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**Securing Labour Standards Through Preventive Criminalisation: New Lessons from
Civil Preventive Orders**

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Abstract: This article offers one of the first critical analyses of the two hybrid civil/criminal measures introduced by the Immigration Act 2016: Labour Market Enforcement (LME) Undertakings and Orders. The article challenges the notion that these are uncontroversial use of regulatory criminalisation in the labour law context. A number of substantive concerns are highlighted. It is then argued that an original theoretical frame is needed to theorise the use of these civil preventive orders in the regulation of work relations, rooted in using the criminal law to reassure, and that this analysis casts new light on the complex and evolving regulatory interface between criminal law and labour law.

Keywords: Enforcement of Labour Standards; Preventive Criminalization; Civil Preventive Orders; Immigration Act 2016; Labour Market Enforcement Undertakings and Orders; Director of Labour Market Enforcement; Civil Order

Introduction

Preventive criminal measures penalize conduct before it causes harm to persons or other interests. They are used to minimize threats and to secure public protection, encapsulating a strong ‘regulatory impulse within criminal law’.¹ It is well known to criminal lawyers that

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¹ H. Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017) 10.

there has been a proliferation of a diverse range of preventive measures in England and Wales in recent years.² One such example is the rapid development of hybrid civil/criminal laws measure called civil preventive orders. Made by civil courts or on conviction, these impose civil law prohibitions or requirements upon recipients in order to prevent harm. The essence of the offence lies in breach of the conditions in a civil order and not necessarily the commission of an offence. One stark feature of civil preventive orders is their significant custodial sentences—some carry sentences of up to five years’ imprisonment, whereas the conduct which attracts their application tends to only be sanctioned by fines. It is estimated that there are currently as many as thirty-three of these codified in the criminal law.³ Civil preventive orders can be strongly linked with a literature around using the criminal law as a regulatory tool.⁴

In this article I analyse a striking new application of these preventive coercive measures in the field of labour law. The Immigration Act 2016 implemented two civil preventive orders—Labour Market Enforcement (LME) Undertakings and Orders—to prevent the risk of harm to workers through breaches of labour standards. These measures require a different type of analysis to civil preventive orders which seek to prevent serious harm to physical interests.⁵ In this context, hybrid civil/criminal law risk measures operate to prevent harm to labour standards, harm which in turn can affect workers physically, but also financially, psychologically and in other ways.

² L. Zedner and A. Ashworth, ‘The Rise and the Restraint of the Preventive State’ (2019) *Annual Review of Criminology* 429; T Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge 2017).

³ R. Kelly, ‘Behaviour Orders: Preventive and/or Punitive Measures?’ DPhil thesis, University of Oxford (2019) 8-10.

⁴ J. Ogg, *Preventive Justice and the Power of Policy Transfer* (Palgrave Macmillan 2015) 65ff; A. Ashworth, ‘Positive Duties, Regulation and the Criminal Sanction’ (2017) *LQR* 606; S. Marshall and C. Fenwick, *Labour Law Regulation and Development: Socio-Legal Perspectives* (Edward Elgar 2016).

⁵ For example, Slavery and Trafficking Prevention and Risk Orders, Modern Slavery Act 2015, Pt 2.

I know of no detailed discussion of the role, scope and principles underlying LME Undertakings or Orders. This is despite the fact that there has been a strong push from the Director of Labour Market Enforcement toward greater use of these measures.⁶ This is symptomatic of the ‘creep’ of criminalization, where justification for criminal law measures is taken as self-evident, in a penal environment where civil preventive measures have burgeoned.⁷ This is to overlook the distinctiveness of coercive preventive measures, and the special issues posed by the rise of the preventive state within the regulation of work relations.⁸ Where preventive criminal law measures are closely linked to regulatory laws the temptation is to assume that these types of measures are justifiable as part of a more nuanced regulatory framework.⁹

Criminal lawyers and labour lawyers must analyse the issues posed by these coercive preventive measures in tandem rather than in isolation. To date criminal lawyers have been more willing to question justifications for civil preventive orders against concerns relating to ‘individual liberties, risks of overreach and the need for limits’.¹⁰ A driving concern of labour lawyers when assessing the use of the criminal law in personal work relations has been whether such measures help to push back against rampant non-enforcement of labour rights.¹¹

I argue that new modes of analysis are needed to conduct this critical work.

⁶ D. Metcalf, ‘United Kingdom Labour Market Enforcement Strategy 2018-19’ (May 2018) 5.

⁷ Ogg (n 4) 198.

⁸ J. Collins and A. Ashworth, ‘The Preventive Role of the Criminal Law in Employment Relations’ in A. Bogg, J. Collins, M. Freedland and J. Herring (eds), *Criminality at Work* (OUP 2020).

⁹ J. Fudge and D. McCann, *Unacceptable Forms of Work: A Global and Comparative Study* (ILO 2015).

¹⁰ Zedner and Ashworth (n 2); C. Steiker, ‘The Limits of the Preventive State’ (1998) 88 *Journal of Criminal Law and Criminology* 771.

¹¹ See M. Ford, ‘The Criminalization of Health and Safety at Work’ in *Criminality at Work* in A. Bogg, J. Collins, M. Freedland and J. Herring (eds), *Criminality at Work* (OUP 2020), ch 21: ‘The normative issue to be explained for a labour lawyer is in what circumstances the law should intervene in work relationships to correct inequality of bargaining power, subordination to managerial power, the

In this article I raise concerns about the substantive scope of these measures. Building on this critique, I argue that a new theoretical lens is required to appraise the preventive endeavour in this context. This will enable us to move beyond viewing these hybrid civil/criminal measures as examples of individualised criminalisation, and criticising them solely on this basis. Rather than putting forward a binary divide between criminal law and labour law, the interaction of these areas of legal regulation is inherently complex, involving overlap and cross-fertilisation of ideas. LME Orders and Undertakings can be theorised as instances of using the criminal law to reassure, and this casts light on the complex and evolving regulatory interface between criminal law and labour law.

1. Civil Preventive Orders: A Brief Introduction to Multi-Step Criminalization

Civil preventive orders are hybrid civil/criminal law measures. They can be given in civil proceedings or by a state enforcement body under civil evidential rules, but breach of the order is a criminal offence (or in some cases, held to be contempt of court).¹² They can impose restrictions or requirements on individuals or other entities. These hybrid civil/criminal law measures can also be made on conviction. In those cases, they are used as a means of regulating future behaviour on the grounds that a criminal conviction has been given. The boundary between civil and criminal law measures is blurred even for this latter category. This is because normal criminal evidential requirements do not need to be satisfied

abuse of civil or social rights, or the potential harm to worker's welfare. The labour lawyer's focus is on the *beneficiary* of social laws, not the citizen (typically a corporate employer) whose freedom is constrained by them'. For example, on persistent non-enforcement of holiday pay entitlements, see 'More than 1M Holiday Workers Denied Legal Holiday Pay' *The Guardian* (16 September 2019) <<https://www.theguardian.com/business/2019/sep/16/more-than-1m-uk-workers-denied-legal-holiday-pay-analysis>> (accessed 1 December 2019).

¹² Contempt of Court Act 1981, s 4 (can lead to two years' imprisonment but is not an offence).

to prove the grounds for imposing the order.¹³ Both sets of orders are part of a growing number of preventive practices which need to be analysed individually and collectively.¹⁴ The current and growing list of civil preventive orders targets an extraordinarily wide variety of harmful behaviour and related conduct, from slavery and trafficking, to harassment, to labour market enforcement.¹⁵ Four new measures have been added in 2019 alone.¹⁶

Despite the wide variety of forms which civil preventive orders take, a significant feature is the breadth of their prohibitions or requirements, backed by a strict liability offence: ‘their terms may be any prohibition (or mandatory term in some cases) deemed necessary to prevent future instances of the broad and vaguely defined conduct on which they are grounded’.¹⁷ This marks an evolution from earlier versions of civil preventive orders, which targeted a narrower range of behaviour and did not commonly include requirements as well as prohibitions.¹⁸ As is well-known, Anti-Social Behaviour Orders (ASBOs) were the first civil preventive measures of their kind. Now repealed, the ASBO model attracted widespread criticism for its unprincipled breadth in targeting nuisance behaviour by identifying a very broad range of qualifying conduct, and by imposing onerous conditions

¹³ For example, the Criminal Behaviour Order found in the Anti-social, Crime and Policing Act 2014 s 22, can be imposed on conviction, see Kelly (n 3) 32. According to s 23: ‘(2) It does not matter whether the evidence would have been admissible in the proceedings in which the offender was convicted’.

¹⁴ L. Zedner, ‘Preventive Justice or Pre-Punishment? The Case of Control Orders’ (2007) *Current Legal Problems* 174.

¹⁵ Kelly (n 3) 8-10.

¹⁶ Kelly (n 3) 5-6, concerning stalking, offensive weapons and extending Serious Crime Prevention Orders to those convicted of criminal offences.

¹⁷ P. Ramsay, ‘The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventive Orders’ in B. McSherry, A. Norrie and S. Bronitt, *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart 2008).

¹⁸ On requirements, see Criminal Behaviour Order, Anti-social Behaviour, Crime and Policing Act 2014, s 22.

such as travel restrictions and curfews.¹⁹ The Orders were backed up by backed up by a significant custodial sentence upon breach—up to five years’ imprisonment.

A further feature of civil preventive orders is that they do not follow a ‘harm plus culpability’ model of criminal liability.²⁰ Andrew Simester and Andreas von Hirsch label some hybrid civil/criminal orders as ‘two-step prohibitions’.²¹ The paradigm example of criminal liability involves ‘one temporal location’.²² By contrast, a two-step prohibition puts limits on conduct at an earlier point on the basis of certain qualifying conduct. First, qualifying conduct occurs at t_0 . This enables an order to be issued at t_1 . Breach of an order at t_2 enables criminal proceedings to be launched. Given the variety of civil preventive orders in existence, I argue that it is more accurate to describe them as examples of multi-step criminalisation. As my analysis in this article reveals, some civil preventive orders utilise more than three temporal stages. The pragmatic push toward these hybrid civil/criminal law measures is clear. First, they bypass the safeguards of a fair criminal trial.²³ For some hybrid civil/criminal measures the qualifying conduct need not be a criminal offence, nor proven to the criminal standard. As we will see in our analysis of LME Undertakings below, no particular evidential standard need be proven. All that is required is that a relevant enforcing authority provides a reason for believing that a trigger offence has been or *might* have been committed. Second, a hybrid order fashions an individualised means of regulating non-criminal or quasi-criminal

¹⁹ Crime and Disorder Act 1998, s 1; R (McCann) v Manchester Crown Court [2002] UKHL 39, [2003] 1 AC 787. For critique, see J. Gardner et al, ‘Clause 1 – The Hybrid Law From Hell’ (1998) 31(1) Criminal Justice Matters 25; S. Macdonald, ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO’s Definition of Anti-Social Behaviour’ (2006) 69 MLR 183.

