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Understanding the experience, meaning and messages of on the spot penalties

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Criminology

Keele University

## **Abstract**

This thesis is a qualitative examination of the meanings, messages and experiences of those using and receiving on the spot penalties across a range of contexts in which such penalties arise. It explores the policy framework in which communications and expectations about “effective” criminal justice clash with everyday experiences of citizens receiving on the spot penalties. The thesis examines how these penalties have been allowed to increase so dramatically that they are now the main means through which justice is experienced when a citizen engages in problematic / deviant behaviour.

This growth in reliance on the on the spot penalty arises from the need to provide an “effective” justice system, one that provides an effective deterrent and takes a zero-tolerance approach to offending, but, at the same time, seeks a proportional response to that offending. This thesis argues that this proportionality is not experienced by citizens who receive these notices, who argue that the penalty notice interaction lacks an essential element of procedural justice, the ability to engage in a ‘rational and reciprocal’ (Duff, 2001:79) communication. Inadequate opportunities for citizens to “voice” their concerns within the system leads to claims that enforcement agencies lack “common-sense”, are illegitimate and untrustworthy.

This thesis argues that citizens then lose respect for enforcement agencies, and the laws they enforce through the on the spot penalty. Such citizens find that being motivated to comply with the law is not a good indicator of actually complying with it. When punished whilst holding a positive motivation about the law, citizens can become deeply frustrated and angry about the treatment they receive.

This thesis concludes that policymakers need to decide whether a ‘simple, speedy and summary’ (DCA, 2006) on the spot penalty can be achieved without significant damage to the legitimacy of the justice system.

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### **Common Acronyms Used in the Thesis**

CEO:	Civil Enforcement Officer
CJPOA:	Criminal Justice and Police Act 2001
CNEA:	Clean Neighbourhoods and Environment Act 2005
CS:	Custody Sergeant
DCA:	Department for Constitutional Affairs
DCLG:	Department for Communities and Local Government
DE:	Daily Express
DETR:	Department for the Environment, Transport and the Regions
DM:	Daily Mail
DP:	Detained Person
DPE:	Decriminalised Parking Enforcement
DFT:	Department for Transport
FG:	Focus Group
FPN:	Fixed Penalty Notice
HYS:	Have your Say (BBC)
KSI:	Killed or Seriously Injured
LA:	Local Authority
MOJ:	Ministry of Justice
NDORS:	National Driver Offender Retraining Scheme
NPM:	New Public Management
NSCP:	National Safety Camera Partnership
O OCD:	Out of Court Disposals
OTSP:	On the Spot Penalty
PACE:	Police and Criminal Evidence Act 1984
PCN:	Penalty Charge Notice
PND:	Penalty Notice for Disorder
PPF:	Pepipoo Forum
TPT:	Traffic Penalty Tribunal
ZTP:	Zero Tolerance Policing

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## Chapter 1: Introduction: The On the Spot Penalty

If the average individual encounters authority as a wrongdoer then they are more than likely to receive an on the spot penalty notice as a result. On the spot penalties (hereafter OTSPs) are mechanisms for imposing a financial penalty for legal contravention without the need to go to court. In 2011<sup>1</sup> the number of OTSPs issued exceeded the number of magistrates court prosecutions by a factor six (10 million OTSPs were issued compared to 1.6 million prosecutions (MOJ, 2011a)) and arrests by a factor of nearly 8. In the same period 1.36 million arrests were made (Home Office, 2011b)).

The OTSP covers a range of activity from more commonly known motoring offences, such as illegal parking and speeding, to behaviour that can broadly be characterised as disorderly or anti-social, such as littering, dog fouling and behaving in a drunken and disorderly manner. Each of these offences is dealt with by different forms OTSPs that have different legal consequences, but each share a similar process.

The use of money in the criminal justice system as a punishment has been widely studied. As O'Malley states

'On the fine ...there has been endless research and discussion on such matters as to: how best to enable or make people pay... what constitutes an appropriate level of fine... [n]umerous experiments have been tried in relation to these problems and numerous evaluations carried out, all in the name of making fines more 'just', more 'affordable' or more 'effective'. (2009a: 2)

In addition whole branches of criminological and legal thought are dedicated to punishment and the prison experience as well as community based alternatives. There are very few studies that are dedicated to the OTSP experience. Although the amount of penalty under

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<sup>1</sup> The latest year for which comprehensive statistics are available

an OTSP may appear insignificant (it is generally a small fine<sup>2</sup>), their use is growing and the way OTSPs are used is not without meaning, for both those receiving and issuing OTSPs.

Little academic research exists on the meaning, usage and experience of OTSPs. This caused Richard Fox to conclude that 'criminal lawyers and criminologists have been remiss in not noticing that the on-the-spot fine has become the principal sanction in the criminal justice system ... [and] is now directly competing with criminal law in the courts and threatens to supplant it in relation to offences at the lesser end of the scale' (1999: 19). Although writing in 1999 Fox's comments still have relevance as the use of OTSPs has expanded. Furthermore, the criminological discipline tends to focus on the 'real' criminal offences rather than those committed by ordinary everyday people, who no doubt see themselves as being part of a law abiding majority. These crimes, lacking any real sensationalist element, nevertheless are an important dimension of criminological study as Karstedt and Farrall argue 'it is exactly these types of behaviour that are indicative of the moral state of society.' (2006: 1012)

This thesis takes up Fox's challenge and examines the meaning, experience and use of OTSPs, which are the most common daily occurrence in the justice system but the least studied. This research examines the experiences and attitudes of OTSP recipients, those who issue OTSPs, and those responsible for policy on OTSPs for their views on this alternative process for imposing justice. As the trend for OTSPs seems to be ever increasing, or expanding the areas in which problematic behaviour can be regulated, it is necessary to examine the meanings that those subject to this method attribute to the penalty. This research seeks to understand whether OTSPs are perceived as fair, or just. It may be that there is widespread support for this method of enforcement since it removes the threat of criminal conviction. Conversely the punishment experience may raise significant concerns about the laws legitimacy and the agencies that enforce it. There is

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<sup>2</sup> although not inconsequential for some,

almost no qualitative empirical data at present on the OTSP phenomenon, something that this study will correct.

For ease throughout the thesis the unifying concept of the OTSP is used to describe the rough conglomeration of all such penalty notices which have, as a common theme, the imposition of a financial charge for problematic behaviour by citizens without needing to go to court. This charge, unlike most financial charges, is not imposed due to any service or goods the recipient receives but instead relates solely to their behaviour which is characterised as legally problematic.

OTSPs challenge the notion that offending must be dealt with in court subject to full legal procedures. Indeed OTSPs also challenge the idea of guilt and innocence in regulating socially problematic behaviour. OTSPs are not convictions<sup>3</sup>, even in those motoring cases where penalty points are imposed. Penalty points in motoring cases are the manifestation of a risk profile which indicates to drivers that they are straying close to unacceptable risky behaviour and if such behaviour continues then full criminal responsibility will be sought (O'Malley, 2009a).

OTSPs developed as a response to the growing use of the motor car (Fox, 1995:4-9) and were first implemented in England and Wales in the Road Traffic Act 1960. This Act, although hardly covering a revolutionary topic, did remove the necessity for court, specifically the magistrates court, in order to impose a financial punishment. Previous practice in Customs and Excise collections of customs duty and local authority collections of vehicle duty, did allow for the settlement out of court of fines and duties owing. However in 1960 a new procedure, built on the previous experience of out of court settlement, authorised the imposition of penalties for legal transgressions without the need to go to court in cases where there was no pre-existing financial relationship.

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<sup>3</sup> R v. Hamer [2010] EWCA Crim 2053

The “effectiveness” of this system was frequently relied on, post 1960, to extend OTSPs to areas that involved more deviant criminality. The first OTSPs, in 1960, covered overstaying at a parking meter and not displaying one’s parking lights after 6pm. From this system there has grown a comprehensive, and yet fragmentary, OTSP system that responds to legally problematic behaviour by citizens, as well as (recently) corporations. Using money to punish problematic behaviour is certainly not new, as shall be discussed below; however what the OTSP has brought is a new process for imposing punishment without the need of court adjudication, providing the penalty is paid. Capturing the experience of this process and the various debates about how effective it is as a policy / process of justice has been understudied and is corrected in this thesis.

### Situating the OTSP: Language, Citizen and State

The OTSP is an essentially simple concept; the imposition of a fixed monetary penalty for wrong doing without the need for court appearance and a conviction. However behind such a simple sounding concept there are far reaching debates to be had about the experience of receiving an OTSP, the experience of using OTSPs to control behaviour and the impact of using OTSPs in terms of the laws legitimacy and the institutions that enforce it. Before one can attempt to understand and examine these debates, an understanding of the language of OTSPs is needed.

This thesis seeks to both contextualise the experience of receiving and issuing an OTSP as well drawing cross-contextual conclusions. To carry out this examination a number of contexts were identified that sought to categorise the difference in the OTSP process depending upon which offences were being enforced and how they were being enforced (either by remote means (e.g. speed camera) or face to face interactions, or somewhere in between and also depending upon the agency enforcing the prohibition). This focus on contextualisation of the experience of enforcement (both receiving and issuing) raised a problem with the language used to describe the OTSP within the contexts.

## The Lexicon of OTSPs

The language used to describe the various means through which a fixed monetary sum is imposed on a person by an enforcement agency is contested and complicated. There are various procedures used in order to bring about this process and various acronyms and terms used to denote the type of penalty involved.

There is the Fixed Penalty Notice (FPN), probably the most recognised form of notice since it is the name utilised in road traffic enforcement by police officers. There are two complications to the use of the phrase FPN. Firstly the general usage of the term 'fixed penalty notice' to denote any form of OTSP is misleading because there are crucial differences of procedure between varying types of OTSP. Further complicating this is the official use of "Fixed Penalty Notice" in various anti-social type behaviour legislation enforced by local authorities. The offence of littering, graffiti, fly posting and dog fouling on public land all attract a so called "Fixed Penalty Notice." However the procedure utilised is different to that used by the police in moving traffic enforcement "Fixed Penalty Notices". The police issued FPN requires payment in a specified period. If payment is not received then the recipient becomes a 'defaulter' (Section 70(1)b Road Traffic Offenders Act 1988) and the amount unpaid is then registered as a court fine (Section 71). This means that it has the same effect as a court imposed fine and can be collected by the courts as if the fine had been imposed following a conviction, although the FPN is not classed as a conviction.

With a local authority FPN there is no automatic registration of the fine at court following non-payment, instead the authority must make a decision whether to prosecute the alleged offender (recipient). Once that decision is made then the authority may launch criminal proceedings in the magistrates court, and if convicted the recipient will, in all likelihood, be fined and have a criminal record.

To add to this semantic confusion there are also different types of OTSPs operated by the police. Penalty Notices for Disorder (PND's) were introduced under the Criminal Justice



and Police Act (CJPOA) 2001 and cover a broad range of behaviour, loosely defined as anti-social and disorderly, but not involving vehicles. The PND has the same registration procedure following non-payment as the police motoring FPN (Section 8 & 9 CJPOA 2001) thus non-payment does not lead to a decision to prosecute but instead a court sanctioned fine is imposed without any hearing. Again the recipient is *not convicted* of any offence.

This study will also consider OTSPs called Penalty Charge Notices (PCN). These are imposed for stationary traffic 'civil' offences by so called 'Civil Enforcement Officers' (CEOs) who are similar, although not exactly the same, as Traffic Wardens. Unlike FPN's (local authority and police) and PND's, the procedure following non-payment is civil recovery not subject to criminal court jurisdiction. Although these "offences" were originally criminal offences, indeed they used to be dealt with by a police issued FPN, following changes in 1991 and 2004 most are now classified as "civil offences", a hybrid of public wrong being dealt with through a penalty but without the use of the criminal justice system.

The problem for this study is discussing and relating these various procedures for imposing a penalty as a whole. The concept of the OTSP is relatively straightforward to elucidate, it is when the OTSP is contextualised that the difficulty arises. In discussing everyday experiences with OTSPs, as an enforcement officer or recipient, the context in which the penalty arises and the notice's procedural elements can affect those experiences. Therefore, it is necessary to examine OTSPs within the context in which they arise as well as looking at the more rounded picture.

The public lexicon for OTSPs veers between the use of the term "fixed penalty" or "ticket" to describe the system as a whole. These two forms of description arise primarily due to the pervasive nature of motoring enforcement. The "ticket" refers to the PCN left on the window of an illegally parked vehicle, and the "fixed penalty" from the enforcement of speeding. These two types of OTSP are the most common form, so it is perhaps unsurprising that the whole system of OTSPs is referred to in this way by the public. Indeed,

as the outcome of the OTSP is generally the same, the only difference typically being the amount of penalty (and possibly driver licence points) it is hardly surprising that criticisms or debates about the use of OTSPs typically refer to either the speeding or parking contexts. Nevertheless there are important procedural elements that differentiate the notice type as well as interactional elements that impact upon how OTSPs are experienced.

There are three contextualisations of OTSPs that are used in this study. Whilst contextualisation is necessary, there is also a danger that one loses sight of the essential elements of any OTSP. Therefore it is necessary at certain points to abstract the OTSP from the context in which it is given in order to examine the place that money, justice and fairness play in the OTSP debate. Therefore throughout this study 'on the spot penalty' (OTSP) refers to the general abstract system of imposing a financial penalty by enforcement officers in the various contexts for transgression of the law by recipients. Where particular forms of penalty are examined it will be referred to as follows:

- Police Issued Road Traffic Fixed Penalties= FPN (typically speeding or driving through a red light, although there are many more forms of motoring FPN)
- Enforcement by local authorities = FPN (again there are more notices than the litter notice but the process itself is the same across the varying offences that lead to a local authority FPN)

Where there is potential for any confusion about which FPN context is being discussed then the following acronyms are used: FPN (Motoring) or FPN (Litter).

- Police issued disorderly behaviour notices = PND (in the majority of cases drunk and disorderly behaviour, harassment, alarm and distress contrary to section 5 Public Order Act 1986 and shop theft, again there are many more PND offences)

- Local authority traffic enforcement = PCN (generally illegal parking in one form or another as well newer moving traffic violations such as driving through a bus lane, or illegally stopping in a box junction.)

### An “Offence”

Another difficult idea with OTSPs is that such penalties are imposed for “offences”. In most of the contexts examined in this thesis “offence” is straightforward; it refers to a specific conduct criminalised by statute. However in the parking enforcement context the word “offence” is problematic. Originally the transgressions governed by parking enforcement *were* criminal offences but the Road Traffic Act 1991 “decriminalised” parking enforcement (DPE) for London local authorities. With this provision parking “offences” were no longer a criminal offence in London, instead a ‘penalty charge’ was payable following the issue of a “penalty charge notice” (PCN). This was subsequently extended in the Traffic Management Act 2004 to all local authorities who adopted its provisions. As of writing approximately 280 local authorities have adopted DPE.<sup>4</sup>

This DPE process has been described by White as a ‘pernicious hypocrisy’ (2009). White (2011), using Thornton’s (1996) analysis of penal provisions, argues that parking OTSPs are criminal provisions that the state has artificially labelled as a civil sanction. According to White there are two principles that describe whether a law is a criminal law; there needs to be ‘a statement of the prohibited act, omission or course of conduct’ and a ‘specification of a punishment for that breach’ (2011:21) if both are lacking then, according to White, the law is a civil law.

White’s contention is essentially an empirical test for whether a law is criminal or not, but based on a conflation of the normative and empirical tests for law. White’s concerns are normative; the withdrawal of the criminal law’s procedural protections. However, there is a countervailing normative interest which supports the decriminalisation process, that we

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<sup>4</sup> Personal Correspondence, Traffic Penalty Tribunal

ought not to criminalise the conduct in question. Certainly there have been many attempts to find a normative definition of the criminal law (see Duff, 2001; Duff and Green, 2005; Husak, 2008; Stuntz, 2001; amongst many others) however the enforcement of parking sits at the boundary of the civil / criminal distinction due to its perceived minor seriousness. Seen in this light the DPE process can be defended from a normative perspective when the consequences of sanction take away the social stigma of conviction, which 'constitutes a powerful form of "status degradation"' (Schwartz and Skolnick, 1963:136). The civil offence, from a sociological perspective, is not a 'pernicious hypocrisy' but a desirable compromise between the need to deter certain behaviours and the need to protect the reputations of citizens in an area of law that is widely seen as not really criminal.

Stuntz sums up the empirical situation better by stating that 'that criminal punishment drives the criminal law' (2001: 506). In other words the desire to punish people through criminal sanctions drives the criminal laws content, not the other way round. In this respect White's claims of a 'pernicious hypocrisy' are a misunderstanding of the empirical test for criminal law. The 1991 and 2004 acts had as their aim the desire to remove the criminal sanction and thus the content of the criminal law was altered, the lowering of the burden of proof was a consequence not causative factor for the change.

Nevertheless, White has a potentially valid empirical point. Those receiving PCNs may not understand the difference and hence can experience them as either criminal or civil and confusion in this regard does blur the boundary between criminal and civil liability. Indeed prior to 1991 such offences were crimes, the only difference now being that the state has labelled the behaviour as a civil problem.

To avoid confusion the term "offence" will be used to cover parking contraventions, although they may be designated as decriminalised it is still fair to describe such actions as "offences". There is no corresponding civil law description that captures the situation as clearly as the idea of "an offence" does. Furthermore it is unlikely that citizens would

understand (or care about) the difference to any great degree, particularly when receiving a PCN.

### Citizen and State

The decision to include the DPE system does cause a problem in understanding and crystallising the debate for this thesis. By including civil offences one may legitimately ask why private parking enforcement, for instance, is not included. Furthermore, various other forms of penalty in civil law interactions, such as contractual penalties, also replicate the OTSP process, and can be studied as such. What will be discussed in this thesis however is the state imposed OTSP, these penalties are issued for breach of public regulations rather than any contractual relations the authorities have with the recipient.

The interactional dynamic between a citizen and the state is the location of study and so it excludes from its purview those situations whereby an OTSP system is utilised by organisations, such as parking companies, credit-card firms, as well as libraries<sup>5</sup>. In such situations it would be strange, as Slapper points out

If you return a library book late, and at the desk you are asked to pay a fine, the librarian would react with surprise if you said you would not pay unless both the library's argument and your excuses were arbitrated by an independent judge after both sides had had an opportunity to put their case with supporting evidence in an open forum. People behind you in the queue might also get a little restless. (2010: 1)

Although the experience appears similar, the commercial penalty notice is subject to different demands and is at a fundamental level of a different character to the communication of a problem by the state. The latter is aimed at seeking to alter, or affect,

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<sup>5</sup> Although libraries are state owned enterprises the library charge is a commercial charge (Library Charges (England and Wales) Regulations 1991/2712).

behaviour for public policy reasons rather than commercial imperatives.<sup>6</sup> This research is about the relationship between citizen and the justice system and how the citizen is problematised within a framework of law that seeks to control and regulate behaviour for the public, rather than commercial, good.

This focus on interaction between citizen and state by way of an OTSP also excludes from its scope OTSPs that are issued to corporate bodies under the Regulatory Enforcement and Sanctions Act 2008. Here the problem is closer to the locus of study, in that the state is informing corporate persons of appropriate conduct and imposing sanctions for breach of regulatory prohibitions, however, corporations although having legal personality do not have a social personality as such; they are not capable of forming or interpreting social relationships and interactions and were therefore also excluded from the study.

#### Methodological Approach and the Research Questions

The research to date on OTSP usage has been fragmentary, tending to focus on specific debates based on the types of OTSP rather than examining the picture as a whole. The notable exception to this is O'Malley's (2009) wide ranging theoretical enquiry into the use of money in the justice system. O'Malley's claim that OTSPs represent a consumerist approach to justice is examined and contested in this thesis using empirical evidence. As shall be demonstrated government policy on OTSPs is framed by a desire to provide a more "effective" form of justice. This thesis therefore examines the multiple ways in which OTSPs are used and how it is believed they will bring about particular outcomes (such as an overall reduction in offending). How this "effectiveness" is operationalised and understood is an important question in determining what policymakers want to achieve by using the OTSP process and what messages recipients take away from the process. In examining the debate over the use of OTSPs in the justice system this thesis critically examines the claims

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<sup>6</sup> State authorities may be allured by the revenue that OTSPs generate, however it is not their principal concern, the principal concern remains public policy. This thesis found no evidence to support the idea that such penalties are seen as a means of generating profit at the expense of public policy.

of policymakers as well as the practice of enforcement agencies in using OTSPs as well as ordinary citizens' reactions to being seen as problem for the law. It conducts this examination through a number of research questions addressing the meaning, messages and experience of OTSPs

**Meaning:**

1. How did OTSPs develop and why are they used as a mechanism for dealing with socially problematic behaviour?
2. What factors of 'effectiveness' are important in understanding the OTSP?

**Messages**

3. Have the claims of 'effectiveness' by policymakers been translated into practice?
4. What does compliance mean in the OTSP process and how is it understood through OTSP practice?
5. What messages are transmitted by OTSPs and officers in conducting enforcement?

**Experience**

6. What do recipients of OTSPs think about the enforcement encounter and the process through which OTSPs are imposed?
7. How is the receiving of an OTSP understood and what affect does receiving one have on citizens' views on the legitimacy, trustworthiness and fairness of the law and enforcing body?

The use of OTSPs by enforcement agencies is therefore subject to this analysis to examine both the meaning of the OTSP and how it has altered (or not) the experience of justice. Given the wide range of contexts in which an OTSP can be given and the importance of various voices of experience within the OTSP system a variety of qualitative methodologies are used to capture this experience. In order to understand and examine the comprehensive nature of the OTSP it is first necessary to examine how OTSP processes

differ depending upon the offence being committed or the enforcing agency carrying out the enforcement.

### The OTSP Processes

This study will examine OTSPs in relation to three different processes. The processes have been chosen as they represent the various ways in which OTSPs can be experienced and they recommend several theoretical perspectives as well as a practical framework from which to approach the research questions set out above.

The three processes are:

1. The automated process
2. The semi-automated process
3. The discretionary process
  - a. The Police Context
  - b. The Local Authority Context

Each of these processes shares a common method (the imposition of a money sanction 'on the spot') but raise dynamics that are different from each other and potentially affect the experience in terms of the justice perceived, and the rationale behind them.

#### *The Automated Process: FPNs and PCNs*

This process relates to the issuing of an OTSP by automatic means. It is an OTSP that is received through the post. There is no interaction with the enforcing agency at the point of transgression, nor is there any opportunity to contest the notice unless the recipient chooses to exercise their right to go to court. It is an almost fully automated process. With the growth of 'techno fixes' (Haggerty, 2004:494) for criminal justice and their ability to provide 'the seemingly irresistible potential for cheaply and reliably identifying instances of risky behaviour' (Wells, 2008:798), technologically automated enforcement processes allow for simple, easy, and quick "justice" without too much input from enforcement officers.



Automated enforcement involves a technological device (a camera) taking a picture of the transgression (involving a vehicle) with this forming the evidential basis for which an OTSP is issued. The process can result in a motoring FPN (typically speeding or driving through a red light), or a PCN for driving in a bus lane or box junction.

Depending upon the make of camera, there can either be some administrator involvement in examining the images and issuing the OTSP (no police officer involvement) or the whole process is digitised through computer linked camera (Vysionics, 2012). Discretionary enforcement, once a centre piece of police, and enforcement agency, 'street level bureaucracy' (Lipsky, 2010) is removed from the process of imposing an outcome. Discretion still resides in the locations in which enforcement takes place, agencies still can choose where to place cameras (as well as mobile camera vans)<sup>7</sup>; however the decision to impose an outcome (a penalty) is taken away from a human actor.

Critics of this system of automatic technological law enforcement generally make competing claims about legitimacy, effectiveness and seek to undermine or counter other suggestions based on a safety rationale (Wells, 2012). This study will examine this process for the effect it has on the recipient's experience and the constructions of justice and fairness that they perceive due to the anonymous nature of the interaction with the official body.

#### *Semi-Automated Process: PCNs*

The experience of receiving a non-camera enforced PCN is similar to the automated process in that the person receiving the notice will typically not have an interaction with a CEO, since the PCN is left on the vehicle for the driver to find sometime later. Of course on occasion the driver may be present, or returning to a vehicle at the point at which the PCN is affixed, nevertheless the decision to issue this notice has already been taken.

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<sup>7</sup> Albeit with speed enforcement such choice is itself regulated

Issuing such PCNs relies on technology (a hand-held device) and a general lack of discretion for the enforcement officer.

This process is also 'techno-fixed' to an extent in that Civilian Enforcement Officers' (CEO's) discretion is managed through technology. A hand-held device is utilised that ensures transgressions are witnessed correctly and have the requisite proof based on the offence requirements. Thus "bad" discretion, the idea that officers might give out a ticket wrongly due to extraneous factors, is controlled. Whereas "good" discretion, the idea that an officer can choose to "ignore" an offence is left undisturbed, whether such "good" discretion is practiced and whether it is actually a "good thing" is contestable.

#### *Discretionary Enforcement: FPN and PND*

There are various contexts in which this discretionary enforcement can take place. It can be by a Police Officer issuing a PND or an FPN for a motoring violation, or by a local authority officer carrying out enforcement activity. This process covers all other OTSPs which involve human input into the process of enforcement and result in direct interactions between the enforcer and enforcee. Here discretion, although it may be constrained by cultural and social factors involved in such enforcement, is not necessarily controlled by technology. The OTSP is issued by an officer based upon their interpretation of the facts and legal circumstances surrounding the case. Contrary to both the automated and semi-automated OTSPs there is full discretion here. The officers involved have full discretion in determining whether an offence has been committed, and what the outcome of that determination should be.

In discussing the discretionary enforcement there are two sub-categorisations that can be made, again based on the justice experience perceived by recipients.

#### **The Police Context**

This context covers the penalty notice for disorder (PNDs) set up under the Criminal Justice Act 2001 and FPNs under the Road Traffic Act 1988 and the Road Traffic Offenders Act

1988 (excluding automatic camera enforcement.) It differs from the local authority context (discussed below) in that these OTSPs can only be issued by police officers and certain authorised persons under the ‘Accredited Persons Scheme’<sup>8</sup>

FPNs for motoring cover a range of offences that can be enforced either through automated enforcement (speeding or red light enforcement where there is no interaction with a police officer) or through actual officer interaction (again speeding where this is involvement of an officer at the location of enforcement e.g. roadside).

What unifies the PND and FPN in this context is not just the similar procedural elements and consequences, but also that police officers are issuing these notices in person. For the recipient of the OTSP the interaction in this context is qualitatively different than the preceding two processes, since they have an opportunity to communicate with an officer at the point at which the officer is considering whether to issue an OTSP. Furthermore these police officers have complete discretion as to whether to impose the notice or not.

### **The Local Authority Context**

These FPNs relate to a selection of offences across what may be termed anti-social behaviour and are enforced by the local authority. They differ from motoring FPNs in that this system operates an “opt-out” procedure. This differs significantly from the police context in that non-payment has to be followed by a prosecution if the authority decides it is necessary to do so. The authority has to positively invoke the prosecution procedure, unlike in the police context in which the notice is registered at court automatically as an unpaid fine.

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<sup>8</sup> The Community Accreditation Scheme (CAS) allows non-police employees to issue PNDs where they have been accredited by the Chief Constable. According to recent statistics 2219 individuals have been accredited in England and Wales (Home Office, 2010), although this statistic is a rolling figure rather than a total. Accreditation does not mean that they can issue a PND, it may simply devolve the power to issue mandatory traffic directions. Of those forces making the highest use of CAS only Avon and Somerset and British Transport Police have, as of 2010 devolved the power to issue a PND. As of writing, BTP have 77 “revenue agents” with the power to issue fixed penalties, Avon and Somerset currently accredit none.

There is also a clear experiential difference in receiving this notice from the police context above. Not only is the behaviour in question at the borderline between socially problematic and criminally problematic, furthermore, local authority enforcement officers are not generally seen to be a part of the criminal justice process. They are, in that they are exercising enforcement activity in an area of criminal law, but may not be recognised as such by ordinary members of the public. The enforcers rarely wear a uniform; they certainly do not wear a nationally recognised or standardised one, and they exercise a civilian rather than police role (e.g. there is no power of arrest.) In short they lack the public police's sacred 'totemic nature' (Reiner, 2010: 120).

In this research, following an analysis of the use of FPNs by local authorities it was decided that littering would be the primary focus of this context. Table 1.1 sets out the latest available statistics on the most commonly used FPNs by local authorities.

**Table 1.1 Data obtained from the Manifesto Club, *Pavement Injustice* (Appleton, 2013)**

Offence	Year	Number
Littering	2011-12	63,883
Dog Fouling	20011-12	3,208
Waste Receptacles	20011-12	5,622

As can be seen from table 1.1 litter accounts for the overwhelming majority of local authority FPNs, therefore in this thesis the FPN is operationalised as the Litter FPN.

### The Current State of Research

Since Fox's challenge to refocus study on 'criminal sanctions at the other end' (1999:1) there has developed a body of literature, albeit small, that has focused on OTSPs from both a philosophical and empirical basis.

## The Theoretical Dimension: using money to solve a problem

The use of money in the criminal justice system as a form of punishment has a long history (Godfrey & Kearon, 2007) and has been widely studied, as O'Malley's quote at the start of this chapter demonstrates. However relatively few studies had been conducted, prior to O'Malley's excellent examination, of the theoretical assumptions behind the use of money and its meaning in imposing justice. Rusche and Kirchheimer's 1939 Marxist analysis of criminal justice saw the fine as a perfect example of capitalist economies using a means of transaction that it viewed with the highest regard.

Money had become the measure of all things, and it was only right that the state, which extends positive privileges in the form of monetary grants, should also introduce the negative privilege of taking wealth away in punishment for delinquency (2003: 168)

Following this first attempt at understanding the fine, Bottoms provided a more rigorous theoretical analysis of the fines growth and located it within a debate about collective control. Bottoms saw the fine's rise as a mode of punishment which ceased to treat legal responsibility as an individual concern and instead focused on the collective, whereby laws are seen as essentially regulatory. The goals of such laws were to secure the 'efficient execution of tasks and attainment of goals and norms' (Bottoms, 1983: 186). Here system efficiency attained primacy and the punishment system (of fines) was aimed at increasing this efficiency. Thus instead of physically incapacitating recalcitrant members of society, they become incentivised to comply with laws which, through the fine, meant that punishment could be imposed and the citizen still remain a member of society.

O'Malley disagrees with Rusche and Kirchheimer's Marxist critique and Bottoms regulatory theory. Instead O'Malley sets out a theoretical understanding of the use of money (relying on the philosophy of Simmel, 1907) in justice (including court fines and OTSPs) as reflecting the growth of consumer society.

Such sanctions govern through ‘freedom of choice’ – indeed we may think of them as a technology of such freedom. As responsible consumers we pay for our choices and for the routine mistakes and failures of foresight that characterize everyday life. Regulatory fines are thus quite consistent with governing the consumer society...’ (2009a: 159)

OTSPs are, in the consumer society, seen as operating in a system of telemetric, monetized and risk based’ governance (O’Malley, 2010:805). O’Malley argues that fines, and the monetary payment, operate a form of ‘simulated justice’

I am policed, judged and sanctioned but no-one has seen me, nor have I been ‘sensed’ in any human way. In key respects I have not been there: my electronic trace has been there and that is what registers for the purposes of governance. This is simulated justice, where the real and the virtual converge (O’Malley, 2010; 795)

O’Malley (2009) has linked this simulated justice experience with Deleuze’s concept of the ‘dividual’ (Deleuze, 1992) in that the ‘individuality of the offender is not an issue only a specific role or “dividual.” In this respect, the fragmentation of the legal subject allows a certain degree of anonymity to be attached to those sanctioned...’ (2009: 83). This “dividuality”, as O’Malley argues, is well suited to motoring regulation since the “driver”, or “owner” is the subject of regulation.

There is a problem with O’Malley’s claims in that they lack, at present, an empirical basis. It may be fair to describe such penalties as being reflective of a consumer society however one needs to understand whether this is experienced in practice. Do citizens see OTSPs as ‘another bill to pay, not as an occasion for moralized commentary’ (2009a: 108) and in OTSP interactions do officers themselves adopt consumerist approaches in trying to secure compliance from citizens? A further problem lies in O’Malley’s conflation of all OTSPs as a form of simulated justice. Most motoring OTSPs may be, however in the discretionary context there is no simulation. Instead a real justice interaction takes place in which the

recipient is 'seen and 'sensed'. Accordingly it is necessary to examine whether this consumerist and simulated approach applies in these contexts.

Whilst O'Malley may be correct that the money payment reflects the simulated nature of the punishment (it can be paid by anyone, not just the recipient, and is frequently paid not by physical currency but electronic transaction) it doesn't address the interactions taking place between officers and individuals. As Carey argues, 'communication is a symbolic process whereby reality is produced, maintained, repaired and transformed.' (1989, 23) The communication itself is thus part of the punishment process (Feeley, 1979). Thus OTSPs may represent simulated consumerist justice due to the monetized nature of the actual penalty (O'Malley, 2009a & 2010), however this is only half the story, since the communicative interaction between officer and "in"dividual also represents "something" within the OTSP process.

As Wells' (2012) study into speeding enforcement shows, focusing on the experiences of those subject to an OTSP opens up debate to concerns regarding claims of 'effectiveness' 'justice', 'fairness' and 'compliance' and how they are experienced. To fully understand the interaction between state and citizen during an OTSP encounter there is a need to focus on interactions that are not always automated, but instead involve human actors communicating. Furthermore, even "non"-interactions, those between human and machine (e.g. the speed camera) can still have meaning and need to be understood.

#### **Empirical Research to date**

The empirical research to date on OTSPs is slight, with few studies focusing on this form of justice. The majority of this research is government based and aimed at understanding the operation of OTSP policy (in particular areas) and whether OTSP practice meets the effectiveness goals set for it during policy formation. In addition academic research exists that has examined the use of various OTSP, but it does not examine their use as a whole; instead the holistic approach to OTSP research has been conducted through philosophical

rather than empirical studies. This research fills the gap between these two traditions of OTSP study; it provides the necessary empirical evidence that engages with the philosophical arguments across the broad spectrum of contexts in which OTSPs arise. The empirical research to date has been limited to examining various forms of OTSP (the PND or the motoring FPN), it has not examined the wider questions of experience that arise from a justice system that relies heavily on OTSPs.

### **Experiencing Motoring OTSPs**

The speeding context has been extensively studied by Wells (2012) and the wider motoring context by Fox (1995: 2003). Fox's 1995 study assessed the extent to which so-called 'expiation notices' (OTSPs in Australia), were used by enforcement agencies in the state of Southern Australia. The range of criminal offences dealt with by expiation notice in Australia is quite staggering, by 2002 over 1000 offences attracted an OTSP (Fox, 2003:1) and 3.5 million expiation notice were issued annually. As Fox states "[c]riminal justice 'on-the-spot' now affects most adult citizens in their daily lives. It regulates the machinery of their mobility" (1995:6). In England and Wales the reliance on OTSPs is even heavier, with just over 10 million OTSPs issued in 2011.

Fox's 2003 study examined a number of themes including the experience of those who have expiated offences, as well as public support for, and knowledge of, the expiation procedure. Fox conducted five focus groups with citizens who had received an expiation notice in order to examine complaints which were then utilised to expand the quantitative element of his study.

Fox found that there was an overwhelming sense of unfairness amongst recipients of expiation notices. Such unfairness, although related to both procedural and instrumental elements of the punishment, was overwhelmingly related to unfairness about the facts leading up to a notice being issued (2003: 9). These feelings, Fox argued, contributed to lack of payment by recipients, with 61% of a survey on non-payers stating that they did not



pay due to feelings of “unfairness”. Fox found that “unfairness” related to the procedure through which the punishment was imposed (28%), the unfairness of the offences being enforced (25%) and 8% refusing to pay ‘on principle’. Contrary to expectations, a mere 6% listed inability to pay as a reason for non-payment (2003: 93-94).

Fox also asked recipients for suggestions on improvements for the expiation system (2003: 81-85). A frequent response from those that had expiated was that officers were rude, discourteous or needed to work on their ‘customer service skills’ (Ibid: 7), which suggests that the interaction is an important part of understanding the citizen’s experience and reactions to OTSPs. However, it should be noted that the majority of those in Fox’s study who were non-compliant (i.e. did not pay to expiate) had no interaction whatsoever with an official other than through the postal service. (Ibid: 106). Again this demonstrates the necessity of examining OTSPs that do involve a direct interaction with the enforcement agency to see how feelings of fairness or justice change with the context in which the penalty is given / received.

### **The Speeding Experience**

OTSP usage in motoring has been studied within the context of a debate about the acceptability of speeding and speeding enforcement. As Wells states

Much research has been concerned with answering various interpretations of the question of whether or not speed cameras ‘work’ (see for example Corbett, 1995; Stradling, 1997; Stradling and Campbell, 2002; Buckingham, 2003, Gains et al 2005, Hirst, Mountain and Maher 2009...). (2012: 8)

Wells widened this debate to examine the experience of being caught and punished through speed camera enforcement. Wells found that there is a ‘demand from some drivers... that all kinds of biases and discrimination be put back into the system’ (2012; 178). Wells links this to the automaticity of enforcement through speed camera, it is “techno fixed” (Haggerty, 2004) so there are no interactions with enforcement agencies at which these ‘biases and

discrimination' can be contested. In this thesis the interactional dynamic is seen as a communicative enterprise, much like communicative punishment (Duff, 2001), but there are different levels of communication involved dependent upon the type of OTSP process. At the one extreme there are motoring FPNs that involve solely written communication (Automatic Enforcement Process) and at the other end the FPN litter and PND involve direct communications with officers (Discretionary Process) and in the middle sit PCN's which occasionally involve direct citizen and officer interaction but are generally documentary interactions. This study examines the communications in the context in which they arise and situates arguments about the interaction within debates about procedural fairness, legitimacy and normative messages about appropriate behaviour.

In addition to the academic literature there have been numerous government reports into the effectiveness of motoring enforcement in changing driver behaviour and in providing a cost efficient enforcement system. Studies have been conducted into the cost benefit of using speed and traffic light cameras (Home Office, 1996; DFT, 2003a; DFT 2003b) in addition the debate around whether speed enforcement (DFT, 2009) as well as whether the threat disqualification from driving deters speeding (DFT, 2008a). Each of these reports had as their aim a desire to see whether policy was working and whether it was meeting the effectiveness goals of policymakers.

### **The disorderly OTSP**

Again the academic literature on the disorderly OTSP is relatively slight, there is some empirical evidence from Australia regarding the experiences of 'expiation notice' recipients for the offence of cannabis possession (see Humeniuk, et al, 1999; Sutton, and McMillan, 1999; Allsop et al, 1999; Brooks, A., et al, 1999, Lenton, Et al 1999).

Research into the experience of receiving and issuing a PND in England and Wales is slight. Young (2008) and Morgan (2011) have examined the extent to which PNDs are used by police forces and related this to critiques on court diversion and governmental targets.

Neither examined officers on street practice in issuing, or the experience of recipients in receiving, a PND.

Coates, Kautt and Mueller-Johnson have studied the PNDs impact on police decision making, specifically on the decision whether to make an arrest or issue a PND (Coates et al 2009). Using quantitative data they examined factors that indicated whether an arrest or PND was a more likely outcome of a police interaction. They found that a number of indicators including, intoxication, active disrespect and aggression all aggravated in favour of arrest rather than a PND. Although, as the authors' state, a frequent outcome of arrest was subsequent de-arrest followed by issuing a PND (ibid: 421).

Coates et al's research does not examine the thoughts and experiences of citizens captured by the system, what messages they take away from the encounter and how fair they view that interaction. Thus once again we are left with incomplete knowledge; we know possible factors that impact upon the police decision to arrest or issue a PND on the street, but we don't know about the experience of receiving the penalty and what citizens think about being labelled a problem in this way.

The Government has commissioned a number of reports into PND usage and typically such reports examine whether the PNDs introduction has been 'effective' or whether the penalty itself is an 'effective' sanction. Since PNDs were introduced with three policy aims; swiftness of action, a practical deterrence and a reduction in police time and bureaucracy (Home Office, 2000b). The first two reviews, undertaken during the policies pilot phase, examined these facets. These studies (Spicer & Kilsby 2004; Halligan-Davis & Spicer, 2005) provided data on the impact on officer time and bureaucracy, as well as payment rates, usage of PNDs across the offences covered by the scheme and finally what officers thought of the policy. What they found was that net-widening had taken place, that officers overwhelmingly supported the policy (82% of those surveyed rated the PND very satisfactory or satisfactory), that payment rate was low (just 51% of penalties were paid

without further court proceedings) and that just two offences (drunk and disorderly and s.5 public order) made up the majority of all PNDs (91%). These findings leave questions unanswered, in particular why officers support the penalty and why the compliance rates were so low.

A third review conducted by the Office for Criminal Justice Review in 2006, despite presenting some of the practical benefits to police services in using PNDs, also highlighted concerns about police operational practice being influenced by, what a later report by HMIC termed, a 'performance culture' (HMIC, 2011: 19). Again however the report fails to tell us what citizens who received such penalties thought about the system. This is crucial particularly where it is suggested that 'performance culture' is driving PND operation. The reactions of citizens to a system of enforcement whereby police officers were thought to be issuing notices for the simple reason of gaining 'brownie points' (Morgan 2011: 20) is important. At the very least there are unanswered questions about these citizens' experiences and thoughts on the legitimacy of the PND.

The government reports, although allowing for an understanding, at a surface level, of the practice of issuing PNDs (typically in the policing contexts), fail to engage on a critical level with either the citizen's understanding of being problematised in this way or the factors underpinning the measures of 'effectiveness' examined. Accordingly this research intends to explore the many factors of effectiveness raised by OTSP policy across the contexts

### Conclusions on the current state of research

The empirical research identifies that there are concerns for those who receive OTSPs in terms of justice and fairness and this in turn impacts on compliance and legitimacy. In order to understand the England and Wales experience with OTSPs one needs to move beyond the quantitative nature of most of the Australian and British research and examine what it is in particular OTSPs mean to both officers using them in their daily work roles and what recipients of OTSPs think about the OTSP experience.

The England and Wales based research commissioned by the Government, identifies quantitative data that is necessary for government to examine, contest or claim, the effectiveness of OTSP policy. However, these reports do not highlight how the policies are understood and interpreted in the daily interactions that officers have with citizens. They do not note how both citizens and officers interpret (and impart) the meaning of such penalties.

This thesis argues that OTSP interactions are communications of justice between citizens and the state. How people understand and make sense of punishment fairness is experienced through the communications they have with officers (be it police officers, local authority enforcement officers or CEOs). As Tyler (2006), and many procedural justice scholars have identified (discussed fully in chapter 6): justice has a procedural element; people judge the fairness of interactions based on the treatment they receive during those interactions, rather than on the outcome of that interaction. Thus if we want to understand whether an OTSP policy is fair we need to understand what happens in the communicative interaction. We need to discover *how* officers issue OTSPs just as much as *why* they issue them. Studies to date have gone some way to providing an answer to the *why* question but have not addressed the *how*. This question is not peripheral to the government aims of providing an “effective” policy, it is central to understanding effectiveness as it directly links with future legal compliance (see Tyler, 2006).

The theoretical literature, most notably O’Malley’s, gives a rich understanding of how citizens, and those tasked with turning government policy into action, *may* view the system of OTSP regulation. O’Malley’s claim that OTSPs are part of a consumerist approach is subjected to empirical analysis in this thesis, it examines the communication of messages about appropriate conduct and compliance within a consumer society and how they are received by those who are subject to OTSPs: the recipients.

## Structure of the thesis

Chapter two discusses the methodological approaches taken to gather qualitative data for this thesis. Since this thesis contextualises the processes through which OTSPs are issued a multi-site multi-method approach to data gathering was adopted. This approach, described fully in chapter two, involves human participation in the research as well as examining the multitude of documentary sources available from enforcement agencies. Since it is argued the OTSP is a communicative enterprise, even in the automatic context, then there was a need for different methods of data collection dependent upon the nature of the OTSP interaction studied. Interviews, non-participant observation and documentary analysis were used to capture data from the enforcement side of the interaction. Likewise on the recipient side interviews were conducted in addition to focus groups and internet based methodologies.

Chapter 3 examines the historical development of OTSPs across the varying contexts and looks at the policy drivers behind adopting the process. In particular it examines the explanations given for switching to an OTSP in the various contexts and seeks to unify these claims into understanding why OTSPs develop in disparate areas of law and yet share the common aim of imposing a financial penalty. It will assess how ideas of productivity and deterrence dominate the debates around the introduction of OTSPs.

Chapter 4 uses this chronology as a means for understanding how “effectiveness” has been conceptualised by policymakers in the debates about using OTSPs. The measures of ‘effectiveness’ can then provide an understanding of what messages about appropriate behaviour are intended by the use of OTSPs.

Chapter 5 uses these intended messages, and builds on this drive for an “effective” policy by examining OTSP use across the contexts. What this chapter highlights is the way in which officers use various cultural, social and legal mechanisms to make sense of the work they are carrying out through OTSPs. Furthermore it examines the policy’s effect in driving

officer communications (seen as expressions) to recipients. This chapter also explores how the language of consumerism is built into the practice of OTSP enforcement.

Chapters 6 and 7 focus on the other side of the communication, the recipients'. Chapter 6 looks at the procedural justice that OTSP recipient's experience. What is seen is that a crucial part of any communication, voice, is absent in the OTSP interaction and consequently citizens use their own conceptions of common-sense to understand how, and why, they have been punished. These conceptions typically do not involve engagement with actual laws as written but common-sense ideas about the purposes for which legislation exists.

Chapter 7 then examines the consequences that a lack of common-sense and fidelity to the purposes of legislation has on recipients feelings of legitimacy (on both the law in question and the enforcement agency), it also examines compliance and its relationship to both legitimacy and procedural justice. It is believed legitimacy, trust and compliance have a complex relationship in the OTSP process and consequently there is a need to reconceptualise compliance into compliance behaviour and compliance motivation in order to understand the experience and concerns of OTSP recipients.

Taken together the research questions answered in this thesis provide new insight in to the use of OTSPs across the varying contexts in which they arise. It situates the debate about fairness, justice and effectiveness in the communicative interaction embodied in the OTSP and the use of consumerist ideals in imposing punishment. This thesis aims to bridge the gap between theory and empirical knowledge in the use of OTSPs. It takes a more holistic approach and looks at the experience across a range of contexts, not only to examine experiences of receiving and issuing an OTSP, but also to see how experiences differ and alter perceptions based upon the context in which they occur.

Many studies have sought to claim or contest the effectiveness of various OTSPs, but none have critically engaged with the ideas underpinning the conception of "effectiveness" in their

studies. This study will take this discussion of effectiveness to a higher level of abstraction and look at how conceptions of effectiveness regarding OTSPs are negotiated and how policymakers, enforcers and the public use effectiveness as a term in relation to OTSPs allowing for further discussion of what we want, or expect, from the justice system.

As the justice system grows increasingly expensive, both in terms of administration and access, OTSPs become increasingly attractive. Deciding which type of legally problematic behaviour can be dealt with in this way is fraught with difficulty at a political and conceptual level. If we can, as Bagaric (1998) claims, open up all offences to OTSPs this certainly will affect the experience of receiving a fine (what it means) and cause significant public, judicial and legal outcry. Alternatively at the other end of the spectrum we could remove OTSPs for all legally problematic behaviour, a move not seriously suggested by anyone (especially in relation to parking). In between these two extremes there exists a real gap in our knowledge about how and why we utilise OTSPs.



## Chapter 2: Methodology

This chapter explains the study's methodological approach and the ways in which data was gathered to answer the series of questions about the usage, experience and effect of OTSPs across the three contextual frames. The methods utilised were chosen to highlight debates about the use and experience of OTSPs and the communicative functions they serve. The differing contextual frames (the automated, semi-automated and discretionary) led to a research framework that was multi-site and multi-method. The specific method(s) utilised in each category of OTSP depended upon issues of applicability to the research questions, the ways in which they illuminated the various practices, procedures and debates about OTSP use and practicality. With any research involving human participation there are ethical challenges and they are considered below alongside the debates about the specific methods utilised.

### The Research Questions

The empirical aspect of this research analyses the experience and expectations of officers who issue OTSPs, those who have some role in setting policies on OTSP use and citizens who receive them. The focus on experience, usage and expectations has led to the development of the research questions, these are:

1. How did OTSPs develop and why are they used as a mechanism for dealing with socially problematic behaviour?
2. What factors of 'effectiveness' are important in understanding the OTSP?
3. Have the claims of 'effectiveness' by policymakers been translated into practice?
4. What does compliance mean in the OTSP process and how is it understood through OTSP practice?
5. What messages are transmitted by OTSPs and officers in conducting enforcement?
6. What do recipients of OTSPs think about the enforcement encounter and the process through which OTSPs are imposed?

7. How is the receiving of an OTSP understood and what affect does receiving one have on citizens' views on the legitimacy, trustworthiness and fairness of the law and enforcing body?

In answering these questions it is important to make clear the underlying themes with which this research is concerned. The key unifying theme that ties the research questions together is the idea of a communicative enterprise between state and citizen and how this is operationalised within an OTSP transaction; what messages are sent to transgressors, to society in general and how such messages are interpreted by OTSP recipients.

As this research is primarily about the practices and experiences of those utilising and receiving OTSPs it called for a qualitative approach to data gathering. However, as the research is also about how "effectiveness" is demonstrated, utilised and assessed, it also called for some quantitative analysis of publicly available statistical data. Such quantitative analysis is primarily limited to the measures through which the success, or failure, of the OTSP process is understood, as well as how the use of penalties have contributed to the criminal justice system (be it positive or negative).

#### **Researching the communicative enterprise**

To fully understand the feelings of recipients, and to examine how the practice of enforcement impacts these feelings, the communication that takes place between the recipient and the enforcement agency must be examined. Communication itself "involves... a reciprocal and rational engagement" (Duff, 2001: 77), its reciprocal nature means that there at least two sides engaging in an actual, or metaphorical, discussion. In order to examine this communicative enterprise both sides of the communication must be studied.

Researching OTSP communication therefore requires methodologies that capture data across multiple locations (physical as well as conceptual) in which OTSPs are issued. Further the multiple voices within the communicative enterprise require an examination of

both the recipient side and the multiple actors engaged in developing, managing and implementing OTSP policy.

### The Research Contexts

The OTSP was contextualised in this research based on the interactional dynamic between the recipient of an OTSP and the enforcement agency. This contextual setting distinguished between three forms of interaction:

1. The automated process
2. The semi-automated process
3. The discretionary process
  - a. The police context
  - b. The local authority context

These contextual settings allow for an examination of the four major types of OTSP (PND, PCN, FPN Motoring and FPN Litter) across the varying contexts in which they arise. The split between processes then allowed for rationalisation of data gathering based on the context and the level of communicative interaction between officer and recipient.

In any communication there is a need to recognise common shared understanding as well as sociological meanings that are attached to the words spoken or the meanings communicated or implied (Carey; 1989). In this research this led to consideration of the policy meanings that enforcement agencies intend or communicate at both the societal and individual levels, as well as messages communicated within the encounter. Accordingly a range of methodologies were used and each is discussed below.

The methodologies chosen were:

- a. Documentary Analysis
- b. Interviews
- c. Non participant observations

- d. Focus groups
- e. Online content analysis

### Choosing the Research Locations

In any research, once research design has been formulated the problem then moves on to implementing that design. In this research it involved questions of availability, choice and participation. In any qualitative research one of the most difficult practical considerations is the location of the research - where it will physically take place. The choice of location was complicated by the fact that there were two enforcement agencies (police and local authority) involved in OTSP issuing.

One initial ethical decision that had to be made was the issue of anonymity for the locations studied. It was felt that in order to obtain frank and open data as well as to provide serving officers with protection from unwanted criticism it was decided to offer anonymity to all officers and research locations agreeing to take part. In what follows the location is called "Midwestshire".

Local authority boundaries are not coterminous with police boundaries, which tend to be larger (although not always) and cover a number of local authority areas. The choice of both police and local authority locations for the study was primarily guided by a sufficiency of workload. Statistical reporting in local government and the police are subject to different regimes, with police forces having the most comprehensive reporting requirements, and, since 2010, local government having little obligation to report nationally (see Pickles, 2010a). Thus it was difficult to use similar statistical analysis to identify sample locations. In what follows the primary reason for choice of location was based on sufficient opportunity for the researcher to observe OTSP policy and practice. High and low performing authorities were excluded from the study as both would tend to give an unrealistic and unrepresentative presentation of standard practice. Furthermore those at the lower end of the scale would not give sufficient opportunity to collect data.

### Choosing the police force

For policing OTSPs two police forces were identified as providing excellent research locations because both demonstrated that they formed an average police force, based on OTSP usage, police force strength, population size and geographic size (Home Office, 2012b), and both issued sufficient number of OTSPs so as to allow for researching OTSP policy. The respective rankings of 'Northshire' and 'Midwestshire' police are in table 2.1. The figures represent their position in a league table according to the categories given, from the largest representing 1, to the smallest, 42.

**Table 2.1**

<b>Police Force</b>	<b>Geographic area</b>	<b>2010 PND per capita figures</b>	<b>2010 FPN per capita figures</b>	<b>2012 Police Force Strength</b>	<b>Population Size</b>
<b>Northshire</b>	22	21	20	20	22
<b>Midwestshire</b>	17	16	15	23	21

In each category Northshire and Midwestshire fell within the mid-25<sup>th</sup> percentile of the median, with the exception of 2010 FPN per capita figures for Midwestshire. This demonstrated that both Northshire and Midwestshire were capable of representing an average police force and, crucially, issued a sufficient number of OTSPs (FPNs and PNDs) so that OTSP practice could be investigated.

Deciding upon research location is, however, only half the problem, the difficulty then changes to one of access, and crucial in such considerations is the initial approach to the research location. As this study is about the experience of officers, and agencies, in their use of OTSPs, and about exemplifying the practice of issuing OTSPs and receiving them a comparative exercise between the two forces was not seen as necessary. Therefore a decision had to be made regarding which force area was to be chosen.

In the final analysis there was little choice as Northshire decided it did not have the time to spare in providing observational opportunities. Midwestshire were keen to participate in the research and provided opportunity for both observational and interview based qualitative research.<sup>9</sup>

### **Choosing the Local Authority Location**

In the other two contexts (Semi-Automatic: parking notice, Discretionary: Litter) a different sampling strategy was used. Litter and PCN schemes are operated by local authorities and it is very difficult to have a sampling strategy that identified the average authority for the OTSP debate. The local authority system (unitary, county or borough) means that in geographical terms it can be difficult to identify sample locations. Demographics differ vastly between unitary (typically city) authorities and county/borough (town) authorities. Furthermore the split between two-tier authorities (County and Borough councils) and unitary authorities made it difficult to undertake any meaningful sampling strategy based on the respective enforcement functions of each authority type.

A further problem in studying the FPN within local government is that there are no national statistics on the number issued. DEFRA, since 2010, no longer keep centralised statistics on litter FPNs (DCLG Announcement, 13<sup>th</sup> October 2010a)<sup>10</sup> instead the responsibility lies with each local authority to decide whether to publish statistics at a local level. Short of freedom of information requests to all 433 local authorities in England and Wales (DCLG, 2013) there are no reliable means of carrying out comparative statistical analysis.

Thus a purposive sampling strategy was used that placed emphasis on a sufficiency of 'workload' (OTSPs) within the authority so that meaningful observational studies could be carried out. Therefore a key criterion of the selection of Midwestshire City Council was that

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<sup>9</sup> This decision by Northshire was quite serendipitous. The Midwestshire location fitted geographically with the enforcement authorities who agreed to allow observational studies of OTSP enforcement in the other contexts. Midwestshire Council had also agreed to allow research into parking and litter enforcement.

<sup>10</sup> The latest publicly available statistics relate to 2008-9

it had a Litter FPN enforcement team. This dedicated team could provide insight and opportunity for interviews and non-participant observations to take place. As Feeley (1979) comments in his study of criminal courts in New Haven ‘the correct test is not to show that New Haven is typical of all American cities or typical of mid-sized cities, but rather to show that it is *not* so atypical as to be unique” (1979: xx). A similar rationale governs the choice of Midwestshire City Council. It is not that it is a ‘beacon’ authority in issuing litter FPNs, but that it is not unique in having an environmental enforcement team who carry out litter patrols.

A final important criterion for selection of Midwestshire City Council was availability to take part in the study. Here reliance was made on pre-existing contacts the researcher had with the local authority in question. Therefore all the observational studies in this research, as well as the interviews with police officers, enforcement officers and civilian enforcement officers (CEO’s) (parking enforcement) were all carried out in the geographic location of Midwestshire.

## Methodology

### Documentary Analysis

We live in ‘literate societies’ (Atkinson and Coffey, 2004:45), ones in which ‘documentary realities’ (ibid) pervade social organisations. In this research, documentary analysis provides means for examining and obtaining data on all the research questions of this thesis. The OTSP is a documentary record, in each context of OTSP, a document, - ‘the notice’ - is created. The language and purposes of that notice create realities, both hypothesised (this is what may happen) and experienced (this is what you must do) and also link in (intertextuality) with other texts (enforcement policies or regulations). Thus OTSP documentary realities create worlds that are both experienced and socially constructed.

Communication between enforcement agency and the recipient is at times solely mediated through documentary sources – for example the speeding FPN or the parking PCN. The

contextual settings in which OTSPs arise (automated, semi-automated and discretionary), are helpful here. Each provides a level of textual interaction between the enforcement agency and the recipients which is different according to the process by which the OTSP is issued.

#### *Documenting the Automated Process*

This process is solely embodied in a documentary reality, unless the recipient wishes to have the matter heard in court. The documentary stages consist of the signs at the point of enforcement, be it the speed limit sign warning drivers of the appropriate level, the bright colour of the speed camera, it's even brighter flash, or the road sign warning drivers of enforcement activity. Further the documentary reality is born at the point in which the recipient is informed of transgression - the notice through the post. Studying the communication between recipient and enforcement agency, in this remote context, requires an analysis of this documentary reality, to see what messages are imparted and how persuasion, legitimacy or threat is a part of this reality.

#### *Documenting the Semi-Automated Process*

Again in this process the interaction between enforcement agency and recipient is generally mediated through documentary sources. The recipient typically receives a PCN that has been affixed to their car window rather than in person. This, in itself, carries a signification function to other members of the parking public about the level of parking enforcement (a deterrent signification). Furthermore the PCNs language and its accompanying documents convey meanings and messages to recipients that can be analysed as well as the signs and poster campaigns used to foster compliance.

#### *Documenting Discretionary Processes*

This process sits at the intersection between 'documentary reality' and physical experience. The OTSP, and the policies and procedures accompanying it, are textual, however they are



delivered within a physical world. If one uses the analogy of the theatre, the notice represents the script whereas the interaction and its manifestation, in lived experience, are the domain of the actors giving life to that script. In both the PND and Litter context this required an examination of both the action of giving out OTSPs, through non participant observation, and the documentary sources that give meaning to the OTSP. To carry out this intersectional analysis it was necessary to obtain OTSPs from the respective authorities as well as the policy and procedural documents relating to each OTSP.

### **Analysing Documentary Realities**

The strategy used to analyse documentary data relies on Mason's (1996) assessment criteria. Mason suggests a series of questions relating to documentary source: 'the level of detail or fullness... how complete an account or perspective they provide... why were they prepared?... by whom, for whom, under what conditions, according to what rules and conventions, what have they been used for?' (1996; 75) Focusing on these questions allows for examination of both the purpose of the documents and the respective functions they serve.

A further inter-textual analysis was also called for in analysing the communicative nature of the documents. The OTSP and accompanying letters do not appear in a vacuum, they arise in a system which is regulated and situated within further policy contexts (the criminal justice system). In the case of OTSPs arising in contexts governed by criminal law (Moving Traffic, PND's, Litter) sentencing principles and guidelines also operate within this system, it is essential to reflect these guidelines and policies when discussing the communication embodied in the OTSP.

### **Interviews**

The key theme of this research is how the experience of the OTSP is interpreted and understood by all sides in the interaction. Therefore it was necessary to engage with those

who had a role in determining policy as well as those involved in understanding and implementing such policy. In addition to other methodologies set out in this chapter, the qualitative interview of both sides of the OTSP interaction was also a vital research method.

OTSP literature and debate has relied largely on quantitative rather than qualitative data; the number of OTSPs issued and the cost/savings of this form of punishment have formed proxy measurements for effectiveness. In this research “effectiveness” is problematised and investigated. The focus on experience and the discussion, as well as the contestation, of “effectiveness” called for a qualitative inquiry, as Gerson and Horowitz (2002) point out ‘people experience their lives not as a set of variables, but rather as the unfolding events, perceptions and feelings over time’ (2002: 208). In the “effectiveness” debate such unfolding perceptions cannot be captured adequately by quantitative measures.

In this research the policy claims of “effectiveness” of OTSPs, and how this is implemented in practice, was examined through the language, understanding and perceptions of both the recipient side of the OTSP and the enforcement side. This qualitative inquiry called for an interview methodology to capture ‘how large scale social transformations are experienced, interpreted and ultimately shaped by the responses of strategic social actors’ (Gerson and Horowitz, 2002: 201).

In studying the experiential responses across both sides of the penalty interaction, as well as the sense of justice communicated, it forces one to reflect on the theory of knowledge creation underpinning the interview methodology. This study does not assume that truths in the social world are objective, instead it takes an interactionist view on such ontological and epistemological philosophy. The starting point for such an approach is given by Miller and Glassner as ‘start[ing] from a belief that people create and maintain meaningful worlds’ (2002:102). Here the research is neither positivist nor radical constructivist, instead it take a position, like that espoused by Miller and Glassner, which is ‘outside of this objectivist–constructivist continuum.’(Ibid: 99)

Such a philosophy holds that “two persons can communicate their perceptions to one another. Knowing full well that there are both structures and pollutants in any discussion, we chose to study what is said in that discussion (Glassner & Loughlin, 1987:33)” (ibid: 102). This approach recognises that whilst there may not be objective truths, ‘[n]arratives that emerge in interview contexts are situated in social worlds; they come out of worlds that exist outside the interview itself.’ (ibid: 104).

To obtain these narratives, semi-structured interviews of recipients were carried out across the OTSP contexts as well as interviews with the enforcement agencies/officers that use OTSPs. To tease out effectiveness and communicative justice narratives in interviews it was essential to allow participants to ‘explore issues that they felt were important’ (Longhurst, 2010: 103). Capturing narrative themes of legitimacy, meaning, effectiveness and communication required an interviewing style ‘beyond conversation but remain[ing] far removed from the very structured end of the scale’ (Davies, 2000: 83). The use of semi-structured interviews involved an approach that was not rigidly structured to exemplify pre-existing researcher ideas, instead participants were allowed the space to develop their own understanding of the experience of receiving, and issuing, OTSPs. Using this approach the researcher must ‘listen’, ‘prompt’ and ‘encourage’ ‘without leading’ (ibid: 91) therefore an interview schedule was created consisting of open questions designed to elicit responses that were self-interpreted; (the participant was allowed the space to interpret the question and answer). The semi ‘*structured*’ nature of the interview then assisted the researcher if it was felt that the discussion was moving off topic, or the participant requested further instruction on the meaning attributed to a particular phrase.

### **Reflexive learning through interviewing styles**

Conducting semi-structured interviews within this research has also been an exercise in reflexive learning on how knowledge is created or understood. Prior to this research the author had been an enforcement officer at a local authority who conducted interviews in a style De Santis calls the ‘professional occupation’ (1980: 73) interview. Such interviewing

was based on professional requirements of criminal justice practice, (so called Police and Criminal Evidence Act (PACE) criteria) and had an epistemological foundation routed in scientific objectivity.

It is recognised that this thesis is a piece of social science research that seeks to understand social phenomena. Accordingly, to obtain experiential data, it necessarily involves searching for answers to the 'meanings people attribute to their experiences' (Miller and Glassner (2002:101)). This re-orienting of ontological and epistemological viewpoint has at times proved difficult throughout this research. Asking open questions designed to allow participants the space to develop a 'narrative' and a 'social world' as Silverman (1993) describes it, has been a challenge. In the 'professional occupation [interview]' (De Santis, 1980: 73) social worlds are created outside the interview not within it. As an officer involved in such interviews, the purpose was to obtain details of the 'outside' (Miller and Glassner, 2002:101), as objectively true reflections of what had happened. In such interviews closed questions are frequently used to 'tie' the suspect into a narrative, which is a 'prospecting task' (Holstein and Gubrium (2004: 115)) rather than a 'meaning making' interactive encounter (ibid: 115). Throughout many interviews and focus groups the researcher had to consciously pull back from filling silences with questions in order to allow participants the space to give voice to their experiences and develop their understandings.

By focusing on the socially constructed nature of meaning in the interviews it helped to divorce the researcher from the strictly positivist ontology required in previous employment. The interviews were not exercises in prospecting but were designed instead as 'a means for exploring the points of view of ...research subjects, whilst granting these points of view the culturally honoured status of reality.'(Miller and Glassner; 2002:104)

Interviews within the contexts

### **The Automated Process**

Semi-structured interviews were conducted with automated OTSP recipients to explore what factors were important around issues of fairness, communication and effectiveness. This data was then utilised, in addition to existing qualitative research (such as Fox, 2003; Wells, 2012) as a means of exploration for questions to be asked in focus group sessions.

As this process can be split into broadly two categories, motoring FPNs issued by the police and PCN (typically bus lane) issued by local authorities, interviews were conducted with officers and recipients in both categories of OTSP.

In the local authority PCN context semi-structured interviews were conducted with Midwestshire City Council officials including the Enforcement Director, (responsible for overall policy and strategy) the Parking Services Strategic Enforcement Manager (responsible for policy and strategy implementation as well as the day to day management of the parking service team) two Civilian Enforcement Officers and a Civilian Enforcement Supervisor. Furthermore a semi-structured interview with the head of the Traffic Penalty Tribunal (TPT) Service was undertaken and two interviews with Adjudicators during TPT observational studies.

The enforcement side of moving traffic violations (FPNs), primarily speeding and failing to comply with traffic light signals, involved semi-structured interviews with a Superintendent of Midwestshire Police who was responsible for 'Justice Services', which included the Central Ticket Office (who process payment for FPNs and manage the Safety Camera Partnership), the Chief Constable Staff Officer (responsible for all civilian staff within Midwestshire Police), the Traffic Process Office / Central Ticket Office manager and three road traffic police officers.

### **The semi-automated process**

Enforcement officials, and agencies, involved in the semi-automated process are the same officials involved in the automated process since in practice there is no distinction of job role between the processes. The same local authority officers and police officers are involved

in enforcing through the semi-automated process as through the automated process. Thus interviews were conducted with the same officials identified in the section above at the same time. On the recipient side of the OTSP debate five recipients of parking charge notices were interviewed as a means of developing and further examining issues raised in focus groups.

### **The Discretionary Process**

- **PNDs and Motoring FPNs**

The discretionary process of OTSP enforcement involves far more of an interaction between recipient and enforcement officer. It is thus important to understand how this interaction takes place and what factors are essential in making sense of the interaction for both recipients and enforcement officials. In the PND context the location of the encounter is generally in police custody and thus there was a need to split the discretionary process between PNDs, motoring FPNs and litter FPNs as this location quite obviously changes the nature of the citizen/officer interaction. Furthermore motoring FPNs are discretionary when enforced by police officers at the road side, again being pulled over by the police and talked to inside a police car make the interaction qualitatively different from the on-street litter FPN interaction.

Interviews were carried out with the two sentencing policy officers at the Ministry of Justice, a Chief Superintendent, and the senior manager of the Central Ticket Office in Midwestshire Police, as identified above, as their responsibility also included PND policy and implementation. In addition semi-structured interviews were carried out with police officers whose daily role involved issuing PNDs for retail theft and FPNs for motoring. A further six interviews of custody officers were carried out during the observational research at Midwestshire custody suite.

Three semi structured interviews were conducted with PND recipients, in addition to two interviews taking place in the custody suite. Interviewing in the custody suite provided

somewhat of an ethical dilemma. As discussed below, during the observational research recipients of notices were notified that I was observing the interaction for the purposes of an academic study. Recipients were given the option to refuse to be observed during their interaction with the officers. At the end of the OTSP interaction I was given the opportunity to discuss the notice with the recipient. This caused some ethical concerns since the recipient may have believed that discussing the PND with the researcher was necessary before being released from custody; however it was explained by both the custody sergeant and researcher that this was not the case.

In preliminary discussions with the Chief Constable Staff Officer and the Principal Data Protection Officer of Midwestshire Police it was envisaged that a separate room would be set aside for the researcher to discuss the PND with recipients. It was stressed at the outset that such participation needed to be voluntary and after the decision to release the detainee from custody was made. A special form was developed (attached at **Appendix 1**) that set out that recipients were not required to speak to the researcher prior to leaving custody. It also stressed that involvement in the research in no way altered the outcome of the penalty encounter; it would not reduce or remove the PND.

Unfortunately accommodation was not made available at the custody suite, indeed there appeared to be no accommodation where such an interview could take place within the suite. Instead some custody sergeants merely asked if I had any questions of the recipient whilst they were in process of being released from custody, such interviews would take place in front of both the custody sergeant and the police officer dealing with the recipient. Those offers were declined as it could not guarantee either reliable or ethical data in such circumstances. However two short interviews did take place outside the custody suite in the main reception once the recipient had been released.

### **The Local Authority FPN**

These OTSPs relate primarily to the quality of life of local residents, generally dealing with environmental matters such as littering, dog fouling and noise nuisance. To carry out empirical research on FPN enforcement it was essential to choose a particular offence to focus on. Such choice was guided by the ability to obtain sufficient data, accordingly litter FPNs were chosen since they represented the most popular notice issued by LA's. Table 2.2 lists the number of FPNs issued by all local authorities up to the latest date for which statistics are available.<sup>11</sup>

**Table 2.2 Data obtained from the Manifesto Club, *Pavement Injustice* (Appleton, 2013)**

Offence	Year	Number
Littering	2011-12	63,883
Dog Fouling	20011-12	3,208
Waste Receptacles	20011-12	5,622
Fly Posting	2011-12	945
Graffiti	2011-12	312
Other	2011-12	1054

This table shows that litter FPNs were by far the most common form of notice issued by local authorities, representing 89% of all local authority issued FPNs in 2011-12.

Litter can be dealt with by police officers by way of a PND, however in 2011-12 only 646 such notices were issued nationally (MOJ, 2014a) compared to 63,883 FPNs issued by local authorities (Appleton, 2013).

Despite the overlap between the police and local authority regimes the contextual split between the two reflected requirements of research design. The local authority enforcers in this context rarely wear a uniform and are not generally accepted to be part of the criminal

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<sup>11</sup> As noted earlier the Coalition Government removed litter statistical reporting in 2010.



justice enforcement system and so the communication and sense of justice, fairness and the 'criminal' nature of the transgression as experienced by recipients are qualitatively different, even if the behaviour (littering) is as morally problematic. Therefore it was essential within the research design to reflect this qualitative difference.

As discussed below the primary method of data gathering in both discretionary contexts was through observational studies. Unfortunately recruitment for semi-structured interviews (and focus groups) in the litter context failed. Despite repeated attempts to contact recipients who at first stressed a willingness to take part in the study, the approach was unsuccessful and those recipients failed to respond. Instead data is primarily drawn from observational research and an analysis of internet forums and news comment groups (explained fully below) to obtain relevant experiential data.

#### **The process of interviewing**

Interviews were audio recorded using a Samsung S3 voice recording app. The recordings were then uploaded to password protected cloud storage and from there downloaded to a password protected PC and transcribed by the researcher within days of the interview taking place.

Interviews with policy professionals and enforcement officers were by means of face to face interaction at a location of their choosing. However with semi-structured interviews of recipients it was far more difficult to arrange meetings due to recipients work commitments or geographical considerations. In those interviews, two were conducted via telephone two were conducted via Skype, and the rest were conducted face to face. Although Skype is a video conferencing system the calls were audio recorded only using a program called Amolto Call Recorder.

#### **Anonymity of Interview Participants**

At the outset of this study guaranteeing participants anonymity was seen as essential, and in most methods it caused little problem (the exception being the internet methods,

described below). In relation to interviews anonymity was problematic for participants rather than the researcher. Many expressly wished to be quoted directly by name, and in a sense this exemplified the theoretical justice problem described in chapter six. Here these respondents felt that they had not had an opportunity to state their case or for it to be recognised that they had suffered unjust treatment. By taking part in the research it was as if the participants had a method of cathartic release and a means by which they could finally use their voice to combat perceived injustice.

This opportunity to provide “voice” created a problem. In effect the study is providing the participant a means finally to voice their concerns and hopefully have someone take notice, but in reality it is an incomplete voice because the study will not identify the individuals and so their experience will remain anonymous. Although this may appear unsatisfactory the researcher felt that anonymity was better guarantor of participants’ rights, or protection, than naming and the potential consequences that can arise from that. Participants may express a desire to be named and to have their voice heard in the context of an interview in which strong emotions are expressed; however in the longer term such feelings may subside. Therefore a cautious approach was taken and all interviews are anonymised. Furthermore when participants expressed a desire to be named they were reminded that it was a confidential study and they would not be named.

