was admissible in proceedings for an ASBO and what was the appropriate evidential standard in such proceedings.⁷⁸ The Court held unanimously that the imposition of an ASBO did not constitute a criminal charge under either domestic law or article 6.⁷⁹ In consequence, reliance on hearsay evidence was allowed. The Court also observed that due to the ‘seriousness of matters involved’ the standard of proof for the imposition of an ASBO was, in effect, the criminal standard of beyond reasonable doubt.⁸⁰

Of particular interest is how the three Law Lords who gave speeches engaged with the third Engel criterion, but I will also comment on other parts of their speeches in which the Law Lords discussed prevention and punishment. Again, the third criterion refers to the ‘degree of severity of the penalty’ imposed and, when satisfied, the imposition of the measure at issue is taken to constitute a criminal charge for the purposes of the Convention.

⁷⁷ *McCann* (n 3) [4] (Lord Steyn).

⁷⁸ *McCann* (n 3) [4] (Lord Steyn). Though, strictly, the evidential standard issue was obiter. See *Jones v Birmingham City Council* [2018] EWCA Civ 1189, [2019] QB 521 [45] (Sir Brian Leveson P).

⁷⁹ *McCann* (n 3) [40] (Lord Steyn), [84] (Lord Hope), [115] (Lord Hutton).

⁸⁰ *McCann* (n 3) [37] (Lord Steyn), [81]-[83] (Lord Hope), [114] (Lord Hutton).

Lord Steyn maintained that the ASBO is not a penalty and drew three brief comparisons to support this view: injunctions (non-penal), binding-over (penal), and compulsory supervision (non-penal).⁸¹ Lord Steyn did not engage with whether a measure could be both preventive and punitive for the purposes of the third Engel criterion. However, when his Lordship considered the ASBO under domestic law he appeared to represent punishment and prevention as alternatives:

The true purpose of the proceedings is preventative. This appears from the heading of Part I. It is also clearly brought out by the requirement of section 1(1)(b) : “that such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him ...” It follows that the making of an anti-social behaviour order is not a conviction or condemnation that the person is guilty of an offence. It results in no penalty whatever. It cannot be entered on a defendant’s record as a conviction. It is also not a recordable offence for the purpose of taking fingerprints: see section 27 of the Police and Criminal Evidence Act 1984.⁸²

Lord Hope paid close attention to the case law of the ECtHR when he engaged with the first two Engel criteria, but he neither engaged with nor cited any before he concluded that the ASBO did not satisfy the third criterion.⁸³ His Lordship set out that the important first question was whether the ASBO was a penalty at all, before assessing if it was a severe enough penalty to satisfy the third Engel criterion.⁸⁴ The value of this initial question will be apparent in light of the issues of both the narrow and broad interpretations of the third criterion detailed above. In answer to the question Lord Hope commented, ‘An anti-social behaviour order may well restrict the freedom of the defendant to do what he wants and go where he pleases. But these restrictions are imposed for preventive reasons, not as

⁸¹ *McCann* (n 3) [4] (Lord Steyn) [31]-[34]. For fuller discussion of the similarities and differences of injunctions and behaviour orders, see chapter 2.

⁸² *McCann* (n 3) [22] (Lord Steyn).

⁸³ *McCann* (n 3) compare [68]-[74] to [75]-[76] (Lord Hope).

⁸⁴ *McCann* (n 3) [75] (Lord Hope).

punishment.’⁸⁵ His Lordship relied on two arguments to support this conclusion. As with Lord Steyn, Lord Hope referenced the second requirement for the imposition of an ASBO – the necessity requirement.⁸⁶ This reliance on the second requirement is appraised in the following subsection.

Lord Hope then provided that an ASBO may restrict liberty, but it is not a penalty because it can neither deprive the recipient of liberty nor is it a fine.⁸⁷ This further argument is questionable as a matter of logic; it does not follow from the combination of 1. imprisonment and fines are punishment and 2. behaviour orders are neither fines nor imprisonment, that behaviour orders are not punishment. Foxes and hedgehogs are animals, an elephant is neither a fox nor a hedgehog, but it is still an animal. Less abstractly, his Lordship did not consider alternative forms of punishment that would have made for closer comparison to behaviour orders such as community orders and suspended sentences. Both of which impose on the recipient conditions backed by the threat of sanctions on breach. The similarities and differences between behaviour orders, and community orders and suspended sentences will be explored further in later chapters.

It should be added that Lord Hope passed comment on the relationship between prevention and punishment when he discussed the second Engel criterion – the nature of the offence. In this context, his Lordship argued that the proceedings are ‘preventive in character rather than punitive or disciplinary’ based on the aforementioned decisions of the ECtHR in *Guzzardi v Italy*, *Raimondo v Italy*, and *M v Italy*.⁸⁸ However, this triumvirate did not give detailed consideration to article 6 and the Engel criteria. Lord Hope’s reliance

⁸⁵ *McCann* (n 3) [76] (Lord Hope).

⁸⁶ *McCann* (n 3) [76] (Lord Hope).

⁸⁷ *McCann* (n 3) [76] (Lord Hope).

⁸⁸ *McCann* (n 3) [72] (Lord Hope).

on these cases and his setting up of prevention and punishment as alternatives will be returned to in the next subsection.

Lord Hutton engaged with case law of the ECtHR when he assessed whether or not ASBOs satisfied the third Engel criterion. First, he argued that the ASBO differs from the power to bind-over that was held to be a criminal charge in *Steel v United Kingdom*.⁸⁹ His Lordship maintained there was not the same immediate link between the risk of imprisonment when one is issued an ASBO as when one is bound over.⁹⁰ This analysis, however, avoided assessment of whether the conditions imposed in the ASBO either alone or in combination with the risk of imprisonment on breach could make the order penal. Secondly, Lord Hutton also relied on *Guzzardi* and *Raimondo* to evidence the claim that:

The jurisprudence of the European Court recognises that proceedings taken to obtain an order designed to prevent future harmful conduct, but not to impose a penalty for past offences, does not constitute the bringing of a criminal charge.⁹¹

In light of the discussion of the ECtHR case law above, this claim is questionable. The next subsection will argue that an alternative reading of the ECtHR case law was open to Lord Hutton and the other Law Lords.

A viable alternative to McCann

A substantial body of academic commentary is critical of *McCann*.⁹² The thrust of this commentary is that the judgment runs contrary to the autonomous meaning of ECHR terms because it focuses more on the state's labelling of the ASBO as preventive than the penal

⁸⁹ (1998) 28 EHRR 603.

⁹⁰ *McCann* (n 3) [104]-[106] (Lord Hutton).

⁹¹ *McCann* (n 3) [109] (Lord Hutton).

⁹² Ashworth (n 5); Chara Bakalis, 'Asbos, "Preventative Orders" and the European Court of Human Rights' [2007] (4) EHRLR 427; Stuart Macdonald, 'The Nature of the Anti-Social Behaviour Order - R (McCann & (and) Others) v Crown Court at Manchester' (2003) 66 Modern Law Review 630; Chara Bakalis, 'Anti-social Behaviour Orders - Criminal Penalties or Civil Injunctions?' (2003) 62(3) Cambridge Law Journal 583. For a somewhat different take, see Ian Dennis, 'Security, Risk and Preventive Orders' in GR Sullivan and Ian Dennis, *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Bloomsbury 2012) 181-182.

realities of the measure. Pearson, by way of example, argues the ASBO amounts to a ‘wolf in sheep’s clothing’.⁹³ In contrast, I do not seek to establish that *McCann* was incorrectly decided. As part of his judgment in the Court of Appeal, Lord Philips MR stated:

Mr Fulford and Miss Simor referred us to a substantial volume of Strasbourg jurisprudence in relation to this issue. As is the practice in this jurisprudence, principles once established tend to be re-enunciated verbatim in subsequent decisions. I propose to be *eclectic* in my reference to these authorities.⁹⁴

The House of Lords was also reticent to engage with the significant body of relevant ECtHR case law.⁹⁵ The Court of Appeal and House of Lords could have focused on different ECtHR judgments as part of their ‘eclectic’ engagement and in consequence held that the ASBO constituted a penalty.

Not all the case law of the ECtHR presents punishment and prevention as alternatives. *Welch* expressly recognised that the prevention of offending is a purpose of punishment, but the case was neither discussed nor cited in *McCann*. The ECtHR’s recognition of the preventive aim of punishment supported its decision, in *Welch*, that the confiscation was penal, despite the United Kingdom arguing the proceedings were preventive. The House of Lords could have similarly taken a preventive purpose as evidence that a measure was penal. With such a starting point, a factor against finding the ASBO to be punitive, that it was preventive, would instead have been a factor in favour of such a finding.⁹⁶ Since *McCann*, the ECtHR has repeatedly held that detention in Germany

⁹³ Geoff Pearson, ‘Hybrid Law and Human Rights – Banning and Behavior Orders in the Appeal Courts’ (2006) 27 *Liverpool Law Review* 125, 125.

⁹⁴ *R (McCann) v Manchester Crown Court* [2001] EWCA Civ 281, [2001] 1 WLR 1084 [50] (Lord Philips MR) (emphasis added).

⁹⁵ See, for instance, *McCann* (n 3) [31] (Lord Steyn).

⁹⁶ Ashworth has critiqued the House of Lords in a similar fashion, he argues that the approach of the Law Lords, ‘places the emphasis on the purpose of the order, and appears to give far less weight to the impact and consequences of the order than did the Strasbourg Court in *Welch*.’ Ashworth (n 5) 280.

described by the state as solely preventive constituted a penalty.⁹⁷ This newer strand of case law reaffirms that prevention and punishment are not always seen as alternatives by the ECtHR. They thus speak to the argument that the House of Lords could have held ASBOs to constitute a penalty for the purpose of article 6, had they viewed a prevention aim as a possible facet of punishment, and not an alternative to it.

Had the House of Lords relied on *Welch* instead of the *Guzzardi* line of case law, it would have avoided a dissonance between its approach to evidential standards and article 6. The Law Lords observed that the evidential standard to satisfy the first requirement to impose an ASBO – previous anti-social behaviour – ought to be beyond reasonable doubt.⁹⁸ Yet, surely the evidential focus ought to have been placed on the second requirement – the necessity of the order for public protection – if the ASBO was envisaged as preventive and not punitive. Instead, the second requirement was left as a matter to be determined by the judge with neither an evidential burden nor heightened standard of proof placed on the applicant.⁹⁹ The evidential primacy of past acts over future risk is hard to square with the Lords' conception of the measure as preventive and not penal. The approach to evidential standards in *McCann* could perhaps have been better rationalised if the Court had relied on *Welch* and recognised the measure was penal.

Yet *McCann* did not rely on *Welch*. *McCann* does not advance on the conceptions of punishment and prevention in the ECtHR: it relied on one of the Strasbourg Court's approaches to punitiveness and applied it in a somewhat confusing manner. The judgment of the House of Lords both reaffirms the aforementioned inconsistency of the ECtHR case law and shows how it can be of practical significance for the classification of particular

⁹⁷ See, for example, *M v Germany* (n 27); *Glien* (n 28); *Jendrowiak v Germany* (2015) 61 EHRR 32. This is not to say that every coercive preventive measure considered by the ECtHR has been held to be a penalty. Compare the above trio of cases to *Bergmann v Germany* (2016) 63 EHRR 21.

⁹⁸ *McCann* (n 3) [37] (Lord Steyn), [81]-[83] (Lord Hope), [114] (Lord Hutton).

⁹⁹ *McCann* (n 3) [37] (Lord Steyn).

legal measures. *McCann* does not offer the conceptual clarity on punishment and prevention that this chapter pursues. Our attention can now shift to more recent domestic judgments on behaviour orders to assess if they have added conceptual depth to the approach taken by the House of Lords over fifteen years ago.

More recent developments

The House of Lords has not given substantial consideration to behaviour orders since *McCann*. In *Secretary of State for the Home Department v MB*, the Court had to assess whether the proceedings for a control order constituted a criminal charge.¹⁰⁰ Lord Bingham maintained that both domestic courts and the ECtHR distinguish between punitive and preventive measures,¹⁰¹ but that the issue can be complex both because prevention is ‘one of the recognised aims and purposes of punishment’, and because preventive measures can be so severe so as to have a punitive effect.¹⁰² Despite the latter claim and Lord Bingham’s acceptance that the conditions of a control order could be very severe, his Lordship did not consider the order to be a penalty.¹⁰³ The judgment does not offer much advance on *McCann*: though it recognises that prevention and punishment are not necessarily alternatives, it offers little detail about their relationship or how to establish that a measure is either one or the other.

Beyond the House of Lords, there has been a string of cases that assess whether different behaviour orders, and similar measures, impose serious enough consequences as

¹⁰⁰ [2007] UKHL 46, [2008] 1 AC 440. Control orders have since been replaced by terrorism prevention and investigation measures in the Terrorism Prevention and Investigation Measures Act 2011. For comment, see Helen Fenwick, ‘Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of “Defensive Democracy”?’ [2017] (Oct) Public Law 609; Alexander Horne and Clive Walker, ‘Lessons Learned from Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament’ [2014] (Apr) Public Law 267.

¹⁰¹ *MB* (n 100) [23] (Lord Bingham). This claim was also made by Lord Hoffmann [49]; neither Law Lord referred to *Welch* (n 18).

¹⁰² *MB* (n 100) [23] (Lord Bingham).

¹⁰³ *MB* (n 100) [26] (Lord Bingham).

to require a heightened standard of proof before they can be imposed. For instance, closure orders were held to not necessitate the heightened standard in *Chief Constable of Merseyside v Harrison*.¹⁰⁴ In the other direction, the evidential standard for the imposition of a risk of sexual harm order was held to be heightened in *Commissioner of Police of the Metropolis v Ebanks*.¹⁰⁵ The distinction between closure orders and risk of sexual harm orders appears to lie, at least in part, in the former attaching to a property, not a person, and having a lesser penalty on breach.¹⁰⁶ The case law, however, does not always require a heightened evidential standard when the measure to be imposed has serious consequences. In *Chief Constable of Lancashire v Wilson*, the High Court accepted that the imposition of a gang injunction could have serious consequences for the recipient, but held that the evidential standard of balance of probabilities set by Parliament was not a violation of article 6.¹⁰⁷ The Court of Appeal followed this approach in *Birmingham City Council v Jones*.¹⁰⁸ The Court there argued that art 6(1) does not give rise to a general requirement of a heightened evidential standard whenever the order applied for would restrict the recipient's liberty.¹⁰⁹ Regardless of whether the seriousness of the measure necessitates an evidential standard of beyond reasonable doubt, this case law cannot offer significant advancement on the approach to punishment and prevention in *McCann*. In *McCann*, it will be recalled, the Court only applied the heightened evidential standard after it had held the measures to be preventive and not punitive.

¹⁰⁴ [2006] EWHC 1106 (Admin), [2007] QB 79. The closure orders at issue have since been replaced, see the Anti-social Behaviour, Crime and Policing Act 2014, ss 76-93.

¹⁰⁵ [2012] EWHC 2368 (Admin), (2012) 176 JP 751. The risk of sexual harm order has since been replaced by the sexual risk order, see the Anti-social behaviour, Crime and Policing Act 2014, s 113.

¹⁰⁶ Compare *Harrison* (n 104) [11] to *Ebanks* (n 105) [20].

¹⁰⁷ [2015] EWHC 2763 (QB) [70]-[84].

¹⁰⁸ [2018] EWCA Civ 1189, [2019] QB 521.

¹⁰⁹ *ibid* [51].

A significant and underexplored area in current case law is the evidence needed, if any, to meet the forward-looking requirement to impose behaviour orders. For instance, two conditions need to be met before a criminal behaviour order can be imposed:

The first condition is that the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person.

The second condition is that the court considers that making the order will help in preventing the offender from engaging in such behaviour.¹¹⁰

Implicit in the latter condition is first that the offender presents a risk of further anti-social behaviour and second this risk will be reduced by the measure. Predicting reoffending and the efficacy of judicial intervention are difficult tasks, but these tasks can surely be subject to both evidence and argument.¹¹¹ In *Browne-Morgan*, the Court of Appeal held that assessment of whether the second criterion has been satisfied is a question for the court to answer ‘acting judicially’.¹¹² The Court went on to reference factors including the pre-sentence report and with whom the applicant’s associates associated.¹¹³ In *DPP v Bulmer*, the High Court set a high threshold for the appeal of such decisions.¹¹⁴

Elsewhere, curious evidence of the necessity of behaviour orders has been employed. In *Birmingham City Council v James*, the Court of Appeal upheld a decision in which previous breaches of court orders were taken to evidence the need to impose a gang injunction.¹¹⁵ The court could also have conceivably held that a gang injunction was

¹¹⁰ Anti-social Behaviour, Crime and Policing Act 2014, s 22.

¹¹¹ See further, chapter 6.

¹¹² [2016] EWCA Crim 1903, [2017] 4 WLR 118 [15]. See similarly, *DPP v Bulmer* [2015] EWHC 2323 (Admin), [2015] 1 WLR 5159 [30]-[36] which states, ‘It is of significance that the inquiry under section 22(3) is a factual one [engaged in requisite behaviour] whereas that under section 22(4) [the order will help prevent] is one of judgment and evaluation.’ Both cases follow the approach in *McCann* (n 3) that was commented on above.

¹¹³ *Browne-Morgan* (n 112) [16]-[19].

¹¹⁴ *Bulmer* (n 112) [36] Beatson LJ also stressed the need for an order to be proportionate in the same paragraph.

¹¹⁵ [2013] EWCA Civ 552, [2014] 1 WLR 23 [9], [18].

necessary because the recipient does not breach court orders. I will develop this point in chapter 4. Though domestic courts have been adamant that behaviour orders are preventive measures, they have not engaged seriously with the question of how to establish whether a person presents a risk, and when and how this could be addressed by the imposition of a behaviour order.¹¹⁶ The case law on behaviour orders has added little conceptual depth to domestic conceptions of prevention and punishment since *McCann*. Instead, an odd state of affairs has developed in which the forward-looking imposition requirements of behaviour orders appears primary for their classification as preventive as opposed to punitive, but secondary for evidential purposes.

Section III. Conclusion

In *Welch*, the ECtHR claimed that the term penalty is ‘commonly understood’.¹¹⁷ Despite this claim, the Court has not developed a clear and consistent means by which to determine if a measure is punitive and/or preventive. The problem extends beyond Strasbourg, when the House of Lords considered whether the ASBO was punitive in *McCann*, it relied on only one of numerous strands of ECtHR case law on punishment and prevention with little explanation as to why. Domestic case law on the status of behaviour orders has not developed significantly since *McCann*. In consequence, existing case law cannot provide sufficient concepts of punishment and prevention against which this thesis can assess the various types of behaviour order. Yet there are positives to be taken from this analysis of the case law. First, we have seen a factor-based approach to punishment in respect of article 7 that can offer some clarity. Secondly, a likely definitional element of a ‘preventive

¹¹⁶ The most detailed case law on when a behaviour order should be imposed is that on the sexual harm prevention order. This case law is analysed in chapter 7.

¹¹⁷ *Welch* (n 18) [33].

measure’ – the purpose of reducing future harm – can be discerned from the case law of the ECtHR.

The two chapters that follow will, in turn, critically examine the terms ‘prevention’ and ‘punishment’. They do so to show why it is so difficult to define each term and also to develop means by which to establish whether behaviour orders are preventive and/or punitive. Such conceptual work is integral to this thesis, but this chapter emphasises that it could also have a wider value. It would be unsatisfying to point out the inconsistencies in the case law of the ECtHR and domestic courts, and go no further.¹¹⁸ Courts need a clear and consistent means by which to establish whether a measure is preventive and/or punitive for the purpose of articles 5, 6 and 7. The purpose of this thesis is not to resuscitate the principle of autonomous meaning, but the approaches to punishment and prevention developed here may be able to better structure the decision-making of courts. We can now leave the conceptual mire of case law and journey to the preventive state.¹¹⁹

¹¹⁸ This view formed the basis of Hayono’s criticism of Goss’ review of the ECtHR’s case law on article 6 (n 1): Laura Hoyano, ‘Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights’ [2015] (3) *Criminal Law Review* 243.

¹¹⁹ Carol Steiker, ‘The Limits of the Preventive State’ (1998) 88(3) *Journal of Criminal Law and Criminology* 771.

Chapter 4: Assessing Prevention

Asset freezing.¹ Internment.² Taxation.³ All have been described as preventive measures. What unites the measures in this category? Is there value in thinking of preventive measures as a category? These questions are posed due to the inconsistencies in how the case law, discussed in the previous chapter, has conceived of prevention. It has cast prevention as both an alternative to punishment and as evidentiary of it.⁴ Chapter 4 draws the assessment of what it is to be preventive out of the shadow of assessing punitiveness. The analysis of prevention in this chapter and of punishment in the next provide the frameworks against which different behaviour orders are evaluated in later chapters. Such separation does not necessitate that the factors taken to speak to a measure being preventive will be exclusive of those that speak to punitiveness. If prevention and punishment are neither synonyms nor antonyms, we cannot examine only one and hope to understand the other.

There is a growing literature justifying and critiquing preventive measures, but significant attention has not yet been paid to the definitional question of what it is to be a preventive measure.⁵ The breadth of measures described as preventive is remarkable. These measures span traditional legal categories and apply to a myriad of factual contexts. Section I looks for common features among these measures so as to better understand what it is that makes them ‘preventive’. The section reaches a necessarily broad conception of a preventive measure: a measure imposed before a possible harm with the purpose of avoiding the harm (traffic lights), reducing the likelihood of it occurring (brakes) or

¹ Hadassa Noorda, ‘Preventive Deprivations of Liberty: Asset Freezes and Travel Bans’ (2015) 9(3) Criminal Law and Philosophy 521.

² David Cole, ‘The Difference Prevention Makes: Regulating Preventive Justice’ (2015) 9(3) Criminal Law and Philosophy 501, 504-505.

³ Andrew Cornford, ‘Preventive Criminalization’ (2015) 18 New Criminal Law Review 1, 21.

⁴ Compare *Guzzardi v Italy* (1981) 3 EHRR 333 [12] to *Welch v United Kingdom* (1995) EHRR 247 [30].

⁵ As will be seen in the next chapter, this resembles the division of labour on justifying and defining punishment. Although there is substantially more work on defining punishment than on defining prevention.

reducing its severity if it does occur (a helmet). Section I then enquires into the value of the preventive measure category. In other words, what do we gain by describing a measure as preventive?⁶ I argue there is value for three reasons. As an example, an overarching assessment allows us to appreciate the cumulative effect of different preventive measures. The section ends by setting out a number of dangers of thinking about preventive measures at too high a level of conceptual generalisation. Not least amongst these dangers is that such thinking can hide important points of legal difference between similar measures. The not so clear divide between inchoate and pre-inchoate offences will be relied on to substantiate this claim. In essence, pre-inchoate offences are those which impose liability before inchoate offences, such as an attempt, apply.⁷ The overarching conclusion of the section is that it is insufficient to know whether a measure is preventive or not if we want to understand the legal issues to which it gives rise.

With this point in mind, section II establishes and defends a more precise subcategory of preventive measure: namely, coercive risk measures. I propose three requirements for a measure to fit within the subcategory: it must fit within the wider preventive measure category; an assessment of the risk posed by the individual must be undertaken and satisfied before it can be imposed; and it must be coercive. The advantages of grouping measures with these shared characteristics are then outlined. In particular, I examine case law on extended determinate sentences and anti-social behaviour injunctions to demonstrate the ease with which narratives of risk can be constructed in courts, before assessing the presumption of harmlessness as a potential safeguard. The section has the important effect of narrowing the overarching research question of the thesis from ‘are behaviour orders

⁶ This is a somewhat different inquiry than why a government would choose to label a measure preventive rather than punitive.

⁷ On attempt, Criminal Attempts Act 1981, s 1. For an analysis of pre-inchoate offences, see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) ch 5.

preventive and or punitive measures?’ to ‘are behaviour orders coercive risk measures and/or punitive?’ Section III then concludes the chapter by reflecting briefly on the value of the doctrinal approach employed here to more normative accounts of the preventive state.

Section I. Understanding prevention

The term ‘preventive’

How can we start to understand what is meant by the term ‘preventive measure’? There is less conceptual analysis⁸ in legal and penal theory of the term ‘preventive’ than there is of the meaning of punishment.⁹ Accordingly, I will set out examples of preventive measures given by academic commentators and then assess possible definitional elements that can be discerned from them. I thus aim to build a conception of what is to be a preventive measure as opposed to choosing one that exists already.¹⁰

An appropriate foundation for such concept building is provided by Steiker who, in 1998, coined the term ‘preventive state’.¹¹ Steiker used the term to capture the state’s role as a preventer of crime and disorder; a role, she argued, that existed both in and beyond its role as a punisher.¹² The significance of Steiker’s contribution lies in her recognition of the commonality of a range of coercive legal measures introduced for preventive purposes and

⁸ Definitions of ‘preventive measure’ and similar terms have been offered by some. See, Ashworth and Zedner (n 7) 20-21; Sandra Mayson, ‘Collateral Consequences and the Preventive State’ (2015) 91 *Notre Dame Law Review* 301, 321; Tamara Tulich, ‘A View inside the Preventive State: Reflections on a Decade of Anti-Terror Law’ (2012) 21 *Griffith Law Review* 209; Lauren Bourke, ‘Preventing Justice? A Principled Approach to the Commonwealth Control Order Regime’ (2015) 40 *The University of Western Australia Law Review* 306, 306.

⁹ For detailed discussion of attempts to define punishment and relevant citations, see chapter 5.

¹⁰ It is worth reaffirming that the concept will not be entirely novel as it relies on extant literature for its examples.

¹¹ Carol Steiker, ‘The Limits of the Preventive State’ (1998) 88(3) *Journal of Criminal Law and Criminology* 771.

¹² Steiker (n 11) 773-775.

in her argument that there should be limitations on such measures.¹³ This was an important step from earlier approaches that had assessed whether particular measures justified as preventive were really punishment.¹⁴ As examples of the preventive state, Steiker gave community policing, sexual offender registration, and criminal offences that target ‘drug loitering’ and ‘gang loitering’.¹⁵

Since Steiker’s article, a body of literature on the preventive state has developed in the United States, the United Kingdom and Australia. Whereas Steiker’s task focused on comprehending the United States as a preventive state, I enquire into the notion of prevention itself. Hence, I can draw on more geographically diverse literature.¹⁶ Examples of preventive measures within this literature vary radically. Cole suggests the torture of suspected terrorists and targeted killings can fit within the preventive paradigm.¹⁷ Mayson, by comparison, has suggested that speed bumps constitute a preventive measure.¹⁸ Further illustrations of preventive measures include forms of taxation,¹⁹ the internment of people of Japanese descent in America during World War Two,²⁰ the sterilisation of 60,000 people in 1920s America,²¹ the Iraq War,²² a range of criminal offences,²³ quarantine,²⁴ travel

¹³ Steiker (n 11) 777.

¹⁴ Steiker (n 11) 774-776. Though such work on prevention as hidden punishment remains important in its own right; see, for example, Paul H Robinson, ‘Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice’ (2001) 114(5) *Harvard Law Review* 1429.

¹⁵ Steiker (n 11) 774-776.

¹⁶ If one, for example, was to assess whether the United Kingdom constituted a preventive state, more care would be needed in the transportation of examples. Though comparison between the measures available in different jurisdictions may be useful to understand just how preventive a particular state was.

¹⁷ Cole (n 2) 502.

¹⁸ Mayson (n 8) 321.

¹⁹ Cornford (n 3) 21.

²⁰ Cole (n 2) 504-505.

²¹ Eric S Janus, ‘The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence’ (2004) 40 *Criminal Law Bulletin* 576.

²² Janus (n 21).

²³ Cornford (n 3) 27; Ashworth and Zedner (n 7) ch 5.

²⁴ Mayson (n 8) 321.

bans,²⁵ asset freezes,²⁶ various sentencing provisions,²⁷ immigration law,²⁸ NSA surveillance,²⁹ and detention in Guantanamo Bay³⁰ amongst other examples.³¹ ‘Prevention’, as Cole acknowledges, ‘can take many forms’.³²

From these examples alone, it is hard to discern a clear line between measures that are preventive and those which are not. Yet the examples do allow for insight into seven conceivable definitional elements. The first three conceivable elements can be dealt with quite briefly: the type of target of preventive measures, the harm to be avoided, and the body of law that contains preventive measures. First, those measures described as preventive are not united in their type of target. Some are imposed on particular individuals (such as registration of a person who has committed a sexual offence) and others are of more general applicability (the speed bump affects every road user). The point is not that particular groups are not or could not be subject to discriminatory imposition of preventive measures (for instance, the wartime internment of people of Japanese descent in the United States).³³ Instead it is that preventive measures do not seem to inherently have a set type of target: individuals, a set group or the general populace. Likewise, the bracketed examples

²⁵ Noorda (n 1).

²⁶ Noorda (n 1).

²⁷ Ashworth and Zedner (n 7) ch 7; Lyndon Harris and Sebastian Walker, ‘Difficulties with Dangerousness: The Timing of the Assessment of Risk - Part 1’ [2018] (9) *Criminal Law Review* 695.

²⁸ Ashworth and Zedner (n 7) ch 10; Cole (n 2) 502.

²⁹ Cole (n 2) 502.

³⁰ Douglas Husak, ‘Lifting the Cloak: Preventive Detention as Punishment’ (2011) 48 *San Diego Law Review* 1173, 1175.

³¹ Frederick Schauer suggests the incarceration of all males aged between 18 and 24 as a possible preventive strategy: ‘The Ubiquity of Prevention’ in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP 2013) 10.

³² Cole (n 2) 503. Though it could be argued that the number of forms of possible preventive measure is not enough to evidence a preventive state. The assessment should not only be of what is enacted, but what is in action. On the remarkable amount of pre-trial detention in the United States, see ‘Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing’ (2018) 131(4) *Harvard Law Review* 1125.

³³ For a diverse range of treatments of race as a predictor of dangerousness in sentencing, see Jan de Keijser, Julian Roberts and Jesper Ryberg (eds), *Predictive Sentencing: Normative and Empirical Perspectives* (Hart 2019).

speak to the variety of harms that the measures can target: sexual offending, road traffic accidents and espionage. Thirdly, the measures do not exist within one body of law. In penal theory, authors often affiliate punishment most closely with the criminal law.³⁴ Yet the above paragraph shows that prevention transcends traditional legal boundaries: the civil-criminal divide; substantive-procedural divides, the executive-judicial divide et cetera.³⁵

A fourth possible definitional element for the term ‘preventive measure’ can be discerned from the above examples: the measure has to be applied before a possible harm, be it a large-scale terrorist attack or a road accident. This temporal element seems close to uncontroversial. A brief point of clarification is needed, however. The fact that a preventive measure must be imposed prior to a possible harm does not mean that it cannot also follow a harm. Preventive measures can follow either of the following structures.

- Initial Harm (time 1) – measure imposed (time 2) – possible further harm (time 3).
- Measure imposed (time 1) – possible harm (time 2).

Without such clarification of when harms can occur, conceptions of prevention can become ambiguous. Janus comments:

Using a phrase coined by Professor Carol Steiker, we are at risk of becoming a “preventive state,” in which the paradigm of governmental social control has shifted from solving and punishing crimes that have been committed, to identifying “dangerous” people and depriving them of their liberty before they can do harm.³⁶

³⁴ As an example, Husak relies on the concept of punishment to draw the boundaries of criminal law ‘I hold that the criminal law *just is* that body of law that subjects persons to state punishment’ (original emphasis). Douglas Husak, ‘Preventive Detention as Punishment?’ in Ashworth, Zedner and Tomlin (n 31) 180-182. This is not to say that there is no possibility of punishment outside of the criminal sphere. See, for instance, Rory Kelly and Andrew Ashworth, ‘State Responses to Criminal Offences in England and Wales and the Problem of Equality’ in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law* (Intersentia 2018); James Goudkamp and Eleni Katsampouka, ‘An Empirical Study of Punitive Damages’ (2018) 38(1) *Oxford Journal of Legal Studies* 90.

³⁵ See also, Marcus D Dubber, ‘Preventive Justice: The Search for Principles’ in Ashworth, Zedner and Tomlin (n 31) 47.

³⁶ Janus (n 21). It is questionable whether Steiker conceived of prevention and punishment as so cleanly divided. She states, ‘Of course, one way to prevent crime is to punish individuals...’ (n 11) 774.

Janus could be misread as discounting the possibility of a preventive measure being imposed after an initial harm to prevent a further harm. Janus' divide between radical and routine prevention soon after shows this would be a misreading: 'radical prevention seeks to intervene where there is some sort of "assessment" or risk of future harm, whereas routine prevention responds to actual or attempted harm.'³⁷ To avoid confusion, a reference to when preventive measures are imposed will be included in the definition of preventive measure.

A fifth plausible definitional element of the term 'preventive measure' – at least within legal and penal theory – is that the measures are instituted by the state. This is perhaps unsurprising given that many of the measures used are meant to evidence the existence of a preventive *state*, not a preventive society. Though many of the measures listed above are imposed by the state, it is hard to see why the category of preventive measures should exclude non-state measures. It would seem illogical to describe the camera outside the Ministry of Justice as preventive, but the camera outside the close by Victoria Place shopping mall as non-preventive. Obvious examples of measures that individuals can employ to prevent crime or harm include burglar alarms, bike locks and guard-dogs.³⁸ The definition of 'preventive measure' I rely on will not be limited to measures imposed by the state.

The purpose of a measure is the sixth conceivable definitional element that can be drawn from the above examples. Such an element would read as follows: for a measure to be preventive it must be intended to stop a predicted harm, reduce the probability of the

³⁷ Janus (n 21).

³⁸ Though it is not their purpose, Alexander and Ferzan place strain on a state/non-state divide through their examination of the justifications of self-defence and preventive detention: Larry Alexander and Kimberly K Ferzan, 'Danger: The Ethics of Preemptive Action' (2012) 9(2) *Ohio State Journal of Criminal Law* 637, 660-663. In addition, Cole gives the hardening of cockpits as an example of a preventive measure, something that could be done by the state or non-state plane owners: (n 2) 503.

harm, or reduce the severity of the harm if it occurs.³⁹ This purposive element seems to unite all the examples. To take preventive detention, it is its preventive purpose which seems to make it comparable to speed bumps, but somewhat distinct from a proportionate sentence of imprisonment following an offence.⁴⁰

The preventive enterprise did not begin in 1998.⁴¹ Authors before Steiker's article have described measures as preventive⁴² and authors since have examined the roots of the preventive state.⁴³ This historical writing is of value because it brings out a factor to be considered when assessing the purpose of a measure, namely that its purpose can change over time.⁴⁴ Green brings this point out well through his examination of the enactment of multiple pieces of legislation to tackle vice crime in the United States during the 20th century.⁴⁵ Vice crime, according to Green, is that crime that causes no harm, only harms another consensually, or only harms the actor.⁴⁶ The following paragraph sums up Green's findings:

While the history of narcotics legislation in the U.S. illustrates a shift from a largely moralistic rationale to an almost exclusively preventive one, the history of federal prostitution legislation reflects a more complex set of changes: first, from prevention to moralism; and then from moralism back to prevention.⁴⁷

³⁹ This formulation of the purposive aspect of preventive measures bears close resemblance Ashworth and Zedner's conception of what it is to be preventive (n 7) 20-21.

⁴⁰ Husak similarly relies on a purposive definition of preventive detention: 'I construe preventive detention as any state practice of confining individuals in order to prevent them from committing future harms': 'Lifting the Cloak' (n 30) 1175. Schauer (n 31) argues that even such backward-looking punishment has clear preventive purposes; for a critical reply see Cole (n 2).

⁴¹ Ashworth and Zedner trace the notion of preventive justice back as far as Blackstone's commentaries in the 18th century (n 7) 28-32.

⁴² By way of example, see Glanville Williams, 'Preventive Justice and the Rule of Law' (1953) 16 *Modern Law Review* 417.

⁴³ Ashworth and Zedner (n 7) ch 2.

⁴⁴ This point is pursued further in the context of punishment in the next chapter.

⁴⁵ Stuart Green, 'Vice Crimes and Preventive Justice' (2015) 9(3) *Criminal Law and Philosophy* 561.

⁴⁶ Green (n 45) 561-562.

⁴⁷ Green (n 45) 566.

Such fluidity of purpose is not limited to the United States. The first consultation of the Scottish Sentencing Council, at the end of 2017, sought to establish what the principles and purposes of sentencing in Scotland ought to be.⁴⁸ Principles considered in the consultation document included crime reduction via prevention, deterrence and rehabilitation.⁴⁹ The Council asked, ‘Are the purposes as listed at paragraph 5(a)-(d) appropriate?’⁵⁰ It also asked, ‘Are there any other purposes which should be included?’⁵¹ That the Council thought it right to ask these questions speaks to the capacity of a practice, here sentencing, to gain or lose a preventive purpose over time. The lesson to be drawn here is that, yes, the purpose of a measure is integral to our understanding of whether it is preventive, but we must be alive to changing purposes. Perhaps the aforementioned guard-dog might become a family pet when it grew older.

A final possible definitional element is discussed with remarkable infrequency in the literature: efficacy. Does a measure have to have some level of preventive efficacy to be classed as preventive? The literature does not appear to require efficacy before a measure is considered preventive. For instance, the deterrence effect of introducing new criminal offences is questionable,⁵² but criminal offences that target behaviour prior to a harm have been labelled as preventive offences.⁵³ Furthermore, there are issues with assessing whether an ostensibly preventive measure has worked; these issues will be analysed in section II below. Even if we exclude efficacy as a definitional element, we can, of course, still critique the efficacy of preventive measures and such criticism may well prove decisive

⁴⁸ Scottish Sentencing Council, ‘Principles and Purposes of Sentencing: A Scottish Sentencing Council Consultation’ (2017).

⁴⁹ Scottish Sentencing Council (n 48) 16.

⁵⁰ Scottish Sentencing Council (n 48) 17.

⁵¹ Scottish Sentencing Council (n 48) 17.

⁵² Paul H Robinson and John M Darley, ‘Does Criminal Law Deter? A Behavioural Science Investigation’ (2004) 24(2) *Oxford Journal of Legal Studies* 173.

⁵³ Such offences are also described as ‘pre-inchoate’ and ‘preparatory’. They are discussed further below.

for our views on whether or not the measure is justified.⁵⁴ That authors such as Husak and Tulich have questioned the efficacy of what they accept as preventive measures speaks to the argument that it is not an essential characteristic of preventive measures that they work.⁵⁵ For present purposes, it is *not* taken to be necessary to show a measure has a particular level of efficacy for it to be classed as a preventive.⁵⁶

We are thus left with a conception of a preventive measure with a temporal and a purposive dimension. To be preventive, a measure must be imposed before a possible harm with the purpose of avoiding the harm, reducing the likelihood of it occurring or reducing its severity if it does occur.⁵⁷ That this definition is so broad is perhaps inevitable given how many measures have been taken to form part of the apparatus of the ‘preventive state’. Such breadth may lead a critic to query what value is there in a taxonomic category that includes both travel bans and eugenics?

The value of prevention

I offer three reasons why continuing to think about preventive measures as a collective category is valuable. All three stem from the quantity and diversity of preventive measures. First, we need to understand the cumulative effect of preventive measures. The total effect of a range of individualised and general preventive measures on a person or community could conceivably be unjustifiable, even if each measure could be justified individually.

⁵⁴ Slobogin has suggested a similar validity requirement for risk assessment tools: Christopher Slobogin, ‘A Defense of Modern Risk-Based Sentencing’ in de Keijser, Roberts and Ryberg (n 33).

⁵⁵ On ineffective preventive detention, see Husak, ‘Lifting the Cloak’ (n 30) 1176. Rebecca Ananian-Welsh, likewise, critiques the efficacy of behaviour orders and ‘bikie’ offences - “‘If at First You do not Succeed...’”: Effectiveness and the Evolution of Preventive Organised Crime Measures’ in Tamara Tulich and others (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge 2017).

⁵⁶ This approach may well not track across disciplines. Perhaps in the medical sphere, there may be both purposive and efficacy-based components to the definition of ‘preventive’ when one uses the term to describe a drug or operation. For an interesting examination of different conceptions of terms by scientists and lawyers, see Helena Likwornik, Jason Chin and Maya Bielinski, ‘The Diverging Dictionaries of Science and Law’ (2018) 22(1) *International Journal of Evidence and Proof* 30.

⁵⁷ This definition is largely in keeping with the conception of preventive measure that forms part of the term ‘coercive preventive measure’ employed by Ashworth and Zedner (n 7) 20-21. Of course, such similarity does not negate the value of working toward a definition.

Secondly, and relatedly, proper consideration of the totality of current preventive measures and strategies, and their impact can allow us to be more critical when a case is made to introduce a further measure. The power of the preventive mantra echoes that of, former UK Labour Leader, Tony Blair's 'tough on crime' rhetoric: who could be against the prevention of harm? Yet there cannot be an exceptional case for the prevention of every harm. Consideration of preventive measures as a collective allows us to detach from the sirens' song of topical harms and ask important over-arching questions. By way of example, why have we or should we allow prevention to be normalized if our capacity to predict future wrongdoing is limited?⁵⁸ In answering – or perhaps better considering – such questions, we can work to promote rational limits on preventive measures.

Thirdly, the multiplicity of forms that preventive measures can take gives rise to what can be described as 'the interchangeability problem'. The interchangeability problem arises from the fact that preventive measures transcend traditional legal domains. We cannot develop appropriate legal safeguards to constrain the state's preventive ambitions within a single legal domain when the state can then employ, or create, a measure in a different domain to the same end. To take an example that I have developed in more detail elsewhere, pre-inchoate offences and behaviour orders can be used to regulate the same behaviour.⁵⁹ Both could be imposed on a person who received training from a terrorist organisation.⁶⁰ The pre-inchoate offence reduces the quantum of evidence needed for coercive state interference by removing any requirement for a harm to be caused or risked before it is

⁵⁸ There have been important and more general works on the development of policies related to prevention: Harry Annison, *Dangerous Politics: Risk, Political Vulnerability, and Penal Policy* (OUP 2015); James Ogg, *Preventive Justice and the Power of Policy Transfer* (Palgrave Macmillan 2015).

⁵⁹ Rory Kelly, 'The Right to a Fair Trial and the Problem of Pre-Inchoate Offences' (2017) *European Human Rights Law Review* 596. The scope of the term 'pre-inchoate' is contestable. This is discussed later in the chapter.

⁶⁰ This functional overlap appears to blur the divide drawn by Cole – (n 2) 504 – between the criminal law as an institution that respects autonomy and preventive measures as running contrary to it.

committed. The behaviour order does the same through its use of non-criminal procedure. If government lost a challenge based on whether the behaviour order complied with the right to a fair trial,⁶¹ any limitation on the use of the behaviour order that resulted would thus not necessarily impact the state's ability to regulate the targeted behaviour. It could, conceivably, just make more use of the overlapping pre-inchoate offence. As preventive measures can operate in different legal domains, we need to be aware of wider developments, otherwise we risk our efforts in one domain being thwarted by reform or subversion in another.

It would be unsatisfying to leave the interchangeability problem without even brief comment on what could be done about it. Slobogin has suggested a consistency principle that would require a baseline for government intervention based on predictions of dangerousness.⁶² To explain this principle, Slobogin contrasted the degree of risk presented by some acts that constitute offences in the United States to the evidence required for preventive detention.⁶³ Husak, by comparison, has repeatedly argued offences focused on risk-prevention should require a standard of risk based on the mens rea standards of recklessness and negligence in the United States – 'substantial' and 'unjustifiable' risk.⁶⁴ However, recklessness and negligence do not, at least in England and Wales, indicate a particular level of risk per se. The degree of risk presented by an individual would vary by what, in particular, they were reckless about or negligent in doing, and how this related to

⁶¹ The use of 'if' here should be stressed; see chapter 3 for an analysis of case law on behaviour orders and the right to a fair trial.

⁶² Christopher Slobogin, 'A Jurisprudence of Dangerousness' (2003) 98 *Northwestern University Law Review* 1, 53.

⁶³ Slobogin, 'A Jurisprudence of Dangerousness' (n 62) 53-59.

⁶⁴ Husak, 'Lifting the Cloak' (n 30) 1174; 'Preventive Detention' (n 34) 185.

the actus reus of the relevant offence.⁶⁵ For example, it seems unlikely that the risks posed by recklessly shooting a firearm and recklessness as to the possession of a firearm are the same. Slobogin's consistency principle is a preferable starting point for addressing the interchangeability problem. Though there would remain questions of policy – what level of risk? – and of efficacy – can we accurately predict that level of risk? – for anyone who wanted to develop a practicable solution to the interchangeability problem.

The dangers of prevention

As the previous subsection demonstrates, Steiker was right to claim that 'Moving up a level of conceptual generalization may well create new insights about particular practices.'⁶⁶ Yet there are also dangers in staying at too high a level of conceptual generalization. In a bid to stave off altitude sickness, this subsection engages with these dangers. The first two result from the breadth of the preventive measure category. If we label a new measure 'preventive', this alone cannot offer us significant insight into the measure. English language teachers warn school children against the overuse of the term 'tasty'. The spiciness of pepperoni. The bitterness of dark chocolate. The zestiness of lemon rind. All could be described as 'tasty', but it would offer little understanding of their distinct tastes. Likewise, the range of distinct measures that can be labelled 'preventive' means that the application of the label alone can offer only limited insight into any particular thing it is used to describe. Relatedly, we constrain our consideration of the limits of the preventive state if we think at too high a level of generalisation. There may be safeguards that should apply to particular preventive measures that should not apply generally. It may, by way of example, be necessary to have one or more medical examinations before quarantine is

⁶⁵ Though it is not Husak's purpose to develop a limit on preventive measures, this limitation may also be inhibitive for his purpose of setting a more general standard of the degree of risk necessary for the creation of a criminal offence. See further, 'Lifting the Cloak' (n 30) and 'Preventive Detention' (n 34).