²⁰ A. Ashworth and L. Zedner, *Preventive Justice* (OUP 2014) 96.

²¹ A.P. Simester and A. von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart 2012) 214.

²² *ibid* 214.

²³ ECHR, Art 6; Art 7.

behaviours, particularly behaviour which is undertaken deliberately and repeatedly.²⁴ The civil prohibition is tailored to a particular person, entity or context.²⁵ The behaviour may be classified as serious precisely because it occurs cumulatively.²⁶

From this brief introduction we recognise why the legitimacy of civil preventive orders has been questioned, producing a large criminal law literature.²⁷ I have already highlighted problems posed by their hybrid civil/criminal law status. A prohibition granted in civil proceedings under civil evidential rules, breach of which is a criminal offence, does not offer the safeguards of the criminal process (such as the presumption of innocence). These coercive preventive measures have the potential to apply in too broad a range of circumstances involving risk of harm, and their prohibitions or requirements can be too onerous. A large amount of discretion is given to the judiciary or to enforcement bodies to assess whether a coercive preventive measure should be imposed, which is constitutionally problematic. Breach of the terms of the measure often attracts a higher penalty than that associated with the behaviour it seeks to regulate (as much as five years' imprisonment). The link between prevention and punishment is blurred by hybrid civil/criminal measures, which affects whether human rights protections apply.²⁸

What emerges from critique of the ASBO model, and its replacement, is that a preventive legislative scheme needs to limit the range of qualifying behaviour which triggers a

²⁴ Simester and von Hirsch (n 21) 214.

²⁵ For interesting parallel developments on individualisation in labour law, see M. O'Sullivan et al, 'Is Individual Employment Law Displacing the Role of Trade Unions?' (2015) *Industrial Law Journal* 222.

²⁶ S. Shute, 'Individualised Criminalisation: The Rise and Rise of Sexual Offences Prevention Orders and Sexual Harm Prevention Orders in the United Kingdom' (draft with author).

²⁷ A. Ashworth and L. Zedner, 'Preventive Orders: A Problem of Undercriminalization?' in R.A. Duff et al (eds), *The Boundaries of the Criminal Law* (OUP 2010); Ramsay (n 17); A. Simester and A. von Hirsch, 'Regulating Offensive Conduct Through Two-Step Prohibitions' in A. von Hirsch and A. Simester (eds), *Incivilities* (Hart 2006).

²⁸ Kelly (n 3) 199.

prohibition or requirement. It must also clearly identify the applicable evidential standard. This is to ensure that agencies given authority to impose prohibitions or restrictions are not given unfettered discretion on the basis of less demanding civil evidential rules. It is preferable on constitutional grounds that the prohibited conduct is itself a criminal offence which attracts a term of imprisonment, since this is to respect Parliament's express legislative intention to i. create a criminal offence and ii. to attach to this offence punishment through deprivation of liberty. A second principle is that the range of conduct which may be prohibited or restricted should be narrow, and put in place for a proportionate length of time.

2. Civil Preventive Orders in the Immigration Act 2016

The focus of this article is on the two new civil preventive orders found in the Immigration Act 2016.²⁹ LME Undertakings and Orders were implemented alongside a range of other measures to improve labour market enforcement.³⁰ They are not the only examples of preventive criminalisation in the 2016 Act.³¹ But far from being just another example of the burgeoning body of civil preventive orders, or of regulatory criminalisation in the labour sphere, I argue that these are novel measures which require careful scrutiny from criminal lawyers and labour lawyers. These preventive orders are distinctive, standing apart from other civil preventive orders operating in the labour sphere which seek to prevent physical harm.³² LME Undertakings and Orders protect different interests: harm or the risk of harm to labour standards. This is a clear example of the expanding reach of coercive preventive measures. Non-compliance with a civil law measure, imposed by an enforcement body with no particular evidential standard, can lead to a significant custodial sentence if breached.

²⁹ Immigration Act 2016, ss 14-30.

³⁰ (n 6) 51 ff.

³¹ Immigration Act 2016, ss 34, 35.

³² Cf Modern Slavery Act 2015, Pt 2, Risk and Preventive Orders, which target those who are at risk of committing another modern slavery offence, or who are at risk of exploiting another person.

This begs a question about whether this is a legitimate extension of coercive state power in regulating work relations, and whether there should be limiting principles.

The value of this work must be emphasised. These hybrid civil/criminal measures are advertised as means of holding employers to account. This is a laudable aim in an era of deregulation and widespread non-enforcement of labour standards.³³ Andrew Ashworth and Lucia Zedner recognise that ‘the politics of the preventive has a strong element of irresistibility built into it, since it generally appears perverse to argue against a preventive measure’.³⁴ Nevertheless, it is well known that in an environment where a deregulation agenda is being pursued, governments often appeal to criminalisation as the ‘solution’ leading to rapid penal expansion.³⁵ Rigorous analysis of civil preventive orders is overdue, rather than marginalising them as examples of regulatory law. These coercive measures are part of a wider preventive enterprise, which must be analysed holistically, since together these measures have the potential for ‘adverse implications for civil liberties and values such as privacy, social solidarity, and trust’.³⁶

i. Background and justification

The genesis of the Immigration Act’s two civil preventive orders is found in a joint paper published in 2015 by the Home Office and the Department for Business, Innovation and

³³ TUC, ‘Shifting the Risk: Countering Business Strategies That Reduce Their Responsibilities to Workers—Improving Enforcement of Employment Rights’ (April 2018) <<https://www.tuc.org.uk/sites/default/files/Shiftingtherisk.pdf>> (accessed 1 December 2019).

³⁴ Ashworth and Zedner (n 20) 13.

³⁵ See M. Pinto, ‘Sowing a “Culture of Conviction”: What Shall Domestic Criminal Justice Systems Reap From Coercive Human Rights?’ forthcoming in N. Mavronicola and L. Lavrysen (eds), *Towards a Coercive Human Rights Law? Positive Duties to Mobilise the Criminal Law Under the ECHR* (Hart 2020).

³⁶ (n 2) 442.

Skills (BIS), *Tackling Exploitation in the Labour Market: Consultation*.³⁷ The consultation paper argued a case for more effective enforcement of labour standards found in the National Minimum Wage (NMW) Act 1998, the Employment Agencies Act 1973, the Conduct of Employment Agencies and Employment Businesses Regulations 2003, and the Gangmasters (Licensing) Act 2004. These standards are currently enforced by three bodies: HMRC, the Employment Agencies Standards (EAS) inspectorate and the Gangmasters and Labour Abuse Authority (GLAA) which have a range of measures at their disposal, including civil law penalties and criminal law sanctions.³⁸ Of course there is a wider picture of non-compliance with labour standards than that identified in the consultation paper alone, including difficulties of accessing Employment Tribunals (at times this is due to fees, but it is also strongly connected to lack of Legal Aid), and the problem of getting paid awards.

The 2015 consultation paper was concerned about two types of non-compliance. The first was non-compliance with the NMW.³⁹ Data from the Office for National Statistics notes that in April 2016, 362,000 jobs (1.3% of all jobs), including 178,000 full-time posts, were paid less than the NMW rate.⁴⁰ In September 2017 the Low Pay Commission put the figure at

³⁷ Both bodies sponsored the Immigration Bill which sought to ‘tackle illegal immigration by making it harder to live and work illegally in the United Kingdom’, ‘Immigration Bill: Explanatory Notes’ Bill 74-EN (2015) para 2. It had the ‘subsidiary’ aim of improving the enforcement of labour law standards, J. Fudge, ‘Illegal Working, Migrants and Labour Exploitation in the UK’ (2018) 38 OJLS 557, 576.

³⁸ C. Barnard, A. Ludlow, S. Fraser Butlin, ‘Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers’ (2018) 47 ILJ, 226, 247-48. Note that there are current calls for amalgamation into one single enforcement agency.

³⁹ Department for Business, Innovation and Skills and Home Office, *Tackling Exploitation in the Labour Market: Consultation* (2015) 8 (and as of 1 April 2016 for the NLW).

⁴⁰ Office for National Statistics, ‘Low Pay in the UK: Apr 2016’ (2016), 2 <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/lowpay/apr2016>> (accessed 1 December 2019). Prior to the Immigration Act 2016, Employment Tribunals Act 1996, s 12A; Employment Tribunals Act 1996, s 37A-37Q, implemented a regime of financial penalties to penalise employers who fail to pay an ET order or settlement scheme.

between 300,000 and 580,000 at its seasonal peak.⁴¹ The Resolution Foundation estimates that 160,000 out of 1.4 million care workers (over 10%) are paid less than the required rate.⁴² The enforcement issue intensifies given that it is estimated that an additional 2.75 million workers will have come into the National Living Wage framework by 2020.⁴³ A second focus of the consultation paper was a perceived ‘shift’ in non-compliance with labour standards, from random breaches towards ‘increasingly organised criminal activity’.⁴⁴ This was associated in parts of the consultation paper with the pejorative (and amorphous) label of ‘labour exploitation’, with a call to curb this type of exploitation.⁴⁵

These types of non-compliance need to be tackled for at least two reasons. For workers, the paper argued that non-compliance with a variety of labour standards is linked to labour exploitation, especially for vulnerable workers holding irregular work status such as migrant workers.⁴⁶ For employers, persistent non-compliance with labour standards creates an uneven playing field resulting in serious competitive disadvantages.⁴⁷ Businesses committed to repeatedly fudging compliance labour standards make it more difficult for compliant businesses to compete. An effect may be to depress standards of pay and working conditions in a particular sector. A gap emerges: between exploitative conduct which is serious enough to come within offences in the Modern Slavery Act 2015, and conduct which can be dealt

⁴¹ Low Pay Commission, ‘Non-Compliance and Enforcement of the National Minimum Wage’ (2017) 12.

