

## RISK CONTROL, RIGHTS AND LEGITIMACY IN THE LIMITED LIABILITY STATE

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*Although controlling risk has become a prevalent theme in contemporary penal development in the main English-speaking societies, the range and extent of these measures is limited and specific, indicative of new obligations and reciprocities between state and citizen following post-1980s restructuring. Individuals are exhorted to take care of themselves, but the state remains committed to managing risks thought beyond their control and likely to cause irreparable harm through innovative penal measures. The paper explains how these have coalesced around risks to community cohesion and sexual attacks on women and children; and how these measures have then been legitimated, given that they contravene previous long-standing rules, principles and conventions intended to prohibit or restrict their use.*

Key words: risk, insecurity, rights, public protection, incivilities, sex offenders, limited liability, legitimacy

### *Introduction*

What do the following have in common? By-laws that prescribe alcohol-free zones in public places; anti-congregation laws against gang members; anti-loitering and anti-begging laws; anti-social behaviour laws; laws restricting the movement of particular groups of offenders—particularly sex offenders—in public space; much greater use of indefinite prison terms; laws that allow categories of sex and violent offenders to be held in ‘civil detention’ at the end of a finite sentence; anti-terrorism laws that impose curfews, restrictions on places of residence and use of the Internet, reinforced by electronic monitoring and other forms of surveillance.

What unites these provisions, variously found across the advanced liberal democracies of the United States, the United Kingdom, Australia, Canada and New Zealand, is their attempt to control risk—from minor incivilities to the most serious crimes: from liquor bans that ‘are in place to keep our communities safe by reducing the risk of alcohol-related offending in public places’ (Kāpiti Coast District Council 2015) to control orders that ‘protect members of the public from a risk of terrorism’ (UK Prevention of Terrorism Act 2005). Their diversity shows how far risk management has become a significant trend in crime control and punishment systems in these societies (Hannah-Moffat 2013), and how far this strategy has moved from its first sightings by Feeley and Simon (1992) in prisoner classification and parole adjudication. It is also clear that these attempts to control risk belong to a separate channel of development from the law and order concerns of recent decades and its moralistic punitiveness (Harcourt 2001). Controlling risk is the response to issues of uncertainty and insecurity rather than order

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(Ericson 2006), with the capacity to envelop a much more amorphous group, conjoining the dangerous with the disorderly and the predatory with the nuisance.

While the use of penal measures to control risk is not itself new (Ashworth and Zedner 2014), such mechanisms had been kept very much at arms length in the past, to be deployed, if deployed at all, as ‘emergency powers’ (Ramsay 2012). This is because they were seen as undermining ‘core values’ (Peeters 2015) of criminal justice in Western societies (no punishment without a crime being committed, punishment should fit the crime rather than what an offender might do in the future, punishment should be fixed and certain rather than indefinite and so on). Now, though, it has been argued that the range and extent of these measures reflects the ‘normalization’ of risk control (Ramsay 2012), and is indicative of ‘a “guided society”, in which citizens have nothing to fear—as long as they do not pose an increased risk’ (Peeters 2015: 178). Similarly, this collection of risk control measures is seen as reflecting the emergence of ‘the security state’ (Ramsay 2012) and ‘the preventive state’ (Ashworth and Zedner 2014), implying an inexorable growth of state power—in ironic contrast to the political emphasis given to individuals ‘taking care of themselves’ in recent decades.

Yet these initiatives are not ad hoc or arbitrary. The ‘right to protection’ (Ramsay 2012) they award does not extend, e.g., to crimes such as burglary (clearance rates range from 12 per cent in New Zealand to 16 per cent in Canada) or car theft (clearance rates range from 9 per cent in New Zealand to 17 per cent in Australia). Rather than these areas being the target of risk control measures, individuals are expected to take their own precautions: they should protect themselves through insurance, as well as investing in anti-crime technology; but if the worst should happen, it is still likely that the damage can be repaired or the goods replaced. Instead, the pattern of risk controls has coalesced around more specific and limited areas: the presence or behaviour of certain individuals or groups thought likely to put at risk community cohesion and the quality of life of its citizens; or thought likely to cause harm to the human body, particularly the bodies of women and children through sexual/violent assault. In these respects, this range of risk control measures is more in keeping with the emergence of what might be termed ‘the limited liability state’, the product of post-1980s economic and social restructuring and the new obligations and reciprocities between state and citizen this has brought about. Exhortations for citizens to ‘take care of themselves’ have obviously not been a chimera. However, where risks are seen as beyond the power of individuals to insure themselves *and* are thought likely to cause irreparable harm, the state remains committed to managing these risks in limited and specific ways in the form of innovative penal measures.

This paper addresses two of the central issues that stem from these arrangements. First, what is it that has brought about the coalescence of risk-based penal measures around such particular areas? It will be argued that this assembly of controls is a by-product of the political decisions that, from the 1980s, set risk free from the previous economic restraints placed on it during the development of the post-war welfare state. This not only restructured the economic life of these societies, it also restructured social and cultural life. Individuals were now given much greater freedom of choice to determine the course of their lives, further strengthening demands that had been gathering force during the 1960s and 1970s in relation to personal identity and sexual expression. In unleashing risk in this way, however, the structures that had previously provided stability and predictability in everyday life were eroded and diminished. Risks to much of what has come to be valued most in these societies over this period then act as strong ‘signals’ (Innes 2004) of

the extent to which everyday security is imperilled and social order thought in danger of collapsing unless special measures of risk control are put in place.