### Observing the OTSP Interaction

This research relies on ethnographic observations of OTSP interactions in the context of litter, speeding enforcement and the issuing of PNDs. Baszanger and Dodier state that

‘ethnographic studies are carried out to satisfy three simultaneous requirements... the need for an empirical approach, the need to remain open to elements that cannot be codified at the time of the study [and] a concern for grounding the phenomena observed in the field’ (2002: 8)

The communicative interaction between an officer and a recipient of an FPN for litter, a PND, or in some cases a motoring FPNs<sup>12</sup> is one that happens on the street or in the custody suite. To understand how such notices are presented, issued and received one needs to be present to observe this interaction. Furthermore as Baszanger and Dodier point out the need for an ethnographic approach is required because the 'phenomena studied cannot be deduced but require empirical observation.' (ibid, 9) Interviews can help understand how recipients, or officers, feel about the interaction, and how they believe they are communicating, but they cannot relay the immediacy of the interaction. They can only relate what was meant or understood, rather than what was said or (mis)interpreted. In the words of Bryman this is the 'gap between stated and actual behaviour' (Bryman, 2001:162).

A key theme of this research has been the extent to which recipients feel they have been involved in a procedurally fair process, therefore it was important to obtain data that examined the behaviour of the enforcement officer and the OTSP recipient. Procedural justice literature has primarily used quantitative methods (for example see Thibaut, J., Walker, L., LaTour, S., & Houlden, (1973) Tyler (2006), Tyler and Huo (2002), Jackson, Bradford, Stanko, and Hohl (2012)). However, as Mastrofski and Parks note, behavioural tendencies are poorly served by quantitative analysis as they are based on 'potential causal factors' (1990: 475) rather than actual observed behaviour. If one wants to understand, or make sense of, the interaction between an OTSP recipient and the law enforcement agency (and the law itself) one needs to engage in methodologies that expose the researcher to this interaction.

Mastrofski and Parks make the point that

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<sup>12</sup> Occasionally CEOs may have such interactions but from the interviews with officers it was clear this was not a common occurrence, mostly PCNs were issued in the drivers absence.

'If, as many suggest, police work is mostly talking (Muir, 1977; Sykes and Brent, 1983), the quantitative behavioral literature tells us only a small portion of what police say and how and why they say it' (1990: 476)

Of course it is also important to recognise that this facet of policing also applies to local authority enforcement. Indeed the communicative function of such enforcement is incredibly important since such officers lack the power of arrest and the 'sacred aura' (Reiner, 2010: 91) that the police have. There is a wealth of literature on police culture, (see Waddington (1999), Loftus (2009) for an introduction) but very little on enforcement culture in non-police roles, the notable exception being Richman's (1983) ethnographic study of traffic wardens in Manchester. To understand the if's, how's and why's of enforcement by way of litter FPN, observational studies were seen as an important source of data gathering; it allowed observation of the interaction and also the opportunity to talk and observe officers in their day to day environment (culture).

A semi-structured style of observation was used in all OTSP contexts, this involved the creation of an observation schedule. This schedule coded certain themes that could be observed during shifts with the enforcement agencies. In addition the schedule acted as an aide memoire for the researcher, to observe interactions and thoughts of the officers in their day to day duties. It was felt that a structured coding schedule would limit observations of the actual interaction. This was particularly true of those OTSPs received on the street where the interaction typically lasted only a few minutes. Trying to code data whilst simultaneously listening to what the officer said, the recipient said, observe any non-verbal communications, and communications received from third parties (be it members of the public, partners, friends or spouses) would have been extremely difficult. Instead in this research the semi-structured nature of the observations allowed for a freedom during these exchanges to, in the words of Bryman, 'record in as much detail as possible the behaviour of participants with the aim of developing a narrative account of that behaviour.' (2001: 163)

Observational studies were carried out in the custody suite of Midwestshire Police (PNDs, five shifts) as well as with their retail crime unit (PND's, two shifts) and their road policing team (FPN, one shift). Additionally, five shift observations were carried out with Midwestshire Council's environmental enforcement team (litter FPNs).

### Ethical Considerations of Observational Research

Gold sets out a fourfold typology of the level of participation that a researcher carrying out observational studies engages in; the complete participant, the participant as observer, the observer as participant and the complete observer (1958: 219-222). Fitting any research into any one typology can be difficult as there are a myriad of ways in which observational studies can be interpreted depending on the object of observation. In this research Gold's categories are difficult to apply due to the dual objectives of the observational research; to observe officers in action as well as recipients receiving notices. Officers may see the researcher as a complete observer, however recipients, whose first sight of the researcher will be alongside an enforcement officer, may think that researcher has a more participatory role which raises ethical concerns.

Firstly this research did not use any covert observations. All officers observed were aware of the researcher's status as an observer and the researcher did not participate in the actions and roles the officers were undertaking. Observations in the policing context provided little additional ethical concern to what has been set out above, however in the litter context there was an issue over the status of the researcher. By accompanying litter officers on patrol duties there was scope for misunderstanding about my role in relation to the enforcement agency<sup>13</sup>. The extra body on the street may provide, or give the appearance of, greater monitoring by the enforcement agency; however alternative strategies for observational research (covert observation for example) are far more ethically problematic (see Herrera (1999)). It may have been that an added benefit to Midwestshire

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<sup>13</sup> In policing observations this was not a factor due to the nationally recognised uniform of officers.

City Council of observational studies would be that it provided the appearance of another officer on the street, which may deter the incidence of littering further. To a certain extent this is an unavoidable consequence of conducting observational research with enforcement officers. Of course the researcher was not in a council uniform and so this also lessened the extent to which this was a factor.

It was interesting to reflect at one point on the debate over the covert / overt observation method, since a similar debate had already taken place within the council over whether officers themselves should adopt overt or covert practices in enforcement. During this research this debate was mentioned by an officer carrying out patrol, who felt hampered by the uniform. As he put it 'it's about understanding what really happens, and do the uniforms help us do this? Would they really not litter if we weren't in uniforms?' (Officer A, Field Notes, 5-10-12)) This quote neatly summarises both the empirical and ethical questions for the field academic, obtaining reliable data (would this happen if I weren't here?) whilst maintaining an ethical approach (is this the right thing to do?).

### **Gaining Consent of the researched**

On the other side of the OTSP interaction there is a further ethical problem in that the recipient may not consent to the observer witnessing the interaction. This is a typical observational research dilemma, the 'public' nature of the interaction and the right, as Goffman has stated, 'not to be stared at and examined' (2009: 40) and that 'once engaged in talk to have their circle protected from entrance and overhearing by others' (ibid). This right was respected in this research by requiring officers at the point at which they introduced themselves to the recipient, or in the case of police custody issued PNDs the point at which the officer proposed to deal with the matter by way of PND, to also introduce the researcher and the purposes for being present. The officer would then give the recipient the option to consent to observation. If they did not consent then the interaction would not be utilised in the research, however none of the recipients forming part of this research objected to observation and note-taking during the interactions.

## Focus Groups

The immediacy of recipient reactions to OTSPs is provided for in the non-participant observation methodology, however such observations were limited in that responses tended to be “in the moment” and not a more considered reflexive opinion. Furthermore the responses made in the encounter involved the researcher’s interpretations rather than the recipients of the experience. Morgan (1997) explains how focus groups can help in this regard.

“By conducting focus groups, we admittedly had to sacrifice the immediacy and emotion of a naturally occurring episode... but this was not really a loss because we could not “sacrifice” what we never had access to in the first place.” (Ibid: 9)

Moreover

“psychological topics such as attitudes and decision making... appear to be slighted in ...observation not because they are less important but because they are less well suited to observation.”(ibid, 9)

Thus focus groups allowed for a more reflexive account of the experience in an atmosphere that was not charged by accusation from an enforcement official. Thus observational studies were focused on the immediate communicative interaction whereas focus groups built on this knowledge and examined recipient experiences, thoughts and perceptions on the encounter at a stage removed from the immediacy of shock (the typical response found in the observations.)

Focus groups were also utilised to challenge the accepted internalised norms of OTSP recipients by asking them to discuss their notice in a room with others who had received either lesser or more seriously perceived OTSP. The advantage of a focus group here is, as Morgan states, that ‘direct evidence about similarities and differences in participants’ opinions and experiences’ (1997: 10) can be obtained ‘as opposed to reaching such

conclusions from post hoc analysis of separate statements from each interviewee.’(ibid) In addition focus groups gave recipients the opportunity to discuss other OTSP interactions they had had.

Humeniuk et al (1999) in their study of the Cannabis Expiation Scheme in South Australia found that those subject to expiation sought and gained reassurance from significant others and deliberately chose those whom the recipient thought would express positive reinforcement. (1999: 49-51) This research instead sought to gain an understanding of the OTSP experience by placing recipients in a focus group with other recipients whose reassurance could not be taken for granted. For instance, in one focus group recipients of FPNs for driving without a seatbelt, using a mobile phone whilst driving, two speeding drivers and one who illegally went through a red light were put together to examine responses and any interactional dynamics between participants who thought that their FPN was either more, or less, serious than the others.

#### Choice of Subject - Recipients

The choice of research participant is a complex interplay of both data adequacy, of which reliability, replication and validity are the three key criteria (Bryman, 2001: 29-30) and subject availability.

The key determinant in this research for the choice of subject was the idea of the ‘problematic citizen’. Those who, to quote Karstedt and Farrall (2006)

‘think of themselves as respectable citizens, and who would definitely reject the labels of ‘criminals’ and ‘crime’ for themselves and their actions. Politicians refer to them as the ‘law abiding majority in this country’, ignoring the fact that the majority *does not* abide by the law, or at least is highly selective in when to comply and when not to’ (2006: 1011) (No emphasis added).



This idea of the law abiding citizen was of far more evidential value to the study than traditional notions of identity such as race, class, age or gender. It was important to examine how those who felt that they were part of the “law abiding majority” responded to an OTSP and how they related this to the idea of being law-abiding.

Given the breadth of behaviour for which one can receive an OTSP the call for participants was open and asked for participation based on experience of any OTSP. Previous studies of OTSPs in Australia suggest that, despite the high number of potential participants, recruitment is difficult. Fox (2003) surveyed 5000 people but in the qualitative stage managed to only recruit five focus groups of between 4-6 people (Fox, 2003; 2-4). As Fox said “[t]hese groups were difficult to recruit, of those who agreed to attend a focus group, a high proportion did not show up.” (43) This research faced similar problems; it was difficult to recruit participants and a majority of potential participants who expressed an interest failed to attend.

A number of routes for advertisement of the study were followed; online advertisements were used on social media and various forums in which it was felt likely that readers may have experienced an OTSP. Motoring forums, football forums and student forums were all used as well as a network of acquaintances and snowballed contacts.

One organisation that had agreed to take part in the observational studies had 5,000 employees and agreed to forward an email advertising the study. In addition an email was sent through the university email system to all students and staff at the University of Keele advertising the study. It was felt that once a number of participants had expressed a willingness to take part in a focus group then a series of sampling steps could be taken with the aim of placing the recipients in an appropriate group as well as providing a means of snowballing contacts.

There were five focus groups ranging in size from 3 – 7 participants. All recipients had received an FPN for motoring offences or PCNs. There were no focus group participants in

the litter or PND category, all those interviewed in the PND category, and those who provisionally expressed an interest in the study, stated at the outset they did not want to take part in a focus group. Given the nature of offences (the moral content of the laws) leading to either a litter FPN or a PND perhaps one reason for not wanting to take part in a focus group is that recipients of these notices had more difficulty in seeing their behaviour as, to a certain extent, acceptable. A couple of PND recipients whilst at first agreeing to take part in the research changed their mind prior to actual interview, one citing 'embarrassment' over what they had done as the key factor in not continuing to take part. With the PCN and the speeding FPN this was not an issue since the offences are so widely enforced and so commonly committed that perhaps they don't carry the same level of moral opprobrium.

A further approach to recruitment was to provide recipients with a brief discussion document outlining the study at the point at which they received an OTSP during observational studies. Those that consented to talking to the researcher after the OTSP encounter finished were given a form about the study (see Appendix 1) and asked to contact the researcher if they wished to participate further. Only two recipients consented to an interview and this took place immediately after the interaction at the police custody suite.

The overall experience of recruiting participants who had received an OTSP was, however, difficult and at times frustrating. A number of recipients simply failed to show up at focus groups or after initially expressing a desire to be involved subsequently ignored any further contact.

### Focus Group Process

Each focus group was recorded in audio format only, on a digital voice recorder. This was uploaded to a password protected computer and transcribed by the author within a short period. Participants were asked if they consented to the use of a recording device prior to the focus group and also at the focus group to ensure full informed consent was given.

Where focus group data is analysed within the text it is specified as 'FG' followed by a number representing the relevant focus group (e.g. "FG1). Participants have been given a pseudonym to protect anonymity, and the OTSP they have received is noted. Where data includes quotes from the researcher it has been identified by the preceding initials AS.

### Online Content

In researching people's responses to OTSPs, internet-based forums have been recognised as 'an active arena in which the debate is conducted' (Wells, 2012:16) and also 'where groups of individuals discuss particular topics of common interest or common experience' (Illingworth, 2001: 9.1). Similarly O'Malley sees the internet as a key site for examining resistant politics in the 'age of the individual' and the 'massification of control' by way of OTSP (O'Malley, 2011). Internet Forums provide, to quote Illingworth, 'a medium whereby the researcher has access to a world of behaviour and ideas... [t]he key to these groups is that they are there to exchange information and ideas about well-defined topics and, as such, provide a rich vein of information' (ibid, 8.1.). The directed nature of the discussion, not directed by the researcher but the commenters themselves, gives the researcher a 'worldview' on an area of debate in which 'individuals seek out, challenge and contest meaning around OTSPs (or any topic).

The internet, as a site of research, 'is a readily available source for information...' (Wells, 2012: 16) which can provide the researcher with a wealth of qualitative data, as well as allowing quantitative analysis of frequencies of responses, or use of particular words. Given that the internet provides a means for communication for vast numbers of people, the wealth of data can be overwhelming. This 'massification,' to use O'Malley's phrase, presents problems of research design, ethicality and accuracy since individuality and normal expectations of social interaction are absent.

## Online Methodology; what is it?

Researching internet forums provide a challenge to the traditional types of methodology in qualitative studies. There are various methods of internet data collection through internet forums. The data can be created and collected in the traditional method of question and response interviews, or, as it is online, it can be used as a means for focus group participation, either by synchronous communication through chat rooms, or asynchronous communication through internet forums (Eun Ok Im & Wonshik Chee, 2006). An alternative method is through observational studies of existing or evolving discussions in forums.

The two methods chosen in this research were: an ethnomethodology focused on non-participant observation in online forums, and use of social media and internet forums to advertise the study. Reasons of ethicality and relevance/accuracy militated against the use of internet forums for participatory research, be it focus group, interview or directed observations. This is not to say that such research is always unethical as Searle, Charteris-Black MacFarlane & McPherson (2010) state 'postings to the Internet are generally regarded as material in the public domain, the researcher might feel able to proceed without asking for ethical approval or informed consent from research participants.' (2010: 596) Although as they also state 'different practices are followed by different researchers in this respect' (Ibid).

Advertising the study on internet forums and social media provided little in the way of ethical or methodological concern since the actual data gathering of those responding to the online advert would take the form of an interview or focus group (offline), which allowed the full ethical procedure of informed consent to be followed.

One interesting, and unforeseen, issue that arose during the advertisement process (the advertisement is reproduced at Appendix 1) was a debate about the use of language to describe the OTSP system. A number of posters on the forums took issue with the descriptive phraseology around OTSPs, whether they could be labelled 'fines' and / or

'penalties' since they were not issued by a court, or whether they could be called 'on the spot' since no money was exchanged at the point of issue. This reinforced Wells' findings about the demonopolisation of expertise (2012:73-103) in that self-identified 'experts' sought to undermine and challenge each phrase in the request for participation. Such contestation served as a means of demonstrating the poster's 'superior interpretive accuracy' (2012: 42). This strengthened the belief that the use of forums to undertake researcher controlled focus groups was not appropriate. As the comments to this posting made clear, controlling the direction of the focus group (its focus) would be difficult in an environment where normal expectations of social interaction were absent. One commenter asked if the debate could take place in the forum but this was ruled out. Instead those commenting that they wished to take part in the study in the forums were asked to contact the researcher by email.

The second internet methodology used a non-participant observation methodology based on analysis of online postings on web forums designed to provide guidance, advice and information to those who had received OTSPs. In addition a number of national news media comments sections were examined that provide options for readers to comment on the news stories reported. In total ten news comment webpages were used to obtain data, these included five from the BBC's Have Your Say Forum (HYS), three from the Daily Mail (DM) one from a local Midwestshire newspaper (TS), and one from the Daily Express (DE)<sup>14</sup>. The reliance on both forms of internet discussion raised ethical and legal concerns.

#### Research ethics in the online world

This research chose on-line locations which required, as part of their licence agreement with the commenter, that contributors had freely chosen to post on *public* internet forums. The locations chosen were either in response to a story in national news media or forums designed for airing debate or requesting guidance from other members. Such forums were

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<sup>14</sup> The list of stories used and web-links listed in Appendix 3

open to all users of the internet and did not require, at the time of writing, membership to view posts.

There were two approaches considered before engaging in internet research of online forums. The first involved active participation of the researcher, and the second approach involved the use of publicly available posts without researcher engagement or involvement.

#### *Engagement - Active or Passive*

Ethical considerations prevented actual involvement in online debate or soliciting for comments due to issues of fairness and consent. It would be quite wrong for the researcher to engage in the debate in question without a full consensual and ethical agreement in place between researcher and participant. These forums are ways in which people make sense of and understand OTSPs they have received or have opinions on. Involving the researcher in such debates leads to questions of independence and the possibility of engineering results to fit the researcher's expectations. Furthermore by requesting data, or engaging in debates that seek to garner a response or opinion, the researcher is in reality conducting an interview and thus should be subject to the same ethical considerations as face to face interviews (informed consent). Additionally the danger of hijacking the forum was ever present, as the discussion above highlighted, thus active engagement was rejected by the researcher.

Research involving direct input into the discussion can be ethical as well as practical (Illingworth, 2001) however for this research it was felt that unstructured, unmediated comment and discussion was a better means of reliability, accuracy and replicability than directed online participation. The forum research represented a more 'realistic' interaction between individuals trying to make sense of a particular policy or OTSP they received. With internet forum research the commenters were the masters of the direction of discussion. By deciding on this method of data gathering a number of ethical issues arose as to the consent of research participants and guarantees of anonymity.

### *Ethics and Choosing the Locations of Debate*

Two types of location were chosen for the online research: news media message boards and specialist online forums. The former provide the newspapers general online readership with an opportunity to comment on a story and provide their own thoughts on the subject. This method of online research is not new, indeed Wells (2007) conducted similar reviews in her study of speeding enforcement.

### **The Public Domain**

In online research, informed consent is a difficult concept given the public nature of online interactions. It was felt that forums and message boards should be chosen that were open to members of the public and placed no restriction on viewing the data. News media message boards examined in this research expressly informed commenters that the information would be published in a readily accessible public forum<sup>15</sup>. Thus these comments were little different to letters pages published in the traditional paper press, readers would be encouraged to have their thoughts published. In relation to internet forums the position was more difficult as these websites generally required membership to post and did not involve general public interest stories.

There were two internet forums analysed in this research: The Student Room (<http://www.thestudentroom.co.uk/>) and Pepipoo (<http://forums.pepipoo.com/>), neither required forum membership to view, copy or paste the data contained therein. The membership criteria for taking part in the forum discussion was also analysed to ensure that applicants using these forums are made aware that the information they post is readily available and in the public domain. In addition to these two forums a further discussion site, Piston Heads (<http://www.pistonheads.com/gassing/>), was ruled out due to copyright restrictions (see below).

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<sup>15</sup> See Web-links in appendix 3

Cavanagh (1999) suggests that in approaching the ethics of using online data there are a number of questions that need to be addressed, including the public/private nature of the conversation and the particular forum rules and their approach to 'lurking' or 'lurkers' who view, but do not engage in, discussion.

In the internet realm there is debate over whether the fact that the information is accessible makes all such data public, and in no circumstances private (see Bakardjieva and Feenberg (2000); Herring (1996) and Reid (1996)). Bakardjieva and Feenberg themselves eschew the strict public/private dichotomy and instead recommend degrees of public/private understanding. The challenge for the researcher, as Berry points out is that they must 'take an active part in the framing of the research ethical position, in order to ensure that unacceptable problems are avoided' (2004:62). Thus the researcher has to identify and develop an understanding of private/public in online research and be ready to defend the use of the material. The starting position for this research was that discussions between individuals that take place in public that are not obviously private are capable of being used without being unethical.

In responding to Barardjivea & Feenberg's public/private challenge, the first consideration of this research was the access route to the forum data itself. Neither the Student Room, Pepipoo nor PistonHeads required forum membership in order to view the forum's pages. This was an important factor as it argues against charges of deliberate deceit by the researcher as to the reasons for their participation in the forum. Opening the forum to all, providing there is a means of internet access, means that the information falls more in the category of public rather than private. However this was not the sole determining factor.

A second consideration in the public/private debate was whether forum members knew that such data was in the public domain. This called for an examination of the terms and conditions of membership for the forums and message boards.



TSR provided the most comprehensive statement that the information forum contributors provided was in the public domain.

“...Please be aware that whenever you voluntarily post personal information to discussion forums, wikis, journals, blogs, message boards, classifieds or any other public forums that that information can be accessed by the public and can in turn be used by those people” (retrieved on 2<sup>nd</sup> September 2013 from: [http://www.thestudentroom.co.uk/faq.php?faq=tsr\\_cat](http://www.thestudentroom.co.uk/faq.php?faq=tsr_cat) )

This clearly demonstrated the information on TSR was in the public domain and hence capable of being utilised in the research, subject to issues of anonymity (discussed below.)

The Pepipoo forum was more complex. This site contains two sections dealing with the public nature of the website. In the first, a ‘beginners guide’ policy states

“Guest - free. As a guest you don't have to register or login to read posts in the public forums. You can't post messages, though.” (Retrieved 2<sup>nd</sup> September 2013, from: <http://forums.pepipoo.com/index.php?showtopic=36860>)

This indicates that guests are free to peruse the data and that such information is therefore in the public domain. A ‘guest’ to this website is any person accessing the site who is not a member, which again suggests that the information is in the public domain.

This public/private determination was further reinforced by a section in the ‘terms of use’ dealing with the ‘subscription only’ part of Pepipoo’s web forum. It states

“Access to some sections of the forums is restricted to Supporter Members who may be required to pay a non-refundable subscription fee. ***The content of these sections is confidential and if you access these sections (whether or not you have been authorised to do so) by doing so you agree not to reveal their***

*contents to any other persons ...*” (ibid, emphasis added) (Retrieved 2<sup>nd</sup> September 2013 from <http://forums.pepipoo.com/index.php?act=boardrules>)

This ‘subscription only’ section of the website has not been accessed by the researcher as it is quite clear that this information is confidential and means that it is a *private* location. Therefore only those areas that are accessible as a “guest” were used as there were no stipulations or prohibitions against using that information.

The conversations that take place on these two web forums, although not synchronous, are conversations that happen in public arenas. Without evidence to the contrary the researcher is entitled to interpret this data as freely available information in the public domain.

### **Copyright**

A closely related question to the above is whether information in the forums was governed by copyright restrictions. Shrum (1996) is correct to state that the issue of copyright ‘must be considered and addressed the moment the researcher decides to become an “electronic ethnographer”’ (cited in Brownlow & O’Dell; 2002: 9). Neither Pepipoo nor TSR claim copyright over forum data. Pepipoo eschews any control or responsibility over the information posted in the forum in its terms and conditions, as does TSR in relation to user generated postings (condition 2.3 Terms and Conditions TSR (retrieved on 2nd September 2013 from: [http://www.thestudentroom.co.uk/faq.php?faq=tsr\\_cat](http://www.thestudentroom.co.uk/faq.php?faq=tsr_cat).)

The copyright status of material on the PistonHeads web forum was a different matter. In their terms and conditions they expressly state “[u]sers may not otherwise download or copy, store in any medium (including any other website), distribute, transmit, re-transmit, modify or show in public any part of PistonHeads without the prior written consent of Haymarket Consumer Media.” (<http://www.pistonheads.com/terms.htm> Retrieved on 2nd

September 2013). Thus using this data would breach copyright and accordingly the website was not used for data gathering.

The message boards for the “Have Your Say Forum” (HYS) and “A Midwestshire Paper” (TS) likewise had copyright controls, both stated that such material could only be used for non-commercial purposes (i.e. research), which could be waived in any future report by writing to the companies involved. Thus both HYS and TS were used in this research.

### **Evidential Value**

Having decided that both Pepipoo and TSR could be used as research locations, the final task was to determine whether the material on the sites was of evidential value. Even this epistemological question raised an issue for research ethicality that requires reflection. As stated above qualitative data in this thesis is to be examined using a narrative and thematic approach to data analysis, one in which ‘two persons can communicate their perceptions to one another [k]nowing full well that there are both structures and pollutants in any discussion....’ ((Glassner & Loughlin,) cited in Miller and Glassner, 2002: 102).

This communicative process of meaning poses special problems in the context of online data, where communication is always a subjective experience. Without direct physical cues it may be difficult to ensure some form of shared understanding. Brownlow et al refer to this as ‘narrative appropriation’ (2002: 10) in which a person’s “storied ways of knowing and communicating” (Riessman, 2005:1) are appropriated by the researcher. However as Glassner and Miller state, in relation to qualitative interviews, ‘...whilst there may not be objective truths, [n]arratives that emerge in interview contexts are situated in social worlds; they come out of worlds that exist outside the interview itself’ (2002:104). The purpose of using online qualitative data in this research is to capture this narrative world. The data narrates how people construct and express experiences of receiving OTSPs in a location which people frequently turn to as a means of providing support, guidance and information on OTSPs.

This focus on the narrative leads to a further ethical concern about the anonymity of forum participants. According to Polkinghorne 'narrative research issues claims about the meaning life events hold for people... It makes claims about how people understand situations, others, and themselves' (2007:476). This forces a focus on the importance of identity, narratively constructed, and consequently the ethics of anonymity. Bruckman (undated) suggests that in thinking about online anonymity we should think of the information as being produced by 'amateur artists' (3.5) which enables us to examine the ethical issues in a manner that takes account of the rich nature of the material.

In this research the use of forum usernames has been anonymised. Bruckman is quite right that usernames or pseudonyms in online encounters are important 'they function like real names' (Bruckman, *Ibid*: 2.3). In the researcher's online experience, usernames in forums tend to cross between forums so that a unique user will use the same username in different forums, and it can sometimes be quiet easy to spot the same user. This raises concerns that the online pseudonym represents the creation of an online identity rather than an attempt at online anonymity. Accordingly in this research no names will be given when using online quotes, in addition changes in grammar (but not meaning) are made so as to avoid online searches which could identify the comments.

Two final concerns for internet methodology, although also a concern for any methodology, are the representativeness of the participants and the reliability of the data. As stated above traditional notions of representativeness were not as important in this research as ideas of one's law abiding identity. Traditionally representativeness of internet users led to concerns about the sampling bias of internet data collection (Selwyn & Robson (1998)) although as Coomber stated in 1997 'significant changes are occurring which move the user group in the direction of greater representativeness' (1997:5.1). Coomber was undoubtedly correct; recent statistics suggest that 86% of the UK adult population have used the internet (ONS, 2013). However, the internet was chosen as a research location in this research because it enlightened the meaning that a section of the recipient community receives. It highlights

how they make sense of what has happened (are they alone? Is it a big problem?) And what messages they have taken, at least at the visceral front end of receiving the OTSP. It also provides a voice for venting, or discussing, these issues where the formal communication/interaction in the OTSP process does not. These sites not only provide reassurance that recipients are not alone but are also locations where advice and guidance can be found. Traditionally, in the criminal justice system, that guidance may have come from a legal professional but is now provided free by “experts” in online forums who draw their “expertise” from experience with OTSP enforcement.

### **Reporting Online Data**

Quotes taken from online sources are noted in the text according to the following acronyms:

**Table 2.3**

<b>Acronym</b>	<b>Web Site</b>
PPF	Pepipoo Forum
TSR	The Student Room
HYS	Have Your Say (BBC)
DM	Daily Mail
DE	Daily Express
TS	Midwestshire Paper

### **Conclusion**

The decision to use OTSPs to alter, or punish, behaviour is one that does not arise in a social vacuum. In any context in which an OTSP arises there are a plethora of policies, intentions, experiences and individual communications that operate to affect the experience. This chapter has set out how this complex amalgam of social forces is to be studied and demonstrated. Documentary realities provide the policy and procedural impetus for the decision to use OTSPs, as well as how certain OTSPs are experienced (speeding and parking). To understand how these policies and procedures are implemented in practice is documented through interviews and observations with officers of various enforcement agencies. The experiences and expectations of those caught within the system are examined through observations, interviews, focus groups and internet

methodology. All of these methodologies provide data on the key themes of this research as well as provide evidence on whether the changes brought about by OTSPs represent something potentially troubling for the justice system.

# PART 1 Meaning

### Chapter 3 - A Chronology of OTSPs

This chapter examines the OTSP's development and the reasons given by policymakers for their introduction. The chapter then proceeds to explore their current usage so that a generalised picture can be gathered about the reasons for the use of, and growth in, OTSPs. There are a number of themes the chapter analyses relating to the policy, practice and theory of OTSPs in terms of their historical development and current practice. The following chapters build on these debates based on the empirical evidence gathered in this research.

The essential questions this chapter seeks to answer relate to the purposes that OTSPs serve and the problems they were deemed the appropriate solution to. In focusing on purposes there are a number of ancillary questions about how these purposes came to be. Furthermore, it is essential to reflect on the fact that although original policy aims may be possible to specify, it must also be recognised that policies are living documents that change and alter in their implementation. Thus what starts out as a policy aim may soon shift, if the policy is successful (or not), on to further aims.

It is certainly difficult to crystallise a single central purpose, or message, in the development of OTSPs. Partly this is a reflection of the wide range of problematic behaviour that can lead to one, and that the implementation of OTSP's has tended to be applied to specific problematic behaviour in isolation and at different times (e.g. parking in the 1960's, motoring in the 1970's, environmental anti-social behaviour and motoring in the 1980's/90's and disorder / anti-social behaviour in the 2000's). There are, however, a series of linked purposes behind the development and growth of the OTSP across the various contexts. Not all of the purposes are necessarily relevant for each particular offence, but in total these commonalities link the purpose of the OTSP as a means of punishment.

During the formulation of OTSP policy proposals there are a number of fundamental assumptions that policymakers have about the legal system, the role of punishment in that system and the role that OTSPs can play. There is an expectation that enforcement, and



consequently transgression, has increased and that the current means for dealing with this are not “adequate” in either providing an efficient process or sufficient salutary punishment. There are also assumptions that OTSPs can provide a more efficient and “effective”, swifter outcome with a greater sense of deterrent than the criminal court system.

One interesting adjunct that this focus on ever increasing efficiency provides is that it creates its own problems which require further new deviances to be addressed. For example, what starts out as an OTSP to control the litter problem quickly creates further problems of obtaining the accused’s identity, therefore new powers (and offences) are needed to enforce the legislation to dissuade non-payment. Thus the “effectiveness” of the control is challenged by the resistant actions of members of the public. In response further deviances are categorised and identified, which can have the effect of omnibus offences being committed where the original underlying problem is merely one of litter.

The development of OTSPs is not unique to the England and Wales, common law countries, such as Australia and US, as well as civil law based systems, such as Germany and Austria, all operate a system of administrative penalties without the need for court appearance/determination. In what follows a chronology of OTSPs in England and Wales will be mapped out identifying the policy aims and purposes of the various OTSPs.

### Finding Purpose in the OTSP – An historical review of OTSP development

In criminal procedure, historically, paying to avoid prosecution constituted the offence of compounding. Compounding was primarily aimed at third parties (witnesses or victims) accepting payments to conceal criminal offences. However, from at least 1825, Customs and Excise have had the power to “stay, sist or compound” certain revenue offences relating to customs duties, whereby the accused would pay the customs fees plus a penalty charge on top (Brandreth, 1977). Furthermore local authorities also had powers to dispense with criminal proceedings in relation to unpaid vehicle excise fees. Much like HM Customs they could accept the general fee and impose an administrative charge on top under the Roads Act 1920 (Sharpe Committee, 1956). Local authorities were also allowed, under the Road

Traffic Act 1956 to impose excess charges on those overstaying on parking meters (section 15(3)). Up to this point however, the power to deal with matters outside court was reserved for offences against the public purse where original monies were due but had not been paid.

### Motoring Regulation

Fox (1995), in his study of OTSPs use in Victoria, Australia, suggests that changes in summary procedures, combined with a recognition of the need for formal rules around the previously informal approach of, for want of a better word, “compounding” offences by state authorities, led to the creation of the OTSP system in Australia in 1938. Incremental changes in summary procedure such as requiring notice of intended prosecution, and the ability to deal with cases in the absence of defendants, led to the administrative practice of offering a means of avoiding prosecution by payment of a financial sum. (Fox, 1995:3-5)

The driving force behind these changes, according to Fox, was the availability of the motor car and the pressure that problematic motoring placed on the courts and justice system. With increasing workloads courts were forced to develop practices that altered summary procedures and ultimately, in certain offences, removed the courts themselves from “summary” procedures. No longer were the courts the sole means through which “summary” justice would be achieved.

In England and Wales similar changes in summary procedure were taking place. The absence of a defendant at trial for motoring offences first gained official recognition in a 1923 Home Office Circular. This circular advised Clerks to Justices of the practice at Bow Street Magistrates Court of no longer requiring the defendant to be present for minor motoring offences under the ‘Motor Cars Acts’ (Home Office, 1923). The procedure allowed magistrates to adjourn hearings if an accused failed to show, or make any response to summons. The magistrate’s clerk would then attempt to contact the defendant by letter. If that was not responded to, or the defendant indicated a guilty plea by post, the matter was dealt with and a fine imposed. The purpose of this circular was not necessarily to save time for the courts but to protect the interests of the motoring public (Shape Committee, 1955).

The growth of the motor car meant that defendants could cover great distances, and transgress far from their own home county; therefore it was felt to require attendance was unfair, as typically the fines imposed were far outweighed by the costs of appearance.

During WWII the concerns switched from the defendant's convenience to the convenience of police officers having to attend court when the defendant was absent. Thus when the summons was issued the court clerk would invite the defendant to state whether s/he accepted the charges by letter. The letter accompanying the summons implicitly threatened the defendant with further cost consequences should they not respond:

If you do not either acknowledge the receipt of the summons (summonses) or appear to answer it (them) either in person or by counsel or solicitor, a further summons (summonses) will have to be issued, thereby causing needless inconvenience and expense to all concerned. (Home Office Circular, 1943)

One can see here that concerns about the expense of court proceedings were starting to be recognised in government.

A 1954 Home Office Circular (66/1954) encouraged bulk processing of similar (especially motoring) cases through court listing practices and recommended informal acceptance of guilty pleas by post. Pleas at that point could not be formally admitted into evidence since they were not given on oath, thus the case needed to be proved in the defendant's absence. The 1954 circular recommended that guilty pleas should be informally accepted so as to dispense with the need for police attendance to prove the matter.

Unfortunately for the Home Office the 1954 circular lacked legal foundation and the Sharpe Committee, a Home Office Departmental Committee set up under Sir Reginald Sharpe QC's chairmanship, was convened to examine possible changes to the law to allow pleas by post. The Sharpe Committees' terms of reference were to examine the process of pleas by post, as well as an oft-made suggestion, but one that had not to this point been acted on, that 'a

radical approach was necessary, and that a remedy should be sought in a system of "fining on the spot" (Sharpe Committee, 1956: 8).

The Sharpe Committee unanimously rejected this proposal believing it to be too fundamental a change for the administration of justice, as courts would no longer determine guilt. Further it was claimed that it would sever the link between the individual offender's circumstances and his means to pay the penalty (Ibid: Para's 60-64) The Committee did recommend change to allow defendants, where cases would not involve imprisonment upon first conviction, to plead guilty by post and thus dispense with the need to call witnesses (ibid: Para 66). This was subsequently enacted in the Magistrates Court Act 1957.

Throughout these changes, as the Sharpe Committee made clear, there were two competing concerns. Whilst proposed changes could have negative consequences on the administration of justice and its fairness to defendants, there was an equal concern with saving officer and court time in dealing with the bulk of minor road traffic offences. Despite the Sharpe Committee's rejection of the OTSP proposal, the then Government brought forward proposals for OTSPs in the Road Traffic Road Improvements Bill 1960.

### **Car crime and the criminological debate**

As Wells sets out, during this period 'an increasing number of authors ...were beginning to write not just about the car as a technological development but about its social, political and criminological significance' (2012:26) The motor vehicle's significance lay not just in the rapid growth of ownership, but the impact that had on law enforcement.

Motoring crime, set in its social context, became something less than a crime, but not so minor that nothing needed to be done. On the one hand, as Emsley states, there was the 'whiggish view of law making... that the motor vehicle presented a problem in need of a solution' (1993: 358). On the other hand the OTSP can be seen as a compromise between the problem of increased car ownership and the problem of criminalising increasing numbers of "normal" people (ibid). The normalisation of ownership of motor vehicles, the

spread of ownership across class boundaries, and the fact that 'the driving public has become an electoral force to be reckoned with' (Corbett, 2003: 33) meant there were inevitable trade-offs between the view of the law as combating crime or combating the motoring public.

One key interest group in this development was the social elite and its role in developing motoring offences, and in particular, speeding enforcement. O'Malley argues, like Emsley, the impact on the court (and justice system) of the rise of the motor vehicle in the early 20<sup>th</sup> century, put little extra pressure on the courts (2009: 99). Instead the involvement of the socially elite motor vehicle owning class in legislative drafting, and lobbying, meant that 'speeding fines were already being administratively bureaucratized: distanced from denunciation in court and regarded as applicable to offences that were only debatably "criminal"' (Ibid: 100).

The series of Home Office Circulars, discussed above, had already championed the use of pleas by post, where the driver of the vehicle did not have to appear in court. As O'Malley states these procedures 'eroded the moral and denunciatory ceremonial of court and introduced more bureaucratic forms of justice' (ibid: 99). Motoring crime was not real crime at all but an administrative matter, one that could be dealt with "on the papers". There was a sense in which courts, and the justice system, were operating as if motoring crime could be resolved by a "gentlemen's agreement".

Another possible driver for the bureaucratization of the process, and consequently the lack of denunciatory court pronouncements is, as Plowden states, that police officers 'dislike[d] enforcing road safety partly because of their discomfort at having to deal with an offender who so often will not "come quietly"' (1971:393). Emsley points out that one way round this particular legal/sociological phenomenon was to label those who did not conform to motoring laws as 'road hogs' which 'by identifying scapegoats, adds legitimacy to the law by its implication that the law is designed to deal with outsiders who threaten society' (1993:

380). However at the same time, Emsley argues, 'there could be no simple response to the problem since a whole series of interest groups were involved' (ibid: 381).

This then sets the social background for the debate about the use of new methods of tackling the problem of illegal motoring. The OTSP is one example of this phenomenon. The government claimed that increasing number of vehicles on the road meant that offences were increasing, however, as O'Malley points out, this was not the case with speeding. Instead the socially elite status of the driving offender led to a system that bureaucratised such enforcement so as to avoid questions about the criminal status of such offending. Certainly as regards government views at the time of introducing the changes there was a feeling that the courts were overburdened; as the Sharpe committee pointed out, they were expressly tasked with seeking a method to reduce court time spent on such offences.

### **A new penalty is born**

It is perhaps no surprise then that in the Road Traffic and Road Improvements Act 1960 (RTRIA) the government, in response to the claimed increasing problem of congestion/obstruction (see HC Deb 1959-60 621 col.892-1034) chose a method of regulation that removed almost entirely the stigma of criminality. No longer were out of court penalties administrative charges added on to existing charges, for non- or late payment, instead these penalties were aimed at non-monetary offences.

During the Road Traffic and Road Improvements Bill's second reading in the House of Commons the then Transport Minister, Eric Marples, laid out the case for change

...this will be a valuable means of dealing with minor offences and will relieve both the courts and the police of a mass of cases, without depriving the driver of any right that he enjoys at present (HC Deb (1959–1960) 621 col.907)

There is a dual concern here with the criminal justice systems productivity (court and police time) as well as a lingering concern with the accused rights, reserving the opportunity for

challenging the notice at court and, perhaps significantly, removing the obligation to attend court.

To improve productivity the Act introduced not just OTSPs but also Traffic Wardens so as to reduce the burden further on the police.

I do not think that the answer is to recruit more police, because it is not in the national interest that we should take fit young men to do part-time work on the roads, routine stuff, which can be done by older men who are seeking employment at present (Ernest Marples MP, Ibid 907-908).

Dealing with the criticism that the Sharpe Committee had previously rejected OTSPs as unnecessary and, to a certain extent, contrary to liberal justice values (1956, 60-64), Marples explained

The Magistrates' Courts Act, 1957, allows a driver to plead guilty by post, but I am told that that is totally inadequate as a solution of the problem in London. Therefore, my right hon. Friend proposes ...where there is no doubt of guilt—and when one parks a car there is generally no doubt of guilt, because the car is there in the wrong place—it can be disposed of without involving the courts. (Ibid, 904))

Again Marples alludes to a concern about productivity; the ability of officers and courts to deal with “the problem”. The plea by post, according to Marples, was not providing the productivity that was envisaged for the system.

A further claim made in favour of the new OTSP approach was that such notices would deal with the matter swiftly and provide a message to other motorists that they will be similarly punished:

Therefore we must have methods of enforcement which are swift and salutary and which will make that first motorist, when he does the wrong thing, pay for it. Then, I think, the rest will behave themselves as reasonable citizens (Ernest Marples MP: ibid, 903)

Here is a common claim made in favour of OTSPs; that the 'swift and salutary' nature of the fine act as a deterrent for other potential wrong-doers.

The RTRA 1960 allowed the imposition of a fixed penalty notice (FPN) for two offences: inadequate lighting at night and non-payment of a parking meter charge. The initial introduction of FPNs in 1960 resulted in a 37% decrease in lighting offences prosecuted at the magistrates court, but at the same time resulted in a 50% net increase in prosecutions for parking meter offences. Overall however, in the first full year of the policy, there was a 29% total reduction in the number of prosecutions' for these two offences, suggesting some success in reducing the burden on magistrates courts. Over the next 10 years the number of prosecutions fluctuated. In the case of lighting offences there was a general downward trend, whereas parking meter offences increased quite significantly.

Overall there was an increase in the number of these cases prosecuted at the magistrates court, somewhat undermining the efficiency claims made for the system.

**Figure 3.1**

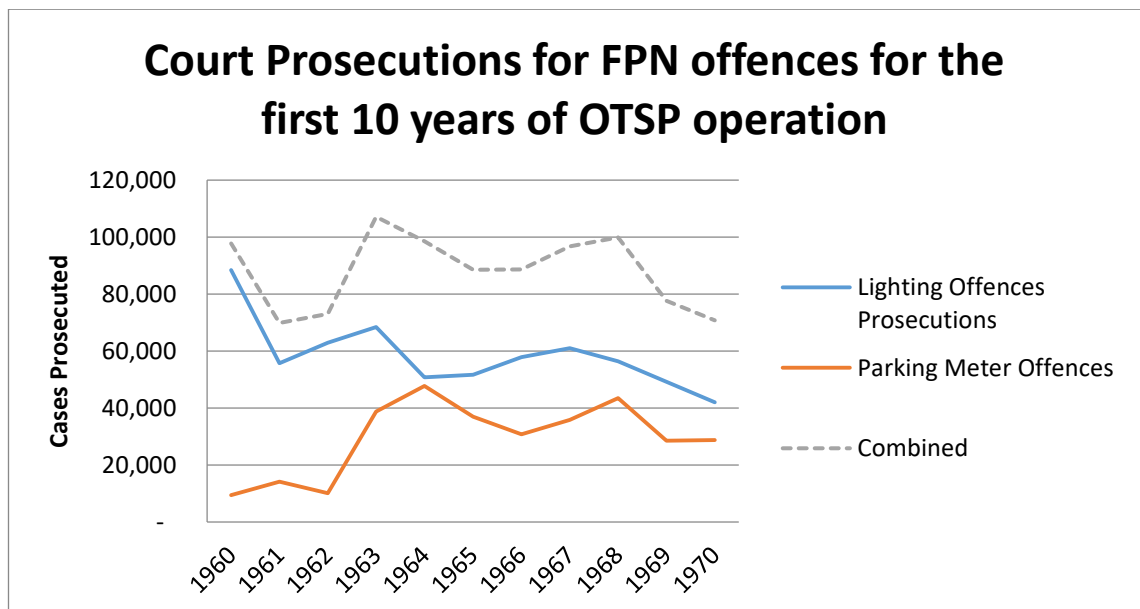
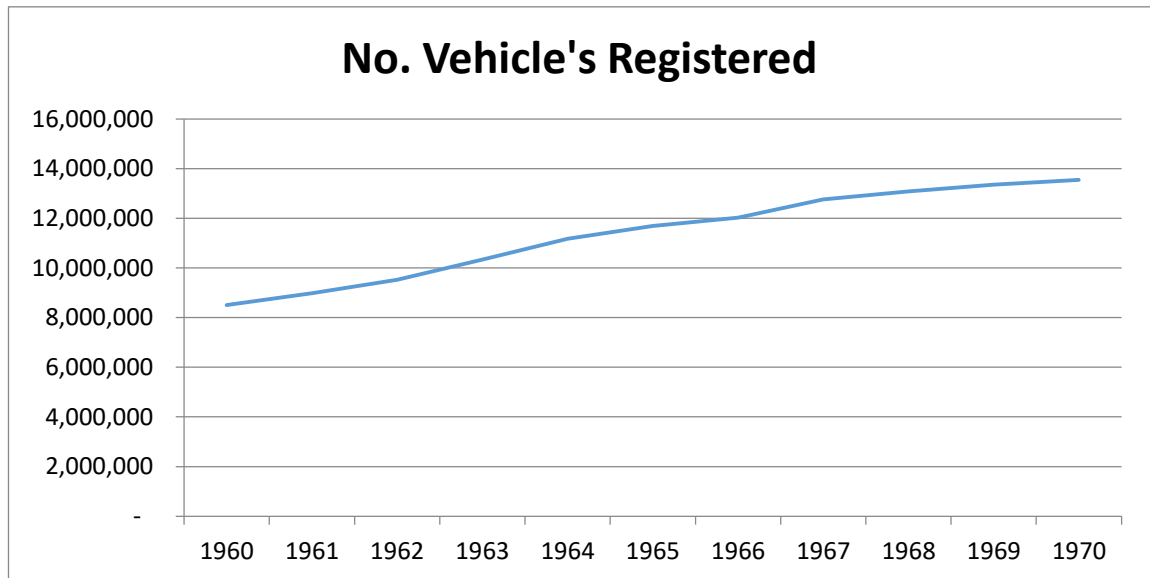




Figure 3.2



Whilst it appears there was growth in the number of these cases going to court (figure 3.1) which calls into question the envisaged efficiency gains of the system, the number of FPNs issued increased far more rapidly. From just 16,921 notices in 1960, by 1970 over 1 million notices were issued each year.<sup>16</sup> Unfortunately such statistics are not available from 1970. However they were included in the 1971 return to parliament on motoring offences (Home Office, 1971) which showed that of the 1.9 million FPNs issued, 1.7 Million were for parking and waiting offences, and 95,565 were for the inadequate lighting offence. Had the OTSP system not been in place it is doubtful the courts could have dealt with this level of offending and it is also debatable whether this many enforcement actions would have taken place. Furthermore it can be seen from figure 3.2 that the increase in the number of motor vehicles registered on the road clearly contributed to parking problems and does give some indication that there was a need to do something to solve the problem.

From these humble beginnings, the system of OTSPs expanded significantly so that by 1986, (the year in which *moving* traffic violations punishable by police issued FPNs were

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<sup>16</sup> By that time the OTSP system had been expanded by the Road Traffic Regulation Act 1967 to include the offences disregarding prescribed routes and non-payment of excise licence. However the number of notices issued for these extra offences was comparatively low -approximately 10% of all FPNs issued (Home Office, 1971).

introduced), just under 5 million motoring FPNs were being issued each year.<sup>17</sup> The removal of these cases from court did not come without problems. Although it created an administrative system to deal with bulk offending, that system required its own rules to police as well as creating its own productivity problems. The first such problem tackled by legislation (the Road Traffic Act 1974) was aimed not at irresponsible drivers but at owners of motor vehicles. Although the FPN was aimed at tackling problematic parking behaviour a significant problem with this approach was that, although cars carried registration marks, these related to the vehicle owner, often there was no evidence as to the driver's identity. This resulted in significant numbers of unpaid FPNs, and failed prosecutions, since a vital element of the case – the driver's identity - could not be proved. Between 1960 and 1974, 23 million FPNs had been issued, of which one third were not paid (HC Deb (1973-1974) 877 c.1534)).

### **Dealing with the administrative system's administrative problems**

The Road Traffic Act 1974 sought to rectify this problem by making the owner liable for FPNs regardless of who was driving, unless the owner could show that the car was being driven without consent. The problem arose from the increase in the number of motorists sanctioned causing an increase in the number of motorists ignoring such sanctions thus requiring further investigation to determine whether the notice could be prosecuted. In the words of Fred Mulley MP, Minister for Transport, not paying ones FPN:

[a]s well as bringing the law into disrepute, [also means] a great deal of police time is taken up at a time when all of us want the police engaged in more constructive duties ...unless they have some way of dealing with the problem it is quite impossible for them to get on (Ibid, 1534).

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<sup>17</sup> Moving traffic violations include speeding, failing to obey traffic lights, motorway offences and neglect of pedestrian rights.

Thus a system designed to reduce the police workload on minor motoring offending had actually increased that workload. As shall be demonstrated this is a common feature of most OTSPs.

The Transport Act 1982 also sought to deal with the issue of non-payment of FPNs, presumably due to the inadequacy of the above system. At the bill's committee stage, the Earl of Avon (leading the case for government), set out the reasons for change:

A major flaw in the operation of the fixed penalty system ...[is] that court time has simply not been available to deal with all the unpaid fixed penalties issued for parking offences. The Bill tackles this fundamental problem by providing for unpaid penalties, plus 50 per cent, to be registered and enforced as fines without a court hearing, unless one is requested (HL Deb (1981-1982) vol.432 c.648).

In the House of Lords the responsible Minister, Lord Belwin, claimed that in London only 10% of FPNs were paid. Certainly time was a key factor in pursuing unpaid penalty notices; by 1985, before the 1982 Transport Act came into effect, 16% of FPNs (659,000) were unenforceable due to the limitation period expiring (Home Office, 1986:4)<sup>18</sup>. It should be noted this problem was specifically a police rather than court administration problem. The limitation period is satisfied by the laying of an information (either in writing or orally) (s.127 Magistrates' Court Act 1980) at the magistrates court. It requires no input from the courts, other than physically opening the document. Thus the lack of productivity of the FPN system was, to a certain extent, self-inflicted in that officers were not pursuing cases within statutory time limits<sup>19</sup>.

It is worth noting that at the time of the previous changes, (passing legal responsibility to owners rather than drivers in the Transport Act 1974) the number of FPNs issued was 3.7 million, but by 1985 that figure had risen to 4.2 million (in between it had fallen as low as 2.7 million during 1978-1979). It could be argued that what had changed was not so much

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<sup>18</sup> Six months from the date of offending

<sup>19</sup> Although, of course, this period pre dates the Crown Prosecution Service

an increasing amount of bureaucracy (or offending), but an increasing perception that it was inappropriate that police officers had to chase unpaid FPNs. It was not so much that the system could not cope, but that the system was apportioning work to police officers that could be done more “effectively” through automatic processes of enforcement.

Unlike the previous system however, the 1982 act made a distinction between FPNs issued by police constables in uniform, and those issued by Traffic Wardens. With the former the Act proposed to make such unpaid penalties automatically registered as court fines, as if the court had itself imposed the penalty. Those issued by traffic wardens (and unpaid) had to be prosecuted.

This refinement of the FPN process, post introduction, is a common feature of most OTSP processes. The OTSP is implemented as a solution to a particular problem (typically productivity) and then further refinement is necessary when the original proposal fails to deliver on the efficiency claims made, or unforeseen problems arise.

This is not to suggest that court productivity was not, similarly, an issue. A chief concern of the Transport Act 1982 was the productivity of the courts and the pressure that motoring offences placed on them

[The problem] stems from the burdens the courts are under in dealing with criminal cases generally, which have led to quite intolerable delays in disposing of them. A large part of this burden is made up of the great weight of motoring offences. Even with the removal from the courts of the motoring offences at present in the fixed penalty system, the magistrates' courts still have to deal with some 2 million cases a year. (Lord Belwin: HL Deb (1981-1982) vol. 431 c 724)

This quote demonstrates a typical problem that arises with the introduction of OTSPs. Originally aimed at reducing bureaucracy within the system and increasing productivity (providing more defendants at reduced costs to both the courts and police), the OTSP also comes with unique bureaucratic problems which occasionally require further creation of

criminal offences to ensure the smooth operation of the system. For example, requiring the owner of a vehicle to specify who was driving (the s. 172 Road Traffic Offenders Act 1988 offence). Speed enforcement, by camera, no longer required police presence to enforce the legislation, however in order for the system to operate police officers needed a power to compel motor vehicle owners to tell them who was driving. There were 28,929 prosecutions for this offence in 2007 (HC Deb (2009-10 Col.802W)).<sup>20</sup>

The Transport Act 1982 came into effect in 1986 and, in addition to fine registration powers, gave police officers the power to issue FPNs for a wider range of moving traffic violations. It also introduced the power for police authorities to impose penalty points (driving licence endorsements) for certain moving traffic violations (e.g. speeding). Penalty points had been introduced formally under the 1981 Transport Act, but could only be imposed at court. The current law on road traffic offending was codified in three acts of parliament in 1988: The Road Traffic Act which codified the offences under previous acts, the Road Traffic Offenders Act which codified the procedure for dealing with offenders under the Road Traffic Act and subsequent enactments, and the Road Traffic (Consequential Provisions) Act which amended all legislation so that reference to 'Road Traffic Acts' meant reference to the above two acts.

#### From FPN to PCN: Decriminalising parking enforcement

In 1991, under the Road Traffic Act, there was a move away from the criminal justice system in dealing with parking offences. This act introduced the concept of decriminalised parking enforcement in London, it no longer used the criminal law (parking offences in London ceased to be criminal offences) and removed the magistrates court from the adjudication of unpaid parking OTSPs. The act instead introduced the Penalty Charge Notice (PCN). This

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<sup>20</sup> Interestingly this offence led the European Court of Human Rights in *O'Halloran & Francis v. UK* (Application No's 15809/02, 25624/02) to conclude that the right to a fair trial, enshrined in Article 6 of the ECHR, did not give an absolute right against self-incrimination. Here even a leading Human Rights court was willing to compromise procedural protections in favour of a productive and 'effective' system.

notice could be issued for breach of parking requirements in Greater London and created an independent appellate structure separate from the court service.<sup>21</sup> The Traffic Management Act 2004 extended this process of decriminalised parking enforcement to the rest of England and Wales. The 2004 act did not mandate that all local authorities operate a system of decriminalised parking enforcement; instead it was a matter for each local authority to adopt the provisions of the act. Currently 280 local authorities have adopted such powers, with a further 30 still operating under the criminal law contained in the Road Traffic Regulation Act 1984.<sup>22</sup>

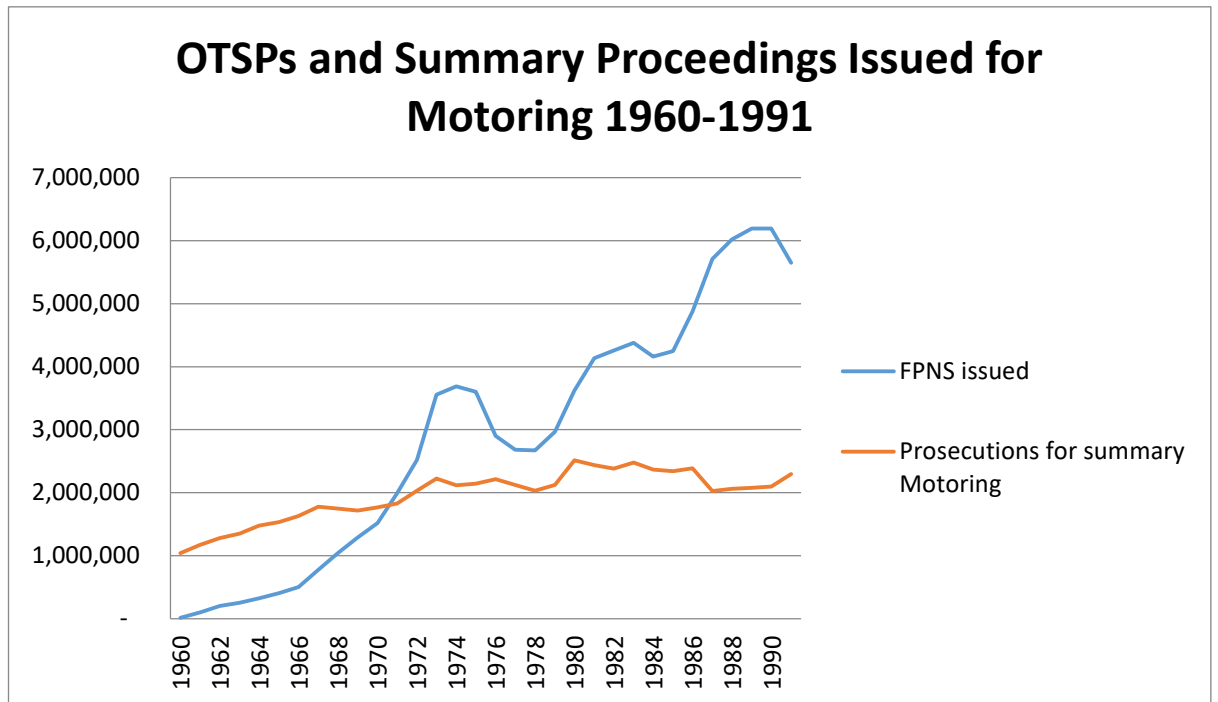
The growth of motoring regulation by FPN can therefore be split into two distinct phases: Prior to 1991 FPNs were issued jointly by police officers and traffic wardens for a range of offences, and post 1991 there was a split system. Figure 3.3 shows how the simple Road Traffic and Road Improvements Act 1960 had morphed, by 1991, into a complex and wide ranging system of motoring regulation. From just 16,921 FPNs issued in 1960 for two offences, the system had grown by 1991 to 5.65 million FPNs issued annually for 37 offences.

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<sup>21</sup> Prior to 1999 authorities outside London could adopt the decriminalised process under the Road Traffic Act 1991 but appeals were to the London Parking Appeals Service. This changed into a dual appellate system in 1999 with the creation of the National Parking Adjudication Service for outside London and the London Parking Appeals Service for London (Road Traffic (Parking Adjudicators) (England and Wales) Regulations 1999/1918). The Traffic Management Act 2004 formalised the current system of traffic regulation by way of OTSP by providing for 'Civil Enforcement of Traffic Contraventions' both inside and outside London. There is still a dual appellate structure; inside London the relevant appellate body is the Parking and Traffic Appeals Service, and outside London the Traffic Penalty Tribunal

<sup>22</sup> Personal correspondence, Traffic Penalty Tribunal

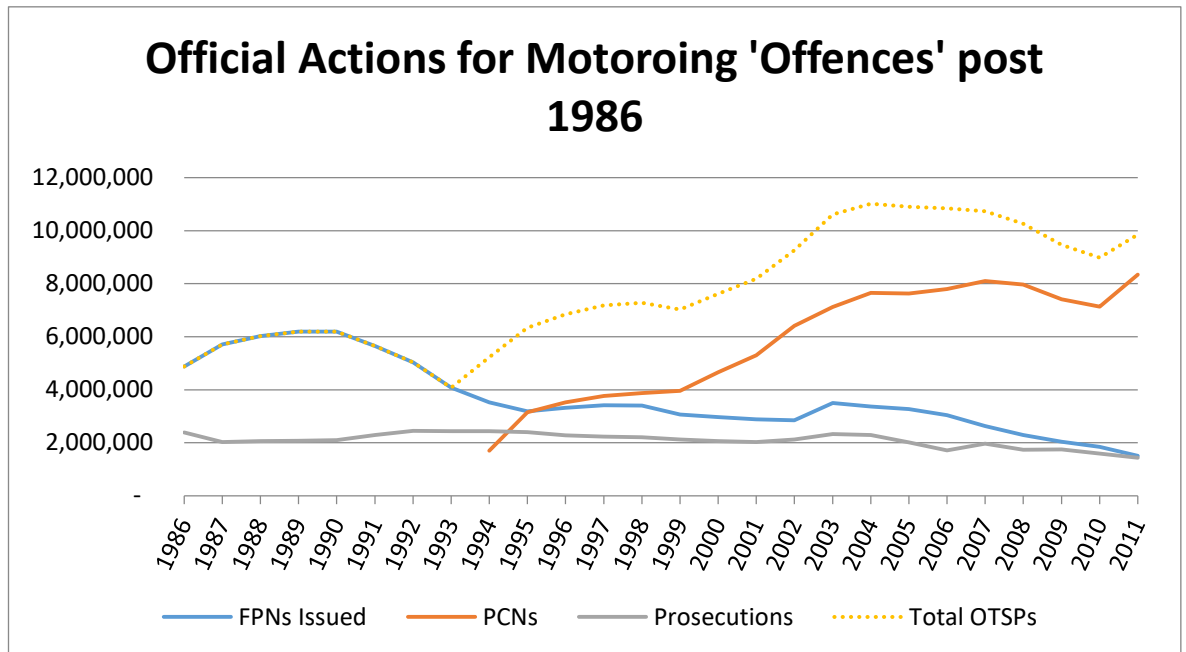
Figure 3.3



The post 1991 reforms, as discussed above, bifurcated enforcement of road traffic regulation between the more serious moving traffic violations enforced by the police, and the more minor parking violations enforced by local authorities<sup>23</sup>. Figure 3.4 shows the number of FPNs and prosecutions in respect of problematic motoring up to 2011, the last date for which such comparisons can be made. In the last year for which statistics are available on a like for like basis, 9,852,248 OTSPs had been issued in respect of problematic motoring. These OTSP were issued in respect of 79 police enforced moving traffic offences and 15 separate categories of local authority traffic offences (or civil offence if the authority operates under the Traffic Management Act 2004.)

<sup>23</sup> Although LA's also enforce moving traffic parking violations such as driving through a bus lane

Figure 3.4



### Motorring: Productivity and Anti-Social Behaviour

The most recent addition to the motoring FPN family is the careless driving FPN. Careless driving was first proposed as suitable for an FPN in 2008 in order to reduce the burden on police forces and increase the number of people being punished. The consultation stated:

[W]e think that the simpler process [FPN] would increase the chances of enforcement action being taken ... [and] by improving the efficiency of police and wider law enforcement operations, we would be releasing resource that could be used for the enforcement of the full range of dangerous driver behaviours (DFT, 2008b:70)

Thus, again, reducing police bureaucracy and increasing the amount of citizens captured were the policy's central purpose. The then government explained the previous systems inadequacy:

The process of charging a driver with careless driving involves a heavy burden of paperwork and is resource-intensive for the police, the Crown Prosecution Service and, where a case reaches trial, the Courts Service ...There is anecdotal evidence



that the heavy resource implications lead to police not charging drivers in the first place. This would suggest that there are careless drivers who are currently 'getting away with it' (DFT, 2008b:69)

Although the proposal was not taken forward at that time, it was revived in 2012 and introduced in August 2013. The consultation document produced by the DFT in 2012 again used the language of productivity. In asking 'What is the Problem?' (DFT, 2012a: 7) the document, borrowing evidence from the previous attempt to enact the FPN, stated:

The current process of charging motorists for a careless driving offence is overly bureaucratic. It involves a heavy burden of paperwork, which is resource intensive for the police and court services, particularly for lower level offending... high resource costs deter the police from charging motorists with lower level instances of careless driving (ibid: 7).

Thus there was a desire to deal with more offenders than the system could manage, foreseeing both an increase in enforcement and punishment of transgression with the introduction of the FPN. Again the productivity of the current system was questioned ("high resource costs deter the police"), and thus the expense of the formal criminal justice system was seen as too great to deal with the majority of careless driving offences.

It is also possible to note in the consultation document a subtle shift of emphasis from risk being the location of control to anti-social behaviour. The document states that police officers were deterred from charging motorists for careless driving since 'the offence may not be suitable for prosecution when considering the public interest and the lower risks. This type of careless driving behaviour may, nonetheless, be antisocial and does increase the danger to others on the road' (Ibid: 7).

It is interesting to note how 'antisocial' driving is highlighted in addition to risk. Not only is such behaviour risky, although not so risky as to warrant a prosecution, it also 'anti-social,' It is worth noting that nowhere in the document does the DFT state what risks are involved

or the level of risk that is permissible. It is perhaps no surprise then that the proposed careless driving FPN also aims at anti-social drivers, since, as Lister has pointed out

ASB has come to categorise and demarcate a distinct policy field that blurs and transcends traditional distinctions between crime and disorder, as well as the appropriate use of civil/criminal and formal/informal responses (Crawford and Lister, 2007: 1)

It is a term that can be used to promote the idea of disorderly driving without the need to provide evidence of risk. The labelling of bad driving as anti-social, although not new (see Emsley, 1993), has found increasing prominence in recent years with the rise of anti-social behaviour thinking in criminal justice policy in general, and OTSP policy in particular.

### Anti-Social Behaviour – Controlling Environmental Crime

The tendency to 'govern through anti-social behaviour' (Crawford, 2009) which Crawford argues has seen the use of regulatory techniques to 'circumvent and erode established criminal justice principles' (ibid: 810) can also be seen in the use of FPNs to combat environmental crime. A range of behaviours loosely described as 'anti-social', starting with litter in 1990, have been regulated through the use of OTSPs. Typically these are issued by local authorities in the field of environmental nuisance and include offences of noise nuisance, graffiti, dog fouling and litter. In this thesis the litter FPN is analysed as the main form of discretionary penalty notice issued by local authority enforcement officers.

There have been a number of complementary strategies aimed at dealing with littering. Education campaigns have received vast amounts of funding, as have mechanisms for legal disposal of waste.<sup>24</sup> However, in reinforcing the seriousness of the litter problem, parliament also chose the criminal law in 1958 to back up the educational message.

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<sup>24</sup> The main means through which education funding has been made available is through Keep Britain Tidy. The financial support the government has given to this organisation started at an annual grant of £2000 in 1963/4 (£36,000 on today's prices) (Hansard, HC Deb 09 June 1964 vol.696 c.216) and had increased by 2010 to £5.1 Million (Keep Britain Tidy, 2010). According to a recent Guardian investigation, councils in England and Wales spend £4.5 billion on waste services, which equates to '£1 in every £3 of council tax' (Guardian, 11<sup>th</sup> October, 2009)

Littering was originally seen as a local rather than national problem; prior to the Litter Act 1958 it was for each local authority to pass a by-law outlawing littering within their borough. By 1930 205 local authorities had enacted the standard model by-law, which contained a provision criminalising littering (HC Deb (1929-1930) 235 c.2397).

It was during the 1950's that the subject of litter started to receive serious attention in parliament. A series of questions were asked annually about the amount of litter and detritus swept from public parks and the resulting cost of such clearing. Furthermore concern was also raised about the punishment issued to those who litter and the means of enforcing anti-litter legislation. The maximum penalty for littering under the by-law system was £5; however the average fine was well below this figure (HC Deb (1929-30) 235 c.2001).

It was not until 1958 that the first nationwide criminal offence of littering was enacted. The Litter Act 1958 came about as a result of a number of attempts, by Conservative MP Rupert Spier, to introduce a private members bill in the House of Commons. At the third attempt Mr Spier's bill finally got the support of the government.

At the second reading stage of the Bill, Spier's was at pains to allay fears that the bill would lead to an increase in officiousness by focusing the bill against the "litter bug" (HC Deb (1957-1958) vol. 580 c1053). He aimed to make clear that accidental dropping of litter 'for example a handkerchief' was not covered by the law but that 'wilful and deliberate' littering was the offence (ibid; 1054); the bill received cross party support in parliament. One can see a parallel here with the motoring context in that the 'litter bug' serves a similar purpose to the "road hog", it helps in 'identifying scapegoats' (Emsley, 1993:380) in order to make the enforcement more palatable.

During the passage of the bill, its sponsor in the House of Lords, Earl Waldergrave, was at pains to point out that littering was not a strict liability offence.

The words "and leaves"... give an intention or deliberateness to the act which is, I am advised, not present in a wholly accidental leaving or depositing of the litter (HL Deb (1957-1958) 209 c.381)

The only concerns raised against the bill covered legitimate sporting and cultural pastimes such as the paper-chase or the throwing of confetti (see *ibid* c1054 and HL Deb (1957 – 1958) 209 c382)). The bill instead made it an offence to *intentionally deposit and leave* litter on public land without the owner's consent; it was this consensual defence that allowed these pastimes to continue and smoothed the passage of the act.

The act envisaged dual enforcement of the provisions either through the police or local authorities. It specifically, in s. 1(2), authorised local authorities to issue criminal proceedings.

The Road Traffic and Road Improvements Act's implementation in 1960 (the act introducing motoring FPNs) led some members of parliament to call for similar powers to deal with litter offences. Spiers MP attempted to gain support for the power to issue OTSPs against littering in an adjournment debate in 1964 (HC Deb (1964-1965) 704 cc1195-206). Citing the RTRIA 1960, Spiers stated:

As we now have traffic wardens, with their parking tickets, this is not such a novel and revolutionary proposal. The Government ought to be giving serious consideration to its possible introduction, more especially if the police authorities take the line that they cannot spare the men or the time to operate the Litter Act. (*ibid*: 1198)

Demonstrated here again is the concern for the productivity (time and expense) of policing litter legislation as a justification for a more summary means of disposal. The OTSP is seen as a potential answer to the perceived lack of enforcement and inadequate police resources to deal with the problem. Moreover it demonstrates how "efficiency" and "effectiveness" arguments transcend the contexts in which they are raised, as policymakers borrow the

processes from one context in order to bring about a similar solution in another. Thus motoring offences and litter offences are completely different; nevertheless the desire to capture more wrongdoers with increased efficiency leads policymakers to choose similar methods.

Over the first 10 years of the Litter Act 1958 the rate of prosecutions was relatively static with an average of 2678 per year, and 2586 convictions (a 97% success rate)<sup>25</sup>. Over the next 8 years the Act began to be prosecuted less, with an average of 2129 prosecutions and 2040 convictions (a 96% success rate). The average fine in 1970 was £5.20 for littering, although the maximum available fine was still £10, this maxima was raised in the Dangerous Litter Act 1971 to £100. The effect of raising the statutory maxima in the first year of the Dangerous Litter Act was to increase the average fine to £5.95; a 14% increase in the amount of average fine but just 6% of the maximum fine. Over the next 10 years the mean average fine was £14.71 (high £21 1981, low £7.74 1972.) (HC Deb (1982-3) 36 c.357w)

The imbalance between the statutory maxima for littering and the actual amount fined has been one of the primary drivers for further enforcement reform. The average fine was seen as an indication of the seriousness with which the magistrates court viewed littering, and the extent to which such sentences provided an effective deterrent (HC Deb (1971-1972) vol.834 cc403-405).

In 1987 the City of Westminster Council was successful in obtaining a local Parliamentary Act which gave the power to authorised officers of that council to issue FPNs for littering. During the consultation period Westminster originally envisaged handing out OTSPs that could be demanded at the point of issue. This was rejected following consultation between the Council and the Metropolitan Police Service (HC Deb (1986-1987) vol.115 c 914).

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<sup>25</sup>HC Deb (1963-1964) vol.698 c.593-5; (1967-1968) vol.764 c.1372-1733; (1965-1966) vol.733 c.657-8;

Instead officers were allowed to issue an FPN that gave the recipient 14 days to pay the sum of £10 or face prosecution for the offence. (Ibid: 914)

Interestingly the reason given for using the FPN system for litter was not just dissatisfaction with the court process *but also* recognition that littering wasn't per se 'criminal'. In introducing the bill Wheeler MP noted that

“The chief failing of the Act is its requirement for criminal proceedings to be undertaken, with all that that implies in administrative procedures and the undue involvement of police, Crown prosecution and court time for an offence that is essentially anti-social rather than criminal.” (Ibid: 913)

It is interesting that “police” time was specifically mentioned here, as in the 1964 FPN adjournment debate, since enforcement responsibility lay primarily with local authorities, not the police. There is no explanation in this debate as to why police time was specifically mentioned, indeed the police were not included in the FPN scheme as they felt existing powers were adequate to deal with the littering cases they prosecuted (Ibid, 916).

Simon Burns MP attempted to introduce FPNs for litter across the country in 1989 through a private members bill, but it was not supported. Perhaps the government still felt as it did in 1984 when the then Secretary of State for the Environment, William Waldegrave MP, stated:

“any system of direct fining would be invidious to operate, particularly in the case of trivial offences. The answer to the problem must lie primarily in persuading the public not to drop litter” (HC Deb (1982-83) vol.54 c420W)

Although it should be pointed out, the ‘invidious’ system had been operating for some time in relation to ‘trivial’ motoring offences.