⁴² L. Gardiner, ‘The Scale of Minimum Wage Underpayment in Social Care’ (2015) 3.

⁴³ *ibid* 19.

⁴⁴ (n 39) 8.

⁴⁵ *ibid* 18-20, with ‘indicators’ of labour exploitation highlighted in the report.

⁴⁶ They range from breach of employment agency rules (regulated by the EAS inspectorate), to non-payment of NMW (regulated by HMRC), to a wide range of serious and less serious breaches of labour standards regulated by the GLAA (including breaches of standards found in the National Minimum Wage Act 1998, the Employment Agencies Act 1973, the Gangmasters (Licensing) Act 2004 and the Modern Slavery Act 2015). This recognises the complexity of labour exploitation as a term to describe unfair labour practices.

⁴⁷ (n 39) 8.

with using civil law penalties and low-level offences. According to the consultation paper, measures are needed ‘to make it easier for law enforcement to deal with such offenders in a way that breaks the pattern and, in so doing, reduces the risk of serial offenders subjecting their workers to more serious forms of exploitation’.⁴⁸ It ought to have been emphasized that that is not to say that this ‘gap’ ought to be plugged by the criminal law.

The government took forward a variation of one of the consultation paper’s suggestions—a type of improvement notice—rather than an aggravated breach of labour law offence.⁴⁹ The improvement notice would be a civil law measure, with breach of an order leading to criminal law sanctions.⁵⁰ It would be enforced by three state enforcement bodies who are specialists in this type of enforcement. The consultation paper suggested that upon breach of a labour standard an enforcement body ‘would be able to ask the court to issue an improvement notice ordering the business to take remedial steps within a specified period in order to fix the problems which had been identified.’⁵¹ The justification given by the government was pragmatic and deterrence-based. First, ‘it would be simpler to prove a breach of the order than it would be to prove a person’s motivation or intention in committing the breach’.⁵² Second, a type of improvement notice would ‘reflect the seriousness of this level of offending and [will] act as a deterrent to stop and prevent any deliberate and persistent breaches of labour law and will better protect workers from exploitation’.⁵³ There is precedent for these types of measures in regulating labour standards but they operate quite

⁴⁸ *ibid* 28-29.

⁴⁹ This is despite the fact that of the 93 respondents to the consultation, 53% supported an aggravated labour law offence for this type of persistent non-compliance, and 29% supported the introduction of an aggravated offence alongside an improvement notice on the grounds of effectiveness.

⁵⁰ (n 39) 29.

⁵¹ *ibid* 29.

⁵² *ibid* 6.

⁵³ *ibid* 26.

differently. Several respondents to the consultation highlighted that the Health and Safety Executive (HSE) has a system of Improvement Notices in section 21 of the Health and Safety at Work Act 1974.⁵⁴ It would have been valuable to have had interrogation of this regime in the government's response. This dual system of Notices is widely used by the HSE to swiftly control perceived risks to safety without the need for court intervention.⁵⁵ A HSE inspector can serve an Improvement Notice if she 'is of the opinion' that a statutory provision has been breached, or there has been a breach in circumstances 'that make it likely that the contravention will continue or be repeated'.⁵⁶ Breach of an Improvement or Prohibition Notice is an offence attracting a maximum fine of £20,000, or a prison term not exceeding 12 months, or both.⁵⁷ Prosecution is very much a last resort, unlike the model adopted via LME Undertakings and Orders, explored below, where escalation is encouraged to improve the deterrent effect.

Equipping enforcement agencies with more tools of enforcement, two civil preventive orders were hastily introduced via a series of amendments to Part 1 of the Immigration Bill as it passed through the Committee Stage of the House of Lords. 112 amendments were introduced to the Bill at a late stage, to the House of Lords' expressed dismay and frustration.⁵⁸ The expressed intention was that civil law measures would be applied first,

⁵⁴ *ibid* 13. It should have been noted that this regime includes Prohibition Notices in section 22 of the same Act. And see Employment Agencies Act 1973, s 3B: failure to comply with a prohibition order, without reasonable excuse, is an offence, liable on conviction to a fine.

⁵⁵ Health and Safety Executive, 'Register of Prosecutions and Notices' <<http://www.hse.gov.uk/enforce/prosecutions.htm>> (accessed 1 December 2019).

⁵⁶ Health and Safety at Work Act 1974, s 21. The statute or regulation concerned must be indicated, as well as the inspector's reasons for serving the notice. An inspector must set out sufficiently clearly what is to be done to ensure compliance within a certain period of no fewer than 21 days (this period can be extended, see Health and Safety at Work Act 1974, s 23(5)(b))

⁵⁷ Health and Safety at Work Act 1974, s 33(1)(g); Schedule 3A. There is a right to appeal to an ET against a Notice, Health and Safety at Work Act 1974, s 24.

⁵⁸ HL Deb vol 768 col 604 18 January 2016, Lord Ashton.

with businesses given ‘several opportunities to put matters right before prosecution’.⁵⁹ For example, Lord Ashton highlighted the appropriateness of naming and shaming as the first port of call in enforcing NMW compliance.⁶⁰ LME Undertakings and Orders ‘are designed for *egregious* offences and *repeated* offences where, for example, some companies may decide to take the fine and continue to pay their workers less than the minimum wage’.⁶¹ Their purpose was to ensure that ‘individuals with rogue businesses face the possibility of imprisonment for repeated or serious breaches of labour market legislation’, whereas currently the majority of these offences permit only a fine to be imposed upon conviction.⁶²

ii. Two pathways

There are two pathways to using the CPOs in the Immigration Act 2016. Pathway 1 is used where a conviction for a labour market offence has *not* been secured. It is the model of an application for an LME Undertaking supplemented by an LME Order.⁶³ The circumstances envisaged by the background documents for its use are where an employer has repeatedly failed to comply with labour market laws, and has failed to respond to lesser warnings and sanctions. Pathway one enables an employer who has not been convicted of a criminal offence to be placed under a prohibition, restriction or requirement via an Undertaking. The employer gives the Undertaking voluntarily and its terms are binding upon it. The evidential standard an enforcement authority (EAS, HMRC, GLAA) must satisfy to apply for an Undertaking is low: their belief that ‘a person has committed, or is committing, a trigger offence’ supported by at least one reason.⁶⁴ This is not the criminal or civil standard of

⁵⁹ *ibid* col 601.

⁶⁰ *ibid* col 605.

⁶¹ *ibid* col 605 (my emphasis).

⁶² HL Deb vol 768 col 601 18 January 2016, Lord Ashton.

⁶³ Immigration Act 2016, ss 14-18.

⁶⁴ Immigration Act 2016, 14(1),(2): a prohibition, restriction or requirement must be considered ‘just and reasonable’. It must also be shown that an Undertaking would prevent or reduce the risk of the

proof—in fact no particular standard of proof is required.⁶⁵ Enforcing authorities have been given considerable power and discretion at this juncture.⁶⁶ An Undertaking has effect for up to two years.⁶⁷ At least one measure included in the Undertaking must be for the purpose of preventing or reducing the likelihood of the subject ‘committing a further trigger offence under the relevant enactment, or continuing to commit the trigger offence.’⁶⁸ An Undertaking must explain how a measure is expected to prevent or reduce the risk of non-compliance with the terms of the Undertaking.⁶⁹

The relevant trigger conduct is based on a fairly narrow set of offences found in the Employment Agencies Act 1973 (excluding the offence in section 9(4)(b)), the National Minimum Wage Act 1998 and the Gangmasters (Licensing) Act 2004. Surprisingly secondary and inchoate versions of these offences are included.⁷⁰ I say more about this in section 3 below. The Secretary of State can add to the list of trigger offences by regulation.⁷¹

subject not complying with any requirement imposed by or under the relevant enactment or would publicise the existence and nature of an LMEU provided, and any steps taken to comply with it, Immigration Act 2016, s 15(2).

⁶⁵ cf the evidential standards imposed for STPOs and STROs, see Home Office, ‘Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders Under Part 2 of the Modern Slavery Act 2015’ (2017) para 3.2.

⁶⁶ The breadth of discretion available draws some similarities to the regime of Improvement and Prohibition Notices under the HSW Act 1974. An inspector may issue an Improvement or Prohibition Notice on the basis of their ‘opinion’, supported by reasons. Health and Safety at Work Act, ss 21, 22(2). The cases have required a degree of certainty on this, but this is not written into the legislation, *Fleet v McKenna* [2005] EWHC 387.

⁶⁷ Immigration Act 2016, s 16(2).

⁶⁸ Immigration Act 2016, s 15(5).

⁶⁹ Immigration Act 2016, s 15(6).

⁷⁰ Immigration Act 2016, s 14(4).

⁷¹ Immigration Act 2016, s 14(4)(d).

An individual's failure to give an LME Undertaking, or breach of its terms, enables an enforcing authority to apply to an appropriate court to make an LME Order.⁷² An enforcing authority is strongly encouraged to do so '[s]ave in exceptional circumstances'.⁷³ This is in order to 'preserve the integrity of the LME Undertakings regime and ensure that it acts as a suitably strong deterrent to prevent future offending'.⁷⁴ The Order can stipulate the same terms as the Undertaking for the same period of two years.⁷⁵ The burden of proof for a court issuing an Order is the civil law standard. The court must be satisfied 'on the balance of probabilities, that the person has committed, or is committing, a trigger offence' and it considers it just and reasonable to do so.⁷⁶ A respondent may appeal against an LME Order but this will be expensive and it also reverses the burden of proof.⁷⁷ Breach of the Order is backed up by criminal sanction. It is an offence to fail to comply with the Order without reasonable excuse, punishable by a maximum of two years imprisonment and/or a fine.⁷⁸

Pathway 2 is used where a conviction for a labour market offence has already been secured, for example, by failing to pay the National Minimum Wage or by running an unlicensed employment agency. In these cases there is no need for an LME Undertaking, since the Order is imposed on the basis of an employer being convicted of a relevant labour market

⁷² Immigration Act 2016, s 18(1).

⁷³ Home Office and Department for BEIS, Code of Practice on Labour Market Undertakings and Orders (November 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/572991/Code_of_Practice_Print.pdf> (accessed 1 December 2019) para 2.32.