⁶⁶ Steiker (n 11) 779.

imposed, but the same examinations would be redundant before the installation of a new traffic light.

A developed example is needed to explain the third danger. To this end, I will take recent writing on what are commonly described as ‘preventive’, ‘preparatory’ or ‘pre-inchoate’ offences. Bozbayindir describes preventive offences as ‘not within the realm of traditional criminal law’ because they criminalise a preparatory or neutral act in order to stop a later harmful act.⁶⁷ Bozbayindir includes within his conception of the ‘traditional criminal law’ the inchoate offences of conspiracy and attempt.⁶⁸ This distinction forms the basis of Bozbayindir’s claim that we are seeing a move from traditional criminal law to a new and unprincipled preventive criminal law.⁶⁹ Carvalho too engages with pre-inchoate offences and describes them as offences that extend the criminal law beyond the standard inchoate offences.⁷⁰ Carvalho includes preparatory offences within his conception of pre-inchoate offences, by which he again refers to those offences that criminalise conduct before it would constitute an inchoate offence.⁷¹ As a worked example, Carvalho provides that the offence of attempting to commit an offence requires conduct that is ‘*more* than merely preparatory’ to the commission of a relevant offence.⁷² Carvalho explains that merely preparatory behaviour would thus be a preparatory offence because liability would bite before the conditions for the offence of attempt were satisfied. Like Bozbayindir,

⁶⁷ Ali Emrah Bozbayindir, ‘The Advent of Preventive Criminal Law: An Erosion of the Traditional Criminal Law?’ (2017) 29(1) Criminal Law Forum 25, 27.

⁶⁸ Bozbayindir (n 67) 27.

⁶⁹ Bozbayindir (n 67) 61-62.

⁷⁰ Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017) 6-7.

⁷¹ The preparatory offences subcategory seems to work as a catch-all for those pre-inchoate offences that do not fit within other subcategories such as possession offences.

⁷² Carvalho (n 70) 7. The offence also requires an intent to commit the relevant offence, Criminal Attempts Act 1981, s 1(1) (emphasis added).

Carvalho relies on pre-inchoate offences to substantiate the claim that there has been a preventive turn in the criminal law.⁷³

Both arguments are open to doctrinal criticism.⁷⁴ In England and Wales, inchoate liability does not all exist at a fixed point in time.⁷⁵ The offence of conspiracy to commit an offence can be completed at a far earlier stage than the offence of attempt. In fact, a conspiracy only requires, in essence, that one person agrees with another to pursue a course of conduct that will constitute or involve an offence.⁷⁶ Conspiracy, a traditional inchoate offence, thus satisfies Bozbayindir's two requirements to be a paradigm altering preventive offence: it criminalises an agreement to stop a further offence, and it does so to deter people from the initial preparatory step of forming such an agreement. Conspiracy may also satisfy Carvalho's conception of a preparatory/pre-inchoate offence because it entails merely preparatory behaviour which exists before an attempt has been committed. Conspiracy thus appears to be both traditional and paradigm challenging.

What is more, both Bozbayindir and Carvalho do not acknowledge that inchoate offences can be linked. A person can be liable for attempting to encourage an offence.⁷⁷ Ormerod and Laird give the example of a person who is about to post a letter to another

⁷³ Carvalho (n 70) 7. I do not intend here to suggest that 'pre-inchoate' offences are necessarily problematic. For an examination of the justifiability of such offences, see Jeremy Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' in GR Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Hart 2012).

⁷⁴ The confusion over the divide between inchoate and pre-inchoate offences to be discussed below may stem, in part, from the use of the latter term by Ashworth. When Ashworth first used the term 'pre-inchoate' he relied on an attempt as his example of an inchoate offence. Andrew Ashworth, 'Criminal Law, Human Rights, and Preventative Justice' in Bernadette McSherry, Alan Norrie, Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing 2008) 90.

⁷⁵ The discussion here is of the relative points in time of inchoate offences as compared to 'pre-inchoate offences'. The lack of temporal fixity of inchoate offences could also be evidenced through their relationship to substantive offences. The earlier the substantive offence bites, the earlier does inchoate liability. Perhaps safer terms to use would be pre-attempt and pre-conspiracy liability.

⁷⁶ Criminal Law Act 1977, s 1.

⁷⁷ Serious Crime Act 2007, s 44.

that explains how to break into a third person's safe.⁷⁸ Such liability appears to bite even before the liability in Bozbayindir's example of a preventive offence: walking down the street with the intention to commit a crime.⁷⁹ The divide between inchoate liability and pre-inchoate/preventive offences is less clear than it may at first appear. The blurred nature of the inchoate/pre-inchoate divide brings into question any claim of a paradigm shift which relies on the assertion that pre-inchoate offences present a unique challenge.⁸⁰ For present purposes, the lesson to be drawn is that seeking to class measures as preventive or non-preventive/traditional may oversimplify or mislead on important points of legal doctrine.⁸¹

On the one hand, the preventive measure category offers the advantages of allowing a better understanding of the cumulative effect of preventive measures, a reminder that future preventive measures are not necessarily introduced due to an exceptional need, and recognition of the interchangeability problem. On the other hand, the category is also limited by its breadth: the label 'preventive' alone cannot offer significant insight into the measures to which it attaches, this breadth also limits how we can think about the safeguards that should precede the imposition of different preventive measures, and it risks shrouding more subtle differences between measures that ought to be brought out. This thesis aspires to better conceptualise behaviour orders and understand what safeguards ought to precede their imposition. As such, the limitations of the preventive measure category outweigh its advantages for present purposes. To allow us to more appropriately assess behaviour orders in later chapters, a more precise subcategory of preventive measure

⁷⁸ David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, OUP 2018) 485-486.

⁷⁹ Bozbayinder (n 67) 58.

⁸⁰ Though Carvalho does not rely on the development of pre-inchoate offences alone when he discusses the preventive turn in criminal law: (n 70) 7-23.

⁸¹ Ashworth and Zedner share this hesitancy: 'We are cautious about the claims of grand theory, divorced from specific law and substantive practices, measures, and institutions.' Ashworth and Zedner (n 7) 6.

must be developed and the reference to ‘preventive measure’ in the overarching research question must be narrowed.⁸²

Section II. Coercive risk measures

I now turn from sketching the land of prevention, to a cartography of a smaller plain: coercive risk measures. In this section, I will first detail the meaning and scope of the coercive risk measures subcategory and then explore its benefits. I will pay particular attention to the remarkably similar issues that can affect different coercive risk measures, and the insights this can allow us. To this end, I analyse case law on anti-social behaviour injunctions and extended determinate sentences and then discuss the presumption of harmlessness. Finally, I will examine some of the limitations of the coercive risk measure subcategory that will affect how it is used in later chapters.

The term ‘coercive risk’

Coercive risk measures are a subcategory of preventive measures. As such, for a measure to fit within the subcategory it must satisfy the temporal and purposive requirements of preventive measure category. Beyond this, there are two requirements for a preventive measure to be a coercive risk measure: first, an assessment of the risk posed by the individual must be undertaken and satisfied before the measure can be imposed; and, second, the measure must be coercive. As to the first requirement, a substantial portion of the academic discussion of the assessment of risk focuses on the use of actuarial tools, their predictive efficacy, and the relationship of their efficacy to the legitimacy of imposing coercive measures in light of their predictions.⁸³ I avoid using a term such as ‘empirically-

⁸² I also note behaviour orders, under the definition provided in chapter 2, by necessity constitute preventive measures. The definition was ‘behaviour orders are imposed to prevent a specified type of behaviour; must have the capacity to contain restrictions and/or requirements targeting that behaviour and related acts or omissions; and breach can result in sanction.’

⁸³ See de Keijser, Roberts and Ryberg (n 33). Actuarial risk assessment is discussed further in chapter 6.

based’ or ‘actuarially-based’ here because in practice – at least in England and Wales – not every assessment of risk relies on such evidence. Instead, and as will be seen, the imposition of some measures has relied on what Slobogin has described as ‘seat-of-the-pants risk assessment’;⁸⁴ in other words, assessments of risk by a judge or others without an actuarial tool or with limited reliance on one. No standard of risk to be established is prescribed as a category restriction. As will be seen, in law the standard of risk necessary for a measure to be imposed can vary and in practice can be unclear.⁸⁵ What is important is that an assessment of risk must be satisfied before the measure can be imposed.

Perhaps the most frequently studied subset of preventive measures is coercive preventive measures. Ashworth and Zedner do so and describe coercion as ‘involv[ing] state-imposed restrictions on liberty of action, backed by a coercive response, or the threat of a coercive response, to the restricted individual.’⁸⁶ Cole too focuses on coercive measures and gives examples to include civil commitment and detention prior to trial as compared to the example of a non-coercive measure – better street lighting.⁸⁷ It is hard to see where exactly one should draw the line between measures that are coercive and those which are not. For instance, Ashworth and Zedner give the example of rehabilitation as a non-coercive measure,⁸⁸ but some rehabilitative practices are backed by the threat of

⁸⁴ Slobogin, ‘Modern Risk-Based Sentencing’ (n 54). Monahan, Metz and Garrett have surveyed judges in Virginia, the heartland of actuarial risk assessment. Even there, they found half of judges rely on judicial experience to the same extent as risk assessment in sentencing drug and property offenders; and a further third said they rely primarily on judicial experience. John Monahan, Anne L Metz, and Brandon L Garrett, (2018) ‘Judicial Appraisals of Risk Assessment in Sentencing’ (2018) 36(5) *Behavioral Sciences & the Law* 565.

⁸⁵ Wasik has commented on the different standards for imposition between the sexual offences prevention order and imprisonment for public protection. Both measures have since been repealed and replaced. Martin Wasik, ‘The Test for Dangerousness’ in GR Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Hart 2012) 259.

⁸⁶ Ashworth and Zedner (n 7) 20.

⁸⁷ Cole (n 2) 507 and 503.

⁸⁸ Ashworth and Zedner (n 7) 6.

sanction.⁸⁹ Perhaps the only non-coercive state actions are those that do not limit the choices of individuals at all, such as a hypothetical voluntary drug rehabilitation course with no consequences for non-attendance.⁹⁰ Throughout the rest of the thesis, I do not aim to test the limits of coercion, such a task could be a thesis in its own right.⁹¹ Mindful of this limitation, I rely on the following broad conception of coercion as a direct or indirect restriction on liberty.

Some examples of coercive risk measures may be of assistance: remand in custody, extended sentences,⁹² quarantine and, as will be seen below, the anti-social behaviour injunction. The example of remand in custody can be developed. There are numerous intricacies surrounding the rules for remand, but, in essence, a person without prior conviction charged with a relevant offence may be held in custody before trial in England and Wales when

the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would— (a) fail to surrender to custody, or (b) commit an offence while on bail, or (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.⁹³

Remand in custody constitutes a preventive measure because it is imposed before a potential harm – absconding, the commission of an offence or an obstruction of justice – with the purpose of avoiding it. Remand falls within the coercive risk measure subcategory

⁸⁹ By way of example, see the discussion of mandatory attendance at classes under anti-social behaviour injunctions below.

⁹⁰ An interesting test case is provided by Rich's discussion of the 'perfect preventive state' which aims to make crime virtually impossible through technological advances. Rich gives the example of smart gun technology which would stop anyone but the legal owner from firing the weapon. Michael L Rich, 'Limits on the Perfect Preventive State' (2013-14) 46 Connecticut Law Review 883, 893.

⁹¹ For critical insight into law and coercion, see Grant Lamond, 'The Coerciveness of Law' (2000) 20(1) Oxford Journal of Legal Studies 39.

⁹² Though the assessment only relates to the extension to the determinate sentence. Extended determinate sentences are discussed further below.

⁹³ Bail Act 1976, sch 1, para 2 (1).

because an assessment of risk must be satisfied before pre-trial detention is imposed and the detention itself is a restriction on liberty.

By comparison, a speed bump would not constitute a coercive risk measure because its imposition does not require an assessment of the risk posed by a particular individual. For the same reason, criminal offences that target behaviour prior to a harm and standard sentencing practices would not constitute coercive risk measures. There is no assessment of a particular individual's risk when they are convicted of a pre-inchoate offence, only a finding that they have done an act that indicates, or is said to indicate, they present a risk of harm. Though the purposes of sentencing in England and Wales include preventive aims – crime reduction including by deterrence, rehabilitation of offenders, and the protection of the public –⁹⁴ there is no obligation on a sentencing judge to assess the risk posed by an individual when they impose a determinate sentence.

In light of the above examples, it is worth reemphasising that an assessment of whether a measure is a coercive risk measure is separate from the question of whether it is punitive. The question is not whether the measure is either risk-based or punitive. The questions are instead whether a measure is a coercive risk measure or not, and whether the measure is punitive or not. Both questions aim to better conceptualise the measure under consideration. The definition of coercive risk measure arrived at is thus threefold.

1. The measure is a preventive measure.
 - a) It is imposed before a possible harm.
 - b) With the purpose of avoiding the harm, reducing the likelihood of it occurring, or reducing its severity if it does occur.
2. An assessment of the risk posed by the individual must be undertaken and satisfied before the measure can be imposed.
3. The measure is coercive.

⁹⁴ Criminal Justice Act 2003, s 142.

The value of the subcategory

Subcategories *can* allow for heightened understanding of a measure. If a tiger attacked a person, and the person did not know what it was they could describe it to those nearby but out of sight as 1. a danger, 2. a dangerous big cat, or 3. a stripy danger.⁹⁵ The most useful descriptor is the second because it conveys the relevant factors of the danger faced. The first is vague; it could contain fire or precariously stacked tyres. The third subcategory is more precise, but not in a manner that provides further useful information on the type of danger faced; it could contain a hornet or an angry mime. For a subcategory to add value, it must not only be precise, but be based on a characteristic or characteristics that provide further useful information.⁹⁶

The coercive risk measure subcategory groups preventive measures that share important characteristics and thus present a similar type of threat to their recipients. As a collective, the coercive risk measures category allows for comparison of how the courts have understood various forward-looking imposition requirements – such as tests of necessity and dangerousness – and what they have allowed to evidence these requirements. Further, these shared characteristics promote and aid consideration of what should evidence such forward-looking requirements; the consistency across measures of this evidence; and the legal safeguards that do and ought to apply before coercive risk measures are imposed. Unlike stripy danger, the coercive risk measure subcategory emphasises important characteristics.

⁹⁵ This example builds on an excellent blog post by Eliezer Yudkowsky, ‘Extensions and Intensions’ (lesswrong, 4 Feb 2008) <<https://www.lesswrong.com/posts/HsznWM9A7NiuGsp28/extensions-and-intensions>> accessed 16 June 2019.

⁹⁶ The value of any subcategory relates to the purpose of the categorisation in the first place, and a categorisation which is effective for its own purpose may still lack wider utility. For example, the approach to coercive risk measures developed here may be of little use to Morse’s analysis of the different approaches to prevention of the sane and the insane: Stephen J Morse, ‘Fear of Danger, Flight from Culpability’ (1998) 4 *Psychology, Public Policy, & Law* 250, 259.

There are, of course, significant differences between the coercive risk measures listed above. As with the wider preventive measure category, we must be mindful that our pursuit of similarity in legal measures does not distract us from important points of difference. Some coercive risk measures can only be imposed on conviction – such as extended determinate sentences – others cannot be imposed on conviction – such as remand in custody. Some require imprisonment – indeterminate sentences – while others allow for a less severe interference with liberty – confinement to one’s home due to being diagnosed with an infectious disease.⁹⁷ Yet these differences can and should form the basis of any examination of when and how coercive risk measures ought to be imposed. Tulich, writing on Australia’s response to terrorism, has highlighted an advantage of learning from other preventive measures: ‘identifying similarities between the diverse set of preventive measures may avoid dangers discovered in one measure being blindly reproduced in another’.⁹⁸ When the measures that are compared are closer in form, this advantage is more pronounced and more practicable. We can ask, why is the forward-looking condition of imposing a life sentence ‘a significant risk...of serious harm’,⁹⁹ whereas a person can be quarantined when they *may* be infected with an infectious disease that *could* present a significant harm?¹⁰⁰ There may well be salient reasons for these differences. It is through comparison of similar measures that we find out where these differences are justified and where they are not.

⁹⁷ In the United States, Slobogin has similarly emphasised the differences between various types of preventive detention: ‘A Jurisprudence of Dangerousness’ (n 62) 50.

⁹⁸ Tulich (n 8) 227; Lucia Zedner, ‘Preventive Justice or Pre-Punishment? The Case of Control Orders’ (2007) 60(1) *Current Legal Problems* 174, 189-190. Such comments follow Steiker (n 11) 774-776.

⁹⁹ Criminal Justice Act 2003, s 225(1)(b).

¹⁰⁰ Public Health (Control of Disease) Act 1984, s 45G, added by Health and Social Care Act 2008, s 129.

Risk narratives and the presumption of harmlessness

It would be remiss to assess only whether different behaviour orders fit within the coercive risk measures subcategory without first offering a broader example of the value to be gained from this subcategory. In this subsection, I engage with a pair of cases on the decision to impose extended determinate sentences (not a behaviour order) and a pair on the decision to impose an anti-social behaviour injunction (a behaviour order). The purpose is to show how the shared characteristics of coercive risk measures mean they have faced remarkably similar issues with respect to deciding when they should be imposed. Recognition of this similarity can further our thinking on the safeguards that ought to apply before different coercive risk measures may be imposed. The particular issue considered here is the ease with which courts can find that a forward-looking imposition requirement is satisfied. Even on diametrically opposed facts a narrative of risk can be constructed. The particular safeguard that the subsection engages with is the presumption of harmlessness.¹⁰¹ Some detail on both regimes must first be provided to show that they constitute coercive risk measures.

The anti-social behaviour injunction was introduced by section 1 of the Anti-social Behaviour, Crime and Policing Act 2014. It replaced the anti-social behaviour order.¹⁰² The Home Office's statutory guidance makes clear that the injunction satisfies the temporal and purposive requirements to be a preventive measure. It provides the purpose of the injunction is '[t]o stop or prevent individuals engaging in anti-social behaviour quickly, nipping problems in the bud before they escalate.'¹⁰³ For the injunction to be imposed, the

¹⁰¹ For wider discussion of the safeguards that could apply to preventive measures, see Ashworth and Zedner (n 7) ch 11; Bourke (n 8); Slobogin, 'A Jurisprudence of Dangerousness' (n 62); Richard L Lippke, 'No Easy Way Out: Dangerous Offenders and Preventive Detention' (2008) 27(4) *Law and Philosophy* 383.

¹⁰² Kevin Brown, 'Replacing the ASBO with the Injunction to Prevent Nuisance and Annoyance: A Plea for Legislative Scrutiny and Amendment' [2013] (8) *Criminal Law Review* 623.

¹⁰³ Home Office, *Anti-social Behaviour, Crime and Policing Act 2014: Anti-social Behaviour Powers – Statutory Guidance for Frontline Professionals* (2017) 20.

court has to be satisfied that two conditions are met: first, on the balance of probabilities, that the respondent has engaged in or threatens to engage in anti-social behaviour; and, secondly, that it would be ‘just and convenient’ to grant the injunction to prevent the respondent from engaging in anti-social behaviour.¹⁰⁴ In keeping with the second requirement to be a coercive risk measure, the second condition to impose an injunction requires an assessment of the risk posed by the individual. It would not be just and convenient to impose an injunction to prevent anti-social behaviour where the recipient presented no risk of anti-social behaviour.¹⁰⁵ An injunction can contain both restrictions and requirements.¹⁰⁶ Examples from the case law and the explanatory notes for the legislation include: prohibitions on contacting the claimant,¹⁰⁷ threatening the claimant’s employees,¹⁰⁸ entering premises without prior consent,¹⁰⁹ carrying a banner that reads ‘no more mosques’ at a march,¹¹⁰ possessing spray paint in a public place;¹¹¹ and requirements to attend alcohol misuse or dog training courses.¹¹² Breach of a restriction or requirement is a contempt of court.¹¹³ Together, these restrictions and requirements, and the consequences of breach make clear the coercion requirement is satisfied. The anti-social behaviour injunction is a coercive risk measure.

¹⁰⁴ Anti-social Behaviour, Crime and Policing Act 2014, s 1(2)-(3).

¹⁰⁵ This point is discussed further in chapter 7 which considers the sexual harm prevention order.

¹⁰⁶ Anti-social Behaviour, Crime and Policing Act 2014, s1(4)(a)-(b). Though the difference between a restriction and a requirement may in some cases be little more than a matter of language. See further chapter 7 and Lyndon Harris, ‘*R (Richards) v Teesside Magistrates’ Court*’ [2015] (6) Criminal Law Review 461 (note).

¹⁰⁷ *Reigate & Banstead BC v Walsh* [2017] EWHC 2221 [10].

¹⁰⁸ *ibid* [10].

¹⁰⁹ *Chief Constable of the Bedfordshire Police v Golding* [2015] EWHC 1875 (QB) [13].

¹¹⁰ *ibid* [2015] EWHC 1875 (QB) [13].

¹¹¹ Explanatory Notes to the Anti-social Behaviour, Crime and Policing Act 2014, para 109.

¹¹² *ibid* para 109.

¹¹³ For further details on contempt of court, see chapter 2.

Turning from Parliament to the courts, in *Barking & Dagenham LBC v Stokes*, an interim injunction was granted following repeated unauthorised encampments by the defendants.¹¹⁴ The unauthorised encampments continued after the interim injunction was granted, but at a lower frequency. Turner J agreed with the claimant's submission that an anti-social behaviour injunction was needed to end the detrimental impact of the encampments on the rights of others in the Borough. *Stokes* closely mirrors the gang injunction case of *Birmingham City Council v James*, outlined in the previous chapter, in which previous breaches of an earlier injunction were taken to be a reason for granting the injunction at issue.¹¹⁵

Reigate & Banstead BC v Walsh, the second injunction case to be considered, arose out of quite a distinct set of circumstances.¹¹⁶ An interim-injunction was granted on a without-notice application against the defendant after he had sent nuisance and threatening emails to the Council. Following the grant of the interim injunction, the defendant did not send further emails. His Honour Judge Robinson found it appropriate to grant a full injunction:

In one sense, having been told that since the hearing on 19 May 2017 the behaviour complained of appears to have ceased, one asks whether injunctive relief is necessary? But of course the probability and indeed overwhelming likelihood is that the behaviour has only ceased because of the injunction, and the sanctions that flow from the breach of an injunction. So it seems to me that it is both appropriate and proportionate to continue the injunction...¹¹⁷

An anti-social behaviour injunction can be justified by breach of or compliance with an interim injunction. As will be seen when we turn to extended determinate sentences, the comparative rationales in this pair of cases cannot be explained only by the relatively low

¹¹⁴ *Barking & Dagenham LBC v Stokes* (2017) (QB) Unreported.

¹¹⁵ [2013] EWCA Civ 552, [2014] 1 WLR 23.

¹¹⁶ *Walsh* (n 107).

¹¹⁷ *Walsh* (n 107) [9].

standard of the risk assessment – ‘just and convenient’ – required for the imposition of the injunction.¹¹⁸

Extended determinate sentences were introduced as part of a regime that replaced the much-maligned sentences of imprisonment for public protection.¹¹⁹ The new regime retained its forbearer’s preventive purpose. As the then Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, commented in Parliament, ‘We are replacing a regime that did not work as it was intended to with one that gives the public the fullest possible protection from serious, violent and sexual crime.’¹²⁰ For an extended determinate sentence to be available four conditions have to be satisfied:

1. The offender is convicted for a specified sexual or violent offence.
2. The court finds the offender to be dangerous: they present a significant risk of serious harm occasioned by the commission of further specified offences.
3. The court is not obligated to impose life imprisonment.
4. The offender has a prior conviction for a relevant offence or the current offence would attract a custodial period of at least four years if the court imposed an extended sentence.¹²¹

The imposition of an extended sentence is more severe on the applicant than a determinate sentence because the length of the custodial period to be served is longer,¹²² and there is an extended licence period following release.¹²³ A person sentenced to a determinate sentence of imprisonment would spend half the sentence in custody and the other half on licence.¹²⁴ A person on an extended determinate sentence could spend the whole determinate sentence

¹¹⁸ This test reflects the common law standard for the imposition of injunctions as confirmed by Senior Courts Act 1981, s 37(1) and County Courts Act 1984, s 38(1).

¹¹⁹ See, for instance, Vanessa Bettinson and Gavin Dingwall, ‘Challenging the Ongoing Injustice of Imprisonment for Public Protection: *James, Wells and Lee v The United Kingdom*’ (2013) 76(6) *Modern Law Review* 1094.

¹²⁰ HC Deb 1 November 2011, vol 534 col 785.

¹²¹ Criminal Justice Act 2003, s 226(A). This is the approach for offenders aged over 18. For more detail on extended determinate sentences and findings of dangerousness, see Harris and Walker (n 27).

¹²² Compare Criminal Justice Act 2003, s 244 (determinate) to s 246A(3)-(7) (extended).

¹²³ *ibid* s 226A(7A) and (8).

¹²⁴ *ibid* s 244.

in custody and would only be eligible for release from custody after they had served two-thirds of their sentence.¹²⁵ The extended period on licence can last from one year to five years for a specified violent offence and up to eight years for a specified sexual offence.¹²⁶ As with the anti-social behaviour injunction, the extended determinate sentence is a preventive measure: the measure's aim of stopping future harm is clear in Clarke's above comment. The extended sentence also satisfies the two further requirements to fit within the coercive risk measure subcategory. First, the second condition set out above is a risk assessment that must be satisfied prior to imposition. Secondly, extended determinate sentences have a greater impact on the liberty of the offender than equivalent determinate sentences so are coercive.

Greene provides a recent example of the role that prior convictions can play when the court is faced with determining whether a person is dangerous for the purposes of imposing an extended sentence.¹²⁷ The appellants had been found guilty of an offence of kidnapping and each had been given an extended determinate sentence. They appealed against sentence. Giving judgment, the Lord Chief Justice set out the appellants' previous convictions and placed particular emphasis on a previous incident that involved two of the appellants. They had entered an 18th birthday party armed with knives as part of a larger group whose other members were armed with noxious substances, and a firearm or imitation firearm that was fired. This history proved important to Burnett LCJ holding that extended determinate sentences had been granted appropriately by the sentencing judge.¹²⁸

¹²⁵ *ibid* s 246A(3)-(7).

¹²⁶ *ibid* s 226A(7A) and (8).

¹²⁷ *Greene* [2018] EWCA Crim 480.

¹²⁸ A limited appeal for one appellant was allowed – *ibid* [34]. The decision is in line with what was said in the guideline judgment on dangerousness about previous convictions: *Lang* [2005] EWCA Crim 286, [2006] 1 WLR 2509 [14].

By way of comparison, in *Attorney General's Reference (Smith)* the Court of Appeal was also faced with the question of dangerousness, but here the sentencing judge had decided that the offender was not dangerous, and thus could not impose an extended sentence.¹²⁹ The case concerned two counts of rape and one of sexual assault by penetration of a fourteen-year old girl that occurred during one incident. Smith had no prior record, the sentencing judge placed emphasis on this along with that lack of explanation for the offending. The Court of Appeal, by comparison, found it troubling that the offences were committed, 'totally out of the blue' and without explanation. Lord Justice Treacy, giving judgment, held that the sentencing judge had placed too much emphasis on the fact that this had been a one-off incident and made a finding that the offender was dangerous. The Court quashed the determinate sentence as unduly lenient and replaced it with an extended determinate sentence.

Brought together, these four cases demonstrate the capacity of judges to find risk even on diametrically opposed facts. The 'just and convenient' test for the imposition of the injunction was met both when an interim injunction had been breached (a tougher measure was needed) and when there was no breach (the injunction worked). The extended sentences cases showed how both prior convictions (a troubling pattern) and no prior convictions (a troubling unpredictability) could be relied on to satisfy the dangerousness requirement. Risk assessment tools have been critiqued extensively in academic writing.¹³⁰ Yet, in practice, there seems to be a significant role for judicial narratives of risk.

The ease with which a risk narrative can be constructed, and thus coercive interference justified, presents a danger to two sets of interests. The first, and more obvious

¹²⁹ *Attorney General's Reference (Smith)* [2017] EWCA Crim 252, [2017] 2 Cr App R (S) 2. For a fuller examination, see Lyndon Harris and Rory Kelly, 'A Dangerous Presumption for Risk-Based Sentencing?' (2018) 134(Jul) Law Quarterly Review 353.

¹³⁰ By way of example, Kelly Hannah-Moffatt, 'Actuarial Sentencing: An "Unsettled" Proposition' 30(2) Justice Quarterly 270.

risk is to the individuals subjected to coercive risk measures. Coercive risk measures restrict liberty and they do so in a manner which labels the person on whom they are imposed as one who lacks self-control and/or disregards the interests of others. The extended periods of imprisonment, and invasive restrictions and requirements described above provide sufficient evidence of the possible impacts of such measures. State-imposed restrictions on liberty and ease of imposition make for an uncomfortable pairing.

It is easy, too easy, to construct the decision to impose preventive measures as one of weighing the liberty of the individual recipient against the interests of wider society.¹³¹ The less obvious set of interests that are affected by the imposition of coercive risk measures are societal. If we predict a person presents a risk, but they do not – a false positive – then the restrictions we place on them may limit the probability of and/or scale of the benefit they could bring to society. For example, the local shop-owner who cannot run their shop due to unnecessary restrictions on their movement.¹³² It is not only false positives that present society with the possibility of losing out. Restrictions imposed due to a ‘true positive’ can also present a cost. If a doctor has a contagious disease and so is quarantined, we would still lose the benefit of their work. The issue arises because risk assessment is not a consequentialist analysis: it focuses on future harm, not future harm weighed against benefit.¹³³ Like the individual recipient, society may also suffer losses if the courts too easily allow for the imposition of coercive measures based on a risk narrative.

¹³¹ For instance, Robinson describes preventive detention as ‘an intrusion of liberty for the benefit of society’ (n 14) 1446.

¹³² Schauer gives other examples of the cost of over-deterrence of preventive measures in highway safety and medicine (n 31) 17.

¹³³ As O’Malley details, the indeterminacy of the future can present opportunity as well as threat, this is the basis of entrepreneurship: ‘The point, thus, is not to observe with Peter Bernstein that “uncertainty makes us free”, nor with Ulrich Beck that “risk dims the horizon”...Freedom is no more given by uncertainty than it is taken away by risk.’ Pat O’Malley, *Risk, Uncertainty, and Government* (Glasshouse Press 2004) 181. For a more challenging take on why uncertainty can be beneficial, see Christopher Slobogin, ‘Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid-Inquisitorialism’ (2015) 57(4) *William & Mary Law Review* 1505, 1525.

Underlying these issues with risk narratives is a complex question, how would we know whether a coercive risk measure was or would be successful?¹³⁴ The anti-social behaviour injunction can be used to illustrate this complexity. An injunction is imposed after a person is found to have sprayed paint on a train station wall; it restricts the person from entering the station with spray paint.¹³⁵ If they do not enter a train station with spray paint again, and thus do not breach the injunction, it could be claimed to be a success. Yet the same claim could be made if the person breached the injunction because the breach provides reason to intervene after they entered, but before any spray painting occurred.¹³⁶ Is the injunction successful if it is obeyed or if there is no graffiti in the future? In fact, even if the injunction was breached and the person did spray paint in the station this could be seen as an issue, not with the injunction, but with the enforcement of it. The basic point is that it is unclear whether compliance or non-compliance tracks easily onto the assessment of the injunction as a success or failure. As a slight aside, such uncertainties allow for a useful extension to Edwards' argument that some laws are designed to reduce wrongdoing by being followed whereas others are made to pursue this end by being broken.¹³⁷ The anti-social behaviour injunction suggests a plausible third category of measures that can appear successful whether followed or broken.¹³⁸

Diametrically opposed facts can be the basis of a narrative used to justify the imposition of a coercive risk measure; coercive risk measures can have serious impacts on

¹³⁴ The problems with assessing the success of preventive measures have been acknowledged by numerous authors. Indicative works include, Alan M Dershowitz, 'Imprisonment by Judicial Hunch: The Case against Pretrial Preventive Detention' (1970) 50(2) *Prison Journal* 12, 18; Cole (n 2) 505 and 515; Ananian-Welch (n 55).

¹³⁵ This example is based on *Lamb* [2005] EWCA Crim 3000, [2006] 2 Cr App R (S).

¹³⁶ The power of arrest must be attached to particular conditions of anti-social behaviour injunctions: Anti-social Behaviour, Crime and Policing Act 2014, s 4.

¹³⁷ James Edwards, 'Laws that are Made to be Broken' (2018) 12(4) *Criminal Law and Philosophy* 587.

¹³⁸ Perhaps inchoate offences and pre-attempt offences would fit within this category too.

their recipient and society; and it can be hard to know how we could discern whether a particular measure is successful.¹³⁹ So, what is to be done? The process for the imposition of the coercive risk measures discussed needs to pay more heed to the interests of the potential recipient and the potential costs to society. A step toward this goal could be taken through the implementation of a presumption that the potential recipient does not present a risk of causing harm: a presumption of harmlessness. Ashworth and Zedner write in favour of such a presumption: ‘It is in principle wrong to take coercive measures against people for preventive reasons unless there are very strong justifications for doing so’.¹⁴⁰ A presumption of harmlessness could work to raise the quality of evidence used to inform assessments of future risk. Such a presumption could be applied in proceedings for the imposition of a coercive risk measure either after conviction for an offence (such as the extended determinate sentence) or in standalone proceedings (such as the anti-social behaviour injunction). The presumption could also apply regardless of the level of harm that would result if a given risk were realised. We do not lose the presumption of innocence for further offending on conviction, and the presumption of innocence also applies to both serious and less serious offences. A presumption of harmlessness should not be treated differently.

The argument for a presumption of harmlessness made here, in the context of the anti-social behaviour injunction and extended determinate sentences, focused on characteristics shared by coercive risk measures: risk assessment and coercion. There is a prima facie case that the presumption of harmlessness should apply across behaviour orders. Yet, as will be seen in later chapters, the issue becomes more complex. For some

¹³⁹ As Dubber has claimed, ‘preventive justice is a guessing game’ (n 35) 57.

¹⁴⁰ Ashworth and Zedner (n 7) 53.

behaviour orders, this safeguard needs to be further refined, and for others the presumption should not necessarily apply.

More generally, a presumption of harmlessness would not be a panacea to the issues that affect coercive risk measures. Such a presumption would be hard to implement and may require legislation.¹⁴¹ Even if such legislation was enacted, there remains the possibility that different courts could come to the conclusion that each of the above four cases would rebut the presumption. By focusing on the particular facts of a case, courts could avoid/miss the overarching problem of the ease of satisfying a risk requirement across different circumstances, and thus undermine the value of a presumption. A presumption alone may not be enough. Yet the discussion of the presumption here shows the value of the coercive risk measures category: it can be used to focus on characteristics of legal measures that are of importance to the question of what procedural safeguards should precede their imposition. In this regard, assessing if measures are coercive risk measures is of a higher value than considering if they are preventive only. As such, the overarching thesis question will be narrowed to enquire into whether behaviour orders are coercive risk measures and/or punitive.

Limitations

The anti-social behaviour injunction was used above as an example of a coercive risk measure. It did not take long to discern that the injunction satisfied the requirements to fit within the subcategory. This speaks to the benefit and limitations of the subcategory. The benefit is the ease of application: it does not take an excessively detailed examination to determine whether a particular type of behaviour order is or is not a coercive risk measure. We could now draw a table and label each behaviour order as either a coercive risk measure

¹⁴¹ For the, limited, statutory presumption in favour of bail, see the Bail Act 1976, s 4.

or not. Such a table would, in a strict sense, answer half of the amended overarching question of the thesis: are behaviour orders coercive risk measures?

Yet a table would constitute an unsatisfactory answer. An answer in table-form would allow us to know that a behaviour order was a coercive risk measure and would thus offer insight into its key characteristics and similarities to other legal measures. However, it would be unsatisfactory because there is an imbalance in the consequences of a measure being labelled 'a coercive risk measure' and 'punitive'. As with the wider preventive measure category, coercive risk measures are not linked by particular safeguards that must precede their imposition. By comparison, if a measure is labelled 'punitive' this does entail heightened safeguards such as the presumption of innocence and the right to cross-examine witnesses. When we say a measure is punitive there is an underlying claim that particular safeguards ought to apply. Perhaps there is a case for comparable safeguards before coercive risk measures are imposed. Yet, apart from the above discussion of the presumption of harmlessness, this remains to be determined.

The imbalance in the effect of the punitive and coercive risk labels will affect later chapters of the thesis. The next chapter will work towards a test of when a measure can be considered punishment. When later chapters examine whether particular behaviour orders are punitive, the test will be applied to them in some detail. By comparison, when I assess whether the same behaviour orders are coercive risk measures, the case law and relevant commentary will also be used to draw out what safeguards ought to precede their imposition in light of these characteristics. As will be seen, punishment is a more contestable concept with clearer implications and coercive risk measure is a clearer concept with more contestable implications.

Section III. Conclusion

The preventive state has been envisaged as all-encompassing. Yet the examination of the term ‘preventive’ in this chapter suggests the preventive state may only be so all-encompassing because our conception of prevention is so broad. The direct effect of this analysis for the thesis is that the overarching research question has been narrowed: later chapters enquire into whether behaviour orders are coercive risk measures, not simply whether they are preventive. Beyond this, if we are to advance our comprehension of, and construct appropriate limits on, the preventive state,¹⁴² we must continue to develop more specific categories of preventive measure/preventive strategy. Further sub-categorisation will allow us to understand different patterns in preventive strategy over time, and perhaps allow us to better see where the biggest threats to liberty are posed. Discussion of preventive measures raises tightly interwoven issues of substance, procedure, evidence, civil, and criminal law across many different factual contexts. Absent an Alexandrian solution, the best way to address the Preventive Knot is to untangle it. By considering whether behaviour orders are coercive risk measures and what safeguards ought to precede their imposition, this thesis seeks to contribute to such an untangling.

¹⁴²Legal and policy reform are not the only means by which to limit the preventive state. Janus (n 21) explains that the application of quarantine law has largely been replaced in practice by antibiotics. Though scientific advances may not only allow for limits on the preventive state. Steiker, as early as 1998, warned of the risk of state data collection fuelling the preventive state: (n 11) 806-807.

Chapter 5: Assessing Punitiveness

Writing in 1914, Faris informed his readers that a duel between elephants, to see which would be the alpha-elephant and which would be a rogue, would not constitute punishment.¹ A quarter of a century later, Mabbott reassured readers that attending a performance by a string quartet would not be punitive.² Such examples of what is and what is not punishment are scattered throughout academic literature. Whereas chapter 4 examined what it is to be preventive, this chapter aims to develop a test by which to establish whether a measure is punitive. The utility of labelling behaviour orders, duels, or quartets ‘punitive’ would be undermined if the labelling was predicated on a limited or problematic definition of punishment.³ This chapter undertakes the conceptual work on punishment needed before we turn to evaluate particular behaviour orders in later chapters.

There is a surprisingly small body of literature directed *solely* at addressing what it is to punish.⁴ However, theorists who write on whether punishment can be justified – and, if so, how – frequently engage with the logically prior definitional question.⁵ Similarly, lawyers who write on the divide between civil and criminal law have relied on punishment as a potential means to distinguish the two bodies of law.⁶ There is thus a rich literature to draw on in developing a test of punitiveness in this chapter.

¹ Ellsworth Faris, ‘The Origin of Punishment’ (1914) 25(1) *International Journal of Ethics* 54, 55-56.

² JD Mabbott, ‘Punishment’ (1939) 48(190) *Mind* 152, 153. See also, JD Mabbott, ‘Professor Flew on Punishment’ (1955) 30(114) *Philosophy* 256, 262.

³ On the importance of defining ‘punitive’ in the United States, see Zimring’s critique of Mann: Franklin Zimring, ‘The Multiple Middlegrounds Between Civil and Criminal Law’ (1991) 101 *Yale Law Journal* 1901, 1901-1902; Kenneth Mann, ‘Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law’ (1991) 101 *Yale Law Journal* 1795.

⁴ Though examples to be considered below include Don E Scheid, ‘Note on Defining “Punishment”’ (1980) 10(3) *Canadian Journal of Philosophy* 453; HLA Hart, ‘Prolegomenon to the Principles of Punishment’ (1959-1960) 60 *Proceedings of the Aristotelian Society* 1.

⁵ For example, RA Duff, *Punishment, Communication and Community* (OUP 2003) XIV.

⁶ For example, Carol Steiker, ‘Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide’ (1997) 85 *Georgetown Law Journal* 775. Other methods of drawing this divide are set out by Dyson who candidly comments, ‘More important here is the simple and known, if rarely openly acknowledged fact, that the distinction is not obvious.’ Matthew Dyson, ‘The State’s Obligation to Provide a Coherent System of Remedies Across Crime and Tort’ in Antje du Bois-Pedain, Magnus Ulväng and Petter

The chapter is split into six sections. Sections I and II each take a popular definition of punishment and examine it in turn: non-expressive punishment and expressive punishment respectively. In essence, what distinguishes expressive definitions from non-expressive definitions is the inclusion of an element of censure, directed at the offender. It may appear odd that non-expressivist definitions are taken first given that they are defined in the negative. This ordering simply reflects that contemporary expressivist definitions initially grew out of criticism of the non-expressive accounts of the 1950s.⁷ I argue that both definitions are unsatisfactory means by which to distinguish between punitive and non-punitive measures.

Section III considers why arriving at a precise definition of ‘punishment’ is so challenging. I contend that punishment is a concept of remarkable fluidity in form and contestability of purpose. In fact, some current definitions of punishment are almost antonyms of each other. As such, to try to capture the essence of punishment in a precise definition will be argued to be a difficult, if not impossible, task. In light of this difficulty, section IV queries whether a definition of punishment is even necessary. I maintain that there is a risk in having no means to appraise whether a measure is punitive. Punishment may not have a clear definition, but to be punished has a clear significance. When a trial may result in punishment, heightened safeguards are needed. Without a means to discern what punishment is, there is a risk that the state will circumvent appropriate fair trial safeguards.

Asp (eds) *Criminal Law and the Authority of the State* (2017 Hart Publishing) 173; Matthew Dyson, ‘Tortious Apples and Criminal Oranges’ in Matthew Dyson (ed), *Comparing Tort and Crime* (Cambridge University Press 2015) 419-421. For an argument that damages in tort could be reconceived as punitive see RA Duff, ‘Repairing Harms and Answering for Wrongs’ in John Oberdiek, *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014).

⁷ Joel Feinberg, ‘The Expressive Function of Punishment’ in Antony Duff and David Garland, *A Reader on Punishment* (article first published in 1965, OUP 1994).

Taken together, sections III and IV present a problem: punishment is a malleable concept, but a means of assessing which measures are punitive is necessary. It is for this reason that critical appraisal of definitions of punishment is more than ‘a piece of dictionary-making’.⁸ In section V, I propose a three-part test to be applied by a court when it seeks to establish whether a measure is punitive. The test will be applied to civil, hybrid, and executive behaviour orders in later chapters to address the question of whether behaviour orders are punitive. In section VI, I conclude by demonstrating the relevance of the chapter for theorists who concern themselves with justifying punishment and lawyers interested in the boundary of civil and criminal law.

Section I. Non-expressive definitions of punishment

In the 1950s, Flew, Benn, and Hart proffered non-expressive definitions of punishment.⁹ All three authors defined punishment as a preliminary – or prolegomenon – to examining whether and how punishment could be justified.¹⁰ The purpose of all three authors was not to set clear and definitive bounds between what is punishment and what is not, but to instead present the standard or central case of punishment.¹¹ Here I examine whether this work on the central case can help to shed light onto the boundaries of punitiveness. Flew, the first of the trio, offered the following five-element definition.¹²

- ‘First, it must be an evil or unpleasantness to the victim.’
- ‘Second, it must (at least be supposed to) be for an offence’
- ‘Third, it must (at least be supposed to) be of the offender.’
- ‘Fourth, it must be the work of personal agencies.’

⁸ Mabbott, ‘Flew’ (n 2) 256.

⁹ Antony Flew, ‘The Justification of Punishment’ (1954) 29(3) *Philosophy* 291; SI Benn, ‘An Approach to the Problem of Punishment’ 1958 33(127) *Philosophy* 325; Hart (n 4).

¹⁰ This is explicitly acknowledged by all three authors: Flew (n 9) 291-295; Benn (n 9) 325-326; Hart (n 4) 1.

¹¹ Flew (n 9) 293; Benn (n 9) 325-326; Hart (n 4) 4.

¹² Flew (n 9) 293-295.

- ‘Fifth, in a standard case punishment has to (be at least supposed to) be imposed by virtue of some special authority, conferred through or by institutions against laws or rules of which the offence has been committed.’

Two initial points must be made to clarify Flew’s definition. In the first element, ‘victim’ refers to the person who is punished, not the person against whom the offence was committed.¹³ The reference in the second element to an ‘offence’ is not to criminal offences only, but instead to breaking the law or rules more generally.¹⁴ This would include the child who throws a paper aeroplane in class or the union member who breaks an official strike.

