

DON'T TREAD ON ME: WOULD A BRITISH SOLUTION TO ANTI-SOCIAL BEHAVIOR TRAMPLE THE U.S. BILL OF RIGHTS?

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Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together.

—*People ex rel. Gallo v. Acuna*¹

It's time to stop thinking of anti-social behaviour as something that we can just ignore. Anti-social behaviour blights people's lives, destroys families and ruins communities. It holds back the regeneration of our disadvantaged areas and creates the environment in which crime can take hold.

....

We must be much tougher about forcing people not to behave anti-socially. When people break the rules, there must be consequences for them: consequences that are swift, proportionate and that change the pattern of their behaviour.

—*David Blunkett, U.K. Home Secretary*²

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1. 929 P.2d 596, 605 (Cal. 1997) (quoting *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 696 (Cal. 1996)).

I. INTRODUCTION

The problem of how to deal with anti-social behavior that does not rise to the level of serious crime has challenged legal systems on both sides of the Atlantic over the past fifteen years. In the United States, the “broken windows” theory of crime³ led to a crackdown on minor public disorder in the 1990’s, most famously by Mayor Rudolph Guiliani and Police Commissioner William Bratton in New York City.⁴ That decade was generally notable as a period of moral soul-searching. One prominent concern was that communities, like the natural environment, could be pushed beyond the point of no return by human neglect and misuse.⁵ Amitai Etzioni, founder of the Communitarian movement, identified recent changes in society and morality as creating the conditions for such a collapse:

In the fifties we had a well-established society, but it was unfair to women and minorities and a bit authoritarian. In the sixties we undermined the established society and its values. In the eighties we were told that the unbridled pursuit of self-interest was virtuous. By the nineties we have seen the cumulative results. There is now near universal agreement that the resulting world of massive street violence, the failing war against illegal drugs, unbridled greed, and

2. David Blunkett, *Foreword to HOME OFFICE, RESPECT AND RESPONSIBILITY: TAKING A STAND AGAINST ANTI-SOCIAL BEHAVIOUR*, 2003, Cm. 5778, 3–4.

3. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, March 1982, at 38.

4. See generally FMC Program Segments 1960–2000: Crime, Broken Windows, and James Q. Wilson, <http://www.pbs.org/fmc/segments/progseg13.htm>. The “broken windows” theory was explained as follows:

CHRISTOPHER JENCKS: James Q. Wilson and George Kelling developed this argument called the broken windows theory, which was that if you go into a neighborhood and you see a lot of broken windows, it tells you that nobody around here cares, that nobody’s looking out for the neighborhood, that if you go break some more windows, nobody’s going to do anything about it, and in some broader sense, anything goes.

JAMES Q. WILSON: It’s the level of disorder that counts as much as crime. And therefore, we urge the police to pay as much attention to public order, the elimination of public disorder, by getting rid of prostitutes and gangs on street corners, by painting out the graffiti, by making people feel comfortable around their homes, that this would do a lot for people, and possibly—this was the theory—actually drive down the crime rate.

BEN WATTENBERG: Police departments across the country adopted the broken windows theory. The most famous example: New York City. Subways, city parks and other public spaces were no longer places to avoid. Crime rates declined. Most strikingly, the city’s homicide rate dropped like a stone.

Id.

5. Alan Wolfe, *Human Nature and the Quest for Community*, in NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS AND COMMUNITIES 126, 130 (Amitai Etzioni ed. 1995) (“It is obvious that human and natural ecologies share much in common. Both are interdependent, fragile, adaptable, and in need of cultivation.”).

so on—our well-worn list of ills—is not one we wish for our children or, for that matter, ourselves. Where do we turn from here?⁶

In Britain, one of the most controversial legislative answers to the question “Where do we turn from here?” was the introduction of the anti-social behavior order, or “ASBO,” in the Crime and Disorder Act of 1998.⁷ ASBOs are civil orders prohibiting an individual from committing specific anti-social acts or from entering defined areas.⁸ While they can ban activity that is not in itself criminal, breach of an ASBO is a criminal offense, and can carry a penalty of up to five years imprisonment.⁹

The British government emphasizes that the aim of the ASBO is to “protect the public from behavior that causes or is likely to cause harassment, alarm or distress.”¹⁰ The media, unsurprisingly, has focused on some of the more colorful, and draconian, applications of the law.¹¹ The BBC News website’s “Asbowatch” pages, for example, feature ASBOs that have prohibited a young Scottish woman from answering her front door in her underwear,¹² a self-styled werewolf from disturbing the neighbors with his howling,¹³ and a teenage delinquent from traveling on the upper deck of another uniquely British institution, a double-decker bus.¹⁴

But how novel, and how uniquely British, are ASBOs? Would ASBOs pass constitutional muster in the United States, or would they run afoul of our First Amendment protections of freedom of speech or freedom of association? Would they violate the Due Process Clause’s vagueness doctrine, the Eighth Amendment’s prohibition of cruel and unusual punishment, or our right to intrastate travel?

This Note attempts to answer these questions. Part II examines the British experience with ASBOs, including their scope, the legal process afforded to their targets, and the criticisms they have attracted. Part III looks at the use of public nuisance injunctions against anti-social behavior in the United States, both historically and, most recently, against urban gang-related activities, and compares the procedures for obtaining and enforcing such injunctions with the equivalent procedures pertaining to ASBOs. Part IV discusses what limits, if any, the U.S.

6. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 248 (1994).

7. *Crime and Disorder Act, 1998*, c. 37, § 1 (U.K.).

8. HOME OFFICE, *RESPECT AND RESPONSIBILITY: TAKING A STAND AGAINST ANTI-SOCIAL BEHAVIOUR*, 2003, Cm. 5778, 78.

9. *Id.* at 78–79.

10. *Id.* at 18.

11. See, e.g., Matt Foot, *A Triumph of Hearsay and Hysteria: Asbos are Targeting the Vulnerable So the Government Can Win Votes*, *THE GUARDIAN* (London), May 5, 2005, at 20; Nick Cohen, *Without Prejudice: A Law for the Vindictive: From Rhubarb-Chuckers to Punning Pub Landlords, Asbos are Increasingly Ill-Targeted*, *THE OBSERVER* (London), March 27, 2005, at 31.

12. Duncan Walker, *Asbowatch V: War on a G-string*, *BBC MAGAZINE*, Mar. 15, 2005, <http://news.bbc.co.uk/1/hi/magazine/4319653.stm>.

13. Duncan Walker, *Asbowatch III: A Dancing Werewolf*, *BBC MAGAZINE*, Dec. 15, 2004, <http://news.bbc.co.uk/1/hi/magazine/4078813.stm>.

14. *Id.*

Constitution would likely place on the scope and nature of ASBO-type orders in this country. The Note concludes that public nuisance injunctions similar to ASBOs have a long legal pedigree in both the United Kingdom and the United States, with fewer procedural safeguards than those applied in the ASBO process. In the United States, however, the Constitution, particularly the First Amendment, would circumscribe the restrictions permitted in an ASBO-type order, and would guard against the more draconian ASBOs highlighted by the British media.

II. ANTI-SOCIAL BEHAVIOR ORDERS: THE BRITISH EXPERIENCE

A. Background

Anti-social behavior orders were first introduced in Britain in 1999 as a response to a growing concern over anti-social behavior.¹⁵ While a majority of the British population does not appear to be affected by anti-social behavior,¹⁶ such behavior is of acute concern to a sizeable minority, particularly those living in inner-city areas.¹⁷ A “One Day Count of Anti-Social Behaviour” conducted by the British government in 2003 resulted in 66,107 reports of anti-social behavior in a single day, which it grouped into thirteen categories: litter/rubbish; criminal damage/vandalism; vehicle-related nuisance; nuisance behavior; intimidation/harassment; noise; rowdy behavior; abandoned vehicles; street drinking and begging; drug/substance misuse and drug dealing; animal-related problems; hoax calls; and prostitution, solicitation and sexual acts.¹⁸

ASBOs are civil orders that Magistrate’s Courts can issue against any person aged ten or over who has acted in an anti-social manner, defined as “a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself,” in order to protect others from further anti-social acts.¹⁹ Between April 1999, when the Crime and Disorder Act came into force, and September 2005, courts issued 7356 ASBOs in England and Wales.²⁰ ASBOs have predominantly been directed at males aged twenty-one

15. Crime and Disorder Act, 1998, c. 37, § 1 (U.K.). Subsequent Acts of Parliament—the Police Reform Act of 2002 and the Anti-Social Behaviour Act of 2003—have extended the law, including allowing for interim orders and orders to be granted in connection with a criminal conviction. *See infra* notes 33–40, 58 and accompanying text; *see generally* Anti-Social Behaviour Act, 2003, c. 38 (U.K.).

16. HOME OFFICE, CRIME IN ENGLAND & WALES 2005/06 38–40 (2006) (including information from the British Crime Survey 2005/06).