Second, how has it been possible to secure legitimacy for the measures to bring these particular risks under control, given that these controls go far beyond what had previously been the established parameters of criminal law and punishment in these societies? For [Beetham \(1991\)](#), legitimacy refers to the way in which a system of power is understood to be morally justifiable and for which there is significant evidence of consent. The moral legitimacy of these measures—protecting the public from those who pose the gravest risks to them—would now seem completely assured. That this is so, however, is itself a reflection of a realignment of the prevailing framework of knowledge that defines the purposes and values of criminal law and punishment ([Savelsberg 1994](#)). For much of the post-1945 era, these systems of power, under the guidance of experts and supranational organizations such as the UN and the European Court of Human Rights, worked to protect the rights of individuals from excesses of state power. From the 1980s, though, the erosion of certainty and security has brought populist forces into existence that are contemptuous of the way in which experts and supranationals seem more preoccupied with that task than ensuring the security of the general public. These forces that include demagogic politicians, media moguls and anti-establishment right-wing pressure groups have commonsensically reshaped this and many other areas of governance. They insist that public protection in the form of preventive powers to be used against those who put the rest of the community at risk should have a legitimate place in criminal law and punishment. Governments, with their own authority weakened by global events and organizations, have largely concurred, even though this means jettisoning long-established principles of justice.

But there is still the question of the *legal* legitimacy of risk control measures. On this, [Ashworth \(2004: 265\)](#) writes that ‘there comes a point when the [preventive] legislative devices being used or proposed are so disrespectful of fundamental principles that questions have to be asked about their legitimacy in a country committed to the protection of human rights’. Yes, according to the way in which human rights have previously been defined in terms of providing individuals with protection from the state. But no, in terms of the way in which human rights are being *redefined* according to the new framework of knowledge in which they are situated. It has been on this basis, as the paper argues and illustrates, that the courts and legal authorities have generally been prepared to accredit them with legitimacy.

### *Risk, Enterprise and Insecurity*

How is it, then, that the new risk control measures have coalesced around issues relating to community cohesion and sexual attacks on women and children? Setting risk free had a dual effect. It brought about new possibilities of human existence, framed around plenitude rather than scarcity, pleasure rather than denial, pluralism rather than homogeneity. Economic restructuring would provide many individuals with much greater disposable income than before because of tax reductions and give them much wider purchasing powers through the choices that became available to them in deregulated economies. In effect, with risk being set free from its previous economic constraints, they were free to roam the world and make new fortunes. A burgeoning self-help literature now proclaimed that risk was something to be celebrated rather

than feared. In his bestselling *Against the Gods*, Bernstein (1996: 229–30) urged that ‘we are not prisoners of an inevitable future. Uncertainty makes us free ... where everything works according to the laws of probability, we are like primitive people ... who have no recourse but to recite incantations to their gods ... what a bore! But thank goodness, the world of pure probability does not exist except on paper ... it has nothing to do with breathing, sweating, anxious and creative human beings struggling to find their way out of the darkness’. They would be better able to make their way through life by embracing risk rather than cowering in trepidation and running to the state for protection each time it appeared in front of them.

Indeed, setting risk free became the key to ‘an ideal world in which every man, woman and child became enterprising, speculatively adventurous, constantly in search of self-fulfilment through invention and achievement’ (O’Malley 2004: 57). It was thought that the enterprise of heroic private sector entrepreneurs in particular would revive economies that had become moribund after decades of state controls (see Young 1990). The way in which this ‘enterprise culture’ then began to transform economic life—from major corporations to street traders—in Britain especially was catalogued in a series of articles in *The Times* from the mid-1980s to the mid-1990s: ‘inhalation of the new enterprise culture has occurred around museums and art galleries’ (28 October 1985); ‘an astonishing rise in corporate hospitality’ (6 November 1989); ‘venture capitalism [is] one of the most visible products of the enterprise culture’ (6 April 1990); ‘franchising has been the essence of the enterprise culture, as it spreads the risks and costs of business between franchises, turning a local operation into a nationwide business, while allowing individuals to be their own boss’ (21 October 1991); ‘determination by senior post office managers to create an enterprise culture in the post office in which Royal Mail is an international company’ (23 January 1995); ‘enterprise culture is alive and well ... [At the Notting Hill carnival] numerous gardens were given over to stalls selling T-shirts, soft drinks and Caribbean fast food. In Ladbrooke Grove, a 45p can of soft drink was sold at 70p from the launderette’ (28 September 1995).

Furthermore, what remained of the public sector began to be remodelled along the lines of the private: ‘new kinds of public institutions are emerging. They are lean, decentralized and innovative. They are flexible, adaptable, quick to learn new ways when conditions change. They use competition, customer choice and other non-bureaucratic mechanisms to get things done ... they are our future’ (Osborne and Gaebler 1993: 2). This new public management spoke of ‘autonomy and entrepreneurship’ (Peters and Waterman 1982: 14–5), and ‘competition and excellence ... the objective is to get better and different, not try to hide from a newly energized economy’ (Peters 1992: 32). Collective bargaining became an out of date concept. Individual merit and worth was the way to gain rewards and bonuses rather than trade union negotiated rises for all.

Nonetheless, there was some wariness on the part of the public towards such enticements, many still preferring the security offered by state-directed economies. They might well prosper, but at the same time they would also have to accept responsibility for mistakes that led to their ruin (Friedman 1962): the state was no longer prepared to throw lifelines to them if they foundered. Indeed, as it heralded the heroes of the enterprise culture, *The Times* also provided a simultaneous catalogue of its failures.<sup>1</sup>

<sup>1</sup>For example, ‘the recession is causing most damage to smaller firms, many of which are products of the enterprise culture’ (*The Times*, 2 May 1990); ‘the roll call of great entrepreneurs of the Thatcher era has turned into a litany of financial meltdowns, collapsing businesses and in some cases outright fraud’ (*The Times*, 29 May 1992).