Within a year of Burns’ private members bill, the plan to introduce FPNs for littering was resurrected in the Environmental Protection Bill. The Bill itself was a comprehensive set of legislative measures to control pollution of which litter enforcement was a small part; the

Act received royal assent in 1990. When introducing the bill, MP's expressly referred to the work already carried out by the City of Westminster and described it as 'shin[ing] like a beacon for the rest of the country' (Simon Burns MP, HC Deb (1988-1989) 155 c.610). The actual effectiveness in terms of number of Litter FPNs issued, or prosecutions pursued, calls into question their beacon-like status. In the first year of local act only four FPNs were issued, one prosecution resulted from failure to pay the FPN and a further 723 individuals were simply asked to pick up their rubbish and did so (ibid: 611).

What is perhaps most interesting about OTSP development in the environmental field is how court productivity was reconceptualised. Court productivity was no longer being undermined by vast numbers being prosecuted for littering, instead the courts were seen as no longer being productive in imposing a sufficient deterrent penalty. It would appear that the government provided no specific advice to the courts about how the fines were felt to be, in the words of Chris Pattern MP, 'derisory' (HC Deb (1989-1990) 165 c40). Answering a parliamentary question in 1989 on this point, the then Attorney General Sir Patrick Mayhew, claimed that such advice was a matter for magistrates clerks in individual cases (HC Deb (1988-1989) 162 c108W). Thus there was no specific guidance issued by the government about increasing the average fine level, nor the maximum fine level. Instead courts and magistrates were expected to interpret this factor by the fact that the statutory maxima had increased.

Here then productivity was aimed at outcome rather than process; the justice system itself was no longer productive in providing a satisfactory outcome. The litter FPN was introduced not to reduce the burden on the courts but to improve the justice outcome, i.e. that the 'fixed' penalty needed to act as a deterrent educative tool to reinforce the anti-litter message. In the case of litter, such outcomes again needed to be swift and provide sufficient deterrent.

The focus on outcome rather than court time is also reinforced by the fact that litter prosecutions were hardly placing an onerous burden on the courts. The average number of prosecutions annually between 1970 and 1990 was 2,000, hardly a difficult figure for

courts to cope with, considering that the magistrates court dealt with, on average, 1.5 million summary offences per year during that period. Instead a dual process was at work; there was a determination to tackle the problem through increased enforcement and at the same time courts were being seen as too soft and cumbersome in imposing the penalties needed to tackle the problem effectively.

Like the motoring context the use of the litter FPN was not without problems as councils needed increased powers in order to issue FPNs. The Clean Neighbourhoods and Environment Act 2005 (CNEA) created a new offence of 'failing to give details to an authorised officer'. Under the previous system there was no power to require such details and enforcement officers had to summon the police if the intended recipient refused. The CNEA also provided incentives for local authorities to issue FPNs. Litter FPNs formed part of key performance indicators under the Comprehensive Performance Assessment (CPA) (BV199a; Local street and environmental cleanliness - litter and detritus) additionally the CNEA also amended the Local Government Act 2003 to allow all councils to keep the money from litter FPNs.

With the introduction of improved powers to enforce litter legislation under CNEA, statutory guidance also made clear that unpaid FPNs should, as a matter of course, be followed with prosecution.

If they [local authorities] are to issue fixed penalty notices they need to do so within a framework that assumes offenders will be prosecuted, should they choose not to pay a notice that has been offered to them. (Defra, 2005: 5)

Failure to do so, the guidance suggested, impacted upon the legitimacy of the system and the fairness with which such a system would be viewed

The use of fixed penalty notices is not without risks... At the top of this list are poor payment rates and a reluctance of some authorities to pursue prosecution, should



a fixed penalty notice go unpaid. Unchecked, these risks could undermine the credibility of fixed penalty notices. (Defra, 2005: 5)

Thus the national policy guidance for litter enforcement through the OTSP was that tough enforcement action (prosecution) should be the default position for those not accepting the OTSP offer.

The CNEA also made it possible to vastly increase the number of people being formally sanctioned for litter offences by including cigarette butts within the definition of litter<sup>26</sup> and further by allowing privatised enforcement (in effect removing the public sector enforcement productivity problem altogether). The dual benefit of privatised enforcement and the keeping of fixed penalty receipts meant that local authorities could offer litter enforcement to tender as a commercially attractive enterprise. It is perhaps unsurprising that such a commercially viable enforcement resulted, at times, in a vast inflation of the number of FPNs issued. For example Basildon District Council's use of XFOR Ltd to enforce litter legislation in 2012, resulted in an increase in the number of FPNs issued by 3974, a 9031% increase on the previous year (Basildon District Council, 2013).<sup>27</sup> Again this vast increase suggests that net-widening was taking place; those who would have had no sanction previously (admittedly as a result of limited enforcement levels) were now being sanctioned.

### Anti-Social Behaviour and Disorder

The extension of the OTSP to anti-social behaviour in the 1990's, albeit limited to environmental minor crime, set the scene for New Labour's extension of the OTSP process to disorderly behaviour in the 2000's. As in the other OTSP contexts, productivity and deterrence dominated the policy landscape leading up to the creation of the Penalty Notice for Disorder (PND) and in subsequent practice.

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<sup>26</sup> It seems quite clear, as the explanatory note to s. 27 CNEA sets out, that such detritus already fell within the litter definition but local authorities had been risk averse in dealing with such cases

<sup>27</sup> Although the commercial viability of this process was disproven in that even such a large increase in the number of notices issued resulted in a net cost to the council of £36,027.50 (also note this figure did not include the cost of legal proceedings, administrative costs, nor Officer costs in dealing with the contract)

The most straightforward and unapologetic advancement of the PND's deterrent philosophy came from Tony Blair in his speech to the Global Ethics Foundation in September 2000. He set out the policy rationale for adopting the OTSP approach for crimes of disorder.

A thug might think twice about kicking in your gate, throwing traffic cones around your street or hurling abuse into the night sky if he thought he might get picked up by the police, taken to a cashpoint and asked to pay an on the spot fine of, for example, £100. (Blair, 2000)

Taking his cue from the anti-social behaviour FPNs introduced in the 1990's Blair stated:

Bizarrely, as the law stands, the police have the power... to levy on the spot fines for cycling on pavements and dog fouling. And yet, they have to deal with drunks who get offensive and loutish and often can do nothing about it without a long, expensive process through the police station, the courts and beyond. (Ibid)

Self-evidently, at least in the view of the then Prime Minister, what was good for motoring crime and anti-social behaviour was good for more serious traditional crime.

There were three overarching aims for the PND policy as discussed in the government's consultation paper 'Reducing Public Disorder: The role of fixed penalty notices' (Home Office, 2000b). These were 1.) Swift action to deal with problems, 2.) A practical deterrent and 3.) Reductions in police bureaucracy (and time).

As Young (2008) notes, there are inconsistencies between each of these aims. The use of deterrence as a policy aim was naive given the academic literature on the efficacy of deterrence in general. Furthermore the net-widening effect (increasing the numbers of people being punished that would not otherwise have been punished) of PND's had the potential counter effect of actually increasing police time in dealing with these minor matters.

Young states:

[It] seems that the government wanted to have it all ways. In line with its 'tough on anti-social behaviour' and 'zero tolerance' stances, it sought to encourage the police

to act more frequently against minor offences, whilst simultaneously claiming that this would save police time. Talk of saving the police and the courts time was in reality a smokescreen for what lay at the heart of these proposals – a deliberate attempt to widen the formal net of social control to take in minor offences. (2008: 173).

This widening of the net of social control drew its support from the need to increase the productivity of the system. The explanatory notes to the Criminal Justice and Police Act 2001 (CJPOA) state that '[w]hilst the conduct in question is already criminal, the need to focus police and court resources elsewhere means that much minor offending of this kind escapes sanction or consequence' (Para 6). As has already been seen with both litter and the motoring context, this claim is oft repeated; that the actions to be regulated by OTSPs are not sufficiently serious to mandate court action, but cannot be ignored. Thus there is determination to carry out more enforcement that is productive and less administratively burdensome, whilst simultaneously allowing the police to focus on more serious matters.

Despite at first rejecting the idea as 'technically impossible' (Charles Clarke, HC Deb, 2001, Standing Committee F, 13<sup>th</sup> February 2001), the New Labour Government introduced the PND into pilot areas in August 2002. The Home Office Research, Development and Statistics Department monitored the progress of the pilot areas (West Midlands Police, Essex, Metropolitan and North Wales – Central Division) (Spicer and Kilsby, 2004; and Halligan Davis and Spicer, 2004).

At the time of the pilot period 11 offences were chosen as suitable for a PND, they are listed in figure 3.5

Figure 3.5

Offence	Description	Authorising Statute / Statutory Instrument	Notes
<b>Upper Tier Penalty (£80)</b>			Currently £90
<b>Section 31 Fire Services Act 1947 (as amended)</b>	Knowingly give false alarm to a fire brigade	CJPOA 2001 s. 1 (1)	
<b>Section 5(2) Criminal Law Act 1967</b>	Wasting police time or giving false report	CJPOA 2001 s. 1(1)	
<b>Section 43(1)b Telecommunications Act 1984 (as amended)</b>	Using a public telecommunications system for sending a message known to be false in order to cause annoyance'	CJPOA 2001 s. 1(1)	
<b>Section 5 Public Order Act 1986</b>	Causing harassment, alarm or distress	CJPOA 2001 (Amendment) Order 2002/1934	
<b>Lower Tier Penalty (£40)</b>			Currently £60
<b>Section 12 Licensing Act 1872</b>	Being drunk in a highway, other public place or licensing premises	CJPOA 2001 s. 1(1)	
<b>Section 80 Explosives Act 1875</b>	Throwing Fireworks in a Thoroughfare	CJPOA 2001 s. 1(1)	Currently upper tier
<b>Section 55 British Transport Commission Act 1949</b>	Trespassing on a railway	CJPOA 2001 s. 1(1)	
<b>Section 55 British Transport Commission Act 1949</b>	Throwing stones etc at trains	CJPOA 2001 s. 1(1)	
<b>Section 169C(3) Licensing Act 1964 (as amended)</b>	Buying or attempting to buy alcohol for consumption in a licensed premises for a person under 18	CJPOA 2001 s. 1(1)	Currently upper tier
<b>Section 91 Criminal Justice Act 1967</b>	Disorder behaviour while drunk in a public place	CJPOA 2001 s. 1(1)	Currently upper tier
<b>Section 12 Criminal Justice and Police Act 2001</b>	Consumption of alcohol in a 'no alcohol' designated public place	CJPOA 2001 s. 1(1)	

The initial pilot report found that officers were positive about PNDs and that 'in addition to significant numbers of offenders being diverted to PNDs (who would otherwise have received cautions), there are new cases which now receive PNDs.' (Spicer & Kilsby, 2004: 1.) By the time of the final pilot analysis 6,043 PNDs had been issued of which nearly half were given to people who previously would have received no sanction (Haligan Davis & Spicer, 2004:1).

The pilot was certainly seen as a success in government, Blair stated that:

'[t]he only complaint of the police was that the powers weren't wide enough. So we have listened, we have extended the powers, extended who can use them [PCSO's and Accredited Persons], and made them ... nation-wide.' (Blair, 2003)

Not only did the government extend the range of offences that could be subject to PND, it also extended the class of people who could issue PNDs, as well as extending the age range for which an alleged offender could receive a PND. PCSO's, created under the Police Reform Act 2002, were given the power to issue PNDs for specific offences. Furthermore a new class of private police, so called accredited persons, were also given that power.<sup>28</sup>

### **Extending the Age Range**

Changes were made in 2003, under the Anti-Social Behaviour Act, to lower the age for receiving a PND to 16 and reserved the right for the secretary of state to further lower the age (originally only those over 18 could receive a PND). During the pilot period there was some disagreement within police forces of the wisdom of this approach. The early pilot evaluation found:

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<sup>28</sup> The Home Office does not keep reliable statistics on the number of accredited persons nor the number that have PND issuing powers. A survey by the Home Office in 2010 reported that there were 2219 accredited persons being operated by various police forces, the biggest user being British Transport Police under the Railway Safety Accreditation Scheme. In an FOI request in 2012 BTP stated they did not keep statistics on the number of OTSPs issued by such officers, it was a matter for the individual accredited company to keep such data (BTP, 2012). Although Grace (2014) states that 229 PNDs were issued by Accredited Persons in 2013.

About one-third of officers reported that they could have issued PNDs to persons aged under 18 if allowed – officers generally would like the scheme extended to juveniles and other offences (Spicer and Kilsby, 2004: 4)

Whereas the final evaluation found that

...a number of officers warned against extending PNDs to under 18s, noting that this would require the presence of a responsible adult and would reduce time savings. Also, officers did not feel that issuing penalty notices to a parent would provide any deterrent to a child who did not have to pay the bill. (Halligan-Davis and Spicer, 2004:5)

Despite this, in 2004, the power to lower the age was exercised (SI 2004/3166) and lowered to 10 years old, and piloted in six forces.

Much like the adult PNDs, the uptake of the youth PND by police forces was relatively high. 4,434 youth PNDs were issued (Amadi, 2008) and, again, there was evidence that nearly half of these PNDs issued went to new entrants. Amadi's evaluation also found some displacement from traditional criminal justice actions, including prosecutions, although the biggest displacement was from Final Warnings. The report also found that 'thirty-seven officers reported having issued tickets in instances where they would not otherwise have taken action' (2008; iii). Again this policy was seen as "effective" by police officers in terms of its deterrent value on young people and the increasing "efficiency" of time savings.

The pilot review concluded:

Though there is some concern that the PND scheme for young people is punishing parents/guardians and not offenders there was some consensus that its greatest strength lies in the fact that it catches youngsters who offend early and deters them from future offending without any serious consequences or long-term implications. In addition, it has the potential to free up officer time particularly when issuing on the street (ibid: v)

Despite the alleged positive benefits of the PND scheme for young offenders it was scrapped by the Coalition Government in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The main policy driver the PND's removal for under 18's was the need to reduce confusion in the youth justice system, in particular between the appropriate place of escalation of criminal justice interactions and where PND's sat within that framework (MOJ, 2011b: 9). The age at which one can receive a PND is now, once again, 18 years old.

### **Extending the Range of Offences**

One of the conclusions of the adult final pilot evaluation (Halligan-Davis & Spicer, 2004) was that officers suggested a number of additional offences that could be brought within the PND scheme. Those mentioned were minor shop lifting, dropping litter and possession of cannabis (as well as other class B and C drugs) (2004: 5). As demonstrated in table 3.5, at the time of the pilot period 11 offences were chosen as suitable for a PND. During the passage of the Criminal Justice and Police Bill a number of offences were proposed and subsequently removed from the scheme at the committee stages of the bill. In particular offences of behaviour contrary to s.5 Public Order Act 1986 and Criminal Damage up to a value of £500 were removed, only to be reintroduced later by way of statutory instrument. Section 5 was added to the scheme prior to the pilot period following representations received from ACPO. The Parliamentary Under-Secretary of State for the Home Department, Wills MP, set out the reason for reintroducing the s.5 offence.

ACPO's view is that the penalty notice for disorder scheme would be seriously undermined by the omission of this offence. Its advice is that this offence is used operationally to deal with a similar type of offending to that covered by section 91 of the Criminal Justice Act 1967, which is disorderly behaviour while drunk in a public place. Section 91 is already a penalty offence, but while section 91 requires the offender to be drunk, section 5 of the 1986 Act does not. A significant number of

offences occur under it. (Hansard, Third Standing Committee on Delegated Legislation Tuesday 18 June 2002 Col.4)

The intervention of ACPO meant that what had previously been heavily criticised in parliament (s.5 as a PND) was also now supported by the Conservative Opposition;

I am swayed by the fact that ACPO supports the measure. Anything that will help to reduce disorder on the streets in a simple and efficacious way should be supported and welcomed ... (Dominic Grieve MP, *ibid*)

Thus s.5 was included within the scheme prior to the start of the pilot evaluation period.

A further eight PND offences were added 2005, including the original criminal damage offence, four offences involving alcohol sales and consumption<sup>29</sup>, a firework offence, littering (bringing a parity with local authority powers)<sup>30</sup> and most controversially shop theft (which government guidance indicated involved a maximum value of £200, subsequently reduced to £100). The rationale for including shop theft was given in the House of Lords by Baroness Scotland

In relation to theft, the difficulty that we have in terms of the volume of crime is petty theft from shopkeepers. We have consulted shopkeepers and they very much welcome this. Particularly, in relation to the younger element, not criminalising a child<sup>31</sup> who has stolen a 10p sweet from the local sweetshop may be seen by many as a very good thing. ...telling the child that it is wrong, making sure that the parents know what the child has done and intervening swiftly in a way that does not unnecessarily criminalise the child but which, we hope, brings an end to the behaviour (HL Deb, 2003-4 664 c.988).

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<sup>29</sup> These were specifically enacted due to changes in underlying licensing legislation, the Licensing Act 2003 which came into force in 2005.

<sup>30</sup> It is interesting that this offence was not included in the original scheme since Blair's claim was that police lack the powers that LA's possessed, quite why they were not given this power is unknown.

<sup>31</sup> At this time PNDs were being issued to under 18's



There are two factors to note here; firstly the focus on shop theft as 'bulk' crime certainly fits in with the productivity aims of OTSPs. It is also interesting to compare this language to that used by Tony Blair when first raising the idea of PNDs; he spoke of marching "thugs" to cash points. Yet the introduction of shop theft PND is seen as a liberalisation of criminal justice, a means of decriminalising certain behaviour, particularly for young children.<sup>32</sup> There is an almost Jekyll and Hyde approach to the issue; a determination to capture and punish more people, but at the same time not label them, from a legal perspective, as problematic. Of course from a rhetorical perspective, as Blair made clear, recipients of such notices can be seen as "thugs" and in 2003 he described those committing anti-social behaviour as 'the mindless few' (Blair, 2003). This is interesting given the findings of the pilot project that nearly half of all PNDs were for new entrants to the system, and that over 6,000 had been issued in one year (Halligan-Davis and Spicer, 2004). The New Labour government's approach to PND policy seems to have fluctuated between a politics of alterity ('the mindless few', the 'thugs'), whilst at the same time recognising that court processes were a disproportionate response to the level of offending.

Another controversial addition to the PND scheme was introduced in 2009; the possession of cannabis. Again, one of the driving forces behind inclusion of this offence were ACPO, who lobbied for it to be included as part of a three pronged strategy on cannabis use (warning first, PND second and final escalation to prosecution in the third instance) (HL Deb, 26 January 2009, c.82)

There has been one further addition to the list of PND offences, in 2012: contravention of the Royal Parks and Other Open Spaces Regulations 1997/1639.<sup>33</sup> Thus from 10 offences originally part of the scheme, the list has grown to 24 offences.

### **PND's as part of Criminal Justice Strategy**

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<sup>32</sup> Who, following the 2012 changes, are no longer subject to the scheme in any event

<sup>33</sup> Littering, use of a pedal cycle or roller blade outside a designated area and failure to remove dog faeces.

It would be a mistake to think that PND policy sits in isolation from other criminal justice policies formulated at the time. It has already been seen with careless driving FPNs and litter FPNs, that anti-social behaviour had become a key target of justice intervention, no doubt due to, as Crawford describes, an approach that seeks to 'govern through anti-social behaviour' (2009: 810). At the same time further reforms, rather than focusing on citizen's behaviour, have focused on the working of the criminal justice system. The 2006 review of summary justice 'Delivering Simple, Speedy, Summary Justice' (DCA, 2006a) found that

A key component of such a *simple, speedy, summary* criminal justice system is the ability to deal rapidly and effectively with cases where formal court proceedings are disproportionate and remedies such as Fixed Penalty Notices, Warnings or Cautions are more appropriate (2006a:40)

Here we see once again the determination that the justice system should deal with minor offending rapidly and 'effectively' (although 'effectively' throughout the document seems to be synonymous with speedy, simple justice, thus defining the problem in opposition to the solution). In addition to doing justice simply, speedily and summarily the government were at the same time examining 'Doing Law Differently' (DCA, 2006b). The then Lord Chancellor, Lord Falconer, stressed the importance of proportionality with OTSPs, where offences are 'too minor to justify a criminal conviction, particularly a one-off offence where the offender accepts their guilt' (2006b:10). At the same time as dealing with matters proportionately the government were also consulting on 'Strengthening Powers to Tackle Anti-Social Behaviour' (Home Office, 2006a). This document aimed to 'nip unacceptable behaviour in the bud' (ibid:3) suggesting a deterrence ideology behind these penalties; providing a swift lesson to offenders before matters escalate.

Interestingly the report also made a distinction between what it termed 'highly rational', 'mixed' and 'chaotic' offenders (Home Office, 2006a: 20). The report stated that police officers should '[s]top issuing Penalty Notices to chaotic individuals' since 'the rationality of an offender is a clear driver of payment of a Penalty Notice' (ibid). Here we have further

characterisation of those who are the proper recipients of PNDs. They are, according to Blair, “thugs” and the “mindless few” but to these categorisations one must now add, ‘rational thugs’, ‘mixed thugs’, ‘chaotic thugs’ and the ‘mindless, yet rational’. In a way this separation of categories of offenders reflects the ambivalent nature of any OTSP. At one point it is a deterrent penalty that punishes the transgressor swiftly and in a salutary fashion. Alternatively the OTSP can represent a liberalisation of the criminal justice system. Courts are here seen as disproportionately harsh in dealing with such minor offending and it is in the interests of (and justice for) the accused that they have a minor financial penalty without the burden of criminal conviction.

Reconciling these two competing views is difficult, perhaps the two approaches cannot be reconciled and instead can be explained by the respective audiences for the claims that are made. Talk of targeting the ‘mindless few’ whilst at the same time providing a more liberal treatment of ‘the mindless few’ can appeal to both left and right in the political spectrum. The former stresses the desire for a crime and punishment approach that is acceptable to the political right, whilst the latter appeals to the more liberal understanding of the political left. In effect it is triangulation, for which the New Labour government under Blair were known (Alderwick, 2012)

“Triangulation” describes a process of ideological and political positioning, by which two seemingly contrasting positions are juxtaposed, and then “transcended” by the formulation of a third position, which utilises and combines features of these original positions, creating a distinctive (triangulated) perspective which can be positioned as centrist (Alderwick, 2012: 2)

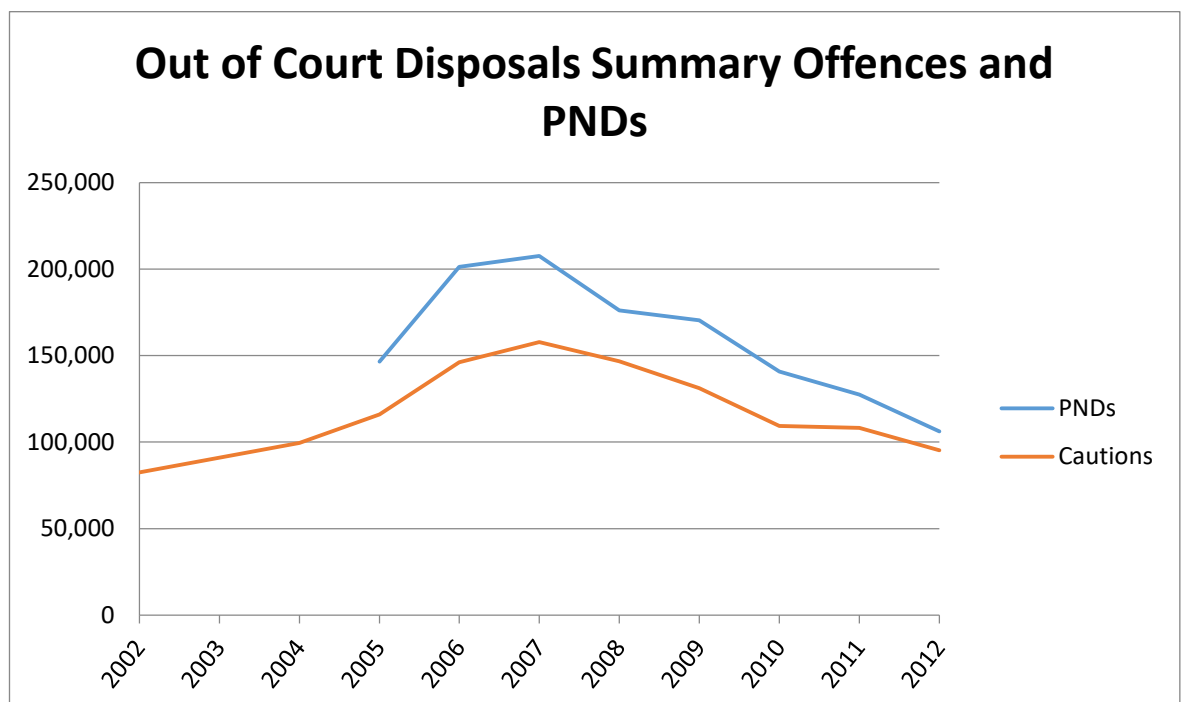
With the introduction of the PND the government was able to triangulate the two competing rhetorics of crime and punishment and liberal justice into a method of punishment that could appeal to both. It increased action against the ‘thugs’ whilst also giving them an opportunity to avoid more serious criminal justice consequences as long as the penalty was paid.

Quite clearly then the New Labour government were keen to use OTSPs as a means of tackling problematic behaviour and reducing administrative burdens on enforcement agencies. This determination applied across the regulatory landscape. Local authorities were encouraged to increase the number of FPNs for litter under the CNEA, and police forces were encouraged to use PNDs to ‘nip in the bud’ unacceptable behaviour (Morgan, 2008: 12-14).

### **Charting PND Usage**

Overall the PND policy can be seen as something of an experiment in translating the motoring FPN to more traditional criminal offences. The PND did not start this experiment as the litter context had already broken the link between OTSPs and problematic vehicle use, however the PND brought the concept of an OTSP into mainstream criminal justice. The following chart shows the number of PNDs issued each year since 2005 (the year of national roll out) and the number of cautions issued for summary only offences (excluding motoring) since 2002.

**Figure 3.6**



The large reductions in PND use post 2007 can be traced to the government's removal of the PND as a statistic on the number of offences brought to justice (OBTJs). So called OBTJ's (Offences Brought to Justice) were a measure of the "justice gap"<sup>34</sup> and the perceived effectiveness of police performance. The Section 5 Public Order PND was counted as an OBTJ, thus each s.5 PND was a recorded crime statistic and, until 2007-8, it was also treated as 'an offence brought to justice' (OBTJ) (MOJ, 2013). This categorization of the s.5 PND was problematic in that it created, as Morgan notes 'perverse incentives' (2011; 18) which could allow police services to focus on minor crime at the expense of more serious criminality, since a conviction for murder and a PND would have the same standing in police targets.

In its 'Strengthening Powers to Tackle Anti-Social Behaviour' consultation the government recognised a problem (Home Office, 2006a: 3.1) with recording s.5 as a 'violent crime' since it artificially increased violent crime statistics. The government therefore removed PNDs for section 5 as a violent crime statistic, demonstrating the truthfulness of Bevan and Hood's claim that 'What's measured is what matters' (2006). What the government did not do was remove PNDs from the OBTJ target. It took nearly another two years before the perversity of PNDs as OBTJs sunk in and the target was removed.

### **The Coalition and PNDs**

With the move to the Coalition government in 2010 a new approach to PNDs can be seen. In its white paper 'Swift and Sure Justice' the government saw PNDs in a similar light to FPNs for careless driving in that they were for low risk cases.

When they are used appropriately, we believe that they are a simple and useful tool for dealing quickly and efficiently with minor offending by low risk offenders (MOJ, 2012c: 37)

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<sup>34</sup> 'the difference between the number of crimes which are recorded and the number which result in their perpetrator being brought to justice' (CPS, 2009)

To overcome concerns that the PND system allocated punishment where it wasn't justified the paper recommended the setting up of scrutiny panels to oversee all out of court disposals. The panels, made up of a collection of magistrates, police officers, crown prosecutors and other relevant bodies, retrospectively scrutinise out of court disposals (OOCD's) (e.g. caution, restorative justice or PND). The senior presiding judge, Lord Justice Gross, has issued guidelines on these panels, which clearly state that such panels must only *retrospectively* examine OOCD's to

provide generalised feedback to local police forces about whether their use of out of court disposals appears to be consistent and appropriate based on a detailed consideration of an anonymised sample of cases (Judge, 2013:5)

Such panels should '**not involve magistrates endorsing, rescinding, or otherwise changing individual out of court disposals in any way**' (Ibid: 4. emphasis in original).

In addition, the current Lord Chancellor, Chris Grayling, has committed to a fundamental review of all OOCD's (MOJ, 2013), although Grayling does not include motoring out of court disposals within this review, which suggests that the "special" status of minor motoring offences has been cemented.

#### Diversions from Diversion: A mini chronology of awareness courses

One of the major changes first enacted by the coalition government in PND enforcement was the introduction of an educational option as an alternative to s.5 and D&D PNDs. The idea of an educational alternative to an OTSP first arose in the motoring context in the Road Traffic Law Review conducted by Peter North in 1988. The North report recommended that '[a] pilot study of one day retraining in basic driving skills as a disposal should be undertaken to determine whether such retraining produces a lasting improvement in the driving skills of the offender...' (Cited in Burgess and Webley, 1999: Para. 1). Despite this recommendation the Road Traffic Act 1988 did not contain any provision for such diversions (either an FPN, or prosecution) (ibid, para 2). Instead Devon and Cornwall Constabulary set up its own

educational scheme whereby drivers involved in crashes at which it was felt there was evidence of the driver carelessness, could attend a one and a half day's educational course in lieu of prosecution (Ibid). Burgess and Webley's report for the Department for Transport, Environment and the Regions (DETR) found favourable results and 'a significant effect on changing client's attitudes and self-reported behaviour in the desired direction' (ibid: para 33). Accordingly the DETR recommended the use of such courses beyond the pilot area and set up the National Driving Improvement Scheme (NDIS).

The success of this scheme in changing driver behaviour was debatable, in an evaluation of NDIS by Connor and Lai for the DFT (2005) two studies were carried out examining the effect of attendance on driver behaviour and driver attitudes. The first study found a positive, though modest, effect on driver attitude and behaviour, although in terms of attitude change this affect had vanished by 12 months from the date of the course (Connor & Lai, 2005; 7). In the second study a driving assessment by an advanced driving instructor was carried out in addition to questionnaires. This study found 'few, if any, effects that could be confidently attributed to attending the course' (ibid: 5.8). Despite this, the government took the educational course idea and applied it to cases where drivers were not involved in accidents but were accused of poor driving behaviour. The National Driving Offender Retraining Scheme (NDORS) extended the NDIS to speeding offences whereby the driver could opt for a speed awareness course in lieu of an FPN (ACPO, 2007).

At present there are six national courses running in respect of driving behaviour, covering a variety of offences including speeding, careless driving, and neglect of traffic lights (ACPO, 2012). There are also locally provided courses for offences such as mobile phone use and not wearing a seatbelt<sup>35</sup>. The Strategic Framework for Road Safety clearly set out its vision of a road safety policy based on educational courses for offenders. Philip Hammond (Secretary of State for Transport) stated that 'our approach, where possible,

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<sup>35</sup> For instance Thames Valley Police operate an online 'Your Belt Your Life' course and the 'Thames Valley Call Divert Scheme'

should be based on making it easier for road users to do the right thing – improving education and training instead of resorting to more bureaucracy, targets and regulation’ (DFT, 2011:5).

The strategy called for a wider use of educational courses in the event of driver offending where ‘this is more effective than financial penalties and penalty points’ (ibid, 8). Although the document suggests no comparative studies will be undertaken, so quite how ‘effective’ is understood is unknown and shall be discussed in the following chapter. The strategy does state that ‘where road users make low level mistakes we intend to divert them in to a greater range of educational courses’ (ibid: 18) which suggests that such educational courses operate as a diversion from an already existing diversion (the FPN) (a situation Stanley Cohen would no doubt find immensely ironic).

Despite the talk of the widening of educational opportunities in the framework, the action plan drafted as part of the process could hardly be described extensive. In diverting cases from an FPN, just two offences were added to the educational scheme: not wearing ones seatbelt and careless driving (DFT, 2013b), the latter, but for the framework, would not have been an FPN in the first place.

Re-education courses operate on cognitive behavioural therapy principles (Corbett, 2003: 157). In their review of Speed Awareness courses in 2010, Stephenson et al (2010) recommend that such courses should ‘first and foremost, target the cognitive predictors of speeding behaviour’ (2010: 8). The courses therefore, to a certain extent, overcome one difficulty of a reliance on deterrence ideology in speeding enforcement. The use of financial penalties, and penalty points, to deter non-compliance with the law does not address the cognitive reasons for offending behaviour (in effect “licensing” speeding through payment does not necessarily have the desired result of reducing speeding.) However, addressing cognitive factors of motoring offending is complicated by the fact awareness courses are seen as appropriate punishment in only *less* severe cases of speeding. ACPO guidance (2011b) on speed limit enforcement recommends an FPN in all cases above 42mph in a

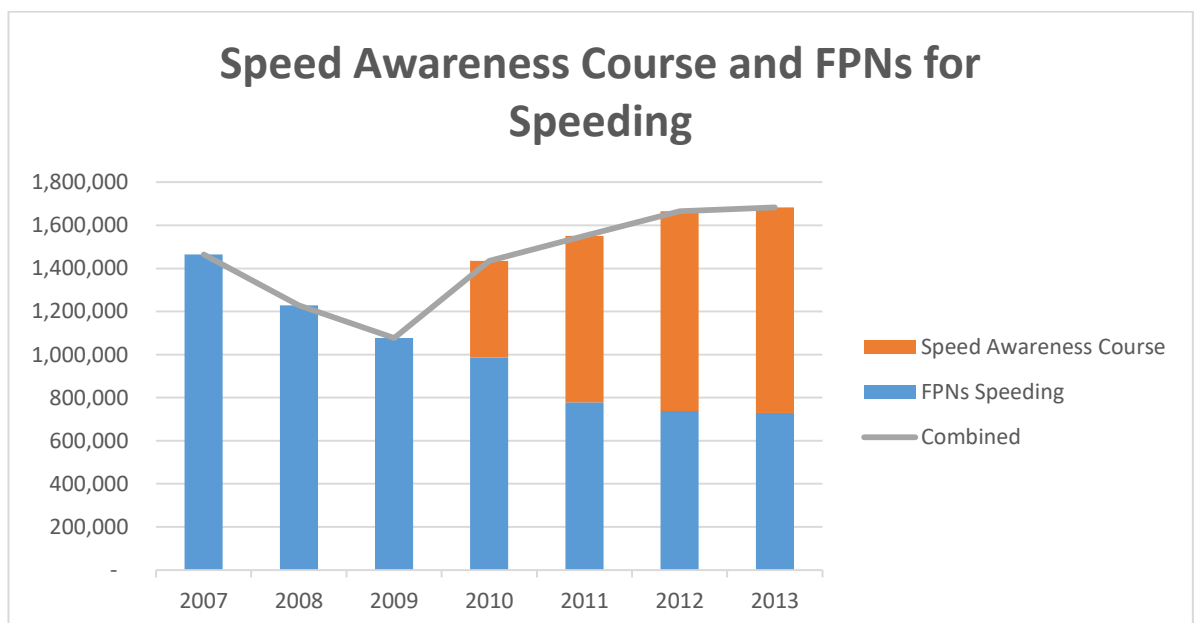


30mph limit which suggests the framework interprets FPNs as too punitive for minor offending. The course then is one which seeks to alter driving behaviour at the lower end of offending, the lower speed driver.

The application of educational principles to areas outside the police motoring context is relatively new. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended the CJPOA 2001 to allow for an educational course, run by the police, in lieu of the recipient paying their PND for s.5 and D&D offences. Understandably the majority of time spent scrutinising the bill in parliament was on the proposed changes to legal aid. On the issue of PND's there was broad support, although in one amendment the Labour party representative sought was to have such courses run by the probation service rather than the police service (Legal Aid, Sentencing and Punishment of Offenders Bill HC Deb, 13 October 2011, c780). This was rejected by the committee.

Centralised statistics are not generally held on the number of attendees at educational courses. However, in relation to speeding, a parliamentary written answer in April 2014 (HC Deb, 8 April 2014, c200W) reported the statistics on the number of Speed Awareness courses attended. The data is presented in figure 3.7

Figure 3.7



As figure 3.7 demonstrates the awareness course has, since 2011, been the most common punishment for alleged speeding. Court convictions for speeding by comparison run at on average<sup>36</sup> 105,000 per year (HC Deb, 7 April 2014, c122W). Thus educational courses do have the potential to displace significant numbers of offenders from the OTSP regime.

Of course in the motoring context there is a clear incentive to sit the course as the alleged offender can avoid receiving penalty points.<sup>37</sup> With the PND course such an incentive is not available and one wonders what the possible reason for attending the course would be. Presumably a reduction in the value of the fine is offered, but this is obtained at the expense of the recipient's time. Midwestshire police do operate an alcohol awareness course, in lieu of a PND, for s.5 and D&D cases. The cost of the course is at present £40.<sup>38</sup> As yet there are no centralised statistics on the number of recipients opting for a PND educational option.

What is particularly interesting with the educational diversion is that the issue appears not to have been trialled in the littering FPN context. As discussed earlier, education played a key part in debates about litter enforcement and yet in practice, discussed in chapter 5, enforcement first, by way of FPN, is the priority. The “offender” is not generally given the option of picking the litter up; if they do it will not affect the notice. Partly this is a reflection of the perceived inadequacy of educational campaigns to combat litter. In adjournment debate in parliament in 1999 the Labour MP Bob Blizzard summed up this feeling

We have had campaigns for as long as I can remember ... we have more bins than ever before throughout the country. The sad conclusion is that when it comes to litter, education does not appear to work—and I say that as an ex-teacher. (HC Deb 17 May 1999 331 c.850)

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<sup>36</sup> Unfortunately 2013 statistics are not available at the time of writing.

<sup>37</sup> Although the insurance consequences of attendance at an awareness course are far from clear-cut as some insurers increase premiums based on attendance, much to the chagrin of ACPO (see BBC, 2012)

<sup>38</sup> Personal correspondence with the Central Ticket Office

It would appear that only Hartlepool Borough Council offer some form of educational course in lieu of a litter FPN. However the course is only available for youth offenders (between the ages of 10 and 17) because they 'have no income generating capacity' (Hartlepool BC, undated).

Likewise in the parking context there appears to be no impetus or attempt to introduce a form of parking awareness course. Given the complexity of parking regulation, a fact recognised in the Coalition Government's 'Consultation on the draft Traffic Signs Regulations and General Directions 2015' (DFT, 2014a), it is perhaps surprising that such courses have not been trialled.

Thus it can be seen that the growth of certain OTSPs has, to a limited extent, been mitigated by the introduction of further justice system diversions. What we see with these courses, certainly in respect to national policy, is a desire to remove minor offending from the OTSP regime. Furthermore there seems to be a consistency of thought (despite very limited evidence) that such courses operate at a more effective level than the incentivised structure of OTSPs.

### Conclusion – Unifying the OTSP

This chapter has shown that there are a number of themes that unify the OTSP across the contexts. There is an expectation that enforcement should increase due to increases in transgression and that the current means for dealing with transgressions are not "adequate" in either providing an efficient process or sufficient salutary punishment. There is an assumption that OTSPs can provide a more "efficient" and "effective", swifter, cheaper and more deterrent sense of punishment than the traditional court system can deliver. However behind these claims lies ambivalence about what, fundamentally, the OTSP is meant to achieve.

In many respects the OTSP is a manifestation of the need for the criminal justice system to deal with cases in a proportionate manner. The essentially minor nature of the punishment,

a small fine (and in certain circumstances driving licence endorsements) reflects the perceived minor nature of the crime, be it littering, general low level anti-social behaviour or problematic vehicle use. On the other hand at times the penalty notice is seen as an invidious punishment, by both recipients and policymakers, for the vast majority of offences that actually receive OTSPs. Thus educational courses are encouraged in order to divert an already diverted population.

The salutary nature of the OTSP and the fact that it imposes an actual burden on the alleged offender, almost immediately with little cost to the state, means that it can also appeal to “zero-tolerance” sentiments. There is little doubt that the introduction of an OTSP results in far more people being punished than would otherwise be the case. The increased speed and ease of OTSP issue, compared to court prosecutions, allows policymakers to stress their active law and order credentials. The OTSP can be used “effectively” to deter and punish the “road hog”, the “lane-hogger”, the “selfish motorist”, the “litter lout”, the “thug” and the “mindless few”. Whilst at the same time the OTSP can provide a minor and proportionately fairer lesson to the “forgetful”, “accidental”, young and “low risk” offender. This ambivalence about the purposes of OTSPs does have an impact in practice. As will be demonstrated it conveys a confusing message that both enforcement professionals and OTSP recipients dispute and struggle to make sense of.

## Chapter 4: Understanding and interpreting the achievements of OTSPs

In the previous chapter a chronology of OTSPs was outlined. The common idea linking the varying OTSPs was the belief of policymakers that such notices would provide a more “effective” means of justice. In this chapter the policies on the various OTSPs are examined to see how policymakers have constructed “effectiveness” judgments. In answering this question the concept of “effectiveness” itself is subject to critical analysis as there are numerous ways through which “effectiveness” can be claimed, constructed or contested.

Policymakers need to demonstrate effectiveness arises from the potential conflict between the expectations of ordinary citizens in their interactions with the justice system and the reality of receiving an OTSP. Put simply making a claim that an OTSP is “effective” is a way of both legitimising the changes to due process and demonstrating that the policy is the right option to take.

This chapter investigates the claims to “effectiveness” made by policymakers; examining the targets and management techniques to promote the idea of an “effective” OTSP system. In addition it is necessary to examine the normative/justice claims that arise as a result of policymakers using “effectiveness” language. What separates these two approaches is that the former uses the metrics of the policymakers to assess whether they have delivered on the claims made, whereas the latter widens the discussion in a normative direction to ask what such a model of “effectiveness” actually requires for the justice system.

“Effectiveness” is a difficult concept to unpick, particularly in criminal justice. There are numerous ways in which the “effectiveness” of OTSP can be operationalised. Whether it is deterrent value, cost efficiency or increased productivity, each claim allows one to investigate, claim and contest “effectiveness”. In this chapter these issues are analysed from theoretical perspectives and the statistics on the usage of OTSPs are used to examine whether the penalty met the “effectiveness” goals that are claimed.

One further aspect of “effectiveness” that must be analysed is the sometimes confusing concept of compliance. Compliance can relate to both the compliance with underlying laws that OTSPs seek to effect (e.g. ceasing to drop litter), and it can also relate to compliance with the notice (i.e. paying the penalty). In addition compliance can consist of gradations of compliant behaviour, particularly with OTSP payment since compliance can either mean payment at the discounted amount, or at a higher amount. In both cases the notice is complied with, however delayed compliance may be more problematic for the authority. Therefore to understand how “effective compliance” happens there is a need to examine how that compliance is characterised in the OTSP system.

### What is effectiveness?

It is worth noting that this research, in problematising “effectiveness”, is not seeking to develop a theory of effective OTSP policy, instead it examines the self-proclaimed goals of OTSP policy through policymaker pronouncements. Additionally, separate normative standards of justice are utilised to problematise the “effectiveness” claims, especially in the field of compliance where simple claims of “increased compliance” cannot begin to paint the true picture of “effective” compliance. Whilst policymakers may be unconcerned about these problematic concepts, they nevertheless allow a richer understanding of the actual effectiveness (and effect) of OTSPs.

Studying or claiming “effectiveness” is not ‘an ideology-free technical activity’ (McNeil, 2001: 672) it involves consideration of ends and means, each of which involve normative questions. Raynor states that ‘the question ‘effective for what?’ raises issues of aim and purpose, which in turn entail some consideration of the values which lie behind aims and purposes’ (1996: 190, cited in McNeil, 2001:672).

“Effectiveness” is an important dimension of this study since the OTSP marks something of a change from the way in which the traditional criminal justice system operates. To gain support for OTSPs, policymakers need to stress the benefits of the penalty in order to make the withdrawal of due process rights somewhat palatable for the public. Thus the goal of

an efficient criminal justice system can be used to draw support for OTSPs which may otherwise antagonise citizens. In this way the suspension<sup>39</sup> of due process is weighed against a competing ideal of an efficient criminal justice system. Using Packer's terminology the 'crime control model' (1969:158) is sold as a more "effective", and hence acceptable, approach than full due process for all suspects. One critical question in adopting the crime control model is whether the system actually delivers on the effectiveness claims that are made.

In what follows four aspects of "effectiveness" in OTSP policy are analysed:

- performance management/targets,
- the diversionary nature of the policy,
- compliance,
- the deterrent value of OTSPs

Each aspect is critically appraised to draw out not only inconsistencies between aspirations and reality, but to also highlight the normative inferences that each measure of "effectiveness" provides.

#### Managing Justice: Macro Level Concerns of Performance Management, Targets and Effectiveness

One government policy that has come to dominate the modern era, regardless of political persuasion, has been that of New Public Management (Hood, 1991). An important facet of such management style is the focus on the '[e]xplicit standards and measures of performances' (Ibid: 4). Certainly in the criminal justice system, performance management has been the key method for centralised governmental monitoring and control (see Sinclair & Miller, 1984; Raine & Wilson, 1997; Raine & Keasey, 2011). This style of governance suited the increasing use of OTSPs and it is perhaps no surprise that performance management was seized on whole-heartedly during the New Labour administration (Raine

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<sup>39</sup> As all OTSPs give the opportunity to appear in court it is better to describe the process as a suspension of due process with a clear incentive not to invoke such rights rather than a "removal".

& Keasey, 2011) which saw large increases in the use of OTSPs to regulate behaviour. During this period a series of Comprehensive Performance Assessments (CPAs) linked public sector performance to financial rewards. Those deemed to be doing well (in certain circumstances linked to the issuing of OTSPs) were given greater autonomy to spend their own money.

The rationale for focus on performance management was given in a 1998 government spending review.

Clear objectives have better enabled the Government to make informed decisions about the allocation of resources. Subsequently, this has facilitated the setting of clear and quantifiable targets ... and show what each department aims to deliver ... and against which performance will be measured. (HM Treasury, 1998: 2)

Raine and Wilson (1997) explain the rise of managerialism in the criminal justice system as part of a Thatcherite determination to focus on '*productivity, cost efficiency and consumerism.*' (1997:83) (emphasis in original). These are all key attributes of a marketised sense of justice, one where thrift and value for money play a key part.<sup>40</sup> Productivity, as Raine and Wilson argue, 'can best be understood in terms of preoccupation with more efficient processing of cases and files within criminal justice' (ibid, 83). Clearly the debates discussed in the previous chapter evidence a desire for OTSPs to provide a more productively efficient system. For example PNDs were promoted on the basis of their supposed greater efficiency:

The greater use of fixed penalty notices should not only reduce the time the police have to spend on paperwork, but also the time they have to spend in making court appearances (Home Office, 2000b:1).

It is perhaps unsurprising that OTSPs were chosen as an option for making the justice system more "effective," since such notices can be assessed in multiple ways through

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<sup>40</sup> And some might argue at the expense of more traditional concerns of fairness and justice



performance management and targets. Whether through direct quantifiable measures (the number issued, the number paid, the times scales of payment), or through comparative measures of “effectiveness”, (e.g. reduction in bureaucracy, time spent and cost), all these measures are capable of quantification and, crucially, presentation as an aspect of an “effective” justice system.

‘The preoccupation with *productivity*,’ Raine and Wilson argue is ‘illustrated in the initiatives to systematise criminal justice, to establish time-limits and other ‘processing’ and ‘throughput’ standards” (1997: 86). Quite clearly, as shown in the debates in the previous chapter, these throughput standards had, at first, a goal of providing a swifter and more cost effective system.

Raine and Wilson also argue that managerialism can be surpassed once certain managerial goals have been met or subsumed by other important goals. They termed this “post-managerialism”: ‘the shift from a preoccupation with the core values of the management accountant – cost-efficiency and productivity – to a concern with other, more humanitarian, values’ (ibid, 92). Raine and Wilson felt that post-managerialism was starting to take hold at the time of their writing (1997). During the period in which OTSPs became the penalty of choice for minor offending (1990-2010) it is difficult to characterise the overall approach as “post-managerial”. Instead, as Ashworth argues, the New Labour approach to criminal justice had two divergent themes, one expressly fostering managerialist tendencies, the other demonstrating a ‘punitive “othering” approach’ (2011: 12).

Ashworth states ‘[t]he government ...looked for ways of managing less serious crime more cost effectively. This managerialist (or “actuarial”) approach was characterised by regulatory and preventative strategies: that is speed, economy and effectiveness.’ (ibid: 12). Indeed New Labour reforms in the justice system spoke of the need to make such justice ‘simple, speedy and summary’ (DCA, 2006a) and, again, the focus of these reforms was on the processing time of criminal cases. The ‘othering approach’ was also evident during the period, for example in the PND context, Blair labelled those receiving such

notices as 'thugs' and 'the mindless few.' Thus Raine and Wilson's argument of movement towards a post-managerialist approach in criminal justice was somewhat premature. Although it must be noted that implementation of the Human Rights Act 1998 demonstrated at least some post-managerial concerns in criminal justice.

Rather than decentralising control, at least as far as minor crime was concerned, the New Labour administration operated a centralised system, one in which it set goals, targets and indicators for authorities all of which, it claimed, demonstrated and promoted "effective" practices. Targets, according to Bevan and Hood, involve setting mechanisms for monitoring performance against set objectives and creating feedback mechanisms linking performance and targets (2006:518). Under New Labour monitoring performance was centralised, with Whitehall departments collating and disseminating the statistics, which would then form part of the comprehensive performance assessment (Bevan and Hood, 2006).

The most obvious example of target led policing was the inclusion of PNDs in the policing "Offences Brought to Justice" (OBTJ) target. In the other OTSP contexts targets and best value indicators were less obvious and less driven by enforcement led targeting systems. For example in speeding and litter enforcement there were no specific targets or indicators that could be directly addressed through OTSP enforcement. However as regards both contexts, enforcement could impact on targets, or Best Value Indicators (BVIs), (in the case of speeding KSI<sup>41</sup> targets, or littering BVI 199a, the 'levels of detritus and litter' in a local authority area) but did not directly measure increased enforcement, unlike the PND context.

### **Post-Managerialism in Coalition Government**

Aspects of post-managerialism can be seen in contemporary policy on OTSPs. The Coalition government have been active in pointing out the 'fairness' problems of the New

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<sup>41</sup> Number of people killed or seriously injured as a result of a road accident

Labour Government's out of court disposal (OOC) policies. The Coalition's consultation on OOC's acknowledged

'OOCs are a valuable tool to the police and others, they can reduce bureaucracy and keep police on the front line at a time when resources are constrained (MOJ, 2013e: 6).

Though it went on to state:

public confidence in the effectiveness or appropriateness of this system can be damaged by the perception that significant numbers of serious or violent offences have been wrongly dealt with by means of an out of court disposal.' (ibid: 6)

Here is a post-managerialist concern with fairness, whilst simultaneously being concerned with more traditional 'effectiveness' criteria, for instance ensuring that justice demands form an integral part of out of court disposals "effectiveness". In a change from New Labour the Coalition did not see itself as the arbiter (and setter) of targets to achieve "effectiveness" goals. Theresa May, Home Secretary, in 2010 (June 29<sup>th</sup>) scrapped most police targets, including those aimed at confidence in policing and the policing pledge, and instead gave just one target 'the reduction of crime' (May, 2010). All other effectiveness measures would no longer be centrally assessed or controlled, but instead subject to local accountability through Police and Crime Commissioners (See Lister, 2013).<sup>42</sup>

Similarly in the field of local government, central government collection and monitoring of performance data was scrapped by the Coalition. In 2010 Eric Pickles, Communities Secretary, announced that centralised control of local government targets would cease and from 31<sup>st</sup> October 2010 'central government will have no role in monitoring them' (Pickles, 2010a), as a consequence there are no nationally held statistics on litter enforcement. Fortunately in parking enforcement the Traffic Penalty Tribunal does keep statistics on

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<sup>42</sup> A BBC report in September 2013 found that although decentralisation has happened this has not resulted in a reduction in performance culture within police forces. It found that Police forces in England and Wales had 178 performance targets under local PCC service agreements. (BBC, 2013)

PCN's issued by local authorities. One key driver for this post-managerial style<sup>43</sup> in central government has been the increased focus on localism combined with austerity (Raine and Keasey, 2011).

Thus "effectiveness" targets and measures have played an important role in OTSP policy and continue to do so albeit at a local level. For present purposes the collection and collation of centralised data during the New Labour period of government allows for an examination of, and contestation of, the concept of "effectiveness" as applied to OTSPs based on the policy aspirations set out for them.

### Targeting Performance in the OTSP contexts

#### Gaming the PND

The use of targets in PND enforcement has led, at times, to practices that do not always address the underlying concerns at which the law is aimed. Cutler and Waine explain, and criticise, the New Labour approach of targeting performance:

Tony Blair ... described public spending as "money for results". The difficulty here is not with the desire for accountability but rather that pressures to show "results" will lead to the adoption of simplistic measures (2000: 330)

This pressures to "show results" has led, at times, to practices that, rather than address the concern behind a target, instead use the target for less noble purposes; so called "gaming" the target.

Gaming activity, 'hitting the target and missing the point' (Bevan & Hood, 2006: 521), can readily be seen in the PND context with the PND counting towards targets on: "Offences Brought to Justice (OBTJs) and the reduction of "violent crime". The inclusion of the PND was apt to mislead about the true state of effectiveness of police forces in combating violent crime and the effectiveness of police forces bringing criminal offences to a satisfactory conclusion.

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<sup>43</sup> One could argue non-managerial style

Firstly the inclusion of s.5 Public Order within the definition of “violent crime” in recorded crime statistics created a problem for police and central government. Police performance assessments’ provided an overview of performance at local force level and over the period 2004-6 a key focus of such performance was “violent crime” (Home Office, 2006b). The inclusion of section 5 as a “violent crime” meant that police forces were reluctant to issue PND’s for s.5 where it was felt that the PND would artificially increase violent crime statistics (Home Office, 2006a: 3.1). Following a review by the Statistics Commission in 2006, it was decided that s.5 PND’s should no longer form part of Police Performance Assessments (ibid, 3.1) in relation to violent crime. However, the section 5 PND continued to be counted as an OBTJ at this point.

The Office for Criminal Justice Reform’s ‘Review of practices across selected forces’ (2006) found significant variations in the use of PNDs as an OBTJ from 1% of all OBTJ’s in the lowest force to 13% in the highest. The report also found that the use of PNDs as an OBTJ was growing (OCCR, 2006:7). The withdrawal of the OBTJ target in 2007 resulted in large reductions in the number of s.5 PNDs being issued, from 77,827 s.5 PNDs in 2007 to 57,773 in 2008; by 2013 this had reduced further to 12,480.

As Morgan points out, the removal of PNDs from the OBTJ target, and the reduction in PND usage that resulted, ‘pointed to the fact that the police were no longer earning Home Office brownie points.’ (2011: 20). It is worth recalling that the most complex murder prosecution, or any serious criminal prosecution, counted as just one OBTJ. Thus in terms of target equivalence the PND was equal to prosecuting the most serious, complex, and resource intensive crimes. This suggests that gaming was certainly in evidence in PND usage, through underreporting of violent crime prior to 2006 and through certain police forces embracing the PND as an OBTJ.

### Targeting Litter

In the litter context there were no specific measures on the level of enforcement which were used to evidence “effectiveness”. Instead there was a best value target, BV199a,

introduced in 2004. This target was an indicator under the government's Comprehensive Performance Assessment, which recorded the state of 'Local street and environmental cleanliness litter & detritus' (Audit Commission, 2007:22). The target's introduction meant that the local condition of streets, in terms of the cleanliness and litter amounts, was assessed and formed a small part of that authority's performance.

The introduction of BV199a coincided with the passage through parliament of the Clean Neighbourhoods and Environment Act (2005). This act allowed for the large scale increase in enforcement of littering legislation to take place. The impact of the introduction of BV199a is difficult to differentiate from CNEA factors, such as allowing all authorities to keep the proceeds of any FPNs issued and privatised enforcement. No doubt all of these factors contributed to the growth of Litter FPN enforcement, however some effect can be seen from the increase in litter FPNs issued between 2003-2004 (from 7,565 to 25,213 suggesting an affect independent of the CNEA). The extent to which this is as a result of BV199a however is complicated by the introduction of the Local Government Act in 2003, which allowed 'excellent' performing authorities under the CPA to retain FPN income. Thus it is difficult to isolate the reason for the resulting drive for increased performance. What can be said is that the removal of BV199a in 2008 led to a stagnation in the use of litter FPNs. In 2008 35,365 FPNs were issued, that figure was 34,465 in 2009, since then enforcement has grown again to 63,883 in 2011 (Appleton, 2012) without any BVI's.

#### **Motoring: Speeding KSI's**

Targets focusing on reducing the casualty levels of British roads have been in place since 1987 (DFT, 1999). These targets produced a 40% reduction in those killed on the road between 1987 and 1999, and a reduction of 45% of those seriously injured when compared to the 1981-1985 average (DFT, 1999:1). In 1999 the New Labour government set out their own reduction targets to be achieved by 2010, these were a 40% reduction in those killed or seriously injured on the roads, a 50% reduction in children killed or seriously injured and a 10% reduction in the slight casualty rate (Ibid).

There were a number of factors that were seen as playing an integral part in the central strategy to achieve these targets.<sup>44</sup> The most important for present purposes was the development of the National Safety Camera Programme, which allowed for the hypothecation of income from camera motoring FPN enforcement. Such income was paid to local partnerships to fund further enforcement against speeding and also red light camera enforcement.

This targeting regime is generally thought to have been a success, as Wells explains the pilot programme was so successful it was rolled out nationally after just one year of operation (Wells, 2012: 30). The aims of the 1999 strategy were met in terms of KSI's, based on 2010 figures the reduction was 45%. The strategy was also successful in meeting the target of a 10% reduction in the number of slight injuries as a result of a road accident, the actual reduction was 32%.

The extent to which speeding enforcement impacted on these reductions is certainly contested (see Wells, 2012), however what is beyond doubt is that the policy saw a rapid increase in the number of fixed speed cameras, from 475 in 1996 to over 5,000 by 2006 (Ibid: 30). The ending of the national programme in 2007 resulted in the removal of hypothecation, nevertheless the targets still remained thus speeding enforcement was still expected by authorities but was not self-financing and instead had to come from the local partnership's own funding partners.

During this period there was certainly a growth in speeding enforcement (including FPNs). Comparing mean averages between 1981-1985 and 2000-2010 of all speeding incidents leading to formal censure,<sup>45</sup> the percentage increase on enforcement capture was 476%. In total, during the operation of the NSCP programme (2000-2007), 12.48 million speeding FPNs were issued, whereas 5.65 million such notices had been issued in the *previous 10*

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<sup>44</sup> Amongst others: focus on drink and drugs, safer transport infrastructure, safer vehicle standards and safer speeds.

<sup>45</sup> Including prosecution, written warning, FPN and awareness course (the last two not available in the 1981-1985 period)

years. Quite clearly targeting KSIs through the NSCP had the effect of increasing speeding enforcement dramatically, the majority of such enforcement being by way of FPN.

In 2010 all central funding of speed cameras ceased. The extent to which this resulted from post-managerial concerns of criminal justice is debatable. By making such enforcement more difficult the government could be said to be concerned with post-managerial concerns of fairness to motorists, indeed The Road Safety Minister at the time, Mike Penning, stressed the need to 'end the war on motorists' by withdrawing central funding (Independent, 26 July 2010). This reform can be seen as a move towards a post-managerialist concern with localism, devolving control to local authorities to determine their own priorities, a claim made by the minister in parliament (HC Deb, 2 December 2010, c948). Additionally the imposition of local transparency standards in 2010 likewise evidenced a desire to move away from centralised control of the collection and dissemination of speed camera statistical monitoring. Instead each authority was tasked with producing their own reports<sup>46</sup> (Penning, 2010). Whether this represented an aspect of post-managerialism is debatable as one can clearly see aspects of Raine and Wilson's managerialism here, including competition by comparison between local partnerships and allowing for consumerist evaluations of performance. Indeed in relation to this last aspect it is telling that in introducing these reforms, and subsequent motoring enforcement policies (including careless driving FPNs and PCN enforcement) Coalition ministers spoke of 'ending the war on motorists' and stating that they were trying to stop authorities using motorists as 'cash cows' (see Pickles, 2010; Penning 2010).

Interestingly, with regard to a method of enforcement that is widely described as a "cash cow", some large authorities have struggled to maintain the cameras as they are too costly. Oxford City Council (BBC 1<sup>st</sup> August, 2010) and West-Midlands police (BBC, 12<sup>th</sup> March 2011) are two authorities that have turned off speed cameras due to maintenance costs.

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<sup>46</sup> A clear burden on local authorities when one considers that funding had already been cut for such cameras. Local partnerships were, in effect, tasked with doing extra for less.



Both authorities have since switched their speed cameras back on (BBC, April 2012 Oxford; BBC, February 2014, West Midlands)

At present it is too early to tell the long term effect that Coalition changes have made to KSI statistics. There has been a slowing in the average reduction, based on 3 year rolling totals, since 2010 (DFT, 2013), there was a 6% reduction in the number of KSIs, however in the previous three year period (2008-2010) the reduction was 12%. The number of FPNs issued annually has reduced significantly from the NSCP period (2004-7). In 2012 only 729,299 speeding FPNs were issued, however 953,464 speed awareness courses were attended, making a total of 1.65 million incidents of speeding receiving an OOC. In 2004 that figure was 1.77 million. Thus withdrawing funding appears not to have had too much of an effect on the number of drivers punished for speeding, nor has it resulted in increases in the number of KSIs.

#### Productive Efficiency: Diverting cases from court

In this section the aim of providing an “effective” means of diverting cases from the magistrates’ court is analysed. In each OTSP context there was a desire to remove cases from the court system, but in so doing there was an expressed need to continue to punish behaviour. In parking enforcement there was a perceived need ‘to relieve the police and the courts of a heavy and growing burden’ (HC Deb, 1960 621 c994). Likewise with the introduction of motoring FPNs, it was claimed they were ‘designed to reduce the burden of road traffic offences imposed on ...the courts so that they are able to devote more time to dealing with more serious offences’ (HC Deb 1982 17 c865). In litter enforcement, although FPN policy was more focused on increasing punishment severity, nevertheless it was still stressed that FPNs would be an effective means of diversion, as one supporter of the 1990 Environmental Protection Act stated

It is important to use fixed fines... [t]hat is better than taking the matter through the courts and convicting the person of the offence. (HL Deb, 1990,520 c1681)

Whether there was an intentional policy of diverting people or merely diverting workload is difficult to assess from policy pronouncements. As discussed previously the switch to OTSPs also resulted from a belief that courts weren't providing sufficient deterrent punishment, particularly in litter and PND enforcement. This desire suggests a need to divert cases from the courts for "efficiency" reasons rather than for diverting an individual from the criminal justice system on justice criteria (fairness, the minor nature of the transgression etc.) Although, at times during parliamentary debates, appeals to this second form of just diversion were made.<sup>47</sup>

This 'just' diversion has to be examined against the system's productivity aims however, since one aspect of a more productive system is an increase throughput (i.e. amount of people that the system can process). In short, diversion allows more people to be punished than would otherwise be the case.

### **Diverting Offenders**

OTSPs have resulted in a vast increase in the number of people being sanctioned for problematic behaviour; this applies equally across the contexts in which OTSPs arise. The increasing number of people being sanctioned by OTSPs calls into question one of the central positions of the switch to OTSPs; that they *divert* people from the formal criminal justice system.

The critical criminology movement, particularly the views of Cohen, can provide some understanding of how such increases can be theorised. The 'dispersal of discipline thesis' (Bottoms, 1983: 73) has its roots in the critical criminology movement of the 1970's (McMahon, 1995) and is perhaps best encapsulated in Cohen's seminal 'Visions of Social Control' (1985). Cohen's argument is that new techniques for diverting cases from the criminal justice system have in reality resulted in increased number of cases coming into

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<sup>47</sup> For example shop lifting PNDs were promoted on the basis that it would divert, in particular children, from the court system.

the criminal justice system: 'the system thus expands to include those who, if the programme had not been available, would not have been processed at all.' (1985: 51)

Situating the diversionary phenomenon within the critical criminology movement leads such scholars to contend that, following Foucauldian analysis, a dispersal of (rather than diversion from) discipline takes place:

A gradual expansion and intensification of the system; a dispersal of its mechanisms from more closed to more open sites and a consequent increase in the invisibility of social control and the degree of its penetration into the social body (Cohen, 1985: 83-4)

It is interesting to note that this process of dispersal, rather than diversion, can be seen as an "effective" strategy if policymakers want to increase action against specific behaviour, as some policy statements claimed was the aim of particular OTSPs. The ability to punish more, with less cost to the justice system, dispersal, through diversion, can be one interpretation of "effectiveness". Although in justice terms, as Cohen would point out, its "effectiveness" is questionable.

The empirical base for the 'dispersal of discipline' thesis, although contested (see McMahon, 1995) was described through a series of metaphors. The most enduring metaphor, in the criminal justice system, is that of "net-widening". Net-widening is described as involving

...an increase in the total number of deviants getting into the system in the first place and many of these are new deviants who would not have been processed previously (Cohen, 1985:44)

The picture here is one in which the criminal justice system casts its net wider so as to result in ever increasing numbers of people being subject to control where, without the new diversionary practice, no formal action would have been taken. In effect the ability to deal

with more cases allows the enforcement agency to be ever more enthusiastic in capturing transgression.

From a managerialist perspective the increase in numbers sanctioned at reduced cost to the justice system is an “effective” strategy. It provides greater throughput with improved cost efficiency and productivity (a reduction in man hours expended per detection). From a post-managerialist perspective, concerned with traditional principles of fairness, the dispersal is not necessarily “effective”. Certainly reducing the burden on the recipient (not being prosecuted for a criminal offence, and the risks involved with that) can be characterised as a positive move. However, if it is in a situation where previously the recipient would have received no action (because perhaps it was felt undeserving of criminal justice intervention<sup>48</sup>), or a warning would have sufficed, then post-managerial concerns of fairness are less in evidence.

There is a dispute about whether OTSPs represent an element of the criminal justice system. Garland states OTSPs cannot be seen as ‘net-widening’ in the critical sense since formal system action is not engaged. Instead such penalties are part of a strategy of ‘defining down’ deviance (Garland, 1996:456) which ‘is, in effect, the opposite of ‘net-widening’ tendency. ...Its concern is to let minor offences and offenders fall below the threshold of notice – to allow them to slip a ‘net’ that is in danger of bursting at the seams’ (Ibid). Garland is for the most part, wrong in this claim, in that FPNs and PNDs both use the criminal justice system as a back drop to enforcement. Here all that happens is that recipients are offered an opportunity to leave the net on payment of an exit fee (the FPN/PND). This exit fee allows for ever more entrants into the system of criminal justice enforcement, albeit not automatically within the full criminal justice system. These offenders are ‘noticed’, but are offered a simpler, less time consuming way out of the system, thus the PND/FPN represents a self-financing method of net control.

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<sup>48</sup> Or possibly that it was too impractical to pursue as the Coalition claimed in its Strategic Framework for Road Safety with the proposal to introduce an FPN for careless driving.

In relation to PCN's Garland is correct since the overwhelming majority of such notices take place outside the criminal justice system under the Traffic Management Act 2004. However this notice still represents a punishment, albeit civil rather than criminal, thus in a broad conception of punishment it is still relevant since motorists are still punished in the exact same way as criminal based OTSPs (a fine) albeit with a different appellate structure and no risk of imprisonment for default.

Diversion across the contexts

### **Diversion and Parking Enforcement**

Figure 4.1

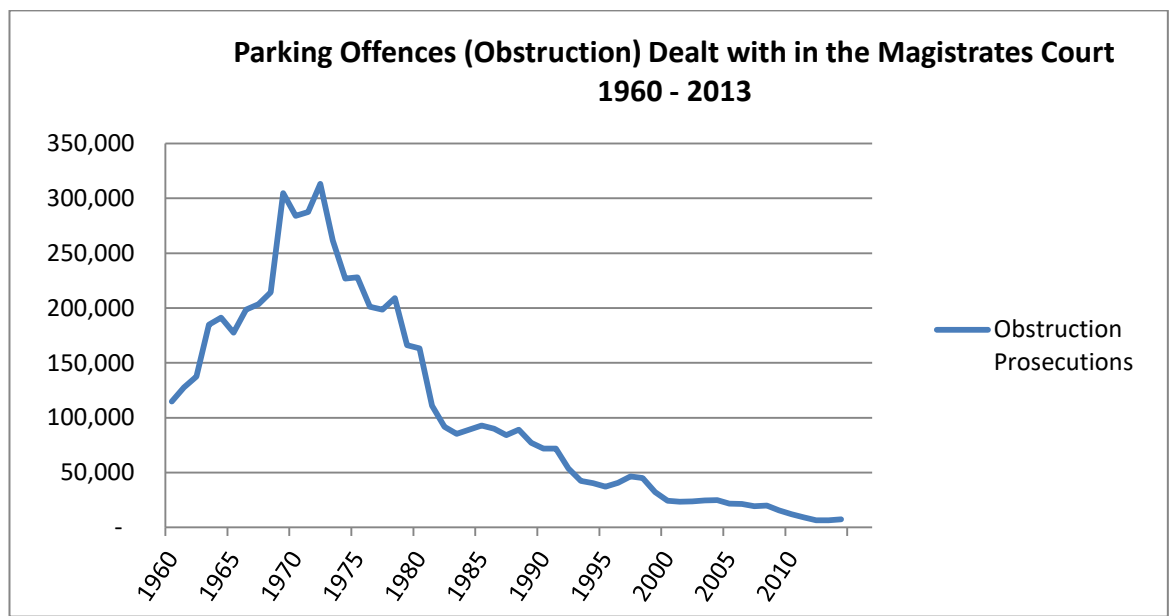
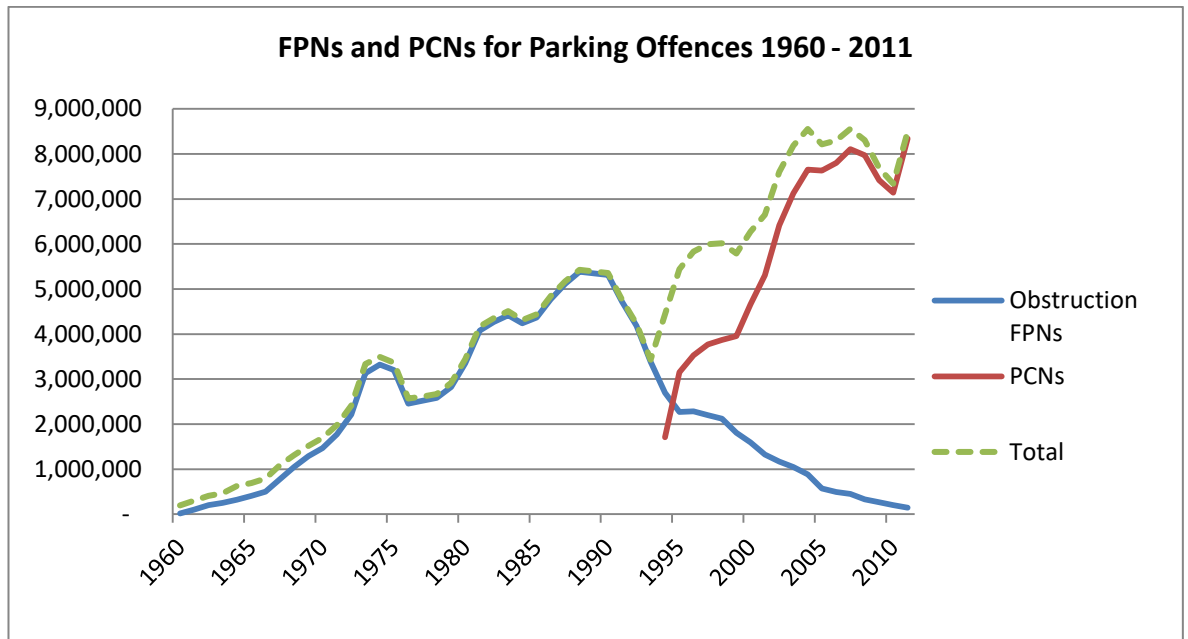


Figure 4.2



These two charts demonstrate the growth of parking enforcement; figure 4.1 charts the number of prosecutions in the magistrates' courts for obstruction and waiting offences. Figure 4.2 gives the number of OTSPs issued for the same type of offences, obstruction and waiting.

As can be seen from Tables 4.1 and 4.2 Cohen's point about net-widening took place with parking enforcement. Table 4.1 shows that the net-widening of obstruction enforcement, at least until the early 1970's, may have led to diversion back into the court system. The increased productivity of the obstruction FPN resulted in *more cases being prosecuted at court*. Following the 2004 Traffic Management Act as noted in table 4.2 true diversion began to take place in that the overwhelming majority of parking enforcement is carried out by PCN and thus the overwhelming majority of transgressors are no longer within the criminal justice system; they have been diverted.