17. *See generally* ANDREW MILLIE, JESSICA JACOBSON, ERAINA McDONALD & MIKE HOUGH, INST. FOR CRIMINAL POLICY RESEARCH, ANTI-SOCIAL BEHAVIOUR STRATEGIES (2005).

18. HOME OFFICE, ONE DAY COUNT OF ANTI-SOCIAL BEHAVIOUR (Sept. 10, 2003), available at <http://www.together.gov.uk/cagetfile.asp?rid=830>.

19. Crime and Disorder Act § 1.

20. Crime Reduction Website, Asbo Statistics (2006), <http://www.crimereduction.gov.uk/asbos/asbos2.htm>. The Crime and Disorder Act also introduced ASBOs in Scotland, but with different rules appropriate to Scotland’s separate judicial system. In the interests of simplicity, the discussion below will be confined to the framework prescribed for England and Wales.

and under,²¹ and have been most commonly aimed at preventing unruly behaviors such as verbal abuse, harassment, graffiti, and excessive noise.²²

The British government has characterized ASBOs as a “completely new approach” to the problem of anti-social behavior, “bringing the flexibility of civil law procedures to bear on perpetrators while ensuring that the strength of the criminal law was brought into play in case of breach.”²³ This blurring of civil and criminal law has come under heavy attack by critics,²⁴ who point out that someone may receive a lengthy prison sentence for breaching an ASBO even when the underlying offense they committed would not normally warrant a custodial sentence.²⁵

B. The ASBO Process

1. Application

The application for an ASBO is the culmination of a process of consultation involving a number of community agencies, which can include the police, local government agencies, and social landlords.²⁶ Any of these agencies, or a combination thereof, may apply to the Magistrate’s Court for an ASBO within six months of the anti-social behavior in question taking place.²⁷ The complaint and a summons to a court hearing are served on the defendant in person, or if this is not possible, by mail to his last known address.²⁸ In the case of a minor, his parent or legal guardian must also receive a copy.²⁹

21. SIOBHAN CAMPBELL, HOME OFFICE RESEARCH, DEV., AND STATISTICS DIRECTORATE, A REVIEW OF ANTI-SOCIAL BEHAVIOUR ORDERS 8 (2002).

22. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS AND ACCEPTABLE BEHAVIOUR CONTRACTS 11 (2003) [hereinafter HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS].

23. JOHN DENHAM, *Foreword* to HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS AND ACCEPTABLE BEHAVIOUR CONTRACTS 3 (2003).

24. The Commissioner for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom, 4th–12th November 2004*, ¶ 116, delivered to the Committee of Ministers and the Parliamentary Assembly, CommDH(2005)6 (June 8, 2005) [hereinafter Commissioner for Human Rights].

25. See HARRY FLETCHER, ASBO CONCERN & NAPO (THE TRADE UNION AND PROF’L ASS’N FOR FAMILY COURT AND PROB. STAFF), ANTI-SOCIAL BEHAVIOUR ORDERS: ANALYSIS OF THE FIRST SIX YEARS 11 (2005), <http://www.asboconcern.org.uk/asbodossier.pdf>.

26. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 25. A “social landlord” is a provider of public housing; either a local government agency, a registered nonprofit organization, or a public trust set up to provide housing in deprived areas. See Together Campaign, *What are the Structures and Functions of Social Landlords?*, <http://www.together.gov.uk/article.asp?aid=2059&c=439> (last visited Sept. 2, 2006).

27. CAMPBELL, *supra* note 21, at 3.

28. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 36.

29. *Id.*

The applying agency prepares a draft of the requested ASBO and submits it to the court as part of the application.³⁰ The agency may negotiate the type and duration of prohibitions contained in the draft ASBO with defense counsel prior to the hearing, and reductions may be made in exchange for an agreement not to contest the issuing of the ASBO in court.³¹ The court has discretion to approve an ASBO negotiated by the parties or to impose more restrictive conditions.³²

Since the passage of the Police Reform Act of 2002,³³ community agencies may also apply for an interim ASBO, which, if granted, is served personally on the defendant with the application for the full order and a summons.³⁴ Interim ASBOs come into force as soon as service takes place.³⁵ Courts may issue interim ASBOs without giving the defendant notice of the proceedings when the court believes an urgent need to protect the community from the defendant's anti-social behavior exists.³⁶ While an interim ASBO is a temporary order for a fixed period, it can impose any prohibitions which would be appropriate in a full ASBO, and the same criminal penalties apply if a defendant breaches an interim ASBO.³⁷ A defendant may apply to the court to vary or discharge an interim ASBO.³⁸ In addition, the defendant has an opportunity to respond to the case at the application hearing for a full ASBO.³⁹ The interim ASBO lapses if the application for a full ASBO is withdrawn or refused.⁴⁰

2. Hearing

Proceedings to obtain an ASBO are civil proceedings.⁴¹ As the imposition of an ASBO is not a conviction and results in no penalty, the hearing is separate from the criminal proceedings for breach of an ASBO.⁴² In both proceedings, public funding is available to assist the defendant in obtaining counsel.⁴³

Because proceedings to obtain an ASBO are civil proceedings, the rules of civil procedure apply in the initial hearing.⁴⁴ In Britain, these rules allow for the admission of hearsay evidence.⁴⁵ The court has discretion to consider what weight

30. CAMPBELL, *supra* note 21, at 54.

31. *See id.*

32. *Id.*

33. Police Reform Act, 2002, c. 30, § 65 (U.K.).

34. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 18–19.

35. *Id.* at 19.

36. *Id.*

37. *Id.* at 18.

38. *Id.* at 19.

39. *Id.*

40. *Id.*

41. R v. McCann [2002] UKHL 39, [2003] 1 A.C. 787, 809 (appeal taken from Q.B.).

42. *Id.* at 808.

43. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 72.

44. *See McCann*, [2002] UKHL 39, [2003] 1 A.C. at 809.

45. *See Civil Evidence Act*, 1995, c. 38, § 4 (U.K.).

to give to such evidence, depending on the facts of the case.⁴⁶ Video footage from surveillance cameras, witness diaries, and testimony from professional witnesses are commonly introduced as evidence.⁴⁷ Although the agency applying for an ASBO may, and in most cases will, introduce witnesses with direct evidence to strengthen its case, it is not required to do so.⁴⁸ The application of the civil rules of procedure means that the defendant has no right to examine any witnesses who appear against him.⁴⁹

In order to obtain an ASBO, the applicant bears the burden of showing that the defendant behaved in an anti-social manner and that an order is necessary for the protection of persons from further anti-social behavior by the defendant.⁵⁰ This has been described as a “two-stage test.”⁵¹ The two parts of the test are considered in very distinct ways, however. The High Court has held that the second part of the test, considering whether the order is necessary to protect persons from further anti-social actions, “does not involve a standard of proof: it is an exercise of judgment or evaluation.”⁵² In the first stage, however, the court departs from the usual civil rules by applying a *criminal* standard of proof.⁵³ The court must “*be sure* that the defendant has acted in an anti-social manner.”⁵⁴

If the court grants the ASBO, the defendant has the right to appeal to the Crown Court,⁵⁵ which will reconsider the application *de novo*.⁵⁶ The Crown Court may rescind the ASBO, vary its terms, or create an entirely new ASBO.⁵⁷

46. *Id.*

47. CAMPBELL, *supra* note 21, at 50. A professional witness is defined as a person practicing as a member of the legal or medical profession or as a dentist, veterinary surgeon or an accountant, who attends a court hearing to give evidence in a professional capacity. See The Crown Prosecution Service (Witnesses’ etc. Allowances) Regulations, 1988, S.I. 1862, art. 3–4 (U.K.), available at http://www.opsi.gov.uk/si/si1988/Uksi_19881862_en_2.htm.

48. CAMPBELL, *supra* note 21, at 50.

49. Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms gives the right to someone charged with a criminal offense to examine or have examined witnesses against him, analogous to the Confrontation Clause in the U.S. Constitution. *McCann* held that this does not apply in ASBO application proceedings. [2002] UKHL 39, [2003] 1 A.C. at 811.

50. CAMPBELL, *supra* note 21, at 49.

51. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 10.

52. *McCann*, [2002] UKHL 39, [2003] 1 A.C. at 812.

53. *Id.*

54. *Id.* (emphasis in original).

55. CAMPBELL, *supra* note 21, at 55. The Crown Court is both a criminal trial court and an appellate court for cases heard in the Magistrates’ courts. See Her Majesty’s Courts Service, The Crown Court (2006), <http://www.hmcourts-service.gov.uk/infoabout/crown/index.htm>.

56. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 45.

57. *Id.* at 46.