Flew’s definition has been criticised for its lack of clarity over whether it is necessary for each element to be present for an act to constitute punishment.¹⁵ This criticism follows Flew’s brief remark that the primary definition of punishment can be met not only when all five elements are satisfied, but also by non-standard cases ‘in which not all the criteria are satisfied.’¹⁶ This is a limitation on the utility of the definition for present purposes and is similar to the critique of the Welch factors developed in chapter 3.¹⁷

An example will help to demonstrate the uncertainties caused by not having a clear rule as to what criteria must be satisfied for a measure to be punitive. Some behaviour orders can, at least in theory, be imposed before any wrongdoing has occurred. A person needs to have acted in a manner which shows a risk that they will commit a slavery or trafficking offence for a slavery and trafficking risk order to be imposed.¹⁸ Home Office guidance explains that an order could be imposed if a person had taken preparatory steps toward committing a slavery offence, but had not yet committed the offence.¹⁹ Thus, no

¹³ Flew (n 9) 293.

¹⁴ Flew (n 9) 295.

¹⁵ Scheid (n 4) 455.

¹⁶ Flew (n 9) 292.

¹⁷ *Welch v United Kingdom* (1995) EHRR 247.

¹⁸ Modern Slavery Act 2015, s 23.

¹⁹ Home Office, *Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015* (2017) 10-11. The examples of when the order can be

rule, either criminal or civil, needs to have been broken before the imposition of a slavery and trafficking risk order. In consequence, the order may not meet the second element – being for an offence – or third element – being of an offender – of Flew’s definition. More is said on the second element below. On the assumption that a slavery and trafficking risk order could not satisfy these two definitional elements, it is unclear whether or not it can still fit within Flew’s definition of punishment. Flew gives no indication of when a measure which does not satisfy each definitional element would constitute a punishment. This shrouds his definition in uncertainty.

A point of interest in relation to Flew’s definition that has been largely unexamined is the number of caveats with which he precedes it.²⁰ Flew describes punishment as both a ‘vague’ and ‘open-textured’ term.²¹ He also emphasises that other disciplines – anthropology and psychoanalysis – and general usage may not align with his definition.²² Flew thus settles not on a definitive conception of punishment, but a ‘proposal’ of what punishment is that draws upon ‘current usage’.²³ This valuable point will be returned to in section III which emphasises the fluidity of the concept. For now, it is sufficient to say Flew appears to have been caught between the rock of wanting to convey the shifting nature of punishment’s meaning and the hard place of offering a clear definition.

Benn takes Flew’s definition verbatim²⁴ and Hart’s definition makes only minor amendments, with one possible exception discussed below. Hart amends the second

applied for provided in the Guidance can be split into three categories: doing something suspicious with a related conviction, earlier intervention than existing criminal liability allows, or as an alternative to a prosecution.

²⁰ Though see Mabbott, ‘Flew’ (n 2) 256-258.

²¹ Flew (n 9) 291.

²² Flew (n 9) 293-294. For criticism of reliance on general usage in philosophical contexts, see Mabbott, ‘Flew’ (n 2) 256-257.

²³ Flew (n 9) 292.

²⁴ Benn (n 9) 325-326.

element to emphasize that it refers to offences ‘against legal rules’,²⁵ and the fourth element to add a mental state: ‘It must be intentionally administered by human beings other than the offender’.²⁶ Both Benn and Hart are firmer on the need for all five elements to be satisfied before a measure can be described as punishment.²⁷ They thus remove some of the uncertainty that surrounded Flew’s definition.

But even to require the satisfaction of all five elements does not leave the non-expressive definition of punishment easy to apply to borderline cases. For Flew, and by implication Benn, ‘an offence’ is not limited to breaches of the criminal law. This gives an uncertain breadth to their definition. How is it to be discerned when hard treatment – or unpleasantness – is imposed for an offence? Does the payment of a heightened tax on cigarettes constitute an offence? Of course, a tax is different from an offence. The point, however, is not to dispute the fact that taxes are different, but to show how the definition offered by Flew and Benn does not obviously lead us to this conclusion. As Fletcher has commented,

We may share an intuitive sense that deportation, expatriation, tort damages, customs fines, and impeachment are not cases of criminal punishment, yet it is by no means easy to explain why.²⁸

The sexual harm prevention order can impose coercive conditions such as curfews and geographical restrictions on the recipient, and it can be applied for by the police.²⁹ Thus the definitional elements left at issue are whether the imposition of a sexual harm prevention order is on an offender and for an offence. Flew and Benn’s definition cannot tell us whether behaviour orders constitute a punishment. In effect, Flew and Benn’s

²⁵ Hart (n 4) 4.

²⁶ Hart (n 4) 4.

²⁷ Benn (n 9) 325-326; Hart (n 4) 4-5. For brief comment Scheid (n 4) 455.

²⁸ George P Fletcher, *Rethinking Criminal Law* (OUP 2000) 412.

²⁹ Sexual Offences Act 2003, ss 103A-103C.

definition just replaces the question of whether the sexual harm prevention order is a punishment with that of whether the order is imposed for an offence. Given that no means are provided to assess whether or not a potential punishment is imposed for an offence, the definition is insufficient to discern whether a measure constitutes punishment.

Due to the similarities of Hart's definition to that of Flew, the focus will be on whether his amended standard case can help us to overcome the problem associated with the term 'offence', and not on all five elements of his definition. Two interpretations of what Hart meant by the terms 'offence' and 'offender' are plausible. The first interpretation is that Hart gives the same broad definition that Flew and Benn relied upon. This interpretation seems preferable. When defining the standard case of punishment, Hart explicitly comments, 'So with Mr. Benn and Professor Flew I shall define the standard or central case of "punishment" in terms of five elements...'³⁰ Hart's definition also explicitly adds 'offences against *legal rules*' to Flew's formulation.³¹ This seems to be intended to incorporate Flew's broader conception of 'offence'.³² If Hart is interpreted in this manner, then his definition is affected by the same uncertainty over what constitutes an offence that was described when appraising Flew and Benn above.³³

However, an alternative interpretation of what Hart envisages as an offence is possible. Hart follows his section on defining punishment with one entitled 'The nature of an offence'.³⁴ In this later section, Hart implies that offences are made up of breaches of the criminal law only. He does so through repeated reference to 'crime' and 'criminal', and

³⁰ Hart (n 4) 4.

³¹ Hart (n 4) 4 (emphasis added).

³² Flew (n 9) 295.

³³ For a recent and alternative engagement with Flew, Benn and Hart's definitions, see Zachary Hoskins, *Beyond Punishment? A Normative Account of the Collateral Legal Consequences of Conviction* (OUP 2019) 42-46.

³⁴ Hart (n 4) 6.

by making no suggestion that an offence is the breach of any law or rule.³⁵ If this conception of the word ‘offence’ is meant to affect Hart’s definition of punishment, it would not necessarily narrow his definition. This is due to the nature of what Hart conceives of as the distinguishing feature of criminal offences:

Without recourse to the simple idea that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.³⁶

Hart accepts in a footnote to this text that some taxes may also aim to discourage conduct.³⁷ This is undoubtedly correct. Scotland, for instance, has increased tax on alcohol with the aim of discouraging excessive drinking.³⁸ Tort law, immigration law, and children’s pocket money can all aim to encourage some forms of conduct and/or discourage others.³⁹ Aiming to affect conduct may be a feature of criminal offences, but it is not a distinguishing one.

If this discussion of the nature of an offence is to impact the use of the words ‘offence’ and ‘offender’ in Hart’s definition of punishment, then his definition becomes over-inclusive. To draw on the example of sexual harm prevention orders again, they would fit Hart’s definition of punishment under this conception of an offence. It appears unarguable that coercive behaviour orders targeting sexual harm are meant to affect behaviour, specifically to discourage sexual harm.⁴⁰ Yet compensatory tort damages – that

³⁵ Hart (n 4) 6-8.

³⁶ Hart (n 4) 6.

³⁷ Hart (n 4) 7.

³⁸ Alcohol (Minimum Pricing) (Scotland) Act 2012.

³⁹ Commenting that tort law has a deterrent function, see Matthew Dyson and John Randall, ‘England’s Splendid Isolation’ in Matthew Dyson (ed), *Comparing Tort and Crime* (Cambridge University Press 2015) 26. On prevention and immigration laws, see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) ch 10.

⁴⁰ As confirmation, see the Explanatory Notes to the Anti-social Behaviour, Crime and Policing Act 2014, para 262. For completeness, the coercive conditions that could be included in the order would meet the pain/unpleasantness element of Hart’s definition; the order would be imposed by a judge so the order would be intentionally imposed as per element four, and the fifth element would be met – on the assumption that the order constituted an offence – because the order would be ‘imposed and administered by an authority constituted by a legal system’.

are commonly accepted to be non-punitive – could also conceivably fit Hart’s definition of punishment under the second interpretation of ‘offence’.⁴¹

The references to ‘an offence’ and ‘an offender’ in the above non-expressive definitions limit their value for present purposes. The terms leave non-expressive definitions vague (Flew, Benn, and interpretation 1 of Hart) or over-inclusive (interpretation 2 of Hart). Either way, the effect is that these non-expressive definitions of punishment are of limited utility when trying to discern whether a measure is punitive. It is perhaps not unsurprising that work which focused on the central cases of punishment, cannot offer a precise divide between punishment and non-punishment. This was not its purpose. In addition, since Feinberg’s critique in the mid-sixties, there has been a turn away from such definitions and toward expressive definitions of punishment.⁴² Our attention can now also turn to these expressive definitions.

Section II. Expressive definitions of punishment

In this section, I focus on expressive *definitions* of punishment, not expressive justifications thereof.⁴³ Though authors who develop expressive justifications rely on expressive definitions of punishment, not everyone who relies on an expressive definition believes punishment can be justified by – or only by – the expression of censure. Both Duff and Boonin adopt an expressivist definition. Duff aspires to a ‘unitary theory’ of punishment

⁴¹ On tort damages generally, see Michael A Jones, Anthony M Dugdale, and Mark Simpson (eds), *Clerk & Lindsell on Torts* (21st edn, 2014 Sweet & Maxwell) ch 28. Though see Dyson on the possible ‘elasticity’ of tort damages and their capacity to fulfil non-compensatory purposes: Matthew Dyson ‘Overlap, Separation and Hybridity Across Crime and Tort’ in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law* (Intersentia 2018) 102.

⁴² Feinberg (n 7).

⁴³ On the adoption of expressive definitions of punishment by academics in Germany, see Claus Roxin, ‘Prevention, Censure and Responsibility: The Recent Debate on the Purposes of Punishment’ in AP Simester, Antje Du Bois-Pedain, and Ulfrid Neumann, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing 2014) 33.

that draws on retributivism and utilitarianism.⁴⁴ Boonin, maintains that state punishment of law-breakers is morally impermissible.⁴⁵ When I use the term ‘expressivist’ hereafter it refers to those who rely on expressivist definitions of punishment. The uniting feature of expressivist definitions is that they make the expression of censure a definitional element of punishment.⁴⁶ This account will be further detailed before examining whether expressivist definitions can help to better elucidate the punitive/non-punitive divide.

Many modern expressivist definitions of punishment appear to follow from an article by Feinberg published in the sixties.⁴⁷ The article constituted a direct reply to the work of Flew, Benn, and Hart.⁴⁸ Feinberg argued that non-expressivists, ‘leave out of their ken altogether the very element that makes punishment theoretically puzzling and morally disquieting.’⁴⁹ Specifically, Feinberg maintained that punishment is distinctive because it is expressive. Punishment, he argued, expresses resentment, disapproval and indignation.⁵⁰ Due to ‘social convention’, Feinberg contended this disapprobation is expressed through the hard treatment that is imposed on the offender; censure and hard treatment are, thus, ‘never separate in reality’.⁵¹ Later writers emphasized that penal censure is expressed by

⁴⁴ Duff, *Punishment* (n 5) 89. Unless otherwise stated, my engagement with Duff in this section is with his seminal work on the topic of punishment: *Punishment, Communication and Community* (OUP 2003).

⁴⁵ David Boonin, *The Problem of Punishment* (Cambridge University Press 2008) ch 1.

⁴⁶ Lacey and Pickard could perhaps be classified as expressivists, but due to the distinctiveness of what they conceive punishment to express, their work is considered later in the chapter; Nicola Lacey and Hanna Pickard, ‘To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice’ (2015) 35(4) *Oxford Journal of Legal Studies* 665.

⁴⁷ Feinberg (n 7). Though not every definition of punishment since Feinberg has been expressive; see, for instance, Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 2002) 4-10.

⁴⁸ All three of whom are referenced in Feinberg’s first endnote: Feinberg (n 7) 89.

⁴⁹ Feinberg (n 7) 73.

⁵⁰ Feinberg (n 7) 74.

⁵¹ Feinberg (n 7) 76. Kleinig has recently described hard treatment and censure as ‘distinguishable foci in a single practice’: John Kleinig, ‘The Architecture of Censure’ in Antje du Bois-Pedain and Anthony E Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart 2019) 11-13.

the state on behalf of the community.⁵² It is important to clarify that censure is distinct from social stigma because it is held to be an inherent part of punishment, as opposed to a possible consequence of it.⁵³

A theme of expressivist commentary is reliance on examples of measures that either do or do not constitute punishment. Feinberg gave examples to include tax (non-punitive),⁵⁴ denial of a pension (non-punitive),⁵⁵ imprisoning a reckless driver (punitive),⁵⁶ and banning a member of the communist party from driving (non-punitive).⁵⁷ Perhaps the most frequent pair of examples given by expressivists is a fine and a tax.⁵⁸ Both a fine and a tax require the person upon whom they are imposed to make a payment to the state, but only the fine is said to constitute a punishment. The distinction is drawn because the fine is said to express disapproval of the payer whereas the tax is said not to. Boonin brings the point to life with a marital example:

When the state charges you a fee to process your wedding license, it is in no way expressing disapproval of your decision to get married. But when the state imposes a fine on you for violating antipolygamy laws, part of what it is doing is expressing its disapproval of your behavior.⁵⁹

Such examples are important because in leading accounts of expressivism the language of censure is hard treatment, but hard treatment does not necessitate the expression of

⁵² Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005) 30.

⁵³ See further, von Hirsch and Ashworth's response to Braithwaite and Pettit's consequentialist theory of criminal justice: Andrew von Hirsch and Andrew Ashworth, 'Dominion and Censure' in Andrew von Hirsch, *Censure and Sanctions* (OUP 1996); John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (OUP 1992).

⁵⁴ Feinberg (n 7) 80.

⁵⁵ Feinberg (n 7) 82.

⁵⁶ Feinberg (n 7) 76.

⁵⁷ Feinberg (n 7) 83.

⁵⁸ For example, Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime & Justice* 55, 71; von Hirsch and Ashworth, *Proportionate Sentencing* (n 52) 17; Hart (n 4) 6; Klaus Günther, 'Criminal law, Crime and Punishment as Communication' in Simester, Du Bois-Pedain, and Neumann (n 43) 126.

⁵⁹ Boonin (n 45) 22.

censure.⁶⁰ This asymmetry underlies the critique made here: problems in definitively stating when hard treatment expresses censure mean expressivist accounts cannot be used to discern whether a measure is punitive.

An initial point of clarification is necessary. My contention is not that censure cannot be relied on because it is an intangible concept. It is worth turning to recent work by Matravers here.⁶¹ As a ‘thought experiment’ Matravers considers whether removing the hard treatment from punishment could be justified.⁶² Censure retains a role in Matravers’ experiment.

For example, when I censure you for breaking a promise I express my disapproval verbally. I may be aware that you will find my censure painful – and I may think less of you if you do not do so (for example, if you shrug off my complaint as if it does not matter) – but my intention might be merely to put the facts to you such that you understand how those facts have affected me.⁶³

In this example, the censure is expressed as verbal admonishment; the medium of hard treatment is not employed. Günther develops this approach; he argues a scale of censure could be adopted, ‘A is convicted of theft in degree 3 (within a scale of 0.1 to 5).’⁶⁴ A censure scale may – in theory – be able to form the basis of assessing if a measure is punitive. Though a necessary requirement for such a basis of assessment would be that the censure was itself readily discernible when it was expressed.

The problem arises because censure is taken by expressivists to be expressed not by words or scales, but by the ‘visible’ hard treatment of fines, imprisonment and other forms of

⁶⁰ Von Hirsch, ‘Proportionality’ (n 58) 71; von Hirsch, *Censure and Sanctions* (n 53) 11; Duff, *Punishment* (n 5) 82.

⁶¹ Matt Matravers, ‘Punishment, Suffering and Justice’ in Stephen Farrell and others (eds) *Justice and Penal Reform: Re-shaping the Penal Landscape* (Routledge 2016).

⁶² Matravers (n 61).

⁶³ Matravers (n 61).

⁶⁴ Klaus Günther, ‘Criminal law, Crime and Punishment as Communication’ in AP Simester, Antje Du Bois-Pedain, and Ulfrid Neumann, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing 2014) 134.

punishment.⁶⁵ Feinberg argued ‘the very physical treatment itself expresses condemnation’.⁶⁶ He rhetorically claimed of a motorist imprisoned for reckless driving that, ‘the very walls of his cell condemn him.’⁶⁷ Garland takes this view on form further, he claims that probation, fines, and imprisonment not only have symbolic value as punishments, but have different symbolic values due to their different forms.⁶⁸

Such a reliance on form as a basis for establishing censure gives rise to a problem. Incidences of contestable punitiveness – such as containing those with a high risk of (re)offending – may or may not constitute punishment. But if it is the ‘very walls’ which condemn, then there is no scope for further analysis, such imprisonment is by necessity punishment. As is quarantining someone to contain a virus. As is getting locked in one’s own house. Furthermore, imprisonment is not the only form of punishment. Later in his essay, Feinberg comments that the payment of a tax would not constitute punishment, despite being hard treatment.⁶⁹ However, this view on taxes sits uncomfortably with Feinberg’s position on form evidencing censure. As above, fines, like taxes, constitute a financial deprivation. This leaves Feinberg as either implying that a fine can never be punitive or suggests the form of a deprivation alone is insufficient to evidence censure. At least in England and Wales,⁷⁰ the insufficiency of form seems more likely because fines are a prevalent accepted form of punishment.⁷¹ In an era that is largely post-capital and

⁶⁵ Günther (n 64) 126.

⁶⁶ Feinberg (n 7) 76.

⁶⁷ Feinberg (n 7) 76.

⁶⁸ David Garland, *Punishment and Modern Society* (OUP 1990) 256-257.

⁶⁹ Feinberg (n 7) 81.

⁷⁰ Though in the United States, where Feinberg wrote, there is a closer connection between imprisonment and punishment. For an example of the terms being used interchangeably, see Katherine Beckett and Naomi Murakawa, ‘Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment’ (2012) 16(2) *Theoretical Criminology* 221.

⁷¹ In fact, 77% of sentences imposed in the year ending December 2018 were fines: Ministry of Justice, *Criminal Justice Statistics Quarterly, England and Wales, Year Ending December 2018 (Annual)* (2019) table Q5.1a.

corporal punishment, form cannot be taken to distinguish measures that express censure from those that do not.⁷² In sum, hard treatment is an uncertain language with which to express censure because its very words – financial deprivation, incarceration and community measures – do not necessarily condemn.

It is worth returning to the fine/tax example to emphasise this point. At first glance, the example seems to show the obviousness of including censure as a definitional element of punishment. This supposed obviousness had been emphasized by expressivists. To this end, von Hirsch has commented, ‘The penal sanction clearly does convey blame’,⁷³ and later when writing with Ashworth he comments, ‘That punishment connotes blame is evident enough.’⁷⁴ Because the fine/tax example reaches the correct conclusion, – fines are punitive and taxes are not – it is easy to assume that censure is a useful means of dividing punitive and non-punitive measures. But the example is loaded. We already have an idea that a fine is punitive and that a tax is not. What if the only information we had was that a person would be charged £20 for possessing a drug which had not previously been regulated? In this scenario, the question ‘does this measure constitute punishment?’ is replaced by ‘does this measure express censure?’ The answer to the latter question is less obvious when we do not know the answer to the former. If we can only say that a sanction entails censure when we already know that it constitutes punishment, then censure does not help to determine if a measure is punitive.⁷⁵

⁷² Steiker (n 6) 795-796.

⁷³ Von Hirsch, *Censure and Sanctions* (n 53) 9.

⁷⁴ Von Hirsch and Ashworth, *Proportionate Sentencing* (n 52) 17. Garland too sees the sentencing role in signifying censure as ‘clear’ (n 68) 256. On preventive detention, Husak claims that ‘it goes without saying’ that preventive detention is hard treatment and ‘it is only slightly less obvious’ that most preventive detention is censuring: Douglas Husak, ‘Lifting the Cloak: Preventive Detention as Punishment’ (2011) 48 *San Diego Law Review* 1173, 1182.

⁷⁵ This applied criticism of expressivist definitions is in keeping with Lacey’s statement that ‘we must constantly bear in mind the implications of theoretical arguments when applied to the real world’ Lacey (n 47) 2.

I now turn to examine more justificatory work of three expressivists to see if censure can be developed into a clearer dividing line between punitive and non-punitive measures. Von Hirsch relies on penal censure to argue that we treat the recipient as ‘an agent capable of moral deliberation’ as opposed to coercing them without censure and thus treating them as ‘tigers might be treated in a circus’.⁷⁶ In an early work, von Hirsch suggested that the wrongfulness of conduct at the core of criminal law ‘reinforce[s]’ the censuring role of punishment.⁷⁷ Even if this is accepted, it should not be taken to mean that appraising behaviour per se is enough to know whether the recipient of a sanction is being censured. Tort law can be used to regulate behaviours at the core of criminal law and damages in tort, as a rule, are taken to be non-punitive.⁷⁸ Although, as I will argue in section V, the behaviour being regulated should have a part to play when we appraise whether a measure is punitive. It is an important factor and is rightly flagged by von Hirsch, but behaviour alone is insufficient to evidence censure.

On Duff’s account of punishment, the communication of censure is integral if the recipient of punishment is to be treated as a member of a liberal political community.⁷⁹ The communication of censure allows the recipient to repent for their wrong, reform themselves, and reconcile with the victim.⁸⁰ Duff applies his expressivist conception of punishment to victim-offender mediation, probation, and community service. However, these three applications do not provide significant insight into how to discern if particular

⁷⁶ Von Hirsch, *Censure and Sanctions* (n 53) 11.

⁷⁷ Von Hirsch, ‘Proportionality’ (n 58) 71.

⁷⁸ Jones, Dugdale, and Simpson (n 41) 28. There is not a total overlap between key concepts at the core of criminal and tort law, see Dyson and Randall (n 39) 27-51. For a recent empirical piece on punitive damages, see James Goudkamp and Eleni Katsampouka, ‘An Empirical Study of Punitive Damages’ (2018) 38(1) *Oxford Journal of Legal Studies* 90.

⁷⁹ Duff, *Punishment* (n 5) ch 3.

⁸⁰ Duff, *Punishment* (n 5) ch 3.

hard treatments express censure because Duff does not go further than to say censure is present.⁸¹ To take community service as an example, Duff states as follows:

As a punishment imposed on her, the (community service) Order communicates to her the censure she deserves for her crime not just a formal censure whose content is simply that she has committed an offense, but a richer and more substantive censure that seeks to bring home to her the nature and implications of that offense.⁸²

To be clear, I do not intend to criticise Duff's work. It is here worth drawing out an important difference between our engagements with punishment. Duff looks to show how we could reconceive punishment to include more inclusionary practices, such as mediation, within it and thus make it justifiable. By comparison, I aim to assess if coercive state-imposed measures, behaviour orders, have been inappropriately excluded from being classified as punitive (and thus excluded from the safeguards contingent on this classification). Nonetheless, Duff's engagement with censure is of some value for present purposes. Duff uses censure to show that victim-offender mediation, probation, and community service could be thought of as punitive. This illustrates that what is taken to be punitive is by no means fixed, I will pick up this point in the following section.

Steiker relies on an expressivist definition of punishment in an attempt to add conceptual clarity to the divide between civil and criminal proceedings.⁸³ As part of this endeavour, Steiker argues that censure can be seen in three places.⁸⁴ First, the moment at which a law is made is 'the primary locus of blame designation.'⁸⁵ Secondly, when it is made clear to a wrongdoer that they are being condemned for their behaviour.⁸⁶ Thirdly,

⁸¹ Duff, *Punishment* (n 5) on victim-offender mediation – 97 and on probation – 101.

⁸² Duff, *Punishment* (n 5) 105.

⁸³ Steiker (n 6) 800-806.

⁸⁴ Steiker (n 6) 805-806.

⁸⁵ Steiker (n 6) 805.

⁸⁶ Steiker (n 6) 805.

the communication with the victims and ‘community affected by the wrongdoing’ via ‘the public nature of the punishment.’⁸⁷

Does Steiker’s reference to these three sites of blame clarify when hard treatment expresses censure? Steiker does not develop her commentary on the first site of blame, the creation of the law. The effect is to resituate the question of whether a measure is punitive from the courtroom to the legislature, but it is left unexplained how we should establish whether censure is present. It must be borne in mind here that my argument is not that the criminal law does not censure, but that it is hard to discern when censure occurs because the language of censure – that is, hard treatment – can also not express censure. Given this, resituating our analysis from the courtroom to the legislature alone is insufficient to make censure a compelling means by which to divide punitive and non-punitive measures. Yet Steiker is right to flag the importance of the lawmaker when we are establishing if a measure is punitive. As will be seen in section V, the purpose of a measure forms an essential part of the proposed test of punitiveness.

Steiker’s second site of blame – condemnation made clear to the wrongdoer – and third site – wider communication of the condemnatory nature of the wrongdoing – share an underlying problem in application. No explanation is given of how censure works to make it clear to any party that the state recognises the wrongfulness of the offender’s action. Here, Steiker appears to have turned from describing how to establish censure is present to explaining how it should function. It thus remains unclear how we are to know which hard treatment does and which does not express censure.

An examination of expressive accounts of punishment provides insight into factors that will be of relevance to the account of punishment I develop below: the importance of the behaviours targeted by the measure and the purpose of the measure; and also, the

⁸⁷ Steiker (n 6) 805-806.

possibility of what we consider punishment changing over time. However, expressive accounts cannot be lifted from their primarily justificatory contexts and applied as a means to distinguish between punitive and non-punitive measures. In sum, there is not, as yet, a functional means to discern which hard treatment expresses censure and which does not. The consequence for this chapter is that we are again left without a clear means by which to distinguish between punitive and non-punitive measures. There is also perhaps a wider consequence for those who rely on censure to justify punishment. If censure is to have a role in justifying punishment, arguably a functional means to discern when it is present is needed. Otherwise, it will remain unclear in practice when we are being treated as citizens in a political community and when as tigers in a circus.⁸⁸ We can now shift to considering why a satisfying definition of punishment has proven so elusive.

Section III. The conceptual fluidity of punishment

Non-expressivist and expressivist definitions of punishment cannot divide punitive and non-punitive measures because both incorporate a broad definitional element in ‘offence’ and ‘censure’ respectively. Why is it so challenging to offer a precise definition of ‘punishment’? The concept is so fluid and contestable that a definition without a broad term is unlikely to gain traction. To evidence this fluidity and contestability, I will first sketch the changing forms and purposes of punishment over the last seventy years. I will then draw on penal theory which comments on or requires the meaning of punishment to be capable of change to further the argument.

Kleinig has noted that: ‘Whatever else we may say about it, punishment is an *imposition*.’⁸⁹ This statement has been true historically because of its generality. Some of

⁸⁸ To borrow the language of Duff, *Punishment* (n 5) 75 and von Hirsch, *Censure and Sanctions* (n 53) 11.

⁸⁹ John Kleinig, ‘Punishment and Moral Seriousness’ (1991) 25 *Israel Law Review* 401, 402 (original emphasis).

the different forms of hard treatment that have been taken to constitute punishment in penal theory over the last seven decades will be set out here. Of course, a longer and more detailed account of the forms of punishment could be presented, but the purpose here is only to show the fluidity of the form of the hard treatment that is often taken to be a necessary element of punishment. As per section II, in 1954 Flew presented a necessary element of punishment as ‘an evil or unpleasantness’ being imposed.⁹⁰ In using these terms, Flew’s intent was to make clear that corporal punishment was not the only form of punishment:

By saying “evil” following Hobbes or “unpleasantness” not “pain” the suggestion of floggings and other forms of physical torture is avoided. Perhaps this was once an essential part of the meaning of the word, but for most people now its employment is less restricted.⁹¹

With the repeal of corporal punishment as a sentence over the course of twentieth century and the abolition of the death penalty in the United Kingdom in 1965,⁹² the practices referred to as ‘punishment’ have changed. Writing in 1989, Duff, like Flew, suggested a necessary criterion of punishment was ‘hard treatment’.⁹³ In using this term, Duff sought to emphasize that imprisonment was not the only measure that can constitute punishment, other measures which he argued could be probation, community service and victim-offender mediation.⁹⁴ Flew and Duff’s accounts of hard treatment make for interesting pairing. Together they show a shift in the form of what constitutes punishment from flogging to community service.

Matravers’ ‘thought experiment’ furthers the idea of punishment as fluid, not by showing a change in the practice that we take to constitute hard treatment, but instead by

⁹⁰ Flew (n 9) 293

⁹¹ Flew (n 9) 293. See also, Mabbott, ‘Flew’ (n 2) 257.

⁹² On corporal punishment, see, for example, Criminal Justice Act 1948, ss 1-2; Criminal Justice Act 1967, s 65. On the abolition of the death penalty, see the Murder (Abolition of the Death Penalty) Act 1965.

⁹³ Duff, *Punishment* (n 5) XIV.

⁹⁴ Duff, *Punishment* (n 5) 96-106. Commenting in the United States, Boonin described probation as ‘uncontroversially punitive’ in 2008: Boonin (n 45) 11.

challenging the necessity of hard treatment in punishment altogether.⁹⁵ Though Matravers' focus is on whether punishment absent hard treatment could be *justified*, it is of interest for present purposes because his argument is predicated on the assumption that it makes *conceptual* sense to describe punishment absent hard treatment as punishment. In fact, Matravers goes as far as to claim that to rename a practice identical to punishment apart from the absence of hard treatment would be 'contrived'.⁹⁶ Likewise, Lacey and Pickard argue that hard treatment should and can be removed as a definitional element of punishment,

Our argument is that the commitment to hard treatment as a defining feature of punishment risks, in practice, undermining the aspiration to foster inclusiveness by inviting exclusionary punitiveness.⁹⁷

Note that the link between punishment and the imposition of retaliatory costs—never mind the desire that the other suffer in turn—is not an essential part of the concept.⁹⁸

Kleinig's claim – that punishment is an imposition – may have been true historically, but it will not necessarily be true perpetually. Even this cursory journey through penal texts shows a significant development in what can constitute punishment. From flogging in the past, to probation at present, to the possibility of no hard treatment in the future.

Beyond the fluidity in the measures that can constitute punishment, the purpose(s) of punishment are highly contested.⁹⁹ This can be shown relatively briefly by contrasting traditional expressivist definitions of punishment with the more recent work of Lacey and

⁹⁵ Matravers (n 61).

⁹⁶ Matravers (n 61).

⁹⁷ Lacey and Pickard, 'Blame or Forgive?' (n 46) 667.

⁹⁸ Lacey and Pickard (n 46) 'Blame or Forgive?' 668. Günther too believes it is 'quite surprising' that more expressivists do not consider that censure could exist independently of hard treatment (n 64) 135.

⁹⁹ Likewise, Garland has described the many and varied meanings of punishment over time as 'a dense cacophony of sounds and images' (n 68) 275.

Pickard.¹⁰⁰ Those who adopt expressivist definitions argue punishments are united as a category – and distinguished from other hard treatment imposed by the state – by the fact that they censure their recipients. Lacey and Pickard have argued that punishment should be reconceived so as to attribute responsibility and express forgiveness instead of censure.¹⁰¹ They argue such a reconceptualization is possible from the perspective of evolutionary psychology and would be more in keeping with the political values of liberal society.¹⁰²

Underlying this justificatory argument is an implicit claim by Lacey and Pickard that punishment which expresses forgiveness instead of blame is conceptually coherent. Lacey and Pickard also make this conceptual claim explicitly:

But it is worth stating at the outset that, in counselling forgiveness within penal philosophy and criminal justice policy and practice, we are not advocating the abolition of punishment, but rather its *reconception*.¹⁰³

Regardless of how persuasive one thinks Lacey and Pickard’s justification of forgiveness-based punishment is, the underlying conceptual claim is what is important here. The purpose of punishment proposed by traditional expressivists – censure – and by Lacey and Pickard – forgiveness – are diametrically opposed.¹⁰⁴

In summary, the practices that can constitute punishment are not fixed. The malleability of punishment presents a significant hurdle to offering a precise definition of

¹⁰⁰ Lacey and Pickard ‘Blame or Forgive?’ (n 46); Nicola Lacey and Hanna Pickard, ‘The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems’ (2015) 78(2) *Modern Law Review* 216; Nicola Lacey and Hanna Pickard, ‘From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm’ (2013) 33 *Oxford Journal of Legal Studies* 1.

¹⁰¹ Lacey and Pickard (n 46) ‘Blame or Forgive?’

¹⁰² Lacey and Pickard (n 46) ‘Blame or Forgive?’ 684-688.

¹⁰³ Lacey and Pickard (n 46) ‘Blame or Forgive?’ 667-668 (original emphasis).

¹⁰⁴ Though traditional expressivists, and Lacey and Pickard agree on seeing the designation of responsibility as integral to punishment. Duff’s theory tries to reconcile such accounts by targeting punishment – and the censure supposedly inherent within it – at the aims of repentance, reform, and reconciliation. Duff, *Punishment* (n 5) 107-112.

the term. We can conceive of punishment as its own antonym: hard treatment imposed to express blame and no hard treatment imposed to forgive. It is thus little wonder that a precise definition of punishment that can be used to distinguish measures at the boundaries of punitiveness – such as behaviour orders – is so hard to produce. A precise definition would risk being too contested, too inclusive, or too historically contingent to fulfil such a purpose effectively.

Some commentary on punishment either explicitly recognises that it is a malleable concept or necessitates this understanding. A non-expressivist and an expressivist example will be given. Flew described punishment as a ‘vague’ and ‘open-textured’ concept because of difficulties in discerning and applying the definitional elements of punishment.¹⁰⁵ Aware of these conceptual difficulties, but in need of a definition so that he could turn out to his central purpose of examining the justifiability of punishment, Flew proffered the ‘standard’ definition – set out above – based on ‘current usage’.¹⁰⁶ Flew was candid in emphasising:

no philosophical analysis of the meaning of any term worth so analysing can ever leave things exactly as they were—however conservative the intentions and protestations of its protagonists.¹⁰⁷

This claim, as above, was later evidenced by both Benn and Hart who relied on Flew’s definitional work, but did not acknowledge the caveats that surrounded it.¹⁰⁸ Flew was well aware of the conceptual vagaries of punishment, and the problems these could present for defining it. Also, by using the phrase ‘current usage’, he implied support for the meaning of punishment being capable of changing.

¹⁰⁵ Flew (n 9) 291-292. For critical engagement with Flew’s approach, see Scheid (n 4).

¹⁰⁶ Flew (n 9) 292.

¹⁰⁷ Flew (n 9) 293.

¹⁰⁸ Benn (n 9) 325-326; Hart (n 4) 4-6. Flew’s compromise appears to have been reflected in later psychological literature. Maruna and King note that punishment is hard to define, but focus only on hard treatment to avoid getting stuck in the theoretical mire: Shadd Maruna and Anna King, ‘Once a Criminal, Always a Criminal? “Redeemability” and the Psychology of Punitive Public Attitudes’ (2009) 15 *European Journal on Criminal Policy and Research* 7, 9-10.

On the other side of the non-expressivist/expressivist divide, Duff acknowledges a caveat to his definition of punishment:

I do not engage here in the kind of discussion of the definition of punishment that has so exercised some philosophers—a discussion that is doomed to futility if it is intended to produce a definition capturing all and only those practices that properly count as “punishment”, and that must rapidly become a normative discussion of how punishment can be justified if it is to produce a useful account of what we *should* mean by “punishment”.¹⁰⁹

This view shapes Duff’s engagement with legal measures. For instance, Duff argues that criminal mediation *should* be seen as punitive because it is largely in keeping with definitions of punishment and can serve punitive aims.¹¹⁰ Of particular interest is Duff’s view that conceptions not only of mediation, but also punishment should be modified to allow for this.¹¹¹ Duff may not explicitly state that he believes punishment is fluid, but his argument requires it.

Punishment is not a concept with a permanent meaning; instead, it has had changing purposes which have been constructed over changing forms. In consequence, it is little wonder those definitions of punishment offered by penal theorists are so contestable. This begs the question, if punishment is such a fluid and contested concept, is it worth defining at all?

Section IV. Why define punishment?

To suggest that punishment is a fluid and contestable concept cannot be the end of the matter. Punishment may not have a clear definition, but there are two related reasons why a means of dividing punitive and non-punitive measures is needed. First, the direct and possible indirect effects of punishment are serious for the person that is punished. At least

¹⁰⁹ Duff, *Punishment* (n 5) XIV (original emphasis).

¹¹⁰ Duff, *Punishment* (n 5) 96-99.

¹¹¹ Duff, *Punishment* (n 5) 97.

at present in England and Wales, punishment entails hard treatment – fines, community sentences and imprisonment – imposed on the offender and it risks social stigma.¹¹² To say punishment risks social stigma is distinct from saying censure is a definitional element of punishment that can be relied upon to distinguish punitive and non-punitive measures. Social stigma is a risked effect, whereas censure is an inherent part of expressivist definitions of punishment. The risk of social stigma relates to the behaviours – at least at the core of criminal law – which can be punished. To impose hard treatment for having engaged in such behaviour is an invitation for the community to stigmatise because it is prima facie the case that an offender has done something wrongful.¹¹³ To clarify, the point here is not to argue that the community ought to have a role in imposing hard treatment. Instead it is that their response to authoritative findings of prima facie wrongs is a further reason for safeguards against unfair punishment, and, therefore, for a means of discerning whether measures are punitive.

The significant detriments of punishment for the recipient necessitate heightened protection before a punitive measure is imposed.¹¹⁴ This need underlies the fair trial safeguards in criminal cases, such as the presumption of innocence and the right to cross-examine witnesses. In England and Wales, these protections are a fundamental part of the common law and, as detailed in chapter 3, are amongst the specific safeguards for those who face a criminal charge required by article 6(2)-(3) of the European Convention on Human Rights.¹¹⁵

¹¹² On the dehumanisation of offenders leading to their removal from the moral community, see Milica Vasiljevic and Tendayi G Viki, 'Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment' in Paul G Bain, Jeroen Vaes, and Jacques-Philippe Leyens (eds) *Humanness and Dehumanization* (2013 Psychology Press).

¹¹³ It is not necessarily the case that an offender have behaved immorally, Robin Hood comes to mind. Stigma is only *risked*.

¹¹⁴ Though an important reason for heightened safeguards, the risk of punishment is not the only reason. Another is the likely economic disparity between the state and the defendant.

¹¹⁵ See further Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal*

The second reason why a means of dividing punitive and non-punitive measures is needed also relates to the heightened safeguards existing for criminal trials. Absent a means of discerning if a measure is punitive, there is a risk that the state would circumvent the criminal fair trial safeguards. The state would have the prerogative to define ‘punishment’ through what it included and excluded from the criminal law. The danger presented by state control of defining punishment is well established in the case law of the ECtHR and academic commentary.

The ECtHR has developed what has been described as an ‘anti-subversion doctrine’.¹¹⁶ Important terms in the Convention – such as ‘criminal charge’ in article 6¹¹⁷ and ‘penalty’ in article 7¹¹⁸ – have autonomous meanings. This allows the court to appraise the substance of a measure instead of having to rely on how any particular state has labelled it. Human rights protections, such as the heightened fair trial safeguards, would be of little use if states could circumvent them by labelling.¹¹⁹ The ECtHR acknowledged this in *Welch v United Kingdom*:

To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of this provision.¹²⁰

Zedner has argued that courts must play a role in holding government to account when it labels punitive measures as non-punitive:

Justice (3rd edn, 2012 Sweet & Maxwell) ch 3. For an insightful satirical article on widespread preference for not punishing the guilty over punishing the innocent, see Alexander Volokh, ‘N Guilty Men’ (1997) 146 *University of Pennsylvania Law Review* 173.

¹¹⁶ Andrew Ashworth, ‘Social Control and “Anti-social Behaviour”: The Subversion of Human Rights?’ (2004) 120(Apr) *Law Quarterly Review* 263.

¹¹⁷ *Engel v Netherlands* (1976) 1 EHRR 647.

¹¹⁸ *Welch* (n 17).

¹¹⁹ The ECtHR is not alone in having developed a rich case law examining what non-criminal measures are punitive. On the case-law of the United States see Mann (n 3); Steiker (n 6); Zimring (n 3); John C Coffee Jr, ‘Paradigms Lost: The Blurring of the Criminal and Civil Law Models-And What Can Be Done About It’ (1992) 101 *Yale Law Journal* 1875; Abraham S Goldstein, ‘White-Collar Crime and Civil Sanctions’ (1992) 101 *Yale Law Journal* 1895.

¹²⁰ *Welch* (n 17) [27].

Punishment is the most powerful exercise of state authority over citizens so there are good reasons to designate coercive measures as punishment in order to reassert due process and human rights protections.¹²¹

Dripps has commented:

Whether substantive or procedural, these safeguards lose their value if civil sanctions functionally equivalent to the criminal sanction may compete for the malicious, irrational, or politically oppressive uses of the government.¹²²

There is a well-established need to guard against state attempts to punish without heightened fair trial safeguards. If anything, this need is heightened once the fluidity and contestability of punishment are recognised. The lack of conceptual fixity in punishment could give states more discretion to label a measure as non-punitive and thus avoid fair trial safeguards.

The reader may query whether this section jars with section III. If a precise definition of punishment cannot be proffered, can we say unfair punishment poses a serious risk? It is important to clarify initially that the point of section III was not to argue that punishment does not exist, but only that it is hard to define. With this in mind, an animal-centric analogy may be instructive. ‘Dangerous animals’ may be a hard concept to define. Our standards of dangerousness may well change. The phrase itself thus may offer little assistance in deciding if a particular animal, say a swan, is dangerous. However, having some notion of what a dangerous animal is, even if it is shifting, is important so that we can safeguard against the risk they present. Ambiguities in the definition of ‘dangerous animals’ do not mean we should open tigers’ cages. In the same way, ambiguities in the definition of punishment do not mean we should allow the state to impose hard treatment that risks stigmatising people without heightened fair trial safeguards. This section and the previous

¹²¹ Lucia Zedner, ‘Penal Subversions: When is a Punishment Not Punishment, Who Decides and on What Grounds?’ (2016) 20(1) *Theoretical Criminology* 3, 14.

¹²² Donald Dripps, ‘The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction’ (1996) 7 *Journal of Contemporary Legal Issues* 199, 202.

one are not logically inconsistent, but they do present a problem. A means of dividing punitive and non-punitive measures is needed and the capacity of a precise definition to satisfy this need is questionable. The next section appraises whether this need can be fulfilled by an alternative to a precise definition.

Section V. The behaviour-effect-purpose test

I now develop and defend a three-part test of punitiveness, the behaviour-effect-purpose test, to respond to the problem identified at the end of section IV. The test is as follows.

1. Does the measure regulate behaviours that can be subject to the criminal law or that are wrongful?
2. Does the measure affect the recipient in a similar manner to accepted punishments?
3. Does the measure have a punitive purpose?

To encapsulate the malleability of punishment, the consequence of satisfying the test is a compelling reason to consider the measure punitive, as opposed to a definitive conclusion. Likewise, if a measure does not satisfy one or more parts of the test, it should be taken as a compelling reason to view it as non-punitive as opposed to a conclusive classification. This allows scope for the argument that despite satisfying the test, the measure should not be thought of as punitive because of something exceptional about the measure. In practice, the making of such arguments, or at least their success, seems unlikely. Though, and as will be seen, there is also scope for development within the three parts of the test.

The behaviour-effect-purpose test aims to promote clarity in decisions that concern whether measures are punitive, whilst leaving scope for conceptions of punishment to develop. We may not know what we will mean by punishment tomorrow, but we can be clear why a measure is held to be punitive today. The test allows for the grounds on which a decision-maker decides that a measure is punitive or not to be 1. clear in individual cases,

and 2. capable of developing.¹²³ A definition of punishment with a broad element – such as ‘offence’ or ‘censure’ – has the capacity to accommodate the fluidity of punishment, but risks unclarity in how and why exactly a measure is held to be punitive. By comparison, a precise definition would avoid a lack of clarity about what is punitive, but it would do so at the cost of not being able to change as conceptions of what punishment is changed.

So how can the test allow us to steer between the Scylla of vagueness and the Charybdis of fixity? Why a particular decision was made would have to be laid out against the three parts of the test. This would promote clarity as to what factors were taken to be of importance to the judge’s decision to class the measure as punitive or non-punitive. Over time, the interpretation of and relative importance of each part could vary, and this could be laid out by judges in their judgments.¹²⁴ In consequence, understandings of punishment under the test could develop incrementally to reflect conceptions of what it is to punish if and as they change. Be it to flog or to mediate. Be it to blame or to forgive. A bank of case law could develop to allow for the direction of the conceptual evolution of punishment to be documented.¹²⁵

Until this point, the argument in favour of the three-part test may have seemed abstract. It is thus important to note that similar approaches have proven popular in practice. As was explained in chapter 3, the ECtHR in *Welch* established a factor-based approach to punishment.¹²⁶

1. Does the measure follow conviction for a criminal offence?
2. What are the nature and purpose of the measure?
3. How is the measure characterized in domestic law?

¹²³ My focus here is on the judiciary as decision-makers, though the test could equally be relied on in academic writing.

¹²⁴ The ‘courts’ and ‘judges’ are used as general terms because whether the ECtHR or a national court is the preferable body to make such decisions is not engaged with. See Zedner (n 121) 11-14 for consideration of difference in approach between the ECtHR and the House of Lords.