*Social Trends* (1990) found that ‘Britain remains a steadfastly collectivist or welfarist society ... only 3% support tax cuts leading to a reduction in public spending’. However, such reservations have since been largely thrown off. Those still looking to state welfare for assistance are now pushed contemptuously aside: ‘support for the [British] government’s main role in providing welfare benefits has declined markedly in the past decade and support for government spending in general and on welfare benefits in particular and on a range of specific benefit types is historically low’ (Clery et al. 2013: 27).

What has brought about this shift in mentalities? Economic liberalism did not simply provide more opportunities for careful wealth accumulation, or for some utilitarian economic revitalization of the nation. It tantalizingly made prizes available that celebrated extravagance and pleasure rather than austerity and thrift—expensive cars, furnishings and fashion items, second homes, holiday homes, holidays abroad and so on; prizes that encouraged self-enhancement rather than anonymity; prizes that, probably for the first time, were no longer the prerogative of an elite few by virtue of blue blood or inherited wealth, but which were projected as being available to all—at least to all those who, rather than settle for the poverty of ambition of the welfare era, were prepared to be enterprising and risk-taking; especially those who were prepared to abandon any encumbrances—in personal life, the local community or at work—which might otherwise hold them back. The fewer the restraints, the more competitions they would be able to enter: ‘individuals who are untied to place, who can travel light and move fast, win all the competitions that matter and count’ (Bauman 2001: 62).

Where did the prizes come from? Deregulated economies based around mass consumption and service had converged with long-standing demands for greater freedom of choice over sexual expression and personal identity. One consequence has been that the human body—particularly the bodies of women—has been transformed into a site for pleasure rather than mere reproductivity. While in the 1950s women’s fashions had been dominated by ‘expectations of marriage and motherhood’, by the 1980s ‘fashion houses offered high vamp, high price chic, flaunting the sexual marketability of women’ (Mulvague 1988: 315). Fitness and dietary regimes, intended to ensure that the body achieves its potential, have in turn become major industries in their own right, a means towards individual fulfilment and achievement, directed to all to aspire to, but particularly women: ‘exercise ... is part of the modern lifestyle ... apart from helping a person to achieve a fashionable shape, correct eating is promoted as vital for improving and maintaining good health. Along with dieting, techniques for relaxation and posture can also help in the quest for a glamorous body’ (Bond 1992: 202). The production of perfected bodies then allows their shape and contours to be displayed in public places, rather than hidden away: visits, e.g., to what Cross (1990: 226) refers to as ‘the pleasure city’—‘a sanitized ideal of exotic restaurants, specialty stores and quaint architecture ... [that] draws its citizens away from their private worlds and into these new public domains of style and display’. Such lifestyle possibilities, signifiers of belonging in a world of affluence and abundance, had scarcely existed before—most people had shared the same kind of life. A filtered search of *The [London] Times* (with similar results from leading newspapers where available online over the same period across these societies)<sup>2</sup> recorded only four references to this term between 1960 and

<sup>2</sup>For example, there were 888 reports in the *New York Times* in the 1970s. This increased to 2014 in the 1990s. In the *Toronto Globe and Mail*, there were 72 in the 1970s, increasing to 3,450 in the 2000s.



1969. However, it is then mentioned in 135 articles/adverts between 1970 and 1979; 1,084 between 1980 and 1989; 3,414 between 1990 and 1999; 6,890 between 2000 and 2009; and 2,397 between 2010 and 2014.

Second though, the new economic freedoms contributed to ‘the end of certainty’ (Kelly 1994). Many of the previous landmarks of stability and roadmaps of security that had been available to individuals as they made their journeys through life have become much less discernible, in some cases have disappeared altogether. ‘Traveling light and alone’ has become an unwelcome necessity for many rather than a preferred choice. At work, the employment security previously found in the public sector has been undermined by the scaling back of government provided services and the erosion of conditions of employment for those still working in what remains: unpredictable, uncertain careers in the quixotic private sector have become much more likely. Furthermore, while individual contracts may now better reward enterprise, this is offset by short-term, impermanent opportunities and the erosion of solidarity and collegiality, amidst great declines in trade union membership (Visser 2006).

Outside the workplace, personal relationships have become more transient and fragmented. The finality of marriage has been displaced by more informal, more impermanent connections. Couples in de facto relationships increased from five to 15 per cent in Australia (1980–2006); six to 16.7 per cent in Canada (1981–2011); 8.9 to 16.4 in the United Kingdom (1996–2014). Divorces per annum are equivalent to about 40 per cent of the number of marriages per annum in these countries. While family sizes have shrunk, solo parent families have increased markedly (Social Issues Research Centre 2008). The percentage of people living alone has increased from 18.8 per cent of the Australian population in 1986 to 23 per cent in 2013; from 11.4 per cent in Canada in 1981 to 27.6 per cent in 2011; from 16 per cent in New Zealand in 1980 to 23.5 per cent in 2013; from 22 per cent in the United Kingdom in 1981 to 28 per cent in 2014; from 22.7 per cent in the United States in 1980 to 27.4 per cent in 2012. Similarly, local community cohesion and the stability, familiarity and quality of life this provides have dissolved: ‘enterprise culture proved to be a solvent of bonds of trust and community and a source of insecurity to many. The mobility demanded by a dynamic market economy is not easily reconciled with a settled common life. The end result was the weakening or dissolution of the ties of the community and the generation of a society of strangers’ (Gray 1993: 54).

