

**Weeding the Garden: The Third Way, the Westminster tradition and
Imprisonment for Public Protection**

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Weeding the Garden: The Third Way, the Westminster tradition and Imprisonment for Public Protection

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Abstract:

Concern at the nature of penal politics and its outcomes is widespread, not least in relation to the continued drive towards preventive measures (Dennis and Sullivan, 2012). This trend is well demonstrated in the UK by the Imprisonment for Public Protection (IPP) sentence, introduced by the Criminal Justice Act 2003. This article engages with this prominent measure against ‘dangerous offenders’ in a ‘substantively political light’ (O'Malley, 1999: 189), providing an interpretation based on policymakers’ beliefs and traditions (Bevir and Rhodes, 2003). In it, I argue that the perceived need for the IPP sentence and its ultimate form was the result of New Labour ministers’ reliance on the Third Way political ideology and its implications for criminal justice policy. In addition, in terms of the policymaking process, I suggest that the ‘Westminster tradition’ conditioned policymakers’ actions in relation to the IPP sentence, in ways that were crucial to its outcome and subsequent effects. The paper concludes with an examination of the moral significance of these beliefs and traditions in reference to Bauman’s (1989) discussion of the dangers of a modern ‘garden culture’.

Key words: New Penology; Crime Policy; Politics; Bauman; Ideology

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WEEDING THE GARDEN: THE THIRD WAY, THE WESTMINSTER TRADITION AND IMPRISONMENT FOR PUBLIC PROTECTION

Concern at the direction of penal policy and the nature of penal politics has been, and continues to be widespread, not least in relation to the continued drive towards pre-emptive and preventive measures (Dennis and Sullivan, 2012; Zedner and Ashworth, 2008). Risk has ‘moved from the periphery to the core of criminological theorizing and crime control practice’ (Loader and Sparks, 2007: 84). In the UK, this trend in criminal justice policy is well demonstrated by the Imprisonment for Public Protection (IPP) sentence, an indeterminate prison sentence created by the New Labour government in 2003. This article takes up Pat O’Malley’s (1999: 189) invitation to engage with such developments ‘in a more substantively political light’, presenting an interpretive political analysis of a particular development in penal policy in a specific locale.

In so doing, this article reveals two key ways in which political beliefs and traditions were central to the development of the IPP. First, the Third Way ideology, fundamental to New Labour policymaking in general terms, informed the perceived need for such a sentence and its ultimate form. This ideological position – containing both rehabilitative and eliminatory strands – interacted with a developing risk paradigm to result in this latest iteration of measures targeted at the ‘dangerous’. Second, the ‘Westminster tradition’ (Rhodes et al., 2009: chapter 3) conditioned policymaking officials’ actions in relation to the IPP sentence, influencing its eventual outcome and effects. It served to limit the perceived boundaries of legitimate activity for civil servants which, combined with officials’ distance

from criminal justice practice and those subject to it, reduced their moral engagement with the nature and likely effects of the sentence.¹

In conclusion, the beliefs and processes described below are interpreted through the lens of Zygmunt Bauman's discussion of the dangers of a modern 'garden society' (Bauman, 1989: 92); a culture which seeks to eliminate irrelevant, useless and harmful 'weeds' and which by its institutional arrangements serves to separate moral evaluation of means from their ultimate ends (Bauman, 1989: 92). If 'moral duty has to count on its pristine source: the essential human responsibility for the Other' (Bauman, 1989: 199), it is argued that the extant political beliefs and traditions served to close off policymakers' human responsibility for one particular 'Other': the 'dangerous offenders' targeted by the IPP sentence.

The IPP sentence and its effects

The IPP sentence, whether measured in terms of its form or effects, stands as a striking development in recent British sentencing policy. As of 31 March 2012, over 6,500 IPP sentences had been imposed since their implementation in April 2005, with 3,506 held beyond their tariff date (Prison Reform Trust, 2012a: 21). The growth of this population has fundamentally changed the nature of the prison population, with one in five prisoners now serving indeterminate (life and IPP) sentences (Prison Reform Trust, 2012b: 20).

The IPP sentence was the central measure of the 'Dangerous Offenders' sentencing regime introduced by Part 12, Chapter 5 of the Criminal Justice Act (CJA) 2003. If a defendant was found to be 'dangerous' and an IPP sentence imposed, the trial judge was to state the minimum term commensurate with the seriousness of the offence (the 'tariff').² After expiry of the tariff, the offender would be released on licence only if the Parole Board

¹ It should be emphasized that the present article is not intended to present an exhaustive history of the creation of the IPP sentence, but rather to focus on the concerns, beliefs and traditions most central to its development.

² To reflect the policy as regards determinate-sentenced prisoners, the tariff would be set at half the equivalent determinate sentence length for the offence committed: s82A, Powers of Criminal Court (Sentencing) Act 2000.

was satisfied that he or she no longer posed a risk to the public. The IPP sentence therefore fell ‘little short of life imprisonment – but it applies to “serious offences” for which life imprisonment is unavailable, and the court does not have to be satisfied that the offence reaches the threshold of seriousness appropriate for a life sentence’ (Ashworth, 2005: 212).

