

Incivilities, Regulating Offensive Behaviour, Andrew Von Hirsch and AP Simester (eds), Hart Publishing, Oxford, 2006

The idea of incivilities, offensiveness and disorder has consistently been a concern in modern societies and is increasingly a concern in contemporary society (Stanko 2000), not least because crimes of a disorderly or 'anti-social' nature are argued to contribute strongly to people's fear of crime (Herbert 1993; Doran & Lees 2005). In response to rising 'fear of crime' the UK Government has responded with a number of measures culminating in the *Anti-Social Behaviour Act* 2003, the backbone of which is the Anti-Social Behaviour Order (ASBO). This edited volume highlights a number of issues in relation to this kind of legislation. The contributions contained in this volume analyse and discuss the philosophical and theoretical issues surrounding incivilities, offensive behaviour and the law.

The underlying themes of this volume are the lawfulness of the anti-social behaviour law itself, and whether punishment for offences created under this Act contravenes the basis of criminal law and the human rights of those targeted by either the Act or ASBOs. The arguments raised by each of the contributors to the volume are both complex and fascinating. In Chapter One, Paul Roberts raises some interesting and intriguing issues about the 'principles of criminalisation' (p8). He draws attention to the failure by criminal law theorists and academics to consider 'what kinds of conduct ought to be proscribed by the criminal law' (p8). Roberts goes on to discuss the issues surrounding harmful conduct and whether a wrong is a 'necessary condition of criminalisation' (p10). He examines the argument that the legitimacy of the punishment meted out by the criminal justice system depends on the foundation of criminal conduct in moral wrongfulness. In addition, this chapter examines the concept of offensiveness and the link (if there is one) between criminal offence and anti-social behaviour. The subtle nuances and questions raised in this chapter create a framework for the contributions that follow.

In Chapter Two, Antony Duff and Sandra Marshall begin with an intricate discussion of what is 'offensive' behaviour and argue that what is offensive must be clearly distinguished if such behaviour is to be criminalised. The authors discuss notions of mediated and immediate offence, intended and unintended offence, and reasonable, unreasonable and necessary offence in some detail, before moving on to discuss how to treat 'wrongs' or offensive behaviour and whether these kinds of behaviour/s should be criminalised. The idea of who decides that behaviour is offensive and whether it should be criminalised is raised here highlighting issues of visibility, power and stigmatisation. What appears to concern Duff and Marshall is the heavy handed application of the criminal law to behaviour that is not necessarily 'criminal', whilst other less drastic measures, such as Anti-social Behaviour Contracts (in a modified form), might be seen as a more effective and acceptable way of dealing with 'offensive' conduct.

In Chapter Three, Douglas Husak begins his discussion with the interesting question of whether there has actually been an increase in offensive behaviour or whether people just perceive an increase in this kind of behaviour. If the conviction that offensive behaviour has increased and 'something needs to be done about it' is merely based on perceptions then there is, he argues, 'little justification for widening the scope of criminal prohibitions to address the situation' (p92). Husak's arguments centre around the idea of disgust and

disgust realism. One of the striking points he raises is that we are more likely to be disgusted by the behaviour or actions of those who are marginalised or who we see as the inferior 'other' to ourselves. Again, issues of power and stigmatisation are examined in this chapter in relation to the dangers of criminalising behaviour that is subjectively judged to be offensive. Husak concludes by arguing that disgust can hopefully be reduced without resorting to the 'heavy hand of criminal sanction' (p111), thus echoing the points made by Duff and Marshall.

These themes are developed further by Andrew von Hirsch and AP Simester in Chapter Four in which the authors argue that offence is not 'merely involving affront to others' sensibilities: an element of *wrongdoing* is also required' (p119). So, for specific forms of conduct to be criminalised, the reasons why the conduct is wrong must be put forward. The authors argue that the immediacy principle (the idea that in order to be criminalised 'the prohibited conduct should be offensive in itself, and not merely make it possible or likely that the actor (or someone else) will engage in further behaviour that is offensive' (p128) is important in this context because of the implications for access to public space. To ban groups such as beggars or young people from parks and public places because they *may* behave offensively at some time in the future is at odds with the principle that public spaces should be freely available to all.

Chapter Five exposes some of the differences between Anglo-American and German writers on the issue of criminalisation. Anglo-American writers look at the issue from the starting point of a descriptive account and the way in which anti-social behaviour 'encroaches on the *interests of other persons*' (p133). German writers, on the other hand, examine this issue from the perspective of the legal good and whether this has been violated by a particular type of behaviour. The criminalisation of certain behaviour protects the common good and prevents social harm. However Tatjana Hornle argues that the German perspective may well benefit from taking into account the victim's view and the idea that behaviour should be criminalised if it has a 'negative impact on another person' (p136). She also emphasises that rights that are to be protected by criminal law need to be seen as important to everyone. According to Hornle, individual opinions about rights which are only important to some people should not be counted as 'rights' in discussions about criminalisation. Again, the implication of the argument in this chapter is that certain groups should not be singled out for the criminalisation of their behaviour/s on the basis of subjective judgments by policy makers.