A criminal court can also impose an ASBO upon conviction for a criminal offense, in addition to a sentence or conditional discharge, either *sua sponte* or at the request of the police or local government authority.⁵⁸

3. Breach

As previously noted, breach of an ASBO is a criminal offense.⁵⁹ Once the Crown Prosecution Service has made a decision to prosecute such a breach, a criminal trial takes place on the issue of whether the defendant has breached the terms of the ASBO. A “reasonable excuse” defense is available.⁶⁰ If convicted of breach, the court may sentence an adult defendant to up to five years’ imprisonment.⁶¹ A juvenile may receive a detention and training order with up to twelve months in custody plus twelve months of community service.⁶²

C. The Scope of ASBOs

No limits on the potential scope of restrictions contained in ASBOs exist, other than the requirement that such restrictions be negative; ASBOs cannot compel an individual to do anything.⁶³ There is no maximum period for an ASBO,⁶⁴ but the subject of an ASBO may apply to the courts to have it lifted.⁶⁵ An ASBO must be effective for a minimum of two years,⁶⁶ although individual restrictions listed within the ASBO may specify a shorter time period.⁶⁷

Government guidelines suggest a variety of behaviors for which ASBOs might be appropriate: intimidating neighbors, carrying out verbal abuse, congregating in disruptive groups on housing estates, behaving abusively towards vulnerable individuals, persistent bullying, engaging in racial or homophobic harassment, and behaving anti-socially as a result of alcohol or drug misuse.⁶⁸ Common types of prohibitions include the following, listed in government materials as samples for use by local agencies:

- [1.] Not to act or incite others to act in an anti-social manner
- [2.] Not to use or incite others to use threatening, insulting or

58. *Id.* at 17.

59. *See supra* notes 23–25 and accompanying text.

60. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 47; *see R. v. Nicholson* [2006] EWCA Crim 1518, 2006 WL 1546634 (holding that the question of whether ignorance, forgetfulness or misunderstanding were capable of amounting to a “reasonable excuse” for being in breach of an ASBO was a matter of fact for the jury to decide.)

61. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 20.

62. *Id.* at 21.

63. CAMPBELL, *supra* note 21, at 3.

64. HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 35.

65. *Id.* at 49.

66. *Id.* at 35.

67. SEC’Y OF STATE FOR THE HOME DEP’T, ANTI-SOCIAL BEHAVIOUR, 2005, Cm. 6588, at 14.

68. CAMPBELL, *supra* note 21, at 12.

abusive words . . . [3.] Not to associate with any of the following [individuals] listed below in any place to which the public has access . . . [4.] Not to enter the exclusion zone marked in red on the plan attached . . . [5.] Not to enter or go within 25 metres of any of the following [stores] . . . [6. Not to be] under the influence of intoxicating liquor in any public street or open place.⁶⁹

An early analysis found that three quarters of ASBOs involved an exclusion element, with people being banned from entering specific stores, shopping malls, streets, parks, or housing projects.⁷⁰ The same study also listed several ASBOs prohibiting individuals from using “threatening words” or verbal abuse.⁷¹ It also cited examples of ASBOs which banned behavior that would generally not be illegal, including driving a mechanically propelled vehicle, misusing the 999 service (Britain’s equivalent of 911), climbing on roofs, and knocking on neighbors’ doors.⁷²

D. ASBOs and their Critics

Criticisms of ASBOs have centered around two main procedural objections: (1) that the intermingling of civil proceedings and criminal penalties denies due process to the subjects of ASBOs; and (2) that ASBOs are unfairly targeted at certain groups of people in certain parts of the country.⁷³ In addition, critics point to anecdotal evidence suggesting that ASBOs are out of control, including ASBOs that: forbid a family from going out together;⁷⁴ ban a woman from owning a stereo, radio, or television;⁷⁵ prohibit a boy with Tourette’s Syndrome from swearing;⁷⁶ and ban a woman who repeatedly tried to kill herself from going near railway lines, rivers, bridges, or parking garages.⁷⁷

Critics contend that the ASBO process circumvents the criminal law.⁷⁸ It is relatively easy for community agencies to obtain ASBOs,⁷⁹ and courts turn down only four percent of applications.⁸⁰ Four out of every ten ASBOs issued are

69. Crime Reduction Website, Sample Prohibitions from ASBOs (2006), <http://www.crimereduction.gov.uk/asbos/asbos8.htm>.

70. CAMPBELL, *supra* note 21, at 19.

71. *Id.* at 117–20.

72. *Id.*

73. *See, e.g.*, FLETCHER, *supra* note 25, at 2–3.

74. *Id.* at 8.

75. *Id.* at 9.

76. Jane Elliott, *Tourette’s Children “Given Asbos,”* BBC NEWS, Aug. 15, 2005, <http://news.bbc.co.uk/1/hi/health/4144840.stm>.

77. FLETCHER, *supra* note 25, at 11. While these are all actual ASBOs, it is notable that many of the more hysterical accounts are about people being “threatened with an ASBO” for frivolous reasons. *See, e.g.*, Vikram Dodd, *Asbo Call over Jokes About the Pope*, THE GUARDIAN (London), Apr. 9, 2005, at 7.

78. FLETCHER, *supra* note 25, at 21.

79. CAMPBELL, *supra* note 21, at 97.

80. *Id.* at 7. The government has suggested that the high rate of approval of orders is, at least partially, the result of petitioners dropping cases which are lacking in merit at the final stages of application. *Id.* at 46. As one local authority officer put it, “To lose

breached,⁸¹ and the consequences of such a breach are potentially severe, regardless of whether the underlying behavior would have warranted a custodial sentence⁸² or was even illegal. An estimated fifty percent of those who breach an ASBO are imprisoned.⁸³

Since the High Court in *R v. McCann*⁸⁴ held that the criminal standard of proof should be used at hearings to issue ASBOs, complaints about the standard of proof have given way to complaints about inconsistency and the use of hearsay evidence.⁸⁵ As the European Union's Commissioner for Human Rights put it, "hearsay evidence and the testimony of police officers or 'professional witnesses' do not seem to me to be capable of proving alleged behaviour beyond reasonable doubt."⁸⁶ (It does seem strange that the Court in *McCann* justified using the higher criminal standard for hearings on applications for ASBOs in the "interests of fairness."⁸⁷ The Court's reasoning that hearings on applications for ASBOs involve "allegations of criminal or quasi-criminal conduct which if proved would have serious consequences for the person against which they are made"⁸⁸ seems to undermine its holding that they are civil hearings, entirely separate from the criminal proceedings for breach.)

Interim ASBOs have been particularly criticized. Even before they were introduced, when the government was arguing that they were necessary to ensure that the community could obtain immediate protection from particularly severe anti-social behavior,⁸⁹ critics raised concerns that interim ASBOs would impose restrictions on liberty without a proper hearing.⁹⁰ In one case, a defendant was served with a lengthy interim ASBO at his house, and left home twice before he had read it fully, unwittingly engaging in activities that breached its restrictions on both occasions.⁹¹

Critics have also voiced equal protection concerns. First, they have charged that ASBOs effectively create a different standard of criminal law for those people to whom they apply, setting up "personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community."⁹² Second, they point out that ASBOs are inconsistently used across the country.⁹³ In what has been described as a "geographical lottery,"⁹⁴ over

sends out this incredible message to perpetrators of anti-social behaviour—you can do what you want, we can't touch you." *Id.*

81. SEC'Y OF STATE FOR THE HOME DEP'T, ANTI-SOCIAL BEHAVIOUR, 2005, Cm. 6588, at 14.

82. FLETCHER, *supra* note 25, at 3.

83. *Id.* at 2.

84. [2002] UKHL 39, [2003] 1 A.C. 787, 826 (appeal taken from Q.B.).

85. *See, e.g.*, Commissioner for Human Rights, *supra* note 24, at 36.

86. *Id.*

87. *McCann*, [2002] UKHL 39, [2003] 1 A.C. at 826.

88. *Id.*

89. *See id.*

90. *Id.* at 826.

91. FLETCHER, *supra* note 25, at 6.

92. Commissioner for Human Rights, *supra* note 24, at 34.

93. *See* FLETCHER, *supra* note 25, at 3–4.

one six-month period 155 persons were the subject of an ASBO in Greater Manchester compared with just 27 in Merseyside, a similar geographical area.⁹⁵ In addition, the vast majority of ASBOs are directed against males aged twenty-one and under,⁹⁶ raising concerns that this segment of the population is being unfairly penalized by the ASBO system.

III. PUBLIC NUISANCE INJUNCTIONS IN THE UNITED STATES

A. Background

State and local governments in the United States have broad discretion to control and regulate the activities of their citizens, so long as they do not infringe on citizens' constitutional rights.⁹⁷ In the exercise of their police powers, states and municipalities have enacted statutes and sought injunctions aimed at controlling anti-social behavior, including public drunkenness,⁹⁸ loitering,⁹⁹ prostitution,¹⁰⁰ and gang activities.¹⁰¹

Where state and local governments have used injunctions to prevent anti-social behavior, they have generally done so under the public nuisance doctrine. A public nuisance has been defined as "an unreasonable interference with a right common to the general public."¹⁰² There is a long history in both England and the United States, dating as far back as the sixteenth century, of Chancery courts and, subsequently, courts sitting in equity, issuing injunctions to enjoin public nuisances.¹⁰³ Pre-statehood Florida, for example, authorized courts to order the abatement of "any nuisance which tends to the immediate annoyance of the citizens in general, or is manifestly injurious to the public health and safety, or tends greatly to corrupt the manners and morals of the people."¹⁰⁴ In *In re Debs*, a landmark 1895 case, the United States Supreme Court commented that "in no wellconsidered [sic] case has the power of a court of equity to interfere by injunction in cases of public nuisance been denied."¹⁰⁵

94. *Id.* at 21.