### *The transformation of public space*

Public space has become one of the most important intersections between the incitements to pleasure and indulgence and the attendant anxieties and insecurities. After World War 2, public space had been understood as a necessary feature of harmonious community life. Ebenezer Howard’s (1946: 44) vision of ‘the social city’, e.g., was based around wide, tree-shrouded avenues, homes, public gardens and a central park: ‘large public buildings would be at [its] centre: town hall, library, museum, concert and lecture hall, the hospital. Here, the highest values of the community are brought together—culture, philanthropy, health and united cooperation’. The built-in cohesion of these communities would generate informal methods of policing and surveillance (Jacobs 1961), although public space also seems to have been largely free, then, from threatening forms of street life. A London County Council survey in February 1949 found ‘only six persons sleeping out in Central London, and regular homelessness

surveys were discontinued thereafter’ (Rose 1988: 176). The *Working Party on Vagrancy and Street Offences Working Paper* (1974: 18–9) confirmed that ‘with the advent of social security and unemployment benefits and other advantages of the welfare state, it is clear that begging is now on a much smaller scale ... those who beg require rehabilitation rather than punishment’. In the United States, Kress (1994: 101) found that there were no listings under the heading of ‘vagrancy’ in the *Readers’ Guide to Periodical Literature* for 1975.

From the 1980s, however, large sections of public space have been sold off for redevelopment as glittering housing projects or exclusive shopping precincts: ‘in towns and cities the great civic achievements of the Victorians—hospitals, schools and churches, often built to enhance public life and civic society—are no longer part of the public life of the city at all ... turned into housing developments surrounded by gates, [they] emphasize their removal from the public realm’ (Minton 2012: 65). Other areas have been contracted out to private security organizations that impose new restrictions and prohibitions on their use. These fortified divisions between private and public are also reflected in the way in which individuals have come to routinely invest in personal security, another aspect of ‘taking care of themselves’. Gated communities are the most extreme manifestation of these ‘defensive refuges against a hostile world’ (Sennett 1997: 62). Here, ‘community spirit’, at a time when this is no longer available organically, can be purchased, along with ‘exclusive services and private amenities’ (*Sunday Times*, 20 January 2008: 38). By 2012, these compounds comprised 10 per cent of national housing stock in the United States. It may well be that economic segregation is still sufficient to separate the unknown and the risky from the known and the predictable elsewhere (Loader et al. 2015). Nonetheless, there were still 200 such developments per year by 2008 in the United Kingdom: ‘electronic gates, 24 hour security guards and CCTV keep outsiders away... in an era when trust in government to provide community and infrastructure services—and, indeed, our trust in each other—is at an all-time low, closed neighbourhoods are highly seductive’ (*Sunday Times*, 20 January 2008: 38).

The very construction of these boundaries is itself a signifier of how threatening public space exterior to them has become. This transformation has been compounded by the repopulation of much of what remains of it—by the return of the homeless but also the needy, the mentally ill and so on, another consequence of economic restructuring which has led to governments relinquishing most of their previous obligations to provide social assistance. In societies where risks have become individualized, the existence of such groups is more likely to provoke suspicion and intolerance rather than empathy: their presence sends out signals that all that has come to be most valued is under threat—but against which previously existing legal forms and protocols prevent the state from intervening and providing protection. The threats encompass, first, community cohesion and stability—‘a safe haven, ‘an island of homely and cosy tranquillity in a sea of turbulence’ (Bauman 2001: 182) where it might be possible to find the precious but elusive concept of ‘quality of life’, something which has become a much more prominent feature of public discourse from the 1980s, and a matter of regular government inquiry and measurement.<sup>3</sup> In public space there are risks from

<sup>3</sup>The phrase ‘quality of life’ appeared in 147 articles in *The Times* between 1960 and 1969; 818 between 1970 and 1979; 721 between 1980 and 1989; 1,034 between 1990 and 1999; 2,673 between 2000 and 2009; 1,976 between 2010 and 2016. As regards growing government concern, *The Times* (25 November 2010) reported that ‘[Prime Minister] David Cameron will today announce plans for a “happiness index” as he asks the national statistician to devise ways of gauging the quality of life in Britain’.

random terrorist attacks that, particularly since 9/11, ‘can happen anywhere ... this is a threat that faces all of us’ (The Independent, 26 June 2015: 1), as British Prime Minister David Cameron explained after one such incident. And there are risks posed by street people, ‘squeegee merchants’, gang members and the like. Their everyday incivilities become harbingers of much more serious crime to come, rather than being defined down in importance (cf. Garland 2001), a legacy of Wilson and Kelling’s (1982: 4) ‘broken windows’ hypothesis: ‘it is not inevitable that serious crime will flourish or violent attacks on strangers will occur [in such circumstances]. But many residents will think that crime is on the rise, and they will modify their behaviour accordingly. They will use the streets less often, and when on the streets will stay apart from their fellows’. While Wilson and Kelling have been much criticized,<sup>4</sup> there is no doubt at all that their hypothesis has greatly influenced subsequent urban design.<sup>5</sup> For example, the Home Office (2003: 14) White Paper *Respect and Responsibility* observed that ‘if a window is broken or a wall is covered in graffiti it can contribute to an environment in which crime takes hold ... environmental decline, anti-social behaviour and crime go hand in hand and create a sense of helplessness that nothing can be done’.

Second, public space also harbours those thought to constitute the gravest risks to the bodies of women from sexual attack. The restructuring of these societies did indeed award women a new prominence in public space; but they are also at the forefront of the extensive discourse that brings attention to the way in which such attacks cause the most appalling, irreparable harm (Wolf 1990). As such, ‘the downside to the urbane life in cities is a world in which one frequently encounters strangers on public streets, in restaurants, and in shops, a world that poses questions about possible dangers and personal harm. In this regard, women are particularly disadvantaged by both the larger cultural traditions of Western societies and the social structures within which such fears are shaped and nourished’ (Karp et al. 1991: 147). This has meant that the presence of strangers in public space is no longer be a sign of civility (Sennett 1977). Instead, the breakdown of community cohesion and informal local controls can mean that their presence becomes a sign of threat, jeopardizing the safety of women’s bodies in particular: stalking, harassment and other kinds of predatory sexual conduct have all come to prominence from the 1980s (Bauman 2000). In these respects, the sighting of the stranger can now set off alarm and panic: ‘Timaru police [New Zealand] are investigating after a [12 year old] school girl reported that an unknown man followed her for over a kilometre while walking home. The man was described as a light coloured Maori male aged between 25 to 35 years, of a medium build, wearing a dark green and brown jersey and dark jeans, with short facial hair like a beard. The girl was picked up by a woman who saw what was happening’.<sup>6</sup>

Third, public space has become the site of some of the most profound risks to children. Ensuring that ‘they are never alone on the street, a truly radical change in the life-world of children’ (Hacking 2003: 44) is now one of the main tasks of parenting. In this regard, the presence of the stranger also sounds an alert for those would put children at intolerable risk—the paedophile especially: ‘Locals detain[ed] innocent tourists on Southend [UK] seafront after mistaking them for paedophiles. One of the

<sup>4</sup>See particularly Innes (2004).