⁷⁴ *ibid* para 2.32.

⁷⁵ Immigration Act 2016, s 22(1).

⁷⁶ HL Deb vol 768 col 605/06 18 January 2016, Lord Ashton: 'The amendment [to have the criminal standard of proof] would limit the ability of enforcement agencies to invoke the LME order regime to secure compliance as an alternative to straightforwardly prosecuting the person for a trigger offence'.

⁷⁷ Immigration Act 2016, s 24; A. Davies, 'The Immigration Act 2016' (2016) 45 ILJ 431.

⁷⁸ Immigration Act 2016, s 27.

offence.⁷⁹ A court can issue an LME Order on conviction for a period of two years *in addition* to the sentence imposed where it is considered just and reasonable. According to the Code of Practice, LME Orders should contain requirements or prohibitions designed to reduce the risk of non-compliance. Breach of that Order, without reasonable excuse, may lead to criminal proceedings with two years' imprisonment the maximum sentence and/or a fine (the same maximum penalty as for pathway 1).⁸⁰ Both pathways enable enforcement authorities to give 'more robust sanctions in cases where they would only previously be able to levy a fine' as a majority of the relevant trigger offences do not attract a term of imprisonment upon conviction.⁸¹

It is pathway 1 which the Director of Labour Market Enforcement strongly pushes toward in his first strategic report. This stands alongside the Director's encouragement to escalate breaches of LME Undertakings to Orders, and then to prosecution. Unlike the system of Improvement and Prohibition Notices in the Health and Safety at Work Act 1974, where prosecution is very much a last resort, the Immigration Act's regime strongly encourages it.⁸² Pathway 1 stands out as an example of multi-step criminalisation. The criminalization process works in the following way. First is identification of triggering conduct at t_0 , with no specific evidential standard. This provides the relevant conduct to justify an enforcing authority requesting an LME Undertaking at t_1 . Breach of or refusal to give an Undertaking at t_2 can justify an enforcement authority applying for an Order where the civil law balance of

⁷⁹ Immigration Act 2016, s 20.

⁸⁰ Immigration Act 2016, s 27; Home Office and BEIS, *Code of Practice of Labour Market Enforcement Undertakings and Orders* (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/572991/Code_of_Practice_Print.pdf> (accessed 1 December 2019) para 40: 'It is not necessary to wait until a new trigger offence is committed before prosecuting for breach of the LME order—it is enough that one of the measures in the order has not been complied with'.

⁸¹ (n 6) 64.

⁸² HSE, 'Enforcement Policy Statement' (2015) 3.

probabilities standard is used. Breach of the Order at t_3 , without reasonable excuse, enables criminal proceedings. A sentence of imprisonment can be given upon conviction whereas many of the relevant trigger offences do not have a sentence attached on breach (see section 3 below). This structure provides a number of opportunities for non-compliant employers to rectify their position with regard to labour standards protected by this regime of civil preventive orders.⁸³

Pathway one LME Undertakings supported by Orders are coercive preventive measures which seek to prevent the risk of harm. They require careful justification since an employer is not being censured for an offence. A risk assessment must be undertaken in order to impose the restriction or requirement. Rory Kelly identifies ‘coercive risk measures’ as measures which are ‘imposed before a possible harm, with the purpose of avoiding the harm, reducing the likelihood of it occurring, or reducing its severity if it does occur’.⁸⁴ A key question is whether pathway one avoids some of the issues identified by criminal law theorists as problematic with civil preventive orders generally.

So far these measures have been used sparingly. The GLAA issued its first LME Undertaking in April 2018 to a Romanian couple who attempted to supply nine workers to an employment agency in Wolverhampton.⁸⁵ Since then a total of 16 LME Undertakings have been issued by enforcement authorities.⁸⁶ As yet there has been no escalation to an LME

⁸³ Code of Practice (n 80) para 33, an LME Order ‘provides the business with a further opportunity to address non-compliance before facing a potential criminal sanction’.

⁸⁴ Kelly (n 3) 13.

⁸⁵ GLAA, ‘Landmark Powers Used’ (GLAA website, 9 April 2018) <<http://www.gla.gov.uk/whats-new/press-release-archive/090418-landmark-powers-used-to-protect-vulnerable-workers/>> (accessed 1 December 2019).

⁸⁶ ‘Modern Slavery Police Transformation: Programme Annual Report to 31 March 2019’ <<https://www.npcc.police.uk/Publication/2019/Modern%20Slavery%20Annual%20Report.pdf>> (accessed 1 December 2019) 40.

Order on application.⁸⁷ The first Order upon conviction was issued in October 2018 to two defendants convicted of acting as gangmasters without a licence.⁸⁸ The Order is in force for two years and was given alongside a suspended 12-month prison sentence.⁸⁹

3. Critical analysis

So far the unique difficulties posed by the Immigration Act's hybrid civil/criminal law measures have gone without critical scrutiny. In 2018/19 the Director of Labour Market Enforcement promised to 'address any emerging or ongoing issues with the LME Undertakings and Orders regime in the next strategy'.⁹⁰ This came to nought in the 2019/20 report where no substantive engagement was forthcoming.⁹¹ Real concerns can be highlighted about this application of the preventive endeavour at the under-explored intersection of criminal law and labour law. It has been said before about civil preventive orders that the fact that 'criminal justice experts should find themselves politically isolated in their condemnation of such sweeping measures is testament to the political effectiveness of the Government's justification of them'.⁹² While enthusiasm to engage in diverse, multi-faceted regulatory enforcement of labour standards is welcome, criminal lawyers and labour lawyers together ought to lead the way in ensuring that the contours of these measures are clearly delineated and appropriate safeguards around their application are developed.

⁸⁷ D. Metcalf, 'United Kingdom Labour Market Enforcement Strategy 2019/20' (July 2019) 113.

⁸⁸ GLAA, 'Couple Convicted of Labour Exploitation' (GLAA website, 26 October 2018), at <<http://www.gla.gov.uk/whats-new/latest-press-releases/25102018-couple-convicted-of-labour-exploitation/>> (accessed 1 December 2019).

⁸⁹ If these measures are not used in practice it renders the existence of the measure irrelevant in practice, and can arguably be seen as part of a deregulatory agenda.

⁹⁰ (n 6) 65.

⁹¹ (n 87) 29.

⁹² (n 17) 120.

Scrutiny of these measures is overdue if a strong push toward increased use of these measures is to be justified.⁹³

i. Justification

The first concern lies in how these civil preventive orders have been justified. This issue is quickly glossed over in the background documents to the Immigration Act 2016 which rely on the concept of deterrence (alongside reducing evidential constraints) as part of the justification for the tougher measures. According to the 2018/19 strategy document civil preventive orders offer a ‘powerful deterrent effect across the wider labour market’.⁹⁴ But is there any or sufficient evidence to support these claims? There are significant complications surrounding the concept of deterrence which is the subject of an enormous literature in punishment theory. For the purposes of this article a few sharp questions can be raised about the reliance on deterrent reasoning. First, doubts about the preventive *efficacy* of the deterrent function of LME Undertaking and Orders deterrent function can be raised.⁹⁵ Lucia Zedner has argued that appeals to prevention rely on two assumptions: ‘first that it is possible to accurately assess the risk posed by any given individual (both in terms of the gravity of the anticipated harm and the likelihood of it occurring) and second that it is possible to design measures that can effectively avert that risk.’⁹⁶ This leads her to argue that the scales are tipped in favour of preventive measures ‘where the political costs of that harm eventuating’ are most compelling, as opposed to the outcome of scientific risk assessment.⁹⁷ The point is that the preventive efficacy of LME Undertakings or Orders has not—most likely, cannot—

⁹³ Immigration Act 2016, s 25: the Secretary of State may revise the Code of Practice on LME Undertakings/Orders from time to time.

⁹⁴ (n 87) 90.

⁹⁵ P.H. Robinson and J.M. Darley, ‘Does Criminal Law Deter? A Behavioural Science Investigation’ (2004) 24(2) Oxford Journal of Legal Studies 173.

⁹⁶ (n 14) 190.

⁹⁷ *ibid* 190.

be proven, and so their efficacy cannot be their justification. The Director's 2019 report emphasises the need to find statistics on deterrent effect. But even if these statistics can be found, this does not provide sufficient justification for these measures.⁹⁸

Next, the background documents seem to rely on a mixture of individual and general deterrence, but it should be emphasized that these are distinct ideas. Discussing the context of sentencing, Andrew Ashworth notes that 'specific or individual deterrence refers to sentences designed to deter this particular offender from re-offending'.⁹⁹ In the context of sentencing, this means that the severity of sentences is escalated. By contrast, general deterrence is concerned with bolstering 'the underlying deterrent effect of the criminal justice system'.¹⁰⁰ This could be by increasing a sentence for a crime 'above a proportionate sentence'.¹⁰¹ This is known as marginal deterrent effect. Ashworth examines how marginal general deterrence is meant to work, and whether there is evidence that it does work. Ashworth concludes that 'one cannot simply assume that, if the legislature or a judge announces an increased sentence for deterrent purposes, that sentence will have a deterrent effect'.¹⁰²

This leads to a crucial point. Even if 'the potential offender is aware of the deterrent sentence, the hydraulic relationship between deterrent sentences and reduced crime rates may

⁹⁸ (n 14) 191: 'There are two objections to pursuing the efficacy question...One is that to call into question the efficacy of control in the community is to invite ever great punitiveness, a danger all too familiar from debates about resort to community penalties over imprisonment. The second objection is that even if it could be said that Control Orders are effective, this would not provide sufficient justification if the order is in principle wrong....efficacy should not count in our arguments because it is not a justification in its own right'.

⁹⁹ A. Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' [2019] Criminal Law Review 564, 566.

¹⁰⁰ *ibid* 566.

¹⁰¹ *ibid* 569.

¹⁰² *ibid* 569.

be thwarted by a low risk of detection'.¹⁰³ We can query whether it is the size of the penalty or the probability of detection which is most important in relation to hybrid civil/criminal law measures. It may be that these measures are closely connected to concerns around *enforcement* offering a means of better equipping enforcement agencies.¹⁰⁴

ii. Substantive issues

Next, I highlight five substantive concerns about the Immigration Act's LME Undertakings and Orders. These hybrid civil/criminal law measures are complex—examples of multi-step criminalisation which blur the link between risk measures and punitive measures—and their compliance with core principles of criminalisation can be enhanced in a number of ways. The following five matters should be clarified by the Director of Labour Market Enforcement or the Secretary of State where it is within their remit.