95. *Id.* at 3. The government has argued that the geographical inconsistencies are the result of different authorities quite reasonably pursuing different strategies to deal with anti-social behavior. See CAMPBELL, *supra* note 21, at 14.

96. CAMPBELL, *supra* note 21, at 9.

97. See *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

98. See, e.g., *Town of Dewitt v. La Cotts*, 88 S.W. 877 (Ark. 1905) (upholding a town ordinance that declared it to be a public nuisance for any person to appear or be found in public in the town in a state of intoxication or drunkenness).

99. See *City of Chicago v. Morales*, 527 U.S. 41 (1999).

100. See, e.g., OHIO REV. CODE ANN. § 3767.03(C)(2) (West 2006).

101. See, e.g., *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).

102. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

103. *Acuna*, 929 P.2d at 603.

104. Act of Feb. 10, 1832, No. 55, sec. 47, 1832 Fla. Terr. Acts 10th Sess., available at <http://fulltext10.fcla.edu/cgi/t/text/text-idx?cc=ftl;subview=fullcitation;idno=ftl1832> (follow "view text" hyperlink).

105. *In re Debs*, 158 U.S. 564, 592 (1895).

While a public nuisance cause of action originated as a private right,¹⁰⁶ for over 100 years courts in the United States have recognized the right of municipalities and other government entities to bring actions to enjoin public nuisances which threaten their citizens.¹⁰⁷ In effect, in such cases, "the state brings suit in order to prevent the violation of a right belonging to it in its public capacity."¹⁰⁸

In some states, this common law right has been supplemented by statutes that authorize district attorneys and city attorneys to seek enjoinder of defined public nuisances within their jurisdictions.¹⁰⁹ These statutes may list specific types of nuisance. For example, Ohio's statute covers prostitution and the distribution of pornographic materials.¹¹⁰ Alternatively, statutes may provide a more general definition of public nuisance. Laws in California describe public nuisance generally as

[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway¹¹¹

As with ASBOs, courts can proscribe behavior that is not in itself criminal through a public nuisance injunction.¹¹² Perhaps one of the key differences between injunctions under the public nuisance doctrine and ASBOs is the threshold question of what constitutes a public nuisance. This differs from state to state. In California, for example, a nuisance must be "substantial and

106. Edwin S. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 395-96 (1903).

107. See *City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 98 (1838) (applying the English rule that "a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney general"). For more recent examples, see *Town of W. Hartford v. Operation Rescue*, 726 F. Supp. 371, 381 (D. Conn. 1989) (citing *Planning & Zoning Comm'n of Middlefield v. Zemel Bros.*, 270 A.2d 562 (Conn. Super. Ct. 1970) (enjoining music festival in action by town authorities)), *vacated on other grounds*, *Town of W. Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990); RESTATEMENT (SECOND) OF TORTS, § 821C(2)(b) (public official may bring suit on behalf of political subdivision); *N.Y. State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1261 (S.D.N.Y. 1989) (enjoining public nuisance on city's claim under New York law).

108. Mack, *supra* note 106, at 393.

109. See, e.g., CAL. CIV. PROC. CODE § 731 (West 1980); OHIO REV. CODE ANN. § 3767.03 (West 2006).

110. OHIO REV. CODE ANN. § 3767.01(C)(2).

111. CAL. CIV. CODE § 3479 (West 1997).

112. As the court in *Acuna* put it, "Acts or conduct which qualify as public nuisances are enjoinderable as civil wrongs or prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public." *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 607 (Cal. 1997).

unreasonable” to qualify as an enjoined public nuisance.¹¹³ It is difficult to see how some of the behaviors prohibited by some of the more extreme ASBOs—answering the front door in your underwear, for example—would meet this “substantial and unreasonable” test and be considered anything more than the kind of “trifling annoyance” referred to by *Acuna*.¹¹⁴

B. Process

1. Obtaining an injunction

In the United States, as in Britain, a suit for an injunction is a civil suit controlled by the rules of civil procedure. This is true even when, as in the anti-social behavior cases considered here, a criminal injunction is being sought.¹¹⁵ Also, as in Britain, the granting of an injunction and the finding of a violation of the terms of the injunction are “two quite separate judicial proceedings.”¹¹⁶ As with any other civil proceeding, notice must be served on the defendant in order for the court to obtain personal jurisdiction.¹¹⁷ However, since an action to obtain an injunction is in equity, the right to trial by jury is not preserved by the United States Constitution's Seventh Amendment¹¹⁸ unless otherwise specified by a statute or a state constitutional provision.¹¹⁹

The burden of proof is on the plaintiff to establish the right to injunctive relief.¹²⁰ Courts generally require that “[t]he facts necessary for granting relief by injunction . . . be established at least by a preponderance of the evidence, which must be competent and credible.”¹²¹ Some courts require the higher clear and convincing evidence standard for the granting of a permanent injunction.¹²² However, no United States court appears to have gone as far as *McCann* in applying a criminal standard of proof, even in hearings granting permanent criminal injunctions.¹²³

113. *Id.* at 604.

114. *Id.*

115. Courts generally distinguish between civil injunctions, which are aimed at securing compliance with a court's order, and criminal injunctions, which are intended to deter and, in the event of breach, punish proscribed behavior. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441–42 (1911).

116. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 321 (1980) (White, J., dissenting).

117. *City of New York v. Andrews*, 719 N.Y.S.2d 442, 445 n.1 (Sup. Ct. 2000) (holding in an action to enjoin members of a gang from entering a certain neighborhood that “[t]he action as against the unserved defendants must of course be dismissed on jurisdictional grounds alone”).

118. U.S. CONST. amend. VII.

119. 47 AM. JUR. 2D *Jury* §§ 34–36 (2006).

120. *See* 43A C.J.S. *Injunctions* § 324 (2006).

121. *Id.*

122. *See, e.g., Ryan Co. v. United States*, 43 Fed. Cl. 646, 650 (1999) (“Because injunctive relief is so drastic in nature, the plaintiff must demonstrate its right to injunctive relief by ‘clear and convincing evidence.’” (quoting *Bean Dredging Corp. v. United States*, 22 Cl. Ct. 519, 522 (1991))).

123. *R v. McCann* [2002] UKHL 39, [2003] 1 A.C. 787 (appeal taken from Q.B.).

Unlike the British rules of civil procedure, the evidentiary rules in federal and state courts generally exclude hearsay. However, it is not unknown for American courts sitting without a jury in a hearing for an injunction to admit hearsay evidence, and to weigh it appropriately.¹²⁴

Courts also distinguish between actions for a statutory injunction and actions for an injunction under common law. At common law, the plaintiff had to prove irreparable injury or the inadequacy of other remedies before an injunction could be granted. In actions for a statutory injunction, however, “[n]o irreparable injury, special harm or damage to the public need be shown, nor need the inadequacy of remedies at law be demonstrated, for the commission of the prohibited act is sufficient to sustain the injunction.”¹²⁵ Thus, as with the second part of the ASBO two-part test, an agency requesting an injunction under the terms of a statute need show “only that there is a reasonable likelihood that the wrong will be repeated.”¹²⁶ As the United States Supreme Court stated in *Vance v. Universal Amusement Co., Inc.*, “it is not unusual in nuisance litigation to prohibit future conduct on the basis of a finding of undesirable past or present conduct.”¹²⁷

As is the case in Britain with interim ASBOs, a court may enter a temporary order pending notice and hearing.¹²⁸ However, this has been described as an “extraordinary remedy” which should be issued only where there is an “immediate threat of irreparable injury.”¹²⁹ In such a case, “[t]he allegations verified by the presenter must be strong and clear, and the trial judge should raise in his or her own mind all possible responses a defendant could raise if present.”¹³⁰ In addition, United States courts may issue injunctions as a condition of probation in a criminal case,¹³¹ just as their British counterparts may impose ASBOs in conjunction with criminal sentencing.¹³²

124. For example, one court noted:

In conducting this hearing, I allowed the City’s counsel the most extraordinary latitude in questioning their witnesses. Much of the testimony regarding the defendants went beyond mere hearsay, and consisted of general reputation among police officers or mere rumor. Had the defendants been represented by counsel devoted to their interests, the bulk of the testimony directly related to the defendants would properly have been objected to and little if any would have been left. . . . I allowed the objectionable questions and testimony, since there was no jury, since the situation complained of is a serious one, and in order to ascertain the weight of the City’s case. That does not mean that I must credit the flagrantly improper and inadmissible testimony as establishing the facts.