<sup>5</sup>See Minton (2012) for further illustrations.

<sup>6</sup><https://www.stuff.co.nz/timaru-herald/news/71773885/student-followed-by-male-unknown-to-police-gest-lft-by-female-stranger>.



locals uploaded pictures of the tourists onto Facebook claiming a “paedophile ring” had been “smashed” (Sims 2016: 1). Again, the monstrous paedophile hardly had any existence in public discourse before the 1980s: a filtered search of *The Times* shows only one mention between 1960 and 1969; 33 between 1970 and 1979; 115 between 1980 and 1989; then 765 between 1990 and 1999; 2,704 between 2000 and 2009; 2,989 between 2010 and 2016. One of the reasons for the acute emotional and moral significance that has come to be invested in children, making awareness of such risks to them all the more acute, is their sheer scarcity in current demography (Zelizer 1985). In addition though, while personal relationships have themselves become more impermanent and transient, ‘the child appears as a unique emotional partner in a relationship ... unlike marriage or friendship, the bond that links a parent to a child cannot be broken, it is a bond that stands out as the exception to the rule that relationships cannot [now] be expected to last forever’ (Furedi 2001: 107). As other features of modern society that once provided these symbols have faded away, it is as if children have become ‘symbols of purity, of origin, of identity, of what preserves the border against transgression’ (Hacking 2003: 40). Hence the importance and necessity of defending these precious but precarious borders from the enemy at the gates.

*From protecting individuals to protecting the public*

It has been in these areas of acute risk, against which individuals cannot be expected to protect themselves, that the limited liability state has been prepared to intervene and provide new forms of security measures. As regards protecting or restoring community cohesion and stability, the initial British anti-social behaviour legislation<sup>7</sup> (Crime and Disorder Act 1998) was justified on the grounds that the state would give this opportunity to those unable to purchase it for themselves. The measures it introduced (including anti-social behaviour orders, curfews and parenting orders) would be used primarily, it was claimed, in those areas where ‘the community [is] represented by weak and vulnerable people who claim they are victims of [such] behaviour which violates their rights’ (R [McCann and others] v Manchester Crown Court 2002)<sup>8</sup>; and against behaviour that led to ‘fear for one’s own safety’ (R v Jones and others 2006).<sup>9</sup> In these ways, the legislation was seen as bolstering weakened communities, providing them with the opportunity to rebuild security and with this, re-establish cohesion and identity (Rose 1999)—sufficiently strong then to stop any further corrosion.

Furthermore, the common-sense associations between incivilities and future crime inform public space protection orders, introduced in the England and Wales Anti-social Behaviour, Crime and Policing Act (2014). These have variously decreed that, in Oxford, ‘no person shall remain in a public toilet without reasonable excuse. Council staff are put at risk when having to remove people and drug-related paraphernalia from the toilets’<sup>10</sup>; in Thurrock, ‘car cruising is a real risk to public safety ... our concern is

<sup>7</sup>This legislation applied to England, Scotland and Wales. After the granting of devolutionary legislative powers to Scotland in 1999, this was followed by the 2003 England and Wales Anti-social Behaviour Act 2003, the Scottish Anti-social Behaviour and Sexual Behaviour (Scotland) Act 2004 and the England and Wales Anti-social Behaviour, Crime and Policing Act 2014. The England and Wales legislation is applied in Northern Ireland through an Order in Council.

<sup>8</sup>[2003] 1 Cr. App. R 27, Lord Steyn, 32.

<sup>9</sup>All ER (D) 97 (Sep).

<sup>10</sup>[https://www.oxford.gov.uk/info/20101/community\\_safety/274/public\\_space\\_protection\\_orders](https://www.oxford.gov.uk/info/20101/community_safety/274/public_space_protection_orders).

that there will be a fatality unless we take tougher action to stop illegal street racing and this order will provide a real opportunity to improve road safety'<sup>11</sup>; in the Borough of Poole, 'anti-social behaviour that harms Poole's communities will not be tolerated ... officers will [now] be able to better deal with the behaviour of young perpetrators and so protect vulnerable individuals and communities from the risk of harm'<sup>12</sup>; in Camden, 'there can be circumstances where risks to victims of anti-social behaviour are linked to public urination and [this order] will reduce this risk'.<sup>13</sup> More informally, the local state and private corporations have devised forms of 'defensive architecture' to move on the unwanted and the undesirable. These include 'embedded metal bollards to prevent skateboarding, bus-shelter seats that pivot forward to prevent them being used as makeshift beds; water sprinklers in public parks that switch on intermittently during the night; park benches with solid dividers and cement bollards under bridges; and metal studs or "anti-homeless" spikes installed outside office buildings to discourage rough sleepers' (*The Independent*, 23 July 2015).