A. The relationship between trigger offences and repeated breaches of labour standards should be made clearer.

For pathway one, an enforcing authority's belief that a trigger offence has been or is being committed is the gateway to requesting an LME Undertaking (recall that this need not be proven to a particular standard of proof). Neglect to respond to this request, or non-compliance with its terms leads to escalation to the Order (often on the same terms as the initial Undertaking). Only at this point does the civil law standard of proof come into play, in order to justify coercive criminal law measures. The court must be satisfied 'on the balance of probabilities, that the person has committed, or is committing, a trigger offence' and it

¹⁰³ *ibid* 569.

¹⁰⁴ On deterrent effect, see Kelly (n 3) 187.

considers it just and reasonable to do so.¹⁰⁵ Breach of an Order is backed up by criminal sanction. We can already see how critical the issue of trigger offences really is. Much hinges on the selected trigger offences and an enforcing authority's belief that they have occurred.

Out of eleven possible trigger offences, only the three offences in the Gangmasters (Licensing) Act 2004 are imprisonable offences.¹⁰⁶ The most serious offence, attracting the highest maximum penalty of ten years' imprisonment, is found in section 12 of the Gangmasters (Licensing) Act 2004.¹⁰⁷ It is an offence to act as a gangmaster in possession of false documents 'with the intention of inducing another person to believe that he or another person [is] acting as a gangmaster'.¹⁰⁸ The offences found in sections 13 and 18 of the 2004 Act are the only other trigger offences which may attract a custodial sentence on conviction. The section 13 offence, penalising those who enter into an arrangement with an unlicensed gangmaster, holds a maximum term of imprisonment of 51 weeks and/or a fine on conviction.¹⁰⁹ This maximum penalty is shared by the section 18 offence of obstructing a GLAA officer in the course of their duties. The remaining eight trigger offences span the National Minimum Wage Act 1998, the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003. They are all non-

¹⁰⁵ HL Deb vol 768 col 605/06 18 January 2016, Lord Ashton: 'The amendment [to have the criminal standard of proof] would limit the ability of enforcement agencies to invoke the LME order regime to secure compliance as an alternative to straightforwardly prosecuting the person for a trigger offence'.

¹⁰⁶ Many of the selected trigger offences do not have a prison sentence attached upon convicted. However, breach of an LME Order, without reasonable excuse, can lead to a maximum sentence of two years' imprisonment, a fine or both. The constitutional objection is that if Parliament had wished for a sentence of imprisonment to be attached, it would have legislated as such.

¹⁰⁷ Gangmasters (Licensing) Act 2004, s 12.

¹⁰⁸ Gangmasters (Licensing) Act 2004, s 12(2).

¹⁰⁹ Gangmasters (Licensing) Act 2004, s 13(1)(2).

imprisonable offences, with a maximum penalty of an unlimited fine.¹¹⁰ Only 14 prosecutions have been made since the NMW Act's implementation, with four prosecutions in 2016/17 and one in 2017/18.¹¹¹ The two offences found in the 1973 Act—of failing to comply with a prohibition order, or of making a false entry into a formal record—are also punishable with a fine.¹¹²

A strong deterrence rationale was placed front and forward for LME Undertakings and Orders when the Immigration Bill was debated:

The regime provides a means of introducing custodial penalties for a number of labour market offences which are currently only punishable with a fine, the aim being to better deter rogue businesses from exploiting their workers and to divert them from further offending.¹¹³

These coercive preventive measures—and pathway one specifically—exist to reduce the risk of that harm occurring or decrease its severity. One immediate concern is that the selected trigger offences do not identify conduct which poses the greatest risk of labour exploitation.¹¹⁴ There are notable omissions from the list of triggering conduct for

¹¹⁰ NMW Act 1998 s 31(1)-(5). All of which can be committed by a body corporate if it is 'committed with the consent or connivance of an officer of the body' or is 'attributable to any neglect on the part of such an officer', National Minimum Wage Act 1998, s 32(2).

¹¹¹ Employment Law Brief 1096 (July 2018) 12.

¹¹² Employment Agencies Act 1973, ss 10, 11. It is also an offence for an employment agency or business to fail to comply with a regulation found in the Conduct of Employment Agencies and Employment Businesses Regulations 2003, or to obstruct an officer responsible for its enforcement. Employment Agency Standards Inspectorate, 'Summary Guidance on the Employment Agencies Legislation and Our Service Standards' (2007). These offences are punishable by a fine.

¹¹³ (n 39) para 2.5.

¹¹⁴ *ibid* para 7: while preventing modern slavery is within both the GLAA and the DLME's remit, several Modern Slavery Act 2015 offences are 'too serious to be included' in the LME

application for an LME Undertaking. This includes the underpayment of holiday pay and working time. Moreover, the DLME's report highlights that the Undertaking and Orders regime only applies to the issue of an employer's status as licensed or unlicensed via the three offences identified in the Gangmasters (Licensing) Act 2004. But 'the licensing conditions which detail labour market obligations' do not form a relevant trigger offence and are therefore excluded.¹¹⁵ As David Metcalf notes, this limits opportunities to use Undertakings to penalize non-compliance with this labour standard.¹¹⁶

Another key consideration is the process by which an enforcing authority or court assesses that there is a risk that harm is going to occur. The harm in question may be exploitation through financial harm, physical harm, psychological harm, and so on. Throughout the background documents a link is drawn to labour exploitation as the relevant harm caused through serious *and persistent* breaches of labour standards. An enforcing authority or court must believe that the trigger offence has been, or is being, committed (and in the court's case, this must be proven on the balance of probabilities). Surely persistent non-compliance with the relevant labour standards increases the risk of the harm eventuating? Surprisingly, especially in the light of the background documents, conduct which exploits workers when undertaken deliberately and persistently is given no special credence in the legislation. The preventive reach of LME Undertakings ranges widely to justify prohibitions, restrictions or requirements being placed on employers for relatively low-level labour standard infractions. No further information is given as to *how often* an infraction has to be committed before an enforcing authority can request an Undertaking. The selection of relevant trigger offences is a matter for Parliament and the Secretary of State. Nevertheless, the Director's next report

Undertaking/Orders regime, especially given the severity of their maximum sentences (life imprisonment for Modern Slavery Act 2015, ss 1, 2).

¹¹⁵ (n 6) 64.

¹¹⁶ *ibid* 64.

could usefully highlight, and offer clarification on, how the existing regime of Undertakings is to work. The following point has been too swiftly overlooked with regard to Undertakings. If it is *repeated* violation of a labour standard which increases severity and forges a link to labour exploitation—argued throughout the background documents—why is there no mention of the need for persistence in violating a particular labour standard in the legislation or in the accompanying Code of Practice?¹¹⁷ The value of clarifying how assessing the risk of the behaviour should be undertaken is paramount.

B. How is the Code of Practice's guidance that a number of other factors 'should be taken into account by the enforcing authority before seeking an undertaking from a business' to be interpreted?¹¹⁸ Does this create additional requirements to an enforcement authority establishing a belief that a trigger offence has been or is being committed? Or does this concern whether the content of an LME Undertaking is just and reasonable?

An enforcing authority invites an employer to give an LME Undertaking based on their *belief* that a trigger offence has been or is being committed.¹¹⁹ This sets the standard of proof lower than the criminal standard. Reasons for this belief must be provided, but a great deal of discretion is given to the enforcing authority.¹²⁰ This bears similarities to the regime of Improvement and Prohibition Notices in the Health and Safety at Work Act 1974.¹²¹ The standard which applies to LME Undertakings is a lower standard of proof than that required for Slavery and Trafficking Prevention Orders (STPOs) and Slavery and Trafficking Risk

¹¹⁷(n 39) 25: The aim of LME Undertakings and Orders is to 'make it easier for law enforcement to be able to deal with employers who subject their workers to more serious forms of exploitation by deliberately, persistently and brazenly committing breaches of labour law and failing to take remedial action'.

¹¹⁸ (n 80) para 17.

¹¹⁹ Immigration Act 2016, s 14(2).

¹²⁰ Immigration Act 2016, s 14(2)(b).

¹²¹ Health and Safety at Work Act 1974, ss 21, 22.

Orders (STROs).¹²² STPOs and STROs require that a court is ‘satisfied so that it is sure that behaviour or actions giving rise to the application took place. This is an enhanced civil standard of proof, which is akin to the criminal standard of proof of being sure beyond reasonable doubt’.¹²³

A puzzle which urgently needs to be addressed concerns the Code of Practice’s guidance that a number of other factors ‘should be taken into account by the enforcing authority before seeking an undertaking from a business’.¹²⁴ These include: the number of trigger offences believed to have been committed; any previous enforcement action; the number of workers affected by the offence; harm, physical or otherwise to workers; the amount of money due to workers; whether the breach is believed to have been committed recklessly or intentionally as opposed to by error; the level of recklessness that led to breach; and whether the enforcing authority believes that the breach was committed intentionally. These factors are repeated in EAS’s guidance on the application of LME Undertakings.¹²⁵ But it is unclear whether these factors create *additional* requirements to an enforcement authority establishing a belief that a trigger offence has been or is being committed, as opposed to establishing that an Undertaking itself is just and reasonable. The question of what this applies to should be addressed in the Director’s next report.

It is critical how this element of belief will be interpreted in practice and thought should be given to this in the Director’s future reports. Enforcement bodies inevitably carry considerable discretion in enforcement. Nevertheless, there are reasons to be nervous about

¹²² Home Office, ‘Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders Under Part 2 of the Modern Slavery Act 2015’ (April 2017) para 3.2.

¹²³ *ibid* para 3.2.2.

¹²⁴ (n 80) para 3.17.

¹²⁵ Department for Business, Energy and Industrial Strategy, ‘Employment Agency Standards Inspectorate (EAS): Enforcement Policy Statement’ (June 2017) 9.

the enforcement authorities' exercise of their considerable discretion. The preventive offence of employing an illegal worker has been accompanied by reports of collusion between employers and immigration enforcement.¹²⁶ Notably none of the procedural safeguards of the criminal law are available where an LME Undertaking is requested on the basis of an enforcing authority's belief in a trigger offence.¹²⁷ The circumstances in which an Undertaking can be requested ought to be put as clearly as possible.