¹²⁵ On the changing conceptions of community sanctions, see Anthony E Bottoms, “‘Punishment’ in Non-custodial Sentences: A Critical Analysis” (2017) 28(3) Criminal Law Forum 563.

¹²⁶ *Welch* (n 17) [28].

4. What procedures are involved in granting and enforcing the measure?
5. How severe is the effect of the measure?

The approach in the United States is also factor-based.¹²⁷ The court first assesses whether the legislature intended the measure to be punitive, and, if no such intention is found, will then assess whether the measure is so punitive in effect to negate the legislature's intent. In assessing whether the effect of the measure is punitive, the court will assess it against five 'guide posts'. The measure:

1. 'has been regarded in our history and traditions as punishment';
2. 'imposes an affirmative disability or restraint';
3. 'promotes the traditional aims of punishment';
4. 'has a rational connection to a non-punitive purpose';
5. 'is excessive with respect to this purpose'.

It will not have escaped the reader's attention that these tests of punitiveness allow for consideration of somewhat different factors. This is unsurprising given they were developed in different jurisdictions at different times. Though such factor-based approaches speak to the functionality of the three-part test defended here, they should not be taken to be finished articles. Instead they show that a test of the type I propose has the advantage of plausible functionality in practice. Steiker has criticized such factor-based approaches as in need of more theoretical substantiation.¹²⁸ Such substantiation is provided by the fluidity of punishment: factor-based approaches can accommodate shifts in what is meant by punishment in a way that precise definitions cannot.

A constitutional challenge to the behaviour-effect-purpose test must be addressed. Zedner has noted that it is 'too simplistic' to say that punishment is the prerogative of the state; to do so just begs the question which limb of the state should decide if a measure is

¹²⁷ The approach outlined here is that detailed by Wayne Logan: 'Challenging the Punitiveness of New-Generation SORN Laws' (2018) 21 *New Criminal Law Review* 426, 440-442. The US Supreme Court's approach to defining 'punishment' has been described as 'divergent and inconsistent' Steiker (n 6) 797. See also Mann (n 3) 1832-1835.

¹²⁸ Steiker (n 6) 799.

punitive.¹²⁹ Zedner suggests there is a need for more explicit work to show which limb of the state ought to have the prerogative to define punishment.¹³⁰ The three-part test empowers a court to determine if measures are punitive. This is constitutionally appropriate. To substantiate this claim, we must first assess the role and interest of different actors in the construction of punishment.

The government, the community¹³¹ and recipients of measures each have a role in shaping conceptions of what it is to punish. Government brings into force measures as either punitive or non-punitive, and they are then interpreted by the community and the recipient as either punitive or non-punitive. This account involves actors central to Garland's engagement with punishment, but gives the community and recipients of measures more proactive roles.¹³² Garland argues that the state is the creator of a social reality through the type of punitive practice they employ, and the offender and the public are audiences to this signifying practice.¹³³ Given the above discussion of the changing forms of punishment, it is doubtful there is something inherent in punitive measures that makes them such signifiers. It is perhaps more plausible that the community and recipients of measures are involved in the construction of what it is to be punitive through their interpretations of measures. Government could thus be understood not as Garland's creators of a social reality, but as advocates of a particular reality with the recipients of measures and the community as assessors of their claims.¹³⁴

¹²⁹ Zedner (n 121) 11.

¹³⁰ Zedner (n 121) 11.

¹³¹ The intention of this reference to the 'community' is not to suggest that every member of the community has equal voice in the construction of punishment. Of course, the process may in practice be controlled by set interest groups. On the particular role and interests of the media, see Garland (n 68) 258.

¹³² Garland (n 68).

¹³³ Garland (n 68) 260-267.

¹³⁴ This conception of punishment as constructed and reconstructed by government, the community, and the recipients of a measures is perhaps analogous to Bottoms and Tankebe's work on legitimacy as a dialogic concept: a 'perpetual discussion' between the state which claims legitimacy and the citizenry who must

An example will help to make this view of the construction of punishment more concrete. A passenger on a train has bought a ticket, but has forgotten their rail card. The ticket inspector notices this and imposes a fee on them in excess of what they would have paid either with or without a rail card. The ticket inspector may have intended this to constitute an administrative fee on the passenger for the extra effort they had to put into providing a valid ticket. However, if the person who has to pay the fee and others in the carriage interpret the measure as a punishment, then it is questionable whether the inspector's construction of social reality should be accepted over their construction. The recipient may think they should be allowed to appeal against the measure as if it was a punishment equivalent to a fine for not having produced a ticket at all (say, by producing their rail card at a later date). Others in the carriage could glower at or refuse to sit beside the person without the rail card. Of course, the inverse situation is also possible wherein the inspector intended the measure to be punitive, but it was instead interpreted as a simple administrative fee. The point here is not to come to a definitive conclusion on whether the fee was punitive, but to indicate how not only the view of the inspector (who represents the state) has a role in constituting a measure as (non)punitive.

Issues arise when the community and/or recipient of a measure interpret its status differently than government had intended (or claimed to have intended): either punitive instead of non-punitive, or non-punitive instead of punitive. It is in such incidences when the court should interpret whether a measure is punitive. The judiciary are the appropriate body to fulfil such an interpretive role. As a matter of practice, they are well versed in assessing whether particular circumstances fit within contested terms such as consent,¹³⁵

constantly assess this claim. Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogical Approach to Legitimacy in Criminal Justice' (2012) 102(1) *Criminal Law and Criminology* 119.

¹³⁵ Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] (5) *Criminal Law Review* 328; Karl Laird, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' [2014] (7) *Criminal Law Review* 492.

dishonesty,¹³⁶ and necessity.¹³⁷ Taking on such a role allows the court to hold government to account if it tries to abuse definitions in pursuit of procedural advantage in proceedings where citizens' liberties are at stake. This is a constitutionally uncontroversial role for the judiciary. As above, both the ECtHR and the Supreme Court of the United States have taken on the role of examining claims of whether a measure is punitive.

Furthermore, there is good reason to preclude the bodies represented in the train example from deciding whether measures are punitive. If a government could decide whether particular measures were punitive, it would be free to circumvent safeguards that ought to precede punishment (the inspector could say the recipient could not appeal the fee). If the recipient decided whether a measure was punitive, they could do the opposite: impose advantageous safeguards when they ought not to be imposed (the passenger could request a right to appeal a simple administrative fee). To allow the community to appraise if a particular measure is punitive risks penal populism (the other passengers might interpret the fee as punitive or non-punitive based on whether the person without their rail card wore a work suit or a tracksuit). In this section, I promote a means to appraise whether measures are punitive that would empower the court significantly. But it empowers the court to decide if a measure is punitive based on the purposes and effects of punishment as constructed by the other bodies mentioned, not to define punishment in the abstract.

Our attention can now turn to detailing the three parts of the behaviour-effect-purpose test. Much of the existing theoretical literature and judicial commentary can be (re)purposed toward developing the current behaviours targeted by, effects of, and purposes of punishment in England and Wales. Of course, others may be of the view that

¹³⁶ Matthew Dyson and Paul Jarvis, 'Poison Ivey or Herbal Tea Leaf?' (2018) 134(Apr) *Law Quarterly Review* 198.

¹³⁷ Simon Gardner, 'Direct Action and the Defence of Necessity' [2005] (5) *Criminal Law Review* 371; Winnie Chan and AP Simester, 'Duress and Necessity: How Many Defences?' [2005] 16(1) *King's Law Journal* 121.

parts of the test ought to be emphasised, added, or removed. If that is the case, they are welcome to respond. I hope that such engagement will promote a strong test of whether measures are punitive. I take each part in turn.

First, does the measure regulate behaviours that can be subject to the criminal law or that are wrongful? Most offences in England and Wales are statutory, with some notable exceptions such as murder and manslaughter. Statutory offences include the very serious such as rape¹³⁸ and the morally contestable, such as assisting suicide.¹³⁹ Many offences are what have been called ‘regulatory’ such as opening a large shop on a Sunday for the serving of retail customers when not for a continuous period of up to six hours between 10am and 6pm.¹⁴⁰ This part also includes reference to ‘wrongful behaviour’ because views on a behaviour may change before it is criminalised or a new behaviour may develop that is seen as wrongful, but that has not been criminalised. If the state-imposed measures with a punitive purpose and effect in response to such behaviour, there is good reason to think punishment has occurred. Where the behaviour regulated is a more serious offence or moral wrong, there is a greater implication that the state response is punitive. To repurpose Boonin’s above example, compare a state-imposed financial cost for a marriage as opposed to for polygamy.

Secondly, does the measure *affect* the recipient in a similar manner to accepted punishments? This factor would allow for consideration of the direct and indirect effects of a measure. Matravers has reflected that, ‘The emphasis we currently give to suffering seems to me to be unhealthy and unreasoned. But, it is not only those things. It is also

¹³⁸ Sexual Offences Act 2003, s 1.

¹³⁹ Suicide Act 1961, s 2.

¹⁴⁰ Sunday Trading Act 1994, sch 1. On what it is to be a regulatory offence, see Rebecca Williams, ‘Criminal Law in England and Wales: Just Another Form of Regulatory Tool?’ in Matthew Dyson and Benjamin Vogel (eds) *The Limits of Criminal Law* (Intersentia 2018) 209-210.

ineffective.’¹⁴¹ Perhaps the effect of punitive measures will soften further in the future. At present however, effects which could, largely, be said to be uncontroversially indicative of punitiveness include imprisonment, financial deprivation, and community sanctions.

Thirdly, does the measure aim to fulfil a punitive *purpose*? Is the measure designed to fulfil a punitive purpose or an unrelated purpose? What are the purposes of punishment? In England and Wales, the purposes of sentencing are set out in section 142 of the Criminal Justice Act 2003 as

1. the punishment of offenders,
2. the reduction of crime (including its reduction by deterrence),
3. the reform and rehabilitation of offenders,
4. the protection of the public, and
5. the making of reparation by offenders to persons affected by their offences.

The purposes of sentencing provide a useful starting point, but further analysis is needed as shown by the inclusion of punishment as a purpose of sentencing. Brief comment on the difference between and relationship of sentencing and punishment is required. Sentencing refers to the imposition of measures on an offender to dispose of a case on conviction.¹⁴² Punishment refers to set measures the imposition of which must be preceded by heightened safeguards such as the presumption of innocence. Core cases of sentencing and punishment are overlapping – imprisonment, fines and community sanctions imposed on conviction for an offence. Away from this core, there are instances of sentencing that are arguably non-punitive such as surcharge orders,¹⁴³ and cases of punishment not imposed on conviction such as penalty notices for disorder.¹⁴⁴ Contextualised as such, the reference to punishment

¹⁴¹ Matravers (n 61).

¹⁴² Section 50 of the Criminal Appeal Act 1968 provides ‘in this Act “sentence”, in relation to an offence, includes any order made by a court when dealing with an offender including, in particular...’ The Law Commission’s report on their Sentencing Code states, ‘We consider that “sentencing” is descriptive of the process by which a person is dealt with for an offence by the court in its response to a conviction’ – Law Commission, *The Sentencing Code Volume I: Report* (Law Com No 382, HC 1724, 2018) para 3.29.

¹⁴³ Criminal Justice Act 2003, ss 161A-161B.

¹⁴⁴ Criminal Justice and Police Act 2001, ss 1-11.

in section 142 can best be understood as the imposition of a proportionate sanction for the commission of an offence. With this in mind, the overlapping core of punishment and sentencing mean we can use the above-listed purposes when assessing whether a measure has a punitive purpose.

As the previous chapter argued, the purposes of a measure can change. In chapter 4, the example of the Scottish Sentencing Council's consultation on the principles and purposes of sentencing was discussed.¹⁴⁵ There the argument ran that a measure can gain or lose a preventive purpose. The consultation also works to reaffirm that the purposes that are associated with punishment can themselves change. The consequence is that a prior finding that a measure is (non)punitive does not mean the measure will remain (non)punitive: the purposes of the measure and/or the purposes associated with punishment may change.

With the three parts of the behaviour-effect-purpose test detailed, an obvious question is are these not the very factors that were described as inappropriate for dividing punitive and non-punitive measures earlier in the chapter? For instance, the critique of Feinberg was the very walls may, but do not necessarily, condemn the person within them. An analogy will prove instructive here. Strong centre backs are a necessary part of a good defence in football, but alone are an insufficient basis to discern that a defence is good. If paired with good full-backs, and an appropriate collective shape, there is a compelling case for a strong defence. In the same manner, an examination against the three parts of the behaviour-effect-purpose is necessary to discern if a measure is punitive, but alone each part is insufficient to achieve this end. Walls alone may not condemn, but there is a compelling case that they do when their imposition is meant to fulfil a punitive purpose

¹⁴⁵ Scottish Sentencing Council, 'Principles and Purposes of Sentencing: A Scottish Sentencing Council Consultation' (2017).

following the commission of an offence. In this sense, the three-part test also advances on *Welch* because the effect of satisfying a part of the test is clearer: each part must be satisfied before there is compelling reason to consider a measure punitive.

The three-part test proposed here is a compromise between the need to have a means of distinguishing punitive and non-punitive measures and acknowledging the conceptual fluidity of punishment. In offering a range of questions, it aims to promote clarity in why a court sees a measure as either punitive or non-punitive. The workings of the test will be developed in the following chapters which apply it to civil, hybrid, and executive behaviour orders.

Section VI. Conclusion

Courts have often employed inconsistent and unsatisfying means of assessing if a measure is punitive. Theorists who work on punishment have often displaced the complexities of defining punishment into difficulties into defining another term such as offence or censure. The behaviour-effect-purpose test established in this chapter is intended to offer a theoretically based and practically applicable means to assess whether measures are punitive. The value of the conceptual analysis in this chapter extends beyond this thesis. The conceptual fluidity of punishment should be of note to those who aim to divide civil and criminal law, and those who seek to justify punishment. If lawyers interested in the civil-criminal divide seek to rely on the concept of punishment as a line in the sand, they ought to acknowledge that this line can itself shift.¹⁴⁶ In other words, they do not neatly categorize what is civil and criminal perpetually through reference to punishment because what exactly we envisage as punishment may change over time.¹⁴⁷ Likewise, theorists who

¹⁴⁶ Jeremy Horder, for instance, suggests that punishment is a 'key factor' when we divide between criminal and civil law: *Ashworth's Principles of Criminal Law* (9th edn, OUP 2019) 2.

¹⁴⁷ For important acknowledgment of this point in Germany see Frank Meyer, 'Propria and Boundaries of Crime and Tort' in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law* (Intersentia 2018)

seek to justify punishment ought to be aware of its fluid and contestable nature. There is a difference between justifying flogging to blame and justifying mediation to forgive. Endeavouring to offer a justification of all possible conceptions of punishment would be hubristic.¹⁴⁸ Those whose interest lies in justifying punishment must be clear about what conception of punishment they seek to justify instead of seeking to defend a fixed, universal conception. Put simply, such a conception does not exist. Perhaps one day elephant duels and quartet recitals will be conceived of as punitive.

108-109. Dyson makes a similar argument that must here be distinguished. Dyson shows that the criminal sphere has taken on more compensatory purposes, and the civil sphere may take on more punitive purposes. My claim is not that the civil and criminal spheres are adopting purposes commonly associated with the other sphere, but that, even if they did not, the divide between them would be uncertain because the meaning of punishment itself is so contestable. Matthew Dyson, 'Overlap, Separation and Hybridity' (n 41) 97-103.

¹⁴⁸ Lacey similarly warns that we must be cognisant of the fact different authors may aim to justify different practices which they both label punishment (n 47) 4.

Chapter 6: Civil Behaviour Orders – the Gang Injunction

This chapter is the first of three in which I assess whether different subcategories of behaviour orders are coercive risk measures and/or punitive. I rely on the conceptions of coercive risk measure and punishment developed in chapters 4 and 5 respectively. This chapter addresses civil behaviour orders, which are behaviour orders granted under civil evidential rules, the breach of which is contempt of court. I focus on the gang injunction because its status as a preventive/punitive measure has been considered recently by the Court of Appeal.¹

Before examining the gang injunction, some context on its rise and the related demise of the anti-social behaviour order (ASBO) is needed. The ASBO was replaced by the anti-social behaviour injunction (ASB injunction) in 2015.² But, before 2015, two cases and one piece of legislation had struck critical blows against the ASBO. In *R (McCann) v Manchester Crown Court* (2002), the House of Lords held that for an ASBO to be imposed, it had to be proven beyond reasonable doubt – rather than on the balance of probabilities – that the person had acted in a manner that caused or was likely to cause harassment, alarm, or distress.³ In an attempt to circumvent this higher evidential standard, Birmingham City Council sought to rely on injunctions to tackle gangs in circumstances where an ASBO would have been available. In *Birmingham City Council v Shafi* (2008), the Court of Appeal rejected this approach, except perhaps in exceptional circumstances, because it ran

¹ *Birmingham City Council v Jones (Secretary of State for the Home Department intervening)* [2018] EWCA Civ 1189, [2019] QB 521.

² Anti-social Behaviour, Crime and Policing Act 2014, s 1. In force from 23 March 2015: Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 8, Saving and Transitional Provisions) Order 2015/373.

³ [2002] UKHL 39, [2003] 1 AC 787. For a detailed assessment of the case, see chapter 3.

contrary to the detailed legislative scheme for the provision of ASBOs and the safeguards of that scheme.⁴

In response to *Shafi*, Parliament enacted section 34 of the Policing and Crime Act 2009 (the 2009 Act) which provided for the gang injunction.⁵ I set out the details of the current law below, but in essence section 34 dropped the evidential standard for imposition from beyond reasonable doubt to the balance of probabilities, and made breach of the injunction a contempt of court as opposed to an offence. This model was effectively copied when the ASBO was later replaced by the ASB injunction. Thus, both the gang injunction and the ASB injunction are responses to the heightened requirements attached to orders to regulate anti-social behaviour developed by the appellate courts. The third civil behaviour order currently in force, the domestic violence protection order (DVPO), has a different form which I will set out below.

The chapter is split into three substantive sections. Section I outlines the 2009 Act, and case law on the gang injunction and relevant government documents. The section also draws comparison with the ASB injunction and the DVPO, and provides detailed commentary on the current law to inform later assessment of whether gang injunctions are coercive risk measures and/or punitive. Section II enquires into whether gang injunctions should be considered punitive. The Court of Appeal engaged with this question in *Birmingham City Council v Jones (Secretary of State for the Home Department intervening)*.⁶ The section considers whether the outcome of that case would have been different if the Court had applied the behaviour-effect-purpose test. The section argues that gang injunctions, and other civil behaviour orders, are not punitive. The section also aims

⁴ [2008] EWCA Civ 1186, [2009] 1 WLR 1961.

⁵ The full name of which is now the injunction to prevent gang-related violence and drug-dealing activity. More detail on the enactment of the gang injunction is provided in chapter 1.

⁶ *Jones* (n 1).

to evidence the relative clarity the behaviour-effect-purpose test brings to assessing punitiveness.

Section III assesses whether the gang injunction should be classed as a coercive risk measure. Coercive risk measures are the subcategory of preventive measures developed in chapter 4 that require both that the recipient satisfies a risk assessment before the measure is imposed and that the measure is coercive. The section argues the gang injunction is a coercive risk measure and develops principled limitations on its imposition that derive from this status. The section thus has the wider value of showing that safeguards on imposing coercive state measures do not have to stem from classifying them as punitive. The section then turns to assess the problematic use of interim civil behaviour orders and suggests two reforms to improve the current law.

Section I. The current law

A local authority or the police can apply for a gang injunction.⁷ A county court or the High Court can then impose a gang injunction on a person aged 14 and over if two imposition requirements are met.⁸ First, the court must be satisfied, on the balance of probabilities, that the person has engaged in, encouraged or assisted either gang-related violence or gang-related drug-dealing activity. Secondly, the court must think it is necessary to grant the injunction to prevent the recipient from engaging in the above-listed behaviours or to protect the recipient from them. These requirements can be satisfied where the respondent does not have a substantial history of gang-related activity.⁹ In addition, there is, no

⁷ Policing and Crime Act 2009, s 34.

⁸ *ibid.*

⁹ *Birmingham City Council v James* [2013] EWCA Civ 552, [2014] 1 WLR 23 [9].

principle of ‘closest fit’ among behaviour orders.¹⁰ In *Birmingham City Council v James*,

Lord Justice Jackson explained

Defence counsel can, of course, invite the first instance court to impose a less draconian order than that which is sought by the applicant. The judge will then exercise his or her discretion to make whatever order seems most appropriate in the circumstances, provided that the statutory conditions are satisfied.¹¹

It is, however, hard to see how the necessity requirement could be satisfied in respect of a more coercive behaviour order if a less coercive intervention was available, all else being equal.¹² More will be said on the necessity requirement below.

Violence or drug-dealing is ‘gang-related’ if it occurs in the course of or relates to the activities of a group of at least three people who have at least one characteristic that allows them to be identified as a group.¹³ Carr, Slowther, and Parkinson have commented that it is ‘difficult...to prove’ that violence or drug-dealing is gang-related.¹⁴ This claim deserves close attention because all three authors are or have been senior police officers.¹⁵ Nonetheless, the claim is open to question. First, the definition of ‘gang-related’ was intentionally broadened in 2015, as will be discussed below. In its statutory guidance, the government explains the definition is ‘intentionally broad and wide-ranging’ due to the variety of gangs in different areas.¹⁶ Secondly, the current definition makes ‘gang-related’ synonymous with ‘group-related’. For instance, three people walking to the golf course together each holding their clubs would satisfy the definition of ‘gang-related’. They are

¹⁰ *ibid* [27]-[31].

¹¹ *ibid* [28].

¹² See, *Terrell* [2007] EWCA Crim 3079, [2008] 2 Cr App R (S) 49 [32]; *Wheller* [2018] EWCA Crim 774 [20]-[24].

¹³ Policing and Crime Act 2009, s 34(5).

¹⁴ Richard Carr, Molly Slothower, and John Parkinson, ‘Do Gang Injunctions Reduce Violent Crime? Four Tests in Merseyside, UK’ (2017) 1(4) *Cambridge Journal of Evidence-Based Policing* 195, 198.

¹⁵ Carr was a detective superintendent with Merseyside Police, Slowther was field manager of West Midlands Police, and Parkinson was Chief Constable of West Yorkshire Police.

¹⁶ Government, *Statutory Guidance: Injunctions to Prevent Gang-Related Violence and Gang-Related Drug Dealing* (revised guidance, May 2016) 7.

three people, walking to their shared activity, golf, and are identifiable as a group due to their clubs. Government guidance does not proffer a means by which to divide gangs from other groups. Instead the statutory guidance only goes so far as to explain that gang injunctions should be used against members of groups that satisfy the definition of ‘gang-related’ and not against those that do not.¹⁷ This is of little use for our hypothetical golfers or anyone else. Thirdly, gang injunctions are issued in civil proceedings. The rules of evidence are more permissive in civil proceeding (for instance, hearsay evidence is generally admissible under section 1(1) of the Civil Evidence Act 1995) and the standard of proof is lower than in criminal proceedings (the balance of probabilities as opposed to beyond reasonable doubt).¹⁸ There is thus good reason to believe that proving an activity is ‘gang-related’ will not be a significant hurdle for applicants.

A gang injunction can contain restrictions and requirements.¹⁹ The restrictions and requirements imposed can be based on the conduct of other gang members.²⁰ Section 35 of the 2009 Act contains a list of indicative restrictions. These include restrictions on access to places, on association, and on wearing particular clothing. A similar list of indicative requirements in the section includes notification duties, to be in particular places at particular times, and to participate in particular activities.²¹ Section 35 does not, however, affect the generality of the restrictions or requirements that can be included in a gang injunction. Government guidance, mindful of the dangers posed by both items, gives the further examples of prohibiting bicycles and clip art.²² A Home Office review of gang

¹⁷ *ibid* 8.

¹⁸ As is acknowledged by the government – *ibid* 20.

¹⁹ Policing and Crime Act 2009, s 34(4).

²⁰ *Murray v Chief Constable of Lancashire* [2015] EWCA Civ 1174 [24]-[34].

²¹ Section 34 specifies that such requirements cannot restrict the respondent to a place for more than eight hours a day.

²² Government, *Injunctions to Prevent Gang-Related Violence and Gang-Related Drug Dealing: A Practitioners’ Guide* (revised guidance, May 2016) 32 and 34.

injunctions in 2014, discussed below, found that the most common restrictions or requirements imposed under the injunction were geographical and association restrictions.²³ This aligns with government guidance for practitioners that recommends both restrictions should be included in every gang injunction.²⁴

A gang injunction can last for up to two years.²⁵ Breach of a restriction or requirement during this period is a contempt of court. The lack of guidance for sentencing such incidences of contempt has attracted judicial criticism. In *Birmingham City Council v Travers*, His Honour Judge McKenna made the point in the context of sentencing for breach of an association restriction.²⁶ His Honour handed down an immediate sentence of 28 days' imprisonment; though the defendant had admitted breach, this was their third breach.²⁷ Further insight into sentencing of breach can be drawn from *Christie v Birmingham City Council* in which the Court of Appeal held 56 days imprisonment for repeated breaches was not, on the facts, excessive.²⁸ The gang injunction has been held to be non-punitive by both the High Court and the Court of Appeal.²⁹ I explore these decisions in detail in the following section.

The 2009 Act provides for a mandatory review hearing of restrictions and/or requirements that last for more than one year.³⁰ Applications can also be made to discharge or vary a gang injunction by the applicant and respondent.³¹ The statutory guidance on the

²³ Home Office, *Review of The Operation of Injunctions to Prevent Gang-Related Violence* (January 2014) 5.

²⁴ Government, *Practitioners' Guide* (n 22) 31.

²⁵ Policing and Crime Act 2009, s 36.

²⁶ [2016] unreported (CC) [6].

²⁷ *ibid* [7].

²⁸ [2016] EWCA Civ 1339 [27].

²⁹ *James* (n 9); *Jones* (n 1).

³⁰ Policing and Crime Act 2009, s 36. The section also sets out a mandatory review hearing for requirements and restrictions that apply to recipients who turn 18 during a gang injunction.

³¹ Policing and Crime Act 2009, s 42.

Act adds that the authority who applied for the injunction should keep the necessity of it under review.³² In addition, guidance to practitioners states the applicant should monitor whether the recipient of the injunction is receiving sufficient support.³³ Such steps in law and government guidance to keep the continued utility of gang injunctions under review are to be commended because risk can vary over time.³⁴ I will revisit this point in chapter 8 when I examine the public spaces protection order, which is significantly harder to review.

The scope of the current law is the result of important amendments made by the Crime and Security Act 2010 and the Serious Crime Act 2015. The 2010 amendments made the gang injunction available for use on 14 to 17-year olds.³⁵ The 2015 Act broadened the definition of ‘gang-related’.³⁶ Previously, it was defined as a group that consisted of at least three people, who shared a name, colour, emblem or other characteristic that allowed them to be identified as a group, and who were associated with a particular area. The 2015 amendments also extended the behaviours targeted by the injunction to include gang-related drug-dealing.³⁷ The extension followed the 2014 Home Office review that had found officials considered the requirements to impose a gang injunction too hard to satisfy.³⁸ This is the same concern that led to the introduction of a gang injunction in the first place.

³² Government, *Statutory Guidance* (n 16) 38.

³³ Government, *Practitioners’ Guide* (n 22) 50.

³⁴ For comment on the fluidity of risk and the criminal process, see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 123-125.

³⁵ Crime and Security Act 2010, s 34. The section itself is no longer in force; it was consolidated into the later 2015 Amendments.

³⁶ Policing and Crime Act 2009, s 34, as amended by Serious Crime Act 2015, s 51.

³⁷ *ibid.*

³⁸ Home Office, *Review* (n 23) 5.

Turning next to the ASB injunction and the DVPO, the ASB injunction is very similar in structure to the gang injunction. A county court or the High Court may grant an ASB injunction if two requirements are met.³⁹ First, the court must be ‘satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.’ Secondly, ‘the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.’ As with the gang injunction, the ASB injunction can impose restrictions or requirements on the recipient, and breach constitutes a contempt of court. Whereas the gang injunction was initially a replacement for the ASBO in the sphere of gang-related violence, the ASB injunction is a more general replacement. There is, however, an overlap in the behaviours that can be targeted by the injunctions. For instance, in *Birmingham City Council v Jones* both a gang injunction and ASB injunction were sought on the same facts.⁴⁰

An important difference between the gang injunction and the ASB injunction is in the formulation of the second imposition requirement. Whereas the gang injunction parallels the ASBO’s use of the necessity standard, the ASB injunction imposes only a ‘just and convenient’ standard. The High Court has considered a similar change in a case that concerned the criminal behaviour order, the order that replaced the ASBO on conviction.⁴¹ In that case, the standard had changed from necessity under the ASBO to the court considers the order ‘will help’ to prevent the offender from engaging in anti-social behaviour under the criminal behaviour order.⁴² The High Court held that Parliament’s removal of the necessity standard lowered the hurdle for making an order, but ‘the lowering

³⁹ Anti-social Behaviour, Crime and Policing Act 2014, s 1.

⁴⁰ *Jones* (n 1) [4]-[5].

⁴¹ Anti-social Behaviour, Crime and Policing Act 2014, s 22. The criminal behaviour order is considered further in the next chapter.

⁴² Anti-social Behaviour, Crime and Policing Act 2014, s 22(4).

of the hurdle [did not] change the nature of the exercise.⁴³ It is to be presumed that the same holds true for the ASB injunction.

The final civil behaviour order, the DVPO, differs from the gang injunction model. The DVPO was enacted by section 27 of the Crime and Security Act 2010. The order can only be granted following the issue of a domestic violence protection notice by the police.⁴⁴ A magistrates' court must hear an application for a DVPO within 48 hours of the issue of such a notice.⁴⁵ Despite the role of the police in granting the notice, the DVPO is not an executive behaviour order because the hearing for a DVPO is a substantive hearing, not a post hoc review of the police officer's decision to issue a notice.⁴⁶ At this substantive hearing two imposition requirements need to be satisfied. The court must be satisfied, on the balance of probabilities, the respondent has 'been violent towards, or has threatened violence towards, an associated person.' The court must also hold that a DVPO is necessary to protect that associated person from violence or the threat thereof from the respondent.⁴⁷

The DVPO can also contain both restrictions and requirements.⁴⁸ A DVPO can only be imposed for between 14 and 28 days.⁴⁹ This limitation reflects the purpose of the DVPO: to provide time and space for the associated person to consider a longer-term remedy.⁵⁰ The order itself is not intended to be a long-term solution. Breach of a restriction or requirement constitutes a contempt of court. However, sentencing for contempt by breach

⁴³ *DPP v Bulmer* [2015] EWHC 2323 (Admin), [2015] 1 WLR 5159 [32].

⁴⁴ For discussion of domestic violence protection notices, see Claire Bessant, 'Protecting Victims of Domestic Violence - Have we got the Balance Right?' (2015) 79(2) *Journal of Criminal Law* 102.

⁴⁵ Crime and Security Act 2010, s 27(3).

⁴⁶ Executive behaviour orders are those behaviour orders imposed by a state body with little or no judicial oversight, the breach of which is an offence. They are the subject of chapter 8.

⁴⁷ Section 28(4) also outlines other factors that must be considered by the court when it assesses whether a DVPO should be imposed.

⁴⁸ Crime and Security Act 2010, s 28(7)-(8).

⁴⁹ Crime and Security Act 2010, s 28(10)(a)-(b).

⁵⁰ Home Office, *Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) Guidance* (2016) para 2.3.

of a DVPO differs from sentencing breach of the other civil behaviour orders because it is dealt with in the magistrates' court, not the county court. As such, section 63 of the Magistrates' Court Act 1980 has effect. The section limits the maximum period of imprisonment a magistrate may impose for contempt to two months in custody. Added to this, the duty on the Secretary of State to release contemnors held halfway through their sentence applies to sentences imposed in the magistrates' court.⁵¹ The cumulative effect is that a person in contempt of a DVPO can be imprisoned for a maximum of one month.

Section II. The gang injunction as a punitive measure?

In *Chief Constable of Lancashire v Wilson*, the High Court held that the imposition of a gang injunction did not constitute a penalty.⁵² The Court of Appeal, in *Jones*, reached the same conclusion.⁵³ Would a different outcome have been reached if the behaviour-effect-purpose test of punitiveness had been applied by the courts? Before I address this question, the reasoning of the High Court and Court of Appeal must be detailed.

The respondents in *Wilson* submitted that the proceedings for the issue of a gang injunction constituted a criminal charge and therefore the balance of probabilities standard set out in statute was incompatible with the heightened fair trial standards demanded in criminal proceedings. The respondents also maintained that hearsay evidence admissible under the Civil Evidence Act 1995 would not be admissible under the Criminal Justice Act 2003 and the Coroners and Justice Act 2009 if the proceedings for grant were found to be criminal.⁵⁴ The submissions thus echoed those made in *McCann*.⁵⁵ Giving judgment, Mr

⁵¹ Criminal Justice Act 2003, s 258(2).

⁵² [2015] EWHC 2763 [58].

⁵³ *Jones* (n 1) [38].

⁵⁴ A second issue in both *Wilson* and *Jones* was if the injunction is not a penalty, should the evidential standard for imposition, nonetheless, be beyond reasonable doubt? I address this point elsewhere: Rory Kelly, 'Reconsidering the Punishment-Prevention Divide' (2019) 135(Jan) Law Quarterly Review 12, 15-17.

⁵⁵ For detailed consideration of the reasoning in *McCann* (n 3), see chapter 3.

Justice Kerr provided three central reasons why the proceedings did not constitute a criminal charge.⁵⁶ First, the fact ‘very many’ of the cases would involve conduct that may be criminal is not decisive. Secondly, the leading cases on article 6 are *Guzzardi v Italy* and the decisions that followed it.⁵⁷ These authorities divide between prevention and punishment, and the gang injunction is preventive. Thirdly, the purpose of an injunction is preventive, and cannot lawfully be punitive.

An appeal in *Wilson* was discontinued for reasons unconnected to the legal merits of the case.⁵⁸ The later judgment of the Court of Appeal in *Jones*, however, addressed the same point. *Jones* is of particular significance for this chapter because it also addressed whether the ASB injunction constitutes a penalty. Sir Brian Leveson P gave judgment and held that neither injunction was a penalty. In keeping with *Wilson*, the President found that criminal behaviour is not necessary for the imposition of a gang injunction.⁵⁹ The President also acknowledged that a measure is not necessarily punitive because the relevant conduct is criminal.⁶⁰ The judgment in *Jones* again relied on the *Guzzardi* line of European Court of Human Rights case law to distinguish between preventive measures and punitive measures. With this divide drawn, the President, somewhat inevitably, found the gang injunction and the ASB injunction were not punitive and, thus, proceedings for them were not in respect of a criminal charge.

Would the judgments in *Wilson* and *Jones* have differed if the courts applied the behaviour-effect-purpose test? The test is as follows.

1. Does the measure regulate behaviours that can be subject to the criminal law or that are wrongful?

⁵⁶ *Wilson* (n 52) [58].

⁵⁷ (1981) 3 EHRR 333. This line of case law is detailed and critiqued in chapter 3.

⁵⁸ *Jones* (n 1) [10].

⁵⁹ *Jones* (n 1) [33].

⁶⁰ *Jones* (n 1) [34].

2. Does the measure affect the recipient in a similar manner to accepted punishments?
3. Does the measure have a punitive purpose?

If the response to each of these questions is positive, there is a compelling case that the measure is punitive.

If the response to one or more of these questions is negative, there is a compelling case that the measure is not punitive.

First, we must assess whether the behaviours regulated by the gang injunction can be subject to the criminal law (or if they are wrongful despite not fitting within the criminal law). Section 34 was enacted and amended to respond to gang-related violence and gang-related drug-dealing (or encouraging or assisting these behaviours). Violence extends to threats of violence, and drug-dealing includes unlawful production, supply, importation or exportation of a controlled drug, or psychoactive substance.⁶¹ When the courts consider the imposition of gang injunctions, they are very aware of the overlap between the behaviours at issue and the criminal law. Sir Brian Leveson P's introductory comments in *Jones*, provide a useful example:

Gang-related violence and the resulting public disorder have become a scourge which affects many cities. It may flow from drug dealing but is not unusually accompanied by the discharge of firearms or other acts of extreme violence directed at members of other gangs such that entirely innocent members of the public can become caught up in the cross fire.⁶²

At its core, the behaviour targeted by the gang injunction is criminal and these behaviours include serious offences.

Government guidance also emphasises the significant overlap between behaviours that can underlie an application for a gang injunction and criminal offences. It does so by proffering gang injunctions as an alternative to prosecution when evidential issues arise. Guidance to practitioners provides an example of a gang alleged to have committed two murders and a litany of other serious offences whose prosecution was inhibited by the

⁶¹ Policing and Crime Act 2009, s 34(6)-(7).

⁶² *Jones* (n 1) [1].

reluctance of witnesses to give evidence.⁶³ The police instead pursued the gang injunction successfully and custodial sentences for breach were later imposed.

To be clear, the gang injunction can also regulate behaviours that may not come within the criminal law. In *Birmingham City Council v James*, the relevant conduct was walking in a large group in a park that another gang considered to be its territory.⁶⁴ Likewise, in *Jones*, counsel for the Secretary of State gave the example of intentionally provoking another gang by making fun of its members on social media.⁶⁵ Yet Mr Justice Kerr held, ‘in very many, if not most cases, the conduct alleged against the respondents in an injunction under section 34 is likely to be criminal...’⁶⁶ Mr Justice Kerr continues to state, correctly, that the fact the conduct at issue ‘may very well be, and probably will be, criminal is not of itself decisive’ to the question of whether there has been a criminal charge.⁶⁷ Sir Brian Leveson P’s example, in *Jones*, of civil damages for an accident that could also amount to a road traffic offence is a good one.⁶⁸ My claim is not that the targeting of behaviours that may be regulated by criminal offences is sufficient to evidence that gang injunctions are punitive. Instead the fact gang injunctions are very likely to target behaviours that constitute criminal offences means they satisfy the first part of the behaviour-effect-purpose test: an important, but not sufficient condition of punitiveness.

The immediate effects of a gang injunction on the recipient are the limiting restrictions and the requirements that compel them to act in particular ways. As above, these restrictions and requirements can vary significantly, but the most common are non-

⁶³ Government, *Practitioners’ Guide* (n 22) 7. See also Government, *Statutory Guidance* (n 16) 9.

⁶⁴ The non-criminal nature of this conduct was emphasized in submissions by Mr Cohen: *Wilson* (n 52) [55].

⁶⁵ *Jones* (n 1) [28].

⁶⁶ *Wilson* (n 52) [58].

⁶⁷ *Wilson* (n 52) [58].

⁶⁸ *Jones* (n 1) [37].

association requirements and geographical restrictions.⁶⁹ The cumulative effect of such restrictions and requirements is doubtless burdensome on the recipient. A comment made by Mr Justice Kerr in *Wilson* offers important insight into the restrictions and requirements imposed under gang injunctions:

The types of injunction available under the 2009 Act are very similar to and no doubt derived from the provisions in section 177 of the Criminal Justice Act 2003 (and surrounding provisions), providing for community penalties where a person is convicted under the criminal law.⁷⁰

The restrictions and requirements that can be imposed under gang injunctions are not only serious, but are similar to and appear to be derived from restrictions and requirements that can be imposed under measures that are accepted to be punitive: community orders and suspended sentences.⁷¹

The similarities between the restrictions and requirements that may be imposed by gang injunctions and community orders should not, however, be overstated. Community orders must contain only one requirement or restriction imposed for the purposes of punishment and/or must be imposed with a fine.⁷² In 2017, almost half of both community orders and suspended sentences contained an unpaid work requirement.⁷³ Sentencing Council guidelines provide the low seriousness community order band can attract 40–80 hours unpaid work and the high band can attract 150–300 hours work.⁷⁴ The Ministry of

⁶⁹ Home Office, *Review* (n 23) 5.

⁷⁰ *Wilson* (n 52) [34].

⁷¹ The conditions that may be imposed under suspended sentences reflect those available for community orders: Criminal Justice Act 2003, s 190.

⁷² Criminal Justice Act 2003, s 177.

⁷³ Ministry of Justice, *Offender Management Statistics Quarterly: October to December 2017* (Probation Statistics 2017, table A4.10, 2018). For comment on suspended sentences, Keir Irwin-Rogers and Julian V Roberts, 'Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000–2017' (2019) 82(1) *Law and Contemporary Problems* 137, 150. For comment on community orders, Catherine Heard, 'Community Sentences Since 2000: How they Work – and Why they Have Not Cut Prisoner Numbers' (Centre for Crime and Justice Studies 2015) 57.

⁷⁴ Sentencing Council, *Imposition of Community and Custodial Sentences: Definitive Guideline* (2016) 4.

Justice envisioned that the unpaid work requirement would act as a punitive aspect of community orders,⁷⁵ and it has been interpreted as such by recipients.⁷⁶ By comparison, only one reported case, *Wilson*, that concerns the imposition of a gang injunction references unpaid work.⁷⁷ Mr Justice Kerr uses the imposition of an unpaid work requirement for punitive purposes as a hypothetical example of the *misuse* of a gang injunction.⁷⁸ Though there is scope for total overlap between the restrictions and requirements that may be imposed under community orders and gang injunctions, in practice one of the most salient punitive aspects of the former is not included in the latter.

A gang injunction can also have wider consequences for the recipient than its restrictions and requirements. Government guidance rightly sets out that the imposition of a gang injunction does not result in a criminal record.⁷⁹ Yet the imposition is stored on the Police National Computer and can be disclosed on an enhanced Disclosure and Barring Service check.⁸⁰ The Disclosure and Barring Service processes requests for criminal records and other information that certain employers may require.⁸¹ Employment that may necessitate an enhanced check includes practising medicine or as a solicitor, and teaching. In addition, gang injunctions are reported in the media.⁸² Statutory guidance provides both

⁷⁵ Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (2010) para 129.

⁷⁶ George Mair and Helen Mills, 'The Community Order and the Suspended Sentence Order Three Years on: The Views and Experiences of Probation Officers and Offenders' (Centre for Crime and Justice Studies 2009) 35-36.

⁷⁷ I searched for "gang injunction" AND "unpaid work" in a free text Westlaw case search on 16 June 2019. There were two results. The other result only mentioned a gang injunction as a contextual factor in a sentence that was appealed: *Jones* [2016] EWCA Crim 157 [4].

⁷⁸ *Wilson* (n 52) [59].

⁷⁹ Government, *Statutory Guidance* (n 16) 46.

⁸⁰ Government, *Statutory Guidance* (n 16) 37.

⁸¹ See further, Disclosure and Barring Service, 'What the Disclosure and Barring Service Does' (*gov.uk*) <<https://www.gov.uk/government/organisations/disclosure-and-barring-service>> accessed 7 June 2019.

⁸² By way of example, 'Bandana Ban for West Yorkshire "Prolific Criminals"' (*BBC News*, 22 November 2018) <<https://www.bbc.co.uk/news/uk-england-leeds-46308025>> accessed 15 April 2019.

that press releases should name individuals and the restrictions/requirements imposed on them, and that such releases can serve deterrence and enforcement functions.⁸³ The imposition of a gang injunction may risk attracting stigma in the same way as conviction and punishment for an offence. As such, the imposition of a gang injunction may have wider consequences, including possible limitations on employment and stigma, comparable to those of punishment.⁸⁴

At first glance, the effects of breaching a gang injunction and a community order or suspended sentence appear similar. Each breach can result in imprisonment, the maximum sentence for breach of a community order can be six months even where the initial offence was non-imprisonable,⁸⁵ for a gang injunction it is two years, and for a suspended sentence it is full activation of the initial custodial period.⁸⁶ In addition, judges reference Sentencing Council guidelines when they impose sentences for contempt of court.⁸⁷ This could lead to the conclusion that when we strip away labels such as ‘civil’ and ‘criminal’, and ‘prevention’ and ‘punishment’, the effects of breaching a gang injunction and of breaching measures accepted as punitive are very similar, if not the same. However, two differences must be noted. First, the concept of a ‘proportionate sentence’ has a different meaning in contempt proceedings than when sentencing for an offence. The sufficiency of a punishment for contempt is assessed against whether it will result in the contemnor

⁸³ Government, *Statutory Guidance* (n 16) 48.

⁸⁴ For important work on the collateral consequences of conviction, see Zachary Hoskins, *Beyond Punishment? A Normative Account of the Collateral Legal Consequences of Conviction* (OUP 2019); Zachary Hoskins, ‘Criminalization and the Collateral Consequences of Conviction’ (2018) 12(4) *Criminal Law and Philosophy* 625.

⁸⁵ For the detail of sentences available on breach of a community order, see Criminal Justice Act 2003, sch 8.

⁸⁶ Criminal Justice Act 2003, sch 12 para 8.

⁸⁷ *Wolverhampton City Council v Taylor* 2016 EWHC 878 (QB) [9]; *Gill v Birmingham City Council* [2016] EWCA Civ 608, [2016] HLR 29 [12] and [22]; *Isos Housing v Lawson* [2014] Ew Misc B42 (CC) [5].

accepting their guilt, being ‘genuinely sorry’ and repenting.⁸⁸ This is a forward-looking exercise, which contrasts with proportionality in sentencing for an offence, which focuses on the seriousness of the offence done. Secondly, a contemnor retains the capacity to purge their contempt.⁸⁹

The outcome of the application of the second part of the behaviour-effect-purpose test is partially positive and partially negative. The effects of a gang injunction can, and often will, be burdensome for the recipient. But there are important differences between the effects of gang injunctions and measures accepted as punitive both in terms of the restrictions and requirements imposed by the injunction and the effects of breach. To suggest that the imposition of a gang injunction had punitive effects would require an extension to our conception of what effects are punitive, though perhaps not a significant one. As such, much turns on whether the gang injunction fulfils a punitive purpose.