City of New York v. Andrews, 719 N.Y.S.2d 442, 448–49 (Sup. Ct. 2000).

125. *Id.* at 447 n.3.

126. *Commodity Futures Trading Comm. v. British Am. Commodity Options*, 560 F.2d 135, 141 (2d Cir. 1977).

127. 445 U.S. 308, 311 (1980).

128. *Injunctions*, *supra* note 120, at § 305.

129. *State v. Beeler*, 530 So. 2d 932, 933–34 (Fla. 1988).

130. *Id.* at 933–34.

131. *See, e.g., In re White*, 158 Cal. Rptr. 562, 565 (Ct. App. 1979).

132. *See supra* note 58 and accompanying text.

2. Breach

The prototypical breach of an injunction involves a straightforward contempt proceeding for disobedience in the same court that is imposing the punishment.¹³³ By extension, for most of United States history, out-of-court disobedience to injunctions was treated the same as direct contempt for conduct in the court's presence.¹³⁴ Both could be punished summarily by the court, without any of the due process normally required in a criminal conviction.¹³⁵

This changed with the United States Supreme Court's ruling in *Bloom v. Illinois*, which required that criminal contempt be treated "like other crimes insofar as the right to jury trial is concerned."¹³⁶ Courts thereafter applied the whole range of criminal procedural protections, including the right to counsel and the requirement of proof beyond a reasonable doubt, to hearings for breach of a criminal injunction,¹³⁷ reasoning that "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings."¹³⁸

Although violations of a common law injunction are heard by the court which granted the injunction in the first place, statutes may vest jurisdiction for the criminal hearing in a designated criminal court.¹³⁹ A defendant may receive a sentence for an act in violation of an injunction that would also be an independently criminal act.¹⁴⁰ The United States Supreme Court has held, however, that an issue of double jeopardy exists when a defendant is prosecuted both for the violation of an order and for the underlying crime.¹⁴¹

C. Public Nuisance Injunction Controversies

In the United States, as in Britain, opponents of public nuisance injunctions have criticized the commingling of criminal and civil procedures, as well as a perceived usurpation of the law by equity, and have described the result as "criminal equity" and "government by injunction."¹⁴² Also, as in Britain, a

133. *Injunctions*, *supra* note 120, at § 400.

134. *Id.*

135. *Bloom v. Illinois*, 391 U.S. 194, 196–97 (1968).

136. *Id.* at 208, 210–11.

137. *See Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 833–34 (1994).

Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding. . . . Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.

Id. (citations omitted).

138. *Id.* at 826 (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 (1988)).

139. *Injunctions*, *supra* note 120, at § 400.

140. *Id.*

141. *United States v. Dixon*, 509 U.S. 688, 712 (1993).

142. *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 605 (Cal. 1997) (citing *Mack*, *supra* note 106, at 397; OWEN M. FISS, *INJUNCTIONS* 580 (1972)).

defendant may face criminal sanctions for the violation of a public nuisance injunction regardless of whether the underlying acts it enjoined were criminal.¹⁴³

Public nuisance injunctions have been most controversial where courts use the common law to enjoin activities not specifically defined as a public nuisance by statute. For example, in *In re Debs*, the Supreme Court justified an injunction breaking a strike by employees at the Pullman car works, issued at the request of the United States Attorney General, on the grounds that "forcible obstructions of the highways along which interstate commerce travels and the mails are carried" represented a public nuisance.¹⁴⁴ The use of injunctions to preserve the peace in labor disputes, to prevent violations of public decency, and to break up monopolies became widespread in the late nineteenth and early twentieth centuries.¹⁴⁵ Although widely accepted by the courts, they were a cause of some controversy, particularly since at the time they afforded those accused of violating an injunction none of the usual due process rights extended to criminal defendants.¹⁴⁶ A law review article of the period, entitled "The Revival of Criminal Equity," compared the use of such injunctions to the infamous Court of Star Chamber of seventeenth-century British history¹⁴⁷ and declared that "in bringing the procedure of courts of equity to the establishment and punishment of crimes they violate fundamental principles of our jurisprudence."¹⁴⁸

Over the past hundred years, courts in some states have pulled back from such an expansive use of public nuisance injunctions under the common law.¹⁴⁹ Nevertheless, courts generally continue to grant injunctions on behalf of the state "where the objectionable activity can be brought within the terms of the statutory definition of public nuisance."¹⁵⁰ In recent years, the use of such statutes has shifted from enjoining such activities as the sale of liquor¹⁵¹ and gambling¹⁵² to shutting down or placing restrictions on premises where drugs are sold or other

143. See, e.g., *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.* in *Ariz.*, 712 P.2d 914, 923 (Ariz. 1985) (holding that conduct which unreasonably and significantly interferes with the public health, safety, peace, comfort, or convenience is a public nuisance even if that conduct is not specifically prohibited by the criminal law).

144. 158 U.S. 564, 587, 598 (1895).

145. Mack, *supra* note 106, at 389.

146. *Id.* at 400-01.

147. Mack, *supra* note 106, at 391-92. "That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons . . . the Star Chamber has for centuries symbolized disregard of basic individual rights." *Faretta v. California*, 422 U.S. 806, 821 (1975).

148. Mack, *supra* note 106, at 401.

149. See, e.g., *People v. Lim*, 118 P.2d 472, 476 (Cal. 1941) (holding that it is the function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity). However, the central holding of *In re Debs* has never been reversed by the U.S. Supreme Court.

150. *Id.*

151. *Barrowman v. State ex rel. Evans*, 381 S.W.2d 251, 252 (Tenn. 1964).

152. *Vandergriff v. State ex rel. Jernigan*, 396 S.W.2d 818, 819 (Ark. 1965).

illegal activities are conducted¹⁵³ and prohibiting various gang-related activities.¹⁵⁴ One of the most cited of these modern cases is *People ex rel. Gallo v. Acuna*, in which the California Supreme Court upheld the right of the Superior Court to issue, on the application of the City Attorney of San Jose, a lengthy injunction prohibiting Varrio Sureño gang members from engaging in certain behavior in a defined four-block neighborhood.¹⁵⁵

153. *E.g.*, *State ex rel. Gibbons v. Club Universe*, No. W2004-02761-COA-R3-CV, 2005 WL 1750358, at *5, (Tenn. Ct. App. 2005) (upholding an injunction enjoining the defendant or any successor business entity from operating a nightclub or similar business at that location, pursuant to a public nuisance statute); *Adust Video v. Nueces County*, 996 S.W.2d 245, 252–53 (Tex. App. 1999) (upholding an injunction enjoining an adult video store from permitting sexual activity within its premises, pursuant to statutes authorizing the abatement of public health nuisances).

154. *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).

155. The injunction prohibited the defendants from any of the following conduct in a specified four-block area:

- (a) Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known 'VST' (Varrio Sureño Town or Varrio Sureño Treces) member;
- (b) Drinking alcoholic beverages in public excepting consumption on properly licensed premises or using drugs;
- (c) Possessing any weapons including but not limited to knives, dirks, daggers, clubs, nunchukas [sic; nunchakus], BB guns, concealed or loaded firearms, and any other illegal weapons as defined in the California Penal Code, and any object capable of inflicting serious bodily injury including but not limited to the following: metal pipes or rods, glass bottles, rocks, bricks, chains, tire irons, screwdrivers, hammers, crowbars, bumper jacks, spikes, razor blades; razors, sling shots, marbles, ball bearings;
- (d) Engaging in fighting in the public streets, alleys, and/or public and private property;
- (e) Using or possessing marker pens, spray paint cans, nails, razor blades, screwdrivers, or other sharp objects capable of defacing private or public property;
- (f) Spray painting or otherwise applying graffiti on any public or private property, including but not limited to the street, alley, residences, block walls, vehicles and/or any other real or personal property;
- (g) Trespassing on or encouraging others to trespass on any private property;
- (h) Blocking free ingress and egress to the public sidewalks or street, or any driveways leading or appurtenant thereto in "Rocksprings";
- (i) Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle or doing anything to obstruct or delay the free flow of vehicular or pedestrian traffic;
- (j) Discharging any firearms;
- (k) In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to "Rocksprings", or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and

The United States Supreme Court declined to grant certiorari in the *Acuna* case.¹⁵⁶ This suggests, at least, that the use of such injunctions, when grounded in a statute, is not in itself constitutionally problematic, particularly now that defendants accused of violating a criminal injunction are assured all the rights of a defendant in a criminal trial. A statute broadly defining anti-social behavior as a public nuisance, enabling city and district attorneys to apply to the courts for the equivalent of an anti-social behavior order to enjoin such behavior, and stipulating that any violation of such orders should be prosecuted in the criminal court system, would not be a radical departure from existing legislation.¹⁵⁷ Thus, a statutory framework essentially the same as that created by the Crime and Disorder Act and subsequent legislation in Britain would appear to be not only constitutional, but grounded in several centuries of American jurisprudence.

requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction;

(l) Causing, encouraging, or participating in the use, possession and/or sale of narcotics;

(m) Owning, possessing or driving a vehicle found to have any contraband, narcotics, or illegal or deadly weapons;

(n) Using or possessing pagers or beepers in any public space;

(o) Possessing channel lock pliers, picks, wire cutters, dent pullers, sling shots, marbles, steel shot, spark plugs, rocks, screwdrivers, 'slim jims' and other devices capable of being used to break into locked vehicles;

(p) Demanding entry into another person's residence at any time of the day or night;

(q) Sheltering, concealing or permitting another person to enter into a residence not their own when said person appears to be running, hiding, or otherwise evading a law enforcement officer;

(r) Signaling to or acting as a lookout for other persons to warn of the approach of police officers and soliciting, encouraging, employing or offering payment to others to do the same;

(s) Climbing any tree, wall, or fence, or passing through any wall or fence by using tunnels or other holes in such structures;

(t) Littering in any public place or place open to public view;

(u) Urinating or defecating in any public place or place open to public view;

(v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as "VST" or "VSL" . . . as described in this Complaint or any of the accompanying pleadings or declarations;

(w) Wearing clothing which bears the name or letters of the gang known as "VST" or "VSL";

(x) Making, causing, or encouraging others to make loud noise of any kind, including but not limited to yelling and loud music at any time of the day or night.