Some criminal lawyers would go further in arguing for a bolstered necessity requirement.¹²⁸ For Kelly this means that the civil evidential standard—on the balance of probabilities—is used to assess whether 'there is a high likelihood of reoffending absent intervention, the relevant intervention will reduce the likelihood substantially, and no less restrictive intervention would have similar effect'.¹²⁹ This is the evidential standard used when considering an LME Order on application, but there is no inclusion of a likelihood test or a no less restrictive intervention in that assessment either.

C. The breadth of triggering conduct for LME Undertakings through inchoate versions of trigger offences should be reconsidered, as well as the role of secondary parties.

An as-yet unnoticed feature of these measures is the breadth of triggering conduct on which an enforcement authority can request an Undertaking. Three inchoate offences qualify as relevant trigger offences—attempt, conspiracy, and encouraging and assisting an offence

¹²⁶ Immigration Act 2016, s 35. Corporate Watch, 'Snitches, Stings, and Leaks: How "Immigration Enforcement" Works' (30 August 2016), at <https://corporatewatch.org/wp-content/uploads/2016/08/CW%20immigration%20raids%20report_0.pdf> (accessed 1 December 2019); ICIBI, 'An Inspection of the Intelligence Management System: February-April 2014' (2014).

¹²⁷ *ibid* 88-89.

¹²⁸ (n 3) 190; S. Shute, 'Rationalising Civil Preventive Orders: Opportunities for Reform' in J.J. Child and R.A. Duff, *Criminal Law Reform Now: Proposals and Critique* (Bloomsbury 2018) 37, 63.

¹²⁹ (n 3) 190.

identified as a trigger offence.¹³⁰ The inchoate offence of incitement is included in section 14(4)(g) but this is surely a drafting mistake given that the offence of incitement was abolished by Part 2 of the Serious Crime Act 2007. A secondary party's involvement will also suffice, so long as this amounts to aiding, abetting, counselling or procuring the principal's offence, or by offering encouragement or assistance.¹³¹ The striking point is that the regime of LME Undertakings regulates *suspected breaches of inchoate versions* of the labour offences identified as trigger offences. An enforcement authority's belief, supported by reasons, is sufficient grounds to request an Undertaking. This extends to trigger offences in their inchoate form. The Immigration Act's legislative scheme permits an enforcement agency to apply for an Undertaking on the basis of its belief that an *inchoate* version of a trigger offence has been or is being committed. In practice, this could mean that an employer who *attempts* to commit an offence under the NMW Act 1998 could be held as having committed a trigger offence and asked to give an Undertaking, on the enforcing authority's *belief* that this attempt has been or is being committed. The inchoate element, combined with the aspect of belief, produces an extremely wide preventive remit around LME Undertakings.¹³²

The constitutional objection is that this inchoate conduct may not be a precursor of conduct which amounts to non-compliance with the relevant labour standards identified as 'trigger offences'. It places the whole weight of discretion to decide this matter on an enforcing authority who is not an elected representative.

¹³⁰ Immigration Act 2016, s 14(4)(e)(f).

¹³¹ Immigration Act 2016, s 14(4)(h).

¹³² See A. Ashworth in 'Attempts' in J. Deigh and D. Dolinko (eds), *The Oxford Handbook of the Philosophy of Criminal Law* (Oxford: OUP 2011).

It is not unusual for so-called ‘regulatory offences’ to be defined using an inchoate mode. This may be because there is no offence ‘which penalises serious harm which actually ensues as opposed to the risk of that harm’.¹³³ But is this justified where the criminal sanction attached to breach of an LME Order is a sentence of imprisonment, in most cases far exceeding the maximum penalties of the trigger offences themselves? This is a matter for Parliament, but direction could be given in an amended Code of Practice regarding examples as to when it is considered acceptable to apply for an LME Undertaking on the basis of an inchoate version of a trigger offence.

More ought also to be said regarding scope for secondary parties to be implicated in breach of labour standards encompassed in the trigger offences, if the enforcing authority believes that this is the case. On the one hand this could be viewed as a positive development.¹³⁴ Recalcitrant companies could potentially be asked to give an Undertaking if their involvement can be demonstrated in the principal’s offence, or by way of offering encouragement or assistance. This may be one route to improving labour standards. On the other hand, this could be fiendishly difficult to enforce. It may be more convincing to adopt a model which, for example, requires companies to demonstrate compliance with labour standards ‘in their purchasing decisions and to exclude contractors that lack the capacity to protect labour rights in their supply chain’.¹³⁵

¹³³ C. Wells, *Corporations and Criminal Responsibility* (Oxford: OUP 2001) 5.

¹³⁴ A. Bogg and P.S. Davies, ‘Accessories at Work’ in A. Bogg, J. Collins, M. Freedland and J. Herring (eds) *Criminality at Work* (OUP 2020).

¹³⁵ FLEX, ‘Public Procurement to Prevent Human Trafficking and Forced Labour’ <<http://www.labourexploitation.org/publications/public-procurement-prevent-human-trafficking-and-forced-labour>> (accessed 1 December 2019). See also Independent Review of the Modern Slavery Act, ‘Second Interim Report: Transparency in Supply Chains’ (January 2019).

D. Pushing for further illustrative examples of LME Undertakings/Orders which comply with proportionality standards.

The range of restrictions imposed by an LME Undertaking/Order must be proportionate to the aim being pursued. These requirements are based on ideas of reducing harm proportionately and reasonably. This element of proportionality is required in the light of the House of Lords' decision in *McCann* which considered the terms on which an ASBO were imposed.¹³⁶ It must also be possible to enforce compliance.¹³⁷ The Code of Practice gives several examples of hypothetical Undertakings.

GLA - A short period of operating without a licence, where there is no exploitation of workers, or any identified non-compliance with labour market legislation including the GLA licensing standards, might result in a decision not to prosecute but to issue an undertaking that a person/business applies for a licence within a given period, does not continue to operate illegally during that time, and corrects any identified non-compliance before a licence is granted.¹³⁸

Compared to the list of nine possible illustrative examples of STPOs and STROs in guidance notes to the Modern Slavery Act 2015, the guidance notes on LME Undertakings/Orders appear sparse. Can more be done on this? Have, as Rory Kelly argues, more recent preventive orders 'been drafted with an awareness of the relation of the severity of the measure and the safeguards preceding its imposition by either requiring proof beyond reasonable doubt for the order to be imposed or, arguably, having less severe consequences

¹³⁶ [2002] UKHL 39.

¹³⁷ (n 80) para 18.

¹³⁸ *ibid* para 21.

on breach’?¹³⁹ It is highly doubtful that preventing an employer from engaging in an inchoate version of a trigger offence is a proportionate measure. At the very least, we can raise a serious question mark around this.

E. Sidelining LME Orders on conviction on the basis of not being able to go beyond the sentence given should be reconsidered.

An LME Order can be made on conviction of a trigger offence in addition to the sentence imposed.¹⁴⁰ The Order can be for a maximum of two years. The Director of Labour Market Enforcement has argued that:

The difficulty with orders on conviction however is that LMEU/Os have effect for a maximum of two years. This means that an order on conviction becomes redundant where the sentence imposed is in excess of this time period.¹⁴¹

The Director’s concern is that Orders are for a shorter period of time than for some maximum sentences of relevant trigger offences. But it is not principled to sideline LME Orders on conviction on this basis. The limitation of two years meets proportionality requirements. It is a core principle of criminalisation that the intensity and scope of restriction placed on an individual ‘should bear a reasonable relationship to the seriousness of the wrongdoing that D is proved to have done’.¹⁴² The alternative is to impose constraints upon employers which run for very long terms and which exceed the maximum penalties of the offences successfully prosecuted. This is pertinent to the LME Orders on conviction regime, given that only the trigger offence found in section 12 of the Gangmasters (Licensing) Act 2004 has

¹³⁹ R. Kelly, ‘The Right to a Fair Trial and the Problem of Pre-Inchoate Offences’ (2017) EHRLR 596.

¹⁴⁰ Immigration Act 2016, s 20.

¹⁴¹ (n 6) 64.

¹⁴² (n 21) 227.

a custodial term higher than two years. The Director should distance himself from this reasoning in the next iteration of his strategy on proportionality grounds.

Moreover, there is a risk that the Director's push away from LME Orders on conviction (pathway two) could be too readily linked with a preference for the lower evidential standards of LME Orders on application (pathway one). For LME Undertakings supplemented by Orders on application, no particular standard of proof is required when establishing an enforcing authority's 'belief' in a trigger offence. On application to a court, an Order can be granted if it is satisfied, on the balance of probabilities, that a person has committed or is committing a trigger offence, and it is just and reasonable to do so.¹⁴³ Breach of the Order, without reasonable excuse, must be proven to the criminal standard of beyond reasonable doubt. By contrast, LME Orders on conviction require conviction of a labour market offence (i.e. proven beyond reasonable doubt) in order to impose the Order, where it is considered just and reasonable. Like pathway one, breach of the Order must be proven to the criminal standard. While the evidential requirements of both pathways have been constitutionally approved by Parliament, LME Undertakings supplemented by Orders provide a number of opportunities for non-compliant employers to demonstrate compliance with labour standards protected. They may therefore be preferable on constitutional grounds.

4. Reconceptualizing Civil Preventive Orders at the Criminal Law/Labour Law Interface

There is still more to say about the Immigration Act's civil preventive orders than to pinpoint precisely, important as this is, the ways in which they fall short of principles of liberal

¹⁴³ Immigration Act 2018, s 18(1).

criminal law.¹⁴⁴ These are measures with a distinct hybrid civil/criminal structure, granted under civil evidential rules. Breach of their prohibitions or requirements is an offence. Analysing civil preventive orders at the criminal law/labour law interface requires a richer theoretical frame, which acknowledges the special complexity of preventive criminalisation.