In his discussion of the complex issues relating to offensive behaviour and criminalisation in Chapter Six, John Tasioulas argues, as do Von Hirsch and Simester, that offensive behaviour must also be wrongful to be criminalised. In addition, Tasioulas contends that behaviour needs to be objectively offensive if it is to be criminalised and not subject to the morals and temperaments of others. For Tasioulas, offensiveness is a concept that is used as a 'justification for enacting criminal laws that oppress and further marginalise unpopular minority groups' (p170). This argument again fits within the volume's overall theme of the justification (or lack of it) for the recent legislative trend to criminalise particular behaviours by specific groups.

Simester and Von Hirsch get to the core of this issue of justification in Chapter Seven and argue that what they refer to as two-step prohibitions (TSPs) supply the criminal law with a bridge between antisocial behaviour itself and its prosecution or criminalisation. TSPs entail issuing of civil orders against persons involved in undesirable conduct initially but then a breach of this civil order becomes a criminal offence. The ASBOs created under the 2003 Act are such TSPs and herein lies the problem as these authors see it. Simester and

Von Hirsch outline a series of constraints that should act upon the criminal law (p173-174) and argue that TSPs, which are designed to be civil orders, effectively bypass these constraints and are exempt from the safeguards that apply to criminal processes. An additional problem and cause for concern according to these authors is that the sanctions imposed by TSP orders (TSPOs) can be just as severe if not more severe than those imposed by 'normal' criminal justice processes. TSPOs make it a crime to do something in the future, not a crime to have done X, Y or Z in the past and so concerns over TSPOs centre on their operation as a technique for criminalisation. The authors also suggest that behaviour that is seen as acceptable for 'normal' members of society becomes unacceptable when it is carried out by 'anti-social', 'undesirable' 'others'. This suggestion further emphasises the theme of discrimination and marginalisation. An additional concern is that violation of an ASBO carries a sentence of up to five years in prison even if the behaviour that was the basis for the ASBO in the first place was not an imprisonable offence. Serious questions are raised in this chapter and throughout this volume regarding the legitimacy and acceptability, in terms of curtailing the human rights of already disadvantaged groups, of punitive legislation such as that contained in the *Anti-Social Behaviour Act 2003*.

In Chapter Eight, Elizabeth Burney augments the concerns of other contributors with an historical examination of the regulation of offensive behaviour. She argues that context and cultural norms determine whether any particular action is considered offensive. The *Vagrancy Act 1824* linked offensive conduct and public order and introduced the notion of the threat to public order, creating stereotypes of the 'dangerous classes' in the Victorian era (p198). This idea of the threat of disorder is present in the issuing of ASBOs in the contemporary era as when these are breached, the custodial sentences that follow are welcomed by the authorities as a way to deal with persistent offenders. An important point that Burney raises is that the structural causes of disorder are not addressed in the legislation because it is easier to stigmatise and punish already marginalised groups (p215-216). The 2003 Act, Burney argues, ignores problem solving measures, such as mediation, as well as structural deficits in favour of repressive and punitive measures to control specific demonised populations such as beggars and young people.

Chapter Nine takes the arguments regarding offensive behaviour in a slightly different direction and looks at them from a sociological perspective. Bryan Turner argues that low social capital among young men produces offensive behaviour and that social isolation and poor integration are causes of poor health, delinquency, crime and depression. He points out therefore that it is ironic that the use of ASBOs increases the social isolation that is linked to crime and deviance, thereby exacerbating the very behaviour legislators are trying to control. Turner also expresses concerns similar to those of the authors of previous chapters in that further stigmatisation of marginalised groups, in particular young people, is created by the forms of social control laid out in the *Anti-Social Behaviour Act 2003*.

In the final chapter of this volume, Anthony Bottoms links incivilities to social order in public places and argues that concern with social order is not necessarily well tackled by exclusively legal means. He identifies several key issues such as the idea of persistence in relation to incivilities (where behaviour that is ongoing and faced every day becomes a major threat to those experiencing it). Also, in a critique of the broken windows thesis (see Wilson & Kelling 1982), Bottoms argues that although this theoretical perspective was wrong in assuming an automatic escalation in crime because of disorder, it is also wrong to neglect the importance of disorder in discussions of crime and the effects of disorder on people's lives. The concept of signal crimes as put forward by Martin Innes (2004), in which certain crimes act as warnings to specific populations about risk, exposes the importance of disorder in discussions of crime. Bottoms cites research that shows that the

top 'signals' in relation to perceived risk are '*disorderly events occurring in public space*' (p258). Bottoms is critical of the fact that governments tend to be preoccupied with how many ASBOs have been given out not by whether anti-social behaviour is actually being effectively addressed or whether it is declining and the effect on people's lives is diminishing.

The arguments contained in this volume are varied, complex and intriguing. Therefore it will be useful to any academic wishing to give depth to discussions around anti-social behaviour, marginalisation, and power relations. It is relevant to the discussions about crime and deviance in a variety of contexts such as youth crime and human rights. The authors ponder questions of definition, legitimacy, power and stigmatisation of marginalised groups as well as asking whether criminalising 'offensive' behaviour with punitive legislation is really the way forward in tackling anti-social behaviour and disorder.

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