Risk prevention measures are also deployed to protect women and children from sexual attack. In the United States, 21 states have enacted sexually violent predator laws since 1990. These allow such offenders to be detained indefinitely by way of civil commitment on completion of a fixed term of imprisonment if it is thought that they would be likely to reoffend without such containment: '[the Supreme Court] has consistently upheld involuntary commitment statutes that detain people unable to control their behaviour and thereby pose a danger to public health and safety' (*Kansas v Hendricks* 1997).<sup>14</sup> The US Adam Walsh Child Protection and Safety Act (2006) provides similar detention of federal prisoners who have never previously been charged with a sex crime but who, it is thought, might commit one if released. It was justified by the Solicitor General because it was needed 'to run a criminal justice system that does not itself endanger the public'. The Queensland Dangerous Prisoners (Sexual Offenders) Act (2003) provides a typical justification for post-prison detention of high-risk sexual offenders in five Australian states and New Zealand: 'children must and will be protected by our Government ... we're going to make sure that the protection of the community, and in particular the protection of children is paramount' (*McSherry and Keyser* 2010: 10). Similarly, the England and Wales Criminal Justice Act (2003) gave the courts power to impose 'indeterminate sentences for public protection' on all offenders convicted of one of a range of violent and sexual offences and judged to represent 'a significant risk to members of the public of serious harm occasioned by the commission of future specified offences'.<sup>15</sup> The New Zealand Sentencing Act (2002, s.87) removed previous specifications regarding age barriers and recidivism requirements to the sentence of preventive detention, thereby allowing much greater use of it 'to protect the community from those who pose a significant and ongoing risk to the safety of its members'.

An additional set of controls has been placed on the movements of sex offenders in public space in the form of parole licenses, probation orders or local ordinances.

<sup>11</sup><https://www.thurrock.gov.uk/public-space-protection-orders/overview>.

<sup>12</sup><http://www.poole.gov.uk/newsroom/2014-news-archive/december-2014/borough-of-poole-obtains-public-spaces-protection-orders>.

<sup>13</sup><https://consultations.wearecamden.org/culture-environment/pspo>.

<sup>14</sup>521 US 346, 506.

<sup>15</sup>Although this provision was abolished for new cases in December 2012.

Under the provisions of the England and Wales Sexual Offences Act (2003), a sexual risk order could be invoked when such offenders were thought to be participating in or about to participate in a ‘trigger event’ (e.g. waiting outside a children’s playground), as well as imposing prohibitions on visiting parks, schools and foreign travel. The order required registration as a sex offender. Failure to comply with the terms of the order then became a criminal offence likely to bring imprisonment, even though no crime may have been committed. The justification was ‘to protect the public or any particular members of the public from serious sexual harm from that individual’ (Thomas 2005: 171). This legislation has since been amended by the Anti-social Behaviour, Crime and Policing Act (2014). Now, a sexual harm prevention order can be imposed on those convicted or cautioned for a sexual offence, allowing the court to impose any restrictions necessary for the purposes of protecting the public from them. Sexual risk orders can be imposed on those judged to be ‘potentially dangerous’, by virtue of them committing an act of a sexual nature (although not necessarily an offence). In addition to the previous restrictions on their movements, those subject to these orders and wishing to engage in (legal) sexual activity may be required to give 24 hours notice to the police before doing so.<sup>16</sup> The preamble to the legislation states that ‘the government is determined to do everything it can to protect the public from predatory sex offenders’. The extended period of supervision in the community for up to ten years post-sentence in the New Zealand Parole (Extended Supervision) Amendment Act (2004, s.107) is intended ‘to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing sexual offences against children or young persons’.

This priority given to protecting the public reverses the post-war emphasis on protecting the criminal justice rights of individuals. Amidst UN declarations and conventions to this effect, statutes and sanctions that threatened those rights were repealed or became obsolescent during the 1950s and 1960s. This spelt the end of the prosecution of status offences in the United States and the more general demise of indeterminate sentencing (Bottoms 1977). It was indeed clear at that juncture that the concept of social defence ‘finds little acceptance in English, [US] or British Commonwealth criminology’ (Howard and Morris 1964: 174). Now, in the social arrangements of the limited liability state and under the aegis of the new framework of knowledge that redefines the values and purposes of the criminal law and punishment, risk control measures sweep aside previous legal barriers that had kept them at bay. US ordinances against vagrancy, e.g., avoid the vagueness that led to earlier laws being struck down by denoting specific areas such as ‘the Civic Centre’ where begging/sleeping out is prohibited rather than unspecified city locations. As Beckett and Herbert (2009: 34) explain, the rewording of legislation has meant that ‘vagrancy was no longer a crime, but sitting or lying on a sidewalk was. Loitering was not prohibited, but one could not camp in a park’.

Ordinances such as these typically take the form of hybrid legislation, providing civil remedies for behaviour that is not itself a crime, but with criminal penalties for breach (the main purpose of the 1998 British anti-social behaviour law was ‘to prevent threats to feelings of security’, R [McCann and others] v Manchester Crown Court 2002).<sup>17</sup> In such ways and as regards these particular risks, the new forms of risk control do indeed

<sup>16</sup>‘Law in Action’, *BBC Radio 4*, 23 June 2016, available online at <http://www.bbc.co.uk/programmes/b07gfjhh> (last accessed 26 July 2016).

<sup>17</sup>1 Cr. App. R 27, Lord Steyn, 30.

introduce a ‘right to security’ (Ramsay 2012) that transcends the rights of individuals to protection from excesses of state power. For example, in relation to public space protection orders: ‘everyone [in Redbridge] has a right to feel safe without being faced with anti-social behaviour which has an impact on their everyday lives ... we know that street drinking has caused a big problem for the community. The public space protection order will help tackle [such] issues’.<sup>18</sup>

The use of this procedural route avoids the way in which the criminal law, with its insistence on high standards of due process for the protection of individual rights, further contributes to problems of uncertainty and insecurity (Ericson 2006). Instead, civil proceedings in the first instance mean recourse to a civil and lesser standard of proof. The England and Wales Crime Prevention Minister thus promised that ‘Councils will be able apply for an injunction to prevent nuisance and annoyance [from “aggressive beggars”]... This will be a wholly civil power, with a civil standard of proof [as] a quicker way of preventing harm to communities. But a breach will still carry serious consequences—including imprisonment’ (*Daily Telegraph*, 14 October 2013: 4). The same principle applies in applications for civil detention orders on Australian prisoners who must be shown to be at risk of committing further serious crimes before such measures can be invoked. These are again made with the intention of controlling risk rather than punishing crime and are allowed to invoke a lesser standard of proof than would be required in criminal law (Keyser and McSherry 2015).