The sentence as originally enacted did not provide for a minimum tariff.³ While in most circumstances the tariff period for a prisoner sentenced to life imprisonment would average 15 years (Prison Reform Trust, 2012b: 20), that of an IPP prisoner could potentially be measured in months, if not weeks.⁴ Widely criticized as over-broad and ill-conceived, the decision that ‘no additional resources [for accredited training programmes, additional Parole Board hearings, additional open prison places, and so on, would be]...allocated specifically for IPP’⁵ exacerbated the problems IPP prisoners faced (HM Chief Inspectors of Prisons and Probation, 2010; Jacobson and Hough, 2010).

Compounding the pains of imprisonment, research conducted by the Sainsbury Centre for Mental Health (SCMH) found that more than half of IPP prisoners have problems with ‘emotional wellbeing’, while one in five had previously received psychiatric treatment (Sainsbury Centre for Mental Health, 2008: 7).⁶ The indeterminate nature of the sentence itself further damaged IPP prisoners’ mental health. Though abolished in December 2012,⁷ the sentence has a ‘long tail’ (HM Chief Inspectors of Prisons and Probation, 2008: 4): with only 502 IPP prisoners having been released by September 2012 (Prison Reform Trust, 2012a: 21-22); substantial concerns remain (Annison, 2013; Howard League for Penal Reform, 2013).

³ The sentence was subsequently amended by the Criminal Justice and Immigration Act 2008.

⁴ The shortest reported tariff for an IPP prisoner sentenced was 28 days (HM Chief Inspectors of Prisons and Probation, 2008: 2).

⁵ Prisons Minister David Hanson MP, House of Commons, written answers 30 April 2007 (quoted in Prison Reform Trust, 2007: 6).

⁶ These percentages were significantly higher than those of the general prison population.

⁷ The IPP sentence was abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Interpreting the IPP sentence

Some writers have cast the IPP sentence as primarily the result of cynical politicians seeking to gain electoral advantage by assuaging perceived popular fears of crime and criminals with little regard for the consequences (Tonry, 2004). Politicians pursued a ‘populist punitive’ approach, ‘tapping into, and using for their own purposes, what they believe to be the public’s generally punitive stance’ (Bottoms, 1995: 40). Such an account is not without force.

In addition, explanations centring on the exclusionary goals of neoliberal states appear, on the face of it, to account well for the creation of such a sentence (Reiner, 2007; Wacquant, 2009). The present article seeks to identify several of what Nicola Lacey has termed ‘linkages’ between the generally abstract neoliberal penalty thesis⁸ and specific policy developments (Lacey, 2012b). While Lacey and others have focused on institutional linkages (Lacey, 2008; 2012a; Savelsberg, 1994; 1999), here it is argued that our understanding of the construction of the IPP sentence is enriched by an exploration of policymakers’ reliance on particular political beliefs and traditions.

This article is underpinned by an interpretive political analysis of penal policy. Drawing on the interpretive methodological framework developed by Bevir and Rhodes (Bevir and Rhodes, 2003; 2006) and the constructivist political analysis promoted by Colin Hay (Hay, 2002), it is ‘a method that sees political combat as pivotal in determining the character of crime control under late modern conditions, rather than epiphenomenal to the master patterns of structural change’ (Loader and Sparks, 2004: 16). Actors are ‘situated agents’ (Bevir and Rhodes, 2006: 5) rather than mere ‘cultural dupes’ (Jessop, 1996: 126); they are ‘strategic actor[s] in a strategically selective context’ (Hay, 2002: 128).

⁸ This term is borrowed from Lacey (2012b).

Central to this approach are Bevir and Rhodes' (2006) concepts of 'belief' and 'tradition.' Beliefs are conceptualized,

not just [as] big commitments people reach through deliberate reflection. They include the everyday tacit understandings on which people act without any noticeable deliberation. (Bevir and Rhodes, 2006: 7)

Beliefs here refer to actors' understandings of concepts such as legitimacy, justice, safety, fairness and so on, which may coalesce into more or less explicitly defined political ideologies.⁹

The term 'tradition' is used to capture 'the social context in which individuals both exercise their reason and act' (Bevir and Rhodes, 2006: 7). Predominantly a 'first influence on people' (Bevir and Rhodes, 2006: 7), traditions are 'a set of understandings someone receives during socialization' (Bevir and Rhodes, 2006: 7). It is these common understandings which '[make] possible common practices and a widely shared sense of legitimacy' (Taylor, 2004: 23).

Change thus arises 'as situated agents respond to novel ideas or problems'. Change is thus 'a result of people's ability to adopt *beliefs* and perform actions through a reasoning that is embedded in the *tradition* they inherit' (Bevir and Rhodes, 2006: 5, emphasis added). In this way, such an approach is founded on a view that:

It is the ideas actors hold about the context in which they find themselves rather than the context itself which *ultimately* informs the way in which they behave. This is no less true of policy-makers and governments than it is of you or I (Hay, 2002: 258, emphasis in original).