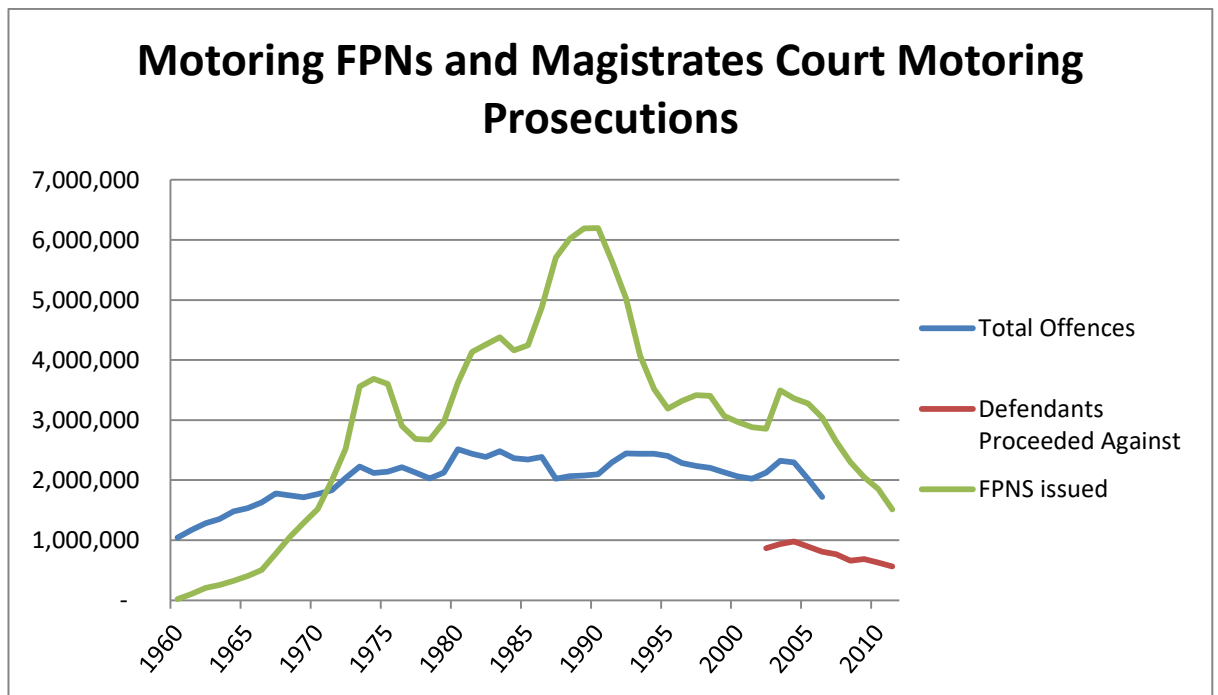
As the above statistics suggest it is unlikely under the old system (court-based prosecution), this many transgressions would have (indeed could have) been actioned by the criminal justice system. There is a clear net increase in the number of people being sanctioned for problematic parking, but that increase takes place outside the criminal law. Thus the policy

has been a successful diversionary policy but it has come at the expense of vastly increased numbers of people being sanctioned. What these new entrants to the system think about being caught up in the process is explored in chapters 6 and 7.

**Diverting Motoring FPNs**

Unfortunately separate motoring offence statistics were discontinued in 2006 and what replaced them, general criminal statistics, altered the way in which such statistics were reported. Instead of presenting the number of motoring offences prosecuted, the new statistics measured the number of defendants proceeded against in the magistrates court. Thus what seems a reduction in offences is in reality *a change in the way the statistics were presented*. Accordingly in the charts below the total number of offences prosecuted at the magistrates court is given up to 2006. From 2006 the number of defendants proceeded against is given, although it is not directly comparable with the number of FPNs since statistics are not collected that note the number of “defendants” given an FPN (some may have repeat notices in each year).

**Figure 4.3**



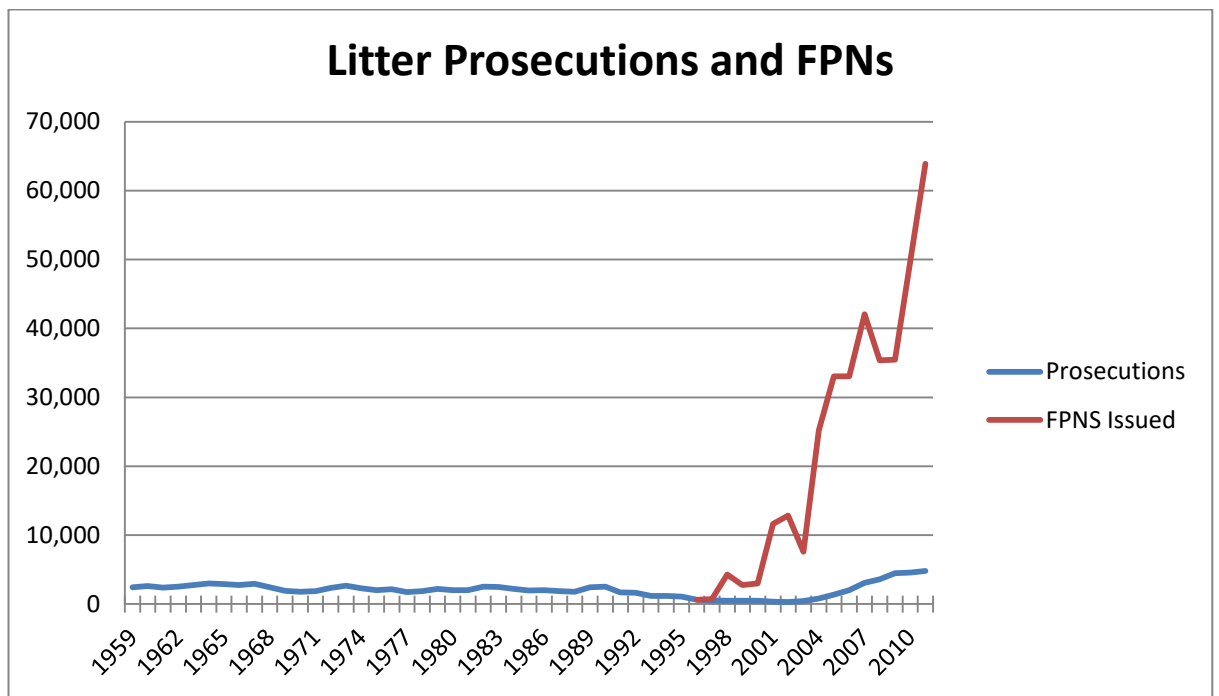
Again the scale of FPNs, eclipsing court proceedings, is demonstrated in figure 4.3. It should be noted when examining this chart that the total number of offences includes *all*

motoring offences prosecuted at the magistrates' court, thus this is not a comparison between the same types of offences (e.g. drink driving is included in the Total Offences data, although it is not an FPN). There will undoubtedly be overlap but within the prosecution statistics there are more serious offences. Cohen's point, that diversionary systems increase the number of people subject to control, is also borne out here. From 1971 the OTSP has been the primary means through which motoring offences have been sanctioned, however one can also see how the increasing use of FPNs can lead to increases in the number of offences being dealt with at the magistrates court.

**Litter**

In the litter context the extent to which FPNs have resulted in an increase in the number of people being sanctioned is demonstrated in the following chart.

**Figure 4.4**



It is important to note the vertical axis here, littering enforcement has not yet reached the levels of parking enforcement; notices issued each year are in the 10,000's rather than millions. However, it can be said the litter FPN's introduction in 1990 resulted in a phenomenal growth in the number of littering incidents that are sanctioned. Again the diversionary nature of the penalty is questionable since increasing the number of people



sanctioned (via FPN) also increases the number prosecuted in the magistrates court, post 2004.

### The PND

Charting the increase of cases being sanctioned with PNDs is imprecise, unfortunately statistics on prosecutions are not provided at an offence level for the majority of PNDs, it is only s.5 Public Order and shop theft that are recordable crimes. Unfortunately theft dealt with by a PND (shop theft under £100 in value) and general shop theft in recorded crime statistics (recorded as 'Other Theft' (Home Office, 2011a)) cannot be compared since prosecutions can involve any amount of money in recorded crime statistics, whereas with PNDs that figure is £100 (at present, and prior to 2007 £200). In order to have reliable data on PNDs a freedom of information request was made to the Ministry of Justice requesting data on cautions, prosecutions and PNDs for s.5 Public Order and Drunk and Disorderly behaviour (D&D), two of the three most common PNDs (the other being shop theft).

**Figure 4.5**

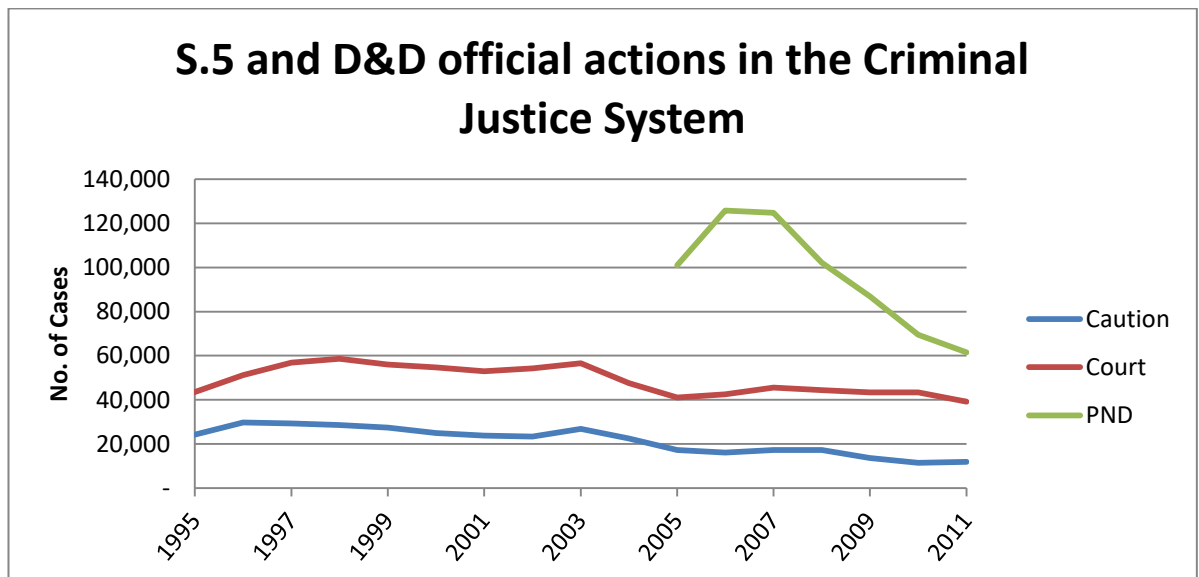


Table 4.5 shows that the PND for S.5 and D&D, at the height of their usage (during the OBJT target period), accounted for more than the combined total of court prosecutions and formal cautions for these offences. As can also be seen from the chart, although the

introduction of the PND comes with a diminution in the amount of offences being cautioned or prosecuted, with the expansion of the PND both prosecutions and cautions increase.

Thus OTSPs, regardless of the context in which they arise, demonstrate that with the notice far more transgressors are punished for their behaviour than likely would have been under the court prosecution system. Thus there are two aspects of “effectiveness” here; on the one hand the OTSP can be seen as “effective” in that it has vastly increased the throughput (net-widening) of transgressors within the system. Of course the downside of this increase is that this must come at the cost of efficiency, especially given the large scale increases in punishment that are seen across the contexts. In effect the dispersal of discipline potentially disperses the costs of the system away from the courts (which undoubtedly was the aim of each OTSP) towards the enforcement agencies.

#### The Ineffectiveness of Diversion: Diversion back into the system

Cohen also claims that ‘diversion diverts – for better or worse – into the system.’ (1986: 89) The introduction of an OTSP, ostensibly to divert cases from the courts, can also result in increases in the number of cases taken to court, thus diverting a diverted population back to where they had originally been diverted from. This is a form of ‘pure ineffectiveness’ (Hood; 1974: 441) in which ‘the desired result’, here diversion, ‘has ‘not [been] achieved at all’ (ibid: 441), it’s as if the particular OTSP policy has had no effect. In fact, given the net-widening identified above, OTSP policies are more dysfunctional than this, in that the policy has resulted in a situation that is directly opposite to what was intended. Here diversion has not “effectively” diverted a case from prosecution, it has facilitated the likelihood of such prosecution taking place, thus impacting on cost, productivity and fairness conceptions of “effectiveness.” Put simply the ease of OTSPs makes it more likely that enforcement takes place and, under certain circumstances, those who challenge the notice will end up in court for an offence that they would not have been prosecuted for under the old system.

In the PND context, although the trend in court prosecutions is downwards, the high use of PNDs during 2005-2007 saw an increase in the number of prosecutions. Such increases took place due to a number of recipients of PNDs challenging their notices (over the 2005-7 period the average challenge rate was 1% or 1,500 cases per year which does account for the increases in magistrates proceedings). Thus switching to an OTSP in this context, 1,500 PND recipients (per year) were diverted into the system which the PND was meant to divert them out of. This is certainly troubling when there is a suggestion that during this period police targets were driving PND enforcement. This clearly demonstrates Cohen's point; some of these individuals have been diverted into the criminal justice system, and prosecuted, in a situation where, but for the PND, no further action would have been taken.

This process can also be seen across all contexts in which OTSPs are examined in this thesis. Figure 4.1 shows a similar process in parking enforcement, where the introduction of obstruction and parking waiting FPNs in 1960 resulted in a large increase in the number of prosecutions for those offences, from 100,000 in 1960 to over 300,000 by 1972. It is only with the introduction of decriminalised parking enforcement that consistent reductions take place in such prosecutions at the magistrates' court. Likewise in litter enforcement; large scale increases in FPNs being issued resulted in increased use of prosecution in the magistrates court. Again these increases are likely a result of recipients challenging notices they feel are not appropriate. Obviously the increasing use of the courts, in a system that was designed, amongst other reasons, to reduce reliance on the courts, calls into question the effectiveness of the diversionary tactic (The OTSP).

### **The Case of Speeding**

The situation with motoring enforcement is less clear cut. If one isolates FPNs for speeding offences then the introduction of the Speeding FPN does result in a large reduction of cases going to the magistrates' court in the initial two years.

Figure 4.6

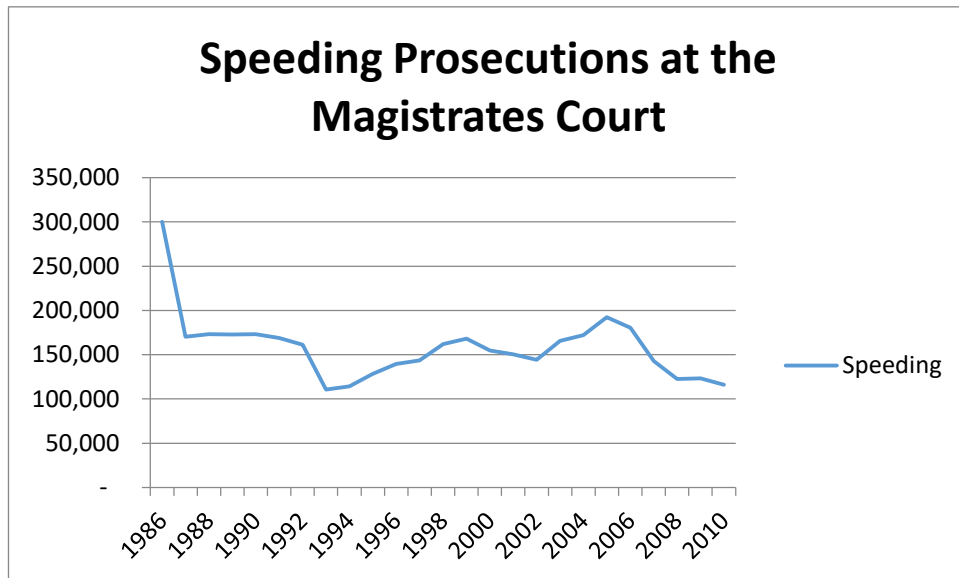
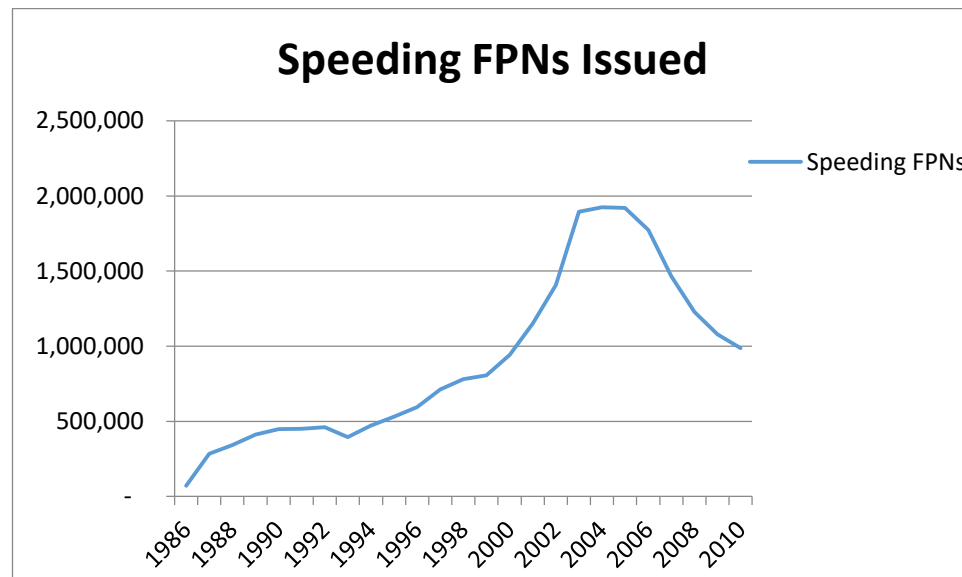


Figure 4.7



From that point there is a more complex pattern of diversion. It appears that the National Safety Camera Programme's (NSCP) (2003-7) introduction resulted in an increase in the number of prosecutions at the same time as a large increase in the number of FPNs issued. The national adoption of speed awareness courses from 2006, the majority run under the NDORS scheme, saw diversion from FPNs and predictably resulted in a reduction in prosecutions. Again suggesting that, as an initial strategy of diversion, the speeding FPN did divert a number of cases back into the formal system.

### **Diversion / dispersal conclusions**

The OTSP, as an exercise in increasing the effectiveness of the criminal justice system by diverting cases from the magistrates court, appears poor, except in the case of speeding where some sustained reductions were seen. One possible reason for the speeding FPNs effectiveness in diverting cases lies in the payment rate for such notices, over 90% of are paid. Even here, however, inflation in the number of FPNs issued also resulted in increased numbers of prosecutions. Thus across the contexts of OTSPs the introduction of the OTSP far from reducing the burden on the courts increases it where OTSP usage is high. Even where overall reductions are achieved, for example in s.5 and D&D PND cases and speeding FPNs, the overall reduction is relatively small compared to the vast number of OTSPs issued. Thus it is fair to say that OTSPs do net-widen significantly and where such widening results in large scale enforcement, then the courts see an increase in their workload.

### **Compliance: administrative or normative concern?**

The focus on performance leads to a discussion of the purposes behind targets and how they are constructed as “effective”. In the criminal justice system one quite obvious purpose behind any enforcement policy must be the desire to decrease the underlying behaviour at which enforcement is aimed. In addition to increased compliance with the law, the enforcement strategy should also meet the other objectives that necessitated its development. As discussed in chapter 3 the primary motivational aim for OTSP policy has been a desire to increase the productivity of the criminal justice system (lowering cost and time whilst increasing throughput) and to provide a greater sense of deterrent through use of OTSPs which it is claimed increases compliance with the laws being enforced.

There are numerous studies into legal compliance and how compliance can be achieved (see, Wilson, 1992; Bottoms, 2001; Tyler and Huo, 2002; Tyler 2006, Jackson et al 2012a; amongst others). Compliance is subject to qualitative examination later in this thesis, in particular the sense of legitimacy and its relationship to compliance that arises from the

interaction between enforcement official and recipient. At this point however it is important to examine what “compliance” means in OTSPs.

Bottoms sets out a fourfold typology of compliance with community penalties, each of these types is problematic and will be examined with reference to the OTSP. The four types of compliance Bottoms identifies are; ‘simple non-reoffending’: ‘a community sentence is effective if it results in no further offending within a specified time period’ (2001:88). A second type of compliance is ‘Comparative non reoffending’ - where ‘it results in no further offending within a specified time period and it is probable that with a different penalty [the offender] would have been more likely to reoffend.’ (ibid). The third type of compliance is ‘successful completion of the order’ ‘if the offender completes it with no breach of formal requirements under the order’ (ibid) and the final type is the achievement of ‘intermediate treatment goals e.g. reduction in alcohol’ (ibid). (This final type is not applicable to the OTSP context.)

The first three types of compliance can be applied to the OTSP, although the translation is uncertain. The effectiveness of OTSPs in causing simple non- reoffending is problematic in two ways. Firstly receipt of a second penalty notice is not necessarily evidence of re-offending, OTSPs are not convictions, thus, it is possible for a non-offender to accept an OTSP even though they have done nothing wrong (e.g. they feel paying the penalty is the easier option) and had they gone to court likely be proved to have done nothing wrong. Secondly, as with all reoffending statistics, receiving no further OTSP is not an indicator of non-re-offending, it may simply mean that the offender has not been caught.

Comparative reoffending, much like simple reoffending, is problematic for the same reasons. Nevertheless, there have been attempts by government to stress the effectiveness of OTSPs based on their comparative success in reducing reoffending. Jack Straw, the then Lord Chancellor, claimed in 2009 that PNDs were comparatively more effective than other disposals based on reconviction rates of those receiving shop theft PNDs compared to other disposals. The use of reoffending statistics, particularly in relation

to PNDs, is, at the least, a speculative exercise. No published figures exist for PND reoffending rates, however in a letter to Anne McIntosh MP, Straw, using theft as comparator offence, claimed that adult reoffending was less following a PND than other criminal justice actions (33% reoffended after a theft PND and 65.9% for other criminal justice actions). However, as was made clear in the letter, such statistics were provisional and speculative since the offending backgrounds of the cohort were different. PND recipients tended to be first time entrants to the justice system, and reconviction in non-PND cases related solely to adults, whereas the PND figures related to adults and children. (HC Deb, 9 November 2009, c138W)

A further criticism of reconviction rates in theft PNDs, as a measure of success, is that “reconviction” did not include receipt of another PND. Government guidance suggested that PNDs should not be issued on multiple occasions (Home Office, 2005) however given that the system for recording PNDs at that time (PENTIP) had yet to be rolled out nationally the figures are suspect, since multiple PNDs from other police forces may have been received but not counted. Thus it is difficult to suggest that ‘reoffending’ rates provide any guidance on the efficacy of compliance within the PND process.

Bottoms’ third type of compliance ‘successful completion of the order’ (2001:88), with OTSPs, is payment of the notice. If such notice is paid then effective compliance has been achieved. Note here however that this form of “effective” compliance requires no impact on the underlying behaviour; payment of the notice does not indicate the recipient has internalised any norms of appropriate conduct. Characterising effective compliance as “payment rates” removes an understanding of the OTSP as a form of moral censure. The OTSP becomes an incentive that seeks compliance by ‘successful completion of the order’ (Bottoms, *Ibid*), through offering opportunities to avoid prosecution following payment of a small sum. Typically such sums are further discounted for prompt payment (for example litter notices typically offer a 50% discount if paid within 14 days, PNDs offer a 33% discount if paid within 28 days.)

## **The Normative Consequences**

Before turning to the data that has been collected by government in assessing “effective” compliance it is necessary to briefly discuss the normative aspects of compliance since this will feature later on in this chapter and throughout the thesis. Across the range of OTSPs compliance, in terms of non-reconviction, relies on deterrence philosophy. As discussed previously, policymakers were keen to stress the instrumental nature of OTSP punishments: they would deter the ‘thugs’ and ‘mindless few’ by providing a financial incentive to comply. The incentive, it was claimed, would send a “swift and salutary” (Ernest Marples MP, HC Deb (1959 – 1960) 621 c. 903) reminder of the law to offenders so that they would cease future offending. The problem with the use of deterrence language and deterrence ideals is that it relies on instrumental reasons for compliance with the law.

The use of instrumental factors to shape compliance is problematic from a socio-legal perspective as Darley states:

People may continue to obey the rules that the “justice” system imposes, but will do so largely to avoid punishment. No society can continue to exist if its citizens take that attitude toward its legal system” (Darley, 2001:11)

Thus any system that encourages instrumental compliance, or values such compliance as “effective”, is not necessarily a positive indication of effective compliance with underlying norms and in the longer term may not be beneficial to society as a whole. The instrumentalism of OTSPs as a means of gaining compliance can relegate compliance to ‘just another bill’ (O’Malley, 2010: 108). Thus the swift and salutary nature of the OTSP is not delivering the message that the government thinks it is. In effect focusing on compliance, without understanding the theoretical assumptions that underpin the concept of “effective” compliance, policymakers may completely misunderstand the situation (i.e. that people may view the OTSP simply as the price of doing business.)

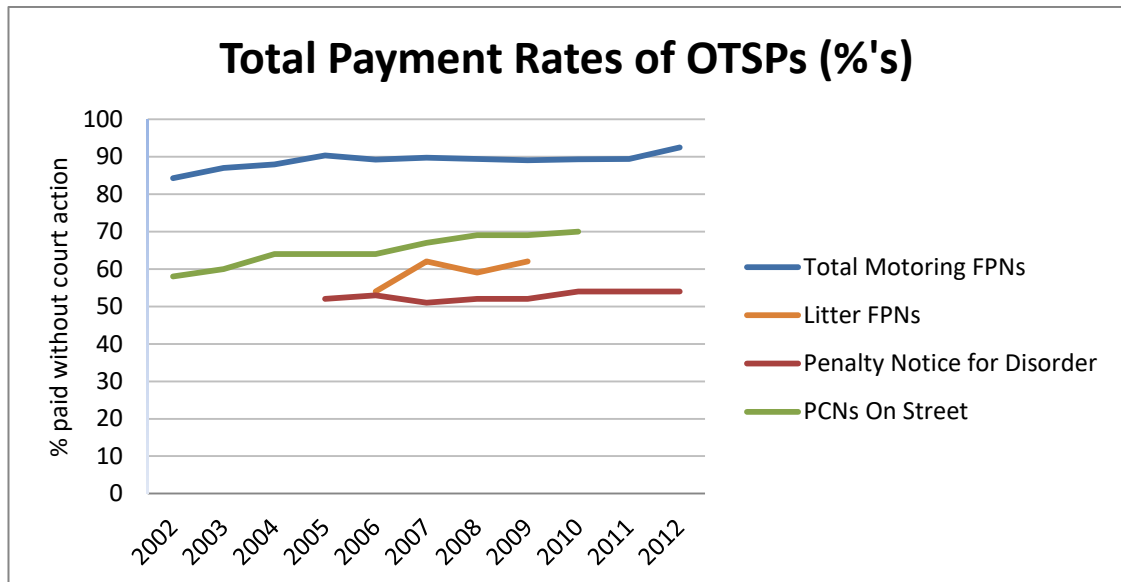


## Complying with OTSPs – The Data

### Compliance with the Order

There is certainly a mixed picture with payment rates for OTSPs as figure 4.8 shows

Figure 4.8



The above chart shows the total, in percentages, of OTSPs paid in each context. Unfortunately due to the difficulties identified above about statistical data collection across the contexts, data is not available for all years in respect of litter and parking. Instead these statistics are based on the latest publicly available data.

The penalties that are complied with the most (by some margin) are motoring FPNs which is unsurprising since issues of identity are rarely problematic in this context. Vehicles are required to be registered and drivers are required by law to state who was driving when requested to do so by a police officer. However, interestingly, PNDs have the lowest compliance rate, where identity of the offender again is not so problematic since officers can detain suspects if they do not have adequate identification. Why PND payments are so low remains unknown and calls for further study. Unfortunately due to the difficulties in recruiting PND recipients (see Chapter 2), this thesis cannot answer this specific question directly, although suggestions are made in later chapters.

PCN's have a higher payment rate than both litter FPNs and PNDs. Again identification is not problematic in PCN enforcement since it is the vehicle owner (as noted on the DVLA register) who is ultimately responsible for paying the PCN. Nevertheless it is quite surprising that, given widespread feelings of illegitimacy about the parking enforcement system, so many PCNs are paid, and paid within a short period (14 days.) Perhaps the incentivised nature of this method of enforcement provides impetus to pay/comply. The PCN system, like the litter FPN, operates an incentivised scheme, offering a discount for early payment (outside London of either £25 or £30 depending on the transgression, instead of £50 or £70 if paid outside 14 days)<sup>49</sup>. Again O'Malley's (2010) point is apposite; such payments resemble general everyday costs that provide an incentive for prompt payment, instead of the commercial "buy now pay later" cost plan this system offers 'half price, buy now'.

From deterrence, cost and time efficiency perspectives the discount for prompt payment makes sense; it deters recipients from challenging OTSPs and causing further administrative delays/costs. O'Malley sees financial penalties as a system of circuitry, in which governance seeks to regulate the 'speeds, flows and obstructions' (2010: 84) of the system by providing an "effective" means to ensure as little obstruction as possible. The discount payment process is an example of this circuitry in action; it seeks to avoid unnecessary obstruction by providing an incentive for prompt payment which ensures smooth flowing of the circuit.

The following table lists the percentage of OTSPs paid in the suspended enforcement period<sup>50</sup>. Unfortunately each notice type has a different length of time before proceedings can be instituted at the magistrates court. In the case of PNDs it is 21 days, for Motoring FPNs it is 28 days. Litter FPNs are subject to local authority rules and they may specify any period for accepting payment and, if they choose, offer no discount for prompt payment.

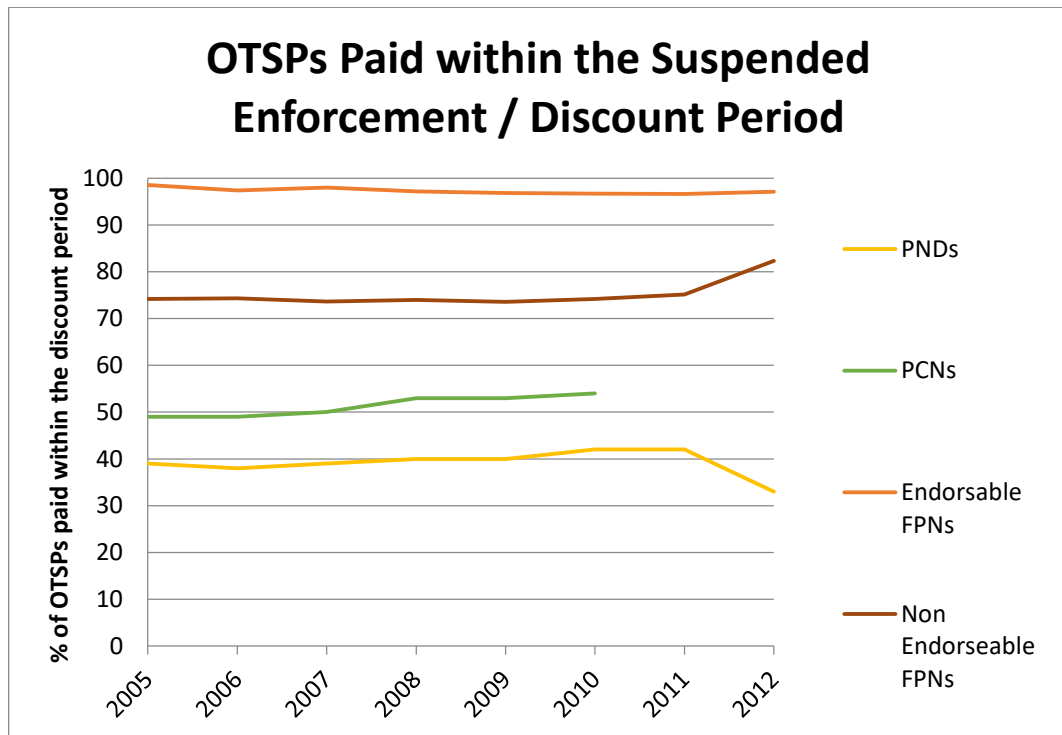
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<sup>49</sup> Although figures for litter enforcement can differ, in general the fine is £50 if paid within either 7 or 14 days, after which time it increases to £80.

<sup>50</sup> The period, during which discounted payment is available to transgressors. During this period any further enforcement actions are suspended pending payment.

Accordingly no central statistics are available regarding litter FPN payment other than the number of notices paid. PCNs do not have a suspended enforcement period, as such, but do have a reduced amount period of generally 14 days.

Figure 4.9



It is difficult to make a generalised statement about the levels of compliance in the OTSP system, although the underlying “effectiveness” intentions are clear: to reduce time and cost by incentivising early payment. Certainly with motoring FPNs (in particular endorseable FPNs<sup>51</sup>) compliance is a near certainty after the issue of an FPN, even non-endorseable FPNs have a high rate of early compliance. As shall be demonstrated in the deterrence section this in no way relates to compliance with the law, however, in terms of compliance with the order, compliance is excellent. Drivers, when they are caught speeding or driving through a red light, or any moving traffic offence that involves the imposition of penalty points, generally comply with the punishment imposed. In the other contexts the compliance rates are more problematic however it still can be said that overall, across the

<sup>51</sup> Those attracting penalty points. Here the compliance rate is a mean average of 98% for the last 9 years

contexts, over half of OTSPs issued are paid. Although in respect of PNDs, within the suspended enforcement period, payment is poor running at 33% in 2012.

Although instrumental compliance is problematic where an authority is seeking to gain normative acceptance of the law in question, nevertheless instrumental compliance is still important. Any effective OTSP policy must have some understanding of the importance of compliance with paying the OTSP. As discussed in the litter FPN context, in chapter three, non-payment of OTSPs, according to DEFRA, is a significant risk to the system's legitimacy. Compliance with the order (paying the penalty notice) does impact on the "effectiveness" of the system, any policy that allowed punishment to be ignored with impunity would not be effective. Although that effectiveness is not directly (or even indirectly) related to the behaviour the penalty notice was aimed to change. As shall be demonstrated in the following chapters' payment compliance does not begin to express the feelings of anger and illegitimacy that recipients of OTSP feel towards the process. Although these recipients all paid their OTSPs, in no way could their attitudes be summed up by a simple quantitative measure of "payment."

### Fostering Compliance through deterrence

It was stated earlier that compliance with the law in question is far more problematic to assess using performance management understandings of effectiveness (though this does not stop proponents claiming success in these terms). Instead claims are also made by policymakers that seek to promote the "effectiveness" of the OTSP in achieving compliance with the law through use of deterrent punishment philosophy.

Deterrence theory posits three factors that influence people to comply: certainty of punishment, severity of punishment and celerity of punishment (Nagin, 2012). These factors can operate at a societal level (so called general deterrence) and at the individual level (specific or special deterrence). The evidential basis for deterrence as an effective social policy is contested and subject to methodological problems (Nagin, 2012). The deterrence literature generally splits between those who examine its efficacy from an

economic objectivist perspective (e.g. Becker (1974), Posner (1985))<sup>52</sup> and those from a social scientific/criminological perspective (perceptual process studies (Hawkins & Williams (1986) Paternoster (1987) etc.) Nagin (2012) in his entertaining review of deterrence literature finds that ‘some sanctions have a general deterrent effect, but not much of a specific deterrent effect’ (Ibid: 69).

According to Nagin there are four conclusions that can be drawn from a Meta-analysis of deterrence studies. The conclusions are that:

- There appears to be real short-term deterrent effects.
- The deterrent effects tend to *decay* over time – to “wear off”
- Many interventions show weak or no effects on crime...
- In some instances (not frequent) there may be a “brutalisation effect”<sup>53</sup> (Nagin, 2012: 76)

Clearly relying on deterrence philosophy is problematic.

A definition of an “effective” deterrent is given by Robinson and Darley, who state:

In specific situations, publicly known rules can deter, if those rules target actors who are dispositionally rational in circumstances that allow for rationality; provide for a high rate of violation detection; and provide a reasonable certainty of punishment following the detected violation. (2003:979)

Added to this conception of deterrent efficacy one must also add celerity of punishment - the speed with which punishment is imposed. As discussed in the previous chapter the swiftness of punishment was one of the main claims in favour of OTSPs. Perhaps the best summation of this view comes from New Labour’s ‘Reducing Public Disorder, The Role of Fixed Penalty Notices’ (Home Office, 2000b). It claimed that the PND was ‘a real practical deterrent... [Whereby] the immediacy of such a punishment [acts] as a greater deterrent in

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<sup>52</sup> Such studies, as Tonry states, have reached a ‘dead end’ (2008:280) in what they can tell us about social phenomena

<sup>53</sup>‘in which increased punishment is associated with increased crime’ Nagin, 2012: 76)

some cases than the prospect of a court appearance some way in the future (2000b:1). Thus the immediacy of the punishment and its financial imposition would deter future offending, and do so at a greater rate of deterrence than the court system. Furthermore OTSPs also act as a general deterrent warning others against transgression, e.g. the original fixed penalty, introduced in 1960, was aimed at providing a 'swift' and salutary warning' (Maples, 1960) to *other motorists*.

### **Money, Deterrence and Utilitarianism**

Deterrence plays a crucial role in the policy aims and promotion of OTSPs. The OTSP, according to O'Malley (2009), represents a means of regulation that controls populations rather than individuals: 'it has been the governmental and political responses to biopolitical problems that have invented the regulatory or "modern" fine.' (2009:110). Thus new mechanisms, of which the OTSP is one, have been created due to the 'emergence of certain problems, characterised especially by high volumes of offending' (ibid, 107).

In controlling populations it becomes meaningless to claim that such fines rehabilitate, since the locus of control is the group not the individual. This hasn't stopped attempts by government to claim that reoffending rates are an indication of success (see above). Indeed during an interview held with the researcher, the sentencing lead at the Ministry of Justice for OOCs, listed reoffending rates as the prime means of gauging PND policy effectiveness.

I think one of the main measures we would use would be looking at reoffending rates and statistics ...it's like 75% of people who receive a PND don't go on to reoffend within one year (Interview, MOJ)

Of course, like all such statistics, this does not mean that reoffending did not occur, it merely means such recipients weren't officially caught again (they may have complied, they may not have and not been caught.)

A more apt view of the OTSP is one of group control where the individual is not rehabilitated but educated. The OTSP act as an educative tool to shape the population towards regulatory norms, or at least towards altering the perceptions of deterrence that citizens have regarding enforcement of those regulatory norms. How one educates a population through law is then an important question since punishment must become consequentialist in this model. Individual punishments must aim to alter population behaviour rather than be strictly concerned with individualised notions of punishment (such as just deserts).

It is, therefore, no surprise that utilitarian philosophy dominates the discussion of regulatory enforcement and the use of money as a sanction (O'Malley, 2009). It does so, it is argued, through the centrality of deterrence punishment philosophy within utilitarian theory. Beccaria and Bentham, the two fathers of utilitarian philosophy, were concerned with individuals who choose to maximise benefits and minimise costs. Deterrence theory is an embodiment of utilitarianism in the philosophy of punishment; it aims to deter through a series of calculations aimed at imposing pain and pleasure so that pleasure is maximised and harm is minimised.

Utilitarian philosophy involves rational choice actors who are 'rational opportunists ...whose conduct is variously deterred or dis-inhibited by the manipulation of incentives - an approach that makes deterrent penalties a self-evident means for reducing offending' (Garland, 2001: 130) – those 'thinking twice' in Blair's vision. Despite the historical writings of Beccaria and Bentham, Garland charts the growth of rational choice theory as an aspect of penal modernism (therefore a resurgence of utilitarianism), and part of the 'new criminologies of everyday life' (Garland, 1996: 450). These 'begin with a premise that crime is a normal, commonplace, aspect of modern society' (ibid). The result of such everyday crime is that 'crime becomes a risk to be calculated (both by the offender and by the potential victim) or an accident to be avoided... rather than a moral aberration which needs to be specifically explained' (ibid: 451). The focus on deterring populations, as O'Malley

states, virtually removes the individual from regulation, instead 'insofar as individuals appear at all it is in the form of the abstract-universal choice offender' (O'Malley, 2010: 88)

Deterrence theory therefore sits perfectly within a framework of law that is concerned with the idea of controlling groups and the 'speeds, flows and obstructions' (O'Malley, 2009: 84) that growing populations cause. As Robinson and Darley (2003) highlight, deterrence impacts almost every part of the contemporary criminal justice system. Whether it is the definitions of criminality, the available defences, the requisite mental states, the way in which cases can be brought before court, the rules of evidence in court, and the sentences passed upon conviction, they are all, to a large extent, predicated upon the idea that each facet of the justice system provides a deterrent (Robinson and Darley, 2003: 958-965). In short, one would be hard pressed to pick any aspect of criminal justice policy (including OTSPs) in which deterrence has not been used to promote changes in the way in which criminal justice is done. In deterrence theory individuals are asked not to reflect on the morality or appropriateness of their actions but instead on the 'swift and salutary' (Marples, 1960) nature of the punishment.

### **Deterrence and knowledge**

Given the centrality of deterrence ideas in OTSP policy it is necessary to have a more fundamental understanding of deterrence before examining whether OTSPs actually provide any increased certainty, celerity or severity of punishment. In this regard Darley, Carlsmith and Robinson's (2001) study provides a more fundamental basis for assessing the effectiveness of deterrence. Rather than looking at whether interventions work based on their severity, certainty or celerity, the authors take a step back and ask whether people are actually aware of the laws on which the efficacy of those laws are claimed. What they found was that people were frequently unaware of what the law's demands were and yet all professed to know with certainty what the law required (2001:181-184). The respondents in the Darley et al's study relied on moral intuition as a guide to what the demands of the law might be. Thus investigating deterrent efficacy one needs to understand that those who



claim to be deterred by a particular law (or claim its deterrent effect) frequently have no idea what the actual law is, and/or conversely misunderstanding of the law leads to a false belief that what they are doing is legal, thus not deterring them.

This is interesting for the present study due to the pervasiveness of strict liability in most OTSP offences and the increasing regulation of 'mundane' everyday life (Woolgar & Neyland, 2013). If people are relying on moral intuition about acceptable conduct then there is a danger that this is at odds with the law's actual requirements. Regulatory laws, such as speeding or illegal parking, are perceived to be devoid of moral wrongness and thus moral intuition about such laws is difficult, which in turn impacts on the actual levels of compliance.

Thus deterrence, although possibly effective based on those intervention studies highlighted by Nagin, is false effectiveness since one cannot be effectively deterred by a law they do not know or understand. To some extent understanding of laws is made easier when the law in question is a simple prohibition, such as speeding, but even here it should be questioned whether people actually understand strict liability laws and the demands of perfection they place on citizens. Indeed laws that at first sight seem incredibly simple, such as parking laws (i.e. do not park), have multiple exemptions and lacunae which can make lawful parking difficult and, for the driver, intensely frustrating.

Regarding intuitions about the content of laws, the strict liability question, Wells (2012) found, in relation to speed enforcement, that people felt it did not pay attention to the attributes and behaviours that people believed important. The lack of congruence between the actual law and people's moral intuitions about what it is (or should be) is therefore dangerous, as Robinson & Darley state:

Conflict may result first in the community's sense that specific laws are unjust, which in turn may spread to a generalized contempt for the criminal justice system. Legal codes then no longer serve as a guide to just and moral behavior; they no longer

become the core of a set of normative rules that citizens use to regulate their behavior (2003: 986)

There is evidence to suggest that individual contempt does lead to more generalised non-law-abidance. Nadler (2005) has found that people's perceptions about the unjust resolution of a legal case have implications beyond that case. Nadler calls this the 'flouting thesis' (2005: 1401) which covers the idea that 'there is a relationship between perceived injustice of specific laws and diminished general compliance with *the law*' (ibid). Nadler found that in situations of perceived injustice people were more likely to break certain laws (e.g. traffic violations, tax evasion, speeding and minor theft) if they were exposed to perceived unjust laws (ibid: 1416). The message from this research seems to be that injustice begets non-compliance; that people who feel that there is an injustice in the legal system are less likely to comply with its demands.

When citizens feel that they are complying, and are motivated to comply, and yet they are in reality not, it must come as something of a surprise to be punished when holding positive views about the law. In such situations the instrumental appeal to deterrence seems to ring hollow, as they intended to comply in the first place. As shall be discussed in later chapters, Tyler's research into procedural justice suggests that treatment at the hands of an authority can and does have implications for the legitimacy with which citizens view that authority and their voluntary compliance with the law (Tyler, 2006).

### Encouraging / Threatening Compliance with the Law: Deterrent Efficacy of OTSPs

#### *Speeding Deterrence*

No criminal offence is perhaps as widely enforced as speeding by FPN. It accounts for over half all police issued FPNs each year (MOJ, 2013) and when compared to all arrests made by the police in 2011/12 for every 100 arrests 64 speeding FPNs were issued.<sup>54</sup> If one looks

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<sup>54</sup> Parking enforcement eclipses all other forms of OTSP enforcement, unfortunately due to the fragmented nature of local government the analysis in this section cannot be applied to parking. No

at police recorded crime then it is only 'other theft' that approaches this level of police action (such action with shop lifting only means recording the crime (Home Office, 2011a). Speeding enforcement is, therefore, perhaps the perfect means through which to test the deterrent efficacy of OTSPs. Speeding FPNs (and speed awareness courses) are widely issued, thus impacting on the certainty of capture, they come with licence demerit points and thus provide some measure of severity above a general OTSP sanction. Thus if speeding fines do not deter we can predict that from a deterrent viewpoint simple OTSPs may not. This section will therefore use the speeding FPN as means through which to assess the deterrent efficacy of OTSPs.

Jackson, Bradford, Hough, Myhill, Quinton and Tyler (2012a) in their study of indicators of compliance found that compliance with motoring laws was only related to the perceived likelihood of being caught, and also to the extent that the respondent indicated it was morally wrong to commit motoring offences. Other factors, such as legitimacy and procedural justice, were found not to indicate a relationship with compliance for motoring offences. Thus the extent to which motoring laws provide an effective compliance guarantee is mediated by the extent to which motorists are deterred from breaking motoring laws.

### **A review of motoring deterrence literature**

There have been numerous studies into the deterrent efficacy of motoring enforcement, particularly speeding enforcement. Zaal's 1994 review of speeding deterrence literature notes a number of inconsistent findings in the studies to that date. One finding that seemed to be uncontested was that the probability of being caught matters more than the severity of sentence. However in order to increase the level of certainty to any great extent requires significant expenditure of time and money (1994:9). The use of random enforcement, at least in drink driving enforcement, has also been found to provide a general deterrent, but when applied at an individual level the specific deterrent is replaced by other factors *in*

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reliable central statistics are available that allow for an investigation into the deterrent efficacy of these punishments.

*favour of offending* (e.g. peer pressure) (Hommel, 1990). De Waard and Rooijes also found that high intensity enforcement resulted in the largest reduction in speeding amongst motorway motorists, however this is complicated in that they also found most drivers were completely unaware that the police were carrying out extra enforcement (1994: 762).

Elvik and Christensen (2007) examined whether increases in FPN amounts resulted in greater compliance with both speeding and seat-belt laws (severity of sanction) and found that seat-belt offences were affected but there was no effect for speeding. They also found increased enforcement against seat-belt offences during the period, which may have accounted for increased compliance. Furthermore their study did not address educational campaigns related to seat-belt wearing that may also have contributed to increased compliance as Tay (2005) found in relation to educational campaigns for drunk driving and speeding.

Tonry (2008) suggests that prohibitions such as parking, speeding and littering can be deterred through both certainty and severity of punishment but provides no evidence for this. Paternoster (1987) in his Meta-analysis of deterrence intervention studies claims that Jacob (1980) found a moderately strong relationship between severity of sanction and speeding, but this is only true if one ignores tests of statistical significance. Jacob (1980) clearly states that there was no statistically significant relationship (ibid: 66) and reports that knowing the severity of sanction has no effect on self-reported speeding, nor does estimating the certainty of sanction.

The studies above all speak to general deterrence, with specific deterrence the picture is more revealing. Manderson, Siskind, Bain and Watson (2004) found that recidivism rates for those who had received one OTSP were 69%, but for those in receipt of two or more this reduced to 43.5%. Lawpoolsri, Li and Braver found those who received citations for speeding were twice as likely to receive further citations (2007:27). Although Mungan suggests that in these types of crimes 'repeat offenders may gain experience and learn

from their own offences and convictions this may lead offenders to be detected with a lower probability in their subsequent offences' (2010: 173).

Although this research is somewhat contradictory, in total, it does suggest that those with speeding FPNs are more prolific offenders or that the receipt of an FPN turns them into one. Of course it must also be recognised that the phrase "offending" in motoring literature is generally synonymous with "being caught", it does not necessarily mean that the offender has not offended again, all that can be said is that those who "reoffend" are those who are *caught* reoffending.

In the speeding context the learning behaviour that Mungan identifies is, to a certain extent, encouraged by the use of fixed speed cameras and financial penalties. Drivers learn where they may speed with impunity (i.e. away from the sites of fixed cameras<sup>55</sup>) and this is reinforced by the small monetary penalty for transgression, as O'Malley says 'it is just another bill' (2010:108). The use of deterrence ideology with its language of incentives and rational choice can foster an attitude that is rational but not normatively appropriate. In speeding it can lead drivers to use their knowledge against the system by altering behaviour to avoid certain roads or stretches of roads, rather than attempt to persuade drivers of the normative merits of obeying speed limits.

Corbett refers to these drivers as 'manipulators;' those who 'knew where they [speed cameras] were, how they operated and how to avoid detection.' (2003: 122-3). The importance of this type of offender, for deterrence purposes, is that manipulators 'had the second highest traffic-offending rate and speeding scores and the highest crash rate' (ibid). Only those Corbett termed 'defiers', those who ignored the law and continued to drive above the limit, had a higher rate of offending. Thus these two groups, who were the most common offenders and thus most likely to be the subject of enforcement, weren't deterred in any

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<sup>55</sup> Or as most interviewees in this research claimed in the 20 yards after the speed camera

effective way. The manipulators are deterred into compliance only in as far as they are likely to be caught; there is no normative commitment to comply.

Watson, Siskind, Flieter and Watson (2010) examined the effect of increasing sanctions on recidivism rates for speeding. Recall that in terms of general deterrence Elvik and Christensen found no effect on speeding with increase FPN amounts (2007). In specific deterrence Watson et al did find that increased penalties had some, albeit minor, effect on reoffending rates, however almost half of the study participants were caught reoffending (Watson et al, 2010: 4). Furthermore they found that increasing the amount reduced the time between being caught again, so although they were slightly less likely to reoffend, those that did, did so in a shorter period (ibid: 6), which suggests that the salutary effect of increased penalty amounts was low. Finally the authors found no effect in a reduction in the average number of speeding offences a recidivist driver committed. Watson et al also add an important caveat in interpreting their results; enforcement increased by 43% (ibid: 6) (in terms of police man hours) with the introduction of increased penalty amounts, thus reductions in proportions of offenders may have been as a result of general rather than specific factors.

The Department for Transport (DFT) in 2008 commissioned research into the deterrent effect of driver licence disqualification on speeding behaviour. Despite claiming that 'the most important conclusion is that threat of disqualification does work' (2008a:3) the evidence was certainly limited. The only predictor variable given for the conclusion was that reconviction rates were low. As shall be discussed below, the gap between certainty of sanction and conviction in speeding is immense.

The DFT report also found that 'drivers who had previously been disqualified were most likely to manipulate speed cameras and were least likely to comply with them' (ibid: 2) thus reinforcing the point above that recidivism rates need to be treated carefully as drivers can learn from their experiences, but not take away the message that enforcement bodies want them too.

In fairness a majority of respondents to the DFT study did state that they were deterred from speeding by certainty of detection, the risk of accidents and the penalty if caught. Again these findings can be questioned by the fact that 'half of the respondents with points claimed that their speeding was inadvertent' (ibid: 2) quite how one can be deterred when doing something inadvertently is difficult to understand. Furthermore in the quantitative element of the study it found that '[d]rivers who had already accumulated a number of points often relied on technology to avoid getting more points, rather than simply driving within the limit.' (ibid: 3) Again it seems that the use of deterrence and risk as a language of incentives, disincentives and calculations helps some drivers to rationalise their problematic behaviour within that framework; not by committing normatively to the law but by adopting technology to lower risk.

### **Speeding Deterrence and Knowledge**

There are many other factors to take into account when assessing the effectiveness of deterrence in impacting behaviour. First there is a need to know whether speeding has actually taken place. It seems like a relatively straightforward question, and indeed the strict liability of the speeding offence makes it a straightforward question in law. However this section is examining the deterrent efficacy of speeding enforcement on the driving public, thus the straightforward question becomes more complex. As discussed earlier Darley et al (2007) found that frequently people are unaware of the requirements of the criminal law, and hence the deterrent efficacy of any law can be questioned where citizens have little idea of what is expected of them. It can be expected that most drivers are aware of speeding offences and the general requirements of speed limits (i.e. not to exceed them), however, translating this knowledge into the actual experience of driving, as anyone who has driven a car can attest, is not so straightforward. In unfamiliar locations drivers will be aware that speeding is an offence, however they will not necessarily be aware of the actual speed limit. Nor will they be aware at all times of what their speed is, as other factors (some legitimate, some not) beyond the speedometer call for a drivers attention. Here Darley et al's point is

valid; the deterrent efficacy of speeding enforcement becomes problematic since it is logically impossible to be deterred from doing something that one is unaware of doing.

Research for the AA Foundation in 2000 found that in general speeding is a conscious decision, and that accidental speeding is relatively rare (Silcock, Smith, Knox and Beuret, 2000: 1), although McKenna, in a 2005 study, found that unintentional speeding was the only common factor in speeding excuses. Thrills and time pressure (found by Gabany, Plummer & Grigg (1997) to be important) were not common excuses. In the household survey research carried out by Silcock et al, it was found that unintentional speeding was a frequent response, although it would appear that strategies of demonopolised expertise, as Wells (2012) has discussed in depth, as well as techniques of neutralisation (Sykes & Matza, 1957) were also apparent in drivers' responses, these included 'the limit was wrong for the location', 'I am an above average driver', 'others abuse it more flagrantly' 'my speeding was safe' and 'I was being forced to speed by someone tail-gaiting me' (Silcock et al, 2000: 2).

What these responses show, beyond the excuses, is how speeding behaviour is impacted by a number of factors which the deterrent effect of enforcement has to compete with. Thus the likelihood of receiving an FPN, the amount of that FPN, and the consequences of receiving driving licence points are factors that no doubt impact on driving behaviour, but these points are just a range of factors to place alongside others. In this respect deterrence is once again unhelpful with its language of calculation and appeal to rational choice. If as a society we are meant to weigh the benefits and drawbacks of speeding based on calculable outcomes, then it seems logically consistent that, for example, "road conditions" "tailgating" "I'm an above average driver" are equally legitimate factors to weigh in that calculation.

#### *Assessing the Certainty of Speeding Capture*

As discussed at the start of this section, significant numbers of people are caught speeding each year. Thus one could argue that Robinson and Darley's point that deterrence depends



upon a 'high rate of violation detection' (2003: 979) applies to the speeding FPN. Large numbers of speeding offenders are caught and therefore this provides a high rate of detection/certainty of capture. In order to make that judgment however one needs to assess the rate of non-capture in order to compare this to capture. Appendix 2 contains the relevant calculations and assumptions that have been made in obtaining the estimates below. The calculations rely on published statistics on the number of licensed drivers, driving habits (see appendix 2) and the number of speeding FPNs and speed awareness courses offered each year (Home Office, 2013).

Various surveys have tried to gauge the true incidence of speeding, generally relying on self-report surveys: Stradling et al (2003) found that 79% of their respondents admitted speeding, whereas Corbett (2003) gives figures of between 85% - 99% of all motorists (2003:111). The AA foundation (Silcock et al, 2000) in a survey of 1000 households found broadly similar results to Corbett (85% of interviewees admitted to speeding). Silcock et al's report also included examination of driving videos of one hour duration in which speeding was assessed. They found that '98% of motorists exceeded the prevailing limit at least once during their one hour drive' (Silcock et al, 2000:1).

The following tables give the amount of offences of exceeding the speed limit that occur each year based on the assumed amount of speeding from the previous academic research and applied to the relevant data. Figures 4.10 and 4.11 examine the relationship between the incidence of speeding based on recidivism rates, the number of FPNs and speed awareness courses each year, and the amount of driver hours (figure 4.10) or driver trips (figure 4.11) per year.

**Figure 4.10**

<b>Applying Speed Research to Driver Hours</b>			
<b>Measure</b>	<b>% of drivers Speeding</b>	<b>No. Of Offences</b>	<b>Rate of Capture %</b>
Stradling et al	79	272,265,024	0.67%
Corbett	85	292,943,380	0.62%
Silcock Et al	98	337,746,485	0.54%

**Figure 4.11**

<b>Applying Speed Research to Driver Trips</b>			
<b>Measure</b>	<b>% of drivers Speeding</b>	<b>No. Of Offences</b>	<b>Rate of Capture %</b>
Stradling et al	79	576,206,250	0.32%
Corbett	85	619,968,750	0.29%
Silcock Et al	98	714,787,500	0.25%

This data suggests that the number of offences of speeding each year is between 272 million and 714 million. The statistics suggest a capture rate of between 0.67% and 0.54% based on driver hours, and 0.32% and 0.25% based on driver trips. This data only relates to drivers who have received an FPN during previous three years. These drivers were chosen since the research above suggests that those with speeding convictions are more likely to offend than those who haven't. The statistics presented here are aimed at giving a very conservative estimate of actual speeding, so that it can be said that even in a best case scenario, the deterrent efficacy of the law seems to fall short.

To gain an understanding of speeding incidence amongst all drivers, including those already with points on their licence, insurance data on vehicles was used (which showed that 23.8 million vehicles are insured each year in the UK) (again this is explained more fully in Appendix 2).

Figure's 4.12 and 4.13 estimate the incidence of speeding amongst the general driving population.

**Figure 4.12**

<b>Applying Speed Research Per Trip</b>			
<b>Measure</b>	<b>% of drivers Speeding</b>	<b>No Of Offences</b>	<b>Rate of Capture %</b>
Stradling	0.79	6,033,185,760	0.03%
Corbett	0.85	6,491,402,400	0.03%
Silcock Et al	0.98	7,484,205,120	0.02%

**Figure 4.13**

<b>Applying Speed Research Per Driver Hour</b>			
<b>Measure</b>	<b>% of drivers Speeding</b>	<b>No Of Offences</b>	<b>Rate of Capture %</b>
Stradling	0.79	2,850,759,240	0.06%
Corbett	0.85	3,067,272,600	0.06%
Silcock Et al	0.98	3,536,384,880	0.05%

It can be seen that the most conservative estimate of speeding behaviour (Stradling et al), suggests there are nearly 2.8 billion offences each year based on driver hours, and 6 billion on an assumption of one speeding offence per trip<sup>56</sup>. Basing certainty of capture rates on these statistics shows a likelihood of capture between 0.06% and 0.05% based on driving hours, and 0.04% and 0.02% on the number of trips. Applying this to the statistics on driver hours per year this means that the average driver can expect to receive a speeding FPN once every 8 years of driving, or once every 1250 hours.

Clearly if this represents the true figure of actual speeding, the idea of the deterrent efficacy of speeding enforcement is negated as a means of increasing the certainty of capture. This is a phenomenal amount of offending that any system of enforcement would find difficult to address. Of course these statistics are speculative and reflect a structured attempt to begin

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<sup>56</sup> This in itself is a problematic understanding of “speeding” since the very act driving can involve multiple single incidences of speeding as the driver slows and speeds up during a stretch of road or prolonged speeding with temporary compliance. It is virtually impossible to quantify this process with sufficient methodological rigour; therefore in the analysis above it was assumed that only one incidence of speeding occurred each hour (or each trip).

to analyse the “dark figure of crime” for speeding. The extent to which these figures represent ‘actual’ crime is far from certain and one is reminded of Biderman and Reiss’s warning

In exploring the dark figure of crime, the primary question is not how much of it becomes revealed but rather what will be the selective properties of any particular innovation for its illumination. (1967:14-15)

This chapter is ultimately about the effectiveness of OTSPs, and in this section, about their deterrent efficacy. The statistics above attempt to draw out concerns about the deterrent efficacy of current speeding enforcement practice. Obviously the above figures are speculative to say the least, but they reflect an attempt to critically examine claims to the effectiveness of deterrence in incentivising appropriate driving conduct. At present it is impossible to say what the true level of speeding is, just as it is impossible to do the same for other OTSPs. What the above figures highlight, however, is the need to have some understanding of the incidence of speeding before treating OTSP enforcement as axiomatic with an “effective” deterrent penalty.

A further problem with the approach above is that it treats all road locations as equally unlikely enforcement sites. This is incorrect; at locations with fixed speed cameras the risk of capture approaches 100%, nevertheless, significant numbers of drivers are caught each year at these locations. In 2012 609,216 speeding FPNs were issued as a result of a driver being caught by camera enforcement (84% of all speeding fixed penalties)<sup>57</sup>.

Zaal suggests that the perceived risk of detection is far more important than the actual risk of detection and that, in general, a person’s perceptions are far lower than the actual risk of detection (1994: 9). If the statistics above are correct then Zaal’s claim must be false. Of course it is possible that offenders learn from their behaviour and one possible learning outcome is that drivers who are caught start to perceive speeding enforcement as more

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<sup>57</sup> Although these statistics also include mobile camera enforcement vans at which the driver may not know the location of enforcement in advance.

effective than it actually is (in terms of certainty of capture). Zaal suggests that this increases the perceptions of risk and should result in greater deterrent effect, however given the original unlikelihood of capture these perceptions must soon wear off. If the average driver only receives a notice every 8 years then the perception of capture will soon regress to lower levels based on their everyday experiences of non-capture. Indeed as Nagin points out this is the general conclusion of most deterrence research, that 'the deterrent effects tend to decay over time (2012:76)

#### *Certainty of punishment following capture*

One facet of Robinson and Darley's deterrence efficacy does exist in speeding enforcement: that 'a reasonable certainty of punishment following the detected violation' (2003:979) exists. Automated speed camera enforcement ensures near certainty of punishment upon detection. The camera is generally infallible<sup>58</sup> with the only bar on certainty being whether the camera is actively maintained by the Safety Camera Partnership.

A further factor in the certainty of punishment of speeding offenders is the extent to which, once captured, speeding is then formally actioned. Here speeding enforcement does provide an effective rate of punishment upon violation detection. In 2011/12 less than 2% of FPN's resulted in no further action (Home Office, 2012a).<sup>59</sup> Thus capture, for the most part, results in automatic punishment, and, as the statistics on compliance with the order show, payment of the penalty.<sup>60</sup> Very few driving offences that are captured result in no further action by the police. Thus there may be certainty of punishment, however, one also needs to consider the celerity of that punishment in order to understand its efficacy.

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<sup>58</sup> Although there is some anecdotal evidence of some bizarre results

<sup>59</sup> the mean average for the last 4 years has been 1.9%

<sup>60</sup> Unless of course the camera is not working correctly (e.g. be out of film) which can create a false sense of security for drivers who see the flash but are not punished.

*Celerity of Punishment: A swift speeding FPN?*

De Waard and Rooijers (1994) found that obtrusive stopping of motorists in the Netherlands had an effect on the average speed of motorists at the particular location, whereas citation by post had no similar effect. Soole, Lennon and Watson (2008) found that self-reported compliance with speed limits in Australia was influenced by on-the-road traffic patrols rather than speed camera remote enforcement.

In England and Wales the overwhelming majority of speeding FPNs are captured by overt speed camera and the resultant notices are sent via post, (609,216 notices, or 84% of all speeding FPNs). Such notices must arrive within 14 days of the offence being detected (section 1 RTOA 1988), the recipient then has 28 days in which to pay the notice or potentially face prosecution for the offence.<sup>61</sup>

It should be noted that such notices are swifter than a magistrates' court hearing. In 2012 the mean time taken for summary proceedings from offence to completion (guilty plea or trial) in the magistrates' court was 167 days, compared to the maximum 42 days of the speeding FPN. In fairness to the magistrates court procedure the 167 days is a mean average of all summary motoring offences, not just speeding, which possibly may be speedier.<sup>62</sup> Nevertheless it should be borne in mind that the celerity of punishment is one factor in determining the deterrent efficacy of speeding FPN enforcement. As seen above the certainty of capture is so low as to approach almost zero as a general deterrent. Thus the celerity of punishment, in the unlikely event of being captured, is a small disincentive that can impact on behaviour, but this must be weighed against other factors, (road condition etc.).

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<sup>61</sup> Once again demonstrating the difficulty with labelling such penalties "on the spot". It is neither issued nor collected on the spot.

<sup>62</sup> It should be noted that the delays in procedure are a result of bringing the case to court not dealing with the matter in court (i.e. not magistrates fault). Once the matter arrives at court then the average case takes 20 days to complete (MOJ, 2014b).

Although this section has been about speeding enforcement it must be noted here that this form of enforcement is not a perfect type notice for the celerity of punishment affect. Here the PND or the litter FPN provides a swifter sense of justice in that the notices are<sup>63</sup> issued on the spot directly to an individual. De Waard and Rooijer's research suggests that such actual on the spot notices are far more effective methods in terms of the celerity of punishment, but even here there can be a delay of up to 28 days in the case of a PND, and 14 in the case of a litter FPN.

#### *Conclusions on speeding deterrence*

Although the above sections have problematised the concept of deterrence in the speeding context it must be said that the literature does provide evidence of some level of deterrent. What this section has set out to prove is that in terms of certainty of capture that level is so low as to be virtually non-existent. Nevertheless in specific situations, as Robinson and Darley intimate, 'publicly known rules can deter' (2003: 979) and it would be false to claim that speeding enforcement by OTSP does not deter at all. Instead it is fair to say that where enforcement levels are high, and obvious to members of the public, specific deterrence may operate (De Waard and Rooijers, 1994). However it is likely, given the amount of offending, that such deterrence soon decreases when the driver leaves the obtrusive surveillance area.

#### *Deterrence in other areas of OTSP enforcement*

Despite this section being exclusively related to speeding enforcement, there are parallels with other OTSP contexts. The main parallel is the behaviour of the "rational choice" citizen and the focus of a majority of OTSPs on behaviour that cannot be regarded as involving rationality. Firstly the idea of applying rationality to the drunk and disorderly citizen in the PND context is questionable; the very fact of their drunkenness means that they are not in a rational mind-set. Of course there are degrees of drunkenness, but it must be recalled

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<sup>63</sup> with the exception of the growing trend to issue notices for drivers of vehicles when a passenger litters

that the PND (or any OTSP) is aimed at dealing with *minor* occurrences of offending in which the boundaries between wrong and right are small and, at times, difficult to assess when sober. Thus rationalising in a state of drunkenness seems bizarre, particularly where the behaviour in question need not be extreme or egregious.<sup>64</sup>

Furthermore in the other OTSP contexts the majority of OTSP offending is either accidental or at worst thoughtless. The use of strict liability for the majority of most motoring offences means that such attitudes are nonetheless punishable. Yet examining the deterrent efficacy of enforcement of such laws, one struggles to see how a person can be deterred from accidentally or thoughtlessly breaking the law. Thoughtlessness by its very nature involves an absence of thought about a particular issue, thus claiming the deterrent efficacy of a penalty in which a person has given no thought to the law in question is a logical impossibility. Of course this is not to suggest that all minor offending is accidental, undoubtedly some people do break these laws intentionally. However, as discussed in the previous chapter, OTSPs are seen as salutary warnings to the thoughtless; the general accidental offender who rather than use the full weight of the criminal law is taught a 'swift and salutary lesson' (Marples, 1960) about the law and its enforcement.

In littering enforcement the legislation was originally designed to capture intentional littering, however, since that time, attitudes have shifted as Bob Blizzard MP noted in an adjournment debate about littering:

One does not need a chemical factory pouring effluent into a river, or a smokestack discharging into the air, or a vehicle with exhaust emissions—just ordinary people dropping litter, as a result of laziness, thoughtlessness, carelessness, plain disregard or loutishness. (HC Deb 17 May 1999 331 c.848)

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<sup>64</sup> Although of course it is accepted that drunkenness doesn't mean a complete loss of rationalism, whilst the offender may not be able to rationalise as Homo-Economicus, there are obviously things that drunken offenders won't do.



Here thoughtlessness and carelessness are seen just as problematic as plain disregard and loudness; all need an enforcement reminder of littering law. In this respect the focus on smoking litter (cigarette-butts) provides an example of where common social practice seems to be at odds with the legal definition of littering. From both the observational studies in this research and previous work experience issuing FPNs for litter, the majority of litter FPNs are for cigarette ends. The smoker will finish their cigarette, place the butt onto the floor and then stand on it in order to extinguish it; it is a very rare smoker that then retrieves the stamped butt from the floor. Thoughtlessness and common social practice make this action automatic and yet basing litter enforcement on a perceived general deterrent that speaks to a rational choice actor cannot take account of this automatic process. Although in specific instances it may cause the offender to think next time, the evidence of deterrence literature is that this effect will soon wear off. Smokers who are caught littering almost invariably are shocked and surprised that they are accused of the offence. There are, in these circumstances, quite clear differences of opinion in what the law actually says and what smokers, in particular, think it should say.

#### *Deterrence, Risk and Moral Argument*

Perhaps Kahan's (1997a) analysis of deterrence as a means for masking moral argument is important here. The switch to risk based enforcement, and risk based offending, are embodiments' of both a normative as well as descriptive deterrence ideology. Indeed Wells (2012) study reinforces this point with respect to speeding enforcement, in which debates about risk, harm and danger are monopolised and contested by various parties in the debates (experts, non-experts, policy and enforcement professionals and motorists). The argument that these people are having is one framed by deterrence ideology, normative in the expertise camp (harm reduction as the guiding principle of enforcement) and descriptive in both camps (the monopolised contestation over statistics, correlation and causation). Thus debating the speed camera is predicated on a conception of efficacy rather than on moral arguments about the worth of various individualised attributes (such as gendered

attributes (thrill seeking, enjoyment etc.), driver's actual intentions, and certain libertarian ideas of free choice).

The "criminal" status of motor offending in such an ideology is side-stepped so that contestation turns to scientific, rational and calculable criteria, which, as Wells (2012) rightly points out, has a tendency to negate the experience and expertise of motorists as motorists. Even if such expertise could be accepted by the 'mainstream' experts (as opposed to 'demonopolised' experts) it still reflects a discussion bounded by deterrence ideology. This is not to suggest that the switch to deterrence based reasoning is without benefits to demonopolised experts. Deterrence ideology can lessen the harm aspects of motoring enforcement; deterrence is only interested in consequences in as much as they incentivise or de-incentivise behaviour; punishment and capture are its focus, not harm. Thus using deterrence ideology motorists can, as Wells explains, construct identities that challenge official statistical claims to efficacy without the need to reflect on moral concerns (actual harm). In this way, as Darley et al (2001) point out, the lack of moral reflection on behaviour means there is a disconnect between what people think the law is and what it actually is. This dispute then allows for the construction of a law-abiding identity, which from a strictly legal perspective, requires an incredible feat of self-deception.

### Conclusion

The concept of "effectiveness" is difficult to grasp in criminal justice, particularly with OTSPs, where there are numerous claims being made about OTSP policies. Some claims to effectiveness sit outside of the debate about the actual effectiveness of the law in terms of its impact upon its target population. The claims to cost efficiency and productivity are system concerns; they relate to the effectiveness of the system to function in ways that it was intended. These system concerns are quantifiable and capable of being performance managed and targeted, even if at times the targets have a dysfunctional impact on the system.

Outside of these system concerns there are further claims to effectiveness. Here policymakers rely on axiomatic claims about the new OTSP system providing deterrent efficacy. The extent to which there is actual evidence that the penalties provide deterrent efficacy is more problematic. As this chapter has demonstrated the deterrent efficacy of the law, punished by OTSPs, is certainly contestable from both a theoretical and empirical perspective. The theoretical perspective questions the extent to which ideas of the rational choice actor can be applied to offences leading to OTSPs. It has been seen that this is difficult in most OTSP contexts. Indeed on the rare occasions where it can be claimed that pure rational economic calculations arise, other important factors vie for calculation. From an empirical perspective the idea of an effective deterrent has been demonstrated to be extremely difficult in speeding enforcement (the enforcement that is the most likely to capture a citizen engaging in criminal conduct).

These contestations over effectiveness have essentially involved the claims made by proponents of the OTSP system (the policymakers). In the next chapter the extent to which the claims of policymakers are reflected in street level practice issuing OTSPs are examined.

# PART 2 Messages

## Chapter 5: Enforcing the OTSP

Thus far this thesis has examined how national policy on OTSPs developed and how it relied on claims about their effectiveness. However, to communicate these messages, there needs to be an interaction between enforcement authority and the recipient (even if only through documentary sources (e.g. the speeding FPN through the postal system)). As discussed, switching to OTSP enforcement results in vast increases in the number of people being sanctioned, however stating this doesn't help to explain, with any great insight, how or why enforcement becomes more prevalent. One may be able to note that interactions are more frequent but this doesn't explain how national policy translates into local policy and how local policy informs street practice.

Lipsky explains how 'street level bureaucracy' (2010) involves both service delivery and a significant element of policy making, it is officers in enforcement agencies that determine the way in which policies are delivered. Therefore, to understand whether the policy justifications are experienced by members of the public, one must look at how OTSP issuing practice communicates a message to recipients and what that message is. Two strategies are explored in this chapter demonstrating the messages that are transmitted to OTSP recipients in the penalty encounter. First there is the local zero tolerance-policing policy (and practice) which is claimed to remove discretion but at the same time offer the officer a means of getting through a difficult on-street encounter. Furthermore the officer can "sell" the OTSP which makes it easier to gain acceptance from recipients during the encounter.

### Controlling Discretion: Policy versus Practice

Pressman and Wildavsky (1984) state policy 'implementation... is the ability to forge subsequent links in the causal chain to obtain desired results' (1973: xxiii). They continue '[i]n the midst of action the distinction between the initial conditions and the subsequent chain of causality begins to erode.' (ibid) Put simply policy desires dissolve with the actual implementation of the policy. Hupe calls this the thesis of 'incongruent implementation'

(Hupe, 2011:67). Pressman and Wildavsky argue 'the longer the chain of causality, the more numerous the reciprocal relationships among the links and the more complex implementation becomes.' (1984: xxiv) Thus the more people involved in policy implementation the more likely the aims of the policy are polluted.