In other respects, risk control measures subvert previous presumptions against retrospective legislation. This was no obstacle to the New Zealand public protection order legislation (nominally in breach of its human rights laws). Meanwhile, the Canadian Tackling Violent Crime Act (2008) reverses the burden of proof in criminal law: repeat offenders with three or more convictions must prove they are not dangerous, rather than the prosecution proving they are, to avoid indefinite detention. Here, and as with the range of UK anti-social behaviour orders, risk is proved commonsensically—repetition is proof enough—rather than any actuarial calculation (cf. Feeley and Simon 1992). Furthermore, the priority given to public protection outweighs previous ethical objections that such excessive powers endangered the rights of individuals. Instead, the Home Office (1996: 48) has claimed that ‘too often in the past, those who have shown a propensity to commit serious or violent sexual offences have served their sentences and been released only to offend again ... the government is determined that the public should receive proper protection’. In the United States, community notification procedures were held to be constitutional because ‘sex offenders’ loss of anonymity is no constitutional bar to society’s attempt at self-defence. The legislature chose to risk unfairness to previously-convicted offenders rather than unfairness to the children and women who might suffer because of their presence in the community’ (*Doe v Poritz* 1995).<sup>19</sup> As regards the public space protection orders, ‘rough sleepers have rights—but so do the other citizens, workers and businesses of Exeter. They have the right not to be intimidated or to have to face the daily ordeal of belongings left in shop doorways’.<sup>20</sup>

<sup>18</sup>[http://www2.redbridge.gov.uk/cms/crime\\_and\\_public\\_safety/keeping\\_redbridge\\_safe/anti\\_social\\_behaviour/public\\_spaces\\_protection\\_order.aspx](http://www2.redbridge.gov.uk/cms/crime_and_public_safety/keeping_redbridge_safe/anti_social_behaviour/public_spaces_protection_order.aspx).

<sup>19</sup>142 NJ 1, 26.

<sup>20</sup><https://www.exeter.gov.uk/council-and-democracy/consultations-and-petitions/public-spaces-protection-order-consultation/>.

*Legitimizing Risk Control*

In an era when governments have chosen to stand aside and let citizens resolve their own risks as best they can, or when they seem helpless against those forces that were unleashed after the decision to set risk free from its economic chains, the introduction of risk control measures in the penal realm performs a very useful function for them. They are able to give assurances that they remain at the helm of the ship of state, reasserting their authority before an otherwise disillusioned electorate: the government is ready—the message seems to be—to intervene against those thought to pose the most tangible and gravest risks to its citizens, nor will it be troubled by principles and conventions that had previously prohibited or limited their ability to do so. The shift in human rights understandings necessary for this then becomes morally justified: public protection orders were warranted, the New Zealand Justice Minister claimed, because ‘ordinary, everyday New Zealanders want to know and ensure that their safety is actually paramount in this parliament’ (NZ Hansard, 17 September 2012: 13449).

How, though, has it been possible to win legal justification for these controls, given that protection from arbitrary or excessive use of the state’s power to punish that risk control measures had previously represented has become one of the cornerstones of Western democracy itself? One way to do this has involved denial: risk control initiatives do *not* constitute additional punishments for crime punished already. If this can be established, it means that ‘double punishment’ objections fail. The US Supreme Court in *Kansas v Hendricks* (1997)<sup>21</sup> set an important precedent when determining that ‘civil commitment’ under that state’s sexual predator law was not punitive and therefore did not violate the constitution. Successful denial of double punishment then unravels other judicial protections from the state’s penal excesses. For example, governments are no longer bound by conventions against laws that provide for retrospective punishments when implementing these measures and also laws that retrospectively impose administrative requirements. The New Jersey Supreme Court determined that sex offender community notification laws in that state ‘are not retributive, but [are] laws designed to give people a chance to protect themselves and their children. They do not represent the slightest departure from our State’s or our country’s fundamental beliefs that criminals, convicted and punished, have paid their debt to society and are not to be punished further’ (*Doe v Poritz* 1995).<sup>22</sup> Similarly, the Victoria Sex Offender Registration Act (2004), compelling registration for offences committed before the act was passed,<sup>23</sup> was declared constitutional, despite the shame and ostracism that registration inflicts on those already punished.

Second, it has been maintained that the risk control penal measures remain within the purview of democratic values and expectations. Not only do governments claim to be protecting the most vulnerable members of the community—a central expectation in democratic society—with these measures but they also claim that post-prison detention, e.g., does not permanently consign those who have already paid one penalty for their crimes to some remote gulag; on the contrary, there is still a way back to free society for them, however, unlikely it may be in reality. As regards the New Zealand public protection orders, ‘it is really important that we have got pathways for these

<sup>21</sup>521 US 346 (1997).

<sup>22</sup>142 NJ 1, 26.

<sup>23</sup>*WBM v Chief Commissioner of Police* (2010), VSC 219 (28 May 2010).



detainees—pathways so they can work towards being released at some stage, if that is an option for them. Each individual will have a management plan that identifies goals that could contribute to their eventual release. An annual review will be performed on each of these public protection orders. The High Court will look at each case every five years ...’ (NZ Hansard, 18 September 2013: 13484).