The gang injunction has a preventive purpose. References to this purpose and specific types of preventive purpose – disruption and deterrence,⁹⁰ protection,⁹¹ and rehabilitation⁹² – abound in government literature. More importantly, the preventive aspirations of the injunction are made clear in the imposition requirements in section 34 of the 2009 Act. Further, the full name of the injunction given in the section is ‘the injunction *to prevent gang-related violence and drug-dealing activity*’.⁹³ Punishment too has preventive purposes: the purposes of sentencing listed in section 142 of the Criminal Justice Act 2003 include crime reduction including by deterrence; reform and rehabilitation of offenders;

⁸⁸ *CJ v Flintshire BC* [2010] EWCA Civ 393, [2010] CP Rep 36 [28] (Aitkens LJ). Endorsed in *Swindon BC v Webb (t/a Protective Coatings)* [2016] EWCA Civ 152, [2016] 1 WLR 3301 [36] (Tomlinson LJ).

⁸⁹ For further details on purging contempt, see chapter 2.

⁹⁰ Government, *Practitioners’ Guide* (n 22) 7.

⁹¹ Home Office, *Review* (n 23) 3.

⁹² Government, *Statutory Guidance* (n 16) 13.

⁹³ (Emphasis added).

and public protection. Nevertheless, as chapter 4 emphasised, there is a large range of legal measures and practices which have a preventive purpose be it taxation or state surveillance.⁹⁴

Does the gang injunction also have a retributivist purpose? Three plausible arguments can be put forward in favour of gang injunctions having such a purpose. The first is structural. Past action is a prerequisite to the imposition of a gang injunction be it gang-related violence or drug-dealing or encouraging or assisting either of these behaviours. If the injunction is solely a preventive tool, why is a past act (and, in particular, past wrongdoing) an imposition requirement? Added to this, the past act requirement has evidential priority over the forward-looking imposition requirement. Whereas the past act must be shown to have occurred on the balance of probabilities, the necessity requirement does not attract an evidential standard – it is instead a matter for judicial assessment. A past action requirement, though, does not necessitate that the gang injunction has a backward-looking purpose. The example of taxation is again instructive. Tax follows an act such as earning a particular income. It can also follow from behaviour that may be thought of as wrongful such as the imposition of a carbon tax on polluters. But tax is a non-punitive preventive measure.

The gang injunction could also be argued to have a retributivist purpose because it is an alternative to prosecution. But the fact an injunction is a procedural alternative to prosecution, does not mean these two procedures share purposes. If the library is closed, I may go to the gym instead, this does not mean both institutions have a common purpose. Thirdly, government employs the language of ‘victims’ throughout its guidance to practitioners and its statutory guidance on gang injunctions.⁹⁵ This language cannot be

⁹⁴ For sources, further examples, and discussion, see chapter 4.

⁹⁵ Government, *Practitioners’ Guide* (n 22); Government, *Statutory Guidance* (n 16).

taken to suggest the gang injunction has a retributivist purpose because the language of victimhood is not reserved for criminal matters and punishment. It is, for example, also used in tort law.⁹⁶

The gang injunction responds to past acts/offences, is an alternative to prosecution, and is imbedded in a policy context focused on victims. This is not sufficient to show the gang injunction has a retributivist purpose. Even when these three points are taken together, it is not obvious that the gang injunction has a retributivist purpose. The gang injunction shares some purposes with punishment, but it does not have a purpose that is necessarily punitive. As such, the third part of the behaviour-effect-purpose test also does not attract a wholly positive answer. As our answers to two parts of the test are partly negative, there is not a compelling case that the gang injunction is punitive. This is not to say the injunction is unproblematic.

One could query whether my dismissal of the retributivist case licenses a government to circumvent fair trial safeguards. Let us assume the worst. Let us assume that the government wants to impose coercive measures on alleged gang-members without heightened fair trial safeguards and with little interest in their preventive efficacy. The fact that a government sought to avoid fair trial safeguards orientated to punishment does not mean those safeguards should apply. Gang injunctions could constitute a misuse of state coercive power without also constituting a punishment. This misuse could be based on the absence of appropriate safeguards tailored to the injunction's status as a coercive risk measure, as will be argued below. The fact state coercion without sufficient safeguards is problematic does not make it punitive.

⁹⁶ See, by way of example, Michael A Jones, Anthony M Dugdale, and Mark Simpson (eds), *Clerk & Lindsell on Torts* (21st edn, 2014 Sweet & Maxwell) paras 1.09-1-1.10.

Even if we should not label gang injunctions punitive, there is still the possibility that a particular gang injunction will be punitive. By way of analogy, bricks as a class may not be considered a weapon, but a brick can certainly be a weapon. The distinction between gang injunctions as a collective and a particular gang injunction was well made by Kerr J in *Wilson*.

I recognise that there may be a danger of the regime being operated in practice in a punitive manner if it is wrongly and not correctly applied. For example if, hypothetically, a judge were to impose an unpaid work requirement as retribution and punishment for taking part in gang-related drug-dealing, that would be wrong and unlawful. If that were to happen, the judge would proceed upon a misdirection as to the law. It is not what the statutory scheme provides for. In a case, for example, where activities are required under an injunction, they must be activities that are considered necessary for either or both of the statutory purposes of prevention and protection.⁹⁷

There is also the possibility that the labelling of the gang injunction should change from non-punitive to punitive in the future. This could occur if either the conception of punishment shifts (as was discussed in chapter 5), or if the form or content of the gang injunction changes. The latter point is not merely a hypothetical. In the United States, sexual offender registration and notification was classed as non-punitive by the United States Supreme Court, but numerous state supreme courts have recently been more willing to label registration and notification punitive because these laws have become more onerous and more is now known of the social consequences of regulation and notification.⁹⁸ If future gang injunctions either standardly included an unpaid work requirement, or there were appellate dicta that limited the purging of contempt, it would support the argument that the gang injunction had become punitive.

Given the structural similarity of the ASB injunction and the gang injunction, there is little reason to think we should think of the former as punitive if the latter is not. Although

⁹⁷ *Wilson* (n 52) [59].

⁹⁸ For an excellent analysis, see Wayne A Logan, 'Challenging the Punitiveness of "New-Generation" SORN Laws' (2018) 21(3) *New Criminal Law Review* 426.

two differences must be noted briefly. First, the behaviours the ASB injunction targets have a less substantial overlap with those targeted by the criminal law, which would point away from the test being satisfied. Secondly, there is government literature that suggests the injunction and other behaviour orders that target anti-social behaviour are punitive.⁹⁹ This literature is examined in the next chapter. Similarly, two points on the DVPO must be addressed. First, the purposes of the DVPO differ from present types of punishment because of the interim nature of the measure. The measure can only be imposed for very limited periods,¹⁰⁰ and is intended to allow time and space for further redress, be it in the form of a punitive response or otherwise.¹⁰¹ In addition, the effects of breaching a DVPO cannot be as burdensome as breach of the other civil behaviour orders.¹⁰² As such, the case for considering the DVPO to be punitive is weaker than that for the gang injunction or the ASB injunction.

Others may view gang injunctions, or other civil behaviour orders, as punitive.¹⁰³ Such disagreement is to be expected. Even if we have an agreed framework by which to assess whether various orders are punitive, there will be scope for legitimate disagreement as to how particular orders are classified. As discussed in chapter 5, punishment is a fluid and contestable term. My goals in this section have been, first, to show there is a strong case for the gang injunction to be regarded as non-punitive and, secondly, to show how the behaviour-effect-purpose test can bring more clarity to this assessment than the approaches so far adopted in the case law. Regardless of whether one accepts that gang injunctions are

⁹⁹ Government, 'Punishments for Antisocial Behaviour' (*gov.uk*) <<https://www.gov.uk/civil-injunctions-criminal-behaviour-orders>> accessed 15 April 2019.

¹⁰⁰ Crime and Security Act 2010, s 28(10)(a)-(b).

¹⁰¹ Home Office, *DVPN DVPO* (n 50) para 2.3.

¹⁰² Magistrates' Courts Act 1980, s 63.

¹⁰³ See, for instance, Liberty, 'Liberty's Report Stage Briefing on the Anti-social Behaviour, Crime and Policing Bill in the House of Commons' (Liberty October 2013) 17.

non-punitive, the behaviour-effect-purpose test is an advance on the false binary between punishment and prevention relied on in the High Court and Court of Appeal. Better disagreement based on clarity than agreement based on unclarity.¹⁰⁴

Section III. The gang injunction as a coercive risk measure?

For the gang injunction to constitute a coercive risk measure, it must satisfy the following criteria.

1. The measure is a preventive measure.
 - a) It is imposed before a possible harm.
 - b) With the purpose of avoiding the harm, reducing the likelihood of it occurring, or reducing its severity if it does occur.
2. An assessment of the risk posed by the individual must be undertaken and satisfied before the measure can be imposed.
3. The measure is coercive.

Does the gang injunction fit into the broader preventive measure category? The gang injunction can only be imposed where it is necessary to prevent a relevant harm, and, therefore, it satisfies 1(a). The gang injunction also has a clear preventive purpose, as per 1(b), this will be apparent from the discussion of the 2009 Act, case law and government literature above. In addition, a risk assessment must be satisfied before a gang injunction can be imposed, as per 2. This is less obvious on the face of the statute, but for it to be necessary to impose the injunction, the recipient must be considered by the court to impose some level of risk.¹⁰⁵ Finally, there is little doubt the gang injunction is coercive, as per 3, given the requirements and restrictions it can impose, the risk of imprisonment on breach, and the wider effect of imposing the injunction. The gang injunction is, therefore, a coercive risk measure. As acknowledged in chapter 4, it is easier to establish whether a

¹⁰⁴ For more on this false binary, see the discussion of the ‘either or fallacy’ in chapter 9.

¹⁰⁵ I am unaware of any cases where a gang injunction has been granted solely to protect the recipient.

measure is a coercive risk measure than it is to establish whether it is punitive. The difficulty lies in discerning what safeguards, if any, should follow this classification.

The gang injunction case law and relevant government literature emphasise one point above all others: the justificatory basis of the injunction and its legal framework centre on the prevention of gang-related violence and drug-dealing.¹⁰⁶ This invites an obvious question, does the gang injunction have preventive efficacy? This question is central to the case I make for a bolstered necessity requirement that should apply before behaviour orders are imposed.¹⁰⁷ Section 50 of the 2009 Act obliges the Secretary of State to undertake a review of gang injunctions. This review was published in 2014, but it is of limited use for assessing the efficacy of gang injunctions. The review sought to establish practitioners' experiences of applying for and using the gang injunction, not the efficacy of the injunction itself.¹⁰⁸ More useful for present purposes is a study by Carr, Slothower and Parkinson that examined whether gang injunctions issued in Merseyside over a 24-month period reduced the frequency and harm of crimes committed by recipients and reduced the recipients' victimisation too. The study found that, relative to the 36-months before the imposition of gang injunctions, crime fell across all three measures.¹⁰⁹

Although clearly important, the Carr study is not the end of the matter. The study provides evidence of the effectiveness of gang injunctions, but it does not conclusively answer the question of whether it is necessary to impose an injunction on a particular

¹⁰⁶ If a further source is needed on this point, see the Explanatory Notes to the Policing and Crime Act 2009 para 13.

¹⁰⁷ An exception will be discussed in chapter 8.

¹⁰⁸ Home Office, *Review* (n 23) 4-5.

¹⁰⁹ Carr, Slothower and Parkinson (n 14) 207. These findings contrast markedly with the absence of clear positive findings in the United States where Werdager has noted, 'there is no real evidence that gang injunctions actually work.' Matthew Mickle Werdager, 'Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions against Urban Street Gangs' (1999) 51 *Stanford Law Review* 409, 444. For a more recent examination of available research, see Beth Caldwell, 'Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions' (2010) 37 *American Journal of Criminal Law* 241, 257-261.

respondent.¹¹⁰ A comparison will be useful. A parent must consider whether it is necessary to ground their teenager to stop them playing their games console excessively. To establish if it is necessary, the parent would have to know at least two things. First, whether their teenager was likely to play the console excessively, and, secondly, whether grounding them could stop them playing it.¹¹¹ It would be insufficient to know that grounding works because the teenager may not present any risk of playing the console excessively. Likewise, even if gang injunctions work, we also need to know whether a particular respondent presents a sufficient risk of engaging in relevant gang-related conduct before we can say an injunction is necessary in a particular case. This leads to an important question: how good are we at assessing the risk of (re)offending?

Slobogin claims that a risk assessment tool will be ‘state of the art’ if it can ‘reliably differentiate between groups with 60% and 10% recidivism rates, and whose high-risk group includes only 40% non-recidivists and whose low risk group includes only 10% recidivism rates’.¹¹² In other words, 2/5 members in the high-risk group of the best tools will not offend and 1/10 of the low risk group will offend. These figures, however, cannot be assessed in isolation.¹¹³ The efficacy of risk assessment tools is affected by how they are applied in practice. Practitioners have significant discretion to affect risk scores through

¹¹⁰ If the Carr study had shown the gang injunction did not work, it would take substantial evidence to later show a particular injunction was necessary.

¹¹¹ The parent would likely also need further information such as whether a less severe intervention would work.

¹¹² Christopher Slobogin, ‘Principles of Risk Assessment: Sentencing and Policing’ (2018) 15 *Ohio State Journal of Criminal Law* 583, 584.

¹¹³ There has recently been strong criticism of the efficacy of risk assessment tools by computer scientists: Julia Dressel and Hany Farid, ‘The Accuracy, Fairness, and Limits of Predicting Recidivism’ (2018) 4 *Science Advances*. On the methodical and ethical issues with risk assessment at sentencing, see Andrew Ashworth and Lucia Zedner, ‘Some Dilemmas of Indeterminate Sentences: Risk and Uncertainty, Dignity and Hope’ in Jan W de Keijser, Julian V Roberts and Jesper Ryberg (eds), *Predictive Sentencing: Normative and Empirical Perspectives* (Hart 2019).

the material they collect and how they assess this material.¹¹⁴ In fact, practitioners have admitted modifying scores to fit preconceived ideas of offenders.¹¹⁵

The risk assessment relied on before the grant of a DVPO provides a useful example of an imperfect tool applied imperfectly. The ‘DASH’ risk assessment framework is used by the police before they impose the notice that triggers a hearing for a DVPO.¹¹⁶ The tool aims to structure professional judgement of risk.¹¹⁷ A study by Almond and others found that only four of the 25 risk factors relied on in DASH were associated with recidivism, with two of these factors having a significant predictive effect.¹¹⁸ A study by Robinson and others found that ‘large proportions’ of police officers viewed every risk factor as very important.¹¹⁹ Taken together, these studies suggest that factors not associated with recidivism function as the basis for coercive state intervention. The Robinson study also found that DASH is circumvented by police officers in practice,¹²⁰ and there is a widespread lack of training on domestic abuse and risk assessment.¹²¹

The appraisal of risk assessment tools and DASH emphasises the current limits on our capacity to predict (re)offending. To these criticisms it must be added that the best risk assessment tools are not always employed. Government guidance to practitioners on the

¹¹⁴ Kelly Hannah-Moffat, Paula Maurutto, Sarah Turnbull, ‘Negotiated Risk: Actuarial Illusions and Discretion in Probation’ (2009) 24 *Canadian Journal of Law and Society* 391, 401-406. See also, Brandon L Garrett and John Monahan, ‘Judging Risk’ (Virginia Public Law and Legal Theory Research Paper 2018-44, 2018).

¹¹⁵ Hannah-Moffat, Maurutto, and Turnbull (n 114) 402.

¹¹⁶ Home Office, *DVPN DVPO* (n 50) 7. The acronym stands for ‘domestic abuse, stalking and honour-based violence’.

¹¹⁷ Amanda L Robinson and others, ‘Risk-Led Policing of Domestic Abuse and the DASH Risk Model’ (College of Policing 2016) 2.

¹¹⁸ Louise Almond and others, ‘Exploration of the Risk Factors Contained Within the UK’s Existing Domestic Abuse Risk Assessment Tool (DASH): Do these Risk Factors have Individual Predictive Validity Regarding Recidivism?’ (2017) 9(1) *Journal of Aggression, Conflict and Peace Research* 58, 63. A study of the predictive effect of DASH could not be undertaken because of the lack of national guidelines on its use.

¹¹⁹ Robinson and others (n 117) 23.

¹²⁰ Robinson and others (n 117) 35.

¹²¹ Robinson and others (n 117) 18-19.

imposition of gang injunctions does not engage with risk assessment tools.¹²² In *James*, the Court of Appeal instead presented risk assessment, when considering the imposition of gang injunctions, as a matter of judicial evaluation: ‘It was for the judge to assess the magnitude of the risk which visiting that part of Birmingham posed and to decide what restrictions were necessary to counter it.’¹²³ There is, thus, a problematic contrast between the rationale of gang injunctions, as a preventive measure, and how we can and do assess the risk posed by recipients of injunctions. In light of this, I now develop a bolstered necessity requirement that develops from the presumption of harmlessness argued for in chapter 4.

As a reminder, the presumption of harmlessness requires that the starting point of a risk assessment should be that the respondent/defendant does not present a risk of harm. As per the games console example, when considering whether a coercive intervention is necessary, the other important issue to establish is that the particular intervention works. Even if the teenager was likely to play the console excessively, there would be little value in grounding them if this would not affect the likelihood of excessive play. What is needed is a means for these issues, of the risk presented by the applicant and the efficacy of the proposed intervention, to be appraised when a court is considering the imposition of a gang injunction. The bolstered necessity requirement would allow for both assessments; it is as follows.

The applicant should have to evidence, to the civil standard, that the relevant behaviour order is necessary. That is, on the balance of probabilities, there is a high likelihood of reoffending absent intervention, the relevant intervention will reduce the likelihood substantially, and no less restrictive intervention would have similar effect.

¹²² Government, *Practitioners’ Guide* (n 22) 12. A case law free text search on Westlaw for – “gang injunction” AND “risk assessment” – also returned no relevant results on 16 June 2019.

¹²³ *James* (n 9) 17.

The requirement develops from section 34 of the Policing and Crime Act 2009, which requires that, for a court to impose a gang injunction it must think an injunction is necessary to prevent relevant gang-related activity. At present, that requirement is left as a matter of judicial assessment and it is unclear what exactly must be shown to meet it.¹²⁴ The bolstered requirement encompasses a presumption of harmlessness and extends beyond the presumption in two important respects. First, it imposes a burden on the applicant, as opposed to leaving the presumption and its rebuttal to judicial evaluation. Secondly, it includes an assessment of the efficacy of the gang injunction as an intervention as well as the likelihood of the defendant (re)offending.

The imposition of a bolstered necessity requirement would mark a development from current appellate case law, but it is a development that could be undertaken by the judiciary, as opposed to requiring legislation. First, in *Wilson* the High Court took a step toward the bolstered requirement when it adopted the following submission from counsel: ‘Injunctions cannot be made simply on the basis of a precautionary measure for the general good for to do so risks...the imposition of prohibitions on a person’s autonomy and liberty that are not justified by the evidence against them.’¹²⁵ Secondly, the Court of Appeal has developed safeguards from the necessity requirement to impose a sexual harm prevention order in a similar manner.¹²⁶

The proposed imposition requirement employs a necessity standard. This is the standard currently required for the imposition of a gang injunction. By comparison, the second requirement to impose an ASB injunction is ‘the court considers it *just and convenient* to grant the injunction for the purpose of preventing the respondent from

¹²⁴ *James* (n 9) 17. This is in keeping with the decision of the House of Lords on the ASBO: *McCann* (n 3) [37] (Lord Steyn).

¹²⁵ *Wilson* (n 52) [100].

¹²⁶ This case law is critiqued in detail in the following chapter.

engaging in anti-social behaviour.’¹²⁷ The necessity standard is to be preferred to the just and convenient standard for two reasons. First, gang injunctions, as with other behaviour orders, are highly coercive measures pursued by the state. This point has been made above and does not need to be laboured. The second reason is more technical. The evidential standard (if any) to which an imposition requirement must be proven, and the content of that requirement combine to affect how easily it can be satisfied.¹²⁸ Current practice is at its most troubling when lower imposition requirements, such as ‘just and convenient’, do not need to be evidenced to any specified standard by the applicant. A necessity requirement would have to be satisfied only on the balance of probabilities. Given the coercive potential of gang injunctions and the lower evidential standard in civil trials, the necessity requirement is to be preferred to the ‘just and convenient’ requirement. We can now turn to what must be shown to be necessary.

If the only safeguard added to proceedings for a gang injunction was a presumption of harmlessness, a judge may decide that an injunction was necessary without significant debate even where the need for an injunction was contestable. The judge could have heard that gang injunctions work, as per the Carr study,¹²⁹ and the respondent could have been classed as high risk be it based on a seat-of-the-pants assessment or a state-of-the-art tool. Together, such information could be taken to satisfy the current necessity requirement for imposition despite the applicant being presumed to be harmless. Yet there is good reason to think that such information would be insufficient to evidence that a gang injunction was

¹²⁷ Anti-social Behaviour, Crime and Policing Act 2014, s 1 (emphasis added).

¹²⁸ For brief comment on such interaction in the context of the death penalty, see Slobogin (n 112) 588. Both the standard of proof and what must be proven affect what evidence is sufficient to impose a measure. But the interaction of the evidential standard and what must be proven cannot be broken down to a matter of raw percentages. By way of example, I have to evidence on the balance of probabilities that an offender has a high risk of reoffending. I show that it is beyond reasonable doubt that there is a medium risk of reoffending. This would not justify the imposition of the relevant measure.

¹²⁹ Carr, Slothower and Parkinson (n 14).

in fact necessary. The central limitation, as above, is on our capacity to predict (re)offending. If we cannot accurately predict that a particular respondent will offend, it is hard to see how a claim for the necessity of a gang injunction could be sustained. A judge should not be left in a position where all they hear is that an intervention works and a respondent is high risk.¹³⁰ Otherwise coercive risk-based measures may be imposed, even when they are not justified.

The explicit burden on the applicant in the bolstered necessity requirement is not intended as a total barrier on the imposition of behaviour orders that constitute coercive risk measures. Behaviour orders are justified as, and structured as, preventive measures. Where it could be shown that a particular behaviour order could reduce the likelihood of a particular person causing harm the applicant for the behaviour order would be able to satisfy the requirement assuming no less restrictive intervention would have similar effect. The burden on the applicant would better allow the current limits on our capacity to assess the likelihood of future offending to be brought out at trial and thus to feed into the court's decision on whether to impose such orders. To allow gang injunctions to be imposed without such assessment would expose respondents to unjustified coercion by the state. Kern and Bergstrom have argued that risk assessment at sentencing should aim to improve incrementally; the perfect, they argue, cannot be the enemy of the good.¹³¹ Yet if a risk assessment is not sufficiently reliable to justify the imposition of an order, this should be made known at trial.

The explicit burden on the applicant in the bolstered necessity requirement may have the added benefit of reconciling current practice and appellate case law. Though current

¹³⁰ Kelly Hannah-Moffatt, 'Actuarial Sentencing: An "Unsettled" Proposition' (2013) 30(2) *Justice Quarterly* 270, 278.

¹³¹ Richard P Kern and Mark H Bergstrom, 'A View from the Field: Practitioners' Response to Actuarial Sentencing: An "Unsettled" Proposition' (2013) 25 *Federal Sentencing Reporter* 185, 188.

case law leaves the necessity requirement as a matter of judicial evaluation, government guidance on gang injunctions emphasises the role of the applicant in ensuring the requirement is satisfied. Statutory guidance states ‘Applicants will also need to convince the court that the gang injunction is necessary ...’¹³² This is echoed in government guidance for practitioners which includes a section entitled ‘Proving Condition (2)’ – condition (2) is the current necessity requirement.¹³³ The section provides examples of evidence that may be used to prove the respondent will engage in relevant gang-related behaviour in the future that include ‘No comment interviews in past arrests’. It also points to the need to prove an intervention can work. Senior police officers have also (mis)understood the second criterion as imposing a burden, and a standard, of proof on the applicant.¹³⁴ A formal requirement to prove necessity, as per the bolstered necessity requirement, is to be preferred to the current law and government guidance. The gang injunction is a coercive measure justified by its preventive ambitions; at trial the bolstered necessity requirement should be employed to show these ambitions can be met.

It would be insufficient to establish only that some form of gang injunction was necessary. Otherwise it may be necessary to impose a gang injunction with one restriction (say, a curfew) and useful to include another (say, non-association). If the restriction on association was included in the injunction, it would constitute an unnecessary restriction on the recipient’s liberty. The 2009 Act can be read as requiring that every restriction and requirement in a gang injunction has to be necessary, but this is not made explicit. In this sense, the injunction differs from the ASBO.¹³⁵ Yet government guidance on the 2009 Act

¹³² Government, *Statutory Guidance* (n 16) 7. Such guidance cannot be relied on in court *Bulmer* (n 43) [19]-[20].

¹³³ Government, *Practitioners’ Guide* (n 22) 12.

¹³⁴ Carr, Slothower and Parkinson (n 14) 196.

¹³⁵ Crime and Disorder Act 1998, s 1(6) [in force 2002-2015].

provides that each restriction and requirement must be necessary: ‘Applicants will need to be prepared for the court to examine each prohibition and requirement, and will need to be able to justify how each of these is necessary...’¹³⁶ In keeping with the above discussion, government guidance indicates that practice may better align to the bolstered necessity requirement proposed here than that which is strictly required by appellate judgments. The bolstered requirement is broad enough to encompass each restriction and requirement in a behaviour order having to be necessary so a further principle to this effect is not set out.

The value of a bolstered necessity requirement would be reduced if judges did not know how to establish when a person had been shown to present a risk. Judicial education on risk assessment and its limitations could increase the standard of argument on risk and necessity at trial. Garrett and Monahan have recently called for more judicial education on risk assessment in the United States.¹³⁷ They argue judges use risk assessment inconsistently in practice and that this is somewhat unsurprising given their lack of training.¹³⁸ The need for judicial training may be greater in England and Wales. In the United States risk assessment has been presented as a tool to limit incarceration of low risk offenders.¹³⁹ By comparison, findings of risk in England and Wales frequently justify coercive state intervention be it via behaviour orders, or other measures such as extended determinate sentences. In support of the bolstered necessity requirement, the Judicial College should provide training for relevant judges on risk assessment.

The final two principles I propose in this chapter also arise out of the practice of civil behaviour orders, but they do not relate to the limitations on our capacity to predict

¹³⁶ Government, *Statutory Guidance* (n 16) 22. Compare this quotation to Government, *Practitioners’ Guide* (n 22) 29 which provides that ‘any reasonable prohibition or requirement’ may be applied for.

¹³⁷ Garrett and Monahan (n 114) 34.

¹³⁸ Garrett and Monahan (n 114) 42-43.

¹³⁹ See the Model Penal Code 2017, s 6b.09(3).

offending. Instead they relate to how interim gang and ASB injunctions have been employed in practice. Little attention has been paid to the functioning of interim behaviour orders in the academic literature. It is first important to set out the varied tests for imposing interim versions of civil behaviour orders. An interim gang injunction with notice requires that the court thinks it is ‘just and convenient’ to impose.¹⁴⁰ Without notice, the standard rises to the court thinking it is ‘necessary to do so’.¹⁴¹ The standard for imposing an interim ASB injunction is that the court thinks it is ‘just and convenient to do so’.¹⁴²

The data collected for the Carr study, discussed above, of gang injunctions in Merseyside can be repurposed to offer some insight into the functioning of interim gang injunctions. That data includes the dates of issue of 36 interim gang injunctions, the dates of the grant of full injunctions and the expiry date of the full injunctions.¹⁴³ From this, we can discern that 39% (average 387 days) of the total time spent regulated by a gang injunction is spent under an interim injunction and 61% (average 615 days) under a final injunction. 387 days is both a substantial period of time for a person’s behaviour to be coercively regulated and a substantial proportion of the total time regulated by a gang injunction.

Further insight into the use of interim behaviour orders can be garnered from *Chief Constable of the Bedfordshire Police v Golding*.¹⁴⁴ Interim ASB injunctions were granted against the leaders of Britain First.¹⁴⁵ The injunctions were applied for in light of a planned Britain First march in Bedfordshire during Ramadan. Mr Justice Knowles recognised that

¹⁴⁰ Policing and Crime Act 2009, s 40.

¹⁴¹ Policing and Crime Act 2009, s 41.

¹⁴² Anti-social Behaviour, Crime and Policing Act 2014, s 7.

¹⁴³ Carr, Slothower and Parkinson (n 14) 199. The table also shows that interim injunctions lasted until the grant of a full injunction.

¹⁴⁴ *Chief Constable of Bedfordshire v Golding* [2015] EWHC 1875 (QB).

¹⁴⁵ Britain First is a far-right political party.

although the injunctions were styled as interim, '[i]n practice they were final for the purposes of the March.'¹⁴⁶ The ASB injunctions prohibited the respondents from entering mosques without prior invitation; publishing materials likely to stir up religious and/or racial hatred; using insulting words and thereby causing distress; and carrying a banner at the march that said 'no more mosques'.

The thresholds for imposing an interim injunction prior to proceedings for the grant of a civil behaviour order are low. Added to this, interim injunctions can last for substantial periods, and can be used as a final resolution in practice. In light of these points, I suggest two limitations on the use of interim behaviour orders. First, the time a person is subject to an interim behaviour order should count toward any future time spent under a final behaviour order. This limitation could trigger earlier reviews of behaviour orders. It would also negate the risk of interim orders being used to stretch statutory limits on the length of behaviour orders and could thus promote more efficient applications for final behaviour orders. Secondly, an interim behaviour order should not intentionally be used as a final resolution. To use interim injunctions as a final resolution runs contrary to their purpose and has the effect of reducing the requirements that must be met before a respondent's liberties are curtailed.

Section IV. Conclusion

The aspiration of harm prevention seems to mean there is always a case for making (civil) behaviour orders easier to impose. Gang injunctions were introduced due to the higher evidential standard that had to precede the introduction of the hybrid ASBO. The ASBO was then replaced by the more general ASB injunction in 2014 – which shared with the gang injunction a lower evidential standard for the first imposition requirement, and also

¹⁴⁶ *Golding* (n 144) [5].

made the second requirement easier to satisfy. Gang injunctions too were made more generally available in 2010 and easier to impose in 2015. Who could be against the prevention of crime? Such thinning of evidential safeguards, based on a preventive aspiration, gave rise to two significant issues. First, do civil behaviour orders constitute veiled punishment? In keeping with recent decisions of the High Court and Court of Appeal, this chapter has argued that gang injunctions – taken as the exemplar civil behaviour order – are not punitive. The behaviour-effect-purpose test applied in this chapter should bring more clarity to the assessment of whether measures are punitive.

The second issue is whether civil behaviour orders should attract particular safeguards regardless of whether they are punitive. The gang injunction is a behaviour order that fits into the coercive risk measure category. As such, it should attract a presumption of harmlessness as detailed in chapter 4. In this chapter, I have suggested a bolstered necessity requirement, that develops from the presumption, which should apply to behaviour orders justified by risk assessment. I have also suggested two safeguards against the misuse of interim behaviour orders. The value of engaging with this second issue must not be underplayed. If we predicate all our discussions of trial safeguards on an assessment of whether measures are punitive, we risk two troubling outcomes. We may allow the state to impose coercive, but non-punitive, measures without appropriate justification. In addition, we may allow the state to impose measures that are both punitive and coercive risk measures without appropriate justification. As will be seen in the next chapter, it may be that both the presumption of innocence and the presumption of harmlessness should apply in some instances.

Chapter 7: Hybrid Behaviour Orders – the Sexual Harm Prevention Order

Hybrid behaviour orders are granted under civil evidential rules, but breach of an order is a criminal offence. The anti-social behaviour order (ASBO) was hybrid in form. The anti-social behaviour injunction is the descendant of the ASBO in the behaviours it targeted, but it took on a different, wholly civil, legal form.¹ Orders such as forced marriage protection orders² and football banning orders,³ in contrast, are the descendants of the ASBO in their legal form, but they target more widespread behaviours. The vast majority of behaviour orders are hybrid. This chapter assesses whether hybrid behaviour orders are coercive risk measures and/or punitive.

The chapter takes the sexual harm prevention order (SHPO) as its exemplar hybrid behaviour order for two reasons.⁴ First, it has a substantial body of appellate case law. Secondly, it can be imposed both on complaint and on conviction. This focus will allow for effective discussion of the two regular forms of hybrid behaviour order. An attempt to discuss every hybrid behaviour order, by comparison, would make the chapter overly descriptive. I also engage with the sexual risk order (SRO) which is available on complaint⁵ and the criminal behaviour order (CBO)⁶ which is available on conviction. All three of these orders were enacted by the Anti-social Behaviour, Crime and Policing Act 2014 (the 2014 Act).

The first section critically assesses the current law on SHPOs and outlines the SRO and CBO regimes. This sets up my analysis of whether SHPOs, and other hybrid behaviour

¹ Anti-social Behaviour, Crime and Policing Act 2014, s 1. The injunction is assessed in the previous chapter.

² Family Law Act 1996, s 63C.

³ Football Spectators Act 1989, s 14B.

⁴ Sexual Offences Act 2003, s 103A.

⁵ Sexual Offences Act 2003, s 122A.

⁶ Anti-social Behaviour, Crime and Policing Act 2014, s 22.

orders, should be considered coercive risk measures in section II and whether they should be considered punitive in section III. If hybrid behaviour orders are coercive risk measures, they should attract the protection of the bolstered necessity requirement developed in previous chapters. If they are punitive, they should attract the relevant human rights protections, including heightened fair trial rights such as the presumption of innocence. Unlike civil behaviour orders, I argue that hybrid behaviour orders should be considered both coercive risk measures and punitive. This conclusion necessitates consideration of how the safeguards against the unfair imposition of coercive risk measures and punishment should interact; section III addresses this question.

Section I. The current law

An SHPO on conviction is available where two imposition requirements are met. First, the court ‘deals with the defendant in respect of’ a relevant offence, a finding they are not guilty of a relevant offence by reason of insanity, or they have done the act charged, but are under a disability.⁷ Relevant offences are those listed in schedules 3 (sexual offences) and 5 (non-sexual offences) to the Sexual Offences Act 2003 (the 2003 Act). The scope of these schedules is not beyond criticism. Harris cites the ‘revenge porn’ offence as an example of a possible exception from both schedules.⁸ Added to this, breach of a sexual offences protection order – the predecessor to the SHPO – is not a scheduled offence.⁹ This speaks to Harris’ conclusion that such lists allow ‘the unusual or exceptional case to slip through the net’.¹⁰

⁷ Sexual Offences Act, 103A(2)(a).

⁸ Lyndon Harris, ‘*Jones (Christopher Wyn)*’ [2019] (1) Criminal Law Review 58 (note). The offence is contained in Criminal Justice and Courts Act 2015, s 33.

⁹ *Hamer* [2017] EWCA Crim 192, [2017] 2 Cr App R (S) 13 [15].

¹⁰ Harris (n 8) 60.

Secondly, for an SHPO on conviction to be imposed, the court must also be satisfied, that the order is necessary to protect the public generally or specific members thereof from sexual harm by the defendant, or to protect children or vulnerable adults outside the United Kingdom from said harm.¹¹ There is a developed case law on the second imposition requirement. The case law builds on the decision of Lord Justice Hughes, as he then was, in *Smith* on the sexual offences protection order. His Lordship described ‘necessity’ as only a ‘starting point’ for satisfying the second imposition requirement and set out the following three-part approach.¹²

- (i) Is the making of an order *necessary* to protect from serious sexual harm through the commission of scheduled offences?
- (ii) If some order is necessary, are the terms proposed nevertheless oppressive?
- (iii) Overall are the terms proportionate?¹³

This approach was followed ‘with slight amendment’ in *Attorney General’s Reference (NC)* which did concern an SHPO.¹⁴ In the later case of *Sokolowski*, the Court of Appeal added that sentencing courts should not ‘rubber stamp’ an SHPO because it is in standard terms or has been agreed by the parties.¹⁵ The Court also said ‘particular care should be taken where an SHPO would prohibit contact with children’.¹⁶ In *Parsons*, the Court supplemented earlier judgments by stating that for an order to be necessary, it must be ‘effective’ and ‘clear and realistic’.¹⁷ The Court of Appeal has also repeatedly held that a ‘safety first’ approach should not be taken to the necessity test: there must be a real risk

¹¹ 2003 Act, s 103A(2)(b). ‘sexual harm’ includes physical and psychological harm caused by an offence listed in schedule 3 to the 2003 Act: s103B(1).

¹² *Smith* [2011] EWCA Crim 1772, [2012] 1 Cr App R (S) 82 [6].

¹³ *ibid* [6]-[8] (original emphasis).

¹⁴ *Attorney General’s Reference (NC)* [2016] EWCA Crim 1448, [2017] 1 Cr App R (S) 13 [8]. See also, *McLellan* [2017] EWCA Crim 1464, [2018] 1 WLR 2969 [20].

¹⁵ *Sokolowski* [2017] EWCA Crim 1903, [2018] 4 WLR 126 [5].

¹⁶ *ibid* [5].

¹⁷ [2017] EWCA Crim 2163, [2018] 1 WLR 2409 [5].

of future harm.¹⁸ The following is a summation of the appellate case law on the second imposition requirement.

- (i) Is the making of an SHPO necessary to protect the public from sexual harm through the commission of scheduled offences?
 - An order can only be necessary if the restrictions imposed will be effective.
 - Any restriction must be clear and realistic; and must be capable of simple compliance and enforcement.
 - The order must be tailored to the facts.
 - There must be a real risk of future harm to satisfy the test; the court cannot adopt a safety-first approach.
 - It is insufficient to satisfy the necessity test that the proposed order is in standard terms or has been agreed between the parties.
 - Particular care must be taken to make sure prohibitions on contact with children are really necessary.
- (ii) If some order is necessary, are the terms imposed nevertheless oppressive?
- (iii) Overall, are the restrictions proportionate?

Government guidance provides that risk assessment is a ‘key factor’ when deciding whether to apply for an SHPO.¹⁹ The guidance explains risk assessment should reference the likelihood the offender committing a sexual offence, the imminence of that offence, the potential harm the offence would cause, the efficacy of an SHPO, and the proportionality of an SHPO.²⁰ Both the Court of Appeal and government guidance deserve praise for how they have endeavoured to unpack the notion of necessity.

The case law on necessity is, however, messy. As will be clear from the above, important principles are split across cases. Perhaps inevitably, the application of the second imposition requirements remains uncertain in some respects. By way of example, in *FG*,

¹⁸ *Lewis* [2016] EWCA Crim 1020, [2017] 1 Cr App R (S) 2 [10]; *Sokolowski* (n 15) [5]; *FG* [2017] EWCA (Crim) 2497 [16]; *Roskams* [2018] EWCA Crim 1653 [4].

¹⁹ Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (2018) 37. This point appears to apply to both SHPOs on complaint and on conviction.

²⁰ Home Office, *2003 Act Guidance* (n 19) 37. The 2003 Act Guidance further details factors to be taken into account during risk assessment at 41-42.

the Court of Appeal stated ‘it is for the prosecution to justify the imposition of an SHPO, not for the defence to object to a pro forma SHPO.’²¹ Yet the lead authorities on comparable imposition requirements for other behaviour orders have not imposed a burden or standard of proof on the prosecution, but instead have constructed the necessity requirement as a matter of judicial evaluation.²² It is hard to see how the prosecution can have a justificatory role, but are not required to bear any evidential burden or meet any evidential standard. Is the practical effect of a failure to justify the imposition of an SHPO not the same as a failure to meet an evidential burden? This tension is heightened by the detailed case law on when the necessity imposition requirement will be satisfied. How, for instance, is a sentencing judge to know that the restrictions in an order would be effective if this is not the subject of submissions by the prosecution? I will return to the uncertainties within appellate case law on SHPOs and in how this case law aligns with wider judgments on necessity requirements for the imposition of behaviour orders in the next section.

An SHPO on complaint can be applied for by the National Crime Agency or a relevant police authority in a magistrates’ court.²³ The applicant must prove the respondent has been convicted or cautioned for an offence listed in either schedule 3 or 5 to the 2003 Act.²⁴ In addition, the court must be ‘satisfied that the defendant’s behaviour since the appropriate date makes it necessary to make a sexual harm prevention order’ for the protective purposes listed above.²⁵ The phrase ‘appropriate date’ refers to the ‘first date on which the offender was convicted, found or cautioned’ of a qualifying offence.²⁶As will be

²¹ *FG* (n 18) [18].

²² *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [37] (Lord Steyn). For discussion of *McCann* and other authorities, see chapter 3.

²³ 2003 Act, 103A(4).

²⁴ Or found not guilty by reason of insanity or found to be under a disability and to have done the act charged. 2003 Act: ss 103A(4) and 103B(2).

²⁵ 2003 Act, s 103A(3)(b).

²⁶ 2003 Act, s 103B(1).

seen in the next section, there may be an important consequence of the different wording of the second imposition requirement for the SHPO on conviction and on complaint.

Unlike the civil behaviour orders considered in the previous chapter, an SHPO – on conviction or complaint – can only impose restrictions, not requirements.²⁷ Each restriction in an SHPO must last for a minimum of five years or until further order.²⁸ A restriction can only be included if it is necessary to protect the public generally or specific members thereof from sexual harm by the defendant, or to protect children or vulnerable adults outside the United Kingdom from said harm.²⁹ This limitation is in keeping with the bolstered necessity requirement developed in the previous chapter. The bolstered requirement entails not only that a behaviour order is necessary before it is imposed, but that each restriction in it is necessary. The application of the requirement is intended to prevent unjustified coercion where an SHPO with one restriction, say on contact with children, may be necessary, but an additional restriction, say on internet access, may be merely convenient. Even once the necessity of some behaviour order has been established, this should not open the door to imposing any and every possible restriction.

Example restrictions can be taken from the decision of the Court of Appeal in *Parsons*: living with a child; entering a house where a child is present without the approval of Social Services; unsupervised communication with a female child (with exceptions); using a computer or device capable of accessing the internet (with exceptions); and using private browsing or equivalent.³⁰ *Parsons* is of particular importance because it confirms the necessity test is sensitive to wider social change. Lord Justice Gross maintained that the internet had become ‘an integral part of social life’ and in consequence it was hard to

²⁷ 2003 Act, s 103C(1)

²⁸ 2003 Act, s 103C(2). There are further limitations that apply to restrictions on travel detailed in s 103D.

²⁹ 2003 Act, s 103C(4).

³⁰ *Parsons* (n 17) [76].

see how a complete ban on access could be imposed in any but the most exceptional cases.³¹ This is a sensible approach to the test. A ban on access to social media, for example, may well be proportionate in an appropriate case, but it would likely have a greater impact on the recipient than the same ban would have had in 2002 and this should be taken into account.³²

The inability of a court to impose positive requirements under SHPOs is not as significant a limitation as it may at first appear. In *MEM*, the respondent was subject to an SHPO that included the following ‘restriction’:

To inform his supervising police public protection officer or his offending manager within 21 days of any developing relationship and provide any relevant information in order that they can ensure any safeguarding measures or disclosure are in place.³³

This is not a restriction, but a requirement to act in certain circumstances. The Court of Appeal, in a sense, recognised as much. Giving judgment, Mr Justice Hickinbottom stated:

Prohibition 4 is, on its face, wrongly phrased as a positive obligation. It is a simple slip that we can remedy. We shall, in any event, allow the appeal to allow that prohibition to be put into the correct form.³⁴

The reformed restriction read as follows:

Not to have any developing relationship without informing his Supervising Police Public Protection Officer or his Offending Manager within 21 days of any developing relationship and providing any relevant information in order that they can ensure any safeguarding measures or disclosures are in place.³⁵

The Court of Appeal explicitly focused on the form of the ‘restriction’ as opposed to its substance. Two criticisms of this approach can be made. First, such a broad reading of ‘restriction’ is hard to reconcile with the reference only to restrictions and not requirements

³¹ *Parsons* (n 17) [9]-[10]. See also, *Smith* (n 12) [20].

³² This is to say nothing of the practicalities of policing such a restriction.

³³ [2016] EWCA Crim 1290 [2].

³⁴ *MEM* (n 33) [14]. Compare this to the position of the Court of Appeal on the sexual offences protection order: *R* [2015] EWCA Civ 7, [2015] 1 WLR 1695. For comment, Lyndon Harris, ‘*R (Richards) v Teesside Magistrates’ Court*’ [2015] (6) Criminal Law Review 461 (note).

³⁵ *MEM* (n 33) [27].

in section 103C(1) of the 2003 Act. In other legislation that enacts behaviour orders, Parliament has explicitly stated that they can contain requirements. By way of example, a CBO may impose both restrictions and requirements.³⁶ Appraising the move from the ASBO to the CBO, Jarvis described the availability of requirements under the latter as an ‘appreciable departure’ from the former.³⁷ This was not a departure made by Parliament when it introduced SHPOs, despite the fact the report which preceded the introduction of SHPOs explicitly recommended adding the phrase ‘or requirements’ to the legislation.³⁸ What is more, section 103D of the 2003 Act provides for the restrictions on foreign travel that may be imposed under SHPOs. It states, ‘(4) A sexual harm prevention order that contains a prohibition [on foreign travel] must require the defendant to surrender all of the defendant’s passports at a police station...’ This requirement is a limited means of enforcing the foreign travel restriction. Nonetheless, it further illustrates that when Parliament wants behaviour orders to be capable of imposing a requirement, this is made explicit.