⁹ This conception of beliefs converges with Freedon's (1996) definition of political ideologies as, 'Political thinking, loose or rigid, deliberate or unintended, through which individuals or groups construct an understanding of the political world they, or those who preoccupy their thoughts, inhabit, and then act on that understanding' (Freedon, 1996: 43).

The below discussion draws on interviews conducted with 53 British policymakers, including ministers, officials, senior judges, representatives of the Parole Board and Prison Service and penal reform groups. In addition, a wide range of documents, including government publications, reports, speeches, newspaper articles, autobiographies, Hansard, internal reports and meeting minutes, were collected and analysed. The interviews sought to gain ‘an insight into...an interviewee’s subjective analysis of a particular episode or situation’ (Richards, 1996: 199-200), eliciting the respondent’s reflections upon the creation, contestation and amendment of the IPP sentence.¹⁰

The Third Way and the IPP sentence

The centrality of risk assessment and risk management to criminal justice policy and practice has been well documented (O'Malley, 1998). The concept of the ‘new penology’, developed by Feeley and Simon (1992; 1994), has been particularly influential. The concept sought to encapsulate three key changes in the nature of criminal justice:

The new penology is...less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather, it is concerned with techniques to identify, classify and manage groupings sorted by dangerousness. The task is managerial, not transformative. (Feeley and Simon, 1992: 452).

Feeley and Simon argued that the new penology ‘abandons the priority of the individual in penalty’ (Simon, 1998: 453), conceiving of crime policy ‘as a problem of actuarial risk management’ (Simon and Feeley, 2003: 78). The new penology thus sees subjects of the penal system as high-risk subjects in need of management, not ‘aberrant’ individuals in need of transformation. Emerging risk technologies were seen to drive this rise of ‘actuarial justice’, with decisions increasingly centred on predictions of the offender’s risk, ‘determined using statistically selected risk factors’ (Simon, 1998: 453).

¹⁰ Interviews were conducted from September 2010 to October 2011. They lasted between one and two hours, with the vast majority recorded (and then fully transcribed). In addition to these interviews, ten written responses were also received.

The clearest demonstration of the emergence and prioritization of such risk technologies in the UK has been the development of the OASys risk assessment tool from the late 1990s onwards. It constitutes:

A structured format for the assessment of risk of harm...[to trigger] other, more specialist assessments in relevant cases...[and to provide] a system for translating the OASys assessment(s) into a supervision or sentence plan. (Robinson, 2003: 119).

With the IPP sentence arriving in the wake not only of OASys but also the DSPD programme,¹¹ it is, on its face, a demonstration *par excellence* of the new penology, with ‘the length of the sentence...[being] proportional to the magnitude of the risk, the intent being to remove significant risks from the community’ (O’Malley, 2010: 42). However, rather than being driven by the developments in actuarial risk assessment tools *per se*, the creation of the IPP sentence was primarily motivated by the dominant Third Way ideology and an assumption that developing risk assessment technologies could serve its attendant goal – the elimination of ‘dangerous offenders’.¹²

The Third Way doctrine, developed by sociologist Anthony Giddens, was fundamental to the New Labour political project (Giddens, 1998; 2000). Giddens argued that the changing nature of society, in which custom and tradition were being replaced by a new individualism, required a renewed form of social democracy. While in the post-war order ‘rights of citizenship – civil, political and social – were understood as necessarily unconditional universal guarantees’ (Ramsay, 2012a: 87),¹³ the need to ensure social cohesion among the diversity of self-fulfilling individuals meant that ‘We need more actively

¹¹ The Dangerous and Severe Personality Disordered (DSPD) scheme was proposed by the New Labour government as a means by which individuals who posed a danger to the public but did not fall within existing mental health or criminal justice measures could be detained for an indeterminate period (Home Office and Department of Health, 1999; Seddon, 2008). The scheme was never fully implemented, resulting instead in ‘DSPD units’ within existing institutions (Rutherford, 2008).

¹² The tensions between the eliminatory and rehabilitative goals contained within the Third Way ideology and the IPP sentence are explored below.

¹³ This is not to suggest that such a lofty stated goal was ever borne out by minority groups’ lived experiences.

to accept responsibilities for the consequences of what we do and the lifestyle habits we adopt' (Giddens, 1998: 37). Its central motto was therefore 'no rights without responsibilities' (Giddens, 1998: 65).¹⁴

A conception of the 'self as a reflexive project' underpinned the Third Way ideology - self-actualization stood as the central goal (Giddens, 1991: 75). For Giddens, a precondition of this process was what he termed 'ontological insecurity', the 'protective cocoon that all normal individuals carry around with them as the means whereby they are able to get on with the affairs of day-to-day life' (Giddens, 1991: 40). This cocoon serves to 'bracket out' the dangers and threats to which citizens would otherwise feel constantly exposed.