Hupe adds three complications to the relationship between policy aspirations and policy outcomes. First there are complications based on 'mechanisms of social interaction' (2011: 71) which 'may take the form both of subordinate compliance and open conflict; but also indifference and inertia and even opposition.' (Ibid)

A further complication is that implementation is 'multi local' (ibid: 72) in which Hupe argues, citing Lynn (2007), 'various levels of management and supervision mediate the relationships between public policies and the outputs of administrative systems, and do so with decisive consequences for service delivery performance.' (Hupe, 2011:72). This second factor is relevant for the OTSP enforcement process as various levels of the enforcement agency are involved in implementing and interpreting policy. In local government (Litter FPNs and Parking PCNs) there are numerous levels of management structure to contend with, and the political context in which local councils operate. Thus for the officer on the street implementing OTSP policy there may be national policy, local policy set by elected officials, and management policy. In the policing context there is likewise the management complication as senior officers (both civilian and ranked police officers) develop their own policies, or views on what counts as successful policy implementation. During field studies PCC's had yet to be elected however their position also complicates the relationship between national and local policing policies.

Hupe's third complication to incongruent implementation relies on Lipsky's concept of the "street level bureaucrat". Lipsky states that each interaction on the street between a "street level bureaucrat" (police officers, law enforcement personnel, social workers, judges...' (2010: 3)), and a member of the public 'represents an instance of policy delivery' (ibid: 3). Interactional policy making takes place through 'relatively high degrees of discretion and

relative autonomy from organizational authority' (ibid: 13). Thus, if law enforcement officers frequently exercise their discretion in a way that means that policy is largely ignored (or incorrectly interpreted) then, the policy message intended by the law may be lost.

The focus on deterrence in OTSP enforcement is instructive here since such a policy aim requires increases in certainty of capture. This can be watered down in an enforcement practice that involves little increase in certainty due to officer leniency. Hence the claims of an "effective" OTSP enforcement policy, by policymakers, need to be re-evaluated in light of the street level officer's ability to interpret and enact policy. Thus the intuitive idea that OTSP enforcement deters is more complicated in reality.

Furthermore, whilst recipients may understand national policy aims (and may even support them), local practice can mean other messages get communicated. In order to understand the reality of OTSP enforcement then one needs to look beyond policy and focus on the experience of enforcing and receiving an OTSP. To date, there is no empirical research on this question.

### Expressive and Communicative Punishment

Literature on expressive and communicative punishment can provide a means through which OTSP communication can be theorised. The OTSP imposes punishment without the need for formal adjudication and in a manner completely different to that imposed through the courts. The withdrawal of automatic court proceedings<sup>65</sup> removes key procedural protections for OTSP recipients. The perceived procedural justness of the OTSP interaction will be examined in the following chapter. Here, the process of enforcement is examined to see what messages are communicated or expressed to recipients.

Punishment, Kahan states, 'is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation' (1996: 593). Punishment itself causes a message to be given to the person being punished, furthermore, as Feeley (1979) notes,

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<sup>65</sup> Although the defendant may still opt for a court hearing should they so wish

the process is also punishment. Thus, it need not be the end sentence that is the sole punishment experienced. The treatment citizens receive from the criminal justice system can be experienced as a punishment, and may transmit a message of its own. This thesis conceptualises punishment as including Feeley's claim.

The "moral condemnation" that punishment transmits is described as either *expressive* (Feinberg, 1970) or *communicative* (Duff, 2001). Expressive punishment holds that 'punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation' (Feinberg, 1970: 95). Feinberg also states the "punishment" aspect of expressive punishment requires 'hard treatment and symbolic condemnation' (Ibid: 112).

Duff argues against the idea that punishment should express and instead favours a communicative form of punishment.

Expression requires only one who expresses. If there is (as need not be the case) someone at whom it is directed, that person need figure only as its passive object or recipient, that intended effect could be entirely nonrational – it need not be mediated by the recipient's reason or understanding. (2001:79)

Instead Duff believes we should talk of punishment as being *communicative*; 'by contrast, communication requires someone to, or with whom, we try to communicate.' (Ibid: 79) This is distinguished from expression: 'communication involves, as expression need not, a reciprocal and rational engagement.' (Duff, 2001:79)

Duff accepts his theory is 'an ideal conception of what criminal punishment ought to be' (Ibid: xviii) not a comprehensive account of punishment practice. Thus Duff's communicative punishment is a normative theory not an empirical observation; nevertheless it has a power to explain how the punishment experience affects those it punishes. Therefore to understand punishment policy, as it relates to OTSPs, one needs to understand the communicative act that takes place at the location in which punishment



occurs. Once this examination is undertaken then it is possible to see how and what communications (or expressions) exist and understand the effects and consequences (unforeseen) of OTSPs beyond the limited policy aims noted in earlier chapters.

Communicative punishment involves a two-way process where both parties to the communication engage with each other. Such communication 'speaks to its citizens as members of the normative community. It seeks not just (as might a sovereign) their obedience to its demands, but their acceptance and understanding of what is required of them as citizens' (Duff, 2001: 77). This communicative enterprise, according to Duff, is inherently liberal, but, unlike deterrence, does not rely on perfect conceptions of rational beings. Instead communicative justice respects individual autonomy to decide.

My aim [in punishing] cannot be to simply find some efficient means of bringing it about that her conduct conforms to what morality requires ...my aim must be that she does what is right *because she sees it to be right* (Duff, 2001:81)

Furthermore, in getting people to see that it is right, punishment must 'aim ...to persuade them to refrain from criminal wrongdoing because they realize it is wrong' (ibid).

Punishment as deterrence does not do this, it 'addresses those it seeks to deter, not in terms of the communal values that it aims to protect, but simply the brute language of self-interest' (ibid: 79). By labelling OTSPs as deterrent punishments they conflict with Duff's communicative punishment theory as the citizen, who is regulated, is seen as an aggregate subject, one who is inherently self-interested. Deterred citizens comply solely for the purposes of self-interest rather than for normative reasons underpinning the particular law.

Duff's communicative punishment concept is important in the OTSP context since he sees a fundamental problem with the fine's ability to communicate censure and reinforce appropriate moral conduct

A fine might communicate formal censure, telling the offender that he has committed a wrong of a certain degree of seriousness, measured by the size of the fine. But it is not suited to the richer communicative purpose... (2001:147).

Thus a fine, delivered without communication imparts little message to the transgressor other than censure and, in line with utilitarian theory, it may not even transmit this. Instead the wrong may be looked on as acceptable as long the price is paid. The idea of punishment in this chapter widens Duff's conception of punishment to include Feeley's idea of the process as punishment and hence as part of the communication process. Thus in the OTSP system the process itself needs to be examined to see if, how and what messages are communicated (or expressed) during OTSP interactions.

In this regard Carey provides a view of communication that can be vital in understanding the impact of the punishment process. Carey distinguishes between two types of communication; firstly 'a transmission view of communication... [which] is defined by terms such as "imparting", "sending", "transmitting", or "giving information to others" [and] is formed from a metaphor of geography' (Carey, 1989:15). On the other hand 'the ritual view of communication ...[where] communication is linked to terms such as "sharing," "participation," "association" ...is directed not toward the extension of messages in space but toward maintenance of society in time, not the fact of imparting information but the representation of shared beliefs.' (Ibid: 18). This is important for the present discussion on the operationalisation of OTSP policies since the messages intended through using OTSPs suggest that enforcement should take the transmission view; messages about deterrence (the swift and salutary nature of the punishment) are "imparted" or "transmitted" to members of the public through enforcement agencies. If one takes the ritual view of communication, what Carey also describes as 'symbolic communication', 'whereby reality is produced, maintained, repaired and transformed' (Ibid: 23) it allows for a deeper understanding of how

OTSP policy messages are more complex than policymakers would want to believe, and also holds out possibilities of counter interpretations of the message.<sup>66</sup>

Recall from Chapter 1 that O'Malley sees OTSPs as consumerist penalties, not directed at individuals but 'the risk-creating dividual... regulatory fines can become anonymous – targeted at owners, proprietors, drivers and so on, and accordingly can be monitored, delivered and expiated privately and anonymously' (2010: 161). The expressive theory of punishment suits this process since 'expression requires only one who expresses' (Duff, 2001:79). The point here is that only the individual can communicate; the dividual, 'stripped of personality' (O'Malley, 2010:26), can only receive expressions. Thus it is necessary to examine whether the interactions officers have with citizens accord with O'Malley's idea of OTSPs as dividualised justice; theories of expressive and communicative just help to understand this distinction.

#### Expression and communication in local policy

##### *Expressing Zero-Tolerance*

All street level bureaucrats engage in substantial discretionary decisions during their daily routine Lipsky (2010). Enforcement officers charged with enforcing litter or parking legislation, have substantial discretion in how policies are implemented since they are not under constant policymaker surveillance. As Lipsky states, 'a defining facet of the working environment of street level bureaucrats is that they must deal with clients' [sic] personal reactions to their decisions' (2010: 9) It is the CEOs and Litter Officers decision whether to impose an OTSP and this sets the boundaries of how the interaction proceeds.

In local government there is the layer of local policy, in addition to national policy, that frames the discretion that officers exercise and forms another potential layer of incongruent implementation. This framing not only operates on officers' perceptions of the discretion they exercise, but also provides officers with a means of avoiding the more negative

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<sup>66</sup> This is developed further in chapters 6 and 7.

consequences of their job; imposing an unwanted punishment in a potentially hostile encounter.

One policy that dominates the local government litter enforcement agenda is zero-tolerance policing (ZTP). ZTP mandates that action is taken against all minor law breaking. Innes states

The fundamental tenets of ZTP strategies have been a concentration upon low-level public disorder offences such as graffiti, vandalism, public drunkenness and so forth. The premise being that strong and authoritative use of coercive police powers, in respect of these types of behaviours, can prevent more serious types of disorder and crime from occurring. (1999: 398)

The idea that ZTP acts as a preventative strategy against more serious disorder draws its logic from 'broken windows theory' (Wilson and Kelling, 1982). ZTP's focus on preventative strategies fits with the idea of the OTSP as an expressive punishment. ZTP, at a fundamental level, operates on deterrence principles; it seeks to deter actions, based on an appeal that there is: high certainty of capture and punishment, and no discretion for the officer (Kahan, 1997b). The recipient of a deterrent is the reasonable and rational offender, again one might call this offender a dividualised offender in that the subjectivity and irrationality of their life is ignored and appeal is made to the dividualised part of their nature that can calculate the costs and benefits of offending (i.e. the dividualised consumer). Thus ZTP can be characterised as an expressive punishment: it expresses that certain actions will never be tolerated, without having to take into account any of the varied circumstances that a citizen wishes to raise.

Despite a belief from 'most criminologists and many sophisticated practitioners ...that enforcement-oriented policing is *not* always the most effective strategy for addressing common crimes, that "we cannot arrest our way out of crime problems"' (Skogan, 2008: 1980) the growth in OTSP's suggests a belief that enforcement orientated policing can at least attempt to deter sufficient number of people from offending.

As demonstrated below, litter FPNs and PCNs represent a zero-tolerance punishment for behaviour, where officers claim to lack discretionary judgement. It will be seen that although zero-tolerance, as a local policy mantra, aims to mandate enforcement through the removal of officer discretion, in reality zero-tolerance is also used at the street level as a defence mechanism. It is used to transfer blame to the authority and away from the officer imposing the penalty. In this way the officer seeks to avoid increased negativity in the encounter by representing the interaction as one that is being forced by an outside body.

Thus ZTP rationale although ostensibly seeking to remove officer discretion, which could be seen as an unjustified intrusion on the officer's professionalism, may free officers from the burden of justifying their decisions. Although the officer may lose discretion, the ZTP policy can provide a defence from charges of irrationality, arbitrariness and (given the subject matter of OTSP offences) pettiness. Instead s/he can pass blame to the authority for their actions.

Of course officers may still choose to ignore offending, however that option, particularly in enforcement agencies that are performance managed, is less likely to be exercised as officers may soon find themselves in trouble with their employers (for not issuing notices and the budgetary concerns that may cause should they choose not to enforce with sufficient regularity.)

### The expressions and communications transmitted through local practice

#### Selling the disposal to consumers

Although ZTP mandates action, it may be difficult for an officer to articulate in individual circumstances why punishment is being imposed (e.g. what it hopes to achieve). Officers may still find it hard to gain compliance, or even make sense, in their own mind, of characterising the behaviour as sufficiently problematic to draw an OTSP. Officers can point to ZTP policy during the encounter but this may not pacify the recipient. Thus a secondary strategy is necessary to gain recipient compliance (or acquiescence) during the

encounter. With OTSPs that strategy involves a “sales pitch”, which also seeks to mitigate the social awkwardness of imposing a financial punishment on a citizen.

Schafer and Mastrofski, whilst studying traffic policing encounters, found that patrol officers engage in a four-step process of dealing with citizens who have broken traffic laws. After initiating the encounter officers then have to decide an appropriate sanction –formal and informal, if the officer took the informal route there was a choice between either “the lecture” or the “sales pitch” (2005:231)

When an officer chose to lecture an offender, there was a certain protocol that was followed. The key rule in lecturing was to preserve the driver’s self-esteem (hence the rule not to lecture a driver who was issued a citation). (ibid: 232)

Describing this interaction as a lecture nicely encapsulates the idea that this is an expressive, rather than communicative, encounter. A lecture is given by one party to another, it seeks to transmit ideas rather than communicate through shared understanding.

The “sales pitch” however, is:

akin to an auto dealer making a “sales pitch” to a consumer ...The officer would begin by telling the citizen an offence had been observed... tell the driver what penalty (or penalties) would typically be associated with such violations. Finally the driver would be informed of the actual sanction being imposed by the officer (ibid: 232)

This strategy was employed so that the ‘citizen was expected to believe they had received a “good deal”’ (Ibid).

The need to employ a strategy of selling a notice arises due to the social status of offenders who are most likely to receive an OTSP. Enforcing minor criminal offences has the capacity to bring enforcement officers into contact with “ordinary” citizens more frequently than focus on more obviously serious and “real” criminal offences. As Schafer and Mastrofski state

Unlike enforcement of most criminal laws, many traffic offenders stopped by police enjoy financial resources and social status on par with that of the officers who stop them, which increases their inclination and capacity to challenge the officer's enforcement decisions. (2005: 225)

This is an important point since OTSPs are designed to provide effective alternatives to court procedures. If a significant number of OTSP recipients challenge the matter in court it will significantly undermine the (much vaunted) efficiency of the system. Thus officers need a strategy for ensuring compliance with the OTSP demand which will appeal to citizens who are likely to challenge their decisions. ZTP can help remove the difficult task of having to justify each particular imposition of punishment according to the justice of each particular case for officers. Nevertheless, understandably, citizens can remain unimpressed with the claim that zero-tolerance means the officer lacks discretion and so officers use the sales strategy to communicate how lenient and fair they are being by offering such a "good deal" (Ibid: 232) in such restricting circumstances.

It is worth recalling O'Malley's linkage between the growth of regulatory fines (including OTSPs) and the growth of consumer society (2009). O'Malley claims that such fines govern through a consumerist ideology that allows rational consumers the choice over what, when and how to pay their penalties. Consumers are rational calculators who have a choice and exercise that choice based on rational calculations of cost and product acceptability. If OTSPs are consumerist penalties then there needs to be an element of choice involved. The transgressor can choose the most appropriate method for dealing with their transgression from within a limited range of options. Of course it is important to note that the interaction itself is not voluntary, so in this regard the consumerist metaphor falls down somewhat. Nevertheless, "the sell" represents an opportunity for the officer to mitigate the apparent harshness of the enforcement policy through an appeal to the recipient's consumer instincts.

In giving the “sales pitch” the officer presents a choice to the recipient/consumer which they have complete control over. They may choose to pay the penalty, they may not, but that choice is made rational through the provision, by officers, of all the requisite consumer information needed to make that decision. However, that information is not solely provided for these reasons, there are more self-interested reasons for the officer to offer “the sell”. Thus “the sell” acts on two levels; it operates as a means for the officer to make the interaction more palatable (for both the recipient and officer), it also demonstrates the extent to which consumerist ideology permeates this form of enforcement.

The “sales pitch” can represent both a communication and an expression, it can communicate the shared belief that the officer is lenient and fair, but it can also express a completely different conclusion; that the matter is so trivial that it represents just ‘another bill to pay, not an occasion for moralized commentary’ (O’Malley, 2009:108). Selling the notice reinforces the consumerist nature of the penalty; it is a “deal” that is “sold” to citizens. Given the general reductions for early payment that apply to most OTSPs, and the short period for reduced payment, it makes the penalty appear as a “buy now, reduced price” offer.

In what follows these ideas of communicating and expressing certain values in OTSP justice are examined through qualitative data. Each OTSP context is examined to see the experience of carrying out OTSP enforcement. The experience presented is, inevitably, a blend of input from local policy and (crucially) the practice of officers in carrying out OTSP enforcement.

### Enforcement: The Qualitative Experience

This section starts by examining enforcement policy and practice in the litter context in Midwastshire Council. Following this, the approach of parking enforcement is examined, also at Midwastshire Council. Finally the policy and practice of Midwastshire Police is examined regarding PND and Motoring FPNs.



Before examining Midwestshire Council practice, it is worth noting that enforcement by local authorities is constrained by factors at both the national and local level. National policy may express a desire to provide more cost effective justice, for example, but how this is operationalised is local in character. Elected officials in local government determine how such desires, are turned into local policy which then feeds in to local practice. The need to implement national policy through local policy causes a significant problem for assessing the congruence of national policy with outcomes. There are over 350 local authorities in England and Wales, each with their own local policy on litter and parking enforcement. Any government that attempts to achieve a policy outcome through local government will find it difficult to assess a policy's consistency across such a breadth of differing local contexts.

## Part 1 Litter Enforcement

### Local Policy

Midwestshire Council had, until late 2013, a dedicated environmental crime investigations team. Their role was to provide enforcement against littering, fly tipping, untidy land, dog fouling, graffiti and other LA waste functions. The unit's management structure was merged with the management of parking enforcement, under the oversight of the Strategic Manager for Parking and Enforcement. The data in this section is drawn from interviews with two elected officials, a senior strategic manager, the enforcement team leader and 6 enforcement officers. In addition 35 hours of observational research were carried out on street and in the back-office.

The team was created following a report by a group of senior councillors who felt that the council's role was 'not only cleaning up after people but also, just as importantly, to challenge and change behaviour in the first place' (Midwestshire, 2009: 4)<sup>67</sup>. They stated 'the name of the [team] "...crime unit" reflects the approach of the team.' (ibid: 35) In other

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<sup>67</sup> The grammatical structure of this sentence, and other sentences quoted from the reports of Midwestshire Council, has been altered to preserve the authority's anonymity. There has been no change in emphasis or meaning attributed to the quotes; they were altered to prevent quotation searches through online search engines.

words, litter ceased to be seen as solely about cleaning the street, it was also an enforcement (crime) problem. Furthermore they stated 'litter, cigarette butts, dog fouling through to fly tipping are all criminal offences and *must be dealt with as such.*' (Midwestshire, 2009: 38) (Emphasis added). Accordingly environmental *crime* was the unit's focus and elected officials were clear that the criminal nature of offending should be recognised in the unit's enforcement actions.

The general enforcement policy of Midwestshire (the policy applying to all of the authority's regulatory enforcement, not just the unit) suggests a hierarchy of enforcement based on the nature of the offence. Those deemed lower in seriousness would receive less enforcement action and punishment (reflective of Ayers and Braithwaite's (1992) responsive regulation). However the 2009 council report identified litter as a serious offence: 'littering and fly-tipping are criminal offences that we need to take seriously.' (2009: 38). Accordingly the report stated that 'we propose a consistent zero-tolerance approach' (ibid: 38).

Untangling tensions between the 'responsive regulation' (Ayers and Braithwaite, 1992:161) proposed in Midwestshire's Enforcement Policy and the Zero-Tolerance approach proposed for environmental FPN enforcement was difficult. Both enforcement policies applied to the litter team and suggested confusion. The former proposed that the minimum level of enforcement should be used to gain compliance, including warnings; whereas the latter saw FPNs as the primary option for dealing with transgression. Clearly for officers this could be confusing, having two policies that envisaged different conceptions of enforcement practice.

Two senior cabinet members from Midwestshire were asked, during the research, how such seeming contradiction could arise in policy. The Cabinet Member for Environment stated:

I don't think those are contradictory at all, because environmental crime is, is visually hugely intrusive. But should we actually go to court with that? It is not like someone has murdered someone, it is seriously affecting people there, but in the whole scheme of things? So I can see... I don't think that is contradictory. It is a minor

offence, you know, if we take the whole gamut of offences in the grand scheme it isn't major, but for those people living there it is, and it has to be treated seriously  
(Interview)

Clearly this cabinet member was as confused by the contradictions as the researcher. Here litter is described as minor in specific instances, but also major as a global concern. Perhaps it is worth noting that the realm of policy making focuses on global concerns, rather than individual cases. In specific instances it can seem petty to punish an individual with a £50 fine for dropping a cigarette end, yet the accumulation of such waste is anything but petty and contributes to a clear public health concern.

The deputy leader of the authority also dealt with the issue thus

Yes I agree, I mean you know if somebody is going to dump a sofa because they can't afford to pay the £20-30, or whatever it is to dispose of it, and they get done, should they have a criminal record? I don't think so, no. Should they get a fine for doing it? Yes and it should be ... So if they are saving 30 quid for doing it then there should be a £50-£70 fine for it. (Interview)

There is a clear consumerist idea being formulated here; the fine should not lead to a criminal record, but it should reflect the fact that a service has been provided (cleaning up the sofa) and that people should be encouraged into paying, up-front, for removal. Thus the FPN is a service charge levied to dissuade the citizen<sup>68</sup> from making unjustified savings on their deposit of waste. Those littering under a zero-tolerance policy are less likely to make an unjustified saving when littering.

A zero tolerance approach was certainly favoured by the cabinet members.

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<sup>68</sup> Although customer is probably a more apt description here

It [ZTP] also adds visibility to the process as well doesn't it, you know people do know that we are going to do you by whatever means possible, you know by word of mouth that you will fine them, then that becomes the deterrent. (Interview)

Furthermore elected officials can find themselves more enforcement orientated than the officers carrying out enforcement practice.

My experience with some fixed penalties is that, the council officers would prefer to use them far more as a last resort than I would as an elected member. (Interview)

Here enforcement practice frustrates policymakers who would prefer to see litter legislation used more proactively. The enforcement officers are seen as more risk averse (avoiding the potential consequences of a prosecution and the potential for a not guilty finding) than the policymakers would like.

In the next section the practice of local officers will be examined to see how local policy is implemented on the street in Midwestshire, and also what messages are communicated through enforcement practice.

#### Local Practice

##### **Zero-Tolerance as a call to action**

During enforcement team observations officers were asked about the distinction between the responsive general enforcement policy and the zero-tolerance approach of the 2009 report.

Officer A says we have no discretion when it comes to issuing tickets. He says he knows that they have an enforcement policy that says they should use lowest means possible to secure compliance, but sees an FPN as the lowest means. They usually give advice and warnings if the offence is not that serious and it will stop the problem. However litter is not considered one of these offences. He accepted that education

was important, but this has to recognise the fact littering *is a crime* and most people are aware of this (Field Notes 13/6/12).

Clearly the officer understands the importance of the report that created the team (and its determination to treat littering as serious crime.) The removal of warnings and advice thus treats litter as serious, and so serious that only an FPN (or something more punitive) will suffice.

At this time another officer, B, also became interested in the discussion

B agrees and says that education happens before the decision to litter is taken [the decision by the citizen to litter]. B, on spotting someone coming to the end of a cigarette..., will remind them of the location of the nearest bin and ask them politely to use it. If they choose not to then enforcement is the option (Field Notes 13/6/12).

This is not to suggest that officer B always seeks to educate. If the waste has already been discarded officer B will issue a notice without giving the litterer the opportunity to pick up the waste. (Field Notes, 13/6/12)

Officers characterise their enforcement actions (issuing an FPN) to recipients as the only option, even where official policy may dictate otherwise. Certainly the council's enforcement policy deals with matters other than litter; it could be argued that it deals with matters more important than litter, for example health and safety enforcement or food standards. It seems strange that enforcement should be the priority in minor littering when more socially harmful activities benefit from advice rather than enforcement first. Perhaps this is a reflection of local policy and the desire of councillors, manifested in practice, to combat littering because it is "visibly hugely intrusive" (Cllr, 6/6/13).

Litter education at Midwestshire is instead reserved for school children. The team offers regular educational talks at local schools informing them about litter and the possible punishments. On one occasion Officer B received a complaint from a local resident who was a parent of a student warned about littering. The complainant alleged officer B acted

surreptitiously by using an 'unmarked vehicle' to entrap their child. The team leader, G, found the complaint funny

G It's not "unmarked," it's just your own private vehicle is not deliberately marked. The question is: were they over 10?'

Officer B 'yeah'

G 'well they are lucky not to have had a fine then!' (Field Notes, 27-9-12)

Thus even the educational aspect of the enforcement role lands officers in difficult and antagonistic situations. Indeed one officer recounted how the team had to go into a school to issue an FPN:

G: We had one yesterday, again it's all circumstances really, but I had a phone call from someone who works out in "neighbourhoods"<sup>69</sup>. Young girl, quite gobby, she was offered the chance to pick it up, she wouldn't. She then decided to kick it down the street and kicked it all the way to end of the road, so that it wasn't safe for anyone to pick it up. So what the chap is now going to do is go into the school, pick her out in assembly, take her to one side and she will take the ticket. If she will accept restorative justice, then fine, if she doesn't then we will pursue the ticket. (Interview)

Thus, even where an educational option is felt appropriate, for a school-age child, there exists the potential for antagonistic interactions, which can precipitate the issue of an FPN if the recipient fails an "attitude test".

The idea of zero-tolerance is then deeply embedded in both the policy environment that led to the establishment of the team, and at the street level in officers interpretations of appropriate sanctioning policy (with the exception of litter FPNs for youths). For these officers zero-tolerance means exactly that, they will issue an FPN every time they witness an offence.

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<sup>69</sup> A department of the council: 'Neighbourhood Services'

### Zero-Tolerance as defence mechanism

In interactions with FPN recipients the language of 'zero-tolerance' is often employed to prevent recipients being under the illusion that what they say can impact on the officer's decision. However, the officer also uses the 'zero-tolerance' phrase to reinforce the idea that, maybe, the officer wouldn't issue the notice if council policy didn't prohibit him/her from being lenient.

Officer C: The council does operate zero-tolerance regarding litter, I have no option but to issue you with a fixed penalty notice today. (Field Notes, 27-9-12)

And

Man: no... Fixed penalty?

A: Yes, because you have deposited litter.

Man: Yeah but I picked it up

A: Yes you have picked it up, but you wouldn't have unless we stopped you and spoke to you today

Man: Give us a chance man, do you know what I mean?

A: The council does operate a zero-tolerance regarding litter, I've got no option but to issue you with a fixed penalty notice today. (Field Notes, 27-9-12)

And

Man: So why.. I mean I could understand... can't you just like let me off for once?

A: I can't

Man: As I'm a nice bloke

A: I can't, there is a zero tolerance sir, it would be more than my job's worth, if I see something I have to action it. (Field Notes, 5-10-12)

In each encounter the recipient is always reminded that the council operates a zero-tolerance policy. This has the effect of closing down one particular avenue of debate: the justice of imposing the penalty in that particular situation. The use of zero tolerance here acts as a defence mechanism for the officer. He needn't engage in a debate over the justice of the penalty and instead merely point out that he has no discretion and has to 'action it'.

Enforcement practice then, at West Midlands, owes a significant debt to zero-tolerance ideas. This policy has been translated into practice. With the exception of one interaction with a suspect of littering<sup>70</sup> officers stressed that they *had* to issue the notice once they had witnessed the transgression. Of course one mustn't rule out the possibility that officers do ignore offending or choose not to see it, but the extent to which that can be quantified is difficult. What can be concluded from this research is that officers demonstrated in both words and actions that they felt compelled to act upon witnessing a transgression.

A complicating factor must be added to the claim that officers lack discretion. Officers did exercise discretion when they were unsure whether the legal grounds for issuing a notice had been satisfied.

Officer B approaches a woman who has thrown a cigarette end onto the floor outside her shop. Officer B tells the woman he isn't going to issue an FPN ... but she is very lucky that he is in a generous mood today. (Field Notes, 27-9-12)

At the conclusion of the encounter the officer was asked why he didn't issue the notice on this occasion:

B says that it is a grey area... because it was at a shop front and there were three bollards that almost fenced it off. (Field Notice, 27-9-12)

The 'grey area' the officer refers to is whether the land in question was public land; it is an offence (since the CNEA 2005) to litter on private land but only where the owner does not

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<sup>70</sup> The exceptional case involved an elderly resident who appeared to have learning and physical disabilities and was instead "let off" with a verbal warning and notified that a subsequent written note of the interaction would be sent to the person.



consent. The fact that this was a shop worker meant there was a 'grey area' about consent which B resolved by not issuing an FPN and instead gave her a 'ticking off':

B: 'She deserved ticking off for littering, as it sets bad example, even if on private land.'

Thus even when not issuing an FPN officers feel that they have a duty to carry out an action, in this case a warning, even though 'it is not technically an offence.' (Field Notes, 27-9-12) The zero-tolerance approach thus causes officers to tackle behaviour even where it is dubious as to whether an offence has been committed. Certainly in such situations these officers would not issue an FPN; however they still believe that ZTP demands some action be taken, in this case a 'ticking off'.

It is also worth pointing out that the above quotes demonstrate a problem with labelling OTSPs as "simple" (DCA 2006a). Even officers here admit that the law is more complex than policymakers would like to believe. In both cases the "grey area" doesn't fall easily into the policy dichotomy of "littering v non-littering". Here one can litter on private ground with the owner's consent (which may not be apparent at the point of OTSP issuing).

B was not alone in requiring a high standard of proof before issuing an FPN.

Officer H thinks he has just seen a man put a cigarette on the ground but his hand was obscured by a tree. The man walks away and H walks to the tree and sees a smouldering cigarette butt. He says 'we missed that one, I couldn't see him because of the tree, but I'm sure he did it...I have learnt my lesson; I have done that before, where I couldn't see, so I wouldn't give out another one because we can't prove it. (Field Notes, 27/9/12)

This desire to be certain, and to ensure offending falls within the legal definition, means that in some measure the criminal law's procedural protections are carried over into enforcement practice. Duff, Farmer, Marshall and Tadross argue that 'even if the criminal trial does not always occur when an individual is accused of a criminal offence it does provide a

fundamental background' (2004: 11). Here the fundamental background of the trial, (the requirements for reliable evidence beyond reasonable doubt), impacts on enforcement practice. Doubts about the applicability of the law, or the certainty that the offender is guilty, means that officers will not issue an FPN. Indeed the team leader 'drills' this into his team:

G: one thing I drill into them is that if you are going to issue a ticket, you issue it on the pretext that they are going to push it all the way to court. That way it keeps the standard high because no one wants them to go to court and say 'actually I'm not entirely sure' ... they only issue a ticket when they are 100% certain that an offence has been committed (Interview).

Officers involved in speeding enforcement, PND enforcement and PCN issuing, all stressed a similar need to be certain an offence had been committed before issuing the OTSP.

#### *Selling the Litter FPN*

As stated above "the sell" acts as a means of ensuring that OTSP recipients comply, as well as providing for a more positive interaction between recipient and officer. The "sales pitch", when done well, communicates to recipients the idea that the officer is mitigating the harshness of zero-tolerance policy by providing a cheaper, more acceptable alternative to court action. Midwestshire litter enforcement officers certainly used the "sales pitch" and it is recommended by management.

G: you do have to sell it to them, that you are doing them a favour by giving them the fine. Again it comes down to how the officer can relay that... you know how successful it is. (Interview)

On street interactions demonstrated 'the sell' in every FPN encounter observed.

B: Right basically I need your details because I'm going to give you an FPN of £50 - that is if you pay in the next two weeks. This gives you the opportunity to discharge your liability as this is a criminal offence. If it is not paid it will go to court and we can prosecute you. If it is not paid in two weeks it will go up to £80 and if it is still not

paid ...we will call you in for an interview under caution and then you can make your concerns heard. And then we will decide whether or not we will prosecute you. (Field Notes, 27-9-12)

In the “sales pitch” the recipient is told the penalty that is going to be imposed. In order to “sweeten” the £50 penalty option the officer then informs the recipient that the price will rise to £80 if it is not paid within two weeks. The “sales pitch” here is akin to a “buy now pay less” offer. The recipient is reminded that there are harsher potential outcomes, an increase in price and possibly a criminal conviction, but that this can be resolved by paying the bargain price of £50 if done within two weeks.<sup>71</sup>

In the following encounter a more structured sale of the FPN is given

A: OK I'll just explain this to you now. I do give you the option of giving you a fixed penalty notice. The FPN is £80 reduced to £50 if you pay within seven days. I must advise you that if you do not pay the notice the local authority may take further action against you which may mean the case being heard by a magistrate in a court of law. The maximum penalty upon conviction if you were taken to court is £2500. (Field Notes, 27-9-12)

Quite clearly there is a “sales pitch” here. Regardless of whether, objectively, the “opportunity” *is* a “good deal”, subjectively the officer wishes to impart the importance of paying the notice and does so by providing a cheaper, less punitive, alternative to court proceedings.

The consumerist nature of the interaction is also reinforced by the following exchange after the recipient accepted the notice

A: Ok that's the FPN. If you do decide to pay, the details are down there. You can pay by debit or credit card into any of the local centres or council offices. If you are

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<sup>71</sup> Although this officer got the time scales wrong. At Midwestshire the notice is reduced if paid within one week, not two. This did not affect this recipient as they stated they would pay on the same day.

going to pay then I recommend you pay within the 7 days so you can get the early discount of £50 not the £80. I'll leave that with you okay. Thank you very much for your time today (Field Notes, 27-9-12)

Schafer and Mastrofski's concept of the "sales pitch" (2005:232) is clearly applicable to litter enforcement here. The language is similar to sales in any form of consumer interaction, not only is the message "buy now, pay less" but also "buy now, many ways to pay, all to make it easier". Of course unlike normal consumer interactions, the "customer" here may not want to pay the price at all since the interaction is involuntary. The "sales pitch" then attempts to put recipients at ease by using the familiar language of consumerism and presenting the recipient with choice. Thus, although the interaction is involuntary, what the recipient takes away from the interaction is a voluntary opportunity to pay a lesser price to avoid a more punitive alternative.

The use of the "sales pitch" does not always gain immediate on street compliance; not all recipients are receptive to it

A: OK. For the offence of littering you could be prosecuted in the magistrates court and fined up to £2500 for the offence of littering. The council do give you option of paying an FPN which discharges your liability for that alleged offence.

Man: So how much are you charging me for this?

A: Right so the FPN is £80 reduced to £50 if paid within 7 days.

Man: wholly fucking ...how am I gonna come up with that much money man?

A: As I say that is an option open to you.

M: How am I supposed to pay that? I'm not even in working, how am I supposed to pay that? (Field Notes, 5-10-12)

The "sales pitch" was first offered to the recipient with the potentially harsher sentence at the magistrates court read out alongside the "option". This interaction gives the recipient a

choice of how to proceed, but that choice is surrounded by techniques of selling the FPN which contrast the negative alternative of court. There is a communication here, but not in the sense of Duff's rational and reciprocal engagement. Although the 'option' speaks to the rational nature of the consumerist recipient, the interaction is not reciprocal. Only the officer sets the boundaries of discussion with the "sales pitch", the "customer" is not free to walk away or decide to "buy" elsewhere.

The recipient here is bargaining with the officer over the offer, but the officer, despite giving a "sales pitch", is not in the "market" for any further deals. Instead the officer reinforces the fairness of the bargain

A: What this does, it doesn't say you have got to pay the fixed penalty; it gives you the option of discharging your liability for the offence... I do have to advise you that the maximum penalty upon conviction in the magistrates' court is a fine of up to £2500. ...As I say the council do operate a zero-tolerance policy, there are litter bins around. (Field Notes 5-10-12)

Throughout this interaction the officer has attempted a number of strategies for gaining acceptance from the recipient. They attempted to sell the FPN, but when this did not have the desired effect, another distancing strategy (similar to the ZTP one) was used. The officer states the 'council do give you the option' which suggests that the officer is like an honest broker between the council and citizen. It seeks to transmit a message to the recipient that the officer is trying to get them the best deal possible from the council. Ultimately the officer seeks to persuade that it is the council that is forcing the officer to do the enforcement, whilst presenting themselves as somewhat distanced from that authority. When even this approach fails, the officer falls back on the idea of the FPN as an option. It need not be the one chosen by the recipient; they do not have to pay it, but if they don't the matter will have to be dealt with in court.

### Communicating through three levels: national policy, local policy and practice

From the viewpoint of communicative justice these “sales pitches” don’t express moral condemnation (Feinberg, 1977; Kahan, 1996). There is no expression of revulsion in the officers’ words or body language. Furthermore the interaction could not be categorised as communicating a form of ‘secular penance’ or ‘communication of deserved censure’ (Bottoms, 2001:30) since there is no sense in these communications that the accused has done wrong, ZTP policy may aim to transmit this message but it certainly does not come across that way on the street.

This is an interesting contrast from local policy since that suggested a more expressive desire to highlight the wrongness of littering. It is worth recalling 2009 cabinet report setting up the team spoke of littering being a criminal offence and ‘*must be dealt with as such.*’ (Midwestshire, 2009:38) (Emphasis added). Here the street level has not carried through the policy message intended by local elected officials. Instead the communication, on a transmission view, transmits the idea that if you have the money available at the time, you can afford the best option possible, a small penalty. In fact Carey’s ritual view of communication (‘the representation of shared beliefs’ (1989: 18)) takes our understanding of “the sell” one step further towards O’Malley’s consumerist framework of regulatory fines. The “sales pitch” is the enforcement officers understanding of appropriate consumer communication. The citizen is treated as a rational consumer who can spot a good deal when one is presented. The “buy-now pay less” offer represents a shared belief in the appropriate use of consumer language to understand the interaction.

This use of consumerist language seems at odds with the original intentions of both the local and national policy. As discussed (chapter 3) the introduction of the littering offence, and the introduction of an FPN, was sometimes loaded with moral charge. Litterers were seen as ‘louts’ or ‘yobs’ to be punished, or deterred through strong enforcement action. The use of consumerist language, and approach, takes this communication away, in effect it relegates punishment to ‘another bill to pay, not as an occasion for moralized commentary.’

(O'Malley, 2009:108). Certainly in litter enforcement practice in Midwestshire there is no moral condemnation communicated. Instead recipients are offered "opportunities" or "cheap deals" to make the problem go away in a quick and painless fashion.

Although ZTP may suggest that deterrence is a relevant factor in enforcement practice, in that it suggests increased certainty of capture, the actual encounter itself paints a different picture. Recipients are not informed that officers are seeking to deter behaviour; instead the message is that once caught there is a relatively easy and cheap means of avoiding censure. Thus talk of swift and salutary messages being sent to transgressors is absent in the actual messages communicated to recipients. In enforcement practice in the litter context it is not swift and salutary punishment that is sold, but a swift means of avoiding salutary punishment.

### Parking Enforcement

#### Local Policy

Midwestshire council employ 40 officers to deal with PCN traffic enforcement - 20 civil enforcement officers (CEOs), 10 officers dealing with representations and appeals against PCNs and a further 10 staff dedicated to car park and associated maintenance. The CEOs are arranged into a team who are managed day to day by a principal officer. That officer reports to the senior manager for parking and enforcement, who in turn reports to a strategic manager for enforcement services. Both senior officers are involved in strategy and policy on enforcement for litter and parking. Both officers are also involved in strategic decisions affecting traffic control in general (i.e. not just enforcement, but also traffic regulation). The data in this section is drawn from interviews with two elected officials, a senior strategic manager, a section manager, one team leader and two CEO's.

Parking enforcement in any local authority, for the most part, operates ZTP due to the absence of "offenders" at the point in which "offending" is discovered. Of course officers themselves may choose to ignore offending, although none of the officers in this study

admitted to this. However, as one officer acknowledged, regardless of the idea of zero-tolerance they would continue to issue PCNs due to their own sense of professionalism.

CEO X: Every day I have worked here I have never not issued at least one ticket. So on Christmas Eve or New Year's Eve if I am working I will go out and get just one.

AS: Why one and not none or more

X: Because I have never come in and not booked any.

AS: So it's kind of like a professional pride thing then is it?

X: You could put it that way (Interview, 24-4-13)

It is unusual, although by no means rare, for CEOs to issue PCNs where there is a driver/owner present.

In Midwastshire officers are also told that they are not to use discretion when witnessing transgressions.

They (CEOs) don't have discretion. I think that is a very dangerous thing... it confuses the enforcement... if you have got 20 officers all applying their own rules it gets into anarchy, the system doesn't work, complaints about people then come in as someone hasn't had the same discretion as somebody else (Interview, Parking Services Manager)

The deputy leader of the council echoed this

I mean take traffic wardens, if people know that they have a higher or lower discretion, then they are more like to be arguing the case... Whereas if they know there is absolutely no discretion, that changes the circumstances, it can't be nice being in that position. (Interview)

Thus in local policy the absence of discretion for parking enforcement is seen as both necessary and the only fair way to operate. Partly this is a reflection of the absence of *mens*



rea in parking offences. Officers are not asked to judge a person's actions based on their intentions. If discretion was available then, as these policy professionals perceive, it could lead to an arbitrary form of justice.

Accordingly local policy does not allow officers the discretion to cancel a PCN. Of course they may simply ignore the transgression, although the need to show results, and having their performance monitored means that it would be unwise to ignore too much offending. This is not to suggest that officers have targets, instead there is an expectation built into the annual budget of a proportional contribution from penalty income as the Senior Strategic Manager stated

You never set a target. But there is always an income expectation attached to it  
(Interview)

It is via this expectation that the idea of no discretion / ZTP is communicated to officers.

#### Local Enforcement Practice

During PCN enforcement in Midwestshire officer discretion is rarely exercised. Most PCNs are issued to vehicles where the driver is absent, and may not return for quite some time. This is not to suggest that the CEO's role is without conflict, when asked how often they received aggravation from members of the public, the officers had this memorable reply.

AS: I suppose one thing to ask is whether you get much grief from members of the public

X: Yes we do, but not as much as people tend to think

Y: Yes every day you get the odd remark

X: But threats of violence or anything like that, perhaps once a fortnight to once a month, it can vary. Then again you can have it twice in one day; it depends on the member of the public. (Interview)

Prior to X's last statement the anticipated answer had been that physical threats of violence were rare and, as such, the actual response of once a fortnight was somewhat surprising. This demonstrated the difference in sensitivity to expectations of violence between the officers and researcher. In order to overcome expectations of violence the officers have instead developed defensive strategy; they seek to *depersonalise* the enforcement.

X: Yes but I always say "I don't issue penalties to people"

Y: Yeah to cars init.

X: I only issue them to vehicles. I'm not bothered who the person is, if the vehicle is committing an offence, I book the vehicle. I try to distance myself from the person, it's the inanimate object I'm doing (Interview)

The language here again reinforces O'Malley's (2009) point about the de-individualisation process through regulatory fines. As part of a consumerist approach to enforcement O'Malley claims that the 'individuality of the offender is not an issue only a specific role or "dividual" [and] in this respect, the fragmentation of the legal subject allows a certain degree of anonymity to be attached to those sanctioned...' (2009: 83). By depersonalising the interaction these officers not only rely on consumerist ideas (the dividualised car owner), but also use that depersonalisation (dividualisation) as a defence mechanism against aggrieved citizens. Thus, as an alternative, officers 'distance' themselves from the idea that they are punishing an individual at all, they instead merely 'book the vehicle'.

#### *Partial Discretion*

Despite the claims above and contrary to the bold statement from the enforcement services manager, and the CEO's themselves, officers will occasionally exercise discretion and not issue a PCN, albeit for practical rather than policy reasons.

X: Yeah it's... the discretion is... if somebody is dropping somebody off, you just ignore them because they are going to be gone and you are not going to have time to issue a penalty anyway. (Interview)

Thus even with ZTP the option to ignore the offence arises, the officer can choose not to see the offence. However, this officer is not saying that the offence is being ignored, what is being described is the officer's inability to issue PCNs when there isn't enough time to go through the process. The length of PCN issuing varies according to the regulation in question. Some require five minutes observation before a PCN can be issued, others can be issued immediately. The length of an immediate notice takes approximately one minute to complete and print on a hand held device (Field Notes, 24-4-13). Given the focus on speed in national policy it is somewhat ironic that officers are still, despite technological advances, prevented from the laws complete enforcement by the speedier transgressor.

Y: If there is somebody in the vehicle 'Can you just move along?'...Because you think that by the time you have printed the ticket out they will have gone. So you might as well ask them move in the first place ... plus you are clearing the road (Interview).

These CEOs were attuned to the written policy of Midwestshire which did allow for discretionary judgements 'in cases where the driver returns to the vehicle before a PCN has been issued; a verbal warning may be more appropriate.' (Midwestshire Parking PCN Processing Policy, 2010) This policy ties in with one of the main purposes of parking legislation: to prevent and remove obstructions of the road network. Thus there is a synthesis here between policy intentions and policy practice; enforcement here represents a responsive regulatory approach (Ayers & Braithwaite, 1992). If officers can clear the street without issuing PCNs then this is the preferred option, it secures compliance without formal enforcement. Thus the zero-tolerance (absence of discretion) approach is mitigated where it is unlikely CEOs will have time to issue the PCN.

Despite this congruence between policy intentions and practice, the increasing reliance on technology has provided a means, in certain situations, to reassert zero-tolerance policy in practice. Midwestshire council have a mobile enforcement camera car which captures various automatic parking transgressions, typically waiting in a no-loading zone, driving

through a bus lane and waiting on a zigzag line by a pedestrian crossing. With these offences there is no defence; the vehicle's presence in a prohibited location is automatically an "offence". It is difficult to say what would happen in these situations without technology - the CEO may let the driver go without punishment, although there is facility in law to issue PCNs by post where the driver drives away before the notice is issued (Regulation 10, Civil Enforcement of Parking Contraventions (England) General Regulations 2007, SI 3483/2007).

The use of technology to capture illegal motoring behaviour was supported by CEOs

X: The mobile enforcement vehicle is a move to the future really isn't it.... Well I can go out in a day, and say on average I issue 8 PCNs, I can go out in the camera car and I can come back with up to 30 easy time stamps<sup>72</sup>. Some of them could have two or three [vehicles] on each time stamp

Y: [It's] virtually out from 8.15 till 10pm, so you are talking about 60-70 PCNs, at £70. ...It is a good thing for us because it takes away that confrontation ...a Kerb marking there really is no discretion ...If we see 'em we just bang 'em. (Interview)

The CEO's therefore recognise the benefit of technology in removing the possibility of dispute and hence an awkward conversation with a motorist. Not only are the officers unlikely to interact with any driver (they are safe in their own car) they also have categorical evidence of transgression. This, given the need to provide an 'effective' service, secures CEOs in their role as they can issue significantly more PCNs than they would on foot.

Again it is worth noting how the enforcement vehicle is seen as a positive move in removing confrontation. In the enforcement of parking, these officers will encounter citizens who are not used to being treated as a problem for the legal system, these citizens may be argumentative, disruptive or even violent on occasion; The use of technology is another helpful strategy for the officers to distance themselves from potential confrontations.

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<sup>72</sup> A time stamp is an indication of "offending"

*Targeting performance: revenue generation as an aspect of enforcement policy*

There is a common belief amongst motorists that parking enforcements main aim is revenue generation (discussed in Chapter 7). In Midwestshire the relationship between parking and profit is more complex than the revenue-raising criticism suggests. Reliance on ZTP can express the idea that revenue generation drives policy, since seemingly incredibly minor “offending” can lead to automatic financial punishment.

The Strategic Manager for Midwestshire rejected the revenue generation claim.

I can never understand that argument because you can't set, you can't guess how many people are going to park illegally... it's a variable you are not in control of. So you can't set targets, you can't say 'well we will guarantee to issue 3,000 penalties a month' (Interview)

Instead

Most of our income comes from the pay and display income, and people that comply with rules, so people who pay at the meters, people who buy permits. The penalty income is very small in comparison, but you wouldn't get one without the other ...If you have no enforcement you would have no deterrent and people wouldn't pay to park... So it is not all about income, it's about providing a service (Interview)

Thus revenue generation is not a deliberate aim of enforcement policy at Midwestshire. However complicating this picture is the legal requirement that parking provision in local authorities' should not be a burden on the general tax payer.

The other thing that is in the legislation we, as a parking department, are supposed to be self-financed. So we are not supposed to be a drain on the taxpayer because it wouldn't be fair. ...we are a motorist service and not every tax payer has got a car and not everybody uses those services, so you couldn't put everything in the general fund in that way (Interview, Parking Services Manager)

Thus to a certain extent parking provision needs to provide a significant income in order to meet the organisation's overheads in providing a parking service.

The CEOs also indicated that there was no pressure from management to issue a set number of PCNs

AS: Are you told before you go out how many tickets you are expected to earn in a month?

Y: No

X: No

AS: Nothing like that

Y: They can't do it can they.

X: I could do twenty a day and nothing is said, I can come in and do none a day and nothing can be said ... No pressure, there is no pressure on us issuing tickets, well that's what I think (Interview)

However officers were clearly aware of the need for the office to be self-financed and of the growing impact of, and focus on, austerity measures being implemented across the council.

X: I don't know if Y feels this way, but I don't feel like I have major pressure on me, but I do feel that the more PCNs we issue, unfortunately, black or white, keeps our jobs safe really

Y: I do look at it like that, yeah. (Interview)

Thus the officers' on-street discretion is partly controlled by their own sense of need to provide income for the authority. These officers are not subject to targets and instead their discretion is bounded by their self-interest in keeping their jobs safe. Not only does this influence the decision whether to issue a PCN, but it can also drive where PCN enforcement takes place.

X: I'll go where I know I can pick tickets up. ...mainly you stick to what we call hot spots, there is a lot of hot spots, there are places that are not hotspots and they are normally customer led, complaints, and people phoning in...

AS: Why do you choose those hotspots, because you know you will get people?

X: Yeah

Y: And also it is because it is where it is a congested area; that is the majority of places where we tend to go.

Thus discretionary judgement does arise for CEOs, in that they can determine where they choose to enforce the law on a day to day basis, although they have little discretion in choosing whether to enforce the law in total.

#### *Selling the parking notice*

Given the general absence of a physical interaction between officer and transgressor the idea of the “sales pitch” is not one that applies to CEOs in their daily duties. CEO's in Midwestshire, although confronted with problematic, and sometimes violent, encounters have little need to “sell” the notice. They may seek, should one occur, to mitigate the uncomfortable social interaction with a driver, by telling them ‘I only book the vehicle’. Although this may not work as an argument, it matters little since the officer does not need cooperation from the driver during any (admittedly unlikely) interaction since all they require is the vehicles registration number. The officer can affix the PCN to the vehicle or, if the recipient attempts to prevent the officer from doing so, they can issue the notice remotely via post. Thus there is no need to “sell” the notice since there is no need to gain the person's cooperation in the encounter.

This is not to suggest that the “sales pitch” does not occur. Instead the “sell” is through the PCN document itself. The PCN is a very dense document that requires specific

information to be listed.<sup>73</sup> The PCN charge amount is at the discretion of the local authority, although they must specify a higher and lower charge in respect of the various offences subject to PCN enforcement. The higher rate PCN covers a variety of parking offences including parking in 'no loading' areas, parking without a resident's permit, being parked in a place for a dedicated class of vehicles, amongst many other types. The lower rate covers minor parking offences such as expiry of pay and display, being parked outside a marked bay etc. Local Authorities must offer a discounted penalty amount equal to 50% of the full charge if the notice is paid within 14 days. Thus the law itself offers something of a "sales pitch" - the "bargain" 50% reduction if paid early.

It is surprising that the 50% reduction is not drawn immediately to the attention of the person reading the PCN. One would expect, given the prominence of the "sales pitch" in litter enforcement, that the discount would be given prominence on the PCN. It is not; it appears in the third section of the notice in the exact same font as the previous paragraph highlighting the undiscounted charge and is not in bold type. Whilst the information is there it is not given any greater prominence than the other legally mandated information on the notice.

Although the consumerist nature of the PCN may seem more prominent than the littering offence, since the behaviour in question can in many instances be tied to a consumerist decision (to park and risk being billed for taking up space) the more consumerist attitudes on display in litter enforcement are lacking. The reduced price offer is not, in West Yorkshire, given great prominence when communicating with transgressors.

The "sales pitch" is not readily apparent in PCN enforcement, over and above the laws general attempt to secure compliance through the discounted offer. This lack of an obvious "sales pitch" reinforces the idea reported above, in litter enforcement, that the "sales pitch" acts as a sweetener to prevent hostility in the person-to-person enforcement encounters.

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<sup>73</sup> see Regulation 8, Schedule 1, The Civil Enforcement of Parking Contraventions (England) General Regulations 2007, no. 3483



The need to gain the compliance in litter interactions, to obtain a name and address, means that officers have to sell the notice. Here it is not needed since the VRN (vehicle registration number) of the vehicle is publicly on show and removes the need to obtain the owners details, since this can be done automatically through the Driver and Vehicle Licensing Agency (DVLA).

### Policing: The Local Context

Compared to the previous two contexts police OTSPs are radically different. The difference inheres in the range of work that police constables are asked to do, the available outcomes that a police officer has at their disposal, and the organisational support that each officer has.

In the policing context the relationship between national and local policy is complex. The traditional notion of the police acting as “domestic missionaries” in the historical endeavours of centralized states to propagate and protect a dominant conception of peace and propriety’ (Reiner, 2010:8) is mitigated by the substantial discretion that is invested in individual officers. As Reiner states

all police forces have been characterized by the discretion exercised by the lowest ranks in the organization, necessitated by the basic nature of police work as dispersed surveillance (2010:8).

This dual conception of the police as capable of being directed to facilitate certain aims and, at the same time, being given great discretion in their work means that the local policy context is difficult to map. The policies produced by Midwestshire Police are akin to a guide, setting the outer boundaries of acceptable discretion, rather than looking to control actual practice. National policy also allows for, and accepts, police officer discretion in using OTSPs, they are frequently described as “tools” for police officers on the front line.

Out-of-court disposals... when they are used appropriately ...are a simple and useful tool for dealing quickly and efficiently with minor offending (MOJ, 2012c:37)

The “tool” metaphor highlights the tension between policy and implementation in the policing context. The aim of OOC policy may be to enforce more against minor crime but it cannot be specified as such due to the importance of maintaining police discretion and operational independence. Instead policy labels the OOC (here the OTSP) as a tool for police officers to use, and clearly hopes that they will do so. The “tool” here operates as a “nudge” towards implementing the aims of governmental policy, without actually mandating that it should be used. As Thaler and Sunstein state ‘A nudge ... is any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options... Nudges are not mandates.’ (2008:6) The OTSP then, as a “tool”, nudges officers towards their use because they are ‘simple and useful’ (MOJ, 2012c:37). There is, therefore, less likelihood of policy incongruence between national and local policy since national policy already recognises the need for policing discretion, instead national policy nudges officers rather than mandating action.

#### *Disorder: The PND*

Midwestshire Police have two dedicated custody suites. The observations undertaken in this research were based in the northern unit, which has 40 cells split into four wings, with each wing supervised by a custody sergeant. The custody sergeant is supported by civilian custody officers provided by a private security firm. Additionally, there is a dedicated Custody Investigation Team (CIT) which carries out investigatory work on less serious cases of criminality, allowing arresting officers to return to the street once the detained person (DP) has been processed into custody. The data in this section is drawn from interviews with three senior officers of Midwestshire Police (one superintendent and two senior civilian managers) 9 police officers, 30 hours of custody observation, and 8 hours of street observations.

In 2011 the northern unit processed 18,000 persons, and up to the first observations (November 2012) the unit had already dealt with 14,000 persons. It was expected that in the Christmas run up the custody unit would process at least another 4,000 DP’s (Field

Notes, 16/11/12). Since the PND issuing high point of 2007 (Midwestshire issued over 3000), Midwestshire has seen a 40% reduction, according to the latest statistics (2012/13), in the number of PNDs issued (now just under 2000). In respect of alcohol related PNDs (Section 5 and D&D) there has been a reduction of 30% from 2010 to 2012 (from approximately 1700 to 1200).

*Police Officer Discretion and the PND: The practice*

The police officer's role is characterised by wide discretion (Reiner, 2010) with officers frequently involved in resolving a tension between law and order (Skolnick, 1966). This discretion applies to the decision to take action following an incident and also the form of such action (arrest, out of court disposal, etc...). Perhaps the most common discretionary action of police officers is to do nothing in response to behaviour: '[The] police routinely under-enforce the law, using their discretion to deal with incidents in a variety of other 'peacekeeping' ways even if an offence has been committed' (Reiner, 2010:19).

Officers on street do have a number of options prior to issuing a PND. They may: ignore the behaviour, issue an informal verbal warning or issue a section 27 notice<sup>74</sup>. If none of these options are appropriate there are two further options, the officers may issue a PND first, or they may arrest the offender and have a custody sergeant decide whether to issue the PND in custody. As discussed (chapter 3) PND's originally were designed as simple and speedy measures for dealing with disorderly behaviour *on the street*. Coates et al's PND research (2009) was conducted at a site with a 74% on-street / 26% custody split for PNDs. Midwestshire by contrast, issued the majority of its PNDs for section 5 and D&D in custody: 83% in custody, 17% on street. Coates et al's findings that police used PNDs to 'dampen down disorder' (2009: 423) cannot be translated to Midwestshire, since arrest was

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<sup>74</sup> This power allows a police officer, where they suspect an individual is likely to contribute or cause alcohol fuelled crime or disorder, to require (in writing) an individual aged over 16 to leave 'the locality' and not return within 48 hours (or any such time as the constable may specify).

the frequent outcome prior to issuing a PND. The most probable option for an officer in West Midlands was to issue the s.27 notice if the behaviour took place earlier in an evening and follow up with arrest and PND later should the s.27 notice not solve the problem. In West Midlands half of all arrests for s.5 and D&D end in a PND, a further quarter ends in the accused being charged.

Issuing so many PNDs in custody is a split from the original intentions of Blair when introducing the PND, he originally envisaged “thugs” being ‘taken to a cash point’ (Blair, 2000). Blair also indicated that ‘summary justice, on the spot, is the essence of the proposal’ (HOC Research Paper 01/10, 2001). In practice the policy is not uniform, some forces embrace the on-street approach others favour custody (HMIC, 2011). West Midlands local policy envisages the PND as an on-street penalty stating that PNDs are ‘intended to be swift and less bureaucratic than processing an offender *through custody* and the courts’ (West Midlands, PND Resolution Policy, emphasis added). However, it is clear that in practice there is some incongruity with this aim, although as most s.5 and D&D offenders seemed to be in drink at West Midlands, it comes as no surprise they were dealt with in custody. Here national and local policy agree that PNDs should not be issued on-street to drunken offenders and instead should be issued in custody.

The decision to issue a PND at West Midlands is therefore, in the majority of cases, taken by a custody sergeant after the detainee has been allowed sufficient time to become sober (or in the case of shop theft to allow sufficient time to obtain evidence (typically CCTV)). In West Midlands the custody sergeant’s discretionary decision is bounded by organisational policy, which, in the case PNDs, mirrors national policy, in that it prohibits issuing a PND if the recipient has received a previous PND in the last 12 months, or a more serious disposal such as a court hearing or caution.

AS: Who makes the decision, and how, with a PND.

Custody Sergeant A: The first thing I do is to check the computer system to make sure that they haven’t got any previous form, or they haven’t received a PND any

time in the last 12 months or a succession of PNDs over the last few years. If they have received a caution or conviction in the last 4-5 years, depending on what it is for, we will not issue a PND since they have failed to show that they can change. ... Once we've seen that he is eligible then it comes down to whether he accepts that he has done wrong. If they still dispute it then the PND will not be offered and they will be charged. (Field Notes, 17/11/12)

In exercising their discretion custody sergeants are not only constrained by operational policy, but such discretion is also mediated through technology. Each sergeant has access to bespoke software which includes the PNC (Police National Computer), Midwestshire's custody record software, and PENTIP (national out of court disposal recording software). Additionally the software ensures the officer complies with various PACE and legal requirements through providing diarised prompts at the appropriate point. It also provides a checklist of actions to take depending on the proposed outcome of custody. (Field Notes, 17/11/12)

Although the sergeant's discretion is constrained somewhat by national policy dictating the number of PNDs that can be issued before more serious action should be taken, if the DP is eligible for a PND then the more traditional discretionary judgement of "attitude" takes place. Loftus states 'in order to pass the attitude test, people were required to display deference through, for example, being polite, apologizing, or admitting their guilt.' (Loftus, 2009: 112). In Midwestshire one custody officer had a less prosaic way of determining attitude for the acceptance of a PND.

CS.A: If he is a being a bit of a dickhead when he is being brought in (or when releasing) then he will be charged.

Reiner describes the attitude test as the incurring of 'sanctions for an offence which otherwise [would] be overlooked' (Reiner, 2010: 170). With PNDs the attitude test does not determine whether an action is overlooked but whether it is charged.

Police: Oh forget it then, you are just being argumentative, you are being charged.

The Sergeant turns to me when the man has left and says:

CS. B: 'What a knob! He was going to get a ticket and now look he has to go to court, I mean he wasn't totally out control when arrested but was shouting and being abusive to officers ... in the middle of night when normal people expect a bit peace and quiet.' (Field Notes, 17/11/12)

This accused was charged under s.5 Public Order Act 1986 and subsequently his solicitor informed the researcher that the defendant had attempted to convince the police to reconsider the PND with no effect. Instead his solicitor managed to obtain a caution for his client from the CPS (Field Notes, 29/11/12).

Discretion then, in the PND context, is multi-faceted and bounded by a number of inputs that lead to the PND decision. Unlike litter enforcement the phrase 'zero-tolerance' was never mentioned in PND encounters. Unfortunately due to the custody/on-street split the on-street interactions between officers and recipients in West Yorkshire were not studied due to officers stating that it would be an unlikely event to actually witness the interaction on-street and hence days of fruitless observations could pass by without witnessing a PND case. It is possible that zero-tolerance language is used in these encounters, but unfortunately at present this research cannot answer this question. However, in the majority of PND interactions in West Yorkshire, those issued in custody, the phrase zero-tolerance was never used while issuing a PND.

One reason for the lack of zero-tolerance language is the absence of the need to convince recipients to comply. The fact the recipient had, in all likelihood, spent the previous eight hours in custody helps to gain their deference. The promise of release from custody is likely to focus the recipient's mind on that factor rather than the outcome of the encounter. Thus the likelihood of engaging in challenging communication is lessened, especially where that PND recipient is likely to be a new entrant into the criminal justice system (Halligan-Davis and Spicer, 2004:3). This is not always the case, as some recipients did challenge the

officers. In these situations, discussed below, officers did try to sell the disposal and so officers do occasionally need to try and gain voluntary compliance from the recipient.

### *Selling the PND*

As stated above selling the notice acts as an attempt by officers to demonstrate fairness and gain compliance through contrasting the potentially harsh sentence should the recipient contest the matter in court. In the PND context the “sales pitch” was in evidence.

CS A says he likes to “soft sell” the PND. He likes to give the example of a case from a couple of years ago to highlight the negative alternative. A young man was issued with a PND ... He was summonsed to court for non-payment but did not attend ... as he was at the V festival. The magistrates did not think this was a valid excuse so they fined him £300 + £300 costs and victim surcharge. So he likes to tell people this so that they can see the benefit of the PND. He tells recipients “it’s like a speeding ticket, only it’s better than one of them since you don’t get any points either. The PND it’s like your get out of jail free card.” (Field Notes, 16/11/12)

In the interactions that officers have with PND recipients the “sales pitch” is largely similar to that used in the litter context:

CS. C: So there are two options for you today, you can: *not* be convicted of the offence, there will be no caution and it will be job done if you accept the penalty notice. Or if you feel like you want to argue the toss and say that you are not guilty then you *can* be charged. If you are charged and found guilty then you will have a conviction against your name, you will also be fined and have to pay costs, which will probably be more than the penalty notice. The option is yours, which do you want? (Field Notes, 18/11/12)

This presentation to the accused is loaded in favour of the PND, not only will they avoid conviction, ‘it will be job done’, the end of the matter. However if the DP does not accept the PND then they are sold a potential future, one that involves court, being found guilty,

having a conviction, a higher fine and costs in excess of the small penalty. Here the PND is sold, not only on the basis that it avoids the potential pitfalls of court, but also by reinforcing that the offer is more generous than a speeding FPN: 'you don't get points on your licence'.

Furthermore some officers also "sell" the PND at the expense of the caution, and here sell the idea of "clean slate".

Officer: With a caution it is not a conviction but it is disclosable and you will not get another chance, you would have to disclose it on any job applications where they ask if you have ever had any cautions. But on the plus side there is no money element, there is no fine.... A fixed penalty notice is what it says it's an £80 fine which you have to pay within 21 days, yes it is money and you do have to pay, you cannot just ignore it. The advantage of this however is that there is no criminal record, there is no sanction on record, we only keep a note of it so that you can't be offered another one tomorrow or at a later date so it basically comes down to whether you can afford to pay... (Field Notes, 5/12/12)

Here the choice for the recipient is between the caution and the PND, again the officer seeks to sell the PND as the best option because it removes the 'sanction' from the recipient's record.

Payment methods are also discussed:

CS C.: Ok you don't have to pay the fine today, you don't pay here, you have 21 days to pay the fine or it tends to double. (Field Notes, 17/11/12)

CIT Officer: you can pay by phone just make sure that if you are going to pay you do so in the 21 days as otherwise it goes up to £120. (Field Notes, PND 7)

CIT Officers: Yeah if you ring that number there they will explain it again and how you can pay the ticket (Field Notes, PND 9)



These pitches, perhaps not as brazen as those in litter enforcement, demonstrate how easy it is for the “consumer” to pay. Again the “sales pitch” is followed by typical consumerist concerns: how and when to pay.

D: Yes I'll take the PND. Can you pay by cheque?

PC John: I should think so as long as you have a cheque guarantee card, but not sure as they a phasing out cheques aren't they? If you ring up that number they will tell you everything you need to know, just remember to get a reference number in case of any later dispute. Remember you have 21 days to pay the penalty after that it automatically increase to £120 and will be registered with the court. (Filed Notes, 5/12/12)

Examining these interactions through Carey's idea of symbolic communication, one does get a sense the process is, following O'Malley (2009), beset by consumerist concerns. In each of these “sales” the “consumer” has a choice presented to them. They can choose to take the matter further; if they do so, then they are reminded that there is extra cost involved. The language is replete with examples of consumer concerns, not only are the recipients given a choice over whether to pay or not (of course such choice is not recommended by appealing to consumerist self interest in reducing the price) they are also given a choice over methods of payment. Thus the choice for the “consumer” is made easy by providing quick, simple and relatively painless payment methods with no sense of moral condemnation for their actions.

#### *Policing the Roads: Discretion and the motoring FPN*

Motoring FPN enforcement generally adopts a ZTP approach, since the majority of FPNs issued by Midwestshire are enforced through fixed automatic camera. Upon witnessing speeding the camera technician has no discretion to ignore the offence, and the FPN process is started automatically if the evidence indicates speeding. Midwestshire have a dedicated road policing unit who also undertake speeding enforcement through a mobile

camera detector van. The van's recording device records a vehicle speeding and this is then relayed to police outriders who pull the motorist over. Here police officers can exercise discretion:

PC Harry... there have been times when due to the layout of the road we have actually said to the speed camera van 'we only want to know when it's 40 and above and then we will do them,' because it just sits a bit more comfortable, 10mph above the speed limit. ...It sits more comfortably when you are doing the enforcement side. You know 'you are supposed to be doing 30' 'well how fast was I going?' 'You were doing 40.' You know if you are doing 36 or 37 ...you know "slow down!" It depends on the layout of the road, if there is a school there, or if there is a particular accident hot spot then we will stick with the 35 because that is what the government says, but we have got the power of discretion. (Interview)

Thus, when police officers are enforcing motoring law, they do have discretion to enforce speeding laws in a way that does not capture all speeding.<sup>75</sup> Discretion can thus be exercised to militate against the perceived harshness of strict enforcement of 30mph speed limits, and remove a potential flashpoint between citizen and officer.

Once the driver is over the threshold then police officer attitude switches to zero-tolerance.

PC Debra: There is no doubt for me that they have committed the offence. It goes back to what we were talking about earlier, discretion, if they have done wrong, and I have to be 100% sure that they have, I don't do it any other way now, they will be stopped. (Field Notes, 25/3/13)

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<sup>75</sup> Indeed ACPO guidance suggests a tolerance level of 10% plus two mph to such speeding enforcement. Indeed even in fixed camera enforcement similar discretionary judgements arise in that cameras aren't sited everywhere nor are all maintained or fitted with the necessary film (Woolgar and Neyland, 2013, 110-111).

It is worth recalling that similar comments were made in litter enforcement. Here again if the officer is not 100% certain they will not take action, but when it reaches this threshold, enforcement is automatic.

Enforcement then, in Midwestshire, is a mixture of discretionary judgement about appropriate driving conduct combined with zero-tolerance for those who have found to be below the accepted standard. This is not zero-tolerance to all speeding (i.e. the level at which the law allows) it is an operationalised form of zero-tolerance taking into account the officers discretionary views about appropriate speeding levels.

Interestingly, despite officers feeling 'more comfortable' enforcing against more serious speeding behaviour (33% above the limit), in their interactions with drivers there is no indication that they view the drivers behaviour as morally problematic. Instead officers were apologetic to drivers.

PC Debra: Ok, sorry about that. But we can't just go round letting people off for speeding, however much we would like to, we have to do something. Sorry about that. (Field Notes, FPN 11)

Driver FPN 3: It's my own fault I know I should have done better.

PC Patrick: That's okay it can happen to us all.

(Field Notes, FPN 3)

Officers in the speeding context used a mixture of humility and humour to gain the drivers acceptance during the interaction.

PC Patrick: Sorry about this but I have to ask, would you describe yourself as white British?

Driver FPN 1 (Laughing) yes

PC Patrick: I know it is ridiculous isn't it but I have to ask

(Field Notes, FPN 1)

PC Patrick: Okay, it's just that they are telling me over the radio that it is a condition of your driving licence that you wear your glasses at all time that you are driving. Let's see them

Driver 2: (Puts on glasses)

PC Patrick: You see, you look very pretty with them on; I don't know why you would want to take them off. They suit you.

Driver 2: (smiles and laughs as do the other two occupants in the car)

(Field Notes, FPN2)

In each example there is a strategy of officers attempting to mitigate the penalties perceived harshness. The approach is a style of ZTP but rather than simply pointing this out to recipients, officers instead attempt to convey their own humanity as a means of fostering a compliant attitude in the driver. It is worth noting Dubber's (2006) point here about citizens seeing themselves as engaged in a 'common policing task with police officers' (2006: 14). Humour, understanding and self-deprecation are all somewhat effective strategies at minimising the feeling that the recipient is being policed. Instead the officer is seeking to put the recipient at ease by creating an interaction that reduces the distance between the police and the policed. These officers engage in a communicative strategy that Carey would describe as 'symbolic communication' (Carey, 1989:15). The officers not only communicate their human persona by engaging in humour and deprecation, but also reminding speeding offenders that 'it's okay it happens to us all.'

Of course not all interactions will be so friendly; it depends, to a large extent, on the communication between the officer and the citizen. If the citizen reacts negatively then officers can also respond in kind.

PC Patrick says it's about treating people calmly, and he will react accordingly. However, he says "this is all well and good but when someone is being abusive to me I will try to calm them down but there comes a point where I have to get more forthright and not be so respectful." .... "there has to be a mutual relationship, it

has to be the same both ways, I can't be polite and concerned when someone is just shouting and going up like a bottle of pop, there is a time and place for these things" (Field Notes, 25-2-13)

The extent to which the more friendly interactions communicate the intended messages policymakers want the OTSP to transmit is questionable. The message appears to be one of a common understanding of the apparent pervasiveness, and pettiness, of this form of enforcement, 'it happens to us all'. The fact that this is a road policing officer could further reinforce the idea that such enforcement is arbitrary, if even an officer with expertise in roads policing can be caught out. Furthermore, the idea that officers feel they have to be apologetic when enforcing these laws suggests a real concern with the laws legitimacy. It potentially communicates a message that officers cannot comprehend the underlying reason for stopping an individual recipient, even if, in reality, it is merely a strategy for getting through the encounter as easily as possible.

Indeed in this respect one officer stated

I don't really agree with this type of enforcement, I have some reservations about 30mph speed limit enforcement, particularly where the driver is going up to 40mph. I don't really agree with it but the powers that be have said this is right and I accept that. ...I would be much happier out catching real criminals, you know, set up in [Deprived Location] catching those with no insurance and those with stolen vehicles.' (Field Notes, 25-2-13)

Although this reservation doesn't impact on this officer's determination to carry out enforcement, it quite clearly does impact on the *way in which enforcement is carried out*. The belief that it is, for want of a better word, overkill, leads the officer to develop a communicative strategy that understands this, shares this belief with the recipient and demonstrates the officer has similar concerns. Whether this is a positive strategy/message depends entirely on where one stands on the purposes of OTSPs. From a policymakers perspective this is not a message that OTSPs should carry, it imparts no moral

condemnation. Indeed it doesn't even suggest that deterrence is an operating policy because the officer is essentially communicating that he doesn't believe it to be so.