Id. at 624 n.3 (Mosk, J., dissenting). While the appeal to the California Supreme Court concerned only paragraphs (a) and (k) of the original injunction, the Court upheld the superior court's equitable power to abate a public nuisance and reversed the Court of Appeal's invalidation of these two provisions. *Id.* at 602.

156. 521 U.S. 1121 (1997).

157. See *supra* notes 109–111 and accompanying text.

IV. CONSTITUTIONAL LIMITS

A. *General Limits on Injunctions and Statutes*

United States law allows courts to issue injunctions similar to ASBOs. The next issue, therefore, is the limits which the United States Constitution and state constitutions place on the nature and scope of the prohibitions contained in such injunctions. In general, the United States Supreme Court has held that injunctions should be no more burdensome than necessary to achieve their purpose.¹⁵⁸ More specifically, the scope of both injunctions and statutes directed at anti-social behavior has been restricted on a variety of constitutional grounds. In particular, courts have considered the effect of such measures on First Amendment rights to free speech¹⁵⁹ and freedom of association;¹⁶⁰ a constitutional right to intrastate travel;¹⁶¹ whether they are overbroad in their effect on these rights;¹⁶² and whether they fail to meet the requirements of the Due Process Clause of the Fourteenth Amendment due to excessive vagueness.¹⁶³ In addition, the United States Supreme Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment bars prosecution for mere status (e.g., being a drug addict).¹⁶⁴

The Supreme Court's more frequent holdings on the constitutionality of ordinances aimed at preventing anti-social behavior might generally apply to injunctions in this area.¹⁶⁵ Some of the reasoning underlying the tests the Court applies to statutes, though, does not make as much sense when applied to injunctions. The Court applies strict scrutiny to statutes that are directly aimed at the content of speech, for example, while it applies a more relaxed standard to

158. See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”); *Champlin Refining Co. v. Corp. Comm’n*, 286 U.S. 210, 238 (1932) (holding that plaintiff seeking an injunction to restrain the enforcement of a statute had the burden to show that restraint was necessary in order to protect its property rights).

159. See, e.g., *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (examining an injunction against anti-abortion protesters and upholding it in part while striking it in part).

160. See *Acuna*, 929 P.2d 596, 609 (holding that street gang’s conduct does not qualify as a form of association protected by the First Amendment).

161. See *In re White*, 158 Cal. Rptr. 562, 567–69 (Ct. App. 1979) (holding that an injunction barring a probationer from specified map areas violated her right to intrastate travel, based on the California Constitution and Article IV, Section 2 and the Fifth, Ninth and Fourteenth Amendments to the United States Constitution). Courts have also found general protection for the right to travel in the First Amendment; see, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964) (“[F]reedom of travel is a constitutional liberty closely related to rights of free speech and association.”).

162. See *In re Englebrecht*, 79 Cal. Rptr. 2d 89, 96 (Cal. App. 1998) (holding that the provisions of an injunction prohibiting gang members from using pagers or beepers within a two-square-mile area was unconstitutionally overbroad).

163. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 59–60 (1999) (holding a gang loitering ordinance to be unconstitutionally vague).

164. *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

165. See *City of New York v. Andrews*, 719 N.Y.S.2d 442, 454 (Sup. Ct. 2000).

statutes that are content-neutral.¹⁶⁶ As injunctions are targeted at specific individuals or groups, an injunction that is content-neutral on its face nevertheless acts in effect to restrict a particular viewpoint, depending on whom it enjoins. Yet a content-based injunction applied narrowly against specified individuals may not have the same sweeping effect on freedom of speech as a content-based statute,¹⁶⁷ and may be closer in its effect to the type of “time, place and manner” restrictions that the Court has upheld in other cases.¹⁶⁸

Before even reaching First Amendment protections, many ASBOs would likely fail the threshold test that injunctions should be no more burdensome than necessary to achieve their purpose. These would likely include sweeping ASBOs such as those banning an individual from entering any car park in England and Wales,¹⁶⁹ a thirteen year old from using the word “grass” anywhere in England and Wales,¹⁷⁰ a shoplifter from entering all shops, stores, and retail outlets in two counties;¹⁷¹ a “noisy neighbor” from owning a stereo, radio, or television;¹⁷² and a

166. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). *Turner* described the standard as follows:

Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

Id.

167. See Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 5 (2000) (“A content-neutral injunction . . . does not have the safeguards against illegitimate motive associated with a content-neutral statute. Conversely, a context-specific, content-based injunction may not pose the same dangers of illegitimate motive as a content-based statute.”).

168. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (upholding city’s sound-amplification guideline because it was “narrowly tailored to serve the substantial and content-neutral government interests of avoiding excessive sound volume and providing sufficient amplification” within concert area, and “the guideline leaves open ample channels of communication”).

169. FLETCHER, *supra* note 25, at 7. The selection of ASBOs for constitutional analysis in this section is not representative of ASBOs in general, but does represent the most recent and comprehensive listing available of controversial ASBOs. As they tend towards the extreme in the activities they prohibit, such ASBOs are of most use in sketching what the outer limits of ASBO restrictions might be under the United States Constitution.

170. *Id.* at 9.

171. *Id.* at 12.

172. *Id.* at 9. Although *Madsen* approvingly quoted the finding of a prior case that “[i]f overamplified loudspeakers assault the citizenry, government may turn them down,” it was silent on whether their use could be proscribed completely. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 773 (1994) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)).

suicidal individual from going near railway lines, rivers, bridges, and multi-story car parks.¹⁷³

That aside, many ASBOs prohibit activity that would likely receive no constitutional protection at all in the United States. As the Supreme Court stated in *City of Dallas v. Stanglin*, “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”¹⁷⁴ Thus, many arguably draconian ASBOs which regulate conduct rather than speech, such as those banning individuals from buying or consuming alcohol,¹⁷⁵ playing ball games in the street outside their home,¹⁷⁶ or possessing matches under the age of sixteen¹⁷⁷ would probably not be invalidated on First Amendment grounds.

ASBOs would also be unlikely to be struck down for excessive vagueness under the Fourteenth Amendment. Courts hold statutes unconstitutionally vague if they cannot be understood by individuals of ordinary intelligence¹⁷⁸ or if they fail “to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.”¹⁷⁹ However, the vagueness doctrine is concerned primarily with the due process requirement of adequate notice.¹⁸⁰ Since an injunction, unlike a statute, is directed by a court at a specific individual or group of individuals, those affected clearly have notice of its terms and, if necessary, may request clarification from the court at the hearing at which it is imposed. Consequently, the United States Supreme Court has upheld injunctions which have proscribed general behavior such as “intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons”¹⁸¹ in terms similar to those used in ASBOs.¹⁸²

B. First Amendment Limits on Injunctions—Standard of Scrutiny

The issue of how to scrutinize injunctions that implicate First Amendment rights is far from settled.¹⁸³ One line of frequently cited cases effectively interprets

173. FLETCHER, *supra* note 25, at 11.

174. 490 U.S. 19, 25 (1989).

175. *E.g.*, FLETCHER, *supra* note 25, at 7, 12, 13.

176. *Id.* at 9.

177. *Id.* at 9.

178. *E.g.*, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

179. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).

180. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 611 (Cal. 1997).

181. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 760 (1994).

182. One ASBO, for example, contained a condition that an individual should not “assault, threaten, harass, pester, or use threatening behaviour” against anyone who worked, resided in, or was visiting his home town. FLETCHER, *supra* note 25, at 12.