Specifically in relation to crime, proponents of the Third Way saw the fear of crime as one of the factors which may corrode this 'protective cocoon' so crucial in the late modern world. As Giddens put it, 'freedom from the fear of crime [becomes] a major citizenship right' (Giddens, 2002: 17). With New Labour committed to building a cohesive society, 'a degree of positive obligation [was imposed] on all citizens, for to avoid causing fear of crime, it is necessary, at a minimum, to maintain an awareness of what will cause fear' (Ramsay, 2012b: 135). For criminal law theorist Peter Ramsay, this sensitivity to the vulnerability of citizens' autonomy is not a contingent feature of dominant political theories including the Third Way, but fundamental to them (Ramsay, 2012a: 85). In relation to 'dangerous offenders', where a citizen's own actions provide grounds for believing that they pose a risk to members of the public, their obligation likely includes the provision of 'positive acts of reassurance' (Ramsay, 2012b: 135).

¹⁴ Whether the Third Way ideology was social democratic or neoliberal in character has been hotly debated (Callinicos, 2000; Freedon, 1999; Lister, 2002).

The connections between the Third Way, fear of crime and the IPP sentence were most apparent in the 2002 *Justice for All* white paper, which led directly to the creation of the sentence:

We recognise that this issue is of critical importance to the public...the fear many people have of being attacked, the anxiety faced by parents about the safety of their children (Home Office, 2002b: 95).

Similarly, the then prisons minister depicted the problem faced by those developing the IPP sentence thus:

Victims and those with responsibility for oversight of the system find [some] cases in which someone who is in essence generally agreed to pose a risk, is [nonetheless] released at the end of their sentence and then commits another offence, the most difficult to deal with. *People legitimately ask why the system did not protect them from that individual.* That is what these provisions are all about.¹⁵

In both of these statements fear of crime and citizens' insecurity are recognised to be legitimate focus of the criminal justice system.

We can now move from these public statements, to the recollections of relevant policymakers. The majority of those interviewed spoke of longstanding concerns regarding a 'real problem' in relation to prisoners 'Who are released at the end of a determinate sentence with the prison authorities knowing that these are dangerous individuals who are likely to re-offend' (Representative, Prisons Inspectorate). With no means to detain them further, such prisoners had to be released back into the community. It was generally accepted that 'there were gaps' in the existing system (Senior official).

Post hoc recognition of shocking crimes, perceived to be inherently preventable, highlighted the need to address this group of people who were causing such great harm. High

¹⁵ Hilary Benn, Prisons Minister, Hansard HC Standing Committee B col 912 (11 February 2003), emphasis added.

profile cases such as the murder of Sarah Payne by Roy Whiting (Silverman and Wilson, 2002), for dominant ministers:

Showed that the previous system had failed and that therefore we needed something like this, because if there'd been an IPP, Whiting would have served his [sentence and then] everyone would have said "hang on this bloke's dangerous, don't let him out" (Senior sentencing official).

The Third Way ideology made clear that a responsible government could not ignore such concerns; it was compelled to act.

The Third Way desire to be 'tough on crime and tough on the causes of crime' led to an unresolved tension at the heart of the IPP sentence. Ministers desired a sentence which would protect the public from those posing a significant risk (i.e. postmodern penal warehousing: Feeley and Simon, 1992), but also assumed that processes were in place which would serve to rehabilitate the offender, thus returning them to full citizenship status (i.e. modern goals of welfarism and social engineering: Garland, 2003). Indeed, policymakers interviewed spoke of these goals as intrinsically intertwined:

[The question was] how do you ensure effective protection of the public, minimize the risk of re-offending, help people to reintegrate, get them off drugs and alcohol problems and those kinds of things (Minister).

Then Home Office minister Baroness Scotland cast the proposed IPP system as serving 'to protect the public from potentially dangerous offenders in cases in which it is necessary', while working 'to rehabilitate prisoners through drug treatment and the other things that are being done to mitigate the problems.'¹⁶ For these reasons, another minister argued that 'it wasn't dumping people – it wasn't just dumping them in prison' (Minister).

This view was also evidenced by the prison population projections developed in relation to the CJA 2003 (Home Office, 2002a), with the underlying assumption being that

¹⁶ Hansard HL Deb col 775 (14 October 2003)

‘there’d be people in this [IPP] group who’d get short tariffs, but we thought they’d get out within a reasonable period of time’ (Home Office official). Given that an IPP prisoner’s release is predicated on a reduction of their ‘dangerousness’,¹⁷ implicit is an assumption that the modernist goals of normalization and rehabilitation would continue to be central to the workings of such a sentence.¹⁸

Nonetheless, also influential was a competing view (sometimes held by the same individuals) that, in relation to that committed by ‘dangerous offenders’, ‘crime can and should be completely eliminated’ (Simon, 1998: 455):

“Better safe than sorry” was definitely [Home Secretary] David Blunkett’s approach to it. The whole thing was about being safe rather than sorry (Senior civil servant).