However it is equally important that officers gain the compliance and willing acceptance of those they police. Treating citizens with respect not only helps foster compliance (Tyler, 2006) it also demonstrates the officer is reflexive and understands the concerns of the citizen. Equally possible, it may be that respectful treatment comes at the expense of respect for the underlying law, if even the enforcers cannot bring themselves to see the law as legitimate.

#### *Selling the Motoring FPN*

As discussed in PCN enforcement, the "sales pitch" does not need to take place with FPNs issued through the post, since there is no need to gain the compliance of the recipient in an encounter (as there isn't one). There is only a brief mention on the form that 'court proceedings may be issued' (Midwestshire, FPN) if the recipient does not respond to the notice, but it does not specify any potential penalties. As the driver will have been identified at this point, by the vehicle owner specifying who was driving under section 172 RTA 1988, there is once again no need to gain compliance. Thus reinforcing the idea that the "sales pitch" is primarily used to gain compliance in the encounter.

In roadside speeding enforcement the "sales pitch" takes a different form. With the growth of awareness courses officers have an alternative to the FPN that they can promote to motorists. Here rather than selling a better potential future (i.e. this can all go away with a small payment) the officers approach is more akin to a waiter at a restaurant providing a menu to a diner.

PC Patrick: Ok so what happens now is that you will be sent some details through the post about today and it will give you a choice of three options. I can tell you that at the speed you were doing according to our thresholds you would be eligible for a speed awareness course, is that something you would be interested in?

Driver 2: Yeah

PC Patrick: Ok what that course is... basically it costs £75 or thereabouts but it means you don't get a ticket or any points on your licence, it lasts about 4 hours, so it is over and done with quite quick

(Field Notes, FPN 2)

This interaction appears as equivalent to a waiter offering the 'special of the day'. The menu of options is set out by the officer, and at each stage they ask whether the consumer/recipient is interested in that option. In most interactions the menu never gets past the first option of a speed awareness course.

PC Debra: You can go on the speed awareness course, they are very flexible on dates and times, but it takes about 4 hours to complete and there is a cost of about £70. You can choose to have a fixed penalty which is £60 but it does put points on your licence

Driver 12: Oh I don't want that

PC Debra: Or should you choose, the matter can be contested at court. (Field Notes, FPN 12)

And

PC Debra: Right if you had been going 44 today (the driver was doing 40) then we would have to issue you a ticket with more points. But at the speed you were going you may be eligible to do the speed awareness course again. You don't get any points if you attend the course but you will still get a fine. There is a charge for attending the course. If you get the letter saying you can take the course but you aren't available on that day they are very flexible, so if it is not convenient you can change the days. (Field Notes, FPN 9)

Again consumerist concerns of flexibility, cost and convenience are apparent in the interaction. Not only does the course save the recipient points on their licence, it's also a 'very flexible' option, since the course runs on convenience to the "customer". In each FPN interaction observed, this menu of options was discussed. The "options" approach sits perfectly with the idea of offenders as consumers, they have choice, and the officer engages in pointing out which option they believe offers the best "deal". Thus the "sales pitch" is not only providing the officer with a means of characterising themselves as not always bearing bad news, but also providing relevant information that any consumer would want in order to make the appropriate choice.

The speed awareness course was welcomed by the road policing officers, some of whom had also been on the course more than once. Officers liked offering the course because it removed the potential for antagonism between officer and citizen.

PC Harry: The courses avenue I think has been well received in the police because it prevents us being that ogre all the time. Yeah it is going to cost you a little bit to go on the course but you are not going to get the points.... So it has taken a bit of those negative attitudes that people can have with traffic type offences (Interview)

By selling the course officers could, once again, demonstrate their fairness, 'not being the ogre', by offering a lesser sentence than the FPN. From a communication as transmission perspective (Carey, 1989), the transmission here appears to be, much like litter enforcement, one of leniency. The officers are seeking to transmit the message that they are being lenient and offering 'an opportunity' to the recipient (which if they don't accept may have more serious consequences). Whether recipients receive this message will be subject of the next chapter.

### Selling the courts as the ultimate alternative

OTSP policy is dominated by concerns with improving productivity (reducing cost and time), deterrence, and increasing the number of people subject to control. In the day to day



practice of police, litter and CEOs the overwhelming policy message communicated to recipients is a mixture of consumerist concerns and, seemingly, a communication that the magistrates' court is not a pleasant place for these recipients. Certainly no officer, in any OTSP context, sought to positively dissuade a recipient from exercising their right to challenge the matter at court. The right to request a hearing was always specified as an alternative:

PC John: If for any reason you are unhappy today or think that the court should deal with you rather than just accepting the penalty notice, then you should fill in this section (on the form). Whatever your choice it is entirely up to you, but please do not ignore it (the ticket). It will not go away.' (Field Notes, PND 13)

Indeed in each litter enforcement encounter the "sales pitch" referred to the availability of the magistrates court for the recipient.

Officer A: If you choose not to pay it then obviously what will happen you do have the right to go to court to appeal against that (Field Notes, 5/10/12)

However the "sales pitch" itself communicates to the recipient that choosing the magistrates court is an option laden with extra risk. Not only is it likely the recipient will be punished more severely, they will also have a criminal conviction. The magistrates' court is discussed as a viable, but risky and expensive forum in which to contest such a simple matter. The process of being caught, which appears intensely embarrassing for many OTSP recipients, is played on by the "sales pitch" as it presents a choice to the recipient at a moment of intense embarrassment in which they can choose to become anonymous again (by paying the OTSP) or be further embarrassed at court, with all the risks associated with that: (criminal conviction, reputational damage, heavy fine plus even heavier costs).

### Conclusion

A key finding of this chapter has been the need for officers to do more than simply issue OTSPs, there is also a need to gain the compliance of recipients where there is a face-to-

face encounter. Officers feel obliged to lessen the awkwardness of interactions they have with problematic citizens. To leave the citizen with something positive to take away from the encounter officers engage in selling the notice.

The reliance on zero-tolerance language by officers in the litter context allows them to attempt to gain the recipient's understanding and compliance by pointing out that it is not the officer that is issuing the penalty, but the policy; the officer has no choice. Likewise in parking enforcement, the officer "dividualises" the punishment; if a recipient is present they can claim that 'I only book the vehicle', thus attempting to remove an antagonistic situation by depersonalising enforcement. This is what O'Malley (2009), relying on Deleuze (1992), refers to as dividualised justice: '[t]he subjects of government are not so much the unique individuals ...but instead are fragmented dividuals that are the stuff of databanks, pattern recognition software, markets and a plethora of other distributions.' (2009: 159) "I only book the vehicle" is a dividualised aspect of PCN enforcement; it is the vehicle that causes the obstruction, not the individual driver committing an offence.

In the PND context discretionary judgement is present; officers can exercise discretion if they feel that the demands of justice dictate. Nevertheless the availability of that discretion is constrained by national policy on recipient eligibility to receive repeated criminal justice interactions. Furthermore the "attitude" test also has some input into whether the officer exercises their discretion to issue a PND, or refer the matter for prosecution. In the motoring FPN context discretion is frequently absent due to the reliance on technology to capture problematic behaviour, although discretionary judgements are made about the threshold at which enforcement takes place.

In the discretionary contexts the idea of "selling" the notice was apparent. Officers in almost every OTSP encounter attempted to "sell" the notice to the recipient by claiming they were going to 'offer an opportunity'. The opportunity typically sold the idea that paying the penalty relieved the recipient of a stressful and uncertain future. This "sales pitch" frequently relied on consumerist strategies for promoting the OTSP, not only were recipients informed of a

bargain price, if paid quickly, they were also made aware of the ease through which such penalties could be paid.

In each context it can be seen that the messages intended by policymakers at national level are not always carried through into on-street practice. In litter, and parking, local policy sought to foster an enforcement approach that attempted to address the national concerns of increasing effective action against transgressions. However, in practice officers do not transmit this message to recipients and this is true in every context examined. Officers rarely imparted any moral condemnation regarding the offence committed, nor did they suggest that what the recipient had done was wrong. Instead officers spent far more time attempting to gain the recipients compliance/acceptance in the encounter, rather than trying to reinforce any message about wider ideas of normative compliance.

Enforcement officers dominate these encounters; they set the parameters for the conversation and then attempt to close down any competing moral arguments by either stressing zero tolerance ideas, or by “selling” the notice. Quite what the recipients of OTSPs make of these encounters is a subject to which the next part of this thesis turns.

# PART 3 EXPERIENCE

## Chapter 6 Voice

In this chapter the experience of receiving an OTSP is examined, it is demonstrated that the experience involves problems of communication with recipients feeling they have not been treated fairly. Theories of procedural justice are engaged by this communicative enterprise because of the importance of “voice” in procedural justice; the sense in which a person has the opportunity to state their case. This chapter outlines the experiences, feelings and expectations of “voice” from those who have received OTSPs.

It will be seen that a crucial aspect of “voice” is lacking in OTSP enforcement; recipients feel that they have no effective means to ‘state ones case’ (Tyler, 2006:125) before the decision to issue an OTSP is made. What recipients of OTSPs want is for the enforcement agency to *listen* to what their concerns are, and the lack of opportunity to engage with officers means that the justice experienced, in receiving an OTSP, is a one-sided encounter. Officers and recipients do not engage in meaningful communication and hence the justice experienced is lacking a crucial aspect of what citizens’ feel is appropriate in communications between citizen and state.

### Procedural Justice

Procedural justice holds that ‘people will be concerned with whether they receive fair outcomes, arrived at through fair procedures, rather than with the favourability of outcomes’ (Tyler, 2006: 5). Theories of procedural justice have their starting point in Thibault and Walker’s (1975) study into the effect of procedures on the perceived fairness of outcomes of court based legal decisions. Tyler extended Thibault and Walker’s ideas from court to everyday interactions with legal authorities, such as the police (Tyler, 1988).

Tyler, in his Chicago Study<sup>76</sup> (2006), found that citizens were more concerned *with fair treatment* by police officers rather than the *outcome* of that interaction. Thus, a negative outcome, could still be perceived as fair by the citizen, providing they were treated fairly

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<sup>76</sup> The study was conducted in 1984

during the encounter. This dimension of justice Tyler refers to as “value expressive”...because [it is] not related to receiving favourable outcomes’ (2006:117)

The importance of procedural justice therefore, is that it divorces ideas of just deserts or equity (the idea that ‘punishments, and resources are allocated in proportion to one's input or contributions’ (Leventhal, 1980: 27)) from ideas of fairness and justice. Furthermore the focus on procedural elements in judging fairness can also dispel the myth that citizens will inevitably be angry, and feel an encounter is unfair, when being punished for something they feel they should not be. Thus, procedural justice literature demonstrates that the claim the recipient is only angry about being caught is false (see Sunshine & Tyler, 2003).

The original findings of Thibault & Walker, and Tyler, have been replicated consistently across a range of diverse settings including; criminal justice (Tyler, 2006, 2003; Engel, 2005; Skogan, 2006; Dai, Frank & Sun, 2011; Jackson et al 2012, plus many others), cross-cultural criminal justice research (Jackson et al 2012a, Kääriäinen & Sirén, 2012), civil justice (Lind et al, 1990; MacCoun et al, 1988; MacCoun, Lind & Tyler, 1992), research in organisations (See Brockner et al, 1998 for a review of the literature, Brockner et al 2001 for a cross-cultural perspective) as well as numerous laboratory experiments (van den Bos 1999, van den Bos and van Prooijen 2001; Van Prooijen et al 2004, 2005, 2006, 2006a), and many more.

#### What is procedural justice?

In his Chicago study Tyler based judgements of procedural justice on criteria of fairness drawn from Leventhal's (1980) critique of equity theory (Tyler, 2006). Tyler found that in *non-voluntary* interactions with officers people were concerned about: the influence they have on the officer (whether they can change his/her mind), the ability of the citizen to state their case to the officer prior to a decision being made (voice) and that the officer acts ethically (with ‘politeness and as concern for one's rights’ (2006:129)). These aspects of procedural justice are most relevant to this research since the OTSP interaction is a non-voluntary interaction with a legal authority.

An important aspect of this thesis's examination of the OTSP is the idea of communication which, according to Duff, requires a 'rational and reciprocal engagement' (Duff, 2001: 79). In other words communication is a shared experience, one that involves a two-party engagement, expression, on the other hand merely transmits feelings of 'resentment and indignation, and of judgments of disapproval and reprobation' (Feinberg, 1970: 95). As seen in chapter five, rather than revulsion perhaps commercial rationality is more apposite for the messages *expressed*. Nevertheless procedural justice literature is important here due to the repeated finding that having 'voice' (i.e. requiring a communication) matters in judgements of procedural fairness.

Having a lack of procedural justice in these encounters does not mean that citizens will automatically stop complying with the law, although it may impact upon the perceptions of legitimacy that citizens feel towards the law, as Tyler states, 'many would still comply with the law, because of their moral belief that they should' (2006: 68). In the absence of moral belief, the evidence of procedural justice studies is that compliance is likely to be reduced (see Chapter 7). It is worth recalling that when introducing OTSPs, policymakers had a clear aim of increasing compliance by increasing deterrence. However, deterrence is unlikely to be effective in a situation where procedural justice is absent, as Tyler states, 'once other factors are accounted for, there is no significant influence of risk related judgements on compliance with the law.' (2006:269). Thus absent moral qualms about the law in question, such absence being more likely in offences that do not carry moral censure, there is a real risk that unfair treatment leads to lowered compliance. Authorities should, therefore, care deeply about how they are perceived by citizens, if citizens feel authorities are acting fairly in these encounters then compliance is more likely.

#### What does having a Voice Mean?

According to the OED "voice" means 'to express in words or with the voice; to say or proclaim openly or publicly, and to say or utter (a word, speech, etc.)' (Oxford English Dictionary, 2008). Tyler's conception of a procedurally fair encounter requires the

opportunity for “voice” and he operationalises this as ‘an opportunity to present their [the citizen’s] problem’ (Tyler, 1988:111). He argues that ‘process control’, or ‘voice,’ provides an indication to citizens that the authority is acting in a procedurally fair manner. He goes on to state

Increased opportunities to state one’s case before a decision is made heighten feelings that one has been involved in a fair procedure, and lead to positive feelings and support for police officers and judges, whether or not the actions of the authorities are influenced by the views expressed (Tyler, 2006:133)

In Tyler’s study ‘process control was measured by asking participants “how much opportunity” they had had to present their problem or case to the authorities before decisions were made.’ (Tyler, 1988:111) He found that ‘process control continues to have an effect even when respondents feel that their opportunities to state their case have little or no effect on the decisions made by a third party’ (2006:127). In other words the opportunity to present ones problem matters even where such an opportunity does not affect the outcome of the decision (what Tyler terms ‘decision control’ (2006:125)). MacCoun (2005) finds similarly that voice matters irrespective of influence on the decision, however these findings are predicated upon the idea that the party making the decision *has actually listened to what the other party has said*.

In OTSP encounters there is virtually no opportunity to influence the officer’s decision, what influence there is generally one-way, where the recipient influences the officer to issue a more severe outcome (e.g. prosecution). With OTSPs it is not that there are not opportunities to state ones case, although in some situations there clearly aren’t (speed camera enforcement, and the majority of PCNs), but in others there are opportunities but these are only provided once the decision has been made to issue the OTSP. The voice opportunity in the OTSP encounter is an opportunity to either confirm ones details (name, address etc.) or to complain, which has no effect on the officer or outcome.



Van Den Bos (1999) operationalises voice as being 'allowed an opportunity to voice [an] opinion' (ibid, 564) and conversely no "voice" means being denied that opportunity (ibid, 565). Tyler, Rasinski and Spodic examined a range of studies that investigated the importance of voice to defendants in traffic courts, and students, in experimental tests of procedural fairness. Again they found that process control, even where decision control (influence over the decision) was low, was rated highly: 'in no case does heightened voice have less impact on judgments of procedural justice ... when decision control is low' (Tyler, Rasinski & Spodic, 1985: 79). McFarlin & Sweeney (1996) also concur on this point, 'having a say does matter independent of whether or not one has actual control over decisions' (1996:299). As Tyler & Huo conclude 'people focus more directly on whether they have an opportunity to present their arguments than they do on whether they think they are influencing the decisions made.' (2002:86)

Avery and Quinones (2002) note some conceptual difficulties in operationalising voice and distinguish between four voice characteristics:

*Voice opportunity* entails the actual availability of the opportunity to present one's views to a decision maker, whereas *perceived voice opportunity* is a measure of an individual's perceptions of the amount of voice opportunity that has been provided. ... *Voice behavior* is the expression of one's suggestions with the intent of improving [the situation]. Finally, *voice instrumentality* pertains to the influence of the individual's voice behavior on the outcome of a decision (2002: 81-82) (emphasis added)

What they found was that 'when voice instrumentality is low, voice behavior has a negative impact on procedural fairness' (ibid: 85). In other words having the opportunity to voice ones opinion, in the hope of altering the decision, where there is little opportunity to alter the decision, leads to feelings of unfairness about that treatment. MacCoun describes this as the 'double edged sword' (2005:193); where procedures can be tailored so that it appearance voice opportunity is present but in reality it is limited, and in the words of Folger

'a limited degree of voice... actually serve[s] as a means of restricting the type of participation that would lead to real change' (Folger, 1977: 109). This limitation therefore leaves people 'potentially vulnerable to manipulation and exploitation' (MacCoun, 2005: 193). Tyler is also cognisant of this fact:

Value-expressive effects also provide opportunities to authorities less interested in helping people: opportunities to mislead and beguile the public by providing chances to speak not linked to any short- or long-term influence over decisions (2006:147)

Thus it is possible for authorities to use voice procedures which make citizens feel they are being treated in a procedurally fair manner without providing a sense of instrumental fairness.

These are challenging findings but suggest the need to contextualise the concept of voice, and influence, rather than relying on decontextualised statements in a quantitative survey. Certainly Avery and Quinones research suggests a need for a richer conception of "voice" that consists of factors that shape voice behaviour (being allowed, and perceiving that there is an opportunity to speak) and voice impact (instrumentality, influence and listening).

What shall be demonstrated in the OTSP context is that there are, at times, opportunities for voice behaviour, and voice behaviour does occur, but like Avery and Quinones found, voice instrumentality is low - it is unlikely that an officer will cancel an OTSP as a result of what the recipient says. The procedural justice research discussed above does not require that citizens feel they have the ability to influence decisions, but what is required is an opportunity to state ones case and have it demonstrated that the authority has considered this opinion.

Simply providing structural opportunities to speak is not enough to produce value-expressive effects: citizens must also infer that what they say is being considered by the decision maker. (Tyler, 2006:149)

Thus, it is argued here, that 'voice' requires a communicative understanding, a two-way process in which expressing one's opinion requires an organisational body, or person, who will listen and acknowledge what the other is saying.

As discussed in the last chapter, at the one extreme communication is a simple expression: 'An utterance, declaration, representation' (Oxford English Dictionary, 2014). This sense of communication merely involves speaking (or other non-verbal communications), it does not require any input from the other party in the communication; they need not listen nor respond. A more involved sense involves the 'transmission view of communication' (Carey, 1989: 15); here voice would require the opportunity to transmit the concerns of the citizen to the enforcement agency. In this form there is a direct recipient of the message, and the expression is directed at that person/s, but they need not listen. What this chapter argues is that for recipients to feel that they have had a procedurally fair encounter requires a 'symbolic' (ibid: 18) communication; involving a much more meaningful participatory exercise. One in which citizen and state engage in a 'rational and reciprocal engagement' (Duff, 2001: 79). This engagement requires listening on the part of the enforcement agency, it does not require that the officer/agency is influenced by the recipient, but that they demonstrate that they have taken the concerns on board by listening to them.

An expressive opportunity reinforces a subservient relationship between citizen and officer. In such a situation the person speaking is given latitude to speak, but the subject in earshot of the voice is under no obligation to listen or take into account what was said. In a power relationship between police officer and citizen, or local authority officer and citizen, the power is clearly in the hands of the officer, they are free to ignore what was said. However, in a listening encounter the officer is demonstrating equality in the relationship. It demonstrates that the concerns of the recipient have been noted and that they are valid to the extent that they are genuinely held beliefs and furthermore, that the person voicing is entitled to have an opinion on what the officer is doing. It demonstrates a consensual

approach to power; deference based on mutual recognition of the rights and responsibilities of both parties.

### Does 'having a say' matter to OTSP recipients?

OTSP recipients certainly feel aggrieved that they do not have a voice opportunity prior to the decision being made to issue the penalty:

They [the police] refused to interview me, or listen to any attempt for me to explain my version of events. The duty solicitor told me the next day that D&D is a type of offence which does not require the suspect to be interviewed. As soon as I got the station I demanded to speak to a solicitor, they wouldn't let me." (TSR, PND)

Here there is an expectation of an opportunity to present the recipients side of the story which is affronted by the police refusing to interview, or listen, to the suspect about the circumstances surrounding the offence.

This lack of listening is a common complaint raised by recipients of OTSPs

AS: Do you think whole process was fair?

R: No not really it was just the... it was just like an easy way out of arresting you isn't it. A caution, you get arrested, you have your say, and this is: "there is the fine, like it or lump it," (PND, Interview)

I assumed at the police station that someone would listen. That I would be able to say I am non-violent, nothing is going on, Okay I did refuse to leave but I needed to get my bag. The police still didn't. (PND, Interview)

He just wasn't interested to be honest but by that time there wasn't really much he could do about it; he had already printed it out, put it in the system and taken a picture of it. ... he was just there to dish it out. (PCN, Interview)

Actually getting anyone to listen to you when you complain about a particular site breaking these rules [on the placement of speed camera equipment] is proving to be virtually impossible (Speeding FPN, PPF)

He [police officer] could have talked to me differently and handled it differently and listened to what I had to say but he didn't want to (FG3, FPN)

There is here frustration creeping in that the officers don't want to listen to the recipient's side of the story, nor are they concerned about it. Recipients clearly feel that once the decision to issue an OTSP has been made officers do not listen to what the recipient has to say.

Lind, Kanfer and Early state that 'as long as there is an opportunity to express one's views and opinions before the decision is made, procedural fairness is enhanced.' (1990:952) In face to face OTSP encounters the decision to issue is made prior to the recipient having an opportunity to present their case. In the custody suite the decision is taken by the sergeant determining that the recipient is eligible. This determination takes place without the recipient being present; when they are called to the custody desk the recipient is presented with options, the minimum option being a PND. In the litter context the decision to issue a notice is taken simultaneously with witnessing the transgression; once an officer determines to stop the citizen they automatically become a recipient. In these encounters there are opportunities for 'voice behaviour' (Avery & Quinones, 2002:81) in that recipients are allowed to speak, however there is no opportunity to meaningfully communicate the recipient's concerns. In the automated processes there is clearly no opportunity to voice ones case prior to the decision being made, nor is there in the vast majority of PCNs issued since it is unlikely that a driver is present.

What the recipients quoted above all suggest is that they wanted a communicative encounter with the relevant officer/agency, they want, each quote states, someone to '*listen*' to the recipient. Instead the encounter is one-sided; the agency has issued the OTSP and is no longer concerned with anything the recipient has to say. Thus the experience is

reduced to an expression from the enforcement agency of ‘there is the fine, like it or lump it.’

### Voice in the Contexts

#### Automated Enforcement

There is no opportunity for voice in the automated OTSP since there is no interaction at the time of the offence. There is an absence of two humans able to communicate at the same point in time; instead the process is remote, through the postal system. Once speeding has been detected by a camera then a formal Notice of Intended Prosecution (NIP) is generated by the police and sent to the name and address of the person registered at the DVLA as the vehicle’s owner. The recipient of this notice **‘must provide the information we ask for on the back of this form within 28 days’** (Midwestshire Police, NIP, no emphasis added) otherwise ‘you could be fined up to £1000 and get six penalty points’ (ibid). The information requested is merely a “tick”; the vehicle owner must indicate whether they were driving, or if they weren’t they must give the address of who was.

If the driver does respond, then s/he may be issued with an FPN through the post which again gives the recipient a choice of three tick boxes, either they chose to pay, chose to contest the matter at court, or if they already have 9 points on their licence they must inform the police of this. There are no options on the form to specify any of the circumstances or feelings that the recipient might have about the offence, and perhaps why they feel the punishment is not justified.

This request for “information”, in the NIP or FPN, is qualitatively different from any conception of “voice”. “Information” here is merely data; it is not a communicative encounter, one that allows recipients to, in the words of Longhurst, ‘explore issues that they felt were important’ (2010:103). Instead, all that is requested is merely sufficient information to identify the driver at the time of transgression. As the following quote from Wells’ study into speed enforcement shows, recipients want an opportunity to express opinions that they feel are important and should be, at the very least, considered:

*Ann* On the form you should at least be able to send in a comment about the stretch you were done in, if the limit was correct or not. (Focus Group: Wells, 2008:807)

As Wells notes the lack of “comment box” ‘formalizes [the] lack of interest in the context of the offence and the offender that is implied by the use of speed limits and speed cameras’ (ibid: 807). Indeed a simple denial of the offence and a request for further information are denied by the form

Me or my car were not at that location, I was working in [xxxx] at the time and my car was locked up outside my house... So what’s the best approach seeing as there doesn’t seem to be a tick box marked ‘don’t know what you’re on about mate’ (Pepipoo, FPN)

The lack of a “comments box” can be seen as another facet of the ‘dividualised’ nature of regulatory fines (O’Malley, 2009). The request for information is not a communication, since that requires individual input into the conversation, instead the “tick” box merely requires sufficient information to act as an input mechanism in the ‘conduit or circuit’ (O’Malley, 2009: 160) of regulatory control. Thus rather than an individual involved in communication with an authority, in this scenario “data” is the only communicative necessity. All the citizen need transmit (express) to the authority, indeed the only relevant data that the authority requests, is a “tick” in a box.

The postal method of enforcement does cause concerns that there are no opportunities to address what recipients feel are the key factors of their case:

...when you get an anonymous letter and you think (exhales loudly) it wasn’t really like that, I have been put in a bracket with other people who were doing 100’ ...you get a bit resentful. (FPN, Male, Interview)

The resentment here arises because there is no opportunity, other than through court, for letting the authority know ‘it wasn’t like that’. The FPN letter brutally simplifies the situation, it creates an either/or choice for the recipient; they are either a speeding (illegal) motorist

or not (a law-abiding motorist). This choice itself is problematic because it is a forced choice; the motorist is forced to condemn themselves.<sup>77</sup>

In the following encounters the recipients of automated FPNs went one step further and actively sought out officials in the enforcement agency to discuss the case.

“I wanted to see somebody at [police headquarters] and explain it to them because I was just sending letters. ...They wouldn't even see me. Not interested. So yeah I put it in a recorded envelope and sent it off and I got me three points and that was it (Red Light, FG3).

When we contacted them they said “you can only see your pictures if you elect to go to court”, now this is despite the fact that they were offering an online viewing system. And they said you either go to court or pay the fixed penalty and no further correspondence will be entered into. (Speeding, Interview)

The idea that the recipient “wanted to see somebody” in the first quote demonstrates the desire for a meaningful voice opportunity. This recipient wanted an officer at the police to listen to his concerns and communicate back why the notice was necessary. In line with procedural justice literature, this recipient does not necessarily want the notice cancelled, merely to have his concerns noted and listened to; simply ‘sending letters’ did not allow that opportunity. In the second example likewise the recipient wanted the authority to listen to his concerns about the pictures used to show his speeding. Instead the authority responds by removing any further opportunity at communication, and instead simply offers an option of paying, or communicating with an outside body, the courts.

Indeed, even in speeding enforcement where an officer is present and directly interacts with the recipient, problems of voice arise:

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<sup>77</sup> Which is one of the rare instances in which a defendant is compelled to answer a question on pain of further punishment. Such compulsion, it is quite clear, is not a breach of Article 6 of the European Convention on Human Rights. See O'Halloran and Francis v. United Kingdom ECHR 15809/02, 25624/02



They weren't interested, they didn't care less. It was get out of the car, come and have a chat with us, there is your notice, there is your points, there is your fine, happy days, see you later. (Speeding, FG3)

In this instance, although not an automatic OTSP, it highlights the automaticity of some routine traffic enforcement encounters. The recipient feels the police are not interested in his opinion and instead the encounter almost represents an assembly line (much like how Packer describes the 'crime control model' (Packer, 1969)). The "chat" here is not a conversation but a staged process: Stage 1, "there is [sic] your points," stage 2 "there is your fine," and stage 3 "happy days, see you later". At every stage of this process the recipient feels there is no opportunity to voice his concerns and have them listened to; It is 'points,' 'fine,' and then concluding pleasantries. Of course describing the interaction as a "chat", as the officer does, must particularly infuriate the recipient in that what follows in the police car is a lecture rather than an informal chat.

This lack of opportunity to voice stems somewhat from the fact that officers have already made the decision to take formal action when stopping the recipient.

PC Harry (Road Police): If I have stopped somebody for an offence that person will generally either come away with a fixed penalty ticket or a vehicle defect rectification notice or they will be sent on to court... because I can't afford to let everybody go, because I will be seen as not doing my job (Interview)

Thus, as discussed in the previous chapter, the staged lecture (like the sell) represents a pragmatic attempt by the officer to lessen the awkwardness of enforcing laws against those who typically see themselves as law abiding. However, as is clear from recipients, this technique is seen as unconcern for their communicative rights.

## Discretionary Notices

### *Litter*

In the litter FPN context, there are opportunities for voice, although these are somewhat limited. The first limitation is an enforcement policy (ZTP) that prevents recipients having influence on the decision of the authority. The language of 'zero-tolerance' is employed to prevent recipients of OTSPs being under the illusion that what they say will be taken into account by the officer. Midweshire council operating a zero-tolerance policy means that the penalty *has to be imposed* regardless of what the recipients feel, intend or explain.

Here officers are, in effect, turning themselves into an automated process. Through a series of cue phrases the officer is in the position to automatically issue the notice. 'Zero-tolerance' and 'no option' are used to demonstrate the lack of discretion the officer has. This zero-tolerance policy is then experienced as an interaction lacking meaningful communication.

My mother had been stopped by two bully officers whilst we visited an area we didn't know well. As my mother smoked she couldn't see a bin, there was no sign at all. You could clearly see cigarette butts around, she put it out as we were just about to head into the only shop there... Then they were there and off on one... They didn't believe she didn't live in the area, they checked that... called through. They didn't say "yes there's no fine but will make her pick it up & direct her to a bin"... No, the butt remained but two overpowering men didn't want to hear nothing just an £80 fine...Unfair treatment of a first timer. (DM1, Litter FPN)

This comment neatly encapsulates the problem of voice definition in enforcement of discretionary OTSPs. The recipient *is* allowed an opportunity to speak, they can confirm their name and address and offer to pick the litter up, but these are not communicative voice opportunities because they don't address the real issue that the recipient feels the officers should take into account, here the minor nature of the transgression and the harm caused. Again the automatic nature of this interaction, despite the notice itself being discretionary, gives no opportunity to voice, all the recipient can do is provide a name and address which

is little different to the automatic OTSP, it is merely an opportunity to state “it was me” rather than tick a box.

A further strategy that denies meaningful voice is the reading of the formal caution once the FPN has been completed. The following interaction is taken from field notes of observations carried out with the litter enforcement team and represents a typical approach to a litter suspect:

Officer A says he saw her put her cigarette end on the floor and leave it. He asks for the offenders details, he explains what he is doing today (litter patrol), and why he stopped her. He says he is going to offer an FPN and cautions the recipient, he then asks if she knows what this (the FPN) is? The woman replies “I won’t have to go to court will I?” (Field Notes, 13-6-12)

This highlights the stages of information given to a litter FPN recipient. First the officer states the barest facts of the case and then proceeds to take personal details from the suspect. At this stage there is no mention of criminality or that an FPN will be issued.

Once the form is complete the officer tells the recipient they are going to receive a litter FPN and reads the PACE caution.

Officer A: Because I believe that you have committed an offence of depositing litter I do remind you of your rights today, so I do read the caution to you. You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be used in evidence against you. (Field Notes, 13-6-12)

This is the only opportunity during the enforcement encounter at which the recipient can communicate (voice) beyond the narrow identification questions asked. It is a constrained voice opportunity because it suggests that the recipient should be careful what is said because it “may be used in evidence against you.” Furthermore there is an implicit threat within the caution that should one fail to answer any questions then it may “harm your

defence". Thus this voice opportunity is asymmetrical; it is not an opportunity for the recipient to say anything, but to answer the officers' questions. Here there is a power imbalance within the conversation; by allowing the recipient a voice the officer is essentially saying "this is your opportunity to incriminate yourself."

Haworth argues that the caution gives the interviewer the power to influence the version of events that are recounted in an interview due to control over the direction of conversation (2009:192). Haworth's study focuses on interviews under caution where the suspect is under arrest and subject to full pace requirements (including a taped record of the interview). The on-street interaction, and the record of the interview, is controlled by the officer, they are free to determine, not only the course of any questions asked, but also what responses are noted since there is no verbatim record of the interview. It is unsurprising therefore that the most common response to the formal caution (on-street) is no answer from the recipient and no follow-up questions from the officer. The caution operates, instead, as means of closing the encounter down; generally it is the last thing said. Furthermore the FPN has no space in which to include the comments of the recipient, instead any responses are written in the officer's PACE book.

The importance of the caution, at least for litter officers, seems to lie in its ability to demonstrate the situation's seriousness:

Officer A tells me... that the cautions are read to recipients of FPNs on the street 'because people remember being cautioned, they could forget a piece of paper or notice' (Field Notes, 27-9-12)

Certainly there is an opportunity for voice here, but it is a limited opportunity, influenced by factors such as the fear of court and that anything that is said may be used against the recipient. It is not a reciprocal communication due to the power imbalance within the conversation and the instrumental concern of the recipient (reinforced by the issuer) that the matter will not go to court.

### *The PND*

In the PND context meaningful voice opportunities are also perceived as absent by recipients.

There were witnesses around, but the Police instantly took her side of the story, and wouldn't listen to mine, and issued me with a Section 5 -... £80 Penalty. (PND, Pepipoo)

Saul: I was fully expecting to see my duty solicitor because I didn't think I had had an interview, all he did was get details of where I worked and get my name and address. I didn't consider that to be an interview about the events. ....Okay, alright, so they gave me this ticket, it was for drunk and disorderly, I said to them instantly 'drunk, I fully understand why drunk is on there, I don't understand why it is disorderly.' She said 'it could have been a lot worse... we have commuted this because you are a teacher, the charge that we could have made for you could have been a lot worse.' I don't know what it was (PND, Interview)

John: they were dismissive, very much so, which... they explained to me that they were giving me a fine and there was no opportunity at all really to kind of explain (PND, Interview)

Here we see not just an expectation of voice, but also an expectation that someone will listen to what the recipient has to say. This is not a communication in Duff's terms, between parties that are engaging in a '*reciprocal*' engagement. In the second example the officer does not answer the question but instead ignores it and responds with a variation of the "sales pitch". A more meaningful voice opportunity would mean that the recipient when asking "in what way was I disorderly?" is requesting a reply to that very question. What he gets instead is a refusal to engage on the topic. The officer allows him to ask the question and at least acknowledges it with a response, but not one predicated on the idea that they have listened to what the recipient has said. Instead the officer offers a counterfactual to try to end the conversation, 'it could have been worse.'

Furthermore, with the police discretionary notice, there is the additional problem of the “attitude test”. It is worth recalling that in deciding whether to issue a PND, the recipient is checked to ensure they are in a compliant (i.e. not argumentative) frame of mind. The voice opportunity in the custody environment is therefore constrained in that there is very little that the recipient can do to influence the officer to take an alternative, less punitive course of action. However the recipient may influence the officer to take a more punitive stance (e.g. a charge). This was demonstrated in the previous chapter (Field Notes, 17/11/12) in which a PND was withdrawn because of the recipient’s perceived argumentative demeanour. The recipient was charged, with the officer stating ‘oh forget it then you are being argumentative, you are being charged’. (Field Notes.17/11/12)

In that encounter the recipient asked ‘is that what I pay my taxes for?’ which can be characterised as ‘voice behaviour’ (Avery & Quinones, 2002)). The detained person had an opportunity to speak to the custody sergeant. However it is clearly constrained as the only influence it had was to increase the potential seriousness of the outcome. From a voice perspective there is nothing this person can do to alter the decision to impose a penalty of some sort; instead all the recipient can do, by speaking, is to potentially increase the seriousness of the outcome, i.e. ‘negotiate’ up from a PND to a charge.

During this encounter the officer had first informed the recipient they were going to receive a PND before any opportunity to speak had been given.

CS A “You were arrested for s.5... Now we *can* deal with this matter in the normal way of a charge, however today it has been decided that we are going to offer you the opportunity of paying a fixed penalty notice of £80 for the offence”

Man: I didn’t do anything, I wasn’t aggressive and I dispute that, I was not causing a problem and you got no evidence that I was

CS A: Do you disagree with the statement or the £80 penalty notice

Man: Oh come on be fair! (Field Notes, 17/11/12)

It is important to note here that “opportunity of paying a fixed penalty” arises before the detained person is allowed to voice his opinions. The problem with this approach is that, as Van Den Bos, Vermunt and Wilke (1997) found, specifying an outcome prior to a voice opportunity causes people to focus more on outcome fairness, rather than procedural fairness. So what is seen here is that the conversation, or voice opportunity, is in reality aimed at the fairness of the outcome, the decision to issue a PND. “Oh come on be fair” arises immediately after the person has been notified they are going to receive a PND.

#### Richer Communicative opportunity: Semi-Automated Enforcement

In the semi-automated process opportunities to state ones case at the point of issue are few. It is unlikely that one will happen to be returning to a vehicle and see the Civilian Enforcement Officer in action. Instead, like the automated process, the opportunity to present ones case is through written means.

Again concerns that the local authority do not listen are present.

I wrote and explained everything. I even sent the ticket in to say look here is my ticket it was a hot day so it's unstuck off my window but it is here. I have also got a disabled badge but no... It's kaput! (PCN FG2)

Although occasionally interactional opportunities with the CEO are present;

Fortunately for me I actually saw the parking attendant as he was finishing up so he was just taking a picture. I tried to talk to him and said ‘clearly I’m not obstructing here, can’t you show some discretion?’ but he didn’t want to do anything about it. He just wasn’t interested (PCN, Interview)

The first quote shows again that the recipient feels the authority has not listened to the reasons they have given, or at least not demonstrated that they have. Instead the response suggests a denial of the importance of the recipient's views about the way the traffic legislation is operating in this situation. This recipient clearly feels they have done enough to comply with the spirit of the legislation; however the authority has not demonstrated that

they have listened to these concerns. Likewise in the second quote the recipient wanted to communicate that he had not breached the purposes of the legislation and as a result the penalty was unjustified. Again the recipient perceives that the officer was not interested when they tried to communicate.

In the following quote a police officer, involved daily in issuing FPNs for motoring offences, felt aggrieved when he received a PCN for alleged illegal parking:

They (the council) weren't interested, weren't bothered, just pay! They were just going through the process to get the money, to get it in rather than listen. (Interview, PCN)

The recipient successfully appealed to the Traffic Penalty Tribunal (TPT). Thus once again recipients want the authority to listen and yet feel that they do not do so.

Unlike every other OTSP examined in this thesis, however, the PCN does have an appeal system that does not involve the spectre of the magistrates' court, and does not have significant potential cost consequences.<sup>78</sup> PCNs have a statutory appeals process involving both informal and formal procedures. At the informal stage, a review into the case is carried out internally by the local authority. At the formal stage the TPT (for PCNs issued outside greater London) or the Parking and Traffic Appeals Service (inside Greater London) operate as independent appellate bodies for PCNs.

The rigour of the internal review has been challenged. In observations of the TPT one adjudicator expressed an opinion that a particular local authority (not Midwestshire) 'never allow anything, they are useless, they have no compassion and never make any effort to be reasonable' (Field Notes, TPT Adjudicator, 23/5/13). This lack of effort can lead to recipients feeling aggrieved.

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<sup>78</sup> By exercising the right of appeal the recipient merely loses the opportunity to pay the penalty at a discounted amount.



But my issue is that they have paid scant regard to the mitigation, I don't think they have considered it and have just relied on the letter of the law, I don't think they have followed any rules of natural justice; I mean I paid and bought a ticket. I went to great lengths to comply, walked three times up and down, it's just so unfair and a waste of time if they won't accept my sincere apology and mitigation. It's not about the money but the principle (Field Notes, 23/5/13)

There are two issues here, the first is with the feeling expressed by this recipient that the authority had 'paid scant regard to the mitigation,' in other words they did not listen and take into account what was said in the appellant's letters. Furthermore there is a more fundamental problem for this recipient when it comes to exercising his voice, it is that what he is saying is immaterial, it is not a concern of the authority, and so he feels that they have ignored an important dimension of his case. Ultimately this appellant was unsuccessful at the tribunal; however he did rate the experience of actually having someone listen to what he had to say:

Thank you for the opportunity to speak. I didn't expect any different decision coming today unfortunately. I think the fault lies in the procedure really. (Field Notes, 23/5/13)

Crucially this opportunity to speak involved a party that was willing to listen to what was said. Tribunal adjudicators go to great lengths to listen to what appellants of PCNs raise during the hearing. This is reinforced to appellants from the moment they enter the room:

Good morning Mr X, my name is Mr Y I'm the adjudicator, what this means is that I independent from the council, I am not employed by them. I have looked at your case but haven't reached any decision yet, you returned a form, an appeal notice, that said you wanted to have a hearing in person, and I will make my decision once you have been heard. All that I ask today is that you give a truthful account to the best of your knowledge and belief. (Field Notes, 23/5/13)

This introductory opening, repeated in every case by this adjudicator, demonstrated that a decision hasn't been made prior to the recipient having an opportunity to state their case. This reinforces the idea that what is said at the appeal will be listened to and may influence the ultimate decision.

As stated above procedural justice literature is in general accord that influence is not an antecedent of a just experience (Tyler (2006); Tyler, Rasinski and Spodic (1985); McFarlin & Sweeney (1996) and Avery & Quinones (2002)). Nevertheless absence of the ability to influence a decision must matter for any theory of justice otherwise it leaves citizens 'vulnerable to manipulation and exploitation' (MacCoun, 2005:193). The adjudicator here, stating that "I ...haven't reached my decision yet", demonstrates to the recipient that they can, and do, have the opportunity to influence the decision. Although Tyler (2006) states that this is not necessary for citizens to judge the authority as fair, objectively speaking Tyler would no doubt agree that the ability to influence the decision must be present in any fair system of independent adjudicatory justice. Indeed Tyler makes this point, that merely speaking is not enough 'citizens must also infer what they say is being considered by the decision maker' (2006:149)

In this regard the TPT adjudicator demonstrates that they have considered what the recipient has said in the hearing.

Just pause there Mr X and I'll let you know my decision. ...Mr X has given detailed evidence today and I thank him for this, he has explained his mitigation which I find to be truthful and thoroughly believe him. There is clearly mitigation on Mr X's behalf, I find that he feels this is disproportionate and in his view the council should use its discretion. ...I find that Mr X certainly had a conversation with the officer and that he genuinely did not intend, or have any idea at the time, he contravened the prohibition. I accept that he had to use his mobile to see as the street was dark and that he did purchase a pay and display ticket. This is a genuine case and a genuine

error... But these are not grounds of appeal, and no grounds of appeal are applicable ...therefore I'm afraid I have to dismiss this appeal (Field Notes, 23/5/13).

This situation then is fundamentally different from the OTSP interaction in that the decision has yet to be made prior to the recipient's communicative opportunity. Here, repeated throughout the case's summation, is a demonstration that the adjudicator has listened to what the recipient has said. This recipient has not been involved in a simple expressive encounter but a communication, which turned the PCN into an individualised justice encounter. Of course the result has not changed; the adjudicator has not been influenced to alter the outcome, however he has demonstrated a concern for the communicative rights of the citizen. He has listened to what the recipient has said, and clearly demonstrated this by referring back to it in his summation.

Here the recipient does not feel, after the result has been given, that he has influenced the adjudicator, or indeed felt it was likely that he would, but as observational field notes make clear he was nevertheless pleased with the treatment he received. In the 18 cases observed at TPT every case had a similar format; the adjudicator outlined their position, stressed their neutrality and summed up the evidence that the appellant had given, demonstrating that they had listened to what had been said. At the TPT at least, voice can be described as a communicative. This opportunity therefore explains why the TPT 'improves appellant comprehension and confidence in the adjudication process, particularly concerning its independence and competence to deal fairly' (Raine & Dustan, 2006: 21)

The focus on the TPT here highlights the ways in which a meaningful communication is available in the PCN context. People can and do have an opportunity to exercise voice, in its richest sense. However, this is not to suggest that the operation of parking enforcement is seen as a fair process, it would strain credulity to suggest that people view parking enforcement as fair, indeed throughout this research it is apparent that parking enforcement is primarily seen as unfair.

There is little or no legal protection for motorists who get a ticket, unless you can afford it (PCN, HYS1)

The truth about parking restrictions is that it is no longer about prevention. It is now a thriving business, with a paid workforce and people making money out of it... (PCN, HYS1)

It's a cynical scheme thought up by stiff-collared folk that have no empathy for real humans ...these bully-boy, money-grubbing measures just aren't humane. (PCN, HYS1)

What upsets me the most was that there was no appeal without being massively financially penalised; two times the fine. This removed any responsibility for the council to show the machine was working nor that the money taken was right! (PCN, HYS2)

These quotes are fairly representative of the vast majority of quotes found in online forums and news comment sections. What they demonstrate is that regardless of the TPT and the opportunity for a communicative experience, parking enforcement, at least in as far as the majority of parking enforcement interactions, is seen as unfair, inflexible and carried out for an illegitimate purpose (revenue generation). Very few appellants actually go to the TPT to contest a PCN, in 2011-12 just 0.35% of all PCNs issued in that period (4.3 million). Thus in the vast majority of PCNs the communicative nature of the interaction lacks a meaningful voice opportunity.

### **Voice across the contexts**

What is seen in all of the contexts in which OTSPs arise is not that there isn't an opportunity to have some form of 'voice', but that such an opportunity is not communicative. It does not allow for 'listening' on the other side of the conversation so as to involve a 'rational and reciprocal engagement' (Duff, 2001:79). The recipients may feel that they have stated their case; however what is missing is someone who is willing to actively listen to what is said *at*

*the point at which an OTSP is issued.* Voice represents not just an opportunity to state one's case, but something more. It requires a listener, someone who will listen to what was said. It is not just an opportunity to express one's thoughts, but a communication between social actors in which both sides bring something to the interaction and seek to talk to each other, even if they do not agree.

### What do recipients want to voice?

Having shown that recipients in the OTSP process want communication and inclusion into the decision making process, it is now necessary to examine the voices of OTSP recipients to see *what* it is that they feel is not listened to by enforcement agencies.

In OTSP interactions there are a number of factors that recipients feel the authority will not listen to; in general such arguments revolve around the issue of common-sense.

What's needed is a common-sense approach to consider each incident before a penalty notice is issued, and an effective appeals process - no more (HYS4)

At its most fundamental level a claim to common-sense is a claim to common understanding. Citizens, making appeals to common-sense, are in effect seeking to lay claim to a common, or shared, self-evident/intuitive fact. This claim to common-sense, it is argued, relates to the concept of voice, specifically its communicative conception. Recipients want to make claims and raise issues of "common-sense" within the enforcement encounter; the ability to raise such issues is constrained and leaves recipients with feelings of unfairness.

To an extent claims of common-sense are also claims that seek to unify disparate complaints about the enforcement system into an easy to understand shared sense of injustice. Partly the claim for common-sense can be seen as an attempt to influence the decision of the authority, since if they exercised common-sense then, presumably, they must agree with the claim. The idea that common-sense is self-evident can be contested; the sense may not be common or shared by others. In this way the claim to common-sense

can be seen as an attempt to persuade the officer, by way of an appeal to intuitive reasoning, towards an expected common-sense result/understanding. This appeal however in OTSP interactions, as discussed above, can rarely be made.

Thus recipients, in making common-sense claims, may be seeking to convince the officer towards a different outcome, but at present it is difficult to evidence this claim empirically due to the general absence of a communicative voice encounter for recipients. Officers may be able to counter the common-sense claims of recipients; however the encounter lacks the structure to do so, at present, since it seems to favour compliance during the encounter rather than acceptance of any underlying norms. Put simply without the opportunity to raise common-sense claims it is very difficult to assess whether the common-sense claim is really about outcome or procedural fairness (i.e. listening).

Van den Bos (1999) has demonstrated, in laboratory conditions, absence of voice can lead people to assess fairness of procedures based on outcome.

[W]hen persons implicitly have not received voice – people may find it difficult to decide how they should judge their procedure, and they therefore use the fairness of their outcome as a *heuristic substitute* to assess how to respond to the procedure. (1999:573) (Emphasis in original)

Thus outcome can influence judgements of procedural fairness where a crucial element of procedural fairness (the opportunity for voice) is absent. A common-sense claim can, therefore, be a means through which the recipient is seeking to influence the authority, or it can demonstrate an absence of a fair communication. It does the latter by denying the perceived common-sense interpretation an opportunity to be heard. Thus voice, on a communicative understanding, requires at least a discussion, or acknowledgment, of the common-sense understandings of both recipient and officer. As Carey states communication involves 'not the fact of imparting information but the representation of shared beliefs', (1989: 18) the primary means through which people can understand, or project, a sense of shared beliefs is through common-sense (it is common). Therefore it is

necessary to develop a theoretical understanding of common-sense in a justice setting. In this regard the work of Finkel (2001) provides guidance on common-sense interpretations of law.

A note of caution must be noted at this point, as Boeckman and Tyler (1997) state, '[a]lthough there are certainly merits to pursuing commonsense justice, history also provides clear examples of injustices' (1997: 378). Such examples include overt racism, sexism and the denial of recognition of procedural protections for marginalised groups (those deemed to be criminals) (ibid: 377-378). Furthermore, as discussed above, authorities can use procedures that make recipients feel they are being treated fairly when in reality the system is unjust (i.e. false consciousness). Common-sense complaints can also be seen in a similar light; ostensibly they are a claim to common-sense fairness but can also be claims to imposing injustice on those thought 'different'. In the OTSP context this difference can be seen in claims that a recipient doesn't deserve a notice because there are others more deserving of punishment. In effect the common-sense message here is not that the process is unfair, it is felt to be fair, but for those thought deserving of it.

Man: So why.. I mean I could understand.. Can't you just like let me off for once?

Officer: I can't

Man: As I'm a nice bloke (Litter Observations, 5-10-12)

Here there is a claim for special treatment to reflect the recipient's respectability, his niceness. Clearly if this were to be operationalised into practice it could result in all manner of bias being brought into the system, something Wells noted speeding drivers wanted in speeding enforcement (2012: 178).

Craig: ... boy-racers flying in and out of each other's lane, causing people to slam their breaks on ...And I said that to the copper..., 'all the way here I have not seen one of you... you have got idiots on the road there that get away with it and I am a

family-man taking my kids to somewhere we have never been before for a good day out and you have just spoilt it. So thanks so much.’ (Speeding, FG3)

This recipient had received a speeding FPN from a road side patrol vehicle. Again one can see how the claim for common-sense is bound with ideas of respectability and a sense of just deserts. Wells has argued that criminal offences which have risk as an operating telos ‘means that ...individuals are no longer insulated from police attention by their respectability or attitude to the law’ (Wells, 2012: 105). Here Craig’s self-identity as ‘a family-man’ who has made a small mistake is contrasted with the ‘idiots on the road’ and the ‘boy racers’. This contrast serves two purposes; it seeks to exculpate his behaviour by contrasting more egregious examples, a form of Sykes and Matza’s ‘condemnation of the condemners’ technique of neutralisation (1957:668). Craig’s statement also seeks to persuade that on a common-sense viewpoint, his behaviour is not worthy of enforcement attention. In other words common-sense policing here would focus on the less respectable driver, the “boy-racer”, and leave the “family-man” alone.

It should be noted that this research is not involved in determining whether common-sense claims are true, or accurate reflections of the researcher’s idea of common-sense. Rather this research examines why, and how, such claims are made and what it signifies in the justice experienced by recipients of OTSPs. Common-sense justice is used to highlight how complaints about the OTSP system can be seen to involve a lack of a meaningful opportunity for recipients to make sense (in justice terms) of the OTSP encounter.

#### A Common-Sense Approach to Discretion

Finkel argues for a dual conception of law, between the black-letter law, that is law that ‘law students study, judges interpret, and jurisprudes analyze’ (Finkel, 2001:2) and what he calls “commonsense justice”. This ‘reflects what ordinary people think is just and fair... It is what ordinary people think the law ought to be.’ (ibid). Finkel argues that in approaching laws and legal systems the “black-letter law” approach is unduly restrictive and doesn’t sit well with common notions of justice.



'The law [black-letter] seems to freeze the frame at the moment of the act and then zoom in on a specific set of determinative variables, the commonsense context, like a motion picture, conveys action before, during, and even after the moment of the act. (Ibid: 319)

This idea that the law acts as a freeze-frame is interesting when one considers the use of technology, specifically cameras, in the enforcement of motoring transgressions. That type of enforcement involves a straightforward case of freeze-frame legality; there are a set of determinative variables which are caught on camera and the punishment process begins automatically. Thus, in speeding, a motor vehicle is pictured travelling over a specific distance in less than a specified time, similarly in bus lane camera enforcement, or red light camera enforcement, mere presence is the determinative variable that decides whether the law should be applied. However, this is not to suggest that technologically facilitated enforcement is the only context in which black-letter law arises. Across the OTSP contexts recipients feel that enforcement agencies use a black-letter law approach; indeed it is a hallmark of all OTSPs that by design they do not take into account mitigation in either sentence imposition or sentence severity. The purpose of the OTSP is that it equalises punishment regardless of personal circumstances; the ideal OTSP system imposes a penalty immediately with no regard for mitigation.

Finkel's concept of common-sense justice would look for a wider enquiry that takes into account social factors both leading up to the act in question and what happens afterwards. It is argued here that claims for "commonsense" justice by OTSP recipients involve claims about voice. Voice is seen as the means through which context is communicated. The claim about voice is a claim to respect and dignity (themselves key criteria of procedural justice) and the use of voice involves a recognition of a wider context in which the offence has taken place, the common-sense context.

Finkel argues that the conception of common-sense justice is based on the moral philosophy of Dworkin (2001: 5); it seeks to achieve a 'morally defensible outcome' (ibid).

However, it is argued, that Finkel's arguments owe more to Aristotle than Dworkin. The dispute about common-sense, and the use of common-sense in enforcement practice, reflects an Aristotelian approach to justice; one that is concerned with "telos" (Sandel, 2010). Sandel points out that Aristotelian justice requires two elements: that justice is teleological, 'defining rights requires us to figure out the *telos* (the purpose, end, or essential nature) of the social practice in question' (2010:186) (no emphasis added), and 'that justice is honorific. To reason about the telos of a practice ...is, at least, to reason or argue about what virtues it should honor and reward' (ibid). These two elements of Aristotelian justice neatly describe the concerns that recipients of OTSPs have about enforcement practice.

Argued here is that denial of a meaningful communication (in OTSP enforcement) in effect denies the teleological reasoning opportunity; it denies recipients the ability to discuss with enforcement agencies their behaviour *within* the context in which the notice came about (justice as telos). This denial of opportunity, for contextualisation of the circumstances surrounding the offence (the motion picture view to use Finkel's analogy), calls into question what purposes the law should serve. By failing to reflect the telos of legislation, authorities thereby fail to reflect the virtues that such telos implies (justice as honorific). This suggests that in determining the purposes of legislation, such laws should reflect normativity. In addition it is argued that the denial of voice is a denial of the "honours and virtues" that recipients feel they are entitled to have taken into account by the law. Thus the following claim, made during a focus group of motoring offenders

Of course I'm peeved. For half a second [he had gone through a red light] and 50 years driving it's not bad going is it? So no I was peeved and I still am now to be honest with you. (FG3, Motoring FPN)

This motorist clearly suggests a desire to have the virtue of having 50 years clean driving experience honoured by the enforcement agency before automatically issuing the FPN. Likewise as discussed above the idea that a recipient is a respectable member of society, 'a family man' or simply 'a nice bloke', is a request that the law takes into account this

honorific aspect of identity which dissociates them from the “real criminals”, those deserving this form of treatment.

### Arguing Purpose (Telos) in Black and White Laws

Recipients of OTSP want to explain how the set of circumstances that led to the “instant” in which a transgression was committed came about. However, recipients feel that authorities are not interested in what they have to say because of the perceived “black and white” nature of the offence:

Jivan: I do remember talking to the chap about this, he said ‘look the bottom line is you can’t be parked on double yellow lines, whether it is a part of your vehicle, whether it is your vehicle is not actually on it, not making contact with it, but your bumper is over the line, the bottom line is that any time you try and fudge it a bit that is opening the door for all’ so I figured yes that is a very straightforward way of looking at it, either it is against the rules or it isn’t. (Interview, PCN)

Here we see the dual problem with voice and black-letter law interpretation, this recipient received a notice for a small portion of his vehicle being on a double yellow line. The recipient was fortunate in that he saw the CEO issuing the notice and spoke to him about it. What he gets in response from the CEO is both a black-letter law approach (“the bottom line”) leading to an exclusion from the conversation any discussion of the common-sense interpretation of the problem (“either it is against the rules or it isn’t.”)

Jivan: That to me didn’t make sense and that ticket was in the same vein, because there was just such a negligible margin between me getting a ticket and not getting a ticket, especially when over 90% of the vehicle [was] fine. I felt a bit gutted by that. (Interview, PCN)

The idea ‘that ...didn’t make sense’ reinforces the notion that there is a perceived gulf in common-sense understanding between enforcement agencies and recipients.

Recipients may believe that laws are passed with a purpose and that they are enforced with that purpose in mind. However as they find out, by receiving an OTSP, the purposes of the law don't always apply to their situation. Unfortunately this lack of understanding is coupled with the situation discussed above; namely the lack of opportunity to engage in a conversation around the purposes to which the law should be aimed.

Mabel: Sometimes I feel like they... it's either black or white, they don't see the shades in between ...they just don't accept any story other than their own. It is like you didn't have a ticket so can't have had a ticket kind of thing, which I think sometimes they should, kind of evaluate... if somebody feels so strongly that they shouldn't have got that parking ticket then they should actually evaluate that case, they shouldn't just say "no, sorry, you got the fine so you will have to pay" (FG2)

Again the situation is, as Finkel would argue, a black-letter law approach; the officer, or agency, has frozen the moment of transgression and will only take into account certain determinative variables. Here the either/or question is whether the parking ticket was displayed. Furthermore in the claim that 'they just don't accept any story other than their own' accords with Finkel's description of black letter law: the authority is presumed to have no care for the reality of the situation, its grey nature, and instead imposes the PCN due to the determinative variables (no ticket displayed) being satisfied. Whereas if the authority were to use Finkel's common-sense justice approach, they would be able to rewind the camera from the moment at which the officer suspected the offence, to when Mabel actually purchased the ticket and thus not punish in these circumstances.

The Traffic Penalty Tribunal has noted this potentially unfair facet of parking enforcement. In its 2010 annual report they state: 'it is not clear at what point in the requirement to 'pay and display' the focus turned from paying to displaying' (TPT, 2010:4). What Mabel has experienced is the increasing practice of local authorities in parking enforcement to focus on all elements of the offence, which is a prototypical black-letter law approach. The black letter interpretation of "pay and display" is conjunctive, it is pay **and** display, thus it is not

enough to pay, one also has to display. This facet of parking enforcement engenders a real concern about the systems fairness, as the TPT state: 'a real sense of grievance arises where the appellant paid to park, but there is a dispute about the display of the ticket.' (TPT, 2010:4)

This black-letter approach is nowhere more apparent than in enforcement of 'display' cases involving blue badge holders (disability parking concessions).

Adjudicator: you were parked in a parking bay but that the back end of your car, from the rear wheel, was over the end of the bay and into the one behind?

Man: I needed to leave space to get out you see for both of us... the council said I must park in the space. They also said I could have parked on the double yellow lines or on the single yellow line, but I thought that would be worse, I would be causing an obstruction. (Field Notes, 23/5/13)

Here the recipient perceives that the council does not allow a common-sense appreciation of what had occurred. Rather than park somewhere more dangerous, or obstructive, the recipient felt that it would be better to park in the space. However, in interpreting the transgression, the authority applied the black letter law approach (was he over the line or not) rather than examining whether it was "appropriate" to park where he did. The authority assumes that "appropriateness" is a given due to the existence of the legal requirement, (i.e. an offence exists therefore it is appropriate to enforce a strict interpretation of it) which, combined with a zero-tolerance approach, means that the authority will not take the recipients factors into account.

Similarly in the following examples authorities are perceived to be lacking in common-sense and not listening to teleological claims.

Milly: I did actually display the ticket but the ticket fell off. I did challenge it, they still made me pay (FG, 24-11-12)

Malcolm: I parked where I normally parked overnight (on a car park), but had taken my badges (disability concession) out because it had been cleaned. I was playing with the kids and forget to put it back in that night. I got a ticket and I asked them to cancel it but they weren't bothered. They said I had to display it and that was it, they didn't listen, just pay up. (Interview, PCN)

Here is a clear example of black-letter law interpretation in action by the authority. Parking offences are *mala prohibita*; they require no proof of harm or intent on the part of the transgressor, and this allows for the literal approach to interpretation. This recipient has the right to park where he was parked, has not deprived anyone of space to which they were entitled, and has merely not exhibited the correct paperwork in the vehicle. As this recipient stated:

Malcolm: I hadn't done anything wrong really, just forgot to put the badges back in.  
(*ibid*)

A communicative engagement here would respond to Malcolm's, Milly's and John's claims for common-sense justice. It need not result in an alteration of the decision<sup>79</sup> but it would demonstrate that the authority had listened to their concerns. Instead they feel that they have not been listened to "they didn't *listen*, just pay up" and "they *still* made me pay".

To a certain extent the black-letter approach is a reflection of zero-tolerance policies described in the previous chapter. ZTP is reinforced by the black-letter law approach; once a transgression has been witnessed (or an officer has formed reasonable suspicion) then the OTSP must be issued. This black-letter approach does not allow for examination of common-sense judgments or for the teleological interpretation of legal requirements in enforcement agencies (i.e. the application of legislative purpose to law enforcement.)

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<sup>79</sup> although again one should remember MacCoun's (2005) warning that procedural fairness isn't always a reliable proxy for actual fairness, here one can see that even with procedural fairness the outcome of these decisions seems unfair)

Telos and the OTSP.

As stated above “commonsense justice” owes much to Aristotelian thinking on justice. In this section it is demonstrated that the teleological enquiry that OTSP recipients require must involve a communicative interaction over the purposes of the legislation being enforced.

### *Parking Telos*

Road traffic regulation is subject to certain limitations contained within the Road Traffic Regulation Act 1984. The RTRA permits local authorities to carry out traffic regulation in accordance with specified aims and principles. These are:

- Avoiding danger or risk of danger to persons or traffic<sup>80</sup>
- Prevention of damage to road or building
- Facilitating passage of traffic
- Prohibiting unsuitable vehicles having regard to character
- Preserving character of area for pedestrians or horseback
- Preserving or improving amenities

However when it comes to enforcing legislation these purposes are unimportant. Authorities are not concerned, at the point of enforcement, with marrying the particularities of the offence with the telos of road traffic regulation. So in Jivan, Mabel, Milly, Malcolm and John’s cases the authority were not interested in whether any of these recipients were impacting upon the *purposes* for which the regulation is in place. Instead what the authority focused on was the black-letter law interpretation of each instance; whether they fell within the *definition* of the legislative provision (not purpose). Although the purposes of traffic regulation are translated into regulations that can be enforced, those regulations displace the purposes for which they were enacted in the first place and are interpreted in a strict fashion.

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<sup>80</sup> Which includes risks created by the authority in exercising its power under s. 1 (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire CC Thursday 14 December 2000, Official Transcript).

Recipients of OTSPs, certainly in the parking enforcement context, repeatedly criticise enforcement activity that does not allow for an examination of the telos of parking restrictions.

Katie: Although you're not in the lines, you're not blocking anyone under the time while doing that, I parked and got ticket. (FG 5-12-11)

Steven: I was on a kerb and they said I was blocking, obstructing the passage of the drive way / driving area and as far as I could see you could fit a tank through there, never mind an ambulance or fire engine so I was sort of, I mean I wasn't parked in the right place, so I accepted that bit, but I wasn't convinced by their argument and their reason for putting a ticket on there (FG, 4-2-13)

Again there is a claim here for Finkel's wider conception of legal problematisation. Here the 'problem' to be enforced, in the recipients' view, is not whether they have technically committed the offence; "not in the lines" or "on the curb", but whether they have actually breached the purpose to which the law is addressed.

Interestingly Steven's comment that "I accepted that bit, but I wasn't convinced by their argument" demonstrates that he feels that telos should be taken into account when deciding whether to impose a PCN. As these notices (PCNs) are typically conducted at arm's-length (without the driver being present) then, in effect, Steven is asking that the CEO on the street has a common-sense discussion with themselves prior to issuing the PCN. Thus recipients feel that enforcement practice that relies on zero-tolerance and the absence of discretion cannot operate fairly because it does not take into account a purposive approach to legal interpretation.

It also demonstrates the fact that the OTSP itself involves a communication. Steven sees the PCN as providing "their argument", the enforcement agencies argument, but because the penalty is issued when he was not present he could not voice his own counter teleological argument that he wasn't causing an obstruction. The problem here is not



necessarily that the recipient could not influence the agency, but that he could not have a 'rational and reciprocal' (Duff, 2001: 189) discussion with the enforcement agency. Such a discussion would involve a conversation about the purposes for which traffic regulation exists.

The linking of purpose with transgression creates a problem for the understanding of procedural justice discussed at the start of this chapter. These recipients, in making the teleological argument, are seeking to convince the authority that if they were to exercise common-sense then the outcome may be different. There is a potential problem here therefore in understanding whether these recipients want an actual change in outcome and whether this drives the sense of unfairness. It is difficult to suggest whether this is true or false given that the procedure itself doesn't allow for such argument. If it did, it may be that these recipients would still be aggrieved if the authority had listened and raised their own counter common-sense claims. Unfortunately at present this study cannot answer this question, it is suggested that following the procedural justice literature the outcome would not be as important if there were perceived fair procedures (Tyler, 2006; Tyler, Rasinski & Spodic, 1985; and McFarlin and Sweeny, 1996)

#### *Moving Traffic Enforcement*

Similarly in police traffic enforcement claims are made about the lack of common-sense and appeal to teleological discussion. This desire to explain, and the lack of opportunity to do so, leads recipients to conclude that the law enforcement agency lacks common-sense and consequently have lost sight of why they are enforcing the legislation (its purpose).

Jim: I wasn't treated with any initiative or common-sense, because there is the letter of the law and there is the spirit of the law, [when he received a previous notice from an actual police officer, not camera enforced] that police officer knew the difference, he knew I wasn't a speeder although I had been speeding, he knows that it was a misunderstanding and I probably won't do it again (Interview, Speeding & PCN)

In Jim's case it is the technological facilitation of the FPN that lacks common-sense. As Wells has argued the 'techno fix' (speed camera) leaves recipients wanting 'a more contextualised and inconsistent treatment' (2008:814). Jim is requesting a personal encounter here, so that the officer can understand the teleological argument he makes, "the spirit of the law" rather than "the letter of the law."

Wells (2012) is correct that "common-sense", "discretion" and "respect" are seen as part of a "just" experience' (2012:178) but, as the following quote demonstrates, the presence of personal interaction with enforcement officers does not guarantee this experience, despite what 'techno-fixed' drivers may think.

Rob: But the thing what gets me, and you know years ago, I mean you get done for speeding down the road, they would let you off, they would just say

Dave: Sometimes it's a bit common-sense int' it

Rob: You know doing like 34 or 35 in a 30 they would say 'just slow it down mate' you know and all this, but now, no 'here is your ticket get it paid'. (FG)

These recipients feel that the widespread use of FPNs for speeding enforcement (post National Safety Camera Programme) has reduced officer discretion. Such discretion is no longer experienced due to the availability of an OTSP, "here is your ticket, get it paid." Rob neatly demonstrates the experience of net-widening (Chapter 4) where officer discretion is removed so as to increase capture. This effect is interpreted by Rob as an assault on common-sense; Rob believes that tolerance and the discretion of officers (previously governed by common-sense) has now been reduced. Thus "they would just say... slow it down mate", in other words they, officers, would recognise the essentially minor nature of the transgression and warn the speeder, whereas now it is no longer an option. This reduction in tolerance/discretion is then experienced as a reduction in the common-sense judgements of officers and evidence of a divergence from the purposes and original intentions of the law.

Noel: I've got fined going through lights, in Nottingham. I felt aggrieved because the ticket showed I went through at 16mph, because I was changing lanes on a doglegged single carriageway with three lanes and various lights. And I was actually right behind a coach that had clearly gone through the lights as it was changing. I moved back into the lane. I couldn't see the light, my view was blocked by the coach. Suddenly realised that I was in the act of driving through the lights. You know, and really couldn't stop. And of course it was one of the places with the camera on it so I felt hard done by because again I'm a law-abiding driver but I seem to have broken the law (FG4, FPN)

Noel is again making the common-sense justice claim that there needs to be a wider appreciation of the circumstances surrounding the offence, rather than the black-letter law application. He feels aggrieved due to the freeze-frame nature of enforcement; his vehicle had been witnessed at a certain point which justifies the application of law. Whereas he seems to want the 'moving picture approach' (quite literally in this case) since it would capture his lack of opportunity to observe the lights. Noel paid his fixed penalty.

Noel: In the end, I let it go because I thought, well, I, technically, I have. But there was no malice. I didn't mean to, it was a mistake. (FG4)

It is worth recalling here that a facet of teleological reasoning is its honorific aspect (Sandel, 2010:186). Noel's lack of malice in this instance is not enough to exclude him from punishment and thus he feels that the punishment is failing to honour an important dimension of his case. In essence Noel is suggesting that motoring offending should consider, as a matter of honouring important principles, his mental state of mind. This is difficult in motoring enforcement as most are strict liability (so called *mala prohibita* offences.)

Traditionally there has been a distinction in law between offences that are *mala in se* (inherently wrong in themselves) and *mala prohibita* (offences that cause no moral concern in and of themselves). This distinction between *mala in se* and *mala prohibita* "was

considered ontological: a crime was evil in itself, representing an action that was bad even if no law spoke against it, while a contravention was merely illegal because a government had decided to prohibit certain behaviour.” (Hildebrandt, 2009: 51) The essential difference is therefore one of morally problematic behaviour, *mala in se* is an offence that is seen as morally wrong whereas *mala prohibita* is merely wrong because the government claim it to be so. Noel, however, is seeking to include moral reasoning within an essentially amoral legal framework. Thus the common-sense interpretation of offending that Noel gives is one in which transgressions occur with some form of malice, or guilty mind. Quite how such a law could be enforced is a significant practical difficulty that enforcement officers would have to overcome. It is important to reemphasise here that this thesis is not suggesting that this approach be adopted, merely to point out how in the absence of a communicative interaction the impracticality of Noel’s suggestion goes uncontested and, as discussed in the next chapter, can lead to feelings that the law is illegitimate.

A further complaint that recipients make, in relation to common-sense, regards the purposes (and fairness) of enforcement tactics.

Daisy: Automatically in a 30 for me to have done that so quickly... I felt I would have caused an accident, because you would literally have to come round the roundabout and slam your brakes down straight away, and if you think of the other traffic.... I didn't think that it had sufficient enough space ...to be able to slow down safely and sensibly to a 30 and I was coming up the 40 and at 36 that should have been taken into account (FG2)

Deidre: So I thought they are just putting them where people are quite likely to get caught out... Because I think the speed limit used to be national speed limit down there and then they changed it to 40, (FG5)

Mark: With the van, where it was located, I did think it was there to catch me out (FG4)

The lack of common-sense judgement here is perceived by recipients to involve underhand tactics by the enforcement agency. As Wells' (2012: 37-72) research amply demonstrates claims to common-sense are part of the demonopolisation of expertise due to the risk based nature of speeding enforcement. However in this context claims to common-sense also reflect concerns that are not adequately addressed within enforcement encounters. Arguments about enforcement practice and tactics are, by the very nature of OTSP enforcement, not subjects up for discussion in the encounter (should there be one). It is self-evident that once an agency or officers decide on enforcement tactics it is unlikely that they will then perceive such tactics as illegitimate in individual interactions.

The decision to use a particular tactic in enforcement practice is predicated upon a telos of its own, the use of risk as a driving ethos in such legislation. Risk as a technique of control 'instead of seeking to bring individuals closer to an established norm through the application of corrective interventions, ...alters the physical and social structures within which individuals behave' (O'Malley, 2010b: 323). In the motoring context this involves the punishment of the risk of harm, rather than the harm itself. The consequences this brings for risk based enforcement can be seen above, the teleological arguments being made are addressed at the individual characteristics of each offence, which are largely immaterial unless they fall within the actuarial categories that are counted. As O'Malley states "offender[s] normally [are] not addressed principally as a person, but primarily as a driver or owner of a motor vehicle or in some specific category, such as proprietor or operator" (O'Malley, 2009: 84). Thus complaints about enforcement tactics are of no concern since the 'target' of enforcement is not a person, but a 'dividual' (ibid) The claims made above are in effect asking for common-sense judgements to be made about the fairness of the enforcement tactics based on *those individual* characteristics that the recipients feel need recognition.