183. Indeed, at least one commentator has described the Supreme Court’s First Amendment jurisprudence regarding injunctions as being “in disarray.” Wells, *supra* note 167, at 1–2 (2000). “We know, or think we know, that the Court heavily disfavors injunctions against expression. . . . Yet the Court’s actual practice does not reveal an unyielding hostility to injunctions. Rather it has upheld some injunctions pertaining to expression with seeming ease.” *Id.*

any injunction infringing speech as a prior restraint, and finds such injunctions to be presumptively unconstitutional.¹⁸⁴ A second line of cases, however, posits a quite different interpretation. In *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, the Supreme Court viewed the imposition of injunctions as part of the “historic freedom [of states] to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.”¹⁸⁵ Subsequently, in *Madsen v. Women’s Health Center, Inc.*, it explicitly held that “[n]ot all injunctions that may incidentally affect expression . . . are ‘prior restraints,’”¹⁸⁶ without giving much guidance as to why this might be so.

Within the *Madsen* court itself, there was a lack of consensus as to the standards that should be applied to such injunctions. Justice Stevens argued that

injunctive relief should be judged by a more lenient standard than legislation. As the Court notes, legislation is imposed on an entire community, regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty—the normal consequence of illegal activity.¹⁸⁷

Conversely, Justice Scalia, joined by Justices Kennedy and Thomas, argued that “a restriction upon speech imposed by injunction (whether nominally content-based or nominally content-neutral) is at least as deserving of strict scrutiny as a statutory, content-based restriction,” because of the power of such injunctions, the fact they are imposed by individual judges, and because they can be used to attack the expression of particular ideas by virtue of whom they target.¹⁸⁸

In *Madsen*, the Court applied what it viewed as a slightly more stringent test to content-neutral injunctions than the traditional intermediate scrutiny applied to content-neutral statutes. The *Madsen* test (derided as “intermediate-intermediate” scrutiny by Justice Scalia¹⁸⁹) asks “whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”¹⁹⁰ The injunction in question was facially content-neutral, and

[a]n injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech,

184. See *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that there is a “heavy presumption” against any prior restraint on expression) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (overturning a public nuisance injunction prohibiting defendants from producing, publishing, or circulating a malicious, scandalous, or defamatory newspaper)).

185. 312 U.S. 287, 293 (1941).

186. 512 U.S. 753, 764 n.2 (1994).

187. *Id.* at 778 (Stevens, J., dissenting in part).

188. *Id.* at 792 (Scalia, J., dissenting).

189. *Id.* at 791 (Scalia, J., dissenting).

190. *Id.* at 765.

of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.¹⁹¹

Thus, the Court justified using a more lenient standard than strict scrutiny.

C. Assessing the Constitutionality of ASBO Provisions under the First Amendment

1. Freedom of Speech and Association

Some ASBOs clearly represent content-specific restrictions on speech, and would thus be presumptively unconstitutional and subject to strict scrutiny. Examples include ASBOs banning individuals from displaying the name of a gang anywhere on their body,¹⁹² from using the word "grass" as a term of abuse,¹⁹³ from swearing in front of children,¹⁹⁴ and from verbally abusing garbage collectors.¹⁹⁵

However, most if not all of the enjoined speech listed above could be categorized as "low value" speech that does not contribute to public discourse, so its prohibition would arguably not be unconstitutional.¹⁹⁶ In *Chaplinsky v. New Hampshire*, the Court upheld a New Hampshire statute prohibiting the addressing of "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place."¹⁹⁷ In *Aguilar v. Avis Rent A Car System, Inc.*, the California Supreme Court upheld an injunction barring the defendant from "using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees" in his workplace.¹⁹⁸ In addition, some of the above

191. *Id.* at 762. This echoes the emphasis in *Milk Wagon Drivers* that injunctions are remedies "arising out of a particular controversy and adjusted to it." 312 U.S. 287, 292 (1941).

192. FLETCHER, *supra* note 25, at 6.

193. *Id.* at 9.

194. *Id.* It should be noted, however, that swearing in the context of otherwise protected speech does not trigger the lower level of protection given to "obscene" speech; the Court has held that "to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic." *Cohen v. California*, 403 U.S. 15, 20 (1971) (overturning the conviction of the wearer of a jacket bearing the words "Fuck the Draft" under a California statute prohibiting disturbance of the peace by offensive conduct).

195. FLETCHER, *supra* note 25, at 9.

196. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

197. *Id.* at 569. Although this holding, applying the "fighting words" doctrine, has been narrowed in subsequent opinions, it still applies to "face-to-face" confrontations such as those typically enjoined by ASBOs. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.39 (7th ed. 2004).

198. 980 P.2d 846, 850 (1999). The court held that "a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets

forms of speech, “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death” could be viewed as a “true threat” under *Virginia v. Black*.¹⁹⁹ As the Court put it in *Milk Wagon Drivers*, “[U]tterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.”²⁰⁰

Other ASBOs, particularly those restricting freedom of association and freedom of movement, represent content-neutral restrictions on freedom of expression, and would thus be subject to the balancing test set out in *Madsen*.²⁰¹ Some ASBOs would fail to meet the first part of the *Madsen* test. Many ASBOs clearly reflect the state’s “strong interest in ensuring the public safety and order . . . in protecting the property rights of all its citizens . . . [and] in residential privacy” and thus “justify an appropriately tailored injunction to protect them.”²⁰² Others, however, rather than serving a “significant government interest,” appear to be aimed more at the type of “public inconvenience, annoyance, or unrest”²⁰³ explicitly held by the Court not to justify restrictions on speech.²⁰⁴ The language of the Crime and Disorder Act, which defines anti-social behavior as behavior causing “alarm, distress or harassment to one or more people not in the same household” as the offender, encompasses such annoyances.²⁰⁵ Thus, the government interest in the ASBOs banning a man from being sarcastic to his neighbors,²⁰⁶ or a woman from answering the front door or going into her garden in her underwear²⁰⁷ would be unlikely to rise to a level justifying an injunction under *Madsen* (assuming a constitutionally-protected expressive interest in such behavior existed).

For those ASBOs satisfying the first part of the *Madsen* test, the Court would carry out a fact-based inquiry as to whether the prohibitions burden more speech than necessary. Many ASBOs, particularly those containing restrictions on freedom of association, would fall at this hurdle. Unlike the restrictions on

will contribute to the continuation of a hostile or abusive work environment.” *Id.* at 848. While Justice Thomas opined that the injunction “very likely suppresses fully protected speech,” the Supreme Court denied certiorari. *Avis Rent A Car System, Inc. v. Aguilar*, 529 U.S. 1138, 1138 (2000) (Thomas, J., dissenting).

199. 538 U.S. 343, 360 (2003) (holding that a Virginia statute banning cross burning with intent to intimidate did not violate the First Amendment).

200. 312 U.S. at 293.

201. 512 U.S. 763, 765 (1994).

202. *Id.* at 768.

203. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). The Court has subjected injunctions based on the communicative impact of speech to rigorous scrutiny and has struck them down “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” *Id.*

204. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (“The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be ‘annoying’ to some people.”).

205. *Crime and Disorder Act*, 1998, c. 37, § 1 (U.K.).

206. FLETCHER, *supra* note 25, at 7.

207. *Id.* at 11.

freedom of association upheld in *Acuna*, which were limited to a specified area,²⁰⁸ ASBOs have imposed blanket bans affecting freedom of association. These have included a ban on an individual from congregating with three or more other youths²⁰⁹ and a ban on a family from going out together (under the terms of the ASBO, they can only leave their home in pairs.)²¹⁰ This latter prohibition is clearly problematic in constitutional terms. While the Court has declined to recognize a general constitutional right to association, and has held that “[t]he freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights,”²¹¹ it has recognized specific rights to intimate and expressive association.²¹² In *Roberts*, the Court recognized that the Bill of Rights protects freedom of association both within “certain kinds of highly personal relationships”²¹³ and for the purpose of exercising “activities protected by the First Amendment,” including free speech, in pursuit of “a wide variety of political, social, economic, educational, religious and cultural ends.”²¹⁴ Unlike the injunction, upheld in *Acuna*, enjoining gang members from appearing in public with any other known gang member,²¹⁵ the ASBO restricting two parents and their three children from appearing in public more than two at a time²¹⁶ clearly implicates the right to associate with family members, the paradigm of the right to intimate association. It is therefore difficult to see how such a restriction could possibly be justified as necessary under the second part of the *Madsen* test.

The ASBO ban on congregating with three other youths²¹⁷ neither specifies prohibited activities nor explicitly exempts protected intimate or expressive associations. Furthermore, unlike the ban in *Acuna*,²¹⁸ it is neither limited to a specific geographical area nor narrowly tailored to prohibit gathering with others likely to be involved in nefarious activities. Such a ban would therefore

208. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 616 (Cal. 1997). The *Acuna* court held,

Given the limited area within which the superior court’s injunction operates, the absence of any showing of constitutionally protected activity by gang members within that area, the aggravated nature of gang misconduct, the fact that even within *Rocksprings* gang members may associate freely out of public view, and the kind of narrow yet irreducible arbitrariness that inheres in such line-drawing, we conclude that [the provision of the injunction forbidding gang members from associating with one another] . . . passes muster as well under the standard of *Madsen*.