Recent critical work in criminal law has emphasised how important it is to assess the criminal law's social function in securing civility, including how it is enforced. Henrique Carvalho has argued that 'The criminal law can only be understood through its relation with the function it performs in society and the place it has in the political constitution of that society'.¹⁴⁵ It is illuminating to question the legitimacy of coercive powers 'in the context of a particular society at a particular time'.¹⁴⁶ We need to look at the social function/s that the criminal law serves rather than the ideal principles that criminal law should adhere to. This insight is powerful when considering the preventive reach of the criminal law in the sphere of work relations. It is a political and economic context. It matters in the work context how preventive measures operate in practice and are enforced, not only how they are justified against normative principles in the abstract. For example the worker-repressive effects of the preventive offences in ss.34 and 35 of the Immigration Act 2016 have been intensified because the offences have been enforced in the context of a zealous hostile immigration agenda.¹⁴⁷

¹⁴⁴ (n 17).

¹⁴⁵ (n 1).

¹⁴⁶ P. Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012) (Introduction): 'Though this question is concerned with the normative dimension of law, it invokes a 'social-scientific' concept of legitimacy as opposed to a strictly normative one'.

¹⁴⁷ See A. Aliverti, 'Making People Criminal: the Role of the Criminal Law in Immigration Enforcement' (2012) 16 *Theoretical Criminology* 417; A. Aliverti, 'Doing the Dirty Work: Labour at the Intersections of Criminal Law and Immigration Controls' in A. Bogg, J. Collins, M. Freedland and J. Herring (eds), *Criminality at Work* (OUP 2020).

This section builds on and develops two literatures. The first is Peter Ramsay's analysis of civil preventive orders as an institutional response to behaviour which fails to reassure. Moving this argument further, the criminal law gives embodiment to a form of 'civil order' and it has not been sufficiently addressed that labour law contributes to that form. Interaction between these areas of legal regulation is fluid and evolving and involves the cross-fertilisation of ideas. A second key issue is the limitations of the preventive endeavour in the labour context. Labour lawyers may regard civil preventive orders as innocuous and regulatory: an example of 'worker-protective' criminalization with 'presumptive legitimacy' to the extent that they enhance employer scrutiny and push back against worker subordination.¹⁴⁸ It is important that effective labour laws serve this purpose, backed up by strong trade unions. Building on recent work by Henrique Carvalho in criminalisation theory, I shed light on the ambiguity of civil preventive orders from a criminal law perspective.

Peter Ramsay's work provides a useful starting point for analysis. His argument is that there is more to hybrid civil/criminal measures than simply 'unprincipled political opportunism'.¹⁴⁹ Rather, they are borne out of endorsement of underlying norms embedded in contemporary political thought. The acceptance of certain norms is what gives civil preventive orders endorsement—even legitimacy—and shields these measures from normative critique. The salient norm underlying several prominent political theories, according to Ramsay, is the norm of 'vulnerable autonomy'.¹⁵⁰ He argues it is found in a broad church of advanced

¹⁴⁸ A. Bogg and M. Freedland, 'Criminality at Work: A Framework for Discussion' in A. Bogg, J. Collins, M. Freedland and J. Herring (eds), *Criminality at Work* (OUP 2020).

¹⁴⁹ (n 17) 111.

¹⁵⁰ J. Anderson and A. Honneth, 'Autonomy, Vulnerability, Recognition and Justice' in J. Christman and J. Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (CUP 2005) 145.

liberal theories, including the Third Way, communitarianism and neo-liberalism.¹⁵¹ This is the crux of the argument:

...each of these influential theories contains the assumption that the individual's autonomy is intrinsically vulnerable to the spontaneous preferences of others and it is this vulnerability which lays the normative basis for liability to the CPOs, the liability to have behaviour which fails to reassure controlled by a preventative order.¹⁵²

Hybrid civil/criminal measures institutionalise a norm of vulnerable autonomy. They do this by placing 'liability on those who consistently fail to reassure others'.¹⁵³ To the extent that these theories are accepted, they 'provide a legitimating context for the substantive law of the [civil preventive order] which institutionalises the protection of this norm'.¹⁵⁴

I have argued in this article that the hybrid civil/criminal preventive measures in the Immigration Act 2016 have assumed an easy legitimacy without real scrutiny. Ramsay's 'social-scientific' analysis is a rich prism through which to explore this extension of preventive criminalization to regulating personal work relations.¹⁵⁵ There is considerable scope in the Immigration Act's legislative scheme to offer reassurance to workers and to other employers.¹⁵⁶ An enforcing authority is given broad discretion to apply for an LME Undertaking in circumstances where it believes that a trigger offence has been or is being committed. They need only give a reason. This request can also be made on the basis of a

¹⁵¹ (n 17) 112.

¹⁵² *ibid* 131.

¹⁵³ *Ibid* 112.

¹⁵⁴ *Ibid* 131-32.

¹⁵⁵ *Ibid* 132, those failings 'which Simester and von Hirsch regard as weakness [in civil preventive orders] reappear as its strengths'.

¹⁵⁶ Immigration Act 2016, ss.14-30.

belief that an inchoate version of a trigger offence has been or is being committed. There is no need for persistent breach in the legislation of guidance notes, despite the background documents using this as a justification for the measures. Escalation to an LME Order requires a court to use the civil standard of proof, with criminal sanctions given upon breach. Added to this is the Director of Labour Market Enforcement's strong push toward their increased use on the basis of deterrence. The sum is to offer enforcement agencies opportunity to put a brake on, rather than consolidating, employer power. Alan Bogg and Mark Freedland would argue these measures are presumptively legitimate from a labour law point of view.¹⁵⁷

Analysing the use of civil preventive orders in the context of work relations requires a more developed theoretical lens. Building on Lindsay Farmer's seminal work, the argument is as follows: the criminal law gives embodiment to a form of 'civil order', reassurance forms part of the purpose of civil order and the institution of labour law contributes to that form. First is the importance of civil order. Civil order is a fluid idea.¹⁵⁸ It does not embody one shared or accepted norm, rather it represents the ebbs and flows of the institution of the criminal law. The evolution of civil order can be charted over time.¹⁵⁹ This includes a coordinating function which involves adjudication between competing norms in order to 'regulate social relations and [to] settle disputes'.¹⁶⁰ How well the criminal law fulfils this coordination function has the capacity to hinder or grow trust between individuals depending on its success.¹⁶¹ Farmer's idea of civil order concerns how 'selfhood and social and political

¹⁵⁷ (n 148).

¹⁵⁸ L. Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (OUP 2016) 63.

¹⁵⁹ *ibid* 300.

¹⁶⁰ *ibid* 41; (n 158) 299: Civil order involves 'the coordination of complex modern societies composed of a range of entities or legal persons that are responsible, in a range of different ways, for their own conduct, for the wellbeing of others, and for the maintenance of social institutions'.

¹⁶¹ *ibid* 299.

organisation' is actualized.¹⁶² At the same time, it pays attention to the fact that criminal law is enacted within a wider institutional, political and social legal order. The context in turn shapes criminal law in any particular period. The institutional function of criminalization is directly influenced by the context of citizenship. In building interpersonal relationships of trust, a reassurance function forms part of the purpose of civil order.

Developing this argument further, civil order is a shared endeavour between criminal law and labour law. Both criminal law and labour law shape normative order as embodied by the criminal law. They may do so in ways that can engender or diminish trust in that institutional order. Criminal law and labour law interact with and use each other. This means that we need to consider political theories underlying criminalization in the context of personal work relations. Here there is no stable commitment to 'vulnerable autonomy'. For example, Alan Bogg has powerfully argued that the Trade Union Act 2016 has taken labour law beyond neo-liberal ideology.¹⁶³ Is there a concern to offer reassurance 'in building and reinforcing trust between individuals' given that this is part of the purpose of civil order as embodied by criminalization practices?¹⁶⁴

This is a deregulated context which fails to reassure. There are many systemic issues in the regulation of work relations—some which involve criminalisation and some which do not—which fail to reassure. For example, the Immigration Act 2016's civil preventive orders were implemented in a context involving difficulties in ensuring access to justice (through

¹⁶² Carvalho (n 1) 105-06.

¹⁶³ A. Bogg, 'Beyond Neo-liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) *Industrial Law Journal* 299.

¹⁶⁴ (n 158) 299.

Employment Tribunal fees¹⁶⁵ and availability of Legal Aid¹⁶⁶) and enforcement of paid awards.¹⁶⁷ Individualised criminalisation using civil preventive orders can be seen as a political/legal corrective to attacks on the collective ability to stand up for labour standards represented by the Trade Union Act 2016. This may explain the strong advertisement of their existence and push toward their use, despite their scant use so far. These preventive measures have been implemented in the context of a socio-political system which shortcuts the collective voice and uses the criminal law repressively in that context. This reveals a deep ambivalence at play. Is the preventive endeavour being used to dull the effects of systemic and institutional issues, and attacks on collective voice/interests/the right to organise? In turn this puts more onus on the institution of criminal law to reassure.

Civil preventive orders may be viewed as an attempt to institutionalise reassurance in a context of deregulated work relations. But we must interrogate a crucial ambivalence within criminal law theory. A second strand of argument is that criminal lawyers are uniquely placed to shed fresh light on the limitations of the preventive endeavour—and hybrid

¹⁶⁵ The Fees Order SI 2013/1893 was introduced by the Coalition government in 2013. This led to a stark fall in claims to ETs. It was left to the Supreme Court in 2017 to rectify the resulting rule of law failing, *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

¹⁶⁶ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 9(1)(a); Sched 1, Pt 1, para 43. Since 2012, the Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) has ensured that civil legal aid is no longer available in matters relating to employment law, with the exception of claims involving discrimination under the Equality Act 2010. The consequences of the unavailability of legal aid are clear to see in the steadily increasing rate of self-representation in ETs, which almost doubled between 2016/17 and 2017/18 Ministry of Justice, 'Tribunals and Gender Recognition Statistics Quarterly, April to June 2018' (Sep 2018) 9 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763679/Tribunal_and_GRC_statistics_Q1_201819_revised_.pdf> (accessed 9 December 2019).