Secondly, the Court’s broad interpretation extends the range of coercive state interventions that may be imposed on the recipient. There may well be a grey area where a condition could legitimately be phrased as either a restriction or a requirement.³⁹ Yet the norm is for restrictions and requirements to be different in effect. It is one thing to be told not to do X on pain of conviction; it is another to be obligated to do Y on such pain.⁴⁰ A

³⁶ The 2014 Act, s 22.

³⁷ Paul Jarvis, ‘The New Criminal Behaviour Order’ [2015] (4) *Criminal Law Review* 278, 282. On the ASBO, see also *R (Lonergan) v Crown Court at Lewes (Secretary of State for the Home Department intervening)* [2005] EWHC 457 (Admin), [2005] 1 WLR 2570 [7] Which states ‘...I accept that the statute requires the order to be substantially and not just formally prohibitory’.

³⁸ Hugh Davies, ‘Civil Prevention Orders Sexual Offences Act 2003’ (ACPO commissioned 2013) para 6.5.13.

³⁹ Perhaps an example is a curfew which restricts a person from leaving their house/requires them to stay within it. See the discussion in *Lonergan* (n 37) [7]-[9].

⁴⁰ Compare, for instance, restrictions on association, and requirements to attend a drug rehabilitation course. For a leading analysis of liability for omissions see Andrew Ashworth, ‘The Scope of Criminal Liability for

plausible response to this position is that more coercive interventions would be made necessary if requirements, in the form of restrictions, could not also be imposed. By way of example, in *MEM* a restriction could conceivably have been imposed that prohibited the offender from entering any relationship. This would have been formally and substantively a restriction, and its impact on the recipient would have been greater than the veiled requirement that was imposed. Yet it is doubtful such a restriction would satisfy the necessity requirement. Could such a broad restriction be described as proportionate? Courts should not include restrictions in behaviour orders in a manner which, in effect, imposes requirements on the recipient.

The police or recipient may apply to have an SHPO varied, renewed or discharged.⁴¹ The police have to consent to the discharge of an order if it was made less than five years previously.⁴² Applications can also be made for interim SHPOs.⁴³ Breach of an SHPO, without reasonable excuse, is an offence.⁴⁴ The maximum sentence for breach is six months' imprisonment on summary conviction and five years on indictment.⁴⁵ A court cannot conditionally discharge a person convicted of breaching an SHPO.⁴⁶ The appeal structure for breach of an SHPO resembles the routes of appeal for convictions and sentences.⁴⁷

Omissions' (1989) 105(Jul) Law Quarterly Review 424. For more recent comment, Andrew Ashworth, 'A New Generation of Omissions Offences?' [2018] (5) Criminal Law Review 354.

⁴¹ 2003 Act, s 103E.

⁴² 2003 Act, s 103E(7).

⁴³ 2003 Act, s 103F.

⁴⁴ 2003 Act, s 103I(1). In addition, a person subject to an SHPO can also be subject to notification requirements for an extended period s 103G. On notification requirements, see Home Office, *2003 Act Guidance* (n 19) 5.

⁴⁵ 2003 Act, s 103I(3).

⁴⁶ 2003 Act, s 103I(4).

⁴⁷ 2003 Act, s 103H.

Unlike SHPOs, there is no schedule of offences for which a CBO is available. The order can be granted where a person has been convicted of any offence.⁴⁸ Government guidance aims to steer practitioners' application of this broad power. It provides that the CBO is intended to be used against '*the most serious and persistent offenders.*'⁴⁹ This limitation is in keeping with earlier government guidance⁵⁰ and appears in the guidance of the Crown Prosecution Service (CPS).⁵¹ Yet sentencing courts have imposed CBOs after conviction for possession of class A drugs,⁵² and breach of an ASBO.⁵³ As above, Harris has critiqued the approach of scheduling offences as 'too prescriptive' and instead advocates, appropriately limited, judicial discretion.⁵⁴ Without doubting the problems associated with schedules of offences, perhaps the SHPO and CBO taken together show that we always risk under-inclusiveness or over-inclusiveness when it comes to the availability of coercive risk measures.

As well as a conviction, two imposition requirements must be satisfied before a criminal court can impose a CBO. First, the court must be satisfied, beyond reasonable doubt, 'the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person.'⁵⁵ How, if at all, does this requirement add to the need for a conviction? In *Khan*, Lord Justice Bean acknowledged the harassment, alarm

⁴⁸ 2014 Act, s 22(1). Though an application for a CBO must be in the public interest: CPS, 'Criminal Behaviour Orders' (Legal Guidance, 2018).

⁴⁹ Home Office, *Anti-social Behaviour, Crime and Policing Act 2014: Anti-social Behaviour Powers - Statutory Guidance for Frontline Professionals* (2017) 29 (emphasis added).

⁵⁰ *ibid* 28.

⁵¹ CPS (n 48).

⁵² *Browne-Morgan* [2016] EWCA Crim 1903, [2017] 4 WLR 118.

⁵³ *DPP v Bulmer* [2015] EWHC 2323 (Admin), [2015] 1 WLR 5159.

⁵⁴ Harris (n 8) 60-61.

⁵⁵ 2014 Act, s 22.

or distress requirement does not seem to be a significant restriction on the availability of CBOs.

We are still in the early days of CBOs and the case law is not yet fully developed. Section 22 of the 2014 Act might on a literal construction be said to apply to a high proportion of cases in the criminal courts. Many offences are committed in public places and cause a degree of alarm and distress either to the victims or to members of the public who observe them. We asked Mr Calder in what types of case a CBO is appropriate: his response was that section 22 of the 2014 Act confers on the Crown Prosecution Service a wide discretion to apply for a CBO in any case which satisfies the requirements of the section. That may be strictly correct, but it does not give any assistance to judges before whom such applications are made.⁵⁶

In addition, offences that occur in private must be capable of satisfying this first requirement. Surely, for instance, it is not doubted that domestic violence can cause serious distress. Furthermore, the behaviour capable of causing harassment, alarm and distress does not have to be the same as the offence for which the offender was convicted.⁵⁷ By way of example, if a person committed a technical fraud offence, and celebrated their ill-gotten gains raucously, those celebrations could see them satisfy the first requirement.

Secondly, the court must consider that making a CBO ‘will help in preventing the offender from engaging in such behaviour.’⁵⁸ An important decision on the second imposition requirement is the Divisional Court in *DPP v Bulmer*.⁵⁹ Giving judgment, Lord Justice Beatson held that the requirement was of the same type as the necessity test for the imposition of an ASBO, but with a lower threshold: ‘the lowering of the burden does not change the nature of the exercise.’⁶⁰ In consequence, the second imposition requirement

⁵⁶ *Khan* [2018] EWCA Crim 1472, [2018] 1 WLR 5419 [19]. The Court of Appeal has elsewhere commented that the CBO is available in a broader array of circumstances than its predecessor, the ASBO on conviction: *Janes* [2016] EWCA Crim 676, [2016] 2 Cr App R (S) 27 [17].

⁵⁷ 2014 Act, s 22(3).

⁵⁸ 2014 Act, s 22(4).

⁵⁹ *Bulmer* (n 53). Endorsed by the Court of Appeal in *Khan* (n 56) [16]-[18].

⁶⁰ *Bulmer* (n 53) [22], [32]. Compare to CPS (n 48) which states ‘The case law relating to necessity under the ASBO provisions is not relevant to the CBO assessment.’

does not place a burden of proof on the prosecution.⁶¹ Yet it does require a ‘proper degree of caution and circumspection’ from the court due to the seriousness of the measure imposed.⁶² CPS guidance provides that an offence per se will sometimes be sufficient to prove that a CBO is necessary, but that prosecutors should consider calling additional evidence ‘to establish this point’.⁶³ Interestingly, this suggests the CPS believes that both requirements for the imposition of a CBO can be met by no more than the fact of a conviction. The question of whether the second imposition requirement has been met is not one of ‘pure discretion’ but the formulation of Lord Justice Beatson leaves substantial scope to sentencing judges:

Unless, however, the court hearing an appeal concludes that the judge has plainly erred in some way, either in his assessment of the facts or in applying the wrong test or leaving out of account matters which he was required to take into account, it should not interfere with his conclusion.⁶⁴

His Lordship added, that where the second imposition requirement is met, the proportionality of a CBO must be considered and that the order must be tailored to the particular case at hand.⁶⁵ This would appear to follow from his Lordship’s earlier observation that when the imposition requirements are met, the 2014 Act does not obligate the judge to impose a CBO, but instead allows them to.⁶⁶ A fuller account of factors to be ‘borne in mind’ when a court is drafting a CBO was given by the Court of Appeal in *Khan*:

- The terms of the order must be precise and capable of being understood by the offender. A court should ask itself before making an order “Are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?”
- The findings of fact giving rise to the making of the order must be recorded.

⁶¹ *Bulmer* (n 53) [31]. See also, *Browne-Morgan* (n 52) [15]: ‘The second of the two conditions for a CBO does not, in contrast to the first condition, require the court to be “satisfied, beyond reasonable doubt”. Instead the court, acting judicially, must “consider” that making the order will “help”...’

⁶² *Bulmer* (n 53) [35].

⁶³ CPS (n 48).

⁶⁴ *Bulmer* (n 53) [36].

⁶⁵ *Bulmer* (n 53) [43]-[46].

⁶⁶ *Bulmer* (n 53) [33].

- The order must be explained to the offender.
- The exact terms of the order must be pronounced in open court and the written order must accurately reflect the order as pronounced.
- Prohibitions should be reasonable and proportionate.
- Prohibitions should be realistic and practical.
- Prohibitions should be in terms which make it easy to determine and prosecute a breach (Exclusion zones should be clearly delineated).⁶⁷

A CBO can contain both restrictions and requirements; breach of either, without reasonable excuse, is a criminal offence with a maximum sentence of six months' imprisonment on summary and five years on indictment.⁶⁸ These restrictions and requirements must 'empower the police to take action before the anti-social behaviour they are designed to prevent takes place.'⁶⁹ By way of example, if the relevant anti-social behaviour was graffiti, a prohibition on painting the property of others without consent would be insufficient. The CBO would also have to include a restriction on owning spray paint or the like. For adult offenders, CBOs – other than interim orders – must last for at least two years and can last for an indefinite period.⁷⁰ A CBO can only be made in addition to a sentence or a conditional discharge not instead of either of these.⁷¹ Evidence not admissible during a criminal trial is admissible for the purposes of deciding whether a CBO will be made.⁷²

SROs, unlike SHPOs and CBOs, are only available on complaint.⁷³ A local police authority or the National Crime Agency can apply for an SRO in a magistrates' court. An SRO may be imposed when the Court is satisfied the respondent has 'done an act of a sexual nature' as a result of which an order is necessary to protect the public from the

⁶⁷ *Khan* (n 56) [14]-[15].

⁶⁸ 2014 Act, ss 22 and 30.

⁶⁹ *Bulmer* (n 53) [44].

⁷⁰ 2014 Act, ss 25(5) and 26(3).

⁷¹ 2014 Act, s 22(6).

⁷² 2014 Act, s 23(1).

⁷³ 2003 Act, s 122A(1).

respondent or to protect children or vulnerable adults abroad from them.⁷⁴ This is a remarkably broad test. The statute does not dictate that the recipient needs to have committed a sexual offence or indeed any offence. There is not even the suggestion the recipient has to have done anything wrongful. This point will be picked up in section III when I appraise whether the behaviours the SRO targets indicate that it is punitive.

An SRO can only contain restrictions, but, as with SHPOs, this is not a significant limitation on the order. An SRO must last for at least two years – unless discharged by a court with the consent of the police – and can be indefinite.⁷⁵ There are particular notification requirements attached to the imposition of a final or interim SRO.⁷⁶ It is an offence to breach an SRO without reasonable excuse for which the maximum sentence is, again, six months' imprisonment on summary and five years on indictment.⁷⁷ With sufficient initial analysis of SHPOs and appropriate detail on the CBO and SRO, we can turn to assess if SHPOs on conviction and complaint are coercive risk measures.

Section II. SHPOs as coercive risk measures?

If SHPOs, or other hybrid behaviour orders, are coercive risk measures, the bolstered necessity requirement, developed in chapter 5, should apply before they are imposed. The requirement is as follows.

The applicant should have to evidence, to the civil standard, that the relevant behaviour order is necessary. That is, on the balance of probabilities, there is a high likelihood of reoffending absent intervention, the relevant intervention will reduce the likelihood substantially, and no less restrictive intervention would have similar effect.

⁷⁴ 2003 Act, s 122A(6).

⁷⁵ 2003 Act, ss 122A(7) and 122D(5).

⁷⁶ 2003 Act, s 122F.

⁷⁷ 2003 Act, s 122H.

For the SHPO to constitute a coercive risk measure and thus show it should attract the bolstered necessity requirement, it must satisfy the following criteria:

1. The measure is a preventive measure.
 - a) It is imposed before a possible harm.
 - b) With the purpose of avoiding the harm, reducing the likelihood of it occurring, or reducing its severity if it does occur.
2. An assessment of the risk posed by the individual must be undertaken and satisfied before the measure can be imposed.
3. The measure is coercive.

Both the SHPO on conviction and complaint are imposed before possible sexual harm with the purpose of avoiding it. This can be discerned from the second imposition requirement of both SHPOs; the orders share that they must be necessary to protect the public or specified groups from sexual harm by the defendant.⁷⁸ In addition, Home Office guidance provides ‘the fundamental purpose of an SHPO is to protect the public from sexual harm’.⁷⁹ It should not come as a surprise that both types of SHPOs fit into the broader preventive measure category; they both have the term ‘harm prevention’ in their name.

But do both orders fit within the coercive risk measure subcategory? The previous chapter argued a risk assessment can be read into the necessity requirement that must be satisfied before a gang injunction may be imposed: an injunction could not be considered necessary unless the recipient was taken to present a risk of some harm. The same argument holds for both the SHPO on conviction and complaint. The Home Office has taken the same view as can be seen by contextualising the above quotation on the fundamental purpose of SHPOs:

Given that the fundamental purpose of an SHPO is to protect the public from sexual harm, a key factor to be considered is the risk presented by the defendant. Risk in this context should include reference to: 1) the likelihood of

⁷⁸ 2003 Act, s 103(A).

⁷⁹ Home Office, *2003 Act Guidance* (n 19) 37-38.

the offender committing a sexual offence 2) the imminence of that offending, and 3) the potential harm which may result from it.⁸⁰

Finally, both types of SHPO are coercive. This should be clear from the above discussion of the restrictions that can be imposed under the orders and the fact that breach can result in a sentence of up to five years' imprisonment.⁸¹ As such, both the SHPO on conviction and complaint are coercive risk measures.

The SHPO is not unique amongst hybrid behaviour orders in constituting a coercive risk measure. Both the CBO and SRO also satisfy the three definitional criteria. CBOs and SROs can only be imposed before a future harm with the purpose of avoiding it (1a and b). This is apparent from the statutory tests for their imposition. A CBO can only be imposed where it will help prevent the offender from engaging in behaviour that will cause or is likely to cause harassment, alarm or distress.⁸² An SRO can only be imposed when it is necessary to prevent future harm to the public or specified classes thereof.⁸³ These statutory tests also require an assessment of the risk posed by the defendant (2). As explained for SHPOs, an order cannot be necessary or helpful in stopping activity X, if the person poses no risk of engaging in activity X. Both the SRO and CBO are coercive (3): they impose restrictions on the recipient (and also requirements under the CBO) the breach of which is an offence. Our attention can now turn to the consequence of classifying the SHPO as a coercive risk measure; and we can do so in the knowledge the SHPO is not anomalous amongst hybrid behaviour orders in fitting into the category, rather, it is typical of these orders.⁸⁴

The consequence of classifying SHPOs as coercive risk measures is that the bolstered necessity requirement should apply. With the requirement in mind, aspects of the statutory

⁸⁰ Home Office, *2003 Act Guidance* (n 19) 37.

⁸¹ Home Office, *2003 Act Guidance* (n 19) 37.

⁸² 2014 Act, s 22(4).

⁸³ 2003 Act, 122A(6).

⁸⁴ For detail on other hybrid behaviour orders, see the table at the end of chapter 2.

scheme that enacted the SHPOs and the case law are to be commended. Two aspects of the bolstered requirement are the defendant should be presumed to be harmless and that it is for the applicant to rebut this presumption (as opposed to it being left as a matter of judicial evaluation). There is, in effect, such a presumption and a burden for the imposition of SHPOs because appellate case law requires the prosecution to justify the imposition of the order.⁸⁵ As detailed in the previous section, appellate case law has held that other factors of importance under the bolstered necessity requirement must be considered before a court may impose an SHPO: there must be a real risk of future harm,⁸⁶ the restrictions imposed must be effective,⁸⁷ and they must be proportionate.⁸⁸ The Court of Appeal has thus taken important steps to bolster the necessity requirement to impose an SHPO in practice.

Despite these commendable aspects of the SHPO regime, the case law gives rise to a number of concerns. First, there is no single judgment of the Court of Appeal which sets out a clear approach to the necessity requirement and the imposition of the order more generally.⁸⁹ Secondly, those appellate decisions which we do have often make the same criticism of applications for an SHPO in first instance courts: a lack of consideration of the decision to apply for an SHPO and a lack of forewarning to the defence and the judge.⁹⁰

Lord Justice Elias' remarks in *Lewis* are representative.

In fairness to the judge, it is only right to point out that both the judge and defence counsel had no advance notice of the proposed order. It was produced to them very shortly before the sentence hearing itself and on the day of the sentence hearing. So neither judge nor defence counsel had a proper opportunity to give it careful consideration. Indeed the judge was wrongly

⁸⁵ *FG* (n 18) [18]; *Lewis* (n 18) [10].

⁸⁶ *Lewis* (n 18) [10]; *Sokolowski* (n 15) [5]; *FG* (n 18) [16]; *Roskams* (n 18) [4].

⁸⁷ *Parsons* (n 17) [5].

⁸⁸ *Attorney General's Reference (NC)* (n 14) [8]. See also, *McLellan* (n 14) [20].

⁸⁹ The Court of Appeal has provided such guidance on general principles of sentencing: Andrew Ashworth, 'The Evolution of English Sentencing Guidance in 2016' [2017] (7) *Criminal Law Review* 507, 515-518.

⁹⁰ *Sokolowski* (n 15) [11] and [21]; *McDonald* [2015] EWCA Crim 2119, [2016] 1 Cr App R (S) 48 [7]-[8].

given the impression that he was merely approving an order which was in standard terms for a case of this nature. That is not good enough.⁹¹

The fact this criticism has been made repeatedly in appellate judgments gives rise to a troubling question. How many unchallenged pro forma SHPOs are rushed through the courts without the respondent or the judge having appropriate opportunity to scrutinise them?⁹²

A plausible response to the untidy appellate case law on SHPOs and the indication of poor practice in first instance courts would be for the Court of Appeal to give a consolidating judgment. By which I mean a judgment which sets out a single approach to the decision to impose an SHPO. If such a judgment were disseminated appropriately, it may make it harder for pro forma SHPOs to be granted on conviction or complaint. A consolidating judgment would present a risk, however. It would show how distinct SHPO case law is from the case law on the ASBO necessity requirement and more recent case law on the equivalent requirement of the CBO. In *R (McCann) v Manchester Crown Court*, the House of Lords held the necessity requirement to impose an ASBO imposed neither a burden nor standard of proof on the applicant, but was instead an exercise in judicial evaluation.⁹³ As above, the High Court followed this approach when it considered the equivalent requirement to impose the CBO.⁹⁴ The risk of pursuing a consolidating judgment is that the Court of Appeal would follow the approach the House of Lords took in *McCann*, and turn from the principles they have developed on SHPOs. In other words,

⁹¹ *Lewis* (n 18) [7]. This follows similar commentary in the case law on the sexual offences protection order: *Smith* (n 12) [3].

⁹² Almost 6,000 SHPOs were imposed in 2016/17: Ministry of Justice, *Multi-Agency Public Protection Arrangements Annual Report 2016/17: Ministry of Justice Statistics Bulletin* (2017) 13.

⁹³ *McCann* (n 22) [37] (Lord Steyn).

⁹⁴ *Bulmer* (n 53) [31].

pursuit of a consolidated judgment could undermine the safeguards against the imposition of the SHPO that have been developed to date around its necessity imposition requirement.

There is some force to the argument the Court of Appeal should have a similar approach to the forward-looking imposition requirements for different hybrid behaviour orders. These are similar requirements that apply before the imposition of similar legal orders. It is doubtful the applicant should bear an evidential burden in applying for some orders, but not others without good reason. A judgment that consolidated existing SHPO authorities would be preferable to a decision that turned from these authorities and followed *McCann* because it would be more in keeping with the principles that should apply before a person is subject to a coercive measure justified by a risk assessment. What is more, *McCann* does not provide a detailed assessment of the necessity requirement, it simply states twice that the requirement is a matter of judicial evaluation.⁹⁵ By comparison, there is now a substantial body of appellate case law on that requirement in the context of the SHPO. A consolidated judgment could allow for a principled approach to the imposition of SHPOs, and possibly other hybrid behaviour orders, to gain a firmer foothold.

So far, the current law on the necessity requirement to impose an SHPO has been presented as if it is the same on conviction and complaint. Yet there is a difference between the requirements and one that may be of importance. To impose an SHPO on conviction, the court must be satisfied that ‘it is necessary to make a sexual harm prevention order’ to protect the public or specified people.⁹⁶ By comparison, to impose an SHPO on complaint, the court must be ‘satisfied that *the defendant’s behaviour*...makes it necessary to make a sexual harm prevention order’ to protect the public or specified people.⁹⁷

⁹⁵ *McCann* (n 22) [37] (Lord Steyn), [83] (Lord Hope).

⁹⁶ 2003 Act, s 103A(2)(b). ‘Sexual harm’ includes physical and psychological harm caused by an offence listed in schedule 3 to the 2003 Act: s 103B(1).

⁹⁷ 2003 Act, s 103A(3)(b) (emphasis added).

Government guidance provides that it is ‘standard practice’ in many areas for police to undertake a risk assessment and present it to the court to establish the second imposition requirement for the SHPO on complaint is met.⁹⁸ The guidance says the following factors, amongst others, should be taken into account in a risk assessment: previous convictions; the offender’s circumstances (e.g. work, housing, stress, and proximity to schools); and compliance with previous court orders.⁹⁹ When assessing the risk posed by sex offenders, the police use a tool named the Risk Assessment 2000.¹⁰⁰ This tool is also relied on by sentencing courts when they impose SHPOs on conviction.¹⁰¹ The Risk Assessment 2000 is an actuarial risk assessment tool designed for use on adult male sexual offenders in the United Kingdom.¹⁰² The tool relies on factual information about sexual offenders, including whether the offender is single, their age, and previous convictions for burglary.

The risk factors taken from both government guidance and the Risk Assessment 2000 do not all concern the behaviour of the defendant. These factors may speak to the risk posed by the defendant, but they appear to be irrelevant under the second imposition requirement for the SHPO on complaint. In other words, neither the age of a person nor their proximity to a school is a behaviour, they are circumstances. As such, irrelevant factors may be used, in light of government guidance, to justify the imposition of the SHPO on complaint. Chapter 4 contended that classifying measures as ‘preventive’ and working toward appropriate safeguards following this classification can obfuscate legal intricacies of practical importance. The risk may be reduced when we instead assess whether behaviour

⁹⁸ Home Office, *2003 Act Guidance* (n 19) 40.

⁹⁹ Home Office, *2003 Act Guidance* (n 19) 41-42.

¹⁰⁰ National Police Chiefs’ Council, ‘New Tailored Approach to Managing Registered Sex Offenders Introduced’ (NPCC, 29 June 2017) <<https://news.npcc.police.uk/releases/new-tailored-approach-to-managing-registered-sex-offenders-introduced>> accessed 29 April 2019.

¹⁰¹ *De Martino* [2017] EWCA (Crim) 2605 [6]-[7]; *Stannard* [2018] EWCA (Crim) 313 [10].

¹⁰² Ruth J Tully and Kevin D Browne, ‘Appraising the Risk Matrix 2000 Static Sex Offender Risk Assessment Tool’ (2015) 59(2) *International Journal of Offender Therapy and Comparative Criminology* 211.

orders are coercive risk measures, but the above analysis shows it does not go away. The principles developed in reliance on the notion of a coercive risk measure may be of value for the vast majority of behaviour orders, but the sufficiency and functioning of these principles as a response to the problems of a particular type of behaviour order cannot be taken for granted. This point will be examined further in the next chapter. For now, it suffices to say that the SHPO on complaint and conviction are coercive risk measures that should attract the protections of the bolstered necessity requirement.

Section III. SHPOs as punitive measures?

Should SHPOs be considered punitive? To address this question, I will apply the behaviour-effect-purpose test. Such a classification is of importance because it underlies the heightened fair trial safeguards, such as the presumption of innocence, in article 6 of the European Convention on Human Rights, and the ban on retrospective punishment in article 7. If a case for hybrid behaviour orders as punitive could be sustained, it would also mark a fundamental departure from previous appellate judgments which have repeatedly found such behaviour orders to be preventive, not punitive.¹⁰³ I maintain that the SHPO, and by implication other hybrid behaviour orders, should be considered punitive based on the application of the behaviour-effect-purpose test. The test is as follows.

1. Does the measure regulate behaviours that can be subject to the criminal law or that are wrongful?
 2. Does the measure affect the recipient in a similar manner to accepted punishments?
 3. Does the measure have a punitive purpose?
- If the response to each of these questions is positive, there is a compelling case that the measure is punitive.
If the response to one or more of these questions is negative, there is a compelling case that the measure is not punitive.

¹⁰³ For an analysis of these judgments, see chapter 3.

At first, it may seem relatively easy to determine that both SHPOs on conviction and complaint regulate behaviours that can be subject to the criminal law. Both orders appear to require the recipient to have committed a listed offence such as murder,¹⁰⁴ hijacking ships,¹⁰⁵ rape¹⁰⁶ or voyeurism.¹⁰⁷ As His Honour Judge Cooke said in *JB*, the availability of an SHPO can indicate that an offence is of a greater seriousness than for an offence for which it is not available.¹⁰⁸ Yet two possible issues arise; the first relates to what I have described as the SHPO ‘on conviction’. A criminal court can impose an SHPO if it ‘deals with the defendant in respect of’ a relevant offence, a finding they are not guilty of a relevant offence by reason of insanity, or they have done the act charged, but are under a disability.¹⁰⁹ The purpose of the section would appear to be to make SHPOs available on conviction or in other special scenarios. Yet there is a conceivable case that an SHPO could also be imposed on acquittal. What does it mean for a court to ‘deal with’ a defendant? The term is not defined in the 2003 Act. What is more, the language of ‘defendant’, as opposed to ‘offender’, speaks to the possibility of liability on acquittal remaining plausible. Although such an interpretation appears possible, in practice it would seem unlikely.¹¹⁰ Government guidance suggests an SHPO is not available on acquittal.¹¹¹ In addition, where behaviour orders are available on acquittal elsewhere, this is made explicit in statute.¹¹²

¹⁰⁴ 2003 Act, sch 5 para 1.

¹⁰⁵ 2003 Act, sch 5 para 52.

¹⁰⁶ 2003 Act, sch 3 para 17.

¹⁰⁷ 2003 Act, sch 3 para 34.

¹⁰⁸ *JB* [2017] EWCA Crim 568 [26].

¹⁰⁹ 2003 Act, s 103A(2)(a).

¹¹⁰ Though the point does not appear to have been raised in the appellate courts. I am grateful for correspondence with a previous employee of the Law Commission who made clear the view of the Commission, on consultation with parliamentary counsel, was that the phrase did not allow for an SHPO to be made on acquittal.

¹¹¹ Home Office, *2003 Act Guidance* (n 19) 36-39.

¹¹² Protection from Harassment Act 1997, s 5A.

The second point arises from the schedules of offences for which an SHPO may be imposed containing decriminalised activities. Prior to the 2003 Act, ‘gross indecency’ between consenting men, either in public or private, was an offence.¹¹³ The offence remains listed in schedule 3 to the 2003 Act.¹¹⁴ The issue is that if an individual had a conviction under the now repealed offence, they may still be subject to coercive state interference via an SHPO on complaint. Thus, not every behaviour the SHPO on complaint can regulate is necessarily an offence now.¹¹⁵ It seems unlikely that an SHPO will be pursued either on acquittal or against those who committed an offence that has since been repealed without replacement in practice. It is thus reasonably clear that both forms of the SHPO regulate behaviours that can be subject to the criminal law, but also that it is doubtful they will be used to regulate non-criminal behaviour. As such, both the SHPO on conviction and complaint satisfy the first part of the behaviour-effect-purpose test.

Turning to the effects of SHPOs, both forms of the order impose coercive restrictions – such as limitations on access to the internet or on interactions with children – for a minimum of five years or until further order.¹¹⁶ As with civil behaviour orders, the cumulative effect of such restrictions will be significant for the recipient. The previous chapter argued the restrictions and requirements that may be imposed under gang injunctions were similar to, but distinguishable from, those that may be imposed under community orders and suspended sentences; both of which are punitive. The point of distinction was that, in practice, unpaid work requirements are not imposed under gang injunctions, but are frequently imposed under community orders and suspended sentences.

¹¹³ Sexual Offences Act 1956, s 13.

¹¹⁴ 2003 Act, sch 3 para 6.

¹¹⁵ Any application for or imposition of an SHPO may result in a human rights challenge. By comparison, see Andrew Ashworth, ‘*ADT v United Kingdom*’ [2000] (12) Criminal Law Review 1009 (note).

¹¹⁶ 2003 Act, s 103C.

In light of the broad reading of the term ‘restriction’ in SHPO case law, both forms of the order may also overlap wholly with the conditions that may be imposed under community orders and suspended sentences. Yet, in practice unpaid work requirements do not appear to be imposed, or even considered, under either form of SHPO.¹¹⁷ As such, the restrictions and requirements that may be contained in SHPOs are again similar to, but not identical to punitive measures.

Like breach of a community order or a suspended sentence, breach of an SHPO can result in imprisonment. In fact, breach of an SHPO has more in common with breach of community orders and suspended sentences than breach of a civil behaviour order does with those measures. The previous chapter argued that the effects of breaching a civil behaviour order are distinguishable from those of breaching a community order or a suspended sentence for two reasons. First, as breach of a civil behaviour order is only a contempt of court, the contemnor can purge their contempt. Secondly, the concept of a proportionate sentence is forward-looking in the context of contempt proceedings as opposed to backward-looking for suspended sentences and community orders.¹¹⁸ Neither of these distinctions apply for breach of a hybrid behaviour order because breach of such orders is, by definition, an offence.

Further, breach of an SHPO can have very serious consequences for the recipient. The maximum sentence is five years’ imprisonment.¹¹⁹ The threat of imprisonment is not just a theoretical one. The starting point for sentencing a breach offence of a medium

¹¹⁷ This view is based on a Westlaw free text case search for “sexual harm prevention order” AND “unpaid work” returning no relevant results on 17 June 2019.

¹¹⁸ *CJ v Flintshire BC* [2010] EWCA Civ 393, [2010] CP Rep 36 [28] (Aitkens LJ). Endorsed in *Swindon BC v Webb (t/a Protective Coatings)* [2016] EWCA Civ 152, [2016] 1 WLR 3301 [36] (Tomlinson LJ).

¹¹⁹ 2003 Act, s 103I.

seriousness – medium harm and medium culpability – is one year of custody.¹²⁰ The starting point for a high seriousness offence – high harm and high culpability – is three years’ custody.¹²¹ By comparison, breach of a community order may result in a re-sentencing for the initial offence or a maximum sentence of six months’ imprisonment if the initial offence was non-imprisonable.¹²² Breach of a suspended sentence may result in up to two years’ imprisonment.¹²³ As such, if the restrictions imposed under SHPOs are less severe than those imposed under accepted punishments, the severity deficit is more than made up for by the consequences of breaching the order.

What is more, the indirect effects of receiving an SHPO may also be severe. The recipient is characterised as someone who needs to be restrained from sexual harm.¹²⁴ Such a characterisation may risk stigma and affect employment opportunities in the same manner as, but perhaps to a greater degree than, civil behaviour orders.¹²⁵ The effects of an SHPO, both direct and indirect, are not only severe, but are similar to the effects of accepted punishments. In consequence, both versions of the order satisfy the second part of the behaviour-effect-purpose test. We can now turn to consider the purposes of the SHPO.

Sexual harm *prevention* orders have preventive purposes. As detailed in the previous chapter, punishment also has preventive purposes: crime reduction including by deterrence;

¹²⁰ Sentencing Council, *Breach Offences Definitive Guideline* (2018) 35. The Sentencing Council deals with breach of a community order and of a suspended sentence in the same guidelines as breach of an SHPO and other hybrid behaviour orders.

¹²¹ *ibid.*

¹²² Criminal Justice Act 2003, sch 8 paras 9-10.

¹²³ Two years would constitute the full activation of the longest period for which a sentence can be suspended: Criminal Justice Act 2003, s 189(1).

¹²⁴ Logan has similarly commented on the extra-legal ramifications of sexual offender registration and notification laws in the United States: Wayne A Logan, ‘Challenging the Punitiveness of New-Generation SORN Laws’ (2018) 21 *New Criminal Law Review* 426, 448-449.

¹²⁵ Jeremy Horder similarly maintains there is ‘obviously great stigma’ in being subject to an SHPO: *Ashworth’s Principles of Criminal Law* (9th edn, OUP 2019) 19. For discussion of civil behaviour orders, stigma, and employment, see the previous chapter.

reform and rehabilitation of offenders; and public protection.¹²⁶ Yet preventive purposes are not unique to punishment and are in fact shared by a myriad of measures that includes quarantine and speed bumps.¹²⁷ As such, the fact that SHPOs have preventive purposes of itself only allows for a partially positive answer to the third part of the behaviour-effect-purpose test. Put differently, SHPOs share purposes with punishment, but do not have a purpose that is exclusively punitive.

We can also assess whether SHPOs have a – concealed – retributivist purpose. The previous chapter argued gang injunctions do not have such a purpose. This followed an assessment of three factors: the gang injunction responds to past acts/offences, is an alternative to prosecution, and is imbedded in a policy context focused on victims. The case for a concealed retributive purpose of the SHPO is, however, stronger than that for the gang injunction. The order has a stronger link to criminal law in that a conviction is generally required for it to be imposed and breach is an offence. The SHPO can be imposed on conviction for a criminal offence, but is not a punishment. The SHPO has very similar effects to accepted punishments, but is not a punishment. The SHPO shares purposes with punishment, but is not a punishment. If the state wanted to conceal a retributive purpose, would this not be the form it would take?

A similar, but alternative argument for both types of SHPO having a punitive purpose can be made. It is, in essence, that the preventive purpose of the SHPO are coloured by the criminal law context in which the order is imposed. The preventive purposes of SHPOs are pursued following a conviction for a criminal offence. This makes the SHPO less similar to preventive measures such as quarantine and speed bumps. SHPOs instead have overlapping purposes with punishment and pursue those purposes in the same context. The

¹²⁶ Criminal Justice Act 2003, s 142.

¹²⁷ For detailed analysis and references, see chapter 4.

SHPO can be imposed after a criminal offence, has serious effects similar to accepted punishments and purposes overlapping with punishment that are pursued after a criminal trial. Regardless, of whether the concealed retribution or the coloured prevention approach is preferred, both types of SHPO can be said to have a punitive purpose. Both the order on complaint and conviction satisfy the behaviour-effect-purpose test. There is, therefore, compelling reason to class both types of SHPO as punitive. We can now turn to some of the distinct issues raised by the SRO and CBO.

As a hybrid behaviour order, the SRO shares key features with the SHPO. Yet the SRO is different in some respects that are of importance to the behaviour-effect-purpose test. The first issue concerns the behaviours that can be regulated by SROs. Government guidance on the order provides that it can be used in response to behaviours which ‘in other circumstances and contexts, have innocent intentions.’¹²⁸ The guidance provides a non-prescriptive and non-exhaustive list of what behaviour may be classed as ‘sexual in nature’ for the purposes of imposing an SRO. The list includes behaviours likely to be criminal offences such as ‘engaging in sexual activity involving a child’ and behaviour which is not criminal per se such as ‘providing presents...to young people’.¹²⁹ The High Court has also indicated SROs are available when a child may be subject to sexual exploitation.¹³⁰ SROs may regulate behaviours that cannot be regulated by the criminal law, but as matter of statute, they can also target criminal offences, government envisages such targeting and the High Court has indicated the order will be used in response to behaviours that can be regulated by the criminal law. This is sufficient to show that behaviours targeted by the SRO indicate it is punitive.

¹²⁸ Home Office, *2003 Act Guidance* (n 19) 46.

¹²⁹ Home Office, *2003 Act Guidance* (n 19) 47.

¹³⁰ *Rotherham Metropolitan BC v M* [2016] EWHC 2660 (Fam), [2016] 4 WLR 177 [15].

The second and related issue is that the purpose of the SRO is less clearly punitive than those of the SHPO because the measure is not contingent on a conviction. The SRO lies closer to the boundary of punitive and non-punitive measures than the SHPO. What should be done when the status of a measure is so contestable that even after applying the behaviour-effect-purpose test, we are left unsure of whether it is punitive? The test is predicated on the need to protect individuals from unfair punishment by the state. Given this, any ambiguities over whether a measure is punitive ought to be resolved in favour of the individual. That is to say, there ought to be a presumption that measures of questionable punitiveness are punishment. This would reflect a preference for extra safeguards when they are not needed over no extra safeguards where they are needed. In this sense, the presumption of punitiveness would parallel the presumption of innocence which allocates preferential value to not convicting the guilty over convicting the innocent.¹³¹ Many of the same factors are at stake for questions of punitiveness and innocence. It is likely the state will have a significant power advantage over the person on whom they seek to impose the contested measure, and, in all likelihood, the measure will entail some threat to that person's interests. In addition, we have a right not to be punished retrospectively, and a right to heightened fair trial safeguards in criminal trials. The state, in contrast, does not have the right to expedient proceedings when it is very contestable that a measure is punitive. Measures of contentious punitiveness should be taken to be punitive. If, even after the application of the behaviour-effect-purpose test, it remains contestable whether or not a measure is punitive, it should be presumed to be punitive so that the safeguards contingent on this classification apply.

¹³¹ See further, Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 248.

The case for the CBO to be considered punitive is particularly strong and would not require reliance on the presumption. First, the CBO is available on conviction for any offence. This general availability means the order more closely mirrors sentences like the suspended sentence and the community order. Secondly, the government repeatedly refers to the CBO as a form of punishment on *Gov.uk*: ‘You must follow certain rules or you could get a more severe punishment’ and, more directly, ‘You can get a...Criminal Behaviour Order (CBO) as punishment for antisocial behaviour.’¹³² This may indicate the government wants the CBO to be understood as punitive. A possible response to this point would be that *Gov.uk* is neither a source of law nor legal advice. Of course, the website is neither of these things, but this only makes the repeated references to punishment more problematic. The page is set up to make the law on the CBO understandable to recipients of the order and the wider public. The implication is thus that government want the CBO to appear as a punishment even if they do not want it to be treated as such by the courts.

Our attention can now turn to two possible consequences of classifying hybrid behaviour orders as punitive. Different behaviour orders target overlapping behaviours. By way of example, Home Office guidance on both the CBO and SHPO states these orders can be used in response to gang-related activities.¹³³ There is thus an overlap with the behaviours targeted by the gang injunction, a civil behaviour order considered in the previous chapter. If civil behaviour orders are not punitive and hybrid behaviour orders are punitive, will the government not just apply for the civil behaviour order where both types of order can be used? This would allow it to avoid the heightened fair trial safeguards and rules on non-retrospectivity that are contingent on a measure being punitive. A related point is that government could also replace those hybrid behaviour orders which do not overlap

¹³² Government, ‘Punishments for Antisocial Behaviour’ <<https://www.gov.uk/civil-injunctions-criminal-behaviour-orders>> (*gov.uk*) accessed 28 April 2019.

¹³³ Home Office, *2014 Act Guidance* (n 49) 30; Home Office, *2003 Act Guidance* (n 19) 26.

with current civil behaviour orders, with new civil behaviour orders to avoid heightened fair trial safeguards.¹³⁴ In other words, classifying the SHPO on complaint as a punishment may result in it being replaced by a sexual harm injunction.

These issues demand close scrutiny. Previous governments have both applied for civil injunctions when hybrid behaviour orders have required higher fair trial safeguards, and have replaced hybrid behaviour orders with civil behaviour orders.¹³⁵ From this we can infer that if a court classified hybrid behaviour orders as punitive, there is a possibility that government would act to increase the use and availability of civil behaviour orders. The fact that I do not classify civil behaviour orders as punitive does not mean that the current requirements for their imposition are satisfactory. This much will be apparent from the discussion of the bolstered necessity requirement in this chapter and the previous one. But let us imagine a less ideal state. Hybrid behaviour orders are held to be punitive, but a bolstered necessity requirement is not adopted. Even in this state, the decision to class hybrid behaviour orders as punitive, may be of some benefit and would at least leave recipients no worse off than under the current law. First, the person or people subject to a hybrid behaviour order would clearly benefit if, for instance, the order had been imposed retrospectively. Secondly, government would not necessarily introduce dozens of new civil behaviour orders. Thirdly, breach of a civil behaviour order is not an offence – contempt of court has a lower maximum sentence than many hybrid behaviour orders, can be purged, and does not appear on a criminal record.

A further ramification of classing hybrid behaviour orders as punitive must be considered. SHPOs – and other hybrid behaviour orders – are both punitive and coercive risk measures. Both classifications attract safeguards such as the presumption of innocence

¹³⁴ For discussion of whether to introduce a civil or hybrid behaviour order to tackle knife crime, see HL Deb 6 February 2019, vol 795 cols 377-378GC, 393GC.

¹³⁵ For examples of both practices, see the introduction to the previous chapter.

and the presumption of harmlessness respectively. The question thus arises how should these safeguards interact? Should the applicant have to satisfy both presumptions (and all other relevant safeguards)? Should one set of safeguards be applied in its entirety (dependent on the applicant's choice or based on some other factor)? Or should one set of safeguards always take priority over the other? There is compelling reason to think that both sets of safeguards should apply in their entirety. By analogy, if a police officer were to dispose a bomb on a plummeting plane, they should have both bomb disposal gear and a parachute. More proximately, if a non-English speaking child was prosecuted for theft, they should attract safeguards in light of both their age – trial in a youth court – and linguistic limitations – a translator. If a measure is both punitive and risk-based, the applicant should have to show both that the recipient is deserving of punishment and that they present a risk. Otherwise, the recipient may be punished without appropriate safeguards, or subject to coercive state intervention unjustified by appropriate risk assessment. Such a requirement, if adopted, may also incentivise the state to introduce measures that are punitive and not coercive risk measures, and coercive risk measures, but not punishment. If ambiguity as to whether a measure is punitive or a coercive risk measure could result in doubly heightened safeguards, why take the risk? Where a behaviour order is both a coercive risk measure and a punishment, the safeguards that follow both classifications should apply.

Section IV. Conclusion

Hybrid behaviour orders target a substantial range of behaviours to include supplying psychoactive substances,¹³⁶ and slavery and trafficking offences.¹³⁷ Yet the hybrid

¹³⁶ Psychoactive Substances Act 2016, ss 18-19.

¹³⁷ Modern Slavery Act 2015, ss 14-15.

behaviour order is more than the most common form of behaviour order. It is the most troubling. Hybrid behaviour orders, like the SHPO, are coercive risk measures, but their imposition is often left as a matter of judicial decision-making as opposed to risk assessment with appropriate safeguards. Hybrid behaviour orders are also punitive, but their imposition is not preceded by the heightened criminal fair trial safeguards. They constitute preventive state coercion without appropriate risk assessment and punishment without a presumption of innocence. The principles developed in this thesis and the approach to assessing punitiveness go a substantial way to addressing the dual evils of unjustified prevention and unjustified punishment that hybrid behaviour orders represent.

Chapter 8: Executive Behaviour Orders – the Public Spaces Protection Order

The brief history of the public spaces protection order (PSPO) has not been short of controversy. The order has been both a means to regulate protest on abortion,¹ and a subject of protest itself.² The PSPO is unique amongst behaviour orders because it imposes restrictions and requirements that apply to people within a space as opposed to on an individual. This chapter takes the PSPO as the exemplar of the executive behaviour order subcategory. Executive behaviour orders are behaviour orders imposed by a state body with little or no judicial oversight, the breach of which is an offence.³ Given that much of the critique of behaviour orders has focused on how they may circumvent fair trial safeguards, an analysis of newer orders that avoid a trial almost altogether is vital.⁴

In light of its unique nature, the selection of the PSPO as an exemplar of the executive behaviour orders subcategory requires explanation. First, the order still makes it possible to address the question of whether executive behaviour orders are coercive risk measures and/or punitive. Where the form of the PSPO will affect the answer to this question in a manner which distinguishes it from other executive behaviour orders – the community protection notice (CPN) and the terrorism investigation prevention measure (TPIM) – the chapter will explore these differences. Further, there is good reason for preferring the PSPO as an exemplar. Despite its widespread use, the order has not been the subject of significant academic attention.⁵ Analysis of the PSPO will also allow this chapter to go beyond the style of analysis in the previous two. The critique in chapters 6 and 7 was centrally status-

¹ *Dulgheriu v Ealing LBC* [2018] EWHC 1667 (Admin), [2018] 4 All ER 881.

² Manifesto Club, ‘#PROTESTPSPO’ <<http://manifestoclub.com/protestpspo.html>> accessed 24 April 2019.

³ This subcategory was developed in chapter 2.

⁴ For discussion of this critique, see chapter 2.