As a Home Affairs adviser to the Prime Minister of the time recalled:

The starting point on crime [was] to aim for no crime. That should be the objective... if you don’t want to achieve that, then what’s the point? (Special Adviser)

The policy outcome, the IPP sentence, therefore resulted from an uneasy confluence of the rehabilitative goals seen above and what Andrew Rutherford (1997) termed the ‘eliminative ideal’, an attempt ‘to solve present and emerging problems by getting rid of troublesome and disagreeable people with methods which are lawful and widely supported’ (Rutherford, 1997: 117).¹⁹

With the desired sentence outlined by ministers, extant risk technologies were perceived at the time to be the ‘enabling tools’ (Minister). However, officials and ministers accepted in research interviews that the risk paradigm was not well understood:

¹⁷ s28 Crime (Sentences) Act 1997; s225(4) Criminal Justice Act 2003.

¹⁸ That said, this analysis does lend support the view that ‘the practice of rehabilitation is increasingly inscribed in a framework of risk rather than a framework of welfare’ (Garland, 2001: 176).

¹⁹ By elimination Rutherford is speaking of measures which result in ‘a social rather than physical death...through the enforced removal to a place from which there is little, if any, prospect of return’ (Rutherford, 1997: 117).

OASys wasn't so widely understood by those not working on it, we were aware of it, knew it was being developed, and therefore knew there was some sort of tool there, but it wasn't a close association (Senior sentencing official).

It was an acceptance that [criminal justice actors] could do it [risk assessment and risk management] – perhaps slight naïvely (Minister).

The creation of the IPP sentence flowed from a straightforward assumption that such risk technologies could facilitate the better protection of the public from dangerous offenders, a desire compelled by the Third Way ideology:

The policy was driven along one track, and there were the odd glimpses – “okay, there will be processes that you can use.” [It was], “this is what we think we'll do, you'll need some system for assessing, oh well there are these various things that you could use”. *I suspect that even had OASys not been there, the policy would have gone right ahead* (Home Office official, emphasis added).

Interviewees recalled that key policymakers took too seriously ‘the claims made by penal practitioners to be able reliably to anticipate and to forestall offender risk’ (Sparks, 2000: 127). More fundamentally, the general approach to the dangerous offender problem, viewed as a task of ‘weeding’ the dangerous from the non-dangerous (see below), clashed fundamentally with the dominant epistemology of the risk paradigm on which risk assessment tools are based (Hannah-Moffat, 2012):

From a scientific perspective [the question “can we identify dangerous offenders?”] is impossible to answer since it is based on an unscientific assumption about dangerousness, namely that it is a stable and consistent quality existing within the individual (Pollock and Webster, 1991: 493).²⁰

We can suggest, therefore, that the IPP sentence was the result of competing and contradictory goals, both eliminatory and rehabilitative. Policymakers were influenced by competing views of dangerousness; the extent to which the issues were genuinely understood ‘*in terms of risk*’ remained unclear (Loader and Sparks, 2007: 87, emphasis in original).

²⁰ For further discussion of the limits of risk assessment, see Kemshall (2003) and Robinson (2003).

These contradictions led to a sentence, and related policy, which was disjointed, fatally undermining the likely success of the sentence on its own terms.

The Westminster Tradition and penal policymaking

They are the politicians and our job is to serve them...the ‘servant’ part is not accidental (Home Office civil servant).

The ‘Westminster tradition’ denotes a distinct and stable set of political institutions as well as a related set of beliefs including the primacy of ‘a unitary state characterised by Parliamentary sovereignty, strong cabinet government’ (Bevir and Rhodes, 2003: 26).²¹ While the precise nature of the Westminster tradition is contested, varying by time and place (Rhodes et al., 2009), it is generally understood to sustain ‘a top down, closed and elitist system of government’ (Richards et al., 2008: 488). Of particular relevance to the present discussion are the implications of the Westminster tradition for the minister-official relationship. The centrality of the doctrine of ministerial responsibility means that ‘in all decisions...the elected minister should have the last word’ (Parker, 1978: 349-53; cited in Rhodes et al., 2009); officials are responsible *to* their minister, and only *through* their minister (Turpin and Tomkins, 2007: chapter 9)

Civil servants’ reactions to the Home Secretary’s desire for a ‘new sentence to ensure that dangerous violent and sexual offenders stay in custody for as long as they present a risk to society’ (Home Office, 2002b: 18) was mixed. Some officials did raise concerns at the problems inherent in such preventive efforts. Bottoms’ (1977) discussion of the ‘Baxstrom

²¹ The phrase ‘Westminster model’ is also commonly used. However, to speak of a ‘model’ risks the reification of what is a socially constructed, evolving concept. For discussion of the ‘Westminster tradition’ and the implications of this interpretivist conception, see Rhodes *et al.* (Rhodes et al., 2009).

patients affair',²² as well as the Californian experience of 'three strikes' legislation (Zimring, 1996), were both cited as examples of the dangers of such measures (senior civil servant).