Third, the uncertain but indefinite nature of risk both justifies the necessity for the controls but at the same time provides reassurances that some of them are likely to be little used and therefore of no practical legal or ethical concern: ‘it is part of [the government’s] programme to build a safer New Zealand, to protect our communities, to prevent crime, and to put victims first ... only a small number of people are likely to be subject to a public protection order, but they are the very worst of the worst and they should not be inflicted on our community’ (NZ Hansard, 18 September 2013: 13481). Fourth, the governmental task of securing the health of the population (Valverde 2011) from incivilities that act as a corrosive agent on the social fabric now outweighs the rights of individuals who pose such risks: ‘the morality of [a] risk society is thoroughly utilitarian. Efficiency in loss reduction is the moral imperative’ (Ericson and Haggerty 1997: 124). Home Secretary David Blunkett (2002) explained that, in relation to the anti-social behaviour laws, ‘without a sense of security, people find it harder to work with others. They are scared to go out on the streets. They are fearful of talking to others’.<sup>24</sup>

Fifth, risk controls are justified as legitimate because these are seen as bringing about a much needed rebalancing between individual rights (the concerns of the post-war welfare state) and protecting the public (the new emphasis in criminal law and punishment in the limited liability state): ‘the civil liberties of individuals who might be suspected of terrorism is important ... but we have to balance that against the civil liberties of all the citizens of this country who also have a right in a democracy to expect to live their lives free from the fear and possibility of harm by people who act in that way’ (UK Hansard, 20 May 2003, vol. 405, col. 954). Such measures in themselves become signifiers of the unending presence of risk and the government’s determination to address its most dangerous manifestations—terrorism in this case—through the normalization of such powers: ‘detaining people, whatever we suspect them of, is a serious matter for a democracy ... at the same time [parliament] will have to judge whether, on balance, the limitation of liberty [14 days] that is being proposed [in the England and Wales Criminal Justice Bill 2003] is proportionate and justified in a very small number of cases in relation to the serious harm that people suspected of such activities can potentially wreak on society’ (UK Hansard, 20 May 2003, vol. 405, col. 944).

Artifices such as these—all that is happening is that rights are being rebalanced, democracy will be strengthened not weakened, the laws will be little used, the vulnerable will be protected—give the impression that risk-based penalty has become some unstoppable, monolithic force, able to refashion and reconstruct law and justice in democratic society to suit its interests alone: ‘if the state denies what it is doing is punishment, then what constitutional limits are there to it?’ (Steiker 1998: 771). However (aside from the political limits to more general risk measures in the limited liability state), we do arrive at these constitutional limits when the state is unable to maintain the façade that particular features of its risk control measures remain within the justice expectations of the democracies. In England and Wales, the Safeguarding Vulnerable Groups

<sup>24</sup>1 Cr. App. R 27, Lord Steyn, 36.

Act (2006) which would have required risk checks on an estimated 11.5 million people in any kind of contact with ‘vulnerable adults’ and children was abolished in 2010. This had been a provision with the potential to encompass more than one-fifth of the population, not simply a risky minority. In Queensland, the Court of Appeal of the Supreme Court of that state declared sections of the Criminal Law (Protective Declaration) Amendment Act (2013) invalid. This would have invested the power to impose indefinite post-prison detention in the Attorney General rather than the courts. It was not only a clear breach of the separation of powers convention (McSherry 2014), another hallmark of the governance of advanced liberal societies, but the investment of such powers in one individual had obvious resonance with forms of arbitrary justice outside the democracies. A proposal in the UK Terrorism Act (2006) to extend the maximum period of police detention for terrorist suspects to 90 days was defeated because it so ostensibly took risk control beyond the boundaries of what was permissible in a democracy: ‘it is worth grasping what is at stake [here] – the imprisonment of men and women without trial in the country that invented *habeas corpus* ... if the period of imprisonment is too long, locking people up without charge risks becoming the first resort of the authorities rather than the last’ (UK Hansard, 9 November 2005, vol. 439, col. 347).

As regards the criminalization of the homeless in the United States, *In re Eichorn* (1998)<sup>25</sup> ratified the necessity defence: ‘[this] involves a determination that the harm or evil sought to be avoided by such conduct is greater than that to be prevented ... necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual’. Here, the right of homeless persons to protection from the risks that come with being homeless outweighed broader public protection issues. To give them this protection would itself prevent future crime. In other respects, homelessness can reach such a level that it becomes an embarrassment to governments, a stain on whatever commitment they profess to social justice, thereby undermining their claims to be amongst the leaders of Western democracies.<sup>26</sup> Equally, ‘defensive architecture’ has led to public disquiet and anger at the way in which the homeless are being pushed away and moved on by these means (Petty 2015).

These, though, provide only spasmodic barriers against the risk concerns washing away great areas of the framework in which human rights, criminal law and punishment had previously been understood. In the specific circumstances that governments intervene to control risk, more likely through penal rather than social measures now, it is as if those often ancient understandings, so long thought unbreachable, have become nothing firmer than ramparts of sand before an incoming tide. With their erosion, so the administration of justice continues to shift from protecting individual rights to protecting the rights of the public at large. As has been seen, in statute and case law a new code of rights is being established to this effect, one more appropriate to the social arrangements of the limited liability state, where individuals are pitted against each other in unending competition for resources or rewards, where the bonds between themselves and others have been broken, but where the risks that threaten all that is most valued seem overwhelming and beyond their control.

<sup>25</sup>*In re Eichorn* (1998), 69 Cal. App. 4th 382, 81 Cal Repr. 2d, 535.

<sup>26</sup>Butler (2016) thus writes that, in Britain, ‘Ministers are considering changes to the law in an attempt to support the growing number of people on the brink of homelessness ... options include introducing a new duty of prevention in England, which would force councils to provide advice and support for anyone at risk of homelessness, regardless of whether they are deemed to be in priority need under existing laws’.

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