For recipients the teleological discussion is not necessarily about the purposes of motoring legislation per se, but about the practice of law enforcement in promoting the telos of

motoring legislation. So both Deidre and Mark in the above examples feel like they have been “caught out”; targeted not because they were causing a harm, or were driving in a dangerous manner, but because the enforcement agency were purposefully targeting *normal* drivers in order to lower overall risk. In such enforcement, authorities may be correct to claim that there are good reasons for this approach in that actual harms may be prevented, however, the consequences of this approach seem to be that recipients feel aggrieved about not having the honorific aspects of good driving behaviour (i.e. non-harmful driving) taken into consideration. This may, in the long run, lead to feelings that the law, and the enforcement agency, is illegitimate (see Chapter 7).

*Telos and the Discretionary Notice – Justice as honorific*

Assessing the extent to which purposes behind legislation are used as arguments against the fairness of receiving a PND, or litter FPN, is difficult due to the problem in recruiting participants who had received these OTSPs (Chapter two).

With this caveat in mind, however, evidence was collected that demonstrated that teleological arguments are made in the PND context. Such arguments revolved around the definition of ‘disorderly behaviour’

Ok I got arrested for being drunk and disorderly. I’m putting my hands up for the drunk part, but I was in no way disorderly (PND, PPF)

Two recipients of PNDs interviewed in this research likewise disputed that they were disorderly

Saul: I said ‘in what way was I disorderly?’ she said ‘I am not privy to that information I am just the person who issues these PND’s’ (PND, Interview)

Olly: The way the whole thing came about, you know if I had walked out of the pub and they asked my name and address, and I gave it them I wouldn’t have got the ticket, I was drunk. It was the fact that I said no I’m not giving you my name and

address I don't have to, what have I done?' and then 'oh yeah he is drunk and disorderly because he is arguing' type thing. (PND, Interview)

In Saul's case he wanted an actual discussion about the nature of the "disorderly" behaviour in question and again one sees the denial of the communicative opportunity in return. In the second quote Olly contests the disorderly nature of his behaviour; he sees his questioning attitude as the sole reason for the police labelling him disorderly. It is worth noting here the comments of ACPO when requesting the extension of the PND scheme to harassment, alarm and distress. They advised ministers that;

this offence is used operationally to deal with a similar type of offending to that covered by section 91 of the Criminal Justice Act 1967, which is disorderly behaviour while drunk in a public place. Section 91 is already a penalty offence, but while section 91 requires the offender to be drunk, section 5 of the 1986 Act does not. ((Hansard, Third Standing Committee on Delegated Legislation Tuesday 18 June 2002 Column 4)

Here Olly seems quite correct that his reported behaviour if not drunk would not constitute the section 5 offence (there was no harassment, alarm or distress caused). Olly instead claims his only crime was getting drunk, of course if there had been a communicative opportunity perhaps Olly would have been able to understand the police perspective<sup>81</sup>. In the PND context therefore, these claims also question the purposes of enforcement against these recipients, since they clearly believe they were not disorderly.

These recipients also felt that their treatment called into question the honorific aspect of justice, the description of the recipient as "disorderly" was felt to dishonour their respectable qualities.

John: You know in the middle of the city centre as well, why weren't they separating people who were glassing each other sort of thing! I mean they were parked up near

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<sup>81</sup> Although being drunk, perhaps not.

the alleyway..., lights off, seen me walk into the alleyway, knew exactly what I was going to do [urinate], follow me into the alleyway and then fine me. ...It's a ridiculous waste, whereas there was probably someone being glassed at that moment in the town centre. (PND, Interview)

Once again the technique of neutralisation on display here, the 'condemnation of the condemners' (Sykes and Matza, 1957:668) suggests that the honorific aspect of justice would recognize that the recipient is not 'glassing' someone, in other words not a "real" criminal and thus not deserving of the process.

In the PND context the idea that the telos of legislation should drive enforcement practice is difficult since the behaviour in question is morally problematic. Shop theft and causing harassment, alarm and distress, all carry a certain negative moral quality, the position of drunk and disorderly behaviour is less clear cut. The history of alcohol regulation is beyond the scope of this thesis, suffice it to say, as Rudy (2005) does, 'drinking and drink related behaviour are being seen as symbolic of other, broader issues, including personal control and freedom, youth and parental responsibility, and the nature of the community' (Ibid: 128) He goes on to argue that the regulation of alcohol, particularly the regulation of public space consumption, can be understood 'from the Durkheimian (1938) perspective of boundary maintenance' (ibid: 129)

Through media accounts, political forums, temperance movements, and policing campaigns, upright consciences are brought together to validate the value of civilized drinking and to stigmatize deviant drinking. Middle-class picnic drinking is civilized and youth drinking is deviant; and drinking in private settings is fine but not in beer halls. (ibid: 129)

Thus the regulation of public drinking is a moral problem, particularly where that drinking is undertaken by classes of people who are deemed to be at risk of deviance. One can certainly see aspects of this boundary maintenance in the introduction of PNDs, as Blair spoke of 'thugs' who were 'drunken, loutish and anti-social' (2000). Similarly in introducing



the CJPOA in the House of Lords the minister, Lord Bassam, saw the bill combating the 'appalling and offensive behaviour, often described as part of the job-culture, which takes place in our towns, cities,... particularly at the weekend and where drink is at the root of the matter.' (HL Deb, 2001 622, c.458).

Certainly the introduction of PNDs created an opportunity for police forces to deal with more instances of disorderly behaviour. The result of this increasing throughput was that more citizens could be dealt with than would otherwise have been the case. Accordingly in D&D offences this meant that the 'boundary maintenance' (Rudy, *ibid*) extended to include those who, through lack of police action, no doubt thought of themselves as belonging to the civilised drinking classes. Being confronted with a PND therefore, one where this claim to civilised/respectable status is ignored, leaves recipients with somewhat of a problem. They may attempt to challenge the notice at court, but would soon be disabused of the notion that respectability, in general, is a defence for drunk and disorderly behaviour.

The use of the PND on the other hand, coming as it does with inadequate opportunity to have these concerns (the respectable nature of the recipient) discussed, instead leaves recipients with no opportunity to reassert their respectability (even if it was to claim that this was an aberrant incident). However as the quotes demonstrate above a frequent response to receiving a PND for D&D is to dispute the idea that the recipient was "disorderly", in other words not beyond the boundary of the 'rough-respectable divide' (Measham, 2008:16)

Tyler finds that '[p]rocedures define social status... because members of the group value their status and security within it, they are very concerned with the procedures used by the group to make decisions.'(2006:174) The use of the PND, particularly in D&D cases where it can represent the boundary line between rough and respectable citizenship, is thus problematic for citizens trying to make sense of the telos of D&D enforcement. These recipients see themselves as part of a "respectable" group of law abiding drinkers. The perceived inadequate procedural fairness discussed above, reinforces the idea that these citizens no longer belong to the "respectable" community. Thus in the claim that they should

not have been punished, they are in effect arguing for recognition of their respectability, the honorific aspect of justice, that honours their respectable, law abiding membership of the moral community (the civilised drinking class).

The ability of police officers to deal with more instances of disorderly behaviour, and the suggestion that such enforcement involves a lowering of tolerance in relation to what is and what is not acceptable (Chapter 4) combined with the risk based nature of the penalty, leave these recipients unsure as to what aspects the law on disorderly behaviour actually honours. Instead they are presented with a situation where, to quote Wells, 'a commitment to avoiding transgressing rules is no guarantee of a life free of intervention from legal authorities...' (2007: 2)

#### *Telos and the Litter FPN*

It is likewise difficult to assess the extent to which teleological arguments are raised in the litter context given the difficulties of recruiting participants to the study. Certainly from observational studies it can be said that respectability may be a key honorific aspect that recipients want to raise in the encounter

Woman: haven't you got anything better to do with your time...? You want to get the smack-heads who throw their cigarettes everywhere; you don't get them do you?  
(Field Notes, 5/10/12)

Here the call to focus on 'smack-heads' is another example of boundary setting. The recipient wants to cast their own transgression into context, the context of their respectability compared to the "real" cause of the littering problem. This claim is not helped by the fixed nature of the penalty, since even if a "smack-head" had littered the penalty would have been the same. This reaffirms to the recipient that their respectability is, not only, not a valid criterion for increased procedural fairness but also for the level of punishment. Again the OTSP fails to reflect important honorific aspects of respectability that the recipient feels should be taken into consideration.

In this respect it is important to note the congruence in language between the introduction of litter FPNs, and PNDs. In both cases “loutish” behaviour was the supposed target of intervention. In litter the “litter-lout” was seen as causing the problem, at least in the early stages of litter legislation and in the PND context “louts” in general were claimed to be the problem. It is perhaps little wonder then that respectability might be an issue for recipients; being labelled a “litter lout” involves setting up a distinction, boundary, and the recipient of the OTSP can be conceived as crossing that boundary.

As a consequence recipients create their own boundaries that allow them to see their behaviour as respectable even where they have been found to be doing wrong. In the above example the recipient distinguished her actions from the “smack-heads”, those felt deserving of punishment. A further strategy is to minimize the amount of harm caused by the littering.

Man: I think it is diabolical I do. Of course if I'd chucked a load down and there were kids around I could understand that. (Field Notes, 5/10/12)

This again sets up boundaries between respectable (no kids, small quantity of litter) and unrespectable behaviour. Unfortunately for the recipients this distinction is unimportant since it will not alter the procedural elements of the penalty (the officer will still claim no discretion/zero-tolerance) nor will it alter the amount of penalty imposed. In effect not only has the penalty removed perceived procedural fairness it has also removed any concept of just deserts.

### **Common-sense or unfair discrimination?**

Common-sense justice is, thus, not experienced by recipients of OTSPs, who feel that “black-letter” law interpretations are the norm for enforcement authorities. The unresolved question is whether such common-sense justice has a place in enforcement of society's laws. As Boeckmann and Tyler argue there is a danger in that ‘commonsense justice

inclinations are ...likely to lead to unequal justice' (1997:378). Certainly some OTSP recipients are aware of this danger:

Peter: because if you then smile at the officer they may say 'ok well don't worry' and if you get out and you have had a bad day... and say 'this is ridiculous'; that is the problem I have with discretion, I hate the accountability of our society, but it is all about how much peas and potato you get compared with other people... you know my daughter gets off speeding fines, my son doesn't. (FG5, Speeding)

For this recipient, discretion and a reliance on common-sense justice present a danger of inequality through a reliance on characteristics of recipients that are not appropriate, such as class, race, sex etc.

Trevor: for me particularly as a young man, there is this sort of sense in traffic enforcement that young men are risky drivers and I would argue that that is not true of me; you know I have never had a speeding fine... You know I have got my parking fine but that is all I have ever been penalised for... But there is... this assumption that because I am a young man, you know if I am stopped doing 5 mph over the speed limit accidentally somewhere, there will be this assumption that I speed a lot worse than that regularly ... I would prefer that if I am caught speeding I am given a ticket because I was caught speeding, and if the elderly lady was caught speeding that she was given a ticket (FG5)

It would certainly be incorrect to suggest that these fears of common-sense justice aren't well founded. It is self-evidently the case that varying social and economically disadvantaged groups have suffered discrimination in the furtherance of "common-sense". However, as Finkel argues, a conception of common-sense justice is not about communitarian or majoritarian sentiment, instead it is about finding a 'morally defensible outcome' (Finkel, 2001:5).

The argument for common-sense justice, particularly in the OTSP debate, is not an argument in favour of, as Wells put it 'that all sorts of biases be put back into the system' (2012:178), but that common-sense justice requires at least a recognition of the principles for which the legislation has been passed.

In fact common-sense justice can be taken back a step further such that common-sense considerations should not necessarily *influence* officers but should be *engaged with* at the very least by those enforcing the law. It may not have much influence on the officer but it would at least demonstrate a more meaningful voice opportunity. It would demonstrate that officers' care about the purposes for which legislation is passed and about the individuals caught within the system. It would recognise their right to be treated fairly and allow for a Duffian sense of communication. By talking about, and listening to, common-sense justice claims, officers would be engaging in a 'rational and reciprocal debate' one that 'speaks to citizens as members of the normative community... seek[ing] not just their obedience... but their understanding and acceptance of what is required of them as citizens.' (Duff, 2001: 79). Common-sense locates that understanding in a shared experience, one that involves both parties negotiating the requirements and understandings of legal obligations. At present there is no shared understanding, the requirements of law, from an enforcement perspective, appear as commands, not obligations.

### Conclusion

The lack of voice, here conceptualised in a rich sense, leaves recipients of OTSPs feeling that the interaction they have had with enforcement authorities is unfair. Theories of procedural justice predict that having an opportunity to state one's case before a decision is made heighten feelings of fairness and support for public authorities (Tyler, 2006). This heightened opinion should be maintained, such studies argue, regardless of whether the opportunity allows for influence on the decision maker. It has been argued that the OTSP encounter lacks a crucial dimension of voice, the requirement for a communicative encounter, in which both parties speak and listen. This does not suggest that the officer

should be influenced by the recipient, indeed the evidence suggests, as found in the PJ literature, that influence is less a determinant of fairness than voice is, but only where such voice involves a party who is willing to listen. In other words it is not that officers will always agree with them, but that they need to engage with what the recipient is saying and demonstrate this. At present all too frequently officers and enforcement agencies either ignore what recipients say as immaterial, or, as was found in the previous chapter, control the conversation and determine what is appropriate to discuss.

Whilst it may be trite to say that people want common-sense in enforcement, it is nevertheless true and essential to people's conceptions of fairness and justice. This is one of the reasons that CCTV enforcement of bus lane and speed cameras so incenses some of those who are caught by them. It isn't, as perhaps the enforcement officer may suggest, "they have been caught doing wrong and they don't like it". What so incenses about that form of enforcement is its lack of narrative grounding in events, which are interpreted through common-sense. These cameras interestingly come with the ability to provide moving pictures, but are interpreted by officers using the freeze-frame approach. There is no panning, rewinding or fast-forwarding, all of which give narrative richness to a situation, instead there is a frozen moment, an instance in which a particular law or regulation can be applied.

The moving picture approach contextualises the situation, it allows for uncertainty, mistake, and even fidelity to a higher purpose. Arguments about common-sense are not necessarily, to quote Samuel Johnson, 'the last refuge of the scoundrel' (Boswell, 1823:347) but real attempts by individuals, many who have had no interaction with law enforcement previously, to understand and ground what is happening in a narrative. Narrative is how 'people make sense of experience, claim identities and 'get a life' (Riessman, 2005:1). If enforcement agencies in their practice do not reflect this narrative grounding of events, as recipients' claim they don't, then it is little wonder people make claims about the lack of common-sense in enforcement.

## Chapter 7: From Common-Sense to Legitimacy and Compliance

*A lady from Coventry was found guilty of dangerous driving before the Huntingdon Bench in October 1907. She said she hoped the chairman of the Bench and the police constable who gave evidence against her would die and leave widows like herself. She once had a great respect for the police, but that had quite gone now (Emsley, 1993:368)*

### **Introduction**

Emsley's quote provides an introduction to the potential for feelings of illegitimacy to lead to great anger in relation to what is, essentially, minor criminality. It gives a good introduction to the frustration and sometimes violent outpourings that come from otherwise "normal" citizens when they are punished for breaking a minor law. The act of punishing behaviour leaves those citizens with feelings that the system is illegitimate evidenced by phrases such as the enforcement being "disproportionate", "unfair", a means of "revenue generation" or that the officers conducting enforcement are untrustworthy, or at the more extreme end "little Hitler's", "Stazi" or "Nazi's" to pick just a few adjectives that can be found relatively easily in online debate.

Against this backdrop this chapter begins by examining the concept of legitimacy and its relationship to compliance; what legitimacy means and what judgements are at work when claims about legitimacy of an authority, or its actions, are made and contested. The importance of legitimacy in the OTSP context also lies in the framing of such penalties as "effective" as Hough points out

The NPM modernization agenda has very largely framed the issues in ways that ignore the central requirements of institutions as they relate to legitimacy. Its concerns have to do with efficiency, effectiveness, and consumer satisfaction – none of which manage to encapsulate subtleties of an institutions legitimacy. (2007:78)

As discussed in Chapter 4, NPM was a primary management agenda during the time in which OTSPs gained increasing prominence (1990-2010). Thus understanding the

legitimacy concerns of OTSP recipients is of paramount importance in extending our knowledge beyond the simple measure of “effectiveness” used by government.

The focus upon voice and procedural justice in the previous chapter is important in any debate about fairness and the treatment citizens receive from state authorities. However, Tyler (2006) also describes how procedural justice has an impact on legitimacy, what he calls ‘obeying a law because one feels that the authority enforcing the law has the right to dictate behaviour’ (2006; 4). Legitimacy is thus an important factor in the OTSP debate, not only due to the close relationship between procedural justice and legitimacy, but also because of the centrality of ‘effectiveness’, and the problematic nature of this, in OTSP policy.

Compliance is problematic with OTSPs since there is confusion as to what it actually means. In this chapter compliance is examined from a legitimacy perspective; how feelings of legitimacy impact on compliance with the law and the demands of the authority. It is argued that feelings of legitimacy impact on the effectiveness of compliance with the laws in question. Furthermore feelings of illegitimacy, arising from OTSP encounters, have the ability to undermine the “effectiveness” claims discussed in chapter four. In other words feelings of illegitimacy not only potentially lead to lowering of compliance with the law in question, but also lead to delays the OTSP system was designed to remove.

Since a facet of OTSPs is net-widening then this makes it more likely that a citizen will either have a problematic interaction with an enforcement agency at some point during their lives, or even, repeated problematic interactions. The effect of these interactions is important since ‘repeated failures of the political and legal system to solve problems or deliver positive outcomes...eventually lead to loss of diffuse support... loyalty can be eroded by repeated experiences of unfairness’ (Tyler, 2006:177). Furthermore as Tyler states ‘personal experiences are evaluated with procedural justice considerations at the forefront (2006: 112) and, as demonstrated, recipients of OTSPs rarely claim that authorities are acting in a procedurally fair manner. This has consequences for feelings of legitimacy that citizens feel



towards enforcement authorities and their compliance, since 'behaviors of police officers and judges that offend and alienate the public are unlikely to be effective in controlling crime in the long term' (Tyler & Huo, 2002:136).

Since procedural justice concerns can lead to negative feelings of legitimacy then there is a need to understand whether the OTSP experience leaves recipients with feelings of illegitimacy toward the system as well as the authorities. If the OTSP is experienced as illegitimate this has consequences for compliance behaviour (Tyler, 2006) as well as the sense in which the citizens see authorities as acting fairly.

### Legitimacy and Personal Experience

Legitimate authority 'obviates the need for surveillance and rewards, since subordinates feel obliged to obey no matter whether there is a 'reward' for compliance or not.' (Matheson, 1987: 200) Thus legitimacy is intimately related with obedience, or lack thereof. Obedience is the essence of Tyler & Huo's approach to legitimacy, which they describe as a felt 'responsibility to support legal authorities and defer to those decisions' (2002:101).

Bottoms and Tankebe (2012) identify a problem with the deference view of legitimacy, in that it accepts too readily that a command by an authority is, of itself, legitimate. Instead they argue that legitimacy, in addition to focusing on people's reactions to authorities, should also focus on 'whether a power-holder is *justified in claiming the right to hold power over other citizens*' (2012: 124) (emphasis in original). Bottoms and Tankebe argue legitimacy is dialogic; it involves a dialogue between '(1) the power-holder to make legitimacy claims and (2) the audience to accept the power-holder as a legitimate authority' (ibid: 160). The splitting of legitimacy into a two-party dialogue has the effect of distinguishing between legitimacy as an empirical concern for authorities (do people comply when the authority is seen as legitimate), and legitimacy as a principle (is the authority legitimately using its powers). In the OTSP process the debate about legitimacy is frequently raised and has the potential to impact on the acceptance of an authority's power.

Furthermore in the absence of felt legitimacy recipients of OTSPs begin to doubt and project negative motives onto the enforcement agency in carrying out its enforcement function.

Hough et al (2013), reflecting on Bottoms and Tankebe's critique, argue for a two-pronged approach to legitimacy; **legitimacy as a normative principle** and **legitimacy as an empirical fact**. The normative understanding 'sets out some 'objective' criteria against which the legitimacy of an authority or institution might be judged (Hinsch, 2008).' (2013: 5). The empirical nature of legitimacy, Hough et al argue, is more subjective and involves Bottoms and Tankebe's dialogical understanding. Hough et al (2013) argue that empirical legitimacy arises where 'the governed recognise an obligation to obey power-holders, believe that power-holders act according to appropriate normative and ethical frameworks, and believe that power-holders act under the rule of law' (2013: 6)

### **Empirical Legitimacy**

The importance of legitimacy then lies not just in its normative status but also in its empirical reality. How that reality is measured is typically through a series of indicators that measure the relationship between legitimacy and compliance. Legitimacy has the potential to affect compliance if an authority exercises its powers legitimately (both normatively and empirically), since this increases the likelihood of voluntary compliance (see Tyler, 2006, Tyler & Huo, 2002). It should be noted that when discussing compliance, legitimacy studies tend to see compliance as a generalised sense of complying with law in the abstract. Thus self-reported claims of legal compliance are used to investigate the link between legitimacy and compliance. The most relevant studies for this thesis are Tyler (2006), Tyler and Jackson (2014), and Jackson et al (2012a). Each of these studies operationalises compliance through a series of indicators that give either a "general compliance" or "minor law compliance"<sup>82</sup> indices.

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<sup>82</sup> For instance complying with traffic laws

With OTSPs compliance can also be operationalised as payment of the notice. Thus in examining legitimacy and compliance in this thesis there needs to be a reflection of the impact of legitimacy on compliance with the laws and compliance with the notice. The latter may not reflect a positive outcome for the authority since the recipient may in effect be treating the notice as 'just another bill' (O'Malley, 2010: 108). However it is nonetheless important for authorities that OTSPs are paid since this can undermine the legitimacy of the system of post-OTSP enforcement, and the legitimacy of that authority in the eyes of those who pay their notices.

The empirical fact of legitimacy has been studied by Jackson et al (2012a) who state '[l]egitimacy may thus be instantiated not only in obedience as prerogative, but also in the belief that the police share the values of those they police.' (2012a: 1054). The focus on the empirical grounding of legitimacy led the authors to develop a model of empirical concerns of legitimacy leading to compliance. The relevant statistically significant factors found were; personal morality (the belief that it would be immoral to break a law), a felt obligation to obey the police which leads to the view that the law was legitimate, and moral alignment with the police (that is 'people morally identify with the police and the group that the police represent' (ibid: 1057)). They also confirmed earlier research by Tyler in the US context (2006), that procedurally just treatment by authorities enhances compliance and the view that the authority is seen as legitimate (2012a:1052).

In an earlier version of this article Jackson et al (2010) applied their empirical legitimacy framework to traffic offending and found that only two factors shaped compliance with traffic laws: personal morality and perceived risk of sanction. The other facets of legitimacy (legitimate laws, felt obligation to obey, moral alignment with the authority) demonstrated no association with compliance. Jackson et al conclude that traffic laws provide a special case for empirical legitimacy:

It could be that traffic law of the type considered here is so unpopular, de-legitimised or simply ignored that people do not think about it in the same way as they do other

laws. They might think laws are definitely not made to be broken, but that traffic law is not 'real' or does not apply in the same way. This underlines the difference between compliance with traffic law and... more general compliance (2010:10)

The lack of empirical legitimacy accorded to authorities in traffic law is thus important for the present study since OTSPs predominantly target traffic law related offences (FPNs and PCNs).

### **Empirical Legitimacy and Minor Crime: The Self-Report Problem**

As discussed, compliance in legitimacy literature is treated as a generalised sense of compliance rather than compliance with specific laws (See Tyler, 2006:30-31). How that generalised sense of compliance is operationalised is through a series of indicators which combine to form an index score of compliant behaviour. These indices are compiled through self-report surveys. Without wishing to reargue the debate about relying on self-report data in criminological research (see Junger-Tas & Marshall (1999) for a good introduction to the issues), it is important to note some criticisms that can be made about the survey research to date. In particular the treatment of data according to indices of "minor compliance," in respect of citizens' interaction with laws, highlights some issues.

Tyler, in his Chicago study, (2006) found that 38% of respondents agreed that they never exceeded the national speed limit, 49% stated they had never parked in contravention of parking laws, and 73% had never littered (2006:41). Similarly Jackson and Tyler in their recent study of legitimacy, compliance and cooperation, developed a scale of "minor compliance" which found that 38% said they had never broken a traffic law regarding speeding or running a red light, and that 86% claimed they had never littered (2014: 83).

As discussed (chapter 4) compliance with speeding law sits between 2% to 21%, even Stradling et al's more conservative estimate of 21% compliance (2003) is significantly lower than those reported by Tyler (2006) and Tyler & Jackson (2014). Furthermore in the context of litter, Keep Britain Tidy (the anti-litter campaign group) states that '62% of people in England drop litter, although only 28% admit to it' (2013:12). Much like the speeding

research discussed in chapter four, the predominant reason for littering, according to a 2006 Keep Britain Tidy survey, was lack of knowledge about what constitutes the offence of litter.<sup>83</sup> Thus self-reported compliance, in the legitimacy literature, with these laws appears to be a normative statement of intent rather than an objective empirical fact. Of course it is worth pointing out that the OTSP system is designed primarily to deal with risk and governing populations rather than individuals (O'Malley, 2010), thus it is actual compliance rather than perceptions of compliance that is important, since only actual compliance can affect the risk calculation.

Admittedly both Tyler, and Tyler and Jackson's studies were based in the USA and may reflect a uniquely American experience with compliance for such minor crimes. However Jackson et al's (2010) study replicating the claims in the UK context, found similar high percentages of "compliant" behaviour. They found that 95% of respondents stated they had never littered and that 66% had never broken a traffic law (2010:16). Clearly reliance on findings of relationships between compliance and legitimacy are problematic in these studies, particularly in those areas of law where intuitive knowledge (or moral guidance) provide little insight as to what the actual law requires. The fact that a citizen can simultaneously commit a criminal offence and at the same time have no knowledge of doing so is problematic. Not only does this suggest somewhat of a failure in civic education (an understandable one given that criminal laws have expanded exponentially with little coherent basis (Stuntz, 2001)) it creates a potential problem for compliance and the ways through which compliance can be theorised.

When a citizen is fundamentally mistaken about their own compliance with the law, views that the enforcement agency's legitimacy contributes to compliance must be suspect. The citizen may view the authority as legitimate but may nevertheless not comply with the legislation, or at best, comply with their own understanding of the legislation, which is objectively false. This is certainly understandable in the area of law that is covered by

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<sup>83</sup> An apple core providing the prime example, most respondents did not see this as littering.

OTSPs, typically minor strict liability laws (although by no means are all OTSP offences strict liability), where the “naturalness” or innate obviousness of wrong doing is absent.

It has already been demonstrated (Chapter four) that lack of knowledge of the law can be fatal to any claims that the law (and punishment) deter would be offenders. This thesis now questions whether the nexus between legitimacy and compliance can be maintained in areas where the citizen has been found to have their expectations confronted with the reality of the law.

### **Distinguishing between compliance motivation and compliance behaviour**

One potential solution to this problem is to treat the legitimacy literature as providing excellent empirical evidence of shaping compliance *motivations*, but providing limited evidence of compliant *behaviour*. Compliance motivation involves the idea that citizens are motivated to comply with the law, regardless of whether they actually do so. The idea is that citizens want to comply with the law and attempt to do so as a matter of course.

With OTSPs this distinction between motivation and behaviour is capable of being a profound problem for the perceived legitimacy of the system. As discussed previously the OTSP increases dramatically the amount of wrong doing captured by the state. The laws that OTSPs govern are not intuitively obvious examples of wrongdoing, as evidenced by the feeling of a lack of common-sense in their enforcement. This combination of a feeling of doing right by the law and yet in reality not actually doing so, and then being challenged about it, must impact on the motivation to comply with such laws. Put simply the OTSP has the potential to capture citizen wrongdoing in situations where the citizen probably feels they are doing no wrong. This then must have consequences for that citizen’s desire to comply with the law in the long term.

Braithwaite similarly argues:

Compliance related behaviours are different from motivational postures... [t]he conceptualisation of attitude and behaviour as separate dimensions of community

responsiveness is in keeping with empirical findings in the area of tax compliance, but departs from the expectation of consistency theorists that attitudes and behaviour should be related. The gap between attitude and action extends beyond the taxation context (2002a: 17).

Thus the term 'compliance' is more problematic than the legitimacy literature may lead one to conclude. Those citizens who fall in the group between actual compliance and self-reported compliance may be demonstrating an engaged motivational posture, but are not necessarily complying with legislation.

Citizens may be motivated to comply with the law, but it is their own understanding of the law with which they are motivated to comply. With OTSPs this is frequently understood through the input of common-sense interpretations of the law's requirements and the governing telos of regulatory obligations. Citizens that receive OTSP's are disabused of the notion that a compliant motivation is a perfect predictor for compliant behaviour; frequently it isn't. In such situations feelings of unfairness, illegitimacy and distrust of the motivations of enforcement authorities become wide-spread. Given that the treatment that OTSP recipients receive goes against their notions of common-sense this can lead to real problems for legitimacy and also future compliance motivations. Once again Braithwaite sums up the position perfectly.

No-one is going to like being sanctioned for non-compliance, but few benefit when discontent of this kind is fuelled by disrespectful treatment from the authorities, leaving individuals with a lifelong passion for resistance and defiance (ibid: 35).

### **From motivational to instrumental compliance through deterrence**

This then raises an interesting dilemma for law enforcement; the focus on seeking compliance behaviour (through deterrent based policies) may come at the cost of a compliance motivation. Darley's claim is apposite here:

“If a legal system’s rules for assigning blame and punishment diverge in important ways from the principles that the citizens believe in, then those citizens may lose respect for the legal system. They may continue to obey the rules that the “justice” system imposes, but will do so largely to avoid punishment. No society can continue to exist if its citizens take that attitude toward its legal system” (Darley, 2001:11)

That there may be fundamental differences between perceptions and reality in the way in which punishment and blame is imposed means that reality will suffer far more than perception. Thus citizens may think that they are complying, intend to comply, but their subjective understanding of compliance is false. In such circumstances being punished whilst holding positive normative beliefs about the law and its legitimacy, and the authority enforcing the law, can lead to ontological problems that may call into question fundamental understandings of fairness and justice. In addition compliance, as Darley argues (and as Jackson et al’s (2012) study demonstrates) switches to instrumental reasons. People’s normative beliefs no longer act as guides to appropriate conduct, instead instrumental factors of deterrence shape compliance behaviour. Darley concludes this is a worrying direction for legal compliance because lack of legitimacy leaves compliance at the mercy of an effective deterrent which, as already demonstrated, is a problem in OTSP enforcement. Deterring citizens doesn’t focus their normative or moral feelings on appropriate behaviour, but instead seeks to *impose* through threats, values that (it is assumed by the need to deter) citizens would not otherwise have. In the words of Thomas (2013) the focus on self interest in deterrence type policies fosters an attitude ‘which dismisses the relevance of the interests of a broader community’ (2013:30).

The suggestion of a switch to instrumental reasons for compliance has two potential negative outcomes; the first is a general contempt for the particular law being enforced, for example speeding (see Wells, 2012). The second, and far more worrying outcome, is alluded to by Darley, that citizens lose respect for the legal system *in total*.



Initial contempt for the specific laws in question soon spreads to the criminal justice system enforcing those laws, the police force and the judges, and finally the legal code in general. When this happens the law loses its most powerful force for keeping order: the citizens' belief that the laws are to be obeyed... (Darley, 2001: 12)

The process of de-legitimisation spread is, therefore, intimately linked with not just the actions of authorities, but also the reactions of citizens. Thus it is crucial to understand the feelings of legitimacy from OTSP recipients to see whether such de-legitimisation does spread.

Given that common-sense arguments are seen as inappropriate by authorities at the point at which the recipient receives the notice, arguments about legitimacy often take place at 'the dinner table' (Wells, 2012: 5) or at the workplace, in the pub, or in internet forums and through the local newspaper, in short anywhere but the location at which these arguments might be countered or expected to influence the actual decision. The move towards the OTSP, based to a certain extent on the demands of productivity (e.g. reducing cost and officer time), then cannot, without sacrificing those demands, adequately deal with the complaints that are made.

A word of caution needs to be sounded at this point. In the following discussions there are descriptive claims being made about the legitimacy of authorities using OTSPs rather than normative claims about what a legitimate policy of OTSPs ought to be. To a certain extent there will be overlap, when a recipient believes that an authority is acting illegitimately (or legitimately) it is descriptive claim (it describes how that person views the legitimacy of the process or agency), but it also involves a potential normative claim (the recipient may make claims about what ought to happen in order for the agency to exhibit the value: legitimacy.) This thesis is a piece of social science research not a policy manifesto, therefore it examines whether and how legitimacy is contested, rather than providing a solution to the question "how can the process of OTSPs be made legitimate?" In describing common factors of

legitimacy, or lack thereof, there are clearly policy implications (including whether and if an OTSP process *can* be legitimate) but that not the purpose of this research.

### Characterising Personal Experiences

#### Legitimacy, Personal Experience and the role of Trust

Tyler & Huo (2002) claim that 'legitimacy or illegitimacy accumulate or decline over time, and each experience has a small positive or negative impact on people's "reservoir of goodwill" towards the police and courts' (2002: 132). The role of personal experiences in shaping legitimacy feelings is important since it 'affects general views about the legitimacy of... authorities and the quality of their job performance' (Tyler, 2006:94). This is also true in the OTSP contexts. Recipients of OTSPs rarely claim that authorities are acting in a procedurally fair manner and this has consequences for the feeling of legitimacy that citizens feel towards enforcement authorities.

Tyler and Huo state that 'when people receive negative or unexpected outcomes they focus more strongly on whether they trust the authority involved.' (2002:74) Thus a negative outcome and negative treatment can be mitigated to an extent where an authority, and its officers, are perceived as being trustworthy. As shall be demonstrated below the OTSP experience is one in which trust can be undermined and may then spread to general distrust of the authority (and its motives) in issuing OTSPs.

Skogan develops the understanding of the impact of a policing encounter by demonstrating that there is an asymmetry in the impact of encounters on views of legitimacy (Skogan, 2006). He states that, in repeated examinations of police encounters across time and countries, 'in every case blame exceeded credit by a significant margin and in some instances there was no credit allocated at all' (ibid: 118). Bradford, Jackson and Stanko (2009) also examined asymmetry and came to a less negative conclusion finding that positive fair treatment did have an association with increasing positive attitudes towards police fairness and engagement with the community. However they reaffirmed the general point that poor treatment matters more than positive treatment at the hands of the authority.

Skogan was also correct to quickly point out that procedural fairness still retains normative value over and above the empirical findings of his study.

The process through which personal interactions can cause wider concerns about legitimacy of authorities outside of the immediate encounter raises an important issue in OTSP encounters. The extent to which poor treatment or feelings of illegitimacy spread from that encounter to become system wide concerns is important in a situation where, as in OTSPs, there are multiple agencies using such penalties each of which could potentially lead to systemic distrust. There is evidence in an organisational setting that distrust and illegitimacy can spread beyond the confines of the parties involved and can, at times, lead to feelings of illegitimacy against parties who are linked through association but not in any way involved in similar treatment. Johnson, Greve & Fujiwara-Greve (2009) make this point in relation to corporate misfeasance; here '[a]udiences categorize organizations by comparing shared characteristics, and a contagion of legitimacy loss can take place among organizations that are categorized as similar' (2009:196) even where these similar organisations are not implicated in bad practice (ibid:221).

## Trust

Trust, then, is an important focus in understanding individuals' perceptions of the legitimacy of an enforcement agency (Tyler and Huo, 2002). Giddens characterises one element of trust to be 'related to absence in time and space... [t]here would be no need to trust anyone whose activities were continuously visible and whose thought processes were transparent.' (1990, 33). Certainly in relation to the automated and semi-automated process of OTSPs, trust is a vital component of recipient's views on the authority enforcing the legislation, since in both cases there can be this separation. In the automated process the separation between capture and knowledge of transgression is complete, in the semi-automated process likewise it is likely there is a separation since officers are rarely present at the point at which the recipient receives the notice. Thus in making decisions about the fairness,

correctness and the legitimacy of the authority there is an element of trust that the authority has acted correctly since the recipient has not observed the officer.

### **What is trust?**

Giddens goes on to state that ‘the prime condition for trust is... lack of full information;’ (ibid: 33). In the automated and semi-automated processes this information relates to why the individual, and behaviour, in question was singled out for punishment. As discussed the lack of such information leads recipients to experience the enforcement through their own common-sense interpretations. Without a communication as to what the recipient has done wrong (from a common-sense perspective) they must either trust that the decision is correct or engage in a posture of mistrust. Certainly this is important in the situation of ever increasing numbers of citizens being penalised through the OTSP, as increasing numbers of trust/mistrust relationships arise, as well as repeated interactions adding to, or reducing, the reservoir of trust.

Giddens develops his conception of trust further:

Trust may be defined as confidence in the reliability of a person or system, regarding a given set of outcomes or events, where that confidence expresses a faith in the probity... or in the correctness of abstract principles (technical knowledge) (1990: 34)

Of particular relevance for this chapter is the idea that trust represents confidence in an expression of ‘faith in the probity’ of an authority. The confidence in the reliability in the ‘correctness of abstract’ principles has been examined fully by Wells (2007), who found that such trust is a contested location of debate between experts and “experts” in the context of speeding. Wells found that contestation over safety and the link between speed and safety is made possible by the ‘demonopolisation of expertise’ (Wells, 2007) of recipients of speeding FPNs. In that debate trust is no longer placed in experts based on their expertise, but instead such experts are ‘compelled to legitimate their interpretations by emphasising superior interpretive accuracy of their own interpretations’ (Wells, 2012:42) Thus this mode

of trust relationship is always contested, never taken for granted and always subject to negative inference should other “expert” interpretations prove attractive to each individual.

If the concept of trust is widened from expert knowledge to ‘trust as confidence in probity’ (Giddens, 1990:34), then one can begin to see how, across all contexts of OTSPs, there is a dynamic of trust. That dynamic involves trust judgements about the legitimacy of officers, agencies and the criminal justice system to conduct enforcement practice in such a way that people can have confidence in the probity of its officers, agencies and systems.

Tyler & Huo (2002) examined this form of trust and distinguish between two ways in which trust can be conceptualised. The first is instrumental trust; ‘[f]rom the instrumental perspective, the key behaviour that leads to trustworthiness is predictability. People feel that they can predict how others will act.’ (2002: 60) The second perspective of trust Tyler & Huo identify is what they term ‘motive based trust’ (2002: 64). This is not based on a calculation but an inference drawn from an authority’s action.

‘Motive based trust is... based on a complex set of inputs that is unique to each person but always reflects the belief that a particular authority in a particular situation is not using his or her authority for personal gain.’ (Ibid: 64)

Tyler and Huo (2002) found that the instrumental perspective on trust is false; it does not lead to trust being placed in an authority based on the predictability of its actions. (2002: 70-71). Indeed as Wells (2012) found consistency (predictability) was not welcomed by recipients of penalty notices for speeding, ‘[t]he overly consistent application of limits [speed] to the situations and contexts that are anything but consistent is experienced, by some, as unfair’ (2012:140).

### **Personalising the experience of Trust**

Jackson and Bradford (2010) make the distinction between institutional trust:

...the implicit or explicit belief that the police (as an institution) behaves effectively, fairly, and that it represents the interests and expresses the values of the community – whether locally or nationally. (ibid: 2)

And ‘encounter based interpersonal trust’

Interpersonal trust refers to the implicit or explicit belief of individuals that *one’s own* encounters with officers will proceed predictably and according to their assumed role and function. (ibid: 2)

The OTSP encounter has been examined in chapters five and six. In this chapter the effect of these encounters on the trust citizens’ place in officers will be examined. As recipients of OTSPs feel that they have not been listened too, or communicated with, then this is a potential negative impact on that person’s views of the legitimacy of the enforcement agency and the trust they place in them. Tyler and Huo (2002) note that personal experiences can develop a generalised sense of fairness, and trust, which applies not just to the individual officer but is also ascribed to the enforcement agency itself. However the converse is also true, that lack of fairness and trust reduces feelings of legitimacy that apply not just to the officer in question, but also to the enforcement agency and the law. In the words of Tyler and Huo

Authorities act as agents of socialization, either encouraging hostile attitudes of distrust and resistance or helping to develop a trusting attitude that leads to lowered levels of conflict and heightened deference. (2002:131)

The lack of meaningful communication in the OTSP encounter is experienced as unconcern for the rights of recipients as citizens. Furthermore it affects recipient’s views on the common-sense and trustworthiness of the enforcing agency. In the following section the personal experiences of recipients of OTSPs are examined to highlight how the OTSP interaction leads to concerns about legitimacy.

## OTSP Encounters

In what follows the views, experiences and expectations of those who have received an OTSP are examined. The data is drawn from interviews, focus groups, observations and online research locations. In addition the views of enforcement professionals are also interspersed where necessary.

### A frustrating experience or a legitimate policy?

The lack of communication in the OTSP process leaves recipients with frustrations about the way they are treated. Spector has examined frustration in organisational settings and states 'frustration... can have extremely negative effects on the behavior of persons' (1975: 636). He found that frustration can lead to a number of negative behaviours, including complaining, inappropriate comments or behaviour, hostility, sabotage, aggression and finally a sense of apathy. Spector's research is to a certain extent limited in that it focuses solely on organisational (work-place) frustration. Little studied is the effect of frustration behaviour in criminal justice, unless one counts the frustration of criminologists with penal policy in which case frustration seems to abound.

Rosenzweig identified three directions in which frustration/anger can be directed, these are termed: "extrapunitiveness", where frustration leading to anger is directed outwards towards another person or organisation. "Intropunitiveness" is the converse, in which frustration is 'directed by the subject against himself' (1945:8). Finally he characterised a third direction of frustration as impunitiveness, here '[a]ggression is evaded or avoided in any overt form, and the frustrating situation is described as insignificant, as no one's fault' (Ibid: 8).

In discussing legitimacy in the context of OTSPs the two most important dimensions of frustration direction are extrapunitiveness and intrapunitiveness since it is only in these two directions that frustration becomes manifest and has the potential to impact on feelings of legitimacy. Coser has identified how the processes of delegitimation and frustration interact, he states that

mere 'frustration' and the ensuing strains and tensions do not necessarily lead to group conflict. Individuals under stress may relieve their tension through 'acting out' in special safety-valve institutions in as far as they are provided for in the social system; or they may 'act out' in a deviant manner, which may have serious dysfunctional consequences for the system. (1957: 204)

In the criminal justice system the traditional 'special safety valve' was the court system, in which the accused could have their say, have it listened too and have an independent body adjudicate. The lack of a full opportunity for voice in the encounter, combined with incongruence between common-sense judgements of enforcement authorities and recipients, leaves those recipients feeling that they have not been treated fairly. Instead recipients vent their frustrations at the system but not in any way that can alter the system. Thus, applying Coser, there is no reduction in frustration because the source of the frustrations (the lack of common-sense) has no forum in which to be challenged.

*Not Frustrating, the system works*

One assumption that can be made, based on the data that follows in this chapter, is that there are widespread concerns about trust and legitimacy when authorities utilise OTSPs. This thesis does not argue that all, or necessarily an overwhelming majority, of OTSP interactions leave recipients feeling angry and frustrated. This thesis is instead predicated upon the idea that there is a sufficiently serious problem, as perceived by OTSP recipients, with the way in which OTSP's are used that calls into question the legitimacy of OTSP policy and the authorities themselves.

It is important to note at this point that not all recipients are frustrated by authority treatment when receiving an OTSP. Some can "buy" into "the sell" that the authorities make or fully acknowledge that they have done wrong and accept the penalty.

Man: Yeah I'm sorry I was stupid.

Custody sergeant: Well you can only move along now and learn from it.



Police Officer: It's just one of them things isn't it?

Man: I don't normally go out anymore, as I said I don't normally drink. I apologise for this. (Field Notes, 15/12/12)

This interaction was preceded by 'the sell' in which the officer described the PND as akin to a parking ticket. This, combined with the caring responses of the officers labelling the offence as almost accidental ('just one of them things'), leads the recipient to apologise for his actions. He was certainly not frustrated by the treatment he had received (both in the interaction and the previous 8 hours he had spent in custody).

The following quote demonstrates how OTSP recipients may also view the notice as a price worth paying for some other more valuable social activity.

Mary: I got one from parking. Yes I was actually very late for something and I planned to park on the road, but there were no spaces... so I ended up parking in the car park. I had no money in my pockets, the cash machine was a long way away so I would have been even more late. If I had ran to the cash machine then I would have had to buy something to get change, then run back to the machine and completely miss what I was late for. So that is why I got a ticket. ...I thought it was fair, it was very clear that if you park there and you don't get a ticket then you would get a fine. (FG2)

There is no frustration here; the PCN is instead seen as a price worth paying, they clearly subscribe to O'Malley's consumerist ideal (2010). Furthermore the recipient is inherently rational in that she calculated the risks and benefits and decided breaching the legislation was worth the risk of punishment. Thus this recipient demonstrates a situation where deterrence may be effective, assuming the penalty could be set at a higher level to alter this calculus in favour of compliance.

Furthermore in the following example there is no frustration:

Daryl: You know, I had done wrong... it certainly has changed my behaviour actually since I got the fixed penalty notice. ...it has changed my behaviour since that day, it was fair and it was just what he did (Seat Belt, FG3).

Indeed at times the officer may even receive a 'thank you' and acknowledgement of wrong doing by the recipient;

Adam: they don't come to you and say "Thank you"?

Marcus: Some people do. They are very few and far between. Some people go "damn your right mate, yeah I shouldn't have done that". We have had a couple of people who have been polite enough to say thank you, which is really strange! The majority of people get quite abusive. (Litter, Senior Officer, Interview)

The acceptance and praise for the system can sometimes be overlooked by critics of OTSPs. It is important however to understand that at times the system is appreciated and has no negative effect on compliance motivations, even though this may not be the majority reaction to the OTSP experience.

In the next sections the directions intro- and extra-punitiveness are examined in citizens' experiences as OTSP recipients. It is claimed that frustration outwards is far more damaging for an enforcing authority's legitimacy. Inwards frustration on the other hand may not be so antithetical to enforcement authorities aims in enforcing legislation since it may give the recipient a means of self-reflection, which could be amenable to new incoming information. With OTSPs such new information can take the form of an educational campaign which may then lead to positive feelings of obligation and support for the authority and the law. The problem with such a suggestion is that enforcement authorities will never be in a position to know whether intropunitive frustration will lead to apathy rather than change. If frustration leads to apathy again concerns about legitimacy, obedience and compliance are raised.

### *Frustration Inwards*

It is certainly the case that receiving an OTSP can be an intensely frustrating experience<sup>84</sup>; such frustrations can be directed inwards

Peter: I'm always conscious about following rules ... and so it's very frustrating to find myself falling foul of technicalities, which is what happens to me. ... I've fallen foul of a technical breach. You know, it produces quite quickly what appears to be unfairness. My feeling when I see that I have a yellow sticker is I'm not doing anything wrong. I've fallen foul of a technical breach. (FG4)

The inward frustration here manifests itself through apathy in that he feels he has done nothing wrong; and as Spector's study found apathy is a common response to frustration. Here the inwards frustration reinforces the notion that the law is about "technicalities" rather than appropriate conduct. Thus the compliance motivation of this recipient is undermined somewhat by the perceived pettiness in focusing on the technical, rather than motivational, nature of the recipient's compliance.

The frustration internalised is that no matter what the person does, feels or intends will make any difference. Instead, they become apathetic about complying with the law, because it is either impossible, or, compliance doesn't matter because one will inevitably at some point still fall foul of the law. Here the frustration manifests itself as a sense of inevitability; it is inevitable that he will be caught even when "I'm not doing anything wrong."

In the following case a recipient of multiple parking and speeding OTSPs likewise experienced frustration at enforcement of parking legislation:

I have just had a couple of parking fines and they were very frustrating because I really did check, as I was really aware because I was in London, but I either didn't see the sign or didn't understand the sign. I wasn't being reckless about it but I still got caught out. (Interview)

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<sup>84</sup> An experience, it is fair to say, that the researcher has on occasion taken part in.

Again this suggests that the inwards frustration leads to questions about the legitimacy of the law being enforced. This inward frustration seems to manifest itself in resignation that no matter what the recipient did (checking, being aware, reading or not reading the sign correctly) he was still “caught out”. It is also equally possible that these feelings of frustration take an outwards direction towards the justice system. If this recipients feels there really is nothing he can do to comply (despite his best efforts to be law-abiding) then it is possible that in future he chooses to make no effort to comply since it has no actual legal affect. The fact that this recipient had received multiple OTSPs for both speeding and parking transgression reinforces this point.

In many respects this intropunitive feeling of frustration is a consequence of external factors, particularly the increasing regulation of everyday life. With the exponential rise of criminal offences (Husak, 2008) and methods for the state taking action against problematic behaviour, it becomes increasingly difficult to know what is expected. It is an approach that Stuntz characterises as the desire for criminal punishment driving the criminal law (2001:506). In such a situation, ignorance of the law may be no defence, but one dare say it is a sociological fact.

As the following demonstrates, even in parking legislation, the rules are so complex that it is difficult to understand what acceptable behaviour is.

In fact, there are so many rules now, it is well-nigh impossible to do anything without breaking any of them. Parking rules can be complex, badly expressed, or notified at zone entry-points miles away. To read the rules on meters, you have to park, which is probably also a breach... I don't mind fines for people who blatantly park where it's clearly not allowed or who park on a meter without paying. But most people try their best to do the right thing. They shouldn't be penalised for minor infractions. (HYS1)

It is little wonder that recipients rely on common-sense judgements to make up for ignorance of particular legal requirements. No person can be expected to know the full intricacies of

all law, indeed no doubt many Supreme Court judges would balk at the idea of a supremely rational legal actor. This lack of knowledge, and the frustration at being “caught out” doing, essentially, nothing wrong in the eyes of the citizen, can therefore lead to that frustration being directed at the authority and legal system.

### *Frustration Outwards*

Outwards facing frustration is perhaps the more common direction, aimed at the authority and the law.

Noel: So I don't feel that I am cheating. I feel that the system... is a bureaucratic system... I partly understand their position, but I also regard it as not particularly flexible or user, consumer friendly... and therefore I feel justified in slight subterfuge. (FG1)

Here frustration has crossed the border between intro- and extra-punitiveness, the recipient knows that he is transgressing, and that he understands the reasons for the bureaucratic system but such bureaucracy drives him to subterfuge. As this recipient went on to say

Noel: I think it is that kind of apparent pettiness and arbitrariness that makes you, you know, be unsympathetic to the cause. I understand why we have a system. I understand the problem and I accept it. (FG1)

Again there is a begrudging acceptance of the need for the system but in his individual case it leaves him feeling frustrated, and that frustration begins to take an extrapunitive turn, towards the bureaucracy (the authority) and the cause (the law).

This outwards frustration can lead to the de-legitimation of the authority enforcing the law; not only is the authority subject to negative feelings but those feelings are expressed through contempt by citizens.

Unlike some other readers, I can understand the frustration of Mr A., Traffic wardens behave like vultures and the councils are running an extortion racket. (DM1)

The dictionary definition of a vulture is “a person of vile and rapacious disposition” (Oxford English Dictionary, 2014). Here the CEO is seen as “preying” on motorists in order to “greedily” and “unscrupulously” run “an extortion racket”, thus the source and cause of frustration is the enforcement agency.

Lisa: Yeah I think the general impression I get of parking wardens is that they are just out for anything, isn't it, the miserable old so-and-so's they have got nothing better in their life to do other than slap tickets on peoples cars (FG5)

This de-legitimisation is a result of the frustrations that recipients feel about the process of enforcement. A “general impression” born of frustration, then leads this recipient to delegitimise not just the individual office holder who issued the notice, but all CEO's. Thus the act of punishment (OTSP) is illegitimate because the officers are not punishing bad behaviour as such, but instead punishing out of caprice.

Basically 90% of my vehicle was on designated roadside public highway, in that instance I felt that it was really being overly pedantic ...there is a certain amount of common-sense that goes with showing discretion and I think in that instance it was, I have never felt more strongly that there was some kind of... I don't want to say conspiracy, but a... incentive for councils to hand out tickets for reasons other than just trying to improve traffic flow and minimise obstructions. (PCN, Interview)

It can be seen here how common-sense judgements also link with frustrations and the de-legitimisation of parking enforcement. The lack of a perceived common-sense judgement by the CEO leads this recipient to begin to suspect ulterior motives (incentives) to enforce the law. Frustration and anger at the experience has led this recipient to construct motives that distance the trust relationship between the agency and/or officer and the recipient.

Here one can see the problem discussed earlier between compliance activity and compliance motivation. This recipient feels motivated to comply with the law but their experience with the process of being punished tells them this is not enough. Rather than

refocusing their effort on trying harder to comply, the frustration instead affects their compliance motivations.

I myself have had this problem with the "Jobs-Worth's" and was absolutely devastated, I smoke and feel I have been targeted by a couple of nasty men who "claimed" they saw me throwing a cigarette butt from my car window, as it happens I may have done... INNOCENT UNTIL PROVEN GUILTY is not true anymore in this country and the government and its minions are total proof of this. ...Officers out on the street making up charges that they cannot prove. (PPF)

This is a prime example of outwards frustration based on personal experience of an encounter with officers, and his treatment at their hands. This recipient is no longer concerned with even motivational compliance and instead is actively seeking a way of avoiding blame. Even simple compliance with the notice (paying it) cannot be taken for granted here, nor can future compliance with the normative demands of the law. The frustration is directed towards the law and its agents based on the treatment in the encounter and through the OTSP process.

Across the contexts in which OTSPs arise there are similar claims made about officers who are involved in issuing OTSPs. Such officers are variously described as "jobs-worth's", "Hitler's", "Fascists", "Stasi" and many other unpleasant names, all of which highlight the levels of anger directed to those authorities by recipients.

We are talking about "litter Nazis" (I don't know their official title), who have no power to arrest or detain (PPF, Litter)

Steven: They never smile. There is a glint in their eyes whenever they are near a car that might... [not have a ticket]. I have seen one of them come up to a car see a disabled badge and walk off... almost angry that they couldn't put a ticket on it. (FG4)

The job of a parking warden is the lowest form of work you can get, lower than an MP - I would rather collect manure than terrorise people by going on ego trips handing out fines for parking, and all because the Plastic Plod couldn't make it as a REAL police person... (TSR, PCN)

Let's face it; the police are lazy and vindictive - easier for them to caution than to fill out paperwork, easy to fine someone for p'ing you off. (HYS5, PND)

My friend refused to give his details and basically told the council oik to get stuffed... the thuggish council Stasi then left him alone saying all the fine stuff would be in the post... He refused to sign the paperwork (my friend that is)... so should hopefully hear no more of it... My question is this... what power do these jumped of council 'officials' actually have? (PPF, Litter)

In all of these quotes it can be seen that the frustrations about the experiences that people have rebound back on the authorities and seek to delegitimize the officers involved in enforcement. Here being found wanting by the law, as enforced under the OTSP, does not lead to a redoubling of efforts to comply, on the contrary the motivation to comply is diminished by labelling the enforcement agency as the problem rather than their own actions. The enforcement agency then become "lazy" "vindictive" "Nazi" "oiks" on an "ego trip" who rather than using their powers for a legitimate purpose (i.e. punishing those who *deserve* it) instead target those who may be motivated to comply but *unintentionally* do not.

This frustration, and anger, becomes directed at the authorities who enforce the law through the OTSP due to the incongruence between the compliance motivations of the citizen and the compliance behaviour that is expected of them. If "90%" of a vehicle is parked legitimately, as an above quote claims, then this clearly evidences a compliance motivation in this citizens mind, and yet in OTSP enforcement this is not enough, the law demands perfection in compliance behaviour and is uninterested in motivation.

### **Officers Questioning the Legitimacy of OTSP Enforcement**



This “us v them” dynamic that is seen above may lead one to think that this is an exclusively ordinary citizens versus government agencies dispute. On the contrary, even officers involved in issuing OTSPs, and other officers involved in speed reduction, are not immune to perpetuating negative stereotypes of OTSP enforcement. Take the following exchange which took place during observational studies with the Road Policing team in West Midlands:

Fireman: it's funny really we always wave in the truck... but when we get waved at by the drivers of the speeding van we don't wave and just say “fucking bastards” when it drives past, and sometimes stick our fingers up, me included. You know and I have worked, I'm operational... But yeah it is funny, we have all been caught, I've been on the course.

PC Patrick: yeah me too

Fireman: as have most of the lads on the truck which is why I think we think of those blokes in the van as bastards. (Field notes, 25-2-13)

Again these feelings are caught up with feelings of common-sense, the ‘bastards’ sat in the mobile police van are viewed as without discretion, as somehow different from other more acceptable officers of the emergency services<sup>85</sup>. Even in a situation where there is mutual professional involvement, the frustration of being caught by ones professional colleagues is too much and so the frustration is manifested in behaviour “stick their fingers up” and attitude: “fucking bastards”.

The above quote between the police officer and fireman was found to be quite a widely held view by enforcement officers (during interviews) against other officers involved in OTSP issuing.

It's that brief period isn't it? Where you are shocked that you have been caught, denial, anxiety, rage, depression; you go through all the stages ... but I have got to

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<sup>85</sup> It should be noted that the drivers of the van are serving police officers in the road crime unit.

say... bloody Midwestshire Road as well, 38 in a 30! (Senior Officer, Midwestshire Council)

Yeah I have been done recently speeding, not much but it was enough to put me over. And you do, I have worked with the police, do joint operations with the police, get on with them, but if I knew one of those was sat behind that bloody camera! ... I would say you know 'you bastard!' (Litter Officer, Midwestshire Council)

Well there are a lot of suited, baseball capped wardens on patrol, so I assume it is paying reasonably well. (Senior Officer, Midwestshire Police)

Well if you ask me parking enforcement is what is killing our town centres, they are dying. ...It's all about raising money. Officers in the police have discretion but these jobs-worths... (ACC, Northwestshire Police)

Indeed in interviews with officers it was quite surprising how the same expression came over the faces of the interviewees when asked whether they had ever received a PCN. A look of distaste was the frequent response when talking about CEOs. Thus even where it may be expected that the enforcement agency and the law should receive its highest support, from officers who are ostensibly "on the same side" in the justice system, there are feelings of illegitimacy towards the enforcement organisations from officers. This suggests that OTSP enforcement is so delegitimised that even officers who use these methods cannot support the process fully.

The frustration these recipients feel, borne out of a lack of opportunity to discuss common-sense outcomes, leads to a lowering of trust in the relationship between the agency and recipients. It is to feelings of trust that this chapter now turns.

Distrust

### **Distrusting Technology**

As discussed above trust involves, as Giddens argues, a separation between experience and observation. In speed, red light and bus-lane enforcement the reliance on technology

further separates the act of the process of investigation from the process of capturing offenders. Authorities themselves, as well as those they punish, rely on trust in calibration of technological devices. In this regard speeding enforcement is perhaps the prime example which calls into question where, who and when trust can be placed:

Jerry: With speed camera certificates, the speed camera manufacturer is responsible for testing and calibrating the equipment and issuing the certificate, and there is nobody looking over their shoulder to check that the calibration is correct. And the other thing is that they calibrate the speed camera to say that it is working but it only says that it is working on the day of the calibration! (FPN, Interview)

Here we see the multiple trust instances that occur for an OTSP in a straightforward case of speeding. In each instance of camera enforcement the recipient is expected to place trust that the calibration was carried out correctly, is currently correct and the calibrator themselves can be trusted. Each of these instances of trust relate to the accuracy of the enforcement apparatus since there is a separation between the enforcement agency and the manufacturer, and tester, of the apparatus.

Arguments about calibration are common in online forums where recipients request assistance in challenging (or sometimes deciding) legal guilt.

Can I ask for a calibration certificate for their clock??! How can I know what time they say it is if they don't show a display anywhere? (PPF, PCN)

I would also require written evidence of the... approval certificate and procedures for calibration for the CCTV... used to capture the alleged contraventions, to ensure this is compliant The Bus Lanes (Approved Devices) (England) Order 2005. (PPF, PCN)

The fact is authorities will not permit any interference in the Speed Camera Cash Cow, and will ignore any evidence the equipment is faulty, no matter how meticulously, brilliantly and expertly it has been prepared. (PPF, Speeding)

And with traffic light camera enforcement

I have logged into the public access system and viewed the pictures of my vehicle..., it also states I should be able to view the calibration certificate for the camera but there is no link to this on the certificates page (PPF, FPN)

I have been flashed by red a light Gatso. From what I can gather... a RLC should not take a picture until the rear wheels reach the stop line. The picture I have shows the rear wheels of the vehicle are still short of that stop line. I was convinced that the lights were still on amber when I went through, but the pictures show otherwise. Admissibility of evidence is my query. The publication below says that a RLC will fail its type approval if a picture is taken when none should be taken. Seemingly, it should have not have taken the picture when it did because it was premature. (PPF, FPN)

Each of these quotes indicates the sometimes central role of trust, or lack thereof, in remote camera enforcement. Each instance indicates that this method of enforcement is not seen as trustworthy, if the recipients had trusted the authority, and the methods it utilised, they would not ask for this evidence. The fact that some also admit guilt but still want a method of "get out" via the calibration argument shows that they are focused clearly on the penalty rather than their behaviour. Darley's (2001) point is once again apposite; these recipients are focused on instrumental reasons for compliance (whether there is a challenge that can be made) rather than whether they have actually done wrong.

### **Trusting Discretion**

The focus on remote enforcement is not to suggest that trust judgements are only applicable to these OTSP contexts, far from it. Trust is equally in issue in the discretionary process of enforcement, albeit in more generalised feelings of trust.

The first four words say it all - "Police cannot be trusted". This has been shown to be true over and over again over the last few years. Giving them the power to be

both judge and jury on a subjective matter like careless driving is therefore a very bad idea. (DM2, FPN)

Saul: By this stage I had lost all trust in the police, I didn't trust their judgement, I didn't trust their discretion, I didn't trust anything about them at this stage. I always have but this changed in a second (PND, Interview)

While I agree that the dropping of litter is wrong I'm not sure I trust these people to exercise this enforcement proportionately. I'm sure the 'laws' (I use the term loosely) were designed to counter and deter, fly-tipping, dumping in rivers, dog mess and general disposal of waste in public etc. but cigarette butts and bus tickets falling from your pocket is a little too much (DM1, Litter)

What we see here is not trust that can be conceptualised as a separation between time and space; there are quite clearly in these classes of OTSPs actual physical interactions. Instead rather than absence, it is presence in an encounter that determines the trust relationship. In each of these instances the enforcement is personal, immediate and apparent, thus inferences about the trustworthiness of the authority are also based upon treatment rather than absence. This treatment can 'affect general views about the legitimacy of [...] authorities and the quality of their job performance' (Tyler, 2006:94). The lack of trust in officers exercising their discretion appropriately not only leads citizens to experience a negative interaction, but also allows citizens to ascribe untrustworthy motives and illegitimate characteristics to the authority, and law.

In the discretionary process the trust relationship can be characterised according to Gliddens' conception of trust as trust in the 'faith and probity' (1990: 34) of the organisation and its officers. Here the trust relationship is one that seeks to analyse the motives of the officer/authority based on the personal experiences citizens have with those authorities. The receipt of the OTSP and its attendant "price" can call into question the probity of the organisation. Enforcement, and punishment, by the OTSP can instead appear to be a means of making profit for the organisation rather than appropriately assigning blame and

punishment on citizens. This perception is obviously not helped by encounters that attempt to “sell” the notice, and provide payment methods in place of communications of wrong doing.

*Interpersonal Trust and the OTSP: Contesting the motivations behind enforcement*

As discussed above trust can be characterised as institutional (involving feelings trust towards the institution) and interpersonal (involving feelings of trust in the citizen’s own encounter with the authority) (Jackson and Bradford, 2010).

The interpersonal trust, or distrust, starts in the personal encounter that each recipient has with the authority. The first site of a trusting relationship in the OTSP encounter is the location of enforcement, where recipients typically raise concerns about the methods used to enforce legislation. In the automated process concerns about enforcement tactics typically relate to the placement of the technological devices used to capture them.

Lisa: I mean I felt like you with the van, where it was located, I did think it was there to catch me out (FG4)

Katie: In Midwestshire now there is a bus lane that is often used by cars in a short cut through road and they are now using one of these mobile cars, with the camera that extends out of the top. And it is a well-known fact that they sit and hide in a particular lay-by outside the back of [shop] to catch people who just you know... and it never holds the traffic up, it keeps it flowing quicker, busses are far less frequent than the cars and the cars get out of the way. (FG5)

This is a common claim about enforcement tactics in the automated process, not only is the enforcement not being carried out in a common-sense way (it is about ‘catching out’ rather than focusing on the purposes for which the legislation exists) it leads recipients to feel that there is an ulterior motive in such enforcement. This ulterior motive is predicated, as Lisa makes clear, on the idea that the enforcement is being carried out with the purpose of ‘catching out’.

The suggestion that enforcement agencies are in some sense deliberately being deceitful in their enforcement practice is also in evidence in recipients' views in the semi-automated process.

I have even seen some of them hiding behind walls, waiting till someone parks then when they are gone run over and slap a ticket on the car. I walked down one road near the college (on a college holiday) and there must have been 50 cars with tickets on. The government don't need to address the price but the way they issue them and the officers' tactics. (HYS1)

I have seen stupid trivial cases including one where the parking attendant met a lot of hostility and is lucky to be in one piece for such a petty matter (One wheel an inch over a white line on a designated parking bay) I have seen parking attendants out in Pay & display car parks at 9:30pm and even as early as 07:45 am on a Sunday morning - hardly peak time for parking but they were there issuing their tickets. (HYS1)

Tony: I assumed it was because the council have cut their budgets so they are after a bit of extra money anyway. So I thought they are going where people are quite likely to get caught (FG4)

The enforcement tactics here are demonstrations of authorities not acting with trustworthy motives, they are, instead, claimed to have an ulterior motive in mind.

### **Revenue Generation as an enforcement motive**

The most commonly raised ulterior motive that recipients feel authorities act with is revenue generation.

Fixed Penalties, Civil Fines etc. have become nothing better than revenue raising scams. (HYS3)

Remember this is about revenue not safety, and the Courts will side with the Police. Be under no illusion, you're not innocent until proven guilty, you're simply guilty unless you can prove your innocence, which is very difficult. (PPF, speeding)

But this isn't about eliminating litter; it's about raising revenue for the council. Sickening that a thread of cotton dropping from a glove is an automatic £80 fine. (DM1)

As if 'SpeedCam/Revenue Scam' wasn't bad enough, now we have the so-called Policeman become a Modern Day Dick Turpin, robbing the poor old motorist who are trying to get a living. (DM2)

The police will abuse these tickets, but not by letting serious offenders off with a fine, they will use them to bump up revenue by ticketing otherwise innocent drivers (DM2)

Katie: Some local authorities, and I mean I am a great believer in local authority services, I worked in local authorities for a long time, is that there is a danger, if there is any argument for money making opportunities, speed cameras or anything else, suddenly paying for social services or education or housing or whatever, then the drive could be to make more money from minor road offences to fund those essential services, and that is a worry for me from local authorities. (FG5)

The revenue generation argument links with the enforcement tactics operated by the authority and the financial penalty that is the result of such tactics.

Lisa: I just find it funny where they do put the vans though... it is normally where they can catch you, that's what I find. (FG4).

Steven: The cynic in me says it may be about money depending on where the van is placed. That looks very much like a money making exercise to me, especially if they hadn't had a particularly high level of accidents in the past. (FG4)

What all of these quotes demonstrate is a wide held belief that OTSPs are operated with a primary aim of financial gain. Thus the motives people typically ascribe to enforcement



agencies using OTSPs are negative. These feelings arise from the treatment they receive in the encounter, which, as Skogan (2006) demonstrated, has far more of a negative effect than any previous positive encounters. Indeed these negative views can come from situations in which there is no encounter per se, simply being present or being witnessed not complying allows citizens to infer motives (generally improper) from the enforcement authority. In addition the financial nature of the penalty (appearing as a consumer choice) also reinforces the revenue generation element.

This is quite dangerous for authorities, particularly those who may have once had a 'sacred canopy' (Reiner, 2010: 120) (the police), since they become viewed through a lens of distrust. Thus the placement of camera detector vans, speed cameras and the like, signify a negative intention on the part of the agency. This then, through the process of de-legitimisation spread, means that officers may not be able to rely on citizen compliance in any interactions they have with citizens, not just those relating to OTSP enforcement, since the office of 'the police' becomes one to be distrusted. Furthermore as the risk of repeated problematic interactions with the authority increases, with the use of OTSPs, then each of these instances reinforce already negative feelings of trust and illegitimacy towards that agency.

Authorities themselves have recognised the danger of distrust arising from the revenue raising debate. Local authorities carrying out parking enforcement, and police authorities using fixed speed cameras, have been increasing the levels of transparency as regards enforcement tactics and income. However it may be questioned whether this transparency is too late since there are still persistent claims that the process is untrustworthy and dominated by a financial motive.

Jim: There is always the suspicion that they want to raise revenue, but that could just be me being annoyed, I don't know whether it is true or not. I am sure they enjoy all the money coming in but then again it is not as if they are spending it on Caribbean holidays, local councils have to spend that. (Interview Speeding),

Mary: Well it can be a bit of a money making scheme because in one day I'm sure they get a lot of parking tickets and different fixed penalty notices that easily pay the wages of people collecting... the tickets. (FG5)

Milly: I agree I think it is more of a money making scheme it does free it up but I think it's a money making scheme. (FG2)

Thus transparency hasn't, as yet, undermined the view of these authorities as untrustworthy. These recipients may have an idea of where the money goes, and that it may not be improperly used (it pays the wages of the enforcement staff), nevertheless the feeling of distrust lingers. The scheme is still seen as a "money making scheme" rather than focusing on citizen behaviours.

#### **Distrusting motives in the PND: revenue, laziness and caprice**

In spite of the focus here on revenue raising, one particular type of OTSP does not seem to attract similar concerns: the PND. Those who were interviewed and those observed in custody, did not suggest that the primary motive for the PND was to raise revenue. Instead those recipients felt the PND was used because it was easier for the police to issue the notice than it was to take matter to court. Of course by making the PND easier to issue than court proceedings there are savings made (and was a primary aim of the government for PNDs). However, the obviousness of profit motive is not typically raised by PND recipients.

Oly: It was just an easy way out. If I got arrested for something I would probably have had to go to court which would probably have costed them more, so 'oh well we will just give him the £80 fine drop him off and that's it isn't it. (PND Interview)

In this quote rather than revenue generation the recipient believes that the PND was cheaper and so led to savings. This is subtly different from the revenue generation argument in that officers are not seen as acting with a profit motive, but instead acting with a casual, almost lazy, disregard for the recipient's rights, in order to save cost.

Saul: Yeah, it is all damage limitation [The PND]. This is the exercise I have been involved in really. Principals, law, fairness, these really haven't featured strongly, only in my mind. Only in enough to make me incapable of sleep for three months just working out my options, letting it swirl around, feeling burning injustice... feeling my middle finger rising in my pocket every time a squad car comes past. ...behaviour that is actually turning me into exactly the stereotypical person that the police intended to arrest that night (PND, Interview).

Thus the claim from policymakers for a more cost effective means of doing justice through the OTSP is felt lacking in *actual justice*, it may be cost effective but this is certainly not respected by those who experience the process.

One possible reason for the lack of revenue generation claims in PND enforcement is that it can be quite apparent that there is large amount of money spent on police PND enforcement.

John: they arrested my friend because he was arguing about it, so they arrested him, took him in the cells, so that is a police van two officers, dealing with a couple of fines for arresting a lad for asking why? It's ridiculous waste. In my specific cases I felt both times it was just boredom on the part of the police, you know being difficult for the sake of being difficult, abusing their position of power, both times ...it's got to be cheaper for the justice system. (PND, Interview)

From these quotes it can be said that raising revenue isn't generally seen as an attitude of the police in the particular case, although it is recognised that financial motives of the system can be seen as appropriate where it is 'cheaper for the justice system'. Instead, with the PND, it is the police officers themselves that are deemed as untrustworthy rather than the authority. Trust here is very much an interpersonal relationship between the recipient and the actual officers dealing with the specific instances. The officers are characterised as acting in an arbitrary manner, relieving boredom. In this sense the trust (lack of trust)

relationship is one in which individual officers are seen as acting in a capricious manner because the PND makes it easier for them to do so.

Saul: If it wasn't for the existence of PND's I don't think I would have got any punishment in the morning. I don't think there would have been any sanction whatsoever (PND, Interview).

Here the situation with trust in the PND process is different from the other OTSP contexts. Distrust is not related to the financial motives of the officers, or agency, but instead relates to the ease with which PNDs can be issued by individual officers. Olly, Saul and John make the point that they believe their PNDs were given for arbitrary reasons, because 'it was just an easy way out'.

The extent to which this interpersonal trust relationship then impacts upon feelings about the police as an authority is a mixed picture. Certainly in Saul's case his individual treatment by the police affected his thoughts on how far the police as an authority can be trusted.