However, two factors militated against the impact of these arguments, with the second reinforcing the first. First, the policymaking process was characterised by a 'culture of impatience' (Loader, 2006: 581), in which the Home Secretary made clear that 'these were not provisions that were going to be resiled from' (Senior official). As one official put it, the creation of IPP reflected an increasingly common policymaking culture:

You have two choices, but option one is to do whatever [senior ministers] want to be done, and so is option two. It was a change of culture – it was less about working towards addressing common problems and more about implementing the wishes of a very small elite (Senior official).

Second, the majority of the officials centrally involved with the creation of IPP demonstrated – in the research interviews, in documents and by their actions – a self-limiting understanding of their legitimate role in the policymaking enterprise, based upon their understanding of the Westminster tradition.²³ Though delivered with a flourish, the following exchange contained an important truth:

Interviewer:	And where was your view, if we have these sort of two camps?
Sentencing official:	Oh, I am but a humble official, I reflect my master's views.

A sentencing official similarly noted that questions of policy are ultimately,

for ministers. And it's right constitutionally that that is the case. Because these are political decisions in the end and it's right that politicians make them (Home Office official).

²² The 'Baxstrom patients affair' constituted a natural experiment which was argued to demonstrate that the benefits of preventive detention were minimal to the point of non-existent (Bottoms, 1977: 77).

²³ In other words, these actors, motivated by the need to be recognised as acting legitimately by those with whom they routinely interacted, operated on a particular understanding of the shared assumptions of acceptable conduct (Barker, 2001).

This pervasive belief is not surprising; such officials are by definition the exemplar of modern bureaucracy, involving as it does the dominance of legal authority, of ‘a belief in the legality of enacted rulers and the right of these elevated to authority under such rules to issue commands’ (Weber, 1978: 215). With officials socialized into the Westminster tradition, their duty to follow the orders of their political rulers becomes a ‘binding constraint’ (Rhodes, 2011: 129).

Nonetheless, within this general acceptance of the implications of the Westminster tradition, officials differed in their views on whether it continued to compel a certain understanding of the ‘values of integrity, honesty, objectivity and impartiality’ so central to the civil service ethos (Better Government Initiative, 2010: 38). For some officials, crucial to their identity as civil servant was a belief in a duty to ‘come up with something that is going to make sense *but with public policy and public good in mind*, rather than the political kudos that ministers are looking for’ (Home Office official, emphasis added). In other words, the role was seen to compel longer-term considerations which denote a certain moral and ethical stance; a belief, we might say, in their ‘official duty’ *as civil servant* (Skowronek, 1995).

However, the position more commonly held by those centrally involved with the creation of IPP was exemplified by the following exchange:

Interviewer: And I suppose as a civil servant with a sort of, well I know one view of the civil service is of having a longer-term duty to the state as well as a duty to the ministers and to the government of the day. I mean again that sounds like a potentially difficult position to be in. To need that nuance and that, that working it through that you’ve discussed before?

Home Office official: Well I think Robert Armstrong described it as for all intents and purposes a duty to the current government, so I’m not sure how much we can go to higher beings or whatever.²⁴

²⁴ ‘The current official mantras for all civil servants (the Armstrong Memorandum of 1985 and 1987 and the new Code of January 1996) [states] that, as civil servants, they serve the Crown, and that this means current

For these officials, while they are socialised into a ‘public service ethos’, their overriding duty is to their minister, to the government of the day and therefore to pursuing vigorously their stated policy goals (Rhodes, 2011: 129-130). Implied by the Westminster tradition, and broadly accepted by officials, was that the ‘public service bargain’ (Hood and Lodge, 2006) entered into as a civil servant equated to an assent to ‘the commandment to be a good, efficient and diligent expert and worker’ (Bauman, 1989: 101-2).²⁵

Nowhere was this expectation clearer than in relation to the CJA 2003 bill team. Bill teams are the ‘key organization serving as a focus for the involvement of the bureaucracy in the development of legislation’ (Page, 2003: 653). As with all legislation, the bill team was focused primarily on ensuring that the relevant provisions and speaking notes were prepared in advance of each stage of the Parliamentary process. Those managing the construction of the bill met ‘all the time, every day’ to ensure that the gargantuan Bill remained on course (Home Office official). The goal was, in other words, primarily instrumental.

No two bill teams are the same. In this case, the desire for efficiency and speed led to the bill team also being responsible for much of the policy contained within the CJA 2003 provisions, including the IPP (Senior civil servant). This meant that recognised experts on sentencing and criminal law within the department were operating at a distance from the detailed policymaking. Lacking was:

The creative tension between the bill unit, who are always bullying the policy people to get on with it and do it simpler and quicker, and the policy people saying “yeah, but hang on. I know the politics of this, but you need to have something that works” (Home Office official).

ministers’ (Barker and Wilson, 1997: 245). It has recently been observed that this is ‘a belief widely shared by top civil servants’ (Rhodes, 2011: 129).

²⁵ The term ‘acceptance’ is intended to recognise that officials may not have been enthusiastic advocates of such a situation, but nonetheless accepted this as constituting the behaviour expected of them.