⁵ For two exceptions, see Kevin J Brown, ‘The Hyper-Regulation of Public Space: The Use and Abuse of Public Spaces Protection Orders in England and Wales’ (2017) 37(3) *Legal Studies* 543; Lucia Zedner, ‘Policing Civility in Public Space and the Exclusion of “Uncivil” Citizens’ (forthcoming).

based, by which I mean the criticism of gang injunctions and sexual harm prevention orders was mainly dependent on whether they constituted punishment and/or coercive risk measures. By comparison, this chapter argues the PSPO is neither punitive nor a coercive risk measure, but is nonetheless problematic and in need of reform. The wider lesson for the thesis is that status-based procedural safeguards, though necessary, are an insufficient means to limit the excesses of behaviour orders.

The chapter is split into seven sections. Section I sets out the legislation that enacted the PSPO, along with relevant case law and the early use of the orders in practice. Sections II and III establish that the PSPO should be considered neither punitive nor a coercive risk measure. Section IV argues the PSPO is, nonetheless, problematic for a number of reasons that include the breadth of behaviours that can be criminalised under it and, relatedly, the lack of procedural requirements before the order can be imposed. Section V offers responses to these problems including statutory limitations on the restrictions and requirements that can be contained in a PSPO. Section VI examines whether these proposed responses should apply to other behaviour orders before section VII concludes.

Section I. The current law

The PSPO was enacted by sections 59-75 of the Anti-social Behaviour, Crime and Policing Act 2014 (the 2014 Act).⁶ A local authority may make a PSPO when it is satisfied, on reasonable grounds, that two imposition requirements are met.⁷ First, that activities carried out in public space within the designated area have had a detrimental effect on the quality of life of those in the locality, or that it is likely activities will be carried out in that area with that effect. Secondly, the effect or likely effect of these activities is or is likely to be

⁶ This overview does not speak to the difference between and relationship of PSPOs and byelaws. On which see the 2014 Act, s 70; Explanatory Notes to the 2014 Act, paras 171-172; Brown (n 5) 558-560.

⁷ 2014 Act, s 59.

A. persistent or continuing; B. such as to make them unreasonable; and C. justifies the relevant restrictions. Both requirements can be met without any detrimental activities having taken place, and without a persistent and unreasonable detrimental effect being likely.⁸

A local authority does not have to attend court before it can make a PSPO. The local authority must, however, consult with the chief officer of police, community representatives the local authority thinks it appropriate to consult, and land owners/occupiers within the area to be regulated.⁹ Home Office guidance advocates open public consultation.¹⁰ Initial judicial commentary has, however, warned against the assumption that a local authority is bound by the views of the majority. *Summers v Richmond Upon Thames LBC* concerned a PSPO that, amongst other things, limited the number of dogs that could be walked at once by one person.¹¹ Giving judgment, Justice May stated

Mr Porter rightly took no point before me on the result of the statutory consultation regarding maximum numbers of dogs being walked. 59% of respondents to that consultation disagreed with the proposal to reduce numbers from six to four; as he fairly acknowledged, however, this was just one part of the information and evidence taken into account by the RegCom.¹²

⁸ Zedner (n 5) notes that the statute does not require a detrimental effect. The legislation is set up to assess the likelihood of each requirement independently and not the total likelihood of persistent and unreasonable behaviour. In consequence, it could be unlikely that an activity that was detrimental, unreasonable and persistent would occur, but a PSPO could still be imposed. A likely detrimental effect – 75%, likely persistent – 75%, and likely unreasonable – 75% (each requirement satisfied). Total likelihood of a detrimental effect that is persistent and unreasonable – 42%. This point assumes that each probability is independent. Even with this assumption, it can be seen that the repeated use of the term ‘likely’ lowers the threshold for imposing a PSPO. To avoid this issue, local authorities and the courts could interpret later likelihoods to encompass factors relevant to earlier assessments, and thus require the totality of persistent and unreasonable conduct that is detrimental to be likely. This would, however, appear to be a strained reading of the legislation.

⁹ 2014 Act, s 72.

¹⁰ Home Office, *2014 Act: Anti-social Behaviour Powers: Statutory Guidance for Frontline Professionals* (2017) 49.

¹¹ *Summers v Richmond Upon Thames LBC* [2018] EWHC 782 (Admin), [2018] 1 WLR 4729 [5].

¹² *ibid* [59] ‘RegCom’ is short for the regulatory committee of the local authority.

Most PSPOs are not brought into effect after a full council hearing, but are passed by one or two council officers.¹³ The orders can then be enforced by the local authority, or enforcement can be contracted out to private companies.¹⁴ PSPOs can be made for up to three years initially and can be extended.¹⁵ Recent Manifesto Club freedom of information requests show that 147 local authorities issued 276 PSPOs between August 2017 and January 2019.¹⁶ This constituted a notable rise in both the number of authorities that have issued a PSPO and the number of PSPOs issued compared to previous periods.¹⁷

PSPOs can impose either restrictions or requirements, and they can apply generally or at specified times, in specified circumstances, or – somewhat disconcertingly – to ‘persons in specified categories’.¹⁸ A remarkable variety of restrictions and requirements have been imposed under PSPOs. Examples include restrictions on cycling,¹⁹ a curfew for under 16s,²⁰ a ban on sleeping in public,²¹ restrictions on dropping-off nursery and primary school children,²² and a restriction on fitness classes in parks.²³ A draft PSPO issued by

¹³ Josie Appleton, ‘PSPOs – Rise and Rise of the “Busybodies’ Charter”’ (Manifesto Club July 2017).

¹⁴ 2014 Act, s 68.

¹⁵ 2014 Act, s 60.

¹⁶ Manifesto Club, ‘PSPOs – The “Busybodies’ Charter” in 2018’ (Manifesto Club 19 April 2019) <<http://manifestoclub.info/pspos-the-busybodies-charter-in-2018/>> accessed 24 April 2019.

¹⁷ Appleton, ‘Rise and Rise’ (n 13).

¹⁸ 2014 Act, s 59(5)-(6). Special provision is made for prohibitions on alcohol in ss 62-63.

¹⁹ Oxford City Council, ‘Public Spaces Protection Order’ <https://www.oxford.gov.uk/downloads/file/2264/oxford_city_centre_pspo> accessed 24 April 2019.

²⁰ Appleton, ‘Rise and Rise’ (n 13).

²¹ Rushcliffe Borough Council, ‘Public Spaces Protection Order (PSPO)’ <<http://www.rushcliffe.gov.uk/pspo/>> accessed 25 April 2019. See also, Teignbridge District Council, ‘Public Spaces Protection Order No. 1 of 2016’ <<https://www.teignbridge.gov.uk/media/1617/public-spaces-protection-order-dawlish.pdf>> accessed 25 April 2019.

²² Three Rivers District Council, ‘School PSPO’ <<https://www.threerivers.gov.uk/egcl-page/school-pspo>> accessed 25 April 2019.

²³ London Borough of Richmond Upon Thames, ‘Public Spaces Protection Order 217’ <https://www.richmond.gov.uk/media/15033/pspo_anti_social_behaviour_order.pdf> accessed 25 April 2019.

Oxford City Council would have required street performers to enjoy themselves.²⁴ The restrictions and requirements imposed under PSPOs do not only vary city by city, but also street by street, and based on age. A parent and child walking through a town centre could thus pass through two and three micro-jurisdictions respectively. Breach of a restriction or requirement, without reasonable excuse, is an offence with a maximum sentence of a fine on summary conviction.²⁵ Breach can also be dealt with by a fixed penalty notice.²⁶

Such a range of restrictions and requirements is perhaps unsurprising given the breadth of the statutory tests to make a PSPO. Initial policy guidance has not crystallised what behaviours should be targeted by PSPOs. To the contrary, government guidance provides:

Public Spaces Protection Orders are intended to deal with a particular nuisance or problem in a specific area that is detrimental to the local community's quality of life, by imposing conditions on the use of that area which apply to everyone.²⁷

Likewise, the government impact assessment that preceded the enactment of the 2014 Act did not put a value to the benefit of introducing the PSPO. It instead stated: 'We have not been able to quantify many of the benefits relating to the proposals. This is because of a lack of data and foresight of how the new powers will be used.'²⁸

The 2014 Act provides two ways to challenge the validity of a PSPO and leaves some scope for judicial review. Section 66 of the 2014 Act sets out a procedure by which an 'interested person' can apply to the High Court for review of the decision to impose the

²⁴ Jason Coppel and Deok Joo Rhee, 'In the Matter of: Oxford City Council Proposals for A "Public Spaces Protection Order"' Joint Opinion' (Liberty 2015) para 63. Available on request from Liberty.

²⁵ 2014 Act, s 67.

²⁶ 2014 Act, s 68.

²⁷ As will be clear from the above, the 'applying to everyone' requirement is in keeping with neither section 55 of the 2014 Act nor practice.

²⁸ Home Office, *Impact Assessment - ASB, Crime and Policing Bill: Community Protection Notice, Community Protection Orders and the Community Trigger* (May 2013) para 68.

order within six weeks of it being made. An interested person is defined as ‘an individual who lives in the restricted area or who regularly works in or visits that area.’²⁹ The section establishes two grounds for challenge: first, the local authority did not have the power to make the order or impose the relevant restriction/requirement, and secondly, an imposition requirement was not complied with and this substantially affected the applicant’s interests. An example of the former would be a PSPO that purported to apply outside of the local authority. An example of the latter may be a PSPO that limited the number of buskers who could perform in a city centre that was brought into force without consultation with buskers. These legislative grounds parallel judicial review based on legality or rationality, and procedural impropriety.³⁰ If a section 66 review is successful, the High Court can quash the order, or any restriction or requirement in it. There have been two reported High Court challenges to PSPOs under section 66.³¹ One of these challenges, *Dulgheriu v Ealing LBC*, concerned the regulation of protest outside an abortion clinic in west London.³² The imposition of that PSPO raised issues related to the freedom of religion, freedom of thought, freedom of speech, freedom of assembly, and freedom from discrimination.³³ More will be said on *Dulgheriu* below.

The second means of challenging a PSPO provided by the 2014 Act is as a defence to the offence of breaching an order. Section 67(3) states, ‘A person does not commit an offence under this section by failing to comply with a prohibition or requirement that the local authority did not have power to include in the public spaces protection order.’ As a

²⁹ 2014 Act, s 66(1).

³⁰ *Summers* (n 11).

³¹ *Dulgheriu* (n 1); *Summers* (n 11). As of 15 June 2019.

³² *Dulgheriu* (n 1).

³³ *Dulgheriu* (n 1) [59]-[76].

criminal defence, this formulation is unusual in England and Wales, and is reminiscent of the ‘constitutional defences’ employed in criminal proceedings in the United States.³⁴

Finally, a person or body may bring a judicial review if they do not satisfy the ‘interested person’ requirement in the 2014 Act but do have sufficient interest to bring a judicial review. The notion of a party that is not an interested person but that has sufficient interest may at first appear incongruous. The difference is of practical importance and is explored further in section IV. Before that, we can now assess whether the PSPO constitutes a coercive risk measure and/or punishment.

Section II. The PSPO as a coercive risk measure?

To be a coercive risk measure, the PSPO would have to satisfy the following requirements.

1. The measure is a preventive measure.
 - a) It is imposed before a possible harm.
 - b) With the purpose of avoiding the harm, reducing the likelihood of it occurring, or reducing its severity if it does occur.
2. An assessment of the risk posed by the individual must be undertaken and satisfied before the measure can be imposed.
3. The measure is coercive.

We can first consider whether PSPOs fit into the wider preventive measure category. Throughout its guidance for practitioners, government uses the language of ‘victims’ when it discusses the imposition of PSPOs. By way of example, ‘The legal tests [for the imposition of a PSPO] focus on the impact that anti-social behaviour is having on victims and communities.’³⁵ This usage and the fact PSPOs can be imposed after behaviour with a detrimental effect do not detract from the status of PSPOs as preventive. As explained in

³⁴ The notion of constitutional challenge to the scope of an offence is so normalised in the United States, that Ellickson writes of the ‘Eight Amendment defense’: Robert C Ellickson, ‘Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Spaces Zoning’ (1996) 105 Yale Law Journal 1165, 1174. For an overview of the, relatively minor, impact of the Human Rights Act 1998 on substantive criminal law in England and Wales, see Jeremy Horder, *Ashworth’s Principles of Criminal Law* (9th edn, OUP 2019) 74-79.

³⁵ Home Office, *Guidance* (n 10) 49.

chapter 4, preventive measures can follow two timelines: measure imposed (time 1) – possible harm (t2); and initial harm (t1) – measure imposed (t2) – possible further harm (t3). The order thus satisfies the temporal requirement set out in requirement 1(a) above.

Government maintains that the purpose of the PSPO is to ‘stop individuals or groups committing anti-social behaviour in a public space.’³⁶ A focus on harm reduction is also apparent in the tests for what restrictions and requirements may be imposed under a PSPO, which are limited to those that will stop the relevant behaviour, reduce the likelihood of it occurring or reduce its effect if it does occur.³⁷ A preventive purpose can equally be seen in the early case law on PSPOs. In *Summers*, the relevant order was set up to prevent nuisances related to uncontrolled dogs in parks and other public spaces.³⁸ In *Dulgheriu*, an order was imposed to prevent the stress caused to those working in and attending an abortion clinic, as well as others in the vicinity by creating a no protest ‘safe zone’.³⁹ PSPOs satisfy the purposive requirement set out in 1(b) and, therefore, constitute preventive measures.

Unlike the behaviour orders considered in the previous two chapters, the imposition of a PSPO does not necessitate an assessment of the risk posed by an individual. The order targets activities or possible activities in public spaces. A conceivable response to this distinction would be that PSPOs can and have been used to target (vulnerable) groups and possibly individuals.⁴⁰ The four-dog limit at issue in *Summers*, by way of example, could be understood as targeting professional dogwalkers.⁴¹ Yet this targeting is no different than

³⁶ Home Office, *Guidance* (n 10) 47.

³⁷ 2014 Act, s 59.

³⁸ *Summers* (n 11).

³⁹ *Dulgheriu* (n 1).

⁴⁰ See further section IV.

⁴¹ *Summers* (n 11).

criminal laws that are more likely to have an impact on some groups than others.⁴² The purpose of the coercive risk measure category is to allow for consideration of the particular issues that affect coercive measures imposed based on an individual risk assessment.⁴³ As the PSPO does not satisfy the risk assessment requirement, there is no need for an examination of whether it is coercive; the order should not be considered a coercive risk measure.⁴⁴ In consequence, its imposition cannot be assumed to require the bolstered necessity requirement argued for in earlier chapters.⁴⁵

It cannot be inferred from the fact PSPOs are not coercive risk measures that every executive behaviour order falls outside this category. The CPN allows local authority officials and police officers⁴⁶ to impose restrictions, requirements, and a requirement to take reasonable steps to achieve a result.⁴⁷ The official must have reasonable grounds to believe a person's conduct is having a persistent or continuing detrimental effect on the quality of life in the locality, and that the conduct is unreasonable.⁴⁸ The only restrictions and requirements that may be imposed are those that are reasonable to prevent the relevant detrimental impact, the likelihood of it continuing or recurring, or to reduce its impact.⁴⁹ Government has argued the purpose of the CPN is '[t]o stop a person aged 16 or over,

⁴² By way of example, section 3 of the Vagrancy Act 1824 could be argued to target the homeless. For similar issues in other jurisdictions, see Carole Gayet-Viaud, 'French Cities' Struggle Against Incivilities: from Theory to Practices in Regulating Urban Public Space' (2017) 23 *European Journal of Policy Research* 77; Stefania Crocitti and Rossella Selmini, 'Controlling Immigrants: The Latent Function of Italian Administrative Orders' (2017) 23 *European Journal of Policy Research* 99.

⁴³ See further chapter 4.

⁴⁴ Though such an analysis would work to test the definition of 'coercive'. As the PSPO is generally applicable, such analysis may require an answer to the question of whether all law is coercive.

⁴⁵ The term 'cannot be assumed' is used because the fact of not holding a status which requires a safeguard does not mean that safeguard should not be adopted, nonetheless.

⁴⁶ Along with others designated by the local authority of a type that has been specified in an order by the Secretary of State: 2014 Act, s 53.

⁴⁷ 2014 Act, s 43.

⁴⁸ 2014 Act, s 43.

⁴⁹ 2014 Act, s43(4).

business or organisation committing anti-social behaviour which spoils the community's quality of life.⁵⁰ There is thus good reason to classify the CPN as a preventive measure and its imposition is based on an assessment (by an official not a judge) of the risk posed by a person. Examples of the conditions included in CPNs include requirements to tidy messy gardens, to stop feeding birds at home, and not to cry at home.⁵¹ Breach of a restriction or requirement, without reasonable excuse, is an offence with a maximum sentence of a fine.⁵² Breach can also result in the imposition of a fixed penalty notice,⁵³ a remedial order,⁵⁴ and seizure and forfeiture of items used in the breach offence.⁵⁵ These restrictions can limit the liberty of a person to emote and act freely at home, and are backed by such substantial enforcement powers as to be coercive. There is thus at least a prima facie case for the CPN constituting a coercive risk measure and its imposition requiring the bolstered necessity requirement. The bolstered requirement was as follows.

The applicant should have to evidence, to the civil standard, that the relevant behaviour order is necessary. That is, on the balance of probabilities, there is a high likelihood of reoffending absent intervention, the relevant intervention will reduce the likelihood substantially, and no less restrictive intervention would have similar effect.

As will be apparent, the requirement is predicated on the imposition of the behaviour order requiring a trial. An executive behaviour order that constituted a coercive risk measure will likely fall far short of satisfying the bolstered necessity requirement due to the troubling lack of court oversight in the imposition of such orders.

⁵⁰ Home Office, *Guidance* (n 10) 38 (emphasis added). Compare to the stated purpose on page 39.

⁵¹ These examples are taken from Josie Appleton, 'The Crime of Crying in your own Home' (Manifesto Club October 2016).

⁵² 2014 Act, s 48.

⁵³ 2014 Act, s 52.

⁵⁴ 2014 Act, s 49.

⁵⁵ 2014 Act, ss 50-51.

Section III. The PSPO as a punitive measure?

In this section, I assess whether the imposition of a PSPO constitutes a punishment, not whether sentencing for breaching the order is punitive. However, the task of discerning whether behaviour orders are punitive cannot be wholly divided from the effects of breach, as will be seen below. The possibility that PSPOs could constitute punishment is one that should be taken seriously. Zedner has described PSPOs as “shadow” forms of punishment,⁵⁶ and comparable measures in Italy have been described as punitive by Crocitti and Selmini.⁵⁷ To assess this possibility, the section employs the behaviour–effect–purpose test of punitiveness developed in chapter 5. If the measure satisfies all three criteria, there is a compelling case that it is a punitive.

1. Does the measure regulate behaviours that can be subject to the criminal law or that are wrongful?
2. Does the measure affect the recipient in a similar manner to accepted punishments?
3. Does the measure have a punitive purpose?

Some of the behaviours regulated by PSPOs can be subject to the criminal law. Failure to keep a dog under control and dog fouling were offences, under byelaws, prior to the enactment of the PSPO at issue in *Summers*.⁵⁸ Research by the Manifesto Club found that five of the behaviours most frequently regulated by PSPOs are alcohol consumption; dog walking; begging/loitering/congregating;⁵⁹ and consumption of intoxicating substances.⁶⁰ PSPOs have also been used to stop people collecting money for charity.⁶¹

⁵⁶ Zedner (n 5). Zedner borrows the term from Katherine Beckett and Naomi Murakawa, ‘Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment’ (2012) 16 *Theoretical Criminology* 221.

⁵⁷ Crocitti and Selmini (n 42)112.

⁵⁸ *Summers* (n 11) [10] – [14]. A byelaw that prohibits an activity is of no effect if that activity is also regulated, in that area, by a PSPO: 2014 Act, s 70.

⁵⁹ For staunch criticism of such a provision in Hillingdon, see Brown (n 5) 554.

⁶⁰ Appleton, ‘Rise and Rise’ (n 13).

⁶¹ Appleton, ‘Rise and Rise’ (n 13).

Some of these activities are not offences, others have been criminalised via byelaws,⁶² and others could constitute statutory offences.⁶³

It is the effect of imposing a PSPO that distinguishes it from other behaviour orders, and which makes it distinctive from existing forms of punishment. PSPOs do not apply to an individual recipient, but to those in a specified area. They thus have more in common with byelaws and the criminal law than current forms of punishment.⁶⁴ The then Lord Justice Hughes said the following of sexual offences prevention orders, ‘...each of its prohibitions creates for the defendant a new and *personal criminal offence*...’⁶⁵ Simester and von Hirsch similarly described the ASBO as ‘delegated criminalisation’ and more precisely as ‘ad hominem criminalisation’.⁶⁶ The PSPO can best be seen as another type of delegated criminalisation: localised criminalisation, or at least de facto localised criminalisation.⁶⁷ This view is supported by the manner in which some local authorities have drafted their PSPOs. The PSPO made by the Richmond Upon Thames LBC, that was at issue in *Summers*, referred to each restriction and requirement included as an ‘offence’. By way of example, ‘Article 4 – Dogs on leads (1) A person in charge of a dog shall be guilty of an offence if, at any time, his dog is not on a lead in the restricted area...’⁶⁸ The

⁶² On the previous control of dogs by byelaws, see *Summers* (n 11) [10] – [14].

⁶³ Psychoactive Substances Act 2016; Vagrancy Act 1824, s 3.

⁶⁴ Such a divide between criminal law and punishment may at first appear odd because punishment is a response to criminal offending. Yet a rule and the consequence of its breach can be distinguished. Robbery and imprisonment that follows a finding of guilt for robbery make for a useful example.

⁶⁵ *Smith (Steven)* [2011] EWCA Crim 1772, [2012] 1 WLR 1316 [3] (emphasis added). The order has since been repealed. For current measures, see the Sexual Offences Act 2003, s 103A (sexual harm prevention orders) and s 122A (sexual risk orders); both are appraised in chapter 7.

⁶⁶ AP Simester and Andrew von Hirsch, ‘Regulating Offensive Conduct through Two-Step Prohibitions’ in Andrew von Hirsch and AP Simester (eds), *Incivilities* (Hart Publishing 2006) 181-182. See also, Matthew Dyson, ‘The State’s Obligation to Provide a Coherent System of Remedies Across Crime and Tort’ in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds) *Criminal Law and the Authority of the State* (2017 Hart Publishing) 183.

⁶⁷ For convenience, future reference will only be made to localised criminalisation and variants, as opposed to de facto localised criminalisation.

⁶⁸ *Dulgheriu* (n 1) [5].

same language of offence creation has been used by Staffordshire Moorlands District Council,⁶⁹ David Lammy,⁷⁰ and the media.⁷¹ The imposition of a PSPO is arguably an exercise in rule creation rather than rule enforcement. In other words, when a local authority makes a PSPO it does not have a similar effect to the imposition of accepted forms of punishment such as a fine, the orders instead function as localised criminalisation.

Turning to the purposes of the PSPO, the White Paper that preceded the 2014 Act emphasised the then government's desire for the PSPO to be a tool to allow for local responses to problem behaviour:

In keeping with the Government's desire to devolve powers to local areas, the order would allow local authorities to make decisions without the burden of having to go through central Government. This provides more local discretion than current byelaws which require Secretary of State sign-off.⁷²

As the Anti-social Behaviour, Crime and Policing Bill worked its way through Parliament, the then Minister for Policing and Criminal Justice, Damian Green, similarly placed emphasis on responding to local problems:

Public spaces protection orders will consolidate those powers and give practitioners clarity and flexibility to respond to a wider range of local

⁶⁹ Staffordshire Moorlands District Council, 'Notice of Intention to Apply a Public Spaces Protection Order' (November 2017) <https://www.staffsmoorlands.gov.uk/media/2755/PSPO-Biddulph-Millennium-Gardens/pdf/PSPO_Biddulph_Millennium_Gardens.pdf> accessed 25 April 2019. Other Councils set up a list of restrictions and requirements and then specify that it is an offence to breach these: Bassett District Council, 'Recreation Ground, Blyth Road, Worksop Public Spaces Protection Order 2017' <<https://www.bassetlaw.gov.uk/media/1597/worskop-pspo-2016.pdf>> accessed 25 April 2019. This too is a style of offence creation. See, for instance, Fraud Act 2006, ss 1-4.

⁷⁰ David Lammy, Tweet <https://twitter.com/DavidLammy/status/974180085224919041?ref_src=twsrc%5Etfw%7Ctwcamp%5Etw%5Eetembed&ref_url=https%3A%2F%2Fd23143793534233350815.ampproject.net%2F1530567757224%2Fframe.html> accessed 25 April 2019.

⁷¹ Dawn Foster, 'Every Rough Sleeper is the Product of Political Decisions. Stop Criminalising Them' (*The Guardian*, 13 February 2018) <<https://www.theguardian.com/society/2018/feb/13/rough-sleeper-political-decisions-stop-criminalising>> accessed 25 April 2019; Jon Stone, 'One in Ten Local Councils are Criminalising Homeless People with New Rules' (*The Independent*, 2 March 2016) <<https://www.independent.co.uk/news/uk/politics/one-in-ten-local-councils-are-criminalising-homeless-people-with-new-rules-a6903611.html>> accessed 25 April 2019.

⁷² Home Office, *Putting Victims First – More Effective Responses to Anti-Social Behaviour* (Cm 8367, 2012) para 3.28.

problems. As we know, there is seldom one problem; there is usually a collection of problems.⁷³

The PSPO thus has a purpose not typically associated with punishment: empowerment of local authorities. If an argument was to be made for the PSPO as punitive, it would likely draw on the preventive aims of the order.⁷⁴ Given the order does not necessarily target wrongful or criminal behaviour, and has non-punitive effects and purposes, a preventive purpose is insufficient to classify the order as punitive. What is more, the criminal law also has a preventive aim; this further speaks to the PSPO constituting localised criminalisation.

We cannot extrapolate from the conclusion that PSPOs are non-punitive that every executive behaviour order is non-punitive. A *prima facie* case for the TPIM constituting punishment can be made. Some context on TPIMs is first needed.⁷⁵ A TPIM can initially be imposed by the Secretary of State either if they reasonably believe the case is urgent (and further imposition requirements are satisfied), or they apply for permission to the High Court.⁷⁶ If an initial application is made, the High Court, does not engage in a substantive assessment of whether a TPIM ought to be imposed, but instead reviews the Secretary of State's decision to assess if it is 'obviously flawed'.⁷⁷ Regardless of the initial route taken, there will next be a review hearing in which the court will apply judicial review principles to the decision to impose a TPIM.⁷⁸ A limited number of restrictions and requirements can be imposed under a TPIM, these include overnight residence requirements⁷⁹ and

⁷³ Anti-social Behaviour Crime and Policing Bill Deb 2 July 2013, col 625.

⁷⁴ Preventive aims have also been used to argue against measures being punitive. See further chapter 3.

⁷⁵ TPIMs have received the most academic attention out of executive behaviour orders. See, by way of example, Clive Walker and Alex Horne, 'The Terrorism Prevention and Investigations Measures Act 2011: One Thing but Not Much the Other?' [2012] (6) *Criminal Law Review* 421; Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' [2017] (Oct) *Public Law* 609.

⁷⁶ Terrorism Prevention and Investigation Measures Act 2011, ss 2-3.

⁷⁷ 2011 Act (n 76) s 6.

⁷⁸ 2011 Act (n 76) s 9.

⁷⁹ 2011 Act (n 76) sch 1 para 1.

monitoring requirements.⁸⁰ Breach of a restriction or requirement is an offence with a maximum sentence of five years' imprisonment.⁸¹ The threefold behaviour–effect–purpose test can now be applied to the TPIM.

TPIMs have been used to regulate behaviours that could constitute criminal offences. In 2013 the then Independent Reviewer of Terrorism Legislation, David Anderson, remarked 'The allegations against some TPIM subjects are at the highest end of seriousness, even by the standards of international terrorism.'⁸² Other TPIMs were imposed for less serious wrongdoing including attempted travel for the purposes of terrorism training.⁸³ This may suggest TPIMs can also target behaviours far outside the scope of criminal law. Yet the acts, and omissions, targeted by terrorism offences are often far removed from any final harm. As Simon and Zedner detail, terrorism offences stretch the boundaries of the criminal law in numerous ways so that the relationship between the relevant act or omission and any potential harm is remote.⁸⁴ Further, Anderson did not present the reasons for choosing an application for a TPIM over a prosecution as based on the substantive limits of the criminal law, but instead as procedural limitations of the criminal justice system. Examples include some recipients had already been acquitted;⁸⁵ domestic intercept material is inadmissible in criminal trials; and an unwillingness of the intelligence agencies to jeopardise informants or other methods of intelligence gathering.⁸⁶

⁸⁰ 2011 Act (n 76) sch 1 para 12.

⁸¹ 2011 Act (n 76) s 23.

⁸² David Anderson, 'Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011' (Independent Reviewer of Terrorism Legislation, March 2013) para 4.15(a).

⁸³ Anderson, '2012 Report' (n 82) para 4.15(b).

⁸⁴ Joanna Simon and Lucia Zedner, 'Countering Terrorism at the Limits of Criminal Liability' in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law* (Intersentia 2018).

⁸⁵ For a more recent example, see *Secretary of State for the Home Department v EC* [2017] EWHC 795 (Admin).

⁸⁶ Anderson, '2012 Report' (n 82) paras 7.1-7.19.

Given the breadth of terrorism-related offences, TPIMs can and do regulate behaviours that can be subject to the criminal law.⁸⁷

Turning to the effects of imposing a TPIM, the restrictions and requirements that may be imposed are limited by statute.⁸⁸ Examples include curfews,⁸⁹ exclusions from specified areas,⁹⁰ and restrictions on the use of electronic communication devices.⁹¹ As Anderson has noted, such restrictions and requirements can constitute ‘severe restrictions on everyday life’.⁹² This is certainly the case when the cumulative effect of multiple restrictions is considered. What is more, the restrictions and requirements that can be imposed under a TPIM overlap with those that may be imposed under measures currently envisaged as punitive. The above-listed examples of TPIM restrictions and requirements can also be imposed under a community order or a suspended sentence.⁹³ Further, TPIMs share with community orders and suspended sentences the possibility of imprisonment on breach of a restriction or requirement.⁹⁴ Breach of a TPIM is a criminal offence with a maximum sentence of five years’ imprisonment.⁹⁵ The effects of imposing a TPIM are thus similar to the effect of punitive measures.

⁸⁷ This is not to say that there is a total overlap between the behaviours that may be regulated by the criminal law and TPIMs. In *Secretary of State for the Home Department v LF* [2017] EWHC 2685 (Admin) Justice Laing, at [222], stated ‘I do not consider that there is any hint in section 4(1) of the 2011 Act that a person cannot engage in TRA [terrorism related activity] unless he also commits a criminal offence.’

⁸⁸ 2011 Act (n 76) s 2 and sch 1.

⁸⁹ 2011 Act (n 76) sch 1 para 1(2)(c).

⁹⁰ 2011 Act (n 76) sch 1 para 3.

⁹¹ 2011 Act (n 76) sch 1 para 7.

⁹² David Anderson, ‘Shielding the Compass: How to Fight Terrorism Without Defeating the Law’ [2013] (3) *European Human Rights Law Review* 233, 240.

⁹³ Curfew – Criminal Justice Act 2003, s 204; exclusion – s 205; prohibition on use of electronic communications – prohibited activity requirement, s 203 (for an example of the banning of the use of devices that could access the internet, see *Brook* [2010] EWCA Crim 866). These community order restrictions and requirements are made available to impose as part of a suspended sentence by the Act, ss 189-190.

⁹⁴ For further detail on the consequences of breaching a community order or a suspended sentence see Andrew Ashworth, *Sentencing and Criminal Justice* (6th edn, CUP 2015) chs 9-10.

⁹⁵ 2011 Act (n 76) s 23.

The government has stated the purpose of TPIMs is ‘to manage the terrorism-related risk posed by people’.⁹⁶ Such a preventive purpose aligns to the general preventive aims of sentencing as set out in section 142 of the Criminal Justice Act 2003: crime reduction (including by deterrence); reform and rehabilitation of offenders; and public protection. While this shows there is a plausible case that the TPIM measure is punitive, this does not lead to a definitive conclusion. Even in undertaking this exercise, it is hard to discern a clear distinction between TPIMs and measures currently seen as punitive. It is perhaps little wonder that the recipient of a TPIM in *D v Secretary of State for the Home Department* saw the measure as a punishment imposed by the state.⁹⁷

The procedural safeguards that precede the imposition of PSPOs and TPIMs fall far short of the safeguards in a criminal trial.⁹⁸ If an executive behaviour order should be considered punitive, the procedural ramifications are likely to be more significant than for other types of behaviour order. This conclusion parallels that in the above section. Executive behaviour orders can be a particularly troubling type of behaviour order due to the lack of procedural safeguards and court oversight before their imposition.

Section IV. The PSPO as unproblematic?

An examination of PSPOs makes clear that not every problem associated with behaviour orders stems from the status of orders as punitive or coercive risk measures. This chapter thus provides an important contrast to the two preceding chapters. In this section, I argue PSPOs are problematic for four reasons: the conduct they have criminalised; the lack of

⁹⁶ Government, *CONTEST: The United Kingdom’s Strategy for Countering Terrorism* (Cm 8123, 2011) 49.

⁹⁷ [2014] EWHC 3820 (Admin), [2015] 1 WLR 2217 [36].

⁹⁸ There are limits to assessing fair trial safeguards in isolation: Rory Kelly, ‘The Right to a Fair Trial and the Problem of Pre-Inchoate Offences’ [2017] (6) *European Human Rights Law Review* 596.

procedural requirements before they can be made; the combination of law-making and law enforcement functions in local authorities; and the limitations on reviewing PSPOs.

As the examples given demonstrate, the behaviours regulated by PSPOs present a range from the possibly virtuous through neutral or nuisance conduct to prior existing offences. Those examples included bans on collecting for charity, congregating, sleeping, and begging. Regardless of which, if any, theory of criminalisation one adopts, some of the behaviours criminalised by PSPOs are eyebrow raising. We do not need a detailed analysis of what constitutes a public wrong to be critical of making it a crime to congregate in public.⁹⁹ Nor do we need an analysis of reverse harms to be sceptical of criminalising sleeping.¹⁰⁰

The behaviours criminalised by PSPOs bring into question the very publicness of the spaces they regulate. Von Hirsch and Shearing present privatisation as a threat to the publicness of public spaces.¹⁰¹ They argue what makes public spaces ‘public’ is that ‘they are supposed to be available to any member of the public; such persons, it is assumed need not be required to account for their presence in such spaces to anyone.’¹⁰² A comparable threat is posed by PSPOs. If a group of children, a skateboarder, or a busker have to provide a reasonable excuse to continue to use public spaces, the place cannot be enjoyed by all the public. As with the privatisation of public spaces, PSPOs construct an acceptable class of person who can have the space in which to enjoy freedoms publicly.

⁹⁹ For recent work on public wrongs, see James Edwards and Andrew Simester, ‘What’s Public About Crime?’ (2017) 37(1) *Oxford Journal of Legal Studies* 105; RA Duff and SE Marshall, ‘Crimes, Public Wrongs, and Civil Order’ (2019) 13(1) *Criminal Law and Philosophy* 27.

¹⁰⁰ On reverse harms, see John Gardner and Stephen Shute, ‘The Wrongness of Rape’ in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (OUP 2000); Andrew Ashworth and Lucia Zedner, ‘Prevention and Criminalisation: Justifications and Limits’ (2012) 15 *New Criminal Law Review* 542, 550-553.

¹⁰¹ Andrew von Hirsch and Clifford Shearing, ‘Exclusion from Public Space’, in Andrew von Hirsch, David Garland and Alison Wakefield (eds), *Ethical and Social Perspectives on Situational Crime Prevention* (Hart Publishing, 2000) 79-81. There has been a considerable expansion of privately-owned public space since 2000: Zedner (n 5).

¹⁰² Von Hirsch and Shearing (n 101) 79.

Yet the risk posed by PSPOs may be broader than that posed by privately owned public spaces. PSPOs also risk the use of criminalisation powers to limit private enterprise and competition. The Manifesto Club report that Cambridge City Council appear to have used a PSPO as part of a move to promote one punting and tour company over others.¹⁰³ It concludes,

Since the council can define “anti-social” or “detrimental” behaviour almost without limit, this creates an obvious danger that these powers will be used by certain sectional interests against others, and even to defend the economic interest of council-linked companies against that of independent operators.¹⁰⁴

The capacity to use the criminal law to promote the private interest of a local authority or a preferred company is a troublesome prospect, especially given the limits on reviewing PSPOs, as will be discussed below.

A plausible (and partial) response to the above criticism of what PSPOs criminalise is that the breadth of what can be criminalised via the orders means they can be used in creative and positive ways.¹⁰⁵ The impact assessment that preceded the introduction of PSPOs made this form of argument in support of the related CPN:

Community protection notices are more flexible than the orders they replace so can be used to deal with changing problems without having to wait for new legislation from central government.¹⁰⁶

Similarly, Jenkins suggests that the breadth of restrictions and requirements that can be imposed under PSPOs means that they, along with CPNs, can and should be the ‘primary response’ to issues of local environmental quality.¹⁰⁷

¹⁰³ Josie Appleton, ‘PSPOs: A Busybodies’ Charter’ (Manifesto Club February 2016).

¹⁰⁴ Appleton ‘Busybodies’ Charter’ (n 103).

¹⁰⁵ Such arguments bear a resemblance to the claim that we can be justified in criminalising broadly in some circumstances: Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2007). There is, however, a difference between a broad criminal offence and a broad power to criminalise.

¹⁰⁶ Home Office, *Impact Assessment* (n 28) para 53. Oddly, this was not a suggested benefit of PSPOs in the same impact assessment – paras 68-76.

¹⁰⁷ Victoria Jenkins, ‘The Legal Response to Safeguarding Local Environmental Quality’ (2015) 35(4) *Legal Studies* 648, 667. Jenkins argues the 2014 Act emerged without ‘clear attention’ to local environmental quality (674). Though the above-mentioned government impact assessment states, ‘The majority of incidents

Writing in the fifties, Williams was wary of this type of argument in the context of the power to bind-over. It is worth quoting from his work in detail.

It is extraordinary that the humblest judicial functionaries should thus be able to indulge their fancy by formulating their own standards of behaviour for those who come before them. True, the power may be employed in a beneficial way. It was used to meet the problem, experienced in both world wars, of young girls who haunted military camps for the purpose of promiscuous associations... The neglect of Parliament to deal with this serious social problem meant that some magistrates' courts fell back upon the weapon of binding over. Beneficent though the result was, it is a notable infringement of civil liberty that persons should be brought before a court for conduct that is not the breach of any legal rule.¹⁰⁸

These observations have continued value. PSPOs may be used for good when there is a gap in the law. Some may maintain that the no-protest zone developed in *Dulgheriu* provides an example of such a good use absent legislation. But this does not overcome the fact that, in practice, PSPOs have allowed local functionaries to criminalise behaviours that should not be criminalised.¹⁰⁹ If the price of plugging gaps in the law is the risk of over-criminalisation and arbitrary criminalisation, it is a high one.

Additionally, even if it was accepted that the protest in *Dulgheriu* ought to be regulated, it does not follow that local authorities are the appropriate body to regulate or that a PSPO is an appropriate means of regulation. There have been calls in Parliament for national regulation of such protests,¹¹⁰ and government has undertaken consultation on

are related to environmental ASB (e.g. litter, graffiti, noise) or public nuisance (e.g. drunk and rowdy behaviour)...’ Home Office, *Impact Assessment* (n 28) 1.

¹⁰⁸ Glanville Williams, ‘Preventive Justice and the Rule of Law’ (1953) 16(3) *Modern Law Review* 417, 420-422 and 427.

¹⁰⁹ In this sense, PSPOs are comparable to what Horder has described as ‘enabling laws’. These are statutes which criminalise the doing of something prohibited by a regulation made under the statute. Enabling laws thus allow later criminalisation via secondary legislation. Horder (n 34) 57-59.

¹¹⁰ HC Deb 4 Jun 2018, vol 642, col 5; HC Deb 07 November 2017, vol 630, col 570WH.

such regulation.¹¹¹ The problem with local regulation of protest outside abortion clinics is made apparent in the final paragraph of Mr Justice Turner's judgment in *Dulgheriu*:

My conclusions in this case do not give the green light to local authorities to impose PSPOs as a matter of course upon areas in the immediate vicinity of abortion clinics. Each case must be decided on its own facts.¹¹²

Local responses do not provide a definitive solution that must be transferred across local authorities. Instead, they risk repeated High Court challenges. Here the criticism starts to bleed into one of the process by which PSPOs are made. It is to that which our attention can now turn.

The problems with PSPOs extend from what they criminalise to how they criminalise. PSPOs risk a lack of accountability before an order is made, and this risk has been realised in practice. Elected local officials do not need to approve PSPOs.¹¹³ A draft PSPO in Liverpool that would have banned begging got as far as public consultation without the mayor or cabinet knowing about it.¹¹⁴ Freedom of information requests issued by the Manifesto Club found that not every council undertook public consultation before making a PSPO; of those who did, a number did not receive significant responses and others set the consultation questions up in a 'self-serving' manner.¹¹⁵ PSPOs risk a lack of accountability both to elected officials and to the public. Simester and von Hirsch made a similar criticism of earlier behaviour orders. Their argument runs that, due to the significant effect of criminalisation on individuals' liberties, the decision to criminalise ought to be made by representative bodies and not by the judicial imposition of restrictions and

¹¹¹ Government, 'Review into Harassment and Intimidation Near Abortion Clinics' (*gov.uk*, 26 November 2017) <<https://www.gov.uk/government/news/review-into-harassment-and-intimidation-near-abortion-clinics>> accessed 25 April 2019.

¹¹² *Dulgheriu* (n 1) [99].

¹¹³ 2014 Act, s 59.

¹¹⁴ Appleton 'Busybodies' Charter' (n 103).

¹¹⁵ Appleton 'Busybodies' Charter' (n 103). There are no centrally collected statistics on PSPOs.

requirements the breach of which is an offence.¹¹⁶ Interestingly, one of Simester and von Hirsch's concerns with those earlier orders was how they could limit the recipient's access to public space.¹¹⁷ The procedure before PSPOs are imposed is even lighter than that for the behaviour orders considered by Simester and von Hirsch despite, arguably, imposing a greater total restriction on liberty due to their general applicability.

PSPOs give local authorities both the power to criminalise conduct and to enforce its decisions. In fact, one local authority official, after consultation with the police, could introduce a PSPO and start to enforce it.¹¹⁸ PSPOs deny individuals the institutional checks of the criminal process. By way of example, assisting suicide is an offence in England and Wales.¹¹⁹ Yet for a person to be convicted of assisting suicide, there would have to be a police investigation, a decision to prosecute (having applied the relevant guidance),¹²⁰ and a finding of guilt by a jury. Such a distribution of power safeguards against the troublesome enforcement of law and the enforcement of troublesome law. The shorter the chain from law-making to law enforcement, the less protection we, the public, have from troublesome law and troublesome enforcement.

There are significant limitations on the ability of interested persons to challenge the restrictions and requirements contained in a PSPO. For example, a local authority imposes a PSPO that prohibits playing music in a park. As above, there are two statutory means by which such a restriction could be challenged: first, under the review provisions set out in section 66 of the 2014 Act, or, secondly, the review defence section 67(3). The initial

¹¹⁶ Simester and von Hirsch (n 66). The authors refer to behaviour orders as 'two-step prohibition orders'. For discussion, see chapter 2.

¹¹⁷ Simester and von Hirsch (n 66) 182.

¹¹⁸ 2014 Act, ss 59 and 68.

¹¹⁹ Suicide Act 1961, s 2.

¹²⁰ Director of Public Prosecutions, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (CPS October 2014).

limitation on a section 66 challenge is the short timeframe in which an application can be brought: 42 days.¹²¹ What is more, a music loving applicant faces the cost of bringing a review, and if unsuccessful the possibility of a costs order being made against them.¹²² Though a PSPO may have a significant effect overall, in many cases it may not have a significant enough effect on an individual for them to pursue a potentially costly legal challenge.

Here a national body, such as Liberty or the Manifesto Club, would be at a procedural advantage if it sought to challenge the music ban because it would not be bound by section 66.¹²³ Section 66 limits interested persons capacity to review the PSPO to the method it stipulates and the review defence discussed below.¹²⁴ However, a national body may have a sufficient interest to be granted standing to bring a judicial review.¹²⁵ This would mean they would have up to three months to bring a review. Two points arise out of this difference in the position of national interest groups and local residents. First, the PSPO is a measure designed to empower local communities, and yet gives procedural preference to national bodies as opposed to concerned local citizens. Secondly, the costs of bringing a judicial review, especially given the number of PSPOs made to date, mean national bodies

¹²¹ 2014 Act, s 66(3).

¹²² Of course, a cost order could be made in favour of the applicant. Yet the risk of costs remains a possible disincentive to challenging a PSPO. For an application for a protective cost order, see *Dulgheriu v Ealing LBC* [2018] EWHC 1302 (Admin). *Dulgheriu* sets out that the Council's costs would be tens of thousands of pounds even if they used in-house council and shows not every challenge to a PSPO would attract protection: [36]-[50].

¹²³ The government guidance to practitioners appears to have inadvertently merged its analysis of these distinct bases of review: Home Office, *Guidance* (n 10) 55.

¹²⁴ Brown (n 5) 561- 563 describes the process by which this compromise position was reached in the House of Lords.