Saul: I had lost all trust in the police, I didn't trust their judgement, I didn't trust their discretion, I didn't trust anything about them (Interview, PND)

What can be seen therefore across the contexts is that trust is always in issue, and frequently recipients of OTSPs come away from the encounter with negative views about the trustworthiness of the authority. It is only in the PND context that the issue of 'revenue raising' is rarely claimed, but this does not mean that such recipients view the authorities' officers as trustworthy. Instead PND recipients tend to focus on what can be termed counterfactual scenarios; as both Saul and Olly's claims suggest. Van Den Bos & Van Prooijen make the link between fair treatment and trust, and argue that '[w]hen it is relatively easy for people to imagine that something else could have happened... justice judgments are more affected by manipulations of procedure' (2001:622). In the PND cases, it seems fair to say, that these recipients do find it easy to see an outcome which did not involve a

PND, and in a situation involving perceived unfairness in the procedure, it is unsurprising that they start to distrust the authority.

### *Trust, Motivation and Social Belonging*

The lack of trust between the authority and those it regulates is clearly worrying, although not necessarily from one compliance perspective; payment of the notice. All of those involved in this research, even when trust was at its lowest vis a vis the authority, paid their OTSP. However, like legitimacy, trust is not simply a function of compliance, people may still comply with immediate demands of the authority but with a lack of trust comes a lowering of expectations about behaviour. Applying Braithwaite's research on social distance (2002a) it can be said that the motivational postures of these recipients has been lowered (or distanced). These citizens, who may once have thought that enforcement authorities represented their interests, now no longer see the authority as always acting in their interests. In effect the recipients can now come to doubt whether they still belong to the same social group as the enforcement authority.

Exclusion from group belonging and lowering of social status, as Jackson et al argue (2012), can stem from poor procedural treatment which 'erodes feelings of shared group membership with the authority concerned' (ibid: 1053) as well as offering a 'stark' message '*you are not valued by society*' (ibid: 1053) (no emphasis added). Dubber (2006) has made this point in relation to the police in general. He argues that the common belief in 'law abidance' (a belief that is certainly contested, see Karstedt & Farrell, 2006) is in reality a statement about belonging. It signifies that the person holding that belief belongs to a shared group, "the police":

'as "the law-abiding public," these individuals regard themselves as engaged in a common policing task with police officers, finding the distinction between themselves and the state obscured' (Dubber, 2006:120)

If the individual then experiences police power as a problematic individual the 'distinction between themselves and the state' (ibid) excludes that individual from this shared group.

[t]his [...] emerges all too clearly on those occasions when they feel state power brought to bear against them, rather than against those whom they regard as the proper objects of police power (ibid: 14)

The receipt of an OTSP has the potential to carry this message of exclusion; the majority of recipient data collected for this thesis speaks to this point. In the majority of cases the recipient felt that the OTSP was undeserved and led them to think less of the authority, which, according to Skogan (2006), will have far more of a negative effect than any potential positive encounters they may have had, or will have, in the future. The foregoing has demonstrated how there is distrust in the motivations of enforcement authorities and how citizens do not accord legitimacy to the agencies involved (and, at times, the laws in question.)

Instead of the punishment trying to ‘challenge behaviour’ in the words of various officers involved in litter and PND enforcement (Field Notes), in a relationship lacking trust there is no challenge, since the recipient side do not trust the motives of the authority and rarely take away the message that they have done wrong.<sup>86</sup> The challenge issued in this perceived distrustful relationship is, in the contexts of motoring and litter, a financial challenge. From a governmental perspective O’Malley (2010) is correct, the penalty notice represents a price, one that all too often recipients are not happy about, but due to instrumental factors, do pay. The recipient therefore may buy the process (due to “the sell”) but they are not buying the normative behavioural expectations of authorities. With a breakdown of trust authorities may continue to rely on factors of compliance due to instrumental concerns of recipients, but can only take such compliance for granted providing sufficient deterrent remains.

**Why are people motivated to comply with the notice when they distrust an authority?**

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<sup>86</sup> Indeed as seen in chapter 5 this challenge is frequently absent in any event.

One final question relates to the payment rate of OTSPs and why compliance is high when feelings of legitimacy and trust are low. Again Tyler makes an excellent point here:

If the people interviewed in the study were to lose their sense that legal authorities are legitimate, many would still comply with the law, because of their moral belief that they should (2006:60)

Additionally as Darley (2001), cited above, explains, compliance can switch to instrumental reasons.

As discussed in Chapter 4 compliance rates, (payment of OTSPs) without further intervention from the justice system, are high. Motoring FPNs are paid at a rate of 90% plus, PCNs and Litter FPNs are also paid at reasonably high rates of between 60-70% and with PNDs a majority do pay (51%). In the Motoring FPN and PCN contexts (arguably the OTSP that recipients regard with the greatest sense of illegitimacy) the overwhelming majority of these notices are paid within the discount period. Therein lies perhaps one of the main reasons why recipients of OTSPs comply with that notice, the increased cost of challenging the matter is not worth it. This is a purely instrumental concern.

Thus compliance, for most part, in the OTSP system is a combination of fear and expectation: fear of further enforcement action by the state and an expectation of a finding of guilt at court.

Christina: I saw a long process, you had to go through but if you pay within seven days or something, it's quite cheap. So I thought I know what'll happen I'll dispute it, but they got photographic evidence. I'll end up paying a higher amount. So I just paid it, because I couldn't be bothered to go through it all, and probably end up paying more (PCN, FG1)

Theresa: it's kind of a calculated risk really isn't it, what are my chances of getting off, oh I will just pay it anyway because otherwise I would end up paying more (Speeding, Interview)

John: I argued both times with the people who gave me the tickets and I felt that they were very abusive of their position of being able to give these things out, but I did pay in the end, it wasn't worth it. (PND Interview)

Peter: I think a lot of us will say the same really, it the palaver of having to go through it (court) and that's why you don't do it, and maybe a bit worried about the fact that you are thinking 'oh I've gotta go court'. And it's a bit like 'oh I can't be arsed for that' even though I have got 3 points and a £60 fine, you can't be arsed! (Speeding, FG3)

Jim: When I got those letters I was frightened, yeah, you know you have been caught doing something and this fear of authority. (Speeding FPN, Interview)

Rob: yeah you go court and you end up with court costs and everything, and you think for the sake of £60 and 3 points I owe £450 now! (Speeding, FG3)

In each of these cases, despite feeling that they were badly treated, weren't accorded the respect they felt was appropriate and believed that the authority was acting with untrustworthy motives, the recipients nevertheless paid the notice. In many respects this finding accords with Bottoms and McClean's findings with plea bargains in the general criminal justice process. Many plead guilty to simply 'get it over' with, to avoid a 'heavier sentence', because the matter was 'too trivial', or 'on lawyers advice' (1976: 121).

In relation to Bottoms and McClean's final category, one recipient of a PND did seek the advice of a solicitor but found that advice to be unhelpful.

Saul: I took advice, I finally found out who my solicitor was on the day, he strongly advised me to pay the fine. He said ... that it would be a very rare magistrate [that would find against the police] (PND Interview)

A further factor found by Bottoms and McClean that influenced apparently innocent offenders to plead guilty was that it was 'not worth challenging the police' (1976:121). This factor was also raised by recipients in a focus group.



Rob: There is no point because they (the police and courts) will probably all stick together anyway like they normally do, and you ain't gonna get anywhere and your name will get stuck on a computer saying this man has got a bad attitude and you are stuffed anyway (Speeding, FG3)

Here is also demonstrated a particular risk of perceptions of illegitimacy within the system. The complaint has spread from treatment at the hands of one authority (the police) to incorporate the courts also. Thus the de-legitimisation has spread beyond the interaction to a more system wide complaint.

Compliance therefore is certainly an interesting phenomenon in the OTSP debate. Despite feelings of illegitimacy against both the law and the treatment they received from the enforcement agency, these recipients complied with the OTSP demand. As stated above, compliance in legitimacy studies is perhaps best understood in motivational terms. Here with the OTSP similar motivational aspirations are demonstrated by the payment of the notice. These citizens, despite feeling frustrated at the treatment they have received, despite according the authority (and the law in question) little legitimacy or trust, nevertheless complied. Their motivational approach still directs itself towards compliance rather than complete disengagement (Braithwaite's ultimate posture of resistance (2002b:3)). There is something noble in this, in the idea that no matter how bad these citizens feel they are treated, their default reaction is still to comply. Admittedly the in-built deterrent helps to make this decision for them.

In none of these encounters did recipients take away the idea that they would deliberately disengage from the authority and take part in active resistance to the law. Certainly some do, as press reports of direct action against safety cameras attest to. Therefore on the one hand it is perhaps to be celebrated that citizens still feel a certain moral alignment with authorities, on the other hand authorities need to be wary that this alignment cannot be taken for granted. At a certain juncture it is feasible that repeated negative interactions

completely disengage the citizen which is dangerous for the respect of legal authority and the law.

### Conclusions

There are clear concerns from recipients about the legitimacy of the system. Receipt of an OTSP can be frustrating and, at times, recipients feel that those frustrations are a direct result of the actions of perceived illegitimate and distrustful authorities. The idea of compliance being related to legitimacy and trust is somewhat complicated in the OTSP system. There are a number of ways in which compliance can be operationalised, in this chapter two factors of compliance have been examined. Firstly normative compliance is somewhat suspect in situations where recipients feel they have been treated poorly, this treatment is not helped by the nature of the laws that OTSPs are used to combat. It is worth repeating the point above that although ignorance of the law may be no defence, it is frequently a sociological fact.

In relation to compliance operationalised as payment of the notice then feelings of illegitimacy and distrust have little effect on such compliance. In such circumstances recipients instead are motivated by instrumental factors such as increased price and the aggravation of going to court. This is certainly worrying for long term compliance with the law in question, since compliance can only be taken for granted where the instrumental factors are strong enough to motivate people to comply. It is possible that a reduction in such factors could lead to widespread non-compliance.

## Chapter 8 Conclusion

The small financial penalty that occurs as a result of being issued an OTSP may at first lead us to question why such a minor financial inconvenience is worthy of study. I argued in chapter one that the use of OTSPs in criminal (and quasi-criminal) justice policy and the experience of receiving one is not without meaning; both policymakers and enforcement officials may assume that the OTSP imparts a message and meaning, however this is by no means the end of the story. The meaning of the OTSP punishment is one that is experienced by recipients who attribute meaning to the encounter/interaction which, as seen in this thesis, is sometimes widely at odds with the intended meaning. Until these varied meanings were known then it was difficult to understand and respond to the challenge made by Bagarich (1998) that all summary offences should be dealt with by way of an OTSP, or to make sense of the claims from government that these penalties represented an 'effective' means of justice.

The underlying aim of this research has been to examine the holistic experience of OTSP policy. It has sought to examine both the meanings and motivations in using OTSPs and what the experiences of receiving one tell us about the aims and aspirations for OTSPs. In conducting this enquiry this research has traced the development of OTSPs from their introduction through to their contemporary use across a diverse range of behaviour.

As discussed in chapter one, we can identify the extent to which OTSPs are used by enforcement authorities, and further there is evidence of how these OTSPs have formed part of a larger concern in the justice system to act more swiftly against deviant behaviour. However, as pointed out in that chapter, our knowledge stopped at that point. The quantitative evidence that existed prior to this thesis supported the contention that OTSPs represent a speedy and cost effective means of justice (although this latter point was challenged in this thesis), in that it focused on speed and "effectiveness" and how these were (or may) be delivered through the OTSP process. This thesis has enriched this picture

by providing empirical qualitative evidence in chapters 5, 6, 7 on the experience of using, and receiving, OTSPs and what meanings were attributed to the justice experienced in being a part of this process.

With this very brief summation of the thesis it is now possible to examine the underlying themes of this research and how it has answered the gap in our knowledge about the experience of receiving and understanding OTSPs. The OTSP is an enigmatic punishment, which contributes to confusion about its aims, what it is meant to achieve, and how the methods of enforcement meet (or do not meet) those aims. In enforcement using OTSPs the enigmatic nature of the penalty means that enforcing officers are free to choose the messages about purpose and meaning that they feel are most appropriate to deliver during the encounter. This leads to a *de-moralisation* of language within the encounter; the language used conveys little moral opprobrium and in certain situations conveys no moral message at all, it is as if the penalty is merely a bill for services rendered. Unfortunately for the legitimacy of the law, this leads to a *demoralisation* of citizens in their attitudes towards the law. The citizen loses any hope and confidence that having a positive attitude towards the law, and being motivated to comply with it, protects them from being labelled a problem. This *demoralisation* occurs due to the meaning that citizens attribute to the system and also due to the incongruence between citizens' motivations to comply with the law and their actual behaviour.

#### The enigmatic OTSP: A penalty without a clear purpose?

The OTSP is something of an enigma; throughout its development in justice policy it has been treated as an axiom for speed, simplicity and efficiency and yet in practice it is hard to sustain these claims. The enigmatic nature of the OTSP arises firstly from the policy environment in which it is promoted. The enforcement environment in which it is issued adds to the confusion and finally the meaning attributed to it by those who have received OTSPs is interpreted, at times, in a way far removed from the meanings originally intended by policymakers.

The OTSP is used daily by various enforcement authorities, millions of people have received OTSPs and continue to receive repeated penalties from enforcement agencies. Receiving an OTSP is, thus, an everyday occurrence in which the justice system attempts to deal with behaviour that the law has classified as deviant. Given this “everydayness” of the penalty and the widespread reliance on it in the justice system, it is surprising that little criminological investigation had been undertaken of this mundane yet often used penalty.

As stated in Chapter 1 Richard Fox concluded ‘criminal lawyers and criminologists have been remiss in not noticing that the on-the-spot fine has become the principal sanction in the criminal justice system ... [and] is now directly competing with criminal law in the courts and threatens to supplant it in relation to offences at the lesser end of the scale’ (1999:19). This thesis took up Fox’s challenge and sought to provide empirical evidence of the experience and meanings attributed to OTSPs and being labelled a problem in an everyday system of law enforcement. What this thesis found is that the OTSP is still something of an enigma, it simultaneously symbolises a proportionate response to the level of offending whilst at the same time, for citizens, it can appear to punish harshly minor instances of public wrong doing, which, in turn, can lead some to claim that the OTSP is an illegitimate system, enforced by illegitimate agencies.

Partly the problem of understanding the OTSP arises from policymakers attempting to convince us of the need to take ‘swift and salutary’ (Marples, 1960) measures against certain groups; ‘the mindless few’ (Blair, 2002), ‘the thug’ (Blair, 2000), the ‘litter lout’ (Spier, 1958), ‘the road hog’ (Emsley, 1994) and in more recent times ‘the lane hogs’ or ‘tailgaters’ (DFT, 2013a). Such characteristics would certainly be difficult to translate into legal classifications of deviant behaviour, but this is not their purpose, instead they serve the more limited purpose of policy promotion. These characterisations of “others”, who it is claimed the policy is really aimed at, creates a real problem of understanding, especially for those who issue OTSPs daily and those who receive them. Furthermore the desire from policymakers to increase enforcement activity, by providing a reduction in cost and time

spent per enforcement action (OTSP) somewhat undermines the claims of a deviant other. The desire to net-widen so as to capture more instances of minor offending hardly seems to accord with the idea that such penalties target the 'mindless few'. Clearly very few people would voluntarily consider themselves part of the 'mindless few' or any other category of alterity used, and yet the 11 million OTSPs issued each year suggests this politics of alterity is woefully incorrect. There are not a mindless few, but seemingly a mindless many.

The desire to manage criminal justice through new public management techniques of monitoring and targeting performance contributes further to the confusion. The aim of the OTSP becomes speed, simplicity and "effectiveness" of the justice system. In targeting such factors the problem that the penalty is meant to solve is defined in opposition to its solution. The criminal justice system becomes the problem rather the solution to law breaking, and the OTSP is given as the panacea to a perceived slow, cumbersome and "soft" justice system. The behaviour of citizens according to the law, and what they feel about these laws, is relegated to a minor complaint within the system. The complaints of citizens are perceived to be unjustified and unfounded because of the obviousness of the citizen's transgression (the presence of the vehicle or the officer actually witnessing the behaviour), thus there is no need to focus on wider social meanings that citizens attribute to OTSPs. All OTSPs operate on the principle of obviousness; in the case of automated and semi-automated enforcement there is technological 'objective' proof of transgression which makes the case obvious and, in the discretionary OTSP system, the very fact of accusation is enough to impose the OTSP punishment.

Contributing further to the enigmatic nature of the penalty is that OTSP policy has been shown to take place in a dynamic environment which has the aim of "effectiveness" but is also ever shifting in order to meet that goal. To ensure that the OTSP has remained "effective" a series of secondary deviances have been drafted; offences such as not providing adequate identification when requested (Motoring FPNs, Litter FPNs, and PCNs) or merely streamlining enforcement procedures for default (Motoring FPN and PND). In so

doing there are debates to be had about the wisdom of such approaches and whether it is possible to have an all-encompassing “effective” means of ensuring compliance with OTSP laws and demands.

The aims of OTSP policy have, as Chapters 3 and 4 demonstrated, involved many desires including the desire to increase the capture of offending, to provide a strong deterrent, to deal with cases more swiftly, more severely (i.e. litter and PNDs) whilst at the same time in a more proportionate manner. In addition the ever present need to be shown to be acting effectively against deviant behaviour has produced a dynamic and changing policy environment.

Without doubt this is certainly a diverse set of aims for an ostensible ‘speedy, summary and simple’ (DCA, 2006a) penalty that involves a small fine and, on occasion, licence demerit points; there is certainly something for everyone in the OTSP. If one were to try to encapsulate the policy approach of the OTSP in a sentence it would be very difficult. It is seemingly a punitive yet proportionate punishment that seeks to deal with transgressors in a swift and salutary manner, and also to act as a warning to others that ‘thuggery’ ‘loutishness’ and ‘selfishness’ will not be tolerated, unless of course the recipient of the penalty can pay the penalty then it will be tolerated to a certain extent. This hardly seems a coherent approach to dealing with deviancy, even if of the minor kind. It should be noted that this is merely the policymakers’ approach, the messages and meanings of enforcement officers and recipients complicate the picture further.

Those carrying out OTSP enforcement also contribute to the enigmatic nature of the OTSP. Chapter 5 demonstrated that the more punitive intentions of policymakers are not carried forward into the ‘street level bureaucracy’ (Lipsky, 2010). Instead officers seek to gain acceptance within the encounter in order to gain the compliance of the citizen and to ensure that the encounter proceeds without aggravation from the recipient.

For the enforcement officer the speed and ease of issuing OTSPs combined with the fact the officer no longer has to attend court is no doubt attractive. Furthermore, since they have

complete discretion in how the policy is interpreted and communicated to recipients, they are free to pick and choose the policy message they want to express. Since there are so many to choose from, they can stress the moral dimension of the offending if they choose or, as happens more regularly, they may eschew moral argument and instead stress the benefits of the OTSP to the recipient.

As chapter 5 demonstrates, the OTSP encounter is potentially a fraught, hostile and difficult interaction between citizen and officer. Typically such encounters, as Schafer and Mastrowski have argued, involve citizens who have the 'inclination and capacity to challenge the officer's enforcement decisions' (2005:225). These challenges undermine the "effectiveness" claims of swiftness of action, cost and time effectiveness that policymakers believe should occur in OTSP enforcement.

The fact that policymakers have had to create secondary deviances, that would not exist but for the OTSP, to tackle what is primarily minor deviancy in the first instance, suggests that the "effectiveness" of policy is influenced by citizens' reactions to receiving an OTSP. It is fair to state therefore, that the OTSP doesn't necessarily solve criminal justice problems, it also creates them. However, policy seems continually to be drafted with little thought or understanding of what these citizens' reactions are and what they tell us about the OTSP system, and the wider justice system.

Recipients are free to choose the meaning attributed to the OTSP, it can be, as O'Malley (2009) suggests, just another bill, but as this thesis has shown it can be much more than that. It can be an unjustified penalty, an unfair penalty, one lacking in common-sense and one that doesn't address the proper purposes (and people) at which it is felt the law should be aimed. What can be said is that policy seems to be drafted with little thought or understanding of what these citizens' reactions are and what they tell about the OTSP system, and potentially the wider justice system.

Until the OTSP enigma is resolved there is a real risk that any changes to the system merely create their own problems or further reinforce feelings of unfairness, injustice or



untrustworthiness. This is certainly the case with the vexed issue of 'revenue raising.' Certainly citizens do regularly argue that 'traffic blitzes [are seen as] no more than revenue-raising enterprises' (O'Malley, 2009: 96). However, as this thesis argues this does not arise from consumerist concerns with price, as O'Malley suggests, but instead arises due to feelings of distrust born from frustration over how citizens are treated by the system. Recent government attempts to solve the "revenue raising problem" by injecting ever more transparency into the system, do not address the root cause of the problem, distrust. Here, to quote Etzioni, it is fair to say that 'transparency itself is not necessarily "the best disinfectant"' (2010: 389). As O'Neil has pointed out there needs to be a distinction between transparency and trust (O'Neil, 2002) and, until this is recognised, then any attempts at transparency are likely to lead to claims that the information cannot be trusted.

The enigmatic nature of the OTSP masks these arguments; it has confusing and contradictory aims which can be interpreted and acted upon in many different ways, which, as this thesis has shown, belies the claims to "simple" and "speedy" on the spot justice. Three factors therefore contribute to the enigmatic nature of the OTSP, the dynamic policy environment, enforcement practice and citizen reactions to being labelled a problem in this way. This thesis has shown that there are real concerns about justice and fairness in a system that is supposed to represent a proportionate response to offending.

#### De-moralising enforcement and demoralised recipients

The punitive language of policymakers, when introducing OTSPs, has not been translated to on street practice. Policymakers desire to target the 'mindless few', the 'thug', the 'litter lout', the 'rod hog' and the 'boy racer' (HC Deb, 1997-1998 300 c.237) sits at odds with the language used during enforcement encounters. When enforcement officers state; "I only book the vehicle", apologise for carrying out the enforcement, sympathise that "it happens to us all", or seek to transfer blame from the officer to the authority by stressing they have no discretion, they are in effect *de-moralising* the enforcement, stripping the moral dimension out of their communications with citizens.

The policymakers' message of an effective justice system, designed to deal with certain categories of offenders, are far removed from actual enforcement practice. Depersonalising enforcement of parking, by only booking the vehicle, "the inanimate object", accords with O'Malley's claim the 'individuality of the offender is not an issue only a specific role or "dividual"' (2009:83). This dividualised form of justice, dependant as it is on ideas of deterrence, is stripped of 'overt moralising' (Kahan, 1999:498) and the moral conduct of the recipient is ignored.

Indeed in personalised enforcement of speeding, communication about moral blameworthiness of the offender is also sidestepped by the officer. Here the officers sometimes feel the need to apologise to drivers and stress instead that 'it happens to us all' which removes any discussion about the moral argument over the risk of harm that speeding involves. As stated in chapter 5 it potentially communicates a message that the officers themselves cannot comprehend the underlying reason for stopping the citizen.

In litter enforcement, the officers (involved in a direct face to face interaction with a potentially hostile recipient) look to de-moralise the encounter by trying to avoid the impression that the officer has judged the recipient as doing wrong. Instead the enforcement, it is claimed, arises not due to officer beliefs about unacceptable behaviour, but due to the authority's zero-tolerance policy, without which, it is claimed, enforcement action may not have taken place.

In every OTSP context there was a de-moralisation strategy in operation. Officers felt they had to gain the compliance of the recipient not through the moral language of harm and wrongdoing, or seeking to make recipients understand why enforcement action had to be taken, instead officers appeal to the consumerist instincts of the recipient. In the OTSP enforcement process officers sought to offer a consumerist choice to an offender, "a sale". Again O'Malley is correct here; '[a]s responsible consumers we pay for our choices and for the routine mistakes and failures of foresight that characterize everyday life' (2009:159). The messages and meanings that are conveyed during the enforcement encounter certainly

reinforce this point. Each recipient is offered a choice, or 'opportunity', to avoid any questions about the morality of their actions by paying a small financial sum. Such a sum is offered as a bargain price since it is always contrasted with the potential increased costs and risks of going to court to contest the OTSP.

Thus, rather than a communication through punishment of the acceptable limits of behaviour, these encounters represent *de-moralised* consumerist interactions. The penalty can, as O'Malley states, appear to be just 'another bill to pay, not as an occasion for moralized commentary.' (2009: 108). This is confusing for an OTSP recipient since they stand accused of breaking the criminal law, a conviction for which carries its own 'powerful form of "status degradation"' (Schwartz & Skolnick, 1963:136) and yet they are offered a choice of paying a small penalty to avoid such degradation.

Contrary to officer expectations, this de-moralisation of offending is certainly not experienced by recipients of OTSPs. Rather than see their actions as de-moralised opportunities, recipients instead see the notice as imparting a moral message about their place within the group. The penalty encounter, unconcerned as it is with the citizens views (voice), is frequently perceived as unfair and offers a moral message that '*you are not valued by society*' (Jackson et al, 2012:1053).

Furthermore, citizens become *demoralised* rather than the action they commit being de-moralised. Citizens become frustrated, apathetic and angry about the system and begin to see it as illegitimate and untrustworthy. The complexity of the laws, and the fact that their actual desire to comply is ignored in the punishment, demoralises the recipient and can at times lead to great anger. Their frustrations may at first involve an inwards facing direction. If the recipient was motivated to comply it may make that recipient apathetic about the rules and lower their desire to comply in the future, since their moral worth (their intention to comply) seems immaterial. Here the de-moralisation of enforcement practice may lead the recipient to feel frustrated that they have been 'caught out' on a 'technicality' rather than engaging in morally dubious behaviour.

This demoralisation does not always face inwards, it can be directed at the enforcement agency (who may be seen as the ‘Stazi’, ‘Hitler’s’ or ‘Jobs-worths’), or against the laws in question. Citizens become demoralised about the state of the enforcement agency who they see as operating without discretion, common-sense or trustworthy motives. This has the effect of demoralising those citizens who policymakers would normally call upon as part of the “law-abiding majority.” They lose confidence in their belief that their moral motivations act as appropriate guides to legal behaviour and consequently lose hope in those organisations who enforce these laws. As Robinson and Darley state, when “[l]egal codes... no longer serve as a guide to just and moral behavior; they no longer become the core of a set of normative rules that citizens use to regulate their behavior (2003: 986). The meaning of the OTSP to recipients, in such circumstances, is one of injustice and unfairness. Unfair in both the treatment they receive during the encounter and, as stated above, unjust in that the law seems not to reflect their ideas about what is appropriate “good” behaviour.

Fortuitously for policymakers, and enforcement officials, the general demoralised attitude of recipients does not lead to lowered compliance with the OTSP. Such notices are still complied with (paid) in sufficiently high proportion that policymakers may still claim such policies are “effective”. However it is worth remembering that “effectiveness” here does not relate to a normative commitment to obey the law, nor an acceptance that the recipient has actually done wrong. Instead it relies solely on instrumental factors: the deterrent efficacy of post-notice enforcement. The instrumental factors of reduced cost and lack of a conviction may invigorate citizens to comply with the notice but certainly does not act as an encouragement to comply with the underlying law. As Robinson and Darley claim, in this state of demoralised compliance:

people may continue to obey the rules that the “justice” system imposes, but will do so largely to avoid punishment. No society can continue to exist if its citizens take that attitude toward its legal system” (Darley, 2001:11)

### The road to compliance: Paved with actions not good intentions

This thesis has demonstrated that compliance in the OTSP system is fraught with conceptual and practical difficulty. At the conceptual level compliance with OTSPs has two meanings; it can mean compliance with the penalty (i.e. ensuring that it is paid) or compliance with the underlying law. Of course any enforcement strategy/policy must have both of these aims in order to exhibit legitimacy; complying with the penalty as a short-term goal and then future compliance through commitment to complying with the law. In seeking a longer term commitment to abiding by the laws that OTSPs govern, there are practical and theoretical problems that have yet to be overcome.

In seeking compliance, and being ever focused on “effectiveness”, policymakers generally resort to the philosophy and language of deterrence. As the debates in chapters 3 and 4 demonstrated, policymakers were concerned with making the OTSP swift and salutary so as, in the words of one policy document, to ‘nip unacceptable behaviour in the bud’ (Home Office, 2006: 3). This preventative (and at the same time punitive) approach to enforcement relied on expectations about human behaviour that are different from human experience.

The deterrent efficacy of OTSPs seeks to gain compliance from citizens through fear of capture and certainty of punishment following capture. The problem with the deterrence perspective is that ‘authorities cannot induce through deterrence alone a level of compliance sufficient for effective social functioning’ (Tyler, 2006:65). Chapter 4 demonstrated this point with speeding enforcement. It should be remembered that such enforcement (speeding) represents the best opportunity for the state to deter citizens, as it is so widely enforced and does have an increased severity of punishment (demerit points). Nevertheless, it was found that the so called ‘dark figure’ of speeding crime suggests a woeful inadequacy in the deterrent capability of speeding OTSPs to gain compliance.

The focus on deterring citizens from law breaking, through the OTSP system, ignores an important dimension of human experience; the incongruence between intentions and actions, or behaviours and motivations. As Braithwaite states ‘compliance related

behaviours are different from motivational postures... [and] depart from the expectation of consistency theorists that attitudes and behaviour should be related' (2002a:17). In the OTSP system this incongruence is readily apparent and, due to the enigmatic nature of the OTSP, one could argue it is a symptom of policymakers' ambivalence in choosing targets for regulation.

In OTSP enforcement authorities expect compliance behaviour at all times regardless of the motivations of citizens who have transgressed. Such citizens may have intended to comply, accidentally or thoughtlessly breached the requirements of the law or deliberately set out to break it. In the OTSP system each of these types of transgression are seen as equally culpable attitudes and are punished in the same fashion. The expectation of perfection in relation to complex, often counter-intuitive, changing and badly publicised laws (e.g. parking regulations) certainly sits at odds with the everyday experience of normal citizens.

What this thesis argues is that, contrary to the expectations of policymakers and enforcement agencies, when receiving an OTSP citizens are not inherently rational legal beings, but ordinary people who desire to abide by the law but through accident, thoughtlessness and sometimes design, find themselves in breach of it. When confronted by their wrongdoing these recipients are then stripped of an opportunity to explain (voice), exculpate or even mitigate their behaviour. In the absence of such an opportunity these recipients reach out to a method that any human has for understanding a shared sense of social meaning: common-sense.

Due to the lack of opportunity to have their concerns listened to in the enforcement encounter, citizens are left with few means of assessing what is required of them other than through their own common-sense. In this regard citizens rely on two heuristic devices to demonstrate to themselves (a technique of neutralisation to use Sykes and Matza's terminology) that they are the victim of an authority that lacks legitimacy and common-sense. They claim that their behaviour complied with the higher purposes of the regulatory

norm in question, thus diminishing the nature of their alleged transgression, or they point to their all-round respectable character as evidence of their general law-abidingness.

Of course in the enforcement of such norms, under a policy of zero tolerance (chapter 5), the purposes of the regulatory norm are inconsequential, instead enforcement becomes automatic (regardless of the actual contextual process used). The witnessing of an offence is stripped of all the contextual circumstances surrounding it and becomes, as Finkel describes it, a 'freeze-frame' (1995:319) of the moment of transgression. The irrationality and complexity of everyday life is ignored in favour of a simplified and easy to understand (for the justice system that is, not those who are deemed the problem) transgression of the law. The "fixed" nature of the penalty, the fact that it pays little attention to either levels of culpability or the degree of risk/harm involved, demonstrates to recipients (in the absence of any meaningful counter communication in the OTSP encounter) that their individual circumstances and character are unimportant. Of course these dimensions of character are important for the ontological security of the individual (Giddens, 2013), but they are not for the law. Thus the everyday experiences of citizens subject to the law are not reflected in the everyday experiences of citizens *with the law*. This incongruence between the expectations of the law and the expectations of normal citizens is no doubt frustrating for those who are found to breaching the law whilst are actively seeking to comply with it.

When confronted with their non-law-abidingness it is perhaps unsurprising that they reject the idea that they belong to a category of non-law abiding citizens and seek to differentiate their behaviour from more egregious examples, e.g. 'the smackheads' 'the yobs' or 'those glassing others in pubs' who it is felt are the true 'mindless few' (Blair, 2002) who, it is claimed, these laws are aimed at.

In the speeding context Wells argues that this desire to be seen as respectable is part of an attempt to create 'do it yourself identities' (2012:195) that seek 'to situate the individual with the moral majority, [which] is characterised by a law-abiding stance and involves making an active contribution to society' (2012:195) This research has found that similar attempts are

made across the contexts in which OTSPs arise, whether it is a litter FPN, PND or PCN, all reject the idea that their behaviour in breaching the regulatory requirement is a fair summation of their character.

Rather than refocusing their efforts on compliance, such citizens instead begin to undermine the system of enforcement, either through challenging the notice thus causing more delay in the system, or not trying as hard in future to comply. Recipients also start to distance themselves from the enforcement bodies who are ostensibly acting on their behalf. Here the police officer, local enforcement officer or CEO become the *other*, the 'Nazi', 'Stazi' or 'fascist' enforcement officer operating without common-sense or discretion. These characterisations of the enforcement agency, and the laws it enforces, seek to persuade and demonstrate to others the illegitimacy of the system and that its agents cannot be trusted. Indeed citizens may even actively engage in subterfuge against the enforcement authority or become apathetic and ignore their demands.

#### **Compliance and legitimacy: motivations, behaviours and the self-report problem**

In order to counter the problem of perceptions of unfair procedural treatment a number of empirical studies into the concept of legitimacy have sought to argue that feelings of legitimacy, fostered by procedurally just treatment, can help shape compliance (see Tyler, 2006; Jackson et al, 2010; Tyler and Jackson 2015, Tyler and Huo 2002 and many more). These studies argue that authorities can expect compliance with the law where enforcement agencies are seen as acting legitimately and with concerns for the rights of those they come into contact with. It is quite clear (chapter 6) that recipients of OTSPs do not believe that the enforcement encounters provide an opportunity to have the citizens' fears and expectations listened to by the enforcement agency. The consequence of this is that citizens have begun to see authorities demands of legal compliance as illegitimate and requiring a level of perfection that few can achieve. Indeed the fact that so many enforcement officers and policy professionals had likewise been a recipient at some point demonstrates the excessive demand of perfection that certain OTSP laws require.



In the absence of an opportunity to communicate in a 'rational and reciprocal' (Duff, 2001:77) way citizens seek to explain and understand their behaviour through common-sense expectations about what is required of them rather than what the law actually requires them to do.

In this regard this thesis found a problem with the legitimacy/compliance equation in that the evidence base relied on, in legitimacy studies, may not indicate actual compliance. As found in Chapter 7 the self-reported compliance of study participants in Jackson et al (2010), Tyler, (2006) and Jackson and Tyler (2014) suggest that such compliance is understood as compliance *motivation* rather than compliance *behaviour*. This is of fundamental importance for understanding both the perceptions of legitimacy of OTSP enforcement and its relationship to compliance with the laws punished by OTSPs. The increasing complexity of legal requirements, even in essentially mundane situations (Woolgar and Neyland, 2013), means that an intention to comply can often manifest itself in law breaking.

The problem here then is one of false consciousness. The citizen feels they are complying, are motivated to comply, and yet this is still not enough. It is no wonder that in situations where citizens hold these views they become intensely frustrated by a penalty encounter that lacks communicative interaction and a penalty itself that is completely unconcerned about their intentions or the circumstances of their case.

Punishing a citizen who holds positive views about the law, and their actions in complying with the law, must be a demoralising experience for that citizen. As seen in Chapter 7 both frustration and anger are frequent responses to the receipt of the penalty, particularly where there is an inadequate opportunity for the citizen to communicate what they feel about the penalty and their own behaviour.

What is patently clear from forgoing discussion is that the expectations of an 'effective' policy of enforcement are frequently countered by the experience of actually receiving an OTSP. In a system that is widely seen as illegitimate not only is the justice and fairness conception of "effectiveness" absent, the more traditional understandings of speed, time

and cost efficiency may also be imperilled. Put simply, where the process is widely seen as illegitimate, more citizens are likely to complain, challenge and contest their treatment which will have the knock on effect of increasing the amount of time and money spent on dealing with these transgressions. Indeed as the system is also aimed at increasing the rate of capture of transgression it means that authorities will need to spend more time, and consequently more cost, on enforcing the legislation without any necessary increases in compliance behaviour. In fact, as chapter 7 demonstrates, compliance motivation may also decrease, thus creating ever more potential recipients.

### Concluding thoughts

The overall message of the OTSP interaction is one that is decided in individual encounters that citizens have with officers. What this thesis has found is that the OTSP is seen variously as a consumer opportunity, a fair second chance, a zero-tolerance punishment, a punishment lacking any common-sense and a completely illegitimate response to minor transgressions. To return to Fox's point about the lack of study for this penalty, what this thesis has shown is that the penalty has meaning, and the interactions people have with the state via this penalty signify more than a 'simple, speedy and summary' justice encounter. Given that the OTSP is by far the most common form of justice interaction in England and Wales it is essential that policymakers understand how and why the penalty is experienced in ways that differ quite significantly from the original diverse aims and aspirations for the penalty.

As this research has shown, Bagarich's contention that all summary offences should be dealt with on the spot is not a positive move for justice, nor would it be welcomed by citizens. Certainly policymakers *could* conceivably accept Bagarich's contention, indeed during the period 1990-2010 it would appear that policymakers were increasingly endorsing Bagarich's idea. However, the policy debate thus far has for the most part focused on what, practically, OTSPs can achieve, not on its symbolic characteristics and what these mean to recipients and citizens.

The future challenge for citizens, policy makers and justice professionals who want a change in the system is to design a process which is experienced as legitimate and has as its aim the communication of the normative expectations of citizen behaviour. This system needn't accept common-sense perceptions but must, at some level, recognize these perceptions exist and deal with them in a procedurally fair and just manner.

### Implications of the study and suggestions for further research

#### **Immediate implications**

The ultimate question at the end of this thesis is directed at the policymakers in the justice system, and the magistrates who operate the only currently viable alternative to OTSPs. That question is whether the justice system should still rely on such penalties given what we know about the recipients' experience of receiving one and the everyday practice of issuing them?

For policymakers the question is essentially one of message; whether they wish to continue to rely on penalties that seem only capable of transmitting the idea that deviant behaviour will be tolerated as long as it can be paid for, or alternatively that citizens everyday common-sense understandings of justice and fairness are unimportant in law enforcement. Neither of these meanings are positive for a sustained commitment to the normative reasons for complying with society's laws.

Certainly one clear contribution to knowledge that this thesis has made is that policymakers should no longer talk of OTSPs as axiomatic with speed, cost reduction and effectiveness in the justice system. The picture is far more complex and requires analysis of all stages of the policy implementation cycle, from the policymakers to the implementers and the receivers of policy.

The use of 'commonsense justice' (Finkel, 2001) ideas in this thesis raises wider questions about expectations and experiences with the law. Numerous government announcements over the previous 10 years have all sought to promote, or welcome, policy that is felt to

reflect “common-sense”. These announcements typically welcome a “common-sense approach” to, amongst many others, implementing and enforcing health and safety laws (DWP, 2013), the town and country planning regime (DCLG, 2010b), criminal sentencing in court (MOJ, 2012) and inheritance laws (MOJ, 2014c). These claims to common-sense are important and reflect more than a simple claim to shared understanding. As this thesis shows they are claims that involve a symbolic communicative function. In implementing OTSP policy this research has shown that common-sense is frequently called for and frequently seen as absent when citizens experience policy in action. The challenge for policymakers and academics is to move the debate forward so that common-sense claims can be understood for what they are and what they require in each particular set of circumstances.

There is no doubt a danger in this approach, as Boeckmann and Tyler argue ‘[a]lthough there are certainly merits to pursuing commonsense justice, history also provides clear examples of injustices’ (1997:378). However, until the claims for common-sense are understood for what they symbolise, rather than for what they are perceived to imply, it is very difficult to move debate forward, as both sides misunderstand the point the other is making. Common-sense as symbolism is therefore an interesting topic that is worthy of further empirical study to see how diverse claims for common-sense in varying contexts represent more than they first appear. As Meehl states

Fireside inductions [common-sense ideas] *are empirical*. No logician would hesitate to say this. Their subject matter is the domain of empirical phenomena, and one who invokes a fireside induction will, when pressed to defend it, appeal to some kind of experience which he expects the critic will share with him, whether personally or vicariously. (1998:119)

Similarly Formiani states that

Psycholegal researchers should use CS-psychology [common-sense psychology] to inform their research, and lawyers and judges relying on social science research

should evaluate it.... To do otherwise ignores a fertile source of hypotheses and knowledge about human behavior, and is perilous because the arbiters of law (judges, juries, and legislatures) sympathize with the pages of human experience, not with ANOVAs, correlations, and effect sizes. The former is its natural bedfellow; the latter, only an occasional mistress. (1998:142)

Put simply the law is experienced through common-sense which is an empirical reality that policymakers, policy implementers and academics ignore at their peril. Again Formiani makes an excellent point in this regard

People need not hold advanced degrees or be experts in natural or social science in order to assess accurately whether existing policy is good or bad, effective or counterproductive, useless or outdated. Their beliefs about the policies they live with are important, no matter how irrational they might appear to be to experts. (ibid: 119)

Common-sense in this research has certainly been a 'fertile source' of understanding and theorising about citizens experiences with the law. It has helped to understand the importance of the telos, or purpose, of legal requirements in shaping citizens motivations to comply with societies laws. As this study has shown, the motivation to comply with OTSP laws is related to the purposes for which, it is perceived, the law is aimed. Where the law takes insufficient account of these purposes it can do great damage to both the system and the laws legitimacy. It is certainly in policymakers, and enforcement officials, interest to understand this point. Here the reliance on perfection in compliance behaviour sits at odds with the common-sense inductions of ordinary citizens. Great injustice is perceived when the law as practiced does not seem to accord with the purposes to which that legislation is aimed.

### **Further study**

Certainly one avenue for further study is to subject the current state of research on compliance and legitimacy to a rigorous analysis. Legitimacy scholars who utilise self-report surveys to link compliance, procedural justice and legitimacy would do well to focus

their attention on the distinction between compliance motivation and compliance behaviour. At present the legitimacy compliance nexus rests on uncertain foundations particularly in relation to everyday law breaking. Self-report surveys, at present, perhaps paint a more rosy view of the relationship between compliance and feelings of legitimacy than is warranted. Certainly methods need to be devised that capture the difference between compliance motivations and compliance behaviour which can then be utilised to understand the true extent of the legitimacy compliance nexus. This is particularly pressing in areas of law where intuitive moral guidance is not a good predictor of what the law requires. Such laws are increasingly being relied upon in the justice system and there is potential that the distinction between action and motivation is likely to become a key problem for citizens and policymakers alike.

As stated at the outset, this research examines the OTSP debate within a framework of citizen and state interactions. One obvious avenue for further study is to examine how the receipt of OTSP in private relationships (citizen v citizen or citizen v corporation) alters the perceptions of fairness or legitimacy within the system. At present very little is known about the extent of OTSP usage in such private law relationships, although anecdotal evidence suggests a clear concern from the judiciary (magistrates) and citizens. The process of civil recovery of debts following shop lifting in which the offender has received either restorative justice or an out of court disposal has been raised as an issue in parliament (HC Deb, 22 March 2011, c248-259) and both the MA and the Citizens Advice Bureau have raised concerns that this is causing significant hardship. The civil recovery method is almost exactly a copy of the OTSP process in that a demand for money is made that is fixed and non-negotiable. This is certainly worthy of further study since it suggests a parallel justice system which doubly punishes the behaviour.

Such an approach is becoming more widespread, with banks and credit card companies providing OTSPs for late payment or being overdrawn. Indeed the OTSP process has even been tried, unsuccessfully thus far, in seeking a resolution to the problem of copyright theft.

The case of *Media CAT Ltd v Adams* [2011] EWPC 6 provides another example of where the OTSP methodology was used to seek payment from people it was believed to have breached copyright through peer to peer downloading, although the scheme in this case ultimately failed. This process of copying the OTSP system is certainly worth further investigation to map both the extent to which it is used and where it is deemed an appropriate response to commercial considerations.

In addition the private enforcement of societal laws is also worthy of further study, particularly where such enforcement involves the use of OTSPs. Private parking firms have operated for many years now and the recent Protection of Freedoms Act 2012 legitimates the process of OTSPs in private parking cases. The extent to which citizens perceive the process as legitimate is debatable, and the extent to which citizens understand the difference between the two processes is certainly worthy of further investigation. It may be that citizens fail to make any distinction and all are seen as equally illegitimate, this has obvious consequences for both types of providers who may be suffering perceptions of illegitimacy due to circumstances they have no control over. The use of privatised enforcement of more public problems, such as accredited persons under the community accreditation scheme (see chapter 3) or litter wardens under the CNEA, is also worth further study. This is particularly so given the profit motive that drives such companies and how this interacts with the public policy interests that govern enforcement of societal laws.

It is fair to say that the OTSP is likely here to stay for a long while as is the ever present need to provide an efficient system of regulation. Where cost and speed dominate the policy environment with these penalties there is likely to be an increased desire for cheaper alternatives to public body enforcement. The use of the private sector to meet these demands is a continuing challenge, and one that needs to be addressed with rigorous analysis in order to understand the complexities of citizens' perceptions of the justice they receive.

The Magistracy should be particularly interested in the findings of this study, in particular in how theories of communication and communicative justice can affect the perceptions of fairness, justice and legitimacy. The magistrates court has the potential to offer an alternative justice, one that does listen and care about citizens' common-sense concerns. As seen in chapter 6 the Traffic Penalty Tribunal does provide such a system. Future study could explore whether the magistrates court provides similar opportunity. If it does not, then future study could examine how magistrates could be involved in a system that does increase participation and listening within court and how this then affects citizens' views on both the system of punishment and the process. At present, in OTSP enforcement interactions, the magistrates court is not presented in a positive light; they are seen, and portrayed, as risky and expensive locations for citizens to have their say. Unchallenged this raises a potentially large problem for the magistracy; they may lose the support of the citizens who they ostensibly represent in the criminal justice system.

Certainly there is potential to alter this opinion, in that Youth Justice has embraced an inquisitive and communicative system. The 1997 white paper 'No More Excuses' specifically envisaged magistrates being heavily involved in communicating and 'engaging' (a repeated phrase throughout the document) with youth offenders. Whether this has been brought to the adult court, and indeed whether it should be, are questions ripe for investigation. Certainly some of the magistrates the researcher has met throughout this research are interested in this point and want to promote the communicative approach in the adult court.

Overall then the OTSPs enigmatic nature means that it can be seen as a response to both commercial and state problems. The growing use of such penalties is a problem for the justice system, both criminal and civil. If both become a byword for illegitimacy and unfairness then there is a real risk that such systems start to be seen as unnecessary expenses. Future study must address how our institutions of justice can provide alternative measures of "effectiveness" which challenge the dominance of speed, simplicity and cost as axioms for justice. No system can be fairly implemented without engaging with, and



understanding, both the supply and demand side of policy. This engagement not only helps understand whether the system 'works' but also whether the policy itself does more harm than good.

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## Appendix 1

### Ethics Approval

19 March 2012

Mr Adam Snow  
101 Derrington Avenue  
Crewe  
Cheshire  
CW2 7JA

Dear Adam

**Re: 'Pay-as-you-go justice? Out of court disposals and the future of the Magistracy'**

Thank you for submitting your revised project for review.

I am pleased to inform you that your project has been approved by the Ethics Review Panel.

If the fieldwork goes beyond the date stated in your application (September 2013) you must notify the Ethical Review Panel via Michele Dawson.

If there are any other amendments to your study you must submit an 'application to amend study' form to Michele Dawson. This form is available from Michele (01782 733588) or via <http://www.keele.ac.uk/researchsupport/researchethics/>

If you have any queries, please do not hesitate to contact Michele Dawson in writing to [m.dawson@uso.keele.ac.uk](mailto:m.dawson@uso.keele.ac.uk)

Yours sincerely



FP Dr Roger Beech  
Chair – Ethical Review Panel

CC RI Manager, Supervisor

EXTENSION OF TIME APPROVAL TO January 2014

25<sup>th</sup> October 2012  
101 Derrington Avenue  
Crewe  
Cheshire  
CW2 7JA

Dear Adam Snow

**Re: On the spot fines and the future of the magistracy**

Thank you for submitting your substantial amendment form and revised documentation for review.

I am pleased to inform you that the amendment and revised documentation has been approved by the Ethics Review Panel as follows:

Document	Version	Date
Protocol Summary	Version 2	11 <sup>th</sup> October 2012

If there are any other amendments to your study you must submit an 'application to amend study' form to X. This form is available from Elizabeth Cameron (01782 334256) or via <http://www.keele.ac.uk/researchsupport/researchethics/>

If you have any queries, please do not hesitate to contact Elizabeth Cameron in writing on the following email address, [uso.erps@uso.keele.ac.uk](mailto:uso.erps@uso.keele.ac.uk).

Yours sincerely

pp.  
Elizabeth Cameron  
ERP1 Administrator

**Dr Jackie Waterfield**  
**Chair – Ethical Review Panel**



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**Information Sheet: Custody Suite**

**Study Title:** Pay as you go justice? On the spot fines and the future of the Magistracy

This information sheet explains the purposes of my study into the use of penalty notices for disorder, why you have been chosen and how the information you provide will be used.

**Purposes of the Study**

The project aims to answer questions around how on the spot fines, commonly called fixed penalty notices are understood by people who receive them, those responsible for issuing them and magistrates. The study will look at what messages about punishment and behaviour are being sent by using fixed penalties, i.e do they adequately punish bad behaviour and do they tell the offender that what they are doing is wrong, how it feels to receive a fixed penalty notice, to see whether more offences should be subject to on the spot fines and whether this is a desirable direction for the future of justice.

**Why you have been chosen**

I have spoken to the custody sergeant and he informs me that you would like to talk about your experience of receiving a penalty notice for disorder. If this is not the case or you no longer wish to talk to me then please feel free to leave at any time.

**Please be aware** that talking to me today and taking part in this study does not mean that your penalty notice is, or will, be cancelled. Your legal obligations are unchanged. Also please note that I cannot comment on the legal situation or justice of the fixed penalty notice. The information that this study is seeking to find is about the experience and your perceptions of the experience of receiving a penalty notice for disorder, it will not examine individual cases nor will I comment on them in either this report or any other study.

**Do I have to take part?**

You are free to decide whether you wish to take part or not. If you do decide to take part you will be asked to sign two consent forms, one is for you to keep and the other is for the researcher's and University records. You are free to withdraw from this study at any time and without giving reasons.

**If I take part, what do I have to do?**

To answer questions and to share your experiences of the criminal justice system, fixed penalty notices and general life experiences as it relates to minor crime and disorder.

**How long will it take?**

The interview will last approximately 30 – 45 minutes.

**What are the benefits (if any) of taking part?**

The research is seeking to understand how fixed penalty notices are experienced and what messages they send to individuals who have received one. The research will contribute to



the debate about the role of fixed penalties and the future implications this has for the magistrates' court and the criminal justice system in general.

**What are the risks (if any) of taking part?**

The focus of the research is on the kinds of behaviours that attract a fine or fixed penalty. However, if you were to disclose that you had committed serious criminality then the researcher would have a duty to report this to the authorities.

**What if there is a problem?**

If you have a concern about any aspect of this study, you may wish to speak to the researcher who will do his best to answer your questions. You should contact Adam Snow on a.j.snow@ilpj.keele.ac.uk or Tel. 07582987273. Alternatively, if you do not wish to contact the researcher you may contact the researcher's supervisor Dr Helen Wells at h.m.wells@crim.keele.ac.uk.

If you remain unhappy about the research and/or wish to raise a complaint about any aspect of the way that you have been approached or treated during the course of the study please write to Nicola Leighton who is the University's contact for complaints regarding research at the following address:-

Nicola Leighton  
Research Governance Officer  
Research & Enterprise Services  
Dorothy Hodgkin Building  
Keele University  
ST5 5BG  
E-mail: n.leighton@uso.keele.ac.uk  
Tel: 01782 733306

**How will information about me be used?**

Your information will be used in the final thesis and subsequent scholarly articles, subject to your consent, to answer a series of questions around the debate about fixed penalties. The interviews will be digitally recorded (sound only) and may be used in future academic publications on the topic. All information will be subject to the Data Protection Act 1998 and will be anonymised.

**Who will have access to information about me?**

- That data will be stored securely in a locked filing cabinet, on a password protected computer and / or a password protected memory stick.
- The level of identifiability: each focus group participant will be given a pseudonym (false name), with an estimated age and gender. Your real name will not be used in any publication nor will it be divulged to any third party, subject to the proviso on admitting, or involvement in ongoing, serious criminality.
- Data will be stored in line with the sponsor's guidelines and that the data will be retained by the principal investigator for at least 6 years.

**Who is funding and organising the research?**

This research is jointly funded by Keele University and the Magistrates Association.

**Contact for further information**

a.j.snow@ilpj.keele.ac.uk  
Tel: 07582987273

# RESEARCH INSTITUTE FOR SOCIAL SCIENCES

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## CONSENT FORM

**Title of Project:** *Pay as you go justice? On the spot fines and the future of the Magistracy*

**Name of Researcher:** *Adam Snow*

Please tick box  
if you agree

- 1 I confirm that I have read and understand the information sheet for the above study and have had the opportunity to ask questions.
- 2 I understand that my participation is voluntary and that I am free to withdraw at any time.
- 3 I agree to take part in this study.
- 4 I understand that data collected about me during this study will be anonymised before it is submitted for publication.
- 5 I agree to be quoted anonymously in academic work and other publications relating to this research.
- 6 I agree that the interview will be tape recorded

-----  
Name of Participant

-----  
Date

-----  
Signature

\_\_\_\_\_  
Researcher

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

## Observation Forms



Keele  
University

### **Observation Information Sheet: Letter and Information Sheet to follow**

## **RESEARCH INSTITUTE FOR SOCIAL SCIENCES**

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My name is Adam Snow and I am a doctoral researcher at Keele University. I am looking for people to take part in a study into the uses of fixed penalty notices and parking fines. What people believe their purpose is, why they are used and if you have received one how it made you feel. (This could be for speeding, not wearing a seat belt or any motoring offence, littering, or even a parking fine)

The officer has just explained to you that my task today was to observe an enforcement officer who is responsible for issuing fixed penalty notices. S/He informs me that you would like to talk about your experience of receiving a notice. If this is not the case or you no longer wish to talk to me then please feel free to leave at any time. During these observations you have been chosen by the enforcement officer as a person who has been issued with a fixed penalty fine.

If you could spare half an hour of your time then I would like to talk to you about your experience. I am not employed by the enforcement agency nor is there any agreement in place between myself and them about the information I receive. I will not pass on any information to the enforcement agency whatsoever. Any information you give will be in strictest confidence and will be disclosed to no-one subject to your approval. The information you give may be used in this or subsequent academic work but it will not identify you at all. Your anonymity will be maintained throughout.

However if you were to disclose that you were involved in ongoing major criminality then the researcher would have to report this to the relevant authorities.

**Please be aware** that talking to me today and taking part in this study **does not** mean that your penalty notice is, or will, be cancelled. Your legal obligations are unchanged. Also please note that I cannot comment on the legal situation or justice of the fixed penalty notice.

The information that this study is seeking to find is about the experience and your perceptions of the experience of receiving a penalty notice, it will not examine individual cases nor will I comment on them in either this report or any other study.

If you would like to talk about your experiences or discuss why you think fixed penalties are a good or bad idea then please contact me. You can reach me on my mobile number 07582987273 or by email at [a.j.snow@ilpj.keele.ac.uk](mailto:a.j.snow@ilpj.keele.ac.uk).

Kind regards

## Facebook and Forum Advertisement

### **Academic Study**

My name is Adam Snow and I am a doctoral researcher at Keele University. I am looking for people to take part in a study into the uses of fixed penalty notices and parking fines. The study looks at questions such as; what people believe the purpose of these fines are, why they are used and if you have received one how it made you feel. (This could be for speeding, no seat belt or any motoring offence, littering, or even a parking fine)

If you could spare half an hour of your time then I would like to talk to you about your experience. The study itself is funded by the Magistrates Association and Keele University. If you would like to talk about your experiences or discuss why you think fixed penalties are a good or bad idea then please contact me. All information will be dealt with in the strictest confidence.

You can reach me on my mobile number 07582987273 or by email at [a.j.snow@ilpj.keele.ac.uk](mailto:a.j.snow@ilpj.keele.ac.uk).

## Appendix 2 Deterrent Calculations

### Assessing the Certainty of Capture

Various surveys have tried to gauge the true incidence of speeding, generally relying on self-reported speeding: Stradling et al (2003) found that 79% of their respondents admitted speeding, whereas Corbett (2003) gave the figures of between 85% - 99% of all motorists (2003:111). The AA foundation (Silcock et al; 2000) in a survey of 1000 households found broadly similar results to Corbett, 85% of interviewees admitted to speeding on occasion. Silcock et al's report also included examination of driving videos of one hour duration in which speeding was assessed. They found that '98% of motorists exceeded the prevailing limit at least once during their one hour drive' (Silcock et al, 2000: 1).

It should be noted in what follows that the statistics relating to driver hours and trips are based on the whole of the Great Britain, excluding Northern Ireland. Thus in order to compare the actual rate of capture we need take into account statistics on fixed penalties for speeding and speed awareness courses in those jurisdictions. Unfortunately the Scottish government has yet to publish the 2012 figures for speeding fixed penalties; therefore the figures for 2011 will be relied on solely in relation to Scotland. Although this is unfortunate the mean average FPNs in the last 3 years has been 68,868 notices, but in 2011 there was small increase, thus the 2011 figures will be used. As shall be demonstrated below this small data inadequacy will have little effect on the level of deterrent. The total amount of fixed penalty notices issued and speed awareness course offered in 2012 for the UK equals 1,816,929.

There are a number of ways to interpret the above data on the incidence of speeding; firstly one can examine the number of drivers licensed in the UK against the number of FPNs issued to achieve a percentage ratio between capture and driving. The number of licensed drivers in England and Wales in 2012 was 34.8 million; the number of official actions for speeding (FPNs, prosecutions and speed awareness courses) totalled 1.82 million, thus from a brute comparison using Stradling et al's most conservative estimate of speeding

(79%) it can be suggested that in a perfect enforcement system 27.5 million drivers would receive a speeding notice. Only 1.82 million did, thus 6.6% of speeding was captured; over half of these were dealt with by speed awareness course. Of course this is a very inaccurate means of measuring the true incidence of speeding, it assumes that each registered driver engages in just one incidence of speeding in that year. Furthermore it assumes that all registered licence holders actually drive their car, as the DFT (2013f) point out this is a poor assumption as the statistics relate to licensed drivers not active drivers.

Unfortunately there are no statistics on the actual amount of active driving licence holders, however there are statistics on those who are most at risk of receiving a fixed penalty notice: those drivers who already have one. There are statistics available from the DFT that list the total number of drivers with points on their driving licence, these show that as at 2012 2.83 million licensed drivers had at least 3 points on their driving licence, indicating that they are active drivers and still currently licensed. Manderson et al's research (2004) found in their research into recidivism rates in Queensland Australia that 69% of drivers with one speeding conviction will reoffend again within three years, 43.5% of those with more than one conviction will reoffend within three years.

From these figures we can attempt to build an estimate of the amount of speeding that occurs in a three year period. In order to perform this calculation Silcock et al's driver video research findings will be utilised, it will be assumed that 98% of these recidivist drivers will commit at least one offence of speeding during one hour of driving. The DFT's Road User survey provides statistics on the average number of hours spent on journeys as a driver in 2012 (DFT, 2012b), and show that 42% of all journeys are undertaken in a private vehicle as a driver (rather than passenger).

Applying this percentage to the mean average of hours spent on journeys the number of hours spent driving on average is 152 hours per year per driver, this is multiplied by three to obtain the three yearly driving rates, 456 hours. This figure is then multiplied by the number

of licensed drivers with points on their licence to obtain an indication of the number of hours driven by driving offenders over three years, this equals 1,036,508,976 hours.

Applying Manderson et al's recidivism rates to these statistics it can be suggested that 1.853 million recidivist drivers fall into the 69% category, and 419,723 fall into the 43.5% category.

Applying this data to the number of driver hours we can suggest the following.

**Table A2.1**

Type of Offender	Total Number of Drivers	Manderson et al's percentage recidivists	Total Mean Driving hours of recidivist drivers (3 Years)	Silcock et als 98% Offending Ratio (*0.98)	Yearly Total (/3)
1 notice	2,685,976	1,853,323	845,115,288	828,212,982	276,070,994
2 or more	964,880	419,723	191,393,688	187,565,814	62,521,938
<b>Totals</b>	<b>3,380,856</b>	<b>2,273,046</b>	<b>1,036,508,976</b>	<b>1,015,778,796</b>	<b>338,592,932</b>

As Silcock et al's research suggested 98% of these drivers will offend at least once per hour, thus 338,592,932 incidents of speeding will occurs based on these assumptions in each year. When this is compared the capture rate of 1.82 million offences we can suggest how paltry the actual risk of capture is in general for these specific offenders, it is 0.53%.

One can also carry out similar analysis with the number of journeys in a year, instead of driver hours. In what follows the assumption will be that in each journey a driver breaks the speed limit once per journey. The relevant data in table A2.2

**Table A2.2**

Type of Offender	Total Number of Drivers	Manderson et al's percentage recidivists	Total Mean Driving Journeys of recidivist drivers (3 Years)	Silcock et als 98% Offending Ratio (*0.98)	Yearly Total (/3)
1 notice	2,685,976	1,853,323	1,784,750,049	1,749,055,048	583,018,349
2 or more	964,880	419,723	404,193,249	396,109,384	132,036,461
<b>Totals</b>	<b>3,380,856</b>	<b>2,273,046</b>	<b>2,188,943,298</b>	<b>2,145,164,432</b>	<b>715,054,811</b>

If the offending driver sped once per journey then the relevant speeding incidence figure would be 715,054,811 such offences (based on a mean average of 321 journeys per year), the risk of capture here would be 0.25%. It should be borne in mind with these two statistics that they assume Silcock's 98% figure is the true incidence of speeding, however one can also run these statistics through both Stirling and Corbett's figures the resulting data is displayed in table A2.3

**Table A2.3**

<b>Applying Speed Research to Driver Hours</b>			<b>Applying Speed Research to Driver Trips</b>		
<b>Measure</b>	<b>%</b>	<b>No. Of Offences</b>	<b>Measure</b>	<b>%</b>	<b>No. Of Offences</b>
Stradling	0.79	272,265,024	Stradling	0.79	576,206,250
Corbett	0.85	292,943,380	Corbett	0.85	619,968,750
Silcock Et al	0.98	337,746,485	Silcock Et al	0.98	714,787,500

Analysing this data one can tentatively suggest that the minimum number of offences of speeding each year (assuming a best case scenario, applying Manderson et al's recidivism where only these recidivist drivers in a year speed once per hour / trip driven and that Stradling's speeding incidence applies (i.e. 79% of the recidivists go on to speed)) is between 272 million and 576 million speeding offences. These statistics suggest a capture rate of between 0.67% and 0.54% based on driver hours, and 0.32% and 0.25% based on driver trips.

It is also possible to suggest speeding incidence involving all drivers; here an assumption will be that all drivers who have a policy of insurance are active drivers. It will be assumed that each policy has only one active driver and that they drive the mean average number of trips / hours each year. The Association of British Insurers keeps statistics on the number of vehicle insurance policies each year, in 2012 that figure was 23.8 million policies.



Table A2.4

Per Trip			Per Hour		
Measure	%	No Of Offences	Measure	%	No Of Offences
Stradling	0.79	6,033,185,760	Stradling	0.79	2,850,759,240
Corbett	0.85	6,491,402,400	Corbett	0.85	3,067,272,600
Silcock Et al	0.98	7,484,205,120	Silcock Et al	0.98	3,536,384,880

Here we see that the most conservative estimate of speeding behaviour, Stradling et al, suggests that there are nearly 2.8 Billion offences each year based on an assumption of one speeding offence per hour driving, and 6 billion on an assumption of one speeding offence per trip. Basing certainty of capture rates on these statistics shows a likelihood of capture between 0.06% and 0.05% based on driving hours, and 0.03% and 0.02%, in other words the average driver would be captured eight times every ten thousand hours, or once every 1250 hours. Applying this to the statistics on driver hours per year this means that the average driver can expect to receive a speeding FPN once every 8 years.

Quite clearly if this represents the true figure of actual speeding, the idea of the legitimacy of speeding laws is quite clearly negated as is the deterrent efficacy of speeding enforcement as a means of increasing the certainty of capture. This is a phenomenal amount of offending that law enforcement appears spectacularly incapable of addressing.

Obviously the above figures are speculative to say the least, but they reflect an attempt to critically examine claims to the effectiveness of deterrence in incentivising appropriate driving conduct. At present it is impossible to say what the actual true level of illegal speeding is. A further problem with this approach is that it treats all road locations as equally unlikely of sites of enforcement. This is most certainly incorrect, at locations with fixed speed cameras the risk of capture approaches 100%, nevertheless significant numbers of drivers are caught each year at these locations, in 2012 609,216 speeding fixed penalties

were issued as a result of a driver being caught by camera enforcement (84% of all speeding fixed penalties).

### Statistical Data Sources

- Department for Transport, London, Statistics  
**Driver Licence Data:** retrieved from <http://data.gov.uk/dataset/driving-licence-data>  
last accessed on 17/10/2014  
2014 *Driver Licence Data*  
2013 *Driver Licence Data*  
2012 *Driver Licence Data*  
2011 *Driver Licence Data*  
2010 *Driver Licence Data*  
  
**National Travel Survey:** retrieved from  
<https://www.gov.uk/government/collections/national-travel-survey-statistics>  
last accessed on 17/10/2014  
2014 *National Travel Survey*  
2013 *National Travel Survey*  
2012 *National Travel Survey*  
2011 *National Travel Survey*  
2010 *National Travel Survey*
- The Scottish Government, Edinburgh, Statistics  
Key Scottish Safety Camera Programme Statistics: Retrieved from  
<http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsSafeCam> accessed on 17/10/2014  
2011 Key Scottish Safety Camera Programme Statistics  
2010 Key Scottish Safety Camera Programme Statistics  
2009 Key Scottish Safety Camera Programme Statistics
- Hansard  
House of Common, HC Deb, 8 April 2014, c200W retrieved from  
<http://www.theyworkforyou.com/wrans/?id=2014-04-08b.194304.h&s=%22speed+awareness+course%22+police+force+area#g194304.r0> accessed on 17/10/2014

## Appendix 3 Terms and Conditions

Terms and Conditions of Newspaper Comment:

Correct as at 03/09/2014

[http://www.dailymail.co.uk/home/house\\_rules.html](http://www.dailymail.co.uk/home/house_rules.html)

<http://www.express.co.uk/terms-and-conditions>

<http://news.bbc.co.uk/1/hi/help/4176520.stm>

### Midwestshire Paper

On-Line Debate Press Articles

#### **BBC:**

Will increased Parking Fines cut driving offences, 20-11-10	HYS1
Give drivers five minutes grace on parking tickets, MPs say: 23-10-13	HYS2
Watchdogs criticise out-of-court penalties 9th June 2011	HYS3
Ban on car parking cameras and 'spy cars' considered in England, 27-09-13	HYS4
Watchdogs criticise out-of-court penalties 9th June 2011	HYS5

#### **Daily Mail**

Litter squads make millions: Fines soar as councils enlist ex-soldiers to patrol streets, 25-3-13	DM1
Magistrates' fears over new police powers to give drivers £60 on-the-spot fines, 18-08-09	DM2
Council worker, 25, set fire to speed camera causing £8,300 of damage after it snapped him breaking the speed limit in Land Rover, Daily Mail, London, 27-9-13	DM3

#### **The Midwestshire Paper**

City's spy car scores own goal at children's football match, 25-03-13	TS1
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#### **Daily Express**

Litter jobsworth fines gran £75 for dropping thread, 2-03-12	DE1
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## Appendix 4 List of Data and Data Gathering Schedules

### **Interviews Conducted** (Interviews and Interviews During Observations in some cases)

<b>Organisation</b>	<b>Individual</b>
Midwestshire Police	Chief Superintendent (FPN + PND)
Midwestshire Police	Chief Constable Staff Officer (FPN + PND)
Midwestshire Police	Central Ticket Office Manager (FPN + PND)
Midwestshire Police	Inspector (Custody) (PND)
Midwestshire Police	Custody Sergeant (x 6) (PND)
Midwestshire Police	Police Officer (x 4 PND) (x 4 FPN)
Ministry of Justice	Sentencing Policy Officer (All OTSP)
Ministry of Justice	Sentencing Policy Lead (All OTSP)
Northshire Police	Assistant Chief Constable (FPN + PND)
Midwestshire Council	Deputy Leader of Council (FPN Litter + PCN)
Midwestshire Council	Cabinet Member for Environment (FPN Litter + PCN)
Midwestshire Council	Senior Strategic Manager (FPN Litter + PCN)
Midwestshire Council	Enforcement Manager (FPN Litter + PCN)
Midwestshire Council	Team Leader (FPN Litter)
Midwestshire Council	Team Leader (PCN)
Midwestshire Council	CEO x 2
Midwestshire Council	Litter Officers x 5
Traffic Penalty Tribunal	Chief Adjudicator
Traffic Penalty Tribunal	Adjudicator x 2

### **Recipient Interviews**

<b>Penalty Notice</b>	<b>Number of Interviews</b>
PND	X 3 (D&D x 3)
PCN	X 3 (of which one had also an FPN Speeding)
FPN	X 4 (of which 2 had had PCNs)

### **Focus Groups**

<b>Focus Group Number</b>	<b>Number of Participants</b>	<b>OTSPs</b>
1	X 4 Participants	2 x PCN, 2 x PCN + FPN Motoring
2	X 3 Participants	2 x PCN, 1 x FPN Motoring
3	X 5 Participants	5 x Motoring FPN, 2 x PCN

4	X 3 Participants	2 x FPN Motorting, 1 x PCN
5	X 4 Participants	3 x FPN Motoring, 2 x PCN

### Observations

Authority	OTSP	Shifts	Hours
Midwestshire Police Custody	PND	X 5	36
Midwestshire Town Centre Police Unit	PND	X 1	8
Midwestshire Road Police Unit	FPN	X 1	8
Midwestshire Council	FPN Litter	X 5	36
Traffic Penalty Tribunal	PCN	X 2	8

### S

The following interview schedules were used as an aide memoir during interviews to ensure that the relevant questions were asked although the structure of the schedule changed during interviews depending upon the flow of the interview (Semi Structured Interviews)

### Interview Schedule Recipients:

1. Can you say what you received your penalty notice for?
  - a. Have you had any other penalties?
  - b. Have you been in trouble with the system before? Magistrates?
2. What did you think when you received it?
  - a. Did you think it was fair? Was this because you hadn't done what was accused?
  - b. How do you think the matter should have been dealt with?
    - i. Why do you say do nothing?
    - ii. Why do you say just a warning?
  - c. Do you think the matter should have been taken to court?
  - d. Do you think what you did was wrong? Was it explained to you what you had done wrong?
  - e. What do you think of the ... (police, council, officer etc) that did this? Do you think it was the officer or (police council etc) that brought this about?
3. Are you going to pay the fine or challenge the matter in court?
  - a. Why? Or why not?
  - b. What is going to happen next?
4. Money
  - a. Do you think that the level of the fine should be less?
  - b. Do you think there should be other options other than a fine?

- i. Why is that?
- 5. Traditionally the matter would have probably ended up in....
  - a. Court: do you think this is better or worse way? Why?
  - b. Caution:
- 6. Do you think the penalty will affect your future in any way?
  - a. Has it made you more or less likely to ...
  - b. Who is going to pay the penalty, you or another?
  - c. Can you afford to pay the penalty?

### **Interview Officers**

1. Experience:
  - a. How many tickets, how long employed etc...
  - b. Any that stand out as exemplifying;
    - i. Good practice
    - ii. Bad experience
    - iii. Worth or not of the OTSP
    - iv. Changes in working practice
2. What do you think when handing out the ticket?
  - a. What factors are uppermost in your mind? (Stop trouble, punish, deter others, justice of the situation)
  - b. What factors effect this decision? (Are you given any instructions or guidance on when to issue and what does this involve?)
3. Your role in providing justice?
  - a. Do you think that you are providing justice? Or is it something else?
  - b. How would you say you are successful in your role? And how do you think this translates into a bigger picture of success?
4. Do you think it would be better to take these matters to court?
  - a. Experiences of court? If not what are your perceptions about court?
  - b. Would you still do this job if you had to go to court?
5. Punishment
  - a. What do you think the ticket says about the transgression?
  - b. Are all cases similar?
  - c. Do you think it is important to talk to the transgressor first?
    - i. Ask for examples of when this might have happened and what the outcomes were?

### **Observation Schedule**

	<b>Enforcer</b>	<b>Recipient</b>
<b>Stage 1</b>	Enforcer: Can I see offence?	Recipient:
<b>Stage 2</b>	Enforcer: How introduce themselves? Why stop this person?	Recipient: Shock? Do they have an inkling?
<b>Stage 3</b>	Enforcer: Words Phrases of moral problem? Criminal used?	Recipient: active listen? Challenge? Dispute?
<b>Stage 4</b>	The sell: magistrates, money, cost	Recipient Reaction: Legitimacy phrases?
<b>Stage 5</b>	Overall:	Overall: