Comment on Chapter 5

Offenders' Rights and Public Safety

Zachary Hoskins*

This is an Author's Accepted Manuscript of an article published in John Child and Antony Duff (eds.), *Criminal Law Reform Now* (Oxford: Hart Publishing, 2018), pp. 67-74.

Stephen Shute offers a thorough and persuasive case for reform of the host of civil preventive orders (CPOs) currently implemented in the United Kingdom, measures whose aim is to reduce the risk that people with criminal records will cause substantial criminal harm to members of the public. Shute focuses on Sexual Harm Prevention Orders (in England and Wales), Sexual Offences Prevention Orders (in Northern Ireland and Scotland), Serious Crime Prevention Orders, Violent Offender Orders (in England and Wales), Violent Offences Prevention Orders (in Northern Ireland), Financial Reporting Orders, Drug Travel Restriction Orders, Slavery and Trafficking Prevention Orders (in England and Wales, and Northern Ireland), and Trafficking and Exploitation Prevention Orders (in Scotland). He contends that these various CPOs, which were created and have developed in a piecemeal fashion, should now be consolidated and streamlined into a new statute that would bring a more rational structure to the orders and bring more coherence to the overall practice of prevention orders. In particular, he calls for rationalization and coherence with respect to seven main issues: a) the maximum and minimum durations of the orders, b) the durations of individual elements within orders, c) whether the orders may impose positive as well as negative obligations, d) who is eligible to be subject to an order, e) the conditions for creation and implementation of the orders, f) whether the orders must

* Assistant Professor in Philosophy, University of Nottingham.

be determined to be necessary as well as proportionate to be permissible, and g) how specifically and exhaustively the orders spell out the potential restrictions.

Overall, I found Shute's argument in favour of a more rational, coherent structure among these various orders largely persuasive. Why, for example, should there be no minimum period for Serious Crime Prevention Orders but a two-year minimum for Violent Offender Orders? Why is it that some CPOs, such as Sexual Harm Prevention Orders and Sexual Offences Prevention Orders, can be imposed on children as young as 10, whereas other orders, such as Violent Offender Orders and Serious Crime Prevention Orders, cannot be imposed on people younger than 18? This is not to say that there may not be rationales for these or other differences among the orders, although Shute often indicates scepticism about whether the differences are justifiable. But his more central point, I take it, is that because these various orders have developed piecemeal, they have not as a group been subject to scrutiny to determine where consistency is rationally warranted and where differentiation is appropriate. This is why a consolidating statute is much needed, as it would provide occasion for just this sort of rational scrutiny.

In this commentary, I first briefly flesh out a couple of the prescriptions Shute offers for particular reforms to make CPOs more consistent. Then, I examine two normative claims that frame Shute's discussion of particular reforms, but on which he does not elaborate in this chapter: first, that CPOs for those with criminal records are easier to justify than CPOs for others, and second, that there is no in-principle argument against CPOs targeting people with criminal records. I contend that there is an in-principle argument grounding at least a strong presumption against CPOs generally. I also highlight two possible answers to the question of

why CPOs are easier to justify for those with criminal records than for others, one of which is plausible and one of which is not.

One of the dimensions Shute considers along which various CPOs differ is with respect to whether they claim to impose only negative prohibitions (as Sexual Harm Prevention Orders do, for instance), or both positive obligations and negative prohibitions (as do Serious Crime Prevention Orders). His proposed consolidating statute would make clear that all of the CPOs considered here may impose positive requirements as well as negative prohibitions. As he recognizes, this approach is more honest than attempting to maintain the somewhat contrived distinction between negative prohibitions and positive duties. The key weakness of the positive-negative distinction is that complying with a negative prohibition frequently will require taking any number of positive steps. To give an example from the U.S. context, some years ago in Englewood, Colorado, the town passed a statute barring people convicted of certain sex offences from living within 2,000 feet of schools, playgrounds, or parks, and within 1,000 feet of licensed day-care centres, recreation centres, swimming pools, recreational trails, bus stops, or walking routes to schools. (The law was struck down by a U.S. District Court in 2013 as unconstitutional because it left virtually all of Englewood off limits to those subject to the restrictions.) Although it might initially be tempting to characterize the statute as imposing a host of negative prohibitions, it in fact creates all sorts of positive requirements, too. Don't go near parks, schools, or playgrounds: negative. Do your grocery shopping one town over, since the stores in Englewood are all in forbidden zones: positive. Don't go near bus stops: negative. Buy a car to get to work, since you cannot take the bus: positive. Rather than adhere to the somewhat contrived distinction between positive requirements and negative prohibitions, I agree with Shute

that it is preferable to acknowledge explicitly that the fulfilment of negative prohibitions will typically require a variety of positive steps.