The creation of IPP was seen as just one of many measures of the time, approached in the default manner. While they might have considered the potential numbers and effects in the abstract, ministers and officials did not dwell on the substantive impact of the sentence – what the sentence would actually mean for the penal system and potential IPP prisoners. Measures were being developed for theoretical, distanced ‘dangerous offenders’ rather than the friends, neighbours, or acquaintances described so evocatively by Christie as people ‘who are...as most of us, a mixture of good and bad...walking mysteries’ (Christie, 2010: 34).

This approach to policymaking, though in some ways longstanding, also reflects the increasingly managerialist nature of penal policymaking (McLaughlin et al., 2001). Experts were focused on their specific roles. For example, the Parliamentary Counsel had no knowledge, nor particular interest, in the likely impact of the sentence; this was beyond their remit (Senior official).²⁶ Those tasked with projecting the likely impact of IPP had little understanding of courts’ likely response to this development; it would have been inappropriate for them to consult the judiciary (Home Office official).²⁷ In other words, the creation of IPP demonstrated the continued pathology of modern bureaucracy, notwithstanding efforts at ‘joined up government’: ‘tunnel vision’, with officials failing to ‘see beyond the boundaries of their area of specialization’ (Rhodes, 2011: 227). For one senior civil servant, many officials were ‘somewhat naïve’, distanced from the day-to-day reality of criminal justice institutions:

The civil servants had nothing. They’d go on visits on a Friday, but they’re like Royal tours (Home Office official).²⁸

²⁶ The Parliamentary Counsel are tasked with drafting legislation. For a discussion of their role in the policymaking process, see Page (2009).

²⁷ In any case, as a judicial representative interviewed recalled, ‘That was a period when there was, as far as I was concerned, and I think as far as most people were concerned, there was almost no consultation.’

²⁸ On civil servants’ ‘royal tours’, see Rhodes (2011: 126).

Parallels can be drawn with Crawley and Sparks' (2005) description of 'thoughtlessness', which they used in the context of the treatment of older prisoners. For them, thoughtlessness denoted 'a certain moral and affective flattening, without which it may be difficult to sustain institutional routines' (Crawley and Sparks, 2005: 353). Similarly, Rhodes' detailed ethnographic exploration of British senior civil servants emphasized the crucial role of 'distance' and 'lack of emotion' in civil service language (Rhodes, 2011: 190) as part of a 'coping strategy' which imposes 'willed ordinariness' on the otherwise overwhelming pressures of government (Rhodes, 2011: 203).

The above discussion demonstrates the distance travelled from the dominant culture of 'Platonic guardianship' in the Home Office in the middle decades of the twentieth century (Loader, 2006). Although the past half decade has not seen a total revolution, we can nonetheless contrast the present situation with past senior officials' efforts to build 'good thinking consensus', cultivating prolonged deliberation and 'get[ting] things done in the right way...with people on the ground' (Loader, 2006: 565-566).

It would be wrong to perceive reliance on the Westminster tradition as merely a 'convenient cloak for the self-interest of civil servants' (Rhodes, 2011: 129). That said, this tradition can be understood as having played an important role in 'cocooning' officials from the moral and ethical challenges they may otherwise have faced – the need to maintain one's self-image as essentially 'good' while constructing a sentence that many recognised to be flawed, over-broad and at the very least insufficiently deliberated upon.

For the majority of officials, refusing to 'play one's role' in relation to IPP – refusing to draft the sentence, unceasingly to challenge ministers, going public with concerns, and so on – would have constituted a launching 'out into something new, knowing that a decision made, or a specific course of action followed, has an irreversible quality, or at least that it will be difficult thereafter to revert to the old paths'; a truly 'fateful moment' (Giddens, 1991:

114). The Westminster tradition thus served a function analogous to the intended role of IPP within the Third Way ideology: protection of the ‘ontological security’ of the civil servant.

Ends and means: weeding the garden

Having explored the role of the Third Way and Westminster tradition, we can now tease out the moral implications of these beliefs by reference to the work of sociologist Zygmunt Bauman. According to Bauman, modern societies tend, by their very nature, towards ‘adiaphorisation.’ An ‘adiaphoric’ social action is one which has become ‘neither good nor evil, measurable against technical...but not moral values’ (Bauman, 1989: 215). Bauman argued that adiaphorization was the result of three ‘complementary arrangements’ which allow people to neutralize their moral misgivings in order to reach certain goals: ‘exempting some “others” from the class of potential objects of moral conduct, of potential “faces”’; ‘disassembling other human objects of action into aggregates of functionally specific traits...[so that] the task set for each action can be free from moral evaluation’; and ‘Stretching the distance between action and its consequences beyond the reach of moral impulse’ (Bauman, 1989: 215).