¹⁶⁷ L. Adams, A. Moore, K. Gore and J. Browne, 'Research into Enforcement of Employment Tribunal Awards in England and Wales (Ministry of Justice Research Series 9/09, 2009); Department for Business, Innovation & Skills, 'Payment of Tribunal Awards: 2013 Study' (2013). To illustrate, 53% of those surveyed in 2009 had not been paid in full 42 days after a judgment had been issued in their favour, a figure that dropped only to 49% by the time of the 2013 study, L. Adams, A. Moore, K. Gore and J. Browne, 'Research into Enforcement of Employment Tribunal Awards in England and Wales', Ministry of Justice Research Series 9/09 (2009) 30; Department for Business, Innovation & Skills, 'Payment of Tribunal Awards: 2013 Study' (2013) 6.

civil/criminal law measures specifically—in regulating personal work relations. Civil preventive orders cannot wholeheartedly reassure. A more nuanced view of civil preventive orders in the work context is needed rather than viewing them as a straightforward means of putting a brake on employer power.

Henrique Carvalho has highlighted a persistent tension in criminal law theory between the protection of an individual’s liberty on the one hand and their security on the other.¹⁶⁸ The tension stems from the central place given to subjective responsibility in liberal and neo-liberal criminal law theories. An individual must have sufficient capacity to engage in decision-making as well as fair opportunity to redirect their conduct in order to be held responsible for it.¹⁶⁹ Deference to subjective liability sits alongside ‘a minimalist approach to criminalization’.¹⁷⁰ However, the reality has been quite different—a preoccupation with criminalization as the means of securing social order.¹⁷¹ This is because the criminal law views the individuals it seeks to regulate as both potentially responsible and as potentially dangerous ‘to the conditions for mutual benefit in society.’¹⁷² Carvalho argues that the inherent tension in liberal law between responsibility and dangerousness is irresolvable—a constant feature of the liberal endeavour, ‘mediated by the environment of citizenship’.¹⁷³

From this tension between respecting subjective responsibility and protecting citizens from dangerous comes the criminal law’s ability to reassure in the first place. The tension

¹⁶⁸ (n 1) chs 1-2.

¹⁶⁹ HLA Hart, *Punishment and Responsibility* (OUP 2008) ch 2.

¹⁷⁰ (n 1) 18. Cf Farmer (n 158) 192 who argues that a focus on subjective responsibility has led to the expansion of the criminal law.

¹⁷¹ (n 1) 18.

¹⁷² *ibid* 18.

¹⁷³ (n 1) 35. Duff (p. viii) writes in the forward to *The Preventive Turn in Criminal Law* (n 1) that we ‘should recognize the ways in which that approach concedes the ground for new ‘anti-liberal’ forms at the same time as it seeks to criticize them’.

‘grounds the ideological efficiency of the reassurance function of the criminal law’.¹⁷⁴ A reassurance function is critical to the maintenance of civil order, and this is strongly linked to preventive offences.¹⁷⁵ The preventive turn in criminalisation has an uneasy relationship with the function of reassurance. Preventive offences display ambivalence in that they can breed distrust as well as provide it. If a preventive offence is enacted it signals to other citizens that a preventive offence is needed in order to reassure and to create the conditions for trust.¹⁷⁶ An atmosphere of distrust and recognition of vulnerable autonomy acts as a driver to further state action in order to reassure. The result ‘of the intense vulnerability of autonomy in the preventive turn’, Carvalho argues, is to invert ‘the relation between trust and assurance predicated by the liberal model: instead of assuming that we can trust each other unless an exceptional situation leads to lack of assurance, preventive criminal offences maintain that we cannot trust others unless we are sufficiently (re)assured’.¹⁷⁷

What of the Immigration Act 2016’s civil preventive orders? Is the value of security over-prioritised in the implementation of these measures, leading to more coercion, as part of the criminal law’s reassurance function? We have seen in recent times a selective reliance on vulnerability: certain parts of community need to be reassured that they can trust, while the criminal law is used repressively against others. This is to entrench a ‘them’ and ‘us’ mentality, linking labour laws and criminal law to culturing a hostile environment.¹⁷⁸

¹⁷⁴ (n 1) ch 2.

¹⁷⁵ *ibid* 46.

¹⁷⁶ *ibid* 46.

¹⁷⁷ (n 1) 44. This is linked to the waning of the state’s political authority, see Zedner and Ashworth (n 2) 5-6: ‘Criminal laws that lack sovereign authority present us with the paradox of a self-defeating insecurity state—a state that upholds the right to security through laws that have as their substantive premise the law’s own lack of authority’.

¹⁷⁸ FLEX, ‘Hostile Environment Undermines UK Government’s Modern Slavery Agenda’ (1 May 2018) <<https://www.labourexploitation.org/news/hostile-environment-undermines-uk-government%E2%80%99s-modern-slavery-agenda>> (accessed 1 December 2019); Home Office Delivery of Brexit: Immigration Contents (9 February 2018)

Invoking the language of security, Carvalho argues that threats are ‘externalised’, rather than accepted ‘that they are tied to the tension at the heart of the liberal endeavour’.¹⁷⁹ In fact ‘the discourse on security is the predominant ideological device used in order for the state to manage and suppress the insecurity of its current socio-political conditions. Through this discourse, liberal society’s problems are reinterpreted as problems of security’.¹⁸⁰ Carvalho’s work has highlighted that the liberal endeavour is beset by a basic tension between dangerousness and responsibility, prompting over-enthusiastic criminalization practices with a focus on prevention.

Most obviously this can be seen in ‘hostile’ criminalization and enforcement, such as that encapsulated by the revamped offences of illegal working and employing an illegal worker.¹⁸¹ But another result can be to use preventive criminalization to intervene in regulating personal work relations in piecemeal and non-joined-up ways. For example, existing civil law measures were not shown to be inadequate before LME Undertakings and Orders were enacted.¹⁸² There was already a strong deterrent regime in place in relation to the trigger offences covered by these preventive measures, including the risk of inspection and civil law penalties. It was not scrutinised if there was still a place for civil preventive orders alongside these other measures too. This point is pertinent given the Director of

<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/421/42106.htm#_idTextAnchor067%3E> accessed 9 December 2019. (n 1) 186: ‘the state portrays a rather contradictory character, as it is forced to heavily intervene in civil society in order to ‘discharge the reassurance function’ at the same time as it must somehow maintain that such intervention is necessitated by problems which are not internal to liberal society, but instead due to ‘external’ circumstances—migration, terrorism and the dangerousness inherent to some offenders are just a few examples.’

¹⁷⁹ (n 1) 186.

¹⁸⁰ *ibid* 186.

¹⁸¹ Immigration Act 2016, ss 34, 35. Amending Immigration Act 1971 and the Immigration, Asylum and Nationality Act 2006, s 21 respectively. Carvalho (n 1) 179 notes that ‘the progress of democratic citizenship in itself also contains a persistent tension between the inclusionary impulse of citizenship and the exclusionary social structure of possessive market relations’.

¹⁸² (n 8) [finalized page number forthcoming from OUP]; discussing (n 6) 55.

Labour Market Enforcement’s proposal in May 2018 to significantly increase civil penalties for non-compliance.¹⁸³ ‘Turnover taxes’ have been proposed, with the value of a fine directly linked to a company’s turnover.¹⁸⁴ Significant revenue streams could then be used to fund the enforcement system.¹⁸⁵ It is not proven that state enforcement via coercive preventive measures offers more effective deterrence than civil law measures carrying substantial financial penalties.

There is the added complexity as to how the criminal law’s preventive offences—and civil preventive orders specifically—interact with labour law. As argued above, the environment of labour law mediates and informs the idea of civil order and how the criminal law embodies this. The contextual environment is key in determining ‘the degree of trust that can be expected of individuals, as well as the amount and quality of reassurance that is necessary to preserve the conditions for trust in society.’¹⁸⁶ The context of personal work relations is one of consolidated employer power with effective labour laws needing to put a brake on this. An environment of distrust is fostered by anti-liberal labour law practices and regulation, intensified by criminalization selectively of particular areas of ‘distrust’. This leads to an over-emphasis on the reassurance function of the criminal law, which is closely tied up with the preventive endeavour. The irony is that as we witness less assurance in the context of labour law, we may see a push toward criminalisation as an attempt to reassure via hybrid civil/criminal law measures. This is a challenge to those who view hybrid civil/criminal law measures as ‘regulatory’ criminal law interventions. These are not neutral measures. Part of the complexity of coercive civil preventive orders is whether they are punitive or non-punitive measures. This evaluation determines whether heightened criminal fair trial

¹⁸³ (n 6) 55.

¹⁸⁴ *ibid* 55.

¹⁸⁵ *ibid* 55.

¹⁸⁶ (n 1) 35.

safeguards are required, such as the right to cross-examine witnesses, which are afforded to punitive measures.¹⁸⁷

Conclusion

We are witnessing the extension of hybrid civil/criminal law risk measures to a new domain: the regulation of personal work relations. Civil preventive orders cannot simply be invoked as another part of a multi-layered model of effective regulation of labour, as valid an aim as that is. Criminal lawyers and labour lawyers must work together to shape the contours of these coercive measures in principled ways. Two streams of argument have been advanced in this article. First, I have argued that more nuanced analysis of these coercive risk measures is needed. The Immigration Act 2016's civil preventive orders require clarification in at least five important respects. Second, a new theoretical lens is needed to appraise the preventive endeavour via civil preventive orders in the work context. It cannot be assumed that this form of preventive criminalisation through civil preventive orders is a benign or unproblematic development. A different type of analysis is needed which involves consideration of the institutional dimension of criminalization—a dimension informed by both criminal law and labour law. This involves a reassurance function and consideration must be given to whether the criminal law is being asked to do more of this reassurance because of the background context of deregulated labour. A second strand is that the need to reassure is underpinned by a deeper ambiguity. While civil preventive orders are advertised as measures which call employers to account, they are another example of resort to coercive measures with custodial sentences attached. The result is to lead to overall more coercion. This reveals afresh a known instability in the liberal endeavour—an irresolvable tension

¹⁸⁷ L. Zedner, 'Penal Subversions: When is a Punishment Not a Punishment, Who Decides, and on What Grounds?' (2006) 20(1) *Theoretical Criminology* 3, 14: 'Punishment is the most powerful exercise of state authority over citizens so there are good reasons to designate coercive measures as punishment in order to reassert due process and human rights protections'.

between respecting subjective responsibility and providing security for citizens. A piecemeal and non-joined up resort to preventive coercive measures as a means of enforcing labour standards could cause more harm than it seeks to solve. This article sets in motion the need for a more comprehensive evaluation of the preventive endeavour in the context of work relations.