Shute also contends that the consolidating statute should make clear that the CPOs considered here must all be both necessary and proportionate (some CPOs, such as Serious Crime Prevention Orders, do not require necessity). Requiring necessity and proportionality, he writes, 'would bring home to all involved that CPOs are strongly freedom inhibiting and the constraints they impose on the rights of those subject to them can only be justified if they are truly necessary to protect the rights of others and if the controls they create are genuinely proportionate to the risk the offenders pose' (p30). Both the necessity constraint and the proportionality constraint admit of different interpretations, so it is worth clarifying which interpretation of each is relevant here.

One way of reading the necessity condition is that some measure is necessary if it is the only way to achieve a given aim. Thus, in our context, a given CPO might be deemed necessary if it is the only way to protect the safety and security of members of the public. But this cannot be the sense of necessity relevant in this context. If we had multiple variants of CPOs that would accomplish the given public safety aim, then this construal of necessity would appear to prohibit all of them, as none would be the only way to achieve the aim. We might try to avoid this worry by instead construing necessity in this case to apply to the set of candidate CPOs: If the only way to achieve the public safety aim is to implement *one or the other* of them, then we might conclude that the necessity condition is satisfied when we choose one from the set of candidate CPOs to implement. The problem with this construal of necessity, however, is that it provides no way of adjudicating between the candidate CPOs. It tells us only that we are permitted to choose from among the effective options.

A more promising construal of the necessity condition holds that a given measure is necessary if there is *no less burdensome alternative means* of achieving the same aim. This is the standard construal of necessity in philosophical debates about the rules of war.[1] Unlike the first construal of necessity considered above, this version does not hold that if multiple CPOs could achieve the public safety aim, they are all therefore impermissible. Unlike the second construal considered above, this version does provide some basis for adjudicating between candidate CPOs. Necessity requires that the CPO under consideration be the least burdensome available means of achieving the public safety aim.

Now let us turn to the proportionality constraint. Proportionality is often invoked as a key consideration in the criminal justice context, although the term is often used to refer to different principles. In punishment theory, for example, several different uses can be identified. Proportionality may refer to the principle that the severity of a sentence should be no more severe than an offender deserves given the seriousness of the crime; It may refer instead to the idea that a sentencing scheme should punish equally serious crimes equally severely, and should punish more serious crimes more severely than less serious crimes; Or it may mean that the benefits generated by punishment should outweigh its harms. Shute is careful to highlight, however, that the purpose of CPOs is preventive rather than punitive. Thus, the relevant sense of proportionality here is forward-looking rather than backward-looking: the controls created by CPOs should be 'genuinely proportionate to the risk the offenders pose' (p30). One might interpret this phrase as holding that CPOs should be no more severe than is required to avert the risk. But on this interpretation, proportionality would amount to nothing more than the necessity constraint discussed above, which requires that the CPO be the least burdensome available

[1] See, eg, J McMahan, 'Proportionate Defense' (2013-14) 23 *Journal of Transnational Law and Policy* 1, esp. pp 2-3.

means of achieving the public safety objective (because if there are less burdensome means of achieving the objective, then the given CPO is more severe than is required). Instead, we should interpret the proportionality constraint as holding that the likely harms to be averted by a given CPO should outweigh the burdens it is likely to create. Taken together, then, the necessity and proportionality constraints require that a CPO be the least burdensome available means of reducing a given risk, and that the burdens the CPO is likely to create are outweighed by the harms it is likely to avert.

Having examined some of Shute's particular prescriptions for a more coherent system of CPOs, I want to devote the remainder of this commentary to consideration of two more general normative claims he makes at the beginning of the chapter: first, that CPOs targeted only at people with criminal records, 'generally involving a serious offence', are 'easier to justify than other CPOs' (pp1-2), and second, that regarding such CPOs, 'there is no argument of general principle which renders their broad structure impermissible' (p2). In what follows, I first offer an in-principle argument for the conclusion that CPOs targeted at people with criminal records are, at least presumptively, impermissible, in that these orders deny to people with criminal records access to goods and opportunities that others enjoy.[2] I acknowledge that the presumption against such measures can be overridden in a fairly limited range of cases on grounds of risk reduction. But I believe it is important to emphasize that our starting point must be a strong presumption against such measures, and that when we do impose such measures, we should do so reluctantly and with a clear sense of their costs. Second, I distinguish two possible answers to the question of why CPOs targeted at people with criminal records are easier to justify than other CPOs. I contend that only one of the two answers is plausible.

[2] For a fuller articulation of the brief argument I offer in what follows, see Z Hoskins, *Beyond Punishment? A Normative Account of the Collateral Legal Consequences of Conviction* (OUP, forthcoming), ch. 5 and ch. 7.