Id. (citation omitted).

209. FLETCHER, *supra* note 25, at 5.

210. *Id.* at 8. The mother, father, and three sons aged 16 to 20 were also banned from meeting more than one friend at a time.

211. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 776 (1994).

212. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

213. *Id.* at 618.

214. *Id.* at 622.

215. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 608 (Cal. 1997).

216. FLETCHER, *supra* note 25, at 8.

217. *Id.* at 5.

218. *Acuna*, 929 P.2d at 608.

apply equally to such protected activities as attending a political meeting or going out with siblings as to hanging out on street corners with gang members, and it too would be unconstitutional under the *Madsen* test.

2. Freedom of Movement

While the Court has held that interstate travel is protected by the Constitution, both under the Privileges and Immunities clause of the Fourteenth Amendment²¹⁹ and, arguably, under the Commerce Clause,²²⁰ there is less precedent indicating the extent to which intrastate travel of the kind commonly abridged by ASBOs might be protected.²²¹ At one end of the spectrum, narrowly crafted injunctions such as that in *Madsen*, which barred demonstrators from a 36-foot buffer zone on a public street around the entrances and driveway of a clinic which performed abortions,²²² are clearly constitutional even when they implicate freedom of speech concerns. At the other end, blanket bans from large geographical areas, analogous to banishment, appear to be unconstitutional. In the case of *In re White*, a California court struck down a blanket provision preventing a convicted prostitute from being in three specified areas of Fresno at any time of the day or night as a condition of her probation.²²³ The court quoted a Second Circuit decision holding that “[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state,”²²⁴ but suggested that a more narrow restriction, either prohibiting entry into particular places such as “bars, pool rooms, motels and the like,” or prohibiting specific behaviors such as hitchhiking in the specified areas, would be upheld.²²⁵

Thus, given the limited amount of precedent available, it would appear that ASBOs such as those banning individuals from entering certain stores,²²⁶ or from traveling on the top deck of double-decker buses,²²⁷ would not be barred by intrastate travel considerations. However, more comprehensive bans, such as the ASBO prohibiting an individual from entering a nearby residential subdivision,²²⁸ might raise constitutional concerns about freedom of movement.²²⁹

219. Saenz v. Roe, 526 U.S. 489 (1999).

220. See *Edwards v. California*, 314 U.S. 160, 172, 177 (1941) (holding that the definition of commerce for purposes of the Commerce Clause includes the transportation of persons and overturning a state statute prohibiting the bringing of indigent nonresidents into the state, characterizing the statute as an unconstitutional burden on interstate commerce).

221. As the United Kingdom is a unitary state rather than a federation, all travel is effectively “intrastate travel.”

222. 512 U.S. 753, 754 (1994).

223. 158 Cal. Rptr. 562, 568–69 (Ct. App. 1979).

224. *Id.* at 567 (quoting *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971)).

225. *Id.* at 569.

226. FLETCHER, *supra* note 25, at 11, 12.

227. *Id.* at 9.

228. *Id.* at 6.

229. See *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) The terms of this ASBO could also potentially violate the constitutional right of

3. Overbreadth

The overbreadth doctrine allows for “the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’”²³⁰ In order to trigger the overbreadth doctrine, a prohibition must have a “sufficiently substantial impact on conduct protected by the First Amendment.”²³¹ Some dispute exists as to the extent to which this doctrine can be applied to injunctions, given the small possibility that injunctions, directed as they are at specified individuals who have already had their day in court, could have a “chilling effect” on those not before the court.²³² A challenge to an injunction on overbreadth grounds might be moot, given that there is little effective difference between finding an injunction unconstitutional on its face and striking down specified unconstitutional provisions.²³³

Nevertheless, in the post-Acuna California decision of *In re Englebrecht*, the court held that it was overbroad to enjoin gang members from possessing and using pagers, even in a specified area, since there was “no attempt to narrow the provision so that it enjoins the use of these devices to abet criminal activities.”²³⁴ Following the logic of this decision, given that the court held that “[t]he right of free speech necessarily embodies the means used for its dissemination,”²³⁵ an ASBO banning a woman from using telephone booths in London after she had used them to call emergency services over seven hundred times²³⁶ would be held invalid for overbreadth. In any event, it is likely that along with the ASBOs prohibiting entry into any car park in England and Wales,²³⁷ and entry into all shops, stores, and retail outlets in two counties,²³⁸ this type of prohibition would fail to meet the threshold requirement that injunctive relief be no more burdensome

intimate association, if family members live in the housing project in question. See *In re Englebrecht*, 79 Cal. Rptr. 2d 89, 95–96 (Ct. App. 1998) (holding that an injunction prohibiting a gang member from associating with other gang members in a specified area did not violate the right of intimate association because defendant was only prohibited from associating with other gang members in that area, not from entering the area altogether).

230. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612–15 (1973)).

231. *Id.* at 52–53 (finding that an ordinance prohibiting loitering, though invalid on other grounds, was not overbroad since it “did not prohibit any form of conduct that is apparently intended to convey a message”).

232. See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 610 (Cal. 1997) (“[T]he foundation of the overbreadth doctrine is the inhibitory effect a contested statute may exert on the freedom of those who, although possibly subject to its reach, are not before the court.”).

233. See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 775 (1994).

234. 79 Cal. Rptr. 2d at 97.

235. *Id.* at 96 (quoting *Wollam v. City of Palm Springs*, 379 P.2d 481, 486 (Cal. 1963)).

236. FLETCHER, *supra* note 25, at 6.

237. *Id.* at 7.

238. *Id.* at 12.

than necessary to achieve its purpose,²³⁹ regardless of whether First Amendment rights were implicated.

V. CONCLUSION

Notwithstanding the reluctance of some judges to take overseas laws into consideration as part of the judicial review process,²⁴⁰ the information in this analysis could be valuable to both the United Kingdom and the United States. The British government may have hoped to gain good public relations for itself by emphasizing the novelty of ASBOs.²⁴¹ By failing to communicate the long-standing historical use of injunctions to prohibit public nuisances, however, it has needlessly exposed the process of obtaining an ASBO to fundamental questions of legitimacy.²⁴² The British government should emphasize that rather than representing an abuse of the judicial system, the process is in fact more restrictive than the traditional procedure at common law (and the procedure followed in the United States), in that it now requires a criminal standard of proof to establish that the putative subject of the ASBO has acted in an anti-social manner.²⁴³

It would be more productive, therefore, for both critics of the ASBO system and the British government to focus on the content of ASBOs rather than on procedural issues. ASBOs could be made more acceptable to British citizens by raising the threshold requirements for behaviors that may legitimately be made the subject of ASBOs, and by explicitly requiring that ASBOs be no more restrictive than necessary to prevent such behaviors.²⁴⁴ The definition of anti-social behavior in the Crime and Disorder Act as behavior causing "alarm, distress or harassment to one or more people not in the same household" as the offender²⁴⁵ could be replaced with a definition closer to the threshold requirement in *Madsen v. Women's Health Center, Inc.*; perhaps behavior that "threatens public order or the safety, domestic privacy or property of one or more people not in the same household as the offender."²⁴⁶ Secondly, there could be a general requirement,

239. See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

240. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (opining that the meaning of the Constitution should not be determined by "foreign courts and legislatures").

241. See *Denham*, *supra* note 23, at 3.

242. See, e.g., *Commissioner for Human Rights*, *supra* note 24, at 36.

243. *Id.*

244. In its published guidance, the Home Office is less than clear on this point. On one hand, it states that "[t]he prohibitions . . . should be necessary for protecting person(s) within a defined area from the anti-social acts of the defendant . . . [and s]hould be reasonable and proportionate." HOME OFFICE, A GUIDE TO ANTI-SOCIAL BEHAVIOUR ORDERS, *supra* note 22, at 34. However, it also advises that "that defined area . . . could in appropriate cases include the whole of England and Wales" and that the ASBO "[m]ay include a general condition prohibiting behaviour which is likely to cause harassment, alarm and distress." *Id.* at 34-35.

245. Crime and Disorder Act, 1998, c. 37, § 1 (U.K.).

246. 512 U.S. 753, 768 (1994).

similar to the *Madsen* test, that the terms of ASBOs be no more burdensome than necessary to prevent the specific anti-social behavior at issue.²⁴⁷

For the United States, the ASBO model provides a potentially powerful weapon that could be used by states against a wider range of anti-social behaviors than the gang activities which public nuisance injunctions have been focused on to date. With the United States' more rigorous constitutional protections, ASBO-type orders could be used to enjoin persistent anti-social behavior while avoiding draconian prohibitions and restrictions on behavior that is merely annoying.

247. Perhaps an amendment to the guidance quoted in note 244, *supra*, explicitly stating that the prohibitions must be *no more than is necessary* to protect people from further anti-social acts by the defendant in the locality would suffice, assuming such guidance was followed by the courts imposing ASBOs.