For Bauman, modern culture is ‘a garden culture’ (Bauman, 1989: 92). This culture ‘defines itself as the design for an ideal life and a perfect arrangement of human conditions’, needing defence against those defined as weeds: ‘what is useless, what is irrelevant, what is harmful’ (Bauman, 1989: 92). The New Labour approach to law and order, deriving from the Third Way ideology, can be regarded as such a ‘garden culture’. New Labour desired the creation of a modern, fear-free and ‘cohesive society’ (Giddens, 1998: 37). In such a political climate, those who fail, by their action or inaction, to reassure others of their non-harmful intentions (Ramsay, 2012a) become harmful ‘weeds’. The IPP sentence thus represents an attempt to ensure that such weeds ‘be segregated, contained, prevented from spreading,

removed and kept outside the society boundaries' (Bauman, 1989: 92). Thus defined, 'dangerous offenders' are 'Othered', placed 'in a position from which they cannot challenge the [policymaking] actor in their capacity as a source of moral demands' (Bauman, 1989: 216).

Bauman (1989) further points to the dangers of a bureaucratization that results in a 'meticulous functional division of labour...[and] the substitution of technical for a moral responsibility' (Bauman, 1989: 98). He argues that such a culture can result in officials' skills, expert knowledge, inventiveness and dedication being 'mobilized and put to the service of the overall bureaucratic purpose...even if this purpose does not agree with the actors' own moral philosophy' (Bauman, 1989: 101). Bureaucratic actors want to excel, with this excellence serving as its own internal referent. In such a situation, morality risks boiling down *solely* 'to the commandment to be a good, efficient and diligent expert and worker' (Bauman, 1989: 102).

The vast majority of officials (and indeed ministers) whom I interviewed regretted the creation of the IPP sentence, acknowledging its faults and recalling the concerns they held at the time – or would have held, had they paused to consider the likely implications of the sentence. The Westminster tradition served to legitimize officials' actions that, if considered in isolation or if directly faced with the likely consequences, would have been considered undesirable, if not straightforwardly wrong. Officials' physical distance from the likely targets of the IPP sentence was matched by their psychological distance. This observation directly parallels Bauman's general warning regarding the dangers of such modern bureaucracies.

Rhodes' (2011: 227) observation that the specialization inherent in bureaucracies leads to 'tunnel vision' thus takes on an important moral dimension. We have seen that the Westminster tradition, the 'way things are done', requires and results in a 'willed

ordinariness' which heavily militates against any 'uproar of emotions' (Bauman, 1989). What risks being closed off, by this tunnel vision and a valorisation of the doctrine of ministerial responsibility, is the 'fundamental discussion of moral matters where norm-clarification would become the central task' (Christie, 1982: 104).

If 'imposing punishment within the institution of law means the inflicting of pain, intended as pain' (Christie, 1982: 5), then IPP – indeterminate imprisonment with release predicated on the reduction of the prisoner's 'dangerousness' – undoubtedly constitutes a form of 'pain delivery' (Christie, 1982: chapter 1). This, of course, does not in itself make it morally acceptable or otherwise. Rather, it emphasizes the dangers of the 'stretching [of] the distance between action and its consequences' (Bauman, 1989: 215). Bauman argues that the 'practical and mental distance' of many bureaucrats means that they likely 'would find it difficult to visualize [the] effects' of their actions (Bauman, 1989: 99). This distance, a 'detached awareness...the kind of knowledge best expressed in statistics' (Bauman, 1989: 99), is well-demonstrated by one official interviewed in 2010, who spoke of the concern in the Ministry of Justice at that time:

We're at nearly two hundred now. One of the worst things is when we look at the stats and the reasons for release [of IPP prisoners]. A significant one is death, which is really worrying (Home Office official).

By the standards of the dominant Westminster tradition and the distanced, cocooned situation in which many officials found themselves, the approach taken to IPP was in no way exceptional. However, Arendt drives home the important moral issue at stake which Bauman (1989) leads us towards: 'politics is not like the nursery; in politics obedience and support are the same' (Arendt, 2006 [1965]: 279).

Conclusion

This article has explored the creation of the prominent UK measure against dangerous offenders, the Imprisonment for Public Protection sentence, casting it in a ‘substantively political light’ (O’Malley, 1999: 189). The rehabilitative and eliminatory strands within the Third Way ideology were identified, with the tensions between them discussed. Our focus was then trained upon the influence of the Westminster tradition, the shared assumptions regarding legitimate activity held by policymakers.

By seeing these activities and their underpinning beliefs in the light of Bauman’s (1989) work, we see that pre-emptive and preventive developments such as the IPP sentence were not, and need not be, the result of avowedly ill-intentioned and duplicitous policymakers, motivated solely by cynical electoral considerations. Rather, we see that the Third Way ideology supplied the ‘weeds’ towards which the criminal justice machinery was to be directed. In terms of ensuring that the instrumental tasks required for the development of such an eliminatory scheme were carried out, we have seen that the Westminster tradition, with its support for ministerial responsibility and implications for the extent to which civil servants should act on their moral concerns, ‘will do perfectly’ (Bauman, 1993: 27).²⁹

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²⁹ In full, the quotation reads: ‘Modernity did not make people more cruel; it only invented a way in which cruel things can be done by non-cruel people...Rational people, men and women well riveted into the impersonal, adiaphorized network of modern organization, will do perfectly’ (Bauman, 1993: 27).

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