The in-principle case against CPOs generally begins with the idea that in a society that values liberty and equality, there should be a presumption against measures that single out certain groups of individuals for the imposition of restrictions of liberty to which other individuals are not subject. This presumption can be strengthened if we take a step back to consider the significance of punishment itself within a liberal democratic polity. As I mentioned, Shute emphasizes that CPOs are preventive rather than punitive, but my account of their presumptive permissibility requires that we consider the significance of punishment to glean insights about the permissibility of imposing additional restrictive measures outside the context of punishment.

Liberal political philosophers, such as Hobbes, Locke, Rousseau, Kant, and more recently, Rawls, have recognized that for exercises of state coercion to be *justified*, they must be *justifiable* to those subject to them. Thus the institution of criminal law and punishment, as perhaps the paradigmatic exercise of state coercion, must be justifiable to those subject to it. It must be justifiable to us as subjects bound by the law, as citizens in whose name the law coerces, and whose values the law claims to represent. It must also be justifiable to those of us who violate the laws and are thus subject to punishment. We must ask, then, what would be required to justify the institution of punishment to all of us, including those of us who commit crimes?

On one type of liberal account, state coercion is justifiable to those subject to it if they have expressly or tacitly consented to it. Such accounts are empirically implausible, however: many people do not consent either expressly or tacitly. Other theorists, most notably Rawls, instead suggest that coercive state institutions are justifiable if they would be endorsed by

individuals in certain idealized conditions.[3] The problem faced by these *hypothetical* consent views is that consent itself does not appear to be doing any normative work. If people in idealized conditions would endorse certain institutions, they would do so for certain reasons, presumably because these institutions have certain features that make them legitimate. If so, then the coercive institutions will be justifiable in virtue of these legitimate-making features, and we still need some account of what these features are.

Other theorists have sought to justify coercive state institutions by appeal instead to the benefits such institutions provide. One version of a 'benefits' account holds that coercion of a person is justified by the benefits this creates for that same person. But liberals typically reject as unappealingly paternalistic the idea of a state's restricting a person's liberties for her own good.[4] A more promising 'benefits' account, I believe, is grounded in the benefits of state coercion to others in society. Christopher Heath Wellman develops such an account. He contends that 'what ultimately legitimizes a state's imposition upon *your* liberty is not merely the services it provides *you*, but the benefits it provides *others*.'[5] Wellman claims that each of us has a duty of samaritanism to help others 'when they are in dire need and one can help them at no unreasonable cost to oneself.'[6] The relevant benefit provided by coercive state institutions is the protection of people's moral rights.[7] Thus each of us has a duty, insofar as it does not generate unreasonable costs on us, to help others stay out of the dire circumstances in which moral rights

[3] J Rawls, *Political Liberalism* (Columbia University Press, 1993), esp. 137. See also see S Dolovich, 'Legitimate Punishment in Liberal Democracy,' (2004) 7(2) *Buffalo Criminal Law Review* 307-442; and C Brettschneider, 'The Rights of the Guilty: Punishment and Political Legitimacy,' (2007) 35(2) *Political Theory* 175-99.
[4] See, eg, JS Mill, *On Liberty*, ch. 1.
[5] CH Wellman, 'Liberalism, Samaritanism, and Political Legitimacy,' (1996) 25(3) *Philosophy and Public Affairs* 211, 213-14.
[6] Ibid, 216. Wellman's principle is similar in obvious respects to Peter Singer's argument in his seminal article 'Famine, Affluence, and Morality,' (1972) 1(3) *Philosophy and Public Affairs* 229-43. Singer offers two versions of a duty-to-aid principle, the more modest of which holds that 'if it is in our power to prevent something very bad from happening, without thereby sacrificing anything morally significant, we ought, morally, to do it' (231).
[7] Ibid, 217.

are unprotected. And because rights can be assured only in the context of general submission to coercive state institutions, none of us has a right to be free from such coercion. Note that on Wellman's account, punishment must not impose costs on anyone that unreasonably outstrip the benefits to them. My samaritan duty to help keep others out of peril may require me to submit to institutions that make me somewhat worse off overall, but it is not reasonable to coerce me to bear inordinate burdens for others' sake.

For punishment to be justifiable to those subject to it, on this account, it must be the case that it helps to protect citizens' moral rights (by helping to reduce crime) without imposing unreasonable costs on those punished. My contention, which I have fleshed out more fully elsewhere, is that a system of proportionate punishment (proportionate in the sense mentioned earlier of being no more severe than is deserved) that functions as the payment of an offender's debt to society, and completion of which restores her to full standing as a member of her political community, does not impose unreasonable costs. A system of punishment that does not treat the completion of a term of punishment as the full payment of the offender's debt, and thus allows the imposition of additional burdens on offenders, is unreasonably costly and thus not justifiable to those subject to it.[8]

If this account is correct, then we should take seriously the conception of punishment as the means by which offenders pay their debts and restore themselves to full standing as citizens in their polity. But if an offender's standing as a citizen is thereby restored, then she is entitled to the same legal rights and privileges as everyone else. Thus just as there is a presumption against subjecting citizens who do not have criminal records to restrictive preventive measures, the same presumption should count, and with equal weight, against subjecting offenders to such measures.

[8] Hoskins, (n2).

Now, presumptions may be overridden, so it is possible that in some limited range of instances, the risk to be averted by CPOs will be substantial enough to override the presumption against them. One question we should ask, however, is what the basis is for Shute's claim that the presumption against such measures is more easily overridable for those with criminal records than for everyone else.

One answer might be that when a person commits a crime, she thereby makes herself liable to be subject to prevention orders, whereas law abiders do not make themselves liable to such orders. But if we are to take seriously the notion that offenders who complete a term of punishment thereby pay their debts and thus restore their standing as members of the political community, it is unclear how we can justify continuing to subject them to onerous treatment to which others are not subject.

A more plausible account of why it is easier to justify subjecting offenders to CPOs than everyone else is epistemic rather than normative: It is not that the offender's moral standing is different (outside the context of her punishment) from anyone else's, but rather that the prior criminal offence provides important information about the person's relative likelihood of offending in the future, whereas there is no such information about those without criminal records. Here, it is worth noting that researchers have suggested factors other than past criminality that correlate with future criminality: factors such as education level and intelligence level, among others. Many people would be uncomfortable with the state's imposing CPOs on the basis of a person's education, intelligence, or similar factors. Why, then, should it be easier to justify imposing CPOs based on a criminal record? The answer should not be simply that a criminal history more strongly correlates with future offending. Even if age, race, and sex were shown to correlate with future offending more strongly than does past offending, many of us

would regard it as unjust to subject people to risk assessment based on age, race, or sex. Why is subjecting some offenders to risk assessment not similarly unjust?

The relevant difference between criminal histories and age, race, or sex as grounds for CPOs is that criminal histories are responses to a person's prior culpable actions. Imposing restrictive orders based on a person's age, race, or sex is not consistent with respecting her as an autonomous agent, because such orders are not responsive to her own autonomous choices. By contrast, taking a person's previous autonomous behaviour into account in imposing CPOs is consistent with respecting her as an autonomous agent. Such engagement is responsive to the person's autonomous choices. Indeed, failing to consider someone's prior choices in predicting her future behaviour arguably fails to respect her agency.

This is not to say that past behaviour should be a *decisive* consideration in our predictions of others' future behaviour. Respecting each other as autonomous agents involves acknowledging that we are always free to make choices for different reasons from those that guided us in the past. But acknowledging that past behaviour is not deterministic of future behaviour is consistent with shaping our engagements with others based in part on predictions of their future behaviour that are responsive to the previous autonomous choices they have made. Thus it is at least sometimes consistent with respect for offenders as autonomous agents for the state to take prior convictions, and the prior public wrongdoing that such convictions certify, into account in imposing CPOs. When I say it is at least sometimes consistent, I mean that it is consistent in those cases where there is a sufficiently compelling interest to be served, when the CPO would effectively serve this interest without generating offsetting harms, and when no less burdensome alternative is available.

In principle, it might also be permissible to subject people without criminal convictions to CPOs — although, again, there is a strong presumptive case against such measures. In practice, CPOs on those without criminal convictions will be infrequently justified. This is because when there is clear, publicly available evidence of previous autonomous behavior that is sufficiently indicative of a risk of serious future wrongdoing to justify restrictive measures, there will typically also be a conviction. But there might be cases in which, despite clear evidence that a person has previously behaved in ways indicative of risk of serious future wrongdoing, there was no conviction: as one example, perhaps the conduct, although now criminalised, was not criminalised when the person committed it. Generally, if there is clear, publicly available evidence of past autonomous behaviour that is sufficiently indicative of a serious risk of future wrongdoing, the presumption against CPOs may be overridden., But if everyone may in principle be liable to CPOs based in part on prior behaviour, then subjecting those with criminal records to such measures does not violate their right to equal treatment.

Thus I maintain that there is an in-principle case against all forms of CPOs. But this case doesn't inflict a fatal wound. Rather, it grounds a strong *presumption* against such measures, but a presumption that may be overridden in a narrow range of cases based on considerations of risk reduction. And in the limited range of cases in which CPOs can be justified, Shute is right that they should be more rational and coherent in their administration. His proposed consolidating statute would be a welcome improvement on the current system of disconnected, and frequently inconsistent, CPOs.