¹²⁵ Lord Woolf and others, *De Smith's Judicial Review* (8th edn, Sweet & Maxwell 2018) paras 2.35-2.36 and 2.39-2.45.

also face considerable limitations on their capacity to hold local authorities accountable. The Manifesto Club has had to turn to crowd-funding to support its challenges to PSPOs.¹²⁶

There are also limitations on the review defence in section 67(3). The majority of enforcement actions do not result in a prosecution. Research by the Manifesto Club shows that 9930 fixed penalty notices were imposed for breach of a PSPO in 2018, but only 198 cases proceeded to prosecution.¹²⁷ If cases are being dealt with out of court, then the review defence is of limited use in practice.¹²⁸ The point here is not to blame those who choose an alternative disposal over the perils of a trial, conviction and criminal record. We should not have to rely on a criminal law defence as a means to challenge the legality of a local authority decision.

The combined effect of the problems raised here is an order that can contain a broad array of (possibly discriminatory) offences; that does not require significant input from local citizens before it is made; that can then be enforced by the authority that made it; and that is difficult to challenge after implementation. PSPOs grant too much discretion, or more accurately too much power, to local authorities.

Section V. Responding to the problems

PSPOs are neither punitive nor coercive risk measures. We can, therefore, not rely on the status-based arguments made in the previous chapters to resolve the problems they pose.¹²⁹

Two important limitations on PSPOs can, however, be established by drawing on the

¹²⁶ Manifesto Club, 'Fight PSPOs - Defend Freedom in Public Spaces' (*Crowdfunder*) <<https://www.crowdfunder.co.uk/fight-pspos-defend-freedom-in-public-spaces/>> accessed 25 April 2019.

¹²⁷ Manifesto Club, 'Charter in 2018' (n 16).

¹²⁸ An interesting question, unexamined here, is what should happen to those who have accepted a fixed penalty notice based on a requirement in a PSPO that is later quashed.

¹²⁹ The basic structure of such status-based argument is – 1. measures which are X require Y safeguards; 2. this measure is X; 3. Therefore, this measure requires Y safeguards.

statutory regime for imposing TPIMs. Given the substantial liberty-based critique of the TPIM and its forbears, it may appear odd to mine it for safeguards on the imposition of PSPOs.¹³⁰ Nonetheless, the safeguards that can be extracted from that regime are, first, limitations on the types of restrictions and requirements that may be made under PSPOs (as opposed to government guidance), and, secondly, a means by which to assess the ongoing necessity of an order.

Local authorities have not only used PSPOs to make broad and unexpected criminal offences, but have issued PSPOs that run contrary to government guidance. The Manifesto Club has estimated that almost one fifth of PSPOs are ‘explicitly prohibited or strongly advised against’ by government guidance.¹³¹ I detail three examples here. First, it will be recalled that the 2014 Act explicitly allows PSPOs to target ‘persons in specified categories’.¹³² Government guidance, however, provides that the scope of PSPOs should be as follows.

Public Spaces Protection Orders are intended to deal with a particular nuisance or problem in a specific area that is detrimental to the local community’s quality of life, by imposing conditions on the use of that area which *apply to everyone*.¹³³

In practice, PSPOs have been brought into force that target young people. Those under-16 have been banned from congregating in groups of more than two in Worksop or Retford town centres.¹³⁴ Caerphilly Council has introduced a curfew for those aged under-18.¹³⁵ This practice of targeting young people also sits uncomfortably with the Home Office

¹³⁰ See the references at footnote 75.

¹³¹ Manifesto Club, ‘Dozens of Council Orders Now Illegal Under New Government Guidance’ (*Manifesto Club*, January 2018) <<http://manifestoclub.info/dozens-of-council-orders-now-illegal-under-new-government-guidance/>> accessed 25 April 2019.

¹³² 2014 Act, 59(6)(a).

¹³³ Home Office, *Guidance* (n 10) 48 (emphasis added).

¹³⁴ Appleton, ‘Rise and Rise’ (n 13).

¹³⁵ Appleton, ‘Rise and Rise’ (n 13). Further examples are provided in the report.

information note on young people and the 2014 Act. The note emphasises the need for practitioners to consider ‘the particular needs of young people’ and makes no mention of PSPOs.¹³⁶

Secondly, as the Anti-social Behaviour, Crime and Policing Bill was debated in Parliament, Lord Clement-Jones stressed how buskers can enhance public space.¹³⁷ The government responded supportively,¹³⁸ and this resulted in a Home Office information note stating:

Busking and other forms of street entertainment can enrich a community’s quality of life, play an important role in community life and can generate a positive atmosphere that is enjoyed by all.¹³⁹

In practice, however, the scope of where and how buskers perform has been limited by local codes for buskers, the breach of which is criminalised via PSPOs.¹⁴⁰ It is such criminalisation of breach of codes that could have led to the above-mentioned criminalisation of buskers not enjoying themselves in Oxford.¹⁴¹

Thirdly, in a speech in December 2017, Amber Rudd, then Home Secretary, told local authorities not to target the homeless with anti-social behaviour powers.¹⁴² This announcement preceded updates to the government guidance that emphasised that PSPOs should not be used to target the homeless.¹⁴³ Freedom of information requests by the Guardian show that dozens have been convicted of offences of loitering or begging under

¹³⁶ Home Office, *Reform of Anti-Social Behaviour Powers: Young People* (2014).

¹³⁷ HL Deb 08 September 2016, vol 774, col 150GC.

¹³⁸ HL Deb 08 September 2016, vol 774, col 150GC-159GC.

¹³⁹ Home Office, *Reform of Anti-Social Behaviour Powers: Public and Open Spaces* (2014).

¹⁴⁰ Appleton, ‘Rise and Rise’ (n 13).

¹⁴¹ Coppel and Rhee (n 24).

¹⁴² Quoted in Patrick Greenfield and Sarah Marsh, ‘Hundreds of Homeless People Fined and Imprisoned in England and Wales’ (*The Guardian*, 20 May 2018) <<https://www.theguardian.com/society/2018/may/20/homeless-people-fined-imprisoned-pspo-england-wales>> accessed 25 April 2019.

¹⁴³ Home Office, *Guidance* (n 10) 51.

PSPOs and hundreds more have paid fixed penalty notices.¹⁴⁴ This accords with the research of the Manifesto Club which found that local authorities have prohibited sleeping in public, another activity that acts as a proxy for homelessness.¹⁴⁵ The cumulative effect is a de facto criminalisation of homelessness across multiple local authorities.¹⁴⁶ Even when government guidance is backed by parliamentarians or senior ministers, local authorities have been willing to circumvent it. The targeting of young people, buskers and the homeless shows that government guidance is an insufficient limit on the broad powers to criminalise that PSPOs grant local authorities.

An alternative to government guidance can be taken from the Terrorism Prevention and Investigation Measures Act 2011.¹⁴⁷ The restrictions and requirements that a TPIM may include are limited by statute. If the restrictions and requirements that could be imposed under a PSPO were constrained in this manner, it would limit the possibility of local authorities issuing PSPOs that over-criminalise or run contrary to government guidance. A rational starting point from which to decide what restrictions and requirements PSPOs ought to be able to contain is an assessment of the powers the order was intended to streamline.¹⁴⁸ Those orders were the dog control order,¹⁴⁹ the designated public place order,¹⁵⁰ and the gating order.¹⁵¹ If the powers that were available under these orders were

¹⁴⁴ Greenfield and Marsh (n 142).

¹⁴⁵ Appleton, 'Rise and Rise' (n 13).

¹⁴⁶ See also, Zedner (n 5).

¹⁴⁷ Brown has suggested that local authorities ought to keep in mind principles of minimal criminalisation when they draft PSPOs (n 5) 549-550. I do not disagree with Brown. However, given that local authorities have refused to take heed of lords, ministers, and government guidance, it seems unlikely that principles of criminalisation will function as effective safeguards against over-inclusive PSPOs.

¹⁴⁸ See Home Office, *Guidance* (n 10) 56 and 2014 Act, s 75.

¹⁴⁹ Clean Neighbourhoods and Environment Act 2005, s 55.

¹⁵⁰ Criminal Justice and Police Act 2001, s 13. For comment, see Alec Samuels, 'Alcohol Consumption in Designated Public Places' (2003) 6(1) *Journal of Local Government Law* 17.

¹⁵¹ Highways Act 1980, pt 8A.

to remain available under a reformed PSPO, statute would have to grant local authorities the power to impose restrictions/requirements related only to the following.

- The proper control of dogs.
- To prohibit the consumption of alcohol in designated public places.
- To restrict the public right of way over certain highways at certain times.

PSPOs, however, were not only introduced to streamline existing powers. They were also intended to grant local authorities more discretion in how they responded to anti-social behaviour.¹⁵² The statutory model would allow for extensions to the behaviours that PSPOs could target, but in a more limited manner. Instead of giving local authorities *carte blanche*, it would require statutory amendment to allow for new types of restrictions and/or requirements to be imposed under PSPOs. By way of comparison, in 2015, the Terrorism Prevention and Investigation Measures Act 2011 was amended to allow the Secretary of State to require the recipient of a TPIM to meet with a specified person,¹⁵³ relocate the recipient,¹⁵⁴ and also to prohibit them from possessing an offensive weapon.¹⁵⁵ The PSPO has been used to criminalise arbitrarily, to over-criminalise and to criminalise contrary to government guidance. If Parliament want to allow PSPOs to regulate begging, congregating, or cycling, they should do so by legislative amendment.

After six weeks, an interested person loses the right to review a PSPO.¹⁵⁶ A PSPO may last for up to three years before there is a requirement to extend it and an interested person could review the decision to extend.¹⁵⁷ In consequence, there can be a period of two years and 46 weeks – the vast majority of the time the initial PSPO is in force – in which

¹⁵² Home Office, *Putting Victims First* (n 72) para 3.25. See also the above quotation of Damian Green. Such a desire for discretion is in keeping with Ellickson's rhetorical claim that a one size fits all approach to regulating public space is comparable to having one speed limit for all roads: (n 34) 1247.

¹⁵³ 2011 Act (n 76) sch 1 para 10A as added by Counter-Terrorism and Security Act 2015, s 19.

¹⁵⁴ 2011 Act (n 76) sch 1 para 2(2) as substituted by Counter-Terrorism and Security Act 2015, s 17(5).

¹⁵⁵ 2011 Act (n 76) sch 1 para 6A as added by Counter-Terrorism and Security Act 2015, s 18.

¹⁵⁶ 2014 Act, s 66(3).

¹⁵⁷ 2014 Act, s 60.

an interested person cannot review the ongoing necessity of the order.¹⁵⁸ Given the imposition of the order is predicated on the possibility of ongoing or new detrimental activity, such a long period without the possibility of review is problematic. Risk can vary over time.¹⁵⁹ It could transpire after several months that the relevant detrimental activity had not occurred and was unlikely to occur during the remainder of the PSPO. Yet an interested person would not be able to challenge the continued validity of the PSPO in light of new evidence as to its likelihood. This would leave a PSPO in place that contained broad and coercive restrictions to regulate a non-existent or highly unlikely detrimental activity.

The variation in risk over time is recognised in the Terrorism Investigation and Prevention Measures Act 2011. Section 11 of the Act imposes an obligation on the Secretary of State to review the ongoing necessity of those TPIMs in force. Specifically, the Secretary of State must keep under review whether they reasonably consider the TPIM necessary for public protection, and for the purposes of preventing the recipient's involvement in terrorism related activity. A similar obligation for review ought to apply to local authorities that impose PSPOs. The bases for review could be whether the test for the imposition of the order continued to be satisfied and whether the restrictions and requirements imposed remained reasonable. Interested persons ought to be able to challenge the decision of the local authority as to ongoing reasonableness. Without such reform, the PSPO should not be seen as the empowerment of the community claimed by government. In its present form, the PSPO instead appears to contribute more to the empowerment of local authorities with little means by which citizens can hold them

¹⁵⁸ The challenge to the extension may function as a standard judicial review as opposed to a section 66 review. Section 66, and the ouster therein, refer to the validity of PSPOs and variation thereto, and not to extensions.

¹⁵⁹ This has important ramifications for assessing the dangerousness of an offender who will be imprisoned: Lyndon Harris and Sebastian Walker, 'Difficulties with Dangerousness: The Timing of the Assessment of Risk - Part 1' [2018] (9) Criminal Law Review 695.

accountable. It could even be said that the PSPO divides the community as opposed to empowering it by removing certain groups from public space. The reforms I have suggested in this section – limited restrictions and requirements, and ongoing review – would go some way to address such criticism.

Section VI. Beyond the PSPO

Though the PSPO is exceptional in its form, the order allows for more general, and important, insights into behaviour orders. This thesis seeks to better understand behaviour orders, and the notions of prevention and punishment. If we are to better understand behaviour orders and how they should be limited, we must also enquire into what they can require of their recipients and who these recipients are. Under the PSPO, the homeless can be refused sleep, gathering with friends can be prohibited and peaceful protest can be seriously limited. Recognition of the wider issues with behaviour orders does not diminish the value of the earlier work in this thesis: it remains necessary to know what safeguards ought to apply to proceedings for the grant of different behaviour orders.¹⁶⁰ Our attention can now turn to consider if either of the limits I suggested for PSPOs in the previous section should apply to behaviour orders generally. Those limits were listed restrictions and requirements, and an extended power to vary.

Should the restrictions and requirements that can be imposed under each type of behaviour order be limited by statute? The argument in favour of such a limitation in the context of PSPOs was predicated on the amount of discretion that the current law gives local authorities, in effect, to create criminal offences. Similar concerns apply to CPNs. What is more, if the restrictions and requirements that may be imposed under a PSPO were limited by statute, CPNs could be used to circumvent this legislative safeguard. Hackney

¹⁶⁰ By way of comparison, if a person is sentenced to death for congregating after being refused legal representation, there would be value in critiquing the offence, the procedure, and the sentence imposed.

Council faced significant backlash when it announced a draft PSPO that would have banned begging.¹⁶¹ The Council abandoned the PSPO and instead has issued CPNs against individuals to target begging. Where state bodies are not required to apply to a court to impose a behaviour order, there is good reason to limit what they can criminalise via the imposition of behaviour orders. Otherwise, officials would remain able to curtail liberty without either significant legislative restraints or judicial oversight.

The argument in favour of statutory limitation on restrictions and requirements is weaker when we turn to those behaviour orders imposed by a court. Such orders are limited by judicial oversight. This does not mean there is no risk that such orders could be used to criminalise problematically. Foxsmith reports a case in which a criminal behaviour order was imposed to prohibit sitting on a pavement.¹⁶² This case would fall foul of Simester and von Hirsch's criticism of the judiciary even having the power to create personalised criminal law.¹⁶³ Statutory lists of the restrictions and requirements that may be imposed under each civil and hybrid behaviour order may be beneficial, but there is not the same imperative for such lists as in respect of executive behaviour orders. As a matter of principle, where a behaviour order can be imposed with little or no judicial oversight, the restrictions and requirements that it may contain ought to be limited by statute.

There is good reason to require that behaviour orders other than the PSPO ought to be kept under review after they are imposed. The argument for this position in the context of PSPOs was, in essence, coercive intervention was justified by a risk assessment and that risk can vary over time. The imposition of all behaviour orders is based on an analysis of risk at one point. Over time, the restrictions or the length of the order may become an

¹⁶¹ This example is taken from Appleton, 'The Crime of Crying' (n 51).

¹⁶² Greg Foxsmith, Tweet <<https://twitter.com/GregFoxsmith/status/998477899190726656>> accessed 25 April 2019.

¹⁶³ Simester and von Hirsch (n 66) 181-182.

excessive response to a fading risk or an insufficient response to a growing risk. Such orders could thus become difficult, if not impossible, to justify on a preventive rationale. In fact, many other behaviour orders do already allow for review and variation.¹⁶⁴

Yet if hybrid behaviour orders were reconceptualised as punitive – as argued in chapter 7 – any variation would have to pay heed to considerations of proportionality. For example, a judge sentences a person to a £200 fine and a criminal behaviour order that contains a curfew, an association restriction and a requirement to attend alcohol rehabilitation classes. At sentencing, the judge acknowledges this sentence is at the higher end of what would be proportionate, and a proportionate sentence could also have been the fine of itself or a criminal behaviour order with the rehabilitation requirement and the curfew. The offender later reduces their risk of reoffending by attending rehabilitation for six months and, perhaps by, gaining employment. The sentencing court should then be able to reduce the sentence accordingly.¹⁶⁵ The court, in this instance, could conceivably revoke the order in its entirety because the fine alone would have been, and would remain, a proportionate sentence for the offence.¹⁶⁶ It follows that behaviour orders, and the restrictions and requirements which they contain, should be kept under review; recipients of the orders should be able to challenge the results of these reviews. Where the order is punitive, any variation should be limited by considerations of proportionality.

¹⁶⁴ See, by way of example, chapter 6 on the ongoing review of gang injunctions.

¹⁶⁵ For a recent account that allows for a ‘second-look’ at sentencing based on actions of the offender post offence, see Julian V Roberts and Netanel Dagan, ‘The Evolution of Retributive Punishment: From Static Desert to Responsive Penal Censure’ in Antje du Bois-Pedain and Anthony E Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart 2019).

¹⁶⁶ Such an approach to sentencing learns from Nicola Padfield’s conception of sentencing as a process: ‘What is a Sentence?’ (The Assize Seminars, 27 April 2018) <<https://www.cccj.law.cam.ac.uk/assize-seminars>> accessed 25 April 2019.

Section VII. Conclusion

In light of the above criticisms of the PSPO, it may be thought the order, and perhaps other executive behaviour orders, ought not to be reformed, but instead repealed. Yet between August 2017 and January 2019 a new PSPO was issued every two days.¹⁶⁷ 4,376 CPNs were issued between November 2015 and December 2016.¹⁶⁸ Though relatively few TPIMs are issued, the measure has received the continued support of government¹⁶⁹ and the Independent Reviewer of Terrorism Legislation.¹⁷⁰ Executive behaviour orders have become normal features of our legal landscape. Abolition seems unlikely. This chapter has instead offered three levels of principled reform that could be applied to behaviour orders: reforms that would apply to PSPOs; reform of executive behaviour orders that constitute punitive and/or coercive risk measures; and principles that should limit behaviour orders more generally. Taken together, such reforms would go some way to better protecting the liberty of those who face the imposition of a behaviour order and would increase the accountability of the state bodies that issue them.¹⁷¹ Behaviour orders have normalised as part of our legal landscape, we must now develop appropriate safeguards to precede their imposition and appropriate methods of oversight to apply when they are in force.

¹⁶⁷ Manifesto Club, 'Charter in 2018' (n 16).

¹⁶⁸ Josie Appleton, 'CPNs: The Anarchy of Arbitrary Power' (Manifesto Club December 2017).

¹⁶⁹ Government, *The Government Response to the Report by David Anderson Q.C. on Terrorism Prevention and Investigation Measures in 2014* (Cm 9041, 2015).

¹⁷⁰ David Anderson, 'Terrorism Prevention and Investigation Measures in 2014: Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011' (Independent Reviewer of Terrorism Legislation, March 2015) para 3.1(a). Max Hill, 'The Terrorism Acts in 2017: Report of The Independent Reviewer of Terrorism Legislation' (Independent Reviewer of Terrorism Legislation, October 2018) which at para 5.43 states 'TPIMs are therefore here to stay.' Para 5.8 of Hill's report also notes that, as of 31 August 2017, only 6 TPIMs were in force.

¹⁷¹ Targeted reform of executive behaviour orders should not be disregarded as utopian thinking. Indefinite detention was replaced by control orders which were in turn replaced by the more liberal TPIMs. See Fenwick, 'Defensive Democracy?' (n 75).

Chapter 9: Conclusions

The anti-social behaviour order (ASBO) is gone.¹ Yet the issues to which its hybridity gave rise have become all the more important with the proliferation of orders that share its form or forms similar to it. These newer orders target behaviours ranging from community nuisance² to terrorism.³ The central research question posed in this thesis was, initially, are behaviour orders preventive and/or punitive measures? The question posed two linked challenges. First, to critically appraise current behaviour orders and the safeguards that precede their imposition. Secondly, to examine the concepts of punishment and prevention themselves.

Section I of the conclusion loosely follows the structure of the thesis. It explains the significance of six key contributions made by the thesis: a new taxonomy of behaviour orders; the limits of European Court of Human Rights (ECtHR) case law and domestic case law; questioning the preventive measure category; developing the coercive risk measures category; rethinking punitive measures; and establishing that not every safeguard is contingent on classifying the orders as punitive or as coercive risk measures. Sections II and III step away from the structure of the thesis to assess its wider ramifications and significance for human rights lawyers and penal theorists, and criminal lawyers respectively. Section II sets out two logical fallacies that sometimes appear – in the academic literature as well as in the jurisprudence of the courts – in debates on whether a measure is punitive. I label these ‘the either-or fallacy’ and ‘the slicing fallacy’. Section III then elaborates on the value of this thesis for substantive criminal law scholarship and

¹ Enacted by the Crime and Disorder Act 1998, s 1 and replaced by the orders in the Anti-social Behaviour, Crime and Policing Act 2014.

² Anti-social Behaviour, Crime and Policing Act 2014, s 43.

³ Terrorism Prevention and Investigation Measures Act 2011.

criminalisation debates in particular. Section IV offers my final word on the broader value of the thesis.

Section I. Key contributions

Given how many behaviour orders have been enacted and varied since 1998, it is difficult to offer precise definitional criteria that include all behaviour orders, exclude other measures and encapsulate what it is to be a behaviour order. Yet this is a class of legal order with important structural similarities and a shared history,⁴ that has been recognised as a group by academics, and the courts.⁵ In consequence, I offered a broad definition to emphasise three important attributes shared by behaviour orders. Behaviour orders are imposed to prevent a specified type of behaviour; must have the capacity to contain restrictions and/or requirements targeting that behaviour and related acts/omissions; and breach can result in sanction. These attributes reveal the commonalities of behaviour orders, but alone they would hide important differences. This sets the stage for an assessment of the first key contribution of the thesis.

A new taxonomy of behaviour orders

It would be futile to assess whether behaviour orders as a collective are preventive and/or punitive because of their variance in form. This thesis introduced three subcategories of behaviour order: civil behaviour orders, hybrid behaviour orders and executive behaviour orders. Civil behaviour orders are granted under civil evidential rules and breach is a contempt of court. Hybrid behaviour orders are granted under civil evidential rules, but breach is an offence. The ASBO was a hybrid behaviour order and the majority of

⁴ As noted in chapter 2, many of these measures reference each other when they are argued for in government documents.

⁵ An example of academic recognition is Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014). An example of judicial recognition is *Birmingham City Council v James* [2013] EWCA Civ 552, [2014] 1 WLR 23 [21].

behaviour orders have this form. Executive behaviour orders are imposed by a state body with little or no judicial oversight and breach is an offence. The purpose of this categorisation was to convey important distinctions in the structure of behaviour orders that are of relevance to the question of what safeguards ought to precede their imposition. As such, it allowed for a more sophisticated response to the central research question. This new taxonomy builds on previous approaches which distinguished between civil and criminal behaviour orders in a number of ways.⁶ Not least amongst these is the introduction of the executive behaviour order subcategory. It would be misleading to describe orders granted with minimal judicial oversight as civil or criminal orders because their imposition does not follow a civil or criminal trial. The term ‘executive’ conveys the enhanced role of executive bodies in imposing these behaviour orders.

The significance of this taxonomy extends beyond its value to the thesis. By way of example, sentencing for breach of various behaviour orders may need to take account of the fact some behaviour orders are imposed by a court and others are imposed by executive bodies. It may well be that breach of the former should be regarded as more serious than breach of the latter.⁷ By way of further example, behaviour orders have been critiqued for their discriminatory application.⁸ The taxonomy presented in this research may assist in establishing whether the likelihood or scale of discrimination varies based on whether the

⁶ Ashworth and Zedner (n 5) ch 4.

⁷ There is no indication of such a divide in the Sentencing Council’s relevant guideline: *Breach Offences Definitive Guideline* (2018).

⁸ For such work on the ASBO, and responses to anti-social behaviour more generally, see the following sources. Race and ethnicity – Sarah Isal, *Equal Respect - ASBOs and Race Equality* (Runnymede 2006); David Prior and Basia Spalek, ‘Anti-social Behaviour and Minority Ethnic Populations’ in Peter Squires (ed), *ASBO Nation* (Policy Press 2008). Disability – Caroline Hunter and others, ‘Disabled People’s Experiences of Anti-social Behaviour and Harassment in Social Housing: A Critical Review’ (Disability Rights Commission 2007); Judy Nixon and others, ‘Anti-social Behaviour and Disability in the UK’ (2007) 2(1) *People, Place & Policy Online* 37. Age – Tim Bateman, ‘Youth Justice News’ 11(2) *Youth Justice* 188, 188-189; Sarah Hodgkinson and Nick Tilley, ‘Tackling Anti-social Behaviour: Lessons from New Labour for the Coalition Government’ (2011) 11(4) *Criminology & Criminal Justice* 283; Peter Squires, ‘Introduction: Why Tackle Anti-social Behaviour? Debating ASBOs’ in Peter Squires (ed), *ASBO Nation* (Policy Press 2008) 8-9.

order can be imposed without judicial oversight and/or based on the consequence of breaching the order.

The limits of case law

Having painted a clearer picture of the current law on behaviour orders, I turned to examine the concepts against which the orders would be assessed in later chapters: prevention and punishment. My starting point was decisions of the ECtHR on articles 5 (liberty), 6 (fair trial) and 7 (non-retrospectivity); and domestic judgments on behaviour orders. This case law is united by consideration of the terms ‘preventive’, ‘punitive’ and related phrases. Neither the ECtHR nor domestic courts have provided a clear or consistent account of either punishment or prevention. This doctrinal analysis was fundamental to the thesis because it revealed the necessity of a more theoretical approach to the concepts of punishment and prevention. Before we can assess if behaviour orders are preventive or punitive, we must know what we mean by those terms.

The analysis of the case law was also of broader value. By way of example, the ECtHR has held on numerous occasions that its approach to articles 5, 6 and 7 is and ought to be consistent.⁹ Yet the Court’s approach to the term ‘penalty’ varies significantly based on which of these articles is at issue: it has employed a declarative approach in respect of article 5,¹⁰ it has implemented a presumption of punitiveness in article 6,¹¹ and it relies on an under-developed factor-based approach in article 7.¹² The detailed conceptual work on prevention and punishment developed in this thesis may well be of value if the Court is to

⁹ See, for instance, *Zolotukhin v Russia* (2012) 54 EHRR 16 [52]; *Varvera v Italy* App no 17475/09 (ECtHR, 24 March 2014) [66] and [69]; *Guzzardi v Italy* (1981) 3 EHRR 333 [100].

¹⁰ *Guzzardi v Italy* (1981) 3 EHRR 333 [100].

¹¹ *Engel v The Netherlands (No 1)* (1979-80) 1 EHRR 647 [82].

¹² *Welch v United Kingdom* (1995) EHRR 247 [23].

develop a more consistent approach in its case law. It is to these concepts which we now turn.

Preventive measures

In search of an understanding of what it is to be a ‘preventive measure’, chapter 4 assessed the use of the term in the ever-growing literature on ‘preventive justice’¹³ and the ‘preventive state’.¹⁴ Examples used in that literature varied significantly from speed bumps on the one hand,¹⁵ to torture on the other.¹⁶ Having examined these measures, I arrived at the following two-part definition of preventive measure. To be preventive, a measure must

1. be imposed before a possible harm
2. with the purpose of avoiding the harm, reducing the likelihood of it occurring or reducing its severity if it does occur.

This definition presented a number of problems. The first is external to the definition: labelling a measure as ‘preventive’ does not have the same legal significance as labelling it ‘punitive’. If a measure is punitive, this attracts specific human rights safeguards such as the rule against retrospective application and the presumption of innocence.¹⁷ No safeguards follow from classifying a measure as preventive. In addition, there is an internal problem with the definition. It is too broad to be of use in establishing what safeguards ought to apply before a particular preventive measure is imposed. Perhaps there should be a total prohibition on torture, but there should probably not be one on speed bumps.

¹³ Ashworth and Zedner (n 5) 200-203.

¹⁴ Carol Steiker, ‘The Limits of the Preventive State’ (1998) 88 *Journal of Criminal Law and Criminology* 771.

¹⁵ Sandra Mayson, ‘Collateral Consequences and the Preventive State’ (2015) 91 *Notre Dame Law Review* 301, 321.

¹⁶ David Cole, ‘The Difference Prevention Makes: Regulating Preventive Justice’ (2015) 9(3) *Criminal Law and Philosophy* 501, 502.

¹⁷ These particular safeguards are set out in articles 7 and 6 of the European Convention on Human Rights respectively.

This critique of the preventive measure category was important for two reasons. First, significant insight would not follow from classifying a particular behaviour order as either preventive or non-preventive. Secondly, and relatedly, it is not apparent what safeguards, if any, ought to precede the imposition of a particular behaviour order if it is classed as preventive. Beyond the thesis, the literature on preventive justice and the preventive state successfully draws out the scale of state practices that are preventive, but to do so it focuses on similarities between preventive measures.¹⁸ If the literature is to offer practicable responses to such measures, it needs also to acknowledge the significant differences between preventive measures and develop appropriate subcategories. Narrowing the focus of analysis will allow for more insight into the different problems posed by particular types of measure. It may also further our understanding of how the strategies of the preventive state, and the risks it poses, change over time.

Coercive risk measures

In light of the limitations of the broad category of preventive measure, I proposed a new subcategory, namely, coercive risk measures. To fit into the subcategory, a preventive measure must satisfy two requirements: 1. an assessment of the risk posed by the individual must be undertaken and satisfied before the measure can be imposed; and 2. the measure must be coercive. Assessing behaviour orders against this subcategory of preventive measures allowed for the development of important safeguards. Those safeguards developed from the forward-looking necessity imposition requirement found in many behaviour orders. The detail of these safeguards is set out in chapters 4 and 6. For present purposes, a more general lesson can be taken from this enterprise. If we are to develop appropriate safeguards to precede the imposition of a measure, we cannot limit ourselves

¹⁸ See, for instance, Frederick Schauer, 'The Ubiquity of Prevention' in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP 2013).

to assessing whether or not it is punitive.¹⁹ The value of moving beyond consideration of punitiveness should be clear regardless of whether the reader agrees with the particular safeguards defended in this thesis.

Punitive measures

Courts and legal theorists tend to take distinct approaches to assessing punitiveness. The most compelling approach taken by the courts is factor-based. Under such an approach, the measure at issue is assessed against a number of factors and, dependent on if these are satisfied, it will or may be classed as punitive. Steiker has claimed that such approaches – which are employed in the ECtHR and the United States Supreme Court – need more theoretical substantiation.²⁰ By contrast, the leading theoretical account of punishment maintains it has two elements, sanction and censure.²¹ The practical utility of this conception of punishment is limited because the complexities of defining punishment are displaced to defining censure. In other words, if we had to establish whether a new financial sanction was punitive, the censure-based approach would do little more than replace the question ‘Is the sanction punitive?’ with ‘Does the sanction censure?’ We thus have factor-based approaches to punishment which, though practicable, lack theoretical foundations, and a leading theoretical account that has only limited practical utility.

In response to these issues, the thesis explained how punishment is a fluid and contestable concept. Its form has ranged from flogging to mediation.²² Its possible purposes are also contestable; with some arguing punishment should express blame and others that

¹⁹ This mirrors an important conclusion of Steiker in her seminal article: ‘The Preventive State’ (n 14).

²⁰ Carol Steiker, ‘Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide’ (1997) 85 *Georgetown Law Journal* 775, 799. In the ECtHR – *Welch v United Kingdom* (1995) ECHR 247. For an overview of the approach of the US Supreme Court, see Wayne Logan: ‘Challenging the Punitiveness of New-Generation SORN Laws’ (2018) 21 *New Criminal Law Review* 426, 440-442.

²¹ Andrew von Hirsch, *Censure and Sanctions* (OUP 1996).

²² This pairing is based on a comparison of Flew and Duff. Antony Flew, ‘The Justification of Punishment’ (1954) 29(3) *Philosophy* 291, 293; RA Duff, *Punishment, Communication and Community* (OUP 2003) 96-106.

it should express forgiveness.²³ As such, it is little wonder that a rigid definition cannot capture what it is to punish. If we accept punishment is a fluid and contestable concept, a factor-based approach to assessing punitiveness becomes more theoretically compelling. When the factor-based approach is applied, it can offer clarity as to why a measure is held to be punitive, but not certainty as to what will later be considered punitive. We may not know what we will mean by punishment tomorrow, but we can be clear on why a measure is held to be punitive today.

The particular factor-based approach developed and applied in this thesis was the behaviour-effect-purpose test.

1. Does the measure regulate behaviours that can be subject to the criminal law or that are wrongful?
 2. Does the measure affect the recipient in a similar manner to accepted punishments?
 3. Does the measure have a punitive purpose?
- If the response to each of these questions is positive, there is a compelling case that the measure is punitive.
If the response to one or more of these questions is negative, there is a compelling case that the measure is not punitive.

This three-part test allows for civil behaviour orders to be classed as non-punitive and hybrid behaviour orders to be classed as punitive. The behaviour-effect-purpose test advances on current approaches to punishment because it is both theoretically-based and practically applicable. The test has the potential to be of value beyond behaviour orders when assessing other measures on the boundaries of punishment.

Miscellaneous safeguards

Not every safeguard proposed in this thesis was contingent on the classification of a behaviour order as a coercive risk measure or as a punishment. By way of example, I suggested two safeguards in light of an issue brought out by the case law and statistics on

²³ Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35(4) *Oxford Journal of Legal Studies* 665.

civil behaviour orders. The issue was the extent to which interim behaviour orders are relied on and how they have, in effect, been used as a final resolution despite the lower procedural requirements set for their imposition.²⁴ The first safeguard was that the period of time a person is subject to an interim behaviour order should count toward any future time spent under a full behaviour order. The second was that an interim behaviour order should not intentionally be used as a final resolution. These safeguards function as an important reminder, both within the context of behaviour orders and beyond it, that improvements to the procedures that precede the imposition of coercive measures do not have to follow from classifying them as punitive or preventive.

Section II. Implications of the thesis for human rights lawyers and penal theorists

Two fallacies should be avoided when courts and academics consider whether a measure is punitive. The first I label ‘the either-or fallacy’ and the second ‘the slicing fallacy’. I will explain each fallacy in turn, provide examples of it, and comment on how the behaviour-effect-purpose test could help to avoid it. Both fallacies are barriers to an adequate conception of measures as punitive or non-punitive. As such, identifying these fallacies makes a valuable contribution to human rights law and to penal theory. As will by now be clear, human rights lawyers must engage with whether a measure is punitive in the context of numerous rights in the European Convention. Penal theorists tend to be more interested in justifying punishment than describing it.²⁵ But we must be able to describe a practice adequately before we assess whether and how it can be justified. Otherwise, arguments about justification may not have a shared basis or may share a problematic basis.

²⁴ The important case being *Chief Constable of Bedfordshire v Golding* [2015] EWHC 1875 (QB).

²⁵ See, for instance, RA Duff, *Punishment, Communication and Community* (OUP 2003) XIV.

The either-or fallacy

The measure could be X or punitive.
The measure is X.
Therefore, it is not punitive.

This measure is preventive and, therefore, it is not punitive was the either-or fallacy addressed throughout the thesis. Expressions of this fallacy include the following.

- A Home Office document on the anti-social behaviour injunction: ‘The terms of the injunction would...be preventative rather than punitive...’²⁶
- The decision of the ECtHR in *Guzzardi v Italy*: ‘On a true analysis, the order for Mr. Guzzardi’s compulsory residence was not a punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to crime.’²⁷
- The judgment of the House of Lords in *R (McCann) v Manchester Crown Court* where Lord Hope maintained the nature of proceedings for the grant of an ASBO are ‘preventive in character rather than punitive or disciplinary’.²⁸
- Applying the fallacy in the other direction, the decision of the ECtHR in *Matyjek v Poland*: ‘[T]he purpose of lustration proceeding is not to prevent former employees of the communist-era secret services from taking up employment in public institutions...but to punish those who have failed to comply with the obligation to disclose.’²⁹

As Lord Hope’s remark demonstrates, the X in the either-or fallacy does not necessarily have to stand for preventive. His Lordship also implied a divide between punitive and disciplinary proceedings. Further examples can be found in academic commentary. Fisher and Kwan rely on a dichotomy between punishment and deprivation in their analysis of the

²⁶ Home Office, *More Effective Responses to Anti-social Behaviour* (2011) 18.

²⁷ (1981) 3 EHRR 333 [100].

²⁸ [2002] UKHL 39, [2003] 1 AC 787 [72] (Lord Hope).

²⁹ App no 38184/03 (ECtHR, 30 May 2006) [56]. Lustration proceedings are used in central and eastern European countries to remove those associated with the Communist regime from governments or at least to make it clear who in government had such affiliations

current law of confiscation.³⁰ Bottoms has critiqued the ‘simple dichotomy’ between punishment and rehabilitation in case law on community correction orders in Victoria.³¹

But what is wrong with such reasoning? Drawing a dichotomy between punishment and X allows the commentator to make a positive case for X, without having established that the status of a measure as X necessitates that it is not punitive. Thus, the commentator at no point directly addresses the question of whether a measure is punitive. In other words, the either-or fallacy ignores the possibility that a measure could be both X and punitive. This line of reasoning is particularly questionable in light of the fluidity and contestability of the term punishment. Independent tests ought to be employed. We should ask not whether a measure is punitive or X, but instead ask whether it is punitive or not punitive, and, if relevant, X or not X. The behaviour-effect-purpose test established and applied in this thesis is a means of assessing punitiveness directly and thus offers a method to overcome the either-or fallacy. It is hoped the adoption of the test would help kill off this troubling and widespread fallacy.

The slicing fallacy

The measure has attributes X, Y, and Z.
None of attributes X, Y or Z are alone sufficient to make the measure punitive.
Therefore, the measure is not punitive.

Little Red Riding Hood can be used to draw out the problems of the slicing fallacy. Some grannies may have bright eyes. Some grannies may have sharp teeth. But when these features are combined with a gravelly voice, it is more likely than not a wolf is in your grandmother’s bed. An approach based on analysing individual attributes appears to have affected the High Court in *Chief Constable of Lancashire v Wilson* which held each of the

³⁰ Jonathan Fisher and Justin Bong Kwan, ‘Confiscation: Deprivatory and not Punitive - Back to the way we Were’ [2018] 3 Criminal Law Review 192.

³¹ Anthony E Bottoms, ‘Punishment in Non-custodial Sentences: A Critical Analysis’ (2017) 28(3) Criminal Law Forum 563, 556.

following was insufficient to make the gang injunction punitive: that it targeted criminal behaviours, that it has serious effects on the recipient, and that it has a preventive purpose.³² Taken together, attributes may be sufficient for a measure to be considered punitive, even where no attribute alone necessitates that it is considered as such. This is the basis of the behaviour-effect-purpose test, which allows a compelling case for a measure to be regarded as punitive to be made on an aggregation of relevant factors. We must avoid the peril of concluding a measure is non-punitive based only on analysis of each of its attributes in isolation.

Perhaps a critical response would be that the behaviour-effect-purpose test brings relevant factors into the same test, but it does not allow for the aggregation of the factors to be considered appropriately. Put differently, it only looks at behaviours, effects, and purposes in isolation and so does not give credence to the sum of these factors being greater than their parts. Such criticism is not fatal because the behaviour-effect-purpose test is not meant simply to generate yes or no answers to each of its parts. For instance, when I assessed the gang injunction, in chapter 6, the test showed it had purposes that were punitive, but that were not only associated with punishment; and that it had effects comparable to, but different from, accepted forms of punishment. If the gang injunction either had a clear retributive purpose or entailed imprisonment this would have been sufficient for it to satisfy the behaviour-effect-purpose test. The test is a structured assessment of the totality of a measure, not a box-ticking exercise.

Finally, neither the either-or fallacy nor the slicing fallacy will necessarily produce the ‘wrong’ answer. For instance, chapter 6 reached the same conclusion as the High Court in *Wilson* by classing gang injunctions as non-punitive.³³ Instead the advantage of

³² *Chief Constable of Lancashire v Wilson* [2015] EWHC 2763 (QB) [54] and [58].

³³ *ibid* [58].

removing these fallacies is that it will promote clarity in why we classify particular measures as punitive or non-punitive. Be it in human rights law or penal theory, clear disagreement is to be preferred to agreement based on vagueness.

Section III. Implications of the thesis for criminal lawyers

The safeguards promoted in this thesis relate almost exclusively to the imposition and oversight of behaviour orders, not the behaviours, in all their variety, that are targeted by these orders. Yet this thesis is also of importance to those who work on criminalisation. There are two forms of the criminalisation question. The general form seeks to establish what the requirements are before a behaviour can be criminalised, be it the need for that behaviour to be harmful, wrongful et cetera.³⁴ The specific form asks if and how the criminalisation of a particular behaviour can be justified.³⁵ Yet when we ask whether criminalisation – be it general or specific – is justified our response must address more than an analysis of the relevant behaviour(s). We must also consider criminal justice processes and criminal law outcomes. The paradigm example of the criminal justice process is investigation (by the police), prosecution (by the Crown Prosecution Service) and trial (in a magistrates' court or the Crown Court).³⁶ The paradigm outcome of this process, where the defendant is found to be guilty, is conviction and sentencing.³⁷ When we query what should be criminalised, we must have the criminal justice process and criminal law

³⁴ For a leading account see Douglas Husak, *Overcriminalisation: The Limits of the Criminal Law* (OUP 2007).

³⁵ Often applying the principles developed by those who engage with the general version of the criminalisation question. See, by way of example, Imogen Jones, 'A Grave Offence: Corpse Desecration and the Criminal Law' (2017) 37(4) *Legal Studies* 599.

³⁶ For further detail of this paradigm and exceptions to it see Rory Kelly and Andrew Ashworth, 'State Responses to Criminal Offences in England and Wales and the Problem of Equality' in Matthew Dyson and Benjamin Vogel (eds) *The Limits of Criminal Law* (Intersentia 2018).

³⁷ On the collateral consequences of conviction and their relation to criminalisation see Zachary Hoskins, *Criminalization and the Collateral Consequences of Conviction* (2018) 12(4) *Criminal Law and Philosophy* 625; Zachary Hoskins, *Beyond Punishment? A Normative Account of the Collateral Legal Consequences of Conviction* (OUP 2019) ch 9.

outcomes in mind because it is these that are at stake. Put differently, ‘criminal offences’ is not just an abstracted category, offences are things for which people can be found liable in set processes with particular outcomes. If these processes and outcomes change, then it may bear significantly on what justifies criminalisation in general and on whether a particular behaviour should be criminalised.

The criminalisation question must adapt in light of the development of alternative means of enforcing the substantive criminal law as exemplified by behaviour orders. When we criminalise a behaviour, we now frequently include scope for specific alternative/additional disposals (such as the sexual harm prevention order),³⁸ or we allow that behaviour to be subject to more general alternative/additional disposals (such as the criminal behaviour order).³⁹ Behaviour orders, and other such alternative/additional disposals, thus affect the outcomes of criminalisation. In essence, the criminalisation question is no longer, implicitly, can we justify the conviction and sentencing of a person for engaging in this behaviour? Rather, the question is can we justify the conviction and sentencing, and/or imposition of another disposal on a person for this behaviour? Likewise, the processes by which behaviour orders are imposed vary. They can be imposed in standalone proceedings, on conviction and even on acquittal.⁴⁰ They can be imposed in criminal courts, in civil courts and by the executive. As such, there is also a shift from the implicit question in the criminalisation debate as to process. The shift is from ‘can we justify the investigation, prosecution and trial of a person for doing X?’ to ‘can we justify this paradigm process, and/or alternative enforcement processes for doing X?’ Such large

³⁸ Sexual Offences Act 2003, s 103A.

³⁹ Anti-social Behaviour, Crime and Policing Act 2014, s 22.

⁴⁰ Protection from Harassment Act 1997, s 5A.

deviations from the paradigm criminal justice process and criminal law outcomes must impact on the justifiability of criminalisation.

A further complexity arises from the variety of processes and outcomes to which the decision to criminalise can now give rise. For example, it is up for debate whether we should make X a sexual offence. If we do so, we would allow X to be regulated by conviction and sentence; conviction and sentence and a sexual harm prevention order;⁴¹ conviction and sentence and a criminal behaviour order,⁴² and conviction and sentence with the possibility of a later application for a sexual harm prevention order granted in standalone proceedings.⁴³ If we are to justify the criminalisation of X, we also need either to justify the inconsistent application of different means of enforcement or to offer a principled means by which to decide when to apply paradigmatic processes and outcomes and when to apply alternative/additional disposals such as behaviour orders. Neither appears an easy task. Failure to do either, however, would result in the justification of criminalisation in a manner that bore little relation to the realities of criminal law and its enforcement.

Section IV. Conclusion

The thesis has demonstrated that the majority of behaviour orders are punitive. This conclusion differs significantly from repeated judgments of the appellate courts. Yet, as this concluding chapter has emphasised, the value of the thesis is not limited to how it has classified particular behaviour orders: be they punitive or non-punitive, be they coercive risk measures or not. The wider value of the thesis lies in the novel approaches to the concepts of punishment, prevention, and coercive risk themselves that it has developed.

⁴¹ Sexual Offences Act 2003, s 103A(2).

⁴² Anti-social Behaviour, Crime and Policing Act 2014, s 22.

⁴³ Sexual Offences Act 2003, s 103A(4).

The concepts of punishment and prevention are fundamental to the justification and limitation of coercive state practices. If we are to appropriately restrict such state coercion, we must have means of discerning what safeguards ought to apply before legal measures can be imposed; be they behaviour orders or something else entirely.

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